30 no 2p 14

BULLEN AND LEAKE'S

PRECEDENTS OF PLEADINGS.

SIXTH EDITION.

PRE

IN

LIBRA
SUPREME
OF CANA

"Fo
et cert
at in

STEVE

SW

7/192
(accessed 9/1/50)

BULLEN AND LEAKE'S

PRECEDENTS OF PLEADINGS

IN ACTIONS IN THE KING'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE,

WITH NOTES.

SIXTH EDITION.

LIBRARY SUPREME COURT OF CANADA.

LIBRARY SUPREME COURT OF CANADA.

BY

CYRIL DODD, ESQ.,

OF THE INNER TEMPLE, ONE OF HIS MAJESTY'S COUNSEL;

AND

T. WILLES CHITTY, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"Formulas agendi diversas in unoquoque genere colligito. Nam et practicæ hoc interest; et certè pandunt illæ oracula et occulta legum. Sunt enim non pauca quæ latent in legibus, at in formulis agendi meliùs et fusiùs perspiciuntur."—BACON, *Aph. de Leg.* lxxxviii.

LIBRARY SUPREME COURT OF CANADA.

TORONTO:

THE CANADA LAW BOOK CO.

LONDON:

STEVENS AND SONS, LIMITED, 119 & 120, CHANCERY LANE,

SWEET AND MAXWELL, LIMITED, 3, CHANCERY LANE.

Law Publishers.

OCTOBER, 1905.

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

PREFACE.

In preparing the present Edition the Editors have made no change in the general arrangement of the book, and have carefully retained, as far as was possible, the notes of the Third Edition, the last one for which the original Authors were responsible.

Since the Fifth Edition was issued many important points have been decided in the Courts, and various statutes involving changes of considerable moment in our legal system have been passed, as, for instance, the Land Transfer Act, 1897, the Workmen's Compensation Acts, 1897, 1900, and the Money-lenders Act, 1900, thus necessitating additions of some length to the notes appearing in that Edition, and compelling the introduction into the present text of fresh and additional forms.

It has seemed desirable at the same time to deal, or to deal more fully, with various subjects which were of less constant occurrence, or had been less fully considered in the Courts, when the Fifth Edition was issued, than is now the case, such as combinations of workmen, trades unions, stock exchange transactions, distress for rates, &c., and some increase in both the text and the notes of the present Edition is due to this.

The subject headings of the former Editions have been retained with scarcely an exception, and some fresh subject headings have been added. Examples of such fresh headings will be found in "*Trade Disputes*," pp. 489—494; "*Stock Exchange*," pp. 308, 792; "*Gift*," p. 856; "*Bill of Sale*," p. 816. Questions arising out of combinations of workmen will be found to have been dealt with under the headings of "*Trade Disputes*" and "*Societies*," pp. 304, 489.

A large number of recent decisions of importance have been cited

or referred to, as well as many fresh statutes, and such new rules as affect the subject-matter of the book. Numerous fresh forms have been given, most of which have been taken from cases which have been actually litigated.

To make room for this increase of matter the Editors have endeavoured to eliminate all that is now obsolete in the text or notes of the former Edition. They have restored, where it seemed of use, references to cases giving declarations, pleas, and other pleadings under the old system of pleading, such as were given in the Third Edition. The Editors have throughout the Work altered the forms given in the Fifth Edition so as to carry out the present requirements, and especially in regard to particulars which are now so generally required. They have obtained the space thus rendered necessary by the means above mentioned, and by striking out the *verbatim* citation of Acts of Parliament which are now familiar to the practitioner, and readily accessible (such as the Sale of Goods Act, 1893, the Bills of Exchange Act, 1882, and the Partnership Act, 1890), retaining only those sections or parts of sections which are necessary for the appreciation of the notes or forms, and contenting themselves with a reference only to the other sections.

The Editors in presenting the result of their labours to the profession desire to express their sense of their indebtedness to the late Mr. T. Bullen and to Mr. C. Clifford, to whom so much that is incorporated from the Fifth Edition is due. In so presenting it they would remind those who would compare it with the early Editions that under the existing system of pleading material facts have to be pleaded, instead of, as formerly, the legal result of those facts. This renders it necessary to state the facts of each particular case in detail, and in general compels the practitioner to adapt or alter the form to suit his particular case, so as to render necessary a special form for each action, instead of merely copying a form applicable to actions of the class to which his case belongs, as was sufficient under the old system in many cases of ordinary occurrence. It is because of this necessary work of adaptation and alteration that the Editors have introduced numerous forms which have been actually used.

These will be readily recognised from their statement at length of special and particular details, and will, it is hoped, be found of practical use.

The whole of the text has been kept in type until the eve of going to press, and by means of this admirable arrangement made by the Publishers, the Editors have been enabled to incorporate throughout the work the latest decisions, down to and including those reported in September.

The Index has been altered so as to restore the method adopted in the Third Edition by which the references to the notes are printed in italics.

C. D.
T. W. C.

Inner Temple,
October, 1905.

PREFACE

TO THE FIRST EDITION.

THIS Work was undertaken in consequence of the want, experienced in actual practice and expressed generally by the profession, of a collection of Precedents settled in conformity with the recent alterations in the System of Pleading. It was begun only when the lapse of time seemed to render it hopeless that the task would be performed by other hands; and it is now presented to the profession with sincere diffidence, but with a hope that it may serve in some degree to supply the existing want.

The System of Pleading has recently passed through a period of transition, in which it has undergone most extensive and important amendments. These, for the most part, have been the result of the labours of Her Majesty's Commissioners for inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law, and have been framed upon the recommendations contained in their Reports. They have been effected at intervals by the Common Law Procedure Acts of 1852 and 1854, and by the subsidiary Rules of Court made by the Judges. The Commissioners have now closed their labours and issued their final Report, in which they appear to consider that very few points affecting Pleading remain in want of amendment. The period of transition may therefore be considered to have passed; and this branch of the law is now left in a state in which it will probably rest for some years to come.

The effect of the recent alterations in Pleading has not been to destroy the system or to change its essential principles. The object proposed by the learned Commissioners and effected by the late statutes and rules has been only to prefer substance to form, and to

prevent unnecessary technicality from working injustice. Although particular forms of expression are no longer indispensable, it is obviously most important that pleadings should as far as possible be uniform, and that precedents or forms which have acquired an ascertained and understood meaning should be used in preference to new modes of expression, the meaning of which must necessarily contain the elements of uncertainty and doubt. Without the use of precedents it is almost impossible, particularly in pleadings of a complicated nature, for any one but an accurate lawyer and experienced draftsman to avoid overlooking some points of a case absolutely essential to the maintenance of the right or defence. This was never more apparent than it has been in some of the specimens of pleadings which have been met with since the recent changes in the law, drawn by unpractised hands without precedent or guide.*

A necessary consequence of the extensive changes in the law of Pleading is, that the valuable and elaborate works previously existing have been rendered comparatively useless, except to those persons who possess an intimate acquaintance as well with the former practice as with the recent changes. The object of the Authors of this Work has been to supply a collection of precedents, with instructions for their use, adapted to the law and practice of Pleading in its present state.

In settling the Precedents they have attempted to follow as closely

* The very learned Editors of Smith's Leading Cases (Mr. Justice Willes and Mr. Justice Keating, the former of whom was a member of the Royal Commission), adverting to the effect produced on the art of pleading by the relaxation of the former rules of criticism, and by the powers of amendment given by the Common Law Procedure Act, 1852, make the following valuable remarks: "It must, however, be remembered that the accurate statement of such of the facts and circumstances of each case as are necessary to enable the plaintiff on the one hand to establish his entire cause of action, and the defendant on the other to set up his entire defence, is still an essential part of the duty of counsel; and that although a final defeat of justice upon merely formal grounds may be averted by the provisions already referred to, no legislative enactment can in all cases prevent the expense and delay which result from the necessity for amending untrue or imperfect narratives of the facts relied upon by the respective parties. Such inconveniences are to be avoided by taking care in the first instance to make the pleadings true and perspicuous, adopting the known and understood formulæ used for the sake of brevity in cases of frequent occurrence, and, where there is no such formula, stating the material facts as they can be proved to exist in intelligible language."—1 Smith's Leading Cases, 4th ed. 103.

as possible the examples given in the Schedule to the Common Law Procedure Act of 1852. They have endeavoured to render the collection sufficiently complete to meet the cases of most frequent occurrence in practice.

Numerous references have also been given to precedents in reported cases, from which it is hoped the practitioner may derive assistance in drawing pleadings in cases of less common occurrence. Care should, however, be taken in using the forms found in the Reports to settle them as nearly as possible in accordance with the forms contained in the Schedule to the Common Law Procedure Act. It is also hoped that these references to reported forms will be found useful as a guide to the most recent or to the leading cases on the particular points of law to which they relate; and it will be seen that some of the references have been introduced more especially with this view.

The Precedents have been arranged in conformity with the plan adopted by the Common Law Procedure Act of 1852, where the division of causes of actions into the two, so to speak, natural divisions of actions on contracts and actions for wrongs independent of contract (irrespective of the technical distinction between forms of action) received an authoritative recognition. This division has been found very convenient in the compilation of the Work; and it is hoped that it will be found equally convenient in its use.

The notes contain references to the statutes, rules of court, and principal decisions relating to the pleadings to which they are appended, with such practical observations on the object and effect of the pleadings as appeared necessary for their more convenient use.

The Authors have endeavoured, by a careful selection of the matter, to keep the work within moderate limits, in order to present it to the profession in a form which, it is hoped, will prove most generally useful.

MIDDLE TEMPLE,
May, 1860.

Pleadings
Issues
Classificat
Rules nov
Pleadings
Date, titl
Mode of p
Signature
Pleadings
Delivery
Amendme
Time for
Parties to
Action in
Misjoinde
Change of
Equitable
Example
General f
Particular

General f
Statement
Parties .
Names of
Misnomer
Number o
Character
Parties u
The body
Joinder of
The claim
Damages

TABLE OF CONTENTS.

CHAPTER I.

Introductory Observations.

	PAGE
Pleadings and their object	1
Issues	2
Classification of actions	2
Rules now in force as to pleading	3
Pleadings, when necessary	4
Date, title, and description, &c., of pleadings	4
Mode of pleading	5
Signature of pleadings	13
Pleadings, when to be printed, &c.	13
Delivery of pleadings	13
Amendment of pleadings	14
Time for delivering pleadings	17
Parties to actions	19
Action in name of wrong plaintiff—leave to add or substitute plaintiffs	26
Misjoinder and non-joinder of parties	27
Change of parties on marriage, death, bankruptcy, &c.	30
Equitable claims and defences, &c.	33
Example of a statement of claim, defence, and reply	35
General form of particulars not stated in the pleadings	37
Particulars	37

CHAPTER II.

Statements of Claim.

General form of a statement of claim delivered after writ issued	42
Statement of claim, when necessary	42
Parties	43
Names of the parties	43
Misnomer	43
Number of the parties	44
Character in which parties sue or are sued	44
Parties under disabilities	44
The body of the statement of claim	44
Joinder of causes of action	52
The claim of debt or damages	54
Damages	54

CHAPTER II.—*continued.*

PAGE

Relief other than damages or payment of debt 58
Venue or place of trial 58
Time for delivery of statement of claim 58
Commencements, &c., of statements of claim 59

CHAPTER III.

Special Indorsements 65

CHAPTER IV.

Statements of Claim in Actions on Contracts 69

CHAPTER V.

Statements of Claim in Actions for Wrongs 334

CHAPTER VI.

Defences.

Sect. I. General form of defence 520
II. Denials and traverses 527
III. Defences other than denials 532
IV. Defences arising after action brought 532
V. Particulars of or under defences 532

CHAPTER VII.

Counterclaims.

Sect. I. Counterclaims in ordinary cases 534
II. Counterclaims when new parties are added thereto as defendants 541

CHAPTER VIII.

Replies and Subsequent Pleadings.

Sect. I. In ordinary cases 545
II. When the defendant sets out a counterclaim 548
III. When new parties are added as defendants to a counterclaim . 551
IV. Replies in the nature of a new assignment 551

CHAPTER IX.

Third Party Procedure 555

CHAPTER X.

Proceedings in Lieu of Demurrer 561

CHAPTER XI.

PAGE
DEFENCES AND SUBSEQUENT PLEADINGS IN ACTIONS ON CONTRACTS. . 566

CHAPTER XII.

DEFENCES AND SUBSEQUENT PLEADINGS IN ACTIONS FOR WRONGS . 815

INDEX 957

AARON'
Abbott
—
—
—
Abergav
Abley *v.*
Abouloff
Abrahar
Abrahar
—
Abrath
Abrey *v.*
Absor *v.*
Acatos *v.*
Ackland
Ackroyd
—
Acocks
Acton *v.*
Adam *v.*
Adams *v.*
—
—
—
—
—
—
Adamson
—
Adcock
Addison
Adlard *v.*
Agar *v.*
— *v.*
Agius *v.*
Agra Ba
—
Ahitbol
Ahrbeck
Aiken *v.*
Ainswort
—
Akroker
125.
Alabaste
Alchorne
Alcock *v.*
Alcott *v.*
Alcoy *v.*
Alderson

TABLE OF CASES.

Aaron's Reefs *v.* Twiss, 658.
Abbott *v.* Hendricks, 601, 602.
— *v.* Macfie, 458, 884.
— *v.* Parfitt, 167.
— *v.* Wolsely, 274, 664.
Abergavenny Commrs. *v.* Straker, 431.
Abley *v.* Dale, 900.
Abouloff *v.* Oppenheimer, 214, 700, 702.
Abraham *v.* Reynolds, 436.
Abrahams *v.* Deakin, 360, 425.
— *v.* Dunlop, &c. Co., 268.
Abrath *v.* N. E. Ry. Co., 424, 425.
Abrey *v.* Crux, 612.
Absor *v.* French, 946.
Acatos *v.* Burns, 293.
Ackland *v.* Lutley, 934, 935.
Ackroyd *v.* Gill, 272.
— *v.* Smith, 950.
Acocks *v.* Phillips, 235.
Acton *v.* Blundell, 509.
Adam *v.* Newbigging, 656, 739.
Adams *v.* Andrews, 865.
— *v.* Batley, 353.
— *v.* Clutterbuck, 480.
— *v.* Gibney, 222.
— *v.* Grane, 377.
— *v.* Lindsell, 80.
— *v.* M'Kenzie, 202.
Adamson *v.* Jarvis, 195, 255.
— *v.* Moore, 537.
Adcock *v.* Wood, 583.
Addison *v.* Overend, 21.
Adlard *v.* Booth, 326.
Agar *v.* Athenæum Ass. Co., 633.
— *v.* Peninsular, &c. Co., 352, 353.
Agius *v.* G. W. Colliery Co., 57, 279, 317.
Agra Bank *v.* Hoffman, 867.
— *v.* Leighton, 601, 773, 774, 783.
Ahitbol *v.* Beniditto, 43.
Ahrbecker *v.* Frost, 537.
Aiken *v.* Short, 259, 260.
Ainsworth *v.* Walmsley, 496.
— *v.* Wilding, 177.
Akrokerro Mines *v.* Economic Bank, 97, 125.
Alabaster *v.* Harness, 423, 424.
Alchorne *v.* Gomme, 910.
Alcock *v.* Smith, 122.
Alcott *v.* Millars Karri, 482.
Alcoy *v.* Greenhill, 549, 557, 775.
Alderson *v.* Davenport, 476.
Alderson *v.* Langdale, 616, 618.
— *v.* Peel, 856.
Aldin *v.* Clark, 422.
Aldous *v.* Cornwell, 580.
Aldred's case, 422.
Aldred *v.* Constable, 552.
Aldridge *v.* Aldridge, 192.
Alexander *v.* Barker, 266.
— *v.* Burchfield, 126.
— *v.* Jenkins, 362.
— *v.* Sizer, 632.
— *v.* Southey, 346.
— *v.* Strong, 571.
— *v.* Thomas, 110.
— *v.* Vane, 254.
Alison, *in re*, 875.
Alison's case, 647.
Allbutt *v.* General Council, 429, 837, 842.
Allcard *v.* Skinner, 857.
Allcock *v.* Moorhouse, 216, 713.
Allday *v.* G. W. Ry. Co., 628.
Alldred *v.* West Metropolitan, &c. Co., 409.
Allen, *in re*, 722.
— *v.* Bryan, 227.
— *v.* Cook, 71.
— *v.* Dunn, 848.
— *v.* Edmundson, 118.
— *v.* Flood, 432, 489, 491.
— *v.* Graves, 309.
— *v.* Hayward, 435, 451.
— *v.* Kennet, 53.
— *v.* Leatham, 432.
— *v.* L. & S. W. Ry. Co., 360, 425.
— *v.* Milner, 585.
— *v.* New Gas Co., 437.
— *v.* Sharp, 472.
— *v.* Smith, 861, 867.
— *v.* Taylor, 421.
Alletson *v.* Chichester, 87.
Allhusen *v.* Brooking, 906.
Allies *v.* Probyn, 567.
Allinson *v.* General Council, 878.
Allison *v.* Bristol Marine Ins. Co., 262, 293.
— *v.* Haydon, 252.
Allkins *v.* Jupe, 200, 204.
Alloway *v.* Steere, 539, 779.
Allsop *v.* Allsop, 365.
Allwood *v.* Heywood, 370.
Almada, &c. Co., *in re*, 638.
Alman *v.* Oppert, 854, 877.

Alston *v.* Grant, 453, 457.
Alton *v.* Mid. Ry. Co., 432.
Amann *v.* Damm, 364.
Ambergate Ry. Co. *v.* Coulthard, 152.
— *v.* Norcliffe, 152.
Ambler *v.* Gordon, 420.
— *v.* Bradford Corporation, 902.
— *v.* Lindsay, 172.
Ambrose *v.* Kerrison, 178.
American Concentrated Meat Co. *v.* Hendry, 899.
American Wire Co. *v.* Thomson, 462.
Amon *v.* Bobbett, 539.
Amor *v.* Fearon, 250, 734.
Amott *v.* Holden, 720.
Andalusian, The, 293.
Anderson's case, 634.
Anderson *v.* Collinson, 646.
— *v.* Carlisle Horse Co., 759.
— *v.* Edie, 205.
— *v.* Gorrie, 418.
— *v.* Martindale, 20, 29.
— *v.* Mid. Ry. Co., 562.
— *v.* Morice, 200.
— *v.* N. E. Ry. Co., 144.
— *v.* Oppenheimer, 453, 454.
— *v.* Radcliffe, 502, 730.
— *v.* Smith, 846.
— *v.* Sutherland 746.
— *v.* Thornton, 204.
Andree *v.* Fletcher, 258.
Andrew *v.* Aitken, 32, 175.
— *v.* Crossley, 462.
Andrews *v.* Dixon, 478.
— *v.* Marris, 898.
— *v.* Mockford, 401.
— *v.* Ramsay, 78.
Angel *v.* Merchants' Mar. Ins. Co., 202.
Anglesey, *in re*, 210.
— *v.* Atherton, 822.
Anglo-American Co. *v.* King, 892.
— Corporation *v.* Crompton, 894.
Anglo-Californian, &c, Co. *v.* Lewis, 636.
Anglo-Egyptian Nav. Co. *v.* Rennie, 261.
Angus *v.* Clifford, 397, 401.
— *v.* Dalton, 487.
— *v.* McLachlan, 861, 867.
Anlaby *v.* Prætorius, 66.
Annen *v.* Woodman, 693.
— *v.* Anon, 364, 747.
Ansell *v.* Baker, 736.
— *v.* Waterhouse, 21.
Anthony *v.* Hanneys, 942.
Apollinaris Co., *in re*, 495.
Apothecaries' Co. *v.* Jones, 252, 271.
Applebee *v.* Percy, 439.
Appleby *v.* Franklin, 11, 923.
— *v.* Myers, 326, 577.
Appleton *v.* Chapeltown Paper Co., 22.
Apthorpe *v.* Apthorpe, 586.
Archer's case, 634.
Archer *v.* Baynes, 665.
Arden *v.* Boyce, 67.
Argentino, The, 56.
Argoll *v.* Cheney, 580.
Arkwright *v.* Gell, 511.
— *v.* Newbold, 397, 739.
Arlett *v.* Ellis, 821, 829, 830.
Arlington *v.* Merricke, 675.
Armani *v.* Castrigue, 122.
Armistead *v.* Wilde, 860.
Armitage *v.* Coates, 583.
Armory *v.* Delamirie, 347.
Armstrong *v.* Milburn, 35, 727.
Arnitt *v.* Garnett, 478.
Arnold, *in re*, 771.
— *v.* Bainbrigge, 773.
— *v.* Blaker, 452, 952.
— *v.* Cheque Bank, 97.
— *v.* Holbrook, 947, 952.
— *v.* Woodham, 190.
Arthur Average Assoc., *in re*, 691.
Artisans' Land Corporation, *in re*, 718.
Asfar *v.* Blundell, 787.
Ash *v.* Dawnay, 552.
Ashbee *v.* Pidduck, 620, 753.
Ashbury *v.* Watson, 633.
— Railway, &c. Co. *v.* Riche, 633.
Ashby *v.* Ashby, 171.
— *v.* Day, 673.
— *v.* James, 70, 71.
— *v.* Wilson, 226.
Ashcroft *v.* Foulkes, 537.
Ashendon *v.* L. B. & S. C. Ry. Co., 628, 629.
Asher *v.* Whitlock, 466, 502, 876.
Ashforth *v.* Redf rd, 758.
Ashley *v.* Taylor, 175.
Ashlin *v.* Lee, 725.
Ashling *v.* Boon, 71, 199.
Ashmole *v.* Wainwright, 257.
Ashworth *v.* Heyworth, 430.
— *v.* Mounsey, 261.
Aslatt *v.* Corporation of Southampton, 413.
Aspden *v.* Seddon, 483, 487.
Aspdin *v.* Austen, 80.
Aspinall *v.* Wake, 167.
Assicurazione Générale *v.* SS. Bessie Morris Co., 788.
Astbury *v.* Astbury, 726.
Astle *v.* Wright, 262.
Astley *v.* Johnston, 602.
— *v.* Reynolds, 257.
— *v.* Weldon, 241, 242.
Aston *v.* Aston, 507.
— *v.* Hurwitz. 66, 67.
Atkin *v.* Acton, 734.
Atkins *v.* Humphrey, 216.
— *v.* N. Met. Tram. Co., 530.
Atkinson *v.* Baker, 370.
— *v.* Bell, 325.
— *v.* Bradford Building Society, 720, 721.
— *v.* Denby, 258.
— *v.* Newcastle Waterworks Co., 271, 360.
Atkyns *v.* Pearce, 191.
Atlas Co. *v.* Miller, 537.
Atlee *v.* Backhouse, 257, 259, 645.
Attack *v.* Bramwell, 373.
Attersoll *v.* Stephens, 507.

Attorney-General *v.* Antrobus, 952.
— *v.* Ashbourne, &c. Co., 413.
— *v.* College of Physicians, 252.
— *v.* Colney Hatch Asylum, 514, 859.
— *v.* Conduit Colliery Co., 484.
— *v.* Emerson, 396.
— *v.* Gaskill, 644.
— *v.* Gauntlett, 819.
— *v.* G. E. Ry. Co., 633.
— *v.* Horner, 431.
— *v.* Leeds Corporation, 514.
— *v.* Lonsdale, 509.
— *v.* Margate Pier Co., 902.
— *v.* Mayor of Preston 455.
— *v.* Met. Ry. Co., 344, 936.
— *v.* Nottingham, &c., 414, 455.
— *v.* Richards, 395.
— *v.* Rufford, 408.
— *v.* Terry, 509.
Attorneys and Solicitors Act, *in re*, 730.
Attwood *v.* Small, 657.
— *v.* Taylor, 211.
Attwooll *v.* Attwooll, 780.
Atwood *v.* Ernest, 847.
Augustinus *v.* Nerinckx, 39.
Austerberry *v.* Oldham, 226.
Austin *v.* Dowling, 497.
— *v.* G. W. Ry. Co., 139, 337.
— *v.* Guardians of Bethnal Green, 161.
— *v.* Mills, 212, 704, 705.
— *v.* Willward, 57.
Australian Newspaper Co. *v.* Bennett, 365.
Australian Steam Co. *v.* Smith, 15.
Austrian-Lloyd S.S. Co. *v.* Gresham Life Soc., 84.
Avanzo *v.* Mackie, 359.
Avery, *in re*, 893.
— *v.* Bowden, 788.
Axford *v.* Reid, 67, 188.
Axman *v.* Lund, 270.
Aylesford *v.* Morris, 741.
Aylett *v.* Ashton, 185.
Aynsley *v.* Glover, 419, 420, 421.
Ayre *v.* Craven, 362.
Ayscough *v.* Bullar, 26.

Babcock *v.* Lawson, 348.
Bach, *in re*, 356.
Bache *v.* Billington, 583.
Back *v.* Stacey, 420.
Backhouse *v.* Bonomi, 483, 484, 874.
— *v.* Charlton, 98.
Bacon *v.* Smith, 507.
Badger *v.* Ford, 821.
Badische Anilin Fabrik *v.* Bahl Chemical Works, 462.
— *v.* Levinstein, 892, 893.
Baerselman *v.* Bailey, 292.
Bagel *v.* Miller, 266.
Bagge *v.* Mawby, 375.
— *v.* Whitehead, 476.
Baglehole *v.* Walters, 397.
Bagnall *v.* Charlton, 78.
Bagot *v.* Easton, 52.
— *v.* Williams, 703.
Bailee *v.* Vivash, 920.
Bailey *v.* Appleyard, 911.
— *v.* Bailey, 67, 212.
— *v.* Bodenham, 126.
— *v.* Bowen, 754.
— *v.* Cuckson, 465.
— *v.* Edwards, 614.
— *v.* Finch, 773.
— *v.* Jamieson, 952.
— *v.* Stevens, 950.
Bailie *v.* Irwin, 726.
— *v.* Sweeting, 664.
— *v.* Thurston, 100, 101.
Baillie *v.* Kell, 250.
— *v.* Moore, 567.
Baily *v.* Clark, 509, 511.
— *v.* Finch, 97.
Bain *v.* Fothergill, 223, 285.
Bainbridge *v.* Wade, 49.
Baines *v.* Bromley, 537, 538.
Baird *v.* Williamson, 510.
Baker, *in re*, 102.
Baker's case, 689.
Baker *v.* Billericay Union, 719.
— *v.* Blaker, 177.
— *v.* Carrick, 837.
— *v.* Cartwright, 731.
— *v.* Heard, 72.
— *v.* Jubber, 617.
— *v.* Mandeville, 247.
— *v.* Paine, 737.
— *v.* Selbright, 507.
— *v.* Walker, 616.
— *v.* Wicks, 383, 384.
— *v.* Yorkshire Fire Insurance Co., 84.
Baldey *v.* Parker, 664.
Baldwin *v.* Casella, 439.
Balfe *v.* West, 72.
Balfour *v.* Ernest, 633.
Balkis Co. *v.* Tomkinson, 633.
Ball, *ex parte*, 923.
Ballantyne *v.* Mackinnon, 201, 646, 647.
Ballard *v.* Tomlinson, 510.
Balme *v.* Hutton, 500.
Bamfield *v.* Tupper, 724.
Bamford *v.* Shuttleworth, 259, 287.
— *v.* Turnley, 456.
Bandy *v.* Cartwright, 222.
Bankes *v.* Jarvis, 539, 774.
Bank of Australasia *v.* Harding, 705.
— *v.* Nias, 701, 702, 705.
Bank of China *v.* American Trading Co., 158.
Bank of England *v.* Vagliano, 97, 113, 114, 273, 633.
Bank of Ireland *v.* Evans's Charities, 633.
Bank of New S. Wales *v.* O'Connor, 371.
— *v.* Owston, 359, 361, 425, 426.
Bank of Scotland *v.* Ker, 161.

Bank of Van Dieman's Land *v.* Bank of Victoria, 116.
Banks *v.* Angell, 909.
Banner, *ex parte*, 177, 259.
— *v.* Berridge, 723.
Barber *v.* Blaiberg, 543.
— *v.* Brown, 260.
— *v.* Lamb, 703, 705.
— *v.* Nottingham, &c. Ry. Co., 156.
— *v.* Penley, 451, 859.
— *v.* Pott, 258.
— *v.* Rollinson, 497, 926.
— *v.* Whiteley, 390, 852, 934.
Barbour *v.* S. E. Ry. Co., 142.
Barclay *v.* Gooch, 254.
— *v.* Pearson, 669, 683.
— *v.* Walford, 397.
Baring *v.* Corrie, 137, 176, 782.
— *v.* Stanton, 78, 137.
Barker's claim, 720.
Barker *v.* Furlong, 91, 345, 350, 475.
— *v.* Janson, 201.
— *v.* Met. Ry. Co., 343.
— *v.* St. Quintin, 700.
Barlow *v.* Browne, 263.
— *v.* Teal, 234.
Barnes *v.* Barnes, 11.
— *v.* Braithwaite, 86.
— *v.* Dowling, 506, 508.
— *v.* Glenton, 722.
— *v.* Hunt, 865.
— *v.* Loach, 420, 421.
— *v.* Richards, 645.
— *v.* Toye, 689.
— *v.* Ward, 387, 457, 458.
Barnett, *ex parte*, 867.
— *v.* Allen, 365.
— *v.* Guildford, 502.
— *v.* Howard, 187, 189.
— *v.* King, 595.
— *v.* Wood, 273.
Barnett's case, 637.
Barney *v.* United Telephone Co., 461.
Baron *v.* Husband, 263.
— *v.* Portslade U. D. C., 271.
Barrell, *ex parte*, 284.
Barrett, *in re*, 650.
— *v.* Davies, 724.
— *v.* Kearns, 836.
Barrick *v.* Buba, 788.
Barron *v.* Willis, 857.
Barrow, *ex parte*, 592, 640.
— *v.* Dyster, 137, 574.
— *v.* Isaacs, 239.
Barry *v.* Croskey, 668.
Barter *v.* Dubeux, 104.
Bartlett *v.* Benson, 113, 116.
— *v.* Wells, 688.
Barton *v.* L. & N. W. Ry. Co., 342, 557.
— *v.* N. Staffordshire Ry. Co., 342.
Bartonshill Coal Co. *v.* Reid, 437.
Bartrum *v.* Coddy, 597.
Barwick *v.* English Joint Stock Bank, 359, 360, 398, 434.
Basébé *v.* Matthews, 424.
Basely *v.* Clarkson, 501, 920.
Basham *v.* Lumley, 863.
Bass *v.* Gregory, 422, 949.
Bassett *v.* Mitchell, 937.
Bastath, *in re*, 102.
Baster *v.* London Printing Works, 734.
Batard *v.* Hawes, 255.
Batchellor *v.* Fortescue, 440.
Bate *v.* Payne, 255.
Bateman *v.* Ashton-under-Lyne, 633.
— *v.* Hunt, 587.
— *v.* Kingston, 688.
— *v.* Lyall, 365.
— *v.* Mid-Wales Ry. Co., 632.
— *v.* Pinder, 725.
— *v.* Poplar Board, 360.
Bates *v.* Burchell, 557, 558.
— *v.* Pilling, 497.
— *v.* Townley, 71, 585.
Bateson *v.* Gosling, 615, 675, 753, 754.
— *v.* Green, 830.
Batley *v.* Kynoch, 465.
Batson *v.* Newman, 667.
Batten, *in re*, 580, 581, 641.
Batterbury *v.* Vyse, 326.
Battersea *v.* London, &c. Electric Co., 408.
Batthyany, *in re*, 563.
— *v.* Walford, 171, 386.
Battishill *v.* Reed, 421, 452, 474, 475, 501, 511.
Battley *v.* Faulkner, 718, 720.
Baxendale *v.* Bennett, 97.
— *v.* Eastern Counties Ry. Co., 148.
— *v.* G. W. Ry. Co., 143.
— *v.* Hart, 626.
— *v.* L. & S. W. Ry. Co., 148.
— *v.* M'Murray, 455, 511.
Baxter *v.* France, 556, 906.
— *v.* Hozier, 70, 571.
— *v.* Nurse, 247, 251.
— *v.* Taylor, 474.
Bayley, *ex parte*, 305.
— *v.* G. W. Ry. Co., 517, 950.
— *v.* Homan, 567.
— *v.* M. S. & L. Ry. Co., 360, 434.
— *v.* Wolverhampton Waterworks, 458.
Baylis *v.* Lawrence, 363.
— *v.* Le Gros, 220, 234.
— *v.* Tyssen-Amhurst, 339.
Bayliss *v.* Fisher, 380.
Baynes *v.* Brewster, 925, 926.
— *v.* Lloyd, 222, 285.
Baynton *v.* Morgan, 217, 710, 712, 713.
Bazeley *v.* Forder, 191, 192.
Beachy *v.* Brown, 731, 732.
Beadsworth *v.* Torkington, 341.
Beal *v.* S. Devon Ry. Co., 628.
Bealey *v.* Shaw, 509.
Beard *v.* Perry, 537.
Beasley *v.* Clarke, 819, 954.
— *v.* Roney, 185, 410, 858.
Beattie *v.* Lord Ebury, 76, 398.
Beauchamp, *in re*, 410.
Beaufort *v.* Aird, 396.
Beaumont, *in re*, 857.
— *v.* Greathead, 54, 746, 747.

Beaumont *v.* Huddersfield Corporation, 271.
— *v.* Kaye, 186, 526, 858.
— *v.* Reeve, 682.
Beaurain *v.* Scott, 418.
Beavan *v.* M'Donnell, 284.
Beck's case, 154, 636.
Beck *v.* Denbigh, 376.
— *v.* Dyson, 439.
— *v.* Pierce, 187, 189.
Beckett *v.* Addyman, 673.
— *v.* Bradley, 646.
— *v.* Mid. Ry. Co., 156, 343.
— *v.* Ramsdale, 266.
— *v.* Tasker, 186.
Beckham *v.* Drake, 101, 267.
— *v.* Knight, 251.
Beckhusen *v.* Hamblet, 793.
Beckley *v.* Scott, 882.
Beckwith *v.* Philby, 926.
Beddall *v.* Maitland, 503, 535, 540, 775.
Beddow *v.* Beddow, 84, 413.
— *v.* Oakley, 384.
Bedells *v.* Massey, 892.
Bedouin, The, 201.
Bedwell *v.* Golding, 388.
Beech *v.* Jones, 195.
Beechey *v.* Brown, 397.
Beer *v.* Beer, 571.
Beeston *v.* Collyer, 247, 248.
— *v.* Weate, 511.
Begbie *v.* Phosphate, &c. Co., 261, 658.
Behn *v.* Burness, 315, 788.
Behrens *v.* G. N. Ry. Co., 626.
Belfast, &c. Ry. Co. *v.* Keys, 150.
— *v.* Strange, 152, 153.
Belham, *in re*, 650.
Bell *v.* Balls, 91.
— *v.* Banks, 736.
— *v.* Carey, 778.
— *v.* Gilson, 691.
— *v.* Janson, 691.
— *v.* Mid. Ry. Co., 55, 473.
— *v.* Von Dadelszen, 556.
Belmore *v.* Kent County Council, 408.
Belshaw *v.* Bush, 615, 618.
Belt *v.* Lawes, 12, 831.
Benbow *v.* Low, 540, 548.
Bench *v.* Merrick, 732.
Benecke *v.* Frost, 556.
Benett *v.* P. and O. Steamboat Co., 292.
Benjamin *v.* Barnett, 309, 622, 793.
— *v.* Storr, 451, 452.
Bennett *v.* Bayes, 379, 382.
— *v.* Gamgee, 104.
Bennetts *v.* McIlwraith, 23, 77.
Bennison *v.* Cartwright, 338, 949, 951, 953.
Benson *v.* Chester, 339.
— *v.* Paul, 428.
Bentall *v.* Burn, 664.
Bentinck, *in re*, 652.
Bentley *v.* Griffin, 192.
— *v.* Keighley, 892.
Bentsen *v.* Taylor, 299, 315, 787.
Benyon *v.* Nettlefold, 683.
Berkeley *v.* Elderkin, 212.
Bernina, The, 21, 479.
Bernstein *v.* Baxendale, 625.
Berrington *v.* Phillips, 211.
Berry, *in re*, 102.
— *v.* Da Costa, 55.
Berthon *v.* Cartwright, 412.
Bertie *v.* Beaumont, 502.
Besant *v.* Wood, 192, 414, 535, 683.
Besley *v.* Besley, 26, 27.
Bessant *v.* G. W. Ry. Co., 391.
Bessela *v.* Stern, 245.
Bethell, *in re*, 115, 721, 724.
Betteley *v.* M'Leod, 955.
Betts *v.* Burch, 134, 241, 242.
— *v.* De Vitre, 360.
Bevan *v.* Waters, 866.
Beverley *v.* Lincoln Gas Co., 643, 644.
Bewley *v.* Atkinson, 872.
Beynon *v.* Cook, 741.
Bibby *v.* Carter, 484, 486, 918.
Bickers *v.* Speight, 66, 68, 70.
Bickett *v.* Morris, 509.
Bickford *v.* Parson, 225, 713.
Biddell *v.* Strathmore, 727.
Bidder *v.* Bridges, 566, 569.
— *v.* McLean, 562.
Biddle *v.* Bond, 347, 590.
Biffen *v.* Bignell, 645.
Biggerstaff *v.* Rowatt's Wharf, 781.
Bignell *v.* Clark, 500.
— *v.* Harpur, 171.
Bilbee *v.* Hasse, 249.
Bilbie *v.* Lumley, 258, 260, 739.
Billing, *in re*, 640.
Binks *v.* S. Yorkshire Ry. Co., 458.
Binnington *v.* Wallace, 682.
Binns *v.* Fisher, 568.
Birch, *in re*, 721.
— *v.* Birch, 700.
— *v.* Wright, 234, 470.
Bird *v.* Boulter, 91.
— *v.* G. N. Ry. Co., 442.
— *v.* Higginson, 217, 480.
— *v.* Holbrook, 460.
— *v.* Jones, 497.
— *v.* Lake, 198.
— *v.* Matthews, 594.
— *v.* Randell, 815.
— *v.* Relph, 372.
Birkenhead, &c. Ry. Co. *v.* Cotesworth, 152.
— *v.* Webster, 152.
Birkmyr *v.* Darnell, 179.
Birks *v.* Trippet, 253.
Birmingham Banking Co. *v.* Ross, 421.
— (Corporation of) *v.* Allen, 483, 488.
— Estates Co. *v.* Smith, 539.
— Excelsior Soc. *v.* Lane, 189.
— Land Co. *v.* Allday, 226.
— — *v.* L. & N. W. Ry. Co., 555, 556.
Bischoff's Trustee *v.* Frank, 645.
Bishop Auckland *v.* Butterknowle, 487.
— of London *v.* Web, 507.
— *v.* Bedford, &c. Trustees, 452, 459.
— *v.* Chambre, 581.
— *v.* Church, 774.

Bissell *v.* Fox, 97.
Bittleston *v.* Timmis, 779.
Bize *v.* Dickason, 259.
Black *v.* Christchurch Finance Co., 435.
— *v.* Ottoman Bank, 676.
Blackburn *v.* Haslam, 694.
— *v.* Liverpool, &c. Co., 292.
— *v.* Smith, 261.
— *v.* Vigors, 694.
Blackburn Building Soc., *in re*, 273.
— *v.* Cunliff, 260.
Blacketer *v.* Gillett, 395.
Blackie *v.* Osmaston, 39.
— *v.* Fidding, 608.
Blackmore *v.* Vestry of Mile End, 408, 458.
— *v.* White, 171.
Blades *v.* Higgs, 924, 925, 942.
Blagg *v.* Sturt, 365.
Blagrave *v.* Bristol Waterworks Co., 452, 459, 514.
Blair *v.* Bromley, 727.
— *v.* Ormond, 720, 726.
Blake's case, 568, 620.
Blake *v.* Albion Life, &c. Co., 11, 12, 360.
— *v.* Appleyard, 537, 538.
— *v.* G. W. Ry. Co., 142, 445.
— *v.* Mid. Ry. Co., 388.
— *v.* Peters, 507.
— *v.* Thirst, 435.
Blakemore (or Blackmore) *v.* B. & E. Ry. Co., 334, 450.
Blanchenay *v.* Burt, 497.
Blank *v.* Footman, 356.
Blatchford *v.* Cole, 231.
Bleaden *v.* Charles, 195, 254.
Blech *v.* Balleras, 267.
Blewett *v.* Tregonning, 822, 829, 950.
Blofeld *v.* Payne, 495.
Blount *v.* Layard, 396.
Blower *v.* G. W. Ry. Co., 142.
Bloxam *v.* Elsee, 893.
— *v.* Hubbard, 21.
Bloxsome *v.* Williams, 797.
Blumberg *v.* Life Interests Co., 798.
Blundell *v.* Catterall, 505.
Blyth *v.* Birmingham, &c. Co., 141, 441.
— *v.* Dennett, 233.
— *v.* Fladgate, 306, 461, 704.
Boaler *v.* Holder, 563.
— *v.* Mayor, 736.
Board *v.* London Gen. Omnibus Co., 434.
Boast *v.* Firth, 583, 735.
Boatwright *v.* Boatwright, 721.
Bobbett *v.* Pinkett, 97, 262.
Boddy *v.* Wall, 16.
Boden *v.* Roscoe, 849.
— *v.* Smith, 887, 888.
Bodger *v.* Arch, 168, 724, 725.
Bodley *v.* Reynolds, 349.
Bolitho *v.* Gridley, 190.
Bolton *v.* Aldin, 354.
— *v.* Bishop of Carlisle, 580, 581.
— *v.* Buckenham, 675, 744.
— *v.* Lambert, 768.
— *v.* Salmon, 674, 744.
Bona, The, 203.
Bonar *v.* Macdonald, 675.
— *v.* Mitchell, 110.
Bond *v.* Rosling, 216.
— *v.* Walford, 578.
Bone *v.* Daw, 922, 923.
— *v.* Ekless, 258.
Bonnard *v.* Dott, 742.
— *v.* Perryman, 366.
Bonnet *v.* Tottenham, &c., 195, 229, 713.
Bonomi *v.* Backhouse, 845.
Boone *v.* Mitchell, 49.
Boorman *v.* Nash, 54.
Boosey *v.* Fairlie, 354.
— *v.* Purday, 358.
— *v.* Whight, 355.
— *v.* Wood, 816, 845.
Booth *v.* Arnold, 362.
— *v.* Briscoe, 22, 57.
— *v.* Hutchinson, 779.
— *v.* Kennard, 892.
— *v.* Lord Warrington, 727.
— *v.* Smith, 273.
Born *v.* Turner, 196.
Borneman *v.* Wilson, 104.
Borough *v.* James, 557.
Borries *v.* Hutchinson, 279.
— *v.* Imperial Ottoman Bank, 782.
Borrowman *v.* Rossel, 738.
Bosanquet *v.* Wray, 267, 744.
Bostock *v.* Nicholson, 57, 317, 319.
— *v.* Ramsay U. C., 903.
Boston *v.* Boston, 192, 216.
Boston Fishing Co. *v.* Ansell, 734.
Boston Trust Co. *v.* British, &c. Ins. Co., 199.
Botterill *v.* Whytehead, 363, 365.
Bottomley *v.* Nuttall, 569, 618.
Boucas *v.* Cooke, 354.
Boucicault *v.* Chatterton, 353.
Bouillon *v.* Lupton, 693.
Boulcott *v.* Woolcott, 605.
Boulter *v.* Webster, 388.
— *in re*, 737.
Boulton *v.* Houlder, 39, 749.
— *v.* Reynolds, 379.
Bourgeoise, *in re*, 579.
Bourne *v.* Coulter, 15, 16.
— *v.* Fosbrooke, 347.
— *v.* Gatliffe, 141, 335.
Bovill *v.* Hammond, 267.
Bowden, *in re*, 654.
Bowden's Patents *v.* Smith, 88, 463.
Bowditch *v.* Balchin, 927.
Bowen *v.* Anderson, 452, 458
— *v.* Hall, 432.
— *v.* Jenkin, 341.
Bower *v.* Hett, 256.
— *v.* Peate, 435.
Bowes, *in re*, 654, 867.
— *v.* Shand, 319, 767.
Bowker *v.* Evans, 175.
Bowles *v.* Orr, 702.
Bowman *v.* Blyth, 272.
Bowyear *v.* Pawson, 196, 773.
Bowyer *v.* Cooke, 56, 501, 862.
Box *v.* Jubb, 453.
Boxsius *v.* Goblet Frères, 363, 835.

Boyd, *in re*, 212.
— *v.* Hind, 578, 639, 640.
— *v.* Lett, 766.
— *v.* Mangles, 779.
Boydell *v.* Drummond, 725.
Boyle *v.* Tamlyn, 390.
Boyse, *in re*, 115, 122, 171.
Brace *v.* Calder, 246, 248, 266.
Bracegirdle *v.* Orford, 55, 505.
— *v.* Peacock, 552.
Bradbee *v.* Christ's Hospital, 447, 459.
Bradburn *v.* Foley, 163.
— *v.* G. W. Ry. Co., 150.
— *v.* Morris, 517.
Bradbury *v.* Cooper, 39.
Bradford *v.* Mayor of Eastbourne, 408.
Bradford Corporation *v.* Ferrand, 509, 510.
Bradlaugh *v.* Clarke, 271.
— *v.* Gossett, 864.
— *v.* Newdegate, 423, 424.
Bradley *v.* Baylis, 378.
— *v.* Benjamin, 158.
— *v.* Chamberlyn, 118.
— *v.* Copley, 346.
— *v.* Gregory, 640.
— *v.* Walsh, 241.
Bradshaw *v.* Beard, 178.
— *v.* Bennett, 284.
— *v.* Bradshaw, 254.
— *v.* L. & Y. Ry. Co., 166, 388.
— *v.* Vaughton, 929.
— *v.* Widdrington, 722.
Brady *v.* Todd, 316.
Braham *v.* Beachim, 496.
Bramley *v.* Chesterton, 231.
— *v.* S. E. Ry. Co., 143.
Branch *v.* Ewington, 82.
Brandao *v.* Barnett, 867.
Brandt *v.* Craddock, 497, 926.
— *v.* Dunlop Co., 88, 89.
Brankelow *v.* Canton Insurance, 199.
Branscomb *v.* Bridges, 379.
Branscombe *v.* Scarbrough, 135.
Braschet *v.* London Illustrated, &c. Co., 357.
Brashier *v.* Jackson, 222.
Brass *v.* Maitland, 142.
Braun *v.* Weller, 700.
Braunstein *v.* Lewis, 186.
Breckon *v.* Smith, 71.
Bremridge *v.* Latimer, 833.
Brenchley *v.* Higgins, 741.
Brenda Steamship Co. *v.* Green, 300.
Breslauer *v.* Barwick, 738.
Brest *v.* Lever, 936, 937.
Brett *v.* Clowser, 950.
Brewer *v.* Brown, 771.
— *v.* Dew, 101, 505.
— *v.* Sparrow, 262.
Brice *v.* Bannister, 88, 89, 586.
— *v.* Wilson, 178.
Briddon *v.* G. N. Ry. Co., 141.
Bridger *v.* Savage, 668.
Bridges *v.* N. L. Ry. Co., 149, 441, 442.
Bridgland *v.* Shapter, 431, 432.
Bridgtown, &c. Co. *v.* Barbadoes, &c. Co., 642.
Brierley Hill Local Board *v.* Pearsall, 343.
Brierly *v.* Kendall, 347, 349, 500.
Brigg *v.* Thornton, 226.
Briggs *v.* Oliver, 441.
Bright *v.* Marner, 11.
— *v.* P. & D. Nav. Co., 150.
— *v.* River Plate Co., 85.
— *v.* Walker, 474, 819, 949, 950, 953, 954.
Brill *v.* Crick, 611.
Brind *v.* Dale, 142.
— *v.* Hampshire, 112, 263.
Brindley *v.* G. N. Ry. Co., 39.
Brine *v.* G. W. Ry. Co., 457.
Brinsmead *v.* Harrison, 703, 704, 824, 862, 863.
Briscoe *v.* Stephens, 705.
Bristol Aerated Bread Co. *v.* Maggs, 768.
Bristol Bank *v.* Mid. Ry. Co., 295, 296, 347, 371, 823.
Bristow *v.* Cormican, 396.
— *v.* Eastman, 858.
Britain *v.* Rossiter, 34, 666, 735.
British Banking Co. *v.* Charnwood Ry. Co., 398, 434.
British Columbia Saw Mills Co. *v.* Nettleship, 144, 146.
— Land Assoc. *v.* Foster, 11.
— Linen Co. *v.* Drummond, 722.
— Marine Ins. Co. *v.* Jenkins, 199, 201.
— Mutual Investment Co. *v.* Smart, 678.
— South Africa Co. *v.* Companhia de Moçambique, 35, 863.
Briton Medical Life Assoc. *v.* Britannia Fire Assoc., 6.
Brittain *v.* Lloyd, 254, 255.
Britten *v.* G. N. Ry. Co., 151.
— *v.* Hughes, 658.
— *v.* Webb, 605.
Broad *v.* Ham, 424.
Broadbent *v.* Wilks, 830.
Broadwater *v.* Blot, 79.
Brockwell *v.* Bullock, 690.
Broder *v.* Saillard, 453, 455.
Broggi *v.* Robins, 449.
Bromage *v.* Prosser, 364.
Brook *v.* Hook, 684.
— *v.* Rawl, 481.
— *v.* Willett, 340.
Brooking *v.* Maudslay, 11, 414, 546.
Brooks *v.* Blackburn Building Society, 302.
— *v.* Cock, 358.
— *v.* Jennings, 531.
— *v.* Mitchell, 129.
— *v.* Torquay Corporation, 644.
Brooksbank *v.* Smith, 727.
Broome *v.* Gosden, 365.
— *v.* Speak, 398, 403.
— *v.* Wenham, 940.
Broomfield *v.* Williams, 421.
Broughton *v.* Jackson, 927.
Brown *v.* Alabaster, 517, 951.
— *v.* Annandale, 892.
— *v.* Brown, 721.
— *v.* Chapman, 497, 926.
— *v.* Copley, 476.

Brown *v.* De Winton, 131.
— *v.* Dimblebv, 187, 189.
— *v.* Glenn, 374.
— *v.* Hawkes, 424, 425.
— *v.* Hodgson, 140, 758.
— *v.* Howard, 720.
— *v.* Jones, 497, 900.
— *v.* Muller, 276, 278.
— *v.* Overbury, 261.
— *v.* Powell Steam Coal Co., 295.
— *v.* Robins, 484.
— *v.* Shevill, 377.
— *v.* Shuker, 678.
— *v.* Storey, 937, 941.
— *v.* Symons, 248, 250.
— *v.* Tanner, 88.
— *v.* Tapscott, 267.
— *v.* Tibbits, 773, 791.
— *v.* Wootton, 862.
Browne *v.* Dawson, 502, 936.
— *v.* Gibbons, 482.
— *v.* La Trinidad, 156.
— *v.* Price, 253.
— *v.* Renouard, 864.
Browning *v.* Newman, 55.
— *v.* Provincial Insurance Co. of Canada, 199.
Brownlow *v.* Tomlinson, 505.
Brownscombe *v.* Fair, 591.
Bruce *v.* Hunter, 210.
— *v.* Nicolopulo, 788.
Brucker *v.* Fromont, 885.
Bruner *v.* Moore, 108.
Brunsden *v.* Humphrey, 56, 862.
Brunt *v.* Mid. Ry. Co., 625, 626.
Brunton *v.* Hall, 517.
Bryan, *in the goods of*, 523.
— *v.* Clay, 372, 649.
— *v.* Whistler, 502.
Bryant *v.* Busk, 283.
— *v.* Foot, 829, 949.
— *v.* Herbert, 3, 139, 370.
— *v.* Lefevre, 422.
— *v.* Wardell, 347.
Brydges *v.* Lewis, 225.
Brymbo Water Co. *v.* Lesters, 511.
Bryson *v.* Russell, 563.
Buccleuch *v.* Metropolitan Board of Works, 343, 344.
Buchanan *v.* Findlay, 256.
— *v.* Rucker, 701.
Buck *v.* Hurst, 70, 71.
— *v.* Robson, 89, 718.
Buckland *v.* Johnson, 824, 863.
Buckle *v.* Fredericks, 314.
Buckley *v.* Coles, 951.
— *v.* Hull Docks Co., 3.
— *v.* Nightingale, 678.
Buckmaster *v.* Russell, 724.
Buckworth *v.* Simpson, 225.
Budd Scott *v.* Daniel, 222.
Buddle *v.* Willson, 21.
Budgett *v.* Binnington, 300.
— *v.* Budgett, 650.
Bufe *v.* Turner, 699.
Bull, *ex parte*, 373.
— *v.* O'Sullivan, 125.
Bull *v.* Sibbs, 215.
Bullard *v.* Harrison, 946.
Buller *v.* Fisher, 201.
— *v.* Harrison, 259.
Bulli Coal Co. *v.* Osborne, 504, 727.
Bullivant *v.* Att.-Gen. for Victoria, 682.
Bunbury *v.* Hewson, 372.
Bunch *v.* Kennington, 500, 849.
Bunn *v.* Harrison, 222.
Bunting *v.* Hicks, 511.
Burchell *v.* Clark, 739.
— *v.* Hickisson, 884.
Burchfield *v.* Moore, 261.
Burdett, *in re*, 67.
— *v.* Withers, 220.
Burdick *v.* Garrick, 721.
Burdon *v.* Benton, 600.
Burge *v.* Ashley, 668, 669.
Burges *v.* Wickham, 693.
Burgess *v.* Clark, 465.
— *v.* Clements, 416.
— *v.* Eve, 673.
— *v.* Gray, 435.
— *v.* Merrill, 197.
Burgh *v.* Legge, 118.
Burke *v.* S. E. Ry. Co., 149.
Burliner *v.* Royle, 569, 615.
Burling *v.* Read, 503, 505.
Burlinson *v.* Hall, 89.
Burmester *v.* Hogarth, 71.
Burn *v.* Carvalho, 87, 88.
— *v.* Miller, 326.
— *v.* Morris, 349.
Burnard *v.* Haggis, 858.
Burnley, &c. Society *v.* Casson, 82.
Burns *v.* Walford, 67.
Buron *v.* Denman, 497.
Burridge *v.* Nicholetts, 887, 942.
Burroughes *v.* Bayne, 344.
Burrows *v.* Barnes, 270.
— *v.* Rhodes, 562, 563.
Burstall *v.* Beyfus, 23, 24, 562, 563.
Burt *v.* Moore, 501.
Burton *v.* Le Gros, 361.
Busa *v.* Beaven, 429.
— *v.* Martin, 791.
— *v.* Parker, 922, 924.
— *v.* Steinman, 458.
Busk *v.* Walsh, 258.
Butcher *v.* Butcher, 502.
— *v.* L. & S. W. Ry. Co., 150.
— *v.* Porter, 908.
Butler *v.* Butler, 192, 410, 647.
— *v.* Knight, 306.
— *v.* M. S. & L. Ry. Co., 930.
— *v.* Quilter, 416, 860.
— *v.* Woolcott, 868.
Buxton *v.* N. E. Ry. Co., 148, 392.
Bwlch y Plwm Mining Co. *v.* Baynes, 656, 657.
Bynoe *v.* Bank of England, 424.
Byrd *v.* Nunn, 12, 51, 527, 528.
Byrne, *ex parte*, 817.
— *v.* Boo ile, 441.
— *v.* Brown, 30, 654.
— *v.* Schiller, 293.
Byrom *v.* Thompson, 580, 608.

Cacker *v.* Keswick, 398.
Cadby *v.* Martinez, 711.
Cage *v.* Acton, 619, 737.
Cahill *v.* L. & N. W. Ry. Co., 150.
Cahu *v.* Pockett's Bristol, &c. Co., 870.
Cain *v.* Moon, 856, 857.
Caine *v.* Coulton, 798.
Caines *v.* Smith, 158, 245.
Caird *v* Moss, 537, 647, 738.
— *v.* Sime, 353.
Calder *v.* Halket, 418.
— *v.* Rutherford, 20.
Caldow *v.* Pixell, 372.
Caledonian Ry. Co. *v.* Walker, 344.
Calisher's case, 637.
Calland *v.* Lloyd, 259.
Callander *v.* Hawkins, 750.
— *v.* Howard, 70, 567.
— *v.* Wallingford, 557, 558.
Callisher *v.* Bischoffsheim, 177, 259.
Calvert *v.* Gordon, 673.
— *v.* Thomas, 264.
Calye's case, 416.
Camac *v.* Warriner, 602.
Cameron *v.* Reynolds, 476.
— *v.* Smith, 210.
Camidge *v.* Allenby, 616.
Campanari *v.* Woodburn, 171.
Campbell *v.* Caledonian Ry. Co., 881, 882.
— *v.* French, 109.
— *v.* Holyland, 32.
— *v.* Loader, 851.
— *v.* Lord Wenlock, 222.
— *v.* Spottiswoode, 838.
— *v.* Wilson, 940, 950.
Canadian Pacific Ry. Co. *v.* Parke, 454.
— *v.* Roy, 360, 441, 454, 936.
Candy *v.* Mid. Ry. Co., 144, 146.
Cane *v.* Chapman, 443.
Cannan *v.* Bryce, 253, 683.
— *v.* Reynolds, 703.
— *v.* Villars, 517.
Canterbury (Abp. of) *v.* Robertson, 134, 619.
Capell *v.* Powell, 192, 410.
Capital and Counties Bank *v.* Gordon, 97, 125, 345.
— *v.* Henty, 363, 364, 365, 833, 834.
Capper, *ex parte*, 134.
Carey *v.* Bermondsey Borough, 903.
Cargill *v.* Bower, 342, 401.
Cargo *ex* Argos, 147.
Carlill *v.* Carbolic Smoke Ball Co., 600, 667.
Carlon *v.* Kenealy, 131.
Carlos *v.* Fancourt, 108, 110.
Carlyon *v.* Lovering, 509. 514, 944.
Carmichael's case, 73, 257.
Carmichael *v.* Carmichael, 172.
Carnaby *v.* Welby, 933.
Carnes *v.* Nisbett, 198, 242.
Carney *v.* Plimmer, 669.
Carpenter *v.* Buller, 646.
— *v.* Parker, 50.
Carque *v.* London and Brighton Ry. Co., 905.
Carr *v.* Foster, 338, 341, 872.
— *v.* Fracis, 864.
— *v.* Lambert, 339.
— *v.* Lynch, 666.
— *v.* L. & N. W. Ry. Co., 646, 647.
— *v.* Wallachian, &c., Co., 49.
Carratt *v.* Morley, 418.
Carrington *v.* Taylor, 481.
Carruthers *v.* Hollis, 390, 907, 911, 934, 935.
— *v.* Newen, 306.
Carstairs *v.* Taylor, 453.
Carswell *v.* Hyland, 167.
Carter *v.* Carter, 708.
— *v.* Rigby, 21.
— *v.* Ring, 619.
— *v.* St. Mary Abbotts, 384.
Cartwright, *in re*, 506, 508.
Carus Wilson, *in re*, 85.
Casey, *in re*, 463.
— *v.* Hellyer, 67.
Cash *v.* Wells, 497.
Cashill *v.* Wright, 860.
Cashin *v.* Cradock, 11, 12.
Castellain *v.* Preston, 207.
Castle *v.* Sworder, 664.
Castlegate Steamship Co. *v.* Dempsey, 299, 300.
Castlemain *v.* Craven, 508.
Castrique *v.* Imrie, 701, 702.
Castro *v.* Murray, 564.
Caswell *v.* Coare, 317.
Catchpole *v.* Ambergate Ry. Co., 342.
Cate *v.* Devon Newspaper Co., 352, 827.
Catling *v.* King, 663, 666.
Caton *v.* Caton, 244.
Cator *v.* Lewisham Board, 517.
Catt *v.* Tourle, 198.
Catterall *v.* Hindle, 76.
— *v.* Kenyon, 345.
Cavalier *v.* Pope, 440, 449.
Cavey *v.* Lidbetter, 455, 456.
Cawkwell *v.* Russell, 513.
Cawley & Co., *in re*, 636.
Caxton, &c. Union *v.* Dew, 182, 677.
Cazenove *v.* British Equitable Ass. Co., 695.
Central African Co. *v.* Grove, 543.
Chadwick *v.* Marsden, 457, 513.
Chaffers *v.* Goldsmid, 13.
Challenge, The, 702.
Challinor *v.* Roder, 44.
Chalmers, *ex parte*, 102, 277.
— *v.* Payne, 366.
Chamber Colliery Co, *v.* Hopwood, 944.
Chamberlain *v.* Boyd, 365, 832, 834.
— *v.* Bradford Corporation, 902.
— *v.* King, 904.
— *v.* Stoneham, 325.
— *v.* Williamson, 167, 245.
Chamberlain's Wharf *v.* Smith, 305.
Chamberlayne *v.* Dummer, 507.
Chambers *v.* Donaldson, 936, 937.
— *v.* Goldthorpe, 87, 327.
— *v.* Miller, 97, 260, 925.
Champion *v.* Plummer, 665,

Chandelor *v.* Lopus, 315.
Chandler *v.* Doulton, 380.
— *v.* Villett, 718.
— *v.* Webster, 577.
Chanter *v.* Dewhurst, 269, 463.
— *v.* Hopkins, 269, 270, 314, 315.
— *v.* Johnson, 269.
— *v.* Leese, 269.
Chapleo *v.* Brunswick Building Society, 302.
Chaplin *v.* Rogers, 664.
Chapman *v.* Auckland Union, 414, 514, 877, 904.
— *v.* Day, 175.
— *v.* G. W. Ry. Co., 147, 336.
— *v.* Gwyther, 316.
— *v.* Midland Ry. Co., 504.
— *v.* Milvain, 95.
— *v.* Rothwell, 448.
— *v.* Speller, 325.
Chappell *v.* Boosey, 354.
— *v.* Davison, 358.
Chapple *v.* Cooper, 178.
— *v.* Durston, 728.
Charles *v.* Blackwell, 97.
— *v.* Marsden, 600.
— *v.* Shepherd, 69, 70.
— *v.* Taylor, 436.
Charlesworth *v.* Mills, 816.
Charleton *v.* Spencer, 584.
Charlwood *v.* Greig, 439.
Charman *v.* S. E. Ry. Co., 360, 392.
Charnley *v.* Grundy, 608.
Charsley *v.* Jones, 222.
Chartered Bank, &c. *v.* Netherlands, 479.
Chasemore *v.* Richards, 484, 509, 510.
— *v.* Turner, 724, 725.
Chastey *v.* Ackland, 421, 422.
Chatfield *v.* Sedgwick, 538.
Chatterton *v.* Cave, 272, 354.
— *v.* Sec. of State for India, 836.
Chauntler *v.* Robinson, 447, 452, 488.
Cheasley *v.* Barnes, 552.
Cheavin *v.* Walker, 496.
Checchi *v.* Powell, 189.
Cheesman *v.* Hardham, 352.
Cheetham *v.* Hampson, 391, 452.
Cherry *v.* Colonial Bank of Australasia, 76.
Chesterman *v.* Lamb, 317.
Cheveley *v.* Morris, 54.
Child *v.* Hearn, 392, 501.
— *v.* Stenning, 23, 28, 543, 544.
Chilton *v.* Corporation of London, 340.
— *v.* London and Croydon Ry. Co., 931.
— *v.* Progress Printing Co., 353.
Chinery *v.* Viall, 279, 349.
Chinnock *v.* Marchioness of Ely, 768.
Chisman *v.* Count, 70.
Chitty *v.* Tancred, 233.
Chivers *v.* Savage, 497.
Chollet *v.* Hoffman, 463.
Cholmeley's School *v.* Sewell, 236, 716.
Chorley *v.* Bolcot, 252.
Chorlton *v.* Dickie, 105.
Chowne *v.* Baylis, 258.
Christian *v.* Christian, 523.
Christiansborg, The, 523, 705.
Christie *v.* Christie, 11.
Christopherson *v.* Bare, 923.
Christy *v.* Row, 293.
Chubb *v.* Stretch, 187, 189.
Church *v.* Imperial Gas Co., 643.
Churchill *v.* Evans, 390.
— *v.* Gardiner, 112.
Churchward *v.* Ford, 215.
— *v.* Johnson, 376.
— *v.* Studdy, 500.
Citizens' Assurance Co. *v.* Brown, 360, 434.
City Brewery Co. *v.* Tennant, 421, 422.
City of Lincoln, The, 56.
City of Manchester, The, 479.
Civil Services Co-op. Society *v.* Gen. Steam Nav. Co., 577.
Clapham *v.* Langton, 693.
Clarapede *v.* Commercial Assoc., 15, 16, 40.
Clare *v.* Lamb, 261, 285.
— *v.* Maynard, 316, 317.
Clark, *in re*, 101, 102.
— *v.* Adie, 270.
— *v.* Chambers, 443, 885.
— *v.* Clark, 683.
— *v.* Cullen, 268.
— *v.* Davies, 909.
— *v.* Gaskarth, 376.
— *v.* Lazarus, 601.
— *v.* London Gen. Omnibus Co., 388.
— *v.* Molyneux, 364, 835, 837.
— *v.* Mumford, 325.
— *v.* Newsam, 57.
— *v.* Wray, 16, 53.
Clarke *v.* Army and Navy, &c. Soc., 322.
— *v.* Birley, 674, 675.
— *v.* Bradlaugh, 272.
— *v.* Callow, 663.
— *v.* Cuckfield Union, 643.
— *v.* Dickson, 401, 407, 656, 657.
— *v.* Fell, 867.
— *v.* Gray, 48.
— *v.* Lewisham, 903.
— *v.* Millwall Dock Co., 377.
— *v.* Ramuz, 285.
— *v.* Roystone, 709.
— *v.* Taylor, 841.
— *v.* Tinker, 821.
— *v.* Watson, 326.
— *v.* Webb, 571.
— *v.* Willott, 283.
— *v.* Wilson, 610.
Clarkson *v.* Lawson, 841.
Clay *v.* Crowe, 609.
— *v.* Yates, 325, 326.
Clayton's case, 747.
Clayton, *in re*, 101.
— *v.* Blakey, 217.
— *v.* Corby, 820, 822, 942, 953.
Cleary *v.* Booth, 923.
Cleave *v.* Jones, 724.
Clegg *v.* Dearden, 874.
— *v.* Earby Gas Co., 271, 360.
— *v.* Hands, 226.
— *v.* Rowland, 654.

Clement *v.* Cheesman, 857.
— *v.* Chivis, 362.
— *v.* Fisher, 364.
Clementi *v.* Walker, 358.
Clements, *in re*, 722.
— *v.* Flight, 846.
— *v.* L. & N. W. Ry., 83, 688, 859.
— *v.* Tyrone C. C., 435.
Clennell *v.* Read, 910.
Clifden, *in re*, 722.
Cliff *v.* Mid. Ry. Co., 393.
Clink *v.* Radford, 300, 786.
Clipsham *v.* Vertue, 787.
Clode *v.* Bayley, 96.
Cloete, *re*, 582.
Close *v.* Phipps, 257.
Clough *v.* L. & N. W. Ry. Co., 348, 656, 657.
Clow *v.* Brogden, 220.
Clowes *v.* Hilliard, 26.
Clutha, The, 293.
Clutton *v.* Attenborough, 113, 114.
Clydebank Co. *v.* Yzquierdo, 241, 243.
Clyde Cycle Co. *v.* Hargreaves, 689.
Clyde Nav. Co. *v.* Barclay, 916.
Clydesdale Bank *v.* Paton, 407, 856.
Cobb *v.* G. W. Ry. Co., 148, 425, 440.
Coburn *v.* College, 721, 792.
— *v.* G. N. Ry. Co., 394.
Cochrane *v.* Green, 570, 773, 783.
— *v.* Moore, 856.
— *v.* Entwistle, 817.
Cocke *v.* Jenner, 906.
Cocker *v.* Musgrave, 478.
Cockerell *v.* Van Diemen's Land Co., 291.
Cocking *v.* Ward, 71.
Cockle *v.* L. & S. E. Ry. Co., 149, 442.
— *v.* Treacy, 649.
Cockrill *v.* Sparke, 726.
Cocks *v.* Bruce, 792.
— *v.* Purday, 358.
Codd *v.* Brown, 163.
Coddington *v.* Paleologo, 767.
Codrington *v.* Lloyd, 497.
Coe *v.* Wise, 360, 361, 442.
Coffee *v.* Brian, 267.
Coggs *v.* Bernard, 93.
Cohen *v.* Hale, 615, 746.
— *v.* Hannam, 200.
— *v.* Kittell, 668.
— *v.* Kuschke, 78.
— *v.* Mitchell, 101.
— *v.* S. E. Ry. Co., 150, 630.
— *v.* Tamar, 233.
Cohn *v.* Davidson, 293.
Colburn *v.* Simms, 355.
Colchester *v.* Roberts, 953.
Cole *v.* Coulton, 271.
— *v.* Cresswell, 602.
— *v.* Firth, 537.
— *v.* Langford, 700.
— *v.* Parkin, 580.
Colebourne *v.* Colebourne, 58.
Colehan *v.* Cooke, 110.
Coleman *v.* Bucks, &c. Bank, 96.
— *v.* Foster, 865.
— *v.* Riches, 316.
Coles *v.* Bristowe, 308.
— *v.* Civil Service Ass., 557.
— *v.* Hulme, 739.
— *v.* Sims, 198.
Collard *v.* Marshall, 366.
Collen *v.* Wright, 76, 77, 222.
Collett *v.* Foster, 497.
— *v.* Morrison, 205.
Collette *v.* Goode, 51, 827.
Colley *v.* Hart, 461.
Collier *v.* Hicks, 929.
Collingbourne *v.* Mantell, 567.
Collinge *v.* Heywood, 686.
Collingridge *v.* Royal Exchange, &c. Co., 207.
Collins *v.* Blantern, 683.
— *v.* Bristol Ry. Co., 142, 143.
— *v.* City & County Bank, 657.
— *v.* Collins, 780.
— *v.* Griffin, 306.
— *v.* Mathew, 213.
— *v.* Middle Level Commissioners, 443.
— *v.* Price, 289.
— *v.* Rhodes, 721.
Collis *v.* Cater, 352.
— *v.* Laugher, 419.
Colls *v.* Home & Colonial, &c., 414, 419, 420, 421, 452, 455.
Collyer *v.* Willock, 725.
Colonial Bank *v.* Whinney, 100.
Colonial Ins. Co. of New Zealand *v.* Adelaide, &c. Co., 200.
Colonial Life Ass. Co. *v.* Colonial Ass. Co., 496.
Coltman, *in re*, 789.
Combined Weighing Machine Co., *in re*, 589.
Combined Weighing Machine Co. *v.* Automatic, &c. Co., 461.
Comfort *v.* Betts, 89.
Commercial Bank, *in re*, 109, 122, 124.
— Steamship Co. *v.* Boulton, 300.
Commings *v.* Heard, 585, 647, 703.
Commissioners of Sewers *v.* Gellatly, 25.
— *v.* Glasse, 340.
Commissioners of Stamps *v.* Hope, 736.
Companhia de Moçambique *v.* British, &c. Co., 503.
Company of African Merchants *v.* British Ins. Co., 693.
Compton *v.* Bagley, 283.
— *v.* Preston, 53, 535.
Concha *v.* Murrietta, 171, 655.
Conflans Quarry Co. *v.* Parker, 609.
Connan, *in re*, 589.
Connecticut, &c. Co. *v.* Kavanagh, 398.
Conolly *v.* Baxter, 215.
Consett Waterworks Co. *v.* Ritson, 483, 563.
Consolidated Co. *v.* Curtis, 91, 350.
— *v.* Musgrave, 683.
Constable *v.* Nicholson, 829.
Conybeare *v.* Lewis, 750.
Cook *v.* Batchellor, 460.
— *v.* Cox, 364.
— *v.* Enchmarch, 53.

Cook *v.* Fowler, 211, 212.
— *v.* Guerra, 706.
— *v.* N. Met. Tram. Co., 468.
— *v.* Ward, 504.
— *v.* Wright, 177.
Cooke *v.* Eshelby, 782.
— *v.* Loxley, 232.
— *v.* Wildes, 835.
— *v.* Wilson, 574.
Coombes *v.* Dibble, 667.
Coombs, *re*, 86, 257.
— *v.* Noad, 868.
— *v.* Wilks, 666.
Cooper *v.* Blick, 251.
— *v.* Crabtree, 473.
— *v.* Crane, 645.
— *v.* Hubbuck, 339.
— *v.* Lloyd, 191.
— *v.* Parker, 571.
— *v.* Phibbs, 739.
— *v.* Shepherd, 863.
— *v.* Simmons, 83, 583.
— *v.* Stevens, 464.
— *v.* Straker, 419.
— *v.* Willomatt, 347.
Coote *v.* Ford, 748, 751.
— *v.* Judd, 827.
— *v.* Whittington, 172.
Cope, *in re*, 170.
Copeland *v.* N. E. Ry. Co., 342, 343.
Copin *v.* Adamson, 701.
Copley *v.* Jackson, 12, 527.
Copper Miners' Co. *v.* Fox, 643.
Corbett *v.* Hill, 501.
— *v.* Packington, 79.
Corby *v.* Hill, 460.
Cordery *v.* Colvin, 118.
Cork Ry. Co. *v.* Cazenove, 689.
— *v.* Goode, 637, 718.
Corkling *v.* Massey, 788.
Corn *v.* Matthews, 82, 83, 688.
Corner *v.* Shew, 171, 178.
— *v.* Sweet, 754.
Cornford *v.* Carlton Bank, 361.
Cornish, *in re*, 723.
— *v.* Stubbs, 225, 865.
Cornman *v.* Eastern Counties Ry. Co., 445.
Cornwall *v.* Henson, 158, 277, 283.
Cornwell *v.* Met. Commrs. of Sewers, 459.
Corry *v.* G. W. Ry. Co., 392.
Cort *v.* Ambergate Ry. Co., 158, 766.
Cory *v.* Patton, 199.
— *v.* Owners of "Mecca," 747.
— *v.* Thames Ironworks Co., 279.
Coryton *v.* Lithebv, 512.
Coslake *v.* Till, 283.
Cossman *v.* West, 202.
Costar *v.* Hetherington, 929.
Cote, *ex parte*, 112.
Cotesworth *v.* Spokes, 235.
Cothay *v.* Fennell, 266.
Cotsworth *v.* Bettison, 383.
Cottam *v.* Partridge, 718, 724.
Cotterell *v.* Jones, 425.
Cotterill *v.* Cuff, 48.
— *v.* Hobby, 475.
Cotton *v.* Browne, 46.
— *v.* Wood, 441.
Coughlin *v.* Gillison, 334.
Couling *v.* Coxe, 518, 519.
Coulter's case, 650.
Coulthart *v.* Clementson, 673.
Countess of Salop *v.* Crompton, 499, 500.
County Bank of Gloucester *v.* Rudry Co., 633.
County Life Ass. Co., *in re*, 633.
Coupland *v.* Hardingham, 459.
Courtauld *v.* Legh, 419.
— *v.* Sanders, 633.
Courtney *v.* Taylor, 253, 736.
Couturier *v.* Hastie, 76.
Covell *v.* Laming, 496, 499.
Cowan *v.* Milbourn, 734.
Coward *v.* Baddeley, 497.
— *v.* Gregory, 56, 220, 650, 703, 713.
Cowes U. D. Council *v.* Southampton, &c. Steam Packet Co., 395.
Cowles *v.* Potts, 835.
Cowley's case, 311.
Cowley *v.* Cowley, 413.
— *v.* Mayor of Sunderland, 451.
— *v.* Newmarket Local Board, 271, 361, 408, 457.
Cowper *v.* Smith, 674, 753.
— -Essex *v.* Acton Local Board, 344.
Cox *v.* Bent, 217.
— *v.* Burbidge, 501.
— *v.* Cooper, 364, 834.
— *v.* English, &c. Bank, 424.
— *v.* Glue, 501, 502, 505.
— *v.* Knight, 215.
— *v.* Lee, 362.
— *v.* Leigh, 478.
— *v.* Muncey, 432.
— *v.* Prentice, 259, 260.
Coxhead *v.* Mullis, 687.
Coxon *v.* G. W. Ry. Co., 143.
Coyle *v.* Cumming, 11.
Crabtree *v.* Robinson, 374, 899.
Crace, *in re*, 673.
Cracknall *v.* Jansen, 13.
Crafter *v.* Met. Ry. Co., 445.
Cramer *v.* Mott, 373.
Crampton *v.* Ridley, 86, 162.
— *v.* Walker, 686, 773.
Cranley *v.* Hillary, 640.
Craufurd *v.* Hunter, 200.
Crawley *v.* White, 667.
Crawshay *v.* Thompson, 495.
Crears *v.* Hunter, 177.
Cree *v.* St. Pancras Vestry, 903.
Creen *v.* Wright, 247.
Crepps *v.* Durden, 271.
Cresswell *v.* Hedges, 503, 505, 939.
Crewe *v.* Field, 519.
Crispe *v.* Thomas, 442.
Crocker *v.* Banks, 884.
— *v.* Knight, 305.
Croft *v.* Alison, 434.
Crompton *v.* Anglo-American Corporation, 893, 894.
Cronmire, *in re*, 311, 668, 671,

Croockewit *v.* Fletcher, 580, 581, 787.
Crook *v.* Corporation of Seaford, 644.
Crookshank *v.* Rose, 684.
Croom, *in re*, 595.
Cropper *v.* Smith, 465, 891, 894.
Crosby *v.* Hetherington, 589.
— *v.* Wadsworth, 501, 505.
Crosier *v.* Tomkinson, 377.
Crosley, *in re*, 593.
Cross *v.* Andrews, 862.
— *v.* Fisher, 302.
— *v.* Jordan, 235.
Crossfield *v.* Manchester Ship Canal, 705.
— *v.* Such, 371, 848.
Crossley *v.* Dixon, 270.
— *v.* Lightowler, 509, 511, 514.
— *v.* Maycock, 768.
Crossthwaite, *ex parte*, 915.
Crouch *v.* Crédit Foncier, 87, 830.
— *v.* G. N. Ry. Co., 54, 55.
— *v.* G. W. Ry. Co., 335.
— *v.* L. & N. W. Ry. Co., 143.
— *v.* Tregoning, 195, 229.
Crowder *v.* Long, 476.
Crowe *v.* Barnicot, 539.
— *v.* Clay, 615, 616, 618.
— *v.* Price, 586.
Crowhurst *v.* Amersham Board, 453.
Crowley's claim, 686.
Crowther *v.* L. & Y. Ry. Co., 394.
Croxon *v.* Worthen, 117.
Croydon Gas Co. *v.* Dickinson, 674, 675.
Crumbie *v.* Wallsend Local Board, 56, 484, 874, 918.
Crump *v.* Lambert, 455, 456, 874, 918.
Cruse *v.* Paine, 308.
Cubitt *v.* Porter, 503, 507.
Cuckson *v.* Stones, 735.
Cuff *v.* Penn, 278.
Cullen *v.* Elwin, 305.
— *v.* Knowles, 20, 26, 27.
— *v.* Thompson, 401.
Cullum *v.* Hodges, 309.
Culverhouse *v.* Wickens, 589.
Cumber *v.* Wane, 566, 568.
Cumberland *v.* Copeland, 359.
Cuming *v.* Hill, 83.
— *v.* Sibly, 270.
Cumming *v.* Green, 369.
— *v.* Ince, 645.
— *v.* Shand, 96.
Cumpston *v.* Haigh, 867.
Cundy *v.* Lindsay, 348.
Cunliffe *v.* Whitehead, 112.
Cunningham *v.* Foot, 723.
Curl Brothers *v.* Webster, 314.
Curlewis *v.* Clark, 566.
Curtis *v.* Mills, 439.
—. *v.* Richards, 71.
— *v.* Spitty, 706.
— *v.* Williamson, 574, 704.
Cussons *v.* Skinner, 251.
Cuthbertson *v.* Irving, 226, 232, 712.
Cutler *v.* N. L. Ry. Co., 630.
— *v.* Southern, 194.
Cutter *v.* Powell, 48, 156, 326.
Czech *v.* Gen. Steam Nav. Co., 292, 785.
Dadswell *v.* Jacobs, 562, 563.
Dagleish *v.* Lowther, 368, 833.
Dahl *v.* Nelson, 299.
Dails *v.* Lloyd, 571.
Daintrey, *in re*, 779.
Dakin *v.* Oxley, 787.
Dalby *v.* India and Lond. Ins. Co., 205.
Dale *v.* Birch, 256.
— *v.* Humfrey, 137.
Dallas *v.* G. W. Ry. Co., 394.
Dalton *v.* Angus, 435, 483, 484, 488, 489.
— *v.* S. E. Ry. Co., 388.
— *v.* Whittem, 349, 376.
Daly *v.* Thompson, 342.
Dancer *v.* Hastings, 910.
Dand *v.* Kingscote, 941, 942.
— *v.* Sexton, 499, 500.
Dando *v.* Boden, 68.
Danford *v.* McAnulty, 875, 906.
Daniel *v.* Ferguson, 421.
— *v.* Met. Ry. Co., 148.
Daniell *v.* Sinclair, 739.
Daniels *v.* Fielding, 427.
Dansey *v.* Richardson, 415.
Darby *v.* Harris, 376.
— *v.* Oakley, 57.
Darbyshire *v.* Leigh, 6, 8, 364, 466.
Darch, *ex parte*, 799.
Darcy *v.* Askwith, 505.
— *v.* Tamar Ry. Co., 632, 633.
Darley Main Colliery Co. *v.* Mitchell, 56, 484, 703, 816, 845, 874, 918.
Darlington *v.* Pritchard, 937, 941.
Darnell *v.* Williams, 601.
Darrell *v.* Tibbitts, 207, 208.
Dartnall *v.* Howard, 72.
Dashwood *v.* Magniac, 506, 508, 830, 943.
Daubuz *v.* Lavington, 67, 471.
Dauglish *v.* Tennant, 640.
Dauncey *v.* Holloway, 362.
Davenport *v.* Reg., 235.
Davey *v.* Bentinck, 13.
— *v.* Shannon, 251, 314.
Davidson *v.* Cooper, 579, 580, 581.
— *v.* Wood, 192.
Davies, *ex parte*, 851.
— *v.* Aston, 376.
— *v.* Davies, 506.
— *v.* Edwards, 724.
— *v.* Makuna, 252, 682.
— *v.* Mann, 884.
— *v.* Marshall, 865, 871, 872, 891.
— *v.* Mayor of Swansea, 905.
— *v.* Rees, 264, 817.
— *v.* Snead, 363.
— *v.* Solomon, 365.
— *v.* Underwood, 220.
— *v.* Williams, 433, 435.
Davis, *ex parte*, 83.
— *in re*, 102.
— *v.* Billing, 843.
— *v.* Bomford, 732.
— *v.* Curling, 457.
— *v.* Duncan, 838.
— *v.* Foreman, 248.
— *v.* Freethy, 730.
— *v.* Gyde, 616.

Davis *v.* Harris, 376.
— *v.* Hedges, 775.
— *v.* Howard, 311.
— *v.* James, 6, 11, 140, 225, 226, 466.
— *v.* Jones, 348.
— *v.* Morgan, 216.
— *v.* Reilly, 615.
— *v.* Russell, 926, 927.
— *v.* Saintsbury, 53.
— *v.* Shepstone, 838.
— *v.* Smyth, 210.
— *v.* Town Properties Corporation, 223, 225.
— *v.* Treharne, 485, 487.
Davison, *in re*, 28, 704.
— *v.* Duncan, 836.
— *v.* Gent, 710.
— *v.* Walton, 468.
— *v.* Wilson, 503, 929.
Davy *v.* Garrett, 11, 12, 52, 398, 618.
Davys *v.* Richardson, 797, 919, 920.
Daw *v.* Eley, 894.
Dawdy, *in re*, 85.
Dawes *v.* Harness, 656.
— *v.* Peck, 140.
Dawkins *v.* Lord Penrhyn, 466, 467, 663, 717, 875.
— *v.* Lord Rokeby, 835, 836, 837.
— *v.* Saxe-Weimar, 564.
Dawson *v.* Chamney, 860.
— *v.* Cropp, 375.
— *v.* Fitzgerald, 585.
— *v.* G. N. Ry. Co., 89, 343.
— *v.* McClelland, 57.
— *v.* Mid. Ry. Co., 390, 392.
— *v.* Prince, 189.
— *v.* Wrench, 199, 691.
Day *v.* Brownrigg, 46, 413, 859.
— *v.* Foster, 461.
— *v.* McLea, 569.
— *v.* Robinson, 364.
— *v.* Singleton, 285.
Dean *v.* Newhall, 754.
— *v.* Taylor, 924.
Deans *v.* Clayton, 460.
Dear *v.* Sworder, 543.
Deare *v.* Soutten, 192.
Dearle *v.* Barrett, 797, 919.
— *v.* Petersfield Union, 719.
Debenham *v.* Mellon, 191, 192.
Debernales *v.* Wood, 284.
De Bernardy *v.* Harding, 247.
Debtor, *in re a*, 741.
De Bussche *v.* Alt, 78.
De Cosse Brissac *v.* Rathbone, 701, 702.
Decks *v.* Strutt, 171, 263.
De Francesco *v.* Barnum, 82, 432.
Degg *v.* Mid. Ry. Co., 82, 432, 435, 436, 881.
Delaney *v.* Fox, 223, 505, 517, 706, 900.
De la Rosa *v.* Prieto, 252.
De Lassalle *v.* Guildford, 224, 314, 315.
Delfe *v.* Delamotte, 355.
De Mattos *v.* Benjamin, 668.
— *v.* Saunders, 779.
De Mautort *v.* Saunders, 266.
De Medina *v.* Grove, 257.
— *v.* Norman, 766, 769.
De Mesnil *v.* Dakin, 44.
Denaby Main, &c. Co. *v.* M. S. & L. Ry. Co., 143, 144.
Denby *v.* Moore, 258.
Dendy *v.* Nicholl, 715.
Denew *v.* Daverell, 331.
Denham *v.* Stephenson, 183.
De Nicholls *v.* Saunders, 706.
Denman *v.* Winstanley, 289.
Dennis *v.* Crompton, 53.
— *v.* Whetham, 915.
Denoon *v.* Home and Colonial Ass. Co., 201.
Densham, *in re*, 495.
Dent *v.* Auction Mart Co., 422.
— *v.* Turpin, 24, 496.
Denton *v.* Peters, 112, 113.
— *v.* Rodie, 210.
— *v.* Strong, 583.
Denys *v.* Shuckburgh, 727.
De Pasquier *v.* Cadbury, 370.
Deposit Life Ass. Co. *v.* Ayscough, 656, 657.
De Pothonier *v.* De Mattos, 588, 753.
Derbon, *in re*, 53.
Derecourt *v.* Corbishley, 927.
Dering *v.* Winchelsea, 674.
Derisley *v.* Custance, 183, 226.
Derry *v.* Handley, 365.
— *v.* Peek, 397, 739.
Deslandes *v.* Gregory, 72.
De Tastet *v.* Shaw, 267.
De Vaux *v.* Salvador, 201.
Devereux *v.* Barclay, 346.
— *v.* Clarke, 39.
Deverges *v.* Sandeman, 264.
De Vignier *v.* Swanson, 199.
De Vitre *v.* Betts, 462.
Devonport Corporation *v.* Tozer, 413.
De Worms *v.* Mellier, 326.
D'Hormusgee *v.* Gray, 54.
Dicas *v.* Lord Brougham, 498.
Dickenson *v.* Watson, 496.
Dickinson *v.* N. E. Ry. Co., 388.
Dicks *v.* Brooks, 482.
— *v.* Yates, 827.
Dickson *v.* G. N. Ry. Co., 142, 628.
— *v.* Reuter's Telegraph Co., 76.
— *v.* Zizania, 316.
Dictator, The, 54.
Diggle *v.* Higgs, 668.
Dillon, *in re*, 857.
— *v.* Balfour, 836.
Dimmock *v.* Hallett, 771.
Ditcham *v.* Worrall, 687.
Dix *v.* Brookes, 55.
— *v.* Groom, 137.
Dixon, *in re*, 135, 136, 212, 242.
— *v.* Bell, 450.
— *v.* Birch, 416.
— *v.* Bradford Co., 233.
— *v.* Calcraft, 479.
— *v.* Clark, 797, 798.
— *v.* Fawcus, 495, 496.
— *v.* Gayfere, 876.
— *v.* Kennaway, 633.
— *v.* Met. Board of Works, 454, 510.

Dixon *v.* Parkes, 797.
— *v.* Sadler, 293, 692, 693.
— *v.* Smith, 365.
— *v.* Stansfeld, 867.
— *v.* Steel, 674.
— *v.* White, 483, 485.
Dobell *v.* SS. Rosmore Co., 292.
Dobie *v.* Larkan, 797.
Dobson *v.* Blackmore, 452, 474.
— *v.* Fussy, 933.
Dodd *v.* Acklom, 706.
— *v.* Churton, 803.
— *v.* Holme, 447, 484.
— *v.* Whelan, 673.
Dodson *v.* Samwell, 231.
Doe *v.* Barnard, 876.
— *v.* Cooper, 235.
— *v.* Dyeball, 466.
— *v.* Earl of Burlington, 506.
— *v.* Guy, 171.
— *v.* Jones, 506.
— *v.* Lock, 480.
— *v.* Oliver, 646.
— *v.* Ongley, 226.
— *v.* Stanion, 283.
— *v.* Wells, 235.
— *v.* Wright, 647, 700, 937, 938.
— *d* Bennett *v.* Long, 234.
— *d.* Bullen *v.* Mills, 226.
— *d.* Calvert *v.* Frowd, 234.
— *d.* Castleton *v.* Samuel, 234.
— *d.* Ellerbrock *v.* Flynn, 235.
— *d.* Fisher *v.* Giles, 470.
— *d.* Grubb *v.* Grubb, 234.
— *d.* Higginbotham *v.* Barton, 470.
— *d.* Lister *v.* Goldwin, 233, 470.
— *d.* Mann *v.* Walters, 233.
— *d.* Parsley *v.* Day, 470.
— *d.* Rigge *v.* Bell, 217.
— *d.* Roby *v.* Maisey, 470.
— *d.* Roylance *v.* Lightfoot, 470.
— *d.* Shore *v.* Porter, 234.
Doherty *v.* Allman, 197, 508.
Donald *v.* Suckling, 346, 847, 868.
Donellan *v.* Read, 666.
Donnell *v.* Bennett, 197.
Donovan *v.* Laing, &c. Syndicate, 434.
Doolan *v.* Mid. Ry. Co., 294, 626, 630.
Dormont *v.* Furness Ry. Co., 360.
Doughty *v.* Townson, 654.
Douglas *v.* Forrest, 172.
— *v.* Patrick, 798.
Douglass *v.* Pintsch's Patent Lighting Co., 461.
Dovaston *v.* Payne, 390, 391.
Dover *v.* Child, 851.
Dowden *v.* Pook, 682.
Down *v.* Halling, 262.
— *v.* Pints, 251.
Downe *v.* Fletcher, 67.
Downes *v.* Richardson, 608.
Downing *v.* Capel, 904.
Downs *v.* Cooper, 910.
Dowse *v.* Gorton, 171.
Drake, *ex parte*, 371, 863.
— *v.* Mitchell, 616, 703, 736, 737.
Dresser *v.* Bosanquet, 867.
Dresser *v.* Norwood, 783.
— *v.* Stansfield, 583.
Drew *v.* Nunn, 690.
Drewe *v.* Lainson, 515.
Drewell *v.* Towler, 934.
Drincqbier *v.* Wood, 32.
Druce *v.* Levy, 311.
Drummond *v.* Van Ingen, 322, 324, 760.
Dublin Ry. Co. *v.* Black, 689.
— *v.* Slattery, 393.
Dubois *v.* Keats, 427.
Dubowski *v.* Goldstein, 314, 682.
Duchess of Kingston's case, 701, 703.
Duck *v.* Bates, 353.
— *v.* Mayeu, 753, 754, 815, 907.
Duckett *v.* Gover, 26.
Duckworth *v.* Johnson, 388, 851.
Dudgeon *v.* Pembroke, 692.
Duffield *v.* Scott, 194.
Duffitt *v.* James, 735.
Dufresne *v.* Hutchinson, 815.
Dugdale *v.* Lovering, 195.
Duke *v.* Winden, 38.
Duke de Cadaval *v.* Collins, 257.
Duke of Bedford *v.* British Museum, 226.
— *v.* Ellis, 25.
— *v.* Emmett, 313.
Duke of Brunswick *v.* King of Hanover, 655.
Duke of Buccleuch, The, 15, 27, 29.
— *v.* Metropolitan Board of Works, 639.
Duke of Leeds *v.* Lord Amherst, 507.
Duke of Newcastle *v.* Worksop Council, 313, 431.
Duke of Norfolk *v.* Arbuthnot, 415, 504, 872, 940, 950.
Duke of Sutherland *v.* Heathcote, 738.
Dulaney *v.* Merry, 641.
Dulien *v.* White, 443, 565.
Dumbleton *v.* Williams, 850.
Dunbar *v.* Ardee Guardians, 442.
Duncan, *in re*, 386.
— *v.* Hill, 309.
— *v.* Louch, 340, 512.
— *v.* N. & S. Wales Bank, 674.
— *v.* Skipwith, 256.
— *v.* Thwaites, 841.
— *v.* Vereker, 11.
Duncombe *v.* Brighton Club Co., 210.
Dunkirk Colliery Co. *v.* Lever, 276.
Dunlop *v.* Balfour, 300.
— *v.* Higgins, 80.
— *v.* Lambert, 140.
— *v.* Maison Talbot, 366, 482.
Dunn *v.* Bucknall, 146.
— *v.* Di Nuovo, 711.
— *v.* Donald Currie, 294.
— *v.* Green, 519.
— *v.* Murray, 251.
Dunnicliff *v.* Mallet, 24, 462, 464.
Dunston *v.* Imperial Gas, 156.
Durgan *v.* Davies, 382.
Durham Corporation *v.* Fowler, 677.
Durham *v.* Robertson, 89.
Durrant *v.* Ecclesiastical Commissioners, 259.

Dutch West India Co. *v.* Van Moses, 161.
Dutton *v.* Marsh, 632.
— *v.* Powles, 443.
— *v.* Solomonson, 140, 759.
Dwyer *v.* Edie, 205.
Dyer *v.* Best, 272.
— *v.* Bowley, 708, 910.
— *v.* Munday, 434, 929.
Dyne *v.* Nutley, 937.

Eadon *v.* Jeffcock, 483.
Eager *v.* Grimwood, 432, 433.
Eaglesfield *v.* Lord Londonderry, 76, 398, 401, 738, 739.
Earl *v.* Lubbock, 440.
Earl Beauchamp *v.* Winn, 739.
Earl Falmouth *v.* Roberts, 581.
Earl Lonsdale *v.* Nelson, 942.
— *v.* Rigg, 502.
Earl of Cardigan *v.* Armitage, 941, 942.
Earl of Shrewsbury *v.* N. S. Ry. Co., 155.
Earl Spencer *v.* Swannell, 887.
Earle *v.* Hopwood, 730.
— *v.* Kingscote, 410.
East Anglican Ry. Co. *v.* Lythgoe, 247.
Eastern African Telegraph Co. *v.* Cape Town Tramways, 453.
Eastern Counties Ry. Co. *v.* Broom, 359, 360, 931.
Eastern Counties Ry. Co. *v.* Darling, 504, 944, 953, 954.
Eastern Telegraph Co. *v.* Dent, 239, 240.
East Freemantle Corporation *v.* Annois, 360, 454, 936.
East Gloucestershire Ry. Co. *v.* Bartholomew, 936.
East India Docks Co. *v.* Kirk, 84.
Eastland *v.* Burchell, 191.
East London Ry. Co., *in re*, 343.
East London Union, *in re*, 343.
— *v.* Met. Ry. Co., 156, 285, 638.
Easton *v.* Isted, 872.
— *v.* London, 370.
Eastwick *v.* Harman, 40.
Eastwood *v.* Kenyon, 179, 194.
Eaton *v.* Basker, 644.
— *v.* Bell, 210.
— *v.* Western, 83, 583.
Ebbetts *v.* Conquest, 220, 703.
Eberle's Hotel Co. *v.* Jonas, 635, 779, 848, 911.
Ebsworth *v.* Alliance, &c. Ins. Co., 207.
Ecclesiastical Commissioners *v.* Kino, 420.
Ecclesiastical Commissioners *v.* Merral, 643, 644.
Eckersley *v.* Mersey Docks Board, 85.
Economic Life Ass. Soc. *v.* Usborne, 736.
Eden's case, 83.
Eden *v.* Naish, 177.
— *v.* Weardale Colliery Co., 557, 558.
Edevain *v.* Cohen, 16.
Edge *v.* Strafford, 215, 216.
Edgecombe *v.* Sparks, 384.
Edgell *v.* Day, 91.
Edger *v.* Knapp, 255.
Edgington *v.* Fitzmaurice, 401, 658.
Edinburgh Ry. Co. *v.* Hebblewhite, 636.
Edison *v.* Holland, 414, 556, 557, 560, 636.
Edison Telephone Co. *v.* Indiarubber Co., 465, 894.
Edison Telephone Co. *v.* Woodhouse, 893.
Edmeads *v.* Newman, 258.
Edmondson *v.* Nuttall, 349.
Edmunds *v.* Pinniger, 900.
— *v.* Wallingford, 254.
Edwards, *ex parte*, 305, 306.
— *v.* Aberayron Mutual Ins. Soc., 199.
— *v.* Baugh, 177.
— *v.* Bethel, 649.
— *v.* Carter, 689.
— *v.* Chapman, 756.
— *v.* Coombe, 640.
— *v.* Dennis, 921.
— *v.* G. W. Ry. Co., 905.
— *v.* Hancher, 566, 567, 595, 640.
— *v.* Hodges, 887.
— *v.* Jenkins, 829.
— *v.* L. & N. W. Ry. Co., 425.
— *v.* Lowndes, 263.
— *v.* Lowther, 28.
— *v.* Mid. Ry. Co., 361, 426.
— *v.* Sherratt, 142.
— *v.* Walters, 609.
Edwick *v.* Hawkes, 503, 865.
Edwin *v.* Lancaster, 644.
Egan *v.* Kensington Union, 162.
Ehrensperger *v.* Anderson, 256.
Eicholz *v.* Bannister, 324.
Elder *v.* Pearson, 190.
Eldersley *v.* Borthwick, 292.
Eley *v.* Positive Life, &c., 156.
Elias *v.* Snowden Slate Co., 943.
Ellen *v.* G. N. Ry. Co., 753.
— *v.* Topp, 583, 755.
Ellesmere Brewery Co. *v.* Cooper, 579.
Ellinger *v.* Mutual Life &c. of New York, 697.
Elliott *v.* Clayton, 100.
— *v.* Hall, 440.
— *v.* Johnson, 225.
— *v.* Kemp, 347, 500, 933.
— *v.* Turquand, 779.
Ellis *v.* Duke of Bedford, 22.
— *v.* Emmanuel, 676.
— *v.* Goulton, 91, 259, 287.
— *v.* Hamlen, 326.
— *v.* Kelly, 252.
— *v.* Loftus Iron Co., 390, 501.
— *v.* L. & S. W. Ry. Co., 393, 884.
— *v.* M'Henry, 593, 655, 701.
— *v.* Manchester Carriage Co., 16.
— *v.* Marshall, 354.
— *v.* Mayor of Bridgnorth, 432.
— *v.* Munson, 531, 532, 540, 549, 642, 775.
— *v.* Rogers, 283, 766, 769.
— *v.* Rowbotham, 228.
— *v.* Sheffield Gas Co., 435.
— *v.* Thompson, 143, 299.
— *v.* Wadsson, 269, 744.

Elliston *v.* Fatham, 456.
Elmore *v.* Kingscote, 665.
— *v.* Stone, 664.
Elmslie *v.* Boursier, 461.
Elphick *v.* Barnes, 761.
Elsee *v.* Gatward, 72.
Elwes *v.* Brigg Gas Co., 347.
— *v.* Mawe, 913.
— *v.* Payne, 431.
Elwood *v.* Bullock, 829, 830, 952, 954.
Elworthy *v.* Sandford, 371.
Embiricos *v.* Anglo Austrian Bank, 122.
Emblen *v.* Myers, 55.
Emblin *v.* Dartnell, 618.
Embrey *v.* Owen, 509, 944.
Emden *v.* Carte, 32, 100, 102, 104.
Emery *v.* Barnett, 706, 712.
Emmens *v.* Elderton, 251.
— *v.* Pottle, 834.
Emmerson *v.* Heelis, 91, 92.
Emperor of Austria *v.* Day, 413.
Empress Engineering Co., *in re*, 633, 634.
Engelhart *v.* Farrant, 445.
Engell *v.* Fitch, 285.
England, *in re*, 722.
— *v.* Cowley, 346.
— *v.* Wall, 820.
Englehart *v.* Farrant, 435, 485.
English Bank of River Plate, *in re*, 110, 124.
English *v.* Darley, 610.
Eno *v.* Dunn, 496.
Erlanger *v.* New Sombrero Co., 656.
Ernest *v.* Nichols, 633.
Erskine *v.* Adeane, 222, 390, 480.
Esposito *v.* Bowden, 788.
Essex *v.* Daniell, 284.
European Bank, *in re*, 867.
European, &c. Mail Co. *v.* Royal Mail, &c. Co, 591.
Eustace *v.* Dublin Ry. Co., 342.
Evans *v.* Bignold, 205.
— *v.* Brander, 472.
— *v.* Bremridge, 676.
— *v.* Buck, 543, 544.
— *v.* Edmonds, 397.
— *v.* Elliott, 379, 472, 910.
— *v.* Evans, 171.
— *v.* Harlow, 482.
— *v.* Harries, 55, 56, 366.
— *v.* Hooper, 153, 201.
— *v.* M. S. & L. Ry. Co., 360, 361, 510, 936.
— *v.* Powis, 567, 639, 640.
— *v.* Walton, 432, 433.
— *v.* Ware, 82, 197, 688.
Everett *v.* London Assurance, 698.
Evershed *v.* L. & N. W. Ry. Co., 143, 257.
Every *v.* Smith, 936.
E. W. A., *in re*, 753.
Ewart *v.* Fryer, 716.
Exall *v.* Partridge, 254, 255.
Exchange Banking Co., *re*, 773.
— Telegraph Co. *v.* Central News, 351.
— Telegraph Co. *v.* Gregory, 351.
Exon *v.* Russell, 130.
Faber *v.* Lathom, 736.
Fagg *v.* Nudd, 72.
Fair *v.* L. & N. W. Ry. Co., 150.
Fairclough *v.* Marshall, 265, 935.
— *v.* Pavia, 113.
Fairman *v.* Oakford, 247.
Falck *v.* Axthelm, 41.
— *v.* Williams, 80.
Falk *v.* Fletcher, 345.
Fallowes *v.* Taylor, 49.
Farbenfabriken, *in re*, 495.
Farebrother *v.* Simmons, 91.
Farhall *v.* Farhall, 171.
Farley *v.* Briant, 678.
Farmer *v.* Russell, 259.
Farnham *v.* Milward, 104.
Farnsworth *v.* Garrard, 331, 801.
Farquhar *v.* Farley, 284.
— *v.* Norris, 135.
Farquharson *v.* King, 646.
Farr *v.* Ward, 210.
Farrar *v.* Cooper, 85.
— *v.* Hutchinson, 753.
Farrer *v.* Close, 305.
Farrow *v.* Wilson, 171, 583, 735.
Faulkner *v.* Cooper, 249.
Faure Electric Co., *in re*, 342.
Fawcett *v.* Cash, 247, 250.
— *v.* Y. & N. M. Ry. Co., 391, 392, 393.
Fay *v.* Prentice, 457.
Fazakerley *v.* M'Knight, 581.
Fear *v.* Castle, 188.
Fearn *v.* Cochrane, 618, 746.
Fearnside *v.* Flint, 722.
Fearon *v.* Earl of Aylesford, 582, 683.
— *v.* Mitchell, 431.
Felix, The, 296.
Felix Hadley & Co. *v.* Hadley, 615, 746.
Fell *v.* Knight, 415.
— *v.* Parkin, 574.
Fendon *v.* Parker, 730.
Fenn *v.* Bittleston, 347.
Fenna *v.* Clare & Co., 458.
Fennell *v.* Ridler, 797.
Fenner *v.* Blake, 710.
Fentiman *v.* Smith, 512.
Fenton *v.* Thorley, 209, 902.
Fenwick *v.* Buck, 309.
— *v.* Croydon Union, 408.
Ferguson *v.* Carrington, 758.
— *v.* Mahon, 701.
Fergusson *v.* Fyffe, 210.
Fernley *v.* Branson, 86.
Ferns *v.* Carr, 83.
Fesenmayer *v.* Adcock, 71, 253.
Fessard *v.* Mugnier, 745.
Feversham *v.* Emerson, 646.
Few *v.* Backhouse, 703.
Fewings, *ex parte*, 703, 736.
— *v.* Tisdal, 247.
Fidgett *v.* Penny, 70, 572, 746.
Field *v.* Adames, 849, 924, 929.
— *v.* Robins, 571.
Fielding *v.* Corry, 96.
— *v.* Morley Corporation, 902, 903.
Fife *v.* Bousfield, 271, 887.

Filburn *v.* People's Palace Co., 360, 439.
Fillicul *v.* Armstrong, 251.
Finance, &c. *v.* Canadian Produce Corporation, 636.
Finchley Electric Co. *v.* Finchley Urban Council, 408.
Finch *v.* Finch, 722.
— *v.* G. W. Ry. Co., 517.
Findon *v.* M'Laren, 377.
— *v.* Parker, 424.
Fine Art Society *v.* Union Bank, 345, 349, 351.
Finlay *v.* Bristol, &c. Ry. Co., 644.
— *v.* Chirney, 101, 167, 171, 245, 385.
Finska *v.* Brown, 537.
Firbank's Executors *v.* Humphreys, 76, 739.
Firth *v.* Thrush, 118.
Fish *v.* Kempton 782, 783.
Fisher *v.* Drewitt, 73.
— *v.* Liverpool Marine Ins. Co., 199.
— *v.* Marsh, 92.
— *v.* Pimbley, 583.
— *v.* Prowse, 452, 459.
— *v.* Roberts, 128.
— *v.* Thames Junction Ry. Co., 887.
Fishmongers' Co. *v.* Robertson, 643.
Fitch *v.* Jones, 580, 670.
Fitt *v.* Cassanet, 755.
Fitzball *v.* Brooke, 272, 359.
Fitzgerald *v.* Mid. Ry. Co., 149.
Fitzjohn *v.* Mackinder, 427.
Fitzroy *v.* Cave, 89 730.
Flannery *v.* Waterford Ry. Co., 442.
Fleeming *v.* Orr, 883.
Fleet *v.* Murton, 76, 137.
— *v.* Perrins, 189.
Fleming *v.* Bank of New Zealand, 55, 600.
— *v.* Dollar, 11, 841, 842, 843.
— *v.* Hislop, 455.
Fletcher *v.* Bealey, 413.
— *v.* Dyche, 243, 773, 803.
— *v.* Hudson, 271.
— *v.* Krell, 397.
— *v.* Marillier, 850.
— *v.* Marshall, 256, 310.
— *v.* Noakes, 716.
— *v.* Rylands, 453, 883.
— *v.* Smith, 453, 510.
Flight *v.* Booth, 771.
— *v.* Maclean, 131.
Flint *v.* Barnard, 591, 594.
Flitters *v.* Allfrey, 647.
Flood *v.* Patterson, 721.
Florence *v.* Jenings, 703.
Flower *v.* L. & N. W. Ry. Co., 148, 688.
— *v.* Low Leyton Local Board, 904.
— *v.* Sadler, 605.
Flureau *v.* Thornhill, 223, 285.
Foakes *v.* Beer, 566, 753.
Foiston *v.* Crachrode, 830.
Foley *v.* Hill, 96, 591.
Foot *v.* Baker, 668.
Foquet *v.* Moore, 710.
Forbes *v.* Corney, 242.
— *v.* Jackson, 674.
— *v.* Smith, 720.
Ford *v.* Beech, 754.
Ford *v.* Cotesworth, 165, 300.
— *v.* Foster, 496.
— *v.* Lacey, 396.
— *v.* Leche, 476.
— *v.* Met. Ry. Co., 951.
— *v.* Tiley, 158.
Forder *v.* G. W. R. Co., 629.
Fordham *v.* Akers, 472.
— *v.* Wallis, 172.
Foreman *v.* Free Fishers of Whitstable, 829.
— *v.* Mayor of Canterbury, 409.
Foreman *v.* "The Liddesdale," 326.
Fores *v.* Wilson, 432.
Forget *v.* Baxter, 290.
— *v.* Ostigny, 138, 668.
Forman *v.* Wright, 601.
Forster *v.* Patterson, 876.
— *v.* Wilson, 779.
Forsyth *v.* Bristowe, 728.
Forward *v.* Pittard, 141.
Foster *v.* Allanson, 267.
— *v.* Bates, 168.
— *v.* Colby, 295.
— *v.* Dawber, 753.
— *v.* Gamgee, 532.
— *v.* Green, 259, 348.
— *v.* Ley, 255.
— *v.* Mackinnon, 113, 597, 739.
— *v.* Reeves, 216.
— *v.* Stewart, 432.
— *v.* Warblington, 397.
— *v.* Wright, 396.
Fotherby *v.* Met. Ry. Co., 343, 428.
Foulds *v.* Willoughby, 344, 346, 498.
Foulger *v.* Newcomb, 363.
Foulkes *v.* Met. D. Ry. Co., 139, 143, 148.
— *v.* Sellway, 731.
Fountain *v.* Boodle, 835.
Fourth City Building Soc. *v.* East Ham, 384.
Fowkes *v.* Manchester, &c. Co., 695.
Fowler *v.* Knoop, 557.
— *v.* Monmouth Canal Co., 790.
Fox *v.* Gaunt, 926.
— *v.* Nott, 296.
Foxbourne *v.* Vernon, 247.
Foy *v.* London & B. Ry. Co., 445.
France *v.* Gaudet, 279, 345, 349.
— *v.* White, 773.
Francis *v.* Cockrell, 149, 448.
Frankenburg *v.* Great Horseless Carriage Co., 22, 23.
Franklin *v.* Carter, 910.
— *v.* Hosier, 866.
— *v.* Miller, 755.
— *v.* S. E. Ry. Co., 388.
Franklyn *v.* Lamond, 92.
Frankum *v.* Earl Falmouth, 512.
Frape, *in re*, 791.
Fraser, *in re*, 266.
— *v.* Cooper, 25, 26.
— *v.* Jordan, 610, 674, 675.
— *v.* Penlebury, 257, 646.
— *v.* Pope, 563, 663.
— *v.* Telegraph Co., 788.
Fraunce's Case, 235.
Fray *v.* Fray, 362.
— *v.* Vowles, 306.

Freake *v.* Cranefeldt, 721.
Free Fishers of Whitstable *v.* Foreman, 313.
Freeman *v.* Birch, 140.
— *v.* Cooke, 397.
— *v.* Jeffries, 258, 260.
— *v.* Reed, 288.
— *v.* Stacey, 718.
— *v.* Taylor, 299, 788.
French *v.* French, 571.
— *v.* Gerber, 786.
— *v.* Howie, 679, 704.
— *v.* Newgass, 788.
— *v.* Phillips, 380.
— *v.* Styring, 267.
Freshney *v.* Wells, 523.
Frewen *v.* Phillips, 420.
Fricker *v.* Van Grutten, 22, 27.
Frisby, *in re*, 722.
Fritz *v.* Hobson, 414, 451.
— *v.* Iles, 314.
Fromant *v.* Astley, 40.
Frost *v.* Aylesbury Dairy Co., 322, 323.
Frost *v.* Knight, 55, 158, 245, 276, 756.
Frühling *v.* Schrœder, 210.
Fry *v.* Chartered Bank of India, 290.
— *v.* Lane, 741.
Fryer *v.* Roe, 71.
Fuller *v.* Blackpool, &c. Co., 353.
Fullwood *v.* Fullwood, 859.
Farber *v.* Taylor, 212.
Furness *v.* Meek, 578.
Furniss *v.* White, 401.
Furnival *v.* Grove, 712.
Fussell *v.* Gordon, 39.

G. *v.* H., 66.
Gabriel *v.* Dresser, 567, 571.
Gadd *v.* Houghton, 72.
Gaden *v.* Newfoundland Bank, 97.
Gadsden *v.* Barrow, 347, 934.
Gahagan *v.* Cooper, 359.
Gainsford *v.* Carroll, 291.
Gale *v.* Abbott, 422.
— *v.* Luttrell, 774.
Galesworthy *v.* Strutt, 242.
Gallard, *in re*, 867.
Gallin *v.* L. & N. W. Ry. Co., 148, 631.
Galloway *v.* Bird, 472.
Gallwey *v.* Marshall, 362.
Gambart *v.* Ball, 254.
— *v.* Dale, 358.
— *v.* Sumner, 358.
Gandy *v.* Gandy, 582.
— *v.* Jubber, 452.
Gann *v.* Free Fishers of Whitstable, 313.
Garbutt *v.* Fawcus, 635.
Garden *v.* Bruce, 721.
Gardiner *v.* Gray, 324.
— *v.* Williamson, 217.
Gardner *v.* Hart, 440.
— *v.* Hodgson's Breweries Co., 947.
Garett *v.* Taylor, 489.
Garland *v.* Mead, 469.
Garnett *v.* Bradley, 3, 213.
— *v.* McEwan, 96.
Garrard *v.* Cottrell, 195.
Garrett *v.* Handley, 266.
Garside *v.* Trent Nav., 336.
Garston *v.* Hickie, 787.
Garton *v.* Bristol Ry. Co., 628.
Gascoigne *v.* Edwards, 585.
Gaskin *v.* Balls, 413.
Gas Light Co. *v.* Hardy, 378.
— *v.* Holloway, 163, 539.
— *v.* St. Mary Abbotts, 454, 859.
— *v.* Towse, 222, 285.
— *v.* Turner, 682.
Gaters *v.* Madely, 189.
Gates *v.* Bayley, 500.
— *v.* Terry, 589.
Gateward's case, 340, 829.
Gathercole *v.* Smith, 586, 775.
Gatly *v.* Fry, 125.
Gaunt *v.* Fynney, 859.
— *v.* Taylor, 652.
Gauntlett *v.* King, 382.
Gautret *v.* Egerton, 443, 454.
Gaved *v.* Martyn, 511.
Gay *v.* Lander, 131.
— *v.* Mathews, 472.
Gaylard *v.* Morris, 925, 929.
Geake *v.* Ross, 211.
Gebhardt *v.* Saunders, 255.
Geddis *v.* Proprietors of Bann Reservoir, 360, 454, 510.
Gedge *v.* Royal Exchange, &c., 200, 682, 691.
Gee *v.* Bell, 51.
— *v.* L. & Y. Ry. Co., 144.
Geer *v.* Herring, 24.
General Accident Ass. *v.* Noel, 198.
— Corporation *v.* Wall, 242
General Auction Co. *v.* Smith, 632.
General Service Stores, *in re*, 635.
General Steam Navigation Co. *v.* Guillon, 161, 647, 702, 863.
George, *in re*, 109, 609, 721.
— *v.* Chambers, 472.
— *v.* Clagett, 267, 782.
George and Richard, The, 388.
Gerahty *v.* Davies, 249.
Gerrard *v.* Clowes, 68, 134, 135, 136.
Gerson *v.* Simpson, 556.
Gibb *v.* Mather, 117.
Gibbings *v.* Strong, 522.
Gibbon *v.* Budd, 252.
Gibbons *v.* Pepper, 497.
— *v.* Vouillon, 754.
Gibbs *v.* Cruikshank, 56, 472, 703, 705, 862, 907, 936.
— *v.* Fremont, 122.
— *v.* Guild, 3, 34, 404, 718, 727, 873.
— *v.* Société des Metaux, 593.
— *v.* Société Industrial, 655.
Giblan *v.* National Labourers Union, 304, 494.
Giblin *v.* McMullen, 335.
Gibson *v.* Carruthers, 88, 102.
— *v.* Ireson, 377.
— *v.* Kirk, 215.
— *v.* Small, 692.
Gieve, *in re*, 668.
Gifford *v.* Whittaker, 567.

Gilbert *v.* Endean, 177, 739.
— *v.* Trinity House, 360.
— *v.* Wright, 86.
Gilbey, *ex parte*, 640.
Gilding *v.* Eyre, 424.
Giles *v.* Groves, 340, 512.
Gill's case, 635, 637.
Gill, *ex parte*, 83.
— *v.* Dickinson, 483, 485.
— *v.* M. S. & L. Ry. Co., 142, 143, 149.
— *v.* Woodfin, 522.
Gillard *v.* Brittan, 279.
Gillespie, *in re*, 124, 591, 779.
— *v.* Cheney, 322.
Gillett *v.* Whitmarsh, 602.
Gilliat *v.* Gilliat, 287.
Gillingham *v.* Baddow, 314.
Gilpin *v.* Fowler, 835.
Ginnett *v.* Whittingham, 864.
Girdlestone *v.* Brighton Aquarium Co., 863.
Gisborne *v.* Hart, 583.
Gisbourne *v.* Hurst, 142, 377.
Gladney *v.* Murphy, 433.
Gladstone *v.* Musurus Bey, 582.
Gladwell *v.* Steggall, 438.
Gla'holm *v.* Barker, 389.
— *v.* Hays, 787.
Glamorgan Coal Co. *v.* South Wales Miners Federation, 490, 494, 834.
Glandman *v.* Johnson, 439.
Glasgow Pavilion *v.* Motherwell, 638.
Glasscock *v.* Balls, 597, 613.
Glasser *v.* Rolls, 397.
Gleaves *v.* Marriner, 372.
— *v.* Parfitt, 372.
Gledhill *v.* Hunter, 53.
Glendarroch, The, 292, 785.
Glenwood Lumber Co. *v.* Phillips, 347.
Glossop *v.* Heston Local Board, 428, 514.
Gloucestershire Banking Co. *v.* Edwards, 256, 476.
Gloucestershire Banking Co. *v.* Phillipps, 186, 556, 557.
Glover *v.* Dixon, 552, 822, 953.
— *v.* L. & S. W. Ry. Co., 930.
Gluckstein *v.* Barnes, 401, 634.
Glyn *v.* Aberdare Ry. Co., 343.
Glyn, Mills & Co. *v.* East India Dock Co., 296, 346.
Glynn *v.* Thomas, 257, 380.
Godard *v.* Gray, 701.
Goddard *v.* O'Brien, 566, 569.
Godden *v.* Corsten, 38, 39.
Godefroy *v.* Dalton, 306.
— *v.* Jay, 306.
Godfrey, *ex parte*, 107, 595.
— *v.* George, 212.
Godwin *v.* Culley, 725.
— *v.* Francis, 76, 77, 222.
Godwin *v.* Schwappes, 421.
Goepel *v.* Swinden, 254.
Goff *v.* G. N. Ry. Co., 359, 360.
Goffin *v.* Donnelly, 836, 838.
Goldberg *v.* Liverpool Corporation, 360.
Goldham *v.* Edwards, 756.
Golding *v.* Wharton Salt Co., 12.
Gold Ores Co. *v.* Parr, 68, 152, 210, 211.
Goldshede *v.* Cottrell, 569, 617.
Goldstone *v.* Osborn, 86.
Goldthorpe, *v.* Hardman, 458.
Gooch *v.* Clutterbuck, 195, 230, 713.
Good *v.* Cheesman, 639, 640.
— *v.* Elliott, 667.
— *v.* Isaacs, 299, 300.
Goodfellow *v.* Prince, 921.
Goodhart *v.* Hyett, 946.
Goodland *v.* Blewith, 798.
Goodman *v.* Aylis, 472.
— *v.* Mayor of Saltash, 396, 829, 852.
— *v.* Pocock, 246.
Goodright *v.* Vivian, 506.
Goodtitle *v.* Alker, 502, 505.
Goodwin *v.* Cheveley, 501, 852, 934.
Gordon *v.* Ellis, 773.
— *v.* G. W. Ry. Co., 629.
— *v.* Harper, 347.
— *v.* Potter, 247.
— *v.* Street, 656.
— *v.* Silber, 415, 416.
Gore *v.* Gibson, 644.
— *v.* Lloyd, 915.
Gorringe *v.* Irwell, 88.
Gorris *v.* Scott, 360.
Gorsly *v.* Gorsly, 571.
Gorton *v.* Falkner, 376, 377.
Gosbell *v.* Archer, 261.
Gosden *v.* Elphick, 497.
Goss *v.* Lord Nugent, 755, 756.
Goswell *v.* Aërated Bread Company, 455.
Gough *v.* Bryan, 884.
— *v.* Findon, 71.
Gould *v.* Webb, 251, 589.
Gouldsworth *v.* Knights, 226.
Gouraud *v.* Fitzgerald, 39.
Gourlay *v.* Duke of Somerset, 85.
Gourley *v.* Plimsoll, 39, 841.
Government Security Co. *v.* Dempsey, 637.
Govier *v.* Hancock, 191.
Grace *v.* Newman, 352.
Grafton *v.* Armitage, 325, 326.
Graham *v.* Allsopp, 255.
— *v.* Belfast, &c. Ry. Co., 629.
— *v.* Peat, 502.
— *v.* Public Works Commrs., 563, 565.
Grainger *v.* Hill, 427, 497.
Grand Junction Canal Co. *v.* Petty, 452, 952.
— *v.* Shugar, 510.
Grand Junction Ry. Co. *v.* White, 952.
— Waterworks *v.* Hampton Council, 952.
Grand Trunk Ry. Co. *v.* Jennings, 388.
Grange *v.* Silcock, 440.
Granger *v.* George, 720.
Grant *v.* Coverdale, 786.
— *v.* Easton, 66, 67, 212, 213.
— *v.* Ellis, 876.
— *v.* Gold, &c. Syndicate, 78.
— *v.* Grant, 875.
— *v.* Gunner, 822.
— *v.* Moser, 925, 926.

Grant *v.* Thompson, 424.
Graves' case, 354.
Graves *v.* Ashford, 354, 358.
— *v.* Key, 753.
Gray *v.* Bonsall, 716.
— *v.* Carr, 296.
— *v.* Fowler, 283, 284, 770.
— *v.* Johnston, 96.
— *v.* N. E. Ry. Co., 393.
— *v.* Pearson, 153, 201.
— *v.* Roper, 632.
— *v.* Seckham, 676.
— *v.* Stait, 850.
— *v.* Webb, 535, 536, 539.
Graydon, *in re*, 647.
Great Britain A1 Assoc, *v.* Wyllie, 201.
Great Eastern R. Co. *v.* Goldsmid, 431.
Great Northern Ry. Co. *v.* Kennedy, 637.
— *v.* Shepherd, 150.
— *v.* Swaffield, 147, 336.
Great Western Ins. Co. *v.* Cunliffe, 78.
Great Western Ry. Co. *v.* Bagge, 140.
— *v.* Blake, 148.
— *v.* Bunch, 142, 150.
— *v.* Fisher, 285.
— *v.* L. & C. Banking Co., 97.
— *v.* M'Carthy, 629.
— *v.* Redmayne, 146.
— *v.* Sutton, 143, 148, 257.
Greatrex *v.* Hayward, 511.
Grébert-Borgiss *v.* Nugent, 57, 279, 321.
Green *v.* Bartlett, 73.
— *v.* Baverstock, 92.
— *v.* Chelsea Waterworks Co., 510, 944.
— *v.* Cole, 506.
— *v.* Davies, 71.
— *v.* Duckett, 257, 849.
— *v.* Elgie, 900.
— *v.* Goddard, 924.
— *v.* Humphreys, 723, 725.
— *v.* Hutt, 888.
— *v.* Irish Independent Co., 354, 357.
— *v.* London Omnibus Co., 360.
— *v.* Lucas, 73.
— *v.* Marsh, 471.
— *v.* Mules, 73.
— *v.* Salmon, 178.
— *v.* Sevin, 283, 548.
— *v.* Shewell, 866.
— *v.* Thompson, 82, 688, 689.
— *v.* Wynn, 754.
Greenbert *v.* Smee, 817.
Greene *v.* Cole, 943.
Greenock Steamship Co. *v.* Maritime Ins. Co., 293, 692, 693.
Greenough *v.* McClelland, 614.
Greenslade *v.* Halliday, 475.
Greenway *v.* Fisher, 346.
Greenwell *v.* Beechburn Coal Co., 485.
— *v.* Howell, 902.
Greenwood *v.* Hornsey, 414, 420.
— *v.* Sutcliffe, 798.
Gregg *v.* Wells, 823.
Gregory *v.* Cotterell, 57, 476.
— *v.* Duke of Brunswick, 491.
— *v.* Hartnall, 744.
— *v.* Hill, 922.
— *v.* Mid. Ry. Co., 628.
— *v.* Piper, 501.
Gregson, *in re*, 774.
Grenfell *v.* Girdleston, 725.
— *v.* Pierson, 845.
Grey, *in re*, 190, 305.
— *v.* Friar, 619.
Griffin *v.* Coleman, 926, 927.
— *v.* Dighton, 942.
Griffith *v.* Taylor, 904.
— *v.* Tower Publishing Co., 586.
Griffiths *v.* Earl of Dudley, 815, 851, 882.
— *v.* Gidlow, 881.
— *v.* London Docks Co., 437.
— *v.* Perry, 92, 279.
— *v.* Ystradyfodwg School Board, 798.
— Corporation *v.* Humber, 665.
Grigg *v.* National Guardian Ass. Co., 270.
Grill *v.* General Screw Colliery Co., 292.
Grimston *v.* Cunningham, 197, 248.
Grimwood *v.* Barrit, 780.
— *v.* Moss, 234, 715.
Grinham *v.* Willey, 497, 926.
Grinnell *v.* Wells, 433.
Grissell's case, 637.
Grissell *v.* Bristowe, 290.
— *v.* Robinson, 254.
Grizewood *v.* Blane, 668.
Grocer's Co. *v.* Dounc, 451.
Grogan *v.* Smith, 73.
Groom *v.* G. W. Ry. Co., 442.
— *v.* Mealey, 779.
Groucott *v.* Williams, 390, 391.
Groves *v.* Wimborne, 394.
Grundon *v.* Master, 249.
Grundy *v.* Townsend, 70.
Guardians of East London Union *v.* Met. Ry. Co., 156.
— Malling Union *v.* Graham, 675.
— St. Leonards *v.* Franklin, 271.
Guest *v.* Poole Ry. Co., 343.
— *v.* Warren, 497, 862.
Guild *v.* Conrad, 179, 194.
Gulliver *v.* Cosens, 257, 379.
Gundry *v.* Feltham, 941.
Gurney *v.* Behrend, 295.
— *v.* Womersley, 261.
Gutsole *v.* Mathers, 364, 482.
Guy *v.* Churchill, 32, 105, 423.
Guyot *v.* Thomson, 270, 464.
Gwilliam *v.* Twist, 434.
Gwinnell *v.* Eamer, 452, 459.
Gwynne *v.* Davy, 755.
Gyse *v.* Ellis, 10.

Hadley *v.* Baxendale, 57, 144.
— *v.* Green, 703.
— *v.* Perks, 927.
— *v.* Taylor, 458, 459.

Haggard *v.* Pelicier, 418, 564.
Hailes *v.* Marks, 927.
Haire *v.* Wilson, 364.
Halbron *v.* International Horse Agency, 91.
Haldane *v.* Johnson, 707.
Hale, *in re*, 724.
— *v.* Bates, 325.
— *v.* Boustead, 104.
Hales *v.* L. & N. W. Ry. Co., 141, 143, 147.
Halestrap *v.* Gregory, 57, 79, 440.
Halford *v.* Kymer, 205.
Halifax Union *v.* Wheelwright, 97.
Hall *v.* Bainbridge, 269.
Hall, *ex parte*, 88.
Hall *v.* Ball, 371.
— *v.* Barrows, 495.
— *v.* Betty, 283.
— *v.* Byron, 340.
— *v.* City of London Brewery Co., 222.
— *v.* Comfort, 67, 471.
— *v.* Conder, 270.
— *v.* Duke of Norfolk, 485.
— *v.* Eve, 12, 45.
— *v.* Ewin, 226, 713.
— *v.* Fearnley, 497, 885, 923.
— *v.* Flockton, 567.
— *v.* Fuller, 97.
— *v.* Hollander, 432.
— *v.* Levy, 647.
— *v.* Lichfield Brewery Co., 422.
— *v.* L. & N. W. Ry. Co., 530.
— *v.* Lund, 516.
— *v.* N. E. Ry. Co., 143, 149, 631.
— *v.* Nottingham, 829.
— *v.* Odber, 213.
— *v.* Poyser, 571.
— *v.* Warren, 690.
— *v.* Wood, 348.
— *v.* Wright, 731.
Hallen *v.* Runder, 176.
Hallett *v.* Dowdall, 199.
— *v.* Mears, 325.
Halley, The, 916.
Halliday *v.* Holgate, 346, 868.
Hamilton *v.* Long, 433.
— *v.* Pandorf, 292, 784, 785.
— *v.* Vaughan-Sherrin Co., 688, 689.
— *v.* Watson, 674.
Hamlet *v.* Richardson, 257.
Hamlin *v.* G. N. Ry. Co., 55, 149.
Hamlyn *v.* Crown Accidental, &c., Co., 209.
— *v.* Houston, 460.
— *v.* Talisker Distillery, 655.
— *v.* Wood, 80, 229, 745.
Hammack *v.* White, 441.
Hammersmith Ry. Co. *v.* Brand, 441, 454
Hammond, *in re*, 85.
— *v.* Bussey, 57, 279, 317.
— *v.* Colls, 941, 942.
— *v.* Schofield, 266, 704.
Hamon *v.* Falle, 364.
Hampden *v.* Walsh, 667, 668.
Hanbury *v.* Jenkins, 396.
Hancke *v.* Hooper, 438.
Hancock, *in re*, 100.
— *v.* Somes, 929.
Hanfstaengl *v.* American Tobacco Co. 357.
— *v.* Baines, 354.
— *v.* Empire Palace Co., 354.
— *v.* Smith, 354.
Hankley, *in re*, 650.
Hanmer *v.* Chance, 830.
— *v.* Clifton, 17.
Hanna *v.* Kears, 434.
Hannam *v.* Mockett, 481.
Hannay *v.* Smurthwaite, 22.
Hansen *v.* Harrold Brothers, 786.
Hanslip *v.* Padwick, 284.
Hanson *v.* Stubbs, 652.
— *v.* Waller, 425, 426.
Hardaker *v.* Idle District Council, 360, 435.
Hardcastle *v.* S. Yorkshire Ry. Co., 458, 459.
Harburg Comb Co. *v.* Martin, 179.
Harden *v.* Clifton, 581.
Harding *v.* Crethorn, 233.
— *v.* Harding, 88, 172, 586.
Hardingham *v.* Allen, 798.
Hardman *v.* Bellhouse, 256, 257.
— *v.* Booth, 348.
Hardwick *v.* Lane, 669.
Hardy *v.* Fothergill, 591.
— *v.* Ryle, 721.
— *v.* Woodroofe, 130.
Hare *v.* Henty, 126.
— *v.* Rickards, 210.
Hargreave *v.* Spinks, 846.
Hargreaves, *in re*, 82, 713.
— *v.* Parsons, 179, 194.
Hargroves *v.* Hartopp, 449.
Harley *v.* King, 713.
Harlock *v.* Ashberry, 724, 725.
Harman *v.* Kingston, 569.
Harmer *v.* Cornelius, 249, 251, 331, 735.
Harmonides, The, 479.
Harnett *v.* Maitland, 506.
Harper *v.* Godsell, 347, 847.
— *v.* Wright, 356.
Harries *v.* Bevan, 226.
Harrington *v.* Derby Corporation, 878, 903.
— *v.* Hoggart, 91, 287.
— *v.* Victoria Graving Docks Co., 78.
Harris's case, 154, 348.
Harris *v.* Baker, 457.
— *v.* Beauchamp, 413.
— *v.* Brisco, 423, 424.
— *v.* De Pinna, 420, 422.
— *v.* Flower, 517.
— *v.* Goodwyn, 753.
— *v.* G. W. Ry. Co., 95.
— *v.* Hickman, 217, 224.
— *v.* James, 452, 453.
— *v.* Jenkins, 11, 339, 422, 511, 512, 517.
— *v.* Lee, 192.
— *v.* Mantle, 51.
— *v.* Mulkern, 466, 851.

Harris *v.* Nickerson, 92.
— *v.* Pepperell, 739.
— *v.* Perry, 139, 337.
— *v.* Quine, 722.
— *v.* Reynolds, 585.
— *v.* Rothwell, 892.
— *v.* Saunders, 213.
— *v.* Waire, 8, 364.
— *v.* Willis, 862.
Harrison *v.* Blackburn, 502.
— *v.* Bush, 835.
— *v.* Cage, 244.
— *v.* Dixon, 898.
— *v.* Duke of Rutland, 391, 502, 953.
— *v.* G. N. Ry. Co., 885.
— *v.* L. B. & S. C. Ry. Co., 630.
— *v.* Malet, 222.
— *v.* Muncaster, 223.
— *v.* Parker, 505.
— *v.* Southwark Waterworks Co., 455, 936.
— *v.* Taylor, 259.
— *v.* Wright, 242.
Harrop *v.* Osett Corporation, 902.
Harse *v.* Pearl Life Assurance Co., 206, 258
Hart *v.* Denny, 250.
— *v.* Miles, 72.
— *v.* Nash, 725.
— *v.* Porthgain Harbour Co., 284.
— *v.* Prendergast, 725.
— *v.* Swain, 739.
— *v.* Wall, 363, 365.
— *v.* Windsor, 222.
Hartley *v.* Cook, 932.
— *v.* Cummings, 432.
— *v.* Harman, 246, 251.
— *v.* Herring, 55.
— *v.* Hindmarsh, 929.
— *v.* Moxham, 499.
Hartnall *v.* Ryde Commissioners, 451.
Harvey, *in re*, 593.
— *v.* Brydges, 924, 929.
— *v.* French, 364.
— *v.* Grabham, 755, 756.
— *v.* Harvey, 899.
— *v.* Pocock, 373, 376.
— *v.* Truro Rural Council, 408.
Harwood *v.* G. N. Ry. Co., 892.
Haseler *v.* Lemoyne, 382.
Hassall *v.* Wright, 463.
Hatchard *v.* Mège, 175, 369, 385, 482, 496.
Hatten *v.* Russell, 283.
Hatton *v.* Harris, 135.
— *v.* Keane, 359.
Hawke *v.* Brear, 537.
Hawken *v.* Sheaver, 390.
Hawkes *v.* Hubbuck, 190.
Hawkins *v.* Blewitt, 857.
— *v.* Eckles, 909.
— *v.* Walrond, 382.
Hawley *v.* Beverley, 256.
Hawtayne *v.* Bourne, 441.
Hawthorne *v.* Hammond, 415.
Hay's case, 77.
Hay *v.* Ayling, 605, 670.
Haydon *v.* Williams, 724.
Hayes *v.* Keene, 899, 900.
Hayn *v.* Culliford, 292.
Hayward *v.* Lely, 826, 827.
Haywood *v.* Brunswick Building Soc., 226.
Hazard *v.* Mare, 639, 640.
Head *v.* Briscoe, 410.
— *v.* Tattersall, 761.
Headland *v.* Castro, 384.
Heald *v.* Carey, 344 346.
Healey *v.* Storey, 632.
Heap *v.* Hartley, 464
— *v.* Marris, 33.
Heard *v.* Bergmann, 28.
Hearn *v.* L. & S. W. Ry. Co., 625.
Heath *v.* Deane, 822, 830.
— *v.* Elliott, 821, 911.
— *v.* Freeland, 325.
— *v.* Milward, 936.
— *v.* Pugh, 875, 906.
Heather *v.* Webb, 592.
— Bell, The, 255.
Heaven *v.* Pender, 440, 886.
Heawood *v.* Bone, 378.
Hebblethwaite *v.* Peever, 722.
Hebden *v.* West, 205, 206.
Hebditch *v.* MacIlwaine, 835.
Hecla Foundry Co. *v.* Walker, 356.
Hedgely, *in re*, 678.
Hedges *v.* Fagg, 433.
— *v.* Preston, 641.
Hedley *v.* Pinkney Steamship Co., 292, 293, 388, 389, 436, 693.
Heenan *v.* Evans, 915.
Heffield *v.* Meadows, 179.
Heilbutt *v.* Hickson, 319, 324.
Helby *v.* Matthews, 348, 870.
Hellier *v.* Silcox, 215.
Hemming, *ex parte*, 593.
Hemmings *v.* Gasson, 57, 365, 366, 835.
— *v.* Sceptre Life Ass., 695.
Hemp *v.* Garland, 720.
Hemstead *v.* Phœnix Gas Co., 410.
Henderson, *in re*, 647.
— *v.* Australian Steam Nav. Co., 643.
— *v.* Broomhead, 836.
— *v.* Eason, 69.
— *v.* Henderson, 213, 701.
— *v.* Maxwell, 352, 827.
— *v.* Mears, 712.
— *v.* Preston, 899, 927.
— *v.* Squire, 216, 233.
— *v.* Stobart, 567, 754.
— *v.* Thorn, 219, 220.
— *v.* Williams, 349.
Hendy *v.* Stephenson, 950.
Henfree *v.* Bromley, 580.
Henley *v.* Soper, 213, 267.
Hennan *v.* Duckworth, 252.
Hennesey *v.* Wright, 37.
Henniker *v.* Howard, 390.
Henning *v.* Burnet, 950, 953.
Henriquez *v.* Dutch West India Co., 161.
Henry *v.* Lowson, 72.
Henthorne *v.* Fraser, 80.

Henwood *v.* Harrison, 835.
Herbage Rents, Greenwich, *in re*, 273.
Herbert *v.* Markwell, 860.
— *v.* Sayer, 101, 102.
Herdman *v.* Wheeler, 592.
Herman *v.* Jeuchner, 682.
Hermann *v.* Charlesworth, 258, 263.
Hesketh *v.* Fawcett, 798.
Heugh *v.* Chamberlain, 12.
— *v.* L. & N. W. Ry. Co., 147.
Hewett *v.* Barr, 721.
Hewlett *v.* Allen, 746, 775, 800.
Hewlings *v.* Graham, 689.
Hewlins *v.* Shippam, 512.
Hewson *v.* Cleeve, 841.
Hext *v.* Gill, 413, 485.
Hey *v.* Moorhouse, 815.
Heydon's case, 57.
Heydon *v.* Thompson, 552.
Heyl-Dia *v.* Edmunds, 462.
Heywood *v.* Pickering, 126.
— *v.* Potter, 359.
Hibblewhite *v.* M'Morine, 577.
Hick *v.* Raymond, 299, 300.
— *v.* Rodocanachi, 165.
Hickinbotham *v.* Leach, 841.
Hickman *v.* Haynes, 279, 756.
— *v.* Machin, 215, 706.
— *v.* Maisey, 502.
Hicks *v.* Faulkner, 425.
Hickson *v.* Lombard, 398.
Hide *v.* Thornborough, 488.
Higgen's case, 703, 736.
Higgins *v.* Betts, 420.
— *v.* Burton, 348.
— *v.* Pitt, 682.
— *v.* Sargent, 210.
— *v.* Senior, 50, 72.
— *v.* Thomas, 824.
Higginson *v.* Simpson, 667.
Higgon *v.* Mortimer, 349.
Highmore *v.* Primrose, 70.
Hilbery *v.* Hatton, 345.
Hildesheimer *v.* Faulkner, 354, 357.
Hilldidge *v.* O'Farrell, 11, 12.
Hill *v.* E. & W. India Docks Co., 217.
— *v.* Featherstonhaugh, 735.
— *v.* Fox, 668, 682.
— *v.* G. W. Ry. Co., 251.
— *v.* New River Co., 443, 885.
— *v.* Royds, 263.
— *v.* Scott, 145, 292.
— *v.* Thompson, 892.
— *v.* Wilson, 293, 612.
Hillman *v.* Mayhew, 58, 539.
Hills *v.* Laming, 270.
— *v.* Street, 257.
Hilton *v.* Earl Granville, 830.
— *v.* Woods, 730.
Hinchcliffe *v.* Barwick, 761.
Hinde *v.* Liddell, 56, 279.
— *v.* Whitehouse, 91.
Hindley *v.* Marquis of Westmeath, 191, 683.
Hinton *v.* Dibbin, 625.
— *v.* Sparkes, 284.
Hiort *v.* Bott, 344, 346.
Hiort *v.* L. & N. W. Ry. Co., 344, 346, 349, 350.
Hipgrave *v.* Case, 16.
Hippisley *v.* Knee Bros., 78.
Hiram-Maxim Co., *in re*, 774.
Hirsche *v.* Sims, 638.
Hirst *v.* West Riding Banking Co., 407.
Hiscox *v.* Batchellor, 249.
Hitchcock *v.* Humfrey, 179.
Hoad *v.* Grace, 49.
Hoadley *v.* M'Lane, 665.
Hoare *v.* Graham, 611.
— *v.* Niblett, 186, 679, 704.
Hobbins, *in re*, 641.
Hobbs *v.* Branscomb, 926.
— *v.* Cathie, 125.
Hobbs *v.* Wayet, 686.
Hobson *v.* Cowley, 755, 756.
— *v.* Monks, 521.
— *v.* Thelluson, 477.
Hochster *v.* De la Tour, 158, 248, 756.
Hodder *v.* Williams, 899.
Hodges *v.* Earl of Lichfield, 284.
Hodgins *v.* Hickson, 466.
Hodgkinson *v.* Ennor, 510, 516.
— *v.* L. & N. W. Ry. Co., 151.
— *v.* Snibson, 472.
Hodgman *v.* West Mid. Ry. Co., 629.
Hodgson, *in re*, 20.
— *v.* Anderson, 570.
— *v.* Scarlett, 836.
— *v.* Sidney, 101.
Hodsoll *v.* Stallebrass, 56, 432.
Hodson *v.* Observer, &c., Soc., 205.
Hoey *v.* Felton, 56.
Hogarth *v.* Jennings, 373.
Hogg *v.* Ward, 926.
Hoggins *v.* Gordon, 86.
Holderness *v.* Collinson, 867.
Holding *v.* Pigott, 500, 934, 935.
Hole *v.* Barlow, 456.
— *v.* Bradbury, 586, 827.
— *v.* Chard Union, 56.
— *v.* Sittingbourne Ry. Co., 435.
Holford *v.* Bailey, 396, 480, 562.
— *v.* Pritchard, 216.
Holker *v.* Porritt, 511.
Holland, *in re*, 664.
— *v.* Bird, 379.
— *v.* Hodgson, 876.
— *v.* Russell, 259.
Hollerson *v.* Bagnell, 387.
Holliday *v.* Hippenstall, 894, 896.
— *v.* Morgan, 316.
— *v.* National Telephone Co., 458.
Hollingshead, *in re*, 726.
Hollinrake *v.* Truswell, 353.
Hollins *v.* Fowler, 344, 345, 346, 348, 350.
— *v.* Verney, 819, 947, 948.
Hollis *v.* Marshall, 271.
— *v.* Palmer, 725, 726.
Holloway *v.* Hill, 226, 713.
— *v.* York, 58.
Holme *v.* Brunskill, 675.
Holmes *v.* Bell, 736.
— *v.* Brierley, 687.
— *v.* Goring, 951.

Holmes *v.* Kerrison, 720.
— *v.* Mather, 497.
— *v.* Mitchell, 179.
— *v.* Newlands, 937.
— *v.* N. E. Ry. Co., 436, 454.
— *v.* Wilson, 56, 501, 862.
Holroyd *v.* Breare, 418.
Holt *v.* Brien, 191.
— *v.* Ely, 258.
— *v.* Ward, 245.
— *v.* Wilkes, 460.
Holtum *v.* Lotun, 498.
Home Marine Ins. Co. *v.* Smith, 199.
Homer *v.* Taunton, 364.
Homfray *v.* Rigby, 134.
— *v.* Scroope, 720.
Honduras Ry. Co. *v.* Tucker, 77.
— *v.* Lefevre, 23.
Honywood *v.* Honeywood, 506.
Hood-Barrs *v.* Heriot, 190.
Hooker *v.* Nye, 910.
Hooper *v.* Bromat, 196.
— *v.* Clark, 225.
— *v.* Kenshole, 431.
— *v.* L. & N. W. Ry. Co., 143.
— *v.* Marshall, 675.
— *v.* Stevens, 725.
— *v.* Williams, 131.
Hopkins *v.* Great Northern Ry. Co., 395.
— *v.* Logan, 71.
— *v.* Ware, 746.
Hopkinson *v.* Forster, 88, 97.
— *v.* Lovering, 102, 229.
Hopper *v.* Burness, 293, 326.
Hopwood *v.* Whaley, 230, 654.
Horn *v.* Anglo-Australian Ass. Co., 697.
— *v.* Chandler, 56.
Hornby *v.* Cardwell, 557, 562, 713.
Horne *v.* Mid. Ry. Co., 57, 144, 146.
Horner, *in re*, 211.
Hornidge *v.* Wilson, 230, 654.
Horsey *v.* Graham, 216.
Horsfall *v.* Thomas, 601.
Horton *v.* Riley, 254.
— *v.* Sayer, 585.
Hosegood *v.* Bull, 407.
Hosking *v.* Phillipps, 942.
Hotten *v.* Arthur, 352.
Hough *v.* Manzanos, 72.
Houghton, *in re*, 650.
— *v.* Matthews, 176.
Houlden *v.* Smith, 418.
Houldsworth *v.* City of Glasgow Bank, 341, 398, 434.
Household Insurance Co. *v.* Grant, 154.
House Property Co. *v.* Horse Nail Co., 28, 32, 474.
Houstoun *v.* Sligo, 8, 646.
Hovenden *v.* Lord Annesley, 727.
How *v.* Kennett, 215.
Howard *v.* Brownhill, 263.
— *v.* Hopkyns, 198.
— *v.* Lovegrove, 195.
— *v.* Refuge Society, 206.
— *v.* Sheward, 316.
— *v.* Woodward, 198, 242.
Howard de Walden *v.* Barber, 225.
Howarth *v.* Brearley, 252.
— *v.* Sutcliffe, 474.
Howcuth *v.* Bonser, 726.
Howden *v.* Yorkshire Miners, 304, 305.
Howe Machine Co., *in re*, 213.
— *v.* Smith, 283, 284.
Howell *v.* Jackson, 929.
— *v.* London Gen. Omnibus Co., 30.
— *v.* Richards, 48.
— *v.* Young, 720.
Howgate's contract, *in re*, 580.
Howitt *v.* Earl of Harrington, 876.
Howland *v.* Norris, 284.
Howlett *v.* Tarte, 647.
Howson *v.* Hancock, 258.
Howton *v.* Frearson, 951.
Hoyle, *re*, 654.
— *v.* Hoyle, 194.
Hubbock *v.* British N. Borneo Co., 519, 751.
— *v.* Wilkinson, 482, 563.
Huber *v.* Steiner, 722.
Huckle *v.* Wilson, 789.
Huckman *v.* Fernie, 205, 695.
Hudd *v.* Ravenor, 374.
Huddart *v.* Rigby, 552.
Hudson *v.* Bilton, 263.
— *v.* Cripps, 223.
— *v.* Revett, 578.
— *v.* Slade, 925.
— *v.* Temple, 283.
Hudston *v.* Mid. Ry. Co., 151.
Huggins, *ex parte*, 586.
— *v.* Coates, 261.
Huggons *v.* Tweed, 536.
Hughes *v.* Coles, 722.
— *v.* Doman, 682.
— *v.* Done, 684.
— *v.* Graeme, 77.
— *v.* Humphreys, 582.
— *v.* Percival, 435, 445
— *v.* Pump House Hotel Co., 26, 89.
— *v.* Thorpe, 71.
Hughes-Hallett *v.* Indian, &c. Co., 686.
Hugill *v.* Masker, 664.
Hull and Lady Meux, *in re*, 577.
— *v.* Bollard, 894.
— Ropes Co. *v.* Adams, 870.
Hulle *v.* Heightman, 326.
Hulls *v.* Estcourt, 911.
Hulme *v.* Muggleston, 779.
Hulthen *v.* Stewart, 300.
Humble *v.* Mitchell, 290.
Hume *v.* Peploe, 797, 799.
— *v.* Somerton, 4.
Humfrey *v.* Dale, 137.
Humphreys *v.* Jones, 724.
Humphries *v.* Brogden, 483, 484, 485.
— *v.* Cousins, 453, 460.
— *v.* Taylor Drug Co., 38, 39, 496.
Humphriss *v.* Worwood, 903.
Humphrys *v.* Polak, 683.
Hunt *v.* Bell, 361.
— *v.* De Blaquiere, 192.
— *v.* Fensham, 53.

Hunt *v.* Gt. N. Ry. Co., 800, 835, 837.
— *v.* Peake, 484.
— *v.* Silk, 261.
— *v.* Worsfold, 53.
Hunter *v.* Caldwell, 306.
— *v.* Daniel, 424.
— *v.* Gibbons, 727.
— *v.* Hunt, 255.
— *v.* Nickolds, 718.
— *v.* Walters, 578, 739.
— *v.* Young, 172.
Huntington *v.* Attrill, 702.
Huntley *v.* Bulwer, 331.
— *v.* Ward, 364, 835.
Hurdman *v.* N. E. Ry. Co., 443, 453, 460, 504.
Hurst *v.* G. W. Ry. Co., 149.
— *v.* Hurst, 242.
— *v.* Parker, 874.
— *v.* Usborne, 788.
Hussey *v.* Horne-Payne, 768.
Hutcheson *v.* Eaton, 72, 583.
Hutchins *v.* Chambers, 380, 384.
Hutchinson *v.* Gillespie, 212.
— *v.* Sturges, 774.
— *v.* Sydney, 254.
— York Ry. Co., 435, 881.
Hutley *v.* Hutley, 424, 730.
Hutton *v.* Bullock, 574.
— *v.* Warren, 709.
Huxley *v.* Bull, 617.
Hyams *v.* Webster, 458.
Hyatt, *in re*, 652.
Hybart *v.* Parker, 153.
Hydraulic, &c. Co. *v.* McHaffie, 57, 279.
Hyman *v.* Helm, 523, 537, 705.
— *v.* Nye, 334.
Hynan *v.* Ogden, 371

I'Anson *v.* Stuart, 362, 841.
Ibbetson, *ex parte*, 100.
Ibbotson *v.* Peak, 481.
Icely *v.* Grew, 284.
Ihlee *v.* Henshaw, 921.
Illidge, *in re*, 678.
— *v.* Goodwin, 445.
Illustrated Newspaper Corporation, *in re*, 247.
Imperial Bank of Canada *v.* Bank of Hamilton, 260.
— Gas Co. *v.* London Gas Co., 727
— Loan Co. *v.* Stone, 290.
Imray *v.* Magnay, 915.
— *v.* Oakshotte, 716.
Inchbald *v.* Robinson, 455.
— *v.* Western Neilgherry, &c. Co., 74.
Ind, Coope & Co. *v.* Emmerson, 34.
Indermaur *v.* Dames, 448.
Indus, The, 916.
Ingle *v.* Bell, 926, 929.
— *v.* M'Cutchan, 791.
Inglis *v.* Robertson, 869.
— *v.* Stock, 200.
Inman *v.* Ackroyd, 156.
— Steamship Co. *v.* Bischoff, 299.
Innes *v.* Stephenson, 98.
International Tea Stores *v.* Hobbs, 421.
Iona, The, 916.
Ionides *v.* Pacific Ins. Co., 499, 738.
— *v.* Pender, 694.
Iredale *v.* China Traders' Co., 203.
Ireland *v.* Livingston, 75, 80, 310.
Ireson *v.* Moore, 451.
Irish Land Commrs. *v.* Ryan, 647.
Irons *v.* Smallpeice, 856.
Irvine *v.* Union Bank of Australia, 633.
Irving *v.* Greenwood, 731, 732.
— *v.* Manning, 201.
— *v.* Veitch, 70, 72, 725.
Isaac *v.* Belcher, 822.
— *v.* Clarke, 345.
— *v.* Wyld, 705.
Isaacson *v.* Durant, 579.
— *v.* Harwood, 72, 253, 736.
Isberg *v.* Bowden, 783.
Israel *v.* Simmons, 216.
Itchin Bridge Co. *v.* Local Board of Southampton, 451, 457.
Ivay *v.* Hedges, 454.
Ivens *v.* G. W. Ry. Co., 165.
Ives *v.* Willans, 85.
Ivimey *v.* Stocker, 511.

Jack *v.* Kipping, 779.
Jackson, *re*, 770.
— *v.* Adams, 364.
— *v.* Allaway, 766.
— *v.* Barry Railway Co., 85.
— *v.* Courtenay, 933.
— *v.* Cummins, 866.
— *v.* Dickinson, 556.
— *v.* Duchaire, 658.
— *v.* Duke of Newcastle, 414.
— *v.* Litchfield, 4.
— *v.* Met. Ry. Co., 149.
— *v.* N. E. Ry. Co., 104, 253, 736.
— *v.* Pesked, 473.
— *v.* Rogers, 141.
— *v.* Smithson, 883.
— *v.* Stopherd, 267.
— *v.* Union Marine Ins. Co., 299, 788.
Jacob *v.* Down, 716.
— *v.* Hart, 580.
Jacobs *v.* Crédit Lyonnaise, 655, 656.
— *v.* Fisher, 71, 572.
— *v.* Revell, 771.
— *v.* Seward, 69, 503, 507, 824, 937, 939.
Jacques *v.* Withy, 258.
Jakeman *v.* Cook, 592.
Jamaica Ry. Co. *v.* Colonial Bank, 17, 51
James, *ex parte*, 260, 634.
— *v.* David, 566.
— *v.* James, 84.
— *v.* Kerr, 423, 730, 741.
— *v.* Radnor D. C., 757, 801.
— *v.* Smith, 663.
— *v.* Vane, 778.
— *v.* Williams, 571, 615.
Jameson *v.* Brick & Stone Co., 101, 102.
Jaques *v.* Millar, 285.

Jarmain *v.* Hooper, 497.
Jarvis *v.* Dean, 459.
Jay *v.* Johnstone, 189, 722.
Jeakes *v.* White, 283.
Jefferies *v.* Sheppard, 256.
Jefferys *v.* Boosey, 351, 353, 358.
— *v.* Gurr, 254.
Jeffreys *v.* Evans, 791.
Jeffries *v.* G. W. Ry. Co., 347.
— *v.* Williams, 484, 486, 918.
Jeffryes *v.* Agra Bank, 832.
Jeffs *v.* Day, 588.
Jegon *v.* Vivian, 262, 504.
Jekyll *v.* Moore, 836.
Jelks *v.* Hayward, 350.
Jell *v.* Douglas, 20.
Jenkins *v.* Betham, 87, 331.
— *v.* Coomber, 597.
— *v.* Harvey, 829.
— *v.* Jackson, 223, 452.
— *v.* Phillips, 364.
— *v.* Tucker, 178.
Jenks *v.* Clifden, 386.
Jenner *v.* A'Beckett, 363, 365, 834, 838.
— *v.* Morris, 192, 775.
Jennings *v.* G. N. Ry. Co., 149.
— *v.* Hammond, 634.
— *v.* Rigby, 652.
— *v.* Rundall, 858.
Jenoure *v.* Dalmège, 363, 835.
Jessel *v.* Bath, 295.
Jesser *v.* Gifford, 473.
Jesson *v.* Solly, 141.
Jevens *v.* Harridge, 230.
Jewsbury *v.* Mummery, 650, 700.
— *v.* Newbould, 192.
Job *v.* Potton, 507.
Johannesburg Hotel Co., *in re*, 638.
John *v.* Bacon, 394.
Johns *v.* Whitley, 235.
Johnson *v.* Blenkensopp, 247.
— *v.* Clay, 800.
— *v.* Diprose, 500.
— *v.* Edge, 461.
— *v.* Emerson, 335, 424, 425.
— *v.* Gallagher, 185.
— *v.* Goslett, 261.
— *v.* Jones, 706, 708, 910.
— *v.* Lansley, 259.
— *v.* Lindsay, 435.
— *v.* L. & Y. Ry. Co., 349.
— *v.* Midland Ry. Co., 141.
— *v.* Newnes, 352.
— *v.* Pye, 688.
— *v.* Royal Mail Co., 255.
— *v.* Skafte, 255.
— *v.* Stear, 349.
— *v.* Sumner, 191.
— *v.* Upham, 379.
— *v.* Wild, 255.
Johnston *v.* Consumers Gas Co., 271.
— *v.* Kershaw, 75.
Johnstone *v.* Huddlestone, 232.
— *v.* Marks, 689.
— *v.* Milling, 756.
— *v.* Sutton, 424.
Jolliffe *v.* Wallasey Local Board, 888.
Jolly *v.* Rees, 191.
Jones, *in re*, 791.
— *v.* Arthur, 799.
— *v.* Barkley, 283.
— *v.* Bewicke, 39.
— *v.* Biernstein, 383.
— *v.* Bird, 451.
— *v.* Broadhurst, 567.
— *v.* Brooke, 195.
— *v.* Brown, 824.
— *v.* Carter, 234, 715.
— *v.* Chapman, 503, 900, 936, 937, 938.
— *v.* Chappell, 474, 506.
— *v.* Corporation of Liverpool, 434, 435.
— *v.* Cowley, 316.
— *v.* Cuthbertson, 189.
— *v.* Daniel, 768.
— *v.* Dowle, 371, 846.
— *v.* Egerton, 443.
— *v.* Festiniog Ry. Co., 442.
— *v.* Flint, 79.
— *v.* Foley, 503.
— *v.* Fowler, 40.
— *v.* Gardiner, 283, 285.
— *v.* Gooday, 920.
— *v.* Heavens, 198.
— *v.* Hill, 506.
— *v.* Hough, 55, 345.
— *v.* Humphreys, 89.
— *v.* Jones, 505, 602.
— *v.* Just, 316, 319.
— *v.* King, 167, 227.
— *v.* Lavington, 222.
— *v.* Marshall, 270.
— *v.* Merionethshire Bldg. Soc., 605, 682, 683.
— *v.* Morris, 910.
— *v.* Nicholls, 888.
— *v.* Nixon, 711.
— *v.* Pearle, 862.
— *v.* Peppercorne, 868.
— *v.* Provincial Ins. Co., 699.
— *v.* Richard, 911.
— *v.* Robin, 821.
— *v.* Ryde, 261.
— *v.* Ryder, 71.
— *v.* St. John's College, Oxford, 803.
— *v.* Sawkins 571.
— *v.* Scullard, 434.
— *v.* Shears, 711.
— *v.* Simes, 175, 385.
— *v.* Tanner, 263.
— *v.* Turner, 289.
— *v.* Victoria Graving Dock, 664.
— *v.* Waite, 683.
— *v.* Watts, 769.
— *v.* Williams, 887, 890, 942.
— *v.* Withers, 875.
Jordan *v.* Gibbon, 925.
— *v.* Moore, 892.
Jordeson *v.* Sutton Gas Co., 414, 454, 484, 936.
Jordin *v.* Crump, 460.
Joselyne, *ex parte*, 589.
Josling *v.* Irvine, 56.
Joule *v.* Jackson, 377.

Joyner *v.* Weeks, 219, 220.
Joynson *v.* Hunt, 73.
Jubb *v.* Ellis, 41, 552.
Judson *v.* Etheridge, 866.
Justice *v.* Gosling, 927.

Kaltenbach *v.* Mackenzie, 202.
Kane *v.* Mulvany, 838.
Kannen *v.* McMullen, 331, 735.
Karberg's case, 738.
Kaufman *v.* Gerson, 645.
Kavanagh *v.* Gudge, 865, 923, 937.
Kay *v.* Oxley, 950.
Keane *v.* Boycott, 687, 688.
Kearley *v.* Thompson, 258, 683.
Kearney *v.* L. B. & S. C. Ry. Co. 441.
— *v.* Whitehaven Colliery Co., 682.
Kearslake *v.* Morgan, 615, 616, 618.
Kearsley, *ex parte*, 107.
— *v.* Cole, 675.
— *v.* Oxley, 230, 654.
Keates *v.* Woodward, 140.
Keech *v.* Hall, 470.
Keen *v.* Henry, 434.
— *v.* Priest, 373, 376.
Keene *v.* Beard, 112, 113, 127.
— *v.* Keene, 109.
— *v.* Thomas, 866.
Keighley *v.* Durrant, 575, 634.
Keith, Prowse & Co. *v.* National Telephone, 197, 715.
Kekewich *v.* Manning, 80.
Kelk *v.* Pearson, 421.
Kelly *v.* Byles, 352.
— *v.* Heathman, 894, 896.
— *v.* Hutton, 352.
— *v.* Lawrence, 44.
— *v.* Met. Ry. Co., 3, 139, 140.
— *v.* Morris, 352.
— *v.* Partington, 362.
— *v.* Solari, 259, 260.
Kemble *v.* Farren, 241.
Kemp *v.* Burt, 306.
— *v.* Christmas, 386.
— *v.* Finden, 255.
— *v.* Goldberg, 39.
— *v.* Lester, 67, 233.
— *v.* Neville, 418.
— *v.* Waddingham, 652.
Kempe *v.* Gibbon, 728.
Kendal *v.* Wood, 568.
Kendall *v.* Hamilton, 20, 28, 29, 30, 266, 267, 574, 703, 704.
— *v.* L. & S. W. Ry. Co., 142.
Kendrick *v.* Roberts, 53.
Kennedy, *ex parte*, 636.
— *v.* Broun, 71, 162.
— *v.* Panama, &c. Mail Co., 739.
— *v.* Thomas, 108.
Kennington *v.* Houghton, 69.
Kensington, &c. Co. *v.* Lane-Fox, &c. Co., 461.
Kensit *v.* G. E. Ry. Co., 509, 511.
Kent's case, 637.
Kent *v.* G. W. Ry. Co., 905.
Kent County Council *v.* Folkstone Corporation, 902.
Kerford *v.* Mondel, 867.
Kernot *v.* Potter, 197.
Kerr *v.* Kerr, 212.
Keyse *v.* Powell, 937, 941.
Kibble *v.* Fairthorpe, 875, 876.
Kidd *v.* Boone, 737.
Kiddell *v.* Burnard, 316.
Kidgill *v.* Moor, 452, 473, 475, 517.
Kidston *v.* Empire Marine Ins. Co., 204.
Kiffin *v.* Willis, 907.
Kilgour *v.* Gaddes, 420, 517.
Killby *v.* Rochussen, 118.
Kilpin *v.* Ratley, 857.
Kimber *v.* Press Assoc., 837.
Kine *v.* Jolly, 420.
King *v.* Alston, 256.
— *v.* Bowen, 583.
— *v.* England, 382.
— *v.* Gillett, 732, 756.
— *v.* Hoare, 266, 703, 704, 862.
— *v.* London Improved Cab Co., 434.
— *v.* Meredith, 140.
— *v.* Smith, 578.
— *v.* Victoria Ins. Co., 89, 201.
— *v.* Wigston, 83.
— *v.* Wilson, 283.
Kingdon *v.* Kirk, 51.
— *v.* Nottle, 167, 227.
King of Greece *v.* Wright, 161.
Kingsford *v.* Merry, 348.
Kingsmill *v.* Bull, 829.
Kington *v.* Kington, 253.
Kinloch *v.* Secretary for India, 864.
— *v.* Nevile, 819, 820, 953.
Kinlyside *v.* Thornton, 506.
Kinnerley *v.* Hossack, 773.
Kinning *v.* Buchanan, 900.
Kino *v.* Rudkin, 32, 415.
Kirby *v.* North British Ins. Co., 3.
Kirk *v.* Bromley Union, 802.
— *v.* Gregory, 346, 499.
— *v.* Todd, 31, 165, 385.
Kirkham *v.* Attenborough, 275.
Kirkheaton Local Board *v.* Ainley, 514.
Kirkland *v.* Peatland, 722.
Kirkman *v.* Hargreaves, 346.
Kirkwood *v.* Carroll, 129.
Kirton *v.* Braithwaite, 798.
— *v.* Wood, 71.
Kitching *v.* Kitching, 53.
Kitts *v.* Moore, 85, 413.
Knackey *v.* Redrath, 390.
Knapp *v.* L. C. & D. Ry. Co., 343, 942.
— *v.* Salsbury, 885, 923.
Knibbs *v.* Hall, 380.
Knight *v.* Clements, 581.
— *v.* Eagle, 434.
— *v.* Egerton, 382.
— *v.* Faith, 202.
— *v.* Gibbs, 365.
— *v.* Simmonds, 227.
— *v.* Williams, 710.
Knights *v.* L. C. & D. Ry. C., 931.
Knill *v.* Prowse, 587.
Knipe *v.* Blain, 135.
Knowles *v.* Michel, 70, 71.
— *v.* Roberts, 11, 12.

Knowles *v.* Scott, 634.
Knox *v.* Gye, 718.
Kœbel *v.* Saunders, 693.
Kopitoff *v.* Wilson, 292.
Krehl *v.* Burrell, 414.
Krell *v.* Henry, 577.
Kurtz *v.* Spence, 461.

Labouchere *v.* Dawson, 314.
Lacave *v.* Credit Lyonnaise, 345.
Lacey *v.* Hill, 311.
Lacy *v.* Kinaston, 754.
— *v.* Rhys, 359.
Ladd *v.* Pulestone, 537.
Lade *v.* Shepherd, 502, 505.
Ladyman *v.* Grave, 420.
Lagunas Co. *v.* Lagunas Syndicate, 342.
Laing *v.* Chatham, 775.
Laird *v.* Briggs, 474.
— *v.* Pim, 284.
Lake *v.* Gibson, 568.
— *v.* King, 836.
Lakeman *v.* Mountstephen, 179.
Lamb *v.* Brewster, 177, 708.
— *v.* Burnett, 922.
— *v.* Evans, 352.
— *v.* Micklethwait, 40.
Lambert *v.* Heath, 261.
— *v.* Lowestoff Corporation, 360, 409, 454.
— *v.* Stroother, 938.
Lambkin *v.* S. E. Ry. Co., 56.
Lambton *v.* Mellish, 455.
Lamburn *v.* Cruden, 247.
Lamine *v.* Dorrell, 262.
Lamond *v.* Richard, 415.
Lancashire & Y. Ry. Co. *v.* Gidlow, 257.
— *v.* Greenwood, 144, 623.
Lancashire Waggon Co. *v.* Fitzhugh, 345, 475, 898.
Lane *v.* Applegate, 845.
— *v.* Capsey, 890.
— *v.* Chapman, 915.
— *v.* Cotton, 142, 442.
— *v.* Cox, 449.
— *v.* Dixon, 501, 505.
— *v.* Hill, 71.
— *v.* Nixon, 693.
Lane-Cox *v.* Kensington, &c. Co., 892, 893.
La Neuville *v.* Campbell, 316.
Langen *v.* Tate, 737.
Langford *v.* Woods, 447, 489.
Langrish *v.* Watts, 725.
Langston *v.* Corney, 111.
Langton *v.* Carleton, 248.
Lanphiere *v.* Phipos, 438.
Larios *v.* Bonany, 96.
Larner *v.* Larner, 410.
Larocque *v.* Beauchemin, 638.
Latouche *v.* Latouche, 725.
Latter *v.* Braddell, 497.
Laugher *v.* Pointer, 434.
Laughton *v.* Bishop of Sodor and Man, 363, 835.
Laurie *v.* Scholefield, 179.
Lavery *v.* Pursell, 666.
— *v.* Turley, 571.
Law *v.* Harwood, 482.
— *v.* London, &c. Co., 206.
— *v.* Parnell, 112.
— *v.* Redditch Local Board, 241, 243, 803.
Lawes *v.* Purser, 261, 269, 270.
— *v.* Shaw, 134.
Lawford *v.* Billericay Council, 161, 643.
Lawrance *v.* Norreys, 13, 16, 398, 564, 727.
Lawrence *v.* Accidental, &c. Co., 208, 209.
— *v.* Aflalo, 352.
— *v.* Hitch, 829.
— *v.* Jenkins, 390.
— *v.* Knowles, 766.
— *v.* Obee, 501.
— *v.* Willcocks, 68, 114, 242.
Laws *v.* Rand, 126.
Law Society *v.* Waterlow, 887.
Lawson *v.* Bank of London, 496.
— *v.* Wallasey Board, 803.
Lax *v.* Corporation of Darlington, 431.
Laycock *v.* Pickles, 70.
Lea *v.* Facey, 271, 904.
— *v.* Thursby, 563.
Leader *v.* Rhys, 845.
Leak *v.* Driffield, 186.
Leake *v* Loveday, 347, 934.
Leame *v.* Bray, 496, 499.
Leaper *v.* Tatton, 725.
Learmouth *v.* Grandine, 571.
Learoyd *v.* Brook, 582.
Leather Cloth Co. *v.* American, &c., Co., 495, 496.
— *v.* Hieronimus, 278, 756.
— *v.* Hirschfield, 495.
Leathes *v.* Leaths, 370.
Le Blanche *v.* L. & N. W. Ry. Co., 56, 149, 150.
Le Brasseur, *in re*, 162.
Lechmere *v.* Fletcher, 461, 724.
Le Conteur *v.* L. & S. W. Ry. Co., 143, 626.
Leduc *v.* Ward, 296.
Lee *v.* Abdy, 656.
— *v.* Ashwin, 11, 13.
— *v.* Cooke, 375, 911.
— *v.* Danger, 476, 478, 915.
— *v.* Everest, 792.
— *v.* Gaskell, 176.
— *v.* Griffin, 326, 665.
— *v.* Haley, 496.
— *v.* Jones, 674.
— *v.* L. & Y. Ry. Co., 753, 815
— *v.* Lester, 780.
— *v.* Riley, 390, 501.
— *v.* Wilmot, 725.
Lee & Chapman's case, 635.
Leech *v.* Schweder, 421.
Leeds Banking Co., *in re*, 117.
Leeds Bank *v.* Walker, 261, 580.
Lees *v.* Patterson, 427, 539.
Leese *v.* Martin, 867.

Leeson *v.* General Council, 878.
Leete *v.* Hart, 904.
Lefanu *v.* Malcomson, 460.
Legg *v.* Evans, 347, 868.
Leggott *v.* G. N. Ry. Co., 388, 646, 647.
Legh *v.* Hewitt, 221.
— *v.* Lillie, 51, 242.
Lehain *v.* Philpott, 375, 708.
Leigh *v.* Dickeson, 215, 254.
— *v.* Paterson, 278.
Leitch *v.* Abbott, 38, 309.
Leitrim, The, 203.
Le Lievre *v.* Gould, 397, 440.
Leman *v.* Fletcher, 252.
— *v.* Houseley, 252.
Lemere *v.* Elliott, 71.
Lemmon *v.* Webb, 453, 890, 941.
Rempriere *v.* Humphrey, 937, 941.
Le Neve *v.* Vestry of Mile End, 901, 952, 954.
Lennssen *v.* Thornton, 289.
Leslie *v.* Clifford, 69.
— *v.* Young, 352.
Letton *v.* Gooden, 395.
Leuckhart *v.* Cooper, 867.
Levene *v.* Greenwood, 741.
Lever *v.* Goodwin, 495.
Levi *v.* Abbott, 914.
— *v.* Anglo-Continental Gold Reefs, 539, 557.
Levington *v.* Lurgan Guardians, 442.
Levitt *v.* Hamblet, 793.
Levy *v.* Baillie, 698.
— *v.* Green, 319.
— *v.* Lewis, 215.
Lewin *v.* Wilson, 724.
Lewis, *in re*, 791.
— *v.* Baker, 233, 910.
— *v.* Campbell, 254, 256.
— *v.* Clay, 597, 739.
— *v.* Davis, 272.
— *v.* Gray, 479.
— *v.* G. W. Ry. Co., 628, 629.
— *v.* Hammond, 257.
— *v.* Jones, 566.
— *v.* Owen, 593.
— *v.* Peachey, 83.
— *v.* Peake, 317.
— *v.* Reed, 382.
— *v.* Rossiter, 85.
— *v.* Rucker, 201.
Leyland *v.* Stewart, 352.
— *v.* Tancred, 380.
Leyman *v.* Latimer, 841.
Liardet *v.* Hammond, 12.
Lickbarrow *v.* Mason, 294, 295, 825.
Lidgett *v.* Secretan, 201.
Lightly *v.* Clouston, 432.
Lilley *v.* Elwin, 250.
— *v.* Hewitt, 179.
— *v.* Rankin, 670.
Lilly *v.* Hays, 263.
Limpus *v.* London Omnibus Co., 359, 360, 434.
Lindenan *v.* Desborough, 695, 699.
Lindon *v.* Hooper, 257.
Lindsay *v.* Cundy, 348.
Lindsay Petroleum Co. *v.* Hurd, 656.
Linford *v.* Lake, 530, 922, 923.
Linotype Co. *v.* British Empire Co., 482.
Linsell *v.* Bonsor, 723, 725.
Lishman *v.* Northern Marine Insurance Co., 199.
Lister *v.* L. & Y. Ry. Co., 142.
— *v.* Lane, 220.
— *v.* Perryman, 424, 927.
Litchfield *v.* Ready, 502, 646.
Lithgow *v.* Vernon, 824.
Littledale *v.* Liverpool College, 467.
Liver Alkali Co. *v.* Johnson, 142, 292.
Liverpool Adelphi, &c. *v.* Fairhurst, 410, 688.
— Borough Bank *v.* Eccles, 578.
— Brokers *v.* Commercial Press, 352, 827.
— Household Stores *v.* Smith, 366.
Livett *v.* Wilson, 949.
Livingston *v.* Ralli, 86.
Livingstone *v.* Rawyards Coal Co., 504.
Llandrindod Water Co. *v.* Hawksley, 86.
Llandudno U. D. C. *v.* Hughes, 431.
Llewellin, *in re*, 867.
Llewellyn *v.* Llewellyn, 177.
Lloyd *v.* Banks, 87,
— *v.* Dimmack, 105.
— *v.* Fleming, 200.
— *v.* Lee, 177.
— *v.* Rosbee, 714.
Lloyds *v.* Harper, 673.
Lock *v.* Ashton, 427, 498.
— *v.* Furze, 222.
— *v.* Pearce, 716.
Lockwood *v.* Cooper, 667.
— *v.* Wood, 313.
Loft *v.* Dennis, 706.
Lomax *v.* Harding, 251.
London and County Contracts *v.* Tallack, 101.
— North Western Ry. Co. *v.* Evans, 487.
— North Western Ry. Co. *v.* Giles, 384.
— North Western Ry. Co. *v.* Glyn, 207.
— North Western Ry. Co. *v.* Lee, 142.
— North Western Ry. Co. *v.* West, 226, 706.
— South Western Ry. Co. *v.* Flower, 220.
London, &c. Assurance Co. *v.* Mansel, 695.
London, &c. Bank *v.* Bank of Liverpool, 260.
— *v.* Belton, 378.
— *v.* Clancarty, 68, 131.
— *v.* Gordon, 97.
— *v.* Groome, 611.
— *v.* Mitchell, 723.
— *v.* Narraway, 779.
— *v.* Newnes, 38.
— *v.* Pritt, 135, 198.
— *v.* River Plate Bank, 891.

London, &c. Bank *v.* White, 816.
London and Globe, *in re*, 818.
— Westminster Loan Co. *v.* Drake, 348.
London, Brighton, &c. Ry. Co. *v.* Truman, 404, 859, 936.
London, Brighton, &c. Ry. Co. *v.* Watson, 271.
London, Brighton, &c. Ry. Co. *v.* Wilson, 636.
London Chartered, &c. Bank *v.* Lempriere, 398.
London, Chatham, &c. Ry. Co. *v.* South Eastern Ry. Co., 210, 211, 563, 585.
Londonderry Commissioners *v.* M'Keever, 395.
London Fire Ins. Co., *in re*, 657.
— Land Co. *v.* Harris, 58.
— Printing, &c. Co. *v.* Cox, 352.
Long *v.* Clarke, 374.
Longdill *v.* Jones, 256.
Long-Eaton, &c. Co. *v.* Mid. Ry. Co., 343.
Longman *v.* Bath, &c. Trams, 646.
Longmore *v.* G. W. Ry. Co., 445.
Longridge *v.* Dorville, 177.
Loog *v.* Bean, 365.
Looker *v.* Wrigley, 302.
Lord *v.* Lee, 583.
— *v.* Mid. Ry. Co., 628.
— *v.* Price, 347.
Lord Arlington *v.* Meyricke, 266.
— Buckhurst's case, 370.
— Cave *v.* Crédit Lyonnaise, 97.
— Dacre *v.* Tebb, 502.
— Falmouth *v.* Thomas, 71.
— Rivers *v.* Adams, 340.
Loring *v.* Warburton, 257.
Louis *v.* Marylebone Guardians, 18.
Lound *v.* Grimwade, 645.
Love *v.* Bell, 487.
Lovegrove *v.* White, 914.
Lovejoy *v.* Cole, 775.
Lovell *v.* Beauchamp, 197, 268.
Lovelock *v.* Franklyn, 158.
Lovett *v.* Hobbs, 142.
Low, *in re*, 213.
— *v.* Bouverie, 397, 647.
Lowe *v.* Adams, 253.
— *v.* Carpenter, 819, 948, 949.
— *v.* Dixon, 255.
— *v.* Dorling, 378.
— *v.* Fox, 579, 580, 679, 720, 933.
— *v.* Holme, 547, 760, 801.
— *v.* Horwarth, 929.
— *v.* L. & N. W. Ry. Co., 644.
— *v.* Peers, 241, 242.
— *v.* Ross, 215.
Lower Rhine Ins. Co. *v.* Sedgwick, 199.
Loweth *v.* Smith, 552.
Lowndes *v.* Bettle, 506.
— *v.* Collins, 130.
Lowry *v.* Bourdieu, 258.
Lows *v.* Telford, 470, 503.
Lowther *v.* Earl Radnor, 418.
— *v.* Heaver, 16, 216.
Lucas *v.* Dixon, 664.
Lucas *v.* Godwin, 326.
— *v.* Harris, 586.
— *v.* Mason, 931.
— *v.* Nickells, 529.
— *v.* Tarleton, 380, 382.
Luce *v.* Izod, 738.
Luck *v.* Handley, 39.
Lucy *v.* Walthond, 178.
Ludbrook *v.* Ludbrook, 876.
Ludgater *v.* Love, 657.
Ludlow *v.* Pike, 708.
Luke *v.* S. Kensington Hotel Co., 27.
Lumb *v.* Beaumont, 6, 11, 12.
Lumby *v.* Allday, 362.
Lumley *v.* Brooks, 67.
— *v.* Gye, 433.
— *v.* Wagner, 248.
Lund *v.* Campbell, 537.
Lundie *v.* Robertson, 117, 118.
Lush *v.* Russell, 251.
Lyall *v.* Edwards, 740.
Lyle Shipping Co. *v.* Cardiff Corporation, 299, 300.
Lyles *v.* Southend-on-Sea Corporation, 902, 904.
Lyme Regis *v.* Henley, 360.
Lynch *v.* Dalzell, 207
— *v.* Knight, 365.
— *v.* Nurdin, 884.
Lynde *v.* Anglo-Italian, &c., Co., 657.
— *v.* Waithman, 68.
Lynn *v.* Bruce, 567.
— *v.* Moody, 380.
Lyon *v.* Fishmongers' Co., 451, 509.
— *v.* Holt, 610.
— *v.* Knowles, 359.
— *v.* Mells, 292.
Lyons *v.* Elliott, 377.
— *v.* Martin, 434.
— *v.* Wilkins, 491.
Lyth *v.* Ault, 570.
Lythgoe *v.* Vernon, 262.
Lyttleton *v.* Cross, 650.

Maas *v.* Pepper, 816.
Maber *v.* Maber, 725.
Maberley *v.* Robins, 284.
McAndrew *v.* Chapple, 787.
M'Arthur *v.* Seaforth, 291.
McCallum, *in re*, 876.
M'Cance *v.* L. & N. W. Ry. Co., 628, 629.
McCarthy *v.* Dublin, &c. Ry. Co., 930.
— *v.* Young, 334, 350.
Macartney *v.* Garbutt, 582.
— *v.* Londonderry Ry. Co., 509, 510.
McCawley *v.* Furness Ry. Co., 148.
McCheane *v.* Gyles, 28, 30, 556.
McClean *v.* Kennard, 578.
McCombie *v.* Davies, 351, 868.
M'Connell *v.* Hector, 579.
— *v.* Wright, 398.
M'Cowan *v.* Baine, 201.
McCrea *v.* Houldsworth, 359.
Macdonald, *in re*, 726.

Macdonald *v.* Carington, 53, 535, 538, 539, 773.
— *v.* Law Union Ins. Co., 695.
— *v.* Longbottom, 665.
— *v.* Whitfield, 255.
McDonnell *v.* Broderick, 640.
Macdougall *v.* Knight, 836, 839, 862.
McDowall *v.* G. W. Ry. Co., 440, 885.
McFadden *v.* Blue Star Line, 292, 293.
McGowan *v.* Middleton, 538, 539, 548.
M'Gregor *v.* Gregory, 841.
— *v.* M'Gregor, 192, 582, 666.
— *v.* Rhodes, 646.
McHenry, *in re*, 107.
— *v.* Lewis, 523, 705.
Machu *v.* L. & S. W. Ry. Co., 626.
M'Ilwraith *v.* Green, 749.
M'Intosh *v.* G. W. Ry. Co., 326.
M'Intyre *v.* Crossley, 348.
— *v.* McGavin, 509.
McIver *v.* State Steamers, 293.
McKay's case, 78.
Mackay *v.* Bannister, 760, 801.
— *v.* Commercial Bank, 359, 360, 361, 398, 434.
— *v.* Ford, 836.
— *v.* Manchester Press Co., 843.
M'Kean *v.* M'Ivor, 346.
Mackenzie, *in re*, 376.
M'Kewen *v.* Cotching, 345.
M'Kinnell *v.* Robinson, 253, 668, 683.
Mackintosh *v.* Trotter, 348.
McKone *v.* Wood, 439.
McLardy *v.* Slateum, 66.
M'Laughlin *v.* Pryor, 434.
M'Lean *v.* Clydesdale Banking Co., 97, 125.
McLean *v.* Fleming, 295.
M'Leod *v.* Power, 704.
— *v.* Schultze, 589.
McMahon *v.* Field, 56.
M'Manus *v.* Armour, 449.
McManus *v.* Bark, 567.
— *v.* Cooke, 666, 871.
— *v.* L. & Y. Ry. Co., 139, 628.
M'Myn, *in re*, 178.
M'Neilage *v.* Holloway, 189.
Macoun *v.* Erskine, 311.
M'Queen *v.* G. W. Ry. Co., 627.
McQuire *v.* Western Morning News, 838.
Macrow *v.* G. W. Ry. Co., 151.
Mactaggart *v.* Watson, 677.
Mace *v.* Philcox, 505.
Maddever, *in re*, 721.
Maddison *v.* Alderson, 217, 666.
Maddon *d.* Baker *v.* White, 234.
Magdalena Steam Nav. Co. *v.* Martin, 581.
Magee *v.* Lavell, 241.
Maggi, *in re*, 652.
Magnay *v.* Burt, 427, 477.
Maguire *v.* Liverpool Corporation, 361, 408, 451.
Magor *v.* Chadwick, 511.
Mahony *v.* East Holyford, &c. Co., 633.
Maillard *v.* Duke of Argyll, 569, 615, 618.
— *v.* Page, 611, 612.
Mainwaring *v.* Giles, 502.
Mainwaring *v.* Leslie, 191.
— *v.* Newman, 267.
Maitland *v.* Goldney, 460.
Makepeace *v.* Rogers, 309.
Makin *v.* Watkinson, 220, 709.
Malachy *v.* Soper, 481.
Malcolm *v.* Hoyle, 574.
— *v.* Scott, 263.
Malcolmson *v.* O'Dea, 396.
Malden *v.* Fyson, 284.
Mallalieu *v.* Hodgson, 658.
Mallet *v.* Bateman, 179.
— *v.* Hanly, 152.
Mallory's case, 235.
Malmesbury Ry. Co. *v.* Budd, 84.
Manby *v.* Scott, 191.
Manchester Bank *v.* Cook, 663.
Manchester Brewery Co. *v.* Coombs, 216, 225, 374.
Manchester Corporation *v.* Lyons, 430, 431.
Manchester Ry. Co. *v.* Anderson, 223.
— *v.* Brooks, 538, 773.
— *v.* Brown, 142, 629.
— *v.* North Central Wagon Co., 816.
Manchester Ship Canal *v.* Manchester Racecourse Co., 198.
Manchester Warehouse Co. *v.* Carr, 220, 222, 943.
Mangan *v.* Atterton, 458.
Manifold *v.* Pennington, 340.
Manisty *v.* Kenealy, 53.
Manley *v.* Field, 433.
— *v.* St. Helen's Canal Co., 450.
Mann *v.* Edinburgh Tramways Co., 154
Mannall *v.* Fisher, 396, 852.
Manning *v.* Eastern Counties Ry. Co., 931.
— *v.* Phelps, 718.
— *v.* Wasdale, 829.
— *v.* Western, 747.
Mansell *v.* Clements, 73.
Manser *v.* Back, 738.
Mansergh *v.* Rimell, 67.
Mansfield Union *v.* Wright, 620, 675, 677.
Manzoni *v.* Douglas, 441, 883.
Maori King *v.* Hughes, 293.
Maple *v.* Junior Stores, 352.
Marbella Iron Co. *v.* Allen, 212, 213.
Mardall *v.* Thelluson, 774.
Marfell *v.* S. Wales Ry. Co., 391
Margetson *v.* Glynn, 296, 785.
— *v.* Wright, 316.
Margrath *v.* Hardy, 589.
Marine Ins. Co. *v.* China Steamship Co. 692.
Markey *v.* Tolworth, &c. Board, 903.
Marks *v.* Hamilton, 207.
— *v.* Lahee, 867, 868
— *v.* Samuel, 369.
Marney *v.* Scott, 448.
Marquis of Salisbury *v.* Gladstone, 830.
Marriage *v.* Marriage, 620.
Marriot *v.* Hampton, 256, 257.
Marriott *v.* Chamberlain, 842.
— *v.* Stanley, 458.
Marryat *v.* Marryat, 253.

Marsden *v.* Moore, 283.
Marsh *v.* Keating, 262.
Marshall *v.* Green, 664, 939.
— *v.* Jones, 10.
— *v.* Lynn, 755.
— *v.* Schofield, 706.
— *v.* Taylor, 467.
— *v.* Ulleswater, &c. Co., 396.
— *v.* Willder, 649.
— *v.* York Ry. Co., 139, 141, 143, 149.
Marston *v.* Allen, 112.
Martin *v.* Andrews, 261, 325.
— *v.* Capper, 270.
— *v.* Gilham, 506.
— *v.* Great Indian, &c. Ry. Co., 149.
— *v.* G. N. Ry. Co., 630.
— *v.* Morgan, 258.
— *v.* Porter, 349, 504.
— *v.* Price, 414, 421.
— *v.* Smith, 235.
Martindale *v.* Smith, 92.
Martinez *v.* Gerber, 432.
Martins *v.* Upcher, 888.
Martyn *v.* Knowlys, 503, 507.
— *v.* Williams, 225.
Marvin, *In re*, 649, 650.
Marzetti *v.* Williams, 54, 96.
Mason *v.* Farnell, 846, 847.
— *v.* Harris, 26.
— *v.* Lambert, 372.
— *v.* Mogridge, 43, 268.
— *v.* Morgan, 189.
— *v.* Sainsbury, 201.
— *v.* Shrewsbury Ry. Co., 944.
— *v.* Williams, 407.
Masper *v.* Brown, 929.
Massam *v.* Thorley's Cattle Food Co., 496.
Massey *v.* Heynes, 23, 28, 77.
— *v.* Johnson, 568.
Master *v.* Miller, 581.
Masters *v.* Fariss, 374.
— *v.* Green, 378.
Mathers *v.* Green, 462.
Mathew *v.* Blackmore, 253, 264.
Mathews *v.* Baxter, 644.
— *v.* Biddulph, 926.
— *v.* Brown, 98.
— *v.* Taylor, 640.
Matson *v.* Cook, 502, 935.
Mattei *v.* Vantro, 688.
Matthay *v.* Wiseman, 589.
Matthew, *ex parte*, 616.
— *v.* Ollerton, 923.
— *v.* Osborne, 646.
Matthews *v.* Usher, 235, 265, 716.
Matthiessen *v.* London, &c. Bank, 128, 349.
Maughan, *in re*, 102.
Maund *v.* Monmouthshire Canal Co., 359, 887.
Maunnall *v.* Fisher, 941.
Maving *v.* Todd, 292.
Maw *v.* Jones, 56, 83.
— *v.* Ulyatt, 775.
Mawson *v.* Fletcher, 770.
Maxim Nordenfeldt Co. *v.* Nordenfeldt, 682.
Maxted *v.* Paine, 290, 308.
Maxwell *v.* British Thompson Houston Co., 196.
— *v.* Hogg, 827.
— *v.* Jameson, 254.
May *v.* Burdett, 439, 833.
— *v.* Chidley, 118.
— *v.* Lane, 189.
— *v.* Newton, 26.
Mayall *v.* Higbey, 371.
Mayer *v.* Jadis, 113.
Mayfair Property Co. *v.* Johnston, 473, 474.
Mayhew *v.* Crickett, 674.
— *v.* Herrick, 824.
— *v.* Suttle, 505, 937, 938.
Maynard *v.* Kent Collieries, 342.
Mayor of Bradford *v.* Pickles, 510.
Mayor of Brecon *v.* Edwards, 432.
Mayor of Carlisle *v.* Graham, 396.
Mayor of Colchester *v.* Brook, 397.
Mayor of Devizes *v.* Clark, 432.
Mayor of Dorchester *v.* Ensor, 431.
Mayor of Durham *v.* Fowler, 181.
Mayor of Kidderminster *v.* Hardwick, 643, 644.
Mayor of London, *in re*, 629.
— *v.* Cox, 705, 864.
— *v.* London Joint Stock Bank, 588.
— *v.* Low, 431.
— *v.* Riggs, 517.
Mayor of Ludlow *v.* Charlton, 643.
Mayor of Lynne's case, 43.
Mayor of Macclesfield *v.* Chapman, 430, 432.
Mayor of Manchester *v.* Williams, 361, 565, 833.
Mayor of Northampton *v.* Ward, 502.
Mayor of Penrhyn *v.* Best, 430, 431.
Mayor of Poole *v.* Whitt, 712.
Mayor of Salford *v.* Lever, 78, 862, 907.
Mayor of Shoreditch *v.* Bull, 409.
Mayor of Stafford *v.* Till, 644.
Mayor of the Staple *v.* Bank of England, 577, 633.
Mayor of Tunbridge Wells *v.* Baird, 408.
Mayor of Woolwich *v.* Gibson, 431.
Mayor of Yarmouth *v.* Groom, 313.
Meakin *v.* Morris, 83.
Mears *v.* L. & S. W. Ry. Co., 475.
Medawar *v.* Grand Hotel Co., 415, 416, 860, 861.
Mediana, The, 479.
Meek *v.* Wendt, 76.
Melbourne Banking Corporation *v.* Brougham, 644.
Meldrum *v.* Scorer, 27.
Melhado *v.* Porto Allegre Ry. Co., 633.
Mellersh *v.* Brown, 212.
Melling *v.* Leak, 899, 900, 935, 937, 938.
Mellor *v.* Leather, 472.
— *v.* Spakman, 821.
— *v.* Watkins, 865.
Mellors *v.* Shaw, 437.
Meltham Spinning Co. *v.* Huddersfield, 272.
Melvain *v.* Mather, 774.
Membrey *v.* G. W. Ry. Co., 440.

Mennie *v.* Blake, 472.
Mercantile Bank *v.* Evans, 89.
Mercer *v.* Cheese, 616, 618.
— *v.* Denne, 829.
— *v.* Sparks, 364.
— *v.* Whall, 251, 529, 734.
Merchant Prince, The, 833.
Merchant Shipping Co. *v.* Armitage, 210.
Merest *v.* Harvey, 55.
Merivale *v.* Carson, 838.
Merryweather *v.* Nixan, 255.
Mersey Docks Co. *v.* Gibbs, 360, 361, 442.
— Steamship Co. *v.* Shuttleworth, 540.
— Steel Co. *v.* Naylor, 277, 634, 635, 756, 778, 779.
Metcalf *v.* L. & B. Ry. Co., 141.
Metcalfe *v.* Britannia Ironworks Co., 293, 326.
— *v.* Hetherington, 443, 450.
Metropolitan Asylum District *v.* Hill, 359, 454, 455, 859.
Metropolitan Asylum District *v.* Petch, 473, 474.
Metropolitan Bank, *in re*, 633.
— *v.* Heiron, 78, 727.
— *v.* Pooley, 13, 335, 336, 424.
Metropolitan Board of Works *v.* Howard, 343.
— Board of Works *v.* McCarthy, 451.
— Coal Ass., *in re*, 657.
— Electric Supply Co. *v.* Girder, 198.
— Omnibus Co. *v.* Hawkins, 361.
— Ry. Co. *v.* Jackson, 440, 441.
— Ry. Co. *v.* Sharpe, 85.
Metters *v.* Brown, 646.
Metzner *v.* Bolton, 247, 249, 250.
Meux *v.* Cobley, 508.
— *v.* G. E. Ry. Co., 141.
— *v.* Maltby, 153.
Mews *v.* Carr, 91.
Meyer *v.* Decroix, 111.
— *v.* Dresser, 295, 787.
— *v.* Everth, 398.
— *v.* Ralli, 701.
Meyerhoff *v.* Froelich, 724, 725.
Meyerstein *v.* Barber, 296.
Meyrick *v.* Anderson, 648.
Michael *v.* Hart, 158, 278, 311, 756.
Micklethwaite *v.* Micklethwaite, 507.
Middleditch *v.* Ellis, 72.
Middlesex JJ. *v.* Reg., 902.
Midgley *v.* Midgley, 653.
Mid-Kent Fruit Factory, *in re*, 779.
Midland Banking Co. *v.* Chambers, 676.
Midland Counties Bank *v.* Attwood, 248, 733.
Midland Insurance Co. *v.* Smith, 201, 207, 923.
Midland Ry. Co. *v.* Edmonton Guardians, 429, 719.
— *v.* Martin, 863.
— *v.* Taylor, 568.
Midland Ry. Co. *v.* Withington Local Board, 888, 905.
Midwood *v.* Manchester Corp., 454.
Mighell *v.* Sultan of Johore, 161, 730, 864.
Migotti *v.* Colvill, 927.
Milan Tramways Co., *in re*, 587.
Milbank *v.* Milbank, 38.
Miles *v.* Bough, 636.
— *v.* Furber, 377.
— *v.* Hutchings, 501.
— *v.* New Zealand Co., 177, 666.
Milford Docks *v.* Milford Council, 903.
Milgate *v.* Kebble, 347.
Mill *v.* Hawker, 359, 465.
Millard *v.* Harvey, 191.
Millen *v.* Brasch, 625, 626.
Miller, *in re*, 13.
— *v.* Atlee, 256.
— *v.* Blankley, 688.
— *v.* David, 363, 364.
— *v.* Dell, 371, 848.
— *v.* Francis, 235.
— *v.* Green, 376.
— *v.* Hancock, 449.
— *v.* Harper, 38.
— *v.* Sharp, 217.
Milligan *v.* Wedge, 434, 450.
Millingen *v.* Picken, 359.
Millington *v.* Fox, 495.
— *v.* Harwood, 537.
— *v.* Loring, 6, 11, 12, 55, 57, 245.
Mills' Estate, *in re*, 3.
Mills *v.* Alderbury Union, 259.
— *v.* Armstrong, 884, 885.
— *v.* East London Union, 219.
— *v.* Mayor of Colchester, 829.
Millwall, The, 195, 556, 558, 905.
Millward *v.* Littlewood, 245.
Milner, *ex parte*, 640.
— *v.* Field, 326.
Milnes *v.* Bale, 271.
— *v.* Duncan, 259.
Miner *v.* Gilmour, 509.
Minshall *v.* Lloyd, 348.
Misa *v.* Currie, 867.
Mitcham *v.* St. Marylebone B. C., 434.
Mitchell's claim, 723.
Mitchell *v.* Cantrill, 420, 872.
— *v.* Crassweller, 434.
— *v.* Holmes, 909.
— *v.* Homfray, 857.
— *v.* Jenkins, 425.
— *v.* L. & Y. Ry. Co., 165, 336.
— *v.* Reynolds, 682.
— *v.* Staveley, 583.
— *v.* Tarbutt, 21, 24.
Mizen *v.* Pick, 191.
Modera *v.* Modera, 54.
Mody *v.* Gregson, 324.
Moffatt *v.* Laurie, 326.
Moggridge *v.* Jones, 602.
Mogul Steamship Co. *v.* M'Gregor, 491.
Mohamidu Hadgiar *v.* Pitchey, 172.
Möller *v.* Young, 141.
Mollett *v.* Wackenbath, 579.
Molton *v.* Camroux, 644, 690.
Mondel *v.* Steele, 315.

Moneux *v.* Goreham, 383.
Monk, *in re*, 372.
Monkhouse, *ex parte*, 906.
Monkman *v.* Shepherdson, 552.
Monmouth Canal Co. *v.* Harford, 949, 954.
— — — *v.* Hill, 505.
Monson *v.* Tussauds, 366, 413.
Montagu *v.* Forwood, 176, 782.
— *v.* Land Corporation, 522.
Montague *v.* Benedict, 191.
— *v.* Perkins, 129.
Montgomerie *v.* United Kingdom Assoc., 201.
Montgomery *v.* Foy, 28, 538.
Montriou *v.* Jefferys, 331.
Moodie *v.* Bannister, 726.
Moon, *in re*, 107.
— *v.* Raphael, 54, 349, 350.
Moore *v.* Bushell, 263.
— *v.* Campbell, 755.
— *v.* Fulham Vestry, 257.
— *v.* Gamgee, 864.
— *v.* Garwood, 261.
— *v.* Knight, 727, 728.
— *v.* Lord Plymouth, 941.
— *v.* Meagher, 365.
— *v.* Met. Ry. Co., 359, 360, 426.
— *v.* Met. Sewage Co., 152, 774.
— *v.* Moore, 857.
— *v.* Peachey, 668.
— *v.* Pyrke, 254, 255.
— *v.* Singer, 382.
— *v.* Wilson, 140.
Morant *v.* Chamberlain, 452, 925, 952, 954.
Morel *v.* Westmoreland (Earl of), 191, 574, 679, 704.
Morgan, *ex parte*, 646.
— *in re*, 12, 171.
— *v.* Bain, 102, 277.
— *v.* Birnie, 326.
— *v.* Blyth, 790.
— *v.* Griffiths, 480.
— *v.* Jackson, 481.
— *v.* Knight, 101, 347.
— *v.* M'Adam, 496.
— *v.* Marquis, 846.
— *v.* Met. Ry. Co., 343.
— *v.* Palmer, 257.
— *v.* Powell, 349.
— *v.* Ravey, 139, 171, 385, 416, 860.
— *v.* Rowlands, 725.
— *v.* Seaward, 892, 893.
— *v.* Uzielli, 200.
— *v.* Webb, 944.
— *v.* Worthington, 663.
Morier, *ex parte*, 774.
Morison *v.* Thompson, 78, 248.
Morley *v.* Attenborough, 324.
— *v.* Bird, 568.
— *v.* Pincombe, 376.
Morrell *v.* Cowan, 179.
— *v.* Wootten, 87, 88.
Morris *v.* Ashbee, 352.
— *v.* Cleasby, 76.
— *v.* Dixon, 724.
— *v.* Edgington, 951.
— *v.* Edwards, 875.
Morris *v.* Hunt, 249.
— *v.* Langdale, 363.
— *v.* Levison, 294.
— *v.* Wright, 352.
Morrison *v.* Chadwick, 712.
— *v.* Fletcher, 688.
— *v.* Universal Marine Ins. Co., 656.
Morritt, *in re*, 264, 868.
— *v.* N. E. Ry. Co., 625.
Morse *v.* Apperley, 937.
— *v.* Slue, 292.
Mortimer *v.* Preedy, 215.
— *v.* S. W. Ry. Co., 343.
Morton *v.* Copeland, 359.
— *v.* Palmer, 378.
— *v.* Tibbett, 664.
Moseley *v.* Rendell, 167.
Mosely *v.* Koffyfontein Mines, 638.
Moser *v.* Marsden, 27.
Moses *v.* Macferlan, 256.
Mosley *v.* Chadwick, 431.
— *v.* Walker, 430, 431, 432.
Moss *v.* Anglo-Egyptian Nav. Co., 646, 647.
— *v.* Gallimore, 706.
— *v.* Hall, 675.
— *v.* Smith, 788.
Mosse *v.* Salt, 210.
Mostyn *v.* Fabrigas, 701, 863, 864.
— *v.* Mostyn, 162.
— *v.* West Mostyn, 536, 738.
Motion *v.* Michand, 73, 247, 249.
Mott *v.* Shoolbred, 452.
Moule *v.* Garrett, 195, 229, 254, 256, 713.
Moult *v.* Halliday, 247.
Mounsey *v.* Ismay, 829, 830.
Mountney *v.* Watton, 841.
Mountnoy *v.* Collier, 706.
Mowatt *v.* Londesborough, 261.
Mowbray *v.* Appleby, 725.
— *v.* Merryweather, 57.
Muddock *v.* Blackwood, 355.
Muggeridge, *in re*, 718.
Muir *v.* Crawford, 615.
Mulkern *v.* Lord, 303.
Mullens *v.* Miller, 771.
Muller *v.* Trafford, 225.
Mullett *v.* Hunt, 955.
— *v.* Mason, 398.
Mulligan *v.* Cole, 363, 834.
— *v.* Dick, 882.
Mulliner *v.* Florence, 346, 347, 349, 861, 862.
Mumford *v.* Collier, 67, 471.
— *v.* Oxford, 456, 474.
Munday *v.* Thames Ironworks Co., 435.
Munden *v.* Duke of Brunswick, 864.
Municipal Building Society *v.* Kent, 789.
— *v.* Richards, 302.
— *v.* Smith, 713.
Municipal Council of Sydney *v.* Bourke, 408.
Munro *v.* Butt, 326.
Munster *v.* Lamb, 836, 837, 838.
Murchie *v.* Black, 483.
Mure *v.* Kaye, 927.

Murgatroyd *v.* Robinson, 514, 944.
Murphy *v.* Mid. Ry. Co., 140, 629.
Murray *v.* Clayton, 892.
— *v.* Earl of Stair, 797.
— *v.* Epsom Local Board, 12.
— *v.* Hall, 503.
— *v.* Mann, 656, 657.
— *v.* Stephenson, 66.
Muschamp *v.* Lancaster Ry. Co., 142.
Musgrave *v.* Pulido, 864.
— *v.* Stevens, 53.
Musgrove *v.* Newell, 425.
Muspratt *v.* Gregory, 377.
Mussen *v.* Price, 759.
Musurus *v.* Gadban, 582, 719.
Myers *v.* Baker, 272.
— *v.* Catterson, 421.
Mytton *v.* Midland Ry. Co., 151.

Nantes *v.* Thompson, 200.
Naoroji *v.* Chartered Bank of India, 778.
Nargett *v.* Nias, 376, 377.
Nash *v.* Armstrong, 755.
— *v.* Calthorpe, 401.
Natal Land Co. *v.* Pauline Colliery, 634.
National Bank, *ex parte*, 672.
— , *in re*, 342.
— *v.* Marshall, 135, 198, 242.
— *v.* Silke, 128.
National Bank of St. Charles *v.* De Bernales, 161.
National Coffee Palace Co., *in re*, 76.
National Mercantile Bank *v.* Hampson, 351, 823.
National Provident Bank, *ex parte*, 676.
National Savings Bank *v.* Tranch, 588, 615, 616, 618.
National Telephone Co. *v.* Baker, 453, 859, 936, 944.
— *v.* Hull Corporation, 903.
Neal, *ex parte*, 591.
Neale *v.* Clarke, 537.
— *v.* Mackenzie, 712.
Neate *v.* Harding, 262.
Neaverson *v.* Peterborough R. C., 950.
Needham *v.* Fraser, 519, 955.
Neill *v.* Duke of Devonshire, 396, 829.
Neilsen *v.* Witt, 300.
Neilson *v.* Harford, 894.
— *v.* James, 309, 622.
Nell *v.* Atlanta Gold Mines, 156.
Nelson *v.* Couch, 862.
— *v.* Dahl, 299, 300.
— *v.* Empress Corporation, 555.
— *v.* Faber, 781.
— *v.* Liverpool Brewery Co., 449, 452, 459.
— *v.* Stocker, 688.
Ness *v.* Stephenson, 378.
Nevill's case, 195.
Nevill *v.* Fine Arts Insurance Co., 263.
Newall *v.* Tomlinson, 259, 260.
Newbattle, The, 161.
Newbould *v.* Coltman, 384.
— *v.* Smith, 725.
Newby *v.* Eckersley, 163, 221.
— *v.* Sharpe, 16, 712.
New Eberhardt Co., *in re*, 636.
Newell *v.* National, &c. Bank of England, 168, 653, 774.
— *v.* Radford, 665.
Newfoundland Government *v.* Newfoundland Ry. Co., 587.
Newhall *v.* Holt, 71.
Newington *v.* Levy, 642, 647, 750.
Newlands *v.* Holmes, 936.
New London Land Association, *in re*, 101.
New London Syndicate *v.* Neale, 612.
Newman, *in re*, 241.
— *v.* Smith, 55.
Newport *v.* Hardy, 706.
Newport Docks Co. *v.* Paynter, 37, 38.
Newson *v.* Pender, 421.
Newton *v.* Allin, 712.
— *v.* Cubitt, 395.
— *v.* Ellis, 458, 888.
— *v.* Harland, 503, 929.
— *v.* Nancarrow, 864.
— *v.* Sherry, 654.
New Zealand Land Co. *v.* Watson, 259.
New Zealand Loan Co. *v.* Morrison, 593, 655.
Niblet *v.* Smith, 349.
Nicholl's case, 620.
Nichols *v.* Chapman, 341, 821.
— *v.* Evens, 748, 848.
— *v.* Marsland, 141, 441, 453, 510.
Nicholson *v.* Bradfield Union, 160, 643.
— *v.* Drury Estate Co., 189.
— *v.* Field, 272.
— *v.* Gooch, 259.
— *v.* L. & Y. Ry. Co., 445.
— *v.* Mansfield, 138, 312, 622, 796.
— *v.* Mouncey, 442.
— *v.* Revill, 567, 753.
— *v.* Ricketts, 261.
Nickalls *v.* Merry, 290, 309.
Nickoll *v.* Ashton, 276.
Nicoll *v.* Greaves, 247.
Nicolls *v.* Bastard, 347, 822.
Nicols *v.* Pitman, 353.
Nield *v.* L. & N. W. Ry. Co., 510.
Nitro-Phosphate Co. *v.* London, &c. Docks Co., 453.
Noad *v.* Murrow, 398.
Noble *v.* Ward, 755, 756.
Noel *v.* Davis, 775.
Norburn *v.* Norburn, 31.
Nordenfeldt *v.* Maxim Nordenfeldt Co., 197, 314.
Norfolk Ry. Co. *v.* M'Namara, 736.
Norman *v.* Thompson, 640.
— *v.* Villars, 192.
Norris *v.* Beazley, 538.
— *v.* Irish Land Co., 342, 428, 429, 430.
— *v.* Seed, 933.
North *v.* Wakefield, 753.
Northam *v.* Bowden, 347.
— *v.* Hurley, 511, 944
North American Land Co. *v.* Watkins, 723, 727.

North British Ins. Co. *v.* Lloyd, 674.
— *v.* London Ins. Co., 698.
— *v.* Moffatt, 207.
North Central Wagon Co. *v.* M. S. & L. Ry. Co., 816.
Northcote *v.* Doughty, 687.
North Eastern Ry. Co. *v.* Elliot, 484.
Northey Stone Co. *v.* Gidney, 745.
North London Ry. Co. *v.* G. N. Ry. Co., 35, 85, 413.
North Met. Tramway Co. *v.* London C. C., 903.
North of England Oil Co. *v.* Archangel Mar. Ins. Co., 200.
North Staffordshire Steel Co. *v.* Ward, 637.
North Sydney Co. *v.* Higgins, 638.
Northumberland *v.* Houghton, 396.
Northumberland, &c. Co., *in re*, 634.
North Western Ry. Co. *v.* M'Michael, 152.
Norton *v.* Counties Building Soc., 789.
— *v.* Ellam, 109, 253, 721, 797.
— *v.* Nicholls, 359.
— *v.* Powell, 797.
Norval *v.* Pascoe, 225.
Nottingham Brick Co. *v.* Butler, 226, 284.
Nottingham Building Society *v.* Thurston, 687.
Nouvion *v.* Freeman, 67, 212, 213, 700, 702.
Novelli *v.* Rossi, 580.
Novello *v.* Sudlow, 358.
Nowlan *v.* Ablett, 247, 260
Noyes *v.* Crawley, 467.
Nugent *v.* Smith, 141, 142, 143, 292.
Nuttall *v.* Bracewell, 509, 511.
— *v.* Hargreaves, 893.
Nyberg *v.* Handelaar, 347.
Nye *v.* Moseley, 682.

Oakden *v.* Pike, 283.
Oakes *v.* Turquand, 258, 656.
— *v.* Wood, 734, 922, 924, 929.
Oakey *v.* Dalton, 175, 385, 495, 496.
Oakfield, The, 916.
Oakley *v.* Davis, 557.
Oastler *v.* Henderson, 710.
Oates *v.* Hudson, 257.
O'Brien *v.* Clement, 364.
— *v.* Mitchelstown Local Fund, *in re*, 902.
— *v.* Tyssen, 562, 563.
Ocean Corporation *v.* Ilford Gas Co., 502.
Ocean Steamship Co. *v.* Ocean Ins. Co., 749.
Ockenden *v.* Henly, 284.
O'Connell *v.* O'Connell, 58.
O'Connor *v.* Grand International Hotel, 416.
Odell *v.* Cormack, 704.
Offord *v.* Davies, 673.
Ogden *v.* Benas, 97, 349.
Ogdens *v.* Nelson, 80, 158.
Ogilvie *v.* Currie, 657.
Ogle *v.* Earl Vane, 278, 279
O'Hanlon *v.* G. W. Ry. Co. 147.
Ohrby *v.* Ryde Commissioners, 451.
O'Keefe *v.* Walsh, 57.
Olive *v.* Booker, 788.
Oliver, *in re*, 791.
— *v.* Bank of England, 76.
— *v.* Fielden, 787.
— *v.* Nautilus Co., 753, 882.
Olley *v.* Fisher, 738.
Onley *v.* Gardiner, 820, 949.
Onward Building Society *v.* Smithson, 739.
Ooregum Gold Co. *v.* Roper, 638.
Oppenheim *v.* White Lion Hotel Co., 160.
Orchis, The, 254.
Oridge *v.* Sherborne, 131.
Orient Steam Navigation Co. *v.* Ocean, &c. Ins. Co., 39, 749.
Oriental Bank, *in re*, 248.
Oriental Financial Corporation *v.* Overend, Gurney & Co., 615.
Oriental Steamship Co. *v.* Taylor, 787.
Original Hartlepool Collieries *v.* Gibb, 859.
Ormerod *v.* Todmorden Mill Co., 509.
Ormes *v.* Beadel, 645.
Ormrod *v.* Huth, 398.
Orr-Ewing *v.* Colquhoun, 509.
— *v.* Orr-Ewing, 864.
— *v.* Registrar of Trade Marks, 921.
Orton *v.* Butler, 348.
Osborn *v.* Chocquel, 439.
— *v.* Gillett, 432.
Osborne, *ex parte*, 725.
O'Sullivan *v.* Thomas, 668.
Otto *v.* Steel, 892.
Ottos Mines, *in re*, 342.
Ottoway *v.* Hamilton, 192.
Oughton *v.* Seppings, 262.
Outram *v.* Morewood, 646.
Overend, Gurney & Co. *v.* Oriental Corporation, 674.
Overton *v.* Freeman, 435.
— *v.* Harvey, 647.
Overweg, *in re*, 309.
Owen *v.* Cronk, 257, 259.
— *v.* Homan, 736.
— *v.* Legh, 376.
— *v.* Morgan, 38, 524.
— *v.* Routh, 291.
— *v.* Wilkinson, 773.
Owens *v.* Wynne, 911.
Owner of Waikato *v.* New Zealand S. Co., 784.
Oxenham *v.* Clapp, 650.
— *v.* Smythe, 76.
Oxford & Cambridge Universities *v.* Gill, 22.
Oxley *v.* Holden, 269.
— *v.* Wilkes, 844, 845.

Paddock *v.* Forrester, 822.
Padstow, &c. Ass. Co., *in re*, 634
Padwick *v.* Scott, 536, 543.
Page *v.* Hawkey, 24, 370.
— *v.* Mid. Ry. Co., 906.

Page *v.* Newman, 210.
— *v.* Wallis, 378.
Paget *v.* Foley, 718.
— *v.* Marshall, 738, 739.
Palk *v.* Skinner, 474.
Palliser *v.* Dales, 303.
— *v.* Gurney, 186.
Palmer *v.* Bate, 88.
— *v.* Bramley, 616.
— *v.* Fletcher, 421.
— *v.* Grand Junction Ry. Co., 905.
— *v.* Johnson, 721.
— *v.* Mallet, 20.
— *v.* Palmer, 11, 339, 466.
— *v.* Pratt, 110.
— *v.* Wick, &c. Co., 255.
Palyart *v.* Leckie, 258.
Panama Telegraph Co. *v.* India-rubber, &c. Co., 78.
Pannell *v.* Mill, 941, 942.
— *v.* City of London Brewery, 716.
Panther Lead Co., *in re*, 711.
Panton *v.* Williams, 927.
Pape *v.* Westacott, 746.
Pappa *v.* Rose, 87.
Paquin *v.* Holder, 187, 191, 680.
Parana, The, 146, 294.
Pardington *v.* S. Wales Ry. Co., 630.
Pardoe *v.* Price, 263.
Parfitt *v.* Chambre, 241.
— *v.* Jepson, 287.
Paris *v.* Levy, 363.
Park, *in re*, 791.
Parker, *ex parte*, 342.
— *v.* Ibbotson, 247, 250.
— *v.* Lewis, 195.
— *v.* London C. C., 902, 903.
— *v.* McKenna, 78, 398.
— *v.* Mitchell, 819, 948, 949.
— *v.* Palmer, 324.
— *v.* S. E. Ry. Co., 95, 149.
— *v.* Stacey, 420.
Parkes *v.* Smith, 585.
Parkins *v.* Scott, 365.
Parkinson *v.* Hanbury, 572.
— *v.* Lee, 316.
— *v.* Potter, 582.
Parks *v.* Edge, 116.
Parlement Belge, The, 864.
Parmaby *v.* Lancaster Canal Co., 448.
Parmiter *v.* Coupland, 362, 363, 838.
Parnell *v.* Mort, 465.
Parrott *v.* Watts, 504.
Parry, *in re*, 506.
— *v.* Roberts, 256.
— *v.* Thomas, 821.
Parsons *v.* Alexander, 667.
— *v.* Gingell, 377.
— *v.* New Zealand Shipping Co., 295.
Part *v.* Boud, 741.
Parton, *in re*, 11.
Partridge *v.* Scott, 484.
Pascoe *v.* Pascoe, 910.
Pasley *v.* Freeman, 314, 397.
Pasmore *v.* Oswaldtwistle, 271, 360, 514.
Patch *v.* Ward, 702.
Paterson *v.* Wallace, 437.
Patman *v.* Harland, 227.
Patmore *v.* Colburn, 755.
Patrick *v.* Colerick, 939, 942.
— *v.* Milner, 283.
— *v.* Stubbs, 821.
Patscheider *v.* G. W. Ry. Co., 151, 336.
Patten *v.* Rea, 434.
Pattinson *v.* Lucley, 581.
Pattle *v.* Hornibrook, 578.
Paul *v.* Dod, 759.
— *v.* Nurse, 713.
— *v.* Summerhayes, 941.
Payne *v.* Cave, 92.
— *v.* Elsden, 325.
— *v.* Fern, 351.
— *v.* Haine, 220.
— *v.* Wilson, 49, 870.
Paynter *v.* Williams, 254.
Peace, *in re*, 186.
Peachey *v.* Rowland, 435.
Peacock *v.* Freeman, 73.
— *v.* Nicholson, 497.
— *v.* Purssell, 616.
— *v.* Purvis, 376.
Pearce *v.* Brooks, 253, 682.
— *v.* Davis, 253, 746.
— *v.* Foster, 734.
— *v.* Gardner, 665.
— *v.* Scotcher, 852.
Pearse *v.* Coaker, 233, 466.
Pearson, *in re*, 221.
— *v.* Cox, 435, 441, 746.
— *v.* Dawson, 664.
— *v.* I'Anson, 163.
— *v.* Iles, 518.
— *v.* Lemaitre, 57, 366.
— *v.* Spencer, 950, 951, 952.
Pease *v.* Chaytor, 418.
Peat *v.* Jones, 778.
Pechell *v.* Watson, 423.
Pedder *v.* Hunt, 875.
Pedley *v.* Davis, 899.
— *v.* Morris, 836.
Peebles *v.* Oswaldtwistle Council, 877, 878.
Peek *v.* Gurney, 397, 401.
— *v.* N. S. Ry. Co., 142, 628, 629.
Peeters *v.* Opie, 156.
Peirce *v.* Corf, 91.
— *v.* Jersey Waterworks Co., 637.
Pellatt *v.* Boosey, 712.
Pelly, *ex parte*, 635, 772.
Pelton *v.* Harrison, 186.
Pemberton *v.* Hughes, 701.
Penarth Harbour *v.* Cardiff Waterworks, 514.
Pendarves *v.* Monro, 420.
Pender *v.* Taddei, 538.
Pendlebury *v.* Greenhalgh, 408.
Penhallow *v.* Mersey Docks, 450.
Penley *v.* Anstruther, 791.
Penn *v.* Jack, 462.
— *v.* Ward, 922, 923.
Pennington *v.* Brinsop Hall Co., 509, 511, 514.
— *v.* Crossley, 746.

Penny *v.* Porter, 50.
— *v.* Wimbledon Urban Council, 435, 750.
Penprase *v.* Crease, 39.
Penrhyn *v.* Licensed Victuallers' Mirror, 831, 838.
Penton *v.* Barnett, 715.
People's Garden Co., *in re*, 635.
Percival *v.* Dunn, 88.
— *v.* Stamp, 505.
Perkins *v.* Plympton, 901.
— *v.* Vaughan, 530.
Perry *v.* Attwood, 70, 71, 567.
— *v.* Barnett, 290, 309, 622.
— *v.* Eames, 420.
— *v.* Fitzhowe, 505.
— *v.* Wimbledon Council, 409.
Peru *v.* Peruvian Guano Co., 13.
Peruvian Railways Co. *v.* Thames Marine Insurance Co., 632
Petch *v.* Lyon, 572.
Peter *v.* Kendal, 395.
Petrie *v.* Nuttall, 646, 952.
Pettitt *v.* Mitchell, 92.
Petty *v.* Taylor, 352.
Peytoe's case, 567, 568.
Peyton *v.* Mayor of London, 447.
Phelps *v.* Hill, 785.
Phené *v.* Gillan, 686.
— *v.* Popplewell, 710.
Philipps *v.* Philipps, 6, 11, 39, 226, 339, 466.
Philips *v.* Naylor, 427.
— *v.* Philips, 724.
— *v.* Robinson, 370.
Phillips, *ex parte*, 668.
— *v.* Alhambra Palace Co., 266.
— *v.* Allan, 593.
— *v.* Barnet, 410.
— *v.* Clagett, 753.
— *v.* Clark, 292.
— *v.* Clift, 582.
— *v.* Eyre, 655, 864.
— *v.* Foxall, 181, 734.
— *v.* Henson, 378.
— *v.* Homfray, 385, 386, 504.
— *v.* Howgate, 922.
— *v.* Im Thurn, 597.
— *v.* L. & S. W. Ry. Co., 56, 150, 388.
— *v.* Low, 421.
— *v.* Miller, 225.
— *v.* Phillips, 38, 192.
— *v.* Ward, 647.
— *v.* Whitsed, 380, 909.
Phillipson *v.* Hayter, 191.
Phillpotts *v.* Clifton, 798.
Philp *v.* Squire, 412.
Philpot *v.* Briant, 610.
Philpott *v.* Kelley, 345.
— *v.* Lehain, 46, 212, 213, 374, 375.
Phœnix Bessemer Steel Co., *in re*, 277.
Phosphate Sewage Co. *v.* Hartmont, 94.
Phypers *v.* Eburn, 830, 937, 941.
Pianciani *v.* L. & S. W. Ry. Co., 625, 626.
Pickard *v.* Sears, 646, 823.
— *v.* Smith, 435.
Pickering *v.* Ilfracombe Ry. Co., 682.
— *v.* Noyes, 941, 942.
— *v.* Rudd, 501.
Pickford *v.* Grand Junction Ry. Co., 141, 142, 817.
— *v.* L. & N. W. Ry. Co., 142.
Pickhard *v.* Boukes, 256.
Pidgeon *v.* Burslem, 138.
Pierce *v.* Evans, 572.
Piercy *v.* Fynney, 267, 568, 754, 773.
Piggott *v.* Birtles, 380.
Pigot's case, 579, 580, 739.
Pigot *v.* Cubley, 868.
Pike *v.* Fitzgibbon, 185, 190.
— *v.* Ongley, 137, 574.
Pilcher *v.* Hinds, 53.
Pillans *v.* Van Mierop, 49.
Pillar *v.* Lynvi Coal Co., 800.
Pillott *v.* Wilkinson, 344.
Pim *v.* Curell, 395.
Pinard *v.* Klockmann, 123.
Pince *v.* Beattie, 730.
Pindar *v.* Wadsworth, 341.
Pinder *v.* Barr, 256.
Pinhorn *v.* Souster, 909.
Pink *v.* Fleming, 201, 208.
Pinnel's case, 566.
Pinney *v.* Hunt, 738.
Pinnington *v.* Galland, 951.
Pinnock *v.* Harrison, 866, 867.
Pitt *v.* Donovan, 481.
Pittman *v.* Prudential Deposit Co., 730.
Pitt Pitts *v.* George & Co., 357.
Plant *v.* Bourne, 665.
— *v.* Cotterill, 370.
— *v.* James, 950.
Platt *v.* Walter, 352.
Player *v.* Warn, 57.
Playfair *v.* Musgrove, 552.
Pledge *v.* Pomfret, 466, 511, 512, 517.
Plevins *v.* Downing, 278, 756.
Plummer *v.* Woodburne, 647.
Polak *v.* Everett, 676.
Polglass *v.* Oliver, 799.
Polkinhorn *v.* Wright, 924, 925.
Pollard *v.* Bank of England, 97.
— *v.* Photographic Co., 197, 351.
Pollen *v.* Brewer, 503.
Polley *v.* Fordham, 418, 419, 902, 903.
Pond *v.* Underwood, 259.
Pontifex *v.* Foord, 555, 556, 713.
— *v.* Mid. Ry. Co., 3, 139.
Poole *v.* Hill, 283.
— *v.* Tumbridge, 797, 800.
Pooley *v.* Harradine, 614.
Poppleton, *ex parte*, 634.
Popplewell *v.* Hodkinson, 484.
Pordage *v.* Cole, 156.
Porter *v.* Cooper, 70.
Portuguese Copper Mines, *in re*, 636.
Postlethwaite *v.* Freeland, 299, 300.
Pott *v.* Clegg, 591.
— *v.* Flather, 291.
Potter *v.* Codrington, 668.
— *v.* Duffield, 666.
— *v.* Faulkner, 436.
— *v.* Rayworth, 118.

Poulsum *v.* Thirst, 888.
Poulton *v.* Lattimore, 761.
— *v.* L. & S. W. Ry. Co., 360.
Pounsett *v.* Fuller, 285.
Pow *v.* Davis, 77.
Powell *v.* Brodhurst, 746.
— *v.* Duff, 577.
— *v.* Fall, 409, 442.
— *v.* Jessopp, 290.
— *v.* Jewesbury, 562.
— *v.* Jones, 78.
— *v.* Layton, 21.
— *v.* London, &c. Bank, 578.
— *v.* Powell, 857.
— *v.* Rees, 262, 349, 385, 386.
— *v.* Salisbury, 390, 391.
— *v.* Smith, 739.
Power *v.* Butcher, 254, 571.
Powers, *in re*, 722.
Powles' case, 657.
Powles *v.* Hider, 434.
— *v.* Innes, 200.
Powley *v.* Walker, 221, 502.
Pownal *v.* Ferrand, 254, 255.
Powys *v.* Blagrave, 506, 508.
Poyser *v.* Minors, 647.
Pozzi *v.* Shipton, 21, 139, 141.
Praed *v.* Graham, 366.
Pratt *v.* Groome, 552.
— *v.* Pratt, 934, 935.
— *v.* Vizard, 257.
Prebble, *in re*, 86.
Preece *v.* Corrie, 910.
Prehn *v.* Royal Bank of Liverpool, 56.
Preist *v.* Last, 322.
Prentice *v.* Elliott, 706.
— *v.* Harrison, 497, 900.
Prestney *v.* Mayor of Colchester, 25.
Preston *v.* Dania, 134.
— *v.* Lamont, 12, 29, 161.
— *v.* Perton, 703.
Pretty *v.* Bickmore, 458.
Price *v.* A. I. Ships, &c. Assoc., 204, 692.
— *v.* Barker, 675, 753, 754.
— *v.* Dewhurst, 701.
— *v.* Kirkham, 179, 675.
— *v.* Livingstone, 787.
— *v.* Moulton, 736, 737.
— *v.* Oriental Bank, 259.
— *v.* Price, 615, 616.
— *v.* Seeley, 926.
— *v.* Taylor, 108, 632.
— *v.* Woodhouse, 829.
Prichard *v.* Powell, 821, 911.
Prickett *v.* Badger, 73, 74.
Prideaux *v.* Criddle, 126.
Priestley *v.* Fernie, 574, 704.
— *v.* Fowler, 435.
Priestman *v.* Thomas, 647.
Prince *v.* Oriental Bank, 96, 126.
Prince Albert *v.* Strange, 351.
Pritchet *v.* Boevey, 284.
Pritchett *v.* English, &c. Syndicate, 212.
Proctor *v.* Bayley, 414, 462.
— *v.* Bennis, 893.
— *v.* Hodgson, 951.
— *v.* Webster, 836.
Prole *v.* Soady, 189.
Protector Loan Co. *v.* Grice, 241.
Proudfoot *v.* Hart, 220.
Proudlove *v.* Twemlow, 382.
Provincial Ins. Co. of Canada *v.* Leduc, 199.
Pryse, in the goods of, 467.
Puckett, *in re*, 771.
Pugh *v.* Griffith, 552.
— *v.* Heath, 875, 877, 906.
— *v.* L. B. & S. C. Ry. Co., 209.
— *v* Roberts, 502.
— *v.* Stringfield, 20.
Pulling *v.* G. E. Ry. Co., 385, 388.
Pullman *v.* Hill & Co., 363, 835.
Pulsford *v.* Devenish, 634.
Purcel *v.* Sowler, 368.
Purdon *v.* Purdon, 726.
Purnell *v.* Young, 502, 936.
Pursell *v.* Horn, 496.
Purves *v.* Landell, 306.
Pye *v.* Mumford, 820, 954.
Pyke, *ex parte*, 668.
Pyle Works, *in re*, 637.
Pym *v.* Campbell, 578.
— *v.* G. N. Ry. Co., 388.

Quarman *v.* Burnett, 434, 885.
Quartz Hill, &c. Co. *v.* Beall, 366, 413.
— *v.* Eyre, 335, 424, 425.
Quebec Marine Ins. *v.* Commercial Bank of Canada, 693.
Queen *v.* Robinson, 929.
Queensland Bank *v.* P. & O. Co., 293.
Quinn *v.* Leathem, 432, 490, 491, 494.

R. *v.* Bishop of Llandaff, 226.
— *v.* Churchill, 829.
— *v.* Cleworth, 797.
— *v.* Cotton, 383.
— *v.* Doutre, 162.
— *v.* Essex County Court, 213.
— *v.* Halifax, 461.
— *v.* Herron, 675.
— *v.* Hindringham, 83.
— *v.* Ivens, 415.
— *v.* Jackson, 858.
— *v.* Judge of City of London Court, 435.
— *v.* Light, 926.
— *v.* L. & N. W. Ry. Co., 156.
— *v.* Lord, 83.
— *v.* Lord Abingdon, 836.
— *v.* Lord Mayor of London, 410.
— *v.* Luellin, 415.
— *v.* Macdonald, 858.
— *v.* Marsden, 926.
— *v.* Mill, 41.
— *v.* Munslow, 364.
— *v.* Negus, 249.
— *v.* Philbrick, 383.
— *v.* Rymer, 415, 416.
— *v.* Salmon, 496.
— *v.* Shakespeare, 43.
— *v.* Skinner, 836.
— *v.* Southerton, 645.

R. *v.* Walker, 926.
Rabe *v.* Otto, 759.
Rabey *v.* Gilbert, 118, 119.
Race *v.* Ward, 829, 830.
Radcliffe *v.* Bartholomew, 721.
— *v.* D'Oyly, 372.
Raffels *v.* Wickelhaus, 740.
Railstone *v.* York. Ry. Co., 343.
Railton *v.* Mathews, 674.
Railway Appliances Co., *in re*, 745.
— Time Tables Co., *in re*, 636.
Rainbow *v.* Hawkins, 92.
Rajah, The, 293.
Rameshur Singh *v.* Pattuk, 511.
Ramsay *v.* Margrett, 500, 503, 816.
Ramsey *v.* Cruddas, 821, 852, 940.
Ramsgate Hotel Co. *v.* Montefiore, 636.
Ramuz *v.* Crowe, 609.
Randal *v.* Cockran, 201.
Randall *v.* Ikey, 39.
— *v.* Moon, 557.
— *v.* Newson, 322.
— *v.* Raper, 56, 279, 317.
Randell *v.* Trimen, 77.
— *v.* Wheble, 477.
Rankin *v.* De Medina, 900.
— *v.* Potter, 202.
Ransford *v.* Copeland, 529.
Raper *v.* Birkbeck, 580.
Raphael *v.* Goodman, 476.
Rapier *v.* London Tramways Co., 859, 936.
Rapley *v.* Taylor, 380.
Rapson *v.* Cubitt, 434.
Rassam *v.* Budge, 11, 369, 832.
Ratcliffe *v.* Evans, 54, 55, 56, 363, 366, 482.
Rathbone *v.* McIver. 292, 293, 693.
Rawley *v.* Rawley, 688, 772, 791.
Rawlings, *ex parte*, 865.
— *v.* Morgan, 220.
— *v.* Till, 496.
Rawlins *v.* Wickham, 739.
Rawlinson *v.* Mort, 857.
Rawson *v.* Johnson, 766.
Rawstorne *v.* Gandell, 753.
Raymond *v.* Fitch, 227.
— *v.* Minton, 582.
Rayner *v.* Condor, 55.
— *v.* Koehler, 172.
— *v.* Mitchell, 434.
Rayson *v.* South London Tram. Co., 424.
Rea *v.* Sheward, 934, 935, 939, 942.
Read *v.* Anderson, 72, 73, 257.
— *v.* Buxley, 377.
— *v.* Coker, 497.
— *v.* Edwards, 481, 501.
— *v.* G. E. Ry. Co., 388, 815, 851.
— *v.* Goldring, 798.
— *v.* Legard, 690.
— *v.* Pope, 212, 705.
— *v.* Rann, 73.
— *v.* Society of Stonemasons, 490.
— *v.* Victoria Ry. Co., 156, 343.
— *v.* Wotton, 53.
Reade *v.* Conquest, 351, 254, 359.
— *v.* Lacey, 354.
Readhead *v.* Mid. Ry. Co., 148, 149, 293.
Reading *v.* London School Board, 586, 594.
Reay *v.* Richardson, 640.
— *v.* White, 640.
Reddaway *v.* Banham, 496.
— *v.* Bentham, 496.
Rede *v.* Farr, 179, 234, 235.
Redgrave *v.* Hurd, 657, 739.
Reed *v.* Key, 205.
— *v.* Mesteer, 759.
— *v.* Nutt, 929.
— *v.* Thoyts, 915.
Reedie *v.* L. & N. W. Ry. Co., 435.
Rees *v.* Berrington, 674, 675, 676.
— *v.* De Bernardy, 423.
— *v.* Williams, 791.
Reese River Silver Mining Co. *v.* Smith, 656, 657, 739.
Reeve *v.* Palmer, 371, 846.
Reeves *v.* Butcher, 720, 721.
— *v.* Hearn, 567.
Reichardt *v.* Sapte, 353, 354.
Reichel *v.* Magrath, 13, 564.
Reid *v.* Allan, 199.
— *v.* Explosives Co., 246, 248, 733.
— *v.* Hoskins, 756, 788.
— *v.* Maxwell, 353.
— *v.* Rigby & Co., 262.
Remmington *v.* Scoles, 13, 564.
Remon *v.* Hayward, 263.
Rendall *v.* Andreae, 654.
Reneaux *v.* Teakle, 192.
Rennie *v.* Robinson, 215.
Renno *v.* Bennett, 251.
Renton Gibbs & Co. *v.* Neville, 549.
Repetto *v.* Miliars Karri Forests, 293.
Republic of Costa Rica *v.* Erlanger, 161.
— Peru *v.* Dreyfus, 161.
Reuter *v.* Sala, 766, 767.
Revett *v.* Brown, 936.
Revis *v.* Smith, 836.
Reynell *v.* Sprye, 730.
Reynolds *v.* Ashby, 376.
— *v.* Doyle, 686.
— *v.* Fenton, 701.
— *v.* Wheeler, 255.
Rhind *v.* Wilkinson, 200.
Rhodes, *in re*, 690.
— *v.* Airedale Commissioners, 343.
— *v.* Bate, 857.
— *v.* Dawson, 102.
— *v.* Moules, 349.
— *v.* Smethurst, 720, 721.
Rhymney Ry. Co. *v.* Rhymney Iron Co., 143, 144, 211.
Rice *v.* Baxendale, 146.
— *v.* Reed, 262.
Rich *v.* Basterfield, 452.
— *v.* Kneeland, 292.
Richards *v.* Easto, 887.
— *v.* Heather, 20.
— *v.* James, 775.
— *v.* Jenkins, 646, 851, 934.
— *v.* L. B. & S. C. Ry. Co., 141, 151.
— *v.* Macey, 702.
— *v.* May, 326.
— *v.* Rose, 488.

Richards *v.* West Middlesex Waterworks Co., 360.
Richardson *v.* Bank of England, 267.
— *v.* Chasen, 56, 284.
— *v.* Du Bois, 191, 690.
— *v.* Dunn, 77.
— *v.* N. E. Ry. Co., 142.
— *v.* Orford, 852, 941.
— *v.* Rowntree, 95, 149.
— *v.* Stanton, 292.
— *v.* Williamson, 76.
Richdale, *Ex parte*, 125.
Richmond *v.* Nicholson, 385.
Ricketts *v.* East and West India Docks Ry. Co., 390, 391.
— *v.* Salwey, 340, 341.
— *v.* Weaver, 163, 167, 227.
Rickford *v.* Ridge, 126.
Ridd *v.* Moggeridge, 725, 726.
Riddell *v.* Strathmore, 11.
Riddle *v.* Grantham Canal Nav., 700.
Ridgway *v.* Hungerford Market Co., 734.
Riding *v.* Smith, 55, 56, 363, 366.
Rigby *v.* Connol, 305.
Right *d.* Fisher *v.* Cuthell, 233.
Riley *v.* Baxendale, 436.
— *v.* Horne, 141, 142.
Rileys, Limited, *in re*, 641.
Ringham *v.* Clements, 822.
Ripley *v.* M'Clure, 158, 276.
Ripon, The, 916.
Rippinghall *v.* Lloyd, 755.
Riseley *v.* Ryle, 478, 915.
Rishton *v.* Whatmore, 91.
Rist *v.* Faux, 433.
Ritchie *v.* Atkinson, 293.
Rivaz *v.* Gerussi, 694.
River Steamer Co., *in re*, 723, 724, 725.
River Wear Commissioners *v.* Adamson, 142.
Rivers *v.* Griffiths, 800.
Roakes *v.* Manser, 134, 619.
Robb *v.* Green, 197.
Robbins *v.* Fennell, 305.
— *v.* Jones, 452.
Roberts, *in re*, 100, 212.
— *v.* Aulton, 256.
— *v.* Barker, 709.
— *v.* Bury Commissioners, 158, 803.
— *v.* Crowe, 195.
— *v.* Davey, 234, 235, 941, 942.
— *v.* Everhardt, 583.
— *v.* G. W. Ry. Co., 391.
— *v.* Gwyfrae D. C., 509, 903.
— *v.* Holland, 29.
— *v.* Orchard, 904.
— *v.* Owen, 877.
— *v.* Plant, 43, 66, 118.
— *v.* Richards, 511.
— *v.* Roberts, 365, 816.
— *v.* Rope, 89.
— *v.* Rose, 944.
— *v.* Smith, 437.
— *v.* Tayler, 937, 942.
— *v.* Wyatt, 347, 349.
Robertson *v.* Hartopp, 339, 340, 341.
— *v.* Macdonogh, 162.
Robertson *v.* Struth, 213, 701.
Robey *v.* Snaefell Mining Co., 715.
Robins *v.* Bridge, 792.
— *v.* Gray, 377, 416, 861.
Robinson, *in re*, 586.
— *v.* Canadian, &c. Ry. Co., 273.
— *v.* Cook, 798.
— *v.* Currey, 271, 272.
— *v.* Davison, 583, 735.
— *v.* Duleep Singh, 339, 340, 341, 821, 822.
— *v.* Geisel, 29, 30.
— *v.* G. W. Ry. Co., 628, 629.
— *v.* Harkin, 556.
— *v.* Harman, 56.
— *v.* Hawksford, 126.
— *v.* Hindman, 734.
— *v.* Kilvert, 222, 223.
— *v.* Local Board of Barton, 408.
— *v.* L. & S. W. Ry. Co., 629.
— *v.* Lynes, 189.
— *v.* Mallett, 137, 138, 309, 622.
— *v.* Nesbitt, 88.
— *v.* Rutter, 90, 91.
— *v.* Tobin, 49.
— *v.* Touray, 580.
— *v.* Waddington, 721.
— *v.* Workington Corporation, 360, 878.
Robson *v.* Drummond, 266, 267.
— *v.* Edwards, 420.
— *v.* N. E. Ry. Co., 149, 442.
— *v.* Whittingham, 421.
Rochdale Canal Co. *v.* Radcliffe, 944.
Roche *v.* Meyler, 482.
Rochfort *v.* Atherley, 271.
Rock *v.* Purssell, 11.
Rockett *v.* Clippingdale, 3.
Roden *v.* Eyton, 380.
— *v.* London Small Arms Co., 740.
Rodgers *v.* Maw, 254, 255, 262.
— *v.* Nowill, 494.
Rodocanachi *v.* Milburn, 146, 296.
Rodway *v.* Lucas, 68.
Rogers, *in re*, 100, 102.
— *v.* Brenton, 829.
— *v.* Custance, 552.
— *v.* Humphreys, 470.
— *v.* Ingham, 258, 260, 739.
— *v.* Lambert, 347, 851.
— *v.* Maddocks, 682.
— *v.* Parker, 382.
— *v.* Price, 178.
— *v.* Rice, 716.
— *v.* Spence, 101.
— *v.* Taylor, 475, 829, 941, 942.
— *v.* Whiteley, 589.
Rolin *v.* Steward, 96.
Rollason *v.* Leon, 216.
Rollins *v.* Jones, 459.
Rolls *v.* Isaacs, 892, 893.
Rolph *v.* Crouch, 222.
Romer, *in re*, 569, 615.
Romford Canal Co., *in re*, 633.
Roope *v.* D'Avigdor, 923.
Rooth *v.* N. E. Ry. Co., 628.
— *v.* Wilson, 347, 390, 391.

Roots *v.* Lord Dormer, 92
Roper *v.* Holland, 263.
— *v.* Johnson, 276, 278.
— *v.* Lendon, 699.
— *v.* Levy, 583, 585.
Rory, The, 38.
Roscorla *v.* Thomas, 315.
Rose *v.* Buckett, 101.
— *v.* Groves, 55, 460.
— *v.* Hart, 778.
— *v.* N. E. Ry. Co., 442.
— *v.* Savory, 71.
— *v.* Sims, 778.
Roselle *v.* Buchanan, 39.
Rosewell *v.* Prior, 452.
Ross *v.* Adcock, 372.
— *v.* Clifton, 887.
— *v.* Fedden, 453, 454.
— *v.* Gutteridge, 593.
— *v.* Jaques, 571.
— *v.* Johnson, 346.
— *v.* Moses, 571.
Rossiter *v.* Miller, 666, 768.
Rotherum, &c. Co., *in re*, 634.
Rothschild *v.* Brookman, 138.
Rouquette *v.* Overmann, 122.
Rourke *v.* Short, 667.
— *v.* White Moss Coll. Co., 434.
Rouse *v.* Bardin, 517, 952.
— *v.* Bradford Banking Co., 614, 615, 674, 676.
— *v.* Dixon, 882.
Rousillon *v.* Rousillon, 701.
Routledge *v.* Abbott, 523.
— *v.* Low, 353.
Roux *v.* Salvador, 202.
Rowbotham *v.* Wilson, 483, 484.
Rowe *v.* Kelly, 39, 749.
— *v.* School Board for London, 285.
— *v.* Young, 111.
Rowley *v.* L. & N. W. Ry. Co., 388.
Rownson, *in re*, 244, 650, 653.
Roxburghe *v.* Cox, 89, 587.
Royal Aquarium Society *v.* Parkinson, 419, 835, 836, 837, 904.
Royal Bank of Scotland *v.* Tottenham, 125.
Royal Bristol, &c. Soc. *v.* Bomash, 285.
Royal British Bank *v.* Turquand, 632, 633.
Royal Exchange Ins. Corporation *v.* Vega, 199, 682.
Royal Mail Co. *v.* English Bank of Rio, 203.
Royle *v.* Busby, 792.
Ruben *v.* Great Fingall, 633.
Rubery *v.* Stephens, 230.
Ruck *v.* Williams, 451.
Ruddock's case, 753.
Rudge *v.* Bowman, 290.
Ruel *v.* Tatnell, 833.
Rugg *v.* Weir, 759.
Rushbrooke *v.* Farley, 53.
Rushforth *v.* Hadfield, 868.
Russel *v.* Viscount Sa da Bandiera, 802.
Russell, *in re*, 791.
— *v.* Bell, 40.
Russell *v.* Ledsam, 892, 894.
— *v.* Niemann, 788.
— *v.* Phillips, 110.
— *v.* Shenton, 452, 457.
— *v.* Watts, 871.
Rust *v.* Victoria Dock Co., 474.
Rutherford, *in re*, 721.
Ryan *v.* Clark, 502, 936, 937, 938.
— *v.* Jenkinson, 248.
Ryland *v.* Fletcher, 501, 510.

Saccharin Corporation *v.* Anglo-Continental, &c., 462.
— *v.* Reitmeyer, 461.
Sachs *v.* Henderson, 3, 139.
— *v.* Speilman, 37, 38, 40.
Saddlers' Co. *v.* Badcock, 207.
Sadgrove *v.* Hole, 363, 835.
Sadler *v.* G. W. Ry. Co., 24.
— *v.* Robins, 213.
— *v.* S. Staffordshire Tramways Co., 454, 497, 923.
Saffery *v.* Mayer, 668, 669.
Saint *v.* Pilley, 92.
Sainter *v.* Ferguson, 198, 241, 242.
St. Gobain, &c. Co. *v.* Hogerman's Agency, 268.
St. Helens Smelting Co. *v.* Tipping, 455.
St. Leonard's, Shoreditch *v.* Franklin, 272.
St. Mary, Newington *v.* Jacobs, 452.
St. Saviour's *v.* Smith, 713.
Salaman *v.* Warner, 562, 563.
Sale *v.* Lambert, 666.
Salisbury *v.* Gould, 902.
Salmon, *re*, 557.
Salomon *v.* Brownfield, 249.
Salomons *v.* Knight, 366.
Salters' Co. *v.* Jay, 420.
Salton *v.* New Beeston Cycle Co., 156, 306.
Salvensen *v.* Rederi, 76.
Sampson *v.* Hoddinott, 509, 511.
Samson *v.* Rhodes, 283.
Samuel *v.* Duke, 898.
Sanders *v.* Coward, 720.
— *v.* Sanders, 875.
— *v.* Stuart, 55, 57.
— *v.* Teape, 501.
Sanderson *v.* Blythe Theatre Co., 23.
— *v.* Collins, 434.
— *v.* Collman, 646.
— *v.* Graves, 755.
— *v.* Mayor of Berwick, 223.
Sandford *v.* Alcock, 371.
Sands *v.* Clarke, 130.
— *to* Thompson, 723.
Sandys, *ex parte*, 739.
Saner *v.* Bilton, 220, 943.
Sanitary Commissioners of Gibraltar *v.* Orfila, 360.
Sankey Brook Co. *v.* Marsh, 635.
Sapsford *v.* Fletcher, 708, 910.
Sard *v.* Rhodes, 569.
Sarson *v.* Roberts, 222.
Satchwell *v.* Clarke, 265.

Saul *v.* Jones, 117.
Saunders *v.* Edwards, 845.
— *v.* Holborn District Board, 271.
— *v.* L. & S. W. Ry. Co., 931.
— *v.* Milsome, 737.
— *v.* Newbold, 741, 742.
— *v.* Newman, 511.
— *v.* Seyd, 363.
— *v.* Sun Life Ass. Co., 496.
— *v.* Warren, 887.
— *v.* Wiel, 356.
Savage *v.* Aldren, 129.
— *v.* Madder, 258.
Savile *v.* Roberts, 424.
Saxby *v.* Easte brook, 366.
Saxon *v.* Castle, 424.
Sayers *v.* Collyer, 414, 859.
Scadding *v.* Eyles, 71, 791.
Scaife *v.* Farrant, 142.
Scaltock *v.* Harston, 235.
Scaramanga *v.* Stamp, 785.
Scarborough *v.* Cosgrove, 416.
Scarf *v.* Jardine, 267, 574, 704.
Scarfe *v.* Halifax, 257.
— *v.* Morgan, 797, 866, 867.
Scarth, *ex parte*, 371.
Schibsby *v.* Westenholz, 701, 702.
Schlesinger *v.* Bedford, 354.
— *v.* Turner, 354.
Schneider *v.* Batt, 556, 557.
— *v.* Foster, 759
— *v.* Heath, 397.
Schofield *v.* Corbett, 774.
— *v.* Hincks, 163.
Scholes *v.* Hargreaves, 339.
Scholey *v.* Central Railway of Venezuela, 657.
Scholfield *v.* Earl of Londesborough, 97, 608, 647.
Schroeder *v.* Central Bank, 88, 97.
Schulze *v.* G. E. Ry. Co., 57, 146.
Schwabe *v.* Branson, 309, 796.
Schwan, The, 916.
Scott *v.* Avery, 86, 585.
— *v.* Brown, 658, 682, 936.
— *v.* Clifton School Board, 161, 643.
— *v.* Corporation of Liverpool, 326, 585.
— *v.* Coulson, 739.
— *v.* Dixon, 401.
— *v.* Gillmore, 605, 682, 684.
— *v.* Godfrey, 793.
— *v.* Godwin, 29.
— *v.* London Dock, 441.
— *v.* Morley, 67.
— *v.* Nixon, 875.
— *v.* Pape, 420.
— *v.* Pilkington, 647, 701, 702.
— *v.* Porcher, 88.
— *v.* Sampson, 6, 922.
— *v.* Sebright, 645.
— *v.* Shepherd, 443.
— *v.* Stanford, 352.
— *v.* Stansfield, 418, 836, 837.
— *v.* Surman, 256.
— *v.* Uxbridge Ry. Co., 798.
— *v.* Wedlake, 648.
Scottish, &c. Co., *in re*, 636.
Scrimgeour's case, 311.
Scully *v.* Lord Dundonald, 177.
Sea Insurance Co. *v.* Hadden, 201.
Seago *v.* Deane, 71.
Sealey *v.* Tandy, 415.
Sealton *v.* Heath, 674.
Seaman *v.* Netherclift, 835, 837.
Sear *v.* House Society, 239.
Seare *v.* Prentice, 438.
Searle *v.* Lindsay, 435.
Searles *v.* Sadgrove, 798.
— *v.* Scarlett, 836.
Sears *v.* General Accident, &c. Co., 208.
Seaton *v.* Benedict, 191.
— *v.* Burnand, 694, 695.
Seddon *v.* North Eastern Salt Co., 739.
— *v.* Tutop, 703.
Sedgworth *v.* Overend, 21.
Secar *v.* Lawson, 32.
Seed *v.* Higgins, 892.
Seeger *v.* Duthie, 787.
Selby *v.* Nettlefold, 946.
Self *v.* L. B. & S. C. Ry. Co., 143.
Selig *v.* Lion, 104.
Sellors *v.* Matlock Local Board, 859.
Sells *v.* Hoare, 380.
— *v.* Sells, 738.
Selmes *v.* Judge, 904.
Selway *v.* Fogg, 656.
Semayne's case, 898, 899.
Semenza *v.* Brinsley, 782, 783.
Senhouse *v.* Christian, 950.
Senior *v.* Ward, 388.
Serff *v.* Acton Local Board, 951.
Sergent *v.* Morris, 140.
Serjeant *v.* Nash, 234, 715.
Serle, *in re*, 716.
Seroka *v.* Kattenburg, 186, 410.
Serraino *v.* Campbell, 296.
Serrao *v.* Noel, 371, 862.
Seton *v.* Lafone, 646.
Severn Ry. Co., *in re*, 718.
Sewell *v.* Burdick, 294, 295.
Seymour *v.* Maddox, 443.
— *v.* Pickett, 252, 747.
Shackell *v.* Rosier, 682.
Shadwell *v.* Hutchinson, 421, 474.
— *v.* Shadwell, 244.
Shafto *v.* Bolckow, 484, 563.
Shand *v.* Grant, 259.
— *v.* Sanderson, 295.
Shapcott *v.* Mugford, 501.
Shardlow *v.* Cotterell, 665.
Sharman *v.* Brandt, 91, 138.
Sharp *v.* Grey, 149.
— *v.* Powell, 885.
— *v.* Taylor, 259.
Sharpe, *in re*, 721.
— *v.* Fowle, 378.
Sharpington *v.* Fulham Guardians, 903.
Sharpley *v.* S. & E. Coast Ry. Co., 657.
Sharrod *v.* L. & N. W. Ry. Co., 391.
Shattock *v.* Carden, 915.
Shaw's Brow Iron Co. *v.* Birch, &c. Co., 276, 278.
Shaw, *ex parte*, 342.
— *v.* Benson, 605, 634, 682, 684.

Shaw *v.* G. W. Ry. Co., 626, 630.
— *v.* Herefordshire C. C., 903.
— *v.* Holland, 291.
— *v.* Simmons, 634.
— *v.* Woodcock, 257.
Sheba Gold Mining Co. *v.* Trubshawe, 210, 211.
Sheddon *v.* Fitzpatrick, 422.
Sheehan *v.* G. E. Ry. Co., 24, 29, 462.
Sheen *v.* Rickie, 349.
Sheerman *v.* Thompson, 601.
Sheffield *v.* Barclay, 195.
— Building Society *v.* Harrison, 376.
— Nickel, &c. Co. *v.* Unwin, 656.
Shelfer *v.* City Electric Co., 414, 452, 473, 474, 484.
Shelton *v.* Braithwaite, 117.
Shepheard *v.* Whitaker, 365.
Shepherd *v.* B. & E. Ry. Co., 336.
— *v.* Conquest, 272, 359.
— *v.* Hills, 718.
— *v.* Johnson, 291.
— *v.* Norwich, 343.
Sheppard *v.* Union Bank, 869.
Sherrard *v.* Gascoigne, 481, 565, 685.
Sherry *v.* Oke, 284.
Shields *v.* Davis, 293.
Shilling *v.* Accidental, &c. Ins. Co., 205.
Shine, *in re*, 102.
Shipway *v.* Broadwood, 78.
Shoe Machinery Co. *v.* Cutlan, 862, 894.
Shoolbred *v.* Roberts, 100, 668.
Shoreditch Corp. *v.* Bull, 409.
Short *v.* M'Carthy, 720, 725.
— *v.* Simpson, 296, 823.
— *v.* Stone, 158, 244, 245.
Shrapnel *v.* Laing, 537.
Shropshire Ry. Co. *v.* Anderson, 636.
Shrosbery *v.* Osmaston, 424.
Shuttleworth *v.* Le Fleming, 819, 852.
Siboni *v.* Kirkman, 171.
Sibree *v.* Tripp, 566, 569.
Sicklemore *v.* Thistleton, 179.
Siddall *v.* Rawcliffe, 703.
Siddell *v.* Vickers, 891.
Siddons *v.* Short, 413, 484, 859.
Sidebotham *v.* Holland, 233.
Sidwell *v.* Mason, 723.
Siggers *v.* Lewis, 797.
Sikes *v.* Wild, 285.
Silber Light Co. *v.* Silber, 27.
Sillem *v.* Thornton, 699, 700.
Silvester, *in re*, 673.
Simeon *v.* Watson, 289, 290.
Simian *v.* Miller, 589.
Simmons *v.* Heseltine, 261.
— *v.* Lillystone, 344, 460.
— *v.* Milligan, 925.
— *v.* Mitchell, 363, 834.
Simon *v.* Lloyd, 617.
Simons *v.* Farren, 712.
— *v.* G. W. Ry. Co., 628.
— *v.* Patchett, 76, 285.
Simpson *v.* Fogo, 701.
— *v.* Hartopp, 376, 377, 379.
— *v.* Lamb, 73, 730.
— *v.* L. & N. W. Ry. Co., 144, 146.
Simpson *v.* Margitson, 108.
— *v.* Mayor of Godmanchester, 941.
— *v.* Mirabita, 593.
— *v.* Nicholls, 797.
— *v.* Penton, 179.
— *v.* Robinson, 840.
— *v.* Savage, 456, 474.
— *v.* Thomson, 201.
Sims *v.* Bond, 266.
— *v.* Brutton, 724.
— *v.* Landray, 91.
Simson *v.* Ingham, 747.
— *v.* Wells, 829.
Sinclair *v.* Bowles, 326.
— *v.* Maritime Passengers' Ass. Co., 208.
Siner *v.* G. W. Ry. Co., 442.
Singer *v.* Clark, 270, 346.
— *v.* L. & S. W. Ry. Co., 150, 868.
— *v.* Wilson, 495, 496.
Singh *v.* Faridkote, 701.
Singleton *v.* Williamson, 379, 390, 849, 911.
Sir C. Napier, The, 201.
Six Carpenters' case, The, 379, 382.
Skeate *v.* Beale, 257, 645.
Skeet *v.* Lindsay, 725.
Skegness Tramways Co., *in re*, 154, 634.
Skene *v.* Cook, 875.
Skillett *v.* Fletcher, 675.
Skinner *v.* L. B. & S. C. Ry. Co., 442.
— *v.* Shew & Co., 461.
— *v.* Stocks, 266.
Skinners' Co. *v.* Knight, 766.
Skuse *v.* Davis, 929.
Slater *v.* Baker, 438.
— *v.* Jones, 639.
— *v.* May, 170.
— *v.* Swann, 499.
Sleap *v.* Newman, 231, 654.
Sleigh *v.* Sleigh, 255.
— *v.* Tayler, 693.
Slingsby's case, 29.
Slocombe *v.* Lyall, 936, 937.
Sloper *v.* Saunders, 215.
Small *v.* G. E. Ry. Co., 445.
Smallman *v.* Pollard, 478.
Smallwood *v.* Sheppards, 215.
Smart *v.* Hutton, 476.
— *v.* Morton, 483, 942.
Smethurst *v.* Taylor, 40.
Smidt *v.* Tiden, 740.
Smith and Service, *in re*, 84.
Smith, *in re*, 588.
— *v.* Andrews, 396, 509, 829, 852.
— *v.* Ashforth, 380.
— *v.* Baker, 262, 436, 437, 881.
— *v.* Baxter, 338, 419, 872.
— *v.* Betty, 772.
— *v.* Bedouin Nav. Co., 295.
— *v.* Birmingham Gas Co., 359.
— *v.* Bond, 134.
— *v.* British, &c. Assoc., 11, 12.
— *v.* Bromley, 258.
— *v.* Buchanan, 593.
— *v.* Chadwick, 397, 739.
— *v.* Chorley D. C., 428, 878.
— *v.* Compton, 195.

Smith *v.* Cook, 79.
— *v.* Cropper, 465, 892, 896.
— *v.* Cuff, 254, 257, 258.
— *v.* Dart, 788.
— *v.* Edwardes, 67.
— *v.* Eggington, 225.
— *v.* Enright, 472.
— *v.* Giddy, 453.
— *v.* Goldcoast Express, 666.
— *v.* Goodwin, 346.
— *v.* Green, 317.
— *v.* Gronow, 716.
— *v.* Hughes, 316, 397, 739.
— *v.* Johnson, 112, 352.
— *v.* Kemp, 396, 502.
— *v.* King, 687.
— *v.* Land, &c. Corporation, 771.
— *v.* London, &c. Docks Co., 886.
— *v.* L. & S. W. Ry. Co., 442.
— *v.* M'Clure, 108.
— *v.* Maguire, 294.
— *v.* Manners, 797.
— *v.* Marrable, 222, 706.
— *v.* Menteith, 645.
— *v.* Milles, 500.
— *v.* Morgan, 652.
— *v.* Musgrave, 510.
— *v.* Neale, 270.
— *v.* Nicholls, 213, 703, 705.
— *v.* Northleach, 903.
— *v.* Page, 70, 567.
— *v.* Pyman, 787.
— *v.* Richardson, 12.
— *v.* Rosario Co., 300.
— *v.* Royston, 502, 937.
— *v.* Russell, 478.
— *v.* Scott, 201, 270.
— *v.* Shirley, 927.
— *v.* Sleap, 257.
— *v.* Sorby, 78.
— *v.* S. E. Ry. Co., 393, 394.
— *v.* Sparrow, 797.
— *v.* Steele, 448.
— *v.* Tatcham, 649.
— *v.* Thackerah, 484.
— *v.* Thomas, 55, 56.
— *v.* Thompson, 251.
— *v.* Trowsdale, 568, 571, 583, 755.
— *v.* Vertue, 110.
— *v.* Wallace, 770.
— *v.* Wilson, 66, 452.
— *v.* Woodfine, 55, 245.
— *v.* Wright, 382, 383.
Smurthwaite *v.* Hannay, 21, 23.
— *v.* Wilkins, 296.
Snark, The, 458.
Sneesby *v.* L. & Y. Ry. Co., 56, 443.
Snelling *v.* Lord Huntingfield, 250.
— *v.* Pulling, 3.
Snook *v.* Mattock, 700.
Snow *v.* Whitehead, 453.
Snowdon, *ex parte*, 255.
Soames *v.* Nicholson, 233.
Soar *v.* Ashwell, 723.
Soblomsten, The, 293.
Société Générale *v.* Walker, 578.
Softlaw *v.* Welch, 187.
Solicitor to Treasury *v.* Lewis, 857.
Solling *v.* Broughton, 876.
Solly *v.* Forbes, 567, 753.
— *v.* Hinde, 601, 602.
Solomon *v.* Lawson, 364.
— *v.* Mulliner, 350.
— *v.* Vintners' Co., 488, 489.
Soltykoff, *in re*, 688.
Somerset, *in re*, 724.
Somerville *v.* Mirehouse, 418.
Somerville's Contract, *in re*, 182.
Somes *v.* British Empire, &c. Co., 93, 867.
Soper *v.* Arnold, 284.
Soulsby *v.* Neving, 231.
South African Breweries *v.* King, 655.
South African Republic *v.* La Compagnie Franco-Belge, 161.
South America Co., *in re*, 647, 705.
South Eastern Ry. Co. *v.* Hebblewhite, 636.
— *v.* Warton, 646.
South Hetton Coal Co. *v.* N. E. News Assoc., 361, 363, 367.
South of Ireland Colliery Co. *v.* Waddle, 643.
Southport Tramways *v.* Gandy, 67.
South Staffordshire Water Co. *v.* Sharman, 347.
South Wales, &c. Co., *in re*, 634.
South Wales, &c. Fed. *v.* Glamorgan Co., 490, 491, 834.
Southwark Water Co. *v.* Wandsworth Board, 902.
Southwell *v.* Bowditch, 72.
Sovereign Life Co. *v.* Dodd, 635, 778.
Soward *v.* Palmer, 616.
Sowell *v* Champion, 349, 497, 899.
Spackman *v.* Foster, 848.
Spaight *v.* Tedcastle, 916.
Spain *v.* Arnott, 734.
Spargo's case, 638.
Spark *v.* Heslop, 56.
Speake *v.* Hughes, 365.
Speck *v.* Phillips, 530.
Spedding *v.* Fitzpatrick, 6, 37, 339, 517.
— *v.* Nevell, 77, 222.
Speight *v.* Gosnay, 365.
Speller *v.* Bristol Steam Nav. Co., 555.
Spence *v.* Healey, 755.
Spencer's case, 225, 226, 227, 713.
Spencer *v.* Dennett, 591.
— *v.* Parry, 71.
Spice *v.* Bacon, 416, 417.
Spicer *v.* Martin, 226.
Spiers *v.* Brown, 352.
Spill *v.* Maule, 835.
Spiller *v.* Westlake, 602, 611.
Spincer *v.* Watts, 23.
Spindler *v.* Grellett, 130.
Spittal *v.* Glasgow Corporation, 902, 903.
Spokes *v.* Grosvenor Hotel, 27.
Spooner *v.* Brewster, 500.
Spotswood *v.* Barrow, 250, 734.
Spragg *v.* Hammond, 258.
Spratt *v.* Hobhouse, 256.
Sprigg *v.* Neal, 552.
Spry *v.* Emperor, 256.
Sprye *v.* Porter, 729, 730.
Spurling *v.* Bantoft, 431.

Spurr *v.* Hall, 421.
Spurrier *v.* La Cloche, 585, 655.
Spybey *v.* Hide, 800.
Spyve *v.* Topham, 739.
Squire *v.* Midland Lace Co., 800.
— *v.* Wheeler, 416.
Stace *v.* Griffith, 835.
Stacey *v.* Hill, 102.
Stackwood *v.* Dunn, 733.
Stafford *v.* Gardner, 163.
Stamford Banking Co. *v.* Smith, 725.
Stammers *v.* Dixon, 502.
Standen *v.* Christmas, 215, 225, 506.
Standish *v.* Ross, 260.
Stanger *v.* Lowitz, 312, 622, 796.
— *v.* Miller, 778.
Stanhope *v.* Stanhope, 32.
Stanley *v.* Earl of Shrewsbury, 859.
— *v.* Jones, 423, 729.
— *v.* Powell, 496, 497, 923.
— *v.* Stanley, 190.
— *v.* Towgood, 220.
— *v.* West Ins. Co., 698.
Stannard *v.* Lee, 354, 827.
Stanton's case, 83.
Stanton *v.* Richardson, 788.
— *v.* Styles, 212, 780.
Stapleton, *ex parte*, 102.
Stapley *v.* L. B. & S. C. Ry. Co., 394.
Star *v.* Rookesby, 501.
Starkey *v.* Bank of England, 76.
Starr-Bowkett Building Society, *in re*, 770.
Stead *v.* Anderson, 891.
— *v.* Poyer, 571.
Steadman *v.* Hockley, 167.
Stedman *v.* Smith, 503.
Steeds *v.* Steeds, 568, 620.
Steel *v.* Haddock, 738.
— *v.* State Line Steamship Co., 292.
— *v.* S. E. Ry. Co., 435.
Steele *v.* Gourley, 273.
— *v.* Hoe, 49.
— *v.* M'Kinley, 597.
Steer *v.* Crowley, 283.
Steers *v.* Rogers, 462.
— *v.* Williams, 257.
Stegmann *v.* O'Connor, 803.
Stein *v.* Yglesias, 600.
Steinman *v.* Angier, 292, 785.
Stennel *v.* Hogg, 935.
Stephens, *in re*, 722.
— *v.* Baldock, 259.
— *v.* De Medina, 283.
— *v.* Dudbridge Ironworks Co., 688, 859, 882.
— *v.* L. & S. W. Ry. Co., 626.
— *v.* Myers, 497.
— *v.* Wilkinson, 279.
Stephenson *v.* Hart, 346.
Stepney Election Petition, *in re*, 579.
Stevens *v.* Benning, 586.
— *v.* Biller, 176, 867.
— *v.* Chown, 413, 431.
— *v.* Evans, 384.
— *v.* Lynch, 260.
— *v.* Sampson, 835 839.
— *v.* Woodward, 434.
Stevenson *v.* Blakelock, 867.
— *v.* Lambard, 712.
— *v.* Newnham, 348, 380.
— *v.* Watson, 87, 326.
Steward *v.* Greaves, 95.
— *v.* Gromett, 424.
— *v.* N. Met. Tram. Co., 15, 16.
— *v.* Young, 481.
Stewart *v.* Cauty, 291.
— *v.* Kennedy, 739.
— *v.* Merchants' Marine Ins. Co., 692.
Stiles *v.* Cardiff Steam Co., 360.
Stimson *v.* Farnham, 477.
Stirling *v.* L. & S. W. Ry. Co., 148.
Stobart *v.* Dryer, 581.
Stock, *in re*, 640, 725.
— *v.* Inglis, 200.
Stockdale *v.* Ascherberg, 224.
— *v.* Onwhyn, 352.
Stockport Waterworks Co. *v.* Potter, 516.
Stoddart *v.* Sagar, 669.
Stogdon *v.* Lee, 186.
Stoke Parish *v.* Price, 160.
Stokes *v.* Cox, 700.
— *v.* Lewis, 254.
— *v.* Russell, 713.
— *v.* Stokes, 3.
Stone *v.* City Bank, 258.
— *v.* Jackson, 459.
— *v.* Lidderdale, 88.
Stoneham *v.* Ocean Accident Ins. Co., 699.
Stonehouse *v.* Elliott, 497, 926.
Stonge *v.* Lowitz, 138.
Stooke *v.* Taylor, 534, 537, 538, 772.
Storey *v.* Ashton, 434.
— *v.* Robinson, 377.
— *v.* Waddle, 58, 738, 771.
Story *v.* Sheard, 271, 385.
Stowell *v.* Robinson, 755.
Strachan *v.* Thomas, 718.
— *v.* Universal Stock Exchange, 258, 671.
Straker *v.* Graham, 618.
Stranks *v.* St. John, 216, 222.
Straton *v.* Rastall, 261.
Stratton *v.* Matthews, 195.
Strauss *v.* County Hotel Co., 417.
Stray *v.* Russell, 261.
Street *v.* Blay, 761.
— *v.* Gover, 549.
— *v.* Rigby, 85, 86.
Streeter *v.* Horlock, 49.
Strick *v.* Swansea Canal Co., 148.
Strickland *v.* Turner, 261.
— *v.* Williams, 68, 134, 241, 242.
Stringer, *in re*, 636.
Stroud *v.* Lawson, 22.
Strousberg *v.* Republic of Costa Rica, 161, 864.
Stroyan *v.* Knowles, 484.
Strutt *v.* Smith, 758.
Stuart, *in re*, 283, 791.
— *v.* Bell, 835.
— *v.* Diplock, 314.
— *v.* Joy, 227.
Stubbs *v.* Holywell Ry. Co., 171
— *v.* Parsons, 910.

Stumore *v.* Campbell, 35, 539, 772.
Sturgeon *v.* Wingfield, 226.
Sturges *v.* Bridgman, 455.
Sturtevant *v.* Ford, 600.
Sucksmith *v.* Wilson, 163.
Suffell *v.* Bank of England, 579, 580, 581.
Sullivan *v.* Creed, 445, 885.
Sumpler *v.* Hedges, 326.
Sunderland Mar. Ins. Co. *v.* Kearney, 199.
Surman *v.* Wharton, 185, 190.
Surplice *v.* Farnsworth, 706.
Sutcliffe *v.* Booth, 511.
— *v.* James, 906.
— *v.* Wood, 53.
Sutherland *v.* Pratt, 201, 691.
Sutton *v.* Clarke, 21.
— *v.* Grey, 76, 194.
— *v.* Page, 567.
— *v.* Sutton, 722.
— *v.* Tatham, 75, 137, 138.
— *v.* Temple, 222, 706.
Suwerkrop *v.* Day, 170.
Svensden *v.* Wallace, 203.
Swain *v.* Ayres, 216.
— *v.* Morland, 256.
— *v.* Shepherd, 140.
Swaine *v.* Wilson, 305.
Swainson *v.* N. E. Ry. Co., 434, 435.
Swan *v.* North British, &c. Co., 342, 429, 430, 578, 739.
Swann *v.* Earl of Falmouth, 380.
Swansborough *v.* Coventry, 421.
Swansea Bank *v.* Thomas, 713.
Sweet *v.* Lee, 261.
— *v.* Sweet, 192, 582.
Sweetapple *v.* Jesse, 364.
Swift *v.* Jewsbury, 407.
Swindell *v.* Bulkeley, 721.
Swindon Waterworks Co. *v.* Wilts Canal Co., 509.
Swinfen *v.* Bacon, 231.
— *v.* Lord Chelmsford, 398.
Swire *v.* Francis, 398.
— *v.* Leach, 377.
Sybray *v.* White, 390, 391.
Sykes *v.* Dixon, 432.
— *v.* Howard, 465, 894.
— *v.* N. E. Ry. Co., 388.
— *v.* Schofield, 23, 28.
Symmons *v.* Knox, 780.
Symonds *v.* Atkinson, 262.
— *v.* City Bank, 38.
— *v.* Hallett, 411.
Synge *v.* Synge, 158, 756.

Tabor *v.* Edwards, 135.
Tadcaster Brewery Co. *v.* Wilson, 283.
Taff Vale Ry. Co. *v.* Amalgamated Society of Ry. Servants, 25, 153, 304, 305.
Tailby *v.* Official Receiver, 88, 89, 102.
Tancred *v.* Allgood, 475, 898.
— *v.* Delagoa Bay Co., 89.
— *v.* Leyland, 380.
Tanner *v.* Smart, 723, 724, 725, 874.
— *v.* S. W. Ry. Co., 460.
Tapley *v.* Wainwright, 937.
Tapling *v.* Jones, 420.
Tappenden *v.* Randall, 258.
Tarbuck *v.* Bispham, 690.
Tarleton *v.* McGawley, 489, 490.
Tarn *v.* Commercial Banking Co., 167.
Tarrabochia *v.* Hickie, 787, 788.
Tarrant *v.* Webb, 437.
Tarry *v.* Ashton, 435, 459.
Tasker *v.* Shepherd, 171, 266.
— *v.* Tasker, 191, 192.
Tatam *v.* Haslar, 604.
— *v.* Reeve, 668.
Tate *v.* Hyslop, 694.
— *v.* Wellings, 50.
Tatlock *v.* Harris, 570.
Tattershall *v.* Ashworth, 168.
Tatton *v.* Hammersley, 950.
— *v.* Wade, 407.
Taylor, *in re*, 867.
— *v.* Bank of New South Wales, 675, 676.
— *v.* Best, 581.
— *v.* Bowers, 683.
— *v.* Burgess, 614.
— *v.* Caldwell, 577.
— *v.* Devey, 830.
— *v.* Dewar, 201.
— *v.* Dunbar, 693.
— *v.* Evans, 910.
— *v.* G. E. Ry. Co., 664.
— *v.* G. N. Ry. Co., 143.
— *v.* Hamstead Colliery Co., 881.
— *v.* Hare, 261.
— *v.* Hawkins, 835.
— *v.* Higgins, 254.
— *v.* Hilary, 755.
— *v.* Hollard, 705, 722, 725.
— *v.* Laird, 247.
— *v.* Lendey, 256, 258.
— *v.* M'Keand, 351.
— *v.* Manners, 568.
— *v.* Mostyn, 504.
— *v.* M. S. & L. Ry. Co., 3, 267.
— *v.* Needham, 226.
— *v.* Roe, 213.
— *v.* St. Helens, 511.
— *v.* Shun, 713.
— *v.* Smetten, 669.
— *v.* Timson, 933.
— *v.* Whitehead, 946.
— *v.* Zamira, 708, 910.
Tebbutt *v.* Selby, 340, 512.
Temperton *v.* Russell, 38, 491, 492.
Tempest *v.* Kilner, 290, 291.
— *v.* Rawling, 48.
Tenant *v.* Elliott, 259.
— *v.* Goldwin, 453.
Tennant *v.* Field, 379, 910.
Tennent *v.* City of Glasgow Bank, 258, 657.
Terry, *in re*, 771.
— *v.* Hutchinson, 433.
Thacker *v.* Hardy, 138, 195, 667, 668, 793.
Thames Insurance Co. *v.* Hamilton, 201, 784.
Thames Ironworks Co. *v.* Patent Derrick Co., 868.

Tharsis Sulphur Co. *v.* Loftus, 86.
— *v.* Morell, 299, 300.
— *v.* M'Elroy, 802.
Thelluson *v.* Fletcher, 200.
Thimbleby *v.* Barron, 754.
Thistlewood *v.* Cracroft, 258.
Thom *v.* Bigland, 398.
Thomas *v.* Birmingham Canal Co. 441, 453, 510.
— *v.* Brown, 261, 666.
— *v.* Chirton, 836.
— *v.* Cook, 179, 194, 710.
— *v.* Cross, 746.
— *v.* Edwards, 758.
— *v.* Fredricks, 86, 217, 480.
— *v.* Harries, 379, 910.
— *v.* Hawkes, 71, 571.
— *v.* Kelly, 816.
— *v.* Lulham, 235.
— *v.* Mirehouse, 478, 915.
— *v.* Owen, 950.
— *v.* Packer, 235.
— *v.* Quartermaine, 881.
— *v.* Rhymney Ry. Co., 142, 148.
— *v.* Thomas, 511.
— *v.* Turner, 827.
Thompson, *in re*, 83, 170, 791.
— *v.* Adams, 208.
— *v.* Bell, 705.
— *v.* Brighton Corporation, 361.
— *v.* Charnock, 585.
— *v.* Davenport, 574.
— *v.* Farrer, 479.
— *v.* Gillespy, 788.
— *v.* Hakewill, 20.
— *v.* Hopper, 692.
— *v.* Hudson, 241.
— *v.* Jackson, 920.
— *v.* Lacy, 416, 861.
— *v.* Lock, 753.
— *v.* London C. C., 24.
— *v.* Mashiter, 377.
— *v.* Mayor of Brighton, 408.
— *v.* Meade, 312.
— *v.* Mid. Ry. Co., 149.
— *v.* N. E. Ry. Co., 450.
— *v.* Ross, 433.
Thomson *v.* Birkley, 434.
— *v.* Clanmorris, 402, 719, 873.
— *v.* Clydesdale Bank, 96.
— *v.* Gill, 213.
— *v.* S. E. Ry. Co., 537, 760.
— *v.* Weems, 695.
Thorburn *v.* Barnes, 583.
Thorley *v.* Kerry, 362.
Thorn *v.* City Rice Mills, 745.
Thorne *v.* Heard, 723, 876.
— *v.* Smith, 615, 746.
— *v.* Tilbury, 347, 590.
Thornett *v.* Haines, 287.
Thornton *v.* Adams, 850.
— *v.* Ford, 864.
— *v.* Maynard, 773, 783.
Thorogood *v.* Bryan, 885.
— *v.* Robinson, 499.
Thoroughgood's case, 739.
Thorp *v.* Holdsworth, 527, 528, 530.
Thorpe *v.* Brumfitt, 455.
— *v.* Thorpe, 256.
Thresh *v.* Rake, 49.
Thurman *v.* Wilde, 815.
Thursby *v.* Plant, 713.
Thurston *v.* Charles, 371.
Thwaites *v.* Wilding, 375, 378.
Thynne *v.* Shove, 314.
Tickle *v.* Brown, 819, 820, 944, 954.
Tidey *v.* Mollett, 216.
Tidman *v.* Ainslie, 841.
Tighe *v.* Cooper, 841.
— *v.* Sinnott, 396.
Tilbury *v.* Silva, 509, 852.
Tildesley *v.* Harper, 527.
Tillett *v.* Ward, 501, 852.
Tilley *v.* Thomas, 283.
Tilling *v.* Dick, 902.
Timothy *v.* Huskisson, 925.
— *v.* Simpson, 926.
Tinsley *v.* Lacey, 354, 355.
Tiverton Ry. Co. *v.* Loosemore, 343.
Tobacco Pipe Makers' Co. *v.* Loder, 719.
Tobin *v.* The Queen, 442.
Todd *v.* Flight, 452, 457.
— *v.* Kerrick, 247, 251.
— *v.* Maxfield, 700.
— *v.* Stewart, 703.
Tod-Heatly *v.* Benham, 314.
Toke *v.* Andrews, 540, 549, 775.
Toleman, *in re*, 172.
— *v.* Portbury, 234, 715.
Tolhausen *v.* Davies, 440, 445.
Tolhurst *v.* Associated, &c. Manufacturers, 88, 89, 277, 586.
Tomkinson *v.* S. E. Ry. Co., 12.
— *v.* Straight, 217.
Tomlinson *v.* Consolidated, &c. Co., 850.
Tompkinson *v.* Balkis Co., 342.
Toms *v.* Wilson, 942.
Tomson *v.* Miles, 769.
Tone *v.* Preston, 484.
Tong *v.* G. N. Ry. Co., 881.
Toogood *v.* Spyring, 364.
Tooker *v.* Halcomb, 925.
Toole *v.* Young, 354.
Toomey *v.* L. & B. Ry. Co., 445.
— *v.* Murphy, 68.
Topham *v.* Booth, 875.
— *v.* Braddick, 573.
— *v.* Morecraft, 171, 263.
Toplis *v.* Grane, 195.
Torkington *v.* Magee, 89.
Torrance *v.* Bolton, 284, 739.
Torriano *v.* Young, 506.
Totterdell *v.* Fareham Brick Co., 633.
Toussaint *v.* Martinnant, 229.
Towers *v.* Barrett, 48.
Towerson *v.* Jackson, 470, 706.
Towne *v.* D'Heinrich, 215.
— *v.* Lewis, 346.
Townend *v.* Sheriff of Yorkshire, 478.
Townsend *v.* Crowdy, 260.
— *v.* Jarman, 314.
— *v.* Parker, 857.
— *v.* Wathen, 460.
Townson *v.* Jackson, 40.

Towse *v.* Loveridge, 560.
Trade Auxiliary Co. *v.* Middlesborough Assoc., 352, 353.
Traherne *v.* Gardner, 54, 257.
Treadwin *v.* G. E. Ry. Co., 626.
Tredway *v.* Machin, 220, 449, 709.
Tredwen *v.* Holman, 585.
Trego *v.* Hunt, 314.
Treleaven *v.* Bray, 543.
Treloar *v.* Bigge, 239.
Tremeere *v.* Morrison, 231.
Trent *v.* Hunt, 909.
Trevivan *v.* Lawrence, 646.
Trickey *v.* Larne, 601.
Trimble *v.* Hill, 295, 713.
Trinidad Asphalte Co. *v.* Ambard, 484.
Trotter *v.* Maclean, 504.
Trower *v.* Chadwick, 447.
Trueman *v.* Hurst, 71.
Truman *v.* Loader, 191.
Truscott *v.* Merchant Taylors' Co., 420.
Trustees' Co. *v.* Short, 876.
Tryon *v.* National Provident Inst., 26, 27, 87.
Tuck *v.* Priester, 351.
Tucker, *in re*, 726.
— *v.* Barrow, 71.
— *v.* Linger, 506, 709, 830, 943.
— *v.* Newman, 457, 473, 474, 475.
Tuckey *v.* Hawkins, 720.
Tugwell *v.* Heyman, 178.
Tulk *v.* Moxhay, 226, 713.
Tullay *v.* Reed, 932.
Tully *v.* Howling, 787.
Tunnicliffe *v.* Tedd, 929.
Tunno *v.* Morris, 418.
Tuohy *v.* G. S. & W. Ry. Co., 149.
Turcan, *in re*, 586.
Turnbull *v.* Walker, 701.
Turner *v.* Bates, 864.
— *v.* Cameron Coal Co., 15, 376, 502.
— *v.* Ford, 383.
— *v.* Goulden, 87.
— *v.* Hardcastle, 101, 347, 500.
— *v.* Hednesford, 543.
— *v.* Horton, 845.
— *v.* Jones, 588.
— *v.* Lamb, 219.
— *v.* Mason, 247, 734.
— *v.* Robinson, 247.
— *v.* Sheffield Ry. Co., 872.
— *v.* Stallibrass, 139.
— *v.* Stone, 261.
— *v.* Willis, 71, 791.
— *v.* Wright, 507.
Turquand *v.* Board of Trade, 102.
— *v.* Fearon, 7, 12, 26, 80.
Tussaud *v.* Tussaud, 496.
Tuther *v.* Caralampi, 68, 134, 135.
Tutton *v.* Darke, 374.
Twycross *v.* Dreyfus, 161.
— *v.* Grant, 166, 385.
Tyers *v.* Rosedale Iron Co., 278.
Tyrie *v.* Fletcher, 204.
Tyrringham's case, 934.
Tyson *v.* Smith, 829, 830.

Udell *v.* Atherton, 397, 657.
Ultzen *v.* Nicolls, 95.
Umphelby *v.* McLean, 904.
Underhay *v.* Read, 708.
Underhill *v.* Wilson, 476.
Underwood *v.* Barker, 682.
— *v.* Lewis, 305.
— *v.* Underwood, 566.
Union Bank of Manchester *v.* Beech, 675, 753.
Union Credit Bank case, 345.
Union Electrical, &c. Co. *v.* Electrical Storage Co., 461.
Union Lighterage *v.* London Graving Dock, 421, 517.
United Horseshoe Co. *v.* Stewart, 462.
United Kingdom Assoc. *v.* Nevill, 201.
United Land Co. *v.* G. E. Ry. Co., 517.
United Service Co., *in re*, 334.
United States of America *v.* Wagner, 161.
United Telephone Co. *v.* Donohoe, 463, 464, 465.
— *v.* Harrison, 892, 893, 896.
— *v.* Smith, 41.
— *v.* Tasker, 51, 52.
Unity Banking Assoc., *ex parte*, 688.
Universal, &c. Fire Ins. Co., *in re*, 699.
Universal Stock Exchange *v.* Strachan, 668, 671.
Universo Ins. Co., of Milan *v.* Merchants, &c., Co., 199.
Unwin *v.* Leaper, 258.
Upton *v.* Lord Ferrers, 130.
— *v.* Townend, 711.
Urquhart *v.* Macpherson, 656.

Vadala *v.* Lawes, 700, 702.
Valentini *v.* Canali, 688.
Vallance, *in re*, 682, 683.
— *v.* Falke, 271.
— *v.* Savage, 460.
Valpy *v.* Manley, 257.
— *v.* Oakeley, 92, 276, 278, 279.
— *v.* Sanders, 262.
Van Gelder Co. *v.* Sowerby, &c. Soc., 27, 265, 462, 464, 935.
Van Gheluive *v.* Nerinckx, 652.
Van Fraagh *v.* Everidge, 91.
Van Sandan *v.* Turner, 900.
Van Toll *v.* S. E. Ry. Co., 591, 630.
Vanquelin *v.* Bouard, 701.
Varlay *v.* Whipp, 315, 319.
Vaughan *v.* Manlove, 450.
— *v.* Taff Vale Ry. Co., 441.
— *v.* Watt, 345.
Vavasour *v.* Ormrod, 50.
Vavasseur *v.* Krupp, 161, 864.
Veale *v.* Automatic Boiler Co., 47, 66.
Veitch *v.* Russell, 162, 252.
Venables *v.* Smith, 434.
Venezuela Ry. Co. *v.* Kisch, 657.
Venning *v.* Leckie, 267.
Vernon *v.* Watson, 923.
Verrall *v.* Robinson, 345.
Vertue *v.* Beasley, 379.

Vezey *v.* Rashleigh, 755, 756.
Vibart *v.* Coles, 650.
Vicars *v.* Wilcocks, 365.
Vickers *v.* Siddell, 891, 893.
Victorian Syndicate *v.* Dott, 742.
Viditz *v.* O'Hagan, 688, 689.
Vilbert *v.* Eastern Telegraph Co., 247.
Vinder *v.* Hughes, 113, 597.
Vine, *ex parte*, 101.
— *v.* Sanders, 412.
Vines *v.* Arnold, 705.
Viney *v.* Bignold, 585, 699.
Violett *v.* Sympson, 720, 874.
Vivian *v.* Moat, 234.
Vizetelly *v.* Mudies, 834.
Vlierboom *v.* Chapman, 293.
Voinet *v.* Barrett, 702.
Voisey, *ex parte*, 216.
Von Heyden *v.* Neustadt, 461.
Von Joel *v.* Hornsey, 421.
Vooght *v.* Winch, 646, 647.
Vorley *v.* Barrett, 738, 740.
— *v.* Cooke, 739.
Vortigern, The, 293.
Vowles *v.* Miller, 390.

Waddell *v.* Blockey, 398.
Wade *v.* Dowling, 583.
— *v.* Simson, 177.
Wadham *v.* Marlowe, 217.
Wadling *v.* Oliphant, 247.
Wadsworth *v.* Pickles, 592.
Wagstaffe *v.* Bentley, 519.
Wahlberg *v.* Young, 294.
Wain *v.* Bailey, 609.
Wainman *v.* Kynman, 724.
Wainwright *v.* Bland, 205.
Wait *v.* Baker, 140.
Waite *v.* Jones, 682.
— *v.* N. E. Ry. Co., 884.
Wake *v.* Harrop, 574, 632, 738.
Wakefield *v.* Duke of Buccleuch, 830.
Wakefield Corporation *v.* Cooke, 647.
— *v.* Newbon, 257, 645.
Wakelee *v.* Davis, 717.
Wakelin *v.* L. & S. W. Ry. Co., 441, 442, 884.
Wakeman *v.* Robinson, 497.
Wakley *v.* Cooke, 841.
— *v.* Froggatt, 865.
Walcot *v.* Goulding, 134, 135.
Waldock *v.* Wingfield, 434.
Walke Wallett, The, 479.
Walker's case, 712.
Walker *v.* Barnes, 797.
— *v.* Bartlett, 290.
— *v.* Bradford Old Bank, 89, 96, 586, 587.
— *v.* Brewster, 455.
— *v.* Brogden, 841.
— *v.* Clay, 351.
— *v.* Clements, 728.
— *v.* Clyde, 345.
— *v.* Goe, 450.
— *v.* Hicks, 66.
— *v.* Hobbs, 222.
— *v.* Mid. Ry. Co., 416.
Walker *v.* Moore, 285.
— *v.* Nevill, 754.
— *v.* Perkins, 683.
— *v.* Witter, 213.
Wall *v.* Taylor, 353.
Wallace *v.* Kelsall, 568, 571.
Waller *v.* Loch, 363, 835.
Walley *v.* M'Connell, 44, 899, 900.
Wallingford *v.* Mutual, &c., Society, 241, 398.
Wallis *v.* Hands, 502, 710.
— *v.* Russell, 322.
— *v.* Smith, 32, 241.
Walmesley *v.* Cooper, 754.
Walsh *v.* Lonsdale, 216, 374, 906.
Walstab *v.* Spottiswoode, 261.
Walter *v.* Everhard, 82, 688, 689.
— *v.* Howe, 352.
— *v.* James, 566, 567.
— *v.* Lane, 352.
— *v.* Rumbal, 382.
— *v.* Steinkopff, 352.
Walters *v.* Green, 22, 24, 491, 494.
Walton *v.* Cook, 107.
— *v.* Lavater, 270, 461, 464.
— *v.* Mascall, 179, 253.
Wandsworth *v.* United Telephone Co., 408.
Wankford *v.* Wankford, 167, 651.
Wanless *v.* N. E. Ry. Co., 394.
Wanton *v.* Coppard, 771.
Warburton *v.* G. W. Ry. Co., 436.
— *v.* Parke, 911.
Ward *v.* Bank of New Zealand, 674, 675, 676.
— *v.* Beck, 200.
— *v.* Conquest, 359.
— *v.* Eyre, 211.
— *v.* Hobbs, 397.
— *v.* Londesborough, 261.
— *v.* Lowndes, 429, 878.
— *v.* Macauley, 500.
— *v.* Morse, 537.
— *v.* National Bank, 753.
— *v.* Robins, 339.
— *v.* S. E. Ry. Co., 342.
— *v.* Wallis, 257.
— *v.* Weeks, 365.
Warden *v.* Stone, 272.
Warder *v.* Saunders, 104, 594.
Warlow *v.* Harrison, 92.
Warne *v.* Lawrence, 827.
— *v.* Seebohm, 353, 354, 355.
Warner *v.* M'Kay, 783.
— *v.* Riddiford, 497.
Warre *v.* Calvert, 619.
Warrick *v.* Queen's College, Oxford, 340.
Warrington *v.* Furbor, 179.
Warwick *v.* Bruce, 245.
— *v.* Foulkes, 840, 928.
— *v.* Nairn, 601, 602.
Washborn *v.* Black, 379.
Washington Co., *in re*, 637.
Waterford Ry. Co. *v.* Pidcock, 636.
Waterhouse *v.* Keen, 257.
Waters *v.* Monarch Ins. Co. 207.
— *v.* Thanet, 253.

Watkin *v.* Hall, 833, 841.
Watkins *v.* Figg, 129.
— *v.* Nash, 578.
— *v.* Rymill, 95.
— *v.* Watkins, 586.
Watson, *ex parte*, 347.
— *v.* Cave, 26.
— *v.* Christie, 530, 922.
— *v.* Earl Charlemont, 261.
— *v.* Gray, 503.
— *v.* Hawkins, 52, 562.
— *v.* Holliday, 104.
— *v.* Mid-Wales Ry. Co., 587, 588, 774.
— *v.* N. Met. Tram. Co., 39.
— *v.* Spratley, 290.
— *v.* Weekes, 445.
— *v.* White, 361.
Watters *v.* Smith, 567.
Watts *v.* Kelson, 950.
— *v.* Rees, 774.
Waugh *v.* Cope, 725.
Way *v.* G. E. Ry. Co., 627.
— *v.* Hearn, 397.
Wayman *v.* Bend, 114.
— *v.* Hilliard, 70.
Waynes Co. *v.* Radford, 38.
Weardale Coal Co. *v.* Hodson, 816.
Weaver *v.* Bush, 923, 924, 925.
— *v.* Ward, 496, 862.
Webb *v.* Beavan, 562, 942.
— *v.* Bird, 422.
— *v.* East, 835, 837.
— *v.* Fairmaner, 758.
— *v.* Herne Bay Commissioners, 429.
— *v.* Hewitt, 568.
— *v.* Hurrell, 589.
— *v.* James, 134.
— *v.* Kirkby, 170.
— *v.* Page, 630.
— *v.* Smith, 88, 91, 587.
— *v.* Spicer, 611, 754.
Webber *v.* Lee, 480.
Webster *v.* British Empire Ass. Co., 211.
— *v.* Emery, 251.
— *v.* Petre, 196.
— *v.* Watts, 925, 929.
Weeding *v.* Aldrich, 849.
Weeks *v.* Propert, 76.
Weeton *v.* Woodcock, 348.
Wegg-Prosser *v.* Evans, 703, 704, 737.
Weidemann *v.* Walpole, 245.
Weiner *v.* Gill, 759.
Weir *v.* Barnett, 401.
— *v.* Bell, 398, 401.
Welby *v.* Drake, 566.
— *v.* West Cornwall Ry. Co., 142.
Welch *v.* Ireland, 134, 135.
Welcome *v.* Upton, 819, 821.
Welchman *v.* Sturgis, 168.
Weld *v.* Baxter, 226.
Weldon *v.* De Bathe, 411, 858.
— *v.* Neal, 16, 679, 720.
Welland Ry. Co. *v.* Berrie, 636.
— *v.* Blake, 161, 637, 719.
Wellesley *v.* Wellesley, 507.
Wells, *in re*, 650.
Wells *v.* Abbott, 741.
— *v.* Abrahams, 923.
— *v.* Girling, 572.
— *v.* Hopkins, 601, 602.
— *v.* Joyce, 741.
— *v.* Kingston-upon-Hull, 643.
— *v.* Moody, 380.
— *v.* Ody, 454.
Welsbach, &c. Co. *v.* New Incandescent Gas Co., 892.
Wenlock *v.* River Dee Co., 302, 633.
Wennhak *v.* Morgan, 363.
Wentworth *v.* Bullen, 585.
— *v.* Chevill, 718.
Werderman *v.* Société Générale, 29.
Werner *v.* Humphreys, 171.
Werth *v.* London Loan Co., 373.
West, *in re*, 791.
— *v.* Baxendale, 927.
— *v.* Blakeway, 755.
— *v.* Francis, 358.
— *v.* Nibbs, 379.
— *v.* Smallwood, 926.
West Cumberland Iron. Co. *v.* Kenyon, 453, 510.
Westacott *v.* Beavan, 537.
Western Building Soc. *v.* Martin, 302.
West Ham Charity *v.* East London Waterworks, 505.
West London Bank *v.* Kitson, 398, 739.
Westmoreland Slate Co. *v.* Feilden, 212, 271.
Westoby *v.* Day, 589.
West of England Ins. Co. *v.* Isaacs, 208.
Weston, *in re*, 857.
— *v.* Fidler, 234.
Westport Coal Co. *v.* McPhail, 292.
Westropp *v.* Solomon, 261.
Westwick *v.* Theodor, 582.
Westwood *v.* Cowne, 55.
Wetherell *v.* Julius, 101.
Weymouth *v.* Rich, 12.
Whaite *v.* L. & Y. Ry. Co., 626.
Whaley *v.* Laing, 512, 517.
Wharton *v.* L. & Y. Ry. Co., 149, 442.
— *v.* Naylor, 478.
Whatman *v.* Pearson, 434.
Wheatley *v.* Patrick, 885.
— *v.* Williams, 71.
Wheaton *v.* Maple, 420, 421, 474, 871.
Wheeldon *v.* Burrows, 421, 511, 517.
Wheeler *v.* Branscombe, 706, 910.
— *v.* Horne, 69.
— *v.* Senior, 552.
— *v.* Stevenson, 712.
— *v.* United Telephone, 750, 897.
— *v.* Whiting, 497.
Wheelton *v.* Hardisty, 695.
Whelan *v.* Palmer, 578.
Whelpdale's case, 645.
Whincup *v.* Hughes, 83, 261, 583.
Whitbourne *v.* Williams, 433.
Whitbread *v.* Watt, 284.
White, *ex parte*, 76.
— *in re*, 241, 243.
— *v.* Bailey, 502.
— *v.* Barry Ry. Co., 393.

White *v.* Cuyler, 736.
— *v.* France, 454.
— *v.* Garden, 348.
— *v.* G. W. Ry. Co., 628.
— *v.* Hindley Local Board, 408, 458.
— *v.* Jameson, 453.
— *v.* Mellin, 363, 481, 482.
— *v.* Morris, 898.
— *v.* Mullett, 247.
— *v.* Turnbull, 80.
Whitehead *v.* Howard, 725.
— *v.* Tattersall, 585, 647.
— *v.* Walker, 115, 116, 721.
Whitehouse, *in re*, 635, 637.
— *v.* Fellowes, 451, 874.
Whiteley's case, 657.
Whiteley *v.* Pepper, 459.
Whitely *v.* Edwards, 190.
Whiteman *v.* Hawkins, 306.
Whitfield *v.* Lord Le Despencer, 442.
— *v.* S. E. Ry. Co., 360.
Whitham *v.* Kershaw, 507.
Whithead *v.* Greetham, 72.
Whitley *v.* Loftus, 82.
Whitmore *v.* Smith, 583.
Whitney *v.* Moignard, 365.
Whittaker *v* Jackson, 646.
— *v.* Kershaw, 858.
Whitwham *v.* Westminster Coal Co., 504.
Whitwood Chemical Co. *v.* Hardman, 198, 248.
Whitworth *v.* Darbishire, 166.
— *v.* Smith, 380.
Whyler *v.* Bingham R.C., 409.
Whyte *v.* Tyndall, 20.
Wickham *v.* Hawker, 480, 941, 942.
Wiesener *v.* Rackow, 89.
Wiffin *v.* Kincard, 497.
Wiggett *v.* Fox, 881.
Wigglesworth *v.* Dallison, 221, 709.
Wightman *v.* Townroe, 267.
Wigley *v.* Ashton, 216.
Wigsell *v.* School for Blind, 56.
Wilbraham *v.* Snow, 140.
Wilby *v.* Elgee, 177, 725.
Wilcox *v.* Steel, 431.
Wild *v.* Harris, 245.
— *v.* Williams, 753.
Wilde *v.* Clarkson, 134, 135.
— *v.* Waters, 348.
Wilder *v.* Speer, 500, 849.
Wildes *v.* Dudlow, 179.
Wiles *v.* Woodward, 646.
Wilkes *v.* Hungerford Market, 459.
Wilkins *v.* Boutcher, 937.
Wilkinson *v.* Alston, 73.
— *v.* Byers, 566.
— *v.* Calvert, 234.
— *v.* Downton, 443.
— *v.* Gaston, 251.
— *v.* Hall, 470.
— *v.* Haygarth, 503.
— *v.* Johnston, 113, 261, 580.
— *v.* Kirby, 466, 851, 936, 937.
— *v.* Lindo, 753.
— *v.* Proud, 822.
— *v.* Unwin, 605.
Wilkinson *v.* Verity, 848.
Wilks *v.* Wood, 68, 210, 211.
Willesden Local Board, *in re*, 84, 85.
Willets *v.* Green, 734.
Williams *v.* Archer, 371.
— *v.* Bayley, 683.
— *v.* Birmingham Battery Co., 436, 881.
— *v.* Blackwell, 852.
— *v.* Bosanquet, 227.
— *v.* Briscoe, 283.
— *v.* Bryant, 43.
— *v.* Burrell, 222, 285.
— *v.* Byrne, 248, 251.
— *v.* Everett, 263.
— *v.* Deese, 346.
— *v.* Glenister, 932.
— *v.* G. W. Ry. Co., 392, 523.
— *v.* Hathaway, 253.
— *v.* Hayward, 227, 712.
— *v.* Heales, 172, 225.
— *v.* Hedley, 258.
— *v.* Hunt, 68, 264, 523.
— *v.* James, 953.
— *v.* Jones, 212, 517, 720.
— *v.* Lee, 171.
— *v.* London Commercial Co., 571.
— *v.* Mersey Docks, 388, 903.
— *v.* Millington, 90.
— *v.* Morland, 514.
— *v.* Mostyn, 477.
— *v.* North China Ins. Co., 199.
— *v.* North's Nav. Collieries, 809.
— *v.* Ogle, 43.
— *v.* Price, 920.
— *v.* Reynolds, 279.
— *v.* Smith, 370.
— *v.* Walker, 906.
— *v.* Waring, 130.
— *v.* Wilcox, 397, 505, 509, 944, 954.
— *v.* Williams, 178, 220, 652.
— *v.* Woods, 221.
Williamson *v.* Barbour, 78.
— *v.* Freer, 835.
— *v.* L. & N. W. Ry. Co., 6, 12, 776.
Willins *v.* Smith, 689.
Willis, *in re*, 67, 471.
— *v.* Baldwin, 658.
— *v.* De Castro, 754.
— *v.* Earl Beauchamp, 13, 564.
— *v.* Earl Howe, 876.
— Maclachlan, 929.
Willison *v.* Patteson, 579.
Willmott *v.* Freehold, &c. Co., 53.
Willoughby, *ex parte*, 867.
— *v.* Backhouse, 380.
— *v.* Swinton, 135.
Wills *v.* Murray, 636.
Willson *v.* Love, 241.
Wilson *v.* Balcarres Steamship Co., 29.
— *v.* Birkenhead Ry. Co., 152.
— *v.* Church, 23, 24.
— *v.* Finch-Hatton, 222.
— *v.* Ford, 191.
— *v.* Glosop, 191.

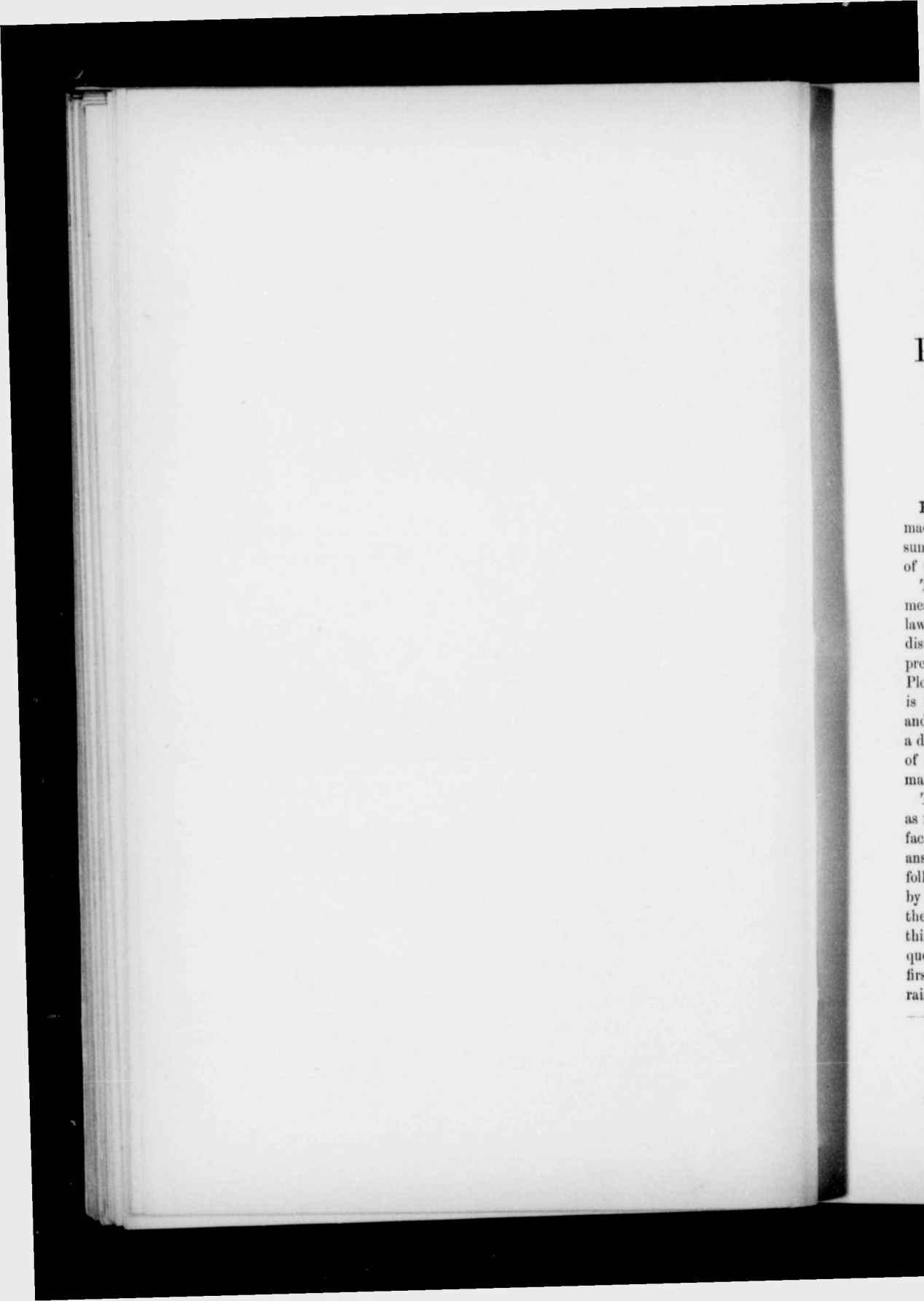
Wilson *v.* Hart, 227.
— *v.* Hicks, 55.
— *v.* Jones, 200.
— *v.* L. & Y. Ry. Co., 142, 146.
— *v.* Mackay, 902.
— *v.* Mackreth, 502, 505.
— *v.* Mayor of Halifax, 888.
— *v.* Merry, 436, 437.
— *v.* Nightingale, 382.
— *v.* Ray, 258.
— *v.* Robinson, 840.
— *v.* Thornbury, 260.
— *v.* Union Oil Mills, 270.
— *v.* Waddell, 453, 510.
— *v.* West Hartlepool Ry. Co., 644.
— *v.* Willes, 830.
— *v.* Wilson, 71, 572, 739.
— *v.* Xantho, 201, 208, 292, 298, 784, 785.
— *v.* Zulueta, 574.
Wilton *v.* Dann, 706.
— *v.* Saffery, 638.
Wiltshear *v.* Cottrell, 349.
Wiltshire Iron Co. *v.* G. W. Ry. Co., 868.
Wimbledon Conservators *v.* Dixon, 517.
Winch *v.* Thames Conservators, 361, 442.
Winchilsea *v.* Beckley, 883, 923.
Wind *v.* Nineteenth Century, &c. Soc., 719.
Winder *v.* Guardians of Hull, 305.
Windle *v.* Andrews, 110.
Winkfield, The, 349.
Winn *v.* Bull, 768.
Winsmore *v.* Greenback, 412, 496.
Winstone *v.* Linn, 582.
Winter, *in re*, 778.
— *v.* Trimmer, 242.
Winterbottom *v.* Lord Derby, 452.
Wintle *v.* Freeman, 915.
Wirral Waterworks Co. *v.* Lloyd, 361.
Wisdom *v.* Hodson, 925.
Wise *v.* Metcalfe, 372.
Wiseman *v.* Booker, 392.
Witham *v.* Vane, 557.
Withington *v.* Tate, 88.
Witt, *in re*, 867.
— *v.* Amis, 857.
Wittersheim *v.* Lady Carlisle, 720.
Wolfe *v.* Mathews, 305.
Wolff *v.* Horncastle, 691.
Wollaston *v.* Hakewill, 230, 231, 654.
Wolmerhausen, *in re*, 675, 676.
— Gullick, 255, 595, 686.
Wolverhampton Waterworks Co. *v.* Hawkesford, 152, 271, 360, 636.
Wood *v.* Adams, 364.
— *v.* Beard, 907.
— *v.* Boozey, 352, 827.
— *v.* Brown, 364.
— *v.* Clarke, 377.
— *v.* Durham, Earl of, 6, 369, 831, 842, 922.
— *v.* Goodwin, 540.
— *v.* Gunston, 836.
— *v.* Kerry, 648.
— *v.* Leadbitter, 865, 932.
— *v.* McCarthy, 26.
Wood *v.* Manley, 865, 939, 942.
— *v.* Nunn, 373.
— *v.* Priestner, 179.
— *v.* Smith, 779.
— *v.* Waud, 509, 511.
Wooderman *v.* Baldock, 500.
Woodger *v.* G. W. Ry. Co., 144.
Woodhouse *v.* Walker, 385, 506, 507.
Woodland *v.* Fear, 96, 261.
Woodman *v.* Chapman, 189.
Woods *v.* Dean, 117, 118.
Woodward *v.* Gyles, 242.
— *v.* L. & N. W. Ry. Co., 626.
Woolcott *v.* Peggie, 770.
Woolf *v.* City Steambeat Co., 158.
— *v.* Hamilton, 667, 670.
Woolfe *v.* Horne, 90, 92.
Woollam *v.* Hearn, 737, 738.
Woolley *v.* Broad, 356, 859.
Worall *v.* Grayson, 744.
Worsley *v.* Wood, 699.
Worth *v.* Gilling, 439.
— *v.* Terrington, 552, 932.
Worthington *v.* Curtis, 205.
— *v.* Hulton, 429.
— *v.* Wigley, 616.
Wragg, *in re*, 495.
Wray *v.* Milestone, 70, 267, 567.
Wren *v.* Holt, 319, 322.
Wrexham Ry. Co., *in re*, 302.
Wright *v.* Burroughes, 937, 941.
— *v.* Child, 476.
— *v.* Clements, 364.
— *v.* Court, 927.
— *v.* Davies, 372.
— *v.* Hitchcock, 461, 891.
— *v.* Lee, 386.
— *v.* Leonard, 410, 688.
— *v.* L. & N. W. Ry. Co., 436.
— *v.* London Omnibus Co., 863.
— *v.* Midland Ry. Co., 148.
— *v.* Pearson, 440.
— *v.* Rowbotham, 371, 847.
— *v.* Stavert, 218, 502.
— *v.* Watts, 618.
— *v.* Williams, 517, 944, 954.
— *v.* Woodgate, 363, 835.
Wulff *v.* Jay, 676.
Wyatt *v.* Harrison, 484, 489.
— *v.* Hodson, 726.
— *v.* Met. Board of Works, 154.
— *v.* Palmer, 425.
— *v.* Rosherville, &c. Co., 54.
— *v.* White, 935.
Wyld *v.* Pickford, 141, 346, 626.
Wylde *v.* Radford, 867.
Wylie *v.* Birch, 477.
Wynne *v.* Tempest, 555, 556.

Xenos *v.* Danube, &c. Ry. Co., 276.
— *v.* Fox, 201.
— *v.* Wickham, 578.

Yarborough *v.* Bank of England, 359.
Yard *v.* Ford, 431.

Yardley *v.* Hine, 922.
Yates, *in re*, 67.
— *v.* Aston, 264.
— *v.* Bell, 263.
— *v.* Terry, 589.
Yeadon Local Board, *in re*, 583.
Yearsley *v.* Hearne, 427.
Yeatman *v.* Dempsey, 519.
Ydum, The, 902.
Yellowly *v.* Gower, 506.
Yeomans *v.* Williams, 568.
Yglesias *v.* River Plate Bank, 616.
York *v.* Stowers, 69.
Yorkshire Prov. Co. *v.* Gilbert, 37, 40.
Yorkshire, &c. Council *v.* Holmfirth, 514.
Yorkshire Waggon Co. *v.* Newport Coal Co., 557.
York Tramways Co. *v.* Willows, 636.
Young *v.* Austen, 611.
— *v.* Bankier Distillery Co., 509, 510.
Young *v.* Chalkley, 198.
— *v.* Cole, 261.
— *v.* Corporation of Leamington, 643, 644.
— *v.* Davis, 408.
— *v.* Grote, 97.
— *v.* Hichens, 500.
— *v.* Higgon, 721, 888.
— *v.* Kitchin, 587, 588.
— *v.* Macrae, 482.
— *v.* Murphy, 732.
— *v.* Naval, &c. Soc., 156.
— *v.* Raincock, 646.
— *v.* Spencer, 473, 475.

Zenobi *v.* Axtell, 364.
Zieremberg *v.* Labouchere, 39, 841.
Zunz *v.* S. E. Ry. Co., 629.



PRECEDENTS OF PLEADINGS.

CHAPTER I.

INTRODUCTORY OBSERVATIONS.

Pleadings and their object.]—Pleadings are printed or written statements made by and delivered between the parties to an action, setting forth in a summary form the material facts relied upon by them respectively in support of their claim or defence.

The principal objects of pleading are, first, to ascertain and define, by means of the statements of the parties, the issues of fact and questions of law to be decided between them, and secondly, to give to each of the parties distinct notice of the case intended to be set up by the other, and thus to prevent either party from being taken by surprise at the trial or hearing. Pleadings are also useful as supplying a brief summary of the case which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and for the purpose of preserving a distinct and permanent record of the questions raised in the action, and of the issues decided therein, and of thus preventing future litigation of matters already adjudicated upon between the parties.

The general principles on which the system of pleading is founded are as follows : The plaintiff by his "statement of claim" alleges the material facts on which he relies in support of his case (*a*). The defendant in answer thereto delivers a "defence," in which he may take all or any of the following courses :—first, he may deny or refuse to admit the facts stated by the plaintiff (*b*) ; secondly, he may confess or admit them, and avoid their effect by asserting fresh facts which afford an answer thereto (*c*) ; thirdly, he may admit the facts stated by the plaintiff, and may raise a question of law as to their legal effect (*d*). If the defendant adopts the first or third of these three courses, a question of fact or of law is at once raised between the parties. If he adopts the second one, the plaintiff may

(*a*) See *post*, p. 42.
(*b*) See "*Denials*," *post*, p. 527.
(*c*) See "*Defences other than Denials*," *post*, p. 531.
(*d*) See "*Proceedings in lieu of Demurrer*," *post*, p. 561.

reply (*e*), first, by denying the fresh facts alleged by the defendant; or, secondly, by admitting them, and alleging other facts which avoid their effect; or, thirdly, by raising a question of law as to their legal effect. If the plaintiff pleads a reply of the second kind, that is, if he replies by way of confession and avoidance, the defendant has the same courses open to him in pleading a rejoinder (*f*), and so the parties proceed till it is ascertained what are the material facts which are asserted by the one side and denied by the other, or what are the questions of law (if any) which are in dispute between them.

In actions transferred to the "Commercial List" the pleadings if ordered are called "Points of Claim" and "Points of Defence." In substance these points are similar to the ordinary pleadings, but instead of the facts and matters relied on being stated fully, they are stated briefly and in a concise form, the point being rather indicated than pleaded at length.

Issues.]—When the result of the pleading on both sides is that a material fact is affirmed on the one side and denied on the other, the question thus raised between the parties is called an *issue of fact*. When, on the other hand, the result of the pleading is, that one party answers his opponent's pleading by stating an objection in point of law, and the other does not thereupon amend his pleading so as to obviate the objection, the last-mentioned party is deemed to deny the validity of the objection in point of law, and the legal question thus raised between the parties may still be called an *issue of law*.

As the parties are now at liberty to combine various claims and various defences, &c., in one pleading respectively, the pleadings in an action may raise several issues either of fact or of law, or may raise issues of both kinds.

Classification of actions.]—Personal actions, such as are ordinarily brought in the King's Bench Division, may in general be conveniently divided into two classes of actions, viz., Actions on Contracts, and Actions for Wrongs.

Before the Common Law Procedure Act, 1852, and even to some extent subsequently thereto, all personal actions in the Superior Courts of Common Law were classed under the two divisions of actions of contract and actions of tort, the former comprising the forms of action known as actions of *assumpsit*, *debt*, and *covenant*, and the latter, the forms of action known as actions of *trespass*, *case* (*g*), *trover* (*h*), *detinue* (*i*) (except in some points of view), and *replevin* (*k*). The effect of the Rules under the Judicature Acts has been

(*e*) See *post*, p. 545.
(*f*) See *post*, p. 550.
(*g*) See "*Limitation, Statutes of*," *post*, p. 718.
(*h*) See "*Conversion*," *post*, p. 344.
(*i*) See "*Detention of Goods*," *post*, p. 379.
(*k*) See 1 Chit. Pl. 7th ed. p. 109.

finally to abolish the old forms of action above referred to (*l*), and the distinctions between them are now chiefly material for the explanation of some of the earlier decisions of the Courts, and for the construction of certain statutes passed previously to the Judicature Acts (*m*).

But the division of personal actions into actions on contracts (or "Actions founded on Contract") and actions for wrongs (or "Actions founded on Tort") is recognised by the present rules (*n*), and is still of importance as regards the provisions of s. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), as amended by the County Courts Act, 1903 (3 Edw. 7, c. 42, s. 3), with respect to costs, and of ss. 65 and 66 of the same Act with regard to the remission of actions to the County Court (*o*). It should be added, however, that causes of action for wrongs arising out of contract, that is, claims for the breach of some duty arising out of a contract, partake to some extent of the character both of breaches of contract and of wrongs, and such actions, therefore, cannot be considered as falling exclusively within either of the two above-mentioned classes of action (*p*).

Rules now in force as to Pleading.]—Pleading in actions in the High Court of Justice is now mainly regulated by the "Rules of the Supreme Court, 1883" (*q*). Many of the former statutory enactments with respect to pleading which had been virtually repealed or superseded by the provisions of the Judicature Acts and of the rules thereunder, have been repealed by the Civil Procedure Acts Repeal Act, 1879, and the Statute Law Revision and Civil Procedure Act, 1883.

The Judicature Act, 1875, s. 33 (2), expressly provides that all enactments inconsistent with that Act or the Judicature Act, 1873, are repealed, and it would seem also that under the provisions of the Judicature Act, 1875, any then existing statutes relating to procedure which are inconsistent with the present rules must be regarded as virtually or impliedly repealed (*r*).

(*l*) *Bryant* v. *Herbert*, 3 C. P. D. at p. 390; 47 L. J. C. P. 670; *Pontifex* v. *Mid. Ry. Co.*, 3 Q. B. D. at p. 26; 47 L. J. Q. B. 28; *Gibbs* v. *Guild*, 9 Q. B. D. at p. 67; 51 L. J. Q. B. 313; and see *Taylor* v. *M. S. & L. Ry. Co.*, [1895] 1 Q. B. 134; 64 L. J. Q. B. 6; *Kelly* v. *Met. Ry. Co.*, [1895] 1 Q. B. 944; 64 L. J. Q. B. 568; *Sachs* v. *Henderson*, [1902] 1 K. B. 612; 71 L. J. K. B. 392.

(*m*) See "*Limitation, Statutes of*," *post*, p. 717; "*Not Guilty by Statute*," *post*, p. 886.

(*n*) See R. S. C., 1883, App. C., Sects. IV., V. and VI.

(*o*) See cases cited note (*l*), *supra*.

(*p*) See "*Carriers*," *post*, p. 139; *Sachs* v. *Henderson*, *supra*.

(*q*) See the Judicature Act, 1875, s. 17, and the introduction to the R. S. C., 1883; and Appendix O.

(*r*) See the Judicature Act, 1875, s. 17, and 46 & 47 Vict. c. 49, s. 6 (c); and see *In re Mills' Estate*, 34 Ch. D. 24; 56 L. J. Ch. 60. As to the effect of the repeal by the Judicature Acts of inconsistent enactments, see *Garnett* v. *Bradley*, 3 App. Cas. 944; 48 L. J. H. L. 186; *Snelling* v. *Pulling*, 29 Ch. D. 85; *Stokes* v. *Stokes*, 19 Q. B. D. 62. 419; 56 L. J. Q. B. 494; *Rockett* v. *Clippingdale*, [1891] 2 Q. B. 293; 60 L. J. Q. B. 782. *Buckley* v. *Hull Docks Co.*, [1903] 2 Q. B. 93; 62 L. J. Q. B. 449; *Kirby* v. *North British Insurance Co.*, [1896] 2 Q. B. 99; 65 L. J. Q. B. 527.

The Judicature Act, 1875, s. 21, contains a saving of previously existing forms and methods of procedure (*mutatis mutandis*) in so far as they are not inconsistent with the Judicature Acts or with any of the rules thereunder (*s*); and it is provided by Ord. LXXII., r. 2, of the present rules that "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force" (*t*). The word "Acts" in that rule means the Supreme Court of Judicature Acts, 1873 to 1879, the Appellate Jurisdiction Act, 1876, and the Supreme Court of Judicature Act, 1881 (*u*).

The present work treats only of the pleadings in use in the King's Bench Division.

Pleadings—when necessary.]—In every action the writ of summons is required to be indorsed with a statement of the nature of the claim made by the plaintiff. In cases within Ord. III., r. 6 (*post*, p. 65), this statement may be in the form of and constitute a statement of claim. In cases within Ord. XIII., r. 12, if the defendant make default in entering an appearance, the plaintiff may without leave file a statement of claim. When the writ is specially indorsed with a statement of claim the defendant must within ten days from the time limited for appearance deliver a defence, unless in the meantime the plaintiff serves a summons for directions under Ord. XXX., or a summons for judgment under Ord. XIV. Except in the cases above mentioned no pleadings can now be delivered without an order expressly authorising their delivery. Such orders are made in all proper cases on a summons for directions under Ord. XXX.

Under Ord. XVIIIA. the plaintiff may indorse on his writ a statement that he proposes to proceed to trial without pleadings. If he does so the action will so proceed, unless the defendant gets an order for a statement of claim. This procedure is not often adopted in the King's Bench Division.

Date, title, and description, &c., of pleadings.]—By Ord. XIX., r. 11, "Every pleading shall be delivered between parties and shall be marked on the face with the date of the day on which it is delivered, the reference to the letter and number of the action, the Division to which" "the action is assigned," "the title of the action, and the description of the pleading, and shall be indorsed with the name and place of business of the solicitor and agent, if any, delivering the same, or the name and address of the party delivering the same, if he does not act by a solicitor."

The "letter and number" are the letter and number by which the action is distinguished in the cause book. (See Ord. V., r. 13, and Rule 3 of the Central Office Practice Rules.)

(*s*) See also s. 23 of the Judicature Act, 1873, as to the mode of exercising jurisdiction.

(*t*) See *Jackson* v. *Litchfield*, 8 Q. B. D. at p. 477; 57 L. J. Q. B. at p. 328; *Hume* v. *Somerton*, 25 Q. B. D. 239; 59 L. J. Q. B. 420.

(*u*) See Ord. LXXI., r. 1.

If the action is proceeding in a district registry, the name of the district registry should be placed immediately under the name of the Division of the High Court.

The description of the pleading should be inserted as a heading at the commencement of the body of it. (See the form set out *post*, 35.)

As to the heading of an amended pleading, see "*Amendment of Pleadings*," *post*, p. 17.

The title of the action is stated on the writ (see Ord. II., r. 3; R. S. C., 1883, App. A., Part I., Nos. 1—5), and, except in cases of changes authorised by the Rules, remains throughout the proceedings in an action the same as that stated on the writ, and must be marked on the pleadings accordingly. (See Ord. XIX., r. 11, above cited; and see "*Statement of Claim*," "*Parties to Action*," *post*, pp. 42, 43, 19; and "*Counterclaims*," *post*, p. 534.) If, in any case allowed by the rules, as by reason of deaths of parties, or the non-appearance of some of several defendants, the parties between whom the pleading is delivered do not correspond with those mentioned in the title of the action, some short statement or suggestion of the fact of the death or non-appearance should be inserted in the title or pleading to explain the discrepancy. (See forms at pp. 60, 61, 104, *post*; "*Misnomer*," *post*, p. 43; "*Parties*," *post*, p. 32; see further, "*Executors*," *post*, p. 174; "*Counterclaims*," *post*, pp. 534 *et seq.*)

Mode of Pleading.]—Under the practice now in force (see Ord. XIX., r. 1) the principal rules to be observed in pleading are as follows:—

By Ord. XIX., r. 2, pleadings are to be "as brief as the nature of the case will admit," and the costs occasioned by any unnecessary prolixity may be ordered "to be borne by the party chargeable with the same."

By Ord. XIX., r. 4, "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures, and not in words."

By Ord. XIX., r. 5, "The forms in Appendices C., D., and E., when applicable, and where they are not applicable, forms of the like character, as near as may be, shall be used for all pleadings, and where such forms are applicable and sufficient, any longer forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be."

Under these rules it is a first principle of pleading that facts only are to be stated, and except where the party pleading relies upon foreign or colonial law, &c., or private Acts of Parliament (as to which see *post*, p. 10), matters of law or mere inferences of law should not be stated as facts.

Mere evidence of facts, as distinguished from the facts themselves, must not be pleaded (Ord. XIX., r. 4, *supra*). This rule applies, *inter alia*, to

admissions relied upon merely by way of evidence. (See *Davy* v. *Garrett*, 7 Ch. D. 473, 485; 46 L. J. Ch. 218; *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787, 793; 49 L. J. Ch. 559, decided under the former rules; *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410, 414; 58 L. J. Ch. 139; *Briton Medical Life Assoc.* v. *Britannia Fire Assoc.*, 59 L. T. 888.)

The same prohibition of pleading evidence was contained also in the repealed Ord. XIX., r. 4, with reference to which Brett, L.J., made the following observations: "The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle, C.J., expressed it in this way. He said there were facts that might be called the *allegata probanda*, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts" (*Philipps* v. *Philipps*, 4 Q. B. D. at pp. 132, 133; 48 L. J. Q. B. 135).

The facts pleaded should be pleaded with "certainty," that is, they should be distinctly stated as facts, and not be left to be *inferred* from vague or ambiguous expressions, or from statements of circumstances consistent with a different conclusion. (See "*Fraud*," *post*, p. 398; *Philipps* v. *Philipps*, *supra*.) It is one of the principal objects of the present rules to prevent unnecessary prolixity in the pleadings. Only such facts should be pleaded as are material to the case of the party pleading (Ord. XIX., r. 4; *Millington* v. *Loring*, 6 Q. B. D. 190; 50 L. J. Q. B. 214). The material facts must be stated in a summary form, and as briefly as the nature of the case will admit, and the pleader is required to adopt or follow, as nearly as the circumstances will allow, the concise forms which are given in Appendices C., D., and E. (See Ord. XIX., rr. 2, 4, 5, 15, cited pp. 5, 523; *Philipps* v. *Philipps*, *supra*; *Davy* v. *Garrett*, 7 Ch. D. 473, 480—482; 47 L. J. Ch. 218; *Scott* v. *Sampson*, 8 Q. B. D. 491; 51 L. J. Q. B. 380; *Davis* v. *James*, 26 Ch. D. 778; 58 L. J. Ch. 523; *Darbyshire* v. *Leigh*, [1896] 1 Q. B. 554; 65 L. J. Q. B. 360.) The material facts which are required to be pleaded in a statement of claim in an action for damages are not confined to facts which are material as constituting the cause of action, but include also facts which are material as showing the nature and extent of the injury in respect of which damages are sought to be recovered, and which are intended to be proved at the trial in aggravation of damages. (See *Millington* v. *Loring*, 6 Q. B. D. 190; 50 L. J. Q. B. 214; *Lumb* v. *Beaumont*, 49 L. T. 772; *Whitney* v. *Moignard*, 24 Q. B. D. 630; 59 L. J. Q. B. 324; though see *Wood* v. *Earl of Durham*, below cited.) It has been held, however, that a defendant is not in general entitled to plead in his defence facts which do not affect the cause of action and merely go in mitigation of damages (*Wood* v. *Earl of Durham*, 21 Q. B. D. 501; 57 L. J. Q. B. 547).

By Ord. XIX., r. 6, "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary

beyond such as are exemplified in the forms aforesaid, particulars (with dates and items, if necessary) shall be stated in the pleading; provided that, if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading." (See "*Particulars*," *post*, p. 37.)

The forms referred to in the above rule are the forms in Appendices C., D., and E. (See Ord. XIX., r. 5, cited *ante*, p. 5.)

The division of a pleading into paragraphs is only required "when necessary" (Ord. XIX., r. 4, *supra*). It appears from the forms given in the Appendices, that pleadings in simple cases may be properly stated in a single paragraph, although such paragraph may contain several distinct allegations. But by Ord. XX., r. 7, "Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counterclaim founded upon separate and distinct facts." In such cases, therefore, the pleading should be divided into paragraphs so as to arrange the different facts relied upon in a distinct and convenient form. Even in the statement of a single cause of action or ground of defence, &c., the same course may also be necessary where the case of the party pleading involves the statement of various distinct facts.

In actions on contracts the pleading should state the date of the contract, and state whether it was in writing, or verbal, or implied. (See the Forms in App. C. and D.; *Turquand* v. *Fearon*, 40 L. T. 543.) If the contract was in writing, the pleading should describe the document or documents sufficiently to identify it or them, and if implied the facts from which the implication arises should be stated. If the party pleading does not state whether the contract relied upon by him was in writing or not, or does not give sufficient particulars with respect to it, the opposite party may, where necessary, obtain an order for particulars as to these matters. (See Ord. XIX., r. 7, cited "*Particulars*," *post*, p. 37.)

In stating a written contract, or other document relied upon, whether under seal or not, it is open to the pleader either to state it according to its legal effect, or where the precise words of the document are material and can be stated without prolixity, to set out the document itself (or the material parts thereof) *verbatim*. Ord. XIX., r. 21, provides that "Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material."

Where the legal effect of the document is stated, the pleader takes upon himself to give the true meaning of the instrument, whatever its terms may be; where the document is set out *verbatim*, he leaves the construction

of it to the Court, except that the meaning is often necessarily assumed in alleging the breach. In the generality of cases, the best course is to state the legal effect of the documents relied on, especially where they are lengthy or numerous; but where the meaning is doubtful, and it is wished to raise in the easiest and most direct form the question of their sufficiency to support the action, it may be advisable to set them out *verbatim* where that can be done without unduly lengthening the pleading. (See App. C., Sect. IV., No. 10, cited *post*, p. 180.)

A pleading which sets out *verbatim* immaterial documents, or documents which are only material as containing matter of evidence (as, for instance, admissions by the opposite party), is liable to be struck out under Ord. XIX., r. 27, cited *post*, p. 11. (See *Davy* v. *Garrett*, *post*, p. 11.) In some cases, however, the precise words of a document not only are material, but must be necessarily inserted *verbatim* in the pleading. Thus the plaintiff in an action for libel is bound to state the precise words of the libel complained of, and must therefore set out *verbatim* in his statement of claim so much of the document in question as contains the alleged libel (*Harris* v. *Warre*, 4 C. P. D. 125; 48 L. J. C. P. 310; *Derbyshire* v. *Leigh*, [1896] 1 Q. B. 554; 65 L. J. Q. B. 360; see "*Defamation*," *post*, p. 364).

Where the legal effect of a document is stated, it is not necessary to follow the words of the instrument (1 Marsh. 216, 217). Generally, however, the safest and best course, even in pleading an instrument according to its legal effect, is to follow the terms and order of the document itself, so far as practicable with due regard to conciseness, instead of attempting to reform it or to use supposed equivalent expressions, but to omit all portions of the document not material to the case. Where it is necessary to state the pleadings in a previous action, their effect should be concisely stated, so far as material, and it is not necessary to set them out in full (*Houston* v. *Sligo*, 29 Ch. D. 448; "*Estoppel*," *post*, p. 645).

Where a written contract or other document relied upon is stated in the claim according to the legal effect attributed to it by the plaintiff, and the defendant, while admitting the document itself, wishes to dispute the construction thus put upon it, he may raise the question of its sufficiency to support the action, either by pleading a denial that it is to the effect alleged, and stating its effect according to his own construction, or by simply setting out the document *verbatim* in the defence, with an allegation that it is the contract mentioned or referred to in the statement of claim. If the document is lengthy, or if numerous documents are relied upon, or if the point of construction does not go to the whole or a substantial part of the cause of action, the defendant's better course is usually to plead such denial as above mentioned, with a short statement of the real effect of the document or documents according to his own contention. (See "*Proceedings in lieu of Demurrer*," *post*, p. 563; "*Agreement*," *post*, p. 576.) If, however, the document or documents can be set out *verbatim* without

prolixity, and the point of construction goes to the whole or to a substantial part of the cause of action, it may in some cases be proper and advisable to set out the document or documents *verbatim* in the defence. In the latter case, where the document is set out *verbatim* by way of a distinct defence, the plaintiff, unless he can show that the document set out is not the document on which he relies, or is incorrectly set out by the defendant, may be obliged either to amend his statement of claim or to raise the question of construction by pleading an objection in point of law. (See *Ib.*)

Where a contract or other document is stated *verbatim*, the pleading must in some way show its application to the facts stated, as by identifying the parties, &c., and it may sometimes be necessary to add an express allegation for this purpose.

By Ord. XIX., r. 24, "Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative." (See App. C., Sect. II., Forms Nos. 11, 12.)

By Ord. XIX., r. 22, "Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred." (See R. S. C., 1883, App. C., Sect. VI., Forms Nos. 13, 14 and 15; and see "*Fraud*," *post*, pp. 397, 656; "*Defamation*," *post*, p. 364; "*Malicious Prosecution*," *post*, p. 425.)

By Ord. XIX., r. 23, "Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material." (See forms alleging notice, under "*Bills of Exchange*," *post*, pp. 115 *et seq.*; "*Landlord and Tenant*," *post*, pp. 231 *et seq.*; "*Master and Servant*," *post*, p. 437.)

By Ord. XIX., r. 25, "Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied: *e.g.*, consideration for a bill of exchange, where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim." (See "*Bills of Exchange, &c.*," *post*, pp. 108, 599.)

The following presumption may be here mentioned as specially important to the pleader, viz., there is a presumption of the continuance of the existing state of things, in the absence of any statement to the contrary; that is to say, if a particular state of things is once alleged in the pleadings as existing, it is, in general, presumed that that state of things has

continued, unless the pleadings contain something to negative it. (See *Gyse* v. *Ellis*, 1 Stra. 228.)

It is unnecessary to plead matters of which the Court takes judicial notice. The Court takes judicial notice not only of the law of the realm, but also of the general law of nations; the law and custom of Parliament, including the privileges and procedure of each branch of the legislature; the prerogatives of the Crown; the maritime and ecclesiastical laws; the articles of war, both in the land and marine service; royal proclamations; the custom of merchants where such custom has been settled by judicial determinations; the special customs of gavelkind and borough English lands; the customs of the city of London, which have been certified by the Recorder; the rules and course of procedure of the Superior Courts, and the limits of their jurisdiction; the power of the Ecclesiastical Courts, and the limits of their jurisdiction; the division of England into counties, provinces, and dioceses; the commencement and ending of legal terms and sittings; the coincidence of the years of the reign of any sovereign of this country with the years of our Lord; the coincidence of the days of the week with days of the month; the order of the months; the meaning of ordinary English words and terms of art; the names and quantities of legal weights and measures; and the value of the coin of the realm.

But judicial notice is not taken of private Acts of Parliament; nor of foreign or colonial law; nor of Scotch law; nor of particular local customs or usages of trade; nor of the jurisdiction of inferior Courts; nor of the laws, usages, or customs of foreign countries or Courts of justice; nor of the situation of any particular place. Any of these matters when relied upon must be alleged like other facts; and even in the case of relying on those things of which the Court takes judicial notice, it is necessary to allege any facts which are required to apply them to the plaintiff or defendant, or to the facts on which the right of action or defence rests.

A more complete enumeration of the matters of which the Court does or does not take judicial notice (including those above stated) may be found in Roscoe's N. P. Ev., 17th ed., pp. 80—84, and in Taylor on Evidence, 9th ed., pp. 3 *et seq.*

By Ord. XIX., r. 14, "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading." (See *post*, pp. 156, 641.)

By Ord. XIX., r. 26, "No technical objection shall be raised to any pleading on the ground of any alleged want of form." (See "*Proceedings in lieu of Demurrer*," *post*, p. 562.) This rule is not intended to dispense with the requirements of the previous rules as to the form of pleadings. (See *Marshall* v. *Jones*, 52 J. P. 423.) Nor is it intended to apply to cases where the pleading is drawn in such a manner as to prejudice, embarrass

or delay the fair trial of the action, as such cases are provided for by the following rule.

By Ord. XIX., r. 27, "The Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client."

Notwithstanding the express use of the word "unnecessary" in the above rule, it would seem that unnecessary statements, where they do not tend to prejudice or embarrass, &c., and do not materially increase the length of the pleadings, will not in general be struck out merely on the ground that they are "unnecessary." (See *Knowles* v. *Roberts*, 38 Ch. D. 263, 270; and *Rock* v. *Pursell*, 84 L. T. Journ. p. 45.)

Matter containing charges and imputations not properly relevant to the issues between the parties will be struck out as scandalous (*Cashin* v. *Cradock*, 3 Ch. D. 376; see *Christie* v. *Christie*, L. R. 8 Ch. 499; 42 L. J. Ch. 544; *Coyte* v. *Cumming*, 27 W. R. 529; *Bright* v. *Marner*, W. N. 1878, p. 211; *Blake* v. *Albion Ins. Assoc.*, 45 L. J. C. P. 663; *Duncan* v. *Vereker*, W. N. 1876, p. 64; *Lee* v. *Ashwin*, 1 Times Rep. 291; *Smith* v. *The British, &c. Assoc.*, W. N. 1883, p. 232; *Brooking* v. *Maudslay*, 2 Times Rep. 827). But allegations of disgraceful facts, if relevant and material to the issues between the parties, are not "scandalous" within the meaning of the rule, and will not be struck out (*Millington* v. *Loring*, 6 Q. B. D. 190; 50 L. J. Q. B. 214; *Lumb* v. *Beaumont*, 49 L. T. 772; *Appleby* v. *Franklin*, 17 Q. B. D. 93; 55 L. J. Q. B. 129; and see *Cashin* v. *Cradock*, *supra*; and *Christie* v. *Christie*, *supra*).

Pleadings, or parts of pleadings, have been struck out or amended as embarrassing, &c., in the following cases (most of which were decided under the repealed Ord. XXVII., r. 1), viz., for pleading mere general allegations of title, instead of stating the material facts relied upon as giving the title (*Philipps* v. *Philipps*, 4 Q. B. D. 127; 48 L. J. Q. B. 185; *Davis* v. *James*, 26 Ch. D. 778; 53 L. J. Ch. 523; "*Recovery of Land*," *post*, p. 466; and see *Harris* v. *Jenkins*, 22 Ch. D. 481; 52 L. J. Ch. 437; *In re Parton*, 30 W. R. 287; *Palmer* v. *Palmer*, [1892] 1 Q. B. 319; 61 L. J. Q. B. 236); for pleading matters which are too vaguely stated to give sufficient information to the opposite party (*Harris* v. *Jenkins*, *supra*; *Riddell* v. *Strathmore*, 3 Times Rep. 329; 31 Sol. Journ. 183; *British, &c. Land Assoc.* v. *Foster*, 4 Times Rep. 574; and see *Fleming* v. *Dollar*, 23 Q. B. D. 388; 58 L. J. Q. B. 548; *Hildidge* v. *O'Farrell*, 8 L. R. Ir. 158; *Barnes* v. *Barnes*, *Ib.* 165); for setting out immaterial matters in a prolix and embarrassing manner (*Knowles* v. *Roberts*, *supra*; *Davy* v. *Garrett*, 7 Ch. D. 473; 46 L. J. Ch. 218); for setting out matters embarrassing and not relevant to the issue (*Rassam* v. *Budge*, [1893] 1 Q. B. 571; 62 L. J. Q. B. 312); for making allegations of matter merely

amounting to evidence, as admissions, &c. (see *Davy* v. *Garrett*, *supra*; *Blake* v. *Albion Ins. Assoc.*, *supra*; *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787; 49 L. J. Ch. 559; see *Lumb* v. *Beaumont*, *supra*; and see *ante*, pp. 5, 6); for making charges of misconduct irrelevant to the question to be tried (*Murray* v. *Epsom Local Board*, [1897] 1 Ch. 35; 66 L. J. Ch. 107); for a misjoinder of plaintiffs or of causes of action (*Smith* v. *Richardson*, 4 C. P. D. 112; 48 L. J. C. P. 140; see "*Parties to Actions*," *post*, p. 19); for pleading mere general or evasive denials (*Copley* v. *Jackson*, W. N. 1884, p. 39; *Byrd* v. *Nunn*, 7 Ch. D. 284; 47 L. J. Ch. 1; *Belt* v. *Lawes*, 51 L. J. Q. B. 259; see "*Denials*," *post*, p. 527); for pleading as defences matters obviously not amounting to any defence (*Smith* v. *British, &c. Assoc.*, W. N. 1883, p. 24; *Liardet* v. *Hammond*, W. N. 1883, p. 96); or matters not pleadable by way of defence (*Preston* v. *Lamont*, 1 Ex. D. 361; 45 L. J. Ex. 797). But the mere fact that the statements in an opponent's pleading may be difficult to deal with does not render the pleading "embarrassing &c.," within the meaning of this rule if they are material facts and are otherwise properly pleaded. See as to statements of claim, *Millington* v. *Loring*, cited *ante*, p. 11; and as to defences, *Heugh* v. *Chamberlain*, 25 W. R. 743; *Golding* v. *Wharton Salt Co.*, 1 Q. B. D. 374; *Weymouth* v. *Rich*, 1 Times Rep. 609; *Tomkinson* v. *S. E. Ry. Co.*, 3 Times Rep. 822; *In re Morgan*, 35 Ch. D. 492; 56 L. J. Ch. 903. Allegations are not to be deemed "embarrassing," &c., merely because it is probable that they may ultimately turn out to be untrue in fact (*Turquand* v. *Fearon*, 40 L. T. 543; *In re Morgan*, *supra*; and see *Hilldidge* v. *O'Farrell*, 8 L. R. Ir. 158), or invalid in law (*Tomkinson* v. *S. E. Ry. Co.*, *supra*). A party is in general entitled to set up several inconsistent claims, defences or replies, and to do so is not embarrassing, provided he pleads them clearly and distinctly (*In re Morgan*, *supra*; *Hall* v. *Eve*, 4 Ch. D. 341; 46 L. J. Ch. 145).

Where the matter which is wrongly or improperly pleaded is severable from the rest of the pleading, the order will usually be limited to that part of the pleading. (See, for instance, *Blake* v. *Albion Life Ass. Co.*, 45 L. J. C. P. 663; *Smith* v. *British Marine Ins. Assoc.*, W. N. 1883, p. 24; *Liardet* v. *Hammond*, W. N. 1883, p. 96; *Knowles* v. *Roberts*, 38 Ch. D. 263.) But where the matter which is faulty or defective is so intermixed with the rest of the pleading as not to be severable from it without difficulty, the whole of the pleading containing it may be struck out. (See, for instance, *Cashin* v. *Cradock*, 3 Ch. D. 376; *Davy* v. *Garrett*, 7 Ch. D. 473; 47 L. J. Ch. 218; *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787; 49 L. J. Ch. 559.)

Counterclaims which are such as ought not to be allowed, or which cannot be conveniently disposed of in the pending action, may be excluded. (See Ord. XIX., r. 3; Ord. XXI., r. 15; "*Counterclaims*," *post*, pp. 534 *et seq.*)

Where a pleading offends against the requirements of the rules, and the objection is a substantial one, the opposite party may apply to have it struck out or amended under Ord. XIX., r. 27, cited *ante*, p. 11 (if it comes within the terms of that rule), or to have it set aside under Ord. LXX., r. 1, which provides that, "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, but such proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit."

Where the objection is that the pleading discloses no reasonable ground of action or defence, or that the alleged ground of action or defence is frivolous or vexatious, the opposite party may make an application under Ord. XXV., r. 4. (See *post*, p. 563.)

Independently of the powers given by Ord. XIX., r. 27 (cited *ante*, p. 11), and by Ord. LXX., r. 1 (cited *supra*), and Ord. XXV., r. 4 (cited *post*, p. 563), the Court has inherent power to strike out or set aside any proceedings which from scandal or prolixity, &c., are vexatious or oppressive, (See *In re Miller*, 51 L. T. 853; *Cracknall* v. *Janson*, 11 Ch. D. 1, 13; 48 L. J. Ch. 168; *Willis* v. *Earl Beauchamp*, 11 P. D. 59; 55 L. J. P. 17; *Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 489; *Lawrance* v. *Lord Norreys*, 39 Ch. D. 213; *Davey* v. *Bentinck*, [1893] 1 Q. B. 185; 62 L. J. Q. B. 114; *Chaffers* v. *Goldsmid*, [1894] 1 Q. B. 186; 63 L. J. Q. B. 59); or which are an abuse of the process of the Court (*Met. Bank* v. *Pooley*, 10 App. Cas. 210; 54 L. J. Q. B. 449; *Reichel* v. *Magrath*, 14 App. Cas. 665; 59 L. J. Q. B. 159; *Remmington* v. *Scoles*, [1897] 2 Ch. 1; 66 L. J. Ch. 526.)

As to amendments with respect to parties, see "*Misjoinder and Non-joinder of Parties*," *post*, p. 27.

As to rules specially applicable to Defences, Counterclaims and Replies, see *post*, pp. 520, 534, 545.

Signature of pleadings.]—By Ord. XIX., r. 4, it is provided (*inter alia*) that "Signature of counsel shall not be necessary; but where pleadings have been settled by counsel or a special pleader, they shall be signed by him; and if not so settled, they shall be signed by the solicitor, or by the party if he sues or defends in person."

Pleadings, when to be printed, &c.]—By Ord. XIX., r. 9, "Every pleading which shall contain less than ten folios (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading" "shall be printed."

A folio consists of seventy-two words, every figure being counted as one word. (See Ord. LXV., r. 27 (14).)

As to the mode of printing, &c., see Ord. LXVI., r. 7.

Delivery of pleadings.]—By Ord. XIX., r. 11, "Every pleading shall

be delivered between parties (see *ante*, p. 4; and see Ord. XIX., r. 2, cited *post*, p. 42); and by Ord. XIX., r. 10, "Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer." The mode of delivery (or "service") of pleadings which is "now in use" (except as to statements of claim specially indorsed, as to which see "*Special Indorsements*," *post*, p. 65) is prescribed by Ord. LXVII., r. 2.

Where no appearance has been entered for a party, or where a party, or his solicitor, as the case may be, has omitted to give an address for service as required by Orders IV. and XII., pleadings may be delivered by filing them with the proper officer (Ord. LXVII., r. 4).

Amendment of pleadings.—By Ord. XXVIII., r. 1, "The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

By Ord. XXVIII., r. 2, "The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once, at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared, or where defence is delivered, but no order for reply is made within ten days from delivery of the defence or the last of the defences."

The "time limited for reply" is, ten days after the delivery of the defence or of the last of the defences, unless the order specifies some other time. (See Ord. XXIII., r. 2, cited *post*, p. 545.)

As to statements of claim indorsed on the writ, see *post*, p. 65.

By Ord. XXVIII., r. 3, "A defendant who has set up any counterclaim or set-off may, without any leave, amend such counterclaim or set-off at any time before the expiration of the time allowed him for answering the reply and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence."

A rejoinder to the reply can only be delivered by leave (Ord. XXIII., r. 2). The time for delivering it is generally limited by the order giving leave to deliver such rejoinder. In the absence of such a limit, the time is four days. (See Ord. XXIII., r. 3, cited *post*, p. 547; and see "*Time for Delivering Pleadings*," *post*, p. 17.)

By Ord. XXVIII., r. 13, "The costs of and occasioned by any amendment made pursuant to Rules 2 and 3 of this Order shall be borne by the party making the same, unless the Court or a judge shall otherwise order."

By Ord. XXVIII., r. 4, "Where any party has amended his pleading under" Rules 2 or 3, above cited, "the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court or a judge to disallow the amendment, or any part thereof, and the Court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just" (*Bourne* v. *Coulter*, 53 L. J. Ch. 699).

By Ord. XXVIII., r. 5, "Where any party has amended his pleading under Rules 2 or 3, the opposite party shall plead to the amended pleading, or amend his pleading, within the time he then has to plead or within eight days from the delivery of the amendment, whichever shall last expire; and in case the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment."

Under Rules 2, 3 and 5, above cited, a plaintiff may without leave amend his statement of claim once within the time prescribed by r. 2, and a defendant who has pleaded a counterclaim may without leave amend his counterclaim once within the time prescribed by r. 3, and where a statement of claim or counterclaim has been so amended, the opposite party, if he has already pleaded, may amend his pleading without leave within the time prescribed by r. 5. In all other cases, if an amendment is required, leave must be obtained for it.

By Ord. XXVIII., r. 6, "In all cases not provided for by the preceding Rules of this Order, application for leave to amend may be made by either party to the Court or a judge or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just." As to the general power of amending defects or errors in any proceedings, see Ord. XXVIII., r. 12.

Applications to amend pleadings before trial should be made to a master by summons at chambers. (See Ord. LIV., r. 12.)

In any case leave will in general be granted to amend so as to enable the real question in dispute between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for or remedied by costs or other terms to be imposed by the order (*Tildesley* v. *Harper*, 10 Ch. D. 393; 48 L. J. Ch. 495; *Steward* v. *North Met. Tram. Co.*, 16 Q. B. D. 178, 566; 55 L. J. Q. B. 157; *Clarapede* v. *Commercial Assoc.*, 32 W. R. 262; *Australian Steam Co.* v. *Smith*, 14 App. Cas. at p. 320). Where these conditions are fulfilled, such leave may be granted at any stage, however negligent or careless the mistake or omission may have been, and however late may be the application for amendment. (See *per* Brett, M.R., in *Clarapede* v. *Commercial Assoc.*, *supra*; *Steward* v. *North Met. Tram. Co.*, 16 Q. B. D. at p. 558; 55 L. J. Q. B. 157; *The Duke of Buccleuch*, [1892] P. 201; 61 L. J. P. 57.) But such applications should be made without

unnecessary delay, as unreasonable delay in making the application may in some cases be a ground against its being granted (*Clarapede* v. *Commercial Assoc.*, 32 W. R. 262, 263 ; *Hipgrave* v. *Case*, 28 Ch. D. 356 ; 54 L. J. Ch. 399 ; *Clark* v. *Wray*, 31 Ch. D. 68 ; 55 L. J. Ch. 119). Leave to amend may be refused where the original omission was *malâ fide* or intentional (*Tibdesley* v. *Harper*, *supra* ; *Lowther* v. *Heaver*, 41 Ch. D. 248 ; 58 L. J. Ch. 482 ; *Edevain* v. *Cohen*, 41 Ch. D. 563), or where at the trial or hearing the party seeks to alter the whole nature of his case by an unexpected amendment which may require further evidence to be adduced by his opponent (*Ellis* v. *Manchester Carriage Co.* 2 C. P. D. 13, 16 ; *Newby* v. *Sharp*, 8 Ch. D. 393 ; 47 L. J. Ch. 617 ; *Bourne* v. *Coulter*, *supra* ; *Hipgrave* v. *Case*, 28 Ch. D. 356 ; 54 L. J. Ch. 399 ; *Clark* v. *Wray*, 31 Ch. D. 68 ; 55 L. J. Ch. 119 ; *Edevain* v. *Cohen*, *supra*), or where it is clear that there is no substantial ground for the case proposed to be set up by the amendment (*Laurence* v. *Lord Norreys*, 39 Ch. D. 213, 232, 235), or where the amendment would cause injustice to the opposite party such as could not be compensated for by imposing terms as to costs or otherwise (*Steward* v. *North Met. Tram. Co.*, *supra* ; *Weldon* v. *Neal*, 19 Q. B. D. 394 ; 56 L. J. Q. B. 621).

Where the statement of claim is amended under an order giving leave to amend, such amendment does not, in the absence of special terms in the order, give the defendant any additional time for pleading his defence or entitle him to amend a defence already delivered. Accordingly, when an application is made for leave to amend, care should be taken by the opposite party to have it imposed as a term of the order, if any, giving such leave that any alteration or amendment of his own pleading (if any) already delivered which may be necessitated by the amendment of the opponent's pleading may be made by him, otherwise a summons for leave to make such amendments or alterations may be necessary. So, too, care should be taken that the order should provide, where necessary, for an extension of the time for pleading to the amended pleading, and, where the party amending is a defendant, for his taking short notice of trial, if required.

Where a party amends his pleading under an order giving leave to amend, and the opposite party, having already pleaded in answer to the original pleading before such amendment, does not himself obtain leave to amend, and amend thereunder, he is deemed to rely on his pleading as it stands as an answer to the amended pleading. (See *Boddy* v. *Wall*, 7 Ch. D. 164 ; 47 L. J. Ch. 112.)

By Ord. XXVIII., r. 7, "If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto* void, unless the time is extended by the Court or a judge."

By Ord. XXVIII., r. 8, "An indorsement or pleading may be amended by written alterations in the copy which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the document as amended."

By Ord. XXVIII., r. 9, "Whenever any indorsement or pleading is amended, the same, when amended, shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.: 'Amended —— day of —— pursuant to order of —— dated the —— of ——.'" (See form, *post*, p. 59.) In the case of an amended writ, the copy served upon the opposite party need not be thus marked; it is sufficient if the original is marked (*Hanmer* v. *Clifton*, [1894] 1 Q. B. 238).

By Ord. XXVIII., r. 10, "Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same" (*Jamaica Rail. Co.* v. *Colonial Bank*, [1905] 1 Ch. 677).

As to applications to have an opponent's pleading struck out or amended as unnecessary or scandalous, or tending to prejudice, embarrass, or delay the fair trial of the action, see Ord. XIX., r. 27, cited *ante*, p. 11.

As to amendments by striking out or adding parties, see "*Parties*," *post*, pp. 26 *et seq.*

Where the claim stated in a general indorsement on the writ of summons is altered, modified, or extended by a statement of claim subsequently delivered, no amendment of the indorsement on the writ is usually required. (See Ord. XX., r. 4, cited *post*, p. 51.)

Time for delivering pleadings.]—The hours within which pleadings, other than statements of claim specially indorsed on the writ of summons (as to which see "*Special Indorsements*," *post*, p. 65), must be delivered are prescribed by Ord. LXIV., r. 11.

As to the times or periods prescribed for the delivery of pleadings in various cases, see "*Time for delivering Statement of Claim*," *post*, p. 58; "*Time for delivering Defence*," *post*, p. 520; "*Mode of Pleading Counterclaims*," *post*, p. 540; "*Replies and Subsequent Pleadings*," *post*, p. 545.

As to the times for delivering amended pleadings, and for pleading thereto, see "*Amendment of Pleadings*," *ante*, p. 14.

The rules appointing certain specified times for the delivery of the pleadings are subject to the following general provisions with respect to the computation of time, &c., in cases to which they are applicable.

By Ord. LXIV., r. 12, "In any case in which any particular number of days, not expressed to be clear days, is prescribed by these rules, the same

shall be reckoned exclusively of the first day and inclusively of the last day."

But by Ord. LXIV., r. 2, "Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time."

Where the time appointed or allowed for delivering or amending pleadings is six days or upwards, the fact that the last day falls on a Sunday, Christmas Day, or Good Friday, does not give the party pleading any additional time for delivering his pleading (though see *Louis* v. *Marylebone Guardians*, 32 Sol. Journ. 187), except where it has to be delivered by being filed (see "*Delivery of Pleadings*," *ante*, p. 14), in which case it would fall within the provisions of Ord. LXIV., r. 3.

By Ord. LXIV., r. 1, where by the rules, or by any judgment or order, time for doing any act or taking any proceeding is limited by months, such time shall be computed by calendar months, unless otherwise expressed.

By Ord. XIX., r. 8, the party at whose instance particulars have been delivered under a judge's order has, unless the order otherwise provides, the same length of time for pleading after the delivery of the particulars that he had at the return of the summons. (See "*Particulars*," *post*, p. 41.)

By Ord. LXIV., r. 6, the day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given, shall not be reckoned in the computation of time allowed to plead.

By Ord. LXIV., r. 4, "In causes intended to be tried during the autumn assizes at any place for which the Commission Day is fixed by Order in Council for a day prior to the 1st December . . . pleadings may be amended, delivered, or filed in the Long Vacation on and after the 1st October in any year, but pleadings shall not be amended, delivered, or filed during any other part of such vacation, unless by direction of the Court or a judge."

By Ord. LXIV., r. 5, "Save as in the last preceding rule mentioned, the time of the Long Vacation in any year shall not be reckoned in the computation of the times appointed or allowed by these rules for amending, delivering, or filing any pleading, unless otherwise directed by the Court or a judge."

The Long Vacation now commences on the 13th of August, and terminates on the 23rd of October (Ord. LXIII., r. 4).

With respect to extensions of time, it is provided generally by Ord. LXIV., r. 7, that "a Court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the

expiration of the time appointed or allowed." And this power may be exercised by a master at chambers, or, where the action is proceeding in a district registry, by the district registrar.

It is provided, however, by Ord. LXIV., r. 8, that "the time for delivering, amending, or filing any pleading, answer or other document, may be enlarged by consent in writing, without application to the Court or a judge."

As a general rule, the costs of an application to extend the time for delivering a pleading are ordered to be paid by the party applying, in any event. The costs of a summons to extend the time will not be allowed on taxation, "unless the party taking out such summons has previously applied to the opposite party to consent, and he has not given a consent to a sufficient extension of time, or the taxing officer shall consider there was a good reason for not making such application"; and the taxing officer is not to allow the costs of more than one extension of time "unless he is satisfied that such extension was necessary, and could not, with due diligence, have been avoided" (Ord. LXV., r. 27 (24)).

A defendant who obtains an order for an extension of the time for pleading is frequently put on the terms of taking short notice of trial, if necessary. (See 1 Chitty's Practice, 14th ed., p. 302.) If no other time is specified in the order, "short notice" means a four days' notice (Ord. XXXVI., r. 14).

Where by consent, or by an order, an extension of time is allowed for any particular number of days not expressed to be clear days, the time is reckoned exclusively of the first day and inclusively of the last day; and where by such consent or order a party is allowed to deliver a pleading within a certain number of days (not expressed to be clear days) from or after a specified date or event, the day of such date or of such event is excluded from the computation of the time, which is reckoned exclusively of that day but inclusively of the last day. Where the time allowed is less than six days from or after any date or event, Sunday, Christmas Day, and Good Friday are not reckoned. (See Ord. LXIV., r. 2, cited *ante*, p. 18.)

By Ord. LXIV., r. 13, "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial, although countermanded, shall, be deemed a proceeding within this rule." This month's notice means a calendar month's notice. (See Ord. LXIV., r. 1, *supra*.)

Pleadings cannot in general be delivered pending a stay of proceedings.

Parties to actions.]—It is a general rule that, where an action is founded upon a contract made with several persons jointly, they should all, if living, and entitled to sue thereon, join in the action as co-plaintiffs. (See Lindley on Partnership, 7th ed., pp. 311 *et seq.*; and see 1 Wms. Saund., 1871 ed., pp. 162 *et seq.*; Bullen & Leake, 3rd ed., p. 471.) So, too, it is a general

rule that, where an action is founded on a contract made by several persons jointly, they must all, if living, and liable to be sued thereon, be joined in the action as defendants. (Lindley on Partnership, 7th ed., pp. 317 *et seq.*; and see 1 Wms. Saund., 1871 ed., pp. 465 *et seq.*; Bullen & Leake, 3rd ed., p. 471.)

In the case of joint contractees, if one of them refuses after tender of an indemnity against costs to sue, the other or others can join him as a co-defendant (*Cullen* v. *Knowles*, [1898] 2 Q. B. 380; see *post*, p. 27).

If a contract made by two or more persons is several as well as joint, the plaintiff may sue all of them jointly, or any one of them separately (see Ord. XVI., r. 6, cited *post*, p. 23; Lindley on Partnership, 7th ed., p. 319; Bullen & Leake, 3rd ed., p. 471; *In re Davison*, 13 Q. B. D. 50); or may in the same action claim against all of them jointly, and also, in the alternative, against each of them separately (Lindley, *supra*; and see Ord. XVI., r. 4, cited *post*, p. 22).

Whether a contract is joint or several depends primarily on the language used, but it is a question of intention to be determined by considering not only the language, but also the interests and relations of the parties. Accordingly, where the words are ambiguous, the contract will be construed to be joint or several so far as regards the contractees, according as the interests of the parties are joint or several respectively, and will be deemed to be joint if the interests are joint, and several if the interests are several (*Pugh* v. *Stringfield*, 3 C. B. N. S. 2; 27 L. J. C. P. 34; *Thompson* v. *Hakewill*, 19 C. B. N. S. 713; *Palmer* v. *Mallet*, 36 Ch. D. 411; 57 L. J. Ch. 226; *Whyte* v. *Tyndall*, 13 App. Cas. 263). It is doubtful, however, whether this applies also to cases where the question is as to whether the liability on a contract is joint or several. (See *Whyte* v. *Tyndall*, *supra*.)

Where the contract sued upon was made *with* several persons jointly, and some of them have died, the action should, in general, be brought by the survivors or survivor, and if all of them have died, by the executors or administrators of the last survivor. (See Lindley on Partnership, 7th ed., p. 325; *Anderson* v. *Martindale*, 1 East, 497; *Richards* v. *Heather*, 1 B. & Ald. 29; *Jell* v. *Douglas*, 4 B. & Ald. 374.) So, if the contract sued upon was made *by* several persons jointly, and any of them have died, the action should, in general, be brought against the survivors, or survivor, or if all of them have died, against the executor or administrator of the last survivor. (See Lindley on Partnership, 7th ed., p. 325; 1 Wms. Saund., 1871 ed., p. 470; *Richards* v. *Heather*, *supra*; *Jell* v. *Douglas*, *supra*; *Calder* v. *Rutherford*, 3 B. & B. 302.) The executors of a deceased co-contractor should not be joined as co-defendants in an ordinary action against the survivor for debt or damages on a joint contract (*Ib.*; *Kendall* v. *Hamilton*, 4 App. Cas. 504; 48 L. J. C. P. 705; *In re Hodgson*, 31 Ch. D. 177; 55 L. J. Ch. 241; *Whyte* v. *Tyndall*, *supra*), though the creditor in the case of a joint debt will have an equitable claim against the estate of the deceased co-contractor in administration proceedings (*Ib.*).

Actions for wrongs arising out of contract are, as regards the persons whom it is necessary to join as parties, on the same footing as actions for breaches of contracts. (See *Powell* v. *Layton*, 2 B. & P. N. R. 365; *Buddle* v. *Willson*, 6 T. R. 369; 1 Wms. Saund., 1871 ed., pp. 471, 486; Bullen & Leake, 3rd ed., p. 708.)

In actions for wrongs independent of contract, where several persons are entitled to sue in respect of a wrong done to them jointly, as, for instance, in cases of injury to their joint property by trespass, conversion, negligence, &c., they should, in general, all join as plaintiffs in the action. (See Lindley on Partnership, 7th ed., p. 315; 1 Wms. Saund., 1871 ed., p. 485; 2 *Ib.* p. 381; Bac. Abr. "Joint Tenants," K.; *Addison* v. *Overend*, 6 T. R. 766; *Sedgworth* v. *Overend*, 7 T. R. 279; *Bloxam* v. *Hubbard*, 5 East, 407.)

Where a wrong independent of contract has been committed by several persons jointly, their liability is, in its nature, several as well as joint (Co. Litt. 232 a; *Sutton* v. *Clarke*, 6 Taunt. 29; *Pozzi* v. *Shipton*, 8 A. & E. 963); and, accordingly, the person who has suffered the wrong is entitled, at his option, to sue them all jointly, or any one or more of them separately. (See 1 Wms. Saund., 1871 ed., p. 472; *Sutton* v. *Clarke*, 6 Taunt. 29, 35; *Mitchell* v. *Tarbutt*, 5 T. R. 649; *Ansell* v. *Waterhouse*, 6 M. & S. 385; *The Bernina*, 12 P. D. at pp. 83, 93.)

The subject of joinder of parties to actions is dealt with by Ord. XVI., and that of the joinder of causes of action by Ord. XVIII. In practice, therefore, care must be taken to observe the requirements of the rules of both orders.

By Ord. XVI., r. 1, "All persons may be joined in one action as plaintiffs in whom any right to relief in respect of, or arising out of, the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a judge may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge in disposing of the costs shall otherwise direct."

It is to be noted that this rule, in its present shape, deals only with the joinder of plaintiffs. It is an amended rule, passed to meet the difficulties as to the joinder of plaintiffs that arose in *Smurthwaite* v. *Hannay*, [1894] A. C. 494; 63 L. J. Q. B. 737; and *Carter* v. *Rigby*, [1896] 2 Q. B. 113; 65 L. J. Q. B. 537, no corresponding or other amendment being made in regard to the joinder of defendants. Consequently the opinions or *dicta* in those cases as to such joinder are still to be regarded.

A joinder of plaintiffs may be permitted under the present rule where the substantial subject matter or grievance upon which the action is founded is common to all (*Oxford and Cambridge Universities* v. *Gill*, [1899] 1 Ch. 55; 68 L. J. Ch. 34), as in the case of a fraudulent prospectus, on the faith of which all have been induced to take shares in a company (*Drincqbier* v. *Wood*, [1899] 1 Ch. 393; 68 L. J. Ch. 181; *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504; 69 L. J. Q. B. 147; see *Stroud* v. *Lawson*, [1898] 2 Q. B. 44; 67 L. J. Q. B. 718), or of a libel published of all in relation to some conduct, business or matter common to all, or there is some main or important question common to all, and where some of the relief claimed by all arises "out of," or "in respect of," some "transaction or series of transactions" in which all are involved, so that separate actions would to a substantial extent involve an unnecessary travelling over the same ground more than once (*Ib.*; and see *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. 494; 68 L. J. Ch. 289; [1901] A. C. 1; 70 L. J. Ch. 102; *Walters* v. *Green*, [1899] 2 Ch. 696; 68 L. J. Ch. 730).

Before the amendment of Rule 1 several persons carrying on business in partnership, who were made the subject of one libel, were obliged to bring separate actions if they sued for damages to their individual reputations, but not if they sued merely in respect of injury to their partnership business (see *Booth* v. *Briscoe*, 2 Q. B. D. 496; *Hannay* v. *Smurthwaite*, [1893] 2 Q. B. 412, 426); and owners of separate properties could not join in one action to restrain a nuisance affecting their respective properties (*Appleton* v. *Chapel Town Paper Co.*, 45 L. J. Ch. 276); but persons sustaining a joint damage might sue jointly for the wrong done, though they had separate interests (*per* Bowen, L.J., *Smurthwaite* v. *Hannay*, [1893] 2 Q. B. 422).

By Ord. XVI., r. 2, cited *post*, p. 26, power is given to rectify *bonâ fide* mistakes as to plaintiffs made in the commencement of an action by directing the substitution or addition as plaintiff of any person necessary for the determination of the real matter in dispute.

By Ord. XVI., r. 11, "No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing." The signature of his agent is not sufficient (*Fricker* v. *Van Grutten*, [1896] 2 Ch. 649; 65 L. J. Ch. 823).

The word "person," when used in these rules of Ord. XVI., includes corporations or incorporated companies (Ord. LXXI., r. 1).

By Ord. XVI., r. 4, "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." This rule, as real subject to Ord. XVIII. (as to joinder of causes of action), is no authority for

combining in one action separate causes of action against different defendants; it does not render it possible to charge in one action various defendants on various distinct grounds of liability. (See *Smurthwaite* v. *Hannay*, *supra*.)

By Ord. XVI., r. 5, "It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest." (See *Child* v. *Stenning*, 5 Ch. D. 695; 46 L. J. Ch. 523; *Wilson* v. *Church*, 9 Ch. D. 552; *Burstall* v. *Beyfus*, 26 Ch. D. 35; 53 L. J. Ch. 565.) Thus in a case of the issue of a fraudulent prospectus by a company, and its directors and promoters, all were allowed to be made defendants, the issue of the prospectus being considered as, in substance, the cause or ground of action (*Frankenburgh* v. *Great Horseless Carriage Co.*, *supra*).

By Ord. XVI., r. 6, "The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes." (See *Sykes* v. *Schofield*, 28 Sol. Journ. 477; *Massey* v. *Heynes*, 21 Q. B. D. 330; 57 L. J. Q. B. 521; *Spincer* v. *Watts*, 23 Q. B. D. 350; 58 L. J. Q. B. 383.)

By Ord. XVI., r. 7, "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties."

Under Ord. XVI., rr. 4 and 7, above cited, two or more persons may be joined as defendants in one action, where the right of action exists alternatively against one or some of them, although there is no joint liability (*Honduras Ry. Co.* v. *Lefevre*, 2 Ex. D. 301; 46 L. J. Ex. 391; *Child* v. *Stenning*, *supra*; *Massey* v. *Heynes*, *supra*). Thus, an action may be brought against principal and agent, claiming against the principal on a contract professedly made on his behalf by the agent, and in the alternative against the agent for breach of warranty of authority (*Honduras Ry. Co.* v. *Lefevre*, *supra*; *Massey* v. *Heynes*, *supra*; *Bennetts* v. *McIlwraith*, [1896] 2 Q. B. 464; *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K. B. 533; 72 L. J. K. B. 761).

Two persons may be joined as defendants to alternative claims in the same action, where the acts complained of by the plaintiff amount either to a wrong on the part of one of the defendants, or to a breach of contract on the part of the other, and the fact that different kinds of relief are claimed against the two defendants does not prevent such joinder (*Child* v. *Stenning*, *supra*).

Where different persons are joined as defendants in respect of separate causes of action against them, there must be some clear connection between the claims against them in order to justify such joinder, and the mere fact that a claim against one person has arisen incidentally in the course of the transactions which gave rise to the claims against others is not a sufficient reason for joining him with them as defendants (*Burstall* v. *Beyfus*, 26 Ch. D. 35 ; 53 L. J. Ch. 565 ; *Sadler* v. *G. W. Ry. Co.*, [1896] A. C. 450 ; *Thompson* v. *London County Council*, [1899] 1 Q. B. 820 ; 68 L. J. Q. B. 625 ; and see *Walters* v. *Green*, [1899] 2 Ch. 696 ; 68 L. J. Ch. 730). A person who is not chargeable with any part of the relief claimed in an action cannot be joined as a defendant merely for the purpose of obtaining from him discovery or payment of costs. (See Ord. XVI., r. 5, *supra* ; *Wilson* v. *Church*, 9 Ch. D. 552 ; *Burstall* v. *Beyfus*, *supra*.) In one case it was held that claims against different defendants in respect of distinct slanders could not be joined even though the plaintiff had added a joint claim against the defendants jointly in respect of a conspiracy independent of the slander (*Page* v. *Hawtrey*, (1901) 85 L. T. 263).

An action to recover land belonging to several joint owners should, in general, be brought in the names of all the joint owners. (See *Mitchell* v. *Tarbutt*, 5 T. R. 649, 651 ; 2 Wms. Saund., 1871 ed., p. 381.) But one of several co-owners of a patent may sue alone for an infringement of his right (*Dunnicliff* v. *Mallet*, 7 C. B. N. S. 209 ; 29 L. J. C. P. 70 ; *Sheehan* v. *G. E. Ry. Co.*, 16 Ch. D. 59 ; 50 L. J. Ch. 68) ; and so may one of several co-owners of a trade mark (*Dent* v. *Turpin*, 2 J. & H. 139 ; 30 L. J. Ch. 495).

If the plaintiff joins persons as defendants who are not really necessary parties, as for instance weekly tenants in an action for recovery of possession of land, the costs he incurs by so doing may be disallowed (*Geen* v. *Herring*, [1905] 1 K. B. 152 ; 74 L. J. K. B. 62).

As to actions against the police authorities for damages done by rioters, see 49 & 50 Vict. c. 38.

As to actions by and against societies and unincorporated associations authorised to sue and be sued by trustees, see "*Societies*," *post*, pp. 301 *et seq.*

As to actions by and against unincorporated banks authorised to sue and be sued by a public officer, see "*Bankers*," *post*, p. 95.

As to actions by and against incorporated companies and other corporations, see "*Company*," *post*, p. 151 ; "*Corporation*," *post*, p. 158.

As to actions by or against partners or joint contractors, where one of them has become bankrupt, see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 113, 114, cited "*Bankruptcy*," *post*, p. 103.

In actions against any of the members of partnerships acting as common carriers by land "to recover damages for loss or injury to any parcel, package, or person," it is unnecessary to join the other partners. (See 11 Geo. 4 & 1 Will. 4, c. 68, s. 5, cited "*Carriers*," *post*, p. 625.)

See further as to joinder of parties in actions by or against partners, "*Partners*," *post*, pp. 265, 460.

By Ord. XVI., r. 8, "Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a judge may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties."

This rule applies almost exclusively to such actions as are assigned to the Chancery Division. (See Jud. Act, 1873, v. 34 (3).) In actions such as are ordinarily brought in the King's Bench Division, trustees or executors (or administrators) in whom the legal ownership is vested are taken to represent the estate for all purposes, and it can rarely, if ever, be proper to join *cestuis que trustent* or legatees as co-plaintiffs or co-defendants with them. The rule, however, may sometimes be applicable with regard to counterclaims for equitable relief in that Division. Provision is made by Ord. XVI., rr. 32—47, with respect to parties in actions for the administration or execution of trusts.

As to parties in actions by or against executors or administrators, see further, *post*, pp. 166, 385.

By Ord. XVI., r. 9, "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

This rule adopts for all Divisions of the High Court the old Chancery practice, and, with regard to persons to sue, is applicable where there is a common interest and a common grievance, and the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent (*Bedford, Duke of* v. *Ellis*, [1901] A. C. 18; 70 L. J. Ch. 102; *Taff Vale Ry. Co.* v. *Amalgamated Society of Ry. Servants*, [1901] A. C. 426, 443; 70 L. J. K. B. 905). Thus, one of the freehold or copyhold tenants of a manor may sue under this rule on behalf of himself and other tenants to establish rights of common. (See "*Common*," *post*, p. 340.) So an action to establish certain customary rights was properly brought by three freemen on behalf of themselves and all other freemen (*Prestney* v. *Mayor of Colchester*, 21 Ch. D. 111).

A plaintiff suing on behalf of himself and other members of a class may except such of the other members as are not in the same interest, and may join them as defendants (*Fraser* v. *Cooper*, 21 Ch. D. 718; 51 L. J. Ch. 575; *Commissioners of Sewers* v. *Gellatly*, 3 Ch. D. 610; 45 L. J. Ch. 788). Such excepted persons, if not joined as defendants, may apply to be so joined (*Ib.*). If a member of the class on behalf of which the plaintiff purports to sue disputes the plaintiff's right to represent the class and seeks to intervene in the action, he should apply by summons to be made

a defendant, or, in an extreme case, to have the action stayed or to have the conduct of it taken from the plaintiff (*Watson* v. *Cave*, 17 Ch. D. 19 ; *Fraser* v. *Cooper*, *supra* ; *May* v. *Newton*, 34 Ch. D. 347 ; 56 L. J. Ch. 313).

The rule is similarly applicable, by leave, in actions in all Divisions of the High Court to the case of numerous defendants having a common interest in the question to be litigated. Thus, the President and Secretary of a Labour League were appointed as defendants to represent that body in an action brought by a member of the League to enforce his alleged rights of membership (*Wood* v. *McCarthy*, [1893] 1 Q. B. 775 ; 62 L. J. Q. B. 373).

By Ord. XVI., r. 37, "In all cases of actions for the prevention of waste, or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest."

As to parties in actions in which married women are plaintiffs or defendants, see Ord. XVI., r. 16 ; "*Husband and Wife*," *post*, pp. 185, 409 ; "*Executors*," *post*, p. 170.

As to parties in actions by and against infants and lunatics, see Ord. XVI., r. 16 ; "*Infant*," *post*, p. 196 ; "*Lunatics*," *post*, p. 243.

Action in name of wrong plaintiff.—Leave to add or substitute plaintiffs.]—By Ord. XVI., r. 2, "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

The above rule is applicable even where the original plaintiff has no cause of action, but it applies only to cases of *bonâ fide* mistake (*Clowes* v. *Hilliard*, 4 Ch. D. 413, 415 ; 46 L. J. Ch. 271 ; *Hughes* v. *Pump House Hotel Co.* (No. 2), [1902] 2 K. B. 485 ; 71 L. J. K. B. 803). A *bonâ fide* mistake of law may bring the case within the rule (*Duckett* v. *Gover*, 6 Ch. D. 82 ; 46 L. J. Ch. 407 ; *Ayscough* v. *Bullar*, 41 Ch. D. 341 ; 58 L. J. Ch. 474 ; *Hughes* v. *Pump House Hotel Co.*, *supra*). The rule is subject to the provision of Ord. XVI., r. 11 (below cited), which, except in some cases of persons under disabilities, declares that no person shall be added as a plaintiff without his written consent (*Tryon* v. *National Prov. Institution*, 16 Q. B. D. 678 ; 55 L. J. Q. B. 236 ; *Besley* v. *Besley*, 37 Ch. D. 648 ; 57 L. J. Ch. 464). Thus, although in certain cases an assignee or *cestui que trust* may be entitled to sue in the name of another or to use the name of another as a co-plaintiff on offering him an indemnity (see *Turquand* v. *Fearon*, 4 Q. B. D. 280 ; 48 L. J. Q. B. 341 ; *Cullen* v. *Knowles*, [1898] 2 Q. B. 380), after the action is brought, the name of a person who ought to have sued as plaintiff or co-plaintiff cannot be added without his written consent. (See Ord. XVI., r. 11, cited pp. 22, 27 ; *Mason* v. *Harris*, 11 Ch.

D. 97 ; 48 L. J. Ch. 589 ; *Tryon* v. *National Prov. Institution, supra; Besley* v. *Besley, supra.*) The written consent of an agent on behalf of his principal is not sufficient (*Fricker* v. *Van Grutten*, [1896] 2 Ch. 649).

The application under this rule should in general be made upon discovery of the mistake, though there is power in a proper case to make an order at any time during the continuance of the action, or whilst any steps remain to be taken (*The Duke of Buccleuch*, [1892] 2 P. 201 ; 61 L. J. P. 57).

The difficulty arising from the impossibility of adding a plaintiff without his consent is usually obviated by making the party a defendant to the action. Thus, where a minority of shareholders have been refused the use of the name of their company to enforce a claim in respect of misapplication of the funds of the company, the company has been made a defendant (*Silber Light Co.* v. *Silber*, 12 Ch. D. 717 ; 48 L. J. Ch. 385 ; *Spokes* v. *Grosvenor Hotel Co.*, [1897] 1 Q. B. 124, 126, 128 ; 66 L. J. Q. B. 572). A similar procedure has been adopted where a co-trustee has by his personal conduct disabled himself from being a plaintiff jointly with his co-trustees (*Luke* v. *South Kensington Hotel Co.*, 11 C. D. 121 ; 48 L. J. Ch. 361 ; *Meldrum* v. *Scorer*, 56 L. T. 471). See also *Cullen* v. *Knowles*, cited *ante*, p. 26.

Misjoinder and non-joinder of parties.]—Misjoinder of parties is where persons who ought not to have been joined as plaintiffs or defendants respectively have been so joined. Non-joinder of parties is where persons who ought to have been joined as plaintiffs or defendants respectively have not been so joined.

By Ord. XVI., r. 11, "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

It would appear to be the duty of the Court under this section to prevent, as far as practicable, justice being defeated for want of parties (*Van Gelder* v. *Sowerby Flour Society*, 44 Ch. D. 374, 394 ; 59 L. J. Ch. 583 ; *Moser* v.

Marsden, [1892] 1 Ch. 487, 490 ; 61 L. J. Ch. 319), and to adjudicate upon and settle, as far as practicable, all questions involved in the cause or matter. (See *Montgomery* v. *Foy*, [1895] 2 Q. B. 321 ; *McCheane* v. *Gyles*, [1902] 1 Ch. 911 ; 71 L. J. Ch. 446.)

As to the power of adding plaintiffs on the plaintiff's application, see also the provisions of Ord. XVI., r. 2, above cited.

Persons who have a distinct cause of action in respect of injury to the same premises from the same acts of the defendant may be added as plaintiffs. Thus, house-owners who sued for an injunction to restrain a temporary nuisance were allowed to add as co-plaintiffs two persons to whom they had demised the premises after action brought (*House Property Co.* v. *Horse Nail Co.*, 29 Ch. D. 190 ; 54 L. J. Ch. 715 ; and see Ord. XVII., rr. 1—4, cited *post*, p. 30).

The plaintiff may in general and apart from special circumstances, such as unreasonable delay, &c., apply under Ord. XVI., r. 11, to have any persons added as defendants whom he could properly have joined as defendants in the first instance. (See *Edwards* v. *Lowther*, 45 L. J. C. P. 417 ; and see also *Sykes* v. *Schofield*, 28 Sol. Journ. 477 ; and *Massey* v. *Heynes*, *infra*, and *Heard* v. *Bergmann*, W. N. 1883, p. 192.)

Leave may be granted under this rule to add as a defendant a person against whom the plaintiff, if he fails to establish his case against the original defendant, has an alternative claim (*Massey* v. *Heynes*, 21 Q. B. D. 330 ; 57 L. J. Q. B. 521, cited *ante*, p. 23 ; and see also *Child* v. *Stenning*, 5 Ch. D. 695 ; 46 L. J. Ch. 523, cited *Ib.*).

As to adding new defendants where a change of parties is rendered necessary by reason of death, marriage, bankruptcy, or assignment, &c., see "*Change of Parties*," *post*, p. 30.

Where it can be clearly shown that parties have been improperly joined, application may be made under Ord. XVI., rr. 11, 12, to have the names of such parties struck out.

Objections on the ground of the non-joinder of parties are of more importance than objections on the ground of misjoinder.

Under the former practice, the only mode in which a defendant in a common law action could object to the non-joinder of joint contractors as defendants was by plea in abatement (Bullen & Leake, 3rd ed., p. 470; 1 Wms. Saund., 1871 ed., p. 164; *Kendall* v. *Hamilton*, 4 App. Cas. at p. 543 ; 48 L. J. C. P. 705) ; and this was also the only way in which he could, by his pleadings, object to the non-joinder of joint owners as plaintiffs in actions for wrongs to their joint property (see Bullen & Leake, 3rd ed., p. 708 ; 1 Wms. Saund., 1871 ed., p. 485) ; or, under ordinary circumstances, to the non-joinder of co-executors in actions by an executor (Bullen & Leake, 3rd ed., p. 472).

Objections on the ground of the non-joinder of joint contractees as co-plaintiffs previously to the Judicature Acts were never, in practice, taken by plea in abatement, though they might have been the subject of

such plea (Com. Dig. "Abatement," E. 12), but were either raised on the evidence at the trial under a plea denying the contract, in which case they were ground for non-suit or for verdict for the defendant (Bullen & Leake, 3rd ed., p. 469 ; 1 Wms. Saund., 1871 ed., p. 164 ; see the C. L. P. Act, 1852, s. 35, now repealed ; and see *Kendall* v. *Hamilton*, 4 App. Cas. at p. 543) ; or, if the defect appeared on the face of the declaration, were taken by demurrer (*Ib.* ; see *Slingsby's Case*, 5 Co. 9 ; *Scott* v. *Godwin*, 1 B. & P. 73 ; *Anderson* v. *Martindale*, 1 East, 497).

Pleas and defences in abatement have been abolished by the Judicature Acts and the rules thereunder (see Ord. XXI., r. 20, cited "*Defences in General*," *post*, p. 522 ; *Preston* v. *Lamont*, 1 Ex. D. 361 ; 45 L. J. Ex. 727) ; and if the defendant seeks to take objection on the ground of the non-joinder of necessary parties, he should, in general, do so by making an application under Ord. XVI., rr. 11, 12, for the joinder of the omitted parties as co-plaintiffs or co-defendants respectively, and for a stay of proceedings, unless and until they shall have been so joined. This is the only mode in which he can raise the objection that a joint contractor has not been joined as a co-defendant (*Kendall* v. *Hamilton*, 4 App. Cas. 504 ; 48 L. J. C. P. 705 ; *Sheehan* v. *Great Eastern Ry. Co.*, 16 Ch. D. 59 ; 50 L. J. Ch. 68 ; *Wilson* v. *Balcarres Steamship Co.*, [1893] 1 Q. B. 422 ; 62 L. J. Q. B. 134, 245 ; *Robinson* v. *Geisel*, [1894] 2 Q. B. 685 ; 64 L. J. Q. B. 52 ; and see *Werderman* v. *Société Générale*, 19 Ch. D. 246, decided under the Rules of 1875).

As the persons so omitted cannot be added as plaintiffs without their written consent under Ord. XVI., r. 11, above cited, a positive order cannot be made for their joinder as plaintiffs in the absence of such consent ; and in cases where they could not properly be joined as defendants (as to which, see *ante*, p. 27), the proper course would appear to be that the action should be stayed until the omitted persons should be added as plaintiffs with their written consent. (See *Roberts* v. *Holland*, [1893] 1 Q. B. 665, 667, 669 ; 62 L. J. Q. B. 621 ; and *The Duke of Buccleuch*, [1892] 2 P. 201, 211 ; 61 L. J. P. 57.)

Where the ground of an application for the joinder of parties under Ord. XVI., r. 11, is an objection which, previously to the Judicature Acts, could only have been taken by way of plea in abatement (*e.g.*, where it is an objection to the non-joinder of joint contractors as co-defendants), the application will be decided on principles similar to those on which a plea in abatement under the former practice would have succeeded or failed (*Kendall* v. *Hamilton*, *supra* ; *Wilson* v. *Balcarres*, *supra* ; *Robinson* v. *Geisel*, *supra*). In order to support such application for the joinder of a joint-contractor as a defendant, the defendant must be prepared to show by affidavit or admission that the person sought to be added is living and is resident within the jurisdiction of the Court (*Ib.* ; and see Bullen & Leake, 3rd ed., p. 471). The plaintiff may successfully resist such application by showing that the contract was not joint, or that it was several as well as

joint, or that the person whose non-joinder is complained of is one who was not bound by the contract, or who is not liable to be sued thereon, as, for instance, if it appears that he was an infant at the time of the contract, and that the contract was not one for necessaries (see "*Infancy*," *post*, p. 687 ; Lindley on Partnership, 7th ed., p. 318 ; 1 Wms. Saund., 1871 ed., p. 216 ; Bullen & Leake, 3rd ed., p. 477), or that he is protected by the Statute of Limitations, or that he has become bankrupt (see the Bankruptcy Act, 1883, s. 114, *post*, p. 103).

Where it is clear that the contract sued upon was a joint, and not a joint and several, contract, made by the defendant jointly with one or more other persons who might and ought to have been joined as co-defendants with him, the defendant is entitled in general to obtain an order for their joinder (*Kendall* v. *Hamilton*, *supra* ; *Robinson* v. *Geisel*, *supra*). It was held in *Robinson* v. *Geisel* (*supra*), that this was not an absolute right, and an action was permitted to proceed in the absence of a co-contractor against the other joint contractor, it appearing that, though he was within the jurisdiction, the plaintiffs were unable to effect service of the writ upon him. A person who is not a necessary party to the action (that is, a person whom the plaintiff is under no obligation to join) will not in general be added as a defendant to the action if the plaintiff opposes the application. (See *Byrne* v. *Browne*, 22 Q. B. D. 657 ; 58 L. J. Q. B. 410 ; *McCheane* v. *Gyles*, [1902] 1 Ch. 911 ; 71 L. J. Ch. 446 ; and see *Howell* v. *London Gen. Omnibus Co.*, 2 Ex. D. 365 ; 46 L. J. Ex. 700.)

In an action for the recovery of land, a person who is in possession of the land by himself or his tenant may, although not named in the writ, obtain leave to appear and defend, and after such appearance and notice thereof to the plaintiff, is to be named as a defendant in all subsequent proceedings. (See Ord. XII., rr. 25—28.)

By Ord. XVI., r. 12, "Any application to add, or strike out, or substitute a plaintiff or defendant may be made to the Court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner."

Where parties are added or struck out under Ord. XVI., rr. 2 or 11, above cited, the writ of summons, and also any statement of claim already delivered, must, in general, be amended accordingly.

As to the third party procedure in cases where a defendant claims contribution or indemnity over against a third party or a co-defendant, see Ord. XVI., rr. 48—55 ; "*Third Party*," *post*, p. 555.

As to parties to counterclaims, see "*Counterclaims*," *post*, p. 538.

Change of parties on marriage, death, bankruptcy, &c.]—By Ord. XVII., r. 1, it is provided (*inter alia*) that "A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*."

By Ord. XVII., r. 2, "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party be made a party, or be served with notice in such manner and form as hereinbefore prescribed, and on such terms as the Court or judge shall think just, and shall make such order for the disposal of the cause or matter as may be just." (See Ord. XVII., r. 4, below cited.)

By Ord. XVII., r. 3, "In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved."

By Ord. XVII., r. 4, "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party or parties may be obtained *ex parte* on application to the Court or a judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence."

By Ord. XVII., rr. 5, 6, 7, provision is made for service of such orders, and for cases where, by reason other than coverture, it becomes necessary to appoint a guardian *ad litem*, and also for the entry of appearance by the new party. Provision is made by Ord. XLII., r. 23, for changes after judgment in the parties entitled to issue execution or liable to execution. (See *Norburn* v. *Norburn*, [1894] 1 Q. B. 448; 63 L. J. Q. B. 341; *In re Clements*, [1901] 1 K. B. 260; 70 L. J. K. B. 58.)

Ord. XVII., r. 1, above cited, further provides that "whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such cases be entered, notwithstanding the death."

If the cause of action does not "survive or continue" within the meaning of Ord. XVII., r. 1, above cited, no order for adding the representatives of a deceased party can properly be made under Ord. XVII., r. 4, above cited (*Kirk* v. *Todd*, 21 Ch. D. 484; 52 L. J. Ch. 224, and other cases cited "*Executors*," *post*, p. 175.

As to what causes of action survive to or against an executor or administrator, see "*Executors*," *post*, pp. 166, 170, 385.

Where, on the death of a defendant who had pleaded a counterclaim, the plaintiff got an order for continuing the action against the deceased's

executor, it was held that the executor, in order to continue the counter-claim, must obtain a like order for that purpose (*Andrew* v. *Aitken*, 21 Ch. D. 175 ; 51 L. J. Ch. 528).

The marriage of a female plaintiff or defendant after action brought does not in general render it necessary to join the husband as a party to the action (see the Married Women's Property Act, 1882, ss. 1, 13, 18 ; "*Husband and Wife*," *post*, p. 186 ; "*Executors*," *post*, p. 170) ; but in cases where it is necessary or proper to add the husband as a party, application may be made to add him under Ord. XVII., rr. 2, 4, above cited.

On the bankruptcy of a defendant, the action against him will in general be stayed under the Bankruptcy Act, 1883, s. 10 (2), cited "*Bankruptcy*," *post*, p. 591, on application made in the action.

As to cases in which the plaintiff becomes bankrupt after action, and as to the continuance of such actions by trustees in bankruptcy, see "*Bankruptcy*," *post*, p. 104.

As to what causes of action pass to a trustee in bankruptcy, see "*Bankruptcy*," *post*, pp. 100, 101.

As to joining parties where there has been an assignment or transmission of the plaintiff's interest after action, see *Seear* v. *Lawson*, 15 Ch. D. 426 ; 16 *Ib.* 121 ; 49 L. J. Q. B. 69 ; 50 *Ib.* 139 ; *Wallis* v. *Smith*, 46 L. T. 473 ; *Stanhope* v. *Stanhope*, 11 P. D. 103 ; 55 L. J. P. 36 ; *Guy* v. *Churchill*, 40 Ch. D. 481 ; 58 L. J. Ch. 345 ; *House Property Co.* v. *Horse Nail Co.*, 29 Ch. D. 190 ; 54 L. J. Ch. 715.

As to joining parties where there has been an assignment of the defendant's interest after action, see *Campbell* v. *Holyland*, 7 Ch. D. 166 ; 47 L. J. Ch. 145.

As to adding plaintiffs or defendants under Ord. XVI., r. 11, cited *ante*, p. 27, where there has been an assignment or devolution of a sole plaintiff's or a sole defendant's interest before action, see *Emden* v. *Carte*, 17 Ch. D. 768 ; 51 L. J. Ch. 41 (cited *post*, p. 104) ; *Kino* v. *Rudkin*, 6 Ch. D. 160 ; 46 L. J. Ch. 807.

In cases where an assignee is substituted for the original plaintiff, the subsequent pleadings should be headed both with the original title of the action and also with the new title, showing the name of the substituted plaintiff, and should also show in the body of the pleading how the plaintiff derives his title as assignee (*Seear* v. *Lawson*, *supra*).

The order made under these rules should contain such directions as may be requisite as to amending the pleadings, or extending the time for pleading, or any other matter necessitated by such change of parties. Where the order does not contain any such directions, and the change of parties has not been explained by any suggestion made in the pleadings already delivered by way of amendment, it is a convenient and proper course for the party amending to suggest, in the pleading next to be delivered by him, the death or bankruptcy, &c., creating the change, and the order, if any, made relating thereto.

Although under Ord. XVII., rr. 6, 7, above cited, provision is made to enable an application at chambers to discharge or vary such orders, it is presumed that where the facts relied upon as causing the transmission of interest are stated in the pleadings, whether by way of suggestion or otherwise, they may be pleaded to.

For forms of suggestions, see "*Bankruptcy*," *post*, p. 104; "*Executors*," *post*, p. 174; "*Societies*," *post*, p. 303.

Equitable claims and defences, &c.]—Law and equity are now administered concurrently in all civil actions by the Courts established under the Judicature Acts. (See the Judicature Act, 1873, ss. 24, 25.) Accordingly the rules and doctrines by which equity has modified and supplemented the system of the common law are now recognised in every Division of the High Court of Justice, and effect is given to them in all cases in which they are properly applicable.

With respect to equitable claims, &c., it is provided by s. 24 (1), that "If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the High Court and the Court of Appeal respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act." (See also s. 24 (7), cited *post*, p. 58.)

But, by s. 34 of the Judicature Act, 1873, actions for any of the various kinds of equitable relief therein specified, which are such as previously to the Judicature Acts fell within the exclusive jurisdiction of the Court of Chancery, are assigned to the Chancery Division, and, therefore, actions brought for the purpose of obtaining such relief should be commenced in that Division, and, if commenced in any other Division of the High Court, are liable to be transferred to the Chancery Division under the provisions of s. 11 of the Judicature Act, 1875, and Ord. XLIX.

As in other cases, the material facts relied upon must be stated in a summary form (see Ord. XIX., r. 4; *ante*, p. 5), but it may sometimes be necessary to state them rather more in detail than is proper in an action for an ordinary common law demand (see *Heap* v. *Marris*, 2 Q. B. D. 630; 46 L. J. Q. B. 761.)

For forms of claim in actions assigned to the Chancery Division, see R. S. C., 1883, App. C., Sect. II.

With respect to equitable defences, &c., it is provided by s. 24 (2), that "If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable

defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act."

For forms of defences in actions assigned as above mentioned to the Chancery Division, see R. S. C., 1883, App. D., Sect. II.

Previously to the Judicature Acts there was a limited right of pleading defences and replies on equitable grounds under the Common Law Procedure Act, 1854, ss. 83 and 84, now repealed by the Stat. Law Rev. Act, 1883 (46 & 47 Vict. c. 49), but that right was restricted to cases in which a Court of Equity would have decreed an absolute, unconditional and perpetual injunction in favour of the party pleading. (See Bullen & Leake, 3rd ed., p. 566.) These restrictions have been removed by the wider enactments of the Judicature Acts, which have given, subject to the provisions relating to the assignment and transfer of particular actions to the Chancery Division (see Jud. Act, 1873, ss. 34, 36; Jud. Act, 1875, s. 11; and Ord. XLIX.), the fullest power of setting up and enforcing equitable rights and claims in actions in the King's Bench Division.

By the Judicature Act, 1873, s. 25, sub-ss. 2–7, the doctrines of law are assimilated to those of equity with respect to certain matters therein particularly mentioned; and it is further provided by sub-s. 11, that "Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

By s. 24 (5), it is declared that, subject to the proviso therein contained, "No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto."

It should be added that, except where the law has been expressly altered (as, for instance, in the particular cases enumerated in the Jud. Act, 1873, s. 25), the doctrines of equity are not in general applicable to cases in which the Courts of Equity, previously to the Judicature Acts, would not have had jurisdiction, or would not have granted relief. (See the Jud. Act, 1873, s. 24 (2), above cited; *Britain* v. *Rossiter*, 11 Q. B. D. 123; 48 L. J. Ex. 362; as to which case, see "*Frauds, Statute of*," *post*, p. 663; *Ind* v. *Emmerson*, 12 App. Cas. 300; and see *Gibbs* v. *Guild*, 8 Q. B. D. 296;

Ib. 59; *Armstrong* v. *Milburn*, 54 L. T. 723; "*Limitation, Statutes of*," *post*, pp. 727 *et seq.*; and see "*Injunction*," *post*, p. 413.)

The Judicature Acts do not in general alter the rights of the parties, but merely amend or improve the procedure for giving effect to those rights. (See *North London Ry. Co.* v. *Great Northern Ry. Co.*, 11 Q. B. D. 30, 36; 52 L. J. Q. B. 380; *Stumore* v. *Campbell*, [1892] 1 Q. B. 314, 316; 61 L. J. Q. B. 463; *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602, 628; 63 L. J. Q. B. 70.)

As to counterclaims founded on equitable estates or rights, or other matters of equity, see the Jud. Act, 1873, s. 24 (3) (7); and see "*Counterclaims*," *post*, pp. 534 *et seq.*

Example of a Statement of Claim, Defence, and Reply (*a*).

19—, [*Here put the letter and number.*]

In the High Court of Justice,
King's Bench Division.

Writ issued 7th June, 1905.

Between *A. B.*.....Plaintiff,
and
C. D. .....Defendant.

Statement of Claim.

The plaintiff's claim is for work done and materials provided by the plaintiff for the defendant at his request.

Particulars:—

	£	*s.*	*d.*
1905. January 1 to 31 May.—To rebuilding house at Wigan, as per contract in writing dated the 24th December, 1904	3,400	0	0
To extras as per account delivered on the 3rd June, 1905	243	0	0
	3,643	0	0
1905. May 1.—Paid on account.....	3,000	0	0
Balance due.....	£643	0	0

The plaintiff also seeks to recover interest on the above balance from the 31st May, 1905, till payment or judgment.

(Signed)
Delivered the 1st July, 1905.

(*a*) This is the form given in R. S. C., 1883, App. E., Sect. II., with such alterations as are necessary to bring it up to date.

[*Heading as above.*]

Defence and Counterclaim.

Defence.

The defendant says that (*b*)—

1. Except as to £200, parcel of the money claimed, the architect did not grant his certificate pursuant to the contract (*c*).

2. As to £200, parcel of the money claimed, the defendant brings [*or* has brought] into Court £200, and says that sum is enough to satisfy the plaintiff's claim herein pleaded to.

Counterclaim.

The defendant says that (*d*)—

1. The contract contained a clause whereby it was provided that the plaintiff should complete the works by the 31st March, 1905, or in default pay to the defendant £1 a day for every subsequent day during which the works should remain unfinished, and they so remained unfinished for sixty-one days to the 31st May.

The defendant counterclaims £61.

(Signed) ——

Delivered the 22nd July, 1905.

[*Heading as above.*]

Reply.

The plaintiff says that (*d*)—

1. As to the first paragraph of the defence, he joins issue.

2. As to the second paragraph thereof, the plaintiff accepts the £—— in satisfaction.

As to the counterclaim—

3. The liquidated damages were waived by ordering extras and material alterations in the works.

Particulars :—[*State them*].

4. The defendant waived the liquidated damages by preventing the plaintiff from having access to the premises till a week after the agreed time.

Particulars :—[*State them*].

(Signed) ——

Delivered the 5th August, 1905.

(*b*) These words, "the defendant says that," are given in several of the forms in the Appendix to the Rules of 1883, but it is submitted that it is better to omit them.

(*c*) It would seem more correct to refer to the provision of the contract making the granting of the certificate a condition precedent.

(*d*) See note (*b*), *supra*.

General Form of Particulars not stated in the Pleadings (*e*).

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.
Between *A. B.* .....Plaintiff,
and
C. D......Defendant.

Particulars.

The following are the particulars of the plaintiff's claim in this action, [*or*, of the counterclaim, *or*, under paragraph —— of the statement of claim, *or*, of the injuries alleged in paragraph —— of the statement of claim, *or*, of the fraud alleged in paragraph —— of the defence, *or*, *as the case may be*].

[*Here state the particulars, and if they are given in pursuance of an order they should be preceded by a statement to that effect, e.g.*, The following are the particulars delivered pursuant to the order of Master —— made in this action, dated —— ——, 19—.]

Delivered the —— ——, 19—.

By *E. F.*, Plaintiff's Solicitor [*or*, Agent].

To *Mr. G. H.*, Defendant's Solicitor [*or*, Agent].

See Form of Particulars of Objections in an Action for Infringement of a Patent, post, p. 895.

(*e*) **Particulars.**]—"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms," *i.e.*, the forms given in Appendices C., D., and E. to the Rules of the Supreme Court, 1883, "particulars (with dates and items, if necessary) shall be stated in the pleading; provided that, if the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading" (Ord. XIX., r. 6).

A folio is seventy-two words, every figure being counted as a word (Ord. LXV., r. 27 (14)).

Examples of the particulars required to be stated in the instances expressly named in Ord. XIX., r. 6 (*supra*), will be found in R. S. C., 1883, App. C., Sect. IV., Nos. 2, 9; Sect. VI., No. 13; App. D., Sect. IV., (12), and of other cases where particulars are necessary instances will be found R. S. C., 1883, Apps. C., D., E., *passim*. An example of a statement that the particulars exceed three folios will be found in App. C., Sect. V., No. 9, cited *post*, p. 220.

The objects of particulars are, to prevent surprise at the trial by informing the opposite party what the case is which he has to meet, to explain and limit pleadings which are vague or require limitation, and, generally, to define and narrow the issues to be tried, and so save unnecessary expense (*Spedding* v. *Fitzpatrick*, 38 Ch. D. 410, 413; 58 L. J. Ch. 139; *Saunders* v. *Jones*, 7 Ch. D. 435, 451; 47 L. J. Ch. 440; *Sachs* v. *Speilman*, 37 Ch. D. 295, 305; 57 L. J. Ch. 658; *Newport Docks, &c. Co.* v. *Paynter*, 34 Ch. D. 88; 56 L. J. Ch. 1021; *Hennessy* v. *Wright*, 57 L. J. Q. B. 594; *Yorkshire Prov. Co.* v. *Gilbert*, [1895] 2 Q. B. 148; 64 L. J. Q. B. 578). Whilst particulars are granted to prevent surprise, and to inform the opposite party of the

nature of the case he has to meet, particulars are not ordered of the particular mode in which it may be proposed to prove the case set up in the pleading (*Duke* v. *Winden*, 77 L. T. 67, 68).

By Ord. XIX., r. 7, "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may, in all cases, be ordered, upon such terms, as to costs and otherwise, as may be just."

The pleader should in all cases, including those specially mentioned in Rule 6 of Ord. XIX., cited above, if practicable, state in, or give with, his pleading, fair particulars of all matters in respect of which, such particulars would otherwise be ordered under Rule 7, above; since if such particulars are not given in the first instance, it is the practice to order them to be given under the above rule if applied for, and to make the costs payable by the party pleading "in any event" if they ought to have been stated in, or given with, the pleading. Thus, for example, if an agreement is pleaded its date should in general be given, and it should appear whether it was in writing or verbal, or if it is an implied agreement, it should appear from what facts or circumstances it is to be implied. So where negligence or contributory negligence is charged, the facts must be given either in the body of the pleading or in the particulars in sufficient detail to enable the opponent to see what the negligence consists of or is which he has to meet.

The same principles apply as a rule to all general and material allegations in pleadings of which the party pleading takes upon himself by his pleading the affirmative proof, including allegations of damage other than mere general damage. It is not the practice to order particulars of general damage. (See *London and Northern Bank* v. *Newnes*, 16 Times Rep. 433.)

Particulars will usually be ordered of pleadings or of any material allegations in pleadings which are too general, or with which an opponent cannot fairly deal without further or more specific information. (See cases cited *supra*, and *Godden* v. *Corsten*, 5 C. P. D. 17; 49 L. J. C. P. 112; *Humphries* v. *Taylor Drug Co.*, 39 Ch. D. 693, 695; *The Rory*, 7 P. D. 117, 121; 51 L. J. P. 73; *Phillips* v. *Phillips*, 4 Q. B. D. 127, 130; 48 L. J. Q. B. 135.) They supplement pleadings which would otherwise be too vague and general (*Milbank* v. *Milbank*, [1900] 1 Ch. 376, 383, 385; 69 L. J. Ch. 287), and insure a fair trial by giving notice of the case intended to be set up (*Temperton* v. *Russell*, 9 Times Rep. 319, 322). Where there are no particulars, anything may be proved which is within the scope of the pleadings; therefore, it is frequently advisable, where general allegations are made in the pleadings, to apply for particulars of such allegations. (See *per* Brett, L.J., in *The Rory*, *supra*.) If the particulars, whether stated in the pleadings, or delivered separately, are not sufficiently specific, an application for further and better particulars should be made. (See, for instance, *Newport Slipway, &c. Co.* v. *Paynter*, 34 Ch. D. 88; 56 L. J. Ch. 1021.)

Where the party pleading is unable to give particulars of his allegations without previously inspecting his opponent's books, or documents, or obtaining discovery from his opponent by interrogatories, an application for particulars may be adjourned till after such inspection or discovery, or the order may be made to take effect thereafter (*Philipps* v. *Philipps*, 4 Q. B. D. at p. 131; *Leitch* v. *Abbott*, 31 Ch. D. 374; 55 L. J. Ch. 460; *Owen* v. *Morgan*, 35 Ch. D. 492; *Sachs* v. *Speilman*, *supra*; *Miller* v. *Harper*, 38 Ch. D. 110; 57 L. J. Ch. 1091; *Waynes Co.* v. *Radford*, [1896] 1 Ch. 29).

Where a charge of fraud or misconduct is made, it is specially necessary that definite particulars should be given in order to afford a proper opportunity for making a defence (*Whyte* v. *Ahrens*, 26 Ch. D. 717; 54 L. J. Ch. 145; *Saunders* v. *Jones*, *supra*; *Symonds* v. *City Bank*, 34 W. R. 364).

Where a dismissal of a servant or agent is justified on the ground of misconduct, the party so justifying must give definite particulars of the misconduct charged (*Saunders* v. *Jones*, *supra*). Where it was alleged in a statement of claim that the defendants had made false entries in the plaintiffs' books for the purpose of defrauding the plaintiffs, particulars were ordered to be given, showing the nature of the impropriety, falsehood, or fraud alleged with regard to each item complained of (*Newport Slipway, &c.*

Co. v. *Paynter*, 34 Ch. D. 88 ; 56 L. J. Ch. 1021). Similarly, where a libel or slander is justified in general terms, particulars will be ordered of the justification (*Jones* v. *Bewicke*, L. R. 5 C. P. 32 ; *Gourley* v. *Plimsoll*, L. R. 8 C. P. 362 ; 42 L. J. C. P. 121 ; *Devereux* v. *Clarke*, [1891] 2 Q. B. 582 ; 60 L. J. Q. B. 773 ; *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183 ; 63 L. J. Q. B. 89).

Particulars of negligence will be ordered when a statement of claim charging negligence does not specially point out the particular negligence, or acts of negligence, complained of ; or where, after alleging specific acts of negligence, it also charges negligence in general terms. So, too, particulars will be ordered to be given where the damage alleged is not alleged with sufficient particularity (*Brindley* v. *G. N. Ry. Co.*, Notes of Cases, 1878, p. 57 ; R. S. C., 1883, App. K., No. 13 ; *Watson* v. *North Met. Tramways Co.*, 3 Times Rep. 273.)

In actions for defamatory statements made to third persons not named in the statement of claim, the party alleging and complaining of such statements will be ordered to furnish particulars giving the names of such third persons (*Rosells* v. *Buchanan*, 16 Q. B. D. 656 ; 55 L. J. Q. B. 376 ; *Bradbury* v. *Cooper*, 12 Q. B. D. 94 ; 52 L. J. Q. B. 558). But whether such an order is requisite or not would seem to be a matter for the exercise of judicial discretion in each case. (See *Gouraud* v. *Fitzgerald*, 37 W. R. 265, where a refusal to grant such an order was upheld as a not improper exercise of judicial discretion.)

Where the statement of claim, in an action to restrain infringement of a trade mark, alleged that "divers persons" had been induced by the acts of the defendant to purchase his goods as and for those of the plaintiff, particulars of the names and addresses of those "divers persons" were ordered (*Humphries* v. *Taylor Drug Co.*, 39 Ch. D. 693).

By Ord. XX., r. 8, "In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars."

Where a plaintiff claims merely to have a general account taken, he need not give particulars as to items (*Augustinus* v. *Nerinckx*, 16 Ch. D. 13 ; 43 L. T. 458 ; *Blackie* v. *Osmaston*, 28 Ch. D. 119 ; 54 L. J. Ch. 473). The mere asking for an account will not prevent particulars being ordered, though where the Court sees that an account must be taken particulars will not be ordered (*Kemp* v. *Goldberg*, 36 Ch. D. 505). Where the plaintiff claims a definite amount instead of an account he must give particulars as to the items of which it is composed (*Ib.* ; and see *Philipps* v. *Philipps*, 4 Q. B. D. at p. 131 ; 48 L. J. Q. B. 135).

By Ord. XXXVI., r. 37, "In actions for libel or slander, in which the defendant does not, by his defence, assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence." (See *post*, p. 843.)

Where there are several heads of claim, and there is in the defence a denial of liability, and also a payment into Court to the whole claim, particulars are not, as a matter of course, ordered to be given, specifying the amount paid in respect of each head of claim, or specifying the heads of claim in respect of which the payment is intended to be made ; but where the justice of the case appears to require it, an order to that effect may be made (*Rowe* v. *Kelly*, W. N. 1888, 141 ; 59 L. T. 139 ; *Orient Steam Nav. Co.* v. *Ocean Marine Ins. Co.*, 34 W. R. 442 ; *Boulton* v. *Houlder*, 19 Times Rep. 635 ; 9 Com. Cas. 75).

Where lump sums are credited in a pleading, particulars may be ordered of the items composing such sums. (See *Godden* v. *Corsten*, 5 C. P. D. 17 ; 49 L. J. C. P. 112.)

It is optional with the plaintiff to give credits for payments or matters of set-off in his particulars (*Randall* v. *Ikey*, 4 Dowl. 682 ; *Penprase* v. *Crease*, 1 M. & W. 36 ; *Luck* v. *Handley*, 4 Ex. 486 ; 19 L. J. Ex. 29 ; *Fussell* v. *Gordon*, 13 C. B. 847), but it is generally advisable to do so.

Where credits are given in the particulars, the plaintiff is considered as suing only

for the balance claimed (*Russell* v. *Bell*, 10 M. & W. 352); so that if he proves no balance beyond what is credited, the defendant is entitled to a verdict (*Smethurst* v. *Taylor*, 12 M. & W. 545). The defence of payment or set-off, when pleaded, is taken with reference to the balance claimed in the particulars (*Eastwick* v. *Harman*, 6 M. & W. 13); the proof under it must be of items other than those credited. The items proved would be *primâ facie* applicable to the balance, and it lies upon the plaintiff to show that they are identical with those already credited (*Townson* v. *Jackson*, 13 M. & W. 374; *Lamb* v. *Micklethwait*, 1 Q. B. 400).

Where the writ bears only a general indorsement, any particulars therein specified are superseded by those contained in a statement of claim subsequently delivered. (See Ord. XX., r. 4, cited *post*, p. 51.)

Where a party who has delivered particulars under an order afterwards desires to amend them or to deliver further particulars, he may obtain an order giving him leave to do so, where such an order can be made without injustice to the other side (*Clarapede* v. *Commercial Union Association*, 32 W. R. 262; Chitty's Practice, 14th ed., p. 386).

If particulars are delivered without leave for the purpose of superseding or supplementing particulars which have been previously given separately from the pleadings, they are irregular, and may accordingly be set aside on application under Ord. LXX. (*Yorkshire Provident Co.* v. *Gilbert*, [1895] 2 Q. B. 148, 153; 64 L. J. Q. B. 578). But if such particulars are accepted by the opposite party they will supersede or supplement the original particulars, the irregularity being one that is waived by receiving the fresh particulars and continuing the proceedings in the action without making such application. (See *Fromant* v. *Ashley*, 1 E. & B. 723; *Jones* v. *Fowler*, 4 Dowl. 232.) If fair and proper particulars have been delivered without leave, an application to have them set aside could rarely be attended with any material advantage, as, on application under such circumstances, an order would probably be made that the fresh particulars should stand.

There are certain actions with regard to which it has been enacted by statutes, or directed by rules, that particulars should be delivered with the declaration, or the pleas, as the case may be; as, for example, it is enacted by s. 4 of the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), as to actions under that Act, that, "in every such action the plaintiff shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered." (See R. S. C., 1883, App. C., Sect. VI., No. 4, cited *post*, p. 387; and see *post*, p. 387.)

For instances of other similar enactments, see "*Copyright*," *post*, p. 826; "*Patents*," *post*, pp. 464, 894.

By s. 33 (2) of the Judicature Act, 1875, all enactments inconsistent with the Judicature Acts were repealed, but by s. 21 of that Act existing forms and methods of procedure which are not inconsistent with the Judicature Acts or the rules thereunder were reserved. With regard to Acts prior to the Judicature Act, 1875, the question whether the sections relating to particulars are to be regarded as preserved by the latter section, or as repealed by the former, is in general unimportant, as where such Acts required particulars, particulars of a similar character will be found necessary under the present rules. (See R. S. C., 1883, App. C., Sect. VI., Nos. 4, 6, *post*, pp. 387, 462; and "*Patents*," *post*, p. 464.)

The practice would appear to be that particulars similar to those required by such statutes are in general ordered, though the precise form or mode of delivery imposed by the statute may not always be required. With regard to Acts passed subsequently to the Judicature Act, 1875, any provision contained in them as to particulars must be followed. (See "*Patents*," *post*, pp. 462, 895.)

In general, a defendant who is entitled to particulars should apply for them before putting in his defence, but he does not as a rule waive his right to such particulars by delaying his application for them until after he has delivered his defence (*Sachs* v. *Speilman*, 37 Ch. D. 295, 302; 57 L. J. Ch. 658).

By Ord. XIX., r. 8, "The party at whose instance particulars have been delivered under a judge's order shall, unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons. Save as in this rule provided, an order for particulars shall not, unless the order otherwise provides, operate as a stay of proceedings, or give any extension of time."

This order does not apply where there has been a previous "peremptory" order fixing the time within which the party subsequently obtaining the order for particulars was to plead not mentioned or referred to in the order for particulars (*Falck* v. *Æthelm*, 24 Q. B. D. 174; 59 L. J. Q. B. 161).

Particulars delivered separately from the pleadings do not for all purposes form part of the pleadings. (See, under the former practice, *Jubb* v. *Ellis*, 3 D. & L. 367; *R.* v. *Mill*, 10 C. B. 379.) But for the purpose of applications for judgment under Ord. XXVII., r. 11, and similar purposes, particulars are regarded as part of the pleadings (*United Telephone Co.* v. *Smith*, 61 L. T. 617; 38 W. R. 70).

As to particulars of and under defences, see further *post*, p. 532.

CHAPTER II.

STATEMENTS OF CLAIM.

General Form of Statement of Claim (*a*).

19—. B. No.——.

In the High Court of Justice,
King's Bench Division.

Writ issued the —— ——, 19—.

Between *A. B.* ..... Plaintiff,

and

C. D. ..... Defendant.

Statement of Claim.

The plaintiff, &c., *or*, The plaintiff's claim is, &c., *or*, The defendant, &c., *or*, *as the case may be.* [*Here state briefly and in a summary form the*

(*a*) **Statement of Claim, when necessary.**]—By Ord. XIX., r. 2, "The plaintiff shall, subject to the provisions of Ord. XX., and at such time and in such manner as therein prescribed, deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled. The defendant shall, subject to the provisions of Ord. XXI., and at such time and in such manner as therein prescribed, deliver to the plaintiff his defence, set-off, or counterclaim (if any), and the plaintiff shall, subject to the provisions of Ord. XXIII., and at such time and in such manner as therein prescribed, deliver his reply (if any) to such defence, set-off, or counterclaim. Such statements shall be as brief as the nature of the case will admit, and the taxing officer in adjusting the costs of the action shall at the instance of any party, or may without any request, inquire into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same."

The above rule must now be read subject to the provisions of Ord. XX., r. 1.

By Ord. XX., r. 1, "The delivery of statements of claim shall be regulated as follows:—

"(a.) Where the writ is specially indorsed under Ord. III., r. 6, no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim:

"(b.) Subject to the provisions of Ord. XIII., r. 12, as to filing a statement of claim when there is no appearance, no statement of claim shall be delivered unless the same be ordered under Ord. XXX., or Ord. XVIIIA., r. 3.

"(c.) When delivery of a statement of claim is ordered the same shall be delivered within the time specified in the order, or, if no time be so specified, within twenty-one days from the date of the order, unless in either case the time be extended by the Court or a judge."

The effect of the above rules is that (except in the case of a statment of claim specially indorsed on the writ under Ord. III., r. 6, and in the case where the defendant

material facts on which the plaintiff relies for his claim or claims, giving particulars of the claim, where necessary, and dividing the statement, where

---

makes default in appearing and a statement of claim is filed under Ord. XIII., r. 12), no statement of claim can now be delivered without an order giving leave to deliver one. Such order is usually made when a statement of claim is considered necessary on a summons for directions under Ord. XXX.

Where a statement of claim has been specially indorsed on the writ, though no further statement of claim can be delivered, it may be amended by the plaintiff under the provisions of Ord. XXVIII., rr. 1, 2, cited *ante*, p. 14 (*Roberts* v. *Plant*, [1895] 1 Q. B. 597; 64 L. J. Q. B. 347).

As to writs specially indorsed with a statement of claim under Ord. III., r. 6, see *post*, p. 65.

As to the date, title, and signature, &c., of statements of claim, see "*Date, Title, &c.*," *ante*, p. 4; "*Signature of Pleadings*," *ante*, p. 130.

Parties.]—The statement of claim should, in general, correspond with the writ in the number and names of the parties, and in the character in which they sue or are sued.

Names of the Parties.]—The christian names and the surnames of the plaintiff and the defendant should be stated in full and correctly in the writ and statement of claim. Titles and names of dignity should be stated as: ——, Duke of, or Marquis of, or Earl of, or Viscount or Baron ——, or ——, Lord Bishop of ——, or Sir —— ——, Baronet. A person having a title by courtesy is usually designated by his proper name, with the addition "commonly called Lord ——." In the case of a clergyman it is usual, but not necessary, to prefix the term "Reverend" to his name, or to add "Clerk" after it.

In the case of a corporation, the full corporate name should be used. (See "*Company*," *post*, p. 151; "*Corporation*," *post*, p. 158.)

"Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action" (Ord. XLVIIIA., r. 1, cited *post*, p. 267). In like manner, "Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name" (Ord. XLVIIIA., r. 11, cited *Ib.*). It may be noted that one person trading in a name or style other than his own must still sue in his own name. (See *Mason* v. *Mogridge*, 8 Times. Rep. 805.) The above rules do not make it obligatory to use the name of the firm in cases to which they apply. (See *post*, p. 267.)

In actions on bills of exchange or promissory notes or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it is sufficient to designate such persons by the same initial letter or letters or contraction of the christian or first name or names. This was formerly the subject of statutory provision by 3 & 4 Will. 4, c. 42, s. 12, which was repealed by the Statute Law Revision Act, 1892, subject to the course of pleading or practice not being affected by such repeal. It seems that a person who executes a deed by a wrong name may be sued by the name in which he executed it. (See *Williams* v. *Bryant*, 5 M. & W. 447; *Mayor of Lynne's Case*, 10 Rep. 122 *b.*)

Misnomer.]—A name wrongly spelt, in a manner *idem sonans*, is no material misnomer (*R.* v. *Shakespeare*, 10 East, 83; *Ahitbol* v. *Benidditto*, 2 Taunt. 401; *Williams* v. *Ogle*, 2 Str. 889). If there be a misnomer in the writ, the defendant, if he appears, can take no advantage of it (1 Chit. Pr., 14th ed., p. 291). But the misnomer should be corrected in the statement of claim, if any is delivered, by inserting the right name, with a statement that the party misnamed had sued or been sued by the name in the writ. (See Forms, *post*, p. 59.) Where there is an inaccuracy of the statement of the name of the defendant in the writ, it may be corrected by the defendant in his appearance, and in such case the plaintiff should adopt the correction in his statement

necessary, into paragraphs numbered consecutively: see the forms given under the various headings, post.]

---

of claim. (See form, *post*, p. 59.) A person served with a writ issued against another person is not bound to appear, and, if he does not appear, proceedings cannot properly be taken against him in default of appearance (*Walley* v. *McConnell*, 13 Q. B. 903; *Kelly* v. *Lawrence*, 3 H. & C. 1; 33 L. J. Ex. 197; *De Mesnil* v. *Dakin*, L. R. 3 Q. B. 18; 37 L. J. Q. B. 42). Usually, his best course in such a case is to apply without appearing, or after entering a conditional appearance, to have the service of the writ set aside under Ord. XII., r. 30. A misnomer of one of three executors on a writ of summons was amended on the plaintiff's application, although the Statute of Limitations had run in the meantime in favour of the defendant whose name was wrongly stated (*Challinor* v. *Roder*, 1 Times Rep. 527).

Number of the parties.]—If a party not named in the writ be joined in the statement of claim without leave, the statement of claim may be set aside as irregular. (See 1 Chitty's Practice, 14th ed., pp. 217, 290.) But a plaintiff may deliver a statement of claim against one or some of several defendants only without proceeding against the others, for the statement of claim may narrow the operation of the writ. (See 1 Chitty's Practice, 14th ed., p. 217.)

Where some only of several defendants appear to the writ, and a statement of claim is delivered to those of the defendants who have appeared, it should contain a statement of the fact that judgment has been entered against the other defendants. (See the form, cited *post*, p. 61.) It should be added that the plaintiff in such cases is, of course, at liberty, if he chooses, to proceed against such of the defendants as have appeared, without entering judgment against those who have not appeared; but the course above mentioned is usually the best, as a defendant is at liberty to appear at any time before judgment is entered against him (Ord. XII., r. 22); and if a defendant should enter appearance after delivery of a statement of claim to other defendants who had appeared previously this would usually necessitate an amendment.

As to amendments where defendants have been added under Ord. XVI., r. 11, see *ante*, p. 32.

Where one of several defendants sued on a joint contract dies before delivery of a statement of claim, the plaintiff may proceed with the action against the surviving defendants, suggesting the fact of the death. (See *post*, p. 60.)

Character in which parties sue or are sued.]—Where parties sue or are sued in a representative character, the indorsement on the writ must state in what capacity it is that the parties sue or are sued (see Ord. III., r. 4, and the forms of indorsement in App. A., Part III., Sect. VII.); and in such cases the statement of claim should correspond with the writ, and show specifically the capacity in which the parties sue or are sued. (See "*Bankruptcy*," *post*, p. 99; "*Executors*," *post*, p. 166; "*Penal Statutes*," *post*, p. 270.)

Where a party sues or is sued both in a representative capacity and also in his own personal capacity, as may sometimes be the case under Ord. XVIII., rr. 3, 5 (see "*Bankruptcy*," *post*, p. 101; "*Executors*," *post*, p. 166), the fact that he sues or is sued in both capacities should be stated, and the statement of claim should state the respective claims, as far as may be, separately and distinctly. (See Ord. XX., r. 7, cited *post*, p. 52.)

If either party wishes to dispute the right of the other to claim in any alleged representative character or other alleged capacity, he must deny (or refuse to admit) the same specifically. (See Ord. XXI., r. 5, cited *post*, p. 527.) So also where a claim is made against either party in an alleged representative capacity there must be a specific denial (or refusal to admit) that he has that capacity if it is intended to dispute it. (See a form of such denial, *post*, p. 648.)

Parties under disabilities.]—As to these, see "*Infant*," *post*, p. 196; "*Lunatics*," *post*, p. 243, &c.

The body of the statement of claim.]—The body of the statement of claim consists

The plaintiff claims £——, *or*, £—— damages, *or*, *as the case may be.* [*Where there are several distinct claims for debt, damages or other relief, they should be stated separately and numbered consecutively.*]

G. H.

[*Signature of the counsel by whom the pleading has been settled, or if it has not been so settled, of the plaintiff's solicitor, or of the plaintiff himself, if he sues in person.*]

Delivered the —— ——, 19—.

---

of the statement in a summary form of the material facts on which the plaintiff relies for his claim (Ord. XIX., r. 4, cited *ante*, p. 5). The statement should be as brief as the nature of the case will admit (Ord. XIX., r. 2, cited *ante*, p. 5); and no facts should be stated except such as are material to the plaintiff's claim (r. 4). As to what are material facts, see *ante*, p. 6. The forms contained in Appendix C. of the R. S. C., 1883, may be used, when applicable, and, where they are not applicable, forms of the like character, as near as may be, should be employed (Ord. XIX., r. 5, cited *ante*, p. 5). As to cases where particulars are necessary beyond such as are exemplified in those forms, see Ord. XIX., r. 6, cited *ante*, p. 37. The material facts should be sufficiently stated to give due notice to the defendant of the case intended to be set up against him and to prevent his being taken by surprise at the trial (see *ante*, pp. 5, 6, and "*Particulars*," *ante*, p. 37); but the evidence by which it is intended to prove those facts should not be set out (Ord. XIX., r. 4, cited *ante*, p. 5).

It is no part of the statement of claim to anticipate the defence, or to state what answer the plaintiff makes to the anticipated defence (*Hall* v. *Ere*, 4 Ch. D. 341, 345, 348; 46 L. J. Ch. 145).

It is unnecessary to state matters of which the Court takes judicial notice, and matters of law should not be stated as facts, unless where the plaintiff relies upon foreign, colonial, or Scotch law, or private Acts of Parliament. (See *ante*, p. 10.) Thus, where an action is brought for a breach of a duty arising out of some contract or relation between the parties, the duty should not be itself alleged as a fact; but the facts which give rise to the duty should be stated; for an express allegation of the duty in such cases would be a mere statement of an inference of law, which would be superfluous, if the facts stated supported it, and of no effect, if they did not support it. (See "*Carriers*," *post*, p. 140; "*Negligence*," *post*, pp. 442, 443.)

As the old forms of action are now abolished, and as the facts relied upon are now to be stated in all cases, the distinction between actions founded on contract and actions for wrongs has lost much of its former importance (see *ante*, p. 3; *post*, p. 139); but it should be borne in mind, as there are still some differences in the manner of stating the cause of action, according as the case falls within the one class of actions or the other. In any action founded on a contract the statement of claim must state or refer to the contract or agreement of the parties by which the right of the plaintiff was created, and must do so in such a way as to show that the contract or agreement was valid and sufficient to create the right in respect of which the plaintiff sues. Thus, where the contract sued upon is a simple contract requiring to be supported by consideration (*vide infra*), the promise and the consideration for it must be stated or disclosed by the statement of claim in order to show a valid creation of the right. Hence, in actions on contracts, the statement of claim may, in general, be regarded as in effect consisting of two principal parts, viz., the statement of the contract or right, and the statement of the breach or violation of the right. On the other hand, in actions for wrongs independent of contract, the right is frequently an existing fact which is implied by law without there being any necessity to show the origin or creation of such right. Thus, certain rights are implied in law and are inseparably annexed to the person of the plaintiff, as the right to security of life and limb, liberty

The like, where there are several Plaintiffs and Defendants.

19—. B. No. ——.

In the High Court of Justice,
King's Bench Division.

Writ issued the —— ——, 19—.

Between *A. B.*, *C. D.*, and *E. F.* ..... Plaintiffs,
and
G. H. and *I. K.* ..... Defendants.

Statement of Claim.

[*The same as in the preceding form, except that the words* "plaintiffs" *and* "defendants" *must, where necessary, be substituted for* "plaintiff" *and*

---

and reputation; and these it is unnecessary to allege. In such cases the pleading states only the violation of the right, as, that the defendant assaulted and beat the plaintiff, or that the defendant imprisoned the plaintiff, or that the defendant spoke of the plaintiff certain defamatory words. (See, *per* Patteson, J., *Cotton* v. *Browne*, 3 A. & E. 312, 314.) Similarly, in ordinary actions for injuries to rights of property, the right is, in general, sufficiently implied by law from the mere statement that the property was the plaintiff's, as, for instance, in actions for trespass to land or goods, where the statement of claim alleges that the land was the plaintiff's, and the defendant broke and entered, or trespassed upon it; or that the goods were the plaintiff's and the defendant seized and carried them away. Where, however, the right which is alleged to have been violated is not a right implied by the general law, but is a legal conclusion from certain facts other than those of which the Court takes judicial notice (as to which, *vide supra*), those facts ought to be shortly stated in the statement of claim. Thus, in an action for infringing a patent, the plaintiff should allege the fact of the existence of the patent and his property therein. Again, in some cases of wrongs the act complained of is not in itself necessarily injurious to the plaintiff, but becomes so only by reason of the actual damage thereby caused to him, and in such cases it is necessary in the statement of claim to allege the actual damage as the gist of the action. (See *post*, p. 55.) In some cases of actions for wrongs, in stating the act complained of, it becomes necessary also to show on the pleading that it was committed in a certain manner, as "negligently," or "maliciously," or "without reasonable or probable cause," or with knowledge of a certain fact; for the act in itself may not be actionable, but may have been made so only by the way in which it was done; as in actions for driving negligently, for defamation, for malicious prosecution, for keeping a mischievous animal with knowledge of its mischievous nature. In these cases the mode of doing the action is of the gist of the cause of action, and constitutes a necessary part of the statement of the wrongful act. (As to the mode of pleading malice, fraudulent intention, knowledge, &c., see Ord. XIX., r. 22, cited *ante*, p. 9.) But in statements of claim for a supposed wrong, where, on the facts alleged, the act complained of appears to afford no cause of action, mere general allegations, such as that the act was done "wrongfully," or "unlawfully," or "improperly," will not add anything to the plaintiff's case, or render the pleading sufficient. (See *Day* v. *Brownrigg*, 10 Ch. D. 294, 302; 48 L. J. Ch. 173; *Philpot* v. *Lehain*, 35 L. T. 855, at p. 857; and see further, *post*, pp. 140, 442, 443.)

Where the action is brought for the breach of some statutory duty arising independently of contract the statute should be referred to, and the facts which bring the case within it sufficiently stated in the pleading.

As to the mode of stating the claim where the wrong complained of is a breach of

" defendant." *Where it is necessary to refer to one of several plaintiffs or defendants, such plaintiff or defendant may be referred to as " the plaintiff*

---

some duty arising from some special relation existing between the parties, see also Ord. XIX., r. 24, cited *ante*, p. 9.

Where the action is brought only to recover a debt or liquidated demand in money arising upon a contract, express or implied, within the provisions of Ord. III., r. 6, it is in most cases advisable that the statement of claim should be specially indorsed upon the writ. (See *post*, p. 65.)

The forms of statements of claim for debts or liquidated money demands which are given in App. C., Sect. IV., are applicable in respect of such causes of action as are therein stated, whether the statement of claim is specially indorsed upon the writ or delivered separately (*Veale* v. *Automatic Boiler Co.*, 18 Q. B. D. 631; 56 L. J. Q. B. 307). In other cases of a like character similar concise forms, where applicable and sufficient, should be employed (Ord. XIX., r. 5, cited *ante*, p. 5).

Sufficient particulars should be given of the debt sued for, and these should be stated in the claim, unless they exceed three folios, in which case the claim may refer to particulars already delivered, or delivered with the pleading (Ord. XIX., r. 7; see *ante*, p. 38).

The mode of pleading exemplified in the forms above referred to is applicable in cases where there is a present debt or liquidated demand in money due from and payable by the defendant to the plaintiff under a contract at the time of action brought, whether the contract is express or implied, whether it was verbal or in writing, and whether it was a simple contract or a contract under seal.

If the contract was in writing the statement of claim should state or disclose that fact, and should identify the writing by stating its date or the parties thereto, &c., and if the contract was under seal that fact should be stated. If the contract was by word of mouth, the fact that it was so made, and the date when it was made, should be stated.

If the contract was under seal, it is unnecessary to state any consideration for it; if it was a simple contract (other than a contract contained in a bill of exchange or promissory note, &c.), the statement of claim should in some way state or show the nature of the consideration for it. (See the forms in App. C., Sect. IV.; and see *post*, pp. 80, 81.) But in actions for debts or liquidated money demands arising under contracts, a very short and simple mode of statement is usually sufficient, and in such cases the statement of the contract to pay, as well as the statement of the breach by non-payment, is often sufficiently implied by the simple allegation of the existing debt due and the consideration for it.

In declarations under the system of pleading prior to the Judicature Acts, certain concise forms of counts were used for suing upon simple contracts resulting in mere debts, in which the cause of action was stated by a general description, the particular circumstances of the debt being reserved to be given in evidence upon the trial, except so far as they were disclosed by particulars which were, as a matter of course, required to be delivered with such counts. (See Bullen & Leake, 3rd ed., pp. 35 *et seq.*) These counts were designated *indebitatus counts*, *money counts*, or *common counts*, whilst counts stating the cause of action more particularly and more at length were termed *special counts*. Of these " indebitatus counts," those which were most frequently used were eight in number, and were called the " common indebitatus counts." In these counts it was alleged that the plaintiff sued the defendant " for money payable by the defendant to the plaintiff " for one or more of the following considerations, viz. :—

1. For goods sold and delivered by the plaintiff to the defendant.
2. For goods bargained and sold by the plaintiff to the defendant.
3. For work done and materials provided by the plaintiff for the defendant at his request.
4. For money lent by the plaintiff to the defendant.
5. For money paid by the plaintiff for the defendant at his request.

C. D.," *or* "*the defendant* G. H." *If there are different claims for debt, damages, or other relief by different plaintiffs, or against different defendants,*

6. For money received by the defendant for the use of the plaintiff.
7. For interest upon money due from the defendant to the plaintiff, and forborne at interest by the plaintiff to the defendant at his request.
8. For money found to be due from the defendant to the plaintiff on accounts stated between them.

Any debts which could formerly have been sued for under these common counts now come within the operation of Ord. III., r. 6, and statements of claim in respect of them may be specially indorsed on the writ.

Similar concise forms of statement of claim may, in general, be employed where a consideration is executed for which a debt, of liquidated amount payable at the time of action, has accrued due under an express or implied agreement for payment. Thus, such forms are in general applicable where the terms of any special agreement (whether by parol or under seal) have been performed and satisfied so as to leave a mere debt due to the plaintiff, and in such cases it is usually sufficient to state in the statement of claim that the debt has become due under the contract, which must be described or referred to sufficiently to identify it, without setting out the contract or further stating the circumstances, except by giving, where necessary, such particulars as may be required under Ord. XIX., r. 6, cited *ante*, p. 37. But such forms are not applicable where an entire contract remains still open and in part unperformed. (See *Cutter* v. *Powell*, cited *post*, p. 156 ; *Towers* v. *Barrett*, 1 T. R. 155.)

Where a special contract after part performance has been rescinded, either by mutual consent or by such a breach on the one side as entitles the other to rescind, and goods, labour, &c., have been provided by one party under the special contract and retained by the other party after the rescission, under such circumstances as to imply a new contract to pay the value of the consideration actually received, the plaintiff may sue for that amount as for a debt. (See *post*, p. 326.) In such cases, however, it is in general proper that the statement of claim should briefly state the circumstances under which the debt arose.

In actions to recover damages for breach of contract, the contract as well as the breach must be distinctly stated, and in actions of this kind it is generally necessary that the contract and the breach of it should be stated with greater particularity than is usual in cases where the claim is merely in respect of an ascertained debt.

In actions to recover damages for the breach of a contract or duty which is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it is sufficient to allege the contract as a fact and to refer to and identify such letters, conversations, or circumstances without setting them out in detail (Ord. XIX., r. 24, cited *ante*, p. 9).

Where there are several covenants in the same deed, or several promises in the same instrument, or forming parts of one verbal contract, it is sufficient to state those covenants or promises only of which breaches are to be afterwards alleged, provided the parts omitted do not materially qualify or alter the nature of the covenants or promises alleged to have been broken (*Cotterill* v. *Cuff*, 4 Taunt. 285 ; *Tempest* v. *Rawling*, 13 East, 18 ; and see *Clarke* v. *Gray*, 6 East, 564 ; *Howell* v. *Richards*, 11, East, 633 ; 1 Wms. Saund., 1871 ed., 277 (1)).

Where there are several covenants or promises in the same deed or agreement, of which breaches are intended to be alleged, it is usually convenient to state the whole of them consecutively before alleging any of the breaches, though this is a matter of discretion. But where there are two or more distinct deeds or contracts of which breaches are to be alleged, each deed or contract, and the breach or breaches of it, should be separately and distinctly stated (Ord. XX., r. 7, cited *post*, p. 52).

Where an agreement between the parties has been altered or modified by a subsequent agreement, the plaintiff may either state the agreements in their order according to the fact, or he may state the contract as it stands modified or altered, without

the claims at the end of the statement of claim should be stated in such a manner as to show, in the case of each of the several claims for debt, damages, or other relief, by and against whom the claim is made, as, for instance—

The plaintiff, *A. B.*, claims, &c.;

The plaintiff, *C. D.*, claims, &c.;

or, The plaintiffs claim against the defendant, *G. H.*, &c., and against the defendant, *I. K.*, &c.

As to alternative claims by different plaintiffs or against different defendants, see the next form.]

---

noticing the original terms which have been dispensed with. (See *Boone* v. *Mitchell*, 1 B. & C. 18; *Thresh* v. *Rake*, 1 Esp. 53; *Robinson* v. *Tobin*, 1 Stark. 336; *Carr* v. *Wallachian Petroleum Co.*, L. R. 1 C. P. 636; 35 L. J. C. P. 314.) As to the effect of unauthorised alterations, see *post*, p. 579.

It is not necessary in the case of a deed to show that there was any consideration for the defendant's covenants, because a specialty contract requires no consideration to support it (*Pillans* v. *Van Mierop*, 3 Burr. 1670; *Fallowes* v. *Taylor*, 7 T. R. 475; see App. C., Sect. IV., No. 8).

Under the present rules, the practice as to the statement of the consideration for a parol promise has been somewhat relaxed. (See the forms of statements of claim on parol promises in App. C., Sects. IV. and V., and especially the form in Sect. V., No. 10.) Having regard to those forms and to the provisions of Ord. XIX., rr. 5, 14 and 26 (cited *ante*, pp. 5, 10), it would appear that, although, where a statement of claim on a simple contract disclosed affirmatively the fact that there was no consideration for the defendant's promise, or stated as the consideration for the promise, a consideration which was manifestly invalid or insufficient, this would be good ground for an objection in law. (See App. E., Sect. III., No. 1; *post*, p. 564.) The mere omission to state a consideration for the promise in the statement of claim could not be relied on as a sufficient ground for such an objection, and the proper course for a defendant who relies upon the absence of consideration for the promise sued on is to plead that fact as a defence. (See *post*, pp. 599, 655.)

Where the promise consists of several parts, and the breach of one or more of the parts only is complained of, it is clearly sufficient to state so much only of the promise as the defendant is charged with having broken. It was formerly held, however, that it was always necessary to state the whole of the consideration for the promise, even where the consideration consisted of several different things. (See Bullen & Leake, 3rd ed., p. 60.) But under the present rules, it is not necessary or proper to set out the whole consideration at length, where to do so would involve prolixity (see App. C., Sects. IV. and V., and *ante*, pp. 5, 6, 7); and it is sufficient in such cases to state the consideration shortly and in general terms, or by reference, so long as the contract sued upon is sufficiently identified.

The consideration should not be alleged as having been past or executed at the time of the making of the promise, because, generally speaking, a past consideration is insufficient to support a promise; but where a contract is set out *verbatim*, the past tense may be held to be an apt form of expression for a concurrent act (*Steele* v. *Hoe*, 14 Q. B. 431, 445; *Payne* v. *Wilson*, 7 B. & C. 423; *Streeter* v. *Horlock*, 1 Bing. 34; *Bainbridge* v. *Wade*, 16 Q. B. 89; *Hoad* v. *Grace*, 7 H. & N. 494; 31 L. J. Ex. 98).

For an instance of an objection in law on the ground that a parol contract sued on discloses a past consideration on the face of it, see App. E., Sect. III., No. 1 (cited *post*, p. 564).

If the promise sued on, or any part of the consideration for it, is illegal, this forms a good defence (see *post*, p. 682); and if the illegality appear upon the face of the statement of claim, it would be good ground for an objection in point of law. (See *post*, p. 563.)

The like, where there are Alternative Claims or Causes of Action by different Plaintiffs or against different Defendants.

[*Headings as above.*]

1, 2, 3, &c. [*Here state the facts relied upon for the different claims, as mentioned in the first of the above forms, showing distinctly how the alternative*

If the consideration, or the promise or covenant, is in the alternative, it should be stated according to the fact. (See, under the former practice, *Penny* v. *Porter*, 2 East, 2 ; *Tate* v. *Wellings*, 3 T. R. 531 ; Bullen & Leake, 3rd ed., p. 60.)

In stating an agreement made by the plaintiff or defendant through an agent, that fact need not necessarily be alleged, for *qui facit per alium facit per se* (see *Higgins* v. *Senior*, 8 M. & W. 834, 844) ; but it nevertheless is advisable to allege it. (See App. C., Sect. V., No. 5.) And where it is material, particulars should be given showing that the contract was made by the agent, and giving his name and the date of the contract, and stating how it was made.

When the promise or covenant itself contains an exception or proviso qualifying the defendant's liability, the exception or proviso, if material to the case, should be stated. (See Bullen & Leake, 3rd ed., p. 60.) But if the covenant or clause in an agreement is absolute in itself, without any exception or proviso, or any reference to any, it may be stated as an absolute contract, although in a distinct part of the deed or instrument there is a proviso defeating or qualifying it under certain circumstances ; such a proviso is in the nature of a defeasance, and must be set up, if the facts permit it, by the other side. Sometimes the covenant or clause, although it does not contain the exception or proviso, refers to it by such words as "except as hereinafter excepted," and in this case the exception or proviso should be stated or referred to in the statement of claim, for *verba relata inesse videntur* (*Varasour* v. *Ormrod*, 6 B. & C. 430). These rules, however, have lost most of their importance under the present system of pleading.

In many cases the cause of action only arises upon the performance of certain conditions, or the lapse of a certain time, or the happening of certain events. In cases of this kind, it was formerly necessary that the declaration should contain an averment that such conditions had been performed, or that such time had elapsed, or that such events had happened ; but now an averment of performance or occurrence of all conditions precedent necessary for the plaintiff's case is implied in the pleading without any express statement to that effect (Ord. XIX., r. 14 ; *post*, p. 157). In cases, however, where such conditions precedent have not been fulfilled, and the plaintiff relies on any matter of *excuse* for their non-fulfilment, it is still proper for him to aver such matter of excuse specifically in his statement of claim. (See *post*, p. 157.)

In actions for breaches of contract, the mode of alleging the breach will depend on the terms and effect of the contract as appearing in the statement of claim. Where the terms of the contract are stated, the breach should, in general, be stated in the words of the contract either negatively or affirmatively, according to whether the contract is affirmative or negative, or in words co-extensive with the effect and meaning of it. Where the effect only of the contract is stated, the breach should be alleged in words co-extensive therewith. In either case particulars of the breach should be given. (See the forms in App. C., Sect. V.)

If a general statement of the breach in the words of the contract is followed in the same sentence by any expressions of details or of particular acts, or by the words "but on the contrary thereof," or even "but," the effect will be to destroy the generality of the preceding words, and to limit the breach to what follows them. (See, *per* Willes, J., *Carpenter* v. *Parker*, 3 C. B. N. S. 206, 243.) Thus, where the covenant was to use a farm in a husbandlike manner, and the breach assigned was that the

claims arise. The claims at the conclusion of the statement of claim should show clearly what the alternatives are, and each alternative after the

---

defendant had not used the farm in a husbandlike manner, but, on the contrary, had committed *waste*, it was held that no misconduct could be shown which did not amount to waste (*Harris* v. *Mantle*, 3 T. R. 307). In cases of this kind, any expressions of details or of particular acts may be charged cumulatively by using the word "and," if it is not intended to limit the general breach previously stated. (See *Byrd* v. *Nunn*, 5 Ch. D. 781; 7 Ch. D. 284; 47 L. J. Ch. 1; *Collette* v. *Goode*, 7 Ch. D. 842; 47 L. J. Ch. 370, as to the effect of particular allegations in narrowing general allegations.) But in all cases particulars of the particular breach or breaches relied on must be given in or referred to in and delivered with the statement of claim.

If the covenant or promise is in the alternative or disjunctive, the breach must allege that the defendant did not do either the one act or the other (*Legh* v. *Lillie*, 6 H. & N. 165; 30 L. J. Ex. 25).

The assignment of the breach may assume whatever is implied by law, as the continuance of an existing state of things. (See *ante*, p. 9.)

If the covenant or agreement, as alleged in the statement of claim, contains any exception or proviso, it will be necessary to qualify the breach accordingly; as, where there is a covenant to repair premises, except damage by fire, it must appear that the defendant failed to repair other damage than damage by fire, and where the covenant is to repair a fence, except on the west side thereof, the breach should show that the want of repair was in other parts of the fence than on the west side (Com. Dig. Pleader (C.), 47).

Under the former system of pleading such statements in the plaintiff's declaration as were introductory only were known by the name of "inducement." In actions on contracts this term was applicable to those prefatory averments as to the relative positions or rights, &c., of the parties which preceded the statement of the contract, and were inserted for the purpose of explaining its meaning (Bullen & Leake, 3rd ed., pp. 8, 436). In actions for wrongs, the term "inducement" was applied, not only to such prefatory and explanatory statements as above mentioned, but also to such statements of the facts constituting the right claimed by the plaintiff as preceded, either in actual or in logical order, the statement of the wrongful act complained of, as, for instance, the statement of the plaintiff's property in actions for trespass to land or goods. (See Bullen & Leake, 3rd ed., pp. 7, 466, 698.) Under the present rules, such prefatory statements should only be made where they are really necessary in order to explain the statement of the cause of action or the claim of damages, so as to be in some sense "material facts" in the case. (See *ante*, p. 5.) Thus, although the forms of statements of claim in Appendix C. (unlike the forms which were in use under the repealed Rules of 1875) contain no prefatory statement as to the trade or profession or place of residence of the parties, it is in some cases proper and material that those facts should be stated by way of inducement.

It is, in general, unnecessary, under the present rules, to state the description or place of abode of the parties in the statement of claim, and this should only be done where such statements are material to the cause of action or to the damages claimed. (See *ante*, p. 5.)

As to statements with respect to the character in which the parties sue or are sued, see *ante*, p. 44.

By Ord. XX., r. 4, "Whenever a statement of claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ." This rule is held not to apply to cases where the statement of claim is merely *filed* under Ord. XIX., r. 10, cited *ante*, p. 14. (See *Gee* v. *Bell*, 35 Ch. D. 161; *Kingdon* v. *Kirk*, 37 Ch. D. 141; *Jamaica Rail. Co.* v. *Colonial Bank*, [1905] 1 Ch. 677, 690.) It does not authorise the plaintiff to insert in the statement of claim claims wholly different in their nature from those appearing on the indorsement of the writ (*Ib.*). And it seems that such claims, if added by the plaintiff in the statement of

first may be introduced by the words "in the alternative," *or* "alternatively," *as, for instance—*

The plaintiffs, *A. B.* and *C. D.*, claim, &c.;

The plaintiff, *C. D.*, in the alternative claims, &c.;

or, The plaintiff claims against the defendant *G. H.*, &c.

In the alternative, the plaintiff claims against the defendant, *I. K.*, &c.]

---

claim without leave, might be struck out on this ground. (See *United Telephone Co.* v. *Tasker*, W. N. 1888, p. 222.) For the rules as to change of parties, see *ante*, pp. 30 *et seq.*

By Ord. XX., r. 7, "Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts." But the mere fact that several different kinds of relief are claimed in the conclusion of the statement of claim, does not make it necessary to distribute the facts stated in the body of the pleading so as to show which of them support each head of the relief claimed (*Watson* v. *Hawkins*, 24 W. R. 884).

If alternative cases are alleged, the facts ought to be stated so as to show on what facts each alternative ground of claim is founded (*Dary* v. *Garrett*, 7 Ch. D. 473, 489; 47 L. J. Ch. 218).

Joinder of causes of action.]—The joinder of causes of action is dealt with by Ord. XVIII. A cause of action against one defendant cannot be joined with a cause of action against another defendant, which is wholly distinct, and does not arise out of the same transaction. (See Ord. XVI., r. 1, cited *ante*, p. 21.)

By Ord. XVIII., r. 1, "Subject to the following rules of this Order, the plaintiff may unite in the same action several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." (See the other rules of Ord. XVIII., below cited.)

Under this rule a plaintiff may allege alternative and inconsistent claims against the defendant, and may ask for different relief in respect of each alternative (*Bagot* v. *Easton*, 7 Ch. D. 1; 37 L. T. 369).

Where the plaintiff has several distinct claims or causes of action against the defendant, founded upon separate and distinct grounds, they should be stated, as far as may be, separately and distinctly (Ord. XX., r. 7, *supra*).

If causes of action which cannot be conveniently tried or disposed of together are joined in the same action, the causes of action so joined may be ordered to be tried or disposed of separately, under the provisions to that effect contained in Ord. XVIII., r. 1, above cited, or in some cases an order may be made, on the application of the defendant, under Ord. XVIII., rr. 8 and 9 (cited *post*, p. 54), confining the action to such of the causes of action as can conveniently be disposed of together, and excluding other claims. (See *Bagot* v. *Easton*, *supra*; *United Telephone Co.* v. *Tasker*, W. N. 1888, p. 222; 59 L. T. 852; and the observations on Ord. XVIII., rr. 8, 9, *post*, p. 54.)

By Ord. XVIII., r. 2, it is provided that "No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed." But this rule contains provisoes to the effect that in actions for foreclosure or redemption an order for delivery of the possession of the mortgaged property may be asked for and obtained, and that "such an action for foreclosure or redemption and for such delivery of possession shall not be deemed an action for the recovery of land" within the meaning of the rules.

The last-cited rule, though primarily applicable to claims by plaintiffs, is also applicable to counterclaims (*Compton* v. *Preston*, 21 Ch. D. 138; 51 L. J. Ch. 680; *Clark* v. *Wray*, 31 Ch. D. 69; 55 L. J. Ch. 119).

Where it is sought to join with a claim for the recovery of land any causes of action other than those which by the terms of the above rule are allowed to be so joined, the plaintiff should apply *ex parte* to a Master at Chambers for leave to do so. Any such application should be made before the writ joining the claims is issued, or the counterclaim joining the claims delivered (2 Chitty's Practice, 14th ed., p. 1207). But, under special circumstances, the application may be made, and the leave granted, at a later stage, where there has been sufficient reason for not making it earlier (*Musgrave* v. *Stevens*, W. N. 1881, p. 163, explaining *Pilcher* v. *Hinds*, 11 Ch. D. 905; 48 L. J. Ch. 587; *Hunt* v. *Fensham*, 28 Sol. Journ. 253; *Willmott* v. *Freehold House, &c. Co.*, 51 L. T. 552; *Rushbrooke* v. *Farley*, 52 L. T. 572; *Clark* v. *Wray*, *supra*), and in that case it should be made by summons.

In general, leave for such joinder of other causes of action in actions for the recovery of land will only be granted where the different causes of action are connected with each other and can conveniently be tried and disposed of together. (See, for instance, *Cook* v. *Enchmarch*, 2 Ch. D. 111; 45 L. J. C. P. 504; *Kitching* v. *Kitching*, 24 W. R. 901; *Sutcliffe* v. *Wood*, 53 L. J. Ch. 970; *Dennis* v. *Crompton*, W. N. 1882, p. 121.) It is not necessary to obtain leave in order to add to a claim for the possession of land, other claims for relief which depend on the plaintiff's title to the land, and are merely part of the "machinery" for enforcing the claim to the land. Thus, a claim for a receiver, or an injunction, or a declaration of title as to the land, may properly be joined without leave to a claim for such possession (*Gledhill* v. *Hunter*, 14 Ch. D. 495; 49 L. J. Ch. 333; *Allen* v. *Kennet*, 24 W. R. 845; *Manisty* v. *Kenealy*, *Ib.* 918; *Kendrick* v. *Roberts*, 30 W. R. 365; *Read* v. *Wotton*, [1893] 2 Ch. 171; 62 L. J. Ch. 481).

An action brought merely to obtain a declaration of title to land without claiming possession is not an action for the recovery of land within the meaning of the rule. (See *Gledhill* v. *Hunter*, *supra*.)

If causes of action, other than those specified in the last-cited rule, are joined with a claim for the recovery of land without leave being obtained for that purpose, the defendant may apply to have the proceedings set aside or amended (*Hunt* v. *Worsfold*, [1896] 2 Ch. 224; 65 L. J. Ch. 548). In a case where such misjoinder was pleaded in the defence, an application before trial to strike out such defence as embarrassing was refused (*Willmott* v. *Freehold House, &c. Co.*, 51 L. T. 532); whilst, in another case it was held that such an objection should not be reserved until the trial, though expressly pleaded in the defence (*In re Derbon*, 58 L. T. 519). The proper course is to apply by summons at chambers at the earliest practicable time to have the misjoinder rectified, although the provisions of Ord. LXX., r. 2, forbidding applications in respect of irregularity after the taking of a fresh step in the action with a knowledge of the irregularity would appear not to apply. (See *Hunt* v. *Worsfold*, *supra*.)

By Ord. XVIII., r. 3, "Claims by a trustee in bankruptcy as such, shall not, unless by leave of the Court or a judge, be joined with any claim by him in any other capacity." (See *post*, p. 101.)

By Ord. XVIII., r. 4, "Claims by or against husband and wife may be joined with claims by or against either of them separately." (See *post*, p. 186.)

By Ord. XVIII., r. 5, "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator." (See *post*, p. 166.)

As to the allegations referred to in this rule, see *Davis* v. *Saintsbury*, 1 Times Rep. 538, where leave was given to amend the indorsement of a writ by joining claims under the rule.

Except in the cases expressly provided for by this rule, claims by or against executors or administrators as such cannot be joined with claims by or against them personally (See *Macdonald* v. *Carington*, 4 C. P. D. 28; 48 L. J. C. P. 179.)

By Ord. XVIII., r. 6, "Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant." (See *D'Hormusgee* v. *Grey*, 10 Q. B. D. 13; 50 L. J. Q. B. 192.)

By Ord. XVIII., r. 7, "The last three preceding rules [that is, Rules 4, 5, and 6, above cited] shall be subject to Rules 1, 8, and 9 of this Order."

By Ord. XVIII., r. 8, "Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the Court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of together."

By Ord. XVIII., r. 9, "If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a judge that the causes of action are such as cannot all be conveniently disposed of together, the Court or judge may order any of such causes of action to be excluded, and consequential amendments to be made, and may make such order as to costs as may be just."

In cases where there has been a misjoinder of claims in violation of the rules, the defendant may apply to have the indorsement of writ or the statement of claim, if any, set aside or amended by striking out some of the claims so as to confine the action to such of the claims as can properly be joined. Any such application should be made by summons at chambers, and at the earliest practicable stage. (See *ante*, p. 53.)

The claim of debt or damages.]—The claim for debt or damages should be sufficient to cover the largest amount of debt or damages likely to be recovered, for the plaintiff, in the absence of amendment, cannot recover more than the amount claimed (*Wyatt* v. *Rosherville Gardens Co.*, 2 Times Rep. 282; and see *Chereley* v. *Morris*, 2 W. Bl. 1300). An amendment, however, in this respect may be allowed even after verdict (Ord. XXVIII., r. 1, cited *ante*, p. 14; *Wyatt* v. *Rosherville Gardens Co.*, *supra*; *The Dictator*, [1892] P. 64; 61 L. J. P. 61; *Modera* v. *Modera*, 10 Times Rep. 61).

Where a particular sum is specified as the amount claimed, it is usually treated as meaning any amount which the plaintiff can prove, not exceeding the sum specified.

The amount thus specified in the statement of claim is not restricted by the amount (if any) indorsed upon the writ as the amount claimed. (See Ord. XX., r. 4, cited *ante*, p. 51.)

Where the claim is for unliquidated damages, it is not now necessary, though it is usual and advisable, to specify the amount claimed. (See R. S. C., 1883, App. C., Sect. VI., No. 12; Sect. VII., No. 2.)

It must be remembered that the damages in respect of any *continuing* cause of action are now to be assessed down to the time of the assessment (Ord. XXXVI., r. 58, cited *post*, p. 56).

Where the plaintiff's claim is for a debt or liquidated demand, and can be ascertained exactly, it is better, even where the statement of claim is not specially indorsed, to claim only the precise amount. (See Ord. XXVI., r. 1; and see *Treherne* v. *Gardner*, 8 E. & B. 161; 26 L. J. Q. B. 359.)

As to claiming interest, see *post*, p. 209.

Damages.]—Damages are distinguished in law as *general* and *special* damages: the former being the necessary and immediate loss occasioned by the injurious act of the defendant; the latter comprising the loss which actually followed under the special circumstances of the case as its natural and proximate consequence beyond its necessary and immediate effect. This distinction leads to the following rule: that if special damage is intended to be claimed, it must be stated with particularity; but general damage requires no particular mention; and is covered by the general claim of damages. (See R. S. C., 1883, App. C., Sect. V., No. 10; Sect. VI., Nos. 1, 7, 14, 15; and see *Boorman* v. *Nash*, 9 B. & C. 145, 152; *Moon* v. *Raphael*, 2 Bing. N. C. 310, 315; *Crouch* v. *G. N. Ry. Co.*, 11 Ex. 742; 25 L. J. Ex. 137; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, 528; 61 L. J. Q. B. 535.)

Where the act of the defendant complained of is in itself a legal injury to the plaintiff, as a breach of contract or a trespass, the law always implies general damage, at least, to a nominal amount (*Marzetti* v. *Williams*, 1 B. & Ald. 415; *Beaumont* v.

Greathead, 2 C. B. 494 ; *Sanders* v. *Stuart*, 1 C. P. D. 326 ; 45 L. J. C. P. 682 ; *Jones* v. *Hough*, 5 Ex. D. 115 ; 49 L. J. Ex. 211 ; *Rayner* v. *Condor*, [1895] 2 Q. B. 289 ; 64 L. J. Q. B. 540). The expression "special damage" is also used in a somewhat different sense to denote the actual loss which is required to be proved in order to give a right of action in those cases where the act complained of is not in itself a legal wrong. The special damage, as it is said, is, in such cases, the gist of the action (*Ratcliffe* v *Evans*, *supra*) ; and is not necessarily or always other than general damage as defined above (*Ib.*). Thus, where words were published reflecting injuriously upon a business carried on by the plaintiff, but not upon the character of the plaintiff himself, it was held that proof of a general loss of business, as distinct from proof of the loss of particular customers, was sufficient to support the action (*Ib.*). Such special or actual damage forms a material part of the cause of action, and should be specifically alleged in the pleading. So, too, where damage beyond general or ordinary damage has been sustained giving rise to a claim in respect of special damage as first above described (*supra*, p. 54), such damage must be distinctly stated in the pleading.

The object of stating such last-mentioned special damage is to give notice to the defendant of the nature and extent of the claim made against him, and of the particular facts by which it is to be supported, so as to enable him to come to trial prepared with evidence to meet it. The charge of general damage is sufficiently notified in the statement of the injury, which imports all its necessary and immediate effects (*Smith* v. *Thomas*, 2 Bing. N. C. 372, 380), but special damage must be stated with sufficient particularity to inform the defendant what the plaintiff intends to prove, and the plaintiff is not allowed to give evidence of any special damage which is not sufficiently stated. (See 1 Wms. Saund., 1871 ed., p. 321, n. (5) ; *Hartley* v. *Herring*, 8 T. R. 130 ; *Crouch* v. *G. N. Ry. Co.*, *supra*.) Thus, in an action by a tradesman for defamation, whereby several customers left him, he cannot prove as damage that any particular customer has left him unless the customer be named in the statement of claim (*Browning* v. *Newman*, 1 Str. 666 ; *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577, 578, 587) ; and in an action by a woman for defamation, an allegation that she thereby lost several suitors is insufficient to admit evidence of any particular suitor having deserted her (*Hartley* v. *Herring*, 8 T. R. 130, 132) ; and under an allegation of special damage by a loss of the plaintiff's lodgers, he was not allowed to prove the loss of a particular lodger (*Westwood* v. *Cowne*, 1 Stark. 172). A general loss of business or custom may, however, be alleged and proved without having recourse to particular instances (*Rose* v. *Groves*, 5 M. & G. 613 ; *Evans* v. *Harries*, 1 H. & N. 251 ; 26 L. J. Ex. 31 ; *Riding* v. *Smith*, 1 Ex. D. 91 ; 45 L. J. Ex. 281 ; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524 ; 61 L. J. Q. B. 535).

The circumstances under which an injury was committed, where they are material to the ascertainment of the nature and extent of the injury, may in general be stated and proved in order to aggravate and enhance the damages (*Millington* v. *Loring*, 6 Q. B. D. 190 ; 50 L. J. Q. B. 214 ; *ante*, p. 6 ; and see *Newman* v. *Smith*, 1 Salk. 642 ; *Dix* v. *Brookes*, 1 Str. 61).

Thus, in an action of trespass for entering the plaintiff's house, the plaintiff may allege that the defendant did it under a false charge that the plaintiff had stolen goods therein (*Bracegirdle* v. *Orford*, 2 M. & S. 77) ; and the jury may take all the circumstances into their consideration in assessing the amount of damages (*Merest* v. *Harvey*, 5 Taunt. 442 ; and see *Wilson* v. *Hicks*, 26 L. J. Ex. 242 ; *Emblen* v. *Myers*, 6 H. & N. 54 ; 30 L. J. Ex. 71 ; *Bell* v. *Mid. Ry. Co.*, 10 C. B. N. S. 287 ; 30 L. J. C. P. 273).

There appears to be a distinction between actions of tort and of contract in this respect ; in the latter, in general, no damages more than nominal can be recovered that are not capable of being specifically stated and appreciated, except in the case of a breach of a contract to marry, where the injury to the plaintiff's feelings may also be taken into account (*Hamlin* v. *G. N. Ry. Co.*, 1 H. & N. 408 ; 26 L. J. Ex. 20 ; *Frost* v. *Knight*, L. R. 7 Ex. 111, 116 ; 41 L. J. Ex. 81 ; *Smith* v. *Woodfine*, 1 C B. N. S. 660 ; *Berry* v. *Da Costa*, L. R. 1 C. P. 331 ; 35 L. J. C. P. 191 ; and see *Emblen* v. *Myers*, *supra* ; *Millington* v. *Loring*, *supra*).

It has also been held that in an action for wrongful dismissal the jury in assessing

the damages may take into account the fact that the defendant assigned false grounds in justification of the dismissal (*Mair* v. *Jones*, 25 Q. B. D. 107 ; 59 L. J. Q. B. 542).

When the injury, whether a tort or a breach of contract, has, as a natural and proximate consequence, caused the plaintiff to incur or become liable for expenses, they should be stated as special damage. (See R. S. C., 1883, App. C., Sect. V., No. 8 ; Sect. IV., Nos. 3, 5, 15.) It should be stated that the plaintiff has *paid* the money when that is the case (see R. S. C., 1883, App. C., Sect. V., No. 8), but a liability to pay is, in general, sufficient to entitle the plaintiff to recover for expenses or charges which are properly specified (*Richardson* v. *Chasen*, 10 Q. B. 756 ; *Spark* v. *Heslop*, 1 E. & E. 563 ; 28 L. J. Q. B. 197 ; *Randall* v. *Raper*, E. B. & E. 84 ; 27 L. J. Q. B. 266 ; *Josling* v. *Irvine*, 6 H. & N. 512 ; 30 L. J. Ex. 78).

If the plaintiff fails in proving the special damage alleged, he may still resort to and recover his general damages (*Smith* v. *Thomas*, 2 Bing. N. C. 372, 380).

In an action for defamation, the plaintiff was held entitled to prove and recover for a general loss of trade, though the declaration also alleged a loss of particular customers which he failed to prove (*Evans* v. *Harries*, 1 H. & N. 251 ; 26 L. J. Ex. 31 ; *Riding* v. *Smith*, *supra* ; *Ratcliffe* v. *Evans*, *supra*).

In some cases damages may properly be estimated upon the principle that if one of the parties to a contract does not perform his part of it, the other may perform it for him as reasonably near as may be, and may claim from him as damage the reasonable expense of so doing (*Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. 286, 313 ; 45 L. J. C. P. 521 ; *Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Ex. 92 ; 39 L. J. Ex. 41 ; and see *Hinde* v. *Liddell*, L. R. 10 Q. B. 265 ; 44 L. J. Q. B. 105, cited *post*, p. 279). But the general rule with respect to the measure of damages in actions for breach of contract seems to be that the plaintiff (subject to the rules mentioned below as to remoteness) is entitled to recover as damages the pecuniary amount of the difference between the position of the plaintiff upon the breach of the contract and that in which he would have been if the contract had been performed, so that the cost of performance cannot in all cases be deemed a correct measure of damages (*Wigsell* v. *School for Blind*, 8 Q. B. D. 357, 364 ; 51 L. J. Q. B. 330 ; *Robinson* v. *Harman*, 1 Ex. 855).

Damages may be claimed and assessed for prospective loss which it is reasonably certain will occur by reason of the cause of action (2 Wms. Saund., 1871 ed., p. 496 ; *Hodsoll* v. *Stallebrass*, 11 A. & E. 301 ; *Phillips* v. *L. & S. W. Ry. Co.*, 5 Q. B. D. 78 ; 49 L. J. Q. B. 233 ; *Lambkin* v. *S. E. Ry. Co.*, 5 App. Cas. 352) ; but not if such future damage constitutes itself a new cause of action (see the cases below cited).

Damages, whether existing or prospective, resulting from one and the same cause of action, can only be assessed and recovered once for all (*Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454 ; 42 L. J. C. P. 273 ; *Brunsden* v. *Humphrey*, 14 Q. B. D. 141 ; 53 L. J. Q. B. 476 ; *Darley Main Co.* v. *Mitchell*, 11 App. Cas. 127, 132, 144 ; 55 L. J. Q. B. 529).

In the case of a continuing cause of action, such as a breach of covenant by an apprentice to serve his master, or a breach of covenant to keep premises in repair, or a continuing trespass, damages are recoverable only to the time of their assessment, the continuation of the breach or injury forming a new cause for which a fresh action may be brought. (See *Horn* v. *Chandler*, 1 Mod. 271 ; *Coward* v. *Gregory*, L. R. 2 C. P. 153 ; 36 L. J. C. P. 1 ; *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503 ; and see *Holmes* v. *Wilson*, 10 A. & E. 503 ; *Bowyer* v. *Cook*, 4 C. B. 236 ; and the rule next cited.)

By Ord. XXXVI., r. 58, "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment." A continuous cause of action is one which arises from the repetition of acts or omissions. (See *Hole* v. *Chard Union*, [1894] 1 Ch. 293 ; 63 L. J. Ch. 469 ; *Crumbie* v. *Wallsend Local Board*, *supra*.)

Damage which is too remote from the injurious act to be connected with it as a natural and proximate consequence cannot be recovered, even though expressly claimed as special damage (*Hoey* v. *Felton*, 11 C. B. N. S. 142 ; 31 L. J. C. P. 105 ; *Sneesby* v. *Lanc. & Y. Ry. Co.*, 1 Q. B. D. 42 ; *McMahon* v. *Field*, 7 Q. B. D. 591 ; 50 L. J. Ex. 552 ; *The Argentino*, 14 App. Cas. 519 ; *The City of Lincoln*, 15 P. D. 15).

The damages recoverable in an action for breach of contract may include not only such consequences as may be considered as arising naturally, *i.e.* according to the usual course of things, from the breach itself, but such also as may reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of the breach of it. (See *Horne* v. *Mid. Ry. Co.*, L. R. 8 C. P. 131, 137; 42 L. J. C. P. 59; *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179; *Sanders* v. *Stuart*, 1 C. P. D. 326; 45 L. J. C. P. 682; *Hydraulic, &c. Co.* v. *McHaffie*, 4 Q. B. D. 670; 27 W. R. 221; *Grébert-Borgniss* v. *Nugent*, 15 Q. B. D. 85; 54 L. J. Q. B. 511; *Schulze* v. *G. E. Ry. Co.*, 19 Q. B. D. 30; 56 L. J. Q. B. 442; *Hammond* v. *Bussey*, 20 Q. B. D. 79; 57 L. J. Q. B. 58; *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561; *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640; *Agius* v. *G. W. Colliery Co.*, [1899] 1 Q. B. 413; 68 L. J. Q. B. 312.)

In some cases notice to the defendant of the facts out of which such last-mentioned damages have arisen will be material as showing that the results which have happened were within the contemplation of the parties at the time of the contract (*Ib.*). Mere notice, however, of the special circumstances will not in itself render the party breaking the contract liable for the special consequences of the breach of contract, unless it appears or can be inferred that the contract was made upon the basis of those circumstances (*Horne* v. *Mid. Ry. Co.*, *supra*; *Grébert-Borgniss* v. *Nugent*, *supra*; *Hydraulic, &c. Co.* v. *McHaffie*, *supra*; *Bostock* v. *Nicholson*, [1904] 1 K. B. 725; 73 L. J. K. B. 524). In pleading in such cases, it is advisable to allege the fact of such notice (see Ord. XIX., rr. 4, 23, cited *ante*, pp. 5, 9; and see *post*, p. 146), and to state that the contract sued upon was made upon the basis of the circumstances of which notice was given.

Matter which would constitute a distinct cause of action is not ordinarily available unless pleaded as such. If, however, such matter is also evidence in support of the claim sued for, it may, in general, be proved at the trial without being pleaded. (See *Millington* v. *Loring*, 6 Q. B. D. 190; 50 L. J. Q. B. 214; and the cases next cited.) Thus, it has been held that, in an action for defamation, subsequent libels published by the defendant of the plaintiff are admissible in evidence to prove the malicious motive of the defendant, in order to aggravate the damages for the libel complained of, and cannot be excluded on the ground that they may disclose distinct causes of action (*Pearson* v. *Lemaitre*, 5 M. & G. 700; *Darby* v. *Oakley*, 1 H. & N. 1; and see *Hemmings* v. *Gasson*, E. B. & E. 346; 27 L. J. Q. B. 252).

Where the cause of action is for a wrong, and two or more defendants are found jointly liable therefor in the action, a question may arise as to whether there may be verdicts and judgments for different amounts against the different defendants so found liable. In one case in which the point arose no decision was arrived at (*Gregory* v. *Cotterell*, 1 E. & B. 360; 22 L. J. Q. B. 217). In other cases separate assessments of damage were under the circumstances of those cases held to be legitimate (*Heydon's Case*, 11 Rep. 56; *Player* v. *Warn*, Cro. Cars. 54; and see *Booth* v. *Briscoe*, 2 Q. B. D. 496; *O'Keefe* v. *Walsh*, (1903) 2 Ir. Rep. 681, 730). Whilst the view that where several have so conducted themselves as to be jointly liable for a wrong each must be held responsible for the whole injury sustained by the plaintiff, is held in other cases to be correct. (See *Austen* v. *Willward*, Cro. Eliz. 860; *Clark* v. *Newsam*, 1 Ex. 131, 140; 16 L. J. Ex. 296; *Dawson* v. *McClelland*, (1899) 2 Ir. Rep. 486.) It is suggested that the better opinion is, that where the circumstances are such that damages for the wrong done may be given, beyond the pecuniary loss suffered by the plaintiff, then if there are circumstances of aggravation as against some one or more of the defendants, and not as against others, there may be separate assessments of damage followed by separate judgments (see cases cited above, and Ord. XVI., rr. 4, 5), and that if, as would usually be the case, the plaintiff consents to this course it is not open to objection, and further that where the wrong complained of is caused by a series of acts, it may be that there may be separate assessments when the parts taken by the various defendants have so varied as to make a distinction in the damages appear just. (See *O'Keefe* v. *Walsh*, *supra*.)

As to treble damages for pound-breach, under the 2 W. & M. sess. 1, c. 5, see *post*, p. 383.

As to liquidated damages, see *post*, p. 241.

Relief other than damages or payment of debt.]—"The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." (Jud. Act, 1873, s. 24 (7); see also the other sub-sections of s. 24 and s. 25 of the same Act.)

The remedy or relief which is sought in the action should, in general, be expressly claimed both on the writ and in the statement of claim, whether it be damages, the appointment of a receiver, a mandamus, an injunction, or specific performance of a contract, or whatever else it may be (Ord. II., r. 1; Ord. XIX., r. 2; Ord. XX., r. 6).

If the claim for a mandamus or injunction, or the appointment of a receiver, is a substantive part of the relief for the obtaining of which the action is brought, the indorsement upon the writ ought to show such claim; but if the necessity therefor arises incidentally in the course of the action, the required relief will be granted though not claimed upon the writ. (See *Colebourne* v. *Colebourne*, 1 Ch. D. 690; 45 L. J. Ch. 749.)

If the defendant, by way of counterclaim, seeks relief which the Chancery Division alone has the requisite machinery to administer (*e.g.*, where specific performance is sought), this may afford good reason for an order to transfer the whole action to the Chancery Division (*Holloway* v. *York*, 2 Ex. D. 333; *Hillman* v. *Mayhew*, 1 Ex. D. 132; 45 L. J. Ex. 334; *London Land Co.* v. *Harris*, 13 Q. B. D. 540; 53 L. J. Q. B. 536); but a defendant in such a case is not entitled as of course to such an order (*Storey* v. *Waddle*, 4 Q. B. D. 289, 290).

As to injunctions and mandamus, see further, *post*, pp. 197, 342, 428.

Venue or place of trial.]—The venue or place of trial is now, in all cases, fixed by an order, and is no longer referred to in the statement of claim. (See Ord. XXXVI., r. 1, as amended July, 1902.)

Time for delivery of statement of claim.]—The time for delivering the statement of claim is usually limited by the order giving leave to deliver it. If no time is so limited, the time is twenty-one days from the date of the order (Ord. XX., r. 1 (c), cited *ante*, p. 42).

A plaintiff cannot deliver a statement of claim during a stay of proceedings obtained by the defendant. (See 1 Chit. Prac., 14th ed., p. 289; *ante*, p. 19.)

By Ord. XXVII., r. 1, "If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs for want of prosecution; and on the hearing of such application the Court or judge may, if no statement of claim shall have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the Court or judge shall think just."

It seems that a statement of claim delivered after time, while the action is still pending, though irregular, is not a nullity. (See *O'Connell* v. *O'Connell*, L. R. 6 Ir. 470.)

As to the time for delivering an amended statement of claim, see Ord. XXVIII., rr. 2, 10; *ante*, pp. 14, 17.

As to the time for delivering a statement of claim after an order for security for costs has been obtained and served, see Ord. LXIV., r. 6, cited *ante*, p. 18.

Statement of Claim by a Plaintiff who has been described in the Writ by a wrong Name (*b*).

Between *A. B.* (by whom the writ of summons was issued herein under the name of *E. B.*) .....Plaintiff,
and
C. D. .....Defendant.

Statement of Claim.

[*Proceed as in the ordinary form.*]

The like against a Defendant who has been described in the Writ by a wrong Name (*b*).

Between *A. B.* .....Plaintiff,
and
C. D. sued as *F. D.* [*or*, against whom the writ of summons was issued herein under the name of *F. D.*] .....Defendant.

Statement of Claim.

[*Proceed as in the ordinary form.*]

Amended Statement of Claim (*c*).

In the High Court of Justice, 19—. B. No. ——.
King's Bench Division.
Writ issued the —— ——, 19—.
Between *A. B.* .....Plaintiff,
and
C. D. .....Defendant.

Amended Statement of Claim.

[*Here set out the statement of claim as amended.*]

(Signed) *L. M.*
(Amended) *L. M.*

Delivered the —— ——, 19—.
Amended and re-delivered the —— ——, 19—. [*If the amendment is made under an order for amendment, add,* "pursuant to the order of ——, dated the —— ——, 19—."]

(*b*) See "*Misnomer*," *ante*, p. 43.
(*c*) See *ante*, p. 17.

Statement of Claim by a surviving Joint Contractee, the other having died before the Commencement of the Action (*d*).

Between *A. B.*.....Plaintiff,
and
C. D. .....Defendant.

Statement of Claim.

[*Proceed as in the ordinary form, except that the cause of action on the contract must be shown to have accrued jointly to the plaintiff and to the deceased partner or joint-contractee, the latter being described as* "since deceased," *or, if the date of his death is known, as having* "died on the —— ——, 19—." *See a form in case of a surviving partner,* "*Partners*," *post*, p. 268.]

The like, by a surviving Plaintiff, the other having died after Writ issued (*d*).

Between *A. B.* and *E. F.* .....Plaintiffs,
and
C. D. .....Defendant.

Statement of Claim.

1. The writ of summons herein was sued out by the above-named *A. B.* and the above-named *E. F.* The said *E. F.* died on the —— ——, 19—, and the above-named *A. B.*, the surviving plaintiff, to whom the cause of action hereinafter set forth has survived, claims against the defendant as follows :—

2, &c. [*Here state the cause or causes of action, which, if joint, should be alleged to have accrued to the plaintiff and the said E. F.*]

Against a surviving Joint-Contractor, the other having died either before or after the Commencement of the Action (*d*).

[*The statement of claim may be in the ordinary form throughout, without any reference to the deceased. But, in general, it is better to state it according to the facts, with a statement of the fact of the death of the deceased partner or joint-contractor, which may be adapted from that in the preceding form.*]

(*d*) See "*Change of Parties*," *ante*, p. 30; and "*Number of the Parties*," *ante*, p. 44.

Statement of Claim after change of parties by death and after an order giving leave to new parties to carry on the action.

Between *A. B.* .....Plaintiff,
and
C. D. .....Defendant,
by original action.
And between *E. F.* (executor of the said *A. B.*)...Plaintiff,
and
G. H. (trustee in the bankruptcy of the said *C. D.*) .....Defendant,
by order dated the —— ——, 19—.

Statement of Claim.

1. [*State the change that has occurred and the making of the order to carry on.*]

2. [*State the facts as usual.*]

Statements of Claim by or against Partners, &c., in the Name of their Firm: see "Partners," post, p. 267.

General Form of Statement of Claim where one of several Defendants appears to the Writ and the others fail to appear, and suffer Judgment by Default, and the Plaintiff proceeds with the Action against the Defendant who has appeared (e).

Between *A. B.* .....Plaintiff,
and
C. D., *E. F.*, and *G. H.* .....Defendants.

Statement of Claim
against the defendant *G. H.*

1. The writ of summons herein was sued out against all the above-named defendants, and the defendants *C. D.* and *E. F.* have not appeared to the said writ, and by reason thereof judgment herein has been entered against the said *C. D.* and *E. F.* that, &c. [*here set forth the judgment*], and thereupon the plaintiff, as against the defendant *G. H.*, who has appeared to the said writ, claims as follows:—

2, &c. [*Here state the claim in the ordinary form, showing that the cause of action, if joint, accrued against all the defendants.*]

By or against Husband and Wife: see "Husband and Wife," post, pp. 194, 409.

(e) See "*Number of the Parties*," *ante*, p. 44.

By or against a Married Woman, where her Husband is not joined: see Ib., post, pp. 184, 193, 409.

By an Infant: see "Infant," post, p. 197.

By or against a Lunatic or Person of Unsound Mind: see "Lunatics," post, p. 243.

By a Person Suing on behalf of a Class (f).

Between *A. B.* (suing on behalf of himself and of all [other] the [copyholders of the manor of ——, *or as the case may be*]).....Plaintiff,
and
C. D. .....Defendant.

Statement of Claim.

[*The body of the statement of claim must show that the other persons whom the plaintiff claims to represent in the action have the same interest therein as himself, and the relief claimed should, in general, be stated to be claimed on their behalf as well as on his own, as, for instance,* The plaintiff, on behalf of himself and of all [other] the [copyholders of the said manor, *or, as the case may be*] claims, &c. (*stating the relief claimed*).]

By or against Executors or Administrators: see "Executors and Administrators," post, p. 166.

Against Heirs and Devisees: see "Heirs and Devisees," post, p. 182.

By or against a Trustee in Bankruptcy: see "Bankruptcy," post, pp. 99 *et seq.*

By or against Municipal Corporations: see "Corporation," post, p. 161.

(*f*) See *ante*, p. 25.

By a Trustee in Bankruptcy and a Solvent Partner of the Bankrupt: see "Bankruptcy," post, p. 103.

By or against Sanitary Authorities, Poor Law Guardians, and other Public Bodies incorporated by Statute or Charter: see "Corporation," post, p. 158.

By or against County Councils and Rural District Councils: see "Corporation," post, p. 158.

By or against a Public Company: see "Company," post, p. 151.

By or against the Public Officer of a Banking Co-partnership, as nominal Plaintiff or Defendant: see "Bankers," post, p. 98.

By or against a Foreign Public Company established under the Laws of a Foreign Country: see "Corporation," post, p. 161.

By or against a Foreign Sovereign: see "Corporation," post, p. 161.

By or against an Incorporated Building Society: see "Societies," post, p. 301.

By or against the Trustees of a Friendly Society: see Ib., post, p. 302.

By or against the Trustees of a Trade Union: see Ib., post, p. 304.

By or against other Associations or their Trustees, &c.: see Ib.

By an Informer in a Qui tam Action: see "Penal Statutes," post, p. 270.

Statements of Claim in Actions for Recovery of Land, where a Person not named as a Defendant in the Writ has obtained leave to Defend: see "Recovery of Land," post, p. 467.

Statement of Claim in an Action removed by Certiorari from a County Court (g).

In the High Court of Justice, 19—. B. No. ——.
King's Bench Division.

Between *A. B.*..... .....Plaintiff,

and

C. D......Defendant.

Removed from the County Court of ——, holden at ——, by writ of certiorari dated the ——, 19— [*or*, Commenced by plaint issued out of the County Court of ——, holden at ——, and removed to the High Court by writ of certiorari dated the ——, 19—].

Statement of Claim.

[*Proceed as in the ordinary form.*]

The like, in an Action removed by Certiorari from any other Inferior Court.

[*Heading as in the preceding form.*]

The prefatory suggestion as to the commencement and removal of the original proceedings may easily be framed from the suggestion in the preceding form, mutatis mutandis, as, for instance, in the case of an action removed by certiorari from the Mayor's Court, London.

Removed from the Mayor's Court, London, by writ of certiorari, &c. [*proceed as in the preceding form*], *or, in the case of an action removed by certiorari from the Court of Passage at Liverpool,*

Removed from the Court of Passage of the city of Liverpool by writ of certiorari, &c. [*continue as in the last preceding form*].

(*g*) See 51 & 52 Vict. c. 43, s. 126.

CHAPTER III.

SPECIAL INDORSEMENTS.

Form of Statement of Claim specially Indorsed on the Writ of Summons under Ord. III., r. 6 (a).

(See R. S. C., 1883, App. A., Part I., No. 2, and the Forms given in App. C., Sect. IV.)

Statement of Claim.

The plaintiff's claim is, &c. [*here state the ground of claim in a summary form, and so as to show that the claim is within the terms of Ord. III., r. 6*].

Particulars :—

[*Here give particulars of the claim. Dates and items must be given if necessary. If the particulars exceed three folios, that fact may be stated, and reference made to full particulars already delivered, or to be delivered with the statement of claim ; see the next form.*]

(Signed) G. H.

(*See the form at* p. 13.)

[*It is not necessary to insert the date of the service or to state the fact of delivery ; see note* (*a*), *infra*, p. 66.]

(*a*) *Special indorsement of statement of claim on the writ.*]—By Ord. III., r. 6, "In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A.) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt) ; or (B.) on a bond or contract under seal for payment of a liquidated amount of money ; or (C.) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or (D.) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only ; or (E.) on a trust ; or (F.) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant ; the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the Forms in Appendix C., Sect. IV., as shall be applicable to the case."

If the defendant does not appear to a writ which is indorsed for a liquidated demand, whether specially or otherwise, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed, together with interest at the rate specified (if any), or, if no rate be specified, at the rate of five per cent. per annum to the date of the judgment, and costs (Ord. XIII., r. 3).

Where no appearance is entered in an action for the recovery of land, the plaintiff may enter judgment for possession (Ord. XIII., r. 8).

By Ord. XIV., r. 1, "(a) Where the defendant appears to a writ of summons specially indorsed under Ord. III., r. 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed, together with interest, if any, or for recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The judge may thereupon, unless the defendant by affidavit, by his own *viva voce* evidence or otherwise, shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.

"(b) If on the hearing of any application under this rule it shall appear that any claim which could not have been specially indorsed under Ord. III., r. 6, has been included in the indorsement on the writ, the judge may, if he shall think fit, forthwith amend the indorsement by striking out such claim, or may deal with the claim specially indorsed as if no other claim had been included in the indorsement, and allow the action to proceed as respects the residue of the claim."

The principal object of indorsing a writ specially with a statement of claim under Ord. III., r. 6, above cited, is to enable the plaintiff to apply for judgment under this provision. The application may be made even after delivery of a defence, but where the application has been delayed, it lies upon the plaintiff to justify the delay (*McLardy* v. *Slateum*, 24 Q. B. D. 504 ; 59 L. J. Q. B. 154).

The claim thus specially indorsed upon the writ is deemed to be the statement of claim in the action (Ord. XX., r. 1, cited *ante*, p. 42), and no further statement of claim can be required by the defendant, and none can be delivered by the plaintiff without leave (*G.* v. *H.*, W. N. 1883, p. 233), unless by way of an amendment under Ord. XXVIII., r. 2, cited *ante*, p. 14. (See *Roberts* v. *Plant*, [1895] 1 Q. B. 597 ; 64 L. J. Q. B. 347).

The service of the writ thus indorsed operates both as service of the writ and as delivery of the statement of claim indorsed thereon (*Veale* v. *Automatic Boiler Co.*, 18 Q. B. D. 631 ; *Aulaby* v. *Pretorius*, 20 Q. B. D. 764 ; 57 L. J. Q. B. 287). It may be served at any hour of the day, like an ordinary writ of summons, as also during the Long Vacation, as Ord. LXIV. rr. 4, 11 (cited *ante*, pp. 17, 18), has no application to writs thus specially indorsed (*Murray* v. *Stephenson*, 19 Q. B. D. 60.)

The statement of claim thus indorsed must be to the effect of such (if any) of the forms given in App. C., Sect. IV., as is applicable to the case (see Ord. III., r. 6, above cited), and if none of those forms is applicable, must be expressed in a form of the like character, as near as may be (see Ord. III., r. 6, and O. XIX., r. 5, cited *ante*, p. 5), but it should not be marked with the memorandum, "Delivered the —— of ——, 19—," as that requirement of Ord. XIX., r. 11, does not apply to it. (See R. S. C., 1883, App. A., Part I., No. 2 ; *Veale* v. *Automatic Boiler Co.*, 18 Q. B. D. 631.) It is no longer necessary or proper to name the place of trial, as that must now be fixed on the hearing of an application under Ord. XIV. or on a summons for directions.

In order to constitute a sufficient special indorsement under Ord. III., r. 6, above cited, the claim must be stated with sufficient particulars to bring to the notice of the defendant what the claim is, so that he may be able to decide how far to admit or resist the demand (*Bickers* v. *Speight*, 22 Q. B. D. 7 ; 58 L. J. Q. B. 42 ; see *Walker* v. *Hicks*, 3 Q. B. D. 8 ; 47 L. J. Q. B. 27 ; *Smith* v. *Wilson*, 5 C. P. D. 25 ; 45 L. J. C. P. 96 ; *Aston* v. *Hurwitz*, 41 L. T. 521).

A specially indorsed statement of claim, containing such particulars as would have constituted a sufficient special indorsement under the C. L. P. Act, 1852, s. 25 now repealed), will in general be sufficient under the present rules (*Bickers* v. *Speight*, 22 Q. B. D. 7 ; 58 L. J. Q. B. 42 ; and see the cases last cited, and *Grant* v. *Easton*, 13 Q. B. D. 302 ; 53 L. J. Q. B. 68).

If the indorsed statement of claim does not state sufficient particulars of the demand, the defendant may apply to have it amended or supplemented by further particulars.

If the particulars of the debt sued for exceed three folios, the indorsed statement of

claim may refer to an account already delivered. (See Ord. XIX., r. 6; R. S. C., 1883, App. C., Sect. IV., No. 1; *Aston* v. *Hurwitz*, 41 L. T. 521.)

If the indorsed statement of claim is insufficient in point of law, that, in the absence of amendment, would be a sufficient answer to an application for leave to enter judgment under Ord. XIV., r. 1.

The mode of objecting to a special indorsement on the ground that it is insufficient in law varies according to the nature of the insufficiency. Where the objection is a matter of substance which deserves to be seriously argued, it would be proper to plead the objection in the defence as an objection in point of law under Ord. XXV., r. 4 (cited *post*, p. 561).

Where the insufficiency of a special indorsement in point of law arises from mere inaccuracy of statement, or want of care in preparing the indorsement, the proper course would be to apply by summons to have the indorsement struck out or amended as embarrassing. (See *ante*, p. 11.)

A foreign or colonial judgment, which in the Courts of the country pronouncing it is treated as conclusively establishing the existence of a debt so as to make it *res judicata* between the parties, may be the subject of a special indorsement (*Grant* v. *Easton*, 13 Q. B. D. 302; 53 L. J. Q. B. 68; *Nouvion* v. *Freeman*, 15 App. Cas. 1). A claim for arrears of alimony *pendente lite* cannot be so indorsed (*Bailey* v. *Bailey*, 13 Q. B. D. 855; 50 L. T. 722).

A claim against a married woman in respect of a debt contracted by her before or during her marriage, and payable out of her separate property, may be specially indorsed (*Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43; *Downe* v. *Fletcher*, 21 Q. B. D. 11; *Axford* v. *Reid*, 22 Q. B. D. 548; 58 L. J. Q. B. 230; "*Husband and Wife*," *post*, p. 186).

A solicitor's bill of costs may be the subject of a special indorsement, although there has been no taxation and the client is entitled to a taxation, but in such cases if the plaintiff applies for leave to sign judgment under Ord. XIV., the order is in ordinary cases made in a special form providing for taxation. (See *Smith* v. *Edwardes*, 22 Q. B. D. 10; 58 L. J. Q. B. 227; *Lumley* v. *Brooks*, 41 Ch. D. 323; 58 L. J. Ch. 494.)

The provision in Ord. III., r. 6, with respect to special indorsements in actions by landlords against tenants for the recovery of land, only applies to simple cases between landlord and tenant where it is unnecessary to prove any devolution of title on the part of the plaintiff, as, for instance, where the plaintiff claims to enter under the terms of a lease or agreement granted by himself, or where the defendant has attorned to the plaintiff by payment of rent, or is otherwise estopped from denying the plaintiff's title (*Casey* v. *Hellyer*, 17 Q. B. D. 97, 99; 55 L. J. Q. B. 207). Mesne profits may be claimed and ordered to be paid down to the date when possession is obtained (*Southport Tramways Company* v. *Gandy*, [1897] 2 Q. B. 66).

A claim to recover land from a tenant on determination of the term by forfeiture, is not the subject of a special indorsement, except in the case of forfeiture for non-payment of rent, for which the Act as amended in 1902 now provides (*Burns* v. *Walford*, W. N. 1884, p. 31; *Mansergh* v. *Rimell*, *Ib.* p. 34; *Arden* v. *Boyce*, [1894] 1 Q. B. 796; 63 L. J. Q. B. 338).

A mortgagor who, by the mortgage deed, attorns tenant to the mortgagee at a rent for the purpose of securing punctual payment of the interest, and gives to the mortgagee a power to enter upon the mortgaged premises at any time, or at any time after a certain date, and without giving any notice to quit, is a tenant to the mortgagee within the meaning of Ord. III., r. 6, above cited, and the mortgagee may proceed against him to recover possession of the premises under Ord. XIV. (*Kemp* v. *Lester*, [1896] 2 Q. B. 162; 65 L. J. Q. B. 532; and see *Daubuz* v. *Lavington*, 13 Q. B. D. 347; 53 L. J. Q. B. 283; *Hall* v. *Comfort*, 18 Q. B. D. 11; 56 L. J. Q. B. 185; though, on certain other points not material for the present purpose, those cases have been overruled: see *In re Willis*, 21 Q. B. D. 384; 57 L. J. Q. B. 634; *In re Burdett*, 20 Q. B. D. 310; *In re Yates*, 38 Ch. D. 112; *Mumford* v. *Collier*, 25 Q. B. D. 279; 59 L. J. Q. B. 552). See the form, *post*, p. 471.

A claim for principal and interest due on a mortgage may be specially indorsed, and

The like, stating that the Particulars exceed three Folios, and referring to Particulars delivered at the Time of, or before, the Service of the Writ.

[*Heading as in the preceding form.*]

The plaintiff's claim is, &c. [*here state the nature of the plaintiff's claim, as in the preceding form, and proceed as follows :*]

Particulars of the said debt [*or*, claim], which exceed three folios, are delivered herewith [*or*, were delivered to the defendant on the —— ——, 19—].

The like, where there are several distinct Causes of Action for different Debts or Liquidated Demands, &c., within the terms of Ord. III., r. 6.

Statement of Claim.

The plaintiff claims £——, as follows :—

(1.) For [*here state the first or principal claim, subjoining particulars of it where necessary : see the preceding form*].

(2.) For [*here state the second claim, subjoining particulars of it where necessary*].

[*Conclude as in the preceding forms.*]

For forms of special indorsements applicable to particular cases, see the appropriate headings in Chapter IV., post.

---

the fact of the appointment of a receiver does not in itself render the procedure under Ord. XIV. inapplicable, but where there are accounts to be inquired into or taken, an application under that Order will, in general, be unsuccessful (*Lynde* v. *Waithman*, [1895] 2 Q. B. 180. See *Williams* v. *Hunt*, cited *post*, p. 264).

Interest cannot be made the subject of special indorsement, unless it is shown to be due under a contract, express or implied, or under a statute (*Rodway* v. *Lucas*, 10 Ex. 667 ; 24 L. J. Ex. 155 ; *Wilks* v. *Wood*, [1892] 1 Q. B. 684 ; 61 L. J. Q. B. 516 ; *Gold Ores Co.* v. *Parr*, [1892] 2 Q. B. 14 ; 61 L. J. Q. B. 522).

Claims which, by s. 57 of the Bills of Exchange Act, 1882, are to be deemed to be liquidated damages, may be specially indorsed (*Lawrence* v. *Willcocks*, [1892] 1 Q. B. 696 ; 61 L. J. Q. B. 519 ; *Baudo* v. *Boden*, [1893] 1 Q. B. 318 ; 62 L. J. Q. B. 339) ; and in an action upon a bill or note, the writ may be specially indorsed with a claim for interest from the date of the writ "till payment or judgment" (*London Bank* v. *Clancarty*, [1892] 1 Q. B. 689 ; 61 L. J. Q. B. 225). See further, "*Bills of Exchange*," *post*, p. 109.

A claim for the penalty of a bond, with a special condition on which breaches have to be assigned under 8 & 9 Will. III. c. 11, cannot be specially indorsed (*Tuther* v. *Caralampi*, 21 Q. B. D. 414 ; see "*Bonds*," *post*, p. 135). But a claim for the penalty only of a common money bond within 4 & 5 Anne, c. 16, s. 12, may be specially indorsed, and judgment may be given under Ord. XIV. for the amount really due under the condition of the bond (*Gerrard* v. *Clowes*, [1892] 2 Q. B. 11 ; 61 L. J. Q. B. 487). So a claim on a bond for a sum payable in a single event (*Strickland* v. *Williams*, [1899] 1 Q. B. 382), and a claim for a sum agreed to be paid as "liquidated damages" (*Toomey* v. *Murphy*, [1897] 2 Ir. R. 601) may be specially indorsed.

The special indorsement may give credit for any payment on account (see App. C., Sect. IV., Nos. 1, 8), or for an admitted set-off (see *Bickers* v. *Speight*, 22 Q. B. D. 7 58 L. J. Q. B. 42).

CHAPTER IV.

STATEMENTS OF CLAIM IN ACTIONS ON CONTRACTS.

Account (*a*).

Claim for an Account.

1. } [*State the facts showing that the plaintiff is entitled to the account*
2. } *claimed. See a form, post*, p. 74.]

The plaintiff claims:—

(1.) That an account be taken of the [orders obtained by the defendant from customers introduced by the plaintiff, and of the amount of commission due to the plaintiff in respect thereof, *or as the case may be*].

(2.) Payment of the amount found due to the plaintiff on the taking of such account.

(*a*) The old action of account, which in modern times was practically superseded by the more convenient remedy of a bill in equity (see *Kennington* v. *Houghton*, 2 Y. & C. C. 620, 627), lay at common law against a bailiff or receiver, or against a merchant at the suit of a merchant, for not rendering a reasonable account of profits (Bacon's Abr. Account; Co. Litt. 172 *a*; *Fitz. Nat. Brev.* Q. 117, 7th ed., p. 266). This action did not lie by the common law against a joint-tenant or tenant in common of realty at the suit of his co-tenant, unless he had been expressly appointed bailiff of the latter's share (*Ib.*; *Wheeler* v. *Horne*, Willes, 208), but by 4 & 5 Anne, c. 3 (c. 16, Ruff.), s. 27, an action of account may be brought by one joint-tenant or tenant in common against the other, as bailiff, "for receiving more than comes to his just share or proportion" (see *Henderson* v. *Eason*, 17 Q. B. 701; *Jacobs* v. *Seward*, L. R. 5 H. L. 464, 475; 41 L. J. C. P. 221). That statute applies both to land and to goods (*Ib.*).

Actions for "the taking of partnership or other accounts" are, by s. 34 of the Judicature Act, 1873, assigned to the Chancery Division of the High Court of Justice. Therefore, where the taking of an account, especially if it be of a complicated character, is a principal part of the relief sought, the action should usually be brought in that Division; and if an action for such account is brought in the King's Bench Division, it may be transferred to the Chancery Division, under Ord. XLIX. (*Leslie* v. *Clifford*, 50 L. T. 591). The King's Bench Division has power, however, to order an account to be taken (ss. 16, 24, 36, Ord. XV., r. 1; *Charles* v. *Shepherd*, [1892] 2 Q. B. 622), and may properly exercise this power where the account is one of a simple character (*York* v. *Stowers*, W. N. 1883, p. 174).

In cases where the plaintiff is unable to give items or details in his pleadings as to some portions of his case it may sometimes be convenient and advisable to add, in the King's Bench Division, to the claims for debt or damages a claim to have accounts taken, as for example where a commercial traveller seeks to be paid commission on

Account Stated.

Claim on Account Stated (*b*).

The plaintiff's claim is for £——, being the amount [*or* balance] found to be due from the defendant to the plaintiff on accounts stated between

---

orders of the details of which he is ignorant, as well as commission on those of which he knows, and can give, the details. See "*Agent*," *post*, p. 74.

For a form of statement of claim in an action against an agent for an account, see *post*, p. 74; *Charles* v. *Shepherd*, *supra*. For a form of declaration by one tenant in common of goods against another for not rendering a reasonable account of the proceeds of the sale thereof, see *Baxter* v. *Hozier*, 5 Bing. N. C. 288.

As to claims for an account in actions for infringement of patents, or of trade marks, see "*Patents*," *post*, p. 462; "*Trade Marks*," *post*, p. 495.

(*b*) An account stated is an admission of a sum of money being due from the defendant to the plaintiff. It affords a distinct cause of action, and may be so stated in the statement of claim (*Irving* v. *Veitch*, 3 M. & W. 90, 106; *Grundy* v. *Townsend*, 36 W. R. 531).

By Ord. XX., r. 8, "In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleadings."

Where there has been no express agreement as to the amount due, but the statement of account relied on is to be implied from letters, conversations, or circumstances, the correct mode of pleading is to allege the stating of the account as a fact, and to give particulars indicating how the implication arises, and to refer to such letters, conversations, or circumstances, with dates, so as to inform the opposite party of the precise case he has to meet. (See Ord. XIX., rr. 24 and 6; *Bickers* v. *Speight*, 22 Q. B. D. 7; 58 L. J. Q. B. 42.) When the account stated, or admission of liability has been reduced to writing, it is correct to state that fact, the drawing up or giving of the writing being, it is conceived, in general a material fact proper to be pleaded. (See "*Pleading in General*," *ante*, p. 7.) It sometimes happens that claims for money due upon accounts stated are joined with claims upon the original debt, or debts, in respect of which such accounts were stated. Where this is the case it is usual to insert the claims upon accounts stated after those upon the original debt or debts.

The claim upon an account stated lies where there is an absolute acknowledgment or admission made by the defendant to the plaintiff of a debt due from him to the plaintiff and payable at the time of action brought (*Wayman* v. *Hilliard*, 7 Bing. 101; *Knowles* v. *Michel*, 13 East, 249; *Highmore* v. *Primrose*, 5 M. & S. 65; *Porter* v. *Cooper*, 1 C. M. & R. 387; *Wray* v. *Milestone*, 5 M. & W. 21, 24; *Buck* v. *Hurst*, L. R. 1 C. P. 297).

Where the acknowledgment or admission applies only to part of a larger debt claimed, it may be a good statement of account as to such part (*Chisman* v. *Count*, 2 M. & G. 307; *Grundy* v. *Townsend*, 36 W. R. 531).

An account stated alone does not extinguish or supersede or alter the previous debts respecting which it was stated (*Fidgett* v. *Penny*, 1 C. M. & R. 108; *Smith* v. *Page*, 15 M. & W. 683; *Perry* v. *Attwood*, 6 E. & B. 691; 25 L. J. Q. B. 408), but an account stated respecting debts on both sides may by agreement between the parties effect an extinction of the cross demands, and so operate as payment *pro tanto* (*Ashby* v. *James*, 11 M. & W. 542; *Callander* v. *Howard*, 10 C. B. 290). And where upon an account containing cross demands a balance is struck and agreed upon, the discharge of the other items is a sufficient consideration to support the debt for the balance, though the account might have contained claims for which an action would not lie (*Laycock* v. *Pickles*, 4 B. & S. 497; 33 L. J. Q. B. 43).

An account stated alone is not conclusive between the parties, but the debts respecting

them verbally on the —— ——, 19— [*or* in writing and contained in a letter from the defendant to the plaintiff dated the —— ——, 19—, *or* in a document (*or* account) signed by the defendant and dated the —— ——, 19—].

Particulars:—

19—, May —. Amount due as aforesaid.....£——.

---

which it was stated may be examined. Thus, the defendant may show that the account was stated by mistake (see *Trueman* v. *Hurst*, 1 T. R. 40, 42; *Thomas* v. *Hawkes*, 8 M. & W. 140; *Perry* v. *Attwood*, *supra*); that the account was stated respecting a debt not then due, as an I O U given as security for a prospective debt (*Lemere* v. *Elliott*, 6 H. & N. 656; 30 L. J. Ex. 350); that the account was stated respecting debts void for want of consideration, or upon a consideration which has failed (*Jacobs* v. *Fisher*, 1 C. B. 178; *Gough* v. *Findon*, 7 Ex. 48; *Wilson* v. *Wilson*, 14 C. B. 616); that the debts were upon an illegal consideration or for an illegal purpose (*Rose* v. *Savory*, 2 Bing. N. C. 145); that the debt was for a solicitor's costs, which could not be recovered for want of a bill delivered (*Scadding* v. *Eyles*, 9 Q. B. 858, *aliter* where the account is in respect of cross claims, *Turner* v. *Willis*, [1905] 1 K. B. 468); that the debt was for the advocacy of a barrister (*Kennedy* v. *Broun*, 13 C. B. N. S. 677; 32 L. J. C. P. 137). But it is no defence that the account was stated respecting a debt due for an executed consideration under a contract within the Statute of Frauds, of which there was no memorandum in writing (*Seago* v. *Deane*, 4 Bing. 459; *Knowles* v. *Michel*, 13 East, 249; *Cocking* v. *Ward*, 1 C. B. 858); *aliter*, if the consideration was within the statute, and still executory (*Lord Falmouth* v. *Thomas*, 1 C. & M. 89).

The acknowledgment may be proved by writing, as by a bill of exchange or promissory note (*Wheatley* v. *Williams*, 1 M. & W. 533), if properly stamped (*Green* v. *Davies*, 4 B. & C. 235; *Jones* v. *Ryder*, 4 M. & W. 32; *Ashling* v. *Boon*, [1891] 1 Ch. 568; 60 L. J. Ch. 306), which is evidence of an account stated between immediate parties to the instrument, but not between remote parties (*Burmester* v. *Hogarth*, 11 M. & W. 97); or by an I O U, which is evidence of an account stated with the person to whom it is addressed (*Jacobs* v. *Fisher*, 1 C. B. 178; *Wilson* v. *Wilson*, 14 C. B. 616; *Buck* v. *Hurst*, L. R. 1 C. P. 297); and if it bears no address, then with the holder, in the absence of evidence to the contrary (*Curtis* v. *Rickards*, 1 M. & G. 46; *Fesenmayer* v. *Adcock*, 16 M. & W. 449); or the acknowledgment may be by oral statement (*Newhall* v. *Holt*, 6 M. & W. 662). An account stated respecting a debt which has not accrued within six years of action brought, must be in writing, by reason of the 9 Geo. 4, c. 14, s. 1, requiring a written acknowledgment (*Jones* v *Ryder*, 4 M. & W. 32; and see *Hopkins* v. *Logan*, 5 M. & W. 241, 248); but upon an account stated respecting items on both sides and admitting a balance, it is no objection to the recovery of the balance that some of the earlier items were barred by the Statute of Limitations (*Ashby* v. *James*, 11 M. & W. 542).

The acknowledgment must be made before action (*Spencer* v. *Parry*, 3 A. & E. 331, 332; *Allen* v. *Cook*, 2 Dowl. 546); and it must show either expressly or by sufficient reference that an ascertained sum is due (*Hughes* v. *Thorpe*, 5 M. & W. 656; *Kirton* v. *Wood*, 1 M. & Rob. 253; *Lane* v. *Hill*, 18 Q. B. 252; 21 L. J. Q. B. 318). The acknowledgment must be made either to the plaintiff himself or to his agent, and is not sufficient if made to a stranger (*Breckon* v. *Smith*, 1 A. & E. 488; *Tucker* v. *Barrow*, 7 B. & C. 623), and it must be made by the defendant or by his agent. An arbitrator is not an agent, and a claim on an account stated will not be supported by his award (*Bates* v. *Townley*, 2 Ex. 152).

An acknowledgment of a debt payable at a future time is evidence of an account stated, upon which the right of action does not commence until the time of payment has arrived, as a promissory note payable at some period after date (*Wheatley* v. *Williams*, 1 M. & W. 533; *Fryer* v. *Roe*, 12 C. B. 437); or a note given to secure a

ADMINISTRATORS. See "*Executors*," *post*, p. 166.

AGENT (*c*).

Claim by an Agent for Remuneration for Work done, &c. (*c*).

The plaintiff's claim is for money payable for work done by the plaintiff for the defendant at his request as agent for the defendant under an agreement in writing dated the —— ——, 19— [*or*, under a contract contained in letters dated, &c., *or* under an agreement made verbally on the —— ——, 19—, *or as the case may be*], whereby the defendant agreed to pay to the plaintiff a commission of £—— per cent. on all orders introduced by the plaintiff to the defendant [*or as the case may be*].

[*If there is also a claim for money paid on the principal's account, add,* and for money paid by the plaintiff for the defendant at his request.]

Particulars :—

---

debt by instalments (*Irving* v. *Veitch*, 3 M. & W. 90). As to an acknowledgment of a debt payable upon a contingency, see *Baker* v. *Heard*, 5 Ex. 959.

From an acknowledgment under seal, a covenant to pay is frequently to be implied, and in such case the action is not upon accounts stated, but upon the covenant thus implied (*Middleditch* v. *Ellis*, 2 Ex. 623 ; *Isaacson* v. *Harwood*, L. R. 3 Ch. 225 ; 37 L. J. Ch. 209 ; and see "*Money Lent*," *post*, p. 253).

It was not necessary under the Common Law Procedure Act, 1852, nor is it now, to state expressly that the money claimed upon an account stated is "payable," since the law implies that from its being found due on an account stated (*Fagg* v. *Nudd*, 3 E. & B. 650).

(*c*) An agent signing a contract in his own name is personally liable upon the contract, unless it appears clearly upon the face of the contract that he signs as the mere agent of some other person, and that the signature was not intended to bind him personally (*Higgins* v. *Senior*, 8 M. & W. 834, 845 ; 11 L. J. Ex. 199 ; *Deslandes* v. *Gregory*, 2 E. & E. 602 ; 29 L. J. Q. B. 93 ; *Hough* v. *Manzanos*, 4 Ex. D. 104, 106 ; 48 L. J. Ex. 398 ; *Hutcheson* v. *Eaton*, 13 Q. B. D. 861). Where a broker on the face of the contract makes it plain that he acts on behalf or on account of a principal only, he is not, in absence of any usage of the particular trade or market, personally liable upon the contract (*Gadd* v. *Houghton*, 1 Ex. D. 357 ; 46 L. J. Ex. 71 ; *Southwell* v. *Bowditch*, 1 C. P. D. 374 ; 45 L. J. C. P. 630). See "*Broker*," *post*, p. 137.

Agents who purchase goods for foreign principals are in general personally liable on the contracts. (See "*Agent*," *post*, p. 574.)

An action will not lie against an agent for merely omitting to perform a commission, unless he is bound by some contract or duty to perform it ; but if he undertakes it, although gratuitously, he is liable to an action for misfeasance in performing it (*Elsee* v. *Gatward*, 5 T. R. 143 ; *Dartnall* v. *Howard*, 4 B. & C. 345 ; *Whithead* v. *Greetham*, 2 Bing. 464 ; *Balfe* v. *West*, 13 C. B. 466 ; 22 L. J. C. P. 175 ; *Hart* v. *Miles*, 4 C. B. N. S. 371 ; 27 L. J. C. P. 218).

Where the relationship is that of principal and agent, as distinguished from that of master and servant, it is *primâ facie* in the power of the principal to revoke the authority of his agent at will and without giving him any prior notice ; but this rule is subject to exceptions arising from the particular circumstances, or from the custom regulating the particular case, or from express agreement (*Read* v. *Anderson*, 10 Q. B. D. at p. 107 ; 13 Q. B. D. 779, 781, 782 ; *Henry* v. *Lowson*, 2 Times Rep. 199 ;

By a House Agent for Commission (d).

The plaintiff's claim is for £—— commission, payable by the defendant to the plaintiff, upon the sale of a house by the plaintiff for the defendant at his request.

Particulars :—

19—, ——. Commission at — per cent. on proceeds of sale of No. —, —— Street, —— ..... £——.

See also a claim, "Work," post, p. 328.

The like, by a Broker for Commission, &c., on the Sale or Purchase of Shares : see "Broker," post, p. 137, *and "Stock Exchange," post,* p. 308.

By an Agent against his Employer for Breach of Agreement to accept a Draft for the Price of Goods bought under the Employment.

1. The plaintiff was employed by the defendant verbally on the —— ——, 19— [*or* by a letter dated the ——, *or as the case may be*], as his

Motion v. *Michaud*, 8 Times Rep. 253, 447 ; *Joynson* v. *Hunt*, 21 Times Rep. 692). Thus where a brandy merchant agreed with a wine merchant that the latter should sell brandies for him on commission, no time being fixed for the duration of the agency, it was held that the latter could maintain no action for the cancellation of the agency without previous notice (*Motion* v. *Michaud, supra*). See further "*Master and Servant*," *post*, p. 247. Where the authority is one securing some benefit to the agent, and that authority has been conferred upon him by an agreement entered into on a sufficient consideration, it is in general irrevocable (*Read* v. *Anderson, supra ; Carmichael's Case*, [1896] 2 Ch. 643, 648 ; 65 L. J. Ch. 902).

(*d*) House agents, estate agents, and the like, have in general no right to any remuneration, unless they succeed in obtaining a tenant or purchaser, as the case may be, on the appointed terms, for the property put into their hands for the purpose of being let or sold (*Read* v. *Rann*, 10 B. & C. 438 ; *Simpson* v. *Lamb*, 17 C. B. 603 ; 25 L. J. C. P. 113 ; *Prickett* v. *Badger*, 1 C. B. N. S. 296 ; 26 L. J. C. P. 33 ; *Green* v. *Mules*, 30 L. J. C. P. 343 ; *Wilkinson* v. *Alston*, 48 L. J. Q. B. 733). The contract in such cases is, by the custom of the trade, in general revocable at the will of the principal at any time before the agent has actually procured a person ready to take or purchase, as the case may be, on the terms arranged (*Simpson* v. *Lamb, supra ; Prickett* v. *Badger, supra*). If the relation of buyer and seller, or landlord and tenant, as the case may be, is actually brought about by the instrumentality of the agent, he is, in general, entitled to his commission (*per* Erle, C.J., *Green* v. *Bartlett*, 14 C. B. N. S. 681, 685 ; 32 L. J. C. P. 262 ; see also *Mansell* v. *Clements*, L. R. 9 C. P. 139). The rule with regard to the payment of commission, in the absence of contract or custom to the contrary, would appear to be that it is not due until the agent has completely performed his task, but if the contract is not fulfilled because of the default of the principal in spite of the agent having done all on his part to be done, commission is nevertheless payable (*Fisher* v. *Drewitt*, 48 L. J. Ex. 32 ; 39 L. T. 253 ; *Green* v. *Lucas*, 33 L. T. 584 ; *Peacock* v. *Freeman*, 4 Times Rep. 541 ; *Grogan* v. *Smith*, 7 Times Rep. 132).

Where the principal by wrongful conduct prevents the agent from procuring the required purchaser or tenant, the agent may sue the principal, and recover compensation for the labour or expense actually bestowed or incurred by him in

agent, to purchase upon the plaintiff's own credit for the defendant on commission —— tons of —— at a price not exceeding £—— per ton, and to ship the same to ——, upon the terms (amongst others) that the defendant would upon presentation accept the plaintiff's draft [at —— days, *or as the case may be*], for the price of the said ——, and for the amount of the commission.

2. The plaintiff accordingly on the —— ——, 19—, bought upon his own credit for the defendant —— tons of —— within the said limit, viz., at £—— per ton, and shipped it to ——, and drew upon the defendant a draft payable as above mentioned for £——, the amount of the said price thereof and of the said commission, and the draft was on the —— ——, 19—, duly presented to the defendant for his acceptance.

3. The defendant on the —— ——, 19—, [verbally] refused to accept, and has not accepted, the said draft.

The plaintiff claims :—

£——, the amount of the said draft and interest thereon [*or as the case may be*].

Against an Agent employed to sell Goods, for not accounting or paying over (*e*).

1. The plaintiff has suffered damage from breach of a contract in writing dated the —— ——, 19—, whereby the defendant agreed with the plaintiff that he would act as agent for the plaintiff in the sale of his drapery goods, on commission, and would on request render to the plaintiff a true and full account of all sales so effected, and would pay over to the plaintiff all moneys received by him for such goods.

2. The defendant has as such agent effected sales of the plaintiff's said goods for the plaintiff (though to what extent the plaintiff is unable to state), but the defendant has not, though requested by the plaintiff so to do, rendered full or true [*or*, any] accounts to the plaintiff of such sales, or paid over to the plaintiff all [*or*, any] moneys received by him for such goods. The said request was made verbally on the —— ——, 19— [*or as the case may be*].

The plaintiff claims :—

(1.) To have a full and true account of such sales.

(2.) Payment of the moneys received and interest thereon.

(3.) Damages.

---

endeavouring to procure a purchaser or tenant (*Prickett* v. *Badger*, 1 C. B. N. S. 296 ; 26 L. J. C. P. 33 ; see also *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C. B. N. S. 733 ; 34 L. J. C. P. 15). See a form of claim *post*, p. 328.

(*e*) Where an agent wrongfully neglects or refuses to pay over to his employer moneys received by him on his employer's behalf, and the latter sues to recover such moneys, the claim may be for "money received" (see *post*, p. 256), and the precise amount, if known, inserted in the claim; whilst, if it is not known except approximately, the approximate amount may be inserted in the claim, and if further

Against an Agent for not using due Care and Diligence in collecting Moneys.

The plaintiff has suffered damage from the defendant's negligence in his conduct of business undertaken by him [verbally] on the —— ——, 19—, as the paid agent and collector for the plaintiff.

Particulars :—

19—.

— June.—The defendant neglected to call on *A. B.*, a customer of the plaintiff, and ask for payment of £—— then due from *A. B.* to the plaintiff, whereby the plaintiff lost payment thereof.

— August.—The defendant negligently omitted to send in accounts to *C. D.* and *E. F.* [*or as the case may be*], whereby the plaintiff lost the sums of £—— and £—— due from them respectively.

The plaintiff claims £—— damages.

Against an Agent employed to purchase Goods, for disregarding his Instructions (*f*).

1. The plaintiff employed the defendant [by letter dated, &c., *or as the case may be*] as a commission agent, to purchase, if practicable, at —— for the plaintiff 200 quarters of wheat of best quality at a price not exceeding £—— per quarter.

2. The defendant, although he could by reasonable diligence have purchased for the plaintiff at —— aforesaid, 200 quarters of wheat of best quality within the said limit of price, neglected to do so. He purchased for the plaintiff only 150 quarters of wheat, and the wheat so purchased by him was of inferior quality.

Particulars of damage :—

Against a del credere Agent on his Guarantee of the Price of Goods sold by him (*g*).

The plaintiff, on the —— ——, 19—, [verbally] employed the defendant as his *del credere* agent to sell on commission certain goods for

---

particulars are required to be given, discovery and inspection may in a proper case be obtained before the defence is put in. (See further, "*Particulars*," *ante*, p. 38.) As to actions against an agent for an account, see "*Account*," *ante*, p. 68, and *infra*, p. 79.

(*f*) A commission agent employed to purchase goods does not in general bind himself absolutely to supply the goods ordered, but merely to use due diligence to fulfil the order, and to get the goods as cheap as he reasonably can for his principal (*Ireland* v. *Livingston*, L. R. 5 H. L. 407; 41 L. J. Q. B. 201). The authority of an agent employed to buy in a particular market is in general to be construed with reference to the usages of such market (*Sutton* v. *Tatham*, 10 A. & E. 27; *Johnston* v. *Kershaw*, L. R. 2 Ex. 82; 36 L. J. Ex. 44; see "*Broker*," *post*, p. 137).

(*g*) A *del credere* agent guarantees to his principal the performance of the contracts

the plaintiff upon the terms that he would be responsible to the plaintiff for the payment of the price thereof, and the defendant received and sold the said goods accordingly, but the price of the same, though due, has not been paid.

Particulars :—

For Breach of an implied Warranty of Authority to contract with the Plaintiff (h).

1. The defendant, on the —— ——, 19—, assuming to be the agent of *G. H.*, induced the plaintiff to enter into a contract with him as such agent

---

by the persons to whom he sells, thus affording an additional security to the principal, but not otherwise affecting the principal's rights or duties in respect of the contract of sale (*Ex p. White*, L. R. 6 Ch. 327, 403 ; 40 L. J. Q. B. 73 ; *Morris* v. *Cleasby*, 4 M. & S. 574 ; *Catterall* v. *Hindle*, L. R. 1 C. P. 191 ; 31 L. J. C. P. 161).

The agreement of a *del credere* agent is in its immediate object a guarantee of the agent's own conduct and skill in effecting sales to solvent customers. It is not an agreement to answer for the debt of another within the 4th section of the Statute of Frauds, and need not be in writing (*Couturier* v. *Hastie*, 8 Ex. 40 ; 22 L. J. Ex. 97 ; *Fleet* v. *Murton*, L. R. 7 Q. B. 126, 132 ; 41 L. J. Q. B. 49 ; *Sutton* v. *Grey*, [1894] 1 Q. B. 285).

(*h*) A person professing to make a contract as agent for another, impliedly, if not expressly, warrants or promises to the person who enters into such contract upon the faith of such profession that the authority which he professes to have does in fact exist (*Collen* v. *Wright*, 7 E. & B. 301 ; 27 L. J. Q. B. 215 ; *Cherry* v. *The Colonial Bank of Australasia*, L. R. 3 P. C. 24, 31 ; 38 L. J. P. C. 49 ; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276 ; 40 L. J. Q. B. 145 ; *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. 54 ; 56 L. J. Q. B. 57). This principle is applicable to directors as agents of their company (see *Weeks* v. *Propert*, L. R. 8 C. P. 427 ; 42 L. J. C. P. 129), and extends in general to any case where a person professing to have authority as agent induces another to act in a matter of business on the faith of his having that authority (*Olivet* v. *Bank of England*, [1902] 1 Ch. 610 ; 71 L. J. Ch. 318 ; *sub nom. Starkey* v. *Bank of England*, [1903] A. C. 114 ; 72 L. J. Ch. 402). If the person who deals with the agent is aware of what is in point of fact the extent of the authority of the agent, but makes a mistake as to whether that authority is sufficient in law to bind the principal, there is, in the absence of an express agreement to that effect, no warranty or promise on the part of the agent to the person dealing with him that he has authority to bind his principal (*Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777, 800 ; L. R. 7 H. L. 102 ; 41 L. J. Ch. 804 ; *Eaglesfield* v. *Lord Londonderry*, 4 Ch. D. 693 ; 38 L. T. (H. L.) 303 ; see also *Dickson* v. *Reuter's Teleg. Co.*, 3 C. P. D. 1 ; 47 L. J. C. P. 1).

In an action against an agent founded on the above principle, the claim must show that the agent had not in fact the authority which by his conduct, or statements, he asserted he had (*Oxenham* v. *Smythe*, 6 H. & N. 690 ; 31 L. J. Ex. 110). The measure of damages is the loss which the plaintiff has sustained by reason of the supposed contract not being binding : thus, where the contract was for the sale of a ship at a certain price, which the plaintiff afterwards resold at a less price, the measure of damages was the difference in price (*Simons* v. *Patchett*, 7 E. & B. 568 ; 26 L. J. Q. B. 195 ; *Godwin* v. *Francis*, L. R. 5 C. P. 295 ; 39 L. J. C. P. 121 ; *In re Nat. Coffee Palace Co.*, 24 Ch. D. 367 ; 53 L. J. Ch. 57 ; *Meek* v. *Wendt*, 21 Q. B. D. 126 ; 59 L. T. 558 ; affd. W. N. 1889, p. 14 ; cf. *Salvesen* v. *Rederi*, [1905] A. C. 302). Where the contract was for a sale of land, the costs of an investigation of title were allowed as damages in addition to the difference between the contract price of the estate and its market value (*Godwin* v. *Francis*, *supra*). Where the contract was for the purchase of goods, the

for [*state what the contract was, as for instance*, the sale by the plaintiff to the said *G. H.* of two ricks of hay at £——], and asserted and warranted impliedly [*or as the case may be*] to the plaintiff that he, the defendant, was authorised by *G. H.* to make the said contract for him as his agent.

2. The plaintiff upon the faith of such assertion and warranty entered into the said contract on the —— ——, 19—, with the defendant as the agent of *G. H.*, but the defendant was not authorised by *G. H.* to make the said contract for him as his agent, and the said *G. H.*, on the —— ——, 19—, verbally [*or as the case may be*] repudiated the said contract and refused to be bound by it, and the plaintiff was unable to enforce the said contract and suffered damage, particulars whereof are as follows :—

Particulars :—

[*State same, e.g.*, The plaintiff lost the value of the said contract, £——, being the difference between the contract and market prices of the said hay, and was put to an expense of £—— costs of an unsuccessful action against *G. H.* for the purpose of enforcing the said contract.]

The plaintiff claims £—— damages.

Against an Agent to recover the Amount of a Secret Commission received by him from Persons dealing with his Employer (*i*).

1. The defendant was employed by the plaintiff as his agent, verbally [*or as the case may be*], on the —— ——, 19—, to buy iron ore for him [on commission, *or*, for reward in that behalf].

---

measure of damages was the difference between the contract price and the value of the goods (*Hughes* v. *Graeme*, 33 L. J. Q. B. 335).

The plaintiff is also, in general, entitled to recover as special damage the costs of an unsuccessful action on the contract against the alleged principal (*Randell* v. *Trimen*, 18 C. B. 786 ; 25 L. J. C. P. 307 ; *Godwin* v. *Francis*, *supra* ; and see *Richardson* v. *Dunn*, 8 C. B. N. S. 655 ; 30 L. J. C. P. 44), or of an unsuccessful suit for specific performance (*Collen* v. *Wright*, *supra* ; *Spedding* v. *Nevell*, L. R. 4 C. P. 212 ; 38 L. J. C. P. 133), if such action or suit would have been a valid and appropriate remedy but for the want of authority in the agent, and would, but for such want of authority, have been successful (*Pow* v. *Davis*, E. B. & E. 222 ; 30 L. J. Q. B. 257 ; *Hughes* v. *Graeme*, 33 L. J. Q. B. 335). But if the plaintiff persists in the action or suit against the alleged principal after the agent has absolutely withdrawn the assertion of authority, or after it is known to the plaintiff that the agent had no authority to bind his alleged principal, he cannot recover costs incurred after such withdrawal or knowledge (*Godwin* v. *Francis*, *supra*). The liability to pay such costs is sufficient to sustain the claim for special damage. (See "*Damages*," *ante*, p. 56.)

It is permissible, and in some cases advisable, to join in the same action the agent and his alleged principal, and to state the case in the alternative, claiming to have damages against the agent, if he has not the authority which he asserted he had to bind his principal and to have damages against the principal, or, in proper cases, specific performance of the contract, if the agent in fact has the authority which he asserted. (See *ante*, p. 23 ; and for instances, see *Honduras Ry. Co.* v. *Tucker*, 2 Ex. D. 301 ; 46 L. J. Ex. 391 ; *Massey* v. *Heynes*, 21 Q. B. D. 330 ; 57 L. J. Q. B. 521 ; *Bennetts* v. *McIlwraith*, [1896] 2 Q. B. 464.)

(*i*) No agent is permitted to make any profit out of his agency beyond his proper remuneration as agent without the knowledge and consent of his principal (*Hay's*

2. The defendant as such agent bought for the plaintiff —— tons of iron ore from Messrs. A., B. & Co., on the —— ——, 19—, at £—— per ton, and in effecting such purchase secretly and corruptly received for himself from the said Messrs. A., B. & Co., a commission of £—— [or some

---

Case, L. R. 10 Ch. 601; 44 L. J. Ch. 721; *Parker* v. *McKenna*, L. R. 10 Ch. 96, 110, 124; 44 L. J. Ch. 425; *Harrington* v. *Victoria Graving Dock Co.*, 3 Q. B. D. 549; 47 L. J. Q. B. 594; *Bagnall* v. *Carlton*, 6 Ch. D. 371; 47 L. J. Ch. 30). All pecuniary benefit or profit which an agent so receives he receives for the benefit of his principal, and he can be compelled to account to his principal for it, and that is so whether it is received by the agent under some secret bargain for it, or is in the shape of a discount, or of a douceur for services rendered (*McKay's Case*, 2 Ch. D. 1, 5; 45 L. J. Ch. 148; *Morison* v. *Thompson*, L. R. 9 Q. B. 480; 43 L. J. Q. B. 215; *Metr. Bank* v. *Heiron*, 5 Ex. D. 319; *Mayor of Salford* v. *Lever*, 25 Q. B. D. 363; [1891] 1 Q. B. 168; 60 L. J. Q. B. 39; *Powell* v. *Jones*, [1905] 1 K. B. 11; 74 L. J. K. B. 457).

The fact that the agent was not influenced by the douceur, or profit, so wrongly obtained in the course of his agency, will not render the transaction legitimate, or entitle the agent to retain such douceur or profit as against his principal (*De Bussche* v. *Alt*, 8 Ch. D. 286; 47 L. J. Ch. 381; *Harrington* v. *Victoria Graving Dock Co.*, *supra*; *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369; 68 L. J. Q. B. 360).

Any surreptitious dealing between one principal and the agent of the other principal is a fraud on the latter (*The Panama Telegraph Co.* v. *Indiarubber Works Co.*, L. R. 10 Ch. 515; 45 L. J. Ch. 125; *Harrington* v. *Victoria Graving Dock Co.*; *Mayor of Salford* v. *Lever*, *supra*). As to rescinding a contract upon the ground of such dealings, see *The Panama Telegraph Co.* v. *Indiarubber Works Co.*, *supra*; *Smith* v. *Sorby*, 3 Q. B. D. 552, n., and as to when fraud is a ground for rescission, see "*Fraud*," *post*, pp. 656, 657.

An agent cannot maintain an action to recover such illegal profit or commission from the person who has promised to pay it to him (*Harrington* v. *Victoria Graving Dock Co.*, *supra*).

Where a secret commission or bribe has been paid to an agent in respect of a transaction in which he is acting for his principal, the principal can sue the person who has thus paid commission to or bribed his agent to recover the amount of which he by such payment has been defrauded (*Grant* v. *Gold Exploration Syndicate*, [1900] 1 Q. B. 233; 69 L. J. Q. B. 150; *Cohen* v. *Kuschke*, 83 L. T. 102), and it would seem to have been held that, notwithstanding such recovery, he may also recover from the agent the amount of the bribe or commission paid to such agent (*Mayor of Salford* v. *Lever*, *supra*; and see *Grant* v. *Gold Exploration Syndicate*, *supra*). Where a person employed as agent to sell property sold the property and took a secret commission from the purchaser, it was held that he was not only liable to pay over such commission to his employer, but was also disqualified from recovering from his employer the commission which upon a proper sale would have been payable to him by his employer (*Andrews* v. *Ramsay*, [1903] 2 K. B. 635; 72 L. J. K. B. 865). But when auctioneers omitted to deduct discount off out-of-pocket expenses it was held that their doing so did not disentitle them to their commission (*Hippisley* v. *Knee Bros.*, [1905] 1 K. B. 1; 74 L. J. K. B. 68). Where the trade practice is for the agent to be remunerated by allowances or discounts made to him by the other contracting party, and that practice is known to, and acquiesced in by the principal, there is nothing illegal in the agent accepting such allowances or discounts (*G. W. Insurance Co.* v. *Cunliffe*, L. R. 9 Ch. 525; 43 L. J. Ch. 741; *Baring* v. *Stanton*, 3 Ch. D. 502; and see *Williamson* v. *Barbour*, 9 Ch. D. 529; 37 L. T. 698).

Where a specific sum is claimed, the claim may be simply for money received for the use of the plaintiff, and the form given under "*Money Received*," *post*, p. 256, will in general suffice, unless it is necessary to rely on fraud; and where this is so, it should distinctly appear on the face of the pleadings. (See "*Fraud*," *post*, p. 398.)

other commission, the amount whereof is unknown to the plaintiff], which he did not account for or pay over to the plaintiff.

The plaintiff claims £—— [*or* an account of such commission and payment of the amount thereof].

AGISTMENT (*k*).

Claim for the Agistment of Horses and Cattle.

The plaintiff's claim is for money payable by the defendant to the plaintiff for the agistment, feeding and taking care of horses and cattle for the defendant at his request, made verbally [*or, as the case may be*] on the —— ——, 19—.

Particulars :—

For the Keep of Horses.

The plaintiff's claim is for money payable by the defendant to the plaintiff for keeping, feeding, grooming, training, and attending to horses for the defendant at his request, made verbally [*or, as the case may be*], on the —— ——, 19—.

Particulars :—

For the Use of Pasture.

The plaintiff's claim is for money payable by the defendant to the plaintiff for the defendant's use, by the plaintiff's permission, given verbally on the —— ——, 19—, of pasture land of the plaintiff for depasturing cattle thereon.

Particulars :—

Where the plaintiff does not know what amount to claim and is unable to sue for specific amounts, the action would necessarily in general be one for account. (See "*Account*," *ante*, p. 69.) As to ascertaining by discovery and inspection the details so as to be able to give particulars, see "*Particulars*," *ante*, p. 38.

(*k*) The common law duty of an agister of cattle with whom cattle are left to be fed, is to keep and take care of them and feed them, and permit the owner to retake them, but not to redeliver them to him (*Broadwater* v. *Blot*, Holt, N. P. C. 547 ; *Corbett* v. *Packington*, 6 B. & C. 268). An agister is not an insurer of the safety of the cattle intrusted to him ; though he is liable if they are injured through his negligence or want of care (*Smith* v. *Cook*, 1 Q. B. D. 79, 81 ; 45 L. J. Q. B. 122 ; *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561 ; 64 L. J. Q. B. 415) ; nor has he, as such, any lien on the cattle. (See "*Lien*," *post*, p. 866.) A contract to take in cattle to feed does not give an interest in land within s. 4 of the Statute of Frauds (*Jones* v. *Flint*, 10 A. & E. 753).

For a Form of Claim for Negligence in carrying out a Contract for Agistment, see Turner v. *Stallibrass*, [1898] 1 Q. B. 56; 67 L. J. Q. B. 52.

AGREEMENT (*l*).

Form of Claim for Damages for Breach of an Agreement not under Seal.

The plaintiff has suffered damage by the defendant's breach of an agreement between the plaintiff and the defendant, made on the —— ——, 19— [and contained in letters dated, &c., *or* in a document dated that day, *or* orally], whereby the defendant agreed [*here state concisely the substance and effect of the agreement so far as is material, taking care to show the consideration for the defendant's agreement* (*m*), *and stating the breach or breaches relied on and the special damage, if any, and giving particulars of damage, &c.*].

(*l*) The statement of claim should show, either in the body of it, or in particulars set out or referred to in it, whether the agreement relied on is in writing or made by word of mouth or implied. In all cases the date and parties should be stated. In the case of a written agreement the document or documents containing it should be described sufficiently to identify it or them. (See *Turquand* v. *Fearon*, 40 L. T. 543.) In the case of an implied agreement the facts and circumstances from which the implication arises should be stated. Where the agreement is to be implied from a series of letters, or conversations, or from circumstances, it is sufficient to allege the agreement as a fact, and to refer generally to the letters, conversations, or circumstances, without setting them out in detail (Ord. XIX., r. 24; see *ante*, p. 9). Stipulations are not to be implied in written contracts, unless they are actually necessary in order to give effect to the express contract as reasonably understood (*Aspdin* v. *Austin*, 5 Q. B. 671, 683; *Hamlyn* v. *Wood*, [1891] 2 Q. B. 488; *White* v. *Turnbull*, 3 Com. Cas. 183, 186; 78 L. T. N. S. 726; and see *Ogdens* v. *Nelson*, [1904] 2 K. B. 410; 73 L. J. K. B. 865, affirmed in D. P., [1905] A. C. 109; 74 L. J. K. B. 433).

It is unnecessary that the statement of claim should contain any express averment of the fulfilment of conditions precedent. (See *post*, p. 157.) Where the post is a usual or proper mode of communicating the acceptance of an offer, the contract is in general deemed to be completed upon the posting of the letter of acceptance (*Adams* v. *Lindsell*, 1 B. & Ald. 681; *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Henthorne* v. *Fraser*, [1892] 2 Ch. 27; 61 L. J. Ch. 373). Where the wording of an offer or authority is so ambiguous as to be fairly capable of two meanings the person making or giving it may be bound by it in the sense in which it is accepted and acted on by the recipient or agent, although that may not have the sense intended in making the offer or giving the authority (*Ireland* v. *Livingston*, L. R. 5 H. L. 395; 41 L. J. Q. B. 201; *Falck* v. *Williams*, [1900] A. C. 176; 69 L. J. P. C. 17).

As to agreements required by the Statute of Frauds to be in writing, see *post*, p. 663.

As to setting out agreements verbatim in a statement of claim, see *ante*, p. 7.

(*m*) Consideration is necessary to the validity of a simple contract, and must, in general, be shown upon the statement of claim. (See *ante*, p. 47.)

In the case of bills of exchange, promissory notes, and cheques, it is not necessary to state the consideration upon the face of the statement of claim, because it is presumed that consideration is given for them until evidence to the contrary is produced. (See *post*, p. 108; Ord. XIX., r. 25, cited *ante*, p. 9.) A gratuitous promise, if it rests in agreement only, is void of legal effect (Plowden, 308; *Kekewich* v. *Manning*, 21 L. J. Ch. 581; 1 De G. M. & G. 176).

A contract by deed is, in general, valid without consideration. It is, therefore, not

For like Forms, see R. S. C., 1883, *App. C., Sect. V., Nos.* 1, 2, 4, 5, *and* 10, *cited* "*Sale of Goods*," *post*, pp. 280, 281 ; "*Shipping*," *post*, pp. 297, 298 ; "*Marriage*, *post*, p. 245.

Claim for Damages for Breach of an Agreement not under Seal, where it is desired to set out the Agreement more fully.

1. By an agreement in writing dated the —— ——, 19— [*or*, made verbally on the —— ——, 19—], it was agreed between the plaintiff and the defendant (amongst other things) that [*here first state the material parts of the agreement, either verbatim or giving the substance and effect thereof, care being taken to show the consideration for the defendant's agreement* (*n*). *Then, after setting out any necessary averments, allege the breach or breaches of the agreement, and state the special damage (if any) claimed, giving particulars when required. The pleading should be divided, where necessary, into separate paragraphs numbered consecutively, and should conclude with a claim for the damages or other relief sought in the action*].

Claim for a Debt due under a Covenant in a Deed.

The plaintiff's claim is for principal and interest due under a covenant in a deed dated the —— ——, 19—.

Particulars :—		£
1900, —— ——.	Principal due this day	100
1900, —— ——.	Paid	20
Principal due.....		80
Interest from —— ——, 19—, to —— ——, 19—, at —— per cent.		3
Amount due		£83

(*See R. S. C.*, 1883, *App. C., Sect. IV., No.* 8.)

Concise Form of Claim for Damages for Breach of Covenant.

1. The plaintiff has suffered damage by the defendant's breach of a covenant contained in a deed dated the —— ——, 19—, made between

necessary in a statement of claim founded upon a deed to state the consideration. Under the provisions of certain statutes some deeds without consideration, or voluntary deeds, are made voidable as against certain persons, *e.g.*, *bonâ fide* purchasers for value, &c. ; but unless the claim itself shows that the defendant is one of such persons, it would be unnecessary to allege consideration in the claim. As to what is consideration, see *post*, p. 600.

(*n*) See note (*m*), on p. 80.

the plaintiff of the one part and the defendant of the other part [*state the parties according to the deed*], whereby the defendant covenanted to [*here give concisely the substance and effect of the covenant, so far as is material*].

2. [*Here state the breach, e.g.*, The defendant did not, *or*, did, &c., *as the case may be, following the covenant as stated in the preceding paragraph, and then state the special damage, if any, and give particulars thereof.*]

For a like Form, see R. S. C., 1883, *App. C., Sect. V., No.* 9, *cited* "*Landlord and Tenant*," *post*, p. 220.

Annuity (*o*).

Appraiser. See "*Auctioneer*," *post*, p. 90.

Apprentice (*p*).

By an Apprentice against his Master on the Indenture of Apprenticeship.

1. By an indenture dated the —— ——, 19—, the plaintiff put himself apprentice to the defendant to learn the defendant's trade of a ——, and to serve him as an apprentice for the term of five years then next following, and the defendant by the said indenture covenanted with the plaintiff to take and receive him as the defendant's apprentice during the said term, and to

(*o*) See "*Bonds*," *post*, p. 134, and "*Annuity*," *post*, p. 582. As to the apportionment of annuities, see "The Apportionment Act, 1870," cited *post*, p. 227, and see also *In re Hargreaves*, 44 Ch. D. 236; 59 L. J. Ch. 375.

(*p*) The form of covenant usually inserted in indentures of apprenticeship, "for the true performance of all and every the said covenants and agreements, each of the said parties binds himself unto the others by these presents," is held to render the father or surety liable for the performance of the articles by the apprentice (*Whitley* v. *Loftus*, 8 Mod. 190; *Branch* v. *Ewington*, Doug. 518). There may be a valid apprenticeship to a company or corporation (*Burnley, &c. Society, Limited* v. *Casson*, [1891] 1 Q. B. 75; 60 L. J. M. C. 59).

An action will not lie against an infant on his covenants in an indenture of apprenticeship, unless it is established that the contract or arrangement made by the deed was a reasonable one, and for the infant's benefit, and such that it might fairly be considered a "necessary" for an infant in his position (*De Francesco* v. *Barnum*, 45 Ch. D. 430; *Walter* v. *Everard*, [1891] 2 Q. B. 369; 60 L. J. Q. B. 728; *Evans* v. *Ware*, [1892] 3 Ch. D. 502; 62 L. J. Ch. 256; *Corn* v. *Matthews*, [1893] 1 Q. B. 310; 62 L. J. M. C. 61; *Green* v. *Thompson*, [1899] 2 Q. B. 1; 68 L. J. Q. B. 719; see

instruct him in the said trade by the best means, and to provide for him sufficient food, drink, lodging and other necessaries, during the said term.

2. The plaintiff accordingly on the —— ——, 19—, entered into the service of the defendant as such apprentice, but the defendant did not during the said term instruct the plaintiff in the said trade and did not provide sufficient food, drink, lodging and other necessaries, for the plaintiff [and during the said term, viz., on the —— ——, 19—, wrongfully dismissed the plaintiff from his said service and wholly refused to allow him to serve as such apprentice under the said indenture].

3. By reason of the above-mentioned breaches of covenant [*state the special damage, if any*].

By the Master against the Father or Guardian on the Indenture of Apprenticeship.

1. By a covenant contained in an indenture of apprenticeship dated the —— ——, 19—, the defendant, the father [*or* the guardian, *or as*

Clements v. *L. & N. W. Ry. Co.*, [1894] 2 Q. B. 482), except in the case of apprenticeships under a custom such as the custom of London, as to which see *Stanton's Case*, Moore, 135; *Eden's Case*, 2 M. & L. 226; and Austin on Apprentices, pp. 108 *et seq.*

An infant apprentice cannot, during infancy, avoid the apprenticeship on the ground of his infancy, but he may, unless the binding is under a custom to bind for a longer period, or under the authority of a statute, avoid it upon attaining full age (*R.* v. *Hindringham*, 6 T. R. 557; *Cooper* v. *Simmons*, 7 H. & N. 707; 31 L. J. M. C. 138). Such avoidance, however, does not discharge the father or other person who has covenanted for him (*Ex p. Davis*, 5 T. R. 715; *Ex p. Gill*, 7 East, 376; *King* v. *Wigston*, 3 B. & C. 484; *Cuming* v. *Hill*, 3 B. & Ald. 59). As to infant apprentices, see further "*Infancy*," *post*, p. 688; and see *R.* v. *Lord*, 12 Q. B. 757; 17 L. J. M. C. 181; *Meakin* v. *Morris*, 12 Q. B. D. 352; 53 L. J. M. C. 72; *Corn* v. *Matthews*, [1893] 1 Q. B. 310. As to suing by next friend, see "*Infant*," *post*, p. 196.

There is, in general, an implied stipulation in an apprenticeship deed that the master shall continue during the term to carry on the business at the same place or part of the country in which it is being carried on at the date of the deed (*Eaton* v. *Western*, 9 Q. B. D. 636; 53 L. J. Q. B. 41, where see also as to the effect of changes in the master's firm, and in the mode of carrying on the business).

As to the measure of damages in actions by or against the master, see *Lewis* v. *Peachey*, 1 H. & C. 518; 31 L. J. Ex. 496; *Mare* v. *Jones*, 25 Q. B. D. 107; 59 L. J. Q. B. 542.

Although in the absence of some provision to the contrary, the death of either the master or the apprentice puts an end to the contract (see "*Apprentice*," *post*, p. 583), there is in general no right to the return of any part of the premium upon the death of the master (*Whincup* v. *Hughes*, L. R. 6 C. P. 78; 40 L. J. C. P. 104). It seems that the same rule in general applies in the case of an articled clerk to a solicitor (*In re Thompson*, 1 Ex. 864; *Whincup* v. *Hughes*, *supra*; *Ferns* v. *Carr*, 28 Ch. D. 409; 54 L. J. Ch. 479; Cordery on Solicitors, 3rd ed., p. 19).

If the master of an apprentice or articled clerk becomes bankrupt during the term, such bankruptcy operates as a discharge of the apprenticeship or articles, if either the master or the apprentice or clerk gives written notice to that effect to the trustee in the bankruptcy, who is empowered in such case to return a reasonable sum in respect of the premium (if any) which was paid to the bankrupt. (See the Bankruptcy Act, 1883, s. 41.)

the case may be] of the apprentice *A. B.*, covenanted with the plaintiff that *A. B.* should for the term of —— years faithfully serve the plaintiff, and should obey his lawful commands, and should not absent himself from the plaintiff's service unlawfully.

2. *A. B.* did not during the said term faithfully serve the plaintiff, nor did he obey his lawful commands, and he absented himself from the plaintiff's service unlawfully.

Particulars of breaches :—

Arbitration and Award (*q*).

Claim for Money due on an Award.

The plaintiff's claim is for £——, being the amount awarded to be paid by the defendant to the plaintiff by the award of *G. H.* in writing and dated

(*q*) The general statute law relating to arbitrations has been consolidated and amended by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), which has repealed many previous enactments on this subject. (See s. 26.)

With respect to references by the written agreement of the parties, it is provided by s. 12 that "An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect." By s. 27, a "submission" means "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named or not," and such agreement need not necessarily be signed by the parties (*Baker* v. *Yorkshire Fire Ins. Co.*, [1892] 1 Q. B. 144). A provision in a contract, entered into at Budapest, that all disputes arising under it should be settled by the Courts at Budapest, has been held to be a "submission" (*Austrian-Lloyd SS. Co.* v. *Gresham Life Society*, [1903] 1 K. B. 249; 72 L. J. K. B. 211). An action is still, in general, necessary in order to enforce an award where the agreement of reference was by word of mouth only, or was a mere agreement for a valuation as distinguished from a reference of disputes to arbitration, or where the leave required by s. 12, above cited, cannot be obtained, or where the award does not determine the liability of the parties (*In re Willesden Local Board*, [1896] 2 Q. B. 412, 417; and see "*Company*," *post*, p. 156).

By s. 1, "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court." The meaning of this section is, that the power of the arbitrator or arbitrators appointed under a submission as above defined cannot, where once conferred, be withdrawn without such leave (*In re Smith and Service*, 25 Q. B. D. 545; 59 L. J. Q. B. 533). As to when leave to revoke an arbitrator's authority may be obtained, see *East India Docks Co.* v. *Kirk*, 12 App. Cas. 738; 57 L. J. Q. B. 295; *James* v. *James*, 23 Q. B. D. 12; 58 L. J. Q. B. 424; and other cases cited in Ann. Pract., 1905, vol. ii., p. 550.

A submission by word of mouth only is revocable, and it is a good defence to an action on an award made upon such a submission that the authority of the arbitrator or arbitrators, as the case may be, was revoked before the award was made.

By s. 11, "Where an arbitrator or umpire has misconducted himself, the Court may remove him." This, in the King's Bench Division, is commonly done on motion. It would, however, seem that an action would lie for an injunction to restrain an arbitrator from proceeding with an arbitration, where, owing to corruption, misconduct or interest in the subject-matter of the arbitration, of which at the time of his appointment the parties had no notice, he is incompetent or unfit, and to remove him from his office (*Malmesbury Ry. Co.* v. *Budd*, 2 Ch. D. 113; *Beddow* v. *Beddow*, 9 Ch. D. 89;

the —— ——, 19—, made pursuant to a submission to arbitration made between the plaintiff and the defendant in writing and dated the —— ——, 19—.

Particulars :—		£	*s.*	*d.*
19—, —— ——.	To amount awarded	——	—	—
	To costs paid to the said *G. H.* on taking up the said award and which by the said award were awarded to be repaid by the defendant to the plaintiff in the event of the plaintiff paying the same	——	—	—
	Amount due	£——	—	—

47 L. J. Ch. 588; but see *Jackson* v. *Barry Ry. Co.*, [1893] 1 Ch. 238). In cases where the contract provides that disputes arising under it are to be decided by the agent of one of the parties, as, for instance, the architect or engineer employed by one of them, such agent is not disqualified from arbitrating because he may have to review his own action as agent to some extent, or reconsider opinions he had, in the course of his duty as agent, expressed upon the matters in dispute, but to remove him it must be shown that he was, or was probably, biassed and would not honestly consider or re-consider the matters to be brought before him (*Jackson* v. *Barry Ry. Co.*, *supra*; *Eckersley* v. *Mersey Docks Board*, [1894] 2 Q. B. 667; 71 L. T. 308; *Ives* v. *Willans*, [1894] 2 Ch. 478; 63 L. J. Ch. 521; *Bright* v. *Rivcr Plate Co.*, [1900] 2 Ch. 835; 70 L. J. Ch. 59).

An action will not lie for an injunction to restrain proceedings in an arbitration upon the ground that the matters are not within the scope of the submission, or that an award, if made upon them, would be futile or invalid (*North London Ry. Co.* v. *G. N. Ry. Co.*, 11 Q. B. D. 30; 52 L. J. Q. B. 380; *Farrar* v. *Cooper*, 44 Ch. D. 268; 59 L. J. Ch. 506), but an action may be brought upon a proper ground, as, for instance, that it was obtained by fraud, to set aside a submission to arbitration, and for an injunction to restrain in the meantime proceedings in the arbitration based on such submission (*Kitts* v. *Moore*, [1895] 1 Q. B. 253; 44 L. J. Q. B. 152).

The Act has no application to a reference for the purpose merely of obtaining a valuation, where there are no disputes to be decided between the parties, and where the valuers are to act mainly upon their own observation and skill without anything like a judicial inquiry. (See *In re Dawdy*, 15 Q. B. D. 426; 54 L. J. Q. B. 374; *In re Carus Wilson*, 18 Q. B. D. 7; 56 L. J. Q. B. 530; *In re Hammond*, 62 L. T. 808.)

The Act applies to arbitrations under the provisions of any particular statute, as if they were arbitrations pursuant to a submission, in so far as it is not inconsistent with the particular statute regulating the arbitration, or with any rules or procedure authorised or recognised by such statute. (See s. 24.) Accordingly s. 12 does not apply where the particular statute imposes a new liability and directs the mode of enforcing the award (*In re Willesden Local Board*, *ante*, p. 84).

Where costs are awarded, it is not in general a condition precedent to an action on the award that the costs should have been taxed (*Houldsworth* v. *Wilson*, 4 B. & S. 1; 32 L. J. Q. B. 289; *Metropolitan Dist. Ry. Co.* v. *Sharpe*, 5 App. Cas. 425; 50 L. J. H. L. 14; *Lewis* v. *Rossiter*, 44 L. J. Ex. 136).

Specific performance of an agreement to refer existing or future differences to arbitration will not in general be ordered (*per* Eldon, L.C., in *Street* v. *Rigby*, 6 Ves. 818; *Gourlay* v. *Duke of Somerset*, 19 Ves. 431; Leake on Contracts, 4th ed., p. 676). An action may be brought to recover damages for the breach of an agreement to refer to arbitration, but it is said that in general the damages recoverable would, in the absence of any express agreement as to damages to be recovered for such breach, be nominal, because there could be no proof of the money loss from the not making of

For Money due under an Award of an Umpire.

The plaintiff's claim is £—— for money due from and payable by the defendant to the plaintiff under an award in writing dated the —— ——, 19—, of *I. K.*, who was by a writing dated the —— ——, 19—, duly appointed an umpire in that behalf by *E. F.* and *G. H.*, under a submission by the plaintiff and the defendant in writing dated the —— ——, 19—, of matters in difference between them to the arbitration of the said *E. F.* and *G. H.*, or of an umpire to be appointed by them in that behalf, in case they should disagree, as they, in fact, did.

Particulars:—[*As in the preceding Form.*]

For Non-performance of an Award of an Arbitrator directing that certain Acts should be done by the Defendant.

1. On the —— ——, 19—, the plaintiff and the defendant by an agreement in writing of that date [*or as the case may be*] agreed to refer all matters then in difference between them to the arbitration of *E. F.*, and to abide by his award concerning the same, and to perform and observe any directions which might be thereby given.

2. The said *E. F.*, by his award in writing, dated the —— ——, 19—, which was duly made and published in pursuance of the said agreement of

---

the award (*Livingston* v. *Ralli*, 5 E. & B. 132; 24 L. J. Q. B. 269; *Street* v. *Rigby*, 6 Ves. 814; but see *Thomas* v. *Fredricks*, 10 Q. B. 775). An action to recover damages may, however, usefully be brought in those cases where by the terms of the contract the price or damages have to be ascertained by arbitration as a condition precedent to their recovery by action, and the party liable for such price or damages fails to carry out, or repudiates, his agreement to have such price or damages ascertained by arbitration (*Goldstone* v. *Osborn*, 2 C. & P. 551; *Scott* v. *Avery*, 8 Ex. 487; 5 H. L. C. 811).

Where a person has been invited by both parties to an arbitration to act as paid arbitrator, he can, if he so act, maintain an action for his reasonable charges as such arbitrator, and the parties are, it would seem, jointly liable to him for such charges, however the liability might ultimately be adjusted as between the parties themselves (*Crampton* v. *Ridley*, 20 Q. B. D. 48; 57 L. T. 809). An arbitrator generally protects himself by retaining his lien upon the award until his fees are paid. In awards made under the Arbitration Act, 1889, in the absence of provision to the contrary in the submission, the costs, including the arbitrator's charges, may be fixed and settled by the award (s. 2), and where this is done there is no right to have such charges taxed (*In re Prebble*, [1892] 2 Q. B. 602), and it would seem that the remedy, in such cases, if an excessive amount is awarded for the charges of the arbitrator, is to apply to set the award aside for misconduct (*Ib.*, *Gilbert* v. *Wright*, 20 Times Rep. 164).

But, where the arbitrator's charge is not thus fixed and settled by the award, if an excessive charge is paid to him in order to take up the award, the party paying it may recover back the overcharge in an action (*Barnes* v. *Braithwaite*, 2 H. & N. 569; *Re Coombs*, 4 Ex. 839, 841, 843; *Fernley* v. *Branson*, 20 L. J. Q. B. 178, and see *Llandrindod Water Co.* v. *Hawksley*, 20 Times Rep. 241).

All arbitrators are not paid arbitrators. Whether the arbitrator is entitled to payment for his services depends in each case upon the express or implied terms of the employment (*Hoggins* v. *Gordon*, 3 Q. B. 466, 474; *Crampton* v. *Ridley*, *supra*).

An arbitrator is in a quasi-judicial position, and cannot, at any rate if he acts *bonâ fide*, be sued in respect of his decision or conduct as such arbitrator (*Tharsis Sulphur*

reference, directed that the defendant should, &c. [*or*, should not, &c., *as the case may be, stating the acts which the defendant was directed to do or to abstain from doing*].

3. The defendant has not, &c. [*or*, has, &c., *as the case may be, stating the breaches complained of*].

Particulars :—[*Here give particulars of the breaches, where necessary, and state any special damage suffered by the plaintiff.*]

A like Form, including a Claim for Costs awarded by the Arbitrator; see Melhado v. *Watson*, 2 C. P. D. 281.

For a Form of a Claim on an Award under the Lands Clauses Act, see post, "*Company*," p. 156.

Assignment of Debts and Choses in Action (*r*).

Co. v. *Leftus*, L. R. 8 C. P. 1 ; 42 L. J. C. P. 6 ; *Pappa* v. *Rose*, L. R. 7 C. P. 32 ; *Ib.* 525 ; 44 L. J. C. P. 11 ; *Ib.* 187 ; *Stevenson* v. *Watson*, 4 C. P. D. 148 ; 48 L. J. C. P. 318). In *Chambers* v. *Goldthorpe*, [1901] 1 Q. B. 624 ; 70 L. J. K. B. 482, it was held (*diss.* Romer, L.J.) that an architect appointed as arbitrator to decide as between his employer and the builder and to give certificates as to work done and as to quantities could not be sued by the employer for negligence in measuring up.

A mere valuer may be sued for misconduct as such valuer by his employer, or for want of that reasonable skill as a valuer which he is held to warrant himself to possess by holding himself out as a professional valuer (*Jenkins* v. *Betham*, 15 C. B. 168 ; 24 L. J. C. P. 94 ; *Turner* v. *Goulden*, L. R. 9 C. P. 57 ; 43 L. J. C. P. 60).

As to awards under the Lands Clauses Consolidation Act, see *post*, pp. 156, 342.

(*r*) Previously to the enactments contained in s. 25 (6) of the Judicature Act, 1873 (as to which, see note (*s*), *post*), debts or choses in action, with the exception of those arising on certain contracts which were assignable by the law merchant (as bills of exchange) or by statute (as policies of life insurance, of marine insurance, book debts by liquidators of companies, &c.), were not assignable at law. In Equity, however, it was otherwise, the Courts of Equity regarding such assignments in general as agreements by the assignor to permit the assignee to sue at law in his name, and compelling the assignor, when the assignment was for valuable consideration, to allow his name to be thus used, upon receiving a proper indemnity against costs (*Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374, 380 ; 42 L. J. Q. B. 187 ; *Tryon* v. *National Provident Inst.*, 16 Q. B. D. 678 ; 55 L. J. Q. B. 236 ; Leake on Contracts, 4th ed., p. 824 ; 1 White & Tudor, 7th ed., p. 103).

The King's Bench Division has now the authority formerly vested in the Courts of Equity, and assignments formerly regarded by those Courts as valid will be so treated in all Divisions of the High Court. Such assignments were regarded in Equity as binding the debt or chose in action in the hands of the debtor, or trustee or other person liable in respect of it to the assignor, from the time when such debtor or trustee or other person had notice of the assignment. No formal or written notice of the assignment was requisite, it was enough to bind the debt in Equity, that the debtor or trustee, &c., had notice in point of fact (*Ib.*; *Lloyd* v. *Banks*, L. R. 3 Ch. 488 ; 37 L. J. C. P. 881 ; *Alletson* v. *Chichester*, L. R. 10 C. P. 319 ; 44 L. J. Ch. 153), and no assent on his part was necessary (*Burn* v. *Carvalho*, 2 My. & Cr. 690 ; *Morrell* v. *Wootten*, 16 Beav. 197, 205 ; Leake on Contracts, 4th ed., p. 831), nor was it in general necessary to the validity of an equitable assignment that it should be in writing, except in cases within the Statute of Frauds (Leake on Contracts, 4th ed., p. 830 ;

By the Assignee of a Debt, under s. 25 (6) *of the Judicature Act,* 1873 (*s*).

The plaintiff's claim is for money payable by the defendant to the plaintiff as assignee of a debt of £——, which, at the time of the assignment hereinafter mentioned, was due from the defendant *E. F.*, for [*here state the nature of the debt, as, for instance,* the price of goods sold and delivered by the said *E. F.* to the defendant], and was assigned by the said *E. F.*, by writing, under his hand, dated the —— ——, 19—, to the plaintiff absolutely, of which assignment express notice in writing was given to the defendant on the —— ——, 19—, by a letter [*or,* notice in writing] dated that day [*or, as the case may be*].

Particulars:—[*Here state particulars of the debt originally due from* E. F.]

Ex p. Hall, 10 Ch. D. 615; 48 L. J. B. 79). As between the assignee and the assignor, notice was not required to complete the assignment (*Robinson* v. *Nesbitt*, L. R. 3 C. P. 264; 37 L. J. C. P. 124; *Withington* v. *Tate*, L. R. 4 Ch. 288; 20 L. T. 637; *Gorringe* v. *Irwell*, 34 Ch. D. 128; 56 L. J. Ch. 85).

An order given to a debtor or trustee, &c., by the person entitled to the debt or trust fund, for payment of money to a third party, if communicated to such third party, and specifying out of what debt or funds the payment is to be made, may be a good equitable assignment (1 White & Tudor, 7th ed., p. 108; see *Burn* v. *Carvalho*, 4 My. & Cr. 690, 702; *Percival* v. *Dunn*, 29 Ch. D. 128; 54 L. J. Ch. 570; *Webb* v. *Smith*, 30 Ch. D. 192; 55 L. J. Ch. 343; *Brandt* v. *Dunlop Co.*, 21 Times Rep. 710, 712; and see *Harding* v. *Harding*, 17 Q. B. D. 442; 55 L. J. Q. B. 552). But an order which does not specify or indicate the fund out of which payment is to be made is not a sufficient equitable assignment (*Percival* v. *Dunn*, *supra*).

A mere order or request to a debtor or agent to pay a third party, not communicated to such third party, is a revocable mandate, not amounting to an equitable assignment (*Scott* v. *Porcher*, 3 Mer. 652; *Morrell* v. *Wootten*, 16 Beav. 197).

A cheque is not an equitable assignment of the moneys in the banker's hands. (See Bills of Exchange Act, 1882, ss. 53 (1), 73; *Hopkinson* v. *Forster*, L. R. 19 Eq. 74; *Schroeder* v. *Central Bank*, 34 L. T. 735; 24 W. R. 710.)

Future debts, or property to be acquired *in futuro*, may be the subject of equitable assignment (*Brown* v. *Tanner*, L. R. 2 Eq. 806; *Tailby* v. *Official Receiver*, cited *post*, p. 89).

Some contracts are, upon grounds of public policy, unassignable, as for instance the salary of a judge, or public official, or military officer (*Stone* v. *Lidderdale*, 1 Anst. 535; *Palmer* v. *Bate*, 2 B. & B. 673), and some are by statute made unassignable (see *post*, p. 586), but as a general rule the benefit of a contract, other than one of so personal a nature as to be for that reason unassignable, as for example a contract between author and publisher, that the one shall write and the other publish a book (see *post*, p. 586) is assignable in Equity, and may be enforced by the assignee, the general practice being that the assignor should also be made a party to the litigation (*Brice* v. *Bannister*, 3 Q. B. D. 569, 575; 47 L. J. Q. B. 722; *Tolhurst* v. *Associated Cement Manufacturers*, [1903] A. C. 414, 420; 72 L. J. K. B. 834; *Bowden's Syndicate* v. *Smith*, [1904] 2 Ch. at p. 91; see *Gibson* v. *Carruthers*, 8 M. & W. 343).

(*s*) By the Judicature Act, 1873, s. 25 (6), "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer

The like, where the Assignment was of a Debt due and of other moneys to become due under an Agreement (*t*).

1. The plaintiff's claim is for money payable by the defendant to the plaintiff as assignee of the sums of money which, at the time of the assignment, were due or to become due from the defendant to *E. F.*, under an agreement between them, dated the —— ——, 19—, whereby it was

---

the legal right to such debt or chose in action from the date of such notice, and all legal or other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

To be within the above section the whole legal right of property in the debt or *chose* in action must be assigned, it must be an out-and-out transfer of the debt or *chose* in action. A mortgage may be an absolute assignment, although it is subject to a proviso for redemption (*Burlinson* v. *Hall*, 12 Q. B. D. 347; 53 L. J. Q. B. 222; *Tancred* v. *Delagoa Bay Co.*, 23 Q. B. D. 239; 58 L. J. Q. B. 459; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, 195, 197; 71 L. J. K. B. 630). An assignment may be absolute although there are trusts in favour of the assignor or of others (*Burlinson* v. *Hall*, *supra*; *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; 53 L. J. Q. B. 280; *Comfort* v. *Betts*, [1891] 1 Q. B. 737, 739, 740; 60 L. J. Q. B. 656; *Wiesener* v. *Rackow*, 76 L. T. 448; 13 Times Rep. 358).

A charge is not an out-and-out transfer of the property to the assignee, but is a mere appropriation to secure a payment or repayment out of a particular fund (*Burlinson* v. *Hall*, *supra*; *Durham* v. *Robertson*, [1898] 1 Q. B. 765; 67 L. J. Q. B. 484; *Mercantile Bank* v. *Evans*, [1899] 2 Q. B. 613; 68 L. J. Q. B. 921; *Hughes* v. *Pump House Hotel Co.*, *supra*).

The assignment of a debt must be of the entire debt, or, at any rate, of some clearly defined and specific part of it to be within the section (*Jones* v. *Humphreys*, [1902] 1 K. B. 10, 13; 71 L. J. K. B. 23; and see *Torkington* v. *Magee*, [1902] 2 K. B. at p. 434). There may be an absolute assignment of a future debt under the section (*Brice* v. *Bannister*, 3 Q. B. D. 569; 47 L. J. Q. B. 722; *Buck* v. *Robson*, *Ib.* 686; 48 L. J. Q. B. 250; *Tailby* v. *Official Receiver*, 13 App. Cas. 523; 58 L. J. Q. B. 75; *Jones* v. *Humphrey*, *supra*). It would seem that the right to sue for damages in tort is not a legal *chose in action* within the section (*Dawson* v. *Great Northern and City Ry. Co.*, [1904] 1 K. B. 277; 73 L. J. K. B. 174, reversed in C. A. [1905] 1 K. B. 260; 74 L. J. K. B. 190 on the ground, however, that a claim for compensation under the Lands Clauses Consolidation Act is not a claim for damages for a wrong, and see *King* v. *Victoria Insurance Co.*, [1896] A. C. 250, 254; 65 L. J. P. C. 38). It is open to doubt whether the right to sue for unliquidated damages in general is within the section. (See *May* v. *Lane*, 64 L. J. Q. B. 236; *King* v. *Victoria Insurance Co.*, *supra*, and Warren on Choses in Action, pp. 154 *et seq.*) See further "*Assignment*," *post*, p. 586.

After notice of the assignment, the debt or chose in action (subject to any equities which may be entitled to priority) is bound in the hands of the party liable, and he cannot subsequently pay the assignor (*Brice* v. *Bannister*, 3 Q. B. D. 569, 578; 47 L. J. Q. B. 722; *Roxburghe* v. *Cox*, 17 Ch. D. 520, 526; 50 L. J. Ch. 772; and see *ante*, p. 87, and *post*, p. 587).

A person who has obtained an absolute assignment from different creditors of a debtor of the various debts due to them may sue the debtor for them in a single action after giving the notice required by the above sub-section (*Comfort* v. *Betts*, [1891] 1 Q. B. 737; 60 L. J. Q. B. 656; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364; 74 L. J. K. B. 829).

Where it is doubtful whether the case is within the section it may be advisable to bring the action in the names of both the assignor and the assignee. (See *Brice* v. *Bannister*, *supra*; *Tolhurst* v. *Associated Cement Manufacturers*, *ante*, p. 88; *Brandt* v. *Dunlop Co.*, 21 Times Rep. 710; Warren on Choses in Action, pp. 347—355.)

(*t*) See note (*s*), *supra*.

agreed that *E. F.* should erect for the defendant the buildings therein mentioned for the sum of £500, to be paid by the defendant to *E. F.*, as follows:—£200 when the outer walls of the buildings should be erected; £150 when they should be roofed in; and £150 when the buildings should be finally completed.

2. The said sums of money were absolutely assigned to the plaintiff by the said *E. F.* by writing under his hand, dated the —— ——, 19—, and express notice in writing of the said assignment was given to the defendant on the —— ——, 19—, by letter [*or*, notice in writing] dated that day.

3. At the time of the said assignment the said outer walls had been erected, and the sum of £200 was due from the defendant to the said *E. F.* under the said agreement, and after the said assignment and before action, the said buildings were roofed in and finally completed, and the said two further sums of £150 each became due from the defendant under the said agreement.

4. The defendant has not paid the said sums, or any of them.

By the Assignee of the Book Debts of a Bankrupt on an Assignment thereof under the Bankruptcy Act, 1883, *s.* 56, *see* "*Bankruptcy*," *post*, p. 105.

By the Assignee of a Debt assigned by a Liquidator appointed under the Companies Winding-up Act, 1890, *see* "*Company*," *post*, p. 155.

By the Assignee of a Policy of Life Insurance, under 30 & 31 *Vict. c.* 144, *see* "*Insurance*," *post*, p. 206.

By or against the Indorsee of a Bill of Lading, where the Property passed by the Indorsement, see "*Shipping*," *post*, pp. 296, 298.

By Shipowners against the Indorsee of a Bill of Lading, where the Property passed by the Indorsement, see "*Shipping*," *post*, p. 298.

ASSURANCE. *See* "*Insurance*," *post*, p. 198.

AUCTIONEER (*u*).

(*u*) An auctioneer employed to sell goods has a special property in them, and a lien upon them for his charges and commission (*Williams* v. *Millington*, 1 H. Bl. 81; *Robinson* v. *Rutter*, 4 E. & B. 954; 24 L. J. Q. B. 250; *Woolfe* v. *Horne*, 2 Q. B. D. 355; 46 L. J. Q. B. 534; see "*Lien*," *post*, p. 866). He has also a lien upon the

Claim for Remuneration for Work done as an Auctioneer (x).

The plaintiff's claim is for money payable by the defendant to the plaintiff for work done and journeys made by the plaintiff, as an auctioneer and appraiser, for the defendant at his request, and for materials provided by the plaintiff in and about the said work for the defendant at his request. Such request was made verbally on the —— ——, 19— [*or as the case may be*].

Particulars :—

By an Auctioneer against the Purchaser for the price of Goods sold by Auction (y).

The plaintiff's claim is for money payable by the defendant to the plaintiff for the price of goods sold by auction on the —— ——, 19—, by the plaintiff to the defendant.

---

proceeds of the sale (*Robinson* v. *Rutter, supra*; *Webb* v. *Smith*, 30 Ch. D. 192; 55 L. J. Ch. 343).

Where the conditions of sale provide for a deposit, the auctioneer, in general, receives the deposit as a stakeholder, and not as a mere agent of the vendor, and cannot usually be sued for the deposit till the result is known (*Harrington* v. *Hoggart*, 1 B. & Ad. 577; *Edgell* v. *Day*, L. R. 1 C. P. 80; 35 L. J. C. P. 7; *Ellis* v. *Goulton*, [1893] 1 Q. B. 350; 62 L. J. Q. B. 232). See further "*Sale of Land*," *post*, p. 287.

An auctioneer is the agent of both parties at a public sale to charge them by signing a memorandum of the sale to satisfy the Statute of Frauds (*Hinde* v. *Whitehouse*, 7 East, 558; *Emmerson* v. *Heelis*, 2 Taunt. 38; *Peirce* v. *Corf*, L. R. 9 Q. B. 210, 214; 43 L. J. Q. B. 52; see *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434; 72 L. J. Ch. 260). An auctioneer's clerk employed at a public auction to take down the buyers' names, may, where the purchaser gives his name to him to be taken down, or otherwise authorises him to act for him, be considered an agent to bind both the seller and the buyer by his signature (*Peirce* v. *Corf, supra*; *Bird* v. *Boulter*, 4 B. & Ad. 443; *Sims* v. *Landray*, [1894] 2 Ch. 318; *Bell* v. *Balls*, [1897] 1 Ch. 663; 66 L. J. Ch. 397). It is only at a public sale that the auctioneer, or his clerk, is thus authorised to bind the purchaser (*Mews* v. *Carr*, 1 H. & N. 484; 26 L. J. Ex. 39; *Bell* v. *Balls*, *supra*). If the auctioneer sues the purchaser in his, the auctioneer's, own name in a case where a written memorandum is required to satisfy the Statute of Frauds, it is not sufficient that there should be a signature by the auctioneer himself, because a vendor cannot be an agent for the purchaser within that Statute (*Sharman* v. *Brandt*, L. R. 6 Q. B. 720; 40 L. J. Q. B. 312; *Farebrother* v. *Simmons*, 5 B. & Ald. 333). But his clerk's signature of the memorandum, if authorised by the purchaser, would be sufficient (*Bird* v. *Boulter, supra*). Where such memorandum is necessary in order to bind the purchaser, an auctioneer employed by the vendor is liable to him for negligence if he fails to make a sufficient memorandum (*Peirce* v. *Corf, supra*). As to what is a sufficient memorandum under s. 4 of the Statute, see *Rishton* v. *Whatmore*, L. R. 8 Ch. D. 467; 47 L. J. Ch. 629.

As to when an auctioneer selling goods for a person who is not entitled to them is liable to an action by the owner for conversion of them, see *Barker* v. *Furlong*, [1891] 2 Ch. 172; 60 L. J. Ch. 368; *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495; 60 L. J. Q. B. 325; and see cases cited "*Conversion*," *post*, p. 350). As to the auctioneer's right of indemnity against his employer, see *Halbronn* v. *International Horse Agency*, [1903] 1 K. B. 270; 72 L. J. K. B. 90.

(*x*) See "*Work*," *post*, p. 325.

(*y*) Auctioneers, in general, contract in their own name, and are, in that case, liable to be sued, and capable of suing, whether they disclose the name of their principal or

Particulars :—[*Here state particulars, showing the goods sold, and the prices thereof, and giving credit for the deposit, if any, paid by the purchaser, and showing what is the balance due.*]

By an Auctioneer against the Purchaser of Goods, for not taking them away and paying for them in accordance with the Conditions of Sale (*z*).

1. The plaintiff sold by auction to the defendant on the —— ——, 19—, certain furniture, at the price of £——, upon the terms [contained in the printed conditions of sale] that the defendant should clear away the said furniture within —— days from the said —— ——, and before clearing away the same should pay the said price thereof to the plaintiff.

[Particulars of the said furniture and the prices at which the defendant purchased the same are as follows :—]

---

not (*Franklyn* v. *Lamond*, 4 C. B. 637 ; *Fisher* v. *Marsh*, 6 B. & L. 411 ; 34 L. J. Q. B. 177 ; *Woolfe* v. *Horne*, 2 Q. B. D. 355 ; 46 L. J. Q. B. 534 ; *Rainbow* v. *Howkins*, [1904] 2 K. B. 322 ; 73 L. J. K. B. 641).

The sale of each lot at an auction is *primâ facie* a separate contract. (See the Sale of Goods Act, 1893, s. 58 (1) ; *Emmerson* v. *Heelis*, 2 Taunt. 38 ; *Roots* v. *Lord Dormer*, 4 B. & Ad. 77.)

Either party may revoke the bid, or the offer to sell, before the fall of the hammer (see the Sale of Goods Act, 1893, s. 58 (2) ; *Payne* v. *Cave*, 3 T. R. 148), and that, even if the conditions provide that the sale shall be without reserve, or that no person shall retract his bidding (*Warlow* v. *Harrison*, 1 E. & E. 295 ; 29 L. J. Q. B. 14 ; and see *Harris* v. *Nickerson*, L. R. 8 Q. B. 286 ; 42 L. J. Q. B. 171).

Merely advertising an intended sale does not amount to a contract with a person attending the sale that the goods shall not be withdrawn, though it may be otherwise where the sale is advertised as without reserve and the goods are withdrawn after the bidding has commenced (*Ib.*).

(*z*) See, for forms of pleading in such cases previously to the Judicature Acts, *Green* v. *Baverstock*, 14 C. B. N. S. 204 ; 32 L. J. C. P. 181 ; *Pettitt* v. *Mitchell*, 4 M. & G. 819.

A condition requiring the purchaser to clear away goods within a specified time does not constitute a condition precedent to the right to claim delivery of them (*Woolfe* v. *Horne*, *supra*).

Goods sold at an auction cannot legally be resold in case of default of the purchaser in carrying them away or paying for them according to the conditions, unless there is a condition enabling them to be so dealt with (*Woolfe* v. *Horne*, 2 Q. B. D. 355 ; 46 L. J. Q. B. 534 ; and see *Valpy* v. *Oakeley*, 16 Q. B. 941 ; 20 L. J. Q. B. 380 ; *Griffiths* v. *Perry*, 1 E. & E. 680 ; 28 L. J. Q. B. 204 ; *Martindale* v. *Smith*, 1 Q. B. 389). If goods sold are re-sold, where there is no condition as to re-sale on default, the original purchaser, although in default, can claim the profit on the re-sale, or, if there is no profit, can recover, at least, nominal damages (Benjamin on Sale, 4th ed., p. 797 ; *Valpy* v. *Oakeley*, *supra* ; and *Griffiths* v. *Perry*, *supra*), but would be liable to be met by a counterclaim for his breach of contract, the claim upon which might be sufficient, or even more than sufficient, to afford a defence to such action.

An auctioneer contracting in his own name is liable, in the absence of conditions to the contrary, if he re-sells, or refuses to deliver, after the time fixed by the conditions of sale for the taking away of the goods by the purchaser has expired, the goods being, notwithstanding the default, for which a cross-action may be brought, or a counterclaim pleaded, the property of the purchaser (*Woolfe* v. *Horne*, *supra* ; *Saint* v. *Pilley*, L. R. 10 Ex. 137 ; 44 L. J. Ex. 33).

2. The defendant did not clear away the said furniture or any part thereof, and did not pay to the plaintiff the said price or any part thereof.

The plaintiff claims £——.

By a Vendor against a Purchaser of Land sold by Auction, for not completing the Purchase: see "Sale of Land," post, p. 286.

AWARD.

See "Arbitration," ante, p. 84.

BAILMENTS (*a*).

Claim by a Warehouseman for keeping and taking Care of Goods (*b*).

The plaintiff's claim is for money payable by the defendant to the plaintiff for work done by the plaintiff in keeping and taking care of goods and providing warehouse-room for the same for the defendant at his request made verbally on the —— ——, 19— [*or* contained in a written agreement dated the —— ——, 19—, *or* on the terms contained in an agreement in writing dated the —— ——, 19—].

Particulars:—

19—.		£	*s.*	*d.*
Jan. 1st to July 31st.	Warehousing and taking care of household furniture at —— between these dates at [the agreed rate of] £—— per month			
	Amount due			

The like by a Wharfinger for Wharfage and Warehouse-room.

The plaintiff's claim is for money payable by the defendant to the plaintiff for the wharfage and warehouse-room of goods landed, stowed and kept by the plaintiff in and upon a wharf, warehouse and premises of the

(*a*) Bailment is a delivery of goods to another for some purpose upon a contract, express or implied, that after the purpose has been fulfilled they shall be re-delivered to the bailor or otherwise dealt with according to his directions, or (as the case may be) kept till he reclaims them. For the law of bailments, see the notes to *Coggs* v. *Bernard*, 1 Smith's L. C., 11th ed., p. 174, 188; and for claims in tort, see "*Bailments*," *post*, p. 334.

(*b*) When a chattel is detained under a claim of lien against the owner, and charges are incurred in keeping and taking care of it, no claim can be made against the owner in respect of such charges (*Somes* v. *British Empire Shipping Co.*, 8 H. L. C. 338; 30 L. J. Q. B. 229).

plaintiff at ——, for the defendant at his request, made verbally on the —— ——, 19— [*or, &c., as in preceding form*].

Particulars :—

19—.		£	*s.*	*d.*
June —.	Wharfage of —— bales of cotton at —— Wharf			
June 4th to Dec. 9th.	Warehouse rent for same for —— weeks at —— per week.....			
	Amount due			

Against a Picture Dealer for not taking proper Care of a Picture entrusted to him for the Purpose of being cleaned.

1. The plaintiff has suffered damage by breach of contract by the defendant in not taking proper care of, cleansing and restoring and returning to the plaintiff in a proper condition a picture belonging to the plaintiff which the defendant received from the plaintiff on the —— ——, 19—, for the purpose of being taken proper care of by the defendant and by him cleaned and restored and returned in a proper condition to the plaintiff, for reward to be paid by the plaintiff to the defendant in that behalf.

2. The defendant did not take proper care of the picture, and returned it to the plaintiff in a damaged and improper condition.

Particulars :—

The contract was made verbally in the defendant's shop on the —— ——, 19—.

The damage to the picture consists of [*state details*], and is estimated at £——.

Against a Livery Stable Keeper for not taking Care of a Horse.

1. The plaintiff has suffered damage by the defendant's breach of contract in not taking proper care of a horse of the plaintiff which the plaintiff on the —— ——, 19—, entrusted to the defendant, who is a livery stable keeper, upon the terms that the defendant would take proper care of the said horse in a separate stall in his stable for the sum of £—— per week.

These terms were agreed to verbally on the —— ——, 19— [*or* are contained in a written agreement dated the —— ——, 19—].

2. The defendant received the said horse for the purpose and on the terms aforesaid, but did not take proper care of the said horse and did not keep the said horse in a separate stall.

3. In consequence of the said breach of contract the said horse was kicked by another horse in the said stable and his leg was broken and he became and is of no use to the plaintiff.

Particulars :—

	£	s.	d.
Value of the horse when delivered to the defendant....			
Present value.....			
Loss.....£			

Against a Railway Company for not safely keeping Goods left in the Cloak Room at one of their Stations (*c*).

1. On the —— ——, 19—, the plaintiff, who was a passenger on the defendants' railway from —— to ——, left his portmanteau in charge of the defendants at the cloak room provided by the defendants at their station at —— for the convenience and accommodation of passengers travelling on their line, and paid the defendants the usual fee charged by them at the said cloak room for the purpose, upon the [implied] terms that the said portmanteau should be taken care of by the defendants and re-delivered to him on request.

2. The defendants did not take care of the said portmanteau and did not re-deliver the same to the plaintiff upon his requesting them verbally, on the —— ——, 19—, to do so, whereby the said portmanteau and its contents were and are lost and the plaintiff has been put to great inconvenience and expense.

Particulars :—

BANKERS (*d*).

(*c*) The liability in these cases is that of bailees for reward, who are bound to restore the goods deposited, when properly demanded by the depositor, unless prevented by some cause not due to the want of reasonable care on their part (*Harris* v. *Gt. W. Ry. Co.*, 1 Q. B. D. 515; 45 L. J. Q. B. 729). Conditions contained in or indorsed on a voucher or ticket such as is usually given to the depositor are binding upon him if he knows of them, or if the company has done what is reasonably sufficient to give him notice that there were such conditions (*Ib.*; *Parker* v. *S. E. Ry. Co.*, 2 C. P. D. 416; 46 L. J. C. P. 768; *Watkins* v. *Rymill*, 10 Q. B. D. 178; 52 L. J. Q. B. 121; *Richardson* v. *Rowntree*, [1894] A. C. 217; 63 L. J. Q. B. 283).

A restaurant keeper is liable for the loss of a customer's overcoat taken charge of by one of his waiters in the course of his employment and negligently kept (*Ultzen* v. *Nicols*, [1894] 1 Q. B. 92; 63 L. J. Q. B. 289).

(*d*) Banking companies which are incorporated by registration under the Companies Act, 1862, or to which that Act applies (see ss. 175—177), sue and are sued in the ordinary form by their registered names as incorporated companies. (See "*Company*," *post*, p. 151.)

Banking copartnerships governed by the 7 Geo. 4, c. 46, s. 9, or by the 7 & 8 Vict. c. 113, s. 47 (re-enacted by s. 205 of the Companies Act, 1862), are bound to sue and must be sued in the name of one of their public officers (*Steward* v. *Greaves*, 10 M. & W. 711; *Chapman* v. *Milvain*, 5 Ex. 61; and see 27 & 28 Vict. c. 32, s. 1). This is so, even where the action is brought upon a deed or instrument relating to the bank business made with the trustees for the copartnership (*Chapman* v. *Milvain*, *supra*).

Claim by Bankers for Money due to them from a Customer (e).

The plaintiffs' claim is for money payable by the defendant to the plaintiffs for money lent by the plaintiffs to the defendant, and for money paid by the plaintiffs for the defendant, [and for work done

---

Where the statement of claim by or against a public officer is framed upon a covenant, bond, or other instrument entered into with trustees for the copartnership, the contract with them must be alleged according to the fact, and the statement of claim should show that it was made with them as trustees for the copartnership, and related to its concerns.

Private bankers who are unincorporated, and are not governed by the statutory provisions above referred to, sue and are sued in the ordinary manner, either as individuals or in the name of their firm. (See "*Partners*," *post*, p. 267.)

(*e*) The relation between a banker and his customer who pays money into the bank is the ordinary relation of debtor and creditor, with the superadded obligation to honour the customer's cheques when the banker has sufficient assets of the customer available for that purpose, the money so paid into the bank being, in fact, money lent to the banker on the terms that it should be repaid when called for by cheque (*Foley* v. *Hill*, 2 H. L. C. 28; *Gray* v. *Johnston*, L. R. 3 H. L. 1; *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; 53 L. J. Q. B. 280).

A banker is bound to honour a customer's cheque if he has sufficient assets of the customer in his hands, and he cannot under ordinary circumstances set up a *jus tertii* against the order of the customer, or refuse to honour his cheque on any other ground than some sufficient one resulting from an act of the customer himself (*per* Lord Westbury, *Gray* v. *Johnston*, L. R. 3 H. L. 14; see, however, *per* Lord Cairns, *Ib.* 11). If, however, an executor or trustee, who is indebted to a banker, applies a portion of the trust assets in the banker's hands to the payment of his debt to the banker, the banker is not justified in accepting such portion if he is cognizant of the fact that the assets are trust assets, as in so doing he would be participating in the breach of trust for his own personal benefit (*per* Lord Westbury, *Gray* v. *Johnston*, *supra*; see, also, *Baily* v. *Finch*, L. R. 7 Q. B. 34; 41 L. J. Q. B. 83; *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282; *Coleman* v. *Bucks and Oxon Bank*, [1897] 2 Ch. 243, 254).

A banker who refuses to pay a customer's cheque, having assets in his hands applicable to that purpose, is liable to pay at least nominal damages (*Marzetti* v. *Williams*, 1 B. & Ad. 415); and substantial damages may be recovered against him without proof of actual loss (*Rolin* v. *Steward*, 14 C. B. 595; 23 L. J. C. P. 148; *Larios* v. *Bonany*, L. R. 5 P. C. 346, 357).

Where the usual dealing of a banker was to credit a customer in his books against bills, &c., paid in, and to honour the cheques of the customer accordingly, he was held liable for refusing to pay a cheque without having given notice that he discontinued such dealing (*Cumming* v. *Shand*, 5 H. & N. 95; 27 L. J. Ex. 129).

Branch banks are agencies of one principal banking corporation or firm (*Prince* v. *Oriental Bank*, 3 App. Cas. 325; 47 L. J. P. C. 42; *Garnett* v. *McKewan*, L. R. 8 Ex. 10; 42 L. J. Ex. 1), and if a customer has accounts at more than one of the branches, the bank, in the absence of any agreement to the contrary, would be justified in refusing to honour his cheques, if on the whole state of accounts he had not sufficient assets (*Ib.*). Such branches are, however, distinct for the purpose of estimating the time at which notice of dishonour should be given (*Clode* v. *Bayley*, 12 M. & W. 51; *Prince* v. *Oriental Bank*, *supra*; *Fielding* v. *Corry*, [1898] 1 Q. B. 268; 67 L. J. Q. B. 7; see "*Bills of Exchange*," *post*, p. 126), and bankers are only bound to pay a customer's cheque at the branch where he keeps his account (*Woodland* v. *Fear*, 7 E. & B. 519; 26 L. J. Q. B. 202; *Prince* v. *Oriental Bank*, *supra*).

A cheque does not operate as an assignment, and where a cheque is drawn by a

and materials provided by the plaintiffs] as bankers [and agents] for the defendant at his request, and for interest upon money due from the defendant to the plaintiffs, and forborne at interest by the plaintiffs to the

customer of a bank in favour of a third person, the payee or holder, as such, has no right of action against the banker in respect of its dishonour (*Hopkinson* v. *Forster; Schroeder* v. *Central Bank*, cited *ante*, p. 88).

A banker having paid a cheque in ignorance that he then had no assets of the customer, cannot recover back the amount from the payee (*Chambers* v. *Millar*, 13 C. B. N. S. 125; 32 L. J. C. P. 30; *Pollard* v. *Bank of England*, L. R. 6 Q. B. 623; 40 L. J. Q. B. 233).

A banker paying a forged or fraudulently altered cheque, cannot (except in those cases of forged indorsements and payments of crossed cheques to which the special protection given to bankers by the Bills of Exchange Act, 1882, ss. 60, 80, 82, is applicable) charge the customer with the amount (*Hall* v. *Fuller*, 5 B. & C. 750; *Baxendale* v. *Bennett*, 3 Q. B. D. 525, 533; 47 L. J. C. P. 264), unless there has been such negligence or other conduct on the part of the customer as to constitute a breach of duty towards his banker, and to disentitle him from alleging that the payment was unauthorised (*Young* v. *Grote*, 4 Bing. 253, as explained in *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514, and see *Bank of England* v. *Vagliano*, [1891] A. C. 107; 60 L. J. Q. B. 145).

The Bills of Exchange Act, 1882, s. 60, provides that "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee, or any subsequent indorsement, was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority." An indorsement purporting to be made by the agent of the person to whose order the cheque is payable, is within the protection of this enactment. (See *Charles* v. *Blackwell*, 2 C. P. D. 151; 46 L. J. C. P. 368.) This enactment applies only to bankers properly so called (see *Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 183; 44 L. J. Ex. 121); and protects only the bankers on whom the cheque is drawn (see the cases next cited). Hence a person other than such banker obtaining payment of a cheque through a forged indorsement thereof may be sued by the lawful owner of the cheque in an action for money received (*Ogden* v. *Benas*, L. R. 9 C. P. 513; 43 L. J. C. P. 259; *Arnold* v. *Cheque Bank*, 1 C. P. D. 578; 45 L. J. C. P. 562; *Bobbett* v. *Pinkett*, 1 Ex. D. 368; 45 L. J. Ex. 555). A similar protection to bankers in regard to forged indorsements is afforded by s. 19 of the Stamp Act, 1853, a section which is unrepealed, and is applicable to drafts drawn by a branch bank on its head office, and not crossed. (See *London and Midland Bank* v. *Gordon*, [1893] A. C. 240, 250; 72 L. J. K. B. 451.)

The Bills of Exchange Act, 1882, ss. 80, 82 (cited *post*, p. 128), provides that a banker who in good faith and without negligence pays a crossed cheque in accordance with the crossing, or who merely collects a crossed cheque for a customer, is protected. (See *Bissell* v. *Fox*, 51 L. T. 663; 53 *Ib.* 193.) A banker who credits his customer's account with the amount of a cheque before it is paid, so as to entitle him to draw against it, is not protected by the Act, because he is himself a holder for value of the cheque and not a mere agent for collection (*Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, 245, 248; 72 L. J. K. B. 451; *M'Lean* v. *Clydesdale Banking Co.*, 9 App. Cas. 99, 109, 111, 114); but a mere credit entry in the banker's ledger not entitling the customer to draw against the cheque will not make the banker a holder for value (*Akrokerri Mines* v. *Economic Bank*, [1904] 2 K. B. 465; 73 L. J. K. B. 742. Cp. *Gaden* v. *Newfoundland Bank*, [1899] A. C. 281; 68 L. J. P. C. 57). A "customer" means in general a person who has an account at the bank, or who habitually employs the banker to present and collect cheques for him (*La Cure* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148; 66 L. J. Q. B. 226; *Great Western*

defendant at his request [*where accounts stated between the parties are relied upon as a substantive ground of action, add* and for money found to be due from the defendant to the plaintiffs on accounts stated between them verbally on or about the —— ——, 19—, *or as the case may be*].

Particulars :—

Against Bankers, for not paying a Customer's Cheque.

The plaintiff, who kept a banking account with the defendants, has suffered damage by the defendants' breach of contract in not paying out of moneys of the plaintiff in their hands applicable to that purpose a cheque drawn by the plaintiff on the defendants and duly presented for payment at the defendants' bank on the —— ——, 19—, by *A. B.*, a person entitled to receive the amount of such cheque.

Particulars :—

The cheque was dated the —— ——, 19—, and was for the payment of £—— to *A. B.* or bearer.

[*Add particulars of special damage, if any.*]

Claim by the Public Officer of a Banking Copartnership suing as Nominal Plaintiff under a Statute.

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.

Between *A. B.*, public officer of the
[—— Bank] ..... Plaintiff,
and
C. D. ..... Defendant.

Statement of Claim.

The plaintiff is the registered public officer of the above named banking copartnership, and his claim is as such public officer against the defendant for [&c., *or*, as follows :—]

[*The cause of action must be alleged as having accrued to the copartnership,*

Rail. v. *L. & C. Banking Co.*, [1901] A. C. 414 ; 70 L. J. K. B. 915). A person coming on an isolated occasion to get a cheque cashed is not a customer (*Mathews* v. *Brown*, 62 L. J. Q. B. 494).

Where money has been paid into a bank upon a joint account, it cannot in general be withdrawn without the joint order of all to whose account it was paid in, and the banker is not discharged by a payment to one only (*Innes* v. *Stephenson*, 1 M. & Rob. 145 ; Leake on Contracts, 4th ed., p. 642). But upon the death of one partner in a firm the survivors are in general entitled to draw cheques upon the partnership account (*Backhouse* v. *Charlton*, 8 Ch. D. 444).

As to the liability of bankers for loss of securities deposited with them, see "*Bailments*," *post*, p. 334.

As to the right of lien of bankers, see "*Lien*," *post*, p. 866.

not to the plaintiff, as, for instance, for money payable by the defendant to the said copartnership for money lent by the said copartnership to the defendant, &c. : *see the preceding Forms.*]

Against the Public Officer of a Banking Copartnership sued as nominal Defendant.

Between *A. B.* ..... Plaintiff,
and
C. D., public officer of the
[—— Bank] ..... Defendant.

Statement of Claim.

The plaintiff's claim is [*or*, The plaintiff claims] against the defendant as one of the registered public officers of the above named banking copartnership for, &c. [*Here state the cause of action, alleging it as having accrued against the copartnership, not the defendant.*]

BANKRUPTCY (*f*).

By a Trustee in Bankruptcy for a Debt due to the Bankrupt before the Bankruptcy.

Between [*A. B.*] the Trustee of the property of
C. D., a bankrupt ..... Plaintiff,
and
E. F. ..... Defendant.

Statement of Claim.

The plaintiff's claim is [*or*, The plaintiff claims], as trustee of the property of *C. D.*, a bankrupt, against the defendant, for [the price of

---

(*f*) The law of bankruptcy is regulated by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). Matters of procedure are regulated by the Bankruptcy Rules issued under those Acts.

In the following notes, the sections referred to are those of the Bankruptcy Act, 1883, except where some other Statute is expressly mentioned.

On the presentation of a bankruptcy petition, either by a creditor or by the debtor himself, the Court may make a receiving order for the protection of the estate (ss. 5—8). The bankrupt is not released from any debts provable under his bankruptcy until he has obtained his discharge under s. 28, though any action brought against him may be stayed on application, at any time after the presentation of the petition. (See s. 10 (2), cited *post*, p. 591 ; and Rule 181 of the Bankruptcy Rules, 1886, cited *post*, p. 591.) As to staying actions commenced against the debtor without leave after the making of a receiving order, see s. 9, cited *post*, p. 591.

Upon an adjudication of bankruptcy, the property of the bankrupt, with the exceptions mentioned in s. 44, becomes divisible among his creditors, and vests in a trustee (ss. 20, 54).

goods sold and delivered by the said *C. D.* before his bankruptcy to the defendant, *or*, for money received by the defendant for the use of the said *C. D.* before his bankruptcy, *or, as the case may be, showing that the cause of action accrued before the bankruptcy*].

The trustee in the bankruptcy is appointed by the creditors, or in case they neglect to appoint one, by the Board of Trade (s. 21).

Until a trustee is appointed after an adjudication in bankruptcy, the official receiver is the trustee for the purposes of the Act, and immediately on the adjudication the property vests in him (s. 54 (1), and s. 20).

On the appointment of a trustee after an adjudication of bankruptcy, the property of the bankrupt forthwith passes to and vests in such trustee (s. 54 (2)).

During any vacancy in the office of trustee the official receiver acts as trustee (s. 70 (1)).

By s. 54 (3), "the property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever."

The title of the trustee relates back to the time of the commencement of the bankruptcy. (See s. 43, next cited, and ss. 20 (1), 44).

A bankruptcy in general relates back to and commences at the time of the completion of the act of bankruptcy on which the receiving order is made, or, if there was a prior act of bankruptcy, to that of the first act of bankruptcy within three months next before the petition (s. 43) ; but a bankruptcy which is not founded on a petition, but is based upon a receiving order made in lieu of a committal under s. 103, relates back to and commences at the time of such order, or, if there was a prior act of bankruptcy, to that of the first act of bankruptcy within three months next before such order (Bankruptcy Act, 1890, s. 20).

The property of the bankrupt, which is divisible amongst his creditors and passes to the trustee, does not comprise property held by the bankrupt in trust for other persons ; nor does it include the tools of his trade and the necessary wearing apparel and bedding of himself, his wife, and children, to a value not exceeding 20*l.* in the whole ; but it comprises all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, or acquired by or devolving on him before his discharge (s. 44 ; and see the definition of the word "property" in s. 168). It also includes "all goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof ; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section" (s. 44). Shares in a limited company are "things in action" (*Colonial Bank* v. *Whinney*, 11 App. Cas. 426), as also are policies of life insurance (*Ex p. Ibbetson*, 8 Ch. D. 519).

The general rule is that all property or rights acquired by or accruing to the bankrupt pending the bankruptcy vest in the trustee (*In re Roberts*, [1900] 1 Q. B. 122 ; 69 L. J. Q. B. 19 ; *Bailey* v. *Thurston*, [1903] 1 K. B. 137 ; 72 L. J. K. B. 36 ; *In re Hancock*, [1904] 1 K. B. 585 ; 73 L. J. K. B. 245 ; *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497 ; 69 L. J. Q. B. 800), and the trustee only, and not the bankrupt, can sue in respect of them (*Ib.*).

To this rule there is an exception in the case of so much, but so much only, of the personal earnings of the bankrupt as is necessary for the support of himself and his wife and family (*In re Roberts, supra*).

This exception is confined to personal earnings strictly so called, and does not extend to the profits of a trade or business (*Elliott* v. *Clayton*, 16 Q. B. 581 ; 20 L. J. Q. B. 217 ; *Emden* v. *Carte*, 17 Ch. D. 768 ; 51 L. J. Ch. 41 ; *Shoolbred* v. *Roberts*, [1899] 2 Q. B. 560 ; 68 L. J. Q. B. 998 ; *In re Rogers*, [1894] 1 Q. B. 425 ; 63 L. J. Q. B. 178).

There are also excepted from the above rule claims arising in respect of breaches committed after the commencement of the bankruptcy of contracts for the personal

Particulars :—

(*See the forms under "Sale of Goods," post*, p. 274 ; "*Money Received*," *post*, p. 259.)

---

services of the bankrupt, when in order to support the claim it is essential that the bankrupt should have been personally ready and willing to perform his part of the contract (*Bailey* v. *Thurston, supra*).

Rights of action in respect of a wrong or injury to the person, feelings or reputation of a bankrupt, or to his property when the substantial damage is the personal wrong or annoyance to himself, do not, whether such wrong or injury was committed before or during a bankruptcy, pass to the trustee (*Rose* v. *Buckett*, [1901] 2 K. B. 449 ; 70 L. J. K. B. 736 ; *Beckham* v. *Drake*, 11 M. & W. 315 ; 2 H. L. C. 579 ; *Ex p. Vine*, 8 Ch. D. 364 ; 47 L. J. Bank. 116 ; *Rogers* v. *Spence*, 13 M. & W. 571 ; 12 Cl. & F. 700 ; *Bailey* v. *Thurston, supra*). Consequently, in respect of such causes of action, the bankrupt alone can sue, or can continue an action commenced before bankruptcy. But, where a wrong committed before the order of discharge is primarily and substantially an injury to the property of the bankrupt, the right of action for such injury will, in general, pass to the trustee (*Ib.* ; *Brewer* v. *Drew*, 11 M. & W. 625 ; *Wetherell* v. *Julius*, 10 C. B. 267 ; *Turner* v. *Hardcastle*, 11 C. B. N. S. 683 ; 31 L. J. C. P. 193 ; see *Hodgson* v. *Sidney*, L. R. 1 Ex. 313).

A breach of a promise to marry is considered as a personal injury to the bankrupt within the above rule, and a right of action in respect of it does not, in general, pass to the trustee (*Beckham* v. *Drake, supra* ; *Rogers* v. *Spence, supra* ; see *Finlay* v. *Chirney*, 20 Q. B. D. 349 ; 57 L. J. Q. B. 247). A breach of a contract to cure a person of a disease appears to stand on the same footing. (See *Ib.*)

In cases within the above exceptions the bankrupt can himself maintain an action as plaintiff without joining the trustee (*Bailey* v. *Thurston, supra* ; *Rose* v. *Buckett, supra*).

With respect to property acquired by the bankrupt after adjudication, and before his discharge, he may hold it, except as against the trustee in bankruptcy ; and he may also maintain actions in his own name in respect of it, or for wrongs done to it, subject to the right of the trustee to intervene (*Herbert* v. *Sayer*, 5 Q. B. 965 ; *Morgan* v. *Knight*, 15 C. B. N. S. 669 ; 33 L. J. C. P. 168 ; *Jameson* v. *Brick and Stone Co.*, 4 Q. B. D. 208 ; 48 L. J. Q. B. 249 ; *In re Clark*, [1894] 2 Q. B. 393 ; 63 L. J. Q. B. 806) ; and where dealings for value between the bankrupt and third persons affecting property so acquired, other than real property, have taken place before the trustee has intervened to claim the property, those dealings are valid as between the trustee and the third persons, even though they knew of the bankruptcy, if they acted *bona fide* (*Cohen* v. *Mitchell*, 25 Q. B. D. 262 ; 59 L. J. Q. B. 411 ; *In re Clark, supra*). This rule applies only so as to protect such third parties, and is not applicable to dealings involving title to realty (*In re New London Land Assoc.*, [1892] 2 Ch. 138 ; 61 L. J. Ch. 617 ; *In re Clark, supra* ; *London and County Contracts* v. *Tallack*, 21 W. R. 408). As to chattel interests in land, see *In re Clayton*, [1895] 2 Ch. 212. Where the trustee knowingly permits an undischarged bankrupt to enter into contracts, or to deal with property acquired during bankruptcy, such contracts or dealings may be valid also as between himself and the bankrupt (*Morgan* v. *Knight, supra* ; *In re Clark, supra*).

As to the powers of a trustee in bankruptcy, see ss. 56, 57.

By s. 57 (2) he is empowered, with the permission of the committee of inspection, to "bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt."

By s. 83, "the trustee may sue and be sued by the official name of "the trustee of the property of ——— a bankrupt," inserting the name of the bankrupt, and by that name may hold property, and do all other acts necessary or expedient to be done in the execution of his office. This section enables the trustee to sue and be sued simply by his official name, but it is usual to prefix to this name of office his Christian name and surname.

By Ord. XVIII., r. 3, "claims by a trustee in bankruptcy as such shall not unless

The like, for Damages for Breach of a Contract made with the Bankrupt before his Bankruptcy.

[*Heading as in the previous Form.*]

1. The plaintiff, who is the trustee of the property of *C. D.*, a bankrupt, has suffered damage as such trustee by the defendant's breach of a contract

---

by leave of the Court or a judge, be joined with any claim by him in any other capacity." (See *ante*, p. 53.)

As to actions by a solvent partner of a bankrupt, and as to actions by the trustee in the bankruptcy of a bankrupt partner, see *post*, p. 103.

A mere receiving order does not divest the debtor of his property, or make him a bankrupt, or enable the official receiver to sue for a debt due to the debtor, and the debtor continues until he is adjudged bankrupt to be the proper person to bring actions to recover his property, though the official receiver may be entitled to the proceeds, when recovered (*Rhodes* v. *Dawson*, 16 Q. B. D. 548; 55 L. J. Q. B. 134; *In re Berry*, [1896] 1 Ch. 939).

The official receiver, while acting as trustee during any vacancy in the office of trustee (after an adjudication of bankruptcy) (see s. 70 (1), above cited), has the powers of a trustee in bankruptcy. (See ss. 54, 68 (3); *Turquand* v. *Board of Trade*, 11 App. Cas. 286; 55 L. J. Q. B. 417; and *Tailby* v. *The Official Receiver*, 13 App. Cas. 523.)

The official receiver may also become trustee in a bankruptcy in certain other specified cases. (See s. 82 (4), 121, s. 125 (5), and Rule 212 of the Bankruptcy Rules, 1886.)

The trustee is also, in general, entitled to sue in respect of any rights of action accruing after the adjudication and before the order of discharge, for breaches of contract affecting the property of the bankrupt (see ss. 44, 168, above referred to), but in the case of a contract made by the bankrupt after adjudication and before discharge, if the trustee does not sue or interpose, an action may be brought and maintained in respect thereof by the bankrupt himself (*Herbert* v. *Sayer*, 5 Q. B. 965; *Jameson* v. *Brick and Stone Co.*, 4 Q. B. D. 208; 48 L. J. Q. B. 249; *Emden* v. *Carte*, 17 Ch. D. 169, 768; 50 L. J. Ch. 492; and *In re Clark*, [1894] 2 Q. B. 393; 63 L. J. Q. B. 806). The trustee may also in some cases obtain an order for payment to him of the salary, income, or pension, &c., of the bankrupt. (See s. 53; *In re Shine*, [1892] 1 Q. B. 522; *In re Rogers*, [1894] 1 Q. B. 425; 63 L. J. Q. B. 178.)

With respect to the executory or uncompleted contracts of a bankrupt other than contracts depending upon his personal qualifications (such as a contract of partnership, or a contract to paint a picture), the trustee in the bankruptcy is, in general, entitled (except in so far as the contract may have provided for credit to be given to the bankrupt), to adopt and complete such contracts (*Gibson* v. *Carruthers* 8 M. & W. 333, 343; *Ex p. Chalmers*, L. R. 8 Ch. 289; 42 L. J. Bank. 37; *Morgan* v. *Bain*, L. R. 10 C. P. 15; 44 L. J. C. P. 47; *Ex p. Stapleton*, 10 Ch. D. 586; *In re Davis*, 22 Q. B. D. 193).

As to disclaimer of unprofitable contracts, or of leases or other onerous property by the trustee, see s. 55, and r. 69 of the Bankruptcy Rules, 1890; and see *In re Maughan*, 14 Q. B. D. 956; 54 L. J. Q. B. 128; *In re Bastable*, [1901] 2 K. B. 518; 70 L. J. K. B. 784; *Stacey* v. *Hill*, [1901] 1 Q. B. 660; 70 L. J. K. B. 435; *In re Baker*, [1901] 2 K. B. 628; 70 L. J. K. B. 856; and as to the right of a trustee to assign a lease to a pauper, see *Hopkinson* v. *Lovering*, 11 Q. B. D. 92; 52 L. J. Q. B. 391.

By s. 63, "No action for a dividend shall lie against the trustee, but if the trustee refuses to pay any dividend, the Court may, if it thinks fit, order him to pay it, and with interest."

The statement of claim in an action by the trustee on a cause of action which has

made [by letters dated, &c., *or, as the case may be*] between the said *C. D.*, before he became [*or*, was adjudged] bankrupt, and the defendant.

2, 3, &c. [*Here state the contract and the breach thereof as in the forms given under the different headings, post, e.g.,* "*Sale of Goods*," *post*, pp. 273 *et seq.*]

By a Trustee in Bankruptcy for a Debt which accrued due to him as such Trustee after the Bankruptcy.

[*Heading as in the first Form.*]

The plaintiff, as trustee of the property of *C. D.*, a bankrupt, claims £—— for [*here state the cause of action showing that it accrued to the trustee, as, for instance* the price of goods sold and delivered by the plaintiff as such trustee to the defendant, and for money received by the defendant for the use of the plaintiff as such trustee as aforesaid].

Particulars :—

(*See the first Form.*)

By a Trustee in Bankruptcy and a Solvent Partner of the Bankrupt for a Debt due to the Firm (*g*).

Between *A. B.*, and *C. D.*, the Trustee of the property of *G. H.*, a bankrupt.....Plaintiffs.

and

E. F......Defendant.

Statement of Claim.

1. The plaintiff *C. D.* is the trustee of the property of *G. H.*, a bankrupt, who before his bankruptcy carried on business in partnership with the plaintiff *A. B.* [under the firm or name of *A. B. and Co.*].

2. The plaintiff *A. B.* and the plaintiff *C. D.* as such trustee as aforesaid claim the sum of £——, which is payable to them for [the price of goods

---

accrued to him in right of the bankrupt should show, either by the facts and dates mentioned or by express averment, that the cause of action arose before the bankruptcy or before the order of discharge, as the case may be, and that it is of such a nature as to pass to the trustee as part of the property of the bankrupt.

(*g*) By s. 113 it is provided (*inter alia*), that "where a member of a partnership is adjudged bankrupt, the Court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action relates shall be void." If the solvent partner consents to join in the action, it is of course unnecessary to apply to the Court under this section.

By s. 114, "Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt."

As to actions by and against partners, see further, "*Partners*," *post*, p. 265.

sold and delivered by the plaintiff *A. B.* and the said *G. H.* before he became bankrupt to the defendant].

Particulars :—

(*See* "*Sale of Goods*," *post*, p. 274.)

By a Trustee in the Bankruptcy of a Sole Plaintiff where the Trustee has been substituted for him as Plaintiff before delivery of a Statement of Claim (*h*).

Between *A. B.*.....Plaintiff.

and

C. D......Defendant.

(by original action)

And between *E. F.*, the trustee of the said *A. B.*, a bankrupt.....Plaintiff,

and

C. D......Defendant.

(by order dated the —— ——, 19—).

Statement of Claim.

1. This action was commenced [*or*, The writ of summons in this action was issued] by the above-named *A. B.* before he became bankrupt, and,

---

(*h*) In the case of a sole plaintiff becoming bankrupt in the course of an action which is of such a nature that the cause of action is by the bankruptcy divested from him and vested in the trustee, the bankrupt cannot continue the action on his own account (see *Jackson* v. *N. E. Ry. Co.*, 5 Ch. D. 844; 46 L. J. Ch. 723; *Warder* v. *Saunders*, 10 Q. B. D. 114; *Selig* v. *Lion*, [1891] 1 Q. B. 513; 60 L. J. Q. B. 403; *Farnham* v. *Milward*, [1895] 2 Ch. 730; 64 L. J. Ch. 816; and see *post*, p. 363); but the trustee is entitled, if he thinks fit, to continue the action (*Ib.*; and see s. 57 (2), *ante*, p. 101, and may obtain an order substituting himself for the bankrupt as plaintiff. (See Ord. XVII., rr. 1—4, cited *ante*, p. 30.)

An election by the trustee not to continue such action does not preclude him from commencing a fresh action for the same cause (*Bennett* v. *Gamgee*, 2 Ex. D. 11; 46 L. J. Ex. 204; affirmed, 36 L. T. 48; Leake on Contracts, 4th ed., p. 907).

If an action is brought by an undischarged bankrupt in respect of a cause of action which has accrued since the bankruptcy, the trustee cannot ordinarily claim to be substituted as plaintiff without the consent of the bankrupt, but, if it appears that the cause of action is one which has vested in him, he may be joined as a co-plaintiff in the action (*Emden* v. *Carte*, 17 Ch. D. 169, 768; 51 L. J. Ch. 492).

Where a sole defendant after action brought has a receiving order made against him, the action against him will in general be stayed on application under ss. 9 (1), 10 (2), cited *post*, p. 591, and where a sole defendant is adjudged bankrupt, the plaintiff cannot ordinarily obtain an order to make the trustee in bankruptcy a party for the purpose of continuing the proceedings against the trustee (*Barter* v. *Dubeux*, 7 Q. B. D. 413; 50 L. J. Q. B. 527; *Hale* v. *Boustead*, 8 Q. B. D. 453; 51 L. J. Ch. 255; see *Watson* v. *Holliday*, 20 Ch. D. 780; 52 L. J. Ch. 543; *Borneman* v. *Wilson*, 28 Ch. D. 53).

Where the action is brought against two or more defendants, and one of them becomes bankrupt after action, the plaintiff may, if the case is such as to require it, obtain leave

after he became bankrupt, it was by an order made by ——, dated the —— ——, 19—, ordered that the proceedings in this action should be continued between the above-named *E. F.*, who is the trustee in the bankruptcy of the said *A. B.*, and the said *C. D.*

2. [*Here state the cause of action, as, for instance*, The plaintiff *E. F.*, as such trustee as aforesaid, claims against the defendant the sum of £——, which is payable by the defendant to the plaintiff *E. F.*, as such trustee as aforesaid, for money lent by the said *A. B.* before the commencement of this action to the defendant].

Particulars :—

Upon a Bill of Exchange, by a Trustee in Bankruptcy: see "Bills of Exchange," post, p. 121.

By the Assignee of Book Debts sold to him by a Trustee in Bankruptcy (*i*).

1. [*Here state the facts showing how the debt arose, as for instance*] On the —— ——, 19—, *E. F.*, before he became a bankrupt as hereinafter mentioned, sold and delivered to the defendant —— bales of Surat cotton at the price of £—— per bale, amounting in the whole to £—— [*or, as the case may be, stating the debt with particulars, if it consists of numerous items*].

2. The said *E. F.* was afterwards, on the —— ——, 19—, adjudged bankrupt, and *G. H.* was duly appointed to be the trustee of the property of the said *E. F.* in the said bankruptcy, and afterwards on the —— ——, 19—, while the price of the said goods was due and unpaid, the said *G. H.* as such trustee sold to the plaintiff by public auction [*or*, by private contract in writing dated the —— ——, 19—] the said debt of £——, which was a book debt due to the said *E. F.* within the meaning of the Bankruptcy Act, 1883, and by writing under his hand dated the —— ——, 19—,

---

to make the trustee in the bankruptcy a defendant, or to serve him with notice of the proceedings (*Chorlton* v. *Dickie*, 13 Ch. D. 160 ; 49 L. J. Ch. 40 ; *Lloyd* v. *Dimmack*, 7 Ch. D. 398 ; 48 L. J. Ch. 398), but such application is not necessary in order to entitle the plaintiff to proceed against the other defendants where the liability is several as well as joint (*Lloyd* v. *Dimmack*, *supra*).

(*i*) By s. 56 (1), the trustee is empowered, subject to the provisions of the Act, to "sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels."

If the trustee sells and assigns the bankrupt's book debts under this section, the assignee will be entitled to sue for them in his own name under s. 25 (6) of the Judicature Act, 1873, provided that the requirements of that section are fulfilled. (See Robson on Bankruptcy, 6th ed., p. 407 ; and see *ante*, p. 88.)

An assignment under s. 56 (1), above cited, of a chose in action is not within the law as to maintenance or champerty (*Guy* v. *Churchill*, 40 Ch. D. 481 ; 58 L. J. Ch. 345)

assigned the said debt to the plaintiff, and notice in writing of the said assignment was on the —— ——, 19—, given by the plaintiff to the defendant, and the said debt is still due and payable to the plaintiff.

By a Trustee in whom the Property of a Debtor has vested under a Scheme of Arrangement in pursuance of the Bankruptcy Acts, 1883 *and* 1890, *for a Debt due to a Debtor* (*k*).

Between *A. B.*, the trustee of the property of *E. F.*, a debtor under the Bankruptcy Acts, 1883 and 1890.....Plaintiff,

and

C. D......Defendant.

Statement of Claim.

1. [*State the cause of action, as for instance*] On the —— ——, 19—, the said *E. F.* sold and delivered a horse to the defendant for the price of £50 to be paid within one month from that date.

(*k*) **Compositions or Arrangements under the Bankruptcy Acts.**]—The provisions of s. 18 of the Act of 1883, with respect to compositions or schemes of arrangement, have been repealed by the Act of 1890, but have been reproduced with some modifications by s. 3 of the latter Act, which contains (*inter alia*) the following enactments:—

The creditors, after the making of a receiving order against the debtor, may, by a majority in number and three-fourths in value of all the creditors who have proved, resolve to accept a proposal for a composition or scheme of arrangement, and such resolution, when approved by the Court, is binding on all the creditors (Bankruptcy Act, 1890, s. 3 (1) (2)).

A composition or scheme thus accepted and approved is binding on the creditors so far as relates to any debts which would be barred by an order of discharge in bankruptcy (see Bankruptcy Act, 1890, ss. 3 (12), 10; Bankruptcy Act, 1883, ss. 19, 30; *post*, p. 594); and the official receiver's certificate that a composition or scheme has been duly accepted and approved is, in the absence of fraud, conclusive as to its validity (Bankruptcy Act, 1890, s. 3 (13)).

After a composition or scheme has been approved of, the receiving order is discharged, and the official receiver, on payment of the costs, &c., forthwith puts the debtor (or, as the case may be, the trustee or assignee under the composition or scheme) into possession of the debtor's property (Bankruptcy Rules, 1890, rr. 30, 38).

In cases of compositions or schemes where no trustee is appointed, or the trustee declines to act, &c., the official receiver is the trustee for the purpose of administering the debtor's property and distributing the composition, or carrying out the terms of the scheme, and he also acts as such trustee during any vacancy in the office (Bankruptcy Rules, 1890, r. 31).

It is provided by s. 3 (16) of the Bankruptcy Act, 1890, that if under or in pursuance of a composition or scheme a trustee is appointed to administer the debtor's property, or manage his business, or to distribute the composition, s. 27 and ss. 72—91 of the Bankruptcy Act, 1883, shall apply as if the trustee were a trustee in a bankruptcy, and as if the terms "bankruptcy," "bankrupt," and "order of adjudication," included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and order approving the composition or scheme.

No action lies against the debtor to enforce payment of any instalment which may

2. Afterwards, on the —— ——, 19—, and while the said £50 was due from the defendant to the said *E. F.*, a scheme of arrangement of the affairs of the said *E. F.* was duly accepted and approved under the 3rd section of the Bankruptcy Act, 1890 [*or, if the scheme was accepted and approved after adjudication*, the 23rd section of the Bankruptcy Act, 1883, as amended by the 6th section of the Bankruptcy Act, 1890], and the plaintiff was duly appointed to be the trustee of the property of the said *E. F.* under the said scheme, and the said property, including the right of action for the said debt of £50, became and was vested in the plaintiff as such trustee as aforesaid, and the said sum of £50 was before the commencement of this action, and still is, due from and payable by the defendant to the plaintiff as such trustee.

The plaintiff as such trustee as aforesaid claims £50.

BARRISTER. *See* "*Counsel*," *post*, p. 161.

be due to a creditor under such composition or scheme, but if default is made in any payment thereunder, the remedy of the person aggrieved is by application to the Court (Bankruptcy Rules, 1890, r. 33), which may enforce the provisions of such composition or scheme on the application of any person interested (Bankruptcy Act, 1890, s. 3 (14), reproducing s. 18 (10) of the Bankruptcy Act, 1893; see *Ex p. Godfrey*, 18 Q. B. D. 670), or may adjudge the debtor bankrupt and annul the composition or scheme without prejudice to the validity of anything duly done thereunder (Bankruptcy Act, 1890, s. 3 (15), reproducing s. 18 (11) of the Bankruptcy Act, 1883; see Bankruptcy Rules, 1890, r. 34; *In re Moon*, 19 Q. B. D. 669; *In re McHenry*, 21 Q. B. D. 580; and see *Walton* v. *Cook*, 40 Ch. D. 325).

These last mentioned provisions, as well as most of those mentioned in the earlier part of this note are in effect applied to the case of a composition or scheme of arrangement after adjudication under s. 23 of the Bankruptcy Act, 1883. (See Bankruptcy Act, 1883, s. 23; Bankruptcy Act, 1890, s. 6; and the cases next cited.)

By s. 23 of the Bankruptcy Act, 1883 (as amended by s. 6 of the Act of 1890), the creditors of a debtor who has been adjudged bankrupt may, after the adjudication, by the like resolution as is required for accepting a composition or scheme proposed before adjudication (see Bankruptcy Act, 1890, s. 3 (2), above cited), accept a composition or scheme of arrangement, and on approval thereof by the Court, the bankruptcy may be annulled, and the property vested in the bankrupt, or in such person as the Court may appoint. (See *Ex p. Kearsley*, 18 Q. B. D. 168; *Ex p. Godfrey*, 18 Q. B. D. 670.)

As to staying proceedings in actions by creditors for their original debts or claims after the acceptance or approval of a composition or scheme of arrangement under the Bankruptcy Acts, see the sections above cited and ss. 9, 10 (2) of the Bankruptcy Act, 1883, cited "*Bankruptcy*," *post*, pp. 591, 595; and as to pleading the proceedings under the composition or arrangement by way of defence to such actions, see the sections cited in the previous part of this note, and "*Bankruptcy*," *post*, p. 594.

As to the rights and powers of a trustee appointed under a composition or scheme of arrangement in pursuance of the Bankruptcy Acts, see s. 3 (17) of the Act of 1890, which reproduces s. 18 (13) of the Act of 1883.

As to compositions or liquidations by arrangement under the Bankruptcy Act, 1869, see ss. 125, 126, and s. 28 of that Act; *post*, p. 595.

As to arrangements and compositions with creditors, independently of the Bankruptcy Acts, see *post*, pp. 639 *et seq.*

BILLS OF EXCHANGE, PROMISSORY NOTES, &c. (*l*).

I. INLAND BILLS OF EXCHANGE (*m*).

Claim by Drawer against Acceptor on a Bill payable to the Drawer (n).

The plaintiff's claim is [*or*, The plaintiff claims] against the defendant as acceptor of a bill of exchange for £——, dated the —— ——, 19—,

---

(*l*) The law relating to bills of exchange, cheques, and promissory notes is now for the most part contained in the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). In the following notes, where no other statute is expressly cited, the sections referred to are those of that Act. The rules of the common law (including the law merchant) still apply, except so far as they are inconsistent with the express provisions of the Act (s. 97).

By Ord. XVI., *r.* 6, "The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any contract, including parties to bills of exchange and promissory notes." See R. S. C., 1883, App. C., Sect. IV., Form No. 5, *post*, p. 114; and see, also, Ord. XVI., r. 4, cited *ante*, p. 22.)

As to actions by or against partners, see s. 23, and "*Partners*," *post*, p. 265.

Three days, called "days of grace," are, where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill in all cases where the bill is not one payable on demand (s. 14). No action can be commenced on a bill not payable on demand until after the expiration of the days of grace (*Kennedy* v. *Thomas*, [1894] 2 Q. B. 759; 63 L. J. Q. B. 761).

The term "month" in a bill means "calendar month" (s. 14 (4)). In ordinary documents its *primâ facie* meaning is a lunar month. (See *Simpson* v. *Margitson*, 11 Q. B. 23; *Bruner* v. *Moore*, [1904] 1 Ch. 305; 73 L. J. Ch. 377.)

In statements of claim upon bills or notes it is not necessary to allege consideration, as consideration is *primâ facie* presumed. (See ss. 29 (1) (b), 30 (1) (2); Ord. XIX., r. 25.) The fact that the bill is unpaid, or that the amount claimed is due, should be shown either in the body of the statement of claim or in the particulars. [cccv]

In actions between immediate parties it is advisable, if there is any doubt as to the validity of the bill or note or the right of recovering upon it as such, to add an alternative claim on the consideration, and in some cases it is also advisable to add a claim on an account stated. (See *Carlos* v. *Fancourt*, 5 T. R. 482, 486; "*Account Stated*," *ante*, p. 70.)

When there is doubt as to whether the instrument sued on constitutes a valid bill of exchange or promissory note, or as to its legal effect, it is often convenient to set out the instrument *verbatim* in the statement of claim, with such averments as may be requisite to show the identity of the persons mentioned in it with the parties to the action. (See *ante*, p. 7; and *Price* v. *Taylor*, 5 H. & N. 540; 29 L. J. Ex. 331.)

In most actions on bills the statement of claim can be specially indorsed on the writ. (See *ante*, p. 65; and see s. 57, cited note (*p*), *post*, p. 109.)

(*m*) An inland bill is a bill which is, or on the face of it purports to be, drawn within the British Islands, and either payable there or drawn upon some person resident therein (s. 4 (1)). The British Islands include Great Britain and Ireland, the Isle of Man, and the Channel Islands (*Ib.*). A holder may treat as an inland bill any bill which does not upon its face purport to be a foreign bill (s. 4 (2)).

(*n*) In actions between the drawer and the acceptor, a bill may be described as "payable to the plaintiff," when it is expressed to be payable to him, or to his order, or to him or his order. (See *Smith* v. *M'Clure*, 5 East, 476.)

drawn by the plaintiff upon the defendant, payable to the plaintiff —— months after date [*or* on demand, *or*, at sight, *or*, on presentation (*o*)].

Particulars :—(*p*)

	£	*s.*	*d.*
19—, —— ——. Principal due			
Interest thereon to date of writ (*p*)			
Expenses of noting (*p*)			
Amount due.....			

The plaintiff also claims interest on £—— of the above amount [*or*, on £——, the principal of the said bill] at —— per cent. per annum from the date of writ until payment or judgment (*p*).

(*o*) By s. 10 (1), a bill is payable "on demand" which is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed. The maker of a promissory note which is payable on demand may be sued upon it without any previous demand (*Norton* v. *Ellam*, 2 M. & W. 461 ; *In re George*, 44 Ch. D. 627 ; 59 L. J. Ch. 709) ; and the acceptor of a bill payable on demand is in the same position. If the bill sued on is payable at a fixed period after demand, or after sight, demand or sight is necessary, and an action for non-payment of the bill cannot be brought until after the expressed period has elapsed ; and in a statement of claim on such a bill the fact and date of the demand should be stated. "Sight" in such case means legal sight, and that is involved in the allegation of acceptance, and can be proved by acceptance or by protest for non-acceptance (*Campbell* v. *French*, 6 T. R. 212).

(*p*) By s. 57, "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows :—

(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(a) The amount of the bill :

(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :

(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2.) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3.) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper."

This section enables claims under it to be specially indorsed on the writ. (See "*Special Indorsements*," *ante*, p. 68.)

The rate of interest allowed on inland bills and notes is usually five per cent., unless another rate is mentioned in the bill or note. (See *Keene* v. *Keene*, 3 C. B. N. S. 144 ; 27 L. J. C. P. 88 ; *In re Commercial Bank*, 36 Ch. D. at p. 529 ; and see Ord. XIII., r. 3.)

The term "interest proper" in sub-sect. 3 means interest which is expressly made payable by the terms of the bill or note so as to constitute a strict *debt*.

Where the particulars are stated in the form of an account, as in the forms given in the R. S. C., 1883, App. C., Sect. IV., the amount to be inserted in the account as the sum claimed for interest should be the precise amount of interest due up to the

The like. Another form.

The plaintiff, by his bill of exchange now overdue, dated the —— ——, 19—, directed to the defendant, required the defendant to pay to the plaintiff £—— —— months after date [*or*, on demand, *or*, at sight, *or*, on presentation, *or*, —— days (*or*, months) after sight], and the defendant accepted the said bill, but has not paid the same.

Particulars :—[*As in the preceding Form, or, it may be as follows :—*]

The plaintiff claims £——, principal due on the said bill, and interest thereon at the rate of [five] per cent. per annum from the —— ——, 19—, until payment or judgment. [*Add any other items of damage claimable, as, for instance*, and £——, expenses of noting the said bill.]

By Drawer against Acceptor on a Bill drawn payable on a Future Event which is certain to happen (q).

The plaintiff claims against the defendant as acceptor of a bill of exchange for £——, dated the —— ——, 19—, drawn by the plaintiff

---

date of the writ. But as further interest is claimable up to the time of payment or judgment, and as the precise amount of such further interest cannot be inserted, it is advisable to frame the particulars in the mode given in the text, so as to include the full amount which may be ultimately claimable.

By s. 9 (3), "Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof."

Claims for the expenses of noting or protesting a bill or note, if sought to be recovered, must be expressly stated. The expenses of protesting bills dishonoured in this country would seem to be allowed only when the protest is necessary (s. 57 (1), *supra*; *In re English Bank of River Plate*, [1893] 2 Ch. 438, 444; 62 L. J. Ch. 578). It is unnecessary that inland bills or notes should be noted or protested on dishonour, unless for the purpose of suing any of the parties abroad. (See ss. 51, 52 (3), 89; *Windle* v. *Andrews*, 2 B. & Ald. 696; *Bonar* v. *Mitchell*, 5 Ex. 415; and see further ss. 51 (2), 52 (3), and ss. 14 (3), 65.) But the holder has the option of noting an inland bill on dishonour under the provisions of s. 51 (1), which enacts that "where an inland bill has been dishonoured, it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be." Similarly, under s. 51 (5), the holder has the option of protesting a bill where the acceptor becomes bankrupt or insolvent, or suspends payment before its maturity.

(*q*) A bill or promissory note may in the body of it be drawn payable on a future event, but in that case the event so specified must be one which is certain to happen, though the time of happening may be uncertain. (See ss. 3 (1), 11 (2); *Colehan* v. *Cooke*, Wils. 393; *Alexander* v. *Thomas*, 16 Q. B. 333; and as to promissory notes, see also ss. 83 (1), 89; *Carlos* v. *Fancourt*, 5 T. R. 482.)

Although a bill cannot be *drawn* payable on an uncertain contingency which may never happen, it may be *accepted* conditionally, so as to become payable only on the happening of a future event or contingency, whether such event or contingency is or is not certain to happen. (See s. 19 (2); *Palmer* v. *Pratt*, 2 Bing. 185, 190; *Russell* v. *Phillips*, 14 Q. B. 891; *Smith* v. *Vertue*, 9 C. B. N. S. 214, 30 L. J. C. P. 56.)

An acceptance may be either general or qualified (s. 19, and see s. 44).

"A general acceptance assents without qualification to the order of the drawer. A

upon the defendant, payable to the plaintiff three months after the death of *E. F.*, who died on the —— ——, 19— [*or, as the case may be, stating the event on which the bill became payable*].

Particulars :—

By Drawer against Acceptor on a Bill Accepted payable on a Future Event or Contingency (r).

The plaintiff claims against the defendant as acceptor of a bill of exchange for £——, dated the —— ——, 19—, drawn by the plaintiff upon the defendant, payable to the plaintiff and accepted payable on [*here state the event or contingency on which the bill was accepted payable, as, for instance,* the death of *E. F.*, who died on the —— ——, 19—, *or,* the arrival of the steamship Thetis at Bristol, which said steamship afterwards arrived at Bristol on the —— ——, 19—, *or, as the case may be*].

Particulars :—

By Drawer against Acceptor on a Bill accepted payable only at a particular specified Place (s).

The plaintiff claims against the defendant as acceptor of a bill of exchange for £——, dated the ——, ——, 19—, drawn by the plaintiff upon the defendant, payable to the plaintiff —— months after date, and accepted payable at [the —— Bank, —— Street, ——, *or as the case may*

---

qualified acceptance in express terms varies the effect of the bill as drawn" (s. 19 (2) : see *Meyer* v. *Decroix*, [1891] A. C. 520). An acceptance which makes payment by the acceptor dependent on the fulfilment of a condition therein stated, is a qualified acceptance (s. 19 (2), where see other instances of qualified acceptances).

A conditional acceptance cannot properly be stated in the statement of claim as an absolute one, although the condition has been fulfilled. (See *Langston* v. *Corney*, 4 Camp. 176.)

(*r*) See note (*q*), *ante*.

(*s*) A bill accepted payable at a banker's or other place was, at common law, a qualified acceptance, and required a presentment according to the tenor of the acceptance. (*Rowe* v. *Young*, 2 B. & B. 165.) But by s. 19 (2), "An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere." So, where the drawer in the body of the bill has required payment to be made at a particular place, the acceptance is general as against the acceptor, unless it contain the restrictive expressions mentioned in the above sub-section (see the cases above cited) ; and by s. 52 (1), "When a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable."

The effect of the above-cited enactment with respect to the place of payment is restricted to the acceptor ; as against all other parties to the bill, the qualifications of the acceptance as to the place of payment remain the same as at common law, and, except where presentment is excused (see s. 46, cited, *post*, p. 114), the bill must be duly presented according to the qualifications of the acceptance, in order to charge the drawer or the indorser.

be] only [*or*, and not elsewhere], which said bill was duly presented for payment at the said [Bank] and was dishonoured.

Particulars :—

By Drawer against Acceptor on a Bill payable to a Third Person.

The plaintiff claims against the defendant as acceptor of a bill of exchange for £——, now overdue and unpaid, dated the —— ——, 19—, drawn by the plaintiff upon the defendant, payable —— months after date to *E. F.* or order, which said bill was delivered by the plaintiff to the said *E. F.* who, upon the same being dishonoured, returned it to the plaintiff.

Particulars :—

By the Payee against the Acceptor (*t*).

The plaintiff claims against the defendant as acceptor of a bill of exchange for £——, dated the —— ——, 19—, drawn by *E. F.* upon the defendant, payable to the plaintiff —— months after date [and delivered by *E. F.* to the plaintiff].

Particulars :—

By Indorsee against Acceptor (*u*).

The plaintiff's claim is [*or*, The plaintiff claims] against the defendant, as acceptor of a bill of exchange for £400, dated the —— ——, 19—,

(*t*) It is unnecessary, in an action by payee against acceptor, to insert an averment of the delivery of the bill to the payee. (See *Churchill* v. *Gardner*, 7 T. R. 596; R. S. C., 1883, App. C., Sect. IV., No. 6.)

(*u*) As to what constitutes a valid indorsement of a bill or note, see ss. 2, 21, 31 (3) (5), and s. 32; and as to what is a sufficient signature, see ss. 23, 25, 26, 56, 91. See further, *post*, p. 597.

The indorsement is incomplete without delivery (see ss. 2, 21 (1), 31 (3)), and the statement of the indorsement includes the delivery for the purpose of transfer (see *Brind* v. *Hampshire*, 1 M. & W. 371; *Denton* v. *Peters*, L. R. 5 Q. B. 475, 477; *Ex parte Cote*, L. R. 9 Ch. 27; 43 L. J. Bk. 19), and imports the transfer of the property in, and the right of action on, the bill (*Marston* v. *Allen*, 8 M. & W. 494; *Law* v. *Parnell*, 7 C. B. N. S. 282; 29 L. J. C. P. 17; *Keene* v. *Beard*, 8 C. B. N. S. 372, 381; 29 L. J. C. P. 287, 290). A statement of delivery merely is not a sufficient statement of indorsement (*Cunliffe* v. *Whitehead*, 3 Bing. N. C. 828).

By s. 31 (4), "Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor." But until indorsement, he has no right of action in his own name against the acceptor of the bill.

The allegation of indorsement is sufficiently proved in an action against the acceptor by proof of an indorsement with intention to transfer the property in the bill, although no right of action be given against the indorser by the transfer (*Smith* v. *Johnson*, 3 H. & N. 222; 27 L. J. Ex. 363; *Denton* v. *Peters*, *supra*). But in order to support an action against the indorser, the indorsement must have been made with the

drawn by *A. B.*, payable three months after date to the order of *E. F.* and indorsed by *E. F.* [to *G. H.*, and by *G. H.* to *I. K.*, and by *I. K.*] to the plaintiff.

Particulars :—

	£
19—, —— ——. Principal due	400
Interest to date of writ	16
Amount due	416

(*See R. S. C.*, 1883, *App. C., Sect. IV., No.* 4.)

---

intention not only to pass the property in it, but also to guarantee the payment if the acceptor makes default (*Denton* v. *Peters, supra*; *Foster* v. *Mackinnon*, L. R. 4 C. P. 704; 38 L. J. C. P. 310). An indorsement may be made "without recourse," that is, expressly negativing the indorser's liability to the holder (see s. 16 (1)), or, it may contain terms making it a restrictive indorsement (s. 32 (6)).

As to restrictive indorsements, see s. 35.

By s. 34, "(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. (2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable."

A holder of a bill indorsed in blank may convert the blank indorsement into a special indorsement. (See s. 34 (4).)

By s. 58, where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is not liable on the instrument, but thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless. He may, however, indorse it, and thus become subject to the ordinary liabilities of an indorser. (See s. 56.)

As to what constitutes a valid delivery, see ss. 2, 21 (2).

By s. 7 (3), "Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." If the name of a real person is used as payee, who has not, and never was intended by the drawer to have, any right upon or arising out of the bill, such person may be a "fictitious person" within the above section (*Bank of England* v. *Vagliano*, [1891] A. C. 107; 60 L. J. Q. B. 149; *Clutton* v. *Attenborough*, [1895] 2 Q. B. 707; 65 L. J. Q. B. 122; affirmed [1897] A. C. 90; *Vinden* v. *Hughes*, [1905] 1 K. B. 795; 74 L. J. Q. B. 410).

As to what are bills payable to bearer, see s. 8 (3), and ss. 7 (3), 34 (1), *supra*.

A bill or note which is payable to bearer is transferable and negotiable by mere delivery without any indorsement (see s. 31 (1) (2)); but such bills or notes are often indorsed by the transferor where the intention is that he shall be personally liable in the event of the bill or note being dishonoured (see s. 56; *Fairclough* v. *Pavia*, 9 Ex. 690, 695; *Keene* v. *Beard*, 8 C. B. N. S. 372; cited *post*, p. 127).

The plaintiff may strike out any indorsements which are not necessary to his title. Thus, if the first indorsement and all subsequent indorsements are in blank, the plaintiff in an action by indorsee against acceptor may in the pleadings be described as the immediate indorsee of the first or any intermediate indorser. In that case the indorsements not stated must be struck out at the trial (*Mayer* v. *Jadis*, 1 M. & Rob. 247), and the remedy against those indorsers whose names have been intentionally struck out is lost (*Ib.*; *Wilkinson* v. *Johnson*, 3 B. & C. 428; and see *Fairclough* v. *Pavia*, 9 Ex. 690). The omission of intermediate indorsements may, in some cases, have the effect of precluding the plaintiff from setting up a further title acquired under the intermediate indorsers (*Bartlett* v. *Benson*, 14 M. & W. 733; though see *Fairclough* v. *Pavia*, 9 Ex. at p. 695). If the remedy against the defendant is at all doubtful, it is, in general, better to state all the indorsements according to the fact. Previously to the Judicature Acts, it was the rule that indorsements stated, though unnecessarily,

A like Form: Laurence v. *Willcocks*, [1892] 1 Q. B. 696; 68 L. J. Q. B. 519.

The like. Another Form (*x*).

1. *E. F.*, by his bill of exchange, dated the —— ——, 19—, directed to the defendant, required the defendant to pay to the order of the said *E. F.* £——, —— months after date [*or*, on demand, *or*, —— days after sight, &c., *or as the case may be*], and the defendant accepted the said bill.

2. The said *E. F.* indorsed the bill to [*G. H.*, who indorsed it to *I. K.*, who indorsed it to] the plaintiff.

3. The defendant did not pay the said bill. [*If the bill was payable after "sight," add* although it became due before action.]

Particulars:—

By Indorsee against Acceptor and Drawer severally (*y*).

The plaintiff's claim is against the defendant *A. B.* as acceptor, and against the defendant *C. D.* as drawer, of a bill of exchange for £500

---

must, in the absence of an amendment, be proved, if denied. (See Bullen & Leake, 3rd ed., p. 97; *Wayman* v. *Bend*, 1 Camp. 175.)

(*x*) See note (*o*), *ante*, p. 109, and the note to the last form.

(*y*) See note (*l*), *ante*, p. 108.

In order to charge the drawer or indorsers, a bill must be duly presented for payment, unless such presentment is excused (ss. 45 and 46).

It is provided (*inter alia*) by s. 45, that "A bill is duly presented for payment which is presented in accordance with the following rules:—

(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due.

(2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

(3.) Presentment must be made by the holder, or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found." (See also s. 92, and s. 45 (4).)

By s. 46 (1), "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

By s. 46 (2), presentment for payment is dispensed with:—(a) where, after the exercise of reasonable diligence, presentment, as required by the Act, cannot be effected; (b) where the drawee is a fictitious person (see *Bank of England* v. *Vagliano*, [1891] A. C. 107; 60 L. J. Q. B. 145; *Clutton* v. *Attenborough*, cited *ante*,

dated the 1st January, 1900, payable three months after date, and indorsed by the defendant *C. D.* to the plaintiff, of the dishonour of which on presentation the defendant *C. D.* had notice.

Particulars :—

		£
1900, —— ——.	Principal	500
	Interest	20
	Amount due	520

(*R. S. C.*, 1883, *App. C.*, *Sect. IV.*, *No.* 5.)

By Payee against Drawer, for default of Acceptance (*z*).

The plaintiff claims against the defendant as drawer of a bill of exchange for £——, dated the —— ——, 19—, drawn upon *E. F.*,

---

p. 113); (c) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented (see *In re Boyse*, 33 Ch. D. 612; 56 L. J. Ch. 135; *In re Bethell*, 34 Ch. D. 561; 56 L. J. Ch. 334); (d) as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented; and (e) by waiver of presentment, express or implied.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment. (See s. 46 (2).) See further, as to days of grace allowed on bills not payable on demand, *ante*, p. 108, and s. 14.

Where the plaintiff relies upon matter of excuse for non-presentment, he must state such matter of excuse in the statement of claim. (See "*Conditions Precedent*," *post*, p. 157; and see the next form, and R. S. C., 1883, App. C., Sect. IV., Form No. 6, cited *post*, p. 119.)

In the case of a bill payable on demand, it is unnecessary to allege in the statement of claim excuses for delay in presentment, since a presentment within a reasonable time is a due presentment (s. 45); but in the case of a bill requiring presentment to be made at a fixed time, it would seem correct, where there has been delay, to allege in the statement of claim the matters excusing the delay, and not to allege merely a due presentment.

(*z*) This cause of action arises immediately on the refusal to accept, and due notice thereof to the defendant (ss. 43 (2), 55 (1)), and dates from that time (*Whitehead* v. *Walker*, 9 M. & W. 506; "*Limitation, Statutes of*," *post*, p. 721). No new cause of action arises afterwards on non-payment. (See *Whitehead* v. *Walker*, *supra*; and see ss. 42, 43 (2).)

By s. 43 (1), "A bill is dishonoured by non-acceptance—

(a.) When it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or

(b.) When presentment for acceptance is excused and the bill is not accepted."

By s. 43 (2), "Subject to the provisions of this Act, when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary."

By s. 44 (1), "The holder of a bill may refuse to take a qualified acceptance, and, if he does not obtain an unqualified acceptance, may treat the bill as dishonoured by non-acceptance."

payable to the plaintiff —— months after date, which was duly presented for acceptance [on the —— ——, 19—], and was dishonoured by non-acceptance, whereof the defendant had due notice on the —— ——, 19—, by letter [*or*, notice in writing] dated that day, but has not paid the said bill.

Particulars :—

The like, by an Indorsee.

The plaintiff claims against the defendant as drawer of a bill of exchange for £——, dated the —— ——, 19—, drawn upon *E. F.*, payable to the order of *G. H.* —— months after date, and indorsed by *G. H.* [to *I. K.*, and by *I. K.*] to the plaintiff, which said bill was on the —— ——, 19—, duly presented for acceptance and was dishonoured by non-acceptance, whereof the defendant had due notice by letter [*or*, notice in writing] dated the —— ——, 19—, but has not paid the said bill.

Particulars :—

By Payee against Drawer, for default of Payment (*a*).

The plaintiff claims against the defendant as drawer of a bill of exchange for £——, dated the —— ——, 19—, drawn upon *E. F.*

As to qualified and partial acceptances, see, further, s. 44 (2) (3), and s. 19 ; and see note (*q*), *supra*.

As to non-acceptance within the customary time of a bill duly presented for acceptance, see s. 42 ; and see also *Bank of Van Diemen's Land* v. *Bank of Victoria*, L. R. 3 P. C. 526 ; 40 L. J. P. C. 28. As to what is a due presentment for acceptance, see s. 41 (1).

By s. 41 (2), presentment for acceptance is excused "(a) Where the drawee is dead or bankrupt, or is a fictitious person, or a person not having capacity to contract by bill : (b) where after the exercise of reasonable diligence such presentment cannot be effected : (c) where, although the presentment has been irregular, acceptance has been refused on some other ground."

By s. 41 (3), "The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment."

Matter of excuse for non-presentment must, when relied upon, be alleged in the statement of claim. (See note (*y*), *supra*.)

Notice of dishonour by non-acceptance must be given at once. (See ss. 42, 48, 49 ; note (*c*), *post*, p. 117 ; *Bartlett* v. *Benson*, 14 M. & W. 733.) As to notice of dishonour, and how and when it is to be alleged, or the want or delay of it excused, see note (*c*), *post*, p. 117 ; and s. 48.

(*a*) This form is applicable only when the bill has not been presented for acceptance, or when it has been accepted and dishonoured by non-payment, and notice has been given of the dishonour. When acceptance has been refused, no new cause of action can arise on non-payment. (See the preceding note.)

It is not necessary to state an acceptance, whether general or at a particular place, against any party except the acceptor (*Parks* v. *Edge*, 1 C. & M. 429 ; see *Whitehead* v. *Walker*, 9 M. & W. 506).

As to what is dishonour by nonpayment, see s. 47 ; and as to notice of dishonour, see note (*c*), *post*.

payable to the plaintiff —— months after date, which was duly presented for payment and dishonoured, whereof the defendant had due notice by letter [*or*, notice in writing] dated the —— ——, 19—.

Particulars :—

By Payee against Drawer, for default of Payment on a Bill drawn payable at a particular Place (*b*).

[*The same as the last preceding Form, except that the Bill should be described as* "payable to the plaintiff in London [*or, as the case may be*]," *and as having been* "presented for payment in London" [*or, as the case may be*].]

By Payee against Drawer for default of Payment, with an Excuse for not giving Notice of Dishonour (*c*).

The plaintiff's claim is against the defendant as drawer of a bill of exchange for £600, dated the —— ——, 19—, drawn upon *A. B.*, payable

---

(*b*) See the preceding note. Where the bill has been drawn payable at a particular place (see note (*s*), *supra*), it should be so described in the statement of claim, and it is convenient to add an averment of due presentment at that place, although a general averment that the bill was duly presented for payment would be sufficient, as in the last form.

Where a bill is drawn or accepted, payable at a particular place, the drawer or indorser can only be rendered liable upon presentment and dishonour at that place (ss. 45, 47 (1), 55 ; see *Gibb* v. *Mather*, 8 Bing. 214 ; *Shelton* v. *Braithwaite*, 18 M. & W. 252 ; *Saul* v. *Jones*, 1 E. & E. 59 ; 28 L. J. Q. B. 37), unless such presentment is excused (see s. 46, note (*y*), *supra*).

An unqualified admission of liability on the bill, as by a promise to pay it, may amount to sufficient evidence of due presentment (*Lundie* v. *Robertson*, 7 East, 231 ; *Croxon* v. *Worthen*, 5 M. & W. 5 ; and see *Woods* v. *Dean*, 3 B. & S. 101 ; cited in note (*c*), *infra*). An indorsement making the bill payable "in need" at a specified banker's does not constitute the banker agent to receive notice of dishonour on behalf of the indorser (*In re Leeds Banking Co.*, L. R. 1 Eq. 1 ; 35 L. J. Ch. 33).

(*c*) By s. 48, "Subject to the provisions of this Act" (see s. 50, *infra*), "when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged ; Provided that—

(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.

(2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted."

As to what is a valid and effectual notice of dishonour, and when and by and whom it must be given, see s. 49, which contains (*inter alia*) the following provisions :—

"(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill."

"(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4.) Where notice is given by or on behalf of an indorser entitled to give notice as

to the plaintiff three months after date, which was [on the —— ——, 19—,] duly presented for payment and dishonoured, but *A. B.* had no effects of

---

hereinbefore provided, it enures for the benefit of the holder, and all indorsers subsequent to the party to whom notice is given.

(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment."

As to the time within which notice of dishonour may be validly given, see s. 49 (12) (13) (14) (15); and see s. 50 (1).

The averment of notice of dishonour is an essential averment in a statement of claim against the drawer (*May* v. *Chidley*, [1894] 1 Q. B. 451, 453; 63 L. J. Q. B. 355; *Roberts* v. *Plant*, [1895] 1 Q. B. 597; 64 L. J. Q. B. 347; see *Bradley* v. *Chamberlyn*, [1893] 1 Q. B. at p. 440).

By s. 50 (1), "Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence.

"(2) Notice of dishonour is dispensed with—

(a.) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged:

(b.) By waiver, express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice:

(c.) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment:

(d.) As regards the indorser in the following cases, namely—(1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation."

In all cases where the plaintiff relies upon the fact that notice of dishonour has been dispensed with, the matter of excuse or dispensation is a material fact, and must be averred in the statement of claim. (See "*Conditions Precedent*," *post*, p. 157; and the above form; and see also, under the former practice, *Burgh* v. *Legge*, 5 M. & W. 418; *Allen* v. *Edmundson*, 2 Ex. 719; *Cordery* v. *Colvin*, 14 C. B. N. S. 374.) But it seems that matter of excuse for mere delay in giving notice of dishonour need not be expressly alleged in the statement of claim, as proof of it is admissible under an averment that the defendant had "notice" or "due notice" of dishonour. (See, under the former practice, *Firth* v. *Thrush*, 8 B. & C. 387; *Allen* v. *Edmundson*, *supra*; *Killby* v. *Rochussen*, 18 C. B. N. S. at pp. 363, 364.) The acceptor of a bill is not in any case entitled to notice of dishonour (s. 52 (3)), nor is the maker of a note (s. 89, cited *post*, p. 129).

A promise to pay or acknowledgment of liability on the bill after the dishonour is evidence of a waiver of notice (*Lundie* v. *Robertson*, 7 East, 231; *Rabey* v. *Gilbert*, 6 H. & N. 536; 30 L. J. Ex. 170; *Cordery* v. *Colvin*, 14 C. B. N. S. 374; 32 L. J. C. P. 210; *Woods* v. *Dean*, 3 B. & S. 101; 32 L. J. Q. B. 1; *Killby* v. *Rochussen*, 18 C. B. N. S. 357), and is also evidence that notice of dishonour has been duly given. (See *Lundie* v. *Robertson*, *Cordery* v. *Colvin*, *Rabey* v. *Gilbert*, *supra*; *Killby* v. *Rochussen*, 18 C. B. N. S. 357.) Where such promise or acknowledgment has been made by the defendant to a party to the bill other than the plaintiff, it may in general be used by the plaintiff as evidence of notice of dishonour or waiver of such notice (*Potter* v. *Rayworth*, 13 East, 417; *Woods* v. *Dean*, *supra*); as where the defendant suffered

the defendant, nor was there any consideration for the payment of the said bill by the said *A. B.*

Particulars :—

(*See R. S. C.*, 1883, *App. C., Sect. IV., No.* 6.)

By Payee against Drawer, for default of Payment, alleging Notice of Dishonour, and also, as an alternative case, Facts dispensing with Notice of Dishonour (*d*).

1. [*Here set out the Form of Statement of Claim by Payee against Drawer for default of Payment, ante*, p. 116, *down to and including the words*, whereof the defendant had due notice, &c.]

2. Alternatively, the plaintiff says that notice of dishonour was dispensed with as follows :—

[*Here state the matter of excuse, as, for instance*, The said *E. F.* had no effects of the defendant, nor was there any consideration for the payment of the said bill by the said *E. F.*]

Particulars :—

By Indorsee against Drawer, for default of Payment, on a Bill payable to the Drawer or Order (*e*).

1. The plaintiff claims against the defendant as drawer of a bill of exchange for £——, dated the —— ——, 19—, drawn by the defendant upon *E. F.*, payable to the order of the defendant —— months after date, and indorsed by the defendant [to *J. K.*, who indorsed it] to the plaintiff.

2. The said bill was duly presented for payment and was dishonoured, whereof the defendant had due notice by letter [*or* notice in writing], dated the —— ——, 19—, but the said bill has not been paid.

Particulars :—

By Indorsee against Indorser, for default of Acceptance (*f*).

1. The plaintiff claims against the defendant as indorser of a bill of exchange for £——, dated the —— ——, 19—, drawn by *E. F.* upon

---

judgment by default in a prior action brought against him on the same bill, by a different holder (*Rabey* v. *Gilbert*, 6 H. & N. 536 ; 30 L. J. Ex. 170).

(*d*) See the preceding note.

(*e*) As to striking out intermediate indorsements, see note (*u*), *ante*, p. 113.

(*f*) As to non-acceptance, see *ante*, p. 115 ; and as to indorsements, see *ante*, p. 112, and *post*, p. 597.

By s. 55 (2) (a), "The indorser of a bill by indorsing it engages that on due presentment it shall be accepted and paid according to its tenour, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken."

As to notice of dishonour, see note (*e*), *supra*.

G. H., payable to the order of the said *E. F.* —— months after date, and indorsed by the said *E. F.* [to *J. K.*, who indorsed the same] to the defendant, who indorsed the same to the plaintiff.

2. The said bill was duly presented for acceptance, and was dishonoured by non-acceptance, whereof the defendant had due notice by letter [*or* notice in writing] dated the —— ——, 19--, and the defendant has not paid the said bill.

Particulars :—

Indorsee against Indorser for default of Payment (g).

1. [*Same as in last preceding Form.*]

2. The said bill was duly presented for payment, and was dishonoured, whereof the defendant had due notice by letter [*or* notice in writing] dated —— ——, 19--, but the defendant has not paid the same.

By Executor or Administrator of Drawer against Acceptor (h).

The plaintiff claims as executor of the last will of *E. F.*, deceased [*or*, administrator of the personal estate of *E. F.*, deceased, who died intestate], against the defendant as acceptor of a bill of exchange for £——, dated the —— ——, 19--, drawn by the said *E. F.* upon the defendant, payable to the said *E. F.* —— months after date, which said bill has not been paid.

Particulars :—

By Executor or Administrator of Indorsee against Acceptor.

[*As in the last preceding Form down to the statement of the date, and proceed thus*] :—drawn by *G. H.* upon the defendant, payable to the order of the said *G. H.* —— months after date, and indorsed by the said *G. H.* [to *J. K.*, who indorsed the same] to the said *E. F.* in his lifetime, which said bill has not been paid by the defendant.

Particulars :—

By Drawer against Executor or Administrator of Acceptor.

The plaintiff claims against the defendant as executor of the last will of *E. F.*, deceased [*or*, administrator of the personal estate of *E. F.*, deceased, who died intestate], upon a bill of exchange for £——, dated the —— ——, 19—, drawn by the plaintiff upon and accepted by the said *E. F.* in his lifetime, payable to the plaintiff —— months after date, which said bill has not been paid.

Particulars :—

(*g*) See note (*f*), p. 119.

(*h*) See "*Executors and Administrators*," *post*, p. 166.

By Indorsee of Executor or Administrator of Drawer against Acceptor.

1. The plaintiff claims against the defendant as acceptor of a bill of exchange for £——, dated the —— ——, 19—, drawn by *E. F.* upon the defendant, payable to the order of the said *E. F.* —— months after date.

2. After the acceptance of the bill the said *E. F.* died, and *G. H.*, as and being the executor of the last will of the said *E. F.* [*or* administrator of the personal estate of the said *E. F.*], indorsed the said bill to the plaintiff, and the defendant has not paid the said bill.

Particulars :—

By the Trustee of the Property of a Bankrupt Drawer against Acceptor (*i*).

The plaintiff, who is the trustee of the property of *E. F.*, a bankrupt, claims as such trustee against the defendant, as acceptor of a bill of exchange for £——, dated the —— ——, 19—, which, before the bankruptcy of the said *E. F.*, was drawn by the said *E. F.* upon and accepted by the defendant, payable to [*or*, to the order of] the said *E. F.* —— months after date, and which has not been paid by the defendant.

Particulars :—

By a surviving Drawer against Acceptor where the other Drawer has died before Action (*k*).

The plaintiff claims against the defendant as acceptor of a bill of exchange for £——, dated the —— ——, 19—, drawn by the plaintiff and *E. F.*, since deceased, upon the defendant, payable to the plaintiff and the said *E. F.* —— months after date, which said bill has not been paid by the defendant.

Particulars :—

Against a surviving Joint Acceptor.

[*The statement of claim may be in the ordinary form, without mentioning the deceased co-acceptor : see ante*, pp. 108 *et seq.*]

(*i*) See "*Bankruptcy*," *ante*, p. 99.

(*k*) See the forms of statement of claim by a surviving joint contractee, *ante*, p. 60, and the note thereto.

II. Foreign Bills of Exchange (*l*).

Claim by Drawer against Acceptor (*m*).

The plaintiff claims [*or*, The plaintiff's claim is] against the defendant as acceptor of a foreign bill of exchange for [—— francs, a sum amounting to £——], dated the —— ——, 19—, drawn by the plaintiff at [Paris in France] upon the defendant, payable to the plaintiff —— months after date.

Particulars :—

[*If the bill expresses the sum payable in English money, the particulars may be as in the previous Form given at* p. 109, *stating what amount is due, and adding a claim for expenses of protest, if any. If the bill expresses the sum payable in foreign money, the amounts may be stated in the foreign money, adding their equivalents in English money.*]

By Drawer against Acceptor, where the Bill was drawn in a Set (*n*).

The plaintiff claims against the defendant as acceptor of the first of three parts of a foreign bill of exchange for £——, dated, &c. [*proceed as in the form supra, to the end*].

(*l*) All bills other than inland bills are foreign bills (s. 4 (1)).

A bill which does not appear on the face of it to be a foreign bill, may be treated by the holder as an inland bill (s. 4 (2), cited *ante*, p. 108).

As to the law by which the rights, duties and liabilities of the parties to a bill drawn in one country and negotiated, accepted or payable in another, are to be determined, and as to conflict of laws, see s. 72; *In re Boyse*, 33 Ch. D. 612; and *Alcock* v. *Smith*, (1892) 1 Ch. 238; 61 L. J. Ch. 161; *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 Q. B. 677; 74 L. J. K. B. 326.

By s. 72 (3), "The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured."

With respect to promissory notes, it is provided by s. 83 (4) that "a note which is, or on the face of it purports to be, both made and payable within the British Islands, is an inland note. Any other note is a foreign note."

As to the stamping of foreign bills, see the Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 2, 34, 35, 36, and the First Schedule.

(*m*) The statement of claim should state or show that the bill is a foreign bill, as otherwise the presumption is that it is an inland bill. (See s. 4 (2), and note (*l*), *supra*: *Armani* v. *Castrique*, 13 M. & W. 443.) The bill should be stated in English, although it is in a foreign language.

Interest on foreign bills is usually calculated according to the rate of interest at the place where they are drawn, accepted or indorsed, as the case may be, according to the liability of the party sued (*Gibbs* v. *Fremont*, 9 Ex. 25; *In re Commercial Bank*, 36 Ch. D. 522; see *Rouquette* v. *Overmann*, L. R. 10 Q. B. 525, 542; 44 L. J. Q. B. 221; and s. 57, cited *ante*, p. 109).

(*n*) By s. 71 (1), "Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill." The acceptance should be on one part only (s. 71 (4)). It is in general sufficient if one of the set is duly stamped (Stamp Act, 1891, s. 39).

By Payer supra Protest for Honour of Drawer, against Acceptor (*o*).

1. The plaintiff claims against the defendant as acceptor of a foreign bill of exchange for [—— marks, a sum amounting to] £——, dated the —— ——, 19—, drawn by *E. F.*, at —— in Prussia upon the defendant, payable to *G. H.* or order —— months after date, and indorsed by *G. H.* to *L. M.*, which said bill when it became due was duly presented to the defendant for payment and was dishonoured, and was duly protested for non-payment.

2. Thereupon the plaintiff, for the honour of the said drawer, on the —— ——, 19—, paid to the said *L. M.*, then being the holder of the bill, the amount thereof, together with the reasonable charges of the said protest, amounting to £——, of which facts the defendant had due notice by a letter [*or*, notice in writing] dated the —— ——, 19—, but has not paid the said bill or the amount so paid by the plaintiff.

Particulars :—

(*See form*, *ante*, p. 122.)

By Payee against Acceptor supra Protest (*o*).

1. The plaintiff claims against the defendant as acceptor *supra protest* of a foreign bill of exchange, dated the —— ——, 19—, drawn by *E. F.*, at ——, in ——, upon *G. H.* for [—— francs, a sum amounting to] £——, payable to the plaintiff —— months after date, and delivered by the said *E. F.* to the plaintiff, which said bill was on the —— ——, 19—, duly presented to *G. H.* for acceptance, and was dishonoured by non-acceptance and duly protested for such non-acceptance, and was thereupon accepted by the defendant under the said protest, and, when it became due, was duly presented to the said *G. H.* for payment and was not paid by him, and was duly protested for such non-payment.

2. The defendant had due notice of the facts above mentioned by a letter [*or* notice in writing] dated the —— ——, 19—, and the bill was on the —— ——, 19—, duly presented to him for payment, but he has not paid the same.

Particulars :—

By Indorsee against Acceptor on a Foreign Bill payable at Usances (*p*).

The plaintiff claims against the defendant as acceptor of a foreign bill of exchange, dated the —— ——, 19—, drawn by *E. F.*, at Vienna, in

---

The legal holder of the bill is entitled to the possession of all the parts, but he cannot sue a previous indorser for them unless they came to the possession of the latter (*Pinard* v. *Klockmann*, 3 B. & S. 388 ; 32 L. J. Q. B. 82).

(*o*) As to intervention for honour, see ss. 65—68 ; and as to protest, see note (*q*), *infra*.

(*p*) See a list of usances between different places, Byles on Bills, 15th ed., 277 ;

Austria, upon the defendant and accepted by the defendant, for —— gulden, a sum amounting to £——, payable to *G. H.* or order at —— usances, that is to say, at —— months after the date of the said bill, which said bill was indorsed by the said *G. H.* to the plaintiff, and has not been paid by the defendant.

Particulars :—

By Payee against Drawer for default of Acceptance (*q*).

1. The plaintiff claims against the defendant as drawer of a foreign bill of exchange, dated the —— ——, 19—, drawn by the defendant at Marseilles in France, upon *E. F.*, for —— francs, a sum amounting to £——, payable to the plaintiff —— months after date, which said bill was delivered by the defendant to the plaintiff, and was duly presented for acceptance, and was dishonoured by non-acceptance, and was duly protested for the non-acceptance thereof.

2. The defendant had due notice of the said facts by a letter [*or*, notice in writing] dated the —— ——, 19—, but has not paid the said bill.

Particulars :—

Chitty on Bills, 11th ed. 260. The length of the usance should be alleged in the statement of claim (Chitty on Bills, 11th ed. 263).

(*q*) Protest is in general unnecessary as against the acceptor (see s. 52 (3)), except in the case of a payment *supra protest* or an acceptance *supra protest*; but it is in general necessary in order to charge the drawer or indorsers. (See the section next cited.)

By s. 51 (2), "Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance; and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment. If it be not so protested, the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary."

By s. 51 (3), "A bill which has been protested for non-acceptance may be subsequently protested for non-payment."

As to the time and place for protesting a bill, see s. 51 (4) (6) (9).

By s. 51 (9), "Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence." (See s. 50, cited note (*c*), *ante*, p. 118.)

As to pleading matters of excuse, see note (*c*), *ante*, p. 118.

By s. 89 (4), "Where a foreign note is dishonoured, protest thereof is unnecessary."

Where bills are dishonoured abroad, re-exchange with interest thereon is in certain cases recoverable as liquidated damages under s. 57 (2), in lieu of the liquidated damages specified in s. 57 (1). (See note (*p*), *ante*, p. 109; and *In re Gillespie*, 16 Q. B. D. 702; 18 *Ib.* 286; 56 L. J. Q. B. 74; *In re Commercial Bank*, 36 Ch. D. 522; *In re English Bank of River Plate*, [1893] 2 Ch. 438; 62 L. J. Ch. 578.)

Where the plaintiff seeks to recover re-exchange and interest thereon, his claim for such re-exchange and interest should be distinctly stated.

Wherever special expenses necessarily incurred by reason of the dishonour of a bill are such as are only recoverable as unliquidated damages, they cannot form the subject of a special indorsement.

By Indorsee against Drawer for default of Payment.

1. The plaintiff claims against the defendant as drawer [and indorser] of a foreign bill of exchange, dated the —— ——, 19—, drawn by the defendant at Marseilles in France, upon *E. F.*, for —— francs, a sum amounting to £——, payable to the order of the defendant —— months after date, and indorsed by the defendant to the plaintiff, which said bill was duly presented for payment and was dishonoured, and was duly protested for the non-payment thereof.

2. The defendant had due notice of the said facts by a letter [*or* notice in writing] dated the —— ——, 19—, but has not paid the said bill.

Particulars :—

III. Bankers' Cheques (*r*).

Claim by the Payee of a Cheque against the Drawer (*s*).

The plaintiff claims [*or*, The plaintiff's claim is] against the defendant as drawer of a cheque for £——, dated the —— ——, 19—, drawn upon Messrs. *E. F.* and Co., bankers [*or* the —— Bank, Limited], —— Street,

---

(*r*) By s. 73 of the Bills of Exchange Act, 1882, "A cheque is a bill of exchange drawn on a banker payable on demand," and it is enacted that, except as otherwise provided in Part III. of that Act, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque.

Statements of claim against the drawer or indorser of a cheque may in most cases be easily framed from such of the foregoing forms as are applicable to inland bills payable on demand.

Cheques are included under the term "Bill of Exchange," in the Stamp Act, 1891 (see s. 32 of that Act), and, when payable on demand, they are, whether post-dated or otherwise, and whether drawn to "order" or to "bearer," admissible in evidence with only a penny stamp, even where the parties taking them had notice that they were post-dated (*Bull* v. *O'Sullivan*, L. R. 6 Q. B. 209; 40 L. J. Q. B. 141; *Gatty* v. *Fry*, 2 Ex. D. 265; 46 L. J. Ex. 605; *The Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715; 64 L. J. Q. B. 99). If a cheque is issued without a stamp, the holder cannot sue upon it, as the power of subsequently affixing a stamp under s. 38 (2) of the Stamp Act, 1891, only applies to the banker who pays the cheque. (See *Hobbs* v. *Cathie*, 6 Times Rep. 292.)

A cheque being a bill payable on demand, the drawer thereof is not entitled to any "days of grace" (ss. 14, 73; *M'Lean* v. *Clydesdale Banking Co.*, 9 App. Cas. 95, 107).

By s. 75, "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—(1.) Countermand of payment; (2.) Notice of the customer's death."

A banker crediting his customer's current account with the amount of a cheque paid in, so as to entitle the customer to draw against it, becomes a holder for value of the cheque (*Ex p. Richdale*, 19 Ch. D. 409; 51 L. J. Ch. 462; *The Royal Bank of Scotland* v. *Tottenham*, *supra*. See *Capital and Counties Bank* v. *Gordon*, and *Akrokerri Mines* v. *Economic Bank*, cited *ante*, p. 97).

(*s*) By s. 74, "Subject to the provisions of this Act—

(1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage,

——, payable to the plaintiff and delivered by the defendant to the plaintiff, which said cheque was duly presented for payment on the —— of ——, 19—, and was dishonoured, and although the defendant had due notice thereof [by a letter (*or* notice in writing) dated the —— ——, 19—], he did not pay the said cheque.

Particulars :—	£	*s.*	*d.*
Principal due			
Interest			
Amount due.....			

[The plaintiff also claims interest on the said £—— (*the amount of the cheque*) at the rate of —— per cent. per annum from the date of the writ until payment or judgment.]

[*In a claim on a cheque it is necessary to allege notice of dishonour, or to state facts excusing the giving of such notice. Where it is desired to state facts excusing the giving of the notice, the form, ante,* p. 117, *may be used.*]

By Bearer, or Indorsee, of Cheque against Drawer (*t*).

The plaintiff claims against the defendant as drawer of a cheque for £——, dated the —— ——, 19—, drawn upon Messrs. *E. F.* and Co.,

---

that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2.) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3.) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him."

The next business-day after the receipt of the cheque, if received at the town in which it is payable, was in general held to be the reasonable time for presentment (*Alexander* v. *Burchfield*, 7 M. & G. 1061 ; *Robinson* v. *Hawksford*, 9 Q. B. 52 ; *Laws* v. *Rand*, 3 C. B. N. S. 442 ; 27 L. J. C. P. 76 ; *Bailey* v. *Bodenham*, 16 C. B. N. S. 288 ; 33 L. J. C. P. 252). Where the cheque was payable at a distance from the place at which it was received, a further time was in general allowed as reasonable (*Rickford* v. *Ridge*, 2 Camp. 537 ; *Hare* v. *Henty*, 10 C. B. N. S. 65 ; 30 L. J. C. P. 302 ; *Prideaux* v. *Criddle*, L. R. 4 Q. B. 455 ; 38 L. J. Q. B. 233 ; *Heywood* v. *Pickering*, L. R. 9 Q. B. 428 ; 43 L. J. Q. B. 145).

Allowance must be made in addition for delay necessarily arising from the fact of a cheque being crossed. (See *Alexander* v. *Burchfield*, 7 M. & G. at p. 1067), or having to be passed through branches of the bank, or any other particular circumstances (*Prince* v. *Oriental Bank*, 3 App. Cas. 325 ; 47 L. J. C. P. 42. See *ante*, p. 96).

As to the exclusion of non-business days, see s. 92.

In order to charge an indorser, a presentment under s. 45 is necessary (see "*Bills of Exchange*," note (*y*), *ante*, p. 114) ; but it seems that the drawer of a cheque is not discharged by delay in presentment for any period short of six years, unless he has suffered damage through the delay. (See s. 74 (1), above cited ; *Laws* v. *Rand*, 3 C. B. N. S. 412 ; 27 L. J. C. P. 76 ; *Heywood* v. *Pickering*, *supra* ; Chalmers on Bills, 6th ed. p. 250.)

As to notice of dishonour, see ss. 47—50 ; and note (*c*), *ante*, p. 117, where see as to pleading excuses for delay or absence of such notice.

(*t*) As to indorsements, see note (*u*), *ante*, p. 112. Even where a cheque is drawn

bankers [*or*, upon the —— Bank], payable to *G. H.* or bearer [*or*, order], of which the plaintiff became the bearer [*or*, which was indorsed by the said *G. H.* to the plaintiff], and which was duly presented for payment and was dishonoured, and although the defendant had due notice thereof by a letter [*or*, notice in writing] dated the —— ——, 19—, he has not paid the said cheque.

Particulars :—

By Indorsee of Cheque against Indorser (u).

The plaintiff claims against the defendant as indorser of a cheque for £——, dated the —— ——, 19—, drawn by *E. F.* upon Messrs. *G. H.* and Co., —— Street, ——, bankers [*or*, upon the —— Bank], payable to *J. K.* or order, and indorsed by *J. K.* to *L. M.* or order, and by *L. M.* to the plaintiff, which said cheque was duly presented for payment and was dishonoured, and, although the defendant had due notice thereof by a letter [*or*, notice in writing] dated the —— ——, 19—, he has not paid the said cheque.

Particulars :—

By Bearer or Indorsee of a Crossed Cheque against Drawer (x).

1. The plaintiff claims against the defendant as drawer of a cheque dated the —— ——, 19—, drawn by the defendant upon Messrs. *E. F.* and Co., —— Street, ——, bankers [*or*, upon the —— Bank], for £——,

---

payable to "bearer," it may be indorsed so as to make the indorser liable. (See s. 56 ; *Keene* v. *Beard*, 8 C. B. N. S. 372 ; 29 L. J. C. P. 287.)

As to presentment and notice of dishonour, see the preceding note.

(*u*) See note (*f*), *ante*, p. 119.

(*x*) The enactments of ss. 76—82, below cited, with respect to crossed cheques are applicable also to dividend warrants (s. 95, subject to the saving in s. 97 (3) (d)), and to any document issued by a banker's customer for the purpose of enabling any person to obtain payment from such banker of the sum therein mentioned (46 & 47 Vict. c. 55, s. 17).

By s. 76 (1), "Where a cheque bears across its face an addition of—

(a) The words 'and company,' or any abbreviation thereof, between two parallel transverse lines, either with or without the words 'not negotiable' ; or,

(b) Two parallel transverse lines simply, either with or without the words 'not negotiable,'

that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition constitutes a crossing, and the cheque is crossed specially and to that banker."

By s. 77 (1), "A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally, the holder may cross it specially.

payable to *G. H.* or bearer [*or*, order], which said cheque before presentment for payment was crossed generally under the provisions of the Bills of Exchange Act, 1882 [*or*, was duly crossed with the name of Messrs. *J. K.* and Co., bankers].

2. The plaintiff became the bearer of the said cheque [*or*, *if the cheque was drawn payable to order*, The said cheque was indorsed by the said *G. H.* to the plaintiff], and was duly presented by a banker [*or*, by the said Messrs. *J. K.* and Co.], for payment, and was dishonoured, of which the defendant had due notice by a letter [*or*, notice in writing] dated the —— ——, 19—, but the defendant has not paid the said cheque.

Particulars :—

---

(4) Where a cheque is crossed generally or specially, the holder may add the words 'not negotiable.'

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself."

As to this section, see *National Bank* v. *Silke*, [1891] 1 Q. B. 435.

By s. 78, "A crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing." (See s. 64, as to alterations, cited *post*, p. 608.)

By s. 79 (1), "Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

(2) Where the banker on whom a cheque is drawn which is crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid." But this sub-section adds a proviso protecting the banker in cases where he has "in good faith and without negligence" paid a cheque which does not *appear* to have been crossed, or to have had a crossing which has been obliterated, added to or altered in an unauthorised manner.

By s. 80, "Where the banker on whom a crossed cheque is drawn in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

By s. 81, "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had." These added words "not negotiable" do not prevent the cheque from being transferable, but they prevent a subsequent transferee from acquiring a better title to the cheque than that which was possessed by his transferor. (See *Matthiessen* v. *London and County Bank*, 5 C. P. D. 7; *Fisher* v. *Roberts*, 6 Times Rep. 354.)

By s. 82, "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." (See *ante*, p. 97.)

As to the rights and liabilities of bankers with respect to cheques, see further, *ante*, p. 96.

IV. Promissory Notes (*y*).

Claim by Payee against Maker (*z*).

The plaintiff's claim is against the defendant as maker of a promissory note for £250, dated the —— ——, 19—, payable to the plaintiff four months after date.

Particulars :—	£	*s.*	*d.*
19—, —— ——, Principal	250	0	0
Interest from —— ——, 19—, to —— ——, 19— ...	10	0	0
.....			
Amount due.....	£260	0	0

(*See R. S. C.*, 1883, *App. C., Sect. IV., No.* 3.)

By Payee against Maker on a Note payable on Demand (*a*).

The plaintiff claims against the defendant as maker of a promissory note for £——, dated the —— ——, 19—, payable to the plaintiff on demand, which said note has not been paid.

Particulars :—

(*y*) By the Bills of Exchange Act, 1882, s. 83 (1), "A promissory note is an unconditional promise in writing made by one person to another signed by the maker engaging to pay, on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer." (See also s. 83 (2) and (3).) The addition of a condition as to the effect of giving time to one of several makers does not prevent an instrument being a promissory note (*Kirkwood* v. *Carroll*, [1903] 1 K. B. 531 ; 72 L. J. K. B. 208).

By s. 84, "A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer."

By s. 5 (2), "Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note." As to what is a fictitious person, see note (*u*), *ante*, p. 113.

As to foreign notes, see s. 83 (4) ; "*Foreign Bills*," *ante*, p. 122.

By s. 89 (1), "Subject to the provisions in" Part IV., "and except as by this section provided, the provisions of this Act relating to bills of exchange, apply, with the necessary modifications, to promissory notes."

(2.) "In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order."

(*z*) As to special indorsements, and as to what are liquidated damages, see s. 57, cited note (*p*), *ante*, p. 109, and *ante*, p. 65.

(*a*) A note payable "on demand" is a present debt, and is due and payable at once, without demand, and the Statute of Limitations runs from the date of the note (*post*, p. 721). The date expressed in the note is *primâ facie* presumed to be its true date, but where it is not issued till a subsequent date, the statute runs from the date of its issue (*Savage* v. *Aldren*, 2 Stark. 232 ; *Watkins* v. *Figg*, 11 W. R. 258 ; *Montague* v. *Perkins*, 22 L. J. C. P. 187).

A note payable on demand is not in general considered as overdue, so as to affect an indorsee with defects of title of which he had no notice. (See s. 86 (3), cited *post*, p. 613 ; see *Brooks* v. *Mitchell*, 9 M. & W. 15.) Interest does not run on such notes if

Payee against Maker on a Note payable at a fixed Period after Demand (*b*).

The plaintiff's claim is against the defendant as maker of a promissory note for £——, dated the —— ——, 19—, payable to the plaintiff —— months after demand.

Demand was made verbally [*or*, by letter, *or* by notice in writing] on the —— ——, 19—, but the defendant has not paid the said note.

Particulars:—

By Payee against Maker on a Note made payable at a particular Place in the Body of it (*c*).

The plaintiff claims [*or*, The plaintiff's claim is] against the defendant as maker of a promissory note for £——, dated the —— ——, 19—, payable to the plaintiff at Messrs. *E. F.* and Co.'s, —— Street, London [*or*, at the offices of the —— Bank, Limited, at ——], —— months after date, which said note was duly presented there for payment and has not been paid.

Particulars:—

By Payee against Maker on a Note payable by Instalments in which the whole sum is made payable on any Default (*d*).

1. The plaintiff's claim is against the defendant as maker of a promissory note dated the —— ——, 19—, whereby he promised to pay to the

---

not expressly made payable with interest, until a demand has been made, or an action has been brought (s. 57 (1), note (*p*), *ante*, p. 109; see *Upton* v. *Lord Ferrers*, 5 Ves. 801; *Lowndes* v. *Collins*, 17 Ves. 27, 28).

Promissory notes purporting to be payable *at sight*, or on presentation, or in which no time for payment is expressed, are now promissory notes payable on demand. (See ss. 10, 89.)

(*b*) In this case a demand is requisite; so where a note is payable *after sight*, a presentment for sight is necessary. (See ss. 14, 89.)

(*c*) By s. 87 (1), "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable." (See *Spindler* v. *Grellett*, 1 Ex. 384, and the next cited cases.) A mere memorandum of the place of payment in the margin or foot of the note does not render presentation at that place necessary (*Exon* v. *Russell*, 4 M. & S. 505; *Williams* v. *Waring*, 10 B. & C. 2).

By s. 87 (2), "Presentment for payment is necessary in order to render the indorser of a note liable."

By s. 87 (3), "Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice."

As to excuses for non-presentment, see s. 46 (2), cited note (*y*), *ante*, p. 114; *Hardy* v. *Woodroofe*, 2 Stark. 319; *Sands* v. *Clarke*, 8 C. B. 751.

(*d*) A promissory note may be validly made payable by stated instalments (s. 9 (1)); and in such case the maker is entitled to the days of grace upon the falling due of each

plaintiff £—— in manner following, namely, £—— on the —— —— then next ensuing, and £—— on the [1st day of each succeeding month] until the whole of the said sum should be fully paid, and further by his said note promised that in case default should be made in payment of any of the said instalments, the whole of the said sum of £—— then remaining unpaid should become immediately payable.

2. The defendant made default in payment of the first of the said instalments, and has not paid the said £—— or any part thereof.

Particulars :—

By Payee against the Makers of a Joint and Several Promissory Note.

The plaintiff's claim is against the defendants jointly, and also against each of them severally, as makers of a joint and several promissory note for £——, dated the —— ——, 19—, payable to the plaintiff —— months after date, which said note has not been paid.

Particulars :—

By Indorsee against Maker (e).

The plaintiff's claim is against the defendant as maker of a promissory note for £——, dated the —— ——, 19—, payable to *E. F.* or order —— months after date, which said note was indorsed by the said *E. F.* [to the order of *G. H.*, and by the said *G. H.*] to the plaintiff, and has not been paid.

Particulars :—

A like Form : London, &c. Bank v. *Clancarty*, [1892] 1 Q. B. 689 ; 61 L. J. Q. B. 225.

By Indorsee against Payee (e).

1. The plaintiff claims against the defendant as indorser of a promissory note for £——, dated the —— ——, 19—, made by *E. F.*, payable to the defendant or order —— months after date, which note was indorsed by

---

instalment. (See s. 14 (1) ; *Oridge* v. *Sherborne*, 11 M. & W. 374 ; *Carlon* v. *Kenealy*, 12 M. & W. 139.)

(*e*) As to indorsement generally, see note (*u*), *ante*, p. 112. An instrument in the form of a note payable to the maker's order is not a valid promissory note until it is indorsed. (See s. 83 (2).)

If it is indorsed in blank it becomes a note payable to bearer, and may be so described in the statement of claim (*Hooper* v. *Williams*, 2 Ex. 13 ; *Brown* v. *De Winton*, 6 C. B. 336 ; *Flight* v. *Maclean*, 16 M. & W. 51). If specially indorsed it becomes a note payable to the indorsee or order (*Gay* v. *Lander*, 6 C. B. 336), and may be so described.

the defendant to the plaintiff, and was duly presented for payment and was dishonoured, of which the defendant had notice by a letter [*or*, notice in writing] dated the —— ——, 19—.

2. The defendant has not paid the said note.

Particulars :—

By Indorsee against Indorser.

1. The plaintiff claims against the defendant as indorser of a promissory note for £——, dated the —— ——, 19—, payable to *J. K.* or order —— months after date, which said note was indorsed by the said *J. K.* to the defendant, and by the defendant to the plaintiff, and was duly presented for payment, &c. [*continue as in the last preceding Form*].

V. Miscellaneous Statements of Claims relating to Bills.

For the Breach of a Promise to retire a Bill at Maturity in Consideration of a Renewal (f).

1. On the —— ——, 19—, it was agreed verbally [*or*, by an agreement in writing] between the plaintiff and the defendant that the plaintiff should accept and deliver to the defendant a bill of exchange, dated the —— ——, 19—, drawn by the defendant upon the plaintiff, for £——, payable to the defendant —— months after date, and that the defendant should thereupon retire a certain other bill of exchange, dated the —— ——, 19—, which had been drawn by the defendant upon and accepted by the plaintiff, for £——, payable to the defendant or order —— months after date.

2. The plaintiff accordingly accepted the first-mentioned bill and delivered it to the defendant.

3. The defendant did not retire the said bill, dated the —— ——, 19—, whereby the plaintiff was obliged to pay to *G. H.*, who was the holder and indorser thereof, the amount of that bill and interest thereon and the expenses of noting the same.

Particulars of damage :—

—— ——, 19—. Paid to *G. H.*	£	*s.*	*d.*
(1) The amount of the last-mentioned bill			
(2) Interest thereon			
(3) Expenses of noting			
Total			

(*f*) If the agreement to renew is contemporaneous with the bill, it must, to be valid, be in writing. (See *post*, p. 611.)

Claim by an Agent against his Employer for Breach of Agreement to accept a Draft for the Price of Goods bought under the Employment: see "*Agent*," *ante*, p. 73.

Claim by the Acceptor of an Accommodation Bill on the Contract to indemnify him: see "*Indemnities*," *post*, p. 195.

BILLS OF LADING. See "*Shipping*," *post*, p. 294.

BOARD AND LODGING. See "*Landlord and Tenant*," *post*, p. 218.

BONDS (*g*).

(*g*) By the common law, the whole penalty of a bond was recoverable upon a breach of the condition. The Courts of equity, however, gave relief against the judgment at law, upon payment of the amount really due, or the damages arising from the breach of the condition. A power of granting similar relief in certain cases was afterwards given to the Courts of law by statute. Thus, actions upon *common money bonds* are subject to certain provisions of the statute 4 & 5 Anne, c. 3 (c. 16, Ruff.). By s. 12 of that statute, where an action is brought upon any bond which has a condition to make void the same upon payment of a lesser sum at a day or place certain, if the obligor has, before the action brought, paid to the obligee the principal and interest due by the condition of such bond, though such payment was not made strictly according to the condition, yet it may be pleaded in bar of such action, and shall be as effectual as if the money had been paid at the day and place according to the condition, and had been so pleaded. (See "*Bonds*," *post*, p. 619.)

Bonds with *special conditions* are subject to certain provisions of the statute 8 & 9 Will. 3, c. 11. By s. 8 of this statute it is enacted, that in all actions upon any bond, or on any penal sum for non-performance of any covenants or agreements in any deed or writing contained, the plaintiff may assign as many breaches as he shall think fit, and the jury shall assess not only such damages and costs of suit as were before usually done, but also damages for such of the said breaches as the plaintiff shall prove to have been broken; and that the like judgment shall be entered on the verdict as before had been usually done in such actions; and that if judgment shall be given for the plaintiff on demurrer, or by confession, or *nil dicit*, he may suggest upon the roll as many breaches as he shall think fit, upon which shall issue a writ to the sheriff to summon a jury before the justice or justices of assize (or now by the 3 & 4 Will. 4, c. 42, s. 16, before the sheriff), to inquire of the truth of those breaches, and to assess the damages. The section then provides, that in case the defendant shall pay into Court the damages assessed, a stay of execution shall be entered; or if the plaintiff is satisfied by execution, the defendant shall be thereby discharged; but, notwithstanding, in each case the judgment shall remain as a security against any further breaches, upon which the plaintiff may have a *scire facias*. Accordingly the judgment is entered for the whole penalty and costs, though the plaintiff can only have execution

thereon to the extent of the damages assessed and costs. (See *Wilde* v. *Clarkson*, 6 T. R. 303; *Welch* v. *Ireland*, 6 East, 613; 1 Wms. Saund, 1871, ed., pp. 75 *et seq.*)

The enactments of the 8 & 9 Will. 3, c. 11, respecting the assignment and suggestion of breaches, and the judgment for the penalty as a security for further breaches, are still in force, and are in general applicable, *mutatis mutandis*, to proceedings under the Judicature Acts. (See *Tuther* v. *Caralampi*, 21 Q. B. D. 414; Jud. Act, 1873, s. 23; Jud. Act. 1875, s. 21; Ord. XIII., r. 14, *infra*; and Ord. XXII., r. 1, cited "*Payment into Court*," *post*, p. 748.)

As to the distinction between common money bonds within the 4 & 5 Anne, c. 3 (c. 16, Ruff.), and bonds with special conditions within the 8 & 9 Will. 3, c. 11, see *Smith* v. *Bond*, 10 Bing. 125; *Preston* v. *Dania*, L. R. 8 Ex. 19; 42 L. J. Ex. 33; *Gerrard* v. *Clowes*, [1892] 2 Q. B. 11; 61 L. J. Q. B. 487; 2 Chitty's Practice, 14th ed., p. 1281.

A bond conditioned for the payment of an annuity is within the 8 & 9 Will. 3, c. 11 (*Walcot* v. *Goulding*, 8 T. R. 126; *Smith* v. *Bond*, *supra*; *Tuther* v. *Caralampi*, 21 Q. B. D. 414). So, too, is a bond conditioned for the payment of a sum by instalments (*Smith* v. *Bond*, *supra*; *Preston* v. *Dania*, *supra*). The provisions of that statute apply also to actions for penalties on covenants and agreements in writing for payment of a penalty on non-performance (2 Wms. Saund., 1871 ed., p. 541; *Betts* v. *Burch*, 4 H. & N. 506, 510; 28 L. J. Ex. 267, 269; *Ex p. Capper*, 4 Ch. D. 724; 46 L. J. B. 57); but they do not apply to an action on a bond conditioned to obey an injunction to refrain from certain acts of trespass, and the amount of such a bond is not a penalty but is liquidated damages (*Strickland* v. *Williams*, [1899] 1 Q. B. 382; 68 L. J. Q. B. 241; and see "*Liquidated Damages*," *post*, p. 241).

As to *replevin bonds*, see note (*m*), *infra*.

It is provided by Ord. XIII., r. 14, that "Where the writ is indorsed with a claim on a bond within 8 & 9 Will. 3, c. 11, and the defendant fails to appear thereto, no statement of claim shall be delivered, and the plaintiff may at once suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said statute and in 3 & 4 Will. 4, c. 42, s. 16." (See Chitty's Forms, 13th ed., p. 649.)

In suing upon a *bond within* 8 & 9 Will. 3, c. 11, there were, before the Judicature Acts, two courses open to the plaintiff. (See 2 Wms. Saund., 1871 ed., p. 544.) The declaration might have been framed for the penalty only, without mentioning the condition or assigning any breach of it; or the condition might have been set out and breaches of it assigned in the declaration. In the latter case, the statute was complied with at once, and the defendant was able to plead either by denying, or by confessing and avoiding the bond and condition, or the breaches, or both. In the former case, where the declaration was framed for the penalty only, the defendant might have set out the condition in his plea and averred performance thereof, or any matter in excuse of performance. If he pleaded performance, the performance might, in some cases, have been pleaded generally, and then it was necessary for the plaintiff, in obedience to the statute, to have assigned in his replication the breaches on which he relied (2 Wms. Saund., 1871 ed., p. 544; 1 *Ib.*, p. 133); or the performance might have been pleaded with particularity according to the terms of the condition, and then it was sufficient for the plaintiff in his replication to take issue on the performance, or such portion of it as he disputed. (See *Roakes* v. *Manser*, 1 C. B. 531.) If, instead of pleading performance in either form, the defendant pleaded a denial of the bond, or some plea in excuse or otherwise, on which the plaintiff took issue, then the plaintiff was obliged, in pursuance of the statute, to *suggest* upon the record, after the joinder of issue, all the breaches upon which he intended to rely (*Homfray* v. *Rigby*, 5 M. & S. 60; *Abp. Canterbury* v. *Robertson*, 1 C. & M. 690; *Webb* v. *James*, 8 M. & W. 645). This same course of *suggesting* the breaches was also adopted in the event of his obtaining judgment upon demurrer, or by default, whenever the breaches had not been assigned in the declaration or replication by any of the above means (*Homfray* v. *Rigby*, *supra*; *Lawes* v. *Shaw*, 5 Q. B. 322). The statute compelled the plaintiff either to assign, or to suggest breaches, and he could only recover damages

Claim for Debt due on a Common Money Bond (h).

The plaintiff's claim is for principal and interest due upon the defendant's bond to the plaintiff, dated the —— ——, 19—, conditioned for payment of £100 on the —— ——, 19—.

Particulars :—

	£
19—, —— ——. Principal	50
Interest from —— ——, 19—, to —— ——, 19—	2
Amount due	£52

(Signed)

(*R. S. C.*, 1883, *App. C., Sect. IV., No.* 7.)

On a Bond, without assigning a Breach (i).

The plaintiff claims £—— upon the defendant's bond, dated the —— ——, 19—, whereby the defendant became bound to the plaintiff in the

---

for the breaches assigned or suggested (*Walcot* v. *Goulding*, 8 T. R. 126; *Welch* v. *Ireland*, 6 East, 613). The plaintiff could not assign or suggest any breaches which occurred after action brought, but for these he must have proceeded by *scire facias* upon the judgment when obtained (see *Willoughby* v. *Swinton*, 6 East, 550); and he could not, on a *scire facias*, suggest any breach which he might have assigned or suggested in the original proceedings (2 Wms. Saund., 1871 ed., p. 546).

In suing upon a bond under 8 & 9 Will. 3, c. 11, a statement of claim may be framed for the whole penalty without assigning any breach of the condition, but that is not the course it is usually advisable to adopt. In general, the statement of claim should state the condition and allege the breach or breaches, and conclude by claiming the whole penalty of the bond, so that the judgment may stand as security for future breaches.

The penalty of a bond with a special condition under the 8 & 9 Will. 3, c. 11, could not properly be claimed by a specially indorsed statement of claim (see *Tuther* v. *Caralampi*, 21 Q. B. D. 414); but in the case of a common money bond within the 4 & 5 Anne, c. 3 (c. 16, Ruff.), the writ may be specially indorsed with a claim for the amount of the bond without noticing the condition (*Gerrard* v. *Clowes*, [1892] 2 Q. B. 11; 61 L. J. Q. B. 487).

As to proceeding by *scire facias* on the judgment to recover damages for further breaches, see 2 Chitty's Practice, 14th ed., p. 1286; Chitty's Forms, 13th ed., pp. 654 *et seq.*; *Tabor* v. *Edwards*, 4 C. B. N. S. 1; 27 L. J. C. P. 183.

The liability of the obligor for debt or damages on the bond is limited to the amount of the penalty (*Wilde* v. *Clarkson*, 6 T. R. 303; *Branscombe* v. *Scarborough*, 6 Q. B. 13; 2 Chitty's Practice, 14th ed., p. 1281; and see *Hatton* v. *Harris*, [1892] A. C. 547; 62 L. J. P. C. 24; *Knipe* v. *Blain*, [1900] 1 Ir. R. 372), though where the condition shows a contract to abstain from doing a particular act, such contract may be enforceable by injunction (*London, &c. Bank* v. *Pritt*, 56 L. J. Ch. 987; 36 W. R. 135; *National, &c. Bank* v. *Marshall*, 40 Ch. D. 112; 58 L. J. Ch. 229; and see *post*, pp. 197 *et seq*).

(*h*) Interest, as such, runs upon a common money bond with a penalty, even though interest is not named in the bond, from the date of the bond, and is recoverable as interest, and not as damages (*Farquhar* v. *Norris*, 7 T. R. 124; *In re Dixon*, [1900] 2 Ch. 561; 69 L. J. Ch. 609).

(*i*) This form is proper for a common money bond under 4 & 5 Anne, c. 16, and also

sum of £—— to be paid by the defendant to the plaintiff, which sum has not been paid.

Particulars :—

For a Claim specially indorsed on the Writ for the Amount of a Common Money Bond, within the 4 & 5 Anne, c. 16, s. 12 : see Gerrard v. *Clowes*, [1892] 2 Q. B. 11 ; 61 L. J. Q. B. 487.

On an Annuity Bond stating the Condition and assigning a Breach (k).

1. The defendant, by his bond dated the —— ——, 19—, became bound to the plaintiff in the sum of £——, to be paid by the defendant to the plaintiff subject to a condition thereunder written that if the defendant should pay to the plaintiff £—— half-yearly, on the —— —— and the —— —— in every year, during the life of the plaintiff, the said bond should be void.

2. The defendant has not paid to the plaintiff the half-yearly payment under the said bond which became due on the —— ——, 19—.

Particulars :—

On a Bond with a Special Condition, setting out the Condition and assigning Breaches (l).

1. The defendant, by his bond bearing date the —— ——, 19—, became bound to the plaintiff in the sum of £——, to be paid by the defendant to the plaintiff subject to a condition thereunder written, whereby, after reciting that [*here state the material recitals, if any, in the condition*], the condition of the said bond was declared to be that if [*here state the condition*], then the said bond should be void.

2. [*Here state the breach or breaches in respect of which the plaintiff seeks to recover damages. If there are several breaches, it is usually convenient to state each breach in a separate paragraph.*]

---

for a bond with a special condition under 8 & 9 Will. 3, c. 11, where no breach of the condition is assigned, but as to this, see *ante*, p. 134. It is also applicable to the case of a single bond, that is, a bond without penalty to pay money on a given day. Upon a single bond interest is not recoverable as such, unless the bond contains express provision to that effect. (See "*Interest*," *post*, p. 212 ; *In re Dixon*, [1900] 2 Ch. at p. 582.) On such a bond it might be awarded as damages (*Ib.*).

(*k*) Annuity bonds are within the 8 & 9 Will. 3, c. 11. (See p. 134, *supra*.)

(*l*) In an action on a bond within the 8 & 9 Will. 3, c. 11, although the breaches relied upon should be assigned as mentioned in note (*g*), *supra*, the plaintiff should ordinarily claim the whole amount of the penalty of the bond, so that the judgment may stand as a security for future breaches (*Ib.*).

Against an Heir on the Bond of his Ancestor : see post, p. 182.

On a Replevin Bond (m) : see Dix v. *Groom*, 5 Ex. D. 91.

BROKER (*n*).

By a Broker for Commission, &c.

The plaintiff's claim is for money payable by the defendant to the plaintiff for work done by the plaintiff as a broker and agent [*or, as the*

(*m*) As to replevin bonds, see the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 134—137 ; Ord. XXII. of the County Court Rules, 1903, and Forms 287, 288 in the Appendix to those Rules ; *Dix* v. *Groom*, cited in the text ; and Bullen on Distress, 2nd ed., pp. 277 *et seq*.

As to the summary jurisdiction of the Court in cases of replevin bonds, see also *Dix* v. *Groom*, *supra*.

Replevin bonds were considered as not being within the 8 & 9 Will. 3, c. 11 (*Dix* v. *Groom*, *supra ;* 1 Wms. Saund., 1871 ed., p. 69, note (b) ; 2 Chitty's Practice, 14th ed., p. 1281). See further, "*Replevin*," *post*, p. 471.

(*n*) See "*Agent*," *ante*, p. 72, and "*Stock Exchange*" *post*, p. 308. A broker is an agent employed to negotiate sales and purchases of goods or shares, &c., and to make contracts for his principals. (See Blackburn on Sales, 2nd ed., p. 78 ; *Baring* v. *Corrie*, 2 B. & Ald. 137 ; *Robinson* v. *Mollett*, L. R. 7 H. L. 802 ; 44 L. J. C. P. 362.) In general, a broker differs from a factor in not being usually authorised to make contracts in his own name (though he may have such authority by special contract, or by the usage of a particular market (see *Robinson* v. *Mollett*, *supra*)), and in not having possession of the goods which are the subject of the sale. (See *Ib.*, and "*Factor*," *post*, p. 176.)

The employment of a broker in a particular trade or market authorises him to act according to the reasonable usages of such trade or market, so far as they are not inconsistent with his position as broker, or with the terms of his employment (*Sutton* v. *Tatham*, 10 A. & E. 27 ; *Baring* v. *Stanton*, 3 Ch. D. 502 ; *Robinson* v. *Mollett*, *supra*).

In some trades and markets there is a usage that a broker who buys or sells on a written contract expressly as broker for a principal, but without disclosing the name of his principal, is personally responsible as a principal for the performance of the contract ; and such usage, in cases where it applies, has been held to be reasonable and binding, and to enable the party with whom the contract is made to sue, on the breach of such contract, either the broker so contracting, or the principal for whom he acted (*Humfrey* v. *Dale*, 7 E. & B. 266 ; 26 L. J. Q. B. 137 ; *Dale* v. *Humfrey*, E. B. & E. 1004 ; 27 L. J. Q. B. 390 ; *Fleet* v. *Murton*, L. R. 7 Q. B. 126 ; 41 L. J. Q. B. 49 ; *Pike* v. *Ongley*, 18 Q. B. D. 708 ; and see "*Agent*," *ante*, p. 72). But the terms of the contract may be such as to exclude such usage (*Pike* v. *Ongley*, *supra ; Barrow* v. *Dyster*, *infra*). Where brokers sold without disclosing the name of the vendor on a sold note addressed to the purchaser, and commencing, "We have sold to you, &c.," the mere addition of the word "brokers" to their signature did not prevent their being held personally liable to the purchasers on the contract, and it was treated as clear that a usage negativing the personal liability of brokers contracting in that form would not be binding on persons ignorant of it (*Barrow* v. *Dyster*, 13 Q. B. D. 635 ; 51 L. J. Q. B. 573).

If a broker is employed to make and does make wagering contracts for his principal,

case may be] for the defendant at his request, and for commission and reward due from the defendant to the plaintiff in respect thereof [and for money paid by the plaintiff for the defendant at his request].

Particulars :—

Against a Broker, who, by the Usage of a Particular Trade, is liable as a Principal, for not accepting Goods Sold (*o*).

1. The defendant, who is a broker on the London fruit market, was employed as such broker by the plaintiff on the —— ——, 19—, verbally [*or*, by letter dated the —— ——, 19—], to sell for him in the said market —— tons of raisins upon the terms usual in the said market, viz., that if the defendant, the selling broker, did not in the contract note furnished by him to the plaintiff, his principal, disclose the name of the purchaser, the defendant should be personally liable to the plaintiff, his principal, upon the contract as though he, the defendant, were himself the purchaser.

2. The defendant accordingly sold the said raisins for the plaintiff on

---

he cannot, since the Gaming Act, 1892, recover from his principal money paid by him for the principal under such contract, nor can he recover commission for services rendered by him in respect of such contracts. (See "*Gaming*," *post*, p. 667.) If the broker is employed to make and does make real and actual contracts for his principal, he is entitled to recover from his principal, besides his commission, any payments made by him in respect of such contracts at his request, and such request would be sufficiently implied from the fact that the broker was employed to enter into such bargains in such a way that by the usages or rules of the Exchange or market upon which the bargains are made, the broker is bound to make such payments (*Thacker* v. *Hardy*, 4 Q. B. D. 685 ; 48 L. J. Q. B. 289 ; *Forget* v. *Ostigny*, [1895] A. C. 318 ; 64 L. J. P. C. 62 ; see also *Sutton* v. *Tatham*, *supra*).

Formerly, a London broker, if not licensed (pursuant to 6 Anne, c. 68 (c. 16, Ruff.), and 33 & 34 Vict. c. 60), could not recover any commission for work done as a broker within the city (*Pidgeon* v. *Burslem*, 3 Ex. 465), but this is no longer so, as the provisions which rendered it illegal for an unlicensed person to do business as a broker in London have been repealed. (See 57 Geo. 3, c. lx. ; and the London Brokers' Relief Act, 1884, 47 Vict. c. 3, s. 3.)

A broker or agent employed to buy or sell for his principal must not himself be the vendor to, or the purchaser from his principal without his knowledge, and if he acts in this manner, the principal is, in general, entitled to repudiate the contract (*Rothschild* v. *Brookman*, 5 Bli. N. S. 165 ; 2 Dow. & Cl. 188 ; 7 L. J. Ch. 163 ; *Sharman* v. *Brandt*, L. R. 6 Q. B. 720 ; 40 L. J. Q. B. 312 ; *Robinson* v. *Mollett*, *supra*), and he must make with the third party a valid contract, the same both as to price and other terms as he puts before his principal, otherwise his principal is in general entitled to repudiate the transaction (*Stange* v. *Lowitz*, 14 Times Rep. 468 ; *Nicholson* v. *Mansfield*, 17 *Ib.* 259). A broker is, in general, entitled to be indemnified by his principal against expense or loss whilst acting in performance of his instructions. (See *post*, pp. 195, 254 ; and see *Robinson* v. *Mollett*, L. R. 7 H. L. at p. 811. See further "*Stock Exchange*," *post*, p. 308.)

(*o*) See note (*n*), *supra*. Where the goods have actually been delivered according to contract, and the action is for the price thereof, and not merely for damages for non-acceptance, the third paragraph of the above form should be altered to show such delivery, and the particulars should be framed accordingly.

the terms aforesaid and, in the contract note which he furnished to the plaintiff on the —— ——, 19—, in respect of such sale, did not disclose the name of the purchaser.

3. The defendant has refused verbally on the —— ——, 19— [*or*, by letter dated the —— ——, 19—], to accept or pay for the said raisins.

Particulars of damage :—(*See post*, p. 276).

For a Claim against an Agent (or Broker) employed to purchase Goods, for negligently disregarding his Instructions, see ante, p. 75.

For Claims by and against Stockbrokers see "Stock Exchange," post, p. 308.

BUILDING CONTRACT. See "*Work*," *post*, pp. 327 *et seq.*

BUILDING SOCIETY. See "*Societies*," *post*, p. 301.

CARRIERS (*p*).

(*p*) The entrusting of goods to a carrier to be carried, or the becoming a passenger to be carried, casts a duty on the carrier, whether payment is, or is not, to be made therefor (*Pozzi* v. *Shipton*, 8 A. & E. 963; *Marshall* v. *York. Ry. Co.*, 11 C. B. 655; *Austin* v. *G. W. Ry. Co.*, L. R. 2 Q. B. 442, 446; *Foulkes* v. *Met. Dist. Ry. Co.*, 5 C. P. D. 157; 49 L. J. C. P. 361; *Harris* v. *Perry*, *post*, p. 337). The law, it is said, from the employment, implies a contract identical in its terms with the duties so imposed by law. (See *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131, 134.) In whichever point of view the transaction is regarded, the duties and liabilities arising from the mere fact of employment may be varied or qualified by lawful terms or stipulations introduced by express agreement. (See *McManus* v. *Lancashire and Yorkshire Ry. Co.*, 4 H. & N. 327, 336; 28 L. J. Ex. 353.)

Form of claim.]—Under the former system of pleading, the declaration in an action against a carrier might, in general, be framed either upon the contract, charging the injury as a breach of contract, or upon the duty imposed by law, charging the injury as a breach of duty, or tort.

Statements of claim now consist of concise statements of fact, and the facts in many such cases disclose a cause of action which may be regarded either as one of contract or one of tort. (See R. S. C., 1883, App. C., Sect. V., No. 7; cited *post*, p. 337.) The distinction between actions of contract, and those of tort, is still of importance with regard to the remitting of actions to the County Courts (see the C. C. Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 66), and with regard to costs (see s. 116 of that Act, and s. 3 of the C. C. Act, 1903; and Ord. LXV., r. 12.) In the application of these enactments as to costs, the substance of the matter is to be looked at, and not merely the form of pleading. (See *Bryant* v. *Herbert*, 3 C. P. D. 389; 47 L. J. C. P. 354; *Pontifex* v. *Midland Ry. Co.*, 3 Q. B. D. 26; *Kelly* v. *Met. Ry. Co.*, [1895] 1 Q. B. 944; 64 L. J. Q. B. 568; *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56; 67 L. J. Q. B. 52; *Sachs* v. *Henderson*, [1902] 1 K. B. 612; 71 L. J. K. B. 392.) If an action could not, in the

absence of a contract, have been maintained in respect of the act complained of, the action is founded on contract, within the meaning of these enactments, but if, in the absence of contract, an action could still be maintained, then the action is founded on tort (*Kelly* v. *Met. Ry. Co., supra*). Thus, an action by a passenger against a railway company for personal injuries caused by negligence, whether such negligence was an act of misfeasance, or one of omission, is to be regarded as an action of tort, and this is so irrespective of whether the passenger had, or had not, a ticket (*Kelly* v. *Met. Ry. Co., supra*).

Where the main claim in an action is for an injunction, the action is not made one of tort within s. 116 of the County Courts Act, 1888, by the addition of a claim for damages for trespass (*Keates* v. *Woodward*, [1902] 1 K. B. 532 ; 71 L. J. K. B. 325).

A statement of claim charging the defendant as a common carrier imports that he is liable to the duties imposed by law as incident to the position of a common carrier. It is therefore generally advisable not to describe the defendant as a *common* carrier, but to describe him as a carrier merely.

Where a breach of duty is charged, the facts from which the duty arises must be stated. It is not enough merely to allege a duty, without showing facts to support that duty. An allegation of a duty is a mere inference of law, and is of no avail if the facts do not support it. (See *ante*, p. 45.) Conditions which are void under the Railway and Canal Traffic Act, 1854, cannot be set up in variance of the carriers' duties. As to these, see *post*, pp. 627 *et seq.*

Parties to the Action.]—An action against a carrier for the loss of goods, or for any breach of duty, or of contract, is, as a general rule, to be brought in the name of the person who, by himself or his agent, employed the defendant, or delivered the goods to him. He may be either the absolute or special owner of the goods (*Freeman* v. *Birch*, 3 Q. B. 492). In some instances, particularly in cases of the sale of goods which are forwarded by the vendor to the purchaser through a carrier, it becomes a matter of nicety to determine whether the action should be in the name of the consignor or in that of the consignee.

The action is to be brought in the name of the consignor when there is an express agreement between him and the carrier as to the employment of the carrier on his account (*Davis* v. *James*, 5 Burr. 2680 ; *Moore* v. *Wilson*, 1 T. R. 659 ; *Sergent* v. *Morris*, 3 B. & Ald. 277 ; *Dunlop* v. *Lambert*, 6 Cl. & F. 600) ; and where the consignor, by necessary implication, employs the carrier on his account, which is usually the case where property has not passed to the consignee, and where the goods remain during the carriage at the risk of the consignor, as where goods are forwarded for sale on approval (*Swain* v. *Shepherd*, 1 M. & Rob. 223 ; *Sergent* v. *Morris, supra ; Freeman* v. *Birch, supra*) ; or where the consignor has to carry or procure at his own expense the carriage of the goods. (See *G. W. Ry. Co.* v. *Bagge*, 15 Q. B. D. 625 ; 54 L. J. Q. B. 599.) It may be taken as a general rule that as between vendor and purchaser the right to sue the carrier goes, *primâ facie*, with the ownership of the goods (*Dunlop* v. *Lambert*, 6 Cl. & F. 600, 620 ; note to *Wilbraham* v. *Snow*, 2 Wms. Saund., 1871 ed., 121 ; *Murphy* v. *Midland Ry. of Ireland Co.*, [1903] 2 Ir. R 5, 23, 30). As to when property passes, see *post*, p. 274.

The action must be in the name of the consignee where the delivery to the carrier is a delivery to the consignee ; it is for him then that the goods are carried, and the consignor in employing the carrier is considered as the agent of the consignee for that purpose, as where goods are delivered to a carrier under a contract of sale by order of the consignee (*Dawes* v. *Peck*, 8 T. R. 330 ; and see the Sale of Goods Act, 1893, s. 32 ; *Dutton* v. *Solomonson*, 3 B. & P. 582 ; *Wait* v. *Baker*, 2 Ex. 1, 7) ; or where goods are shipped under a bill of lading by order and on account of the consignee (*Brown* v. *Hodgson*, 2 Camp. 36). In such cases it is immaterial that the consignor paid the carriage (*King* v. *Meredith*, 2 Camp. 639). The principle of law is to refer all transactions of agents to the principal on whose account they were entered into. (See *Dawes* v. *Peck, supra.*)

In cases where the consignee receives the goods and promises either expressly, or by implication, to pay the carriage, he may in general be sued by the carrier for the

I. Of Goods by Land (*q*).

Claim for the Carriage of Goods.

The plaintiff's claim is for money payable by the defendant to the plaintiff for the conveyance of goods by the plaintiff for the defendant at his request.

Particulars :—

		£ *s.* *d.*
19—. Jan. 11th.	7 tons of copper carried from —— to ——	
Feb. 2nd.	4 iron girders, ditto	
	Amount due.....£	

carriage of the goods, as the waiver by the carrier of his lien on the goods affords sufficient consideration to support the contract to pay such carriage. (See *Jesson* v. *Solly*, 4 Taunt. 52 ; *Moller* v. *Young*, 4 E. & B. 755 ; 25 L. J. Q. B. 94.)

In an action for the loss of a passenger's luggage, it was held that the owner might sue in his own name, though he travelled as the servant of another person who paid his fare for him and took his ticket (*Marshall* v. *York. Ry. Co.*, 11 C. B. 655 ; 21 L. J. C. P. 34). Where a box containing property of two persons was addressed to one only, and sent on behalf of both, it was held they might join in suing for the loss of the goods (*Metcalf* v. *London and Brighton Ry. Co.*, 4 C. B. N. S. 317). Where a servant had taken with him as part of his luggage upon a journey, for which he had taken the ticket, his portmanteau containing his livery, the property of his master, it was held that the master could maintain an action against the railway company for destruction of the livery by an act of misfeasance on the part of one of the company's porters in the course of his employment (*Meux* v. *G. E. Ry. Co.*, [1895] 2 Q. B. 387 ; 64 L. J Q. B. 657).

In case of doubt as to the proper parties to sue or be sued it may be advisable, though at the risk of having to pay costs occasioned by the joinder of unnecessary parties, to join all who may be supposed proper to sue or be sued. See as to parties to be made defendants where several carriers are concerned, p. 142, *post*.

(*q*) **Carriers of Goods by Land.**]—The duties of a common carrier of goods imposed by law in the absence of special agreement are :—to receive for carriage all goods offered, provided he has convenience to carry them, and the goods are of a proper kind, and the employer is ready and willing to pay the proper and reasonable hire (*Pickford* v. *Grand Junction Ry. Co.*, 8 M. & W. 372 ; *Johnson* v. *Midland Ry. Co.*, 4 Ex. 367 ; *Jackson* v. *Rogers*, 2 Show. 330) ; to carry for a reasonable reward, and to deliver the goods within a reasonable time (*Hales* v. *London and North Western Ry. Co.*, 4 B. & S. 66 ; 32 L. J. Q. B. 292) ; to insure their safety during the carriage and until delivery, the act of God and the King's enemies excepted (*Forward* v. *Pittard*, 1 T. R. 27 ; *Pozzi* v. *Shipton*, 8 A. & E. 963 ; *Riley* v. *Horne*, 5 Bing. 217 ; *Bourne* v. *Gatliffe*, 3 M. & G. 643 ; *Richards* v. *L. B. & S. C. Ry. Co.*, 7 C. B. 839 ; *Wyld* v. *Pickford*, 8 M. & W. 443 ; *Nugent* v. *Smith*, 1 C. P. D. 423 ; 45 L. J. C. P. 697).

The events excepted as acts of God seem to include all disturbances of nature so sudden or violent as to be practically irresistible (*Nichols* v. *Marsland*, L. R. 10 Ex. 258 ; 44 L. J. Ex. 134 ; 2 Ex. D. 1 ; 46 L. J. Ex. 174 ; *Nugent* v. *Smith*, 1 C. P. D. 34, 423 ; 45 L. J. C. P. 28, 697). A frost of extraordinary severity that could not be foreseen has been held to constitute *vis major*, or, in this sense, an act of God (*Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781) ; so, too, has a great and unexpected fall of snow (*Briddon* v. *Great Northern Ry. Co.*, 28 L. J. Ex. 51) ; as, also, a violent

The like, by a Railway Company.

The plaintiff's claim is for £——, payable by the defendant to the plaintiff for the carriage of goods by rail for the defendant at his request.

Particulars :—[*State or refer to particulars already delivered or to be delivered with the statement of claim, showing the journeys and charges, and identifying the goods carried. The plaintiffs may in some cases be compelled to give particulars splitting up their charges similar to those required by sect.* 33, *sub.-s.* 3, *of the R. & C. T. Act*, 1888 (*L. & N. W. Ry. Co.* v. *Lee*, 7 Times Rep. 603; cf. *Pickford* v. *L. & N. W. Ry. Co.*, [1905] 1 K. B. 752).]

---

tempest (*Nugent* v. *Smith*, *supra*; *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 734, 749; 47 L. J. Q. B. 193).

A common carrier is not responsible for damage accruing to the thing carried, from its inherent vice, or natural defects, or deterioration, or from improper packing by the sender; at all events, where there has been nothing to indicate to the carrier the defective nature of the packing. Thus, he is not liable for the loss of, or injury to an animal, caused by its own violence or want of temper, if he has secured it in a proper manner (*Blower* v. *G. W. Ry. Co.*, L. R. 7 C. P. 655; 41 L. J. C. P. 268; *Kendall* v. *L. & S. W. Ry. Co.*, L. R. 7 Ex. 373, 377; 41 L. J. Ex. 184; *Barbour* v. *S. E. Ry. Co.*, 34 L. T. 67; *Brass* v. *Maitland*, 6 E. & B. 470; 26 L. J. Q. B. 49; *Nugent* v. *Smith*, *ante*; *Lister* v. *Lanc. & York. Ry. Co.*, [1903] 1 K. B. 878; 72 L. J. K. B. 385; see, also, *Richardson* v. *N. E. Ry. Co.*, L. R. 7 C. P. 78). Where, however, the deterioration is caused by the default of the carrier, or the vice, in the case of an animal, is brought out by the negligence or default of the carrier, the liability of the carrier attaches (*Wilson* v. *Lanc. Ry. Co.*, 9 C. B. N. S. 632; 30 L. J. C. P. 232; *Gill* v. *M. S. & L. Ry. Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89; see *Blower* v. *G. W. Ry. Co.*, *supra*; *Lister* v. *Lanc. & York. Ry. Co.*, *supra*).

As to who are common carriers, see *Gisbourne* v. *Hurst*, 1 Salk. 244; *Brind* v. *Dale*, 8 C. & P. 207; 2 M. & Rob. 80; *Nugent* v. *Smith*, *supra*; *Liver Alkali Co.* v. *Johnson*, L. R. 7 Ex. 267; L. R. 9 Ex. 338; 43 L. J. Ex. 216; *Scaife* v. *Farrant*, L. R. 10 Ex. 358; 44 L. J. Ex. 36; *Dickson* v. *G. N. Ry. Co.*, 18 Q. B. D. 176; 56 L. J. Q. B. 111; *G. W. Ry. Co.* v. *Bunch*, 13 App. Cas. 31; 57 L. J. Q. B. 361; *post*, p. 292.

A common carrier is justified in refusing to carry if his conveyance is already full, and he has not convenience to carry that which otherwise he would be bound to carry according to his profession (*Lovett* v. *Hobbs*, 2 Show. 428; *Riley* v. *Horne*, 5 Bing. 217), or if from any cause the goods offered, either by reason of the mode in which they are packed, or otherwise, are unusually dangerous, or unusually hazardous to carry *Edwards* v. *Sherratt*, 1 East, 604), or if the goods are brought at an unreasonable time (*Lane* v. *Cotton*, 1 Ld. Raym. 652; *Pickford* v. *Grand Junction Ry. Co.*, 12 M. & W. 776).

The power of railway or canal companies by special contracts to vary their liabilities in respect of loss of, or injury done to, animals, goods, or things, in the receiving, forwarding, or delivering thereof, by neglect or default of their servants, is limited to such conditions, signed by the party, as may be adjudged by the Court or judge before whom any question relating thereto shall be tried to be just and reasonable. (See the Railway and Canal Traffic Act, 1854, s. 7, *cited post*, p. 627; *Peek* v. *North Staffordshire Ry. Co.*; *M. S. & L. Ry. Co.* v. *Brown*, *cited post*, p. 629.)

The liability of a carrier extends throughout the entire distance over which he professes to carry. Thus the liability of a railway company professing to carry over the lines of other companies, extends over the whole distance (*Muschamp* v. *Lancaster Ry. Co.*, 8 M. & W. 421; *Welby* v. *West Cornwall Ry. Co.*, 2 H. & N. 703; 27 L. J. Ex. 181; *Blake* v. *Great Western Ry. Co.*, 7 H. & N. 987; 31 L. J. Ex. 346; *Collins* v. *Bristol Ry. Co.*, 29 L. J. Ex. 41; *Thomas* v. *Rhymney Ry. Co.*, L. R. 6 Q. B. 266; 39 L. J. Q. B. 141). Only the contracting company can be sued for any breach of the

Against a Carrier for not carrying and delivering Goods.

1. The plaintiff has suffered damage from the breach by the defendant of a contract with the plaintiff contained in letters dated —— ——, 19— [*or, as the case may be*], to carry for the plaintiff certain goods, viz.:— [*describe the goods*], from —— to ——, and there deliver them to —— for reward to the defendant.

---

contract to carry over its own line and that of other railway companies unless the circumstances are such as to constitute the several companies carrying the goods, or passengers, partners in the transaction (*Coxon* v. *Great Western Ry. Co.*, 5 H. & N. 274; 29 L. J. Ex. 165; *Collins* v. *Bristol Ry. Co., supra*; *Gill* v. *M. S. & L. Ry. Co.*, L. R. 8 Q. B. 186; *Foulkes* v. *Met. Dist. Ry. Co.*, 5 C. P. D. 157; 49 L. J. C. P. 361). But, as the law imposes upon all persons a duty to do no act to injure another, such other companies may be liable for acts of misfeasance causing injury to passengers or goods entrusted to them (*Foulkes* v. *Met. Dist. Ry. Co., supra, per* Bramwell, L.J.; *Self* v. *L. B. & S. C. Ry. Co.*, 32 L. T. 173); or for breaches of the duty cast upon them by the receipt of such passengers or goods to be carried by them (*Foulkes* v. *Met. Dist. Ry. Co., supra*; *Marshall* v. *York. Ry. Co.*, 11 C. B. 655; *Hooper* v. *L. & N. W. Ry. Co.*, 43 L. T. 570; 50 L. J. C. P. 103).

A common carrier receiving goods within the realm to carry to a place without the realm is subject to the duties of a common carrier for the whole distance (*Crouch* v. *L. & N. W. Ry. Co.*, 14 C. B. 255; *Nugent* v. *Smith*, 1 C. P. D. 423; 45 L. J. C. P. 697). As to goods received without the realm, see *Bramley* v. *S. E. Ry. Co.*, 12 C. B. N. S. 63; 31 L. J. C. P. 286; *Le Conteur* v. *L. & S. W. Ry. Co.*, L. R. 1 Q. B. 54; 35 L. J. Q. B. 40. Where goods are accepted by a railway company to be carried to a place beyond their line, subject to special conditions, the conditions apply throughout the whole distance (*Collins* v. *Bristol Ry. Co.*, 29 L. J. Ex. 41; 7 H. L. C. 194; *Hall* v. *N. E. Ry. Co.*, L. R. 10 Q. B. 437; 44 L. J. Q. B. 164).

The carrier, in the absence of special agreement as to time for delivery, is bound to deliver within a reasonable time. What this may be depends upon his available means of forwarding the goods entrusted to him, and upon the whole circumstances, and is, in each case, a question of fact (*Hales* v. *L. & N. W. Ry. Co.*, 4 B. & S. 61; 32 L. J. Q. B. 292; *Taylor* v. *G. N. Ry. Co.*, L. R. 1 C. P. 385; 35 L. J. C. P. 210; *Ellis* v. *Thompson*, 3 M. & W. 445, *per* Alderson, B.; and see *post*, p. 299).

Though common carriers are by common law obliged to carry for all persons for reasonable reward, they are not obliged to charge all persons alike or equally. In the case of railway companies, there are, in general, statutory provisions requiring them to charge all persons equally. (See the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 90; the Railway and Canal Traffic Act, 1854, ss. 2, 3; the Railway and Canal Traffic Act, 1888.) By the Railways Clauses Consolidation Act, 1845, s. 90, all companies to which that Act applies are required to charge equally to all persons, and after the same rate, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances. For a breach of this requirement an action lies; and overcharges made contrary to this enactment are illegal, and if paid in ignorance of the facts, or paid under protest and extorted under compulsion, they may be recovered by means of an action (*Baxendale* v. *G. W. Ry. Co.*, 16 C. B. N. S. 137; *G. W. Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226; 38 L. J. Ex. 177; *Evershed* v. *L. & N. W. Ry. Co.*, 3 App. Cas. 1029; 48 L. J. Q. B. 22; *Denaby Main Colliery Co.* v. *M. S. & L. Ry. Co.*, 14 Q. B. D. 209; 11 App. Cas. 97; 55 L. J. Q. B. 181; *Rhymney Ry. Co.* v. *Rhymney Iron Co.*, 25 Q. B. D. 146; 59 L. J. Q. B. 414).

By the Railway and Canal Traffic Act, 1854, as amended by the Regulation of

2. The defendant on the —— ——, 19—, received the said goods for the purpose and on the terms aforesaid, but did not carry them from —— to ——, or there deliver them to ——, but wholly failed to deliver and lost them.

3. In consequence, the plaintiff has been deprived of the said goods and lost their value [*stating the damage according to the fact*].

Particulars of damage :—

Railways Act, 1873 (36 & 37 Vict. c. 48), and the Railway and Canal Traffic Act, 1888, power is given to the Railway Commissioners to prevent railway and canal companies from making or giving any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, and from subjecting any particular person or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, but no action will lie for any contravention of these enactments, which, whilst interfering in no way with rights or remedies to which a party would be entitled apart from the provisions, give new rights cognisable only by the Commissioners. (See s. 6 of the 1854 Act; *Denaby Main Colliery Co.* v. *M. S. & L. Ry. Co.*, *supra*; *L. & Y. Ry. Co.* v. *Greenwood*, 21 Q. B. D. 215; 58 L. J. Q. B. 16; *Rhymney Ry. Co.* v. *Rhymney Iron Co.*, *supra*.)

By the Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), power is given to the Railway Commissioners to reduce charges unreasonably increased since 1892, but their jurisdiction is exclusive, and no action can be brought upon that Act.

Before commencing an action or counterclaiming in respect of overcharges, it is necessary to see that the overcharge is not merely a charge that is made improper by the Railway and Canal Traffic Act, 1854, and the statutes amending it, but that it is illegal apart from those enactments.

Damages.]—When the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object by the carrier's default (*Horne* v. *Midland Ry. Co.*, L. R. 8 C. P. 131; 42 L. J. C. P. 59; *Simpson* v. *London and North Western Ry. Co.*, 1 Q. B. D. 274; 45 L. J. Q. B. 182).

A miller, in an action against a carrier for delay in delivering a shaft of his mill, was held not entitled to recover as damages the loss of profits by the stoppage of the mill (*Hadley* v. *Baxendale*, 9 Ex. 341); so the owner of a cotton mill, in an action against a carrier for delay in delivering cotton to be used in his mill, was held not entitled to recover damages for the wages paid to workmen, and the loss of profits while the mill was stopped for want of cotton (*Gee* v. *L. & Y. Ry Co.*, 6 H. & N. 211; 30 L. J. Ex. 11). Similarly, where a box containing part of the machinery of a saw mill was lost by a carrier, it was held that the carrier was not liable for the loss incurred by the stoppage of the works, though the absence of the lost portion made the rest of the machinery useless, and the carrier, when he received the box, knew that it contained machinery (*British Columbia Saw Mill Co.* v. *Nettleship*, L. R. 3 C. P. 499; 37 L. J. C. P. 235). Where a commercial traveller was kept waiting in idleness at an hotel for the arrival of a case of samples, which ought to have been, but was not, delivered to him within a reasonable time by a carrier, to whom it had been entrusted for carriage, it was held that the carrier was not liable for hotel expenses so incurred, the contents of the case not having been stated, nor the object with which they were sent brought to the notice of the carrier (*Woodger* v. *Great Western Ry. Co.*, L. R. 2 C. P. 318; 36 L. J. C. P. 177; see also *Candy* v. *Midland Ry. Co.*, 38 L. T. 226; *Anderson* v. *North Eastern Ry. Co.*, 4 L. T. 216; 9 W. R. 519).

As to damages, see further, *post*, p. 146.

Against a Carrier for Injury to Goods (*r*).

1. The plaintiff has suffered damage from the breach by the defendant of a contract with the plaintiff [contained in a letter dated the —— ——, 19—, *or*, made verbally on the —— ——, 19—, *or* implied in law from the receipt by the defendant of the said goods as hereinafter stated] to safely carry [*or*, *if the defendant is not a common carrier*, to carefully carry] the plaintiff's goods, viz. [*describe same*], from —— to ——, and there deliver the same to the plaintiff [*or*, to ——, for the plaintiff, *as the case may be*] for reward to the defendant.

2. The defendant on the —— ——, 19—, received the said goods for the purpose and on the terms aforesaid, but did not safely [*or*, carefully] carry them.

3. The said goods were broken and damaged whilst being carried upon the said journey. [*If the defendant is not a common carrier, add* by the negligence and want of care of the defendant, *and give particulars of the negligence and want of care.*]

Particulars of damage :—

The like, for not Carrying and Delivering within a reasonable Time (*s*).

1. The plaintiff has suffered damage from the breach by the defendant of a contract with the plaintiff contained [&c., *as in preceding form*] to carry for the plaintiff certain goods, viz. : ——, from —— to ——, and there deliver the same to the plaintiff [*or*, *as the case may be*] within a reasonable time in that behalf, for reward to the defendant.

2. The defendant on the —— ——, 19—, received the said goods for the purpose and on the terms aforesaid, but did not within a reasonable time in that behalf carry them from —— to ——, or there deliver them to the plaintiff [*or*, *as the case may be*].

3. The defendant did not deliver the said goods at —— until the —— ——, 19—.

4. In consequence the plaintiff has suffered the following damage, viz. :—

Particulars of damage :—

Against a Carrier for Damage done to Furniture in removing it.

1. The plaintiff on the —— ——, 19—, verbally [*or*, *as the case may be*] employed the defendant to remove and carry from —— to —— certain

(*r*) Where a person, in carrying on a public business of taking goods for carriage, takes goods without stipulating for any restriction upon his personal liability, he is subject to the liability of a common carrier, although it is known that he does not personally carry or provide the means of conveyance. (See *Hill* v. *Scott*, [1895] 2 Q. B. 371 ; *Ib.* 713 ; 65 L. J. Q. B. 87.)

(*s*) As to reasonable time, see *ante*, p. 143.

household furniture of the plaintiff, upon the [implied] terms that the defendant should use due care and skill in so removing and carrying the same for reward to the defendant.

2. The defendant removed and carried the said furniture from —— to ——, but did not use due care and skill in removing or carrying the same whereby the said furniture was broken, damaged, and lessened in value.

Particulars :—

Against a Carrier for not Carrying and Delivering Goods in Time for a Market (*t*).

1. The plaintiff has suffered damage from the breach by the defendant of a contract with the plaintiff made verbally [*or, as the case may be*] on the —— ——, 19—, to carry for him certain goods, viz.: ——[*state what*] from —— to ——, in time for a market to be there held on the —— ——, 19—, for reward to the defendant.

(*t*) If goods are sent by a carrier by land to be sold at a particular market, and by reason of delay on the part of the carrier they have not arrived in time for the market, damages for loss of market may, in the absence of conditions to the contrary, be recovered (*The Parana*, 2 P. D. 118 ; *Wilson* v. *L. & Y. Ry. Co.*, 30 L. J. C. P. 232 ; 9 C. B. N. S. 632 ; *Dunn* v. *Bucknill*, [1902] 2 K. B. 614 ; 71 L. J. K. B. 963). So, if samples, useful only for a particular season, are sent by a carrier who has notice of the nature of the goods, he may be liable for the whole value to the sender of such samples if by reason of his delay in carrying them they are useless when they are delivered (*Schulze* v. *G. E. Ry. Co.*, 19 Q. B. D. 30 ; 56 L. J. Q. B. 442).

In estimating damages, circumstances peculiar to the plaintiff, and of which the carrier had no notice, or with reference to which he did not contract, cannot be used in aggravation ; as, for instance, that when the goods did at length arrive at their destination the plaintiff's traveller, who would have sold them, had left, or that a special bargain was lost (*Great Western Ry. Co.* v. *Redmayne*, L. R. 1 C. P. 329 ; *Horne* v. *Midland Ry. Co.*, L. R. 7 C. P. 538 ; L. R. 8 C. P. 131 ; 42 L. J. C. P. 59). Mere knowledge or notice of the purpose of a sender of goods will not suffice to render a common carrier, who by his breach of contract defeats that purpose, liable for the loss consequent upon the purpose being so defeated. The knowledge must be acquired, or the notice given, under such circumstances as to make the fulfilling of the sender's purpose a common object of both parties, or to make it a term of the contract that the carrier will be liable for such damages if the contract is broken (*British Columbia Saw Mill Co.* v. *Nettleship*, *ante*, p. 144 ; *Horne* v. *Midland Ry. Co.*, *supra*). Thus, in an action against a railway company for delay in delivering goods, a notice given to the company at the time of consigning the goods that the senders were under contract to deliver the goods by a certain day, was held insufficient to charge the company with the loss of the contract price (*Horne* v. *Midland Ry. Co.*, *supra*).

As to what circumstances are sufficient to constitute a binding notice of the special purpose for which the goods are sent, see *Simpson* v. *L. & N. W. Ry. Co.*, 1 Q. B. D. 274 ; 45 L. J. Q. B. 182 ; and *Candy* v. *Midland Ry. Co.*, 38 L. T. 226 ; and cases cited above.

In an action against a carrier for the loss of goods, the plaintiff is, in general, entitled to recover the market value of the goods at the place to which they are consigned (*Rice* v. *Baxendale*, 7 H. & N. 96 ; 30 L. J. Ex. 371 ; *British Columbia Co.* v. *Nettleship*, *supra* ; *Rodocanachi* v. *Milburn*, 18 Q. B. D. 67, 77, 80 ; 56 L. J. Q. B. 202). If there is no market for such goods at the place of delivery, the cost

2. The defendant received the said goods for the purpose and on the terms aforesaid, but did not carry them in time for the said market, whereby the plaintiff lost the profit he would have made by selling them at the said market, and was compelled to sell them at a low price, and lost the benefit of the expense he incurred in attending the said market.

Particulars of loss and expenses :—

By a Carrier for the Carriage of a Horse, and for Expenses occasioned by Non-removal thereof within a reasonable Time after Arrival at Destination (u).

1. By an agreement in writing dated the —— ——, 19— [*or*, made verbally on the —— ——, 19—, *or*, *as the case may be*], it was agreed between the plaintiffs and the defendant that the plaintiffs should carry for the defendant from Doncaster to York a horse, and that the defendant should within a reasonable time after its arrival at York take delivery of the said horse and pay the plaintiffs their charges for the said carriage thereof.

2. The plaintiffs accordingly carried the said horse to York, and gave to the defendant notice of its arrival there on the —— —— 19— [by letter, dated ——, *or*, *as the case may be*], but the defendant did not within a reasonable time take delivery of the said horse and pay the plaintiffs' charges for the carriage thereof, whereupon the plaintiffs, on the said default of the defendant, put the said horse at livery, and paid the charges for so putting the said horse at livery.

Particulars :—

Against a Railway Company to recover Over-charges extorted contrary to s. 90 of the Railway Clauses Consolidation Act, 1845 (x).

The plaintiff's claim is for £——, payable by the defendants to the plaintiff, being the amount of over-charges paid under compulsion by the

---

price, together with the cost of carriage and a reasonable allowance for importer's profit, would appear to be a proper measure of damages (*O'Hanlon* v. *G. W. Ry. Co.*, 6 B. & S. 484 ; 34 L. J. Q. B. 154). Loss of hire of goods sent for hire cannot be recovered where the carrier has no notice that they are sent for that purpose (*Hales* v. *L. & N. W. Ry. Co.*, 4 B. & S. 66 ; 32 L. J. Q. B. 292).

(*u*) Carriers, after a refusal by the consignee of the goods carried, or when delivery at the place or to the person named cannot be effected, become "involuntary bailees" of the goods thus left upon their hands, and are only bound to act with reasonable care and caution with respect to such goods (*Heugh* v. *L. & N. W. Ry. Co.*, L. R. 5 Ex. 51 ; 39 L. J. Ex. 48 ; *Chapman* v. *G. W. Ry. Co.*, 5 Q. B. D. 278 ; 49 L. J. Q. B. 420). If under such circumstances it becomes reasonable to incur expenses in taking care of the goods, the carrier can, in general, recover such expenses from the person with whom the contract of carriage was made (*Cargo ex Argos*, L. R. 5 P. C. 134 ; *G. N. Ry. Co.* v. *Swaffield*, L. R. 9 Ex. 132 ; 43 L. J. Ex. 89).

(*x*) A railway company, which is liable by statute to carry for all persons upon

plaintiff to the defendants for the carriage of his goods, and extorted from the plaintiff by the defendants contrary to s. 90 of the Railway Clauses Consolidation Act, 1845.

Particulars :—

II. Of Passengers (*y*).

By a Passenger against a Railway Company for Damages for Personal Injuries sustained in a Collision : see "Carriers," post, p. 337.

---

equal terms (see *ante*, p. 143), cannot for the same journey charge more for a parcel consigned to one person containing several packed parcels belonging to different persons, than for a parcel containing similar goods belonging all to one person; and if any overcharge is made and exacted it may be recovered back (*Great Western Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226; 38 L. J. Ex. 177). It is immaterial that the several parcels are addressed to different persons if they are consigned collectively (*Baxendale* v. *London and South Western Ry. Co.*, L. R. 1 Ex. 137; 35 L. J. Ex. 108). But where the several parcels belonging to different persons are not enclosed in one package, although they are all consigned at one time by and to the same persons, the company is justified in charging an increased rate in respect of the increased trouble in weighing, entering, and taking care of the different parcels (*Baxendale* v. *Eastern Counties Ry. Co.*, 4 C. B. N. S. 63; 27 L. J. C. P. 137). The company may charge different rates to different persons where the services rendered are different (*Strick* v. *Swansea Canal Co.*, 16 C. B. N. S. 245; 33 L. J. C. P. 240).

(*y*) **Carriers of Passengers.**]—Carriers of passengers are not bound to receive as passengers persons who offer themselves in an unfit state to be carried, or who are not willing to conform to reasonable regulations as to carriage, or who are not ready and willing to pay the proper and reasonable fare, or for whom the carrier has not sufficient room in his carriage. Carriers of passengers do not insure the safety of passengers during the journey, but they undertake, in the absence of any special contract to the contrary, that due care shall be used in the conveyance of the passenger (*Readhead* v. *Midland Ry. Co.*, L. R. 2 Q. B. 412; 4 Q. B. 379, 393; 36 L. J. Q. B. 181; 38 L. J. Q. B. 169; *Daniel* v. *Met. Ry. Co.*, L. R. 5 H. L. 45, 55; 40 L. J. C. P. 121; *Cobb* v. *Gt. W. Ry. Co.*, [1894] A. C. 419; 13 L. J. Q. B. 629). In the case of a railway company contracting to carry a passenger to a place beyond their own line, the company undertake that due care shall be used in conveying him so far as regards railway management throughout the entire journey, and are, in general, liable upon the contract for the negligence, with regard to his conveyance, of the servants of the companies employed by them to carry him beyond their own line, as though such servants had been their own (*Great Western Ry. Co.* v. *Blake*, 7 H. & N. 991; 31 L. J. Ex. 346; *Buxton* v. *N. E. Ry. Co.*, L. R. 3 Q. B. 549; 37 L. J. Q. B. 258; *Thomas* v. *Rhymney Ry. Co.*, L. R. 5 Q. B. 226; 6 Q. B. 266; 39 L. J. Q. B. 141; 40 L. J. Q. B. 89); they are also liable for the defective construction of stations and carriages used (*Foulkes* v. *Met. Dist. Ry. Co.*, 5 C. P. D. 157, 168; 49 L. J. C. P. 361; and see *Readhead* v. *Midland Ry. Co.*, cited *supra*); but they are not liable for the wrongful acts of third parties over whom they have no control (*Wright* v. *Midland Ry. Co.*, L. R. 8 Ex. 137; 42 L. J. Ex. 89; *Daniel* v. *Met. Ry. Co.*, L. R. 5 H. L. 45, 55; 40 L. J. C. P. 121).

A passenger may make a special contract relieving a railway company from any liability for negligence in his conveyance, and free passes usually contain a condition to that effect (*McCawley* v. *Furness Ry. Co.*, L. R. 8 Q. B. 57; 42 L. J. Q. B. 4; *Gallin* v. *L. & N. W. Ry. Co.*, L. R. 10 Q. B. 212; 44 L. J. Q. B. 89); or the liability may, as in the case of workmen's cheap tickets, be limited to a certain amount. (See *Stirling* v. *L. & S. W. Ry. Co.*, 12 Times Rep. 69.) But where the workman is an infant, he will not be bound by a special condition which is so much to his detriment as to be unfair to him (*Flower* v. *L. & N. W. Ry. Co.*, [1894] 2 Q. B. 65; 63 L. J. Q. B. 547).

As in the case of valid special conditions with regard to the conveyance of goods, a special condition with regard to the conveyance of a passenger is, in general, operative throughout the entire journey, even though it is in part to be performed on the line of another company employed by the contracting company (*Hall* v. *North Eastern Ry. Co.*, L. R. 10 Q. B. 437; 44 L. J. Q. B. 164).

A passenger taking a ticket from one company for a journey extending over the lines of other companies contracts with that company which issued the ticket, and cannot sue the others upon the contract, unless he can show a partnership between the company issuing the ticket and the other companies (*Gill* v. *M., S. & L. Ry. Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89; *Tuohy* v. *G. S. & W. Ry. Co.*, [1898] Ir. R. 789). But as to the liability of such other companies for acts of misfeasance, or breaches of duty, *vide infra*, and see *ante*, p. 143.

Carriers by land do not warrant that the carriages are "road-worthy," and they are not liable to a passenger injured in consequence of a latent defect in the carriage, which it was impossible to detect either during construction or afterwards (*Readhead* v. *Midland Ry. Co.*, L. R. 4 Q. B. 379; 38 L. J. Q. B. 169). They are, however, liable if the defect is one that could, by the exercise of care and skill, be discovered during construction, or is one which could, by the exercise of care and skill, have been avoided, even though the carriage be made for them by an independent contractor (*Francis* v. *Cockrell*, L. R. 5 Q. B. 184, 194; 5 Q. B. 501, 508, 513; 39 L. J. Q. B. 113, 291; and see *Sharp* v. *Grey*, 9 Bing. 457, 459). Railway companies are bound to provide reasonable accommodation for their passengers, including reasonable facilities for entering or leaving their trains (*Cockle* v. *L. & S. E. Ry. Co.*, L. R. 7 C. P. 323; *Bridges* v. *North London Ry. Co.*, L. R. 7 H. L. 213; 43 L. J. Q. B. 151, as explained in *Jackson* v. *Met. Ry. Co.*, 3 App. Cas. 193; 47 L. J. C. P. 303; *Robson* v. *N. E. Ry. Co.*, 2 Q. B. D. 85, 88; 46 L. J. Q. B. 50; *Wharton* v. *L. & Y. Ry. Co.*, 5 Times Rep. 142).

The action for a breach of duty in carrying a passenger or his luggage, is so far independent of contract that the passenger may maintain an action in his own name, though another person took and paid for the ticket for him (*Marshall* v. *York Ry. Co.*, cited *ante*, p. 141; *Martin* v. *Great Indian Peninsula Ry. Co.*, L. R. 3 Ex. 9). See further as to parties, *ante*, p. 140.

A person having taken, and had delivered to him by the railway company, tickets for his servants, which he kept in his own possession, was held entitled to sue the company for not conveying his servants, whom the company had refused to carry because they could not produce their tickets (*Jennings* v. *Great Northern Ry. Co.*, L. R. 1 Q. B. 7; 35 L. J. Q. B. 15).

A carrier, in the absence of any special contract as to time, contracts with regard to passengers, as with regard to goods, to carry within a time which is, under all the circumstances, reasonable (*Hurst* v. *Great Western Ry. Co.*, 19 C. B. N. S. 310; 34 L. J. C. P. 264; *Fitzgerald* v. *Midland Ry. Co.*, 34 L. T. 771; and see note (*q*), *ante*, p. 143).

In general, railway companies impose special conditions upon passengers carried by them with regard to the times of starting and arrival of trains, and with regard to delay. Such conditions bind passengers to whose knowledge they are brought, and also, it would seem, passengers who have not become aware of them, if the company has done all that reasonably should be done to make such passengers aware of them, and has dealt as if and in the belief that they had become aware of them (*Le Blanche* v. *L. & N. W. Ry. Co.*, *infra*; *Fitzgerald* v. *Midland Ry. Co.*, 34 L. T. 771; *Thompson* v. *Midland Ry. Co.*, 34 L. T. 34; *Parker* v. *S. E. Ry. Co.*, 2 C. P. D. 416, 422, 423; 46 L. J. C. P. 768; *Burke* v. *S. E. Ry. Co.*, 5 C. P. D. 1; 49 L. J. C. P. 107; *Richardson* v. *Rowntree*, [1894] A. C. 217; 63 L. J. Q. B. 283).

Damages for not carrying a Passenger, or for Delay.]—Loss occasioned to a passenger prevented from attending business appointments or engagements by unreasonable delay in carrying him to his destination, cannot, in the absence of a special contract to that effect, be recovered against a carrier, as such damage is too remote (*Hamlin* v. *Great Northern Ry. Co.*, 1 H. & N. 408; 26 L. J. Ex. 20).

If a carrier engages to put a person down at a given place, and does not put him

Against a Railway Company for Loss of Passenger's Luggage (*z*).

1. On the —— ——, 19—, the plaintiff became a passenger to be carried, with his luggage, by the defendants from —— to —— by the defendants' railway for reward to them.

2. The defendant did not carry the plaintiff's luggage to ——, but lost it upon the said journey, whereby the plaintiff has suffered damage.

Particulars :—

[*State contents of luggage, and value of the articles lost.*]

---

down there, but puts him down somewhere else, such person may, in the absence of any special agreement to the contrary, adopt reasonable means of getting to the place at which he ought to have been put down, and recover the costs thereof as damages against the carrier for his breach of contract (*Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. 286, 313 ; 45 L. J. C. P. 521 ; *Bright* v. *P. & O. Navigation Co.*, 2 Com. Cas. 106).

See further, *ante*, p. 56, and *post*, p. 630.

Damages for Personal Injuries.]—In an action by a passenger against a carrier for personal injury, the jury in assessing damages are warranted in taking into consideration the pain and personal suffering of the injured passenger, the expense incurred by him for medical and other necessary treatment and attendance, and the business loss he has sustained, and is likely to sustain, through inability to continue, as he otherwise would have done, to attend to his business (*Phillips* v. *L. & S. W. Ry. Co.*, 5 C. P. D. 280 ; 49 L. J. C. P. 233 ; *Fair* v. *L. & N. W. Ry. Co.*, 21 L. T. 326). But where the passenger has, under a policy of insurance against accidents, received a sum of money in respect of the accident in question, they are not entitled to deduct such sum from the compensation to be awarded to such passenger (*Bradburn* v. *G. W. Ry. Co.*, L. R. 10 Ex. 1 ; 44 L. J. Ex. 9). As to death caused by negligence, see *post*, p. 387.

(*z*) Carriers are liable for loss of, or injuries caused to, passengers' luggage, by negligence of themselves or their servants, whilst in their charge (*Cohen* v. *S. E. Ry. Co.*, 2 Ex. D. 253 ; 46 L. J. Ex. 417 ; *G. W. Ry. Co.* v. *Bunch*, 13 App. Cas. 31 ; 57 L. J. Q. B. 361) ; and in the case of luggage taken by them out of the care and control of the passenger they are liable as common carriers in the case of other goods, in the absence of any special contract to the contrary (*G. W. Ry. Co.* v. *Bunch, supra* ; *Cohen* v. *S. E. Ry. Co.*, 2 Ex. D. 253, 259 ; 46 L. J. Ex. 417 ; *Singer Co.* v. *L. & S. W. Ry. Co.*, [1894] 1 Q. B. at p. 837 ; see also *Butcher* v. *L. & S. W. Ry. Co.*, 16 C. B. 13 ; 24 L. J. C. P. 137). With regard to luggage placed by a railway company in the same carriage with the passenger, at the request, or with the consent of the passenger, the company are common carriers, subject to the following modification of the ordinary liability of a common carrier, namely, that, in respect of such passenger's interference with their exclusive control of such luggage, the company are not liable for any loss or injury occurring during its transit owing to, or caused by the act or default of the passenger (*G. W. Ry. Co.* v. *Bunch, supra*).

It would seem that the short period during which a railway porter takes charge of a passenger's luggage before it is put into the train on his arrival, or into a cab on his departure, may be regarded as a part of the period of transit, and that the railway company is responsible during that period to the same extent as during the rest of the journey (*Ib.*).

A passenger by railway who takes merchandise as his personal luggage cannot claim in respect of it against the company, unless the company have voluntarily and knowingly accepted it as personal luggage, and waived their right to charge for it as merchandise, as, for example, by raising no objection when informed of its nature either by the passenger or by its appearance (*Cahill* v. *L. & N. W. Ry. Co.*, 13 C. B. N. S. 818 ; 31 L. J. C. P. 271 ; *Great Northern Ry. Co.* v. *Shepherd*, 8 Ex. 30 ; 21 L. J. Ex. 114, 296 ; *Belfast, &c., Ry. Co.* v. *Keys*, 9 H. L. C. 556).

CHARTERPARTY ; *see* "*Shipping*," *post*, p. 299.

COMPANY (*a*).

Claim by a Company under the Companies Acts, 1862 *to* 1900, *against a Shareholder for Allotment Money and Calls* (*b*).

The plaintiffs' claim is for money in which the defendant, as a member of the company, is indebted to the plaintiffs (being a company incorporated

---

"Personal" or "ordinary" luggage means articles of the kind which passengers usually carry as their luggage. (See *Hudston* v. *Midland Ry. Co.*, L. R. 4 Q. B. 366 ; 38 L. J. Q. B. 213 ; *Mytton* v. *Midland Ry. Co.*, 4 H. & N. 615 ; 28 L. J. Ex. 385.) Thus a trunk containing six pairs of sheets, six pairs of blankets, and six quilts was not considered to be "ordinary passengers' luggage" (*Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 672 ; 40 L. J. Q. B. 300). So, too, a bicycle has been held not to be "ordinary luggage" (*Britten* v. *G. N. Ry. Co.*, [1899] 1 Q. B. 243 ; 68 L. J. Q. B. 75).

The carrier is bound to be ready to deliver luggage of which he takes charge to the passenger at the end of the journey. As to what is a sufficient delivery, see *Patscheider* v. *Great Western Ry. Co.*, 3 Ex. D. 153 ; *Hodkinson* v. *L. & N. W. Ry. Co.*, 14 Q. B. D. 228 ; *Richards* v. *L. B. & S. C. Ry. Co.*, 7 C. B. 839, 860 ; 18 L. J. C. P. 251 ; and see Redfield on Carriers, at p. 61.

See as to parties, *ante*, p. 140.

(*a*) Public companies and other corporations aggregate, whether incorporated by charter, or by Act of Parliament, or by statutory registration, sue and are sued by their corporate name. When corporations have been once mentioned by their name in the title of the pleadings, they may be styled "the plaintiffs" or "the defendants" throughout the body thereof. As to companies incorporated by royal charter, see Lindley on Companies, 6th ed., p. 3 ; 2 Blackst. Comm., p. 472. As to banking companies formed by letters patent under 7 Geo. 4, c. 46, see "*Bankers*," *ante*, p. 95.

Ordinary joint stock companies are in general regulated by the Companies Act, 1862 (25 & 26 Vict. c. 89), as amended and supplemented by the Companies Act, 1867 (30 & 31 Vict. c. 131), and subsequent statutes.

Companies incorporated by registration under the Companies Act, 1862, or to which that Act applies, sue and are sued by their registered name. (See s. 18 of the Act of 1862.) Where a company is formed on the principle of limited liability, the word "Limited" must be added as the last word in its name (Companies Act, 1862, ss. 8, 9). A limited company has power with the approval of the Court to reduce its capital, and in that case must, during such period, if any, as shall be fixed by the Court, add to its name, as part thereof, the words "and reduced" (Companies Act, 1867, ss. 9, 10, 15 ; Companies Act, 1877, ss. 3, 4).

On a winding up by the Court, the liquidator may, with the sanction either of the Court or of the committee of inspection, bring or defend any action in the name and on behalf of the company (Companies (Winding-up) Act, 1890, s. 12 (1)). On a voluntary winding up, under the Companies Act, 1862, the liquidator has the same power without obtaining any such sanction (Companies Act, 1862, s. 133 (7)).

The property of a company registered under the Companies Act, 1862, does not vest in the liquidator during a winding up, and actions, when brought or continued during the winding up, are commenced or continued by and against the company in its corporate name (*Ib.*, ss. 94, 95, 195, 196) and not in the name of the liquidator.

As to unregistered companies, see *Ib.*, s. 203.

(*b*) Several of the Acts relating to companies contain provisions for simplifying the pleadings and proofs in actions against shareholders for calls, and it appears that,

under the Companies Acts, 1862 to 1900) for allotment money of —— per share on —— shares in the company allotted to the defendant, as such

mutatis mutandis, the provisions of those Acts as to pleadings are now in substance applicable to statements of claim. (See *Mallet* v. *Hanly*, 18 Q. B. D. 303, 310.)

With respect to companies registered under the Companies Act, 1862, it is enacted by s. 70 of that Act that "In any action or suit brought by the company against any member to recover any call or other moneys due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other moneys due, whereby an action or suit hath accrued to the company."

If interest on allotment moneys or calls is sought to be recovered under a specially indorsed statement of claim, the express or implied contract under which it became payable must be shown in the indorsement (*Gold Ores Co.* v. *Parr*, [1892] 2 Q. B. 14; 61 L. J. Q. B. 522).

To establish a *primâ facie* case in actions for calls by such last-mentioned companies, it is, generally, only necessary to prove that the calls sued for were made, that the defendant was then a shareholder, that he had due notice of the making of the calls, and that the time appointed for their payment elapsed before action.

By s. 16 of the Companies Act, 1862, all moneys payable by a member to a company in pursuance of the regulations of the company, a phrase which includes calls, are to be deemed to be a debt in the nature of a specialty debt; and s. 75 contains a like enactment as to the liability of contributories on a winding up.

With respect to companies formed by an Act of Parliament incorporating the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), it is provided by s. 26, that "in any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special Act." Before the Judicature Act, it was held that the statutory form must, if adopted, be strictly followed (*Moore* v. *Metropolitan Sewage Co.*, 3 Ex. 333), and that it ought to be adopted in all cases to which it was applicable (*Wolverhampton Waterworks Co.* v. *Hawkesford*, 6 C. B. N. S. 336; 7 *Ib.* 795; 11 *Ib.* 456; *Wilson* v. *Birkenhead Ry. Co.*, 6 Ex. 624). As the action in this form charged the defendant only upon his liability as a shareholder, it was held that it was necessary to insert the averment that he is a shareholder (*Wolverhampton Waterworks Co.* v. *Hawkesford*, *supra*). That averment meant that he *was* a shareholder at the time the call was made (*Belfast Ry. Co.* v. *Strange*, 1 Ex. 739); and therefore the form was not applicable to the executor of a deceased shareholder who had died after the calls were made (*Birkenhead, &c. Ry. Co.* v. *Cotesworth*, 5 Ex. 226), and in such case it was necessary that the averments should be framed according to the facts. Under this Act a call may be made payable by instalments (*North Western Ry. Co.* v. *M'Michael*, 6 Ex. 273; *Birkenhead, &c. Ry. Co.* v. *Webster*, 6 Ex. 277; *Ambergate Ry. Co.* v. *Norcliffe*, 6 Ex. 629; 39 L. J. Ex. 234); but it was held that the instalments could not be sued for in the statutory form until all the instalments were due and payable (*Ib.*; *Ambergate Ry. Co.* v. *Coulthard*, 5 Ex. 459).

With respect to unincorporated cost-book mining companies within the Stannaries Act, 1869 (32 & 33 Vict. c. 19), it is enacted by s. 13 of that Act that it shall be lawful for the company to sue its shareholders for calls in any Court of law having competent jurisdiction, in the name of the purser for the time being of the company as nominal plaintiff for the company, to recover the amount of the call due, together with interest and the costs of suit. This section is not repealed by the Stannaries Court (Abolition)

member, at his request, and for —— calls of £—— each upon shares in the company of which the defendant is a holder, whereby an action has accrued to the plaintiffs.

Particulars :—

		£	*s.*	*d.*
19—, —— ——.	Allotment of —— shares to the defendant at £—— per share...			
19—, —— ——.	(1st) Call at £—— per share ...			
19—, —— ——.	(2nd) Call at £—— per share ...			
	Amount due.....			

(*R. S. C.*, 1883, *App. C.*, *Sect. IV.*, *No.* 9.)

By a Company formed by an Act of Parliament incorporating the Provisions of the Companies Clauses Consolidation Act, 1845, *against a Shareholder for a Call* (*b*).

The plaintiffs' claim is for money in which the defendant, as a shareholder of the company, is indebted to the plaintiffs, who are a company incorporated by the —— Act, 18— [*or, specify the Act by the year and chapter*], for a call of £—— per share, payable on the —— ——, 19—, upon —— shares in the company of which the defendant is the holder

Act, 1896 (59 & 60 Vict. c. 45), which transfers the jurisdiction of the Court of the Vice-Warden to certain county courts; though in such county courts pursers' suits are now abolished, and calls must there be sued for in the name of the company itself, and not in that of the purser. (See "*County Court, Stannaries Jurisdiction Rules*," 1897, r. 5; W. N. 1897, p. 61.)

Under ordinary circumstances, and in the absence of some special provision to the contrary in the Act or articles of association constituting or regulating the company, the person liable to pay a call is the person who was the holder of the shares at the time the call was made, and, in the case of a registered transfer of the shares after the making of the call, but before it has become payable, it seems that the transferor, and not the transferee, is the person *primâ facie* liable. See as to companies under the Companies Clauses Consolidation Act, 1845, s. 27 of that Act, *supra*; *Belfast Ry. Co.* v. *Strange*, 1 Ex. 739; Lindley on Companies, 6th ed., p. 593; and as to companies under the Companies Act, 1862, see s. 70 of that Act, *supra*, and Table A, art. 4 (though see also art. 6), and Lindley on Companies (*Ib.*).

Unincorporated companies, in the absence of special statutory authority, have no power to sue shareholders for calls in the name of an officer of the company, and must, in general, sue and be sued like ordinary partners. (See *Hybart* v. *Parker*, 4 C. B. N. S. 209; 27 L. J. C. P. 120; and see *Gray* v. *Pearson*, L. R. 5 C. P. 568; *Evans* v. *Hooper*, 1 Q. B. D. 45; 45 L. J. Q. B. 206.) But it would seem that where the parties thus to be sued would be very numerous or difficult to ascertain and serve with process, or where for any reason justice could not otherwise be done, a certain number of them fairly representative of the company might be sued or sue on behalf of themselves and the other members of the company as representing the company. (See *Taff Vale Ry. Co.* v. *Amalgamated Ry. Servants*, [1901] A. C. 426, 438, 443; 70 L. J. K. B. 905; *Meux* v. *Maltby*, 2 Sw. 277, 283.)

(*b*) See the preceding note.

[and for interest upon the amount of the said call from the said —— ——, 19—], whereby an action has accrued to the plaintiffs by virtue of the said Act and of the Companies Clauses Consolidation Act, 1845.

Particulars :—

Amount due in respect of call, made on the —— ——, 19—, of £—— per share on —— shares..... £

The like by a Company for Allotment Money (e).

The claim of the plaintiff company is for money payable by the defendant, as a shareholder of the company, to the company for allotment money on shares in the company allotted to the defendant at his request in writing dated —— ——, 19—.

Particulars :—

	£	*s.*	*d.*
The shares were 20 shares of £10 each, payable £5 on allotment and the residue by instalments of £1 as called up.			
——, 19—. 20 shares allotted.....	100	0	0
Amount due	£100	0	0

Against a Company under s. 65 of the Companies Clauses Consolidation Act, 1845, for Costs and Expenses incurred in obtaining the Company's special Act (d).

1. The plaintiff claims against the defendants, who are a company incorporated by and under the —— —— Act [*state the company's special Act*],

---

(*e*) The applicant for shares is bound by his offer to accept the shares and pay the allotment money on them, if an allotment is duly made in accordance with such offer, and due notice of allotment is properly posted to him, even though such notice does not actually reach him (*Harris's Case*, L. R. 7 Ch. 587 ; 41 L. J. Ch. 621 ; *Beck's Case*, L. R. 9 Ch. 392 ; 43 L. J. Ch. 531 ; *Household Ins. Co.* v. *Grant*, 4 Ex. D. 216 ; 48 L. J. Ex. 577).

(*d*) By the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16), s. 65, it is enacted, "that all the money raised by the company—whether by subscription of the shareholders, or by loan, or otherwise—shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special Act, and all expenses incident thereto ; and, secondly, in carrying the purposes of the company into execution."

This section, as also the similar sections in other Acts relating to particular companies, creates a debt entitling promoters, that is, the persons engaged in getting up the bill, and who have no paymaster to look to but the company, to payment out of the moneys raised by the company (*Wyatt* v. *Met. Board of Works*, 11 C. B. N. S. 744 ; 31 L. J. C. P. 217 ; *In re Skegness Tramways Co.*, 41 Ch. D. 215 ; 58 L. J. Ch. 737 ; and see *Mann* v. *Edinburgh Tramways Co.*, [1893] A. C. 69). Where the promoters had employed a parliamentary agent to obtain the Act, which contained a similar clause, it was held that the agent must sue his employers, and that the promoters only, and not the agent, could recover under the clause (*Ib.*).

which Act incorporates s. 65 of the Companies Clauses Consolidation Act, 1845, for money payable by the defendants to the plaintiff for work done and money paid by the plaintiff in and about obtaining the said Act.

2. The defendants have raised moneys sufficient to satisfy and applicable to the satisfaction of the plaintiff's claim, which is within and under the said s. 65 of the Companies Clauses Consolidation Act, 1845.

Particulars :—

By the Assignee of a Debt assigned by a Liquidator appointed under the Companies (Winding-up) Act, 1890 (e).

1. The —— Company, Limited, which was a company registered under the Companies Act, 1862, sold and delivered to the defendant —— tons of iron at £—— per ton, payable on delivery [*or, as the case may be*].

2. Afterwards, and whilst the price of the said goods was owing to the said company by the defendant, the said company was being wound up by the Court under the provisions of the Companies Acts, 1862 to 1900, and the liquidator appointed in the winding-up by a contract in writing dated the —— ——, 19—, of which the defendant had notice in writing by a letter dated the —— ——, 19—, sold and assigned the said debt to the plaintiff.

3. The said debt is still unpaid.

Particulars :— £ *s.* *d.*

19—, —— ——. To —— tons of iron at £——
per ton .....

Claim by a Director for his Fees (f).

The plaintiff's claim is for £—— for director's fees earned by the plaintiff for work done and services rendered by the plaintiff to and for and at the

---

Money agreed to be paid by promoters of a railway company to a landowner for supporting their bill is not within s. 65 (*supra*) (*Earl of Shrewsbury* v. *North Staffordshire Ry. Co.*, L. R. 1 Eq. 593; 32 L. J. Ch. 156). Except in cases falling within the above or other similar enactments, preliminary expenses incurred in the formation of a company are not, in general, recoverable against the company, a contract made on behalf of an intended company being legally incapable of ratification by the company when subsequently formed. (See *post*, p. 633.)

(*e*) The liquidator in a winding-up may assign things in action belonging to the company which is being wound up, and the assignee may bring or defend actions relating thereto in his own name (Companies (Winding-up) Act, 1890, s. 12 (2); Companies Act, 1862, ss. 95, 157; and as to voluntary winding-up, see s. 133; and see *ante*, pp. 87, 151).

Where the winding-up is under an order of the Court, the liquidator, if other than the official receiver, is to be called "liquidator," and not "official liquidator" (Companies (Winding-up) Act, 1890, s. 4 (3)).

(*f*) A contract by a company to remunerate or pay fees to its directors for their services cannot be implied from the mere fact of their appointment, and of their

request of, the defendant company, as a director thereof, on and between the —— ——, 19—, and the —— ——, 19—, and which by Article —— of the defendant company's Articles of Association [and a resolution of the directors dated the —— ——, 19—] were fixed at £—— per annum.

Particulars :—

19—, —— ——, to 19—, —— ——. Amount due for fees earned between these dates ..... £

Claim for Amount awarded on an Award under the Lands Clauses Consolidation Act, 1845 (g).

The plaintiff's claim is for £——, the amount awarded by *E. F.* by his award in writing dated the —— ——, 19—, made pursuant to a submission in writing dated the —— ——, 19—, to be paid by the defendant company to the plaintiff as compensation for land taken compulsorily under the Lands Clauses Consolidation Act, 1845.

Particulars :—

19—, —— ——. Amount awarded ..... £

Conditions Precedent (h).

having done work for the company in that capacity, nor can the directors in the absence of a contract to that effect maintain an action for their fees or remuneration (*Dunston* v. *Imperial Gas Co.*, 3 B. & Ad. 125; and see *Inman* v. *Ackroyd*, [1901] 1 Q. B. at p. 615; 70 L. J. Q. B. 450). Articles of Association or resolutions of a company to the effect that its directors are to be paid certain fees are not contracts with the company on which the directors can sue (*Dunston* v. *Imperial Gas Co.* (*supra*); *Eley* v. *Positive Life Assurance Co.*, 1 Ex. D. 20, 88; *Browne* v. *La Trinidad*, 37 Ch. D. 1, 13, 14; 57 L. J. Ch. 292); but where the Articles of Association purport to give certain fees to a director, and he acts accordingly as director, then, if nothing appears to the contrary to show that there was in fact no agreement, a contract may be implied with the company entitling him to the fees (*Salton* v. *New Beeston Cycle Co.*, [1899] 1 Ch. 775; 68 L. J. Ch. 634; and see *Nell* v. *Atlanta Gold Mines*, 11 Times Rep. 407). As to travelling expenses, see *Young* v. *Naval, etc. Society*, [1905] 1 K. B. 687; 74 L. J. K. B. 302.

(*g*) The ordinary mode of enforcing an award under the Lands Clauses Consolidation Act, 1845, is by action. Before the action is commenced the plaintiff should tender a conveyance of the land (*East London Union* v. *Metropolitan Ry. Co.*, L. R. 4 Ex. 309). The award of the arbitrator is conclusive as to the amount of compensation but not as to the right which may be contested in the action (*Beckett* v. *Midland Ry. Co.*, L. R. 1 Ch. 241). This applies also to the verdict of a jury (*R.* v. *L. & N. W. Ry. Co.*, 3 El. & Bl. 443; *Read* v. *Victoria Station Co.*, 1 H. & C. 826; 32 L. J. Ex. 167; *Barber* v. *Nottingham, etc. Ry. Co.*, 15 C. B. N. S. 726; 33 L. J. C. P. 193). See *post*, pp. 343, 344.

(*h*) As to what are conditions precedent to rights of action on contracts, see the notes to *Pordage* v. *Cole*, 1 Wms. Saund., 1871 ed., 548; *Peeters* v. *Opie*, 2 *Ib.* 742, and *Cutter* v. *Powell*, 2 Sm. L. C., 11th ed., p. 1; Leake on Contracts, 4th ed., pp. 444 *et seq.*

The C. L. P. Act, 1882, by s. 57 modified the earlier practice requiring the pleader to allege expressly the performance or fulfilment of each necessary condition precedent to the rights claimed, by enabling him to make use of a general averment of the

Averment that Performance of a condition Precedent was excused by the Defendant (i).

The defendant excused and discharged the plaintiff from paying or tendering the said £—— [*or as the case may be, stating the condition or conditions excused*] by —— [*here state fully the time and mode of the discharge*].

A like Form, alleging Prevention of Performance by a Breach of the Contract on the part of the Defendant (i).

The plaintiff was prevented from performing the said agreement on his part in respect of [*state what*] by the defendant's breaking the said agreement by —— [*here state how the defendant prevented the performance*].

A like Form, alleging that the defendant disabled himself from performing the Contract (i).

The defendant absolutely disabled himself from performing the said contract on his part, and thereby waived and excused the performance by the plaintiff of all conditions precedent on his part to be performed.

Particulars :—

---

performance or fulfilment of such conditions. For this purpose, the form in use was "all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said promise [*or*, agreement, *or*, covenant] performed by the defendant, and to maintain this action for the breach thereof hereinafter alleged" (adding, in some cases, where there were also negative conditions, a further averment to the effect that "nothing happened to disentitle the plaintiff from having such performance or from maintaining this action").

Now, by Ord. XIX., r. 14, it is provided that "any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading." The effect of this rule is to obviate the necessity for any general allegation of performance or fulfilment of conditions precedent, and to throw on the opposite party the burden of objecting to any failure of the right claimed by reason of non-performance or non-fulfilment of any such condition.

Notwithstanding the above rule, it is often convenient to allege the performance or fulfilment of some one or more of the conditions precedent to the right relied upon.

(*i*) Where a condition has not been fulfilled, but the performance of it has been excused or discharged, the fact that it has been so excused or discharged should, strictly speaking, be stated in the statement of claim, as owing to the implied averment of its performance the averment in the reply of its non-performance with the excuse for it would be a departure. (See Ord. XIX., r. 16.) This was the rule before the C. L. P. Act, 1852 (Co. Lit. 304, a; *Cort* v. *Ambergate Ry. Co.*, 17 Q. B. 127; 20 L. J. Q. B. 460; 24 L. J. Q. B. 460); and Ord. XIX., r. 16, cited *post*, p. 547, makes it still necessary in some cases. In practice, however, the pleader frequently waits to see whether the defendant sets up the non-performance in the defence, and if he does so, pleads the excuse in reply.

Specific Averment that a particular Condition Precedent has been fulfilled: see R. S. C., 1883, App. C., Sect. V., No. 10, cited "Marriage," post, p. 244.

COPYHOLD.

Claim for Fines.

The plaintiff's claim is for £—— payable by the defendant to the plaintiff for fines payable by the defendant as tenant of customary tenements of the manor of —— to the plaintiff as lord of the said manor for the admission of the defendant into the said tenements.

Particulars :—

CORPORATION (*k*).

Claims by or against an Incorporated Company (k): see "Company," ante, p. 151.

If the promiser disables himself from performing the contract on his part, he thereby waives or excuses the performance of future conditions precedent to his liability (*Ford* v. *Tiley*, 6 B. & C. 325 ; *Caines* v. *Smith*, 15 M. & W. 189 ; *Short* v. *Stone*, 8 Q. B. 358 ; *Lovelock* v. *Franklyn*, 8 Q. B. 371 ; *Synge* v. *Synge*, [1894] 1 Q. B. 466, 471 ; *Bradley* v. *Benjamin*, 46 L. J. Q. B. 590). The mode by which the promiser has disabled himself should be stated.

It is in general a sufficient excuse for non-performance of a condition precedent that the performance was prevented by the breach of contract or wrongful act of the promisee. (See Com. Dig. Condition L. ; *Roberts* v. *Bury Commissioners*, L. R. 5 C. P. 310, 326 ; 39 L. J. C. P. 129.)

An absolute refusal to perform an agreement, or an absolute repudiation of it, communicated to the opposite party, is a waiver and excuse of the performance by him of future conditions precedent (see *Ripley* v. *M'Clure*, 4 Ex. 345 ; *Cort* v. *Ambergate Ry. Co.*, 17 Q. B. D. 127 ; 20 L. J. Q. B. 460 ; *Bank of China* v. *American Trading Co.*, [1894] A. C. 266, and the cases below cited), and, if accepted as a termination of the agreement, gives to the opposite party, in general, an immediate right of action, even though the time for performance by the promiser has not arrived (*Frost* v. *Knight*, L. R. 7 Ex. 111 ; 41 L. J. Ex. 79, cited "*Marriage*," *post*, p. 245 ; *Hochster* v. *De la Tour*, 2 E. & B. 678 ; 22 L. J. Q. B. 455, cited "*Master and Servant*," *post*, p. 248 ; *Michael* v. *Hart*, [1902] 1 K. B. 482, 490 ; 71 L. J. K. B. 265 .Affd. in H. L. 89 L. T. 422 ; *Cornwall* v. *Henson*, [1900] 2 Ch. 298, 300 ; 69 L. J. Ch. 581, 583 ; *Ogdens* v. *Nelson*, [1905] A. C. 109 ; 74 L. J. K. B. 433 ; and see "*Rescission*," *post*, p. 756).

(*k*) For the mode in which corporations aggregate sue and are sued, see "*Company*," *ante*, p. 151.

In the case of an English corporation duly constituted, it is not requisite that there should be any express statement of the fact of its incorporation (see *Woolf* v. *City Steamboat Co.*, 7 C. B. 103), except in cases where the mode of incorporation is material. (See R. S. C., 1883, App. C., Sect. IV., Form No. 9, cited "*Company*," *ante*, p. 151.) If, however, the corporation is a foreign or colonial one, it is usual and proper that the fact of its incorporation should appear in the pleading.

Corporations Sole.]—Where a corporation sole has a name of dignity, he should sue and be sued in that name, his own christian name being prefixed to his name of office, as for instance, "John, Lord Bishop of ——." (See "*Names of the Parties*," *ante*, p. 43.) In other cases, even in actions brought by or against him in his corporate

Claim by a Municipal Corporation (l).

Between the Mayor, Aldermen, and Burgesses of the Borough of M—— [*or*, the Mayor, Aldermen, and Citizens of the City of M——, *as the case may be*] ..... Plaintiffs,

and

John Smith ..... Defendant.

Statement of Claim.

The plaintiffs' cla'm is, &c., *or*, The plaintiffs claim, &c. [*proceed to state the cause of action, giving particulars where necessary*].

By a County Council (m).

Between the County Council of [Monmouthshire] ..... Plaintiffs,

and

John Smith ..... Defendant.

Statement of Claim.

[*See the preceding Form.*]

Against a Rural District Council (n).

Between John Smith ..... Plaintiff,

and

The Rural District Council of M—— ..... Defendants.

Statement of Claim.

[*See the preceding Form.*]

---

capacity, he sues and is sued in his individual name (see *Ib.*; and 2 Inst. 666); but where he sues in his corporate capacity, his name of office should be added after his own christian and surname. (See Grant on Corporations, p. 636.)

(*l*) Municipal corporations are now regulated by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), which has consolidated the general statute law relating to such corporations. By sect. 8 of that Act, the proper style of the municipal corporation of a borough is "the mayor, aldermen and burgesses of the borough of ——;" and the proper style of the municipal corporation of a city is, "the mayor, aldermen and citizens of the city of ——."

(*m*) County councils were established by the Local Government Act, 1888 (51 & 52 Vict. c. 41). By s. 79 (1) of that Act, "the council of each county shall be a body corporate by the name of the county council, with the addition of the name of the administrative county, and shall have perpetual succession and a common seal." By s. 64 (1), all county property held by county justices, &c., for the public purposes of the county was (with certain exceptions therein specified) transferred to and vested in the council of the county, subject to all debts and liabilities affecting the same.

(*n*) By the Local Government Act, 1894 (56 & 57 Vict. c. 73), a district council is

Against a Board of Guardians of the Poor of a Union (o).

Between John Smith ..... Plaintiff,

and

The Guardians of the Poor of the —— Union in the County of —— ..... Defendants.

Statement of Claim.

[*State the cause of action in the ordinary manner, as, for instance,* The plaintiff's claim is for money payable by the defendants to the plaintiff for the price of goods sold and delivered to the defendants.]

Particulars:—

---

created for every rural sanitary district (see s. 21), and is incorporated by the name of the district council with the addition of the name of the district, and has perpetual succession and a common seal. (See s. 24 (7).)

All urban sanitary authorities are to be called urban district councils, except that the style or title of corporations and councils of boroughs is not to be altered. (See s. 21.)

All urban sanitary authorities, not otherwise incorporated, were incorporated by s. 7 of the Public Health Act, 1875, with perpetual succession and a common seal, and that section is not affected by the Local Government Act, 1894, consequently all urban district councils are bodies corporate.

By the Local Government Act, 1894, s. 3 (9), every parish council shall be a body corporate, by the name of the parish council with the addition of the name of the parish, and have perpetual succession; but, instead of a common seal being granted, it is enacted that in cases where an instrument under seal is required, it may be under the hands and seals of the chairman presiding at the meeting, and two other members of the council.

In those smaller rural parishes which have not a parish council, the chairman of the parish meeting and the overseers are a body corporate, by the name of the chairman and overseers of the parish, with perpetual succession, and, if an instrument under seal is required, it may be under the hands and seals of such chairman and overseers (s. 19 (6)). A parish council has no power to bring an action on behalf of the inhabitants of the parish (*Stoke Parish Council* v. *Price*, [1899] 2 Ch. 277; 68 L. J. Ch. 447).

(*o*) By 5 & 6 Will. 4, c. 69, s. 7, the guardians of the poor of every union and of every parish placed under the control of a board of guardians shall be for all the purposes of that Act a corporation by the name of "the guardians of the poor of the —— union (or of the parish of ——), in the county of ——"; and they are thereby empowered to take and hold buildings, lands, or hereditaments, goods, effects, or other property, and may use a common seal, and are further empowered by that name to bring actions and to sue and be sued, and to take or resist all other proceedings in relation to any such property, or any bonds, contracts, securities, or instruments given to them in virtue of their office; and it is enacted that in every such action relating to any such property, it shall be sufficient to state the property to be that of the guardians of the —— union or of the parish of ——. And by the 5 & 6 Vict. c. 57, s. 16, it is enacted that every such board of guardians may in all cases sue and be sued in their corporate name. (See, further, as to the constitution of boards of guardians, the Local Government Act, 1894, Part II.)

Notwithstanding the general rule requiring the contracts of corporations aggregate to be under seal (see "*Corporation*," *post*, p. 643), the guardians of a union are liable to be sued for the price of goods which have been supplied for the necessary use of their workhouse under an agreement not under seal (*Nicholson* v. *Bradfield Union*,

By a Foreign Corporation (*p*).

Between The Société Générale de Lyons [*or*, the Société d'Acclimatation] ..... Plaintiff,
and
John Jones ..... Defendant.

Statement of Claim.

1. The plaintiffs are a company [*or*, an association, *or*, a body of persons] duly constituted and incorporated in the republic of France, and are entitled and empowered by the law of the said republic [to make the contract hereinafter mentioned and] to sue and be sued by their name above-mentioned.

2. The plaintiffs' claim is, &c., *or*, The plaintiffs claim, &c. [*state the cause of action*].

COUNSEL (*q*).

L. R. 1 Q. B. 620; 35 L. J. Q. B. 176, a case approved in *Lawford* v. *Billericay Council*, [1903] 1 K. B. 772; 72 L. J. K. B. 554). But the appointment by guardians of a clerk to the master of a workhouse was held not to fall within the exceptions to the rule (*Austin* v. *Guardians of Bethnal Green*, L. R. 9 C. P. 91). A school board could validly contract for the payment of its architect or other officers by a duly signed minute, and such contract need not have been under seal. (See *Scott* v. *Clifton School Board*, 14 Q. B. D. 500.)

(*p*) A foreign corporation duly created according to the laws of a foreign state recognised by his Majesty, may sue and be sued by its corporate name in the English Courts; but the fact of its incorporation according to the law of the foreign state must be proved, unless admitted (*National Bank of St. Charles* v. *De Bernales*, 1 C. & P. 569; *General Steam Navigation Co.* v. *Guillon*, 11 M. & W. 877; *Bank of Scotland* v. *Ker*, 8 Sim. 246).

A colonial corporation is regarded as a foreign one, and a liability which, by a foreign or colonial statute, is declared to be a specialty debt, is regarded in this country as a debt by simple contract only (*Welland Rail. Co.* v. *Blake*, 6 H. & N. 410; 30 L. J. Ex. 161).

A foreign trading corporation may sue in this country in a name only acquired by reputation (*Dutch West India Co.* v. *Van Moses*, 1 Stra. 612; *Henriquez* v. *Dutch West India Co.*, 2 Ld. Ray. 1532).

Where notice of a writ has been served by leave out of the jurisdiction (as to which, see Ord. XI.), the objection that the cause of action is not one in which such leave could properly have been given, cannot be pleaded as a defence, though it would be ground for an application to set aside the writ (*Preston* v. *Lamont*, 1 Ex. D. 361; 45 L. J. Ex. 797).

As to actions by or against foreign sovereigns or states, see *King of Greece* v. *Wright*, 6 Dowl. 12; *United States of America* v. *Wagner*, L. R. 2 Ch. 582; 36 L. J. Ch. 624; *Republic of Costa Rica* v. *Erlanger*, 1 Ch. D. 171; *Twycross* v. *Dreyfus*, 5 Ch. D. 605; 46 L. J. Ch. 510; *Vavasseur* v. *Krupp*, 9 Ch. D. 351; *Strousberg* v. *Republic of Costa Rica*, 44 L. T. 199; 29 W. R. 125; *The Newbattle*, 10 P. D. 33; *Republic of Peru* v. *Dreyfus*, 38 Ch. D. 348; *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149; 63 L. J. Q. B. 593; *South African Republic* v. *La Compagnie Franco Belge*, [1898] 1 Ch. 190; 1 Smith L. C., 11th ed., 643.

(*q*) A barrister cannot bring an action for fees for professional services, or upon a

COUNTY COUNCIL. See "*Corporation*," *ante*, p. 159.

COVENANT. See "*Agreements*," *ante*, p. 81.

CROPS.

Claim for Crops sold (*r*).

The plaintiff's claim is for the price of crops bargained and sold by the plaintiff to the defendant on the —— ——, 19—, by contract contained in letters dated the —— —— and —— ——, 19—.

Particulars :—

		£	*s.*	*d.*
——, 19—.	—— acres of growing wheat at —— [*describe where*], at £—— per acre			
	Amount due .....£			

By an Outgoing Tenant against the Landlord for Tillages, &c., according to the Custom of the Country (*s*).

The plaintiff's claim is, as outgoing tenant of certain lands known as —— Farm, in the parish of ——, in the county of ——, which were

---

contract the consideration of which is professional services, or on an account stated in respect of them (*Kennedy* v. *Brown*, 13 C. B. N. S. 677 ; 32 L. J. C. P. 137 ; *Mostyn* v. *Mostyn*, L. R. 5 Ch. 457 ; 39 L. J. Ch. 780 ; *Robertson* v. *Macdonogh*, 6 L. R. Ir. 433 ; *R.* v. *Doutre*, 9 App. Cas. 745 ; 53 L. J. P. C. 86). He may, however, sue on a contract for remuneration for services which are unconnected with his professional character. (See Addison on Contracts, 9th ed., p. 800.) Thus, where a barrister had been employed as returning officer in an election of guardians for a union, under an express contract for remuneration, he was held entitled to recover (*Egan* v. *Kensington Union*, 3 Q. B. 935). But it seems open to question whether he can sue for any remuneration in respect of services as an arbitrator (see *Veitch* v. *Russell*, 3 Q. B. 928, 936 ; *Crampton* v. *Ridley*, 20 Q. B. D. 48). The relation of client or solicitor and counsel is such as to render them incapable of entering into binding contracts of hiring and service concerning advocacy in litigation, and the client or solicitor cannot sue the counsel for non-performance of such a contract. (See *per* Erle, C.J., in *Kennedy* v. *Brown*, *supra* ; *Robertson* v. *Macdonogh*, *supra* ; *In re Le Brasseur*, [1896] 2 Ch. 487, 496 ; 65 L. J. Ch. 763.)

(*r*) As to the cases in which sales of growing crops are of an interest in land within s. 4 of the Statute of Frauds, or of goods within s. 4 of the Sale of Goods Act, 1893, see Leake on Contracts, 4th ed., 166, 172, and *post*, pp. 273, 865.

(*s*) Where a tenant is entitled by the custom of the country to be paid for the seeds, tillages, &c. given up by him at the expiration of the tenancy, the landlord is the person *primâ facie* liable to pay them, and, in the absence of a contract between the outgoing and the incoming tenant, the latter is not in any way liable for such payment

demised to him by the defendant on the —— ——, 19—, by a lease [*or* contract in writing] dated that day [*or, as the case may be*], subject to the custom of the country, against the defendant, as landlord, for money payable by the defendant to the plaintiff [upon a valuation in writing duly made by ——, and dated the —— ——, 19—] under the said custom for the plaintiff having at the expiration of his tenancy left and given up for and to the defendant in accordance with the said custom the benefit of work done, and materials, seeds, manures, crops, tillages, and other things provided, and moneys expended by the plaintiff in cultivating and improving the said lands.

Particulars:—

By an Outgoing Tenant against an Incoming Tenant upon an Agreement for Tillages, &c., according to the Custom of the Country (s).

1. The plaintiff's claim is, as outgoing tenant of certain lands known as —— Farm, in the parish of ——, in the county of ——, which were demised to him by *A. B.* by a lease [*or* contract in writing] dated the —— ——, 19—, subject to the custom of the country, against the defendant, as incoming tenant of the said lands.

2. By the said custom the plaintiff was entitled to be paid by the said *A. B.* at the expiration of his tenancy for the benefit of work done, and materials, seeds, manures, crops, tillages, and other things provided, and moneys expended by him in cultivating and improving the said lands left and given up by him to the said *A. B.* or to the incoming tenant according to a valuation made in the customary manner.

3. By agreement in writing [*or, as the case may be*] dated the —— ——, 19—, between the plaintiff, the defendant, and the said *A. B.*, it was agreed that the plaintiff should be paid by the defendant in lieu of by the said *A. B.*, and that the amount to be so paid should be ascertained by a

---

(*Bradburn* v. *Foley*, 3 C. P. D. 129; 47 L. J. C. P. 331; and see *Sucksmith* v. *Wilson*, 4 F. & F. 1083; *Stafford* v. *Gardner*, L. R. 7 C. P. 242, 249). Such a contract between an outgoing and an incoming tenant may be either express or implied from circumstances, but the mere fact of an incoming tenant entering upon the land and obtaining the benefit of the tillages, &c. is not sufficient ground for implying such contract (*Ib.*; *Codd* v. *Brown*, 15 L. T. 536). As to customs of the country, see further, "*Landlord and Tenant*," *post*, p. 221; "*Custom*," *post*, p. 829.

In cases where a valuation is a condition precedent, but has been prevented by the conduct of the defendant, it may be necessary to claim damages for breach of contract in not appointing a valuer, &c.

Claims for compensation under the Agricultural Holdings (England) Act, 1883, can only be enforced by arbitration in the manner provided by that Act (s. 57; see *Gas Light and Coke Co.* v. *Holloway*, 52 L. T. 434; *Schofield* v. *Hincks*, 58 L. J. Q. B. 147), but this only applies to tenants claiming under the Act, and does not apply to a claim for compensation under an agreement outside it (*Pearson and T'Anson*, [1899] 2 Q. B. 613; 68 L. J. Q. B. 878; *Newby* v. *Eckersley*, [1899] 1 Q. B. 465; 68 L. J. Q. B. 261).

(*s*) See preceding note.

valuation between the plaintiff and the defendant made in the customary manner.

4. The plaintiff accordingly left and gave up to the defendant the benefit of the work done, and the materials, seeds, manures, crops, tillages, and other things provided, and the moneys expended by him in cultivating and improving the said lands, and the amount to be paid by the defendant for the same was ascertained by a valuation in writing made by ——, and dated the —— ——, 19—, between the plaintiff and the defendant in the customary manner to be £——, but the defendant has not paid the said amount.

Particulars are as follows:—

Amount due .....£

The like, a more concise Form.

The plaintiff's claim is for money payable by the defendant to the plaintiff for the amount of the valuation in writing by ——, dated the —— ——, 19—, of the tenant right of —— Farm, made pursuant to an agreement in writing dated the —— ——, 19—, between the plaintiff as outgoing and the defendant as incoming tenant of the said farm.

Particulars:—

For Work and Labour expended in Cultivation by an Outgoing Tenant.

The plaintiff's claim is for money payable by the defendant to the plaintiff for the plaintiff having, on the —— ——, 19—, left and given up for and to the defendant, at his request, the benefit of work done, and materials, seeds, manures, crops, tillages, and other things provided, and moneys expended by the plaintiff in cultivating and improving certain lands known as —— Farm, at ——, in the county of ——.

Particulars:—

DAMAGES: *see ante*, p. 54, *and see* "*Liquidated Damages*," *post*, p. 241.

DEMURRAGE (*t*).

For Forms of Claim for Demurrage in respect of Ships, see "*Shipping*," *post*, p. 301.

(*t*) See "*Shipping*," *post*, pp. 299, 300. The word "demurrage," strictly speaking, signifies the agreed additional payment (generally of so much per day) for an allowed

Claim for Demurrage of Wagons at an agreed Rate.

The plaintiffs' claim is for money payable by the defendants to the plaintiffs for the demurrage of coal wagons kept on demurrage by the defendants under an agreement in writing dated the —— ——, 19— [*or* made verbally on the —— ——, 19—, *or, as the case may be*], at the agreed rate of £—— per day for each wagon.

Particulars :—

Claim for Damages for Detention of Wagons beyond a reasonable time in Loading.

1. The plaintiffs have suffered damage from breach by the defendants of a contract made between the plaintiffs and the defendants on the —— ——, 19—, verbally [*or*, in writing, *or*, contained in letters dated ——, *or*, *as the case may be*], that the defendants should use reasonable despatch in loading with coal at the defendants' colliery at —— wagons to be sent by the plaintiffs for that purpose.

2. The defendants did not use reasonable despatch in so loading the wagons so sent, and unreasonably detained the same.

Particulars :—

Wagon number	——	——	
Date of arrival at defendants' colliery	——	——	
Days within which same ought to have been loaded.....	——	——	
Date when same was loaded	——	——	
Days' detention	——	——	——
Total days' detention			——

—— days at £—— per truck per day..... £——

The plaintiff's claim £——

---

detention beyond the period specified in the contract, but it is popularly used also to signify compensation for undue detention. Money due for an allowed detention at an agreed rate creates a debt, but where the detention is not an allowed detention, the claim is one for damages, not of debt.

Where the contract is silent as to the time within which a ship, or a truck, or the like, is to be unloaded or loaded by the hirer, it is, in general, an implied term of the contract that the hirer will use reasonable despatch and diligence. (See *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; L. R. 5 Q. B. 544; 39 L. J. Q. B. 188; *Hick* v. *Rodocanachi*, [1891] 2 Q. B. 626; 61 L. J. Q. B. 42; and see *post*, p. 299.) A notice given by a carrier to his customer that a charge will be made for trucks of the carrier delayed by the customer, or for warehousing goods which the customer neglects to take delivery of with reasonable despatch, or the like, if not objected to or dissented from by the customer, affords evidence of a contract between the customer and the carrier for payment of such charge. (See *Ieens* v. *Great Western Ry. Co.*, 53 J. P. 148; *Mitchell* v. *Lancashire and Yorkshire Ry. Co.*, L. R. 10 Q. B. 256; 44 L. J. Q. B. 107.)

Exchange.

Claim upon a Contract of Exchange.

1. The plaintiff has suffered damage from the breach by the defendant of his contract with the plaintiff made verbally [*or, as the case may be*] on the —— ——, 19—, to deliver a horse of the defendant [called ——] in exchange for a bay mare of the plaintiff and £20.

2. The plaintiff delivered to the defendant the said mare and paid him the £20, but the defendant has not delivered to the plaintiff the said horse [*or*, the plaintiff was, and is, ready and willing to deliver to the defendant the said mare and to pay him the £20, but the defendant has not carried out, and will not carry out, the said contract on his part].

Particulars of damage :—

—✦—

Executors and Administrators (*u*).

Claim by an Executor or Administrator for Debts accrued to the Deceased (*x*).

The plaintiff's claim is as executor of [the last will of] *C. D.*, deceased, [*or*, as administrator of [the personal estate and effects of] *C. D.*, deceased,

(*u*) Where parties sue or are sued as executors or administrators, the fact that they sue or are sued in that capacity must be shown in the indorsement on the writ of summons (Ord. III., r. 4, cited *ante*, p. 44) and in the statement of claim. (See *ante*, p. 44.) The full description of an executor is "executor of the last will and testament of —— ——, deceased," and the full description of an ordinary administrator is "administrator of the personal estate and effects which were of —— ——, deceased, who died intestate," but in ordinary cases an executor may be shortly described in pleading as "executor of —— ——, deceased," and an administrator as "administrator of —— ——, deceased." (See R. S. C., 1883, App. A., Part III., Sect. VII. ; App. C., Sect. II., Nos. 1, 4, and Sect. VI., No. 7.)

Either of the above descriptions of an executor is applicable to a surviving executor, but if he sues upon causes of action accrued to the joint executors during their joint lives, he should usually be described as "surviving executor of, &c."

As to the descriptions of various kinds of administrators, see the headings, *post*.

By Ord. XVIII., r. 5, "Claims by or against an executor or administrator, as such, may be joined with claims by or against him personally ; provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator." Claims inserted in contravention of this rule may be struck out (*Whitworth* v. *Darbishire*, 9 Times Rep. 211). It has been held that this rule does not apply to counterclaims. (See "*Counterclaims*," *post*, p. 535.)

(*x*) **Actions by Executors and Administrators.**]—An executor or administrator may sue upon all contracts made with the testator or intestate which affect his personal estate in respect of the damage accrued to the personal estate from the breach of them, whether such breach occurred before or after the death (*Ricketts* v. *Weaver*, 12 M. & W. 718 ; *Bradshaw* v. *Lancashire Ry. Co.*, L. R. 10 C. P. 189 ; 44 L. J. C. P. 148 ; *Twycross* v. *Grant*, 4 C. P. D. 40, 46 ; 48 L. J. Q. B. 1, 3 ; 1 Wms. Exs., 10th ed., pp. 604 *et seq.* ; 1 Wms. Saund., 1871 ed., 240). But for breaches of contract which affect the person of the testator only and not his transmissible personal estate—as a

who died intestate] for money payable by the defendant to the plaintiff as executor [*or*, administrator] as aforesaid, for [*here state the debts accrued to the deceased, as, for instance*, the price of goods sold and delivered by

---

breach of promise to marry, where there is no special damage to the estate—an executor or administrator cannot sue (*Chamberlain* v. *Williamson*, 2 M. & S. 408 ; see *Finlay* v. *Chirney*, 20 Q. B. D. 494 ; 57 L. J. Q. B. 247 ; "*Marriage*," *post*, p. 245).

Prior to the coming into operation of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) contracts with a testator or intestate affecting his *real* estate, and which run with the land, as covenants for title, covenants to repair, &c., passed in general with the estate to the heir or devisee if it were freehold, and to the executor or administrator where it was a chattel interest in the land. In the former case, although the executor might in general sue in respect of breaches committed during the testator's lifetime which caused loss or injury to the personal estate, only the heir or devisee could sue in respect of breaches committed after the testator's death (*Ib.*; *Kingdon* v. *Nottle*, 1 M. & S. 355 ; 4 *Ib.* 53 ; *Jones* v. *King*, 4 *Ib.* 418 ; see *Ricketts* v. *Weaver*, 12 M. & W. 718) ; and similarly, the heir or devisee was the proper person to sue in cases where the only substantial damage arising from a *continuing* breach was damage occasioned to the heir or devisee after the death. (See *Ib.*)

By the Land Transfer Act, 1897, s. 1, "real estate," as defined by that Act (s. 1 (4)), vests in the executor or administrator, and it would seem, therefore, that until the assent or conveyance to the heir or devisee provided for by s. 3 (1) the executor or administrator would now be the proper party to sue or be sued in respect of breaches of contracts affecting real estate. (See *post*, pp. 182, 227, 230.) As regards real estate vested in the deceased as a sole trustee or mortgagee, his executors or administrators, to whom such real estate has passed under the Conveyancing Act of 1881 (44 & 45 Vict. c. 41), s. 30, are the proper persons to sue in respect of any breaches of covenants affecting it. (See *Carswell* v. *Hyland*, 3 Times Rep. 708.)

Where the cause of action arose in the lifetime of the deceased, the executor or administrator must sue in his representative character (2 Wms. Exs., 10th ed., p. 1517). Where the cause of action arose wholly after the death, he may sue either in his own name personally (as being the party contracted with), or in his representative character, if the money to be recovered would be assets of the estate (*Ib.*; *Aspinall* v. *Wake*, 10 Bing. 51 ; *Moseley* v. *Rendell*, L. R. 6 Q. B. 338 ; 40 L. J. Q. B. 111 ; *Abbott* v. *Parfitt*, L. R. 6 Q. B. 346 ; 40 L. J. Q. B. 115). The character in which he sues in such cases may sometimes be important, as determining the rights of set-off or counterclaim possessed by the defendant. (See "*Set-off*," *post*, pp. 773, 777 ; "*Counterclaims*," *post*, p. 538.)

In actions by executors, all of them should join as plaintiffs (2 Chitty's Practices, 14th ed., 1113 ; 2 Wms. Exs., 10th ed., pp. 1515, 1541), except such as have renounced probate. (See 20 & 21 Vict. c. 77, s. 79 ; and see 21 & 22 Vict. c. 95, s. 16.) So if there are several administrators, they should all join in suing (2 Wms. Exs., 10th ed., p. 1515). If one or more of several executors or administrators have died, the action should be brought by the survivor, and in such case the ordinary form of statement of claim by executors is usually sufficient. As to the effect of the nonjoinder and misjoinder of parties who ought to have been joined, see Ord. XVI., r. 11 ; "*Misjoinder*, &c.," *ante*, p. 27.

An executor may commence an action before probate, and it is usually sufficient if he obtains probate in time to prove his title in case it should be disputed. But where the only dispute between the parties is as to the title of the executor and his right to give a valid receipt or discharge, which he cannot do until he has obtained probate, an action brought before obtaining probate will be stayed till the probate is produced (1 Roll. Abr. 917 A. 2 ; *Wankford* v. *Wankford*, 1 Salk. 302, 303 ; *Tarn* v. *Commercial Banking Co.*, 12 Q. B. D. 294 ; and see Wms. Exs., 10th ed., pp. 222, 1518).

An administrator cannot commence an ordinary action to recover a debt or damage

the said *C. D.* to the defendant, *or*, work done and materials provided by the said *C. D.* for the defendant at his request, *or*, money received by the defendant for the use of the said *C. D.*, *or*, *as the case may be*].

Particulars:—[*See* "*Sale of Goods*," *post*, pp. 274, 275; "*Work*," *post*, p. 326; "*Money Received*," *post*, p. 259, &c., &c.]

For a form of a Claim by an Administrator against Bankers for the Balance of the Intestate's Account, see Newell v. *National Provincial Bank*, 1 *C. P. D.* 496.

By an Executor or Administrator for Debts accrued since the Death of the Deceased (*y*).

The plaintiff's claim is as executor of [the last will of] *C. D.*, deceased, [*or*, as administrator of the personal estate and effects of *C. D.*, deceased, who died intestate] for money payable by the defendant to the plaintiff as executor [*or*, administrator] as aforesaid, for [*here state the causes of action accrued since the death, as, for instance*, the price of goods sold and delivered by the plaintiff as such executor [*or*, administrator] to the defendant, *or*, work done and materials provided by the plaintiff as such executor [*or*, administrator] for the defendant at his request, *or*, money received by the defendant for the use of the plaintiff as such executor [*or*, administrator], *or*, *as the case may be*].

Particulars:—

By an Executor or Administrator for Damage for Breach of a Contract made with the Deceased (*y*).

The plaintiff, as executor of [the last will of] *C. D.*, deceased [*or*, as administrator of the personal estate and effects of *C. D.*, deceased, who died intestate], has suffered damage from [*here state the causes of action, as, for instance*, the breach of a contract made between the defendant and the said *C. D.* on the —— ——, 19—, and contained in letters dated —— [*or as the case may be*] for sale and delivery by the defendant to the

---

until the letters of administration have issued (1 Wms. Exs., 10th ed., p. 315; *Tattershall* v. *Ashworth*, Phillimore, J., at Chambers, 2nd July, 1903, M.S.).

The title of an executor to the personal property and effects vests in him on the death; the title of an administrator only vests in him on the grant of the letters of administration, but it then, for most purposes, relates back to the death. (See 1 Wms. Exs., 10th ed., pp. 220, 467 *et seq.*; *Foster* v. *Bates*, 12 M. & W. 226; *Bodger* v. *Arch*, 10 Ex. 333; *Welchman* v. *Sturgis*, 13 Q. B. 552.)

As to the right of executors or administrators to sue and be sued on behalf of, or as representing the estate, without joining any of the beneficiaries, see Ord. XVI., r. 8, cited *ante*, p. 25.

(*y*) See preceding note.

said *C. D.* of 100 tons of Scotch pig iron at £5 per ton, to be delivered on rail at Middlesbrough on the 15th March, 19—, which said iron the defendant, during the lifetime of the said *C. D.*, on the —— ——, 19—, by letter dated that day, wholly refused to deliver, and did not at any time deliver].

Particulars :—

By an Executor of an Executor (*z*).

The plaintiff's claim is as executor of the last will of *E. F.*, deceased, who in his lifetime and at the time of his death was executor of the last will of *G. H.*, deceased, for, &c. [*or*, The plaintiff, as executor of the last will of *E. F.*, deceased, who, &c., *as above*, has suffered damage from, &c.].

The like, by an Administrator with the Will annexed.

The plaintiff's claim is as administrator of the personal estate and effects of *C. D.*, deceased, with the last will and testament of the said *C. D.* annexed, for, &c. [*or*, The plaintiff, as administrator of the personal estate of *C. D.*, deceased, with, &c., *as above*, has suffered damage by, &c.].

The like, by an Administrator de bonis non with the Will annexed.

The plaintiff's claim is as administrator, with the last will and testament of *C. D.*, deceased, annexed, of the personal estate and effects of the said *C. D.* left unadministered by *E. F.* and *G. H.*, now respectively deceased, who were the executors of the last will and testament of the said *C. D.*, for, &c. [*or*, The plaintiff, as administrator, with, &c., *as above*, has suffered damage from, &c.].

The like, by an Administrator de bonis non after the Death of the first Administrator.

The plaintiff's claim is as administrator of the personal estate and effects of *C. D.*, deceased, left unadministered by *E. F.*, now deceased, who was the administrator of the personal estate and effects of the said *C. D.*, for, &c. [*or*, The plaintiff, as administrator of, &c., *as above*, has suffered damage from, &c.].

(*z*) The executor of a sole or surviving executor may be described as the executor of the first testator (see 1 Wms. Exs., 10th ed., pp. 180 *et seq.*; "*Executors*," *post*, p. 651), but it is more correct to state his executorship according to the fact in some such form as that above, and it is necessary to do so where the cause of action sued upon accrued to the first executor in his lifetime.

The like, by an Administrator during the Minority of an Executor (*a*).

The plaintiff's claim is as administrator of the personal estate and effects of *C. D.*, deceased, during the minority of *E. F.*, an infant under the age of twenty-one years, who is executor of the last will and testament of the said *C. D.*, for, &c. [*or*, The plaintiff, as administrator of, &c., *as above*, has suffered damage from, &c.].

The like, by an Administrator during the Absence of the Executor (*b*).

The plaintiff's claim is as administrator of the personal estate and effects of *C. D.*, deceased, during the absence of *E. F.*, who is the executor of the last will and testament of the said *C. D.*, and who is now beyond the seas, for, &c. [*or*, The plaintiff, as administrator of, &c., *as above*, has suffered damage from, &c.].

By or against an Executrix or Administratrix who is a Married Woman (*c*).

[*The pleadings are now in the same form as if she were a feme sole.*]

Against an Executor or Administrator for Debts accrued from the Deceased in his Lifetime (*d*).

The plaintiff's claim is against the defendant as executor of [the last will of] *C. D.*, deceased [*or*, as administrator of the personal estate and

(*a*) An administrator, during the minority of an executor, has, for the time, all the powers of an ordinary administrator (*In re Cope*, 16 Ch. D. 49; 50 L. J. Ch. 13; *In re Thompson*, [1896] 1 Ir. R. 356). See further, as to such administrators, 1 Wms. Exs., 10th ed., pp. 386 *et seq.*; Simpson on Infants, 2nd ed., pp. 106, 239.

(*b*) As to administrators *durante absentiâ*, see 1 Wms. Exs., 10th ed., p. 403; *Slater* v. *May*, 2 Ld. Raym. 1071; *Suwerkrop* v. *Day*, 8 A. & E. 624; *Webb* v. *Kirkby*, 7 De Gex, M. & G.; 25 L. J. Ch. 872; 26 *Ib.* 145.

(*c*) An action may be brought by or against a married woman as executrix or administratrix without joining her husband as a party to the action, for by s. 18 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it is enacted that "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued . . . in that character, without her husband, as if she were a *feme sole*."

(*d*) **Actions against Executors and Administrators.**]—An executor or administrator is, in general, liable upon all contracts made by the deceased for breaches before or after death, to the extent of the assets which have come to his hands to be administered (2 Wms. Exs., 10th ed., p. 1346).

This rule is applicable to cases of breaches of duty arising out of any express or implied contract with the testator or any obligation in the nature of such contract

effects of *C. D.*, deceased], for money payable by the defendant as such executor [*or*, administrator] to the plaintiff for [*here state the cause of*

(1 Wms. Saund., 1871 ed., p. 240; *Morgan* v. *Ravey*, 6 H. & N. 265; *Batthyany* v. *Walford*, 36 Ch. D. 269; 56 L. J. Ch. 881; *Finlay* v. *Chirney*, 20 Q. B. D. at p. 504; *Concha* v. *Murrieta*, 40 Ch. D. 543; 60 L. T. 798; *Blackmore* v. *White*, [1899] 1 Q. B. 293, 304; 68 L. J. Q. B. 180). But an action for breach of promise of marriage is considered to be in the nature of an action for a personal wrong, and an executor or administrator is not liable for such breach by the deceased, unless in respect of special damage affecting property (*Finlay* v. *Chirney*, 20 Q. B. D. 494; 57 L. J. Q. B. 247).

Contracts of agency, or for personal acts or services, are in general revoked by death, and the executor or administrator cannot be sued upon them except for breaches which occurred in the lifetime of the testator or intestate (*Farrow* v. *Wilson*, L. R. 4 C. P. 744; *Stubbs* v. *Holywell Ry. Co.*, L. R. 2 Ex. 311, 313; *Werner* v. *Humphreys*, 2 M. & G. 853; *Campanari* v. *Woodburn*, 15 C. B. 400; *Siboni* v. *Kirkman*, 1 M. & W. 418, 423; *Tasker* v. *Shepherd*, 6 H. & N. 575; 30 L. J. Ex. 207; Wms. Exs., 10th ed., pp. 605, 1349 *et seq.*; and see *ante*, p. 83).

An executor cannot be liable, as executor, for goods sold to him, or work done at his request, or for money received by him for the use of the plaintiff, or for money lent to him; and claims against him as executor on these causes of action may be construed as claims against him personally (*Ashby* v. *Ashby*, 7 B. & C. 444; *Corner* v. *Shew*, 3 M. & W. 350; *Farhall* v. *Farhall*, L. R. 7 Ch. 123; 41 L. J. Ch. 146; *Dowse* v. *Gorton*, [1891] A. C. 190; 60 L. J. Ch. 745). An executor who carries on the business of the deceased after the death is personally liable for the debts he contracts in so doing (*In re Morgan*, 18 Ch. D. 93, 99; 50 L. J. Ch. 654; *Evans* v. *Evans*, 34 Ch. D. 597; *Dowse* v. *Gorton*, *supra*).

An executor is not liable, as such, in an action for interest on a debt due from him as executor, and forborne at his request, though he would be liable for interest due on a contract with the testator (*Bignell* v. *Harpur*, 4 Ex. 773). An executor may be liable in his representative capacity on accounts stated, and also for money paid for him as executor at his request (*Ashby* v. *Ashby*, 7 B. & C. 444; see also *Farhall* v. *Farhall*, *supra*; and 2 Wms. Exs., 10th ed., pp. 1413 *et seq.*).

As to the liability of an executor for his testator's funeral, see "*Funeral Expenses*," *post*, p. 178. As to the executor's liability in respect of rent and breaches of covenant, see *post*, p. 230.

By the Statute of Frauds (29 Car. 2, c. 3), s. 4, it is enacted (*inter alia*) that "no action shall be brought whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Such promise by an executor or administrator to answer personally is not binding unless supported by a new and sufficient consideration (2 Wms. Exs., 10th ed., p. 1417).

An executor, although he may be compelled by proceedings in the Chancery Division to perform his duties to the legatees (see 2 Wms. Exs., 10th ed., p. 1609; Judicature Act, 1873, s. 34), cannot be sued for a legacy in the King's Bench Division, except in cases where the legatee could formerly have brought an action at law against him. In general no action could have been brought for a legacy, whether general or specific. (See *Deeks* v. *Strutt*, 5 T. R. 690; 2 Wms. Exs., 10th ed., p. 1566.) But after assent by an executor to a specific legacy, he was held to be liable to an action at law by the legatee, because the property vests in the legatee upon the assent (*Williams* v. *Lee*, 3 Atk. 223; *Doe* v. *Guy*, 3 East, 120; 2 Wms. Exs., 10th ed., p. 1567; and as to cases where the assent may be retracted, see *Ib.*, p. 1108). So in the case of a pecuniary legacy, after the executor had admitted to the legatee that he had received the money, and held it to the use of the legatee in such a manner as to constitute a debt, the latter might recover it in an action at law upon an account stated. (See *Topham* v. *Morecraft*,

action accrued against the deceased, as, for instance, the price of goods sold and delivered by the plaintiff to the said *C. D., or*, work done and materials provided by the plaintiff for the said *C. D.* at his request, *or*, money received by the said *C. D.* for the use of the plaintiff, *or, as the case may be*].

Particulars :—

The like, on a Bond or Covenant of the Testator.

The plaintiff's claim is against the defendant as executor of [the last will of] *C. D.*, deceased [*or*, as administrator of [the personal estate of] *C. D.*, deceased], for principal and interest due on the bond of the said *C. D.*, dated the —— ——, 19— [*or*, due under the covenant of the said *C. D.* contained in a deed dated the —— ——, 19—].

Particulars :—

19—, —— ——. Principal due ..... £

Interest from the —— ——, ——, at —— per cent. per annum to date of writ .....

Amount due ..... £

---

8 E. & B. 972; 2 Wms. Exs., 10th ed., p. 1568.) So also a residuary legatee, or a person to whom he has assigned his rights under s. 25 (6) of the Judicature Act, 1873, may sue the executor on an account stated, where the executor has rendered an account showing the balance due (*Harding* v. *Harding*, 17 Q. B. D. 442; 55 L. J. Q. B. 462).

When an executor has distributed the assets and paid over the residue of an estate, an unpaid creditor of the testator is entitled to follow the residue to the extent of his debt, and residuary legatees who have received their legacies, may be compelled to refund so much of the amounts paid to them as may be requisite to satisfy his claim (*Fordham* v. *Wallis*, 10 Hare, 217; *Hunter* v. *Young*, 4 Ex. D. 256; 48 L. J. Ex. 689, where see a form of statement of claim under the repealed Rules of 1875; and see *post*, p. 231).

In actions against executors, all of them who have proved or administered should be joined as defendants (2 Chitty's Practice, 14th ed., 119; 2 Wms. Exs., 10th ed., p. 1569); but an executor who has renounced probate should not be joined (20 & 21 Vict. c. 77, s. 79).

A person cannot be sued as executor until he has either proved the will or intermeddled with the estate (*Douglas* v. *Forrest*, 4 Bing. 686; *Mohamidu Hadgiar* v. *Pitchey*, [1894] A. C. 437; 63 L. J. P. C. 90).

If one of several executors has died, the action should be against the survivors or survivor (2 Chitty's Practice, 14th ed., 1119; 2 Wms. Exs., 10th ed., p. 1570). As to an executor appointed *pendente lite*, see *In re Toleman*, [1897] 1 Ch. 866; 66 L. J. Ch. 452.

Actions against an Executor de son tort.]—An executor *de son tort* is a person who, without having been appointed executor, or without having taken out letters of administration, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor or administrator (1 Wms. Exs., 10th ed., p. 183; where see also what acts constitute an executor *de son tort*).

An *executor de son tort* has all the liabilities, though none of the privileges that belong to an executor (*Carmichael* v. *Carmichael*, 1 Phill. C. C. 103, *per* Lord Cottenham; *Rayner* v. *Kochler*, L. R. 14 Eq. 262; *Coote* v. *Whittington*, L. R. 16 Eq. 534; *Ambler*

Against an Executor or Administrator for Debts incurred by him in that Character after the Death (*e*).

1. The plaintiff's claim is against the defendant as executor of [the last will of] *C. D.*, deceased [*or*, as administrator of [the personal estate and effects of] *C. D.*, deceased], for money payable by the defendant as such executor [*or*, administrator] to the plaintiff for money paid by the plaintiff for the defendant as such executor [*or*, administrator] at his request.

Particulars:—[*See* "*Money Paid*," *post*, p. 254.]

2. [*If an account stated with the executor or administrator as such is also relied upon as a substantive ground of action, and not merely by way of evidence or admission of other alleged causes of action, add*, The plaintiff also claims against the defendant as executor [*or*, administrator] as aforesaid for money found to be due from the defendant as such executor [*or*, administrator] to the plaintiff upon accounts stated [*or*, upon an account stated] between the defendant as such executor [*or*, administrator] and the plaintiff, as mentioned in the following particulars.]

Particulars:—[*See* "*Account Stated*," *ante*, p. 71.]

The like, for Damages on Causes of Action accrued against the Deceased in his Lifetime (*e*).

1. The plaintiff claims against the defendant as executor of [the last will of] *C. D.*, deceased [*or*, as administrator of the personal estate and effects of *C. D.*, deceased], for damage suffered by the plaintiff from [*here state the cause of action accrued against the deceased, as, for instance* the breach by the said *C. D.* of a contract made between the said *C. D.* and the plaintiff on the —— ——, 19—, in writing and contained in letters dated —— [*or, as the case may be*] for sale and delivery by the said *C. D.* to the plaintiff of —— tons of —— iron at —— per ton to be delivered on rail at —— on the —— ——, 19—, and the said *C. D.* in his lifetime broke the said contract by not delivering any (*or*, —— tons, *as the case may be*) of the said iron].

Particulars of damage:—[*See* "*Sale of Goods*," *post*, pp. 280, *et seq.*]

The plaintiff claims £——.

---

v. *Lindsay*, 3 Ch. D. 198; *Williams* v. *Heales*, L. R. 9 C. P. 177; 1 Wms. Exs., 10th ed., p. 190). It is not necessary to describe him as *executor de son tort* in the claim, as he may be sued and described as in the case of an ordinary executor (1 Wms. Exs., 10th ed., p. 190; and see *post*, p. 648). An executor *de son tort* may be sued either separately or jointly with the rightful executor (Com. Dig. "Abatement," F. 10; 1 Wms. Exs., 10th ed., p. 191).

(*e*) See preceding note.

Against an Executor or Administrator for Damages for the Breach of a Contract made by the Deceased which was broken after his Death (e).

1. The plaintiff claims against the defendant as executor of [the last will of] *C. D.*, deceased [*or*, as administrator of the personal estate and effects of *C. D.*, deceased, who died intestate], for damage suffered by the plaintiff from the breach of an agreement made on the —— ——, 19—, verbally [*or*, in writing and contained in a memorandum of agreement dated the said day, *or*, of a covenant by the said *C. D.* contained in an indenture dated the —— ——, 19—, and made] between the said *C. D.* during his lifetime and the plaintiff, whereby it was agreed [*or*, covenanted by the said *C. D.*] that, &c. [*here state the agreement or covenant so far as material, and if the claim is for breach of an agreement not stated to be under seal, showing the consideration for it.*]

2. [*Here state the breach according to the facts, showing by the dates or otherwise that it occurred after the death, and giving particulars, where necessary.*]

Against an Executor of an Executor, or against an Administrator with the Will annexed, or an Administrator de bonis non, &c.: see the above forms of Claims by them respectively, which may readily be adapted, mutatis mutandis, to Claims against them.

By an Executor or Administrator continuing an Action brought by a sole Plaintiff, who has Died after Writ issued and before Delivery of Statement of Claim (f).

Between *A. B.* .....Plaintiff,
and
C. D. .....Defendant
(by original action),
And between *E. F.*, executor [*or* administrator] of
the said *A. B.* deceased .....Plaintiff,
and
C. D. .....Defendant
(by order dated —— ——, 19—.)

Statement of Claim.

1. This action was commenced by *A. B.*, who afterwards died [on the —— ——, 19—], and by an order dated the —— ——, 19—, it was

(e) See preceding note.

(f) On the death of a plaintiff or a defendant, where the cause of action survives, or continues to or against his executors or administrators, an order may be obtained *ex parte* at chambers that the proceedings in the action shall be continued by or against

ordered that the proceedings should be continued between the above-named *E. F.*, executor of [the last will of] the said *A. B.*, deceased [*or*, administrator of the personal estate and effects of the said *A. B.*, deceased], and the defendant.

2. The plaintiff as such executor [*or*, administrator] claims, &c. [*state the claim as in the preceding forms*].

Claim where an Action brought against a sole Defendant who died after Writ issued, and before Delivery of Statement of Claim, is continued against his Executor or Administrator (*g*).

Between *A. B.* .....Plaintiff,
and
C. D. .....Defendant
(by original action),
And between *A. B.* .....Plaintiff,
and
E. F., executor of *C. D.*, deceased
[*or*, administrator, &c.] .....Defendant
(by order dated the —— ——, 19—).

Statement of Claim.

1. This action was commenced against *C. D.*, who afterwards died on the —— ——, 19—, and, by an order dated the —— ——, 19—, it was ordered that the proceedings in this action should be continued between the plaintiff and the above-named *E. F.*, executor of [the last will of] the said *C. D.*, deceased [*or*, administrator of [the personal estate and effects of] the said *C. D.*, deceased].

2. [*State the claim as in the preceding forms.*]

Claim by Executors against an Agent of the Testator for not accounting.

1. The plaintiffs are the executors of *E. F.*, deceased.

2. From the year —— till his death on the —— ——, 19—, the said

---

them (Ord. XVII., rr. 1—4; "*Change of Parties*," *ante*, p. 30; see *Ashley* v. *Taylor*, 10 Ch. D. 768; 48 L. J. Ch. 406; *Andrew* v. *Aitken*, 21 Ch. D. 175; 51 L. J. Ch. 784; *Oakey* v. *Dalton*, 35 Ch. D. 700; 56 L. J. Ch. 823; *Hatchard* v. *Mège*, 18 Q. B. D. 771; 56 L. J. Q. B. 397; *Jones* v. *Simes*, 43 Ch. D. 607; 59 L. J. Ch. 351). But where it is clear that the cause of action does not survive or continue to or against the executors or administrators, such order will not be made. (See *Kirk* v. *Todd*, 21 Ch. D. 484; 52 L. J. Ch. 224; *Bowker* v. *Evans*, 15 Q. B. D. 565; 54 L. J. Q. B. 421; *Hatchard* v. *Mège*, *supra*; *Chapman* v. *Day*, 49 L. T. 436.)

As to when rights of action survive to or against executors or administrators, see the cases above cited, and see further, notes (*x*) and (*d*), *supra*, and "*Executors*," *post*, p. 385.

(*g*) See preceding note.

E. F. employed the defendant as his confidential agent in the management of a large building estate at ——.

3. The defendant as such agent received large sums of money for the said *E. F.*, for which he has not accounted and refuses to account.

The plaintiff's claim :—

1. Accounts of all sums received and paid by the defendant as agent for the said *E. F.*

2. Payment of the amount found due.

(*See R. S. C.*, 1883, *App. C.*, *Sect. II.*, *No.* 4.)

For other Forms of Claim by and against Executors or Administrators, see "*Bills of Exchange*," *ante*, p. 120; "*Insurance*," *post*, p. 205; "*Landlord and Tenant*," *post*, pp. 227 *et seq.*

Factor (*h*).

See "*Agent*," *ante*, p. 72, and "*Broker*," *ante*, p. 137.

Fixtures (*i*).

Claim for the Price of Fixtures.

1. The plaintiff's claim is for the price of fixtures in a house No. ——, —— Street, in the —— of ——, sold and given up by the plaintiff to the defendant, on the —— ——, 19—, upon the terms [contained in letters

(*h*) A factor is a person to whom goods are consigned for sale usually by a merchant residing abroad or at a distance from the place of sale; and he generally sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name (*per* Abbott, C.J., in *Baring* v. *Corrie*, 2 B. & Ald. 143; see also *Stevens* v. *Biller*, 25 Ch. D. 31; 53 L. J. Ch. 249; *Montagu* v. *Forwood*, [1893] 2 Q. B. at pp. 354, 355).

A factor has in general a lien upon the goods entrusted to him for sale for advances made to his principal, and for the general balance of account arising out of his employment as factor (*Houghton* v. *Matthews*, 3 B. & P. 458; see "*Lien*," *post*, p. 867); and he does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions to sell at a particular price and in the principal's name (*Stevens* v. *Biller*, *supra*).

As to the Factors Act, 1889 (52 & 53 Vict. c. 45), see *post*, p. 869.

(*i*) The sale and giving up possession of fixtures by a tenant who has a right to remove them to his landlord or to an incoming tenant, is not a sale of an interest in land within the Statute of Frauds (*Hallen* v. *Runder*, 1 C. M. & R. 266; *Lee* v. *Gaskell*, 1 Q. B. D. 700; 45 L. J. Q. B. 540). See as to the removal of tenants fixtures, *post*, p. 913.

bearing date, &c., *or, as the case may be*] that the defendant should, upon the giving up of the said fixtures, pay the plaintiff for the same the sum of £——.

2. The defendant has not paid the plaintiff the said £—— or any part thereof.

Particulars of the fixtures are contained in an inventory in writing made by ——, dated —— [*or*, are as follows :—]

Forbearance (*k*).

Claim on a Promise made in Consideration of Forbearance to prosecute an Action.

1. The plaintiff has suffered damage from the breach by the defendant of an agreement made on the —— ——, 19—, by letters dated [&c., *or, as the case may be*], whereby the defendant, in consideration that the plaintiff would forbear from further prosecuting [and discontinue] an action which he had brought in the High Court of Justice, King's Bench Division 19—, ——, No. ——, against the defendant to recover damages for breach of contract in not delivering certain yarn [*or, as the case may be*], promised the plaintiff

(*k*) Forbearance to commence or prosecute an action for a *bonâ fide* claim is a sufficient consideration for a promise, and it is sufficient for this purpose if the action forborne is an action to try a question which is, or which is fairly and honestly believed by the party seeking to enforce the promise to be, a doubtful question (*Longridge* v. *Dorville*, 5 B. & Ald. 117 ; *Cook* v. *Wright*, 1 B. & S. 559 ; 30 L. J. Q. B. 321 ; *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 451 ; 39 L. J. Q. B. 181 ; *Wilby* v. *Elgee*, L. R. 10 C. P. 497 ; 44 L. J. C. P. 254 ; *Miles* v. *New Zealand Co.*, 32 Ch. D. 266 ; 55 L. J. Ch. 801). Forbearance at request affords a sufficient consideration for a promise, even though the creditor does not bind himself to forbear (*Crears* v. *Hunter*, 19 Q. B. D. 341 ; 56 L. J. Q. B. 518). But forbearing an action where the plaintiff had no cause of action and knew that he had none, will not support a promise (*Wade* v. *Simson*, 2 C. B. 548 ; *Callisher* v. *Bischoffsheim*, *supra* ; *Ex p. Banner*, 17 Ch. D. 480 ; 32 L. J. Ch. 266, as explained in *Miles* v. *New Zealand Co.*, *supra*).

Forbearing to sue for an alleged balance of unsettled accounts as to which there is a *bonâ fide* dispute between the plaintiff and the defendant is a good consideration for a promise (*Llewellyn* v. *Llewellyn*, 3 D. & L. 318) ; but where there is no foundation for the dispute, and it is not a *bonâ fide* dispute on the part of the plaintiff, the plaintiff cannot enforce a promise, the consideration of which is his forbearing to take legal proceedings to enforce his unfounded claim (*Edwards* v. *Baugh*, 11 M. & W. 641 ; *Lloyd* v. *Lee*, 1 Str. 94 ; and see *Cook* v. *Wright*, and cases cited, *supra*). So, generally, any giving up or forbearing by agreement to enforce a legal right may afford a valid consideration for a promise (*Lamb* v. *Brewster*, 4 Q. B. D. 220 ; 48 L. J. Q. B. 277).

Where an action is compromised, an order to enforce the terms of the compromise can be made in the original action itself, and a separate action is not necessary, at any rate where such compromise involves only the questions in the action (*Eden* v. *Naish*, 7 Ch. D. 781 ; 47 L. J. Ch. 325 ; *Scully* v. *Lord Dundonald*, 8 Ch. D. 658 ; *Baker* v. *Blaker*, 55 L. T. 723 ; Jud. Act. 1873, s. 24 (7) ; Chitty's Forms, 13th ed., p. 182). But to set aside a compromise made in an action it is necessary to institute a fresh action (*Gilbert* v. *Endean*, 9 Ch. D. 259 ; *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673 ; 65 L. J. Ch. 432).

that he the defendant would within —— months deliver to the plaintiff —— of yarn at £—— per —— (*or, as the case may be*) [and would pay to the plaintiff his taxed costs of the said action].

2. The plaintiff accordingly did forbear to further prosecute [and discontinued] the said action [and the said costs were taxed at £——], but the defendant did not within the said —— months or at all deliver the said —— of yarn or any part thereof to the plaintiff [nor did he pay the said costs or any part thereof], whereby the plaintiff lost the value of the said yarn, viz., £—— [and the amount of the said costs].

FRIENDLY SOCIETY. See "*Societies*," *post*, p. 302.

FUNERAL EXPENSES (*l*).

Claim by an Undertaker for Funeral Expenses.

The plaintiff's claim is for money payable by the defendant to the plaintiff for goods sold and delivered and goods let on hire to the defendant and work done and materials provided and moneys paid by the plaintiff for the defendant at his request in and about the funeral of *G. H.*, deceased.

Particulars :—

(*l*) An executor, having assets, is liable personally, *de bonis propriis*, upon an implied contract, to pay for the funeral expenses of his testator; and he may be sued by the undertaker without any express order given by him, unless the undertaker has given exclusive credit to a third party. But the executor is only liable upon this implied contract for the expenses of a funeral suitable to the degree of the testator (*Brice* v. *Wilson*, 8 A. & E. 349; *Lucy* v. *Waldrond*, 3 Bing. N. C. 841). In order to charge the executor with any greater expense it must be shown that he sanctioned, or ordered it (*Ib.*; and see *Williams* v. *Williams*, 20 Ch. D. 659; 51 L. J. Ch. 385). The executor may defeat an action founded only on the implied contract, by showing that he has no assets (*Tugwell* v. *Heyman*, 3 Camp. 298; *Rogers* v. *Price*, 3 Y. & J. 28; *Corner* v. *Shew*, 3 M. & W. 350, 356; and see *Green* v. *Salmon*, 8 A. & E. 348). As to defences in actions against executors or administrators, see further, "*Executors*," *post*, p. 648.

A husband is liable for the expenses of his wife's funeral, and where a person in his absence necessarily employs an undertaker, and pays the expenses of the funeral of the wife, such person may recover the amount as money paid for and on behalf of the husband, under an agency, or authority to act on the husband's behalf, implied by the law (*Jenkins* v. *Tucker*, 1 H. Bl. 90; *Ambrose* v. *Kerrison*, 10 C. B. 776; *Bradshaw* v. *Beard*, 12 C. B. N. S. 344; 31 L. J. C. P. 273; see *In re M'Myn*, 33 Ch. D. 575). An infant widow may render herself liable for the funeral of her husband, as for necessaries (*Chapple* v. *Cooper*, 13 M. & W. 252).

GUARANTEES (*m*).

Claim on a Guarantee of a Debt.

The plaintiff's claim is for £—— payable by the defendant to the plaintiff under a guarantee in writing dated the —— ——, 19—, whereby in

(*m*) The Statute of Frauds, 29 Car. 2, c. 3, s. 4, provides that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

A guarantee is an accessory or secondary contract (*Lakeman* v. *Mountstephen*, L. R. 7 H. L. 17, 24; 39 L. J. Q. B. 275). To constitute a guarantee within the statute, the person whose debt is answered for must be some person other than the promisor or promisee, and he must be liable for such debt and continue liable whilst the guarantee is in force, and the promisee must be himself the creditor (*Simpson* v. *Penton*, 2 C. & M. 430; *Eastwood* v. *Kenyon*, 11 A. & E. 438; *Hargreaves* v. *Parsons*, 13 M. & W. 561; *Mountstephen* v. *Lakeman*, *supra*; *Harburg Comb Co.* v. *Martin*, [1902] 1 K. B. 778; 71 L. J. K. B. 529). A mere promise of indemnity, or a promise to answer for a debt of the promisee, is not within the statute (*Thomas* v. *Cook*, 8 B. & C. 728; *Wildes* v. *Dudlow*, L. R. 19 Eq. 198; 44 L. J. Ch. 341; *Guild* v. *Conrad*, [1894] 2 Q. B. 885; 63 L. J. Q. B. 721; and see *Harburg Comb Co.* v. *Martin*, *supra*). Nor is a promise to pay for goods, where the goods are supplied to another upon the sole credit of the promisor (*Birkmyr* v. *Darnell*, 1 Smith's L. C., 11th ed., p. 299). An agreement to give a guarantee is within the statute (*Mallet* v. *Bateman*, L. R. 1 C. P. 163; 35 L. J. C. P. 40).

A guarantee must be construed according to the intention of the parties as expressed in the writing, and evidence of the position and circumstances of the parties may be given at the trial for the purpose of ascertaining such intention (*Wood* v. *Priestner*, L. R. 2 Ex. 66, 282; 36 L. J. Ex. 127; *Heffield* v. *Meadows*, L. R. 4 C. P. 595; *Laurie* v. *Scholefield*, L. R. 4 C. P. 622; 39 L. J. C. P. 290; *Morrell* v. *Cowan*, 7 Ch. D. 151; 47 L. J. Ch. 73).

By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3, the consideration for the promise may be proved by parol evidence, but the promise must still be complete in the writing (*Holmes* v. *Mitchell*, 7 C. B. N. S. 361; 28 L. J. C. P. 301).

In claiming upon a guarantee it is better to allege in the body of the claim or in the particulars, that the guarantee is in writing, and also to give the date of it, otherwise particulars may be ordered to be given showing when and how the guarantee relied on was given (see *ante*, p. 38); but the omission to allege that the guarantee is in writing is no ground for objecting to the statement of claim in point of law, as the Statute of Frauds, if relied on, must be expressly pleaded (see "*Frauds, Statute of*," *post*, p. 663).

A surety is not entitled to a demand for payment upon the default of the debtor, or to notice of the default, unless he has expressly stipulated for it (*Sicklemore* v. *Thistleton*, 6 M. & S. 9; *Hitchcock* v. *Humfrey*, 5 M. & G. 559; and see *Price* v. *Kirkham*, 3 H. & C. 437; 34 L. J. Ex. 35); and in order to charge a surety upon a contract of guarantee it is not necessary to make a demand upon the principal debtor, unless such demand is necessary to charge the debtor (*Rede* v. *Farr*, 6 M. & S. 121; *Lilley* v. *Hewitt*, 11 Price, 494; *Warrington* v. *Furbor*, 8 East, 242; *Walton* v. *Mascall*, 13 M. & W. 452), or unless the surety has expressly stipulated that such demand shall be made (Leake on Contracts, 4th ed., p. 454).

By s. 5 of the Merc. L. A. Act, 1856, "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for

consideration that the plaintiff would give time to *E. F.* for the payment of a debt of £—— due from the said *E. F.* to the plaintiff and would forbear from suing the said *E. F.* for the said debt [until the —— ——, 19—], which the plaintiff accordingly did, the defendant agreed to pay to the plaintiff the said £——, on the [said] —— ——, 19—, if the said *E. F.* failed to do so. The said *E. F.* did fail to pay the said sum [on the said day, or at all] and the same is still unpaid.

Particulars :—

19—, —— ——. Principal due..... £——.

Claim on a Guarantee for the Price of Goods.

The plaintiff's claim is for the price of goods sold and delivered by the plaintiff to *E. F.*, under the following guarantee :—

—— ——, 19—.

Sir,—In consideration of your supplying goods to *E. F.*, I undertake to see you paid.

Yours, &c.,

To Mr. *A. B.* (Plaintiff). *C. D.* (Defendant).

Particulars :—

19—.	£	*s.*	*d.*
—— ——. 55 tons of coal at 20*s.*	55	0	0
Amount due.....	£55	0	0

(*See R. S. C.*, 1883, *App. C., Sect. IV., No.* 10.)

---

him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable." (See further, "*Guarantees*," *post*, pp. 674, 676.)

A surety who has made payments under the guarantee may, in general, recover the amount so paid as money paid for such principal at his request. (See "*Money Paid*," *post*, p. 255.) So also a surety who is liable as surety jointly (or jointly and severally) with others may, if he pays the debt guaranteed, recover from his co-sureties their shares of such debt, and similarly each of such sureties may recover contribution from his co-sureties in respect of any payment he may have made under the guarantee in excess of his proper proportion (*Ib.*).

As to actions on representations respecting the credit of third parties, see 9 Geo. 4, c. 14, cited "*Fraud*," *post*, p. 406.

Against a Principal Debtor and his Surety on a Guarantee for Goods Sold.

The plaintiff's claim is against the defendant *A. B.* as principal, and against the defendant *C. D.* as surety, for the price of goods sold and delivered by the plaintiff to *A. B.* on the guarantee by *C. D.* in writing dated the 2nd of February, 1882.

Particulars :—

1900.	£	*s.*	*d.*
2nd February, goods	47	15	0
3rd March ,, ...	105	14	0
17th March ,, ...	14	12	0
5th April ,, ...	34	0	0
Amount due	£202	1	0

(*See R. S. C.*, 1883, *App. C., Sect. IV., No.* 11.)

On a Guarantee for due Accounting by a Collector (*n*).

1. By an agreement in writing dated the —— ——, 19—, it was agreed between the plaintiff and the defendant that, in consideration that the plaintiff would employ *X. Y.* as his collector, the defendant would be answerable to the plaintiff for the due accounting to the plaintiff by *X. Y.* for, and due payment by *X. Y.* to the plaintiff of all moneys received on behalf of the plaintiff by *X. Y.* as such collector.

2. The plaintiff accordingly employed *X. Y.* as his collector, but *X. Y.* did not, whilst in such employment, duly account for to the plaintiff or make due payment to the plaintiff of all moneys received by him as such collector.

Particulars of sums not accounted for or paid over :—

19—, —— ——.	£.	*s.*	*d.*
From Brown & Co.			
From Wm. Jones			
Amount due			

3. The defendant has not paid to the plaintiff the said amount or any part thereof.

(*n*) In the case of a guarantee for the honesty of a servant, if the master, after he has discovered acts of dishonesty by the servant such as to render him unworthy of further confidence and to justify his dismissal, chooses to continue him in his service without acquainting the surety with the facts and obtaining his consent to such continuance, he thereby becomes disentitled to claim under the guarantee in respect of subsequent acts of dishonesty, it being a general principle that the person guaranteed has a duty not to act unfairly towards the surety (*Phillips* v. *Foxall*, L. R. 7 Q. B. 666 ; 41 L. J. Q. B. 293 ; and see *Mayor of Durham* v. *Fowler*, 22 Q. B. D. 394, 419—423 ; 58 L. J. Q. B. 246). But the principle only applies when the dishonesty is

A like Form.

The plaintiff's claim is for money payable by the defendant to the plaintiff under a written guarantee given by the defendant to the plaintiff dated the —— ——, 19—, for the due payment by *X. Y.* to the plaintiff of all moneys received by him as the plaintiff's collector on the plaintiff's behalf. The consideration for the guarantee by the defendant was the employment by him of *X. Y.* as his collector.

Particulars :—

The amounts received by *X. Y.* and not paid to the plaintiff are as follows [*state same, with dates and amounts and names of the persons by whom paid*].

—♦—

Heirs and Devisees (*p*).

Against Heir and Devisee, for a Debt due under a Covenant by the Testator (*q*).

The plaintiff's claim is against the defendant *C. D.* as [eldest son and] heir-at-law of *G. H.*, deceased, and against the defendant *E. F.* as devisee

committed in the course of the servant's employment, and when the master has power to dismiss him for it (*Caxton, &c. Union* v. *Dew*, 68 L. J. Q. B. 380). See further, *post*, p. 675.

(*p*) At common law a distinction was made between specialty debts in which the obligor bound himself only, and those in which he also bound his heir by name. The former did not bind the heir in respect of the lands of the ancestor which passed by descent to him ; the latter did, and the obligee could recover upon them against the heir, to the extent of the lands which the latter acquired by descent from the obligor. In neither case could the obligee recover against the devisee of the lands. The 11 Geo. 4 & 1 Will. 4, c. 47, gives a like remedy against the devisee upon specialty debts of the latter kind to the extent of the lands devised, and by the Conveyancing, &c. Act, 1881 (44 & 45 Vict. c. 41), s. 59, the distinction between specialty debts in which the obligor binds himself only, and those in which he binds his heir by name is abolished in respect of deeds executed subsequent to 1881, other than those in which the contrary is expressly provided, and such obligations bind the heirs and real estate as if heirs were named.

An important change has been effected by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), as to the devolution of "real property" within that Act, upon the death of the person entitled. The Act does not apply to copyholds or to customary freeholds as to which an admission or any act by the lord is necessary to perfect the title of a purchaser from a customary tenant. (See *In re Somerville's Contract*, [1903] 2 Ch. 583 ; 72 L. J. Ch. 727.) In the cases within the Act, that is, in cases of real estate in general, the estate vests upon the death in the executors or administrators, as though it were a chattel real, and not as formerly in the heir or devisee, and is held subject to their duties as executors or administrators, in trust for the parties beneficially entitled, until by conveyance or assent it is transferred to or vested in the heir or devisee, or otherwise dealt with in the course of the administration.

A consequence of this would seem to be that an heir or devisee of such real estate cannot be sued for a debt due under a covenant of the ancestor or testator until the estate has become thus vested in him, and that until that has happened the action should be against the executor or administrator. (See "*Executors*," *ante*, p. 167.)

(*q*) The action against the heir and devisee of a testator, upon specialties in which the

of the said *G. H.* of lands and hereditaments which were of the said *G. H.* under the last will of the said *G. H.* [dated the —— of ——, 19—], which said lands and hereditaments before the commencement of this action became vested in the defendants as such heir-at-law and devisee as aforesaid, for principal and interest due from the defendants *C. D.* and *E. F.* respectively to the plaintiff under a covenant of the said *G. H.* in a deed dated the —— ——, 19—, whereby the said *G. H.*, for himself and his heirs, covenanted with the plaintiff that he the said *G. H.* would pay to the plaintiff £——, with interest for the same at the rate of —— per cent. per annum, on the —— ——, 19—.

Particulars.

[*State the amount due for principal and interest, see "Agreements," ante*, p. 81.]

By Heir or Devisee of Lessor against Lessee on a Covenant in the Lease: see "Landlord and Tenant," post, p. 228.

Hire (*r*).

For the Hire of Goods.

The plaintiff's claim is for money due from the defendant for the hire of goods let by the plaintiff on hire to the defendant under an agreement in writing dated [&c., *or as the case may be*].

heir is bound, is founded on the 11 Geo. 4 & 1 Will. 4, c. 47. By. s. 2, testamentary dispositions of real estate whereof the testator was seised in fee, in possession, reversion, or remainder, are to be deemed void as against any person with whom the testator had entered into any bond, covenant, or other specialty binding his heirs. By s. 3, every such creditor shall have an action upon such specialties against the heir and devisee, or the devisee of such devisee, jointly. By s. 4, in case there shall not be any heir, the creditor may maintain an action against the devisee or devisees solely.

In an action against an heir, before the Judicature Acts, it was sufficient for the plaintiff to state the fact of the heirship, without stating how the defendant was heir, this being a matter more within the defendant's knowledge than the plaintiff's (*Denham* v. *Stephenson*, 1 Salk. 355; see *Derisley* v. *Custance*, 4 T. R. 75), and it is thought that this rule of pleading is still applicable in such cases. It may, however, sometimes be advisable to state the facts constituting the defendant's heirship, where it can be done shortly, or where the heirship is likely to be disputed.

It was not necessary, as against an heir, to allege that the ancestor died possessed of any real assets which descended to the heir, as it lay on the heir to show by way of defence that nothing in respect of which he could be rendered liable descended to him. (See "*Heirs and Devisees*," *post*, p. 678; Ord. XIX., r. 25, cited *ante*, p. 9.) But it would now seem correct to show that the lands, or some of them, had passed out of the hands of the executors or administrators and become vested in the parties sued. (See *note* (*p*), *ante*, p. 182.)

(*r*) See "*Bailments*," *ante*, p. 93, and *post*, p. 334; "*Conversion*," *post*, p. 344, and "*Reversion*," *post*, p. 474.

Particulars :—[*Give particulars of dates and items, as for instance—*]
19—, —— —— Hire of piano between these dates at
to —— ——. £—— a month as agreed ..... £——

Against the Hirer of Goods for Breaches of Agreement.

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing dated [*or, as the case may be*], whereby the plaintiff let certain household furniture and other goods on hire to the defendant for —— months at £—— per month, and the defendant undertook to use the said furniture and goods in a careful and reasonable manner during the continuance of such hiring, and to re-deliver the same at the expiration of such hiring to the plaintiff in as good a state and condition as they were in when so let to him (reasonable wear and tear only excepted).

2. The defendant used the said furniture and goods in a negligent and unreasonable manner, and when he re-delivered the same to the plaintiff on the —— ——, 19—, at the expiration of the said hiring, they were not in such a state and condition as aforesaid, and were greatly damaged and deteriorated otherwise than by reasonable wear and tear.

Particulars :—

Against a Hirer of Wagons for Demurrage of the Wagons : see "*Demurrage*," *ante*, p. 165.

The like for Damages for Detention beyond the allowed Time : see Ib.

Husband and Wife (*s*).

Claim by a Married Woman for a Debt contracted or on a Contract made during Coverture.

Between *A. B.* (a married woman) ..... Plaintiff,
and
C. D...... Defendant.

Statement of Claim.

The plaintiff is a married woman and the wife of *E. B.*, and her claim against the defendant is for [*here state the cause of action as in ordinary cases*].

(*s*) The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), by which it is amended, effected

Claim by a Married Woman for a Debt contracted or on a Contract made before Marriage.

[*Title as in preceding form.*]

The plaintiff is a married woman and the wife of *E. B.* [to whom she was married on the —— ——, 19—], and her claim against the defendant

---

important alterations in the law of husband and wife and in the procedure relating thereto.

In general, at common law, a married woman was incapable of contracting on her own account, and could not properly sue or be sued, either in contract or in tort, separately from her husband, though in certain cases she might sue or be sued jointly with him; she might, however, contract as agent for her husband, and when she so contracted, he was the proper person to sue or be sued upon the contract; though he might join the wife as a co-plaintiff where the consideration for the contract had proceeded solely from her, so that she was what was called the meritorious cause of action. This rule as to the wife's incapacity to contract was subject to certain exceptions, as, for instance, where the wife was judicially separated from her husband, or had obtained a protection order against him, or where the husband was civilly dead; and in those cases the wife could contract and could sue and be sued, as a *feme sole*. (See Leake on Contracts, 4th ed., pp. 385 *et seq.*)

In equity a married woman, who had separate estate not subject to a restraint against anticipation, might make contracts which, though they could not be enforced against her personally, were enforceable against such separate estate (*Aylett* v. *Ashton*, 1 M. & Cr. 105; *Johnson* v. *Gallagher*, 3 D. F. & J. 494; 30 L. J. Ch. 298; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 40 L. J. Ch. 394; and see *post*, p. 190).

Procedure in Actions by and against Married Women.]—By Ord. XVI., r. 16, "Married women may sue and be sued as provided by the Married Women's Property Act, 1882."

By s. 1 (2) of that Act, "A married woman shall be capable . . . . of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

By s. 12 of the same Act, "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any . . . proceeding under this section, it shall be sufficient to allege such property to be her property."

As to actions against a married woman in respect of ante-nuptial debts and liabilities, see ss. 13, 15, 19, cited *post*, pp. 188, 190.

By s. 23 of the same Act, it is enacted that "For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living." (See *Surman* v. *Wharton*, [1891] 1 Q. B. 491; 60 L. J. Q. B. 233.)

Although it is unnecessary to join the husband as co-plaintiff with the wife in any case in which she can sue alone under the provisions of the Act, he may properly be so joined where he has any rights of action on his own behalf in respect of the subject-matter of the action. (See *Beasley* v. *Roney*, [1891] 1 Q. B. 509; 60 L. J. Q. B. 408;

is for goods sold and delivered [*or, as the case may be*] by her before her marriage and whilst she was known as *A. G.* [*or*, for damage for breach of

---

and *post*, p. 411.) And he ought to be so joined where he is a joint-contractee with the wife in respect of a contract sued upon. (See *Hoare* v. *Niblett*, [1891] 1 Q. B. 781; 60 L. J. Q. B. 565.)

Similarly, although it is usually unnecessary to join the husband as a co-defendant with the wife, he may properly be so joined if he is under any personal liability to the plaintiff in respect of the subject-matter of the action, *e.g.*, where he is a joint contractor or a joint tort-feasor with the wife, or where he is liable for a tort committed by the wife. (See *Hoare* v. *Niblett*, *supra*; *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; 55 L. J. Q. B. 375; *Beaumont* v. *Kaye*, [1904] 1 K. B. 292; 73 L. J. K. B. 213; and see *post*, p. 410; and the Married Women's Property Act, 1882, ss. 14, 15, cited *post*, p. 188.)

Where a married woman contracts jointly with her husband or any other person, the ordinary rules as to the joinder of joint contractors as parties to actions on the contracts are applicable. (See *Hoare* v. *Niblett*, *supra*.)

By Ord. XVIII., r. 4, "Claims by or against husband and wife may be joined with claims by or against either of them separately." (See Ord. XVIII., rr. 1, 8, 9; *ante*, p. 52.) In an action against a married woman who has separate property vested in trustees for her, no order will be made against the trustees for payment of the amount of the judgment out of the settled property, unless they are parties to the action; but the plaintiff, without joining them, can obtain a charge upon the property and obtain equitable execution thereon by the appointment of a receiver. (See *In re Peace*, 24 Ch. D. 405; 49 L. T. 637.)

A married woman may be brought in as a third party where she is liable in respect of her separate property to the defendant for contribution or indemnity (*Gloucestershire Banking Co.* v. *Phillipps*, 12 Q. B. D. 533; 58 L. J. Q. B. 493; see *post*, p. 557).

The marriage of a female plaintiff or defendant pending the action does not cause the action to abate where the cause of action continues, nor does it in general render it necessary to join the husband as a party. (See Ord. XVII., rr. 1—4, cited *ante*, p. 30.)

In the King's Bench Division a female plaintiff should be described in the title of the action on the writ as either spinster, or widow, or married woman, and a female defendant ought also to be so described therein where practicable. (See Central Office Practice Rules, Ann. Prac., 1905, p. 1049.)

Contracts during Coverture.]—By the Married Women's Property Act, 1882, s. 1 (2), it is enacted (*inter alia*) that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract." Sub-sections (3) and (4) of that section have been repealed by s. 4 of the Married Women's Property Act, 1893, as from the date of the passing of that Act, viz., the 5th December, 1893, and do not apply to contracts entered into since that date. Previously to the repeal of these sub-sections, it was held that a married woman could not validly contract on her own account so as to bind her separate property under s. 1 of the Act of 1882, unless at the time of the contract she had some separate property which she could bind by her contracts, and with reference to which she could be deemed to have contracted, and that the onus of proving that fact in an action brought against her under that section lay upon the plaintiff (*Palliser* v. *Gurney*, 19 Q. B. D. 519; 56 L. J. Q. B. 546; *Leak* v. *Driffield*, 24 Q. B. D. 98; 59 L. J. Q. B. 89; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669).

The provisions of s. 1 (2), and of sub-ss. (3) and (4), only applied to what is termed free separate property, that is, separate property not subject to a subsisting restraint on anticipation. (See the M. W. P. Act, 1882, s. 19, cited *post*, p. 190; *Beckett* v. *Tasker*, 19 Q. B. D. 7; 56 L. T. 636; *Pelton* v. *Harrison*, [1891] 2 Q. B. 422; 60 L. J. Q. B. 742; *Braunstein* v. *Lewis*, 64 L. T. 365, 65 *ib.* 449; *Stogdon* v. *Lee*, *supra*.)

a contract in writing, dated the —— ——, 19— (*or, as the case may be*), made by her before her marriage and whilst she was known as *A. G.*, whereby the defendant agreed, &c., *proceed as in the ordinary form*].

Particulars:—

As to contracts entered into by married women (otherwise than as agents) upon or subsequently to the 5th December, 1893, the M. W. P. Act, 1893, s. 1, provides that—

"Every contract hereafter entered into by a married woman, otherwise than as agent,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

This proviso is construed, together with s. 19 of the Act of 1882 (*post*, p. 190), to have the effect of preventing execution against property which at or since the date of the contract was subject to the restraint, although the married woman has become a widow or discovert, in respect of a debt or liability incurred during the marriage (*Barnett* v. *Howard*, [1900] 2 Q. B. 784; 69 L. J. Q. B. 955; *Brown* v. *Dimbleby*, [1904] 1 K. B. 28; 73 L. J. K. B. 35; *Softlaw* v. *Welch*, [1899] 1 Q. B. 419; 68 L. J. Q. B. 940). The section does not affect contracts made by a married woman as agent for her husband (*Paquin* v. *Holden*, cited *post*, p. 191).

In an action against a married woman upon contracts within the above section it is unnecessary for the plaintiff to allege or prove that she had separate property at the date of the contract.

Ante-nuptial Debts and Liabilities of the Wife.]—By s. 22 of the M. W. P. Act, 1882, the M. W. P. Acts of 1870 and 1874 (33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50) were repealed. Such repeal, however, is subject to the saving contained in that section of rights acquired and liabilities incurred under the repealed Acts, and having regard to the provisoes contained in ss. 13 and 14, cited *infra*, of the Act of 1882, the rights and liabilities in respect of the ante-nuptial debts contracts and torts of a married woman will depend upon the date of her marriage.

Thus, if the marriage took place previously to the 9th of August, 1870 (the date of the coming into operation of the M. W. P. Act, 1870), those rights and liabilities will still be mainly governed by the common law in existence previously to that date. By that law, on marriage, the husband became liable to be sued jointly with the wife in respect of contracts made or torts committed by her before the marriage. (See *Beck* v. *Pierce*, 23 Q. B. D. 316, 320; 58 L. J. Q. B. 516; *Chubb* v. *Stretch*, L. R. 9 Eq. 535, 559; 39 L. J. Ch. 329.)

If the marriage took place after the 9th of August, 1870, and before the 30th of July, 1874 (the date of the coming into operation of the M. W. P. Act, 1874), the wife, by s. 12 of the M. W. P. Act, 1870, is liable to be sued as a *feme sole* for all her ante-nuptial debts, and any property belonging to her for her separate use is liable to satisfy such debts as if she had continued unmarried, and the husband, by the same section, is wholly exonerated from liability in respect of the wife's ante-nuptial debts.

If the marriage took place between the 30th of July, 1874, and the 1st of January, 1883 (the date of the coming into operation of the M. W. P. Act, 1882), the husband, by ss. 1, 2, of the M. W. P. Act, 1874, is liable for the wife's ante-nuptial debts, contracts, and torts, but to the extent only of the assets which are specified in s. 5 of that

Act; and he may further reduce his liability by deducting the amount of any payment of such debts made by him before the commencement of the action, and of any judgment *bonâ fide* recovered against him in respect of her ante-nuptial debts or liabilities in any action commenced previously to the action in question (*Fear* v. *Castle*, 8 Q. B. D. 380; 51 L. J. Q. B. 279). In actions under that Act, the husband and wife should be sued jointly (see ss. 1, 3, 4), and the husband cannot properly be sued alone.

The Act of 1874 did not alter the liability of the wife as regards her ante-nuptial debts, except by making her liable to be sued for them jointly with her husband (*vide supra*), and therefore, with that exception, the liability of a wife married between the 30th of July, 1874, and the 1st of January, 1883, in respect of her ante-nuptial debts, is the same as if she had been married during the period between the 9th of August, 1870, and the 30th of July, 1874, as to which *vide supra*. This liability of her separate property for her ante-nuptial debts under the Act of 1870 extends even to separate property which is subject to a restraint on anticipation (*Axford* v. *Reid*, 22 Q. B. D. 548; 58 L. J. Q. B. 230).

If the marriage took place after 1882, the rights and liabilities in respect of the wife's ante-nuptial debts, contracts, and torts, depends on the following enactments of the M. W. P. Act, 1882:—

By s. 13 of that Act, "A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory . . . under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed."

By s. 14, "A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

By s. 15, "A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if, in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so

entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally, and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."

Under these sections the husband and the wife may be sued in respect of the wife's ante-nuptial debts, contracts, or torts, either together or separately (see *Beck* v. *Pierce*, 23 Q. B. D. 316; 58 L. J. Q. B. 516); but their liability is not a joint one, the right of action against each being distinct; and, therefore, an unsatisfied judgment obtained against the wife in an action brought separately against her for an ante-nuptial debt is no bar to a subsequent action against the husband for the same demand (*Beck* v. *Pierce*, *supra*).

A wife is liable to have a judgment against her personally, under Ord. XIV., or otherwise, for a debt contracted by her before marriage (*Robinson* v. *Lynes*, [1894] 2 Q. B. 577; 63 L. J. Q. B. 759); but s. 19 of the Act of 1882 (*post*, p. 190) limits, in cases to which it is applicable, the property which may be made available to answer the judgment (*Birmingham Excelsior Society* v. *Lane*, [1904] 1 K. B. 35, 39; 73 L. J. K. B. 28).

Where a woman contracts debts during a first marriage, and afterwards marries again, the debts so contracted are "debts contracted before her marriage" within the meaning of s. 13 (*Jay* v. *Robinson*, 25 Q. B. D. 467; 59 L. J. Q. B. 367; see *Barnett* v. *Howard* and *Brown* v. *Dimbleby*, cited *ante*, p. 187).

Where the husband is sued under the Act of 1882 in respect of the wife's ante-nuptial debts or liabilities, the statement of claim should allege that the defendant has acquired or become entitled to such property from or through the wife.

Under ss. 14 and 15 of the M. W. P. Act, 1882, the husband's liability, if any, to be personally sued for the ante-nuptial debts of the wife continues even after her death. (See *Beck* v. *Pierce*, 23 Q. B. D. 316; 58 L. J. Q. B. 516.) If the wife survives the husband, she thereupon becomes again liable as a *feme sole* in respect of her ante-nuptial debts, contracts, and torts, as at common law (see *Chubb* v. *Stretch*, L. R. 9 Eq. 555; 39 L. J. Ch. 329; *Woodman* v. *Chapman*, 1 Camp. 189), except that in cases of marriage since 1882 property which was made subject to restraint against anticipation is not available in execution where the restriction is not contained in a settlement, or agreement for a settlement, of her own property, made or entered into by herself. (See The Married Women's Property Act, 1882, ss. 13, 19, *ante*, p. 188, *post*, p. 190; *Birmingham Excelsior Society* v. *Lane*, *supra*.)

Property of the Wife.]—At common law marriage operated as a gift to the husband of all personal chattels in possession then belonging to the wife in her own right; and similarly, any personal chattels in possession acquired by her in her own right during the coverture vested in the husband, so that he alone could bring actions in respect of them. (See Co. Litt. 351 *b*; *M'Neilage* v. *Holloway*, 1 B. & Ald. 218, 221; *Mason* v. *Morgan*, 2 A. & E. 30; *Dawson* v. *Prince*, 2 D. & J. 41; 27 L. J. Ch. 169.)

The husband had also at common law a qualified right in the *choses in action* of the wife, whether acquired before or during the marriage, for he might make them his own by reducing them into possession during the coverture, and they then vested absolutely in him; but, if they were not reduced into his possession during the coverture, they remained the property of the wife, if she survived him; and if she predeceased him, they passed to her administrator, so that the surviving husband could only sue for them in that character (*Checchi* v. *Powell*, 6 B. & C. 253; *Gaters* v. *Madely*, 6 M. & W. 423, 427; *Prole* v. *Soady*, L. R. 3 Ch. 220; *Fleet* v. *Perrins*, L. R. 4 Q. B. 500; 38 L. J. Q. B. 257; *Jones* v. *Cuthbertson*, L. R. 8 Q. B. 504; 42 L. J. Q. B. 221; and see Bullen & Leake, 3rd ed., pp. 171, 473). As to what amounted to such reduction into possession, see the last-cited cases, and *Nicholson* v. *Drury Estate Co.*, 17 Ch. D. 48, 55; 47 L. J. Ch. 192.

The rule at common law as to land and real estate of the wife (other than chattels real, such as leaseholds, &c.) was that the husband and wife were deemed to be seised thereof in right of the wife during the coverture, and the husband was entitled to a freehold interest therein and to the rents and profits thereof during the coverture, though after the coverture he had no interest in it, unless he became tenant by the curtesy (2 Blackst. pp. 126, 433).

As to the wife's chattels real, the common law rule was that the husband had a qualified interest in them, so that he might during the coverture use and enjoy them, or assign and dispose of them by act *inter vivos*, but, if he died during the coverture without having so assigned or disposed of them, they survived to the wife, while, if the wife died during the coverture, such of them as were in possession vested in him by his marital right (*Elder* v. *Pearson*, 25 Ch. D. 620; 32 W. R. 358; *Surman* v. *Wharton*, [1891] 1 Q. B. 491; 60 L. J. Q. B. 233).

In equity, however, real or personal property of any kind might be settled in trust for the separate use of a woman independently of her husband, and where property was so settled, it was regarded as belonging absolutely to the wife, and the husband had no right of interfering with or disposing of it. Such settlement might contain a provision restraining the wife during coverture from disposing of the future income of the settled property by way of anticipation, and in such case she could not during the coverture alienate the property or the future income thereof, or render it liable in respect of her debts or contracts (*Arnold* v. *Woodham*, L. R. 16 Eq. 29; 42 L. J. Ch. 578; *Stanley* v. *Stanley*, 7 Ch. D. 580; 47 L. J. Ch. 256; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; 50 L. J. Ch. 294; *In re Grey*, 34 Ch. D. 712; 56 L. J. Ch. 511; *Hood-Barrs* v. *Heriot*, [1896] A. C. 174; 65 L. J. Q. B. 352); but if she survived her husband, such restraint ceased to be operative during her widowhood, though, unless specially restricted to the first coverture, it would revive on her marrying again (*Hawkes* v. *Hubbuck*, L. R. 11 Eq. 5).

A restraint on anticipation does not apply to the arrears of income accrued due and payable at or before the date of a judgment, so as to protect such arrears (*Hood-Barrs* v. *Heriot*, *supra*), though it does apply to the arrears accruing due after the date of the judgment (*Whitely* v. *Edwards*, [1896] 2 Q. B. 48; 65 L. J. Q. B. 457; *Bolitho* v. *Gridley*, [1905] A. C. 98; 74 L. J. K. B. 430).

These doctrines of equity with respect to property settled to a married woman's separate use were extended by the Judicature Acts to every Division of the High Court, in the cases to which they applied; but, as regards property of a married woman not settled to her separate use, and not within the scope of those doctrines, the above-mentioned rules of the common law, subject to the exceptions introduced by the M. W. P. Act, 1870, continued to be, in general, applicable until the M. W. P. Act, 1882, came into operation.

Under the provisions of the latter Act, all real and personal property (including all chattels in possession or *choses in action*, and all real estate and chattels real) belonging or accruing to a married woman whose marriage took place on or after the 1st of January, 1883, or acquired on or after that date by a married woman whose marriage took place before that date, is the separate property of the married woman (see the M. W. P. Act, 1882, ss. 1, 2, 5, and s. 24); and she is, therefore, in general, the proper person to sue for the recovery or protection thereof, or for any injury thereto, in any case where such property is not vested in trustees for her. (See ss. 1 (2), 12, cited *ante*, p. 185.) That Act and the amending Act of 1893 contain the following saving clauses with respect to settlements and restraints upon anticipation:—

By s. 19 of the M. W. P. Act, 1882, "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have

any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

Similarly the M. W. P. Act, 1893, s. 1 (cited *ante*, p. 187), expressly exempts from the operation of that section any separate property of a married woman which is subject to a restraint on anticipation.

The law with respect to *paraphernalia* of the wife has not been affected by the M. W. P. Acts. (See *Tasker* v. *Tasker*, [1895] P. D. 1.)

Wife's Contracts as Agent].—The M. W. P. Act, 1893, s. 1, does not apply to, or render a wife liable on, contracts made by her as agent for her husband (*Paquin* v. *Holden*, 21 Times Rep. 361), and *primâ facie* a contract made by a married woman living with her husband for the purchase of necessaries which she has his authority to purchase, and in respect of which she intends to pledge his credit, is made by her as his agent (*Ib.*). The authority of the wife to contract as agent for her husband is a question of fact in each case ; but there is, during cohabitation, a *primâ facie* presumption in favour of her authority to contract for such domestic matters as are usually intrusted to the management of the wife, as for the reasonable supply of goods for the use of her husband, herself, or the household, according to the condition in which they live (*Phillipson* v. *Hayter*, L. R. 6 C. P. 38 ; 40 L. J. C. P. 14 ; *Montague* v. *Benedict*, 2 Smith's L. C., 11th ed., p. 488 ; *Seaton* v. *Benedict*, *Ib.*, p. 482 ; *Debenham* v. *Mellon*, 5 Q. B. D. 394 ; 6 App. Cas. 24 ; 49 L. J. Q. B. 497 ; 50 L. J. Q. B. 155). Such presumption of authority of the wife arising merely from cohabitation may in general be rebutted by proving that the husband had supplied her with sufficient funds for payment, whether the creditor had notice thereof or not (*Holt* v. *Brien*, 4 B. & Ald. 252 ; *Mizen* v. *Pick*, 3 M. & W. 481 ; *Richardson* v. *Du Bois*, L. R. 5 Q. B. 51 ; 39 L. J. Q. B. 69 ; *Eastland* v. *Burchell*, 3 Q. B. D. 432 ; 47 L. J. Q. B. 500 ; *Morel* v. *Earl of Westmorland*, [1903] 1 K. B. 64, 73, 74 ; [1904] A. C. 11 ; 72 L. J. K. B. 66) ; or by proving the express revocation of the authority by the husband, even though there has been no notice of the revocation to the parties dealing with her (*Jolly* v. *Rees*, 15 C. B. N. S. 628 ; 33 L. J. C. P. 177 ; *Debenham* v. *Mellon*, *supra*). But if there have been previous dealings of the same kind through the wife with the same person, which have been acknowledged by the husband, thus giving a foundation of special consent to the agency, it seems that revocation of authority would not be effectual without notice to the person dealing upon the faith of the continuance of the agency (Leake on Contracts, 4th ed., p. 398 ; *Debenham* v. *Mellon*, *supra* ; *Truman* v. *Loader*, 11 A. & E. 589).

There is no such presumption of authority during separation ; but a married woman living apart from her husband, if he has compelled her to do so, or if she has been compelled to separate herself from him by his misconduct, has, if she is without an adequate maintenance, an implied authority, which he cannot rebut, to bind him by contracts for necessaries (*Manby* v. *Scott*, 2 Smith's L. C., 11th ed., p. 497 ; *Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200 ; *Bazeley* v. *Forder*, L. R. 3 Q. B. 559 ; *Wilson* v. *Ford*, L. R. 3 Ex. 63 ; *Debenham* v. *Mellon*, *supra*), unless she has been guilty of adultery which has not been connived at or condoned by him (*Govier* v. *Hancock*, 6 T. R. 603 ; *Atkyns* v. *Pearce*, 2 C. B. N. S. 763 ; 26 L. J. C. P. 252 ; *Cooper* v. *Lloyd*, 6 C. B. N. S. 519 ; *Wilson* v. *Glossop*, 20 Q. B. D. 354 ; 57 L. J. Q. B. 161).

In the case of a wife living apart from her husband, the *onus* of proving that the circumstances are such as to render the husband liable to be charged lies on the party seeking to charge him (*Mainwaring* v. *Leslie*, M. & M. 18 ; *Johnson* v. *Sumner*, 3 H. & N. 261 ; 27 L. J. Ex. 341 ; Leake on Contracts, 4th ed., pp. 398, 399).

As in the case of any other agent, a husband may, by ratification, become liable on contracts made by his wife in excess of the authority given to her to contract as his agent (*Montague* v. *Benedict*, *supra* ; *Seaton* v. *Benedict*, *supra* ; *Millard* v. *Harvey*, 34 Beav. 237).

In cases where a husband would be liable for necessaries, he may be liable to an equitable claim for money lent to his wife and applied in procuring necessaries, or

paying for necessaries procured (*Harris* v. *Lee*, 1 P. Wms. 482; *Jenner* v. *Morris*, 3 D. F. & J. 45; 30 L. J. Ch. 361; *Davidson* v. *Wood*, 1 D. J. & S. 465; 32 L. J. Ch. 400; *Deare* v. *Soutten*, L. R. 9 Eq. 151).

As to what are necessaries, see *Hunt* v. *De Blaquiere*, 5 Bing. 550; *Bazeley* v. *Forder*, *supra*; *Reneaux* v. *Teakle*, 8 Ex. 680; *Ottoway* v. *Hamilton*, 3 C. P. D. 393; 47 L. J. C. P. 725.

If the credit was given exclusively to the wife, the husband is not liable (*Bentley* v. *Griffin*, 5 Taunt. 356; see *Jewsbury* v. *Newbould*, 26 L. J. Ex. 247; *Debenham* v. *Mellon*, *supra*).

Where the wife has express or implied authority to bind the husband by her contracts, the fact of her being possessed of separate property does not prevent her from contracting so as to pledge his credit (*Davidson* v. *Wood*, 1 D. J. & S. 465; 32 L. J. Ch. 400).

Actions between Husband and Wife.]—At common law a husband and wife, being regarded as one person, could not validly contract with each other or sue each other in contract or in tort. In equity, however, a married woman, being regarded as a *feme sole* with respect to her separate estate, could contract directly with her husband in respect of it, and could sue or be sued by him on such contract (*Butler* v. *Butler*, 14 Q. B. D. 831, 834; 16 *Ib.* 374; 55 L. J. Q. B. 55). This rule of equity was, by the Judicature Acts, rendered applicable in all the Divisions of the High Court, and the M. W. P. Acts have greatly extended its applicability. (See *Ib.*; *McGregor* v. *McGregor*, 21 Q. B. D. 424; 57 L. J. Q. B. 591; *Sweet* v. *Sweet*, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108; *Boston* v. *Boston*, [1904] 1 K. B. 124; 73 L. J. K. B. 17; M. W. P. Act, 1882, ss. 1 (2), 12.) The remedies given to a married woman by the M. W. P. Act, 1882, s. 12 (cited *ante*, p. 185), for the protection and security of her separate property, are expressly made applicable as against her husband.

A husband and wife may validly contract with each other as to conjugal rights, or as to compromising proceedings between them relating thereto, even without the intervention of a trustee (*Besant* v. *Wood*, L. R. 12 Ch. D. 605; 48 L. J. Ch. 697; *Aldridge* v. *Aldridge*, 13 P. D. 211; *McGregor* v. *McGregor*, *supra*).

As to a wife suing her husband on a covenant in a separation deed, see *Sweet* v. *Sweet*, *supra*; and see further "*Illegality*," *post*, p. 683.

A husband who after the marriage has lent money to or paid money for his wife cannot sue her for money lent to or paid at her request for her before the marriage, because marriage still operates, as at common law, as a release of debts or obligations which have accrued between the parties before marriage (*Butler* v. *Butler*, *supra*).

By s. 17, provision is made for the summary decision by a judge of the High Court of any question between husband and wife as to the title to or possession of property on application by summons. (See *Phillips* v. *Phillips*, 13 P. D. 220; 59 L. T. 183; *Tasker* v. *Tasker*, [1895] P. D. 1.)

Judicial Separations, Protection Orders &c.]—The effect of a judicial separation, as of a divorce, is to place the wife in the same position as to property, as to contracts, and as to actions, as if she were a *feme sole* (20 & 21 Vict. c. 85, ss. 25, 26; 21 & 22 Vict. c. 108, s. 7).

A protection order under the last-mentioned Acts, obtained by a wife who has been deserted by her husband, has a similar effect.

The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5, enables justices to make an order which is equivalent to a decree of judicial separation.

The effect of a divorce under the Matrimonial Causes Act, 1857, is to place a married woman in the position of a *feme sole* with respect to property and contract, and with respect to suing and being sued. (See *Capell* v. *Powell*, 17 C. B. N. S. 743; 34 L. J. C. P. 168.) But a decree *nisi* for the dissolution of the marriage does not change the *status* of the wife, as she remains a married woman until the decree is made absolute (*Norman* v. *Villars*, 2 Ex. D. 359; 46 L. J. Ex. 579).

Wife Executrix &c.]— A married woman may be executrix, administratrix, or trustee, without the consent of her husband. (See M. W. P. Act, 1882, ss. 1 (2), 18, 24.)

Claim against a Married Woman for a Debt contracted or on a Contract made during Coverture and since the 5th December, 1893 (*t*).

The ordinary form may be used, but the defendant should be described as a married woman in the title of the action and in the body of the claim, as for instance :—

The plaintiff's claim is for £—— due to him from the defendant, who is a married woman and the wife of *E. F.*, for goods sold and delivered by the plaintiff to the defendant.

Particulars :—

[*Set out the particulars.*]

The plaintiff claims £—— (*u*).

Claim against a Married Woman for a Debt contracted, or on a Contract made, during Coverture after 1882, *but prior to the 5th December*, 1893 (*x*).

The plaintiff's claim against the defendant, who is, and was at the date of the contracting of the debt hereinafter mentioned, the wife of *E. F.*, and possessed of, or entitled to separate property, is for money payable by her to the plaintiff for, &c., [*as the case may be, continuing as in the ordinary form, or, where the action is for damages for breach of contract*, The plaintiff has suffered damage by the defendant's breach of a contract in writing, (*or, as the case may be*) made between her and the plaintiff on the —— ——, 19—, for, &c., *as the case may be, stating the cause of action as in the ordinary form*]. The defendant was at the time of the making of the said contract, and still is, a married woman [*or*, the wife of *E. F.*], and possessed of or entitled to separate property.]

Claim against a Married Woman for a Debt contracted before Marriage when the Marriage took place after 1882 (*y*).

The plaintiff's claim is for £——, payable by the defendant, who is a married woman and the wife of *E. D.* [to whom she was married after

(*t*) In the case of debts contracted or contracts made since the 5th December, 1893, it is not necessary to allege that the defendant had or has separate estate. (See *ante*, p. 187.)

(*u*) It is not necessary to claim payment out of the separate estate. The judgment against a married woman is in the following form : "It is adjudged that the plaintiff recover against the defendant, a married woman, £—— and costs to be taxed, such sum and costs to be payable out of her separate property and not otherwise."

(*x*) In actions against a married woman upon contracts made during coverture and prior to the 5th December, 1893, it should be alleged in the Statement of Claim that the married woman was possessed of or entitled to separate estate at the date of the contract, and that she still was possessed or entitled to separate estate. (See *ante*, p. 186.)

(*y*) The judgment in respect of ante-nuptial liability against a married woman

1882], for goods sold and delivered [*or, as the case may be*] by the plaintiff to the defendant whilst she was unmarried and known as *C. G.*

Particulars :—[*State them as in ordinary cases.*]

Against Husband and Wife, married after 1882, *for a Debt contracted by the Wife before the Marriage* (*z*).

Between *A. B.* .....Plaintiff,

and

C. D. and *E. D.*, wife of the said *C. D.* ...Defendants.

Statement of Claim.

1. The plaintiff's claim is for money due from the defendants to the plaintiff for goods sold and delivered by the plaintiff to the defendant *E. D.*, before her marriage to the defendant *C. D.*, which took place after the commencement of the Married Women's Property Act, 1882 [*or, state the year of the marriage, showing it to have been subsequent to* 1882].

Particulars :—[*State the particulars with dates and items.*]

2. The defendant *C. D.*, upon or subsequently to the said marriage, acquired from or through his said wife, or became entitled from or through his said wife, to property belonging to her, which was and is more than sufficient in value to satisfy the plaintiff's claim for the price of the said goods [after making such deductions (if any) as he is entitled to make under the provisions of the said Act].

[*If the debt was contracted prior to the 5th December*, 1893, *add* : 3. The defendant *E. D.* has [*or*, is possessed of or entitled to] separate property belonging to her, independently of the defendant *C. D.*]

The plaintiff claims £——.

INDEMNITIES (*a*).

whose marriage is subsequent to 1882, is against her separate property excluding any property included in a settlement or agreement for a settlement made for her benefit by a stranger. (See *ante*, pp. 188, 190, 191.)

(*z*) See note, *ante*, p. 193.

(*a*) A mere indemnity, as distinguished from a guarantee, is not within s. 4 of the Statute of Frauds, and need not be in writing (*Hoyle* v. *Hoyle*, [1893] 1 Ch. 84; *Sutton & Co.* v. *Grey*, [1894] 1 Q. B. 285). So also a promise to answer for a debt or liability incurred by the promisee himself, is not within that section (*Thomas* v. *Cook*, 8 B. & C. 728; *Eastwood* v. *Kenyon*, 11 A. & E. 438; *Hargreaves* v. *Parsons*, 13 M. & W. 561; *Guild* v. *Conrad*, [1894] 2 Q. B. 885; 63 L. J. Q. B. 721; see also "*Guarantees*," *ante*, p. 179). Notice of the damnification is not a condition precedent in the contract, unless such notice was expressly stipulated for (*Cutler* v. *Southern*, 1 Wms. Saund., 1871 ed., p. 133; *Duffield* v. *Scott*, 3 T. R. 374). Under a contract of

Claim by the Acceptor of an Accommodation Bill on the Contract to indemnify him (*b*).

1. The plaintiff, at the request of the defendant, made verbally on the —— ——, 19— [*or*, contained in a letter dated ——, *or as the case may be*], and for his accommodation, accepted a bill of exchange for £—— dated the —— ——, 19—, payable —— months after date, drawn on him by the defendant, and delivered it to the defendant upon the terms implied from the circumstances, the plaintiff having lent his name for the defendant's accommodation as such acceptor without value [*or*, contained in the aforesaid letter, *or as the case may be*], that the defendant should indemnify the plaintiff against any loss or damage by reason of his so accepting and delivering the same.

2. The defendant did not indemnify the plaintiff against the said loss or damage, and the plaintiff was obliged to and did on the —— ——,

---

indemnity against a claim, all costs reasonably incurred by reason of the claim, and not merely those payable to the opposite party, are recoverable (*Howard* v. *Lovegrove*, L. R. 6 Ex. 43; 40 L. J. Ex. 13; *Smith* v. *Compton*, 3 B. & Ad. 407, as explained in *Parker* v. *Lewis*, L. R. 8 Ch. 1035; *The Millwall*, [1905] P. 155, 174, 175). See note (*c*), *post*.

Apart from any express promise, a contract of indemnity may in general be implied where one who is only secondarily liable performs, under compulsion of law, an obligation for which another person is primarily liable (*Roberts* v. *Crowe*, L. R. 7 C. P. 636, 637; 41 L. J. C. P. 200, 201). Such contract may also be implied "where two persons are equally liable for a debt, and the person who is not in the enjoyment of the property in respect of which the debt arises, and therefore only secondarily liable, is called upon to pay" (*Roberts* v. *Crowe*, *supra*; see also *Nevill's Case*, L. R. 6 Ch. 43; 40 L. J. Ch. 1). Thus there is an implied agreement between the original lessee and each successive assignee of a term that the latter shall whilst in possession indemnify the former from liability on breaches of the covenants of the lease (*Moule* v. *Garrett*, L. R. 5 Ex. 132; *Ib.*, 7 Ex. 101; 39 L. J. Ex. 69; 41 L. J. Ex. 62; and see *Crouch* v. *Tregoning*, L. R. 7 Ex. 88; *Bonner* v. *Tottenham Building Society*, [1899] 1 Q. B. 161; 68 L. J. Q. B. 114; *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148; 68 L. J. Q. B. 808). Similarly, where one person at the request of another does an act apparently lawful, which he was not otherwise under any obligation to do, and thereby injures the rights of a third person and so involves himself in liability, a right of indemnity will, in general, arise (*Toplis* v. *Grane*, 5 Bing. N. C. 636; *Dugdale* v. *Lovering*, L. R. 10 C. P. 196; 44 L. J. C. P. 197; see *Sheffield* v. *Barclay*, 74 L. J. K. B. 747; 21 Times Rep. 642). So an agent is in general entitled to indemnity from his principal against any liabilities caused by executing the orders of his principal, unless those orders are illegal (*Adamson* v. *Jarvis*, 4 Bing. 66; *Dugdale* v. *Lovering*, *supra*); but this rule does not extend to liabilities incurred by reason of the default or misconduct of the agent in the course of carrying out the orders (*Toplis* v. *Grane*, *supra*; *Thacker* v. *Hardy*, 4 Q. B. D. 685, 687; 48 L. J. Q. B. 289). See further, "*Money Paid*," *post*, p. 254; "*Insurance*," *post*, p. 201.

(*b*) The drawer or acceptor of an accommodation bill is entitled to recover against the party accommodated, not only the amount of the bill, but also the costs which he has been compelled to pay (*Jones* v. *Brooke*, 4 Taunt. 464; *Stratton* v. *Mattheus*, 3 Ex. 48); but not the costs of an action against him upon the bill which he ought to have paid without action (*Beech* v. *Jones*, 5 C. B. 696; and see *Bleaden* v. *Charles*, 7 Bing. 246). Where, however, such costs have been incurred at the defendant's request, and actually paid before action, they may be recovered as money paid at the defendant's request (*Garrard* v. *Cottrell*, 10 Q. B. 679).

19—, pay to *G. H.*, the holder of the said bill, the amount thereof, with £—— interest thereon.

On a Promise to indemnify the Plaintiff against defending an Action (*c*).

1. On the —— ——, 19—, *G. H.* brought an action against the plaintiff in the King's Bench Division of the High Court of Justice (19—, G. No.——) to recover a sum of £—— then in the hands of the plaintiff which was claimed by the defendant.

2. It was thereupon, on the —— ——, 19—, orally agreed between the plaintiff and the defendant that the plaintiff should defend the said action, and that the defendant should indemnify and save harmless the plaintiff from all loss and damage by reason of his defending the same.

3. The plaintiff accordingly defended the said action, and the said *G. H.*, on the —— ——, 19—, recovered judgment therein against the plaintiff for the said £——, and for £—— for costs of action.

4. The defendant has not indemnified and saved harmless the plaintiff from all loss and damage by reason of his defending the said action, whereby the plaintiff has been obliged to pay and has paid the said £—— for costs of the said action, and a further sum of £—— incurred by the plaintiff for his own costs and expenses in and about defending the said action.

Particulars:—

19—, —— ——. Amount of the taxed costs of the said *G. H.* paid this day .....

—— ——. Amount of the plaintiff's solicitor's bill of costs paid this day .....

For further Forms on Contracts of Indemnity, see Webster v. *Petre*, 4 Ex. D. 127; *Bowyear* v. *Pawson*, 6 Q. B. D. 540.

INFANT (*d*).

(*c*) Usually an indemnity against costs only covers party and party costs (*Maxwell* v. *British Thompson Houston Co.*, [1904] 2 K. B. 342; 73 L. J. K. B. 644), and does not extend to the costs of an appeal by the party indemnified (*Ib.*). But a party entitled to be indemnified may be entitled to solicitor and client costs (*Born* v. *Turner*, [1900] 2 Ch. 211; 69 L. J. Ch. 593; *Hooper* v. *Bromet*, 89 L. T. 39).

(*d*) By Ord. XVI., r. 16, "Infants may sue as plaintiffs by their next friends in the manner heretofore practised in the Chancery Division, and may, in like manner, defend by their guardians appointed for that purpose" (Daniell's Ch. Pract., 7th ed., pp. 115, 125). As to actions against infants, see "*Infancy*," *post*, p. 687.

An infant plaintiff, after coming of age, may elect to repudiate the action (2

Commencement of Statement of Claim by an Infant.

Between *A. B.*, an infant, by *C. D.*, his next friend ..... Plaintiff,
and
E. F. ..... Defendant.

Statement of Claim.

The claim of the plaintiff, who is an infant suing by *C. D.*, his next friend, is, &c. [*or*, The plaintiff, who is an infant and sues by *C. D.*, his next friend, has suffered damage by, &c.].

INJUNCTION (*e*).

The ordinary form applicable to the particular case may be used, but the statement of claim should contain a paragraph showing that the defendant threatens and intends to repeat the breach of contract complained of, as for instance:—

The defendant threatens and intends, unless restrained from so doing, to repeat [*or*, continue to commit] the breach of contract above complained of.

[*The claim should be or contain a claim for:—*

An injunction restraining the defendant from repeating or continuing the breach of contract complained of.]

Chitty's Pract., 14th ed., p. 1137; Daniell's Ch. Pract., 7th ed., p. 123; Simpson on Infants, 2nd ed., p. 481).

Where a contract made by an infant jointly with adult persons has been repudiated by the infant, an action on the contract may properly be brought against the adult contractors only. (See *Burgess* v. *Merrill*, 4 Taunt. 468; Bullen & Leake, 3rd ed., p. 477.)

Where one partner in a firm is an infant, the firm may be sued in the firm name, but judgment for a business debt cannot be recovered against the firm, but only against the firm "other than the infant partner" (*Lovell* v. *Beauchamp*, [1894] A. C. 607; 63 L. J. Q. B. 802; Ord. XLVIIIA., r. 1, cited "*Partners*," *post*, p. 267).

(*e*) See generally as to injunctions, "*Injunction*," *post*, p. 413.

The Court has a general jurisdiction to enforce by injunction a negative contract, that is, a covenant or agreement *not* to do a thing (Kerr on Injunctions, 4th ed., pp. 370 *et seq.*; *Doherty* v. *Allman*, 3 App. Cas. 709, 720; 39 L. T. 129; *Evans* v. *Ware*, [1892] 3 Ch. 502; 62 L. J. Ch. 256; *Nordenfelt* v. *Maxim Nordenfelt Co.*, [1894] A. C. 535; 63 L. J. Ch. 908; *Grimston* v. *Cunningham*, [1894] 1 Q. B. 125). This jurisdiction extends to cases of implied contracts, or breaches of confidence (*Pollard* v. *Photographic Co.*, 40 Ch. D. 348; 58 L. J. Ch. 251; *Robb* v. *Green*, [1895] 2 Q. B. 1, 315, 319; 64 L. J. Q. B. 593).

Negative stipulations, though forming part of a contract which could not as a whole be enforced by specific performance, may nevertheless be enforced by injunction, where they are severable from the rest of the contract (Kerr on Injunctions, 4th ed., pp. 356, 400; *Kernot* v. *Potter*, 3 D. F. & J. 447, 459; *Donnell* v. *Bennett*, 22 Ch. D. 835; 52 L. J. Ch. 414; *Grimston* v. *Cunningham*, *supra*; *Keith, Prowse &*

For Forms of Injunctions to restrain Breaches of Contract, see Daniell's Chancery Forms, 4th ed., pp. 692—696; *Seton's Judgments and Orders*, 5th ed., pp. 463—471.

INNKEEPER. *See post*, p. 415.

INSURANCE.

I. MARINE POLICIES (*f*).

Co. v. *National Telephone*, [1894] 2 Ch. 147; 63 L. J. Ch. 373). Although the contract or stipulation may be affirmative in form, it may be enforced by injunction if it sufficiently implies a negative (*Catt* v. *Tourle*, L. R. 4 Ch. 654; *National Bank* v. *Marshall*, 40 Ch. D. 112; 58 L. J. Ch. 229; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37; 70 L. J. Ch. 468; *Metropolitan Electric Supply Co.* v. *Girder*, *Ib.* 799, 805; *Ib.* 862). But a merely affirmative contract which does not imply any negative stipulation cannot be enforced by injunction, though in a proper case it may be enforced by specific performance (*Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416; 60 L. J. Ch. 428).

Where a party to a contract in effect agrees not to do a particular act, the fact that the contract stipulates for the payment of a sum of money by way of penalty for a breach of this agreement does not prevent the granting of an injunction against acts constituting such breach (*Howard* v. *Hopkyns*, 2 Atk. 371; *Bird* v. *Lake*, 1 H. & M. 111; *Howard* v. *Woodward*, 34 L. J. Ch. 47; *Jones* v. *Heavens*, 4 Ch. D. 636; *London, &c. Bank* v. *Pritt*, 56 L. J. Ch. 987).

Where it appears inferentially from the contract that the sum therein named to be paid on a breach is intended by the parties as ascertained damages to be paid as the price of the breach, then, if the promisee recovers judgment for or receives such sum, he cannot also obtain an injunction (*Sainter* v. *Ferguson*, 1 Mac. & G. 286; *Carnes* v. *Nisbett*, 7 H. & N. 158, 778; 30 L. J. Ex. 348; *General Accident Assurance* v. *Noel*, [1902] 1 K. B. 377; 71 L. J. K. B. 236). In some cases it may be at the option of the promisee whether he will sue for the fixed damages or for an injunction. The rights of the parties depend on the substance of the matter and but little on whether the sum is called in the contract itself "penalty" or "liquidated damages." (See "*Liquidated Damages*," *post*, p. 241; *National Bank* v. *Marshall*, *supra*; *Coles* v. *Sims*, 5 De G. M. & G. 1, 11; *Young* v. *Chalkley*, 16 L. T. 286.)

(*f*) A contract for sea insurance must be expressed in a policy, otherwise, unless it is an insurance against those losses without the actual fault or privity of the owner in respect of which his liability is limited by s. 503 of the Merchant Shipping Act, 1894, cited *post*, p. 293, it is invalid (The Stamp Act, 1891, ss. 91—93). A time policy is, in general, invalid if for more than twelve months (*Ib.*). But by 1 Edw. 7, c. 7, s. 11, a time policy for sea insurance may lawfully contain a "continuation clause" to the effect that if the ship is still at sea or the voyage otherwise not completed on the expiration of the policy, the subject matter of the insurance shall be held covered until the arrival of the ship or for a reasonable time not exceeding thirty days. By The Stamp Act, 1891 (s. 93 (3)), "A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months."

As to specifying the names of those interested, see 28 Geo. 3, c. 56, s. 1, *infra*.

An unstamped or insufficiently stamped policy cannot be received in evidence in civil proceedings except on payment of the unpaid duty, and a penalty of £100, and of a further sum of £1. (See ss. 14, 95 of the Stamp Act, 1891.)

The "slip" or memorandum of insurance, which is initialled by the underwriters before executing the formal policy itself, is not legally binding or enforceable (*Fisher* v. *Liverpool Mar. Ins. Co.*, L. R. 9 Q. B. 418; 43 L. J. Q. B. 114; *Home Mar. Ins. Co.* v. *Smith*, [1898] 2 Q. B. 351; 67 L. J. Q. B. 777); but it may be given in evidence whenever its contents are material to prove some collateral fact, as, for instance, to show the intention of the parties as to the nature of the risk (*Ionides* v. *Pacific Ins. Co.*, L. R. 6 Q. B. 674; L. R. 7 Q. B. 517; 41 L. J. Q. B. 190; *Cory* v. *Patton*, L. R. 7 Q. B. 304; L. R. 9 Q. B. 577; 41 L. J. Q. B. 195, n.; 43 L. J. Q. B. 181; *Lishman* v. *Northern Mar. Ins. Co.*, L. R. 8 C. P. 216; L. R. 10 C. P. 179; 42 L. J. C. P. 108; 44 L. J. C. P. 185; *Lower Rhine Ins. Co.* v. *Sedgwick*, [1899] 1 Q. B. 179; 68 L. J. Q. B. 186; and see *Ashling* v. *Boon*, [1891] 1 Ch. D. 568, 573; 60 L. J. Ch. 306). The insurance relates back to the time when the real agreement is made between the parties, that is, to the date of the "slip"; consequently the obligation which attaches to the relation of insurer and insured, that up to the time of insurance all material facts which would affect the judgment of an underwriter must be communicated, attaches up to the time of the making of the slip only, and not to that of the executing the formal policy (*Lishman* v. *Northern Mar. Ins. Co.*, *supra*; *Cory* v. *Patton*, *supra*; *Ionides* v. *Pacific Ins. Co.*, *supra*).

The requirement of a description of the risk or adventure in a policy necessitates a clear statement of the *termini* in a voyage policy (1 Arnould, 7th ed., pp. 22, 50; *Royal Exchange Insurance Corp.* v. *Vega*, [1901] 2 K. B. at p. 573; 6 Com. Cas. 19; cited on appeal, *post*, p. 682; and of the duration in a time policy (1 Arnould, 7th ed., pp. 22, 50, n.; and see *Edwards* v. *Aberayron Mutual Ins. Soc.*, 1 Q. B. D. 563, 573; 44 L. J. Q. B. 67). Where a partnership firm subscribes a policy, it is sufficient if the name of the firm is expressed in the policy. (See *Reid* v. *Allan*, 4 Ex. 326; *Hallett* v. *Dowdall*, 18 Q. B. 2.)

A contract by an incorporated company for payment of the amount insured out of the capital stock and funds of the company is, as against the company, tantamount to an absolute contract for payment by the company (*Sunderland Marine Ins. Co.* v. *Kearney*, 16 Q. B. 925). A contract by directors of an unincorporated company to pay out of the funds of the company was held to be equivalent to an absolute contract for payment by such directors, provided that there were such funds available for payment (*Dawson* v. *Wrench*, 3 Ex. 359; *Hallett* v. *Dowdall*, 18 Q. B. 2).

The action on a policy of sea insurance may be brought in the name of the party nominally effecting the insurance, being the agent or insurance broker, or in the name of the principal or party interested; and where the insurance has been effected by an agent in his own name on behalf of his principal, the principal may sue on the policy, although it contains nothing to show the agency (*De Vignier* v. *Swanson*, 1 B. & P. 364, n.; *Browning* v. *Provincial Ins. Co. of Canada*, L. R. 5 P. C. 263; *Provincial Ins. Co. of Canada* v. *Leduc*, L. R. 6 P. C. 224; *Williams* v. *North China Ins. Co.*, 1 C. P. D. 757). As to when policy effected by owners inures for the benefit of charterers, see *Boston Trust Co.* v. *British, &c. Ins. Co.*, [1905] 1 K. B. 637; 74 L. J. K. B. 273. Upon a Lloyd's policy or other policy of marine insurance in ordinary form, the broker effecting the insurance is, by custom, the party liable to the underwriter or insurer for the premiums, and entitled to sue the insured, by whom he is employed, for them (*Universo Ins. Co. of Milan* v. *Merchants' Marine Ins. Co.*, [1897] 2 Q. B. 93; 66 L. J. Q. B. 564; *British Marine Ins. Co.* v. *Jenkins*, [1900] 1 Q. B. at p. 308; 69 L. J. Q. B. at p. 181).

By 28 Geo. 3, c. 56, s. 1, it is not lawful for any person to effect any policy of insurance upon any ship, goods, or other property, without first inserting in such policy the name or names, or usual style and firm of one or more of the persons interested in such insurance, or of the consignors and consignees of the property insured, or of the persons residing in Great Britain who shall receive the order for and effect such policy, or of the persons who shall give the order to the agent immediately

employed to effect such policy; and by s. 2 it is declared that every policy made contrary to the meaning of this Act shall be void.

It is enacted by the Marine Insurance Act, 1745 (19 Geo. 2, c. 37), s. 1, "that no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty or any of his subjects, or any goods, merchandises, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes." This section renders policies containing the forbidden provisions void which relate to British ships, or even to probable or possible loading of goods on board British ships, or to advances on such ships, or to profits depending on the safety of such ships (*Allkins* v. *Jupe*, 2 C. P. D. 375; 46 L. J. C. P. 824; *Berridge* v. *Man On Ins. Co.*, 18 Q. B. D. 346; 56 L. J. Q. B. 223; *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214; 69 L. J. Q. B. 506); but it does not apply to foreign ships (*Thellusson* v. *Fletcher*, 1 Doug. 315; *Craufurd* v. *Hunter*, 8 T. R. 13; *Nantes* v. *Thompson*, 2 East, 385). It is therefore not necessary, in the case of a policy on a foreign ship, to allege that the plaintiff was interested in the ship (*Ib.*).

An insurable interest exists in any person who owns or has any right of property in the subject matter of the insurance, or who has a right or is under a liability arising out of a contract relating thereto of such a character that its preservation is of benefit to him or its destruction of prejudice (See 1 Arnould, 7th ed., p. 304; *Wilson* v. *Jones*, L. R. 2 Ex. 139, 150; *Anderson* v. *Morice*, L. R. 10 C. P. 609; 1 App. Cas. 713; 46 L. J. H. L. 11; *Stock* v. *Inglis*, 12 Q. B. D. 564; 53 L. J. Q. B. 356; *Inglis* v. *Stock*, 10 App. Cas. 263; 54 L. J. Q. B. 582; *Colonial Ins. Co. of New Zealand* v. *Adelaide Mar. Ins. Co.*, 12 App. Cas. 128; 56 L. J. P. C. 19; *Morgan* v. *Uzielli*, [1905] 2 K. B. 555).

By the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), s. 1, "Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected"; and by s. 2, "the assignment of a policy may be made by indorsement in the form given in the schedule." (See also Judicature Act, 1873, s. 25 (6), cited *ante*, p. 88.)

In an action by an assignee under the Policies of Marine Insurance Act, 1868, the claim should show that the assignee suing in his own name is entitled to the property insured by the policy.

The policy may be assigned after loss (*Lloyd* v. *Fleming*, L. R. 7 Q. B. 299; 41 L. J. Q. B. 93). When the interest of the assured in the subject-matter of an insurance has ceased, the policy cannot be assigned by him unless in pursuance of a previous agreement for assignment made with a person interested in such subject-matter (*North of England Oil Co.* v. *Archangel Ins. Co.*, L. R. 10 Q. B. 249; 44 L. J. Q. B. 121).

In statements of claim on marine policies, the interest in the subject of the policy is averred as being in the plaintiff, if the insured, or in the person or persons on behalf of whom he is suing (*Cohen* v. *Hannam*, 5 Taunt. 101). An averment of interest at the time of, or before effecting the policy, is immaterial; it is sufficient if the plaintiff be interested at the commencement of the risk (*Rhind* v. *Wilkinson*, 2 Taunt. 237). If the insured assigns away his interest after effecting the policy and before the loss, he cannot recover upon the policy, except where he is trustee of the policy for the assignee (*Powles* v. *Innes*, 11 M. & W. 10; *North of England Oil Co.* v. *Archangel Ins. Co.*, L. R. 10 Q. B. 249; 44 L. J. Q. B. 121). If the assignment was only by way of mortgage, he may recover (*Ward* v. *Beck*, 13 C. B. N. S. 668; 32 L. J. C. P. 113). In an action on a policy (lost or not lost) it is immaterial that the plaintiff acquired his interest and made the insurance after the loss, provided he had no notice of such loss

at the time of making the insurance (*Sutherland* v. *Pratt*, 11 M. & W. 296). The interest may be valued in the policy at a fixed sum independently of its real value, and the insured is entitled to recover such fixed sum for a total loss (*Irving* v. *Manning*, 6 C. B. 391; *Barker* v. *Janson*, L. R. 3 C. P. 303; 37 L. J. C. P. 105; *Lidgett* v. *Secretan*, L. R. 6 C. P. 616; 40 L. J. C. P. 257); or a proportionate part for a partial loss (*Lewis* v. *Rucker*, 2 Burr. 1167; and see *Dennon* v. *Home and Colonial Assurance Co.*, L. R. 7 C. P. 341; 41 L. J. C. P. 162).

If that which immediately caused the loss is a peril of the seas, an insurance against perils of the seas applies, although it may have been induced by negligence on the part of those in charge, the principle being that the proximate cause only is considered (*Wilson* v. *Xantho*, 12 App. Cas. 503; 56 L. J. Adm. 116; *Pink* v. *Fleming*, 25 Q. B. D. 396; 59 L. J. Q. B. 560). As to what are perils of the seas, see *Wilson* v. *Xantho*, *supra*; *Thames Ins. Co.* v. *Hamilton*, 12 App. Cas. 484; 56 L. J. Q. B. 626; *The Bedouin*, [1894] P. 1; *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455; 65 L. J. Q. B. 616). An injury caused to cargo or ship by collision is a loss by perils of the seas (*Buller* v. *Fisher*, 3 Esp. 67; *Smith* v. *Scott*, 4 Taunt. 126; *De Vaux* v. *Salvador*, 4 A. & E. 420; *Simpson* v. *Thomson*, 3 App. Cas. 279); but where a shipowner has been compelled to pay damages in consequence of a collision, such damages are not recoverable as loss by perils of the sea under a policy which contains no "collision clause" (*De Vaux* v. *Salvador*, 4 A. & E. 420). The "collision clause," usually inserted to insure damage payable for collisions did not include costs incurred by shipowners in successfully defending an action for collision (*Xenos* v. *Fox*, L. R. 3 C. P. 630; 4 *Ib.* 665; 37 L. J. C. P. 294; 38 *Ib.* 351). A "running down" clause is now frequently inserted to include the costs incurred or paid in consequence of litigation respecting collision (Marsden on Collision, 5th ed., pp. 271 *et seq.*; *Taylor* v. *Dewar*, 5 B. & S. 58; 33 L. J. Q. B. 141; *M'Cowan* v. *Baine*, [1891] A. C. 403).

A contract of insurance is, in general, a contract of indemnity, and an insurer who has by paying the loss indemnified the insured, is entitled to bring an action in the name of the insured against a wrongdoer who has caused such loss for damages for the injury (*Mason* v. *Sainsbury*, 3 Doug. 64; *Randal* v. *Cockran*, 1 Ves. Sen. 97; *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561; 50 L. J. Q. B. 329). If the insured, after payment of compensation by the insurer for the loss, sues a wrongdoer who has caused such loss, he is in general to be regarded as trustee of the proceeds of the action for the insurer (*Ib.*; and see *The Sir C. Napier*, 5 P. D. 73; 49 L. J. Adm. 23). See further, as to the right of subrogation, *post*, p. 207; and *Simpson* v. *Thomson*, 3 App. Cas. 279; *Sea Ins. Co.* v. *Hadden*, 13 Q. B. D. 706; 53 L. J. Q. B. 252; *King* v. *Victoria Ins. Co.*, [1896] A. C. 50.

By the 3 & 4 Will. 4, c. 42, s. 29, damages in the nature of interest may be given in actions on policies of insurance (see *post*, p. 211).

In the case of some mutual insurance societies or clubs there are provisions in the rules by which they are governed providing, in effect, that members only shall be entitled to sue for losses, or be liable to be sued for contributions or premiums; and where this is so, effect must be given to those provisions (*United Kingdom Association* v. *Nevill*, 19 Q. B. D. 110; *Montgomerie* v. *United Kingdom Association*, [1891] 1 Q. B. 370; 60 L. J. Q. B. 429). But in the absence of such provisions the owners, being the persons interested, are liable for contributions or premiums (*Great Britain A 1 Association* v. *Wyllie*, 22 Q. B. D. 710; 58 L. J. Q. B. 614; *British Marine Mutual Co.* v. *Jenkins*, [1900] 1 Q. B. 299). Where the members of a mutual insurance association agreed that the manager of the association should sue in his own name for all sums payable by members for premiums and contribution, it was held that the manager was not thereby enabled to sue (*Gray* v. *Pearson*, L. R. 5 C. P. 568; *Evans* v. *Hooper*, 1 Q. B. D. 45; 45 L. J. Q. B. 206).

Against an Underwriter, on a Policy of Insurance on a Ship for a Loss (g).

The plaintiff was interested to the amount of £——, under a marine policy of insurance for that amount, dated the —— ——, 19—, on the ship "Hero," subscribed by the defendant for £——.

Particulars.

1. Valued or open :—Valued at £20,000.
2. Voyage :—At and from Cardiff to Valparaiso.
3. [*Or*, time :—From noon of 1st January, 19—, to noon of 1st January, 19—.]
4. Premium to defendant :—£—— per cent.
5. Perils insured against causing loss :—Of the seas.
6. Loss :—Total [*or*, exceeding 3 per cent.].

The plaintiff claims £——.

(*R. S. C.*, 1883, *App. C., Sect. V., No.* 6.)

The like, against an Incorporated Company.

The plaintiff was interested to the amount of £—— under a marine policy of insurance made by the defendants [under their common seal] for that amount, dated the —— ——, 19—, on the ship "Hero."

Particulars :—[*The same as in the preceding form.*]

Against an Underwriter on a Marine Policy for a Constructive Total Loss (g).

The plaintiff was interested to the amount of £—— under a marine policy of insurance for that amount, dated the —— ——, 19—, on the

(*g*) The loss may be total or partial, or what is termed a "constructive total loss." A "constructive total loss" is when the damage is of such a character that the insured is entitled, if he thinks fit, to treat the loss as total, although the subject-matter of the insurance still exists *in specie*. There may be a "total loss," although the ship does still exist *in specie*, as, for instance, in the case of capture and sale upon condemnation, where capture is a peril insured against (*Cossman* v. *West*, 13 App. Cas. 160, 170). There may be a constructive total loss where a prudent uninsured owner would not think it worth while to repair the damaged ship (*Angel* v. *Merchants Marine Insurance Co.*, [1903] 1 K. B. 811 ; 72 L. J. K. B. 498). Under a policy against "total loss only," a constructive total loss may be recovered (*Adams* v. *M'Kenzie*, 13 C. B. N. S. 442 ; 32 L. J. C. P. 92). Notice of abandonment is, in general, a condition precedent to the right of the assured to claim for a "constructive total loss" (*Knight* v. *Faith*, 15 Q. B. 649 ; *Kaltenbach* v. *Mackenzie*, 3 C. P. D. 467 ; 48 L. J. C. P. 9). Where, however, there is substantially nothing to abandon, and the insurer would gain nothing by the notice of abandonment, the giving of such notice is held excused or waived (*Rankin* v. *Potter*, L. R. 6 H. L. 83 ; 42 L. J. C. P. 169 ; *Kaltenbach* v. *Mackenzie*, *supra*).

A sale authorised by necessity during the voyage may amount to a total loss, for which the assured may recover without notice of abandonment (*Roux* v. *Salvador*, 3 Bing. N. C. 266 ; *Rankin* v. *Potter*, *supra* ; *Cossman* v. *West*, 13 App. Cas. 160, 176).

body, tackle, boats, furniture, and equipment of the S.S. "British Queen," subscribed by the defendant for £——.

Particulars.

1. Valued or open :—Valued at £——.
2. Adventure :—At and from the port of —— to the port of ——, and until she should there have been safely moored at anchor for twenty-four hours.
3. Premium to the defendant :—£——.
4. Perils insured against causing loss :—Of the seas.
5. Loss :—Constructive total.
6. Notice of abandonment :—Given in writing by Messrs. ——, ship's agents, to defendant —— ——, 19—.

Against an Underwriter on a Policy of Insurance on Cargo for a Loss (h).

The plaintiff was interested to the amount of £3,000 upon a marine policy of insurance for that amount, dated the —— ——, 19—, on the cargo of the ship "Ellen," subscribed by the defendant for £250.

Particulars.

1. Valued or open :—Valued at £3,000.
2. Voyage :—At and from the port of —— to the port of ——.
3. Premium to the defendant :—£—— per cent.
4. Perils insured against :—Of the seas.
5. Loss :—Total [*or*, partial, being deterioration caused by leaking, amounting to £1,500, *or*, *as the case may be*].

On a Policy of Insurance upon Goods to recover for a General Average Loss (i).

1. The plaintiff was interested as owner [*or*, *state how*] in twenty tons of linseed shipped at Riga on board the ship "West Ella," and caused

(*h*) See note (*g*), *ante*, p. 202.

(*i*) "General average" is the proportionate contribution made by all persons interested in the ship, freight, or cargo, in respect of damage or loss sustained by any part of the ship or cargo which is sacrificed, in a time of danger, in order to preserve the rest, and for the common benefit of all concerned in the adventure. (See Abbott on Shipping, 14th ed., p. 751 ; 2 Arnould on Marine Insurance, 7th ed., pp. 1020 *et seq.* ; *Svensden* v. *Wallace*, 13 Q. B. D. 69 ; 10 App. Cas. 404 ; 54 L. J. Q. B. 497 ; *Royal Mail Co.* v. *English Bank of Rio*, 19 Q. B. D. 362 ; 57 L. J. Q. B. 31 ; *The Bona*, [1895] P. 125 ; 64 L. J. P. D. & A. 62 ; *The Leitrim*, [1902] P. 256 ; 71 L. J. P. 108 ; and see *Iredale* v. *China Traders Ins. Co.*, [1900] 2 Q. B. 515 ; 69 L. J. Q. B. 783.)

"Particular average" is damage or partial loss arising from the perils insured against, not amounting to a total or constructive total loss, and not including any loss

himself to be insured thereon by the defendants by a policy of marine insurance, dated the —— ——, 19—, made in consideration of the payments therein mentioned by the defendants for £——, at and from the said port of Riga to the port of Hull against perils of the seas, the said goods being warranted free from average, unless general, or the ship should be stranded [*or, as the form of the policy may be*].

2. Whilst on the said voyage, and whilst the plaintiff was interested as aforesaid, the ship, together with the said linseed, was, by perils of the seas, brought into great danger of being lost, and the master of the said ship, for the general safety and preservation of the ship and linseed and other cargo then on board, was obliged to, and did, on the —— ——, 19—, cut away and cast overboard masts, sails, and rigging of the ship, whereby the same were wholly lost.

3. The plaintiff, in consequence, became liable to pay, and paid, a proportionate part of the value of the said masts, sails, and rigging, thereby sustaining a general average loss of £—— [being £—— per cent. for each £100 so insured by him].

For Return of a Premium paid on a Policy of Insurance, where the Risk never attached (*k*).

The plaintiff's claim is for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff, being the amount of a premium paid by the plaintiff to the defendant upon a policy of sea insurance, dated the —— ——, 19—, and subscribed by the defendant for £——, whereby the plaintiff caused himself to be insured in the sum of £—— against the perils therein mentioned upon a voyage from —— to —— upon goods to be carried on the said voyage in the ship "——," beginning the adventure from the loading of the said goods on the said ship.

2. The said goods were never loaded on the said ship, and the said

---

or damage which amounts to "general average." (See Lowndes on Marine Insurance, 2nd ed., p. 170; 2 Arnould, 7th ed., p. 1137; and see *Kidston* v. *Empire Marine Ins. Co.*, L. R. 1 C. P. 535; 2 *Ib.* 357; 35 L. J. C. P. 250; 36 *Ib.* 150; *Price* v. *A 1 Ships Small Damage Association*, 22 Q. B. D. 580, 589; 58 L. J. Q. B. 269.)

(*k*) As the premium is paid in consideration of the risk to be incurred by the underwriter, the general rule is that, if the risk has never in fact commenced, the amount of the premium may be recovered back by the party who has paid it. (See *Tyrie* v. *Fletcher*, Cowp. 666; 2 Arnould, 7th ed., p. 1411.)

If the risk has once commenced, or if the policy be void for illegality, or avoided on the ground of fraud of the insured, the premium is not recoverable (3 Kent, Com. 341; *Allkins* v. *Jupe*, 2 C. P. D. 375; 46 L. J. C. P. 824); but if the policy be avoided by a material concealment or misrepresentation without fraud, the premium may be recovered, the risk never having attached (*Anderson* v. *Thornton*, 8 Ex. 425).

See further, *post*, p. 206.

ship made the said voyage, and no risk ever commenced upon the said adventure.

Particulars.

——, 19—. Amount of premium paid to the defendant under the said policy..... £——.

II. Life Policies (*l*).

By Executors against an Insurance Company upon a Policy of Insurance on the Life of the Testator (*l*).

The plaintiffs' claim is, as executors of [the last will of] *C. D.*, deceased, for £——, payable by the defendants to the plaintiffs as such executors

---

(*l*) By 14 Geo. 3, c. 48, s. 1, "No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by gaming or wagering, and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

By s. 2, "It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote." It is not sufficient for the name of the party interested merely to appear in the policy, but it must be inserted therein as the name of the party interested (*Hodson* v. *Observer Life Ass. Soc.*, 8 E. & B. 40; 26 L. J. Q. B. 303; *Evans* v. *Bignold*, L. R. 4 Q. B. 622).

By s. 3, "In all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events."

The interest in this statute means, in general, pecuniary interest. The interest of a father in the life of a child is not sufficient alone to support an insurance on the child's life (*Halford* v. *Kymer*, 10 B. & C. 724; *Worthington* v. *Curtis*, 1 Ch. D. 419; 45 L. J. Ch. 259). But a wife may insure her husband's life, and the husband his wife's (*Reed* v. *Key*, Peake's Add. Cases, 70; *Huckman* v. *Fernie*, 3 M. & W. 505).

A creditor has an insurable interest in the life of his debtor (*Anderson* v. *Edie*, Park, Ins., 8th ed., 914, 915), provided the debt is not an illegal one (*Dwyer* v. *Edie*, Park, Ins., 8th ed., 914); and a *cestui que trust* may insure the life of his trustee (*Collett* v. *Morrison*, 9 Hare 162).

Where one person causes another in whose life he has no pecuniary interest to insure such life in his own name, but at the expense and for the benefit of such first person, the policy is void under the statute (*Wainwright* v. *Bland*, 1 M. & W. 32; 1 M. & Rob. 481; *Shilling* v. *Accidental Death Ins. Co.*, 2 H. & N. 42; 26 L. J. Ex. 266). A promise made by a creditor to his debtor not to enforce a debt during his life, if made without consideration, is not an insurable interest of the debtor in the life of the creditor (*Hebden* v. *West*, 3 B. & S. 579; 32 L. J. Q. B. 85). A contract of employment at a salary for a certain number of years creates an insurable interest in the life of the employer (*Ib.*). It is sufficient that there is an interest in the life of the person insured at the time of effecting the insurance; and it is immaterial that it ceases afterwards. The value of the interest at the date of the policy may be recovered on the death, but no more (*Dalby* v. *India & Lond. Ins. Co.*, 15 C. B. 365; 24 L. J. C. P. 2;

under a policy of insurance for that amount upon the life of the said *C. D.*, dated the —— ——, 19—, effected by him with the defendants, and made by them in consideration of the payments made and to be made to them as therein mentioned. The said *C. D.* died on the —— ——, 19—, whilst the said policy was still in force.

The like, by an Assignee under 30 & 31 *Vict. c.* 144 (*m*).

1. The plaintiff's claim is for £——, payable by the defendants to the plaintiff upon a policy of insurance for £—— upon the life of *C. D.*,

---

Law v. *London Indisputable Life Co.*, 1 K. & J. 223; 24 L. J. Ch. 196). If the same interest be insured with several insurers, no more than the value of the interest insured can be recovered (*Hebden* v. *West*, *supra*).

By the Married Women's Property Act, 1882, s. 11, a married woman may effect a policy upon her own life or the life of her husband for her separate use, and a policy effected by a man on his own life and expressed to be for the benefit of his wife or children, or by a woman on her own life, and expressed to be for the benefit of her husband or children, creates a trust in favour of the objects therein named; provided that on proof that the policy was effected, and the premiums paid with intent to defraud creditors, the creditors become entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid.

By 3 & 4 Will. 4, c. 42, s. 29, damages in the nature of interest may be given on a policy of insurance. (See *post*, p. 211.)

The stamping of life policies is governed by the Stamp Act, 1891 (54 & 55 Vict. c. 39).

Some life insurance companies are entitled by their special Acts to sue or be sued in the name of their public officer or manager. (See Bunyon on Life Assurance, 3rd ed., pp. 15 *et seq.*)

Where the policy is not under seal the consideration should be stated in the claim; but where it is under seal it is sufficient to state that it is under seal.

Where a policy is avoided upon the ground of fraud on the part of the insurer or his agent, or of illegality, premiums already paid cannot be recovered back, and this is also the case where it is void by reason of absence of interest in the life insured (*Howard* v. *Refuge Society*, 54 L. T. 644; *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K. B. 550; 73 L. J. K. B. 373; and see *ante*, p. 204).

(*m*) By the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 1, any person or corporation "becoming entitled by assignment, or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys."

By s. 3, no assignment of a policy of life assurance shall confer any right to sue "until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or in case they have two or more principal places of business, then at some one of such principal places of business, either in England, or Scotland, or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed."

By s. 5, "Any such assignment may be made either by indorsement on the policy, or

deceased, dated the —— ——, 19—, effected by the said *C. D.* with the defendants, and made by them in consideration of the payments made and to be made to them as therein mentioned.

2. On the —— ——, 19—, *C. D.* assigned the said policy by indorsement thereon [*or*, by a separate instrument, *describing the same*] to the plaintiff, who, on the —— ——, 19—, gave to the defendants a written notice of the date and purport of such assignment at their principal place of business.

3. *C. D.* died on the —— ——, 19—.

On a Policy of Insurance on the Life of a Third Person (*n*).

1. The plaintiff's claim is for £——, payable by the defendants to the plaintiff under a policy of insurance for that amount, dated the —— ——, 19—, and made by the defendants in favour of the plaintiff upon the life of *G. H.* in consideration of the premiums mentioned in the said policy.

2. The plaintiff was at the time of the making of the said policy interested in the life of the said *G. H.* to the full amount of the said policy.

3. The said *G. H.* died on the —— ——, 19—.

III. Fire Policies (*o*).

On a Policy of Insurance against Fire.

1. By a policy of insurance dated the —— ——, 19—, made by the defendants, in consideration of premiums paid and to be paid to them by

---

by a separate instrument in the words and to the effect set forth in the schedule hereto, such indorsement or separate instrument being duly stamped."

It is provided by 54 & 55 Vict. c. 39, s. 118, that no assignment of a life policy shall confer any right to sue for the moneys assured or to give a valid discharge for them, unless the assignment is duly stamped.

(*n*) See *ante*, p. 205.

(*o*) A policy of fire insurance is void unless the person in whose favour it is made has an insurable interest in the goods insured and his name is inserted in the policy. (See 14 Geo. 3, c. 48, ss. 1 and 2, cited *ante*, p. 205.) Such interest must exist at the time of the insuring and of the fire (*Lynch* v. *Dalzell*, 4 Bro. P. C. 431; *Saddlers' Co.* v. *Badcock*, 2 Atk. 554), and should be alleged in the statement of claim. A warehouseman, wharfinger, or common carrier, has a sufficient insurable interest in the goods which are deposited with him (*Waters* v. *Monarch Ins. Co.*, 5 E. & B. 870; 25 L. J. Q. B. 102; *L. & N. W. Ry. Co.* v. *Glyn*, 1 E. & E. 652; 28 L. J. Q. B. 193).

As to what is an insurable interest, see *ante*, p. 200, and further *Marks* v. *Hamilton*, 7 Ex. 323; 21 L. J. Ex. 109; *North British Ins. Co.* v. *Moffatt*, L. R. 7 C. P. 25; 41 L. J. C. P. 1; *Ebsworth* v. *Alliance Marine Ass. Co.*, L. R. 8 C. P. 596; *Collingridge* v. *Royal Exchange Ass. Co.*, 3 Q. B. D. 173; 47 L. J. Q. B. 32. A policy of fire insurance is a contract of indemnity, and upon payment of the amount of the loss the insurer is entitled to be put in the place of the assured (*Darrell* v. *Tibbitts*, 5 Q. B. D. 560; 50 L. J. Q. B. 33; *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561; 50 L. J. Q. B. 329; *Castellain* v. *Preston*, 11 Q. B. D. 380; 52 L. J. Q. B. 366); and if at a subsequent time the

the plaintiff, the defendants insured the plaintiff against loss or damage by fire as follows—viz., £—— on a dwelling house, No. —, —— Street, —— [in the county of ——], and £—— on the furniture and other goods in the said house, the plaintiff being then, and at the time of the loss and damage hereinafter mentioned, interested in the said house and goods to the amounts so insured thereon respectively.

2. On the —— ——, 19—, the said house and goods were destroyed [*or*, damaged] by fire.

3. The amount of the said loss and damage is due from and payable by the defendants to the plaintiff, and has not been paid.

Particulars.

Particulars of the said loss and damage were duly delivered to the defendants on the —— ——, 19— [*or*, exceed three folios, and are delivered herewith, *or*, *state the particulars, if they do not exceed three folios*].

The plaintiff claims £——.

IV. Accidents (*p*).

Claim by Executor or Administrator on Accident Policy.

1. The plaintiff claims £——, as executor [*or*, administrator] of *E. F.*, deceased, on a policy of insurance in writing, dated —— ——, 19—, and made between the said *E. F.* and the defendants, whereby the defendants,

---

assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him (*Darrell* v. *Tibbitts*, *supra*); and similarly the full value of any right of the assured against third parties to which, but for renunciation on the part of the assured, the insurer would have been entitled to be subrogated, must be accounted for (*West of England Ins. Co.* v. *Isaacs*, [1896] 2 Q. B. 377; affirmed [1897] 1 Q. B. 226; 66 L. J. Q. B. 36). In the case of fire insurance the "slip" or "provisional insurance," which is frequently given by the insurer pending the execution of the formal policy, usually creates a legal contract, this not being prevented by any statutory provisions similar to those relating to marine insurance (*Thompson* v. *Adams*, 23 Q. B. D. 361; and see "*Insurance, Marine*," *ante*, p. 198). The stamping of fire policies is governed by the Stamp Act, 1891 (54 & 55 Vict. c. 39).

(*p*) What is in each case covered by a policy must depend upon the language of the policy itself, but it is a general rule of construction that, in policies of insurance the proximate and immediate cause only is to be regarded as the cause of the loss or accident (*Lawrence* v. *Accidental Ins. Co.*, 7 Q. B. D. 206; 50 L. J. Q. B. 522; *Pink* v. *Fleming*, 25 Q. B. D. 396, 397; 59 L. J. Q. B. 559; *Wilson* v. *Xantho*, cited *ante*, p. 201).

The word "accident" in what are called accident policies is generally used as in contrast with "design" and in contrast with "disease," and "death from accident" as in contrast with "death from natural causes."

Thus it was held that death from sunstroke was not an accident within the meaning of such a policy (*Sinclair* v. *Maritime Ass. Co.*, 3 E. & E. 478; 30 L. J. Q. B. 77); nor is death by heart failure brought on by physical exertion (*Scarr* v. *General Accident Ass. Co.*, [1905] 1 K. B. 387; 74 L. J. K. B. 237). Whilst, where the insured being seized

in consideration of a premium of £——, insured the said *E. F.* in the sum of £—— against death by accident.

2. The said *E. F.* died on the —— ——, 19—, by being accidentally run over at a level crossing at —— by a train of the —— Railway Company [*or, as the case may be*].

The plaintiff claims as executor [*or*, administrator] as aforesaid £——.

By the Assured for Allowance during Incapacity.

1. The plaintiff claims £—— under a policy of insurance in writing, dated the —— ——, 19—, made between the defendants and the plaintiff, whereby in consideration of a premium of £—— the defendants agreed to pay to the plaintiff £—— a week for any period [not exceeding twenty-six weeks] during which the plaintiff might be wholly incapacitated by an accident from attending to his business.

2. The plaintiff on the —— ——, 19—, met with an accident, viz., being knocked down and run over by a hansom cab at the corner of —— and —— Streets, in ——.

3. By the said accident the plaintiff was incapacitated from attending to his business for —— weeks, from the —— ——, 19—, till the —— ——, 19—.

The plaintiff claims £——.

INTEREST (*q*).

Claim for Interest.

The plaintiff's claim is for interest due from the defendant to the plaintiff under an agreement in writing dated the —— ——, 19— [*or*, a mortgage deed dated the —— ——, 19—, *or, as the case may be*].

Particulars :—

19—, —— ——. Interest at —— per cent. per annum on £——, from 19—, —— ——, to 19—, —— ——, as agreed .....£

---

with a fit at a railway station, fell off the platform on to the lines and was killed by a passing train, it was held that the death was caused by "accident" within the meaning of the policy (*Lawrence* v. *Accidental Ins. Co., supra*).

Subject to the above observations the word "accident" would seem in general to describe an event of an unintended and unforeseen character, causing personal injury, or where property is the subject of the insurance actual injury to the property (*Pugh* v. *L. B. & S. C. Ry. Co.*, [1896] 2 Q. B. 248, 253 ; 45 L. J. Q. B. 521 ; *Hamlyn* v. *Crown Accidental Ins. Co.*, [1893] 1 Q. B. 750 ; 62 L. J. Q. B. 409 ; and see *Fenton* v. *Thorley*, [1903] A. C. 443 ; 72 L. J. K. B. 787).

The stamping of policies against accident, or for payments during sickness or incapacity from personal injury, is governed by the Stamp Act, 1891, as explained by 58 Vict. c. 16. s. 13.

(*q*) Interest is recoverable as a debt in cases where it is due under the terms of a

The plaintiff also claims interest at the said rate from the latter date until payment or judgment.

---

contract, express or implied, for its payment, or under a statute fixing the amount. (See *Cameron* v. *Smith*, 2 B. & C. 305, 308, and cases cited *infra*.) Where it is payable as a debt, it may be the subject of a special indorsement on the writ; but where it is claimable merely as damages, a claim for it cannot be specially indorsed, except where such damages are declared by statute to be in effect liquidated damages ("*Special Indorsements*," *ante*, p. 68; *Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q. B. 674; 61 L. J. Q. B. 219; *Wilks* v. *Wood*, [1892] 1 Q. B. 684, 61 L. J. Q. B. 516; *Gold Ores, &c. Co.* v. *Parr*, [1892] 2 Q. B. 14; 61 L. J. Q. B. 522).

At common law interest was not payable on ordinary debts, unless by agreement, or by mercantile usage, and damages in the nature of interest were not given for non-payment of such debts (*Higgins* v. *Sargent*, 2 B. & C. 348; *Page* v. *Newman*, 9 B. & C. 378; *L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, [1892] 1 Ch. 120, 140, 146; 61 L. J. Ch. 294; [1893] A. C. 429, 439, 441; 63 L. J. Ch. 93).

An agreement to pay interest may, in some cases, be implied from the previous course of dealing between the parties (*Bruce* v. *Hunter*, 3 Camp. 466; *Frühling* v. *Schroeder*, 2 Bing. N. C. 77; *In re Anglesey*, [1901] 2 Ch. 548; 70 L. J. Ch. 810), and this may even authorise a charge for compound interest (*Eaton* v. *Bell*, 5 B. & Ald. 34; and see *Mosse* v. *Salt*, 32 Beav. 269; 32 L. J. Ch. 756; *Fergusson* v. *Fyffe*, 8 Cl. & F. 121).

Interest by way of damages was allowable at common law by the custom of merchants upon mercantile securities, such as bills of exchange, or promissory notes, where there was no express contract for the payment of interest (*Higgins* v. *Sargent*, *supra*).

Where a person breaks an agreement to do something other than pay money, and thereby becomes liable to pay damages, then in estimating those damages and as part of them, interest may be reckoned on money which would have become payable by him with interest, if he had not broken his agreement, and thereby prevented the principal from falling due (*L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, [1892] 1 Ch. at pp. 142, 151, cited *supra*).

Interest may be allowed on the price of goods agreed to be paid for by a bill or note, although the bill or note was never given (*Farr* v. *Ward*, 3 M. & W. 25; *Davis* v. *Smyth*, 8 M. & W. 399); and on a guarantee for the payment of a bill (*Hare* v. *Rickards*, 7 Bing. 254); and on a loan of money which was to be secured by a bill (*Denton* v. *Rodie*, 3 Camp. 493, 496). The allowance of interest as liquidated damages on bills of exchange and promissory notes containing no express contract for payment of interest is now provided for by the Bills of Exchange Act, 1882, s. 57. (See *ante*, p. 109.)

By 3 & 4 Will. 4, c. 42, s. 28, it is enacted that "upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law." By this section the debt or sum certain must be payable, if there has been no such demand in writing as specified in the section, at a "certain time," and it seems that it is not enough if it is payable on an event which may and probably will happen (*Merchant Shipping Co.* v. *Armitage*, L. R. 9 Q. B. at p. 114; 43 L. J. Q. B. 24; *L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, *supra*; but see *Duncombe* v. *Brighton Club Co.*, L. R. 10 Q. B. 371; 44 L. J. Q. B. 216). The section would seem to be applicable to those cases only in which there is a written instrument giving rise to an ascertained or fixed debt or sum (*Ib.*). A contract to pay a sum of money six

For Claim for Principal and Interest, where the Interest is claimed as a Debt or Liquidated Demand, see "*Agreement*," *ante*, p. 81; "*Bills of Exchange*," *ante*, p. 109; "*Bonds*," *ante*, p. 135; "*Money Lent*," *post*, p. 253.

Claim for Interest only, where it is not sought to recover the Principal: see "*Mortgage*," *post*, p. 265.

For Instances of Claims where Interest is claimed as Unliquidated Damages for the Non-payment of Money due, see "*Agent*," *ante*, p. 74; "*Fraud*," *post*, p. 400.

---

months after the death of A., who, at the time of the contract is alive, is a contract to pay at a "certain time" (*In re Horner*, [1896] 2 Ch. 188; 65 L. J. Ch. 694).

The service of a writ indorsed with a claim for interest is not a sufficient demand within this section (*Rhymney Ry. Co.* v. *Rhymney Iron Co.*, 25 Q. B. D. 146; 59 L. J. Q. B. 414; *Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q. B. 674, 680; 61 L. J. Q. B. 219). As to what is, see further *Geake* v. *Ross*, 44 L. J. C. P. 315; *Ward* v. *Eyre*, 15 Ch. D. 130; 49 L. J. Ch. 657.

By s. 29, "The jury, on the trial of any issue or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, in all actions of *trover* or *trespass de bonis asportatis*, and over and above the money recoverable in all actions on policies of insurance."

The discretionary powers of allowing interest given by the above-cited enactments to the jury, may be exercised by a judge of the High Court at the trial of an action which is tried without a jury. (See *Webster* v. *British Empire Life Ass. Co.*, 15 Ch. D. 169; 49 L. J. Ch. 769; *Cook* v. *Fowler*, L. R. 7 H. L. 27; 43 L. J. Ch. 855; *L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, *supra*.)

Interest under the statute can only be given by way of damages, and must be assessed by the jury or other tribunal at the trial or hearing (*Ib.*; *Berrington* v. *Phillips*, 1 M. & W. 48), who may, if they think fit, refuse to allow it (*Attwood* v. *Taylor*, 1 M. & G. 279; *Webster* v. *British Empire Life Ass. Co.*, *supra*; *Wilks* v. *Wood*, [1892] 1 Q. B. 684; 61 L. J. Q. B. 516). It will not be allowed where the delay in payment of the principal sum sued for was occasioned by the default of the plaintiff, as by his neglecting to take the necessary steps to ascertain and fix the amount payable (*L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, *supra*), or to obtain a legal title to receive and give a discharge for the money (*Webster* v. *British Empire Life Ass. Co.*, 15 Ch. D. 169; 49 L. J. Ch. 769).

Where interest is sought to be recovered as a debt due under a contract or a statute, the contract for its payment, or the facts which bring the case within the statute, should appear in the statement of claim (*Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q. B. 674, 682; 61 L. J. Q. B. 219; *Gold Ores, &c. Co.* v. *Parr*, [1892] 2 Q. B. 14; 61 L. J. Q. B. 522; and see R. S. C., 1883, App. C., Sect. IV., Forms 3—8). An express claim for interest should be inserted where it is sought to be recovered as damages for non-payment of a debt which does not ordinarily bear interest, *e.g.*, a debt for goods sold or money received.

Where a written security is given for the payment of money on a certain day, with interest at a specified rate up to that day, this does not imply a contract for payment of interest at that rate after the day, and if the debt is not then paid, any allowance

JUDGMENTS AND ORDERS (*r*).

Claim on a Judgment of the High Court.

The plaintiff's claim is for money due from the defendant to the plaintiff on a judgment for £—— and costs to be taxed, recovered by the plaintiff

---

claimed in respect of its subsequent non-payment is in the nature of damages for non-payment, and the amount of such damages depends upon the discretion of the tribunal before which the claim is made (*Cook* v. *Fowler*, L. R. 7 H. L. 27; 43 L. J. Ch. 865; *In re Roberts*, 14 Ch. D. 49; *Mellersh* v. *Brown*, 45 Ch. D. 225; 60 L. J. Ch. 43; and see the Bills of Exchange Act, 1882, s. 57 (3), *ante*, p. 109). It is usual to give such damages at the stipulated rate of interest, where that is not excessive (*Ib.*). In the case of a common money bond with a penalty the interest recoverable, whether accrued before or after the time fixed for payment, is regarded as a debt and not as damages, and this is so with regard to interest accrued after the time fixed for payment although interest is not mentioned in the bond, but is awarded merely as part of the terms on which relief is given against the penalty (*In re Dixon*, [1900] 2 Ch. 561; 69 L. J. Ch. 609). The equity jurisdiction to grant relief against unconscionable bargains for extravagant rates of interest made with expectant heirs, &c., is not affected by the repeal of the Usury Acts, and has been extended by the Money Lenders Act, 1903 (63 & 64 Vict. c. 51), *post*, p. 741.

(*r*) A final judgment of a Court of competent jurisdiction for the payment of a sum certain creates a debt, for which an action will lie (*Williams* v. *Jones*, 13 M. & W. 628, 633; *Hutchinson* v. *Gillespie*, 11 Ex. 798; *Grant* v. *Easton*, 13 Q. B. D. 302; 53 L. J. Q. B. 68; *Philpott* v. *Lehain*, 35 L. T. 855; *Marbella Iron Co.* v. *Allen*, 47 L. J. C. P. 601; 38 L. T. 815); though as to County Court judgments, *vide infra*. But no action will lie on a judgment which is not final, but remains subject to the control of the Court which pronounced it, and may be varied at its discretion. (See *Nourion* v. *Freeman*, 15 App. Cas. 1; 59 L. J. Ch. 337; *Bailey* v. *Bailey*, 13 Q. B. D. 855; 53 L. J. Q. B. 583; and *Westmoreland Slate Co.* v. *Feilden*, [1891] 3 Ch. 15; 60 L. J. Ch. 680.)

An action may in general be brought on an interlocutory order made in any cause or matter in the Supreme Court, for payment of money or costs to any person or party Ord. XLII., r. 24; *In re Boyd*, [1895] 1 Q. B. 611; 64 L. J. Q. B. 439; *Godfrey* v. *George*, [1896] 1 Q. B. 48; 65 L. J. Q. B. 249; *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q. B. 428; 68 L. J. Q. B. 801); but where it is brought unnecessarily the Court may refuse to allow the costs, or may even stay the action as an abuse of the process of the Court (*Pritchett* v. *English, &c. Syndicate, supra*). An action is not maintainable upon an order of the Divorce Court for alimony or the like (*Ib.*; and see *Bailey* v. *Bailey*, *supra*; and *Kerr* v. *Kerr*, [1897] 2 Q. B. 439; 66 L. J. Q. B. 838).

An action lies upon an order for costs which forms part of a final judgment of the House of Lords (*Marbella Iron Ore Co.* v. *Allen*, 47 L. J. C. P. 601).

An action will in general lie on the judgment of an inferior Court, whether a Court of record or not (*Read* v. *Pope*, 1 C. M. & R. 302; *Williams* v. *Jones*, 13 M. & W. 628). But no action can be maintained in the High Court on a judgment or order of a County Court (*Berkeley* v. *Elderkin*, 1 E. & B. 805; 22 L. J. Q. B. 281; *Austin* v. *Mills*, 9 Ex. 288; 32 L. J. Ex. 40), though such judgment may be the subject of a set-off or counterclaim. (See *Stanton* v. *Styles*, 5 Ex. 578.) An action will not lie in the High Court on an order made in the County Court for payment of costs of proceedings in the High Court (*Furber* v. *Taylor*, [1900] 2 Q. B. 719; 69 L. J. Q. B. 898).

In an action on a judgment of an inferior Court, the statement of claim should show that the original cause of action was within the jurisdiction of such Court. (See *Read* v. *Pope*, 1 C. M. & R. 302; *Williams* v. *Jones*, 13 M. & W. 628.)

Formerly, in an action on an English or Irish judgment brought by a person who was plaintiff in the original action, the plaintiff, by the 43 Geo. 3, c. 46, s. 4, was

prevented from recovering any costs of suit, unless the Court or a judge thereof otherwise ordered, and such an order was not in general made where the plaintiff might have realised his judgment by execution or otherwise (see 1 Chit. Prac., 12th ed., 494; *Philpott* v. *Lehain, supra*; *Marbella Iron Co.* v. *Allen, supra*). Such costs, as in other actions, are now subject to the discretion given to the Court or judge by Ord. LXV., r. 1, and s. 5 of the Judicature Act, 1880. (See *Garnett* v. *Bradley*, 3 App. Cas. 944; 48 L. J. Ex. 186.)

A foreign or colonial judgment for a liquidated demand in money establishes a debt between the parties, but does not merge or extinguish the original cause of action (*Nouvion* v. *Freeman, supra*; and see "*Judgment Recovered*," *post*, p. 705); and accordingly the plaintiff may sue in this country upon the original cause of action, if actionable here, or upon the judgment of the foreign Court, or upon both (*Walker* v. *Witter*, 1 Doug. 1, 5; *Sadler* v. *Robins*, 1 Camp. 253; *Hall* v. *Odber*, 11 East, 118; *Smith* v. *Nicholls*, 5 Bing. N. C. 208, 221).

The debt created by a foreign or colonial judgment, like that created by the judgment of an inferior Court not of record, is a debt by simple contract only, and not a debt of record. (See 1 Wms. Exors., 10th ed., p. 763.) Such debt may be the subject of a special indorsement (*Grant* v. *Easton*, 13 Q. B. D. 302; 53 L. J. Q. B. 68).

It need not be expressly alleged in a statement of claim upon the judgment of a foreign Court that the Court had jurisdiction over the parties or the cause, such jurisdiction being presumed until the contrary is made to appear (*Robertson* v. *Struth*, 5 Q. B. 941; *Henderson* v. *Henderson*, 6 Q. B. 288).

An action will lie on a decree of a colonial Court of Equity for the payment of money (*Sadler* v. *Robins*, 1 Camp. 253; *Henley* v. *Soper*, 8 B. & C. 16; *Henderson* v. *Henderson*, 6 Q. B. 288).

The judgments and decrees of Irish and Scotch Courts are, subject to the statutory provision next below cited, considered as foreign judgments in English Courts (*Harris* v. *Saunders*, 4 B. & C. 411; and see *Collins* v. *Mathew*, 5 East, 473).

By the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 1, as modified by s. 76 of the Judicature Act, 1873, and by s. 71 of the Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), a certificate of a judgment obtained in the High Court in Ireland for any debt, damages, or costs, may be registered in the High Court in England within twelve months of the date of such judgment, or within such extended time as may be permitted by that Court, and "shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid, in the Court in which it is so registered, and all the reasonable costs and charges attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment." And by s. 3, a certificate of a decree of the Court of Session in Scotland obtained for the payment of "any debt, damages, or expenses" may be registered in a similar manner, and with the like effect; and there is a like provision as to the recovery of "the reasonable costs, charges, and expenses" of such registration. (See *In re Howe Machine Co.*, 41 Ch. D. 118; *In re Low*, [1894] 1 Ch. 147.) A receiver may be appointed where, if the judgment had been an English one, that would have been a proper mode of execution (*Thomson* v. *Gill*, [1903] 1 K. B. 760; 72 L. J. K. B. 411).

Irish judgments not falling within the terms of the above enactment can be enforced by being enrolled in this country under 41 Geo. 3, c. 90.

By 1 & 2 Vict. c. 110, s. 17, "Every judgment debt shall carry interest at the rate of four pounds per cent. per annum from the time of entering up the judgment." This enactment does not apply to County Court judgments (*The Queen* v. *Essex County Court*, 18 Q. B. D. 704; 56 L. J. Q. B. 315). An order of the High Court for the payment to any person of costs, whether final or interlocutory, carries interest at the like rate from the making of such order (*Taylor* v. *Roe*, [1894] 1 Ch. 413; 63 L. J. Ch. 282; Ord. XLII., rr. 16, 24). Interest is not allowed upon a foreign judgment debt unless it forms part of the judgment (Leake on Contracts, 4th ed., p. 788).

against the defendant in an action brought by the plaintiff against the defendant in the [King's Bench] Division of the High Court (19—, A. No. ——).

Particulars :—

	£	s.	d.
19—, —— ——. Judgment debt			
Costs as taxed and certified on the —— ——, 19——.....			
Interest thereon [at the rate of four per cent. per annum] to date of writ.....			
Amount due .....£			

The plaintiff will also claim interest at the rate of four per cent. per annum on the said sum of £—— [*the amount of the said judgment, including the costs*] from the date of the writ herein until payment or judgment in this action.

Claim on an Order (*s*).

The plaintiff's claim is for £——, which, by an order of [Master] ——, dated the —— ——, 19——, made in the action of —— v. —— (19—, B., No. ——), the defendant was ordered to pay to the plaintiff.

Particulars :—

19—, —— ——. Amount ordered to be paid [*or*, Costs ordered to be paid which, as appears by certificate of Master ——, dated this day, were taxed at] .....£

On a Judgment of a French Court (*t*).

The plaintiff's claim is for £——, which is the equivalent in English money of —— francs, being the amount which the plaintiff by a judgment, dated the —— ——, 19——, of the Court of ——, in the Republic of France, which Court was duly constituted and held in accordance with the laws of the said Republic and had jurisdiction in that behalf, and according to the laws of the said Republic, recovered against the defendant, and which the defendant was by the said Court adjudged and ordered to pay to the plaintiff.

Particulars :—

The like, on the Judgment of a Russian Court: see Abouloff v. *Oppenheimer*, 10 *Q. B. D.* 297.

(*s*) See *ante*, p. 212.
(*t*) See *ante*, p. 213.

LANDLORD AND TENANT.

Claim for Use and Occupation (u).

The plaintiff's claim is for £——, payable by the defendant to the plaintiff for the defendant's use and occupation, by the plaintiff's permission, of a messuage and land, No. ——, in —— Street, in the —— of ——.

Particulars :—

19—, —— —— to —— ——.	Use and occupation between these dates at —— per week as verbally agreed on the —— ——, 19— [*or*, as agreed by agreement in writing dated —— ——, 19—, *or*, being a reasonable amount] ... £

(*u*) A contract to pay a fair compensation for use and occupation is implied by law from the fact that lands, &c. belonging to the plaintiff have been occupied by the defendant by the plaintiff's permission; the amount of compensation in such case depends on the value of the premises and on the duration of the occupation. As soon as the occupation ceases, the implied contract ceases, and as no express time is limited for payment, the compensation accrues due from day to day (*Gibson* v. *Kirk*, 1 Q. B. 850; *Churchward* v. *Ford*, 2 H. & N. 446; 26 L. J. Ex. 354; *Sloper* v. *Saunders*, 26 L. J. Ex. 275). An implied contract is, of course, negatived by an express agreement on the same matter.

The mere fact of the plaintiff's ownership of the land, &c., and of the occupation by the defendant, is sufficient *primâ facie* evidence of a contract to support this action (*Hellier* v. *Silcox*, 19 L. J. Q. B. 295; *Churchward* v. *Ford*, 2 H. & N. 446; 26 L. J. Ex. 354; *Leigh* v. *Dickeson*, 12 Q. B. D. 194; 15 Q. B. D. 60; 53 L. J. Q. B. 120; 54 *Ib.* 18). But this presumption may be rebutted by showing that the occupation was adverse to the consent of the plaintiff, or that it was under a contract with a third party, a stranger to the plaintiff, or by proof of any circumstances which are inconsistent with a contract between the plaintiff and the defendant (*Churchward* v. *Ford*, *supra*; *Cox* v. *Knight*, 18 C. B. 645; 25 L. J. C. P. 314; *Turner* v. *Cameron Coal Co.*, 5 Exch. 932; *Sloper* v. *Saunders*, 29 L. J. Ex. 275; *Levy* v. *Lewis*, 6 C. B. N. S. 766; 30 L. J. C. P. 141). A tenant or a party claiming under him cannot dispute the title of the landlord from whom he received possession, but he may show that the title has determined. (See *post*, p. 232.)

The assignee of the reversion may maintain this action (*Rennie* v. *Robinson*, 1 Bing. 147; *Standen* v. *Chrismas*, 10 Q. B. 135), but can only recover in respect of the use and occupation subsequent to the assignment (*Mortimer* v. *Preedy*, 3 M. & W. 602). So also the assignee of a mortgagor who has let a tenant into possession after the mortgage (*Hickman* v. *Machin*, 4 H. & N. 716; 28 L. J. Ex. 310). The action will also lie against the assignee of a tenancy created by simple contract who has occupied the premises (*How* v. *Kennett*, 3 A. & E. 659).

A tenant who has agreed to take premises, but who has never entered, is not liable for use and occupation, but must be sued for breach of his agreement (*Edge* v. *Strafford*, 1 C. & J. 391; *Lowe* v. *Ross*, 5 Ex. 553; *Towne* v. *D'Heinrich*, 13 C. B. 892; 22 L. J. C. P. 219; *Smallwood* v. *Sheppards*, [1895] 2 Q. B. 627; 64 L. J. Q. B. 727).

One who, having permission to occupy premises of the plaintiff, permits another to occupy them, is liable to the plaintiff for use and occupation, unless and until such other becomes the plaintiff's tenant, or occupies under the plaintiff's permission, for the possession of the tenant of a tenant is the possession of the tenant himself as against the superior landlord (*Bull* v. *Sibbs*, 8 T. R. 327; *Conolly* v. *Baxter*, 2 Stark.

For Rent (*x*).

The plaintiff's claim is for £——, being —— quarters rent due from the defendant to the plaintiff in respect of a house and premises, No. ——, in

---

525 ; *Allcock* v. *Moorhouse*, 9 Q. B. D. 366 ; 47 L. T. 404 ; see *Henderson* v. *Squire*, L. R. 4 Q. B. 170 ; 38 L. J. Q. B. 73).

The liability for use and occupation extends to any hereditament, corporeal or incorporeal, as a right of fishery (*Holford* v. *Pritchard*, 3 Ex. 793), a pew (*Israel* v. *Simmons*, 2 Stark. 356), or a watercourse (*Davis* v. *Morgan*, 4 B. & C. 8), &c.

An executor or administrator should in respect of occupation by him since the decease be charged as occupying in his own right, and not in his representative capacity (*Wigley* v. *Ashton*, 3 B. & Ald. 101 ; *Atkins* v. *Humphrey*, 2 C. B. 654).

(*x*) Rent accrued under a demise, whether by deed or simple contract, is recoverable, whether there has been an actual occupation or not.

By the Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2, all leases, estates, interests of freehold, or terms of years, or any uncertain interest in any lands or hereditaments, not put in writing, and signed by the parties so making the same, or their agents lawfully authorised by writing, shall have the effect of leases or estates at will only, except leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at least of the full improved value of the thing demised ; and by 8 & 9 Vict. c. 106, s. 3, a lease required by law to be in writing of any tenements or hereditaments made after the 1st October, 1845, is void at law unless made by deed. These enactments only apply when the tenancy is one that must last more than three years (*Ex p. Voisey*, 21 Ch. D. at p. 458).

An instrument void as a lease under the statute may be good as an agreement for a lease (*Bond* v. *Rosling*, 1 B. & S. 371 ; 30 L. J. Q. B. 227 ; *Rollason* v. *Leon*, 7 H. & N. 73 ; 31 L. J. Ex. 96 ; *Tidey* v. *Mollett*, 16 C. B. N. S. 298 ; 33 L. J. C. P. 235 ; *Stranks* v. *St. John*, L. R. 2 C. P. 376 ; 36 L. J. C. P. 118).

By the Statute of Frauds (29 Car. 2, c. 3), s. 4, no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

An agreement for a lease is a contract for an interest in lands within this section (*Edge* v. *Strafford*, 1 Tyr. 295 ; 1 Cr. & J. 391) ; so is a contract to procure a lease or assignment of a lease (*Horsey* v. *Graham*, L. R. 5 C. P. 9 ; 39 L. J. C. P. 58) ; but an agreement to pay money to a person in the event of his obtaining a lease is not (*Boston* v. *Boston*, [1904] 1 K. B. 124 ; 73 L. J. K. B. 17).

The above section did not render such agreements void if not in writing, but merely prohibited any action being brought upon them to charge any person thereon ; and since the Judicature Act, 1873, the position of a tenant, under an agreement for a lease, who has entered into possession thereunder and who is entitled to enforce specific performance of such agreement, is practically that of holding on the same terms as if a lease had been granted him containing the terms which would be contained in a lease executed in pursuance of such agreement (*Walsh* v. *Lonsdale*, 21 Ch. D. 9 ; 52 L. J. Ch. 2 ; *Swain* v. *Ayres*, 21 Q. B. D. 289, 293 ; 57 L. J. Q. B. 428 ; *Lowther* v. *Heaven*, 41 Ch. D. 248, 261, 264 ; 58 L. J. Ch. 482 ; *Foster* v. *Reeves*, [1892] 2 Q. B. 255 ; 61 L. J. Q. B. 763 ; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608, 617 ; 70 L. J. Ch. 814, 819).

An action for specific performance can be maintained if there have been acts of part performance unequivocally referable to, and done with a view to perform, the oral

—— Street, at ——, under an indenture of lease [*or*, an agreement in writing] dated the —— ——, 19--, made between the plaintiff and the defendant.

Particulars :--

		£	*s.*	*d.*
19--, March 25.	Quarter's rent due this day			
June 24.	Quarter's rent due this day			
	Amount due.....£			

For Rent under a Covenant in a Lease (*y*).

The plaintiff's claim is for rent due under a covenant contained in a lease, dated the —— ——, 19--, of a house and land called ——, at ——, for —— years, from the —— ——, 19--, whereby the defendant covenanted with the plaintiff to pay him rent for the said premises during the said term at the rate of £—— a year, by equal quarterly payments, on the usual quarter days [*or, as the case may be*].

Particulars.

One year's rent from the —— ——, 19—, to the —— ——, 19— [*or, as the case may be*]	£——.

agreement for a lease (*Tomkinson* v. *Straight*, 17 C. B. 697 ; 25 L. J. C. P. 85 ; *Maddison* v. *Alderson*, 8 App. Cas. 467 ; 52 L. J. Q. B. 737 ; *Miller* v. *Sharp*, [1899] 1 Ch. 622 ; 68 L. J. Ch. 322). Where the tenant has possession given him by the landlord according to the agreement, the taking of such possession is sufficient (*Maddison* v. *Alderson*, *supra*).

If a tenant enter into possession under a lease void under the statute, or an agreement for a lease, and pays rent at so much a year under it, the jury may conclude that he entered under a parol demise, on such terms contained in the void lease or agreement as are not inconsistent with a yearly tenancy. (See notes to *Doe* d. *Rigge* v. *Bell*, and *Clayton* v. *Blakey*, 2 Smith's L. C., 11th ed., pp. 119, 134.) So if being in possession he admits such rent to be due (*Cox* v. *Bent*, 5 Bing. 185). As to what terms are consistent with a yearly tenancy, see 2 Smith's L. C., 11th ed., 121 ; *Harris* v. *Hickman*, [1904] 1 K. B. 13 ; 73 L. J. K. B. 31.

A lease of incorporeal hereditaments was always required to be by deed, as a lease of a right of shooting (*Bird* v. *Higginson*, 6 A. & E. 824), or a lease of tithes (*Gardiner* v. *Williamson*, 2 B. & Ad. 336). But if an incorporeal hereditament has been used under a parol licence for which the defendant agreed to pay, he may be sued for the money due upon such executed consideration (*Thomas* v. *Fredricks*, 10 Q. B. 775, and see *Bird* v. *Higginson*, *supra*).

(*y*) An action lies against the lessee on the express covenant for rent, notwithstanding an assignment of the lease and acceptance by the landlord of the assignee as tenant (1 Wms. Saund., 1871 ed., 299 ; 2 *Ib.* 697, n. (3) ; see also *Hill* v. *E. & W. India Dock Co.*, 9 App. Cas. 448 ; 53 L. J. Ch. 842 ; *Baynton* v. *Morgan*, 22 Q. B. D. 74 ; 58 L. J. Q. B. 139). Under those circumstances the lessee would not remain liable on the mere reservation of rent in the lease (*Wadham* v. *Marlowe*, 8 East 314 ; 1 H. Bl. 437 ; 1 Wms. Saund., 1871 ed., 305).

For Rent of a Furnished House under an Agreement in Writing.

The plaintiff's claim is for rent due from the defendant to the plaintiff in respect of a furnished house, No. ——, —— Street, whereof the defendant became and was tenant to the plaintiff, under an agreement in writing, dated [*or*, an agreement made verbally on] the —— ——, 19—, for —— months from [that date], at the rent of £—— a month [*or, as the case may be*].

Particulars.

—— months' rent from the —— ——, 19—, to the —— ——, 19— ..... £——.

Claim for Board and Lodging (*z*).

The plaintiff's claim is for £——, payable by the defendant to the plaintiff for the boarding and lodging of the defendant by the plaintiff at the defendant's request, under an agreement in writing dated the —— ——, 19— [*or*, contained a letter dated ——, *or*, made verbally on the —— ——, 19—, *or, as the case may be*].

Particulars.

19—, May 3rd to Aug. 15.	Board and lodging at ——, at the agreed charge of £—— a week [*or*, at £—— a week, being a fair and reasonable charge]...	£——.

Landlord against Tenant for Damages for not keeping the Premises in Tenantable Repair (*a*)

The plaintiff has suffered damage from breaches by the defendant of his agreement with the plaintiff made by letters, dated respectively the —— —— and the —— ——, 19— [*or*, made verbally on the —— ——, 19—, *or, as the case may be*], under which he became tenant to the plaintiff of the house, No. —, —— Street, ——, upon the terms that he should keep the said house during his said tenancy thereof in tenantable repair.

The breaches are as follows :—[*State same.*]

The like for not using the Premises in a Tenant-like Manner (*a*).

1. The defendant became and was tenant to the plaintiff of a house known as ——, at ——, in the county of ——, [and of furniture of the plaintiff

(*z*) A contract for board and lodging, where no specific rooms are demised to the lodger, is not a contract for an interest in land within the Statute of Frauds (29 Car. 2, c. 3), s. 4, and need not be in writing (*Wright* v. *Stavert*, 2 E. & E. 721 ; 29 L. J. Q. B. 161).

(*a*) A contract to use premises in a tenant-like and proper or husband-like manner

therein] upon the [implied] terms, [*or*, upon the terms contained in an agreement dated ——, *or*, *as the case may be*], that the defendant would, during the said tenancy, use the said house [and furniture] in a tenant-like and proper manner.

2. The defendant during the said tenancy used the said house [and furniture] in an untenant-like and improper manner.

Particulars:—[*Set out particulars of the breaches and the damages.*]

For not delivering up Fixtures upon the Premises in good Repair.

1. The defendant became and was tenant to the plaintiff of a house of the plaintiff, No. ——, —— Street, for a term of —— years, from the —— ——, 19—, upon the terms [amongst others] contained in an agreement bearing date the —— ——, 19— [*or*, *as the case may be*], that the defendant should, at the expiration of the said term, deliver up to the plaintiff the said house, with all the fixtures therein, in the same state and condition as they were in at the commencement of the said term, reasonable wear and tear only excepted.

2. The said term expired on the —— ——, 19—, by effluxion of time [*or*, *as the case may be*] and the defendant then delivered the said house up to the plaintiff, but he did not deliver up to him the fixtures therein in the same state or condition as they were in at the commencement of the said term, reasonable wear and tear only excepted.

Particulars.

The following fixtures were broken or damaged:—

[*State same, specifying, as far as practicable, the extent and amount of damage.*]

The plaintiff sustained damage as follows:—[*Set out particulars of the damages.*]

Landlord against Tenant for Breach of Covenant to Repair (*b*).

1. By a repairing covenant contained in a lease under seal from the plaintiff to the defendant, dated the —— ——, 19—, of a house, No. 401, Piccadilly,

---

is implied by law from the mere fact of the tenancy, in the absence of any express agreement on the subject. (See further, "*Waste*," *post*, p. 506.)

(*b*) In an action by a landlord against a tenant for breach of contract to keep the demised premises in repair, the measure of damages during the continuance of the lease is the diminution in value of the reversion (*Turner* v. *Lamb*, 14 M. & W. 412; *Mills* v. *East London Union*, L. R. 8 C. P. 79; 42 L. J. C. P. 46; *Joyner* v. *Weeks*, [1891] 2 Q. B. 31; 60 L. J. Q. B. 510; *Henderson* v. *Thorn*, [1893] 2 Q. B. 164; 62 L. J. Q. B. 586); but the measure of damages where the covenant is contained in an underlease is not the same as in the case of a direct lease with a freehold reversion, as

for seven years from the —— ——, 19—, the defendant covenanted to keep the premises in such repair and condition as therein mentioned.

2. The premises were, during the term, out of such repair as was required by the covenant.

3. They were yielded up out of such repair at the expiration of the term.

4. Particulars of dilapidations were delivered to the defendant's solicitor on the —— ——, 19—, and exceed three folios.

(*R. S. C.*, 1883, *App. C., Sect. V., No.* 9.)

A like Form, upon an Agreement to Repair (*c*).

1. The plaintiff, by deed [*or*, agreement in writing] dated the —— ——, 19—, let to the defendant a house, No. ——, —— Street, ——, to hold

in the former case the liability of the lessee to the freeholder must be taken into consideration, and for that purpose the cost of putting the property into repair at the end of the lease may be considered (*Ebbetts* v. *Conquest*, [1895] 2 Ch. 377; 64 L. J. Ch. 702; [1896] A. C. 490; 65 L. J. Ch. 808). Where the plaintiff is a sub-lessor, whose lease is determined by a forfeiture not shown to have been wholly caused by the breach of the sub-contract by the defendant, the sub-lessee, to repair, the measure of damages is not the value of the lease or term of the plaintiff, the lessee, but may be the sum it would cost to do the repairs as contracted for (*Clow* v. *Brogden*, 1 M. & G. 39; *Davies* v. *Underwood*, 2 H. & N. 570; 27 L. J. Ex. 113; and see *Williams* v. *Williams*, L. R. 9 C. P. 659; 43 L. J. C. P. 382). The amount of the damages also depends upon the class and condition of the premises at the time of the demise, the extent of the tenant's liability being construed with regard thereto (*Stanley* v. *Towgood*, 3 Bing. N. C. 4; *Burdett* v. *Withers*, 7 A. & E. 136; *Payne* v. *Haine*, 16 M. & W. 541; *Saner* v. *Bilton*, 7 Ch. D. 815; 48 L. J. Ch. 545; *Proudfoot* v. *Hart*, 25 Q. B. D. 42; 59 L. J. Q. B. 389; *Lister* v. *Lane*, [1893] 2 Q. B. 212; 62 L. J. Q. B. 583). Where the term has come to an end, the measure of damages for not having left the premises in repair according to the terms of the contract of tenancy, will, in general, be the cost of executing the repairs (*Joyner* v. *Weeks*, [1891] 2 Q. B. 31; 60 L. J. Q. B. 510; *Henderson* v. *Thorn*, [1893] 2 Q. B. 164; 62 L. J. Q. B. 586). But credit must be given for any amount recovered for breaches committed during the term (*Ebbetts* v. *Conquest*, 82 L. T. 560; *Coward* v. *Gregory*, L. R. 1 C. P. 153; 36 L. J. C. P. 1). Where the reversioner after the expiration of the lease granted a new lease on the terms of pulling down the house and building a new one, it was held that the jury were not obliged to give merely nominal damages for breaches of the covenant to repair contained in the old lease which had been committed during the term granted by the old lease (*Rawlings* v. *Morgan*, 18 C. B. N. S. 776; 34 L. J. C. P. 185). A lessor who covenants with his lessee to repair demised premises is entitled to notice of the want of repair before being sued for non-performance of his covenant (*Makin* v. *Watkinson*, L. R. 6 Ex. 25; 40 L. J. Ex. 33; *L. & S. W. Ry. Co.* v. *Flower*, 1 C. P. D. 77; 45 L. J. C. P. 54; *Manchester Warehouse Co.* v. *Carr*, 5 C. P. D. 507; 49 L. J. C. P. 809; *Tredway* v. *Machin*, 91 L. T. 310; 20 Times Rep. 726).

In *Proudfoot* v. *Hart*, *supra*, "good tenantable repair" is defined to be "such repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it."

The covenants in leases to repair absolutely, and to repair after notice, are usually distinct and independent covenants (*Baylis* v. *Le Gros*, 4 C. B. N. S. 537; *Roe* v. *Paine*, 2 Camp. 520).

(*c*) See preceding note.

for —— years, from the —— —— 19—, and the defendant by the said deed covenanted [*or*, by the said agreement agreed] with the plaintiff well and substantially to repair the said house during the said term [*or, as the case may be, stating the covenant or agreement according to its terms*].

2. The defendant did not well and substantially repair the said house during the said term [*or, as the case may be, stating the breach*].

Particulars of the breaches complained of were delivered to the defendant on the —— ——, 19— [*or*, are delivered herewith, *or*, are as follows:—]

Landlord against Tenant for not Farming according to the Custom of the Country (*d*).

1. The defendant became and was tenant to the plaintiff of a farm called ——, at ——, in the county of ——, upon the terms contained in an agreement dated —— [*or, as the case may be*], that the defendant should use and cultivate the said farm during the said tenancy according to the course of good husbandry and the custom of the country wherein the said farm is situate.

2. During the said tenancy the defendant did not use and cultivate the said farm according to the course of good husbandry and the custom of the country.

Particulars.

The breaches are as follows:—

[*State same, e.g.*, 19—, —— ——. The defendant carted away and sold off the farm ten loads of straw.]

For Forms of Claim by an Outgoing Tenant for Tillages, &c. left on the Land at the expiration of his Tenancy, see "*Crops*," *ante*, p. 162.

Lessee against Lessor for Breach of Covenant for Quiet Enjoyment and for Title (*e*).

1. The defendant, by deed dated the —— ——, 19—, let to the plaintiff a house, No. ——, —— Street, ——, for —— years, from the ——

(*d*) From the mere fact of a tenancy of a farm, whether under a written or parol agreement, or under a lease by deed, the law implies a promise on the part of the tenant to cultivate it in a husbandlike manner and according to the custom of the country where it is situate, unless the express contract is inconsistent with such implication (*Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith's L. C., 11th ed., p. 545; *Powley* v. *Walker*, 5 T. R. 373; *Legh* v. *Hewitt*, 4 East, 154; *Williams* v. *Woods*, 17 L. J. Q. B. 319).

The Agricultural Holdings Acts, 1883 to 1900, do not prevent a landlord and tenant from making an agreement as to the terms on which the tenant will quit in respect of matters for which compensation can be obtained under those Acts (A. H. Act, 1900, s. 1, (5); *Newby* v. *Eckersley*, [1899] 1 Q. B. 465; 68 L. J. Q. B. 261; *In re Pearson*, [1899] 2 Q. B. 618; 68 L. J. Q. B. 878).

(*e*) Under a lease by deed, the word "demise" or "grant," or any equivalent words,

——, 19—, and the defendant thereby covenanted with the plaintiff that the defendant then had good right and title so to let the same [*following the form of the covenant*], and also that the plaintiff, his executors, administrators and assigns paying the yearly rent thereby reserved, and performing and observing the covenants therein contained by him and them to be performed and observed, should peaceably and quietly hold, use and occupy

---

import a covenant for quiet enjoyment against the lessor and all that come in under him by title, unless there be an express covenant, in which case no implication can be raised from such words (Shep. Touch. p. 165; *Adams* v. *Gibney*, 6 Bing. 656, 666; *Baynes* v. *Lloyd*, [1895] 2 Q. B. 610; 64 L. J. Q. B. 787). Such implied covenants are limited to the duration of the lessor's estate, and cease upon its determination (*Adams* v. *Gibney*, *supra*; *Baynes* v. *Lloyd*, *supra*), and do not extend to the acts of persons not claiming under the lessor (*Jones* v. *Lavington*, [1903] 1 K. B. 253; 72 L. J. K. B. 98). A warranty of the demise by the lessor is an express covenant, and extends to the whole term granted (*Williams* v. *Burrell*, 1 C. B. 402).

Under a parol demise the law will imply a promise, subject to the limitations above mentioned, for quiet enjoyment during the term, but not for title (*Bandy* v. *Cartwright*, 8 Ex. 913; 22 L. J. Ex. 285, and xl. *note*; *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737; 31 L. J. Q. B. 257; *Robinson* v. *Kilvert*, 41 Ch. D. 88; 58 L. J. Ch. 392; *Budd Scott* v. *Daniel*, [1902] 2 K. B. 351; 71 L. J. K. B. 706). A similar promise is not implied in a mere agreement to demise (*Brashier* v. *Jackson*, 6 M. & W. 549); although in such an agreement there is an implied undertaking by the lessor that he has title to enter into the agreement, and has a good title to let for the agreed term (*Stranks* v. *St. John*, L. R. 2 C. P. 376; 36 L. J. C. P. 118). There is in general no implied warranty in a lease of a warehouse or of an unfurnished house, or of land, that it is reasonably fit for use, habitation, or cultivation (*Sutton* v. *Temple*, 12 M. & W. 52; *Hart* v. *Windsor*, *Ib.* 68; *Erskine* v. *Adeane*, 42 L. J. Ch. 835; L. R. 8 Ch. 756; *Manchester Warehouse Co.* v. *Carr*, 5 C. P. D. 507; 49 L. J. C. P. 809; and see *Bunn* v. *Harrison*, 3 Times Rep. 146); but in letting furnished apartments or a furnished house a lessor impliedly undertakes or promises, in the absence of express stipulation, that it is reasonably fit for occupation (*Smith* v. *Marrable*, 11 M. & W. 5; *Wilson* v. *Finch-Hatton*, 2 Ex. D. 336; 46 L. J. Ex. 489; *Campbell* v. *Lord Wenlock*, 4 F. & F. 710; *Charsley* v. *Jones*, 53 J. P. 280; *Harrison* v. *Malet*, 3 Times Rep. 58); but not that it will so continue (*Sarson* v. *Roberts*, [1895] 2 Q. B. 395; 65 L. J. Q. B. 37), and if it is not so when first let, the tenant may quit at once, and is not liable for rent after so quitting. (See cases cited *supra*.)

Under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 75, a contract is implied in all lettings, for habitation by persons of the working classes, of a house or part of a house, at a rent within the limits for the composition of rates under s. 3 of 32 & 33 Vict. c. 41, that at the commencement of the letting it is in all respects reasonably fit for human habitation. (See *Walker* v. *Hobbs*, 23 Q. B. D. 458; 59 L. J. Q. B. 93.)

The measure of damages is the loss directly sustained through the invalidity of the demise; thus, where a defendant had granted a lease which he had not title to grant, and the plaintiff obtained from the person having title a fresh lease, he was held entitled to recover from the defendant in an action on the covenant for quiet enjoyment the expenses of the void lease and the difference in value of the void and valid lease (*Lock* v. *Furze*, 19 C. B. N. S. 96; 34 L. J. C. P. 201; 35 *Ib.* 141; L. R. 1 C. P. 441; see also *Williams* v. *Burrell*, 1 C. B. 402; *Ralph* v. *Crouch*, L. R. 3 Ex. 44; 37 L. J. Ex. 8; *Godwin* v. *Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121; *Collen* v. *Wright*, 8 E. & B. 647; 27 L. J. Q. B. 215; *Spedding* v. *Nevell*, L. R. 4 C. P. 212). But where the invalid demise purports to be made under a power of which the tenant has notice, but which does not authorise the demise, the tenant cannot, it would seem, recover damages for the loss of his bargain. (See *Gas Light and Coke Co.* v. *Towse*,

the said house for the said term, without any lawful denial, let, hindrance, molestation, or interruption whatsoever of or by the defendant, his heirs, or assigns, or any person or persons claiming through, under, or in trust for him [*following the form of the covenant*].

2. The defendant had not, at the time of the making of the said demise, good right or title so to let the said house to the plaintiff for the said term.

3. After the making of the said demise and during the said term, *G. H.*, then lawfully claiming the said house through and under the defendant [*add, where practicable, the grounds and particulars of the claim of G. H.*], and having a good title to the same and to the possession thereof, through and under the defendant, on the —— ——, 19—, entered into the said house and evicted the plaintiff therefrom.

Landlord against Tenant for not giving up Possession at the End of the Term.

The plaintiff has suffered damage from the defendant's breach of contract in not giving up to the plaintiff at the expiration of his tenancy which expired on the —— ——, 19—, the possession of the farm at ——, in the county of ——, of which the defendant had been tenant to the plaintiff under an agreement in writing dated ——, whereby the plaintiff lost the use and possession of the said farm for —— weeks, and was put to expense in recovering possession thereof.

Particulars.

The value to the plaintiff of the use and possession of the farm for the said —— weeks was ..... £——.

The expense the plaintiff was put to is as follows :—

---

35 Ch. D. 519, 541 *et seq.*, following the principle of *Flureau* v. *Thornhill*, 2 W. Bl. 1078, and *Bain* v. *Fothergill*, L. R. 7 H. L. 158 ; 43 L. J. Ex. 423, cited "*Sale of Land*," *post*, p. 285.)

The question whether there has been a breach of a covenant for quiet enjoyment is in general one of fact. Any substantial interference with the ordinary enjoyment of the land by the lessor or those lawfully claiming under him the right to do the acts complained of (*Davis* v. *Town Properties Corporation*, [1902] 2 Ch. 635 ; 71 L. J. Ch. 900 ; [1903] 1 Ch. 797 ; 72 L. J. Ch. 389) will suffice (*Sanderson* v. *Mayor of Berwick*, 13 Q. B. D. 547, 551 ; 53 L. J. Q. B. 554 ; *Robinson* v. *Kilvert*, 41 Ch. D. 88 ; 58 L. J. Ch. 392 ; *Harrison* v. *Muncaster*, [1891] 2 Q. B. 680 ; *Hudson* v. *Cripps*, [1896] 1 Ch. 265, 268 ; 65 L. J. Ch. 328 ; *Cohen* v. *Tamar*, [1900] 2 Q. B. 609 ; 69 L. J. Q. B. 904). A mere temporary inconvenience involving no interference with the physical possession of the premises is not a breach (*Jenkins* v. *Jackson*, 40 Ch. D. 71 ; 58 L. J. Ch. 124 ; *Manchester, S. & L. Ry. Co.* v. *Anderson*, [1898] 2 Ch. 394 ; 67 L. J. Ch. 568).

Lessor against Lessee for Breach of a Covenant to pay Rates, &c. (*f*).

1. By a covenant contained in a lease under seal from the plaintiff to the defendant, dated the —— ——, 19—, of a house and land at ——, known as ——, for —— years from the —— ——, 19—, the defendant covenanted with the plaintiff to pay all rates, &c. [*state the covenant*].

2. [*State the making of the rate during the term and the non-payment thereof by the defendant, and the fact that the plaintiff was compelled to pay and paid the same.*]

Lessee against Lessor for breach of Warranty and Fraud as to its Sanitary Condition on Letting a House (*g*).

1. The plaintiff has suffered damage by the defendant's breach of warranty [and fraudulent misrepresentation] on the letting of a house No. ——, —— Street, in the city of ——.

2. By an indenture of lease dated the —— ——, 19—, the defendant let to the plaintiff the said house for the term of —— years from the —— ——, 19—, at the yearly rent of £——.

3. In order to induce the plaintiff to enter into and execute the said lease and in consideration of his so doing the defendant represented and warranted to the plaintiff that the said house was in a perfect sanitary state, and that the drains thereof were in good condition. The said representation and warranty were made verbally by the defendant to the plaintiff on the —— ——, 19— [*or*, are contained in a letter dated the —— ——, 19—, *or*, *as the case may be*].

4. The plaintiff, as the defendant well knew, was induced to and did execute the said lease on the faith of the said representation and warranty and entered into possession of the said house with his wife and family on the —— ——, 19—.

5. The said representation was untrue and the said warranty was broken in this, that the said house was not in a perfect sanitary state, and the drains were not in good condition, in the following respects, viz :— [*Here state the particulars of the breaches of warranty complained of*.]

[6. *If fraud is alleged add:* Further, or in the alternative, the plaintiff says that the defendant made the said representations fraudulently and well knowing that the same were false.]

7. In consequence of the said breaches of warranty [and misrepresentation]

(*f*) As to construction of covenants with regard to rates, taxes, or outgoings imposed on property, or the owners, or the occupiers thereof, see Foa on L. and T., 3rd ed., p. 168; *Stockdale* v. *Ascherberg*, [1904] 1 K. B. 447; 73 L. J. K. B. 206; *Harris* v. *Hickman*, [1904] 1 K. B. 13; 73 L. J. K. B. 31; Fawcett on L. and T., 3rd ed., pp. 386 *et seq*.

(*g*) An action will lie for the breach of a parol warranty collateral to the lease as to the state of the premises let (*De Lassalle* v. *Guildford*, [1901] 2 K. B. 215; 70 L. J. K. B. 533). And an affirmation made at the time of the letting may amount to such a warranty (*Ib.*).

the plaintiff has sustained the following damage, viz. :—[*Here set out the particulars of the damages claimed.*]

The plaintiff claims £——.

[*Add claim for rescission if fraud is alleged and the plaintiff desires rescission.*]

Assignee of Lessor against Lessee (*h*).

1. *G. H.* being seized in fee [*or*, possessed for the residue of a term of —— years, commencing the —— ——, 19—] of [*or*, having an

---

(*h*) **Assignees of Lessor and Lessee.**]—By the common law certain covenants run with the land, so as to attach the benefit or the burden of them to the assignee of the term, but not with the reversion; and by the common law covenants are not assignable (1 Wms. Saund., 299, n. (*b*)). Consequently the assignee of the reversion could neither sue nor be sued upon a covenant in a lease. To remedy this inconvenience the statute 32 Hen. 8, c. 34, gave an action to and against the assignee of the reversion. By s. 1 it was enacted that all persons, being grantees or assignees of any reversion, should have like advantage against the lessees and their assigns by action for not performing conditions, covenants, or agreements, expressed in the indentures of lease, as the lessors and grantors, their heirs or successors, might have had; and by s. 2, that all lessees of lands or their assigns should have like action and remedy against all persons having any gift or grant of the reversion of the lands so let, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the lessors.

The statute only applies to leases by deed (*Brydges* v. *Lewis*, 3 Q. B. 603; *Standen* v. *Chrismas*, 10 Q. B. 135; *Smith* v. *Eggington*, L. R. 9 C. P. 145; 43 L. J. C. P. 140; *Phillips* v. *Miller*, L. R. 10 C. P. 420; 44 L. J. C. P. 265; *Elliott* v. *Johnson*, L. R. 2 Q. B. 120; 36 L. J. Q. B. 41); but it has been held that when the assignee of the reversion is entitled to compel specific performance of an agreement to take a lease he can sue as if a lease had been executed (*Manchester Brewery Co.* v. *Coombs*, *infra*). If the demise be not by deed, the lessor, notwithstanding the assignment, can sue (*Bickford* v. *Parson*, 5 C. B. 920; 17 L. J. C. P. 192). The statute applies to leases by deed of incorporeal hereditaments (*Martyn* v. *Williams*, 1 H. & N. 817; 26 L. J. Ex. 117; *Hooper* v. *Clark*, L. R. 2 Q. B. 200; 36 L. J. Q. B. 19; *Norcal* v. *Pascoe*, 34 L. J. Ch. 82). The statute applies only to covenants which run with the land, as to which see *Spencer's Case*, 5 Co. 18a; 1 Smith's L. C., 11th ed., pp. 55, 61; *Muller* v. *Trafford*, [1901] 1 Ch. 74; 70 L. J. Ch. 72; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608; 70 L. J. Ch. 814; *Howard de Walden* v. *Barber*, 19 Times Rep. 183. See further the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), ss. 10—12, as explained in *Davis* v. *Town Properties Corporation*, [1903] 1 Ch. 797; 72 L. J. Ch. 389.

In the case of tenancies not under lease by deed, the payment of rent and holding as before the assignment affords evidence of a new tenancy under the terms of the original letting, and thus a conventional law is made equivalent to that of Hen. 8 in the case of leases under seal, the new contract being that everything shall go on as before the assignment (*Cornish* v. *Stubbs*, L. R. 5 C. P. 339; 39 L. J. C. P. 205; *Buckworth* v. *Simpson*, 1 C. M. & R. 834; *Brydges* v. *Lewis*, 3 Q. B. 603; *Williams* v. *Heales*, L. R. 9 C. P. 177; 43 L. J. C. P. 80).

In actions where the plaintiff's claim is upon a demise by himself, his title to the land demised need not be set out, as he may rely on the deed alone; but in an action by the assignee of the reversion the statement of claim must show that the lessor was seised or possessed of some estate which would pass by assignment, and must state how the plaintiff became assignee. (See *Davis* v. *James*, 26 Ch. D. 778; 53 L. J. Ch. 523.)

Upon the execution of a lease by the lessee he is estopped from denying the lessor's

estate sufficient to enable him to make the demise hereinafter mentioned, leaving a reversion in him, and his executors, administrators and

---

title, as recited in the lease. If the lessor's title is not shown in the lease, the lessee is estopped from setting up any defence founded upon the fact that the lessor *nil habuit in tenementis;* and thus there arises, as between the lessor and lessee, a reversion in the lessor by estoppel. This reversion by estoppel is *primâ facie* a reversion in fee simple, and assignable and capable of passing by devise or descent (*Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 H. & N. 135; 28 L. J. Ex. 306; 29 L. J. Ex. 485; *Gouldsworth* v. *Knights*, 11 M. & W. 337); but the lessee may rebut the *primâ facie* presumption of the reversion being in fee simple by evidence consistent with the estoppel, as by showing that the reversion is an estate for years or for life, &c., but not by showing that the lessor had no estate, for this would be inconsistent with the estoppel (*Weld* v. *Baxter*, 11 Ex. 816; 1 H. & N. 568; 25 L. J. Ex. 214; 26 *Ib.* 112). The heir, or devisee, or assignee of a reversion by estoppel may sue upon the covenants in the lease (*Gouldsworth* v. *Knights*, 11 M. & W. 337; *Sturgeon* v. *Wingfield*, 15 M. & W. 224; *Doe* v. *Ongley*, 10 C. B. 25; *Cuthbertson* v. *Irving*, *supra*). An estoppel which binds a party binds those claiming through or under such party (*Taylor* v. *Needham*, 2 Taunt. 278; *Doe* d. *Bullen* v. *Mills*, 2 A. & E. 17; *London and North Western Ry. Co.* v. *West L. R.*, 2 C. P. 553; 36 L. J. C. P. 245). All persons taking the estate, term, or reversion, to which the covenants are annexed, under the same title, become bound by, and entitled to the benefit of the covenants, and that whether they take by operation of law as trustees in bankruptcy or heirs, or as administrators, or by act of the party as executors or assignees (*Spencer's Case*, 5 Co. 17 b; 1 Sm. L. C., 11th ed., p. 55).

Where a party is pleading his own title derived by assignment, he must deduce it step by step through the various mesne assignments, it being matter within his own knowledge, and which he is bound to state for the information of his opponent (*Philipps* v. *Philipps*, 4 Q. B. D. 127; 48 L. J. Q. B. 135; *Davis* v. *James*, 26 Ch. D. 778; 53 L. J. Ch. 523; *R.* v. *Bishop of Llandaff*, 2 Stra. 1012); but a party alleging title by assignment in his opponent may plead it by a *que estate*, that is, by a general averment that the estate precedently laid in some other person vested in him by assignment (*Harries* v. *Bearan*, 4 Bing. 646; *Derisley* v. *Custance*, 4 T. R. 75).

Covenants restrictive of the mode of user of land are enforceable against assignees of the covenantor who have notice of such covenants, even though the covenants do not run with the land at law, the principle being that, where there is a restrictive covenant, a Court of Equity will restrain anyone who takes the property with notice of it from using such property in a manner inconsistent with the covenant (*Tulk* v. *Moxhay*, 2 Ph. 774; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; 51 L. J. Q. B. 72; *Clegg* v. *Hands*, 44 Ch. D. 503; 59 L. J. Ch. 477; *Holloway* v. *Hill*, [1902] 2 Ch. 612; 71 L. J. Ch. 818). But this principle does not extend to covenants to repair or to do something which necessitates expenditure upon the property (*Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; 51 L. J. Q. B. 73; *Austerberry* v. *Oldham*, 29 Ch. D. 750; 55 L. J. Ch. 633; *Hall* v. *Ewin*, 37 Ch. D. 74; 57 L. J. Ch. 95).

Where an owner of land parcels it out in lots and leases or sells it to various persons, subject to restrictive covenants as to mode of user or construction of buildings upon their respective lots of such a nature that it appears that those covenants were intended for the mutual benefit of the various lessees or purchasers, each of such persons is entitled to enforce those covenants against his fellow lessees or purchasers, and it is not necessary that the original owner, with whom the covenant was made, should be a party to the action brought for that purpose (*Bedford* (*Duke of*) v. *British Museum*, 2 My. & K. 552; *Nottingham Brick Co.* v. *Butler*, 15 Q. B. D. 261; 16 Q. B. D. 778; 55 L. J. Q. B. 280; *Spicer* v. *Martin*, 14 App. Cas. 12; 58 L. J. Ch. 309; *Birmingham Land Co.* v. *Allday*, [1893] 1 Ch. 342; 62 L. J. Ch. 90; *Ashby* v. *Wilson* [1900] 1 Ch. 66; 69 L. J. Ch. 47; *Brigg* v. *Thornton*, [1904] 1 Ch. 386; 73 L. J. Ch. 301). Such covenants are also enforceable against assignees of such lessees or purchasers taking the property with notice, whether actual or

assigns in (*i*)] a messuage and land situate at ——, let the same by deed dated the —— ——, 19—, to the defendant, to hold for —— years from the —— ——, 19—.

2. The defendant, by the said deed, covenanted with the said *G. H.* and his assigns that [*state the covenant*].

3. Afterwards, and during the said term, the said *G. H.*, by a deed dated the —— ——, 19—, granted and assigned all his reversion of and in the said messuage and land to the plaintiff.

4. Afterwards, and during the said term, the defendant [*state the breach, giving such particulars as to date, &c. as are practicable*].

Particulars of damage :—[*State them.*]

Executor of Lessor possessed of a Term against Lessee (*k*).

1. The plaintiff is the executor of the last will of *G. H.*, deceased.

2. The said *G. H.*, being possessed of a farm called ——, at ——, in the county of ——, for a term of years more than sufficient to enable him to

---

constructive, of those covenants: see cases cited *supra*, and *Wilson* v. *Hart*, L. R. 1 Ch. 463; 35 L. J. Ch. 569; *Patman* v. *Harland*, 17 Ch. D. 353; see further *Spencer's Case*, 1 Sm. L. C., 11th ed., p. 79; *Knight* v. *Simmonds*, [1896] 2 Ch. 294.

A term passes by assignment so as to carry covenants without possession or actual entry (*Williams* v. *Bosanquet*, 1 B. & B. 238). An assignee of the rent reserved in a lease may, without attornment, sue for such rent (4 Anne, c. 16, s. 9; *Allen* v. *Bryan*, 5 B. & C. 512; *Williams* v. *Hayward*, 28 L. J. Q. B. 374); and where a termor underleases for a longer period than his term, reserving a rent, the rent so created is assignable, and the assignee can sue for it (*Williams* v. *Hayward*, *supra*).

By 8 & 9 Vict. c. 106, s. 9, when the reversion expectant on a lease of any tenements or hereditaments of any tenure, shall be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease.

The original lessor (*Stuart* v. *Joy*, [1904] 1 K. B. 362; 73 L. J. K. B. 97) and the original lessee (*ante*, p. 217 n. (*y*)) remain liable on the covenant entered into by them respectively notwithstanding assignment of the reversion or of the term.

(*i*) See 1 Sm. L. Cas., 11th ed., p. 100.

(*k*) Covenants which run with the land, as covenants to repair, &c., pass with the reversion. Prior to the Land Transfer Act, 1897, the reversion passed to the executor or administrator when it was for a term only, and this is still so, whilst if it was in fee it passed at once to the heir or devisee. Now in all cases under the Act the reversion passes to the executor or administrator in the first instance. (See *ante*, p. 167.) For damages caused to the personal estate of the testator exclusively by breaches of covenants in his lifetime, the executor may sue (*Kingdon* v. *Nottle*, 1 M. & S. 355; *Jones* v. *King*, 4 M. & S. 188; 5 Taunt. 418; *Raymond* v. *Fitch*, 2 C. M. & R. 588; *Ricketts* v. *Weaver*, 12 M. & W. 718). An executor can sue for rent accrued to the testator, seised in fee or for life, in his lifetime, by virtue of 32 Hen. 8, c. 37.

At common law rent was not apportionable in respect of time, but now by "The Apportionment Act, 1870" (33 & 34 Vict. c. 35), which extends the remedies given by former enactments (11 Geo. 2, c. 19, s. 15; 4 & 5 Will. 4, c. 22; 6 & 7 Will. 4, c. 71;

make the lease hereinafter mentioned [*or, as the case may be*], by deed dated the —— ——, 19—, let to the defendant the said farm to hold for —— years from the —— ——, 19—, and the defendant by the said deed covenanted with the said *G. H.* [*state the covenant*].

3. During the said term and in the lifetime of the said *G. H.*, the defendant [*state the breaches which occurred in the lifetime of G. H., as in other cases*].

4. During the said term and after the death of the said *G. H.*, the defendant [*similarly state the breaches which occurred after the death*].

Particulars of damage:—[*State them.*]

Heir of Lessor against Lessee (*l*).

1. *G. H.*, being seised in fee of a house and land called ——, at ——, let the same by a deed dated the —— ——, 19—, to the defendant to hold for —— years from the —— ——, 19—.

2. The defendant by the said deed covenanted with the said *G. H.* and his heirs [*state the covenant*].

3. The said *G. H.* died on the —— ——, 19—, and upon [*or* after] his death the reversion in the said house and land devolved upon and became vested in *A. B.* and *C. D.*, the executors [*or*, administrators] of the said *G. H.*, and they by deed dated the —— ——, 19—, conveyed the same to the plaintiff as and being the eldest son and heir of the said *G. H.*

4. Afterwards, during the said term and whilst the plaintiff was seised of the said reversion, the defendant [*state the breach*].

Particulars of damage:—[*State them.*]

---

14 & 15 Vict. c. 25; 23 & 24 Vict. c. 154), if a tenancy determines by death, the proportionate part of the rent up to the time of the determination is recoverable, but not until the time arrives when the next payment would but for such determination have fallen due. If the death which determines the tenancy is that of the landlord, his executors or administrators can then sue for such proportionate part. If the tenancy continues notwithstanding the death of the landlord, and the reversion is one that does not upon his death pass to his executors or administrators, the person to whom the reversion passes must recover the rent from the tenant when the next period for payment of rent after the death arrives, and is liable to the executors or administrators for the proportionate part of the rent up to the time of the death as money received to their use. By s. 2 of the above statute it is enacted (subject to the other provisions of the Act) that "all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." By s. 7, the Act is not to apply where the parties have expressly stipulated that there is to be no apportionment. The Act does not affect rent payable in advance (*Ellis* v. *Rowbotham*, [1900] 1 Q. B. 740; 69 L. J. Q. B. 379).

Executors and administrators may join claims in their representative capacity with those in their own right arising with reference to the estate of the deceased. (See Ord. XVIII., r. 5, *ante*, p. 166.)

(*l*) See preceding note; and see "*Heirs and Devisees*," *ante*, p. 182.

Devisee of Lessor against Lessee (*m*).

1. *G. H.*, being seised in fee of a messuage known as ——, situate at ——, let the same by a deed dated the —— ——, 19—, to the defendant to hold for —— years from the —— ——, 19—.

2. The defendant by the said deed covenanted with the said *G. H.* and his assigns [*state the covenant*].

3. The said *G. H.* died on the —— ——, 19—, having by his last will devised all his reversion in the said messuage to the plaintiff. *A. B.* and *C. D.* were the executors [*or*, administrators] of the said *G. H.* and they by deed dated the —— ——, 19—, conveyed the said reversion to the plaintiff (*m*).

4. Afterwards, during the said term and whilst the plaintiff was seised of the said reversion, the defendant [*state the breach*].

Particulars of damage :—

Lessor against Assignee of Lease upon a Covenant in the Lease (*n*).

1. The plaintiff, by a deed dated the —— ——, 19—, let to *G. H.* a messuage situate at ——, to hold for —— years from the —— ——, 19—, and by the said deed the said *G. H.* covenanted for himself and his assigns with the plaintiff [*state the covenant*].

2. By a deed dated the —— ——, 19—, the said *G. H.*, being then possessed of the said term for the portion thereof then unexpired, assigned to the defendant all the estate of him the said *G. H.* in the said term (*n*).

3. Afterwards, during the said term, and whilst the defendant was assignee thereof as aforesaid, the defendant [*state the breach, giving particulars*].

Particulars of damage :—

Claim by Lessee against Assignee of Lease for Indemnity (*o*).

1. The plaintiff's claim is for £——, payable to him by the defendant, for money paid by him for the defendant to *A. B.* at the defendant's request under the circumstances following :—

2. The plaintiff became tenant to *A. B.* of a house No. ——, —— Street,

---

(*m*) See note (*k*), p. 227.

(*n*) It is not necessary to plead the defendant's title. If it is not known, it is sufficient to say, "Afterwards and during the said term the same became and was vested in the defendant."

(*o*) An assignee of a lease, whether it is assigned to him by the lessee, or whether there have been other mesne assignments, is under an obligation implied by law to indemnify the lessee against breaches of covenant running with the land in the lease committed during his own tenancy (*Moule* v. *Garrett*, L. R. 5 Ex. 132; L. R. 7 Ex. 101;

——, under a lease under seal dated the —— ——, 19— [*or, as the case may be*], which contained a covenant by the plaintiff to pay *A. B.* rent therefor during the term thereby granted at the rate of £—— a year, payable by equal quarterly payments on the usual quarter days.

3. The plaintiff, by deed dated the —— ——, 19—, assigned the said term to *C. D.*, and afterwards it became by assignment vested in the defendant. Whilst it was so vested in the defendant, and during the continuance of the said term, the defendant made default in paying and the plaintiff became compellable to pay —— of the said quarterly payments to the said *A. B.* for the quarters ending —— and ——, 19—, and paid the same. The defendant has not repaid the said £—— or any part of it to the plaintiff.

Lessor against Executor of Lessee (*q*).

1. [*As in paragraph* 1 *of the form ante*, p. 229.]

2. Afterwards, during the said term, on the —— ——, 19—, the said *G. H.* died, having by his last will appointed the defendant his executor.

3. During the said term and before the death of *G. H.* [*state such breaches as occurred in the lifetime of G. H., giving particulars*].

4. During the said term and after the death of *G. H.* [*similarly state such breaches as occurred after the death of G. H. giving particulars*].

---

41 L. J. Ex. 62). The implied obligation does not extend to an underlessee of the assignee (*Bonner* v. *Tottenham Building Society*, [1899] 1 Q. B. 161; 68 L. J. Q. B. 114). It only extends to breaches committed during the tenancy of the assignee (*Crouch* v. *Tregoning*, L. R. 7. Ex. 88; 41 L. J. Ex. 97; *Hopkinson* v. *Lorering*, 11 Q. B. D. 97; 52 L. J. Q. B. 391). But a liability in respect of prior breaches may be created by apt words in the assignment (*Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148; 68 L. J. Q. B. 808).

Implied promises only exist in the absence of express stipulation between the parties (*Toussaint* v. *Martinnant*, *per* Buller, J., 2 T. R. 105; *Hamlyn* v. *Wood*, [1891] 2 Q. B. 488; 60 L. J. Q. B. 734).

(*q*) In actions by the landlord against the executor of the deceased tenant for rent accrued due during the life of the tenant the executor is liable *de bonis testatoris*, and the action must be brought against him in his representative character. For rent accrued due after the death of the tenant, the executor may be charged *de bonis testatoris*, and sued in his representative character; he may also be sued in his own right as assignee of the term generally, and proof that he is executor is sufficient to support the allegation that the term vested in him by assignment (*Wollaston* v. *Hakewill*, 3 M. & G. 297); but when he is thus charged in his own right as assignee generally, he may plead that he is executor only, and has never entered, if such is the fact (*Ib.* 320, 321; *Kearsley* v. *Oxley*, 2 H. & C. 896); or, if he has entered, he may plead that he is assignee only as executor, and that the premises are of no value, or are of less value than the rent, admitting his liability *pro tanto*, and that he has no other assets. (See Wms. Exs., 9th ed., p. 1637; *Jerens* v. *Harridge*, 1 Wms. Saund., 1871 ed., p. 1, n.; *Rubery* v. *Stevens*, 4 B. & Ad. 241; *Hornidge* v. *Wilson*, 11 A. & E. 645; *Hopwood* v. *Whaley*, 6 C. B. 744; *In re Bowes*, 37 Ch. D. 128; 57 L. J. Ch. 455.)

As to breaches of covenant, the executor of the tenant is, in general, liable *de bonis testatoris* for breaches of covenant in the lifetime or after the death of the testator

For Double Value under 4 Geo. 2, c. 28, s. 1 (r).

The defendant, who was tenant to the plaintiff of a messuage and land, known as ——, at ——, under a deed dated the —— ——, 19— [*or, as the case may be*], for a term of years which determined on the —— ——, 19—, wilfully held over the said messuage and land after the said determination of the term, and after demand made, and notice in writing given on the —— ——, 19—, to the defendant by [*E. F.*, the lawfully authorised agent of] the plaintiff, who was the landlord of the defendant as aforesaid, for delivering the possession thereof, and kept the plaintiff out of the possession thereof for —— months, from the —— —— to the —— ——, 19—, after the said determination, demand, and notice, whereby and by virtue of the statute 4 Geo. 2, c. 28, s. 1, the defendant became liable to pay to the

---

(Wms. Exs., 9th ed., p. 1630; *Wollaston* v. *Hakewill*, 3 M. & G. 297, 320). With respect to breaches of covenant after the death of the testator, the executor is liable *de bonis propriis* as assignee of the term if he enters (*Sleap* v. *Newman*, 12 C. B. N. S. 116; *Rendall* v. *Andreæ*, 61 L. J. Q. B. 630), except that with respect to covenants to pay rent his liability does not exceed what the property yields where the entry is merely as executor (*Tremeere* v. *Morison*, 1 Bing. N. C. 89).

By 22 & 23 Vict. c. 35, s. 27, where an executor, after satisfying all present liabilities under a lease of the testator, and setting apart a sufficient sum to answer any future claim in respect of any fixed and ascertained sum under the lease, has assigned the lease to a purchaser, and distributed the residuary estate, he is no longer personally liable in respect of any subsequent claim under the lease; but the lessor may follow the assets distributed. (See *Dodson* v. *Sammell*, 30 L. J. Ch. 799; and see further, "*Executors*," *ante*, p. 172.)

(*r*) By 4 Geo. 2, c. 28, s. 1, any tenant or other person who comes into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant who wilfully holds over after the determination of the term, and after demand made, and notice in writing given, for delivering the possession thereof, by his landlords or lessors, or the person to whom the remainder or reversion shall belong, or his agent thereunto lawfully authorised, shall, for and during the time he shall so hold over, or keep the person entitled out of possession, pay to the person so kept out of possession, his executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments so detained, for so long time as the same are detained, to be recovered by action of debt, and against the recovering of the penalty there is no relief in equity.

The double value is in the nature of a penalty given to the party grieved, and must be sued for within two years. (See *post*, p. 718.) The holding over must be wilful and contumacious, and not by mistake or under a *bonâ fide* claim of right (*Soulsby* v. *Neving*, 9 East, 310; *Swinfen* v. *Bacon*, 6 H. & N. 184, 846; 30 L. J. Ex. 33, 368). A person to whom the landlord has granted a fresh lease, to commence at the expiration of the defendant's term, is not a person entitled to possession within the meaning of the Act, and cannot maintain this action (*Blatchford* v. *Cole*, 5 C. B. N. S. 514; 28 L. J. C. P. 140).

A landlord may also sue his tenant for the special damage occasioned by the tenant holding over after the expiration of the tenancy, as for the damages which the landlord is rendered liable to pay to a third party to whom he has let the premises, and to whom he is unable to give possession in consequence of the tenant holding over (*Bramley* v. *Chesterton*, 2 C. B. N. S. 592; 27 L. J. C. P. 23).

A claim for double value under the statute may be joined without leave with a claim for recovery of the premises. (See Ord. XVIII., r. 2; *ante*, p. 52.)

plaintiff £——, being at the rate of double the yearly value of the said messuage and land for the time during which the same were so detained as aforesaid.

For Double Rent under 11 *Geo.* 2, *c.* 19, *s.* 18 (*s*).

The defendant, who was tenant to the plaintiff, under a deed dated the —— ——, 19— [*or, as the case may be*], of a messuage and land called ——, at ——, from year to year at a yearly rent of £——, payable quarterly, gave to the plaintiff on the —— ——, 19—, due notice [in writing] of his, the defendant's, intention to quit the said premises at a time mentioned in such notice, namely, on the —— ——, 19—.

2. The defendant did not at the said time mentioned in such notice deliver up possession of the said messuage and land to the plaintiff, but continued in possession thereof until the —— ——, 19—.

3. The double rent of the said messuage and land from the —— ——, 19—, to the —— ——, 19—, is £——, which sum is due to the plaintiff and unpaid.

Claim to recover Possession where the Tenancy has expired or been determined by Notice to Quit, and for Mesne Profits (*t*).

1. The plaintiff is entitled to the possession of a farm and premises called Church Farm, in the parish of St. James, in the county of Surrey, which

---

(*s*) 11 Geo. 2, c. 19, s. 18, provides that any tenant who gives notice of his intention to quit the premises by him holden at a time mentioned in such notice, and does not deliver up the possession at the time in such notice contained, shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered at the same time, and in the same manner, as the single rent or sum before the giving such notice could be levied, sued for, or recovered; and that such double rent shall continue to be paid during all the time such tenant continues in possession as aforesaid. The double rent given by this statute is not in the nature of a penalty, like the double value under the statute 4 Geo. 2, c. 28, but may be levied, sued for, and recovered in the same manner as the single rent. The statute applies only where the tenant had the power of determining his tenancy by a notice, and has given a valid notice sufficient to determine it (*Johnstone* v. *Huddlestone*, 4 B. & C. 922).

(*t*) **Title to Recover Possession.**]—Where a landlord seeks to recover the possession of the demised premises, the statement of claim should show the creation of the relation of landlord and tenant between himself and the defendant, and its determination before action, either by lapse of time (as in a lease for years), or by notice to quit (as in a yearly tenancy), or by a determination of the will of the landlord (as in a tenancy at will), or by surrender or forfeiture, and the defendant's continued possession of the premises by himself or his tenant. It is not necessary for a landlord in such action to deduce a good title to the premises as against all the world, a tenant being estopped from disputing the landlord's title to the demised premises at the time of such letting, though not estopped from showing its subsequent determination (*Cooke* v. *Loxley*, 5 T. R. 4; *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 *Ib.* 135; 28 L. J. Ex. 306; 29 *Ib.* 485; *Delaney* v. *Fox*, 2 C. B. N. S. 768). As to when other claims may be joined with a claim for the recovery of land, see Ord. XVIII., r. 2, *ante*, p. 52. See, generally, notes to "*Recovery of Land*," *post*, p. 466.

was let by the plaintiff to the defendant by a deed dated the —— ——, 19— [*or, as the case may be*], for the term of three years from the —— ——, 19—, which term expired on the —— ——, 19— [*or*, as tenant from year to

---

As to the power of specially indorsing on the writ a claim by a landlord against a tenant for the recovery of demised premises where the term has expired, or been duly determined by notice to quit, either with or without a claim for rent, or for *mesne* profits which is given by Ord. III., r. 6, see *Kemp* v. *Lester*, [1896] 2 Q. B. 162; 65 L. J. Q. B. 532, and other cases cited, *ante*, p. 67.

Mesne Profits.]—As soon as a tenant's interest is legally determined, his holding becomes wrongful, and is in law a trespass for which damages in respect of mesne profits may be recovered. A claim for mesne profits may be joined with one for the recovery of the land or premises in respect of which the claim is made (Ord. XVIII., r. 2, cited *ante*, p. 52).

By Ord. XXXVI., r. 31, "If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim so far as the burden of proof lies upon him." Consequently in an undefended action the plaintiff must, to recover mesne profits, prove his right to possession, and his title to and the amount of mesne profits; unless, and except so far as, admitted on the pleadings.

Mesne profits may be claimed from the date when the tenant's interest is determined. Where the interest is determined by a forfeiture, it would seem that a proportionate part of the current rent up to the date of the forfeiture may be recovered as rent, and that after that date and up to the time of the recovery of the premises mesne profits are recoverable (*The Apportionment Act*, 1870, s. 2, cited *ante*, p. 227).

It is the duty of a tenant at the expiration of his term, not merely to go out himself, but to deliver up complete possession of the demised premises to his landlord; it is therefore no defence that the premises are occupied by his under-tenant, who refuses to give them up (*Harding* v. *Crethorn*, 1 Esp. 57, *per* Lord Kenyon; *Chitty* v. *Tancred*, 7 M. & W. 127, 130, *per* Parke, B.); and the tenant is liable both for mesne profits whilst his under-tenant holds over, and for the costs of ejecting him (*Henderson* v. *Squire*, L. R. 4 Q. B. 170, 174; 38 L. J. Q. B. 73, *per* Blackburn, J.). It is the correct course in such a case, to claim such costs expressly in the statement of claim.

The damages claimed as *mesne profits* are in general measured by the rent, but there may in some cases be further damages, and if so, they should be specifically claimed (*Pearse* v. *Coaker*, L. R. 4 Ex. 92, 99; *Henderson* v. *Squire*, *supra*).

Notice to Quit.]—A tenancy from year to year can in general be determined by a notice to quit. The notice may be given by either party. When once given it can only be withdrawn by assent of both parties (*Blyth* v. *Dennett*, 13 C. B. 178). In the absence of express stipulation between the parties, the common law requires the notice to be a half-year's notice to quit at the end of the first or some other year of the tenancy (*Sidebotham* v. *Holland*, [1895] 1 Q. B. 378; 64 L. J. Q. B. 200). When an agreement for a yearly tenancy provides for a three months' notice, such notice must expire with a year of the tenancy (*Dixon* v. *Bradford Co.*, [1904] 1 K. B. 444; 73 L. J. K. B. 136; *Lewis* v. *Baker*, [1905], 2 K. B. 576; 74 L. J. K. B. 617); but this is otherwise where the agreement of tenancy expressly provides that the notice may be given at any time (*Soames* v. *Nicholson*, [1902] 1 K. B. 157; 71 L. J. K. B. 24). The half-year rule does not apply to tenancies of incorporeal hereditaments as to which a reasonable notice is sufficient (*Lowe* v. *Adams*, [1901] 2 Ch. 598; 70 L. J. Ch. 783).

A notice to quit, when given on behalf of the landlord by a person not authorised by him at the time when the notice begins to run, to give it, cannot be made valid by a subsequent ratification (*Doe* d. *Mann* v. *Walters*, 10 B. & C. 626; *Doe* d. *Lister* v. *Goldwin*, 2 Q. B. 143, 146; *Right* d. *Fisher* v. *Cuthell*, 5 East, 491, 498).

When the tenancy is other than yearly, a reasonable notice, in the absence of express stipulation, must be given; what is customary is probably the reasonable

year from the —— ——, 19—, which said tenancy was duly determined by notice to quit given on the —— ——, 19—, by a notice in writing dated that day [*or, as the case may be*] and expiring on the —— ——, 19—].

The plaintiff claims—

(i) possession,

(ii) £50 mesne profits since the —— ——, 19—.

(*The above form is framed from that given in R. S. C.*, 1883, *App. C., Sect. VII.*, No. 1.)

Claim for Possession upon a Forfeiture for Breach of Covenant to Repair, with Claims for Damages for Breach of Covenant, for Arrears of Rent, and for Mesne Profits (*u*).

1. On the —— ——, 19—, the plaintiff, by a deed [*or*, agreement in writing] dated that day, let to the defendant a house and premises,

---

notice (*Jones* v. *Mills*, 10 C. B. N. S. 788 ; 31 L. J. C. P. 66). Where a week's notice is agreed on, seven clear days' notice must be given (*Weston* v. *Fidler*, 88 L. T. 769). A "month" ordinarily means a lunar month. (See *ante*, p. 108.)

A notice to quit is not rendered unnecessary by the assignment of the term, or of the reversion, whether such assignment is by act of one of the parties, or otherwise (*Maddon* d. *Baker* v. *White*, 2 T. R. 159 ; *Doe* d. *Shore* v. *Porter*, 3 T. R. 13 ; *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173 ; *Birch* v. *Wright*, 1 T. R. 378).

The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), provides (s. 33) that in the case of tenancies within that Act, "Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall, by virtue of this Act, be necessary and sufficient for the same, unless the landlord and tenant of the holding by writing under their hands agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient ; but nothing in this section shall extend to a case where a tenant is adjudged bankrupt or has filed a petition for a composition or arrangement with his creditors." A yearly tenancy made determinable *by express agreement* on a half-year's or a six months' notice, is not within this section (*Wilkinson* v. *Calvert*, 3 C. P. D. 360 ; 47 L. J. Q. B. 679 ; *Barlow* v. *Teal*, 15 Q. B. D. 501 ; 54 L. J. Q. B. 564).

A notice to quit is only necessary where the tenancy is admitted ; and where the tenant disclaims and denies his landlord's title, he thereby renders a notice to quit unnecessary, and waives his right to such notice (*Doe* d. *Calvert* v. *Frowd*, 4 Bing. 560 ; *Doe* d. *Bennett* v. *Long*, 9 C. & P. 773 ; *Doe* d. *Grubb* v. *Grubb*, 10 B. & C. 816 ; *Vivian* v. *Moat*, 16 Ch. D. 730 ; 50 L. J. Ch. 331).

(*u*) **Forfeiture.**]—Leases containing conditions of forfeiture upon default of the tenant, as, for not repairing, non-payment of rent or other breach of covenant, are upon such default voidable at the option of the lessor, who must by some unequivocal act, indicating to the lessee his intention to insist upon the forfeiture, exercise his option, in order to avoid them (*Rede* v. *Farr*, 6 M. & S. 121 ; *Roberts* v. *Davey*, 4 B. & Ad. 664 ; *Baylis* v. *Le Gros*, 4 C. B. N. S. 537 ; *Jones* v. *Carter*, 15 M. & W. 718, and see *Toleman* v. *Portbury*, L. R. 6 Q. B. 245 ; 7 *Ib.* 344 ; 40 L. J. Q. B. 125 ; 41 *Ib.* 98). The issue of a writ claiming possession is such an unequivocal act (*Jones* v. *Carter*, *supra* ; *Serjeant* v. *Nash*, [1903] 2 K. B. 309, 311 ; 72 L. J. K. B. 630, 633 ; see *Grimwood* v. *Moss*, L. R. 7 C. P. at p. 364).

In some cases a right of re-entry or forfeiture not arising on non-payment of rent, assigning, underletting, or parting with possession of the land leased, cannot be enforced without notice in accordance with the provisions of the Conveyancing Acts,

No. ——, —— Street, ——, for a term of —— years, from the —— ——, 19—, at the yearly rent of £——, payable quarterly on the usual quarter days.

2. By the said deed the defendant covenanted to pay the said rent to the plaintiff at the times aforesaid and to keep the said house and premises in good and tenantable repair [*or, as the case may be*].

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether legally demanded or not, should be in arrear for

---

1881 and 1892, as to which, see *post*, p. 715. These Acts further enable relief to be given against forfeiture in certain cases, but relief under these Acts cannot be obtained either after actual re-entry or in the cases above excepted. As to relief against forfeiture for non-payment of rent, see the C. L. P. Act, 1852 (15 & 16 Vict. c. 76), ss. 210—212, and the C. L. P. Act, 1860 (23 & 24 Vict. c. 38), s. 1.

The Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 4, gives power to the Court to protect underlessees on forfeiture of the lease. (See *post*, p. 716.)

A lease conditioned to be *void* for the benefit of one party is *voidable* only at the option of that party (*Rede* v. *Farr*, *supra*; *Roberts* v. *Davey*, *supra*; *Davenport* v. *Reg.*, 3 App. Cas. 115; 47 L. J. P. C. 8).

A proviso in a lease for re-entry on a condition broken can operate only during the term (*Johns* v. *Whitley*, 3 Wils. 127), but it will extend to a new implied tenancy from year to year upon the terms of the lease (*Thomas* v. *Packer*, 1 H. & N. 669; see also *Martin* v. *Smith*, L. R. 9 Ex. 50; 43 L. J. Ex. 43). Sect. 25, sub-s. 5, of the Judicature Act, 1873, does not enable a lessor who has mortgaged the reversion after the lease to enforce a forfeiture (*Matthews* v. *Usher*, [1900] 2 Q. B. 538; 69 L. J. Q. B. 856).

If a tenant renounces his character as tenant by either setting up title in a third person, or in himself, to the premises against his landlord, his conduct amounts to a disclaimer, and his term is thereby forfeited (*Doe* v. *Cooper*, 1 M. & G. 135, 139, *per* Tindal, C.J; *Doe* d. *Ellerbrock* v. *Flynn*, 1 C. M. & R. 137). But mere words will not operate as a disclaimer of a lease for a term certain, there must be some act done by the tenant, the effect of which, if acquiesced in, would be to impair the landlord's title (*Doe* v. *Wells*, 10 A. & E. 427).

Forfeiture for non-payment of rent.]—If a lease contains a proviso for re-entry for non-payment of rent, a demand by the landlord or his agent duly authorised, of the precise rent due and payable, to save the forfeiture, on the exact day, at the proper place of payment, at a convenient hour between sunrise and sunset is, at common law, requisite, before the landlord can claim to re-enter for non-payment of rent, unless the demand is expressly dispensed with by the terms of the lease. If no place is named for payment, the proper place is at the most notorious place on the land; therefore, if there be a principal dwelling-house it must be there, at the front door (1 Wms. Saund., 1871 ed., p. 435; *Aveocks* v. *Phillips*, 5 H. & N. 183).

By the C. L. P. Act, 1852, s. 210, the necessity of a legal demand by the landlord of the rent is done away with, if it be proved that half a year's rent was due, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter. (See *Thomas* v. *Lulham*, [1895] 2 Q. B. 400; 64 L. J. Q. B. 720; *Coteswerth* v. *Spokes*, 10 C. B. N. S. 103; 30 L. J. C. P. 220; *Cross* v. *Jordan*, 8 Ex. 149).

The assignee of the reversion cannot eject for non-payment of rent unless the tenant has had notice of the assignment before the forfeiture accrued (*Mallory's Case*, 5 Rep. 1136; *Fraunces' Case*, 8 Rep. 92 a; *S. C.*, *sub nom. Miller* v. *Francis*, 1 Godb. 272; Co. Litt. 215 b); though where the forfeiture is for causes other than non-payment of rent such notice is not necessary (*Scaltock* v. *Harston*, 1 C. P. D. 106; 45 L. J. C. P. 125).

twenty-one days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the —— ——, 19—, a quarter's rent became due, and on the —— ——, 19—, the same had been in arrear for twenty-one days; and the said rent is still due and unpaid.

5. On the —— ——, 19—, the house and premises were not, nor are they now, in good or tenantable repair, and the plaintiff as such lessor thereupon on the said last-mentioned day served on the defendant a notice in writing specifying the particular breach of the aforesaid covenant complained of, and requiring the defendant to remedy such breach, and requiring him to make compensation in money for such breach.

6. A reasonable time for the defendant to have remedied such breach, which was capable of remedy, and to have made reasonable compensation in money to the satisfaction of the plaintiff for the said breach, elapsed before this action, but the defendant has not remedied the said breach, nor has he made such or any compensation for the said breach.

7. The particulars of the breach of the covenant to repair exceed three folios, and were delivered to the defendant's solicitor on the —— ——, 19— [*or*, are as follows :—].

The plaintiff claims :—

(1.) Possession of the said house and premises.

(2.) £.—— for the said arrears of rent.

(3.) £.—— damages for the said breach of covenant to repair.

(4.) £.—— for mesne profits.

(*For form of Claim for Possession on Bankruptcy, see Cholmeley's School* v. *Sewell*, [1893] 2 Q. B. 254; 62 L. J. Q. B. 476.)

The like, in another form.

1. The plaintiff is entitled to possession of all that piece or parcel of ground situate and being in —— Street in the parish of —— in the city of —— together with the messuages or tenements and buildings now standing thereon and called or known as Nos. — and —, —— Street aforesaid, which are hereinafter referred to as "the said premises."

2. By an indenture of lease dated the —— ——, 19—, and made between the plaintiff of the one part and the defendant of the other part the plaintiff demised the said premises to the defendant for twenty-one years from the —— ——, 19—, at the yearly rent of £—— payable quarterly on the usual quarter days.

3. By the said indenture (to which for the full terms thereof the plaintiff craves leave to refer) the defendant entered into the following covenants—

(A) A covenant to pay the said rent.

(B) Covenants to repair and paint and keep in repair the said premises in the manner and at the times therein mentioned.

4. The said indenture contained a proviso for re-entry by the plaintiff in the event of any breach of the said covenants or of the said rent being unpaid for twenty-one days after becoming due whether lawfully demanded or not.

5. The following breaches of the said covenants have been committed by the defendant:—

(A.) Two quarters' rent due on the —— —— and —— ——, amounting together to £——, are still unpaid.

(B.) The said premises were not and are not repaired or painted in accordance with the said covenants.

6. On the —— ——, 19—, the plaintiff served on the defendants a notice pursuant to section 14 of the Conveyancing and Law of Property Act, 1881, specifying the particular breaches of the aforesaid covenants to repair and paint herein complained of and requiring him to remedy the said breaches by repairing and painting the said premises in accordance with the said covenants and further demanding compensation for the said breaches.

7. The said notice has not been complied with either by execution of the repairs or by payment of compensation, although a reasonable time has since elapsed.

8. The defendants retain possession of the said premises.

The plaintiff claims:—

(1.) Possession of the said premises.

(2.) £—— arrears of rent.

(3.) Damages for breaches of covenant.

(4.) Mesne profits as from ——, 19—.

Claim for Possession on Forfeiture and Damages by Assignee of the Lessor against the Assignee of the Lessee.

1. The plaintiff is entitled to the possession of a house known as No. ——, in —— Street, at —— in the county of ——, hereinafter referred to as "the said premises."

2. By an indenture of lease dated the —— ——, 19—, and made between *E. F.* of the one part and *G. H.* of the other part, the said *E. F.* being the owner in fee simple in possession of the said premises [*or*, being possessed of a term in the said premises sufficient to enable him to make the demise hereinafter mentioned, leaving a reversion in him and his executors, administrators, or assigns (*x*)] demised the said premises to the said *G. H.* for the term of —— years from the —— ——, 19—, at the yearly rent of £——, payable quarterly on the usual quarter days.

(*x*) This is the correct mode of stating a leasehold title in the original lessor. (See 1 Sm. L. C., 11th ed., p. 100.)

3. By the said indenture (to which for the full and exact terms thereof the plaintiff will refer) the said *G. H.* covenanted for himself, his executors, administrators, and assigns as follows :—

(a) To pay the said rent on the said days.

(b) To repair the said premises and keep the same in repair in accordance with the terms of covenant in the said indenture contained.

(c) To paint the outside of the said premises once in every three years of the said term, and to paint, paper, grain, varnish, whitewash, and colour the inside of the said premises once in every seven years of the said term, in accordance with the terms of the covenant in that behalf in the said indenture contained.

4. The said indenture contained a proviso for re-entry in case the said yearly rent or any part thereof should be in arrear and unpaid for the space of twenty-one days next after any of the said quarter days, whether the same should or should not have been legally demanded, or in case of any breach of any of the aforesaid covenants.

5. Afterwards, on the —— ——, 19—, by an indenture dated that day and made between the said *E. F.* of the one part and the plaintiff of the other part, the said *E. F.* assigned to the plaintiff the said premises and all his title to and interest in the same and to and in the reversion dependent on the said term, and the same thereupon became and now is vested in the plaintiff (*y*).

6. Afterwards and during the said term the said term became and was vested in the defendant as assignee of the said term, and he took and now holds possession thereof (*z*).

7. The defendant afterwards and whilst he was still assignee as aforesaid committed the following breaches of the said covenants, viz. :—

(A) He did not pay the rent due at Lady Day and Midsummer, 19—, on the said days, and £32 7s. 9d., being part of the rent due at Midsummer, 19—, remained and was in arrear for the space of twenty-one days after the quarter day, and still is in arrear and unpaid.

(B) He did not repair the said premises or keep the same in repair in accordance with the terms of the covenant contained in the said indenture.

(C) He did not paint the outside of the premises every three years or paint, paper, grain, varnish, whitewash and colour the inside every seven years in accordance with the terms of the covenant contained in the said indenture.

Full particulars under sub-paragraphs (B) and (C) are contained in the notice hereinafter referred to.

(*y*) The plaintiff's title as assignee must be fully stated, and traced step by step from the original lessor.

(*z*) It is not necessary to trace the title of the defendant. If he is in possession he is presumed to be so as assignee of the lease.

8. On the —— ——, 19—, the plaintiff served on the defendant a notice in writing specifying the breaches of the said covenant in paragraph 7 (B) and (C) hereof complained of and requiring him to remedy the same and to make compensation in money therefor. The defendant, however, failed within a reasonable time or at all to remedy the said breaches or to make compensation to the plaintiff therefor.

9. By reason of the matters aforesaid the plaintiff became and is entitled to re-enter and to recover possession of the said premises, and to recover the said arrears of rent and damages for the aforesaid breaches of covenant. The defendant retains possession of the said premises.

The plaintiff claims :—

(1.) Possession of the said premises.

(2.) [£32 7*s*. 9*d*.] arrears of rent.

(3.) Mesne profits.

(4.) £100 damages for breach of covenant to repair, &c.

Claim for Possession on Forfeiture for Breach of Covenant not to Assign (*a*).

1. The plaintiff is entitled to possession of all that messuage known as No. ——, in —— Street, in the —— of ——, hereinafter referred to as the said premises.

2. By an indenture dated the —— ——, 19—, the plaintiff demised the said premises to the defendant *C. D.*, for the term of —— years from the —— ——, 19—.

3. By the said indenture the defendant *C. D.* covenanted that he would not assign the said lease [without first obtaining the consent of the plaintiff in writing to his so doing].

4. On or about the —— ——, 19—, the defendant *C. D.*, in breach of the said covenant, assigned the said lease to the defendant *E. F.* [without first obtaining the consent of the plaintiff in writing to his so doing].

The plaintiff claims :—

(1.) Possession.

(2.) Mesne profits since the —— ——, 19—.

(*a*) See 1 Smith L. C., 11th ed., pp. 46 *et seq*. In some cases the covenant not to assign without licence is qualified by a proviso that the licence shall not be unreasonably withheld. In these cases if the licence is unreasonably withheld an assignment would not create a forfeiture (*Treloar* v. *Bigge*, L. R. Ex. 151 ; 43 L. J. Ex. 95 ; *Scar* v. *House Society*, 16 Ch. D. 387 ; 50 L. J. Ch. 77) ; provided the lessee before assigning has asked for the consent. An assignment without asking for the licence would create a forfeiture, even though the licence could not be reasonably withheld (*Barrow* v. *Isaacs*, [1891] 1 Q. B. 417 ; 60 L. J. Q. B. 179 ; *Eastern Telegraph Co.* v. *Dent*, [1899] 1 Q. B. 835 ; 68 L. J. Q. B. 564). Covenants not to assign, &c., are

Claim for Possession on Forfeiture for Non-payment of Rent (*b*).

1. The plaintiff is entitled to the possession of the messuage and premises known as ——, at —— in the —— of ——, which by an indenture of lease [*or*, agreement in writing] dated the —— ——, 19—, the plaintiff demised [*or*, let] to the defendant for the term of —— years from the —— ——, 19— [*or*, as tenant from year to year, *or*, *as the case may be*], at the yearly rent of £——, payable by the defendant by four equal quarterly instalments of £—— each on the usual quarter days in each year of the said term [*or*, *as the case may be*], subject nevertheless to a proviso for the forfeiture of the said term in the event of any such instalment of rent, or any part thereof, remaining unpaid for —— days after becoming payable, whether legally demanded or not [*or*, *as the case may be*, *stating shortly the substance of the proviso*].

2. The said term became and is forfeited to the plaintiff by reason of non-payment of the rent due on the —— ——, 19—.

Particulars of rent in arrear.

		£	*s.*	*d.*
19—, —— ——.	One quarter's rent			
—— ——.	One quarter's rent			
	Total arrears .....£			

The plaintiff claims :—

(1.) Possession of the said premises.

(2.) £—— arrears of rent.

(3.) Mesne profits since the —— ——, 19—.

Claim for Possession on a Forfeiture for Non-payment of Rent under the C. L. P. Act, 1852 (*b*).

1. The plaintiff, by deed dated the —— ——, 19—, let to the defendant a messuage and premises known as ——, at ——, for a term of —— years from the —— ——, 19—, at the yearly rent of £——, payable quarterly on the usual quarter days.

2. The said deed contained a clause of re-entry entitling the plaintiff to re-enter upon the said messuage and premises in case the said rent should be in arrear for 21 days.

---

excluded from the provisions of sect. 14 of the Conveyancing Act, 1881 (see s. 14, sub-s. 6 (1)), and no relief can be granted in respect of breaches of such covenants (*Eastern Telegraph Co.* v. *Dent*, *supra*).

(*b*) By Ord. III., r. 6, as amended January, 1902, claims for recovery of land by a landlord against a tenant whose term has become liable to forfeiture for non-payment of rent may be specially indorsed on the writ. (See *ante*, p. 66.)

3. On the —— ——, 19—, a quarter's rent became due, and on the —— ——, 19—, another quarter's rent became due, and on the —— ——, 19—, both had been in arrear for 21 days, and both are still due.

4. Before the writ in this action was issued or served, the said two quarters' rent, making one half-year's rent, was due, and no sufficient distress was to be found on the said messuage and premises countervailing the said arrears of rent then and still due.

The plaintiff claims [*as in preceding form*] :—

LIQUIDATED DAMAGES (*c*).

Claim for Liquidated Damages payable under a Covenant.

1. The plaintiff's claim is for £——, being liquidated damages payable by the defendant to the plaintiff for the defendant's breach of an indenture

(*c*) *Liquidated damages* are a sum agreed upon in a contract by the parties themselves as the damages for a breach of it.

A *penalty* is a sum named in a contract to be forfeited on a breach, not as an agreed valuation of the damages, but as a security for the due performance of the contract (*Lowe* v. *Peers*, 4 Burr. 2225, 2229; *Kemble* v. *Farren*, 6 Bing. 141, 148; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127; 61 L. J. Q. B. 172).

Where there is a sum mentioned in a contract as damages for non-performance of any of a number of stipulations, some of trifling and others of serious importance, such sum is in general to be regarded as a penalty (*Willson* v. *Love*, [1896] 1 Q. B. 626; 65 L. J. Q. B. 474; *Bradley* v. *Walsh*, 88 L. T. 737), but where it is agreed that if a party do, or omit to do, a particular thing, a fixed sum shall be paid by him, there the sum is *primâ facie* to be regarded as liquidated damages (*Kemble* v. *Farren*, *supra*; *Betts* v. *Burch*, 4 H. & N. 506; 28 L. J. Ex. 267; *In re Newman*, 4 Ch. D. 725, 731; 46 L. J. Ch. 57; *Wallis* v. *Smith*, 21 Ch. D. 243; 52 L. J. Ch. 150; *Strickland* v. *Williams*, [1899] 1 Q. B. 328; 68 L. J. Q. B. 241).

Where a larger sum of money is agreed to be paid on default of payment of a smaller sum, it is regarded as a penalty (*Astley* v. *Weldon*, 2 B. & P. 346; *Wallis* v. *Smith*, *supra*; *Law* v. *Redditch Local Board*, *supra*). But this does not apply to a case where it is agreed that on non-payment of an instalment the whole sum due shall become immediately payable (*Wallingford* v. *Mutual Society*, 5 App. Cas. 685; 50 L. J. Q. B. 49; *Protector Loan Co.* v. *Grice*, 5 Q. B. D. 592, 596; 49 L. J. Q. B. 812).

Where the sum named is in reality a penalty, only the actual damage sustained can be recovered, even though the parties by the contract call the sum liquidated damages (*Thompson* v. *Hudson*, L. R. 4 H. L. 1, 30; 38 L. J. Ch. 431; *Magee* v. *Lavell*, L. R. 9 C. P. 107; 43 L. J. C. P. 134; *In re Newman*, *supra*; *Law* v. *Redditch Local Board*, *supra*). So the fact that the sum named is called a penalty in the contract will not prevent the Court from holding it to be liquidated damages where clearly so intended (*Sainter* v. *Ferguson*, 7 C. B. 716; *Parfitt* v. *Chambre*, L. R. 15 Eq. 36; 42 L. J. Ch. 6; *In re White, Clydebank Co.* v. *Yzquierdo*, *post*, p. 243, though the name given to it by the parties is an element to be considered (*Willson* v. *Love*, *supra*).

Upon the breach of a contract secured by a penalty the plaintiff may either sue for the penalty assigning the breach—in which case he can recover the amount of damage sustained, not exceeding the penalty, or he may sue for unliquidated damages for the breach, to be assessed by the jury irrespectively of the penalty. In the former case the

dated the —— ——, 19—, whereby the defendant covenanted [*here state the covenant, as, for instance,* to pay to the plaintiff the said sum if the defendant carried on the business of a —— within —— miles of —— within —— years from the —— ——, 19—].

2. The defendant, on or about the —— ——, 19— [*here state the breach, as, for instance,* commenced to carry on and has since carried on the said business at ——, which is within the said distance of ——].

Particulars —

19—, —— ——. Liquidated damages, £——.

Claim on a Covenant in a Deed of Sale of a Business, to pay Liquidated Damages in the Event of the Defendant carrying on the Business.

1. The plaintiff's claim is for £ ——, liquidated damages, due from the defendant to the plaintiff under a covenant contained in a deed dated the

---

recovery of the full penalty will be a satisfaction for all breaches of the contract, but in the latter the plaintiff may sue *toties quoties* there are breaches and recover a full indemnity. (See 8 & 9 Will. 3, c. 11, s. 8, cited *ante*, p. 133; *Lowe* v. *Peers*, *supra*; *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East, 343; *Astley* v. *Weldon*, *supra*; *Betts* v. *Burch*, *supra*.)

On a bond conditioned not to carry on business within certain limits or to pay liquidated damages, an injunction may be granted to enforce the condition (*Howard* v. *Woodward*, 34 L. J. Ch. 47; *Nat. Prov. Bank* v. *Marshall*, 40 Ch. D. 112; 58 L. J. Ch. 229). In such cases the amount payable is usually regarded as liquidated damages, for it cannot be ascertained what damages may be actually sustained from a breach of such a contract (*Galsworthy* v. *Strutt*, 1 Ex. 663).

A plaintiff cannot as a rule obtain both liquidated damages and an injunction in respect of the same breach, but he may sue for unliquidated damages for a breach and also claim an injunction (*Carnes* v. *Nesbitt*, 7 H. & N. 158; *Ib.* 778; 30 L. J. Ex. 348; 31 *Ib.* 273; *General Accident Corporation* v. *Wall*, [1902] 1 K. B. 377; 71 L. J. K. B. 236).

The Court will not interfere by injunction where a certain sum has been agreed on as the price of a breach, and the defendant has in effect purchased the right to do the act complained of as a breach (*Woodward* v. *Gyles*, 2 Vern. 119; *Forbes* v. *Corney*, cited in "Joyce on Injunctions," 80; *Sainter* v. *Ferguson*, 1 Mac. & G. 286). Thus, where an increased rent was reserved by way of liquidated damages, the Court refused an injunction to restrain the lessee from committing the breach of covenant in respect of which the increased rent became payable (*Woodward* v. *Gyles*, *supra*). As to injunctions, see further, *ante*, p. 197.

Where the statement of claim merely claims the amount of the liquidated damages, it may be specially indorsed on the writ. (See *ante*, p. 68; *Lawrence* v. *Willcocks*, [1892] 1 Q. B. D. 696; 61 L. J. Q. B. 519; *Strickland* v. *Williams*, [1899] 1 Q. B. 382; 68 L. J. Q. B. 241.)

A statement of claim for liquidated damages must distinctly show that the liquidated damages are due and unpaid (*Hurst* v. *Hurst*, 4 Ex. 571; *Legh* v. *Lillie*, 6 Ex. 165; 30 L. J. Ex. 25).

As to when contracts not to carry on a trade, &c. are illegal, as being unreasonable and against public policy, see *post*, p. 682.

As to interest, see *In re Dixon*, [1900] 2 Ch. 561; 69 L. J. Ch. 609, cited *ante*, p. 212.

As to penal rents on agricultural holdings, see the Agricultural Holdings Act, 1900 s. 6.

—— ——, 19—, by which deed the defendant, for the consideration therein mentioned, assigned his business as a —— at —— to the plaintiff.

2. The defendant by the said deed covenanted with the plaintiff that the defendant would not at any time afterwards carry on the business of a —— at ——, or within —— miles thereof, and that, in case of any breach of the said covenant, he would pay to the plaintiff the sum of £—— as liquidated damages for such breach.

3. The defendant afterwards carried on the said business at —— [*or*, within —— miles of ——], but has not paid the said sum of £—— to the plaintiff.

Particulars:—

[*Set out particulars of the breach.*]

For a Form of Counterclaim for Penalties on a Building Contract, see ante, p. 36 (*d*).

LUNATICS (*e*).

Commencement of Statement of Claim by a Person of Unsound Mind so found by Inquisition.

Between *A. B.*, committee of the estate of *C. D.*, a person of unsound mind so found by inquisition, and the said *C. D.*, by the said *A. B.*, as his committee ..... Plaintiffs,

and

E. F. ..... Defendant.

Statement of Claim.

1. The above-named *A. B.* is committee of the estate of the above-named *C. D.*, who is a person of unsound mind so found by inquisition.

(*d*) The so-called penalties in building contracts of so much per day, or per week, or the like for delay in the completion after a certain date are in general to be regarded as liquidated damages (*Fletcher* v. *Dyche*, 4 T. R. 32, 36; *Law* v. *Redditch Local Board*, *ante*, p. 241; see also *In re White*, 84 L. T. 594). Similarly a so-called penalty for delivery by a shipbuilding company of torpedo boats later than the contract date of £500 per week per vessel was regarded as liquidated damages (*Clydebank Co.* v. *Yzquierdo*, [1905] 6 A. C. 6; 74 L. J. C. P. 1).

(*e*) By Ord. XVI., r. 17, "Where lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the" Judicature Act, 1873, "have sued as plaintiffs, or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose."

A person of unsound mind who has been so found by inquisition sues and is sued by his committee as co-plaintiff or co-defendant respectively; but, if he has no committee, or the interest of the committee is adverse, he sues by his next friend and defends by a

The like, by a Person of Unsound Mind not so found by Inquisition.

Between *A. B.*, a person of unsound mind not so found by inquisition, by *C. D.*, his next friend..... Plaintiff,
and
E. F. ..... Defendant.

Statement of Claim.

1. *A. B.*, the above-named plaintiff, is a person of unsound mind not so found by inquisition, who sues by *C. D.*, his next friend.

The like, against a Person of Unsound Mind so found by Inquisition.

Statement of Claim.

Between *A. B.* ..... Plaintiff,
and
C. D., a person of unsound mind so found by inquisition, who defends by *E. F.*, committee of the estate of the said *C. D.*, and the said *E. F.* ..... Defendants.

1. The above-named defendant, *C. D.*, is a person of unsound mind so found by inquisition, who defends by *E. F.*, committee of the estate of the said *C. D.*

MARRIAGE (*f*).

Claim for Breach of Promise to Marry.

1. The plaintiff has suffered damage by the defendant's breach of his promise to marry her on the —— ——, 19— [*or*, within a reasonable time, *or*, *as the case may be*].

---

guardian *ad litem* (Daniell's Ch. Pract., 7th ed., pp. 134, 137; Pope on Lunacy, 2nd ed., pp. 321 *et seq.*).

A person of unsound mind not so found by inquisition sues by his next friend, and defends by a guardian *ad litem* (*Ib.*).

As to the contracts of lunatics and persons of unsound mind, see *post*, p. 690.

(*f*) Mutual promises to marry are not agreements made upon consideration of marriage within the Statute of Frauds, s. 4 (cited, *post*, p. 665), and need not be proved by writing (*Harrison* v. *Cage*, 1 Ld. Raym. 386); though promises to pay money or settle property in consideration of marriage are within that section, and are accordingly required to be in writing. (See *Shadwell* v. *Shadwell*, 9 C. B. N. S. 159; 30 L. J. C. P. 145; *Caton* v. *Caton*, L. R. 1 Ch. 137; L. R. 2 H. L. 127; 34 L. J. Ch. 564; 36 *Ib.* 886; *In re Rownson*, 29 Ch. D. 358; 54 L. J. Ch. 950.) A general promise to marry, without any express stipulation as to time, is a promise to marry within a reasonable time (*Harrison* v. *Cage*, 1 Ld. Raym. 386; and see *Short* v. *Stone*, 8 Q. B. 358). A promise to marry made by a person who was already married at the time of making the promise,

2. The said promise was made verbally on the —— ——, 19— [*or*, is contained in a letter from the defendant to the plaintiff dated the —— ——, 19—, *or, as the case may be*].

3. The said day was past [*or*, A reasonable time had elapsed] before the commencement of this action, but the defendant has not married the plaintiff but has neglected [and by a letter dated the —— ——, 19—, refused] to do so.

Particulars of special damage:—[*Insert particulars of special damage, if any.*]

The plaintiff claims £——.

(*See R. S. C.*, 1883, *App. C., Sect. V., No.* 10.)

The like, alleging Seduction as Special Damage (*g*).

1. The plaintiff has suffered damage by breach of promise made verbally on the —— ——, 19— [*or, as the case may be*], by the defendant to marry her on the —— —— [*or*, within a reasonable time, which elapsed before action, *or*, on the death of *A. B.*, which happened before action].

2. The defendant did not [*or*, on the —— ——, 19—, verbally refused

---

if the promisee had no notice of that fact, is binding, and an action may be maintained upon it (*Wild* v. *Harris*, 7 C. B. 999; *Millward* v. *Littlewood*, 5 Ex. 775).

The marriage of one of the parties to a third party after the promise, though before the time for performance has elapsed, is a breach of the contract, and entitles the other party at once to bring an action (*Short* v. *Stone*, 8 Q. B. 358; *Caines* v. *Smith*, 15 M. & W. 189). So an absolute and unconditional renunciation of a promise of marriage before the time for its performance, is, at the election of the promisee, a breach upon which an action may be immediately maintained (*Frost* v. *Knight*, L. R. 7 Ex. 111; 41 L. J. Ex. 78; "*Conditions Precedent*," *ante*, p. 158).

An executor or administrator cannot sue or be sued for a breach of promise of marriage made to or by the testator or intestate, except in respect of special damage caused to the property of the promisee by the breach of contract (*Chamberlain* v. *Williamson*, 2 M. & S. 408; *Finlay* v. *Chirney*, 20 Q. B. D. 494; 57 L. J. Q. B. 247).

In an action for breach of promise of marriage the jury may give damages for the injury to the feelings of the plaintiff, as well as for loss of the marriage, and evidence of the conduct of both parties is allowed to be given in aggravation or mitigation of damages (*Smith* v. *Woodfine*, 1 C. B. N. S. 660, 668; *Millington* v. *Loring*, 6 Q. B. D. 190; 50 L. J. Q. B. 214; *Finlay* v. *Chirney*, *supra*). The fact that the plaintiff has been seduced under the promise of marriage may be alleged in the statement of claim (*Millington* v. *Loring*, *supra*; and see "*Damages*," *ante*, p. 55).

An infant may by his or her next friend maintain an action for a breach of a promise to marry (*Holt* v. *Ward*, 2 Str. 937; *Warwick* v. *Bruce*, 2 M. & S. 209).

Before 32 & 33 Vict. c. 68, the parties to an action for breach of promise of marriage were not competent witnesses, but now by s. 2 of that Act, they are "competent to give evidence in such action; provided always that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." As to what is such evidence, see *Bessela* v. *Stern*, 2 C. P. D. 265; 46 L. J. C. P. 467; *Weidemann* v. *Walpole*, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762.

(*g*) See *Millington* v. *Loring*, cited *supra*.

to] marry the plaintiff on the said —— —— [*or*, within a reasonable time, *or*, on the death of *A. B.*].

3. Relying on the said promise the plaintiff, on and about the —— ——, 19—, allowed the defendant to seduce and carnally know her, whereby she became pregnant of a child of which she was delivered on the —— ——, 19—.

Particulars of special damage :—[*State them.*]

The plaintiff claims £——.

The like, upon an Absolute Repudiation of a Promise to marry upon the happening of a Future Event, made before the happening of the said Event.

1. The plaintiff and the defendant, on the — June, 19—, verbally agreed to marry one another upon the death of *A. B.*

2. On the —— ——, 19—, the defendant verbally [*or*, by a letter of that date, *or*, *as the case may be*] wrongfully repudiated and determined the said agreement on his part, and absolutely refused to be any longer bound thereby.

[*State particulars of special damage, if any.*]

Master and Servant (*h*).

Claim for Salary or Wages due.

The plaintiff's claim is for salary [*or*, wages] payable by the defendant to the plaintiff for work done and services rendered by the plaintiff, as a ——, for the defendant at his request.

Particulars :—

19—, —— ——. One quarter's salary due this day as by agreement in writing dated —— —— [*or, as the case may be*] ...£ ——

(*h*) Where by the contract the wages are payable at fixed periods, as yearly, quarterly, or monthly, and the master wrongfully dismisses the servant during the currency of one of those periods, the servant is entitled to recover, as part of his damages in an action for the wrongful dismissal, compensation for the service actually done during the broken period up to the time of the dismissal, or, at his option (instead of suing for damages for the wrongful dismissal), he may treat the contract as rescinded, and sue the master as on a new implied contract for a proportion of wages in respect of the work actually done during the broken period (*Goodman* v. *Pocock*, 15 Q. B. 576); and in either case he is also entitled to claim and recover, as a debt, any amount due to him for wages in respect of any completed periods which have elapsed prior to such dismissal. (See *Hartley* v. *Harman*, 11 A. & E. 798.) In estimating the damages for a wrongful dismissal, the fact that the plaintiff has, or might have, obtained, or may obtain, fresh employment within the period during which he ought to have been retained by the defendant in his service is to be taken into consideration (*Goodman* v. *Pocock*, *supra*; *Reid* v. *Explosives Co.*, 19 Q. B. D. 264; 56 L. J. Q. B. 388; *Brace* v. *Calder*, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582).

Claim for Wrongful Dismissal by a Servant employed for a Definite Time.

1. The plaintiff was employed by the defendant as his manager under an agreement in writing dated the —— ——, 19—, for a term of

---

In the hiring of menial or domestic servants there is a custom, presumptively forming part of the contract, that the servants may be dismissed with a month's warning or a month's wages (*Nowlan* v. *Ablett*, 2 C. M. & R. 54). It would seem that the "month" should be a calendar month (*Gordon* v. *Potter*, 1 F. & F. 644). This custom applies to a servant engaged as head gardener (*Ib.*), to a person hired to assist in garden and stables (*Johnson* v. *Blenkensopp*, 5 Jur. 870), to a huntsman (*Nicoll* v. *Greaves*, 17 C. B. N. S. 27; 33 L. J. C. P. 259); but not to a governess (*Todd* v. *Kerrich*, 8 Ex. 151; 22 L. J. Ex. 1). In cases where the custom applies, the month's wages to be paid upon dismissal without notice are payable as a compensation for the dismissal, and not, properly speaking, as wages (*Fewings* v. *Tisdal*, 1 Ex. 295); but they may, it would seem, be regarded as a debt due under the contract upon the dismissal. (See *East Anglian Ry. Co.* v. *Lythgoe*, 2 L. M. & P. 221, 226; and see a form of declaration in *Turner* v. *Mason*, 14 M. & W. 112.) The custom in such cases to determine the service at the end of the first month by a fortnight's notice has not yet received judicial notice, and must be proved in each case (*Moult* v. *Halliday*, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451).

Where the contract of service has been rescinded (*Lamburn* v. *Cruden*, 2 M. & G. 253), or where a servant has wrongfully left the service (*Taylor* v. *Laird*, 1 H. & N. 266; 25 L. J. Ex. 329), or has been dismissed for misconduct (*Turner* v. *Robinson*, 5 B. & Ad. 789), after a period of service, but before any wages have accrued due under the contract, the plaintiff cannot recover for the services rendered, unless a new agreement to pay for such services can be established (*De Bernardy* v. *Harding*, 8 Ex. 822). A contract of service for an indefinite time, where the relationship between the parties is that of master and servant, distinguished from that of principal and agent, is, in the absence of express agreement with regard to notice, in general capable of being terminated by notice by either party, and the length of notice required will be determined by the custom or usage, where there is one, of the particular trade or employment, whilst in the absence of proof of such custom or usage the notice required will be a reasonable notice, and what is such a notice is a question of fact to be determined on a consideration of all the circumstances. (See *Creen* v. *Wright*, 1 C. P. D. 591; 46 L. J. C. P. 427; *Motion* v. *Michaud*, 8 Times Rep. 253.)

In engagements of service in particular trades and businesses, where there is a custom in the trade or business to determine the contract by notice, such custom is incorporated in the contract, unless the terms of the contract expressly or impliedly exclude it (*Metzner* v. *Bolton*, 9 Ex. 518; *Parker* v. *Ibbetson*, 4 C. B. N. S. 346; 27 L. J. C. P. 236). Thus it is said that London juries usually find three months as the period of notice for clerks, where there is no special arrangement in regard to it (*Fairman* v. *Oakford*, 29 L. J. Ex. 459), but in one case a clerk to a telegraph company was held entitled to one month's notice (*Vibert* v. *Eastern Telegraph Co.*, 1 Cab. & E. 17); whilst editors of newspapers have in some cases been held entitled to six months' notice. (See *Wadling* v. *Oliphant*, 1 Q. B. D. 145; 45 L. J. Q. B. 173; *Foxbourne* v. *Vernon*, 10 Times Rep. 647.) And in others three months' and one month's notice were found proper in cases of newspaper editors. (See *Baker* v. *Manderille*, 13 Times Rep. 71; *In re Illustrated Newspaper Corporation*, 16 Times Rep. 197.)

A contract of service for an indefinite time is said to be *primâ facie* a contract for a year; but there is no inflexible rule of law to that effect, and each particular case must depend upon its own circumstances (*Beeston* v. *Collyer*, 4 Bing. 309; *Fawcett* v. *Cash*, 5 B. & Ad. 904; *Baxter* v. *Nurse*, 6 M. & G. 935; *Fairman* v. *Oakford*, 5 H. & N. 635; 29 L. J. Ex. 459; *Creen* v. *Wright*, 1 C. P. D. 591, 594).

A contract of service, "to be binding for twelve months certain, and continue from time to time, until three months' notice be given by either party to determine the

[—— years] from the —— ——, 19—, at a salary of £—— per annum.

2. On the —— ——, 19—, the defendant wrongfully terminated the said employment and dismissed the plaintiff therefrom and verbally refused to employ the plaintiff any longer.

Particulars of damage :—

The plaintiff claims £——.

---

same," was held determinable at the expiration of the first year by a three months' notice (*Brown* v. *Symons*, 8 C. B. N. S. 208; 29 L. J. C. P. 251). And where the contract was "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice," it was held that at the close of the first twelve months the agreement could be determined by either party without any notice (*Langton* v. *Carleton*, L. R. 9 Ex. 57).

A contract of service for a term of more than a year is within s. 4 of the Statute of Frauds. (See "*Frauds, Statute of*," *post*, p. 666; "*Master and Servant*," *post*, p. 735.)

Where there is a contract of hiring for a year, the continuation of the service at the expiration of the year, without further agreement, is evidence of a new contract for a year on the same terms (*Beeston* v. *Collyer*, 4 Bing. 309). Under such circumstances it seems that a new contract arises each year, which is determined at the expiration of the year without notice. Where the parties contracted "for one whole year, and so from year to year, so long as the parties should please," it was held that the notice should be one ending with the current year (*Williams* v. *Byrne*, 7 A. & E. 177). A schoolmaster was engaged at an annual salary so long as, by mutual consent, he should retain the office, the appointment to be subject to termination by three months' notice by either party; it was held that the notice might be given at any time (*Ryan* v. *Jenkinson*, 25 L. J. Q. B. 11).

Where there is a contract for a service to commence on a future day, and the employer before the time for the commencement of the service absolutely renounces and refuses to perform the contract on his part, and communicates his renunciation and refusal to the servant, the latter may, if he pleases, treat this as an immediate breach, and at once bring an action to recover damages for such breach, instead of waiting till the time for the commencement of the service (*Hochster* v. *De la Tour*, 2 E. & B. 678; 22 L. J. Q. B. 455; and see "*Conditions Precedent*," *ante*, p. 158).

The appointment of a receiver and manager of the assets and business of a company on behalf of its mortgagees may operate as a discharge of the servants of the company, and entitle them to compensation for wrongful dismissal (*Reid* v. *Explosives Co.*, 19 Q. B. D. 264; 56 L. J. Q. B. 368). An order for winding up a company operates in general as a notice of discharge of all persons in the employ of the company, though this effect of the order may be prevented by an agreement to the contrary (*In re Oriental Bank*, 32 Ch. D. 366; 55 L. J. Ch. 620). A resolution for a voluntary winding up does not so operate (*Midland Counties Bank* v. *Attwood*, [1905] 1 Ch. 357; 74 L. J. Ch. 286). As to a dissolution of partnership, see *Brace* v. *Calder*, cited *ante*, p. 246.

The Courts will not in general decree specific performance of contracts for personal service (*Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416, 426; 60 L. J. Ch. 428; *Davis* v. *Foreman*, [1894] 3 Ch. 654; 64 L. J. Ch. 187); but where the contract contains a negative stipulation, *e.g.*, a contract by a servant not to serve any other master, the Court can restrain him by injunction from breaking this negative stipulation (*Ib.*; *Lumley* v. *Wagner*, 1 D. M. & G. 604; *Grimston* v. *Cuningham*, [1894] 1 Q. B. 125; *Davis* v. *Foreman*, *supra*; and see "*Injunction*," *ante*, p. 197).

Where a servant during the service and in the course thereof or in connection therewith earns and receives money from third persons for work done by him for them, the master may maintain an action against the servant to recover the amounts as money received to his use (*Morison* v. *Thompson*, L. R. 9 Q. B. 480; 43 L. J. Q. B. 215; "*Agent*," *ante*, p. 77).

The like by a Servant entitled to Notice.

1. The plaintiff has suffered damage by the defendant's breach of a contract, dated the —— ——, 19—, [made in writing, *or*, by letters, dated, &c.] between the plaintiff and the defendant, whereby it was agreed that the plaintiff should serve the defendant, and should be retained by the defendant in his service until the service should be determined by a three months' [*or*, a reasonable] notice on either side, in the capacity of a clerk in the defendant's business of a ——, at the salary of £—— per annum, payable monthly [*or*, at the wages of £—— per week, *or*, *as the case may be*].

2. The plaintiff served the defendant in the said capacity until the —— ——, 19—, when the defendant, although no such notice had been given on either side to determine the said service, [verbally] dismissed the plaintiff from the said service, and refused to allow him to continue therein.

Particulars of damage :—

By a Commercial Traveller for Wrongful Dismissal and Commission (i).

1. On the —— ——, 19, —the plaintiff entered into the employment of the defendant in the trade of a ——, as a commercial traveller on the terms [contained in a written contract dated the —— ——, 19—, whereby it was agreed] that the plaintiff should travel and obtain orders for the defendant in the —— district and that he should be paid by the defendant a weekly salary of £—— and a commission of —— per cent. on all orders obtained by him for the defendant or transmitted by him to the defendant and

A person who enters into a service where the exercise of skilled labour is required, impliedly warrants that he is possessed of the requisite skill for such service, and an action may be maintained against him for any breach of such warranty (*Harmer* v. *Cornelius*, 5 C. B. N. S. 236 ; 28 L. J. C. P. 85).

(*i*) When a traveller gives his whole time to one employer, and is bound to follow his directions, the contract is one of service, rather than of agency, and, where it is one for an indefinite time, it is thought that such traveller would, in general, whether paid by salary or commission, be entitled to a reasonable notice to terminate his employment where there is no express agreement as to notice. (See *Motion* v. *Michaud*, 8 Times Rep. 253 ; and see *Reg.* v. *Negus*, L. R. 2 C. C. 34.)

Whether after leaving he is entitled, when his remuneration is wholly or in part by commission, to be paid commission on orders obtained by him during his employment, but executed after his service has terminated, or on orders sent in after he left by customers he had procured, must depend on the express contract in the first place, if there is one, and, if there is not, upon the usage or custom of the trade or employment, and, in the absence of any usage or custom, it would seem that he would not be entitled to recover such commission, the burden of proving a right thereto resting on him. (See *Bilbee* v. *Hasse*, 5 Times Rep. 677 ; *Morris* v. *Hunt*, 12 Times Rep. 187 ; *Salomon* v. *Brownfield*, *Ib.* 239 ; *Gerahty* v. *Davies*, 19 Times Rep. 554 ; *Faulkner* v. *Cooper*, 4 Com. Cas. 213.)

Where there was no express contract as to the length of notice to be given, a three months' notice has, in some cases, been considered proper for a commercial traveller (*Metzner* v. *Bolton*, 9 Ex. 518 ; *Grundon* v. *Master*, 1 Times Rep. 205). In a case of a canvasser for advertisements, a one month's notice has been held sufficient (*Hiscox* v. *Batchellor*, 15 L. T. N. S. 543).

which were executed by the defendant, and that the said commission should be due on the execution of the orders and payable monthly, commencing on the —— ——, 19—.

2. The plaintiff accordingly did travel for the defendant in the said district and did obtain orders for him and transmit orders to him, and the said orders were executed by the defendant. The defendant duly paid to the plaintiff all salary and commission due up to the —— ——, 19—, but he has paid none since.

3. By the terms of the said agreement [*or*, the custom of the said trade subject to which the said agreement was made] the plaintiff was entitled to a three months' [or, in the alternative a reasonable] notice to determine the said employment, and to have the said employment continue until the expiration of such notice. [A reasonable notice is a three months', or in the alternative a one month's notice.]

4. On the —— ——, 19—, by a letter dated that day, the defendant, without giving the plaintiff any such notice as aforesaid, wrongfully determined the said agreement and dismissed the plaintiff from the said employment.

5. At the time of such dismissal there was due from the defendant to the plaintiff —— weeks' salary to the —— ——, 19—. There was also due £—— for commission on orders executed up to the —— ——, 19— [as appears by the defendant's letters dated the —— ——, 19—].

6. By the terms of the said agreement [*or*, by the custom of the said trade subject to which the said agreement was made] the plaintiff was entitled to be paid commission on all orders obtained by him before and executed by the defendant after the said —— ——, 19—. The best particulars the plaintiff can at present give of such orders are delivered herewith.

The plaintiff claims :—

(1.) £—— arrears of salary and commission.

(2.) £—— damages.

(3.) An account of the orders obtained by him before and executed by the defendant after the said —— ——, 19—, and payment of the commission due in respect thereof.

See forms of declarations, under the old system of pleading, on yearly hirings for wrongful dismissal: by a bailiff (*Snelling* v. *Lord Huntingfield*, 1 C. M. & R. 20) ; *by a gardener* (*Nowlan* v. *Ablett*, 2 C. M. & R. 54) ; *by a clerk to a merchant* (*Amor* v. *Fearon*, 9 A. & E. 548) ; *by an agent to a manufacturer* (*Parker* v. *Ibbetson*, 27 L. J. C. P. 236) ; *by a traveller and salesman* (*Spotswood* v. *Barrow*, 5 Ex. 110 ; *Metzner* v. *Bolton*, 9 Ex. 518 ; *Hart* v. *Denny*, 1 H. & N. 609 ; *Brown* v. *Symons*, 8 C. B. N. S. 208 ; 29 L. J. C. P. 251) ; *by a warehouseman* (*Fawcett* v. *Cash*, 5 B. & Ad. 904) ; *by an accountant* (*Baillie* v. *Kell*, 4 Bing. N. C. 638) ; *by*

a teacher in a school (*Fillieul* v. *Armstrong*, 7 A. & E. 557); *by a governess* (*Todd* v. *Kerrich*, 8 Ex. 151); *by a reporter to a newspaper* (*Dunn* v. *Murray*, 9 B. & C. 780; *Gould* v. *Webb*, 4 E. & B. 933; *Williams* v. *Byrne*, 7 A. & E. 177); *by the editor of a periodical* (*Baxter* v. *Nurse*, 6 M. & G. 935); *by a solicitor* (*Emmens* v. *Elderton*, 13 C. B. 495); *by a superintendent on a railway* (*Hill* v. *G. W. R.*, 10 C. B. N. S. 148).

See also forms of declarations on contracts of hiring for various periods for wrongful dismissal: by a manager or foreman of manufacturing works (*Lomax* v. *Arding*, 10 Ex. 734; *Down* v. *Pinto*, 9 Ex. 327; *Hartley* v. *Harman*, 11 A. & E. 798; *Cussons* v. *Skinner*, 11 M. & W. 161; *Beckham* v. *Knight*, 1 M. & G. 738); *by a clerk to a shipping agent* (*Smith* v. *Thompson*, 8 B. & C. 44); *by an articled clerk* (*Mercer* v. *Whall*, 5 Q. B. 447); *by a secretary* (*Wilkinson* v. *Gaston*, 9 Q. B. 137); *by an editor of a newspaper* (*Cooper* v. *Blick*, 2 Q. B. 915); *by a courier* (*Fischer* v. *Aidé*, 3 M. & W. 486); *by an actor* (*Webster* v. *Emery*, 10 Ex. 901); *by a seaman* (*Renno* v. *Bennett*, 3 Q. B. 768); *by a scene-painter* (*Harmer* v. *Cornelius*, 28 L. J. C. P. 85); *by a journeyman baker* (*Lush* v. *Russell*, 4 Ex. 637).

Claim by a Master against a Servant for Breach of Contract by carrying on Business within a certain Distance: see Davey v. *Shannon*, 4 Ex. D. 81; 48 L. J. Ex. 459.

MEDICAL ATTENDANCE (*k*).

Claim for Medical or Surgical Attendance and Medicines, &c.

The plaintiff's claim is for money due from and payable by the defendant to the plaintiff for work done and services rendered [and medicines and

(*k*) The law relating to medical practitioners is regulated by the "Medical Acts," the principal of which are the Medical Act, 1858 (21 & 22 Vict. c. 90), the Medical Act, 1859 (22 Vict. c. 21), and the Medical Act, 1886 (49 & 50 Vict. c. 48). A practitioner registered before the 1st of June, 1887, is "entitled, according to his qualification or qualifications, to practise medicine or surgery, or medicine and surgery, as the case may be, and to demand and recover in any Court of law reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied by him to his patients," provided that he is not a fellow or member of any College of Physicians which has passed a bye-law to the effect that their fellows or members shall not be entitled to sue as above mentioned. (See s. 31 of the Medical Act, 1858, which, though repealed by s. 28 of the Medical Act, 1886, appears to have been in effect preserved by s. 24 of the last-mentioned Act.)

A practitioner who obtains registration on or after the 1st of June, 1887, is, by s. 6 of the Medical Act, 1886, "entitled to practise medicine, surgery, and midwifery, . . . and to recover in due course of law in respect of such practice any expenses, charges in respect of medicaments or other appliances, or any fees to which he may be entitled, unless he is a fellow of a College of Physicians, the fellows of which are prohibited by bye-law from recovering. . . ."

medical and surgical appliances provided and supplied] by the plaintiff as a medical practitioner for the defendant at his request.

Particulars :—

No person is "entitled to recover any charge in any Court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless" he proves that he is registered under the Medical Acts. (See s. 32 of the Medical Act, 1858, and s. 1 of the Medical Act, 1886.)

A qualified practitioner can sue for services rendered under his supervision and direction by an unqualified assistant or partner, but not if he has in no sense supervised and directed the unqualified person who actually rendered the services in respect of which the action is brought (*Howarth* v. *Brearly*, 19 Q. B. D. 303 ; 56 L. J. Q. B. 543).

Under s. 31 of the Medical Act, 1858, a practitioner whose qualification was to practise surgery *only*, could not recover for attendance or medicines in a medical case (*Allison* v. *Haydon*, 4 Bing. 619 ; *Leman* v. *Fletcher*, L. R. 8 Q. B. 319 ; 42 L. J. Q. B. 214 ; see further *Ellis* v. *Kelly*, 30 L. J. M. C. 35, 37), though he might have recovered for medicine administered as ancillary to a surgical case. (See *Ib.*)

Sect. 32 of the Medical Act, 1858, requiring registration, applies not only in actions against the patients, but also in actions against persons sued for the attendance received by others (*De la Rosa* v. *Prieto*, 33 L. J. C. P. 262 ; 16 C. B. N. S. 578). It applies to attendance given on board a foreign man-of-war in an English port (*Ib.*). A medical practitioner engaged by another to attend his patients in his absence cannot recover the price of his services without proof of registration (*Ib.*). The plaintiff must be qualified and registered at the time when he supplied the medicines and rendered the services, in order to recover in the action (*Leman* v. *Houseley*, L. R. 10 Q. B. 66 ; 44 L. J. Q. B. 22).

Before the Medical Act, 1858, a physician was prevented by custom from recovering his fees in an action without a special contract for payment (*Chorley* v. *Bolcot*, 4 T. R. 317 ; *Veitch* v. *Russell*, 3 Q. B. 928 ; and see *Attorney-General* v. *College of Physicians*, 1 J. & H. 561 ; 30 L. J. Ch. 757). Under the Medical Acts, a physician duly registered may sue and recover without a special contract, unless restrained by a bye-law (*Gibbon* v. *Budd*, 2 H. C. 92 ; 32 L. J. Ex. 182). The Royal College of Physicians has passed a bye-law that "no Fellow of the College shall be entitled to sue for professional aid rendered by him." This bye-law does not extend to members. (See *Gibbon* v. *Budd*, 32 L. J. Ex. 182, n. (2).)

By the Apothecaries Act, 1815 (55 Geo. 3, c. 194, s. 21), no apothecary is allowed to recover any charges in any Court of law, unless he proves on the trial that he has obtained a certificate to practise as an apothecary from the Society of Apothecaries, and by s. 20, practising without such certificate is prohibited under a penalty of 20*l.* (See *Leman* v. *Fletcher*, L. R. 8 Q. B. 319 ; 42 L. J. Q. B. 214, and *Leman* v. *Houseley*, *supra* ; *Davies* v. *Makuna*, 29 Ch. D. 596, 605 ; 54 L. J. Ch. 1148 ; *Apothecaries' Co.* v. *Jones*, [1893] 1 Q. B. 89.)

By s. 5 of the Dentists Act, 1878 (41 & 42 Vict. c. 33), no one is entitled to recover any fee or charge "for the performance of any dental operation, or for any dental attendance or advice, unless he is registered under this Act, or is a legally qualified medical practitioner." A charge for making and fitting false teeth may be recovered by a person who is not registered, and who is not a qualified medical practitioner (*Hennan* v. *Duckworth*, 90 L. T. 546 ; 20 Times Rep. 436 ; *Seymour* v. *Pickett*, [1905] 1 K. B. 715 ; 74 L. J. K. B. 413).

By s. 17 of the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), persons who are not registered as therein mentioned cannot recover fees or charges for practising as veterinary surgeons.

It is not necessary that the fact of registration or of having obtained a certificate should be shown in the statement of claim, but the want of registration or the absence of a certificate may be pleaded as a defence.

Money Lent (*l*).

Claim for Money lent.

The plaintiff's claim is for money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant.

Particulars :—

, —— ——. Amount lent this day, £——.

The like, with a Claim for Interest.

The plaintiff's claim is for money due from the defendant to the plaintiff for money lent by the plaintiff to the defendant, and for interest agreed by an agreement in writing dated the —— ——, 19— [*or*, verbally on the —— ——, 19—], to be paid thereon by the defendant to the plaintiff at the rate of —— per cent. until repayment.

Particulars :—	£	*s.*	*d.*
1904, Jan. 10th. Money lent to the defendant			
Interest thereon at the rate aforesaid from the —— ——, 19—, to the date of the writ herein			
Amount due..... £			

(*l*) A debt arising out of a loan on a simple contract may be sued for in the form first set out, but where the terms of the loan are complicated, or there is reason for desiring to have specific admissions or denials of them, they should be stated concisely in the claim.

An I O U alone will not support a claim for money lent ; for though it is proof of money owing on an account stated, it is no more proof of money lent than of goods sold or any other source of a debt (*Fesenmayer* v. *Adcock*, 16 M. & W. 449). Nor will a cheque of itself support this claim (*Pearce* v. *Davis*, 1 M. & Rob. 365). A loan may be recovered as a simple contract debt, though it has been secured by a mortgage, where the deed contains no covenant to repay. (See "*Mortgage*," *post*, p. 264.) But where there is such a covenant, though a limited one, no other contract can be implied and the action must be brought on the covenant (*Mathew* v. *Blackmore*, 1 H. & N. 762 ; 26 L. J. Ex. 150 ; *Browne* v. *Price*, 4 C. B. N. S. 598 ; 27 L. J. C. P. 290 ; "*Merger*," *post*, p. 736). A covenant may be sometimes implied from a mere acknowledgment of the debt in the deed, so as to have the effect of merging the simple contract in the specialty ; but if the deed has another object, then a covenant will not be implied from that acknowledgment (*Courtney* v. *Taylor*, 6 M. & G. 851 ; *Marryat* v. *Marryat*, 28 Beav. 224 ; 29 L. J. Ch. 665 ; *Jackson* v. *N. E. Ry. Co.*, 7 Ch. D. 573 ; 47 L. J. Ch. 303 ; *Isaacson* v. *Harwood*, L. R. 3 Ch. 225 ; 37 L. J. Ch. 209 ; "*Merger*," *post*, p. 736). Money lent for an illegal purpose or for an immoral purpose cannot be recovered (*Cannan* v. *Bryce*, 3 B. & Ald. 179 ; *McKinnell* v. *Robinson*, 3 M. & W. 434 ; *Pearce* v. *Brooks*, L. R. 1 Ex. 213 ; 35 L. J. Ex. 134 ; 4 H. & C. 358 ; see "*Illegality*," *post*, p. 682 ; "*Gaming*," *post*, p. 667).

Where money is lent without any stipulation as to the time of repayment a present debt is created, which is in general repayable at once without any demand (*Birks* v. *Trippet*, 1 Wms. Saund., 1871 ed., p. 38 ; see also *Norton* v. *Ellam*, 2 M. & W. 464 ; and *per* Parke, B., in *Walton* v. *Mascall*, 13 M. & W. 458 ; see also *Kington* v. *Kington*, 11 M. & W. 235 ; *Waters* v. *Thanet*, 2 Q. B. 757) ; but if at the time of the loan

The plaintiff will also claim interest on the amount of the said loan at the rate aforesaid from the date of the writ until payment or judgment.

Money Paid.

Claim for Money Paid (*m*).

The plaintiff's claim is for money payable by the defendant to the plaintiff for money paid by the plaintiff for the defendant at his request. Such request was made by the defendant verbally at —— on the ——

---

there was an express stipulation that the repayment should be conditional upon the making of a request, such request must be made before action.

As to the Money Lenders Act, 1900, see *post*, p. 741.

(*m*) A claim of this kind is appropriate where there has been a payment of money by the plaintiff to a third party at the request or by the authority of the defendant, express or implied, with an undertaking, express or implied, to repay it (*Brittain* v. *Lloyd*, 14 M. & W. 762; *Lewis* v. *Campbell*, 8 C. B. 541; *Hutchinson* v. *Sydney*, 10 Ex. 438).

There must be actual payment, or what is equivalent to it (*Power* v. *Butcher*, 10 B. & C. 329, 346), of money of the plaintiff which he is entitled to be repaid (*Goepel* v. *Swinden*, 1 D. & L. 888). Giving a note, which is accepted as payment, is equivalent to money paid (*Barclay* v. *Gooch*, 2 Esp. 571). Executing a covenant to pay is not equivalent to payment of money (*Power* v. *Butcher*, 10 B. & C. 329); nor is the extinguishment of a debt by giving a new security (*Taylor* v. *Higgins*, 3 East, 169; *Maxwell* v. *Jameson*, 2 B. & Ald. 51). It has been held that the proceeds of goods sold as a distress for rent cannot be treated as money paid by the party distrained upon (*Moore* v. *Pyrke*, 11 East, 52). As to money levied by sale of goods under a *fi. fa.*, see *Rodgers* v. *Maw*, 15 M. & W. 444.

The payment must be at the request or by the authority of the defendant; a voluntary payment without request or authority is not sufficient (*Stokes* v. *Lewis*, 1 T. R. 20; *Exall* v. *Partridge*, 8 T. R. 308, 310; *Pownal* v. *Ferrand*, 6 B. & C. 439; *Leigh* v. *Dickeson*, 15 Q. B. D. 60, 64; 54 L. J. Q. B. 340). A request or authority may be implied by the general course of dealing, or by the nature of the particular transaction; thus, a person who employs a broker on the Stock Exchange impliedly authorises the latter to pay money for him according to the rules of the Stock Exchange. (See "*Broker*," *ante*, p. 137; "*Stock Exchange*," *post*, p. 308.) A request may sometimes be implied where the defendant has notice of the payment being made for him, and does not dissent (*Paynter* v. *Williams*, 1 C. & M. 810; *Alexander* v. *Vane*, 1 M. & W. 511). So where a payment has been compelled through the wrongful act of the defendant, of which he gets the benefit; as where an acceptance of the plaintiff was wrongfully indorsed by the defendant (*Bleaden* v. *Charles*, 7 Bing. 246). Where an insolvent, having made a composition with his creditors, gave acceptances to the defendant, being one of his creditors, for a larger amount than his composition, in fraud of the other creditors, and was afterwards compelled to pay the acceptances in the hands of third parties, he was held entitled to recover the amount from the defendant as money paid to his use (*Bradshaw* v. *Bradshaw*, 9 M. & W. 29; and see *Smith* v. *Cuff*, 6 M. & S. 160; *Horton* v. *Riley*, 11 M. & W. 492).

A request or authority will be implied where the plaintiff has been legally compelled to pay, or, being legally compellable to pay, has paid, a debt or claim for which the defendant is primarily liable (*Grissell* v. *Robinson*, 3 Bing. N. C. 10, 15; *Jefferys* v. *Gurr*, 2 B. & Ad. 833; *Moule* v. *Garrett*, L. R. 7 Ex. 101; 41 L. J. Ex. 64; *Edmunds* v. *Wallingford*, 14 Q. B. D. 811, 814; *The Orchis*, 15 P. D. 38, 43; 59 L. J. Adm. 31);

——, 19— [*or*, by letter dated, &c., *or*, was implied under the following circumstances : *state the circumstances concisely*].

Particulars :—

	£	*s.*	*d.*
19—, January 20th. Amount paid to *A. B.*			

---

as where an executor has paid the legacy duty for which the legatee was liable (*Foster* v. *Ley*, 2 Bing. N. C. 269; *Bate* v. *Payne*, 13 Q. B. 900); where the indorser of a bill was made to pay the defendant's acceptance (*Pownal* v. *Ferrand*, 6 B. & C. 439; and see *Sleigh* v. *Sleigh*, 5 Ex. 514); where the plaintiff, an auctioneer, was compelled to pay the auction duty upon the sale of an estate which he sold for the defendant (*Brittain* v. *Lloyd*, 14 M. & W. 762); and where a tenant was compelled to incur expense in remedying a nuisance arising from defects for which the landlord was liable under the Metropolitan Management Acts (*Gebhardt* v. *Saunders*, [1892] 2 Q. B. D. 452).

Where a surety pays the debt of the principal debtor he may recover it as money paid for the use of such debtor (*Exall* v. *Partridge*, 8 T. R. 308, 310); so where one of several co-contractors (not being partners) pays the whole debt for which the other co-contractors are jointly liable with him, he may sue each co-contractor, or the representatives of such as are deceased, for contribution in this form (*Edger* v. *Knapp*, 5 M. & G. 753; *Kemp* v. *Finden*, 12 M. & W. 421; *Batard* v. *Hawes*, 2 E. & B. 287). Where one of several co-sureties has become insolvent, the others have, *inter se*, to share the loss so occasioned (*Lowe* v. *Dixon*, 16 Q. B. D. 455). A surety has no claim in an action for debt against his co-sureties until he has paid more than his share of the debt due to the creditor, whilst such co-sureties remain liable to the creditor for the unpaid portion of the debt (*Ex p. Snowdon*, 17 Ch. D. 44; 50 L. J. Ch. 540; *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; 62 L. J. Ch. 773). Where the plaintiff drew and the defendant indorsed a bill as co-sureties for the acceptor, the plaintiff, having paid it, was held entitled to recover contribution (*Reynolds* v. *Wheeler*, 30 L. J. C. P. 350; 10 C. B. N. S. 561; and see *Macdonald* v. *Whitfield*, 8 App. Cas. 733; 52 L. J. P. C. 70). There is in general no right of contribution between joint wrong-doers, and, if one of them has been compelled to pay the whole damage, he cannot recover contribution from the others (*Merryweather* v. *Nixan*, 1 Smith's L. C., 11th ed., p. 398; *Adamson* v. *Jarvis*, 2 Bing. 66; *Palmer* v. *Wick, &c. Shipping Co.*, [1894] App. Cas. 318), at any rate in the case of an unlawful act wilfully committed (*Ib.*, see "*Indemnities*," *ante*, p. 195).

Where the plaintiff has been compelled, under a distress or threat of a distress to which his goods were liable, to pay the rent of the defendant's premises, he may recover the amount from the defendant (*Exall* v. *Partridge*, 8 T. R. 308; and see *Moore* v. *Pyrke*, 11 East, 52; *Rodgers* v. *Maw*, 15 M. & W. 444, 448; *Graham* v. *Allsopp*, 3 Ex. 186; *per* Lush, J., *Johnson* v. *Skafte*, L. R. 4 Q. B. at p. 705; 38 L. J. Q. B. 318).

Where the plaintiff and the defendant were underlessees at separate rents of separate portions of premises, the whole of which were held at an entire rent under one lease, the plaintiff having been compelled to pay the whole rent under threat of distress, was held not entitled to recover a portion from the defendant as money paid to his use (*Hunter* v. *Hunt*, 1 C. B. 300; *Johnson* v. *Wild*, 44 Ch. D. 146; 59 L. J. Ch. 533).

If by reason of the default of A. in paying a debt the goods of B. become liable to seizure, and B. has been compelled or is compellable in order to preserve possession of or to release his goods to pay the debt, B. may, in general, recover from A. the amount so paid (*Johnson* v. *Royal Mail Co.*, L. R. 3 C. P. 38, 45; 37 L. J. C. P. 33, 49; *The Heather Bell*, [1901] P. at p. 155).

Money paid by the plaintiff, against the payment of which the defendant had agreed to indemnify him, may, in general, be recovered as money paid where there is an

Money Received (*n*).

Claim for Money Received.

The plaintiff's claim is for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff.

Particulars :—

[*State particulars of the money received, showing how the claim arises.*]

---

express or implied request to make the payment (*Lewis* v. *Campbell*, 8 C. B. 541 ; *Hawley* v. *Beverley*, 6 M. & G. 221 ; *Moule* v. *Garrett*, L. R. 5 Ex. 132 ; 7 *Ib.* 101 ; 39 L. J. Ex. 69 ; 41 *Ib.* 62) ; as where an accommodation acceptor, drawer, or indorser is obliged to pay the amount of the bill to the holder, this is money paid for the use of the person accommodated. (See "*Indemnities*," *ante*, p. 195.)

It is in general a defence to an action for money paid that the payment was requested and made for an illegal purpose, or in execution of an illegal contract. (See "*Illegality*," *post*, p. 682, and "*Gaming*," *post*, p. 667.)

(*n*) Whenever a person has received money which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by such person to the use of such other, a debt is created which is recoverable by action (*per* Lord Mansfield, C.J., *Moses* v. *Macferlan*, 2 Burr. 1005 ; and see *Marriot* v. *Hampton*, 2 Smith's L. C., 11th ed., p. 421).

In some cases it may be advisable to set forth concisely in the body of the pleading the facts which give rise to the implication that the receipt of the money claimed was to the use of the plaintiff, but generally it will suffice to specify in the particulars the circumstances relied upon.

The claim must be for money, but if anything has been received by the defendant as money for the use of the plaintiff, it may be so treated ; as a cheque (*Spratt* v. *Hobhouse*, 4 Bing. 173), a country bank note (*Pickard* v. *Bankes*, 13 East, 20), or foreign money (*Ehrensperger* v. *Anderson*, 3 Ex. 148).

The following cases afford examples of circumstances under which a debt for money received is implied :—

Where a sheriff in execution of and under a writ of *fi. fa.* has received money, the execution creditor is entitled to recover it from the sheriff (*Dale* v. *Birch*, 3 Camp. 347 ; *Longdill* v. *Jones*, 1 Stark. 345 ; *Bower* v. *Hett*, [1895] 2 Q. B. 337 ; 64 L. J. Q. B. 772 ; and see *Jefferies* v. *Sheppard*, 3 B. & Ald. 696) ; so also he may recover the proceeds of the goods seized and sold (*Swain* v. *Morland*, 1 B. & B. 370 ; *Gloucestershire Banking Co.* v. *Edwards*, 20 Q. B. D. 107 ; 57 L. J. Q. B. 51). Where the defendant has received fees pertaining to an office, asserting his right to the fees or to the office, the plaintiff, being the person really entitled to the office and the fees, may recover the amount received (*King* v. *Alston*, 12 Q. B. 971 ; *Spry* v. *Emperor*, 6 M. & W. 639 ; *Roberts* v. *Aulton*, 2 H. & N. 432 ; 26 L. J. Ex. 380 ; *Pinder* v. *Barr*, 4 E. & B. 105). So where an agent has received money from his principal under a revocable authority to dispose of it in a particular manner, the principal, if he revokes the authority before it has been acted upon, may recover the money (*Taylor* v. *Lendey*, 9 East, 49 ; *Parry* v. *Roberts*, 3 A. & E. 118 ; *Fletcher* v. *Marshall*, 15 M. & W. 755). But so long as the authority remains unrevoked, the action for any non-compliance with instructions must be for a breach of such instructions (*Ehrensperger* v. *Anderson*, 3 Ex. 148 ; and see *Duncan* v. *Skipwith*, 9 Camp. 68 ; *Miller* v. *Atlee*, 3 Ex. 799, 801 ; *Hardman* v. *Bellhouse*, 9 M. & W. 596) ; unless such breach amounts to a repudiation of the agency, or a total refusal by the agent to dispose of the money according to his instructions, in which cases the principal may also recover back the money (*Scott* v. *Surman*, Willes, 400, 404 ; *Thorpe* v. *Thorpe*, 3 B. & Ad. 580 ; *Buchanan* v. *Findlay*, 9 B. & C. 738 ; *Ehrensperger* v. *Anderson*, 3 Ex. 148, 158).

A principal cannot revoke the authority of his agent to pay money to a third person on his behalf, and, before the payment to such third person, recover from his agent the

In actions for money received to the plaintiff's use, the statement of claim should in all cases state clearly, by way of particulars or otherwise, the facts relied on as showing that the money was received to the use of the plaintiff.

---

money entrusted to him for the purpose of making such payment, where, by express agreement, or by implication arising from the employment, the authority is intended to be irrevocable. (See, for the principle, *Read* v. *Anderson*, 13 Q. B. D. 779; 53 L. J. Q. B. 532, though the case itself was prior to the Gaming Act, 1892, and see *Carmichael's Case*, [1896] 2 Ch. 643, 648.) Where the agency is a mere mandate or delegation of power, the non-execution of which subjects the agent to no loss, damage, or liability, the inference, in the absence of express agreement, is that it is revocable at the will of the principal. (See *Ib.*)

Where money has been paid by the plaintiff to get rid of *duress* to the person of the plaintiff, or to his goods, the money may be recovered back (*Astley* v. *Reynolds*, 2 Str. 915; *Shaw* v. *Woodcock*, 7 B. & C. 73; *Skeate* v. *Beale*, 11 A. & E. 983; *Atlee* v. *Backhouse*, 3 M. & W. 633; *Wakefield* v. *Newbon*, 6 Q. B. 276; *Pratt* v. *Vizard*, 5 B. & Ad. 808; *Oates* v. *Hudson*, 6 Ex. 346; see *Owen* v. *Cronk*, [1895] 1 Q. B. 265; 64 Q. B. 288); so also where a mortgagor has paid money to a mortgagee beyond what is justly due to prevent a threatened sale (*Close* v. *Phipps*, 7 M. & G. 586), or to obtain a transfer or assignment of the mortgage (*Fraser* v. *Pendlebury*, 31 L. J. C. P. 1); so also money may be recovered which has been exacted by other kinds of oppression or extortion (*Smith* v. *Cuff*, 6 M. & S. 160; *Valpy* v. *Manley*, 1 C. B. 594; *Scarfe* v. *Halifax*, 7 M. & W. 288; *Smith* v. *Sleap*, 12 M. & W. 585); or by abuse of legal process (*Duke de Cadaval* v. *Collins*, 4 A. & E. 858). But money paid under the compulsion of legal process cannot in general be recovered by the party paying it (*Marriot* v. *Hampton*, 2 Smith's L. C., 11th ed., p. 421; *Hamlet* v. *Richardson*, 9 Bing. 644; *Moore* v. *Fulham Vestry*, [1895] 1 Q. B. 399; 64 L. J. Q. B. 226), even if paid under mistake of fact, if the recipient is acting *bonâ fide* (*Moore* v. *Fulham Vestry*, *supra*; *Ward* v. *Wallis*, [1900] 1 Q. B. 675; 69 L. J. Q. B. 423). So, money improperly extorted under a distress cannot be recovered back as a debt, but the plaintiff must replevy, or bring an action for the wrongful distress (*Lindon* v. *Hooper*, 1 Cowp. 414; *Gulliver* v. *Cosens*, 1 C. B. 788; *Glynn* v. *Thomas*, 11 Ex. 870; 25 L. J. Ex. 125; *Loring* v. *Warburton*, E. B. & E. 507; 28 L. J. Q. B. 31), except, it would seem, when the payment is made to release the goods before the impounding, which places the goods *in custodiâ legis* (*Green* v. *Duckett*, 11 Q. B. D. 275; 52 L. J. Q. B. 435).

Money paid by the plaintiff in discharge of a demand illegally made under colour of an office may be recovered back as a debt (*Morgan* v. *Palmer*, 2 B. & C. 729; *Steele* v. *Williams*, 8 Ex. 625); as excessive fees paid to the steward of a manor for admission to copyholds (*Traherne* v. *Gardner*, 5 E. & B. 913; 25 L. J. Q. B. 201); excessive fees paid to a broker under a distress (*Hills* v. *Street*, 5 Bing. 37); overcharges paid to a carrier to induce him to carry or deliver goods (*Ashmole* v. *Wainwright*, 2 Q. B. 837); payments extorted by a railway company in excess of the statutory charges permitted them, or contrary to s. 90 of the Railways Clauses Consolidation Act, 1845 (*Gt. W. Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226; 38 L. J. Ex. 177; and *per* Lord Chelmsford in *L. & Y. Ry.* v. *Gidlow*, L. R. 7 H. L. 527; *Ecersheď* v. *L. & N. W. Ry.*, 3 App. Cas. 1029; 48 L. J. H. L. 22; and see "*Carriers*," *ante*, pp. 143, 147); and excessive charge paid to an arbitrator to take up his award (*Re Coombs*, 4 Ex. 839, but see now *ante*, p. 86); money improperly exacted as a toll at a turnpike (*Waterhouse* v. *Keen*, 4 B. & C. 200; and see *Lewis* v. *Hammond*, 2 B. & Ald. 206); an excessive sum extorted by a distrainor as a condition of releasing animals distrained *damage feasant*, and not impounded in a public pound (*Green* v. *Duckett*, *supra*).

Money recovered in an action which the defendant might have successfully defended cannot be recovered back (*Marriot* v. *Hampton*, *supra*; *Hamlet* v. *Richardson*, *supra*; *Duke de Cadaval* v. *Collins*, *supra*; *De Medina* v. *Grove*, 10 Q. B. 152); nor can money paid voluntarily, and with a full knowledge of the facts, to satisfy a claim

which the plaintiff could have successfully resisted (*Spragg* v. *Hammond*, 2 B. & B. 59; *Bilbie* v. *Lumley*, 2 East. 469; *Denby* v. *Moore*, 1 B. & Ald. 123; *Wilson* v. *Ray*, 10 A. & E. 82; *Barber* v. *Pott*, 4 H. & N. 759; 28 L. J. Ex. 381; *Freeman* v. *Jeffries*, L. R. 4 Ex. 189; 38 L. J. Ex. 116; *Rogers* v. *Ingham*, L. R. 5 Ch. D. 351).

Money paid by reason of ignorance or mistake of fact may, in general, be recovered as money received. (See *post*, p. 259 note (*o*).)

Money paid for a consideration that has failed may be thus recovered. (See *post*, p. 261.)

Money obtained wrongfully or by fraud may, in general, be thus recovered. Thus, where money was obtained from the plaintiff by fraudulent misrepresentation (*Holt* v. *Ely*, 1 E. & B. 795; *Edmeads* v. *Newman*, 1 B. & C. 418; *Martin* v. *Morgan*, 1 B. & B. 289); so where a plaintiff has been induced by fraudulent misrepresentations contained in a prospectus of a company to take and pay for shares in the company, he may, before the rights of other persons intervene, avoid his contract as a shareholder upon the discovery of the fraud, and recover back the money paid (*Oakes* v. *Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949); but if the company is then being wound up, he is too late to avoid the contract (*Stone* v. *City and County Bank*, 3 C. P. D. 282; 47 L. J. C. P. 681; *Tennent* v. *City of Glasgow Bank*, 4 App. Cas. 615). So also where an agent, or servant, improperly and contrary to his duty receives, in his employment, a commission from third persons, the principal, or master, may recover it from him. (See "*Agent*," *ante*, p. 77.)

In general, where a party is entitled to rescind a contract on the ground of fraud, he may recover back the money he has paid under the contract.

Money stolen may be treated as a debt and recovered as money received (*Chowne* v. *Baylis*, 31 L. J. Ch. 757), subject, however, it has been said, to the action being stayed where it is brought by one who ought, in the interests of public justice, to have prosecuted the defendant for the theft. (See "*Trespass*," *post*, p. 923.)

Where the plaintiff has paid money to the defendant upon an *illegal executory contract*, or for a future *illegal object*, there is a *locus pœnitentiæ*, and the plaintiff may, before there has been any substantial part performance of the contract, or progress towards accomplishment of the object, demand and recover back the money (*Lowry* v. *Bourdieu*, 2 Doug. 468; *Jacques* v. *Withy*, 1 H. Bl. 65; *Taylor* v. *Lendey*, 9 East, 49; *Tappenden* v. *Randall*, 2 B. & P. 467; *Bone* v. *Ekless*, 5 H. & N. 925; 29 L. J. Ex. 438; *Kearley* v. *Thomson*, 24 Q. B. D. 742; 59 L. J. Q. B. 288; *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123; 74 L. J. K. B. 620). It seems that where the parties are *in pari delicto* the plaintiff should give notice that he demands the money before action (*Palyart* v. *Leckie*, 6 M. & S. 290; *Savage* v. *Madder*, 36 L. J. Ex. 178; *Busk* v. *Walsh*, 4 Taunt. 290; *Strachan* v. *Universal Stock Exchange*, [1895] 2 Q. B. 697, 703; 65 L. J. Q. B. 178). Money in the hands of a stakeholder deposited upon a void or illegal wager may, in general, be recovered back before it has been paid over. (See "*Gaming*," *post*, p. 668.) After an illegal or void contract or purpose has been executed, or performed in a substantial part, the money paid cannot, in general, be recovered (*Lowry* v. *Bourdieu*, 2 Doug. 468; *Andree* v. *Fletcher*, 3 T. R. 266; *Thistlewood* v. *Cracroft*, 1 M. & S. 500; *Wilson* v. *Ray*, 10 A. & E. 82; *Howson* v. *Hancock*, 8 T. R. 575; *Kearley* v. *Thompson*, *supra*; *Strachan* v. *Universal Stock Exchange*, *supra*; and see *Hermann* v. *Charlesworth*, *supra*). In some cases, however, money paid in execution of, or as the consideration for, an illegal agreement, or for an illegal purpose, may be recovered back, though the agreement or purpose has been executed, where the party paying is not *in pari delicto* with the party receiving, but is in such a position as to have been subject, or liable, to oppression, or imposition, at the hands of the other party to the transaction (*Smith* v. *Bromley*, 2 Doug. 696, n; *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K. B. 558, 563, 564; 73 L. J. K. B. 373; *Kearley* v. *Thomson*, *supra*); as, money paid to compromise a penal action in defiance of the statute (*Williams* v. *Hedley*, 8 East, 378; *Unwin* v. *Leaper*, 1 M. & G. 747); money paid by a debtor compounding with his creditors to a creditor in excess of the composition to obtain his consent to the composition (*Atkinson* v. *Denby*, 6 H. & N. 778; 7 H. & N. 934; 30 L. J. Ex. 331; 31 L. J. Ex. 362; *Smith* v. *Cuff*, 6 M. & S. 160).

The like, against a Rent Collector and Estate Agent.

The plaintiff's claim is for money received by the defendant for the use of the plaintiff.

Particulars :—

19—, 1st January.	£	*s.*	*d.*
To amount of rents of No. 5, Smith Street, collected by the defendant	72	10	0
To deposit on intended sale of Eva Villa	100	0	0
Amount due.....	£172	10	0

(*See R. S. C.*, 1883, *App. C., Sect. IV., No.* 2.)

The like, where the Money has been paid by Mistake (*o*).

The plaintiff's claim is for money received by the defendant for the use of the plaintiff.

Although the plaintiff cannot enforce an illegal or void contract, yet if money has been paid to his agent on his behalf in execution of such contract he may recover it (*Tenant* v. *Elliott*, 1 B. & P. 3 ; *Farmer* v. *Russell*, 1 B. & P. 296 ; *Nicholson* v. *Gooch*, 5 E. & B. 999 ; 25 L. J. Q. B. 137 ; *Johnson* v. *Lansley*, 12 C. B. 468 ; *Sharp* v. *Taylor*, 2 Phill. 801). See further "*Gaming*," *post*, p. 667.

Money paid under a compromise of a *bonâ fide*, though possibly mistaken, claim cannot be recovered back (*Atlee* v. *Backhouse*, 3 M. & W. 633 ; *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449 ; 39 L. J. Q. B. 181 ; and see *Ex p. Banner*, 17 Ch. D. 480 ; 51 L. J. Ch. 300). Where the defendant has received the plaintiff's money from a third party, *bonâ fide*, and under a binding contract, he is not, in general, accountable to the plaintiff (*Calland* v. *Lloyd*, 6 M. & W. 26 ; *Foster* v. *Green*, 7 H. & N. 881 ; 31 L. J. Ex. 159 ; *Atlee* v. *Backhouse*, *supra*).

An agent receiving money rightfully on behalf of his principal is accountable to his principal, and is not, after payment over of the money to his principal without notice of any claim, subject to claims of third parties with regard to such money (*Pond* v. *Underwood*, 2 Ld. Raym. 1210 ; *Bamford* v. *Shuttleworth*, 11 A. & E. 926 ; *Holland* v. *Russell*, 4 B. & S. 14 ; 32 L. J. Q. B. 297 ; *Shand* v. *Grant*, 15 C. B. N. S. 324 ; *Stephens* v. *Badcock*, 3 B. & Ad. 354 ; *Owen* v. *Cronk*, [1895] 1 Q. B. 265, 274 ; 64 L. J. Q. B. 288. See *Ellis* v. *Goulton*, [1893] 1 Q. B. 350 ; 62 L. J. Q. B. 232). But where the payment is void *ab initio*, so that the money never was received for his principal, it may be recovered from the agent before he has paid it to his principal, or settled with him for it ; as, for example, if the payment has been made by mistake (*Buller* v. *Harrison*, 2 Cowp. 565 ; *Cox* v. *Prentice*, 3 M. & S. 344 ; *Newall* v. *Tomlinson*, L. R. 6 C. P. 405). A principal cannot charge a sub-agent upon a merely unauthorised delegation of agency, there being neither primarily, nor by ratification, any privity of contract between them (*Stephens* v. *Badcock*, 3 B. & Ad. 354 ; *Prince* v. *Oriental Bank Corp.*, 3 App. Cas. 325, 334 ; *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. 374 ; 50 L. J. Q. B. 433).

(*o*) Money paid by reason of ignorance or mistake of fact, or by reason of an excusable forgetfulness of fact, may be recovered back (*Bize* v. *Dickason*, 1 T. R. 285 ; *Milnes* v. *Duncan*, 6 B. & C. 671 ; *Kelly* v. *Solari*, 9 M. & W. 54 ; *Mills* v. *Alderbury Union*, 3 Ex. 590 ; *Aiken* v. *Short*, 1 H. & N. 210 ; 25 L. J. Ex. 321 ; *Durrant* v. *The Ecclesiastical Commissioners*, 6 Q. B. D. 234 ; 50 L. J. Ex. 30) ; as where a tenant under a landlord who held *pur autre vie* paid rent in ignorance that the life had dropped

Particulars :—

1904, December 20th.

Amount paid by the plaintiff to the defendant by a mistake of fact, viz. :—[*state what the mistake was*] ..... £——

(*Barber* v. *Brown*, 1 C. B. N. S. 121 ; 26 L. J. C. P. 41) ; where an excess of price was paid for a bar of silver sold by weight, upon an erroneous calculation of the weight (*Cox* v. *Prentice*, 3 M. & S. 344) ; where a like excess was paid upon a wrong calculation of price (*Newall* v. *Tomlinson*, L. R. 6 C. P. 405) ; and where one partner purchased another's share in the partnership, for a price dependent upon the amount of the profits, and paid the other more than he was entitled to under a mistake in the calculation of them (*Townsend* v. *Crowdy*, 8 C. B. N. S. 477 ; 29 L. J. C. P. 300). A sheriff who seized goods in execution and paid over the proceeds to the judgment creditor in ignorance of the fact of a previous act of bankruptcy of the judgment debtor, and who was subsequently compelled to pay the amount to the assignees of the bankrupt, was held entitled to recover the proceeds paid to the judgment creditor (*Standish* v. *Ross*, 3 Ex. 527). Money paid under compulsion of law cannot in general be recovered back, although the compulsion was submitted to under a mistake as to a fact. (See *ante*, p. 257.)

Where money is paid under a supposed obligation to pay it, and in forgetfulness of a fact which put an end to the obligation, it may be recovered back, as when an insurance office paid the amount of a life policy in forgetfulness of a default which had previously caused the policy to lapse (*Kelly* v. *Solari*, 9 M. & W. 54) ; but if the money is paid intentionally, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, it is a voluntary payment, and cannot be recovered (*per* Parke, B., in *Kelly* v. *Solari*, *supra*). The right to recover money paid under a mistake of fact must in general have reference to a belief in the existence of a fact which, if true, would have given the person receiving the money a right against the person paying it. (See *per* Bramwell, B., in *Aiken* v. *Short*, 1 H. & N. 210 ; 25 L. J. Ex. 321.)

A banker who pays to a third party the amount of the cheque of his customer, in the mistaken belief that such customer has assets in the bank sufficient to meet such cheque, cannot recover the money so paid from such third party (*Chambers* v. *Miller*, *ante*, p. 97). An acceptor of a bill of exchange who pays the amount to a holder who derives title through a forged indorsement, cannot afterwards, on discovering the forgery, recover back the amount from the holder, if the holder received payment in good faith, and if such an interval of time has elapsed that the position of the holder may have changed by reason of it having become too late to give notice of dishonour to other parties to the bill (*London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7 ; 65 L. J. Q. B. 80, as explained in *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, 58 ; 72 L. J. P. C. 1). A voluntary gift made under a mistake cannot usually be recovered back (*Aiken* v. *Short*, *supra* ; *Wilson* v. *Thornbury*, L. R. 10 Ch. 239). Before commencing an action to recover money paid by mistake, if the defendant had no notice of the mistake, notice should in general be given him, and a demand of the money made (*Freeman* v. *Jeffries*, L. R. 4 Ex. 189 ; 38 L. J. Ex. 116 ; *Kelly* v. *Solari*, *supra*).

Where money is paid voluntarily with a knowledge of the facts, it is not ground for recovering it back that it was paid under a mistake as to or in ignorance of the law (*Bilbie* v. *Lumley*, 2 East, 469 ; *Stevens* v. *Lynch*, 12 East, 38 ; *Rogers* v. *Ingham*, 3 Ch. D. 351 ; *Blackburn Building Society* v. *Cunliff, Brooks & Co.*, 29 Ch. D. 902, 910 ; 54 L. J. Ch. 1091 ; and see *Ex p. James*, L. R. 9 Ch. Ap. 609 ; 43 L. J. B. 107).

The like, where the Money was paid for a Consideration which has failed (*p*).

The plaintiff's claim is for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff.

(*p*) Money paid by the plaintiff for a consideration that has failed may be recovered as money received (see *Straton* v. *Rastall*, 2 T. R. 366, 369, 370); as, money given for forged railway scrip (*Westropp* v. *Solomon*, 8 C. B. 345); for a forged bank note or worthless cheque (*Turner* v. *Stone*, 1 D. & L. 122; *Woodland* v. *Fear*, 7 E. & B. 519; 26 L. J. Q. B. 202); for a forged bill or bank-note (*Jones* v. *Ryde*, 5 Taunt. 488; *Gurney* v. *Womersley*, 4 E. & B. 133; as to money paid in discharge of a forged bill, see *Wilkinson* v. *Johnston*, 3 B. & C. 428); money given for a bill of exchange that has been avoided by a material alteration (*Burchfield* v. *Moore*, 3 E. & B. 683; *Leeds Bank* v. *Walker*, 11 Q. B. D. 84; 52 L. J. Q. B. 590); money given for bonds sold as valid bonds, but which proved defective and worthless (*Young* v. *Cole*, 3 Bing. N. C. 724); money paid as deposit on a contract of sale which has been rescinded otherwise than for default of the purchaser (*Blackburn* v. *Smith*, 2 Ex. 783; *Ashworth* v. *Mounsey*, 9 Ex. 175; *Simmons* v. *Heseltine*, 5 C. B. N. S. 554; 28 L. J. C. P. 129); or which the vendor could not complete (*Gosbell* v. *Archer*, 2 A. & E. 500); or which has been defeated by a condition not fulfilled (see as to deposits, *post*, p. 283) money paid as deposit on scrip for shares in a railway scheme which turned out abortive (*Moore* v. *Garwood*, 4 Ex. 681; *Watson* v. *Earl Charlemont*, 12 Q. B. 856; *Ward* v. *Londesborough*, 12 C. B. 252; *Mowatt* v. *Londesborough*, 4 E. & B. 1; *Walstab* v. *Spottiswoode*, 15 M. & W. 501); or deposits on shares in an abortive cost-book mine (*Johnson* v. *Goslett*, 25 L. J. C. P. 274; 3 C. B. N. S. 569; 27 L. J. C. P. 122); the price of an annuity, the securities for which have been set aside (*Huggins* v. *Coates*, 5 Q. B. 432); or of an annuity which had ceased to exist before the sale (*Strickland* v. *Turner*, 7 Ex. 208); the conduct money paid with a subpœna to a witness whose attendance was countermanded, and who incurred no expense (*Martin* v. *Andrews*, 7 E. & B. 1; 26 L. J. Q. B. 39); money paid for a purpose which afterwards became impossible (see *Brown* v. *Overbury*, 25 L. J. Ex. 169; 11 Ex. 715). See further "*Insurance*," *ante*, p. 204.

The plaintiff cannot recover as upon a failure of consideration where he has obtained that which he bargained for, although it turns out to be not genuine, but valueless (*Begbie* v. *Phosphate, &c. Co.*, 1 Q. B. D. 679; 44 L. J. Q. B. 233; *Lambert* v. *Heath*, 15 M. & W. 486; *Clare* v. *Lamb*, L. R. 10 C. P. 334; 44 L. J. C. P. 177); as money paid for the use of a patent, which is, after being used for some years, discovered to be invalid (*Taylor* v. *Hare*, 1 B. & B. N. R. 260; and see *Lawes* v. *Purser*, 6 E. & B. 930; 26 L. J. Q. B. 25); or where the consideration fails partly through his own default (*Straton* v. *Rastall*, 2 T. R. 366; *Stray* v. *Russell*, 1 E. & E. 888, 916; 28 L. J. Q. B. 279; 29 *Ib.* 115); as where the plaintiff purchased shares in a bank, but did not get the transfers of them registered, and the bank afterwards failed (*Ib.*). So where the plaintiff paid money to the defendant under a contract which he could not enforce by reason of the Statute of Frauds, it was held that he could not, merely on that account, recover it back (*Sweet* v. *Lee*, 3 M. & G. 452; *Thomas* v. *Brown*, 1 Q. B. D. 714; 45 L. J. Q. B. 811; but see *Gosbell* v. *Archer*, 2 A. & E. 500).

The failure of consideration must be complete in order to entitle the plaintiff to recover the money paid for it (*Hunt* v. *Silk*, 5 East, 449; *Blackburn* v. *Smith*, 2 Ex. 783; *Anglo-Egyptian Nav. Co.* v. *Rennie*, L. R. 10 C. P. 271; 44 L. J. C. P. 130; *Nicholson* v. *Ricketts*, 29 L. J. Q. B. 55; 6 Jur. N. S. 422); so, where a premium was paid for an apprenticeship of six years and the master died at the end of the first year, and an action was brought to recover the premium, it was held that there was only a partial failure, and that such action was not maintainable (*Whincup* v. *Hughes*, L. R. 6 C. P. 78; 40 L. J. C. P. 104; and see *Ferns* v. *Carr*, 28 C. D. 409; 54 L. J. Ch. 479). But where the consideration is severable, complete failure of part may form a ground

Particulars :—

19—, November 13th.

To amount paid by the plaintiff to the defendant for wheat to be delivered during the month following to the plaintiff's order pursuant to contract in writing, dated, &c., none of which wheat was in fact delivered... £——

The like, against a Wrongdoer waiving the Tort and claiming the Proceeds as Money received for the use of the Plaintiff (*q*).

The plaintiff's claim is for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff.

Particulars :—

19—, —— ——. Proceeds of sale by defendant of plaintiff's horse .....£——

---

for recovering a proportionate part of the money paid (see *Astle* v. *Wright*, 23 Beav. 77 ; 25 L. J. Ch. 864) ; as where a quantity of goods was ordered at a certain rate of payment, and only a portion was delivered (*Deraux* v. *Conolly*, 8 C. B. 640).

Freight paid in advance is not in general recoverable, although the goods are lost on the voyage (*Allison* v. *Bristol Mar. Ins. Co.*, 1 App. Cas. 209, 225).

As to actions to recover payments made by infants under void contracts, see "*Infancy*," *post*, p. 687.

(*q*) Where the plaintiff's goods have been wrongfully obtained by the defendant and converted into money, the plaintiff may waive the wrong and follow the proceeds as money received for his use (*Lamine* v. *Dorrell*, 2 Ld. Raym. 1216 ; *Oughton* v. *Seppings*, 1 B. & Ad. 241 ; *Neate* v. *Harding*, 6 Ex. 349 ; *Marsh* v. *Keating*, 1 Bing. N. C. 215 ; *Rodgers* v. *Maw*, 15 M. & W. 448 ; *Reid* v. *Rigby & Co.*, [1894] 2 Q. B. 40 ; 63 L. J. Q. B. 451). So, where the plaintiff's stock was sold by a member of the defendant's firm under a forged power of attorney and the price paid to the firm, the amount of the price was thus recovered (*Marsh* v. *Keating*, *supra*) ; so, if the defendant wrongfully, having no title thereto, has converted to his own use a cheque, bill, or other security of the plaintiff, the proceeds of such conversion are in like manner recoverable (*Down* v. *Halling*, 4 B. & C. 330 ; *Symonds* v. *Atkinson*, 1 H. & N. 146 ; 25 L. J. Ex. 313 ; *Babbett* v. *Pinkett*, 1 Ex. D. 368 ; 45 L. J. Ex. 555). So where coal has been wrongfully got by an adjoining owner, the true owner may recover the proceeds (*Powell* v. *Rees*, 7 A. & E. 426 ; *Jegon* v. *Vivian*, L. R. 6 Ch. 742 ; 40 L. J. Ch. 389).

In cases where the plaintiff waives the wrong in order to claim his money or the proceeds of his goods which have been wrongfully obtained, he thereby precludes himself from claiming damages for the wrong done. Thus, he cannot recover the proceeds of goods wrongfully sold by the defendant as a debt, and also recover damages in respect of the injurious nature of the act (*Brewer* v. *Sparrow*, 7 B. & C. 310 ; and see *Valpy* v. *Sanders*, 5 C. B. 886 ; *Smith* v. *Baker*, L. R. 8 C. P. 350 ; 42 L. J. C. P. 155 ; *per* Bovill, C.J. ; and see *Rice* v. *Reed*, [1900] 1 Q. B. 54, 65, 67 ; 69 L. J. Q. B. 33). Nor can he waive the wrong in part only ; so that, having accepted from the defendant part of the price of goods which had been wrongfully sold by the latter, he is bound to treat the balance also as a debt (*Lythgoe* v. *Vernon*, 5 H. & N. 180 ; 29 L. J. Ex. 164.

Claim for Wrongful Conversion of Cheques and Bills belonging to the Plaintiff, with an alternative Claim for the Proceeds thereof.

1. The plaintiff has suffered damage by the defendant wrongfully depriving the plaintiff of divers cheques and bills of exchange, the property of the plaintiff, particulars whereof [are as follows: *stating same*].

2. Alternatively, the plaintiff claims against the defendant £—— payable to him by the defendant for money received by the defendant for the use of the plaintiff.

Particulars :—

The money received was £——, the proceeds of the cheques and bills above mentioned, which were cashed and converted into money by the defendant. The items are as follows [*stating same*].

For Money admitted to have been received for the use of the Plaintiff (r).

The plaintiff's claim is for money received by the defendant for the use of the plaintiff.

Particulars :—

19—, January, ——.

The defendant received from A. B., of ——, £——, with directions from him to pay it to the plaintiff, and [by letter dated ——] the defendant admitted to the plaintiff that he had received the said sum for the use of the plaintiff.

Amount due, £——.

(r) Where money has been received by an agent from his principal, with instructions to pay it over to the plaintiff, the agent is not accountable to the latter until he has acknowledged to him that he has accepted the charge, and holds the money for his use (*Williams* v. *Everett*, 14 East, 582; *Yates* v. *Bell*, 3 B. & Ald. 643; *Lilly* v. *Hays*, 5 A. & E. 548; *Brind* v. *Hampshire*, 1 M. & W. 365; *Baron* v. *Husband*, 1 B. & Ad. 611; *Moore* v. *Bushell*, 27 L. J. Ex. 3; *Hill* v. *Royds*, L. R. 8 Eq. 290; 38 L. J. Ch. 538). Where such acknowledgment is given conditionally, the action will not lie until after fulfilment of the condition (*Malcolm* v. *Scott*, 5 Ex. 601; *Hudson* v. *Bilton*, 6 E. & B. 565; 26 L. J. Q. B. 27).

If a trustee who has received trust money admits to the *cestui que trust* that he holds the money as the money of the *cestui que trust* to be accounted for to the latter as an ordinary debt, it may in general be recovered by the latter in the King's Bench Division as money received for his use. (*Remon* v. *Hayward*, 2 A. & E. 666; *Roper* v. *Holland*, 3 A. & E. 99; *Edwards* v. *Lowndes*, 1 E. & B. 81, 89; *Pardoe* v. *Price*, 16 M. & W. 451, 458; *Howard* v. *Brownhill*, 23 L. J. Q. B. 23, *per* Erle, J.) In the absence of such acknowledgment and of any contract between the trustee and the *cestui que trust*, the action would in general be one to enforce a trust, and proper to be commenced in the Chancery Division. (See Jud. Act, 1873, s. 34).

An executor or administrator is in the position of a trustee, and the legacies or distributive shares payable out of the estate of the deceased cannot in general be recovered as debts (*Deeks* v. *Strutt*, 5 T. R. 690; *Jones* v. *Tanner*, 7 B. & C. 542). But after an executor or administrator has admitted to the legatee that he holds the money to his use as a debt, the legatee may recover it as a debt (*Topham* v. *Morecraft*, 8 E. & B. 972; and see *Barlow* v. *Browne*, 16 M. & W. 126). See *ante*, pp. 171, 172.

By a Principal for Money received by his Agent as a Bribe or Secret Commission: see "Agent," ante, p. 77.

Against an Agent employed to sell Goods for not accounting for or paying over Moneys received by him: see "Agent," ante, p. 74.

Against a Carrier for Overcharges: see "Carriers," ante, p. 147.

For the Return of a Premium paid on a Policy of Marine Insurance, where the Risk never attached: see "Insurance," ante, p. 204.

Mortgage.

Claim on the Covenant for Payment in a Mortgage Deed (*s*).

The plaintiff's claim is for principal and interest due under the defendant's covenant in a mortgage deed, dated the —— ——, 19—.

Particulars :—

	£
19—, —— ——. Principal due	
Interest from —— ——, 19—, to date of writ	
Amount due	£

(*See R. S. C.*, 1883, *App. C., Sect. IV., No.* 8.)

(*s*) If the mortgage deed does not contain any express or implied covenant for payment of the debt, such debt may be recovered as a simple contract debt for money lent (*Yates* v. *Aston*, 4 Q. B. 162; *Mathew* v. *Blackmore*, 1 H. & N. 762; 26 L. J. Ex. 150; see "*Money Lent*," *ante*, p. 253). So also where a bill of sale containing a covenant for payment is void under the Bills of Sale Act, 1882, an action may nevertheless lie for money lent (*Davies* v. *Rees*, 17 Q. B. D. 408).

As a rule a mortgagee may pursue all his remedies concurrently, but if he commence an action in the Chancery Division for an account, a second action in the King's Bench Division for payment of the principal and interest will be stayed as improper (*Williams* v. *Hunt*, [1905] 1 K. B. 512; 74 L. J. K. B. 364).

A power to sell upon default is implied in a mortgage deed, whether of land or chattels, unless a contrary intention appears in the deed. (See the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), ss. 2, 19; and see as to the exercise of the statutory power of sale, s. 20.) The form of bill of sale given by the Bills of Sale Act, 1882, excludes this implied power of sale (*Calvert* v. *Thomas*, 19 Q. B. D. 204; 56 L. J. Q. B. 470). As to the powers of sale in general of pledgees and mortgagees of chattels, see *In re Morritt*, 18 Q. B. D. 222; *Deverges* v. *Sandeman*, [1901] 1 Ch. 70; [1902] 1 Ch. 579; 71 L. J. Ch. 328.

As to implied covenants for payment, see the Conveyancing Act, 1881, s. 26, and "*Money Lent*," *ante*, p. 253.

Actions for foreclosure or redemption are assigned to the Chancery Division

For Interest due under a Covenant in a Mortgage Deed, where the Plaintiff does not claim Repayment of the Principal Sum due.

The plaintiff's claim is for interest due under a covenant in a mortgage deed, dated the —— ——, 19—, whereby the defendant covenanted that, if he did not repay to the plaintiff the principal sum of £——, with interest thereon at —— per cent. per annum, on the —— ——, 19—, he would thereafter, so long as the said principal sum should remain unpaid, pay to the plaintiff, by equal half-yearly payments, on the —— ——, and the —— ——, in every year, interest on the said principal sum at the rate of —— per cent. per annum.

Particulars :— £ *s. d.*

19—. —— ——. One half-year's interest .....

—— ——. Ditto.....

Amount due ..... £

A like Form by the Transferee of a Mortgage : see Satchwell v. *Clarke*, 8 *Times Rep.* 592.

See Claims for Recovery of Possession, post, pp. 469, 471.

PARTNERS (*l*).

(Judicature Act, 1873, s. 34 ; see also Ord. LV., rr. 5a, 5b).

As to the cases in which a mortgagor of land entitled to possession or to the receipt of the rents and profits may bring actions in respect of it against third persons in his own name, without joining the mortgagee, see the Jud. Act, 1873, s. 25 (5) ; *Fairclough* v. *Marshall*, 4 Ex. D. 37 ; 48 L. J. Ex. 146 ; *Van Gelder Co.* v. *Sowerby, &c. Society*, 44 Ch. D. 347, 390, 393 ; *Matthews* v. *Usher*, [1900] 2 Q. B. 535 ; 69 L. J. Q. B. 856.

On the death of a sole mortgagee in fee, the estate devolves on his personal representatives, who are the persons to sue on covenants running with the land. (See the Conveyancing Act, 1881, s. 30.) A mortgage of a debt or *chose in action* may amount to an "absolute assignment" within s. 25 (6) of the Judicature Act, 1873. (See *ante*, p. 89.)

(*l*) The general law with regard to partnership has been codified by the Partnership Act, 1890 (53 & 54 Vict. c. 39). Partnership is by s. 1 defined as "the relation which subsists between persons carrying on a business in common with a view of profit." The receipt by a person of a share of the profits of a business is *primâ facie*, but not conclusive, evidence that such person is a partner in the business (s. 2 (3) ; and see s. 2 also for rules by which to determine whether a partnership exists or not).

By s. 5, "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership ; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

Where the contract is made in a partnership name, and there are partners who

did not appear in the transaction and were unknown to the other contracting party, the secret partners are in the position of undisclosed principals, and, although they may join in suing upon the contract, the other party cannot be compelled to sue them. He may join them with the ostensible partners as defendants, if he chooses, or he may sue the ostensible partners only, and in the latter case no objection can be taken on the ground of the non-joinder of the secret partners (*De Mautort* v. *Saunders*, 1 B. & Ad. 398; *Kendall* v. *Hamilton*, 4 App. Cas. 504, 514; 48 L. J. C. P. 705, and see further *infra*).

By s. 7, "Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner."

By s. 9, "Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner."

Where the debt or obligation is joint only, a judgment recovered against one of the firm is, even without satisfaction, a bar to a further action against the other members of the firm (*King* v. *Hoare*, 13 M. & W. 494; *Kendall* v. *Hamilton*, 4 App. Cas. 514; 48 L. J. H. L. 705; *Hammond* v. *Schofield*, [1891] 1 Q. B. 453; 60 L. J. Q. B. 539; "*Judgment Recovered*," *post*, p. 704).

As to the equitable remedy of a creditor against the estate of a deceased partner, see *Beckett* v. *Ramsdale*, 31 Ch. D. 177; 55 L. J. Ch. 241.

A person who has held himself out or allowed himself to be represented as a partner, but who is not in fact a partner, may be held liable as though he were a partner by persons who have thereby been led to give credit to the firm. (See s. 14; *In re Fraser*, [1892] 2 Q. B. 633, 637.)

By s. 17, "(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

"(2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before the retirement."

An action for goods sold and delivered will not lie against the executor of a deceased partner for the price of goods, ordered for the firm in the testator's lifetime, but delivered after his death (*Bagel* v. *Miller*, [1903] 2 K. B. 212; 72 L. K. J. B. 495). A contract with a partnership respecting matters connected with the business of the firm is, in general, intended to be applicable to, and is made with reference to, the existing partnership and business, and where the personal qualifications of the individuals composing the firm are material, it is terminated by a dissolution or change of the partnership, unless the contrary is expressed or appears by clear implication (*Lord Arlington* v. *Meyricke*, 2 Saund. 414, n. (s); *Phillips* v. *Alhambra Palace Co.*, [1901] 1 Q. B. 59, 64; 70 L. J. Q. B. 26; and see *Brace* v. *Calder*, [1895] 2 Q. B. 253; 65 L. J. Q. B. 582). In the case of a troupe of music hall performers engaged by a firm carrying on business as music hall proprietors it was held that the death of one of the firm did not put an end to the engagement (*Phillips* v. *Alhambra Palace Co.*, *supra*). Whilst where two partners engaged a person as their agent for a period of four and a half years, and one of them died during that period, it was held that the engagement was thereby terminated (*Tasker* v. *Shepherd*, 6 H. & N. 575). See further as to when contracts are terminated by death, *ante* pp. 83, 171.

Where a contract is made *with* one partner in his own name only, without mention of his firm, on account of the partnership business, the other partners may join with him in suing on it (*Skinner* v. *Stocks*, 4 B. & Ald. 437; *Garrett* v. *Handley*, 4 B. & C. 664; *Cothay* v. *Fennell*, 10 B. & C. 671; *Robson* v. *Drummond*, 2 B. & Ad. 303; *Alexander* v. *Barker*, 2 C. & J. 133), or he may sue on it alone, upon the same principle that where an agent contracts for an undisclosed principal either the former or the latter may sue upon it (*Sims* v. *Bond*, 5 B. & Ad. 389, 393). The right of an undisclosed partner to the benefit of the contract is, like that of an undisclosed principal, subject to the equities and defences which the defendant may have against the partner who

Claim by one Firm against another in the Firm's Name (*u*).

Between—*Brown, Smith,* & Co.....Plaintiffs,

and

Johnson and Taylor .....Defendants.

Statement of Claim.

[*Proceed in the ordinary form, describing the parties as* "the plaintiffs" *and* "the defendants" *respectively throughout.*]

---

actually contracted (*Robson* v. *Drummond*, 2 B. & Ad. 303; *George* v. *Clagett*, 7 T. R. 359).

Where a contract is made *by* one partner in his own name, on account of the partnership business, and the other partners are not disclosed, he may be sued alone upon it, or the other partners may be sued with him as co-defendants at the option of the person with whom the contract is made (*Beckham* v. *Drake*, 9 M. & W. 79; 11 M. & W. 315; *Kendall* v. *Hamilton*, 4 App. Cas. 504, 514; 48 L. J. C. P. 705). But when he has sued and obtained judgment against the partner who made the contract, he cannot afterwards sue the non-disclosed partners (*Kendall* v. *Hamilton*, *supra*; *Scarf* v. *Jardine*, 7 App. Cas. 345; 51 L. J. Q. B. 612; and see *post*, p. 704).

Previously to the Judicature Acts one partner could not sue another at law upon any matter involving the partnership accounts (Lindley on Partnership, 7th ed., p. 597). But partners could sue each other at common law in respect of matters independent of the partnership, or on express covenants or agreements (*Ib.*; and see *Brown* v. *Tapscott*, 6 M. & W. 119; *Blech* v. *Balleras*, 29 L. J. Q. B. 261). So, if one partner advanced for the other a sum of money as the other's share of the partnership capital, he could recover it by a common law action (*Venning* v. *Leckie*, 13 East, 7; *French* v. *Styring*, 2 C. B. N. S. 357; 26 L. J. C. P. 181). So also one partner could sue another for his share of the produce of the partnership transaction, after a final account stated and a balance acknowledged to be due (*Foster* v. *Allanson*, 2 T. R. 479; *Jackson* v. *Stopherd*, 4 Tyr. 330; *Borill* v. *Hammond*, 6 B. & C. 149; *Coffee* v. *Brian*, 3 Bing. 54; *Wray* v. *Milestone*, 5 M. & W. 21; *Henley* v. *Soper*, 8 B. & C. 16, 20.) In cases such as those above, where the taking of a partnership account is not involved, partners may now sue each other in the King's Bench Division; but actions in which the taking of partnership accounts is involved are, by s. 34 of the Judicature Act, 1873, assigned to the Chancery Division, and, if brought in the King's Bench Division, are subject to the power of transfer under Ord. XLIX.

A firm is now, it would seem, at liberty to maintain, in a proper case, an action for debt against one of its members in the King's Bench Division, and *vice versâ* (see Ord. LVIII., r. 10), though formerly no action could be brought at common law upon a contract made by one or more of the members of a partnership firm with the firm, or by the firm with one or more of its members (*Mainwaring* v. *Newman*, 2 B. & P. 120; *De Tastet* v. *Shaw*, 1 B. & Ald. 664, 669; *Richardson* v. *Bank of England*, 4 My. & Cr. 165, 171); and, where two firms had a member who was common to both, a contract made between the two firms could not be sued on by the partners of either firm in an action at law (*Bosanquet* v. *Wray*, 6 Taunt. 597; *Mainwaring* v. *Newman*, *supra*). In the former Courts of Equity effect could usually be given to such contracts (*Piercy* v. *Fynney*, L. R. 12 Eq. 69; *Taylor* v. *M. Ry. Co.* 8 H. L. C. 751), and consequently, effect will now, subject to what has been said above as to the power of transfer, be given to them in the King's Bench Division. (See Jud. Act, 1873, ss. 16, 24; and s. 46 of the Partnership Act, 1890.)

The executors of a deceased partner carrying on the business for the benefit of the estate are liable as partners for debts incurred by them in carrying on the business, and are partners in such business (*Wightman* v. *Townroe*, 1 M. & S. 412; and see the cases cited, *ante*, p. 171).

(*u*) By Ord. XLVIIIA., r. 1, "Any two or more persons claiming or being liable as

By a Surviving Partner for the Price of Goods sold and delivered by himself and his deceased Partner, where the latter died before Writ issued (*x*).

Between *A. B.* .....Plaintiff,

and

C. D. .....Defendant.

Statement of Claim.

The plaintiff's claim is for money payable by the defendant to the plaintiff for the price of goods sold and delivered by the plaintiff and *E. F.*, since deceased [then trading together in co-partnership under the style or firm of "——"] to the defendant.

Particulars :—[*See* "*Sale of Goods*," *post*, p. 273.]

The like, where the deceased Partner died after the Issue of a Writ of Summons in the Names of both Partners : see Form of Claim by a surviving Plaintiff, ante, p. 60.

---

co-partners and carrying on business within the jurisdiction may *sue or be sued* in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action" ; and by r. 11, "Any person carrying on business within the jurisdiction in a name or style other than his own name may *be sued* in such name or style as if it were a firm name." If a writ is issued under the first of these rules in the name of a firm as plaintiffs, the defendant may obtain by demand or summons a statement of the names of the persons constituting the firm (Ord. XLVIIIA., rr. 1 and 2). Such statement when made will be treated as embodied in the statement of claim and will be a necessary part of the cause of action, and if the plaintiff fail in establishing it the action will fail (*Abrahams* v. *Dunlop Pneumatic Co.*, [1905] 1 K. B. 46, 51 ; 74 L. J. K. B. 14, 17).

A firm may be sued as such, although one of the partners is an infant, but the judgment and execution should be against the firm "other than the infant partner" (*Lovell* v. *Beauchamp*, [1894] A. C. 607 ; 63 L. J. Q. B. 802).

A foreign subject resident abroad, though carrying on business within the jurisdiction in a name other than his own, is not within r. 11 above cited (*St. Gobain, &c. Co.* v. *Hogerman's Agency*, [1893] 2 Q. B. 96 ; 62 L. J. Q. B. 485).

By r. 5 "Where persons are sued as partners in the name of their firm, they shall appear individually in their own names ; but all subsequent proceedings shall, nevertheless, continue in the name of the firm."

It would seem that a person who has obtained judgment against a firm in the firm name may, instead of availing himself of the remedy by execution, bring an action on the judgment against an individual member of the firm (*Clark* v. *Cullen*, 9 Q. B. D. 355 ; 47 L. T. 307).

(*x*) A sole surviving partner, even if he continues the partnership business under the name of the old firm, cannot properly sue in the name of the firm (*Mason* v. *Mogridge*, 8 Times Rep. 805).

Against a surviving Partner, the other having died either before or after Writ issued: see Statement of Claim against a surviving Joint Contractor, ante, p. 60 (*y*).

Claim against Partners constituting a new Firm for a Debt due from the old Firm, where the Liability for such Debt has been transferred to the new Firm by Agreement between all Parties (*z*).

1. The plaintiff's claim is against the defendants under the agreement hereinafter mentioned for the price of goods sold and delivered by him to *E. F.* and the defendant *G. H.*, who then carried on business together in partnership as ——.

Particulars :—[*See "Sale of Goods," post,* p. 273.]

2. The said *E. F.* afterwards retired from the said partnership, and transferred his share and interest therein to the defendants for the purpose of their continuing the said business in partnership together, and thereupon, by agreement between the plaintiff and the defendants and the said *E. F.*, the said *E. F.* was discharged from liability to the plaintiff for the said price, and the defendants undertook to pay the said price to the plaintiff.

Particulars of the agreement :—

The agreement was contained in letters dated, &c. [*or*, is to be implied from conduct and course of dealing as follows :—*stating the nature thereof*].

Patents (*a*).

Claim for Payments agreed to be made, for a Licence to use a Patent.

The plaintiff's claim is for £ —— payable by the defendant to the plaintiff under an agreement in writing made between them and bearing date the —— ——, 19— [*or, as the case may be*], for the licence and

(*y*) This form is only appropriate where the writ was issued in the individual names of the partners. If the writ was issued against the firm, in the firm name, the action continues against the firm (*Ellis* v. *Wadeson*, [1899] 1 Q. B. 714 ; 68 L. J. Q. B. 604).

(*z*) See "*Accord and Satisfaction*," *post*, pp. 566, 570 ; and see s. 17 (3) of the Partnership Act, 1890.

(*a*) An action will lie to recover money agreed to be paid by the defendant for an assignment of, or a licence to use, a patent, where the consideration has been executed and the defendant has had the benefit of the assignment or licence, although the assignment or licence was not under seal (*Chanter* v. *Dewhurst*, 12 M. & W. 823 : 13 L. J. Ex. 198 ; *Chanter* v. *Johnson*, 14 M. & W. 408 ; 14 L. J. Ex. 289 ; *Lawes* v. *Purser*, 6 E. & B. 930 ; 26 L. J. Q. B. 25). For forms of declarations under the former system for payments for licence to use a patented invention, see *Chanter* v. *Hopkins*, 4 M. & W. 399 ; *Chanter* v. *Leese*, 4 M. & W. 295 ; 5 M. & W. 698 ; *Chanter* v. *Dewhurst*, 12 M. & W. 823 ; *Hall* v. *Bainbridge*, 5 Q. B. 233 ; *Oxley* v. *Holden*, 8 C. B. N. S. 666 ; 30 L. J. C. P. 68.

permission of the plaintiff by him thereby granted to the defendant to use a patent invention [*state what*] whereof the plaintiff was owner, and for the defendant's use of the said invention under the said licence and permission.

Particulars :—

19—, —— —— to —— ——. Amount payable for licence between these dates at —— per —— as agreed..... £——

Pawnbrokers (*b*).

Penal Statutes (*c*).

Commencement and Conclusion of a Claim by an Informer in a Qui Tam Action (*c*).

1. The plaintiff sues in this action as well for the King [*or*, for the poor of the parish of ——, in the county of ——] as for himself.

On an assignment of a patent, or on the grant of a licence to use a patent, there is no implied warranty that the patent is valid (*Hall* v. *Conder*, 2 C. B. N. S. 22; 26 L. J. C. P. 138, 288; *Smith* v. *Scott*, 6 C. B. N. S. 771; 28 L. J. C. P. 325; *Clark* v. *Adie*, 3 Ch. D. 134; 2 App. Cas. 423; *Wilson* v. *Union Oil Mills*, 9 Patent Cases, 57, 63). But the assignor can take no advantage of the invalidity of the patent as against the assignee (*Walton* v. *Lavater*, 8 C. B. N. S. 162, 186; 29 L. J. C. P. 275). Nor can the assignee, in general, dispute the validity of the patent as against the assignor. (*Hills* v. *Laming*, 9 Ex. 256; *Smith* v. *Neale*, 2 C. B. N. S. 67; 26 L. J. C. P. 143; *Lawes* v. *Purser*, 6 E. & B. 930; 26 L. J. Q. B. 25; *Crossley* v. *Dixon*, 10 H. L. C. 293; 32 L. J. Ch. 617). So a licensee is estopped, during the continuance of the licence, from denying the validity of the patent (*Ib.*; and see *Axman* v. *Lund*, L. R. 18 Eq. 330).

On the sale of a specified article under its patent or trade name there is no warranty that it shall answer the purpose for which it is ordered (Sale of Goods Act, 1893, s. 14 (1), cited *post*, p. 322; *Chanter* v. *Hopkins*, 4 M. & W. 399).

Although a mere licence not coupled with a grant is in general revocable, an exclusive licence for the use of a patent was held not to be revocable, where a lump sum had been paid down for it, and the deed showed an intention that it should not be revocable (*Guyot* v. *Thomson*, [1894] 3 Ch. 388; 64 L. J. Ch. 32).

(*b*) Under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), a pawnbroker may maintain an action for the balance of the loan after sale of the pledge for an amount less than the debt (*Jones* v. *Marshall*, 24 Q. B. D. 269; 59 L. J. Q. B. 123). That Act does not interfere with the rights of an owner of property which is pledged improperly and against his will (*The Singer Co.* v. *Clark*, 5 Ex. D. 37; 49 L. J. Ex. 226; *Burrows* v. *Barnes*, 82 L. T. N. S. 721). Delivery of the thing pledged is essential to all pledges, but this may be without a physical change of the possession, as for instance where the person agrees to hold and does hold the pledge on behalf of the pledgee. (See *Martin* v. *Capper*, 11 C. B. N. S. 730, 734; *Grigg* v. *National Guardian Ass. Co.*, [1891] 3 Ch. 206, 211; 61 L. J. Ch. 11.)

(*c*) A claim for a penalty imposed by statute, although it is in the nature of a debt (*Cuming* v. *Sibly*, 4 Burr. 2489), cannot be specially indorsed on the writ of summons (Ord. III., r. 6; *ante*, p. 65).

The statement of claim in an action for such penalty must show how the defendant

2, 3, &c. [*State the facts which constitute the cause of action for recovery of the penalty.*]

---

became liable to the penalty; but, if it states the facts bringing the case within the statute, there seems (notwithstanding the former decision in *Fife* v. *Bousfield*, 6 Q. B. 100) to be no longer any need to insert an express averment that the defendant's acts were against the form of the statute or contrary to the statute, though it is usually convenient to add some such averment.

In actions for a penalty imposed by statute, where the action is given to the party grieved, the statement of claim must state as a fact or show that the plaintiff is a party grieved (*Hollis* v. *Marshall*, 2 H. & N. 755; 27 L. J. Ex. 235). The absence of the Attorney-General's consent, where such consent is necessary, is pleadable as a defence (see *Ib.*, and *Lea* v. *Facey*, 19 Q. B. D. 352; 56 L. J. Q. B. 532); and would also be a ground for staying proceedings (*Hollis* v. *Marshall*, *supra*; *Rochfort* v. *Atherley*, 1 Ex. D. 511; *Fletcher* v. *Hudson*, 5 Ex. D. 287; 49 L. J. Ex. 793).

It is not in general necessary for the plaintiff in a *qui tam* action to aver an authority to sue from the Crown or from the party entitled to the penalties (*Cole* v. *Coulton*, 2 E. & E. 695; 29 L. J. M. C. 125, 127). In *qui tam* actions the indorsement on the writ must show the capacity in which the plaintiff sues. (See Ord. III., r. 4, and Appendix A., Part III., Sect. VII.)

As to when a person is entitled to sue for a penalty as "a party aggrieved," see *Hollis* v. *Marshall*, and cases cited *supra*, and *Robinson* v. *Currey*, 7 Q. B. D. 465; 50 L. J. Q. B. 561.

A corporation cannot sue for penalties as a common informer, unless expressly empowered by statute to do so (*Guardians of St Leonards* v. *Franklin*, 3 C. P. D. 377; 47 L. J. C. P. 727).

No action will lie against an executor for penalties incurred by his testator, under a penal statute, for what amounts to a personal tort (*Story* v. *Sheard*, [1892] 2 Q. B. 515).

As to when distinct penalties are incurred by the repetition or continuance of prohibited acts, see *Crepps* v. *Durden*, 2 Cowp. 640; 1 Sm. L. C., 11th ed. 651; *Milnes* v. *Bale*, L. R. 10 C. P. 591; 44 L. J. C. P. 336; *Apothecaries' Co.* v. *Jones*, [1893] 1 Q. B. 89; *Beaumont* v. *Huddersfield Corporation*, 67 J. P. 57, C. A.

As to the limitation of penal actions, see "*Limitation, Statutes of*," *post*, p. 719.

Where a statute imposes a penalty for doing or omitting to do certain acts, it does not necessarily follow, even where the penalty is not given to the party grieved, that an action will lie for special damage sustained by the plaintiff from the doing of the acts. Whether in such a case the doing or omitting of those acts does or does not give a right of action for damages to a party suffering damage from the breach, must depend upon the object and language of the particular statute (*Atkinson* v. *Newcastle Waterworks Co.*, 2 Ex. D. 441; 46 L. J. Ex. 775; *Vallance* v. *Falke*, 13 Q. B. D. 109; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, 352; *Saunders* v. *Holborn District Board*, [1895] 1 Q. B. 64; 64 L. J. Q. B. 101; *Clegg* v. *Earby Gas Co.*, [1896] 1 Q. B. 522). *Baron* v. *Portslade U. D. C.*, [1900] 1 Q. B. 588.

Where a statute creates a new right and contains special provisions for the mode of enforcing it, the particular remedy prescribed by the statute is generally exclusive, though the question in each case is one of the construction of the particular statute (*Wolverhampton Waterworks Co.* v. *Hawkesford*, 6 C. B. N. S. 336, 356; 28 L. J. C. P. 242; *L. B. & S. C. Ry. Co.* v. *Watson*, 3 C. P. D. 429; 4 C. P. D. 118; 47 L. J. C. P. 634; 48 L. J. C. P. 361; *Westmoreland Slate Co.* v. *Feilden*, [1891] 3 Ch. 15, 27; *Pasmore* v. *Oswaldtwistle*, [1898] A. C. 387, 394; 67 L. J. Q. B. 635; *Johnston* v. *Consumers Gas Co.*, [1898] A. C. 447, 454; 67 L. J. P. C. 331; and see 1 Sm. L. C., 11th ed., p. 296).

Where a penalty is imposed by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, such penalty belongs to the Crown, and the Crown alone can maintain an action for it (*Bradlaugh* v. *Clarke*, 8 App. Cas. 354; 52 L. J. Q. B. 505).

It may be useful for purposes of reference to mention the following instances of

The plaintiff, as well for the King [*or*, for the poor of the above-mentioned parish] as for himself, claims £—— [*the amount of the penalty sued for*].

For a Claim to recover Penalties for default in supplying Compensation Water under a local Act, see Meltham Spinning Co. v. *Huddersfield*, 89 L. T. N. S. 168 ; *affirmed, Ib*, 403.

PENALTY : *see* "*Penal Statutes*," *supra, and* "*Liquidated Damages*," *ante*, p. 241.

PLEDGE : *see* "*Mortgage*," *ante*, p. 264 ; "*Pawnbrokers*," *ante*, p. 270 ; *and* "*Conversion*," *post*, p. 345.

PRINCIPAL AND AGENT : *see* "*Agent*," *ante*, p. 72.

PRINCIPAL AND SURETY : *see* "*Guarantees*," *ante*, p. 179.

PROMISSORY NOTES : *see* "*Bills of Exchange, &c.*," *ante*, p. 129.

declarations under the old practice in actions for penalties :—Declaration for a penalty under the Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), for acting as a commissioner after having become disqualified :—*Nicholson* v. *Field*, 7 H. & N. 810 ; 31 L. J. Ex. 233. For acting as commissioner after being concerned in a contract with the commissioners ; *Dyer* v. *Best*, L. R. 1 Ex. 152 ; 35 L. J. Ex. 105. Against an officer of a County Court for acting as attorney for a party in a proceeding in the Court under 9 & 10 Vict. c. 95, s. 30 ; *Ackroyd* v. *Gill*, 5 E. & B. 808 ; *Warden* v. *Stone*, 7 *Ib.* 603. Against a magistrate's clerk for taking excessive fees under 26 Geo. 2, c. 14, s. 2 ; *Bowman* v. *Blyth*, 7 E. & B. 26 ; *Lewis* v. *Davis*, L. R. 10 Ex. 86 ; 44 L. J. Ex. 86. For penalties for the unauthorised use of the name of a patent under 5 & 6 Will. 4, c. 83, s. 7 ; *Myers* v. *Baker*, 3 H. & N. 802 ; 28 L. J. Ex. 90. For penalties for infringing the copyright in a dramatic performance under 3 & 4 Will. 4, c. 15 ; *Fitzball* v. *Brooke*, 6 Q. B. 873 ; *Shepherd* v. *Conquest*, 17 C. B. 427 ; *Chatterton* v. *Cave*, L. R. 10 C. P. 572 ; 2 C. P. D. 42 ; 3 App. Cas. 483.

For forms of statements of claim in actions for penalties under the R. S. C., 1875, see *St. Leonard's, Shoreditch* v. *Franklin*, 3 C. P. D. 377 ; 47 L. J. C. P. 727 ; *Robinson* v. *Currey*, 6 Q. B. D. 21 ; 50 L. J. Q. B. 9 ; *Clarke* v. *Bradlaugh*, 7 Q. B. D. 38 ; 44 L. T. 667.

RENTCHARGE (*d*).

SALE OF GOODS (*e*).

Claim for the Price of Goods Sold and Delivered (*f*).

The plaintiff's claim is for the price of goods sold and delivered.

(*d*) As to actions for recovery of arrears of rentcharges, see *Booth* v. *Smith*, 14 Q. B. D. 318; 54 L. J. Q. B. 119; *In re Blackburn Building Society*, 42 Ch. D. 343; *Searle* v. *Cooke*, 43 Ch. D. 519; 59 L. J. Ch. 259.

As to tithe rentcharge, see the Tithe Act, 1891 (54 & 55 Vict. c. 8), and the previous Tithe Acts therein mentioned.

A tenant for years is not, except under special circumstances, liable in an action of debt for non-payment of a rentcharge issuing out of the land of which he is in occupation (*In re Herbage Rents, Greenwich*, [1896] 2 Ch. 811).

(*e*) Sales of goods are now regulated by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and, consequently, previous decisions are of no importance or effect where they conflict with the Act, but where the provisions of the Act are of doubtful import, or where the language has acquired a technical meaning, or where a particular matter has not been provided for by the Act, the cases decided prior to the Act are still of importance as authorities. (See *Robinson* v. *Canadian Pacific Ry. Co.*, [1892] A. C. at p. 487, citing *Bank of England* v. *Vagliano*, [1891] A. C. at p. 145; and s. 61 (2) of the Sale of Goods Act.)

By s. 62 "unless the context or subject-matter otherwise requires," the term "goods" includes "all chattels personal other than things in action and money, and also includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

In sales of goods, unless otherwise agreed, the delivery of the goods and the payment of the price are concurrent acts, and each party should in such case at the proper time be ready and willing to perform the act to be done on his part (see s. 28, cited *post*, p. 766), except in cases where there has been a waiver of it by the other party, or a refusal, or conduct amounting to a refusal, to perform the concurrent act to be done by him. (See *post*, pp. 277, 766; "*Conditions Precedent*," *ante*, p. 157.)

It is unnecessary to insert in the statement of claim an averment of the fulfilment of the condition of readiness and willingness; but if the plaintiff relies upon an express or implied waiver of it, he should insert an averment of such waiver. (See *ante*, p. 157.)

As to the unpaid seller's right of lien or of stoppage *in transitu*, see ss. 38—47; "*Conversion*," *post*, p. 825.

(*f*) No action will lie for the price of goods sold, unless the price is actually due and payable at the time of action brought. (See "*Sale of Goods*," *post*, p. 758 (*e*).) When the price is actually due and payable, the claim for it may be specially indorsed on the writ (Ord. III., r. 6; "*Special Indorsements*," *ante*, p. 65). Where goods are ordered, on credit by a member of the committee of a club, or by one of the trustees of a charitable or other fund, to be used by the club, or for the purposes of the fund, he may be personally liable unless he makes it clear that credit is not to be given to him but that the assets of the club or fund alone are to be looked to for payment. (See *Steele* v. *Gourley*, 3 Times Rep. 772; *Barnett* v. *Wood*, 4 Times Rep. 278; *Williams* v. *Hathaway*, 6 Ch. D. 544.)

The first of the above forms is applicable where, upon a sale of goods, the property has passed and the goods have been delivered to the purchaser. The second form is

Particulars :—

	£	s.	d.
19—, 31st December—			
Balance of account for butcher's meat [*or, as the case may be, describing the goods*] to this date, full particulars whereof are set out in the pass book delivered to the defendant week by week	35	10	0
19—, 1st January to 31st March—			
Butcher's meat, full particulars whereof are set out in the said pass book	74	5	0
	109	15	0
19—, 1st February.—Paid	45	0	0
Balance due	£64	15	0

(*See R. S. C.*, 1883, *App. C.*, *Sect. IV.*, *No.* 1.)

---

applicable where, upon a sale of goods, the property has passed to the purchaser, and the contract has been completed in all respects except delivery, and the delivery was not a part of the consideration for the price, or a condition precedent to its payment.

By the Sale of Goods Act, 1893, s. 34, "(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract; (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

By s. 35, "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

The acceptance dealt with in the above sections is an acceptance as a performance of the contract, not the acceptance recognising the existence of a contract required to satisfy the provisions of s. 4, *post*, p. 664 (*Abbott* v. *Wolsely*, [1895] 2 Q. B. 97; 64 L. J. Q. B. 388).

By s. 36, "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

A buyer may, in general, reject goods in which property has not passed to him, if when tendered they are found to be of wrong quantity, or, if sold by sample or description, when they do not correspond with the sample or description, but he is not so entitled in the absence of express stipulation to that effect for a breach of warranty (ss. 11, 13, 14, 15, 30, 53 (1), 62 (1)).

By s. 49 (1), "Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods."

By s. 16, "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."

By s. 17, "(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

For the Price of Goods Bargained and Sold, but not Delivered.

The plaintiff's claim is for [money payable by the defendant to the plaintiff for] the price of goods bargained and sold.

Particulars :—

19—, November 13th.

50 tons steel rails bought by the defendant under contract in writing dated —— ——, 19— [*or*, contained in letters dated, &c., *or*, *as the case may be*], at £—— per ton, to be paid for within one month, but not to be removed from the plaintiff's works before payment..... £——

For Damages for not accepting Goods contracted to be Sold (*g*).

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing, dated, &c. [*or*, contained in letters dated, &c., *as the*

See further ss. 17 (2), 18, for the rules for ascertaining the intention of the parties.

When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer :—

"(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction :

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact" (s. 18, r. 4).

Pledging the goods is an "act adopting the transaction" (*Kirkham* v. *Attenborough*, [1897] 1 Q. B. 201 ; 66 L. J. Q. B. 149).

On a sale of unascertained goods the property, in general, passes when they are, by the express or implied assent of both parties, unconditionally appropriated to the contract in a deliverable state (s. 18, r. 5).

By s. 8, "(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties ; (2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

By s. 9, "(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided ; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor : (2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault."

In contracts of sale "month" means *primâ facie* calendar month (s. 10 (2)).

(*g*) By s. 37 of the Sale of Goods Act, 1883, "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for

case may be], between the plaintiff and the defendant for the purchase and acceptance by the defendant of —— tons of ——, to be delivered by the plaintiff to the defendant at —— on or before the —— ——, 19—, at [the price of] £—— per ton, payable [on delivery, *or*, one calendar month after delivery, *or*, *as the case may be*].

2. The defendant did not accept [*or*, refused on the —— ——, 19—, by letter dated (*or*, verbally, *or*, *as the case may be*), to accept] the said —— or any part thereof, or pay the plaintiff for the same.

Particulars of damage:—

Difference between the said contract price and the market price [*or*, *if there is no market*, the value] of the goods on the —— of ——, 19—, viz., £—— per ton on —— tons ..... £——.

[*Add special damage, if any.*]

---

a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract."

By s. 50, "(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance; (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract; (3) Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

Where there is an available market for the goods, and there is no evidence of any difference between the contract price and the market price, the damages are, in general, nominal only (*Valpy* v. *Oakley*, 16 Q. B. 941; 20 L. J. Q. B. 380). Where there is no such available market, the damages must be estimated in accordance with s. 50 (2), above cited; and in cases of this kind, it would seem that, if the goods are of such a nature as to be useless to anyone but the purchaser, the whole price could be recovered. (See s. 50 (2).)

The purchaser cannot anticipate the claim for damages by giving previous notice of his intention not to accept the goods (*Ripley* v. *M'Clure*, 4 Ex. 345; *Xenos* v. *Danube, &c. Ry. Co.*, 11 C. B. N. S. 152; 13 C. B. N. S. 825; 21 L. J. C. P. 84, 284; *Frost* v. *Knight*, L. R. 7 Ex. 111; 41 L. J. Ex. 78; and see *Roper* v. *Johnson*, L. R. 8 C. P. 167, below cited).

If, however, the vendor, after such notice from the purchaser, has at his request sold the goods in the market before the time for performance of the contract, and claims damages on that footing, the purchaser cannot object to his doing so (*Shaw's Brow Iron Co.* v. *Birch Grove Steel Co.*, 6 Times Rep. 50). A vendor is not obliged to go into the market and re-sell the goods refused by his purchaser in order to recover his damages, but he is bound to act as a reasonable man of business in the matter, and cannot claim as damages any loss beyond what a man so acting would have sustained (*Brown* v. *Muller*, L. R. 7 Ex. at p. 322; 41 L. J. Ex. 214; *Roper* v. *Johnson*, L. R. 8 C. P. at p. 182; 42 L. J. C. P. 65; *Dunkirk Colliery Co.* v. *Lever*, 9 Ch. D. at p. 25; and see *Nickoll* v. *Ashton*, [1900] 2 Q. B. at p. 305; 69 L. J. Q. B. 640). An unpaid vendor who retains possession of the goods sold has in general a lien for the price, and may on the buyer's default in payment re-sell the goods, if they are perishable, or if after notice of his intention to re-sell the buyer does not within a reasonable time pay or tender to him the price (ss. 39 (1), 48 (3)).

For Damages, on a Sale by Instalments, for Refusal to accept Goods contracted for, and Repudiation of the Contract, and also to recover the Price of Goods previously delivered under the Contract (*h*).

1. The plaintiff has suffered damage by breach of a contract in writing dated the —— ——, 19— [*or, as the case may be*], for purchase and acceptance by the defendant from the plaintiff of 600 bags of potatoes, to be by the plaintiff delivered to the defendant at Hull, in two lots of 300 bags each, on the —— ——, 19—, and on the —— ——, 19—, respectively, at the price of £4 7*s.* 6*d.* per score bags, payable on delivery.

2. The plaintiff accordingly, on the —— ——, 19—, delivered 300 bags of potatoes in Hull to the defendant, who then accepted the same.

3. The plaintiff was ready and willing to deliver the remaining 300 bags on the said —— ——, 19—, according to the said contract, but the defendant, by letter dated the —— ——, 19— [*or*, verbally on the —— ——, 19—, *or, as the case may be*], wrongfully repudiated his said contract, and refused to accept or pay for the same, whereby the plaintiff lost the benefit of the said contract, and was obliged to sell the said remaining 300 bags of potatoes at a lower price, viz., £—— per score bags.

(*h*) By s. 31 (1), "Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments."

By s. 31 (2), "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated."

If the default in payment be made with the manifest intention of repudiating the contract, or under circumstances showing an absolute incapacity to perform it, so that the party in default cannot be regarded as ready in future to perform his part, the seller is discharged from future deliveries (*Morgan* v. *Bain*, L. R. 10 C. P. 15; 44 L. J. C. P. 47; *Ex p. Chalmers*, L. R. 8 Ch. 289; 42 L. J. Bk. 37; *Mersey Steel Co.* v. *Naylor*, 9 Q. B. D. 648; 51 L. J. Q. B. 576; 9 App. Cas. 434; 53 L. J. Q. B. 497; *Cornwall* v. *Henson*, [1900] 2 Ch. 298; 69 L. J. Ch. 581). The insolvency or bankruptcy of a buyer, where there is no election by the trustee to carry out the contract, may, upon this principle, entitle an unpaid seller to withhold future deliveries (*Ib.*; and see *In re Phœnix Bessemer Steel Co.*, 4 Ch. D. 108; 46 L. J. Ch. 115). Similarly, although the liquidation of a company does not of itself involve inability to carry out a pending contract, it may with other circumstances ground an inference that the company has renounced the contract (*Tolhurst* v. *Associated Cement Manufacturers*, [1902] 2 K. B. 660, 671, 678; 71 L. J. K. B. 949; and see *S. C.*, [1903] A. C. 414; and cases cited *supra*), and thus justify a seller in withholding future deliveries.

The rules given in ss. 50 (3) and 51 (3) as to the measure of damages in actions for non-acceptance or for non-delivery respectively are applicable to cases of sales by instalments. (See pp. 276, 278.)

4. The defendant has not paid the price of the 300 bags actually delivered.

Particulars :—

19—, December 1st—

Price of first 300 bags, £65 12*s.* 6*d.*

Loss on re-sale of 300 bags at £—— per bag, £——.

The plaintiff claims £——.

For Damages for not delivering Goods contracted to be Sold (*i*).

1. The plaintiff has suffered damage by breach of a contract in writing, dated the —— ——, 19-- [*or, as the case may be*], for sale and delivery by

(*i*) By the Sale of Goods Act, 1893, s. 51, "(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery ; (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract ; (3) Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

It is by s. 54 expressly enacted that the right to special damage is not, in the case either of buyer or seller to be affected by the Act. When the action is brought upon a complete breach before the time for delivery has elapsed, as, for instance, upon an absolute repudiation of and refusal to perform the contract, the market or current price *primâ facie* to be taken is not that at the moment of the breach, but that at the time or times when the goods should have been delivered (s. 51 (1), *supra ;* and see *Brown* v. *Muller*, L. R. 7 Ex. 319 ; 41 L. J. Ex. 214 ; *Roper* v. *Johnson*, L. R. 8 C. P. 167 ; 42 L. J. C. P. 65 ; and *Michael* v. *Hart*, [1902] 1 K. B. 482 ; 71 L. J. K. B. 265 ; affd. in H. L. 89 L. T. 422).

As to what amounts to a sufficient delivery by the vendor, see ss. 29—34.

A request not to deliver, or to postpone delivery, operates as an excuse for non-delivery, and extends the time for delivery (*Plevins* v. *Downing*, 1 C. P. D. 220 ; 45 L. J. C. P. 625). If the seller forbears delivery at the agreed time, or sends by a new route, at the buyer's request, it is said that this is not to be regarded as a new contract, and that the arrangement has only reference to the mode of performance of the original contract (*Plevins* v. *Downing*, *supra ; Cuff* v. *Penn*, 1 M. & S. 24 ; *Tyers* v. *Rosedale Iron Co.*, L. R. 10 Ex. 195 ; 44 L. J. Ex. 130 ; *Ogle* v. *Earl Vane*, L. R. 3 Q. B. 272 ; 37 L. J. Q. B. 77 ; *Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 140 ; 44 L. J. Q. B. 54). This distinction between a new contract and a mere agreement that a new mode of performing a contract shall be taken as a satisfaction for or in lieu of the agreed mode, is of importance with regard to the provisions of s. 4 of the above Act replacing those of s. 17 of the Statute of Frauds, the assent to such substituted performance not requiring writing. (See "*Frauds, Statute of*," *post*, p. 663, and cases cited *supra*.)

The seller cannot, without the buyer's consent, diminish the claim for damages, by giving previous notice of intention not to deliver (*Leigh* v. *Paterson*, 8 Taunt. 540 ; and see *Roper* v. *Johnson*, *supra ; Shaw's Brow Iron Co.* v. *Birch Grove Co.*, 6 Times Rep. 50). Where there is no difference between the contract price and the market price, the damages are in general only nominal. (See *Valpy* v. *Oakeley*, 16 Q. B. 941.) Where there is no market for the purchase of goods exactly similar to those contracted for, the purchaser may buy goods as nearly like them as practicable, and recover the

the defendant to the plaintiff of 100 tons of Scotch pig iron at £5 per ton, to be delivered on rail at Middlesbrough on the —— ——, 19—.

2. The defendant did not deliver any [*or*, —— tons, *as the case may be*] of the said iron.

---

difference in price as damages (*Hinde* v. *Liddell*, L. R. 10 Q. B. 265 ; 44 L. J. Q. B. 105). It was held that where goods of similar quality were not procurable, the price at which the buyer had re-sold might be taken as the value (*France* v. *Gaudet*, L. R. 6 Q. B. 199 ; 40 L. J. Q. B. 121 ; *Grébert* v. *Nugent*, 15 Q. B. D. 85 ; 54 L. J. Q. B. 511).

Where a contract was made with a manufacturer for the supply of an article which was not to be procured in the market, and which he knew was intended for shipment and sale abroad, it was held upon a failure to deliver the whole at the time contracted for, and the delivery, after delay, of a part only, that damages were recoverable in respect of a sale to a foreign buyer, and of the extra freight and insurance upon the part delivered caused by the loss of season through the delay (*Borries* v. *Hutchinson*, 18 C. B. N. S. 445 ; 34 L. J. C. P. 169 ; and see *Grébert* v. *Nugent*, *supra*). Loss of profit on a re-sale cannot be recovered in general, unless it is brought to the notice of the seller at the time of the contract that such re-sale is intended, so that such damages are then fairly within the contemplation of the parties, and there is no market in which it is reasonably practicable for the purchaser to buy goods to perform his contract for re-sale (*Williams* v. *Reynolds*, 6 B. & S. 495 ; 34 L. J. Q. B. 221 ; *Randall* v. *Raper*, E. B. & E. 84 ; *Cory* v. *Thames Ironworks Co.*, L. R. 3 Q. B. 181 ; 37 L. J. Q. B. 68 ; *Hydraulic Eng. Co.* v. *McHaffie*, 4 Q. B. D. 670 ; and see cases cited *supra*).

Where a re-sale is thus in the contemplation of the parties, a purchaser may, where he properly and reasonably defends an action brought against him, in consequence of the vendor's conduct in breaking his contract, by his sub-purchaser, recover the costs so incurred (*Hammond* v. *Bussey*, 20 Q. B. D. 79 ; 57 L. J. Q. B. 58 ; *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413 ; 68 L. J. Q. B. 312). See further, p. 317.

If the price has been paid, the buyer is entitled to recover the whole market value of the goods at the time of delivery ; but where a bill had been given for the price, and after a breach of contract by the vendor in not delivering the goods the bill was dishonoured, the purchaser was held entitled to recover only the difference between the contract price and the market price, as in the case where the price remains unpaid (*Valpy* v. *Oakeley*, *supra* ; *Griffiths* v. *Perry*, 1 E. & E. 680 ; 28 L. J. Q. B. 204).

Where the property in the goods has passed under the contract, but the price has not been paid, and the vendor has wrongfully converted and disposed of the goods so as to preclude himself from delivering them, the purchaser can only recover the difference between the value of the goods and the contract price, and cannot recover the full value by suing for the conversion of the goods instead of for the breach of contract (*Chinery* v. *Viall*, 5 H. & N. 288 ; 29 L. J. Ex. 180) ; but if the vendor wrongfully re-takes the goods after delivery, the purchaser may recover the full value in an action for trespass or conversion, the vendor having his remedy for the price (*Gillard* v. *Brittan*, 8 M. & W. 575 ; *Stephens* v. *Wilkinson*, 2 B. & Ad. 320). If the buyer, at the request of the seller, forbear to claim delivery, though without binding himself to do so, the damages will be regulated by the state of the market when he withdraws the forbearance, and he can claim in such case the benefit of a rise (*Ogle* v. *Earl Vane*, *supra*). So if the seller forbear delivery at the request of the buyer, the damage may be estimated according to the market price at a reasonable time after the last request (*Hickman* v. *Haynes*, L. R. 10 C. P. 598 ; 44 L. J. C. P. 358). As to when an unpaid seller has a right to re-sell on default of the buyer, see *ante*, p. 276.

In an action for breach of contract to deliver specific or ascertained goods, the Court may direct specific performance of the contract (s. 52).

Particulars of damage :—

£—— per ton, being the difference between the contract price of £—— per ton, and £—— per ton, the market price at the time of the breach .....£——

The plaintiff claims £——.

(*See R. S. C.*, 1883, *App. C.*, *Sect. V.*, *No.* 1.)

A like Form.

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing dated [&c.] for the sale and delivery by the defendant to the plaintiff of 5,000 tons of Merthyr steam coal at 18*s.* 6*d.* per ton f.o.b. at Cardiff, by equal monthly deliveries over the first five months of 19—.

2. The April and May instalments were not delivered.

Particulars of the damage :—

Difference between market price in April and May and the contract price, 2*s.* 6*d.* per ton, on 2,000 tons..... £250.

(*See R. S. C.*, 1883, *App. D.*, *Sect. VIII.*)

The like, alleging Special Damage.

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing [contained in letters from the plaintiff to the defendant dated —— —— and —— ——, 19—, and letters from the defendant to the plaintiff dated —— —— and —— ——, 19—] whereby the defendant agreed to sell and deliver to the plaintiff within a reasonable time [40 tons] of —— at the price of £—— [per ton].

2. The plaintiff, as the defendant at the time of the making of the said contract well knew, required the said goods for shipment abroad for sale to customers at a profit [of £—— per ton].

3. The defendant failed [and on the —— ——, 19—, by letter dated that day refused] to deliver any part of the said goods within such reasonable time or at all [*or*, The defendant delivered to the plaintiff in accordance with the said contract —— tons of the said —— but failed to deliver any more thereof within a reasonable time or at all].

4. The plaintiff was unable to purchase similar goods on the market and unable to supply his said customers, and lost the profit he would have made on the re-sale and had to pay to his customers compensation for default in delivery of the said goods. In the alternative the plaintiff lost the difference between the market and contract prices at the date of the breach, which was the same as the said profit.

Particulars:—

Loss of profit or difference between contract and market prices on —— tons at £—— per ton ..... £——.

Compensation paid to Messrs. ——, of —— ..... £——.

The plaintiff claims £——.

For Damages for delivering Goods inferior to Contract, and for Non-Delivery of Part of the Goods contracted for (*k*).

1. The plaintiff has suffered damage by breach of a contract in writing dated —— ——, 19—, between the plaintiff and the defendant for sale and delivery of 100 sacks of flour known as seconds, at 35*s.* per sack.

2. Eighty sacks delivered were inferior to seconds, and twenty sacks were not delivered.

Particulars of damage:—

	£
80 sacks at 4*s.*	16
20 sacks at 5*s.*	5
	£21

The plaintiff claims £21.

(*See R. S. C.*, 1883, *App. C.*, *Sect. V.*, *No.* 2.)

Claim for not delivering Goods according to Sample, and Short Delivery.

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing, dated the —— ——, 19—, whereby the plaintiff agreed to buy, and the defendant, through his agent, Mr. *B*——, of London, agreed to sell to the plaintiff fifteen tons or thereabouts of pure Manila Reaper Twine at £27 per ton f.o.b. London Export S.S.

2. The defendant by the said contract agreed with the plaintiff as conditions of the said contracts (*inter alia*)—

(a) That the said twine should be of a quality equal to a sample ball of twine submitted by the defendant to the plaintiff.

(b) That the said twine should be well and cleanly spun and of 85 lbs. strain.

(c) That the said twine should measure not less than 550 feet to the lb.

3. The defendant was on the —— ——, 19—, verbally informed, through his agent aforesaid, that the said twine was intended for shipment, and it was then further verbally agreed that shipment should be guaranteed

(*k*) As to sales by description or by sample, and generally as to warranties and conditions on sales, see "*Warranty*," *post*, p. 314.

by the defendant as to 5 tons part thereof by steamer leaving London on the —— ——, 19—, and as to 10 tons remainder thereof within seven days after, and that the defendant should supply to the plaintiff invoices of the twine so shipped.

4. In pursuance of the said contract the defendant shipped for the plaintiff on the —— ——, 19—, bales of twine amounting in all to 309 bales, and the defendant's lighterman transhipped the same to —— to customers of the plaintiff.

5. By the invoices supplied by the defendant the weight of twine in the bales aforesaid was stated to amount to 312 cwt. 3 qrs. 6 lbs., whereas in fact the defendant in breach of his said contract shipped only 292 cwt. 0 qrs. 13 lbs.

6. The said twine was not of a quality equal to the sample ball submitted by the defendant to the plaintiff.

7. The said twine was not well and cleanly spun, nor of 85 lbs. strain.

8. The said twine did not measure 550 ft. to the lb., but measured less than 506 ft. on an average.

9. By reason of the facts stated the customers of the plaintiff claimed compensation for the deficiency in value in the twine caused thereby, or in default of such compensation refused to accept the twine.

10. The plaintiff, to avoid the heavy expense of re-shipping the twine to this country and to prevent further loss, paid to the said customers the sum of £43 1*s.* 4*d.*, being the deficiency in value of the said twine caused by the defendant's said breach of contract.

The plaintiff claims £——.

For claims for breach of warranty on sale of goods, see "*Warranty*," *post*, p. 316 *et seq.*

For claims for fraud on sale of goods, see "*Fraud*," *post*, p. 658.

Sale of Land (*l*).

(*l*) As to the necessity in general for a written contract or memorandum, see "*Frauds, Statute of*," *post*, p. 663; and as to what part performance is sufficient to dispense with that requirement, see pp. 216, 217.

As to the authority of an auctioneer or his clerk to sign a memorandum of the contract in sales by public auction, see "*Auctioneer*," *ante*, p. 91.

Actions for specific performance are assigned to the Chancery Division, Jud. Act, 1873, s. 34; see "*Sale of Land*," *post*, p. 771.

On a contract for the sale of land, in the absence of any contrary stipulation, the

vendor must make out a good title to the estate which he contracts to sell (*Doe* v. *Stanion*, 1 M. & W. 695, 701; *Hall* v. *Betty*, 4 M. & G. 410; *Jeakes* v. *White*, 6 Ex. 873; 21 L. J. Ex. 265; *Clarke* v. *Willott*, L. R. 7 Ex. 313; 41 L. J. Ex. 197; *Ellis* v. *Rogers*, 29 Ch. D. 661, 670, 672; and see the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 1, and the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 3).

Under an agreement for the sale of land, the vendor, in the absence of stipulation to the contrary, is bound to deliver at his own expense to the purchaser or the purchaser's solicitor a proper abstract of title, and to verify it, if required, by the production of the title deeds (*Samson* v. *Rhodes*, 6 Bing. N. C. 261; 8 Sc. 544; *Steer* v. *Crowley*, 14 C. B. N. S. 337; 32 L. J. C. P. 191; *Oakden* v. *Pike*, 34 L. J. Ch. 620; *Gray* v. *Fowler*, L. R. 8 Ex. 249; 42 L. J. Ex. 161; *Bryant* v. *Busk*, 4 Russ. 1; *Compton* v. *Bagley*, [1892] 1 Ch. 313; 61 L. J. Ch. 113). This is, however, now subject to the provisions of the Conveyancing Act, 1881, which, *inter alia*, throw on the purchaser the expenses of evidence not in the possession of the vendor required by the purchaser in support of the abstract (*In re Stuart*, [1896] 2 Ch. 328), and of the Vendor and Purchaser Act, 1874.

It is under ordinary circumstances the purchaser's duty, unless there is a stipulation to the contrary, to prepare and tender the conveyance for execution, and it is therefore sufficient if the vendor was ready and willing to execute it (*Poole* v. *Hill*, 6 M. & W. 835; and see *Stephens* v. *De Medina*, 4 Q. B. 422; *Marsden* v. *Moore*, 4 H. & N. 500).

By s. 25 (7) of the Judicature Act, 1873, as amended by s. 10 of the Judicature Act, 1875, stipulations in contracts, as to time or otherwise, which would not, before the Judicature Acts, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have theretofore received in equity. In sales of land, except where the property sold is of a diminishing or fluctuating nature, time is not of the essence of the contract, unless it is so by express stipulation or necessary implication. (See *Tilley* v. *Thomas*, L. R. 3 Ch. 61, 67; *Patrick* v. *Milner*, 2 C. P. D. 342; 46 L. J. C. P. 537; *Hudson* v. *Temple*, 29 Beav. 536, 543.) Yet, though time may not be originally of the essence of the contract, where there is great and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed, and a distinct written notice by him that he will consider the contract at an end, if not completed within a reasonable time named, is treated as binding on the party to whom it is given (*King* v. *Wilson*, 6 Beav. 124, 126; *Green* v. *Sevin*, 13 Ch. D. 589; 41 L. T. 724; *Hatten* v. *Russell*, 38 Ch. D. 334; 57 L. J. Ch. 425; *Compton* v. *Bagley*, *supra*).

In such sales, where time is not of the essence of the contract, a purchaser seeking damages is no longer obliged to prove his readiness and willingness to complete on the day named, but may recover if he can prove such readiness and willingness within a reasonable time after the stipulated day (*Howe* v. *Smith*, 27 Ch. D. 89, 103; 53 L. J. Ch. 1055; *Cornwall* v. *Henson*, [1900] 2 Ch. 298; 69 L. J. Ch. 581). As examples of properties in respect of which time would in general be of the essence of the contract, mining leases, short leases, leases of licensed premises, and land for immediate use for building, and the like, may be mentioned (*Hudson* v. *Temple*, *supra*; *Coslake* v. *Till*, 1 Russ. 376; *Tadcaster Brewery Co.* v. *Wilson*, [1897] 1 Ch. 705, 711; *Jones* v. *Gardiner*, [1902] 1 Ch. 191, 196; 71 L. J. Ch. 93). If the action is brought in respect of a breach by an absolute refusal to perform the contract amounting to a renunciation of it before the time for performance, such refusal dispenses with the subsequent performance by the plaintiff of conditions under the contract, such as subsequent readiness and willingness on his part to perform acts remaining to be done by him thereunder (*Jones* v. *Barkley*, 2 Doug. 684; *Williams* v. *Brisco*, 22 Ch. D. 441; "*Conditions Precedent*," *ante*, p. 158).

Where the contract is rescinded for want of title, or default on the part of the vendor, and there is a complete failure of consideration, the purchaser is entitled to recover the deposit as a debt. (See "*Money Received*," *ante*, p. 261.) So also where it is rescinded on the ground of fraud, or misrepresentation on the part of the vendor, or on the ground

of mistake (*Torrance* v. *Bolton*, L. R. 8 Ch. 118; 42 L. J. Ch. 177; *Nottingham Brick Co.* v. *Butler*, 16 Q. B. D. 778, 790; 55 L. J. Q. B. 280; see also *Whitbread* v. *Watt*, [1901] 1 Ch. 911, 915; [1902] 1 Ch. 835, 839, 840; 71 L. J. Ch. 424). If the purchaser makes default, and by the terms of the contract it is forfeited, he cannot recover it (*Bearan* v. *M'Donnell*, 9 Ex. 309; *Soper* v. *Arnold*, 14 App. Cas. 429; 59 L. J. Ch. 214).

The deposit is in general paid as a guarantee for the performance of the contract, and even when there is no condition for forfeiture, the purchaser, generally speaking, is not entitled to recover the deposit, if the sale goes off from his default, as for instance from his refusal to accept completion, or his repudiation of the contract (*Ex parte Barrell*, L. R. 10 Ch. 512; 44 L. J. Q. B. 138; *Howe* v. *Smith*, *supra*; *Hart* v. *Porthgain Harbour Co.*, [1903] 1 Ch. at p. 693).

Damages.]—Where the estate remains the property of the vendor (though possession may have been given to the purchaser), the vendor is not, in the absence of an agreement to that effect, entitled to claim the unpaid purchase-money as a debt, and the measure of damages in actions against a purchaser for not completing is the loss sustained by the vendor from the breach of contract, as the difference between the amount of the agreed purchase-money and the estimated saleable value of the land, together with the amount of the loss of interest on the purchase-money and the costs incurred. (See *Laird* v. *Pim*, 7 M. & W. 474.) Ordinarily the amount of the deposit, if any, must be allowed for in the computation of damages, and this even where there is a condition that the purchaser shall make good any loss on a re-sale, and the vendor sues for the amount of the loss on such re-sale (*Ockenden* v. *Henly*, E. B. & E. 485; 27 L. J. Q. B. 361; *Essex* v. *Daniell*, L. R. 10 C. P. 538).

A condition that a purchaser's deposit shall be forfeited in the event of his failure to comply with any of the conditions of sale, does not amount to a stipulation that the amount of such deposit shall be taken as liquidated damages for a breach of the contract by the purchaser, and does not prevent the vendor from recovering general damages for such breach, subject to such deduction of the amount of the deposit as above mentioned (*Icely* v. *Grew*, 6 N. & M. 467; *Essex* v. *Daniell*, *supra*). But it is otherwise where there is a stipulation to the effect that, in the case of failure to complete the purchase, the deposit shall be forfeited, and the amount of it taken as liquidated damages. In such a case the vendor was held entitled to recover the amount of an I O U, which had been given for the deposit money. (See *Hinton* v. *Sparkes*, L. R. 3 C. P. 161; 37 L. J. C. P. 81.)

In an action by the purchaser against the vendor for not completing the purchase, the purchaser can claim as damages the costs of preparing and entering into the agreement, and the costs of investigating the title, and of endeavouring to procure a good title (*Hodges* v. *Earl of Lichfield*, 1 Bing. N. C. 492; *Hanslip* v. *Padwick*, 5 Ex. 615); and it is sufficient if these costs have been incurred, though not paid before action (*Richardson* v. *Chasen*, 10 Q. B. 756; and see *Pritchet* v. *Boevey*, 1 C. & M. 775). He may also claim interest on the deposit money as special damage (*De Bernales* v. *Wood*, 3 Camp. 258; *Farquhar* v. *Farley*, 7 Taunt. 592; *Hodges* v. *Earl of Lichfield*, *supra*); though not as a debt (*Maberley* v. *Robins*, 5 Taunt. 625; *Bradshaw* v. *Bennett*, 5 C. & P. 48). He cannot claim the costs of raising the purchase-money in readiness for payment, nor the interest on it while lying idle, where it has been raised prematurely and before ascertaining whether the vendor has a good title (*Hanslip* v. *Padwick*, *supra*); but where the purchaser has acted reasonably and properly in raising and setting apart the purchase-money, and was justified by the circumstances in so doing, it seems that such interest would be recoverable as special damage. (See *Sherry* v. *Oke*, 3 Dowl. 349; *Howland* v. *Norris*, 1 Cox, 59.) He cannot claim the costs of a Chancery suit brought by him against the defendant for specific performance, and dismissed for defect of the defendant's title (*Malden* v. *Fyson*, 11 Q. B. 292); nor the extra costs of a Chancery suit brought against him by the defendant and dismissed with costs (*Hodges* v. *Earl of Lichfield*, *supra*; and see *Gray* v. *Fowler*, L. R. 8 Ex. 249). Expenses unnecessarily incurred before entering into the contract cannot be claimed (*Hodges* v. *Earl of Lichfield*, *supra*).

Claim for Purchase Price of Land Sold (m).

The plaintiff's claim is for £——, being the agreed price of a messuage and land No. —, —— Street, in the —— of ——, on the —— ——,

The purchaser cannot claim damages for the loss of his bargain, or for loss of profit on a re-sale, where the vendor fails to complete by reason of a defect in his title, provided the vendor acted *bonâ fide*, and had reasonable grounds for supposing that he had, or could in due time acquire, a good title (*Flureau* v. *Thornhill*, 2 W. Bl. 1070; *Walker* v. *Moore*, 10 B. & C. 416; *Pounsett* v. *Fuller*, 17 C. B. 660; 25 L. J. C. P. 145; *Sikes* v. *Wild*, 1 B. & S. 587; 4 *Ib.* 421; 30 L. J. Q. B. 325; 32 *Ib.* 375; *Bain* v. *Fothergill*, L. R. 7 H. L. 158; 43 L. J. Ex. 423; *Gas Light and Coke Co.* v. *Towse*, 35 Ch. D. 520, 542; 56 L. J. Ch. 889; *Rowe* v. *School Board for London*, 36 Ch. D. 619, 622; 57 L. J. Ch. 179).

But where the vendor fails to complete from any other cause than inability from defect of title, *e.g.*, where the sale goes off from his refusing to complete (see *Simons* v. *Patchett*, 7 E. & B. at p. 572), or from his declining, or purposely omitting, to take the necessary steps for giving possession to the purchaser (*Engell* v. *Fitch*, L. R. 3 Q. B. 314; 4 *Ib.* 659; 37 L. J. Q. B. 145; 38 L. J. Q. B. 304; *Simons* v. *Patchett*, 7 E. & B. at p. 572; and see *Bain* v. *Fothergill*, *supra*); or from his not taking the ordinary and proper steps to obtain the consent of a person whose consent was necessary in order to make a good title (*Day* v. *Singleton*, [1899] 2 Ch. 320; 68 L. J. Ch. 593), the purchaser is entitled to recover damages for the loss of his bargain, and the measure of damages is the difference between the contract price and the value of the land at the time of the breach of contract, and the fact that the purchaser has re-sold the land at an enhanced price is *primâ facie* evidence of its value (*Engell* v. *Fitch*, *supra*; *Walker* v. *Moore*, 10 B. & C. 416). So where, on an agreement to grant a lease, the intended lessor wilfully refused to give possession according to the contract, he was held liable for damages in respect of the loss of profits by delay of a trade, for the purpose of which, as he knew, the premises had been taken by the intended lessee (*Jaques* v. *Millar*, 6 Ch. D. 153; 47 L. J. Ch. 544; see *Royal Bristol Building Society* v. *Bomash*, 35 Ch. D. 390; 56 L. J. Ch. 840); and where a vendor, by not using reasonable diligence in performing his part, delayed the completion of a contract for the sale of some land for building, the purchaser recovered damages for the loss he sustained by being delayed in obtaining possession (*Jones* v. *Gardiner*, [1902] 1 Ch. 191; 71 L. J. Ch. 93).

Where there has been an actual conveyance to the purchaser of the estate bargained for, the purchaser's remedy under ordinary circumstances is upon the covenants for title (if any) contained expressly or by implication in the conveyance (*Clare* v. *Lamb*, L. R. 10 C. P. 334; 44 L. J. C. P. 177; see on the latter point *Baynes* v. *Lloyd*, [1895] 1 Q. B. 820); and in an action for the breach of such covenants he is, generally speaking, entitled, if evicted, to recover the whole value of the estate, besides any special damage sustained by him in consequence of the breach. (See *Great Western Ry. Co.* v. *Fisher*, [1905] 1 Ch. 316; 74 L. J. Ch. 241.) Thus, in an action for a breach of the covenant for quiet enjoyment in a lease, the value of the term is recoverable (*Williams* v. *Burrell*, 1 C. B. 402; and see *Lock* v. *Furze*, 19 C. B. N. S. 96; 34 L. J. C. P. 201; L. R. 1 C. P. 441; 35 L. J. C. P. 141).

A vendor who remains in possession of the property contracted to be sold is for some purposes in the position of a trustee of the property for the purchaser, and he may be made responsible for loss or damage caused by his not taking reasonable care of the property (*Royal Bristol Building Society* v. *Bomash*, 35 Ch. D. 390; 56 L. J. Ch. 840; *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456; 60 L. J. Q. B. 679).

(*m*) In order to support a claim for the purchase price of land sold or assigned there must have been a conveyance or assignment to the defendant (*Laird* v. *Pim*, 7 M. & W. 474; *East London Union* v. *Metropolitan Ry. Co.*, L. R. 4 Ex. 309; 38 L. J. Ex. 225). The mere giving of possession is not enough (Stat. Frauds, s. 1; 8 & 9 Vict. c. 106,

19—, sold and conveyed by the plaintiff to the defendant [*or* sold and assigned by the plaintiff to the defendant for the remainder of a term of —— years to come and unexpired therein]. The agreement is in writing and dated the —— ——, 19— [*or, as the case may be*].

By Vendor against Purchaser, on a Sale by Private Contract, for not completing the Purchase.

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing dated, &c. [*or*, made by letters dated, &c.], whereby the defendant agreed to purchase from the plaintiff a messuage and land known as No. —, —— Street, ——, in the county of —— [*or, as the case may be*], for the price of £——, the sale to be completed and the said purchase-money paid to the plaintiff on the —— ——, 19—.

2. [*Except in cases where the plaintiff alleges an absolute renunciation and refusal to perform the contract on the part of the defendant, the statement of claim should in some way show that time was of the essence of the contract, as, for instance, by inserting some such averments as the following:*—It was part of the said agreement [*or*, of the agreement contained in the said letters] that time should be deemed to be of the essence of the contract [*or*, The defendant was guilty of gross and unreasonable delay in performing the contract on his part after the last-mentioned day, and thereupon notice in writing dated the —— ——, 19—, was given by the plaintiff to the defendant requiring the defendant to complete the said purchase and pay the said price to the plaintiff within a reasonable time, viz., on or before the —— ——, 19—, which elapsed before action.]

3. The defendant has not completed the said purchase or paid the said price, or any part thereof, to the plaintiff [*or*, The defendant, on the —— ——, 19—, by a letter dated that day, wholly renounced the said contract and absolutely refused to perform the same on his part], whereby the plaintiff lost the benefit of the said contract and has suffered damage of which the following are the particulars.

Particulars :—

By Vendor against Purchaser, on a Sale by Auction, for not completing the Purchase (*n*).

1. The plaintiff on the —— ——, 19—, caused to be put up for sale by public auction by Messrs. ——, at ——, a messuage and land called ——,

s. 3). In the absence of a conveyance or assignment the claim must be for specific performance or damages.

(*n*) By the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), s. 5, it is enacted that "The particulars or conditions of sale by auction of any land shall state whether

situate in the parish of ——, in the county of ——, upon and subject to the following, among other, conditions of sale, which were printed in the particulars of sale : [*State the material conditions, as for instance*] That the highest bidder should be the purchaser, and that the purchaser should pay a deposit of —— per cent. immediately after the sale, and the remainder of the purchase-money on the —— ——, 19—, on which day the purchase should be completed, and that if the purchaser should fail to comply with the conditions his deposit should be forfeited, and the vendor should be at liberty to re-sell the premises by public auction or private contract, as he should think fit, and the deficiency, if any, in price, and all expenses attending such re-sale should be paid by the purchaser to the vendor.

2. At such sale the defendant was the highest bidder for the said property, and purchased the same from the plaintiff for £——, upon and subject to the said conditions, [and signed an agreement of that date at the foot of a copy of the said particulars of sale whereby he agreed with the plaintiff to purchase the same at the said price, and upon and subject to the said conditions,] and paid the said deposit.

3. [*Here insert averments showing that time was originally of the essence of the contract, or was made so by notice : see paragraph* 2 *of the preceding form.*]

4. The defendant did not nor would complete the purchase on his part, or pay the remainder of the purchase-money, whereupon the plaintiff re-sold the said property by public auction on the —— ——, 19—, for the sum of £—— only, leaving a deficiency of £—— on such re-sale, and the expenses incurred by the plaintiff in and about such re-sale amounted to £——.

Particulars are as follows :—[*State same.*]

5. The defendant had, on the —— ——, 19—, by a letter of the plaintiff's solicitors, dated that day, notice of the re-sale and of the said deficiency and expense, but he has not paid the amount thereof to the plaintiff.

---

such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved ; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person."

If the seller does employ a "puffer" or person to bid for him, contrary to this section, such bidding is a fraud, and a purchaser, on discovering that he has been thus "run up," may rescind the contract. (See *Thornett* v. *Haines*, 15 M. & W. 367 ; *Gilliat* v. *Gilliat*, L. R. 9 Eq. 60 ; 39 L. J. Ch. 142 ; *Parfitt* v. *Jepson*, 46 L. J. C. P. 522, 532.)

Where, after a sale by auction, the purchaser is entitled to rescind the contract, he may maintain an action for the deposit against the auctioneer, if he has received it as a stakeholder on behalf of both parties, or against the vendor if it has been paid to him (*Harrington* v. *Hoggart*, 1 B. & Ad. 577) ; but not against a person to whom the money was paid merely as agent for the vendor (*Bamford* v. *Shuttleworth*, 11 A. & E. 926 ; *Ellis* v. *Goulton*, [1893] 1 Q. B. 350 ; 62 L. J. Q. B. 232 ; and see further, "*Auctioneer*," *ante*, p. 91). He cannot recover interest from the auctioneer although the latter has invested the money at interest (*Harrington* v. *Hoggart*, *supra*).

By Purchaser against Vendor, on a Sale by Private Contract, for Damages for not completing, and for a Return of the Deposit.

1. By an agreement in writing dated the —— ——, 19— [*or*, By letters dated —— and ——, *or as the case may be*], it was agreed between the plaintiff and the defendant that the defendant should sell to the plaintiff, and the plaintiff should purchase from the defendant, the —— Farm, —— [*specify the property*] for £——, of which £—— should be paid immediately as a deposit in part payment of the purchase-money, and the remainder on the —— ——, 19—, on which day the said sale should be completed, and the said property should be conveyed by the defendant to the plaintiff.

2. [*Here insert averments showing that time was originally of the essence of the contract if such was the case, as in paragraph 2 of the form, ante*, p. 286.]

3. The plaintiff duly paid the said deposit, and was ready and willing to carry out the said agreement on his part.

4. [*If time was not originally of the essence of the contract, insert averments showing that it was made so by notice given after unreasonable delay on the part of the defendant: see paragraph 2 of the form, ante*, p. 286.]

5. The defendant has not completed the said sale, and the said property has not been conveyed by the defendant to the plaintiff.

6. By reason of the above-mentioned breach of contract the plaintiff lost the use of the money paid by him as such deposit as aforesaid and of other moneys provided by him for the completion of the said purchase, and has lost the expenses incurred by him in investigating the title of the defendant, &c. [*as the case may be*].

Particulars:—

The plaintiff claims £—— damages, and £——, the amount of the said deposit.

The like, for not deducing a good Title, and for a Return of the Deposit (*o*).

1. [*The same as in the preceding form down to the word "completed," and proceed as follows:*—] and that the defendant should deduce and make a good title to the said premises, commencing with (*&c., according to the fact*), on or before the —— ——, 19—, and on payment of the said remainder of the purchase-money should execute a conveyance of the said premises to the plaintiff.

2, 3, 4. [*As in paragraphs 2, 3 and 4 of the preceding form.*]

5. The defendant has not deduced or made such good title to the said premises as aforesaid.

(*o*) As to the damages recoverable in an action for breach of implied covenant for title, see *ante*, p. 285.

Particulars :—[*Here state details of the defects in title, &c.*]

6. [*The same as in paragraph* 6 *of the preceding form.*]

Particulars :—

The plaintiff claims, &c. [*as in the preceding form*].

SCHOOLMASTER.

Claim by a Schoolmaster for Tuition, Board, &c.

The plaintiff's claim is for money payable for work done by the plaintiff, as a schoolmaster, in and about the instructing of *G. H.* [the defendant's son] for the defendant at his request, and for board, lodging, washing, books, and other necessaries and goods provided by the plaintiff for the said *G. H.* at the request of the defendant.

Particulars :—

By a Schoolmaster for Removing a Pupil without previously giving a Term's Notice (*p*).

1. The plaintiff is the proprietor of a school at ——, and on the —— ——, 19—, received the defendant's son *G. H.* at the said school under an agreement between the plaintiff and the defendant, contained in a printed prospectus and in a letter from the defendant dated the —— ——, 19— [*or*, contained in letters dated, &c., *or*, *as the case may be*], that the plaintiff should provide the said *G. H.* with education, board, and lodging, whilst he should be at such school, and that the defendant should pay the plaintiff therefor £—— per term, and that the defendant should continue the said *G. H.* at the said school to be educated, boarded, and lodged as aforesaid, until the expiration of a term's notice, to be given to the plaintiff by the defendant of his intention to take the said *G. H.* away from the said school, or, if he should take the said *G. H.* away from the said school without giving such notice as aforesaid, he should pay the plaintiff for one term at the rate aforesaid, in addition to the payment for the terms during which the said *G. H.* had continued at the said school.

2. The said *G. H.* was and remained at the said school under the said

(*p*) When the contract—often contained in a prospectus—expressly provides for the payment of a term's fees if the pupil is removed without a term's notice, the amount can be recovered as liquidated damages (*Lennssen* v. *Thornton*, 3 Times Rep. 657; *Jones* v. *Turner*, 7 Times Rep. 421). If the contract merely states that a term's notice is required, the damages are unliquidated, and only the amount actually lost can be recovered (*Denman* v. *Winstanley*, 4 Times Rep. 127; *Jones* v. *Turner*, *supra*). No action will lie for the removal of a pupil without the term's notice if the pupil is prevented from returning to school by illness (*Simeon* v. *Watson*, 46 L. J. Q. B. 679), but the fact that the pupil becomes ill after a term has commenced and is thereby prevented from attending the school, does not discharge the obligation to pay fees for that term (*Collins* v. *Price*, 5 Bing. 132).

agreement until the —— ——, 19—, when the defendant took away the said *G. H.* from the said school without giving the plaintiff any such notice as aforesaid, but the defendant has not made the plaintiff such additional payment for one term as aforesaid.

The plaintiff claims £——.

(*See a form in Simeon* v. *Watson*, 46 L. J. Q. B. 679.)

Shares (*q*).

Claim for the Price of Shares.

The plaintiff's claim is for money payable for the price of —— shares of and in a company called —— [*here state the name of the company*], sold and transferred by the plaintiff to the defendant.

Particulars :—

By the Vendor of Shares against the Purchaser for not accepting the Shares (*r*).

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing dated the —— ——, 19—, whereby it was agreed that the

---

(*q*) Shares in companies were held not to be "goods, wares, or merchandises" within the meaning of s. 17 of the Statute of Frauds (*Humble* v. *Mitchell*, 11 A. & E. 205 ; *Tempest* v. *Kilner*, 3 C. B. 249) ; and it is clear that they are not "goods" within the Sale of Goods Act, 1893, nor are they an "interest in land" within the meaning of s. 4 of the Statute of Frauds, except in some few cases where they are such as to give the shareholders an actual interest in real estate (*Humble* v. *Mitchell*, *supra* ; *Powell* v. *Jessopp*, 18 C. B. 336 ; 25 L. J. C. P. 199 ; *Watson* v *Spratley*, 10 Ex. 222 ; 24 L. J. Ex. 53). By s. 22 of the Companies Act, 1862, and by s. 7 of the Companies Clauses Consolidation Act, 1845, shares in companies within the provisions of those Acts respectively are expressly declared to be personal estate.

Contracts relating to the sale and purchase of shares are in general regulated by the usages of the Stock Exchange or market in which they are made (*Grissell* v. *Bristowe*, L. R. 4 C. P. 36, 49 ; 38 L. J. C. P. 10 ; *Maxted* v. *Paine*, L. R. 6 Ex. 132 ; 40 L. J. Ex. 57 ; *Nickalls* v. *Merry*, L. R. 7 H. L. 530 ; 45 L. J. Ch. 285 ; *Forget* v. *Baxter*, [1900] A. C. 467, 478 ; 69 L. J. P. C. 101). See "*Stock Exchange*," *post*, pp. 308 *et seq.*

Contracts for the sale of shares, or of any interest in a joint stock banking company in the United Kingdom issuing shares transferable by deed or writing, must set forth and designate in writing such shares or interest by the numbers by which they are distinguished on the register or books of the company, or, if there is no register showing numbers, then they must set forth the names of the persons registered as proprietors thereof at the time of the making of the contract, otherwise such contracts are, by 30 & 31 Vict. c. 29, s. 1, null and void. (See *Perry* v. *Barnett*, 15 Q. B. D. 388 ; 54 L. J. Q. B. 466.)

There is an implied contract between the vendor and purchaser of shares that the vendor shall be indemnified against the payment of calls made subsequently to the time fixed for the transfer of the shares, and that the purchaser shall be indemnified against the payment of calls made previously to such time (*Walker* v. *Bartlett*, 17 C. B. 446 ; 18 C. B. 845 ; 25 L. J. C. P. 156, 263 ; *Rudge* v. *Bowman*, L. R. 3 Q. B. 689 ; 37 L. J. Q. B. 193).

(*r*) In an action for not accepting shares under a contract of sale, the usual measure

plaintiff should sell to the defendant —— shares of and in a company called —— [*here state the name of the company*], at the price of £—— per share, and should do all things necessary on his part to transfer the said shares to the defendant on the —— ——, 19—, and that the defendant should purchase the said shares from the plaintiff at the price aforesaid, and should accept the transfer of the said shares at the last-mentioned date, and pay the said price for the said shares upon the transfer thereof.

2. The defendant, by letters dated the —— ——, 19— [*or*, verbally on the —— ——, 19—], refused to accept the transfer of the said shares, and did not pay the said price or any part thereof for the same.

Particulars of damage :—

19—, —— ——.	£.	*s.*	*d.*
Difference between the market price of the said shares at the date of the said breach, viz. £——, and the said agreed price.....			

[*Add any special damage sustained by the plaintiff, as, for instance,*

19—, —— ——, and —— ——.			
Amount of —— calls of £—— each, which the plaintiff, as legal holder of the said shares, became liable to pay, and did pay, upon the said shares subsequently to the said breach .....]			

Against a Share-Broker for not purchasing Shares according to Order: see "Stock Exchange," post, p. 310.

For other Forms by and against Stockbrokers, see "Stock Exchange," post, p. 308.

---

of damages is the difference between the contract price and the price at the time appointed for acceptance, or upon a re-sale if re-sold by the vendor within a reasonable time after the breach (*Stewart* v. *Canty*, 8 M. & W. 160; *Pott* v. *Flather*, 11 Jur. 735 16 L. J. Q. B. 366).

The usual measure of damages for the breach of a contract of sale of shares in not delivering or transferring the shares sold is the difference between the contract price and the market price when the contract was broken, allowing the purchaser reasonable time for the purchase of the shares (*Shaw* v. *Holland*, 15 M. & W. 136; *Tempest* v. *Kilner*, 3 C. B. 249; and see *Cockerell* v. *Van Diemen's Land Co.*, 18 C. B. 454).

On a contract to replace, on a given day, stock or shares which have been lent by the plaintiff to the defendant, the measure of damages is the difference of the contract price and the market price at the time appointed by the contract for replacing the stock or shares, or the price at the day of the trial, at the option of the plaintiff (*Shepherd* v. *Johnson*, 2 East, 211; *M'Arthur* v. *Seaforth*, 2 Taunt. 257; *Owen* v. *Routh*, 14 C. B. 327; and see *Gainsford* v. *Carroll*, 3 B. & C. 625; *Shaw* v. *Holland*, 15 M. & W. 136, 145; *Cockerell* v. *Van Diemen's Land Co.*, *supra*).

For Forms of Claims by Companies against Shareholders for Allotment Money and for Calls on Shares, see "Company," ante, p. 151.

SHIPPING (*s*).

(*s*) Common carriers of goods by water, in the absence of any express contract, are, in general, subject to the same duties as common carriers by land. (See "*Carriers*," *ante*, p. 141.)

Owners or masters of general vessels, whether engaged in the coasting trade or on sea voyages, are common carriers (*Morse* v. *Slue*, 2 Lev. 69; *Benett* v. *P. & O. Steamboat Co.*, 6 C. B. 775; *Nugent* v. *Smith*, 1 C. P. D. 19; 45 L. J. C. P. 19; *reversed on another ground*, 1 C. P. D. 423; 45 L. J. C. P. 897); so are lightermen and bargemen (*Maring* v. *Todd*, 1 Stark. 72; *Rich* v. *Kneeland*, Cro. Jac. 330; and see *Liver Alkali Co.* v. *Johnson*, L. R. 7 Ex. 267; L. R. 9 Ex. 338; 41 L. J. Ex. 110; 43 L. J. Ex. 216). It has been doubted whether owners and masters of ships other than general ships are common carriers (*Nugent* v. *Smith*, 1 C. P. D. 425; 45 L. J. C. P. 697, *per* Cockburn, C.J.). It is, however, usual for shipowners to make special contracts respecting the carriage of goods by charterparty, bill of lading, or otherwise; and then their liability is regulated by the written document.

In the absence of clear provision to the contrary, a carrier by sea remains liable for the negligence and default of himself, his servants, or agents, and he is not relieved by general words exempting him from liability from particular causes, where those causes come into operation owing to such negligence or default (*Phillips* v. *Clark*, 2 C. B. N. S. 156; 26 L. J. C. P. 168; *Czech* v. *General Steam Nav. Co.*, L. R. 3 C. P. 14; 37 L. J. C. P. 3; *Steel* v. *State Line Steam Ship Co.*, 3 App. Cas. 72, 87; *Wilson* v. *Xantho*, 12 App. Cas. 503, 510; 56 L. J. Adm. 116; *Hamilton* v. *Pandorf*, 12 App. Cas. 518, 524, 526 *et seq.*; 57 L. J. Q. B. 24; *Hill* v. *Scott*, [1895] 2 Q. B. 371; *Ib.* 713; 64 L. J. Q. B. 635; 65 *Ib.* 87; *Dobell* v. *S.S. Rosmore Co.*, [1895] 2 Q. B. 408; 64 L. J. Q. B. 777).

In order to relieve the shipowners from the liabilities which the law implies clear and unambiguous words in the contract of carriage are necessary (*Rathbone* v. *McIver*, [1903] 2 K. B. 374; 72 L. J. K. B. 703; *Eldersley S.S. Co.* v. *Borthwick*, [1905] A. C. 93; 74 L. J. K. B. 338). In some bills of lading a clause is inserted which expressly exempts the shipowner from liability for the negligence of himself or his servants (*Blackburn* v. *Liverpool, &c. Co.*, [1902] 1 K. B. 290; 71 L. J. K. B. 177; *Westport Coal Co.* v. *McPhail*, [1898] 2 Q. B. 130; 67 L. J. Q. B. 674; *Baerselman* v. *Bailey*, [1895] 2 Q. B. 301; 64 L. J. Q. B. 707). In the absence of such a clause the ordinary exceptions in a bill of lading do not exempt the owner from liability for loss or damage through negligence of the owner and his servants or crew (*Grill* v. *Gen. Screw Colliery Co.*, L. R. 3 C. P. 476; *Hayn* v. *Culliford*, 4 C. P. D. 182; 48 L. J. C. P. 372; *Steinman* v. *Angier*, [1891] 1 Q. B. 619, 624; 60 L. J. Q. B. 425; and cases cited *supra*). The onus of proving negligence, to take a case out of the ordinary exceptions, lies on the party alleging it (*The Glendarrock*, [1894] P. 226, 229; 63 L. J. P. 89).

It is implied in contracts of affreightment, whether under a charter-party, bill of lading, or otherwise, that the ship shall at the commencement of the voyage be fit to carry the goods, or, as it is usually termed, "seaworthy" (*Lyon* v. *Mells*, 5 East, 428; *Richardson* v. *Stanton*, L. R. 7 C. P. 421; L. R. 9 C. P. 390; 43 L. J. C. P. 230; 45 L. J. C. P. 78; *Kopitoff* v. *Wilson*, 1 Q. B. D. 377; 45 L. J. Q. B. 436; *Cohn* v. *Davidson*, 2 Q. B. D. 455; 46 L. J. Q. B. 305; *Steel* v. *State Line Steam Ship Co.*, 3 App. Cas. 72; *Hedley* v. *Pinkney*, [1894] A. C. 322; 63 L. J. Q. B. 419; *Eldersley S.S. Co.* v. *Borthwick*, *supra*; *McFadden* v. *Blue Star Line*, [1905] 1 K. B. 697; 74 L. J. K. B.). Exceptions applicable to matters that may arise during the voyage do not exclude

this warranty (*Maori King* v. *Hughes*, [1895] 2 Q. B. 550; 65 L. J. Q. B. 168). But as in long voyages it is not practicable for a steamship to take on board at the commencement of the voyage a sufficient supply of coal for the whole voyage, so that the ship may be in that respect "seaworthy," it is a sufficient compliance with the warranty if, at each stage at which it is contemplated that the ship will stop to coal, it is sufficiently coaled to take it to the next of such stages (*The Vortigern*, [1899] P. 140; 68 L. J. P. 49; *McIver* v. *Tait Steamers*, [1903] 1 K. B. 362; 72 L. J. K. B. 253; *Greenock S.S. Co.* v. *Marit. Ins. Co.*, [1903] 1 K. B. 367; *Ib.* 2 K. B. 657; 72 L. J. K. B. 868; *McFadden* v. *Blue Star Line*, *supra*).

A carrier of passengers by water does not, it would seem, impliedly warrant to his passengers that his ship is seaworthy, or warrant their safety any more than a carrier of passengers by land (see *Readhead* v. *Mid. Ry. Co.* L. R. 4 Q. B. 379, 390; 38 L. J. Q. B. 169; "*Carriers*," *ante*, p. 148); but by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 458, an obligation is imposed upon owners of ships in regard to the seaworthiness of their ships, in favour of the masters, crews, and apprentices employed by them on ocean-going ships. The effect of this section is, in general, to give an action to the master, or any of the crew, or apprentices, sustaining injury from an ocean-going ship being sent to sea in an unseaworthy condition, or without being fitted with proper appliances for its safety (*Hedley* v. *Pinkney*, [1892] 1 Q. B. 58; [1894] A. C. 222; 63 L. J. Q. B. 419); or, it would seem, the safety of the crew (*Ib.*), but not to enable an action to be maintained for injury due to the negligence of the master in not making use of the appliances with which the ship was fitted (*Ib.*).

A seaworthy vessel is one that is in a fit state as to repairs, equipment, and crew, and in all other respects to encounter ordinary perils of the voyage and to receive and carry the cargo which the owner contracts she is to carry on her (*per* Parke, B., *Dixon* v. *Sadler*, 5 M. & W. 405, 414; *Hedley* v. *Pinkney*, *supra*; *Maori King* v. *Hughes*, *supra*; *Queensland Bank* v. *P. & O. Co.*, [1898] 1 Q. B. 567; 67 L. J. Q. B. 402; *Rathbone* v. *McIver*, [1903] 2 K. B. 378; 72 L. J. K. B. 703).

In general, either the master or the owner may sue for freight (*Shields* v. *Davis*, 6 Taunt. 65), but where the master signs as a mere agent only for the owners, he cannot sue for freight (*Repetto* v. *Millars Karri Forests*, [1901] 2 K. B. 306; 70 L. J. K. B. 561).

Freight paid in advance cannot be recovered back, although the vessel is lost on the voyage (*Bryne* v. *Schiller*, L. R. 6 Ex. 20; *Ib.* 319; 40 L. J. Ex. 40; *Ib.* 177; *Allison* v. *Bristol Marine Ins. Co.*, 1 App. Cas. 209; 43 L. J. C. P. 311).

Freight *pro ratâ itineris* may be recovered where the goods are delivered short of their destination, when the circumstances are such as to raise a fair inference that the owner of the goods, having an option in the matter, dispenses with their further carriage (*The Soblomsten*, L. R. 1 Ad. 293; 36 L. J. Ad. 5; *Vlierboom* v. *Chapman*, 13 M. & W. 238; *Hill* v. *Wilson*, 4 C. P. D. 329, 335; 48 L. J. C. P. 764; *Christy* v. *Row*, 1 Taunt. 300; and see also *Acatos* v. *Burns*, 3 Ex. D. 282; 47 L. J. Ex. 566); but if the master justifiably sells part of the cargo at an intermediate port for the necessary repairs of the ship, freight *pro ratâ* cannot be charged (*Hopper* v. *Burness*, 1 C. P. D. 137; 45 L. J. C. P. 377; *Metcalfe* v. *Britannia Iron Works Co.*, 1 Q. B. D. 613; 2 Q. B. D. 423; 45 L. J. Q. B. 837; 46 L. J. Q. B. 443). As to claims for freight on delivery of incomplete cargo, see *Ritchie* v. *Atkinson*, 10 East, 295.

Limitation of Liability.]—By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 502—509, the liability of shipowners for loss or damage happening without their actual fault or privity is in certain cases limited.

The usual mode of obtaining the benefit of these enactments is by action in the Admiralty Division, paying into Court the amount per ton specified in the statute (see a form of claim in *The Andalusian*, 3 P. D. 182); but the relief may be obtained in the King's Bench Division by way of counterclaim. (See the Merchant Shipping Act, 1894, s. 504; *The Clutha*, 3 Asp. Mar. Law Cas. 225; 45 L. J. Ad. 108; *The Rajah*, L. R. 3 A. & E. 539; Marsden on Collisions, 5th ed., p. 298, and R. S. C. (Merchant Shipping), 1894.) For an instance of a defence by a shipowner on the ground of a

Claim for Freight (t).

The plaintiff's claim is for freight for the carriage by the plaintiff for the defendant at his request of goods.

Particulars:—

19—, —— ——. Freight [as per bill of lading (*or*, charter-party) dated ——] of —— tons of —— by the S.S. —— from —— to —— at —— per ton ..... £

The like, against a Consignee named in a Bill of Lading (u).

1. The plaintiff's claim is for freight for the carriage of goods carried in the ship "——," whereof the plaintiff is owner, from —— to —— [under a bill of lading dated the —— ——, 19—].

---

right on his part to have his liability limited under the above Acts, see *Wahlberg* v. *Young*, 45 L. J. C. P. 783.

As to the liability of a railway company contracting by through booking to carry animals, luggage, or goods partly by railway and partly by sea, see s. 14 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119; 26 & 27 Vict. c. 92, ss. 30, 31; 34 & 35 Vict. c. 78, s. 12: and *Doolan* v. *Midland Ry. Co.*, 2 App. Cas. 792).

In the case of a breach of the contract for carriage of goods by ship, damages for loss of market are not in general recoverable (*The Parana*, 2 P. D. 118), but there is no absolute rule to this effect; and when the circumstances admit of calculations as to the probable time of the ship's arrival and the probable fluctuations of the market, the ordinary principles of law apply (*Dunn* v. *Donald Currie & Co.*, [1902] 2 K. B. 614; 71 L. J. K. B. 963).

The measure of damages for not loading a cargo is, in general, the freight which would have been earned had the cargo been carried, less the expenses of carrying it and any profit which the ship has made by being otherwise employed (*Smith* v. *Maguire*, 3 H. & N. 554; 27 L. J. Ex. 465; *Morris* v. *Levison*, 1 C. P. D. 155, 158; 45 L. J. C. P. 409).

The limits of liability for horses, cattle, sheep, and pigs mentioned in s. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), would seem applicable to their carriage by a railway company in steam vessels by sea, where the special Act incorporates Part IV. of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92). (See 26 & 27 Vict. c. 92, ss. 30, 31; and 34 & 35 Vict. c. 78, s. 12.) See further "*Carriers*," *ante*, p. 139; *post*, p. 627.

(*t*) The above form is applicable to an action for freight against the shipper or consignor of the goods, or in an action for freight against the consignee, where the goods have been shipped for him by the shipper as his agent, or where the consignee has received delivery of the goods from the carrier. In the latter case, however, the delivery and receipt should be expressly alleged either in the body of the statement of claim or in the particulars.

Where the action is brought under the 18 & 19 Vict. c. 3, s. 1, against the consignee named in the bill of lading, or the indorsee of the bill of lading, the subsequent forms should be used. (See the next note.)

(*u*) **Bill of Lading.**]—The bill of lading represents the goods shipped, and the indorsement and delivery of the bill of lading by the shipper or owner of the goods with intent to transfer the property in the goods, effects a transfer of the property to the indorsee (*Lickbarrow* v. *Mason*, 2 T. R. 63; 6 East, 21; 1 Sm. L. C., 11th ed., p. 693; *Sewell* v. *Burdick*, 10 App. Cas. 74; 54 L. J. Q. P. 156).

2. The defendant was the consignee of the said goods named in the bill of lading, to whom the property in the goods therein mentioned passed

---

If the indorsement and delivery of the bill of lading is proved to have been intended to operate only as a pledge, and not as an absolute transfer of property in the goods, it will have the intended effect only, and the pledgee will not thereby become liable, either at common law, or under the statute 18 & 19 Vict. c. 111 (cited *infra*), to pay for the carriage of the goods (*Sewell* v. *Burdick*, *supra*), though it would seem that if the indorsee takes delivery of the goods under the bill of lading, he may become liable to pay for the carriage thereof according to its terms (*Ib.* at p. 86).

The indorsee for value of a bill of lading who takes it *bonâ fide* and without notice that the goods have not been paid for, and that the consignee is insolvent, has a right to the goods which is superior to the right of the unpaid vendor to stop in transit (*Lickbarrow* v. *Mason*, *supra*; Sale of Goods Act, 1893, s. 47); but if the indorsement is by way of pledge only, so that the property in the goods does not pass by or upon the indorsement, the right of the unpaid vendor to stop in transit is not thereby defeated, though that right is subject to a charge on the goods in favour of the indorsee of the bill of lading (*Ib.*).

In the absence of notice, the indorsee for value of a bill of lading is liable to those claims only on the goods which are specified or referred to in the bill of lading. (See *Lickbarrow* v. *Mason*, and other cases cited *supra*; *Foster* v. *Colby*, 3 H. & N. 705; 28 L. J. Ex. 81; *Shand* v. *Sanderson*, 4 H. & N. 381; 28 L. J. Ex. 278; *Gurney* v. *Behrend*, 3 E. & B. 622, 633.)

By the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

This section does not apply to pledges of bills of lading (*per* Lopes, L.J., *Bristol Bank* v. *Mid. Ry. Co.*, [1891] 2 Q. B. 653, 664; and see *Sewell* v. *Burdick*, *supra*).

By s. 2, "Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement."

By s. 3, "Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board."

The owner is not conclusively bound by the signature of the master for goods not in fact shipped (*Jessel* v. *Bath*, L. R. 2 Ex. 267; 36 L. J. Ex. 149; *Brown* v. *Powell Steam Coal Co.*, L. R. 10 C. P. 562; 44 L. J. C. P. 289); but the onus of proving that goods thus signed for were not in fact shipped is on the shipowner (*Smith* v. *Bedouin Nav. Co.*, [1896] A. C. 70; 65 L. J. P. C. 8). The section only makes the bill of lading conclusive against the person by whom, or by whose authority, it is signed; in other cases it may be shown that the goods were not shipped (*McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128; and see *Meyer* v. *Dresser*, 16 C. B. N. S. 646; 33 L. J. C. P. 289). It does not prevent the shipowner from showing that the goods which he tenders for delivery were in fact those shipped, though, owing to a mistake, they do not correspond, in some respect, not touching their quality or quantity, with the marks stated in the margin of the bill of lading (*Parsons* v. *New Zealand Shipping Co.*, [1901] 1 K. B. 548; 70 L. J. K. B. 404).

upon or by reason of such consignment [*add, if the fact was so,* and he took delivery of the said goods in —— under the said bill of lading].

Particulars:—[*As in preceding form.*]

The like, against an Indorsee of the Bill of Lading (*x*).

1. [*The same as in the preceding form.*]

2. The defendant was the indorsee of the bill of lading to whom the

---

The above statute transfers the contract in the bill of lading to the indorsee, but the liability and right of the indorsee under the statute does not continue after he has indorsed it away, provided he does so before the arrival and delivery of the cargo (*Smurthwaite* v. *Wilkins*, 11 C. B. N. S. 842; 31 L. J. C. P. 214; *The Felix*, L. R. 2 Ad. 273; 37 L. J. Ad. 48). It seems that the indorsement of the bill of lading transfers to the indorsee the right of action for a breach of the contract previously accrued (*Short* v. *Simpson*, L. R. 1 C. P. 248; 35 L. J. C. P. 147). An indorsee may recover for a conversion of the goods which took place before the date of the indorsement (*Short* v. *Simpson*, *supra*; *Bristol Bank* v. *Mid. Ry. Co.*, [1891] 2 Q. B. 653). The indorsement of the bill of lading does not relieve the original shipper or owner of the goods from his liability for freight under it (*Fox* v. *Nott*, 6 H. & N. 630; 30 L. J. Ex. 259; 18 & 19 Vict. c. 111, s. 2, *supra*).

The bill of lading remains in force until the goods have been delivered thereunder to a person having a right to take such delivery (*Meyerstein* v. *Barber*, L. R. 2 C. P. 661; L. R. 4 H. L. 317; 39 L. J. C. P. 187). Bills of lading are usually drawn in sets of three, and the property in the goods in general passes to the first indorsee (*Meyerstein* v. *Barber*, *supra*). But the master or shipowner is justified in delivering the goods to the indorsee of the bill of lading first produced to him of the set, whether on the face of it it appears to be the first of the set or not, provided he acts *bonâ fide*, and without notice of any prior title in any indorsee or holder of one of the other bills of lading of the set (*Glyn, Mills & Co.* v. *East India Dock Co.*, 7 App. Cas. 591; 52 L. J. Q. B. 146). As between shipowner and charterer, the bill of lading is to be regarded as the receipt for the goods, and the charterparty as the contract for their carriage (*Rodocanachi* v. *Milburn*, 18 Q. B. D. 67; 56 L. J. Q. B. 202), whilst as between a shipper of goods under a bill of lading, who is not a charterer, and the shipowner the bill of lading contains the terms of the contract of carriage (*Glyn, Mills & Co.* v. *East India Dock Co.*, 7 App. Cas. 591, 596; 52 L. J. Q. B. 146; *Leduc* v. *Ward*, 20 Q. B. D. 475; 57 L. J. Q. B. 379; *Margetson* v. *Glynn*, [1892] 1 Q. B. 337; [1893] A. C. 351; 62 L. J. Q. B. 466).

Where, by the bill of lading, freight is payable "as per charterparty," the indorsee of the bill of lading to whom property in the goods is transferred by the indorsement, or who takes delivery thereunder, becomes liable to pay freight according to the terms of the charterparty (*Fry* v. *Chartered Bank of India*, L. R. 1 C. P. 669; 35 L. J. C. P. 356; *Gray* v. *Carr*, L. R. 6 Q. B. 522; 40 L. J. Q. B. 257; *Serraino* v. *Campbell*, 25 Q. B. D. 501; [1891] 1 Q. B. 283; 60 L. J. Q. B. 303). But where the bill of lading expresses that "freight and all other conditions" are "as per charter," that does not incorporate into the bill of lading the negligence clause in the charterparty so as to extend the excepted perils, the words being construed to refer only to those conditions of the charter that are to be performed by the consignees or receivers of the goods (*Serraino* v. *Campbell*, *supra*).

By the Sale of Goods Act, 1893, s. 19 (2), "Where goods are shipped, and, by the bill of lading, the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal."

(*x*) See preceding note.

property in the goods therein mentioned passed upon or by reason of the indorsement [and he took delivery of the said goods in London under the said bill of lading].

Particulars :—

A like Form (*y*).

1. The plaintiff's claim is against the defendant as indorsee of a bill of lading, dated the —— ——, 19—, for freight for the carriage of goods by the plaintiff in the ship "——," under the said bill of lading, from —— to ——.

2. The said goods were shipped on the said ship at —— by *G. H.*, and were by the said bill of lading made deliverable at —— to him or his assigns [*or*, to order or assigns], and the said bill of lading was afterwards indorsed by him [to *I. K.*, and by the said *I. K.*] to the defendant, and the property in the said goods passed [to the said *I. K.* and] to the defendant upon or by reason of the said indorsement [*or*, of the said indorsements respectively].

Particulars :—

Claim for Lighterage.

The plaintiff's claim is £—— for lighterage conveyance [shipping] and landing of goods conveyed in lighters and other vessels [and shipped] and landed from the same by the plaintiff for the defendant and at his request.

Particulars :—

Claim for Towage.

The plaintiff's claim is £—— for towage by the plaintiff of ships for the defendant at his request.

Particulars :—

19—, —— ——. Towage of the S.S. —— from —— to ——...£——

By Shipper against Master on a Bill of Lading for Damage to Goods (*y*).

1. The plaintiff has suffered damage by breach of contract by bill of lading of goods shipped by the plaintiff on board the "Jane," signed by the defendant, dated the 1st January, 19—.

2. 50 bales of cotton were delivered in a damaged condition.

Particulars of damage:

50 bales at £2 ..... £100.

The plaintiff claims £100.

(*See R. S. C.*, 1883, *App. C., Sect. V., No.* 4.)

(*y*) See note (*u*), p. 294.

By Shipper against Shipowner on a Bill of Lading for Damage and Short Delivery (*z*).

1. The plaintiff has suffered damage by breach of contract by bill of lading of goods shipped by the plaintiff, signed by the master of the ship "Mary," as the defendant's agent, dated the 1st January, 19—.

2. 50 quarters of wheat were delivered in a damaged condition, and 100 quarters were not delivered.

Particulars of damage:—

	£
100 quarters at 40*s.*	200
50 quarters at 4*s.*	10
	£210

The plaintiff claims £210.

(*See R. S. C.*, 1883, *App. C., Sect. V., No.* 5.)

By Indorsee of Bill of Lading against Shipowner for not delivering Goods shipped.

1. The plaintiff has suffered damage by breach of contract by bill of lading, dated the —— ——, 19—, of goods shipped at —— on board the defendant's ship "Fanny," for carriage from —— to ——, signed by the defendant's agent the master of the said ship.

[2. The bill of lading was indorsed to the plaintiff, to whom the property in the goods passed by such indorsement.]

3. The goods were not carried to —— or there delivered.

Particulars:—

The like, with an Alternative Claim for Loss through a Collision caused by Negligent Navigation: see Wilson v. *Xantho*, 12 App. Cas. 503; 56 L. J. Ad. 116.

By Shipowners for Freight and Demurrage on a Bill of Lading which expresses that Freight, and all other Conditions, are to be "as per Charterparty."

1. The plaintiff's claim is for freight and demurrage under a bill of lading, dated the —— ——, 19—, which provided that the goods therein mentioned should be carried by the plaintiff in the ship —— from —— to ——, and there delivered to the defendant [*or*, to *G. H.* or assigns] he or they paying freight for the said goods and all other conditions as per charterparty dated the—— ——, 19—.

(*z*) See note (*a*) on p. 294.

2. By the terms of the said charterparty freight was to be paid for the said goods in cash on delivery at the rate of £—— per [ton] delivered, and —— days were to be allowed for loading and —— days for discharging, and —— days were to be allowed for demurrage, if required, at £—— per day.

[3. The said bill of lading was indorsed by the said *G. H.* to the defendant, and the property in the said goods passed to the defendant upon [*or*, by reason of] the said indorsement.]

4. The said goods were carried by the plaintiff in the said ship from —— to —— aforesaid, and there delivered to the defendant, who kept the said ship —— days on demurrage at that port.

Particulars:—

	£	*s.*	*d.*
Freight of —— tons of —— at £—— per ton			
Demurrage at —— for —— days, from the —— ——, 19—, to the —— ——, 19—, at the rate of £—— per day.....			
Amount due..... £			

Against the Charterer of a Ship, for Freight due under a Charterparty (*a*).

The plaintiff's claim is for freight due under a charterparty dated the —— ——, 19—, between the plaintiff and defendant, whereby the

(*a*) **Charterparty.**]—As to what are conditions precedent to the liability of the charterer to load, see *Bentsen* v. *Taylor*, [1893] 2 Q. B. 274; 62 L. J. Q. B. 516; and see *post*, p. 787; and as to what are conditions precedent to the liability for freight, see *Ib.*; *Inman Steamship Co.* v. *Bischoff*, 7 App. Cas. 670; 52 L. J. Q. B. 169; and see *post*, p. 787; and see generally as to the mutual rights and liabilities of freighter and shipowner, *Postlethwaite* v. *Freeland*, 5 App. Cas. 599; 49 L. J. Ex. 630; *Nelson* v. *Dahl*, 12 Ch. D. 568, 580; 6 App. Cas. 38; 50 L. J. Ch. 411; *Tharsis Sulphur Co.* v. *Morel*, [1891] 2 Q. B. 647; *Castlegate Steamship Co.* v. *Dempsey*, [1892] 1 Q. B. 854; 61 L. J. Q. B. 620; *Good* v. *Isaacs*, [1892] 2 Q. B. 555; 61 L. J. Q. B. 649; *Hick* v. *Raymond*, [1893] A. C. 22; 63 L. J. Q. B. 98.

Neglect or delay in the performance of the contract, in the absence of express stipulation, is only ground for a claim for damages; unless it be such as to frustrate the object of the charterparty, in which case the charterer would be discharged (*Freeman* v. *Taylor*, 8 Bing. 124; *Jackson* v. *Union Marine Insurance Co.*, L. R. 8 C. P. 572; L. R. 10 C. P. 125; 42 L. J. C. P. 284; 44 L. J. C. P. 27; *Dahl* v. *Nelson*, 6 App. Cas. 38, 53, 61; 50 L. J. Ch. 411).

Where the contract is silent as to time, the law implies that the act shall be done within a reasonable time, that is to say, within a time which is, under all the circumstances of the case, reasonable (*Ellis* v. *Thompson*, 3 M. & W. 445; *Postlethwaite* v. *Freeland*, 5 App. Cas. 599, 621; 49 L. J. Ex. 630; *Hick* v. *Raymond*, [1893] A. C. 22; 62 L. J. Q. B. 98; *Lyle Shipping Co.* v. *Cardiff Corporation*, [1900] 2 Q. B. 638; 69

plaintiff's ship "——" was chartered by the defendant for the carriage of goods from —— to ——.

Particulars :—

19—, ——.

Freight of —— tons of —— at the rate of £—— per ton... £——.

L. J. Q. B. 889). Under charterparties silent as to the time in which unloading is to be completed, each party is bound to use reasonable diligence in performing that part of the delivery which by the custom of the port falls on him (*Postlethwaite* v. *Freeland*, 4 Ex. D. 155 ; 5 App. Cas. 599 ; 49 L. J. Ex. 630 ; *Hick* v. *Raymond*, *supra*). The charterer in such a charterparty being only bound to use proper diligence under the actual circumstances, is not liable for delay by a strike, not attributable to his fault (*Ib.* ; *Castlegate Steamship Co.* v. *Dempsey*, [1892] 1 Q. B. 854 ; 61 L. J. Q. B. 620 ; *Hulthen* v. *Stewart*, [1903] A. C. 389 ; 72 L. J. K. B. 917). Under a charterparty which specifies a limited number of days or other time within which the unloading is to be completed, the charterer is liable for a detention by a strike, or otherwise, beyond the specified period, unless the charterparty contains a stipulation to the contrary, or the detention is the fault of the shipowner, or of those for whose conduct he is responsible (*Budgett* v. *Binnington*, [1891] 1 Q. B. 35 ; 60 L. J. Q. B. 1 ; *Castlegate Steamship Co.* v. *Dempsey*, *supra* ; *Hulthen* v. *Stewart*, *supra*). A charterparty in which there are stipulations as to loading or discharging cargo in a port is to be construed as made with reference to the custom of that port (*Postlethwaite* v. *Freeland*, 5 App. Cas. 599 ; 49 L. J. Ex. 630, *per* Lord Blackburn ; *Smith* v. *Rosario Co.*, [1894] 1 Q. B. 174 ; *Lyle Shipping Co.* v. *Cardiff Corporation*, *supra*) ; unless they are expressly excluded (*Brenda S.S. Co.* v. *Green*, [1900] 1 Q. B. 518 ; 69 L. J. Q. B. 445).

In charterparties it is usual to allow a certain number of days, termed *lay* days, for loading and unloading, with liberty to detain the ship for a specified number of days, at a specified rate of payment.

The sums agreed to be paid for such allowed detention during the specified days are properly called "demurrage," and are recoverable as a debt, but compensation for any detention beyond those specified days, where there is no agreement as to the payment to be made in respect thereof, is not "demurrage" (though sometimes popularly called so), and is recoverable only as damages (*Neilsen* v. *Witt*, 16 Q. B. D. 67, 70 *et seq.* ; *Clink* v. *Radford*, [1891] 1 Q. B. 625 ; 60 L. J. Q. B. 388 ; *Dunlop* v. *Balfour*, [1892] 1 Q. B. 507 ; 61 L. J. Q. B. 354). See *ante* p. 164.

In reckoning demurrage, in the absence of stipulation to the contrary, a fraction of a day is reckoned as a day (*Commercial Steamship Co.* v. *Boulton*, L. R. 10 Q. B. 346 ; 44 L. J. Q. B. 219).

Whenever, in the charterparty, it is agreed that a specified number of days shall be allowed for loading, or unloading, as the case may be, and that it shall be lawful for the freighter to detain the vessel for that purpose a further specified time, on payment of a daily sum, this constitutes a stipulation on the part of the freighter that he will not detain the ship for loading, or unloading, as the case may be, beyond those two specified periods (*Ford* v. *Cotesworth*, L. R. 4 Q. B. 127 ; L. R. 5 Q. B. 544 ; 39 L. J. Q. B. 188 ; *Nelson* v. *Dahl*, 12 Ch. D. 568, 583, 584 ; 50 L. J. Ch. 441 ; 6 App. Cas. 38).

The right of the shipowner as to unloading is that the liability of the charterer as to his part of the joint act of unloading should accrue as soon as the ship is in the place named as that at which the carrying voyage is to end, and the ship is ready, so far as she is concerned, to unload ; and when the ship is at the named place, or, where there is a stipulation to that effect, so near thereto as she may safely get, and is ready to discharge, the liability of the charterer as to unloading commences (*Nelson* v. *Dahl*, *supra* ; *Tharsis Sulphur Co.* v. *Morel*, [1891] 2 Q. B. 647, 651 ; 61 L. J. Q. B. 11 ; *Good* v. *Isaacs*, [1892] 2 Q. B. 555 ; 61 L. J. Q. B. 649).

The like, for Demurrage due under a Charterparty (*b*).

The plaintiff's claim is for demurrage due from the defendant to the plaintiff under a charterparty, dated the —— ——, 19—, between the plaintiff and the defendant, of the ship "——" [of which the plaintiff was owner].

Particulars :—

Demurrage of the said ship at —— for —— days, from the —— ——, 19—, to the —— ——, 19—, inclusive, at the rate of £—— per day ..... £——.

Shipowner against Charterer for Detention beyond the Demurrage Days (*b*).

1. The plaintiff has suffered damage by breach of a charterparty dated the 10th March, 19—, between the plaintiff and the defendant of the ship "Mary."

2. The ship was detained at the port of loading.

Particulars of damage :—

19—, Jan. 1st to Jan 10th. 10 days' detention beyond the demurrage days, at £25 per day ..... £250.

The plaintiff claims £250.

(*See R. S. C.*, 1883, *App. C., Sect. V., No.* 3.)

The like, for not Loading pursuant to the Charterparty (*b*).

1. [*The same as paragraph* 1 *of the last Precedent.*]

2. The defendant made default in loading the agreed cargo.

Particulars :—

SOCIETIES.

I. BUILDING SOCIETIES (*c*).

Commencement of Claim by or against an Incorporated Building Society.

The plaintiffs, who are a building society incorporated under the Building Societies Acts, claim, &c., *or*, The plaintiff claims against the defendants, who are, &c. [*as above*].

(*b*) See preceding note.

(*c*) The principal enactments now in force relating to BUILDING SOCIETIES are the Building Societies Acts, 1874 to 1894 (37 & 38 Vict. c. 42 ; 38 & 39 Vict. c. 9 ; 40 & 41 Vict. c. 63 ; 47 & 48 Vict. c. 41 ; 57 & 58 Vict. c. 47), which may be cited together as "The Building Societies Acts." Upon obtaining a certificate of incorporation under these Acts the society becomes a body corporate by its registered name (see 37 & 38 Vict. c. 42, s. 9), and sues and is sued by that name.

II. Friendly Societies (*d*).

Commencement of Claim by a Friendly Society.

Between *A. B.* and *C. D.*, trustees of the —— Friendly Society ..... Plaintiffs,

and

E. F. ..... Defendant.

Statement of Claim.

The plaintiffs, who are the trustees of the —— Friendly Society, which is a society registered under the Friendly Societies Acts, claim, &c.

By 37 & 38 Vict. c. 42, s. 16, the rules of building societies thereafter established are required to state whether disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, are to be settled by reference to the County Court, or to the Registrar of Friendly Societies, or to arbitration; and by s. 36, the determination by the designated tribunal of such disputes is to be final and conclusive.

As to the meaning of the word "disputes," when used in the Building Societies Acts, see 47 & 48 Vict. c. 41, s. 2; *Western Building Society* v. *Martin*, 17 Q. B. D. 609; 55 L. J. Q. B. 382; *Municipal Building Society* v. *Richards*, 39 Ch. D. 372; 58 L. J. Ch. 8; and as to the cases in which the County Court has jurisdiction to determine such disputes, see s. 35. The effect of these enactments appears to be that the ordinary jurisdiction of the Supreme Court is usually ousted by the rules in cases of disputes arising between a society and its members (or representatives of members) in their capacity of members, that is, in cases of disputes arising out of the social contract; and further, that, if the rules make express provision to that effect, but not otherwise, it is also ousted in cases of disputes arising between them collateral to the social contract, such as those on mortgages; whilst with regard to disputes entirely extraneous to the social contract, such as one arising in respect of work done for the society by a member, the jurisdiction is not ousted (*Ib.*).

Building societies have limited powers of receiving deposits or loans (see 37 & 38 Vict. c. 42, s. 15; and 57 & 58 Vict. c. 47, s. 14), and cannot borrow or receive deposits in excess of those powers (*Chapleo* v. *Brunswick Building Society*, 6 Q. B. D. 696; 50 L. J. Q. B. 372; *Brooks* v. *Blackburn Building Society*, 9 App. Cas. 857; 54 L. J. Ch. 376; *Wenlock* v. *River Dee Co.*, *infra*).

By s. 43 of 37 & 38 Vict. c. 42, it is provided that if any society under the Act receives loans or deposits in excess of the prescribed limits, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess. (See *Looker* v. *Wrigley*, 9 Q. B. D. 397; *Cross* v. *Fisher*, [1892] 1 Q. B. 467.) Directors or officers of building societies receiving moneys on behalf of the society in excess of the powers of the society, may in some of such cases be personally liable by the common law, upon the ground that they impliedly warranted that they had authority to borrow for the society (*Chapleo* v. *Brunswick Building Society*, *supra*; *Cross* v. *Fisher*, *supra*; "*Agent*," *ante*, p. 76).

A society may be equitably liable in some cases to repay money advanced beyond its borrowing powers where it can be shown that the money so advanced has been applied to the repayment of debts properly incurred by the society (*Brooks* v. *Blackburn Building Society*, *supra*; see also *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354; 57 L. J. Ch. 946; 19 Q. B. D. 155; 36 Ch. D. 674; 38 Ch. D. 534; *In re Wrexham, &c., Ry. Co.*, [1899] 1 Ch. 205, 440; 68 L. J. Ch. 270).

(*d*) Friendly Societies, in general, are regulated by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25).

The like, where the Trustees have died since the Writ was issued, and new ones have been appointed.

[*The Statement of Claim should state both the original title of the action and the substituted title as in the form, ante*, p. 61. *The plaintiffs being described as* "trustees of the —— Friendly Society," *as in the preceding form.*]

Statement of Claim.

1. This action was commenced by *A. B.* and *C. D.* (since deceased), who were then the trustees of the —— Friendly Society, and, after the death of the said *A. B.* and *C. D.*, the above-named plaintiffs were duly appointed trustees of the said friendly society, and were, by an order in this action dated the —— ——, 19—, made plaintiffs in this action.

2. The above-named Friendly Society is a society registered under the Friendly Societies Acts, and the plaintiffs *E. F.* and *G. H.*, as trustees of the said society, claim, &c.

Property belonging to a registered society, vests in the trustees for the time being of the society (see s. 49 (1)), and the property of a registered branch of a society vests in the trustees for the time being of the branch, unless the rules vest it in the trustees of the society (see s. 49 (2)).

By s. 51, "In all legal proceedings whatsoever concerning any property vested in the trustees of a registered society or branch, the property may be stated to be the property of the trustees in their proper names as trustees for the society or branch without further description."

By s. 94, "(1.) The trustees of a registered society or branch, or any other officers authorised by the rules thereof, may bring or defend, or cause to be brought or defended, any action or other legal proceeding in any Court whatsoever, touching or concerning any property, right, or claim of the society or branch, and may sue and be sued in their proper names, without other description than the title of their office.

"(2.) In legal proceedings brought under this Act by a member, or person claiming through a member, a registered society or branch may also be sued in the name, as defendant, of any officer or person who receives contributions or issues policies on behalf of the society or branch within the jurisdiction of the Court in which the legal proceeding is brought, with the addition of the words 'on behalf of the society or branch' (naming the same).

"(3.) A legal proceeding shall not abate or be discontinued by the death, resignation, or removal from office of any officer, or by any act of any such officer after the commencement of the proceedings."

By s. 9 (3), and the 1st Schedule (8), the rules of the society are to contain provisions stating the manner in which disputes are to be settled; and by s. 68 of the Act, disputes between the society and its members, or between the other parties specified in that section, are to be decided in manner directed by the rules, and such decision is to be conclusive.

The effect of the above enactment is that the ordinary jurisdiction of the Supreme Court is in general ousted as regards disputes arising out of their membership between members or persons claiming through members of a friendly society and the society or its officers, that disputes which are entirely independent of membership are not withdrawn from the cognizance of the Court (see *Mulkern* v. *Lord*, 4 App. Cas. 182; 47 L. J. Ch. 228), and that where the question in dispute is whether a party is or is not a member of the society the remedy is by action. (See *Palliser* v. *Dale*, [1897 1 Q. B. 257; 66 L. J. Q. B. 236.)

III. Industrial and Provident Societies (*e*).

IV. Loan Societies (*f*).

V. Trade Unions (*g*).

Commencement of Claim by or against a Trade Union.

The plaintiffs, who are the trustees of the [*state the title of the Union*], which is a trade union registered under the Trade Union Acts, 1871 and 1876, *or*, The plaintiff claims against the defendants, who are, &c. [*as above*].

(*e*) The law as to Industrial and Provident Societies has been consolidated and amended by the Industrial and Provident Societies Acts, 1893 to 1895 (56 & 57 Vict. c. 39, and 58 & 59 Vict. c. 30), which are the Acts now in force on this subject.

By s. 21, the registration of a society under this Act renders it a body corporate, and it may sue and be sued in its registered name.

The provisions made for the settlement of disputes are similar to those for friendly societies.

(*f*) Loan Societies are regulated by 3 & 4 Vict. c. 110, repealed in part by the Statute Law Revision Acts, 1874 and 1890, and by the Friendly Societies Act, 1875, s. 10 (4). These societies cannot sue or be sued in their own name. The trustees in whom the property is vested must sue or be sued for them. (See s. 8 of 3 & 4 Vict. c. 110.)

(*g*) The principal acts relating to Trades Unions are the Trade Union Acts, 1871 and 1876 (34 & 35 Vict. c. 31, and 39 & 40 Vict. c. 22). All real and personal estate belonging to a union registered under these Acts is vested in trustees, and in all actions the same must be stated to be the property of the trustees, in their proper names as trustees of such trade union (34 & 35 Vict. c. 31, s. 8; 39 & 40 Vict. c. 22, s. 3).

The trustees of any union so registered, or any other officer of such union who may be authorised so to do by the rules thereof, are empowered to bring or defend any action concerning the property, right, or claim to property of the union; and may in all cases concerning the property of such union, sue and be sued in their proper names, without other description than the title of their office; and no such action will abate by the death or removal from office of such persons, or any of them, but the same may be proceeded in by their successors (34 & 35 Vict. c. 31, s. 9).

A registered trade union may, although it is not a body corporate, be sued in its registered name (*Taff Vale Ry. Co.* v. *Amalgamated Railway Servants*, [1901] A. C. 426; 70 L. J. K. B. 905).

Where the action is one to prevent a misapplication of the funds of the union, the trustees should, it would seem, in general be parties to the action. (See *Howden* v. *Yorkshire Miners Association*, *infra*.) Where the action is to recover damages for wrongs committed on behalf of a union by its officers, it has been usual to sue the union and to join such officers; see, for instance, *Giblan* v. *National Labourers Union*, [1903] 2 K. B. 600; 72 L. J. K. B. 907.

By s. 3 of the Trade Union Act, 1871, "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

By s. 4 it is provided that "Nothing in this Act shall enable any Court to entertain

SOLICITORS (*h*).

Claim for Work done, &c., by a Solicitor (*i*).

The plaintiff's claim is for £—— for work, journeys, and attendances, done, performed, and bestowed by the plaintiff as the defendant's solicitor

---

any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of" certain agreements, including agreements "between members of a trade union as such, concerning the conditions on which any members" of such union "shall or shall not sell their goods, transact business, employ or be employed," and agreements for the payment by any person of any subscription or penalty to a trade union, or for the application of the funds of a trade union to provide benefits to members. Prior to this Act an association whose main purposes were in restraint of trade was an illegal association and could, in consequence, maintain no action to enforce its objects, and was not liable to any action at the suit of a member seeking to enforce its objects, or his own rights, or claims as member, even apart from the technical difficulty (as to which see now the decision in the *Taff Vale Case, supra*) of its position as an unincorporated society not registered or recognised by the law (*Farrer* v. *Close*, L. R. 4 Q. B. 602; 38 L. J. Q. B. 263; *Rigby* v. *Connol*, 14 Ch. D. 482; 49 L. J. Ch. 328). Where the main purposes are lawful, such as those of a friendly society, the association might, and may maintain actions to enforce such purposes, and is liable to be sued in respect of them by its members (*Swaine* v. *Wilson*, 24 Q. B. D. 252; 59 L. J. Q. B. 76).

The general effect of the above enactments is, that the Courts do not enforce claims by trade unions, as ordinarily constituted, to recover from their members payments due in respect of membership, or claims by members to be paid allowances or to receive benefits due to them as members, or damages for wrongful expulsion from membership nor do they grant injunctions to prevent such expulsion, or decide disputes as to the right to be or remain a member (*Rigby* v. *Connol*, *supra*; *Crocker* v. *Knight*, [1892] 2 Q. B. 702; *Chamberlain's Wharf* v. *Smith*, [1900] 2 Ch. 605; 69 L. J. Ch. 783; *Cullen* v. *Elwin*, 88 L. T. 686; 90 L. T. 840). But they will entertain actions to prevent wrongful applications of the funds of a union to purposes not sanctioned by the rules of the union, as for instance, in aid of a strike not authorised by the union (*Howden* v. *Yorkshire Miners' Association*, [1905] A. C. 256; 74 L. J. K. B. 511; and see *Wolfe* v. *Mathews*, 21 Ch. D. 194; 51 L. J. Ch. 833). Such last-named actions are not considered as "instituted with the object of directly enforcing" the agreement between the member and the union (*Ib.*; and see *Winder* v. *Guardians of Hull*, 20 Q. B. D. 412). See further "*Trade Disputes*," *post*, p. 489; "*Illegality*," *post*, 682; "*Master and Servant*," *post*, p. 432.

(*h*) By the Judicature Act, 1873, s. 87, the name "solicitor" is, in effect, substituted for that of "attorney," as regards persons practising in the Supreme Court, and by the Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 21, the enactments in force relating to attorneys are to be construed as applicable to solicitors.

The Court has a summary jurisdiction over solicitors as officers of the Court, and will enforce honourable conduct on their part, even apart from contractual obligation, or legal liability. (See *Ex p. Bayley*, 9 B. & C. 691; *Ex p. Edwards*, *infra*; *In re Grey*, [1892] 2 Q. B. 440, 443, 447; 61 L. J. Q. B. 795.)

(*i*) An untaxed bill may be the subject of a special indorsement, and, if in such case an application is made for judgment under Ord. XIV., a special order may be made providing for the taxation of the bill. (See *ante*, p. 67.) A solicitor retained to conduct an action cannot ordinarily sue for his costs until the action is ended (*Underwood* v. *Lewis*, [1894] 2 Q. B. 306).

There is, in general, no privity of contract between the client and the town agent of the client's solicitor, and consequently no right of action by the client against such town agent for any breach of his contract or duty as solicitor, or by the town agent

for the defendant at his request, and for moneys paid by the plaintiff [as such solicitor] for the defendant at his request.

Particulars :—

19—, —— ——, to 19—, —— ——. To work done, &c., full particulars whereof are contained in a bill of costs delivered to the defendant on the —— ——, 19—.....£

By a Client against his Solicitor for Negligence (k).

1. The plaintiff has suffered damage from the defendant's negligence in his conduct for the plaintiff, as his solicitor, of business undertaken by the defendant on the plaintiff's retainer.

2. The negligence was in making, on the —— ——, 19—, an application under Ord. XIV., r. 1, in the case of *A. B.* (the plaintiff) v. *C. D.*, where the case was one of unliquidated damages and not of debt.

Particulars of damage :—

Taxed costs paid to *C. D.* on dismissal of summons, £——.

(*See R. S. C.*, 1883, *App. C.*, *Sect. V.*, *No.* 8.)

---

against such client for his charges (*Robbins* v. *Fennell*, 11 Q. B. 248 ; 17 L. J. Q. B. 77 ; *Cobb* v. *Becke*, 6 Q. B. 930). The solicitor is answerable to his client for his town agent's management of the client's cause or matters (*Collins* v. *Griffin*, 1 Barnes, 37).

When the town agent receives, in an action which he is conducting for the solicitor, payment of the debt or damages sued for, he has no lien upon the money so received as against the client, beyond such as the country solicitor may have on it ; and the Court may, under its summary jurisdiction, order him, in the absence of proof of such lien of the country solicitor, to pay over the money to the client, although there is no privity of contract between them (*Ex p. Edwards*, 7 Q. B. D. 155 ; 8 Q. B. D. 262 ; 50 L. J. Q. B. 541 ; 51 L. J. Q. B. 108).

(*k*) Actions against solicitors by their clients for negligence may be framed, in general, either in contract or in tort. (See *Blyth* v. *Fladgate*, [1891] 1 Ch. at p. 366.)

A solicitor impliedly contracts to use reasonable skill and diligence in the performance of his duty, but he is not liable for a mere error of judgment upon a point of law open to reasonable doubt (*Purves* v. *Landell*, 12 Cl. & F. 91 ; *Hunter* v. *Caldwell*, 10 Q. B. 69, 83 ; 16 L. J. Q. B. 274 ; *Kemp* v. *Burt*, 4 B. & Ad. 424 ; *Godefroy* v. *Dalton*, 6 Bing. 460 ; *Godefroy* v. *Jay*, 7 Bing. 413 ; *Whiteman* v. *Hawkins*, 4 C. P. D. 13).

A solicitor has no implied authority to compromise his client's claim before the commencement of the action, and the client is not bound by a compromise so made, if he has neither previously authorised it, nor ratified it when it came to his knowledge (*Macauley* v. *Polley*, [1897] 2 Q. B. 122) ; but he may compromise an action that has been commenced, provided he is acting *bonâ fide* and not contrary to his client's express instructions (*Carruthers* v. *Newen*, 19 Times Rep. 247).

A solicitor is liable to his client in an action for damages for compromising an action against the express directions of the client (*Butler* v. *Knight*, L. R. 2 Ex. 109 ; 36 L. J. Ex. 66 ; *Fray* v. *Voules*, 1 E. & E. 839 ; 28 L. J. Q. B. 232).

A solicitor who professes to act for one who has in fact not retained him or authorised him to do so, or who has to his knowledge died, may, in some cases, be liable to a third party, upon an implied warranty that he had the authority he professed to have. (See "*Agent*," *ante*, p. 76 ; *Salton* v. *New Beeston Co.*, [1900] 1 Ch. 43 ; 69 L. J. Ch. 20.)

The like, for Negligent Advice and Misrepresentation as to Investments.

1. The plaintiff has suffered damage from the defendant's negligence in his conduct for the plaintiff as her solicitor of business undertaken by the defendant on the plaintiff's retainer.

2. The negligence consisted of the defendant as the plaintiff's solicitor in ——, 19—, advising and inducing her to invest the cash she then had and to sell out the investments she then held and invest the proceeds thereof (which cash and proceeds amounted to £——) in the purchase of certain equities of redemption of and in Nos. — and —, and subsequently, on the —— ——, 19—, also Nos. —, —, and —, —— Road, Kensington.

3. The defendant induced the plaintiff to make the said investment and purchase the said equities of redemption by representing to her verbally on the —— ——, 19—, that the same was a safe and profitable investment; that the said investment would produce 10 per centum per annum interest on the capital invested; that the defendant had made similar purchases for his own wife; that the defendant had purchased similar equities for another lady client of his, and that they had thereby increased their incomes from £—— or £—— a year to £—— a year; that the owner would sell the said equities of redemption at a less price to any client of the defendant's than to a stranger; that the defendant had made all due and proper inquiries as to the value of the said property and the said equities and had ascertained that the same afforded ample security for the said investment. Each and every of the said representations was untrue as the defendant well knew or ought to have known.

4. The defendant in inducing and advising the plaintiff to make the said investment negligently omitted to explain to her the nature of an equity of redemption, of which she was ignorant, and negligently omitted to explain and point out to her that by purchasing the same she became liable to pay to the mortgagee large sums of money far exceeding the amount invested or the amount she possessed and that the said property was leasehold and that she became liable to pay the ground rent and to perform the covenants as to repairing and insuring and the other covenants contained in the lease and that the income to be derived from the said investment was contingent on the said houses being let and the tenants paying their rent. Moreover he concealed the fact that the owner of the said equities of redemption was a client of his and that he himself or another client of his was the mortgagee.

5. The defendant in so advising and inducing the plaintiff to make the said investment negligently omitted to make due and proper inquiry as to the sufficiency thereof as a security for the capital invested and omitted to make proper deductions for cost of collection repairs and loss through houses standing empty and tenants not paying their rent. The defendant knew or he could by due and proper inquiry have ascertained that the said security was wholly insufficient and unsafe.

6. Acting on the advice and inducement of the defendant the plaintiff on the —— ——, 19—, sold out her said other investments and invested the said £—— in the purchase of the said equities of redemption.

7. The said investment was and is valueless. It has not paid 10 per cent. or any interest, nor will it pay any. The said security was not a safe or sufficient or indeed any security for the said investment.

8. By reason of the premises the plaintiff has lost the interest on the said capital invested by her and has lost her said capital and she has incurred the aforesaid liabilities and is liable to be called upon to pay and satisfy the same and she has been and is otherwise injured.

The plaintiff claims £——.

Stock Exchange (*l*).

Claim by a Stockbroker for Money Paid, Commission, &c.

The plaintiff's claim is for money paid and work done by him as stock-broker for the defendant and at his request in and about the purchase of stocks and shares, and for commission and brokerage [and interest] due from the defendant to him in respect thereof.

Particulars :—

19—					19—			
—	—	To ——— @			—	—	By ——— @	
							Balance due ...	

The plaintiff claims £——.

(*l*) See "*Broker*," *ante*, p. 137 ; *post*, p. 621 ; "*Gaming*," *post*, p. 667. It is in general the duty of a person employed as broker to buy or sell shares, whether employed to do so on the London Stock Exchange or not, to establish for his employer a privity of contract with a third person willing to contract and capable of contracting. Upon the London Stock Exchange this is done by procuring, in the first instance, a contract with a "jobber," who is bound either to carry out the contract himself or to pass the name of a person capable of contracting, and who authorises his name to be passed, so that ultimately a contract may be established between such person and the employer (*Coles* v. *Bristowe*, L. R. 4 Ch. 3 ; 38 L. J. Ch. 81 ; *Cruse* v. *Paine*, L. R. 4 Ch. 441, 443 ; 38 L. J. Ch. 225 ; *Maxted* v. *Paine*, L. R. 6 Ex. 132 ; 40 L. J. Ex. 57) ; and the employer may object to

Claim by a Stockbroker for Differences, &c. (*m*).

The plaintiff's claim is for money paid and work done by him as stockbroker for the defendant and at his request in and about the purchase and sale and carrying over of stocks and shares and for differences contangoes [backwardations] commission and interest due from the defendant to the plaintiff in respect thereof.

Particulars :—

19—	—	To balance—full particulars were delivered to the defendant before action.						19—	—	By ——— @					
		To ——— @													
										Balance due ...					

The plaintiff claims £——.

a name which is that of an infant or person incapable of contracting, or of a foreigner resident abroad (*Allen* v. *Graves*, L. R. 5 Q. B. 478; 39 L. J. Q. B. 157; *Nickalls* v. *Merry*, L. R. 7 H. L. 530; 45 L. J. Ch. 575).

A person employing a broker on the London Stock Exchange impliedly authorises him to act according to the rules and regulations of that exchange, provided they are not unreasonable, or contrary to law, or inconsistent with the nature and terms of the employment, and is bound to indemnify him against payments made by him under and in compliance with such rules and regulations (*Robinson* v. *Mollett*, L. R. 7 H. L. 802; 44 L. J. C. P. 362; *Perry* v. *Barnett*, 15 Q. B. D. 388; 54 L. J. Q. B. 466; *Neilson* v. *James*, 9 Q. B. D. 546; 51 L. J. Q. B. 369; *Benjamin* v. *Barnett*, 8 Com. Cas. 244, 247; 19 Times Rep. 564); but not against payments or losses caused by the default or misconduct of the broker (*Duncan* v. *Hill*, L. R. 8 Ex. 242; 42 L. J. Ex. 179).

It is the duty of brokers to render to their employers proper and true accounts of all transactions entered into by them on behalf of their employers, and to permit their employers at reasonable times to inspect the entries in their books relating to the business done on behalf of such employers with third persons. (See *Leitch* v. *Abbott*, 31 Ch. D. 374; 55 L. J. Ch. 460; and *Makepeace* v. *Rogers*, 34 L. J. Ch. 396.)

(*m*) "Contango" is the money which a buyer has to pay to postpone payment for and acceptance of shares, and "backwardation" that which a seller has to pay to postpone delivery of shares. An order given to a broker to buy or sell is, if no mention is made of time, *primâ facie* taken on the London Exchange as meaning for the next account day (Schwabe and Branson, pp. 55, 133, 134). A broker has no right or duty to "carry over" for his employer without a contract between himself and his employer to that effect, either express or implied (*Ib.* p. 134; *Fenwick* v. *Buck*, 24 L. T. 274; *Cullum* v. *Hodges*, 18 Times Rep. 6; *In re Overweg*, [1900] 1 Ch. 209; 69 L. J. Ch. 255).

Claim against a Stockbroker for Differences.

The plaintiff's claim is for money had and received by the defendant to and for the use of the plaintiff in respect of the purchase and sale by the defendant as the plaintiff's stockbroker of stock and shares.

Particulars :—

19—							19—						
—	—	To ——— @					—	—	By ——— @				
		Balance due to plaintiff ...											

The plaintiff claims £——.

Against a Stockbroker for not Purchasing according to Order (*n*).

1. The plaintiff has suffered damage by the defendant's breach of a contract made verbally on the —— ——, 19— [*or*, made by letters dated the —— ——, 19—, and —— ——, 19—, *or, as the case may be*], whereby the defendant agreed to purchase for the plaintiff —— shares of and in the —— Company, Limited [*or, as the case may be*], at a price not exceeding £—— per share, or at the then market price of the said shares for commission to the defendant.

2. The defendant could have purchased the said shares pursuant to the said contract at the said price, but he wholly failed to do so.

The plaintiff has suffered the following loss and damage, viz. :—

		£	*s.*	*d.*
19—, —— ——.	Price at which the defendant could have purchased the shares, at £—— per share			
	Price which the plaintiff had to pay for them at £—— per share.....			
	Loss.....£			

(*n*) A broker does not, in general, undertake absolutely, that he will buy or sell for his employer, but only that he will make reasonable efforts to do so, using for that purpose reasonable skill as a broker (*Fletcher* v. *Marshall*, 15 M. & W. 755 ; 5 Rail. Cas. 340 ; and see *Ireland* v. *Livingston*, L. R. 5 H. L. 395, 407, 409 ; 41 L. J. Q. B. 201).

Against Stockbrokers for wrongly closing the Plaintiff's Account (*o*).

1. The plaintiff has suffered damage by the defendants' breach of agreement to carry over stock purchased for him.

2. The plaintiff on the —— ——, 19—, verbally [*or*, by a letter dated that day, *or*, *as the case may be*] employed the defendants as his stockbrokers to purchase for him certain shares, viz., ——, for the [Mid June] account, and the defendants verbally [*or*, by a letter dated the —— ——, 19—, *or*, &c.] accepted the said employment, and on the —— ——, 19—, purchased the said shares at £—— per share.

3. On the —— ——, 19—, in consideration that the plaintiff would deposit with the defendants certain securities, viz., ——, which he accordingly did, the defendants agreed with the plaintiff verbally [*or*, *as the case may be*] that they would continue and carry over the said shares until the —— ——, 19—.

4. The defendants did not continue or carry over the said shares until the said —— ——, 19—. On the —— ——, 19—, they wrongfully and without the plaintiff's instructions or authority closed the plaintiff's account and sold the said shares. The plaintiff by letter dated the —— ——, 19—, repudiated the said sale, and required the defendants to continue and carry over the said shares as agreed.

5. The plaintiff has suffered the following damage :—

	£	*s.*	*d.*
Price of the said shares on the said —— ——, 19—, at £—— per share			
Price at which the defendants could and should have carried over the said shares at £—— per share			
Loss.....£			

The plaintiff claims £——.

(*o*) It is, in the absence of agreement to the contrary, express, or implied from previous dealings, the duty of the employer to put his broker in funds before the account day to meet the payments he has to make for him, and if he fails after proper notice to do so, the broker may close the account and recover from the employer the differences or other sums he is compellable to pay, as also his proper charges on the transaction (*Davis* v. *Howard*, 24 Q. B. D. 691 ; 59 L. J. Q. B. 133 ; *Druce* v. *Levy*, 7 Times Rep. 259 ; *Macoun* v. *Erskine*, [1901] 2 K. B. 493, 498, 500 ; 70 L. J. K. B. 973). An account may also in general be closed if the employer dies or becomes insolvent. (See *Lacey* v. *Hill*, *Scrimgeour's Case*, 8 Ch. D. 921 ; 42 L. J. Ch. 657 ; *Ib.*, *Cowley's Case*, L. R. 18 Eq. 182 ; 43 L. J. Ch. 551.)

As to securities deposited as "cover," see "*Gaming*," *post*, p. 670, and *In re Cronmire*, [1898] 2 Q. B. at p. 395.

As to the measure of damages for wrongfully closing an account, see *Michael* v. *Hart*, [1901] 2 K. B. 867 ; [1902] 1 K. B. 482 ; 71 L. J. K. B. 265. Affd. in H. L. 89 L. T. 422.

Claim against Brokers (outside) employed to buy and sell on the London Stock Exchange, for Damages for not buying and selling on such Stock Exchange (p).

1. Between the months of July and December inclusive, 1905, the plaintiff employed the defendants, who are outside brokers in London, as his brokers to buy and sell and carry over stocks and shares for him on the London Stock Exchange from and to members on the said Stock Exchange.

2. From time to time, in the course of the fortnightly accounts during the said period from July to December, the defendants rendered to the plaintiff contract notes and accounts [and wrote letters to the plaintiff] representing that they had bought and sold and carried over stocks and shares as his agents and brokers on his account, and that they had bought and sold such stocks and shares from and to members on and of the said Stock Exchange, and that they were entitled to be indemnified by the plaintiff in respect of the liabilities so incurred by them in their employment as aforesaid as his agents and brokers. Such representations are contained in all the contract notes sent by the defendants to the plaintiff during the said period.

3. The plaintiff, in the belief that the defendants were acting within the terms of their said employment, and on the faith of the said representations, made payments from time to time to the defendants in order to indemnify them as he supposed from the liabilities represented to have been incurred by them and to pay for their supposed services as such agents and brokers as aforesaid.

Particulars.

	£	*s.*	*d.*
[1905, July 4	100	0	0
„ July 14	96	16	0
„ July 31	240	2	6
„ &c.		&c.	

4. The defendants did not buy or sell the said stocks and shares [as the plaintiff's agents and brokers at all, or] on the said Stock Exchange from or to members on or of the said Stock Exchange [or any one else], and were not entitled to be indemnified by the plaintiff, and if (which is not

(*p*) Where a broker employed to buy on the Stock Exchange buys elsewhere or passes off his own shares, instead of procuring a contract for his employer with a third party, the employer may, on discovering what has been done, repudiate the transaction, and recover any money he has paid in respect of it, and in addition he may recover such damages as he has suffered directly owing to the broker's misconduct, whilst the broker, on the other hand, has no right to be paid for his services in the transaction. (See *ante*, p. 138; *Thompson* v. *Meade*, 7 Times Rep. 698; *Stange* v. *Lowitz*, 14 *Ib.* 468; *Nicholson* v. *Mansfield*, 17 *Ib.* 259.)

A similar rule applies to sales. The broker must not be the purchaser of shares he has to sell for his employer (*Ib.*). See "*Broker*," *ante*, p. 138.

admitted) they made any contracts all those of purchase were at a price less than they represented by the said contract notes to the plaintiff, and those of sale at a price greater than they represented by the said contract notes to the plaintiff.

5. [The defendants did not, if they did in fact buy or sell to third parties at all, which is not admitted, give to the plaintiff true or any accounts of such sales.]

6. In the course of the said period the defendants paid the plaintiff the sums of £25 on September 2nd and £71 8*s.* 6*d.* on November 7th, and no more, purporting to be money received by them in their said employment as his said agents and brokers on his behalf; and the plaintiff, without admitting any legal liability to do so, is willing to credit the defendants with those sums.

The plaintiff claims (1) £——, the amount which he has paid the defendants after giving credit for the said £96 8*s.* 6*d.*

(2) Damages for the breaches aforesaid by the defendants of their said contract of employment.

(3) An account and payment of the amount found to be due.

For a Claim for the Price of Shares, see "Shares," ante, p. 290.

For a Claim by a Vendor against the Purchaser for not accepting the Shares, see "Shares," ante, p. 290.

Tolls (*f*).

Trade (*g*).

By the Vendor against the Purchaser of a Business to recover the agreed Price.

The plaintiff's claim is for money payable by the defendant to the plaintiff for the agreed price of the stock-in-trade and goodwill of the

(*f*) For instances of declarations for market tolls and stallage before the Judicature Act, see *Duke of Bedford* v. *Emmett*, 3 B. & Ald. 366; *Lockwood* v. *Wood*, 6 Q. B. 31; *Mayor of Yarmouth* v. *Groom*, 1 H. & C. 102; 32 L. J. Ex. 74. As to anchorage tolls, see *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192; 35 L. J. C. P. 29; *Free Fishers of Whitstable* v. *Foreman*, L. R. 4 H. L. 266. As to fair and market tolls, see *Duke of Newcastle* v. *Worksop Council*, [1902] 2 Ch. 145.

(*g*) The sale of the goodwill of a business does not, in the absence of express

business of a ——, at ——, sold, transferred, and given up by the plaintiff to the defendant on the —— of ——, 19—, pursuant to an agreement in writing dated the —— ——, 19—.

Particulars :—

By the Purchaser against the Vendor of a Business for Breach of Warranty as to the Takings of the Business : see "Fraud," post, pp. 397, 399.

By the Purchaser of a Business on a Covenant by the Vendor to pay Liquidated Damages in the event of his carrying on a like Business within a certain Distance : see "Liquidated Damages," ante, p. 242.

By a Master against a former Servant for Breach of an Agreement not to carry on Business within a certain Distance : see Davey v. *Shannon*, 4 *Ex. D.* 81 ; 48 *L. J. Ex.* 459.

WARRANTY (*h*).

stipulation, imply any contract on the part of the vendor not to set up a similar business even in the immediate neighbourhood of the business sold, but he must not solicit orders from the former customers of that business (*Labouchere* v. *Dawson*, L. R. 13 Eq. 322 ; 41 L. J. Ch. 427 ; *Trego* v. *Hunt*, [1896] A. C. 7 ; 65 L. J. Ch. 1 ; *Gillingham* v. *Beddow*, [1900] 2 Ch. 242 ; 69 L. J. Ch. 527), even although they have dealt with him since the sale (*Curl Bros.* v. *Webster*, [1904] 1 Ch. 685 ; 73 L. J. Ch. 540).

Contracts by vendors not to carry on a particular business may be enforced by action provided that they are not such as to operate in unreasonable restraint of trade (*Nordenfeldt* v. *Maxim Nordenfeldt, &c. Co.*, [1894] A. C. 535 ; 63 L. J. Ch. 908) ; and so may similar contracts by servants with their employers (*Dubowski* v. *Goldstein*, [1896] 1 Q. B. 478 ; 65 L. J. Q. B. 397) ; and so may contracts by lessees or purchasers of land not to carry on particular trades on the premises (*Tod-Heatley* v. *Benham*, 40 Ch. D. 80 ; 58 L. J. Ch. 83 ; *Stuart* v. *Diplock*, 43 Ch. D. 343 ; 59 L. J. Ch. 142 ; *Buckle* v. *Fredericks*, 44 Ch. D. 244 ; *Fritz* v. *Iles*, [1893] 1 Ch. 77).

The purchase of the goodwill of a business generally carries with it the right to use the trade name, but, apart from express agreement, the purchaser will not be allowed to use the name of the vendor in such a manner as to expose the latter to legal liability for debts contracted in the business after the transfer (*Thynne* v. *Shove*, 45 Ch. D. 577 ; 59 L. J. Ch. 509 ; and see *Townsend* v. *Jarman*, [1900] 2 Ch. 698 ; 69 L. J. Ch. 823).

(*h*) A warranty is a contract, collateral to the main purpose of the contract of sale or other principal contract. (See *Chanter* v. *Hopkins*, 4 M. & W. 399 ; 2 Sm. L. C., 11th ed., pp. 28, 61 ; Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 62 (1).) To create an express warranty it is not requisite that the word "warrant" should be used ; any affirmance or representation made at the time of a sale is a warranty, if so intended and understood by the parties (*Pasley* v. *Freeman*, 3 T. R. 51, 57 ; 2 Sm. L. C., 11th ed., pp. 55, 56 ; *De Lassalle* v. *Guildford*, *infra*).

Words merely expressing opinion, belief, or expectation, and representations not

intended to amount to a promise, are to be distinguished from words of contract, and from representations amounting to promises; the former do not, whilst the latter may, create a warranty. (See *Bentsen* v. *Taylor*, [1893] 2 Q. B. 274, 280, 281; 62 L. J. Q. B. 516; *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, 218, 221; 70 L. J. K. B. 533.) A new consideration is required to support a warranty made after the sale or other principal contract (*Chandelor* v. *Lopus*, Cro. Jac. 4; 2 Sm. L. C., 11th ed., p. 54; *Roscorla* v. *Thomas*, 3 Q. B. 234).

The law relating to warranties on the sale of goods has been codified, and in some respects amended, by the Sale of Goods Act, 1893.

A breach of the warranty gives no right to the buyer to reject or return goods sold with a warranty, unless there is an express contract to that effect, but only gives a claim for damages. (See ss. 62 (1), 53 (1); and see s. 11 (1) (b) (c).)

A breach of a condition may afford to the buyer a ground for rejecting the goods (s. 11 (1) (b) (c)). A condition is not a collateral contract, but is a fundamental and essential part of the contract itself. (See *Chanter* v. *Hopkins*, *Bentsen* v. *Taylor*, *supra*; *Behn* v. *Burness*, 3 B. & S. 751; 32 L. J. Q. B. 204; *Varley* v. *Whipp*, [1900] 1 Q. B. 513; 69 L. J. Q. B. 333.)

By the Sale of Goods Act, 1893, s. 11 (1), "(a.) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

"(b.) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

"(c.) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

A stipulation which originally amounted to a condition of the contract so that a breach of it would have justified a rescission, may, after acceptance of part of the goods by the buyer, lose the character of a condition and become a mere collateral warranty. (See s. 11 (1) (c), *supra*.)

Where there is a breach of warranty, or a breach of a condition by the seller, which the seller elects, or is compelled, to treat as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price: or (b) maintain an action against the seller for damages for the breach of warranty" (s. 53 (1)).

By s. 53 (4), "The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty, if he has suffered further damage." The word "action" in this section includes counterclaim and set-off. (See s. 62.)

If, in an action for the price, the purchaser reduces the amount of the claim by proving the diminution in value of the goods by reason of the breach of warranty, he is to that extent deemed to have received satisfaction for the breach, and is therefore precluded to that extent from afterwards recovering damages on a cross-action or counterclaim for such breach (*Mondel* v. *Steele*, 8 M. & W. 858).

Where all the terms of the contract are put into writing, evidence cannot be given of a parol warranty adding to or varying the writing, but where the parol warranty is collateral to the contract of sale, it may be relied on, although the terms of the sale itself are in writing (*De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, 222; 70 L. J. K. B. 533). See further "*Sale of Goods*," *ante*, p. 273; "*Fraud*," *post*, p. 397.

Claim for Breach of Warranty of a Horse (i).

1. The defendant on the —— ——, 19—, by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff for £——,

---

A warranty or condition as to quality, or fitness for a particular purpose, may be implied on a sale of goods by the usage of the trade, or by virtue of the provisions of the Sale of Goods Act, 1893 (see ss. 13, 14, 15, 62 (1), pp. 319, 322), or under those of particular statutes, *e.g.*, the Chain Cables and Anchors Act, 1874 (37 & 38 Vict. c. 51); the Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56); and the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).

(*i*) Upon a sale of a specific chattel, or of specific goods, the actual conditions of which may be ascertained by the purchaser, there is, in general, no implied warranty of soundness or quality (see s. 14, *post*, p. 322; and see *Parkinson* v. *Lee*, 2 East, 314; *Dickson* v. *Zizania*, 10 C. B. 602, 610; *Jones* v. *Just*, L. R. 3 Q. B. 197, 202; 37 L. J. Q. B. 89; *Smith* v. *Hughes*, L. R. 6 Q. B. 597, 603; 40 L. J. Q. B. 225); and the rule is the same in cases of exchange of specific goods (*La Neuville* v. *Campbell*, 3 Camp. 351).

An agent who gives a warranty in selling on his master's behalf binds his master by such warranty where it is within the limits of his authority to warrant, or where it is within the apparent limits of his authority, so that the person dealing with him has a right to believe, and does believe, that he has the authority to warrant which he assumes to have. Thus, the servant of a horse dealer employed in the ordinary conduct of the business, may bind his master by selling a horse with a warranty, though he may on the particular occasion have express instructions, unknown to the buyer, not to warrant (*Howard* v. *Sheward*, L. R. 2 C. P. 148; 36 L. J. C. P. 42; *Brady* v. *Todd*, 9 C. B. N. S. 592; 30 L. J. C. P. 223; *Coleman* v. *Riches*, 16 C. B. 104; 24 L. J. C. P. 128). But if the master does not carry on the business of a horse dealer, a servant employed by him on a particular occasion to sell a horse would have no implied authority to warrant the horse, and the master would not be bound by a warranty given by the servant, if, in fact, he had no authority to warrant (*Brady* v. *Todd*, *supra*). If the master in such case affirms the sale he must affirm it *in toto*, and adopt the warranty (*Ib.*).

It is ordinarily to be implied that defects apparent at the time of the bargain are not included in a general warranty; a party, therefore, who should buy a horse knowing it to be blind, could not sue on a general warranty of soundness (*per* Tindal, C.J., in *Margetson* v. *Wright*, 7 Bing. 603; and see *Holliday* v. *Morgan*, 1 E. & E. 1; 28 L. J. Q. B. 9).

If at the time of the sale the horse warranted to be then sound has any disease, or congenital defect, or malformation, which diminishes his usefulness so as to make him less fit for work, or which will in the ordinary course diminish his usefulness, or if he has, either from disease or accident, undergone any alteration in structure that actually does, or in its ordinary effect will, so diminish his usefulness, such horse is unsound (*Kiddell* v. *Burnard*, 9 M. & W. 669; *Holliday* v. *Morgan*, *supra*).

A warranty may be given so as to be a warranty only of soundness for particular purposes, or otherwise limited in its effect, and where the warranty is qualified, it should be stated according to its terms. (See *Jones* v. *Cowley*, 4 B. & C. 445; *Chapman* v. *Gwyther*, L. R. 1 Q. B. 463; 35 L. J. Q. B. 142; and *ante*, p. 50.)

By s. 53 (2), "The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty"; and by s. 53 (3), "In the case of breach of a warranty of quality, such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

The right to recover special damage is unaffected by the Act (s. 54).

The loss of profit on a contract for a re-sale cannot, in general, be recovered (*Clare* v.

which the plaintiff then paid to defendant. The said warranty was verbal [*or*, is contained in a letter dated the said day, *or, as the case may be*].

2. The said horse was not then sound and quiet to ride.

Particulars :—

The horse was unsound in the following respects [*state same*].

3. By reason of the said breach of warranty the said horse was of no use to the plaintiff [*or*, was worth £—— less than if it had been as warranted].

The plaintiff claims £——.

Claim for Breach of Warranty and Fraud on Sale of a Horse.

1. The defendant on the —— ——, 19—, by verbally warranting that a certain horse was sound and that it had never bolted or kicked and that it had always worked well, sold it to the plaintiff for the price of £—, which the plaintiff paid to him.

Maynard, infra) ; but where it is known to both parties at the time of the bargain that the purchase is made for the purpose of re-sale at an advanced price the loss on such contract may be recovered (*Randall* v. *Raper*, E. B. & E. 84 ; 27 L. J. Q. B. 266). The re-sale at an advanced price may be evidence of what the value would have been if the goods had been as warranted. (See *Clare* v. *Maynard*, 6 A. & E. 519.)

The costs of defending an action brought for breach of a similar warranty given upon a re-sale by the purchaser, are recoverable if the action was reasonably defended in reliance upon the original warranty, and it was known to the original vendor when he gave the warranty that the person who purchased from him bought for the purpose of re-selling with a similar warranty, so that the contract was made upon that footing (*Hammond* v. *Bussey*, 20 Q. B. D. 79 ; 57 L. J. Q. B. 58 ; and see *Agius* v. *Great Western Colliery*, cited *ante*, p. 279 ; and "*Agent*," *ante*, p. 77). If notice of such action is given to the original seller, and he returns no answer, or still insists on the truth of his warranty, and declines to interfere in the action, that affords evidence that the defence of the action is reasonable (*Lewis* v. *Peake*, 7 Taunt. 153 ; *Hammond* v. *Bussey*, *supra*). A liability to pay such costs may be sufficient without payment (*Randall* v. *Raper*, *supra* ; see further "*Damages*," *ante*, p. 56).

If a horse has been sold with an untrue warranty to a purchaser who has been compelled to keep it for a time before he could reasonably re-sell it, he may claim the cost of so keeping it as special damage, at any rate where he has given the seller the option of taking back the horse on the discovery of the breach of warranty (*Caswell* v. *Coare*, 1 Taunt. 566 ; *Chesterman* v. *Lamb*, 2 A. & E. 129, 132).

Where a person sold a cow with a warranty of soundness, knowing that it would in the ordinary course be placed by the purchaser with other cattle, and the purchaser, relying upon the warranty, placed the cow with other cattle, to which it communicated an infectious disease from which it was suffering at the time of the sale, it was held that the purchaser could recover as special damage in an action upon the warranty the loss caused to him by such communication of disease (*Smith* v. *Green*, 1 C. P. D. 92 ; 45 L. J. C. P. 29). Similarly, where "sulphuric acid commercially free from arsenic" was agreed to be supplied, and in breach of that agreement the acid supplied was not commercially free from arsenic, it was held that the buyers were entitled to recover the price paid for the impure and useless acid, and the value of the goods spoiled by being mixed in the ordinary course with such acid (*Bostock* v. *Nicholson*, [1904] 1 K. B. 725 ; 73 L. J. K. B. 524).

2. The horse, contrary to the said warranty, before the making of the said warranty had bolted or kicked and it had not worked well and did not nor would always work well and worked badly and in that respect the defendant broke his said warranty.

3. The defendant also by falsely and fraudulently representing to the plaintiff verbally on the said day that the said horse was perfectly quiet and went well in harness sold and delivered the same to the plaintiff as aforesaid for the said price which the plaintiff paid him.

4. The said horse was not at the time of the said sale and representation perfectly quiet and did not and would not go well in harness and the said representation was false and fraudulent as the defendant knew at the time of making it.

5. The said horse by reason of the premises was of no use to the plaintiff and he was obliged to and did get rid of and sell the same for a much less price than that he paid the defendant for it namely for the price of £——, and the plaintiff was put to and incurred expenses on such re-sale and in and about feeding keeping and taking care of the horse until such re-sale to the amount of £——.

Particulars of expenses:—

The plaintiff claims £——.

For Breach of Warranty of the Quality of Goods sold and delivered, with a Claim for Costs incurred in defending an Action brought by a Sub-vendee (*k*).

1. The plaintiff has suffered damage from breach of warranty contained in a contract in writing, dated the —— ——, 19—, whereby the defendant sold to the plaintiff —— tons of linseed, to be delivered at Hull ex "Argos," at £—— per ton, and whereby the defendant warranted the said linseed to be first-class Calcutta linseed.

2. The linseed was delivered at Hull, but was not first-class Calcutta linseed.

3. The plaintiff, who was a dealer in linseed, bought the said linseed from the defendant for the purpose of then re-selling it at a profit with a similar warranty, as the defendant knew at the time when he sold it to the plaintiff.

4. The plaintiff, on the —— ——, 19—, re-sold the said linseed to *E. F.* at the price of £—— per ton, with a warranty made verbally [*or, as the case may be*] that it was first-class Calcutta linseed, and delivered it to the said *E. F.*

5. The said *E. F.* afterwards brought an action in the King's Bench Division of the High Court of Justice for the breach of the last-mentioned warranty against the now plaintiff, who thereupon gave notice to the defendant of such action, and reasonably and properly defended the same, but judgment was given therein on the —— ——, 19—, against the now

(*k*) See *ante*, pp. 317, 279.

plaintiff with costs, and the now plaintiff was obliged to pay to the said *E. F.* the amount of the said judgment and costs.

Particulars of damages :—

	£
Loss of profit on the said re-sale.....	
Amount of the said judgment	
Taxed costs of the said *E. F.* in the said action.....	
Plaintiff's costs of defending the said action	

The plaintiff claims £——.

For Breach of a Contract to supply Goods of a specified Description (l).

1. The plaintiff has suffered damage by breach of a contract [made orally on the —— ——, 19—, *or*, made by letters dated, &c.] between the plaintiff and the defendant for the sale and delivery by the defendant to the plaintiff of [—— tons of best selected copper], to be supplied and delivered by the defendant to the plaintiff at ——, at the price of £—— per ton [payable on delivery].

2. The defendant, on the —— ——, 19—, delivered to the plaintiff at —— aforesaid [—— tons of copper] in pretended performance of the said contract, and the plaintiff received the same [and paid the said price thereof to the defendant].

(*l*) By s. 13 of the Sale of Goods Act, 1893, "Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description."

This section applies in cases where unascertained goods, or goods which the buyer has no opportunity of inspecting, are sold by a particular description. (See *Jones* v. *Just*, L. R. 3 Q. B. 197, 205 ; 37 L. J. Q. B. 89 ; *Varley* v. *Whipp*, [1900] 1 Q. B. 513, 516 ; 69 L. J. Q. B. 333 ; *Bostock* v. *Nicholson*, [1904] 1 K. B. 725 ; 73 L. J. K. B. 524.) And by s. 14 (2) (see p. 322), if in such cases the goods are supplied by a person whose business it is to manufacture or deal in such goods, it is also a condition of the contract that they shall be of merchantable quality, that is merchantable under that description (*Jones* v. *Just*, *supra* ; and see *Wren* v. *Holt*, [1903] 1 K. B. 610, 615, 616 ; 72 L. J. K. B. 340).

If the goods do not answer the description under which they are sold, the buyer may, in general, treat this failure to comply with the contract as a breach of condition entitling him to reject the goods, or if he retains the goods he may treat the condition as a warranty and sue for the breach of the contract to deliver goods of the specified description. (See ss. 11 (1), 53 (1) (cited *ante*, p. 315) ; *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438 ; 41 L. J. C. P. 228 ; *Bowes* v. *Shand*, 2 App. Cas. 455, 480 ; 46 L. J. Q. B. 561.)

It is further provided by s. 13, that "if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description."

By s. 30 (3), "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole." (See *Levy* v. *Green*, 27 L. J. Q. B. 111.)

3. The [copper] so delivered by the defendant was not [best selected copper], and was of a different and inferior description and quality.

Particulars of damage :—

Difference between the value of the [copper] delivered and the value of the same quantity of [best selected copper]... £

The like, where there has also been a Breach by Non-delivery of Part of the Goods sold: see ante, p. 281.

The like, on a Sale by Description and Sample (*m*).

1. By a contract in writing dated the —— ——, 19—, it was agreed between the plaintiff and defendant that the defendant should sell and deliver to the plaintiff and the plaintiff should buy and accept from the defendant eight tons of copper and ten tons of heavy brass gun-metal, 90 per cent. being heavy Government metal, three tons of common light brass and also five or six tons of yellow bolts and nails and spikes to be delivered as soon as required at and for certain prices which the plaintiff agreed to pay and the plaintiff paid to the defendant the sum of £50 on account thereof.

2. It was a condition of the said contract or in the alternative the defendant in consideration of the plaintiff entering into the said contract [impliedly] warranted and agreed that the said metals should be and were metals of the said several descriptions and saleable as such, that 90 per cent. of the said heavy brass gun-metal should be and was heavy Government metal, and that the said metals should be and were equal in quality and description to certain samples shown by the defendant to the plaintiff and that the quantities to be delivered should be the quantities above specified.

3. The plaintiff on the —— ——, 19—, by letter of that date, required the defendant to deliver the said metals but the defendant wholly failed to perform the said contract or to deliver to the plaintiff the metals agreed on or any metals in accordance with the said contract. As and for the said metals he sought to deliver to the plaintiff certain goods but the same were not metals of the said several descriptions or saleable as such nor was 90 per cent. of the said heavy brass gun-metal heavy Government metal, nor were the said goods equal in quality or description to the said samples, nor were the quantities the quantities specified. On the contrary the said goods were different and very inferior in description and quality and contained a mixture of rubbish and were short in quantity and were useless to the

---

m) As to sale by sample, see *post*, p. 324.

plaintiff, and the plaintiff as soon as he had an opportunity of inspecting the said goods rejected and refused as he was entitled to do to receive or accept the same.

4. The plaintiff, as the defendant at the time of the making of the said agreement well knew, purchased the said metals for the purpose of re-selling the same and he had re-sold the same at a profit.

5. By reason of the aforesaid breaches of contract the consideration for the payment of the said £50 wholly failed and the plaintiff has lost the same. Moreover the plaintiff has lost the profits he would have made and incurred and was put to expense in and about inspecting the said goods and endeavouring to procure the performance by the defendant of the said contract.

Particulars of damages :—[*State the particulars.*]

The plaintiff claims :

(a) £50 ;

(b) £200 damages.

The like.

1. The plaintiffs have suffered damage by the breach by the defendants of a contract made in writing dated the —— ——, 19—, whereby the defendants agreed to sell and deliver to the plaintiffs and the plaintiffs to buy from the defendants a cargo of "best double screened Micklefield steam coals" to be shipped by the defendants at —— by the S.S. —— and delivered by them to the plaintiffs at ——.

2. The plaintiffs ordered and the defendants by the said contract agreed to supply "best double screened Micklefield steam coal" and the defendants by the said contract and impliedly warranted that the coal to be supplied under the said contract should be double screened and should be merchantable under the description of "best double screened Micklefield steam coal."

3. The plaintiffs, as the defendants at the time of the making of the said contract well knew, purchased the said coal for the purpose of re-selling the same at Odessa and of fulfilling certain sub-contracts they had entered into for the re-sale thereof at a profit.

4. The defendants in breach of their said contract failed to sell or deliver to the plaintiffs the said or any "best double screened Micklefield steam coal." They shipped and delivered 2,759 tons 12 cwt. of coal but the same was in fact not double screened nor was it merchantable under the description of "best Micklefield steam coal." The coal delivered was small coal and was not screened or double screened and was in great part dust.

5. By reason of the premises the said coal was worth much less than the contract price and the plaintiffs have overpaid the defendants, and moreover they have lost the profit they would have made upon the re-sales and were compelled to make allowances and payments to their sub-purchasers

and incurred dock dues and other expenses in keeping, examining and loading and re-selling the said goods, and otherwise.

Particulars of damages :—

The plaintiffs claim £——.

For Breach of an Implied Warranty that Goods sold and supplied by the Defendant in the course of his Business for a particular Purpose were reasonably fit for that Purpose (*n*).

1. The plaintiff has suffered damage from the breach of a warranty by the defendant that certain goods, that is to say [*state the goods*], which were sold and supplied by the defendant to the plaintiff on the —— ——, 19—, were reasonably fit for the purpose for which the same were required, viz. [*state the purpose*].

2. The warranty was implied under the following circumstances. It was in the course of the defendant's business, as a ——, at ——, to sell and supply goods of the description aforesaid, and the said purpose for which the said goods were required was, before and at the time of the said

---

(*n*) This form is applicable when there has been a breach of an implied condition that the goods should be reasonably fit for a particular purpose, and the buyer, instead of rejecting the goods, has retained them, and claims damages. (See ss. 11 (1), 53, 54, pp. 315, 316.) It is framed upon s. 14 (1), which is as follows :—

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose." (See *Clarke* v. *Army and Navy Co-op. Society*, [1903] 1 K. B. 155, 163; 72 L. J. K. B. 153; and *Wren* v. *Holt*, *Ib.* 610; *Ib.* 340.)

Evidence may be given of letters or conversations prior to a written contract of sale in support of the allegation that the buyer had made known to the seller the particular purpose for which the goods were required (*Gillespie* v. *Cheney*, [1896] 2 Q. B. 59; 65 L. J. Q. B. 552; *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608; 74 L. J. Q. B. 386). Where it is desired to give such evidence, it is advisable to insert in the claim a statement that such information was given by the buyer to the seller, or to give particulars referring to the letters or conversations relied on.

The particular purpose may be made known to the seller by the description of the thing asked for, thus in asking for a "hot water bottle," the purchaser is in effect telling the seller he wants the bottle for the purpose of putting hot water into it, and consequently a seller of such bottles may be held to warrant to a purchaser that they will bear hot water (*Preist* v. *Last*, [1903] 2 K. B. 148; 72 L. J. K. B. 657; and see *Wallis* v. *Russell*, [1902] 2 Ir. Rep. 585).

It is important to observe that food for human consumption is "goods" within the meaning of the Act and of this sub-section. (See *Wren* v. *Holt*, *supra*; *Wallis* v. *Russell*, *supra*; *Frost* v. *Aylesbury Dairy Co.*, *supra*.)

This implied warranty of fitness may be broken by the existence of even latent defects (*Randall* v. *Newson*, 2 Q. B. D. 102; 46 L. J. Q. B. 259; *Drummond* v. *Van Ingen*, 12 App. Cas. 284; 56 L. J. Q. B. 563).

sale, made known by the plaintiff to the defendant, so as to show, as was the fact, that the plaintiff relied on the defendant's skill and judgment to supply goods reasonably fit for the said purpose.

3. The said goods were not reasonably fit for the said purpose.

Particulars :—[*State how the goods were not fit.*]

4. The plaintiff has in consequence sustained the following damage, viz. [*set out the particulars of damage*].

The like.

1. The plaintiffs have suffered damage by the defendant's breach of contract to sell and deliver the iron and steel rods hereinafter mentioned.

2. The plaintiffs by a letter dated the —— ——, 19—, ordered from the defendant and agreed to buy from him and the defendant by a letter dated the —— ——, 19—, agreed to sell and deliver to the plaintiffs —— tons of wire rod for the purpose of the same being manufactured into wire by the plaintiffs on the terms that the said wire rods should be, and the defendant agreed and warranted that the same should be, of good and sufficient quality and fit for the said purpose.

3. The defendant from time to time delivered to the plaintiffs, in pretended performance of the said order and terms, certain rods, but the rods so delivered were not of good or sufficient quality or fit for the said purpose but on the contrary were of bad and inferior quality and unfit for the said purpose and were worthless and useless.

4. The said rods were ordered, as the defendant at the time of their being ordered well knew, for the purpose of the plaintiffs manufacturing the same into wire and re-selling it at a profit. The plaintiffs, before they could discover the defective quality and unfitness of the said rods, manufactured the same or much thereof into wire and sold the said wire at a profit.

5. By reason of the defective quality and unfitness of the said rods, the wire so manufactured was useless and worthless and the plaintiffs have lost the price they paid for the said rods, the cost of manufacturing the same into wire, the profit they would have derived from the sale of the wire and their machinery has been kept standing and their men unemployed and they have been otherwise damaged.

Particulars of damage :—

The plaintiffs claim £600.

For a form of claim for breach of implied warranty to supply wholesome milk, see Frost v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608 ; 74 L. J. K. B. 386.

For Breach of Warranty on a Sale of Goods by Sample (*o*).

1. The defendant on the —— ——, 19—, by warranting to the plaintiff orally [*or, as the case may be*] that —— pockets of hops were equal in quality to a sample thereof then shown by him to the plaintiff, sold the said —— pockets of hops to the plaintiff for £—— [and the plaintiff afterwards on the —— ——, 19—, in reliance upon the said warranty, took delivery of the said —— pockets of hops from the defendant and paid him the said price for them].

2. The said —— pockets of hops were not at the time of the said sale equal in quality to the said sample, and were greatly inferior thereto.

Particulars :—

Upon a Warranty of Title and quiet Possession on a Sale of Goods (*p*).

1. The defendant on the —— ——, 19—, by warranting that he then had good right and title to sell certain goods, that is to say, —— [and that

---

(*o*) The conditions to be implied on a sale by sample are, that the bulk should correspond with the sample in quality, that the buyer should have a reasonable opportunity of comparing the bulk with the sample, and that the goods should be free from any defect rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample (Sale of Goods Act, 1893, s. 15 (2)). "Quality" includes state and condition (s. 61 (2)).

A sale by sample excludes any implied warranty as to all such matters as can be judged of by the sample (*Mody* v. *Gregson*, L. R. 4 Ex. 49 ; 38 L. J. Ex. 12 ; *Drummond* v. *Van Ingen*, 12 App. Cas. 284 ; 56 L. J. Q. B. 563).

The purchaser may reject the goods if they do not correspond with the sample (*Parker* v. *Palmer*, 4 B. & A. at p. 392 ; *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438, 451, 456 ; 41 L. J. C. P. 228). See further as to warranties and conditions, *ante*, pp. 314 *et seq.*

The fact that a sample is shown at the time of the sale does not necessarily make the sale one by sample, but the sale is by sample, when expressed so to be, or when the sample is produced as a warranty of what the bulk is. (See *Gardiner* v. *Gray*, 4 Camp. at p. 144 ; Ker's Sale of Goods Act, p. 102 ; s. 15 (1).)

(*p*) By s. 12, "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—(1) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass : (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods : (3) an implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

As to the distinction between a "warranty," and a "condition," see *ante*, p. 315.

As to the law before this enactment, see *Eichholz* v. *Bannister*, 17 C. B. N. S. 708 ; 34 L. J. C. P. 105.

A pawnbroker who sells an article as a forfeited pledge warrants only that it has been pledged with him and is irredeemable, and that he knows of no defect of title, and he is not liable for breach of an implied warranty of title upon the article being claimed by the true owner (*Morley* v. *Attenborough*, 3 Ex. 500). Similarly a sale of

the plaintiff should have and enjoy quiet possession thereof] sold the said goods to the plaintiff for £—— [which sum the plaintiff then paid to the defendant]. The warranty was made orally at the time of the sale [*or*, was contained in a letter dated, &c., *or*, was implied from the following circumstances, viz., (*here state same*)].

2. The defendant at the time of the said sale had not lawful right or title to sell the said goods or any of them [and the plaintiff did not have or enjoy quiet possession of the said goods after the said sale], and the plaintiff was afterwards, on the —— ——, 19—, obliged to deliver up the said goods to *E. F.*, who had the lawful right and title thereto, and the plaintiff has lost the said goods [and the said sum of £——, which he paid the defendant for the same].

For a Claim for Breach of Warranty on Letting a House, see ante, p. 224.

WITNESS (*q*).

WORK (*r*).

General form of Claim for Work done and Materials provided.

The plaintiff's claim is for £—— due from the defendant to the plaintiff for work done and material provided by the plaintiff for the defendant at his request.

---

goods taken in execution, or sold under a distress for rent, imports no warranty of title (*Chapman* v. *Speller*, 14 Q. B. 621; 19 L. J. Q. B. 239; *Payne* v. *Elsden*, 17 Times Rep. 161).

(*q*) A witness may maintain an action for his expenses against the party by whom he is subpœnaed, and this is so even where he was not examined at the trial because he had refused to give evidence unless his expenses were paid (*Hallett* v. *Mears*, 13 East, 15; see *Hale* v. *Bates*, E. B. & E. 575; 28 L. J. Q. B. 14; *Chamberlain* v. *Stoneham*, 24 Q. B. D. 113). The solicitor in an action is not, in general, personally liable to a witness for his expenses. (See "*Solicitor*," *post*, p. 792.)

An action for money received is maintainable to recover back conduct money paid to a person upon a *subpœna* to attend a trial as a witness, where he does not attend upon the subpœna (*Martin* v. *Andrews*, 7 E. & B. 1).

(*r*) Under the general term "work" any species of labour may be given in evidence (*Clark* v. *Mumford*, 3 Camp. 37), whether mental or physical, or both (*Grafton* v. *Armitage*, 2 C. B. 336; *Clay* v. *Yates*, 1 H. & N. 73; 25 L. J. Ex. 237); but it is usual and proper to describe the kind of work or the character in which the work has been done, as, work done as a solicitor, an auctioneer, a broker, &c. If there is a claim for materials provided it should be stated (*Heath* v. *Freeland*, 1 M. & W. 543).

Where the work has been done by the plaintiff upon his own materials in making an article to be delivered to the defendant under a contract of sale, the work is done by the plaintiff for himself, and not for the purchaser, and the subject of the contract should be treated as goods sold, and not as work and labour (*Atkinson* v. *Bell*, 8 B. & C.

Particulars :—

19—, —— ——, to 19—, —— ——.	To work done and materials provided as a —— between these dates—full particulars were delivered to the defendant on the —— ——, 19— [*or, as the case may be*] £——.

277 ; *Lee* v. *Griffin*, 1 B. & S. 272 ; 30 L. J. Q. B. 252). Contracts which fall under the description of work and labour, although they result in the delivery of completed goods, are not within the 17th section of the Statute of Frauds, or the 4th section of the Sale of Goods Act, 1893. (See *Clay* v. *Yates*, 1 H. & N. 73 ; 25 L. J. Ex. 237 ; *Lucas* v. *Godwin*, 3 Bing. N. C. 737 ; *Grafton* v. *Armitage*, 2 C. B. 336.)

Where work is done by one party under a special contract, but not according to its terms, the other may refuse to accept it (*Ellis* v. *Hamlin*, 3 Taunt. 52) ; but if he does accept it and takes the benefit of it, he may be sued for the value of it (*Burn* v. *Millar*, 4 Taunt. 745). If, however, the work is of such a nature that it cannot be rejected, so that the party has no option in accepting it, he is not necessarily liable for the value ; as work done in building upon the defendant's land, but not according to contract (*Ellis* v. *Hamlin*, *supra* ; *Milner* v. *Field*, 5 Ex. 829 ; *Burn* v. *Millar*, *supra* ; *Munro* v. *Butt*, 8 E. & B. 738 ; *Sumpter* v. *Hedges*, *infra*) ; or work done on a ship of a better quality than that contracted for (*Forman* v. "*The Liddesdale*," [1900] A. C. 190 ; 69 L. J. P. 44).

Where the terms of the contract are such as to make the remuneration contingent upon the completion of the services, a partial performance will not alone give any claim against the employer (*Hulle* v. *Heightman*, 2 East, 145 ; *Cutter* v. *Powell*, 6 T. R. 320 ; 2 Sm. L. C., 11th ed., p. 1 ; *Moffatt* v. *Laurie*, 24 L. J. C. P. 56 ; *Sinclair* v. *Bowles*, 9 B. & C. 92). Thus a builder who contracts to erect buildings on the land of another for a lump sum cannot, if he abandons the contract before completion, recover for the work actually done unless some new contract to pay him for the value of that work is made or can be implied, and no such new contract can be implied from the mere fact that the employer takes possession and completes the buildings himself (*Sumpter* v. *Hedges*, [1898] 1 Q. B. 673 ; 67 L. J. Q. B. 545). So if the completion is prevented by some accident or event that may excuse the further performance, yet if there be no default in the employer, he is not liable for the value of the part performed where by the contract payment is contingent on completion (*Appleby* v. *Myers*, L. R. 2 C. P. 651 ; 36 L. J. C. P. 331 ; *Adlard* v. *Booth*, 7 C. & P. 108 ; *Metcalfe* v. *Britannia Ironworks Co.*, 1 Q. B. D. 613 ; 45 L. J. Q. B. 837 ; 2 Q. B. D. 423 ; *Hopper* v. *Burness*, 1 C. P. D. 137 ; 45 L. J. C. P. 377).

But where the contract is to do work or render services to be paid for on completion, and the employer revokes the retainer before the work is completed, or prevents the completion of it, he must nevertheless reimburse the party employed for his labour expended in pursuance of the employment, unless the contract is such as to admit the power of revocation in the employer without any compensation for the services rendered, as to which see "*Agent*," *ante*, p. 73.

It is common in building contracts and the like to make it a condition precedent to the payment of the price that the architect or engineer give his certificate of approval ; and then there can be no claim for payment under the contract until it is given (*Morgan* v. *Birnie*, 9 Bing. 672 ; *Milner* v. *Field*, 5 Ex. 829 ; *Richards* v. *May*, 10 Q. B. D. 400 ; 52 L. J. Q. B. 272) ; and that is so even where the certificate is wrongly or unreasonably withheld (*Clarke* v. *Watson*, 18 C. B. N. S. 278 ; 34 L. J. C. P. 148 ; *Scott* v. *Corporation of Liverpool*, 3 D. & J. 334 ; 28 L. J. Ch. 230 ; *De Worms* v. *Mellier*, L. R. 16 Eq. 554). There may, however, be a claim or right of action on the ground of fraud where the certificate is withheld by the procurement of the employer in collusion with the architect (*Batterbury* v. *Vyse*, 2 H. & C. 42 ; 32 L. J. Ex. 77 ; *M'Intosh* v. *G. W. R. Co.*, 2 Mac. & G. 74 ; *Stevenson* v. *Watson*, 4 C. P. D. 148 ; 48 L. J. C. P. 318).

Claim by a Builder for Work done and Materials provided.

The plaintiff's claim is for work done and materials provided by the plaintiff for the defendant at his request.

Particulars:—	£	s.	d.
19—, —— —— to —— ——. To re-building house at Wigan, as per contract [in writing] dated the —— ——, 19—	3,400	0	0
To extras as per account delivered on the —— ——, 19—	243	0	0
	3,643	0	0
19—, —— ——. Paid on account	3,000	0	0
Balance due	£643	0	0

The plaintiff also claims interest on the above balance from the —— ——, 19—, till payment or judgment.

(*See R. S. C.*, 1883, *App. E., Sect. II.*)

By a Servant against a Master for Salary or Wages due: see "Master and Servant," ante, p. 246.

For other Forms of Claims for Remuneration for Services rendered in various capacities, see "Agent," ante, p. 72; *Auctioneer," ante*, p. 91; *"Broker," ante*, p. 137; *"Carrier," ante*, pp. 141, 142; *"Medical Attendance," ante*, p. 251; *"Solicitors," ante*, p. 305; *"Stock Exchange," ante*, p. 308.

Claim for Preventing the Plaintiff from Completing a Contract for Work.

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing [*or, as the case may be*] dated the —— ——, 19—, whereby the plaintiff agreed to build for the defendant and the defendant agreed to pay for a house on certain land of the defendant at —— in —— in accordance with a certain specification and plans in the said contract referred to at the price of £——.

2. The plaintiff commenced to build the said house and expended much labour and material thereon, but the defendant on the —— ——, 19—,

---

Where by the contract the architect is to act as arbitrator—and not merely as agent for the building owner—in giving the final certificate he cannot be sued for negligence in giving it (*Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624; 70 L. J. K. B. 482).

verbally [*or, as the case may be*] refused to allow the plaintiff to continue to build or complete the said house and wholly repudiated and put an end to the said contract.

Particulars of damage :—	£	s.	d.
To labour and materials, full particulars whereof are delivered herewith and exceed three folios			
To loss of profit			
The plaintiff claims			

Claim for Work done under a Contract with Alternative Claim on a quantum meruit.

1. The plaintiff's claim is for £—— which the defendant by a contract in writing dated [*or*, made verbally on] the —— ——, 19—, agreed to pay to the plaintiff in consideration that the plaintiff would [*state the consideration, as for instance*] introduce to the defendant a person who would lend to the defendant £—— on the mortgage of a house of the defendant's at ——.

2. The plaintiff did accordingly [*show that the consideration was performed, as for instance*], on the —— ——, 19—, introduce to the defendant one *E. F.*, who on the —— ——, 19—, lent to the defendant the said sum on a mortgage of the said house.

3. In the alternative, if the said *E. F.* did not lend to the defendant the said sum on the said mortgage, the plaintiff says that the said *E. F.* was ready and willing to do so, but the defendant on the —— ——, 19—, verbally refused to borrow the said sum and therefore prevented the plaintiff from earning the said £——.

4. In the further alternative, the plaintiff says that, for and at the request of the defendant, contained in and to be inferred from the said contract he did much work in and about finding and introducing the said *E. F.* to the defendant, and he claims £—— as a reasonable remuneration for such work.

Particulars of the said work are delivered herewith and exceed three folios.

The plaintiff claimed :

(1.) £——, or,

(2.) £—— damages, or,

(3.) £——.

Claim for Breach of Contract to do Work.

1. By a contract in writing dated the —— ——, 19—, the defendant agreed with the plaintiff to [*describe the work to be done, as, for instance*]

build for the plaintiff within a reasonable time a house and stables on the plaintiff's land at ——, in the —— of ——, in accordance with a certain specification and certain plans in the said agreement referred to, for the sum of £——.

2. [*State the breach, as, for instance*] The defendant commenced the said work and proceeded so far as to dig out the foundation for the said house and stables, but on the —— ——, 19—, he ceased to do any further work and he has not done any more, and he has wholly failed to build or complete the said house and stables.

3. [*State the damage, as, for instance*] By reason of the defendant's said breach of contract, the plaintiff has had to employ another builder at a greatly increased price to build the said house and stables, and lost the use of the land and the use and enjoyment of the said house and stables from the —— ——, 19—, when the defendant ought to have completed them, until the —— ——, 19—, when they were completed, and was put to great inconvenience. He has also lost the sum of £——, which, in anticipated performance of the said contract, he paid to the defendant on the —— ——, 19—.

Particulars :—

	£	*s.*	*d.*
Difference between £——, the price agreed to be paid to the defendant, and £——, the price the plaintiff had to pay			
Loss of use of land, house and stables, from —— ——, 19—, to —— ——, 19—			
Amount paid to the defendant on account			
The plaintiff claims ..... £			

Claim for Damage for Breach of Contract to do Work well and with good Materials.

1. The plaintiff has suffered damage by the defendant's breach of a contract in writing, dated the —— ——, 19—, whereby the defendant agreed to build for the plaintiff a steamship in accordance with a certain specification, and to deliver the said steamship on or before the —— ——, 19—.

2. By the said contract and specification the defendant agreed that the said steamship should be built with the best workmanship and with proper and sufficient materials, and that [*here set out any special terms of the contract or specification that the defendant has failed to comply with*].

3. As and for the steamship so agreed to be built and delivered, the defendant built and on the —— ——, 19—, delivered to the defendant a steamship, but the said steamship was not built in accordance with the said

contract and specification, and defendant broke his said contract in the following respects, viz. :—

(a) The said steamship was not built with the best workmanship and with proper or sufficient materials.

(b) } [*Set out any specific breaches of the specification relied on.*]
(c) }

(d) The said steamship was not delivered until the —— ——, 19—.

4. By reason of the defendant's said breaches of contract, the said steamship was worthless, or worth far less than the contract price of £——, [which the plaintiff paid to the defendant on the —— ——, 19—], and the plaintiff has lost the sum of £—— which he had to pay in employing another builder to repair some of the defects in the said steamship and endeavouring to make the same in accordance with the contract and specification, and he lost the use of the said steamship from the —— ——, 19—, when the same ought to have been delivered, until the —— ——, 19—, when it was delivered, and further until the —— ——, 19—, when the said repairs were finished.

5. Full particulars under paragraphs 3 and 4 hereof are delivered herewith.

The plaintiff claims £——.

Against a Workman for using Bad Materials and Workmanship.

1. The plaintiff has suffered damage by breach of a contract in writing dated the —— ——, 19—, and made between the plaintiff and the defendant, whereby the defendant agreed to do and complete the roofing of a house at —— in a good and workmanlike manner, and with materials of the best description and quality.

2. The defendant did not do and complete the said roofing in a good and workmanlike manner or with material of the best description or quality.

Particulars :—

The workmanship was bad in the following respects [*state same*].

The materials were not according to contract in the following respects [*state same*].

The damage sustained was as follows [*state same*].

Against a Coachmaker employed to repair a Carriage, for not using reasonable Care and Skill in repairing it (s).

The plaintiff has suffered damage from the breach by the defendant who is a coachbuilder of a contract made verbally on the —— ——, 19—,

(s) A person who carries on a particular trade requiring skill, impliedly contracts that he will use reasonable skill in the exercise of such trade when employed in such

whereby the defendant agreed to use reasonable care and skill in repairing the plaintiff's carriage.

2. The defendant did not use reasonable care and skill in repairing the said carriage.

Particulars:—

The want of care and skill consisted in [*state what*].

The plaintiff incurred expense in having the said carriage repaired properly in accordance with the said contract as follows:—[*here set out the items*].

Claim against an Architect for Negligent Work.

1. The defendant was and is an architect and surveyor.

2. On the —— ——, 19—, the plaintiff, being the owner of a public-house called the "Red Lion" at —— in the county of ——, verbally employed the defendant as such architect and surveyor on the usual terms as to remuneration to prepare the plans specifications bills of quantities forms of tender and contracts for the altering and re-building of the said public-house and for that purpose to make all usual and necessary surveys examinations and inquiries and to insert in the said plans specifications and contracts all proper and necessary provisions for the due execution of the work and the safety stability and utility of the building.

3. The defendant accepted the said employment and prepared certain plans specifications bills of quantities forms of tender and a contract. Tenders were invited, the tender of Mr. —— was accepted and a contract dated the —— ——, 19—, made by the plaintiff with him for the execution of the work under the superintendence of the defendant.

4. The plaintiff on the —— ——, 19—, verbally employed the defendant for reward to superintend the doing of the work and to act as architect and surveyor under the said contract and the defendant accepted such employment.

5. The situation of the said public-house was such that if the cellars and basement were below a certain level the ground would be water-logged and they would be below the level of the sewers and liable to be flooded and to remain so unless special and sufficient provision was made for keeping out the water and draining the same. The defendant was aware of these facts or had he exercised due care and skill he would have ascertained and been aware of them. He was also aware that the cellars are a most important

---

trade (*Harmer* v. *Cornelius*, 5 C. B. N. S. 236; 28 L. J. C. P. 85; *Jenkins* v. *Betham*, 15 C. B. 189). If the work is useless owing to the workman's improper execution of the work he contracted to do with reasonable skill and care, such workman can recover nothing in respect of it (*Farnsworth* v. *Garrard*, 1 Camp. 38; *Montriou* v. *Jefferys*, R. & M. 317; *Denew* v. *Daverell*, 3 Camp. 451; *Huntley* v. *Bulwer*, 6 N. C. 111; *Kannen* v. *McMullen*, Peake, 59).

part of a public-house and that unless they are dry and the water kept out the beer and spirits wine and goods stored in them will be spoilt and the trade diminished.

6. The said public-house was rebuilt in accordance with the plans, specifications, and contract prepared by the defendant and under his superintendence.

7. The defendant was guilty of negligence and breach of his duty and contract to and with the plaintiff in the following respects :—

(A) He negligently designed the cellars and basement of the said public-house so that the same or the floor and part thereof were below the level of the sewers and below the level at which the soil was water-logged and flooded.

(B) He negligently omitted to provide for any or in the alternative any proper or sufficient means of keeping out the water and preventing the said cellars and basement from being flooded.

(C) He negligently omitted to provide for any means of draining the said cellars and basement or getting rid of any water that accumulated or collected there.

(D) He negligently omitted during the construction of the works to ascertain and remedy the aforesaid omissions.

(E) He negligently omitted to require the builders to make any provision for keeping out and getting rid of the water.

(F) He negligently allowed the builders to omit the only but wholly inefficient precaution (if any) that he had provided against the water, viz., cement rendering.

(G) He negligently on or about the —— ——, 19—, substituted for one of the original plans another plan which omitted the cement rendering, which was the only precaution (if any) that he had provided against the water.

8. In consequence the plaintiff has suffered and will suffer serious loss and damage. The said cellars and basement have been and are liable to be flooded and useless, and no means exist for getting away the water except pumping. The joints in the brickwork are open, and the mortar has been and is being washed out. The foundations are giving way and the walls settling. The whole building is endangered and will require to be rebuilt or the foundation footings and walls and floor of the cellars and basement restored and reconstructed and protected, which will involve great expense and occupy much time.

9. In consequence the plaintiff has not been able to and cannot use the cellars or basement. He lost £—— worth of beer and £—— worth of spirits, and £—— worth of wines, which were destroyed or injured by the flooding of the cellars. He has lost and will lose the profit of the business of the said public-house owing to loss of trade from the beer, spirits and wines being deteriorated and his being unable to store the same and consequently losing custom and trade.

10. In consequence also the plaintiff has lost the expense he incurred and will incur pumping out the cellars.

11. Further in consequence the plaintiff has lost the amount paid to the builders and to the defendant and the amount that it will cost him to reinstate the building.

12. The defendant was also guilty of negligence and breach of his duty and contract to and with the plaintiff in this, that instead of inserting in the contract, as he should have done, a proper penalty clause providing that the builders should pay penalties if they delayed the works beyond a certain date, and providing that in case of extras or alterations being ordered the clause should still apply with a reasonable addition of time in respect of the extra time (if any) occasioned by such extras or additions, the defendant negligently and improperly inserted a penalty clause which made no provision for extras or additions, with the result that as extras and additions were (as the defendant ought to have foreseen that they would be) ordered the said clause was useless and could not be enforced.

13. In consequence, although the builders greatly exceeded the agreed time, the plaintiff could not recover any penalties from them, and lost the use and profits of the said public-house for a long time without any remedy.

14. Particulars under paragraphs 8, 9, 10, 11 and 13 hereof are delivered herewith.

The plaintiff claims £——.

For a Claim by a Client against his Solicitor for Negligence in his Conduct of Work undertaken on the Client's Retainer, see "*Solicitors*," *ante*, p. 306.

For a Claim by a Patient against his Medical Attendant for Negligence in the Course of his Employment, see "*Medical Practitioners*," *post*, p. 438.

For a Claim for Liquidated Damages for Non-completion of a Building Contract within a limited Time, see ante, p. 36.

CHAPTER V.

STATEMENTS OF CLAIM IN ACTIONS FOR WRONGS.

BAILMENTS (*a*).

Against a Bailee for Negligence in Keeping Goods.

The plaintiff has suffered damage from the negligence of the defendant in not safely keeping and taking proper care of certain goods, viz. [*state what the goods were*], which were on the —— ——, 19—, entrusted by the plaintiff to the defendant to be by the defendant safely kept and taken care of [for reward to the defendant in that behalf].

Particulars of negligence :—

[*State them.*]

Particulars of damage :—

[*State same.*]

(*a*) See "*Bailments*," *ante*, p. 93 ; "*Conversion*," *post*, p. 344 ; "*Detention*," *post*, p. 370.

The duty of a person who lets out carriages for hire appears to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it. He is bound to take the same care as railway companies, or carriers who provide carriages for the public to travel in (*Hyman* v. *Nye*, 6 Q. B. D. 625; see "*Carriers*," *ante*, p. 149).

Bankers are not gratuitous bailees of documents or securities deposited with them by their customers in the ordinary course of their business as bankers under circumstances which would create a lien on them for the customers' general banking accounts (*In re United Service Co.*, L. R. 6 Ch. 212 ; 39 L. J. Ch. 730. See 1 Sm. L. C. 11th ed. 193).

Upon the gratuitous bailment of a chattel, lent for use, the borrower is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, above all for anything that may be qualified as legal fraud. So, the lender is responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects which may make the loan perilous, or unprofitable, to him (*Blakemore, or Blackmore*, v. *Bristol and Exeter Ry. Co.*, 8 E. & B. 1035, 1057 ; 27 L. J. Q. B. 167 ; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145 ; 68 L. J. Q. B. 147). Accordingly, it was held that a gratuitous lender of a scaffold was not liable for an injury sustained by the borrower, which was caused by the defective construction of the scaffold of which the lender was not aware ; although the jury found that he had been guilty of negligence in the construction, and that the injury was caused by that negligence (*M'Carthy* v. *Young*, 6 H. & N. 329 ; 30 L. J. Ex. 227). So, in the case of a gratuitous deposit for safe custody, the bailee is only bound to take ordinary care of the thing deposited, and is only liable if his

By a gratuitous Bailee of a Horse for Injuries caused him.

1. The defendant on the —— ——, 19—, lent the plaintiff a horse to ride which was, as the defendant then knew, vicious, and dangerous to ride.

2. The plaintiff did not know that the horse was vicious or dangerous to ride, and the defendant, though aware that this was unknown to the plaintiff, did not inform him thereof.

3. The plaintiff in consequence rode the horse and was by reason of its vice aforesaid thrown from it on the —— ——, 19—, and severely injured.

Particulars :—

BANKRUPTCY (*b*).

Claim by a Trustee in Bankruptcy to recover Damages for a Wrong committed before the Bankruptcy and affecting the Bankrupt's Estate.

Between [*A. B.*], the Trustee of the property of *C. D.*, a bankrupt ..... Plaintiff,

and

E. F. ..... Defendant.

Statement of Claim.

The plaintiff is trustee of the property of *C. D.*, a bankrupt, and claims as such trustee against the defendant for damages suffered by the said *C. D.* before he became bankrupt by, &c. [*here state the wrong complained of as*

negligence is such that an ordinarily prudent man would not be guilty of with regard to his own property (*Giblin* v. *McMullen*, L. R. 2 P. C. 317 ; 38 L. J. P. C. 25).

(*b*) See "*Bankruptcy*," *ante*, p. 99.

Causes of action for wrongs committed against the bankrupt previously to the bankruptcy, where such wrongs affect the bankrupt's property, pass, in general, to the trustee in the bankruptcy ; but causes of action for wrongs which are personal to the bankrupt do not, in general, vest in the trustee, and can only be sued upon by the bankrupt. (See "*Bankruptcy*," *ante*, p. 100.)

The statement of claim in an action by the trustee should state the facts in such a manner as to show that the right of action is one which has vested in him as trustee.

Where a bankrupt has acquired property after the adjudication without interference by the trustee in his bankruptcy, and a wrong has been committed in respect of such property, the bankrupt, though undischarged, may maintain an action in his own name against the tortfeasor, unless and until the trustee intervenes (see "*Bankruptcy*," *ante*, p. 101), and accordingly the defendant in such case could not validly plead the facts of the bankruptcy, &c., as a defence, unless he also added an allegation that the trustee had intervened (*Ib.*). An assignment for value of such right of action by the bankrupt to a person dealing *bonâ fide*, though with knowledge of the circumstances, if made before such intervention, is good against the trustee (*Ib.*).

An action will lie for maliciously, and without reasonable or probable cause, presenting a bankruptcy petition against a person, and causing him to be adjudged bankrupt, provided that the adjudication has been reversed or annulled before action (*Johnson* v. *Emerson*, L. R. 6 Ex. 329, 368 ; 40 L. J. Ex. 201, 222 ; *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210 ; *Quartz Hill, &c. Co.* v. *Eyre*, 11 Q. B. D. 674 ; 52 L. J. Q. B. 488 ; see "*Malicious Prosecution*," *post*, p. 424). The bankrupt himself might

having been committed against the bankrupt's property before the bankruptcy, adding particulars where necessary, as for instance, by the defendant on the —— ——— 19—, wrongfully depriving the said *C. D.* of two casks of oil by refusing verbally to give them up on demand. (*See* "*Conversion*," *post*, p. 350.)]

Particulars :—

Carriers(*c*).

Against a Common Carrier for refusing to carry Goods.

1. The defendant is a common carrier of goods for hire from —— to ——, and the plaintiff on the —— ——, 19—, duly tendered to the defendant as such carrier a —— [*describe the goods*] of the plaintiff at —— aforesaid and [verbally] requested the defendant as such carrier to carry the same for him from —— to —— aforesaid for hire to the defendant, and the plaintiff was then ready and willing and offered to pay to the defendant his reasonable hire in that behalf.

2. The defendant had then sufficient means and convenience to carry the said goods for the plaintiff as requested, and he could, and as such carrier as aforesaid ought to have done so, but the defendant did not and would not carry the same.

Particulars of damage :—

Against Carriers for losing Goods.

1. The defendants were carriers of goods for hire from —— to —— and on the —— ——, 19—, the plaintiff delivered to the defendants, and the defendants received as such carriers, certain goods of the plaintiff to be by the defendants taken care of and safely and securely carried from ——

sue in such case for the annoyance and personal injury thereby occasioned to him, but it seems that the right to damages in respect of any injury thereby occasioned to his property would pass to the trustee (*Metropolitan Bank* v. *Pooley*, *supra*).

(*c*) As to the duties and liabilities of carriers of goods by land, see "*Carriers*," *ante*, p. 141.

A common carrier is not liable as an insurer after the carriage of the goods to their destination, though they are not accepted by their consignee; after completion of the carriage the carrier is liable only for negligence (*Garside* v. *Trent Nav.*, 4 T. R. 581; and see *Bourne* v. *Gatliffe*, 3 M. & G. 643; 7 M. & G. 850; 11 Cl. & F. 45; *Crouch* v. *G. W. Ry. Co.*, 2 H. & N. 491; 27 L. J. Ex. 345; *Shepherd* v. *Bristol Ry. Co.*, L. R. 3 Ex. 189; 37 L. J. Ex. 113; *G. N. Ry. Co.* v. *Swaffield*, L. R. 9 Ex. 132; 43 L. J. Ex. 89; *Mitchell* v. *L. & Y. Ry. Co.*, L. R. 10 Q. B. 256; 44 L. J. Q. B. 107; see *ante*, p. 147).

A misdelivery of goods by the carrier to the wrong person amounts to a conversion. (See *post*, p. 346.) It is the duty of a carrier to keep goods which are to be fetched away a reasonable time for the consignee to come and fetch them (*Bourne* v. *Gatliffe*, *supra*; *Patscheider* v. *G. W. Ry. Co.*, 3 Ex. D. 153). But if the consignee delays to take the goods away within a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, and is confined to taking proper care of the goods as a warehouseman (*Chapman* v. *G. W. Ry. Co.*, 5 Q. B. D. 278; 49 L. J. Q. B. 420); and this is so, even if the goods are consigned "to be left till called for" (*Ib.*).

to —— aforesaid, and there delivered to [*or*, for] the plaintiff, within a reasonable time in that behalf for reward to the defendants.

2. The defendants did not take care of the said goods and did not safely and securely carry and deliver the same to [*or*, for] the plaintiff as aforesaid, whereby the same were lost to the plaintiff.

Particulars :—

Against a Carrier for Misdelivery of Goods.

The plaintiff has suffered damage from the defendant's negligence in delivering contrary to the plaintiff's orders, given [verbally] on the —— ——, 19—, to a person or persons other than the plaintiff, the plaintiff's goods, viz. [*state what*], which had been on the —— ——, 19—, by the plaintiff entrusted to the defendant for carriage from —— to —— [for reward to the defendant], whereby the plaintiff has lost his said goods.

Particulars :—

By a Passenger against a Railway Company for Damages for Personal Injuries sustained in a Collision (*d*).

The plaintiff has suffered damage from the defendants' negligence in carrying the plaintiff as a passenger by railway from London to Brighton, causing personal injuries to the plaintiff in a collision near Hayward's Heath, on the —— ——, 19—.

Particulars of the negligence :— [*state them*].

Particulars of injuries :— [*state them*].

Particulars of expenses :—

	£	*s.*	*d.*
Loss of fifteen weeks' salary as clerk at £2 per week, from —— ——, 19—, to —— ——, 19—	30	0	0
Dr. Smith	10	10	0
Nurse for six weeks from —— ——, 19—	3	0	0
	£43	10	0

The plaintiff claims £500.

(*See R. S. C.*, 1883, *App. C.*, *Sect. V.*, *No.* 7.)

For other Forms of Claim in Actions against Railway Companies for personal Injuries sustained through their Negligence, see "*Negligence*," *post*, pp. 444 *et seq.*

(*d*) See "*Carriers*," *ante*, p. 148, and "*Negligence*," *post*, pp. 440, 444. The right which a passenger has to be carried with care does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the company or carrier to use due care in regard to carrying him (*Harris* v. *Perry*, [1903] 2 K. B. 219, 226; 72 L. J. K. B. 725; *Austin* v. *G. W. Ry. Co.*, L. R. 2 Q. B. 442, 445; 36 L. J. Q. B. 201).

Against Carriers by the Executor or Administrator of a Passenger killed by the Negligence of the Defendants, under 9 & 10 *Vict. c.* 93 : *see* "*Executors*," *post*, p. 387.

Against a Railway Company for Loss of Passenger's Luggage: see "*Carriers*," *ante*, p. 150.

COMMON (*e*).

Claim for Disturbance of a Right of Common of Pasture by Digging up Turf and Soil and Enclosing.

1. The plaintiff was [and is] entitled to common of pasture for all the commonable cattle levant and couchant in and upon his messuage and land

(*e*) Where the claim is by prescription, it may be either by prescription at common law or by prescription under the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), which enacts (s. 1) that "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land" of any "person or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

By s. 4, "each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question," and "no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made."

By s. 7, "the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

The interruption under ss. 1, 4, must be an obstruction by some adverse claimant, and not a mere cessation of user by the claimant himself (*Carr* v. *Foster*, 3 Q. B. 581; *Smith* v. *Baxter*, [1900] 2 Ch. 138, 143; 69 L. J. Ch. 437). An action or legal proceeding is not essential to show non-acquiescence in such interruption, which is a mere question of fact (*Bennison* v. *Cartwright*, 5 B. & S. 1; 33 L. J. Q. B. 137).

The periods prescribed by the Act are required to be next before some suit or action

known as —— Farm, at ——, in and over a waste or common called ——, in the parish of ——, at all times of the year as to the said messuage and land appertaining.

---

wherein the claim shall be brought in question (see s. 4); consequently until such suit or action the period is not complete, and the right is not established (*Ward* v. *Robins*, 15 M. & W. 347); but the establishment of the right in any such suit or action is conclusive in any subsequent suit or action between the same parties without further proof of enjoyment for the period next before the pending suit or action (*Cooper* v. *Hubbuck*, 12 C. B. N. S. 456; 31 L. J. C. P. 323).

A right of common of pasture for cattle levant and couchant cannot be prescribed for in respect of a messuage only without land (*Scholes* v. *Hargreaves*, 5 T. R. 46; *Benson* v. *Chester*, 8 T. R. 396). "Cattle levant and couchant" imports such number of cattle as the land to which the right of common is appurtenant or appendant is capable of maintaining. Levancy and couchancy is the measure of the right, whether in fact that number or any cattle are actually maintained on the land (*Carr* v. *Lambert*, 3 H. & C. 499; L. R. 1 Ex. 168; 34 L. J. Ex. 66; 35 *Ib.* 121; *Robertson* v. *Hartopp*, 43 Ch. D. 485, 517; 59 L. J. Ch. 553). The right is not affected by the land being temporarily put to a use which renders the maintenance of cattle or sheep upon it impossible (*Ib.*).

It was the rule, previously to the Prescription Act, that it was sufficient for a plaintiff suing in respect of such rights to allege that he was entitled to the right claimed by reason of his possession of land, without specifically deducing or setting out his title, or the mode in which his title arose, although where such rights were set up by a *defendant* as a defence to actions of trespass, &c., a greater amount of particularity in the statement of his title to the rights alleged was required (see 1 Wms. Saund., 1871 ed., p. 623); and it was enacted by s. 5 of the Prescription Act "that in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

The last-cited section must be read subject to the Judicature Acts and the R. S. C. (see Ord. XIX., rr. 1, 4; Jud. Act, 1875, ss. 21, 33 (2)), and either a plaintiff or a defendant should now state in what manner the alleged right is claimed to have arisen (*Harris* v. *Jenkins*, 22 Ch. D. 481; 52 L. J. Ch. 437; *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410; 58 L. J. Ch. 139; and see *Baylis* v. *Tyssen-Amherst*, 6 Ch. D. 500; 46 L. J. Ch. 718; *Robinson* v. *Dulcep Singh*, 11 Ch. D. 798, 823; 48 L. J. Ch. 758; *Philipps* v. *Philipps*, 4 Q. B. D. 127; 48 L. J. Q. B. 135; *Palmer* v. *Palmer*, [1892] 1 Q. B. 319; 61 L. J. Q. B. 236). A claim which does not show how the right arises may be embarrassing, and in such case an order may be obtained that it should be struck out, or for particulars showing how the right is claimed (*Harris* v. *Jenkins*, *supra*; and see *Palmer* v. *Palmer*, *supra*). The right should be described accurately in respect to its extent, with all the restrictions and qualifications, if any, to which it is subject. It is

2. The defendant disturbed and injured the plaintiff in the use and enjoyment of his said common of pasture by wrongfully digging up and subverting the soil and carrying away the turf of the said waste, and by wrongfully enclosing a part thereof and keeping the same enclosed.

Particulars :—

The right is claimed [*state how, e.g.*, under the Prescription Act, 1832, by sixty years', and, as an alternative, by thirty years' uninterrupted enjoyment as of right]. The particulars of the acts of disturbance are as follows :—

[*If an injunction is claimed, add a paragraph stating any facts material for that purpose : see* "*Injunction*," *post*, p. 413.]

---

immaterial, however, that a right is alleged more narrowly than it really exists, provided the allegation is wide enough to cover the disturbance complained of. (See *Duncan* v. *Louch*, 6 Q. B. 904 ; *Tebbutt* v. *Selby*, 6 A. & E. 786.)

A right of common was held to be well laid as "for sheep at all times of the year," though it was proved to be subject to folding the sheep at night on a certain farm ; the expression being held to mean all usual times (*Brook* v. *Willett*, 2 H. Bl. 224). Where a declaration alleged a right of common for all commonable cattle, it was held to be some evidence in support of it that the plaintiff was shown to have turned on all the cattle which he kept, although he had never kept any sheep (*Manifold* v. *Pennington*, 4 B. & C. 161). Where the declaration alleged a right of common by reason of the possession of a messuage and land, proof of a right of common in respect of land only without any messuage was held sufficient (*Ricketts* v. *Salwey*, 2 B. & Ald. 360). If the allegation of the right is divisible, it seems that the plaintiff is entitled to a limited verdict for a divisible part of the right alleged, though he fails to prove the residue. (See *Giles* v. *Groves*, 12 Q. B. 721 ; 1 Chit. Pl., 7th ed., 400.) An injunction against a wrongful inclosure or other interference with rights of common may be claimed in addition to claims of damages or other relief. (See "*Injunction*," *post*, p. 413.)

One freehold tenant of a manor can maintain an action on behalf of himself and all other freehold tenants, or freehold and copyhold tenants of the manor (if numerous and having the same interest), to obtain a declaration of the title of such tenants to rights of common, and an injunction restraining the lord of the manor from interfering with those rights. (See Ord. XVI., r. 9 ; *Warrick* v. *Queen's College, Oxford*, L. R. 6 Ch. 716 ; 40 L. J. Ch. 780 ; *Hall* v. *Byron*, 4 Ch. D. 667 ; 46 L. J. Ch. 297 ; *Commissioners of Sewers* v. *Glasse*, L. R. 19 Eq. 134 ; *Ib.* 7 Ch. 456 ; 41 L. J. Ch. 409 ; *Ib.* 415 ; and see *Robertson* v. *Hartopp*, *infra*.)

The lord of a manor cannot ordinarily justify inclosing or approving, or taking gravel, marl, loam and the like in the wastes of the manor to such an extent as to interfere with the rights of common of the commoners appurtenant to their tenements, though he may inclose or approve, or take gravel, marl, loam and the like so long as he does not thereby interfere with such rights (*Hall* v. *Byron*, 4 Ch. D. 667 ; 46 L. J. Ch. 297 ; *Robinson* v. *Duleep Singh*, 11 Ch. D. 798, 831 ; 48 L. J. Ch. 758 ; *Robertson* v. *Hartopp*, 43 Ch. D. 484, 498). The *onus* of proof that in approving or enclosing he has left sufficient pasture for the commoners is on the lord (*Robertson* v. *Hartopp*, *supra*). As to approvement, see further, *post*, p. 821.

A right of common cannot be claimed on behalf of an indeterminate and fluctuating body of persons, such as the inhabitants of a parish, unless by virtue of a grant from the Crown or of an Act of Parliament (*Gateward's Case*, 6 Co. 59b ; *Lord Rivers* v. *Adams*, 3 Ex. D. 361 ; 48 L. J. Ex. D. 47 ; *Chilton* v. *Corporation of London*, 7 Ch. D. 735 ; 47 L. J. Ch. 433). Inhabitants, as such, cannot claim by prescription either under the Act or at common law (*Warrick* v. *Queen's College*, L. R. 6 Ch. at p. 724, *supra* ; *Lord Rivers* v. *Adams*, 3 Ex. D. at pp. 364, 365, *supra*). See further "*Common*," *post*, p. 819 ; "*Custom*," *post*, p. 829.

Claim for a Disturbance of a right of Common of Pasture by Wrongfully putting Cattle on the Common.

1. [*As in the previous form.*]

2. The defendant disturbed and injured the plaintiff in the use and enjoyment of his said common of pasture by wrongfully putting divers horses, cows and sheep in and upon the said waste and keeping and depasturing the same there for a long time.

Particulars:—[*as in the previous form*].

For a statement of claim for disturbing a right of pasturage, see Robinson v. *Duleep Singh*, 11 Ch. D. 798; 48 L. J. Ch. 758.

For a statement of claim by freehold and copyhold tenants of a manor on behalf of themselves and other tenants for disturbance of rights of common of pasturage, estovers, &c., see Robertson v. *Hartopp*, 43 Ch. D. 485; 59 L. J. Ch. 553.

The following instances of declarations under the former practice may be useful, viz.:—A declaration for injury to a right of common of pasture to which the plaintiff claimed to be entitled as freeman of a borough: Beadsworth v. *Torkington*, 1 Q. B. 782.

The like by an owner of land in a common field claiming a right of common over the whole field: Cheesman v. *Hardham*, 1 B. & Ald. 706.

The like claiming a right of common for a certain number of cattle of different kinds: Nichols v. *Chapman*, 5 H. & N. 643; 29 L. J. Ex. 461.

The like for disturbing a right of common by surcharging: Bowen v. *Jenkin*, 6 A. & E. 911.

The like for disturbing a right of common by removing the manure of the cattle and so impoverishing the common: Pindar v. *Wadsworth*, 2 East, 154.

The like for disturbing the plaintiff's right of common of pasture by digging up the soil and inclosing: Carr v. *Foster*, 3 Q. B. 581; *Ricketts* v. *Salwey*, 2 B. & Ald. 360.

COMPANY (*f*).

Claim against a Railway Company for Negligence causing personal Injuries to a Passenger: see "Carriers," ante, p. 337.

(*f*) With respect to actions by and against incorporated companies for wrongs generally, see "*Corporation*," *post*, p. 359.

A person induced by the fraudulent misrepresentations of the agents of a joint-stock company to become a shareholder in the company cannot sue the company for damages for the fraud whilst he remains a shareholder; and, therefore, if the rescission of his contract with the company becomes impossible, by the winding up of the company or by other means, he cannot maintain such action, though he may sue such of the directors or other officers or agents of the company as are personally responsible for the misrepresentations (*Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317). Directors acting within their powers, and in accordance with the view they have honestly

By an Owner of Land against a Company for a Mandamus requiring them to issue their Warrant to the Sheriff to summon a Jury in a disputed Compensation under the Lands Clauses Consolidation Act, 1845 (g).

1. The plaintiff's claim is for a mandamus commanding the defendants who are a company incorporated by the —— Act [*state the company's*

arrived at are not liable to their company for losses occasioned by their mistakes, even if by more care they would have avoided those mistakes, but they are in general liable for those caused by acts of theirs which they knew, or must be taken to have known, were *ultra vires*, or by conduct on their part such as amounts to gross negligence (*In re Faure Electric Co.*, 40 Ch. D. 141, 150; 58 L. J. Ch. 48; *Lagunas Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392; 68 L. J. Ch. 689; *In re National Bank, Ib.* 629, 671). Directors are not merely by virtue of their positions, agents the one of another, and responsible for each other's acts or conduct in relation to the company (*Cargill* v. *Bower*, 10 Ch. D. 502; 47 L. J. Ch. 649).

As to actions against directors or promoters for misrepresentations in prospectuses, &c., see *post*, p. 401.

An action will lie for maliciously presenting a winding-up petition against a solvent company. (See *post*, p. 425.)

Companies constituted by Act of Parliament incorporating the Companies Clauses, &c. Act, 1845, or containing similar provisions, are, in general, under a statutory obligation to register the names of shareholders on proper application being made, and, if they wrongfully refuse or neglect to perform this duty, the person aggrieved by such neglect may sue them in an action for damages (*Daly* v. *Thompson*, 10 M. & W. 309; *Norris* v. *Irish Land Co.*, 8 E. & B. 512; 27 L. J. Q. B. 115; *Copeland* v. *North Eastern Ry. Co.*, 6 E. & B. 277; *Catchpole* v. *Ambergate Ry. Co.*, 1 E. & B. 111; 22 L. J. Q. B. 35); and for a mandamus (*Norris* v. *Irish Land Co.*; and *Copeland* v. *North Eastern Ry. Co., supra*; *Ward* v. *South Eastern Ry. Co.*, 2 E. & E. 812; 29 L. J. Q. B. 177; and see "*Mandamus*," *post*, p. 428). So, also, an action for mandamus or injunction may be brought against them, if they wrongfully remove a shareholder's or stockholder's name from the register and improperly insert another name in its place (*Eustace* v. *Dublin Ry. Co.*, L. R. 6 Eq. 182; 37 L. J. Ch. 716; and see *Barton* v. *L. & N. W. Ry. Co.*, 38 Ch. D. 144; *Barton* v. *North Staff. Ry. Co.*, 38 Ch. D. 458; 57 L. J. Ch. 800).

As to actions for wrongfully declaring the plaintiff's shares forfeited and selling them, see *Catchpole* v. *Ambergate Ry. Co., supra*.

Companies registered under the Companies Act, 1862, are under a like obligation to keep a register of shareholders (see s. 25), and if, where they are not justified by their Articles of Association in refusing to register, they wrongfully refuse or neglect to register the transferee, whose transfer is in proper form and duly stamped, as a shareholder in respect of the shares, or if they refuse or neglect to replace on the register a shareholder's name which has been wrongfully removed, the person aggrieved may sue them for damages and for a mandamus. (See *Swan* v. *North British Co.*, 7 H. & N. 603; 2 H. & C. 175; 32 L. J. Ex. 273; *Tompkinson* v. *Balkis Co.*, [1891] 2 Q. B. 614; [1893] A. C. 396; *In re Ottos Mines*, [1893] 1 Ch. 618; *Maynard* v. *Kent Collieries*, [1903] 2 K. B. 121; 72 L. J. K. B. 681; and "*Mandamus*," *post*, p. 429.)

A summary remedy is provided by s. 35, as regards any company registered in England, by motion or application at Chambers for an order for the rectification of the register, and for the payment by the company of any damages the party aggrieved may have sustained (*In re Ottos Mines, supra*; see also s. 98, and the Companies Act, 1867, s. 26). This jurisdiction will not, however, be exercised in complicated and doubtful cases (*Ex p. Shaw*, 2 Q. B. D. 463; 46 L. J. Ex. 65; *Ex p. Parker*, L. R. 2 Ch. 685; 15 W. R. 1217), and in such last-mentioned cases an action may still be necessary (Buckley, 8th ed., pp. 109 *et seq.*).

(*g*) A notice to treat for the sale of lands under s. 18 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), creates what for most purposes amounts to a

special Act] which incorporates the provisions of the Lands Clauses Consolidation Act, 1845 [*or, state which of such provisions so far as is material*],

relation of vendor and purchaser between the landowner and the company giving the notice, even where the land has not been actually taken by the company (*Tiverton Ry. Co.* v. *Loosemore*, 9 App. Cas. 480, 493; 53 L. J. Ch. 812; *Shepherd* v. *Norwich*, 30 Ch. D. 553; 54 L. J. Ch. 1050). The company, after giving such notice, may be compelled to have the value of the land assessed in the statutory manner (see s. 68), and if they refuse or neglect to issue their warrant to the sheriff for that purpose, after the proper steps have been taken by the landowner, an action may be brought against them for a mandamus to compel them to perform that duty, and the landowner may also claim damages in such action. (See *Ib.*; *Fotherby* v. *Metropolitan Ry. Co.*, L. R. 2 C. P. 188; 36 L. J. C. P. 88; *Morgan* v. *Metropolitan Ry. Co.*, L. R. 3 C. P. 553; 4 *Ib.* 97; 37 L. J. C. P. 265; 38 L. J. C. P. 87; *Guest* v. *Poole Ry. Co.*, L. R. 5 C. P. 553; 39 L. J. C. P. 329; see "*Mandamus*," *post*, p. 428.)

When the compensation claimed exceeds £50, it is in effect enacted by s. 68 of the last-mentioned Act that where notice has been duly given by a party entitled to compensation of his desire to have the amount settled by a jury, and the company have not paid or entered into a written agreement to pay the amount claimed, and have neglected to issue within due time their warrant to the sheriff to summon a jury to settle the amount, the company thereby become liable to pay to him the whole amount claimed by him. (See *Railstone* v. *York Ry. Co.*, 15 Q. B. 404; *Glyn* v. *Aberdare Ry. Co.*, 6 C. B. N. S. 359; 28 L. J. C. P. 271; *Knapp* v. *London, C. & D. Ry. Co.*, 2 H. & C. 212; 32 L. J. Ex. 236; *Barker* v. *Met. Ry. Co.*, 17 C. B. N. S. 785.) But so far as regards railway companies, the provisions of s. 68 have been modified by the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), which in substance enacts, by s. 41, that either party may, before the issue of the warrant to the sheriff, apply for a judge's order for the question of compensation to be stated in the form of an issue and tried in the High Court (see *In re East London Ry. Co.*, 24 Q. B. D. 507); and the same Act, by s. 42, enacts that the obtaining by the company of such judge's order shall be a satisfaction of the duty on the part of the company to issue such warrant to the sheriff.

When the amount of compensation is assessed by a jury the verdict is, unless set aside by legal proceedings, conclusive as to the amount of compensation, but it is not conclusive as to the right, which may be disputed in an action for the amount (*Read* v. *Victoria Ry. Co.*, 1 H. & C. 826; 32 L. J. Ex. 167; *Mortimer* v. *South Wales Ry. Co.*, 1 E. & E. 375; 28 L. J. Q. B. 129; *In re East London Ry. Co.*, *supra*). So, also, the award of an arbitrator as to the compensation to be paid under the Act is, in general, conclusive as to the amount (*Beckett* v. *Midland Ry. Co.*, L. R. 1 C. P. 241; 35 L. J. C. P. 163; *Rhodes* v. *Airedale Commissioners*, L. R. 9 C. P. 508; 1 C. P. D. 402; 45 L. J. C. P. 861; *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418; 41 L. J. Ex. 137; and see *Brierley Hill Local Board* v. *Pearsall*, 9 App. Cas. 595). But it would appear to be a good defence to an action on such award that the award is for an entire sum, including compensation for non-compensable matters which cannot be severed from the rest (*Beckett* v. *Midland Ry. Co.*, *supra*; *Rhodes* v. *Airedale Commissioners*, *supra*), though the verdict of a jury, so long as it is not set aside, cannot be impeached in an action brought to enforce it because it includes non-compensable items, if it also includes compensable items (*Metropolitan Board* v. *Howard*, 5 Times Rep. 732; *Long Eaton Recreation Co.* v. *Midland Ry. Co.*, [1902] 2 K. B. 574, 579; 71 L. J. K. B. 837). The ordinary and proper mode of enforcing payment of the compensation, whether assessed by a jury or by an arbitrator, is by action on the verdict or award, as the case may be. (See *Buccleuch* v. *Metropolitan Board of Works*, *supra*; *Long Eaton Recreation Co.* v. *Midland Ry. Co.*, *supra*; *Dawson* v. *G. N. & City Ry. Co.*, [1905] 1 K. B. 260; 74 L. J. K. B. 190.)

As to the action to enforce an award under the Lands Clauses Act, 1845, *ante*, p. 156.

to issue their warrant to the sheriff of —— requiring him to summon a jury to settle and determine by their verdict the question of disputed compensation within the meaning of the said Act, which had arisen between the plaintiff and the defendants, the defendants having wrongfully neglected to issue such warrant.

2. The compensation claimed by the plaintiff exceeded £50, and is claimed by the plaintiff in respect of his interest as owner of lands required, by a notice to treat dated the —— —— 19—, duly given by the defendants to the plaintiff, to be taken by the defendants for their works [and injuriously affected by the execution of the defendant's works].

The plaintiff claims a mandamus commanding the defendants to issue the said warrant.

CONSPIRACY. See "*Trade Disputes*," *post*, p. 489.

CONVERSION (*h*).

Claim for Conversion of Goods.

The plaintiff has suffered damage by the defendant converting to his own use and wrongfully depriving the plaintiff of the plaintiff's goods, that is to

To entitle a party, none of whose land has been taken, to compensation under the Lands Clauses Consolidation Act, 1845, for injurious affection of land or buildings, the injury must be such as, but for the statute authorising the acts done, would have supported an action, and the damage must be damage arising from the construction or execution of the works, and not from the authorised use of the railway, &c. after its completion (*Caledonian Ry. Co.* v. *Walker*, 7 App. Cas. 259; *Att.-Gen.* v. *Met. Ry. Co.*, [1894] 1 Q. B. 384).

Where some of the claimant's land is taken, the right to compensation is not thus restricted, and it would appear that matters which would on a voluntary sale be taken into account may be considered, so that the claimant may in such cases have, in effect, compensation for the injury that his land not taken will sustain by reason of the use of the railway when made on that part of his land which is taken (*Buccleuch* v. *Metropolitan Board*, *supra*; *Cowper Essex* v. *Acton Local Board*, 14 App. Cas. 153; 58 L. J. Q. B. 594), in addition to compensation for damage arising from the construction or execution of the works.

(*h*) This action was called *trover* from the original form of the declaration, when it was applicable only to the case of goods lost and found, and converted by the finder to his own use. It may now perhaps be more correctly designated as a *conversion* of goods, the term adopted in the schedule to the C. L. P. Act, 1852 (15 & 16 Vict. c. 76), and in App. C. of the R. S. C., 1883.

A conversion is a wrongful interference with goods, as by taking, using, or destroying them, inconsistent with the owner's right of possession (*Fouldes* v. *Willoughby*, 8 M. & W. 540; *Simmons* v. *Lillystone*, 8 Ex. 431, 442; *Hiort* v. *L. & N. W. Ry. Co.*, 4 Ex. D. 188; 48 L. J. Ex. 545; *Hollins* v. *Fowler*, L. R. 7 H. L. 757; 44 L. J. Q. B. 169; *Heald* v. *Carey*, 11 C. B. 977; 21 L. J. C. P. 97; *Burroughs* v. *Bayne*, 5 H. & N. 296; 29 L. J. Ex. 185; *Pillott* v. *Wilkinson*, 2 H. & C. 72; 3 *Ib.* 345; 32 L. J. Ex. 201; 34 *Ib.* 22; *Hiort* v. *Bott*, L. R. 9 Ex. 86; 43 L. J. Ex. 81). To constitute this injury there must be some act of the defendant repudiating the owner's right, or some

say —— [*describing the goods*] by —— [*describing the conversion relied on, as, for instance*, by refusing on the —— ——, 19—, to deliver them up to the plaintiff on demand made verbally on that day].

[*Add particulars of any special damage.*]

The plaintiff claims £——.

---

exercise of dominion inconsistent with it (*Ib.*; *Jones* v. *Hough*, 5 Ex. D. 115; 49 L. J. Ex. 211; *Fine Art Society* v. *Union Bank*, 17 Q. B. D. 705; 56 L. J. Q. B. 70; *Union Credit Bank Cases*, [1899] 2 Q. B. 205, 216; 68 L. J. Q. B. 842). A mere contract of sale of goods, not in market overt, without delivery or change of possession, or transfer of the documents of title by which possession may be obtained, as it does not affect the property in the goods, is not a conversion by the seller (*Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L. J. Ex. 231; and see *Barker* v. *Furlong*, [1891] 2 Ch. 172; 60 L. J. Ch. 368).

The purchase of goods which the seller had no right to sell, accompanied by taking possession, is a conversion by the purchaser, although the purchaser did not know the sale was wrongful (*Fine Art Society* v. *Union Bank*, 17 Q. B. D. 705, 712; 56 L. J. Q. B. 70); so where a principal ratifies the unauthorised purchase on his behalf by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion (*Hilbery* v. *Hatton*, 2 H. & C. 822; 33 L. J. Ex. 190).

Where the plaintiff placed his goods on board the defendant's ship to be carried, the refusal of the defendant to give the plaintiff bills of lading in his own name, and the denial of his title as owner, and the taking of the goods to a person not intended by the owner to have them, was held to amount to a conversion (*Falk* v. *Fletcher*, 18 C. B. N. S. 403; 34 L. J. C. P. 146; and see *Jones* v. *Hough*, *supra*). A refusal to sign bills of lading containing a certain clause to which the owner was entitled, and the sailing with the cargo on board without any bills of lading being signed, but without any denial of the owner's title or demand by him of re-delivery, was held to be a breach of contract, but no conversion (*Jones* v. *Hough*, *supra*).

A banker who receives from his customer a cheque, post office order, or bill belonging not to his customer, but to some other person, may, by getting it cashed, collected or discounted, be liable for a conversion of it, if his customer is acting wrongfully, and without the authority of the true owner, in cases where the currency or negotiability of the instrument does not afford an answer by giving to such banker or customer a good title as a *bonâ fide* holder for value, or where the banker has no special protection such as that afforded by s. 82 of the Bills of Exchange Act, 1882, *ante*, p. 128, in the case of receiving payment of a crossed cheque (*Fine Art Society* v. *Union Bank*, *supra*; *Lacave* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148; 66 L. J. Q. B. 226; *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240; 72 L. J. 451; and see C. A., [1902] 1 K. B. 242, 264, 277).

Where the conversion cannot be proved by any positive act, it may be inferred from proof of a demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, he having the control over them at the time (*Philpott* v. *Kelley*, 3 A. & E. 106; *Verrall* v. *Robinson*, 2 C. M. & R. 495; *Catterall* v. *Kenyon*, 3 Q. B. 310; *M'Kewen* v. *Cotching*, 27 L. J. Ex. 41; *Walker* v. *Clyde*, 10 C. B. N. S. 381; *France* v. *Gaudet*, L. R. 6 Q. B. 199; 40 L. J. Q. B. 121).

A demand and refusal is always *evidence* of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion (*per* Blackburn, J., in *Hollins* v. *Fowler*, L. R. 7 H. L. 757, 766; 44 L. J. Q. B. 169, 174). If the refusal is by a person who does not know the plaintiff's title, and having a *bonâ fide* doubt as to the title to the goods detains them for a reasonable time, for clearing up that doubt, it is not a conversion (*Ib.*; *Isaac* v. *Clarke*, 2 Buls. 306, 312; *Vaughan* v. *Watt*, 6 M. & W. 492; 9 L. J. Ex. 272). So a finder, or an involuntary bailee of goods is justified in taking steps for their protection and safe custody until he finds the owner, and it is no conversion to

remove them *bonâ fide* to a place of security. (See *per* Blackburn, J., *Hollins* v. *Fowler*, *supra*; and see *Kirk* v. *Gregory*, 1 Ex. D. 55; 45 L. J. Ex. 186.)

A warehouseman with whom goods have been deposited is not guilty of conversion by merely keeping them or restoring them to the depositor, though that person turns out to have had no authority from the true owner (*per* Blackburn, J., *Hollins* v. *Fowler*, *supra*; *Heald* v. *Carey*, 11 C. B. 977; 21 L. J. C. P. 97; *Alexander* v. *Southey*, 5 B. & Ald. 247; *Glyn* v. *East & West India Dock Co.*, 6 Q. B. D. 475, 491); but he becomes guilty of a conversion if, after demand by the true owner, he nevertheless persists in restoring them to such depositor, the assumption and exercise of dominion over a chattel inconsistent with the title of the true owner being a conversion. (See *per* Brett, J., in *Hollins* v. *Fowler*, *supra*; *Hiort* v. *Bott*, L. R. 9 Ex. 86; 43 L. J. Ex. 81.) The same principle would seem applicable to carriers and the like (*Ib.*; *Greenway* v. *Fisher*, 1 C. & P. 190, as to which see *per* Blackburn, J., in *Hollins* v. *Fowler*, L. R. 7 H. L. 768; 44 L. J. Q. B. 175). If a man steals a chattel and takes it to a carrier to be carried to A., and there delivered to X., and the carrier takes, carries, and delivers the chattel accordingly, it is clear that the carrier would not be guilty of a conversion (*per* Bramwell, L.J., *Glyn* v. *East and West India Dock Co.*, *supra*).

If some time is necessarily taken by the defendant to obtain actual possession of the goods and deliver them up, and he does not make any unnecessary delay in doing so, he is not on that account guilty of a conversion (*Towne* v. *Lewis*, 7 C. B. 608).

A conversion differs from a mere trespass; the former must amount to a deprivation of the possession to such an extent as to be inconsistent with the right of the owner, and evidence an intention to deprive him of that right; whereas the latter includes every direct forcible injury or act disturbing the possession without the consent of the owner, however slight or temporary the act may be (*Fouldes* v. *Willoughby*, 8 M. & W. 540; and see *per* Parke, J., *Smith* v. *Goodwin*, 4 B. & Ad. 420).

A limited interference with the plaintiff's goods where all along the plaintiff is himself in possession, does not constitute conversion (*England* v. *Cowley*, L. R. 8 Ex. 126; 42 L. J. Ex. 80).

If a pawnbroker, with whom goods are wrongfully pledged without the assent of the owner, refuses on demand by the owner to restore them to him, this is a conversion by such pawnbroker (*Singer Co.* v. *Clark*, 5 Ex. D. 37; 49 L. J. Ex. 224; see *ante*, p. 270).

If a bailee of chattels deals with the chattels in a manner inconsistent with the purpose for which they are held, he may be guilty of a conversion, as where a carrier delivers goods to the wrong person (*Devereux* v. *Barclay*, 2 B. & Ald. 702; *Stephenson* v. *Hart*, 4 Bing. 476, 483; *Wyld* v. *Pickford*, 8 M. & W. 443; *Hiort* v. *London and North Western Ry. Co.*, 4 Ex. D. 188, 194; 48 L. J. Ex. 545, 546).

A mere omission or negligence of a bailee, or person entrusted with the possession for a special purpose in the course of his employment, is not a conversion; thus, the loss of goods by a carrier is not a conversion (2 Wms. Saund., 1871 ed., 103; *Ross* v. *Johnson*, 5 Burr. 2825; *Williams* v. *Gesse*, 3 Bing. N. C. 849; *Kirkman* v. *Hargreaves*, 1 Selw. N. P., 13th ed., 364); nor is delivery of the goods in the ordinary course of business at the place directed, although they are delivered to someone not intended by the sender (*M'Kean* v. *M'Ivor*, L. R. 6 Ex. 36; 40 L. J. Ex. 30).

There is a distinction between a pledge, and a bailment giving a lien without power of sale. In the latter case an unauthorised sale or pledging of the property bailed terminates the bailment, and is a conversion, whilst in the former case a sale or subpledge is not so inconsistent with the original contract or pledge as to terminate the pledge or amount to a conversion (*Mulliner* v. *Florence*, 3 Q. B. D. 484, 492; 47 L. J. Q. B. 700, 703; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; 37 L. J. Ex. 174; *Donald* v. *Suckling*, L. R. 1 Q. B. 585; 35 L. J. Q. B. 232).

A right of lien, properly so called, is a mere personal right of detention, and an unauthorised transfer of the thing does not transfer that personal right (*per* Blackburn, J., in *Donald* v. *Suckling*, *supra*; and see, also, *Mulliner* v. *Florence*, *supra*).

In order to maintain an action for conversion the plaintiff must have the right to the immediate possession of the goods, and not merely a property in reversion, or future property (*Bradley* v. *Copley*, 1 C. B. 685; and see "*Reversion*," *post*, p. 475).

The owner of goods let to another for a term still continuing cannot maintain this action (*Gordon* v. *Harper*, 7 T. R. 9); nor can the owner of goods in the possession of another who is entitled to a lien on them (*Milgate* v. *Kebble*, 3 M. & G. 100); but any special or temporary ownership with immediate possession, as under a lien, pledge, or bailment, is sufficient to maintain the action (*Legg* v. *Evans*, 6 M. & W. 36; *Roberts* v. *Wyatt*, 2 Taunt. 268; *Brierly* v. *Kendall*, 17 Q. B. 937; *Bristol Bank* v. *Mid. Ry. Co.*, [1891] 2 Q. B. 653, 663; 61 L. J. Q. B. 115). Where goods are bailed to another for hire, the bailee is the proper person to sue for a conversion by a third party; but where the bailee terminates the bailment by any act inconsistent with it, as where the bailee of goods for hire, or a bailee having a mere personal lien without power of sale, sells them to a third party, the bailor may at once sue the purchaser or the bailee for a conversion (*Cooper* v. *Willomatt*, 1 C. B. 672; *Fenn* v. *Bittleston*, 7 Ex. 152; *Bryant* v. *Wardell*, 2 Ex. 479; *Mulliner* v. *Florence*, *supra*; *Jelks* v. *Hayward*, [1905] 2 Q. B. 460; 74 L. J. Q. B. 717).

Upon any bailment of goods which does not exclude the absolute owner's right to the immediate possession, either the bailor or the bailee may maintain an action for conversion by a third party (*Nicolls* v. *Bastard*, 2 C. M. & R. 659; *Booth* v. *Wilson*, 1 B. & Ald. 59).

The purchaser of goods which remain in the vendor's possession subject to the vendor's lien for the price, cannot maintain this action against a wrong-doer (*Lord* v. *Price*, L. R. 9 Ex. 54).

A joint owner of goods cannot maintain this action against his co-owner in respect of any act of the latter consistent with his ownership. (See *post*, p. 824.)

Where goods were pledged by four joint owners, a refusal to re-deliver upon a tender of the amount due, made by three of such joint owners acting on their own behalf, was held not to be a conversion (*Harper* v. *Godsell*, L. R. 5 Q. B. 422; 39 L. J. Q. B. 185; and see *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202; 61 L. J. Q. B. 709).

As possession in fact is evidence of the right of possession, it is sufficient to maintain the action against the wrongdoer who cannot show a better title in himself, or authority under a better title (*Elliott* v. *Kemp*, 7 M. & W. 312; *Northam* v. *Bowden*, 11 Ex. 70; *Armory* v. *Delamirie*, 1 Smith's L. C., 11th ed., p. 356; *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515; 34 L. J. C. P. 164). But if a plaintiff was not in possession at the time of the conversion, and has to rely upon his right only, he must then be able to prove a good title in order to maintain the action, the defendant being in such case at liberty to rebut the plaintiff's title by showing a *jus tertii* (*Gadsden* v. *Barrow*, 9 Ex. 514; *Leake* v. *Loveday*, 4 M. & G. 972). A defendant cannot set up a *jus tertii* where he has disturbed the actual possession of the plaintiff, unless he can justify under the authority of the third party (*Jeffries* v. *Great Western Ry. Co.*, 5 E. & B. 802; 25 L. J. Q. B. 107; *White* v. *Mullett*, 6 Ex. 713; and see *Thorne* v. *Tilbury*, 3 H. & N. 534; 27 L. J. Ex. 407; *Biddle* v. *Bond*, 6 B. & S. 225; 34 L. J. Q. B. 137; *Rogers* v. *Lambert*, [1891] 1 Q. B. 316; 60 L. J. Q. B. 187; *Glenwood Lumber Co.*, v. *Phillips*, [1904] A. C. 405, 410, 73 L. J. P. C. 62, 64).

The finder of an article in the house or on the land of another which has been left or lost there by some unknown former owner, would seem to have a sufficient title to maintain an action against a stranger for any disturbance by him of his possession of such article; and the finder would not himself, in general, be able either to defeat a claim by the owner and occupier of the house or land where it was found, to recover such article, or to maintain an action for a disturbance of his possession by such owner and occupier (*Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562; 55 L. J. Ch. 734; *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44; 65 L. J. Q. B. 460); and, as between owner and occupier, the right of the landowner would in general prevail over that of the occupier, where the article was one which was in or on the land prior to the commencement of the occupation. (See *Ib.*)

An uncertificated bankrupt having been again adjudicated bankrupt, it was held that the second assignees might maintain trover for goods acquired by the bankrupt after his first bankruptcy against all persons except the first assignees (*Morgan* v. *Knight*, 15 C. B. N. S. 669; 33 L. J. C. P. 168; *Ex p. Watson*, 12 Ch. D. 380).

Where a vendee has obtained goods by fraud or false pretences from a vendor who

has delivered possession to him with the intention of passing the property to him, the property vests in the vendee until the vendor has done some act to disaffirm the transaction. (See the Sale of Goods Act, 1893, s. 23, cited *post*, p. 846, and *Kingsford* v. *Merry*, 11 Ex. 577, 579; 25 L. J. Ex. 166, 168.) If the vendor does not treat the sale as void before the vendee has re-sold the goods to an innocent purchaser, the property passes to such purchaser, and he cannot be sued in conversion, or otherwise made liable to the original vendor (*Ib.*; *White* v. *Garden*, 10 C. B. 919; 20 L. J. C. P. 166; *Higgins* v. *Burton*, 26 L. J. Ex. 342; and see further *per* Lord Cairns in *Cundy* v. *Lindsay*, 3 App. Cas. 463, 464; 47 L. J. H. L. 481; *Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex. 26; 41 L. J. Ex. 17; *Stevenson* v. *Newnham*, 13 C. B. 285).

Where goods were pledged with the plaintiffs as security for an advance, and the pledgors, the owners, by fraud induced the plaintiffs to give them back the possession of the goods, and then pledged them to the defendants for an advance, giving a power of sale, it was held that, as the plaintiffs had parted with their special property to the pledgors, they could not recover against the defendants, who had obtained the goods *bonâ fide* and for good consideration (*Babcock* v. *Lawson*, 4 Q. B. D. 394; 5 Q. B. D. 284; 48 L. J. Q. B. 524; 48 *Ib.* 408).

The property in stolen goods re-vests in the true owner upon the conviction of the offender for larceny. (See the Sale of Goods Act, 1893, s. 24 (1), cited *post*, p. 846.)

By s. 25 of the Sale of Goods Act, 1893, it is enacted that "(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

"(2) Where a person having bought, or agreed to buy, goods, obtains, with the consent of the seller, possession of the goods, or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

"(3) In this section, the term 'mercantile agent' has the same meaning as in the Factors Acts."

A person having "agreed to buy" means a person who has bound himself to buy, not one who has merely acquired an option, whether under a hiring agreement, or otherwise (*M'Intyre* v. *Crossley*, [1895] A. C. 457; 64 L. J. P. C. 129; *Helby* v. *Matthews*, [1895] A. C. 471; 64 L. J. Q. B. 465). A similar enactment is contained in ss. 8 and 9 of the Factors Act, 1889 (52 & 53 Vict. c. 45).

Where a vendor has sold goods to A., or has been led to believe that he has sold them to A., and the person who induced him so to sell, or led him into that belief, receives the goods and disposes of them to another, there is no contract between the vendor and such person, and the latter cannot, unless by a sale in market overt, confer a good title on anyone else, the property never having been vested in him (*Hardman* v. *Booth*, 1 H. & C. 803; 32 L. J. Ex. 105; *Lindsay* v. *Cundy*, 2 Q. B. D. 96, 100; 3 App. Cas. 459; 45 L. J. Q. B. 381; 46 *Ib.* 233; 47 *Ib.* 481; *Hollins* v. *Fowler*, L. R. 7 H. L. 757; 44 L. J. Q. B. 169; *Higgins* v. *Burton*, 26 L. J. Ex. 342).

The action for conversion lies only in respect of specific personal property; it will not lie for money, though certain in amount, unless it be identified in specie (*Orton* v. *Butler*, 5 B. & Ald. 652; *Hall* v. *Wood*, Dyer, 22; Cro. Eliz. 841; *Harris' case*, Noy, 128; and see *Foster* v. *Green*, 31 L. J. Ex. 158). It does not lie for fixtures, *eo nomine*, as they form part of the land, and therefore cannot be converted (*Davis* v. *Jones*, 2 B. & Ald. 165; *Minshall* v. *Lloyd*, 2 M. & W. 450; *Wetton* v. *Woodcock*, 5 M. & W. 587; *Mackintosh* v. *Trotter*, 3 M. & W. 184; *Wilde* v. *Waters*, 16 C. B. 637; 24 L. J. C. P. 193). Though an action lies for wrongfully preventing the plaintiff from

exercising his right to remove them (*Lond. & Westminster Loan Co.* v. *Drake*, 6 C. B. N. S. 798; 28 L. J. C. P. 297). If they have been reduced to the state of moveable goods by severance, they become capable of being converted, though they should not then, strictly speaking, be described as fixtures. (See *Sheen* v. *Rickie*, 5 M. & W. 175; 7 Dowl. 335; and see *Niblet* v. *Smith*, 4 T. R. 504; *Dalton* v. *Whittem*, 3 Q. B. 961; *Wiltshear* v. *Cottrell*, 1 E. & B. 674.) So conversion lies for soil taken up from the land and removed (*Higgon* v. *Mortimer*, 6 C. & P. 616); and for coals or minerals wrongfully dug from the plaintiff's land (*Martin* v. *Porter*, 5 M. & W. 351; *Morgan* v. *Powell*, 3 Q. B. 278; *Powell* v. *Rees*, 7 A. & E. 426). So, too, it lies for a bank note, a cheque, or the like (*Burn* v. *Morris*, 2 Cr. & M. 579; *Matthiessen* v. *Lond. & County Bank*, 5 C. P. D. 7; 48 L. J. C. P. 529; *Ogden* v. *Benas*, L. R. 9 C. P. 513; 43 L. J. C. P. 250; *Fine Art Society* v. *Union Bank*, 17 Q. B. D. 705; 56 L. J. Q. B. 70).

The goods should be described in the statement of claim with sufficient certainty to inform the defendant as to the goods taken, and particulars will be ordered as to the specific goods taken where the description is only general.

The measure of damages for a conversion is *primâ facie* the value of the goods converted, but it is not necessarily so, the damages being compensation for the loss actually sustained by the wrongful act (*Johnson* v. *Lanc. & York. Ry. Co.*, 3 C. P. D. 499; *Hiort* v. *L. & N. W. Ry. Co.*, 4 Ex. D. 188; 48 L. J. Ex. 545; *Brierly* v. *Kendall*, 17 Q. B. 937; *Chinery* v. *Viall*, 5 H. & N. 288; 29 L. J. Ex. 180; *Mulliner* v. *Florence*, 3 Q. B. D. 484; 47 L. J. Q. B. 700). The value, where that is the proper measure of damages, is, in general, the price at the date of the conversion for which the owner could purchase similar goods to those converted (*Henderson* v. *Williams*, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308; *Rhodes* v. *Moules*, [1895] 1 Ch. 236, 254; 64 L. J. Ch. 122; and see *France* v. *Gaudet*, L. R. 6 Q. B. 199; 40 L. J. Q. B. 121). If the goods converted have been returned to the plaintiff, he recovers the damages sustained by the wrongful act, and not their full value (*Hiort* v. *L. & N. W. Ry. Co.*, *supra*).

Where the plaintiff could have resumed the property, if he could lay hands on it, and could have rightfully held it as the full and absolute owner, he is entitled to the value as damages in conversion (*Johnson* v. *Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130; *Johnson* v. *Lanc. & York. Ry. Co.*, *supra*).

A person having a special property in the goods, with immediate possession, can only recover against the absolute owner for a conversion by him damages in respect of such limited interest (*Roberts* v. *Wyatt*, 2 Taunt. 268; *Brierly* v. *Kendall*, 17 Q. B. 937); but in an action against a stranger who is guilty of a conversion he is entitled to recover the full value of the goods (*Turner* v. *Hardcastle*, 11 C. B. N. S. 683; 31 L. J. C. P. 193; *The Winkfield*, [1902] P. 42; 71 L. J. P. 21). Where the defendant, having obtained a judgment against the plaintiff, wrongfully refused to give up certain goods of the plaintiff then in his possession, and afterwards sold them under his judgment, the plaintiff was held entitled to recover the full value of the goods (*Edmondson* v. *Nuttall*, 17 C. B. N. S. 280; 34 L. J. C. P. 102). So where the defendant having obtained a judgment against the plaintiff, seized his goods under process, but in a place where the process did not run, the plaintiff was held entitled to recover the full value of the goods (*Sowell* v. *Champion*, 6 A. & E. 407).

Special damage sustained may be recovered, if stated and claimed (*Moon* v. *Raphael*, 2 Bing. N. C. 310; *Bodley* v. *Reynolds*, 8 Q. B. 779; *France* v. *Gaudet*, L. R. 6 Q. B. 199; 40 L. J. Q. B. 121).

By 3 & 4 Will. 4, c. 42, s. 29, in all actions for conversion the jury may, if they shall think fit, give damages in the nature of interest over and above the value of the goods.

A judgment in conversion or detinue for the whole value of the goods, if followed by satisfaction, vests the property in the goods in the defendant. (See "*Judgment Recovered*," *post*, p. 863.)

In this action the Court will sometimes stay proceedings upon a return of the goods and payment of nominal damages and costs, and on such other terms as the Court thinks proper to impose; but the general practice would appear to be, that if the plaintiff will not consent to accept a return of the goods on the terms considered proper by the Court, he will be allowed to proceed with his action, but if he fail to get

The like.

The plaintiff has suffered damage by the defendant on the —— ——, 19—, wrongfully depriving the plaintiff of two casks of oil, by refusing verbally [*or*, by letter dated —— ——, 19—, *or, as the case may be*] to give them up on demand [*or*, by throwing them overboard out of a boat in the London Docks, &c.].

Particulars :—

The value of the said two casks was £——.

[*Add particulars of any special damage claimed.*]

The plaintiff claims £——.

(*See R. S. C.*, 1883, *App. C., Sect. VI., No.* 1.)

Against an Auctioneer for a Conversion of the Defendant's Goods by selling them for a Third Person, and delivering them to the Purchaser (*i*).

The plaintiff has suffered damage by the defendant on the —— ——, 19—, wrongfully depriving the plaintiff of a pianoforte [*or*, 6 chairs, *or, as the case may be*], the property of the plaintiff, by selling the same by public auction on behalf of and as the property of *E. F.*, and delivering it [*or*, them] to the highest bidder at the said auction as the purchaser thereof.

Particulars :—

The value of the piano [*or*, 6 chairs] was £——.

See a form of Claim against a Warehouseman for wrongly delivering a Motor Car to a third party, and against the latter for its Conversion: Solomon v. *Mulliner*, [1901] 1 Q. B. 76 ; 70 L. J. Q. B. 165.

For Trespass to the House of the Plaintiff, and wrongful Seizure of the Goods of the Plaintiff therein, with a Claim for Conversion of the Goods seized: see "*Trespass*," *post*, p. 503.

---

substantial damages, and so justify his refusal, he may be made to pay the costs subsequent to the application (*Moon* v. *Raphael*, 2 Bing. N. C. 310, 314 ; *Hiort* v. *London and North Western Ry. Co.*, 4 Ex. D. 188, 195 ; 48 L. J. Ex. 545).

(*i*) An auctioneer or other person selling goods under the instructions or orders of, or in pursuance of a contract made by himself with a person having no right to dispose of such goods, and delivering possession to the purchaser, is guilty of a conversion (*Hollins* v. *Fowler*, L. R. 7 H. L. 757 ; 44 L. J. Q. B. 169 ; *Barker* v. *Furlong*, [1891] 2 Ch. 172 ; 60 L. J. Ch. 368 ; *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495 ; 61 L. J. Q. B. 325). So is a sheriff or bailiff who sells under an execution goods not belonging to the judgment debtor (*Jelks* v. *Hayward*, [1905] 2 Q. B. 460 ; 74 L. J. K. B. 717).

By the Grantee of a Bill of Sale of Household Furniture against a Person who has taken Possession thereof under a wrongful Sale by the Grantor (*k*).

The plaintiff has suffered damage by the defendant on —— ——, 19—, wrongfully depriving the plaintiff of the household furniture and effects of the plaintiff, which were in No. —, —— Street, ——, by refusing verbally on the —— ——, 19— [*or*, by letter dated —— ——, 19—, *or*, *as the case may be*], to give them up on demand [*or*, by removing them on the —— ——, 19—, to the defendant's shop at ——, and there selling them as the property of the defendant, *or*, *as the case may be*].

Particulars :—

Claim for wrongful Conversion of Cheques and Bills belonging to the Plaintiff, with an alternative Claim for the Proceeds thereof: see "*Money Received*," *ante*, p. 263.

COPYRIGHT (*l*).

Claim for Damages for the Infringement of Copyright in a Book.

The defendant has infringed the plaintiff's copyright in a book entitled "The History of Rome," registered on the —— ——, 19—.

Particulars of the infringement are as follows :—

[*Here state the facts as to the infringement.*]

(*k*) A person who takes the property of another by assignment from a third party who has no right or authority to dispose of it is, in general, guilty of conversion (*McCombie* v. *Davies*, 6 East, 538, 540; *Fine Art Society* v. *Union Bank*, 17 Q. B. D. 705, 712; 56 L. J. Q. B. 70). An authority to dispose of another's property may be conferred by implication. Thus, a bill of sale of stock in trade, when the trade is to be carried on, is subject to an implied condition that the grantor shall have liberty to deal with the goods in the ordinary way of his trade, and any *bonâ fide* purchaser buying from him in such way obtains a good title (*National Merc. Bank* v. *Hampson*, 5 Q. B. D. 177; 49 L. J. Q. B. 480; *Walker* v. *Clay*, 49 L. J. C. P. 560; 42 L. T. 369). But if the disposition of the goods is not *bonâ fide*, and in the ordinary course of business, the grantee may demand such goods from the purchaser, and upon his refusal to give them up maintain an action against him for their conversion (*Taylor* v. *M'Keand*, 5 C. P. D. 358; 49 L. J. C. P. 563; *Payne* v. *Fern*, 6 Q. B. D. 620).

(*l*) Copyright in works of literature and art, after publication, exists only by statute (*Jefferys* v. *Boosey*, 4 H. L. C. 876; 24 L. J. Ex. 81; *Reade* v. *Conquest*, 9 C. B. N. S. 755; 30 L. J. C. P. 209; *Tuck* v. *Priester*, 19 Q. B. D. 629; 56 L. J. Q. B. 553). As to the right, existing independently of statute, to prevent or recover compensation for unauthorised copying *before* publication, see *Ib.*; and see *Prince Albert* v. *Strange*, 1 Mac. & G. 25; *Pollard Photographic Co.*, 40 Ch. D. 345; 58 L. J. Ch. 251; *Exchange Telegraph Co.* v. *Gregory*, [1896] 1 Q. B. 147; 65 L. J. Q. B. 262; *Exchange Telegraph Co.* v. *Central News*, [1897] 2 Ch. 48; 66 L. J. Ch. 672.

The statutes regulating copyright are as follows :—

Literary Copyright.]—The Copyright Act, 1842 (5 & 6 Vict. c. 45), regulates the

Particulars of special damage are as follows :—

Loss of sale of 50 copies	£50
Loss of profit in the copyright	50
	£100

The plaintiff claims £100.

---

copyright in books, which term (by s. 2) includes "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan, separately published."

The periods of copyright are defined by ss. 3 and 4 ; and s. 15 gives to the proprietor of the copyright an action for infringement.

Sects. 11, 13, and 19, provide for the registration of the book by the proprietor of the copyright ; and by s. 24, such registration is made a condition precedent to an action for infringement of the copyright. (See "*Copyright*," *post*, p. 827.)

Sect. 23 provides that all copies of the book which shall have been unlawfully printed or imported without the written consent of the registered proprietor of the copyright, shall be deemed to be his property, and that, after demand thereof in writing, he may sue for and recover the same, or damages for the detention or conversion thereof. (See *post*, p. 355.)

Provision is made by s. 18 as to the copyright in articles in periodicals, &c. ; and by s. 19, registration of the first number, or part of a periodical, is sufficient to give copyright in the subsequent numbers or parts as they come out. (See *Henderson* v. *Maxwell*, 4 Ch. D. 163 ; 46 L. J. Ch. 59 ; *Johnson* v. *Newnes, Ld.*, [1894] 3 Ch. 663 ; 63 L. J. Ch. 786 ; and the cases next cited.) These enactments of ss. 18, 19, apply (*inter alia*) to newspapers (*Walter* v. *Howe*, 17 Ch. D. 708 ; 50 L. J. Ch. 621 ; *Trade Auxiliary Co.* v. *Middlesbrough Association*, 40 Ch. D. 425 ; 58 L. J. Ch. 293 ; *Cate* v. *Devon Newspaper Co.*, 40 Ch. D. 500 ; 58 L. J. Ch. 288).

An assignment of the copyright may be made either by entry in the register under ss. 11, 13, or by an assignment in writing between the parties (*Wood* v. *Boosey*, L. R. 2 Q. B. 340 ; 3 *Ib.* 223 ; *Leyland* v. *Stewart*, 4 Ch. D. 419 ; 46 L. J. Ch. 103), but in the latter case the assignee cannot sue for infringement until he has been registered (*Liverpool, &c. Association* v. *Commercial Press*, [1897] 2 Q. B. 1 ; 66 L. J. Q. B. 405). See, as to artistic copyright, *London Printing Alliance* v. *Cox*, [1891] 3 Ch. 291 ; 60 L. J. Ch. 707 ; *Petty* v. *Taylor*, [1897] 1 Ch. 465 ; 66 L. J. Ch. 209.

There is no copyright in immoral or illegal publications. (See *Southey* v. *Sherwood*, 2 Mer. 435, 439 ; *Stockdale* v. *Onwhyn*, 5 B. & S. 173.)

As to infringing the copyright in a dictionary, see *Spiers* v. *Brown*, 6 W. R. 352 ; in a directory, *Kelly* v. *Morris*, L. R. 1 Eq. 697 ; 35 L. J. Ch. 423 ; *Morris* v. *Ashbee*, L. R. 7 Eq. 34 ; *Morris* v. *Wright*, L. R. 5 Ch. 279 ; *Kelly* v. *Byles*, 13 Ch. D. 682 ; 49 L. J. Ch. 181 ; in a telegraph code, *Agar* v. *Peninsular, &c. Co.*, 26 Ch. D. 637 ; 53 L. J. Ch. 589 ; in statistical returns, *Scott* v. *Stanford*, L. R. 3 Eq. 718 ; 36 L. J. Ch. 729 ; in a descriptive catalogue and books of designs, *Hotten* v. *Arthur*, 1 H. & M. 603 ; 32 L. J. Ch. 771 ; *Grace* v. *Newman*, L. R. 19 Eq. 623 ; 44 L. J. Ch. 298 (as to which see *Petty* v. *Taylor*, *supra*) ; *Maple* v. *Junior Stores*, 21 Ch. D. 369 ; 52 L. J. Ch. 67 ; *Collis* v. *Cater*, 78 L. T. 613 ; in articles or tales published in periodicals, *Smith* v. *Johnson*, 4 Giff. 632 ; 33 L. J. Ch. 137 ; *Henderson* v. *Maxwell*, 4 Ch. D. 163 ; 5 *Ib.* 892 ; in information as to circular tours, *Leslie* v. *Young*, [1894] A. C. 534. As to copyright in newspapers, see *Kelly* v. *Hutton*, L. R. 3 Ch. 703 ; 37 L. J. Ch. 917 ; *Platt* v. *Walter*, 17 L. T. 157 ; *Walter* v. *Howe*, 17 Ch. D. 708 ; 50 L. J. Ch. 621 ; *Trade Auxiliary Co.* v. *Middlesbrough Assoc.*, 40 Ch. D. 425 ; 58 L. J. Ch. 293 ; *Cate* v. *Devon Newspaper Co.*, 40 Ch. D. 500 ; 58 L. J. Ch. 288 ; *Walter* v. *Steinkopff*, [1892] 3 Ch. 489 ; 61 L. J. Ch. 521 ; *Lamb* v. *Evans*, [1893] 1 Ch. 218 ; 62 L. J. Ch. 404 ; in articles in an encyclopædia, see *Lawrence* v. *Aflalo*, [1904] A. C. 17 ; 73 L. J. Ch. 85 ; in reports of speeches, see *Walter* v. *Lane*, [1900] A. C. 539 ; 69 L. J. Ch. 699. A race card giving a list of horses selected as probable winners by various newspapers was held not to infringe the

copyright in the newspapers. The statement by a newspaper of its selection of a horse as a probable winner is not a "literary composition" which can be protected by the Act (*Chilton* v. *Progress Printing Co.*, [1895] 2 Ch. 29; 64 L. J. Ch. 510). Nor is a dressmaker's pattern card with scales for measurement upon it (*Hollinrake* v. *Truswell*, [1894] 3 Ch. 420; 63 L. J. Ch. 719).

A copyright in a book under the 5 & 6 Vict. c. 45, may be infringed by the defendant's gratuitously printing and circulating copies among a limited class of persons (*Agar* v. *Peninsular, &c. Co.*, 26 Ch. D. 637; 53 L. J. Ch. 509; *Trade Auxiliary Co.* v. *Middlesbrough Assoc.*, 40 Ch. D. 425; 58 L. J. Ch. 293); or even by his making and distributing gratuitously a few copies of it in manuscript (*Warne* v. *Seebohm*, 39 Ch. D. 73; 57 L. J. Ch. 689).

The protection of copyright in a work given by 5 & 6 Vict. c. 45, extends over the whole of the British dominions and is afforded to every author, whether an alien or not, who, being at the time of first publication a resident within any portion of the British dominions, first publishes such work in the United Kingdom (*Routledge* v. *Low*, L. R. 3 H. L. 100; 37 L. J. Ch. 454). A first publication in a foreign country out of the King's dominions deprives the author, whether a British subject or a foreigner, of any copyright here, save such as he may acquire under the International Copyright Acts (*Jefferys* v. *Boosey*, 4 H. L. C. 815; 24 L. J. Ex. 81; *Boucicault* v. *Chatterton*, 5 Ch. D. 267; 46 L. J. Ch. 335). As to books published in parts, see *Reid* v. *Maxwell*, 2 Times Rep. 790.

Oral Lectures.]—Copyright is regulated as to oral lectures by 5 & 6 Will. 4, c. 85. (See *Caird* v. *Sime*, 12 App. Cas. 326; 57 L. J. P. C. 2; *Nicols* v. *Pitman*, 26 Ch. D. 374; 53 L. J. Ch. 552.)

Dramatic and Musical Copyright.]—The rights in respect of the public representation or performance of dramatic pieces and musical compositions are regulated by the 3 & 4 Will. 4, c. 15, as extended and modified by ss. 20—22 of the Copyright Act, 1842. The rights in respect of the performance of musical compositions have been further modified by the Copyright (Musical Compositions) Acts, 1882 and 1888 (45 & 46 Vict. c. 40, and 51 & 52 Vict. c. 17).

By s. 3 of 3 & 4 Will. 4, c. 15, actions for any offence against that Act must be commenced within twelve months after the committing of the offence.

When dramas or musical compositions have been printed and published, there is also a literary copyright in them as "books" under the Copyright Act, 1842, as to which, *vide supra*.

A song which requires neither scenery nor dramatic effect for its representation, although intended to be sung on the stage of music halls in appropriate costume, is not a dramatic piece (*Fuller* v. *Blackpool Winter Gardens Co.*, [1895] 2 Q. B. 429; 64 L. J. Q. B. 699).

The registration of dramatic pieces or musical compositions is not a condition precedent to an action for infringement of the sole right of representation or performance. (See the Copyright Act, 1842, s. 24; *Reichardt* v. *Sapte*, [1893] 2 Q. B. 308.)

To constitute an infringement of the right of representation of a drama, the representation complained of must have been "at a place of dramatic entertainment" (3 & 4 Will. 4, c. 15, s. 2; see *Duck* v. *Bates*, 13 Q. B. D. 843; 53 L. J. Q. B. 338); but these words are not incorporated by ss. 20, 21 of the Copyright Act, 1842, which extends to musical compositions the remedies given as to dramatic pieces by 3 & 4 Will. 4, c. 15, and it is sufficient, therefore, to constitute an infringement of the sole right of performance of a musical composition, if there is an unauthorised performance of it in public, *e.g.*, at a concert or tea-meeting (*Wall* v. *Taylor*, 9 Q. B. D. 727; 11 *Ib.* 102; 51 L. J. Q. B. 547; 52 *Ib.* 558).

The amount of "not less than forty shillings," recoverable under the 3 & 4 Will. 4, c. 15, s. 2, for infringement of the exclusive right of representation of a dramatic piece, is in the nature of liquidated damages and is not a mere penalty (*Adams* v. *Batley*, 18 Q. B. D. 625; 56 L. J. Q. B. 393. See 51 & 52 Vict. c. 17, s. 1).

In an action for an unauthorised performance of a dramatic piece or musical

The like.—A fuller Form, with Claims for Delivery of unauthorised Copies of the Book and for an Injunction (m).

1. The defendant has infringed the plaintiff's copyright in a book entitled "——," registered on the —— ——, 19—.

---

composition, it is no defence that the piece or composition was published as a book before any public performance or representation thereof (*Chappell* v. *Boosey*, 21 Ch. D. 232; 51 L. J. Ch. 625).

Dramatising and representing a novel on the stage is not an infringement of the literary copyright in the novel (*Reade* v. *Conquest*, 9 C. B. N. S. 755; 30 L. J. C. P. 209; *Toole* v. *Young*, L. R. 9 Q. B. 523; 43 L. J. Q. B. 170). But making and distributing in print or manuscript, even gratuitously, copies of a drama in which the scenes and language of a novel are copied, is an infringement of the copyright in the latter (*Warne* v. *Seebohm*, 39 Ch. D. 73; 57 L. J. Ch. 689; see *Tinsley* v. *Lacey*, 1 H. & M. 747; 32 L. J. Ch. 535). Where the plaintiff wrote a drama and then turned it into a novel, and the defendant dramatised and represented the novel, without knowing of the plaintiff's drama, it was held an infringement of the dramatic copyright of the plaintiff (*Reade* v. *Lacey*, 1 J. & H. 524; 30 L. J. Ch. 655; *Reade* v. *Conquest*, 11 C. B. N. S. 479; 31 L. J. C. P. 153; *Schlesinger* v. *Turner*, 63 L. T. 764; and see *Boosey* v. *Fairlie*, 7 Ch. D. 301; 4 App. Cas. 711; 46 L. J. Ch. 726; 47 L. J. Ch. 186). But it was held otherwise where, after the publication of a novel, the author dramatised it, and the defendant represented a dramatised version of the novel, which had been made direct from the novel and in ignorance of the dramatised version by the novelist (*Toole* v. *Young*, *supra*; *Schlesinger* v. *Bedford*, 63 L. T. 762; see also *Reichardt* v. *Supte*, *ante*, p. 353).

In order to constitute an infringement under 3 & 4 Will. 4, c. 15, by a representation of part of any production of which another has the sole right of performance, the part represented must be a material and substantial part (*Chatterton* v. *Cave*, 3 App. Cas. 483; 47 L. J. H. L. 545).

Artistic Copyright.]—The copyright in sculptures, models, and casts is regulated by 54 Geo. 3, c. 56.

Copyright is regulated as to engravings, prints, and lithographs, by 8 Geo. 2, c. 13 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; and 15 & 16 Vict. c. 12, s. 14. Copies thereof made by photography are within these statutes (*Gambart* v. *Ball*, 14 C. B. N. S. 306; 32 L. J. C. P. 166; *Graves* v. *Ashford*, L. R. 2 C. P. 410; 36 L. J. C. P. 139). Maps, charts, and plans are "books" within the Copyright Act, 1842. (See s. 2, cited *ante*, p. 352, and *Stannard* v. *Lee*, L. R. 6 Ch. 346; 40 L. J. Ch. 489.)

Copyright in paintings, drawings, and photographs is regulated by the Copyright Act, 1862 (25 & 26 Vict. c. 68). As to photographs, see *Bolton* v. *Aldin*, 65 L. J. Q. B. 120. The copyright in a photograph which is taken and is to be paid for in the ordinary way, belongs to the sitter (*Boucas* v. *Cooke*, [1903] 2 K. B. 227; 72 L. J. K. B. 741); but when a photograph is taken gratuitously for the purpose of selling copies, the photographer is entitled to the copyright (*Ellis* v. *Marshall*, 64 L. J. Q. B. 757).

A photograph taken from a picture is an original photograph (*Graves' Case*, 4 Q. B. 715; 39 L. J. Q. B. 31).

The representation of a picture by means of what are called "*tableaux vivant*" on the stage of a theatre is not an infringement of the copyright in the picture under the Copyright Act, 1862 (*Hanfstaengl* v. *Empire Palace Co., Limited*, [1894] 2 Ch. 1; 63 L. J. Ch. 417; *Hanfstaengl* v. *Baines*, [1895] A. C. 20; 64 L. J. Ch. 81). In an action to recover penalties under sect. 6 of the Copyright Act, 1862, each infringing copy constitutes a separate offence, but the Court may award a lump sum in respect of all the offences (*Hildesheimer* v. *Faulkner*, [1901] 2 Ch. 552; 70 L. J. Ch. 800, in this respect differing from *Green* v. *Irish Independent Co.*, *infra*, [1899] 1 Ir. R. 386). As to what constitutes an infringement, see *Hanfstaengl* v. *Smith*, 92 L. T. 351.

(*m*) The proprietor in addition to the special action given by sect. 15, may, under

Particulars of infringement are as follows :—[*State same.*]

Particulars of special damage are as follows :—[*State same.*]

2. The defendant has in his possession a large number of copies of the said book, which were wrongfully printed, or caused to be printed, by the defendant without the plaintiff's consent, and has detained, and still detains, the same from the plaintiff, and has refused verbally on the —— ——, 19— [*or, as the case may be*], to deliver the same to the plaintiff, although the plaintiff demanded the same from the defendant in writing before this action on the —— ——, 19—, by letter dated that day. [*If the defendant, subsequently to such demand, has wrongfully sold or disposed of, or destroyed, any of the unauthorised copies then in his possession, these facts should be stated, and a claim should be inserted for conversion.*]

3. The defendant threatens and intends to continue and repeat such infringements of the said copyright of the plaintiff.

The plaintiff claims—

(1.) £—— damages.

(2.) An order for delivery to the plaintiff of all copies of the said book which are in the defendant's possession as aforesaid.

(3.) An injunction to restrain the defendant, his agents and servants, from continuing or repeating any such infringements of the plaintiff's copyright as aforesaid, and from doing any acts to infringe or injure the said copyright.

Claim for Infringement of Musical Copyright (*n*).

1. The plaintiff was and is the author of a musical composition entitled ——, and the owner of the sole right of performing such composition in public. The requirements of the Copyright (Musical Compositions) Act, 1882, were duly complied with in respect of the said musical composition.

2. The defendant has infringed the plaintiff's sole right of performing the said musical composition in public by performing and singing the same in public at [the —— Music Hall at ——] on the —— ——, 19— [and on the —— following nights], without the consent of the plaintiff first had and obtained.

---

sect. 23 of the Copyright Act, 1842 (cited *ante*, p. 352), claim in detinue for all copies retained after written demand, and in trover for all copies wrongfully converted after such demand (*Muddock* v. *Blackwood*, [1898] 1 Ch. 58; 67 L. J. Ch. 6; *Boosey* v. *Whight* (No. 2), 81 L. T. 265; *Warne* v. *Seebohm*, 39 Ch. D. 73; 57 L. J. Ch. 689). The measure of damages is the amount realised by the sale of the books, &c. (*Ib.*).

An injunction to restrain the defendant from future infringements of the plaintiff's copyright may be obtained without showing any actual damage (*Tinsley* v. *Lacy*, 1 H. & M. 747; 32 L. J. Ch. 56).

As to claiming an account of profits in lieu of damages, see *Colburn* v. *Simms*, 2 Ha. 543, 560; *Delfe* v. *Delamotte*, 3 K. & J. 581.

(*n*) See *ante*, p. 353, note.

[3. The defendant intends, unless restrained from so doing, to repeat the said infringement.]

The plaintiff claims:—

(1.) Damages, or 40*s.* in respect of each of the said performances.

[(2.) An injunction restraining the defendant from singing or performing the said musical composition in public.]

(3.) Double costs under the statute 3 Will. 4, c. 15, s. 2 (*o*).

Claim for Infringement of a Dramatic Copyright (*p*).

1. The plaintiff was and is the author of a dramatic piece entitled ——, and the duly registered proprietor of the sole liberty of representation and performance of and in the said dramatic piece.

2. The defendant on the —— ——, 19— [and on the —— following days], without the plaintiff's consent in writing first had and obtained, and well knowing that such representation was unauthorised, represented or performed, or caused or permitted to be represented or performed the aforesaid dramatic piece, or part thereof, at a certain place of dramatic or public entertainment (to wit) ["The Royal Music Hall"], ——, in the county of ——, of which said [Hall] the defendant was at such times the proprietor and manager, and holder of the licences for public music and refreshments respectively.

The plaintiff claims:—

(1.) £—— damages or penalties.

(2.) Double costs.

Claim for Infringement of the Copyright in a design (*q*).

1. The plaintiff is the proprietor of the copyright in a design for a curtain, and was registered as such on the —— ——, 19—, in pursuance of the Patents, Designs, and Trade Marks Act, 1883.

2. The defendants have wrongfully and without the licence or written consent of the plaintiff first had and obtained, applied such design or a

---

(*o*) See 45 & 46 Vict. c. 40, s. 4.

(*p*) See *ante*, p. 353, note.

(*q*) **Designs for Manufactures, &c.**]—The copyright in designs for manufactures or articles of trade is regulated by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), as amended by ss. 6 and 7 of the Patents, &c. Act, 1888 (51 & 52 Vict. c. 50). See also 49 & 50 Vict. c. 37, s. 3, and the Designs Rules, 1890.

As to what "designs" are within the protection of the first-mentioned Act, see ss. 47, 60; *Hecla Foundry Co.* v. *Walker*, 14 App. Cas. 550; *Blank* v. *Footman*, 39 Ch. D. 678; 59 L. T. 507; *In re Bach*, 42 Ch. D. 661; *Saunders* v. *Wiel*, [1893] 1 Q. B. 470; 62 L. J. Q. B. 341; *Harper* v. *Wright*, [1896] 1 Ch. 142; 65 L. J. Ch. 161.

By s. 58 (as amended by 51 & 52 Vict. c. 50, s. 7 (2)), a penalty is imposed for every infringement of the copyright in a registered design, and is recoverable by an action at the suit of the registered proprietor. (See *Saunders* v. *Wiel*, *supra*; *Woolley* v. *Broad*, [1892] 1 Q. B. 806; 61 L. J. Q. B. 259.) This remedy, however, does not

fraudulent or obvious imitation thereof in the class of goods in which such design is registered as aforesaid for purposes of sale to certain curtains.

3. Further, the defendants have wrongfully published or exposed for sale certain curtains to which such design, or a fraudulent or obvious imitation thereof, has been applied, knowing that the same had been so applied without the consent of the plaintiff.

Particulars under paragraphs 2 and 3 are as follows:—[*State them.*]

The plaintiff claims:—

(1.) An injunction to restrain the defendants from applying the plaintiff's design or any fraudulent or obvious imitation thereof to any substance or any article of manufacture, and in particular to lace curtains, and from publishing, selling, or exposing the same for sale.

(2.) An account of all curtains to which such design or a fraudulent or obvious imitation thereof shall have been applied, manufactured, published, sold, or exposed for sale by the defendants, and of profit made thereby.

(3.) The delivery up of all curtains, cards and drafts to which such design or a fraudulent or obvious imitation thereof shall have been applied, that are in the possession of or under the control of the defendants, their servants and agents.

(4.) Damages under section 59 of the Patents, Designs and Trade Marks Act, 1883, or in the alternative, penalties under section 58 of the said Act.

Claim for Infringement of the Copyright in a Foreign Painting (*r*).

1. The plaintiff was and is the author of and owner of the copyright in a painting called ——.

2. The said painting was first produced and published in [Berlin, in the Empire of Germany] by the plaintiff, subsequent to the Berne Convention of 1886. All the conditions and formalities prescribed by the law of the [Empire of Germany] relating to and necessary for copyright in the said painting have been duly complied with, and the plaintiff is entitled to the

---

interfere with the right of the proprietor to bring an action to recover damages for such infringements. (See s. 59; *Green* v. *Irish Independent Co.*, [1899] 1 Ir. R. 386.)

(*r*) **International and Colonial Copyright.**]—International copyright is regulated by the International Copyright Acts (7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12; 25 & 26 Vict. c. 68; 38 & 39 Vict. c. 12; and 49 & 50 Vict. c. 33). See also the Orders in Council of 28 November, 1887, and 8 March, 1898, and *Hanfstaengl* v. *American Tobacco Co.*, [1895] 1 Q. B. 347; 64 L. J. Q. B. 277; *Pitts* v. *George*, [1896] 2 Ch. 866; *Braschet* v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73; 69 L. J. Ch. 35, which latter case is only overruled by *Hildesheimer* v. *Faulkner*, cited *ante*, p. 354, on the point as to giving a lump sum for penalties.

As to colonial copyright, see 10 & 11 Vict. c. 95, and ss. 8, 9 of the International Copyright Act, 1886. See also as to Canada, 38 & 39 Vict. c. 53.

See also Cohen on Copyright, pp. 80 *et seq.*

sole and exclusive copyright therein in the [Empire of Germany] and in the United Kingdom.

3. Divers repetitions, copies, and imitations of the said painting were, at a date or dates not known to the plaintiff, without the plaintiff's consent made and multiplied by photography or otherwise, for sale, hire, and distribution, by *E. F.* or some other person or persons not known to the plaintiff.

4. The defendant has wrongfully and contrary to the statute 25 and 26 Vict. c. 68, s. 6 [*here state the infringement complained of, as, for instance,* imported into the United Kingdom, and sold, published, exhibited, and distributed, and offered for sale, exhibition, or distribution repetitions, copies, or imitations of the said painting] without the consent of the plaintiff, and knowing that such repetitions, copies, or imitations had been unlawfully made.

The best particulars the plaintiff can at present give are as follows:—

[*Here state the particulars.*]

The plaintiff claims:—

(1.) An injunction restraining the defendant, his servants and agents from importing into the United Kingdom or selling, publishing, exhibiting or distributing or offering for sale, exhibition or distribution any repetitions, copies, or imitations of the said painting.

(2.) Penalties under the statute 25 & 26 Vict. c. 58, s. 6.

(3.) An account of and delivery up of all repetitions, copies or imitations of the said painting in the possession, custody or control of the defendant his servants or agents.

(4.) Damages.

The following forms of declarations under the former system of pleading may be useful:—

Count for infringing the copyright of a musical composition by printing it for sale: Clementi v. *Walker,* 2 B. & C. 861; *Jefferys* v. *Boosey,* 24 L. J. Ex. 81; *Cocks* v. *Purday,* 5 C. B. 860; *Boosey* v. *Purday,* 4 Ex. 145.

For infringing the copyright of a song, with a likeness of the singer on the outside leaf, by printing and selling imitations: Chappell v. *Davidson,* 25 L. J. C. P. 225; 18 C. B. 194.

For infringing the copyright of a song by gratuitous circulation: Novello v. *Sudlow,* 12 C. B. 177.

For infringing the copyright of a print: Brooks v. *Cock,* 3 A. & E. 138; *West* v. *Francis,* 5 B. & Al. 737.

For infringing the copyright in a print by means of photography: Gambart v. *Dale,* 14 C. B. N. S. 306; 32 L. J. C. P. 166; *Graves* v. *Ashford,* L. R. 2 C. P. 410.

For selling a print from a spurious plate under 17 *Geo.* 3. *c.* 57: *Gambart* v. *Sumner,* 5 H. & N. 5; 29 L. J. Ex. 98.

For infringing the copyright of a bust: *Gahagan* v. *Cooper*, 3 Camp. 112.

Counts for infringing a design for an article of manufacture within 6 & 7 *Vict. c.* 65: *Millingen* v. *Picken*, 1 C. B. 799.

Count for the infringement of a design registered under 5 & 6 *Vict. c.* 100: *Harrison* v. *Taylor*, 27 L. J. Ex. 315; 3 H. & N. 301; *Heywood* v. *Potter*, 1 E. & B. 439; *Norton* v. *Nicholls*, 28 L. J. Q. B. 225; *McCrea* v. *Holdsworth*, L. R. 1 Q. B. 264; *Ib.* 2 H. L. 380; 33 L. J. Q. B. 329.

Count for infringing the copyright of a print under the International Copyright Act: *Avanzo* v. *Mudie*, 10 Ex. 203.

Count for penalties for infringing the copyright of a dramatic piece under 3 & 4 *Will.* 4, *c.* 15: *Fitzball* v. *Brooke*, 6 Q. B. 873; *Shepherd* v. *Conquest*, 27 L. J. C. P. 127; 17 C. B. 427; *Morton* v. *Copeland*, 16 C. B. 517; *Hatton* v. *Kean*, 7 C. B. N. S. 268; 29 L. J. C. P. 20; *Read* v. *Conquest*, 9 C. B. N. S. 755; *Cumberland* v. *Copeland*, 7 H. & N. 181; 21 L. J. Ex. 19, 353; *Lyon* v. *Knowles*, 3 B. & S. 556; 32 L. J. Q. B. 71.

Count by the assignee of a copyright: *Lacy* v. *Rhys*, 4 B. & S. 873; 33 L. J. Q. B. 157; *Ward* v. *Conquest*, 17 C. B. N. S. 418; 33 L. J. Q. B. 319.

Corporation (*s*).

Claim by and against Companies and Corporations: see "*Corporation*," *ante*, p. 158; "*Company*," *ante*, p. 151; "*Defamation*," *post*, p. 367.

(*s*) An action will in general lie against a corporation for a wrong which they cause to be committed, as a nuisance, a trespass to the person, or to land, or goods, or a conversion or detention of goods; and the authority of their agent may be sufficiently proved against a corporation without showing an appointment under seal (*Yarborough* v. *Bank of England*, 16 East, 6; *Smith* v. *Birmingham Gas Co.*, 1 A. & E. 526; *Maund* v. *Monmouthshire Canal Co.*, 2 Dowl. N. S. 113; *Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 314; *Goff* v. *Great Northern Ry. Co.*, 3 E. & E. 672; 30 L. J. Q. B. 148; *Mill* v. *Hawker*, L. R. 9 Ex. 309; *Ib.* 10 Ex. 92; 43 L. J. Ex. 129; 44 *Ib.* 49; *Met. Asylum District* v. *Hill*, 6 App. Cas. 193; 50 L. J. H. L. 353, and the cases below cited). Such authority may be inferred from the nature of the employment of the agent or servant, and, generally speaking, a corporation is liable for the acts of an agent or servant acting within the scope of his employment (*Limpus* v. *London Omnibus Co.*, 1 H. & C. 526; 32 L. J. Ex. 34; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; 36 L. J. Ex. 147; *Mackay* v. *Commercial Bank*, L. R. 5 P. C. 394; *Moore* v. *Metrop. Ry. Co.*, L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; *Bayley* v. *M. S. & L. Ry. Co.*, L. R. 8 C. P. 148; 42

L. J. C. P. 78; *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270; 48 L. J. C. P. 301; *Richards* v. *West Middlesex Waterworks Co.*, 15 Q. B. D. 660). Where, however, the act complained of is one which the corporation is not under any circumstances authorised to do, no such authority to the agent will ordinarily be implied (*Poulton* v. *London and South Western Ry. Co.*, L. R. 2 Q. B. 534; 36 L. J. Q. B. 294; see *Moore* v. *Metrop. Ry. Co.*, L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; *Richards* v. *West Middlesex Waterworks Co.*, 15 Q. B. D. 660).

An agent or servant has in general an implied authority to do all those things that are necessary for the protection of the property entrusted to him, or for the fulfilment of the duty that he has to perform. (See *Allen* v. *L. & S. W. Ry. Co.*, L. R. 6 Q. B. 65, 69; 40 L. J. Q. B. 55, 57; *Bank of New South Wales* v. *Owston*, *supra*; *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516; 60 L. J. Q. B. 238.) A subsequent ratification by a corporation of an act done by a servant or agent on their behalf may be equivalent to a prior authority. (See *Eastern Counties Ry. Co.* v. *Broom*, *supra*.)

Among the cases in which actions for wrongs have been held to lie against corporations are the following: An action against a company conducting an electric telegraph for publishing a libel (*Whitfield* v. *South Eastern Ry. Co.*, E. B. & E. 115; 27 L. J. Q. B. 229. See *Citizens' Life Assce. Co.* v. *Brown*, [1904] A. C. 423; 73 L. J. P. C. 102); an action against a company engaged in running omnibuses for driving them in such a manner as to obstruct the plaintiff in the use of the highway (*Green* v. *London Omnibus Co.*, 7 C. B. N. S. 290; 29 L. J. C. P. 13; *Limpus* v. *London Omnibus Co.*, *supra*); an action against a railway company for arresting a passenger upon a false charge of travelling without having paid his fare (*Goff* v. *G. N. Ry. Co.*, 3 E. & E. 672; 30 L. J. Ex. 148; *Moore* v. *Metrop. Ry. Co.*, *supra*. See *post*, p. 425); an action for infringing a patent (*Betts* v. *De Vitre*, L. R. 3 Ch. 441); an action for knowingly keeping a mischievous animal (*Stiles* v. *Cardiff Steam Co.*, 33 L. J. Q. B. 310; *Filburn* v. *People's Palace Co.*, 25 Q. B. D. 258; 59 L. J. Q. B. 471); an action for deceit in respect of the fraud of their agent (*Blake* v. *Albion Life Assurance Co.*, 4 C. P. D. 94; 48 L. J. C. P. 169; *Barwick* v. *English Joint Stock Bank*, *supra*; *Mackay* v. *Commercial Bank*, *supra*); an action against a district council for damage caused by negligence in constructing a sewer (*Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335).

An action will in general lie against a corporation at the suit of a person who has sustained individual injury from the non-performance of public duties imposed upon them by statute (*Dormont* v. *Furness Ry. Co.*, 11 Q. B. D. 496; *Bateman* v. *Poplar Board*, 37 Ch. D. 272; *Charman* v. *S. E. Ry. Co.*, 21 Q. B. D. 524; *Lyme Regis* v. *Henley*, 1 B. & Ad. 77); provided that the statute renders the performance of such duties a duty to the plaintiff (see *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Atkinson* v. *Newcastle Waterworks Co.*, 2 Ex. D. 441; 46 L. J. Ex. 775; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400; *Hardaker* v. *Idle District Council*, *supra*); and provided that the statute does not provide some special remedy which excludes the remedy by action. If a special remedy is provided it is *primâ facie* exclusive if the duty is not one which already exists at common law (*Wolverhampton Waterworks Co.* v. *Hawkesford*, 6 C. B. N. S. 336, 356; *Clegg* v. *Earby Gas Co.*, [1896] 1 Q. B. 592; 65 L. J. Q. B. 339; *Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 617; 66 L. J. Q. B. 388; *Pasmore* v. *Oswaldtwistle U. D. C.*, [1899] A. C. 387, 397; 67 L. J. Q. B. 635. See 1 Sm. L. C., 11th ed., 396).

A corporation is liable to an action for performing its statutory duties in a negligent manner, and thereby causing injury to the plaintiff. (See *Mersey Docks Co.* v. *Gibbs*, L. R. 1 H. L. 95; *Coe* v. *Wise*, L. R. 1 Q. B. 711; *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430; *Gilbert* v. *Trinity House*, 17 Q. B. D. 795; *Evans* v. *M. S. & L. Ry. Co.*, 36 Ch. D. 628; and see other cases cited, "*Nuisance*," *post*, p. 454.) But no action will lie in respect of injury sustained by reason of the exercise in a proper manner of statutory duties (*East Freemantle Corporation* v. *Annois*, [1902] A. C. 213; 71 L. J. P. C. 39; *Canadian Pacific Ry.* v. *Roy*, [1902] A. C. 220; 71 L. J. P. C. 51; *Goldberg* v. *Liverpool Corporation*, 82 L. T. 362; *Lambert* v. *Lowestoft Corporation*, [1901] 1 K. B. 590; 70 L. J. Q. B. 333).

COUNTY COURTS (*l*).

DEFAMATION (*u*).

A corporation, apart from any special statutory enactments, is subject to the ordinary common law obligations as an owner of property, and is liable to an action for neglect of those duties (*Winch* v. *Thames Conservators*, L. R. 7 C. P. 458; 41 L. J. C. P. 458; *Evans* v. *M. S. & L. Ry. Co.*, *supra*).

A local authority having to execute the office of surveyor of highways is not liable to a private person who is injured by reason of an omission on its part to repair the highway (*Cowley* v. *Newmarket*, [1892] A. C. 345; 62 L. J. Q. B. 65; *Thompson* v. *Brighton Corporation*, [1894] 1 Q. B. 332; 63 L. J. Q. B. 181; *Maguire* v. *Liverpool Corporation*, [1905] 1 K. B. 767; 74 L. J. K. B. 369).

An action will lie against a corporation for a malicious prosecution (*Edwards* v. *Midland Ry. Co.*, 6 Q. B. D. 287; 50 L. J. Q. B. 281; *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270; 48 L. J. P. C. 25; *Mackay* v. *Commercial Bank*, *ante*, p. 359; and *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392; 68 L. J. Q. B. 196).

An action will lie at the suit of a corporation for a libel causing injury to its property, *e.g.*, a libel imputing insolvency to a trading company (*Metropolitan Omnibus Co.* v. *Hawkins*, 4 H. & N. 87; 28 L. J. Ex. 201).

A libel calculated to injure a corporation in the way of its business is actionable, without special damage (*South Hetton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B. 133). But a corporation cannot sue for a libel imputing an offence which a corporation as such cannot commit, and accordingly a municipal corporation could not sue for a libel imputing personal corruption (*Mayor, &c. of Manchester* v. *Williams*, [1891] 1 Q. B. 94; 60 L. J. Q. B. 23).

A corporation is liable for the negligence of its servants, upon the same principle on which an individual is liable; and it makes no difference in the liability that the corporation is appointed to perform duties of a public nature, or receives no profits for its own benefit (*Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Coe* v. *Wise*, L. R. 1 Q. B. 711; *Winch* v. *Thames Conservators*, L. R. 9 C. P. 178; see "*Negligence*," *post*, p. 442); and the property of such corporations is liable to executions against them (*Wirral Waterworks Co.* v. *Lloyd*, L. R. 1 C. P. 719).

(*l*) With respect to actions against any bailiff, or any person acting by order and in aid of any bailiff, for anything done in obedience to any warrant under the hand of the registrar and the seal of a County Court, sect. 54 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), contains provisions similar in effect to those of the 24 Geo. 2, c. 44, s. 6 (cited "*Police*," *post*, p. 898), with respect to actions against constables for acts done in obedience to warrants of justices.

By sect. 35 of the County Courts Act, 1888, the high bailiff of a County Court is responsible for all the acts and defaults of himself and of the bailiffs appointed to assist him in like manner as the sheriff of any county is responsible for the acts and defaults of himself and his officers. (See "*Sheriff*," *post*, p. 476; and see *Burton* v. *Le Gros*, 34 L. J. Q. B. 91; *Watson* v. *White*, [1896] 2 Q. B. 9; 65 L. J. Q. B. 92.)

By sect. 32, "No officer of a County Court in executing a warrant of a Court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant or in the mode of executing it, but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof."

(*u*) **Libel and Slander.**]—*Libel* consists in the publication by the defendant, by means of printing, writing, pictures, or the like signs, of matter defamatory to the plaintiff (3 Bl. Com. 125), and is always actionable without special damage.

General Form of Claim for a Libel.

1. The plaintiff has suffered damage from the defendant on the —— ——, 19—, falsely and maliciously writing and publishing of the plaintiff

---

Slander consists in the publication by the defendant, by means of words spoken, of matter defamatory to the plaintiff (3 Bl. Com. 123), and is only in some cases actionable without special damage.

The nature of the defamatory matter which is actionable in a written publication or libel, and that which is actionable when spoken, with the distinction between them, may be seen from the following descriptions.

Matter imputing criminal offences is actionable equally in the form of libel and of slander.

Matter imputing misconduct in the discharge of a public office is also actionable both as libel and as slander.

Matter imputing misconduct, or want of care or of qualification or of skill in a lawful profession, trade, or business, is also actionable both as libel and as slander.

Matter imputing to a person that he is suffering from a contagious disease calculated to cause his exclusion from society, such as leprosy or the pox, is also actionable both as libel and slander.

Slanders of the kinds above mentioned are actionable without special damage.

Matter not falling within the above descriptions, but imputing conduct or qualities tending to degrade or disparage the plaintiff, or exposing him to public hatred, contempt, or ridicule, is actionable as libel when published in print, writing or other permanent form, but not as slander when merely spoken, unless special damage is shown. (See *l'Anson* v. *Stuart*, 1 T. R. 748; *Thorley* v. *Kerry*, 4 Taunt. 364; *Clement* v. *Chivis*, 9 B. & C. 175; *Parmiter* v. *Coupland*, 6 M. & W. 105, 108; *Fray* v. *Fray*, 17 C. B. N.S. 603; 34 L. J. C. P. 45; *Cox* v. *Lee*, L. R. 4 Ex. 284; 38 L. J. Ex. 219; *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797; 61 L. J. Q. B. 634.)

By the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), s. 1, words spoken which impute unchastity or adultery to any woman or girl are made thereafter actionable without proof of special damage, subject to the proviso that for words thus made actionable the plaintiff shall not recover more costs than damages, unless the judge certifies that there was reasonable ground for bringing the action.

Defamatory words merely spoken, and not actionable under any of the above descriptions, but which cause special damage to the plaintiff, are actionable as slander. (See *Kelly* v. *Partington*, 5 B. & Ad. 645.)

Words imputing a criminal offence punishable corporally, are actionable *per se* as slander without special damage; and it is not necessary to show that they impute an indictable offence (*Webb* v. *Bearan*, 11 Q. B. D. 609; 52 L. J. Q. B. 544).

Words merely imputing unfitness for a public office which is not an office of profit, where they do not amount to an imputation of misconduct in the discharge of the office, and would not, if true, be any ground for dismissal from it, are not actionable as slander without special damage (*Alexander* v. *Jenkins*, [1892] 1 Q. B. D. 797; 61 L. J. Q. B. 634). But words imputing misconduct or dishonest conduct in the discharge of such office are actionable without special damage, whether there is, or is not, a power of removal therefrom for conduct such as is imputed (*Booth* v. *Arnold*, [1895] 1 Q. B. 571; 64 L. J. Q. B. 443).

Defamatory words spoken of a person engaged in a profession, trade, or occupation, not imputing misconduct or incapacity in that profession, trade or business (*Dauncey* v. *Holloway*, [1902] 2 K. B. 441; 70 L. J. K. B. 695), or merely imputing general immorality (*Lumby* v. *Allday*, 1 Cr. & J. 301; *Ayre* v. *Craven*, 2 A. & E. 2; *Gallwey* v. *Marshall*, 9 Ex. 294), are not a sufficiently specific injury to such person's profession, trade, or occupation to be actionable without special damage, though such imputations might be actionable if written or printed, and published, as imputing conduct tending to degrade or bring into contempt the person so charged. A shopkeeper, whose wife

[in a letter addressed and sent by the defendant to *E. F.*] the words following, that is to say —— [*here set out the words complained of verbatim*].

---

assisted him in his shop, was held entitled to maintain an action for words spoken and published of his wife imputing to her adultery committed at the shop, followed, as the natural consequence, by a falling off in his business (*Riding* v. *Smith*, 1 Ex. D. 91 ; 45 L. J. Ex. 21).

A profession, trade, or occupation must be a lawful one in order to entitle the plaintiff to recover damages for defamation in respect of it (*Morris* v. *Langdale*, 2 B. & P. 284 ; *Hunt* v. *Bell*, 1 Bing. 1). But it need not necessarily be one of which the Court will take judicial notice (*Foulger* v. *Newcomb*, L. R. 2 Ex. 327 ; 36 L. J. Ex. 169).

An incorporated trading company may, without proof of special damage, bring an action for damages for a defamatory false statement in writing or print reflecting upon the character of the company as regards the management of their business (*South Hetton Coal Co.* v. *North Eastern News*, [1894] 1 Q. B. 133 ; 63 L. J. Q. B. 293).

Whether matter, written or spoken, is defamatory, within the above descriptions, is a question for the jury. It is for the judge to direct the jury what constitutes defamation in law, and for the jury to say whether according to such direction, the matter in question is defamatory (*Parmiter* v. *Coupland*, 6 M. & W. 105 ; *Baylis* v. *Lawrence*, 11 A. & E. 920 ; *Paris* v. *Levy*, 9 C. B. N. S. 342, 352 ; and see *Capital & Counties Bank* v. *Henty*, 5 C. P. D. 514 ; 7 App. Cas. 741 ; 49 L. J. C. P. 830 ; 52 L. J. Q. B. 232). The judge may state his opinion to the jury whether the matter is defamatory (*Ib.*). If the words sued on are reasonably susceptible of a libellous or slanderous construction, it is for the jury to decide whether they bear that meaning (*Hart* v. *Wall*, 2 C. P. D. 146 ; 46 L. J. C. P. 227 ; *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11 ; 41 L. J. Q. B. 14 ; *Botterill* v. *Whytehead*, 41 L. T. 588 ; *Simmons* v. *Mitchell*, 6 App. Cas. 156). But if they are incapable of such construction, the defendant may plead the objection in point of law, or the case may be withdrawn from the jury, and judgment entered for the defendant (*Miller* v. *David*, L. R. 9 C. P. 118 ; 43 L. J. C. P. 84 ; *Capital & Counties Bank* v. *Henty*, *supra* ; *Mulligan* v. *Cole*, L. R. 10 Q. B. 549 ; 44 L. J. Q. B. 153).

The ordinary rule is that from the publishing of the defamatory matter, whether written or spoken, malice is inferred, though where the occasion is privileged, this *primâ facie* inference is rebutted, and actual malice must be proved in order to maintain the action (*Wright* v. *Woodgate*, 1 C. M. & R. 577 ; *Laughton* v. *Bishop of Sodor & Man*, L. R. 4 P. C. 495, 505 ; 42 L. J. P. C. 11 ; *Davies* v. *Snead*, L. R. 5 Q. B. 608 ; 39 L. J. Q. B. 202 ; *Waller* v. *Loch*, 7 Q. B. D. 619 ; 51 L. J. Q. B. 274 ; *Jenoure* v. *Delmège*, [1891] A. C. 73 ; 60 L. J. P. C. 11 ; *Nevill* v. *Fine Arts Ins. Co.*, [1895] 2 Q. B. 156 ; 64 L. J. Q. B. 681 ; affirmed, [1897] A. C. 68 ; 13 Times Rep. 97).

Publication is the making known of defamatory matter to some person other than the person defamed (see *per* Lord Esher, *Pullman* v. *Hill*, [1891] 1 Q. B. at p. 527), but when this is done innocently, without intention to defame, and without negligence, and in the ordinary course of business, as for instance, by carriers, newspaper vendors, and the like, it has been held not a publication of a libel, but an innocent dissemination of the matter complained of. (See *post*, p. 834 ; *Wennhak* v. *Morgan*, 20 Q. B. D. 635 ; 57 L. J. Q. B. 241 ; *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842 ; 63 L. J. Q. B. 401 ; and *Sadgrove* v. *Hole*, [1901] 2 K. B. 1 ; 70 L. J. K. B. 455, a case of a post card.)

False statements not defamatory or libellous, or actionable in themselves, may give rise to an action if they are intended to cause, and do cause, actual damage. (See *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524 ; 61 L. J. Q. B. 535 ; *White* v. *Mellin*, [1895] A. C. 154 ; 64 L. J. Ch. 308 ; and "*Slander of Title*," *post*, p. 481.) The publisher of a libel cannot maintain an action against a person for giving information of the libel to the person of whom it is published (*Saunders* v. *Seyd*, 75 L. T. 193).

As to "privileged communications," see "*Defamation*," *post*, p. 834.

2. By the said words the defendant meant that the plaintiff [*here add any necessary innuendo*].

As to joinder of parties in an action for libel, see "*Parties*," *ante*, pp. 22, 24.

The Form of the Statement of Claim.]—The defamatory matter must be *false*, and must be so charged in the statement of claim; it is then, unless it appears that the occasion was a privileged one, presumed to have been published maliciously (*Bromage* v. *Prosser*, 4 B. & C. 247, 255; *Haire* v. *Wilson*, 9 B. & C. 643; *Huntley* v. *Ward*, 6 C. B. N. S. 514; *Davies* v. *Snead*, L. R. 5 Q. B. 608, 611; 39 L. J. Q. B. 202; *Toogood* v. *Spyring*, 1 C. M. & R. 193; *Hamon* v. *Falle*, 4 App. Cas. 247, 251).

It is usually alleged that the words were printed, or written, or spoken *maliciously*, but this is not strictly necessary, unless it appear that the occasion was a privileged one, as the malice is sufficiently implied from the falseness of the defamatory words (*Bromage* v. *Prosser*, 4 B. & C. at p. 255; *Anon.*, Styles, 392; *Mercer* v. *Sparks*, Owen, 51; Noy, 35; *Clark* v. *Molyneux*, 3 Q. B. D. 237, 247; 47 L. J. Q. B. 230. Cf. *R.* v. *Munslow*, [1895] 1 Q. B. 758; 64 L. J. M. C. 138). Where it appears that the occasion is a privileged one, it is sufficient in a statement of claim to allege *malice* as a fact without setting out the circumstances from which it is to be inferred (Ord. XIX., rr. 4, 22, cited *ante*, pp. 5, 9). Subsequent libels or slanders published by the defendant of the plaintiff are admissible in evidence to prove malice. Evidence of actual malice may in all cases be given to increase the damages.

It must appear upon the statement of claim that the defamatory matter was written, printed, or spoken "of the plaintiff," either by express averment to that effect or by necessary implication (*Clement* v. *Fisher*, 7 B. & C. 459; *O'Brien* v. *Clement*, 4 D. & L. 583). It is necessary to set out the words spoken or published exactly; it is not enough to set out their effect, the words being the "material facts" (*Harris* v. *Warre*, 4 C. P. D. 125; 48 L. J. C. P. 310; *Capital & Counties Bank* v. *Henty*, 7 App. Cas. 741, 771; 52 L. J. Q. B. 232; *Gutsole* v. *Mathers*, 1 M. & W. 495; *Solomon* v. *Lawson*, 8 Q. B. 823; *Wood* v. *Adams*, 6 Bing. 431; *Wright* v. *Clements*, 3 B. & Ald. 503); nor is it enough to set out the "substance" or "purport" of the words (*Wright* v. *Clements*, *supra*; *Wood* v. *Brown*, 6 Taunt. 169; *Cook* v. *Cox*, 3 M. & S. 110; *Harris* v. *Warre*, *supra*; *Darbyshire* v. *Leigh*, [1896] 1 Q. B. 554, 557; 65 L. J. Q. B. 360).

The libel or slander, if in a foreign language, should be set out in the original (*Zenobio* v. *Axtell*, 6 T. R. 162; *Jenkins* v. *Phillips*, 9 C. & P. 766), and should be translated with allegations of its actionable meaning; and the statement of claim should aver that the persons in whose presence it was spoken, or to whom it was published, understood the foreign language (*Amann* v. *Damm*, 8 C. B. N. S. 597; 29 L. J. C. P. 313). Where the ground of action is that the words impute misconduct, or want of qualification, or skill, in a lawful profession or business, or in a public office, it must appear upon the statement of claim by express averment or by necessary implication that the words were spoken of the plaintiff in relation to such profession, business, or office (*Miller* v. *David*, L. R. 9 C. P. 118; 43 L. J. C. P. 84; *Booth* v. *Arnold*, [1895] 1 Q. B. 571; 64 L. J. Q. B. 443).

Innuendo.]—Expressions which are actionable in their plain and ordinary meaning, as calling a man a "thief," saying that he has committed "perjury," &c., may be alleged simply without any explanation (*Harvey* v. *French*, 1 C. & M. 11; *Day* v. *Robinson*, 1 A. & E. 558; *Homer* v. *Taunton*, 5 H. & N. 661; 29 L. J. Ex. 318). But where the words are innocent or uncertain in their natural meaning, and are actionable only in consequence of the peculiar meaning conveyed by them on the particular occasion, as calling a man a "lame duck," a "black sheep," or saying that he is "forsworn," or where the words are used ironically, it is necessary to add an *innuendo*, or statement of the meaning intended by the words, whereby they are rendered actionable (*Sweetapple* v. *Jesse*, 5 B. & Ad. 27; *Jackson* v. *Adams*, 2 Bing. N. C. 402; *Cox* v. *Cooper*, 12 W. R. 75).

Whether the words are capable of the meaning alleged, and whether such meaning is actionable, are questions for the Court; whether they in fact were used with that

3. In consequence the plaintiff has been injured in his credit and reputation [*if any special damage has been suffered add* and has suffered special

meaning is a question for the jury (*Blagg* v. *Sturt*, 10 Q. B. 899; *Broome* v. *Gosden*, 1 C. B. 728; *Hemmings* v. *Gasson*, E. B. & E. 346; 27 L. J. Q. B. 252; *Barnett* v. *Allen*, 3 H. & N. 376; *Hart* v. *Wall*, 2 C. P. D. 146; 46 L. J. C. P. 227; *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; *Botterill* v. *Whytehead*, 41 L. T. 588; *Shepheard* v. *Whitaker*, L. R. 10 C. P. 502; *Capital & Counties Bank* v. *Henty*, 5 C. P. D. 514; 49 L. J. C. P. 830; 7 App. Cas. 741; 52 L. J. Q. B. 232; *Australian Newspaper Co.* v. *Bennett*, [1894] A. C. 284; 65 L. J. P. C. 105).

The Damage.]—Where defamatory words spoken are actionable in themselves, it is not necessary to state any special damage, unless it is intended to claim it in addition to the general damages resulting from the injury. Where defamatory words spoken are actionable only by reason of the damage caused by them, the special damage must be alleged in the statement of claim. The special damage must be the natural and proximate consequence of the defamation (*Chamberlain* v. *Boyd*, 11 Q. B. D. 407; 52 L. J. Q. B. 277). Illness of body caused by defamatory words not actionable in themselves cannot be relied on as special damage, because not a consequence which generally happens under the same circumstances (*Allsop* v. *Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315). The loss of the hospitality of friends consequent upon slander may be charged as special damage (*Moore* v. *Meagher*, 1 Taunt. 39; *Davies* v. *Solomon*, L. R. 7 Q. B. 112). Exclusion from membership of a congregation of Protestant dissenters, as not involving temporal or pecuniary loss, is not sufficient special damage (*Roberts* v. *Roberts*, 5 B. & S. 384; 33 L. J. Q. B. 249).

Except under the provisions of the Slander of Women Act, 1891 (cited *ante*, p. 362), a wife cannot maintain an action for words imputing unchaste conduct to her without proof of special damage occasioned thereby (*Lynch* v. *Knight*, 9 H. L. C. 577), and the loss of the consortium of her husband, if due to her own repetition of the charge against her to her husband, is not such special damage (*Lynch* v. *Knight*, *supra*; *Parkins* v. *Scott*, 1 H. & C. 153; 31 L. J. Ex. 331). Whether the loss of the consortium of her husband alone without other damage of a pecuniary or material nature is sufficient special damage is doubtful (*Lynch* v. *Knight*, *supra*; *Davies* v. *Solomon*, *supra*).

Damage caused by an unauthorised repetition of defamatory words spoken by the defendant cannot, in general, be charged as special damage (*Ward* v. *Weeks*, 7 Bing. 211; *Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125; *Bateman* v. *Lyall*, 7 C. B. N. S. 638; *Speight* v. *Gosnay*, 60 L. J. Q. B. 231). But where there is a duty or moral obligation to repeat such words, then it would seem such a repetition may be a natural consequence of the original wrong, and charged as special damage against the original utterer (*Derry* v. *Handley*, 16 L. T. 263; *Speight* v. *Gosnay*, *supra*). A defendant who publishes defamatory matter with the knowledge that it will be repeated or re-published by others, may be charged in the statement of claim with so publishing the same, and evidence may then be given in support of such charge in aggravation of damages (*Whitney* v. *Moignard*, 24 Q. B. D. 630; 59 L. J. Q. B. 324).

The wrongful acts of third parties cannot be charged as special damage, unless such damage is the natural and reasonable consequence of the defamatory words (*Vicars* v. *Wilcocks*, 8 East, 1; 2 Sm. L. C., 11th ed., 521; *Speake* v. *Hughes*, [1904] 1 K. B. 138; 73 L. J. K. B. 172).

When a third party acts upon the defamatory words to the prejudice of the plaintiff, although he did not believe them, the consequence may be charged as special damage (*Knight* v. *Gibbs*, 1 A. & E. 43).

When special damage is claimed it must be alleged in the statement of claim with sufficient particularity to inform the defendant of what the plaintiff intends to prove.

Where it is intended to prove that particular customers have, in consequence of the defamation complained of, ceased to deal with the plaintiff, the names of such customers should be stated in the statement of claim. Damages may, however, be recovered for

damage, of which the following are the particulars, viz. :—*State the particulars*].

The plaintiff claims £——.

Claim for a Libel in a Newspaper.

1. The plaintiff has suffered damage from the defendant falsely and maliciously printing and publishing of the plaintiff in a newspaper called the "——," published at —— on the —— ——, 19—, the words following, that is to say [*set out the defamatory words verbatim, e.g.*, "He is a regular prover in bankruptcies"].

2. *Where necessary, add an innuendo, or explanatory statement of the meaning of the words, as, for instance:* By the said words the defendant meant and intended that the plaintiff was in the habit of proving against the estates of bankrupts debts which he knew to be fictitious.

3. *Add a statement of any special damage, thus :*—By reason of the publication of the said words the plaintiff has suffered the following damage, viz. :—

---

a general loss of trade, if such general loss be alleged, without stating or proving the ceasing of any particular customer to deal with the plaintiff (*Evans* v. *Harries*, 1 H. & N. 251 ; 26 L. J. Ex. 31 ; *Riding* v. *Smith*, 1 Ex. D. 91 ; 45 L. J. Ex. 281 ; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524 ; 61 L. J. Q. B. 535 ; see *ante*, p. 55).

In actions for defamation express malice may be proved in aggravation of damages ; and for this purpose subsequent libels published by the defendant of the plaintiff are admissible in evidence, and cannot be excluded on the ground that they may disclose distinct causes of action ; but, if they disclose distinct causes of action, the jury cannot give damages in respect of them (*Chalmers* v. *Payne*, 2 C. M. & R. 156, 157 ; *Pearson* v. *Lemaitre*, 5 M. & G. 700 ; and see *Hemmings* v. *Gasson*, E. B. & E. 346 ; 27 L. J. Q. B. 252).

The whole conduct of the defendant, from the time of the publication of the defamatory matter to the time of the finding of the verdict, may be considered by the jury in assessing damages (*Praed* v. *Graham*, 24 Q. B. D. 53 ; 59 L. J. Q. B. 230).

The Court has power to grant an injunction to restrain a defendant from publishing of the plaintiff, to the injury of property or trade, matter which has been decided to be, or which clearly is, defamatory (*Saxby* v. *Easterbrook*, 3 C. P. D. 339 ; *Liverpool Household Stores* v. *Smith*, 37 Ch. D. 170 ; 57 L. J. Ch. 85 ; *Bonnard* v. *Perryman*, [1891] 2 Ch. 269 ; 60 L. J. Ch. 617 ; *Collard* v. *Marshall*, [1892] 1 Ch. 571 ; *Dunlop Pneumatic Co.* v. *Maison Talbot*, 25 W. R. 254 ; 20 Times Rep. 579), but, except in a very clear case, this jurisdiction will not be exercised by granting an interlocutory injunction (*Quartz Hill Co.* v. *Beall*, 20 Ch. D. 501 ; *Salomons* v. *Knight*, [1891] 2 Ch. 294 ; 60 L. J. Ch. 743 ; *Monson* v. *Tussaud*, [1894] 1 Q. B. 671 ; 63 L. J. Q. B. 454). The jurisdiction exists both with regard to matter written or printed, and matter spoken, though the Court is more reluctant to interfere where the defamatory matter is spoken merely (*Loog* v. *Bean*, 26 Ch. D. 306), and it would seem that it is not necessarily limited to cases where injury to property or trade is shown. (See *per* Lord Halsbury, *Monson* v. *Tussaud*, *supra*.)

As to actions in respect of false statements respecting goods or property, see *post*, p. 481, "*Slander of Title.*"

For sending a Libellous Letter to, and publishing it in, a Newspaper.

1. The plaintiff has suffered damage from the defendant falsely and maliciously writing and publishing, and procuring to be printed and published in a newspaper of and concerning the plaintiff the words following, that is to say [*set out the defamatory words verbatim, and, where necessary, add an innuendo, or explanatory statement*].

Particulars are as follows:—

The words complained of were written and published by the defendant in a letter addressed and sent by him to the editor of a newspaper published at ——, called "The ——," and were printed and published in that newspaper by the defendant's procurement on the —— ——, 19—.

2. In consequence of the premises the plaintiff has been, and is, greatly injured in his credit and reputation. [*Add particulars of special damage, if any.*]

For a Libel imputing a Felony to the Plaintiff.

1. The plaintiff has suffered damage from the defendant falsely and maliciously writing and publishing of the plaintiff [in a letter sent by the defendant to A. B. on the —— ——, 19—] the words following, that is to say, "He is the person who took my horse," meaning thereby that the plaintiff feloniously stole a horse of the defendant.

2. [*The same as paragraph 2 of the last preceding form.*]

For a Libel on a Limited Company (*x*).

1. The plaintiff company was and is a company registered under the Companies Acts, 1862 to 1890, and was and is the owner of collieries at —— and —— in the county of —— and of buildings and property there.

2. The defendant —— was and is a checkweighman at the plaintiff company's colliery at ——. The defendant the —— Association Limited was and is the proprietor, and the defendant —— was and is the publisher, of a newspaper called the —— Gazette.

3. On or about the —— ——, 19—, the defendants falsely and maliciously wrote and printed and published, or caused to be written, printed and published in the issue of the said newspaper dated that day, of the plaintiff company and its collieries and property the words following, that is to say [*here set out the words*].

4. By the said words the defendant intended that the plaintiff's property was insanitary, unhealthy and unfit for habitation, and that the plaintiff

(*x*) This was the form used in the *South Hetton Coal Co.* v. *North Eastern News*, [1894] 1 Q. B. 133; 63 L. J. Q. B. 293.

company was guilty of neglect of its workmen and failed in a manner that was unjustifiable and discreditable to provide for its workmen fit and proper houses with fit and sanitary conveniences, and that the plaintiff company was not such a master as workmen could or should serve.

5. By reason of the premises the plaintiff company has been injured in its credit and reputation and has suffered damage.

The plaintiff company claims £——.

For a Libel in a Foreign Language.

1. The plaintiff has suffered damage from the defendant falsely and maliciously writing and publishing of the plaintiff [in a letter addressed to ——, and dated, &c.] in the Welsh language the words following, that is to say [*here set out the libel verbatim in Welsh*].

2. The said words mean, and were understood by the persons to whom they were so published to mean [*here set out a literal translation of the libel in English, adding any necessary innuendo, as in the ordinary form*].

Particulars of special damage :—

Claim by the Medical Officer of a Workhouse for a Libel on him as such contained in a Newspaper Report of the Proceedings at a Meeting of the Board of Guardians: see Purcell v. *Sowler*, 1 C. P. D. 781. *See now the Law of Libel Amendment Act*, 1888 (51 & 52 *Vict. c.* 64), s. 4, *cited post*, p. 836.

Claim by a Justice of the Peace and Candidate for Election as a Parish Councillor for a Libel stating that he was a Bankrupt: see Dagleish v. *Lowther*, [1899] 2 Q. B. 590.

Claim for Slander.

1. The plaintiff has suffered damage from the defendant on the —— ——, 19—, at ——, falsely and maliciously speaking and publishing of the plaintiff to *E. F.* [and *G. H.* and other bystanders whose names are unknown to the plaintiff] the words following, that is to say, "He is a thief."

[*Add any necessary innuendo, as for instance*, 2. The defendant by the said words meant that the plaintiff, &c., *as the case may be.*]

[*If there be any special damage, state it, as for instance*, 3. The plaintiff, in consequence, lost his situation as —— to A. B., and has since been unable to obtain another situation.]

The like, with an Innuendo that the Words used imputed the Criminal Offence of Cheating at Cards: Cumming v. *Green*, 7 Times Rep. 408.

The like, imputing that the Plaintiff had brought a Blackmailing Action: Marks v. *Samuel*, [1904] 2 K. B. 287; 73 L. J. Q. B. 587 (*y*).

The like, by an Agent of the British Museum, with an Innuendo that the Words complained of imputed the indictable Offence that he had wrongfully appropriated Property belonging to the Museum: Rassam v. *Budge*, [1893] 1 Q. B. 571.

For a Slander of the Plaintiff in his Trade.

1. The plaintiff has suffered damage from the defendant on the —— ——, 19—, at —— falsely and maliciously speaking and publishing of the plaintiff, in relation to his business of a ——, to ——, at ——, the words following, that is to say [*state the words, with innuendoes, if necessary, as, for instance*, meaning thereby that the plaintiff cheated and was guilty of fraudulent conduct in his said business].

2. The plaintiff in consequence was injured in his credit and reputation as a ——, and in his said business [*add special damage, if any, e.g.*, and lost the custom of *A. B.* and *C. D.*, who formerly dealt with him in his said business, *or, as the case may be*].

By a Jockey, for Words charging him with unfair and dishonest riding in Races: Wood v. *Durham*, 21 Q. B. D. 501; 57 L. J. Q. B. 547.

By a Wine Merchant, for Words contained in a Notice charging him with fraudulently using in his Business the Trade Mark of another Merchant: Hatchard v. *Mège*, 18 Q. B. D. 771; 56 L. J. Q. B. 397.

(*y*) It was held in the case cited that the action lay without any proof of special damage.

By a Tradesman, against the Publishers of a Newspaper for publishing a Statement imputing that a Judgment previously recovered against him remained unsatisfied: *Williams* v. *Smith*, 22 Q. B. D. 134; 58 L. J. Q. B. 21.

By an Actor for a Slander published of him as such: *Page* v. *Hawtrey*, 85 L. T. 263.

For a Slander in respect of Words not actionable without Special Damage.

1. The plaintiff has suffered damage from the defendant falsely and maliciously speaking and publishing of the plaintiff to *A. B.* on the —— ——, 19—, at ——, the words following, that is to say [*here state the words verbatim*].

2. By reason of the speaking and publishing of the said words the plaintiff has suffered the following special damage, viz. [*here set out the special damage*].

Detention of Goods, or Detinue (*z*).

Claim for the Detention of Goods.

The defendant detained [and detains] from the plaintiff the plaintiff's goods and chattels, that is to say, a horse, harness, and gig.

(*z*) An action lies for the specific recovery of personal chattels wrongfully detained from the person entitled to the possession of them, and also for damages occasioned by the wrongful detainer (3 Bl. Com. 151). The technical name of this action is "Detinue." The gist of the action is the wrongful detention of goods, and, in general, therefore, it is an action for a wrong independent of contract, and is "founded on tort" within the meaning of s. 116 of the County Courts Act, 1888. (See *Bryant* v. *Herbert*, 3 C. P. D. 389; 47 L. J. C. P. 670; *De Pasquier* v. *Cadbury*, [1903] 1 K. B. 104; 72 L. J. K. B. 78; see *ante*, pp. 3, 139.) To support the action, the plaintiff must have the right to the immediate possession of the goods at the time of commencing the action, arising out of an absolute or a special property; an interest in reversion is not sufficient. The goods must be sufficiently ascertained and distinguishable to be capable of being recovered. Thus, the action cannot be brought for a sum of money or a quantity of corn, unless they be specifically distinguished from other property of the same kind, as by being in a bag or a sack (3 Bl. Com. 152).

The action may be brought for the title-deeds of a real estate; and, in general, the proper party to sue in such case is the person entitled to the legal interest in the estate. (See *Atkinson* v. *Baker*, 4 T. R. 229; *Philips* v. *Robinson*, 4 Bing. 106; *Plant* v. *Cotterill*, 5 H. & N. 430; 29 L. J. Ex. 198.) Thus, the legal tenant for life may maintain an action of detinue to recover the title-deeds against the remainderman (*Lord Buckhurst's Case*, 1 Co. Rep. 2 a; *Allwood* v. *Heywood*, 1 H. & C. 745; 32 L. J. Ex. 153; *Leathes* v. *Leathes*, 5 Ch. D. 221; 46 L. J. Ch. 562). On the death of the tenant for life the reversioner may recover the deeds from the assignee of the tenant for life to whom they have been assigned as security for an advance (*Easton* v. *London*,

The plaintiff claims a return of the said goods and chattels or their value, and £10 for their detention.

(*See R. S. C.*, 1883, *App. C.*, *Sect. VI.*, *No.* 2.)

---

33 L. J. Ex. 34). The lessor is not entitled to the possession of a lease for an expired term as against the lessee (*Hall* v. *Ball*, 3 M. & G. 242; *Elworthy* v. *Sandford*, 34 L. J. Ex. 42). A tenant in common cannot, in general, sue for the detention of title-deeds without joining his co-tenant. (See *Wright* v. *Robotham*, 33 Ch. D. 106.) A mortgagor cannot sue the mortgagee for detention of the deeds while any of the mortgage money remains unpaid, even where he has made a tender of it (*Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273).

The injurious act being the wrongful detention of the goods, and not the original taking or obtaining of the possession, it is immaterial whether they were obtained by the defendant by lawful means, as by a bailment or finding, or by a wrongful act, as by a trespass or conversion (1 Chit. Pl., 7th ed., 137). The usual evidence of the detention is, that the defendant, having the possession or control over the goods, does not deliver them to the plaintiff when demanded (*Jones* v. *Dowle*, 9 M. & W. 19; *Miller* v. *Dell*, [1891] 1 Q. B. 468). The defendant cannot excuse himself from such delivery by reason of his having lost the possession by his own wrongful act, as where the defendant, having had the possession of the plaintiff's goods, has wrongfully sold them (*Jones* v. *Dowle*, 9 M. & W. 19); or carelessly lost them (*Reeve* v. *Palmer*, 5 C. B. N. S. 84, 91; 27 L. J. C. P. 327; 28 *Ib.* 168); or, if he ought to be in possession of the goods, by proof that he wrongfully parted with the possession before the plaintiff became entitled to them (*Bristol Bank* v. *Mid. Ry. Co.*, [1891] 2 Q. B. 653).

The goods must be described with sufficient certainty and accuracy for the purpose of identification, because the judgment and execution are for the recovery of the specific goods (2 Wms. Saund. 74 b).

The judgment for the plaintiff is, that he recover the goods, or the sum assessed by the jury for the value of them if the plaintiff cannot have his goods again, and also his damages assessed by the jury beyond the value of the goods, and his costs (Chit. Forms, 13th ed., p. 374).

By Ord. XLVIII., r. 1, the Court or a judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property upon paying the value assessed. This power may be exercised without any assessment of the value (*Hynas* v. *Ogden*, [1905] 1 K. B. 246, 250; 74 L. J. K. B. 101, 107; cf. Sale of Goods Act, 1883, s. 52).

If there are distinct goods or parcels of goods claimed, the value of each should be separately assessed (*Sandford* v. *Alcock*, 10 M. & N. 689). Where the goods have been re-delivered, the assessment may be confined to the damages for the detention (*Williams* v. *Archer*, 5 C. B. 318; *Crossfield* v. *Such*, 8 Ex. 159).

The damages may include not only those for the original wrongful detention, but also damages for all subsequent wrongful detention until re-delivery (*Serrao* v. *Noel*, 15 Q. B. D. 549, 559). Special damage may be recovered if properly claimed (*Ib.*; *Thurston* v. *Charles*, 21 Times Rep. 659). Where the defendant improperly detained photographs belonging to the plaintiff, and had taken and sold copies of them, the plaintiff was held entitled to recover the photographs or their value in detinue, and also to have an injunction to prevent the defendant taking or selling any more copies (*Mayall* v. *Higbey*, 1 H. & C. 148; 31 L. J. Ex. 329).

In this action the Court will sometimes exercise a summary jurisdiction to stay proceedings upon delivery to the plaintiff of the deeds or goods sought to be recovered, and upon payment of nominal damages and costs, and upon such other terms as the Court thinks proper to impose (2 Chit. Prac., 14th ed., p. 367).

A judgment for the plaintiff in detinue does not, without satisfaction of the assessed value of the chattel detained, change the property in the chattel (*Ex p. Drake*, 5 Ch. D. 866; *Ex p. Scarth*, 31 L. T. 737; and see "*Conversion*," *ante*, p. 349).

For the Detention of a Lease, with Claim for Special Damage.

1. The defendant detained, and detains, from the plaintiff a deed of the plaintiff, that is to say, a lease dated the —— ——, 19—, and made between *G. H.* and the plaintiff, whereby *G. H.* demised to the plaintiff a house and premises at —— for an unexpired term of years.

2. In consequence of such detention the plaintiff was prevented from selling the said lease and his interest in the said house and premises to *J. K.*, and lost £——, the price he would have received for the same, and incurred expense in maintaining and repairing the said house.

Particulars are as follows:—[*Here state the particulars of the contract with* J. K., *and of the expense.*]

The plaintiff claims a return of the said lease or its value, and £—— damages for its detention, and £—— special damage.

Dilapidations (*a*).

See "*Landlord and Tenant*," *ante*, p. 219.

(*a*) The incumbent of a benefice is bound to keep the buildings and fences belonging to his benefice in good and substantial repair, and also to restore and rebuild such buildings when necessary; though he is not bound to maintain or supply matters of ornament or luxury (*Wise* v. *Metcalfe*, 10 B. & C. 299; see *Bird* v. *Relph*, 4 B. & A. 826; 2 A. & E. 773; and *Ross* v. *Adcock*, L. R. 3 C. P. 655; 37 L. J. C. P. 290). By the common law, the non-fulfilment of this obligation subjected the preceding incumbent, if living, and, if he was not living, his executors or administrators (having assets), to an action at the suit of his successor, or of the representatives of the successor, to recover the value of the dilapidations (whenever they may have happened) as damages (*Ib.*; and see *Radcliffe* v. *D'Oyly*, 2 T. R. 630; *Mason* v. *Lambert*, 12 Q. B. 795; *Bunbury* v. *Hewson*, 3 Ex. 558; *Bryan* v. *Clay*, 1 E. & B. 38; *Gleaves* v. *Parfitt*, 7 C. B. N. S. 838; 29 L. J. C. P. 216).

The Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), by s. 34 empowers the bishop of the diocese, after an inspection of the buildings and fences of a vacated benefice and a report by a surveyor, to make an order stating the repairs and their cost for which the late incumbent, his executors or administrators, is or are liable, and by s. 36 enacts that the sum stated in the order as the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such; and by s. 53 it is enacted that "no sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of this Act, and to which this Act shall be applicable, unless the claim for such sum be founded on an order made under the provisions of this Act."

Hence in nearly all cases an action for debt is now substituted for the action for damages as the remedy in respect of dilapidations of the buildings or fences of the benefice. (See *Wright* v. *Davies*, 1 C. P. D. 638; *Ib.* 649, 651; 46 L. J. C. P. 41; *In re Monk*, 35 Ch. D. 583; 56 L. J. Ch. 809.)

The provision of s. 29 of the Act with reference to the time within which the bishop is to direct the surveyor to inspect and report is directory and not imperative, and the fact that such direction was not given within the time mentioned by the Act, is no defence to an action brought to recover the amount specified in an order subsequently made by the bishop under s. 34 (*Caldow* v. *Pixell*, 2 C. P. D. 562; 46 L. J. C. P. 541; *Gleaves* v. *Marriner*, 1 Ex. D. 107).

DISTRESS (*b*).

General Form of Claim for Illegal Distress.

1. On and before the —— ——, 19—, the plaintiff was in possession of a house and premises No. —, —— Street, in the —— of ——, and the owner and in possession of furniture, goods, and chattels therein.

(*b*) **Wrongful Distress.**]—In actions for *illegal* distresses, as for a distress where no rent is due, or after tender of the rent due, or for distraining things privileged from distress, the particular facts may be alleged in the statement of claim, showing that there was a distress, and setting forth the circumstances under which it was levied, and which made it *illegal*, or the wrongful acts merely which are complained of may be set forth as in the forms given under the titles "*Trespass*," *post*, p. 499; "*Conversion*," *ante*, p. 344; or for the taking of the goods the plaintiff may proceed by replevin (see "*Replevin*," *post*, p. 471); or an alternative claim may be set up as in the form *supra*.

In an action for an illegal distress, where the defendant is a trespasser *ab initio* as to the whole, the full value of the goods taken is recoverable as damages (*Attack* v. *Bramwell*, 3 B. & S. 520; 32 L. J. Q. B. 146). So in an action for taking things not distrainable (*Keen* v. *Priest*, 4 H. & N. 236; 28 L. J. Ex. 157). But if a portion only of the goods distrained are privileged, the landlord is a trespasser *ab initio* only as to such portion, and in such a case where the tenant paid the rent and costs, and the distress was withdrawn, it was held that only the actual damage sustained by taking the particular goods privileged could be recovered, and not the whole amount paid (*Harvey* v. *Pocock*, 11 M. & W. 740).

An action for an *excessive* distress lies under the Statute of Marlbridge (see *post*, p. 380, n. (*g*)), and the plaintiff cannot sue for trespass or conversion.

Actions for *irregular* distresses lie only in respect of the special damage occasioned by irregularities in conducting distresses; and the claim must be framed upon the particular irregularity complained of. (See note (*h*), *post*, p. 381.)

By s. 7 of the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21, amended by 58 & 59 Vict. c. 24), no person may act as a bailiff to levy any distress for rent unless he has a certificate authorising him so to act granted by a County Court judge or registrar; and if a distress is levied by a person not holding such certificate, he and any person who has authorised him so to levy are deemed to have committed a trespass (*Hogarth* v. *Jennings*, [1892] 1 Q. B. 907).

In order to create a distress it is not necessary that there should be an actual seizure; it is enough if the landlord or his bailiff takes effectual means to prevent the removal of the article from the premises, on the ground of rent being in arrear, as by declaring that it shall not be removed until the rent is paid, and prohibiting removal (*Cramer* v. *Mott*, L. R. 5 Q. B. 357; 39 L. J. Q. B. 172). Where there has been a seizure the distress is not invalidated by the inability of the distrainor to prevent the removal of the distress (*Wood* v. *Nunn*, 2 M. & W. 809; *Werth* v. *London Loan Co.*, 5 Times Rep. 320).

In the case of the bankruptcy of the tenant the landlord's right to distrain is limited to six months' rent accrued due prior to the date of the order of adjudication (Bankruptcy Act, 1883, s. 42; Bankruptcy Act, 1890, s. 28).

By s. 44 of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), "It shall not be lawful for any landlord entitled to the rent of any holding to which this Act applies to distrain for rent which became due in respect of such holding more than one year before the making of such distress" (*Ex p. Bull*, 18 Q. B. D. 642).

An agreement for a lease under which the tenant has entered, and which can be specifically enforced by him, is in general equivalent to a lease for the purpose of

2. On the said —— ——, 19—, the defendant by his servant or agent, one *E. F.*, wrongfully broke and entered the plaintiff's said house and seized and took possession of the plaintiff's said furniture, goods, and chattels, and wrongfully removed and sold the same, and converted the same to his own use, and deprived the plaintiff of the same.

3. In the alternative the plaintiff says that on the said day he was tenant to the defendant of the said house, and the defendant committed the acts above complained of under colour of a distress for rent alleged to be due from the plaintiff to the defendant, but in fact the alleged distress was wholly illegal and unjustifiable because [*state why the alleged distress was illegal, and show how it was so*].

[*Add particulars of any special damage.*]

The plaintiff claims £——.

Claim for Distraining and Selling where no Rent was due, to Recover Double Value of the Goods sold, under 2 *W. & M., sess.* 1, *c.* 5, *s.* 5 (*c*).

1. The plaintiff was tenant to the defendant of a messuage known as —— at —— at a rent of £—— a year, and the defendant on the —— ——, 19—, when none of the said rent was due or in arrear, wrongfully distrained in the said messuage certain goods of the plaintiff as a distress for pretended arrears of the said rent, and on the —— ——, 19—, wrongfully sold the said goods as such distress.

2. The plaintiff claims to recover from the defendant, by virtue of the

---

enabling the intended lessor to distrain according to the terms of the intended lease (*Walsh* v. *Lonsdale*, 21 Ch. D. 9; 52 L. J. Ch. 2; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. at p. 617, and see *ante*, p. 216).

The entry into a house for the purpose of distraining must be made in a legal manner and at a legal time. It is illegal to break open the outer door of or to break into a house, or stable, or building, for the purpose of distraining, but it is permissible to climb over the wall of a back yard, or the fence of a garden, or to enter through an open window for that purpose (*Brown* v. *Glenn*, 16 Q. B. 254; 20 L. J. Q. B. 205; *Crabtree* v. *Robinson*, 15 Q. B. D. 312; *Long* v. *Clarke*, [1894] 1 Q. B. 119; 63 L. J. Q. B. 108). It is illegal to distrain before sunrise or after sunset (*Tutton* v. *Darke*, 5 H. & N. 647; 29 L. J. Ex. 271).

(*c*) The statute 2 W. & M., sess. 1, c. 5, which enables, though it does not compel the sale of goods distrained for rent (*Hudd* v. *Ravenor*, 2 B. & B. 662; 5 Moore, 542; *Philpott* v. *Lehain*, 35 L. T. 855), gives, by s. 5, an action to recover "double of the value of the goods . . . distrained and sold, together with full costs of suit," to the owner of goods, his executors or administrators, which are distrained and sold under a distress for rent, made when in truth no rent is in arrear or due, to the person or persons distraining, or in whose name or names the distress is taken, from the person or persons so distraining or any of them or his or their executors or administrators. In such action the jury ought to be directed, if they find for the plaintiff, to give damages to double the amount of the value of the goods (*Masters* v. *Fariss*, 1 C. B. 715).

"Full costs" would seem to mean the ordinary "party and party costs," as now allowed.

statute 2 W. & M., sess. 1, c. 5, s. 5, double the value of the said goods so distrained and sold as aforesaid.

Particulars.

The value of the goods distrained was £——.

The goods were as follows :—[*Describe the goods so far as practicable.*]

The plaintiff claims £——.

For Distraining twice for the same Rent (*d*).

1. The plaintiff was tenant to the defendant of a house No. 5, —— Street, ——, at a yearly rent of £—— payable half-yearly by equal payments on the 24th of June and the 25th of December in each year.

2. The defendant, on the —— ——, 19—, distrained certain goods of the plaintiff in the said house as a distress for [one half-year's] arrears of the said rent.

3. At the time of making the said distress there were in the said house goods of the plaintiff liable to the said distress of more than sufficient value to have satisfied the said arrears and the charges of a distress for the same and of the sale thereof, and which the defendant could then have distrained to satisfy the same, of which the defendant then had notice.

4. The defendant afterwards, on the —— ——, 19—, wrongfully made a second distress on certain goods of the plaintiff in the said house for the same arrears of rent for which the first mentioned distress was made as above stated, and for the charges of such second distress.

Particulars of damage :—[*State them.*]

The plaintiff claims £——.

(*d*) An action for trespass or conversion will lie for the wrongful taking or conversion under the second distress (*Dawson* v. *Cropp*, 1 C. B. 961 ; and see *Bagge* v. *Mawby*, 8 Ex. 641 ; 22 L. J. Ex. 236).

If there has been some mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder ; or if the tenant has done anything equivalent to saying "forbear to distrain now and postpone your distress to some other time," the landlord may distrain a second time. But, if there is fair opportunity, and there is no legal cause why he should not work out the payment of the rent by the first distress, his duty is to work it out by the first distress, and he cannot distrain again. (See *per* Parke, B., *Bagge* v. *Mawby*, *supra* ; *Thwaites* v. *Wilding*, 12 Q. B. D. 4 ; 53 L. J. Q. B. 1.) Where by misconduct the tenant prevents the first distress being realised, a second may lawfully be made (*Lee* v. *Cooke*, 2 H. & N. 584 ; 3 H. & N. 203 ; 27 L. J. Ex. 337).

After a distress, and before the sale of the goods distrained, no action can be maintained for any rent distrained for, whether the distress is sufficient or not (*Lehain* v. *Philpott*, L. R. 10 Ex. 242 ; 44 L. J. Ex. 225), though after the sale an action will lie for any balance remaining due after giving credit for the proceeds of such sale (*Philpott* v. *Lehain*, 35 L. T. 855).

For Distraining Beasts of the Plough, contrary to 51 *Hen.* 3, *st.* 4 (*e*).

The plaintiff has suffered damage by the defendant, to whom the plaintiff was tenant of a farm at ——, wrongfully on the —— ——, 19—, distraining upon the said farm, and holding as a distress the plaintiff's beasts of

(*e*) It is enacted by 51 Hen. 3, st. 4, that no man shall be distrained by his beasts that gain his land, nor by his sheep, so long as the distrainor can find other chattels sufficient for the demand (2 Inst. 132). As to what are such beasts, see *Keen* v. *Priest*, 4 H. & N. 236 ; 28 L. J. Ex. 157.

The plaintiff may also in this case sue as for a trespass or conversion, or replevy the goods unlawfully taken (*Nargett* v. *Nias*, 1 E. & E. 439 ; 28 L. J. Q. B. 143 ; *Davies* v. *Aston*, 1 C. B. 746).

Similar to this action is the action for distraining implements of trade and other things privileged from distress, whether absolutely or conditionally. (See the last-cited cases, and *Harrey* v. *Pocock*, 11 M. & W. 740.)

Fixtures are absolutely privileged from distress, and the removal of fixtures under a distress amounts to a conversion (*Dalton* v. *Whittem*, 3 Q. B. 961 ; *Darby* v. *Harris*, 1 Q. B. 895 ; *Turner* v. *Cameron*, L. R. 5 Q. B. 306 ; 39 L. J. Q. B. 125). A distrainor is not liable for claiming to take fixtures unless he actually removes them (*Beck* v. *Denbigh*, 29 L. J. Ch. 273). Tenants' fixtures removable by the tenants are, whilst affixed to the land or tenement not distrainable (*Simpson* v. *Hartopp*, Willes, 512 ; 1 Sm. L. C., 11 ed., p. 437 ; *Holland* v. *Hodgson*, L. R. 7 C. P. 328 ; 41 L. J. C. P. 146 ; *Sheffield Building Society* v. *Harrison*, 15 Q. B. D. 358 ; 54 L. J. Q. B. 15 ; *Reynolds* v. *Ashby*, [1903] 1 K. B. 87 ; 72 L. J. K. B. 51 ; [1904] A. C. 466 ; 73 L. J. K. B. 946 ; Bullen on Distress, p. 105).

A mere temporary removal of a fixture for necessary repairs does not make it whilst so severed lose its privileged quality (*Gorton* v. *Falkner*, 4 T. R. 565).

Goods *in custodia legis* are privileged from distress (*In re Mackenzie*, [1899] 2 Q. B. at p. 574 ; Co. Lit. 47 a ; Bullen on Distress, p. 93 ; Gilbert, p. 40), therefore goods already distrained for rent are privileged from a second distress ; and similarly goods taken in execution cannot be distrained, except growing crops seized and sold under an execution, which by the Landlord and Tenant Act, 1851, are, in default of sufficient distress of the tenants' goods, liable to be distrained for rent accrued due after such seizure and sale.

Growing crops are distrainable by statute 11 Geo. 2, c. 19, s. 8, and may be cut when ripe, and appraised and sold. (See *Peacock* v. *Purris*, 2 B. & B. 362 ; *Owen* v. *Legh*, 3 B. & Ald. 470.)

Trees and shrubs growing in a nursery ground are not distrainable (*Clark* v. *Gaskarth*, 8 Taunt. 431 ; 2 Moore, 491).

The provisions of 11 Geo. 2, c. 19, s. 8, apply only to distresses made by the lessor or landlord (*Miller* v. *Green*, 2 C. & J. 142).

Commodities of a perishable nature, and which cannot be restored in the same state as that in which they were taken, as meat, milk, fruit, &c., cannot be distrained (*Morley* v. *Pincombe*, 2 Ex. 101). Formerly corn and hay were thus privileged, but they have been made distrainable by 2 W. & M., c. 5, s. 3.

Under the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4, the wearing apparel and bedding of the tenant or his family, and the tools and implements of his trade to the value of five pounds, are protected from distress for rent, except where the lease or tenancy has expired and possession of the premises has been demanded, and the distress is made not earlier than seven days after such demand.

A bedstead is "bedding" within this section (*Davis* v. *Harris*, [1900] 1 Q. B. 729 ; 69 L. J. Q. B. 232) and a sewing machine procured by a husband for his wife's use has been held to be an implement of his trade (*Churchward* v. *Johnson*, 54 J. P. 326).

By s. 4 of the Law of Distress Amendment Act, 1895, justices have jurisdiction

the plough wherewith he tilled his said farm at a time when the defendant could and ought to have found on the said farm other distrainable goods

---

to order restoration of goods protected under the above section, or compensation in respect thereof.

Implements of trade or husbandry, except in cases within the last-mentioned enactment, are privileged from distress for rent conditionally, that is to say, if other sufficient distress can be found (*Gorton* v. *Falkner*, 4 T. R. 565 ; *Simpson* v. *Hartopp*, *supra* ; *Nargett* v. *Nias*, *supra*).

Goods necessarily delivered to a person exercising a trade for the purpose of having them dealt with in the way of his trade are absolutely privileged whilst on the premises where such trade is carried on (Co. Lit. 47 a ; *Simpson* v. *Hartopp*, *supra* ; *Wood* v. *Clarke*, 1 C. & J. 484 ; *Lyons* v. *Elliott*, 1 Q. B. D. 210 ; 45 L. J. Q. B. 159). Thus, goods sent to an auctioneer, factor, or commission agent, to his premises to be sold (*Adams* v. *Grane*, 1 C. & M. 380 ; *Findon* v. *M'Laren*, 6 Q. B. 891 ; *Thompson* v. *Mashiter*, 1 Bing. 213 ; *Lyons* v. *Elliott*, *supra*) ; materials delivered to a manufacturer to be worked up (*Gibson* v. *Ireson*, 3 Q. B. 39 ; *Read* v. *Buxley*, Cro. Eliz. 566 ; *Lyons* v. *Elliott*, *supra*) ; an animal sent to a butcher to be slaughtered (*Brown* v. *Shevill*, 2 A. & E. 138) ; goods pledged with a pawnbroker (*Swire* v. *Leach*, 18 C. B. N. S. 479 ; 34 L. J. C. P. 150) ; goods of guests at a common inn, and goods in a market or fair (see *per* Parke, B., *Muspratt* v. *Gregory*, 1 M. & W. 633, 654 ; *Lyons* v. *Elliott*, *supra*) ; goods sent to or brought by guests at a common inn as part of their baggage and so received into the inn, whether the property of the guests or not (*Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501 ; 65 L. J. Q. B. 44) ; goods stored at a furniture depository to be taken care of (*Miles* v. *Furber*, L. R. 8 Q. B. 77 ; 42 L. J. Q. B. 41) ; goods in the hands of a carrier, or being taken to market, are privileged absolutely, even when not on the premises of the carrier or person taking them to market (*Lyons* v. *Elliott*, *supra* ; Co. Lit. 47 a ; *Gisbourne* v. *Hurst*, 1 Salk. 249).

Where a horse was sent to an inn, and the innkeeper put it into a stable which had been temporarily lent to him, at a distance from the inn, it was held that the horse was not privileged from distress by the landlord of the stable, on the ground that the privilege did not extend beyond the privileged premises (*Crosier* v. *Tomkinson*, Barnes, 472 ; 2 Ld. Ken. 439 ; *Lyons* v. *Elliott*, *supra*).

The goods are not privileged in such cases as the following :—A boat sent by the buyers of goods to the manufacturers, to carry away the goods bought (*Muspratt* v. *Gregory*, 1 M. & W. 633 ; 3 *Ib.* 677) ; brewers' casks sent to a public-house and left until the beer is consumed (*Joule* v. *Jackson*, 7 M. & W. 450) ; goods sent to an auctioneer to be sold at a sale held, not on the auctioneer's premises, but at a private house, whilst at such private house (*Lyons* v. *Elliott*, *supra*).

It has been held that horses and carriages standing at livery are not privileged (*Parsons* v. *Gingell*, 4 C. B. 545 ; see as to this, *Swire* v. *Leach*, *supra*).

Things belonging to a third person which are on the demised premises for the purpose of being wrought up or manufactured by the tenant in the way of his trade are not privileged, unless they have been sent or delivered by such third person to the tenant for that purpose (*Clarke* v. *Millwall Dock Co.*, 17 Q. B. D. 494 ; 55 L. J. Q. B. 378).

Things in actual use of a person are privileged whilst they are being used, as a horse on which a person is riding (*Storey* v. *Robinson*, 6 T. R. 138) ; a loom with which a person is weaving, or clothes which a person is wearing (*Simpson* v. *Hartopp*, *supra*).

By s. 1 of the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79) if a superior landlord distrains on the goods of a lodger for arrears of rent due to him by his immediate tenant, such lodger may serve the superior landlord, or the person employed by him to distrain, with a declaration in writing setting forth that such immediate tenant has no property or interest in the goods distrained, or threatened to be distrained upon, and that they are the property, or in the lawful possession of such lodger, and also setting forth whether any and what rent is due, and for what period, from such lodger to his

sufficient to satisfy the rent distrained for and all charges consequent upon such distress.

Particulars of the beasts of the plough distrained :—

Particulars of damage :—

---

immediate landlord, and to such declaration a correct inventory subscribed by the lodger is to be annexed of the goods referred to in the declaration, and such lodger may pay the superior landlord, or the person employed by him to distrain, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the superior landlord's claim.

Section 2 provides that if, after service of such declaration and inventory, and after payment or tender by the lodger to the superior landlord, or person employed to distrain, of the said rent, if any, which by the preceding section such a lodger is authorised to pay, the superior landlord or bailiff, or other person employed by him, shall levy, or proceed with a distress, on the lodger's goods, he shall be deemed guilty of an illegal distress and the superior landlord shall also be liable to an action at the suit of the lodger, or the lodger may apply to a justice of the peace for an order for the restoration of the goods distrained.

A lodger means one who lives and sleeps, or at any rate sleeps on the premises, and whose immediate landlord lives on, or has a certain control over the premises, performing some duties in the house (*Phillips* v. *Henson*, 3 C. P. D. 26 ; 47 L. J. C. P. 273 ; *Bradley* v. *Baylis*, 8 Q. B. D. 195 ; 51 L. J. Q. B. 183 ; *Morton* v. *Palmer*, 51 L. J. Q. B. 7 ; *Ness* v. *Stephenson*, 9 Q. B. D. 245 ; *Heawood* v. *Bone*, 13 Q. B. D. 179 ; 51 L. T. 125).

The protection afforded by this Act is limited to the distress in respect of which the lodger's declaration was made, and does not extend to a distress afterwards made for subsequent rent (*Thwaites* v. *Wilding*, 11 Q. B. D. 421 ; 12 *Ib.* 4 ; 52 L. J. Q. B. 734 ; 53 *Ib.* 1). If the landlord sells the distress before the expiration of the required period, a lodger who is thereby prevented from serving a declaration for the purpose of protecting his goods is entitled to maintain an action against the landlord for selling the goods within that period (*Sharpe* v. *Foulc*, 12 Q. B. D. 385 ; 53 L. J. Q. B. 309). The action lies against the bailiff who thus unlawfully distrains and also against the superior landlord by whose authority he does so (*Lowe* v. *Dorling*, [1905] 2 K. B. 501 ; 74 L. J. K. B. 794).

By the Gasworks Clauses Acts, 1847 and 1871, gas-meters and fittings let for hire by gas companies under those Acts are exempt from distress for rent due in respect of the hirer's premises. A gas stove is within this exemption (*Gas Light Co.* v. *Hardy*, 17 Q. B. D. 619 ; 56 L. J. Q. B. 168).

Similar exemption is given to water pipes, meters, and apparatus of water companies by 10 & 11 Vict. c. 17, s. 44, and 26 & 27 Vict. c. 93, s. 14, and to electrical fittings and apparatus of electrical companies by 45 & 46 Vict. c. 56.

By s. 45 of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), machinery upon a holding within that Act, under an agreement with the tenant for its hire or use in his business, and live stock on the holding solely for breeding purposes, are privileged from distress for the rent of such holding, if the property of some person other than the tenant. By the above section, where the tenant of such a holding takes in live stock belonging to another person to be fed at a fair price agreed upon between them, such stock is not distrainable for the rent of the holding if other sufficient distress is to be found, and, if there is no other sufficient distress, the amount recoverable is limited to the unpaid portion of the price of agistment ; but, so long as any portion of the stock remains on the holding, it continues liable to distress to the extent of so much of the price as remains from time to time unpaid. The fair price mentioned in the section need not necessarily be a money payment (*London and Yorkshire Bank* v. *Belton*, 15 Q. B. D. 457 ; 54 L. J. Q. B. 568) ; but it must be a payment for the agistment merely (*Masters* v. *Green*, 20 Q. B. D. 807 ; 59 L. T. 476).

By the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), s. 3, railway

For refusing to restore Goods distrained on Tender of the Rent and Charges before impounding (f).

1. The plaintiff has suffered damage by the defendant, to whom the plaintiff was tenant of a farm at ——, wrongfully on the —— ——, 19—, refusing to restore to the plaintiff certain goods of the plaintiff which the defendant had distrained for arrears of rent of the said farm.

2. Whilst the defendant was in possession of the plaintiff's goods under the said distress and before the impounding thereof, the plaintiff on the —— ——, 19—, tendered to the defendant the said arrears of rent and the charges of the said distress, and [verbally] requested the defendant to restore to the plaintiff his said goods, but the defendant wrongfully [verbally] refused to restore the same to the plaintiff.

Particulars :—

---

rolling stock being in "a work" (see s. 2) is not liable to distress for rent payable by a tenant of the work, if such rolling stock is not the property of the tenant, and has a distinguishing mark conspicuously impressed or made thereon, sufficiently indicating the actual owner thereof. By s. 5, the protection from distress is not to extend to the interest which such tenant may have in the rolling stock.

See further, as to what things are privileged, notes to *Simpson* v. *Hartopp*, 1 Smith's L. C., 11th ed., p. 437, and Bullen on Distress, pp. 102 *et seq.*

(*f*) Tender before the distress makes the distress wrongful; tender after the distress and before impounding makes the detainer and not the taking wrongful; tender after the impounding makes neither the taking nor the detainer wrongful, for then it comes too late (*per* Lord Coke in *Six Carpenters' Case*, 8 Co. Rep. 147 a; cited by Tindal, C.J., in *Gullivер* v. *Cosens*, 1 C. B. 788, 795; *West* v. *Nibbs*, 4 C. B. 172; *Singleton* v. *Williamson*, 7 H. & N. 747; 31 L. J. Ex. 287). This, however, it would seem, must now be taken subject to the qualification that an action may be maintained for selling after a tender of the rent and expenses, made within the time allowed for replevying, although made after the impounding (*Johnson* v. *Upham*, 28 L. J. Q. B. 252; 2 E. & B. 250; Bullen, pp. 213, 231). Tender may be made at any time before the impounding is complete (see *Thomas* v. *Harries*, 1 M. & G. 695), which may be without removal of the goods (*Ib.*), as by mere agreement with the party distrained upon to consider the goods as impounded (*Washborn* v. *Black*, 11 East, 405, n. (*a*); *Tennant* v. *Field*, 8 E. & B. 336). Tender may be made to a bailiff authorised to make a distress, but not to a man put in by the bailiff to keep possession (*Boulton* v. *Reynolds*, 29 L. J. Q. B. 11). Tender before actual distress need not include the costs incurred, although the warrant to distrain has been delivered for execution (*Bennett* v. *Bayes*, 5 H. & N. 391; 29 L. J. Ex. 224).

An action for trespass, detention, conversion, or of replevin will lie for a wrongful distress made after tender. (See *Branscomb* v. *Bridges*, 1 B. & C. 145; *Holland* v. *Bird*, 10 Bing. 15.) Detinue or replevin will lie for a wrongful detainer after tender made before impounding (*Gullivер* v. *Cosens*, 1 C. B. 788; *Evans* v. *Elliott*, 5 A. & E. 142); and an action for trespass or conversion also, if the goods have been afterwards removed by the distrainor (*Vertue* v. *Beasley*, 1 M. & Rob. 21). An action for conversion or detention will lie, if the landlord refuses to deliver the goods after tender and acceptance of the rent in arrear and the expenses of the distress after impounding (*West* v. *Nibbs*, 4 C. B. 172).

For taking an Excessive Distress, contrary to the Statute of Marlbridge (*g*).

1. The plaintiff has suffered damage by the defendant on the —— ——, 19—, levying an excessive and unreasonable distress upon the goods of the plaintiff at No. —, —— Street, whereof he was tenant to the defendant at a certain rent of £—— a year for alleged arrears of the said rent contrary to the statute in such case made and provided.

(*g*) **Excessive Distress.**]—This action lies upon the Statute of Marlbridge, 52 Hen. 3, c. 4, which enacts that "distresses shall be reasonable, and not too great." (See 2 Inst. 107.) If any rent be due, no action will lie for a distress merely because it is made under a claim of more than is due, unless it be followed by some special damage (*Leyland* v. *Tancred*, 16 Q. B. 669; *Lucas* v. *Tarleton*, 3 H. & N. 116; 27 L. J. Ex. 246; *Stevenson* v. *Newnham*, 13 C. B. 285; *Glynn* v. *Thomas*, 11 Ex. 870; 25 L. J. Ex. 125; *French* v. *Phillips*, 1 H. & N. 564; 26 L. J. Ex. 82). But if more goods are taken than are reasonably sufficient to cover the arrears of rent and expenses, an action will lie for an excessive distress. In this case no action will lie for trespass or conversion (*Lynn* v. *Moody*, 2 Str. 851; *Hutchins* v. *Chambers*, 1 Burr. 590; *Whitworth* v. *Smith*, 5 C. & P. 250).

If a larger sum than is due for arrears is paid under a distress, the excess was not under the former system, in general, permitted to be recovered back in an action for money received (*Knibbs* v. *Hall*, 1 Esp. 84; *Glynn* v. *Thomas*, 11 Ex. 870; 25 L. J. Ex. 125; and see Bullen, pp. 223, 224). It therefore is advisable in such case to set out the facts in the claim.

The mere distraining of the goods to an excessive value above the rent due, without sale or removal, is sufficient to support this action (*Sells* v. *Hoare*, 1 Bing. 401; *Swann* v. *Earl of Falmouth*, 8 B. & C. 456; and see *Bayliss* v. *Fisher*, 7 Bing. 153; *Chandler* v. *Doulton*, 3 H. & C. 553; 34 L. J. Ex. 89). The action lies for the excessive taking of things distrainable by statute, as growing crops, as well as things distrainable at common law (*Piggott* v. *Birtles*, 1 M. & W. 441, 449). The excess of the value of the goods distrained above the arrears of rent due must be unreasonably great. The landlord is not bound to calculate very nicely the value of property seized; but he must take care that some proportion is kept between that and the sum for which he is entitled to take it (*per* Bailey, J., *Willoughby* v. *Backhouse*, 2 B. & C. 821, 823; *Roden* v. *Eyton*, 6 C. B. 427). The landlord is not bound by the amount of rent claimed at the time of distraining; for the plaintiff must show an excess above the amount really due. (See *Tancred* v. *Leyland*, 16 Q. B. 669; *Phillips* v. *Whitsed*, 29 L. J. Q. B. 164.)

The ordinary test of value of the goods seized is what they would have sold for at a broker's sale (*Wells* v. *Moody*, 7 C. & P. 59; *Rapley* v. *Taylor*, 1 C. & E. 150). But an actual sale made under the distress, though not proved to be unfair, is not a conclusive test of value, and an action may be maintained for an excessive distress, if the excess be proved, though at the sale the goods did not in fact realise the rent due (*Smith* v. *Ashforth*, 29 L. J. Ex. 259).

The measure of damages, if the goods are removed and impounded off the land, is the loss of the use and enjoyment of the surplus of the goods, and if the goods are not restored before action, the plaintiff may claim the full value of the surplus (*Piggott* v. *Birtles*, 1 M. & W. 441, 448). The plaintiff may recover substantial damages, although the goods are not removed or sold, and the plaintiff retains the use of them while under the distress (*Bayliss* v. *Fisher*, 7 Bing. 153); and the plaintiff, upon proof of an excessive distress, is entitled to nominal damages, though he cannot prove substantial damages (*Chandler* v. *Doulton*, 3 H. & C. 553; 34 L. J. Ex. 89). Upon an excessive distress of growing crops, the measure of damages was held to be the compensation for the additional expense of the distress, and for the loss of ownership and power of disposition, or, if the tenant replevied, for the additional expense and inconvenience of replevying to a larger amount (*Piggott* v. *Birtles*, 1 M. & W. 441).

2. The said goods were of much greater value than the amount of the said arrears and of the charges of the said distress and of the sale thereunder, and a part of them of sufficient value to have satisfied the said arrears and charges might then have been distrained by the defendant for the same.

Particulars.

Rent distrained for ..... £
[Charges of distress and sale £ ——] .....
Value of goods distrained .....

For selling without the Statutory Notice (*h*).

The plaintiff has suffered damage by the defendant, to whom the plaintiff was tenant of the house No. —, —— Street, ——, at a certain rent, wrongfully on the —— ——, 19—, selling goods of the plaintiff which the defendant had distrained for rent due in respect of the said house, without notice of the said distress and of the cause of making the same having been given to the plaintiff or left at the said house [five] days before sale of the said goods, contrary to the statute 2 W. & M. sess. 1, c. 5, s. 2. [*If the statutory period has been extended by a written request of the tenant under sect.* 6 *of the Law of Distress Amendment Act*, 1888, *the fact of such request must be stated in the pleading, and the number of the days must be altered accordingly.*]

Particulars:—[*State particulars of special damage, &c.*]

(*h*) **Irregular Distresses.**]—By the common law goods distrained for rent could not be sold, but could only be detained as a pledge for enforcing payment of the rent. A power of selling the goods, for the rent and charges of the distress, was given by the statute 2 W. & M. sess. 1, c. 5, subject to certain restrictions and formalities of which the following (see s. 2) are still in force. Notice of the distress (with the cause of the taking) must be left "at the chief mansion house, or other most notorious place on the premises charged with the rent," and then for [five] days, to give the tenant or owner of the goods time to replevy, the distress must be held, after which it may be sold "for the best price that can be gotten" for it; subject, however, to the restriction that there has been an appraisement of the goods, if the tenant or owner of the goods has, in writing, required an appraisement, which presumably he will not often do as he has to bear the cost of it. A sale without such notice is irregular (Bullen on Distress, p. 161).

The sheriff, under-sheriff, and constable have no longer any powers or responsibilities as to distresses or replevins (see 35 & 36 Vict. c. 92, s. 13; 51 & 52 Vict. c. 43, s. 134), and the period of five days allowed by the statute 2 W. & M. sess. 1, c. 5, for replevying is, by the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 6, to be extended to "a period of not more than fifteen days," if the tenant or owner of the goods distrained makes a written request to that effect to the landlord or other person levying the distress, and gives security for any additional cost that may be occasioned by such extension of time. Appraisement is now, by sect. 5 of the Law of Distress Amendment Act, 1888, in general, unnecessary, unless the tenant or owner in writing requires it; and by 35 & 36 Vict. c. 92, s. 13, no oath is to be required from such appraisers. (See Bullen, pp. 189—191.)

At common law an irregularity in the conduct or treatment of a distress made the

For not selling for the Best Price, under 2 *W. & M. sess.* 1, *c.* 5, *s.* 2 (*i*).

The plaintiff has suffered damage by the defendant on the —— ——, 19—, wrongfully selling goods of the plaintiff which the defendant had distrained for rent due in respect of [*describe the premises*], of which the plaintiff was tenant to the defendant, for less than the best price that could be gotten for the same, contrary to the statute in such case made and provided.

Particulars :—[*Here state the special damage, &c.*]

---

party distraining a trespasser *ab initio*, and liable to be sued as such (*Six Carpenters' Case*, 8 Co. 146 a ; 1 Smith's L. C., 11th ed., p. 132). This doctrine occasioned great hardship in cases of distress for rent, and consequently the rule was altered in these cases by the 11 Geo. 2, c. 19, s. 19, which enacted, that where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent, the distress itself shall not be deemed to be unlawful nor the party making it be therefore deemed a trespasser *ab initio;* but the party aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage sustained thereby and no more. In respect of distresses other than for rent, the common law doctrine still, in general, prevails.

An action for any irregularity in dealing with a distress cannot be maintained without proof of actual damage (*Proudlove* v. *Twemlow*, 1 C. & M. 326 ; *Rogers* v. *Parker*, 18 C. B. 112 ; 25 L. J. C. P. 220 ; *Lucas* v. *Tarleton*, 3 H. & N. 116 ; 27 L. J. Ex. 246) ; and therefore the damage sustained should be set forth in the claim, or the fact of damage alleged, and particulars given. The landlord is liable for irregularities committed by his bailiff in conducting the distress ; but he is not liable for acts wholly unlawful committed by the bailiff, as where the latter distrains on the wrong premises, or on goods privileged from distress, as fixtures, unless he expressly sanctioned such acts by prior authority or subsequent assent after notice (*Lewis* v. *Reed*, 13 M. & W. 834 ; *Gauntlett* v. *King*, 3 C. B. N. S. 59 ; *Haseler* v. *Lemoyne*, 5 C. B. N. S. 530 ; 28 L. J. C. P. 103). The person who authorises the bailiff is liable, although he is only an agent of the landlord (*Bennett* v. *Bayes*, 5 H. & N. 391 ; 29 L. J. Ex. 224).

The notice required by the 2 W. & M. sess. 1, c. 5, s. 2, should be in writing (*Wilson* v. *Nightingale*, 8 Q. B. 1034 ; but see *Walter* v. *Rumbal*, 1 Ld. Raym. 53 ; Bullen, p. 159). The damages for selling without appraisement, where appraisement is still necessary, would seem to be the real value of the goods sold *minus* the rent. (See *Knight* v. *Egerton*, 7 Ex. 407, 408.)

A distrainor may not use or work the thing or animal distrained (*Smith* v. *Wright*, cited *post*, p. 383), though he may milk milch kine, or scour armour to avoid rust or the like. (See Bullen, p. 180 ; *Dargan* v. *Davies*, 2 Q. B. D. at p. 120.)

Overcharges by bailiffs may, in general, be recovered. (See *ante*, p. 257.)

(*i*) A sale to the landlord himself is not a sale within the statute, and, if made without the consent of the owner, it does not change the property in the goods (*King* v. *England*, 4 B. & S. 782 ; 33 L. J. Q. B. 145 ; *Moore* v. *Singer*, [1903] 2 K. B. 168 ; 72 L. J. K. B. 577).

Where a landlord sells hay, &c. of his tenant under a distress for rent, he cannot lawfully impose upon a purchaser a stipulation that it is to be consumed or used only on the land demised, even if the tenant is bound to him by covenant so to consume or use such hay, &c., the statute requiring the best price to be gotten (*Hawkins* v. *Walrond*, 1 C. P. D. 280 ; 45 L. J. C. P. 772).

For Pound-breach, claiming Treble Damages, under 2 W. & M. sess. 1, c. 5, s. 4 (k).

The plaintiff has suffered damage by the defendant on the —— ——, 19—, breaking a pound on the premises known as ——, wherein certain goods distrained by the plaintiff for rent due to him as the lessor of the said premises had been and were impounded by him, and then wrongfully seizing and carrying away the said goods, whereby the plaintiff lost the benefit of the said distress, and has sustained £—— damages.

Particulars :— [*State the particulars of the damage.*]

The plaintiff claims under the statute 2 W. & M. sess. 1, c. 5, s. 4, treble the amount of the said damages.

For making an Excessive Distress for Poor's Rate (l).

1. The plaintiff has suffered damage by the defendants on the —— ——, 19—, levying an excessive and unreasonable distress upon the goods of the plaintiff at —— ——, for alleged arrears of poor's rate.

2. The said alleged arrears of poor's rate amounted to £——, and the charge of the said distress and sale to £——, but the defendants distrained

---

(*k*) The proper remedy for the landlord to pursue in case of any wrongful interference with the goods impounded is not an action for conversion or trespass, but an action for pound-breach or rescue founded upon the statute 2 W. & M. sess. 1, c. 5, in which action treble damages are recoverable by s. 4 of that statute (*Moneux* v. *Goreham*, 2 Sel. N. P., 10th ed., 1351 ; *Turner* v. *Ford*, 15 M. & W. 212). By 11 Geo. 2, c. 19, s. 10, any distress for any rent may now be impounded or otherwise secured in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for such impounding and securing. Goods when impounded are not regarded as in the possession of the landlord, but are treated as *in custodia legis*. (See *R.* v. *Cotton*, Parker, 121 ; *Cotsworth* v. *Bettison*, 1 Salk. 247 ; 1 Ld. Raym. 105.)

When the goods have been impounded, a mere temporary absence of the bailiff in charge of them does not take them out of the custody of the law, and, therefore, a tenant re-taking, during such absence, possession of goods of his which have been distrained and impounded on the premises may be liable in an action for pound-breach (*Jones* v. *Biernstein*, [1899] 1 Q. B. 470 ; [1900] 1 Q. B. 100 ; 69 L. J. Q. B. 1). An abuse of the distress by the distrainor by working it, or using it, puts an end to the impounding, and justifies a re-taking by the tenant or owner to prevent such abuse (*Smith* v. *Wright*, 6 H. & N. 821 ; 30 L. J. Ex. 313). In an action for treble damages for pound-breach, it is not necessary to prove any special damage (*Kemp* v. *Christmas*, 79 L. T. N. S. 233).

The tenant or the owner of the goods distrained, may by request in writing require the removal of the distress, for sale, to a public auction room, or to some other fit and proper place specified. (See the Law of Distress Amendment Act, 1888, s. 5.)

(*l*) An action will lie for an excessive and unreasonable distress for poor's rate, or other rate to be levied in the same way as the poor's rate. (See *Baker* v. *Wicks*, [1904] 1 K. B. 743 ; 73 L. J. K. B. 410.) An action will also lie to recover back unreasonable charges made and paid for taking, keeping and selling such a distress (*Rex* v. *Philbrick*, [1905] 2 K. B. 108 ; 74 L. J. K. B. 464).

Such a distress partakes of the nature of an execution. It is not a mere pledge, it is

on and sold goods of the value of £—— or more, being of much greater value than was necessary to have satisfied the said arrears and charges, whereas they might have distrained on goods of sufficient value only to have satisfied such arrears and charges.

Particulars of damage :—

---

to be sold, though not subject to the provisions of 2 W. & M. sess. 1, c. 5 (*ante*, p. 374), and the restrictions applicable to distress for rent are, for the most part, not applicable to it. Thus, beasts of the plough that gain the land may be taken, even where there is other sufficient distress (*Hutchins* v. *Chambers*, 1 Burr. 579), implements and tools of trade have no privilege, unless they fall within 42 & 43 Vict. c. 49, s. 21 (2), which absolutely protects the wearing apparel and bedding of a person and his family, and, to the value of five pounds, the tools and implements of his trade, from such distress (*Edgecombe* v. *Sparks*, 2 Show. 126 ; *Fourth City Building Society* v. *East Ham*, [1892] 1 Q. B. 661 ; and see *ante*, p. 376). The goods to be taken are those only of the party liable for the rate ; those of a third party may not be taken. (See 43 Eliz. c. 2, s. 3 ; 17 Geo. 2, c. 38, s. 7 ; *Stevens* v. *Evans*, 2 Burr. 1152 ; *Haine* v. *Davey*, 4 A. & E. 892 ; *Baker* v. *Wicks*, *supra*.) The seizure need not be made on the premises rated, and, for want of sufficient distress in the county of goods of the party liable, it may even be made in another county. (See 17 Geo. 2, c. 38, s. 7 ; 54 Geo. 3, c. 170, s. 12.)

The outer door of a house or tenement must not be broken open to effect the distress (*Bell* v. *Oakley*, 2 M. & S. 259 ; and see *ante*, p. 374), nor, it is thought, must things in actual use be seized. (See Nolan on Poor Laws, p. 262.)

The warrant is in general directed to the overseers, and they, or those of them acting in the matter, are liable for their own acts in relation thereto, and for any irregularity on the part of their bailiffs in the conduct of the distress, but they are not liable for the conduct of an assistant overseer, since he is not their agent or bailiff, but an independent officer having statutory authority (*Baker* v. *Wicks*, *supra*). Assistant overseers and bailiffs are, of course, liable for their own misconduct (*Ib.*).

By 17 Geo. 2, c. 38, s. 8, the persons distraining are not to be deemed trespassers on account of any defect or want of form in the rate or in the warrant of distress, nor are they to be deemed trespassers *ab initio* (see *ante*, p. 373), on account of any irregularity done in the course of distraining, but the party injured by such irregularity is to recover only for the actual or special damage he has sustained.

By the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 1, the justices issuing the warrant of distress have power to order that the levy shall include "the reasonable charges of taking, keeping, and selling of the said distress," but this does not repeal the Distress (Costs) Act, 1817 (57 Geo. 3, c. 93), in so far as it gives a maximum limit to such charges (*Headland* v. *Castro*, [1905] 1 K. B. 219 ; 74 L. J. K. B. 210). The justices are protected by 11 & 12 Vict. c. 44, ss. 4, 5, in issuing their warrant, unless they are acting entirely without jurisdiction. (See *Newbould* v. *Coltman*, 6 Ex. 189, and *L. & N. W. Ry. Co.* v. *Giles*, 33 J. P. 776.)

By ratifying the illegal act of a bailiff, with knowledge thereof, the authority interested may become liable for such illegal act. Thus, where a vestry ratified an illegal seizure of a third person's goods for a rate, it was held that the vestry was liable to such third person (*Carter* v. *St. Mary Abbotts*, 64 J. P. 548), but in general such authority cannot be held responsible, the warrant importing no command by them, or indeed by any one, to act contrary to law.

The principal enactments relating to such distresses are, 43 Eliz. c. 2, ss. 2, 3 ; 17 Geo. 2, c. 38, ss. 7, 8 ; 54 Geo. 3, c. 170, s. 12 ; 11 & 12 Vict. c. 14, ss. 4, 5 ; 12 & 13 Vict. c. 14 ; 25 & 26 Vict. c. 82.

Executors and Administrators (*m*).

Claim by an Executor or Administrator for a Wrong done to the Property of the Deceased in his Lifetime.

The plaintiff, as executor of [the last will of] *C. D.*, deceased [*or*, as administrator of the personal estate of *C. D.*, deceased], has suffered

(*m*) See "*Executors and Administrators*," *ante*, p. 166. With respect to actions for damages for wrongs independent of contract done either to or by a deceased person in his lifetime, the rule of the common law was *actio personalis moritur cum personâ*, and the executor or administrator could neither sue nor be sued (1 Wms. Saund., 1871 ed., 239; *Pulling* v. *G. E. Ry. Co.*, 9 Q. B. D. 110; 51 L. J. Q. B. 453; *Kirk* v. *Todd*, 21 Ch. D. 484; 52 L. J. Ch. 224; *Phillips* v. *Homfray*, 24 Ch. D. 439; 52 L. J. Ch. 833; *Finlay* v. *Chirney*, 20 Q. B. D. 494; 57 L. J. Q. B. 247; *Hatchard* v. *Mège*, 18 Q. B. D. 771; 56 L. J. Q. B. 397; *Story* v. *Sheard*, [1892] 2 Q. B. 515). This rule still remains in force with respect to actions for injuries to the person, as assault, battery, false imprisonment, libel and slander (*Ib.*); but by the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), with respect to personal injuries resulting in the death of the deceased from the wrongful act, neglect, or default of another, an action is given to the executor or administrator of the deceased for the benefit of his relatives. (See the next note.)

For injuries to the personal estate of the testator an action was given to the executor by the statute 4 Edw. 3, c. 7, which was afterwards extended to executors of executors by 25 Edw. 3, c. 5, and to administrators upon their institution under 31 Edw. 3, c. 11. Upon the construction of this statute an executor now has the same action for any injury done to the personal estate of the testator in his lifetime, whereby it has become less beneficial to the executor, as the testator himself might have had (1 Wms. Saund., 1871 ed., 244; *Twycross* v. *Grant*, 4 C. P. D. 40; 48 L. J. C. P. 1; *Hatchard* v. *Mège*, 18 Q. B. D. 771; 56 L. J. Q. B. 397; *Oakey* v. *Dalton*, 35 Ch. D. 700; 56 L. J. Ch. 823). In such actions the fact of damage to the personal estate is usually sufficiently implied by the statement of the wrong, but where that is not so, an express allegation of it should be inserted. (See *Twycross* v. *Grant*, *supra*.) Where the cause of action is a pure tort to the person, independent of any contract, the mere fact of some incidental damage resulting to the estate will not bring the case within these statutes. (See *Pulling* v. *G. E. Ry. Co.*, *supra*.)

For injuries to the real estate of the deceased in his lifetime an action is given to the executor by the Civil Proc. Act, 1833 (3 & 4 Will. 4, c. 42). By s. 2, an action may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages, when recovered, shall be part of the personal estate of such person. (See *Jones* v. *Simes*, 43 Ch. D. 607.)

With respect to injuries done by a person deceased in his lifetime to another in respect of his property real or personal, the last-mentioned statute, by the same section, enacts that an action may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as the injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person, and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person. (See *Powell* v. *Rees*, 7 A. & E. 426; *Richmond* v. *Nicholson*, 8 Scott, 134; *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131; *Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 609; *Kirk* v.

damage [*here state the wrong complained of, as, for instance,* from the defendant on the —— ——, 19—, wrongfully depriving the said *C. D.* during his lifetime of two casks of oil, and refusing to give them up to the said *C. D.* on demand. The demand was made verbally on the —— ——, 19—, and the refusal took place verbally on the same day] [*or, as the case may be*].

Particulars of special damage:—[*See "Conversion," ante,* p. 344.]

The plaintiff, as such executor [*or* administrator], claims £——.

By an Executor or Administrator for a Wrong done since the Death to Property vested in him in that Character.

The plaintiff, as executor of [the last will of] *C. D.*, deceased [*or*, as administrator of the personal estate [and effects] of *C. D.*, deceased], who died intestate, has suffered damage by [*here state the wrong complained of, as, for instance,* the defendant on the —— ——, 19—, wrongfully depriving the plaintiff as such executor [*or*, administrator] of two casks of oil belonging to the plaintiff as such executor [*or*, administrator] by refusing to give them up to the plaintiff on demand]. The refusal [*&c., as in the preceding form*].

Particulars:—[*See the preceding form.*]

The plaintiff, as such executor [*or*, administrator], claims £—— damages.

Todd, supra; Phillips v. *Homfray, supra.*) It will be observed that the six months runs from the time the *injury* was committed, and, therefore, in the case of a continuing injury, as, for instance, an obstruction of ancient lights, the statute gives a remedy provided the obstruction is continued within the six months (*Jenks* v. *Clifden*, [1897] 1 Ch. 694; 69 L. J. Ch. 338).

In actions under this section the claim should show that the facts bring the case within these provisions. This may be done either in describing the plaintiff or defendant, and in stating the injury, or by a distinct allegation. Such allegation where the executor is suing may be as follows:—"The injury herein complained of was committed within six calendar months before the death of the said *C. D.*, and this action was brought within one year after his death." Where the action is brought against the executor the allegation may be thus:—"The injury herein complained of was committed within six calendar months before the death of the said *G. H.*, and this action was brought within six calendar months after the defendant took upon himself the administration of the estate and effects of the said *G. H.*" No such allegation is required in an action under the above statutes of Edw. 3 for an injury to the personal estate.

Where a wrong committed by the deceased against the real or personal property of another is shown to have amounted to a breach of contract (see *Batthyany* v. *Walford*, 33 Ch. D. 624; 36 Ch. D. 269), or to have produced an ascertained pecuniary benefit to the deceased's estate (*Powell* v. *Rees, supra; Wright* v. *Lee*, 4 Times Rep. 573; see *Phillips* v. *Homfray, supra*, and [1892] 1 Ch. 465, 473; and *In re Duncan*, [1899] 1 Ch. 387, 390; 68 L. J. Ch. 253; 2 Wms. Exs., 9th ed., p. 1602), an action will lie against his representatives on the contract, or for money received, &c., even where an action in respect of the wrong as such would not lie by reason of the case not falling within the above provisions of 3 & 4 Will. 4, c. 42, s. 2 (*Ib.*).

Claim under the Fatal Accidents Act, 1846, against Carriers by the Executor of a Passenger killed by the Negligence of the Defendants (*n*).

The plaintiff, as executor of *C. D.*, deceased, brings this action for the benefit of Eva, the wife, and William and Margaret and Dorothea, the

(*n*) By the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 1, it is enacted that "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

By s. 2, it is enacted that "every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

By s. 3, it is provided that "not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person."

It is provided by s. 4 that the plaintiff in every such action shall, with the statement of claim, deliver to the defendant, or his solicitor, "a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered." (*Vide infra.*)

By s. 5, the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

By 27 & 28 Vict. c. 95, s. 1, amending the above Act, it is enacted that "if there shall be no executor or administrator of the person deceased, or that, there being such executor or administrator, no such action as in the said Act mentioned shall within six calendar months after the death of such deceased person as therein mentioned have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator."

The action may, under this section, be brought, if there is no executor, and no administrator has been appointed, before six months from the death; it is not necessary to wait for the expiration of that period (*Holleran* v. *Bagnell*, L. R. 4 Ir. p. 741).

The particulars required by the 9 & 10 Vict. c. 93, s. 4, above cited, may be contained in a separate document to be delivered with the statement of claim (see R. S. C., 1883, App. C., Sect. VI., No. 4); but in any case, and especially where they are short, they may be inserted in the statement of claim. (See Ord. XIX., r. 6; "*Particulars*," *ante*, p. 37).

The claim need not negative the existence of relations entitled to compensation other than those named therein. (See *Barnes* v. *Ward*, 9 C. B. 392.)

children of *C. D.* [*as the case may be*], who have suffered damage from the defendant's negligence, in carrying the said *C. D.* by omnibus, whereby the said *C. D.* was killed in Cornhill on the —— ——, 19—.

Particulars of the negligence are as follows :—[*State them.*]

The position of the executor or administrator suing is that of trustee for the particular persons designated by the Act. (See *Bradshaw* v. *L. & Y. Ry. Co.*, *infra.*)

Where the action is in the names of the persons beneficially entitled (see 27 & 28 Vict. c. 95, s. 1, *supra*), if any of such persons are under a disability they should sue as persons under such disability do in other cases; for example, if infants, they should sue by a next friend (Ord. XVI., r. 16).

The defendant is liable under these statutes only where he would have been liable for the same cause at the suit of the deceased had he survived. (See 9 & 10 Vict. c. 93, s. 1, *supra*; *Senior* v. *Ward*, 1 E. & E. 385; 28 L. J. Q. B. 139; and see *Read* v. *G. E. Ry. Co.*, L. R. 3 Q. B. 555; *Hedley* v. *Pinkney, &c. Co.*, [1894] A. C. 222; 63 L. J. Q. B. 419). So if the claim of the deceased, had he lived, would have been barred by the Public Authorities Protection Act, 1893, no action in respect thereof can be maintained by his representative (*Williams* v. *Mersey Docks*, [1905] 1 K. B. 804).

Where a person is injured by the negligence of another, and afterwards dies in consequence of such injury, the death does not create a new cause of action, the negligence alone is the cause of action (*Read* v. *G. E. Ry. Co.*, *supra*; and see *post*, p. 851).

Where a person is killed by negligence amounting to a breach of contract, the executor or administrator of the deceased may maintain an action for the loss which thereby resulted to the personal estate of the deceased in respect of medical expenses, &c., incurred by him in consequence of the negligence of the defendant (*Bradshaw* v. *L. & Y. Ry. Co.*, L. R. 10 C. P. 189; 44 L. J. C. P. 148; *Leggott* v. *G. N. Ry. Co.*, 1 Q. B. D. 599; 45 L. J. Q. B. 557; *Pulling* v. *G. E. Ry. Co.*, 9 Q. B. D. 110; cited *ante*, p. 385); and it is no defence to such action that damages have been recovered in a previous action under the Fatal Accidents Act, 1846, by the personal representative of the deceased, nor do the findings in such previous action create any estoppel (*Leggott* v. *G. N. Ry. Co.*, *supra*).

The measure of damages under the Fatal Accidents Act is the pecuniary loss occasioned to the relatives by the death; and in estimating the damages the reasonable expectation of pecuniary advantage which the relatives had from the deceased, and the probable pecuniary loss sustained by his death, are to be taken into account (*Dalton* v. *South-Eastern Ry. Co.*, 4 C. B. N. S. 296; 27 L. J. C. P. 227; *Franklin* v. *South-Eastern Ry. Co.*, 3 H. & N. 211; *Pym* v. *Great Northern Ry. Co.*, 4 B. & S. 396; 31 L. J. Q. B. 249; 32 *Ib.* 377). Mourning expenses cannot be recovered (*Ib.*). The pecuniary loss is the only damage recoverable (*Blake* v. *Midland Ry. Co.*, 18 Q. B. 93; *Grand Trunk Ry. Co.* v. *Jennings*, 13 App. Cas. 800). As to deductions in respect of amounts received on insurances, see the last-cited case. In *Bedwell* v. *Golding*, 18 Times Rep. 436, and *Clark* v. *London G. Omnibus Co.*, 92 L. T. 691, it appears to have been held at *nisi prius* that funeral expenses could be recovered. The contrary was held in *Dalton* v. *South-Eastern Ry. Co.*, *supra*, and *Boulter* v. *Webster*, 11 L. T. 598.

The plaintiff is not entitled to a verdict with nominal damages on proof merely of the death by negligence, without further proof of damage (*Duckworth* v. *Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25).

The expectation of life of the deceased is an element to be considered (*Rowley* v. *L. & N. W. Ry. Co.*, L. R. 8 Ex. 221; *Phillips* v. *L. & S. W. Ry. Co.*, 4 Q. B. D. 406; 5 *Ib.* 78). Pecuniary loss arising from a contract with the deceased cannot be taken into consideration in assessing damages under the statute (*Sykes* v. *N. E. Ry. Co.*, 44 L. J. C. P. 191).

The word "child" in the Act means legitimate child only (*Dickinson* v. *N. E. Ry. Co.*, 2 H. & C. 735; 33 L. J. Ex. 91). It includes a child *en ventre sa mère* (*The George and Richard*, L. R. 3 Adm. 466).

Particulars pursuant to statute are delivered herewith [*or*, are as follows :—

Names of the person [*or*, persons] on whose behalf the action is brought.

E., the widow of the deceased.

W., aged ——, his son.

M., aged ——, his daughter.

D., aged ——, his daughter.

The nature of the claim in respect of which damages are sought.

The said *C. D.* was a —— in the employ of —— and was earning —— a week, and was the sole support of his said wife and children and by his death they have lost all means of support and living [*or, as the case may be*].]

The plaintiff claims £500.

(*See R. S. C.*, 1883, *App. C., Sect. VI., No.* 4.)

Particulars delivered by an Executor with a Claim under the Fatal Accidents Act, 1846 (*o*).

19—, B. No. ——.

In the High Court of Justice,

King's Bench Division.

Between *A. B.* .....Plaintiff,

and

G. H. .....Defendant.

Particulars.

The following is a full particular of the persons for whom and on whose behalf this action is brought by the plaintiff as executor of *C. D.*, deceased, viz., Eva, the wife, and William and Margaret and Dorothea, the children of the said *C. D.* [*or, as the case may be*]. And the following is a full particular of the nature of the claim in respect of which damages are sought to be recovered in this action, viz. [*state the nature of the claim as in the form supra*].

Delivered the —— ——, 19—.

E. F.,
Solicitor for the plaintiff.

To *J. K.*,
Solicitor for the defendant.

The Act applies to loss of life arising from collisions at sea, but subject to the limitation of liability contained in the Merchant Shipping Act, 1894, s. 503, in cases within that section. (See *Glaholm* v. *Barker*, L. R. 1 Ch. 223 ; 35 L. J. Ch. 259 ; *Hedley* v. *Pinkney, &c. Co., supra.*)

As to actions by the legal personal representatives of a deceased workman under the Employers' Liability Act, 1880, see "*Master and Servant*," *post*, pp. 435 *et seq.*

(*o*) See preceding note.

Fences and Fencing (*p*).

Claim for not repairing a Fence between adjacent Fields.

1. The plaintiff has suffered damage by the defendant not repairing and keeping in repair the fence between a field of the plaintiff known

(*p*) The general rule of law is that the owner of cattle is bound to take care that they do not trespass on the land of others. But the owner of land may be bound by prescription, contract, or by special statute to maintain and repair a fence for the benefit of the owner of the adjoining land, who may have a corresponding right to have the fence so maintained and repaired (1 Wms. Saund., 1871 ed., 559; *Churchill* v. *Evans*, 1 Taunt. 529; *Dovaston* v. *Payne*, 2 H. Bl. 527; *Boyle* v. *Tamlyn*, 6 B. & C. 329; and see *Ricketts* v. *East and West India Docks Ry. Co.*, 12 C. B. 160; *Erskine* v. *Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 835; *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274; 42 L. J. Q. B. 147).

As between owners of adjoining fields separated by a hedge and ditch there is a presumption, in the absence of evidence rebutting such presumption, that the hedge and ditch are both the property of the owner whose field is next the hedge (*Vowles* v. *Miller*, 3 Taunt. 137; *Henniker* v. *Howard*, 90 L. T. 157).

As to fences between common land and ancient enclosure, see *Barber* v. *Whiteley*, 34 L. J. Q. B. 212. A person having the right to dig shafts for minerals is impliedly bound to fence the shafts for the protection of the owner of the surface (*Groucott* v. *Williams*, 4 B. & S. 149; 32 L. J. Q. B. 237; and see *Sybray* v. *White*, 1 M. & W. 435; *Hawken* v. *Shearer*, 56 L. J. Q. B. 284). The Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 13, imposes an obligation on the owner of an abandoned mine to fence the shaft. (See *Knuckey* v. *Redruth R. C.*, [1904] 1 K. B. 382; 73 L. J. K. B. 265.)

Where cattle trespass on the plaintiff's land through a defect in the fence which the defendant is bound to repair, the plaintiff may maintain an action in the above form in respect of the damage done, or he may maintain an action of trespass against the owner of the cattle (see "*Trespass*," *post*, p. 501, and *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10; 44 L. J. C. P. 24), or he may distrain the cattle *damage feasant* (see "*Distress*," *post*, p. 849; "*Fences*," *post*, p. 851); and the defendant is liable for mischief done by his cattle so straying, without proof that he knew they were of a mischievous disposition (*Lee* v. *Riley*, 18 C. B. N. S. 722; 34 L. J. C. P. 212; see "*Mischievous Animals*," *post*, p. 439).

Where cattle escape from the plaintiff's land through a defect in the fence which the defendant is bound to repair, the plaintiff may maintain an action for not repairing the fence in respect of any damage thereby occasioned to his cattle, or even to cattle not his own, but kept by him on his land for another person to whom he was liable (*Rooth* v. *Wilson*, 1 B. & Ald. 59; and see *Carruthers* v. *Hollis*, 8 A. & E. 113; *Singleton* v. *Williamson*, 7 H. & N. 410; 31 L. J. Ex. 17; *Dawson* v. *Midland Ry. Co.*, L. R. 8 Ex. 8; 42 L. J. Ex. 49).

Where the evidence showed a prescriptive obligation on the defendant to maintain a sufficient fence at all times, the act of God or *vis major* only excepted, the fact that the defendant had no knowledge or notice of the fence being out of repair did not relieve him from liability, and it was held that damage occasioned by the death of the plaintiff's cows, which, having escaped through the defective fence, were poisoned by eating the leaves of a yew tree felled on the defendant's land, was not too remote (*Lawrence* v. *Jenkins*, *supra*; and see *Ellis* v. *Loftus Iron Co.*, *supra*; *Powell* v. *Salisbury*, 2 Y. & J. 391).

A plaintiff whose cattle trespassed on the land adjoining the defendant's cannot maintain an action against him for damage occasioned to them by a defect in the fence, although the defendant is bound to repair it as against the owner of the adjoining land (*Ricketts* v. *East and West India Docks Ry. Co.*, 12 C. B. 160). So, where the defendant was bound to repair the fence between his land and the highway, it was held that

as the —— field and an adjacent field of the defendant known as the —— field at ——, in the parish of ——, which fence the defendant was bound by prescription [*or, as the case may be*] to repair and keep in repair so as to prevent cattle lawfully being in the said respective fields from escaping from and out of the one into the other of the said fields through defects of the said fence [*or, as the case may be, stating the extent of the obligation*].

2. By reason of the said default divers cattle of the plaintiff, then lawfully being in the plaintiff's said field on the —— ——, 19—, escaped therefrom into the defendant's said field and were lost [*or*, injured, *or, as the case may be*], and divers cattle of the defendant, then being in the defendant's said field, escaped therefrom into the plaintiff's said field and trod down and consumed the grass therein.

Particulars :—

See for forms of declarations under the old system for not repairing the fences of a close adjoining that of the plaintiff, whereby a horse of the plaintiff fell through and was killed: Rooth v. *Wilson*, 1 B. & Ald. 59; *for not repairing the fences of the adjoining close, whereby the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystack: Powell* v. *Salisbury*, 2 Y. & J. 391; *for not fencing a shaft of the defendant's mine in the plaintiff's close, whereby the plaintiff's horse fell in and was killed: Sybray* v. *White*, 1 M. & W. 435; *and see Growcott* v. *Williams*, 32 L. J. Q. B. 237.

Claim against a Railway Company for Neglect of the Statutory Obligation to fence (q).

1. The plaintiff was and is the owner and occupier of a field known as the —— field at —— in the —— of ——. The said field adjoins the defendants' line of railway from —— to ——, which runs over land taken by the defendants for the use of their railway.

---

the plaintiff, in order to maintain this action, must show that his cattle were lawfully using the highway (*Doraston* v. *Payne*, 2 H. Bl. 527, cited in *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. at p. 156; and see *Fawcett* v. *York and North Midland Ry. Co.*, 16 Q. B. 610).

The action must be brought against the person bound to repair who is, in general, the occupier, and not the owner (*Cheetham* v. *Hampson*, 4 T. R. 318).

(*q*) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68, an obligation is imposed on railway companies to make and maintain sufficient fences to prevent cattle of the owners and occupiers of lands adjoining the railway from straying on to the railway, but this obligation does not extend to the cattle of other persons which stray on to the adjoining land or to cattle which stray on to an adjoining highway, though it extends to cattle travelling along and lawfully using the highway (*Ricketts* v. *East and West India Docks Ry. Co.*, 12 C. B. 160; *Bessant* v. *G. W. Ry. Co.*, 8 C. B. N. S. 368; *Marfell* v. *South Wales Ry. Co.*, 8 C. B. N. S. 525; *Roberts* v. *G. W. Ry. Co.*, 4 C. B. N. S. 506; 27 L. J. C. P. 266; *Sharrod* v. *L. & N. W. Ry. Co.*,

2. The defendants neglected to make and maintain sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the said railway and land from the said field of the plaintiff and protecting the cattle of the plaintiff from straying from out of his said field by reason of the defendant railway and allowed the fence erected by them to be out of repair and insufficient.

3. By reason of the defendants' said neglect two cows of the plaintiff on the —— ——, 19—, strayed from out of the plaintiff's said field on to the defendants' railway and were killed by a passing train.

Particulars :—

The said cows were of the value of £—— each and were killed and cut to pieces.

The plaintiff claims £——.

The like.

1. The plaintiffs before and at the times of the committing of the grievances by and of the default of the defendants hereinafter mentioned were and still are possessed and occupiers of a farm and lands at —— in the county of ——.

2. The defendants during those times were and still are owners and possessed of a railway which was and is subject to the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

3. Part of the said farm and lands of the plaintiffs adjoins the said railway which runs through and separates the said part from the residue.

4. The defendants were and are liable and bound under and by virtue of the provisions of the said Act to make and at all times maintain for the accommodation of the plaintiffs or other owners and occupiers of the said part of lands adjoining the said railway sufficient posts, rails, hedges, ditches, mounds or other fences for separating the land taken for the use of the railway from the plaintiffs' adjoining lands not taken and protecting the cattle of the plaintiffs from straying thereout by reason of the railway.

5. In the month of ——, 19—, the defendants neglected their obligation and duty in that behalf and carelessly, negligently and improperly did not

---

4 Ex. 580; *Dawson* v. *Midland Ry. Co.*, L. R. 8 Ex. 8; 42 L. J. Ex. 49; *Child* v. *Hearn*, L. R. 9 Ex. 176; 43 L. J. Ex. 100; *Wiseman* v. *Booker*, 3 C. P. D. 184; 38 L. T. 292; *Corry* v. *G. W. Ry. Co.*, 6 Q. B. D. 237; 7 *Ib.* 322; 50 L. J. C. P. 313; *Ib.* 386). The section does not impose on the company any duty towards their passengers to keep up the fences (*Buxton* v. *N. E. Ry. Co.*, L. R. 3 Q. B. 549; 37 L. J. Q. B. 258).

By s. 47 of the same statute an obligation is imposed on railway companies to make and maintain gates at level crossings on such highways as are public carriage ways, and to provide persons to open and shut them (see *post*, p. 394); and by s. 61 they are required to provide gates or stiles on other highways (*Ellis* v. *L. & S. W. Ry. Co.*, 2 H. & N. 424; 26 L. J. Ex. 349; *Williams* v. *G. W. Ry. Co.*, L. R. 9 Ex. 157; 43 L. J. Ex. 105; *Charman* v. *S. E. Ry. Co.*, 21 Q. B. D. 524; 57 L. J. Q. B. 597; and see *Fawcet* v. *York & North Midland Ry. Co.*, 16 Q. B. 610).

maintain sufficient posts, rails, hedges, ditches, mounds or other fences for separating the same land taken for the use of the railway from the plaintiffs' lands not taken and protecting the cattle of the plaintiffs from straying thereout as required by the said statute, and by reason thereof a flock or part of a flock of sheep of the plaintiffs' consisting of 500 ewes in lamb strayed from and out of the said land of the plaintiffs' adjoining the said railway into and upon the said railway, and while the said sheep were on the said railway a locomotive engine and train of trucks and carriages using the said railway were forced and ran into and upon and amongst the said sheep whereby a large number of the said sheep were killed and many of them were damaged and injured and some of them afterwards died of the said injuries and divers of them cast their lambs also by reason of the premises; the plaintiffs have also been hindered and prevented from breeding rearing and keeping up and maintaining so good and valuable a flock and stock of sheep as they might and otherwise would have done and have lost and been deprived of gains and profits which they otherwise might and would have derived from the said sheep had they not been so killed and damaged and injured, and the plaintiffs were otherwise injured.

Full particulars of the damages are delivered herewith.

The plaintiffs claim £500.

For forms of declaration against a railway company for not maintaining sufficient gates or stiles on a level crossing, under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 46, 61, *see Ellis* v. *L. & S. W. Ry. Co.*, 2 H. & N. 424; 26 L. J. Ex. 349; *Fawcett* v. *York and North Midland Ry. Co.*, 16 Q. B. 610 (*r*).

Against a Railway Company for Negligence of their Servants at a Level Crossing or a Public Carriage Road causing Injuries to the Plaintiff and his Carriage (*r*).

1. The plaintiff has suffered damage from personal injuries to himself and damage to his horse and carriage caused by the negligence of the defendants'

(*r*) It is the duty of the railway company to take reasonable care not to injure persons crossing their lines whether at occupation or field crossings, or at places at which persons are ordinarily suffered to and do cross the lines (*Dublin Ry. Co.* v. *Slattery*, 3 App. Cas. 1155, 1183, 1187; *White* v. *Barry Ry. Co.*, 15 Times Rep. 474). The precautions to be taken depend upon the circumstances of each case. Thus where it is the usual and reasonable precaution to whistle on nearing the crossing, or to travel slowly, or to keep a good look out from the engine, or the like, the absence of such precaution affords, in general, evidence of negligence. (See *Cliff* v. *Midland Ry. Co.* L. R. 5 Q. B. 258, 261, 264; *Dublin Ry. Co.* v. *Slattery, supra*; *White* v. *Barry Ry. Co., supra*; *Gray* v. *N. E. Ry. Co.*, 48 L. T. 904; *Smith* v. *S. E. Ry. Co.*, [1896] 1 Q. B. 178, 183; 65 L. J. Q. B. 219.) Similarly conduct on the part of the company's servants

servants on the —— ——, 19—, at the level crossing near —— station where the public carriage road from —— to —— crosses the defendants' line of railway.

2. The negligence consisted of the defendants' servants leaving the gates at the said level crossing open, and thereby inviting the plaintiff to cross the line at a time when a train was approaching. In consequence the plaintiff who was proceeding to cross the line with his carriage and horse was run into by the said train and sustained severe personal injuries and his carriage and horse were damaged.

Particulars of personal injuries:—

Particulars of damage to carriage and horse:—

Particulars of loss and expense:—

For Injuries to a Workman caused by the Neglect of the Defendant his Employer to fence dangerous Machinery required by Statute to be fenced (s).

1. The plaintiff has suffered damage by personal injuries sustained by him in consequence of the negligence of the defendant in not fencing a [steam winch with revolving cog-wheels worked by steam power] at the defendant's factory called —— works at ——.

2. The said steam winch was a dangerous part of the machinery at the said factory and ought pursuant to the Factory and Workshop Act, 1901, s. 10, to have been securely fenced by the defendant, but it was not fenced at all, and was left in an unfenced and dangerous state, and in consequence of the defendant's breach of his statutory duty the plaintiff who on the ——

---

amounting to an invitation to use the crossing, or which is such as to lead a person to cross in the belief induced thereby that the line is clear for crossing, at a time when it is in fact dangerous to cross, affords, in general, evidence of negligence (*Wanless* v. *N. E. Ry. Co.*, L. R. 7 H. L. 12; 43 L. J. Q. B. 185; *Smith* v. *S. E. Ry. Co.*, *supra*).

The opening or leaving open of the gates at a level crossing (see 8 & 9 Vict. c. 20, s. 47, *ante*, p. 392) by the servants of the company is an invitation to cross, and if at the time it is in fact unsafe to cross, such conduct is, in general, negligence (*Stapley* v. *L. B. & S. C. Ry. Co.*, L. R. 1 Ex. 21; *Wanless* v. *N. E. Ry. Co.*, *supra*). The open gates may be an invitation to foot passengers, although the statutory requirement of gates was for the protection of carriages, carts, horses and cattle (*Stapley* v. *L. B. & S. C. Ry. Co.*, *supra*).

Railway companies are bound to use reasonable care to have the level crossings used by passengers in going from one platform to another at their stations, or in entering or leaving their stations, such and so managed, that their passengers may use them with reasonable safety, and are liable for the negligence of their servants in the management thereof, or of their trains in passing over them (*Crowther* v. *L. & Y. Ry. Co.*, 6 Times Rep. 18; *Coburn* v. *G. N. Ry. Co.*, 8 *Ib.* 31; *Dallas* v. *G. W. Ry. Co.*, 9 *Ib.* 344; and see *John* v. *Bacon*, L. R. 5 C. P. 437, 439; 39 L. J. C. P. 365).

(*s*) The Factory and Workshop Act, 1901 (1 Edw. 1, c. 22), s. 10, requires certain machinery in factories to be fenced, and an action is in general maintainable for personal injuries caused by the failure to provide or maintain such fencing (*Groves* v. *Wimborne*, [1898] 2 Q. B. 402; 67 L. J. Q. B. 862).

——, 19—, was employed by the defendant at the said factory as a —— at the said steam winch, was caught by the revolving cog-wheel and his right arm was torn off and he sustained severe personal injuries.

Particulars of injuries :—[*State them.*]

Particulars of loss and expense :—[*State same.*]

FERRY (*t*).

Claim for disturbing the Plaintiff's Ferry.

1. The plaintiff was possessed of an ancient ferry for the carriage of [foot passengers and their goods] across the river ——, from —— to ——, taking for the carriage of [such passengers and goods] certain reasonable freights and ferryages.

2. The defendant wrongfully disturbed the plaintiff in the enjoyment of his said ferry, whereby the plaintiff lost the profits of the said ferry.

Particulars :—

[*Give particulars of the disturbances, stating the dates and nature thereof, and of the damage or loss.*]

See a form of claim, Cowes U. D. Council v. *Southampton, &c. Steam Packet Co.*, 21 Times Rep. 506.

(*t*) The owner or lessee of an ancient ferry or franchise by which he has the exclusive right of carrying passengers across a river is in general bound to maintain and keep up such ferry, and may maintain an action for disturbance against persons carrying passengers for hire across such river along or in proximity to his ferry (*Newton* v. *Cubitt*, 12 C. B. N. S. 32; 31 L. J. C. P. 246; *Hopkins* v. *G. N. Ry. Co.*, 2 Q. B. D. 224; 46 L. J. Q. B. 265). To support such action it is sufficient to prove that the plaintiff is in possession of the ferry, and that the ferry has existed for a long period of time. (See *Peter* v. *Kendal*, 6 B. & C. 703.)

In cases of substantial and continued disturbance of a ferry where there is the exclusive right of carrying by it, an injunction is a proper remedy. (See "*Injunction*," *post*, p. 413, and *Att.-Gen.* v. *Richards*, 2 Anst. at p. 608; *Huzzey* v. *Field*, 2 C. M. & R. 432; *Letton* v. *Gooden*, L. R. 2 Eq. 123; 35 L. J. Ch. 427.) But a corporation empowered by statute to establish and work a steam ferry, but on which no obligation was imposed to maintain it, was held not entitled to bring an action to restrain a person from establishing and working a rival ferry (*Londonderry Commissioners* v. *M'Keever*, 27 L. R. Ir. 462).

It is doubtful whether the exclusive right of the owner of a ferry extends beyond the carriage of passengers by boat, and whether the building of a bridge even in the line of a ferry would be actionable as a disturbance (*Hopkins* v. *G. N. Ry. Co.*, *supra*). And it would appear that the owner of a ferry cannot maintain an action for loss of traffic caused by a new highway by bridge or ferry built or established near to the old ferry in order to provide for a new kind of traffic different from that which was accommodated by the old ferry (*Ib.*; *Newton* v. *Cubitt*, *supra*; *Cowes U. D. Council* v. *Southampton, &c. Steam Packet Co.*, [1905] 2 K. B. 287; 74 L. J. K. B. 665). For other instances of actions for disturbance of ferry, see *Pim* v. *Curell*, 6 M. & W. 234; *Blacketer* v. *Gillett*, 9 C. B. 26.

FISHERY (*u*).

Claim for Trespass to the Plaintiff's Fishery.

The plaintiff has suffered damage from the defendant on the —— ——, 19—, breaking and entering the several fishery of the plaintiff in the river —— at ——, and fishing in the said fishery for fish and disturbing the fish therein and catching and carrying away and converting to his own use large quantities of the plaintiff's fish therein.

Particulars :—

For other forms see Blount v. *Layard*, [1891] 2 Ch. 681, *n.*; *and Foster* v. *Wright*, 4 C. P. D. 438.

(*u*) A "several fishery" is a right to fish in certain water to the exclusion of all other persons. (See Co. Litt. 122 a; Leake on Uses and Profits of Land, p. 175; *Holford* v. *Bailey*, 13 Q. B. 426; *Foster* v. *Wright*, 4 C. P. D. 438.) The owner of a several fishery, whether owner of the soil or not, may maintain an action for trespass where the defendant has broken and entered his several fishery (*Holford* v. *Bailey*, 8 Q. B. 1000; 13 *Ib.* 426; 18 L. J. Q. B. 107; see also *Smith* v. *Andrews*, [1891] 2 Ch. 678). Long-continued enjoyment as of right of exclusive fishing in tidal navigable waters as well as in other waters affords evidence of a right to a several fishery. (See *Goodman* v. *Saltash*, 7 App. Cas. 633; 52 L. J. Q. B. 193; *Neill* v. *Devonshire*, 8 App. Cas. 135, 180; *Smith* v. *Andrews*, *supra*; *Tighe* v. *Sinnott*, [1897] 1 Ir. R. 140; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401; 70 L. J. Ch. 730.)

The soil of arms of the sea and of navigable rivers, so far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishing therein is *primâ facie* in the public (*Malcolmson* v. *O'Dea*, 10 H. L. C. 618; *Smith* v. *Andrews*, [1891] 2 Ch. 678; see *Beaufort* v. *Aird*, 20 Times Rep. 602). The public cannot, by prescription or otherwise, obtain a legal right to fish in a non-tidal river (*Smith* v. *Andrews*, *supra*; and see "*Fishery*," *post*, p. 852). *Primâ facie* the Crown is entitled to the foreshore between high and low water-mark; but proof of the ownership of a several fishery over the foreshore raises a presumption against the Crown that the ownership of the foreshore is in the owner of such fishery (*Att.-Gen.* v. *Emerson*, [1891] A. C. 649).

Common of fishery or free fishery is a right to fish in the water of another, but so that the owner of the soil is not excluded (Co. Litt. 122 a; Leake on Uses and Profits of Land, p. 176). Where the plaintiff had an exclusive right of fishery over a river under a Crown grant, the fact that the river, by a gradual change of its course, had encroached on part of the defendant's land, and that the defendant had fished only over the land which was so submerged, was held to be no defence (*Foster* v. *Wright*, 4 C. P. D. 438). But it is otherwise where the change in the course of the river is not gradual, or where the grant is so expressed as to restrict the right to the original channel (*Ib.*; and see *Mayor of Carlisle* v. *Graham*, L. R. 4 Ex. 363; 38 L. J. Ex. 226). The Crown has no *de jure* right to the soil or fisheries of an inland non-tidal lake, and, therefore, a Crown grant of a several fishery therein is not of itself sufficient to establish the title thereto (*Bristow* v. *Cormican*, 3 App. Cas. 641). As to the effect of a re-grant of a fishery which had been resumed by the Crown, see *Northumberland* v. *Houghton*, L. R. 5 Ex. 127; 39 L. J. Ex. 66; and *Foster* v. *Wright*, *supra*.

For instances of actions for trespass to fisheries besides the cases above cited, see *Smith* v. *Kemp*, 2 Salk. 637; *Mannall* v. *Fisher*, 5 C. B. N. S. 856; *Marshall* v. *Ulleswater Navigation Co.*, 3 B. & S. 732; 32 L. J. Q. B. 139; *Ford* v. *Lacey*, 7 H. & N. 151; 33 L. J. Ex. 351.

See forms of declarations under the old system for injuring oyster beds, Colchester (Mayor, &c.) v. *Brook*, 7 Q. B. 339. *Cf. Foster* v. *Warblington U. C.*, 69 J. P. 42 ; 3 L. G. R. 605 ; *for throwing down a weir, Williams* v. *Wilcox*, 8 A. & E. 314.

—•—

FRAUD (*x*).

Claim for Damages for Fraudulent Misrepresentation on the Sale of the Goodwill and Lease of a Public-House.

1. The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the goodwill and lease of the "George" public-house, Stepney,

(*x*) An action to recover damages arising from fraud will lie where the defendant has stated or represented as a matter of fact what is untrue, knowing it to be untrue, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss (*Pasley* v. *Freeman*, 3 T. R. 51 ; 2 Smith's L. C., 11th ed., p. 66 ; *Smith* v. *Chadwick*, 9 App. Cas. 187, 200 ; 53 L. J. Ch. 879 ; *Derry* v. *Peek*, 14 App. Cas. 337, 374, 376 ; 58 L. J. Ch. 864). To maintain this action there must be proof of fraud and of damage. A misrepresentation due to honest blundering, or even negligent carelessness without dishonesty, will not suffice though damage is proved (*Derry* v. *Peek*, *supra* ; *Angus* v. *Clifford*, [1891] 2 Ch. 449, 480 ; 60 L. J. Ch. 443 ; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491 ; 62 L. J. Q. B. 353). Such action will not lie upon a statement made by the defendant without an intention to induce the plaintiff to act upon it (*Barley* v. *Walford*, 9 Q. B. 197 ; *Way* v. *Hearn*, 13 C. B. N. S. 292 ; 32 L. J. C. P. 34 ; *Peek* v. *Gurney*, L. R. 6 H. L. 377 ; 43 L. J. Ch. 19 ; and see *Freeman* v. *Cooke*, 2 Ex. 654).

The action lies where the defendant, in order to induce the plaintiff to act upon his representation, fraudulently or recklessly (*i.e.*, without caring whether his representation is true or false) represents as true a matter of which he knows nothing, and which is, in reality, untrue, if the plaintiff is thereby induced to act upon such representation to his loss (*Evans* v. *Edmonds*, 13 C. B. 777 ; 22 L. J. C. P. 211 ; *Derry* v. *Peek*, *supra* ; *Le Lievre* v. *Gould*, *supra*).

It is not enough to prove that the representation was made without any reasonable ground for believing it to be true, and that it was in fact false, but it must be proved to have been made dishonestly (*Ib.* ; *Glasier* v. *Rolls*, 42 Ch. D. 431 ; 58 L. J. Ch. 820 ; and see *Low* v. *Bouverie*, [1891] 3 Ch. 82 ; 60 L. J. Ch. 594).

The active concealment of a material fact may operate as a misrepresentation (*Schneider* v. *Heath*, 3 Camp. 506 ; *Baglehole* v. *Walters*, *Ib.* 154 ; *Udell* v. *Atherton*, 7 H. & N. 172 ; 30 L. J. Ex. 337 ; *Peek* v. *Gurney*, *supra*). Thus, where a vessel, sold "with all faults," was, previously to the sale, placed by the vendor so as to prevent examination of her bottom, which he knew to be unsound, it was held that this was a fraud entitling the buyer to avoid the contract (*Schneider* v. *Heath*, *supra*).

Mere non-disclosure of facts, where there is no duty to disclose them, will not give a cause of action (*Fletcher* v. *Krell*, 42 L. J. Q. B. 55 ; *Smith* v. *Hughes*, *infra* ; *Beechey* v. *Brown*, E. B. & E. 796 ; 29 L. J. Q. B. 105 ; *Ward* v. *Hobbs*, 3 Q. B. D. 150 ; 4 App. Cas. 13 ; 47 L. J. Q. B. 90 ; 48 L. J. Q. B. 281). As to fraudulent concealment, see further *Smith* v. *Hughes*, L. R. 6 Q. B. 597 ; 40 L. J. Q. B. 221 ; *Peek* v. *Gurney*, L. R. 6 H. L. 377 ; 43 L. J. Ch. 19 ; *Arkwright* v. *Newbold*, 17 Ch. D. 318 ; 50 L. J. Ch. 272 ; and cases cited *infra*.

Where there is an express warranty given on a sale, or where the contract of sale implies a warranty, the statement of claim may be framed either upon the contract or upon the wrong. (See "*Warranty*," *ante*, p. 314.) Where no warranty exists in the

by fraudulently representing to the plaintiff that the takings of the said public-house were £40 a week, whereas in fact they were much less, to the defendant's knowledge.

---

contract, but the contract was induced by false representations, known by the seller to be false, the action is grounded on the fraud, and should be so framed (*Ormrod* v. *Huth*, 14 M. & W. 651 ; *Meyer* v. *Everth*, 4 Camp. 22). A claim upon a warranty may be joined with an alternative claim upon the ground of fraud. Where it is intended to rely upon alternative cases the facts ought to be distinctly stated, so as to show on what facts each alternative of the relief sought is founded ; the facts ought not to be mixed up, leaving the defendant to pick out the facts applicable to each case (*Davy* v. *Garrett*, *infra*, *per* Thesiger, L.J.).

Where fraud is intended to be charged, there should be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word *fraud* should be used, the facts must be so stated as to show distinctly that fraud is charged (*Davy* v. *Garrett*, 7 Ch. D. 473, 489 ; 47 L. J. Ch. 218 ; *Wallingford* v. *Mutual, &c. Society*, 5 App. Cas. 697, 701, 709 ; 50 L. J. Q. B. 49 ; *Lawrance* v. *Norreys*, 15 App. Cas. 210, 221 ; 50 L. J. Ch. 681).

It has been held that where the title to relief is rested in the pleadings entirely upon a charge of fraud, it is not open to the plaintiff, if he fails in establishing the charge of fraud, to pick out facts which might, if not put forward as material facts in support of the charge of fraud, have entitled him to relief apart from fraud (*Hickson* v. *Lombard*, L. R. 1 H. L. 324 ; *London Chartered Bank of Australia* v. *Lempriere*, L. R. 4 P. C. 572 ; *Noad* v. *Murrow*, 40 L. T. 109 ; see *Connecticut, &c. Co.* v. *Kavanagh*, [1892] A. C. 473, 479). The rule under the former system of pleading at common law was, that if a declaration disclosed a state of facts upon which an action might be maintained without fraud, the plaintiff might recover upon the facts disclosed, though fraud was alleged and disproved (*Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890, 921 ; *Thom* v. *Bigland*, 8 Ex. 725, *per* Parke, B. ; see *Connecticut, &c. Co.* v. *Kavanagh*, *supra*). Where charges of fraud are made which are not sustained, the judge has power to make the party making such charges pay the costs occasioned thereby (Ord. LXV., r. 1 ; Jud. Act, 1890, s. 5 ; see *Parker* v. *McKenna*, L. R. 10 Ch. 96 ; 44 L. J. Ch. 425 ; *London Chartered Bank of Australia* v. *Lempriere*, *supra*).

A principal is, in general, responsible civilly for the fraud of his authorised agent acting within the scope of his authority (*Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259 ; 36 L. J. Ex. 174 ; *Mackay* v. *Com. Bank of New Brunswick*, L. R. 5 P. C. 394 ; 43 L. J. P. C. 31 ; *Swire* v. *Francis*, 3 App. Cas. 106 ; 47 L. J. P. C. 18 ; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317, 326, 339). But a principal is not liable in an action for deceit for unauthorised and fraudulent acts committed by his agent, not for the benefit of his principal, but for his own private advantage (*Barwick* v. *English Joint Stock Bank*, *supra* ; *British Banking Co.* v. *Charnwood Ry. Co.*, 18 Q. B. D. 714 ; 56 L. J. Q. B. 449). The agent actually committing the fraud is also personally responsible (*Weir* v. *Bell*, 3 Ex. D. 238, 248 ; 48 L. J. Ex. 764 ; *Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. D. 693, 708).

The damages recoverable in an action for deceit are such as are the direct and natural consequence to the plaintiff of acting upon the faith of the fraudulent representations made to him by the defendant (*Mullett* v. *Mason*, L. R. 1 C. P. 559 ; 35 L. J. C. P. 299 ; *Waddell* v. *Blockey*, 4 Q. B. D. 678 ; 48 L. J. Q. B. 517 ; *Cacker* v. *Keswick*, 85 L. T. 14 ; *McConnell* v. *Wright*, [1903] 1 Ch. 546 ; 72 L. J. Ch. 347 ; *Broome* v. *Speak*, [1903] 1 Ch. 586).

A misrepresentation of matter of law, that is as to the legal consequences of true facts, does not, at any rate in the absence of actual fraud, give a right to relief (*Beattie* v. *Lord Ebury*, L. R. 7 Ch. Ap. 777, 800 ; 41 L. J. Ch. 804 ; *Eaglesfield* v. *Marquis of Londonderry*, *supra* ; and see *Hirschfeld* v. *L. B. & S. C. Ry. Co.*, 2 Q. B. D. 1 ; 46 L. J. Q. B. 94 ; and *West London Bank* v. *Kitson*, 13 Q. B. D. 362 ; 53 L. J. Q. B. 345).

2. The said representation was made verbally [*or, as the case may be*] on the —— ——, 19—, by the defendant [*or* by *G. H.*, the defendant's agent]. The contract of purchase is in writing and is dated the —— ——, 19—.

Particulars of special damage :—

The plaintiff claims £——.

(*See R. S. C.*, 1883, *App. C.*, *Sect. VI.*, *No.* 14.)

Claim for Misrepresentation on the Sale of a Public-House Business, with alternative Claims for Fraud and Breach of Warranty.

1. By a contract in writing dated the —— ——, 19—, the plaintiff agreed to purchase from the defendant and the defendant agreed to sell to the plaintiff the lease and goodwill of a public-house called The ——, in —— Road, ——, for £——.

2. The said contract was completed on the —— ——, 19—, and the plaintiff paid to the defendant £—— [and executed a memorandum of charge in favour of the defendant to secure the remaining £—— and interest thereon].

3. In order to induce the plaintiff to make and complete the said contract and pay the said money [and to execute the said memorandum of charge] the defendant represented to the plaintiff [and in consideration of his doing so warranted]

(a) that the payments made at the said public-house for beer and ale, wines, spirits, and sundries, amounted to £—— a month, as follows, viz :—

Beer and ale	£
Wines and spirits	£
Sundries	£
	£

(b) that the said figures represented payments actually made by the defendant for goods actually delivered at the said public-house ;

(c) that the said payments were made in respect of goods delivered at the said public-house and sold and consumed thereat in the ordinary and legitimate course of business there.

(d) that the said payments represented a genuine trade and honestly showed the amount of bonâ fide and legitimate trade done at the said public-house.

4. The said representations [and warranty] were made by and are to be inferred from

(a) Two memoranda, one dated —— ——, 19—, and the other undated handed by the defendant's agents, ——, to the plaintiff's agent in the early part of ——, 19—.

(b) Verbal statements made by the defendant [*or* the defendant's agent *G. H.*] ——, to the plaintiff on the —— ——, 19—.

5. The plaintiff was induced to and did make and complete the said contract and pay the said money [and execute the said memorandum of charge] by and on the faith of the said representations [and warranty].

6. The plaintiff has since discovered and the fact is that the said representations were all untrue [and the said warranty broken] in this that—

(a) The said payments did not amount to the said sums or anything like so much.

(b) The said payments were not actually made nor were they made for goods actually delivered at the said public-house.

(c) The said payments were not made in respect of goods delivered at or sold or consumed at the said public-house in the ordinary and legitimate course of business there but were fictitious or represented payments for goods delivered or consumed elsewhere than at the said public-house or disposed of otherwise than in the ordinary and legitimate course of business there.

(d) The said payments did not represent a genuine trade or honestly show the amount of bonâ fide and legitimate trade done at the said public-house.

7. Further on in the alternative the plaintiff says that the defendant made the said representations fraudulently and either well knowing that the same were false or recklessly and not caring whether they were true or false.

8. So soon as he discovered that the said representations were untrue the plaintiff elected to rescind the said contract.

9. By reason of the matters aforesaid the said lease and goodwill were worthless or worth far less than the said £——, and the said public-house can only be worked at a loss and the said plaintiff has lost the said £—— and interest thereon and all the expenses and trouble he was and will be put to in acquiring and going into and out of the said public-house.

Particulars.

Estimated expenses, £500, made up as follows :—[*State them.*]

The said plaintiff claims :—

(a) Rescission of the contract.

(b) [Cancellation of the said memorandum of charge.]

(c) Return of the said £—— and interest thereon.

(d) Damages.

For Fraud in Selling an unsound Horse by a false Representation that it was sound.

The plaintiff has suffered damage by the defendant on the —— ——, 19— inducing the plaintiff to buy from the defendant a horse and pay him £——, the price thereof, by fraudulently representing to the plaintiff

verbally on the said day that the said horse was sound, whereas in fact it was unsound, to the defendant's knowledge.

Particulars of the unsoundness :—

Particulars of special damage :—

Against a Director of a Company for inducing a Person to apply for and take Shares by Fraudulent Statements in a Prospectus (y).

1. On the 31st January, 19—, the defendant issued a prospectus to the public relating to the *A. B.* Company, Limited.

2. On the 1st February, 19—, the plaintiff received a copy of this prospectus.

(*y*) If the officers or promoters of a company fraudulently publish false and deceitful statements of fact in order to induce persons to invest in the shares or securities of the company, and such persons on the faith of those statements do so invest and thereby sustain a loss, the officers or promoters so acting are, independently of any statute, responsible for damages in an action for deceit (*Cullen* v. *Thompson*, 4 Macq. 441 ; *Clarke* v. *Dickson*, 6 C. B. N. S. 453 ; 28 L. J. C. P. 225 ; *Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. D. 693 ; *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459 ; 55 L. J. Ch. 650 ; *Angus* v. *Clifford*, [1891] 2 Ch. 449 ; 60 L. J. Ch. 443).

In order to support such action, it is necessary to show the "inducing" to do the act which caused the loss ; and accordingly, as the *primâ facie* object of a prospectus is to induce persons to take shares or debentures directly from the company, and as it is not, in general, addressed to persons buying them in the market from previous allottees, the persons so buying cannot, in general, sue the officers or promoters of the company for deceit in respect of misrepresentations contained therein (*Peek* v. *Gurney*, L. R. 6 H. L. 378 ; 43 L. J. Ch. 19 ; and see *Scott* v. *Dixon*, 29 L. J. Ex. 62) ; but where the prospectus is intended to induce persons to buy in the market, persons so buying may maintain an action against those issuing it for that purpose (*Andrews* v. *Mockford*, [1896] 1 Q. B. 372 ; 65 L. J. Q. B. 302).

One officer or promoter is not, by reason of his position, the agent of the others so as to render them responsible for his frauds, to which they have neither expressly nor tacitly assented and to which they have not been party (*Weir* v. *Barnett*, 3 Ex. D. 32 ; *Weir* v. *Bell*, 3 Ex. D. 238 ; 47 L. J. Ex. 704 ; *Cargill* v. *Bower*, 10 Ch. D. 502 ; 47 L. J. Ch. 649).

The Companies Act, 1900 (63 & 64 Vict. c. 62), s. 10, requires that every prospectus must contain statements specified in that section. This Act repeals s. 38 of the Companies Act, 1867 (see *Nash* v. *Calthorpe*, [1905] 2 Ch. 237), but s. 10 does not state, as s. 38 did, that any prospectus which fails to comply with its requirements shall be deemed to be fraudulent. It is submitted, however, that in the event of non-compliance with the section, an action would lie for the breach of the statutory duty.

A prospectus, like any other document or statement, must as against its author be read in the sense it was intended to convey (*per* Lord Macnaghten, *Gluckstein* v. *Barnes*, [1900] 1 Ch. at p. 250 ; 69 L. J. Ch. at p. 391 ; *Furniss* v. *White*, [1894] 1 Q. B. at p. 510).

By the Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3 (1), an action lies for damage sustained by reason of any untrue statement in a prospectus or notice which invites persons to subscribe for shares in, or debentures, or debenture stock, of a company, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, at the suit of any person subscribing for shares, debentures, or debenture stock, on the faith of such prospectus or notice,

3. The plaintiff on the —— ——, 19—, subscribed for 100 shares in the company on the faith of this prospectus.

4. The prospectus contained misrepresentations, of which the following are particulars:—

(a) The prospectus stated "——," whereas in fact ——.

(b) The prospectus stated "——," whereas in fact ——.

(c) The prospectus stated "——," whereas in fact ——.

5. The defendant knew of the real facts as to the above particulars.

---

against every person who was a director of the company at the time of the issue of the prospectus or notice, or who authorised the issue thereof, or who having authorised such naming of him, is named in the prospectus or notice as a director, or as having agreed to become a director, and against every promoter party to the preparation of the prospectus or notice, or of the portion thereof containing the untrue statement, unless it is proved:—

"(a) With respect to every such untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be, believe, that the statement was true; and

"(b) With respect to every such untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an engineer, valuer, accountant, or other expert, that it fairly represented the statement made by such engineer, valuer, accountant, or other expert, or was a correct and fair copy of or extract from the report or valuation. Provided always, that notwithstanding that such untrue statement fairly represented the statement made by such engineer, valuer, accountant, or other expert, or was a correct and fair copy of an extract from the report or valuation, such director, person named, promoter, or other person, who authorised the issue of the prospectus or notice as aforesaid, shall be liable to pay compensation as aforesaid if it be proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and

"(c) With respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of such statement or copy of or extract from such document; or unless it is proved that having consented to become a director of the company he withdrew his consent before the issue of the prospectus or notice, and that the prospectus or notice was issued without his authority or consent, or that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was so issued without his knowledge or consent, or that after the issue of such prospectus or notice and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and caused reasonable public notice of such withdrawal, and of the reason therefor, to be given."

In cases within this enactment it is sufficient for the plaintiff in an action thereunder to state simply the facts which bring the case within the earlier part of the section, without alleging fraud or knowledge of the falsity of the statement on the part of the defendant, as the burden is cast upon the defendant of alleging and proving such of the grounds of defence mentioned in the section as he may rely upon. As to claims for indemnity and contribution by directors *inter se*, see ss. 4 and 5 of the above Act.

The period of limitation for actions under this Act appears to be six years (*Thomson* v *Clanmorris*, [1900] 1 Ch. 718; 69 L. J. Ch. 337).

6. The following facts, which were within the knowledge of the defendant, are material, and were not stated in the prospectus :—

(a)

(b)

7. The plaintiff has paid calls to the company to the extent of £1,000.

The plaintiff claims :—

(1.) Repayment of £1,000 and interest.

(2.) Indemnity.

(*See R. S. C.*, 1883, *App. C.*, *Sect. VI.*, *No.* 14.)

See a form : Broome v. *Speak*, [1903] 1 Ch. at p. 593.

Claim against Promoters for Fraudulent Misrepresentation inducing the Plaintiff to Purchase Shares.

1. For some time prior to the —— ——, 19—, the defendants had carried on business as —— at ——, in the —— of ——, as "——."

2. In or before ——, 19—, the defendants conceived the idea of raising money by starting a company to be called the "—— Company Limited," to which they proposed to sell at an exorbitant price that part of the business hitherto carried on by them which consisted of the making of —— nails, themselves continuing to carry on on their own account the other portion of the business previously carried on by them. The —— nail business so proposed to be transferred to the proposed company was comparatively worthless and unprofitable, whereas the other portions of the said business were valuable and profitable.

3. The defendants accordingly promoted and started and registered a company called the "—— Company Limited," which is hereinafter referred to as "the said company."

4. The defendants, in order to induce the plaintiff to purchase shares in the said company, made the following representations and statements to him, viz. :—

(a) }
(b) } That [*here set out the representations*].

5. The said representations were contained in a prospectus prepared and issued by the defendants for the purpose of inducing persons to apply for and to purchase shares in the said company and which was sent by post on the —— ——, 19—, by the defendant *C. D.* on behalf of himself and the other defendants to the plaintiff, and were made verbally on the —— ——, 19—, by the defendant *C. D.* on behalf of himself and the other defendants and also verbally on the —— ——, 19—, by one G. H. as agent for the defendants.

6. The said representations were and each of them was false and untrue. In particular [*here set out the respect in which the representation was untrue*].

7. The defendants at the time when they made or caused to be made the said representations knew them to be false and untrue.

8. The defendants made or caused to be made the said representations in order to induce the plaintiff to buy and become the holder of the shares in the said company hereinafter mentioned.

9. By means of the said representations and acting on the faith thereof and in the belief that the same were true the plaintiff was induced to purchase and did on the —— ——, 19—, purchase —— shares in the said company, for which he paid £——.

10. The said shares so purchased by the plaintiff were and have ever since been worthless or worth much less than the price which the plaintiff was induced by the said representations to pay and did pay for the same, and the plaintiff has lost the said £—— which he paid as aforesaid and the interest thereon and use thereof, and was and is otherwise injured.

The plaintiff claims—

(1.) £—— damages.

See a like form: Gibbs v. *Guild*, 8 Q. B. D. 296.

Against a Director of a Company, for Compensation for Loss or Damage from Untrue Statements in a Prospectus, under the Directors Liability Act, 1890 (*z*).

1. On the —— ——, 19—, a prospectus was issued inviting persons to subscribe for shares in a company called ——, being a company within the meaning of the Directors Liability Act, 1890.

2. The plaintiff on the —— ——, 19—, subscribed for —— shares in the said company on the faith of the said prospectus.

3. [*The same as paragraph* 4 *of the form on* p. 402].

4. At the time of the issue of the said prospectus, the defendant was a director of the said company.

5. The plaintiff has by reason of the said untrue statements sustained loss and damage, of which the following are particulars :—

Claim for Fraudulent Misrepresentation in a Prospectus, with Alternative Claim under the Directors Liability Act, 1890.

1. On or about the —— ——, 19—, the defendant became a director of the —— Company Limited, incorporated in ——, 19—, under the Companies Acts 1862 to 1900 (hereinafter called the company), and in or about ——, 19—, while the defendant was such a director, a prospectus was with the authority of the defendant issued by the company with the intention of inducing the public to apply for [purchase $\frac{\text{and}}{\text{or}}$ otherwise acquire] shares in the said company. The said prospectus was sent to and received by the plaintiff with the authority of the defendant.

(*z*) See preceding note.

2. On the faith of and in consequence of receiving the said prospectus the plaintiff on the —— ——, 19—, applied for and was subsequently allotted [*or*, purchased] —— shares of £1 each in the said company and paid £—— for the same.

3. The said prospectus contained misrepresentations and was false and fraudulent to the knowledge of the defendant in the following particulars. The said prospectus contained statements—

(a) That [*here set out the false statements complained of*].

4. The said statements were false and fraudulent in the following respects, viz. :—

(a) [*Here set out the respects in which the statements were false.*]

5. In the alternative the defendant had not up to the time of the application for and allotment to [*or*, purchase by] the plaintiff of the said shares in the company reasonable ground to believe that the statements in the prospectus herein referred to were true or in the further alternative the statements aforesaid were made recklessly and without any belief in their truth.

6. The said prospectus did not specify the dates and names of the parties to certain contracts in accordance with section 10 (k) of the Companies Act, 1900.

Particulars :—

(a) Contracts [*here specify the contracts omitted*].

7. The said shares in the company became absolutely valueless and the plaintiff has lost the whole of the amounts paid by him as aforesaid :—

The plaintiff claims—

(1.) £—— damages for fraud.

(2.) In the alternative £—— for compensation under the Directors Liability Act, 1890.

Claim under the Directors Liability Act in respect of Misrepresentation of an Issue of Debentures, with an alternative Claim for Fraudulent Misrepresentation.

1. The above named defendants *E. F.* and *G. H.* were at the time of the issue of the prospectus hereinafter mentioned and are still directors of a company called the —— Company Limited, which was a company registered under the Companies Acts 1862 to 1890. Each of the other two defendants was a promoter of the said company within the meaning of the Directors Liability Act, 1890.

2. In or about ——, 19—, the defendants issued or authorised the issue to the public and to each of the defendants of a prospectus dated the —— ——, 19—, inviting subscriptions for, and for the purpose of inducing the public and the plaintiffs to apply for and take, 4½ per cent. first mortgage debentures of £100 each in the said company to the amount of £50,000. The said prospectus with their authority named the defendants *E. F.* and *G. H.*

as directors of the said company. Each of the defendants was a party to the preparation and issue of the said prospectus.

3. The said prospectus contained (inter alia) the following representations and statements:—[*Here set out the representations.*]

4. The whole of the aforesaid representations and statements were material. They were all untrue and contrary to the fact.

In particular—[*here state that each representation was untrue, and in what respects*].

5. The defendants wilfully and fraudulently concealed from the plaintiffs the following facts material to be known and which made the statements contained in the said prospectus false and misleading, viz.:—[*Here set out any concealments.*]

6. The following contracts material to be known were suppressed and concealed in the said prospectus, viz. :—[*Here set out any contracts not disclosed*].

7. The plaintiff, upon the faith of the said prospectus and believing the said statements and representations above mentioned to be true, and on the faith of the said prospectus fully disclosing all the material facts relative to the said company, was, as the defendants intended he should be, induced to and did on the —— ——, 19— subscribe for and take and pay for debentures of the said company to the amount of £——.

8. By reason of the matters aforesaid the said debentures were and are worthless and unsecured, [A receiver and manager of the property of the said company has been appointed by the Court in an action brought by the first mortgage debenture holders] and on the realisation of its assets there will be little or nothing realised, and the plaintiff has lost the amount subscribed and paid by him and interest.

9. In the alternative the plaintiff says that the defendants *E. F.* and *G. H.* issued the said prospectus falsely and fraudulently, knowing the same to be untrue, or with reckless carelessness as to the truth or falsity thereof, and with intent that the same should be as in fact it was acted on by the plaintiff.

The plaintiff claims the amount subscribed and paid by him and interest thereon as compensation under the Directors Liability Act of 1890, or alternatively as damages.

For Fraudulently Representing that a Third Person might be trusted with Goods on Credit (*a*).

The plaintiff has suffered damage from the defendant on the —— ——, 19—, inducing the plaintiff to sell and deliver to *G. H.* certain goods [namely,

(*a*) By the 9 Geo. 4, c. 14 (Lord Tenterden's Act), s. 6, "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may

5 tons of hay] on credit, by fraudulently representing to the plaintiff that the said *G. H.* then held a responsible situation, and was then in good circumstances, and might safely be trusted with goods on credit, whereas in fact the said *G. H.* did not then hold a responsible situation, and was not then in good circumstances, and could not then be safely trusted with goods on credit, as the defendant then well knew.

Particulars:—

The said representation was in writing and contained in a letter from the defendant to the plaintiff dated the —— ——, 19—.

The said goods were sold and delivered on the —— ——, 19—.

The plaintiff in consequence lost the price of the said goods, viz.: £——.

Highways (*b*).

obtain credit, money, or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith."

In the case of a representation, partly written and partly verbal, if the part which is in writing was relied on by the plaintiff to a substantial and material extent, the statute is satisfied as to that part of the representation and the plaintiff can sue thereon (*Tatton* v. *Wade*, 18 C. B. 371; 25 L. J. C. P. 240; and see *Clarke* v. *Dickson*, 6 C. B. N. S. 453; 28 L. J. C. P. 225). The representation must be signed by the party; a signature by his agent will not suffice (*Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; *Hosegood* v. *Bull*, 36 L. T. 617). Consequently an incorporated banking company is not made liable for such representations by a document signed by their manager (*Hirst* v. *West Riding Banking Co.*, [1901] 2 K. B. 560; 70 L. J. K. B. 828). So a partner of a firm signing such a representation in the name of the firm, with the authority of the firm, makes himself only, and not his partners, liable (*Mason* v. *Williams*, 28 L. T. 232).

As to the effect of the statute on bills of exchange, see *Clydesdale Bank, Limited* v. *Paton*, [1896] A. C. 381; 65 L. J. P. C. 73.

(*b*) The highways in England are mainly regulated by the Highway Act, 1835 (5 & 6 Will. 4, c. 50), the Highway Act, 1862 (25 & 26 Vict. c. 61), the Highway Act, 1864 (27 & 28 Vict. c. 101), which Acts, together with certain other Acts relating to highways, may be cited collectively as "The Highway Acts, 1835 to 1885" (see the Short Titles Act, 1896 (59 & 60 Vict. c. 14)), and by the provisions relating to highways contained in the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 144—149, the Metropolis Management Acts, the Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 11, 41 (4), 85, and the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25. The last-named Act establishes district councils, urban and rural, and (subject to a power of postponement given to County Councils) transfers to the rural district councils the powers, duties and liabilities of the former authorities and bodies in regard to highways, other than such main roads in the county as the County Council retain. (See the Local Government Act, 1894, ss. 21, 25, 84 (4); Local Government Act, 1888, s. 11; Public Health Act, 1895, s. 144.)

By s. 11 of the Local Government Act, 1888, all roads in a county which are main roads within the meaning of the Highways, &c. Act, 1878, are (except where the urban authority of the district claims to repair and maintain them) to be repaired and maintained by the County Council, and are, together with the materials thereof and drains belonging thereto, to vest in the County Council.

Subject to the above provisions as to main roads, by s. 149 of the Public Health Act, 1875, all "streets" in any urban district which are highways repairable by the

Claim against a Highway Authority for Misfeasance (*c*).

1. The defendants were and are the ——, and the office of surveyor of highways for the —— district was and is vested in them.

2. The highway from —— to —— is within the defendants' said

inhabitants at large, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, vest in and are under the control of the urban authority; and by s. 4 of that Act "street" includes "any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not."

Under the above sections, the urban authority (now urban district council) has in such "streets," and in the materials composing them, and in the roadside strips or wastes forming part of any such "streets," such property only as is necessary for the control, protection and maintenance of them as a highway for public use, and not the ownership of the soil beneath (*Wandsworth* v. *United Telephone Co.*, 13 Q. B. D. 904; 53 L. J. Q. B. 449; *Mayor of Tunbridge Wells* v. *Baird*, [1896] A. C. 434; 65 L. J. Q. B. 451; *Bradford* v. *Mayor of Eastbourne*, [1896] 2 Q. B. 205; 65 L. J. Q. B. 571). The "area of user," as it is termed, alone vests in the authority; that it has been held that an authority cannot forbid or control electric wires placed at such a height above, or depth below, as to be altogether incapable of causing interference with the traffic on the highway which is "vested" in such authority (*Finchley Electric Co.* v. *Finchley Urban Council*, [1903] 1 Ch. 437; 72 L. J. Ch. 297; *St. Mary, Battersea* v. *London and Brush Electric Co.*, [1899] 1 Ch. 474; 68 L. J. Ch. 238).

As to what is a "street," see further, *Robinson* v. *Local Board of Barton*, 8 App. Cas. 798; 53 L. J. Ch. 226; *Fenwick* v. *Croydon Union*, [1891] 2 Q. B. 216; *Att.-Gen.* v. *Rufford*, [1899] 1 Ch. 537.

In the absence of evidence to the contrary, in the case of a highway all between the fences of an ordinary road is *primâ facie* to be regarded as highway (*Harrey* v. *Truro Rural Council*, [1903] 2 Ch. 638; 72 L. J. Ch. 705), though this presumption may be rebutted (*Belmore* v. *Kent County Council*, [1901] 1 Ch. 873; 70 L. J. Ch. 501). The Public Health Act, 1890 (53 & 54 Vict. c. 59), s. 13, gives to urban councils power to make bye-laws for the prevention of danger from wires placed over or across streets for the purpose of any telegraph, telephone, lighting, or other purpose.

As to actions by the owner of the soil of a highway for trespassing thereon, by using it for other purposes than that of passing and repassing, see "*Trespass*," *post*, p. 502.

By s. 15 of the Public Health Act, 1875, every local authority is bound to keep in repair all sewers belonging to it (as to which see s. 13), and is consequently liable to persons lawfully using a highway in which such sewers are placed for injuries caused to such persons by the sewers being negligently allowed to remain in a defective and dangerous state (*White* v. *Hindley Local Board*, L. R. 10 Q. B. 219; 44 L. J. Q. B. 114; *Blackmore* v. *The Vestry of Mile End*, 9 Q. B. D. 451; 51 L. J. Q. B. 496).

(*c*) A surveyor of highways is not, nor are corporate bodies executing that office, liable, as such, for damages caused to individuals by non-repair of a highway within the district for which they hold office (*Young* v. *Davis*, 7 H. & N. 760; 2 H. & C. 177; 31 L. J. Ex. 250; *White* v. *Hindley Local Board*, *supra*; *Thompson* v. *Mayor of Brighton*, [1894] 1 Q. B. 332; 63 L. J. Q. B. 181; *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433; 64 L. J. P. C. 140; *Maguire* v. *Liverpool Corporation*, [1905] 1 K. B. 767; 74 L. J. K. B. 369). But a person is not, by reason of his holding the office of surveyor, exempted from liability for the consequences of his own personal negligence (*Pendlebury* v. *Greenhalgh*, 1 Q. B. D. 36; 45 L. J. Q. B. 3). Nor are corporate bodies executing that office free from liability for injuries caused by their negligence, or that of their servants acting within the scope of their employment, whether in discharging obligations imposed on them by statute or otherwise (*Cowley* v.

district, and at the time of the happening of the injuries to the plaintiff hereinafter mentioned the defendants were repairing the said highway.

3. On the night of the —— ——, 19—, the defendants or their servants left on the side of the said highway near —— a heap of stones, which they had placed there projecting into the said highway, without in any way lighting or guarding the same, and so as to be dangerous to persons using the said highway.

4. In consequence the plaintiff, who on the said night was driving along the said highway in his cart, drove against the said heap of stones and his cart was overturned and injured, and he was thrown violently out and sustained serious injuries.

Particulars :—[*Here set out the particulars of the injuries to the plaintiff and to the cart and of the damages claimed.*]

For further forms of Claims for Obstructing or Causing Nuisances on the Highway, see "Nuisances," post, pp. 457 *et seq.*

HUSBAND AND WIFE (*e*).

Claim by a Married Woman suing alone in respect of a Wrong committed during Coverture (*e*).

[*The statement of claim may be in the ordinary form, as though the plaintiff were a feme sole, but the fact that the plaintiff is a married woman*

Newmarket Local Board, [1892] A. C. 345). Thus where the servants of a corporate body, executing the office of surveyor of highways, negligently left a heap of stones by the side of one of the highways within their district, without a light or guard at night, whereby the plaintiff drove against it and was injured, it was held that such corporate body was liable to the plaintiff in damages (*Foreman* v. *Mayor of Canterbury*, L. R. 6 Q. B. 214 ; 40 L. J. Q. B. 138). And where such a body breaks up a road to lay or repair the sewers, or to repair it, it is liable for injuries caused by its own or its servants' negligence in restoring or repairing such road (see *Whyler* v. *Bingham Rural Council*, [1901] 1 Q. B. 45, 49 ; 70 L. J. Q. B. 207 ; *Lambert* v. *Lowestoft*, [1901] 1 Q. B. 590 ; 70 L. J. Q. B. 333 ; *Shoreditch* (*Mayor*) v. *Bull*, 90 L. T. 210 ; 20 Times Rep. 254), and it would appear, in general, for that of its contractor. (See *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72 ; 68 L. J. Q. B. 704, and *post*, p. 435.)

Under the Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 28, 29, tramway companies are bound to repair that portion of the highway which is occupied by their lines, but are not liable for accidents arising from non-repair thereof, if the road authority has bound itself by contract with them to repair that part (*Alldred* v. *West Met. Tramways Co.*, [1891] 2 Q. B. 398 ; 60 L. J. Q. B. 631). As to obstructions to highways, see "*Nuisance*," *post*, p. 457, and "*Ways*," *post*, p. 517.

The owner of a locomotive engine is responsible for damage done by the escape of sparks from such locomotive while passing along the highway (*Powell* v. *Fall*, 5 Q. B. D. 597 ; 49 L. J. Q. B. 428). Motors on highways are regulated by the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), and the Motor Car Act, 1903 (3 Ed. 7, c. 36), and the regulations made under those Acts. (See "The Motor Cars (Registration and Licensing) Order, 1903," and "The Motor Cars (Use and Construction) Order, 1904.") See *post*, p. 446.

(*e*) A married woman may now sue and be sued in actions for wrongs as if she

should be stated thus:—The plaintiff is, and was at the time [*or*, times] hereinafter mentioned, the wife of *A. B.*, *or thus:*—The plaintiff, who is, and was at the time [*or*, times] hereinafter mentioned, the wife of *A. B.* has suffered damage, &c.]. See the form, *post*, p. 446.

---

were a *feme sole* (see "*Husband and Wife*," *ante*, p. 185), and when she sues or is sued alone in such an action, it is usual though unnecessary to describe her as a married woman in the body of statement of claim.

Although the husband need not be joined with the wife in an action for a wrong to her person or property, he may properly be joined in such action as a co-plaintiff, where he has claims of his own against the defendant which can be conveniently disposed of in the same action, whether arising out of the same wrongful act or not. (See Ord. XVIII., r. 4, and rr. 1, 8, 9; "*Husband and Wife*," *ante*, p. 185; *Beasley* v. *Roney*, [1891] 1 Q. B. 509; 60 L. J. Q. B. 408; and see *Hemstead* v. *Phœnix Gas Co.*, 3 H. & C. 745; 34 L. J. Ex. 108; and the second form in the text.)

In an action by a married woman for a wrong to her separate property, it is sufficient to describe such separate property simply as "her property," without expressly stating it to be separate property (see the M. W. P. Act, 1882, s. 12, cited *ante*, p. 185); but, where the fact of the marriage appears on the statement of claim, it is better that the property should be stated to be her separate property.

Although a married woman may be sued alone under s. 1 (2), cited *ante*, p. 185, for any torts committed by her during the coverture, the M. W. P. Acts do not exempt the husband from his general common law liability to be sued for such torts, and, therefore, in such case, the plaintiff, instead of suing the wife alone, may, in general, if he thinks fit, bring the action against both husband and wife jointly (*Seroka* v. *Kattenburg*, 17 Q. B. D. 177; 55 L. J. Q. B. 375; *Earle* v. *Kingscote*, [1900] 1 Ch. 203; 2 Ch. 585; 69 L. J. Ch. 202; 69 L. J. Ch. 725; see note (*g*), *infra*). But the husband, where he has not authorised or participated in such torts, can only be sued for them jointly with the wife and during the continuance of the coverture, and, therefore, if the coverture is determined by the wife's death or by a divorce, before judgment is obtained against him in an action for such torts, he is no longer liable for them (*Wright* v. *Leonard*, 11 C. B. N. S. 258; 30 L. J. C. P. 365; *Capel* v. *Powell*, 17 C. B. N. S. 743; *In re Beauchamp*, [1904] 1 K. B. 572, 581; 73 L. J. K. B. 311).

The mere fact that the husband and wife are living apart from each other makes no difference to the husband's liability (*Head* v. *Briscoe*, 5 C. & P. 484; *Capel* v. *Powell*, *supra*); but it appears that the husband is not liable for any wrongs committed by the wife during a judicial separation, or while a protection order, or order under the Summary Jurisdiction (Married Women) Act, 1895, is in force against him (see "*Husband and Wife*," *ante*, p. 192).

If the wife survives the husband, or is divorced from him, she alone is liable for the torts committed by her during the coverture (*Capel* v. *Powell*, *supra*).

The husband's liability for torts committed during the coverture by the wife, which he has not authorised or participated in, is confined to acts of the wife which are pure torts, and does not extend to acts, whether fraudulent or not, which are in substance breaches of contract, even if they are capable of being expressed in the pleadings as torts or acts of wrong (*Earle* v. *Kingscote*, [1900] 2 Ch. 585, 591; 69 L. J. Ch. 725). (See *Liverpool Loan Association* v. *Fairhurst*, 9 Ex. 422; 23 L. J. Ex. 163; *Wright* v. *Leonard*, 11 C. B. N. S. 258; 30 L. J. C. P. 365.)

A wife may now sue her husband for a wrong committed by him against her separate property (*Larner* v. *Larner*, [1905] 2 K. B. 539; 74 L. J. K. B. 797), but, with that exception, no husband or wife is entitled to sue the other for a tort (see the M. W. P. Act, 1882, s. 12, cited "*Husband and Wife*," *ante*, p. 192; *Butler* v. *Butler*, 14 Q. B. D. 831; 16 Q. B. D. 374; 55 L. J. Q. B. 55; *R.* v. *Lord Mayor of London*, 16 Q. B. D. 772; 55 L. J. M. C. 118); and a wife cannot, even after being divorced, sue her husband in respect of a tort to the person committed during the coverture (*Phillips* v. *Barnet*, 1 Q. B. D. 436; 45 L. J. Q. B. 277).

Claim in an Action by Husband and Wife for Damages for Negligence causing Personal Injury to the Wife after Marriage, the Husband claiming also in respect of the Damage to Himself (f).

Between *A. B.* and *C. B.*, his wife.....Plaintiffs,
and
D. E......Defendant.

Statement of Claim.

1. The plaintiff *C. B.* is and was on the —— ——, 19— [*or*, at the time of the committing of the grievances hereinafter mentioned], the wife of the plaintiff *A. B.*

2. The defendant or his servant on the —— ——, 19—, so negligently drove a horse and cart in —— Street, ——, that the said horse and cart struck and knocked down the plaintiff *C. B.* as she was crossing the roadway and caused her personal injuries.

Particulars of negligence :—[*State them, as, for instance*, The defendant turned the corner from —— Street into —— Street on the wrong side and without looking where he was going and at a rapid pace and came up behind the plaintiff without any warning and drove into her and knocked her over.]

Particulars of injuries :—[*State them.*]

3. By reason of the premises, the plaintiff *A. B.* lost the plaintiff *C. B.*'s society and services for —— weeks, and was put to expense in nursing her and for medical attendance, and was compelled to employ for —— weeks an additional servant.

Particulars of expenses :—[*State them.*]

The plaintiff *C. B.* claims £—— damages in respect of the said personal injuries, and the plaintiff *A. B.* further claims £—— damages in respect of the matters mentioned in paragraph 3 hereof.

Against a Married Woman for a Wrong committed by her during the Coverture.

[*The claim may be in the ordinary form, as though the defendant were a feme sole, but if it is material to allege the coverture, that may be done as mentioned in the first form.*]

An injunction may be obtained by the wife to restrain a husband from entering a house which is her separate property or in her sole occupation, where such entry is for some other purpose than that of obtaining her society (*Symonds* v. *Hallett*, 24 Ch. D. 346; 53 L. J. Ch. 60; see *Weldon* v. *De Bathe*, 14 Q. B. D. 339; 54 L. J. Q. B. 113).

(*f*) See preceding note.

Against Husband and Wife for Damages for a Wrong committed by the Wife during the Coverture (*g*).

On the —— ——, 19—, the defendant *C. B.*, who then was and still is the wife of the defendant *A. B.*, wrongfully seized and took and carried away a diamond ring belonging to the plaintiff, and still wrongfully retains possession thereof.

The plaintiff claims :—

£—— damages against both defendants.

Against Husband and Wife, married after 1882, *for a Wrong committed by the Wife before the Marriage* (*h*).

1. The defendant *C. D.* is the wife of the defendant *E. D.*, to whom she was married after the committing of the wrongs [*or*, grievances] hereinafter mentioned.

2. On the —— ——, 19—, the defendant *C. D.*, before her said marriage, wrongfully converted to her own use and deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say [*state what they were*], by, &c., [*state how*].

3. The defendant *E. D.*, upon or subsequently to the said marriage, acquired from or through his said wife, and became entitled from or through his said wife to property belonging to her, which was and is more than sufficient in value to satisfy the plaintiff's claim for the price of the said goods.

The plaintiff claims judgment against the defendants for his damages and costs under the 15th section of the Married Women's Property Act, 1882.

By a Husband for enticing away and wrongfully harbouring his Wife (*i*).

1. The plaintiff has suffered damage by the defendant on the —— ——, 19—, wrongfully enticing and procuring the plaintiff's wife *C. B.*, whom the defendant then well knew to be the wife of the plaintiff, unlawfully and

(*g*) See note (*e*), *ante*, p. 410.

The husband may be sued alone in respect of torts committed by husband and wife jointly, or in respect of any torts committed by the wife by his direct instigation or authority. (See *Vine* v. *Sanders*, 4 Bing. N. C. 96.)

(*h*) See "*Husband and Wife*," *ante*, pp. 188, 189.

(*i*) Claims for wrongfully enticing away or wrongfully harbouring a wife against the will of the husband, such as are stated above, are quite distinct from the old action for criminal conversation, which was abolished by 20 & 21 Vict. c. 85, s. 59. No action will lie for harbouring the wife, if she was justified in leaving the husband by reason of his misconduct, and if the defendant has harboured her from motives of humanity (*Philp* v. *Squire*, 1 Peake, 114 ; *Berthon* v. *Cartwright*, 2 Esp. 480 ; see further *Winsmore* v. *Greenbank*, Willes, 577).

against the will of the plaintiff to depart and remain absent from [the house and society of] the plaintiff [and by the defendant wrongfully, and with knowledge of the premises, and against the will of the plaintiff [on the said day and ever since], receiving and harbouring and detaining the said *C. B.* at ——, from —— to ——, 19—, and refusing to deliver her to the plaintiff although requested by the plaintiff so to do].

2. The plaintiff has thereby lost the society and services of his said wife.

Infant (*k*).

Injunction (*l*).

The facts on which the claim for the injunction is based, should be stated in the ordinary way. A paragraph should be added showing or stating that: The defendant threatens and intends, unless restrained from so doing, to

(*k*) See "*Infant*," *ante*, p. 196, and "*Infancy*," *post*, p. 858.

As to claims by or on behalf of infants, under the Fatal Injuries Act, 1846, or 27 & 28 Vict. c. 95, amending that Act, see *ante*, pp. 387 *et seq.*

(*l*) The Judicature Acts have given to every division of the High Court of Justice the powers as to injunctions, &c., formerly possessed by the Court of Chancery, and also those formerly possessed by the superior Courts of common law under the C. L. P. Act, 1854, ss. 79, 81, 82 (now repealed by 46 & 47 Vict. c. 49), and have somewhat enlarged the previously existing facilities for enforcing or protecting legal or equitable rights by injunction. (See Jud. Act, 1873, ss. 16, 24, and s. 25 (8); *Quartz Hill Gold Co.* v. *Beall*, 20 Ch. D. 501; 51 L. J. Ch. 874; *North London Ry. Co.* v. *Gt. N. Ry. Co.*, 11 Q. B. D. 30; 52 L. J. Q. B. 380; *Harris* v. *Beauchamp*, [1894] 1 Q. B. at p. 809; and see *Monson* v. *Tussaud*, cited "*Defamation*," *ante*, p. 366.) But they have not altered the principles on which injunctions are granted or refused (*Gaskin* v. *Balls*, 13 Ch. D. 324; *Beddow* v. *Beddow*, 9 Ch. D. 89; 47 L. J. Ch. 588; *Day* v. *Brownrigg*, 10 Ch. D. 294, 307; 48 L. J. Ch. 173; *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 143, 148; 50 L. J. Ch. 31); and they have not given power to the High Court to grant injunctions in cases where no legal remedy could have been awarded by any Court previously to the Judicature Acts. (See *ante*, p. 34, and *North London Ry. Co.* v. *Gt. N. Ry. Co.*, 11 Q. B. D. 30; *Kitts* v. *Moore*, [1895] 1 Q. B. 253; 64 L. J. Ch. 152; *Cowley* v. *Cowley*, [1901] A. C. 450, 454, 461; 70 L. J. P. 83.)

The jurisdiction to grant an injunction is not limited to cases in which there is a right of action at law (*Stevens* v. *Chown*, [1901] 1 Ch. 894; 70 L. J. Ch. 571, 576, *per* Farwell, J.). Thus where a statute creates or confirms a right of property, an invasion of that right may be restrained by injunction, even although the statute fixes a penalty or makes provision for the protection of the right (*Ib.*; *Att.-Gen.* v. *Ashbourne Recreation Co.*, [1903] 1 Ch. 101; 72 L. J. Ch. 67. See *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759; 72 L. J. Ch. 411).

The jurisdiction by injunction to protect property from wrong threatened, which the Court has, is especially exercised in cases in which damages, if the threat were carried into effect, would afford no adequate remedy (*Emperor of Austria* v. *Day*, 3 D. F. & J. 217, 240; 30 L. J. Ch. 706; *Hext* v. *Gill*, L. R. 7 Ch. 699; 41 L. J. Ch. 761; *Siddons* v. *Short*, 2 C. P. D. 572; 46 L. J. C. P. 795; *Fletcher* v. *Bealey*, 28 Ch. D. 688; 54 L. J. Ch. 424). If the action is brought before the wrongful act has been done, the *onus* lies

continue and repeat the wrongful acts above complained of. *The claim for relief should be as follows:* —

The plaintiff claims:—

(1.) £—— damages.

(2.) An injunction restraining the defendant, his servants and agents from —— [*here state the exact act or acts in respect of which the injunction is sought, or say:* from continuing or repeating the wrongful acts complained of, or any of them].

---

upon the plaintiff of showing the threat or intention of the defendant to do the act (*Ib.*; *Proctor* v. *Bayley*, 42 Ch. D. 390; 59 L. J. Ch. 12), or of establishing, where that is in dispute, that the action of the defendant, if continued, will, or in all reasonable probability will, produce the injurious result sought to be averted (*Att.-Gen.* v. *Nottingham*, [1904] 1 Ch. 673, 677; 73 L. J. Ch. 512).

A division of the High Court of Justice cannot restrain by injunction proceedings which are pending in another division of the Court. (See the Jud. Act, 1873, s. 24 (5).) But it may restrain a person from commencing proceedings in another division (*Besant* v. *Wood*, 12 Ch. D. at p. 630; *Brooking* v. *Maudslay*, 38 Ch. D. 636; 57 L. J. Ch. 1001).

The 21 & 22 Vict. c. 27 (Lord Cairns' Act), which enabled the former Court of Chancery to award damages in lieu of or in addition to an injunction claimed, has been repealed by the 46 & 47 Vict. c. 49, but this repeal is subject to the saving contained in s. 5 of that Act, and the jurisdiction conferred by the repealed Act has been preserved and extended by the Judicature Acts and may be exercised by any division of the High Court of Justice. (See Jud. Act, 1873, ss. 16, 24, 76; *Fritz* v. *Hobson*, 14 Ch. D. 542; 49 L. J. Ch. 321; *Sayers* v. *Collyer*, 28 Ch. D. 103; 54 L. J. Ch. 1; *Greenwood* v. *Hornsey*, 33 Ch. D. 471; 55 L. J. Ch. 917; *Chapman* v. *Auckland Union*, 23 Q. B. D. 294; 58 L. J. Q. B. 504; *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179, 188; 73 L. J. Ch. 484). The damages which may be given in lieu of an injunction are not limited to such as may have accrued at the date of the writ (*Fritz* v. *Hobson*, 14 Ch. D. 542; 49 L. J. Ch. 321; *Chapman* v. *Auckland Union*, *supra*). But it is doubtful whether the jurisdiction extends to awarding damages in lieu of an injunction in respect of an injury not yet committed, but only threatened and intended (*Martin* v. *Price*, [1894] 1 Ch. 276, 284; 63 L. J. Ch. 209).

An injunction will be granted, and the Court will not, against the will of the plaintiff, substitute an award of damages in lieu of an injunction, where the injury cannot fairly be compensated by money, or where the defendant has acted in a high-handed manner or endeavoured to steal a march upon the plaintiff (*Colls* v. *Home and Colonial Stores*, [1904] A. C. at pp. 193, 212; 73 L. J. Ch. 484; and see *Krehl* v. *Burrell*, 11 Ch. D. 146; 48 L. J. Ch. 252; *Greenwood* v. *Hornsey*, *supra*; *Shelfer* v. *City Electric Co.*, [1895] 1 Ch. 267; 64 L. J. Ch. 216; *Jordeson* v. *Sutton*, *&c.*, *Gas Co.*, [1899], 2 Ch. 217; 68 L. J. Ch. 457); but where the injury is not grave, and damages can fairly compensate the plaintiff, or where the conduct of the plaintiff is unreasonable or oppressive, the Court, in the exercise of its discretion, inclines to the substitution of damages for injunction (*Ib.*).

The plaintiff in an action cannot obtain an injunction against a person who has been added as a third party under Ord. XVI., rr. 48—52 (cited *post*, p. 555), but who has not been made a defendant to the action, and has not been put under terms to abide the judgment of the Court (*Edison* v. *Holland*, 41 Ch. D. 28; 58 L. J. Ch. 525).

Where an injunction is claimed, the material facts which are relied upon as entitling to such injunction should be stated (Ord. XIX., rr. 2, 4; see *ante*, p. 5), and the statement of claim should distinctly show against what description of acts the injunction sought is required (*Ib.*).

An injunction may be granted in an action by a reversioner where material injury to the reversion is proved (*Jackson* v. *Duke of Newcastle*, 3 De G. J. & S. 275; 33

Claim of Injunction in an Action for Obstruction of Lights: see "*Lights*," *post*, p. 422.

The like, in an Action for Nuisance by Smells: see "*Nuisance*," *post*, p. 551.

The like, in an Action for Nuisance by Pollution of Water: see "*Water*," *post*, p. 514.

The like, in an Action for Infringement of a Patent: see "*Patents*," *post*, p. 461.

The like in an Action for Infringement of a Trade-Mark: see "*Trade-Marks*," *post*, p. 495.

For forms of Injunction in other Cases, see "*Copyright*," *ante*, p. 355; "*Support*," *post*, p. 486; "*Trespass*," *post*, p. 503; "*Ways*," *post*, p. 518.

INNKEEPER (*m*).

Claim against an Innkeeper for refusing to Lodge the Plaintiff.

1. The defendant was an innkeeper and kept a common inn called the ——, at ——, for the accommodation of travellers.

2. The plaintiff on the —— ——, 19—, being a traveller, came to the

L. J. Ch. 698; *Kino* v. *Rudkin*, 6 Ch. D. 160; 46 L. J. Ch. 807; *Colwell* v. *St. Pancras*, [1904] 1 Ch. 707, 712; 73 L. J. Ch. 275).

A defendant may claim an injunction in his counterclaim. (See Jud. Act, 1873, s. 24 (3), cited "*Counterclaims*," *post*, p. 534; *Duke of Norfolk* v. *Arbuthnot*, 4 C. P. D. 291; 48 L. J. C. P. 737.)

(*m*) By the custom of the realm an innkeeper who professes to entertain and lodge all travellers is bound to receive a traveller at any hour of the day or night, provided the traveller offers himself in proper condition to be received into the inn, and is ready to pay for his accommodation, and there is room to accommodate him (*Fell* v. *Knight*, 8 M. & W. 269; *R.* v. *Ivens*, 7 C. & P. 213; *Hawthorn* v. *Hammond*, 1 C. & K. 404; *R.* v. *Rymer*, 2 Q. B. D. 136; *Gordon* v. *Silber*, 25 Q. B. D. 491; 59 L. J. Q. B. 507; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11; 60 L. J. Q. B. 209); but he is not bound to receive a guest who is not a traveller (*R.* v. *Luellin*, 12 Mod. 445; *R.* v. *Rymer*, 2 Q. B. D. 136), or to retain one who has ceased to be a traveller (*Lamond* v. *Richard*, [1897] 1 Q. B. 541; 66 L. J. Q. B. 315).

An alehouse or ordinary licensed public-house for the sale of liquors does not seem to be an inn (*Sealey* v. *Tandy*, [1902] 1 K. B. 296; 71 L. J. K. B. 41; and see *Lamond* v. *Richard*, *supra*), nor does a boarding-house, or restaurant (*Dansey* v. *Richardson*, 3

said inn and required the defendant to receive and lodge him as a guest in the said inn then and during the night then next ensuing. The defendant then had sufficient room and accommodation in the said inn so to receive and

E. & B. 144; *R.* v. *Rymer*, *supra*; *Scarborough* v. *Cosgrove*, 21 Times Rep. 754). To constitute an inn there must be a profession of furnishing rest or accommodation to travellers. (See *Thompson* v. *Lacy*, 3 B. & Ald. 283; *R.* v. *Rymer*, *supra*; *Calye's Case*, 1 Sm. L. C., 11th ed., p. 119.) Where goods were lost at an hotel, of which a company were proprietors, and an action was brought to recover their value against the paid manager in whose name the justices' licence had been granted, it was held that the company were the real "innkeepers," and, therefore, that the action was not maintainable (*Dixon* v. *Birch*, L. R. 8 Ex. 135).

The law implies a promise on the part of the innkeeper to take care of the goods of his guest according to his common law duty, and a claim against him for loss of the goods may be framed either in tort or upon such promise (*Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131; see *ante*, p. 139). The loss of the goods is presumptive evidence of negligence which it lies on the innkeeper to rebut. He is not an insurer of the goods of his guest, and is not liable for loss occasioned by the act of God, or of the King's enemies, or by the negligence of the guest himself (*Calye's Case*, *supra*; *Burgess* v. *Clements*, 4 M. & S. 305; *Morgan* v. *Ravey*, *supra*; *Spice* v. *Bacon*, 2 Ex. D. 463, 465, n.; 46 L. J. Ex. 713; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11; 60 L. J. Q. B. 209; *Butler* v. *Quilter*, 17 Times, 159; and see further, *post*, p. 860). The liability extends to goods of third persons which are brought to the inn by the guest as his own (*Gordon* v. *Silber*, *supra*), or under such circumstances as to make it the duty of the innkeeper to receive them (*Robins* v. *Gray*, [1895] 2 Q. B. 501; 65 L. J. Q. B. 44).

By the Innkeepers Act, 1863 (26 & 27 Vict. c. 41), s. 1, it is enacted that "no innkeeper shall be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of £30, except in the following cases (that is to say):—

"(1.) Where such goods or property shall have been stolen, lost, or injured, through the wilful act, default, or neglect of such innkeeper, or any servant in his employ:

"(2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper:" (See *O'Connor* v. *Grand International Hotel*, [1898] 2 Ir. 92.)

"Provided always, that in the case of such deposit it shall be lawful for such innkeeper, if he think fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box, or other receptacle, fastened and sealed by the person depositing the same."

By s. 2, "if any innkeeper shall refuse to receive for safe custody, as before mentioned, any goods or property of his guest, or if any such guest shall, through any default of such innkeeper, be unable to deposit such goods or property as aforesaid, such innkeeper shall not be entitled to the benefit of this Act in respect of such goods or property."

By s. 3, "every innkeeper shall cause at least one copy of the first section of this Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he shall be entitled to the benefit of this Act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited."

The word "wilful" in s. 1 applies only to the word "act" (*Squire* v. *Wheeler*, 16 L. T. 93, *per* Byles, J.). As to what is a sufficient "copy" under s. 3, see *Spice* v. *Bacon*, 2 Ex. D. 463; 46 L. J. Ex. 713.

As to the lien of an innkeeper, see *post*, p. 861.

The duty of an innkeeper to take proper care of his premises for the safety of his guests is limited to those parts of his premises to which guests may reasonably suppose that they are invited to go (*Walker* v. *Midland Ry. Co.*, 55 L. T. 489).

lodge the plaintiff therein, and the plaintiff was ready and willing and offered to pay the defendant a reasonable sum of money for such lodging.

3. The defendant did not nor would receive and lodge the plaintiff as a guest in the said inn, and verbally refused to do so, and in consequence the plaintiff was obliged to procure a lodging elsewhere, and was put to inconvenience and expense.

Particulars :—

By a Guest against an Innkeeper for the Loss of Goods.

1. The defendant is an innkeeper, and keeps a common inn, called the ——, at ——, for the accommodation of travellers.

2. On the —— ——, 19—, the plaintiff, as and being a traveller, was received into the said inn by the defendant, with his goods, that is to say ——, and whilst the plaintiff was staying there as such traveller as aforesaid, the defendant did not keep the said goods safely and without diminution or loss, and the said goods were, owing to the neglect and default of the defendant or his servants (*n*), wrongfully taken and carried away from the said inn by some person to the plaintiff unknown, and were thereby lost to the plaintiff.

Particulars :—[*Give Particulars of the goods and their value.*]

For like forms, see Spice v. *Bacon*, 2 Ex. D. 463; *Strauss* v. *County Hotel Co.*, 12 Q. B. D. 27.

The like when the Goods were Deposited for Safe Custody.

1. The defendant at the times hereinafter mentioned was an innkeeper, and kept a common inn for the accommodation of travellers, called the "——," near ——, in the county of Middlesex.

2. The plaintiff, on the —— ——, 19—, as and being a traveller, came to and was received into the said inn by the defendant, and brought into the said inn as such traveller (inter alia) a shawl and a dressing-case containing jewellery and other articles and money to the value of £—— of the plaintiff.

3. From the time of the plaintiff being received into the said inn, and the said shawl and dressing-case with its contents being brought into the said inn, until the time of the loss hereinafter mentioned, the said shawl and the dressing-case with its contents were within the said inn, and the plaintiff was abiding as a traveller and guest within the said inn.

4. The plaintiff at the time of bringing the said shawl and dressing-case with its contents into the said inn deposited the same with the

(*n*) See *ante*, p. 416, n. (*m*).

defendant for safe custody, and the defendant [verbally or] impliedly promised to take care of the same.

5. The defendant did not keep the said shawl and dressing-case with its contents safely and without diminution or loss, and the defendant and his servants in their employ so negligently conducted themselves in that behalf that the said shawl and the dressing-case with its contents were by and through the negligence and default of the defendant and his servants in that behalf wrongfully taken and carried away by some person to the plaintiff unknown, and became and were and are lost to the plaintiff.

Particulars :—

JUDGE (*n*).

JUSTICE OF THE PEACE (*o*).

(*n*) No action will lie against a judge for anything done or said by him in the exercise of his office in a matter which is within his jurisdiction, although it may be irregular or founded on an erroneous judgment (*Calder* v. *Halket*, 3 Moore, P. C. 28; *Kemp* v. *Neville*, 10 C. B. N. S. 523; 31 L. J. C. P. 158; *Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Haggard* v. *Pelicier*, [1892] A. C. 61; 61 L. J. P. C. 19; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668). But a judge of a Court of limited jurisdiction is liable to an action of trespass for an act done by his authority for which he had clearly no jurisdiction (*Houlden* v. *Smith*, 14 Q. B. 841; *Carratt* v. *Morley*, 1 Q. B. 18; *Beaurain* v. *Scott*, 3 Camp. 388; *Calder* v. *Halket*, 3 Moore, P. C. at p. 77), and such judge is responsible for mistakes of law respecting his jurisdiction, though he is justified in determining his jurisdiction upon the facts as they appear before him, although they may subsequently be found to be false (*Lowther* v. *Earl Radnor*, 8 East, 113; *Houlden* v. *Smith*, 14 Q. B. 841, 852; and see *Pease* v. *Chaytor*, 1 B. & S. 658; 3 B. & S. 621; 31 L. J. M. C. 1; 32 *Ib.* 121).

The judge of a Court is not answerable for the wrongful acts or defaults of the ministerial officers of the Court in executing the commands of the Court (*Holroyd* v. *Breare*, 2 B. & Ald. 473; and see *Tunno* v. *Morris*, 2 C. M. & R. 298).

It seems that any action against a judge for acts done by him in the execution or intended execution of his judicial duties would be subject to the provisions of the Public Authorities Protection Act, 1893, cited *post*, p. 901.

(*o*) Justices of the peace are not liable to an action for any acts done by them in the execution of their duty as such justices in matters within their jurisdiction, unless such acts were done maliciously and without reasonable and probable cause, and the statement of claim in any such action should contain an allegation to that effect. (See the Justices' Protection Act, 1848 (11 & 12 Vict. c. 44), s. 1; *Somerville* v. *Mirehouse*, 1 B. & S. 652; *Pease* v. *Chaytor*, 1 B. & S. 658; 3 *Ib.* 621; 31 L. J. M. C. 1; 32 *Ib.* 121.) But they are liable to an action for acts done by them without jurisdiction, although not done maliciously and without reasonable and probable cause, and in such last-mentioned action the above allegation is unnecessary (11 & 12 Vict. c. 44, s. 2; *Polley* v. *Fordham*, (No. 2) 91 L. T. 525; 20 Times Rep. 639).

They are not liable, however, for deciding erroneously as to jurisdiction upon the facts before them, unless they have proceeded without reasonable and probable cause (*Pease* v. *Chaytor*, *supra*); and it is provided by s. 2, above cited, that no action shall be brought against a justice of the peace for anything done under a conviction or

LIBEL.

See "*Defamation*," *ante*, p. 361.

LIGHTS (*p*).

order, until the conviction has been quashed, or for anything done under a warrant issued to procure the appearance of a party which has been followed by a conviction, or order, until after such conviction or order has been quashed, or for anything done under a warrant to compel appearance, if a summons requiring appearance has been previously served and not obeyed.

It is also provided by s. 7 of the last-mentioned Act that the Court or a judge may order a stay of proceedings in any action against a justice of the peace which is brought in contravention of the provisions of that Act.

It seems that a justice of the peace is absolutely privileged as regards defamatory statements made by him in the course of exercising his judicial functions in respect of matters within his jurisdiction. (See *Royal Aquarium Society* v. *Parkinson*, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409; and other cases cited *post*, p. 836.)

The enactment contained in s. 8 of the 11 & 12 Vict. c. 44 to the effect that "no action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced six calendar months next after the act complained of has been committed," is repealed by the general provisions contained in the Public Authorities' Protection Act, 1893 (56 & 57 Vict. c. 61), but is in effect reproduced by the provisions of s. 1 o that Act. (See *post*, p. 901.) Notice of action is no longer required in such actions, but the defendant is entitled to the protection afforded by the last-mentioned Act. (See *Ib.*) In an action for an illegal distress the period of limitation runs only from the wrongful entry and not from the conviction (*Polley* v. *Fordham*, No. 1, [1904] 2 K. B. 345; 73 L. J. K. B. 687).

(*p*) By the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3, it is enacted that, "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

The period is the period before the right is challenged in some action, as appears from s. 4. (See "*Common*," *ante*, p. 338; *Aynsley* v. *Glover*, L. R. 10 Ch. 283, 285; 44 L. J. Ch. 523; *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179, 189; 73 L. J. Ch. 484.)

The interruption mentioned in the above section means an adverse interruption, not a mere cessation of enjoyment (*Smith* v. *Baxter*, [1900] 2 Ch. 138, 143; 69 L. J. Ch. 437; and see *ante*, p. 338).

The access of light to a house may be "actually enjoyed" within the above section, although the house is unoccupied and not completed internally nor fit for habitation, if windows have been opened in it, through which the light in fact enters (*Courtauld* v. *Legh*, L. R. 4 Ex. 126; 38 L. J. Ex. 45; *Collis* v. *Laugher*, [1894] 3 Ch. 659; 63 L. J. Ch. 851).

It is not essential that there should have been a continuous user of the right. A right may be acquired for a building with movable shutters if during the twenty years the window openings have remained in substantially the same position, and the shutters covering them have at intervals, at the owner's pleasure, been opened (*Cooper* v. *Straker*, 40 Ch. D. 21; 58 L. J. Ch. 26; *Smith* v. *Baxter*, [1900] 2 Ch. 138, 144, 146, *supra*).

In stating a claim of such right by actual enjoyment under the statute, it is not necessary to allege such enjoyment to have been "as of right," and this observation applies also to defences on the ground of such statutory right. (See *Truscott* v. *Merchant Taylors' Co.*, *infra*; *Frewen* v. *Phillips*, 11 C. B. N. S. 449; 30 L. J. C. P. 356; Goddard on Easements, 6th ed., pp. 300, 301.) In order to maintain the action there must be such a diminution of the light as renders the premises to a sensible degree less fit for the purposes of business or occupation (*Back* v. *Stacey*, 2 C. & P. 465; *Parker* v. *Smith*, 5 C. & P. 438; *Colls* v. *Home and Colonial Stores*, *supra*; *Kine* v. *Jolly*, [1905] 1 Ch. 480; 74 L. J. Ch. 174). It must be a substantial deprivation of light; the obstruction must, in other words, amount to a nuisance (*Ib.*; *Higgins* v. *Betts*, [1905] 2 Ch. 210), and in considering the cases cited on various points *infra*, it must be remembered this is now established as the law, though formerly doubted. A right to a special amount of light necessary for a particular business cannot be acquired by twenty years' enjoyment (*Ambler* v. *Gordon*, [1905] 1 K. B. 417; 74 L. J. K. B. 185).

No right can be acquired under the statute to light not passing in any defined channel (*Harris* v. *De Pinna*, 33 Ch. D. 238). A right to light under the Prescription Act, 1832, can only be acquired under s. 3, above cited, for s. 2 (cited "*Ways*," *post*, p. 947) does not apply to the easement of light (*Perry* v. *Eames*, [1891] 1 Ch. 658; 60 L. J. Ch. 345; *Wheaton* v. *Maple*, [1893] 3 Ch. 48; 62 L. J. Ch. 963). Consequently, no right can be acquired under the Act to light as against the Crown (*Ib.*).

It has been held that a right to light may be acquired by one tenant as against another tenant of land under the same landlord (*Frewen* v. *Phillips*, *supra*; *Mitchell* v. *Cantrill*, 37 Ch. D. 56, 61; 57 L. J. Ch. 72; *Robson* v. *Edwards*, [1893] 2 Ch. 146; 62 L. J. Ch. 378), but this must now, having regard to the contrary decision as to s. 2, dealing with rights of way, be regarded as open to some doubt. (See *Wheaton* v. *Maple*, *supra*; *Kilgour* v. *Gaddes*, [1904] 1 K. B. 457; 73 L. J. K. B. 232.) The distinction would seem to be, that under s. 2 the easement must be enjoyed as of right; whilst under s. 3, which deals with light, it is sufficient if it is "actually" enjoyed for the required period. The acquiring of a right to light under the statute is suspended during the continuance of a unity of possession of the two tenements (*Ladyman* v. *Grave*, L. R. 6 Ch. 763; *Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. 213; 49 L. J. Ch. 529).

The custom of the city of London authorising the building on ancient foundations so as to obstruct a neighbour's ancient lights, is abolished by s. 3, in cases where there has been an enjoyment of the light for the statutory period without interruption (*Salters' Co.* v. *Jay*, 3 Q. B. 109; *Truscott* v. *Merchant Taylors' Co.*, 11 Ex. 855; 25 L. J. Ex. 173).

If a person having ancient lights opens new lights, or enlarges the ancient ones, the adjoining proprietor is entitled to obstruct the new lights or enlargements only, and in so doing he is not entitled to obstruct the original lights, though he cannot otherwise obstruct the new ones (*Tapling* v. *Jones*, 11 H. L. C. 290; 34 L. J. C. P. 342; *Aynsley* v. *Glover*, L. R. 10 Ch. 283; 44 L. J. Ch. 523; and see *Barnes* v. *Loach*, 4 Q. B. D. 494; 48 L. J. Q. B. 756).

The alteration of a building entitled under the statute to the access of light, or of the windows in it through which such light has been enjoyed, does not extinguish the right to the light, unless the alteration is such as to manifest an intention of absolutely abandoning such right (*Tapling* v. *Jones*, *supra*; *Ecclesiastical Commissioners* v. *Kino*, *supra*; *Scott* v. *Pape*, 31 Ch. D. 554; *Greenwood* v. *Hornsey*, 33 Ch. D. 471). It has accordingly been held that pulling down and setting back, or putting forward such a building, does not extinguish the right, where the new windows are so placed as to receive the same, or a substantial portion of the same light which previously passed into the original building through the ancient windows (*Barnes* v. *Loach*, *Scott* v. *Pape*, *Greenwood* v. *Hornsey*, *supra*), and as to correspond with some defined parts of the ancient windows (*Pendarves* v. *Monro*, [1892] 1 Ch. 611; 61 L. J. Ch. 494; and cases cited *supra*).

Where a man grants a house in which there are windows, neither he nor any one

subsequently claiming under him can block up the windows or destroy the light, unless the right so to do is expressly reserved, or unless the circumstances of the grant are such as to render it manifest that the intention was to permit such blocking up or destruction (*Palmer* v. *Fletcher*, 1 Lev. 122; 1 Sid. 167, 227; *Swansborough* v. *Coventry*, 9 Bing. 305; *Allen* v. *Taylor*, 16 Ch. D. 355; 50 L. J. Ch. 178; *Broomfield* v. *Williams*, [1897] 1 Ch. 603; and see *Birmingham Banking Co.* v. *Ross*, 38 Ch. D. 295, 308, 315; 57 L. J. Ch. 601; *Phillips* v. *Low*, [1892] 1 Ch. 47, 50; 61 L. J. Ch. 44); but if, having a house and land, he grants the land and retains the house without any reservation of the right to light, the grantee can block up the windows of the house (*Ib.*).

The grant of part of a tenement ordinarily implies a grant of all those continuous and apparent easements (such as access of light) over the other part of the tenement retained by the grantor, which are necessary to the enjoyment of the part granted, and have been theretofore used therewith; and the fact that the part retained by the grantor is at the time of the grant in the possession of a lessee does not prevent the presumption of such implied grant of a right to the access of light (*Barnes* v. *Loach*, 4 Q. B. D. 494; 48 L. J. Q. B. 756; and see *Leech* v. *Schweder*, L. R. 9 Ch. 463; 43 L. J. Ch. 487; *Myers* v. *Catterson*, 43 Ch. D. 470; 59 L. J. Ch. 315). But, except in the case of ways of necessity and in some few similar cases, there is no corresponding implication of a reservation in favour of the grantor of part of a tenement in respect of the part retained by him (*Wheeldon* v. *Burrows*, 12 Ch. D. 31; 48 L. J. Ch. 853; *Allen* v. *Taylor*, *supra*; *Union Lighterage* v. *London Graving Dock*, [1902] 2 Ch. 557; 71 L. J. Ch. 791).

By s. 6 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), conveyances of land having houses or buildings thereon, made since the 31st December, 1881, operate to convey therewith all lights and casements appertaining, or reputed to appertain thereto, or enjoyed therewith, unless a contrary intention is expressed in the conveyance. (See *Broomfield* v. *Williams*, *supra*; *Godwin* v. *Schweppes*, [1902] 1 Ch. 926; 71 L. J. Ch. 438; *International Tea Stores* v. *Hobbs*, [1903] 2 Ch. 165; 72 L. J. Ch. 543.)

The plaintiff, whether tenant or reversioner, may maintain repeated actions for damages so long as the obstruction continues (*Shadwell* v. *Hutchinson*, 2 B. & Ad. 97; *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J. C. P. 290; *Spurr* v. *Hall*, 2 Q. B. D. 615).

An injunction may, in a proper case, as to which see *Colls* v. *Home and Colonial Stores*, *supra*, be claimed either alone or coupled with a claim for damages, and either as alternative or additional relief. (See *Robson* v. *Whittingham*, L. R. 1 Ch. 442; 35 L. J. Ch. 227; *Kelk* v. *Pearson*, L. R. 6 Ch. 809; *Aynsley* v. *Glover*, *supra*; *Martin* v. *Price*, [1894] 1 Ch. 276; 63 L. J. Ch. 209; and see "*Injunction*," *ante*, p. 414.) As to when a mandatory injunction will be granted for the removal of a building already erected, see *Kelk* v. *Pearson*, *supra*; *City Brewery Co.* v. *Tennant*, L. R. 9 Ch. 212; 43 L. J. Ch. 457; *Myers* v. *Catterson*, *supra*; *Daniel* v. *Ferguson*, [1891] 2 Ch. 27; *Von Joel* v. *Hornsey*, [1895] 2 Ch. 774; 65 L. J. Ch. 102; *Colls* v. *Home and Colonial Stores*, *supra*. As to interlocutory injunctions, see *Newson* v. *Pender*, 27 Ch. D. 43; *Daniel* v. *Ferguson*, *Von Joel* v. *Hornsey*, *supra*. As to the jurisdiction of the Court in certain cases to substitute damages for an injunction, see "*Injunction*," *ante*, p. 414.

The right to light may sometimes be established on the ground of prescription from time immemorial, where, by reason of interruption or other causes, a prescription under the Prescription Act cannot be made out. (See *Aynsley* v. *Glover*, *supra*; *Wheaton* v. *Maple*, [1893] 3 Ch. 48; 62 L. J. Ch. 963.) But ordinarily a claim of such right by immemorial prescription is liable to be negatived by the known date of the buildings; and in such cases, where proof cannot be given of a prescriptive right under the statute, the right to light may sometimes be supported on the ground of the presumption of a lost grant from the owner of the servient tenement.

A claim to have the benefit of all the air which floats over the whole surface of a neighbour's property is too vague and indefinite to be the subject of prescription under the Prescription Act, 1832, or from time immemorial, or to found the presumption of a lost grant. (See *Chastey* v. *Ackland*, [1895] 2 Ch. 389; 64 L. J. Q. B. 523; [1897] A. C. 155; 13 Times Rep. 237, and the cases next cited.) Accordingly, such claims

Claim in an Action for an Injunction to restrain a threatened Obstruction of the Plaintiff's Ancient Lights with a further Claim for a Mandatory Injunction or Damages in lieu thereof (*q*).

1. The plaintiff is the owner [*or*, lessee] and occupier of a house, 700, Regent Street, London, in which are the following ancient lights :—

(1.) The kitchen window in the basement on the south side.

(2.) The two back dining-room windows on the ground floor on the south side.

(3.) The landing window and back drawing-room window on the south side.

2. The defendant is erecting a building [on the south side of the plaintiff's said house] which will, if not stopped, materially diminish the light coming through the said windows.

The plaintiff claims an injunction to restrain the defendant, his contractors, servants, and workmen, from continuing the erection of the building, so as to obstruct or diminish the access of light to the said windows or any of them.

The plaintiff will also, if necessary, claim to have the said building pulled down, or damages for the injury he will sustain if the same is completed and not pulled down.

(*R. S. C.*, 1883, *App. C.*, *Sect. VI.*, *No.* 10.)

---

were held not maintainable where they were made for the access of air to the sails of a windmill (*Webb* v. *Bird*, 10 C. B. N. S. 268; 13 *Ib.* 841; 30 L. J. C. P. 384; 31 *Ib.* 335); or to the plaintiff's chimneys (*Bryant* v. *Lefever*, 4 C. P. D. 172; 48 L. J. C. P. 380; but see *Chastey* v. *Ackland*, *supra*); or to a skeleton timber-shed (*Harris* v. *De Pinna*, 33 Ch. D. 238; 56 L. J. Ch. 344). A right to the access and passage of air through defined channels over adjoining property into buildings of the person claiming the right, may be claimed where there has been long enjoyment, by lost grant or covenant, or, it seems, by prescription under s. 2 of the Prescription Act, 1832, or at common law (*Harris* v. *De Pinna*, *supra*; *Bass* v. *Gregory*, 25 Q. B. D. 481; 59 L. J. Q. B. 574; *Aldin* v. *Clark*, [1894] 2 Ch. 437; 63 L. J. Ch. 601). It seems also that an obstruction which stopped the access of salubrious air to the doors and windows of a house, and thereby rendered it unwholesome, would be actionable as a nuisance (see *Aldred's Case*, 9 Co. Rep. 58 b; *Dent* v. *Auction Mart Co.*, L. R. 2 Eq. at p. 252; *Hall* v. *Lichfield Brewery Co.*, 49 L. J. Ch. 655; 43 L. T. 380; Gale on Easements, 6th ed., pp. 298—304), and might in some cases of danger to health, &c., be ground for an injunction. (See *Gale* v. *Abbott*, 10 W. R. 748; and *City of London Brewery Co.* v. *Tennant*, L. R. 9 Ch. 212, 222).

(*q*) The allegation that the windows are "ancient lights" appears sufficiently to import that the defendant is entitled to the right by prescription; but it may frequently be proper and advisable to insert an express allegation to that effect, as in the next form in the text (see *Harris* v. *Jenkins*, 22 Ch. D. 481; 52 L. J. Ch. 437; *Sheddon* v. *Fitzpatrick*, 38 L. J. Ch. 410; 58 L. J. Ch. 139; and other cases, cited "*Common*," *ante*, p. 339); and where the claim to the right is based upon express or implied grant, or upon a lost grant, the mode in which the claim arises should be distinctly stated.

Claim in an Action for Damage for Obstructing the Access of Light to a House where the Right is claimed by Prescription.

1. The plaintiff was [and is] possessed of a dwelling-house, known as ——, at ——, and having —— windows on the [west] side thereof, and was [and is] entitled by prescription under the Prescription Act, 1832 [*or*, by prescription from time immemorial], to the access and use of light [and air] to and for the said house through the said windows which were ancient lights.

2. The defendant, in ——, 19—, erected, and has ever since maintained [and still maintains], a high wall near to the said windows, and has thereby prevented and obstructed [and still prevents and obstructs] the light [and air] from entering into the said house by the said windows, whereby he has rendered the said house dark [and unwholesome].

Particulars:—[*State particulars of the obstruction and damage.*]

Claim by a Reversioner for Damage for Obstructing his Ancient Lights (*r*).

1. The plaintiff was and is the owner of the house No. ——, —— Street, ——, now in the occupation of *A. B.*, as tenant thereof to the plaintiff under a lease for a term of which —— years, or thereabouts, are still unexpired.

2. There are in the said house the following ancient lights:—[*State same.*]

3. The defendant has erected a building of a permanent character which materially diminishes the light coming through the said windows, and diminishes the value of the plaintiff's reversion of and in the said house.

MAINTENANCE (*s*).

(*r*) See "*Reversion*," *post*, p. 473.

(*s*) Maintenance is "an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it" (4 Bl. Comm., c. 10, ss. 12, 13; *Bradlaugh* v. *Newdegate*, 11 Q. B. D. 1; 52 L. J. Q. B. 454; *Alabaster* v. *Harness*, [1894] 2 Q. B. 897; [1895] 1 Q. B. 339; 64 L. J. Q. B. 76; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, 369; 74 L. J. Q. B. 829). Champerty is a species of maintenance, being "the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it" (*per* Tindal, C.J., *Stanley* v. *Jones*, 7 Bing. 369; *James* v. *Kerr*, 40 Ch. D. 449; 58 L. J. Ch. 355; *Guy* v. *Churchill*, 40 Ch. D. 481; 58 L. J. Ch. 345; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437; 65 L. J. Ch. 656).

Where one of the parties to an action has been illegally maintained and assisted in it by a person who has no interest in the suit, the other party to the suit may bring an action against the person who has been guilty of such maintenance to recover any damages thereby sustained (*Pechell* v. *Watson*, 8 M. & W. 691; *Bradlaugh* v. *Newdegate*, 11 Q. B. D. 1; 52 L. J. Q. B. 454; *Harris* v. *Brisco*, 17 Q. B. D. 504; 55 L. J. Q. B. 423; *Alabaster* v. *Harness*, *supra*). But a person who has, or who reasonably believes that he has, an interest in the suit, is justified in assisting one of the

Malicious Prosecution (*t*).

Claim for Malicious Prosecution before a Justice of the Peace and at Quarter Sessions.

The defendant, on the —— ——, 19—, maliciously and without reasonable or probable cause preferred a charge of larceny against the plaintiff before a justice of the peace, sitting at ——, ——, causing the plaintiff to be sent for trial on the charge and imprisoned thereon from

---

parties, and his doing so will not amount to maintenance (*Findon* v. *Parker*, 11 M. & W. 675; *Hunter* v. *Daniel*, 4 Hare, 420, 431; *Hutley* v. *Hutley*, L. R. 8 Q. B. 112; *Bradlaugh* v. *Newdegate*, *supra*; *Alabaster* v. *Harness*, *supra*). So also in the case of master and servant, or husband and wife, or of father and son, or of certain other near relations or connections, such assistance does not amount to maintenance (see *Bradlaugh* v. *Newdegate*, *supra*; Bac. Abr., Maintenance, A.); though the mere fact of the party being a cousin of the plaintiff is no justification for maintenance (*Hutley* v. *Hutley*, *supra*). It is a good defence to an action for maintenance that the defendant assisted the party from charitable motives, believing him to be oppressed (*Harris* v. *Brisco*, *supra*; *Alabaster* v. *Harness*, *supra*). The doctrine of maintenance does not apply to criminal proceedings (*Grant* v. *Thompson*, 15 Rep. 290; 72 L. T. 264). See further, "*Maintenance*," *post*, p. 729.

(*t*) This cause of action consists in the prosecution by the defendant of legal proceedings, of a civil or criminal nature, against the plaintiff, maliciously, and without any reasonable or probable cause, whereby the plaintiff is injured, as by being arrested and imprisoned or put to expense (*Johnstone* v. *Sutton*, 1 T. R. 493, 544; *Quartz Hill, &c., Co.* v. *Eyre*, 11 Q. B. D. 674, 683, 689; 52 L. J. Q. B. 488; *Rayson* v. *South Lond. Tramways Co.*, [1893] 2 Q. B. 304; 62 L. J. 493), or injured in credit or character (*Savile* v. *Roberts*, 1 Ld. Raymond, 374, 378; *Quartz Hill, &c., Co.* v. *Eyre*, *supra*).

The statement of claim must show the legal proceedings instituted by the defendant against the plaintiff, and the termination of them in favour of the plaintiff, where the proceedings are capable of such a termination (*Basébé* v. *Matthews*, L. R. 2 C. P. 684; 36 L. J. M. C. 93; *Met. Bank* v. *Pooley*, 10 App. Cas. 210, 216, 228; *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467; 71 L. J. K. B. 208), the absence of reasonable or probable cause for instituting the proceedings, and the malice of the defendant in so doing, and also the arrest or other loss or injury suffered by the plaintiff (*Johnson* v. *Emerson*, L. R. 6 Ex. 329, 344, 372; 40 L. J. Ex. 201; *Saxon* v. *Castle*, 6 A. & E. 652; *Abrath* v. *N. E. Ry. Co.*, 11 Q. B. D. 440, 448, 455; 11 App. Cas. 247; 52 L. J. Q. B. 352, 620; *Quartz Hill, &c., Co.* v. *Eyre*, *supra*). Where the proceedings were *ex parte*, and the plaintiff had no opportunity of preventing an unfavourable termination, it was held that, notwithstanding such termination, the plaintiff might recover (*Steward* v. *Gromett*, 7 C. B. N. S. 191; 29 L. J. C. P. 170; *Gilding* v. *Eyre*, 10 C. B. N. S. 592; 31 L. J. C. P. 174).

The absence of reasonable and probable cause is a question of law for the judge to determine; the facts and inferences of fact are for the jury (*Lister* v. *Perryman*, L. R. 4 H. L. 521; 39 L. J. Ex. 177; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, 726, 727; 60 L. J. Q. B. 332; *Cox* v. *English, &c., Bank*, [1905] A. C. 168; 74 L. J. P. C. 62).

The *onus* of showing that there was not reasonable and probable cause rests on the plaintiff (*Lister* v. *Perryman*, *supra*; *Abrath* v. *N. E. Ry. Co.*, *supra*). "In order to justify a defendant there must be a reasonable cause—such as would operate on the mind of a discreet man; there must also be a probable cause—such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him" (*per* Tindal, C.J., in *Broad* v. *Ham*, 5 Bing. N. C. 725; *Lister* v. *Perryman*, L. R. 4 H. L. 521, 532, 540; 39 L. J. Ex. 177; *Shrosbery* v. *Osmaston*, 37 L. T. 792).

the —— ——, 19—, until the —— ——, 19—, and prosecuted the plaintiff thereon at the —— Quarter Sessions, where the plaintiff was acquitted.

Particulars of special damage :—	£
Messrs. *L. & L.'s* bill of costs	65
Loss in business from 1st January, 19—, to 18th February, 19—.....	100

The plaintiff claims £500.

(*See R. S. C.*, 1883, *App. C., Sect. VI., No.* 15.)

Malice may be alleged as a fact without setting out the circumstances from which it is to be inferred (Ord. XIX., r. 22). The malice necessary to support this action consists in the defendant being actuated by spite, or by indirect or improper motives (*Mitchell* v. *Jenkins*, 5 B. & Ad. 588 ; *Hicks* v. *Faulkner*, 8 Q. B. D. 167, 174 ; 51 L. J. Q. B. 268 ; *Abrath* v. *N. E. Ry. Co.*, *supra* ; *Brown* v. *Hawkes*, *supra*). Malice is a question of fact for the jury, and the absence of reasonable and probable cause affords in general some evidence of the presence of malice (*Ib.*). If the prosecutor honestly believes the charge he makes, some distinct evidence of malice is required in order to prove he acted maliciously (*Brown* v. *Hawkes*, *supra*). A prosecution instituted with malicious motives does not give a cause of action, unless there was also a want of reasonable and probable cause for it. (See *Mitchell* v. *Jenkins*, *supra* ; *Musgrove* v. *Newell*, 1 M. & W. 582 ; *Hicks* v. *Faulkner*, *supra*.)

In an action for malicious prosecution of civil proceedings, special damage must be alleged and proved in order to sustain the action (*Cotterell* v. *Jones*, 11 C. B. 713 ; *Quartz Hill, &c., Co.* v. *Eyre*, *supra*) ; but in certain cases, *e.g.*, malicious and unfounded petitions in bankruptcy, or for winding up of a company, damage to credit and reputation will be presumed, and will support the action (*Johnson* v. *Emerson*, L. R. 6 Ex. 329 ; 40 L. J. Ex. 201 ; *Quartz Hill, &c. Co.* v. *Eyre*, *supra* ; and see *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106 ; 68 L. J. Q. B. 709). The extra costs incurred in successfully defending a civil action, beyond the amount awarded by the Court, are not damage sufficient to maintain this action (*Cotterell* v. *Jones*, *supra* ; *Quartz Hill, &c., Co.* v. *Eyre*, *supra*).

The arrest and prosecution of offenders, or supposed offenders, is a citizen's duty to public justice (see *per* Earl of Selborne, *Cobb* v. *G. W. Ry. Co.*, [1894] A. C. at p. 425), but is not in general within the scope of employment of servants, or part of their service, and a master, in the absence of proof of authority for or ratification of an arrest or prosecution by the servant on his behalf, is not ordinarily responsible for such arrest or prosecution. A servant in charge of property has, in general, an implied authority to do all that is necessary for the protection of such property, but no implied authority to punish for an infringement of the law. (See *Allen* v. *L. & S. W. Ry. Co.*, L. R. 6 Q. B. 65, 69 ; 40 L. J. Q. B. 55 ; *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270 ; 48 L. J. P. C. 25 ; *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516 ; 60 L. J. Q. B. 238 ; *Hanson* v. *Waller*, [1901] 1 Q. B. 390 ; 70 L. J. Q. B. 231.) Thus it has been held that neither the arrest, nor the prosecution, of offenders is within the ordinary scope of a bank manager's authority, and that, unless there is express evidence of such authority, or evidence thereof to be implied from the exigency of the particular occasion, his principals are not responsible for his action in arresting or prosecuting persons for stealing the bank property (*Bank of New South Wales* v. *Owston*, *supra*). So a foreman porter in the service of a railway company, who is left in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property ; and if he gives an innocent person in charge on such suspicion, the company are not liable (*Edwards* v. *L. & N. W. Ry. Co.*, L. R. 5 C. P. 445 ; 39 L. J. C. P. 241). A similar decision was come to in the case of a manager of a public-house (*Hanson* v. *Waller*, *supra*).

Authority to arrest or prosecute offenders may be implied in particular cases, where

The like before a Justice of the Peace.

1. The defendant on the —— ——, 19—, falsely and maliciously and without reasonable or probable cause preferred before ——, a justice of the peace, a charge against the plaintiff of having [feloniously stolen the defendant's purse] and procured the said justice to grant a warrant for the apprehension of the plaintiff on the said charge, and caused the plaintiff to be arrested under the said warrant on the —— ——, 19—, and imprisoned until the —— ——, 19—, and then brought in custody before the said justice [and then procured the said justice to remand the plaintiff to prison and caused him to be further imprisoned until the —— ——, 19—, and then again brought before the said justice].

2. The said justice having heard the said charge, dismissed the same and discharged the plaintiff out of custody, whereupon the said prosecution determined.

3. The plaintiff has in consequence suffered the following special damage :—[*Set out particulars of any special damage.*]

The like, when the Plaintiff was committed for Trial and the Grand Jury threw out the Bill.

1. The plaintiff is a ——, residing at ——, in the —— of ——.

2. On the —— ——, 19—, the defendant falsely, maliciously and without any reasonable or probable cause appeared before Mr. ——, one of the magistrates at Bow Street Police Court, in the county of London, and charged the plaintiff with having [unlawfully obtained of and from —— the sum of —— by certain false pretences with intent to defraud], and upon such charge procured the said magistrate to grant a warrant for the apprehension of the plaintiff and for bringing him before the said magistrate or some other magistrate to be dealt with according to the law, and under and by virtue of the said warrant caused the plaintiff to be arrested and imprisoned for —— hours, and afterwards to be brought in custody before the said magistrate [and then procured the said magistrate to remand the plaintiff and caused the plaintiff to be imprisoned from —— ——, 19—, till —— ——, 19—, and afterwards on the —— ——, 19—, to be brought again before the said magistrate], and then by false and malicious representations procured the said magistrate to commit the plaintiff to prison to await his trial at the Middlesex Sessions.

3. On the —— ——, 19—, the defendant falsely, maliciously, and without any reasonable or probable cause, caused a bill of indictment for that he did

---

the employment is such that its duties could not be efficiently performed for the benefit of the employer without such authority (*Bank of New South Wales* v. *Owston*, *supra*; *Moore* v. *Met. Ry. Co.*, L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; *Edwards* v. *Mid. Ry. Co.*, 6 Q. B. D. 287; 50 L. J. Q. B. 281; *Hanson* v. *Waller*, *supra*).

[unlawfully obtain of and from the said —— the sum of —— by certain false pretences with intent to defraud] to be preferred against the plaintiff at the Middlesex Sessions then next ensuing. The grand jury, on the case coming before them, ignored the said bill of indictment, and the plaintiff was discharged from custody, whereby the said prosecution was determined.

4. By reason of the premises the plaintiff has been injured in his reputation, and suffered pain of body and mind, and was prevented from attending to his said business, and incurred expense in defending himself from the said charge and obtaining his release from the said prosecution.

Particulars :—

The like, for a Malicious Prosecution at Assizes (*u*).

1. The defendant, on the —— ——, 19—, maliciously and without reasonable or probable cause presented to the grand jury at the Assizes holden in and for the county of ——, a bill of indictment against the plaintiff, falsely charging him with having [*state the crime or offence charged*], and maliciously and without reasonable and probable cause prosecuted and caused and procured the plaintiff to be tried at the said Assizes upon the said charge, and the plaintiff upon such trial was acquitted of the said charge.

Particulars of special damage are as follows :—

For a Malicious Arrest under s. 6 of the Debtors Act, 1869 (*x*).

The defendant maliciously and without reasonable or probable cause, by making a false affidavit on an application under s. 6 of the Debtors Act, 1869, caused and procured an order to be made by the Hon. Mr. Justice

(*u*) If the defendant maliciously and without reasonable or probable cause procures the prosecution of a criminal charge, it is no defence for him, if sued, that he has procured himself to be bound over by recognisance to prosecute (*Dubois* v. *Keats*, 11 A. & E. 329 ; see *Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505). A remand is the act of the magistrate, and may be sued for in an action for malicious prosecution ; it cannot be charged as the act of the defendant so as to support an action for false imprisonment. (See *Lock* v. *Ashton*, 12 Q. B. 871.)

(*x*) An action is maintainable for falsely and maliciously, and without reasonable or probable cause, making or procuring an affidavit under s. 6 of the Debtors Act, 1869 (32 & 33 Vict. c. 52), and thereby obtaining an order for the plaintiff's arrest. (See *Daniels* v. *Fielding*, 16 M. & W. 200 ; *Grainger* v. *Hill*, 4 Bing. N. C. 212 ; and *Lees* v. *Patterson*, 7 Ch. D. 866 ; 47 L. J. Ch. 616.) A person privileged from arrest on the ground that he is attending a Court of justice as a witness, or on any similar ground, if arrested, cannot maintain an action, although the arrest was made maliciously and with knowledge of the privilege ; for the privilege is that of the Court granting it, and not that of the person, and it is discretionary in the Court to allow the privilege, even if claimed by the plaintiff (*Magnay* v. *Burt*, 5 Q. B. 381 ; *Yearsley* v. *Heane*, 14 M. & W. 322 ; *Philips* v. *Naylor*, 3 H. & N. 14 ; 4 *Ib.* 565 ; 27 L. J. Ex. 222 ; 28 *Ib.* 225).

——, on the —— ——, 19—, whereby it was ordered that the defendant should be arrested and imprisoned as therein mentioned, and maliciously and without reasonable and probable cause procured the defendant to be arrested on the —— ——, 19—, under the said order, and detained in custody for —— days until he was discharged therefrom by an order of the Hon. Mr. Justice ——, dated the —— ——, 19—, whereby the said first-mentioned order was rescinded.

Particulars :—

The affidavit was false in the following particulars :—[*State same.*]

[*State special damage, if any.*]

Mandamus (*y*).

Claim for a Mandamus.

[*Set forth the grounds upon which the claim is founded, taking care to show that the plaintiff is personally interested in the duty claimed to be fulfilled, and*

(*y*) By the C. L. P. Act, 1854, ss. 68—73, the superior Courts of Common Law were empowered to grant to the plaintiff in any action (except replevin and ejectment), in pursuance of a claim to be made in the action, a peremptory writ of mandamus commanding the defendant to fulfil any [public or *quasi*-public] duty in the fulfilment of which the plaintiff was personally interested. This jurisdiction was transferred, by s. 16 of the Jud. Act, 1873, to the High Court of Justice, and the jurisdiction is preserved by s. 5 of the repealing Act (46 & 47 Vict. c. 49), and also by s. 25 (8) of the Jud. Act, 1873, and by the R. S. C. (See Ord. LIII., rr. 1—4 ; Ord. XLII., r. 30.)

The mandamus here spoken of is not the ancient prerogative writ of mandamus which is granted on motion, but is a mandamus to perform some act by way of relief in an action. (See *Glossop* v. *Heston Local Board*, 12 Ch. D. 102, 122 ; 49 L. J. Ch. 89 ; *Smith* v. *Chorley District Council*, [1897] 1 Q. B. 532, 538, 678 ; 66 L. J. Q. B. 427.) No writ of mandamus is issued in an action, but a judgment or order is made which has the same effect as a writ of mandamus formerly had (Ord. LIII., r. 4).

Where the plaintiff seeks to obtain a mandamus in an action he must indorse such claim upon the writ of summons (see Ord. LIII., rr. 1, 2), and the statement of claim should distinctly claim the mandamus, and should show what is the duty of which performance is sought to be enforced, and state the material facts relied upon in support of the claim, and allege that the plaintiff is personally interested in the fulfilment of such duty, and that he sustains or may sustain damage by the non-performance thereof, and that performance thereof has been demanded and refused or neglected.

A mandamus may be claimed either together with claims for damages or other relief, or separately, and it is not necessary that the plaintiff in such action should show a cause of action which would entitle him to recover damages (*Fotherby* v. *Metrop. Ry. Co.*, L. R. 2 C. P. 188 ; 36 L. J. C. P. 88). The duty for the performance of which a mandamus is claimed in an action must be one of a public, or *quasi*-public, nature, as well as one in the performance of which the plaintiff is personally interested. (See *Benson* v. *Paul*, 6 E. & B. 273 ; 25 L. J. Q. B. 274 ; *Norris* v. *Irish Land Co.*, 8 E. & B. 512 ; 27 L. J. Q. B. 115 ; *Fotherby* v. *Met. Ry. Co.*, *supra*.) Hence an action for a mandamus will not lie for the specific performance of a mere personal contract, as to accept a lease under an agreement (*Benson* v. *Paul*, *supra*). Nor will an action for a mandamus lie where there is any other equally effectual remedy, as for instance, for

that he sustains or will sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him and refused or neglected, and conclude:—]

The plaintiff claims a mandamus commanding the defendant that [*here state the duty claimed to be fulfilled*].

Claim for a Mandamus to Guardians of the Poor of a Union to Pay Costs in Pursuance of an Order made by Quarter Sessions and removed into the High Court by Certiorari (*z*).

1. On the —— ——, 19—, the plaintiffs entered an appeal to the General Quarter Sessions of the Peace for the county of Middlesex against a certain rate or assessment made for the relief of the poor of the parish of ——, on the —— ——, 19—, in respect of premises described in the rate book for the said parish. The assessment committee of the —— union appeared as respondents to the said appeal.

2. The said appeal came before the said Court of General Quarter Sessions on the —— ——, 19—, and the said Court ordered (inter alia) that the respondents should pay the plaintiffs' costs of and attending the said appeal, which said costs were thereafter duly taxed at £——.

3. The respondents to the said appeal neglected and refused to pay the said costs in accordance with the said order, and the said order was on the —— ——, 19—, by an order of the Honourable Mr. Justice —— removed into this Court.

---

a personal debt for which an action may be brought in the ordinary manner (*Bush* v. *Beavan*, 1 H. & C. 500; 32 L. J. Ex. 54).

The following are instances of actions in which a claim for a mandamus has been held to lie, viz.: against a public company requiring them to register the plaintiff as a shareholder in respect of his shares (*Norris* v. *Irish Land Co.*, 8 E. & B. 512; 27 L. J. Q. B. 115; and see other cases cited *ante*, p. 342); requiring the company to replace on the register the name of the plaintiff which had been wrongfully removed (*Swan* v. *North British Australasian Co.*, 7 H. & N. 603; 31 L. J. Ex. 425; 2 H. & C. 175; 32 L. J. Ex. 273); against a railway company requiring them to issue a warrant for a jury to assess compensation for land which they had given notice to take for the purposes of their undertaking (see *ante*, p. 342); against Improvement Commissioners requiring them to levy a rate for the payment of a debt due to the plaintiff (*Ward* v. *Lowndes*, 1 E. & E. 940, 956; 28 L. J. Q. B. 265; 29 *Ib.* 40; *Worthington* v. *Hulton*, L. R. 1 Q. B. 63); against Improvement Commissioners to compel them to apply their funds in payment of certain bonds in compliance with their duty (*Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642; 39 L. J. Q. B. 221). But where the General Council established by the Medical Act (21 & 22 Vict. c. 90), acting *bonâ fide* under the discretionary powers given them by that Act, had expunged the plaintiff's name from the register of medical practitioners, a mandamus against them to restore it was refused (*Allbutt* v. *General Council*, 23 Q. B. D. 400; 58 L. J. Q. B. 606).

(*z*) The taxation of costs ordered by Sessions to be paid must take place at the particular Sessions, unless there is an agreement to tax out of Sessions (*Mid. Ry. Co.* v. *Edmonton Union*, [1895] A. C. 485) or the case is one within the Licensing Act, 1902, s. 20.

4. The said costs have not been paid, and by virtue of the provisions of the statute 27 & 28 Vict. c. 39, the defendants are bound to pay the same.

5. Application was made by the plaintiffs to the defendants for payment of said costs so taxed at £——, by a letter dated —— ——, 19—, but the defendants have wholly neglected and refused to pay the same or any part thereof.

The Plaintiffs claim :—

(1.) A mandamus commanding the defendants to pay the sum of £——, in accordance with the order of the Court of General Quarter Sessions of the Peace for the county of Middlesex, made on the —— of ——, 19—.

See a Form of Claim against a Company under the Lands Clauses Consolidation Act, 1845, *for a Mandamus requiring them to issue their Warrant for a Jury*, *ante*, p. 342.

The following forms of declaration may be useful :—

Against a Joint Stock Company to register the Plaintiff as a Shareholder : Copeland v. *N. E. Ry. Co.*, 6 E. & B. 271 ; *Swan* v. *North British Australasian Co.*, 7 H. & N. 601 ; 31 L. J. Ex. 425.

Against a Company by the Administrator of a Deceased Shareholder to compel the Company to register him as the Proprietor of the Shares : Norris v. *Irish Land Co.*, 27 L. J. Q. B. 115 ; 8 E. & B. 512.

Market (*a*).

Claim for Disturbing the Plaintiff's Market.

1. The plaintiff was possessed of an ancient market for the sale of goods, wares, and merchandise, holden in the town of ——, in the county of ——, on [Saturday] in every week, together with tolls, stallage, and other profits to the said market appertaining.

(*a*) The mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market may be held (*Macclesfield* (*Mayor*) v. *Chapman*, 12 M. & W. 18 ; *Penryn* (*Mayor*) v. *Best*, 3 Ex. D. 292 ; 48 L. J. Ex. 103 ; *Manchester Corporation* v. *Lyons*, 22 Ch. D. 287) ; but such right may be acquired by immemorial enjoyment or prescription (*Mosley* v. *Walker*, 7 B. & C. 40 ; *Macclesfield* (*Mayor*) v. *Pedley*, 4 B. & Ad. 397 ; *Penryn* (*Mayor*) v. *Best*, *supra*.

As to markets authorised by statutes incorporating the Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), see the provisions of that Act, which, by s. 13, exempts sales in a person's own dwelling-place or shop from the penalty thereby imposed for disturbance of such markets. (See *Ashworth* v. *Heyworth*, L. R. 4 Q. B. 316 ; 38 L. J. M. C.

2. The defendant disturbed the plaintiff's said market and prevented his enjoyment thereof, and of the said tolls, stallages, and other profits, by unlawfully holding a new market for the sale of divers goods, wares, and merchandise in the said town near to the place where the said market of the plaintiff was holden as aforesaid.

3. In consequence the plaintiff lost the tolls, stallages, and other profits of the said market.

The plaintiff claims :—

(1.) Damages.

(2.) An injunction restraining the defendant, his servants and agents, for holding the said new market or disturbing the plaintiff's market.

Claim for Disturbance of Market and Refusal to pay Tolls (*b*) : *see Penryn* (*Mayor*) v. *Best*, 3 Ex. D. 292 ; 48 L. J. Ex. 103.

Claim for Damages for Disturbance and Injunction : Wilcox v. *Steel*, [1904] Ch. 212, 214 ; 73 L. J. Ch. 217, 218.

---

91 ; *Fearon* v. *Mitchell*, L. R. 7 Q. B. 690 ; 41 L. J. M. C. 170 ; *Hooper* v. *Kenshole*, 2 Q. B. D. 127 ; *Abergavenny Commissioners* v. *Straker*, 42 Ch. D. 83 ; 58 L. J. Ch. 717 ; where see as to injunctions against such disturbance. See also *Llandudno U. D. C.* v. *Hughes*, [1901] 1 Q. B. 472 ; 69 L. J. Q. B. 303 ; *Woolwich* (*Mayor, &c.*) v. *Gibson*, 92 L. T. 538.)

As to the construction of grants of market, see *Great Eastern Ry. Co.* v. *Goldsmid* 9 App. Cas. 927 ; 54 L. J. Ch. 162 ; *Att.-Gen.* v. *Horner*, 14 Q. B. D. 245 ; 11 App. Cas 66 ; 54 L. J. Q. B. 227 ; 55 *Ib.* 193 ; and *Manchester Corporation* v. *Lyons*, *supra*, where see as to the effect of a re-grant of an ancient market by a subsequent statute. The franchises of fair and market may co-exist (*Newcastle* (*Duke*) v. *Worksop U. D. C.*, [1902] 2 Ch. 145 ; 71 L. J. Ch. 487). Toll is not incident to a market, but owes its origin to a further grant (*Ib.*).

The owners of a cattle market are bound to see that the place in which they hold their market is reasonably safe for the cattle, and if a person using the market on their invitation and paying them tolls, sustains damage by their neglect of this obligation, he may, in the absence of contributory negligence or voluntary acceptance of the risk, sue them for the loss so sustained by him (*Lax* v. *Darlington Corporation*, 5 Ex. D. 28 ; 49 L. J. Ex. 105).

(*b*) As to what acts constitute a disturbance of a market, see *Mosley* v. *Chadwick*, 7 B. & C. p. 47, n. (*a*) ; *Mosley* v. *Walker*, 7 B. & C. 40 ; *Bridgland* v. *Shapter*, 5 M. & W. 375 ; *Yard* v. *Ford*, 2 Wms. Saund. 1871 ed., p. 500 ; *London* (*Mayor*) v. *Low*, 49 L. J. Q. B. 144 ; 42 L. T. 16 ; *Dorchester* (*Mayor*) v. *Ensor*, L. R. 4 Ex. 335 ; *Elwes* v. *Payne*, 12 Ch. D. 468 ; *Manchester Corporation* v. *Lyons*, *supra* ; *Spurling* v. *Bantoft*, [1891] 2 Q. B. 384 ; 60 L. J. Q. B. 745. In the case of a mere sale outside the market the defendant's intention is important, but it is immaterial when he has really established a rival market (*Wilcox* v. *Steel*, [1904] 1 Ch. 212 ; 73 L. J. Ch. 217).

An action will lie for, and an injunction may be granted against, the disturbance of an ancient market which is regulated by statute, even although the statute gives a summary remedy (*Stevens* v. *Chown*, [1901] 1 Ch. 894 ; 70 L. J. Ch. 571).

It is no defence to an action for an injunction against disturbance of a market, that the accommodation in the plaintiff's market is insufficient (*Great Eastern Ry. Co.* v. *Goldsmid*, *supra*).

For forms of declarations before the Judicature Acts, see: For disturbing the plaintiff's market by selling goods near the market: Bridgland v. *Shapter*, 5 M. & W. 375; *Brecon (Mayor)* v. *Edwards*, 1 H. & C. 51; 31 L. J. Ex. 368; *for disturbing the plaintiff's market by selling goods in private shops on market days: Devizes (Mayor)* v. *Clark*, 3 A. & E. 506; *Mosley* v. *Walker*, 7 B. & C. 40; *Macclesfield (Mayor)* v. *Chapman*, 12 M. & W. 18; *for disturbing the plaintiff's right of holding a stall in a market adjoining his house by removing the market: Ellis* v. *Bridgnorth (Mayor)*, 15 C. B. N. S. 52; 32 L. J. C. P. 273.

Master and Servant (*c*).

Claim for enticing away the Plaintiff's Servant (d).

The plaintiff has suffered damage by the defendant on the —— ——, 19—, wrongfully enticing and procuring *A. B.*, who was then in the service of the plaintiff [in the business of a ——] as a ——, to depart from the said service unlawfully and without the consent and against the will of the plaintiff, whereby the plaintiff was deprived of the services of the said *A. B.*, and was put to great inconvenience [in his said business].

Particulars:—

(*c*) A master may, in general, sue for loss of services caused by an injury to his servant inflicted by the defendant (see the cases cited *infra*, and *Hodsoll* v. *Stallebrass*, 11 A. & E. 301); and he may maintain the action although the injury done to the servant was not direct, but consequential, and one for which the servant could not have maintained an action of trespass (*Martinez* v. *Gerber*, 3 M. & G. 88).

The loss of service is essential to the cause of action.

It has been held that a master cannot maintain an action for loss of services caused by an injury which resulted in the immediate death of his servant (*per* Kelly, C.B., and Piggott, B., Bramwell, B., *dissenting*, *Osborn* v. *Gillett*, L. R. 8 Ex. 88; 42 L. J. Ex. 53).

An action may be maintained by a parent for the loss of service of his child, if the child is living with the parent, and capable of performing acts of service; but where the child was incapable of performing any service by reason of his tender age, the action was held not maintainable (*Hall* v. *Hollander*, 4 B. & C. 660).

(*d*) In order to maintain this action there must be a valid contract of service, or an actual subsisting service in fact (*Sykes* v. *Dixon*, 9 A. & E. 693; *Hartley* v. *Cummings*, 5 C. B. 247; *Bowen* v. *Hall*, 6 Q. B. D. 333; 50 L. J. Q. B. 305; *De Francesco* v. *Barnum*, 45 Ch. D. 430; 60 L. J. Ch. 631), to the knowledge of the defendant (*Fores* v. *Wilson*, Peake, 55; *De Francesco* v. *Barnum*, *supra*), and an actual loss of service by the act of the defendant (see *Eager* v. *Grimwood*, 1 Ex. 61). An action will not lie for enticing away an apprentice if the indentures of apprenticeship are void (*Cox* v. *Muncey*, 6 C. B. N. S. 375). The services of a daughter residing at home are sufficient to entitle the father to maintain an action for enticing her away (*Evans* v. *Walton*, L. R. 2 C. P. 615; 36 L. J. C. P. 307). Where the defendant has enticed away the plaintiff's apprentice, or has kept him after notice, the plaintiff may waive the tort and sue as upon a contract for the value of his services (*Lightly* v. *Clouston*, 1 Taunt. 112; *Foster* v. *Stewart*, 3 M. & S. 191). As to actions for inducing another to break a contract, see further *Allen* v. *Flood*, *Quinn* v. *Leathem*, and the cases cited *post*, pp. 489 *et seq.*

For a form under the old Practice for maliciously enticing away a singer and procuring her to break her engagements, see Lumley v. *Gye*, 2 E. & B. 216 ; 22 L. J. Q. B. 463.

For Loss of Services by the Seduction of the Plaintiff's Servant (e).

1. The plaintiff has suffered damage from the seduction and carnally knowing by the defendant on [or about] the —— ——, 19—, of *G. H.*, the [daughter and] servant of the plaintiff, [whereby the said *G. H.* became pregnant with a child, of which she was delivered on the —— ——, 19--].

2. The plaintiff in consequence lost the services of the said *G. H.* for a long time and incurred expense in and about taking care of and nursing the said *G. H.* and in and about the delivery of the said child.

Particulars of special damage are as follows :—

	£	*s.*	*d.*
Loss of service [as ——] from the 1st March to the 30th November, 19—, estimated at.....	100	0	0
Nursing and medical attendance [as appears by accounts that will be produced on notice]	10	10	0
	£110	10	0

The plaintiff claims £500.

(*See R. S. C.*, 1883, *App. C., Sect. VI., No.* 9.)

(*e*) In order to maintain an action for seduction, the relation of master and servant must subsist between the plaintiff and the seduced person at the time of the seduction (*Davies* v. *Williams*, 10 Q. B. 725 ; *Hedges* v. *Tagg*, L. R. 7 Ex. 283; 41 L. J. Ex. 169) ; but the services of a daughter to her parents are sufficient for this purpose (*Ib.*). Where the seduced woman is at the time of the seduction in the service of her seducer and not of her father, her father can maintain no action in respect of her seduction (*Whitbourne* v. *Williams*, [1901] 2 K. B. 722 ; 70 L. J. K. B. 933), notwithstanding that she may have left her seducer's service, and be performing services for her father and living at her father's expense at the time of the birth of her child (*Gladney* v. *Murphy*, 26 L. R. Ir. 651). So if the daughter is in her father's service at the time of the seduction, and he subsequently die, the mother cannot maintain the action (*Hamilton* v. *Long*, [1903] 2 Ir. R. 407).

A father can maintain an action for the seduction of his daughter only in respect of his loss of his daughter's services occasioned by the seduction, and not in respect of his being compelled to maintain her by reason of the seduction (*Grinnell* v. *Wells*, 7 M. & G. 1033). The loss of service must be alleged in the statement of claim, and proved. Any loss of service, however trifling, is sufficient for the purpose of maintaining this action. (See *Thompson* v. *Ross*, 5 H. & N. 16 ; 29 L. J. Ex. 1 ; *Manley* v. *Field*, 7 C. B. N. S. 96 ; 29 L. J. C. P. 79 ; *Rist* v. *Faux*, 4 B. & S. 409 ; 32 L. J. Q. B. 386 ; *Evans* v. *Walton*, *ante*, p. 432 ; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599 ; 37 L. J. Q. B. 257 ; *Hedges* v. *Tagg*, *supra*.) The loss of service must be occasioned by the act of the defendant. Where the jury found that the defendant seduced the plaintiff's daughter, but was not the father of the child whose birth occasioned the loss of service he was held entitled to a verdict (*Eager* v. *Grimwood*, 1 Ex. 61).

Particulars of the time and place of the alleged seduction will not generally be,

Against a Master for Injuries caused by the Negligent Driving of his Servant (f): see the form sub tit. "Negligence," post, p. 440.

ordered, at all events before defence, unless the defendant makes an affidavit denying the seduction (*Knight* v. *Engle*, 61 L. T. 780; *Thomson* v. *Birkley*, 47 L. T. 700; *Hanna* v. *Keers*, [1896] 2 Ir. R. 226).

(*f*) The master is, in general, liable for the negligence of his servant in the course of his employment, and he is also liable for wrongful acts done by the servant wilfully and intentionally, if done in the course of the employment and for the purposes of the master (*Limpus* v. *Lond. Gen. Omnibus Co.*, 1 H. & C. 526; 32 L. J. Ex. 34; *Huzzey* v. *Field*, 2 C. M. & R. 432; *Croft* v. *Alison*, 4 B. & Ald. 590; *Patten* v. *Rea*, 2 C. B. N. S. 606; 26 L. J. C. P. 235; *Whatman* v. *Pearson*, L. R. 3 C. P. 422; 37 L. J. C. P. 156; *Bayley* v. *M. S. & L. Ry. Co.*, L. R. 8 C. P. 148; 42 L. J. C. P. 78; *Dyer* v. *Munday*, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448). He is liable for every such wrong of his servant or agent as is committed in the course of his service, and for the master's benefit, though no express command or privity of the master be proved, because, although the master may not have authorised the particular act, he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing those acts (*Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; 36 L. J. Ex. 147, *per* Willes, J.; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; 43 L. J. P. C. 31; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *Citizens Assurance Co.* v. *Brown*, [1904] A. C. 423). The master, however, is not liable for the negligence of his general servant whilst acting under the orders and control of another person (*Rourke* v. *White Moss Coll. Co.*, 2 C. P. D. 205; 46 L. J. C. P. 283; *Swainson* v. *N. E. Ry. Co.*, 3 Ex. D. 341; 47 L. J. Ex. 372; *Donovan* v. *Laing, &c. Syndicate*, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25). In these cases the principal test is, who in fact, having regard to the contract between the master and the other person and the circumstances of the case, has, at the time of the negligence complained of, the control of the servant (*Ib.*, *Waldock* v. *Winfield*, *infra*; *Jones* v. *Scullard*, *infra*; *Mitcham* v. *St. Marylebone B. C.*, 1 L. G. R. 412). He is not liable for acts done by the servant beyond the scope of his employment, or for acts done by him for his own purposes (*Lyons* v. *Martin*, 8 A. & E. 512; *Mitchell* v. *Crassweller*, 13 C. B. 237; 22 L. J. C. P. 100; *Storey* v. *Ashton*, L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; *Rayner* v. *Mitchell*, 2 C. P. D. 357; *Stevens* v. *Woodward*, 6 Q. B. D. 318; 50 L. J. C. P. 231; *British Banking Co.* v. *Charnwood Ry. Co.*, 18 Q. B. D. 714; 56 L. J. Q. B. 449; *Sanderson* v. *Collins*, [1904] 1 K. B. 628; 73 L. J. K. B. 348; *Board* v. *London G. O. Co.*, [1900] 2 Q. B. 530; 69 L. J. Q. B. 895). As to the authority of servants to give persons into custody, see *ante*, p. 425.

The master is not in general liable for the negligence of persons employed by the servant to do his work, between whom and the master the relation of master and servant does not exist (*Milligan* v. *Wedge*, 12 A. & E. 737; *Rapson* v. *Cubitt*, 9 M. & W. 710; *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474).

The hirer of a carriage and horses, to be driven by the servant of the owner, is not ordinarily liable for the negligent driving of the servant (*Laugher* v. *Pointer*, 5 B. & C. 547; *Quarman* v. *Burnett*, 6 M. & W. 499; *Jones* v. *Corporation of Liverpool*, 14 Q. B. D. 890; 54 L. J. Q. B. 345; and see *McLaughlin* v. *Pryor*, 4 M. & G. 48); but the owner of a horse and carriage, who hired a driver from a livery stable keeper, was held liable for the negligence of such driver (*Jones* v. *Scullard*, [1898] 2 Q. B. 565; 67 L. J. Q. B. 895). The owner of vans and horses which he let out to a manufacturer together with a driver for the purpose of delivering the manufacturer's goods, was held liable for the negligence of the latter whilst delivering such goods (*Waldock* v. *Winfield*, [1901] 2 K. B. 596; 70 L. J. K. B. 925).

A cab proprietor under the statutes relating to hackney carriages is liable for the negligence of his driver (*Powles* v. *Hider*, 6 E. & B. 207; *Venables* v. *Smith*, 2 Q. B. D. 279; 46 L. J. Q. B. 470; *King* v. *London Improved Cab Co.*, 23 Q. B. D. 281; 58 L. J. Q. B. 456; *Keen* v. *Henry*, [1894] 1 Q. B. 293; 63 L. J. Q. B. 211).

In an Action under the Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *removed into the High Court by Certiorari* (*g*).

1. The plaintiff, on the —— ——, 19—, entered a plaint in and caused a summons to be issued out of the County Court of ——, holden at ——, against the defendants in respect of the cause of action hereinafter

---

Where a person employs a contractor to do certain work, the work being proper to be done and the contractor a proper person to do it, the employer is not in general liable for injuries caused by the negligence of the contractor or of the servants employed by the contractor in the performance of the work (*Pickard* v. *Smith*, 10 C. B. N. S. 470; *Reedie* v. *L. & N. W. Ry. Co.*, 4 Ex. 244; *Overton* v. *Freeman*, 11 C. B. 867; *Peachey* v. *Rowland*, 13 C. B. 182; *Steel* v. *South Eastern Ry. Co.*, 16 C. B. 550; *Allen* v. *Hayward*, 7 Q. B. 960; *Pearson* v. *Cox*, 2 C. P. D. 369; *Dalton* v. *Angus*, 6 App. Cas. 740, 829; 50 L. J. Q. B. 689; *Jones* v. *Corporation of Liverpool*, *supra*); but he is liable where the work contracted for is wrongful and causes the injury (*Ellis* v. *Sheffield Gas Co.*, 2 E. & B. 767; *Hole* v. *Sittingbourne Ry. Co.*, 6 H. & N. 488; 30 L. J. Ex. 81; *Blake* v. *Thirst*, 2 H. & C. 20; 32 L. J. Ex. 188). He may also be liable where he retains a control over the contractor or personally interferes with the work (*Burgess* v. *Gray*, 1 C. B. 578); and where a duty is incumbent upon a person, he is not excused for the omission or imperfect performance of the duty by reason of his having engaged a contractor to do it (*Hole* v. *Sittingbourne Ry. Co.*, *supra*; *Tarry* v. *Ashton*, 1 Q. B. D. 314; 45 L. J. Q. B. 260; *Bower* v. *Peate*, 1 Q. B. D. 321; 45 L. J. Q. B. 446; *Dalton* v. *Angus*, *supra*; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335; *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72; 68 L. J. Q. B. 704).

Where the work which the contractor is employed to do is such that, in the absence of reasonable care and precaution, it is likely to involve injurious consequences to the public or to a neighbour, the employer may be liable for the negligence of the contractor in doing the work (*Ib.*; *Hughes* v. *Percival*, 8 App. Cas. 443; 52 L. J. Q. B. 719; *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48; *Hardaker* v. *Idle District Council*, *supra*; *Penny* v. *Wimbledon Urban Council*, *supra*); though not for mere casual or collateral accidents (*Penny* v. *Wimbledon Urban Council*, *supra*; *Clements* v. *Tyrone C. C.*, [1905] Ir. R. 413).

When the negligence of the servant is the effective cause of an injury, the fact that the injury is immediately caused by the intervention of a third party does not relieve the master from liability (*Englehart* v. *Farrant*, [1897] 1 Q. B. 240; 66 L. J. Q. B. 122).

(*g*) Before the passing of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), a master was not in general liable to an action at the suit of a servant for an injury arising from the negligence of a fellow-servant in the course of a common employment (*Priestley* v. *Fowler*, 3 M. & W. 1; *Hutchinson* v. *York Ry. Co.*, 5 Ex. 343; *Degg* v. *Midland Ry. Co.*, 1 H. & N. 773; 26 L. J. Ex. 171; *Searle* v. *Lindsay*, 11 C. B. N. S. 429; 31 L. J. C. P. 106; *Swainson* v. *N. E. Ry. Co.*, 3 Ex. D. 341; 47 L. J. Ex. 372; *Johnson* v. *Lindsay*, [1891] A. C. 371; 61 L. J. Q. B. 90). This is still the law with regard to actions commenced in the High Court of Justice; but by the above-mentioned Act a special action, to be brought in a county court, is given in respect of personal injury caused to a workman under the circumstances therein set forth. By s. 6 of the above Act, upon the application of either plaintiff or defendant, power is given to direct the removal of such action into the High Court by *certiorari*. This power is discretionary, and will not be exercised in the absence of special circumstances plainly rendering its exercise desirable (*Munday* v. *Thames Ironworks Co.*, 10 Q. B. D. 59; 52 L. J. Q. B. 119; *R.* v. *Judge of City of London Court*, 14 Q. B. D. 905; 54 L. J. Q. B. 330). After removal, the action is conducted in all respects as if it had been originally commenced in the High Court (*Davies* v. *Williams*, 13 Ch. D. 550; 49 L. J. Ch. 352).

In order to exempt the master from liability in an action not within the Employers' Liability Act, 1880, there must be a common employment and a common master,

set forth, and by a writ of certiorari duly issued on the —— ——, 19—, out of the King's Bench Division of the High Court of Justice, directed to the judge of the said County Court, the said plaint, with all things touching the same, were sent into the said King's Bench Division of the said High Court of Justice.

2, &c. [*State the facts concisely, showing the cause of action.*]

By a Servant against his Master for employing him to work upon an unsafe Scaffolding (*h*).

1. The plaintiff was, on the —— ——, 19—, employed [as a bricklayer] by the defendant to do certain work for the defendant upon a certain scaffolding constructed by the defendant at ——.

---

though the service need not be permanent or for any defined time (*Johnson* v. *Lindsay*, [1891] A. C. 371; 61 L. J. Q. B. 90). Where two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing, as part of the work which he is bound to do, may injure the other whilst he is doing the work which he is bound to do, the master is not, at common law, liable to the one servant for the negligence of the other (*per* Brett, L.J., in *Charles* v. *Taylor*, 3 C. P. D., at p. 496). Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority (*Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326; *Hedley* v. *Pinkney Steamship Co.*, [1894] A. C. 222; 63 L. J. Q. B. 419).

A person who volunteers to assist a servant in his work is in the same position as a servant in respect of the right of action for personal injury against the master (*Degg* v. *Midland Ry. Co.*, 1 H. & N. 773; 26 L. J. Ex. 171; *Potter* v. *Faulkner*, 1 B. & S. 800; 31 L. J. Q. B. 30; and see *Abraham* v. *Reynolds*, 5 H. & N. 143). But where, while a person is on the defendants' premises with their consent for the purpose of assisting in the delivery of his own goods, an accident happens to him through the negligence of the defendants' servants, the defendants are liable to him for the consequences of their negligence (*Wright* v. *L. & N. W. Ry. Co.*, 1 Q. B. D. 252; 45 L. J. Q. B. 570; and see *Holmes* v. *N. E. Ry. Co.*, L. R. 6 Ex. 123; 38 L. J. Ex. 151). Where a railway station was used by two companies, it was held that the respective servants of the two companies, in the course of their ordinary duties, were not on that account engaged in a common employment (*Warburton* v. *G. W. Ry. Co.*, L. R. 2 Ex. 30; 36 L. J. Ex. 9). In an ordinary contract of service, there is no implied promise on the part of the master not to expose the servant to extraordinary risk in the course of the employment (*Riley* v. *Baxendale*, 6 H. & N. 445; 30 L. J. Ex. 87). On the principle of *volenti non fit injuria*, it is held that where a servant or workman has voluntarily accepted and undertaken the risk of a danger from which he afterwards suffers a personal injury, he has no right of action in respect of it against his employer; but to make this maxim applicable, it must be shown that he, either expressly or impliedly by his conduct, consented to accept the risk with full knowledge of the danger, and that the mere fact of his continuing in the service with knowledge of the danger is not necessarily conclusive evidence of such consent on his part (*Smith* v. *Baker*, [1891] A. C. 325; 60 L. J. Q. B. 683; *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q. B. 338; 68 L. J. Q. B. 918).

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), further extends the liabilities of employers for injuries sustained by their workpeople, but proceedings under that Act are not taken in the High Court.

(*h*) An action will lie at the suit of a servant against his master for knowingly

2. The said scaffolding was, by the negligence and default of the defendant, constructed unsafely and with defective and improper materials, and was in an unsafe condition and unfit to be used for the said work, which the defendant well knew [but of which the plaintiff was ignorant].

Particulars:—[*Here set out the particulars of the defects and improper materials.*]

3. By reason of the premises, whilst the plaintiff was so employed in doing the said work upon the said scaffolding, the said scaffolding broke and gave way, and the plaintiff was thereby thrown to the ground, and seriously injured and rendered unfit for work, and put to great expense.

Particulars:—[*Set out the particulars of the injuries and loss and damages.*]

Claim by Servant against Master for requiring him to use an unsafe Floor and Ways.

1. On the —— ——, 19—, the plaintiff was employed as a carpenter and joiner by the defendants to do certain work for the defendants at ——, the said work being in the upper part of the building, and in order to descend to the ground after he had finished the said work, the plaintiff, when it was dark, was invited and required by the defendants to pass along and over certain floors and ways, and by reason of one of the said floors and ways being in a dangerous and unsafe condition and unfit for

omitting to provide and maintain proper appliances or providing bad materials or instruments for the work, whereby injury is caused to the servant, unless the servant took the risk of the state of the appliances, materials or instruments. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so; and if from any negligence in this respect damage arises to the servant the master is responsible (*per* Lord Cranworth, C., *Paterson* v. *Wallace*, 1 Macq. H. L. C. 748; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. C. 266, 288; *Roberts* v. *Smith*, 2 H. & N. 213; 26 L. J. Ex. 319; *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L. J. Q. B. 333; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326, 332, 344; *Griffiths* v. *London Docks Co.*, 13 Q. B. D. 259; 53 L. J. Q. B. 504; *Smith* v. *Baker*, [1891] A. C. 325; 60 L. J. Q. B. 683; *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q. B. 338; 68 L. J. Q. B. 918).

In the case of neglect to maintain the appliances, the statement of claim must not only affirm the master's knowledge of the danger, but must also negative the servant's knowledge of it (*Griffiths* v. *London Docks Co.*, *supra*); but this is not so when the master has neglected to supply proper appliances (*Williams* v. *Birmingham Battery Co.*, *supra*). In the latter case the mere knowledge of the risk does not necessarily involve a consent to undertake it (*Ib.*; *Smith* v. *Baker*, *supra*).

An action will lie at the suit of a servant against his master for negligently employing an incompetent fellow-servant, through whose incompetency the plaintiff is injured, although there is no generally implied warranty by the master of the competency of his workmen (*Tarrant* v. *Webb*, 18 C. B. 797; 25 L. J. C. P. 261; *Wilson* v. *Merry*, *supra*; *Allen* v. *New Gas Co.*, L. R. 1 H. L. Sc. 326).

As to the statutory liability of a master with regard to unfenced machinery in factories, see *ante*, p. 394.

the purpose of being so used by the plaintiff, the plaintiff whilst so passing over and along the same in the dark fell and was thrown from a great height to, into and upon a glass case below and sustained the injuries hereinafter referred to.

2. The plaintiff was ignorant of the unsafe and dangerous and unfit condition of the said floor or way, and he says either that the defendants well knew or ought to have known thereof, and that the said floor or way was in such unsafe and dangerous and unfit condition owing to the negligence and default of the defendants, or in the alternative that the said unsafe and dangerous and unfit condition was in the nature of a trap, and that the defendants, whilst they knew or ought to have known thereof, negligently allowed the same to remain unguarded and unlighted, and invited the plaintiff to use the same.

3. The plaintiff fell from a height with great violence head foremost into a glass case and was seriously and permanently injured. He sustained a concussion of the brain and suffered from epileptic and epileptiform attacks and from softening of the brain and loss of memory, and suffered much pain and was otherwise injured. He was and will hereafter be unable to work or gain a livelihood for himself and his family, and he lost the wages that he would otherwise have earned, and was and is otherwise injured.

Particulars of damage :—[*State them.*]

Medical Practitioners (*i*).

Claim against a Medical Practitioner for Negligence and Unskilfulness in the Treatment of a Patient (*i*).

The plaintiff has suffered damage from the negligence and unskilfulness of the defendant as a medical practitioner, retained and employed by the plaintiff on or about the —— ——, 19—, for reward to attend and treat the plaintiff for —— [*here state the malady or ailment*], from which the plaintiff was then suffering.

Particulars of negligence :—

[*Here state particulars of the negligence and unskilfulness complained of.*]

Particulars of damage :—[*State them.*]

Mesne Profits.

See "*Landlord and Tenant*," *ante*, p. 233; "*Recovery of Land*," *post*, p. 465.

(*i*) See *Slater* v. *Baker*, 4 Wils. 359; *Seare* v. *Prentice*, 8 East, 348; *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; *Hancke* v. *Hooper*, 7 C. & P. 81; *Lanphier* v. *Phipos*, 8 C. & P. 475; and see "*Medical Attendance*," *ante*, p. 251; "*Work*," *ante*, p. 325.

MINES.

See "*Support*," *post*, p. 483; "*Trespass*," *post*, p. 504.

MISCHIEVOUS ANIMALS (*k*).

Claim for knowingly keeping a Fierce Dog which injured the Plaintiff (*l*).

1. The plaintiff has suffered damage from personal injuries to the plaintiff caused by a dog, which was kept by the defendant, attacking and biting the plaintiff at —— on the ——- ——, 19—.

(*k*) Lions, tigers, elephants, bears, and other like animals of a savage nature, are presumed by law to be dangerous, and a person who keeps an animal of this kind is bound at his peril to prevent it from doing injury, and is *primâ facie* liable for any injury done by it, whether he knew the particular animal to be dangerous or not (*Filburn* v. *People's Palace Co.*, 25 Q. B. D. 258; 59 L. J. Q. B. 471).

Ordinary tame or domesticated animals, such as dogs, horses, bulls, cows and oxen, belong to a different class, and are not presumed by law to be dangerous; but, if an animal of this kind causes injury by reason of its fierce and mischievous disposition, the person who kept it is liable to an action for such injury, on proof that he knew the particular animal to be dangerous or mischievous. The wrongful act in such cases consists in insecurely keeping the dangerous animal with knowledge of its propensities, and it is unnecessary to show negligence (*May* v. *Burdett*, 9 Q. B. 101; see "*Mischievous Animals*," *post*, p. 883), or that the defendant was the owner of the animal (*McKone* v. *Wood*, 5 C. & P. 1). Where the plaintiff has acted in such a manner as to bring the injury upon himself, this fact would constitute a defence to his action (*Curtis* v. *Mills*, 5 C. & P. 489; *Charlwood* v. *Greig*, 3 C. & K. 48; *Filburn* v. *People's Palace Co.*, 25 Q. B. D. 258, 260; 59 L. J. Q. B. 471).

As to trespasses by animals, see "*Trespass*," *post*, p. 501; "*Fences*," *ante*, p. 390.

As to distress of animals *damage feasant*, see "*Distress*," *post*, p. 849.

(*l*) To support this action the plaintiff must show not only that the dog was ferocious but that to the knowledge of the defendant it had a ferocious disposition directed against mankind (*Osborn* v. *Chocquel*, [1896] 2 Q. B. 109; 65 L. J. Q. B. 534). The averment that the dog was of a fierce and mischievous nature and accustomed to bite, may be supported by evidence that, to the knowledge of the defendant, it was of a fierce disposition and attempted to bite, without proof that it had ever bitten anyone before (*Worth* v. *Gilling*, L. R. 2 C. P. 1); but it is not sufficient to show merely that the dog was of a fierce disposition and usually tied up by the defendant (*Beck* v. *Dyson*, 4 Camp. 198). If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master (*Baldwin* v. *Casella*, L. R. 7 Ex. 325; 41 L. J. Ex. 167). A complaint made to the defendant's wife on the premises for the purpose of being communicated to the defendant, was held to be evidence of defendant's knowledge (*Glandman* v. *Johnson*, 36 L. J. C. P. 153). So also was a complaint made to defendant's barmaids on the premises (*Applebee* v. *Percy*, L. R. 9 C. P. 647; 43 L. J. C. P. 365; *per* Coleridge, C.J., and Keating, J.; Brett, J., *dissenting*).

With respect to injuries done to sheep and cattle by dogs, it is enacted by the Dogs Act, 1865 (28 & 29 Vict. c. 60), s. 1, that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner. Such damages shall be recoverable

2. The said dog was of a fierce and mischievous nature, and accustomed to attack and bite mankind, and the defendant wrongfully kept the said dog, well knowing that it was of such fierce and mischievous nature and so accustomed.

Particulars :—

[*Here state the personal injuries and any special damage sustained by the plaintiff.*]

Negligence (*m*).

Claim for Injuries done by the Negligent Driving of the Defendant or his Servant.

The plaintiff has suffered damage from personal injuries to the plaintiff and damage to his carriage, caused by the defendant [*or*, the defendant's servant] on the —— ——, 19—, negligently driving a cart and horse in Fleet Street.

---

in any Court of competent jurisdiction by the owner of such cattle or sheep killed or injured. Where the amount of the damages claimed shall not exceed five pounds, the same shall be recoverable in a summary way before any justice or justices sitting in petty sessions."

The word "cattle" includes horses and mares (*Wright* v. *Pearson*, L. R. 4 Q. B. 582 ; 38 L. J. Q. B. 112). The Act applies even where the cattle or sheep are trespassing at the time they receive the injury (*Grange* v. *Silcock*, 77 L. T. 340).

By s. 2 it is provided that, "the occupier of any house or premises where any dog was kept or permitted to live or remain at the time of such injury shall be deemed to be the owner of such dog, and shall be liable as such, unless the said occupier can prove that he was not the owner of such dog at the time the injury complained of was committed, and that such dog was kept or permitted to live or remain in the said house or premises without his sanction or knowledge : provided always, that where there are more occupiers than one in any house or premises let in separate apartments, or lodgings, or otherwise, the occupier of that particular part of the premises in which such dog shall have been kept or permitted to live or remain at the time of such injury shall be deemed to be the owner of such dog."

An innkeeper at whose inn a dog is kept is, under this section, deemed to be the owner of such dog (*Gardner* v. *Hart*, 44 W. R. 527).

(*m*) **Negligence.**]—An action lies for the omission or negligent performance of any duty of the defendant towards the plaintiff, whereby the plaintiff has sustained damage. In order to maintain such action, it must be shown that there was a duty on the part of the defendant towards the person injured (*Batchellor* v. *Fortescue*, 11 Q. B. D. 474 ; *Tolhausen* v. *Davies*, 58 L. J. Q. B. 98 ; *Heaven* v. *Pender*, 11 Q. B. D. 503, 507 *et seq.* ; 52 L. J. Q. B. 702 ; *Elliott* v. *Hall*, 15 Q. B. D. 315 ; 54 L. J. Q. B. 518 ; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491 ; 62 L. J. Q. B. 353 ; *Earl* v. *Lubbock*, [1905] 1 K. B. 253 ; 74 L. J. Q. B. 121 ; and see *Membery* v. *G. W. Ry. Co.*, 14 App. Cas. 179, 190 ; 58 L. J. Q. B. 563 ; and *Caralier* v. *Pope*, 21 Times Rep. 747).

The negligence must be the effective cause of the damage (*McDowall* v. *G. W. Ry. Co.*, [1903] 2 K. B. 331 ; 72 L. J. K. B. 652).

The damage sustained must be sufficiently connected with the negligence, and must be the natural result of it (*Met. Ry. Co.* v. *Jackson*, 3 App. Cas. 193 ; 47 L. J. C. P. 303 ; *Cobb* v. *G. W. Ry. Co.*, [1894] A. C. 419 ; 63 L. J. Q. B. 629 ; *Hilestrap* v. *Gregory*, [1895] 1 Q. B. 561).

The mere happening of an accident is not, in general, *primâ facie* evidence of negligence, but the plaintiff must ordinarily give affirmative evidence of negligence on

Particulars of negligence:—[*State them, as, for instance,* The defendant was driving down Chancery Lane towards Fleet Street at a rapid pace on the

---

the part of the defendant, causing the accident (*Cotton* v. *Wood*, 8 C. B. N. S. 568; 29 L. J. C. P. 333; *Hammack* v. *White*, 11 C. B. N. S. 588; 31 L. J. C. P. 129; *Manzoni* v. *Douglas*, 6 Q. B. D. 145; 50 L. J. C. P. 289; *Wakelin* v. *L. & S. W. Ry. Co.*, 12 App. Cas. 41; 56 L. J. Q. B. 229). Thus, the mere fact of the defendant's omnibus running over the plaintiff while crossing the road is not evidence of negligence against the defendant (*Cotton* v. *Wood*, *supra*); and where the defendant rode a horse which he had just bought, and of which he had no experience, in the public street and which became unmanageable and knocked down the plaintiff, it was held that these facts afforded no evidence of negligence (*Hammack* v. *White*, *supra*). So where a horse drawing a brougham in a public street suddenly and without any explainable cause bolted, and, notwithstanding the utmost efforts of the defendant's servant, who was driving, to control him, swerved on to the footway and injured the plaintiff, it was held that there was no evidence of negligence for a jury (*Manzoni* v. *Douglas*, *supra*).

But in some cases the circumstances of the accident alone raise a sufficient presumption of negligence; thus, a barrel falling from the defendant's warehouse on to the plaintiff below was held to afford *primâ facie* proof of negligence against the defendant (*Byrne* v. *Boadle*, 2 H. & C. 722; 33 L. J. Ex. 13; and see *Pearson* v. *Cox*, 2 C. P. D. 369; 36 L. T. 495). So also where a packing-case of the defendant on his premises fell against the plaintiff (*Briggs* v. *Oliver*, 4 H. & C. 403; 35 L. J. Ex. 163). So where goods fell upon the plaintiff from a crane fixed over a doorway upon the defendant's premises under which the plaintiff was passing, no explanation being given of the cause, it was held that there was sufficient evidence of negligence (*Scott* v. *London Dock Co.*, 34 L. J. Ex. 17; *Ib.* 220; 3 H. & C. 596). So, where a brick from a railway bridge fell upon the plaintiff while passing on the road underneath, this circumstance was in itself held to furnish sufficient evidence of negligence (*Kearney* v. *L. B. & S. C. Ry. Co.*, L. R. 6 Q. B. 759; 40 L. J. Q. B. 285). Where a person procures work to be done upon his land of such a character as to be, in the absence of precautions, dangerous or likely to cause injury to his neighbour, or to persons lawfully coming on or near to his land, it is his duty to provide such precautions as may be reasonable, and he is in general, in the absence of reasonable precautions, liable for injury caused to his neighbour or to such persons owing to the want of reasonable precautions. (See *ante*, p. 435.)

Negligence has been described as being the omission to do something which a reasonable man would do, or the doing of something which a reasonable man would not do (*per* Alderson, B., *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781, 784; 25 L. J. Ex. 212). Whether there is reasonable evidence of negligence to be left to the jury is a question for the judge to decide, whilst it is for the jury to say whether negligence ought to be inferred (*Bridges* v. *N. L. Ry. Co.*, L. R. 7 H. L. 213; 43 L. J. Q. B. 151; explained in *Met. Ry. Co.* v. *Jackson*, 3 App. Cas. 193; 47 L. J. C. P. 303).

The omission to guard against extraordinary accidents is not negligence; thus, a water company whose pipes were constructed with reasonable care with reference to ordinary frost was held not to be liable for the breaking of the pipes by an extraordinary frost (*Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781; 25 L. J. Ex. 212; and see *Nichols* v. *Marsland*, 2 Ex. D. 1; 46 L. J. Ex. 174; *Thomas* v. *Birmingham Canal Co.*, 49 L. J. Q. B. 851; 43 L. T. 435). The law, as it is said, provides for that which is common, not for that which is unusual (*per* Parke, B., *Hawtayne* v. *Bourne*, 7 M. & W. 595, 598).

Railway companies are not liable for accidental fires occasioned by their engines, if they have taken all possible precautions, and are not guilty of some negligence in fact (*Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 679; 29 L. J. Ex. 247; *Hammersmith Ry. Co.* v. *Brand*, L. R. 4 H. L. 171; 38 L. J. H. L. 265; *Canadian Pacific Ry. Co.* v. *Roy*, [1902] A. C. 220; 71 L. J. P. C. 51), provided the use of such engines is authorised by

wrong side of the road and suddenly and without looking where he was going turned sharply round the corner westward into Fleet Street close to

---

their Acts (*Jones* v. *Festiniog Ry. Co.*, L. R. 3 Q. B. 733; 37 L. J. Q. B. 214; and see *Smith* v. *L. & S. W. Ry. Co.*, L. R. 6 C. P. 14; 40 L. J. C. P. 21; *Groom* v. *G. W. Ry. Co.*, 8 Times Rep. 253; see also *Powell* v. *Fall*, 5 Q. B. D. 597; 49 L. J. Q. B. 428). In the case, however, of injuries on or after the 1st Jan., 1908, to agricultural land or crops not exceeding £100, the Railway Fires Act, 1905 (5 Edw. 7, c. 11), provides that the fact that the engine was used under statutory powers shall not affect the liability provided the notice required by s. 3 of that Act is given. Where two trains, both belonging to the same company, came into collision upon their railway, it was held that this alone showed a *primâ facie* case of negligence (*Skinner* v. *L. B. & S. C. Ry. Co.*, 5 Ex. 787). Where an accident occurred owing to some empty waggons running off the line, it was held that, in the absence of evidence as to the cause of their so doing, the jury were at liberty to find that it was caused by negligence, such an occurrence not being usual where due care is exercised (*Flannery* v. *Waterford and Wicklow Ry. Co.*, Ir. R. 11 C. L. 30). Though, as such an occurrence is possible where due care is exercised, the happening thereof is not conclusive, but merely affords *primâ facie* evidence of negligence (*Bird* v. *G. N. Ry. Co.*, 28 L. J. Ex. 3). Where a man had been run over and killed by a train near a level crossing, and there was no evidence to show whether the accident occurred through the negligence of the railway company or that of the deceased, it was held that there was no case to go to the jury (*Wakelin* v. *L. & S. W. Ry. Co.*, 12 App. Cas. 41; 56 L. J. Q. B. 229). The mere fact of a carriage, forming part of a train, being pulled up either short of, or beyond the platform at a station is not in itself evidence of negligence (*Siner* v. *G. W. Ry. Co.*, L. R. 4 Ex. 117; 40 L. J. Ex. 67; *Cockle* v. *S. E. Ry. Co.*, L. R. 7 C. P. 321; 41 L. J. C. P. 140; *Bridges* v. *N. L. Ry. Co.*, L. R. 7 H. L. 213; *Robson* v. *N. E. Ry. Co.*, 2 Q. B. D. 85; 46 L. J. Q. B. 50; *Rose* v. *N. E. Ry. Co.*, 2 Ex. D. 248; 46 L. J. Ex. 374; Beven on Negligence, pp. 1193—1200); but railway companies are bound to find reasonable means for their passengers to alight, and the bringing up of a train to a final standstill at a station amounts to an invitation to them to alight, at all events, after such a time has elapsed that they may reasonably infer that it is intended that they should alight (*Cockle* v. *L. & S. E. Ry. Co.*, L. R. 7 C. P. 326; *Robson* v. *N. E. Ry. Co.*, *supra*; and see *Wharton* v. *L. & Y. Ry. Co.*, 5 Times Rep. 142).

Partners are liable jointly for the negligence of one of them acting in the ordinary course of the partnership business. (See *post*, p. 460.)

Corporate bodies, trustees, and commissioners, carrying on public works or performing public duties, are liable for negligence upon the same principles as those upon which individuals are liable, notwithstanding they undertake such duties gratuitously or derive no profit from them (*Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Coe* v. *Wise*, L. R. 1 Q. B. 711; *Winch* v. *Conservators of the Thames*, L. R. 9 C. P. 378). So they are liable for the acts of their servants in the same manner as an individual is liable (*Ib.*; see "*Corporation*," *ante*, p. 359). It has been held that guardians of the poor are not liable to a patient in the workhouse for the negligent treatment of her by officials (*Dunbar* v. *Ardee Guardians*, [1897] 2 I. R. 76). As to their liability to strangers, see *Levingston* v. *Lurgan (Guardians)*, [1868] I. R. 2 C. L. 202.

Officers of Government performing public duties, as the Postmaster-General, Commissioners of Customs, military and naval officers, are not responsible for the negligence or misconduct of inferior officers in their several departments, although they appoint and may dismiss them (*Whitfield* v. *Lord Le Despencer*, 2 Cowp. 754; *Lane* v. *Cotton*, 1 Ld. Raym. 646; *Nicholson* v. *Mouncey*, 15 East, 384; and see *Tobin* v. *The Queen*, 16 C. B. N. S. 310; 33 L. J. C. P. 199).

A statement of claim merely alleging that the defendant acted "negligently," and that damage ensued to the plaintiff, does not alone show a cause of action, unless it is

his off side and so came into collision with the plaintiff's carriage which was being driven along Fleet Street on the near side in an easterly direction].

Particulars of injuries :—[*State them.*]

Particulars of loss, expenses, &c :—

	£	*s.*	*d.*
Loss of earnings as a —— for —— weeks from —— to ——, at —— per week.			
Charges of Mr. *Smith*, surgeon	10	10	0
Charges of Mr. *Jones*, coachmaker	14	5	6
	£24	15	6

The plaintiff claims £150.

(*See R. S. C.*, 1883, *App. C.*, *Sect. VI.*, *No.* 3.)

Claim by a Married Woman for Damages for Personal Injury in the nature of a Shock to the System caused by a Van being Negligently driven into the Public-house where she was serving: (*Dulieu* v. *White*, [1901] 2 K. B. 669 ; 70 L. J. K. B. 837.

By a Passenger against a Railway Company for Damages for Personal Injuries sustained in a Collision: see "*Carriers*," *ante*, p. 337.

also shown, or can be inferred from the facts alleged, that the negligence amounted to a breach of duty or wrong (*Dutton* v. *Powles*, 2 B. & S. 174 ; 31 L. J. Q. B. 191, 192 ; *Gautret* v. *Egerton*, L. R. 2 C. P. 371 ; 36 L. J. C. P. 191 ; *Jones* v. *Egerton*, *Ib.* ; *Metcalfe* v. *Hetherington*, 11 Ex. 257 ; *Collis* v. *Selden*, L. R. 3 C. P. 495 ; 37 L. J. C. P. 233). Where the cause of action is founded on contract, or arises out of a relation created by bailment or retainer, it is necessary to show expressly the creation of the duty alleged to have been broken ; and where it arises independently of contract, the statement of the facts must show that the defendant was bound to do or not to do what he is alleged to have negligently omitted or committed, or that he was bound, as regarded the plaintiff, not to do negligently what he did. An express allegation of duty on the part of the defendant is a mere inference of law. If the facts stated do not raise the duty, the express allegation will not supply the defect ; and if the facts sufficiently show the duty, the express allegation is unnecessary, and therefore ought not to be introduced (*Cane* v. *Chapman*, 5 A. & E. 647 ; *Seymour* v. *Maddox*, 16 Q. B. 326 ; and see *per* Cotton, L.J., *Hurdman* v. *N. E. Ry. Co.*, 3 C. P. D. 168 ; 47 L. J. C. P. 368 ; see *ante*, pp. 45, 140).

The defendant is responsible for all the consequences which he could reasonably foresee as the result of his negligent act, or which are the natural result of it, and such as might, in the ordinary course of things, be expected to flow therefrom (*Scott* v. *Shepherd*, 2 W. Bl. 892 ; *Hill* v. *New River Co.*, 9 B. & S. 303 ; *Collins* v. *Middle Level Commissioners*, L. R. 4 C. P. 279 ; 38 L. J. C. P. 236 ; *Sneesby* v. *L. & Y. Ry. Co.*, 1 Q. B. D. 42 ; 45 L. J. Q. B. 1 ; *Clark* v. *Chambers*, 3 Q. B. D. 327 ; 47 L. J. Q. B. 427 ; *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57 ; 66 L. J. Q. B. 493 ; *Dulieu* v. *White*, [1901] 2 K. B. 669 ; 70 L. J. K. B. 837).

As to claims under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), amended by 27 & 28 Vict. c. 95, see "*Executors*," *ante*, p. 387.

For negligently driving a Train against the Plaintiff.

1. The plaintiff has suffered damage from personal injuries to the plaintiff caused by the defendants on the —— ——, 19—, so negligently and unskilfully driving and managing a train upon a railway, which the plaintiff was then lawfully crossing at ——, that the said train was driven against and struck the plaintiff.

2. By reason of the said personal injuries the plaintiff suffered great pain, and was and is permanently disabled, and has been [and will be altogether] prevented [*or*, has been prevented for —— weeks] from attending to his business [*or*, occupation] of a —— at ——, and has thereby sustained great loss, and has incurred expenses for surgical and medical attendance and appliances, and for nursing and medicines.

Particulars:—

The negligence is as follows:—[*State same, as, e.g.*, The train was driven at an excessive speed, no look-out, or no proper look-out, was kept, and no whistle or other warning was given of the approach of the said train.]

The personal injuries are as follows:—[*State same.*]

The loss and expenses are as follows:—[*State same.*]

Against a Railway Company for the Negligence of their Porter, who knocked the Plaintiff down with a Truck.

1. The plaintiff has suffered damage from personal injuries to the plaintiff, caused by the defendants, by their servant on the —— ——, 19—, so negligently and unskilfully wheeling and managing a truck upon the platform of a railway station at ——, along which the plaintiff was lawfully passing as a passenger to be carried by the defendants, that the said truck was forced against and struck the plaintiff.

2. [*Proceed as in paragraph 2 of the above form, and give particulars as in that form.*]

The like, where the Injuries arose from the Negligence of the Defendants in not sufficiently Lighting a Station.

1. The plaintiff has suffered damage from the negligence of the defendants in not sufficiently lighting their station at ——, so that certain steps in the said station, leading from the booking office to the platform, were dangerous and unsafe to passengers using the same, and the plaintiff, who was, on the —— ——, 19—, lawfully passing from the said booking office to the said platform as a passenger to be carried by the defendants, could not and did not see the said steps, owing to the said station being insufficiently lighted as aforesaid, and fell down the said steps and thereby sustained severe personal injuries.

2. [*Proceed as in paragraph 2 of the form on p.* 444, *and give particulars as in that form.*]

See a Claim against a Railway Company for Negligence at a Level Crossing: "*Fences*," *ante*, p. 393.

See forms of declaration under the old system against railway companies for negligently keeping an obstruction at a station, which the plaintiff fell over, Corman v. *Eastern Counties Ry. Co.*, 4 H. & N. 781 ; 29 L. J. Ex. 94 ; *for keeping station in a dangerous state, Toomey* v. *L. & B. Ry. Co.*, 3 C. B. N. S. 146 ; *for negligently keeping a dangerous staircase at a station, Longmore* v. *G. W. Ry. Co.*, 19 C. B. N. S. 183 ; 35 L. J. C. P. 135 ; *Crafter* v. *Metropolitan Ry. Co.*, L. R. 1 C. P. 300 ; 35 L. J. C. P. 132 ; *for negligently allowing a dog to be on the station, which bit the plaintiff, Small* v. *G. E. Ry. Co.*, L. R. 2 C. P. 4 ; 36 L. J. C. P. 22 ; *for not keeping the line in a proper state for traffic, Blake* v. *G. W. Ry. Co.*, 7 H. & N. 987 ; 31 L. J. Ex. 346 ; *for not providing proper means for alighting from the train, Foy* v. *L. & B. Ry. Co.*, 18 C. B. N. S. 225 ; *for not providing proper means of departure from the train, Nicholson* v. *L. & Y. Ry. Co.*, 3 H. & C. 534 ; 34 L. J. Ex. 84.

For Injury to the Plaintiff caused by the Negligence of the Defendant's Servant in the course of his Employment in Leaving a Horse and Van unattended in a Public Street (*a*).

1. The plaintiff has suffered damage from the negligence of defendant's servant in leaving in the course of his employment a horse and van of the defendant's in Oxford Street, London, on the —— ——, 19—, unattended [whilst he was engaged in delivering for the defendant a parcel at a shop No. ——, Oxford Street], whereby the said horse was enabled to and did run away, knocking down the plaintiff, who was crossing the said street, and breaking his left arm and two of his ribs and causing him a severe shock and greatly bruising him.

2. The plaintiff was thereby put to great pain and was put to expense in nursing and in medical and surgical attendance and otherwise, and was prevented for a long time from attending to his business as a fruiterer and greengrocer, and lost profits he would have otherwise made in his said business, and was compelled to hire for —— months an additional assistant in his said business.

Particulars of expenses and loss are as follows :—[*State same.*]

(*a*) It is in general a question for the jury whether it is, in the particular case, negligence to leave a horse and carriage unattended ; but to do so would, it seems, ordinarily afford evidence of negligence for their consideration (*Illidge* v. *Goodwin*, 5 C. & P. 190 ; and see *Watson* v. *Weekes*, cited by Smith, J., in *Tolhausen* v. *Davies*, 57 L. J. Q. B. at p. 394 ; *Engelhart* v. *Farrant*, [1897] 1 Q. B. 240 ; 66 L. J. Q. B. 122 ; *Sullivan* v. *Creed*, [1904] 2 Ir. R. at p. 342).

Against the Owner of a Motor Car for Injuries caused to the Plaintiff and to his Horses and Carriage by the Negligence of the Servant of the Defendant in the Management of such Motor Car upon a Highway (*o*).

1. The plaintiff has suffered damage from the negligence of the servant of the defendant in the management and driving of the defendant's motor car in the course of his employment in Cross Street, ——, on the ——, 19—, whereby the said motor car was driven with great force against the plaintiff's carriage, which was being driven in the street, and the plaintiff, who was in the said carriage, was thrown out and injured and put to expense in medical and surgical attendance, and his said carriage was greatly damaged and his horses then drawing the same were cut and bruised and deteriorated in value, [and the plaintiff was for —— weeks prevented from attending to his business as a stock broker].

Particulars of negligence as follows:—[*State same, e.g.*, The car was without warning driven suddenly out of —— Street into Cross Street and at an excessive speed and driven into the plaintiff's carriage.]

Particulars of injuries and expenses are as follows:—[*State same, and if any special loss of earnings is claimed, give details thereof.*]

The like, by a Married Woman for Personal Injuries (*o*).

1. The plaintiff is the wife of a professor of music and resides with her husband at —, —— Street, in the —— of ——.

2. On the —— ——, 19—, the plaintiff was seated in the interior of an omnibus which was standing on its right side of the road outside the —— public-house, ——, when the defendant or his servant so carelessly and negligently managed a motor car in which he was riding that the same collided with the said omnibus so that the occupants thereof were thrown from their seats and the plaintiff received the injuries in paragraph 3 described.

3. The plaintiff was hurled against the door of the said omnibus, violently striking and spraining her left knee against the same and bruising her body generally, and her apparel was torn and she received so severe a shock that her health has become permanently impaired and she has not yet fully recovered.

4. The said negligence consisted in driving the said motor car at an excessive speed, having regard to the nature, condition and use of the highway, and upon the wrong side of the road and into an omnibus which

(*o*) The Motor Car Act, 1903 (3 Edw. 7, c. 36), contains provisions for the registration and identification of motor cars. Section 9 provides for a maximum speed. The Motor Car Registration and Licensing Order, 1903 (Chit. Stat., 1903, p. 298), and the Motor Cars Use and Construction Order, 1904 (Chit. Stat. 1904, p. 495) further regulate the registration of cars and licensing of drivers. See *ante*, p. 409.

was at rest upon its right side of the road and in letting the same get out of control.

5. In the alternative the plaintiff says that the defendant or his servant drove the said motor car recklessly and negligently and in a manner dangerous to the public contrary to the provisions of sect. 1, sub-sect. 1, of 3 Edw. 7, c. 36.

6. By reason of the premises the plaintiff has been put to great pain and has incurred expense for medical attendance and for cab and carriage hire and was prevented from returning to her home for about two months and was obliged to remain that time at ——, ——, at considerable expense, and she has since been unable to attend as before to her household duties and to assist her husband in the exercise of his profession and has suffered damage.

Particulars of the injuries and expenses:—[*State them.*]

For Damage done to the Plaintiff's House by the Defendant negligently pulling down the adjoining House (*p*).

The plaintiff has suffered damage from the defendant on and about the —— ——, 19—, so negligently and unskilfully pulling down a house adjoining the dwelling-house of the plaintiff, No. —, —— Street, ——, that the plaintiff's said house was injured, and the plaintiff has thereby sustained great loss and inconvenience, and has incurred expense in and about repairing his said house.

Particulars of negligence:—[*State them.*]

Particulars of damage and loss and expenses:—[*State them.*]

Against the Occupier of a Shop for Injuries to a Customer by falling through a Trap Door left Open and Unguarded (*q*).

1. The plaintiff has suffered damage from the negligence of the defendant, who was, and is, the occupier of a shop in Castle Street, Sheffield,

(*p*) When the plaintiff is not entitled to a right of support for his house from the adjoining house, an action will not lie for pulling down the adjoining house without shoring up the plaintiff's (*Peyton* v. *Mayor of London*, 9 B. & C. 725; see "*Support*," *post*, p. 488). But an action may be maintained for any damage caused to the plaintiff's house by pulling down the adjacent house in a negligent and improper manner, as distinct from the damage done by the removal of the support (*Dodd* v. *Holme*, 1 A. & E. 493; *Langford* v. *Woods*, 7 M. & G. 625; *Bradbee* v. *Christ's Hospital*, 4 M. & G. 714; *Trower* v. *Chadwick*, 3 Bing. N. C. 334; 6 *Ib.* 1; *Hughes* v. *Percival*, 8 App. Cas. 443; 52 L. J. Q. B. 719; and see *ante*, p. 435). There is no obligation towards a neighbour cast by law on the owner of a house, merely as owner, to keep it repaired; the only duty is to keep it in such a state that his neighbour may not be injured by its fall (*Chauntler* v. *Robinson*, 4 Ex. 163).

(*q*) It is a general principle that the occupier of land or other property owes to those who come upon his property at his invitation, express or implied, for purposes o

in leaving open and unguarded a trap door or hole in the floor of his said shop without giving to the plaintiff any warning or notice thereof, in consequence whereof the plaintiff, who, on the invitation of the defendant and as a customer, came into his said shop on the —— ——, 19—, fell through the said trap door or hole into the cellar below and was thereby severely injured, his left arm and two of his ribs being broken and his body bruised.

2. The plaintiff was thereby much shaken and put to pain and prevented for a long time from attending to his business of a —— and deprived of profits he would otherwise have made therein, and put to expense for medical and surgical attendance and otherwise.

Particulars are as follows :—[*State same.*]

See forms of declaration under the old system for negligently leaving a trap door in a private passage open, Chapman v. *Rothwell*, E. B. & E. 168 ; 27 L. J. Q. B. 315 ; *for negligently keeping a shoot in a sugar refinery in an unprotected state, through which the plaintiff fell, Indermaur* v. *Dames*, L. R. 1 C. P. 274 ; 2 *Ib.* 311 ; 36 L. J. C. P. 181.

Against the Landlord of a Building let out in Flats who retains control of the Common Staircase, for Injuries to a Person using it for the purpose of going to see a Tenant of the Flats, caused by its being out of repair (*r*).

1. The plaintiff has suffered damage from personal injuries sustained by him on the —— ——, 19—, by reason of the staircase at the —— Mansion,

---

business in which he is interested, or of doing work thereon for him, or in which he is interested, a duty to use reasonable care to see that there is nothing in the state of the property to expose them to unusual risk or danger (*Indermaur* v. *Dames*, *infra* ; *Smith* v. *Steele*, L. R. 10 Q. B. 125 ; 44 L. J. Q. B. 60 ; *Marney* v. *Scott*, [1899] 1 Q. B. 986, 992 ; 68 L. J. Q. B. 736). This duty arises from the occupation, from the having control of the property, and extends in general to any structure, whether fixed or movable. (See *Ib.*, and *Francis* v. *Cockrell*, L. R. 5 Q. B. 501 ; 39 L. J. Q. B. 291 ; Pollock on Torts, 7th ed., p. 498.) Thus a shopkeeper who leaves a trap door open in the floor of his shop, where customers will come, is liable if one of them falls through and is injured (*Parnaby* v. *Lancaster Canal Co.*, 11 A. & E. 223, 230 ; *Chapman* v. *Rothwell*, E. B. & E. 168 ; 27 L. J. Q. B. 315 ; see further *post*, p. 454).

A workman who is sent in the ordinary course by his master to do work which his master has undertaken to do for the occupier on the premises has the same right of action for the breach of the above duty as his master would have had if he had gone in person (*Indermaur* v. *Dames*, L. R. 1 C. P. 274, 285 ; L. R. 2 C. P. 311, 312 ; 36 L. J. C. P. 131 ; *Marney* v. *Scott*, *supra*). Thus where the defendant left a shoot in his sugar refinery unprotected, and the plaintiff, being there on business as a workman fell down the shoot, the defendant was held liable (*Indermaur* v. *Dames*, *supra*). The occupier is not, it would seem, discharged from this duty by proof that he employed a competent contractor, or servant, to keep the premises or property in a proper condition. (See *Marney* v. *Scott*, *supra*, and "*Master and Servant*," *ante*, p. 435.)

(*r*) The landlord of a house let out in flats to tenants, if he keeps control over and

—— Street, being out of repair and dangerous to persons lawfully using the same. Particulars of the want of repair and dangerous condition are as follows :—[*State them.*]

2. The said —— Mansions were owned by the plaintiff and were let out by him to tenants in flats, he retaining the possession and control of the said staircase, which was the only mode of access to the said flats.

3. At the time when he sustained the said injuries the plaintiff was lawfully using the said staircase for the purpose of visiting [*or*, delivering goods to] Mr. ——, one of the defendant's tenants [*or, as the case may be*].

Particulars of the injuries :—[*State them.*]

Particulars of loss and expense :—[*State them.*]

Against Carriers by the Executor of a Passenger killed by the Negligence of the Defendants : see "Executors," ante, p. 387.

By a Servant against his Master for employing him to work upon an Unsafe Scaffolding : see "Master and Servant," ante, p. 436.

For Injuries to a Ship and Cargo by the Defendant's Negligent Navigation of another Ship : see "Shipping," post, p. 480.

---

is responsible for the repair of the common staircase by which the flats are reached, is, in general, liable to the tenants, or their visitors or servants, and to workpeople or others invited to the premises by the tenants, for accidents causing injury to them arising from the dangerous and improper condition of the staircase (*Miller* v. *Hancock*, [1893] 2 Q. B. 177). So when the landlord of a house so let out retains the control of the roof he is liable for injury occasioned to a tenant by water, which, owing to the stoppage of a gutter, overflows and floods the tenant's flat, after he has had notice of the stoppage, and a reasonable time to clear it out (*Hargroves* v. *Hartopp*, [1905] 1 Q. B. 472 ; 74 L. J. K. B. 233).

But where a landlord parts with the entire possession and control of premises to his tenant and is under no obligation to repair, or only under such obligation on notice of the want of repair and has had no such notice, he is, in general, not liable, either to his tenant or to the visitors or workpeople of such tenant, for accidents arising from the want of repair of the premises (*Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311 ; 46 L. J. C. P. 375 ; *Lane* v. *Cox*, [1897] 1 Q. B. 415 ; 66 L. J. Q. B. 193 ; *Cavalier* v. *Pope*, 21 Times Rep. 747 ; and see *Broggi* v. *Robins*, 15 Times Rep. 224 ; *Tredway* v. *Machin*, 20 Times Rep. 726 ; *M'Manus* v. *Armour*, [1901] 5th series, 3 R. 1078). As to the duty imposed on landlords in respect of dwellings let to the "working classes," see 53 & 54 Vict. c. 70, and *ante*, p. 222. See further, "*Nuisance*," *post*, pp. 452—459.

Against a Solicitor for Negligence in the Conduct of his Client's Business: see ante, p. 306; *against a Medical Practitioner: see ante*, p. 438.

By a Workman for Neglect to Fence Dangerous Machinery: see "Fences," ante, p. 394.

By Husband and Wife for Damages for Negligence causing Personal Injury to the Wife, the Husband claiming in respect of the Damage to himself: see "Husband and Wife," ante, p. 411.

See also forms of declaration under the old system:—For negligence in lending a machine with a known defect in it, in using which the plaintiff was injured: Blackmore v. *Bristol & Exeter Ry. Co.*, 27 L. J. Q. B. 167; *McCarthy* v. *Young*, 6 H. & W. 329; 30 L. J. Ch. 227 (*the borrower, and perhaps any other persons for whose use the loan of the machine was intended, can alone maintain this action, and not persons whom the borrower permits to use the machine without the privity of the lender, Ib.*); *for negligence in entrusting a young girl with a loaded gun: Dixon* v. *Bell*, 5 M. & S. 198; *for negligently constructing a hayrick, which took fire and burnt plaintiff's house: Vaughan* v. *Menlove*, 3 Bing. N. C. 468; *for negligently driving an ox through the streets, which ran into the plaintiff's shop and broke his goods: Milligan* v. *Wedge*, 12 A. & E. 737.

See for forms of declarations against commissioners, trustees, &c., of public works for negligence (*s*)*:—Against the trustees of a harbour for negligence in allowing it to become choked with mud: Metcalfe* v. *Hetherington*, 11 Ex. 257; *Gibbs* v. *Trustees of Liverpool Docks*, 1 H. & N. 439; 3 H. & N. 164; 27 L. J. Ex. 321; L. R. 1 H. L. 93; *Thompson* v. *North Eastern Ry. Co*, 2 B. & S. 106; 30 L. J. Q. B. 67; 31 *Ib.* 194; *Penhallow* v. *Mersey Docks Board*, L. R. 1 H. L. 93; 30 L. J. Ex. 329; *against the trustees of a canal for keeping a dangerous bridge whereby a person fell in and was drowned: Manley* v. *St. Helen's Canal Co.*, 2 H. & N. 840; 27 L. J. Ex. 159; *against commissioners of a canal navigation for want of repair in a lock, whereby the plaintiff's barge was delayed: Walker* v. *Goe*, 3 H. & N. 395; 27 L. J. Ex. 427; *against commissioners of sewers for negligence in constructing a sewer, whereby the plaintiff's house was injured:*

(*s*) See note (*m*), *ante*, p. 442.

Jones v. *Bird*, 5 B. & Ald. 837 ; *Rick* v. *Williams*, 3 H. & N. 308 ; 27 L. J. Ex. 357 ; *Grocers' Company* v. *Donne*, 3 Bing. N. C. 34 ; *against commissioners under an Act of Parliament for the making of certain navigation works for negligence, whereby the plaintiff's land was flooded*: *Allen* v. *Hayward*, 7 Q. B. 960 ; *against a local board of health for negligently keeping sewers*: *Itchin Bridge Co.* v. *Southampton Local Board of Health*, 8 E. & B. 801 ; *against the corporation of a town for providing a dangerous swinging machine under the Baths and Washhouses Act, in using which the plaintiff was injured*: *Cowley* v. *Sunderland* (*Mayor of*), 6 H. & N. 565 ; 30 L. J. Ex. 127 ; *against the trustees of a turnpike road for negligently maintaining the drains of the road*: *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765 ; 30 L. J. C. P. 305 ; *against commissioners under the Towns Improvement Clauses Act*, 1847, 10 & 11 *Vict. c.* 34, *for suffering the highway to be in a dangerous condition*: *Hartnall* v. *Ryde Commissioners*, 4 B. & S. 361 ; 33 L. J. Q. B. 39 ; *Ohrby* v. *Ryde Commissioners*, 5 B. & S. 743 ; 33 L. J. Q. B. 296. *As to the last two cases, see now, however, Maguire* v. *Liverpool Corporation*, *cited ante*, p. 408.

Nuisance (*t*).

Claim for causing a Nuisance by Smells and Vapours, claiming Damages and an Injunction.

1. The plaintiff has suffered damage from offensive and pestilential smells and vapours caused by the defendant on and about and since the

(*t*) Nuisances are either *public* nuisances, as obstructions to highways, noxious trades, &c., which are indictable offences, or private nuisances, such as obstructing lights or rights of way, diverting watercourses, &c. (3 Bl. Com. 216). The latter are for the most part injuries to easements, as to which, see "*Ways*," "*Water*," "*Lights*," &c.

No action will lie for a public nuisance at the suit of a private person, unless he has thereby sustained particular damage over and above what is common to others (3 Bl. Com. 220). Thus, no action will lie merely for placing an obstruction on a public highway, but if a person suffers damage by driving or falling against such obstruction, he may maintain an action for such damage ; so if an unauthorised obstruction of the highway prevents access to a person's abode and hinders his business, he may maintain an action for the damage thereby done to his trade (*Ireson* v. *Moore*, 1 Ld. Raym. 486 ; 12 Mod. 262 ; *Benjamin* v. *Storr*, L. R. 9 C. P. 400 ; 43 L. J. C. P. 162 ; *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243 ; *Fritz* v. *Hobson*, 14 Ch. D. 542 ; 49 L. J. Ch. 321 ; *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662 ; 46 L. J. Ch. 68 ; *Barber* v. *Penley*, [1893] 2 Ch. 447 ; 62 L. J. Ch. 623). But mere delay caused by the obstruction, or the trouble and expense of removing it, being common to all, is not sufficient damage to enable an individual to maintain an action (*Winterbottom* v.

——, 19—, to come into and be on and about the plaintiff's dwelling-house, No. 15, James Street, Durham, whereby the plaintiff's said dwelling-house is rendered unhealthy and unfit for habitation.

Lord Derby, L. R. 2 Ex. 316 ; 36 L. J. Ex. 194 ; *Benjamin* v. *Storr*, *supra*). That the plaintiff and his servants were compelled to go to and from the plaintiff's premises by a longer route, and their work was thereby increased, and the plaintiff was prevented from employing his servants otherwise, is sufficient particular damage (*Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369 ; *Smith* v. *Wilson*, [1903] 2 Ir. R. 45).

A highway may be dedicated to the public subject to an obstruction or to the exercise of some private right upon it, which is then not actionable (*Fisher* v. *Prowse*, 2 B. & S. 770 ; 31 L. J. Q. B. 212 ; *Morant* v. *Chamberlain*, 6 H. & N. 541 ; 30 L. J. Ex. 299 ; *Arnold* v. *Blaker*, L. R. 6 Q. B. 433 ; 40 L. J. Q. B. 185 ; *St. Mary Newington* v. *Jacobs*, L. R. 7 Q. B. 47 ; 41 L. J. M. C. 72 ; *Grand Junction Canal Co.* v. *Petty*, 21 Q. B. D. 273 ; 57 L. J. Q. B. 572).

If the defendant persists in continuing a nuisance after a judgment has been obtained against him for nominal damages, vindictive damages may be given against him in a second action in order to compel him to abate the nuisance (*Battishill* v. *Reed*, 18 C. B. 696 ; 25 L. J. C. P. 290 ; *Colls* v. *Home and Colonial Stores*, [1904] A. C. at p. 192 ; Ord. XXXVI., r. 58, cited *ante*, p. 56).

An action for a nuisance may be maintained by the reversioner where there is damage done to his reversion ; this may be, either by the damage being of a permanent nature, or by its being such as to be an injury to his title to the premises, as by establishing, or furnishing evidence of some right adverse to his title thereto (*Kidgill* v. *Moor*, 9 C. B. 364 ; 19 L. J. C. P. 177 ; *Dobson* v. *Blackmore*, 9 Q. B. 991 ; *Mott* v. *Shoolbred*, L. R. 20 Eq. 22 ; 44 L. J. Ch. 380 ; *Shelfer* v. *City Electric Co.*, [1895] 1 Ch. 287 ; 64 L. J. Ch. 216 ; and see "*Lights*," *ante*, p. 423; "*Reversion*," *post*, p. 473).

Where the nuisance is of a continuing nature, or the defendant threatens and intends to continue it, it is usually advisable to claim an injunction as well as damages. (See *ante*, p. 413.)

Where the nuisance is caused by real property or the use of real property, it is the occupier who is *primâ facie* liable, and not the owner merely as owner ; the latter can be charged only upon some special ground of liability (*Cheetham* v. *Hampson*, 4 T. R. 318 ; *Russell* v. *Shenton*, 3 Q. B. 448 ; *Chauntler* v. *Robinson*, 4 Ex. 163, 169 ; *Bishop* v. *Bedford Charity Trustees*, 1 E. & E. 697 ; 29 L. J. Q. B. 53 ; *Pickard* v. *Smith*, 10 C. B. N. S. 470 ; *Robbins* v. *Jones*, 15 C. B. N. S. 221 ; 33 L. J. C. P. 1).

Where the landlord knowingly lets land with a standing and continuing nuisance upon it, as with a wall which obstructed a neighbour's light (*Rosewell* v. *Prior*, 2 Salk. 460 ; 1 Ld. Raym. 713), with a noxious privy (see *Rich* v. *Basterfield*, 4 C. B. 783, 804), with a dangerous stack of chimneys (*Todd* v. *Flight*, 9 C. B. N. S. 377), and so lets it without making any provision for remedying the nuisance, he is liable for such nuisance (*Gwinnell* v. *Eamer*, L. R. 10 C. P. 658 ; *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311 ; 46 L. J. C. P. 675). See further *ante*, p. 449.

A yearly or a weekly tenancy is regarded as a continuing tenancy until it is determined by notice, and, therefore, the fact that the landlord could have determined the tenancy by notice is not equivalent to a re-letting, and does not render him liable for a nuisance created on the premises during the continuance (*Gandy* v. *Jubber*, 5 B. & S. 485 ; 9 B. & S. 15, n. ; *Bowen* v. *Anderson*, [1894] 1 Q. B. 164). A landlord is not liable for nuisances occasioned by the use of the premises by the occupiers, and not by the premises alone, as for a nuisance of smoke from a chimney let with the premises (*Rich* v. *Basterfield*, 4 C. B. 783) ; unless the premises are let for the express purpose of using them in the way which causes the nuisance (*Harris* v. *James*, *infra* ; see *Jenkins* v. *Jackson*, 40 Ch. D. 71 ; 58 L. J. Ch. 124). An occupier is liable for any nuisance naturally resulting from operations which he has licensed another person to carry on upon the land ; thus, where the occupier gave a licence for the burning of bricks

Particulars :—The smells and vapours are caused and come from a —— recently erected by the defendant on his premises, No. —, —— Street, ——.

upon the land, he was held liable for the nuisance thereby occasioned (*White* v. *Jameson*, L. R. 18 Eq. 303 ; *Harris* v. *James*, 45 L. J. Q. B. 545 ; 35 L. T. 240). As to liability for injury to tenants, and to those invited or employed by tenants, see *ante*, pp. 447, 478.

An occupier of land is, in the absence of any easement or contract to the contrary, bound to keep his trees or their branches from encroaching (*Lemmon* v. *Webb*, [1895] A. C. 1 ; 64 L. J. Ch. 205 ; *Smith* v. *Giddy*, [1904] 2 K. B. 448 ; 73 L. J. K. B. 894), and to keep all filth, sewage, and the like, arising on his land from escaping, on to the land of his neighbour (*Tenant* v. *Goldwin*, 2 Ld. Raym. 1089 ; 1 Salk. 21, 360 ; *Snow* v. *Whitehead*, 27 Ch. D. 588 ; 53 L. J. Ch. 885 ; *Fletcher* v. *Rylands*, L. R. 3 H. L. 330 ; 1 Sm. L. C., 11th ed., 810 ; *Alston* v. *Grant*, 3 E. & B. 128). So if anyone by making artificial erections or works upon his own land, or by allowing the continuance on his land of artificial erections or work placed there before he took possession of it, causes rain water or liquid filth to pass into his neighbour's land, so as to interfere substantially with his enjoyment thereof, it is, in general, an actionable wrong (*Broder* v. *Saillard*, 2 Ch. D. 692, 700 ; 45 L. J. Ch. 414 ; *Tenant* v. *Goldwin*, *supra* ; *Humphries* v. *Cousins*, 2 C. P. D. 239 ; 46 L. J. C. P. 438 ; *Hurdman* v. *N. E. Ry. Co.*, 3 C. P. D. 168, 173 ; 47 L. J. C. P. 368). But if a man simply uses his own land in the ordinary manner in which such land is used and without negligence, he is not, in general, liable for any incidental damage which may be thereby caused to his neighbour (*Fletcher* v. *Rylands*, *supra* ; *Wilson* v. *Waddell*, 2 App. Cas. 95) ; and accordingly a mine owner is exempt from liability for water which, in consequence of his works, flows by gravitation into an adjoining mine, if his works are carried on with skill and in the usual manner, excavating and raising minerals being regarded as the natural use of mineral land (*Hurdman* v. *N. E. Ry. Co.*, *supra* ; *Wilson* v. *Waddell*, *supra* ; *Fletcher* v. *Rylands*, *supra* ; *West Cumberland Iron Co.* v. *Kenyon*, 11 Ch. D. 782 ; 48 L. J. Ch. 793 ; *Fletcher* v. *Smith*, 2 App. Cas. 781 ; 47 L. J. Ex. 4). If, however, he brings upon the land for his own purposes anything which is in itself dangerous, and likely to do mischief if it escapes, as, for instance, a large quantity of water, or a great accumulation of electricity, he must keep it in at his peril ; and if he fails to do so, he is *primâ facie* answerable, even where he has acted without negligence, for all ordinary damage which is the natural consequence of its escape (*Fletcher* v. *Rylands*, *supra* ; *Fletcher* v. *Smith*, *supra* ; *Crowhurst* v. *Amersham Board*, 4 Ex. D. 5 ; 48 L. J. Ex. 109 ; *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186 ; 62 L. J. Ch. 699 ; *Eastern African Telegraph Co.* v. *Cape Town Tramways*, [1902] A. C. 381 ; 71 L. J. P. C. 122 ; "*Trespass*," *post*, p. 501 ; and see "*Water*," *post*, p. 510), unless he can excuse himself by showing that the escape was owing to the plaintiff's default, or that it was due to *vis major*, or the act of God, and occurred in spite of all reasonable care on his part (*Fletcher* v. *Rylands*, *supra* ; *Nichols* v. *Marsland*, L. R. 10 Ex. 255 ; 2 Ex. D. 1 ; 44 L. J. Ex. 134 ; 46 L. J. Ex. 174 ; *Nitro-Phosphate Co.* v. *London & St. K. Docks Co.*, 9 Ch. D. 503 ; *Carstairs* v. *Taylor*, L. R. 6 Ex. 217 ; 40 L. J. Ex. 29 ; *Box* v. *Jubb*, 4 Ex. D. 76 ; 48 L. J. Ex. 417 ; *Thomas* v. *Birmingham Canal Co.*, 49 L. J. Q. B. 851).

Where the dangerous matter is brought upon the land for the joint purposes of the defendant and the plaintiff, with the consent of the plaintiff, there is no such absolute obligation to keep it in as exists where it is brought by the defendant upon his land for his own purposes, the defendant in the former case not being liable for injury caused by its escape in the absence of negligence on his part (*Carstairs* v. *Taylor*, L. R. 6 Ex. 217 ; 40 L. J. Ex. 29 ; *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602 ; 49 L. J. Q. B. 708 ; and see *Ross* v. *Fedden*, L. R. 7 Q. B. 661 ; 41 L. J. Q. B. 270). One who takes a part of a house, takes it subject to the ordinary risks arising from the ordinary use of the rest of the house, and therefore cannot, in the absence of negligence, recover against an occupier of the other part of the house for damage done by an escape of water from the pipes in the possession of such occupier (*Ross* v. *Fedden*, *supra* ; *Anderson*

2. The defendant threatens and intends, unless restrained from so doing, to continue the said nuisance.

The plaintiff claims:—

(1.) £50.

(2.) An injunction to restrain the defendant from the continuance or repetition of the said injury or the committal of any injury of a like kind in respect of the same property.

(*See R. S. C.*, 1883, *App. C., Sect. VI., No.* 11.)

---

v. *Oppenheimer, supra*). An occupier is bound to use reasonable care to protect persons coming to his premises by his invitation, or upon ordinary business, from unusual dangers which he knows, or ought to know, to be there, as he has a duty towards such persons to keep his premises in a reasonably secure condition, or at least to warn them of such danger (see *Indermaur* v. *Dames*, and other cases cited *ante*, p. 448); but a person voluntarily using private premises as a mere licensee for purposes of his own unconnected with the premises or the business there carried on, and not for the purpose of carrying out a contract with the occupier, or in pursuance of a contract with the occupier for such use of the premises, cannot maintain an action to recover damages for an injury occasioned to him by the dangerous state of the premises, unless such danger was one hidden or unusual, so as to be in the nature of a trap (*Gautret* v. *Egerton*, L. R. 2 C. P. 371; 36 L. J. C. P. 191; *White* v. *France*, 2 C. P. D. 308; 46 L. J. C. P. 823; *Ivay* v. *Hedges*, 9 Q. B. D. 80). Where a person, permitted by the defendants to go along a flagged path of the defendants' to assist in unloading coals which the defendants had carried for him, was injured, owing to the flag he stepped on being so worn as to give way, it was held that the defendants had a duty towards him to keep the path in a reasonably safe condition (*Holmes* v. *N. E. Ry. Co.*, L. R. 4 Ex. 254; *Ib.* 6 Ex. 123; 38 L. J. Ex. 151).

Where by statute a thing is directed or authorised to be done, the doing of which, if not so directed or authorised, would amount to a nuisance or otherwise cause damage entitling persons injured thereby to an action, no action is, as a rule, maintainable in respect of such thing, and in such case the persons thereby injured can, in the absence of proof that there was negligence or want of *bona fides* in the mode in which the statutory powers were used (see *East Fremantle* v. *Annois*, [1902] A. C. 213, 218; 71 L. J. P. C. 39; *Canadian Pacific Ry. Co.* v. *Roy*, *Ib.* 220; 71 L. J. P. C. 51), recover only such compensation, if any, as the statute directing the thing to be done, or the statutes incorporated therewith have provided, and can only proceed for such compensation in the manner (if any) provided by such statutes (*Hammersmith Ry. Co.* v. *Brand*, L. R. 4 H. L. 171, 188, 196; 38 L. J. H. L. 265; *Dixon* v. *Met. Board of Works*, 7 Q. B. D. 418; *London & B. Ry. Co.* v. *Truman*, 11 App. Cas. 45; 55 L. J. Ch. 354; *Lambert* v. *Lowestoft*, [1901] 1 K. B. 590; 70 L. J. K. B. 333). But if the thing directed to be done would not amount to a nuisance or cause damage, unless done negligently, the statute does not, in general, afford any answer to an action brought by a person injured by reason of such negligence (*Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, 456; *Gas Light Co.* v. *St. Mary Abbotts*, 15 Q. B. D. 1; 54 L. J. Q. B. 414; *Sadler* v. *South Staffordshire Tramways Co.*, 23 Q. B. D. 17; 58 L. J. Q. B. 421). And if the statute is not imperative, but merely permissive as to time or place, particularly if no provision is made to compensate persons injured by the thing being done, the statute is, where the language will fairly allow it, to be construed as not authorising the thing to be done at a time when, or place where, it may cause injury to others (*Met. Asylums District* v. *Hill*, 6 App. Cas. 193, 202; 50 L. J. Q. B. 353; *Jordeson* v. *Sutton, &c. Gas Co.*, [1899] 2 Ch. 217; 68 L. J. Ch. 457; *Canadian Pacific Ry. Co.* v. *Parke*, [1899] A. C. 535; 68 L. J. P. C. 89). The above rules must, however, be applied subject, in each case, to a consideration of the language and objects of the particular enactment to be construed. (See *Midwood* v. *Manchester Corporation*, [1905] 2 K. B. 597, where the statute preserved the right of action.)

For a Nuisance in carrying on a Noxious Manufacture near the Plaintiff's Land (*u*).

1. The plaintiff is the [owner and] occupier of a house and land known as ——, at ——, and the defendant carries on the business of a ——, at a manufactory called ——, at —— aforesaid.

2. Ever since ——, 19—, the defendant has wrongfully caused to issue and proceed from the said manufactory offensive, poisonous and unwholesome smoke, vapours, and noxious matter, which spread and were diffused into the plaintiff's said house and over his said land, and settled and were deposited in and upon the same respectively, whereby the said house has been rendered unwholesome, dirty, and uncomfortable to live in, and the trees, hedges, herbage, crops, and shrubs and plants growing on the plaintiff's said land were damaged and otherwise injured, and the said house and land have been deteriorated in value.

Particulars :—[*State the particulars of the injuries and of the damages claimed.*]

(*u*) Smoke, noise, and smells may severally constitute a nuisance and be ground for an action for damages or for an injunction (*Crump* v. *Lambert*, L. R. 3 Eq. 409 ; *Sturges* v. *Bridgman*, 11 Ch. D. 852 ; 48 L. J. Ch. 785 ; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642 ; 35 L. J. Q. B. 66 ; *Walker* v. *Brewster*, L. R. 5 Eq. 25 ; 37 L. J. Ch. 33 ; *Inchbald* v. *Robinson*, L. R. 4 Ch. 388 ; *Broder* v. *Saillard*, 2 Ch. D. 692 ; 45 L. J. Ch. 414 ; *Sturges* v. *Bridgman*, 11 Ch. D. 852 ; 48 L. J. Ch. 785 ; *Lambton* v. *Mellish*, [1894] 3 Ch. 163 ; 63 L. J. Ch. 929).

In order to constitute a nuisance it must appear that physical injury is inflicted on the plaintiff's property, or that the ordinary use of it is materially interfered with, or that the ordinary comfort or healthfulness of human existence in the plaintiff's premises is materially diminished (*Crump* v. *Lambert*, *supra* ; *St. Helen's Smelting Co.* v. *Tipping*, *supra* ; *Carey* v. *Ladbetter*, 12 C. B. N. S. 470 ; 32 L. J. C. P. 104 ; *Inchbald* v. *Robinson*, *supra* ; *Fleming* v. *Hislop*, 11 App. Cas. 686, 694 ; *Colls* v. *Home and Colonial Stores*, cited *ante*, p. 420).

A material addition to previously existing nuisances is separately actionable (*Crump* v. *Lambert*, *supra* ; *Baxendale* v. *M'Murray*, L. R. 2 Ch. Ap. 790). The acts of several persons together may constitute a nuisance which the Court will restrain, though the damage done by the acts of each one, if taken alone, would be inappreciable (*Thorpe* v. *Brumfitt*, L. R. 8 Ch. 650 ; *Lambton* v. *Mellish*, [1894] 3 Ch. 163 ; 63 L. J. Ch. 929).

Whether anything is a nuisance is to be determined not merely by an abstract consideration of the thing itself, but with reference to the locality, the duration, and all the circumstances (*Sturges* v. *Bridgman*, 11 Ch. D. 852, 865 ; 48 L. J. Ch. 785 ; *Lambton* v. *Mellish*, *supra* ; and see *St. Helen's Smelting Co.* v. *Tipping*, *supra*). A nuisance caused by a noxious or noisy trade or manufacture is not justifiable merely on the ground that the trade is carried on in a convenient and proper place (*Ib.*). As to a nuisance caused by a hospital, see *Met. Asylum District* v. *Hill*, 6 App. Cas. 193 ; 50 L. J. Q. B. 353 ; *Att.-Gen.* v. *Nottingham Corporation*, [1904] 1 Ch. 673 ; 73 L. J. Ch. 512. Mere temporary inconvenience from noise or dust, caused by an occupier or owner of land in the execution of lawful works in the ordinary user of the land, and without negligence, is not a nuisance (*Harrison* v. *Southwark Waterworks Co.*, [1891] 2 Ch. 409 ; 60 L. J. Ch. 630 ; *Goswell* v. *Aërated Bread Co.*, 10 Times Rep. 661). An injunction will not ordinarily be granted if the nuisance is merely temporary and occasional, and causes no real injury to health or property (*Att.-Gen.* v. *Mayor of Preston*, 13 Times Rep. 14).

3. The defendant still continues and intends to continue to cause such smoke, vapours and noxious matter to issue and proceed from the said manufactory as aforesaid.

The plaintiff claims :—[*Proceed as in the last form.*]

The like.

1. The plaintiffs at the time of the committing of the grievances hereinafter mentioned were and still are printers carrying on an extensive business at offices and premises situate in —— Street, in the City of London.

2. The defendants at the time of the committing of the grievances hereinafter mentioned were and still are in the possession of certain premises and works thereon near and adjoining to the said offices and premises of the plaintiffs.

3. The defendants for and during the last six months and upwards wrongfully caused to issue, proceed and arise from the said premises in their possession near to the said offices and premises of the plaintiffs and from engines on the defendants' said premises quantities of offensive, noxious, unwholesome smoke, fumes, vapours and gases, soot, blacks, noxious, dirty and filthy matter, which spread and diffused themselves into, over and upon the said offices and premises of the plaintiffs and impregnated and corrupted the air in and about the same.

4. By reason of the premises the said offices and premises of the plaintiffs were defiled and rendered unhealthy and much less fit for use and occupation and for the plaintiffs' carrying on their said business thereon and the plaintiffs were prevented from carrying on their said business in so free and ample a manner as they otherwise might and would have done, and they were otherwise injured.

The plaintiffs claim :—

(1.) £1,000 damages.

(2.) An injunction to restrain the defendants from repeating or continuing of the acts complained of.

See forms of declaration under the old system—Against a manufacture of bricks: Hole v. *Barlow*, 4 C. B. N. S. 334 : 27 L. J. C. P. 207 ; *Bamford* v. *Turnley*, 3 B. & S. 62 ; 31 L. J. Q. B. 286 ; *Cavey* v. *Ledbetter*, 13 C. B. N. S. 470 ; 32 L. J. C. P. 104 ; *for carrying on a manufacture of iron so as to cause a nuisance by the noise: Elliotson* v. *Fatham*, 2 Bing. N. C. 134 ; *Mumford* v. *Oxford W. & W. Ry. Co.* 1 H. & N. 34 ; 25 L. J. Ex. 265 ; *and see Crump* v. *Lambert*, L. R. 3 Eq. 409 ; *for carrying on a manufactory causing a nuisance by smoke: Simpson* v. *Savage*, 1 C. B. N. S. 347 ; 26 L. J. C. P. 50 ; *against the occupier of the adjoining property for keeping*

offensive drains: Russell v. *Shenton*, 3 Q. B. 449; *Itchin Bridge Co.* v. *Local Board of Health, Southampton*, 8 E. & B. 801; 28 L. J. Q. B. 41; *for keeping a badly constructed sewer on the defendant's land whereby an overflow of the contents was discharged on the plaintiff's premises: Alston* v. *Grant*, 3 E. & B. 128; *for allowing noxious matters from a tan-pit of defendant to flow into plaintiff's premises: Chadwick* v. *Marsden*, L. R. 2 Ex. 285; *for causing water to flow against the plaintiff's dwelling-house by means of a neighbouring embankment: Brine* v. *Great Western Ry. Co.*, 2 B. & S. 402; 31 L. J. Q. B. 101; *against the owner of the adjoining house for building a projecting cornice, which cast the rain water from the defendant's roof on to the plaintiff's premises: Fay* v. *Prentice*, 1 C. B. 828; *a like count by a reversioner: Tucker* v. *Newman*, 11 A. & E. 40; *against the landlord of the adjoining house who had demised it with a dangerous chimney, which fell on to the plaintiff's house: Todd* v. *Flight*, 9 C. B. N. S. 377; 30 L. J. C. P. 21 (*as to the liability of landlords in such cases, see ante*, p. 452).

By a Riparian Proprietor, for a Nuisance by Pollution of the Water in a River, claiming an Injunction and Damages: see "Water," *post*, p. 514.

For placing on a Highway an Obstruction over which the Plaintiff fell (*x*).

The plaintiff has suffered damage by the defendant, on the —— ——, 19—, wrongfully heaping up earth and stones on a public highway known as [—— Street], at —— [*or*, in the parish of ——], so as to obstruct the said highway, whereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones, and sustained personal injuries, and incurred loss and expense.

Particulars of injuries, loss and expense :—

For a similar form, see ante, p. 408, *and Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, 349.

See for forms of declarations under the old system—Against a surveyor of highways for leaving gravel on the highway at night without proper precautions: Davis v. *Curling*, 8 Q. B. 286 (*he is not liable for mere omission to repair, ante*, p. 408); *against the trustees of a public road for leaving in the road heaps of road-scrapings, which the plaintiff fell over: Harris* v. *Baker*, 4 M. & S. 27; *against a contractor for not making good the surface of a*

(*x*) See the note and form, *ante*, p. 408.

highway after opening and filling up holes in it: Hyams v. *Webster*, L. R. 2 Q. B. 264; 36 L. J. Q. B. 166; *against the owner of a house, for a nuisance caused by rubbish placed on the highway by a workman employed in repairing the house: Bush* v. *Steinman*, 1 B. & P. 404; *for placing rubbish on a highway by the side of a canal, which caused the plaintiff to fall in: Goldthorpe* v. *Hardman*, 13 M. & W. 377; *for digging in the highway and leaving it without any light or signal: Newton* v. *Ellis*, 5 E. & B. 115; *for exposing dangerous implements for sale on a public highway, by falling against which the plaintiff was injured: Marriott* v. *Stanley*, 1 M. & G. 568; *and see Mangan* v. *Atterton*, L. R. 1 Ex. 239; *for placing a shutter against the wall of a public highway, which fell upon the plaintiff: Abbot* v. *Macfie, Hughes* v. *Macfie*, 2 H. & C. 744; 33 L. J. Ex. 177; *against a waterworks company for keeping a fire-plug uncovered in a highway, in consequence of which plaintiff's horse placed his foot in the plug-hole and was lamed: Bayley* v. *Wolverhampton Waterworks Co.*, 6 H. & N. 241; 30 L. J. Ex. 57.

For keeping open and unfenced a dangerous Cellar adjoining a Public Highway (y).

The defendant, who was possessed of a vault or cellar immediately adjoining a public highway, known as [—— Street], at —— [*or*, in the parish of ——], wrongfully suffered the said vault or cellar to be open to

(*y*) Making an excavation, cellar, or area adjoining a public highway, and leaving or keeping such an excavation, cellar, or area insecurely and improperly fenced and unguarded, so as to render the way unsafe to those who use it with ordinary care, is a nuisance, for which an action will lie at the suit of the person who is injured by falling into it, &c., while he is so lawfully using the public way (*Barnes* v. *Ward*, 9 C. B. 392; *Hadley* v. *Taylor*, L. R. 1 C. P. 53; *White* v. *Hindley Local Board*, L. R. 10 Q. B. 219; 44 L. J. Q. B. 114; see *Blackmore* v. *Mile End Vestry*, 9 Q. B. D. 451; 51 L. J. Q. B. 496; *Bowen* v. *Anderson*, [1894] 1 Q. B. 164). In general a person who procures work to be done in or close to a highway, of a character likely to cause danger to people lawfully using the way, has a duty to see that all reasonable precautions are taken to avoid injury to those who so use the way, and he is not relieved of that duty by proofs that he employed a competent contractor to perform that duty for him. (See *ante*, pp. 435, 441; *Chapman* v. *Fylde Waterworks*, [1894] 2 Q. B. 599, 603; 64 L. J. Q. B. 15; *Holliday* v. *National Telephone Co.* [1899] 2 Q. B. 392; 68 L. J. Q. B. 1016; *The Snark*, [1900] P. 105; 69 L. J. P. 41.) A person who has erected a dangerous structure on his own land so near a highway as to constitute a nuisance, may be liable to a person injured thereby (*Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199; 64 Q. B. 238). But it seems that the excavation or erection, in order to constitute a nuisance, must be at a place substantially adjoining the highway (*Barnes* v. *Ward*, *supra*; *Hardcastle* v. *S. Yorkshire Ry. Co.*, 4 H. & N. 67; 28 L. J. Ex. 139; *Binks* v. *S. Yorkshire Ry. Co.*, 3 B. & S. 244; 32 L. J. Q. B. 26).

Where there is a coal cellar or the like below the pavement of a public street, which is reached by an opening in the pavement, and a foot passenger is injured through the cover or grating, which should be over the opening, being absent or defective, or not properly secured, the occupier is *primâ facie* liable (*Pretty* v. *Bickmore*, L. R. 8 C. P.

the said highway without any fence or railing or other protection, and so as to be dangerous to persons lawfully passing along the said highway, whereby the plaintiff, whilst lawfully passing along the said highway on the —— ——, 19—, fell into the said vault or cellar and was hurt and wounded and permanently injured, and was prevented for a long time from attending to his employment [*or*, business] as a ——, and incurred medical and other expenses.

Particulars of injuries :—

Particulars of loss and expenses :—

See for forms of declarations under the old system—Against the person in occupation for keeping the grating of a cellar under a public footway out of repair, whereby the plaintiff fell through and was injured: Bishop v. *Bedford Charity*, 1 E. & E. 697, 28 L. J. Q. B. 215 ; 29 *Ib.* 53 ; *see Rollins* v. *Jones*, 15 C. B. N. S. 221 ; 33 L. J. C. P. 1 ; *for keeping a cellar door projecting over a public highway : Fisher* v. *Prowse*, 2 B. & S. 770 ; 31 L. J. Q. B. 212 ; *for keeping an open area adjoining a public highway, into which the plaintiff fell and was injured : Jarvis* v. *Dean*, 3 Bing. 447 ; *Coupland* v. *Hardingham*, 3 Camp. 398 ; *Barnes* v. *Ward*, 9 C. B. 392 ; *Stone* v. *Jackson*, 16 C. B. 199 ; *Hadley* v. *Taylor*, L. R. 1 C. P. 53; *for making a dangerous reservoir of water adjoining a public way, into which a person fell and was drowned: Hardcastle* v. *South Yorkshire Ry. Co.*, 28 L. J. Ex. 139 ; *against commissioners of sewers for keeping an open sewer by the side of a public highway : Cornwell* v. *Metrop. Commiss. of Sewers*, 10 Ex. 771 (*where see the law respecting the duty of fencing ditches, &c., in land adjoining public highways*) ; *for obstructing a public right of way, whereby the plaintiff was injured in his trade by reason of customers not being able to approach his shop : Wilkes* v. *Hungerford Market Co.*, 2 Bing. N. C. 281 ; *Bradbee* v. *Christ's Hospital*, 4 M. & G. 714 ; *for obstructing a public footpath through the plaintiff's land, whereby the plaintiff and his servants were compelled to go round in passing from one part of the land to another, and were so delayed in their business : Blagrave* v. *Bristol Waterworks Co.*, 1 H.

---

401 ; *Gwinnell* v. *Eamer*, cited *ante*, p. 452 ; *Nelson* v. *Liverpool Brewery Co.*, *Ib.*). If the nuisance is caused by the act of a third party, or of his servants in the course of his employment, as for instance when the servant of a coal merchant, in delivering coals to the occupier of such a cellar through such an opening neglects to replace the cover, and thereby a passer-by is injured, such third person is liable (*Whiteley* v. *Pepper*, 2 Q. B. D. 276 ; 46 L. J. Q. B. 436), though it may be the occupier is also, in general, liable in such a case, as having a duty to take reasonable care to see that the cover was replaced (*Ib.*).

An occupier who maintains a lamp projecting over a highway is bound to keep it in repair so as not to be dangerous to persons lawfully using the highway, and is liable for injury occasioned by its falling, through want of repair, upon a person passing by, notwithstanding that the occupier may have employed a competent contractor to repair it (*Tarry* v. *Ashton*, 1 Q. B. D. 314 ; 45 L. J. Q. B. 260).

& N. 369; *for obstructing the access to the plaintiff's house by a public navigable river: Rose* v. *Groves*, 5 M. & G. 613; *Davis* v. *Walton*, 8 Ex. 153; *Simmons* v. *Lillystone*, 3 Ex. 431; *for obstructing the plaintiff's right of way on a railroad: Tanner* v. *South Wales Ry. Co.*, 25 L. J. Q. B. 7; 5 E. & B. 618; *by a reversioner for obstructing the access to the house by a public highway: Vallance* v. *Savage*, 7 Bing. 595; *for placing an obstruction on a private way which the plaintiff was licensed to use: Corby* v. *Hill*, 27 L. J. C. P. 318; *for setting spring-guns on defendant's land, whereby the plaintiff trespassing without notice thereof was shot: Bird* v. *Holbrook*, 4 Bing. 628 (*if the plaintiff trespassed with notice of the spring-guns the action will not lie: Holt* v. *Wilkes*, 3 B. & Ald. 304; *where see another count*); *for setting dog-traps and dog-spears near public paths: Townsend* v. *Wathen*, 9 East, 277; *Deane* v. *Clayton*, 7 Taunt. 489; *Jordin* v. *Crump*, 8 M. & W. 782 (*as to when the action will lie, see Ib.*).

Claim alleging that the Defendant artificially raised the Surface of his Land above the level of the Plaintiff's adjoining Land, whereby Rain-water falling on the Defendant's Land percolated into the adjoining House of the Plaintiff: see Hurdman v. *N. E. Ry. Co.*, 3 C. P. D. 168; 47 L. J. C. P. 368.

Claim for Negligently allowing Sewage to Escape into a Neighbour's Premises: see Humphries v. *Cousins*, 2 C. P. D. 239; 46 L. J. C. P. 438.

Officers (*z*).

Partners (*a*).

(*z*) As to the special provisions for limitation of action, and tender of amends, &c., in the case of actions for acts done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Acts, duty, or authority, see the Public Authorities Protection Act, 1893 (cited "*Public Authorities*," *post*, p. 901).

(*a*) See "*Partners*," *ante*, p. 265. If several persons are jointly entitled to property injured, they should ordinarily join in suing in respect of such injury. (See "*Parties to Action*," *ante*, pp. 19 *et seq.*) Thus partners in trade may join in an action for a slander or libel concerning their trade. (See *Le Fanu* v. *Malcomson*, 1 H. L. C. 637; *Cook* v. *Batchellor*, 3 B. & P. 150; *Maitland* v. *Goldney*, 2 East, 426.) In *Hamlyn* v. *Houston*, [1903] 1 K. B. 81; 72 L. J. K. B. 72, a firm was held liable in damages for the wrongful act of one partner in obtaining by bribery of a clerk of a rival trader information as to the transactions of the latter.

By s. 10 of the Partnership Act, 1890, "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the

PATENTS (*b*).

Claim by a Patentee for Infringement of a Patent, claiming an Injunction and Damages (*b*).

The defendant has infringed the plaintiff's patent, No. ——, granted for the term of fourteen years, from the —— ——, 19—, for [certain

---

authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

By s. 11, "In the following cases, namely—

(a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss."

By s. 12, "Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections."

Where the liability is joint and several, a judgment recovered against one member of the firm is not in itself a bar to an action against the other members of the firm (*Lechmere* v. *Fletcher*, 1 C. & M. 623, 635; *Blyth* v. *Fladgate*, [1891] 1 Ch. 337, 353; 60 L. J. Ch. 66. As to judgment recovered, see *post*, pp. 703, 862).

(*b*) Patent rights, though emanating from the royal prerogative, are regulated by statute law (*R.* v. *Halifax*, [1891] 1 Q. B. 793; 2 *Ib.* 263). The principal statutes now in force with respect to letters patent for inventions are the Statute of Monopolies (21 Jac. 1, c. 3), ss. 1, 6, and the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). The last-mentioned Act repealed (see s. 113) the previous Patent Acts (with the exception of the above-mentioned sections of the Statute of Monopolies), and amended and consolidated the law. It has been modified by 48 & 49 Vict. c. 63, 49 & 50 Vict. c. 37, 51 & 52 Vict. c. 50, 1 Edw. 7, c. 18, and 2 Edw. 7, c. 34.

By the Patents, &c. Act, 1883, s. 32, an action for an injunction or damages may be brought by any person or persons aggrieved in respect of threats of legal proceedings, &c. made "by circulars, advertisements, or otherwise," issued by persons falsely claiming patent rights in respect of any alleged manufacture (see *Barney* v. *United Telephone Co.*, 28 Ch. D. 394; 54 L. J. Ch. 633; *Kurtz* v. *Spence*, 36 Ch. D. 770; 57 L. J. Ch. 278; *Union Electrical, &c. Co.* v. *Electrical Storage Co.*, 38 Ch. D. 325; *Skinner* v. *Shew*, [1893] 1 Ch. 413; [1894] 2 Ch. 581; 62 L. J. Ch. 196; 63 *Ib.* 826; *Douglass* v. *Pintsch's Patent Lighting Co.*, 65 L. J. Ch. 919); but the section does not apply "if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent" (*Combined Weighing Co.* v. *Automatic, &c. Co.*, 42 Ch. D. 665; 59 L. J. Ch. 26; *Day* v. *Foster*, 43 Ch. D. 435; *Colley* v. *Hart*, 44 Ch. D. 179; 59 L. J. Ch. 308; *Kensington, &c. Co.* v. *Lane Fox Electrical Co.*, [1891] 2 Ch. 573; *Johnson* v. *Edge*, [1892] 2 Ch. 1; 61 L. J. Ch. 262).

An action may be brought for infringement of a patent right, even where the infringement is innocent and unintentional. (See "*Patents*," *post*, p. 891.) Thus, the sale in this country of articles which have been manufactured, either here or abroad, by the unauthorised use of a patent process, is itself an infringement of the patent right, although the defendant did not know them to be so manufactured (*Walton* v. *Lavater*, 8 C. B. N. S. 162; 29 L. J. C. P. 275; *Wright* v. *Hitchcock*, L. R. 5 Ex. 37; 39 L. J. Ex. 97; *Elmslie* v. *Boursier*, L. R. 9 Eq. 217; 39 L. J. Ch. 328; *Von Heyden* v. *Neustadt*, 14 Ch. D. 230; see also *Saccharin Corporation* v. *Reitmeyer*, [1900] 2 Ch.

improvements in the manufacture of iron and steel *or, as the case may be*], whereof the plaintiff was the first inventor.

Particulars of breaches are delivered herewith [*or*, are as follows (*c*):—*Set out the particulars. See the form, post*, p. 464, *and Chitty's Forms*, 13th ed., p. 188].

The plaintiff claims an injunction to restrain the defendant from further infringement and £100 damages.

(*See R. S. C.*, 1883, *App. C., Sect. VI., No.* 6.)

A like form, stating the Claims for Relief more fully: see Cunynghame on Patent Practice, p. 571; *and see Proctor* v. *Bayley*, 42 Ch. D. 390, 393.

The like, for Infringement of a Patent, after an Amendment of the Specification (*d*).

1. The plaintiff was the first and true inventor of [*describe the nature of the invention*], and thereupon a patent, No. ——, was granted to the plaintiff

659; 69 L. J. Ch. 761; *Saccharin Corporation* v. *Anglo-Continental Chemical Works*, [1901] 1 Ch. 414; 70 L. J. Ch. 194); but an action will not lie against a foreign manufacturer who manufactures abroad and sends by post to this country articles which infringe a patent (*Badische Anilin und Soda Fabrik* v. *Basle Chemical Works*, [1898] A. C. 200; 67 L. J. Ch. 141).

In general, the plaintiff in an action for the infringement of a patent is not entitled to have both damages and an account of profits, and must elect which of those two forms of relief he will adopt. (See *American Wire Co.* v. *Thomson*, 44 Ch. D. 274; *De Vitre* v. *Betts*, L. R. 6 H. L. 319; 42 L. J. Ch. 841.) See further as to damages, *Penn* v. *Jack*, L. R. 5 Eq. 81; 37 L. J. Ch. 136; *United Horse Shoe Co.* v. *Stewart*, 13 App. Cas. 401.

Each of several co-owners of a patent may maintain an action for its infringement (*Dunnicliff* v. *Mallet*, 7 C. B. N. S. 209; 29 L. J. C. P. 70; *Mathers* v. *Green*, L. R. 5 Ch. 29; 35 L. J. Ch. 1; *Sheehan* v. *Gt. E. Ry. Co.*, 16 Ch. D. 59; 50 L. J. Ch. 68; *Van Gelder Co.* v. *Sowerby Bridge Society*, 44 Ch. D. 374; 59 L. J. Ch. 292). Each of such co-owners may use and work the patent for his own profit without being liable, unless under a contract, to account to the others for his profits (*Steers* v. *Rogers*, [1892] 2 Ch. 13; 61 L. J. Ch. 676; *Heyl-Dia* v. *Edmunds*, 81 L. T. 579).

(*c*) By the Patents, &c. Act, 1883, s. 29 (1), "In an action for infringement of a patent the plaintiff must deliver with his statement of claim . . . particulars of the breaches complained of."

(*d*) As to amendments of specifications by way of disclaimer, correction, or explanation, see ss. 18—21, and 51 & 52 Vict. c. 50, s. 5.

Where there has been an infringement of an amended patent, and the amendment has been made before action, the statement of claim should state the fact of the amendment (*Andrew* v. *Crossley*, [1892] 1 Ch. at p. 505).

By the Patents, &c. Act, 1883, s. 20, "Where an amendment by way of disclaimer, correction, or explanation has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge."

As to the extension of the term of a patent by an Order in Council, see s. 25.

for the said invention the nature of which was particularly described in the specification therein mentioned, for the term of —— years, from the —— ——, 19—, and the said specification was afterwards on the —— ——, 19—, duly amended by way of disclaimer [*or*, correction, *or* explanation, *as the case may be*].

2. The defendant has since the said amendment infringed the plaintiff's said patent [and intends and threatens to continue the said infringement].

3. Particulars of breaches are delivered herewith [*or*, are as follows :—]

The plaintiff claims [*state the claims as in the first preceding form and the other forms referred to*].

For a like form, see United Telephone Co. v. *Donohoe*, 31 Ch. D. 399.

Claim by the Assignee of a Patent for an Infringement thereof (*e*).

1. *A. B.* was the first and true inventor of [*describe the nature of the invention*], and thereupon a patent, No. ——, was granted to the said *A. B.* for the said invention, the nature of which was particularly described in the

(*e*) Where the action for infringement is brought by an assignee of a patent right, the statement of claim must be framed accordingly, and must state the fact of the assignment.

It seems that the legal property in a patent can only be assigned by deed (*Chanter* v. *Dewhurst*, 12 M. & W. 823 ; *In re Casey*, [1892] 1 Ch. 104 ; 61 L. J. Ch. 61) ; but a parol assignment for consideration would, as against the assignor himself and persons subsequently taking assignments or licences from him with notice of the prior assignment, be enforceable and sufficient to support an action for infringement (Cunynghame on Patent Practice, pp. 274, 359).

By s. 87, the person entered on the register as proprietor of a patent, copyright in a design, or trade-mark, as the case may be, has, subject to the provisions of the Patents and Trade Marks Act, 1888, and to any rights appearing from such register to be vested in any other person, power absolutely to assign, grant licences, and to give effectual receipts for any consideration for such assignment or licence : provided that any equities in respect of such patent, design, or trade-mark, may be enforced in like manner as in respect of any other personal property.

It was held under s. 35 of the repealed Patents Act of 1852 (15 & 16 Vict. c. 83), that until registration, no legal right passed by an assignment of a patent, and that an assignee who was not registered could not maintain an action for infringement, except as against his assignor or persons subsequently taking assignments or licences from him with notice of the facts of the prior assignment (*Chollet* v. *Hoffman*, 7 E. & B. 686 ; 26 L. J. Q. B. 249 ; and see *Hassall* v. *Wright*, L. R. 10 Eq. 509 ; 40 L. J. Ch. 145, where see also as to relation back of registration to the date of the assignment). But the wording of s. 87 of the Patents, &c. Act, 1883, differs from that of s. 35 of the repealed Act of 1852, and it would seem that registration is no longer essential to the title of an assignee of a patent. (See Cunynghame on Patent Practice, pp. 268, 359 ; Terrell on Patents, 3rd ed., p. 186 ; Edmunds on Patents, 2nd ed., p. 361 ; though see Lawson on Patents, 2nd ed., p. 362.)

An assignee of a provisional protection cannot, before the patent is assigned to him, sue for infringement without joining the patentee as a party (*Bowden's Patents Syndicate* v. *Smith*, [1904] 2 Ch. 86, 122 ; 73 L. J. Ch. 522).

specification therein mentioned, for the term of —— years, from the —— ——, 19—, and the said specification was afterwards on the —— ——, 19—, duly assigned by the said *A. B.* to the plaintiff. The assignment is contained in a deed dated the —— ——, 19—.

2. The defendant has since the said assignment infringed the plaintiff's said patent [and intends and threatens to continue the said infringement].

3. Particulars of breaches are delivered herewith [*or*, are as follows :—].

The plaintiff claims [*see the first preceding form and the other forms referred to*].

For like Forms stating Amendments by Disclaimer and Assignment, see United Telephone Co. v. *Donohoe*, 31 Ch. D. 399 ; *Cunynghame on Patent Practice*, p. 571.

Particulars of Breaches in an Action for Infringement (*f*).

19—. B. No. ——.

Between *A. B.*.....Plaintiff,

and

C. D......Defendant.

The following are the particulars of the breaches of patent right complained of in this action, viz. :—

[*Here state the particulars of the infringement.*]

Delivered the —— ——, 19—,

To Mr. *E. F.*,
The defendant's solicitor
[*or*, agent].

G. H.,
The plaintiff's solicitor
[*or*, agent].

A mortgagor in possession of a patent may bring an action for infringement after an assignment by way of mortgage to persons registered as mortgagees (*Van Gelder Co.* v. *Sowerby Bridge Co.*, 44 Ch. D. 374 ; 59 L. J. Ch. 292). As to assignments of parts or shares of patents, see *Dunnicliff* v. *Mallet*, 7 C. B. N. S. 209 ; 29 L. J. C. P. 70 ; *Walton* v. *Lavater*, 8 C. B. N. S. 162 ; 29 L. J. C. P. 275 ; *Van Gelder Co.* v. *Sowerby Bridge Co.*, *supra*.

By s. 36 of the Act of 1883, "A patentee may assign his patent for any place in or part of the United Kingdom or Isle of Man, as effectually as if the patent were originally granted to extend to that place or part only."

A licence to use a patent should, properly, be under seal (see Cunynghame on Patent Practice, p. 285) ; but, as between the licensee and the licensor or persons subsequently taking assignments or licences from him with notice of the previous licence, a parol licence is for most purposes sufficient. (See "*Patents*," *ante*, p. 269 ; and see *Cooper* v. *Stevens*, [1895] 1 Ch. 567.)

A mere licence, even where it is an exclusive and irrevocable licence, does not amount to an assignment, and does not give the licensee a right to sue for infringement of the patent, except where the infringement is by the licensor or his subsequent assignees or licensees with notice of the plaintiff's right (*Heap* v. *Hartley*, 42 Ch. D. 461 ; *Guyot* v. *Thomson*, [1894] 3 Ch. 388 ; 64 L. J. Ch. 32).

(*f*) By s. 29 (1), "In an action for infringement of a patent, the plaintiff must deliver with his statement of claim, or, by order of the Court or the judge, at any

For form of particulars, see Chitty's Forms, 13th ed., p. 189; *United Telephone Co.* v. *Donohoe*, 31 *Ch. D.* 399.

Penal Statutes (*g*).

Public Health (*h*).

Railways.

For forms of claim in actions against railway companies, see "Carriers," ante, p. 336; "*Fences*," *ante*, p. 391; "*Negligence*," *ante*, p. 440.

Recovery of Land (*i*).

Claim by Heir against a Stranger for Recovery of Land (*i*).

1. The plaintiff is entitled to the possession of Blackacre, in the parish of —— [*or*, of No. 2, Bridge Street, Bristol], in the county of ——, hereinafter referred to as the said premises.

---

subsequent time, particulars of the breaches complained of;" and by s. 29 (5), such particulars may be from time to time amended, by leave of the Court or a judge. As to particulars of breaches, see Chitty's Forms, 13th ed., p. 188; Cunynghame on Patent Practice, pp. 362—365; and see *Batley* v. *Kynock*, L. R. 19 Eq. 229; *Sykes* v. *Howarth*, 12 Ch. D. 826; 48 L. J. Ch. 769; *Edison Telephone Co.* v. *India Rubber Co.*, 17 Ch. D. 137; *Parnell* v. *Most*, 29 Ch. D. 325; *Cropper* v. *Smith*, 26 Ch. D. 700; 54 L. J. Ch. 287; *Smith* v. *Cropper*, 10 App. Cas. 249; 55 L. J. Ch. 12.

(*g*) See "*Penal Statutes*," *ante*, p. 270.

(*h*) See "*Corporation*," *ante*, p. 359; "*Highways*," *ante*, p. 407.

By s. 265 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "No matter or thing done, and no contract entered into by any local authority or joint board or port sanitary authority, and no matter or thing done by any member of such authority, or by any officer of such authority, or other person whomsoever acting under the direction of such authority, shall, if the matter or thing were done or the contract were entered into *bonâ fide* for the purpose of executing this Act, subject them or any of them personally to any action, liability, claim, or demand whatsoever." (See *Mill* v. *Hawker*, L. R. 9 Ex. 309; L. R. 10 Ex. 92; 44 L. J. Ex. 49; *Bailey* v. *Cuckson*, 7 W. R. 16, *Burgess* v. *Clark*, 14 Q. B. D. 735.)

Sect. 264 of the same Act has been repealed by the Public Authorities Protection Act, 1893, and the protection afforded by s. 1 of that Act substituted. (See "*Public Authorities*," *post*, p. 901.)

(*i*) Formerly, in actions of ejectment, there were no pleadings, but now the action for the recovery of land is placed substantially on the same footing as other actions in this respect, though no defendant in such action who is in possession by himself or his tenant need plead his title except in certain specified cases. (See *post*, p. 905.) A

2. On and before the —— ——, 19—, *A. B.* was seised in fee and in possession of the said premises.

3. On the —— ——, 19—, the said *A. B.* died so seised, without having made a will [*or*, intestate].

---

claim for recovery of land cannot be specially indorsed on the writ except where the action is brought "by a landlord against a tenant whose term has expired, or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant." (See Ord. III., r. 6; and *ante*, p. 65.) The plaintiff in an action for the recovery of land is also restricted in joining therewith other causes of action. (See Ord. XVIII., r. 2; and *ante*, p. 52.)

In general, all persons in whom title to possession is alleged to exist should be joined as plaintiffs. But in certain cases a mortgagor of land may bring actions for its recovery without joining the mortgagee. (See Jud. Act, 1873, s. 25 (5), cited *ante*, p. 265. The plaintiff, in an action for recovery of land, must in the claim state such facts as, if true, show that he has an interest entitling him to possession of the premises sought to be recovered, or show that the defendant is estopped from disputing his title. (See *ante*, p. 232.) Where the defendant is not so estopped, the title of the plaintiff should be stated in such a way as to afford notice to the defendant of the case he has to meet (*Philipps* v. *Philipps*, 4 Q. B. D. 127; 48 L. J. Q. B. 135; *Davis* v. *James*, 26 Ch. D. 778; 53 L. J. Ch. 523; *Palmer* v. *Palmer*, [1892] 1 Q. B. 319; 61 L. J. Q. B. 236; *Pledge* v. *Pomfret*, 74 L. J. Ch. 357). Thus, where the plaintiff has never been in possession, but claims as heir of some ancestor formerly in possession, the statement of claim should state that the ancestor was seised in fee or otherwise entitled to and was in possession or in receipt of the rents and profits of the land, and should show how the plaintiff is heir, tracing the title, and stating upon what deeds and documents he relies in deducing his title; and it is not enough that there is a general allegation that the plaintiff is so entitled as heir by virtue of certain deeds and documents in the possession of the defendant (*Ib.*; and see *ante*, p. 182). Where the facts in a pedigree are facts relied upon as establishing the right or title, they must be set out (*Philipps* v. *Philipps*, *supra*, *per* Brett, L.J.). It is in general enough to state the effect of a will relied on without setting forth the exact words (*Darbyshire* v. *Leigh*, [1896] 1 Q. B. 554). It is not in general necessary to state negative facts, as that a person made no will, or did not bar an entail. The statement of claim need not show how the defendant came into possession, or deal with the title he alleges (*Hodgins* v. *Hickson*, 39 L. T. 644 (Ir.)). It must show that there was a right of entry at the date of the writ; and for the purpose of recovery of *mesne profits* from an earlier date, it must be shown that the right of entry accrued at such earlier date. Prior possession, however short, is a sufficient *primâ facie* title against a wrong-doer (*Doe* v. *Dyeball*, M. & M. 346; 3 C. & P. 610; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1).

It may sometimes be inexpedient to claim more than the mere recovery of the premises, and in such a case judgment and execution in the original action is no bar to a subsequent action for *mesne profits*. In such subsequent action, the judgment in the original action is, if pleaded, conclusive evidence of the plaintiff's title at the date of the writ in such original action as against the same defendant and persons claiming under him (*Wilkinson* v. *Kirby*, 15 C. B. 430; 23 L. J. C. P. 224; *Harris* v. *Mulkern*, 1 Ex. D. 31, 36; 45 L. J. Ex. 244), and *primâ facie* evidence of the defendant's possession at the same date (*Pearse* v. *Coaker*, L. R. 4 Ex. 92, 99; 38 L. J. Ex. 82).

If the defendant should set up a title prior to that which the plaintiff has set out, the plaintiff may amend his statement of claim and set out his earlier title. As to *mesne profits*, see further *ante*, p. 233.

The effect of the Real Property Limitation Acts is not merely to bar the remedy, but also to extinguish the title after the lapse of the statutory period (*Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318; 4 App. Cas. 51; 48 L. J. Ch. 304; *post*, p. 875). If the statement of claim shows upon the face of it that the plaintiff and the persons through whom he claims have been out of possession more than twelve years, it must show also

4. On the —— ——, 19—, *C. D.* was appointed administrator of the personal estate and effects of the said *A. B.*, deceased, and afterwards on the —— ——, 19—, *C. D.*, by a deed bearing date the —— ——, 19—, conveyed the said Blackacre to [*or*, by a writing signed by him bearing date the —— ——, 19—, *or, as the case may be*, assented to the said Blackacre descending to and vesting in] the plaintiff, the eldest son and heir-at-law of the said *A. B.*

5. After the death of the said *A. B.* the defendant wrongfully took and still wrongfully keeps possession of the premises.

The plaintiff claims—

(1.) Possession of the premises.

(2.) Mesne profits from the —— ——, 19—.

(*See R. S. C.*, 1883, *App. C., Sect. VII., No.* 2.)

The like, against a Tenant of Land and a Person not named in the Writ, who defends as Landlord (*k*).

Between *C. D.* ..... Plaintiff,

and

E. F., and *G. H.* ..... Defendants.

Statement of Claim.

1—4. [*As in the preceding form.*]

5. The writ in this action was issued against the defendant *E. F.*, who then was and still is wrongfully in possession of the said premises.

---

the facts which entitle the plaintiff to a longer period, otherwise the statement of claim will in general be open to objection in point of law (*Dawkins* v. *Lord Penrhyn*, *supra*; *Noyes* v. *Crawley*, 10 Ch. D. 31, 36; 48 L. J. Ch. 112; *post*, p. 875), or, in a flagrant case, may be struck out as vexatious under Ord. XXV., r. 4, cited *post*, p. 563.

Prior to the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), an estate of freehold upon the death of the owner intestate descended directly to his heir-at-law; whilst if he devised it by will it passed at once upon the death to the devisee; but a leasehold interest, or chattel real, passed in the first instance to the personal representative of the deceased, and did not vest in the legatee or next of kin until such personal representative, whether executor or administrator, assented to it so vesting or conveyed it to such legatee, or next of kin. The Land Transfer Act, 1897, has, by s. 1, assimilated "real property" in general in this respect to leasehold interests, making, however, an exception of ordinary copyhold interests. (See *ante*, p. 182.) In the case, therefore, where it is necessary to plead the title of an heir or devisee of freehold lands arising since 1897, it must appear that the administrator or executor, as the case may be, conveyed the property to such heir or devisee, or assented to it vesting in him. The title of an administrator to real estate, when appointed, relates back to the death, as does that to the personal effects (*In the goods of Pryse*, [1904] P. 301).

As to what is a sufficiently exclusive possession to transfer the title to the possessor from the true owner, see *Marshall* v. *Taylor*, [1895] 1 Ch. 641; 64 L. J. Ch. 416 *Littledale* v. *Liverpool College*, [1900] 1 Ch. 19; 69 L. J. Ch. 87.

(*k*) If the action is against a tenant in possession, the landlord, though not named in the writ as a defendant, may obtain leave to appear and defend the action as landlord (Ord. XII., rr. 25—29; and see *post*, p. 905).

6. Since the issuing of the said writ the defendant *G. H.*, who has no right or title to the said premises, but who claims that he is in possession of the said premises by the defendant *E. F.*, as his tenant, has been, pursuant to order dated the —— ——, 19—, admitted to appear to this action, and to defend for the whole of the property claimed therein, and he has accordingly entered an appearance in the said action as landlord of the defendant *E. F.*

By Devisee of Freehold (*l*).

1. The plaintiff is entitled to the possession of a house and land known as ——, at ——, in the county of ——.

2. *A. B.* was at the time of his death, which took place on the —— ——, 19—, seised in fee and in possession of the said house and land.

3. The said *A. B.*, by his last will, dated the —— ——, 19—, appointed *C. D.* executor of his personal estate and effects, and devised the said house and land unto and to the use of the plaintiff in fee simple.

4. The said *C. D.*, by a deed bearing date the —— ——, 19—, conveyed the said house and land to [*or*, by a writing signed by him bearing date, &c., *or, as the case may be*, assented to said house and land being devised to and vested in] the plaintiff, the devisee named in the said will.

5. The defendant, after the death of the said *A. B.*, wrongfully took and still keeps possession of the said house and land, [and has refused to give up possession thereof to the plaintiff].

By Legatee of Leasehold (*m*).

1. [*Same as in paragraph* 1 *of last form.*]

2. *C. D.*, being seised in fee and in possession of the said house and land, demised the same by deed dated the —— ——, 19—, to *E. F.*, for —— years from the —— ——, 19—, at the rent therein mentioned.

3. *E. F.* thereupon entered into possession of the said house and land in

---

(*l*) It was, in general, only necessary for the devisee of a freehold suing a stranger for recovery of the land devised to show by his claim that the testator was at the time of his death seised in fee of or entitled to the land, that he died after having by his last will devised it to the plaintiff, and that the defendant is in possession; but it must now, since the Land Transfer Act, 1897, if the death occurred after 1897, appear that the executor or administrator, as the case may be, conveyed the property to the devisee or assented to it vesting in him. (See *ante*, p. 182). If any estates are limited by the will prior to the devise to the plaintiff, or if the testator had demised the property, the expiration or determination of such estates or tenancy must also be shown. Where land has been devised to the heir of the testator, he takes it as devisee, and should sue as devisee (3 & 4 Will. 4, c. 106, s. 3).

(*m*) The statement of claim must show the assent of the executors to the bequest, for until such assent the term vests in the executors (1 Wms. Exors., 9th ed., p. 595; 2 *Ib.* p. 1225). Such assent may be by deed or word of mouth or conduct.

pursuance of the said lease, and remained in possession thereof and entitled thereto under the said lease until his death hereinafter mentioned.

4. *E. F.*, by his last will and testament dated the —— ——, 19—, bequeathed all his estate, interest and term in the said house and land to the plaintiff, and appointed *G. H.* the executor of his said will and testament.

5. The said *E. F.* died on the —— —— 19—, and his said will and testament was duly proved in the Probate Division of the High Court of Justice on the —— ——, 19—.

6. The said *G. H.* afterwards duly assented to the said bequest. [*State or give particulars of how the assent was given.*]

7. The defendant, after the death of the said *E. F.*, wrongfully took and still keeps possession of the said house and land, [and has refused to give up possession thereof to the plaintiff].

By Devisee of Copyhold (*n*).

1. The plaintiff is entitled to the possession of a farm and lands called ——, at ——, of which *A. B.* was, previously to and at the time of his death, seised in his demesne as of fee, at the will of the lord of the manor of ——, according to the custom of the said manor.

2. *A. B.* died on the —— ——, 19—, having by his last will, which was dated the —— ——, 19—, devised the said farm and lands to the plaintiff, his heirs and assigns, according to the custom of the said manor; and the plaintiff was on the —— ——, 19—, duly admitted, according to the custom of the said manor, as devisee of the said farm and lands.

3. The defendant, after the death of *A. B.*, took possession of the said farm and lands, and refuses to give up possession thereof to the plaintiff.

By Mortgagee against Mortgagor for Recovery of Land (*o*).

1. The plaintiff is entitled to the possession of a house and land known as ——, at ——, in the county of ——.

2. The said house and land were, by an indenture dated the —— ——, 19—, and made between the defendant and the plaintiff, granted and conveyed by the defendant unto and to the use of the plaintiff and his heirs

(*n*) By 1 Vict. c. 26, s. 3, copyhold estates may be devised by will, and the effect of that Act is to enable a copyholder to devise his estate in every case, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till the admittance of the devisee (*Garland* v. *Mead*, L. R. 6 Q. B. 441). The devisee must show that he has been admitted. Estates of copyhold, the title to which must be perfected by admission or some act of the lord, are exempted from the operation of the Land Transfer Act, 1897. (See s. 1, sub-s. (4), and *ante*, p. 182.)

(*o*) Where the mortgage deed contains no proviso or stipulation amounting in law to a re-demise, and the mortgagor remains in possession after the execution of the

[by way of mortgage to secure the sum of £—— and interest thereon, and the said mortgage is still subsisting].

deed, the mortgagee may bring an action against the mortgagor for possession of the premises, unless a tenancy, other than one of sufferance, has been created between them (*Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 553; *Doe* d. *Parsley* v. *Day*, 2 Q. B. 147). Where no tenancy other than a tenancy by sufferance has been created, it is unnecessary for the mortgagee before bringing such action to give any notice to quit or to make any demand of possession (*Doe* d. *Roby* v. *Maisey*, 8 B. & C. 767; *Doe* d. *Fisher* v. *Giles*, 5 Bing. 421).

If the deed contains any proviso or stipulation that the mortgagor may remain in possession until a certain day, or until default in payment of a certain sum at a particular time, and it is executed by the mortgagee, it in general amounts in law to a re-demise, and no action for the recovery of the premises can be maintained until after such day, or default (*Wilkinson* v. *Hall*, 3 Bing. N. C. 504; *Doe* d. *Lister* v. *Goldwin*, 2 Q. B. 141), though, in some cases, the proviso or stipulation may amount only to a covenant. (See Shep. Touch. 272; *Doe* d. *Parsley* v. *Day*, *supra*; Cole on Ejectment, pp. 464 *et seq.*) Where the mortgage deed stipulates for payment of a certain sum on a particular day, and the mortgagor makes default in payment and remains in possession of the premises after such default, an action may, in the absence of any new tenancy, be brought against him by the mortgagee for recovery of the premises without any previous notice to quit or demand of possession (*Doe* d. *Fisher* v. *Giles*, *supra*; *Doe* d. *Roby* v. *Maisey*, *supra*).

It is provided by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 18, as to mortgages made after 1881, and not containing any provision to the contrary, that a mortgagor in possession shall, as against his mortgagees, have power to make any such leases of the mortgaged property or any part thereof as are authorised by that section. By the Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57), s. 2, where a person occupies agricultural land under a contract of tenancy with the mortgagor, which is not binding on the mortgagee, as a tenant from year to year, or for a term not exceeding twenty-one years at a rack-rent, the mortgagee, before he deprives the occupier of the possession of the land, must give to the occupier six calendar months' notice in writing of his intention so to deprive him of possession. But in cases which are not within the provisions of these enactments, the mortgagee, if entitled to enter into possession as against the mortgagor, may, without giving any notice to quit, recover possession of the mortgaged property against such lessees or tenants of the mortgagor, unless they have become tenants to the mortgagee (*Keech* v. *Hall*, 1 Smith's L. C., 11th ed., p. 511; *Lows* v. *Telford*, 1 App. Cas. 414, 425). A notice by the mortgagee to the tenant to pay rent to him, not assented to by the tenant, will not create a new tenancy; but a notice assented to by payment of rent or otherwise, is evidence from which a jury may infer a new contract of tenancy from year to year as between the mortgagee and the tenant in possession (*Rogers* v. *Humphreys*, 4 A. & E. 299, 313; *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307; *Towerson* v. *Jackson*, [1891] 2 Q. B. 484; 61 L. J. Q. B. 36).

In the case of a tenancy created before the mortgage, the tenant will be entitled to possession until the lease or tenancy has expired or been determined by notice to quit, or otherwise (*Birch* v. *Wright*, 1 T. R. 379, 381; Cole on Ejectment, pp. 39, 473).

Where a person was in possession before the mortgage adversely to the mortgagor, the plaintiff must rely upon the title conferred upon him by the mortgage deed, and must proceed against him as in ordinary cases between strangers. (See, further, Cole on Ejectment, p. 479.)

By s. 18 (2) of the Conveyancing Act, 1881, a mortgagee in possession of land under a mortgage made after 1881, and containing no provision to the contrary, is empowered to make such leases as are authorised by that section.

An action for foreclosure is not an action for the recovery of land within the meaning of Ord. XVIII., r. 2, cited *ante*, p. 52.

3. The defendant has never given up possession of the said house and land to the plaintiff, and has remained and still remains wrongfully in possession thereof.

The plaintiff claims possession of the said house and land.

Claim by Mortgagee against Mortgagor for Possession on Determination of a Tenancy at Will created by an Attornment Clause (p).

The plaintiff claims and is entitled to the possession of a house and premises No. —— —— Street, in the —— of ——, of which said house and premises the defendant, by an attornment clause contained in an indenture of mortgage, dated the —— ——, 19—, became tenant at will to the plaintiff, and which said tenancy was determined by demand [and notice to quit] in writing dated the —— ——, 19—.

See a form in Daubuz v. *Lavington*, 13 Q. B. D. 347.

By Landlord against Tenant whose Term has expired or been determined by Notice to Quit: see "Landlord and Tenant," ante, p. 232.

For other forms of Claims by Landlords against Tenants, see "Landlord and Tenant," ante, pp. 234, *et seq.*

Replevin (q).

Claim in Replevin where a Distress was taken for Rent when no Rent was in fact due.

1. By an indenture of lease dated the 1st January, 1904, the defendant let to the plaintiff a house and land at —— for a term of seven years from

---

(*p*) Where the mortgage deed contains a clause creating the relationship of landlord and tenant between the mortgagor and the mortgagee, and the tenancy so created is determined by notice to quit or effluxion of time, the statement of claim may be specially indorsed under Ord. III., r. 6 (*ante*, p. 65), and the plaintiff may apply for judgment under Ord. XIV. (*Daubuz* v. *Lavington*, 13 Q. B. D. 347; 53 L. J. Q. B. 283; *Hall* v. *Comfort*, 18 Q. B. D. 11; 56 L. J. Q. B. 185). The provision of the Bills of Sale Act, 1878, s. 6, which requires certain attornments to be registered, does not affect the right to recover possession of the land (*Mumford* v. *Collier*, 25 Q. B. D. 279; 59 L. J. Q. B. 552; see *In re Willis*, 21 Q. B. 384; 57 L. J. Q. B. 634; *Green* v. *Marsh*, [1892] 2 Q. B. 330; 61 L. J. Q. B. 442). See *ante*, p. 67.

(*q*) The action of replevin, it is said, lies wherever goods have been unlawfully taken out of the possession of the owner (Com. Dig. "Pleader," 3 K. 1, and "Replevin" (A.);

the said 1st January at a rent of £120 a year, payable by two equal half-yearly instalments on the 24th June and the 25th December in each year, commencing with the 24th June, 1904.

2. The plaintiff duly paid the said rent up to and including that due on the 25th December, 1904, to *A. B.*, the agent of the defendant who was authorised by the defendant to receive the same, and who did receive the same on behalf of the defendant.

Galloway v. *Bird*, 4 Bing. 299 ; *Mellor* v. *Leather*, 1 E. & B. 619 ; *George* v. *Chambers*, 11 M. & W. 149 ; *Allen* v. *Sharp*, 2 Ex. 352 ; see the County Courts Acts, 1888 (51 & 52 Vict. c. 43), s. 135). Thus it lies for goods improperly taken for poor rates, or unlawfully taken under a distress for rent (*Gay* v. *Matthews*, 4 B. & S. 425 ; 32 L. J. M. C. 58 ; *Evans* v. *Elliott*, 5 A. & E. 142), though in one case (*Mennie* v. *Blake*, 6 E. & B. 842 ; 25 L. J. Q. B. 399) a doubt was suggested as to its applicability to cases other than distresses. (See "*Distress*," *ante*, p. 373, and the form given by the R. S. C., 1883, App. A., Part III., Sect. IV., for the indorsement of the writ in such action).

In actions of replevin the plaintiff and the defendant are both actors (*Goodman* v. *Aylis*, Yelv. 148 ; *Anon.*, 2 Mod. at p. 199 ; *Hodgkinson* v. *Snibson*, 3 Bos. & Pul. 603). The plaintiff seeks damages for the taking and detaining of his goods until, on giving security or depositing a sum of money as security in the replevin proceedings, he gets them back, and also seeks to be repaid the expenses he has been put to in replevying (see *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454 ; 42 L. J. C. P. 273 ; *Smith* v. *Enright*, 63 L. J. Q. B. 220 ; Bullen on Distress, 2nd ed., p. 284), whilst the defendant, in general, seeks a return of the distress and damages (Com. Dig., Pleader, 3 K. 12 ; Bullen on Distress, 2nd ed., p. 286). Sometimes the plaintiff may require, in addition, damages for trespass to his land in entering thereon for the purposes of the distress, and in such case a claim should be added to that effect (Bullen on Distress, 2nd ed., p. 284).

The pleadings in actions of replevin in the High Court of Justice now stand on the same footing as those in other actions. The material facts should be stated concisely, and supplemented where necessary by particulars. As to declarations in replevin under the former system, see Bullen & Leake, 3rd ed., p. 392 ; *Evans* v. *Brander*, 2 H. Black. 548.

Replevin consists in the re-delivery to the owner of the goods taken. This was formerly made by the sheriff, who took the goods from the distrainor, and re-delivered them to the owner upon the execution of a bond by the owner and two sureties, conditioned to prosecute his suit with effect and without delay against the distrainor, and to return the goods if a return should be awarded, but the powers and responsibilities of the sheriff with respect to replevin bonds and replevins have been transferred to the registrar of the County Court, who now grants replevin upon security being given by a bond by the owner and two sureties to the effect above mentioned. (See the County Courts Acts, 1888 (51 & 52 Vict. c. 43), ss. 134—136, and ss. 108, 109.)

An action of replevin may be commenced in the County Court of the district or in the High Court at the option of the plaintiff, upon his giving the required security. (See *Ib.*)

If the action is commenced in the County Court, it may be removed into the High Court by writ of *certiorari*, upon application by the defendant to the High Court or a judge thereof for such writ, and upon his giving the required security. (See s. 137.)

A deposit of money may be made in lieu of security by bond. (See ss. 108, 109.)

For an instance of the mode of stating the removal of an action by *certiorari*, see *ante*, pp. 64, 435.

If the defendant does not remove the action into the superior Court, the County Court has jurisdiction, though title to hereditaments comes in question, and although the value or rent of the hereditaments exceeds £50 per annum. (See *Fordham* v. *Akers*, 4 B. & S. 578 ; 33 L. J. Q. B. 67.)

Particulars of payments :—[*State same with dates.*]

3. On the 5th April, 1905, when no rent was due or in arrear, the defendant by his bailiff wrongfully seized and took and carried away as a distress for a half year's rent of the said premises, divers cattle and goods of the plaintiff then on the said premises.

Particulars of distress taken :—[*State same.*]

4. The defendant refused to return to the plaintiff the cattle and goods so seized until the 14th April, 1905, when they were returned to the plaintiff under proceedings taken by the plaintiff in replevin and under the bond with sureties, which the plaintiff was in such proceedings required and compelled to give, conditioned (inter alia) to prosecute his action with effect and without delay.

5. The plaintiff lost the use of his said cattle and goods for the said period and was put to expense in the said proceedings to replevy the same.

Particulars of damage and expenses :—[*State same.*]

The plaintiff claims :—

(1.) Damages for the seizure and detention.

(2.) The expenses he has been put to.

(3.) To have it declared that the said distress was illegal

(4.) The cancellation of the said bond.

Reversion.

Claim for an Injury to the Plaintiff's Reversion in Land (*r*).

1. At the times hereinafter referred to certain land known as the —— Farm, at ——, in the county of ——, was [and still is] in the possession

(*r*) The statement of claim must either state something which is necessarily an injury to the reversion, as the cutting down timber trees or the like; or if it state something which may or may not be an injury to the reversion, it must go on to aver that the reversionary interest of the plaintiff is thereby injured. Where that which is stated *cannot* be injurious to the reversion, the allegation that the reversion is thereby injured will not help the plaintiff; where it *must* be an injury to the reversion, that concluding allegation is unnecessary. (See *per* Willes, J., *Metropolitan Ass.* v. *Petch*, 5 C. B. N. S. 504, 513; *Jackson* v. *Pesked*, 1 M. & S. 234; and see *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508, 517; 63 L. J. Ch. 399.) It is usual, however, and under ordinary circumstances advisable, to insert an allegation to that effect in the statement of claim wherever the plaintiff sues as a reversioner. The allegation may be supported by proof of any act injurious to the land of a permanent character, although the damage might be remedied before the reversion came into possession. Thus, opening a new door in a house (*Young* v. *Spencer*, 10 B. & C. 145; see "*Waste*," *post*, p. 505); obstructing a right of way (*Kidgill* v. *Moor*, 9 C. B. 364; *Bell* v. *Midland Ry. Co.*, 10 C. B. N. S. 287); obstructing ancient lights (*Jesser* v. *Gifford*, 4 Burr. 2141; *Metropolitan Ass.* v. *Petch*, 5 C. B. N. S. 504; 27 L. J. C. P. 330; see *ante*, p. 421); building a roof with eaves which discharge the rain-water on the land (*Tucker* v. *Newman*, 11 A. & E. 40); placing foundations of a wall on the land (*Mayfair Property Co.* v. *Johnston*, *supra*), causing structural injury to buildings by vibration (*Shelfer* v. *City Electric Co.*, [1895]

of *G. H.*, as tenant thereof to the plaintiff, the reversion thereof then [and still] belonging to the plaintiff.

2. The defendant [*here state the acts complained of, as, for instance*, on the —— ——, 19—, wrongfully cut down certain trees growing on the said land], whereby the plaintiff's said reversion in the said land was [and is] injured.

Particulars :—

For a Claim by a Reversioner for Obstruction of Light, see "Lights," ante, p. 423.

For Injury to the Plaintiff's Reversion by Disturbance of Water Rights, see Howarth v. *Sutcliffe*, [1895] 2 Q. B. 358 ; 64 L. J. Q. B. 729.

See forms of declaration under the old system—For an injury to the reversion by obstructing lights : Metropolitan Association v. *Petch*, 5 C. B. N. S. 504 ;

1 Ch. 287 ; 64 L. J. Ch. 216), may be injurious to the reversion, and warrant a finding to that effect.

The action will not lie for acts which are of a mere temporary character not affecting the reversion. Thus, no such action will in general lie for a nuisance of mere noise although less rent is paid by the tenant in consequence of the noise (*Mumford* v. *Oxford W. & W. Ry. Co.*, 1 H. & N. 36 ; 25 L. J. Ex. 265 ; *Jones* v. *Chappell*, L. R. 20 Eq. 539 ; 44 L. J. Ch. 658 ; see *House Property Co.* v. *Horse Nail Co.*, 29 Ch. D. 190 ; *Shelfer* v. *City Electric Co.*, *supra*), or for a temporary nuisance of smoke (*Simpson* v. *Savage*, 1 C. B. N. S. 347 ; 26 L. J. C. P. 50), or for a temporary flooding of the premises (*Rust* v. *Victoria Dock Co.*, 36 Ch. D. 113 ; 56 L. T. 216).

It has been held that the action will not lie for a temporary act which is not in fact injurious to the reversion, merely in respect of its being done with the intent to establish an easement in and upon the land by prescription, as the exercise of a right of way (*Baxter* v. *Taylor*, 4 B. & Ad. 72 ; but see *Dobson* v. *Blackmore*, 9 Q. B. 991, 1004 ; *Tucker* v. *Newman*, 11 A. & E. 40 ; *Cooper* v. *Crabtree*, 20 Ch. D. 589 ; 51 L. J. Ch. 544 ; *Mayfair Property Co.* v. *Johnston*, *supra*). Such acts would not be evidence against the reversioner where a right of way or watercourse is claimed by reason of forty years' user under s. 2 of the Prescription Act (cited *post*, p. 947), as that Act, by s. 8, reserves to the reversioner three years for resisting any such claim after his estate has come into possession, although the full period of prescription has previously elapsed (see *Bright* v. *Walker*, 1 C. M. & R. 220 ; *Palk* v. *Skinner*, 18 Q. B. 568). But the last-cited section appears to be limited to claims of rights of way or watercourse, and does not apply to claims of light. (See *Laird* v. *Briggs*, 19 Ch. D. 22, 33 ; *Wheaton* v. *Maple*, [1893] 3 Ch. 48 ; 62 L. J. Ch. 963.)

The action by the reversioner is independent of the remedy which the tenant may have for the same act in respect of the damage to his possession (*Cooper* v. *Crabtree*, 20 Ch. D. 589 ; 51 L. J. Ch. 544 ; *Mayfair Property Co.* v. *Johnston*, *supra* ; *Shelfer* v. *City Electric Co.*, *supra*, and the cases next cited) ; but they may join in suing as co-plaintiffs in the same action, under Ord. XVI., r. 1, cited *ante*, p. 21, and it is frequently advisable for them to do so (*Shelfer* v. *City Electric Co.*, *supra*). Repeated actions for damages may be brought for a continuing injury (*Battishill* v. *Reed*, 18 C. B. 696 ; 25 L. J. C. P. 290 ; *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97 ; see *ante*, p. 421). If the defendant persists in continuing the nuisance after a verdict against him for nominal damages, the jury in a second action may give vindictive damages to compel him to abate the nuisance (*Ib.*).

27 L. J. C. P. 330; *by obstructing a right of way: Kidgill* v. *Moor*, 9 C. B. 364; *by cutting down trees: Cotterill* v. *Hobby*, 4 B. & C. 465; *for digging holes and spoiling the surface of the land under an alleged right of working stone quarries: Rogers* v. *Taylor*, 1 H. & N. 706; 26 L. J. Ex. 203; *by a reversioner against his own tenant for opening a new door in the house: Young* v. *Spencer*, 10 B. & C. 145; *by a reversioner against the occupier of the adjoining land for building a house with eaves which discharged rain-water on to the land of the plaintiff: Tucker* v. *Newman*, 11 A. & E. 40; *by a reversioner for pulling down the eaves of a house and so preventing the rain-water from dropping on the adjoining premises as it of right ought to have done: Battishill* v. *Reed*, 18 C. B. 696; 25 L. J. C. P. 290; *by reversioner for an injury to the right to divert a stream for the purposes of irrigation by removing a dam placed to divert it: Greenslade* v *Halliday*, 6 Bing. 379.

For an Injury to a Reversionary Property in Goods (s).

The plaintiff was the owner of certain goods let to hire [under an agreement in writing, dated —— ——, 19—] to *G. H.*, who had the possession thereof under such letting to hire, the reversionary property and interest in the said goods then belonging to the plaintiff; and the defendant on the —— ——, 19—, injured the plaintiff's said reversionary property and interest in the said goods by wrongfully damaging and breaking the said goods, and converting the same to his own use.

Particulars of the goods:—

Particulars of the damage and loss:—

SEDUCTION.

See "*Master and Servant*," *ante*, p. 433.

(s) The owner of a future or reversionary interest in goods can sue in respect of injury done to his reversionary interest therein, though he cannot in general sue as for a *conversion* of them or for *trespass* to them. (See *ante*, p. 346, and *post*, p. 500.) In order to support the action it must appear upon the face of the pleading, and be proved, that actual damage to the reversion has been sustained (*Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J. Ex. 362; *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L. J. Ex. 231; *Mears* v. *L. & S. W. Ry. Co.*, 11 C. B. N. S. 850; 31 L. J. C. P. 220). A mere sale of the goods, not in market overt, and without a delivery of them to the purchaser and taking or user of them by him, is not an injury to the reversionary property in the goods (*Ib.*; and see *Barker* v. *Furlong*, [1891] 2 Ch. 172; *ante*, p. 345).

Sheriff (*l*).

Claim against a Sheriff for Damages for not Levying under a Writ of Fi. Fa.

1. On the —— ——, 19—, the plaintiff, by the judgment of the —— Division of the High Court of Justice, recovered against *E. F.*

(*l*) The Sheriffs Act, 1887 (50 & 51 Vict. c. 55), has amended, and to some extent consolidated, the law as to sheriffs, and has, by s. 39, repealed many former enactments on the subject.

In the event of the death of a sheriff of a county during his year of office, or before he is lawfully superseded, his under-sheriff is personally liable for the due execution of the office during the vacancy. (See s. 25 (1); *Gloucestershire Banking Co.* v. *Edwards*, 20 Q. B. D. 107.)

The Sheriffs Act, 1887, s. 29 (2), provides that a sheriff, under-sheriff, bailiff, or officer of a sheriff, or officer to whom the return or execution of writs belongs, who (*inter alia*) takes or demands any money or reward other than the fees or sums allowed by or in pursuance of that or any other Act; or grants a warrant for the execution of any writ before he has actually received that writ; or is guilty of any offence against or breach of the provisions of that Act, or of any wrongful act or neglect or default in the execution of his office, shall be liable to forfeit two hundred pounds, and to pay all damages suffered by any person aggrieved, and that such forfeiture and damages may be recovered by such person as a debt by an action in the High Court of Justice.

By s. 29 (7), such actions must be commenced within two years of the alleged offences. In general, an action under this section, being for an offence, would not fall within the provisions of s. 1 of the Public Authorities' Protection Act, 1893. (See "*Sheriff*," *post*, 914; "*Public Authorities*," *post*, p. 901.)

As s. 29 (2) is of a punitive character, the sheriff is not liable in an action brought thereunder without some proof of actual authority or of knowledge or intent on his part, and he is therefore not liable to a penalty thereunder for the wrongful acts of his bailiff in the course of the execution, unless it appears that he actually knew of or authorised them. (See *Lee* v. *Dangar*, [1892] 2 Q. B. 337; 61 L. J. Q. B. 780; *Bagge* v. *Whitehead*, [1892] 2 Q. B. 355; 61 L. J. Q. B. 778.) But the section does not interfere with any of the ordinary civil remedies which existed before and independently of the Act. (See *Lee* v. *Dangar*, [1892] 2 Q. B. at pp. 348, 353; and *Bagge* v. *Whitehead*, *supra*.) In ordinary actions for damages against the sheriff, apart from the provisions of s. 29 (2), the nature of the liability is different, and he may, in general, be made liable without proof of any such actual authority or of knowledge or intent. In such last-mentioned cases, the action for any default of duty in the office of sheriff, should, in general, be brought against the high sheriff, though the default is occasioned by the under-sheriff or bailiff. (See *Cameron* v. *Reynolds*, Cowp. 403.)

The sheriff is liable for every irregularity or default committed under colour of process (*Gregory* v. *Cotterell*, 5 E. & B. 571; 25 L. J. Q. B. 33), whether by his bailiffs or their agents (*Ib.*), as for arresting the debtor under a writ of *fi. fa.* (*Smart* v. *Hutton*, 8 A. & E. 568, n.; and see *Raphael* v. *Goodman*, 8 A. & E. 565); but not for what is done irrespectively of the process, unless it is subsequently adopted by the sheriff (*Underhill* v. *Wilson*, 6 Bing. 697; *Crowder* v. *Long*, 8 B. & C. 598); nor for what is done after the bailiff's authority is terminated (*Brown* v. *Copley*, 7 M. & G. 558); nor is he liable at the suit of the execution creditor for what is done by the bailiff with the execution creditor's authority (*Crowder* v. *Long*, 8 B. & C. 598); nor for what is done by a bailiff specially appointed by the execution creditor (*Alderson* v. *Davenport*, 13 M. & W. 42; *Ford* v. *Leche*, 6 A. & E. 699); nor is he liable at the suit of the execution debtor for what is done with the consent and authority of the latter (See *Wright* v. *Child*, L. R. 1 Ex. 358; 35 L. J. Ex. 209.)

Actions against the sheriff for breach of duty can in general only be maintained in

£ ——; and on the —— ——, 19—, caused a writ of *fieri facias*, upon the said judgment, directed to the sheriff of ——, to be issued out of the said Court commanding him that of the goods and chattels of the said *E. F.* in his bailiwick he should cause to be made the amount of the said judgment, and also interest thereon at £4 per centum per annum from the —— ——, 19—, and should have the said money and interest in the said Court immediately after the execution of the said writ, to be paid to the plaintiff in pursuance of the said judgment, and in what manner he should have executed the writ the said sheriff should make appear in the said Court immediately after the execution thereof.

2. On the —— ——, 19—, the plaintiff delivered the said writ to the defendant, as and being sheriff of ——, to be executed, and the said writ was duly indorsed with a direction to levy £—— and interest thereon from the —— ——, 19—, and with such other matters as are required by the Rules of the Supreme Court.

3. At the time of the delivery of the said writ by the plaintiff to the defendant, and during a reasonable time afterwards, goods and chattels of the said *E. F.* were within the said bailiwick of the defendant, of which the defendant then had notice, and out of which the defendant could and ought to have levied the money and interest indorsed on the said writ as aforesaid.

Particulars of the goods and notice are as follows :—[*State them.*]

4. The defendant, being such sheriff as aforesaid, did not and would not levy the said money and interest, or any part thereof, and made default in the execution of the said writ, whereby the plaintiff has been unable to obtain the said money and interest, and is likely to lose the same.

Against a Sheriff for a False Return of Nulla Bona to a Writ of Fi. Fa. after Levying.

1—3. [*As in preceding form.*]

4. The defendant thereupon, as being such sheriff as aforesaid, by virtue of the said writ levied of the goods and chattels of the said *E. F.* in his bailiwick the money and interest so indorsed on the said writ.

---

respect of actual damage (*Wylie* v. *Birch*, 4 Q. B. 566, 577; *Williams* v. *Mostyn*, 4 M. & W. 145; *Randell* v. *Wheble*, 10 A. & E. 719; *Stimson* v. *Farnham*, L. R. 7 Q. B. 175; 41 L. J. Q. B. 52; and see *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642; 36 L. J. Q. B. 302).

An action will not lie against the sheriff for arresting under process a person privileged from arrest by reason of his attending a Court of justice, or other similar ground (*Magnay* v. *Burt*, 5 Q. B. 381). See *ante*, p. 427.

By s. 15 of the Sheriffs Act, 1887, "A person unlawfully imprisoned by a sheriff or any of his officers shall have an action against such sheriff in like manner as against any other person that should imprison him without warrant."

Sect. 16 gives an action in the case of the escape of a person in the custody of the sheriff or any of his officers.

As to the sheriff's fees and poundage, see s. 20, and the Order of the 31st of August,

5. The defendant had not the said money and interest so levied as aforesaid in the said Court immediately after the execution of the said writ as required by the said writ, or at all, nor has the defendant paid the said money and interest or any part thereof to the plaintiff.

6. The defendant, as being such sheriff as aforesaid on the —— ——, 19—, falsely returned to the said Court upon the said writ that the said *E. F.* had not any goods or chattels in his bailiwick whereof he could cause to be made the money and interest so indorsed on the said writ as aforesaid, or any part thereof, whereby the plaintiff has been unable to obtain the said money and interest, and the same is still wholly unpaid.

By a Landlord against a Sheriff for the Removal of Goods taken in Execution against the Tenant, without Payment of Rent due (u).

1. *G. H.* was tenant to the plaintiff from year to year [*or, as the case may be*] of a messuage situate at ——, at the yearly rent of £——, payable quarterly [*or, as the case may be*], and on the —— ——, 19—, whilst the said *G. H.* was such tenant to the plaintiff as aforesaid, and whilst £—— was due and in arrear from the said *G. H.* to the plaintiff for one year of the said rent, the defendant, as and being the sheriff of ——, under a writ of *fieri facias* against the goods and chattels of the said *G. H.*, issued out of the High Court of Justice, King's Bench Division, at the suit of *I. K.* and directed to the defendant, seized and took the goods and chattels of the said *G. H.*, being in the said messuage.

2. Afterwards, and before the removal of the said last-mentioned goods

---

1888, issued thereunder; *Townend* v. *Sheriff of Yorkshire*, 24 Q. B. D. 621; 59 L. J. Q. B. 156; and as to actions to recover the same, see *Townend* v. *Sheriff of Yorkshire*, *supra*; *Lee* v. *Dangar*, [1892] 2 Q. B. 337; 61 L. J. Q. B. 780.

As to actions by an execution creditor for money received under an execution, see "*Money Received*," *ante*, p. 257.

(*u*) As to this action, see the 8 Anne, c. 14 (c. 18 in Revised Statutes), s. 1; and see "*Sheriff*," *post*, p. 915; *Cocker* v. *Musgrave*, 9 Q. B. 223; *Wharton* v. *Naylor*, 12 Q. B. 673; *Smallman* v. *Pollard*, 6 M. & Gr. 1001, and the cases below cited.

This enactment only applies to subsisting tenancies (*Cox* v. *Leigh*, L. R. 9 Q. B. 333; 43 L. J. Q. B. 123); and, in order to make the sheriff liable as a wrong-doer for the removal, it must appear that he knew, or had notice of the claim for rent in arrear (*Arnitt* v. *Garnett*, 3 B. & A. 441; *Smith* v. *Russell*, 3 Taunt. 400; *Riseley* v. *Ryle*, 11 M. & W. 20; *Andrews* v. *Dixon*, 3 B. & A. 645).

The measure of damages in this action is *primâ facie* the amount of the arrears of rent due to the plaintiff, but the sheriff may reduce the damages by showing that the value of the goods, as distinguished from what they realised on a forced sale under the execution, was less than that amount (*Thomas* v. *Mirehouse*, 19 Q. B. D. 563).

See, further, 7 & 8 Vict. c. 96, s. 67, by which, in case of a tenancy at a weekly rent, the landlord's claim is limited, when there is an execution, to four weeks' arrears; and where the tenement is let for any other term less than a year, to arrears accruing during four such terms or times of payment.

and chattels, the plaintiff on the —— ——, 19—, by a notice in writing dated that day gave notice to the defendant, that the said rent was then, as was the fact, due and in arrear from the said *G. H.* to the plaintiff as aforesaid, and requested the defendant not to remove the said goods and chattels from the said messuage unless the said arrears of rent should be first paid.

3. The defendant, notwithstanding the said notice and request, removed the said goods and chattels from the said messuage without the said arrears of rent being first paid or satisfied, contrary to the statute in such case made and provided.

4. The said arrears of rent are still unpaid.

5. [The said goods and chattels so removed were of greater value than the said arrears of rent, *or*, were of the value of £——.]

SHIPPING (*x*).

(*x*) By s. 25 (9) of the Judicature Act, 1873, "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail." This section modifies the common law rule as to contributory negligence furnishing in general a defence (*per* James, L.J., *The City of Manchester*, 5 P. D. 221, 222; 48 L. J. P. D. & A. 70), but it does not apply to actions under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), those not being Admiralty actions (*The Bernina*, 12 P. D. 58; 13 App. Cas. 1; 57 L. J. Ad. 65; and see the Act cited, "*Executors*," *ante*, p. 387).

Where both ships in a collision are to blame the Admiralty rule is that each bears half of the combined loss. (See Marsden on Collisions, 5th ed., pp. 116, 122; *Chartered Bank, &c.* v. *Netherlands Nav. Co.*, 9 Q. B. D. 118; 10 Q. B. D. 522; 52 L. J. Ad. 220.)

As to the measure of damages, see *The Mediana*, [1900] A. C. 113; 69 L. J. P. 35; *The Harmonides*, [1903] P. 1; 72 L. J. P. 9.

By s. 459 of the Merchant Shipping Act, 1894, a power is given to the Board of Trade to detain British ships unfit to proceed to sea without serious danger to human life, provisionally for the purpose of survey, with a view to final detention or release; and by s. 460 of that Act, "If it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention 'of the ship' as an unsafe ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey."

By s. 460 (4) of the above Act, the liability of the Board of Trade for such costs and compensation is to be enforced by action against the Secretary of the Board of Trade by his official title. In the above special action it is not necessary to allege or prove malice. For an example of such an action, see *Dixon* v. *Sir Henry Calcraft* (*Secretary of the Board of Trade*), [1892] 1 Q. B. 458; 61 L. J. Q. B. 529; and see *Lewis* v. *Gray*, 1 C. P. D. 452; 45 L. J. C. P. 720; *Thompson* v. *Farrer*, 9 Q. B. D. 372; 51 L. J. Q. B. 534.

An action will, it would seem, lie for arresting a ship under process of the Admiralty Court where the process has been made use of maliciously, and without reasonable or probable cause (*The Walke Wallet*, [1893] P. 202; 62 L. J. P. 88).

Claim for Injuries to a Ship and Cargo by the Defendant's Negligent Navigation of another Ship (*y*).

The plaintiff has suffered damage from injuries to his ship, the "Betsy," and the cargo on board thereof, by a collision with the ship, the "Jane," caused by the negligent navigation thereof by the defendant or his servants on the river Thames, on the —— ——, 19—.

Particulars of negligence :—[*State them.*]

Particulars of loss and expenses :—

(1.) Charges of Jones & Co., shipwrights, £450 2*s*.

(2.) Loss of use of ship from —— ——, 19—, to —— ——, 19—, at —— per —— £280.

Particulars of damage to cargo :—[*Insert them.*]

The plaintiff claims £——.

(*See R. S. C.*, 1883, *App. C., Sect. VI., No.* 5.)

Shooting (*z*).

Claim for Disturbance of a Right of Shooting.

1. The plaintiff was possessed of and entitled to the exclusive right of shooting and killing game by himself and his servants in, upon and throughout land called ——, at ——, in the parish of ——, in the county of ——,

(*y*) In actions for damages by such collisions a *Preliminary Act* must be filed as required by Ord. XIX., r. 28. (See the form, Chit. Forms, 13th ed., p. 657.)

(*z*) The right of shooting can be granted only by deed (*Bird* v. *Higginson*, 2 A. & E. 696; *Thomas* v. *Fredericks*, 10 Q. B. 775; *Adams* v. *Clutterbuck*, 10 Q. B. D. 403; 52 L. J. Q. B. 607); but an action will lie to recover money due for the use and enjoyment of such right as a debt due upon an executed consideration, without a conveyance by deed (*Ib.*; see "*Landlord and Tenant*," *ante*, p. 215), and such use and enjoyment of the right without a grant by deed will support an action for the breach of an agreement in writing not under seal to leave a good stock of game on the land at the end of the intended letting (*Adams* v. *Clutterbuck*, *supra*).

A reservation or exception of a right of shooting in a conveyance of land operates as a grant creating the right by the party taking the land under the conveyance. (See *Wickham* v. *Hawker*, 7 M. & W. 63; *Doe* v. *Lock*, 2 A. & E. 705, 743.)

An action of trespass will lie for the disturbance of a right of free warren *in alieno solo*. (See *Holford* v. *Bailey*, 8 Q. B. 1000, 1017; 13 *Ib.* 426, 445.)

A mere revocable licence to shoot over land may be granted verbally, but an agreement to let shooting, with a right to carry away the game shot, or part of it, gives a right to a *profit à prendre*, and is within the 4th section of the Statute of Frauds (*Webber* v. *Lee*, 9 Q. B. D. 315; 51 L. J. Q. B. 174; see "*Frauds, Statute of*," *post*, p. 663; and "*Leave and Licence*," *post*, p. 864).

A collateral verbal promise by a landlord to an intended lessee to keep down the game in consideration of such lessee accepting and executing the lease, was held enforceable by action (*Morgan* v. *Griffiths*, L. R. 6 Ex. 70; 40 L. J. Ex. 46; *Erskine* v. *Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 835).

and the defendant wrongfully disturbed the plaintiff's said right by shooting and killing game on the said land.

2. The defendant intends, unless restrained from so doing, to continue and repeat the disturbance complained of.

Particulars of plaintiff's title:—[*State them.*]

Particulars of the disturbance by the defendant:—[*State them.*]

Particulars of damage:—[*State them.*]

The plaintiff claims:—

(1.) —— damages.

(2.) An injunction restraining the defendant, his servants and agents, from continuing or repeating the disturbance complained of.

SLANDER OF TITLE (*a*).

Claim for an Injunction and Damages in respect of a Publication defamatory of the Machines manufactured and sold by the Plaintiff, and upon the Plaintiff as such Manufacturer and Seller.

1. The plaintiffs were and are manufacturers of machines for the purpose of ——, and for some time prior to the publication of the [circular] hereinafter complained of, manufactured and sold large numbers of the said machines, and acquired a great reputation in respect thereof. The defendants were and are manufacturers of machines for the same purpose.

2. On and about the —— ——, 19—, the defendants in a [circular] dated that day falsely and maliciously wrote and published of and

---

The provisions of s. 3 of the Ground Game Act, 1880, avoiding agreements or covenants in leases interfering with the tenant's right to kill and take ground game, do not invalidate an agreement by which an occupier who is entitled otherwise than by the Act to kill and take ground game lets to a third party the sole right of killing and taking game (*Morgan* v. *Jackson*, [1895] 1 Q. B. 885; 64 L. J. Q. B. 462) but they do invalidate an agreement by a landlord with his tenant to compensate him for damage to crops if he leave the ground game unshot (*Sherrard* v. *Gascoigne* [1900] 2 Q. B. 279; 69 L. J. Q. B. 720). In *Hannam* v. *Mockett*, 2 B. & C. 934, it was held that an action would not lie for disturbing the plaintiff's rookery (cf. *Read* v. *Edwards*, 17 C. B. N. S. 245, 258). As to disturbance of a decoy for wild fowl by firing near to it, see *Carrington* v. *Taylor*, 11 East, 571; and as to a disturbance of game by a nuisance on adjoining land, see *Ibbotson* v. *Peak*, 3 H. & C. 644; 34 L. J. Ex. 118.

(*a*) This action lies to recover compensation for special damage sustained by reason of the speaking, or writing, and publishing slander of the plaintiff's title to property (*Malachy* v. *Soper*, 3 Bing. N. C. 371). Whether the words were spoken or written, no action lies for damages unless actual damage has been sustained; and the same rule applies to actions claiming an injunction only (see *White* v. *Mellin*, [1895] A. C. 154; 64 L. J. Ch. 308, and cases cited *infra*).

The statement constituting the slander must be false; it must have been spoken or published maliciously, and must have occasioned the damage sued for. A statement made *bonâ fide* and under a reasonable belief of its truth, by a person having an interest in the matter, is not actionable (*Pitt* v. *Donovan*, 1 M. & S. 639; *Brook* v.

concerning the said machines manufactured and sold by the plaintiffs and in disparagement and depreciation thereof the words following, that is to say:—[*Here set out the words complained of.*]

3. The defendants by the said words meant, and were understood by the persons to whom the same were published to mean:—[*Here set out any necessary innuendo.*]

4. The defendants published the said words to *E. F.*, of ——, and *G. H.*, of ——, and to many other persons using or likely to use the plaintiff's said machines. The plaintiff cannot, until after discovery, give particulars of the said other persons (*b*).

5. The plaintiffs by the said publication have been greatly injured in their business and in the sale of their said machines, inasmuch as they have lost the sale of machines which they otherwise would have had, and have in consequence lost the profit on such machines, and have been damaged.

Particulars (*c*):—[*Here set out particulars of the special damage claimed.*]

6. As a further cause of action the defendants falsely and maliciously

---

Rawl, 4 Ex. 521; 38 L. J. Q. B. 327; *Steward* v. *Young*, L. R. 5 C. P. 122; 39 L. J. C. P. 85; *Dicks* v. *Brooks*, 15 Ch. D. 22, 39; 49 L. J. Ch. 812; *Dunlop Tyre Co.* v. *Maison Talbot*, 20 Times Rep. 579; 52 W. R. 254).

The words complained of must be set out in the statement of claim as in ordinary actions of slander. (See *Gutsole* v. *Mathers*, 1 M. & W. 495; and *ante*, p. 364.)

A right of action for slander of title will usually survive to the executors of the person injured. (See *Hatchard* v. *Mège*, 18 Q. B. D. 771; 56 L. J. Q. B. 397.) It is not an action for "slander" within the 21 Jac. 1, c. 16, s. 3, but an action on the case for special damage. (See "*Limitation, Statutes of*," *post*, p. 873; *Law* v. *Harwood*, Cro. Car. 140; *Browne* v. *Gibbons*, 1 Salk. 206; *Hatchard* v. *Mège*, *supra*.)

An action will lie for the actual damage caused by false statements, whether written or verbal, disparaging another's goods, published maliciously without lawful occasion or just excuse, either intended to cause, or likely to cause damage, such as that produced. (See *Evans* v. *Harlow*, 5 Q. B. 624; *White* v. *Mellin*, [1895] A. C. 154; 64 L. J. 308; *Hubbuck* v. *Wilkinson*, [1899] 1 Q. B. 86; 68 L. J. Q. B. 34; *Linotype Co.* v. *British Empire Co.*, 81 L. T. 331, H. L.; *Alcott* v. *Millars Karri, Limited*, C. A., 91 L. T. 722.) But it is not unlawful for a trader to puff his own goods, or the goods in which he trades, or even to do so in comparison with the goods of other people (*Ib.*; *Young* v. *Mackrae*, 3 B. & S. 264; 32 L. J. Q. B. 6), and it would appear that where he does not defame his rival's goods as bad in themselves, or as unfit for the purpose for which his rival sells them, he is not liable for the damage he so causes, even if his statements are untrue and made maliciously, though it may be otherwise if he with knowledge of their falsity publishes statements not merely that they are inferior to his goods, but that they are bad in themselves. (See *White* v. *Mellin*, *supra*, at p. 179; *Hubbuck* v. *Wilkinson*, *supra*, and *Hatchard* v. *Mège*, *supra*; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535.) See further, "*Injunction*," *ante*, p. 413; "*Defamation*," *ante*, p. 366.

As to actions for threats of legal proceedings for alleged infringement of patents, see the Patents, &c. Act, 1883, s. 32; *ante*, p. 461; and as to actions for denying the plaintiff's title to a trade-mark, see *Hatchard* v. *Mège*, *supra*; *post*, p. 496.

(*b*) The plaintiff may be ordered to give particulars of the persons to whom and the occasions on which the words were published (*Roche* v. *Meyler*, [1896] 2 Ir. R. 35).

(*c*) The plaintiff must give particulars of damage. (See *Roche* v. *Meyler*, [1896] 2 Ir. R. 35.)

printed and published the said [circular] in the manner and at the times aforesaid of and concerning the plaintiffs, and of and concerning them as manufacturers and sellers of —— machinery.

7. In addition to the meanings mentioned in paragraph 3 hereof the defendants meant by the said words that the plaintiffs obtained and attempted to obtain orders for their said machines by making false and misleading representations with respect to them; that they persuaded persons to purchase such machines by means of false and misleading representations and by false guarantees, although after experience in the working of such machines such purchasers who had been so persuaded found the said machines to be useless.

8. By the said publication the plaintiffs have been greatly injured in their reputation and in their reputation as manufacturers and sellers of —— machinery and have suffered damage and in particular the damage mentioned in paragraph 5 hereof.

The plaintiffs claim :—

(1.) An injunction to restrain the defendants, their servants and agents, from continuing to publish libels or slanders concerning the plaintiffs' machines or concerning the plaintiffs themselves, and particularly from printing and distributing circulars in the form hereinbefore mentioned or any circulars similar thereto.

(2.) £1,000 damages.

Support of Land (*d*).

(*d*) Where the surface of land belongs to one person, and the subjacent soil and minerals to another, the owner of the surface is entitled, *primâ facie*, to a natural right of support by the subjacent strata (*Humphries* v. *Brogden*, 12 Q. B. 739; *Smart* v. *Morton*, 5 E. & B. 30; 24 L. J. Q. B. 260; *Rowbotham* v. *Wilson*, 8 E. & B. 123; 8 H. L. C. 348; 27 L. J. Q. B. 61; 30 L. J. Q. B. 49; *Dalton* v. *Angus*, 6 App. Cas. 740; 50 L. J. Q. B. 689; *Dixon* v. *White*, 8 App. Cas. 833). The owner of land is also entitled to a right of support for his land by the adjacent land as a natural incident to his property, independently of grant or prescription (*Humphries* v. *Brogden*, *supra*; *Backhouse* v. *Bonomi*, 9 H. L. C. 503; 34 L. J. Q. B. 181; *Dalton* v. *Angus*, *supra*; *Birmingham Corporation* v. *Allen*, 6 Ch. D. 284; 46 L. J. Ch. 673). These rights, however, may be qualified or altogether abandoned by statute, express reservation, grant, or covenant, or by prescription (*Rowbotham* v. *Wilson*, *supra*; *Murchie* v. *Black*, 19 C. B. N. S. 190; 34 L. J. C. P. 337; *Eadon* v. *Jeffcock*, L. R. 7 Ex. 379; 42 L. J. Ex. 36; *Aspden* v. *Seddon*, L. R. 10 Ch. 394; 44 L. J. Ch. 359; *Aspden* v. *Seddon*, 1 Ex. D. 496; 46 L. J. Ex. 353; *Gill* v. *Dickinson*, 5 Q. B. D. 159; 49 L. J. Q. B. 262; *Consett Waterworks Co.* v. *Ritson*, 22 Q. B. D. 318, 702).

The support to which an owner of land is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural undisturbed state was sufficient to afford the requisite support (*Corporation of Birmingham* v. *Allen*, 6 Ch. D. 284; 46 L. J. Ch. 673).

The natural right of the owner of land to support from the adjacent land only extends to the land in its natural unincumbered state, and not with the additional

weight of buildings erected thereon (*Dodd* v. *Holme*, 1 A. & E. 493; *Humphries* v. *Brogden*, 12 Q. B. 743; *Wyatt* v. *Harrison*, 3 B. & Ad. 871; *Dalton* v. *Angus*, 6 App. Cas. 740; 50 L. J. Q. B. 689). But a right to support from adjacent or subjacent land for the additional weight of buildings on land may be acquired as an easement by twenty years' uninterrupted enjoyment or otherwise. (*Ib.*; *Partridge* v. *Scott*, 3 M. & W. 220; *Brown* v. *Robins*, 4 H. & N. 186; 28 L. J. Ex. 250; *Hunt* v. *Peake*, 1 Johns. 705; 29 L. J. Ch. 785; *N. E. Ry. Co.* v. *Elliot*, 29 L. J. Ch. 808; *Tone* v. *Preston*, 24 Ch. D. 739; 53 L. J. Ch. 40). It would appear that such a right is within the Prescription Act (2 & 3 Will. 4, c. 71), s. 2, cited "*Ways*," *post*, p. 947 (*Dalton* v. *Angus*, 6 App. Cas. 740; 50 L. J. Q. B. 689; *Tone* v. *Preston*, *supra*). Although the owner of land may be entitled to a right of support for the natural surface, without any right of support for additional buildings, he cannot acquire a prescriptive right to support for buildings independently of a right of support for the surface (*Rowbotham* v. *Wilson*, 6 E. & B. 593; 8 *Ib.* 123; 8 H. L. C. 348; 25 L. J. Q. B. 362; 27 *Ib.* 61; 30 *Ib.* 49). The owner of the land may maintain an action for a disturbance of the natural right to support for the surface, notwithstanding buildings have been erected thereon, provided the weight of the buildings did not cause the injury (*Brown* v. *Robins*, *supra*; *Stroyan* v. *Knowles*, 6 H. & N. 454; 30 L. J. Ex. 102).

Mere possession is sufficient to support an action against a stranger who interferes with the support of a building by the adjacent land (*Jeffries* v. *Williams*, 5 Ex. 792; *Bibby* v. *Carter*, 4 H. & N. 153; 28 L. J. Ex. 182; see note (*f*), *infra*).

It is doubtful whether an owner of land has any natural right to have the support of subterranean percolating water for his land (*Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81; *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; 38 L. J. Ex. 126; *Jordeson* v. *Sutton Gas Co.*, [1899] 2 Ch. 217; 68 L. J. Ch. 457; *Trinidad Asphalte Co.* v. *Ambard*, [1898] A. C. 594; 68 L. J. P. C. 114), and it has been held that the right of an adjoining owner to drain his land for its better use for ordinary purposes is paramount to any claim to have the support of the percolating water (*Popplewell* v. *Hodkinson*, *supra*; *Jordeson* v. *Sutton Gas Co.*, *supra*).

If the land of an owner is supported by a bed of wet sand or running silt, his neighbour has no right to withdraw the sand or silt, and if in withdrawing the water he withdraws such sand or silt also, he is liable (*Jordeson* v. *Sutton Gas Co.*, *supra*; *Trinidad Asphalte Co.* v. *Ambard*, *supra*).

Damage is part of the gist of an action for wrongful interference with a right of support (*Backhouse* v. *Bonomi*, *supra*; *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127; 55 L. J. Q. B. 529; see *post*, p. 918).

It has been held that, to support this action, the plaintiff must show that the damage sustained has been appreciable (*Smith* v. *Thackerah*, L. R. 1 C. P. 564; 35 L. J. C. P. 275); but it is clear that any substantial subsidence of the plaintiff's land caused by the acts complained of is sufficient damage to support the action, without proof of any pecuniary damage (*Attorney-General* v. *Conduit Colliery Co.*, (1895) 1 Q. B. 301; 64 L. J. Q. B. 207).

The damages recoverable include all such damage as has arisen, or is likely to arise, from a subsidence which has taken place before the commencement of the action, or even, it would seem, before the trial of the action; but the plaintiff cannot recover damages in respect of future apprehended subsidences which have not then taken place. (See *Darley Main Colliery Co.* v. *Mitchell*, *supra*; *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503; 60 L. J. Q. B. 392; *post*, p. 918; and see Ord. XXXVI., r. 58, cited *ante*, p. 56.)

An injunction may be obtained in a proper case to prevent threatened damage (*Siddons* v. *Short*, 2 C. P. D. 572; 46 L. J. C. P. 795; *Shafto* v. *Bolckow*, 34 Ch. D. 725; 56 L. J. Ch. 735; *Shelfer* v. *City Electric Co.*, [1895] 1 Ch. 287; 64 L. J. Ch. 216; *ante*, p. 413).

Claim for Damage caused by taking away the Support of the Plaintiff's Land by Mining (e).

1. The plaintiff was and is the owner and in possession of a field known as ——, situate at ——, in the county of ——.

2. The defendant, in or about ——, 19—, wrongfully excavated and worked [and has thenceforth continued to wrongfully excavate and work] certain coal mines under and near to the said field, and under the land adjoining the said field, and has dug out and removed coal and earth from the said mines, without leaving proper or sufficient vertical or lateral support for the said field, whereby the said field sank and gave way, and [the drainage thereof has been interrupted and water caused to accumulate thereon, and the herbage and crops thereon deteriorated and destroyed and whereby the said field] was and is greatly diminished in value.

Particulars of damage:—[*Set out the particulars.*]

3. [*If an injunction is also sought, add as follows, viz.*, The defendant continues, and threatens and intends to continue his said excavations and workings, and will thereby cause further damage to the plaintiff, unless he is restrained by injunction from so doing.]

The plaintiff claims:—

(1.) £—— damages.

[(2.) An injunction to restrain the defendant from so working in the future as to cause a further subsidence or injury to the said land.]

The like, with an Alternative Claim for Compensation under the Terms of a Mining Lease.

[*Proceed as in the preceding form to the end of paragraph* 2, *and add*]

3. In the alternative the plaintiff says that under a lease dated —— ——, 19—, he demised for a term not yet expired the mines and minerals under and near to the said land of the plaintiff to certain lessees, with power to them and their assigns to work the said mines and win the said minerals,

(e) Where the action is brought for damage done to land in its natural state by depriving it of the support of the subjacent or adjacent land, it is not necessary to state expressly the right to support, because it is naturally incident to the ownership of the land. (See *Humphries* v. *Brogden*, 12 Q. B. 739; *Hext* v. *Gill*, L. R. 7 Ch. 659, 713; 41 L. J. Ch. 761; *Gill* v. *Dickinson*, 5 Q. B. D. 159; 49 L. J. Q. B. 262; *Davis* v. *Theharne*, 6 App. Cas. 460; *Dixon* v. *White*, 8 App. Cas. 833; Ord. XIX., r. 25.) In such cases it lies upon the defendant to plead in his defence any facts which may displace the *primâ facie* title to support (*Ib.*).

Where the excavation which causes the subsidence is due to the wrongful working of his mines by A., and A. before the subsidence assigns his mines thus excavated to B., the liability for the subsidence lies upon A. (*Greenwell* v. *Beechburn Coal Co.*, [1897] 2 Q. B. 165; 66 L. J. Q. B. 643; *Hall* v. *Duke of Norfolk*, [1900] 2 Ch. 493; 69 L. J. Ch. 571).

subject to their paying compensation to the plaintiff for all damage or injury occasioned (inter alia) to the said land of the plaintiff by reason of the use or exercise of the said power. The defendant is [an assignee of] the said lessee and did the damage complained of in the exercise of the said power in working the said mines and winning the said minerals, and thereby has become liable to make compensation to the plaintiff in respect thereof, which the defendant has refused to do.

The plaintiff claims:—

£—— damages, or an account of the compensation payable to the plaintiff by the defendant under paragraph 3.

For forms of declarations, see Humphries v. *Brogden*, 12 Q. B. 740; *Smart* v. *Morton*, 5 E. & B. 30; 24 L. J. Q. B. 260; *Adams* v. *Lloyd*, 3 H. & N. 351; 27 L. J. Ex. 499.

The like, for Damage to the Plaintiff's Land and Buildings (*f*).

1. The plaintiff was [and is] possessed of a house and land known as ——, at ——, in the county of ——, and was [and is] entitled to have the said house, which was and is an ancient house, and the said land supported by the land near to and adjoining and under the same [*or, instead of stating that the house was an ancient houses, the plaintiff may state how he acquired the right of support, thus:*—The plaintiff was and is entitled to the said right of support for his said house by enjoyment thereof for twenty [*or*, forty] years before this action as of right and without interruption [*or*, by prescription from time immemorial, *or, as the case may be*]].

2. The defendant in or about ——, 19—, wrongfully excavated and worked [and has thenceforth continued to wrongfully excavate and work] certain coal mines near to and adjoining and under the said land and house of the plaintiff, and then dug out and removed [and has thenceforth continued to dig out and remove] the coal and other minerals near to and adjoining and under the said land and house without leaving proper or sufficient support for the said land and for the said house.

3. By reason of the premises the said land has sunk and given way, and the said house and the foundations thereof have sunk, and have become ruinous and cracked and dilapidated, and have been otherwise damaged [and are likely to fall], and the said land and house have been and are greatly diminished in value.

(*f*) The right to support for buildings not being a natural right (see note (*d*), *ante*, p. 483), the plaintiff, except where the defendant appears to be a mere wrongdoer must allege or show a title to such support (*Jeffries* v. *Williams*, 5 Ex. 792; *Bibby* v. *Carter*, 4 H. & N. 153; 28 L. J. Ex. 182); and a mere general averment of title to such support would not be sufficient, and he must show how he claims to be entitled, whether by long enjoyment, or by grant or statute, &c. (See *ante*, p. 339.)

4. [*If an injunction is also sought, add a paragraph to the effect of paragraph* 3 *of the form, ante*, p. 485.]

Particulars of damage :—

For a like form, alleging the Wrongful and Negligent Removal of Support from a Manufactory, see Angus v. *Dalton*, 3 Q. B. D. 85 ; 47 L. J. Q. B. 163.

The like, where the Working of the Defendant was under a Lease, giving him a Right to work Mines, subject to leaving sufficient Support for Houses built upon the Plaintiff's Land, and such Support was not left (*g*).

1. By a deed dated the —— ——, 19—, *A.*, who was then seised in fee and in possession of certain land known as ——, at ——, in the county of ——, and of the mines and minerals under the said land, granted and conveyed the said land to the plaintiff in fee, excepting and reserving the mines and minerals thereunder, with liberty to him and his assigns to search for, dig, work, win, get, and carry away the same, leaving always sufficient and proper support for the houses then being, or which should thereafter be, erected on the said land, and the said *A.* afterwards, by a deed dated the —— ——, 19—, leased to the defendant, for a term of years still unexpired, the said mines and minerals so excepted and reserved as aforesaid, with liberty to the defendant, his agents, and workmen, to search for, dig, work, win, get, and carry away the said mines and minerals, leaving always sufficient and proper support for the houses then being, or which should thereafter be erected, on the said land.

2. The defendant afterwards entered upon and worked the said mines and minerals under the said land, and dug out and carried away the coal, and soil, and minerals under the said land, without leaving sufficient or proper support for a house, called —— house, which, at the dates of the said deeds, was, and still is, upon the said land, or for a certain other house, called —— cottage, erected after the —— ——, 19—, and still

---

(*g*) If an owner of both the surface and the minerals beneath grants the minerals to A. with liberty to let down the surface, making compensation to the owner thereof for the damage done, and afterwards grants the surface to B., the latter may recover such compensation from A. for damage done by him to the surface (*Aspden* v. *Seddon*, 1 Ex. D. 496 ; 46 L. J. Ex. 353).

A deed or an Act of Parliament will not be construed as taking away a natural right to support without clear words showing that intention (*Davis* v. *Treharne*, 6 App. Cas. 460 ; 50 L. J. Q. B. 665 ; *Love* v. *Bell*, 9 App. Cas. 286 ; 53 L. J. Q. B. 257 ; *Bishop Auckland Co-op. Society* v. *Butterknowle Colliery Co.*, [1904] 2 Ch. 419 ; 73 L. J. Ch. 335.

A right of support may be annexed by implication to the grant of an easement, to the enjoyment of which such support is necessary (*London & North Western Ry. Co.* v. *Evans*, [1893] 1 Ch. 16).

existing on the said land, whereby the said two houses sank and the walls thereof were cracked and injured.

Particulars of damage :—

3. [*Continue as in the form on* p. 485, *paragraph* 3.]

For taking away from the Plaintiff's House the Support to which it was entitled from the adjoining House (*h*).

1. The plaintiff was [and is] possessed of a house, No. —, —— Street, ——, and was entitled to have his said house supported by the adjoining house, No —, —— Street, aforesaid. The plaintiff was and is entitled [&c., *as in paragraph* 1 *of the form, ante*, p. 486].

2. The defendant in or about the month of ——, 19—, wrongfully deprived the plaintiff of the support to his said house of the said adjoining house by pulling down the said adjoining house without propping up or otherwise [sufficiently] supporting or securing the plaintiff's said house, whereby the walls of the plaintiff's said house were cracked, weakened, and displaced, and the said house was otherwise damaged and injured.

Particulars :—

The like, against the Owner of the adjoining House and the Builders employed by him.

1. The plaintiff was and is the leaseholder of the house and premises called No. —, —— Street, —— Square, in the county of Middlesex.

2. The defendant *C. D.* is the owner of a house and land contiguous to the plaintiff's house. The defendants, Messrs, *E. F.* and Sons were, in the month of ——, 19—, employed by the defendant *C. D.* to pull down and rebuild his said house.

3. The plaintiff was entitled to have his said house supported by the said house of the defendant *C. D.* and by the soil and land subjacent

---

(*h*) As between adjoining houses, there is no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbour's property (*Chauntler* v. *Robinson*, 4 Ex. 163). Where houses are built by the same owner adjoining one another, and depending upon one another for support, and are afterwards conveyed to different owners, there exists, by a presumed grant and reservation, a right of support to each house from the adjoining ones (*Richards* v. *Rose*, 9 Ex. 218). A similar right, where adjoining houses are built by the separate owners of adjacent lands, may be acquired by twenty years' user. (See *Dalton* v. *Angus*, cited note (*d*), *supra*; *Hide* v. *Thornborough*, 2 C. & K. 250; *Solomon* v. *Vintners' Co.*, 4 H. & N. 585; 28 L. J. Ex. 370.) It has been held that no such right can be thus acquired by the owner of a house against the owners of the houses beyond the adjoining one (*Solomon* v. *Vintners' Co.*, 4 H. & N. 585; 28 L. J. Ex. 370; though see *Corporation of Birmingham* v. *Allen*, 6 Ch. D. 284; 46 L. J. Ch. 673; and *Dalton* v. *Angus*, 6 App. Cas. at p. 827). See further, *ante*, p. 447.

and adjacent to the plaintiff's said house. Such right was acquired by enjoyment of the support for over twenty years.

4. The defendants in the course of pulling down and rebuilding the said house adjacent to the plaintiff's house wrongfully removed the support to which the plaintiff's house was entitled from the said adjacent house and the soil and land subjacent and adjacent thereto.

5. The defendants omitted properly to shore or prop up or otherwise secure or to take reasonable or proper precautions to support the plaintiff's said house.

6. In the alternative the plaintiff says that the defendants performed the said building operations negligently and carelessly.

Particulars :—[*state them.*]

7. In consequence of the premises the plaintiff's said house and the walls thereof sank and subsided and the walls cracked, parted, and gave way, and the plaintiff's said house was weakened and injured.

8. Owing to the said wrongful and negligent acts of the defendants the plaintiff has suffered damage by injury to her said house and to the furniture and effects therein [and the plaintiff has also lost the profit arising from letting lodgings in her said house since the month of ——, 19—, and was put to much trouble, inconvenience and expense.

Particulars of damage :—[*state them.*]

The plaintiff claims £1,000 damages.

For forms of declarations previous to the Judicature Acts, see Langford v. *Woods*, 7 M. & G. 625 ; *Wyatt* v. *Harrison*, 3 B. & Ad. 871 ; *Solomon* v. *Vintners' Co.*, 4 H. & N. 585 ; 28 L. J. Ex. 370.

Trade Disputes (*i*).

Claim for Damages and an Injunction against Persons who by Threats and Coercion procure the Plaintiff's Servants and Workmen to leave their Employment and his Customers to cease Dealing with him (*k*).

1. The plaintiff was at the times of the grievances hereinafter mentioned, and had for several years prior thereto been possessed of a stone quarry

(*i*) See "*Trade Unions*," *ante*, p. 304 ; "*Slander of Title*," *ante*, p. 481 ; "*Master and Servant*," *ante*, p. 432.

(*k*) The above claim is applicable to the case of a single defendant or to that of several. It will be observed that it neither alleges "malice" on the part of the defendants, nor "conspiracy," but it alleges damage to a lawful trade brought about by coercion of threats of violence and loss, which is a sufficient cause of action (*Garett* v. *Taylor*, 2 Rolle, 162 ; Cro. Jac. 567 ; cited, *Allen* v. *Flood*, [1898] A. C. 1, 130, 137 ; 67 L. J. Q. B. 119 ; *Tarleton* v. *M'Gawley*, 1 Peake N. P. 270).

at ——, which he worked by his servants and workmen, selling to his customers stone extracted therefrom.

2. The defendants, by wrongfully threatening with violence and loss the plaintiff's said servants and workmen, induced, coerced, and procured divers of his said servants and workmen to leave the plaintiff's service and to cease to work in his said quarry.

Particulars :—[*State particulars of the threats, giving as far as practicable dates, names and details, and particulars of the persons who so left his service, with dates and names.*]

3. The defendants further, by wrongfully threatening them with violence and loss, induced, coerced, and procured divers customers of the plaintiff in his said business to cease and abstain from buying stone from him and from dealing with him in his said business.

Particulars :—[*State particulars as under paragraph* 2.]

4. By reason of the premises the plaintiff has been seriously injured in his said business and lost profits which he would otherwise have made.

Particulars :—[*State particulars of injury and loss of profits.*]

5. The defendants threaten and intend to continue in the manner aforesaid, and in similar ways to injure the plaintiff in his said business.

The plaintiff claims :—

(1.) Damages.

(2.) An injunction restraining the defendants, their servants and agents, from continuing the acts complained of and from the commission of the said or of similar acts.

Claim for wrongfully and maliciously inducing the Servants or Customers of the Plaintiff to break their Contracts with the Plaintiff (*l*).

The plaintiff has suffered damage from the defendant wrongfully and maliciously inducing and procuring the servants [*or*, customers] of the plaintiff to break their contracts with the plaintiff.

Particulars :—[*State particulars, showing how they were induced, what the contracts were, and what the damages are.*]

Thus where a person, to prevent certain negroes from going to the plaintiff's vessel to trade with the plaintiff, fired upon them, and so stopped them from going to trade, it was held that the plaintiff was entitled to recover damages from such person (*Tarleton* v. *M'Gawley*, *supra*).

(*l*) It is an actionable wrong to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference (*Quinn* v. *Leathem*, [1901] A. C. 495, 510; 70 L. J. P. C. 76; *Read* v. *Society of Stonemasons*, [1902], 2 K. B. 732, 740; 71 L. J. K. B. 994; *Glamorgan Coal Co.* v. *South Wales Miners Federation*, [1903] 2 K. B. 545, 570, 573; 72 L. J. K. B. 933; affirmed in D. P. [1905] A. C. 239; 74 L. J. K. B. 525).

Claim for Damages to Trade by a Conspiracy in pursuance of which unlawful means are used (*m*).

1. The plaintiff at the times of the grievances hereinafter-mentioned was carrying on business as a —— at ——, and had for many years carried on the said business.

2. The defendants wrongfully and maliciously conspired and combined amongst themselves to procure, cause and induce the customers of the plaintiff in his said business to cease to deal with him and not to continue dealing with him in his said business, and to procure, cause and induce his servants employed by him in his said business to leave his service and to abstain from continuing therein.

3. The defendants, in pursuance of such conspiracy and combination,

---

(*m*) The above claim shows a conspiracy to injure, carried out by unlawful means and causing injury to the plaintiff, and consequently states a clear cause of action. (See *Quinn* v. *Leathem*, [1901] A. C. 495, 505, 511 ; 70 L. J. P. C. 76 ; and see *Mogul Co.* v. *Macgregor*, [1892] A. C. at pp. 37, 52 ; 61 L. J. Q. B. 295.) Similar conduct on the part of one or more persons would, it seems, without any allegation of conspiracy give a right of action where there are threats of violence, or where there is coercion of an unlawful character. (See *ante*, p. 489.) But, where there is no conspiracy and no use of unlawful means, it is thought that an action will not lie for damage done by inducing persons to abstain from making new contracts with the plaintiff, even though the damage is intentionally and maliciously inflicted. (See *Mogul Co.* v. *Macgregor*, 23 Q. B. D. 598 ; [1892] A. C. 25 ; 58 L. J. Q. B. 465 ; 61 *Ib.* 295 ; *Allen* v. *Flood*, [1898] A. C. 1, 121, 171 ; 67 L. J. Q. B. 119.)

To conspire maliciously, that is, intentionally and without just cause or excuse, to injure the trade of another, is an actionable wrong if it inflicts damage on that other. (See *Gregory* v. *Duke of Brunswick*, 6 M. & G. 953 ; *Temperton* v. *Russell*, [1893] 1 Q. B. 715, 729, 731 ; 82 L. J. Q. B. 412, as explained in *Quinn* v. *Leathem*, and see *Quinn* v. *Leathem*, [1901] A. C. 495, 506, 510, 519 ; 70 L. J. P. C. 76.)

The ground of the action would appear to be, either that the acts done in combination, even if not in themselves unlawful, as acts or threats of violence or other obviously unlawful acts, become, because done by or under the sanction of a combination, acts of unlawful coercion, or that the conspiracy to injure is, of itself, an unlawful act. (See *Ib.*, *South Wales Miners Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239, 252 ; 74 L. J. K. B. 525 ; and Chalmers-Hunt on Trade Unions, pp. 82, 98, 99.)

Thus it would seem that to cause workmen to give in their notices to their employer, and at the termination of the period of notice leave their employment, or to procure persons to abstain from contracting or dealing with another, may, where this is caused by such a conspiracy, give rise to an action, even though no act or threat of violence, and no obviously unlawful act, is used to carry out the conspiracy (*Ib.* ; and see 2 Sm. L. C., 11th ed., p. 531).

For the above meaning of "maliciously," see *Allen* v. *Flood*, [1898] A. C., at pp. 75, 84 ; *South Wales Miners Federation* v. *Glamorgan Coal Co.*, *supra*.

If unlawful acts, such as watching or besetting contrary to s. 7 of the Conspiracy and Protection of Property Act, 1875, are made use of to carry out the joint purpose, and damage ensues, an action for damages is maintainable, and if necessary an injunction to prevent the continuance or repetition of the acts of wrong complained of, or the commission of similar acts of wrong may be granted. (See *Quinn* v. *Leathem*, *supra* ; *Lyons* v. *Wilkins*, [1899] 1 Ch. 255 ; 68 L. J. Ch. 146 ; *Walters* v. *Green*, [1899] 2 Ch. 696 ; 68 L. J. Ch. 730.)

wrongfully and maliciously, by threats and coercion, procured, caused and induced divers of the said customers of the plaintiff to cease to deal with him in his said business and not to continue dealing with him therein.

Particulars :—[*State the particulars.*]

4. Further, the defendants, in pursuance of such conspiracy and combination, wrongfully and maliciously, by threats of violence and of the infliction of loss on them, and by coercion, procured, caused and induced divers of the said servants of the plaintiff, employed by him in his said business, to leave his service and to abstain from continuing therein.

Particulars :—[*State them.*

5. By reason of the premises the plaintiff was greatly injured in his said business and lost profits he otherwise would have made therein.

Particulars :—[*State them.*]

Claim for Damages and Injunction for inducing Persons to break Contracts and to refuse to contract with the Plaintiff (*n*).

1. The plaintiff is and was at the times hereinafter mentioned a mason and builder, employing workmen and carrying on business at ——. The defendants are and were respectively members and officers of the —— branches of certain associations or societies of workmen or mechanics (having branches at ——) and of a joint committee thereof established, to manage and control the affairs of such associations or societies at ——.

2. The plaintiff had prior to the wrongful acts of the defendants herein mentioned entered into a contract dated the —— ——, 19—, with Messrs. ——, of ——, for the supply by them to the plaintiff of a quantity of slate. The defendants, knowing that the said contract had been entered into as aforesaid, maliciously and wrongfully and with intent to injure the plaintiff procured and induced the said Messrs. —— to break their said contract and to refuse to perform the same, and the said Messrs. —— did by reason of such procurement and inducement break and refuse to perform such contract, whereby the plaintiff lost the benefit of the contract and suffered great damage and inconvenience.

3. The plaintiff subsequently entered into other contracts with certain other persons, viz., ——, ——, —— and ——, for the supply by the plaintiff to the said persons of certain materials on agreed terms, and the defendants with knowledge thereof maliciously and wrongfully and with intent to injure the plaintiff, procured and induced each of the said persons to break such contracts and not to perform the same, with the like result as in the preceding paragraph mentioned.

(*n*) This was the form of claim used in *Temperton* v. *Russell*, [1893] 1 Q. B. 715; 62 L. J. Q. B. 412; 69 L. T. 78. As to the necessary particulars, see *Temperton* v. *Russell*, 9 Times Rep. 318, 319.

4. The defendants further maliciously and wrongfully and with intent to injure the plaintiff procured and induced the said persons in the two preceding paragraphs referred to and other persons whose names are unknown to the plaintiff not to use the goods supplied by the plaintiff and not to enter into other contracts with the plaintiff, whereby the plaintiff has suffered great loss and damage.

5. Further and in the alternative the defendants, knowing that the plaintiff had entered into the contracts referred to in paragraphs 2 and 3 hereof, maliciously and wrongfully and with intent to injure the plaintiff procured and induced the workmen in the employ of the said persons who had contracted with the plaintiff as in the said paragraphs mentioned not to use goods supplied by or do work for or for the benefit of the plaintiff and to leave the service of their employers and break their contracts of service if their said employers performed their said contracts or entered into other contracts with the plaintiff. The defendants did the said acts and things for the purpose of injuring the plaintiff by preventing the said persons from performing their said contracts or from entering into other contracts with the plaintiff. The said employers by reason thereof broke their said contracts and refused to perform the same as aforesaid and refused to enter into other contracts with the plaintiff, whereby the plaintiff lost the benefit of the said contracts and has been unable to make new contracts or to sell materials and has suffered great loss and damage.

6. Further and in the alternative the defendants have maliciously and wrongfully and with intent to injure the plaintiff intimidated and coerced the said persons in paragraphs 2 and 3 hereof referred to to break their said contracts with the plaintiff, to the plaintiff's damage as aforesaid, and have further intimidated and coerced them not to enter into new contracts with the plaintiff, whereby the plaintiff has suffered the damage set out in the preceding paragraphs hereof. The defendants have also intimidated and coerced the workmen or some of them in the employ of the said persons to do the acts and things in the preceding paragraph hereof mentioned for the purpose and with the result in the said paragraph mentioned.

7. The plaintiff in the alternative says that the acts and things in the preceding paragraphs hereof complained of were done by some or one of the defendants with the authority of all the defendants.

8. Further and in the alternative the defendants have unlawfully and maliciously conspired together and with the other members of the said associations or societies and other persons (all whose names are unknown to the plaintiff) to do the acts and things in the preceding paragraphs hereof complained of with intent to injure the plaintiff and for the purposes mentioned in the said paragraphs, whereby the plaintiff has suffered the damage and inconvenience aforesaid.

The following are particulars of special damage suffered by the plaintiff

by reason of the breaches of contract referred to in paragraphs 2 and 3 hereof—

Loss on ——'s contract .. .. £

Loss on ——'s contract ... .

£

9. The plaintiff is apprehensive that the defendants will repeat the acts and things herein complained of unless they are restrained by this Honorable Court.

The plaintiff claims :—

(1.) £1,000 damages.

(2.) An injunction to restrain the defendants from doing the acts and things set out in paragraphs 2 to 8 hereof and to prevent a repetition thereof.

For similar forms, see Quinn v. *Leathem*, [1901] A. C. at p. 519 ; 70 L. J. P. C. at p. 78 ; *Giblan* v. *National Labourers' Union*, [1903] 2 K. B. at pp. 606, 607 ; 72 L. J. K. B. at p. 908 ; *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K. B. at p. 546.

For a Claim for an Injunction to prevent Watching and Besetting Places to which Workmen were being brought to supply the places of the Plaintiff's workmen then on strike, see Walters v. *Green*, [1899] 2 Ch. at pp. 697, 698 ; 68 L. J. Ch. at p. 732.

Trade Libel.

See ante, p. 481.

Trade Marks (*o*).

Claim for the Infringement of a Trade Mark, claiming an Injunction and an Account or Damages.

1. The defendant has infringed the plaintiff's trade mark.

2. The trade mark is [*describe it*].

[*If the plaintiff is not the original proprietor of the trade mark, show shortly how his title is derived.*]

(*o*) The law relating to the registration of trade marks was amended and consolidated by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).

3. The following are the acts complained of, viz. :—
[*Set them out.*]

The plaintiff claims :—

(1.) An injunction to restrain the defendant, his servants and agents, from infringing the plaintiff's said trade mark, and in particular from [*stating any particular injunction sought*].

(2.) An account or damages.

This Act was modified in some points of detail by the Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), and by s. 6 of the Patents, &c. Act, 1885 (48 & 49 Vict. c. 63). As from the 1st April, 1906, these enactments are repealed as regards trade marks and replaced by the Trade Marks Act, 1905 (5 Edw. 7, c. 15), which then comes into force.

As to what is a trade mark capable of registration under the Patents, &c. Act, 1883, see s. 64 of that Act, as amended by s. 10 of the Patents, &c. Act, 1888, and ss. 72—74 of the Patents, &c. Act, 1883, as modified by ss. 14—16 of the Patents, &c. Act, 1888; and as to what are "invented words" within the meaning of the first-cited section, see *In re Apollinaris Co.*, [1891] 2 Ch. 186; *In re Farbenfabriken*, [1894] 1 Ch. 645; 63 L. J. Ch. 257; *In re Densham*, [1895] 2 Ch. 176.

The registration of a person as proprietor of a trade mark gives him the right to the exclusive use of the trade mark. (See the Patents, &c. Act, 1883, s. 76, and the Trade Marks Act, 1905, ss. 39, 40, 41; see *In re Wragg*, 29 Ch. D. 551; and see s. 87, cited "*Patents*," *ante*, p. 463.)

As regards trade marks capable of registration, no action will, subject to certain exceptions, lie for infringement thereof, unless they have been registered. (See "*Trade Marks*," *post*, p. 921.)

The common law action to recover damages for the infringement of a trade mark was based on the ground of fraud and intention to deceive (*Singer Co.* v. *Wilson*, 2 Ch. D. 434, 454; 3 App. Cas. 376; 45 L. J. Ch. 490; 47 *Ib.* 481; and see *Rodgers* v. *Nowill*, 5 C. B. 109; *Crawshay* v. *Thompson*, 4 M. & G. 357). But in equity the right to use a trade mark for trade purposes was regarded as a right of property (*Hall* v. *Barrows*, 4 De G. J. & S. 150; 33 L. J. Ch. 204; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523; 35 L. J. Ch. 53; *Singer Co.* v. *Wilson*, *supra*), and proof of knowledge or fraudulent intent was unnecessary in a suit to restrain infringement (*Ib.*; *Millington* v. *Fox*, 3 M. & Cr. 338; *Dixon* v. *Fawcus*, 3 E. & E. 537; 30 L. J. Q. B. 137; *Singer Co.* v. *Wilson*, *supra*). The Act of 1883 clearly recognises this right of property in the case of registered trade marks. (See s. 76, cited *supra*, and s. 87, cited *ante*, p. 463.) So does the Act of 1905. It appears, therefore, that damages for the infringement of a registered trade mark are recoverable without proof of fraudulent intent on the part of the defendant, at any rate, in cases where the plaintiff would be entitled to an injunction.

Where a trade mark has been infringed, the plaintiff, in an action for the infringement, may ordinarily claim an injunction, and also a declaration of his right to the exclusive use of the mark, and an account of the profits made by the defendant from wrongful sales of goods improperly marked with the trade mark. (See *ante*, p. 462; *Lever* v. *Goodwin*, 36 Ch. D. 1; *Oakey* v. *Dalton*, 35 Ch. D. 700; 56 L. J. Ch. 823.)

In general, the plaintiff is not entitled to have both damages and an account of profits. (See *Lever* v. *Goodwin*, *supra*; and "*Patents*," *ante*, p. 462.) Proof of the defendant having sold goods under the forged trade mark does not of itself entitle the plaintiff to recover the profits which he would have made by the sale of the same amount of goods, as it cannot be assumed that he would have sold them if the defendant had not (*Leather Cloth Co.* v. *Hirschfield*, L. R. 1 Eq. 299; 13 L. T. 427).

An action for infringing a trade mark is maintainable without any allegation or proof of special damage (*Rodgers* v. *Nowill*, 5 C. B. 109; *Blofeld* v. *Payne*, 4 B. & Ad.

TRESPASS.

I. TO THE PERSON (*p*).

Claim for Assault and Battery.

1. The plaintiff has suffered damage from the defendant on the —— ——, 19—, assaulting and beating him at ——, and [*here describe the*

410; and see *Singer Co.* v. *Wilson, supra; Braham* v. *Beachim*, 7 Ch. D. 848; 38 L. T. 640; *Reddaway* v. *Bentham Co.*, [1892] 2 Q. B. 639, 644).

If the trade mark used by the defendant is calculated to deceive purchasers, it is not usually necessary to allege or prove that any purchaser was actually deceived (*Reddaway* v. *Bentham Co., supra; Reddaway* v. *Banham*, [1896] A. C. 199; 65 L. J. Q. B. 381); but if the plaintiff alleges that "divers persons" were deceived thereby, he may be ordered to give particulars of this statement (*Humphreys* v. *Taylor Drug Co.*, 39 Ch. D. 693).

A right of action for slander of title to a trade mark survives to the executors of the proprietor (*Hatchard* v. *Mège*, 18 Q. B. D. 771; 56 L. J. Q. B. 397; *ante*, p. 482). So a right of action for damages or an account of profits in respect of an infringement of a trade mark survives to executors (*Oakey* v. *Dalton*, 35 Ch. D. 700; 56 L. J. Ch. 823).

If a trade mark is deceptive, as containing any material misrepresentation, the person using such mark is not entitled to any protection in respect of it. (See s. 73 of the Patents, &c. Act, 1883; and see *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523; 35 L. J. Ch. 53; *Morgan* v. *M'Adam*, 36 L. J. Ch. 228; *Ford* v. *Foster*, L. R. 7 Ch. 611; 27 L. T. 219; *Cheavin* v. *Walker*, 5 Ch. D. 850; 46 L. J. Ch. 486; *Eno* v. *Dunn*, 15 App. Cas. 252.)

One of the two joint owners of a trade mark may sue separately in respect of the injury to his separate interest by infringement (*Dent* v. *Turpin*, 2 J. & H. 139; 30 L. J. Ch. 495; *Sheehan* v. *G. E. Ry. Co.*, 16 Ch. D. 59; 50 L. J. Ch. 68; and see *ante*, p. 462).

As to the jurisdiction apart from statute to restrain the deceptive use of the name of a business, or of a trade article, and the cases in which it will be exercised, see *Lawson* v. *Bank of London*, 18 C. B. 84; 25 L. J. C. P. 188; *Colonial Life Assurance Co.* v. *Colonial Assurance Co.*, 33 Beav. 548; 33 L. J. Ch. 591; *Lee* v. *Haley*, L. R. 5 Ch. 155; 39 L. J. Ch. 284; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; 35 L. J. Ch. 352; *Singer Co.* v. *Wilson, supra; Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; 59 L. J. Ch. 631; *Saunders* v. *Sun Life Ass. Co.*, [1894] 1 Ch. 537; 63 L. J. Ch. 247; *Reddaway* v. *Banham, supra*.

An action will lie for fraudulently procuring the plaintiff to manufacture goods with the trade mark of another manufacturer, whereby the plaintiff was subjected to an action for an injunction, which was compromised (*Dixon* v. *Fawcus*, 3 E. & E. 537; 30 L. J. Q. B. 137).

(*p*) **Trespass to the Person.**]—Trespass to the person consists in any direct injury to the person, as a battery, an assault, or an imprisonment.

A *battery* is the unlawful beating of another. The least touching of another's person hostilely or against his will is a battery (*Rawlings* v. *Till*, 3 M. & W. 28; 3 Bl. Com. 120). It includes the striking another with a missile (*Pursell* v. *Horn*, 8 A. & E. 602). The act may be a trespass although unintentional (*Covell* v. *Laming*, 1 Camp. 497). Thus, for the result of misdirected force exercised by the defendant, in a place where the natural and probable result of misdirected force would be injury to others, the defendant may be responsible, though he did not intend to inflict injury (*Leame* v. *Bray*, 3 East, 599; *Winsmore* v. *Greenbank*, Willes, 577; *Dickenson* v. *Watson*, 2 Jones, 205; *Weaver* v. *Ward*, Hob. 134; *R.* v. *Salmon*, 6 Q. B. D. 79; and see *Stanley* v. *Powell*, [1891] 1 Q. B. 86; 60 L. J. Q. B. 52, where the plaintiff appears to have voluntarily

assault and battery complained of, as, for instance, striking him on the head with a stick and so cutting open his head and spoiling his hat and clothes].

2. In consequence the plaintiff was for a long time unable to transact

---

undertaken the risk). If the damage be the result of pure accident, without fault on the part of the defendant, or of some agency over which the defendant had no control, so as not to be his act, an action for trespass cannot be maintained (*Gibbons* v. *Pepper*, 1 Ld. Raym. 38; *Hall* v. *Fearnley*, 3 Q. B. 919; *Wakeman* v. *Robinson*, 1 Bing. 213; *Holmes* v. *Mather*, L. R. 10 Ex. 261; 44 L. J. Ex. 176; *Sadler* v. *South Staffordshire, &c. Tramways Co.*, 23 Q. B. D. 17; 58 L. J. Q. B. 421; *Stanley* v. *Powell*, *supra*; *Peacock* v. *Nicholson*, 11 Times Rep. 225). An action does not lie for a medical examination of the person submitted to under the influence of supposed authority, where the submission was not caused by force or threats, or by reasonable fear of violence (*Latter* v. *Braddell*, 50 L. J. Q. B. 166, 448). Touching a person for the purpose of calling his attention is not a battery (*Wiffin* v. *Kincard*, 2 B. & P. N. R. 471; *Coward* v. *Baddeley*, 4 H. & N. 478; 28 L. J. Ex. 260).

An *assault* is an attempt at a battery; a menacing attitude, as holding up a hand or stick to strike a person who is within reach thereof at the time, constitutes an assault (3 Bl. Com. 120; *Stephens* v. *Myers*, 4 C. & P. 349; *Read* v. *Coker*, 13 C. B. 850). A mere verbal threat of bodily hurt, if followed by actual damage through fear thereof, as by the interruption of a man's business, will, it is said, support an action of trespass (3 Bl. Com. 120).

An *imprisonment* consists in the restraint of the liberty of a person, as by confining him in a prison or within walls, or by forcibly detaining him in an open place (3 Bl. Com. 127). It must amount to a total restraint of his liberty for some period, however short. A partial obstruction of his will, as the prevention of his going in one direction or in all directions but one, does not constitute an imprisonment (*Bird* v. *Jones*, 7 Q. B. 742). A restraint by authority submitted to may be an imprisonment, although the person is not actually touched (*Grainger* v. *Hill*, 4 Bing. N. C. 212; *per* Willes, J., *Warner* v. *Riddiford*, 4 C. B. N. S. 180, 204). If a person order another, as a policeman, to take a third person, it is an imprisonment by the first as well as by the policeman, and is ground for an action of trespass against him (*Wheeler* v. *Whiting*, 9 C. & P. 262; *Stonehouse* v. *Elliott*, 6 T. R. 315). If he merely states the facts to a policeman (or other person), who takes the person on his own responsibility (*Gosden* v. *Elphick*, 4 Ex. 445; *Grinham* v. *Willey*, 4 H. & N. 496; 28 L. J. Ex. 242, where signing the charge sheet by direction of the police-constable was held not to amount to giving in charge), or if he procures a magistrate to issue a warrant for taking the person (*Brown* v. *Chapman*, 6 C. B. 365), it is no imprisonment or trespass by him. Where, however, a person puts the law in motion maliciously and without reasonable or probable cause, it is ground for an action for malicious prosecution (*Ib.*; *Barber* v. *Rollinson*, 1 C. & M. 330; see *ante*, p. 424). As to the distinction between an action for a trespass and one for a malicious prosecution, see *Austin* v. *Dowling*, L. R. 5 C. P. 534; 39 L. J. C. P. 260; *Chivers* v. *Savage*, 5 E. & B. 697; 25 L. J. Q. B. 85; *Brandt* v. *Craddock*, 27 L. J. Ex. 314; *Guest* v. *Warren*, 9 Ex. 379; and see *ante*, p. 424.

An action will lie for false imprisonment under colour of legal process where the process has been set aside for irregularity, &c. Both the party and his solicitor are in general liable for the trespass committed in such cases (*Bates* v. *Pilling*, 6 B. & C. 38; *Codrington* v. *Lloyd*, 8 A. & E. 449; *Jarmain* v. *Hooper*, 6 M. & G. 827; *Collett* v. *Foster*, 2 H. & N. 356; 26 L. J. Ex. 412; and see *Sowell* v. *Champion*, 6 A. & E. 407; *Blanchenay* v. *Burt*, 4 Q. B. 707; *Prentice* v. *Harrison*, 4 Q. B. 852). So also an action will lie for a trespass committed under legal process where the judgment and execution have been set aside as against good faith (*Brown* v. *Jones*, 15 M. & W. 191; and see *Cash* v. *Wells*, 1 B. & Ad. 375).

An act done by the command of the Crown is not a trespass (*Burton* v. *Denman*, 2

his business of a ——, and incurred expenses for nursing and for surgical and medical attendance.

Particulars of injuries :—

[*State the nature of the injuries.*]

Particulars of loss and damage :—

[*Give details of the loss and expenses incurred.*]

For False Imprisonment (*q*).

1. The defendant, on the —— ——, 19—, assaulted the plaintiff and gave him into the custody of a policeman upon a false charge, then made by the defendant, of [*state what the charge was, e.g.*, stealing ten yards of cloth], and caused the plaintiff to be imprisoned in the police office at —— for —— hours [until the plaintiff was brought in custody before a magistrate upon the said charge, and the defendant then procured the said magistrate to remand the plaintiff to prison upon the said charge until the —— ——, 19—, when he was again brought in custody before the said magistrate upon the said charge, when the said charge was dismissed].

Particulars :—

[*Here state any special damage, including any costs incurred in the plaintiff's defence.*]

See forms of claim for malicious prosecution, ante, pp. 424, *et seq.*

Against a Railway Company for Assault and False Imprisonment (*r*).

The defendants, by their servants, on the —— ——, 19—, assaulted the plaintiff at ——, and forcibly dragged him out of a railway carriage of the defendants, in which he was travelling as a passenger from —— to ——, for reward to the defendants, and wrongfully imprisoned him at —— station for —— hours.

Particulars of damage :—

Ex. 167) ; nor is the act of a judge acting judicially within his jurisdiction (*Dicas* v. *Lord Brougham*, 6 C. & P. 249).

A remand being the act of the magistrate cannot be charged as a substantive trespass, but may form the ground of a claim for malicious prosecution (*Holtum* v. *Lotun*, 6 C. & P. 726 ; *Lock* v. *Ashton*, 12 Q. B. 871).

As to the extent of the responsibility of masters for the acts of their servants, see *ante*, pp. 425, 434.

(*q*) See *post*, p. 926.

(*r*) See *ante*, pp. 360, 425.

Claim in an Action for Damages for Assault in forcibly ejecting the Plaintiff from a Public Meeting, brought against the Chairman of the Meeting and another person (*s*).

1. The plaintiff on the —— ——, 19—, upon the invitation of the —— Association, of which the plaintiff was a member, attended a public meeting held at [the Town Hall]——.

2. In the course of such meeting some of the persons present, including the defendants, expressed their approval of the opinions expressed by *G. H.*, one of the speakers, whilst the plaintiff expressed his disapproval thereof as he lawfully might.

3. Thereupon the defendant *C. D.*, who was the chairman of the said meeting, directed the defendant *E. F.* to remove and eject the plaintiff from the said meeting, and the defendant *E. F.* in accordance with such directions seized the plaintiff and with great force shoved and thrust him out of the said meeting [and out of the said Town Hall], flinging him with violence down the stairs, whereby he was thrown down and seriously bruised and injured.

Particulars of injuries :—

Particulars of damage :—

II. To Goods (*t*).

Claim for Trespass to Goods.

The defendant, on the —— ——, 19—, at ——, seized and took the plaintiff's goods, that is to say, a horse, and cart, and carried away the same and disposed of them to his own use.

Particulars :—

The plaintiff lost the value of the said horse and cart, viz., £——.

[*Add any special damage.*]

(*s*) See *post*, p. 931.

(*t*) **Trespass to Goods.**]—The ground of this action is an actual taking of, or any direct and immediate injury to goods (*Leame* v. *Bray*, 3 East, 593; *Fouldes* v. *Willoughby*, 8 M. & W. 540). An indirect interference with the owner's possession, as preventing him from having access to his goods, or locking the door of the defendant's room in which they are, will not support the action (*Hartley* v. *Moxham*, 3 Q. B. 701; and see *Thorogood* v. *Robinson*, 6 Q. B. 769); but a direct interference with the goods, such as a wrongful removal of them from one place to another, will support the action (*Kirk* v. *Gregory*, L. R. 1 Ex. D. 55).

In order to constitute a trespass, it is not necessary that the act should be intentional (*Corell* v. *Laming*, 1 Camp. 497; *Colwill* v. *Reeves*, 2 Camp. 575, 576).

Trespass will lie for goods taken under an illegal distress, as where no rent is due, or where the goods were privileged, but not for irregularities in dealing with goods under a distress. (See *ante*, p. 373.) Trespass will lie for beating the plaintiff's dog or horse (*Dand* v. *Sexton*, 3 T. R. 37; and see *Slater* v. *Swann*, 2 Str. 872). If a bailee of goods for a special purpose destroys them, it is a trespass (Co. Lit. 57 a; see *Countess*

The like.

The defendant, on the —— ——, 19—, at ——, seized and took possession of a china dinner service of the plaintiff, and broke and injured the same.

Particulars :—

See also forms, "*Conversion*," *ante*, p. 344, *and* "*Distress*," *ante*, p. 373.

See also forms of declaration under the old system—For a trespass in taking and distraining sheep, and putting them in an improper pound, whereby some died: Gates v. *Bayley*, 2 Wils. 313 ; *Wilder* v. *Speer*, 8 A. & E. 547 ; *Bignell* v. *Clark*, 5 H. & N. 485 ; 29 L. J. Ex. 257 ; *for taking and ill-using the plaintiff's dog, whereby it died: Bunch* v. *Kennington*, 1 Q. B. 679 ; *Dand* v. *Sexton*, 3 T. R. 37 ; *for taking the plaintiff's game: Churchward* v. *Studdy*, 14 East, 249 ; *for stopping and driving away the plaintiff's waggon: Holding* v. *Pigott*, 7 Bing. 465 ; *for taking away a tombstone from a churchyard, erected by the plaintiff: Spooner* v. *Brewster*, 3 Bing. 136.

---

of Salop v. *Crompton*, Cro. Eliz. 777, 784 ; and see *ante*, pp. 346, 347). One tenant in common of a chattel may maintain trespass against another for a destruction of it (2 Wms. Saund., 1871 ed., p. 110, *et seq.*).

The plaintiff in this action must at the time of the trespass have the present possession of the goods (*Ward* v. *Macauley*, 4 T. R. 489 ; *Young* v. *Hichens*, 6 Q. B. 606), either actual or constructive (*Smith* v. *Milles*, 1 T. R. 475, 480) ; or a legal right to the immediate possession, which is said in the case of personal property to draw to it the possession (*Balme* v. *Hutton*, 9 Bing. 471, 477 ; 2 Wms. Saund. 47 b ; *Johnson* v. *Diprose*, [1893] 1 Q. B. 512 ; 62 L. J. Q. B. 291). A trustee having the legal property may sue, though the beneficial interest and possession are in another (*Wooderman* v. *Baldock*, 8 Taunt. 676). A special or temporary right to the present possession, as that of a hirer of goods, or of a carrier, or bailee who has had actual possession, is sufficient to support an action of trespass (*Colwill* v. *Reeves*, 2 Camp. 575 ; 2 Wms. Saund. 47 e). And the person having such special property in the goods may maintain an action of trespass even against the absolute owner for a wrongful taking of the goods by the latter, and recover damages in respect of his limited interest (*Brierley* v. *Kendall*, 17 Q. B. 937 ; and see *Turner* v. *Hardcastle*, 11 C. B. N. S. 683 ; 31 L. J. C. P. 193).

Possession is *primâ facie* evidence of the right to possession, and therefore sufficient to maintain the action against a wrongdoer who cannot show a better right, or authority under a better title (*Elliott* v. *Kemp*, 7 M. & W. 312). Hence it is not open to a defendant in an action of trespass to set up a *jus tertii* under which he cannot justify, to rebut the title of the plaintiff who was in actual possession at the time of the injury complained of ; but where the plaintiff relies upon a mere right of property without actual possession, the defendant may rebut his title by showing a *jus tertii*. (See *post*, p. 933.) Where possession in fact is undetermined, possession in law follows the right to possess. (See Pollock & Wright on Possession, p. 24, and *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, 27 ; 63 L. J. Q. B. 513.)

By 3 & 4 Will. 4, c. 42, s. 29, in all actions of trespass *de bonis asportatis* the jury may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of seizure.

III. To Land (*u*).

Statement of Claim for Trespass to Land.

The defendant [by his servants and agents], on the —— ——, 19—, broke and entered certain land of the plaintiff called the Big Field at ——, in the county of ——, and depastured the same with cattle.

Particulars of damage:—

(*u*) **Trespass to Land.**]—A trespass to land is an entry upon or any direct and immediate act of interference with the possession of land; it is commonly described by the terms "breaking and entering." A trespass may be committed by driving a nail into the plaintiff's wall (*Lawrence* v. *Obee*, 1 Stark. 22); or by placing anything against his wall (*Gregory* v. *Piper*, 9 B. & C. 591); or by shooting into the plaintiff's land (*Pickering* v. *Rudd*, 1 Stark. 56, 58, where see also as to shooting over plaintiff's land); or by placing anything above and overhanging the land. (See *Corbett* v. *Hill*, L. R. 9 Eq. 671.) Where the plaintiff held apartments in the defendant's house as tenant of the defendant, and the defendant locked the outer door and refused the plaintiff access to the apartments, it was held that this was evidence of a breaking and entering of the apartments by the defendant (*Lane* v. *Dixon*, 3 C. B. 776).

The owner of animals, as horses, cattle, &c., in which property exists, is, as a rule, bound to keep them from straying into the land of another, and if they do so, it is, in general, actionable as a trespass, without any proof of negligence on the part of the owner; and he is liable for the ordinary consequences of the trespass, and for any damage not too remote; but is not liable for damage caused by a peculiar mischievous disposition of such animals, unless he had a previous knowledge of such disposition, or was guilty of negligence. (See *Star* v. *Rookesby*, 1 Salk. 335; *Cox* v. *Burbidge*, 13 C. B. N. S. 430; 32 L. J. C. P. 89; *Lee* v. *Riley*, 18 C. B. N. S. 722; 34 L. J. C. P. 212; *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10; 44 L. J. C. P. 24.) He is not liable to an adjoining occupier for their straying, where such straying was due to the defect of fences, which it was the duty of such adjoining occupier to maintain (2 Roll. Abr. Trespass, 565, pl. 3; *Child* v. *Hearn*, L. R. 9 Ex. 176; 43 L. J. Ex. 100); neither is he liable for an entry by his cattle on land adjoining the highway when being driven along the highway without any negligence on his part (*Goodwyn* v. *Cheveley*, 4 H. & N. 631; 28 L. J. Ex. 298; *Tillett* v. *Ward*, 10 Q. B. D. 17; 52 L. J. Q. B. 61). For injuries to cattle or sheep by dogs the owners of the dogs are, by 28 & 29 Vict. c. 60, responsible. (See *ante*, p. 439.) And as to trespasses by dogs, see *Read* v. *Edwards*, 17 C. B. N. S. 245; 34 L. J. C. P. 31; *Sanders* v. *Teape*, 51 L. T. 463; *Miles* v. *Hutchings*, [1903] 2 K. B. 714; 72 L. J. K. B. 775.

So if the owner of land collects and keeps upon his land water or filth, which escapes into or upon land of another, he is liable without proof of negligence (*Rylands* v. *Fletcher*, L. R. 3 H. L. 330; and see *ante*, p. 453).

An omission or nonfeasance does not constitute a trespass, as an omission to take away tithes from the plaintiff's land (*Shapcott* v. *Mugford*, 1 L. Raym. 187; and see *Lawrence* v. *Obee*, 1 Stark. 22). The continuance of a trespass is a fresh trespass, and is actionable in the same manner as the original commission of it (*Holmes* v. *Wilson*, 10 A. & E. 503); and notwithstanding a recovery for the original act (*Bowyer* v. *Cook*, 4 C. B. 236; and see *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J. C. P. 290).

A trespass is actionable though committed unintentionally or by mistake, as where the defendant mowed the plaintiff's grass by mistake for his own (*Basely* v. *Clarkson*, 3 Lev. 37).

The subject of the trespass must be real and corporeal property, as land or houses, or the vesture of land or herbage or pasture, to the exclusive possession of which the plaintiff is entitled, although he may have no other interest in the land (Co. Lit. 4 b; *Crosby* v. *Wadsworth*, 6 East, 602; *Burt* v. *Moore*, 5 T. R. 329; and see *Cox* v. *Glue*,

The like, claiming an Injunction.

1. The plaintiff was and is the owner and occupier of a farm called Highfield Farm, in the parish of ——, and county of ——, through which said farm a private road of the plaintiff, known as Highfield Lane, runs.

---

5 C. B. 533) ; an exclusive right of cutting turf (*Wilson* v. *Mackreth*, 3 Burr. 1824) ; or a several right of fishing or of free warren (*Smith* v. *Kemp*, Salk. 637 ; *Lord Ducre* v. *Tebb*, 2 W. Bl. 1151 ; *Holford* v. *Bailey*, 8 Q. B. 1000 ; 13 Q. B. 426 ; see *ante*, p. 396).

An incorporeal right is not the subject of a trespass ; as a right of common of pasture, or of fishing, or of digging turf, or a right of way, or a right to a pew or any easement annexed to land (*Wilson* v. *Mackreth*, 3 Burr. 1824 ; *Mainwaring* v. *Giles*, 5 B. & Ald. 356, 361 ; *Bryan* v. *Whistler*, 8 B. & C. 288, 292).

The owner of the soil may maintain an action of trespass against a person entitled to rights over the surface for acts of trespass not justified by the exercise of such rights (*Stammers* v. *Dixon*, 7 East, 200 ; *Earl Lonsdale* v. *Rigg*, 1 H. & N. 924 ; 26 L. J. Ex. 196). Thus the owner of land subject to a highway over it may maintain an action of trespass for any act amounting to a trespass upon it other than a user of it as a highway (*Lade* v. *Shepherd*, 2 Str. 1004 ; *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142, 147, 151, 156 ; 62 L. J. Q. B. 117 ; *Hickman* v. *Maisey*, [1900] 1 Q. B. 752 ; 69 L. J. Q. B. 511 ; and see *Goodtitle* v. *Alker*, 1 Burr. 133). So the owner of land subject to a public market held thereon (*Mayor of Northampton* v. *Ward*, 1 Wils. 107). The owner of the subsoil of land, of which the surface belongs to another, may maintain an action for a trespass to the subsoil (*Stammers* v. *Dixon*, 7 East, 203 ; *Cox* v. *Glue*, 5 C. B. 533).

The term "close" is often used to describe the place trespassed upon, and is applicable equally either to surface or subsoil, or to an open or an enclosed parcel of land ; if the plaintiff charging a trespass to his close proves a sufficient interest in the *locus in quo* to maintain an action of trespass, though he fails to prove exclusive possession of the soil for all purposes, he is entitled to recover (*Cox* v. *Glue*, 5 C. B. 533, 551 ; and see *Smith* v. *Royston*, 8 M. & W. 381).

In order to maintain an action for this wrong the plaintiff must have a present possessory title. The owner legally entitled cannot maintain an action of trespass before entry (*Litchfield* v. *Ready*, 5 Ex. 939 ; *Turner* v. *Cameron Coal Co.*, 5 Ex. 932 ; *Wallis* v. *Hands*, [1893] 2 Ch. 75 ; 62 L. J. Ch. 586) ; thus, the assignee of a term cannot maintain trespass before entry (*Ryan* v. *Clark*, 14 Q. B. 65 ; *Harrison* v. *Blackburn*, 17 C. B. N. S. 678 ; 34 L. J. C. P. 109) ; but an actual entry will relate back to the time of the legal right to enter, so as to support an action for a preceding trespass (*Barnett* v. *Guildford*, 11 Ex. 19 ; *Anderson* v. *Radcliffe*, E. B. & E. 806 ; 29 L. J. Q. B. 128 ; *Ocean Corp.* v. *Ilford Gas. Co.*, [1905] 2 K. B. 493 ; 74 L. J. K. B. 799) ; and upon entry the rightful owner may maintain an action against a party previously in possession (*Butcher* v. *Butcher*, 7 B. & C. 399).

Actual possession as owner is presumptive proof of property, and is sufficient against a mere wrongdoer who cannot show any better title or authority (*Graham* v. *Peat*, 1 East, 244 ; *Parnell* v. *Young*, 3 M. & W. 288 ; *Pugh* v. *Roberts*, 3 M. & W. 458 ; *Matson* v. *Cook*, 4 Bing. N. C. 392 ; *Browne* v. *Dawson*, 12 A. & E. 624 ; and see *Asher* v. *Whitlock*, L. R. 1 Q. B. 1). And it is not open to the defendant to set up a *jus tertii* to rebut the mere possessory title of the plaintiff, unless he acted under the authority of such right. (See *post*, p. 933, and *ante*, p. 500.)

The possession of a servant or agent is the possession of the owner (*Bertie* v. *Beaumont*, 16 East, 33), and seems not to entitle the servant to maintain trespass (*White* v. *Bailey*, 10 C. B. N. S. 227, 235 ; 30 L. J. C. P. 253, 256). A person who has contracted merely for board and lodging, and not for any interest in the premises, cannot maintain trespass. (See *Wright* v. *Stavert*, 2 E. & E. 721 ; 29 L. J. Q. B. 161.)

2. On the —— ——, 19—, the defendant, who wrongfully claimed to use the said road for his horses and carriages as a public highway, wrongfully entered the said private road with a cart and horse, and a large number of servants and workmen, and broke down and removed a gate which the plaintiff had caused to be placed across the said road, and wrongfully used the said road.

3. The defendant still persists in the said claim, and threatens and intends to repeat the acts hereinbefore complained of.

The plaintiff claims :—

(1.) £—— damages.

(2.) An injunction restraining the defendant, his servants and agents, from continuing or repeating any of the acts complained of.

For Trespass to a House and Seizure of Furniture therein.

1. The plaintiff is, and was on the —— ——, 19—, the occupier of a house No. —, —— Street, ——.

2. On the said —— ——, the defendants, by their servants and agents, broke and entered the plaintiff's said house, and seized and carried away

---

One joint tenant or tenant in common of land cannot maintain an action of trespass against another in respect of the exercise of any acts of ownership on the land by the latter, consistent with the right of the former (*Martyn* v. *Knowlys*, 8 T. R. 145 ; *Cubitt* v. *Porter*, 8 B. & C. 257 ; *Jacobs* v. *Seward*, L. R. 5 H. L. 464 ; 41 L. J. H. L. 221 ; and see Co. Litt. 200) ; but trespass lies by one tenant in common against another for an actual expulsion of the plaintiff from the land by the defendant (*Murray* v. *Hall*, 7 C. B. 441) ; or for digging up and carrying away the soil (*Wilkinson* v. *Haygarth*, 12 Q. B. 837) ; or for destroying buildings (*Cresswell* v. *Hedges*, 1 H. & C. 421 ; 31 L. J. Ex. 497) ; or for the occupation of a party-wall to the exclusion of the plaintiff (*Stedman* v. *Smith*, 8 E. & B. 1 ; 26 L. J. Q. B. 314 ; *Watson* v. *Gray*, 14 Ch. D. 192 ; 49 L. J. Ch. 243) ; but not for pulling down a party-wall for the purpose of rebuilding it (*Cubitt* v. *Porter*, 8 B. & C. 257).

As soon as a person is entitled to possession, and enters in the assertion of that possession, the law vests in him the actual possession to the exclusion of a wrongdoer who, but for such entry, would be deemed in possession (*Jones* v. *Chapman*, 2 Ex. 803, 821 ; *Lows* v. *Telford*, 1 App. Cas. 414, 426 ; *Ramsay* v. *Margrett*, cited *ante*, p. 500).

An owner of land, having a right of entry thereon, who by force enters upon his land and evicts an occupier wrongfully in possession thereof is not liable in damages to such occupier for the eviction and forcible entry, even though he may have rendered himself liable to be indicted for a forcible entry under 5 Ric. 2, Stat. 1, c. 8 (*Newton* v. *Harland*, 1 M. & G. 644 ; 1 Sc. N. R. 474 ; *Burling* v. *Read*, 11 Q. B. 904 ; *Davison* v. *Wilson*, 11 Q. B. 890 ; 17 L. J. Q. B. 196 ; *Pollen* v. *Brewer*, 7 C. B. N. S. 373 ; *Beddall* v. *Maitland*, 17 Ch. D. 174 ; 44 L. T. 248) ; though if in the course of such entry the owner of the land commits an independent wrong he would seem to be answerable for it in damages (see cases *supra*, and *Edwick* v. *Hawkes*, 18 Ch. D. 199 ; 50 L. J. Ch. 577 ; though see *Jones* v. *Foley*, [1891] 1 Q. B. 730 ; 60 L. J. Q. B. 464).

An action for trespass to land situate in a foreign country cannot be maintained in the Courts of this country (*Companhia de Moçambique* v. *British South African Co.*, [1893] A. C. 602 ; 63 L. J. Q. B. 70 ; see *post*, p. 863).

See further "*Injunction*," *ante*, p. 413. As to the action of trespass for *mesne* profits, see *ante*, p. 233.

therefrom the household furniture, stock-in-trade, goods, and effects of the plaintiff, which were therein.

3. By reason of the premises the plaintiff has been, and is wrongfully deprived of his said household furniture, stock-in-trade, goods, and effects [and prevented from carrying on his business as a ——, and deprived of the profits thereof].

Particulars of furniture, &c. :—

Particulars of loss and damage :—

For Trespass to Coal (*x*).

1. The plaintiff was and is the owner and occupier of certain land situate at ——, and of the mines and minerals thereunder.

2. The defendant, who is the occupier of a coal mine adjacent to the said land of the plaintiff, on and about and since the —— ——, 19—, broke and entered the said land of the plaintiff, and took and carried away large quantities of coal of the plaintiff from under the said land.

Particulars :—

For other forms of Claim for Trespass to Land, see Duke of Norfolk v. *Arbuthnot*, 4 C. P. D. 290 ; 41 L. T. 317 ; 48 L. J. C. P. 737 ; *Hurdman* v. *N. E. Ry. Co.*, 3 C. P. D. 168 ; 47 L. J. C. P. 368 ; 38 L. T. 339 ; *Cook* v. *Ward*, 2 C. P. D. 255 ; 46 L. J. C. P. 554 ; 36 L. T. 893 ; *Parrott* v. *Watts*, 37 L. T. 755 ; *Chapman* v. *Mid. Ry. Co.*, 5 Q. B. D. 167, 431.

See forms of declarations under the old system—For breaking and entering a landing stage moored to a wharf on a river : Eastern Counties Ry. Co. v. *Dowling*, 5 C. B. N. S. 821 ; 28 L. J. C. P. 202 ; *for a trespass to a*

(*x*) In the absence of fraud, negligence, or wilful trespass, the measure of damages for the wrongful working and abstracting of another's coal is, in general, the price at the pit's mouth, less the cost of severance or getting the coal and of bringing it to the surface ; but where the trespass is wilful, the cost of severance or getting is not, in general, allowed as a deduction (*Martin* v. *Porter*, 5 M. & W. 351 ; *Jegon* v. *Vivian*, L. R. 6 Ch. 742 ; 40 L. J. Ch. 389 ; *Trotter* v. *Maclean*, 13 Ch. D. 574, 586 ; 40 L. J. Ch. 389 ; *Taylor* v. *Mostyn*, 33 Ch. D. 226, 233 ; 55 L. J. Ch. 893 ; *Phillips* v. *Homfray*, 44 Ch. D. 694, 702 ; 59 L. J. Ch. 547 ; *Bulli Coal Co.* v. *Osborne*, [1899] A. C. 351 ; 68 L. J. P. C. 49). Where, however, the plaintiff owned a small patch of coal, which would never have been got but for the adjacent workings of the defendants, and damages for the innocent abstraction of this coal by the defendants were assessed at the value of the coal to the plaintiff, such assessment was sustained on appeal (*Livingstone* v. *Rawyard's Coal Co.*, 5 App. Cas. 25, 33, 42 ; see also *Taylor* v. *Mostyn*, *supra*). Where the defendants trespassed by depositing spoil from their colliery upon the land of another, the reasonable value of the land for tipping purposes, and not merely its diminished value to the plaintiff, was taken as the measure of damages (*Whitwham* v. *Westminster Coal Co.*, [1896] 1 Ch. 894 ; *Ib.* 2 Ch. 538 ; 65 L. J. Ch. 508 ; *Ib.* 601).

bridge: Harrison v. *Parker*, 6 East, 154; *for a trespass on the seashore with bathing machines: Blundell* v. *Catterall*, 5 B. & Ald. 268; *Mace* v. *Philcox*, 15 C. B. N. S. 600; 33 L. J. C. P. 124; *for a trespass to a growing crop of grass of the plaintiff: Crosby* v. *Wadsworth*, 6 East, 602; *for a trespass to the plaintiff's exclusive right of cutting turf from a close: Wilson* v. *Mackreth*, 3 Burr. 1824; *for a trespass to the subsoil of a close of the plaintiff, where the possession of the surface was in another: Cox* v. *Glue*, 5 C. B. 533; *for a trespass to a close of the plaintiff over which there was a highway: Lade* v. *Shepherd*, 2 Str. 1004; *and see Goodtitle* v. *Alker*, 1 Burr. 133; *for a trespass on a piece of land enclosed from the side of a highway: Brownlow* v. *Tomlinson*, 1 M. & G. 484; *for a trespass on the towing path of a canal: Monmouthshire Canal and Ry. Co.* v. *Hill*, 4 H. & N. 421; 28 L. J. Ex. 283; *for a trespass in throwing down a weir of the plaintiff appurtenant to his fishery: Williams* v. *Wilcox*, 8 A. & E. 314.

See for forms of declarations under the old system—For a trespass in breaking and entering the plaintiff's apartments: Lane v. *Dixon*, 3 C. B. 776; *for a trespass in entering the plaintiff's house, and continuing therein and hindering his business: Mayhew* v. *Suttle*, 4 E. & B. 347; *Percival* v. *Stamp*, 9 Ex. 167; 23 L. J. Ex. 25; *for entering the plaintiff's house in search for goods, which the defendant charged the plaintiff with having stolen: Bracegirdle* v. *Orford*, 2 M. & S. 77; *for a trespass in entering the plaintiff's house under an informal warrant, obtained under the Small Tenements Act*, 1 & 2 Vict. c. 47: *Delaney* v. *Fox*, 1 C. B. N. S. 166; *for breaking and entering plaintiff's house, and pulling it down whilst he and his family were within: Perry* v. *Fitzhowe*, 8 Q. B. 757; *Burling* v. *Read*, 11 Q. B. 904; *Jones* v. *Jones*, 1 H. & C. 1; 31 L. J. Ex. 506; *for a trespass in entering the plaintiff's house and taking away his stock-in-trade under an unfounded claim, stating special damage to his trade and credit: Brewer* v. *Dew*, 11 M. & W. 625; *by one tenant in common against another, for a trespass in destroying the property: Cresswell* v. *Hedges*, 1 H. & C. 421; 31 L. J. Ex. 497.

Waste (*y*).

Claim for Voluntary or Commissive Waste in a Dwelling-house.

The plaintiff has suffered damage by the defendant on or about the —— ——, 19—, wrongfully committing waste in a dwelling-house known as ——, at ——, whereof he was, under a deed dated

(*y*) There are two kinds of waste, viz., voluntary or commissive waste, and permissive waste; the former consisting in acts, as pulling down a house; the latter in omissions, as suffering a house to fall into decay.

An act which alters the nature of the thing demised is in general to be regarded as waste (*Darcy* v. *Askwith*, Hob. 234; *West Ham Charity* v. *East London Waterworks*, [1900] 1 Ch. 624; 69 L. J. Ch. 257).

It has been said that no act amounts to waste which is not injurious to the inheritance or reversion, either by diminishing the value of the estate, or by increasing the

—— ——, 19— [*or*, a written agreement dated —— ——, 19—, *or*, a verbal agreement made on the —— ——, 19—], tenant to the plaintiff from year to year [*or*, for a term of —— years from the —— ——, 19—, *or*, *as the case may be*], by pulling down and removing the doors, windows,

---

burden upon it, or by impairing the evidence of title (*Doe* v. *Earl of Burlington*, 5 B. & Ad. 507, 517; *Jones* v. *Chappell*, L. R. 20 Eq. 539, 540; 44 L. J. Ch. 658; *Tucker* v. *Linger*, 21 Ch. D. 18, 28; 51 L. J. Ch. 713).

Where trees are excepted out of a lease and the tenant cuts them down, it is not waste, but a trespass (*Goodright* v. *Vivian*, 8 East, 190). As to the distinction between waste and trespass, see *Lowndes* v. *Bettle*, 33 L. J. Ch. 451.

At common law the action for waste lay only against tenant by courtesy, tenant in dower, or guardian, but the liability to an action for damages for waste was extended to lessees for life or for years by the 52 Hen. 3, c. 23 (2 Inst. 145; *Greene* v. *Cole*, 2 Wms. Saund., 1871 ed., p. 644; *Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 611). The 6 Ed. 1, c. 5, gave special remedies for waste against tenants for life generally and against tenants for years, but the writ of waste given by that statute was abolished by the 3 & 4 Will. 4, c. 27, s. 36, and the statute itself has been repealed by the 42 & 43 Vict. c. 59.

It was formerly laid down that the 52 Hen. 3 applied to permissive as well as to commissive waste, and that, therefore, tenants for life under leases for life or lives, and tenants for years, were liable as such, and without any express obligation or contract to repair, &c., for permissive waste (see *Yellowly* v. *Gower*, 11 Ex. 274; 1 Wms. Saund., 1871 ed., p. 574; 2 *Ib.* p. 646), but this doctrine has been much questioned (see *Ib.*, and *Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 609), though it was adopted in a recent case as to the validity of a lease for years (see *Davies* v. *Davies*, 38 Ch. D. 499). An action for mere permissive waste will not lie at the suit of a remainderman against a tenant for life whose tenancy was created by a will or settlement not imposing on him any duty to repair, &c. (*Powys* v. *Blagrove*, 4 D. M. & G. 448; *Barnes* v. *Dowling*, 44 L. T. 809; *In re Cartwright*, 41 Ch. D. 532; 58 L. J. Ch. 590; *In re Parry*, [1900] 1 Ch. 160; 69 L. J. Ch. 190).

Where an express duty to repair, &c., is imposed on a tenant for life or years by the instrument creating his tenancy, he will, of course, be responsible for permissive waste arising from his neglect of such duty (*Woodhouse* v. *Walker*, *supra*; *In re Cartwright*, *supra*).

A tenant at will is not liable for permissive waste (*Harnett* v. *Maitland*, 16 M. & W. 257). It is an implied term of a tenancy, in the absence of express agreement, that the tenant shall use the premises in a tenant-like manner (*Standen* v. *Chrismas*, 10 Q. B. 135; and see "*Landlord and Tenant*," *ante*, p. 218), and that a tenant of a farm shall use it in a husbandlike manner (*Powley* v. *Walker*, 5 T. R. 373); but the tenant is not impliedly liable for reasonable wear and tear (*Torriano* v. *Young*, 6 C. & P. 8; and see *Martin* v. *Gilham*, 7 A. & E. 540). A tenant may be sued in an action for waste for which he is liable, notwithstanding he has covenanted with the plaintiff not to commit the waste complained of, and the plaintiff has also a remedy upon the covenant (*Kinlyside* v. *Thornton*, 2 Wm. Bl. 1111; *Torriano* v. *Young*, 6 C. & P. 8, 11); but proof of a mere breach of covenant not amounting to waste will not support the action (*Jones* v. *Hill*, 7 Taunt. 392); and the terms of the lease or covenant may restrict the liability for acts which would otherwise be waste (*Doe* v. *Jones*, 4 B. & Ad. 126; *Yellowly* v. *Gower*, 11 Ex. 274). The liability for waste may also be restricted by local usage or custom not excluded by the terms of the tenancy (*Honywood* v. *Honywood*, L. R. 18 Eq. 306; 43 L. J. Ch. 652; *Tucker* v. *Linger*, 21 Ch. D. 18; 8 App. Cas. 508; 51 L. J. Ch. 713; *Ib.* 941; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306). The liability for waste is also in some cases restricted by the Settled Land Act, 1882. (See ss. 29, 35.)

In order to maintain this action, the plaintiff must have a vested interest in the

and fixtures belonging to the same and affixed thereto, and carrying away the said doors, windows, and fixtures and disposing of the same to his own use.

Particulars :—

---

reversion at the time when the waste was committed; thus, an heir cannot sue for waste done in the life of his ancestor (2 Inst. 305; 2 Wms. Saund. 252; and see *Bacon* v. *Smith*, 1 Q. B. 345). It may be brought by him in the reversion or remainder for life or years, as well as in fee or in tail (2 Wms. Saund. 252 (a); *Woodhouse* v. *Walker*, *supra*).

The action may lie at the suit of one tenant in common against another, where one does waste against the will of the other (see *per* Littledale, J., in *Cubitt* v. *Porter*, 8 B. & C. 257, 268); but it does not lie where one cuts down trees fit to cut, reaps crops, or cuts grass for hay (*Martyn* v. *Knowlys*, 8 T. R. 145; *Jacobs* v. *Seward*, L. R. 5 H. L. 464; 41 L. J. C. P. 221). So, where there are tenants in common of a coal mine, one cannot sue the other for working the coal as for waste (*Job* v. *Potton*, L. R. 20 Eq. 84; 44 L. J. Ch. 262). By 4 & 5 Anne, c. 3 (c. 16, Ruff.), s. 27, joint tenants and tenants in common, and their executors and administrators, had a remedy given to them in the form of an action for an account. (See "*Account*," *ante*, p. 69.)

By Ord. XVI., r. 37, "In all cases of actions for the prevention of waste, or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest."

An action will lie at the suit of the reversioner for any act of commissive waste which is injurious to his reversion, whether committed by a stranger or by the tenant. (See *Attersoll* v. *Stephens*, 1 Taunt. 183.) As to such actions, see "*Reversion*," *ante*, p. 473.

There is a further branch of commissive waste termed *equitable* waste, formerly cognisable only in Courts of Equity, but which is now recognised in all Divisions of the High Court of Justice.

By s. 25 (3) of the Judicature Act, 1873, "An estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

Equitable waste consists in the doing, by a tenant for life whose tenancy is "without impeachment for waste," acts of destructive injury to the property to the detriment of the persons entitled in remainder (Addison on Torts, 7th ed., p. 416; *Baker* v. *Sebright*, 13 Ch. D. 179; 49 L. J. Ch. 65). It is equitable waste on the part of such tenant to cut down trees unfit for cutting, to the detriment of the property (*Chamberlayne* v. *Dummer*, 1 Bro. Ch. C. 160; 3 *Ib.* 548), or trees required for the shelter or ornament of a mansion-house (*Micklethwaite* v. *Micklethwaite*, 26 L. J. Ch. 721; *Wellesley* v. *Wellesley*, 6 Sim. 497; and see *Baker* v. *Sebright*, *supra*), or to commit any wanton or malicious act destructive of the property (*Aston* v. *Aston*, 1 Ves. sen. 265; *Duke of Leeds* v. *Lord Amherst*, 14 Sim. 357; *Bishop of London* v. *Web*, 1 P. Wms. 528).

A tenant in fee simple subject to an executory devise over may not commit equitable waste (*Blake* v. *Peters*, 31 L. J. Ch. 889; *Turner* v. *Wright*, Johns. 740; 2 De G. F. & J. 234; 29 L. J. Ch. 470); nor may a lessee for years without impeachment of waste commit acts destroying and causing lasting injury to the inheritance (*Bishop of London* v. *Web*, *supra*).

When an action for waste is brought during the term of the tenancy, the ordinary measure of damage is the diminution in value of the reversion by reason of the matters complained of (*Whitham* v. *Kershaw*, 16 Q. B. D. 613); but where an action is brought for waste to buildings, &c., and is commenced after the expiration of the term, the ordinary measure of damages is the amount required to put the premises into repair (*Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 609).

An injunction may in a proper case be claimed to prevent further or apprehended

For Permissive Waste in a Dwelling-house against a Tenant for Years, bound by the Terms of his Tenancy to Repair.

The plaintiff has suffered damage from the defendant on or about the —— ——, 19—, wrongfully permitting waste to a dwelling-house, known as ——, whereof he was under a deed dated —— ——, 19— [*or, as in preceding form*], tenant to the plaintiff for —— years from the —— ——, 19— [*or, as the case may be*], by suffering the same to become ruinous and in decay in the roof, walls, and timbers thereof for want of such needful and necessary repairing thereof as the defendant by the terms of his said tenancy was bound to do and effect.

Particulars :—

[The defects are as follows: *stating the same and giving such other particulars as the nature of the case may require.*]

For Voluntary Waste in Woods, Hedges, &c.

The plaintiff has suffered damage from the defendant on or about the —— ——, 19—, wrongfully committing waste to a farm, lands, and woods, at ——, whereof the plaintiff was under a deed dated the —— ——, 19— [*or, &c., see forms supra*], tenant to the defendant from year to year [*or, as the case may be*], by felling, lopping, topping, and shrouding the trees of the plaintiff there growing and being, and by rooting up and destroying the hedges and fences of the plaintiff there also growing and being.

Particulars :—

[*Give such details as to the acts and time as may be necessary.*]

For other forms of Pleadings in Actions for Waste, see Barnes v. *Dowling*, 44 L. T. 809 ; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, 309 ; *Meux* v. *Cobley*, [1892] 2 Ch. 255.

Water and Watercourses (*z*).

acts of commissive waste, but it is not the practice to grant an injunction against unimportant and trivial acts not affecting title, nor, in general, against permissive or ameliorating waste (*Castlemain* v. *Craven*, 22 Vin. 233 ; *Doherty* v. *Allman*, 3 App. Cas. 709 ; *Powys* v. *Blagrave*, 4 D. M. & G. 458 ; *In re Cartwright*, 41 Ch. D. 532 ; 58 L. J. Ch. 590 ; *Meux* v. *Cobley*, [1892] 2 Ch. 253), by which latter expression acts are denoted which are technically *waste*, but which in fact improve the property.

(*z*) The proprietor of land has a right to have the natural streams of water which run through or by his land run in their natural course and in their natural state

(*Wood* v. *Waud*, 3 Ex. 748, 775 ; *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839, 854 ; *Young* v. *Bankier Distillery Co.*, [1893] A. C. 691, 698).

Each riparian proprietor has a right to take the water from a natural stream as it flows past his land, for his ordinary purposes, such as the watering of his cattle, the use of his household, the watering of his garden, and the like, to a reasonable extent, and such use does not render him liable to any other proprietor who may, by reason of the diminution of the flow thereby caused, be injured (*Miner* v. *Gilmour*, 12 Moore, P. C. 156 ; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1 ; 36 L. J. Ex. 1 ; *Swindon Waterworks Co.* v. *Wilts Canal Co.*, L. R. 9 Ch. 451 ; L. R. 7 H. L. 696 ; 43 L. J. Ch. 393 ; 45 L. J. Ch. 638 ; *McCartney* v. *Londonderry Ry. Co.*, [1904] A. C. 301 ; 73 L. J. P. C. 73). He is further entitled to use it for manufacturing, or secondary, or extraordinary purposes connected with or incident to his land, and to dam up or divert the water, subject to the condition that he does not thereby sensibly diminish or alter the flow of the stream, or the quality or state of the water, so as to prejudice or injure any other riparian owner (*Ib.* ; *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. 155 ; 52 L. J. Q. B. 445 ; *Kensit* v. *G. E. Ry. Co.*, 27 Ch. D. 122 ; 54 L. J. Ch. 19 ; *Young* v. *Bankier Distillery Co.*, *supra* ; *Baily* v. *Clark*, [1902] 1 Ch. 649, 663 ; 71 L. J. Ch. 396).

These rights are not founded on a right of property in the water, nor on prescription, but they exist *ex jure naturæ* as incident to the property in the land (*Ib.* ; *Chasemore* v. *Richards*, 7 H. L. C. 349 ; 29 L. J. Ex. 81 ; *Swindon Waterworks Co.* v. *Wilts Canal Co.*, *supra* ; *Bradford Corp.* v. *Ferrand*, [1902] 2 Ch. 655 ; 71 L. J. Ch. 859). All riparian proprietors have these rights, and the right of each is subject to the same rights in the others (*Embrey* v. *Owen*, 6 Ex. 369). A riparian proprietor has no natural right to use the water for purposes foreign to, or unconnected with his riparian land, or to sell it to others for uses unconnected therewith (*Roberts* v. *Gwyfrai District Council*, [1899] 1 Ch. 583 ; *Ib.*, 2 Ch. 608 ; 68 L. J. Ch. 757 ; *McCartney* v. *Londonderry Ry. Co.*, *supra*).

The bed of a natural stream *primâ facie* belongs in severalty to the respective riparian proprietors *usque ad medium filum aquæ* ; but such proprietors have not the right of using it in a manner to interfere with the natural flow of the stream (*Bickett* v. *Morris*, L. R. 1 Sc. Ap. 47 ; and see *Crossley* v. *Lightowler*, L. R. 2 Ch. 478 ; 36 L. J. Ch. 584 ; *Orr-Ewing* v. *Colquhoun*, *supra* ; *Tilbury* v. *Silva*, 45 Ch. D. 98). The bed of a navigable tidal river belongs *primâ facie* to the Crown, so far at least as the tide flows (*Williams* v. *Wilcox*, 8 A. & E. 314 ; *Smith* v. *Andrews*, [1891] 2 Ch. 678) ; but the above-mentioned rights of riparian proprietors exist also in navigable tidal rivers, subject to the public rights of navigation and to any authority conferred by statute (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662 ; 46 L. J. Ch. 68). As to encroachments on the beds of such rivers, see *Att.-Gen.* v. *Lonsdale*, L. R. 7 Eq. 377 ; 38 L. J. Ch. 335 ; *Att.-Gen.* v. *Terry*, L. R. 9 Ch. 423 ; 29 L. T. 716.

Besides the rights to flowing water arising *ex jure naturæ* as above mentioned, other rights in excess of the natural rights of a riparian proprietor, and in derogation of the rights of the other riparian proprietors situated above or below the stream, may be acquired by grant or by prescription (*Bealey* v. *Shaw*, 6 East, 207, 214 ; *Acton* v. *Blundell*, 12 M. & W. 324, 353 ; *Carlyon* v. *Lovering*, 1 H. & N. 784 ; 26 L. J. Ex. 251 ; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590 ; 26 L. J. C. P. 148 ; *McIntyre* v. *McGavin*, [1893] A. C. 268, 273). Such rights are within the Prescription Act, 1832, s. 2, cited *post*, p. 947.

A riparian proprietor is entitled to an action for any injury to the above-mentioned natural or acquired rights, as by diverting the stream or by abstracting the water, or by obstructing or penning back its flow, or by fouling, or altering the quality of the water, unless it can be justified as a legitimate exercise by another riparian proprietor of his rights, or as an exercise of powers obtained by grant, or by prescription, or in some other lawful way. (See cases, *supra* ; *McIntyre* v. *McGavin*, [1893] A. C. 268.) That the wrongful acts, if continued, might ripen into a right is, in general, a sufficient ground for nominal damages, or for the intervention of the Court by injunction, even though no actual damage has been sustained (*Pennington* v. *Brinsop Hall Co.*, 5

Ch. D. 769; 44 L. J. Ch. 773; *Young* v. *Bankier Distillery Co.*, [1893] A. C. 691, 698; *McCartney* v. *Londonderry Ry. Co.*, [1904] A. C. at pp. 305, 313).

Known and defined streams of water flowing underground are, it is said, subject to the same rules as streams on the surface (*Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81, 85; *Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. 483; *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655; 71 L. J. Ch. 859). A landowner may absolutely appropriate water, whether on the surface or underground, not running in defined streams, as it passes through his land, and he may, by pumping, well-sinking, and other lawful operations on his own land, abstract such waters from his neighbour's land without thereby affording ground for action (*Ib.*; *Chasemore* v. *Richards*, *supra*; *Bradford* (*Mayor of*) v. *Pickles*, [1895] 1 Ch. 145; [1895] A. C. 587; 64 L. J. Ch. 101; *Ib.* 759).

Water percolating below the surface in no defined channel is said not to be the subject of property; it is rather to be considered as a common source, which everybody has the right to appropriate as far as he is able (*Ballard* v. *Tomlinson*, 29 Ch. D. 121; 54 L. J. Ch. 456). But an owner of land is liable to an action for fouling such water under his land and permitting it to escape in a foul state on to his neighbour's land (*Hodgkinson* v. *Ennor*, 4 B. & C. 229; 32 L. J. Q. B. 105; *Ballard* v. *Tomlinson*, *supra*).

If the owner of a mine pumps up water so that it is thereby caused to flow into an adjacent mine, he is liable to an action (*Baird* v. *Williamson*, 15 C. B. N. S. 376; 33 L. J. C. P. 101; *Young* v. *Bankier Distillery Co.*, [1893] A. C. 691); but where mineral workings have caused a subsidence of the surface, and a consequent flow of rainfall into an adjacent lower coalfield, the injuries, being entirely from gravitation and percolation, are not a valid ground for any claim for damages (*Wilson* v. *Waddell*, 2 App. Cas. 95; see further, "*Support of Land*," *ante*, p. 484). Lower land is subject to the natural servitude of receiving the flow of surface and percolating water from the higher land, and no action will lie for damages caused thereby, even if by ordinary agricultural draining operations carried out upon the higher land the mode of discharging such water is altered to the detriment of the lower land (*Ib.*).

An owner of land has, in general, a right to do anything he chooses on his own land with regard to the diversion or storage of water, provided that he does not allow or cause that water to go upon his neighbour's land so as to affect that land in some other way than the way in which it has been affected before, and does not interfere with any easement his neighbour may have (*West Cumberland Iron Co.* v. *Kenyon*, 11 Ch. D. 782; 48 L. J. Ch. 793).

If a landowner by artificial means brings water on to his land for his own purposes which would not naturally come there, he is, in general, bound at his peril to keep it on his land, and, if it escapes, he is *primâ facie* liable, even without negligence, for any damage thereby occasioned to his neighbour's land as by flooding his neighbour's mine (*Rylands* v. *Fletcher*, L. R. 3 H. L. 330; 37 L. J. Ex. 171; and see *Fletcher* v. *Smith*, 2 App. Cas. 781; S. C., *Smith* v. *Musgrave*, 47 L. J. H. L. 4; *West Cumberland Iron Co.* v. *Kenyon*, *supra*; *Nield* v. *L. & N. W. Ry. Co.*, L. R. 10 Ex. 4; 44 L. J. Ex. 15). But this liability, apart from negligence, does not exist where the escape of such water is proximately caused by the act of God or *vis major*, as by extraordinary floods which could not reasonably have been anticipated (*Nichols* v. *Marsland*, 2 Ex. D. 1; 46 L. J. Ex. 174; *Thomas* v. *Birmingham Canal Co.*, 43 L. T. 435; 49 L. J. Q. B. 851).

Where water is brought on to land by artificial means authorised by statute in execution of powers given or duties imposed by statute, it would seem that the above common law liability is not, in most cases, imposed on the persons or company thus bringing the water on to the land; and that they are not, in general, liable for the escape of such water without negligence; but in each case the extent of the liability is to be determined on a consideration of the wording and purpose of the enactment. (See *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430; *Dixon* v. *Met. Board of Works*, 7 Q. B. D. 418; 50 L. J. Q. B. 772; *Evans* v. *M. S. & L. Ry. Co.*, 36 Ch. D. 626; *Green* v. *Chelsea Waterworks Co.*, 70 L. T. 547; 10 Times Rep. 259.)

Claim for Disturbance of the Plaintiff's Natural Right to the Flow of a Stream by Obstructing and Diverting the Water (a).

1. The plaintiff was [and is] possessed of land, known as ——, in the county of ——, in the parish of ——, and was [and is] entitled by his

A right to discharge an artificial stream of water into another person's land may be acquired by grant or prescription. A proprietor of land having acquired a right to discharge pure water into his neighbour's land, has no right to discharge water in a polluted state, and would be liable for so doing (*Wood* v. *Waud*, 3 Ex. 748; *Magor* v. *Chadwick*, 11 A. & E. 571). Under this head may be included the right to discharge water and drainage, through channels, gutters, and drains, on to the adjacent property, as in *Thomas* v. *Thomas*, 2 C. M. & R. 35; also the right to discharge the rain-water from the eaves of buildings, as in *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J. C. P. 290. In the case of an artificial stream, no right to compel the continuance of its flow is necessarily acquired by riparian proprietors against the person discharging it (*Arkwright* v. *Gell*, 5 M. & W. 203; *Greatrex* v. *Hayward*, 8 Ex. 291; 22 L. J. Ex. 137; *Gaved* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353; *Brymbo Water Co.* v. *Lesters*, 8 R. 329), or against the proprietors through whose land it flows (*Wood* v. *Waud*, 3 Ex. 748).

In the case of artificial streams, water rights can only be acquired by prescription, grant, or contract, as the riparian proprietors do not, *ex jure naturæ*, possess in regard thereto the ordinary rights which riparian proprietors have in the case of natural streams (*Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148; *Rameshur Singh* v. *Pattuk*, 4 App. Cas. 121; *Kensit* v. *G. E. Ry. Co.*, 23 Ch. D. 566; 27 Ch. D. 122; 52 L. J. Ch. 608; 54 L. J. Ch. 19). But an artificial watercourse may have been made originally under such circumstances, and may have been so used, as to give all the rights that the riparian proprietors would have had if it had been a natural stream (*Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136; *Irimey* v. *Stocker*, L. R. 1 Ch. 396; 35 L. J. Ch. 467; *Holker* v. *Porritt*, L. R. 8 Ex. 107; 10 *Ib.* 159; *Roberts* v. *Richards*, 50 L. J. Ch. 297; *Baily* v. *Clark*, [1902] 1 Ch. 649; 71 L. J. Ch. 396). The right to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created (*Rameshur Singh* v. *Pattuk, supra*; *Holker* v. *Porritt, supra*; *Greatrex* v. *Hayward*, 8 Ex. 293).

A natural stream of water flowing in an ancient artificial channel is, in general, subject to the same rules of law as the natural stream in its natural channel (*Beeston* v. *Weate*, 5 E. & B. 986; 25 L. J. Q. B. 115; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; 36 L. J. Ex. 1; *Holker* v. *Porritt*, L. R. 8 Ex. 107; L. R. 10 Ex. 59; 42 L. J. Ex. 85; 44 L. J. Ex. 52). As to what amounts to abandonment of water rights, see *Crossley* v. *Lightowler*, L. R. 2 Ch. 478; 36 L. J. Ch. 584.

A mere variation in the mode of enjoying riparian rights does not prevent an action for injury caused by their infringement (*Holker* v. *Porritt, supra*; *Pennington* v. *Brinsop Coal Co.*, 5 Ch. D. 769; 46 L. J. Ch. 773; and see *Saunders* v. *Newman*, 1 B. & Ald. 258; *Baxendale* v. *McMurray*, L. R. 2 Ch. 790).

As to the effect of a grant of "watercourses, &c.," see *Taylor* v. *St. Helens*, 6 Ch. D. 264; 46 L. J. Ch. 857; *Bunting* v. *Hicks*, 7 R. 293; 70 L. T. 455; and *Northam* v. *Hurley*, 1 E. & B. 665; 22 L. J. Q. B. 183. As to implied grants and reservations, see *Wheeldon* v. *Burrows*, 12 Ch. D. 31; 48 L. J. Ch. 853; and the Conveyancing Act, 1881, s. 6.

As to actions by reversioners, see "*Reversion*," *ante*, p. 473, and s. 8 of the Prescription Act, 1832.

(*a*) Where the right claimed by a riparian proprietor is not one claimed *ex jure naturæ*, or where it is in excess of his natural rights, the ground upon which the claim is founded, whether by grant or prescription at common law or under the statute (2 & 3 Will. 4, c. 71), should be stated in the statement of claim (see *Harris* v. *Jenkins*, 22 Ch. D. 481; 52 L. J. Ch. 437; *Pledge* v. *Pomfret*, 74 L. J. Ch. 357); but where the claim is founded

riparian rights as [owner and] occupier of the said land to the flow of a stream called —— to and through the said land.

2. The defendant, in the month of ——, 19— [and thenceforth until, &c., *state how long the acts complained of were continued*], wrongfully obstructed the said stream and diverted [large quantities of] the water thereof away from the said land of the plaintiff, and thereby greatly diminished the quantity of water which flowed down the said stream to and through the said land, and deprived the plaintiff of the flow of water to which he was entitled as aforesaid.

3. [*If an injunction is also claimed, state any material facts in support of such claim, as, for instance*, The defendant still continues such obstruction and diversion of the water of the said stream as aforesaid, and threatens and intends to continue the same, unless restrained by injunction from so doing.]

Particulars :—

[*State particulars of the acts complained of, and of the damage sustained therefrom by the plaintiff.*]

The plaintiff claims :—

(1.) £—— damages.

(2.) [An injunction to restrain the defendant, his agents, servants, and workmen, from continuing or repeating any of the wrongful acts hereinbefore complained of, and from obstructing or diverting the water of the said stream in any manner so as to interfere with the plaintiff's said rights.]

---

upon a right as a riparian owner *ex jure naturæ*, the above forms would be sufficient, since they show sufficiently the circumstances giving the right claimed, and to allege its infringement (see "*Common*," *ante*, p. 339 ; Gale no Easements, 7th ed., pp. 561 *et seq.*).

Where a general allegation of title on the part of the plaintiff embarrasses the defendant, the latter would be entitled to have the statement of claim amended, or particulars given, so as to show the mode in which the right is claimed (*Harris* v. *Jenkins*, *supra*) ; but when the plaintiffs stated that their predecessors under a specified deed became the owners of a mill and watercourse, and that the watercourse had ever since belonged to the mill, particulars were refused (*Pledge* v. *Pomfret*, *supra*). Where the title is set forth, it should be stated accurately (*Fentiman* v. *Smith*, 4 East, 107 ; *Coryton* v. *Lithebye*, 2 Wms. Saund. 362 ; *Hewlins* v. *Shippam*, 5 B. & C. 221 ; *Whaley* v. *Laing*, 2 H. & N. 476 ; 27 L. J. Ex. 422). Where the right was claimed as an acquired right by reason of the possession of a mill, and the evidence showed only a natural right to the flow of the stream through the premises, the variance was, under a former system of pleading, held to be material, as it might affect the defence (*Frankum* v. *Earl Falmouth*, 2 A. & E. 452).

The right should be described accurately in respect of its extent, with the restrictions and qualifications, if any, to which it is subject. It would be immaterial for the right to be stated more narrowly than it really exists, provided the statement is wide enough to cover the disturbance complained of (*Duncan* v. *Louch*, 6 Q. B. 904 ; *Tebbutt* v. *Selby*, 6 A. & E. 786). The right should not be stated too largely ; but, where the allegation of the right is divisible, it would seem that the plaintiff may have a limited judgment for a divisible part of the right alleged, though he fails to prove the residue. (See *Giles* v. *Groves*, 12 Q. B. 721 ; and see *ante*, p. 340.) If a person having the right to send clean water through the drain of another chooses to send dirty water, every

For Disturbance of a Prescriptive Right to the Flow of Water for a Mill (*b*).

1. The plaintiff was at the times hereinafter mentioned [and still is] possessed of certain land at ——, and of a water-mill erected thereon, and then was [and still is] entitled by prescription to have the benefit of the flow of the water of a stream [*or*, watercourse], known as —— [which flowed to and through the said land], and to divert and use the said water for the purpose of working his said mill.

2. The rights above mentioned were acquired by prescription from time immemorial [the plaintiff being tenant of the said land and mill with the appurtenances under a lease granted to him on the —— of ——, 19—, by E. F., who was seised thereof in fee, and who, and whose predecessors in title, enjoyed from time immemorial the said rights for themselves and their tenants, *or*, *as the case may be*].

In the alternative the plaintiff says that he acquired the said rights under the Prescription Act, 1832, by uninterrupted enjoyment as of right for twenty or in the alternative forty years before this action.

3. [*The same as paragraph* 2 *of the last form down to the words* "to and through the said land," *then proceed as follows*:—and deprived the plaintiff of the benefit to which he was entitled as aforesaid, and hindered and prevented him from diverting or using the said water for the purpose aforesaid, and thereby caused great loss and damage to the plaintiff.]

4. [*See paragraph* 3 *of the last form.*]

Particulars:—

The acts complained of are as follows, viz. [*state them*].

The loss and damage suffered by the plaintiff are as follows, viz. [*state the damage sustained by the plaintiff, including any special damage by loss of business, &c.*].

The plaintiff claims, &c. [*see the last form*].

For Penning back the Water of a Stream on to the Plaintiff's Land (*b*).

1. The plaintiff was [and is] possessed of a meadow called ——, adjoining the river ——, at —— ; and was and is entitled [by his riparian rights] as [owner and] occupier of the said meadow to have the said river flow by and away from the said meadow without obstruction or hindrance.

2. The defendant, on or about the —— ——, 19—, wrongfully obstructed the flow of the said river by erecting and continuing a wall or dam in the bed of the said river, about —— yards lower down the said river than the said

particle of the water may be stopped because it is dirty (*Cawkwell* v. *Russell*, 26 L. J. Ex. 34). A right for the passage of water and soil does not include the refuse from manufactures (*Chadwick* v. *Marsden*, L. R. 2 Ex. 285; 36 L. J. Ex. 177).

(*b*) See preceding note, *ante*, p. 511.

meadow, and thereby penned and forced back the water of the said river, so that it was hindered and prevented from flowing by and away from the said meadow as it of right ought to have done, and overflowed and flooded the said meadow and occasioned great loss and damage to the plaintiff.

3. [*See paragraph* 3 *of the first form.*]

Particulars :—[*State particulars as in the first form.*]

The plaintiff claims, &c. [*see the first form*].

See forms of declaration under the old system—For causing a watercourse to flow with unusual violence : Williams v. *Morland*, 2 B. & C. 910 ; *for diminishing the force of the stream : Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369 ; 26 L. J. Ex. 57 ; *against a waterworks company for taking more water than they were authorised to take : Penarth Harbour Co.* v. *Cardiff Waterworks Co.*, 7 C. B. N. S. 816 ; 29 L. J. C. P. 230 ; *for throwing materials into the stream which lodged on the bed of the stream in the plaintiff's lands : Murgatroyd* v. *Robinson*, 7 E. & B. 391 ; 26 L. J. Q. B. 233 ; *Carlyon* v. *Lovering*, 1 H. & N. 784 ; 26 L. J. Ex. 251.

By a Riparian Proprietor, for a Nuisance by Pollution of the Water in a River, claiming an Injunction and Damages (*c*).

1. The plaintiff is the owner [*or*, lessee] and occupier of a farm known as ——, through which there runs a river known as ——.

(*c*) The pollution of a stream with refuse or filth to the injury of riparian proprietors, or others having a right to the beneficial use of the water in its ordinary state, is a nuisance, for which damages may be obtained (*Murgatroyd* v. *Robinson*, 7 E. & B. 391 ; 26 L. J. Q. B. 233).

Where there is continuing damage, or a threatened continuance of damage, an injunction may be claimed, either in addition to damages or as the sole remedy. (See "*Injunction*," *ante*, p. 413 ; *Pennington* v. *Brinsop Hall Coal Co.*, 5 Ch. D. 769 ; 46 L. J. Ch. 773 ; *Att.-Gen.* v. *Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146 ; 38 L. J. Ch. 265 ; *Chapman* v. *Auckland Union*, 23 Q. B. D. 294 ; 58 L. J. Q. B. 504.)

The fact that a stream is fouled by others as well as by the defendant is no answer to an action to restrain the fouling by him (*Crossley* v. *Lightowler*, L. R. 2 Ch. 478 ; 36 L. J. Ch. 584 ; *Att.-Gen.* v. *Leeds Corporation*, L. R. 5 Ch. 583 ; 39 L. J. Ch. 711).

Where a local board under the Public Health Act, 1875 (38 & 39 Vict. c. 55), did no act themselves to cause a nuisance, but merely neglected their duty of providing a proper and satisfactory system of drainage, such neglect of duty was held to be no ground of action by an individual injured for damages or injunction, the remedy being by complaint to the Local Government Board, whose order may be enforced by mandamus (*Glossop* v. *Heston Local Board*, 12 Ch. D. 102 ; 48 L. J. Ch. 736 ; *Pasmore* v. *Oswaldtwistle*, [1898] A. C. 387 ; 67 L. J. Q. B. 635. See "*Mandamus*," *ante*, p. 428).

A special jurisdiction is given by the Rivers Pollution Acts, 1876, 1893, to the County Courts to restrain persons or corporations from knowingly permitting sewage to flow into streams. (See *Kirkheaton Local Board* v. *Ainley*, [1892] 2 Q. B. 274 ; 61 L. J. Q. B. 812 ; *Yorkshire West Riding Council* v. *Holmfirth*, [1894] 2 Q. B. 842 ; 63 L. J. Q. B. 485.)

2. The defendant or persons in his employ pollute the water in the said river by passing into the same the refuse of the defendant's dye works at ——, situate higher up the said river.

Particulars of damage :—

The plaintiff claims :—

(1.) An injunction to restrain the defendant, his servants and agents, from sending from the said dye works into the said river any matter so as to pollute the waters thereof, or to render them unwholesome or unfit for use, to the injury of the plaintiff [*or, as the case may be*].

(2.) Damages in respect of the said nuisance.

(*See R. S. C.*, 1883, *App. C., Sect. VI., No.* 12.)

Claim against a Waterworks Company for Wrongfully Erecting a Reservoir and Polluting the Water of a Stream.

1. The plaintiff is a silk dyer and in and for some years prior to the year 19— was the owner and possessor of certain lands and of certain dye-works and premises erected thereon at —— in ——.

2. The said lands were situate on the banks of a natural stream called the river ——, which flowed past them, and the said dye-works and premises were erected close to the said stream.

3. The plaintiff prior to and during part of the year 19— carried on his trade and business of a silk dyer on the said lands at the said dye-works and premises.

4. The plaintiff for the purposes of his said trade and business used and was entitled to use the water of the said river —— ; he was entitled to have the use of it for the said purposes in its natural state and without being polluted and disturbed and made muddy and impure as hereinafter mentioned.

5. For the purposes of the plaintiff's trade and business it was necessary that the said water should be and except so far as natural causes rendered it otherwise he was entitled to have the use of it pure and soft and free from mud, silt, sand and other impurities.

6. The defendants are the —— Waterworks Company, which company was incorporated by the statute — & — Vict. c. — for the purpose of taking water from certain springs called the —— Springs for supplying the inhabitants of —— with pure water and for other purposes. These powers were extended by The —— Waterworks Act, 18— (— & — Vict. c. —), with which the Waterworks Clauses Act, 1847 (10 &11 Vict. c. 17), and the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), were incorporated, and again by the statute — & — Vict. c. —.

7. The defendants in the year 19— constructed and built and erected a reservoir and embankment and certain other works higher up the said river

than the plaintiff's said lands, dye-works, and premises, and kept and continued the same so built and erected during all the times hereinafter referred to.

8. The defendants improperly and negligently omitted to clean and keep clean the said reservoir, and allowed the same to become and remain unclean and foul.

9. The defendants wrongfully omitted to provide proper means for filtering and purifying the water which flowed away from the said reservoir, and they managed the same in a negligent and improper manner and continued to do so during all the times hereinafter referred to.

10. By the acts and omissions in the 8th and 9th paragraphs hereof mentioned, or one or more of them, the defendants wrongfully polluted and disturbed the water of the said river and rendered and made it muddy, hard and impure, and full of mud, silt, and sand, and other impurities to a much greater extent than it would naturally have been.

11. In consequence thereof the said water became and was rendered and continuously thenceforth remained unfit for the purposes of the plaintiff's said trade and business, and he was unable to use and lost and was deprived of the use of it for the said purposes and thereby was hindered and prevented from carrying on his said trade and business in so free a manner as he would otherwise have done and became and was unable to carry it on properly, and it was greatly diminished and decreased, and he lost the profits and advantages which he would otherwise have derived from it, and his said lands, dye-works and premises were greatly diminished in value, and eventually, in ——, 19—, he was obliged to sell and did sell the same for a much less price than he would otherwise have obtained for the same.

12. If the defendants claim a right to construct, build, and erect the said reservoir, embankment, and works, and continue the same under the powers given to them by the said or any other Acts of Parliament, the plaintiff says that the said Acts gave them no power to construct, build, and erect the same so as to produce the effect in the 10th and 11th paragraphs hereof mentioned, and that the defendants exceeded the powers given them by the said Acts or did not comply with the conditions subject to which they were granted.

Particulars under paragraphs 8, 9, 11 and 12 are as follows :—

Particulars of damage are as follows :—

The plaintiff claims £2,000.

See forms of declarations under the old system—For fouling the water of plaintiff's mill: Hall v. *Lund*, 1 H. & C. 676 ; 32 L. J. Ex. 113 ; *Hodgkinson* v. *Ennor*, 4 B. & S. 229 ; 32 L. J. Q. B. 231 ; *for fouling the water of a stream, which the plaintiffs used to supply a town: Stockport Waterworks Co.* v. *Potter*, 7 H. & N. 160 ; 31 L. J. Ex. 9 ; *by a reversioner for discharging into the stream water impregnated with noxious mineral matter :*

Wright v. *Williams*, 1 M. & W. 77 ; *for polluting an artificial watercourse : Whaley* v. *Laing*, 2 H. & H. 476 ; 3 *Ib.* 675 ; 26 L. J. Ex. 327 ; 27 *Ib.* 422 ; *against a Board of Works under the Metropolis Management Act*, 1855, *for polluting a stream by drainage : Cator* v. *Board of Works of Lewisham*, 5 B. & S. 115 ; 34 L. J. Q. B. 74.

WAYS (*d*).

Claim for obstructing a Private Right of Way (*d*).

1. The plaintiff was and is the owner [*or*, lessee under a lease from *E. F.*, dated the —— ——, 19—] and occupier [*or*, was and is possessed] of a

(*d*) Rights of way are *public* or *private*. As to public rights of way, see "*Nuisance*," *ante*, p. 451 ; "*Highways*," *ante*, p. 407 ; "*Ways*," *post*, p. 952. The owner of a private right of way is entitled to maintain an action and recover nominal damages for an obstruction, although no special or substantial damage is suffered thereby. An action will lie at the suit of a reversioner, where the obstruction is of a permanent character and injurious to his reversion (*Kidgill* v. *Moor*, 9 C. B. 364 ; and see "*Reversion*," *ante*, p. 473).

In actions for obstructing private rights of way, the mode in which the plaintiff claims to make out his title to the way, whether by grant, prescription, or otherwise, should be shown in the statement of claim. (See *Harris* v. *Jenkins*, 22 Ch. D. 481 ; 52 L. J. Ch. 437 ; cf. *Pledge* v. *Pomfret*, 74 L. J. Ch. 357, 359 ; see "*Common*," *ante*, p. 339.)

The *termini*, and the kind of way, whether a footway or carriage-way, &c., should be stated, as also the qualification of the right in those cases where the right claimed is a qualified right, as for instance, a right for particular times of the year, or for particular purposes (*Harris* v. *Jenkins*, *supra* ; *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410 ; 58 L. J. Ch. 139 ; and see *Rouse* v. *Bardin*, 1 H. Bl. 351 ; *Brunton* v. *Hall*, 1 Q. B. 972).

A right of way to and from a piece of land by user is *primâ facie* restricted to the purposes necessary for the ordinary and reasonable use of such land while remaining in the same state (*Williams* v. *Jones*, L. R. 2 C. P. 577 ; 36 L. J. C. P. 256 ; *Wimbledon Conservators* v. *Dixon*, 1 Ch. D. 362 ; 45 L. J. Ch. 353 ; *Bradburn* v. *Morris*, 3 Ch. D. 812 ; *Mayor of London* v. *Riggs*, 13 Ch. D. 798 ; 49 L. J. Ch. 297).

But where the right is acquired by an express grant, the extent of the right, and the question of whether it is available for new purposes rendered necessary or desirable by subsequent alteration of the user of the dominant tenement, should be determined upon a construction of the terms of the grant, having regard to the circumstances under which the grant was made. (See *United Land Co.* v. *G. E. Ry. Co.*, L. R. 10 Ch. 586 ; 44 L. J. Ch. 688 ; *Cannon* v. *Villars*, 8 Ch. D. 415 ; 47 L. J. Ch. 599 ; *Finch* v. *G. W. Ry. Co.*, 5 Ex. D. 254 ; *Bayley* v. *G. W. Ry. Co.*, 26 Ch. D. 434, 452 ; *Harris* v. *Flower*, 74 L. J. Ch. 127.)

On a grant of a part of an owner's land, there will, in general, pass to the grantee all those continuous and apparent easements, or rights in the nature of easements, which are necessary to the reasonable enjoyment of the property granted, and which were at the time of the grant used by the owner of the entirety for the benefit of the part granted (*Wheeldon* v. *Burrows*, 12 Ch. D. 31, 49 ; 48 L. J. Ch. 853 ; *Brown* v. *Alabaster*, 37 Ch. D. 490, 504 ; 57 L. J. Ch. 255 ; *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557 ; 71 L. J. Ch. 791). But if the grantor intends to reserve any right over the property granted, he must as a rule do so expressly in the grant (*Ib.*).

A tenant of land cannot by user acquire a right of way over land occupied by another tenant of the same landlord (*Kilgour* v. *Gaddes*, [1904] 1 K. B. 457).

messuage known as ——, at ——, and was and is entitled to a right of way from the said messuage over a field called —— to a public highway called the —— Road, and back again from the said highway over the said field to the said messuage, for himself and his servants, on foot [and with horses, carriages, and cattle], at all times of the year. [*Describe the way claimed so as to show its position and termini. It is often convenient to incorporate in the statement of claim or to refer to a plan or map.*]

2. The plaintiff was [and is] entitled to the said right of way by enjoyment thereof for twenty [*or*, forty] years before this action as of right and without interruption [*or*, by prescription from time immemorial, *or*, by the grant thereof from *E. F.*, then the owner in fee in possession of the said field, by deed dated the —— ——, 19—].

3. The defendant on the —— ——, 19—, wrongfully obstructed the said way [by placing a fence in the said field, blocking up the said way].

4. The defendant has ever since continued and maintained, and intends to continue and maintain, the said obstruction.

The plaintiff claims :—

(1.) Damages.

(2.) An injunction restraining the defendant, his servants and agents, from the repetition or continuance of the acts above complained of or of acts similar thereto.

WITNESS.

Claim against a Witness for not attending in pursuance of a Subpœna (*e*).

1. The plaintiff has suffered damage from the defendant, who was a necessary and material witness on behalf of the now plaintiff in an action then standing for trial at the then approaching assizes in and for the county of ——, not attending at the said assizes in pursuance of a *subpœna* duly

(*e*) This action lies at common law, and is the usual mode of suing; but the plaintiff may proceed under the statute 5 Eliz. c. 9, s. 12, which gives to the party grieved an action of debt for a penalty of £10 and "such further recompense as by the direction of the judge of the Court out of which the said process shall be awarded, according to the loss and hindrance that the party which procured the said progress shall sustain by reason of the non-appearance" of the witness.

A count framed under the former rules of pleading upon this statute will be found in *Pearson* v. *Iles*, 2 Doug. 556.

The witness may also be proceeded against by attachment for contempt of Court (1 Chitty's Prac., 14th ed., p. 568).

A good cause of action in the original action is not essential in all cases where an action is brought against a witness for not attending, for where several issues were joined in the original action, on some of which the plaintiff was entitled to succeed, although he had no cause of action, he may maintain an action against the witness in respect of the issues lost through his absence (*Couling* v. *Coxe*, 6 C. B. 703).

And this is still the case, as the costs of issues are divisible, and a plaintiff, though failing on the whole action, may be entitled to costs in respect of certain issues. (See

served upon him on the —— ——, 19— [*or*, a reasonable time before the time appointed for the said trial], when a reasonable sum was paid [*or*, tendered] to him for his expenses.

2. The evidence of the defendant would have enabled the now plaintiff to obtain a verdict and judgment in his favour in the said action [*or*, upon the issues or some of them joined in the said action], but the now plaintiff could not safely proceed to trial without the evidence of the defendant, and was, by reason of the defendant not attending, compelled to withdraw the record [*or*, *as the case may be*].

Particulars :—

The assizes commenced on the —— ——, 19—.

The amount paid [*or*, tendered] was [*state what*].

The nature of the evidence would have been [*state what*].

The damage sustained was [*state same*].

WORK.

For a Claim by an Employer for Negligence, see "*Work*," *ante*, p. 330.

For Forms of Claims by a Master against Workmen or others for wrongfully procuring his Servants to break their Contracts with him, or for illegally conspiring to hinder the Master's Customers from dealing with him: see "*Trade Disputes*," *ante*, p. 489.

Crewe v. *Field*, 12 Times Rep. 405; cf. *Wagstaffe* v. *Bentley*, [1902] 1 K. B. 124; *Dunn* v. *Green*, [1903] 1 K. B. 358; *Hubback* v. *British N. Borneo Co.*, [1904] 2 K. B. 473.)

The existence of actual damage is essential to the action, as the law will not imply a loss to the plaintiff from mere disobedience to the subpœna (*Couling* v. *Coxe*, *supra*; *Crewe* v. *Field*, *supra*; and see *Yeatman* v. *Dempsey*, 7 C. B. N. S. 628; 29 L. J. C. P. 177.) The plaintiff is entitled to recover all the costs he has been put to by the non-attendance of the defendant as a witness, if he has properly claimed such damages in his statement of claim (*Needham* v. *Fraser*, 1 C. B. 815, 823).

An action for defamation will not lie against a witness for false and malicious statements made in the course of judicial proceedings. (See "*Defamation*," *post*, pp. 835—837.)

CHAPTER VI.

DEFENCES (*a*).

		PAGE
SECTION I.	*General Form of Defence*	520
II.	*Denials and Traverses*	527
III.	*Defences other than Denials*	530
IV.	*Defences arising after Action brought*	531
V.	*Particulars of or under Defences*	532

SECTION I.—GENERAL FORM OF DEFENCE (*b*).

Form of Defence.

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.

Between *A. B.*.....Plaintiff,

and

C. D......Defendant.

Defence.

1. &c. [*Here state briefly and in a summary form the material facts relied upon for the defence, specifically denying (or refusing to admit) such*

(*a*) **Defences.**]—The defendant's answer to the plaintiff's claim is embodied in a pleading called a "defence." (See Ord. XIX., r. 2, *ante*, p. 42.) This is sometimes called a "statement of defence," which was the title adopted in the Rules of 1875, but the proper title now is "defence."

Defence, when necessary.]—If the writ of summons is specially indorsed under Ord. III., r. 6 (see *ante*, p. 65), with a statement of claim, the defendant may and, except in the cases provided for by Ord. XXI., r. 6 (*infra*), must, if he wishes to prevent judgment being signed against him, deliver a defence without any order (Ord. XXI., r. 6, *infra*). He may also deliver a defence without any order where leave is given to defend under Ord. XIV. (Ord. XXI. r. 7, *post*), or where a statement of claim is filed under Ord. XIII. (Ord. XXI., r. 8, *post*, p. 521). In all other cases a defence is only required and can only be delivered under an order.

(*b*) **Formal parts of the Defence.**]—The defence should be intituled with the name of the Court and Division, the reference, date, letter, and number, and the title of the action in the same manner as the statement of claim. (See *ante*, pp. 4 and 42.) It should be headed "Defence." If there is a set-off or counterclaim it should be headed "Defence and Set-off," or "Defence and Counterclaim," or "Defence, Set-off, and Counterclaim."

Time for delivering Defence.]—By Ord. XXI., r. 6: "Where a defendant has appeared to a writ of summons specially indorsed under Ord. III., r. 6, he shall deliver

of the allegations of the plaintiff as are disputed by the defendant, and dividing the whole statement into paragraphs numbered consecutively.]

L. M. [*Signature of the counsel or special pleader by whom the pleading has been settled, or if it has not been so settled, of the defendant's solicitor, or of the defendant himself if he defends in person.*]

Delivered the —— ——, 19—.

(*See R. S. C.*, 1883, *App. D., Sect. I.*)

Skeleton Form of Defence.

1. The defendant denies that —— (see *post*, p. 527).
2. The defendant does not admit that —— (see *post*, p. 530).
3. The defendant says that —— (see *post*, p. 531).
4. The defendant admits that ——, but says that ——.

---

his defence within ten days from the time limited for appearance, unless such time is extended by the Court or judge, or unless in the meantime the plaintiff serves a summons for judgment under Ord. XIV., or a summons for directions."

By r. 7, "Where leave has been given to a defendant to defend under Ord. XIV., he shall deliver his defence (if any) within such time as shall be limited by the order giving him leave to defend: or if no time is thereby limited, then within eight days after the order."

By r. 8, "When a statement of claim is delivered pursuant to an order, or filed in default of appearance under Ord. XIII., r. 12, the defendant, unless otherwise ordered, shall deliver his defence within such time (if any) as shall be specified in such order, or, if no time be so specified, within ten days from the delivery, or filing in default, of the statement of claim, unless in either case the time is extended by the Court or a judge."

By Ord. XII., r. 22, "A defendant may appear at any time before judgment. If he appear at any time after the time limited by the writ for appearance, he shall not, unless the Court or a judge shall otherwise order, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ." In ordinary cases the time limited by the writ for appearance is eight days after service of the writ, including the day of such service. (See Ord. II., r. 3, App. A., Part I., Forms 1—4; Chitty's Practice, 14th ed., p. 251.)

Where leave is given to serve a writ or notice of a writ out of the jurisdiction, the time limited by the writ for appearance is that directed by the order giving the leave (Ord. II., r. 5, App. A., Part I., Forms 5—8; Ord. XI., r. 5; Chitty's Practice, 14th ed., p. 251).

Where the plaintiff has served on the defendant a summons for judgment under Ord. XIV., no defence should be delivered until the summons has been disposed of (*Hobson* v. *Monks*, W. N. 1884, p. 8; 1 Chitty's Practice, 14th ed., p. 297).

The above rules are subject to the provisions of Ord. LXIV., rr. 7, 8, *ante*, pp. 18, 19, under which extensions of the time for pleading may be granted even after the time allowed for pleading has expired.

If a defendant fails to deliver a statement of defence within the time appointed or allowed for that purpose, he will be subject to the provisions of Ord. XXVII. with respect to judgment for default of pleading. (See Ord. XXVII., rr. 2—8, 11, 12, 15; 1 Chitty's Practice, 14th ed., p. 328.)

Judgment for default of pleading cannot be signed during a stay of proceedings, or during the pendency of a summons (*e.g.*, a summons for further time to plead) returnable at or before the time at which judgment could be signed which operates as such stay (1 Chitty's Practice, 14th ed., p. 301).

If a defence is delivered without leave after the expiration of the time limited for that purpose, it is an irregularity, but if delivered while the action is proceeding, and

5. If the defendant did ——, which he wholly denies, he says that ——.

6. As to paragraph — of the statement of claim the defendant says that ——.

7. In the alternative the defendant says that ——.

---

before judgment, it is not a nullity, and, therefore, its delivery prevents the plaintiff from subsequently signing judgment as for default of pleading (*Gill* v. *Woodfin*, 25 Ch. D. 707 ; 53 L. J. Ch. 617 ; *Gibbings* v. *Strong*, 26 Ch. D. 66 ; 50 L. T. 578 ; *Montagu* v. *Land Corporation*, 56 L. T. 730).

The Body of the Defence.]—The defence should, "when necessary," be divided into paragraphs numbered consecutively (Ord. XIX., r. 4, *ante*, p. 5). Each distinct ground of defence or reply, &c., should be stated in a separate paragraph. (See the forms given in the R. S. C. 1883, App. D. and E.)

Defences are subject to the general rules and principles of pleading. (See *ante*, pp. 3—17.) For instance, they must be "as brief as the nature of the case will admit" (Ord. XIX., r. 2) ; mere evidence is not to be pleaded (Ord. XIX., r. 4) ; dates, sums, and numbers should be expressed in figures (*Ib.*) ; when settled by a counsel they are to be signed by him (*Ib.*) ; they are to be printed when of the length of ten folios, or more (Ord. XIX., r. 9).

"Defences" upon the facts are statements in a summary form of the material facts on which the defendant relies for his defence against the plaintiff's claim. (See Ord. XIX., rr. 4, 15, cited pp. 5 and 523.) The defendant may either deny the case put forward by the plaintiff, or he may set up an affirmative case of his own in answer to the plaintiff's allegations, or he may adopt both those lines of defence.

Defences under the Judicature Acts are, in general, analogous to those defences which were formerly termed *pleas in bar*. Under the former system of pleading, *pleas in bar* were pleas which answered the cause of action alleged, and were divided into *pleas in denial* and *pleas in confession and avoidance*. Defences pleaded under the present rules may for the most part be similarly classified. Defences by way of *denial* deny facts alleged which are material to the cause of action ; those by way of *confession and avoidance* admit the facts alleged, and state new facts which avoid their legal effect. (See Bullen & Leake, 3rd ed., p. 435, and *ante*, p. 1.)

Both these kinds of defences may be, and usually are, combined in the defence, and they may be relied upon either as alternative defences to the whole of the claim, or as separate defences applicable to different parts of the claim.

Before the Judicature Acts pleas were divisible into *pleas in bar* and *dilatory pleas*. Dilatory pleas were not pleaded to the cause of action, but were pleaded either to the *jurisdiction* of the Court, or in *abatement* of the action in its then present form. (See Bullen & Leake, 3rd ed., pp. 435, 468, 628.) Pleas in abatement set up some matter of fact, the legal effect of which was to preclude the plaintiff from recovering upon the writ and declaration as then framed (*Ib.*, p. 468). Of this kind were pleas which stated facts showing non-joinder of necessary parties (for the present practice, see *ante*, p. 29); or that either of the parties was under some personal disability of suing or being sued, or that another action was pending in a superior Court (Bullen & Leake, 3rd ed., pp. 468 *et seq.*). The old practice with regard to dilatory pleas is now superseded, and it is expressly provided by Ord. XXI., r. 20, that "No plea or defence shall be pleaded in abatement." In general, the matters which were the subject of pleas in abatement under the former practice are not such as to be pleadable by way of defence to the action, but they frequently afford ground for an application at chambers to have the defect in the proceedings amended or rectified and for a stay of proceedings in the meanwhile. (See *ante*, p. 29 ; and *post*, p. 579.) Thus, if a plaintiff brings two actions in the High Court against the same defendant for the same cause, such conduct, which would formerly have been ground for a plea in abatement (see Bullen & Leake, 3rd ed., pp. 473, 474), is *primâ facie* vexatious, and the defendant may apply for a stay of proceedings in one or other of the actions (Jud. Act, 1873, s. 24 (5) ; see Chitty's Practice,

8. Further, or in the alternative, the defendant says that ——.

9. If, contrary to what the defendant, contends the plaintiff did ——, the defendant says that——.

10. The defendant will submit that ——.

Form of Defence, where different Grounds of Defence are pleaded to different Parts of the Plaintiff's Claim.

1. As to the —— paragraph [*or*, the —— and —— paragraphs] of the statement of claim, *or*, As to the plaintiff's claim for, &c., *or*, in respect of,

---

14th ed., p. 369; *Williams* v. *Hunt*, [1905] 1 K. B. 512, 514; 74 L. J. K. B. 364). The pendency of another action in a foreign or inferior Court for the same cause could not be pleaded in abatement, but it might, and may still in some cases, be ground for an application to have the action in the High Court stayed, or to have the party required to elect which of the two actions should be stayed, or to have an order restraining the party from continuing proceedings in the foreign or inferior Court, as the justice of the case may require, where such duplication of actions appears unnecessary, oppressive or vexatious. (See *McHenry* v. *Lewis*, 22 Ch. D. 397; 52 L. J. Ch. 325; *Hyman* v. *Helm*, 24 Ch. D. 521; *The Christianborg*, 10 P. D. at p. 153; *Christian* v. *Christian*, 78 L. T. 86; *Bryan, In the goods of*, 20 Times Rep. 290.)

In any case where matters which might formerly have been pleaded by way of dilatory plea are of such a nature as to afford a defence to the action, they may be pleaded in the defence in the same manner as other defences. (See *ante*, p. 27.)

By Ord. XIX., r. 15, all matters must be raised by the pleading "which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as if not raised would be likely to take the opposite party by surprise, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law, or Statute of Frauds."

It is unnecessary to plead to the damages claimed as arising from the cause of action alleged, or to the amount of such damages. (See Ord. XXI., r. 4, *post*, p. 529.) It must, however, be noted that in actions for defamation, if it is intended to give certain specified matters in evidence in chief in mitigation of damages, there is express provision that this shall not be done without notice to the opposite party. (See Ord. XXXVI., r. 37, cited *post*, p. 845.)

A paragraph containing a defence which is only applicable to a part of a claim or to one of several distinct grounds of claim, should be so expressed as to show distinctly that it is pleaded only to that part of the plaintiff's claim or to that ground of claim. (See the forms *supra* and *post*, pp. 524 *et seq.*, R. S. C., 1883, App. D., Sect. IV., and App. E., Sect. II., "*Counterclaims*," *post*, p. 534; "*Payment into Court*," *post*, pp. 748, 896.)

Defences, however, which are capable of being construed distributively, are, as formerly, in general so construed. (See C. L. P. Act, 1852, s. 75.) Thus, if issue is joined upon a defence of payment, and the defendant fails to prove such payment to the full amount alleged, he is nevertheless entitled to avail himself of the partial payment proved as a defence *pro tanto*, and the plaintiff in such case will be entitled to judgment on that issue for the residue of his demand not covered by the defence pleaded. (See *post*, p. 745.) The same principle is applied also in set-off and in many other cases, *e.g.*, where, in an action for the conversion or detention of goods, issue is joined upon a denial that the goods were the plaintiff's (*Williams* v. *Great W. Ry. Co.*, 8 M. & W. 856; *Freshney* v. *Wells*, 1 H. & N. 653; 26 L. J. Ex. 228; *Routledge* v. *Abbott*, 8 A. & E. 592). So where a plaintiff or a defendant states a right more largely than is required for the purpose of establishing his claim or his defence, as sometimes happens in stating rights of common, rights of way, and other similar rights, if the

&c., *or*, As to the alleged breach of the covenant to repair [*here state the ground of defence relied upon in this paragraph, limiting it to that part of the plaintiff's claim to which the particular defence is intended to be pleaded*].

---

statement of his right is divisible, it is sufficient for him to prove so much as will support his case, and the judgment may be for the other party as to the residue. (See *ante*, pp. 340, 512.) Where matter which affords a defence only as to part of the claim or claims is pleaded as a defence to the whole, the defendant may in some cases incur a liability for the costs of so much of the issue as is found against him.

The defendant may plead as many distinct grounds of defence as he thinks fit, and may plead them as alternative defences to the whole of the plaintiff's claim, or, where the claim is divisible, as defences to the different parts of it. Where alternative defences are pleaded, it is immaterial that they are inconsistent with each other. (See *Owen* v. *Morgan*, 35 Ch. D. 492.)

Where the defendant relies upon several distinct grounds of defence, set-off, or counterclaim founded upon separate and distinct facts, they must be stated, as far as may be, separately and distinctly. (See Ord. XX., r. 7, *ante*, p. 52, and *post*, p. 539.)

The different grounds of claim alleged by the plaintiff should, where practicable, be dealt with *seriatim* in the order in which they are alleged, and in dealing with each distinct ground of claim it is usually convenient to state the defences relied upon in the following order.

Denials or refusals to admit, and any affirmative statements inserted for the purpose of explaining such denials or refusals to admit, should precede any matter alleged by way of confession and avoidance. Of defences by way of confession and avoidance those alleging a justification or excuse should generally be placed before those alleging a satisfaction or discharge, but ordinary defences, such as the Statute of Limitations, leave and licence, payment or release, are frequently placed before more special and complicated ones. A set-off, when pleaded by way of defence, is placed after the more direct answers to the plaintiff's claim. Payment into court is generally pleaded after any other matters alleged by way of defence. Where there is a counterclaim, the counterclaim should be pleaded after the "defence."

Where there are several grounds of claim alleged by the plaintiff, if the same ground of defence, such as a denial of the contracts or breaches, or wrongful acts, alleged by the plaintiff, or a general defence of payment or release, &c., is applicable to all or to more than one of the claims, it should be pleaded once for all (either before or after the more limited defences) as to all the claims to which it will apply, so as to avoid unnecessary repetition, but, subject to this observation, the denials, &c., and the defences in confession and avoidance, should be pleaded to the different claims in their order.

Where the defendant pleads an objection in point of law as well as a defence upon the facts, such objection should be placed at the end of the defence, but before the counterclaim, if any. (See *post*, p. 562.)

Where a defence has to be drawn to a claim which contains particulars, it is to be remembered that it is a principle of pleading that it is not necessary to plead to particulars. A difficulty may, however, sometimes be felt in carrying out this principle where important matter which ought to have been pleaded in the body of the statement of claim has, whether by inadvertence or by design, been placed together with other matter in the particulars given or referred to in the claim. It may not be, and perhaps generally would not be, worth while to take out a summons to have the claim amended as embarrassing, but at the same time it may be thought unwise to allow the action to go to trial without placing on the pleadings the facts which answer the matter in question, lest it should afford an opportunity to the opponent to complain of surprise from want of notice of the intention to rely on those facts by way of answer. Under these circumstances the pleader, in framing the defence, will usually treat such matter as though alleged in the defence itself and plead thereto, relying on being able, if

2, 3, &c. As to, &c. [*If there are other distinct grounds of defence applicable to other parts of the claim, they should be stated in like manner in consecutive paragraphs, and each of such paragraphs should be limited at its commencement to that part of the statement of claim to which it is intended to be pleaded.*]

A like Form of Defence, where different Grounds of Defence are pleaded as to different Parts of a Claim in respect of a Simple Contract Debt other than a Bill, Note, or Cheque.

1. Except as to £——, part of the money claimed [*here state the ground of defence relied upon as to the part pleaded to*].

2. As to the said £—— [*here state some ground of defence as to the excepted part of the claim, or payment into Court in satisfaction of it*].

(*See R. S. C.*, 1883, *App. D., Sect. IV., and App. E., Sect. II.*)

A like Form.

1. As to £——, parcel of the money claimed [*here state a distinct ground of defence to the part of the claim pleaded to*].

2. As to the said £—— [*state any other distinct ground of defence as to the part pleaded to*].

3. As to the residue of the claim [*or*, of the money claimed] [*here state some ground of defence as to the residue, or pay money into Court in satisfaction of it*].

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

A Form of Defence admitting certain Facts alleged in the Statement of Claim (given "Lights," ante, p. 422), and denying other Facts therein alleged (c).

1. The defendant admits that the plaintiff is the owner and occupier of the said house.

2. The defendant also admits that he is erecting a building.

3. The defendant denies that the said building will, if not stopped, materially diminish the light to any of the plaintiff's windows, with the exception of the kitchen window firstly mentioned in the statement of claim.

4. The said kitchen window is not an ancient light.

his pleading is attacked, to show that his irregularity was caused by his opponent's improper pleading, and is not in truth embarrassing. As a rule it would hardly be likely to embarrass, as it would merely be giving to an opponent information to which, it might be said, he was not strictly, on the pleadings as framed, entitled.

(*c*) *Ante*, p. 422, n. (*q*).

Form of a Paragraph stating a Distinct Ground of Defence and repeating Allegations contained in a preceding Paragraph.

The defendant repeats the statements made in the above —— paragraph [except so much thereof as alleges, *or*, relates to, &c., *excepting anything not intended to be repeated*], and further says that [*here state the additional matter constituting, together with the repeated allegation, the separate ground of defence relied upon in this paragraph*].

Defence where there are two Defendants, and one of them defends separately from the other (*d*).

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.
Between *A. B.*.....Plaintiff,
and
C. D. and *E. F.* .....Defendants.
Defence of the defendant *E. F.*

1, &c. [*See the form, ante*, p. 520.]

For Forms of Defence where there is a Counterclaim, see post, pp. 534, 542.

Form of an Amended Defence (*e*).

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.
Between *A. B.*.....Plaintiff,
and
C. D......Defendant.
Amended Defence.

[*If the amendment is made under an order for amendment, add*, Amended the —— ——, 19—, pursuant to order of Master ——, *or*, the Hon. Mr. Justice ——, dated the —— ——, 19—.]

1, 2, &c. [*State the defence as amended.*]

(*Signed*) *L. M.*
Delivered the —— ——, 19—. (*Amended*) *L. M.*
Amended and redelivered the —— ——, 19—.

(*d*) Where there are two or more defendants they may, at their discretion, either plead jointly, or sever in their defences and deliver separate defences. Where they thus sever, each of the separate defences should be described in the heading as that of the person or persons pleading it, as in the above form. In the case of an action against husband and wife jointly for a tort committed by the wife, where there is no separate claim against the wife, they cannot deliver separate defences (*Beaumont* v. *Kays*, [1904] 1 K. B. 292, 294; 73 L. J. Q. B. 213). As to defences in actions against partners in the firm name, see *post*, p. 744.

(*e*) **Amended Defence.**]—See as to amending pleadings, *ante*, p. 14.

Section II.—Denials and Traverses (*f*).

General Form of Denial or Traverse.

The defendant denies that [he made the agreement alleged in the statement of claim or any agreement with the plaintiff, *or*, that the plaintiff

(*f*) **Denials and Traverses.**]—The defendant must in his defence deny, either expressly or by necessary implication, or state that he does not admit, each allegation in the statement of claim of which he does not admit the truth, because, by Ord. XIX., r. 13, every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

Before the Judicature Acts it was only material allegations which were admitted by reason of not being denied, and such matters of inducement as were explanatory only of the facts and not essential to the cause of action were not admitted by reason of their not being denied by the defendant's pleading, and could not properly be traversed (see Bullen & Leake, 3rd ed., p. 436); but, under the present rules, it is necessary to deny, or refuse to admit, any disputed allegations, lest they should otherwise be taken as admitted.

Denials must be specific, and not general, or vague, or evasive.

By Ord. XIX., r. 17, "It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages."

See as to damages, *post*, p. 529.

By Ord. XIX., r. 19, "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances." (See *Thorp* v. *Holdsworth*, 3 Ch. D. 637; 45 L. J. Ch. 406; *Byrd* v. *Nunn*, 7 Ch. D. 284; 47 L. J. Ch. 1; *Tildesley* v. *Harper*, 10 Ch. D. 393; 48 L. J. Ch. 495.)

By Ord. XIX., r. 20, "When a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise." See further, *post*, p. 576.

By Ord. XXI., r. 1, "In actions for a debt or liquidated demand in money comprised in Ord. III., r. 6, a mere denial of the debt shall be inadmissible." (See *Copley* v. *Jackson*, W. N. 1884, p. 39.)

By Ord. XXI., r. 3, "In actions comprised in Ord. III., r. 6, classes (A.) and (B.), a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed; *e.g.*, in actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed; in an action for money had and received, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff." (See "*Sale of Goods*," *post*, p. 756; "*Money Received*," *post*, p. 743.)

As to denials in actions on bills of exchange, &c., see Ord. XXI., r. 2, cited, *post*, p. 596.

By Ord. XXI., r. 5, "If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any

sold or delivered to him the goods referred to in the statement of claim, or any part thereof; *or*, that he drove the said cart and horse either negligently or unskilfully; *or*, The defendants deny that they, or either of them, &c.; *or, as the case may be*].

[*The defence must state clearly what it is that is denied, and should deny it in substance. If an allegation of a fact is made in the statement of claim*

---

representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically."

In actions for the recovery of land a defence of possession contains by implication a general denial of the allegations of fact contained in the statement of claim (Ord. XXI., r. 21, cited *post*, p. 906).

Previously to the Judicature Acts, defendants in common law actions were allowed to plead certain general statements in denial of the plaintiff's case, known as "general issues," such as "*Never Indebted*," "*Non Assumpsit*," "*Non est Factum*," "*Non Detinet*," and "*Not Guilty*," &c., and to raise thereunder many defences which would now be required to be pleaded specifically. (See Bullen & Leake, 3rd ed., pp. 460 697; *Byrd* v. *Nunn*, 7 Ch. D. 284, 287; 47 L. J. Ch. 1.) Similar forms of denial may still in some cases be used in defences, but, except in the case of Not Guilty by Statute (see *post*, p. 886), the effect of such denials has been materially restricted by the rules, and they no longer operate as general denials of the plaintiff's case. Thus, under the present rules, the defendant may still plead in his defence to an action on a contract that he did not make the promise or agreement alleged, but such denial has a different effect from that of the old general issue of *non assumpsit*, as it amounts merely to a denial in fact of the express contract alleged, or of the matters of fact from which the same may be implied by law, and not of its sufficiency in law. (See Ord. XIX., r. 20, *ante*, p. 527.) Moreover, the use of the expression "as alleged" is now improper in a denial unless the defendant adds some words such as "or at all," so as to show that he is not merely denying the plaintiff's allegation along with the attendant circumstances alleged.

In pleading a denial, care should be taken to answer the point of substance (Ord. XIX., r. 19, *supra*), so that the effect and purport of the denial may be clear and distinct, denying the point of substance, and not involving immaterial circumstances included in the allegation to which it relates (*Ib.*). Thus, if a paragraph in a statement of claim contains a compound allegation, consisting of several distinct facts, *e.g.*, an allegation that "a bill of lading of goods shipped by the plaintiff was signed by A. B. as the defendant's agent" (see R. S. C., 1883, App. C., Sect. V., No. 5), it would not be correct simply to state in the defence that the defendant denies or does not admit the paragraph in question. The proper mode of denying such a paragraph is to single out the particular part of it which the defendant desires to deny (*e.g.*, that A. B. was the defendant's agent), and to deny that only, or, if it is desired to deny the whole, to break up the compound allegation and deny each part of it separately.

As to the necessity for pleading an express denial of any implied averment of performance of a condition precedent of which it may be desired to contest the performance, see Ord. XIX., r. 14, cited *ante*, pp. 10, 157; and *post*, p. 641.

A denial or traverse is usually framed in terms of the allegation denied (see R. S. C., 1883, App. D., Sect. IV., Sect. V., and Sect. VI.; App. E., Sect. III.); and will be in a negative or affirmative form, according to the form of the allegation traversed. Denials may also be pleaded by simply stating that the defendant denies the particular allegation disputed. (See R. S. C., 1883, App. D., Sect. VI.) The words "as alleged" should not generally be added to the denial (see *Thorp* v. *Holdsworth*, 3 Ch. D. 637; 45 L. J. Ch. 406), though in some cases, where that can be done without rendering the denial ambiguous in its effect, it is convenient and proper to do so. (See R. S. C., 1883, Sect. V., Nos. 1—3.)

In cases where the effect and meaning of a denial in terms of the opposite party's

along with circumstances such as the date when or the place where it occurred, the fact should be denied, and not merely the fact along with these circumstances. The defendant should not deny that a fact occurred "as alleged" unless he adds, "or at all," or some other words to show that he intends to deny the alleged fact, and not merely that fact along with any alleged attendant circumstances.]

---

allegation would in itself be doubtful or obscure, the defendant may often render it clear by adding an affirmative statement of what he contends to have been the facts of the case. (See *post*, pp. 572, 576.)

A mere denial that the defendant did the act complained of "*wrongfully*," or "*maliciously*," would usually be open to objection as embarrassing, and should not be pleaded. (See "*Defamation*," *post*, p. 831.)

In general, a denial of the acts which are charged as constituting the injury, denies the bare acts only, and not their wrongful quality under the particular circumstances, unless in cases where no details are given of the ground of complaint, and the plaintiff describes the wrongful act complained of only by a legal term necessarily involving its wrongfulness, as, for instance, where the plaintiff expressly charges an "assault," or "battery," or a "conversion" of goods, &c. See "*Trespass*," *post*, p. 922; "*Conversion*," *post*, p. 822.)

Except in such last-mentioned cases, a denial of the acts or matters complained of does not entitle the defendant to set up thereunder any matters in confession and avoidance of the alleged ground of complaint, and, accordingly, all matters in confession and avoidance, that is, any facts which show, either that the act was not wrongful by reason of some excuse or justification, or that, although it was wrongful, the cause of action has been satisfied or discharged by matter subsequent, as, for instance, by a release, must be specially pleaded, when relied upon by the defendant in an action for a wrong. (See Ord. XIX., r. 15, *ante*, p. 523.)

As to the defence of "Not Guilty by Statute," see *post*, p. 886.

Allegations which consist of mere statements or inferences of law (such as allegations of duty, &c., as the legal result of facts) may be dealt with either by denying the facts which legally raise the duty, or by disputing by an objection in point of law the inference drawn from the facts. (See *ante*, p. 443; *post*, p. 561.) The defendant, however, may properly plead a denial of an allegation compounded of law and fact (*Lucas* v. *Nockells*, 10 Bing. 157; *Ransford* v. *Copeland*, 6 A. & E. 482).

It is not always advisable to deny or decline to admit every disputable allegation, because the defendant, under and subject to the provisions of the Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5, and Ord. LXV., r. 1, ordinarily has to pay the costs of the issues on which he fails, and, under Ord. XXI., r. 9, and Ord. LXV., r. 2, the extra costs occasioned by reason of facts which ought to have been admitted having been denied or not admitted by the defence, and also because, where the proof of any issue lies upon the plaintiff at the trial the plaintiff has the *right to begin*, which involves the right to reply if evidence is adduced by the defendant.

In actions for unliquidated damages, whether founded on contract or on tort, the plaintiff has the right to begin by reason of the proof of the damages being upon him, but in actions for liquidated or nominal damages or for debt, the *right to begin* may frequently be obtained by omitting to plead any denial or refusal to admit, and pleading affirmatively only. (See *Mercer* v. *Whall*, 5 Q. B. 447.) On the other hand, it is sometimes important to take a traverse in order to compel the plaintiff to call a particular witness whom the defendant may wish to cross-examine, or by whose evidence he may hope to prove a particular fact which may be essential to his case.

Denial as to Damages.]—In general, it is unnecessary for the defendant to plead any denial or defence in answer to the plaintiff's allegations of general or special damage, for it is provided by Ord. XXI., r. 4, that "no denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted." (See also Ord. XIX. r. 17, cited *ante*, p. 527.)

The like, in Different Forms.

The defendant did not—[*State what it is that is denied, as in the preceding form.*]

The defendant did not ——. On the contrary, he ——.

Comprehensive Form of Denial (g).

The defendant denies specifically each and every allegation in paragraph —— of the statement of claim [*or*, Save as above admitted, the defendant denies specifically each and every allegation in [paragraph —— of] the statement of claim].

Form of Refusal to Admit (h).

The defendant does not admit that—[*Here state specifically what it is that the defendant refuses to admit.*]

Section III.—Defences Other than Denials (*i*).

The defence should be stated as concisely as possible, and the forms

---

It would seem that this rule applies to allegations of the fact of damage, where such damage is the gist of the action, and essential to its maintenance; but where in such cases the fact of the alleged damage is disputed, it is advisable that the defendant should plead a denial of it, or state expressly that he does not admit it. (See *post*, p. 831.) In practice it is not unusual, and often convenient, to plead to and deny allegations of damage, especially where special damage is alleged.

In actions for defamation, the defendant, if he intends to adduce evidence of certain specified matters in mitigation of damages, is expressly required to give previous notice or particulars thereof to his opponent, and it seems that in those cases such notice or particulars may be given either in the pleadings or separately. (See Ord. XXXVI., r. 37; and 6 & 7 Vict. c. 96, s. 1, cited *post*, pp. 843, 845.) It is a general rule in all actions for unliquidated damages, that matter which, if pleaded, would amount to an answer or justification of the cause of action cannot, without being pleaded, be proved in mitigation of damages (*Watson* v. *Christie*, 2 B. & P. 224; *Linford* v. *Lake*, 3 H. & N. 276; *Perkins* v. *Vaughan*, 4 M. & G. 988; and see *Speck* v. *Phillips*, 5 M. & W. 279).

(*g*) This form of denial may be used (*Atkins* v. *North Metropolitan Tramway Co.*, 63 L. J. Q. B. 361). It should not be adopted as a rule in denying the more important or essential allegations in the statement of claim. These should be dealt with specifically. In dealing, however, with a long and complicated statement of claim or paragraph containing many statements, especially when the latter are added by way of inducement or description, or are more or less immaterial, it is often useful to use this comprehensive form. In such case, when the essential allegation has been specifically dealt with, it is often convenient to add the form qualified by the words "save as aforesaid," or "save as above stated," or "save as above admitted."

(*h*) Where the defendant refuses to admit allegations contained in the statement of claim, he must plead such refusal plainly and specifically (*Thorp* v. *Holdsworth*, 3 Ch. D. 637; 45 L. J. Ch. 406; see *per* Grove, J., *Hall* v. *L. & N. W. Ry. Co.*, 35 L. T. 848).

(*i*) **Defences other than Denials.**]—In addition to or instead of denying the allegations

applicable to the particular case, which will be found in Chapters XI. and XII., post, may be used.

For forms of Defence stating an Objection in Point of Law, see "Proceedings in Lieu of Demurrer," post, p. 561.

Section IV.—Defences arising after Action brought (*k*).

Defences arising after Action and before Delivery of Defence.

After the commencement of this action, viz., on the —— ——, 19— [*Here state the matter of defence relied upon.*]

made in the statement of claim, the defendant may in his defence set up an affirmative case, either by stating his version of the facts and showing that the plaintiff has no cause of action on the true facts, or he may plead in confession and avoidance and show that notwithstanding the facts stated by the plaintiff he has a defence.

All defences by way of confession and avoidance must, whether the action be founded on contract or on tort, be specially pleaded, except in those cases where they may be raised by pleading Not Guilty by Statute (see *post*, p. 886), or in actions for the recovery of land where the defence of "possession" is applicable (see *post*, p. 906).

In general, defences by way of confession and avoidance either state facts showing that the plaintiff never had a cause of action (as where the defendant in an action founded on contract pleads illegality, or a rescission before breach, or the defendant in an action for a wrong pleads a justification or excuse), or they state facts showing that a cause of action once subsisting has been subsequently discharged or rendered ineffectual (as where the defendant pleads a release or other matter of discharge). In cases within Ord. XXVII., r. 9, the omission to deal with a distinct cause of action or severable part of the claim may give the plaintiff a right to obtain leave to enter a judgment for the unanswered portion of the claim.

It is open to the defendant to "give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party" (Ord. XXXII., r. 1), and in such case the other party may apply for such judgment as the admission may entitle him to (Ord. XXXII., r. 6).

(*k*) By Ord. XXIV., r. 1, "Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be raised by the defendant in his statement of defence, either alone or together with other grounds of defence."

By Ord. XXIV., r. 2, "Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, . . . within eight days after such ground of defence has arisen, or at any subsequent time by leave of the Court or a judge, deliver a further defence . . . setting forth the same."

The above limitation of time for delivering the further defence is subject to the rules of Ord. LXIV. with respect to the computation of time, and extension of time by consent. (See *ante*, p. 17.)

A defence of matter arising after action must show, either by express averment or by the dates, &c., mentioned in the defence, that the ground of defence relied upon arose after action, as it will otherwise be construed as referring only to matters which took place before action (*Ellis* v. *Munson*, 35 L. T. 585; see *post*, p. 540; and see *Brooks* v. *Jennings*, L. R. 1 C. P. 476; Bullen & Leake, 3rd ed., p. 451). If the defence as

For a Defence of Payment after Action of a Simple Contract Debt, see R. S. C., 1883, *App. D., Sect. IV., cited "Payment," post*, p. 748.

Defence of Matter arising after Action and after Delivery of Defence: see ante, p. 531.

Further Defence.

The defendant by way of further defence says that:—

1. After the delivery of the defence herein, viz., on the —— ——, 19— [*Here state the matter of defence relied upon.*]

SECTION V.—PARTICULARS OF OR UNDER DEFENCES.

Form of Particulars of Defence, delivered in pursuance of an Order under Ord. XIX., r. 7. (*See "Particulars," ante*, p. 37.)

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.

Between *A. B.* ..... Plaintiff,

and

C. D. .....Defendant.

Particulars:

The following are the particulars of [*state the matter of which the defendant has been ordered to give particulars*] delivered pursuant to the order

---

pleaded is ambiguous in this respect, it seems that the plaintiff may apply to have it amended as embarrassing under Ord. XIX., r. 27, cited *ante*, p. 11. (See *Ellis* v. *Munson*, *supra*.)

Under the former system of pleading, a plea of matter arising after action was called a plea to the further maintenance of the action, or, if the defendant had already pleaded, a plea *puis darrein continuance*. It seems, notwithstanding *Foster* v. *Gamgee*, (1 Q. B. D. 666), that a defence pleaded under r. 2, of matter arising after action, does not operate as an abandonment of defences previously pleaded, and will be construed as an alternative or additional defence only, but the plaintiff in such a case is at liberty to confess the defence and obtain judgment for costs under the following rule.

By Ord. XXIV., r. 3, "Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence (which confession may be in the Form No. 5 in Appendix B., with such variations as circumstances may require), and may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a judge shall, either before or after the delivery of such confession, otherwise order. (See *post*, p. 642.)

Particulars.]—The general principles upon which the Courts act in requiring particulars to be given of allegations or matters stated in claims are applicable equally to defences or other pleadings, and the rules relating to the giving of particulars are in general applicable to all pleadings, though from the nature of the case the occasion for

of ——, dated the —— ——, 19— [*State the particulars in accordance with the order, and, if necessary, in numbered paragraphs.*]

Dated the —— ——, 19—.

G. H., defendant's solicitor [*or*, agent].

To Mr. *E. F.*, the plaintiff's solicitor [*or*, agent].

---

particulars arises somewhat less frequently in regard to defences and subsequent pleadings than in regard to claims. Thus where a defence consists of traverses or denials of allegations in the claim so that the defendant is not taking upon himself the *onus* of proving any substantive facts, but is only denying or requiring proof of those alleged by the plaintiff, the occasion for particulars does not arise; but where he pleads affirmatively, or sets up facts to be proved in answer to the plaintiff's case, he may be, and in general is, as much under obligation to give particulars as if he were alleging such or similar matters in a statement of claim. For instance, if a defendant sets up a defence of payments made he has to give particulars of the dates and amounts of such payments. So if he justifies a libel he must state the facts fully in his pleadings or give particulars. (See "*Particulars*," *ante*, p. 37.) Similarly where he alleges that he is released from, or exonerated and discharged from the performance of his contract, he must either by particulars or in the pleading itself give sufficient information to his opponent as to how and when he was so released or discharged. (See the form in the text, p. 753, and see pp. 755.)

CHAPTER VII.

COUNTERCLAIMS (*a*).

		PAGE
SECTION I.	*Counterclaims in Ordinary Cases*	534
II.	*Counterclaims where New Parties are added as Defendants thereto*	541

SECTION I.—COUNTERCLAIMS IN ORDINARY CASES.

General Form of Defence and Counterclaim.

[*Heading as in the form ante*, p. 520.]

Defence.

1. } [*To be filled up. See the general form of defence, ante*, p. 520, *and*
2. } *the forms of defences, post*, Chapters XI. and XII.]

(*a*) **Counterclaims.**]—Previously to the Judicature Acts, a defendant who had a cross-claim against the plaintiff could not in any case recover anything in respect of it from the plaintiff by way of counterclaim in the same action (*Stooke* v. *Taylor*, 5 Q. B. D. 569, 575 *et seq.*; 49 L. J. Q. B. 857), although in cases of mutual debts within the statutes of set-off (2 Geo. 2, c. 22, s. 13; 8 Geo. 2, c. 24, ss. 4, 5), and in certain other cases mentioned under "*Set-off*," *post*, p. 772, a defendant might plead a set-off by way of defence.

By the Judicature Act, 1873, s. 24 (3), the High Court of Justice and the Court of Appeal respectively, and every judge thereof, have "power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant."

By s. 24 (7), "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between

Counterclaim.

[3. The defendant repeats paragraph [2] of his defence, and says that :—]

4. 5. [*Here state concisely, and in the same manner as in a statement of claim, the facts on which the counterclaim is based. The forms of statement of claim in Chapters IV. and V. may be used. See the forms of counterclaim infra.*]

The defendant claims :—

[*Here state the amount of the debt or damages, or the relief or remedy, claimed.*]

(*Signed*) L. M. [*See ante*, p. 13.]

Delivered the —— ——, 19—.

(*See R. S. C.*, 1883, *App. D., Sect. I.*)

---

the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

By Ord. XIX., r. 3, "A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

By Ord. XXI., r. 17, "Where in any action a set-off or counterclaim is established as a defence against the plaintiff's claim, the Court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

The right to counterclaim exists whether the claims on either side are liquidated or unliquidated, pecuniary or non-pecuniary, legal or equitable (see Jud. Act. 1873, s. 24 (2), (3), (6), (7), and Ord. XIX., r. 3, *supra*; *Gray* v. *Webb*, 21 Ch. D. 802, 804; 51 L. J. Ch. 815; and see *Besant* v. *Wood*, 12 Ch. D. 605, 610, 630); and, except in cases where a third person or a co-defendant is added as defendant to the counterclaim (as to which, see *post*, pp. 541 *et seq.*), it is not necessary that the counterclaim should be in any way connected with the subject-matter of the claim, or even *ejusdem generis* with it. (See *Beddall* v. *Maitland*, 17 Q. B. D. 174, 181; 50 L. J. Q. B. 401; *Gray* v. *Webb*, *supra*).

For the purpose of determining what claims may or may not be joined in a counterclaim, regard must be had to the provisions of Ord. XVIII. with respect to the joinder of different causes of action in a statement of claim. (See *ante*, p. 52; and see *Compton* v. *Preston*, 21 Ch. D. 138; 51 L. J. Ch. 680; *Macdonald* v. *Carington*, 4 C. P. D. 28.) Thus it seems that the provisions of Ord. XVIII., r. 2, which restrict the joinder of other claims in an action for the recovery of land, are applicable to counterclaims, or at any rate, that a counterclaim which joins claims, the joinder whereof in a statement of claim would contravene those provisions, will be disallowed or excluded (*Compton* v. *Preston*, *supra*; see *ante*, p. 53). But the provisions of Ord. XVIII., r. 5, which allow a plaintiff in certain cases to join claims against a defendant personally with claims against him as executor, have been held not to apply to counterclaims (*Macdonald* v. *Carington*, 4 C. P. D. 28; 48 L. J. C. P. 179). If a counterclaim joins claims which ought not to be joined, it may be wholly or partially disallowed or excluded under Ord. XIX., r. 3, *supra*, and Ord. XXI., r. 15, below cited, or may be struck out or amended as embarrassing (*Compton* v. *Preston*, *supra*; *Macdonald* v. *Carington*, *supra*; and see Ord. XIX., rr. 3, 27, and Ord. XVIII., rr. 8, 9, cited *ante*, pp. 11, 54).

Form of Counterclaim where no Defence is pleaded.

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.

Between *A. B.*.....Plaintiff,

and

C. D......Defendant.

[Defence.

Subject to the counterclaim hereafter set forth, the defendant admits the plaintiff's claim.]

Counterclaim.

1. } [*Here state in a summary form, in the same manner as in a*
2. &c. } *statement of claim, the material facts on which the defendant relies for his counterclaim, dividing the statement of them, when necessary, into*

It is provided by Ord. XXI., r. 15, that "Where a defendant sets up a counterclaim, if the plaintiff, or any other person named in manner aforesaid as party to such counterclaim" (*i.e.*, any person added as defendant along with the plaintiff to the counterclaim, see Ord. XXI. r. 11, cited *post*, p. 543), "contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before reply apply to the Court or a judge for an order that such counterclaim may be excluded, and the Court or a judge may, on the hearing of such application, make such order as shall be just."

A counterclaim will be excluded under these rules where it would improperly prejudice or embarrass the plaintiff or unduly delay him in the prosecution of his action. (See *Padwick* v. *Scott*, 2 Ch. D. 736; 45 L. J. Ch. 350; *Huggons* v. *Tweed*, *supra*; *Gray* v. *Webb*, 21 Ch. D. 802; 51 L. J. Ch. 815.)

If a counterclaim is frivolous or vexatious, or discloses no reasonable grounds of counterclaim, it may be ordered to be struck out under Ord. XXV., r. 4, cited *post*, p. 563. So if it contains matter which is unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, the Court or a judge have power to order such matter to be struck out or amended under Ord. XIX., r. 27, cited *ante*, p. 11.

If the claims on both sides are for liquidated amounts, such as would be the subject of set-off, the defendant may at his option plead his cross-demand either as a defence or as a counterclaim, or he may plead it both as a defence and also as a counterclaim in the alternative. If the amount of such cross-demand exceeds the amount of the plaintiff's liquidated claim, the defendant may plead in his defence a set-off of part of the debt due from the plaintiff, and may counterclaim for the residue of it, so as to recover judgment against the plaintiff for the excess.

Where the claim on either side is a claim for unliquidated damages or for non-pecuniary relief, and the case is not one in which the cross-claim of the defendant could have been pleaded as a defence under the law existing previously to the Judicature Acts, the cross-claim is not in general available by way of defence properly so called, and the defendant, if he seeks to avail himself of it in the same action, can only do so by pleading it as a counterclaim.

A pecuniary counterclaim may be for either a greater or a smaller amount than the amount of the plaintiff's claim to which it is pleaded. (See *Mostyn* v. *West Mostyn, &c., Co.*, 1 C. P. D. 145; 45 L. J. C. P. 401; *Gray* v. *Webb*, 21 Ch. D. 802; 51 L. J. Ch. 815.)

Under ordinary circumstances it is advisable for a defendant who has a cross-claim

separate paragraphs numbered consecutively. See the forms of counterclaims infra. The forms of Statements of Claim set out in Chapters IV. and V., ante, may be used.]

The defendant claims [*or*, counterclaims] :—

[*Here state the amount of debt or damages, or the relief or remedy claimed, in the same manner as in a statement of claim. If several distinct claims are made by the counterclaim, they should be stated separately.*]

(*Signed*) *L. M.*

Delivered the —— ——, 19—.

(*See R. S. C.*, 1883, *App. D., Sect. I.*)

---

which can be properly and conveniently disposed of in the same action to plead it by way of set-off or counterclaim in the action, but he is not obliged to do so, as he may reserve it, if he chooses, for a cross-action against the plaintiff. (See "*Set-off*," *post*, p. 775 ; *Thomson* v. *S. E. Ry. Co.*, 9 Q. B. D. 320 ; 51 L. J. Q. B. 322 ; *Caird* v. *Moss*, 33 Ch. D. 22.) But, if such cross-claim has arisen out of the same transactions as the plaintiff's claim, and the defendant commences a cross-action against the plaintiff in respect of it during the pendency of the original action, the Court or a judge may order that the proceedings in one of the cross-actions shall be stayed, on the terms that the claim of the plaintiff in that action may be set up by way of set-off or counterclaim in the other action (*Thomson* v. *S. E. Ry. Co.*, *supra* ; *Caird* v. *Moss*, *supra* ; *Ladd* v. *Pulestou*, 52 L. J. Ch. 976 ; *Adamson* v. *Moore*, 44 L. T. 420 ; see *Hyman* v. *Helm*, 24 Ch. D. 531).

A counterclaim is treated for the purpose of taxation as a cross-action (*Amon* v. *Bobbett*, 22 Q. B. D. 543 ; *Finska* v. *Brown*, W. N. 1891, 116) ; whilst a set-off proper is a defence, and consequently the distinction between set-off properly so called and counterclaim is often material as regards costs. Where the defendant establishes a defence of set-off to an amount equal to or greater than the proved amount of the plaintiff's claim, he thereby defeats the action, and is entitled (subject to the discretion of the Court or judge under Ord. LXV., r. 1, and the Jud. Act, 1890, s. 5) to the general costs of the action as well as to the costs of his defence of set-off. (See *Baines* v. *Bromley*, 6 Q. B. D. at pp. 691, 694 ; 50 L. J. Q. B. 465 ; *Lowe* v. *Holme*, 10 Q. B. D. 286 ; 52 L. J. Q. B. 270 ; *Lund* v. *Campbell*, 14 Q. B. D. 821 ; 54 L. J. Q. B. 281.) But where the plaintiff succeeds on his claim and the defendant merely succeeds in establishing a cross-claim which can only be relied upon by way of counterclaim (as, for instance, where the claim on either side is for unliquidated damages), the plaintiff's claim, even if it is overtopped by the proved amount of the counterclaim, has not been defeated, and (subject to the discretion of the Court or a judge under Ord. LXV., r. 1, and the Jud. Act, 1890, s. 5, and, in cases where they apply, to the provisions of the County Courts Acts, 1888 and 1903, and Ord. LXV., r. 12), the plaintiff, having succeeded in establishing his claim, is entitled to the general costs of the action, while the defendant is merely entitled to the costs of and incidental to his counterclaim (*Blake* v. *Appleyard*, 3 Ex. D. 195 ; *Cole* v. *Firth*, 4 Ex. D. 301 ; *Neale* v. *Clarke*, 4 Ex. D. 286 ; *Ward* v. *Morse*, 23 Ch. D. 377 ; *Hawke* v. *Brear*, 14 Q. B. D. 841 ; 54 L. J. Q. B. 315 ; *Ahrbecker* v. *Frost*, 17 Q. B. D. 606 ; *Shrapnel* v. *Laing*, 20 Q. B. D. 334 ; *Westacott* v. *Beran*, [1891] 1 Q. B. 774 ; *Atlas Co.* v. *Miller*, [1898] 2 Q. B. 500 ; 67 L. J. Q. B. 815).

If a defendant establishes a defence of set-off, the plaintiff only "recovers" the amount by which his proved claim exceeds the amount of the set-off (*Ashcroft* v. *Foulkes*, 18 C. B. 261 ; *Beard* v. *Perry*, 2 B. & S. 493 ; *Neale* v. *Clarke*, *supra* ; *Stooke* v. *Taylor*, 5 Q. B. D. 569 ; 49 L. J. Q. B. 857 ; *Baines* v. *Bromley*, *supra*). Whilst if a defendant merely establishes a cross-claim which is not pleadable as a defence by

Counterclaim for a Debt for Money lent, and for Damages for Non-delivery of Goods sold.

Counterclaim.

1. The defendant lent £500 to the plaintiff on the 1st May, 19—.

2. The defendant has suffered damage by the plaintiff's breach of a contract in writing, dated the —— ——, 19— [*or*, contained in letters

---

way of set-off, and can only be replied upon by way of counterclaim, the plaintiff is deemed to "recover" the whole amount of his proved claim (*Stooke* v. *Taylor*, *supra*; *Baines* v. *Bromley*, *supra*). The provisions of the County Courts Acts, 1888 and 1903, and of Ord. LXV., r. 12, do not affect the right of a defendant who succeeds upon a counterclaim to obtain his costs in respect of such counterclaim (*Blake* v. *Appleyard*, *supra*; *Chatfield* v. *Sedgwick*, 4 C. P. D. 459).

From the above observations, it appears to be advisable, so far as regards costs, that a defendant who has a cross-demand which is pleadable as a set-off, should plead it, or a sufficient part of it, by way of defence as such set-off (adding, where necessary, a counterclaim for any excess thereof over the amount which may be due to the plaintiff on his claim), rather than that he should set it up simply as a counterclaim. Under some circumstances, however, it may be more advantageous to the defendant to plead such cross-demand as a counterclaim than to set it up as a defence of set-off, for the plaintiff is obliged to reply specifically to a counterclaim (see *post*, p. 548), and, moreover, a counterclaim may be proceeded with, even if the action is dismissed or discontinued (see Ord. XXI., r. 16), whereas a set-off would in such case drop with the action. (See *McGowan* v. *Middleton*, 11 Q. B. D. 464; 52 L. J. Q. B. 355.)

Parties to Counterclaims.]—If one of two or more joint defendants has a separate cross-claim against the plaintiff, he may counterclaim alone against the plaintiff in respect of it.

A defendant cannot set up a counterclaim which he jointly with another person, not a party to the action, has against the plaintiff (*Pender* v. *Taddei*, [1898] 1 Q. B. 798; 67 L. J. Q. B. 703), but it may be a sufficient reason for compelling the plaintiff to join a person as defendant, that, if joined, he would have a counterclaim either jointly with the original defendant against the plaintiff, or arising out of the transactions the subject of the action (*Montgomery* v. *Foy*, [1895] 2 Q. B. 321; 65 L. J. Q. B. 18; and see *Norris* v. *Beazley*, 2 C. P. D. 80; 46 L. J. C. P. 169).

By Ord. XVI., r. 11 (cited *ante*, p. 27), a general power is given to bring in parties necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter. A question which it was necessary in effect to determine as a subsidiary question, in order to arrive at a decision as to the principal matter in issue in the action, would appear to be a question involved in the original action. (See *Montgomery* v. *Foy*, *supra*.)

By Ord. XVI., r. 3, "Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has set up a counterclaim or set-off, he may obtain the benefit thereof by establishing his set-off or counterclaim as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon."

Even where several plaintiffs have been properly joined in an action on a joint claim, the defendant, if he has a cross-claim against one of them only, or distinct cross-claims against each of them separately, may (subject to the rules above mentioned) counterclaim against one of them, or each of them accordingly (*Manchester, &c., Ry. Co.* v. *Brooks*, 2 Ex. D. 243; 46 L. J. Ex. 244).

In an action brought by the plaintiff in his personal character only, a counterclaim against him as executor would not, in general, be allowed (*Macdonald* v. *Carington*, 4

dated the —— and —— ——, 19—, *or as the case may be*] for the sale and delivery by the plaintiff to the defendant of 5,000 tons of Merthyr steam

C. P. D. 28, 38; 48 L. J. C. P. 179; see also *Gray* v. *Webb*, 21 Ch. D. 802; 51 L. J. Ch. 815); and though, in an action by a trustee in his capacity as trustee, a set-off or counterclaim of claims of the *cestui que trust* may be set up, and in an action by a *cestui que trust* claims of the trustee in his capacity as trustee (*Bankes* v. *Jarvis*, [1903] 1 K. B. 549; 72 L. J. K. B. 267; and see *post*, p. 773), as a general rule the claims which are permitted to be raised by counterclaim must be claims against the plaintiff in the capacity in which he sues. (See *Macdonald* v. *Carington*, *supra*; *Gray* v. *Webb*, *supra*; *Alloway* v. *Steere*, 10 Q. B. D. 22; 52 L. J. Q. B. 38; *Stumore* v. *Campbell*, *infra*.) Thus, if the plaintiff sues as public officer of a company authorised to sue by its public officer, a counterclaim against him for debt or damages personally, in his private capacity, would not be allowed.

There is power to transfer to the Chancery Division an action, in which there is a counterclaim for relief, which the Chancery Division alone has the proper machinery to administer. (See *ante*, pp. 33, 34, 69.)

Mode of pleading Counterclaims.]—A counterclaim is in the nature of a statement of claim in a cross-action by the defendant (*McGowan* v. *Middleton*, 11 Q. B. D. 464, 473; 52 L. J. Q. B. 355; *Amon* v. *Bobbett*, 22 Q. B. D. 543, 548; 58 L. J. Q. B. 219; *Stumore* v. *Campbell*, [1892] 1 Q. B. 314, 316; 61 L. J. Q. B. 463; *Levi* v. *Anglo-Continental Gold Reefs*, [1902] 2 K. B. 481, 483; 71 L. J. K. B. 789), and substantially the same principles of pleading apply to it as would be applicable to a statement of claim in such cross-action.

By Ord. XXI., r. 10, "Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim."

A counterclaim should have the word "Counterclaim" prefixed to it as a heading, so as to distinguish it from what is pleaded merely as matter of defence to the plaintiff's claim, though the mere absence of such heading would not invalidate a counterclaim which was otherwise properly pleaded. (See *Lees* v. *Patterson*, 7 Ch. D. 866; 47 L. J. Ch. 616.)

A counterclaim must contain a statement in a summary form of the material facts, but not the evidence by which they are to be proved, and such statement must, when necessary, be divided into paragraphs numbered consecutively. (See Ord. XIX., r. 4, cited *ante*, p. 5.)

Where the defendant pleads both a defence and a counterclaim, the paragraphs of the counterclaim are usually numbered as though they were a continuation of the paragraphs of the defence.

It is provided by Ord. XX., r. 7, that where the defendant relies upon several distinct grounds of counterlaim founded upon separate and distinct facts, such grounds of counterclaim must be stated, as far as may be, separately and distinctly. (See *ante*, p. 7.)

The facts pleaded as supporting a counterclaim must be such as would be sufficient to support an action brought by the defendant for the same cause of complaint. (See *Birmingham Estates Co.* v. *Smith*, 13 Ch. D. 506; 49 L. J. Ch. 251; *Gaslight, &c., Co.* v. *Holloway*, 52 L. T. 434; *McGowan* v. *Middleton*, 11 Q. B. D. 464; 52 L. J. Q. B. 355.) If they are not such as would be sufficient for that purpose, the counterclaim will be open to an objection in point of law under Ord. XXV., r. 2. (See *post*, p. 561.)

The defendant is not allowed to rely for his counterclaim upon matters which have been stated simply as grounds of defence to the plaintiff's claim, and are not specifically referred to in the counterclaim (see *Hillman* v. *Mayhew*, 24 W. R. 485; *Crowe* v. *Barnicot*, 6 Ch. D. 753; 46 L. J. Ch. 855; and *Lees* v. *Patterson*, *supra*), but he may by reference incorporate in his counterclaim allegations already made in the defence. (See the form *ante*, p. 535; and see *Birmingham*

coal at 18*s.* 6*d.* per ton f.o.b. at Cardiff, by equal monthly deliveries over the first five months of 1905.

3. The April and May instalments were not delivered.

Particulars of the damages :—

	£	*s.*	*d.*
Difference between market price in April and May, and the contract price, 2*s.* 6*d.* per ton on 2,000 tons . .	250	0	0

The defendant claims [*or*, counterclaims] :—

(1.) £500.

(2.) £250.

(*Signed*) *L. M.*

Delivered the —— ——, 19—.

(*See R. S. C.*, 1883, *App. D., Sect. VIII.*)

Estates Co. v. *Smith*, 13 Ch. D. 506 ; 49 L. J. Ch. 251 ; *Benbow* v. *Low*, 13 Ch. D. 553 ; 49 L. J. Ch. 259.)

Particulars of the matters relied upon as supporting the counterclaim must be given in all cases where they are required to be given by Ord. XIX., r. 6, and, if sufficient particulars are not given, an order may be made for further and better particulars. (See Ord. XIX., rr. 6, 7, cited *ante*, pp. 37, 38.)

A counterclaim, like a statement of claim, must state specifically the claim made or relief sought by the defendant, though where the defendant has specifically stated the particular relief claimed it is unnecessary for him to add a claim for general or other relief, which may always be given as if it had been asked for. (See Ord. XX., r. 6.)

Where the defendant pleads no other defence than a counterclaim, the allegations of fact contained in the statement of claim (except allegations as to damages) will be taken to be admitted by him (Ord. XIX., rr. 13, 17, cited *ante*, p. 527), but the Court has a discretion whether to make an order for judgment under Ord. XXXII., r. 6, in respect of a pecuniary claim, where there is a substantial counterclaim for debt or damages to an equal or greater amount (*Mersey Steamship Co.* v. *Shuttleworth*, 10 Q. B. D. 468 ; 11 *Ib.* 531 ; 52 L. J. Q. B. 522).

By Ord. XXVIII., r. 3, "A defendant who has set up any counterclaim or set-off may, without any leave, amend such counterclaim or set-off at any time before the expiration of the time allowed him for answering the reply and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence." It seems that this rule applies only to matters pleaded by way of counterclaim, and that where a strict set-off is pleaded merely by way of defence, the defendant, if he wishes to amend it, must obtain leave to do so under Ord. XXVIII., r. 1. (See *ante*, p. 14.)

The time allowed for delivering to the plaintiff a counterclaim or a defence containing a counterclaim is the same as that for delivering a defence. (See *ante*, p. 520.)

A counterclaim, like a defence of set-off (see *post*, p. 775), may (subject to the power of disallowance or exclusion under Ord. XIX., r. 3, and Ord. XXI., r. 15) be pleaded in respect of matters arising after action brought (Jud. Act, 1873, s. 24 (3) (7) : *Beddall* v. *Maitland*, 17 Ch. D. 174 ; 50 L. J. Ch. 401 ; *Ellis* v. *Munson*, 35 L. T. 585 ; *Toke* v. *Andrews*, 8 Q. B. D. 428 ; 51 L. J. Q. B. 281 ; *Wood* v. *Goodwin*, W. N. 1884, p. 17). Where matters arising after action are relied upon as a substantive ground of counterclaim, the counterclaim must show, either by express statement or by the dates therein mentioned, &c., that the matters relied upon arose after action brought, as it will otherwise be deemed to have been pleaded in respect of matters arising before action (*Ellis* v. *Munson*, *supra* ; and see *ante*, p. 531).

Defence and Counterclaim in an Action for the price of Goods sold, on the ground of Breach of Warranty: see "Sale of Goods," post, pp. 760 *et seq.*

Defence and Counterclaim in an Action for Work done and materials provided under a Building Contract: see the Forms, ante, p. 36, *and post,* p. 804.

Defence and Counterclaim in an Action for Trespass to Land, the Defence justifying the Entry for the purpose of removing an unlawful Obstruction, and the Counterclaim claiming Damages for the Obstruction: see Norfolk (Duke of) v. *Arbuthnot,* 4 C. P. D. 290; 5 *Ib.* 390.

For forms of Defences of Set-off, see "Set-off," post, pp. 772 *et seq.*

Section II.—Counterclaims where New Parties are added as Defendants thereto (*b*).

General Form of Defence and Counterclaim, where a Person not a party to the original Action is added as a Defendant along with the Plaintiff to the Counterclaim.

19—. B. No. ——.

In the High Court of Justice,
King's Bench Division.

Between *A. B.*.....Plaintiff,
and
C. D......Defendant,
(by original action)

And between the said *C. D.*.....Plaintiff,
and
the said *A. B.* and *E. F.*....Defendants,
(by counterclaim).

Defence.

1. } [*Here state the grounds of defence to the plaintiff's claim in*
2. } *the action. See ante,* p. 520.]

(*b*) **Joinder of Third Parties as Defendants to Counterclaim.**]—By the Judicature Act, 1873, s. 24 (3) (*ante,* p. 534), a defendant who has a cross-claim against the plaintiff

Counterclaim.

3. } [*Here state in a summary form, in the same manner as in a state-*
4. } *ment of claim in an action brought by the defendant against the plaintiff and the third person, the facts relied upon by the defendant for the claims made against them by his counterclaim, dividing the statement, where necessary, into separate paragraphs numbered consecutively. See the general forms of counterclaim above given. The plaintiff in the action should continue to be spoken of as* "the plaintiff" *in the body of the counterclaim, and similarly the counterclaiming defendant should continue to call himself* "the defendant," *or, if he is one of several defendants,* "the defendant *C. D.*"]

The defendant claims against the said *A. B.* and *E. F.*—[*Here state the amount of debt or damages, or the remedy or relief claimed by the counterclaim: see the general forms of counterclaim above given. If any distinct part of the claims made by the counterclaim are against one only of the defendants to the counterclaim, such part should be stated as being made against that person.*]

General Form of Defence and Counterclaim by one of two or more Defendants who has joined a Co-defendant as a Defendant along with the Plaintiff to a Counterclaim (*c*).

19—. B. No. ——.

In the High Court of Justice,
King's Bench Division.

Between *A. B.*.....Plaintiff,
and
C. D. [*E. F.*] and *G. H.*.....Defendants,
(by original action)
And between the said *C. D.*.....Plaintiff,
and
the said *A. B.* and the said *G. H.*....Defendants,
(by counterclaim).

Defence
of the above named defendant *C. D.*

1. } [*The same as in the preceding form of defence.*]
2. }

---

along with some other person is at liberty to add such other person as a defendant along with the plaintiff to a counterclaim in respect of it, provided that the relief claimed by the counterclaim relates to or is connected with the original subject of the action, and is relief in which the plaintiff is interested, and which might properly have been granted in an action brought by the defendant against the plaintiff and such third person, and this right applies, whether such third person is already a party to the action or not, and consequently a co-defendant may be joined as defendant along with the plaintiff to such counterclaim.

(*c*) Where a third person or a co-defendant is added as a defendant along with the

Counterclaim.

3. } [*Here state in a summary form, in the same manner as in a state-*
4. } *ment of claim in an action brought by the counterclaiming defendant against his co-defendant and the plaintiff, the facts relied on for the claims*

---

plaintiff to a counterclaim, the relief sought against such third person or co-defendant must be "relief relating to or connected with the original subject of the cause" (Jud. Act, 1873, s. 24 (3), cited *ante*, p. 534 ; see *Padwick* v. *Scott*, 2 Ch. D. 736 ; 45 L. J. Ch. 350 ; *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 145 ; 47 L. J. Ex. 296 ; *Barber* v. *Blaiberg*, 19 Ch. D. 473 ; 51 L. J. Ch. 509), and such "as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose," and must be relief which in some way concerns or involves the plaintiff (*Trelearen* v. *Bray*, 45 L. J. Ch. 113 ; *Dear* v. *Sworder*, 4 Ch. D. 476).

The defendant cannot add a third person as defendant to a counterclaim which merely claims relief against such third person or against the plaintiff in the alternative (*Central African Co.* v. *Grove*, 48 L. J. Ex. 510) ; and it has been held that a person cannot be joined as defendant along with the plaintiff to a counterclaim where relief is only claimed against the plaintiff and such person in one of two inconsistent alternatives (*Evans* v. *Buck*, 4 Ch. D. 432 ; see *Child* v. *Stenning*, 5 Ch. D. 695 ; 48 L. J. Ch. 392). But where a counterclaim relates to the plaintiff's cause of action, and raises a question between the defendant and the plaintiff along with the person so added as a party, it is not necessary that the person so added should be one who could have joined as a co-plaintiff in the plaintiff's claim, or that the counterclaim should show a joint liability on the part of the plaintiff and of the person so added. (*Turner* v. *Hednesford Gas Co.*, *supra*.)

By Ord. XXI., r. 11, "Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim setting forth the names of all the persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff." (See the forms, *supra*.) Although in the "further title" which is required to be added under the above rule the counterclaiming defendant is described as plaintiff by counterclaim, and the plaintiff and the person joined along with him are described as defendants by counterclaim, this method of description should not be followed in the body of the pleading, as it might produce confusion, and it is better that in the body of the counterclaim the defendant in the action should continue to be described as the "defendant," or the "defendant *C. D.*," as the case may be, and the plaintiff in the action as "the plaintiff."

The time prescribed for delivery of a statement of defence to the plaintiff is, if the statement of claim was delivered pursuant to an order, ten days after delivery of the claim in the absence of any other order as to time. (See *ante*, p. 521.)

By Ord. XXI., r. 12, "Where any such person as in the last preceding rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence."

A third person or co-defendant who is added as a defendant along with the plaintiff to a counterclaim may reply to the counterclaim any matters which would be a defence to a statement of claim in an action brought by the defendant for the same cause of complaint (see Jud. Act, 1873, s. 24 (3), above cited) ; but he may not counterclaim. (See *post*, p. 549.)

As to the time allowed to such third person or co-defendant for delivering his reply, it is provided by Ord. XXI., r. 14, that "Any person named in a defence as a party to a counterclaim thereby made may deliver a reply within the time within which he

made against them by the counterclaim : see the last preceding form of counterclaim. The co-defendant who is joined as a defendant to the counterclaim may be called " the defendant *G. H.*"]

The defendant *C. D.* against the said *A. B.* and *G. H.*—[*Here state the amount of debt or damages, or the remedy or relief claimed by the counterclaim, distinguishing, if necessary, as to claims made against either of the defendants to the counterclaim separately from the other : see the last preceding form of counterclaim.*]

---

might deliver a defence if it were a statement of claim," thus, in the absence of any other order as to time, making it ten days from the delivery of the counterclaim. (See *ante*, p. 521.)

If the grounds pleaded as supporting the counterclaim are not such as would support an action for the same cause, a third person or co-defendant added as a defendant to the counterclaim may plead in his reply an objection in point of law (*Evans* v. *Buck*, 4 Ch. D. 432 ; *Child* v. *Stenning*, 5 Ch. D. 695 ; 48 L. J. Ch. 392 ; and see *post*, p. 561).

CHAPTER VIII.

REPLIES AND SUBSEQUENT PLEADINGS (*a*).

		PAGE
SECTION I.	*In Ordinary Cases*	545
II.	*When the Defendant sets up a Counterclaim* . . .	548
III.	*When New Parties are added as Defendants to a Counterclaim*	551
IV.	*Replies in the Nature of a New Assignment* . . .	551

SECTION I.—REPLIES AND SUBSEQUENT PLEADINGS IN ORDINARY CASES.

Ordinary Form of Reply to a Defence, where the Defendant has not pleaded a Counterclaim.

19—. B. No. —.

In the High Court of Justice,
King's Bench Division,
Between *A. B.* .....Plaintiff,
and
C. D. .....Defendant.

Reply.

1. The plaintiff joins issue on the defence.

2. &c. [*Here state in a summary form, and in paragraphs numbered consecutively, the special grounds of reply relied upon.*]

(*Signed*) *L. M.*

Delivered the —— ——, 19—.

(*See R. S. C.*, 1883, *App. E., Sects. I. and II.*)

(*a*) **Replies and Subsequent Pleadings.**]—By Ord. XXIII., r. 1, "Except in Admiralty actions no reply shall be delivered unless the same be ordered," and by Ord. XXIII., r. 2, the time, in the absence of any other order as to time, for delivery of the reply is ten days after the defence or last of the defences.

As to the title, date, description, and signature, &c., of replies and subsequent pleadings, see *ante*, pp. 4, 5, 13, and the forms in the text; and see *post*, p. 548.

The plaintiff, where no counterclaim is pleaded, will in most cases find it unnecessary to deliver a reply, as in the absence of any reply the pleadings are "deemed to be closed" at the expiration of the time for delivery of the reply, and "all the material statements of fact" in the defence deemed to have been denied and put in issue (Ord. XXVII., r. 13), but in some cases, as, for example, if the plaintiff desires to admit,

For forms of Reply where the Defendant has pleaded a Counterclaim, see post, p. 548, *et seq.*

For forms of Reply stating an Objection in Point of Law, see "Proceedings in Lieu of Demurrer," post, pp. 561-565.

Reply stating different Grounds of Reply to different Grounds of Defence alleged by the Defendant.

1. As to paragraph —— [*or*, the —— and —— paragraphs] of the defence [*or*, As to the allegation that, &c., *or*, As to so much of the defence as alleges that, &c.], the plaintiff joins issue.

2. As to paragraph —— of the defence—[*Here state any grounds of reply as to the matters alleged in that paragraph.*]

---

so as to save unnecessary costs, some of the facts in the defence, whilst denying others; or if he desires to admit the facts, or some of the facts alleged in the defence, and to meet them by asserting new and additional facts, pleading, as it was called, under the former system in confession and avoidance, he must get leave to deliver and deliver a reply. He must also do so if he wishes to plead in answer to the defence that it mistakes the cause of action. (See *post*, p. 551.) He must also do so where the defence contains a counterclaim which he desires to contest. (See *post*, p. 548.) He must also do so if he wishes to plead specifically an objection to the defence in point of law. (See *post*, p. 561.)

Wherever a reply is delivered by the plaintiff, he will be deemed to admit all such material facts alleged by way of defence to the claim as are not denied either by a joinder of issue or by specific denials in the reply. (See Ord. XIX., rr. 13, 18, cited *ante*, p. 527, and *infra*.)

In all cases when the plaintiff desires to deliver a reply he must get leave to do so (Ord. XXIII., r. 1, *supra*). The leave is obtained by getting an order for it on the summons for directions or on a subsequent application at chambers.

A joinder of issue operates as a denial of all material allegations in the defence, if pleaded to the whole defence, and if pleaded only to a part of the defence, to a denial of all such allegations in that part. (See Ord. XIX., r. 18.) "Each party in his pleading (if any) subsequent to reply may join issue upon the previous pleading" (*Ib.*), so that a joinder of issue is a pleading which may, where applicable, be used in all cases except in answer to a statement of claim or to a counterclaim. (See *post*, p. 548.)

The reply should answer the whole of the matters to which it is pleaded, as the defendant may otherwise move for judgment on admissions under Ord. XXXII., r. 6. (See *ante*, p. 531.) If necessary, the plaintiff may, after receipt of the defence, and before taking any further proceeding (other than an interlocutory application), withdraw all or any part of his claim by a notice of discontinuance under Ord. XXVI., r. 1. He cannot properly do this by his reply. (See *Brooking* v. *Maudslay*, 2 Times Rep. 827.)

Where any particular ground of reply applies only to a part of the grounds of defence alleged by the defendant, the paragraph stating that ground of reply should be so expressed as to show distinctly that it is pleaded only to that part.

The plaintiff in replying, may rely either on legal or on equitable grounds of reply

Reply to a Defence pleaded by one of several Defendants who have severed in their Defences.

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.

Between *A. B.* and *C. D.* .....Plaintiffs,
and
E. F., *G. H.* and *I. K.* .....Defendants.

Reply
to the defence of the defendant *G. H.*

1. The plaintiffs, as to the defence of the above-named defendant *G. H.*, say that—[*Here state the grounds of reply relied upon in answer to the defence to which the reply is pleaded.*]

Form of Rejoinder to a Reply, where the Defendant has not pleaded a Counterclaim.

[*Heading as in the form ante*, p. 545.]

Rejoinder.

1. The defendant joins issue on the reply.

2. &c. [*Here state, in paragraphs numbered separately, any special grounds of rejoinder pleaded by leave under Ord. XXIII., r. 3, cited infra.*]

(see *ante*, p. 33), or on both, and may plead alternative or inconsistent grounds of reply, if he thinks fit.

With respect to the numbering of paragraphs in replies and subsequent pleadings, see *ante*, p. 522, and with respect to the order in which different grounds of reply should be pleaded, see the observations as to the order of pleading defences, *ante*, p. 524.

If the plaintiff alleges any fresh facts in his reply, he must take care that his reply is consistent with his statement of claim, as it would otherwise contravene the provisions of Ord. XIX., r. 16, which direct that "No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same." A defect of this kind under the former system of pleading was called "a departure" in pleading, and was a ground of demurrer. (See Bullen & Leake, 3rd ed., p. 819.) It will now be ground for an application to strike out the reply or rejoinder in which the defect occurs.

The pleading (if any) of the defendant in answer to the plaintiff's reply is called a rejoinder, but, as a joinder of issue on the reply will be implied from not delivering a rejoinder (Ord. XXVII., r. 13), it is unnecessary to deliver a rejoinder, except where the defendant desires to admit some of the facts stated in the reply, or to state fresh facts by way of confession and avoidance of the matter pleaded in the reply, or to plead an objection in point of law to the reply. In either of the two last-mentioned cases leave to rejoin specially must be obtained accordingly. (See Ord. XXIII., r. 3, below cited.)

By Ord. XXIII., r. 3, "No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a judge, and then shall be pleaded only upon such terms as the Court or judge shall think fit. Every pleading subsequent to reply shall be delivered within the time specified in the order giving leave to deliver

For form of Rejoinder to a Reply, where the Defendant has pleaded a Counterclaim, see post, p. 550.

Section II.—Replies, &c., when the Defendant sets up a Counterclaim.

General Form of Reply to a Defence and Counterclaim (b).

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.

Between *A. B.* .....Plaintiff,

and

C. D. .....Defendant.

Reply.

As to the defence:—

1. } [*Here state the reply to the matter alleged by way of defence: see*
2. } "*Replies*," *ante*, p. 545.]

---

the same, or if no time be so specified four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a judge."

As to the mode of computing time, and as to vacations, &c., see *ante*, p. 17.

As to replies where there is a counterclaim, see *infra*.

(*b*) The pleading in answer to a counterclaim is a "reply" and should be so called, and should not be called a "defence to counterclaim." It is in the nature of a defence to the claim set up in the counterclaim, and is subject to substantially the same rules of pleading as defences to statements of claim. (See *ante*, p. 520.) It cannot be delivered without an order giving leave to deliver it. (See Ord. XXIII., r. 1, *ante*, p. 545.) Such order should be obtained on the summons for directions, or on a subsequent application. If a counterclaim alone is pleaded, or a counterclaim with a defence, the time for reply, in the absence of any special order or direction, is ten days (Ord. XXIII., r. 2; Ord. XXI., r. 14).

The plaintiff, in his reply to a counterclaim, may plead anything which would be pleadable by way of defence to a cross-action for the same cause of complaint. (See *McGowan* v. *Middleton*, 11 Q. B. D. 464, 470; 52 L. J. Q. B. 355.)

Ord. XIX., r. 17, provides that it shall not be sufficient for a plaintiff, in his reply to a counterclaim, to deny generally the grounds alleged by the counterclaim, and that he must deal specifically with each allegation of fact of which he does not admit the truth, except damages. (See *ante*, p. 527.) Hence a plaintiff is not entitled to reply to a counterclaim by a mere joinder of issue, and a reply to a counterclaim which merely purports to join issue may be struck out as irregular (*Benbow* v. *Low*, 13 Ch. D. 553; see *Green* v. *Sevin*, 13 Ch. D. 589); and where there is a counterclaim which the plaintiff contests, whether it is pleaded together with a defence or alone, a reply is necessary. By Ord. XXIII., r. 2, the time for delivering such reply is, in the absence of other order as to time, ten days after the defence or the last of the defences.

A plaintiff not under disability will be taken to admit every allegation of fact in the counterclaim which he does not deny specifically or by necessary implication, or expressly refuse to admit in his reply, except allegations as to damages claimed or their amount. (See Ord. XIX., r. 13, cited *ante*, p. 527, and Ord. XIX. r. 17, *supra*.) This, however, is not applicable to a reply of "possession" pleaded in answer to a counterclaim for the recovery of land. (See Ord. XXI., r. 21, cited *post*, p. 906.)

If the plaintiff disputes the counterclaim, he must raise by his reply all matters

As to the counterclaim :—

3. } [*Here state the grounds of reply to the matters alleged by way of*
4. } *counterclaim, pleading each distinct ground of reply in a separate paragraph, and numbering the paragraphs consecutively: see the forms of replies to counterclaims, infra. The forms of defence set out in Chapters XI. and XII., post, may be used.*]

(*Signed*) *L. M.*

Delivered the —— ——, 19—.

which show the counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of reply as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law, or Statute of Frauds (Ord. XIX., r. 15, cited *ante*, p. 523).

If the facts stated in the counterclaim do not show any sufficient ground of action against the plaintiff, an objection in point of law may be pleaded by the reply to the counterclaim. (See Ord. XXV., r. 2, cited *post*, p. 560.)

By Ord. XXII., r. 9, "A plaintiff may in answer to a counterclaim pay money into Court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant." (See "*Payment into Court*," *post*, p. 748.)

It is provided (*inter alia*) by Ord. XXIV., r. 1, that "if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counterclaim alleged therein by the defendant, it may be raised by the plaintiff in his reply, either alone or together with any other ground of reply;" and by Ord. XXIV., r. 2, that "where any ground of defence to any set-off or counterclaim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, or at any subsequent time by leave of the Court or a judge, deliver a further reply setting forth the same." (See *ante*, p. 531.)

A reply pleaded by the plaintiff under the above rules must show by express averment, or by the dates therein mentioned, &c., that the matter relied upon has arisen since the delivery of the statement of defence. (See *Ellis* v. *Munson*, 35 L. T. 585; and see *ante*, p. 531.)

Where the plaintiff sets up, in answer to a counterclaim, a ground of defence which has arisen after action brought and *before* the defence and counterclaim has been delivered, the case is not within the words of Ord. XXIV.; but any such ground of defence to a counterclaim may be set up by the plaintiff in his reply under the provisions of s. 24 (3) of the Jud. Act, 1873 (*Toke* v. *Andrews*, 8 Q. B. D. 428; 51 L. J. Q. B. 281; and see *Renton* (*or Gibbs*) v. *Neville*, [1900] 2 Q. B. 181; 69 L. J. Q. B. 514). A person not a party to the original action, but brought in as defendant to a counterclaim, is held not to be entitled to counterclaim (*Street* v. *Gover*, 2 Q. B. D. 498; 46 L. J. Q. B. 582; *Alcoy, &c. Co.* v. *Greenhill*, [1896] 1 Ch. 19; 65 L. J. Ch. 99). A plaintiff may, in his reply to a counterclaim founded upon a cause of action, or contract, which he does not admit, and which he has not set up in his claim, himself set up, in answer to such counterclaim, a counterclaim founded upon such cause of action, or contract, but only by way of protection or shield against such first-mentioned counterclaim (*Renton* v. *Neville*, *supra*). A plaintiff in his reply to a counterclaim has been permitted to counterclaim against the defendant in respect of cross-claims against the defendant which accrued to the plaintiff since the delivery of the defence (*Toke* v. *Andrews*, *supra*; but see *Ellis* v. *Munson*, 35 L. T. 585; *Alcoy, &c. Co.* v. *Greenhill*, *supra*, and *Renton* v. *Neville*, *supra*).

As to replies by a person named as defendant along with the plaintiff to a counterclaim, see *post*, p. 551.

Pleadings subsequent to the reply to a counterclaim are subject to Ord. XXIII. r. 3, cited *ante*, p. 547.

General Form of Reply to a Counterclaim where no Defence is pleaded.

[*Heading as in the preceding form.*]

Reply.

1.)
2.) [*Here state the grounds of reply relied upon in answer to the*
3. &c.) *counterclaim: see the preceding form.*]

Reply, in an Action on a Guarantee, to a Defence of Time given to the Principal, and Counterclaim for Damages for Non-delivery of Goods sold.

[*Heading as in the preceding form.*]

Reply.

As to the defence:—

1. The plaintiff joins issue.

2. The agreement giving time to the principal expressly reserved remedies against the surety.

As to the counterclaim:—

1. The defendant was not ready and willing to accept and pay for the goods.

(*See R. S. C.*, 1883, *App. E., Sect. I.*)

Example of a Statement of Claim, Defence and Counterclaim, and Reply: see ante, pp. 35 et seq.

Rejoinder to a Reply to a Counterclaim.

Rejoinder.

As to the plaintiff's reply to the defendant's counterclaim, the defendant says that:—

[*Where it is necessary to rejoin specially, and leave has been obtained to do so, state the facts which are relied upon in answer to the reply, in the ordinary manner: see ante*, pp. 546, *et seq.*]

(*Signed*) *L. M.*

Delivered the —— ——, 19—.

Section III.—Replies, &c., when New Parties are added as Defendants to a Counterclaim.

Reply by a Person, who is not a Party to the original Action, to a Counterclaim pleaded against him as a Co-defendant with the Plaintiff (c).

[*Heading as in the form ante*, p. 541.]

Reply

of the above-named *E. F.* to the counterclaim.

[The above-named *E. F.*, who is one of the defendants to the counterclaim herein, says, as to the said counterclaim, that:—]

1. } [*Here state the grounds of reply relied upon by the party pleading*
2. } *the reply: see the general form of reply to a counterclaim, ante*,
3. &c. } p. 548.]

A like Reply by one of the Defendants to the original Action who has been joined as a Defendant along with the Plaintiff to a Counterclaim.

[*Heading as usual.*]

Reply

of the defendant *G. H.* to the counterclaim.

[The defendant *G. H.*, as to the counterclaim herein, says that:—]

1. } [*Proceed as in the preceding form of reply.*]
2. }

Section IV.—Replies in the Nature of a New Assignment (*d*).

Reply that the Breaches relied upon are not the same as those referred to in the Defence, giving particulars of the Breaches relied upon.

The breaches mentioned in the statement of claim [*or, where no statement of claim has been delivered,* in the indorsement of the writ of summons] are not the breaches referred to in the defence, but other and different breaches of the said agreement [*or*, covenant]. They are as

(*c*) If a person not a party to the original action is made a defendant to a counterclaim, he must, if he wishes to dispute the counterclaim, obtain leave to deliver and deliver a "reply" to the counterclaim. The reply is in the nature of a defence, and all the rules applicable to the latter apply to it.

(*d*) Under the system of pleading which was in force previously to the Judicature Acts, it frequently happened that in consequence of the generality of statement allowed in declarations, a plea either mistook altogether the cause of action, or restricted it within narrower limits than the plaintiff intended. In such cases the plaintiff was not allowed, under a mere denial of the matter of defence alleged in the plea, to show that he was suing for other causes of action than those to which the matter pleaded applied,

follows, viz.:—[*State particulars of the breaches relied upon by the plaintiff, as, for instance,* They are breaches of the said agreement (*or*, covenant) which were committed by the defendant subsequently to the —— ——, 19— (*or*, the date of the said release, *or*, judgment, &c.), viz., between that date and the —— ——, 19—.]

---

as by such denial he was deemed to adopt the particular or restricted cause of action which the plea had specified (*Rogers* v. *Custance*, 1 Q. B. 77 ; *Bracegirdle* v. *Peacock*, 8 Q. B. 174 ; *Jubb* v. *Ellis*, 3 D. & L. 364), and he was not allowed to reply by merely denying that the cause of action specified in the plea was the cause of action stated in the declaration, because the defendant would thereby have been precluded from pleading any matter of defence which he might have to the causes of action on which the plaintiff really relied (*Sprigg* v. *Neal*, 3 Lev. 92 ; *Heydon* v. *Thompson*, 1 A. & E. 210 ; *Wheeler* v. *Senior*, 7 M. & W. 562 ; *Aldred* v. *Constable*, 6 Q. B. 370 ; *Glover* v. *Dixon*, 9 Ex. 158). It was also held that a reply joining issue under s. 79 of the C. L. P. Act, 1852, did not import a denial that the cause of action specified in the plea was the same as that stated in the declaration (*Glover* v. *Dixon, supra ; Huddart* v. *Rigby*, L. R. 5 Q. B. 139 ; 39 L. J. Q. B. 19 ; see "*Ways*," *post*, p. 953). In such cases, therefore, where the plea *primâ facie* answered the whole of the declaration so as not to be demurrable on the ground that it only answered part of the alleged cause of action, the plaintiff was in general obliged, in order to prevent the exclusion or undue restriction of his causes of action, either to amend his declaration so as to show distinctly what his real causes of action were, or to plead a new assignment. (See Bullen & Leake, 3rd ed., p. 654.)

A new assignment was a pleading in the nature of a special kind of reply, which explained the declaration in such a manner as to point out the real or supposed mistake of the defendant, and to show that the defence pleaded was either wholly inapplicable to the causes of action relied upon by the plaintiff, or was applicable only to a part of them. It stated that the plaintiff was suing for another cause of action than that admitted in the plea ; as, for example, for another promise or debt (*Heydon* v. *Thompson*, 1 A. & E. 210 ; *Monkman* v. *Shepherdson*, 11 A. & E. 411 ; *Jubb* v. *Ellis*, 3 D. & L. 344), for a trespass on a different spot or upon a different occasion (*Pratt* v. *Groome*, 15 East, 235 ; *Oakley* v. *Davis*, 16 East, 82), or for an excess in committing an act which the defendant had attempted to justify by his plea (*Loweth* v. *Smith*, 12 M. & W. 582 ; *Worth* v. *Terrington*, 13 M. & W. 781 ; *Playfair* v. *Musgrove*, 14 M. & W. 239 ; *Ash* v. *Dawnay*, 8 Ex. 237).

Where the plea wholly mistook the causes of action relied upon by the plaintiff, the new assignment stated that the plaintiff was suing not for the causes of action admitted in the plea, but for breaches of other contracts, or for other breaches of the same contract, or for trespasses or grievances committed at other times and on other occasions than those referred to in the plea, or for trespasses or grievances committed to a greater extent and with more violence, or for a longer time, than was necessary for the purposes or upon the occasions stated in the plea. (See Bullen & Leake, 3rd ed., pp. 655, 755.) Where the plea correctly answered part of the causes of action, but unduly restricted them, the plaintiff, if he disputed the truth of the matter of defence pleaded, joined issue on the plea, and also new assigned that he sued not only for the causes of action admitted in the plea, but also for breaches of other contracts, or for other breaches, or for trespasses or grievances committed at other times, &c., than those referred to in the plea (*Ib.*).

The plaintiff under a new assignment was bound to state and prove a cause of action within the terms of the declaration (*Cheasley* v. *Barnes*, 10 East, 73 ; *Pugh* v. *Griffith*, 7 A. & E. 827), and of the particulars (if any) delivered by him (C. L. P. Act, 1852, s. 87, now repealed).

The necessity for a reply introducing matter in the nature of a new assignment can but rarely, if ever, arise under the present system. The greater particularity now

Reply joining Issue on the Defence, and stating that the Breaches relied upon include Breaches other than those which are admitted by the Defence.

1. The plaintiff joins issue.

2. The breaches of the said agreement [*or*, covenant] which are relied upon by the plaintiff, and in respect of which this action is brought [*or*, The breaches of the said agreement (*or*, covenant) which are mentioned in the statement of claim, *or*, *if no statement of claim has been delivered*, in the indorsement of the writ of summons], include not only those breaches which are admitted [*or*, referred to] in the defence, but also other breaches of the said agreement [*or*, covenant], viz. :—[*State particulars of such of the breaches relied upon as are not admitted by the defence: see the preceding form.*]

Reply stating that the Wrongful Acts complained of are different from those which are admitted in the Defence, and giving Particulars of them.

The acts which are complained of, and for which this action is brought [*or*, The wrongful acts which are mentioned in the statement of claim, *or*, *if no statement of claim has been delivered*, in the indorsement of the writ of summons], are not the trespasses [*or*, grievances, *or*, acts] which are admitted [and attempted to be justified] in the defence. They are trespasses [*or*, grievances, *or*, wrongful acts] committed by the defendant upon other parts of the said land [*or*, in respect of other goods, *or*, at other

---

required in the statement of claim usually precludes the necessity for a new assignment arising. It may be noted that r. 6 of Ord. XXIII., which provided that no new assignment should be necessary or used, was annulled by r. 7 of the R. S. C., 1902. The necessity for such a reply may possibly still arise in cases where, in answer to a general statement of the plaintiff's ground of complaint, a defence is pleaded which, while setting up a *primâ facie* answer to the claim, apparently mistakes the causes of action intended to be sued upon, or unduly restricts the causes of action on which the plaintiff relies. (See "*Trespass*," *post*, p. 922.) In such cases it is usually advisable for the plaintiff to amend, so as to show distinctly what are the causes of action relied upon; but in rare cases it may be advisable to reply specially in such a manner as to give distinct notice of his intention to contend that the defence pleaded is not applicable to the causes of action relied upon, or applies only to a part of them.

A special reply in the nature of a new assignment need not be in any particular form, but it must state the omitted matter with sufficient particularity to point out distinctly what are the causes of action relied upon by the plaintiff, and what the case is which the defendant has to meet. It must be consistent with the terms of the statement of claim, or of the indorsement of the writ where no statement of claim has been delivered, or of the particulars, if any, delivered by the plaintiff, and cannot, therefore, be pleaded in respect of any causes of action not covered by those terms respectively. (See *ante*, p. 547.) If such reply introduced new matter which was inconsistent with the terms of the statement of claim, it would be objectionable as contravening the provisions of Ord. XIX., r. 16, cited *ante*, p. 547.

times, *or*, upon other occasions, *or*, for other purposes] than those referred to in the defence.

Particulars are as follows:—[*State particulars of the causes of action relied upon by the plaintiff, so as to show that the defence pleaded is inapplicable to them.*]

Reply joining Issue on the Defence, and also stating that besides the Matters admitted by the Defence the Plaintiff complains of other Wrongful Acts of the Defendant, and giving Particulars thereof.

1. The plaintiff joins issue.

2. The wrongful acts [*or*, trespasses, *or*, grievances] complained of by the plaintiff in this action include not only those which are admitted [*or*, referred to and attempted to be justified] in the defence, but also trespasses [*or*, grievances, *or*, wrongful acts] committed by the defendant upon other parts of the said land [*or*, in respect of other goods, *or*, at other times, *or*, upon other occasions, *or*, for other purposes] than those referred to in the defence.

Particulars are as follows:—[*State particulars of such of the acts complained of as are not admitted by the defence.*]

A like Reply to a Defence of Justification, where the Plaintiff complains of an Excess.

1. The plaintiff joins issue.

2. The wrongful acts [*or*, trespasses, *or*, grievances] complained of by the plaintiff in this action include not only those which are admitted [*or*, referred to and attempted to be justified] in the defence, but also wrongful acts [*or*, trespasses, *or*, grievances] committed by the defendant to a greater extent and with more violence [*or*, for a longer time] than was necessary for the purposes [*or*, upon the occasions] referred to in the defence.

Particulars are as follows:—

Like forms of reply: see "*Ways*," *post*, p. 953.

CHAPTER IX.

THIRD PARTY PROCEDURE (*a*).

Third Party Notice.

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.
Between *A. B.*.....Plaintiff,
and
C. D......Defendant.

To Mr. *E. F.* Notice filed —— ——, 19—.

THIRD PARTY NOTICE.

Take notice that this action has been brought by the plaintiff against the defendant [as surety for *M. N.* upon a bond conditioned for payment of £2,000 and interest to the plaintiff.

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are (his co-surety under the said bond, *or*, also

(*a*) **Third Party Procedure.**]—The "third party procedure" is regulated by Ord. XVI., rr. 48—55, and is based upon the Judicature Act, 1873, s. 24 (3), cited *ante*, p. 534.

It is applicable only in cases where the defendant's claim against a person sought to be made liable as a third party is substantially a claim for contribution or indemnity in respect of the plaintiff's claims in the action, and not where the right claimed is an independent right, not depending on the liability of the defendant to the plaintiff in the action (*Pontifex* v. *Foord*, 12 Q. B. D. 152; 53 L. J. Q. B. 321; *Speller* v. *Bristol Steam Nav. Co.*, 13 Q. B. D. 96; 53 L. J. Q. B. 322; *Birmingham Land Co.* v. *L. & N. W. Ry. Co.*, 34 Ch. D. 261; *Wynne* v. *Tempest*, [1897] 1 Ch. 110, 66 L. J. Ch. 81; *Nelson* v. *Empress Assce. Corp.*, [1905] 2 K. B. 281; 74 L. J. K. B. 699).

By Ord. XVI., r. 48, "Where the defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the Court or a judge, issue a notice (hereinafter called the third-party notice) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his defence. Such notice may be in the form or to the effect of the Form No. 1 in Appendix B., with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action."

Claims for indemnity under the above rule can arise only from a contract for such indemnity, express or implied, or from some equity resulting from the relation of the

surety for the said *M. N.*, in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the —— day of ——, A.D. ——).]

Or [as acceptor of a bill of exchange for £500, dated the —— day of ——, A.D., drawn by you upon and accepted by the defendant, and payable three months after date.

---

parties to each other (*Birmingham Land Co.* v. *L. & N. W. Ry. Co.*, *Wynne* v. *Tempest*, *supra*, and see "*Indemnities*," *ante*, p. 194).

Claims for contribution arise generally between co-sureties or other joint contractors, or between co-trustees (see "*Money Paid*," *ante*, p. 255; *Robinson* v. *Harkin*, [1896] 2 Ch. 413, 426; 65 L. J. Ch. 773; *Jackson* v. *Dickinson*, [1903] 1 Ch. 947; 72 L. J. Ch. 761), though in some cases, as, for example, under s. 5 of the Directors' Liability Act, 1890, they arise by virtue of express statutory enactment. (See *Gerson* v. *Simpson*, [1903] 2 K. B. 197; 72 L. J. K. B. 603.)

The defendant's claim against the third party for contribution or indemnity need not be co-extensive with the whole of the plaintiff's claim against the defendant (see Ord. XVI., r. 52, cited *infra*; *Pontifex* v. *Foord*, *supra*), and leave may be granted to serve a third party notice even where the indemnity was not given till after action brought (*Edison, &c. Co.* v. *Holland*, 33 Ch. D. 497). If there is a *bonâ fide* claim for contribution or indemnity, leave to serve the notice may be granted without inquiring into the validity of the claim (*Ib.*).

As to service out of the jurisdiction, see *McCheane* v. *Gyles*, [1902] 1 Ch. 287; 71 L. J. Ch. 183.

Where a third party desires to dispute the defendant's liability to the plaintiff's claim, or his own liability to the defendant for contribution or indemnity, he must enter an appearance in the action within eight days from the service of the notice. (See Ord. XVI., r. 49.) The fact of his so appearing will not preclude him from raising any objections which he may have to the third party proceedings against him on the hearing of a summons for directions under r. 52, cited *infra* (*Benecke* v. *Frost*, 1 Q. B. D. 419, 421; 45 L. J. Q. B. 693; *Pontifex* v. *Foord*, *supra*; *Baxter* v. *France*, [1895] 1 Q. B. 455; 64 L. J. Q. B. 335) and the proper time for raising such objections is upon the hearing of such summons (*Baxter* v. *France*, *supra*).

By Ord. XVI., r. 52, "If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court or a judge for directions, and the Court or judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or judge may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party."

If no application for directions under this rule is made, or if on such application directions are refused, the third party proceedings come to an end (*Schneider* v. *Batt*, 8 Q. B. D. 701; 50 L. J. Q. B. 525; *Baxter* v. *France*, *supra*; cp. *The Millwall*, [1905] P. 155, 163; 75 L. J. P. 13). Directions will not, in general, be given where there would remain a dispute arising out of the same transaction between the defendant and the third party to be tried in another action even if directions were given as asked in the original action (*Baxter* v. *France*, *supra*). If the third party, on an application for directions under r. 52, does not set up any defence to the defendant's claim, and it does not appear that there is any question to be tried as to his liability, judgment may be ordered to be entered for the defendant against the third party, where the defendant's claim against the third party is a liquidated one (*Gloucestershire Banking Co.* v. *Phillipps*, 12 Q. B. D. 533; 53 L. J. Q. B. 493; *Bell* v. *Von Dadelszen*, W. N. 1883, p. 208). Where a person not already a party to the action has been added, under Ord. XVI.,

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.]

Or [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent.]

And take notice that, if you wish to dispute the plaintiff's claim in this

---

r. 48, as a third party, he cannot counterclaim against the plaintiff in the action, and it seems that this is so, even where the third party has obtained leave to defend the action under r. 53, below cited (*Eden* v. *Weardale Colliery Co.*, 28 Ch. D. 333 ; 35 *Ib.* 287 ; 54 L. J. Ch. 384 ; 56 *Ib.* 178 ; *Alcoy* v. *Greenhill*, [1896] 1 Ch. 19 ; 65 L. J. Ch. 99) ; but it has been held that he might counterclaim against the defendant (*Borough* v. *James*, W. N. 1884, p. 32 ; *Re Salmon*, 42 Ch. D. 354 ; but see *Eden* v. *Weardale*, *supra*).

If the defendant does not apply for directions under r. 52 within a reasonable time after the third party has appeared in the action, the third party may apply to be dismissed from the action, and to have the proceedings against him set aside with costs.

A married woman may properly be made a third party in respect of her separate estate (*Gloucestershire Banking Co.* v. *Phillipps*, *supra*).

A plaintiff against whom there is a counterclaim is a defendant to such counterclaim, and may as such defendant, in a proper case, avail himself of the third party procedure in regard to the subject-matter of the counterclaim. (See *Levi* v. *Anglo-Continental Gold Reefs*, [1902] 2 K. B. 481 ; 71 L. J. K. B. 789.)

By Ord. XVI., r. 53, "The Court or a judge upon the hearing of the application mentioned in rule 52, may, if it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the Court or judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action."

After service of the third party notice, the third party is deemed a party to the action, and has the same rights in respect of his defence against the defendant's claim as if he had been sued in the ordinary way by such defendant (Jud. Act, 1873, s. 24 (3), cited *ante*, p. 534 ; *Hornby* v. *Cardwell*, 8 Q. B. D. 329 ; 51 L. J. Q. B. 89).

There would seem to be power to permit a person brought in as a third party to bring in as a fourth party a person who has contracted to pay him a contribution or to indemnify him in respect of the defendant's claim, and this has been allowed to be done in some cases (*Fowler* v. *Knoop*, 36 L. T. 219 ; *Witham* v. *Vane*, 49 L. J. Ch. 242 ; though see *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 Q. B. D. 268 ; 49 L. J. Q. B. 527).

If the third party disputes the defendant's liability to the plaintiff's claim, directions may be given that the third party shall have liberty to defend against the plaintiff's claim in the action. (See r. 53, above cited ; *Coles* v. *Civil Service Ass.*, 26 Ch. D. 529 ; 53 L. J. Ch. 638 ; *Callender* v. *Wallingford*, 53 L. J. Q. B. 569 ; *Fowler* v. *Knoop*, *supra* ; *Eden* v. *Weardale Colliery Co.*, *supra* ; *Barton* v. *London & N. W. Ry. Co.*, 38 Ch. D. 144 ; 57 L. J. Ch. 676 ; *Edison Co.* v. *Holland*, 41 Ch. D. 28.) In such case it is not uncommon to order that the defendant do deliver a statement of claim to the third party, and that the third party do deliver a defence thereto. (See the form of order, Chitty Forms, 13th ed. 213 ; see *Hornby* v. *Cardwell*, *supra* ; *Schneider* v. *Batt*, *ante*, p. 556 ; *Bates* v. *Burchell*, W. N. 1884, p. 108.) In such cases the pleadings will be in substantially the same form (*mutatis mutandis*) as ordinary pleadings in an action between the parties for the same cause, but the words "*E. F.*, Third Party,"

action as against the defendant *C. D.* or your liability to the defendant *C. D.*, you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing, you will be deemed to admit the validity of any judgment obtained against the defendant *C. D.*, and your own liability to contribute or indemnify to the extent herein claimed, which may be summarily enforced against you pursuant to the Rules of the Supreme Court, 1883, Order XVI., Part VI.

Dated the —— ——, 19—.

(*Signed*) *C. D.*
Or, *X. Y.*
Solicitor for the defendant *C. D.*

Appearance to be entered at ——.

(*See R. S. C.*, 1883, *App. B.*, *No.* 1.)

(*See a form of notice, The Millwall*, [1905] P. at p. 158.)

Statement of Claim by Defendant against Third Party.

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.
Between *A. B.*.....Plaintiff,
and
C. D......Defendant,
and
E. F......Third Party.

Statement of Claim

by the defendant *C. D.* against the third party, *E. F.*, delivered pursuant to the order of——, dated the —— ——, 19—.

1. The plaintiff's claim against the defendant herein, as appears by the statement of claim, a copy whereof was delivered to the third party on the

should be added to the title of the action, and the heading of the pleadings should describe them according to the fact.

Where the third party obtains leave to defend the action against the plaintiff he will in general be allowed to defend the action upon any ground which would have been available to the original defendant as a defence to the plaintiff's claim (*Callender* v. *Wallingford*, *supra*; *Eden* v. *Weardale Colliery Co.*, *supra*), unless as regards any set-off or counterclaim which the latter may have had against the plaintiff. It seems that the leave given him to defend the action will not entitle him to set up a counterclaim on his own account against the plaintiff. (See *ante*, p. 557.)

Where directions have been given that pleadings shall be delivered between the defendant and the third party, the third party may pay money into Court in respect of the defendant's claim, together with a defence denying liability. (See Jud. Act, 1873, s. 24 (3), above cited; *post*, p. 748; *Bates* v. *Burchell*, W. N. 1884, p. 108.)

—— ——, 19—, is for [*state the claim shortly, as, for instance*, £—— alleged to be due from the defendant as the acceptor to the plaintiff as the holder of a bill of exchange for £——, dated —— ——, 19—, drawn by *X. Y.* upon and accepted by the defendant, payable —— months after date].

2. The defendant [disputes the plaintiff's claim on the grounds appearing in his defence, but in the event of his being held liable to the plaintiff he] claims and is entitled to be indemnified by the third party, *E. F.*, against the plaintiff's claim [*or*, claims and is entitled to contribution from the third party, *E. F.*, to the extent of one-half (*or, as the case may be*) of any liability he may be under to the plaintiff under the following circumstances] :—

3. [*Here state the facts on which the claim for indemnity or contribution is based. This should be done in the same manner as in an ordinary statement of claim, as, for instance,* The defendant accepted the said bill of exchange (if at all) for the accommodation of the third party, and at his request made verbally on the —— ——, 19—.]

The defendant claims against the third party :—

(1.) A declaration that he is entitled to be indemnified as [*or*, to contribution to the extent] aforesaid.

(2.) Judgment for any amount that may be found due from the defendant to the plaintiff [*or*, for contribution to the extent aforesaid].

(3.) Judgment for the amount of any costs he may be adjudged to pay to the plaintiff, and for the amount of his own costs of the defence and proceedings against the third party herein.

(*Signed*) *L. M.*

Delivered on the —— ——, 19—.

Defence of Third Party to Statement of Claim against him by the Defendant.

[*Title, &c., as in preceding form.*]

Defence

of the above-named third party, *E. F.*, to the statement of claim of the defendant *C. D.*, delivered pursuant to the order of ——, dated the —— ——, 19—.

By Ord. XVI., r. 55, "Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party ; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action."

Where a defendant claims contribution or indemnity over against a co-defendant

1. } [*State the answer to the claim for indemnity or contribution as in*
2. } *an ordinary defence as, for instance*—1. The third party admits [*or*, does not admit] that the defendant accepted the said bill of exchange.

2. The third party denies that the defendant accepted the said bill of exchange for his accommodation or at his request, or under any circumstances such as would entitle the defendant to be indemnified by the third party in respect thereof.]

(*Signed*) *L. M.*

Delivered on the —— ——, 19—.

---

under this rule, the latter may be served with a third party notice without any leave being obtained for that purpose (*Towse* v. *Loveridge*, 25 Ch. D. 76; 53 L. J. Ch. 499).

Ord. XVI., r. 54, gives power to the Court to make such order as to costs against a third party as it may think right (*Edison Co.* v. *Holland*, 41 Ch. D. 28; see also Jud. Act, 1890, s. 5). Such claims are not within the enactments of the County Courts Act, 1888, s. 116, as to costs.

CHAPTER X.

PROCEEDINGS IN LIEU OF DEMURRER (*a*).

Defence consisting of an Objection in Point of Law.

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.
Between *A. B.* .....Plaintiff,
and
C. D. .....Defendant.

Defence.

The defendant will object that the statement of claim is bad in law and discloses no cause of action against him on the grounds that—[*Here state the point of law showing that the plaintiff's statement of the alleged cause of action is bad in substance, and that the action is not maintainable against the defendant: see the following forms.*]

(*Signed*) *L. M.*
Delivered the —— ——, 19—.

(*a*) **Proceedings in lieu of Demurrer.**]—Previously to the coming into operation of the R. S. C., 1883, the mode of disputing the sufficiency in law of the pleading of the opposite party was by demurrer.

A demurrer was a pleading which raised an issue in *law* as distinguished from an issue of *fact*, that is, it admitted, for the purposes of the demurrer, the truth of all the facts alleged in the pleading demurred to, but denied that they were sufficient in their legal effect to constitute the right of action or ground of defence or reply, &c., which was relied upon by the opposite party (Bullen & Leake, 3rd ed., p. 820; Stephen on Pleading, 7th ed., p. 140).

Before the Common Law Procedure Act, 1852, demurrers were of two kinds, viz., *general* demurrers, under which the party demurring could not raise any objections founded on mere defects of form in the pleading demurred to, and *special* demurrers, under which the party demurring was allowed to rely upon technical objections in respect of formal defects expressly set out in the demurrer. (See Bullen & Leake, 3rd ed., p. 819.) Special demurrers for merely formal defects in an opponent's pleading were abolished by the last-mentioned Act.

By Ord. XXV. of the Rules of 1883, demurrers have been wholly abolished and other proceedings substituted in lieu thereof.

By Ord. XXV., r. 1, "No demurrer shall be allowed."

By Ord. XXV., r. 2, "Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court or a

Defence, including an Objection in Point of Law, to an Action for Verbal Slander actionable only by reason of Special Damage.

Defence.

1. The defendant did not speak or publish the words or any of them.

2. The words did not refer to the plaintiff.

3. The defendant will object that the special damage stated is not sufficient in point of law to sustain the action.

(*R. S. C.*, 1883, *App. E.*, *Sect. III.*, *No.* 2.)

---

judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

By Ord. XXV., r. 3, "If, in the opinion of the Court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court or judge may thereupon dismiss the action or make such other order therein as may be just."

Hence, if a party seeks to raise by his pleading any objection in point of law as distinguished from any ground of defence or reply upon the facts, he may do so by pleading such objection in his defence or reply, &c., stating it in a succinct form, such as is exemplified by the precedents cited *supra*, from the R. S. C., 1883, App. E., Sect. III.

An objection in point of law may be pleaded together with grounds of defence or of reply upon the facts, and in such cases the objection does not require any separate heading, but should be stated in a separate paragraph, which should generally follow the paragraphs containing the statement of the party's case upon the facts, and be numbered consecutively with them. The date, title, and description of a defence or reply, &c., containing an objection in point of law is the same as that of an ordinary defence or reply, &c., upon the facts, and it must be delivered in the same manner and within the same time as such defence or reply, &c.

A party who pleads an objection in point of law should state the ground of objection relied upon, but where the objection is that the pleading objected to is insufficient in the absence of further allegations or facts, which might well be of more than one description, it is enough to state as the ground of objection, "that the claim shows no cause of action," or the defence "shows no answer to the claim," as the case may be. (See *Bidder* v. *McLean*, 20 Ch. D. 512; *Burrows* v. *Rhodes*, [1899] 1 Q. B. 816, 818; 68 L. J. Q. B. 545; *Anderson* v. *Midland Ry. Co.*, [1902] 1 Ch. 369, 370; 71 L. J. Ch. 89.)

If an objection in point of law applies only to part of the causes of action or grounds of defence or counterclaim or reply, &c., it should be limited to that part accordingly, or so stated as to show distinctly to what part it is pleaded. The part so objected to must be a distinct and severable part of the causes of action or grounds of defence, counterclaim, or reply, &c., alleged by the other side. (See Ord. XXV., r. 2, *supra*; and see *Hornby* v. *Cardwell*, 8 Q. B. D. 329; *Watson* v. *Hawkins*, 24 W. R. 884; *Powell* v. *Jewesbury*, 9 Ch. D. 34.)

An objection may be pleaded in any case where it raises some substantial question of law, which, if decided in favour of the party pleading the objection, would show that the causes of action, or the grounds of defence, counterclaim, or reply, &c., alleged by the opposite party, or any distinct part or parts thereof respectively, are ineffectual in law as against the party pleading the objection. (See Ord. XXV., r. 3, above cited; *Burstall* v. *Beyfus*, 26 Ch. D. at p. 38; 53 L. J. Ch. 565; *O'Brien* v. *Tyssen*, 28 Ch. D. 372; *Dadswell* v. *Jacobs*, 34 Ch. D. 278; *Salaman* v. *Warner*, [1891] 1 Q. B. 734; 60 L. J. Q. B. 624.)

The objection must be one of substance, and not a mere technical objection for defects of form. (See Ord. XXV., r. 3, *supra*; and Ord. XIX., r. 26, cited *ante*, p. 10.)

It would seem that an objection in point of law may now be pleadable in some

The like, to an Action on a Marine Policy stated to contain Clauses that the Policy was to be Proof of Interest and without Benefit of Salvage.

1. The defendant did not make the policy.
2. The loss was not by the perils insured against.
3. The defendant will object that the policy was avoided by 19 Geo. 2, c. 37, s. 1.

(*R. S. C.*, 1883, *App. E.*, *Sect. III.*, *No.* 3.)

---

cases in which a demurrer under the former practice would not have been admissible, since, by the terms of the present Rules, objections in point of law pleaded under Ord. XXV., r. 2, are not restricted, as demurrers under the former practice were, to matters appearing on the *pleadings* strictly so called. (See *Dadswell* v. *Jacobs*, *supra*; *Consett Waterworks Co.* v. *Ritson*, 22 Q. B. D. 318; *Graham* v. *Public Works Commissioners*, [1901] 2 K. B. at p. 782.)

In general, however, objections in point of law pleaded under the Rules are, like demurrers under the former practice, founded upon the facts appearing on the face of the pleadings of the opposite party, or, where the objection is pleaded to part only of his case, in that part of his pleadings to which the objection is directed, and the facts so appearing are, for the purpose of the decision of such objection, deemed to be admitted by the party pleading the objection. (See *O'Brien* v. *Tyssen*, 28 Ch. D. 372; *Burrows* v. *Rhodes*, [1899] 1 Q. B. at p. 821. If the objection which is sought to be raised depends upon a denial of any of those facts, or upon any other facts not so appearing, the party who seeks to raise it should simply plead such denial or such additional facts, leaving to his opponent the option of joining issue thereon or of pleading an objection in point of law, or of answering in both these ways.

Where the contest between the parties is as to which of two constructions is the true construction of a deed or other document, it may sometimes be convenient to set out the document *verbatim* in the pleadings, so that its construction may be determined by an objection in point of law. (See *ante*, p. 8.)

Where an objection in point of law under Ord. XXV., r. 2, raises the whole or a substantial part of the question between the parties, so that its decision may render the trial of the issues of fact unnecessary, an order may in general be obtained on application under that rule for hearing and disposing of the objection in point of law before the trial of the action. (See *London, Chatham & Dover Ry. Co.* v. *S. E. Ry. Co.*, 53 L. T. 109; and see also *Bryson* v. *Russell*, 14 Q. B. D. 720; *O'Brien* v. *Tyssen*, 28 Ch. D. 372; *Salaman* v. *Warner*, [1891] 1 Q. B. 734; 60 L. J. Q. B. 624.) As to the mode of pleading defences under the Statute of Frauds and the Sale of Goods Act, 1893, see *post*, pp. 663, *et seq.*, and as to those under the Statutes of Limitation, *post*, pp. 717, 875.

By Ord. XXV., r. 4, "The Court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

A summons to strike out pleadings under the above rule should only be taken out where it is clear that the pleading objected to discloses no reasonable cause of action or ground of defence, or reply, &c., or that the action is on the face of the pleadings frivolous or vexatious (*Burstall* v. *Beyfus*, 26 Ch. D. 35; 53 L. J. Ch. 565; *In re Batthyany*, 32 W. R. 379; *Boaler* v. *Holder*, 54 L. T. 298; *Dadswell* v. *Jacobs*, *supra*; *Shafto* v. *Bolckow*, 34 Ch. D. 725; *Hubbuck* v. *Wilkinson*, [1899] 1 Q. B. 86, 91; 68 L. J. Q. B. 34; *Lea* v. *Thursby*, 90 L. T. 265). An objection under the Statute of Frauds should not be raised by an application under this rule (*Fraser* v. *Pape*, 91 L. T. 340).

Irrespectively of the jurisdiction conferred by r. 4 above cited, the Court has an

The like, to an Action on a Guarantee for the Price of Goods.

1. The goods were not supplied to *E. F.* on the guarantee.

2. The defendant will object that the guarantee discloses a past consideration on the face of it.

(*R. S. C.*, 1883, *App. E., Sect. III., No.* 1.)

Defence, including Objections in Point of Law, to distinct Parts of the alleged Causes of Action.

Defence.

1, 2. [*Here state any facts which afford a defence to the whole claim or to those parts of it to which the objections in point of law are not pleaded.*]

3. As to the —— paragraph of the statement of claim [*or*, As to so much of the statement of claim as alleges that, &c., *or*, As to the alleged breach of the covenant to repair, *or*, As to the plaintiff's claim on the alleged guarantee, &c., *as the case may be*], the defendant will object that—[*Here state the objection: see the preceding forms.*]

4. As to the said —— paragraph of the statement of claim [*or, as the case may be*], the defendant will further object that—[*Here state any other distinct ground of objection to the same causes of action to which the preceding objection is pleaded.*]

Reply of an Objection in Point of Law.

19—. B. No. —.

In the High Court of Justice,
King's Bench Division.

Between *A. B.* .....Plaintiff,

and

C. D. .....Defendant.

Reply.

The plaintiff will object that the defence is bad in law and discloses no answer to the statement of claim, on the ground that—[*Here state the point of law showing that the defence is bad in substance.*]

(*Signed*) *L. M.*

Delivered the —— ——, 19—.

---

inherent jurisdiction to strike out any pleading which is an abuse of the process of the Court (*Remmington* v. *Scoles*, [1897] 2 Ch. 1; 66 L. J. Ch. 526); or to dismiss actions which are shown to be frivolous or vexatious (*Willis* v. *Earl Beauchamp*, 11 P. D. 59; *Castro* v. *Murray*, L. R. 10 Ex. 213; *Dawkins* v. *Saxe-Weimar*, 1 Q. B. D. 499; *Reichel* v. *Magrath*, 14 App. Cas. 665; 59 L. J. Q. B. 159; *Lawrance* v. *Norreys*, 15 App. Cas. 210; 59 L. J. Ch. 681; *Haggard* v. *Pelicier*, [1892] A. C. 61; 61 L. J. P. C. 19).

Reply including an Objection in Point of Law, as well as other Grounds of Reply.

Reply.

1. The plaintiff joins issue.
2. [*Here state the other ground of reply.*]
3. As to the —— paragraph of the defence [*or*, As to the alleged release, &c., *or, as the case may be*], the plaintiff will object that—[*Here state the objection in point of law.*]

For a form of Objection on the Ground that the Agreement relied on is void under the Ground Game Act, 1880, *see Sherrard* v. *Gascoigne*, [1900] 2 Q. B. at p. 280.

For a form of Objection on the Ground that the Action is not maintainable, by reason of the Damage alleged being too remote, see Dulieu v. *White*, [1901] 2 K. B. at p. 670.

For a form of Objection that the Action would not lie, the Remedy being by Petition of Right only, see Graham v. *Public Works Commissioners*, [1901] 2 K. B. at p. 782 [*the point of law raised was held bad*].

For a form of Objection to an Action brought by a Corporation for a Libel charging them with Corrupt Practices, that the Words were not capable of being a Libel on the Plaintiffs, and that the Claim disclosed no cause of action, see Mayor of Manchester v. *Williams*, [1891] 1 Q. B. at p. 95.

CHAPTER XI.

DEFENCES AND SUBSEQUENT PLEADINGS IN ACTIONS ON CONTRACTS.

For the Date, Title and Formal Parts of Defences and Subsequent Pleadings, see "General Forms of Defence," ante, p. 520; "Counterclaims," ante, pp. 534 et seq.; and "Replies, &c.," ante, p. 545.

Accord and Satisfaction (a).

Defence of Accord and Satisfaction by the Delivery of Goods.

On the —— ——, 19—, a brown horse was delivered by the defendant to, and accepted by, the plaintiff in discharge of the alleged cause of action. (*See R. S. C.*, 1883, *App. D., Sect. IV.*)

(*a*) This defence consists, as the name imports, of two parts, *accord* and *satisfaction*: that is to say, of something given or done by the defendant to or for the plaintiff, and accepted by the latter upon a mutual agreement that it shall be a discharge of the cause of action. The agreement is the accord, and the thing given or done is the satisfaction. Both parts are essential to the defence, for accord without satisfaction is no answer. (See *James* v. *David*, 5 T. R. 141, and cases cited *post*, p. 567.)

Bills of exchange and promissory notes may be discharged without satisfaction by renunciation on the part of the holder. (See *post*, p. 609.)

Anything may be given and received by way of accord and satisfaction; and in the common case of a debtor paying his creditor a debt *post diem*, the defence is really one of accord and satisfaction, although from the frequent recurrence of the transaction it is looked upon as a distinct defence under the name of payment. (See *post*, p. 745.) In the case of payment of an ascertained debt, however, the payment of a smaller sum by the debtor is no satisfaction of a larger sum then due from him without some additional consideration (*Cumber* v. *Wane*, 1 Stra. 426; 1 Sm. L. C., 11th ed., p. 338; *Foakes* v. *Beer*, 9 App. Cas. 605; 54 L. J. Q. B. 130; *Underwood* v. *Underwood*, [1894] P. 204; 63 L. J. P. 109); whereas, in other cases the value of the things done or given in accord and satisfaction is not inquired into, as they are accepted as equivalent by agreement (*Pinnel's Case*, 5 Co. 117 a; *Curlewis* v. *Clark*, 3 Ex. 375, 379; *Sibree* v. *Tripp*, 15 M. & W. 23; *Goddard* v. *O'Brien*, 9 Q. B. D. 37; *Bidder* v. *Bridges*, 37 Ch. D. 406; 57 L. J. Ch. 300). But payment of a smaller sum may be a satisfaction of a larger ascertained debt where there is a new consideration to support the agreement to that effect, as where it is paid by a negotiable instrument (*Sibree* v. *Tripp*, *supra*; *Bidder* v. *Bridges*, *supra*; and see *post*, p. 569); or where it is paid before the whole debt is payable, or as a composition under an arrangement with creditors or by a third party (*Lewis* v. *Jones*, 4 B. & C. 506, 513; *Welby* v. *Drake*, 1 C. & P. 557; *Wilkinson* v. *Byers*, 1 A. & E. 106; *Edwards* v. *Havelier*, 1 C. P. D. 111; see *post*, p. 567; and as to payment by a third party, see *Walter* v. *James*, L. R. 6 Ex. 124; 40 L. J. Ex. 104, and cases there cited). An account

The like, by Work done.

On the —— ——, 19—, the defendant did certain work for the plaintiff [in repairing the plaintiff's house, &c., *or, as the case may be, giving particulars of the work done*], which work was done by the defendant and accepted by the plaintiff in discharge of the alleged cause of action.

---

stated of the balance due between the plaintiff and the defendant, and a payment of that balance by the defendant, being a smaller sum than the amount claimed, where all the items of the account are on one side, is not a defence by way of accord and satisfacton to the whole claim, but merely amounts to a defence of payment *pro tanto*. (See *Perry* v. *Attwood*, 6 E. & B. 691; 25 L. J. Q. B. 408; *Smith* v. *Page*, 15 M. & W. 683.) But a defence of an account stated of cross demands and payment of the balance is good (*Callander* v. *Howard*, 10 C. B. 290; *Sutton* v. *Page*, 3 C. B. 204; and see form *post*, p. 747).

A substituted agreement may be accepted in accord and satisfaction of an existing cause of action, the new promise only, and not the performance of it, being taken in satisfaction and discharge (*Hall* v. *Flockton*, 14 Q. B. 380; 16 *Ib.* 1039; *Evans* v. *Powis*, 1 Ex. 601; *Edwards* v. *Hancher*, *supra*). In such cases the discharge of the original debt by the acceptance of the new promise in satisfaction of it is a sufficient consideration for such new promise, and if the new promise so accepted is not performed, the remedy of the creditor will be by action for its breach (*Lynn* v. *Bruce*, 2 H. Bl. 317; *Henderson* v. *Stobart*, 5 Ex. 99; *McManus* v. *Bark*, L. R. 5 Ex. 65; 39 L. J. Ex. 65).

An accord, in order to form a defence, must be executed and satisfied, as the accord alone is no defence (*Peytoe's Case*, 9 Co. 79 a; *Bayley* v. *Homan*, 3 Bing. N. C. 915, 920; see *Hardman* v. *Bellhouse*, 9 M. & W. 596). Thus, a plea that it was agreed that the defendants should secure the debt by a mortgage to be paid by instalments, and that the defendant had always been ready to execute the mortgage, but had never been called upon to do so, was held bad (*Allies* v. *Probyn*, 2 C. M. & R. 408). So, a plea that it was agreed that the plaintiff should take out his debt in beer, and that the defendant was always ready and willing to carry out the agreement on his part, was held a bad plea (*Collingbourne* v. *Mantell*, 5 M. & W. 289; and see *Wray* v. *Milestone*, 5 M. & W. 21). So, in an action upon a contract to deliver timber, a plea that the plaintiff agreed to accept other timber instead of that contracted for, and that the defendant tendered such other timber, which the plaintiff refused to accept, was held to be a plea of an accord without satisfaction (*Gabriel* v. *Dresser*, 15 C. B. 622; 24 L. J. C. P. 81). So, pleas to the effect that it was agreed that the defendant should give the plaintiff authority to collect the defendant's debts, and satisfy the cause of action thereout, and that the plaintiff might have collected the debts, but through his negligence or default failed in doing so, have been held to be bad (*Gifford* v. *Whittaker*, 6 Q. B. 249; *Baillie* v. *Moore*, 8 Q. B. 489). Until satisfaction under the accord, the original cause of action is not at all affected thereby, so that it remains liable to be barred by the Statute of Limitations (*Reeves* v. *Hearne*, 1 M. & W. 323).

An accord and satisfaction made by a third party with the plaintiff, on the defendant's behalf, may be subsequently adopted by him and enure to his benefit (*Jones* v. *Broadhurst*, 9 C. B. 173, 193; *Randall* v. *Moon*, 12 C. B. 261; and see *Walter* v. *James*, L. R. 6 Ex. 124; 40 L. J. Ex. 104, and the cases there cited).

An accord and satisfaction accepted from one of several persons jointly liable, or jointly and severally liable, for the same debt is a discharge of all (*Nicholson* v. *Revill*, 4 A. & E. 675), unless there has been an express agreement that the rights of the plaintiff against the other parties liable should be reserved (*Solly* v. *Forbes*, 2 B. & B. 38; *Watters* v. *Smith*, 2 B. & Ad. 889). Before the Judicature Acts it was the rule at common law that an accord and satisfaction made with one of several joint-creditors was a good discharge as against all, on account of the necessity of all the joint-creditors

The like, by Substituted Agreement.

On the —— ——, 19—, by an agreement in writing, dated that day [*or*, made verbally, *or*, *as the case may be*], between the plaintiff and the defendant, it was agreed that the defendant should deliver the cargo of the "Mary" at the Surrey Commercial Docks instead of at Hull [as per charter-party of 1st March, 19—,] [which he accordingly did,] and that

---

joining as plaintiffs in a common law action against the debtor (*Wallace* v. *Kelsall*, 7 M. & W. 264). In equity, however, if the debt due to such joint-creditors was due to them as members of a partnership firm, or, it would seem, if the debt was a joint loan of which each had contributed a part out of his own separate money, so that they were partners in the transaction, they were regarded as having several interests in the debt, and as being tenants in common of it (*Lake* v. *Gibson*, 2 White & Tudor, 7th ed. 952 *et seq.*; *Morley* v. *Bird*, 3 Ves. 628, 631; *Steeds* v. *Steeds*, 22 Q. B. D. 537; 58 L. J. Q. B. 30), and, consequently, in such cases, an accord and satisfaction made with one of them in fraud of the others, where the facts were known to the debtor, was not binding in equity on the other joint-creditors so far as regarded their shares of the debt (*Steeds* v. *Steeds*, *supra*). Thus, where the debtor of a firm, who made an arrangement by way of accord and satisfaction with one of the partners, had knowledge or notice that the arrangement was for the private advantage of that partner only, and was made in fraud of the other partners, and without their authority, the defrauded partners were allowed to sue the debtor in equity, joining the other partner as a co-defendant (*Piercy* v. *Fynney*, L. R. 12 Eq. 69; 40 L. J. Ch. 404; and see *Kendal* v. *Wood*, L. R. 6 Ex. 243; 39 L. J. Ex. 167; and *Midland Ry. Co.* v. *Taylor*, 8 H. L. C. 751). It appears that the equity rule would now be followed. (See Jud. Act, 1873, s. 24 (1) and (7), s. 25 (11); Lindley on Partnership, 6th ed., pp. 276, 279, 304; *Steeds* v. *Steeds*, *supra*.)

The defence of accord and satisfaction properly so-called is confined to the case of accord and satisfaction *after* breach. Where, before breach, a new agreement is entered into varying or discharging the original agreement, such new agreement, if validly entered into, is, without satisfaction or performance, a good defence to an action for a subsequent breach of so much of the original agreement as has been so discharged or altered; but this is not properly a defence by way of accord and satisfaction, but a defence by way of rescission. (See *post*, p. 755.)

Accord and satisfaction after breach was in general a good defence at common law to an action on any contract, whether made by parol or by specialty (*Blake's Case*, 6 Co. 43 b; *Smith* v. *Trowsdale*, 3 E. & B. 83; *Cumber* v. *Wane*, *supra*). But this rule did not apply in some cases of contracts by specialty, where the liability sued upon arose solely out of the specialty itself and irrespectively of any subsequent default, *e.g.*, in the case of covenants for payment of present money debts (*Blake's Case*, *supra*; *Peytoe's Case*, 9 Co. 79 a; *Massey* v. *Johnson*, 1 Ex. 241, 253; *Steeds* v. *Steeds*, 22 Q. B. D. 537, 539; 58 L. J. Q. B. 302). In such last-mentioned cases, and also in cases of so-called accord and satisfaction *before* breach in respect of liabilities by specialty, it was necessary to the validity of the accord and satisfaction at common law that it should be made or evidenced by deed, as the original contract being under seal could not at common law be altered or rescinded by parol. (See *post*, p. 753.) But this rule did not prevail in equity, as a parol release, or rescission of a specialty contract, may be effectual in equity if founded on consideration (*Binns* v. *Fisher*, 43 L. J. Ch. 188; *Webb* v. *Hewitt*, 3 K. & J. 438; *Taylor* v. *Manners*, L. R. 1 Ch. 48; 35 L. J. Ch. 128; see *Yeomans* v. *Williams*, L. R. 1 Eq. 184; 35 L. J. Ch. 283; and *post*, p. 753), and it appears that the equitable doctrine on these subjects is now applicable (Jud. Act, 1873, s. 24 (1), (2), (5), s. 25 (11), *ante*, pp. 33—35; *Steeds* v. *Steeds*, *supra*).

See further *post*, p. 755.

such agreement should be and the same accordingly was accepted in discharge of the alleged cause of action.

(*See R. S. C.*, 1883, *App. D.*, *Sect. IV.*)

The like, by giving a Bill of Exchange (*b*).

The defendant, on the —— ——, 19—, indorsed and delivered to the plaintiff a bill of exchange for £——, dated —— ——, 19—, drawn by the defendant on [and accepted by] *J. K.*, payable to the defendant or order, —— months after date, which said bill was so indorsed and delivered by the defendant, and was received and accepted by the plaintiff in discharge of the plaintiff's claim.

The like, by indorsing to the Plaintiff a Promissory Note (*b*).

The defendant, on the —— ——, 19—, indorsed and delivered to the plaintiff a promissory note, dated —— ——, 19—, made by *J. K.*, whereby the said *J. K.* promised to pay to the defendant or order £——, —— months after date, which said note was so indorsed and delivered by the defendant, and was received and accepted by the plaintiff in discharge of the plaintiff's claim.

(*b*) If a negotiable bill or note is given and accepted in complete satisfaction and discharge of a cause of action, the transaction amounts to an *accord and satisfaction*, and this is so, even where such bill or note is given and accepted in satisfaction of a cause of action for an ascertained debt of larger amount than the amount of the bill or note (*Sibree* v. *Tripp*, 15 M. & W. 23; *Goddard* v. *O'Brien*, 9 Q. B. D. 37; *Bidder* v. *Bridges*, 37 Ch. D. 406; 57 L. J. Ch. 300). But if such bill or note is given and accepted, not in satisfaction and discharge, but, as is usually the case, merely for and on account of a debt forming the cause of action, the transaction only operates as a conditional payment to the amount of the bill or note, suspending to that extent the right of action during the running of the security and until default in payment thereof. (See *post*, p. 616, where see also an example of the mode of pleading the last-mentioned defence.) If such security given for and on account of the cause of action (or any renewal of such security) is duly paid, the transaction thereupon operates, to the extent of the bill or note, as payment of the original debt (*Ib.*). Whether the bill or note is given and accepted *in accord and satisfaction* or *for and on account* of the debt, is a question of fact depending on the actual agreement made between the parties (*Sibree* v. *Tripp*, *supra*; *Goldshede* v. *Cottrell*, 2 M. & W. 20; *Maillard* v. *Duke of Argyll*, 6 M. & G. 40; *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122; 28 L. J. C. P. 110; *Day* v. *McLea*, 22 Q. B. D. 610; 58 L. J. Q. B. 293; *Bidder* v. *Bridges*, *supra*; *In re Romer*, [1893] 2 Q. B. 286).

Where the defendant pleads that a bill or note has been taken in accord and satisfaction, a reply simply alleging that the bill or note was subsequently dishonoured would be bad. (See *Sard* v. *Rhodes*, 1 M. & W. 153.) But where the defendant merely pleads that the bill or note has been taken for and on account of the debt, such a reply would be good, as in that case the original right of action revives on the dishonour of the bill or note. (See *Ib.*; and *Burliner* v. *Royle*, 5 C. P. D. 354; *In re Romer*, [1893] 2 Q. B. 286; and *post*, pp. 615, 746.)

The like, by Payment of a Smaller Sum by a Third Party (*c*).

On the —— ——, 19—, *J. K.*, out of his own moneys paid to the plaintiff, at the defendant's request, £——, which, by agreement in writing dated the —— ——, 19—, [*or*, contained in a letter dated ——, *or*, made verbally on the —— ——, 19—, *or, as the case may be*], between the said *J. K.*, and the plaintiff and the defendant, the said *J. K.*, so paid, and the plaintiff accepted in discharge of the plaintiff's claim.

Defence of an Agreement between the Plaintiff, the Defendant and a Third Party, that the Defendant should be discharged and the Third Party be accepted by the Plaintiff as his Debtor instead (*d*).

On the —— ——, 19—, by agreement in writing dated that day [*or*, made verbally, *or, as the case may be*] between the plaintiff and the defendant and *J. K.*, who then owed the defendant £——, the defendant relinquished his claim against *J. K.* for the said £——, and *J. K.* undertook to pay the said £—— to the plaintiff instead of to the defendant, and the plaintiff then accepted the said *J. K.* as his debtor for the said sum in discharge of his claim against the defendant.

Defence of Accord and Satisfaction by a Composition made by a Debtor with his Creditors: see "Composition with Creditors," post, p. 639.

(*c*) See *ante*, p. 566.

(*d*) The precedent states that the defendant relinquished a debt due from the third party to the defendant, but the existence of such debt from the third party to the defendant is not essential to the validity of the defence. Wherever an agreement has been made between the plaintiff and the defendant, and a third party, that the latter should become liable to the plaintiff instead of the defendant, and that the defendant should be discharged, and the plaintiff has accepted the liability of the third party, and discharged the defendant according to the agreement, the transaction affords a good defence by way of accord and satisfaction. (See *per* Buller, J., *Tatlock* v. *Harris*, 3 T. R. 180; *Hodgson* v. *Anderson*, 3 B. & C. 842, 855.)

A retiring partner may be discharged from existing liabilities by an express agreement to that effect between himself and the members of the firm as newly constituted and the creditors, or by a course of dealing between the creditors and the firm as newly constituted, from which such an agreement is to be implied. (See 53 & 54 Vict. c. 39, s. 17 (3), and *ante*, p. 269.)

The acceptance of the separate liability of one of several joint debtors, instead of the joint liability of all, is a sufficient consideration for the discharge of the joint liability, and amounts to an accord and satisfaction in respect of such joint liability (*Lyth* v. *Ault*, 7 Ex. 669; 21 L. J. Ex. 217). So, where an agreement has been made between the plaintiff and the defendant, and a third party, to whom the plaintiff was indebted, that the defendant should take upon himself the debt of the plaintiff, in consideration of the plaintiff discharging him from his debt, and accordingly the defendant has become liable to the third party, and the third party has discharged the plaintiff from his debt, this may be pleaded as a defence by way of accord and satisfaction (*Cochrane* v. *Green*, 9 C. B. N. S. 448; 30 L. J. C. P. 97).

See for forms of pleas under the old system of accord and satisfaction made to one of three joint plaintiffs: Wallace v. *Kelsall*, 7 M. & W. 264; *of accord and satisfaction by delivery of goods: Hall* v. *Poyser*, 13 M. & W. 600; *by a set-off of debts and delivery of goods: Wallace* v. *Kelsall*, 7 M. & W. 264; *Learmouth* v. *Grandine*, 4 M. & W. 658; *by giving a guarantee: Alexander* v. *Strong*, 9 M. & W. 734; *by delivering goods to a third party for the plaintiff: Stead* v. *Poyer*, 1 C. B. 782; *by an agreement to refer the matters of the action, together with other matters, to arbitration, and performance of the agreement: Williams* v. *London Commercial Exchange Co.*, 10 Ex. 569; *by the settlement of a former action for the same cause on payment of the debt and costs: Power* v. *Butcher*, 10 B. & C. 329; *Ross* v. *Jaques*, 8 M. & W. 135; *by paying a smaller sum, and withdrawing a defence to an action and paying costs: Cooper* v. *Parker*, 14 C. B. 118; 15 C. B. 822; *by the plaintiff satisfying the debt out of goods deposited in his hands for that purpose: Ross* v. *Moses*, 1 C. B. 227; *by delivering possession of a house and a payment of money: Lavery* v. *Turley*, 6 H. & N. 239; 30 L. J. Ex. 49. *See also, pleas of accord and satisfaction: to an action on a bill of exchange, by delivery of other negotiable instruments: James* v. *Williams*, 13 M. & W. 828; *to an action for the breach of the condition of a bond: Field* v. *Robins*, 8 A. & E. 90; *to an action for not delivering goods under a contract of sale, by the acceptance of other goods in accord and satisfaction: Gabriel* v. *Dresser*, 15 C. B. 622; 24 L. J. C. P. 81; *to an action for use and occupation that plaintiff had wrongfully distrained the defendant's goods, and it was agreed that plaintiff should keep the goods distrained in satisfaction of the debt: Jones* v. *Sawkins*, 5 C. B. 142; *to an action on an award to pay money by instalments: Smith* v. *Trowsdale*, 3 E. & B. 83.

ACCOUNT (*e*).

See "*Account*," *ante*, p. 69.

ACCOUNT STATED (*f*).

Denial of the Stating of the Account.

The defendant denies that the alleged or any accounts were [*or*, account was] stated between the plaintiff and the defendant.

(*e*) For instances of former pleadings in actions of account before the Judicature Acts, see cases cited *ante*, p. 69, and *Baxter* v. *Hozier*, 5 Bing. N. C. 288; *Beer* v. *Beer*, 12 C. B. 60; *Gorsly* v. *Gorsly*, 1 H. & N. 144.

(*f*) It is a good defence to a claim on an account stated to show that the account stated was incorrect (*Thomas* v. *Hawkes*, 8 M. & W. 140; *Dails* v. *Lloyd*, 12 Q. B. 531), or that it was stated respecting a debt for which there was no consideration (*French* v. *French*, 2 M. & G. 644; *Clarke* v. *Webb*, 1 C. M. & R. 29), or the consideration for

Defence alleging that the Amount found to be due on the Accounts stated was a smaller Sum than that claimed.

The sum of £—— only was found to be due from the defendant to the plaintiff upon the alleged stating of accounts. [*Here state any answer which there may be as to the* £—— *admitted to have been found due, or, in the absence of such answer, plead payment of that amount into Court: see "Payment into Court," post,* p. 747.]

Administrators.

See "Executors," post, p. 648.

Admissions (*g*).

The defendant admits that—[*State fact admitted.*]

Agent (*h*).

Denial of Agency.

The defendant denies that the plaintiff [*or*, defendant, *as the case may be*] was employed by the defendant [*or*, plaintiff] to act as his agent [*or*, was the agent of the defendant, *or*, plaintiff] as alleged, or at all.

Denial of the alleged Terms of Employment.

The plaintiff [*or*, defendant, *as the case may be*] was not employed upon the alleged terms. The terms of the employment were contained in a

which had failed (*Jacobs* v. *Fisher*, 1 C. B. 178; *Wilson* v. *Wilson*, 14 C. B. 616), or respecting a debt for which the defendant was not liable (*Petch* v. *Lyon*, 9 Q. B. 147; and see *Wells* v. *Girling*, 8 Taunt. 737; *Pierce* v. *Evans*, 2 C. M. & R. 294). As to other defences, see *ante*, pp. 70, 71.

It is no defence to a claim on an account stated to plead simply that a subsequent account was stated in which the balance was in the defendant's favour, but the defendant in such case must plead the payment or set-off, or other transaction by which the account has been altered. (*Fidgett* v. *Penny*, 1 C. M. & R. 108.)

Where it is sought to re-open a settled account there must be upon the pleadings some distinct and specific averment of errors, or at any rate of some one definite and important error (*Parkinson* v. *Hanbury*, L. R. 2 H. L. 1, 11, 19; 36 L. J. Ch. 292).

(*g*) See "*Defences*," *ante*, p. 520. As to signing judgment on admissions in pleadings, see Ord. XXXII., r. 6, and Chitty's Forms, 13th ed., p. 237.

(*h*) See "*Agent*," *ante*, p. 72; "*Broker*," *post*, p. 621; "*Money Paid*," *post*, p. 742; "*Money Received*," *post*, p. 743; "*Stock Exchange*," *post*, p. 792.

written agreement dated —— —— 19— [*or*, in letters dated ——, *or*, agreed to verbally on the —— —— 19—, *or*, *as the case may be*] and were, &c. [*Here state the terms briefly, and show that they have been duly complied with by the defendant.*]

Defence to an Action for Commission, denying the alleged Services.

The defendant did not sell [*or*, procure a purchaser of] the goods, or any of them [*or*, let the said house, *or*, procure the said *E. F.*, or any person to become tenant of the house, *or*, *as the case may be*].

Defence to an Action against an Agent for not Accounting, that the Plaintiff never requested the Defendant to Account (*i*).

The defendant was employed by the plaintiff upon the terms contained in [&c. *as in the form, supra*] that he should render an account only when requested to do so, and he was never requested to do so.

Defence to a Claim by a House Agent for Commission.

1. The defendant never agreed or otherwise became liable to pay the alleged or any commission.

2. The plaintiff did not earn or otherwise become entitled to be paid the alleged or any commission. He did not introduce the said lessees nor did he let the said premises to them.

3. The defendant denies that the plaintiff did anything in respect of the said letting. If he did anything which is denied he did it voluntarily and not on any terms, or under any contract which would entitle him to be paid by the defendant in respect thereof.

4. The amount of the commission claimed is excessive and unreasonable.

Defence to an Action on an Agreement, that the Defendant contracted solely as Agent for a disclosed Principal (*k*).

The alleged agreement was made by the defendant, not on his own account, but only as agent for *J. K.*, as the plaintiff at the time of the making of the alleged agreement well knew.

(*i*) The above form is applicable only in cases where a request to account is a condition precedent to the agent's liability for not accounting. See *Topham* v. *Braddick*, 1 Taunt. 572; and see *post*, p. 641, as to the mode of pleading in such cases.

(*k*) An agent who enters into a contract, not on his own account, but professedly as agent for a disclosed principal, is not in general personally liable thereon to the other

Denial of Receipt of an alleged Secret Commission (l).

The defendant denies that he received the alleged or any commission.

Denial that the alleged Commission was received corruptly, secretly, or improperly (l).

1. The defendant admits he received the alleged commission, but he says it was not received by him either secretly or corruptly, nor was it received in breach of his duty towards the plaintiff.

2. It was received by the defendant openly and with the knowledge of the plaintiff, and in payment for his services to the plaintiff, and in accordance with his contract with the plaintiff [*or*, with the known usage of the trade].

---

contracting party; and this is so, generally speaking, even where the contract is in writing, provided that the contract sufficiently expresses that he is contracting merely as agent for another party. (See notes to *Thompson* v. *Davenport*, 2 Sm. L. C., 11th ed., p. 379, and see *ante*, p. 72.) But where an agent signs a written contract in his own name, without any qualification, and there is nothing in the written contract itself to show that he is contracting merely as an agent for another, he is in general personally bound by the contract, as he is not allowed to controvert the terms of the written document by parol evidence. (See *ante*, p. 72.) In some trades a broker expressly contracting as agent for an unnamed principal may be personally liable on the contract by reason of a special custom of the trade. (See *ante*, p. 137, and *Barrow* v. *Dyster*, 13 Q. B. D. 635; *Pike* v. *Ongley*, 18 Q. B. D. 708; 56 L. J. Q. B. 373.) So, too, where an agent buys goods for a foreign principal, the question whether credit was given to the agent or the foreign principal is one of fact, but the credit is ordinarily deemed to be given to the agent personally, although the fact of his agency is known, and in such cases the above defence that the defendant merely contracted as an agent will not in general be available (*Wilson* v. *Zulueta*, 14 Q. B. 405; 19 L. J. Q. B. 49; *Cooke* v. *Wilson*, 1 C. B. N. S. 153; *Hutton* v. *Bullock*, L. R. 8 Q. B. 331; 9 *Ib.* 572; *Malcolm* v. *Hoyle*, 63 L. J. Q. B. 1; see 2 Sm. L. C., 11th ed. 418 *et seq.*).

As to when agents ordering goods on behalf of clubs or societies are personally liable, see *ante*, p. 273.

It is a good defence to an action on a written contract, in which the defendant is named as a principal, that the form of the contract in this respect was entirely due to a mistake common to both parties, and was contrary to their intention, which was, that the defendant should contract only as agent, and should not be personally bound (*Wake* v. *Harrop*, 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 *Ib.* 451; see *post*, p. 738).

In cases where either the agent or the principal may be charged at the option of the other contracting party (as in cases where the agency is not disclosed by the agent at the time of his entering into the contract), a definitive election made by such other contracting party to charge the agent or the principal respectively, will prevent his afterwards suing the other of them on the contract (*Priestly* v. *Fernie*, 3 H. & C. 977; 34 L. J. Ex. 172; *Curtis* v. *Williamson*, L. R. 10 Q. B. 57; 44 L. J. Q. B. 27; *Kendall* v. *Hamilton*, 4 App. Cas. 504, 514; 48 L. J. C. P. 705; *Scarf* v. *Jardine*, 7 App. Cas. 345; 51 L. J. Q. B. 612; *Fell* v. *Parkin*, 52 L. J. Q. B. 99; 47 L. T. 350; *Morel* v. *Westmoreland*, [1904] A. C. 11; 73 L. J. K. B. 93; and see *post*, p. 704).

(*l*) See *ante*, p. 77.

Denial of an alleged Warranty of Authority to contract as Agent (*m*).

The defendant did not warrant or assert that he was authorised to contract as agent for *G. H.* as alleged. [He truly stated the facts giving rise to the supposed authority, but did not warrant the correctness of the legal inference of authority drawn by the plaintiff therefrom. Such statement was made verbally [*or, as the case may be*] on the —— ——, 19—.]

Denial of the alleged Breach of Warranty of Authority (*m*).

The defendant was authorised by the said *G. H.* to make the said contract as his agent on his behalf, and the said contract was in fact binding on the said *G. H.*, and was enforceable against the said *G. H.*

Defence to an Action for the Price of Goods sold, alleging that they were sold by the Plaintiff's Agent as apparent Principal, and claiming a Set-off in respect of a Debt which accrued due from the Agent to the Defendant, before the Defendant had knowledge of the facts: see "Set-off," post, p. 782.

Reply of Ratification (*n*).

If and so far as the said *E. F.* was not the defendant's agent to make the said contract at the time of the making thereof the defendant says that the said *E. F.* purported to make the said contract as the defendant's agent, and the defendant subsequently, on the —— ——, 19—, by [a letter dated that day] ratified the said contract.

AGREEMENTS (*o*).

Defence denying the making of an Agreement not under Seal.

The defendant denies that he made the alleged or any contract [*or* promise, *or*, agreement].

(*See R. S. C.*, 1883, *App. D., Sect. V.*)

(*m*) See *ante*, p. 76.

(*n*) It is often advisable to reply specially that the defendant ratified the contract. When a person in making a contract purports to do so on behalf of another but without having in fact the authority of that other to do so, that other person can subsequently ratify the contract, but when a person makes a contract without purporting to act as agent for another and without having authority from any other person, a third party cannot ratify or adopt the contract so made (*Keighley* v. *Durrant*, [1901] A. C. 240; 70 L. J. K. B. 662; see also "*Company*," *post*, p. 633).

(*o*) When a defendant wishes to deny any allegations of fact contained in the statement of claim, he must not do so by a mere general denial, but must deal specifically

A like Form.

The defendant did not make the alleged or any agreement.
(*See R. S. C.*, 1883, *App. D., Sect. II.*)

Defence denying the Agreement and alleging that it was subject to a Formal Contract being drawn and approved by the Solicitor of the Parties: see post, p. 769.

Denial of the making of the Agreement alleged with a Statement of the Agreement actually made.

The defendant denies that it was agreed between the plaintiff and the defendant as alleged. The agreement was [in writing dated the —— ——, 19—, *or*, made verbally on the —— ——, 19—, and was] as follows:—[*Here state the material parts of the agreement, either verbatim where the precise words are material, or by giving briefly the substance and effect thereof,*

---

with each allegation of which he does not admit the truth, except in the case of mere allegations of damages, and he must not frame his denials evasively, but must answer the point of substance in the disputed allegation (Ord. XIX., rr. 13, 17, 19, cited *ante*, pp. 527 *et seq.*).

Where the defendant intends to set up that the contract actually made was other than that alleged in the statement of claim, and that under the contract actually made there was no cause of action against him, or that the contract so made was performed by the defendant, or in some way satisfied or discharged, he should, besides denying the alleged contract, briefly state the contract actually made, and, where he relies upon such performance or satisfaction or discharge as constituting a defence, should plead it, so as to give to the plaintiff notice, in accordance with Ord. XIX., rr. 4, 15, of the facts on which he intends to rely. As to setting out agreements in writing *verbatim* in a pleading, see *ante*, pp. 7—9.

The above-mentioned rules apply equally to a plaintiff's reply to a counterclaim, as to a defendant's defence to a statement of claim.

By Ord. XIX., r. 20, "When a contract, promise or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise or agreement, whether with reference to the Statute of Frauds or otherwise." (See Ord. XIX., rr. 4, 15, *ante*, pp. 5, 523; "*Denials*," *ante*, pp. 527 *et seq.*)

As to what constitutes a final and concluded agreement, see, further, "*Sale of Land*," *post*, p. 768.

As to the Statute of Frauds, see *post*, p. 663; and as to illegality, see *post*, p. 682.

As to defences on the ground of non-fulfilment of conditions precedent, see *post*, p. 641.

For other defences to actions on contracts, such as fraud, infancy, mistake, duress, &c., not hereinbefore specified, see the different titles of defences to actions on contracts.

As to substituted agreements, see *ante*, pp. 48, 567, 568, 570.

As to defences to actions on parol agreements on the ground of want of consideration, see *ante*, p. 47; "*Bills of Exchange*," *post*, pp. 599 *et seq.*

and add, where necessary, averments of performance, satisfaction, or discharge of the agreement actually made.]

Defence of Non-performance of a Condition Precedent: see "Conditions Precedent," post, p. 641.

Defence that the Contract was subject to an implied Condition that the Subject-Matter should continue to exist (p).

The contract alleged in the statement of claim was subject to a condition which is to be implied from the nature thereof, that [*here state the condition, as, for instance,* the said —— Theatre should continue to exist at the time when the said performance was to be given by the defendant]. Whereas [*here state that the subject-matter ceased to exist, as, for instance,* before the said time namely, on the —— ——, 19—, the said —— Theatre was without any fault on the part of the defendant destroyed by fire, and the performance of the said contract was rendered impossible].

Denial of the Execution of a Deed (q).

The alleged deed is not the defendant's deed.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

(*p*) Where from the nature of the contract it is clear that the contract is based upon the assumption by both parties to it that the subject-matter will, when the time for the fulfilment of the contract arrives, still exist, or that some condition or state of things going to the root of the contract and essential to its performance will be in existence, the non-existence of such subject-matter or of such condition or state of things when the time for the fulfilment of the contract has arrived affords, in general an answer to a claim for any further fulfilment of the contract, and also to one for damages for the failure to further carry out the contract (*Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164; *Appleby* v. *Myers*, L. R. 2 C. P. 651; 36 L. J. C. P. 331; *Krell* v. *Henry*, [1903] 2 K. B. 740; 72 L. J. K. B. 794; *Civil Service Co-op. Soc.* v. *Gen. Steam Navigation Co.*, [1903] 2 K. B. 756; 72 L. J. K. B. 933; *Chandler* v. *Webster*, [1904] 1 K. B. 493, 499, 501; 73 L. J. K. B. 401 *In re Hull and Lady Meux*, [1905] 1 K. B. 588; 74 L. J. K. B. 252).

(*q*) The affixing of the seal of a corporation to a document by a person having no authority so to do does not make such document the deed of the corporation (see *Mayor, &c., of the Staple of England* v. *Bank of England*, 21 Q. B. D. 160; 57 L. J. Q. B. 418); but where it is intended to rely upon such want of authority in answer to an action on the deed, the fact should be stated concisely. (See *post*, p. 632.) In a similar way the facts should be stated where it is intended to rely upon a material alteration made in a deed subsequently to its execution. (See *post*, p. 579.)

As to the defence that a deed sued upon was executed in blank, that is, that at the time of execution the deed was incomplete by reason of material omissions in it which were afterwards filled in, see *Powell* v. *Duff*, 3 Camp. 181; *Hibblewhite* v. *M'Morine*, 6

For like forms of Denial, see "Bonds," post, p. 618, *and "Insurance," post,* pp. 691 *et seq.*

Defence denying the making of the Deed alleged, and stating the Terms of the Deed actually made.

The defendant denies that he ever made the alleged deed [*or*, bond]. The deed [*or*, bond] made by the defendant was [*here state briefly the terms of the deed or bond actually made, and allege performance thereof, or some sufficient matter in confession and avoidance*].

Denial of a particular Covenant.

The deed did not contain [either expressly or by implication] any covenant to [*here identify the covenant which it is intended to deny, e.g.,* insure the premises against loss by fire].

Defence to an Action on a Deed, that the alleged Deed was only delivered by the Defendant as an Escrow (*r*).

The alleged deed was delivered by the defendant to *J. K.* merely as an escrow, upon the terms contained in a letter from the defendant to the

M. & W. 200 ; *Hudson* v. *Revett*, 5 Bing. 368 ; *Swan* v. *North British Australasian Co.*, 2 H. & C. 175 ; 32 L. J. Ex. 273 ; *Société Générale* v. *Walker*, 11 App. Cas. 20 ; 55 L. J. Q. B. 169 ; *Powell* v. *London, &c., Bank*, [1893] 1 Ch. 610.

(*r*) As to the defence that a deed was delivered as an escrow only, see *Xenos* v. *Wickham*, L. R. 2 H. L. 296 ; 36 L. J. C. P. 313 ; *Watkins* v. *Nash*, L. R. 20 Eq. 262 ; 44 L. J. Ch. 505 ; *Bond* v. *Walford*, 32 Ch. D. 238 ; 55 L. J. Ch. 667.

An analogous defence may in some cases be pleaded in respect of agreements not under seal, as, for instance, that a parol agreement sued on was only executed on condition that it should not operate as a contract until the happening of some event which has not happened, as that some third party should approve of the subject of the agreement (*Pym* v. *Campbell*, 6 E. & B. 370 ; 25 L. J. Q. B. 277 ; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25), or that the agreement or a counterpart should be signed by the other party (*Furness* v. *Meek*, 27 L. J. Ex. 34 ; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 139 ; 28 L. J. Ex. 122 ; *McClean* v. *Kennard*, L. R. 9 Ch. 336 ; 43 L. J. Ch. 323), or by some third party (*Boyd* v. *Hind*, 1 H. & N. 938 ; 25 L. J. Ex. 246), or that the defendant should be satisfied of the plaintiff's responsibility (*Pattle* v. *Hornibrook*, [1897] 1 Ch. 25 ; 66 L. J. Ch. 144), and such defence should be expressly pleaded in the defence. As to the defence that a bill of exchange or promissory note was only delivered by way of escrow, see *post*, p. 612.

The defence of *non est factum* is inapplicable where the defendant executes the deed, knowing that it conveys or does something with his property, but in ignorance of the way in which it does deal with it, executing it in the belief, induced by the fraud of another, that he is executing a deed of a different kind from that which he is in fact executing (*Hunter* v. *Walters*, L. R. 7 Ch. 75, 85, 88 ; 41 L. J. Ch. 175 ; *King* v. *Smith*, [1900] 2 Ch. 425 ; 69 L. J. Ch. 598).

plaintiff, dated —— ——, 19— [*or*, agreed to verbally on the —— ——, 19—, *or*, *as the case may be*], that it should not take effect or be operative or enforceable until the fulfilment of a certain condition, viz., [*here state the condition*]. The said condition has never been fulfilled, and, save as aforesaid, the defendant never delivered the deed.

Denial of Breaches (*s*).

The defendant did not [*or*, denies that he did] [*insert breaches denied*]. (*See R. S. C.*, 1883, *App. D.*, *Sect. V.*, *No.* 4.)

ALIEN ENEMY (*t*).

Defence that the Plaintiff is an Alien Enemy.

The plaintiff was at the time of the making of the alleged contract, and still is, an alien, and not a subject of the King, and then was, and still is, an enemy of the King [and was residing in this kingdom without his permission].

ALTERATION OF WRITTEN DOCUMENTS (*u*).

Defence that a Written Agreement was made void by an Alteration.

[The agreement referred to in the statement of claim was in writing, and was contained in a document dated the —— ——, 19—, and signed by the defendant, and] after the making and signing of the [said] agreement,

(*s*) See "*Denials*," *ante*, p. 527.

(*t*) If the plaintiff was an enemy when the contract was made, this is a defence to an action on the contract, as the contract was illegal. (See Leake on Contracts, 4th ed., pp. 372, 528.) If he has become so since the making of the contract, this, which was formerly ground for plea in abatement (*Harman* v. *Kingston*, 3 Camp. 150, 153), would now appear to be ground for an application for a stay of proceedings. (See *ante*, p. 522.) A British subject, or the subject of a neutral state, voluntarily residing in an enemy's country, is considered as adhering to the enemy, and is incapable of suing (*Willison* v. *Patteson*, 7 Taunt. 439; *M'Connell* v. *Hector*, 3 B. & P. 113).

As to aliens, see, further, *Isaacson* v. *Durant*, *In re Stepney Election Petition*, 17 Q. B. D. 54; 55 L. J. Q. B. 331; *In re Bourgeoise*, 41 Ch. D. 310.

(*u*) When the plaintiff without authority alters a deed, or where it is so altered in a material point while in the possession or custody of the plaintiff by a stranger with the privity of the plaintiff, it is thereby made void (*Pigot's case*, 11 Co. Rep. 27 *a*; *Davidson* v. *Cooper*, 11 M. & W. 778; 13 M. & W. 343, 352; *Lowe* v. *Fox*, 12 App. Cas. 206; 56 L. J. Q. B. 480; *Ellesmere Brewery Co.* v. *Cooper*, [1895] 1 Q. B. 75; 65 L. J. Q. B. 173). The same rule applies in general to instruments of contract not under seal (*Davidson* v. *Cooper*, *supra*; *Mollett* v. *Wackenbath*, 5 C. B. 181, 194; *Suffell* v. *Bank of England*, 9 Q. B. D. 555; 51 L. J. Q. B. 401), and is even applicable to documents not containing

and whilst it was in the possession and custody of the plaintiff, it was rendered void by being materially altered without the consent of the defendant, viz., by [*here state the alteration made, as, for instance,* affixing a seal

any contract (*Lowe* v. *Fox*, *supra*). With regard to bills of exchange and promissory notes the same rule applies as modified by s. 64 (1) of the Bills of Exchange Act, 1882, (cited *post*, p. 608). Except in the cases last referred to, the alteration vitiates the whole instrument, although it may not be made in the particular part of it which is sued upon (*Ib.*). It has been laid down that a deed or instrument, if materially altered while in the plaintiff's possession or custody by a stranger, will be thereby rendered void, even if the alteration was without the privity of the plaintiff (see *Pigot's case*, *supra*), but it is doubtful whether this rule can apply to alterations made in fraud of the plaintiff, and against his will. (See *Lowe* v. *Fox*, 12 App. Cas. at p. 217.) If the instrument is not in the possession of the plaintiff, and if the plaintiff is not responsible for its safe custody, it seems that its alteration without his privity by a stranger, though in a material point, would not avoid it. (See *Henfree* v. *Bromley*, 6 East, 309; *Davidson* v. *Cooper*, *supra*; *Crookewit* v. *Fletcher*, 1 H. & N. 893; 26 L. J. Ex. 153.) In the case, however, of negotiable instruments, such as bills of exchange, or promissory notes, a material and apparent alteration made after the issuing thereof will in general vitiate the instrument, even in the hands of a subsequent holder, as against such of the prior parties liable on the instrument as have not authorised or assented to the alteration. (See "*Bills of Exchange*," *post*, p. 608.)

An alteration may be accounted for on the ground of accident, and the original state of the instrument shown by parol evidence (Sheppard's Touchstone, 69), as where the seal of a deed had been torn off by a child (*Argoll* v. *Cheney*, Palm. 402, 403), or eaten off by rats (*Bolton* v. *Bishop of Carlisle*, 2 H. Bl. 260, 263). So an alteration may be shown to have been made by mistake, without any intention of altering the instrument (*Raper* v. *Birkbeck*, 15 East, 17; *Wilkinson* v. *Johnson*, 3 B. & C. 428; *Novelli* v. *Rossi* 2 B. & Ad. 757), or in order to correct a mistake (*Fitch* v. *Jones*, 5 E. & B. 238; 24 L. J. Q. B. 293; *In re Howgate's Contract*, [1902] 1 Ch. 451; 71 L. J. Ch. 279). Such alterations do not affect the validity of the instrument. Merely completing an instrument in accordance with express provisions to that effect contained in the document itself, as by the addition of subsequent names and signatures which are added in pursuance of an intention expressed in the instrument that they should be so added, is no alteration (*In re Batten*, 22 Q. B. D. 685; 58 L. J. Q. B. 333; cited *post*, p. 641).

An alteration of an instrument in a point not material, whether made by a stranger or by the plaintiff himself, does not avoid the instrument (*Aldous* v. *Cornwell*, L. R. 3 Q. B. 573; 37 L. J. Q. B. 201; *Lowe* v. *Fox*, *supra*; overruling the dictum in *Pigot's case*, *supra*). An alteration by adding words which merely express the effect of the instrument as originally framed, is immaterial (*Ib.*). An alteration may be material although not affecting any contract contained in the instrument, as where there was a fraudulent alteration of the numbers of Bank of England notes (*Suffell* v. *Bank of England*, *supra*; and see *Leeds Bank* v. *Walker*, 11 Q. B. D. 84; 52 L. J. Q. B. 590).

An alteration made by consent of both parties amounts to a new contract, which supersedes the original contract (see *post*, p. 755), unless it is made only for the purpose of correcting a mistake in the original contract, and to carry out the original intention of the parties. (See *Cole* v. *Parkin*, 12 East, 471, 475.) In such last-mentioned case, if the original contract is sufficiently stamped, the amended contract does not require a new stamp, unless the amendment has so altered the nature of the contract as to make a different stamp necessary (*Robinson* v. *Touray*, 1 M. & S. 217; *Jacob* v. *Hart*, 6 *Ib.* 142; *Byrom* v. *Thompson*, 11 A. & E. 31; and see *post*, p. 608).

Whenever the defendant intends to rely upon the defence that the instrument sued upon has been rendered void by a material alteration, he should distinctly plead that ground of defence, whether the instrument is sued upon in its original or in its altered form (O. XIX., rr. 4, 15). The precedent in the text is primarily applicable to cases where the plaintiff sues upon the agreement in its original form, but it may readily be

to the said agreement near to the signature of the defendant as and for the seal of the defendant, *or*, altering the words "twenty shillings per bushel" into "thirty shillings per bushel," *or, as the case may be, stating the alteration in such a manner as to show its materiality*].

For a form of Defence to an Action on a Bill of Exchange on the Ground of an Alteration therein, see "Bills of Exchange," post, p. 608.

See forms of plea under the old system—That the agreement was altered by affixing a seal so as to make it purport to be a deed of the defendant: Davidson v. *Cooper*, 11 M. & W. 778; 13 M. & W. 343; *that a charter-party was altered by the insertion of material words: Croockewit* v. *Fletcher*, 26 L. J. Ex. 153; 1 H. & N. 893; *that a mortgage-deed was altered by increasing the amount of the debt secured: Stobart* v. *Dryden*, 1 M. & W. 615; *that a bond of guarantee was altered by inserting a condition that the giving time to the principal debtor should not discharge the sureties: Harden* v. *Clifton*, 1 Q. B. 523.

See also a reply to a plea of release, that the deed was altered after execution by inserting the amount: Fazakerley v. *M'Knight*, 26 L. J. Q. B. 30; 6 E. & B. 795.

AMBASSADOR (*x*).

adapted to cases in which the action is brought upon the agreement in its altered form. In such last mentioned cases, the statements as to the fact of the alteration should be accompanied by a denial of the making of the agreement in the altered form. (See *ante*, p. 575.)

The unauthorised alteration of a written agreement by one of the parties does not render the agreement absolutely void for all purposes, and accordingly the other party is still entitled to sue upon the original agreement, and if he does sue upon it, he is bound by the terms and conditions thereof, and cannot, in the absence of a new contract, express or implied, recover upon the contract without showing that he has complied with those terms and conditions (*Pattinson* v. *Luckley*, L. R. 10 Ex. 330; 44 L. J. Ex. 180). Similarly, the alteration or cancelling of a deed by which an estate or other property is conveyed does not divest the estate or property from the grantee or revest it in the grantor (*Bolton* v. *Bishop of Carlisle, supra*; *In re Batten, supra*).

When a document is produced it is for the jury to say whether it has been altered or not, and the party producing a document which appears to have been altered is bound to account for the alteration (*Bishop* v. *Chambre*, M. & M. 116; *Knight* v. *Clements*, 8 A. & E. 215; *Earl Falmouth* v. *Roberts*, 9 M. & W. 469, 471; *Suffell* v. *Bank of England, supra*).

As to alterations, see, further, the notes to *Master* v. *Miller*, 1 Sm. L. C., 11th ed., p. 767.

(*x*) As to the defence that the defendant is an alien, and is an ambassador or public minister of a foreign state, and received as such by the King, see 7 Anne, c. 12; *Magdalena Steam Nav. Co.* v. *Martin*, 2 E. & E. 94; 28 L. J. Q. B. 310; *Taylor* v.

Annuity (*y*).

Apothecary.

See "*Medical Attendance*," *post*, p. 735.

Apprentice (*z*).

Defence to an Action by the Father of an Apprentice for not instructing the Apprentice.

The defendant was always ready and willing to instruct *A. B.* in his trade, but the said *A. B.* refused to be so instructed, and by his wilful misconduct prevented the defendant from so instructing him.

Particulars of the misconduct are as follows :—[*Here give particulars.*]

Best, 14 C. B. 487; *Gladstone* v. *Musurus Bey*, 32 L. J. Ch. 155; *Musurus* v. *Gadban*, [1894] 1 Q. B. 533; 2 *Ib.* 352; 63 L. J. Q. B. 621; and 1 Sm. L. C., 11th ed., p. 649.

The privilege of the ambassador applies also to the secretaries and attachés of the embassy (*Parkinson* v. *Potter*, 16 Q. B. D. 152; 55 L. J. Q. B. 153), and this is so in general, even if they are British subjects (*Macartney* v. *Garbutt*, 24 Q. B. D. 368; but see *Re Cloete*, 65 L. T. 102).

(*y*) Contracts for annuities or other periodical payments are within sect. 4 of the Statute of Frauds (cited *post*, p. 665), as being agreements not to be performed within a year, only when from their terms they are incapable of performance within the year (*McGregor* v. *McGregor*, 21 Q. B. D. 424; 57 L. J. Q. B. 591).

Where by a separation deed a husband covenants to pay an annuity to his wife or to trustees for her, and the wife or her trustees covenant that she shall not molest him, these are independent covenants, and molestation is no defence to an action for arrears (*Fearon* v. *Earl of Aylesford*, 14 Q. B. D. 792; 54 L. J. Q. B. 33; *Sweet* v. *Sweet*, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108; see *Gandy* v. *Gandy*, 7 P. D. 77, 168; 51 L. J. P. 41).

(*z*) The covenants in an indenture of apprenticeship are usually independent covenants; and therefore mere disobedience or misconduct, though it may form good ground for an action or counterclaim, is not, in general, a defence to an action against the master upon his covenants in the deed (*Winstone* v. *Linn*, 1 B. & C. 460; *Phillips* v. *Clift*, 4 H. & N. 168; 28 L. J. Ex. 153), except in so far as it has prevented his performance of them (see *Raymond* v. *Minton*, below cited, and the form of defence in the text). In some cases, however, it is expressly provided that misconduct shall relieve the master from liability on his covenants, or the covenants of the master to teach, &c., are made conditional upon the good behaviour of the apprentice; and when this is so, such misconduct affords to the master a complete defence when sued upon his covenants (*Westwick* v. *Theodor*, L. R. 10 Q. B. 224; 44 L. J. Q. B. 110). Even apart from such special provisions, it is a good defence to an action for not teaching and providing for the apprentice, that he quitted the service without leave (*Hughes* v. *Humphreys*, 6 B. & C. 680), or that he refused to be taught (*Raymond* v. *Minton*, L. R. 1 Ex. 244; 35 L. J. Ex. 153), or that he so conducted himself as to render it impossible to teach him (*Learoyd* v. *Brook*, [1891] 1 Q. B. 431; 60 L. J. Q. B. 373). Thus, to an action against a pawnbroker for refusing to keep and teach his apprentice, it was held a good defence that the apprentice was an habitual thief, so that it was not possible to teach him (*Ib.*). It is a good defence to an action against the father for the desertion

Arbitration and Award.

I. Defences to Actions on Awards (*a*).

Denial of the Submission.

The defendant denies that he made, or agreed to, the alleged, or any submission to arbitration [*or*, The defendant did not agree to submit the alleged, or any, matters to arbitration].

---

of the apprentice that the master had abandoned one of three trades which he covenanted to teach (*Ellen* v. *Topp*, 6 Ex. 424); and see, as to the effect of changes in the business, *Eaton* v. *Western*, cited *ante*, p. 83.

As to defence of infancy to an action against an apprentice on his covenants in the deed of apprenticeship, see *ante*, pp. 82, 83.

As in the case of other contracts for personal services, the covenant that the apprentice shall serve is conditional upon his continued capability, and the performance thereof is excused by illness or insanity (*Boast* v. *Firth*, L. R. 4 C. P. 1; 38 L. J. C. P. 1; *Robinson* v. *Davison*, L. R. 6 Ex. 269; 40 L. J. Ex. 172). So, too, the death of the master or the apprentice puts an end to an ordinary contract of apprenticeship (*Whincup* v. *Hughes*, L. R. 6 C. P. 78; 40 L. J. C. P. 104; see *Farrow* v. *Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326), though by an express provision to that effect the contract may, of course, be extended to the executors, or surviving partners of the master or to other persons carrying on the trade (*Cooper* v. *Simmons*, 7 H. & N. 707; 31 L. J. M. C. 138). As to the bankruptcy of the master, see *ante*, p. 83.

(*a*) Where the defence to an action on an award is a denial of the submission or agreement to refer to arbitration, such denial must be specifically pleaded. (See *ante*, p. 527.) A mere denial of the making of the award will simply put in issue the making thereof in point of fact, and not its validity. Any defence on the ground of the invalidity of the award must be distinctly alleged in the defence. Of this kind are the following defences:—The defence that the award was not made in due time, or that an enlargement, where necessary, was not obtained (*Lord* v. *Lee*, L. R. 3 Q. B. 404; 37 L. J. Q. B. 121; see *In re Yeadon Local Board*, 41 Ch. D. 53; 58 L. J. Ch. 563; and as to the power of enlarging the time, see s. 9 of the Arbitration Act, 1889, and *Denton* v. *Strong*, L. R. 9 Q. B. 117; 43 L. J. Q. B. 41); that the award was not final, as not determining all matters referred (*Mitchell* v. *Staveley*, 16 East, 58; *Gisborne* v. *Hart*, 5 M. & W. 50; *Dresser* v. *Stansfield*, 14 M. & W. 822; *Roberts* v. *Eberhardt*, 3 C. B. N. S. 482; 28 L. J. C. P. 74; *Armitage* v. *Coates*, 4 Ex. 641); that other matters than those referred were involved in the determination (*Fisher* v. *Pimbley*, 11 East, 188; *King* v. *Bowen*, 8 M. & W. 625); that the award was not executed in pursuance of the submission (*Wade* v. *Dowling* 4 E. & B. 44); that it has been subsequently set aside (*Roper* v. *Levy*, 7 Ex. 55; 21 L. J. Ex. 28); and that the arbitrator has exceeded his jurisdiction (*Adcock* v. *Wood*, 6 Ex. 814; 7 *Ib.* 468; *Hutcheson* v. *Eaton*, 13 Q. B. D. 861).

A parol accord and satisfaction after breach is a good defence to an action on an award, even where the submission is under seal (*Smith* v. *Trowsdale*, 3 E. & B. 83).

Notice of the award is not a condition precedent to its validity, unless specially provided for, because the award is equally within the notice of both parties (2 Wms. Saund., 1871 ed. 154).

It seems that collusion or other misconduct of the arbitrator should not be pleaded as a defence to an action on the award, but is ground for an application to set it aside (*Whitmore* v. *Smith*, 5 H. & W. 824; 7 *Ib.* 509; 29 L. J. Ex. 402; 31 *Ib.* 107; *Thorburn* v. *Barnes*, L. R. 2 C. P. 384; 36 L. J. C. P. 184; *Bache* v. *Billington*, [1894] 1 Q. B. 107, 112; 63 L. J. M. C. 1).

An award of compensation under the Lands Clauses Acts, or under Acts incorporating

Denial of the Making of the Award.

The defendant denies that the said *E. F.* made or published the alleged or any award.

Denial that the Award was to the Effect alleged.

The defendant denies that the said *E. F.* awarded as alleged. His award was [*state what, and add any facts showing a defence as to the award really made*].

Defence that the Arbitrator exceeded his Authority (*b*).

The said award extends to matters other than those referred to by the submission. The submission is in writing, dated the —— ——, 19—, and referred only the following matter, viz. :—[*Here state the matter or matters referred*]. It did not refer the question as to the —— in respect of which the said *E. F.* has purported to award the amount now claimed by the plaintiff.

Defence of Revocation of the Arbitrator's Authority (*c*).

The submission was by word of mouth only, and the submission and the authority of the said *E. F.* thereunder was before the making of the said award revoked by the defendant verbally, on the —— ——, 19— [*or*, by a letter dated —— ——, 19—, *or, as the case may be*] ; and notice of such revocation was duly given to the said *E. F.* verbally, on the —— ——, 19— [*or*, by a letter dated —— ——, 19—, *or, as the case may be*] before the making of the alleged award.

---

the Lands Clauses Acts, does not in general determine the right to compensation, but only its amount. (See *ante*, pp. 156, 343.)

(*b*) See a form of plea, *Charleton* v. *Spencer*, 3 Q. B. 693.

(*c*) The authority of an arbitrator appointed by or under a submission within the Arbitration Act, 1889, is, in general, irrevocable without an order for that purpose (see s. 1 and ss. 25—27 ; *ante*, pp. 84, 85) ; but where the submission is not within the Act, a revocation of the arbitrator's authority, if communicated to him before the making of the award, may be pleaded as a defence to an action on the award. (See *ante*, p. 84.)

II. Defences of Reference to Arbitration (*d*).

Defence of a Reference to Arbitration by Agreement and of an Award thereunder respecting the Causes of Action (*e*).

Before action it was agreed between the plaintiff and the defendant [by an agreement in writing dated the —— ——, 19—] that the causes of action alleged in the statement of claim [and all matters in difference respecting the same] should be referred to the arbitration of *X. Y.*, who by his award in writing, dated the —— ——, 19—, duly made and published in pursuance of the said agreement, awarded that [*here state the effect of the*

(*d*) A stipulation in an agreement that disputes shall be referred to arbitration does not of itself oust the jurisdiction of the Court, and is not in general pleadable as a defence to an action for a breach of the agreement (*Thompson* v. *Charnock*, 8 T. R. 139; *Scott* v. *Avery*, 8 Ex. 487; 5 H. L. C. 811; 25 L. J. Ex. 308; *Horton* v. *Sayer*, 4 H. & N. 643; *Dawson* v. *Fitzgerald*, 1 Ex. D. 257; 45 L. J. Ex. 893; *London, C. & D. Ry. Co.* v. *S. E. Ry. Co.*, 40 Ch. D. 100; 58 L. J. Ch. 75); even though an arbitration touching the cause of action be actually pending (*Harris* v. *Reynolds*, 7 Q. B. 71). But where an agreement makes it a condition precedent that the amount of damages shall be ascertained by a reference to arbitration, no action will lie until the condition has been satisfied (*Scott* v. *Avery*, *supra*; *Scott* v. *Corporation of Liverpool*, 3 De G. & J. 334; 28 L. J. Ch. 230; *Tredwen* v. *Holman*, 1 H. & C. 72; 31 L. J. Ex. 398; *Dawson* v. *Fitzgerald*, *supra*; *Viney* v. *Bignold*, 20 Q. B. D. 172; 57 L. J. Q. B. 82; *Spurrier* v. *La Cloche*, [1902] A. C. 446; 71 L. J. P. C. 101).

A written agreement to refer to arbitration, which does not make such reference a condition precedent to the right of action, and is therefore not pleadable in bar of the action, will, nevertheless, in most cases, afford ground for an application to stay proceedings in the action under s. 4 of the Arbitration Act, 1889.

(*e*) Where there is a debt which was due previously to the agreement of reference, and there is a parol reference merely to ascertain how much is due, an award fixing the amount does not change the nature of the original debt, and therefore, of itself, and without performance or something equivalent to performance, is no defence to an action on the original debt, except as regards any excess sued for beyond the amount found by the arbitrator to be due (*Allen* v. *Milner*, 2 C. & J. 47; *Commings* v. *Heard*, L. R. 4 Q. B. 669; 10 B. & S. 606). But where an award changes the nature of the defendant's liability, and substitutes a different liability in its place—as, for instance, where it fixes the amount of a claim against him for unliquidated damages, thereby reducing such claim to a debt—it extinguishes the original liability, and is therefore in itself, and without performance, a good defence to any claim of the plaintiff in respect of the original liability (*Ib.*; and see *Gascoigne* v. *Edwards*, 1 Y. & J. 19; though see *Whitehead* v. *Tattersall*, 1 A. & E. 491; *Parkes* v. *Smith*, 15 Q. B. 297; *Wentworth* v. *Bullen*, 9 B. & C. at p. 849; *Bates* v. *Townley*, 2 Ex. 157). Where an award duly made on the reference of a claim finds that nothing is due in respect of it, such award is a good defence to any subsequent action on the claim so referred. (See *Parkes* v. *Smith*, 15 Q. B. 297.) Even where the award merely fixes the amount of a debt without changing the nature of the liability, the performance of the award will in general afford a defence to an action on the original claim. (See *Allen* v. *Milner*, *supra*; *Commings* v. *Heard*, *supra*.) A defence of tender of the amount awarded, and payment of that amount into Court, may in some cases be relied upon as equivalent to performance of the award. (See *Roper* v. *Levy*, 7 Ex. 55; 21 L. J. Ex. 28.)

As to the effect of an award by way of estoppel, see *post*, p. 647.

award, and add, where necessary, an averment showing that the defendant has performed, or has been excused from performing, the award on his part, if the time for such performance has elapsed before action].

Assignment of Debts and Choses in Actions (*f*).

Defence denying the Assignment.

The defendant denies the making of the alleged assignment [*or, as the case may be, according to the terms of the allegation in the statement of claim*].

Defence to an Action by an Assignee under s. 25 (6) of the Judicature Act, 1873, denying that the Assignment was an absolute one (g).

The alleged assignment was not an absolute assignment [but purported to be and was an assignment by way of charge only].

(*f*) Sect. 25 (6) of the Judicature Act, 1873, does not apply to cases where the debt or chose in action sought to be assigned is in its nature non-assignable, or has been so made by statutory enactment. Thus the pay of an army officer on service or his pension on retirement are not assignable (*Apthorpe* v. *Apthorpe*, 12 P. D. 192; 57 L. T. 518; *Lucas* v. *Harris*, 18 Q. B. D. 127; 56 L. J. Q. B. 15; see *Crowe* v. *Price*, 22 Q. B. D. 429; 58 L. J. Q. B. 215); nor is a clergyman's pension on resigning a benefice (*Gathercole* v. *Smith*, 7 Q. B. D. 626; 50 L. J. Q. B. 681); nor is a wife's alimony (*In re Robinson*, 27 Ch. D. 160; 53 L. J. Ch. 986); nor is money which is payable to a divorced woman under an order for maintenance (*Watkins* v. *Watkins*, [1896] P. 222; 65 L. J. P. D. 75). As to the pension of a colonial judge, see *Ex p. Huggins*, 21 Ch. D. 15; 51 L. J. Ch. 937.

Contracts in which the personal qualifications of the parties form an essential ingredient are not, from their nature, assignable, such as, for example, a contract of service, or a contract between the publisher and author of a book (*Stevens* v. *Benning*, 1 K. & J. 168; 24 L. J. Ch. 153; *Hole* v. *Bradbury*, 12 Ch. D. 886; 48 L. J. Ch. 673; *Griffith* v. *Tower Publishing Co.*, [1897] 1 Ch. 21; 66 L. J. Ch. 12; *Tolhurst* v. *Associated Cement Manufacturers*, cited *ante*, p. 88), and it would seem that contracts not depending on personal qualifications, as, for instance, contracts to pay money, may in general be rendered non-assignable by inserting an express stipulation to that effect. (See *per* Bramwell, L.J., in *Brice* v. *Bannister*, 3 Q. B. D. 569; 47 L. J. Q. B. 722; *In re Turcan*, 40 Ch. D. 5; 58 L. J. Ch. 101.)

It appears that absence of consideration for an assignment of a debt or legal chose in action under s. 25 (6) of the Judicature Act, 1873, cannot be set up by the debtor or other person liable as a defence to an action by the assignee (*Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; 53 L. J. Q. B. 280; *Harding* v. *Harding*, 17 Q. B. D. 442; 55 L. J. Q. B. 462). A debtor sued under s. 25 (6) by the assignee of a debt may interplead as to such part of the debt as he admits to be due, and may defend the action as to the residue (*Reading* v. *London School Board*, 16 Q. B. D. 686).

(*g*) An ordinary mortgage deed assigning a debt or chose in action to the mortgagee in the usual manner as security is an "absolute assignment" within s. 25 (6), above cited, though a mere charge upon the debt or chose in action, where the property does not pass under the instrument, would not be an absolute assignment within that sub-section. (See *ante*, p. 88.) So an assignment of debts to accrue under a subsisting

The like, denying that the Assignment was in Writing.

The alleged assignment was not in writing [*or, if it was in writing, and not signed by the assignor*, was not under the hand of *A. B.*].

The like, denying that Notice in Writing of the Assignment was given to the Defendant (h).

No [express] notice in writing of the alleged assignment was given to the defendant.

The like, alleging a Set-off of a Debt which became due from the Assignor to the Defendant before Notice of the Assignment (i): see "Set-off," post, p. 781.

Defence to an Action by the original Creditor that the Debt sued for was absolutely assigned, and Notice of such Assignment given, before Action brought.

The plaintiff, by an absolute assignment in writing under his hand, dated the —— ——, 19— [and not purporting to be by way of charge only],

---

contract and not yet payable may be an absolute assignment within the sub-section (see *ante*, p. 89), as also may an assignment containing trusts in favour of the assignor (see *ante*, p. 89), or a direction to a tenant to pay his rent to a creditor of the landlord until such direction was countermanded (*Knill* v. *Prowse*, 33 W. R. 133).

(*h*) Notice of an assignment under the Judicature Act, 1873, may be validly given after the death of the assignor (*Walker* v. *Bradford Old Bank*, *supra*; *Bateman* v. *Hunt*, [1904] 2 K. B. 530; 73 L. J. K. B. 782).

(*i*) In general, an assignee of a debt or chose in action, in cases not falling within the rules as to negotiable instruments, takes subject to any rights of set-off or lien, &c., which have arisen against the assignor before notice of the assignment (*Watson* v. *Mid Wales Ry. Co.*, L. R. 2 C. P. 593; 36 L. J. C. P. 285; *Roxburghe* v. *Cox*, 17 Ch. D. 520, 526; 50 L. J. Ch. 772; *Webb* v. *Smith*, 30 Ch. D. 192; 55 L. J. Ch. 343; *Newfoundland Government* v. *Newfoundland Ry. Co.*, 13 App. Cas. 199; 57 L. J. P. C. 35; and see *post*, p. 781). This right of set-off is not confined to cases of set-off strictly so called, but may extend to claims for unliquidated damages which have arisen against the assignor under the same contract and are sufficiently connected with the chose in action sued upon to form a defence to the claim (*Young* v. *Kitchin*, 3 Ex. D. 127; 47 L. J. Ex. 579; *Newfoundland Government* v. *Newfoundland Ry. Co.*, *supra*). Cross-claims for debt or damages arising against the assignor, even after notice of the assignment, may in some cases be set up by way of defence to an action brought by the assignee, where they have arisen out of the same contract as the chose in action sued upon or out of contemporaneous transactions, and are, by agreement or otherwise, sufficiently connected with the chose in action sued upon (*Ib.*, and see *In re Milan Tramways Co.*, 25 Ch. D. 587; 53 L. J. Ch. 1008). But such cross-claims against the assignor can only be used by way of defence to the claim, and to the extent required for such defence (*Ib.*); and, therefore, where it is sought to set them up, this should be done by way of

assigned the debt referred to in the statement of claim and sought to be recovered in this action to *E. F.*, of ——, and express notice in writing of the said assignment was given [by the said *E. F.*] to the defendant on the —— ——, 19—, before the commencement of this action.

See also forms under the old system—Of a plea that the plaintiff had assigned the debt to a third party who had given notice of the assignment to the defendant, and that the plaintiff was not suing for the benefit or with the consent of the assignee: Jeffs v. *Day*, L. R. 1 Q. B. 372; 35 L. J. Q. B. 99; *of a replication to a plea of payment, that the payment was made after assignment of the debt with the intent to defraud the assignee, for those whose benefit the action was brought: De Pothonier* v. *De Mattos*, E. B. & E. 461; 27 L. J. Q. B. 260; *of a replication to a plea of set-off, that the plaintiff had assigned the debt, with the notice to the defendant, before the set-off accrued, and was suing as trustee for the assignee: Watson* v. *Mid Wales Ry. Co.*, 36 L. J. C. P. 285; L. R. 2 C. P. 593; *of a plea that defendant at request of plaintiff gave a note for the debt to a third party, replication that the third party took the note as trustee for the plaintiff of which defendant had notice: National Savings Bank Ass.* v. *Tranah*, L. R. 2 C. P. 556; 36 L. J. C. P. 260.

Attachment of Debt.

Defence of Payment to a Judgment Creditor of the Plaintiff or into Court (k).

The defendant before this action, on the —— ——, 19—, paid the amount now claimed to *J. K.* [*or*, into Court] under the compulsion of a garnishee order absolute, dated the —— ——, 19—, made in garnishee proceedings

---

set-off or counterclaim stating the facts, and showing that it is only sought to reduce or answer the claim of the assignee, and not to recover any amount of debt or damages from him beyond his claim on the debt or chose in action assigned to him (*Young* v. *Kitchin*, *supra*).

(*k*) Payment made by, or execution levied upon, the garnishee under garnishee proceedings is a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceedings may be set aside, or the judgment or order reversed. (See Ord. XLV., r. 7; *In re Smith*, 20 Q. B. D. 321; 57 L. J. Q. B. 212.) But a payment under garnishee proceedings, in order to operate as such discharge, must be *bonâ fide* and compulsory. (See *In re Smith*, *supra*; *Turner* v. *Jones*, 1 H. & N. 878; 26 L. J. Ex. 262; and see *Mayor of London* v. *London Joint Stock Bank*, 6 App. Cas. 393; 50 L. J. Q. B. 594.)

As to compulsory payment under a foreign attachment in the Mayor's Court, London, see *Mayor of London* v. *London Joint Stock Bank*, *supra*.

Payment into Court of the amount of the debt under compulsion of garnishee proceedings will, in general, operate as a discharge where the judgment creditor is entitled

instituted by *J. K.* in respect of a judgment obtained on the —— ——, 19—, by the said *J. K.* in this Court in an action (19—, —— No. ——) at the suit of the said *J. K.* against the now plaintiff for £——, which judgment was at the date of the said payment unsatisfied.

See forms under the old system—Of pleas of foreign attachment in the Mayor's Court, and execution had of the debt in the hands of the defendant as garnishee: Magrath v. *Hardy*, 4 Bing. N. C. 782; *Crosby* v. *Hetherington*, 4 M. & G. 933; *Webb* v. *Hurrell*, 4 C. B. 287; *of a like plea, and replication that the plaintiff sued as trustee, and that the custom did not extend to debts held in trust, of which the garnishee had notice: Westoby* v. *Day*, 2 E. & B. 605; *of a like plea to an action by an administration and replication that the proceedings in attachment were instituted after the death of the intestate: Matthey* v. *Wiseman*, 18 C. B. N. S. 657; 34 L. J. C. P. 216; *of a plea that the debt was fenced and arrested in Scotland by the law of Scotland: M'Leod* v. *Schultze*, 1 D. & L. 614; *of a plea of attachment of the debt in the State of New York by the law of that state: Gould* v. *Webb*, 4 E. & B. 933; *of a plea of attachment of the debt in France by the law of France: Simian* v. *Miller*, 1 C. B. N. S. 686.

Bailments (*l*).

Defence to an Action by a Warehouseman denying the Warehousing, and further denying that the Warehousing was at the Request of the Defendant.

1. The defendant denies that the plaintiff warehoused the goods referred to in the statement of claim or any of them.

---

to the money so paid in. (See *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295; 37 L. J. C. P. 107.)

It seems that so long as a garnishee order absolute, duly served on the garnishee, and requiring payment of the amount of the debt to the judgment creditor, remains in force, such order, even without payment made or execution levied thereunder, is sufficient ground for an application by the garnishee to stay proceedings in an action by the judgment debtor to recover the debt (*In re Connan*, 20 Q. B. D. 690; 57 L. J. Q. B. 472).

A garnishee order *nisi*, duly served, attaches and binds the debt (see Ord. XLV., r. 2; *Ex p. Joselyne*, 8 Ch. D. 327; 47 L. J. B. 91; *Re Combined Weighing Machine Co.*, 43 Ch. D. 99, 105); and this is so even where the amount of the debt exceeds the sum due on the judgment, and such order was, therefore, held to be a defence to the garnishee, a banker, for refusing to honour the cheques of his customer, the judgment debtor, while the order was in force, though the balance of the customer's account exceeded the amount both of the judgment and the cheques (*Rogers* v. *Whiteley*, 23 Q. B. D. 236; 58 L. J. Q. B. 416; [1892] A. C. 118; 61 L. J. Q. B. 512; *Yates* v. *Terry*, [1902] 1 Q. B. 527; 71 L. J. Q. B. 282).

(*l*) See *ante*, p. 93; "*Lien*," *post*, p. 866.

2. The defendant denies that the plaintiff warehoused the said goods or any of them, if at all, for the defendant or at his request.

Defence to a like Action, disputing the Amount charged.

The terms upon which the plaintiff warehoused the goods were not £—— per month as alleged, but £—— per month, as was agreed to between the plaintiff and the defendant verbally on the —— ——, 19— [*or*, by an agreement in writing dated the —— ——, 19—]. [*Add further facts constituting a defence to the plaintiff's claim for the amount admitted.*]

Defence to an Action against a Bailee, denying the alleged Terms of the Bailment.

The defendant did not receive the said goods for the alleged purpose [*or*, on the alleged terms]. They were received by the defendant for the purpose only of [*here state the purpose*], and on the terms agreed to verbally on the —— ——, 19— [*or*, contained in an agreement in writing dated the —— ——, 19—] that [*here state the terms*] and not otherwise. [*Proceed by stating fulfilment of the purpose and compliance with the terms.*]

(*See R. S. C.*, 1883, *App. D., Sect. V.*)

Defence to an Action for not re-delivering on Request, denying the Request.

The plaintiff never requested the defendant to re-deliver to him the said goods or any of them.

Defence to an Action for not taking Care of the Goods and for not re-delivering them to the Plaintiff, denying the alleged Breaches.

1. The defendant did take proper care of the said goods until the re-delivery thereof hereinafter mentioned.

2. The defendant re-delivered the said goods to the plaintiff on the —— ——, 19— [when the plaintiff requested the re-delivery thereof].

For forms of pleas under the old system to an action of conversion that the bailor's title had determined by the claim of the rightful owner: Thorne v. *Tilbury*, 3 H. & N. 534; 27 L. J. Ex. 407; *see Biddle* v. *Bond*, 6 B. & S. 225; 34 L. J. Q. B. 137, *and see ante*, p. 347, *and* "*Conversion*," *post*, p. 823; *plea to a count for not re-delivering a ship under a contract of bailment, that before the time for re-delivery the bailors mortgaged it to a third party, who took*

it from the defendant: European and Australian Mail Co. v. *Royal Mail S. P. Co.*, 30 L. J. C. P. 247; *plea by bailors that they received the goods upon the terms that they should not be responsible for them if the value was above* £10, *which it was: Van Toll* v. *South Eastern Ry. Co.*, 12 C. B. N. S. 75; 31 L. J. C. P. 241.

BANKERS (*m*).

BANKRUPTCY (*n*).

Defence of the Bankruptcy of the Defendant (*o*).

On the —— ——, 19—, and after the accruing of the plaintiff's claim, which was a debt provable in bankruptcy, the defendant was adjudicated a bankrupt, and on the —— ——, 19—, the defendant obtained his order of discharge whereby he was released from the plaintiff's claim.

(*m*) See *ante*, p. 95.

As to defences under the Statute of Limitations, see *Pott* v. *Clegg*, 16 M. & W. 321; *Foley* v. *Hill*, 1 Phill. 399; 2 H. L. C. 28; *post*, p. 720.

As to the defence of a banker's lien, see *post*, p. 867.

(*n*) See *ante*, p. 99.

By s. 9 (1) of the Bankruptcy Act, 1883, it is provided that, after the making of a receiving order in respect of the debtor's property, "except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the Court, and on such terms as the Court may impose." But this provision does not affect the power any secured creditor may have to realise or otherwise deal with his security. (See s. 9 (2).)

As to what debts or liabilities are "debts provable in bankruptcy," see s. 37; and see *Ex p. Neal*, 14 Ch. D. 579; *In re Gillespie*, 18 Q. B. D. 286; 56 L. J. Q. B. 74; *Hardy* v. *Fothergill*, 13 App. Cas. 351; 58 L. J. Q. B. 44; *Flint* v. *Barnard*, 22 Q. B. D. 90; 58 L. J. Q. B. 53.

It is provided by r. 181 of the Bankruptcy Rules, 1886, that "There may be included in a receiving order an order staying any action or proceeding against the debtor or staying proceedings generally."

By s. 10 (2), "The Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just." This power applies to actions pending when the petition is presented, and also to actions commenced after that date (*Brownscombe* v. *Fair*, 58 L. T. 85).

As to the effect of bankruptcy of parties after action, see *ante*, pp. 101, 104.

(*o*) The form given in the R. S. C., 1883, App. D., Sect. IV., is simply: "The defendant became bankrupt." This seems insufficient. Bankruptcy without an order of discharge is no defence, but only a ground for staying proceedings (*Spencer* v. *Demett*, L. R. 1 Ex. 123, 35 L. J. Ex. 73).

By s. 30 of the Bank. Act of 1883, "(1) An order of discharge shall not release the bankrupt from any debt on a recognizance, nor from any debt with which the

The like, another Form.

The defendant on the —— ——, 19—, became [*or*, was adjudged] bankrupt, and on the —— ——, 19—, obtained his discharge and the cause [*or*, causes] of action sued upon accrued before such discharge and was [*or*, were] in respect of debts provable in the said bankruptcy.

---

bankrupt may be chargeable at the suit of the Crown, or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence; and he shall not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom. An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party." (See the further exceptions added by the Bankruptcy Act, 1890, s. 10, *infra*.)

"(2.) An order of discharge shall release the bankrupt from all other debts provable in bankruptcy.

"(3.) An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence.

"(4.) An order of discharge shall not release any person who at the date of the receiving order was a partner or a co-trustee with the bankrupt, or was jointly bound, or had made any joint contract with him, or any person who was surety, or in the nature of surety, for him."

By the Bankruptcy Act, 1890, s. 10, "An order of discharge shall not release the bankrupt from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause, except to such an extent and under such conditions as the Court expressly orders in respect of such liability."

Where the debt or liability sued upon is discharged after the commencement of the action by a discharge in bankruptcy, the defence, if pleaded, should be pleaded as a ground of defence arising after action. (See Ord. XXIV., rr. 1, 2; *ante*, p. 531; and the next note.)

Where a debt has been barred by a discharge in bankruptcy, a subsequent promise by the debtor without any fresh consideration is a mere *nudum pactum*, and no action lies for the breach of such promise, but, where such subsequent promise is founded upon a new and valuable consideration, such as the giving of fresh credit by the creditor subsequently to the discharge in the bankruptcy, an action will lie for the breach of it, as it constitutes a fresh cause of action which had not been released by the discharge (*Heather* v. *Webb*, 2 C. P. D. 1; 46 L. J. C. P. 89; *Jakeman* v. *Cook*, 4 Ex. D. 26; 48 L. J. Ex. 165; see *Wadsworth* v. *Pickles*, 5 Q. B. D. 470; 49 L. J. Q. B. 454; *Ex p. Barrow*, 18 Ch. D. 464; 50 L. J. Ch. 821).

The same considerations are applicable where a debt has been discharged by the due fulfilment of the terms of a composition or scheme of arrangement under the Bankruptcy Acts of 1883 and 1890. (See *Ex p. Barrow*, *supra*.) But it was held, under the Act of 1869, that a compounding debtor could not, previously to the completion of the composition, validly agree with one of the creditors, who was bound by the resolutions, to pay him his debt in full, as such agreement, even if there were consideration for it, would be void as a fraud upon the other creditors (*Ex p. Barrow*, *supra*), and the principle of that decision appears to be applicable to like cases arising

Reply to the preceding Defences that the Debt was incurred or Forbearance thereof was obtained by the Fraud of the Defendant (*p*).

The debt [*or*, liability] to the plaintiff referred to in the statement of claim and which constitutes the plaintiff's cause of action herein, was incurred by fraud, to which the defendant was a party [*or*, The defendant obtained forbearance of the debt (*or*, liability) to the plaintiff, *&c., as above*, by fraud to which he was a party].

Particulars of the fraud are as follows:—

Defence of the Bankruptcy of the Plaintiff (*q*).

On the —— ——, 19—, and before the commencement of this action and after the accruing of the plaintiff's cause of action, the plaintiff was adjudicated bankrupt, and the cause of action sued on herein vested in the trustee [*or*, trustees] of his property.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

---

under the Acts of 1883 and 1890 (see *In re Harrey*, W. N. 1888, 88), which are to be construed as one Act.

The defence of discharge by a foreign bankruptcy is a good defence to a debt or liability contracted within the jurisdiction of the foreign Court, but not to a debt or liability contracted in this country (*Smith* v. *Buchanan*, 1 East, 6; *Lewis* v. *Owen*, 4 B. & Ald. 654; *Gibbs* v. *Société des Métaux*, 25 Q. B. D. 399; 59 L. J. Q. B. 510; *New Zealand Loan Co.* v. *Morrison*, [1898] A. C. 349; 67 L. J. P. C. 10); except, perhaps, where the plaintiff has taken the benefit of the foreign proceedings in bankruptcy (*Phillips* v. *Allen*, 8 B. & C. 477; see, further, *Ellis* v. *M'Henry*, L. R. 6 C. P. 228; 40 L. J. C. P. 109; *Simpson* v. *Mirabita*, L. R. 4 Q. B. 257; 38 L. J. Q. B. 76; and see *post*, p. 655).

(*p*) If the debt was incurred by means of any fraud on the part of the defendant, or if he has obtained forbearance of the debt by any fraud, he is not released by the order of discharge (see s. 30 (1), cited *supra*), and the creditor, even where he has proved and received dividends in the bankruptcy, may sue for he balance after the debtor has obtained an order of discharge. (See *Ex p. Hemming*, 13 Ch. D. 183; 49 L. J. Bank. 17; *Ross* v. *Gutteridge*, 52 L. J. Ch. 280; 48 L. T. 117; *In re Crosley*, 35 Ch. D. 266).

In such case, if the order of discharge is pleaded as a defence to the action, the plaintiff should reply specially as above. So a creditor in respect of a debt incurred by fraud may, after receiving dividends or composition under a scheme of arrangement or composition under the Act, bring an action, after the fulfilment of the terms of the scheme of arrangement or composition, for the balance of the debt due to him. (See *In re Crosley*, *supra*; and s. 19, cited *post*, p. 594.)

(*q*) This form is applicable in cases where the right of action has passed to the trustee in bankruptcy.

As to the property of the bankrupt passing to the trustee, see ss. 20, 44, 54, 168, and *ante*, pp. 99, 100; and as to what rights of action vest in the trustee, see *ante*, pp. 100, 101, 335.

The making of a receiving order does not constitute the debtor a bankrupt, or divest him of his property, and therefore, until adjudication, he is the proper person to bring or continue actions, though the receiver may be entitled to the proceeds of them. (See *ante*, p. 102.)

Where a sole plaintiff is adjudged bankrupt after action brought, in a case where the

Defence that the alleged Cause of Action vested in the Trustee of the Plaintiff's Property under a Scheme of Arrangement (*r*).

A scheme of arrangement of the plaintiff's affairs was on the —— ——, 19—, and before action duly accepted and approved in pursuance of the 3rd section of the Bankruptcy Act, 1890 [*or, if the scheme was accepted and approved after adjudication*, the 23rd section of the Bankruptcy Act, 1883, as amended by the 6th section of the Bankruptcy Act, 1890], and *E. F.* was duly appointed to be the trustee of the plaintiff's property under the said scheme, and the alleged cause of action vested in the said *E. F.* as such trustee.

Defence of a Composition or Scheme of Arrangement under the Bankruptcy Act, 1890, *s.* 3 (*s*).

The defendant after the accruing of the alleged cause [*or*, causes] of action, compounded [*or*, made an arrangement] with his creditors, under the 3rd section of the Bankruptcy Act, 1890.

Particulars are as follows:—

[*Here give particulars, specifying dates, &c.*]

---

cause of action vests in the trustee, the defendant may, if the trustee does not elect whether to continue the action or not, apply at chambers for an order staying the proceedings, unless and until the trustee makes such election (*Warder* v. *Saunders*, 10 Q. B. D. 114; *Reading* v. *London School Board*, 16 Q. B. D. 686; *Bird* v. *Mathews*, 46 L. T. 513; 2 Chitty's Practice, 14th ed., p. 1030).

Where an undischarged bankrupt has acquired personal property since the adjudication, or has become entitled to rights of action for debt or damages on contracts made by him subsequently to the adjudication, he is entitled, unless and until the trustee in his bankruptcy in some way interposes or intervenes, to bring and maintain an action in his own name for the recovery of such after-acquired property, or for any injury thereto, or for the recovery of any debt accrued on such subsequent contracts, or for damages for the breach thereof. (See *ante*, pp. 101, 102.) Hence, in such cases, it is no defence to plead the fact of the plaintiff's previous bankruptcy, and the consequent vesting of the right of action in the trustee as having accrued before the bankrupt has obtained his discharge, unless the defence also alleges that the trustee has in some manner intervened (*Ib.*).

(*r*) See the preceding note, and *ante*, p. 106.

(*s*) See note (*k*), *ante*, p. 106. It is provided by s. 3 (12) of the Bkptcy. Act, 1890, that "A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy, but shall not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause, except to such an extent, and under such conditions as the Court expressly orders in respect of such liability."

The word "debts" in this sub-section appears to include any liabilities which would be barred by a discharge in bankruptcy. (See *Flint* v. *Barnard*, 22 Q. B. D. 90; 58 L. J. Q. B. 53.)

This sub-section is subject to s. 19 of the Bkptcy. Act, 1883, which provides that "such composition or scheme shall not be binding on any creditor so far as regards

A like Defence, under s. 23 of the Bankruptcy Act, 1883 (t).

The defendant, after the accruing of the alleged cause [*or*, causes] of action, was adjudged bankrupt, and after such adjudication compounded [*or*, made an arrangement] with his creditors under s. 23 of the Bankruptcy Act, 1883.

Particulars are as follows:—

---

a debt or liability from which, under the provisions of this Act, a debtor would not be discharged by an order of discharge in bankruptcy, unless the creditor assents to the composition or scheme." The Bkptcy. Act, 1890, and the Bkptcy. Act, 1883, are to be construed as one Act (Bkptcy. Act, 1890, s. 31 (2)). As to orders of discharge, see Bkptcy. Act, 1883, s. 30; Bkptcy. Act, 1890, s. 10; *ante*, pp. 591, 592.

By s. 3 (19) of the Bkptcy. Act, 1890, "The acceptance by a creditor of a composition or scheme shall not release any person who, under the principal Act and this Act, would not be released by an order of discharge if the debtor had been adjudged bankrupt." (See Bkptcy. Act, 1883, s. 30, and Bkptcy. Act, 1890, s. 10, cited *ante*, pp. 591, 592.)

The fact that a composition or scheme of arrangement has been duly accepted and approved, under the Bkptcy. Acts, 1883 or 1890, appears, under ordinary circumstances, and in the absence of special terms to the contrary, to operate as a discharge of the debtor from all debts and claims which would have been provable in bankruptcy and would have been barred by an order of discharge in bankruptcy, and to put an end to the creditor's right to sue in respect of any such debt or claim. (See the sections above cited, and the sections and rules cited *ante*, pp. 100, 591; and see per Lord Esher, M.R., in *Ex p. Godfrey*, 18 Q. B. D. 670; *Barnett* v. *King*, [1891] 1 Ch. 4; 60 L. J. Ch. 148; *In re Croom*, [1891] 1 Ch. 695; 60 L. J. Ch. 373; *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, 518; 62 L. J. Ch. 773.)

In such cases, if an action for the original debt or claim is brought or continued against the debtor by a creditor, the defendant may apply to have the proceedings in the action stayed under ss. 9, 10 (2), cited *ante*, p. 591 (see Williams on Bankruptcy, 8th ed., p. 58), or under the general jurisdiction of the Court; or may, it would seem (see *Barnett* v. *King*, *supra*), plead the facts by way of defence.

These courses appear to be in general open to the defendant even where there has been default on the part of the defendant in carrying out the provisions of the composition or scheme of arrangement, as it seems that, in the absence of any special terms to the contrary, the doctrine of the revival of the creditor's right to sue for the whole original debt on default in payment of a stipulated composition (see *Edwards* v. *Hancher*, 1 C. P. D. 111) has no application to the case of a composition under the Bkptcy. Acts, 1883, 1890. (See the sections and rules above cited, and Bkptcy. Rules, 1890, rr. 33, 37, and per Lord Esher, M.R., in *Ex p. Godfrey*, 18 Q. B. D. 670; Williams on Bankruptcy, 8th ed., p. 74.)

If the composition or scheme of arrangement relied upon was subsequent to the commencement of the action, the defence should be pleaded as one arising after action. (See *ante*, p. 531.)

As to compositions with creditors apart from the Bankruptcy Acts, see *post*, p. 639.

(*t*) As to this defence, see s. 23 of the Bkptcy. Act, 1883; s. 6 of the Act of 1890; and r. 216 of the Bkptcy. Rules, 1886; *ante*, p. 107.

The effect of the acceptance and approval of a composition or scheme of arrangement under s. 23, above cited, and of an annulment of the adjudication under that section, is, in general, the same as that of the acceptance and approval of a composition or scheme before adjudication, under s. 18 of the Bkptcy. Act, 1883, or s. 3 of the Bkptcy. Act, 1890. (See *Ib.*; and see the preceding note; and *Ex p. Godfrey*, 18 Q. B. D. 670; and Bkptcy. Rules, 1890, r. 38.)

Defences to Actions brought by a Trustee in Bankruptcy for Debts due to the Bankrupt, of a Set-off of Debts due from the Bankrupt to the Defendant: see "Set-off," post, p. 778.

Bills of Exchange, Promissory Notes, &c. (*u*).

I. Inland Bills of Exchange.

Denial of the Drawing of the Bill (*v*).

The defendant did not draw [*or* denies that he drew] the bill of exchange sued on.

Denial of the Acceptance of the Bill (*v*).

The defendant did not accept [*or* denies that he accepted] the bill of exchange sued on.

Denial of the Indorsement of the Bill to a Party under whom the Plaintiff claims (*v*).

The defendant did not indorse [*or* denies that he indorsed] the bill of exchange sued on to *A. B.* or at all.

Denial of the Indorsement of the Bill to the Plaintiff (*v*).

The defendant [*or, A. B.*] did not indorse the bill of exchange sued on to the plaintiff.

(*u*) See "*Bills of Exchange*," *ante*, p. 108.

(*v*) By Ord. XXI., r. 2, "In actions upon bills of exchange, promissory notes or cheques, a defence in denial must deny some matter of fact, *e.g.*, the drawing, making, indorsing, accepting, presenting or notice of dishonour of the bill or note."

Where the legal effect of a bill or note is disputed, it may sometimes be convenient to set it out *verbatim* in the defence, so that the point of law may be raised on the pleadings. (See *ante*, pp. 8, 9, 108.)

In actions on bills, notes or cheques, care must be taken not to plead denials in cases where the defendant is estopped or "precluded" from pleading them. The Bills of Exchange Act contains the following provisions with respect to such estoppels:—

By s. 55 (1) (b), the drawer of a bill, by drawing it, is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

For the definition of a "holder in due course," see s. 29, cited *post*, p. 603.

By s. 54 (2), the acceptor of a bill, by accepting it, "is precluded from denying to a holder in due course:

"(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

"(b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

Defence by an Acceptor, that the Bill was accepted payable on an Event or Contingency which has not happened(x).

The defendant expressly specified in writing in his acceptance of the bill of exchange sued on that the bill was accepted payable only on [*here state the event or contingency on which the bill was to become payable according*

"(c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement."

This section applies to an acceptor *supra protest*. (See *Phillips* v. *Im Thurm*, L. R. 1 C. P. 463, 471; 18 C. B. N. S. 694.)

By s. 55 (2), the indorser of a bill, by indorsing it, is "precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;" and is also "precluded from denying to his immediate or subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto."

A proper indorsement can only be made by one who has a right to the bill and who thereby transmits the right, but a stranger to the bill, who has no right to the bill, may, by putting his name on it as if indorser, become liable to a subsequent holder, or to subsequent parties, if the bill is dishonoured. (See *Steele* v. *M'Kinley*, 5 App. Cas. 754, 772, 782; *Jenkins* v. *Coomber*, [1898] 2 Q. B. 168; 67 L. J. Q. B. 780.)

A person who puts his name on the back of a bill, as if indorser, in the belief that he is executing some different instrument, induced thereto by fraud, is not an indorser, and the same principle is applicable to the drawing of a bill or making of a promissory note (*Foster* v. *Mackinnon*, L. R. 4 C. P. 704; 38 L. J. C. P. 310; *Lewis* v. *Clay*, 67 L. J. Q. B. 224).

By s. 20, "(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit.

"(2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

"Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given." (See *Herdman* v. *Wheeler*, [1902] 1 K. B. 361; 71 L. J. K. B. 270; *Vinder* v. *Hughes*, [1905] 1 K. B. 795; 74 L. J. K. B. 410.)

Where the plaintiff is precluded by law from recovering on a bill or note by reason of its not being duly stamped, it would seem that the facts raising the objection may be pleaded by way of defence, but this is not the course adopted, as under the defence of non-acceptance, or under any defence which requires the plaintiff to produce the bill or note in evidence, the defendant will have the advantage of any objection as to the stamp. In general, the defect is not one which can be remedied after the bill or note has been issued. (See the Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 14, 37, 38.)

A note which has been paid by the maker (other than a bank note within s. 30 of the Stamp Act, 1891) cannot be re-issued by him without a fresh stamp (*Bartrum* v. *Caddy*, 9 A. & E. 275; *Glasscock* v. *Balls*, 24 Q. B. D. 13; 59 L. J. Q. B. 51).

(x) See note (q), *ante*, p. 110. If the acceptance is alleged in the claim as a general acceptance in the ordinary form, a mere general denial of the acceptance "as alleged" would not be sufficient.

to the tenor of the acceptance, as, for instance, the death of *E. F.*, *or*, the arrival of the steamship "Thetis" at Bristol], and not otherwise.

2. [*Here negative the happening of the specified event or contingency, as, for instance,* The said *E. F.* is still alive, *or*, did not die till after the commencement of this action; *or*, The said steamship has not yet arrived at Bristol, *or*, did not arrive at Bristol before the commencement of this action.]

A like Defence, setting out the Acceptance verbatim (y).

1. The defendant's acceptance of the bill sued on was a qualified acceptance only, and was in the following words, viz. [*here set out the acceptance verbatim*].

2. [*Here negative the happening of the specified event or contingency, as in the last preceding form.*]

Defence by an Acceptor that the Bill was accepted payable only at a Particular Place specified in the Acceptance, and was not presented there (z).

The bill sued on was accepted payable only at the —— Bank, —— Street, ——, and not elsewhere, and was not presented there for payment.

Defence to an Action for Default of Acceptance, denying the Presentment for Acceptance (a).

The bill sued on was not presented for acceptance.

Defence to a like Action, denying the Default in Acceptance (a).

G. H. accepted the bill sued on when the same was presented for acceptance.

Defence to an Action for Default of Payment, denying the Presentment for Payment (b).

The bill sued on was not presented for payment.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

(*y*) See note (*x*) on p. 597.

(*z*) See the preceding note, and *ante*, p. 111.

(*a*) See *ante*, pp. 115, 116, 117.

(*b*) As to this defence, and the cases in which it is applicable, see *ante*, pp. 111, 114, 115.

It is not a defence in an action against the acceptor, unless the acceptance was a qualified one rendering presentment necessary. (See *ante*, p. 111.)

Defence in a like Action, denying that the Bill was duly presented.

The bill sued on was not duly presented for payment. [*State the facts relied upon as showing that the presentment was insufficient.*]

Denial of the Notice of Dishonour (*c*).

The defendant denies that he had due [*or*, any] notice of the dishonour of the bill of exchange sued on. [The only notice received by the defendant was contained in a letter dated the —— ——19—, received by the defendant on the —— ——19—, but such notice was not due notice because (*state the grounds relied on as showing that the notice was not due notice*).]

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence that the Plaintiff was not the Holder (*d*).

The plaintiff was not the holder of the bill sued on at the commencement of the action.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence that the Defendant accepted the Bill for the Plaintiff's Accommodation (*e*).

The bill sued on was accepted by the defendant for the accommodation of the plaintiff and there never was any consideration for the acceptance or payment thereof by the defendant.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

(*c*) See *ante*, p. 117. The defence should state either that the defendant had no notice of dishonour, or that he had no *due* notice, and in the latter case it should state the facts relied on as showing that the notice given was not due notice. If the plaintiff has alleged matter of excuse for not giving notice of dishonour or for delay in the notice, such matter of excuse, if disputed must be specifically denied in the defence.

(*d*) By s. 2, the word "holder" in the Bills of Exchange Act, 1882, means "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof;" and by the same section the word "bearer" means "the person in possession of a bill or note which is payable to bearer." If the plaintiff has indorsed away the bill after the commencement of the action, and has thereby ceased to be the holder, the defence must be pleaded as arising after action.

As to the rights and powers of the holder, see s. 38, cited *post*, p. 603.

(*e*) By s. 30, "(1) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value." In other words, consideration is presumed, unless proof is given to the contrary (Ord. XIX., r. 25, cited *ante*, p. 9); and, therefore, if the defendant relies upon absence of consideration as a defence, he must plead that defence specifically, and the onus of proving such absence of consideration will rest upon him.

Absence of consideration is a good defence to an action on the bill between immediate

Defence that the Defendant accepted the Bill for the Accommodation of the Drawer, who indorsed it to the Plaintiff without Consideration (f).

The bill sued on was accepted by the defendant for the accommodation of the drawer, and there never was any consideration for the acceptance or payment of it by the defendant, and it was indorsed to the plaintiff and he always held it without consideration.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence that the Bill was accepted in Payment for Goods sold, which the Plaintiff failed to deliver (g).

The defendant accepted the bill sued on for and on account of the price of fifty tons of coal, to be delivered by the plaintiff to the defendant by

---

parties, and also between remote parties, where the bill has passed without consideration through the intermediate parties; but the want of consideration throughout must be stated in the defence, and must be proved if denied. (See the next form and s. 27 (2), *infra*, and note (*l*), *infra*).

By s. 27 (1), any consideration sufficient to support a simple contract constitutes a valuable consideration for a bill, and an antecedent debt or liability constitutes such valuable consideration, whether the bill is payable on demand or at a future time.

Valuable consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other (Com. Dig., Action on the Case, *Assumpsit*, B. 1—15; *Fleming* v. *Bank of New Zealand*, [1900] A. C. at p. 586; 69 L. J. P. C. at p. 123; and see *per* Bowen, L.J., in *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. at p. 271; 62 L. J. Q. B. at p. 264).

By s. 27, "(2) Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time;" and by sub-s. "(3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien."

By s. 28, "(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or indorser without receiving value therefor, and for the purpose of lending his name to some other person."

By s. 28, "(2) An accommodation party is liable on the bill to a holder for value, and it is immaterial whether when such holder took the bill he knew such party to be an accommodation party or not." (See the next note.)

An acceptance originally for accommodation will cease to be so if value is given at any time during the currency of the bill (*Burdon* v. *Benton*, 9 Q. B. 843).

Under Ord. XXVII., r. 13, cited *ante*, p. 545 (notwithstanding the provisions of Ord. XIX. r. 25, cited *ante*, p. 9), where the defendant by his pleading alleges absence of consideration, the plaintiff need not reply specially stating what the consideration was.

(*f*) See the preceding note. It is no defence that the acceptance was an accommodation acceptance, and that the bill was indorsed to the plaintiff when overdue, and with notice of its being an accommodation bill. (See s. 28 (2), *supra*; *Charles* v. *Marsden*, 1 Taunt. 224; *Stein* v. *Yglesias*, 1 C. M. & R. 565; *Sturtevant* v. *Ford*, 4 M. & G. 101.) It may, however, be a defence that a bill was accepted as an accommodation bill on the terms that it should be negotiated before it became due only, and not afterwards, and that it was first indorsed when overdue. (See ss. 29, 36 (2), *post*, pp. 603, 611.)

(*g*) An *entire* failure of consideration is a good defence to an action on a bill or note

the —— —— 19—, and the plaintiff failed to deliver the said coal or any part thereof.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence to an Action by Indorsee against Acceptor, that the Bill was accepted in Payment for Goods sold by the Drawer which he failed to deliver to the Defendant, and that the Bill was indorsed by the Drawer to the Plaintiff without Consideration, or with Notice, or when overdue (*h*).

1. The defendant accepted the bill sued on for and on account of the price of fifty tons of coal, to be delivered by *G. H.*, the drawer of the bill, to the defendant by the —— ——, 19—, and *G. H.* failed to deliver the said coal or any part thereof.

2. The bill sued on was indorsed by *G. H.* to the plaintiff, and he always held the same without consideration [*or*, with notice of the above-mentioned facts, *or*, when overdue].

Defence to an Action by an Indorsee against Acceptors of failure of Consideration, and that the Bill was Indorsed to the Plaintiff when overdue, etc.

In the alternative the consideration (if any) for the acceptance of the bill sued on was that the drawer would within a reasonable time and before

---

(*Solly* v. *Hinde*, 2 C. & M. 516; *Wells* v. *Hopkins*, 5 M. & W. 7; *Abbott* v. *Hendricks*, 1 M. & G. 791; and see note (*e*), *supra*); and when the consideration can be severed into ascertained amounts of money, an entire failure of consideration as to a certain amount may be pleaded *pro tanto* to a portion of the bill (*Darnell* v. *Williams*, 2 Stark. 166; *Forman* v. *Wright*, 11 C. B. 481); and it may be pleaded with a different defence to the rest of the bill (*Ib.*; *Sheerman* v. *Thompson*, 11 A. & E. 1027, 1032; *Agra Bank* v. *Leighton*, L. R. 2 Ex. 56; 36 L. J. Ex. 33).

Similarly, wherever upon a sale of goods the purchaser would be entitled to recover back the price as money received to his use (see *ante*, p. 261), he might also defend an action upon a bill given for the price on the ground of entire failure of consideration. (See *Agra Bank* v. *Leighton*, *supra*.)

A partial failure of consideration cannot be pleaded by way of defence to the whole amount of the bill (*Clark* v. *Lazarus*, 2 M. & G. 167; *Trickey* v. *Larne*, 6 M. & W. 278); nor can a failure of consideration to an unliquidated amount be pleaded even to a part (*Ib.*; *Warwick* v. *Nairn*, 10 Ex. 762; *Horsfall* v. *Thomas*, 1 H. & C. 90; 31 L. J. Ex. 322.) In such cases, however, although the partial failure of consideration is not pleadable by way of defence, the acceptor may now avail himself of it by way of counterclaim, in an action brought against him by the drawer.

Where the action is between remote parties, the fact that there has been a total failure of the consideration for which the bill was originally given is not a sufficient defence, unless it is also shown that the subsequent holder or holders took the bill without consideration or with notice or when overdue.

As to the effect of taking a bill when overdue, see s. 36 (2), (3), cited note (*s*), *post*, p. 611.

(*h*) See preceding note.

it became due consign to the defendants goods to be sold by them as brokers and agents of and for the drawer for reward to the defendants. and upon the terms agreed to verbally on the —— —— 19—, that the defendants should be at liberty to meet and pay the said bill at maturity out of the proceeds of the sale of the said goods, and the defendants were always ready and willing to receive and sell the said goods for the purpose and on the terms aforesaid, but the drawer did not within a reasonable time as aforesaid or at any other time consign or deliver to the defendants the said goods or any of them, and except as aforesaid there was no consideration for the acceptance or payment of the bill by the defendants, and the bill was indorsed to the plaintiff (if at all) after it became due and without any consideration and with notice of the above facts.

The like.

In the alternative the bill was accepted in respect of monies to become due from the defendants to the drawer after its date in respect of sales by the defendants of goods for the drawer, and save as aforesaid there was no consideration for its acceptance or payment and no monies ever became so due, and the bill was indorsed to the plaintiff (if at all) without consideration, with notice of the above facts and after it was overdue.

See forms of pleas under the old system—That the bill was given for goods sold according to a certain sample, and that no goods were delivered answering the sample: Wells v. *Hopkins* 5 M. & W. 7; *Warwick* v. *Nairn*, 10 Ex. 762; *that the note was made in consideration of future services of the plaintiff which he never rendered: Abbott* v. *Hendricks*, 1 M. & G. 791; *that the bill was accepted in payment of some materials supplied as warranted fit for roofing, which proved unfit for that purpose: Camac* v. *Warriner*, 1 C. B. 356; *that the note was given to secure part of a debt due from a third party to the plaintiff, in consideration that the plaintiff would not enforce the residue, and that the plaintiff afterwards enforced the whole debt: Gillett* v. *Whitmarsh*, 8 Q. B. 966; *that the note was given in consideration of the trouble the payee would have in being the maker's executor, and that the payee died in the lifetime of the maker: Solly* v. *Hinde*, 2 C. & M. 516; *that the note was given as the purchase-money of land which the plaintiff refused to convey: Jones* v. *Jones*, 6 M. & W. 84; *Moggridge* v. *Jones*, 14 East, 486; *Spiller* v. *Westlake*, 2 B. & Ad. 155; *that the note was given in consideration of the plaintiff paying the defendant's creditors, which he failed to do: Cole* v. *Cresswell*, 11 A. & E. 661; *that the note was given as security for advances to a third party which were repaid before the note became due: Richards* v. *Macey*, 14 M. & W. 484; *that the bill was accepted in consideration of money agreed to be paid to the*

defendant by the plaintiff and a third party, and which was not paid: Astley v. *Johnston*, 5 H. & N. 137; 29 L. J. Ex. 161.

Defence to an Action by Indorsee against Acceptor, that the Defendant was induced to accept the Bill by the Fraud of the Drawer, who indorsed it to the Plaintiff without Consideration, or with Notice, or when overdue (*i*).

1. The defendant was induced to accept the bill sued on by the fraud of the drawer.

Particulars of the fraud are as follows:—

[The drawer, in order to induce the defendant to accept the said bill, on the —— ——, 19—, falsely and fraudulently represented to the defendant verbally, that he had shipped twenty tons of pig iron for the defendant on

---

(*i*) The title of a *bonâ fide* indorsee for value who took the bill before it became due and without notice is not affected by any fraud in the inception of the bill, or by any illegality in the consideration. Such an indorsee is a "*holder in due course*" within the definition of s. 29, *infra*. As to when a bill is overdue, see s. 36 (2) (3), *post*, p. 611, and s. 86 (3) *post*, p. 613.

By s. 29, "(1.) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

"(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;

"(b) That he took the bill in good faith" (see s. 90) "and for value" (see s. 27 (1), cited note (*e*), *ante*, p. 600) "and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

"(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

"(3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."

By s. 38, "The rights and powers of the holder of a bill are as follows:—

"(1.) He may sue on the bill in his own name:

"(2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;

"(3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill."

Where the title is traced through several indorsements, the defence must invalidate the title of each indorsee down to the plaintiff inclusive by alleging that each took it without value or with notice, or after it was due. (See note (*e*), *ante*, p. 599). This may be done where the indorsements are numerous by a general statement that all the alleged indorsements were without value, or that all were with notice, or that all were made when the bill was overdue.

By s. 30, "(2) Every holder of a bill is *primâ facie* deemed to be a holder in due

board the "Ajax," whereas he had not in fact so shipped the said pig iron or any part thereof.]

2. The said bill was indorsed to the plaintiff, and he took and always held the same without consideration [*or*, with notice of the fraud aforesaid, *or*, after the same was overdue].

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence by the Acceptor that the Bill was accepted without Consideration and delivered to the Drawer for the Purpose of his getting it discounted, and was indorsed by him to the Plaintiff in Fraud of that Purpose and without Consideration, or with Notice, or when overdue (*k*).

1. The bill sued on was accepted and delivered to said drawer, *G. H.*, without consideration, for the purpose of his getting it discounted for the defendant, and the said drawer, in fraud of the defendant, and contrary to the said purpose, indorsed the bill to the plaintiff.

2. The plaintiff took and always held the said bill without consideration [*or*, with notice of the said fraud, *or*, when it was overdue].

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence by the Drawer that he drew and indorsed the Bill without Consideration for the Purpose of getting it discounted, and that it was negotiated in Fraud of that Purpose, and came to the Plaintiff without Value (*k*).

The defendant drew the bill sued on and indorsed it in blank, and then delivered it without consideration to *J. K.* for the purpose of his getting it discounted for the defendant, and *J. K.*, in fraud of the defendant, and contrary to the said purpose, delivered the said bill without consideration to [a person to the defendant unknown], who afterwards delivered it to the plaintiff, who took and always held it without consideration, and the bill was not otherwise indorsed to the plaintiff.

Defence that the Bill was given for an Illegal Consideration (*l*).

The defendant accepted the bill sued on for and on account of [*here state the consideration for the bill, showing the illegality thereof, and, if the*

---

course; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." (See *Tatam* v. *Haslar*, 23 Q. B. D. 345; 58 L. J. Q. B. 432; and see s. 29 (1), above cited.)

(*k*) See preceding note.

(*l*) See *post*, pp. 669, 682; and ss. 29 (2) (3), 30 (2), cited note (*i*), *ante*, p. 603. Where the consideration is wholly or in part an undertaking, whether express or

action is by an indorsee, state further that the bill was indorsed without consideration, or with notice, or when overdue: see note (*i*), *ante*, p. 603].

Defence in an Action by the Indorsee against the Indorser of a Bill that the Plaintiff and Drawer are the same Person (*m*).

A. B., the drawer and indorser of the bill sued on, and the plaintiff are the same person.

Reply to the preceding Defence, that the Plaintiff indorsed the Bill without Consideration for the purpose of the Defendant indorsing it to him as Surety for the Acceptor, and the Defendant indorsed it accordingly (*m*).

The plaintiff indorsed the bill sued on to the defendant without consideration for the purpose of the defendant indorsing it to the plaintiff, and thereby becoming surety to the plaintiff for the payment thereof by the acceptor, and the defendant indorsed the bill to the plaintiff for that purpose.

implied, to stifle a prosecution, or not to prosecute for a crime, it is an illegal consideration (*Flower* v. *Sadler*, 9 Q. B. D. 83; 10 *Ib.* 572; *Jones* v. *Merionethshire Bdg. Soc.*, [1892] 1 Ch. 173; 61 L. J. Ch. 138). Where part of the consideration for a bill is illegal, the consideration is not severable (*Scott* v. *Gillmore*, 3 Taunt. 226; *Hay* v. *Ayling*, 16 Q. B. 423). A bill given to the trustee of an illegal association in pursuance of a contract made in the course of carrying on the business of the association is regarded as having been given for an illegal consideration (*Shaw* v. *Benson*, 11 Q. B. D. 563; 52 L. J. Q. B. 575; see *post*, pp. 634, 684).

(*m*) If a bill be re-indorsed to a previous indorser the latter, in order to avoid a circuity of action, is not, under ordinary circumstances, permitted to recover against the intermediate parties; for upon such recovery against them, they would *primâ facie* have their remedy over against him, and the result would be to place the parties in precisely the same situation as before any action at all. (See s. 37; *Wilkinson* v. *Unwin*, 7 Q. B. D. 636; 50 L. J. Q. B. 338.) Accordingly, a statement of claim showing upon the face of it that the bill sued upon was drawn by the plaintiff, indorsed by him to the defendant, and re-indorsed to the plaintiff, would be objectionable in point of law, unless it also showed circumstances negativing the defendant's right of recourse against the plaintiff. But if the claim is drawn so as not to disclose the identity of the plaintiff and indorser, as where the indorser is described by name only, and not as "the plaintiff," it would perhaps be supported on the assumption that they are different persons (*Britten* v. *Webb*, 2 B. & C. 483; *Boulcott* v. *Woolcott*, 16 M. & W. 584); and a defence identifying them as one and the same would be necessary. (See form, *supra*.) If in such case there exist circumstances which alter the rights of the parties as they appear on the bill, and negative the right of the defendant to recover over against the plaintiff, the action will be maintainable, and these facts may be set up by way of reply.

Defence that the Defendant was induced to accept the Bill sued on and others in Payment of the Price of a Business, by Fraud, with a Counterclaim for return of the Bills and damages.

1. The defendant was induced to accept the bill of exchange sued on by fraud under the circumstances hereinafter stated, and there never was any value or consideration for the acceptance or payment thereof by the defendant, or the only value or consideration (if any) wholly failed.

2. By an agreement in writing dated the —— ——, 19—, and made between the plaintiff and the defendant, the plaintiff agreed to sell and sold to the defendant the lease of certain premises and the goodwill, fixtures and stock of an [oil merchant's] business at ——, and the benefit of certain contracts therein mentioned, for the sum of £—— and certain interest thereon, payable as to £—— in cash, and as to £ —— by bills of exchange, and as to the interest by certain instalments. The defendant craves leave to refer to the original agreement for the terms thereof.

3. Pursuant to the said agreement, the defendant paid to the plaintiff £ —— in cash and he also accepted and delivered to the plaintiff eight bills of exchange, all dated the —— ——, 19—, payable respectively at three, six, nine, twelve, fifteen, eighteen, twenty-one, and twenty-four months after date, the first seven being for £—— each and the last for £——. The defendant duly met and paid to the plaintiff the amount of the first two of the said bills and the interest to the date of such payment, amounting in all to £——. The bill now sued on is the third of the said bills. The remaining five bills are still in the possession of the plaintiff but have not yet matured.

4. In order to induce the defendant to make the said agreement and to pay the said money and to accept the said bills, and to pay those and the interest that he has paid, the plaintiff, on the —— ——, 19, verbally falsely and fraudulently represented to the defendant, and warranted and agreed with him :

(a) That the plaintiff was retiring after many years' successful trading, whereas the trading had not been successful.

(b) That the net profits of the said business were over £—— per annum, whereas there were no profits, or only very small profits, if any.

(c) That the books and accounts would prove that the profits were over £—— per annum, whereas they did not so prove.

(d) That the books and accounts had been properly and honestly kept, whereas they had not been so kept, and numerous expenses and outgoings were omitted.

(e) That the business was a splendid investment for a capital of about £——, whereas the business was not a splendid investment at all but a losing concern.

(f) That a certain balance sheet or trading account, which purported to be a balance sheet or trading account for the three years

ending the —— ——, 19—, and which purported to show a gross trading for the three years of £——, and a gross profit of £——, was a true and correct balance sheet or trading account, and truly and completely represented the amount of the trading, outgoings and profits of the said business, whereas the said balance sheet or trading account was false, fictitious, and incomplete and misleading, and did not truly or completely represent the trading, outgoings and profits.

(g) That the amount of the receipts and of the expenses or outgoings were correctly stated in the said balance sheet or trading account, whereas the fact was that many items entered as paid to the plaintiff were omitted to be entered as afterwards repaid by him and the expenses and outgoings for lighterage, carriage, sundries, stamps, returns, and discounts were omitted and understated.

Particulars under sub-paragraphs (e), (f) and (g) are delivered herewith.

5. The plaintiff made the said statements knowing the same to be false.

6. Save as aforesaid there never was any consideration or value for the acceptance or payment by the defendant of the bill of exchange sued on or any of the other of the said bills, or for any of the aforesaid payments.

7. The defendant never agreed or otherwise became liable to pay the banker's commission or the interest claimed.

Counterclaim.

8. The defendant repeats paragraphs 1 to 6, both inclusive, of the defence, and says that by reason of the premises the said business is wholly worthless and that he has lost the sums he has paid to the plaintiff and will lose the amount of the said bills if he has to pay the same, and he was and is otherwise injured.

9. In pursuance of the said agreement and as collateral security for the performance by him thereof, and on the faith of the aforesaid representations, the defendant was induced to and did deposit with *G. H.* certain deeds, namely, a lease, an assignment and an underlease, and four bills of exchange drawn by the defendant upon and accepted by Messrs ——.

The defendant claims:—

(1.) To have the said agreement and the assignment of lease executed and other things done in pursuance thereof rescinded and declared void.

(2.) To have the bill of exchange sued on and the five other remaining bills delivered up and cancelled.

(3.) Repayment of the amount paid to the plaintiff.

(4.) To have it declared that he is entitled to have the deeds and bills referred to in paragraph 9 delivered up to him.

(5.) Further or in the alternative damages.

Defence of an Alteration of the Bill (*n*).

The bill sued on was rendered void after issue by a material [and apparent] alteration, viz., by the alteration of the date from the 21st of January to the 2nd of January, without the authority or consent of the defendant.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence that the Bill has been lost by the Plaintiff (*o*).

After the acceptance of the bill sued on the plaintiff, whilst he was the holder thereof, lost the said bill [*add, if this does not appear in the statement*

(*n*) By s. 64, "(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.

"(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

An innocent acceptor of a bill for a certain sum is not liable to pay a larger sum afterwards fraudulently inserted as the amount of the bill by a subsequent holder, even though the bill was carelessly accepted in such a shape as would facilitate the fraud (*Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514; 65 L. J. Q. B. 593).

As to the general rules of law with respect to alterations of documents, see *ante*, p. 579.

An alteration made after the issuing of the bill with the consent of all parties, which materially changes the effect of the instrument, in general invalidates the stamp, and thus prevents the bill being given in evidence. But this is not the case where the alteration was so made before the bill was issued, or where it was made to correct a mistake, and in furtherance of the original intention of the parties (*Byrom* v. *Thompson*, 11 A. & E. 31). An accommodation bill is not considered as issued until it is in the hands of a party who has a remedy upon it, and a previous alteration does not affect the validity of the bill as against the parties assenting to such alteration (*Downes* v. *Richardson*, 5 B. & Ald. 674; followed by Charles, J., in *Scholfield* v. *Earl of Londesborough*, [1894] 2 Q. B. at p. 666).

"'Issue' means the first delivery of a bill or note complete in form" to a holder (s. 2).

Where a bill is sued upon in the form in which it was accepted, the defence that it has been altered after acceptance should be specially pleaded. (See *ante*, p. 580.)

Where such bill is sued upon in its altered form, the defendant, instead of specially pleading the alteration, may content himself with denying that he accepted the bill alleged, and stating the tenor of the bill accepted and any facts constituting a defence to the bill in its original form. But wherever an alteration in a bill is relied upon as a substantive defence to an action on such bill, the fact of such alteration should be specially pleaded.

(*o*) This defence must be pleaded, and cannot be relied upon under a denial of the acceptance of the bill; for under the issue raised by such denial secondary evidence would be admissible on proof of the loss (*Blackie* v. *Pidding*, 6 C. B. 196; *Charnley* v.

of claim, which was payable to bearer, *or*, to order, and transferable by indorsement, *as the case may be*], and the same has ever since been and still is lost.

Defence of a Discharge of the Bill by absolute Renunciation in Writing (p).

After the maturity of the bill sued on, and whilst the plaintiff [*or, A. B.*] was the holder thereof, he discharged the said bill by absolutely and unconditionally, on the —— ——, 19—, renouncing in writing his rights against the acceptor.

Particulars:—[*Give particulars of the writing.*]

Defence of an absolute Renunciation in Writing by the Plaintiff of the Defendant's Liabilities on the Bill (p).

After the defendant became a party to the bill sued on, the plaintiff, on the —— ——, 19—, whilst the holder of the said bill, absolutely and unconditionally renounced in writing the defendant's liabilities in respect of the said bill.

Particulars:—[*Give particulars of the writing.*]

Defence in an Action against the Drawer that the Plaintiff agreed with the Acceptor to give him Time for Payment (q).

The plaintiff, after the maturity of the bill sued, and whilst holder

---

Grundy, 14 C. B. 608). It cannot be pleaded to a non-negotiable instrument (*Ib.*; *Wain* v. *Bailey*, 10 A. & E. 616). A replication that when the plaintiff lost the bill he had not indorsed it, and it was not transferable by delivery, was held bad (*Ramuz* v. *Crowe*, 1 Ex. 167). The above defence is an answer to a claim on the consideration for the bill as well as to a claim on the bill itself (*Clay* v. *Crowe*, 8 Ex. 295; 9 Ex. 604). In an action for money received, to recover the amount paid to a banker for circular notes afterwards lost, it was held that the loss of the notes might be set up in answer to the action (*Conflans Quarry Co.* v. *Parker*, L. R. 3 C. P. 1; 37 L. J. C. P. 51).

It is enacted by s. 70, that "In any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question." (See Chit. Forms, 13th ed., p. 198.)

(*p*) By s. 62, "(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor." (See *In re George*, 44 Ch. D. 627; 59 L. J. Ch. 709; *Edwards* v. *Walters*, [1896] 2 Ch. 157; 65 L. J. Ch. 557.)

"(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

A holder or his agent may cancel a bill, or the signature of any party thereto, and thus discharge the bill. (See s. 63.)

(*q*) The drawer of a bill of exchange is in the position of a surety for the acceptor;

thereof, released the defendant by giving time to the acceptor in pursuance of a binding agreement.

Particulars:—[*Here state the particulars of the agreement to give time, specifying the date, and whether it was in writing or verbal, and the consideration for it.*]

For a Defence to an Action against one of several Joint Makers of a Promissory Note, that the Defendant made the Note as Surety only for another Maker, to whom the Plaintiff gave Time, see post, p. 614.

Defence of Payment by the Defendant.

(*R. S. C.*, 1883, *App. D., Sect. IV., cited post*, p. 745.)

Defence to an Action by the Indorsee against the Drawer, of Payment by the Acceptor (*r*).

After the bill sued on became due, and whilst the plaintiff was the holder thereof, and before action, *G. H.* [the acceptor], on the —— ——, 19—, satisfied the principal and interest then due on the bill by payment to the plaintiff.

---

so an indorser of a bill or note is a surety for all the previous parties. Consequently, if the holder of a bill or note, by a binding contract with the acceptor or maker, or an indorser, gives time for payment, the subsequent parties to the bill or note who stand in the position of sureties are in general discharged from liability (*English* v. *Darley*, 2 B. & P. 61; *Philpot* v. *Briant*, 4 Bing. 717, 720; *Clarke* v. *Wilson*, 3 M. & W. 208; and see *post*, p. 674).

A contract made with a stranger to the bill to give time to the acceptor will not of itself have the effect of discharging the drawer or indorser (*Lyon* v. *Holt*, 5 M. & W. 250; *Fraser* v. *Jordan*, 8 E. & B. 303; 26 L. J. Q. B. 288).

(*r*) By s. 59—"(1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. 'Payment in due course' means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

"(2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but—

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

"(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged."

Defence to an Action by the Indorsee against the Acceptor of Payment to the Drawer after the Bill was Due, and subsequent Indorsement by the Drawer (s).

After the bill sued on became due, and whilst *G. H.* [*the drawer*] was the holder, the defendant on the —— ——, 19—, satisfied the principal and interest then due on the said bill by payment to *G. H.*, who first indorsed the bill to the plaintiff after such payment.

Defence of Payment to a prior Holder not mentioned in the Statement of Claim, and subsequent Indorsement to the Plaintiff after Maturity.

The bill sued on was indorsed by the drawer to *K. L.*, who indorsed it [to *M. N.*, who indorsed it] to the plaintiff, and after the said bill became due, and whilst *K. L.* [*or*, *M. N.*] was the holder thereof, and before the bill was indorsed to the plaintiff, the defendant on the —— ——, 19—, satisfied the principal and interest then due on the bill by payment thereof to *K. L.* [*or*, *M. N.*].

Defence in an Action by the Drawer against the Acceptor, of a contemporaneous Agreement in Writing between the parties for the Renewal of the Bill on Request (t).

The defendant accepted and delivered the bill sued on to the plaintiff, and the plaintiff received and held it upon the terms then agreed upon between them in writing, that if, before the maturity of the said bill, the defendant should request a renewal of the bill for —— months from the

---

(*s*) By s. 36—"(2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

"(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact."

The above-cited sub-sections (2) (3) of s. 36 apply to cheques on bankers (see s. 73, cited *ante*, p. 125, and *London, &c., Bank* v. *Groome*, 8 Q. B. D. 288; 51 L. J. Q. B. 224), but do not apply to promissory notes payable on demand (see s. 86 (3), cited *post*, p. 613).

(*t*) The rights under a bill or note may be affected by an agreement in writing made at the same time and between the same parties, and directly with respect to it. If the bill or note is intended to be a distinct and separate security, it is not affected by a collateral agreement merely referring to it; so an agreement made between different parties cannot affect the rights under it (*Brill* v. *Crick*, 1 M. & W. 232; *Spiller* v. *Westlake*, 2 B. & Ad. 155; *Webb* v. *Spicer*, 13 Q. B. 886; *Maillard* v. *Page*, L. R. 5 Ex. 312; 39 L. J. Ex. 235). A contemporary verbal agreement cannot vary the rights of the parties as shown on the instrument (*Hoare* v. *Graham*, 3 Camp. 57; *Young* v.

date of its maturity, the plaintiff would renew it accordingly, and the defendant, before the maturity of the bill, requested such renewal, but the plaintiff refused to renew the bill.

Particulars :—

The agreement is contained in a document dated the —— ——, 19—, signed by the plaintiff and the defendant.

The request and refusal were verbal, and were made and took place on the —— ——, 19—.

Defence of Discharge of the Acceptor by a Foreign Bankruptcy: see post, p. 655.

II. Foreign Bills of Exchange: *see ante*, p. 122.

Defence that an Indorsement was invalid by Foreign Law.

The indorsement to the plaintiff (if any) was made in Norway and subject to the laws of that country, by which the indorsement is invalid and ineffectual unless the date, the value given, and the name of the indorsee are indorsed, and which was not done in the indorsement to the plaintiff.

III. Bankers' Cheques (*u*).

Denial of the Drawing of the Cheque (*x*).

The defendant denies that he drew the cheque sued on.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

For forms denying Indorsement, Notice of Dishonour, &c., see the forms given in "Inland Bills," ante, pp. 596, 599 *et seq.*

Austen, L. R. 4 C. P. 553; 38 L. J. C. P. 9; *Abrey* v. *Crux*, L. R. 5 C. P. 37; 39 L. J. C. P. 9; *Hill* v. *Wilson*, L. R. 8 Ch. 888; 42 L. J. Ch. 817); and evidence cannot, therefore, be given of a contemporary verbal agreement to renew a bill or note (*Maillard* v. *Page*, L. R. 5 Ex. 312, 319; 39 L. J. Ex. 235; *New London Syndicate* v. *Neale*, [1898] 2 Q. B. 487; 67 L. J. Q. B. 825). But evidence is admissible which shows a contemporaneous verbal arrangement, upon the faith of which the instrument was handed over, that it was not to be an effective or operative bill or note until some condition was fulfilled, and the condition is still unfulfilled (*Ib.*, and see *ante*, p. 578, n. (*r*)).

By s. 21 (2), as between immediate parties, and, as regards a remote party other than a holder in due course, the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the bill. As to delivery by way of an escrow, see *ante*, p. 578.

(*u*) See *ante*, p. 125.

(*x*) In actions upon cheques a defence in denial must deny some matter of fact. (See Ord. XXI., r. 2, cited *ante*, p. 596.) As to what matters of fact may not be denied by particular persons, see note (*r*), *ante*, p. 596.

Defence of an Alteration of the Cheque (*y*).

The cheque sued on was rendered void after issue by a material and apparent alteration, viz., by the alteration of the date from the 21st of January to the 2nd of January, without the authority or assent of the defendant.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

IV. Promissory Notes (*z*).

Denial of the Making of the Note (*a*).

The defendant denies that he made the note sued on.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

For forms denying Indorsement, Notice of Dishonour, &c., see the forms given in "Inland Bills," ante, pp. 596, 599 *et seq.*

(*y*) See note (*n*), *ante*, p. 608.

(*z*) See *ante*, p. 129. The forms of pleadings given under "*Bills of Exchange*" may for the most part readily be adapted so as to apply to actions on promissory notes.

By s. 88 of the Bills of Exchange Act, 1882, the maker of a promissory note by making it—

"(1) Engages that he will pay it according to its tenour;

"(2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse."

As to estoppels, see, further, note (*v*), *ante*, p. 596.

By s. 86, "(1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented, the indorser is discharged.

"(2) In determining what is reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

"(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue." But it may be otherwise, if the note itself shows that it was issued an unreasonable time before indorsement (*Glasscock* v. *Balls*, 24 Q. B. D. 13; 59 L. J. Q. B. 51).

As to when presentment for payment is necessary, see s. 87, cited note (*c*), *ante*, p. 130.

As to stamps, see the Stamp Act, 1891, and *ante*, p. 597.

(*a*) In actions upon promissory notes, a defence in denial must deny some matter of fact. (See Ord. XXI., r. 2, cited *ante*, p. 596.) As to what matters of fact may not be denied by particular persons, see note (*r*), *ante*, p. 596.

Defence that the Defendant made the Note for the Plaintiff's Accommodation (*b*).

The note sued on was made for the accommodation of the plaintiff, and he took and always held it without consideration.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence that the Note was made in Payment for Goods sold which the Plaintiff failed to deliver (*c*).

The defendant made the note sued on for and on account of the price of fifty tons of coal to be delivered by the plaintiff to the defendant by the —— ——, 19—, and the plaintiff failed to deliver the said goods or any part thereof.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence of an Alteration of the Note (*d*).

The note sued on was rendered void after issue by a material and apparent alteration, viz., by the alteration of the date from the 21st of January to the 2nd of January, without the authority or assent of the defendant.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence to an Action against one of several Joint Makers of a Promissory Note, that the Defendant made the Note as Surety only for another Maker, to whom the Plaintiff gave Time (*e*).

The note sued on was made by the defendant jointly with *I. K.* for *I. K.'s* accommodation, and as his surety only, to secure a debt [of £——] due to the plaintiff from *I. K.* alone, of which facts the plaintiff then had

---

See note (*e*), *ante*, p. 599.

(*c*) See note (*g*), *ante*, p. 600.

(*d*) See note (*n*), *ante*, p. 608.

(*e*) See *post*, p. 676. In the case of a joint acceptance or joint promissory note, where the defendant, who is one of the acceptors or makers, accepted the bill or made the note as surety for the other, though appearing on the face of the bill or note as a principal, it is a good defence that the defendant did so only as surety for the other acceptor or maker, and that the plaintiff, knowing that he was only surety, by a binding contract gave time to the principal debtor without the defendant's consent (*Pooley* v. *Harradine*, 7 E. & B. 431; 26 L. J. Q. B. 156; *Taylor* v. *Burgess*, 5 H. & N. 1; 29 L. J. Ex. 7; *Greenough* v. *McClelland*, 2 E. & E. 424; 30 L. J. Q. B. 15; *Bailey* v. *Edwards*, 4 B. & S. 761; 34 L. J. Q. B. 41; *Edwin* v. *Lancaster*, 6 B. & S. 571; 13 W. R. 857; and see *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586). It is not necessary for this defence that the plaintiff should have known of such suretyship at

notice, and, except as aforesaid, there never was any consideration for the making or payment of the note by the defendant; and after the note became due, the plaintiff, whilst holder thereof, released the defendant by giving time to *I. K.* in pursuance of a binding agreement and without the defendant's consent.

Particulars:—

The said agreement is in writing, and is dated the —— ——, 19— [*or, as the case may be*].

Bill or Note taken for the Debt (*f*).

Defence that the Defendant accepted on account of the Debt a Bill of Exchange, which is still running.

After the accruing of the plaintiff's claim, the plaintiff on the —— ——, 19—, received from the defendant for and on account of such claim a bill of exchange dated the —— ——, 19—, drawn by the plaintiff

---

the time of the acceptance of the bill or the making of the note, as it is sufficient if the plaintiff knew the fact when he made the contract giving time (*Oriental Financial Corp.* v. *Overend, Gurney & Co.*, L. R. 7 Ch. 142; *Ib.* 7 H. L. 348; *Rouse* v. *Bradford Banking Co.*, *supra*). But the giving of time to the principal debtor will not exonerate the surety if the creditor has by his agreement with the principal expressly reserved his remedies against the surety (*Bateson* v. *Gosling*, L. R. 7 C. P. 9; 41 L. J. C. P. 53; and see *Muir* v. *Crawford*, L. R. 2 H. L. Sc. 456).

(*f*) The giving of a negotiable security on account of a simple contract debt operates in general as a conditional payment, *i.e.*, a payment if the security is paid when due; and it suspends the right of action in the meantime, and is a good defence to an action brought before the security is due (*Kearslake* v. *Morgan*, 5 T. R. 513; *James* v. *Williams*, 13 M. & W. 828, 833; *Belshaw* v. *Bush*, 11 C. B. 191; *Crowe* v. *Clay*, 9 Ex. 604; 23 L. J. Ex. 150; *Cohen* v. *Hale*, 3 Q. B. D. 371; 47 L. J. Q. B. 496; *Burliner* v. *Royle*, 5 C. P. D. 354; *In re Romer*, [1893] 2 Q. B. 286; *Felix Hadley & Co.* v. *Hadley*, [1898] 2 Ch. 680; 67 L. J. Ch. 694). If the security so given has been duly paid, the transaction operates as a payment and satisfaction of the original debt (*Ib.*; *Thorne* v. *Smith*, 10 C. B. 659).

It is also a good defence to an action for the original debt that the plaintiff at the time of such action has ceased to be the holder of a bill or note given on account of the debt by having transferred or indorsed it for value to some other person who or whose indorsee is then the holder of the security, and entitled to sue the defendant thereon (*Maillard* v. *Duke of Argyll*, 6 M. & G. 40; *Price* v. *Price*, 16 M. & W. 232; *Belshaw* v. *Bush*, *supra*; see *National Savings Bank* v. *Tranah*, L. R. 2 C. P. 556; 36 L. J. C. P. 260). Similarly, it is a defence to such an action that the plaintiff has lost a negotiable bill accepted by the defendant and given by him to the plaintiff on account of the debt, and that the bill is no longer in the plaintiff's power or control, and is still lost and outstanding (*Crowe* v. *Clay*, *supra*). But such defence would be no answer to an action upon the bill itself if the plaintiff obtain an order under s. 70 of the Bills of Exchange Act, 1882. (See *ante*, p. 609.) If the plaintiff has transferred the bill and is not the holder at the time of the commencement of the action, the fact that he gets it into his hands before the trial will not be an answer to the defence (*Davis* v. *Reilly*, [1898] 1 Q. B. 1; 66 L. J. Q. B. 844).

If the defendant is the person primarily liable on the bill or note given on account of the debt, the defence must show that the bill or note was duly paid before action, or that it was not due at the time of action brought, or that it has been indorsed away by the

upon and accepted by the defendant for the payment of £—— to the plaintiff or order —— months after date, which period had not elapsed at the commencement of this action.

A like form, where the Bill has arrived at Maturity, and has been duly paid.

[*Repeat the preceding form with the exception of the words* "which period had not elapsed at the commencement of this action," *and proceed as follows :*] and the defendant before action, on the —— ——, 19—, duly paid the amount due on the said bill to the plaintiff [*or*, to *G. H.*, to whom the plaintiff had indorsed the said bill, and who was then the holder thereof].

---

plaintiff, so that the defendant is liable on it to other parties, or that it has been lost by the plaintiff and remains so lost (*Price* v. *Price*, 16 M. & W. 232 ; *National Savings Bank* v. *Tranah*, *supra* ; *Crowe* v. *Clay*, *supra*). But in cases where other parties are primarily liable on the instrument, and the defendant is only secondarily liable thereon, a *primâ facie* defence is shown by stating that the bill or note was taken on account of the debt, and it then lies on the plaintiff to displace this *primâ facie* defence by showing that the instrument has been dishonoured, and that the defendant has had due notice of such dishonour (*Price* v. *Price*, *supra* ; and see *Kearslake* v. *Morgan*, *supra* ; and *Mercer* v. *Cheese*, 4 M. & G. 804). If the defendant has indorsed to the plaintiff on account of the debt a bill or note accepted or made by third parties, the plaintiff may make the instrument his own by laches, as by neglecting to make due presentment thereof for payment or to give due notice of dishonour to the defendant (*Soward* v. *Palmer*, 8 Taunt. 277 ; *Cumidge* v. *Allenby*, 6 B. & C. 373 ; *Peacock* v. *Purssell*, 14 C. B. N. S. 728 ; 32 L. J. C. P. 266), or by altering the instrument in a material point (*Alderson* v. *Langdale*, 3 B. & Ad. 660 ; see *ante*, p. 608), and in such cases the transaction operates as payment, and the plaintiff has no remedy against the defendant either on the bill or on the debt. (See the cases above cited, and *Yglesias* v. *River Plate Bank*, 3 C. P. D. 60, 330.)

Any agreement to take a negotiable security as a conditional payment for a debt of any nature whatsoever, and to suspend other remedy in respect of such debt during the currency of the security, followed by the taking of the security, will operate as a conditional payment of the original debt, and suspend other remedy in accordance with the agreement made. (See *ante*, p. 569.)

It was held before the Judicature Acts that the mere giving of a bill or note on account and by way of conditional payment was not a defence to an action on a bond or other specialty debt (*Worthington* v. *Wigley*, 3 Bing. N. C. 454), or for rent (see *Drake* v. *Mitchell*, 3 East, 251 ; *Davis* v. *Gyde*, 2 A. & E. 623), but it would appear now to afford some evidence of an agreement to suspend the remedy during the currency of the bill or note (*Palmer* v. *Bramley*, *infra* ; *Baker* v. *Walker*, *infra*). Thus, a promissory note given for a judgment debt is evidence of an agreement to suspend the judgment until the note is due, which is a sufficient consideration to support an action on the note (*Baker* v. *Walker*, 14 M. & W. 465 ; see *Ex p. Matthew*, 12 Q. B. D. 506). So also a bill taken by a landlord for rent affords some evidence of an agreement not to distrain during the currency of the bill (*Palmer* v. *Bramley*, [1895] 2 Q. B. 405 ; 65 L. J. Q. B. 42).

As to the mode of pleading in cases where a negotiable instrument is taken not merely for and on account of the debt, but in absolute satisfaction and discharge of it, see *ante*, p. 569.

A like form, stating that the Bill was indorsed away by the Plaintiff, and is still outstanding.

[*Repeat the first preceding form with the exception of the words* "which period had not elapsed at the commencement of this action," *and proceed as follows:*] and before such bill became due, the plaintiff indorsed and delivered it for value to *G. H.* [*or*, to a person to the defendant unknown], and the said bill at the commencement of this action was [and still is] outstanding in the possession of the said *G. H.* [*or*, of the last mentioned person, *or*, of *J. K.*, to whom the said *G. H.* indorsed the same, *or*, *as the case may be*].

A like form, stating that the Bill has been lost by the Plaintiff.

[*State the giving of the bill on account of the debt as in the first preceding form, showing that the bill was a negotiable one, and proceed as follows:*] and the plaintiff before action, and whilst he was the holder of the said bill, lost the same, and it thence has been and still is lost.

Defence that the Defendant indorsed to the Plaintiff on Account of the Debt a Bill accepted by a Third Party.

After the accruing of the plaintiff's claim, the defendant, on the —— ——, 19—, indorsed and delivered to the plaintiff, and the plaintiff received from him, for and on account of the said claim, a bill of exchange, not then due, dated the —— ——, 19—, drawn by the defendant [*or*, by *G. H.*] upon and accepted by *J. K.*, for the payment to the defendant or order of £ ——, —— months after date.

Reply to the last preceding Defence, that the Bill is overdue and dishonoured.

Before action, and when the bill referred to in the defence became due, it was duly presented for payment to the said *J. K.*, and was dishonoured, whereof the defendant had due notice, but did not pay the said bill, and the plaintiff at the commencement of this action held, and still holds, the said bill unpaid and unsatisfied.

See also the following forms of pleas under the old system, viz., that the defendant gave a blank acceptance on account of the debt payable at a time not yet elapsed: Simon v. *Lloyd*, 2 C. M. & R. 187; *Baker* v. *Jubber*, 1 M. & G. 212; *Huxley* v. *Bull*, 7 M. & G. 571; *to an action on a note, that the defendant gave bills to take it up, which are not yet due: Goldshede* v. *Cottrell*,

2 M. & W. 20; *that the defendant accepted a bill on account of the debt, which the plaintiff has indorsed away: Emblin* v. *Dartnell*, 1 D. & L. 591; *Wright* v. *Watts*, 3 Q. B. 89; *Belshaw* v. *Bush*, 11 C. B. 191; *Maillard* v. *Duke of Argyll*, 6 M. & G. 40; *that the defendant accepted a bill on account of the debt, which the plaintiff has lost: Crow* v. *Clay*, 8 Ex. 295; 9 Ex. 604; *that the defendant gave a note on account of the debt, and afterwards gave a warrant of attorney, in accord and satisfaction of the note: Fearn* v. *Cochrane*, 4 C. B. 274; *that the defendant, at plaintiff's request, gave a note to a third party on account of the debt; replication on equitable grounds that the third party took the note as trustee for the plaintiff, of which the defendant had notice, and that the note is overdue and unpaid: National Savings Bank* v. *Tranah*, L. R. 2 C. P. 556; 36 L. J. C. P. 260; *that the defendant indorsed a note to the plaintiff for and on account of the debt: Kearslake* v. *Morgan*, 5 T. R. 513; *that a third party has accepted a bill drawn by the plaintiff for and on account of the debt: Belshaw* v. *Bush*, 11 C. B. 191; *that a partner or joint debtor accepted a bill drawn by the plaintiff for the debt: Mercer* v. *Cheese*, 4 M. & G. 804; *Bottomley* v. *Nuttall*, 28 L. J. C. P. 110; *that the defendant gave the plaintiff a bill drawn on a third person, payable after sight, and that the plaintiff kept the bill for an unreasonable time before presentment for acceptance, whereby the drawee was unable to pay it, and it was dishonoured: Straker* v. *Graham*, 4 M. & W. 721; *the defendant gave the plaintiff a bill accepted by a third person, and the plaintiff altered it, and thereby made it void: Alderson* v. *Langdale*, 3 B. & Ad. 660.

Bonds (*g*).

Denial of the Execution of the Bond (*h*).

The defendant denies that the bond sued on is his bond [*or*, denies that he executed the alleged bond].

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Denial that the Bond is correctly stated: see "Agreements," ante, p. 576.

Defence that the Bond was delivered merely as an Escrow: see "Agreements," ante, p. 578.

(*g*) See *ante*, p. 133.

(*h*) As to the effect of denials of the bond, see *ante*, p. 577.

Defence to an Action on a Bond with a Special Condition denying the alleged Breaches (i).

The defendant did not [*or*, denies that he ——] [*insert breaches denied: see ante*, p. 527].

Defence to a like Action, of Matters excusing Performance of the Condition (k).

Before the time for performance of the condition of the said bond, the defendant was excused from performing the same by [*here state shortly the facts relied upon in excuse of performance*].

Defence to a like Action, where the Condition is not set out in the Statement of Claim, stating the Condition and alleging Performance generally (k).

The bond referred to in the statement of claim was and is subject to a condition that if [*here state shortly the condition or the substance thereof*],

(*i*) If the claim states the condition and assigns breaches, it is enough for the defendant in his defence to deny the breaches specifically, or to plead the matter of excuse. If, however, the claim is framed for the penalty only, without stating the condition, or assigning a breach of it, the defendant in his defence must state the condition, and show performance of the condition, or state the matter excusing the performance. (See *ante*, p. 134.) In such case the defendant, in pleading performance, may, where it can be done concisely, state the matters which he relies upon as constituting such performance, or may plead performance generally; and, where the performance is pleaded generally, the plaintiff should under ordinary circumstances amend his statement of claim or should reply specially by stating in what particulars the condition has not been performed. (See *ante*, p. 134; Chitty's Practice, 14th ed., p. 1284; and, as to the former practice in these respects, see also *Roakes* v. *Manser*, 1 C. B. 531; *Grey* v. *Friar*, 15 Q. B. 891, 909; and Bullen & Leake, 3rd ed., p. 543.)

Where it is wished to plead generally the performance of a condition which is in a negative or alternative form, the defence should state that the defendant did not do such things as are specified in the condition as not to be done, and should show which of the alternative acts specified he has performed. If the time fixed by the condition for the performance of it has not yet arrived, and this does not appear upon the face of the statement of claim, the defendant should state the condition, or so much of it as is necessary to raise this defence. So, too, if the performance depends on a contingency which has not yet happened, and this is not shown in the plaintiff's pleading, the defendant in his defence should state the condition to that effect, and should state that the contingency has not happened. (See *Cage* v. *Acton*, 1 L. Raym. 515; *Carter* v. *Ring*, 3 Camp. 459.)

As to *suggestions* of breaches in actions on bonds, see *ante*, pp. 133 *et seq.*; *Archbishop of Canterbury* v. *Robertson*, 1 Cr. & M. 690; *Warre* v. *Calvert*, 7 A. & E. 143. Such suggestions cannot be pleaded to (1 Wms. Saund., 1871 ed., p, 79) and matters in excuse of performance cannot be set up on an inquiry to assess damages upon a suggestion of breaches after the defendant has pleaded a denial of the bond (*Archbishop of Canterbury* v. *Robertson*, *supra*).

(*k*) See note (*i*), *ante*, p. 135.

then the said bond should be void; and before action the defendant performed the said condition.

Particulars:—[*Give particulars of the date, &c. of the performance.*]

Defence to an Action on a Common Money Bond, of Payment on the Day named in the Bond.

The defendant made payment to the plaintiff on the day according to the condition of the bond.

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence to a like Action, of Payment after the Day named in the Bond (*l*).

The defendant made payment to the plaintiff, after the day named and before action, of the principal and interest mentioned in the bond.

Particulars of payment:—[*state them.*]

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence to a like Action, of Payment into Court (*m*).

The defendant has paid [*or*, brings] into Court the sum of £—— [*the amount of the principal and interest due by the condition of the bond, the interest being reckoned up to the time of pleading, or of giving notice of the payment into Court under Ord. XXII., r.* 4], and says that that sum is enough to satisfy the plaintiff's claim.

Defence of Payment into Court in an Action upon a Bond with a Special Condition (*m*).

1. The defendant, as to the breach [firstly] assigned [*or*, the breach alleged in the —— paragraph of the statement of claim, *or*, the alleged breach by carrying on the trade, &c., *as the case may be, specifying the*

(*l*) Payment *post diem* could not be pleaded at common law to an action on a bond (*Nicholl's Case*, 5 Co. Rep. 43 a; *Blake's Case*, 6 *Ib.* 43 b), nor could any accord and satisfaction (*Steeds* v. *Steeds*, 22 Q. B. D. 537; 58 L. J. Q. B. 302; and see *ante*, p. 568); but in actions on common money bonds payment *post diem* is a defence under the 4 & 5 Anne, c. 3, s. 12, cited *ante*, p. 133. This enactment did not enable the obligor to discharge himself by a tender *post diem* (2 Wms. Saund., 1871 ed., p. 144; see *post*, p. 797), and before the Judicature Acts payment *post diem* of a part only of the money due under the condition could not be pleaded to an action on a bond (*Ashbee* v. *Pidduck*, 1 M. & W. 564; *Marriage* v. *Marriage*, 1 C. B. 761; 2 Wms. Saund., 1871 ed., p. 144), but it would appear that it would now be proper to plead such payment as a defence *pro tanto*.

(*m*) The defence of payment into Court in actions on common money bonds is now regulated by the provisions of Ord. XXII., and payment into Court of the principal and interest due may be made in such actions in the ordinary manner. (See *post*, p. 748.)

breach pleaded to], has paid [*or*, brings] into Court the sum of £——, and says that that sum is enough to satisfy the plaintiff's claim in respect of that breach.

2. [*Payment into Court may be pleaded in like manner as to any other breach.*]

Defence of Set-off on a Bond: see post, p. 779.

Broker (*n*).

Defence to a Claim by a Broker for Commission, &c. (*o*).

1. The defendant denies that the plaintiff did the alleged work or paid the alleged money or any part thereof, or that he did so if at all for the defendant or at his request.

2. The defendant denies that he agreed or otherwise became liable to pay, or that the plaintiff earned or otherwise became entitled to be paid, the alleged or any commission or reward.

3. On the —— ——, 19—, by a letter dated that day the defendant requested the plaintiff to purchase for him as his broker and agent —— quarters of —— wheat at a price not to exceed —— shillings per quarter f.o.b. at ——.

4. The plaintiff in pretended performance of the said employment bought or affected to buy for the defendant —— quarters (*a different quantity*) of —— wheat (*a different quality*) at the price of —— shillings a quarter (*a price exceeding the limit*) f.o.b. at ——.

5. The defendant on the —— ——, 19—, by a letter dated that day rejected the said wheat and refused to be bound by the alleged contract for the purchase thereof.

6. Save as aforesaid the defendant denies specifically each and every allegation in the statement of claim.

If the defendant has a defence as to part of the debt due on the bond, he may plead that defence as to such part of the demand and payment into Court as to the residue. (See *Mansfield Union* v. *Wright*, 9 Q. B. D. 683.)

With respect to bonds with a special condition under 8 & 9 Will. 3, c. 11, payment into Court is admissible only as to particular breaches, and cannot be pleaded to the whole action (Ord. XXII., r. 1; and see *post*, p. 748).

(*n*) See *ante*, p. 137. See also "*Stock Exchange*," *post*, p. 792.

(*o*) This form is appropriate to a claim pleaded in a general form such as the one given at p. 137, *ante*.

If a broker makes for his employer a bargain different from that which he is employed and instructed to make, the employer has on learning of it, or within a reasonable time of learning of it, the option of repudiating the bargain and refusing to be bound by it, and if he does so repudiate it, the broker can neither recover any commission or pay for his services, nor enforce any claim for indemnity or repayment of money he has paid or is liable to pay in respect of the transaction; and this principle

Carriers (*p*).

I. Of Goods by Land.

Defence to an Action for the Carriage of Goods, denying that the Goods were carried for the Defendant.

The said goods carried were not carried for the defendant or at his request [or under any circumstances such as would render the defendant liable to pay the freight claimed or any part thereof].

Defence to an Action against a Carrier, denying the Receipt of the Goods on the Terms alleged, with a Statement of the Terms on which they were received.

The defendant did not receive the goods for the purpose or on the terms alleged. He received them for the purpose of ——, and on the terms that —— [*here state the purpose and terms according to fact*].

(*See R. S. C.*, 1883, *App. D., Sect. V., No.* 2.)

Defence by Carriers, showing that the Damage or Loss occurred through no Fault on their part.

The damage or loss occurred from the bad condition of the goods when received [*or*, from the inherent vice of the horse, *or, as the case may be*].

(*See R. S. C.*, 1883, *App. D., Sect. V., No.* 8.)

---

is applicable where the broker acts as if he were a principal instead of a broker or agent by himself selling the goods to his employer or buying from his employer (*Robinson* v. *Mollett*, L. R. 7 H. L. 802 ; 44 L. J. C. P. 362 ; *Stange* v. *Lowitz*, 14 Times Rep. 468 ; *Nicholson* v. *Mansfield*, 17 *Ib.* 259). The employer may, where his broker makes a contract by which he gets from the third party a better price, or other advantage, than that which he puts before and gives to his employer, accept or carry out the contract thus put before him by his broker, or sue the broker and recover the difference or other advantage from him. (See "*Agent*," *ante*, p. 77.)

A person employing a broker to buy or sell for him in a particular market is not, in the absence of clear agreement to the contrary, bound by usages of such market which would alter the intrinsic nature of the employment, or which are contrary to law, or which are not reasonable and of which he is ignorant (*Robinson* v. *Mollett*, *supra* ; *Neilson* v. *James*, 9 Q. B. D. 546 ; 51 L. J. Q. B. 369 ; *Perry* v. *Barnett*, 15 Q. B. D. 388 ; 54 L. J. Q. B. 466 ; *Benjamin* v. *Barnett*, 8 Com. Cas. 244 ; 19 Times Rep. 564).

See further "*Broker*," *ante*, p. 137 ; "*Stock Exchange*," *ante*, p. 308, *post*, p. 793.

(*p*) See *ante*, p. 139.

The like, showing that the Damage or Loss occurred through defective Packing (q).

The plaintiff delivered the goods to the defendants for carriage, packed insufficiently and negligently, whereof the defendants had no notice, and the damage complained of arose solely from such packing.

Particulars:—

Denial of alleged Damage to Goods.

The goods were not either broken or damaged (if at all) whilst being carried upon the alleged journey.

Denial of Failure to deliver within a reasonable Time (r).

The defendants did deliver the said goods to the plaintiff within a reasonable time. [They delivered them on the —— ——, 19—, which was a reasonable time in that behalf.]

Denial of an alleged Contract to deliver in Time for a particular Market.

The defendants did not contract to deliver the said goods in time for the alleged market.

Defence to an Action against a Railway Company for Over-charges, that the alleged Over-charges were paid voluntarily and with full knowledge of the Facts (s).

The alleged over-charges were paid by the plaintiff to the defendants voluntarily, with full knowledge of the facts, and were not paid under compulsion or extorted as alleged.

Defence to a like Action under Section 90 of the Railway Clauses Consolidation Act, 1845, that the Charges were not contrary to that Enactment (t).

1. The goods of the plaintiff were not carried by the defendants over the same portion only of the line of railway as those of the said other persons, or of any of them.

(q) See *ante*, p. 142.

(r) See *ante*, p. 143.

(s) See *ante*, p. 260. It is no defence to an action by a railway company for its charges, that the charges constitute an "undue prejudice" contrary to s. 2 of the Railway and Canal Traffic Act, 1854 (*L. & Y. Ry. Co.* v. *Greenwood*, 21 Q. B. D. 215; 58 L. J. Q. B. 16; and see *ante*, pp. 143, 144).

(t) See "*Carriers*," *ante*, pp. 143, 147, 148.

2. The goods of the plaintiff were not of a like description with those of the said other persons, or of any of them.

Defence that the Goods were within the Carriers Act, 1830, *and were above the Value of* £10, *and were not declared or insured* (*u*).

The goods referred to in the statement of claim were above the value of £10, and consisted of articles mentioned in the first section of the Carriers

(*u*) By s. 1 of the Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), it is enacted that "no mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following (that is to say): gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, fur or lace" (not including machine-made lace, see Carriers Amendment Act, 1865 (28 & 29 Vict. c. 94), s. 1), "or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds; unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their bookkeeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

By s. 2, "when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house, where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice without further proof of the same having come to their knowledge."

By s. 3, "when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this Act,

Act, 1830, that is to say, silks [*or, as the case may be*], and their value and nature was not declared, nor was any increased charge paid, nor was any

---

but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

By s. 4, the common law liability in respect of goods to be carried cannot be limited or affected by a public notice or declaration.

By s. 5, every office, warehouse, or receiving-house appointed by any mail contractor or stage-coach proprietor, or common carrier, for the receiving of parcels to be conveyed, shall be deemed to be the receiving-house, warehouse, or office of such mail contractor, &c.; and any one or more of such mail contractors, &c., shall be liable to be sued by his, her or their name or names only; and no action to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage-coach, or other public conveyance by land for hire. The effect of the latter part of this section is, that no objection to such non-joinder can now be taken (see *ante*, p. 522).

By s. 6, special contracts between such mail contractor, stage-coach proprietor, or common carrier, and any other parties for the conveyance of goods and merchandises are not affected by the Act.

By s. 7, "where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package."

By s. 8, "nothing in this Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, bookkeeper, or other servant, from liability for any loss or injury occasioned by his or their own personal neglect or misconduct."

By s. 9, "such mail contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but shall in all cases be entitled to require from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and the mail contractors, &c., aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as before mentioned."

This statute, in the cases to which it relates, protects the carrier from all liability for loss except where the loss arises from the felonious acts of his servants. Hence, where the defendant pleads a defence under the Carriers Act, a reply that the loss was occasioned by the defendant's negligence would be bad (see *Hinton* v. *Dibbin*, 2 Q. B. 646), and a carrier is not deprived of the protection of the Act by the fact that the loss of or injury to the goods happens after they have been negligently taken by him beyond their destination (*Morritt* v. *N. E. Ry. Co.*, 1 Q. B. D. 302; 45 L. J. Q. B. 289). But the statute affords no defence to a claim for any default or negligence other than a loss of or injury to the goods (*Hearn* v. *L. & S. W. Ry. Co.*, 10 Ex. 793; *Pianciani* v. *L. & S. W. Ry. Co.*, 18 C. B. 226). If, therefore, the goods have been lost, and the claim charges only a breach by *non-delivery*, a defence under the Carriers Act should allege that the non-delivery complained of was by reason of the loss. (See *Pianciani* v. *L. & S. W. Ry. Co.*, *supra*.) A loss may be within the protection of the statute, though it is temporary and not permanent, and, if the carrier in such case delivers the goods within a reasonable time after he has recovered them, he will not be liable for any damage consequent on their detention (*Millen* v. *Brasch*, 10 Q. B. D. 142).

As to what articles are within the Act, see *Bernstein* v. *Baxendale*, 6 C. B. N. S. 251; 28 L. J. C. P. 265; *Brunt* v. *Midland Ry. Co.*, 2 H. & C. 889; 33 L. J. Ex.

engagement to pay the same accepted by the person receiving the said goods.

(*See R. S. C.*, 1883, *App. D., Sect. V., No.* 10.)

Reply to a Defence under the Carriers Act, 1830, *that the Loss was occasioned by the Felonious Acts of the Defendants' Servants* (*x*).

The loss of the goods arose from the felonious acts of the defendants' servants.

Particulars:—

The goods were stolen during the journey from —— to ——, by defendants' servants having charge of the train in which the same were [*or, as the case may be*].

187; *Whaite* v. *L. & Y. Ry. Co.*, L. R. 9 Ex. 67; 43 L. J. Ex. 47. In the last-mentioned case, a waggon containing pictures, which was carried on a truck on the defendants' railway, was held, with its contents, to be a "parcel or package" within the meaning of s. 1 of the Act. It is a question of fact for the jury whether an article is of the description mentioned in the statute (*Brunt* v. *Midland Ry. Co.*, *supra*; *Woodward* v. *L. & N. W. Ry. Co.*, 3 Ex. D. 121). The box or packing case containing articles which are within the Act is held, in general, to be accessory to the contents for the purposes of the Act (*Wyld* v. *Pickford*, 8 M. & W. 443; *Whaite* v. *L. & Y. Ry. Co.*, *supra*); but where the box or case contains articles some of which are within the statute and some not, the value of the box or case and of the articles not within the statute may be recoverable separately (*Treadwin* v. *G. E. Ry. Co.*, L. R. 3 C. P. 308; 37 L. J. C. P. 83).

Where the plaintiff has omitted to declare the value of the goods, the carrier is not deprived of the protection of the Act by reason of there having been no notice affixed to his office or receiving-house demanding an increased charge (*Baxendale* v. *Hart*, 6 Ex. 769; 21 L. J. Ex. 123); but when the sender of goods has declared their value in accordance with the statute, it lies upon the carrier to demand the increased charge specified in such notice, and if he accepts the goods without such demand, he is liable for loss or injury to them, although the increased charge is not tendered or paid (*Behrens* v. *G. N. Ry. Co.*, 6 H. & N. 366; 7 *Ib.* 950; 30 L. J. Ex. 153; 31 *Ib.* 299).

A carrier who contracts to carry goods partly by land and partly by water is entitled to the benefit of the Act in respect of loss or injury in the course of the land journey. (*Pianciani* v. *L. & S. W. Ry. Co.*, *supra*; *Le Conteur* v. *L. & S. W. Ry. Co.*, L. R. 1 Q. B. 54; 35 L. J. Q. B. 40; and see *Millen* v. *Brasch*, 8 Q. B. D. at p. 37; 19 *Ib.* 142).

(*x*) The protection afforded by the Carriers Act does not extend to loss or injury caused by the felonious acts of the carrier's servants (see s. 8), and the carrier is not prevented by the provisions of the Railway and Canal Traffic Act, 1854 (see *ante*, p. 142, *post*, p. 627), from limiting his liability by means of a contract so as to exclude, in the absence of negligence or default on his part, or on the part of his servants within the scope of their employment, liability for the felonious acts of servants (*Shaw* v. *Gt. W. Ry. Co.*, [1894] 1 Q. B. 373).

Where a carrier enters into a sub-contract with other parties, with respect to goods which he has undertaken to carry, the servants employed by such sub-contractors are servants in the employ of the carrier within the meaning of s. 8 of the Act (*Machu* v. *L. & S. W. Ry. Co.*, 2 Ex. 415; *Stephens* v. *L. & S. W. Ry. Co.*, 18 Q. B. D. 121; *Doolan* v. *Midland Ry. Co.*, 2 App. Cas. 792, where see as to the like construction of the word "servants" in s. 7 of the Railway and Canal Traffic Act, 1854). But where a railway company allowed goods to be removed from the station by a person who

Defence to an Action against a Railway Company for Loss of or Injury to Goods, that the Goods were received and carried under a Special Contract exempting the Defendants from Liability under the Railway and Canal Traffic Act, 1854 (*y*).

1. The goods were received by the defendants to be carried under a special contract between the plaintiff and defendants, signed by the plaintiff

fraudulently represented to them that he was a carman in the employ of such sub-contractors, it was held that the company were not estopped from showing that such person, who had afterwards stolen the goods, was not their servant (*Way* v. *G. E. Ry. Co.*, 1 Q. B. D. 192; 45 L. J. Q. B. 874).

To prove such a reply as above it must be shown by reasonable evidence, so as to raise a *primâ facie* case, that the goods were stolen by the company's servants, but it is not necessary to prove which particular servant or servants committed the felony. (See *M'Queen* v. *G. W. Ry. Co.*, L. R. 10 Q. B. 569; 44 L. J. Q. B. 130.)

(*y*) Where the claim against a carrier is founded upon his common law liability, and the defence relied upon is a special contract between the parties, such special contract, or so much of it as is material, should be set out or stated in the defence. If the special contract relied upon is within the Railway and Canal Traffic Act, 1854, it must satisfy the conditions of that statute. The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, enacts that every railway company and canal company "shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods or things in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void. Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried to be just and reasonable. Provided always, that no greater damages shall be recovered for the loss of, or for any injury done to any such animals, beyond the sums hereinafter mentioned; (that is to say) for any horse, £50; for any neat cattle, per head, £15; for any sheep or pigs, per head £2; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned. Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury. Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals articles, goods, or things as aforesaid, shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles goods, or things respectively, for carriage. Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act, 11 Geo. 4 & 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said Act." (See *ante*, pp. 142, 624.)

Under the above statute, the following conditions have been held to be reasonable:—That no claim for loss would be allowed unless made within seven days of the time when the goods should have been delivered (*Lewis* v. *G. W. Ry. Co.*, 5 H. & N. 867; 29 L. J.

[*or*, by the person delivering the goods] and dated the —— ——, 19—, and subject to certain just and reasonable conditions contained in the said contract, one of which conditions was [*here state the condition exempting from liability*].

2. The loss [*or*, injury] complained of arose from —— [*show that the loss or*

Ex. 425); that the company would not be answerable for the loss of any goods which were untruly or incorrectly described in the receiving note (*Ib.*); that in carrying fish the company would not be responsible under any circumstances for loss of market, or for other loss or injury arising from delay or detention of train, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud (*Beal* v. *South Devon Ry. Co.*, 5 H. & N. 875; 29 L. J. Ex. 441; 3 H. & C. 337); that in carrying meat the company would not be liable for loss of market, provided the goods were delivered in reasonable time after the arrival thereof at the station from whence delivery was to be made (*Lord* v. *Midland Ry. Co.*, L. R. 2 C. P. 339; and see *White* v. *G. W. Ry. Co.*, 2 C. B. N. S. 7; 26 L. J. C. P. 158).

The following are instances of conditions which have been held unreasonable:—That the company should not be liable for the loss, detention, or damage of any package insufficiently or improperly packed (*Simons* v. *G. W. Ry. Co.*, 18 C. B. 805; *Garton* v. *Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J. Q. B. 273); that the company should not be responsible for the loss of or injury to certain specified goods, unless declared and insured according to their value (*Peek* v. *North Staffordshire Ry. Co.*, 10 H. L. C. 472; 32 L. J. Q. B. 241; see *Ashendon* v. *L. & B. Ry. Co.*, 5 Ex. D. 190; 42 L. T. 586, where a like condition as to dogs was held bad; see also *Dickson* v. *G. N. Ry. Co.*, 18 Q. B. D. 176); that the owner of cattle sent by the railway must see to the efficiency of the waggon before he allows his stock to be placed therein, and complaint must be made in writing as to all defects before it leaves the station (*Gregory* v. *Midland Ry. Co.*, 2 H. & C. 944; 33 L. J. Ex. 155); that the owners of live stock should undertake all risks of conveyance, loading and unloading, whatsoever, as the company would not be responsible for any injury or damage, howsoever caused, occurring to any live stock travelling upon their railway (*M'Manus* v. *L. & Y. Ry. Co.*, 4 H. & N. 327; 28 L. J. Ex. 353); that, upon the carriage of cattle at the ordinary rates, the company should not be answerable for any danger arising from over-carriage, detention or delay in conveying or delivering, however caused (*Allday* v. *G. W. Ry. Co.*, 5 B. & S. 903; 34 L. J. Q. B. 5); that horses were to be carried entirely at the owner's risk (*M'Cance* v. *L. & N. W. Ry. Co.*, 7 H. & N. 477; 31 L. J. Ex. 65); that the company should not be liable for damage to cattle from any cause whatever, and that cattle should be carried entirely at the owner's risk (*Gregory* v. *Midland Ry. Co.*, 2 H. & C. 944; 33 L. J. Ex. 155; see *Booth* v. *N. E. Ry. Co.*, L. R. 2 Ex. 173; 36 L. J. Ex. 83, where a similar condition was held bad, although the owner was allowed a free pass for a person to take care of the cattle). But in several of the last cited cases, one of the grounds of decision was that the conditions purported to be applicable in all cases, and that the railway company did not offer the consignor any reasonable alternative of sending the goods on any other terms. (See *Peek* v. *North Staffordshire Ry. Co.*, *Simons* v. *G. W. Ry. Co.*, *Ashendon* v. *L. & B. Ry. Co.*, *Dickson* v. *G. N. Ry. Co.*, *supra*.) Where the company have two rates of charge for the carriage of particular kinds of goods, one being the ordinary reasonable and lawful rate at which they carry such goods, subject to the ordinary responsibilities of carriers, and the other a lower rate at which they carry such goods only on the conditions of a special contract exempting them from all liability for loss or injury, and the consignor, knowing that he has the alternative at his option of having the goods carried at the ordinary rate and upon the ordinary terms as to the carrier's liability, sends them at the lower rate and subject to a special contract signed according to the statute and containing conditions such as those last mentioned such conditions have, in many cases, been held to be just and reasonable, and to be binding on the consignor. (See *Robinson* v. *G. W. Ry. Co.*, 35 L. J. C. P. 123;

injury arose from a cause within the meaning of the exemption], and the defendant is exempted from liability in respect thereof under the said condition.

Lewis v. *G. W. Ry. Co.*, 3 Q. B. D. 195; 47 L. J. Q. B. 131; *Manchester Ry. Co.* v. *Brown*, 8 App. Cas. 703; *G. W. Ry. Co.* v. *McCarthy*, 12 App. Cas. 218.)

It seems doubtful whether a condition protecting the railway company from all liability for loss or damage to animals unless a claim therefor is made within either three days or seven days would be reasonable. (See *Murphy* v. *Mid. G. W. Ry. of Ireland*, [1903] 2 Ir. R. 5, and *Lewis* v. *G. W. Ry. Co.*, 5 H. & N. 867, cited *ante*, p. 628.)

As to what is a sufficient reference to a special condition to embody it in a note signed by the consignor which does not itself contain the condition, see *Peek* v. *N. S. Ry. Co.*, 10 H. L. C. 472; 32 L. J. Q. B. 241; and *Lewis* v. *G. W. Ry. Co.*, 3 Q. B. D. 165.

Where a consignor or his agent for delivery signs a consignment note containing such conditions, he must be taken to have known its contents, although he signed it without reading them. (See *Lewis* v. *G. W. Ry. Co.*, 5 H. & N. 867; and "*Bailments*," *ante*, p. 95.) A condition which merely provides that horses, &c., are to be carried 'at owner's risk" does not apply to damage caused by delay in carrying (*Robinson* v. *G. W. Ry. Co.*, *supra*). A condition exempting from liability for detention, &c., unless arising from wilful misconduct, did not protect the company from liability for their refusing to deliver the goods in consequence of a mistake of one of their clerks in not entering the goods as "carriage paid" (*Gordon* v. *G. W. Ry. Co.*, 8 Q. B. D. 44; 51 L. J. Q. B. 58). "Wilful misconduct" means conduct which is wrong, and to which the will is a party, as opposed to mere negligence or accident. (See *Lewis* v. *G. W. Ry. Co.*, 3 Q. B. D. 195; *In re Mayor of London*, [1894] 2 Ch. 524, 538; 63 L. J. Ch. 580; *Forder* v. *G. W. Ry. Co.*, [1905] 2 K. B. 532.

Under the proviso in s. 7, limiting the damages for loss of or injury to animals to certain fixed sums, but permitting the company to demand a reasonable percentage for increased risk upon the excess of value declared beyond such sums, the company is not entitled to demand such percentage, unless the person sending the animals declares the higher value with the intention of paying it; the company is bound to carry at the ordinary rate of charge if the sender requires it, but will do so in such case without the increased risk, notwithstanding they may have notice of the higher value of the animals (*Robinson* v. *L. & S. W. Ry. Co.*, 19 C. B. N. S. 51; 34 L. J. C. P. 234).

A declaration of value made in order to get the goods carried at a lower rate will bind the owner on the question of damages (*M'Cance* v. *L. & N. W. Ry. Co.*, 3 C. & H. 343; 34 L. J. Ex. 39). In cases where the company are not protected by a special contract under s. 7, the proviso limiting the amount of damages recoverable in respect of animals, protects the company during the receiving of the animals, though the ticket has not then been taken and no complete contract has been entered into (*Hodgman* v. *West Midland Ry. Co.*, 5 B. & S. 173; 6 *Ib.* 560; 33 L. J. Q. B. 233; 35 *Ib.* 85).

If some of the conditions contained in a special contract are unreasonable, the company may nevertheless rely on others of them which are reasonable (*M'Cance* v. *L. & N. W. Ry. Co.*, *supra*). But a condition which purported to exempt the company from all liability for loss in any case, and was therefore held unreasonable as extending even to a loss by gross negligence or wilful default (in a case where no alternative was offered by the company), was held not to be divisible, and to be no protection to the company, even assuming that the loss arose merely from accident, and without any negligence or default on their part (*Ashendon* v. *L. & B. Ry. Co.*, *supra*; see also *Manchester Ry. Co.* v. *Brown*, *supra*).

The provisions of s. 7 do not extend to conditions relating to the carriage of goods or animals by one railway company over the line of another (*Zunz* v. *S. E. Ry. Co.*, L. R. 4 Q. B. 539; 38 L. J. Q. B. 209).

The word "servants" in s. 7 means not merely servants properly so called, but also the agents (not strictly servants) employed by railway companies to do for them work

II. Of Passengers by Land.

Denial that the Plaintiff was a Passenger.

The plaintiff did not become nor was he a passenger to be carried by the defendants for reward, or at all.

The like.

The defendant did not receive the plaintiff as a passenger to be carried as alleged, or at all.

(*See R. S. C.*, 1883, *App. D., Sect. V., No.* 3.)

Denial of the alleged Negligence, and of the alleged Injuries.

1. The defendants were not guilty of the alleged or any negligence or want of care or skill in or about carrying the plaintiff.
2. The plaintiff was not injured or damaged as alleged, or at all.

Defence of a Special Contract by which the Passenger agreed to relieve the Defendants from all Liability for Personal Injury (*z*).

The plaintiff became and was a passenger to be carried by the defendants

which such companies are bound to perform under their contracts with the consignors (*Doolan* v. *Midland Ry. Co.*, 2 App. Cas. 792).

In general, passengers' luggage received for carriage by a railway company is "goods" within s. 7, and any special contract or condition limiting the liability of the company in respect of the loss or injury of such luggage must be just and reasonable, and must be signed, as required by that section, in order to protect the company (*Cohen* v. *S. E. Ry. Co.*, 1 Ex. D. 217; 2 *Ib.* 253; 45 L. J. Ex. 298; 46 *Ib.* 417; *Cutler* v. *N. L. Ry. Co.*, 19 Q. B. D. 64; 56 L. J. Q. B. 648).

The Act does not apply to the receiving of goods by railway companies at their stations for safe custody and re-delivery to the owners, and not for the purpose of carriage (*Van Toll* v. *S. E. Ry. Co.*, 12 C. B. N. S. 75; 31 L. J. C. P. 241); and therefore in such cases an unsigned condition, if sufficiently brought to the notice of the owner, may exempt the company from responsibility for loss or damage (*Ib.*; see "*Bailments*," *ante*, p. 95).

The provisions of this statute with respect to the requisites of special contracts only apply in cases of loss or injury occasioned by the neglect or default of the company or its servants, and not in cases of loss or injury arising purely from accident. (See *Harrison* v. *L. & B. Ry. Co.*, 2 B. & S. 122; 31 L. J. Q. B. 113; *Shaw* v. *G. W. Ry. Co.*, [1894] 1 Q. B. 373.)

Apart from any special contract or condition, it appears to be in general a defence to an action against a carrier for loss of or injury to goods, that the loss or injury was occasioned solely by the negligence and default of the plaintiff himself, without any default on the part of the defendants. (See *Webb* v. *Page*, 6 M. & G. 196; *Martin* v. *G. N. Ry. Co.*, 16 C. B. 179; 24 L. J. C. P. 209; *Pardington* v. *South Wales Ry. Co.*, 1 H. & N. 392.)

As to the carriage of goods by sea by railway companies, see "*Shipping*," *ante*, p. 294.

(*z*) In actions by passengers for personal injuries, a special contract entered into by

by railway on the said journey upon the terms, amongst others, that the defendants should in no case be liable to him for any injury, loss or damage he might sustain through any negligence or breach of contract on their part.

Particulars :—

[*State same, e.g.*, The said terms were embodied in a written contract with the defendants dated the —— ——, 19—, signed by the plaintiff.]

Defence to an Action for Loss of a Passenger's Luggage, that the Loss arose from the Conduct of the Plaintiff.

The alleged failure of the defendants to carry the said luggage, and the loss thereof, was not due to any default on the part of the defendants, but was caused by the conduct of the plaintiff in taking it out of the custody of the defendants at ——, during the said journey, and there leaving it on the platform [*or, as the case may be*].

Defence to an Action for Loss of Passenger's Luggage, that it was not Ordinary Passenger's (*a*).

1. The said luggage consisted of three boxes which were delivered by the plaintiff to the defendants as ordinary passenger's luggage, and were received by the defendants as such in ignorance of their contents.

2. The said luggage was not ordinary passenger's luggage at all, but consisted of and contained [*here state the contents*].

Defence of Contributory Negligence to a Claim in respect of Personal Injuries : see "Carriers," post, p. 818.

CHAMPERTY.

See "Maintenance," post, p. 729.

---

the passenger relieving the company from liability may constitute a good defence, although it is not in writing or signed by the passenger. (See *Gallin* v. *L. & N. W. Ry. Co.*, L. R. 10 Q. B. 212 ; 44 L. J. Q. B. 89 ; *Hall* v. *N. E. Ry. Co.*, L. R. 10 Q. B. 437 ; 44 L. J. Q. B. 164) ; but with regard to passengers' luggage injured or lost by negligence it is otherwise, as s. 7 of the Railway and Canal Traffic Act, 1854, is applicable to luggage. (See *ante*, pp. 150, 627.)

(*a*) As to this defence see *ante*, p. 151.

Charterparty.

See "Shipping," post, p. 784.

Company (*b*).

(*b*) Contracts required to be made in order to carry out the purposes for which trading companies are incorporated are exceptions to the rule that a corporation can only contract under seal. (See *post*, p. 643.)

It is expressly provided that contracts may be made, discharged, or varied, on behalf of companies formed under the Companies Act, 1862, as if they were contracts made by private persons (see s. 37 of the Act), so that for contracts of such companies a seal is not required where, if the contract were that of a private individual, a seal would be unnecessary, and s. 97 of the Companies Clauses Consolidation Act, 1845, contains similar provisions with respect to the mode in which contracts may be made by directors or a committee of directors on behalf of any company to which that Act applies.

Similarly, the Companies Act, 1862, s. 47 (the provisions of which are not affected by the Bills of Exchange Act, 1883, see ss. 22 (1), 91 (2), 97 (3) of that Act), enacts that "a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed, on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by, or on behalf, or on account of the company, by any person acting under the authority of the company."

This does not empower directors to bind the company by negotiable instruments, where the issuing of such instruments is not within the general scope of its constitution (*Peruvian Rys. Co.* v. *Thames Marine Ins. Co.*, L. R. 2 Ch. 617; 37 L. J. Ch. 864); but a trading company has, in the absence of any prohibition, an implied power to borrow money in the ordinary course of business (*General Auction Co.* v. *Smith*, [1891] 3 Ch. 432; 60 L. J. Ch. 723), and in the case of such a company, it would seem, that a power to bind the company by negotiable instruments, where in such businesses that is the usual course, is readily implied (*Ib.*).

Where a note or bill is made or accepted by the directors or agents of a company, it must appear on the face of it that such directors or agents signed it only in that capacity and on behalf of the company, otherwise the company will not be bound by the note or bill, and the persons signing it may be personally liable. (See *ante*, p. 574; and see *Healey* v. *Storey*, 3 Ex. 3; *Gray* v. *Roper*, L. R. 1 C. P. 694; *Dutton* v. *Marsh*, L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; *Alexander* v. *Sizer*, L. R. 4 Ex. 102; 38 L. J. Ex. 59.) In some cases where a director or agent of a company is charged as personally liable on a bill or note, it is a defence to an action by the drawer or payee that the note or bill was not delivered by the defendant or received by the plaintiff except as a note or acceptance on behalf of the company, and that there was no intention on either side that the defendant should be personally liable. (See *Price* v. *Taylor*, 5 H. & N. 540; 29 L. J. Ex. 31; *Courtauld* v. *Sanders*, 16 L. T. 468; *Wake* v. *Harrop*, 5 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 *Ib.* 451.)

A railway company incorporated in the usual way has no power to draw, accept, or indorse bills of exchange (*Bateman* v. *Mid-Wales Ry. Co.*, L. R. 1 C. P. 499; 35 L. J. C. P. 205).

The production of a document bearing the seal of a company or corporation is *primâ facie* evidence that the seal was properly affixed (*D'Arcy* v. *Tamar Ry. Co.*, L. R. 2 Ex. 158; 36 L. J. Ex. 37; *Royal British Bank* v. *Turquand*, 5 E. & B. 248; 6 *Ib.* 327; 24 L. J. Q. B. 327; 25 *Ib.* 317); but where the plaintiff relies upon an instrument bearing such seal the defendants may (except in cases where by their conduct or otherwise they are estopped from so doing) show by way of defence that the seal was affixed improperly

and by persons who had no authority to use it (*D'Arcy* v. *Tamar Ry. Co.*, *supra*; *Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 389; *In re Metropolitan Bank*, 2 Ch. D. 366; 45 L. J. Ch. 525; *Mayor of the Staple* v. *Bank of England*, 21 Q. B. D. 160; 57 L. J. Q. B. 418). A company or corporation is not estopped from showing that their seal was affixed improperly and without authority, merely because it appears that the company or corporation negligently left its seal in the hands of a person who abused their trust, and dishonestly made use of and affixed the seal (*Mayor of the Staple* v. *Bank of England*, *supra*; *Bank of England* v. *Vagliano*, [1891] A. C. 107, 115; 60 L. J. Q. B. 445); but a company incorporated under the Companies Acts issuing, in the ordinary course of its business, a share certificate under its seal is estopped, as against a person who purchased or acted on the faith of the certificate, from showing that it issued it owing to the fraud or negligence of one of its officials, and in mistake (*Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396; 63 L. J. Q. B. 134; *Dixon* v. *Kennaway*, [1900] 1 Ch. 833; 69 L. J. Ch. 501; and see *Ruben* v. *Great Fingall*, [1904] 2 K. B. 712; 73 L. J. K. B. 872, where a certificate forged by the secretary was held not to bind the company).

Where the directors or agents of a company have, on its behalf, entered into contracts which are *ultra vires* of the company, as not being within the scope of its constitution or as being expressly or impliedly prohibited by any statutes by or under which it is created, such contracts are not binding on the company (*Bateman* v. *Ashton-under-Lyne*, 3 H. & N. 323; 27 L. J. Ex. 458; *Ashbury Ry. Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; 44 L. J. Ex. 185; *Attorney-General* v. *G. E. Ry. Co.*, 5 App. Cas. 473; 49 L. J. Ch. 545; *Wenlock* v. *River Dee Co.*, 10 App. Cas. 354; and see *post*, p. 644).

In the case of companies formed under the Companies Act, 1862, the scope of their constitution is defined and limited by their memorandum of association, and they have no power of entering into contracts for purposes not covered by that memorandum either expressly or by reasonable implication (*Ashbury Ry. Carriage Co.* v. *Riche*, and *Attorney General* v. *G. E. Ry. Co.*, *supra*; *Ashbury* v. *Watson*, 30 Ch. D. 376).

Contracts which are *ultra vires* of the company are incapable of being ratified even by the unanimous consent of all the shareholders (*Ib.*).

Persons dealing with a company are deemed to have read the public documents relating to the constitution of the company, for instance, the Act or Acts of Parliament by or under which it is established, and, in the case of a company formed under the Companies Act, 1862, the memorandum and articles of association, and to have had notice of everything therein stated, including all limitations or qualifications therein contained of the powers of the directors or officers of the company (*Ernest* v. *Nichols*, 6 H. L. C. 401, 417; *Balfour* v. *Ernest*, 5 C. B. N. S. 601; 28 L. J. C. P. 170; *In re County Life Ass. Co.*, L. R. 5 Ch. 288; 38 L. J. Ch. 231; *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366; 46 L. J. P. C. 87; *Ashbury Ry. Carriage Co.* v. *Riche*, *supra*; and see the cases next cited). But persons who are dealing *bonâ fide* with a company or its directors or agents, and who have no actual notice of any irregularity, are not bound to make inquiry beyond the contents of the public documents above mentioned, and are not affected with constructive notice of the proceedings of the company as to matters of internal management. Such persons, therefore, where the company's Act of Parliament or articles of association authorise the directors to exercise certain powers subject to the fulfilment of certain conditions, and the directors or the persons acting as directors appear to be duly exercising those powers, are entitled to assume that the directors, or *de facto* directors, have been duly appointed, and that the conditions required for the valid exercise of their powers have been duly fulfilled (*Royal British Bank* v. *Turquand*, 5 E. & B. 248; 6 *Ib.* 327; 24 L. J. Q. B. 327; 25 *Ib.* 317; *Agar* v. *Athenæum Ass. Co.*, 3 C. B. N. S. 725; 27 L. J. C. P. 95; *Totterdell* v. *Fareham Brick Co.*, L. R. 1 C. P. 674; 35 L. J. C. P. 278; *In re County Life Ass. Co.*, *supra*; *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869; *In re Romford Canal Co.*, 24 Ch. D. 85; *County Bank of Gloucester* v. *Rudry Co.* [1895] 1 Ch. 629; 64 L. J. Ch. 451).

A contract made by promoters on behalf of an intended company before its incorporation, is incapable as such of ratification by the company when subsequently formed (*Melhado* v. *Porto Allegre Ry. Co.*, L. R. 9 C. P. 503; 43 L. J. C. P. 253; *In re Empress*

Engineering Co., 16 Ch. D. 125; *In re Northumberland, &c., Co.*, 33 Ch. D. 16; *Keighley* v. *Durant*, cited *ante*, p. 155; *Natal Land Co.* v. *Pauline Colliery*, [1904] A. C. 120, 126; 73 L. J. P. C. 22); and such promoters will in general be liable thereon, in the absence of a substituted contract by the company (*In re Skegness Tramways Co.*, 41 Ch. D. 215, 219, 220; 58 L. J. Ch. 737). But a contract made by the promoters, if it is *intra vires* of the company, may be replaced by a fresh agreement on the same terms entered into by the company after its formation, and such agreement with the company, if so intended, may operate by way of novation and as a discharge of the contract with the promoters (*In re Empress Engineering Co., supra; In re Northumberland, &c., Co., supra*).

As to how far there may be an equitable right to receive payment for services rendered of which the company has had the benefit, see *In re Empress Engineering Co., supra; In re Rotheram, &c., Co.*, 25 Ch. D. 103.

The directors of a company may be personally liable for breach of warranty of authority, where they profess to bind the company by contracts which are *ultra vires*, and unauthorised, and not binding upon the company. (See *ante*, p. 76.)

Directors are, in general, liable to account to the company for profits made by them in the exercise of their office, and by reason of their position as trustees or agents for the company. (See *ante*, pp. 77, 78.)

As to the liability of directors or officers, &c., of a company which is being wound up to be ordered to make good any losses sustained by reason of misappropriation or misfeasance on their part, see the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 10; *Archer's Case*, [1892] 1 Ch. 322; 61 L. J. Ch. 129; *Gluckstein* v. *Barnes*, [1900] A. C. 240; 69 L. J. Ch. 385.

As to the liability of directors and promoters for false statements in a prospectus, &c., see the Directors' Liability Act, 1890, cited *ante*, p. 401; and the Companies Act, 1900, s. 10.

A liquidator in a winding-up is not under any personal liability to individual shareholders or creditors during the liquidation for the due performance of his duties, as to collecting and distributing the assets, and, apart from fraud or personal misconduct, they have no right of action against him for non-performance thereof (*Knowles* v. *Scott*, [1891] 1 Q. B. 717; 60 L. J. Ch. 284), though after the liquidation is concluded, a creditor who ought to have been paid by the liquidator, who had assets applicable to that purpose, may, it would seem, sue the liquidator for negligence or breach of duty in not so paying him. (See *Pulsford* v. *Devenish*, [1903] 2 Ch. 625; 73 L. J. Ch. 35.)

An unregistered association of more than twenty persons having gain for its object, and not authorised by statute or by letters patent, is rendered illegal by s. 4 of the Companies Act, 1862 (*In re Padstow, &c., Assurance Ass.*, 20 Ch. D. 137; 51 L. J. Ch. 344); and, therefore, all contracts entered into with such association, or any trustee on its behalf, in the course of carrying on its business, are illegal, and are not enforceable either by the association or by such trustee (*In re South Wales, &c., Co.*, 2 Ch. D. 763; 46 L. J. Ch. 177; *Jennings* v. *Hammond*, 9 Q. B. D. 225; 51 L. J. Q. B. 493; *Shaw* v. *Benson*, 11 Q. B. D. 563; 52 L. J. Q. B. 575; *Shaw* v. *Simmons*, 12 Q. B. D. 117; 53 L. J. Q. B. 29; *Ex p. Poppleton*, 14 Q. B. D. 379; 54 L. J. Q. B. 336; see "*Illegality*," *post*, p. 684).

A shareholder sued for calls by a company, may, in general, set-off any debts due to him from the company, for which he can maintain an action against them, but this rule is subject to exception in cases where the company is being wound up under the Companies Acts. (See "*Set-off*," *post*, p. 774.)

Winding-up proceedings under the Companies Acts do not interfere with the right of an ordinary debtor of a company who is not a shareholder, and who is sued in the name of the company for a debt which has accrued in respect of transactions previous to the winding-up, to set off a debt which has accrued due to him from the company previously to the winding-up (*Anderson's Case*, L. R. 3 Eq. 337; 36 L. J. Ch. 73; *Ex p. James*, L. R. 8 Eq. 225; see *Mersey Steel Co.* v. *Naylor*, 9 Q. B. D. at pp. 661, 667); and it would seem (notwithstanding s. 101 of the Companies Act, 1862), that this

would apply also to a shareholder, if the debt so sued for was unconnected with his character of shareholder.

In actions brought by liquidators in the name of insolvent companies which are being wound up under the Companies Acts, the right of set-off on the part of defendants who are not shareholders has been extended by s. 10 of the Jud. Act, 1875, which applies in such cases the rules in bankruptcy with respect to set-off in cases of "mutual credit," or "mutual dealings" (see Bankruptcy Act, 1883, s. 38; *post*, p. 778), and thus enables such defendants to plead in their defence a set-off or counterclaim for unliquidated damages in respect of transactions previous to the winding-up, though only to the extent sufficient for a defence to the action (*Mersey Steel Co.* v. *Naylor*, 9 Q. B. D. 648; 9 App. Cas. 434; 53 L. J. Ch. 497; see *Ex p. Pelly*, 21 Ch. D. 492; *Lee and Chapman's Case*, 30 Ch. D. 216; 54 L. J. Ch. 460; *Eberle's Hotel Co.* v. *Jonas*, 18 Q. B. D. 459; 56 L. J. Q. B. 278; *Sovereign Life Ass. Co.* v. *Dodd*, [1892] 2 Q. B. 573; 62 L. J. Q. B. 19); and in such cases the defendant may plead such counterclaim without obtaining leave to do so under s. 87, cited *infra* (*Mersey Steel Co.* v. *Naylor*, *supra*).

The right of set-off or counterclaim conferred by s. 10 of the Jud. Act, 1875, in the case of a winding-up, is wider than the corresponding right in bankruptcy, as it may in such case enable a defendant to set up a counterclaim, even in respect of damages for a tort, by way of a defence to a pecuniary claim, because by s. 158 of the Companies Act, 1862, such damages, though they could not be proved for in bankruptcy, may be proved for in a winding-up (*Eberle's Hotel Co.* v. *Jonas*, *supra*). But it seems that in order to admit such right of set-off or counterclaim, the claims on both sides must be pecuniary ones (*Ib.*).

This right of set-off, &c., in respect of "mutual dealings" on transactions previous to the winding-up, has no application to the case of a shareholder who is sued for calls. (See *Gill's Case*, 12 Ch. D. 755, cited in note, *infra*, p. 637.)

Where the action is in respect of transactions with the liquidator subsequent to the commencement of the winding up, the defendant, whether he is a shareholder or not, cannot, under ordinary circumstances, set off or counterclaim for any debts or damages which have accrued to him in respect of transactions with the company previously to the winding-up (*Sankey Brook Coal Co.* v. *Marsh*, L. R. 6 Ex. 185; 40 L. J. Ex. 125; *Mersey Steel Co.* v. *Naylor*, 9 Q. B. D. at p. 669; 53 L. J. Q. B. 497). It would appear that this would, in general, apply where the winding-up was voluntary. (See *In re Whitehouse*, 9 Ch. D. 595.)

At any time after the petition for winding-up, and before the winding-up order, the Division of the High Court before which any action is pending against the company may, upon the application of the company or of any creditor or contributory, restrain further proceedings in such action upon such terms as may be thought fit. (See the Companies Act, 1862, s. 85; Jud. Act, 1873, s. 24 (5); *In re People's Garden Co.*, 1 Ch. D. 44; 45 L. J. Ch. 129; *In re General Service Stores*, [1891] 1 Ch. 496; 60 L. J. Ch. 586.)

There is a similar power in the case of a voluntary winding-up. (See *Ib.*, s. 138 of the Companies Act, 1862, and s. 25 of the Companies Act, 1900.)

The 87th section of the Companies Act, 1862, enacts that "when an order has been made for winding up a company under this Act, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose."

In actions brought or proceeded with against a company contrary to the above enactment, the defendant would, in general, be entitled to obtain a stay of proceedings under s. 24 (5) of the Jud. Act, 1873, on application for that purpose at Chambers in the action, and such application seems the proper course to adopt under such circumstances (see *Garbutt* v. *Faweus*, 1 Ch. D. 155; *In re People's Garden Co.*, *supra*; *In re General Service Stores*, *supra*), though it is conceived that the facts bringing the case within the statutory prohibition would also be pleadable as a defence.

After an order has been made for the winding-up, the judge, in whose Court such winding-up is pending, has power to order the transfer to himself of any action pending

Defence to an Action for a Call, that the Call was not duly made (*e*).

The said call was not duly made.

Particulars :—[*State the ground of defence on which the defendant relies, e.g.*, twenty-one days' notice of the making of the call was not given as required by the article —— of the plaintiff company's articles of association, *or, as the case may be*].

---

in any other division brought or continued by or against such company (Ord. XLIX., r. 5).

(*e*) In actions for calls the defendant is not entitled to plead a mere general denial of the alleged debt, but must specifically deny such of the matters of fact, from which his liability is alleged to arise, as he disputes, and must allege such matters (if any) as he relies upon by way of defence, so as to show distinctly on what grounds he disputes the claim. (See *ante*, p. 527.)

The registers of shareholders which, under the provisions of the Companies Clauses Consolidation Act, 1845, and the Companies Act, 1862, respectively, are required to be kept by the company, are only *primâ facie* evidence of the statements contained in them, and those statements may therefore be rebutted by contrary evidence (*Shropshire Ry. Co.* v. *Anderson*, 3 Ex. 401 ; *Waterford Ry. Co.* v. *Pidcock*, 8 Ex. 279 ; Lindley on Companies, 6th ed., pp. 75 *et seq.*). The provisions of s. 9 of the Companies Clauses Consolidation Act, 1845, with respect to the sealing and the mode of keeping the register of shareholders are directory only, and the fulfilment of those provisions is not essential to constitute a person a shareholder (*East Gloucestershire Ry. Co.* v. *Bartholomew*, L. R. 3 Ex. 15 ; 37 L. J. Ex. 17 ; *Wolverhampton Waterworks Co.* v. *Hawkesford*, 11 C. B. N. S. 456 ; 31 L. J. C. P. 184). As to registers, see further, *ante*, p. 342.

An allottee of shares may in general refuse to accept or be bound by the allotment if there is unreasonable delay in making it (*Ramsgate Hotel Co.* v. *Montefiore*, 4 H. & C. 164 ; 35 L. J. Ex. 90) ; or if it is made by persons not authorised to make it (*In re Stringer*, 9 Q. B. D. 436 ; *In re Portuguese Copper Mines Co.*, 45 Ch. D. 16 ; 58 L. J. Ch. 813 ; see *Ex p. Kennedy*, 44 Ch. D. 472 ; 59 L. J. Ch. 288) ; or if it is not in accordance with the terms of his application (see *Beck's Case*, L. R. 9 Ch. 392 ; 43 L. J. Ch. 531 ; *In re New Eberhardt Co.*, 43 Ch. D. 118 ; 59 L. J. Ch. 73). But he may disentitle himself from raising such objections by acts of acceptance or by unreasonable delay, &c. (See *In re Railway Time Tables Co.*, 42 Ch. D. 98 ; 58 L. J. Ch. 504 ; *In re Scottish, &c., Co.*, 23 Ch. D. 413 ; 51 L. J. Ch. 841.)

An allotment made in contravention of the provisions of s. 4 of the Companies Act, 1900, is voidable at the instance of the allottee within one month of the holding of the statutory meeting of the company (Companies Act, 1900, s. 5, and see *Finance and Canadian Produce Corporation*, [1905] 1 Ch. 35, 47 ; 73 L. J. Ch. 751).

Among other usual grounds of defence to actions for calls are the following, viz., that the call was not made or was not duly made (see *Wills* v. *Murray*, 4 Ex. 843 ; *In re Cawley & Co.*, 42 Ch. D. 209 ; 58 L. J. Ch. 633) ; or was made by incompetent persons (*Anglo-Californian, &c., Co.* v. *Lewis*, 6 H. & N. 174 ; 30 L. J. Ex. 50 ; *York Tramways Co.* v. *Willows*, 8 Q. B. D. 685) ; or was not authorised by the constitution of the company (see *South Eastern Ry. Co.* v. *Hebblewhite*, 12 A. & E. 497 ; *Welland Ry. Co.* v. *Berrie*, 6 H. & N. 416 ; 30 L. J. Ex. 163) ; or that the defendant received no notice, or no sufficient notice, of the call. (See *Miles* v. *Bough*, 3 Q. B. 845 ; *Edinburgh Ry. Co.* v. *Hebblewhite*, 6 M. & W. 707 ; *London & Brighton Ry. Co.* v. *Wilson*, 6 Bing. N. C. 135.)

By s. 6 of the Companies Act, 1900, it is provided that companies which invite the public to subscribe for shares shall not commence any business or exercise any borrowing powers unless (amongst other things) shares to be paid for in cash have been allotted to an amount not less than the minimum subscription fixed on allotment,

Defence to an Action for Calls that the Defendant was induced to take the Shares by Fraud: see "Fraud," post, p. 658.

For a Defence of Infancy, see "Infancy," post, p. 689.

Defence that the Defendant only became liable to apply for Shares under an Underwriting Agreement, and that he has been allotted more than his quota of Shares.

Further, or in the alternative, the defendant says that he is not liable (if at all) to take and pay for —— shares as alleged in the statement of

---

and further that any contract made by such companies before they are entitled to commence business, shall be provisional only, and not binding on the company until it is so entitled, and then it becomes binding *ipso facto*. (See *North Stafford Steel Co.* v. *Ward*, L. R. 3 Ex. 172; 37 L. J. Ex. 83; *Peirce* v. *Jersey Waterworks Co.*, L. R. 5 Ex. 209; 39 L. J. Ex. 156.)

It would appear to be a good defence to an action for calls that the provisions of the above section have not been complied with. In pleading such a defence the provisions which have not been complied with should be distinctly stated.

Where a contract has been made professedly on behalf of such a company, and before the required amount has been subscribed, that fact, if the company is still not entitled to commence business, affords a defence. (See s. 6 (1), (3); and *North Stafford Steel Co.* v. *Ward*, *supra*.)

It is, in general, no defence to an action for calls that the shares in respect of which the calls were made have been forfeited subsequently to the making of the call. (See s. 29; and *G. N. Ry. Co.* v. *Kennedy*, 4 Ex. 417; 19 L. J. Ex. 11.)

Where a limited company is being wound up under the Companies Acts, a shareholder cannot, so long as any of the company's creditors remain unpaid, set off against a claim for calls made in the winding-up any debt due to him from the company on transactions previous to the winding-up. (See the Companies Act, 1862, ss. 38 (7), 101; *Grissell's Case*, L. R. 1 Ch. 528; 35 L. J. Ch. 754; *In re Whitehouse*, 9 Ch. D. 595; 47 L. J. Ch. 801; *Gill's Case*, 12 Ch. D. 755; *Kent's Case*, 39 Ch. D. 259; 57 L. J. Ch. 977; *In re Pyle Works Co.*, 44 Ch. D. 534; 59 L. J. Ch. 489; *In re Washington Co.*, [1893] 3 Ch. 95; 62 L. J. Ch. 895.)

This is so, even where the winding-up is purely voluntary (*In re Whitehouse*, *supra*; *In re Pyle Works Co.*, *supra*; *Government Security Co.* v. *Dempsey*, 50 L. J. C. P. 199). It seems also that the same rule applies where the claim is for calls made before the winding-up of such company (*Ib.*; Companies Act, 1862, s. 101; *Calisher's Case*, L. R. 5 Eq. 214; 37 L. J. Ch. 208; *Barnett's Case*, L. R. 19 Eq. 449; 44 L. J. Ch. 243).

A debt due for calls on the shares of a company registered under the Companies Act, 1862, is a specialty debt within s. 3 of the 3 & 4 Will. 4, c. 42 (see *ante*, p. 152; *post*, p. 718), as also a debt due for calls in a company incorporated under the Lands Clauses Consolidation Act, 1845, or under a special Act containing similar provisions as to calls (*Cork and Bandon Ry. Co.* v. *Goode*, 13 C. B. 826; and see *post*, p. 718). But an action for calls by a company established under a foreign or colonial statute is in general an action founded upon a simple contract (*Welland Ry. Co.* v. *Blake*, 6 H. & N. 410; 30 L. J. Ex. 161), and it seems, therefore, that the period of limitation for such action is six years only by the 21 Jac. 1, c. 16, s. 3, cited *post*, p. 717.

By s. 7 of the Companies Act, 1900, in the case of a company limited by shares, if

claim, but only a less number. The defendant only became liable to apply for or take or pay for any shares under an underwriting agreement in writing, dated the —— ——, 19—, which provided that if the public subscribed *bonâ fide* for —— shares, then the defendant's responsibility was to cease, but if the public did not subscribe such an amount, but should *bonâ fide* subscribe any smaller amount, the defendant's undertaking was to stand for the number of shares that would constitute his *pro ratâ* contribution with the other underwriters to make up the difference between the amount subscribed by the public and the total amount underwritten. Although the public did not subscribe for —— shares, they subscribed for —— [*or* a large number], and the defendant's *pro ratâ* contribution to make up the difference between the amount subscribed by the public and the total amount underwritten was —— [*or* less than ——].

Defence to Action claiming Amount awarded as Compensation for Land taken, that the Plaintiff had not executed any Conveyance of the Land (*d*).

The plaintiff has not executed [*or*, had not at any time before the commencement of this action executed] any conveyance of the land in respect of which the compensation was awarded.

Defence to an Action on an Award under the Lands Clauses Consolidation Act, that the Plaintiff was not the Owner of the Land, and that the Land was not injuriously affected (*d*).

1. The award referred to in the statement of claim purports to have been made pursuant to the Lands Clauses Consolidation Act, 1845, and the amount thereby awarded and claimed herein is so awarded as and for

---

shares are allotted wholly or in part for a consideration otherwise than cash, a contract in writing constituting the title of the allottee, together with any contract of sale, or for services, or other consideration for the allotment, must be filed with the registrar, and a penalty is imposed for default.

When the transaction is a set-off by mutual agreement of present debts on both sides, or where it is such a transaction as would, in an action at law for calls, support a plea of payment, it is a sufficient "payment in cash" (*Spargo's Case*, 8 Ch. D. 407; 42 L. J. Ch. 488; *In re Johannesburg Hotel Co.*, [1891] 1 Ch. 119; 60 L. J. Ch. 391; *Larocque* v. *Beauchemin*, [1897] A. C. 358, 364; 60 L. J. P. C. 59; *North Sydney Co.* v. *Higgins*, [1899] A. C. at p. 273). So also is a payment by a cheque believed to be good and which is in fact afterwards duly paid (*Glasgow Pavilion* v. *Motherwell*, 5th Ser. Sess. Cas., vol. VI., p. 116).

It is, in general, illegal to issue the shares of a limited company at a discount (*In re Almada, &c., Co.*, 38 Ch. D. 415; 57 L. J. Ch. 706; *Ooregum Gold Co.* v. *Roper*, [1892] A. C. 125; 61 L. J. Ch. 337; *Hirsche* v. *Sims*, [1894] A. C. 654; 64 L. J. P. C. 1; *Welton* v. *Saffery*, [1897] A. C. 299; 66 L. J. Ch. 362; *Mosely* v. *Koffyfontein Mines*, [1904] 2 Ch. 108; 73 L. J. Ch. 569.

(*d*) See *ante*, pp. 156, 343. The amount awarded is not payable until a conveyance has been executed (*East London Union* v. *Metropolitan Ry. Co.*, L. R. 4 Ex. Ch. 309; 38 L. J. Ex. 225).

compensation for the compulsory taking by the defendant company of the land of the plaintiff, situate at —— in the county of ——, and for the injuriously affecting of land alleged to be land of the plaintiff, adjacent thereto, by the defendant company, by the execution of works at ——, authorised by an Act of Parliament intituled ——.

2. The said land was not, nor was any part thereof, nor was the said adjacent land or any part thereof, the plaintiff's, nor had he any right or title thereto or interest therein.

3. The said adjoining land was not, nor was any part thereof, injuriously affected by the execution of the said works.

See forms of pleas to the like effect: Buccleugh, Duke of v. *Metropolitan Board of Works*, L. R. 3 Ex. 308—311.

Composition with Creditors.

I. Compositions and Arrangements under the Bankruptcy Acts:

see "*Bankruptcy*," *ante*, p. 106.

II. Compositions and Arrangements apart from the Bankruptcy Acts (*e*).

Defence that the Defendant paid a Composition for the Debt under an Agreement with the Plaintiff and other Creditors (*e*).

After the accruing of the debt claimed [*or*, indebtedness alleged] by the plaintiff in the statement of claim it was agreed by deed [*or*, by an

(*e*) Where a debtor and his creditors have, apart from the provisions of the Bankruptcy Acts, agreed that a composition shall be paid and accepted in satisfaction of his debts to them, and the composition has been duly paid in pursuance of the agreement, such payment, subject to the requirement of registration in cases within the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), below cited, operates as a satisfaction of the debts and is a bar to any action for the residue of such debts. (See *Evans* v. *Powis*, 1 Ex. 601; *Boyd* v. *Hind*, 1 H. & N. 938; 26 L. J. Ex. 164; *Slater* v. *Jones*, L. R. 8 Ex., at p. 193, and the other cases cited, *infra*.)

The consideration to each creditor for entering into such an arrangement is the assent of such other creditors as join in the arrangement to forego part of their demands, and the existence of this new consideration distinguishes the case of a payment under a composition from that of a payment of a smaller sum in respect of a larger ascertained debt. (See *ante*, p. 566; *Good* v. *Cheesman*, 2 B. & A. 328; *Boyd* v.

agreement in writing] dated the —— ——, 19—, between the defendant and the plaintiff and other creditors of the defendant, that the plaintiff and the said other creditors should accept the payment by the defendant of a composition of —— in the pound on their respective debts in satisfaction thereof respectively, and the defendant, on the —— ——, 19—, duly paid to the plaintiff the said composition on his said debt, and the plaintiff accepted such composition in satisfaction of his said debt.

Hind, 1 H. & N. 938; 26 L. J. Ex. 164; *Norman* v. *Thompson*, 4 Ex. 755; *Reay* v. *Richardson*, 2 C. M. & R. 422.)

Where the defendant has duly tendered the amount of the composition under such an agreement at the appointed time and place, and has always been ready and willing to perform the agreement on his part, those facts, together with payment into Court of the amount of the composition, may, subject to the provisions of the Deeds of Arrangement Act, 1887, below cited, in cases within that Act, be pleaded as a defence to an action for the original debt (*Norman* v. *Thompson*, 4 Ex. 755; *Bradley* v. *Gregory*, 2 Camp. 383; *Boyd* v. *Hind*, *supra*; see *Reay* v. *White*, 1 C. & M. 748; *post*, p. 797).

Such agreements for the payment and acceptance of a composition in satisfaction of debts must be strictly carried out by the debtor, for, under ordinary circumstances, where the agreement of the creditors is to accept a composition in satisfaction of their debts, and the debtor makes default in paying the composition at the appointed time or times, the creditors' original rights in respect of their debts will thereupon revive, and they will be entitled to sue for the whole amount of such debts, giving credit, however, where part of the composition has been paid, for so much as they have received (*Hazard* v. *Mare*, 6 H. & N. 435; 30 L. J. Ex. 97; *Evans* v. *Powis*, *supra*; *Cranley* v. *Hillary*, 2 M. & S. 120; and see, under the former Bankruptcy Act of 1869, *Edwards* v. *Coombe*, L. R. 7 C. P. 519; 41 L. J. C. P. 202; *Ex p. Gilbey*, 8 Ch. D. 248; 47 L. J. B. 49, and *Edwards* v. *Hancher*, 1 C. P. D. 111). In such cases the Statute of Limitations in respect of the original debt runs from the default only (*In re Stock*, 66 L. J. Q. B. 146; *McDonnell* v. *Broderick*, [1896] 2 Ir. R. 142). In some cases, the terms of the composition agreement are such as to provide that the mere agreement of the debtor to pay the composition, as distinguished from the actual payment by him of the composition, is to be accepted in satisfaction of the debts, and where the composition agreement contains such provisions, the mere non-payment of the composition at the agreed time will not remit the creditors to their original rights of action in respect of their debts, but will merely give them a right of action for the breach of the substituted agreement to pay the composition (*Good* v. *Cheesman*, *Boyd* v. *Hind*, *Evans* v. *Powis*, *Hazard* v. *Mare*, and *Edwards* v. *Hancher*, *supra*).

If a creditor executes a composition agreement conditionally only on its being assented to by other creditors, he will not be bound by such execution of the agreement, unless they assent to it. (See *Mathews* v. *Taylor*, 2 M. & G. 667; *Reay* v. *White*, *supra*; *Reay* v. *Richardson*, *supra*.)

In order that a composition agreement should be binding on all the creditors who are parties thereto, it is necessary that there should be perfect good faith between the debtor and the assenting creditors, and each creditor is entitled to require that the concurrence of the other creditors shall have been obtained by fair means only; and if such concurrence were obtained by means of a corrupt bargain made by the debtor with any of his creditors, as by a secret promise from him to give them something more than was agreed to be given to the other creditors, the composition agreement would be fraudulent and therefore not binding on the other creditors who were no parties to the fraud (*Dauglish* v. *Tennant*, L. R. 2 Q. B. 49; 35 L. J. Q. B. 10; *Ex p. Milner*, 15 Q. B. D. 605; 54 L. J. Q. B. 425; *Ex p. Barrow*, 18 Ch. D. 464; 50 L. J. Ch. 821; and see *In re Billing*, [1903] 2 K. B. 50; 72 L. J. K. B. 392).

Reply that the Deed or Instrument was not registered (f).

The deed [*or*, agreement] referred to in the defence was a deed of arrangement within the meaning of the Deeds of Arrangement Act, 1887, and was not registered, and is therefore void.

CONDITIONS PRECEDENT (*g*).

Defence that a Condition Precedent was not performed.

1. By the agreement referred to in the statement of claim, it was a condition precedent to any liability on the part of the defendant that —— [*here state the condition*]. The said condition appears in the document containing the agreement [*or*, was agreed to verbally on the —— ——, 19—, *or, as the case may be*].

2. The said condition was not performed in this, that —— [*here show that the condition was not performed*].

See also "*Agreements*," *ante*, p. 577, *and* "*Insurance*," *post*, pp. 698 *et seq.*

For other forms, denying the fulfilment of conditions precedent, see R. S. C., 1883, *App. D., Sect. V., Nos.* 15, 16, *cited post*, pp. 766, 730; *App. E., Sects. I., II., cited ante*, p. 36; *and post*, p. 766.

(*f*) By the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 5, any deed or written agreement made between a debtor and his creditors for the benefit of his creditors generally (see *Hedges* v. *Preston*, 80 L. T. 847; *In re Hobbins*, 6 Manson, 212), otherwise than in pursuance of the Bankruptcy Acts, and comprising an assignment of property or an arrangement for a composition, &c., is void unless registered within seven clear days after the first execution thereof by the debtor or any creditor. If it is executed at any place out of England a further period is allowed. This Act does not apply to deeds of arrangement executed by limited companies (*In re Rileys, Limited*, [1903] 2 Ch. 590; 72 L. J. Ch. 678), or executed by foreign debtors abroad (*Dulaney* v. *Merry*, [1901] 1 K. B. 536; 70 L. J. K. B. 377).

The addition of creditors' names in the Schedule after registration of such deed, does not avoid the deed or the registration, where the addition is in accordance with the terms of the deed (*In re Batten*, 22 Q. B. D. 685).

(*g*) See *ante*, p. 156.

Where the party pleading a defence, or a reply to a counterclaim, wishes to contest the fulfilment of any condition precedent to the case set up by his opponent, he cannot do so by a mere general denial of the averment (whether express or implied) of the fulfilment of all conditions precedent necessary to his opponent's case, but must distinctly show by his pleading what is the condition the fulfilment of which he denies (Ord. XIX., r. 14, cited *ante*, pp. 10, 157), and the same course should in general be followed in a pleading subsequent to a defence or to a reply to a counterclaim, except in cases where the opponent's pleading discloses the existence of the condition the performance of which is disputed, and also alleges its fulfilment.

CONFESSION (*h*).

Confession of a Defence arising after Action.

19—. [*Here put the letter and number.*]

In the High Court of Justice,
King's Bench Division.

Between *A. B.* .....Plaintiff,

and

C. D. .....Defendant.

The plaintiff confesses the defence stated in the —— paragraph of the defendant's defence [*or*, of the defendant's further defence].

(*See R. S. C.*, 1883, *App. B.*, *Form No.* 5.)

CONTRACT.

See "*Agreements*," *ante*, p. 575.

(*h*) As to pleading grounds of defence arising after action, see Ord. XXIV., rr. 1, 2, cited *ante*, p. 531. Where the defendant alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence in the above form, with such variations as circumstances may require, and may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a judge otherwise order (Ord. XXIV., r. 3, cited *ante*, p. 532). Where the plaintiff has delivered such confession under the last cited rule, he is not prevented from signing judgment for his costs by the fact of the defendant having pleaded other defences to the same cause of action, or part of a cause of action (*Bridgtown Waterworks Co.* v. *Barbados Water Co.*, 38 Ch. D. 378; 57 L. J. Ch. 1051).

Where the defendant pleads payment into Court in satisfaction of a debt, the plaintiff should not deliver a confession, but, if he accepts the money in satisfaction of the causes of action in respect of which it is paid in, he should give notice to the defendant of such acceptance in the form No. 4 in R. S. C., 1883, App. B., or if a reply is necessary to other portions of the defence, he may state such acceptance in the reply. (See *post*, p. 749.)

It seems that to entitle a plaintiff to confess a ground of defence and sign judgment for his costs under the above rule, it must appear from the defence that the alleged ground of defence arose after action, and that, where this does not appear from the defence, the plaintiff, if he wishes to avail himself of the provisions of the above rule, should apply to have such defence amended so as to show when the facts which support it arose (*Ellis* v. *Munson*, 35 L. T. 585). As to confessing a counterclaim in respect of a set-off arising since the commencement of the action, see *ante*, p. 549.

Where the plaintiff has delivered a confession and signed judgment under the above rule, he is thereby precluded from bringing any other action for the same cause. (See *Newington* v. *Levy*, L. R. 5 C. P. 607; 6 *Ib.* 180; 39 L. J. C. P. 334; 40 *Ib.* 29.) It is otherwise if he merely discontinues the action under Ord. XXVI., r. 1, as such discontinuance is no bar to another action for the same cause.

Corporation (*i*).

Defence that Contract sued on was not under Seal (*i*).

The agreement referred to in the statement of claim [if made at all, which is denied] was not made under the seal of the defendant corporation, and is therefore not binding on the defendant corporation.

(*i*) Where the defence relied upon is that the contract sued on was a contract by or with a corporation aggregate, and that it was not a contract in writing under their common seal, such defence should be specifically pleaded. (See Ord. XIX., rr. 15, 20, cited *ante*, pp. 523, 527.)

It is a general rule of the common law, though a rule subject to some exceptions, that a corporation aggregate can contract only by writing under their common seal. (See *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815; *Clarke* v. *Cuckfield Union*, 21 L. J. Q. B. 349; *Mayor of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 13; 43 L. J. Ex. 9; *Young* v. *Corporation of Leamington*, 8 Q. B. D. 579; 51 L. J. Q. B. 292; 8 App. Cas. 517; 52 L. J. Q. B. 713; *Lawford* v. *Billericay Union*, [1903] 1 K. B. 772; 72 L. J. K. B. 554.)

Those exceptions may be referred generally to three classes, viz.: contracts authorised to be made without seal by the particular purpose and constitution of the corporation, contracts authorised to be made without seal upon the general grounds of convenience and necessity, and some executed contracts of which the corporation has had the benefit.

The first of these classes includes such contracts as are required to be entered into in order to carry out the purposes for which the corporation was incorporated (*Henderson* v. *Australian Steam Nav. Co.*, 5 E. & B. 409; 24 L. J. Q. B. 322; *Nicholson* v. *Bradfield Union*, L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; *Scott* v. *Clifton School Board*, 14 Q. B. D. 500), and therefore trading corporations may validly make by parol such contracts as are within the scope of their constitution, and are required to be made for the purpose of carrying on their business (*South of Ireland Colliery Co.* v. *Waddle*, L. R. 4 C. P. 617; 38 L. J. C. P. 338).

The second of the classes of exceptions includes all such ordinary contracts of small amount or frequent occurrence as are required to be entered into in order to carry out the purposes for which the corporation was constituted, and such contracts may accordingly be validly made by parol even by non-trading corporations, such as municipal or ecclesiastical corporations. (See *Becerley* v. *Lincoln Gas Co.*, 6 A. & E. 829; *Church* v. *Imperial Gas Co.*, *Ib.* 846; *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402; *South of Ireland Colliery Co.* v. *Waddle*, *supra*.)

The third class of exceptions is that in which the contract is one in respect of matters for the doing of which the corporation was created, and which has been executed by the other contracting party, so that the corporation has had the benefit of it. In such cases a promise to pay may be implied, and the corporation may be liable to pay for the work done or services rendered, although the contract to pay for them was not under seal (*Lawford* v. *Billericay Rural Council*, [1903] 1 K. B. 772; 72 L. J. K. B. 554).

The absence of a seal will not of itself amount to a defence where the claim is merely one for specific performance of a contract, and is based upon the facts that the contract has been partly performed by the plaintiff, and that such part performance has been accepted by the corporation (*Crook* v. *Corporation of Seaford*, L. R. 6 Ch. 551; *Wilson* v. *West Hartlepool Ry. Co.*, 2 De G. J. & S. 475; 34 L. J. Ch. 241; *Melbourne Banking Corporation* v. *Brougham*, *infra*).

A corporation may be liable to an action for use and occupation in respect of the time during which it has actually occupied land under a parol agreement. (See *Becerley* v. *Lincoln Gas Co.*, 6 A. & E. at p. 841; *Lowe* v. *London & N. W. Ry. Co.*, 18 Q. B. 632; *Finlay* v. *Bristol, &c. Ry. Co.*, 7 Ex. 409.)

Drunkenness (*j*).

Defence that the Defendant was Drunk at the time of Contracting.

At the time when the defendant made the promise [*or*, agreement, *or*, executed the deed, *or*, contracted the debt, *as the case may be*] alleged in the statement of claim, he was, as the plaintiff then knew, so drunk that he

---

Where in an action against a corporation the plaintiff makes a claim of debt or damages in respect of a contract not falling within any of the exceptions above referred to, it is a good defence to show that the contract was not under the seal of the corporation.

Contracts which are entered into by an urban sanitary authority (now urban district council) under the Public Health Act, 1875, and which exceed £50 in amount or value, require a seal under s. 174 (1) of that Act, even where the consideration has been executed by the other party to the contract (*Young* v. *Corporation of Leamington*, *supra*; *Eaton* v. *Basker*, 7 Q. B. D. 529; 50 L. J. Q. B. 444; *Attorney-General* v. *Gaskill*, 22 Ch. D. 537). The amount or value to be considered is that of the contract at the time it is entered into. (See *Eaton* v. *Basker*, *supra*.)

The exceptions above referred to do not apply in cases where it is enacted by statute that particular specified corporations shall only contract in respect of certain specified matters by deed, and, therefore, a contract required under s. 174 (1), above cited, to be by deed, is void if not under seal, even where, if it had been made by the same body in their other character of a municipal corporation, it would have fallen within the above-mentioned exceptions to the rule (*Young* v. *Corporation of Leamington*, *supra*). It is sufficient, however, if the contract is ratified under seal (*Brooks* v. *Torquay Corporation*, [1902] 1 K. B. 601; 71 L. J. Q. B. 109), and it is not necessary that the other contracting party should seal the contract (*Ib.*).

When an action is brought by a corporation upon a parol contract which does not fall within any of the exceptions above referred to, and which remains executory on both sides, the defendant may set up the defence that the contract was not under seal. (See *Mayor of Kidderminster* v. *Hardwick*, *supra*; *Copper Miners' Co.* v. *Fox*, 16 Q. B. 229; 20 L. J. Q. B. 174.) But he cannot set up this defence where the consideration for the contract has been executed on the part of the corporation (*Fishmongers' Co.* v. *Robertson*, 5 M. & G. 131; *Ecclesiastical Commissioners* v. *Merral*, L. R. 4 Ex. 162; 38 L. J. Ex. 93); and it appears that such a defence is not available where the corporation, though their part of the contract has not been performed, would be held liable for specific performance of it (*Ecclesiastical Commissioners* v. *Merral*, *supra*; *Mayor of Kidderminster* v. *Hardwick*, *supra*; *Melbourne Banking Co.* v. *Brougham*, 4 App. Cas. 156, 168; 48 L. J. P. C. 12).

As to actions for use and occupation brought by a corporation, see *Mayor, &c. of Stafford* v. *Till*, 4 Bing. 75; *Ecclesiastical Commissioners* v. *Merral*, *supra*.

The defence that the contract sued upon was not within the power or capacity of the corporation, and is therefore void as being *ultra vires*, must be pleaded. (See Ord. XIX., r. 20, cited *ante*, p. 527.)

(*j*) A contract may in general be avoided on the ground that the party making it was at the time in such a state of intoxication as to be incapable of understanding the effect of the contract, and that his condition was then known to the other party (*Gore* v. *Gibson*, 13 M. & W. 623; *Molton* v. *Camroux*, 2 Ex. 487, 501; 4 *Ib.* 17; and see *post*, p. 690). But in such cases the contract is not absolutely void, but only voidable at the option of the party who was intoxicated, and may therefore be ratified by him after he has become sober (*Mathews* v. *Baxter*, L. R. 8 Ex. 132; 42 L. J. Ex. 73). Accordingly, where the defendant in an action on a contract, set up drunkenness as a defence, it was held a good reply, that after he became sober and able to transact business, he ratified the contract; and unless the party who was intoxicated has

was unable to comprehend the meaning or effect of the said promise [*or*, agreement, *or* deed, *or*, contract, *as the case may be*] or to contract thereby.

Duress (*k*).

Defence that the Defendant was induced to Contract by Duress.

The defendant was induced to make the agreement [*or*, to execute the deed, *or*, to accept the bill of exchange, &c., *as the case may be*] referred to [*or*, alleged] in the statement of claim, by duress on the part of the plaintiff.

Particulars of the duress are as follows :—

Estoppel (*l*).

subsequently disaffirmed the contract, he would be able to insist on its fulfilment by the other party (*Ib.*).

Where necessaries are sold and delivered to a person who, by reason of drunkenness, is incompetent to contract, he must pay a reasonable price therefor (Sale of Goods Act, 1893, s. 2, cited *post*, p. 689).

(*k*) Contracts procured by duress on the part of the person contracted with are voidable at the option of the party subjected to the duress (2 Inst. 482 ; *Whelpdale's case*, 5 Co. Rep. 119). So, too, are contracts procured by duress on the part of a person other than the person contracted with, provided the latter knew of the duress at the time of the making of the contract (1 Rolle, Abr. 688). Such contracts, however, not being absolutely void, are capable of subsequent ratification. (See *Ormes* v. *Beadel*, 2 De G. F. & J. 333 ; 30 L. J. Ch. 1.)

Duress ordinarily consists in illegal imprisonment (2 Inst. 483 ; *Cumming* v. *Ince*, 11 Q. B. 112 ; *Smith* v. *Menteith*, 13 M. & W. 427), or threats calculated to produce fear of loss of life, or of bodily harm, or of unlawful imprisonment (2 Inst. 483). The fear produced by such threats must be an actual serious apprehension (Co. Litt. 353 b ; 2 Inst. 483 ; *R.* v. *Southerton*, 6 East, 140 ; *Lound* v. *Grimwade*, 39 Ch. D. 605) ; but it seems that in estimating the effect of the threats, the age, sex, and condition of the person threatened may properly be considered (*Scott* v. *Sebright*, 12 P. D. 21 ; 56 L. J. P. D. 12 ; *Cooper* v. *Crane*, [1891] P. 369). A threat to do what is lawful is not duress in point of law (*Cummings* v. *Ince*, 11 Q. B. 112 ; 17 L. J. Q. B. 105 ; *Biffen* v. *Pignell*, 7 H. & N. 877 ; 31 L. J. Ex. 189 ; *Barnes* v. *Richards*, 71 L. J. Q. B. 341). A married woman may avoid a contract which she was coerced into making by threat of prosecution of her husband (*Kaufman* v. *Gerson*, [1904] 1 K. B. 591 ; 73 L. J. K. B. 320).

The illegal taking and detaining of goods, or threats of injury to goods, do not constitute duress sufficient to avoid a contract (*Skeate* v. *Beale*, 11 A. & E. 989), although money paid under such circumstances in order to recover possession of the goods or to preserve them, may be recovered as money received to the plaintiff's use, on the ground of its having been paid without any legal consideration and involuntarily (*Ib.* ; *Atlee* v. *Backhouse*, 3 M. & W. 633 ; *Wakefield* v. *Newbon*, 6 Q. B. 276 ; and see *ante*, p. 257).

See further as to duress, Leake on Contracts, 4th ed., pp. 276 *et seq.*

As to undue influence not amounting to duress, see *Bischoffs Trustee* v. *Frank*, 98 L. T. 188, where a wife was held not liable as a guarantor of her husband's debts.

(*l*) Matter of estoppel by *record* or by *deed* must in general be pleaded where there is an opportunity of pleading it, and the party omitting to plead it when he may do

General form of a Defence of Estoppel.

The defendant says the plaintiff ought not to be admitted to say [*or*, is estopped from saying] that [*here state the matter to which the estoppel applies*], because [*here state the matter relied upon as creating the estoppel*].

---

so, cannot rely upon it (*Litchfield* v. *Ready*, 5 Ex. 939, 945; *Fevershame* v. *Emerson*, 11 Ex. 385; *Young* v. *Raincock*, 7 C. B. 310; *Matthew* v. *Osborne*, 13 C. B. 919; *Vooght* v. *Winch*, 2 B. & Ald. 662; *Treviran* v. *Lawrence*, 2 Smith's L. C., 11th ed., p. 742).

Under the present practice, which differs in this respect from the old, matter of estoppel *in pais*, as by payment or acceptance of rent, &c., should be expressly pleaded wherever there is an opportunity of pleading it, and it is desired to set it up as a defence. (See Ord. XIX., rr. 4, 15, cited *ante*, pp. 5, 523.)

It is not necessary to plead estoppel in any special form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer (*Houstoun* v. *Sligo*, 29 Ch. D. 448). Formerly, where the matter of estoppel appeared on the pleadings of the opposite party, the objection was allowed to be raised by demurrer (1 Wms. Saund., 1871 ed., pp. 578—580; *Beckett* v. *Bradley*, 2 D. & L. 586; *Sanderson* v. *Collman*, 4 M. & G. 209, 225; *Macgregor* v. *Rhodes*, 6 E. & B. 266; 25 L. J. Q. B. 318; *Moss* v. *Anglo-Egyptian Nav. Co.*, L. R. 1 Ch. 108), and it would seem that in such cases it may now be raised by objection in point of law, under Ord. XXV., r. 2, cited *ante*, p. 561.

The estoppel operates only between the same parties and their privies (Co. Lit. 352a; *Outram* v. *Morewood*, 3 East, 346; *Petrie* v. *Nuttall*, 11 Ex. 569; *Doe* v. *Oliver*, 2 Smith's L. C., 11th ed., p. 724; *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455; *Anderson* v. *Collinson*, [1901] 2 K. B. 107; 70 L. J. K. B. 620), and in the same rights (*Ib.*; *Leggott* v. *G. N. Ry. Co.*, 1 Q. B. D. 599; 45 L. J. Q. B. 557; *Richards* v. *Jenkins*, 18 Q. B. D. 451). A party suing or sued in a different right, as an executor or administrator, is not bound by an estoppel against himself in his own right (*Metters* v. *Brown*, 1 H. & C. 686; 32 L. J. Ex. 138; see *Whittaker* v. *Jackson*, 2 H. & C. 926; 33 L. J. Ex. 181).

An estoppel by deed is not available in an action not founded on the deed and wholly collateral to it (*Carpenter* v. *Buller*, 8 M. & W. 209; and see *Wiles* v. *Woodward*, 5 Ex. 557, 563; *South-Eastern Ry. Co.* v. *Warton*, 6 H. & N. 520; 31 L. J. Ex. 515; *Fraser* v. *Pendlebury*, 31 L. J. C. P. 1; *Ex parte Morgan*, 2 Ch. D. 72; 45 L. J. Bk. 36). For an instance of a former plea of estoppel by deed, see *South-Eastern Ry. Co.* v. *Warton*, *supra*.

As to estoppels *in pais*, by conduct or by representations, &c., they arise where a person is precluded from denying the truth of something which he has represented as a fact, although it is not a fact. If a man by words or conduct, wilfully endeavours to cause another to believe in a state of facts which the first knows to be false, or represents to another the existence of a certain state of facts which he intends to be acted upon in a certain way by such other, or if a man so conducts himself that a reasonable person would naturally take his action to mean that certain facts existed and that it was intended that he should act upon that supposition in a certain way, then in all these cases, if the person, thus misled, act to his damage on the belief thus created an estoppel arises. Further, if in the transaction in dispute one by culpable negligence lead another into belief in a certain state of facts, which do not exist, and the person thus misled act thereon to his damage, an estoppel may also arise. (See *Pickard* v. *Sears*, 6 Ad. & El. 469; *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 307, 316; 44 L. J. C. P. 109; *Seton* v. *Lafone*, 19 Q. B. D. 68; 56 L. J. Q. B. 415; *Farquharson* v. *King*, [1902] A. C. 325; 71 L. J. K. B. 667; *Longman* v. *Bath Electric Trams*, [1905] 2 Ch. 646, 663, 667; see also the notes, 2 Sm. L. C., 11th ed., pp. 848 *et seq.*). And by negligence is meant

Defence of Estoppel by a Judgment against the Plaintiff in a former Action.

[*Commence as in the preceding form, and proceed as follows:*] because on the —— ——, 19—, before the commencement of this action the plaintiff brought an action against the now defendant in the —— Division of the

---

the breach of some duty by the one to the other, arising out of the business transaction between them, or the relationship of the one to the other. (See *Seton* v. *Lafone*, *supra*; *Low* v. *Bouverie*, [1891] 3 Ch. 82; 60 L. J. Ch. 594; and see *Scholfield* v. *Londesborough*, [1896] A. C. 514, 540; 65 L. J. Q. B. 593.)

A judgment recovered against the plaintiff in a former action for the same cause of complaint is matter of estoppel (*Vooght* v. *Winch*, 2 B. & Ald. 662; *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877; *Overton* v. *Harvey*, 9 C. B. 324). A judgment recovered against the defendant in such former action is a merger of the original cause of action, and a bar to the subsequent action. (See *post*, p. 703.)

A defence alleging an estoppel by a judgment recovered against the plaintiff in a former action for the same cause, is bad if it appears on the face of it that the cause of action was determined against the plaintiff on a ground which does not constitute a defence to the action in which it is pleaded. (See *Phillips* v. *Ward*, 2 H. & C. 717; 33 L. J. Ex. 7; and see *Moss* v. *Anglo-Egyptian Nav. Co.*, L. R. 1 Ch. 108; *Caird* v. *Moss*, 33 Ch. D. 22.)

A judgment of a Court of competent jurisdiction is not only conclusive with reference to the actual matter decided, but is in general conclusive with reference to the grounds of the decision, where those grounds distinctly appear on the proceedings. (See *Alison's case*, L. R. 9 Ch. 1, 24; 43 L. J. Ch. 1; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29; 44 L. J. C. P. 73; *Priestman* v. *Thomas*, 9 P. D. 70, 210; and see *Wakefield Corporation* v. *Cooke*, [1904] A. C. 31; 73 L. J. K. B. 88.) A judgment is conclusive upon the points actually decided (*Ballantyne* v. *Mackinnon*, cited *ante*, p. 646). But this does not apply where the subsequent action is brought in a different right (*Leggott* v. *G. N. Ry. Co.*, *supra*).

A mere verdict not followed by a judgment works no estoppel (*Butler* v. *Butler*, [1894] P. D. 25).

The pendency of proceedings by way of appeal is no answer to a pleading of estoppel by a judgment, though it may be ground for applying for a stay of proceedings. (See *Doe* v. *Wright*, 10 A. & E. 763; *Scott* v. *Pilkington*, 2 B. & S. 11; 31 L. J. Q. B. 81; *In re Henderson*, 35 Ch. D. 704; 37 L. J. Ch. 244.)

A final and conclusive judgment of a foreign or colonial Court against the plaintiff may be pleaded in estoppel (*Plummer* v. *Woodburne*, 4 B. & C. 625; *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877; see *post*, p. 705). So also may the judgment of a County Court as to matters within its jurisdiction. (See *Flitters* v. *Allfrey*, *supra*; *Poyser* v. *Minors*, 7 Q. B. D. 329; 50 L. J. Q. B. 555; *In re Graydon*, [1896] 1 Q. B. 417; 65 L. J. Q. B. 328.)

A judgment by consent or by default would seem to have the same effect as a judgment obtained after a hearing of the action (*Howlett* v. *Tarte*, 10 C. B. N. S. 813; 31 L. J. C. P. 146; *In re South American Co.*, [1895] 1 Ch. 37; 64 L. J. Ch. 189; but see *Irish Land Commissioners* v. *Ryan*, [1900] 2 Ir. R. 565).

Where a plaintiff delivers a confession of a defence, and signs judgment for his costs under Ord. XXIV., r. 3, his doing so will in general have the effect of an estoppel as to matters which might have been set up in reply to the defence confessed. (See *Newington* v. *Levy*, L. R. 5 C. P. 607; 6 *Ib.* 180; 39 L. J. C. P. 334; 40 *Ib.* 29; *Hall* v. *Levy*, L. R. 10 C. P. 154; 44 L. J. C. P. 89.)

An award is binding between the parties in all matters decided by it which are within the jurisdiction of the arbitrator, and it may therefore form a ground of estoppel in subsequent proceedings between the same parties (*Whitehead* v. *Tattersall*, 1 A. & E. 491; *Commings* v. *Heard*, L. R. 4 Q. B. 669; 10 B. & S. 606).

High Court of Justice, 19—, B., No. —, for [*here state briefly the former cause of action*], and the defendant pleaded in his defence in the said action that [*here state briefly the matter of the defence on which the estoppel is founded*], and the plaintiff joined issue on the said defence [*or, as the case may be*], and the said action and issue were tried [*here state briefly the mode of trial, the verdict or findings of the jury (if any), and the judgment, for instance*] on the —— ——, 19—, before the Honourable Mr. Justice ——, and a [*special*] jury at ——, and upon the said trial the jurors as to the said issue found that [*here state the verdict or findings in favour of the defendant*], and judgment was entered in the said former action for the defendant on the —— ——, 19—, and the said judgment still remains in full force.

General form of a Reply of Estoppel.

The plaintiff says that the defendant ought not to be admitted to say [*or*, is estopped from saying] that [*here state the matter to which the estoppel applies*], because [*here state the matter relied upon as an estoppel*].

Executors and Administrators (*m*).

Denial that the Defendant [or, Plaintiff] is Executor or Administrator (n).

The defendant [*or*, plaintiff] is not, and never was, executor [*or*, administrator] of the said *E. F.*, deceased.

Defence by an Executor or Administrator, to an Action for the Price of Goods sold to the Deceased, and on Accounts stated with the Defendant, denying the Sale and the Stating of the Accounts (o).

1. The defendant denies that the plaintiff sold or delivered to the said *G. H.* [*the deceased*] the goods referred to in the statement of claim, or any part thereof.

(*m*) See *ante*, p. 166.

As to set-off and counterclaim in actions by or against executors or administrators, see *post*, pp. 774, 777; and *ante*, pp. 538, 539.

(*n*) In actions brought by or against an executor or administrator, the defendant if he wishes to put in issue the alleged representative character of the plaintiff, or of himself, as executor or administrator, must deny it specifically (Ord. XXI., r. 5, cited *ante*, p. 527).

A statement of claim describing the defendant as executor imports that he is executor either by right or by wrong, and therefore, where the statement of claim simply alleges that he is executor, a denial of that averment sufficiently denies that he is executor *de son tort*. (See *Scott* v. *Wedlake*, 7 Q. B. 766, 780; *Wood* v. *Kerry*, 2 C. B. 515; *Meyrick* v. *Anderson*, 14 Q. B. 719.)

(*o*) An executor or administrator may in general plead in answer to an action

2. The defendant denies that the alleged or any accounts were ever stated between the plaintiff and the defendant as executor [*or*, administrator] or otherwise.

Defence of Plene Administravit (*p*).

The defendant has fully administered all the personal estate and effects of the said *G. H.* [*the deceased*] which have ever come to the hands of the

---

brought against him in that character, on an alleged liability of the deceased, any defence which would have been open to the deceased.

Subject to the discretion as to costs given to the Court or judge by Ord. LXV., r. 1, a successful plaintiff in an action against an executor in general obtains judgment for his costs, to be levied of the goods of the deceased, if any, and if not, then of the goods of the defendant (*Marshall* v. *Willder*, 9 B. & C. 655; 2 Wms. Exs., 10th ed., p. 1533, 1594, 1597). It was formerly held that if the executor or administrator pleads a defence which is false within his own knowledge, as, for instance, a denial of his being *executor* or *administrator*, or a release to *himself*, and it is found against him, the judgment as to debt or damages, as well as costs, will be *de bonis testatoris si, &c., et si non de bonis propriis;* though this would probably not be now so held, so far as regards debt or damages (*Ib.*); but an executor or administrator should be careful not to plead any defence without good ground for expecting success, as he may, if unsuccessful, become personally liable for costs. An executor or administrator succeeding on the plea of *plene administravit* will in general, subject to the discretion given by Ord. LXV., r. 1, above mentioned, obtain the general costs of the cause, although other issues are found against him (*Edwards* v. *Bethel*, 1 B. & Ald. 254; *Marshall* v. *Willder*, 9 B. & C. 655, 657).

(*p*) If the executor or administrator has no assets of the deceased, he must plead *plene administravit;* otherwise he will be taken to admit that he has assets and may be made personally liable for the debt, and costs, if they cannot be levied on the goods of the deceased (2 Wms. Exs., 10th ed., p. 1583. *In re Marvin*, 21 Times Rep. 765).

If the defendant simply pleads *plene administravit* without any other defence, the plaintiff may apply under Ord. XXXII., r. 6, to have judgment for his debt and costs of future assets *quando acciderint* (Chitty's Forms, 13th ed., pp. 552, 553); and see 2 Wms. Exs., 10th ed., p. 1596; *Cockle* v. *Treacy*, [1896] 2 Ir. 267); or the plaintiff may take issue on the defence, and, if successful, he may then obtain judgment to the extent of assets proved against the defendant, and of future assets *quando acciderint* for the residue, if any, of his debt (2 Wms. Exs., 10th ed., p. 1583).

Under an issue taken on a defence of *plene administravit*, pleaded in the ordinary form, the burden of proof lies on the plaintiff, and he may prove assets either before the commencement of the action, or after the commencement of the action, and before the delivery of the defence. If assets have been received after the delivery of the defence, the plaintiff should obtain judgment of future assets *quando acciderint* (*Smith* v. *Tatcham*, 2 Ex. 205), or allege such receipt in his reply (see 2 Wms. Exs., 10th ed., p. 1588; and see as to the evidence under this issue, 2 Wms. Exs., 10th ed., p. 1589).

The defendant may, under this defence, prove, in answer to the plaintiff's evidence of assets received, the payment of the funeral and testamentary expenses, the payment before action of debts, including his own, not inferior in kind to the debt of the plaintiff, or the payment of debts inferior in kind before action and before he had notice of the plaintiff's debt (2 Wms. Exs., 10th ed., p. 1592). He may also plead as a defence arising after action (see *ante*, p. 531) the payment of a debt superior in degree to that of the plaintiff after action brought (*Bryan* v. *Clay*, 1 E. & B. 38). He may now also set up as a defence of *plene administravit* arising after action, the payment of debts of equal degree with the debt of the plaintiff after action and notice thereof

defendant as executor [*or*, administrator] to be administered, and the defendant had not at the commencement of this action, or at any time afterwards, nor has he, any such personal estate or effects in his hands as executor [*or*, administrator] to be administered.

(*Vibart* v. *Coles*, 24 Q. B. D. 364 ; 59 L. J. Q. B. 152); though he cannot properly make such payments after an order for administration has been made in an administration action (*In re Barrett*, 43 Ch. D. 70 ; 59 L. J. Ch. 218 ; *In re Wells*, 45 Ch. D. 569 ; 59 L. J. Ch. 810). He cannot prefer simple contract creditors to specialty creditors (*In re Hankley*, [1899] 1 Ch. 541 ; 68 L. J. Ch. 242). He cannot under a defence of *plene administravit* prove the existence of debts, even of a higher degree, to other creditors, which he has not paid ; a retainer of assets to meet those debts must be pleaded specially.

As to the priorities of different kinds of debts, see *post*, p. 652.

A defence of *plene administravit* may be pleaded by an executor *de son tort*, if he has duly administered the assets. (See *Oxenham* v. *Clapp*, 2 B. & Ad. 309.)

A retainer by the executor or administrator for his own debt is sometimes pleaded specially (see a form of plea in *Lyttleton* v. *Cross*, 3 B. & C. 317), and this seems the safer course, though formerly it was unnecessary so to plead it, as the facts constituting this defence might be given in evidence under a general defence of *plene administravit* or *plene administravit præter* (2 Wms. Exs., 10th ed., p. 1587. *In re Marvin*, *supra*).

An executor or administrator has, in general, a right of retainer for his own debts in preference to all debts of equal or lower degree (Wms. Exs., 10th ed., p. 785 ; see *In re Belham*, [1901] 2 Ch. 52 ; 70 L. J. Ch. 474). There is no such right of retainer on the part of an executor *de son tort*. (See *Coulter's case*, 5 Co. 31 a ; Wms. Exs., 10th ed., p. 193.)

Under a defence of *plene administravit*, the defendant cannot prove the payment of, or retainer for, debts which are not enforceable by reason of the provisions of the Statute of Frauds (*In re Rownson*, 29 Ch. D. 358 ; 54 L. J. Ch. 950), though he may prove payment of, or retainer for, debts which are barred by the Statute of Limitations (*Ib.* ; *Budgett* v. *Budgett*, [1895] 1 Ch. 202 ; 64 L. J. Ch. 209).

An executor has the power to compromise debts and claims (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 21), and one executor can compromise with his co-executor (*In re Houghton*, [1904] 1 Ch. 622 ; 73 L. J. Ch. 317).

If the plaintiff is in doubt, upon a defence of *plene administravit* being pleaded, whether to go to trial upon that issue, or to take judgment of future assets *quando acciderint*, it may be convenient to administer interrogatories to obtain a discovery of the assets and debts of the testator or intestate, and of the disposal of the assets by the defendant. (See a form, Chitty's Form, 13th ed., p. 270).

The judgment against the assets of the deceased may be enforced by *fi. fa.* Before the Judicature Acts, if the sheriff returned *nulla bona testatoris*, and also a *devastavit*, the plaintiff might immediately sue out a *fi. fa. de bonis propriis* against the defendant, and it does not appear that the Judicature Acts have made any difference in this respect. (See Chitty's Pr., 14th ed., 1124.)

If the sheriff returns *nulla bona testatoris* only, the plaintiff may proceed by action on the judgment, suggesting a *devastavit*, and, if he succeeds in such action, he will be entitled to judgment and execution against the defendant personally, as in ordinary cases (2 Wms. Exs., 10th ed., pp. 1598 *et seq.* ; Chitty's Pr., 14th ed., p. 124 ; *Coward* v. *Gregory*, L. R. 2 C. P. 153 ; 36 L. J. C. P. 1 ; *Jewsbury* v. *Mummery*, L. R. 8 C. P. 56 ; 42 L. J. C. P. 22).

The judgment of assets *quando acciderint* may, after assets have come to the hands of the executor or administrator, and after demand has been made upon him for payment, be enforced by applying for leave to issue execution under Ord. XLII., rr. 9, 23 (Chitty's Pr., 14th ed., 955 ; 2 Wms. Exs., 10th ed., p. 1603).

Defence of Plene Administravit Præter (*q*).

The defendant has fully administered all the personal estate and effects of the said *G. H.* [*the deceased*] which have ever come to the hands of the defendant as executor [*or*, administrator] to be administered, except personal estate and effects of the value of £——, and, with that exception, the defendant had not at the commencement of this action, or at any time afterwards, nor has he, any personal estate or effects of *G. H.* in his hands as executor [*or*, administrator] to be administered.

Defence of Plene Administravit by the Executor of an Executor (*r*).

The said *G. H.* in his lifetime fully administered all the personal estate and effects of the said *J. K.* which ever came to the hands of the said *G. H.* as executor to be administered, and the defendant has fully administered all the personal estate and effects of the said *J. K.* which have ever come to the hands of the defendant as executor to be administered, and the defendant had not at the commencement of this action, or at any time afterwards, nor has he, any personal estate or effects of the said *J. K.* in his hands as executor to be administered.

Defence of a Judgment Debt outstanding against the Deceased, and Plene Administravit Præter (*s*).

On the —— ——, 19—, in the lifetime of the said *G. H.*, *J. K.*, in the —— Division of the High Court of Justice, by the judgment of the said Court dated that day in an action 19—, K. No.—, recovered against the said *G. H.* £——, and £—— for costs, which said judgment [was duly registered, and] is still in force and unsatisfied, and the defendant has fully

(*q*) The plaintiff may go to trial upon this defence, or may apply under Ord. XXXII., r. 6, for leave to sign judgment to the extent of the assets acknowledged, and of future assets *quando acciderint* for the residue of his debt and costs. (See Chitty's Forms, 13th ed., p. 551.) The defendant might pay into Court the amount of assets admitted, but this would not generally be expedient where there are other debts of equal degree, as by allowing the plaintiff to obtain judgment, the defendant might plead the judgment, even to a pending action for a debt of equal degree.

(*r*) An executor of a sole or surviving executor is in general chargeable as being in the position of executor of the original testator (1 Wms. Exs., 10th ed., pp. 180 *et seq.*; *Wankford* v. *Wankford*, 1 Salk. 306). Where, therefore, an executor of an executor is sued as executor of the original testator, and desires to plead *plene administravit*, the above form should be altered by inserting a prefatory averment that he is merely the executor of the person who was executor of the original testator.

(*s*) An executor or administrator must plead specially the existence of debts of a higher nature than the debt sued for, and no assets *ultra*; and all such debts must be stated in the defence, as he cannot give these facts in evidence under the defence of *plene administravit*. (See note (*p*), *supra*; 2 Wms. Exs., 10th ed., p. 1584.) The plaintiff may join issue on this defence, or reply specially to it, or may reply under Ord. XXXII., r. 6, for judgment of future assets, *quando acciderint*, after satisfaction

administered all the personal estate and effects of the said *G. H.* which have ever come to the hands of the defendant as executor [*or*, administrator] to be administered, except personal estate and effects, the value of which is not sufficient to satisfy the said judgment debt, and the defendant had not at the commencement of this action, or at any time afterwards, nor has he, any personal estate or effects of the said *G. H.* in

---

of the debts mentioned in the defence. (See form of such judgment, Chitty's Forms, 13th ed., p. 552.)

As to the order of distribution of the estate of deceased persons, and the priorities of different kinds of debts, see 1 Wms. Exs., 10th ed., pp. 753 *et seq.*; and Roscoe's N. P. Ev., 17th ed., p. 1148.

Under the law as it stood previously to the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), specialty debts and rent were considered as being of higher degree than simple contract debts, and had priority of such last-mentioned debts. (See *In re Hyatt*, 33 Ch. D. 109.) But by sect. 1 of that Act such priority is abolished in cases of persons dying after 1869.

Debts on judgments obtained against the deceased have still, subject to the enactments as to registration, priority over all other debts of the deceased, with the exception of debts due to the Crown by record or specialty (*In re Bentinck*, [1897] 1 Ch. 673; 66 L. J. Ch. 359); and of some particular debts which have preference under certain statutes (2 Wms. Exs., 10th ed., pp. 762 *et seq.*). The priority of a judgment against the deceased is irrespective of the nature of the original debt or liability in respect of which the judgment was recovered, and priority in point of time as between different creditors who have obtained judgments against the deceased is immaterial (*Ib.*). Such judgments are not entitled to priority over other debts of the deceased unless they have been duly registered (or re-registered) within five years before his death (23 & 24 Vict. c. 38, ss. 3—5, and statutes there cited; *Kemp* v. *Waddingham*, L. R. 1 Q. B. 355; 35 L. J. Q. B. 114; *Van Gheluire* v. *Nerinckx*, 21 Ch. D. 189; 51 L. J. Ch. 929).

A judgment obtained against an executor or administrator stands on a different footing, as it has no priority, except with regard to debts of equal degree with that in respect of which the judgment was obtained, and, as between different creditors of equal degree who obtain judgments against an executor or administrator, he who first obtains such judgment is entitled to precedence (2 Wms. Exs., 10th ed., p. 763; see *Williams* v. *Williams*, L. R. 15 Eq. 270; 42 L. J. Ch. 158; and *Hanson* v. *Stubbs*, 8 Ch. D. 154; 47 L. J. Ch. 671). Where an executor or administrator pleads a judgment obtained against himself, and no assets *ultra*, the defence should show that the debt in respect of which such judgment was recovered was equal or superior in degree to the debt claimed in the subsequent action. The above-mentioned enactments with respect to registration are confined to judgments obtained against the deceased, and do not apply to judgments obtained against executors or administrators, and such last-mentioned judgments are therefore entitled without registration to preference over other debts of the same degree (*Gaunt* v. *Taylor*, 3 M. & G. 886; *Jennings* v. *Rigby*, 33 Beav. 198; 33 L. J. Ch. 149). Accordingly, in cases within the 32 & 33 Vict. c. 46, above cited, an unregistered judgment obtained against an executor or administrator in an action on a simple contract debt of the deceased (before an administration decree has been made) has priority in administration over specialty debts as well as over simple contract debts in respect of which no judgment has been obtained (*Williams* v. *Williams*, *supra*; *Hanson* v. *Stubbs*, *supra*; *Smith* v. *Morgan*, 5 C. P. D. 337; 49 L. J. C. P. 410; *In re Maggi*, 20 Ch. D. 545; 51 L. J. Ch. 560).

Where a judgment obtained against an executor for a debt is void against creditors, as not having been filed under the Debtors Act, 1869 (32 & 33 Vict. c. 62), the original debt is not merged in the judgment and the executor, in an action against him by creditors, may show the payment of that debt, if not inferior in kind to the plaintiff's under a defence of *plene administravit* (*Vibart* v. *Coles*, 24 Q. B. D. 364; 59 L. J. Q. B.

his hands as executor [*or*, administrator] to be administered, except the said personal estate and effects, the value of which is not sufficient to satisfy the said judgment debt, and which are liable to satisfy the same.

Defence of a Judgment recovered against the Defendant as Executor, and Plene Administravit Prœter (*t*).

After the death of the said *G. H.*, *J. K.* commenced an action (19—, K. No. —) against the now defendant as executor of the said *G. H.* for the recovery of £—— [which the said *G. H.* in his lifetime covenanted by deed, dated the —— ——, 19—, to pay to the said *J. K.*, and which was due and unpaid to the said *J. K.* at the time of the death of the said *G. H.*], and in the said action, on the —— ——, 19—, [*add, if the fact was so*, after the commencement of this action], the said *J. K.* recovered against the defendant as such executor by the judgment of the said Court £——, and £—— for costs, which said judgment is still in force and unsatisfied, and the defendant has fully administered all the personal estate and effects of the said *G. H.* which have ever come to the hands of the defendant as executor to be administered, except personal estate and effects, the value of which is not sufficient to satisfy the said judgment debt, and the defendant had not at the commencement of this action, nor has he since had, nor has he, any personal estate or effects of the said *G. H.* in his hands to be administered, except the said personal estate and effects, the value of which is not sufficient to satisfy the said judgment debt, and which are liable to satisfy the same.

Reply to a set-off of a debt accruing due after the death of the intestate, pleaded in an action by an administrator to recover a debt due to the intestate, that before action an order was made in an administration action to take an account of the debts and liabilities affecting the estate of the deceased, of which the defendant had notice before action : see Newell v. *National Provincial Bank*, 1 C. P. D. 496, 497.

---

152). A foreign judgment is regarded merely as a debt by simple contract (1 Wms. Exs., 10th ed., p. 763).

Where in an action against an executor or administrator, the defendant pleads an outstanding judgment and no assets *ultra*, the plaintiff may reply any matter defeating the judgment, as that it was satisfied, or that it was obtained or is kept on foot by fraud and collusion between the executor and the creditor (2 Wms. Exs., 10th ed., p. 1587).

An executor is not in general bound to set up a defence of the Statute of Limitations to an action brought against him, and may pay a debt barred by the statute without being guilty of a *devastavit* (*In re Rowcson*, 29 Ch. D. 358 ; *Midgley* v. *Midgley*, [1893] 3 Ch. D. 282). He may not, however, pay such a debt after it has been judicially declared that it is barred by the statute (*Midgley* v. *Midgley*, *supra*).

A judge of the Chancery Division, in whose Court an administration is pending, may order actions in other Divisions, by or against the executors or administrators, to be transferred to his Court. (See Ord. XLIX., r. 5.)

(*t*) See preceding note.

Defence that Notices were given and Assets distributed by the Defendant under 22 & 23 Vict. c. 35, s. 29, before he had Notice of the Plaintiff's Claim (*u*).

Notices were given and assets distributed by the defendant under Statute 22 & 23 Vict. c. 35, s. 29, before he had notice of the plaintiff's claim.

Particulars of the Notices.

Advertisements in the "Times" of —— ——, 19—.
" " "New York Herald," —— ——, 19—.
" " "Bombay Gazette," of —— ——, 19—.

[*Give the titles of the newspapers and the dates of those in which the advertisement appeared.*]

(*See R. S. C.*, 1883, *App. D., Sect. II., para.* 7.)

A like Defence: see Doughty v. *Townson*, 43 Ch. D. 1.

Defence to an Action charging the Defendant for Rent as Assignee of the Term, that the Defendant became Assignee only as Executor, and that the Premises yielded no Profit, and Plene Administravit (*v*).

The defendant was assignee of the term referred to in the statement of claim only as executor of the last will of the said *G. H.*, who died during the

---

(*u*) An executor or administrator may protect himself from liability in respect of claims of which he has no notice by publishing notices under 22 & 23 Vict. c. 35, s. 29, inviting creditors to send in their claims before a certain date; but it is expressly provided that the right of a creditor or claimant to follow assets into the hands of the persons who may have received the same is not to be thereby prejudiced. (See *Clegg* v. *Rowland*, L. R. 3 Eq. 368; *Newton* v. *Sherry*, 1 C. P. D. 246; 45 L. J. C. P. 257; *Doughty* v. *Townson*, 43 Ch. D. 1; *In re Bowden*, 45 Ch. D. 444; 59 L. J. Ch. 815.) As to this right, see *ante*, pp. 172, 231.

(*v*) The executor of a deceased tenant may be charged at the suit of the landlord for the rent accrued due since the decease of the tenant either as executor of the deceased or in his own right as assignee of the term. (See *ante*, p. 230.) In the latter case he may deny that he is assignee, and may show that he is executor only and has never entered, if such is the fact (see *Wollaston* v. *Hakewill*, 3 M. & G. 297, 320; *Kearsley* v. *Oxley*, 2 H. & C. 896; *Rendall* v. *Andreae*, 61 L. J. Q. B. 630; 8 Times Rep. 615); or, if he has entered, he may plead that he is assignee as executor only, and that the premises yielded no profits, or no profits except a sum admitted, and that he has no other assets. (See *Wollaston* v. *Hakewill*, 3 M. & G. 297, 321; *In re Bowes*, 37 Ch. D. 128; 57 L. J. Ch. 455; *Rendall* v. *Andreae*, *supra*; Woodfall, 17th ed., pp. 326 *et seq.*; and see *ante*, p. 230.) The value of the premises under such defence is what the executor by reasonable diligence might have derived from them (*Hornidge* v. *Wilson*, 11 A. & E. 655; *Hopwood* v. *Whaley*, 6 C. B. 744). The law is the same with respect to the administrator of a deceased tenant. As to the executor's liability on covenant other than that to pay rent, see *Sleap* v. *Newman*, 12 C. B. N. S. 116.

An executor or administrator may protect himself from claims under the lease by availing himself of the provisions of 22 & 23 Vict. c. 35, s. 27. (See *ante*, p. 231; *Byrne* v. *Brown*, 22 Q. D. D. 657; 58 L. J. Q. B. 410.)

said term, and the defendant became and was possessed of the demised premises as such executor, and not otherwise, and since the death of the said *G. H.* the defendant has not derived, and could not have derived, any profit from the said premises, and the said premises have not, since the death of the said *G. H.*, yielded any profit whatever, and the defendant has fully administered, &c. [*Proceed as in the above form of the defence of plene administravit, ante*, p. 649.]

FORBEARANCE (*w*).

Defence denying Consideration for the Defendant's Promise.

There was no consideration for the alleged agreement. The claim in the said action was frivolous and groundless, as the plaintiff at the time of the making of the alleged agreement well knew.

FOREIGN LAW (*x*).

Defence of Discharge by French Bankruptcy (x).

The bill of exchange sued on was accepted by the defendant at ——, in France, and was expressly made payable there, and on the —— ——, 19—, before the commencement of the action and after the said bill became due and payable, proceedings in the nature of bankruptcy proceedings were commenced against the defendant in the Tribunal of Commerce at ——, in France, and thereupon such proceedings were had in the said Court that

(*w*) See *ante*, p. 177.

(*x*) A defence on the ground of foreign or colonial law must be specially pleaded.

Foreign law, including that of our colonies, is in the Courts of this country matter of fact to be decided on evidence (*Concha* v. *Murrieta*, 40 Ch. D. 543, 550).

A mere allegation that an instrument depending on foreign law is null and void is too vague (*Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1). A debt or liability arising in a colony, or in a foreign country, if discharged by the law of that colony or country, is regarded as discharged in the Courts of this country, if according to such colonial or foreign law the discharge there is an extinguishment of the debt or liability, and not merely a bar to the remedy (*Phillips* v. *Eyre*, L. R. 6 Q. B. at p. 30; *Ellis* v. *M'Henry*, L. R. 6 C. P. at p. 234; 40 L. J. C. P. 109; and see *post*, p. 722, and *ante*, p. 593), but a debt arising in this country is not discharged by a foreign bankruptcy (*Gibbs* v. *Société Industrielle*, 25 Q. B. D. 399; 59 L. J. Q. B. 510; *New Zealand Loan Co.* v. *Morrison*, [1898] A. C. 349; 67 L. J. C. P. 10).

Whether a particular contract is to be governed by foreign law is in general a matter to be decided upon the language of the contract itself, as read by the light of the subject matter and of the surrounding circumstances so as to ascertain the intention of the parties (*Jacobs* v. *Crédit Lyonnais*, 12 Q. B. D. 589, 599—601; 53 L. J. Q. B. 156; *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202; *South African Breweries* v. *King*, [1900] 1 Ch. 273; 69 L. J. Ch. 171; *Spurrier* v. *La Cloche*, [1902] A. C. 446; 71 L. J. P. C. 101; and see Leake on Contracts, 4th ed., p. 135).

the defendant was on the —— ——, 19—, discharged from all debts and liabilities existing at that time, and the said bill was a debt or liability then existing, and the defendant was thereby discharged from all liability in respect thereof.

Defence that a Foreign Indorsement on a Bill of Exchange was invalid, ante, p. 612.

Defence of French Law: see Jacobs v. *Crédit Lyonnais*, 12 Q. B. D. 589.

Defence of Colonial Law and Reply thereto stating an Objection in Point of Law: see Lee v. *Abdy*, 17 Q. B. D. 809.

Fraud and Misrepresentation (*y*).

Defence that the Contract was procured by the Fraud of the Plaintiff (*z*).

The defendant was induced to make the agreement [*or*, to accept, *or*, indorse the bill, *or*, to make the promissory note, *or*, to give the guarantee, *or*, to execute the deed] alleged in the statement of claim by the fraud of the plaintiff.

(*y*) The defence of fraud must be specially pleaded (Ord. XIX., r. 15, cited *ante*, p. 523), and particulars of the alleged fraud (with dates and items, if necessary) must be stated in the pleadings (Ord. XIX., r. 6; *ante*, p. 37; see R. S. C., 1883, App. D., Sect. IV., cited *ante*, p. 604). A defence pleaded in the first of the above forms is taken to imply that the defendant has duly disaffirmed the contract, see *Dawes* v. *Harness*, L. R. 10 C. P. 166.

By Ord. XIX., r. 22 (cited *ante*, p. 9), knowledge or fraudulent intention may be alleged as a fact without setting out the circumstances from which it is to be inferred.

(*z*) A contract procured by fraud is voidable at the election of the party defrauded, but it remains valid until he has duly disaffirmed it (*Selway* v. *Fogg*, 5 M. & W. 83; *Murray* v. *Mann*, 2 Ex. 538; *Deposit Life Ass. Co.* v. *Ayscough*, 6 E. & B. 761; 26 L. J. Q. B. 29; *Clarke* v. *Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223; *Oakes* v. *Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949; *Reese River Co.* v. *Smith*, L. R. 4 H. L. 64; 39 L. J. Ch. 849). The right to disaffirm must be exercised without unreasonable delay after the discovery of the fraud, and while the parties remain in, or can be restored to, their original position (*Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex. 26; 41 L. J. Ex. 17; *Morrison* v. *Universal Marine Ins. Co.*, L. R. 8 Ex. 197; 42 L. J. Ex. 115; *Erlanger* v. *New Sombrero Co.*, 3 App. Cas. 1218, 1277; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 239; *Gordon* v. *Street*, [1899] 2 Q. B. 641, 649; 69 L. J. Q. B. 45; and see *Adam* v. *Newbigging*, 13 App. Cas. 308; 57 L. J. Ch. 1066). Delay, if unreasonable, affords strong evidence that the defrauded party has elected to affirm the contract (*Ib.*). If the position of the parties has been changed, the party seeking to disaffirm the contract must be able to show that he has in effect restored the original state of things or taken all necessary steps for that purpose (*Deposit Life Ass. Co.* v. *Ayscough, supra*; *Clarke* v. *Dickson, supra*; *Sheffield Nickel, &c. Co.* v. *Unwin*, 2 Q. B. D. 214; 46 L. J. Q. B. 299; *Bwlch y Plwm Mining Co.* v. *Baynes*, L. R. 2 Ex. 324; 36 L. J. Ex. 183; *Urquhart* v. *Macpherson*, 3 App. Cas. 831).

Particulars of the fraud are as follows :—

[In order to induce the defendant to make the alleged agreement the plaintiff on the —— ——, 19—, verbally represented to the defendant, falsely and fraudulently, that ——, whereas, as the plaintiff then well knew, the fact was that ——.]

The right of disaffirming the contract is in many cases subject to the rights acquired by innocent third parties through or under the contract before any disaffirmance of it (*Clough* v. *London & N. W. Ry. Co.*, *supra* ; *Oakes* v. *Turquand*, *supra* ; *Reese River Co.* v. *Smith*, *supra* ; *Tennent* v. *City of Glasgow Bank*, 4 App. Cas. 615 ; 40 L. T. 694 ; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317 ; 42 L. T. 194).

A contract is in general voidable for the fraud of an agent through whom it was made, although the principal was not personally cognisant of the fraud (*Udell* v. *Atherton*, 7 H. & N. 172 ; 30 L. J. Ex. 337 ; *Attwood* v. *Small*, 6 Cl. & F. 232, 448 ; *Murray* v. *Mann*, 2 Ex. 538 ; *Ludgater* v. *Love*, 44 L. T. 694 ; and see *ante*, p. 398). This rule applies in general to contracts made with a public company through directors or agents of the company acting within the scope of their authority ; and a person who has been induced to take shares in the company by the fraudulent representations of such directors or agents, may disaffirm the contract as above mentioned and repudiate the shares, provided he does so before anything has been done or happened disentitling him to rescind (*Oakes* v. *Turquand*, *supra* ; *Tennent* v. *City of Glasgow Bank*, *supra* ; *Reese River Co.* v. *Smith*, *supra* ; *Bwlch y Plwm Mining Co.* v. *Baynes*, L. R. 2 Ex. 324 ; 36 L. J. Ex. 183). Where this defence is relied upon as an answer to an action in which the defendant is charged as a shareholder, the defendant must show that he has ceased to be a shareholder, or that on discovering the fraud he repudiated and renounced the shares, and took all necessary steps for relieving himself of his liability in respect of them (*Ib.* ; *Deposit Life Ass. Co.* v. *Ayscough*, *supra* ; *Clarke* v. *Dickson*, *supra* ; *In re London Fire Ins. Co.*, 24 Ch. D. 149, 154). A shareholder seeking to repudiate his shares must not delay such repudiation after he has become aware of the fraud on which he relies as furnishing the ground for such repudiation (*Ogilvie* v. *Currie*, 37 L. J. Ch. 541 ; *Powles' case*, L. R. 4. Ch. 500 ; 38 L. J. Ch. 318 ; *Sharpley* v. *South & East Coast Ry. Co.*, 2 Ch. D. 685) ; and his right to rescind the contract is lost if after discovering the fraud he by his conduct acquiesces in it, as for example by receiving dividends or paying calls on his shares (*Nicol's case*, 3 D. & J. 431 ; *Scholey* v. *Central Ry. of Venezuela*, L. R. 9 Eq. 266 n.).

A person induced to become such shareholder by the fraud of the Company cannot after the commencement of a winding up repudiate his liability as against creditors of the company not parties to the fraud (*Oakes* v. *Turquand*, *supra* ; *Collins* v. *City & County Bank*, 3 C. P. D. 282 ; 47 L. J. C. P. 681) ; and in such cases, as he cannot claim damages for the fraud in an action against the company, his only remedy appears to be to sue the company's directors or officers for damages for their misrepresentations (*Ib.* ; *Houldsworth* v. *City of Glasgow Bank*, *supra*). The time when the petition is filed on which the company is ultimately wound up, is regarded as the commencement of the winding up (*Whiteley's case*, [1900] 1 Ch. 365 ; 69 L. J. Ch. 250).

As a general rule the fraud necessary to entitle the defrauded party to rescind a contract must be that of the other contracting party or his agent, but a person who has made an application to a company for shares based upon a prospectus issued by the promoters of the company before its formation and has had his application accepted by the allotment of shares may rescind the contract if he discovers that the representations in the prospectus which induced him to apply were untrue (*In re Metropolitan Coal Assoc.*, [1892] 3 Ch. 1, 13 ; 61 L. J. Ch. 741 ; *Lynde* v. *Anglo-Italian Hemp Co.*, [1896] 1 Ch. 178 ; 65 L. J. Ch. 96). It is not a sufficient answer to a charge of fraud, that the party defrauded had means of knowledge on the subject, and would have learnt the real facts but for his negligence in not making sufficient inquiry (*Redgrave* v. *Hurd*, 20 Ch. D. 1 ; 51 L. J. Ch. 113 ; *Venezuela Ry. Co.* v. *Kisch*, L. R. 2 H. L. 99 ;

Defence that the Defendant was induced to Contract by Fraud, and afterwards repudiated the Contract.

The defendant was induced to make the alleged contract [*or*, agreement] by the fraud of the plaintiff, and within a reasonable time after he had notice of the said fraud, and before he had received any benefit under the said contract [*or*, agreement], he repudiated and abandoned the same.

Particulars are as follows:—[*Here state particulars of the fraud and repudiation.*]

Defence to an Action for the Price of Goods sold and delivered, that the Defendant was induced to Purchase the Goods by Fraud, and returned them on Discovery of the Fraud.

The defendant was induced to buy the said [horse] by the fraud of the plaintiff, and on the —— ——, 19—, and within a reasonable time after he had notice of the said fraud he repudiated the said purchase and returned the said [horse] to the plaintiff.

Particulars of the fraud are as follows:—[*Here state particulars, as, for instance,* The plaintiff at the time of the sale of the horse represented to the defendant [verbally, *or, as the case may be*], for the purpose of inducing him to purchase the same, that the said horse was then sound, whereas the said horse was then unsound, as the plaintiff then well knew (*here state the nature of the unsoundness*).]

See other forms, "*Sale of Goods,*" *post,* p. 756.

Defence to an Action by a Company for Calls, that the Defendant was induced to become a Shareholder by Fraud, and repudiated the Shares.

1. The defendant was induced to become a holder of the said shares by the fraud of the plaintiffs.

Aarons Reefs v. *Twiss*, [1896] A. C. 273, 279; 65 L. J. P. C. 54). As to what amounts to "inducing," see *Ib.*, and *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459.

Where fraud is relied upon it is sometimes advisable, not merely to plead the fraud by way of defence, but also to allege it by way of counterclaim, so as to claim damages or such further relief as may be required.

As to the defence that the contract between the plaintiff and the defendant was entered into for the illegal purpose of defrauding a third party, see *Willis* v. *Baldwin*, 2 Doug. 450; *Jackson* v. *Duchaire*, 3 T. R. 551; *Malla'ieu* v. *Hodgson*, 16 Q. B. 689; 20 L. J. Q. B. 339; *Britten* v. *Hughes*, 5 Bing. 460; *Begbie* v. *Phosphate, &c. Co.* 1 Q. B. D. 679; 44 L. J. Q. B. 233; *Scott* v. *Brown*, [1892] 2 Q. B. 724; 61 L. J. Q. B. 738.

See further as to fraud, *post*, pp. 727, 853, and as to innocent misrepresentations *post*, pp. 739, 771.

Particulars:—

In order to induce the defendant to apply for [*or*, purchase] the said shares the plaintiff falsely and fraudulently represented to the defendant that [*set out the representation*].

The said representation was in writing and is contained in a prospectus dated the —— ——, 19—, issued by the plaintiffs [*or, as the case may be*].

The said representation was false to the plaintiffs' knowledge in the following respect, viz., [*here set out the particulars*].

2. On the —— ——, 19—, and within a reasonable time after he had notice of the said fraud, and before he had received any benefit from or in respect of the said shares or any of them, the defendant by a letter dated the —— ——, 19—, repudiated and disclaimed the said shares and all liability in respect thereof.

Defence to an Action for Calls that the Defendant was induced to take Shares by Misrepresentation and Fraud, and Counterclaim for Rescission and Damages.

Defence and Counterclaim.

Defence.

1. The defendant was induced to and did apply for and take the said shares on the faith of a prospectus dated the —— ——, 19—, issued to the public and the defendant by the plaintiff company for the purpose of inducing the public and the defendant to apply for and take shares in the plaintiff company.

2. The said prospectus contained (inter alia) the following representations and statements:—[*State the representations relied on, as, for instance.*]

(a) That there existed at —— ——, large areas of coal.

(b) That the plaintiff company was formed for the purpose of acquiring all the right, title, and interest in and developing the mining rights in the said large areas of coal.

(c) That the plaintiff company had obtained concessions, which embraced an area of —— acres, sufficient for the establishment of several collieries, and that of this area —— acres were vested in the plaintiff company, and —— acres further were vested in nominees for the plaintiff company.

(d) That the plaintiff company held authorities direct from the Crown, under the —th section of the —— —— Mining Act, 1894, and that such authorities gave the right to mine the coal under the water of —— harbour.

(e) That the company's tenure was subject to certain conditions, but that such conditions were specially favourable to the plaintiff company.

(f) That the existence of the —— seam had been recently proved by the Government under the plaintiff company's property.

3. The whole of the aforesaid representations and statements were untrue and contrary to the fact, and were false and misleading, and concealed the truth in the following respects, viz. :

(a) The alleged large areas of coal did not exist at all.

(b) The plaintiff company did not and could not acquire any right, title, or interest in, nor could it develop the alleged mining rights. Neither the alleged areas of coal nor the alleged mining rights existed at all. Nor had the plaintiff company acquired any right, title, or interest therein. Moreover such right, title, or interest could only be acquired by a grant from the Crown, which would only be granted for a limited period, and subject to power to determine the same at any time.

(c) The plaintiff company had not acquired, nor could it in point of law or of fact acquire the alleged concessions, nor were the said acres vested in the plaintiff company.

(d) The plaintiff company did not hold the alleged authorities, nor did such authorities (if any) give the right to mine the coal under the waters of —— harbour. Moreover the alleged authorities (if any) were limited in point of time, and subject to a liability to be determined at any time.

(e) The conditions to which the plaintiff company's tenure (if any) was subject were not specially favourable or even favourable to the plaintiff company.

(f) The existence of the —— seam had not been proved by the Government or anyone else under the plaintiff company's property. The said seam did not exist under the plaintiff company's property (if any).

4. The plaintiffs wilfully and knowingly concealed the following material facts from the defendant by not stating the same in the prospectus (that is to say) :

(a) That burnt and valueless coal only was found in the shaft nearest to the property the subject of the plaintiffs' concessions.

(b) That burnt coal was found at the Southern collieries near —— which runs for several miles.

(c) That no bore was made or coal found under —— harbour.

(d) That all the known facts or data pointed to the conclusion that no coal existed under —— harbour, or that any coal that so existed was burnt coal and not workable.

(e) That although it was essential to the success of the plaintiff company that they should acquire means of access from their pits to the harbour, no such means existed, or were or could be acquired.

(f) That the option to purchase the site which the plaintiff company had acquired gave it only the surface, and gave it no right, and that

the plaintiff company had in fact no right to sink pits or to dig for or work or get coal.

(g) That the plaintiff company could not tunnel under the foreshore, and had no means or right of access to the alleged coal under the harbour from the alleged pits.

(h) That without a grant from the Crown the company would have no right to work the coal, and that such grant, even if obtained, would only endure for twenty-one years. No such grant has been obtained.

(i) That the company could not acquire any right to cross or interfere with the foreshore without a grant from the Crown; and that even if it obtained such a grant, such grant would only endure for twenty-eight years, and would be terminated at any time at the will of the Crown.

5. The defendant on the faith of the said statements and representations and on the faith of the said prospectus fully disclosing all material facts relative to the plaintiff company applied for and was allotted the said shares, and in respect thereof paid to the plaintiff company the following sums of money—that is to say, on or about the —— ——, 19—, £——; on or about the —— ——, 19—, £——; and on or about the —— ——, 19—, £——.

6. In the alternative the defendant says that the plaintiffs made the said representations falsely and fraudulently, knowing the same to be untrue, or with reckless carelessness as to the truth or falsity thereof, and with intent that the same should be, as in fact they were, acted on by the defendant.

Counterclaim.

7. The defendant repeats paragraphs 1 to 6 both inclusive of the Defence.

8. In the alternative the defendant says that the consideration for which he paid the said sums of £——, £——, and £——, wholly failed, and he seeks to recover the same as money had and received by the plaintiffs to the use of the defendant.

The defendant claims—

(1) That the contract between himself and the plaintiff company may be rescinded and declared null and void.

(2) That the register of the plaintiff company may be rectified by the removal of the defendant's name therefrom.

(3) That the said sums of £——, £——, and £——, may be repaid to him by the plaintiff company with interest thereon.

Defence to Claim for the Price of Shares, that the Defendant was induced by Fraud, to employ the Plaintiff to purchase them, and that the Plaintiff endeavoured to sell his own Shares to the Defendant and Counterclaim for rescission, etc.

Defence and Counterclaim.

Defence.

1. The defendant denies that the plaintiff sold or transferred to the defendant the said shares or any part thereof, or that he ever requested the plaintiff to do so.

2. In order to induce the defendant to employ the plaintiff as his agent to purchase for the defendant 100 shares of £1 each in the —— Company Limited, the plaintiff on the —— ——, 19—, verbally represented to the defendant that the said company was a good concern, that he being a director of the said company and having special means of judging of its prospects knew that it was a good concern and that the defendant would never regret the purchase, and that he had solely the defendant's welfare at heart in urging him to purchase the said shares. That he could purchase the shares cheap, and that he could get them for 12*s.* 6*d.* each and not for less, and that he could only get them so cheap by reason of his being such director.

3. Acting on the faith of the aforesaid representations the defendant was induced to and did employ the plaintiff as his agent to purchase the said shares and the plaintiff subsequently on the —— ——, 19—, in order to induce the defendant to accept a transfer of them, verbally represented to the defendant that he (the plaintiff) had purchased the said shares for the defendant at the said price, and thereby and by means of the representation set out in paragraph 2 hereof he induced the defendant to accept a transfer of them and afterwards to pay him £5 on account thereof, which the defendant accordingly did.

4. The defendant has since discovered and the fact was and is that the whole and each of the aforesaid representations were and was false and untrue. The company was a rotten concern and its shares and prospects worthless and the plaintiff's real motive was that he might transfer to the defendant certain worthless shares in the company that the plaintiff already held. Further or in the alternative the plaintiff well knew the said representations to be false and untrue and made them fraudulently.

5. The plaintiff as and for the shares that he represented he had purchased for the defendant at the said price as aforesaid, fraudulently and in breach of faith and of his duty as the defendant's agent purported to transfer to the defendant the shares referred to in the statement of claim, but the said shares were in fact part of a large number of shares which the plaintiff then previously held and which he had a long time previously purchased for himself at a much less price and which he was desirous of getting rid of and which were and are worthless.

6. The plaintiff fraudulently concealed the fact that the plaintiff was himself the owner of the said shares from the defendant.

7. In the alternative if the plaintiff sold the said shares to the defendant the defendant says that the plaintiff made the aforesaid representations in order to induce him to purchase them and that he purchased them on the faith thereof.

Counterclaim.

8. The defendant repeats the defence and claims—

(a) That the contract with respect to the said shares be rescinded and declared void.

(b) That the plaintiff be ordered to accept a re-transfer of the said shares.

(c) Repayment of the said £5.

(d) Damages.

See forms of Defence of Fraud to Claims on Bills of Exchange, ante, pp. 603, 606.

Frauds, Statute of, and Sale of Goods Act, 1893 (*a*).

Defence under Sect. 4 of the Sale of Goods Act, 1893, to an Action upon a Contract for the Sale of Goods of the Value of £10 or upwards (b).

The contract [*or*, agreement] sued on (if any) was a contract for the sale of goods of the value of £10 or upwards, and the requirements of section 4 of

(*a*) Where the defendant relies on the fact that the requirements of the Statute of Frauds or s. 4 of the Sale of Goods Act, 1893, have not been complied with, the defence must be pleaded so as to show distinctly that the defendant intends to rely upon the statute, and it is not sufficient merely to traverse allegations made by the plaintiff in anticipation of objections founded on the statute. (See Ord. XIX., rr. 15, 20; *Clarke* v. *Callow*, 46 L. J. Q. B. 53; *Manchester Bank* v. *Cook*, 49 L. T. 674.) It has been held in the Chancery Division that it is sufficient to state generally that the Statute of Frauds has not been complied with, and that the particular section relied upon need not be stated (see *James* v. *Smith*, [1891] 1 Ch. 384; and see the form, R. S. C., 1883, App. D., Sect. II., *post*, p. 772); but in actions in the King's Bench Division the section relied upon should usually be specified. (See the forms, R. S. C., 1883, App. D., Sect. IV.)

Where it cannot be gathered by reference to the statement of claim what is the ground of objection relied upon under a defence of the statute, the allegation of non-compliance with the requirements of the statute should be preceded by a short statement of the nature of the contract, showing what is the objection intended to be raised under the statute. (See the form given *supra*.) A defence founded upon the Statute of Frauds cannot be raised by demurrer (see *Catling* v. *King*, 5 Ch. D. 660; 46 L. J. Ch. 384; *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51, 58; *Morgan* v. *Worthington*, 38 L. T. 443), or by an application to strike out the statement of claim (*Fraser* v. *Pape*, 91 L. T. 340; 20 Times Rep. 798), but must be pleaded as a defence.

Sections 1, 2, and 3 of the Statute of Frauds relate to leases and to the creation and transfer of estates and interests in land. (See pp. 216, 712.) Sections 4 and 17 are dealt with *post*, pp. 663 *et seq.*

(*b*) The provisions of s. 17 of the Statute of Frauds (which is numbered 16 in the

the Sale of Goods Act, 1893, in respect of such contracts were not complied with, and the said contract is therefore not enforceable by action.

---

revised statutes), and of s. 7 of Lord Tenterden's Act have been repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and the following provisions of the Sale of Goods Act, 1893, have been substituted therefor.

By s. 4 it is enacted that :—

"(1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

"(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

"(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

"(4.) The provisions of this section do not apply to Scotland."

Sub-s. (1) above does not render contracts void, but merely renders them unenforceable in the Courts, consequently it would seem property may pass under contracts which are not capable of being proved by the written evidence required by the statute. (See *Lucas* v. *Dixon*, 22 Q. B. D. 357, 360, 363 ; *Hugill* v. *Masker*, *Ib.* at p. 371 ; *Taylor* v. *Great Eastern Ry. Co.*, [1901] 1 Q. B. 774 ; 70 L. J. K. B. 499 ; *In re Holland*, [1902] 2 Ch. 300, 375, 382 ; 71 L. J. Ch. 518.)

Any act in relation to the goods which would be of wrong if there were no contract, and of right if there were a contract, is evidence of an acceptance within the section (*Abbott* v. *Wolsey*, [1895] 2 Q. B. 97 ; 64 L. J. Q. B. 587). Thus where the buyer took a sample from the bulk, and, after comparing it with a sample on which he had bought, rejected the goods, saying they were not equal to sample, it was held there was evidence of such acceptance (*Abbott* v. *Wolsey*, *supra*). So a re-sale of the goods or of a part of them as specific goods to a third party would appear to be evidence of such acceptance. (See *Chaplin* v. *Rogers*, 1 East, 195 ; *Marshall* v. *Green*, 1 C. P. D. 35, 41 ; 45 L. J. C. P. 153.)

There must be a transfer of the possession of the goods, or of part of them, to constitute an "acceptance and actual receipt," but this may be effected, without any actual removal of the goods, by a change in the character of the possession. Thus if goods stored at a warehouse for the vendor are, by arrangement with the warehouseman, thereafter held for the buyer (see *Bentall* v. *Burn*, 3 B. & C. 423 ; *Pearson* v. *Dawson*, 1 E. & B. 448, 456), or if the vendor himself makes a change in the mode in which he holds, so as to cease acting as if owner of the goods, and thereafter acts merely as the bailee or agent of the buyer, there may be a sufficient "acceptance and actual receipt" (*Elmore* v. *Stone*, 1 Taunt. 458 ; *Castle* v. *Sworder*, 29 L. J. Ex. 235 ; 30 L. J. Ex. 310 ; 6 H. & N. 828). But so long as the vendor continues to hold the goods subject to his lien as unpaid vendor there is no such change of possession as to satisfy the requirements of the statute (*Baldey* v. *Parker*, 2 B. & C. 44 ; *Morton* v. *Tibbett*, 15 Q. B. 428, 438 ; 19 L. J. Q. B. 382).

The memorandum required by the section may be made at the time of the sale, or at any time subsequent thereto up to the time of action brought (*Bailey* v. *Sweeting*, 9 C. B. N. S. 843 ; *Lucas* v. *Dixon*, 22 Q. B. D. 357 ; 58 L. J. Q. B. 161 ; *In re Holland*, [1902] 2 Ch. at p. 382 ; 71 L. J. Ch. 518). It may be signed by an agent having authority to sign the writing relied on, and his signature may be sufficient although placed there without any intention of furnishing a memorandum to satisfy the statute, but *alio intuitu* (*Jones* v. *Victoria Graving Dock*, 2 Q. B. D. at p. 323 ; *Re Hoyle*

The like (*b*).

The 4th section of the Sale of Goods Act, 1893, has not been complied with.

Defence to an Action upon a Contract within s. 4 of the Statute of Frauds, where the Statement of Claim shows that the Contract is within that Section (*c*).

The 4th section of the Statute of Frauds has not been complied with.
(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

[1893] 1 Ch. 84; 62 L. J. Ch. 182; *Griffiths Corporation* v. *Humber*, [1899] 2 Q. B. 414, 418; 68 L. J. Q. B. 959).

A memorandum is insufficient which fails to show who the parties are, either by name or by a sufficient description (*Champion* v. *Plummer*, 1 B. & P. (N. R.) 252; *Newell* v. *Radford*, L. R. 3 C. P. 52; 37 L. J. C. P. 1), or which does not describe or define the subject matter, or which does not state all the express terms of the contract (*Archer* v. *Baynes*, 5 Ex. 625), including the price, if, in fact, a price has been fixed (*Elmore* v. *Kingscote*, 5 B. & C. 583; *Hoadley* v. *M'Laine*, 10 Bing. 482). Parol evidence cannot be used to complete a defective memorandum, or to connect papers or writings neither physically connected so as to form one memorandum, nor so connected by internal reference, but such evidence is admissible to identify the parties described or the subject matter mentioned. (See *Shardlow* v. *Cotterell*, 20 Ch. D. 90; 51 L. J. Ch. 353; *Plant* v. *Bourne*, [1897] 2 Ch. 281; 66 L. J. Ch. 643; and see *Pearce* v. *Gardner*, [1897] 1 Q. B. 688; 66 L. J. Q. B. 457; *Griffiths Corporation* v. *Humber*, *supra*.) Thus where a letter contained an agreement to purchase "your wool," evidence was admitted to show what wool was meant by that (*Macdonald* v. *Longbottom*, 1 E. & E. 977, 987; 28 L. J. Q. B. 293; 29 L. J. Q. B. 256). As to what are "goods" within the section, see "*Sale of Goods*," *ante*, p. 273; "*Shares*," *ante*, p. 290; and s. 62 (1) of the Act. Where the parties in contracting contemplate the ultimate delivery of a chattel the contract is in general for a sale of goods, although it may involve work of high skill, as for instance the supply by a dentist of a set of teeth (*Lee* v. *Griffin*, cited *ante*, p. 326). As to sales by auction, see *ante*, pp. 91, 92.

(*b*) See preceding note.

(*c*) By s. 4 of the Statute of Frauds, it is enacted that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate" (see "*Executors*," *ante*, p. 171), "or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person" (see "*Guarantees*," *ante*, p. 179), "or to charge any person upon any agreement made upon consideration of marriage" (see "*Marriage*," *ante*, p. 244), "or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them" (see "*Sale of Land*," *ante*, p. 282), "or upon any agreement that is not to be performed within the space of one year from the making thereof" (see "*Annuity*," *ante*, p. 582), "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." In the case of contracts within s. 4, other than guarantees, the consideration must appear expressly or by necessary inference from the writing in order that the writing may satisfy the section. (See Leake on Contracts, 4th ed., p. 179.)

Subject to the above qualification, a writing to satisfy s. 4 would seem subject to the same requirements as to one to satisfy s. 4 of the Sale of Goods Act, 1893. (See *ante*, p. 664.)

The parties are sufficiently described, if, from the description, their identity is certain,

For a like form in an Action upon a Guarantee, see post, p. 672.

A like Form (*d*).

There was no agreement in writing nor was there any memorandum or note in writing of the alleged agreement as required by the 4th section of the Statute of Frauds, or at all.

The like to an Action for Wrongful Dismissal of a Servant, where it does not appear from the Statement of Claim that the Contract was one which could not be performed within a Year from the making thereof (*e*).

The agreement was not to be performed within one year from the making thereof, and the 4th section of the Statute of Frauds has not been complied with.

Defence of the Statute of Frauds to an Action for Specific Performance: see "Sale of Land," post, p. 772.

or is certainly ascertainable so that it cannot be disputed (*Rossiter* v. *Miller*, 3 App. Cas. 1124, 1140, 1147; 48 L. J. Ch. 10; *Catling* v. *King*, 5 Ch. D. 660; 46 L. J. Ch. 384; *Carr* v. *Lynch*, [1900] 1 Ch. 613, 615; 69 L. J. Ch. 345). Thus it may be enough, in dealing with land, to use the phrase "the proprietor" or "the owner," but not to use such words as "my client" or "the landlord," without more (*Sale* v. *Lambert*, L. R. 18 Eq. 1; 43 L. J. Ch. 470; *Potter* v. *Duffield*, L. R. 18 Eq. 4; 43 L. J. Ch. 474; *Thomas* v. *Brown*, 1 Q. B. D. at p. 720; and see *Coombs* v. *Wilkes*, [1891] 3 Ch. 77; 61 L. J. Ch. 42).

(*d*) This form may be found useful to compel a distinct reply of part performance, of which particulars may be required.

The equitable doctrine with respect to part performance taking a case out of the statute, is applicable only in cases to which a Court of equity would have applied it before the Judicature Acts (*Britain* v. *Rossiter*, 11 Q. B. D. 123; 48 L. J. Q. B. 362; cited "*Master and Servant*," *post*, p. 735; *Maddison* v. *Alderson*, 8 App. Cas. 467; 32 L. J. Q. B. 737; *McManus* v. *Cooke*, 35 Ch. D. 681; 56 L. J. Ch. 662; *Lavery* v. *Pursell*, 39 Ch. D. 508; 57 L. J. Ch. 570).

The acts of part performance must be acts unequivocally referable to, and done with a view to performing the verbal contract (*Maddison* v. *Alderson*, *supra*). See further as to part performance, pp. 216, 217.

(*e*) By agreements not to be performed within a year, agreements incapable of complete performance on either side within that period are meant (*Donellan* v. *Read*, 5 B. & Ad. 903; *Miles* v. *New Zealand Estate Co.*, 32 Ch. D. at pp. 276, 296; *McGregor* v. *McGregor*, 21 Q. B. D. 424; 57 L. J. Q. B. 591). An agreement to serve for a year, the service to begin next day, is not an agreement "not to be performed within a year" (*Smith* v. *Gold Coast Explorers*, [1903] 1 K. B. 538; 72 L. J. K. B. 235).

GAMING (*f*).

Defence that the Contract sued on was a Gaming or Wagering Contract.

The alleged contract [*or*, agreement] was [*or*, The money claimed is money which was agreed to be paid by the defendant to the plaintiff under] a contract [*or*, agreement] by way of gaming or wagering within the Statute 8 & 9 Vict c. 109, s. 18.

Particulars :—[*Give particulars showing how the contract was within the statute, as, for instance*] The alleged contract was a bet on a horse race.

(*f*) At the common law a *wager* was in general binding (*Good* v. *Elliott*, 3 T. R. 693; *Hampden* v. *Walsh*, 1 Q. B. D. 189; 45 L. J. Q. B. 238); but now by the Gaming Act, 1845, *infra*, all agreements by way of gaming or wagering are null and void.

A *wager* is a promise made upon a chance event in which neither party had any interest, except that created by the wager. The essence of gaming and wagering is, that one party is to win and another to lose on a future event which is uncertain at the time of the contract (*Thacker* v. *Hardy*, 4 Q. B. D. 695, *per* Cotton, L.J.; *Crawley* v. *White*, 14 Times Rep. 247, 248; and see further *Carlill* v. *Carbolic Ball Co.*, [1892] 2 Q. B. 484, 490; 61 L. J. Q. B. 696; [1893] 1 Q. B. 256; 62 L. J. Q. B. 257; *Lockwood* v. *Cooper*, [1903] 2 K. B. 428; 72 L. J. K. B. 690).

By the statute 9 Anne, c. 14, as amended by 5 & 6 Will. 4, c. 41, s. 1, all notes and bills given for money won by gaming at cards or other games, or by betting at such games, or for any money knowingly lent for that purpose are deemed to have been made for an illegal consideration.

The indorsee of a cheque given in payment of a bet on a horse race cannot recover on it if at the time he took it he knew that it was so given (*Woolf* v. *Hamilton*, [1898] 2 Q. B. 337; 72 L. J. Q. B. 49). As to the recovery of money paid to the holder of such securities, see s. 2 of the last-mentioned Act.

The Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always, that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

By the Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1, "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the 8 & 9 Vict. c. 109," is itself made null and void, and it is enacted that no action at the suit of the payer shall lie to recover such money; and similarly any express or implied promise "to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith" is thereby made null and void, and no action can be brought to recover such money.

A wagering contract for the sale of goods, where the amount of the price was not fixed with any regard to the value of the goods, but was made to depend upon the result of what was substantially a wager, was held void under the 8 & 9 Vict. c. 109, s. 18 (*Rourke* v. *Short*, 5 E. & B. 904; 25 L. J. Q. B. 196). So also where remuneration for services was made contingent upon the result of betting on a race, the contract was held void under the 8 & 9 Vict. c. 109, s. 18, above cited (*Higginson* v. *Simpson*, 2 C. P. D. 76; 46 L. J. C. P. 192).

The proviso in that section only applies where there is a subscription or contribution for a plate or prize, &c., without there being anything amounting to a wager on the part of those subscribing or contributing (*Parsons* v. *Alexander*, 5 E. & B. 263; 24

Defence under the Gaming Act, 1892, to a Claim for Money Paid at the Request of the Defendant, that the Payment was made in respect of a Gaming or Wagering Contract.

The alleged payment was made by the plaintiff under or in respect of a contract or agreement by way of gaming or wagering which was rendered null and void by the Act 8 & 9 Vict. c. 109.

Particulars :—[*State the particulars, showing how the contract was within the Act.*]

L. J. Q. B. 277 ; *Coombs* v. *Dibble*, L. R. 1 Ex. 248 ; 35 L. J. Ex. 167 ; *Batson* v. *Newman*, 1 C. P. D. 573). The first portion of s. 1 of the Gaming Act, 1892, prevents a commission agent or other person from recovering from another, money which he has, at that other's request, paid in discharge of that other's bets or wagers (*Tatam* v. *Reeve*, [1893] 1 Q. B. 44 ; 62 L. J. Q. B. 30 ; and see *Saffery* v. *Mayer*, [1901] 1 Q. B. 11 ; 70 L. J. Q. B. 145), whilst the second portion prevents an agent from enforcing any claim for commission on betting or similar void transactions in stocks or shares.

Before the passing of the Act it was held that a betting agent employed by the plaintiff to make bets for him was liable to him for moneys received from the losers of the bets (*Bridger* v. *Savage*, 15 Q. B. D. 363 ; 54 L. J. Q. B. 464 ; *Moore* v. *Peachey*, 7 Times Rep. 748 ; *Potter* v. *Codrington*, 9 Times Rep. 54), and it would seem that the Act makes no difference in this respect (*De Mattos* v. *Benjamin*, 63 L. J. Q. B. 248 ; *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. at p. 700).

Money lent for the purpose of playing at an illegal game cannot be recovered (*M'Kinnell* v. *Robinson*, 3 M. & W. 434 ; *Foot* v. *Baker*, 5 M. & G. 335).

Money lent for the purpose of enabling the borrower to pay bets already lost to third parties was held previously to the Gaming Act, 1892, to create a debt which could be recovered from the borrower (*Hill* v. *Fox*, 4 H. & N. 359 ; *Ex p. Pyke*, 8 Ch. D. 754), and it would seem that a *bonâ fide* loan, as distinguished from a payment of a bet by the alleged lender, can still be so recovered.

No action will lie against an agent employed to make bets for neglecting to make them, as they would be void if made (*Cohen* v. *Kittell*, 22 Q. B. D. 689 ; 58 L. J. Q. B. 241).

Contracts of wagering made under the form of insurance by parties having no interest in the subject-matter are provided against by statute. (See *post*, pp. 691, 694.)

Wagers on the price of stock, in the form of contracts for the sale and delivery of stock, are subject to the above statute 8 & 9 Vict. c. 109. Accordingly, a mere "time bargain" or agreement for a nominal purchase or sale of shares and stocks, whereby the parties merely agree to pay or receive the differences, is a gaming and wagering transaction within the meaning of the statute (*Grizewood* v. *Blane*, 11 C. B. 526 ; *Barry* v. *Croskey*, 2 J. & H. 1 ; *Ex p. Phillips*, 2 De G. F. & J. 634 ; *Thacker* v. *Hardy*, 4 Q. B. D. 685 ; 48 L. J. Q. B. 289). Where both parties intend that no shares or stocks shall pass, but that differences only shall be paid, it may be a gaming transaction, even though on the face of the contract there would seem to be a right to call for delivery of the shares or stocks, such contract being merely intended to cloak the fact that the transaction was one of gaming (*Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166 ; 65 L. J. Q. B. 429 ; *In re Gieve*, [1899] 1 Q. B. 794 ; 68 L. J. Q. B. 509 ; and see *Forget* v. *Ostigny*, [1895] A. C. 318 ; 64 L. J. P. C. 62). Where, however, one of the parties is intended to make and makes actual contracts on which he is liable to deliver or take the stock, the contract is valid (*Thacker* v. *Hardy*, *supra*).

Where any money or thing is deposited with a stake-holder to abide the event of a wagering contract, the depositor may withdraw the authority of the stake-holder to pay it over or transfer it according to the event at any time before he has in fact done so, and may recover his deposit by action from such stake-holder, and this even

The like to Claims by a Betting Agent for Money Lent to the Defendant and for Money Paid and Work done for him at his Request.

1. No money was lent by the plaintiff to the defendant.

2. The money alleged to have been lent to and paid for the defendant was money paid by the plaintiff in discharge of bets made by [*or*, for] the defendant with certain other persons, which said bets were contracts by way of gaming and wagering rendered null and void by the Act 8 & 9 Vict. c. 109.

3. The work alleged to have been done by the plaintiff consisted solely of services in relation to or in connection with contracts by way of gaming and wagering rendered null and void by the said Act.

Defence to an Action on a Promissory Note or Cheque, that the Note or Cheque was made or drawn for Money lost to the Plaintiff upon a Wager (8 & 9 *Vict. c.* 109, *s.* 18)(*g*).

The defendant made and delivered the note [*or*, cheque] to the plaintiff

---

though the event has taken place (*Hampden* v. *Walsh*, *ante*, p. 667; *O'Sullivan* v. *Thomas*, *supra*; *Diggle* v. *Higgs*, 2 Ex. D. 422; 46 L. J. Ex. 721; *Burge* v. *Ashley*, [1900] 1 Q. B. 744; 69 L. J. Q. B. 538; *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497, 502; 69 L. J. Q. B. 800). Thus in the case of a match where each competitor deposits his stake with a stake-holder, the winner can recover his own stake, and the loser, if it is still in the hands of the stake-holder, can recover his (*Ib.*).

After the event it is too late to sue the stake-holder for a return of the deposit if he has paid it over without notice that his authority to do so was withdrawn (*Hampden* v. *Walsh*, *supra*; *In re Cronmire*, [1898] 2 Q. B. 383, 397; *Burge* v. *Ashley*, *supra*).

Where the plaintiff advanced a sum of money to the defendant to be used as the defendant's share of the capital in making bets for their joint benefit, it was held, that after it had been lost in such betting the plaintiff could not recover it from the defendant, as to do so would be to recover money "paid in respect of a wagering agreement and upon an implied promise to repay money paid by the plaintiff "in respect of" such agreement (*Saffery* v. *Mayer*, [1901] 1 Q. B. 11; 70 L. J. K. B. 145). In another case the plaintiff advanced for the defendant his stake in a boxing match upon the terms, that if the defendant won, he was to be repaid by the defendant. The defendant did win but did not repay the advance. It was held that no action would lie to recover the advance (*Carney* v. *Plimmer*, [1897] 1 Q. B. 634; 66 L. J. Q. B. 415). The money, it will be observed, ceased, when advanced, to be the plaintiff's, and the repayment depended on the event of the wager. (See *Burge* v. *Ashley*, *supra*.)

Lotteries are prohibited by 10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119. Sales by lottery are prohibited by 12 Geo. 2, c. 28, and the lands, goods, &c., set up and exposed for sale in such manner are to be forfeited to such person as shall sue for the same. (See s. 4.) As to what constitutes a lottery, see *Taylor* v. *Smetten*, 11 Q. B. D. 207; *Barclay* v. *Pearson*, [1893] 2 Ch. 154; 62 L. J. Ch. 636; *Stoddart* v. *Sagar*, [1895] 2 Q. B. 474; 64 L. J. M. C. 234; *Hardwick* v. *Lane*, [1904] 1 K. B. 204; 73 L. J. K. B. 96.

(*g*) Bills, cheques, and notes given for gaming debts within the description of the statute of Anne, are deemed to be made for an illegal consideration; while bills, cheques, and notes given under gaming or wagering contracts within the statute of Victoria

for money won by the plaintiff from the defendant upon a contract made between them [on the —— ——, 19—], by way of wagering.

Particulars are as follows:—[*Here state shortly the nature of the contract sufficiently to show that it was void under the above cited statute.*]

Defence to an Action on a Bill of Exchange, that the Bill was accepted by the Defendant for Money won by the Plaintiff from the Defendant by Gaming (9 *Anne, c.* 14; 5 *& 6 Will.* 4, *c.* 41, *s.* 1) (*g*).

The bill was accepted by the defendant for money won from him by the plaintiff on the —— ——, 19—, by gaming [*or*, betting on gaming] at cards [*or*, by betting on a horse race called the ——, at ——, *or other game, according to the facts*].

Defence to a like Action by an Indorsee, that the Bill was accepted by the Defendant for Money won by the Drawer from the Defendant by Gaming, and that the Bill was afterwards indorsed to the Plaintiff with Notice, or without Consideration, or when Overdue.

The bill was accepted by the defendant for money won from him by [*A. B.*] the drawer [on the —— ——, 19—], by gaming [*or*, betting on gaming] at cards [*or*, by betting on a horse race called the ——, at ——, *or other game, see the last precedent*], and the said bill was afterwards indorsed by the drawer to the plaintiff, with notice of the facts above mentioned [*or*, without consideration, *or*, when overdue].

Defence to a Claim against a Dealer in Shares for the wrongful Detention of Securities deposited with him by the Plaintiff, that the Securities were deposited as Cover on Share Transactions, and had been, before Action, appropriated to that purpose (*h*).

1. The said securities referred to in the statement of claim were deposited by the plaintiff with the defendant on the —— ——, 19—, as security for

---

only, being given under contracts which are void, are in the same condition as if given without consideration (*Fitch* v. *Jones*, 5 E. & B. 238; 24 L. J. Q. B. 293). In the former case, as for instance when the consideration is a bet on a horse race, a holder for value with notice of the circumstances under which the bill was given cannot recover on it (*Hay* v. *Ayling*, 16 Q. B. 423; *Woolf* v. *Hamilton*, *ante*, p. 667, and see *ante*, p. 604). In the latter case a holder for value can recover on it, as for instance where the consideration is a gaming debt arising from gambling on the Stock Exchange (*Lilley* v. *Rankin*, 56 L. J. Q. B. 248).

(*g*) See preceding note.

(*h*) If the claim shows that the authority to transfer or sell the securities was

the due payment by the plaintiff to the defendant of any money which might thereafter become due from the plaintiff to the defendant in respect of any dealings between them in stocks or shares, and upon the terms agreed to verbally [*or, as the case may be*] on the —— ——, 19—, that the defendant should upon default on the part of the plaintiff in payment of any such money be at liberty without further notice to the defendant to appropriate the said securities or any portion thereof at their market value in or towards payment of such debt, or at his option to sell the same and appropriate the proceeds in or towards payment of such debt and of his reasonable charges for so selling.

2. A sum of £—— became due on the —— ——, 19—, from the plaintiff to the defendant in respect of such dealings between them in stocks and shares.

Particulars of the dealings are as follows :—[*State same.*]

3. The plaintiff did not pay and has not paid the said sum of £——, or any of it, and on the —— ——, 19—, and before this action, the defendant in accordance with the terms of the said deposit appropriated the said securities at their market price £—— towards payment of the said sum of £——.

Particulars of market prices :—[*State same.*]

4. Except as aforesaid there was no detention of the said securities or of any of them.

5. The said securities were not, nor were any of them the property of the plaintiff at the time or times of or since the alleged detention thereof.

GIFT.

See post, "*Money Lent*," p. 740; "*Gift*," p. 856.

GUARANTEES.

Denial of the Contract of Guarantee.

The defendant denies that he made or gave the guarantee referred to in the statement of claim.

---

withdrawn before action, it may be necessary to allege in the defence that the transfer or sale took place before the notice of the withdrawal was received.

Securities deposited as cover for differences on wagering transactions in stocks and shares may be recovered back by the owner who has deposited them, at any time until they have, without notice of the revocation of the authority to appropriate them in discharge of the differences, been in fact appropriated as permitted by the terms on which they were deposited (*Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166; 65 L. J. Q. B. 428; *Strachan* v. *Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697; 65 L. J. Q. B. 178; *In re Cronmire*, [1898] 2 Q. B. 383, 396; 67 L. J. Q. B. 620).

Defence that the alleged Contract did not satisfy the Statute of Frauds (i).

The 4th section of the Statute of Frauds was not complied with in respect of the alleged contract of guarantee.

Defence to an Action on a Guarantee for the Price of Goods sold, that the Plaintiff did not supply the Goods on the Guarantee (k).

The defendant denies that the plaintiff supplied the alleged or any goods to the said *E. F.*, or that he did so (if at all) on the guarantee.

(*See R. S. C.*, 1883, *App. E.*, *Sect. III. No.* 1.)

Defence to a like Action, that the Plaintiff did not supply the Goods according to the Terms of the Guarantee (k).

The guarantee sued on was a guarantee for the price of such goods only as the plaintiff should sell and deliver to *E. F.* on the usual terms of dealing between them, viz. [*here state what the usual terms were*], and the goods in the statement of claim mentioned were not sold or delivered by the plaintiff to the said *E. F.* on those terms.

Defence to a like Action, that the Goods were sold to the Principal on Credit, and that the Period of Credit had not expired at the Time of Action brought (k).

The goods referred to in the statement of claim were sold and delivered by the plaintiff to *E. F.*, on [two months] credit, and that period of credit had not expired at the time of action brought. The said terms of credit were agreed to verbally on the —— ——, 19—.

(*i*) It is necessary to plead specially the defence that the alleged contract was not in a form sufficient to satisfy the Statute of Frauds. By the Mercantile Law Amendment Act, 1856, s. 3, *ante*, p. 179, the consideration for the guarantee need not be in the writing. (See *ante*, p. 663.)

(*k*) If the defendant intends to contest the fulfilment of any condition precedent to the plaintiff's right of action, *e.g.*, if the defendant disputes that the goods were supplied in accordance with the guarantee, or that the principal made default, or that the defendant had notice of it, where such notice is necessary (as to which see *ante*, p. 179), he must distinctly specify such condition in his pleading, unless it sufficiently appears from the statement of claim, and must state its non-fulfilment. (See Ord. XIX., r. 14, cited *ante*, p. 157.)

Defence to an Action on a Guarantee of a Debt, of Payment by the Principal.

The principal debtor, the said *E. F.*, satisfied the claim of the plaintiff by payment before action on the —— ——, 19—.

(*See R. S. C.*, 1883, *App. D.*, *Sect. IV.*)

Defence to an Action on a Continuing and Revocable Guarantee, that the Defendant revoked the Guarantee before the Transactions alleged (*l*).

The guarantee sued on was [by the express terms thereof] revocable by notice, and before the plaintiff made any of the advances to *G. H.*, in respect of which [*or*, sold or delivered any of the goods in respect of the price whereof] this action is brought, the defendant revoked the alleged guarantee by notice to the plaintiff. Such notice was in writing and contained in a letter from the defendant to the plaintiff dated the —— ——, 19— [*or*, *as the case may be*].

(*l*) Where the guarantee is a continuing one, the guarantor may, in general, by notice terminate his liability in respect of future transactions, but this is not so where it appears from the document of guarantee, as construed by the light of the surrounding circumstances, that it was the intention of the parties that it should not be thus terminable (*Offord* v. *Davies*, 12 C. B. N. S. 748; 31 L. J. C. P. 319; *Coulthart* v. *Clementson*, 5 Q. B. D. 42; 49 L. J. Q. B. 204; *Burgess* v. *Eee*, L. R. 13 Eq. 450, 457; 41 L. J. Ch. 515). Notice of the death of the guarantor would also, in general, terminate liability in respect of future transactions, as against the estate of the deceased, where it did not appear that the intention was to the contrary (*Coulthart* v. *Clementson*, *supra*; *Lloyd's* v. *Harper*, 16 Ch. D. 290; 50 L. J. Ch. 140; *Beckett* v. *Addyman*, 9 Q. B. D. 783; 51 L. J. Q. B. 597; *Ashby* v. *Day*, 54 L. T. 408; *In re Silvester*, [1895] 1 Ch. 573; 64 L. J. Ch. 390; *Dodd* v. *Whelan*, [1897] 1 Ir. R. 575). Where the consideration for a guarantee was the admission at Lloyd's of an underwriter, whose future conduct in that position was guaranteed, it was held that the guarantee was not revocable by notice of the death of the guarantor, and that his estate remained liable (*Lloyd's* v. *Harper*, *supra*; *In re Crace*, [1902] 1 Ch. 733; 71 L. J. Ch. 358). Where the consideration is an act done once for all, the guarantee is not revocable on death or by notice (*Ib.*).

A guarantee for the fidelity of a collector, clerk, or servant would in general be regarded as not revocable, except upon discovery of such dishonesty on his part as would render it improper and unfair towards the surety for the employer to continue him in his service (*Culvert* v. *Gordon*, 3 M. & Ry. 124; *Lloyd's* v. *Harper*, *supra*; and see further *post*, p. 677).

Where a guarantee is joint only, the death of one of the guarantors would seem, where there is nothing to show a different intention, to give to the survivor or survivors a right to treat the guarantee as terminated by the death, and inapplicable to future transactions, but the parties may, by their conduct or by express agreement, continue the guarantee notwithstanding the death (*Ashby* v. *Day*, 54 L. T. 408).

A continuing guarantee given to or for a firm is, in the absence of agreement to the contrary, revoked as to future transactions by a change in the membership of the firm (The Partnership Act, 1890, s. 18).

Defence that the Guarantee was procured by Fraud (m) : see "Fraud," ante, p. 656.

Defence that the Plaintiff discharged the Defendant by giving Time to the Principal Debtor (n).

The defendant was released by the plaintiff on the —— ——, 19—, giving time to the principal debtor, *E. F.*, in pursuance of a binding agreement.

Particulars of the agreement to give time are as follows :—[*State the particulars.*]

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

(*m*) The relation of creditor and surety (unlike the contract of insurance) does not require a full disclosure by the former to the latter of all material facts relating to the principal debtor, and the mere non-communication of such facts, where it does not amount to fraudulent concealment, does not invalidate the guarantee (*Hamilton* v. *Watson*, 12 Cl. & F. 109 ; *North British Insurance Co.* v. *Lloyd*, 10 Ex. 523 ; 24 L. J. Ex. 14 ; *Lee* v. *Jones*, 17 C. B. N. S. 482 ; 34 L. J. C. P. 131 ; see *Railton* v. *Mathews*, 10 Cl. & F. 934 ; and see *Seaton* v. *Burnand*, [1899] 1 Q. B. 782 ; 68 L. J. Q. B. 631 ; [1900] A. C. 135 ; 69 L. J. Q. B. 409.

(*n*) A surety on paying the debt in respect of which the guarantee was given becomes entitled to the benefit of the remedies and securities which the creditor has against the principal debtor, whether, when he became a surety, he knew of them or not. (See 19 & 20 Vict. c. 97, s. 5, cited *ante*, p. 179 ; *Mayhew* v. *Crickett*, 2 Swanst. 185 ; *Duncan* v. *North and South Wales Bank*, 6 App. Cas. 1 ; 50 L. J. Ch. 355 ; *Forbes* v. *Jackson*, 19 Ch. D. 615 ; 51 L. J. Ch. 690 ; *Ward* v. *Bank of New Zealand*, 8 App. Cas. 755, 765 ; 52 L. J. P. C. 65 ; *Dixon* v. *Steel*, [1901] 2 Ch. 602 ; 70 L. J. Ch. 794 ; and see further, notes to *Dering* v. *Winchelsea*, 2 White & Tudor L. C., 7th ed., p. 535.)

If the creditor gives time to the principal debtor under a binding contract with him to that effect, without the authority or consent of the surety, the latter is thereby discharged, unless the rights against the surety are expressly reserved ; for the surety is deprived by such contract of his right upon payment of the debt to have the securities and remedies of the creditor, and to enforce them, if necessary, in his name (*Rees* v. *Berrington*, 2 White & Tudor, L. C., 7th ed., 568 ; *Fraser* v. *Jordan*, 8 E. & B. 303 ; 26 L. J. Q. B. 288 ; *Overend, Gurney & Co.* v. *Oriental Corporation*, L. R. 7 H. L. 348 ; *Croydon Gas Co.* v. *Dickinson*, 2 C. P. D. 46 ; 46 L. J. C. P. 157 ; *Ward* v. *Bank of New Zealand, supra ; Clarke* v. *Birley*, 41 Ch. D. 422, 434 ; 58 L. J. Ch. 616 ; *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586 ; 63 L. J. Ch. 337). When the liability of a surety has been discharged by the extension of time granted to the debtor (under a binding contract to that effect) goods or property pledged by the surety with the creditor as security for the debt or liability guaranteed are or is, in general, discharged also (*Bolton* v. *Salmon*, [1891] 2 Ch. 48 ; 60 L. J. Ch. 237). The release by the creditors of a principal debtor discharges the sureties unless they have agreed to the contrary, or unless the release is expressly made subject to the reservation of the rights of the sureties (*Overend, Gurney & Co.* v. *Oriental Corporation*, L. R. 7 H. L. 348 ; and cases *infra*).

The original contract of guarantee may expressly reserve to the creditor the right to give indulgence to, or to release the principal debtor without discharging the surety, and in such cases the surety will not be discharged by the creditor's giving time to, or releasing the principal debtor in accordance with the right reserved (*Cowper* v. *Smith*,

A like Defence, where the Surety is sued as a Principal upon a Promissory Note on which he appears as primarily liable: see "Bills of Exchange," ante, p. 614.

---

4 M. & W. 519; *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L. J. Ex. 133; see *Croydon Gas Co.* v. *Dickinson*, *supra*).

In order that the giving of time by the creditor may have the effect of discharging the surety, the rule is that "there must be either a new security given to extend the time, or a binding agreement upon a sufficient consideration to suspend the remedy." (See *Moss* v. *Hall*, 5 Ex. 46, 50; *Bolton* v. *Buckenham*, [1891] 1 Q. B. 278; 60 L. J. Q. B. 261; and cases cited *supra*). If no such security is accepted, and no binding agreement to give time is entered into by the creditor, the mere fact of his giving time for payment, and forbearing to enforce his remedies against the principal debtor, will not discharge the surety, unless, by the contract between him and the creditor, the latter has undertaken that he will actively enforce those remedies. (See *Price* v. *Kirkham*, 3 H. & C. 437; Story's Eq. Jur., § 326; notes to *Rees* v. *Berrington*, *supra*.) A contract with a stranger to give time to the principal debtor does not affect the right against the surety (*Fraser* v. *Jordan*, *supra*; *Clarke* v. *Birley*, *supra*).

Where the guarantee was for the payment of the price of periodical supplies of gas to be paid for by monthly payments, it was held that, as the surety's contract was severable, the giving of time to the principal without the surety's consent on one occasion, did not affect the surety's liability as to subsequent payments (*Croydon Gas Co.* v. *Dickinson*, *supra*).

An agreement to give time to, or a covenant not to sue, or a release of the principal debtor, qualified by a reservation of remedies against the surety, preserves all the rights of the creditor against the surety, as also all the rights of the surety against the principal debtor (*Kearsley* v. *Cole*, 16 M. & W. 128; *Price* v. *Barker*, 4 E. & B. 760; 24 L. J. Q. B. 130; *Hooper* v. *Marshall*, L. R. 5 C. P. 4; 39 L. J. C. P. 14; *Bateson* v. *Gosling*, L. R. 7 C. P. 9; 41 L. J. C. P. 53; and see the notes to *Rees* v. *Berrington*, *supra*; and *post*, p. 753).

If after giving a guarantee the creditor, without the authority or consent of the surety, alters the contract made with the principal debtor, the surety is thereby discharged, on the ground that he cannot be made liable for non-performance of a contract he has not guaranteed (*Croydon Gas Co.* v. *Dickinson*, 2 C. P. D. 46, 49; 46 L. J. Q. B. 157; *Holme* v. *Brunskill*, 3 Q. B. D. 495; 47 L. J. Q. B. 610; *Ward* v. *Bank of New Zealand*, 8 App. Cas. 755, 763; 52 L. J. P. C. 65; *Taylor* v. *Bank of N. S. Wales*, 11 App. Cas. 596, 603; 55 L. J. P. C. 47; *In re Wolmershausen*, 62 L. T. 541).

Where the guarantee is for the performance by a third party of the duties of a particular office, a substantial change in the duties of the office not within the contemplation of the parties at the time of the giving of the guarantee would, in general, be such an alteration (*Arlington* v. *Merricke*, 2 Saund. 403; *Bonar* v. *Macdonald*, 3 H. L. C. 226; *Rex* v. *Herron*, [1903] 2 Ir. R. 474). An appointment to a new and additional office would not, in the absence of any agreement or understanding that the person whose conduct was guaranteed was not to be appointed to any additional office, discharge a surety (*Skillett* v. *Fletcher*, L. R. 1 C. P. 217; *Ib.* 2 C. P. 469; see further, *Guardians of Malling Union* v. *Graham*, L. R. 5 C. P. 201; 39 L. J. Q. B. 74).

A surety is, in general, discharged by any dealing between the principals which impairs his position or deprives him of his remedies, whether against the principal debtor or against his co-sureties, if he has not assented to such dealing (*Croydon Gas Co.* v. *Dickinson*, *supra*; *Holme* v. *Brunskill*, 3 Q. B. D. 495, 505; 47 L. J. Q. B. 610; *Ward* v. *Bank of New Zealand*, *supra*; and see *Mansfield Union* v. *Wright*, 9 Q. B. D. 683).

The loss or wasting by the creditor of a security to the benefit of which a surety would, on payment of the debt or liability guaranteed, be entitled, will operate *pro tanto* as a release of the surety, on the general principle that a creditor with a pledge

Reply to the preceding Defences, that the Remedies against the Surety were reserved by the Agreement for giving Time.

The alleged agreement giving time to the principal debtor expressly reserved the remedies against the surety.

(*R. S. C.*, 1883, *App. E.*, *Sect. I.*)

Reply to like Defences, that the Time was given in Pursuance of Provisions contained in the Guarantee.

The guarantee sued on contained a provision empowering the plaintiff to give time to the principal debtor, without thereby prejudicing his rights or remedies against the defendant, and [the alleged agreement was made and] the alleged time was given in pursuance of that provision.

---

or other security is bound to account not only for the money he has made out of the security, but also for that which he ought to have made out of it (*Wulff* v. *Jay*, L. R. 7 Q. B. 756; 41 L. J. Q. B. 322; *Polak* v. *Everett*, 1 Q. B. D. 669; 46 L. J. Q. B. 218; *Ward* v. *Bank of New Zealand*, *supra*; *Taylor* v. *Bank of N. S. Wales*, 11 App. Cas. 596, 603; 55 L. J. P. C. 47; *In re Wolmershausen*, 62 L. T. 541).

Mere passive inactivity on the part of the creditor, or neglect to call the principal debtor to account, or to enforce payment from him with reasonable despatch, will not discharge a surety (*Black* v. *Ottoman Bank*, 8 Jur. N. S. 801; and see further, *post*, p. 677).

A surety is not relieved from his liability by the discharge of the principal debtor in bankruptcy, or by the creditor's acceptance of a composition or scheme of arrangement in proceedings against the principal debtor under the Bankruptcy Acts, 1883, 1890. (See *ante*, pp. 592, 594, 595.)

The surety, on paying the debt or the part of a debt in respect of which the guarantee was given, has ordinarily the right of receiving dividends or a composition under such bankruptcy proceedings in respect of the amount so paid. (See *Gray* v. *Seckham*, L. R. 7 Ch. 880; 42 L. J. Ch. 127.) But in some cases the terms of a limited guarantee may be such as to deprive the surety of this right, and to give the whole benefit of any such dividends or composition to the creditor, leaving the surety liable for the ultimate balance due; and in such last-mentioned cases the surety, if sued by the creditor for the amount guaranteed, cannot claim to deduct any dividends or composition which the creditor may have received from the estate of the principal debtor. (See *Ellis* v. *Emmanuel*, 1 Ex. D. 157; 46 L. J. Ex. 25; *Midland Banking Co.* v. *Chambers*, L. R. Ch. 398; 38 L. J. Ch. 478; *Ex p. National Bank*, 17 Ch. D. 98; *Ex p. National Provident Bank*, [1896] 2 Q. B. 12; 65 L. J. Q. B. 481.)

Where the surety is sued upon an instrument upon the face of which he appears as primarily liable, as upon a bond or promissory note which he has made jointly or jointly and severally with the principal debtor, he may plead that he entered into the contract or made the bond or note, &c., as a surety only for the principal debtor, and that this was then, or before the dealings complained of as unfair to the surety, known to the plaintiff, and he may thereupon further plead any facts which may constitute a defence under the doctrines of suretyship, as, for instance, the giving of time to the principal debtor under a binding agreement. (See *Rees* v. *Berrington*, *supra*; *Evans* v. *Bremridge*, 8 D. M. & G. 100; 25 L. J. Ch. 102, 334; *Rouse* v. *Bradford Banking Co.*, cited *ante*, p. 674; and see *ante*, p. 614.)

For a form of Defence including an Objection in Point of Law, see ante, p. 564.

Defence to an Action on a Guarantee for the due Accounting by a Collector that he did duly Account (*o*).

The defendant denies that the said *X. Y.* did not duly account for and make due payment of all moneys received by him on behalf of the plaintiff as his collector.

To a like Action, that the Collector was, without the Assent of the Guarantor, continued in the Service of the Plaintiff after Discovery by the Plaintiff of Acts of Dishonesty on the part of the Collector, which rendered it the Duty of the Plaintiff to have discharged such Collector (*o*).

1. The alleged non-accounting and failure to make due payment on the part of the said *X. Y.*, were acts of dishonesty and embezzlement on his part, and they took place after similar previous acts of dishonesty and embezzlement had to the knowledge of the plaintiff been committed by the said *X. Y.* as such collector during the existence of the said guarantee.

Particulars of previous acts :—[*State same.*]

2. The plaintiff might and ought to have discharged the said *X. Y.* from his said employment as his said collector upon the discovery of such previous acts of dishonesty and embezzlement, and before the non-accounting and failure to make due payment on the part of the said *X. Y.* now alleged.

3. The plaintiff did not upon such discovery inform the defendant thereof, but without the consent of the defendant and contrary to his duty to the defendant as such surety as alleged, continued and retained the said *X. Y.* in his employment as such collector, and thereby discharged the defendant from all liability in respect of matters now complained of.

Heirs and Devisees (*p*).

Denial of Heirship, in an Action on a Bond or Covenant of the alleged Ancestor.

The defendant denies that he is the [eldest son or] heir-at-law of *G. H.*, deceased.

(*o*) In the case of a guarantee for the honesty or conduct of a servant or agent, mere negligence on the part of the employer to whom the guarantee is given is no defence to an action on the guarantee (*Mansfield Union* v. *Wright*, 9 Q. B. D. 683 ; *Durham Corporation* v. *Fowler*, 22 Q. B. D. 394 ; 58 L. J. Q. B. 246 ; *Caxton, &c. Union* v. *Dew*, 68 L. J. Q. B. 380). Mere laches of the obligee or mere passive acquiescence by him in acts contrary to the conditions of the bond is not sufficient of itself to relieve the sureties (*Mactaggart* v. *Watson*, 3 Cl. & F. 525 ; see *ante*, p. 181).

(*p*) In an action against an heir or devisee upon a bond or covenant of the ancestor

Defence by an Heir of Riens per Descent (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 47, *s.* 7).

The defendant had not at the commencement of this action, nor has he since had, nor has he any lands, tenements, or hereditaments by descent from the said *G. H.*, in fee simple.

Denial by a Defendant, sued as Devisee, that he is Devisee.

The defendant is not devisee of any lands or hereditaments under the last will of *G. H.*, deceased.

Defence by a Devisee of Riens per Devise.

The defendant had not at the commencement of this action, nor has he since had, nor has he, any lands, tenements, or hereditaments by devise from the said *G. H.*

---

or testator, the defendant may plead that the bond or covenant sued upon was not the bond or covenant of the ancestor or testator, or may plead any defence showing that the plaintiff has no right of action upon the specialty. He may also, if sued as heir, deny the heirship, or plead that he had nothing by descent from the deceased; and, if sued as devisee, he may deny that he was a devisee under the will of the testator, or may plead that he had nothing by devise from the deceased. It would seem that it is sufficient for a defendant to allege that he had nothing by descent (or by devise) from the deceased at the time of the commencement of the action or subsequently, and that the plaintiff may reply that the defendant had lands, tenements, or hereditaments by descent (or by devise) from the deceased *before* the commencement of the action. If the plaintiff should succeed on the issue raised by that reply, he would be entitled to have judgment to the assessed value of the lands, notwithstanding that the defendant had *bonâ fide* aliened them before action, which would have been a defence at common law. (See 11 Geo. 4 & 1 Will. 4, c. 47, ss. 5, 7, 8; 2 Wms. Saund., 1871 ed., p. 19; *Brown* v. *Shuker*, 1 C. & J. 583; *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567; 44 L. J. Ch. 695.) The forms of defence given in the text would therefore appear to be sufficient, though in cases where the defendant has not in fact had any assets by descent or devise, it may be better not to limit the denial to the commencement of the action, but to state that he has never had any assets by descent or by devise, as the case may be.

By the common law, if issue was joined on the plea of *riens per descent*, and the jury found some assets, however small, the plaintiff was entitled to a verdict and a general judgment against the defendant for the debt and costs (2 Wms. Saund. 1871 ed., p. 20); but it seems that the provisions of the Act above cited, with respect to the assessment of the value of the assets would now be applied in all cases. (See *Brown* v. *Shuker*, *supra*; *In re Hodgely*, 31 Ch. D. 379; 56 L. J. Ch. 360). It is generally advisable, however, where there are some assets, which are not sufficient for the payment of the amount claimed, to plead one of the forms given in the text with an express *exception* of the assets which are admitted, and a statement of their value.

The heir or devisee may plead payment of other specialty creditors before action in reduction of the assets (2 Wms. Saund., 1871 ed., p. 28; see *Buckley* v. *Nightingale*, 1 Stra. 665; *Farley* v. *Briant*, 3 A. & E. 839, 842); and it would seem that he may also plead a retainer in respect of a specialty due to himself from the deceased. (See *In re Illidge*, 27 Ch. D. 478; 53 L. J. Ch. 991.)

Reply to a Defence of Riens per Descent, that the Defendant had Lands, &c., from his Ancestor (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 47, *s.* 7).

The defendant before action had lands, tenements, and hereditaments in fee simple by descent from the said *G. H.*

Particulars :—

Husband and Wife (*q*).

Defence to a Claim against a Married Woman sued as a Feme Sole, that she was under Coverture (*q*).

[*After dealing with the claim, and either admitting or denying it, add*] The defendant was covert and the wife of *G. H.* at the time of making the alleged contract [*or*, contracting the alleged debt, *or*, accepting the said bill, *or*, making the said promissory note, *or*, executing the said deed], and she will submit that any judgment in this action can only be enforced against her separate estate, if any.

(*q*) As a married woman is now capable of suing and being sued alone, (see *ante*, p.185), the mere fact of her being under coverture at the time of action brought, which before the Judicature Acts was only pleadable in abatement (see Bullen & Leake, 3rd ed., pp. 473, 598), is no defence to any action brought by or against her (see Ord. XXI. r. 20, cited *ante*, p. 522) ; and that fact, or the fact of a woman plaintiff or defendant marrying pending the action, is not in itself any ground for an application for the joinder of the husband.

So, too, the mere fact of coverture at the time of the making of the contract, which was pleadable in bar of the action previously to the Judicature Acts (see Bullen & Leake, 3rd ed., p. 598), cannot be set up as a defence to any action brought against a married woman on a contract made after the commencement of the M. W. P. Act, 1882. If, however, a married woman is sued as if she were a feme sole, and the fact that she is a married woman is not stated in the claim, it would seem that she can still plead that she is a married woman so as to prevent any judgment being obtained that could be enforced against her otherwise than in respect of her separate estate.

If a husband is sued alone on a contract made by him and his wife jointly, a judgment obtained against him in that action is a bar to a subsequent action against the wife on the same contract (*Hoare* v. *Niblett*, [1891] Q. B. 781 ; 60 L. J. Q. B. 565 ; and see *post*, p. 704). So a judgment against the wife in an action against the husband and wife jointly is a bar to any proceedings against the husband in respect of the same debt (*Morel* v. *Westmoreland*, [1904] A. C. 11 ; 73 L. J. K. B. 213) ; but such a judgment for part of a debt has been held to be no bar as to the residue (*French* v. *Howie*, [1905] 2 K. B. 580 ; 74 L. J. K. B. 853).

Coverture at any time after the commencement of the M. W. P. Act, 1882, does not operate as a disability under the Statutes of Limitation. (See *post*, p. 720 ; and see *Weldon* v. *Neal*, W. N. 1884, p. 153 ; 51 L. T. 289 ; *Lowe* v. *Fox*, 15 Q. B. D. 667 ; 12 App. Cas. 206 ; 56 L. J. Q. B. 480) ; and such coverture cannot, therefore, be set up by a married woman or her representatives as a reply to a defence founded on those statutes. (See *Ib.*)

Defence by a Married Woman, that she made the Contract, or contracted the Debt only as Agent for her Husband (*r*).

At the time when the goods referred to in the statement of claim were ordered and delivered, the defendant was the wife of and living with *E. F.*, and the said goods were ordered by and delivered to the defendant as agent only for, and with the authority of, the said *E. F.*, and she is in no way personally liable in respect thereof [*or*, The defendant entered into the alleged contract [*or*, contracted the alleged debt] only as agent for her husband *E. F.* and with his authority, and the plaintiff contracted with her only as such agent].

Defence by a Husband to an Action in respect of the Wife's ante-nuptial Debts, Contracts, or Wrongs, that he never had any Property from or through his Wife (*s*).

The defendant [*or*, The defendant *A. D.*, *if sued with his wife*] married the said *C. D.* after the year 1882, and never acquired from or through his said wife, and never became entitled from or through her to any property whatsoever belonging to her within the meaning of the Married Women's Property Act, 1882.

The like, where the Husband had Property from or through his Wife, but claims to deduct Payments, &c. (*s*).

[*Repeat the last form and proceed as follows:*] except property to the value of £——, [of which particulars are as follows: *here give particulars,*] and the defendant has since his marriage with his said wife and before action made payments [*or*, had judgments bonâ fide recovered against him in proceedings at law] to the amount of £——, in respect of debts contracted [*or*, contracts made, *or*, wrongs committed] by his said wife before the said marriage, in respect of which she was liable before the said marriage, viz., [*here state particulars of the payments or judgments*].

(*r*) It is a good defence to an action against a married woman on a contract to show that the married woman did not make the contract on her own account, but was contracting merely as an agent for her husband or a third party, and that the plaintiff contracted with her only on that footing (*Paquin* v. *Holden*, cited *ante*, p. 191).

(*s*) See *ante*, pp. 187, *et seq.* The husband, besides relying on any facts showing his non-liability under the Act, could also avail himself of any other defences showing the invalidity of the claim, as, for instance, by showing that the claim has been barred by the Statutes of Limitation, which run in such cases not from the date of the marriage, but from the time when the claim first arose against the wife.

Defence by a Husband that his Wife had no authority to pledge his Credit in respect of the Claim (*t*).

1. The defendant denies that he ordered or agreed to buy the goods referred to in the statement of claim or any part thereof, or that the same were sold or delivered to him.

2. If and so far as the said goods were ordered by, or sold or delivered to, the defendant's wife *G. H.*, which he does not admit, the defendant says that the said *G. H.* was not his agent and had no authority from him to order the said goods, or to buy or accept delivery thereof.

3. Further, or in the alternative, the defendant says—

(a) that the said goods were not necessaries suitable to the defendant's station in life and the station which the defendant permitted his wife to assume;

(b) that before the time at which it is alleged that the said *G. H.* ordered the said goods the defendant had on the —— ——, 19—, verbally forbidden his said wife to pledge his credit or to order or purchase goods on credit;

(c) that at the time when it is alleged that she ordered the said goods and at which the same were delivered, the said *G. H.* was already supplied with and had a sufficient supply of similar goods;

(d) that at the time when it is alleged that she ordered the said goods and at which the same were delivered to her, the said *G. H.* was supplied by the defendant with a sufficient allowance or sufficient means of buying the said or similar articles without pledging the defendant's credit;

(e) that on the —— ——, 19—, he verbally warned the plaintiff not to supply the said *G. H.* with goods on credit.

Defence by a Husband to a Claim for Goods sold, that the Goods were supplied to and on the Credit of his Wife.

1. The defendant does not admit that the plaintiff sold or delivered the goods referred to in the statement of claim or any part thereof at all. He denies that the plaintiff either sold or delivered the said goods or any part thereof to him or under any circumstances such as would render him liable to pay for the same.

2. The said goods were sold or delivered, if at all, to and on the credit of one *G. H.*, the defendant's wife, and not to or on the credit of the defendant.

[3. *Add, if applicable, allegation showing that the wife had no authority to pledge her husband's credit.*]

(*t*) See *ante*, p. 191.

Illegality (*u*).

Defence to an Action on a Bond, that the Bond was given for an Immoral Consideration (*u*).

The bond sued on was executed and delivered by the defendant to the plaintiff for an illegal consideration, viz., in consideration of the plaintiff then agreeing with the defendant that she would unlawfully and immorally cohabit and commit fornication with him.

(*u*) Where the defendant relies upon the defence of illegality, he should distinctly raise that defence by his pleading (Ord. XIX., rr. 15, 20, cited *ante*, pp. 523, 527), and should state the facts or refer to facts already stated in the statement of claim, so as to show clearly what the illegality is. (See *Bullivant* v. *Att.-Gen. for Victoria*, [1901] A. C. at p. 204.) Even where illegality is not pleaded, the Court will not enforce a contract which is illegal, or arises out of an illegal transaction, if the illegality is disclosed on the plaintiff's own evidence and it appears that the plaintiff was implicated in it (*Scott* v. *Brown*, [1892] 2 Q. B. 724; 61 L. J. Q. B. 738; *Gedge* v. *Royal Exchange Assurance Co.*, [1900] 2 Q. B. 214; 69 L. J. Q. B. 506). Where a statute makes a particular contract or class of contracts void the Court will refuse to allow an action to be maintained thereon even though the objection is not pleaded and the parties do not desire to rely on it (*Royal Exchange Association* v. *Vega*, [1902] 2 K. B. 384; 71 L. J. K. B. 739.

No action can be brought on a promise to do an illegal act, or to do an act with an illegal object (*Gas Light Co.* v. *Turner*, 5 Bing. N. C. 666, 675; *Pearce* v. *Brooks*, L. R. 1 Ex. 213; 35 L. J. Ex. 134; *Shaw* v. *Benson*, 11 Q. B. D. 563; *Davies* v. *Makuna*, 29 Ch. D. 596; 54 L. J. Ch. 1148); and no action can be brought on a promise the consideration for which is wholly or in part illegal (*Scott* v. *Gillmore*, 3 Taunt. 226; *Waite* v. *Jones*, 1 Bing. N. C. 656, 662; *Shackell* v. *Rosier*, 2 *Ib.* 634; *Higgins* v. *Pitt*, 4 Ex. 312; *Hill* v. *Fox*, 4 H. & N. 359; *Herman* v. *Jeuchner*, 15 Q. B. D. 561; 54 L. J. Q. B. 340; and see *Jones* v. *Merionethshire Building Society*, [1891] 2 Ch. 587).

Where a contract founded upon legal consideration comprises several promises, some of which are legal and some illegal, the illegality of some of the promises will not affect the right of action in respect of such of them as are legal, provided the latter are distinct and severable from the former (1 Wms. Saund., 1871 ed., p. 85; *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. at p. 250; *Rogers* v. *Maddocks*, [1892] 3 Ch. 346; *Kearney* v. *Whitehaven Colliery Co.*, [1893] 1 Q. B. 700, 711).

Contracts in restraint of trade which are unlimited both in regard to space and in regard to time, are, in general, unenforceable, as being contrary to public policy, and therefore void (*Maxim, &c. Co.* v. *Nordenfelt*, [1894] A. C. 535; 63 L. J. Ch. 908; *Dowden* v. *Pook*, [1904] 1 K. B. 45; 73 L. J. K. B. 38). But a contract in partial restraint of trade, that is, one which is limited either as to time or space, is valid, if the restraint does not exceed that which, under all the circumstances is reasonably required for the protection of the trade of the contractee, whilst, if the restraint is greater than can be reasonably required for this purpose, such contract is invalid (*Ib.*; *Dubowski* v. *Goldstein*, [1896] 1 Q. B. 478; 65 L.J. Q. B. 397; *Underwood* v. *Barker*, [1899] 1 Ch. 300; 68 L. J. Ch. 201; *Hughes* v. *Doman*, [1899] 2 Ch. 13; 68 L. J. Ch. 201). See notes to *Mitchell* v. *Reynolds*, 1 Smith's L. C., 11th ed., pp. 406, 417.

A bond given to provide for a woman after past illicit cohabitation is valid (*Nye* v. *Moseley*, 6 B. & C. 133; *In re Vallance*, 26 Ch. D. 353), though a simple contract made under the same circumstances is void for want of consideration (*Binnington* v. *Wallace*, 4 B. & Ald. 650; *Beaumont* v. *Reeve*, 8 Q. B. 483). But a bond or covenant made in

Defence that the Contract is void as being in Illegal Restraint of Trade.

The said contract is an unreasonable and unnecessary restraint of the defendant's trade, and is contrary to public policy and illegal.

Defence to an Action on a Separation Deed, that the Deed illegally provided for Future Separation (x).

The deed sued on was made for an illegal purpose agreed upon between the defendant and the plaintiffs with the concurrence of *J. K.*, who was then the wife of the defendant and cohabiting with him, viz., for the purpose of providing a separate maintenance for her in case the defendant and *J. K.* should thereafter live separate from each other and cease to cohabit together as man and wife, and the covenant sued upon was made with the plaintiffs

---

consideration of future illicit cohabitation is invalid, just as a simple contract for such immoral consideration would be (*Walker* v. *Perkins*, 1 W. Bl. 517; *Benyon* v. *Nettlefold*, 3 Mac. & G. 94; *In re Vallance*, *supra*). A contract whereby a woman transfers to another her obligation to maintain her illegitimate child is illegal (*Humphrys* v. *Polak*, [1901] 2 K. B. 385; L. J. K. B. 752).

A contract to interfere with the due course of public justice is illegal; and upon this ground a contract to compound a felony or other public offence, and to stifle a prosecution, is unenforceable, and securities given in pursuance of such a contract cannot be enforced by parties to any such contract, or by those who take them with notice of such illegality (*Williams* v. *Bayley*, L. R. 1 H. L. 200; 35 L. J. Ch. 717; *Brook* v. *Hook*, L. R. 6 Ex. 89; 40 L. J. Ex. 50; *Jones* v. *Merionethshire Building Society*, [1891] 2 Ch. 587; [1892] 1 Ch. 173). A contract to indemnify bail is illegal (*Consolidated Exploration Co.* v. *Musgrave*, [1900] 1 Ch. 37; 69 L. J. Ch. 11).

Money paid for the defendant at his request in execution of an illegal purpose cannot be recovered, nor can money lent to the defendant to carry out an illegal purpose, at any rate if the purpose has been carried out wholly or to a substantial extent (*Cannan* v. *Bryce*, 3 B. & Ald. 179; *McKinnell* v. *Robinson*, 3 M. & W. 434; *Kearley* v. *Thomson*, 24 Q. B. D. 742; 59 L. J. Q. B. 288; see "*Money Received*," *ante*, p. 258). But where money has been paid upon an illegal executory contract, or for a future illegal purpose, the party paying it may in general reclaim it at any time before any material part of the contract or purpose has been executed or accomplished (*Taylor* v. *Bowers*, 1 Q. B. D. 291; 46 L. J. Q. B. 39; *Kearley* v. *Thomson*, *supra*; *Barclay* v. *Pearson*, [1893] 2 Ch. 154; 62 L. J. Ch. 623; *Hermann* v. *Charlesworth*, *infra*).

As to marriage brokage contracts see *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123; 74 L. J. K. B. 620.

See further as to illegality, "*Gaming*," *ante*, p. 667; "*Felony*," *post*, p. 851; "*Company*," *ante*, p. 634; and notes to *Collins* v. *Blantern*, 1 Smith's L. C., 11th ed., pp. 369, 377.

(*x*) A deed made during cohabitation to provide for the future separation of husband and wife is illegal (*Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200). But a deed made upon an actual separation providing for the rights and liabilities of husband and wife living separately is not illegal (*Jones* v. *Waite*, 5 Bing. N. C. 341; 4 M. & G. 1104; *Besant* v. *Wood*, 12 Ch. D. 605, 620; 48 L. J. Ch. 497; *Fearon* v. *Aylesford*, 14 Q. B. D. 792; 54 L. J. Q. B. 33; *Clark* v. *Clark*, 10 P. D. 188).

as trustees for *J. K.* and in order to provide her with such maintenance in the event of such separation.

Defence that a Contract was made for forming and carrying on or for carrying on a Company of more than twenty persons contrary to the Companies Act, 1862, *s.* 4 (*x*).

The contract, if any, was an illegal contract.

Particulars :—

The plaintiffs and defendant and other persons exceeding 20 in number on or about the —— ——, 19—, and after the commencement of the Companies Act, 1862, formed themselves into a company association or partnership for the purpose of carrying on a business, namely, [purchasing and working the said steamship,] having for its object the acquisition of gain by the company association or partnership or the individual members thereof, which company assocation or partnership was not registered as a company under the said Act and was not formed in pursuance of any other Act of Parliament or of letters patent and was not a company engaged in working mines within and subject to the jurisdiction of the Stannaries. The contract sued on was made, if at all, for the purpose of [forming and] carrying on the said company association or partnership, and the plaintiffs are suing and the defendant being sued as members thereof.

Defence to an Action for the Price of Goods sold, and on Accounts stated in respect of the same matters, that the Debt was for Spirits sold in quantities of less Value than Twenty Shillings (24 *Geo.* 2, *c.* 40, *s.* 12 ; 25 & 26 *Vict. c.* 38) (*y*).

The alleged debt was contracted for spirituous liquors sold and delivered at various times, and no part of the alleged debt was bonâ fide contracted at any one time, or for such liquors delivered at any one time, to the amount of twenty shillings or upwards, and no part of such liquors was sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof in quantities not less at any one time than a reputed quart.

Defence that a Contract sued upon was a Contract by way of Gaming or Wagering within the 8 & 9 *Vict. c.* 109, *s.* 18 : *see* "*Gaming*," *ante*, p. 667; *and for similar Defences under other Acts relating to Gaming, see Ib.*

(*x*) See *ante* p. 634, *Shaw* v. *Benson* cited *ante* pp. 605, 634.

(*y*) See for an instance of a like defence under the former system of pleading, *Hughes* v. *Done*, 1 Q. B. 294 ; and as to this defence in actions on bills and notes, see *Scott* v. *Gilmore*, 3 Taunt. 226 ; *Crookshank* v. *Rose*, 5 C. & P. 19 ; 1 M. & Rob. 100.

Defence to an Action on a Marine Policy, denying the Plaintiff's Interest (19 *Geo.* 2, *c.* 37): *see* "*Insurance*," *post*, p. 691.

Defence that a Bill of Exchange was given for an Illegal Consideration: see "*Bills of Exchange*," *ante*, p. 604.

Defence stating Illegality under the Ground Game Act, 1880, *as a Point of Law: Sherrard* v. *Gascoygne*, [1900] 2 Q. B. 279, 280.

Impossibility of Performance.

See "*Agreements*," *ante*, p. 577.

Indemnities (*z*).

Denial of the Contract: see "*Agreements*," *ante*, p. 575.

Denial of the alleged Breach.

The defendant did indemnify the plaintiff from the said loss [*or*, damage *or*, expense, *or as the case may be, varying the allegation according to the allegations in the statement of claim*], viz., by, &c. [*here state in what manner the defendant performed the contract of indemnity, e.g.*, paying £—— to the plaintiff on the —— ——, 19—].

Denial that the Plaintiff was damnified (*a*).

The plaintiff did not sustain the alleged or any loss [*or*, suffer the alleged or any damage, *or*, incur the alleged or any expense, *varying the form of denial according to the form of the allegation in the statement of claim*].

(*z*) See "*Indemnities*," *ante*, p. 194; "*Broker*," *ante*, p. 138; "*Gaming*," *ante*, p. 668; "*Guarantees*," *ante*, p. 179. Where a defendant is entitled to be indemnified against the plaintiff's claim by some person who is not a party to the action, he may obtain leave to bring in such person as a third party in the action, and on establishing his claim to such indemnity against the party so added, may have relief against such third party as part of the proceedings in the action. (See Ord. XVI., rr. 44—54; *ante*, p. 555.) Similarly, where a defendant is entitled to an indemnity over against a co-defendant, he may take proceedings against him under Ord. XVI., r. 55, *ante*, p. 559.

(*a*) In general no action will lie upon a contract of indemnity until the plaintiff has

The like, where the Plaintiff sues upon a Bond, and the Statement of Claim does not disclose that the Bond sued on was a Contract of Indemnity.

The bond sued on was subject to a condition to make void the same if [*here state the condition, and, if the indemnity extends to several matters, proceed as follows:* and the plaintiff has not at any time since the making of the bond sustained any loss or damage [*or*, incurred any expense, *as the case may be*] by reason of any cause or thing in the said condition mentioned]. [*If the condition is for indemnification in respect of one particular matter only, the defence should state specifically that the plaintiff has not sustained any loss, &c., in respect of that particular matter.*]

Defence that the alleged Loss or Damage, &c., did not result from the Matters indemnified against.

The alleged loss [*or*, damage, &c., *according to the form of the allegation in the statement of claim*] did not arise from or by reason of any of the matters or things indemnified against [*or state the particular matter indemnified against, if only one*].

Defence that the Plaintiff was damnified by his own Wrong or Default.

The alleged loss [*or*, damage, &c., *according to the allegation of the damnification in the statement of claim*] was occasioned by the plaintiff's own wrong and default.

Particulars are as follows:—[*State particulars.*]

---

been damnified, that is, until the loss or damage which gives the right to the indemnity has accrued (*Hughes-Hallett* v. *Indian, &c. Gold Mines Co.*, 22 Ch. D. 561; 52 L. J. Ch. 418; *Crampton* v. *Walker*, 30 L. J. Q. B. 19; see *Reynolds* v. *Doyle*, 1 M. & G. 753; *Collinge* v. *Heywood*, 9 A. & E. 633). In some cases, however, a trustee or agent or surety is entitled to be indemnified against *liability* as well as loss incurred on behalf of the *cestui que trust* or principal. (*Wolmershausen* v. *Gullick* (1893) 2 Ch. 514. *Johnson* v. *Salvage Association*, 19 Q. B. D 458, 460. *Phené* v. *Gillan*, 5 Hare, 1, 12; *Crowley's claim*, L. R. 18 Eq. 182; 43 L. J. Ch. 551; *Hughes-Hallett* v. *Indian, &c. Gold Mines Co., supra*; *Hobbs* v. *Wayet*, 36 Ch. D. 256; De Colyar on Guarantees, 3rd ed. 299).

It is no defence to an action on a contract of indemnity that the defendant has had no notice of the damnification, unless such notice was expressly stipulated for by the contract (*ante*, p. 194).

If the statement of claim does not disclose that the contract sued on was a contract of indemnity, a denial of the damnification should be preceded by a statement of the nature of the contract, showing that it was a contract of indemnity.

Infancy (*b*).

Defence of the Infancy of the Defendant at the Time of the alleged Contract.

The defendant was an infant at the time of making the alleged contract [*or*, contracting the alleged debt].

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

(*b*) The defence of infancy must be specially pleaded. (See Ord. XIX., rr. 15, 20, cited *ante*, pp. 523, 527.)

Previously to the passing of the Infants' Relief Act, 1874, contracts made by a person during his infancy (other than contracts for necessaries), were in general voidable, but being voidable only and not void (except where they were manifestly to his prejudice), they were capable of ratification after the person who made them attained his full age. (See *Keane* v. *Boycott*, 2 H. Bl. 512, 515.)

By the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1, "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable"; and by s. 2, "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

It is further provided by the Betting and Loans (Infants) Act, 1892 (55 Vict. c. 4), s. 5, that "If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever. For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan."

The words "any promise or contract" in the latter part of s. 2 of the Infants Relief Act, 1874, are not limited to the contracts mentioned in s. 1; and therefore where the defendant during his infancy promised to marry the plaintiff, and after coming of age ratified the promise, it was held that the right of action upon such promise was taken away by the second section (*Coxhead* v. *Mullis*, 3 C. P. D. 439; 47 L. J. C. P. 761); but a new and independent promise to marry which was made after the defendant came of age, and which was not a mere ratification of any previous promise, was held to be binding (*Ditcham* v. *Worrall*, 5 C. P. D. 410; 49 L. J. C. P. 688; *Northcote* v. *Doughty*, 4 C. P. D. 385). As to what is an independent promise as distinguished from a mere ratification, see *Ib.*, and *Holmes* v. *Brierley*, 36 W. R. 745.

Where a bill had been accepted, after majority, in compromise of an action brought to recover a debt contracted during infancy by the acceptor otherwise than for necessaries, it was held that, by reason of s. 2 of the Act of 1874, no action could be brought on the bill by an indorsee with notice (*Smith* v. *King*, [1892] 2 Q. B. 543).

A building society cannot recover money lent to an infant member on mortgage, but, if the money borrowed is applied in the purchase of land, is entitled to stand in the position of the vendor and enforce his lien (*Nottingham Building Society* v. *Thurstan*, [1903] A, C. 6; 72 L. J. Ch. 134).

Where an infant has paid money on an application for shares in a company, or in respect of any other voidable contract, he may, it would seem, if he avoids such

The like, where the Defendant is still an Infant (*c*).

Between *A. B.*..... .....Plaintiff,

and

C. D., an infant, by *E. F.*, his guardian.....Defendant.

Defence.

The defendant, by *E. F.*, his guardian, says that he was, at the time of

---

contract, recover back the money so paid by action as money paid for a consideration which has failed before he has received any benefit or advantage from the contract (*Hamilton* v. *Vaughan-Sherrin Co.*, [1894] 3 Ch. 589 ; 63 L. J. Ch. 795). So, also, if the contract is one void by the Infants Relief Act, 1874, he may recover money paid by him thereunder if he has received no benefit or advantage, but not where he has received a benefit or advantage, and is not in a position to restore the consideration to the opposite party (*Valentini* v. *Canali*, 24 Q. B. D. 166 ; 59 L. J. Q. B. 74).

Sect. 2 of the Infants Relief Act 1874, applies to a set-off. (See *Rawley* v. *Rawley*, 1 Q. B. D. 460 ; 45 L. J. Q. B. 675.) The defence of infancy is available in actions founded on contracts, although the statement of claim is framed upon a wrong, as in the case of breaches of duty arising out of contracts, though it cannot be pleaded to actions brought for wrongs independent of contract. (See *post*, p. 858.)

An infant is not liable to an action for damages for obtaining a contract with another person by fraudulently representing himself as of full age (*Johnson* v. *Pye*, 1 Sid. 258 ; 1 Lev. 169 ; *Miller* v. *Blankley*, 38 L. T. 527 ; and see *Liverpool Adelphi Loan Ass.* v. *Fairhurst*, 9 Ex. 422 ; *Wright* v. *Leonard*, 11 C. B. N. S. 258 ; 30 L. J. C. P. 365) ; but in some cases where there has been an express misrepresentation as to age, and the facts are such as would formerly have afforded ground for relief in a Court of Equity, such equitable relief may still be obtained (*Ex p. Unity Banking Ass.*, 3 De G. & J. 63 ; 27 L. J. B. 33 ; *Nelson* v. *Stocker*, 4 De G. & J. 458 ; 28 L. J. Ch. 760 ; *Ex p. Jones*, 18 Ch. D. 109 ; 50 L. J. Ch. 673). This relief would seem to be that the infant may be bound in such cases by payments made and acts done at his request on the faith of his misrepresentation, and may be compelled to restore, where possible, any advantage he has obtained by his misrepresentation. (See Pollock on Contracts, 7th ed., pp. 55, 76.) The plaintiff suing upon an ordinary common law claim for debt or damages cannot properly reply to a defence of infancy that the defendant procured the making of the contract by fraudulently representing himself as of full age (*Bartlett* v. *Wells*, 1 B. & S. 836 ; 31 L. J. Q. B. 57 ; *Bateman* v. *Kingston*, 6 L. R. Ir. 328 ; though see Roscoe's N. P. Ev., 17th ed., p. 666).

Certain contracts made by an infant which are manifestly to his prejudice have always been held void, *e.g.*, a bond with a penalty (Co. Litt. 172 a ; *Keane* v. *Boycott*, 2 H. Bl. 512, 515 ; *Walter* v. *Everard*, [1891] 2 Q. B. at p. 372 ; *Viditz* v. *O'Hagan*, [1900] 2 Ch. at p. 97) ; or a bill of exchange or promissory note (*In re Soltykoff*, [1891] 1 Q. B. 413 ; 60 L. J. Q. B. 339) ; but a contract which is a beneficial one for an infant is not necessarily invalidated by the mere fact that it contains a penalty clause (*Morrison* v. *Fletcher*, 17 Times Rep. 95). An unfair provision in a contract for carriage of an infant passenger was held void (*Flower* v. *L. & N. W. Ry. Co.*, [1894] 2 Q. B. 65) ; and so was an agreement to settle a claim (*Mattei* v. *Vantro*, 78 L. T. 682 ; and see *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225, 229 ; 73 L. J. K. B. 739). The mere fact that a contract contains among its provisions certain stipulations against an infant, does not invalidate it, where, as a whole, it appears to be for his benefit (*Corn* v. *Matthews*, [1893] 1 Q. B. 310 ; *Evans* v. *Ware*, [1892] 3 Ch. 502 ; *Clements* v. *L. & N. W. Ry. Co.*, [1894] 2 Q. B. 482 ; 63 L. J. Q. B. 837 ; *Green* v. *Thompson*, [1899] 2 Q. B. 1 ; 68 L. J. Q. B. 719 ; *Morrison* v. *Fletcher*, *supra*). See *ante*, p. 197, and *post*, p. 858.

(*c*) An infant appears and defends by a guardian *ad litem* (Ord. XVI., rr. 16, 18 ; *ante*, p. 196).

Ord. XIX., r. 13, *ante*, p. 527, which provides that allegations of fact which are not denied are to be taken to be admitted, does not apply as against an infant.

making the alleged contract [*or*, contracting the said debt, *or* accepting the said bill, &c.], and still is, an infant.

Reply that the Debt sued for was for Necessaries supplied to the Defendant (*d*).

The goods sold and delivered [*or*, The work done and materials provided, *or*, *as the case may be*], were necessaries suitable to the then condition in life of the defendant and required for his use.

Defence to an Action for Calls that the Defendant was an Infant at the Time of taking the Shares (*e*).

The defendant was an infant when he first became holder of the said shares, and he repudiated and abandoned the said shares on that ground within a reasonable time after he came of age, viz., on the —— ——, 19—, by a letter to the plaintiffs dated that day [*or*, *as the case may be*].

Reply of the Plaintiff's Infancy to a Defence under the Statutes of Limitation: see "*Limitation, Statutes of*," *post*, p. 724.

(*d*) It is provided (*inter alia*) by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2, that where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. "Necessaries" are, by the same section, defined as "goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of the sale and delivery." (See *Barnes* v. *Toye*, 13 Q. B. D. 410; 53 L. J. Q. B. 567; *Johnstone* v. *Marks*, 19 Q. B. D. 509; 57 L. J. Q. B. 6; *Hewlings* v. *Graham*, 70 L. J. Ch. 568; *Clyde Cycle Co.* v. *Hargreaves*, 78 L. T. 296.)

"Necessaries" may include (*inter alia*) the proper instruction of the infant according to his condition in life (Co. Litt. 172 a; Leake on Contracts, 4th ed., p. 380); and accordingly, if infancy is pleaded as a defence to an action on a deed of apprenticeship, &c., the plaintiff may reply that the instruction and maintenance or wages provided for by the deed were necessary for the infant, and that the provisions of the deed were for his benefit (*Walter* v. *Everard*, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738; *Green* v. *Thompson*, cited *ante*, p. 688).

An infant may acknowledge a debt for necessaries so as to take it out of the Statute of Limitations (*Willins* v. *Smith*, 4 E. & B. 180; 24 L. J. Q. B. 62).

(*e*) When a person is sued upon obligations arising out of property of which he has become possessed under a contract, as shares in a company, he cannot avoid the obligation by the simple defence that he was an infant at the time of acquiring the property, but must further plead that before coming of age or within a reasonable time in that behalf after coming of age he repudiated the contract on that ground, and disclaimed the property. (See *Cork Ry. Co.* v. *Cazenove*, 10 Q. B. 935; *Dublin Ry. Co.* v. *Black*, 8 Ex. 181; *Baker's case*, L. R. 7 Ch. 115; *Edwards* v. *Carter*, [1893] A. C. 361; *Hamilton* v. *Vaughan-Sherrin Co.*, [1894] 3 Ch. 589; 63 L. J. Ch. 795; *Viditz* v. *O'Hagan*, [1899] 2 Ch. 569; 68 L. J. Ch. 553; approved on this point, though reversed on the ground that the case was governed by foreign law, [1900] 2 Ch. 87; 69 L. J. Ch. 507).

Insanity (*f*).

Commencements of Defences by Lunatics and Persons of Unsound Mind: see "Lunatics," ante, p. 243.

Defence that the Defendant was Insane at the Time of Contracting.

The defendant was of unsound mind at the time of making the alleged contract [*or*, of contracting the alleged debt, *or*, of accepting the alleged bill, *or*, of executing the alleged deed, &c.], and incapable of understanding the same, as the plaintiff then well knew.

Reply of Insanity to a Defence under the Statutes of Limitation: see "Limitation, Statutes of," post, p. 724.

(*f*) It is in general a good defence that the defendant at the time of making the alleged contract was so insane as to be incapable of understanding it, and that this was known to the plaintiff (*Molton* v. *Camroux*, 2 Ex. 487; 4 *Ib.* 17; 18 L. J. Ex. 68, 356; *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599). This defence must be pleaded specially (see Ord. XIX., r. 15, *ante*, p. 523), and it must allege that the insanity of the defendant was known to the plaintiff at the time of the contract (*Imperial Loan Co.* v. *Stone*, *supra*).

A lunatic is liable on an implied obligation to pay for necessaries supplied to him, notwithstanding that the person who supplied them to him was aware of his insanity (*Brockwell* v. *Bullock*, 22 Q. B. D. 567; 58 L. J. Q. B. 289; *In re Rhodes*, 44 Ch. D. 94; 54 L. J. Ch. 298; and see the Sale of Goods Act, 1893, s. 2, *ante*, p. 689). So, too, a lunatic may be liable for the price of necessaries supplied to his wife during his insanity by a person who has notice of his insanity, for the insanity of the husband does not put an end to the wife's implied authority to pledge his credit for such necessaries (*Read* v. *Legard*, 6 Ex. 636; 20 L. J. Ex. 309). But this doctrine is not applicable where the wife has received a competent allowance for her maintenance out of the husband's estate (*Richardson* v. *Du Bois*, L. R. 5 Q. B. 51; 39 L. J. Q. B. 69).

A lunatic cannot during his insanity appoint an agent (*Yarbuck* v. *Bispham*, 2 M. & W. 2, 8), and the authority of an agent previously appointed will, as between the principal and the agent, be revoked by the complete insanity of the principal, if known to the agent; but as between the principal and third parties to whom the principal, while sane, has held out the agent as authorised to contract for him, the authority of the agent will not be revoked until such third parties have notice of the principal's insanity (*Drew* v. *Nunn*, 4 Q. B. D. 661; 48 L. J. Q. B. 591).

A contract made by a lunatic during a lucid interval is good (*Hall* v. *Warren*, 9 Ves. 605).

Ord. XIX., r. 13 (cited *ante*, p. 527)—which provides that allegations of fact which are not denied are to be taken to be admitted—does not apply as against a lunatic or person of unsound mind not so found by inquisition.

INSURANCE.

I. MARINE POLICIES (*g*).

Denial of the making of the Policy.

The defendant [*or*, defendants] did not make [*or*, subscribe] the policy sued on. [*The form of denial may be varied according to the terms used in the statement of claim.*]

(*See R. S. C.*, 1883, *App. E.*, *Sect. III.*)

Defence denying the Plaintiff's Interest (*h*).

The plaintiff was not interested in the subject-matter of the insurance.

(*R. S. C.*, 1883, *App. D.*, *Sect. V.*)

Objection in Point of Law on the ground that the Policy was avoided by 19 *Geo.* 2, *c.* 37, *s.* 1: *see* "*Proceedings in Lieu of Demurrer*," *ante*, p. 563, *and see note* (*h*), *infra.*

(*g*) As the statement of claim is deemed to contain an implied averment of the fulfilment of all conditions precedent necessary for the case of the plaintiff (*e.g.*, the sailing the ship, the loss of the ship, the loading of the goods, and the loss of the goods, the interest of the plaintiff in the ship or goods, and also the compliance with warranties), the fulfilment of any such condition, if intended to be contested, must be distinctly denied. (See *ante*, p. 157, and Ord. XIX., r. 14, there cited.)

Notice of loss and demand of payment are not ordinarily conditions precedent (*Dawson* v. *Wrench*, 3 Ex. 359; and see *ante*, p. 194). As to when notice of abandonment is a condition precedent, see *ante*, p. 202.

Unseaworthiness, fraud, misrepresentation, concealment, deviation, and other defences of a similar nature, must be specially pleaded. (See Ord. XIX., r. 15, cited *ante*, p. 523.)

The statement in the policy of the persons named as interested, or as the consignors or consignees of the property insured, or as the persons who received the orders for and effected the policy, or as the persons who gave the order to effect the policy, according to the 28 Geo. 3, c. 56, s. 1 (see *ante*, p. 199), is material and may be denied (*Bell* v. *Janson*, 1 M. & S. 201). The name of a person acting as having received an order, whose act is afterwards ratified, is sufficient to satisfy the statute (*Wolff* v. *Horncastle*, 1 B. & P. 316; *Bell* v. *Gilson*, *Ib.* 345). As to what is a sufficient statement of the names of the subscribers or underwriters, see *In re Arthur Average Association*, L. R. 10 Ch. 542; 44 L. J. Ch. 509.

(*h*) Insurances made, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer," are void by the Marine Insurance Act, 1745 (19 Geo. 2, c. 37): see *ante*, p. 200. The Court will take notice of the illegality, though not pleaded (*Gedge* v. *Royal Exchange Assurance*, [1900] 2 Q. B. 214; 69 L. J. Q. B. 506).

It is no defence to an action on a policy on goods "lost or not lost," that the loss occurred before the plaintiff acquired any interest, unless it is also shown that the plaintiff acquired the interest with a knowledge of the loss (*Sutherland* v. *Pratt*, 11 M. & W. 296).

Defence denying that the Loss was by the Perils Insured against (*i*).

The loss was not by the perils insured against.

(*R. S. C.*, 1883, *App. D., Sect. V., and App. E., Sect. III.*)

Defence that the Loss was an Average Loss within the Exception in the Policy (*k*).

The policy sued on contained a memorandum that [corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general, or the ship should be stranded, and that sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under £5 per cent., and that all other goods, also the ship and freight, were warranted free from average under £3 per cent., unless general, or the ship should be stranded, *or as the case may be*], and the goods lost were [sugar, tobacco, &c.], and the loss thereof was an average loss [under £5 per cent.] within the meaning of the policy, and was not a general average loss, and the ship was not stranded during the voyage.

For a like form, see Stewart v. *Merchants' Marine Insurance Co.*, 14 Q. B. D. 555 ; 16 *Ib.* 619.

Defence that the Ship was not Seaworthy (*l*).

The ship was not seaworthy at commencement of risk [*or*, voyage].

(*R. S. C.*, 1883, *App. D., Sect. V.*)

(*i*) See *ante*, p. 201.

(*k*) Marine policies of insurance usually contain a memorandum at the end protecting the underwriter from liability to small particular averages, under a certain percentage, which might otherwise be claimed in respect of certain perishable commodities. (See *ante*, pp. 203, 204 ; *Marine Ins. Co.* v. *China Steamship Co.*, 11 App. Cas. 573 ; *Stewart* v. *Merchants' Mar. Ins. Co.*, 16 Q. B. D. 619 ; *Price* v. *A1 Ships Small Damage Association*, 22 Q. B. D. 580 ; 58 L. J. Q. B. 269.)

See as to general average, *ante*, p. 203.

(*l*) A warranty of seaworthiness of the ship at the commencement of the risk is implied in all voyage policies on ship or goods, but not in time policies, and therefore, in actions upon time policies, the fact of the unseaworthiness of the ship is no defence (*Gibson* v. *Small*, 4 H. L. C. 353 ; *Dudgeon* v. *Pembroke*, 2 App. Cas. 284 ; 46 L. J. H. L. 409). But in an action on a time policy a defence that the plaintiff knowingly sent the ship to sea in an unseaworthy condition, and thereby occasioned the loss, is a good defence (*Thompson* v. *Hopper*, 6 E. & B. 172 ; 25 L. J. Q. B. 240 ; 26 *Ib.* 18 ; *Dudgeon* v. *Pembroke*, *supra*). In the case of a round voyage the warranty applies to the commencement of each stage of the voyage (*Greenock S.S. Co* .v. *Maritime Ins. Co.*, [1903] 2 K. B. 657 ; 72 L. J. K. B. 868). A plea to an action on a voyage policy that during the voyage the ship was rendered unseaworthy by the negligence of the master was held bad (*Dixon* v. *Sadler*, 5 M. & W. 405 ; 8 M. & W. 895). The implied warranty

Defence that the Ship did not sail on the Day Warranted.

The ship did not sail on or before the —— ——, 19—, within the meaning of the warranty to that effect contained in the policy.

Defence that the Ship deviated from the Voyage insured (m).

After the commencement of the risk mentioned in the policy, and before the loss, the ship, without sufficient cause or excuse, did not proceed on the voyage, and deviated therefrom.

Particulars :—

Defence that the Policy was obtained by Fraud.

The defendant was induced to make [*or*, subscribe] the policy [*or*, to become such insurer] by the fraud of the plaintiff.

Particulars of the fraud are as follows:—[*Here state particulars: see* "*Fraud*," *ante*, pp. 397, 656.]

---

of seaworthiness does not extend to the lighters in which the goods are landed from the ship (*Lane* v. *Nixon*, L. R. 1 C. P. 412; 35 L. J. C. P. 243). In a voyage policy on goods there is no implied warranty that the goods are seaworthy for the voyage (*Koebel* v. *Saunders*, 17 C. B. N. S. 71; 33 L. J. C. P. 310); but if the goods are lost by reason of some inherent vice therein, it is not a loss by the perils of the sea for which the insurers are liable (see *Ib.*; *Taylor* v. *Dunbar*, L. R. 4 C. P. 206).

By the warranty of seaworthiness of a ship "it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk (*Annen* v. *Woodman*, 3 Taunt. 299; Park on Ins., 8th ed., 473); and if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as if it were a voyage down a canal or river, and thence across the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it" (*Dixon* v. *Sadler*, 5 M. & W. 405, 414; approved in *Burges* v. *Wickham*, 33 L. J. Q. B. 17, 25; *Bouillon* v. *Lupton*, 15 C. B. N. S. 113; 33 L. J. C. P. 37, 42; *Clapham* v. *Langton*, 5 B. & S. 729; 34 L. J. Q. B. 46; *Quebec Marine Ins.* v. *Commercial Bank of Canada*, L. R. 3 P. C. 234; 39 L. J. P. C. 53; *Hedley* v. *Pinkney*, [1892] 1 Q. B. 58; [1894] A. C. 222; 63 L. J. Q. B. 419; 61 L. J. Q. B. 179; *Greenock, S.S. Co.* v. *Maritime Ins. Co.*, [1903] 1 K. B. 673; [1904] 2 K. B. 657; 72 L. J. K. B. 59, 868). The warranty of seaworthiness includes fitness of the ship to carry the cargo, as well as to encounter the perils of navigation (*Rathbone* v. *MacIver*, [1903] 2 K. B. 378; 72 L. J. K. B. 703; *Sleigh* v. *Tayler*, [1900] 2 Q. B. 333; 69 L. J. Q. B. 626). "But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against" (*Dixon* v. *Sadler*, 5 M. & W. 405, 414; 8 M. & W. 895).

(*m*) As to what is a deviation, see Arnould on Marine Insurance, 7th ed., p. 452; 2 Wms. Saund., 1871 ed., p. 569; *Company of African Merchants* v. *British Ins. Co.*, L. R. 8 Ex. 154; 42 L. J. Ex. 60.

Defence of Misrepresentation of a Material Fact respecting the Risk (*n*).

At the time of the insurance being effected, the plaintiff misrepresented to the defendant a fact then material to be known to the defendant.

Particulars are as follows :—

[The plaintiff on the —— ——, 19—, verbally represented to the defendant that the ship had sailed from —— on the —— ——, 19— ; whereas the ship had not sailed from —— on that day, but had sailed from —— on the —— ——, 19—, *or, as the case may be.*]

Defence of Concealment of a Material Fact (*n*).

At the time of the insurance being effected the plaintiff wrongfully concealed from the defendant a material fact then known to the plaintiff and unknown to the defendant.

Particulars are as follows :—

[The plaintiff concealed from the defendant the fact that the said ship had been aground and had sustained serious damage, and then was lying at —— for repairs, *or, as the case may be.*]

II. Life Policies.

Denial of the making of the Policy.

The defendants did not make the alleged policy.

(*R. S. C.*, 1883, *App. E., Sect. III.*)

Defence denying the Plaintiff's Interest in the Life assured (*o*).

At the time of the making of the policy the plaintiff was not interested in the life of *A. B.*

(*n*) The misrepresentation or concealment, at the time of the negotiation of a policy of a material fact which, having regard to the ordinary practice of underwriters, would affect the judgment of an underwriter as to whether he should accept the risk or not, will vitiate the policy, even though the fact may not be material with regard to the risk insured (*Ionides* v. *Pender*, L. R. 9 Q. B. 531 ; 43 L. J. Q. B. 227 ; *Rivaz* v. *Gerussi*, 6 Q. B. D. 222 ; 50 L. J. Q. B. 176 ; *Tate* v. *Hyslop*, 15 Q. B. D. 368 ; *Blackburn* v. *Vigors*, 12 App. Cas. 531 ; *Blackburn* v. *Haslam*, 21 Q. B. D. 144 ; 57 L. J. Q. B. 479 ; *Seaton* v. *Burnand*, [1900] A. C. 135 ; 69 L. J. Q. B. 409). In such cases the contract may be avoided at the election of the underwriter as in cases of fraud, although the misrepresentation or concealment may not have been accompanied by any fraudulent intention (*Ib.*). The obligation to disclose material facts attaches up to the time of the making of the "slip," and not to that of the executing of the formal policy. (See *ante*, p. 199.)

(*o*) As to insurance without interest, see 14 Geo. 3, c. 48, s, 1, cited *ante*, p. 205 ; and as to what is a sufficient interest, see *ante*, p. 205.

Defence that the Policy was obtained by Fraud.

The defendants were induced to make the policy by the fraud of the plaintiff [*or*, the said *G. H.*].

Particulars of the fraud are as follows:—[*Here state particulars: see "Fraud," ante*, p. 657.]

Defence that the Policy was obtained by the Fraudulent Concealment of a Material Fact (p).

The defendants were induced to make the policy by the plaintiff [*or*, the said *G. H.*] fraudulently concealing from them a fact then material to be known to them, and of which they were then ignorant.

Particulars are as follows:—

[The fact so concealed was that the said *G. H.* had suffered from and was then subject to a disease called ——.]

Defence that the Declaration agreed upon as the Basis of the Insurance was untrue.

Previously to effecting the insurance the said *G. H.* [*or*, the plaintiff] on the —— —— 19—, delivered to the defendants a declaration stating amongst other things that he [*or*, the said *G. H.*] was then in a good state

---

(*p*) The concealment of a material fact known to the proposed assured vitiates any contract of insurance whether of life, fire, or sea or other risk (*Lindenau* v. *Desborough*, 8 B. & C. 586; *London Assurance* v. *Mansel*, 11 Ch. D. 363; 48 L. J. Ch. 331; see *Seaton* v. *Burnand*, cited *ante*, p. 674). In policies of life insurance effected by one person on the life of another, an erroneous statement respecting the life to be insured, made in a declaration by the person whose life is insured, does not in the absence of any fraudulent intention avoid the policy, unless the policy contains an express proviso that it shall be conditional upon the truth of such declaration made by the insured (*Wheelton* v. *Hardisty*, 8 E. & B. 232; 27 L. J. Q. B. 241; *Thomson* v. *Weems*, 9 App. Cas. 671). Under such a proviso an untrue statement contained in the declaration avoids the policy, whether it was made fraudulently or not, and whether it was material or not in inducing the policy (*Cazenove* v. *British Equitable Ass. Co.*, 6 C. B. N. S. 437; 28 L. J. C. P. 259; 22 L. J. C. P. 160; *Macdonald* v. *Law Union Ins. Co.*, L. R. 9 Q. B. 328; 43 L. J. Q. B. 131; *Thomson* v. *Weems*, *supra*). Where a proviso in the policy expressed it to be conditional upon the truth of the declaration only in the case of wilful misrepresentation and concealment, a plea alleging merely that the declaration was untrue was held bad (*Fowkes* v. *Manchester Life Assurance Ass.*, 3 B. & S. 917; 32 L. J. Q. B. 153; *Hemmings* v. *Sceptre Life Ass.*, [1905] 1 Ch. 365; 74 L. J. Ch. 231).

If, upon making an insurance, the insured *bonâ fide* refers the insurer to the person whose life is insured, or to other persons, for the information required, he does not thereby make those persons his agents in effecting the insurance so as to be affected by false or fraudulent statements made by them, and he is not affected by their statements unless the policy is expressly made upon the basis of those statements (*Huckman* v. *Fernie*, 3 M. & W. 505; *Wheelton* v. *Hardisty*, *supra*).

of health, and was not afflicted with any disease or disorder, and it was agreed by the policy that such declaration should be the basis of the insurance effected by the policy. The said *G. H.* was not in a good state of health at the time of the making of the said declaration, and was then afflicted with a disease or disorder tending to shorten life.

Particulars are as follows:—[*Here state the nature of the disease or disorder.*]

The like.

1. The defendants do not admit the policy of assurance mentioned in the statement of claim, and require the plaintiff to produce and prove the same.

2. By the policy of assurance effected with the defendant company on the life of *G. H.*, deceased, it was declared that the same was subject [to the articles of association of the defendant company and] to the several conditions endorsed on the said policy, and that it was issued on the faith of a certain proposal made and signed by the said *G. H.*, which proposal was by the said policy declared to be the basis of the contract therein contained.

3. It was a condition of the said policy that if the proposal on the basis of which the same was effected contained any untrue statement, or failed to disclose any material fact, the said policy should be void.

4. The proposal on the basis of which the said policy was effected being the proposal aforesaid, and certain answers made by the said deceased to the defendant company's medical officer and forming part of the said proposal did contain certain untrue statements, and did fail to disclose certain material facts, the particulars of which are as follows: the said deceased untruly stated that she resided at —— Cottage, ——, and omitted to state the material fact that she was the wife of a licensed victualler and resided in a public-house; the said deceased untruly stated that she had never required any medical attendant, whereas she had been in the habit of consulting and being attended by a medical man; the said deceased untruly stated that there were not any circumstances or information affecting her past or present health or habits with which the directors of the defendant company ought to be made acquainted, whereas there were such circumstances and information aforesaid, to wit, that the said deceased had been ill and had suffered pains in the lower part of the body, and was suffering from a complaint of the uterus and urinary organs; the said deceased untruly stated that her present state of health was good, and that she considered her constitution in every respect sound, and that she had not at any time required medical assistance, and had not been medically attended for any serious or tedious disease, whereas the said deceased was in bad health, and her constitution was unsound, and she had required medical assistance, and been attended for a serious disease, to wit,

an affection of the uterus and urinary organs ; the said deceased untruly stated that she was not subject to any complaint of the urinary organs ; the said deceased untruly stated that she did not know of what diseases her parents had died, whereas her mother, as the deceased well knew, had died of —— ; that the said deceased untruly stated that her mother died aged —, whereas she died aged —, as the said deceased well knew ; the said deceased untruly stated that there were no other circumstances known to herself which required to be communicated so as to enable the risk of an assurance on her life to be fairly judged of, whereas such circumstances known to the said deceased did exist, to wit, that she had suffered pains in the lower part of her body, and was subject to a complaint of the urinary organs, and had been unwell and had been medically attended and treated, and that her mother had died of —— at the age of —.

5. The defendants further say that the said deceased falsely and fraudulently made the statements aforesaid on the —— ——, 19—, to the agent and medical officer of the defendant company, to induce the said company to execute and issue to her the policy sued upon in this action, and the defendant company upon the faith of the said false and fraudulent statements, executed and issued the said policy.

6. By reason of the matters aforesaid the defendants contend that the said policy became and is wholly void.

Defence that the Person whose Life was insured departed beyond Europe, whereby the Policy was avoided.

The policy was made subject to a proviso that it should be void if the said *G. H.* should, without the consent of the directors for the time being of the [defendants'] company, go beyond the limits of Europe, and after the making of the policy the said *G. H.*, on or about the —— ——, 19—, went without the consent of such directors beyond the limits of Europe, viz., to Egypt.

Defence that the Person whose Life was insured died by his own hand, whereby the Policy became void (*q*).

The policy was made subject to a proviso that it should be void if the said *G. H.* should die by his own hand, and the said *G. H.* did die by his own hand.

Particulars are as follows :—

(*q*) Death by suicide avoids the policy even in the hands of a third party, if the policy or a declaration made part of it contains a warranty to that effect (*Ellinger* v. *Mutual Life Ins. Co. of New York*, [1905] 1 K. B. 31 ; 74 L. J. K. B. 39). It appears that a proviso against suicide would be implied even if not inserted in the policy, and would afford a ground of defence unless the suicide occurred through insanity (*Horn* v. *Anglo-Australian Ass. Co.*, 30 L. J. Ch. 511).

III. Fire Policies (*r*).

Denial of the Making of the Policy.

The defendants did not make the policy sued on.

(*R. S. C.*, 1883, *App. E., Sect. III.*)

Denial that the Loss or Damage was caused by Fire (*s*).

The alleged loss and damage was not caused by fire [*where practicable, allege what it was caused by*].

Denial of the Fact of Loss or Damage.

The alleged loss and damage is denied.

Defence denying the Plaintiff's Interest (*t*).

The plaintiff was not interested in the subject-matter of the insurance.

(*R. S. C.*, 1883, *App. D., Sect. V., No.* 14.)

Defence that the Plaintiff did not give Notice of the Loss according to a Condition of the Policy (*u*).

The policy was subject to a condition precedent that upon the happening of any loss or damage by fire to the property insured, the plaintiff should

(*r*) In general an insurer, after payment of a total loss, is subrogated to the rights of the insured against third parties in respect of the property insured. (See *ante*, p. 201.)

As to the effect of a condition providing that, in case of double insurance of the insured property, the insurers shall only pay a rateable proportion of the loss, see *North British Ins. Co.* v. *London Ins. Co.*, 5 Ch. D. 569; 46 L. J. Ch. 537.

(*s*) Damage caused by an explosion, which is a concussion of the air caused by fire, is not damage occasioned by fire, the rule in insurance cases being that the immediate cause only is looked at (*Everett* v. *London Assurance*, 19 C. B. N. S. 126; 11 Jur. N. S. 546). Loss by pilfering by a crowd during the removal of goods insured from premises on fire would seem to be loss or damage by fire (see *Levy* v. *Baillie*, 7 Bing. 349); as also necessary spoiling of goods by water in the course of attempting to put out a fire, or breaking caused by hasty removal of goods, done to avoid their destruction by fire (see *Stanley* v. *Western Ins. Co.*, L. R. 3 Ex. 71, 74). In the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 12, there is express provision that damage occasioned by the brigade in the execution of their duties shall be deemed to be damage by fire within the meaning of any policy against fire, and in some local Acts similar provision is to be found.

(*t*) As to insurable interest, see 14 Geo. 3, c. 48, ss. 1, 2, cited *ante*, pp. 205 and 207.

(*u*) Policies frequently contain provisions or conditions requiring notice of loss and particulars of damage to be given within a specified time, and making the policy void in case of failure to give such notice within the specified time, and in those cases the

forthwith give notice of the alleged damage and loss to the defendants at their office, and the plaintiff, upon the happening of the alleged loss and damage, did not comply with this condition.

Defence that the Plaintiff did not give in an Account of his Loss to the Office according to a Condition of the Policy (*v*).

The policy was subject to a condition precedent that the plaintiff should within —— days next after the happening of any fire causing loss of or damage to the property insured, deliver to the defendants as particular an account of his loss or damage as the nature of the case should admit of, and the plaintiff did not within —— days next after the alleged fire comply with this condition.

Defence that the Plaintiff made a fraudulently exaggerated Claim (*v*).

The policy was subject to a condition that it should be void if the plaintiff made and delivered to the defendants a fraudulent or fraudulently exaggerated claim or declaration of loss, and the plaintiff did on the —— ——, 19—, make and deliver to the defendants a fraudulent [*or*, fraudulently exaggerated] claim and declaration of loss.

Particulars are as follows :—[*State how, and in what particulars, it was fraudulent, or fraudulently exaggerated.*]

Defence that the Plaintiff obtained the Policy by the Concealment of a Material Fact (*x*).

The defendants were induced to make the policy sued on by the plaintiffs concealing from them a fact then material to be known to them, and which was then known to the plaintiff, but unknown to them, viz., [*state the fact concealed*].

---

failure to give the required notice within the specified time is, in general, a good defence, if pleaded. Where the giving of such notice is not expressly stated to be a condition precedent to the right to recover, or the failure stated to avoid the policy, it is a question of construction whether the giving of such notice is a condition precedent to liability, or merely a collateral stipulation, to be determined by a consideration of the whole policy (*Roper* v. *London*, 1 E. & E. 825 ; 28 L. J. Q. B. 260 ; *Worsley* v. *Wood*, 6 T. R. 710 ; *Viney* v. *Bignold*, 20 Q. B. D. 172 ; 57 L. J. Q. B. 82 ; and see *Stoneham* v. *Ocean Accident Ins. Co.*, 19 Q. B. D. 237. See further, *ante*, pp. 585 and 641).

(*r*) See preceding note.

(*x*) In contracts of insurance against fire the misrepresentation or concealment of any fact material to the risk avoids the policy, as in contracts of marine insurance, even where there is no fraudulent intention. (See *Bufe* v. *Turner*, 6 Taunt. 338 ; *Lindenau* v. *Desborough*, 8 B. & C. 586, 592 ; *Jones* v. *Provincial Ins. Co.*, 3 C. B. N. S. 65, 86 ; *Sillem* v. *Thornton*, 3 E. & B. 868 ; 23 L. J. Q. B. 362 ; *In re Universal, &c. Fire Ins. Co.*, L. R. 19 Eq. 485 ; 44 L. J. Ch. 761 ; see further, *ante*, p. 695.)

It would seem that where the person insured has given a description of the premises

Defence that the Policy was obtained by Fraud.

The defendants were induced to make the policy sued on by the fraud of the plaintiff.

Particulars are as follows:—[*State same: see* "*Fraud*," *ante*, pp. 397, 696.]

JUDGMENTS (*y*).

Defence denying the alleged Judgment (*y*).

The defendant denies that the plaintiff recovered judgment against him as alleged, or at all. There is no such judgment.

---

which is embodied in the policy, there is, in the absence of express stipulation, an implied condition that the premises shall not be altered so as to increase the risk (*Sillem* v. *Thornton*, *supra*; though see per Willes, J., in *Stokes* v. *Cox*, 1 H. & N. 533; 26 L. J. Ex. 114). But such implied conditions are excluded by inserting in the policy any express conditions respecting alterations (*Stokes* v. *Cox*, *supra*).

(*y*) Previously to the Judicature Acts, the proper mode of denying the existence or the alleged effect of an English judgment relied upon by the opposite party was by pleading *nul tiel record*, viz., by denying the existence of any record of the alleged judgment in the Court in which it was stated to have been recovered. (See Bullen & Leake, 3rd ed., p. 621; 2 Chit. Pract., 12th ed., pp. 936—941.) Under the present practice it seems more correct for the party pleading to deal in the ordinary manner with the facts alleged by his opponent. No special form of reply is required.

To an action on a judgment the defendant cannot plead any facts which might have been pleaded by way of defence to the original action (*Todd* v. *Maxfield*, 6 B. & C. 105; *Jewsbury* v. *Mummery*, L. R. 8 C. P. 56; 42 L. J. C. P. 22; see *Braun* v. *Weller*, L. R. 2 Ex. 183; 36 L. J. Ex. 100).

Nor can he plead facts which would merely afford ground for application to the summary jurisdiction of the Court to set aside the judgment, or for an appeal against the judgment; nor can the pendency of an appeal be pleaded as a defence to such an action, though it may be ground for an application to stay execution. (See *Snook* v. *Mattock*, 5 A. & E. 248; *Doe* v. *Wright*, 10 A. & E. 763; *Riddle* v. *Grantham Canal Nav.*, 16 M. & W. 882; *Nouvion* v. *Freeman*, 15 App. Cas. 1; 59 L. J. Ch. 337; and see Ord. LVIII., r. 16.) But it seems that the defendant in such an action may set up in his defence any matter of equity which, if the Judicature Acts had not been passed, would have entitled him to an injunction against further proceedings in the action. (See Jud. Act, 1873, s. 24 (5), and s. 24 (2), cited *ante*, pp. 33, 34.)

Payment could not be pleaded at common law to an action upon a judgment, because that defence consisted of matter *in pais* and not of record. But by the statute 4 & 5 Anne, c. 3 (c. 16, Ruff.), s. 12, it is enacted that "Where any action of debt shall be brought upon any judgment, if the defendant hath paid the money due upon such judgment, such payment shall and may be pleaded in bar of such action."

The statute does not authorise a plea of satisfaction otherwise than by payment (1 Chit. Pl., 7th ed., 512). But a release under seal may be pleaded in bar to an action on a judgment (Co. Litt. 291 a; *Barker* v. *St. Quintin*, 12 M. & W. 441), and since the Judicature Acts it would appear that a parol release, if founded on consideration, would constitute a defence to such action (see *ante*, p. 568; and *post*, p. 755).

It is a good defence to an action on any judgment that the judgment was obtained by fraud. (See *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295; 52 L. J. Q. B. 1; *Vadala* v. *Lawes*, 25 Q. B. D. 310; *Cole* v. *Langford*, 67 L. J. Q. B. 698; *Birch* v. *Birch*, [1902] P. 130; 71 L. J. P. 58.)

An action to recover money on a judgment must be brought within twelve years,

Defence to an Action on a Foreign Judgment, that the Defendant was not a Subject of the Foreign Country, nor resident there, and that he did not appear in the Foreign Suit (z).

The defendant is not, and was not at any time in the course of the action in which the plaintiff obtained the judgment sued on, a subject of, or resident or present or domiciled in, and owed no allegiance to the [empire] of —— [*the country in which the judgment was obtained*] and was not subject to the

---

unless there has been part payment of principal or interest, or an acknowledgment in writing (37 & 38 Vict. c. 57, s. 8, cited *post*, p. 722).

(*z*) A final judgment of a foreign or colonial Court, having jurisdiction over the parties and the subject-matter of the suit, is conclusive between the parties on the merits, and in an action on such judgment no defences upon the merits can be pleaded which might have been pleaded in the original action (*Scott* v. *Pilkington*, 2 B. & S. 11; 31 L. J. Q. B. 81; *Godard* v. *Gray*, L. R. 6 Q. B. 139, 150; 40 L. J. Q. B. 62; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781; and see notes to *Mostyn* v. *Fabrigas*, 1 Sm. L. C., 11th ed., p. 626; *Duchess of Kingston's case*, 2 Sm. L. C., 11th ed., pp. 785 *et seq.*).

Thus, it is no defence to an action on a foreign judgment that the evidence in the foreign Court was insufficient or defective (*Henderson* v. *Henderson*, 6 Q. B. 288), or that fresh evidence has been discovered since the judgment, showing it to be erroneous (*De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 238), or that the contract originally sued upon was obtained by fraud (*Bank of Australasia* v. *Nias*, 16 Q. B. 717; 20 L. J. Q. B. 284), or that the defendant had a cross-claim which he might have set off in the original action (*Henderson* v. *Henderson*, *supra*), or that he had a discharge in bankruptcy which he might have pleaded in that action (*Ellis* v. *M'Henry*, L. R. 6 C. P. 228; 40 L. J. C. P. 109), or that the proceedings were irregular (*Pemberton* v. *Hughes*, *supra*).

It has been held that the defendant in such an action cannot plead that the foreign Court has acted on a mistaken view as to the English law, even where the mistake appears on the face of the proceedings (*Godard* v. *Gray*, *supra*; see *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 448), though it may be a defence to show that the foreign Court has knowingly and perversely disregarded the English law in a case to which it was manifestly applicable (see *Simpson* v. *Fogo*, 1 John. & H. 18; 1 Hem. & M. 195; 32 L. J. Ch. 249; and the cases last cited).

So it is in general no defence to an action on a foreign judgment that the foreign Court has made a mistake as to the law of its own country (*Scott* v. *Pilkington*, *supra*), though it was held otherwise where such a mistake clearly appeared upon the express findings of a special case stated between the parties (*Meyer* v. *Ralli*, 1 C. P. D. 358).

Where a person is sued in this country on a judgment obtained against him in a foreign country for default of appearance, he may plead that the foreign Court had no jurisdiction in respect of the subject-matter of the suit, or of the parties (*Ferguson* v. *Mahon*, 11 A. & E. 179; and see *Robertson* v. *Struth*, 5 Q. B. 941; *Vanquelin* v. *Bouard*, 15 C. B. N. S. 341; 33 L. J. C. P. 78; *Bank of Australasia* v. *Nias*, *supra*; *Godard* v. *Gray*, *supra*; *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155; 40 L. J. Q. B. 73), or that he was not a subject of the foreign country and was not resident or domiciled there, and either that he was not served with process in the foreign suit, and had no knowledge or notice of the suit and no opportunity of answering it (*Buchanan* v. *Rucker*, 1 Camp. 63; 9 East, 192; *Reynolds* v. *Fenton*, 3 C. B. 187; *Price* v. *Dewhurst*, 4 M. & Cr. 76; *Copin* v. *Adamson*, 1 Ex. D. 17; 45 L. J. Ex. 15; *Rousillon* v. *Rousillon*, 14 Ch. D. 351; *Singh* v. *Faridkote*, [1894] A. C. 670), or did not appear in the action or otherwise submit to the jurisdiction of the Court (*Schibsby* v *Westenholz*, *supra*; *Turnbull* v. *Walker*, 5 R. 132; 67 L. T. 67), or that the judgment was not a remedial one in support of a private right of the plaintiff in the action, but a punitive judgment

jurisdiction of the said —— Court, and he did not appear in the said action or otherwise submit to the jurisdiction of the said Court [*or*, and was never served with any process in the said action, and took no part in and had no notice or knowledge of the proceedings therein].

Defence to an Action on a Spanish Judgment, that the Judgment was not a Final Judgment: see Nouvion v. *Freeman*, 35 Ch. D. 704; 15 App. Cas. 1.

Defence to an Action on a Russian Judgment, that the Judgment was obtained by Fraud: see Abouloff v. *Oppenheimer*, 10 Q. B. D. 295; 52 L. J. Q. B. 1.

The like, to an Action on an Italian Judgment: see Vadala v. *Lawes*, 25 Q. B. D. 310.

Defence of Set-off of the Amount due to the Defendant upon a Judgment of the High Court of Justice: see "Set-off," post, p. 780.

to enforce a penalty under the municipal law of the foreign country. (See *Huntington* v. *Attrill*, [1893] A. C. 150; 62 L. J. P. C. 44.)

But if the defendant in a foreign suit has voluntarily appeared in the foreign Court, and has taken his chance of judgment being in his favour, it would seem that he might be sued here upon such judgment, and could not then raise the defence of want of jurisdiction. (See *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 238; and *Schibsby* v. *Westenholz*, *supra*), though it may be otherwise if he has been virtually compelled to appear in the foreign suit in order to save his property from a forced sale. (See *Schibsby* v. *Westenholz*, *supra*; and *General Steam Nav. Co.* v. *Guillou*, 11 M. & W. 877; *Voinet* v. *Barrett*, 55 L. J. Q. B. 39; *The Challenge*, [1904] P. 41, 58; 73 L. J. P. 2, 8.)

An appeal pending in the foreign Court is not a good defence to an action on a foreign judgment, though it may be a ground for staying execution (*Scott* v. *Pilkington*, *supra*; *Nouvion* v. *Freeman*, 15 App. Cas. 1; 59 L. J. Ch. 337).

It is a defence to an action on a foreign judgment that the judgment was obtained by fraud on the part of the plaintiff (*Bowles* v. *Orr*, 1 Y. & C. 464; *Bank of Australasia* v. *Nias*, *supra*; *Castrique* v. *Imrie*, *supra*; *Patch* v. *Ward*, L. R. 3 Ch. 203; *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295; 52 L. J. Q. B. 1; *Vadala* v. *Lawes*, 25 Q. B. D. 310).

See, further, *post*, p. 703.

JUDGMENT RECOVERED (*a*).

Defence of Judgment recovered by the Plaintiff in a former Action for the same Debt or cause of Action in the High Court of Justice (*b*).

The plaintiff in a former action brought by him against the defendant in [this] Division of the High Court of Justice [19—, B., No. —] for the same debt [*or*, in respect of the same cause of action] as that alleged in the statement of claim, on the —— ——, 19—, by a judgment dated that day recovered judgment against the defendant for £—— for the said debt [*or*, in respect of the said cause of action], and the said judgment still remains in force.

(*a*) A judgment recovered by the plaintiff in an action in an English Court of record merges the original cause of action and affords a good defence to a second action for the same cause (*Higgens' case*, 6 Co. 44 b; *King* v. *Hoare*, 13 M. & W. 494, 504; *Smith* v. *Nicolls*, 5 Bing. N. C. 208, 220; *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584; 7 *Ib.* 547; 40 L. J. C. P. 281; 41 *Ib.* 190; *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454; 42 L. J. C. P. 273; *Kendall* v. *Hamilton*, 4 App. Cas. 504; 48 L. J. C. P. 705; *Ex p. Fewings*, 25 Ch. D. 338; and see *post*, p. 736). But this is subject to the exception that a judgment recovered on a contract of record, as a recognizance, does not merge the contract, because both securities are matter of record, and of equal degree (*Preston* v. *Perton*, Cro. Eliz. 817).

Where the plaintiff has recovered judgment for part only of one entire claim, the judgment is conclusive as to the amount recoverable, and affords a good defence to a subsequent action for the residue of the same claim (*Bagot* v. *Williams*, 3 B. & C. 235; *Siddall* v. *Rawcliffe*, 1 C. & M. 487; *Todd* v. *Stewart*, 9 Q. B. 759; *Barber* v. *Lamb*, 8 C. B. N. S. 95; 29 L. J. C. P. 234; see *Cannan* v. *Reynolds*, 5 E. & B. 301; 26 L. J. Q. B. 62). The facts constituting the last-mentioned defence may in some cases be pleaded as a defence by way of estoppel, and it seems proper that they should be so pleaded in cases where the plaintiff has recovered judgment for part only of a liquidated demand, and there has been judgment for the defendant as to the residue. (See *Todd* v. *Stewart*, *supra*; see also *Commings* v. *Heard*, L. R. 4 Q. B. 669; 10 B. & S. 606.)

(*b*) As to what claims are covered by a judgment in a former action, see *Seddon* v. *Tutop*, 6 T. R. 607; *Hadley* v. *Green*, 2 C. & J. 374; *Bagot* v. *Williams*, 3 B. & C. 235; *Florence* v. *Jenings*, 2 C. B. N. S. 454; 26 L. J. C. P. 274; *Ex p. Fewings*, *supra*; *Darley Main, &c. Co.* v. *Mitchell*, 11 App. Cas. 127; 53 L. J. Q. B. 471; and the notes to the *Duchess of Kingston's case*, 2 Sm. L. C., 11th ed., p. 746.

A plea of judgment recovered on a promissory note given for and on account of a debt due under a covenant was held a bad plea to an action on the covenant (*Drake* v. *Mitchell*, 3 East, 251); and it seems that, where judgment is recovered on a cheque, note or acceptance given for a simple contract debt, such judgment will not merge the right of action for the original debt. (See *Wegg-Prosser* v. *Evans*, cited note (*c*), *infra*.) Where a breach of contract is continuing, as in not keeping premises in repair, the recovery in a former action goes only in mitigation of damages (*Coward* v. *Gregory*, 36 L. J. C. P. 1; L. R. 2 C. P. 153, cf. *Ebbetts* v. *Conquest*, 82 L. T. 560).

A defence of judgment recovered, which showed on the face of the pleading that the judgment could not have been recovered for the same cause of action as that alleged in the statement of claim, as by setting up a judgment prior in date to the admitted date of the alleged cause of action, would be open to an objection in point of law (*Few* v. *Backhouse*, 8 A. & E. 789).

Defence of Judgment recovered in a like Action against a Co-debtor with the Defendant (*e*).

The alleged debt was incurred by the defendant jointly with one *E. F.*, and not by the defendant alone, and the plaintiff afterwards, in an action brought by him against the said *E. F.* in this Division of the High Court of Justice [19—, B., No. —] for the same debt, on the —— ——, 19—, by a judgment dated that day, recovered judgment against the said *E. F.* for £—— in respect of the said debt, and the said judgment still remains in force.

Defence of Judgment recovered by the Plaintiff in a former Action for the same Debt, or Cause of Action, in a County Court (*d*).

The plaintiff on the —— ——, 19—, in a former action brought against the defendant in the County Court of ——, holden at ——, and then

(*e*) A judgment obtained against one of several joint debtors or joint contractors for debt or damages is, without satisfaction, a bar to a subsequent action for the same debt or damages against the other joint debtors or joint contractors, unless they were severally as well as jointly liable (*King* v. *Hoare, supra; Brinsmead* v. *Harrison, supra; Kendall* v. *Hamilton*, 4 App. Cas. 504; 48 L. J. H. L. 705; *In re Davison*, 13 Q. B. D. 50; *Odell* v. *Cormack*, 19 Q. B. D. 223; *Blyth* v. *Fladgate*, [1891] 1 Ch. 337, 353; 60 L. J. Ch. 66; *Hammond* v. *Schofield*, [1891] 1 Q. B. 453; 60 L. J. Q. B. 539; *Hoare* v. *Niblett*, [1891] 1 Q. B. 781; 60 L. J. Q. B. 565; *Morel Bros.* v. *Westmoreland*, (*Earl*), [1904] A. C. 11; 73 L. J. K. B. 93). This is so, even where the subsequent action is brought against a secret partner, whose liability was unknown to the plaintiff at the time when he recovered judgment against the acting partners (*Kendall* v. *Hamilton, supra*). So judgment against one of two co-defendants who have appeared is a defence to further proceedings against the other, and may be pleaded as such (*M'Leod* v. *Power*, [1898] 2 Ch. 295; 67 L. J. Ch. 551). Judgment against a co-debtor for part of a debt has been held to be no bar as to the residue (*French v. Howie*, [1905] 2 K. B. 580; 74 L. J. K. B. 853).

But by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 11, a person having a cause of action against joint-debtors "shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued, after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid." (See s. 12, cited *post*, p. 720.)

An unsatisfied judgment obtained against one of two joint sureties upon a cheque which he had given for the amount of the debt was held not to operate as payment or to merge the right of action for the original debt, and was, therefore, no bar to an action against the other surety for the amount of that debt (*Wegg-Prosser* v. *Evans*, [1895] 1 Q. B. 108; 64 L. J. Q. B. 1).

One who has a claim which he may enforce at his election against either of two different persons may, by suing one of them to judgment, determine his election and prevent himself from afterwards suing the other of them in respect of the same claim (*Priestley* v. *Fernie*, 3 H. & C. 977; 34 L. J. Ex. 172; see *Curtis* v. *Williamson*, L. R. 10 Q. B. 57; 44 L. J. Q. B. 27; *Kendall* v. *Hamilton*, 4 App. Cas. at p. 514; *Scarf* v. *Jardine*, 7 App. Cas. 345; 51 L. J. Q. B. 612; *Morel Bros.* v. *Westmoreland* (*Earl*), [1904] A. C. 11; 73 L. J. K. B. 93; and see *ante*, p. 574).

(*d*) See note (*a*), *ante*, p. 703. The recovery of a final judgment in an inferior Court of record, of competent jurisdiction in England, is a bar to an action in any other Court for the same cause (*Austin* v. *Mills*, 9 Ex. 288). Where the defendant pleads

having jurisdiction in that behalf, for the same debt [*or*, in respect of the same cause of action] as that alleged in the statement of claim, recovered judgment against the defendant for £—— for the said debt [*or*, for damages in respect of the said cause of action], and the said judgment still remains in force.

Defence of Judgment recovered against the Plaintiff upon the same Matter in a former Action between the Parties (e) : see "*Estoppel*," *ante*, p. 647.

JURISDICTION (*f*).

See post, p. 863.

such judgment, the defence should state that the inferior Court had jurisdiction in that behalf (*Briscoe* v. *Stephens*, 2 Bing. 213; *Read* v. *Pope*, 1 C. M. & R. 302; see *Mayor of London* v. *Cox*, L. R. 2 H. L. at p. 264).

A previous judgment recovered in a County Court for the same cause of action is final and conclusive between the parties (The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93; and see *Austin* v. *Mills*, 9 Ex. 288; *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454).

It is a good defence that the plaintiff recovered judgment in a County Court for part of the cause of action, and abandoned the excess under s. 81 of the County Courts Act, 1888. (See *Vines* v. *Arnold*, 8 C. B. 632; 19 L. J. C. P. 98; *Isaac* v. *Wyld*, 7 Ex. 163; 21 L. J. Ex. 46.)

A judgment of a foreign or colonial Court against the defendant does not operate as a merger of the original cause of action, and, if not followed by execution or satisfaction, affords no defence to a subsequent action brought in this country for the same claim (*Smith* v. *Nicolls*, 5 Bing. N. C. 208; *Bank of Australasia* v. *Harding*, 9 C. B. 661; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Thompson* v. *Bell*, 2 E. & B. 236; 23 L. J. Q. B. 159; see *ante*, p. 213); though such judgment against the plaintiff may be pleaded in estoppel if final and conclusive. (See *ante*, p. 701.) But where the sum recovered by such judgment has been paid to the plaintiff, the judgment and payment are a good defence (*Barber* v. *Lamb*, 8 C. B. N. S. 95; 29 L. J. C. P. 234; *Taylor* v. *Hollard*, [1902] 1 K. B. 676; 71 L. J. K. B. 278). Such judgment, though unsatisfied, may be ground for an application to stay proceedings in an action in this country, if the defendant can show that the proceedings here are vexatious. (See *McHenry* v. *Lewis*, 22 Ch. D. 397; 52 L. J. Ch. 325; *Hyman* v. *Helm*, 24 Ch. D. 531; *The Christiansborg*, 10 P. D. 141; 54 L. J. Ad. 84.)

As to Scotch and Irish judgments, see *ante*, pp. 212, 213.

(*e*) Judgment recovered *against* the plaintiff is conclusive between the parties as to all matters adjudicated upon, and is a defence by way of estoppel to a subsequent action in which the same matters are brought in question. (See *In re South America Co.*, [1895] 1 Ch. 37; 64 L. J. Ch. 189.)

(*f*) The jurisdiction of the High Court is in some cases ousted by statute, as in the case of some disputes with building societies (see *ante*, p. 302) or friendly societies (see *ante*, p. 303), and in other cases (See *Crossfield* v. *Manchester Ship Canal Co.*, [1904] 2 Ch. 123; 73 L. J. Ch. 345, reversed 21 Times Rep. 689). In such cases the objection to the jurisdiction may be raised by an application to stay proceedings, or by defence, or the Court may allow it to be raised at the trial (*Ib.*, at pp. 134 *et seq.*).

Landlord and Tenant (*g*).

Defence to an Action for the Use and Occupation of a House and Land, denying the Use and Occupation (*g*).

The defendant denies that he used or occupied the said house or land.

(*g*) Where the plaintiff's claim is for use and occupation, the defendant may either deny the use and occupation, or state facts showing that it was not by the permission of the plaintiff, as in the forms given in the text. Thus, the defendant may plead a surrender before the period in respect of which the plaintiff claims to recover compensation (*Dodd* v. *Acklom*, 6 M. & G. 672; see *post*, p. 710) or an eviction by the plaintiff, or by title paramount (*Prentice* v. *Elliott*, 5 M. & W. 606). If the defendant's use and occupation commenced by the permission of the plaintiff, the defendant cannot dispute the plaintiff's title, except by showing that it has determined since the commencement of the tenancy (*Curtis* v. *Spitty*, 1 Bing. N. C. 15; *Delaney* v. *Fox*, 2 C. B. N. S. 768; 26 L. J. C. P. 248; *London & N. W. Ry. Co.* v. *West*, L. R. 2 C. P. 553; 36 L. J. C. P. 245). But he may show a judgment obtained by a third party for the recovery of the land, and his own attornment as tenant to the latter in answer to a claim in respect of a subsequent occupation of the premises (*Newport* v. *Hardy*, 2 D. & L. 921). So, too, he may show that his landlord's title has expired, without showing an eviction (*Mountnoy* v. *Collier*, 1 E. & B. 630; 2 Wms. Saund., 1871 ed., p. 828); but a voluntary surrender of the premises to a mere adverse claimant without eviction is no defence (*Emery* v. *Barnett*, 4 C. B. N. S. 423; 27 L. J. C. P. 217).

Where the plaintiff's claim is an express claim for rent as such, or for breach of a contract for the payment of rent, matters showing the termination of the tenancy or contract, as surrender, eviction, &c., must be pleaded specially.

If the defendant enters and occupies under a mortgagor in possession (except where the letting is authorised under s. 18 of the Conveyancing Act, 1881), a mere notice by the mortgagee to pay the rent to him is no defence to an action by the mortgagor for use and occupation or for rent under a demise (*Wilton* v. *Dunn*, 17 Q. B. 294; *Hickman* v. *Machin*, 4 H. & N. 716; 28 L. J. Ex. 310; and see *Towerson* v. *Jackson*, [1891] 2 Q. B. 484; 61 L. J. Q. B. 36). Payment to the mortgagee in pursuance of such notice would be equivalent to payment to the mortgagor, but the defence should be specially pleaded. (See *Ib.*; *Johnson* v. *Jones*, 9 A. & E. 809; *Wheeler* v. *Branscombe*, 5 Q. B. 373.) If the mortgage is subsequent to the tenancy, the mortgagee, as assignee of the reversion, may claim the rents which accrue subsequently to the mortgage; but payments of such rent made to the mortgagor before notice of the mortgage are valid (*Moss* v. *Gallimore*, 1 Smith's L. C., 11th ed., p. 514), provided they are not pre-payments (*De Nicholls* v. *Saunders*, L. R. 5 C. P. 589; 39 L. J. C. P. 297; *Cook* v. *Guerra*, L. R. 7 C. P. 132; 41 L. J. C. P. 89).

Where the premises have been taken for a term, it is in general no defence to an action for the rent that they were not capable of occupation in the manner for which they were let (*Sutton* v. *Temple*, 12 M. & W. 64), and the tenant is liable for the rent, notwithstanding that the landlord has agreed to do repairs, unless the completion of the repairs was expressly made a condition precedent (*Surplice* v. *Farnsworth*, 8 Scott, N. R. 307). It is a defence that the premises consisted of a ready-furnished house which was not in a state fit for habitation at the time of the letting (*Smith* v. *Marrable*, and other cases cited *ante*, p. 222). It is no defence that the premises consisted principally of buildings which were destroyed by fire (*Marshall* v. *Schofield*, 52 L. J. Q. B. 58); nor in such case is it any defence that the landlord insured the premises, and received the amount insured, but has not laid it out in rebuilding (*Loft* v. *Dennis*, 1 E. & E. 474).

A claim on a warranty or fraudulent representation as to the sanitary or other condition of the premises made at the time of the letting and collateral to the lease may be raised by counterclaim (see *ante*, pp. 224, 480.

Defence to a like Action, that the Use and Occupation were not by the Permission of the Plaintiff (h).

The defendant admits that he used and occupied the said house, but denies that he used or occupied the same under the plaintiff or by his permission. [*Here state facts showing further the nature of the defence relied upon.*]

Defence to a like Action, where no express Agreement is alleged by the Plaintiff, that the Tenancy was under an express Agreement and that by the Terms of such Agreement no Rent is due.

The defendant occupied the said premises under an express verbal [*or*, written] agreement with the plaintiff made [*or*, dated] the —— ——, 19—, as tenant thereof to the plaintiff from year to year [*or, as the case may be*] at a rent of £—— payable [*state when*], and [no rent had become payable at the commencement of this action, *or, as the case may be, alleging the matter in excuse of non-payment of the rent*].

Defence to an Action for Breach of an Agreement of Tenancy which was not by Deed, denying the Letting upon the Terms alleged.

The plaintiff did not let the house to the defendant upon the terms alleged [*or*, The defendant was not tenant to the plaintiff of the house upon the terms alleged]. The terms of the letting to the defendant are contained in a document dated the —— ——, 19—, and by the said terms ——. [*Here state the material parts of the agreement, either verbatim, where the precise words are material, or by giving briefly the substance and effect thereof, and add, where necessary, averments of performance, satisfaction, or discharge of the agreement actually made.*]

Defence to an Action for the Breach of a Covenant contained in a Lease by Deed, denying the Making of the Deed: see "*Agreements*," *ante*, pp. 577, 578.

Defence to an Action for Rent, of Payment: see "*Payment*," *post*, p. 745(*i*).

Defence that the Rent sued for was satisfied by a Distress.

While the rent claimed was in arrear the plaintiff on the —— ——, 19—, distrained certain goods upon the demised premises for the said rent, and

---

(*h*) See preceding note.

(*i*) See *post*, p. 745. A plea that the defendant was on the premises ready to pay the rent at the time it became due, but that the plaintiff was not there to receive it, was held a bad plea to an action against the lessee on his covenant to pay the rent reserved (*Haldane* v. *Johnson*, 8 Ex. 689).

on the —— ——, 19—, sold the said goods under such distress, and satisfied the said rent out of the proceeds of such sale.

Defence that the Plaintiff distrained for the Rent, and still holds the Distress (*k*).

While the rent claimed was in arrear, the plaintiff, on the —— ——, 19—, distrained certain goods upon the demised premises for the said rent, and he still holds the said goods as a distress for the said rent.

Defence as to part of the Rent claimed, of a Deduction by the Defendant for Property Tax paid in respect of the Premises (*l*).

As to £——, parcel of the money claimed, the demised premises were chargeable with property tax under the statutes in that behalf, and the defendant was obliged to pay and paid £——, the amount thereof, on the —— ——, 19—.

Particulars are as follows :—

Defence to an Action for not keeping the Premises in Tenantable Repair, denying the alleged Breach.

The defendant at all times during the tenancy kept the premises in tenantable repair and condition.

(*k*) When a landlord distrains for rent and does not sell the goods, he cannot bring an action for the rent so long as he holds the distress, though it be insufficient to satisfy the rent (*Lehain* v. *Philpot*, L. R. 10 Ex. 242 ; 44 L. J. Ex. 225).

(*l*) By 5 & 6 Vict. c. 35, s. 60, the tenant having paid the landlord's property tax in respect of the demised premises, may deduct it "out of the first payment thereafter to be made on account of rent," as if the money paid in discharge of the tax had been a payment made to the landlord on account of the rent. (See also 16 & 17 Vict. c. 34, s. 40). By 27 & 28 Vict. c. 18, s. 15, the deduction may be made in respect of property tax chargeable during the period through which the rent was accruing due.

By 5 & 6 Vict. c. 35, s. 103, all contracts and agreements for payment of any rent in full without allowing such deduction as aforesaid shall be utterly void. But an agreement that, if the tenant will continue to pay his rent in full without any deduction in respect of landlord's property tax paid by him, the landlord will repay him all sums which he has paid or shall pay for the landlord's property tax, is not invalid (*Lamb* v. *Brewster*, 4 Q. B. D. 607 ; 48 L. J. Q. B. 421).

A like defence might be pleaded of deduction in respect of payments of other charges upon the land, as of the interest of a mortgage of the premises (*Dyer* v. *Bowley*, 2 Bing. 94 ; *Johnson* v. *Jones*, 9 A. & E. 809 ; *Underhay* v. *Read*, 20 Q. B. D. 209 ; 57 L. J. Q. B. 129), or of a rent-charge (*Taylor* v. *Zamira*, 6 Taunt. 524), or of rent to the ground landlord (*Carter* v. *Carter*, 5 Bing. 406 ; *Sapsford* v. *Fletcher*, 4 T. R. 511). As to tithe rent charge, see *Ludlow* v. *Pike*, [1904] 1 K. B. 531 ; 73 L. J. K. B. 274. As to deductions for rates, charges, and assessments, see *ante*, p. 224.

Defence to an Action for not using the Premises in a Tenantlike Manner, denying the alleged Breach.

The defendant at all times during the tenancy used the premises in a tenantlike and proper manner.

Defence denying the alleged Breach of a Covenant or Agreement to Repair (*m*).

The defendant denies that the premises were during the term out of such repair as was required by the covenant [*or*, agreement, *or*, were during the term out of good or substantial repair, *traversing the breach as alleged by the plaintiff*].

Defence to an Action for not cultivating a Farm according to the Custom of the Country, denying the alleged Breach.

The defendant during the tenancy used and cultivated the farm and land in a husbandlike manner, according to the custom of the country where the same were situate. [*If the breaches are stated with particularity in the statement of claim, they should be denied in terms.*]

Defence to a like Action, denying the alleged Custom of the Country (*n*).

The defendant denies that there was any such custom of the country as is alleged. [*If the defence is pleaded to part only of the breaches alleged, it should be limited accordingly.*]

Defence to an Action for Breach of the Covenant for Title in a Lease, denying the alleged Breach.

The defendant denies that at the time of the making of the demise he had not full and lawful power and authority to demise the house to the plaintiff for the said term.

(*m*) Upon a covenant by the lessor to keep in repair the main walls, main timbers and roofs of the demised premises, the lessor cannot be sued for non-repair, unless he has received notice of want of repair (*Makin* v. *Watkinson*, L. R. 6 Ex. 25; 40 L. J. Ex. 33; *Tredway* v. *Machin*, (C. A.) 91 L. T. 310). As to the measure of damages for breach of such covenant, see *ante*, p. 219.

(*n*) Where the custom of the country is inconsistent with the terms of a written agreement or lease, those terms will govern the rights of the parties, and should be stated in the defence (*Wigglesworth* v. *Dallison*, 1 Sm. L. C., 11th ed., 545; *Hutton* v. *Warren*, 1 M. & W. 466; *Roberts* v. *Barker*, 1 Cr. & M. 808; *Clarke* v. *Roystone*, 13 M. & W. 752; *Tucker* v. *Linger*, 8 App. Cas. 508; 52 L. J. Ch. 941).

Defence to an Action for Breach of the Covenant for Quiet Enjoyment, denying the alleged Breach.

G. H. did not enter into the house or evict the plaintiff therefrom [*or, as the case may be*].

Defence to a like Action, denying the Title of the Person evicting the Plaintiff.

At the time when [it is alleged that] *G. H.* entered into the house and evicted the plaintiff therefrom, the said *G. H.* had no lawful claim or title to the said house or to the possession thereof through or under the defendant.

Defence of a Surrender (*o*).

Before any part of the rent sued for became due [*or*, Before the alleged breach, *or*, Before the breach herein pleaded to, *as the case may be*], the defendant [by deed dated the —— ——, 19—,] surrendered to the plaintiff the said demised premises and all the then unexpired residue of the said term, and the plaintiff then accepted such surrender and took possession of the said premises.

(*o*) By the Statute of Frauds (29 Car. 2, c. 3), s. 3, no leases or terms of years in any lands, tenements, or hereditaments shall be surrendered unless by deed or note in writing, signed by the party surrendering the same or his agent thereunto lawfully authorised in writing, or by act and operation of law. And by 8 & 9 Vict. c. 106, s. 3, a surrender in writing of any interest in any tenements or hereditaments (not being a copyhold interest, and not being an interest which might by law have been created without writing) shall be void at law unless made by deed.

A surrender by operation of law may be effected by the lessor, with the assent of the lessee, accepting a new tenant, provided that possession be given to the latter (*Thomas* v. *Cook*, 2 B. & Ad. 119; *Davison* v. *Gent*, 1 H. & W. 744; 26 L. J. Ex. 122; *Wallis* v. *Hands*, [1893] 2 Ch. 75; 62 L. J. Ch. 586; see *Fenner* v. *Blake*, [1900] 1 Q. B. 426; 69 L. J. Q. B. 257; *sed qu.*). So the acceptance by an existing tenant of a new lease operates as a surrender by operation of law of the old one, provided the new one be valid (*Knight* v. *Williams*, [1901] 1 Ch. 256; 70 L. J. Ch. 92). So also does an agreement to terminate the tenancy followed by the landlord taking possession of the premises by some unequivocal act (*Phené* v. *Popplewell*, 12 C. B. N. S. 334; 31 L. J. C. P. 235; *In re Panther Lead Co.*, [1896] 1 Ch. 978; 65 L. J. Ch. 499), but the mere acceptance of the key, even though followed by attempts to let the premises, does not amount to such an unequivocal act (*Oastler* v. *Henderson*, 2 Q. B. D. 575; 46 L. J. Q. B. 607). The defence of a surrender by operation of law should show or give particulars of the facts which constitute such a surrender. (See Ord. XIX., r. 4; and see *Foquet* v. *Moore*, 7 Ex. 870, 875.)

A surrender by the assignee of the lessee or the lessee of part of the premises does not extinguish the term, or discharge the lessee from his express covenant to pay rent (*Baynton* v. *Morgan*, 22 Q. B. D. 74; 58 L. J. Q. B. 109).

As to apportionment of rent, see *ante*, p. 227.

Defence of a Surrender by Operation of Law (*p*).

Before any part of the rent sued for became due [*or*, Before the alleged breach, *or*, Before the breach herein pleaded to, *as the case may be*], the demised premises and all the then unexpired residue of the said term were duly surrendered by the defendant to the plaintiff by act and operation of law.

Particulars are as follows :—

[The premises were surrendered by the defendant, on the —— ——, 19—, giving up to the plaintiff and the plaintiff then accepting from the defendant the possession of the said demised premises with the intention respectively of then putting an end to the said term.]

Defence to an Action against a Tenant from Year to Year that the Tenancy was determined by a Notice to Quit before the alleged Rent became due or the alleged Breaches were committed (*q*).

Before any part of the rent sued for had accrued due [*or*, Before any of the alleged breaches were committed], the defendant's tenancy of the premises was determined by a notice to quit, given on the —— ——, 19—, in writing [*or, as the case may be, describing the notice relied on*] by the defendant to the plaintiff [*or*, by the plaintiff to the defendant], and expiring on the —— ——, 19—, and the defendant quitted the said premises on the expiration of the said notice.

Reply that the Notice was afterwards waived.

The tenancy was not determined as alleged or at all. The notice relied on was before the expiration thereof waived by consent of the plaintiff and the defendant.

Particulars of such waiver are as follows :—

[*State the matters relied upon as a waiver.*]

Defence of Eviction (*r*).

During the term and before any part of the rent sued for became due [*or*, Before the alleged breach, *or*, Before the breach herein pleaded to, *as the*

(*p*) See preceding note.

(*q*) As to notice to quit, see *ante*, p. 233.

The above form of defence can easily be adapted to the case of a notice to determine a demise under a lease or tenancy for a fixed period determinable by notice. (See *Jones* v. *Shears*, 4 A. & E. 832; *Cadby* v. *Martinez*, 11 *Ib.* 720; *Jones* v. *Nixon*, 1 H. & C. 48; 31 L. J. Ex. 505.)

(*r*) As to what amounts to eviction, see 1 Wms. Saund., 1871 ed., 208 n. (2); *Dunn* v. *Di Nuovo*, 3 M. & G. 105: *Upton* v. *Townend*: 17 C. B. 30; 25 L. J. C. P. 44;

case may be], the plaintiff, without the consent and against the will of the defendant, on the —— ——, 19—, wrongfully entered into and upon the said messuage and premises and evicted the defendant from the possession use and occupation thereof, and has ever since kept him so evicted.

Defence to an Action against an Assignee of a Lease [*or, Reversion*], *denying the Assignment* (*s*).

The defendant denies that the estate [*or*, reversion] of *G. H.* of and in the said messuage and land vested in the defendant by assignment as is alleged or at all [*or, as the case may be, according to the terms of the allegation traversed*].

For a Form of Defence in an Action against an Executor as Assignee of a Term: see "Executors," ante, p. 654.

Defence to an Action by an Assignee of the Reversion, denying that the Lessor was entitled to the Reversion (*t*).

The defendant denies that the said *G. H.* was possessed [*or*, seised] of the said reversion.

Henderson v. *Mears*, 28 L. J. Q. B. 305; *Furnival* v. *Grove*, 8 C. B. N. S. 496; *Wheeler* v. *Stevenson*, 6 H. & N. 155; 30 L. J. Ex. 46; *Pellatt* v. *Boosey*, 31 L. J. C. P. 281; *Newby* v. *Sharpe*, 8 Ch. D. 39, 50; 47 L. J. Ch. 617; *Baynton* v. *Morgan*, 22 Q. B. D. 74, 80; 58 L. J. Q. B. 139. A voluntary giving up of possession upon a mere claim is no eviction, unless the claimant has a good title, which he can enforce (*Mayor, &c., of Poole* v. *Whitt*, 15 M. & W. 571; *Delaney* v. *Fox*, 2 C. B. N. S. 768; 26 L. J. C. P. 248; *Emery* v. *Barnett*, 4 C. B. N. S. 423; 27 L. J. C. P. 216). An eviction of the tenant by his landlord from part of the demised premises creates a suspension of the entire rent during the continuance of the eviction; but the tenant is not thereby discharged from his covenants or contracts, other than for the payment of rent (1 Wms. Saund., 1871 ed., 211; *Morrison* v. *Chadwick*, 7 C. B. 266; *Newton* v. *Allin*, 1 Q. B. 518). Eviction by title paramount is a good defence to a claim for subsequent rent (*Simons* v. *Farren*, 1 Bing. N. C. 126, 272; *Mayor, &c., of Poole* v. *Whitt*, *supra*; *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 *Ib.* 135; *Stevenson* v. *Lambard*, 2 East, 575). Upon eviction from part of the premises by title paramount, the rent is apportionable, but the covenants are not (*Walker's case*, 3 Co. 22 b; *Stevenson* v. *Lambard*, 2 East, 575; see *Neale* v. *Mackenzie*, 2 C. M. & R. 84; 1 M. & W. 747; 1 Wms. Saund., 1871 ed., 210, n. (*i*)). The defence cannot be supported by proof that the defendant was prevented from using an easement demised with the premises (*Williams* v. *Hayward*, 1 E. & E. 1040; 28 L. J. Q. B. 374).

(*s*) By the Statute of Frauds (29 Car. 2, c. 3), s. 3, no leases or terms of years in any lands, tenements, or hereditaments shall be assigned unless it be by deed or note in writing signed by the party assigning the same, or his agent thereunto lawfully authorised by writing, or by act or operation of law. And by the 8 & 9 Vict. c. 106, s. 3, an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, shall be void at law unless made by deed. See *ante*, pp. 216, 710.

(*t*) A lessee is estopped from denying the lessor's title as recited in the lease. If the title is not shown in the lease, the lessee is estopped from pleading that the lessor *nil habuit in tenementis*, or any defence involving that assertion. (See *ante*, pp. 225, 232.)

Defence by the Assignee of a Lease, that he had assigned the Term (*u*).

Before any part of the rent sued for became due [*or*, Before the alleged breach, *or*, Before the breach herein pleaded to], the defendant, by deed dated the —— ——, 19—, assigned all his estate and term of years then to come and unexpired in the demised premises to *J. K.*, who then entered into the demised premises, and was possessed thereof for the residue of the said term.

Defence to an Action by the Lessor on the Covenants in the Lease, that the Lessor assigned the Reversion before Breach (*x*).

Before any part of the rent sued for became due [*or*, Before the alleged breach, *or*, Before the breach herein pleaded to], the plaintiff by deed dated the —— ——, 19—, granted and assigned all his reversion of and in the

---

(*u*) The assignee of a term is liable for breaches of covenant happening whilst he continues assignee, but not for those committed after an assignment by him (*Harley* v. *King*, 2 C. M. & R. 18; *Taylor* v. *Shum*, 1 B. & P. 21; *Paul* v. *Nurse*, 8 B. & C. 486; *Hopkinson* v. *Lovering*, 11 Q. B. D. 92; and see the note to *Spencer's case*, 1 Smith's L. C., 11th ed., p. 55). He is not liable for breaches committed before the assignment to him (*St. Saviour's* v. *Smith*, 3 Burr. 1271; *Coward* v. *Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1).

A lessee continues liable on his express covenants, notwithstanding an assignment by him of the term, and the acceptance of his assignee by the lessor (*Thursby* v. *Plant*, 1 Wms. Saund., 1871 ed., p. 277; *Baynton* v. *Morgan*, 22 Q. B. D., at p. 82; 55 L. J. Q. B. 139). The fact that such assignee becomes bankrupt after the assignment, and that his trustee in bankruptcy has disclaimed the lease under the provisions of s. 55 of the Bankruptcy Act, 1883, does not affect the lessee's liability on his express covenants.

A lessee who, after assignment, is sued on the covenants in the lease may in general bring in the assignee as a third party, under Ord. XVI., r. 48, cited *ante*, p. 555 (see *Hornby* v. *Cardwell*, 8 Q. B. D. 329; 51 L. J. Q. B. 89; *Moule* v. *Garrett*, L. R. 5 Ex. 132; *Ib.*, 7 Ex. 101; 39 L. J. Ex. 69; 41 *Ib.* 62; *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148; 68 L. J. Q. B. 808), but not an underlessee (*Bonner* v. *Tottenham, &c. Building Society*, [1899] 1 Q. B. 161; 68 L. J. Q. B. 114; *Pontifex* v. *Foord*, 12 Q. B. D. 152; 53 L. J. Q. B. 321). See further, *ante*, p. 555.

As to the effect of the Apportionment Act, 1870, cited *ante*, p. 228, where an assignment takes place during one of the periods in respect of which the rent is payable, see *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; 48 L. J. Ex. 344; and *In re Hargreaves*, 44 Ch. D. 236; 59 L. J. Ch. 375.

A sub-lessee with notice of restrictive covenants in the lease may be bound thereby. (See *Tulk* v. *Moxhay*, 2 Ph. 744; *Hall* v. *Ewin*, 37 Ch. D. 74; *Holloway* v. *Hill* [1902] 2 Ch. 612, 71 L. J. Ch. 818.)

(*x*) The facts stated in the above form do not alone constitute a defence to a contract contained in a lease not under seal, because such contracts do not pass by assignment of the reversion under the statute 32 Hen. 8, c. 34 (*Bickford* v. *Parson*, 5 C. B. 920; and see *Allcock* v. *Moorhouse*, 9 Q. B. D. 366; and *ante*, p. 225). As to the effect of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 10, with regard to leases made subsequent to that Act, see *Municipal Building Society* v. *Smith*, 22 Q. B. D. 70; 58 L. J. Q. B. 61. The defence cannot be pleaded to a claim for breaches of covenant committed before the assignment. It is no defence to an action on covenants which are not of a nature to run with the land, as such covenants do not pass by the assignment (*Stokes* v. *Russell*, 3 T. R. 678).

demised premises to *J. K.*, and thenceforth ceased to have any reversion therein.

Defence to an Action by a Landlord for Double Value under 4 *Geo.* 2, *c.* 28, *s.* 1, *that the Defendant held over under a bonâ fide claim of Title* (*y*).

The defendant held over the premises under a bonâ fide claim of title, and not contumaciously.

Particulars of the bonâ fide claim referred to are as follows :—

Defence under Ord. XXI., r. 21, *to an Action by Landlord against Tenant for Recovery of Land* (*z*).

The defendant is in possession of the premises by himself [*or*, his tenant].

(*See R. S. C.*, 1883, *App. D., Sect. VII.*)

Defence to an Action by Landlord against Tenant to recover Possession of the demised Premises on an alleged Determination of the Tenancy by a Notice to Quit, denying the Notice.

The defendant denies that the plaintiff gave him the alleged or any notice to quit.

(*See R. S. C.*, 1883, *App. D., Sect. VII.*)

Defence to a like Action that the Notice was waived: see Form of Reply of Waiver, ante, p. 711.

Defence to an Action by a Landlord for Recovery of the demised Premises for a Forfeiture that the Forfeiture was waived (*a*).

The alleged forfeiture was waived by the plaintiff before the commencement of this action.

Particulars of such waiver are as follows :—

[*Here state the matters relied upon as a waiver.*]

(*y*) See *ante*, p. 231. This action is in the nature of a penal action given to the party grieved. (See *Lloyd* v. *Rosbee*, 2 Camp. 453.) The period of limitation for this action is two years (3 & 4 Will. 4, c. 42, s. 3, *post*, p. 718).

(*z*) See Ord. XXI., r. 21, cited *post*, p. 906. Although this rule enables a defendant under the form above given to raise every kind of defence other than an equitable one, or one depending on an equitable title, yet it is generally advisable to plead specifically the particular ground of defence relied upon, as is done in the form given in App. D., Sect. VII., of the R. S. C., 1883 (*supra*).

(*a*) If the landlord or lessor, knowing that a forfeiture has been incurred, does any unequivocal act whereby he recognises the tenancy as still continuing, this will, except

Defence to an Action by Landlord against Tenant to recover Possession of the Demised Premises on an alleged Forfeiture, that no Notice specifying the Breach complained of had, as required by the Conveyancing Acts, 1881, 1892, *been served on the Tenant* (*b*).

The plaintiff did not comply with the requirements of section 14, sub-s (1), of the Conveyancing and Law of Property Act, 1881, by serving on the defendant [*or*, the lessee] a notice such as is required by that sub-section [*or*, *when the plaintiff pleads that he gave the notice and the defendant contends that*

---

in the case of a continuing breach (*Penton* v. *Barnett*, [1898] 1 Q. B. 276; 67 L. J. Q. B. 11), amount to a waiver of the forfeiture (*Dendy* v. *Nicholl*, 4 C. B. N. S. 376; 27 L. J. C. P. 220; *Toleman* v. *Portbury*, L. R. 7 Q. B. 344; 41 L. J. Q. B. 98; *Keith-Prowse* v. *Telephone Co.*, [1894] 2 Ch. 147), unless he has previously brought an action for the recovery of the land on such forfeiture, and has served the writ in such action (*Jones* v. *Carter*, 15 M. & W. 718, 725; *Grimwood* v. *Moss*, L. R. 7 C. P. 360; 41 L. J. C. P. 239; *Toleman* v. *Portbury*, *supra*; *Serjeant* v. *Nash*, *Field & Co.*, [1903] 2 K. B. 304; 72 L. J. K. B. 630).

(*b*) By s. 14 of the Conveyancing and Law of Property Act, 1881, it is provided as follows:—

"(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

"(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief, and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit."

This section does not affect the law relating to re-entry, or forfeiture, or relief in case of non-payment of rent (s. 14 (8)), and does not extend to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased, or to a covenant or condition in a mining lease for inspection of books, accounts, &c., or of the mines or workings. (See s. 14 (6).)

As to conditions for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest, it is provided in effect by s. 14 (6), as amended by the Conveyancing Act, 1892, s. 2 (2) (3), that the provisions of s. 14 of the Conveyancing Act, 1881, shall not extend to such conditions when contained in leases of the particular kinds specified in s. 2 (3) of the Conveyancing Act, 1892 (which include agricultural or mining leases and leases of furnished houses, or of public-houses, or beer-shops), and shall not apply to such conditions when contained in leases of other kinds not specified in that sub-section after the expiration of a year from the date of the bankruptcy or taking in execution, unless the lessee's interest has been sold during that year.

The bankruptcy of the lessee after an authorised assignment by him would not

it is insufficient, say: The alleged notice referred to in paragraph — of the statement of claim was insufficient in the following respect, viz.,——].

ordinarily be a ground of forfeiture under such condition (*Smith* v. *Gronow*, [1891] 2 Q. B. 394).

The provisions of s. 14 apply to conditions of forfeiture for not insuring.

By s. 14 (9), "This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

The word "lease" in this section includes an under-lease (see Conveyancing Act, 1881, s. 14 (3)), and also an agreement for a lease or an under-lease where the lessee or under-lessee has become entitled to have his lease or under-lease granted. (See Conveyancing Act, 1892, s. 5.) But the word "lessee" in sub-s. (2) does not include a sub-lessee (*Wind* v. *Nineteenth Century Building Society*, [1894] 2 Q. B. 226; 63 L. J. Q. B. 636).

The notice given under the Act, by the lessor must be sufficiently specific to enable the lessee to understand what he is required to do, a mere general notice is usually insufficient (*Fletcher* v. *Noakes*, [1897] 1 Ch. 27; 66 L. J. Ch. 177; *In re Serle*, [1898] 1 Ch. 652; 67 L. J. Ch. 344; *Mathews* v. *Usher*, 68 L. J. Q. B. 988; *Jacob* v. *Down*, [1900] 2 Ch. 156, 162; 69 L. J. Ch. 493).

Several breaches may be included in one notice (*Pannell* v. *City of London Brewery*, [1900] 1 Ch. 496; 69 L. J. Ch. 244).

Where the breach is capable of remedy, the notice must require the lessee to remedy it, but it is not necessary to claim compensation in money for the breach, in cases where the amount of such compensation cannot be assessed or calculated, and it would seem that in any case the omission of a claim for such compensation will not invalidate the notice, though it would prevent the lessor from obtaining compensation in the action (*Lock* v. *Pearce*, [1893] 2 Ch. 271; 62 L. J. Ch. 582).

The defence that the lessor had failed to give notice would be open to the defendant under a defence of possession pleaded under Ord. XXI., r. 21, but it is generally convenient that it should be specially pleaded.

A defendant in an action by the lessor to enforce a forfeiture may plead the facts entitling him to relief under s. 14 (2) of the Conveyancing Act, 1881, by way of counterclaim (*Cholmeley's School* v. *Sewell*, [1893] 2 Q. B. 254; 62 L. J. Q. B. 476; and see the cases next cited). Application by any person entitled to such relief may also be made by summons in the landlord's action or by an independent action (*Lock* v. *Pearce*, *supra*; *Cholmeley's School* v. *Sewell*, *supra*).

Relief cannot be granted under s. 14 (2) of the Conveyancing Act, 1881, where the lessor has already re-entered before the application is made (*Rogers* v. *Rice*, [1892] 2 Ch. 170; 61 L. J. Ch. 583; *Lock* v. *Pearce*, *supra*).

By the Conveyancing Act, 1892, s. 4, Where a lessor is proceeding by action or otherwise to enforce a forfeiture of a lease, the Court, on application by an under-lessee of the demised property or any part thereof, may, either in the lessor's action or in an action brought by such under-lessee, make an order vesting the same property or part thereof in such under-lessee for the whole or part of the term of the lease (not exceeding the term granted by the sub-lease) upon such conditions as the Court under the circumstances shall think fit. The above section is for the protection of the vested interest of the sub-lessee, and permits the Court in granting relief, if it thinks fit, to vary the rent or shorten the term of the sub-lease, or impose on the sub-lessee such conditions as may appear just, except that the term is not to be made longer (*Cholmeley's Schools* v. *Sewell*, [1894] 2 Q. B. 906; 63 L. J. Q. B. 820; *Ewart* v. *Fryer*, [1901] 1 Ch. 499; 70 L. J. Ch. 138). It is independent of the Act of (1881), and under it relief may be given to an under-lessee which could not be given in the case of a lessee, as for instance in the case of the breach of a covenant not to assign (*Imray* v. *Oakshotte*, [1897] 2 Q. B. 218; 66 L. J. Q. B.), or to pay rent (*Gray* v. *Bonsall*, [1904] 1 K. B. 601; 73 L. J. Q. B. 515).

Defence to an Action for Recovery of Possession of Premises on Forfeiture for Breach of Covenant to repair, with a Counterclaim for Relief.

DEFENCE.

1. The defendant admits the making of the lease referred to in the statement of claim, and that he thereby became tenant to the plaintiff of the said premises, but he does not admit that the terms of the covenants to repair are correctly stated in the statement of claim, and he requires the lease to be produced and referred to for such terms.

2. The defendant denies that he committed the alleged or any breaches of the covenants to repair. On the contrary he says that he did repair the said premises, and keep the same in repair in accordance with the said covenants.

3. The defendant denies that [*here deny specifically any specific breaches alleged*].

COUNTERCLAIM.

4. The defendant repeats paragraph 1 of the defence, and if contrary to what he contends it should be found that he has committed the alleged or any breach or breaches of the said covenants to repair, he claims to be relieved from the alleged forfeiture, under sect. 14 of the Conveyancing and Law of Property Act, 1881, on such terms as the Court shall think fit.

LIMITATION, STATUTES OF (*c*).

Defence of the Statute of Limitations to an action on a Simple Contract Debt.

The alleged debt [*or*, cause of action] did not accrue within six years before this action, and was and is bound by the Limitation Act, 1623 (21

(*c*) The Statutes of Limitation form a defence to an action brought after the prescribed period has elapsed Where the defendant relies on this defence, he must (except in actions for the recovery of land, see *post*, p. 523), distinctly raise it by his pleading (Ord. XIX., r. 15, cited *ante*, p. 523).

Where the action is an ordinary claim for debt or damages the Statute of Limitations must be pleaded specially, but in actions to recover land, where the facts sufficiently appeared from the statement of claim, the objection can be raised as a point of law (*Wakelee* v. *Davis*, 25 W. R. 60; *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318; 4 App. Cas. 51; *post*, p. 875).

If the claim wrongly states the date of a cause of action which has been barred by the statute, and thus brings it within the statutory period, the above forms should be preceded by a denial of the alleged date of the cause of action and also, where practicable, by a statement of its true date.

By the Limitation Act, 1623 (21 Jac. 1. c. 16), s. 3, "all actions of account and upon the case, *other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants*, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent"—"shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say), the said actions upon the case, and the said actions for

Jac. 1, c. 16), s. 3 [*or more simply*, the alleged debt was and is barred by the Statute of Limitations (21 Jac. 1, c. 16).

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

---

account, and the said actions for debt, within six years next after the cause of such actions or suit, and not after."

The "actions upon the case" in this enactment include actions for breach of contracts such as were formerly the subject of actions of assumpsit (*Chandler* v. *Vilett*, 2 Wms. Saund., 1871 ed., p. 391; *Battley* v. *Faulkner*, 3 B. & Ald. 288, 294; *Gibbs* v. *Guild*, 8 Q. B. D. at p. 302; 51 L. J. Q. B. 228). The "actions of debt for arrearages of rent," are actions for rent on a parol demise; actions for rent reserved by an indenture of lease are within the 3 & 4 Will. 4, c. 42, below cited (*Freeman* v. *Stacey*, Hutt. 109). The exception as to merchants' accounts was in effect repealed by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 9. (See *Cottam* v. *Partridge*, 4 M. & G. 271, 283; *Knox* v. *Gye*, L. R. 5 H. L. 656; 42 L. J. Ch. 234.)

By the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3, "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, within two years after the cause of such actions or suits, but not after; and the said other actions within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

By the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 42 "no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

It has been held that the last-cited enactment applies only to remedies against the land, and not to personal actions upon bonds or covenants for the payment of rent or interest upon money charged upon land (*Paget* v. *Foley*, 2 Bing. N. C. 679; *Strachan* v. *Thomas*, 12 A. & E. 556; *Manning* v. *Phelps*, 10 Ex. 59; 24 L. J. Ex. 62; *Hunter* v. *Nockolds*, 1 Mac. & G. 640; 19 L. J. Ch. 177). See 37 & 38 Vict. c. 57, s. 8; *post*, p. 722.

As to mortgages, see *post*, p. 722.

Actions for debt on a statute (other than penal actions) are considered as founded on a specialty within the 3 & 4 Will. 4, c. 42, s. 3; as actions for calls under the Companies Consolidation Act, 1845 (*Cork and Bandon Ry. Co.* v. *Goode*, 13 C. B. 826; 22 L. J. C. P. 198; and see *Shepherd* v. *Hills*, 11 Ex. 55; 25 L. J. Ex. 6; *Wentworth* v. *Chevill*, 26 L. J. Ch. 760). The liability of a contributory for calls upon the winding-up of a company under the Companies Act, 1862, creates a debt of the nature of a specialty (25 & 26 Vict. c. 89, ss. 16, 75: see *In re Muggeridge*, L. R. 10 Eq. 443; 39 L. J. Ch. 620; *Buck* v. *Robson*, L. R. 10 Eq. 629; 39 L. J. Ch. 821). An action for recovery of a dividend on shares in a company is not barred until after the lapse of twenty years (*In re Severn Ry. Co.*, [1896] 1 Ch. 559; 65 L. J. Ch. 400; *In re Artisans' Land, &c., Corp.*, [1904] 1 Ch. 796; 73 L. J. Ch. 581).

An action for calls by a company established under a statute of a colonial legislature

The like in an Action for a Specialty Debt within 3 & 4 *Will.* 4, *c.* 42, *s.* 3.

The alleged debt [*or*, cause of action] did not accrue within twenty years next before the commencement of this action and is barred by the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3.

---

is an action upon a simple contract (*Welland Ry. Co.* v. *Blake*, 6 H. & N. 410; 30 L. J. Ex. 161). An action or debt for a penalty due under a bye-law made by virtue of a charter is barred by 21 Jac. 1, c. 16, s. 3, if not commenced within six years (*Tobacco Pipe Makers' Co.* v. *Loder*, 16 Q. B. 765; 20 L. J. Q. B. 414).

An action against directors and promoters under the Directors Liability Act, 1890, is not subject to the two years' limit (*Thomson* v. *Clanmorris*. [1900] 1 Ch. 718; 69 L. J. Ch. 337). The limitation in such case would appear to be six years (*Ib.*), and the statute runs from the time the shares are subscribed for.

By the 31 Eliz. c. 5, s. 5, it is enacted that all actions which shall be brought for any forfeiture upon any penal statute, the benefit whereof is or shall be by the said statute limited, "to the Queen, her heirs or successors, and to any other which shall prosecute in that behalf," shall be brought by any person that may lawfully sue for the same as aforesaid, within one year next after the offence committed, and that any such action brought after that time shall be void. It was held in *Dyer* v. *Best*, L. R. 1 Ex. 152; 35 L. J. Ex. 105, that this limitation of one year applied not only to actions brought by an informer suing *qui tam*, but also to actions brought by an informer suing for himself alone. This decision has, however, been questioned by the Court of Appeal in *Robinson* v. *Currey*, 7 Q. B. D. 465; 50 L. J. Q. B. 561, where an opinion was expressed that the above section applies only to actions by *qui tam* informers.

By the 22 & 23 Vict. c. 49, ss. 1, 4, it is in effect provided that actions for debts incurred by guardians of any union or parish, or the board of management of any school or asylum district, must be commenced within the half-year in which the debts were incurred, or within three months after the expiration of such half-year, unless the Poor Law Board, by order, extend the time for a period not exceeding twelve months from the date of the debts. (See *Baker* v. *Billericay Union*, 2 H. & C. 642; 33 L. J. M. C. 40; *Midland Ry. Co.* v. *Edmonton Guardians*, [1895] A. C. 485; 64 L. J. Q. B. 710.) This section was held not to apply to guardians acting, under s. 9 of the Public Health Act, 1875, as a rural sanitary authority (*Dearle* v. *Petersfield Union*, 21 Q. B. D. 447; 57 L. J. Q. B. 640).

A limit of six months is imposed by the Public Authorities Protection Act, 1893 (55 & 56 Vict. c. 61), s. 1 a. (See *post*, p. 901.)

By the effect of s. 7 of the above statute of Jac. 1, and s. 4 of 3 & 4 Will. 4, c. 42, if the person entitled to any action within those statutes is at the time of the cause of action accrued within the age of twenty-one years, *feme covert*, or *non compos mentis*, the time does not begin to run till those disabilities have ceased. A similar privilege was also extended by those sections to plaintiffs who were beyond the seas, but it has been abolished by 19 & 20 Vict. c. 97, s. 10, which has also abolished the privilege granted by the statute of James to plaintiffs who were under imprisonment at the time when the cause of action accrued.

By the 4 Anne, c. 16, s. 19 (which applies to the various actions on simple contracts or for wrongs specified in 21 Jac. 1, c. 16, s. 3), if the person against whom the cause of action exists is at the time of the accruing of the cause of action beyond the seas, the person entitled to the cause of action may bring the action against such person after his return from beyond the seas within the time limited by the statute of James. (See *Musurus* v. *Gadban*, [1894] 1 Q. B. 523; 63 L. J. Q. B. 621.) The 4th section of the 3 & 4 Will. 4. c. 42, contains a similar provision with respect to actions on specialties. By the 3 & 4 Will. 4. c. 42, s. 7, "No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be

The like, in an Action for Money due under a Covenant in a Mortgage Deed.

The alleged debt or cause of action did not accrue within twelve years next before the commencement of this action, and was and is barred by the Real Property Limitation Act, 1874.

---

deemed to be beyond the seas" within that Act, and by the 19 & 20 Vict. c. 97, s. 12, the same is enacted as to those words in the statute of Anne and that Act. In the case of joint debts, where one of the joint debtors is beyond the seas at the time when the cause of action accrued, the periods of limitation fixed by the above-mentioned statutes run from the time of the accrual of the cause of action as to such of the joint debtors as are not beyond the seas, but do not run to such as are beyond the seas, and a judgment recovered against the former is no bar to an action against the latter after their return (19 & 20 Vict. c. 97, s. 11, cited *ante*, p. 704).

Whether the cause of action arises in this country or abroad, the plaintiff, whether he is himself then abroad or not, has six years in which to bring the action in this country after the defendant first returns to this country, if the defendant was, when the cause of action arose, abroad (*Williams* v. *Jones*, 13 East, 439, 451; *Forbes* v. *Smith*, 24 L. J. Ex. 299; 11 Ex. 161).

With respect to *coverture*, the provisions of the 21 Jac. 1, c. 16, s. 7, and the 3 & 4 Will. 4, c. 42, s. 4, and also those of the Real Property Limitations Act, 1874, s. 3 (see *post*, p. 876), must now be read subject to the provisions of the Married Women's Property Act, 1882. That Act (cited *ante*, p. 185), by enabling married women to bring actions in their own name, as if they were *femes sole*, prevents coverture from operating as a disability. See *Weldon* v. *Neal*, W. N. 1884, p. 153; 51 L. T. 289; *Lowe* v. *Fox*, 15 Q. B. D. 667; 12 App. Cas. 206; *post*, p. 876.

The time of limitation begins to run from the period when the action might first have been brought, subject to the above provisions as to disabilities, &c. (*Hemp* v. *Garland*, 4 Q. B. 519; *Atkinson* v. *Bradford Building Soc.*, 25 Q. B. D. 377; 59 L. J. Q. B. 360; *Reeves* v. *Butcher*, [1891] 2 Q. B. 509, 511; 60 L. J. Q. B. 619; *Barker's claim*, [1894] 3 Ch. 290). Where the time has once begun to run, no subsequent disability will suspend the operation of the statutes (*Rhodes* v. *Smethurst*, 6 M. & W. 351; *Homfray* v. *Scroope*, 13 Q. B. 509, 512). If the plaintiff relies upon any of the above disabilities as deferring the period of limitation, he should reply the fact specially. The mere fact that the plaintiff was not aware of the accrual of the cause of action will not prevent the time of limitation from running against him (*Short* v. *M'Carthy*, 3 B. & Ald. 626; and see *Brown* v. *Howard*, 2 B. & B. 73; *Granger* v. *George*, 5 B. & C. 149).

In actions on contracts the date of the accruing of the cause of action is the date of the breach of contract, and not the date of the accruing of the damages resulting therefrom (*Battley* v. *Faulkner*, 3 B. & Ald. 288; *Howell* v. *Young*, 5 B. & C. 259; see *Violett* v. *Sympson*, 8 E. & B. 344; 27 L. J. Q. B. 138).

In the case of a single bond the cause of action is complete on the execution of the bond, and the statute begins to run from the date of such execution; if the bond is subject to a condition, the cause of action accrues when the condition is first broken, and the statute begins to run from that date (*Sanders* v. *Coward*, 15 M. & W. 48; *Tuckey* v. *Hawkins*, 4 C. B. 655). If the bond is conditioned to do various things, or if there are covenants in the same instruments to do various things, every distinct breach gives a new cause of action, against which the statute begins to run from the date of the breach on which it is founded (*Sanders* v. *Coward*, *supra*; *Blair* v. *Ormond*, 17 Q. B. 423, 438; 20 L. J. Q. B. 444, 453). On a bond conditioned to pay an annuity, the non-payment of each instalment is a distinct breach, and the statute begins to run in respect of each as it becomes due (*Amott* v. *Holden*, 18 Q. B. 593; 22 L. J. Q. B. 14).

Upon a bill or note the statute begins to run from the time the instrument is due and unpaid. (See *Wittersheim* v. *Lady Carlisle*, 1 H. Bl. 631; *Holmes* v. *Kerrison*, 2 Taunt.

Defence of the Statute of Limitations in Actions to recover Damages for Breach of a Parol Contract.

The plaintiff's alleged claim [*or*, claims] was [*or*, were] barred by the Limitation Act, 1623 (21 Jac. 1, c. 16).

323; *In re Rutherford*, 14 Ch. D. 687; 49 L. J. Ch. 654; *In re Boyse*, 33 Ch. D. 612; 56 L. J. Ch. 135; and as to an undated cheque, see *In re Bethell*, 34 Ch. D. 561; 56 L. J. Ch. 334.)

On a promissory note payable on demand, it runs from the date of the note (*Norton* v. *Ellam*, 2 M. & W. 461; *In re George*, 44 Ch. D. 627; 59 L. J. Ch. 709; *ante*, p. 109). The same principle applies also to other cases where there is a present debt and a promise to pay on demand, but not to a collateral contract by a surety (*Brown* v. *Brown*, [1893] 2 Ch. 300; and see *Reeves* v. *Butcher*, *supra*).

Upon the dishonour of a bill by non-acceptance, the statute runs as against the then holder from the default of acceptance, and not from the time for payment (*Whitehead* v. *Walker*, 9 M. & W. 506). Where money was lent in the form of a cheque, it was held that the statute began to run from the cashing of the cheque, and not from the delivery of it to the borrower (*Garden* v. *Bruce*, L. R. 3 C. P. 300; 37 L. J. C. P. 112).

Upon a solicitor's bill of costs the statute runs from the time of the completion of the work and not merely from the time when a signed bill is delivered (*Coburn* v. *College*, [1897] 1 Q. B. 702; 66 L. J. Q. B. 462).

The statute does not apply in the case of an express trust. (See *post*, p. 722.)

Mere laches or delay on the part of the creditor for anything short of the statutory period does not, under ordinary circumstances, raise any equity or constitute any bar to his claim (*Collins* v. *Rhodes*, 20 Ch. D. 230; 51 L. J. Ch. 315; and see *Palmer* v. *Johnson*, 12 Q. B. D. 32; 53 L. J. Q. B. 348; *In re Maddever*, 27 Ch. D. 523; *In re Birch*, *Ib.* 622), unless in some cases of purely equitable claims (*In re Sharpe*, [1892] 1 Ch. 154, 168; 61 L. J. Ch. 193).

The time of limitation is computed exclusively of the day on which the cause of action arose (*Hardy* v. *Ryle*, 9 B. & C. 603; *Young* v. *Higgon*, 6 M. & W. 49, 54; *Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161; 61 L. J. M. C. 63; and see *Robinson* v. *Waddington*, 13 Q. B. 753).

The time of the commencement of the action is the date of the issuing of the writ of summons (Ord. II., r. 1). The writ remains in force for twelve months from the date thereof, including the day of such date, and, if not served, may, during that period, be renewed by leave (Ord. VIII., r. 1; *Hewett* v. *Barr*, [1891] 1 Q. B. 98; 60 L. J. Q. B. 268). Where an administrator sues upon a cause of action which did not accrue until after the death of the intestate, the statute does not begin to run against the administrator until administration has been granted (*Burdick* v. *Garrick*, L. R. 5 Ch. 233, 241; 39 L. J. Ch. 369; *Atkinson* v. *Bradford Building Society*, 25 Q. B. D. 377; 59 L. J. Q. B. 360).

If the action is brought in the first instance against the representative of a deceased person, it is no answer to the Statute of Limitations that the period of limitation expired after the death of the debtor, but before the appointment of a representative, and that the action was brought within a reasonable time after such appointment (*Rhodes* v. *Smethurst*, 4 M. & W. 42; 6 *Ib.* 351; *Freake* v. *Cranefeldt*, 3 M. & Cr. 499; *Boatwright* v. *Boatwright*, L. R. 17 Eq. 71; 43 L. J. Ch. 12). But if an action of contract is commenced within the proper period, and during its pendency the defendant dies, a new action brought against his personal representative for the same matter within a reasonable time, is not allowed to be defeated by the Statute of Limitations, though the time may have then run (*Swindell* v. *Bulkeley*, 18 Q. B. D. 250; 56 L. J. Q. B. 613). Where the debtor lived and died abroad, and no probate or administration is taken out in England, the statute does not run (*Flood* v. *Patterson*, 29 Beav. 295; 30 L. J. Ch. 486).

The like, in an Action to recover Damages for Breach of Covenant, or in an Action upon a Bond where the Plaintiff's Claim in respect of the alleged Breaches is barred by the Statute.

The plaintiff's alleged cause [*or*, causes] of action was [*or*, were] barred by the Statute of Limitations 3 & 4 Will. 4, c. 42.

The general rule is that the time of limitation of the action must be governed by the law of the country where the action is brought, and therefore a foreign law of limitation, if it merely limits the time within which actions are allowed to be brought, is no defence to an action in this country on a foreign contract (*British Linen Co.* v. *Drummond*, 10 B. & C. 903; *Huber* v. *Steiner*, 2 Bing. N. C. 202; *Harris* v. *Quine*, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331; *Finch* v. *Finch*, 45 L. J. Ch. 816). But if the foreign law of limitation wholly extinguished the debt or liability in case no action were brought within the prescribed period, it would be pleadable as a defence to such action, provided that the parties were resident in the foreign country until such extinguishment had taken place (*Ib.*).

By s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime (see *In re Clifden*, [1900] 1 Ch. 774; 69 L. J. Ch. 478) some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent (*Ib.*; *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430; 71 L. J. Ch. 627), to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

The word "judgment" in this section is not limited to judgments which operate as charges on land, but extends to judgments generally (*Hebblethwaite* v. *Peever*, [1892] 1 Q. B. 124; *Jay* v. *Johnstone*, [1893] 1 Q. B. 189; 62 L. J. Q. B. 128).

The limitation of twelve years imposed by the above section applies to the personal remedy on the covenant in a mortgage deed, or on a bond given by the mortgagor as collateral security for a mortgage debt, as well as to the remedy against the land (*Sutton* v. *Sutton*, 22 Ch. D. 511; 52 L. J. Ch. 333; *Fearnside* v. *Flint*, 22 Ch. D. 579; 52 L. J. Ch. 479; *In re England*, [1895] 2 Ch. 820; 65 L. J. Ch. 21; *In re Allen*, [1898] 2 Ch. 499; 67 L. J. Ch. 614). The section applies in the case of a mortgage of a reversionary interest (*Kirkland* v. *Peatland*, [1903] 1 K. B. 756; 72 L. J. K. B. 355). But it does not apply to a bond given by a third person as surety for the payment of the mortgage debt (*In re Powers*, 30 Ch. D. 291); and it seems open to doubt whether it applies to actions against a surety who has joined in the covenant for payment in the mortgage deed (*In re Frisby*, 43 Ch. D. 106; 59 L. J. Ch. 94). In the case of a single contract debt charged on land, the six years limitation applies (*Barnes* v. *Glenton*, [1899] 1 Q. B. 885; 68 L. J. Q. B. 502).

The part payment within this section must be one from which a promise to pay the residue can be implied (*Taylor* v. *Hollard*, [1902] 1 K. B. 676; 71 L. J. K. B. 278).

By s. 25 of the Judicature Act, 1873, "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations." But by s. 10 of the Real Property Limitation Act, 1874, the time for recovering a legacy or other money charged upon land is not to be enlarged by reason of there being an express trust for raising the same. (See *Hughes* v. *Coles*, 27 Ch. D. 231; *In re Stephens*, 43 Ch. D. 39; 59 L. J. Ch. 109.)

Reply, in a Case within 21 *Jac.* 1, *c.* 16, *s.* 7, *or* 3 *& 4 Will.* 4, *c.* 42, *s.* 4, *that the Plaintiff was under the Disability of Infancy until within the Prescribed Period before Action.*

The plaintiff was an infant at the time of the accruing of the cause of action [in respect of the said debt, *or*, breach of contract, &c., *as the case may be*], and did not attain the age of 21 years until within six [*or*, twenty, *according as the case is within* 21 *Jac.* 1, *c.* 16, *or* 3 *& 4 Will.* 4, *c.* 42] years before action.

The Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1), provides that in any action "against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use," all rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as if the trustee or person claiming through him had not been a trustee or person claiming through him; and that if the action is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be at liberty to plead the lapse of time as a bar to such action in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary until the interest shall be an interest in possession.

The expression "trustee" includes an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee (sect. 1 (3)). It does not apply to a trustee in bankruptcy (*In re Cornish*, [1896] 1 Q. B. 99; 65 L. J. Q. B. 106).

The general effect of this enactment would seem to be that an innocent trustee is protected to the same extent as if his duties had arisen out of contract (*How* v. *Earl Winterton*, [1896] 2 Ch. 626; and see *Thorne* v. *Heard*, [1895] A. C. 495, 504; 64 L. J. Ch. 652).

An "express trust" is a trust created by express terms, which, if relating to land, must be in writing; though, if relating to personalty, they may be either written or verbal (*Cunningham* v. *Foot*, 3 App. Cas. at pp. 984, 993; *Banner* v. *Berridge*, 18 Ch. D. 254; 50 L. J. Ch. 630; *Sands to Thompson*, 22 Ch. D. 614; 52 L. J. Ch. 406; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390); and is distinguished from an implied or constructive trust, which arises by inference from circumstances (*Ib.*; *Soar* v. *Ashwell*, *supra*).

A person who receives trust property and deals with it in a manner inconsistent with the trust of which he is cognizant is not protected by the statute (*Soar* v. *Ashwell*, *supra*; *North American Land Co.* v. *Watkins*, [1904] 2 Ch. 233; 73 L. J. Ch. 626).

The statutes of limitations as regards personal property, differing in this respect from those as to real property (see *post*, p. 875), only bar the remedy and not the right, and therefore do not affect the title to personal property mortgaged to secure the debt (*London & Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161; 68 L. J. Ch. 568).

Renewal of Debt by Acknowledgment.]—With respect to *simple contract debts*, if at any time after a debt is due, the debtor renews his promise to pay it, or makes such an unqualified acknowledgment of the debt being due that a promise to pay it may be inferred therefrom, he renews his liability from the date of such subsequent promise or acknowledgment, and cannot avail himself of the Statute of Limitations in respect of the preceding lapse of time (*Tanner* v. *Smart*, 6 B. & C. 603; *In re River Steamer Co., Mitchell's claim*, L. R. 6 Ch. 822, 828; *Linsell* v. *Bonsor*, 2 Bing. N. C. 241; *Sidwell* v. *Mason*, 2 H. & N. 306; 26 L. J. Ex. 407; *Green* v. *Humphreys*, 26 Ch. D. 474; 53 L. J. Ch. 625).

Reply, in a Case within 21 *Jac.* 1, *c.* 16, *that the Plaintiff was under the Disability of Insanity.*

At the time of the accruing of the plaintiff's cause of action [in respect of the said debt, *or*, breach of contract, &c., *as the case may be*] the plaintiff was *non compos mentis* within the meaning of 21 Jac. 1, c. 16, s. 7, and from that time was never of sane memory or understanding [until within six years before this action].

The debtor may by such subsequent promise renew his liability absolutely or to a limited extent. He may promise to pay a portion of the debt, or to pay it by instalments, or to pay it at some future day, or conditionally upon the happening of some event; in such cases his liability is limited by the terms of his new promise (*Tanner* v. *Smart*, *supra*; *Lechmere* v. *Fletcher*, 1 C. & M. 623; *Humphreys* v. *Jones*, 14 M. & W. 1; *Philips* v. *Philips*, 3 Hare, 299; *Buckmaster* v. *Russell*, 10 C. B. N. S. 745, 749; *Chasemore* v. *Turner*, L. R. 10 Q. B. 500; 45 L. J. Q. B. 66; *In re River Steamer Co.*, *supra*; *Meyerhoff* v. *Froehlich*, 3 C. P. D. 333; 4 *Ib.* 63; 48 L. J. C. P. 43; *In re Bethell*, 34 Ch. D. 561). If the new promise is conditional, the plaintiff who relies on the new promise as taking the case out of the statute must prove that the condition has been fulfilled (*Ib.*; *Barrett* v. *Davies*, 21 Times Rep. 21; 91 L. T. 736); and the fulfilment of the condition should be alleged in the pleading.

Part payment on account of the debt is in general a sufficient acknowledgment from which a renewed promise to pay the residue may be inferred (*Cottam* v. *Partridge*, 4 M. & G. 287; *Bodger* v. *Arch*, 24 L. J. Ex. 19; *Wainman* v. *Kynman*, 1 Ex. 121; *Davies* v. *Edwards*, 7 Ex. 22); and payment of interest on account of the debt has the same effect as part payment of the debt itself (*Bamfield* v. *Tupper*, 7 Ex. 27; *Sims* v. *Brutton*, 5 Ex. 802, 809; *In re Somerset*, [1894] 1 Ch. 231, 268; 63 L. J. Ch. 41). Part payment by an agent will suffice (*In re Hale*, [1899] 2 Ch. 107; 68 L. J. Ch. 517). See further as to part payment, 1 Sm. L. C., 11th ed., pp. 580 *et seq.*

Before Lord Tenterden's Act (9 Geo. 4, c. 14) the acknowledgment might be proved either by writing or verbally. By s. 1 of that Act, "in actions of debt or upon the case grounded upon any simple contract no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of" the Statute of Limitations, 21 Jac. 1, c. 16, "or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby" (see *Haydon* v. *Williams*, 7 Bing. 163, 166); and by s. 8, "no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps" (*Morris* v. *Dixon*, 4 A. & E. 845).

By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13, it is enacted in reference to the above sections that "an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself."

Lord Tenterden's Act, by s. 1, expressly provided that nothing therein contained should alter or take away or lessen the effect of any payment of any principal or interest; and therefore an acknowledgment so made may still be proved by verbal evidence (*Cleave* v. *Jones*, 6 Ex. 573).

A payment in order to take a case out of the Statutes of Limitation must be such a payment as to amount to an acknowledgment of liability by the party chargeable (*Harlock* v. *Ashberry*, 19 Ch. D. 539; 51 L. J. Ch. 394; see *Lewin* v. *Wilson*, 11 App. Cas. 639).

No new promise of payment can be inferred from a payment of part of the sum

The like, in a Case within 3 & 4 *Will.* 4, *c.* 42, *s.* 4.

At the time of the accruing of the plaintiff's cause of action [in respect of the said debt, *or*, breach of covenant, &c., *or, as the case may be*] the plaintiff was *non compos mentis* within the meaning of the statute 3 & 4 Will. 4, c. 42, s. 4, and from that time was never of sound memory or understanding [until within twenty years before this action].

---

claimed, where the payment is expressly made as a payment of the whole sum admitted to be due (*Waugh* v. *Cope*, 6 M. & W. 824); or where the payment is made by a third party without the debtor's authority or ratification (*Linsell* v. *Bonsor*, 2 Bing. N. C. 241; see *Harlock* v. *Ashberry*, *supra*; *Newbould* v. *Smith*, 33 Ch. D. 127; 14 App. Cas. 423); or where such payment is made under compulsion of law (*Morgan* v. *Rowlands*, L. R. 7 Q. B. 493, 498; 41 L. J. Q. B. 187; *Taylor* v. *Hollard*, [1902] 1 K. B. 676; 72 L. J. K. B. 278). A part payment made expressly on account of the principal sum only does not prevent the statute from operating as to the claim for interest (*Collyer* v. *Willock*, 4 Bing. 313). If the right to the principal is barred by the statute, the claim to interest thereon is barred also (*Hollis* v. *Palmer*, 2 Bing. N. C. 713; see *Ex p. Osborne*, L. R. 10 Ch. 41; 44 L. J. Q. B. 1).

The part payment, in order to take the case out of the statute, need not be made in money; it is sufficient if the creditor receives from the debtor anything which by their agreement is taken as equivalent to payment in reduction of the debt (*Hart* v. *Nash*, 2 C. M. & R. 337; *Hooper* v. *Stevens*, 4 A. & E. 71; *Bodger* v. *Arch*, 10 Ex. 333; 24 L. J. Ex. 19; see *Maber* v. *Maber*, L. R. 2 Ex. 153; 36 L. J. Ex. 70).

In order that an acknowledgment may have the effect of taking a case out of the statute of James, it must have been made to the creditor, or his agent, as otherwise a promise cannot be inferred (*Godwin* v. *Culley*, 4 H. & N. 373, 380; *Grenfell* v. *Girdlestone*, 2 Y. & C., Exch. 662, 676; *Stamford Banking Co.* v. *Smith*, [1892] 1 Q. B. 756; 61 L. J. Q. B. 405; see *Wilby* v. *Elgee*, L. R. 10 C. P. 497; 44 L. J. C. P. 254).

The cause of action must be complete at the time of action brought, so that the defence of the statute cannot be met by a renewed promise made after action (*Bateman* v. *Pinder*, 3 Q. B. 574).

As to what amounts to a sufficient acknowledgment to take a case out of the statute see further, *Lee* v. *Wilmot*, L. R. 1 Ex. 364; 35 L. J. Ex. 175; *Chasemore* v. *Turner*, L. R. 10 Q. B. 500; 45 L. J. Q. B. 66; *Skeet* v. *Lindsay*, 2 Ex. D. 314; 46 L. J. Ex. 249; *Meyerhoff* v. *Froehlich*, 3 C. P. D. 333; 4 *Ib.* 63; 48 L. J. C. P. 43; *Green* v. *Humphreys*, 26 Ch. D. 474; 53 L. J. Ch. 625; *Mowbray* v. *Appleby*, 80 L. T. 805. A promise to pay any balance that may be due will suffice (*Langrish* v. *Watts*, [1903] 1 K. B. 636; 72 L. J. K. B. 435). An offer of payment contained in a letter expressed to be written "without prejudice," cannot be relied on as amounting to such an acknowledgment, if the offer is not accepted. (See *In re River Steamer Co.*, L. R. 6 Ch. 822.)

The renewal of liability by acknowledgment is confined to cases of debts; no similar effect is given to acknowledgments of liability for breaches of contract not resulting in debts (*Boydell* v. *Drummond*, 2 Camp. 157, 160; *Short* v. *M'Carthy*, 3 B. & Ald. 626; *Whitehead* v. *Howard*, 2 B. & B. 372; *Ashlin* v. *Lee*, 44 L. J. Ch. 174).

In the case of a renewed promise to pay a simple contract debt, the existence of the old debt, even if already barred by the statute (*Latouche* v. *Latouche*, 3 H. & C. 576; 34 L. J. Ex. 85; *Chasemore* v. *Turner*, *supra*), forms a sufficient consideration for the renewed promise, which is considered as a new cause of action (*Tanner* v. *Smart*, 6 B. & C. 603, 606; *Ridd* v. *Moggeridge*, 2 H. & N. 567; *Leaper* v. *Tatton*, 16 East, 420; *Irving* v. *Veitch*, 3 M. & W. 90; *Hart* v. *Prendergast*, 14 M. & W. 741; *Morgan* v. *Rowlands*, *supra*).

Where a debtor executes a composition deed acknowledging the debt and makes default in paying the composition, the Statute of Limitations as regards the original debt runs from the date of such default (*In re Stock*, 66 L. J. Q. B. 146).

Reply in a Case within 21 Jac. 1, c. 16, or 3 & 4 Will. 4, c. 42, that the Defendant was Abroad when the Cause of Action accrued.

When the plaintiff's cause of action accrued the defendant was in [Australia], beyond the seas within the meaning of the statute, 21 Jac. 1, c. 16 [*or*, 3 & 4 Will. 4, c. 42, *if the action is brought upon a specialty*];

Previously to the Judicature Acts, the plaintiff, in cases where the debt had been renewed by a promise to pay, might sue either upon the original cause of action or upon the fresh cause of action created by the new promise, and even where he sued upon the original debt, he was entitled under a joinder of issue on a plea of the statute to give evidence of the new promise or acknowledgment without replying it specially. Under the present rules of pleading the facts as to the new promise or part payment constituting the acknowledgment should be expressly pleaded in the claim or reply, though possibly this might be held to be not strictly necessary. (See *Purdon* v. *Purdon*, 10 M. & W. 562; *Hollis* v. *Palmer*, 2 Bing. N. C. 713; *Ridd* v. *Moggeridge*, 2 H. & N. 567.) See the form, *post*, p. 728.

In cases of *specialty debts* the effect of the Statutes of Limitation may be avoided by subsequent acknowledgment in the manner provided by the 3 & 4 Will. 4, c. 42. By s. 5 of that statute, it is enacted (*inter alia*) that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the person entitled to bring his action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid;—and the plaintiff or plaintiffs in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute. As the acknowledgment under this section may be made in writing not under seal, it is the original cause of action founded on the deed or specialty which is revived from that date; and it is not the mere acknowledgment which forms a new cause of action, as in the case of simple contract debts.

An acknowledgment within this section need not be such as necessarily to import a promise to pay (*Moodie* v. *Bannister*, 4 Drew. 432; 38 L. J. Ch. 881); and therefore, it seems, may be sufficient, if made to a stranger and not to the creditor (*Howcutt* v. *Bonser*, 3 Ex. 491, 500). The renewal of liability under this statute applies only to money remaining unpaid and acknowledged to be due, and not to liabilities for breaches of covenants not resulting in money debts (*Blair* v. *Ormond*, 17 Q. B. 423; 20 L. J. Q. B. 444).

It is provided by 9 Geo. 4, c. 14, s. 1, that an acknowledgment of the debt by one of several joint debtors should not revive the remedy against the others. This enactment did not extend to acknowledgment by part payment or payment of interest (*Wyatt* v. *Hodson*, 8 Bing. 309); but by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14, it was enacted in reference to the provisions of the Acts 21 Jac. 1, c. 16, s. 3, and 3 & 4 Will. 4, c. 42, s. 3, "that no co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors or administrators." (See *Cockrill* v. *Sparke*, 1 H. & C. 699; 32 L. J. Ex. 118; 45 L. J. Ch. 57; *In re Hollingshead*, 37 Ch. D. 651; 57 L. J. Ch. 400; *In re Tucker*, [1894] 3 Ch. 429; *Bailie* v. *Irwin*, [1897] 2 Ir. R. 614.) These statutes apply only to the remedy against the co-executor, and therefore an acknowledgment of a debt by one of several executors is still sufficient to take the case out of the statute as against the testator's estate (*In re Macdonald*, [1897] 2 Ch. 181; 66 L. J. Ch. 630). See as to land, *Astbury* v. *Astbury*, [1898] 2 Ch. 111; 67 L. J. Ch. 471.

and the plaintiff commenced this action within six [*or*, twenty] years next after the first return of the defendant from beyond the seas after the accruing of the said cause of action.

Reply of Concealed Fraud to a Defence of the Statute of Limitations 21 *Jac.* 1, *c.* 16, *s.* 3 (*d*).

1. The plaintiff joins issue on the defence.

2. As to paragraph —— of the defence the plaintiff in addition to joining issue thereon, says:

(a) that the cause of action relied on is the fraud and misrepresentation of the defendant;

(b) that the plaintiff did not discover the existence of the fraud until within six years next before the commencement of this action;

(c) that the plaintiff did not discover that the defendant had been a party to or was guilty of the said fraud until within six years next before the commencement of this action;

(d) that the plaintiff could not by the exercise of reasonable diligence have discovered and had not the means of discovering the matters

---

(*d*) This was the form used in *Gibbs* v. *Guild* (8 Q. B. D. 296; 9 *Ib.* 59; 51 L. J. Q. B. 228, 318), and is a good reply in point of law.

Previously to the Judicature Acts, it was no answer to a plea of the statute that the defendant had fraudulently concealed from the plaintiff the existence of the cause of action until within the statutory period (*Hunter* v. *Gibbons*, 1 H. & N. 459; 26 L. J. Ex. 1; *Imperial Gas Co.* v. *London Gas Co.*, 10 Ex. 39). But the Courts of equity held that, where there had been such fraudulent concealment the period of limitation only began to run from the time of the discovery of the fraud, or from the time when the plaintiff by the exercise of reasonable diligence might have discovered it (Storey's Eq. Jur., s. 1521; *Booth* v. *Lord Warrington*, 4 Bro. P. C. 163; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 630; *Blair* v. *Bromley*, 5 Hare, 542). This doctrine is now applicable wherever the facts are such as would have given jurisdiction to a Court of equity before the Judicature Acts, and accordingly where the Statute of Limitations is pleaded as a defence to an action to recover damages for fraudulent misrepresentations, a reply to the effect that the defendant had fraudulently concealed from the plaintiff the existence of the cause of action until within six years before the action, and that the plaintiff had not discovered or had the means of discovering the existence of the cause of action until within that period, is good (*Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 *Ib.* 59; 51 L. J. Q. B. 228, 313; *Armstrong* v. *Milburn*, 54 L. T. 723; *Moore* v. *Knight*, [1891] 1 Ch. 547; 60 L. J. Ch. 271; *North American Land, etc. Co.* v. *Watkins*, 73 L. J. Ch. 626; and see *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319). Where fraudulent concealment is thus relied upon, the nature of the fraud must be clearly and explicitly stated in the pleadings (*Biddell* v. *Strathmore*, 3 Times Rep. 329; *Lawrance* v. *Norreys*, 15 App. Cas. 210; 59 L. J. Ch. 681; and see *ante*, p. 656).

It would seem that the same principle will apply to other cases in which the rules of equity would have prohibited the expiration of the statutory period from being set up as a defence, as, for instance, in cases where the plaintiff had been prevented by a mistake of fact from taking proceedings to enforce his rights, and had not been guilty of any laches after discovering the mistake (*Brooksbank* v. *Smith*, 2 Y. & C., Exch. 58; *Denys* v. *Shuckburgh*, 4 *Ib.* 42; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 751; 68 L. J. P. C. 49).

stated in sub-paragraphs (b) and (c) hereof until within six years next before the commencement of this action ;

(e) that the existence of and the means of discovering such fraud was concealed by the defendant until within such six years ;

(f) that the defendant, in order to prevent the plaintiff from discovering the said fraud and that he had been guilty of it, actively and deliberately concealed the same until within six years next before the commencement of this action, and so prevented and delayed the plaintiff from discovering the same and bringing this action in respect thereof.

Particulars under sub-paragraphs (e) and (f) are as follows [*state them*].

A like Defence under the Statute of Limitations, 21 *Jac.* 1, *c.* 16, *s.* 3, *and the Trustee Act*, 1888, *s.* 8: *see Moore* v. *Knight*, [1891] 1 Ch. 547 ; 60 L. J. Ch. 271.

Reply of an Acknowledgment (*e*).

The defendant on the —— ——, 19—, within six [or twenty] years before this action, made an acknowledgment [in writing signed by him (*or*, by —— ——, his agent), *or*, by part payment, *or*, by part satisfaction on account of the principal money, *or*, interest then due on the said deed, *or*, bond, *or*, *as the case may be*] that the debt now sued for remained unpaid and due to the plaintiff.

Reply of the Statute of Limitations to a Defence of Set-off (*f*).

The alleged set-off was before the commencement of this action barred by the Statute of Limitations [*state which*].

(*e*) In actions on specialties an acknowledgment under 3 & 4 Will. 4, c. 42, s. 5, cited *ante*, p. 726, should be pleaded specially. (See *Kempe* v. *Gibbon*, 9 Q. B. 609.) The mode of making the acknowledgment, whether by writing or by part payment or by part satisfaction, should also be specifically stated in the reply (*Forsyth* v. *Bristowe*, 8 Ex. 347 ; 22 L. J. Ex. 255). As to acknowledgments in the case of simple contract debts, see *ante*, p. 726. See a form, *Skeet* v. *Lindsay*, 2 Ex. D. 314.

(*f*) The Statutes of Limitation apply to cases of set-off and of counterclaim. (See Lord Tenterden's Act (9 Geo. 4, c. 14), s. 4, and *Chapple* v. *Durston*, 1 C. & J. 1.) If relied on in such cases, they must be replied specially (*Chapple* v. *Durston*, *supra*).

It is a good reply to a defence of set-off that the debt sought to be set off was barred by the Statute of Limitations before the commencement of the action, but it would not be a good reply to state that it was barred after the commencement of the action, but before the defendant pleaded it, as it is sufficient if it was an actionable claim at the time of action brought (*Walker* v. *Clements*, 15 Q. B. 1046).

Liquidated Damages (*g*).

For forms of Set-off or Counterclaim for Liquidated Damages, see "Set-off," post, p. 781.

For forms of Reply of Waiver to a Counterclaim for Liquidated Damages due under a Building Contract, see R. S. C., 1883, *App. E., Sect. II., cited ante*, p. 36.

Lunacy.

See "Insanity," ante, p. 690.

Lunatics (*h*).

Commencement of Defence by a Person of Unsound Mind so found by Inquisition, and defending by and with his Committee.

[*This may easily be framed from the Form of Statement of Claim given "Lunatics," ante*, p. 243.]

Commencement of Defence by a Person of Unsound Mind not so found by Inquisition, and defending by Guardian.

Between *A. B.*.....Plaintiff,

and

C. D., a person of unsound mind not so found by inquisition, who defends by *E. F.*, his guardian.....Defendant.

Defence.

The defendant, who is a person of unsound mind not so found by inquisition, by *E. F.*, his duly appointed guardian *ad litem*, says that :—

Maintenance (*i*).

Defence of Maintenance or Champerty.

The contract [*or*, promise, *or*, etc.] sued on was made by way of maintenance or champerty and was and is illegal.

Particulars :—[*State the particulars showing how the contract, etc. was made by way of maintenance or champerty.*]

(*g*) See *ante*, p. 241.

(*h*) See *ante*, pp. 243, 690.

(*i*) See *ante*, pp. 423, 682. Agreements made by way of maintenance or champerty are illegal and cannot be enforced (*Stanley* v. *Jones*, 7 Bing. 369 ; *Sprye* v. *Porter*, 7

MARRIAGE (*k*).

Denial of an alleged Promise of Marriage (*l*).

The defendant did not promise [*or*, agree] to marry the plaintiff as alleged or at all.

Defence of the Infancy of the Defendant at the Time of the Promise (*m*): *see* "*Infancy*," *ante*, p. 688.

Defence that the Plaintiff was not Ready and Willing to marry the Defendant (*n*).

The plaintiff was not ready and willing to marry the defendant.

[*If any specific refusal to marry the plaintiff or any specific fact or act is relied on it should be stated by way of particulars under the above defence.*]

(*See R. S. C.*, 1883, *App. D.*, *Sect. V.*, *No.* 16.)

E. & B. 58; 26 L. J. Q. B. 64; *Reynell* v. *Sprye*, 8 Hare, 222; 1 D. M. & G. 660; *Hutley* v. *Hutley*, L. R. 8 Q. B. 112; *James* v. *Kerr*, cited *ante*, p. 423; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364; 74 L. J. K. B. 829). For forms of pleas alleging maintenance under the former system of pleading, see *Sprye* v. *Porter*, *supra*; *Fendon* v. *Parker*, 11 M. & W. 675.

The purchase by the attorney in the suit of the whole or part of the property to be recovered in the action, *pendente lite*, was held to be illegal and void (*Simpson* v. *Lamb*, 7 E. & B. 84; 26 L. J. Q. B. 121; *Davis* v. *Freethy*, 24 Q. B. D. 519; 59 L. J. Q. B. 318; *Pittman* v. *Prudential Deposit Co.*, 13 Times Rep. 110). So a contract to pay the attorney in the suit, over and above all legal charges, a sum of money according to the interest and benefit of the litigant sought to be recovered in the action, was held void as amounting in effect to the same thing (*Earle* v. *Hopwood*, 9 C. B. N. S. 566; 30 L. J. C. P. 217); and a stipulation by an attorney to have 5 per cent. on the property recovered, in addition to his costs, was held illegal (*Pince* v. *Beattie*, 32 L. J. Ch. 734; and see *Hilton* v. *Woods*, L. R. 4 Eq. 432; 36 L. J. Ch. 941; *In re The Attorneys and Solicitors Act*, 1870, 1 Ch. D. 573). It seems that the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), has not altered the law as to champerty in such cases (see s. 11 of the Act, and the case last cited); and the Solicitors' Remuneration Act, 1881, s. 8, does not apply to remuneration for business done in an action or in any contentious business. The taking by the solicitor of a security upon the property to be recovered in the action for past advances made towards prosecution of the suit is not illegal (*Anderson* v. *Radcliffe*, E. B. & E. 806; 28 L. J. Q. B. 32; 29 *Ib.* 128).

(*k*) See *ante*, p. 244. It is a defence to an action for breach of promise to marry that the defendant was a foreign sovereign not subject to the jurisdiction. (See *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149; 63 L. J. Q. B. 593, cited *post*, p. 864.)

(*l*) As to the form and effect of denials of the alleged contract or promise, see *ante*, pp. 527—529.

(*m*) The infancy of the plaintiff is no defence. (See *ante*, p. 687.)

(*n*) If the defendant contests the fulfilment of any condition precedent, he must distinctly state that such condition was not fulfilled. (See *ante*, p. 641.) But where a defendant, before any default on the plaintiff's part, and before the time for performance has arrived, has absolutely renounced and refused to perform a conditional contract, and is sued for the breach created by such renunciation and refusal, the non-fulfilment of the condition forms no defence to the action. (See *ante*, p. 158.)

It is no defence to an action for breach of promise of marriage that after the promise

Defence to an Action on a Promise to Marry within a Reasonable Time, that a Reasonable Time had not Elapsed.

A reasonable time for the said marriage had not elapsed before action.

Defence that the Promise was Conditional only, and that the Condition has not been performed.

1. The defendant denies that he agreed to marry the plaintiff within a reasonable time or at all.

2. The agreement (if any, which is denied) was made subject to the following conditions, which were agreed to verbally on the —— ——, 19—, viz.: (a) that the defendant's parents should give their consent and pecuniary assistance, and (b) that certain of the plaintiff's relatives resident in Canada should give their assistance, and (c) that the defendant should be in a position and possessed of sufficient means to marry the plaintiff.

3. The said conditions have not been performed. The defendant's parents have never consented and have refused to consent to the alleged agreement and have refused to give any pecuniary assistance to the defendant for the purpose of carrying out the alleged agreement. The plaintiff's said relations have not given their assistance. The defendant has not been and is not in a position or possessed of sufficient means to marry the plaintiff.

4. A reasonable time for the performance of the said promise had not elapsed before action brought. A reasonable time for the said marriage could not and would not elapse unless and until the defendant was in a position and possessed of sufficient means to marry the plaintiff, and he has not been and is not in such a position or possessed of such means.

Defence that after making the Promise the Defendant discovered that the Plaintiff was not Chaste (*o*).

The defendant made the promise under the belief that the plaintiff had always been and then was a chaste and modest woman, whereas the plaintiff

---

the defendant was afflicted with a disease by reason whereof he became incapable of marriage without danger to his life (*Hall* v. *Wright*, E. B. & E. 746; 27 L. J. Q. B. 345; 29 *Ib.* 43). Nor is it a defence to such an action that the defendant after the promise discovered that the plaintiff at the time of the promise was under an engagement to marry another person (*Beachy* v. *Brown*, E. B. & E. 796; 29 L. J. Q. B. 105); and it was held to be no defence to an action for breach of a promise of marriage that after the promise the defendant discovered that the plaintiff had previously been insane and confined in a lunatic asylum (*Baker* v. *Cartwright*, 10 C. B. N. S. 124; 30 L. J. C. P. 364).

(*o*) As to this defence, see *Foulkes* v. *Sellway*, 3 Esp. 236; *Irving* v. *Greenwood*, 1 C. & P. 350; *Hall* v. *Wright*, E. B. & E. at p. 754.

had not always been nor was she then a chaste or modest woman. The defendant first discovered this on the —— ——, 19—, after making the promise and before the alleged breach, and therefore refused to marry the plaintiff, which is the alleged breach.

Particulars are as follows :—

Defence of Rescission or Exoneration before Breach (p).

1. The alleged agreement [*or*, promise] (if any, which is denied) was before any breach thereof by the defendant rescinded and put an end to by mutual consent verbally on the —— ——, 19—, and the plaintiff thereby exonerated and discharged the defendant from the performance of the same.

2. The defendant denies that he ever refused to marry the plaintiff, but if he ever did so he says that such refusal took place (if at all) after the promise [*or*, agreement] was rescinded as stated in paragraph 1 hereof.

Defence that the Defendant was induced to make the Promise by Fraud (q): "*see Fraud*," *ante*, p. 656.

MASTER AND SERVANT (r).

Denial of an alleged Contract of Employment: see "Agreements," ante, p. 572.

Denial of the alleged Terms of the Employment.

The defendant did not employ the plaintiff upon the terms alleged. The terms of the employment, which were agreed to verbally on the ——, 19— [*or*, which are contained in a written agreement dated ——, 19—, *or, as the case may be*], were as follows :—

[*State the material terms, and any defence arising thereunder.*]

(p) In order to prove a defence of exoneration before breach, the defendant must show what amounts to a mutual rescission of the contract (*King* v. *Gillett*, 7 M. & W. 55). A total cessation of correspondence and intercourse between the parties is evidence in support of a defence of such exoneration or rescission (*Davis* v. *Bomford*, 6 H. & N. 245; 30 L. J. Ex. 139).

(q) Fraud is a good defence to an action for breach of promise of marriage, as the defendant in such a case is entitled to rescind the contract on discovering the facts (*Young* v. *Murphy*, 3 Bing. N. C. 54; *Beach* v. *Merrick*, 1 C. & K. 463; see *Irving* v. *Greenwood*, *ante*, p. 731, and *Beachy* v. *Brown*, *ante*, p. 731).

(r) See *ante*, pp. 246, 432; *post*, p. 879; and see "*Apprentice*," *ante*, p. 82; "*Truck Acts*," *post*, p. 800.

Defence to an Action for Wrongful Dismissal, denying the alleged Breach (*s*).

The defendant did not dismiss the plaintiff from the said service. [The plaintiff on the —— ——, 19—, voluntarily withdrew himself from the said service.]

Defence to a like Action that the Service was determined by the Notice (*t*).

On the —— ——, 19—, [being one calendar month] before the alleged dismissal of the plaintiff from the said service, the defendant gave to the plaintiff [*or*, the plaintiff gave to the defendant] verbally [*or* by a letter dated the —— ——, 19—, *or, as the case may be*] [one calendar month's] notice of his intention to put an end to the said service.

The like, where the Fact that the Service was determinable by Notice is not shown in the Plaintiff's Claim, or where the Defendant relies upon a Local Custom as annexing that Term to the Agreement (*u*).

It was a term of the plaintiff's employment [*or*, of the said agreement] that the plaintiff's service thereunder might be at any time determined by either the plaintiff or the defendant giving [one calendar month's] notice to the other of them to determine the said service. The said term was agreed to verbally on the —— ——, 19— [*or*, is contained in a written agreement dated —— ——, 19—] [*or*, At the time of the making of the agreement the defendant carried on the trade of a —— at ——, and the said employment was an employment of the plaintiff as a —— in the said trade, and the agreement was subject to a general usage or custom existing in that trade at ——, whereby on such employment of a —— in the said trade either party to the contract was at liberty at any time to determine the said employment on giving to the other party [one calendar month's] notice of his intention to determine the service, and *proceed as in the last preceding form*].

(*s*) As to what amounts to a dismissal, see *Reid* v. *Explosives Co.*, 19 Q. B. D. 264; 56 L. J. Q. B. 388; *Midland Counties Bank* v. *Attwood*, [1905] 1 Ch. 357, 362; 74 L. J. Ch. 286, cited *ante*, p. 248. The defence that the service was duly determined by notice must be specially pleaded (see the next note), and all matters in excuse or justification of the dismissal, such as the misconduct of the plaintiff (see note (*x*), *infra*), must be distinctly stated in the defence.

(*t*) See *ante*, p. 247. If a contract alleged by the plaintiff as a general contract of hiring for a fixed period was by the express or implied terms of the agreement subject to be determined by notice at an earlier date, the defendant, if he relies on such determination by notice, should not plead merely a denial of the contract alleged, but should expressly state what were the terms as to notice, and show their fulfilment.

(*u*) See *ante*, pp. 247, 249.

Reply that the Notice was waived.

After the giving of the said notice and before the expiration thereof, and before the defendant dismissed the plaintiff, the plaintiff and the defendant agreed verbally [*or, as the case may be*] on the —— ——, 19—, that the said notice should be withdrawn and waived, and thereupon the said notice was so withdrawn and waived accordingly.

Defence justifying a Dismissal on the Ground of Misconduct (*x*).

After the said contract, and before the alleged breach, the plaintiff misconducted himself in the said service by wilfully disobeying the reasonable orders of the defendant by him given to the plaintiff in the course of the said service [*or*, by habitually neglecting his duties in the said service and failing to perform the same, *or*, by dishonestly converting to his own use money which he had received to the use of the defendant, *state the misconduct which justified the dismissal, according to the fact*], and the defendant therefore discharged the plaintiff from the said service, which is the alleged breach.

Particulars are as follows :—

[*State particulars of the misconduct.*]

(*x*) The master is justified in dismissing his servant without notice if the latter has been in fact guilty of misconduct, although that was not the actual motive which induced the master to dismiss him (*Ridgway* v. *Hungerford Market Co.*, 3 A. & E. 171; see *Mercer* v. *Whall*, 5 Q. B. 447, 466; *Oakes* v. *Wood*, 2 M. & W. 791), and notwithstanding that the master did not know of the misconduct at the time of dismissal (*Willets* v. *Green*, 3 Car. & K. 59; *Spotswood* v. *Barrow*, 5 Ex. 110; 19 L. J. Ex. 226; *Boston Fishing Co.* v. *Ansell*, 39 Ch. D. 339; *Cowan* v. *Milbourn*, L. R. 2 Ex. 230, 235; 36 L. J. Ex. 124).

Wilful disobedience to the lawful orders of the master is such misconduct as to justify dismissal without notice (*Spain* v. *Arnott*, 2 Stark. 256; *Turner* v. *Mason*, 14 M. & W. 112), so is continued and habitual neglect of duties (*Robinson* v. *Hindman*, 3 Esp. 235; *Amor* v. *Fearon*, 9 A. & E. 548), so is dishonesty (*Spotswood* v. *Barrow*, *supra*), so also is serious moral misconduct (*Atkin* v. *Acton*, 4 C. & P. 208; *Pearce* v. *Foster*, 17 Q. B. D. 536, 539; 55 L. J. Q. B. 306), or the taking of a secret commission for himself in the course of transacting his master's business (*Boston Fishing Co.* v. *Ansell*, *supra*). In one case a single instance of forgetfulness in the working of an expensive machine, which caused substantial damage to it, was held enough to justify dismissal without notice (*Baster* v. *London Printing Works*, [1899] 1 Q. B. 901; 68 L. J. Q. B. 622).

The defendant should give sufficient particulars of the misconduct to show clearly in what it consisted, and to enable the plaintiff to meet the charge, and if this is not done further particulars will be ordered. (See Ord. XIX., rr. 6, 7, cited *ante*, pp. 37, 38; *Saunders* v. *Jones*, 7 Ch. D. 435; 47 L. J. Ch. 440.)

If a master, with full knowledge of such misconduct on the part of a servant as would justify his dismissal, nevertheless expressly waives and condones the misconduct and continues him in the service, he cannot at any subsequent time insist upon that misconduct as a ground of dismissal. (See *per* Blackburn, J., in *Phillips* v. *Foxall*, L. R. 7 Q. B. at p. 680.)

Defence justifying a Dismissal on the Ground of Incompetency (y).

The defendant was induced to make the alleged contract by the plaintiff impliedly [*or*, on the —— ——, 19—, verbally, *or, as the case may be*] representing and warranting to him that he, the plaintiff, was then reasonably competent to perform the service for which he was engaged under the said contract, whereas the plaintiff was not then nor has he since been reasonably competent to perform the said service; and the defendant therefore rescinded the said contract, and dismissed the plaintiff from his said service, which is the alleged breach.

Particulars:—

The representation and warranty were made verbally on the —— ——, 19— [*or*, are to be implied from the fact of the plaintiff publicly professing himself to be a [scene painter], in which capacity he was engaged].

Defence to a like Action, where it does not appear from the Statement of Claim that the Contract was one which could not be performed within a Year from the making thereof (z): see "Frauds, Statute of," ante, p. 666.

Medical Attendance (a).

(*y*) An artisan, who has been engaged for a fixed term on his express or implied representation of his competency to perform the required service, may be dismissed before the end of the term upon his proving to be incompetent (*Harmer* v. *Cornelius*, 5 C. B. N. S. 236; 28 L. J. C. P. 85). In contracts for personal services, it is an implied condition, in the absence of any stipulation to the contrary, that the death of either party shall dissolve the contract (*Farrow* v. *Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326). Permanent or complete incapacity from illness or insanity to perform the agreed service will ordinarily justify either party in determining the contract. (See *Cuckson* v. *Stones*, 1 E. & E. 248; 28 L. J. Q. B. 25; *Boast* v. *Firth*, L. R. 4 C. P. 1; *Robinson* v. *Davison*, L. R. 6 Ex. 269; 40 L. J. Ex. 172; and see *ante*, p. 583.) But mere temporary incapacity through illness will not (*Ib.*).

(*z*) It seems that the fact that the plaintiff has actually served under such a contract for part of the stipulated period is no ground for inferring a fresh implied contract such as would support the action, and the equitable doctrine of part performance is not applicable to such a case (*Britain* v. *Rossiter*, 11 Q. B. D. 123; 48 L. J. Ex. 362; see *ante*, pp. 34, 666).

(*a*) As to the defence that the defendant was not registered, see *ante*, p. 252.

As to the defence that there was such negligence or want of skill on the part of the plaintiff as to render his work and attendances wholly useless, see *Kannen* v. *McMullen*, Peake, 59; *Duffit* v. *James*, cited 7 East, 480; *Hill* v. *Featherstonhaugh*, 7 Bing. at pp. 572, 574; and as to counterclaims for negligence or unskilfulness, see *ante*, pp. 330, 438.

MERGER (*b*).

Defence to an Action for a Simple Contract Debt, of Merger by a Covenant of the Defendant to pay the Debt (*b*).

After the accruing of the plaintiff's claim it was merged and extinguished by the defendant executing and delivering to the plaintiff, and the plaintiff

---

(*b*) Where a security of a higher nature is taken or obtained for a debt, the original remedies for the debt are merged in the higher security. Thus, if a bond or covenant is given for a simple contract debt, the simple contract is merged in the higher security; and so, if judgment be recovered in an action for a simple contract or bond or specialty debt, the original security is merged in the judgment, which, being matter of record, is of a higher nature (*Higgen's case*, 6 Co. 45 b; *Drake* v. *Mitchell*, 3 East, 251, 259; *Owen* v. *Homan*, 3 Mac. & G. 378, 407).

As to merger by judgment recovered, see *ante*, p. 703.

Whether a judgment for the principal and interest due under the covenants in a mortgage deed extinguishes the covenant for payment of interest depends in each case on the terms of the deed (*Economic Life Assurance Society* v. *Usborne*, [1902] A. C. 147; 71 L. J. P. C. 34). In the case of an ordinary mortgage with merely an incidenta covenant to pay interest the judgment operates as a merger, and no action will lie for subsequent interest, and the creditor is left to his remedy on the judgment (*Ex p. Fewings*, 25 Ch. D. 338; 53 L. J. Ch. 543; *Faber* v. *Lathom*, 77 L. T. 168).

It has been laid down that, where a higher security is given for the identical debt due under the inferior security, the merger of the debt takes place by operation of law independently of the intention of the parties (*Price* v. *Moulton*, 10 C. B. 561; 20 L. J. C. P. 102; see *Owen* v. *Homan*, 3 Mac. & G. 378, 408; though see *Commissioners of Stamps* v. *Hope*, [1891] A. C. 476; 60 L. J. P. C. 54).

Where the debts are not identical, or the parties are not the same, there is no merger, and the second security does not discharge the first, unless given and accepted in satisfaction and discharge, which is a different ground of answer (*Price* v. *Moulton*, *supra*; *Boaler* v. *Mayor*, 19 C. B. N. S. 76; 34 L. J. C. P. 230). Thus, where the defendant, being indebted to the plaintiff, gave a bond with sureties to a limited amount to secure the present debt and future advances, it was held that the bond was only a collateral security, and did not merge the debt (*Norfolk Ry. Co.* v. *M'Namara*, 3 Ex. 628). So, where a banker took a bond from his customer and a surety, conditioned for the payment of all moneys advanced or to be advanced, it was held that the actual debt, not being in existence at the time of giving the bond, was not thereby merged (*Holmes* v. *Bell*, 3 M. & G. 213). If one of two makers of a joint and several promissory note gives the holder a deed of mortgage to secure the amount, with a covenant to pay it, the other maker is not thereby discharged, because the remedy given by the specialty security, being confined to one of the debtors only, is not co-extensive with the remedy on the note (*Ansell* v. *Baker*, 15 Q. B. 20). So a bond given by two persons to secure the simple contract debt of one of them does not merge the debt, because the parties are not the same (*Holmes* v. *Bell*, *supra*); and a superior security given by the debtor to a third person as trustee for the creditor does not effect a merger of the debt (*Bell* v. *Banks*, 3 M. & G. 258; and see *White* v. *Cuyler*, 6 T. R. 176).

A deed acknowledging a simple contract debt may import a covenant to pay it without express words to that effect, and so operate as a merger; but if the acknowledgment is made for a collateral purpose, importing no such covenant, there will be no merger (*Courtney* v. *Taylor*, 6 M. & G. 851; *Isaacson* v. *Harwood*, L. R. 3 Ch. 225; 37 L. J. Ch. 209; *Jackson* v. *N. E. Ry. Co.*, 7 Ch. D. 573; 47 L. J. Ch. 363; and see p. 253). A deed reciting a simple contract debt, and agreeing to execute a mortgage with all usual covenants, was held to convert the debt into a specialty debt, because

accepting and receiving from him, a deed dated the —— ——, 19—, whereby the defendant covenanted with the plaintiff to pay the debt sued for to the plaintiff [on the —— ——, 19—].

Defence to an Action on a Contract, of a Judgment recovered by the Plaintiff for the same Claim: see "Judgment Recovered," ante, p. 703.

Misrepresentation.

See "Fraud," ante, p. 656; *and "Mistake," infra.*

Mistake (*c*).

Defence of Mistake, in an Action upon a Deed or Agreement in Writing.

The agreement [*or*, deed] sued on was entered into [*or*, made] by mistake. Particulars are as follows:—

(*See R. S. C.*, 1883, *App. D., Sect. II.*)

---

the mortgage would contain a covenant for payment (*Saunders* v. *Milsome*, L. R. 2 Eq. 573; see *Kidd* v. *Boone*, L. R. 12 Eq. 89; 40 L. J. Ch. 531).

It seems that there may be a merger of a part of a simple contract debt where the higher security is specifically appropriated to that part of the debt (*Price* v. *Moulton*, *supra*).

Where a bill of exchange was given as security for a debt due under a covenant, a judgment recovered on the bill without satisfaction was held to be no answer to an action on the covenant (*Drake* v. *Mitchell*, 3 East, 251); and it seems that, in general, where a bill, note, or cheque is given as security for a debt, an unsatisfied judgment in an action on the bill, note, or cheque does not merge the right of action for the original debt (*Wegg-Prosser* v. *Evans*, [1894] 3 Q. B. 101; [1895] 1 Q. B. 108; 63 L. J. Q. B. 728; 64 *Ib.* 1; see *ante*, pp. 704, 736).

A bond or other specialty given for the payment of rent which has accrued due under a parol demise does not effect a merger (*Cage* v. *Acton*, 1 Ld. Ray. 515; 1 Salk. 325).

(*c*) The fact that a written contract was entered into by mistake should be specially pleaded.

A person who has entered into a written contract cannot dispute its terms by extrinsic evidence, but he may, nevertheless, for the purpose of obtaining relief from liability thereunder, show by oral evidence that the terms of the written contract have, by mistake, been drawn up in such a manner as to contravene the intention of the parties, or that the contract was entered into under a mutual mistake as to matters forming the basis of the contract and essentially affecting it (Story, Eq. Jur., ss. 110 *et seq.*; *Baker* v. *Paine*, 1 Ves. sen. 456; *Woollam* v. *Hearn*, 7 Ves. 211; *In re Boulter*, 4 Ch. D. 241; 46 L. J. Q. B. 11; *Langen* v. *Tate*, 24 Ch. D. 522; Leake on Contracts, 4th ed., pp. 207 *et seq.*). In such cases, on proof of the mistake, the Court has jurisdiction to set aside the document or to reform and rectify it in accordance with the intention of the parties; and although, by s. 34 (3) of the Judicature Act, 1873, actions for "the rectification, or setting aside, or cancellation of deeds or other written instruments," are assigned to the Chancery Division, the King's Bench Division has

The like, with a Counterclaim for Rectification.

Defence.

1. The defendant denies that he made the agreement sued on.

2. On the —— ——, 19—, it was verbally agreed between the plaintiff and the defendant that [*here state the agreement actually made*].

3. The written contract referred to in the statement of claim was [prepared

---

jurisdiction to set aside or rectify a deed or other written instrument, where the necessity for so doing arises in the course of proceedings in that division. (See the Jud. Act, 1873, ss. 16, 24, 36; *Pinney* v. *Hunt*, 6 Ch. D. 98; *Breslauer* v. *Barwick*, 36 L. T. 52; *Storey* v. *Waddle*, 4 Q. B. D. 289; notwithstanding the *dicta* in *Mostyn* v. *West Mostyn, &c. Co.*, 1 C. P. D. 145; 45 L. J. C. P. 401.)

Where the facts show that the defendant would be entitled to claim to have the deed or writing set aside or rectified, and that, if such relief were granted, the plaintiff would be unable to maintain his action, the Court will give effect to the facts by way of a defence to the action, if they are so pleaded, and for that purpose will treat the deed or writing as set aside or rectified, without any formal judgment to that effect. (See Jud. Act, 1873, s. 24 (2); *Mostyn* v. *West Mostyn, &c. Co., supra*; *Breslauer* v. *Barwick*, 36 L. T. 52.) Accordingly, where the facts show a right on the part of the defendant to have the contract, or so much of it as remains unperformed, absolutely and unconditionally set aside on the ground of mistake, they will constitute a complete defence to the action (*Ib.*; and see *Wake* v. *Harrop*, 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 *Ib.* 451; and *ante*, p. 574). Similarly, the facts amount to a complete defence to an action on the contract where they show that a contract which by mistake has been drawn up in a manner contrary to the intention of the parties has been fully performed according to the terms really intended (see *Steel* v. *Haddock*, 10 Ex. 643; 24 L. J. Ex. 78; *Luce* v. *Izod*, 1 H. & N. 245; 25 L. J. Ex. 307; *Vorley* v. *Barrett*, 1 C. B. N. S. 225; 26 L. J. C. P. 1; *Caird* v. *Moss*, 33 Ch. D. 22; 55 L. J. Ch. 854), or has by lapse of time or by the default of the plaintiff become wholly impracticable, so that nothing further can be done under it (see *Borrowman* v. *Rossel*, 16 C. B. N. S. 58; 33 L. J. C. P. 111).

In any case of mistake, where the written contract sued upon contains provisions purporting to be operative *in futuro*, and the defendant desires not merely to defend himself against the claims made by the plaintiff in the pending action, but also to preclude the plaintiff from subsequently making further claims in respect of erroneous executory stipulations in the written contract, it is expedient to counterclaim for the setting aside or rectification of the document.

If the defendant counterclaims to have the contract rectified with the view of himself enforcing a claim upon it against the plaintiff, it seems that, where the contract was one required by the Statute of Frauds to be in writing and the statute is pleaded, he must support his case by written evidence, or by proof of part performance, where part performance operates to take the case out of the statute (*Woollam* v. *Hearn*, 7 Ves. 211; *Manser* v. *Back*, 6 Hare, 443; *Olley* v. *Fisher*, 34 Ch. D. 367; 56 L. J. Ch. 208). As to the Statute of Frauds, see *ante*, pp. 663, 666.

In general, where a written contract has been entered into, a mistake, in order to constitute a defence to an action on the contract, or to give a right to have it set aside or rectified, must be a mistake common to both parties (*Sells* v. *Sells*, 1 Dr. & S. 42; 29 L. J. Ch. 500; *Ionides* v. *Pacific Ins. Co.*, L. R. 6 Q. B. 674; L. R. 7 Q. B. 517; *Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. D. 693; 35 L. T. 822; 38 *Ib.* 303; *Paget* v. *Marshall*, 28 Ch. D. 255; 54 L. J. Ch. 575; *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. 475, 486; 61 L. J. Ch. 248, 251). Where a contract is entered into by both parties upon the basis of a particular state of facts existing, which is afterwards found to be a mistake, the facts supposed not being the true state of facts, such contract is, in general, one that cannot be further enforced against a party who on

by the plaintiff's solicitor and was] intended to embody the agreement made as stated in paragraph 2 hereof, which was the only agreement made by the plaintiff and the defendant, and was signed by the plaintiff and the defendant in the belief that it did embody the same.

4. The said written contract does not [*or*, If and so far as the said written

---

discovery of the mistake objects on the ground of the mistake (*Scott* v. *Coulson*, [1903] 2 Ch. 249; 72 L. J. Ch. 600). A mistake of one party only does not ordinarily afford any defence or ground for relief, though it may have that effect, where it has been caused by some misrepresentation or concealment by the other party, or has been known to and taken advantage of by him, where he was under some duty to disclose the facts (*Ib.*; *Torrance* v. *Bolton*, L. R. 8 Ch. 118; 42 L. J. Ch. 177; *Smith* v. *Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221; *Earl Beauchamp* v. *Winn*, *infra*; *Stewart* v. *Kennedy*, 15 App. Cas. 108). See further as to rectification on the ground of unilateral mistake, *Harris* v. *Pepperell*, L. R. 5 Eq. 1; *Paget* v. *Marshall*, *supra*.

An innocent misrepresentation essentially affecting the subject-matter of the contract, and relied upon by the party to whom it was made, may be sufficient ground for relief against or rescission of the contract (*Rawlins* v. *Wickham*, 3 De G. & J. 304; *Kennedy* v. *Panama*, *&c. Mail Co.*, L. R. 2 Q. B. 580; *Hart* v. *Swaine*, 7 Ch. D. 42; 47 L. J. Ch. 5; *Gilbert* v. *Endean*, 9 Ch. D. 259; *Redgrave* v. *Hurd*, 20 Ch. D. 1; 51 L. J. Ch. 113; *Adam* v. *Newbigging*, 13 App. Cas. 308; 57 L. J. Ch. 1066; *Karberg's case*, [1892] 3 Ch. 1; 61 L. J. Ch. 741; and see *post*, p. 771), so long as it remains unexecuted (*Seddon* v. *North Eastern Salt Company*, [1905] 1 Ch. 326; 74 L. J. Ch. 199), though, in the absence of anything amounting to fraud, it would not form ground for an action for damages (*Reese River*, *&c. Co.* v. *Smith*, L. R. 4 H. L. 64; 39 L. J. Ch. 849; *Arkwright* v. *Newbold*, 17 Ch. D. 301; 50 L. J. Ch. 372; *Smith* v. *Chadwick*, 20 Ch. D. 27; 9 App. Cas. 187; 53 L. J. Ch. 873; *Derry* v. *Peek*, 14 App. Cas. 337; 58 L. J. Ch. 864; and see *Adam* v. *Newbigging*, *supra*).

The mistake, in order to afford a defence or give a right to relief, must in general be a mistake of fact, and not a mere mistake of law. (See *Powell* v. *Smith*, L. R. 14 Eq. 85; 41 L. J. Ch. 734; *Bilbie* v. *Lumley*, 2 East, 469; *Rogers* v. *Ingham*, 3 Ch. D. 351; *Eaglesfield* v. *Marquis of Londonderry*, *supra*; *Ex p. Sandys*, 42 Ch. D. 98; 58 L. J. Ch. 504.) But it seems that a mistake as to mere private rights, or as to the proper legal construction to be put upon particular documents, may in some cases be considered as amounting only to a mistake of fact, and may therefore give a title to relief (*Cooper* v. *Phibbs*, L. R. 2 H. L. 149, 170; *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223, 234; and see *Daniell* v. *Sinclair*, 6 App. Cas. 181; 50 L. J. P. C. 50; *West London Bank* v. *Kitson*, 13 Q. B. D. 360; 53 L. J. Q. B. 345; *Firbank* v. *Humphreys*, 18 Q. B. D. 54; 56 L. J. Q. B. 57).

Where the mistake is a mere clerical error obviously appearing to be such on the face of the document itself, it will be set right by the Court in its construction of the document (*Spyer* v. *Topham*, 3 East, 115; *Coles* v. *Hulme*, 8 B. & C. 568; *Burchell* v. *Clark*, 2 C. P. D. 88; 46 L. J. C. P. 115; and see *Wilson* v. *Wilson*, 5 H. L. C. 40; 23 L. J. Ch. 697).

A defendant, who is sued upon a written contract, may plead that the deed or document sued upon, although bearing his seal or signature, was executed by him on a false representation and under a total mistake as to its nature, and in the *bonâ fide* belief that he was executing an instrument of a wholly different kind, and if there was no negligence on his part in the matter these facts will in general constitute a good defence (*Thoroughgood's case*, 2 Co. 9; *Pigot's case*, 11 *Ib.* 27 b; *Swan* v. *North British*, *&c. Co.*, 2 H. & C. 175; 32 L. J. Ex. 273; *Vorley* v. *Cooke*, 1 Giff. 230; *Foster* v. *Mackinnon*, L. R. 4 C. P. 704; 38 L. J. C. P. 310; *Lewis* v. *Clay*, 67 L. J. Q. B. 224; see *Hunter* v. *Walters*, L. R. 7 Ch. 75; 41 L. J. Ch. 175; *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1; 62 L. J. Ch. 138).

A defendant in an action on a written contract may show by oral evidence that

contract does not] contain or embody the aforesaid agreement but [*or*, it] was drawn up and signed under a mutual mistake of fact, and the defendant never agreed to the terms contained in it.

5. [*Here state any other defence or show that the defendant was ready and willing to perform or did perform the agreement actually made.*]

Counterclaim.

6. The defendant repeats paragraphs 2, 3, and 4 of the defence, and claims to have the said written contract rectified, so as to embody the agreement actually made or to have it treated as being so rectified.

MONEY LENT (*d*).

Denial of the Lending.

The plaintiff did not lend to the defendant the money alleged, or any part thereof. [*Add, if such is the case*, He gave the said money to the defendant as a gift.]

Defence that the Sum lent was less than the Amount Claimed.

The plaintiff lent the defendant £—— and no more.

[*Here state any defence as to the amount admitted to have been lent, or plead payment of that amount into Court.*]

For a form of Counterclaim for Money lent, see R. S. C., 1883, *App. D., Sect. VIII., cited ante*, p. 538.

---

there was a latent ambiguity in the terms expressed in the writing, and that those terms were understood by him and by the plaintiff in different senses, so that there was no real contract between them or no contract in the sense alleged by the plaintiff (*Raffles* v. *Wichelhaus*, 2 H. & C. 906; 33 L. J. Ex. 160; see *Smidt* v. *Tiden*, L. R. 9 Q. B. 446; 43 L. J. Q. B. 199; *Roden* v. *London Small Arms Co.*, 46 L. J. Q. B. 213).

The remarks above made as to defences on the ground of mistake are in general applicable also to replies on the like ground to defences setting up releases or other instruments by way of answer to the plaintiff's claim. (See *Lyall* v. *Edwards*, 6 H. & N. 337; 30 L. J. Ex. 193; *Verley* v. *Barrett*, 1 C. B. N. S. 225; 26 L. J. C. P. 1.)

As to payments made by mistake, see *ante*, p. 259.

(*d*) See *ante*, p. 253, and see "*Gift*," *post*, p. 856.

Defence and Counterclaim under the Money Lenders Act, 1900, *s.* 1 (*e*).

Defence.

1. The plaintiff at the date when it is alleged that the money claimed was lent to the defendant [*or*, when the agreement or security sued on was made] was a money lender.

(*e*) By the Money Lenders Act, 1900 (63 & 64 Vict. c. 51), sect. 1 (1), "Where proceedings are taken in any Court by a money lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of equity would give relief, the Court may re-open the transaction, and take an account between the money lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money lender, and if the money lender has parted with the security may order him to indemnify the borrower or other person sued."

(2) "Any Court in which proceedings might be taken for the recovery of money lent by a money lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the Court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any other instalment thereof, may not have arrived."

(4) "The foregoing provisions of this section shall apply to any transaction which whatever its form may be, is substantially one of money lending by a money lender."

This enactment is not confined to cases in which the Courts of equity would formerly have granted relief, but extends also to all cases where the transaction is harsh and unconscionable (*In re a Debtor*, [1903] 1 K. B. 705; 72 L. J. K. B. 382; *Saunders* v. *Newbold*, [1905] 1 Ch. 260; 74 L. J. Ch. 120). It was applied to a case where there was in the contract a clause which made the whole unpaid debt repayable at once in case of non-payment of any instalment, instead of by instalments, and made interest run upon such unpaid debt, thus increasing greatly the interest payable; it appearing that this effect of the clause, though intended by the lender was not appreciated or understood by the borrower (*Levene* v. *Greenwood*, 20 Times Rep. 389. See further, *Wells* v. *Allott*, [1904] 2 K. B. 842; 73 L. J. K. B. 1023; *Wells* v. *Joyce*, [1905] 2 Ir. R. 134; *Part* v. *Bond*, 21 Times Rep. 553; 93 L. T. 49). Before this statute the Courts of equity in cases of unconscionable bargains with expectant heirs and persons entitled to reversionary or future interests in property, would grant relief on the terms of repayment of the actual advance with a reasonable rate of interest. (See *Aylesford* v. *Morris*, L. R. 8 Ch. 484; 42 L. J. Ch. 546; *Beynon* v. *Cook*, L. R. 10 Ch. 389; *Brenchley* v. *Higgins*, 70 L. J. Ch. 788; and see as to analogous cases, *Fry* v. *Lane*, 40 Ch. D. 312; 58 L. J. Ch. 113; *James* v. *Kerr*, 40 Ch. D. 449; 58 L. J. Ch. 355.)

An action will lie for relief under the Act without waiting for the money lender to

2. The interest charged in respect of the sum actually lent is [*or*, the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, and charges for —— are] excessive and the transaction is harsh and unconscionable, or is such that a Court of equity would give relief.

Particulars :—[*State the particulars relied on as bringing the case within the section.*]

[3. The amount fairly due from the defendant to the plaintiff in respect of principal, interest and charges, does not exceed £——, being £——, the amount actually lent, and £—— for interest thereon at £—— per cent. per annum, and the defendant brings the said £—— into Court and says that that sum is sufficient to satisfy the plaintiff's claim.]

Counterclaim.

4. The defendant relies on all the facts stated in the defence, and claims relief under the Money Lenders Act, 1900, and to have the transaction reopened and an account taken between the plaintiff and the defendant and to be relieved from payment of any sum in excess of the amount fairly due in respect of principal, interest and charges.

Money Paid (*f*).

Denial of the Payment.

The defendant denies that the plaintiff paid the said money or any part of it at all [*or*, The plaintiff did not pay the said money or any part of it].

Denial of the Request (*g*).

The defendant denies that he ever requested the plaintiff to pay the said money or any part of it, or that it was paid, if at all, either for him or at his request.

[*Or*, The defendant says that if the plaintiff in fact paid the said money or any part of it he did not do so for the defendant or at his request or under any circumstances such as would render the defendant liable in respect thereof.]

[*Or*, The plaintiff did not pay the said money or any part of it for the defendant, or at his request.]

---

sue. (*Bonnard* v. *Dott*, 21 Times Rep. 491.) And under it a transaction closed and completed by the repayment of the money lent may be reopened (*Saunders* v. *Newbold*, *supra*). A contract entered into as a money-lender by a person who is not registered as such is illegal (*Victorian Syndicate* v. *Dott*, 21 Times Rep. 743).

A form of judgment reopening a loan transaction and directing an account will be found in *Saunders* v. *Newbold*, *supra*.

(*f*) See *ante*, p. 254.

(*g*) If the plaintiff alleges circumstances implying a request, the defendant must deal specifically with such allegations. (See *ante*, p. 527.)

MONEY RECEIVED (*h*).

Denial of the Receipt of the Money.

The defendant denies that he received the said money or any part thereof [*or*, The defendant did not receive the said money or any part of it].

Denial of the Receipt of the Money for the use of the Plaintiff (h).

The defendant denies [that he had or received the said money or any part of it at all. He moreover denies] that he had or received the said money or any part of it (if at all) for the use of the plaintiff or under any circumstances such as would entitle the plaintiff to recover the same from him.

[*Or*, If, which is denied, the defendant received the said money or any part of it at all, he did not do so for the use of the plaintiff or under any circumstances such as would entitle the plaintiff to recover it from him.]

[*Or*, The defendant received the said money, but he did not receive it, or any of it, for the use of the plaintiff.]

[*The statement of claim should state the facts relied on as showing that the money was received to the use of the plaintiff, and if it does so the facts so stated should be specifically denied or otherwise dealt with by the defence.*]

Defence that the Money was received in the Course of a Joint Venture which Failed.

[Further or in the alternative] the defendant says that the said moneys were received and paid (if at all) in the course and for the purpose of a joint venture and on the terms agreed to verbally on the —— ——, 19—, that the plaintiff should share in the profits of the said venture if it succeeded and should lose the said moneys if it failed and not on the terms that he should be repaid the same in the event of such failure and the said venture failed.

MORTGAGE (*i*).

Defence to an Action upon a Covenant for Payment in a Mortgage Deed (i).

1. The defendant did not execute the alleged mortgage deed.

2. The plaintiff released the debt by deed dated the —— ——, 19—.

3. The debt was barred by the Statute of Limitations [*state which, e.g.*, the Real Property Limitation Act, 1874, s. 8].

(*h*) See *ante*, p. 256.

(*i*) See "*Mortgage*," *ante*, p. 264; "*Release*," *post*, p. 753; "*Limitation, Statutes of*," *ante*, p. 722.

The Court or a judge has a summary jurisdiction, under 7 Geo. 2, c. 20, s. 1, and the

PARTNERS (*k*).

Defence by the Defendant Firm (*l*).

[*When the partners agree in putting in a defence common to all, they should deliver one defence, which should be in the ordinary form.*]

Defence by an Individual Partner (*l*).

Defence
of the defendants *C. D.* & Co.,
by *E. F.*, one of the partners appearing in this action.

1.
2. } [*Here state the defence in the ordinary form.*]

Defence of a Retired Partner to an Action against himself and his former Partners for a Debt incurred by the Partnership as originally constituted, that he has by Agreement been discharged from the Claim (*m*).

Defence of the Defendant *C. D.*

1. The defendant *C. D.*, on the —— ——, 19—, after the alleged sale and delivery [*or, as the case may be*], retired from the said partnership of *C. D.* & Co., and transferred his share and interest therein to the defendants *E. F.* and *G. H.*, for the purpose of their continuing the business of the said

---

C. L. P. Act, 1852, s. 219, to stay proceedings in actions brought on covenants (or bonds) for mortgage debts, and in actions brought by a mortgagee for the recovery of the mortgaged land, and to compel a reconveyance and delivery of the title deeds by him, on payment by the defendant of principal, interest, and costs.

The mortgagor's covenant for payment may be extinguished or suspended by the mortgagee accepting from him a new covenant to pay a sum including the debt at a more distant date, and in such case a surety for the payment of the original debt would be discharged from liability (*Bolton* v. *Buckenham*, [1891] 1 Q. B. 278; 60 L. J. Q. B. 261; *Bolton* v. *Salmon*, [1891] 2 Ch. 48; 60 L. J. Ch. 237).

Judgment for principal and interest due under the ordinary covenants in a mortgage deed extinguishes the covenant for interest. (See *ante*, p. 736.)

(*k*) See "*Partners*," *ante*, p. 265. Before the Judicature Acts it was, in general, a good defence at law to an action for debt or breach of contract to show that the plaintiff and the defendant were partners, and that the alleged cause of action formed part of unadjusted partnership transactions, and that the ascertainment of the rights of the parties involved the taking of a partnership account (*Bosanquet* v. *Wray*, 6 Taunt. 597; *Worall* v. *Grayson*, 1 M. & W. 166; *Gregory* v. *Hartnall*, *Ib.* 183). This would now merely furnish ground on which the action might be transferred to the Chancery Division. (See *ante*, p. 267.)

(*l*) Where the defendants are sued as a firm in the firm name, any defence delivered must be a defence for the firm. If the partners can agree on delivering a joint defence they should do so. But any or each partner who appears is entitled to put in a separate defence (*Ellis* v. *Wadeson*, [1899] 1 Q. B. 714; 68 L. J. Q. B. 604). If he does so it must still be a defence for the firm, and should be in the second of the above forms (*Ib.*). If one or more of several partners die, the surviving partner or partners must still defend in the name of the firm (*Ib.*), and judgment can only be obtained against the firm, and only the assets of the firm or the surviving partners are liable (*Ib.*).

(*m*) See the Partnership Act, 1890, s. 17, cited *ante*, p. 266.

partnership in partnership together, and thereupon, by an agreement between the plaintiff and the defendant *C. D.* and the other defendants, the said other defendants took upon themselves the liability of the defendant *C. D.* to the plaintiff in respect of the said sale and delivery [*or, as the case may be*] and undertook to be themselves liable to the plaintiff in respect thereof, and the defendant *C. D.* was then discharged from all liability to the plaintiff in respect of such sale and delivery [*or, as the case may be*].

Particulars of the Agreement :—

The agreement was contained in letters dated, &c. [*or*, is to be implied from conduct and course of dealing as follows :—*stating the nature thereof*].

PATENTS (*n*).

PAYMENT (*o*).

Defence of Payment before Action.

The defendant [*or, A. B.*, the defendant's agent] satisfied and discharged the plaintiff's claim by payment before action to the plaintiff [*or*, to *C. D.*, the plaintiff's agent] [in cash *or* by cheque] on the —— ——, 19—.

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

(*n*) See *ante*, p. 269, and *post*, p. 891. Where a patent was assigned in consideration of royalties to be paid by the assignee, it was held that there was no implied contract on the part of the assignee to keep up the patent by paying fees, &c. (*In re Railway Appliances Co.*, 38 Ch. D. 597 ; 57 L. J. Ch. 1027 ; see *Hamlyn* v. *Wood*, [1891] 2 Q. B. 488 ; 60 L. J. Q. B. 734).

(*o*) The defence of payment must be specifically pleaded (Ord. XIX., r. 15, *ante*, p. 523).

Payment need not be pleaded of sums specifically credited by the plaintiff in his statement of claim or particulars. If the plaintiff merely gives credit for a lump sum, or claims to recover a certain balance of account without giving credit for any particular sum or sums, the defendant is entitled to apply for particulars, with dates and items of the amounts credited. (See *ante*, pp. 39, 40.)

If in a contract under which money has to be paid there is no stipulation as to the place of payment, it is in general the duty of the debtor to pay at the place where the creditor is (see *Robey* v. *Snaefell Co.*, 20 Q. B. D. 152 ; 57 L. J. Q. B. 134 ; *Thorn* v. *City Rice Mills*, 40 Ch. D. 357, 359 ; 58 L. J. Ch. 297 ; *Northey Stone Co.* v. *Gidney*, [1894] 1 Q. B. at p. 100), but if the contract is an English one, and the creditor was within the realm when it was made, the debtor is not, in general, bound to follow him abroad to pay him if he has since the making of the contract left the realm (*Fessard* v. *Mugnier*, 34 L. J. C. P. 126 ; 18 C. B. N. S. 286).

In general, a payment of a smaller sum is no satisfaction of a liquidated debt of greater amount, there being no consideration for giving up the remainder. (See *ante*, p. 566.) Hence, where part only of the debt sued for has been paid the correct course is to limit the defence of payment by pleading it only as to that part of the plaintiff's claim which has been satisfied by the payment. But payment of a smaller sum may amount to a discharge of a larger debt, when it is made by a third party or

Defence to an Action upon a Covenant for the Payment of a Liquidated Amount in Money at a Specified Time, of Payment on the Day named in the Covenant.

The defendant made payment to the plaintiff on the day according to the covenant.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

---

under a valid contract which is supported by some new consideration (*ante*, p. 566). The defence in the last-mentioned cases must be pleaded according to the facts, and cannot be relied upon under an ordinary defence of payment in one of the forms given in the text.

The giving and accepting of a negotiable security, as a bill or note, *for and on account* of the cause of action, suspends the right of action during the running of the security and until default in payment, and constitutes a good defence to an action during that time. (See *ante*, p. 615.) If the security is duly paid, it operates as payment of the debt as from the date of the security (*Felix Hadley & Co.* v. *Hadley*, [1898] 2 Ch. 680; 67 L. J. Ch. 694), and may be proved under the common defence of payment, though it is generally better to plead the giving of the security and its payment specially (*Fearn* v. *Cochrane*, 4 C. B. 274; *Thorne* v. *Smith*, 10 C. B. 659). If the security is dishonoured, and is in the hands of the plaintiff, the original right of action revives where the plaintiff has been guilty of no laches.

A negotiable security may also be given and accepted in complete *satisfaction and discharge* of the cause of action, and not merely *for and on account* thereof as above; the transaction then becomes an accord and satisfaction, and operates as a discharge of the debt, even if the security is of smaller amount than the amount of the debt. (See *ante*, p. 569.)

If a creditor accepts from his debtor on account of the debt a cheque drawn in the ordinary form, the transaction operates as a conditional payment until the cheque is presented, and if upon due presentment the cheque is dishonoured, the original debt revives (*Pearce* v. *Davis*, 1 M. & R. 365; *Cohen* v. *Hale*, 3 Q. B. D. 371, 373; 47 L. J. Q. B. 496; *Felix Hadley & Co.* v. *Hadley*, *supra*).

When a cheque in payment of a debt is sent by the post and lost in transit the loss falls on the sender unless he can prove a request for payment by post (*Pennington* v. *Crossley*, 77 L. T. 43). As to the effect of delay in presenting a cheque sent in payment of a debt, see *Hopkins* v. *Wan*, L. R. 4 Ex. 268, and *ante*, p. 125.

Payment by or to one of several partners or joint debtors or joint creditors is *primâ facie* a discharge of the claim as to all of them. (See *Beaumont* v. *Greathead*, 2 C. B. 494; *Thorne* v. *Smith*, 10 C. B. 659; *ante*, pp. 567, 568.) But payment of a debt due to one partner as a private and separate matter unconnected with the business of the firm, made to the firm is *primâ facie* not a discharge of such debt (*Powell* v. *Brodhurst*, [1901] 2 Ch. 160, 164; 70 L. J. Ch. 587).

Payment to an agent should *primâ facie* be made in cash, in the absence of agreement to the contrary, since it is beyond the scope of an agent's authority to take payment by bill, cheque, or the like if he has not been expressly empowered by his principal so to do, or impliedly authorised so to do by the practice between them, or by the known usage of the particular trade, or by the general practice adopted in similar transactions. (See *Pearson* v. *Scott*, 9 Ch. D. 198; *Pape* v. *Westacott*, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222; *Anderson* v. *Sutherland*, 2 Com. Cas. 65.)

A doubt sometimes occurs as to whether a particular transaction amounts to a payment or a set-off (see *Fidgett* v. *Penny*, 1 C. M. & R. 108; *Thomas* v. *Cross*, 7 Ex. 728; *Hewlett* v. *Allen*, [1894] A. C. 383, 389), and in such a case it is advisable to plead both defences.

Payment of a debt, where the payment was made and accepted after the time for payment, but before action, is a complete defence, and the creditor is not entitled in

Defence to a like Action, of Payment after the Day named in the Covenant.

The defendant made payment to the plaintiff, after the day named, and before action, viz., on the —— ——, 19—, of the principal and interest mentioned in the covenant.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

For like Defences to Actions on Common Money Bonds, see "Bonds," ante, p. 620.

Defence of Payment by Set-off of Cross Demands in an Account stated, and Payment of the Balance (*p*).

On the —— ——, 19—, the plaintiff and the defendant stated in [writing] an account of the plaintiff's claims against the defendant (including the claim now sued upon), and of certain claims of the defendant against the plaintiff, and upon the said account, after setting off the said claims of the defendant against the said claims of the plaintiff, there was then found to be due from the defendant to the plaintiff £—— and no more, and it was then agreed verbally [*or, as the case may be*] between them that the said claims of the plaintiff should be satisfied and discharged by setting off the said claims of the defendant as aforesaid, and by the payment by the defendant to the plaintiff of the said £——, and the said claims of the defendant were then set off and discharged accordingly, and the defendant afterwards, on the —— ——, 19— [before action], paid the said £—— to the plaintiff.

Defence of Satisfaction by Payment of a Smaller Sum by a Third Party: see "Accord and Satisfaction," ante, p. 570.

---

such case to sue for nominal damages for detention of the debt (*Beaumont* v. *Greathead*, 2 C. B. 494).

Whether a particular debt has been paid or not, may, in some cases, depend upon whether a payment is to be attributed to it, or to some other debt at the time of the payment existing between the parties. The power of appropriation is, in the first instance, in the payer. He may, in making the payment, appropriate it to a particular debt, but if he does not, then the recipient may, in general, elect to which of the debts it should be appropriated, and this he may do at any time (*Anon.*, Cro. Eliz. 68; *Manning* v. *Westerne*, 2 Vern. 606; *Clayton's case*, 11 Mer. 585, 608; *Cory* v. *Owners of the Mecca*, [1897] A. C. 286), even when he is being examined as a witness in an action against him by the debtor (*Seymour* v. *Pickett*, [1905] 1 K. B. 715; 74 L. J. K. B. 413). A creditor is not irrevocably bound by his appropriation until such appropriation is communicated to the debtor (*Simson* v. *Ingham*, 2 B. & C. 65).

(*p*) See *ante*, p. 566.

Defence of Payment to a Judgment Creditor of the Plaintiff under an Order of Attachment under Ord. XLV.: see "Attachment of Debt," ante, p. 588.

Defence to an Action for a Simple Contract Debt of Payment after Action (*q*).

The defendant satisfied the claim by payment to the plaintiff after action on the —— ——, 19—.

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

Confession of a Defence of Payment after Action: see "Confession," ante, p. 642.

PAYMENT INTO COURT (*r*).

Defence of Payment into Court.

The defendant, as to the whole action [*or*, as to £——, parcel of the money claimed, *or*, as to the plaintiff's claim on the guarantee of the —— ——, 19—, *or, as the case may be*], brings [*or*, on the —— ——, 19—, paid] into Court £——, and says that that sum is enough to satisfy the plaintiff's claim [*or*, the plaintiff's claim herein pleaded to].

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

(*q*) As to pleading grounds of defence which have arisen after action, see *ante*, p. 531.

(*r*) By Ord. XXII., r. 1, "Where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a judge, pay into Court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (except in actions or counterclaims for libel or slander), pay money into Court which shall be subject to the provisions of Rule 6: Provided that in an action on a bond under the statute 8 & 9 Will. 3, c. 11, payment into Court shall be admissible to particular breaches only, and not to the whole action."

Payment into Court under Ord. XXII. can only be made in cases where the plaintiff's claim is for "a debt or damages," and the order is therefore not applicable to a case where the plaintiff sues for an account (*Nicholls* v. *Evens*, 22 Ch. D. 611; 52 L. J. Ch. 383), or to establish a right, or for an injunction (*Coote* v. *Ford*, [1899] 2 Ch. 93; 68 L. J. Ch. 508). See further, "*Detention*," *post*, p. 848.

By r. 2, "Payment into Court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein."

By r. 7, "The plaintiff, when payment into Court is made before delivery of defence, may within four days after the receipt of notice of such payment, or, when such payment is first signified in a defence, may before reply, or where no reply is ordered within ten days from delivery of defence or the last of the defences, accept in satisfaction of the claim or cause of action in respect of which such payment has been made the sum so paid in, in which case he shall give notice to the defendant in the Form No. 4 in Appendix B., and shall be at liberty in case the entire claim or cause of action

Defence of Payment into Court as to Part of a Liquidated Claim, with a Defence on the Facts as to the Residue of the Claim.

1. Except as to £200, parcel of the money claimed [*here state some matter of defence, as, for instance, where an architect's certificate was a condition precedent to the cause of action,* the architect did not grant his certificate pursuant to the contract].

2. As to the said £200, parcel of the money claimed, the defendant brings [*or,* has brought] into Court £200, and says that that sum is enough to satisfy the plaintiff's claim herein pleaded to.

(*See R. S. C.,* 1883, *App. E., Sect. II.*)

---

is thereby satisfied, to tax his costs after the expiration of four days from the service of such notice, unless the Court or a judge shall otherwise order, and in case of non-payment of the costs within forty-eight hours after such taxation, to sign judgment for his costs so taxed."

Payment into Court may be made and pleaded to one or more of several causes of action, or to a severable part thereof, or to a part of an alleged debt, and in such cases the defence of payment into Court should be limited accordingly. As a payment of a smaller sum does not *per se* operate as a satisfaction of a liquidated debt of greater amount (see *ante*, p. 566), it would be informal in an action for a liquidated claim to pay a smaller sum into Court in satisfaction of a claim for a larger amount.

Where interest or damages in respect of a continuing cause of action have accrued subsequently to the commencement of the action, the sum paid into Court must cover the amount due up to the time of pleading the payment into Court.

In cases, where payment into Court of a smaller amount than the claim is pleaded generally to a claim consisting of several distinct heads of claim, the defendant should in his defence give particulars specifying in respect of which heads the payment is made. (See r. 2, above cited.) If he fails to do so such particulars may be ordered (*Rowe* v. *Kelly*, 59 L. T. 139; *Ocean Steamship Co.* v. *Ocean Ins. Co.*, 2 Times Rep. 425; *Orient Steam Nav. Co.* v. *Ocean Ins. Co.*, 34 W. R. 442; *Boulton* v. *Houlder* (No. 1), 9 Com. Cas. 95; 19 Times Rep. 635). Where the payment into Court is made in respect of part only of the claim or cause of action, the plaintiff, if he thinks fit, may entitle himself to tax costs and sign judgment under r. 7, above cited, by abandoning the residue of his claim, which he may ordinarily do by delivering, either before or at the time of the delivery of a notice of acceptance in satisfaction, a notice of withdrawal under Ord. XXVI., as to the residue of his claim. (See *ante*, p. 642.) An action may be thus discontinued as to any part of the claim without an order for that purpose in any case where no defence has been delivered, or where the plaintiff has taken no proceeding (other than an interlocutory application) subsequent to the payment into Court (*Ib.*). It seems also that in some cases where money has been paid into Court as to part of a claim a notice by the plaintiff that he accepts the same in full satisfaction of all the causes of action sued upon is equivalent to a notice of discontinuance of the action as to the residue (*M'Ilwraith* v. *Green*, 14 Q. B. D. 766; 54 L. J. Q. B. 41).

Wherever a defence is delivered in cases of payment into Court, the fact of the payment into Court, and the claim or cause of action in satisfaction of which such payment is made, must be notified in the defence, whether the payment into Court is made before or at the time of delivering the defence. (See r. 2, *supra*, and r. 11, *infra*.)

Where the defendant, before delivery of a defence, pays money into Court as to the whole of the plaintiff's claim, or cause or causes of action, and the plaintiff accepts the money in satisfaction of his claim, and taxes and receives his costs or signs judgment

Defence under Ord. XXII., r. 11, appropriating Money paid into Court pursuant to an Order under Ord. XIV.

Since the commencement of this action the defendant on the —— ——, 19—, paid into Court £—— pursuant to the order of —, dated the —— ——, 19—, made herein under the provisions of Ord. XIV. and he now [brings

for them under r. 7, it would seem that the action is thereupon at an end (see *Newington* v. *Levy*, L. R. 5 C. P. 607; 6 *Ib.* 180; 39 L. J. C. P. 334; 40 *Ib.* 29; *Conybeare* v. *Lewis*, 13 Ch. D. 469), and that the subsequent delivery of a defence would be unnecessary and improper. But, where such payment into Court is made only in respect of a part of the plaintiff's claim, it is necessary, except in cases where the plaintiff has delivered a notice of acceptance of the money under r. 7, and has actually or in effect discontinued the action as to the residue of his claim (*vide supra*), that the defendant should deliver a defence, which, besides showing some defence to the residue of the plaintiff's claim, must state the fact of the payment into Court, and specify the part of the claim in respect of which the payment is made. (See r. 2, above cited, and r. 11, *infra*.) And in all cases of payment into Court before defence, whether made in respect of the whole or of a part only of the claim, or cause or causes of action, where the plaintiff does not deliver a notice of acceptance of the money under r. 7, the defendant must deliver a defence, complying with the requirements of r. 2, above cited.

If the defendant intends to deny liability as well as to pay money into Court, which he may in many cases do under r. 6, he should postpone paying the money into Court until the time of delivering the defence, as a payment into Court before defence would operate as an admission of liability (*Dumbleton* v. *Williams*, 76 L. T. 81), and entitle the plaintiff to have the money paid out to him under r. 5, and a subsequent defence would be irregular (*Ib.*).

It is provided by r. 11 that "where before the delivery of defence, money has been paid into Court by the defendant pursuant to an order under the provisions of Ord. XIV., he may (unless the Court or a judge shall otherwise order) by his pleading appropriate the whole or any part of such money, and any additional payment if necessary, to the whole or any specified portion of the plaintiff's claim; and the money so appropriated shall thereupon be deemed to be money paid into Court pursuant to the preceding Rules of this Order relating to money paid into Court, and shall be subject in all respects thereto."

By r. 9, "A plaintiff may, in answer to a counterclaim, pay money into Court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant."

Payment into Court is not a "defence" arising after action within the meaning of Ord. XXIV., and a plaintiff who accepts the money in satisfaction cannot deliver a confession under r. 3, but should deliver a notice of acceptance under r. 7 (*Callander* v. *Hawkins*, 2 C. P. D. 592).

Where a payment into Court is made, together with a denial of liability, such payment into Court is regarded as an alternative defence to the action, and if the defendant succeeds on that issue at the trial, he is *primâ facie* entitled to have judgment entered for him and to recover the general costs of the action. (See *Wheeler* v. *United Telephone Co.*, 13 Q. B. D. 597; 53 L. J. Q. B. 466.)

Payment into Court by one defendant does not when liability is denied enure for the benefit of a co-defendant (*Penny* v. *Wimbledon U. D. Council*, [1899] 2 Q. B. 72; 68 L. J. Q. B. 704). When in an action against two defendants, one of them pays money into Court with a denial of liability, and the other merely denies liability, the latter cannot, if the jury find the defendants liable but award less than the amount paid in, rely on the payment into Court for the purpose of avoiding having to pay costs (*Ib.*).

into Court a further sum of £——, making together the sum of £——, and] appropriates the same to the whole of the plaintiff's claim [*or*, to the plaintiff's claim in respect of, &c.], and says that the same is enough to satisfy the plaintiff's claim [*or*, the plaintiff's claim in respect of, &c.].

Defence of Payment into Court, together with a defence in Denial of Liability (*s*).

1. [*Here state the defence to the action, as, for instance, a denial of the alleged contract or breach, or an allegation of some matter in excuse or discharge of the alleged cause of action.*]

2. The defendant, as an alternative defence, and whilst denying any liability, brings into Court £——, and says that that sum is enough to satisfy the plaintiff's claim.

Defence of Payment into Court in an Action on a Common Money Bond (*t*): *see* "*Bonds*," *ante*, p. 620.

Defence of Payment into Court in an Action upon a Bond with a Special Condition under the 8 & 9 *Will.* 3, *c.* 11 (*t*): *see* "*Bonds*," *ante*, p. 620.

Reply of Acceptance of the Amount paid into Court (*u*).

The plaintiff accepts the sum of £——, paid into Court by the defendant in satisfaction of that part of the plaintiff's claim [*or*, of the cause, *or*, causes of action] in respect of which it is paid in.

(*s*) See Ord. XXII., r. 1, cited *ante*, p. 748, and see *ante*, p. 750, as to the power to pay into Court, whilst at the same time denying liability.

When that is done, whether the whole claim is denied and payment into Court is made in respect of the whole, or a part of the claim only is thus treated, the following rules apply (Ord. XXII., r. 6).

The plaintiff may accept the payment and have the money paid out to him, thus obtaining a stay of the action, in respect of the claim to which the payment is made, or he may proceed with the action as though no such payment had been made.

If he accepts, he must either give notice (Form No. 4, Appendix B.) or reply that he accepts it.

If he does not accept, the money remains in Court to abide further order, and he only gets it, if, and so far as, he succeeds in proving he is entitled to it.

See further, *Coole* v. *Ford*, cited *ante*, p. 748; *Hubback* v. *British North Borneo Co.*, [1904] 2 K. B. 473, 477; 73 L. J. K. B. 654.

(*t*) See *ante*, p. 133, and Ord. XXII., r. 1, above cited. If the condition of the bond is not stated or referred to in the claim, the averment of the payment into Court should be preceded by a statement of the condition to which the bond was subject.

(*u*) Where the plaintiff intends to accept a sum paid into Court in satisfaction of his whole claim, he should, in lieu of replying, deliver a notice of acceptance, and

Reply, to a Defence in which Payment into Court is pleaded together with Allegations denying Liability stating that the Sum paid into Court is insufficient (*v*).

As to the —— paragraph of the defence, the plaintiff says that the sum paid into Court is not enough to satisfy the plaintiff's claim [*or*, cause of action, *or*, that part of the claim (*or*, the cause of action) to which the payment into Court is pleaded].

Penal Statutes (*x*).

Penalty (*y*).

Principal and Agent.

See "*Agent*," *ante*, p. 572.

Principal and Surety.

See "*Guarantees*," *ante*, p. 671.

Promissory Notes.

See ante, p. 613.

should proceed to tax his costs under r. 7, cited *ante*, p. 748. Where the payment is made only in respect of part of the claim, and the plaintiff determines to accept it in satisfaction of that part, and to abandon the residue of the claim, he may, as above mentioned, discontinue the action as to such residue, and deliver a notice of acceptance of the sum paid in.

If the plaintiff contests the sufficiency of the amount paid into Court, he may simply proceed with the action, and as a denial of all the allegations in the defence is now implied (see Ord. XXVII., r. 13, *ante*, p. 545), no reply is necessary. If any special reply is necessary as to any other part of the defence, leave to deliver it must be obtained, and the above form of acceptance or denial of the sufficiency of the amount paid into Court should be used.

(*v*) See preceding note.

(*x*) See *ante*, pp. 270, 271; "*Limitation, Statutes of*," *ante*, p. 719.
As to the defence of not guilty by statute, see *post*, p. 886.

(*y*) See *ante*, pp. 241 *et seq.*

RELEASE (z).

Defence of Release.

The cause of action was released by deed dated the —— ——, 19—, between the plaintiff of the first part and the defendant of the second part.

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

(z) A release must be specifically pleaded (Ord. XIX., r. 15). At common law a release of a cause of action once accrued must have been by deed under seal (*Harris* v. *Goodwyn*, 2 M. & G. 405), but in equity a parol release was in some cases held effectual where founded on consideration. (See *Foakes* v. *Beer*, 9 App. Cas. 605, 611; and *ante*, p. 568.) And in such cases the equitable doctrines are now applicable to actions in the King's Bench Division. (See *Ib.*)

Where the consideration for a parol discharge of a cause of action is executed, the defence may be pleaded as an accord and satisfaction. (See *ante*, p. 567.)

As to renunciation of a bill or note, see *ante*, p. 609.

A receipt in full for a debt is only evidence of payment (*Foster* v. *Dawber*, 6 Ex. 839, 848; *Farrar* v. *Hutchinson*, 9 A. & E. 641; *Graves* v. *Key*, 3 B. & Ad. 313; *Lee* v. *Lancashire, &c. Ry. Co.*, L. R. 6 Ch. 527, 534). It does not create an estoppel (*Oliver* v. *Nautilus S.S. Co.*, [1903] 2 K. B. 639, 648; 72 L. J. K. B. 857, 861; *Ellen* v. *G. N. Ry. Co.*, 49 W. R. 395; 17 Times Rep. 453).

A release of one of joint or joint and several debtors, in general, releases all the co-debtors (*Nicholson* v. *Revill*, 4 A. & E. 675, 683; *Ward* v. *National Bank*, 8 App. Cas. 755; *Duck* v. *Mayeu*, [1892] 2 Q. B. 511; *In re E. W. A.*, [1901] 2 K. B. 642; 70 L. J. K. B. 810). But the original contract may expressly reserve to the creditor the right of giving a release to one without discharging the others (*Cowper* v. *Smith*, 4 M. & W. 519; *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L. J. Ex. 133; see *ante*, p. 674); or the creditor may give a qualified release to one by inserting therein an express reservation of his right of action against the others, which will preserve his rights as against such others (*North* v. *Wakefield*, 13 Q. B. 536; *Solly* v. *Forbes*, 2 B. & B. 38; *Thompson* v. *Lack*, 3 C. B. 540; *Price* v. *Barker*, 4 E. & B. 760; 24 L. J. Q. B. 130; *Bateson* v. *Gosling*, L. R. 7 C. P. 9; 41 L. J. C. P. 53; *Duck* v. *Mayeu*, *infra*). A plea of a release to an executor of one of joint obligors was held bad, because on the death of the one the debt survived against the others (*Ashbee* v. *Pidduck*, 1 M. & W. 564). But if the deceased obligor was the principal debtor and the others sureties, the release might operate as a discharge. (See *ante*, p. 675.)

So, also, a release given by one of several co-creditors, was in general a release at law of the cause of action as to all (*Ruddock's case*, 6 Co. Rep. 25; *Wilkinson* v. *Lindo*, 7 M. & W. 81); but this rule is now subject to the doctrines of equity in cases where the joint creditors are, in equity, tenants in common of the debt. (See *ante*, p. 568.) If such a release is obtained by the fraud of the debtor upon the releasing creditor, it may be answered, as in the case of a release given by a single creditor, by a reply that it was obtained by fraud (*Wild* v. *Williams*, 6 M. & W. 490). Formerly, where such release was executed by collusion between the releasing creditor and the debtor in order to defraud the plaintiff, and it was clearly shown that the release was made in fraud of the other creditors, or where it was manifest that the releasing creditor was a mere nominal party to the action, having no real interest in the subject-matter of it, the Court would interfere in a summary manner to set aside the plea of release in a common law action (*Phillips* v. *Clagett*, 11 M. & W. 84; *Rawstorne* v. *Gandell*, 15 M. & W. 304). Now, under the Judicature Acts, the exercise of such summary jurisdiction is unnecessary, and the parties are at liberty to plead the facts in the usual way. (See *De Pothonier* v. *De Mattos*, E. B. & E. 461; 27 L. J. Q. B. 260; Jud. Act, 1873, ss. 24, 25.) If the releasing creditor is not a party to the action, the plaintiff would be

Defence of the Release of a Co-contractor.

The alleged debt was contracted by [*or*, The alleged promise, *or*, agreement was made by, *or*, The alleged cause of action accrued against] the defendant and *J. K.* jointly, and not by [*or*, against] the defendant alone, and the plaintiff, by deed dated the —— ——, 19—, released the said *J. K.* therefrom.

Reply that the Deed contained a Reservation of the Right of Action against Defendant.

The deed releasing the said *J. K.* from the said debts expressly reserved the plaintiff's remedies against the defendant.

Reply that the Release was obtained by Fraud.

The release was procured by the fraud of the defendant.
Particulars of the fraud are as follows :—[*Here state particulars.*]

---

allowed, if necessary, to have him added as a defendant. (See *Piercy* v. *Fynney*, L. R. 12 Eq. 69 ; 40 L. J. Ch. 404 ; and *ante*, p. 568.)

By s. 113 of the Bankruptcy Act, 1883, "Where a member of a partnership is adjudged bankrupt, the Court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner ; and any release by such partner of the debt or demand to which the action relates shall be void."

An absolute covenant not to sue amounts to a release, on the ground of avoiding circuity of action ; and may accordingly be pleaded as a defence (2 Wms. Saund., 1871 ed., 140, 446 ; *Ford* v. *Beech*, 11 Q. B. 852, 871 ; see *Webb* v. *Spicer*, 13 Q. B. 886). But a covenant not to sue for a limited time does not amount to a release (*Ib.* ; *Thimbleby* v. *Barron*, 3 M. & W. 210). Such covenant could not therefore be pleaded as a defence (*Ib.*), except in cases where the deed containing a covenant not to sue for a limited time also contained a proviso that if an action should be brought within the time the right of action should be forfeited (*Gibbons* v. *Vouillon*, 8 C. B. 483 ; *Walker* v. *Nevill*, 3 H. & C. 403 ; 34 L. J. Ex. 73 ; *Corner* v. *Sweet*, L. R. 1 C. P. 453 ; 35 L. J. C. P. 151 ; *Bailey* v. *Bowen*, L. R. 3 Q. B. 133). A covenant not to sue for a limited time may now be pleaded as a defence in cases where such covenant would have been enforced in equity previously to the Jud. Acts. (See Jud. Act, 1873, s. 24 (2).) A covenant with one of several co-debtors not to sue him does not operate as a release of the others (*Lacy* v. *Kinaston*, 1 Ld. Raym. 690 ; *Dean* v. *Newhall*, 8 T. R. 168 ; *Price* v. *Barker*, 4 E. & B. 760 ; 24 L. J. Q. B. 130 ; *Henderson* v. *Stobart*, 5 Ex. 99 ; *Willis* v. *De Castro*, 4 C. B. N. S. 216 ; 27 L. J. C. P. 243 ; *Duck* v. *Mayeu*, [1892] 2 Q. B. 511, 513). A covenant by one of two joint creditors not to sue the debtor does not operate as a release by the other joint creditor, and cannot be pleaded as such (*Walmesley* v. *Cooper*, 11 A. & E. 216). A release in terms of one joint debtor, reserving remedies against the other, amounts only to a covenant not to sue, and not to a release (*Willis* v. *De Castro*, *supra* ; *Green* v. *Wynn*, L. R. 4 Ch. Ap. 204 ; *Bateson* v. *Gosling*, L. R. 7 C. P. 9 ; 41 L. J. C. P. 93).

Reply that the Release was subject to a certain Condition, and that such Condition had not been satisfied.

The release was by the terms of the deed subject to a condition that [*here set forth the condition, and negative the performance thereof*].

RESCISSION (*a*).

Defence that the Contract was rescinded before Breach.

The contract was rescinded [*or*, The defendant was exonerated and discharged by the plaintiff from performing the alleged contract] before breach.

Particulars are as follows:—An arrangement between the plaintiff and

---

(*a*) It is competent to the parties to a contract, at any time before breach of it by a new contract to add to, subtract from, or vary the terms of it, or altogether to waive and rescind it (*Goss* v. *Lord Nugent*, 5 B. & Ad. 58, 65). The substituted contract forms a good defence to an action on those terms of the previous contract which have been altered by it, and may be so pleaded without any performance or satisfaction, which is required to constitute a good defence after breach (*Taylor* v. *Hilary*, 1 C. M. & R. 741; see *Patmore* v. *Colburn*, 1 C. M. & R. 65; *Hobson* v. *Cowley*, 27 L. J. Ex. 205; see *ante*, p. 567). So also an agreement by the parties to a contract to rescind it, if made before any breach has been committed, forms a defence to an action brought upon the contract so rescinded. A contract cannot be rescinded without the consent of both parties (*Franklin* v. *Miller*, 4 A. & E. 599, 606; *Fitt* v. *Cassanet*, 4 M. & G. 898).

It was a rule at common law that, if the original contract was under seal, it could be altered or discharged only by deed (*Rippinghall* v. *Lloyd*, 5 B. & Ad. 742; *West* v. *Blakeway*, 2 M. & G. 729; *Ellen* v. *Topp*, 6 Ex. 424); and that a subsequent parol contract afforded no defence to an action on a covenant (*Ib.*; *Spence* v. *Healey*, 8 Ex. 668; and see *Smith* v. *Trowsdale*, 3 E. & B. 83). In equity, however, a parol alteration or rescission of a contract under seal might be effectual if founded on consideration; and in such cases the equity doctrine would now prevail. (See *ante*, p. 568.)

An agreement not to enforce the performance of the covenants in a deed is a good consideration for a new promise (*Nash* v. *Armstrong*, 10 C. B. N. S. 259; 30 L. J. C. P. 286; *Gwynne* v. *Davy*, 1 M. & G. 857); and if the promise made on such consideration has been performed, these facts would form a good defence to an action on the covenants (*per* Willes, J., *Nash* v. *Armstrong*, *supra*).

If the original contract was such that the law required it to be in writing, the alteration in any part must also be in writing, although the part altered be such that, if the subject of a separate contract, it might be agreed upon without writing (*Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Harvey* v. *Grabham*, 5 A. & E. 61; *Stowell* v. *Robinson*, 3 Bing. N. C. 937; *Marshall* v. *Lynn*, 6 M. & W. 109; *Moore* v. *Campbell*, 10 Ex. 323; 23 L. J. Ex. 310; *Noble* v. *Ward*, L. R. 1 Ex. 117; 2 *Ib.* 135; 35 L. J. Ex. 81; 36 *Ib.* 91; *Sanderson* v. *Graves*, L. R. 10 Ex. 234; 44 L. J. Ex. 210; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634; 73 L. J. Ch. 422). No action can be maintained upon such contract in its altered state unless the whole is in writing (*Goss* v. *Lord Nugent*, *supra*); and the alteration, unless in writing, cannot be set up in answer to an action upon the contract in its original state (*Moore* v. *Campbell*, *supra*; *Noble* v. *Ward*, *supra*); though where the contract has been by consent performed in a different manner, the fact that

the defendant, made verbally on the —— ——, 19— [*or*, by letter from the defendant to the plaintiff and answer of plaintiff, dated the —— and —— ——, 19—].

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence to an Action on a Contract for the Sale of Land, that the Defendant rescinded the Contract under a Power contained in the Conditions of Sale: see "Sale of Land," post, p. 770.

SALE OF GOODS (*b*).

General Denial of Sale and Delivery.

The defendant denies that the plaintiff [either] sold or delivered to him the goods referred to in the statement of claim, or any part thereof.

---

the defendant assented to such substituted performance may be proved by oral evidence. (See *Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 140; 44 L. J. Q. B. 54; *Hickman* v. *Haynes*, L. R. 10 C. P. 598; 44 L. J. C. P. 358; *Plevins* v. *Downing*, 1 C. P. D. 220; 45 L. J. C. P. 695; *ante*, p. 278.)

Where the original contract is such as must by law be made in writing, it can be wholly abandoned or rescinded by parol agreement (*Goss* v. *Lord Nugent*, 5 B. & Ad. 58, 66; *Vezey* v. *Rashleigh*, *supra*; and see *Harvey* v. *Grabham*, 5 A. & E. 61, 74; *Noble* v. *Ward*, *supra*). If the original contract was put in writing merely by the will of the parties, and not in consequence of a requirement of law, it may be either partially altered or wholly rescinded by parol agreement without writing (*Goss* v. *Lord Nugent*, 5 B. & Ad. 58, 65).

A defence of an alteration in, or rescission of the terms of the contract, must show that the alteration or rescission took place before the breach. A breach committed and right of action consequently vested, can be discharged only by accord and satisfaction (*Edwards* v. *Chapman*, 1 M. & W. 231; and see *Plevins* v. *Downing*, *supra*; *ante*, p. 568), or by a release under seal (*Goldham* v. *Edwards*, 17 C. B. 141), or a valid equitable release (see *ante*, p. 753); except in the case of renunciation of rights under bills of exchange and promissory notes: as to which, see *ante*, p. 609.

The rescission of the contract is sometimes pleaded in the form that, before any breach, the plaintiff exonerated and discharged the defendant from his promise. (See the above form; *King* v. *Gillett*, 7 M. & W. 55; *Goldham* v. *Edwards*, 17 C. B. 141.) But in order to support the defence of exoneration, the defendant must prove a mutual exoneration, agreed to on both sides, before breach, amounting to a rescission of the contract (*Ib.*; and see *Reid* v. *Hoskins*, 6 E. & B. 961; 26 L. J. Q. B. 5; *Hobson* v. *Cowley*, 27 L. J. Ex. 205).

A renunciation of the contract, or a total refusal to perform it before the time of performance has arrived, may be acted upon by the other party, and so adopted by him as a rescission of the contract (*Hochster* v. *De la Tour*, 2 E. & B. 678; *Frost* v. *Knight*, L. R. 7 Ex. 111; 41 L. J. Ex. 79; *Mersey Steel Co.* v. *Naylor*, 9 App. Cas. 434; 53 L. J. Q. B. 497; *Johnstone* v. *Milling*, 16 Q. B. D. 460; 55 L. J. Q. B. 167; *Synge* v. *Synge*, [1894] 1 Q. B. 466; *Michael* v. *Hart*, [1902] 1 Q. B. 482; 71 L. J. Q. B. 265; affd. in H. L. 89 L. T. 422; see *ante*, p. 158).

(*b*) Where the price of goods sold is claimed as a debt, the defendant, although he cannot plead a mere denial of the debt, may plead any facts which negative its existence, or which show that the action is not maintainable on other grounds. (See

Denial of the alleged Contract of Sale or Purchase of Goods.

The plaintiff did not sell, &c., *or*, agree to sell, &c., *or* The defendant did not purchase, &c., *or*, agree to purchase, &c. [*varying the denial according to the terms of the allegation traversed: see* "*Agreements*," *ante*, p. 575].

Defence that s. 4 of the Sale of Goods Act, 1893, has not been complied with: see "*Frauds, Statute of*," *ante*, p. 663.

Defence to an Action for the Price of Goods, denying the alleged Price of the Goods.

The price was not £——. [*Here state what the price agreed upon really was, showing when and how the agreement was made, and plead some defence to the admitted price, or pay the amount into Court.*]

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence to a like Action, that there was no Agreement as to Price, and that the Price claimed is unreasonable (*c*).

1. There was no agreement as to the price to be paid by the defendant for the said goods, and the defendant denies that the prices claimed are fair or reasonable [*or*, and the reasonable price for the same is (*or*, does not exceed) £——].

Ord. XXI., rr. 1, 3, cited *ante*, p. 527.) Thus he may deny the alleged contract of sale, as in the second form in the text, and such denial will be construed as a denial that any such contract was in fact made, or that the facts are such as would imply such a contract (Ord. XIX., r. 20, cited *ante*, p. 527).

The defendant may plead as a defence *pro tanto* that the agreed price was less than the amount claimed as the price by the plaintiff, or that the goods were sold without any agreement as to the amount to be paid for them, and that the sum claimed by the plaintiff is in excess of what was a reasonable price for the goods under the circumstances. (See s. 8, cited *ante*, p. 275.)

Where the claim merely alleges the delivery of goods in pursuance of an order, it will be a good defence to deny the fact of such delivery. Where the claim alleges an order by the defendant to the plaintiff for goods, a denial of that allegation is not in itself a defence, if other facts appear on the claim from which liability may arise independently of the order, such as the retention, or user of the goods by the defendant.

As to defences admitting the original existence of the debt, but showing that it has been discharged by matter subsequent, or that for other reasons the action is not maintainable, see "*Accord and Satisfaction*," *ante*, p. 566; "*Bill or Note taken for the Debt*," *ante*, p. 615; "*Limitation, Statutes of*," *ante*, p. 717; "*Payment*," *ante*, p. 745; "*Release*," *ante*, p. 753; "*Rescission*," *ante*, p. 755; "*Set-off*," *post*, p. 772.

(*c*) Where there is no agreement as to price, a reasonable price is in general to be paid. (See *ante*, p. 275.) If the defendant denies that the prices claimed are fair and reasonable, he will not be ordered to give particulars of what are fair and reasonable prices (*James* v. *Radnor County Council*, 6 Times Rep. 240).

2. [*Here plead some defence as to the residue of the plaintiff's claim, or pay the amount of such residue into Court: see* "*Payment into Court*," *ante*, p. 749.]

Defence to an Action for the Price of Goods Sold and Delivered, denying the Delivery.

The defendant denies that the plaintiff delivered to him the said goods or any part thereof [*or*, The goods were not delivered to the defendant].

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

Like Defence as to Part only of the Plaintiff's Claim for the Price of Goods.

Except as to £——, parcel of the plaintiff's claim [*here state the defence, as in the preceding or succeeding forms*].

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence to an Action for the Price of Goods where it is alleged in the Claim that the Goods were ordered by the Defendant (*d*).

The defendant did not order or agree to purchase the goods or any part thereof [nor did any other person do so on his behalf or by or with his authority].

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence to an Action for the Price of Goods, that the Goods were Sold upon Credit, and that the Period of Credit has not expired (*e*).

The goods were sold upon terms of credit agreed to verbally [*or, as the case may be*] on the ——— ——, 19—, viz. [*here state the terms, as, for instance*, upon the terms that the defendant should pay for them —— months after delivery], and the said period of credit had not expired at the time of action brought.

(*d*) A person who orders goods on credit, *primâ facie* is ordering on his own credit, and becomes, in the absence of evidence or of circumstances to rebut this inference, personally liable to pay for them. (See *ante*, p. 273; and *Thomas* v. *Edwards*, 2 M. & W. 215.) This traverse of the allegation that the defendant ordered the goods will in many cases not be a complete answer to the claim made, as for instance where goods ordered by one person are by mistake delivered to and used by another, such other, though he never ordered the goods, may be liable to pay for them (*Brown* v. *Hodgson*, 4 Taunt. 189).

(*e*) Where goods are sold upon credit, no action will lie for the price until the period of credit has expired (*Webb* v. *Fairmaner*, 3 M. & W. 473; *Ferguson* v. *Carrington*, 9 B. & C. 59; *Streatt* v. *Smith*, 1 C. M. & R. 312; *Ashforth* v. *Redford*, L. R. 9 C. P.

Defence to a like Action, that the Goods were to be paid for by a Bill of Exchange, and that the Period for which the Bill was to run has not expired (f).

The goods were sold upon the terms agreed to verbally on the —— ——, 19-- [*or*, contained in a written agreement dated the —— ——, 19--, *or*, which are to be inferred from the course of dealing between the plaintiff and the defendant], that they should be paid for by a bill of exchange, to be drawn by the plaintiff and accepted by the defendant for the payment of the price of the goods to the plaintiff —— months after the date of the delivery of the goods, and the action was commenced before the time at which the said bill would have become payable.

For forms of Defence to a like Action on the ground that a Bill of Exchange or Promissory Note has been taken for the Debt, see "Bill or Note taken for the Debt," ante, p. 615; *and "Accord and Satisfaction," ante,* p. 569.

Defence that the Goods were sent on Sale or Return, and that Part were returned and the Rest paid for (g).

1. The defendant denies that the plaintiff sold or delivered to him the said goods or any part thereof.

2. The agreement (if any) which was made between the plaintiff and the defendant with regard to the said goods was made verbally on the —— ——, 19—, and was that the plaintiff should deliver them to the defendant on sale or return, that is to say, that the defendant should be at liberty to return to the plaintiff within a reasonable time such of the said goods as he did not approve of or did not sell, and should only pay for those not returned by him within such time.

20; 43 L. J. C. P. 57), even though the purchaser agrees to give a bill of exchange as security and fails to do so (*Rabe* v. *Otto*, 89 L. T. 562). Similarly, where goods are sold and delivered upon the terms that they shall be paid for by a bill of exchange, no action under ordinary circumstances will lie for the price until the expiration of the period for which the bill was to run, even though no bill be in fact given (*Mussen* v. *Price*, 4 East, 147; *Dutton* v. *Solomonson*, 3 B. & P. 582; *Paul* v. *Dod*, 2 C. B. 800). In such cases it is ordinarily the duty of the vendor to tender to the purchaser a draft for his acceptance (*Reed* v. *Mesteer*, 2 Comyns on Contracts, 229). If the purchaser refuses to accept the draft an action for damages will lie (*Mussen* v. *Price, supra*; *Rabe* v. *Otto, supra*). The same rule applies where the goods are to be paid for by a bill, but the purchaser has the option of paying cash (*Anderson* v. *Carlisle Horse Clothing Co.*, 21 L. T. 760; *Mussen* v. *Price, supra*), unless the purchaser elects to pay cash, as by paying part (*Schneider* v. *Foster*, 2 H. & N. 4). If, however, the terms are cash with the option of giving a bill, the vendor may at once sue for the price if the purchaser refuses to accept the bill (*Ib.*: *Rugg* v. *Weir*, 16 C. B. N. S. 471).

(*f*) See preceding note.

(*g*) See Sale of Goods Act, 1893, s. 18, rule 4; *Weiner* v. *Gill*, [1905] 2 K. B. 172; 74 L. J. K. B. 845; and *ante*, p. 275.

3. In pursuance of that agreement the defendant kept certain of the said goods, and on the —— ——, 19—, paid the plaintiff £——, being the price thereof, and on the —— ——, 19—, he returned the rest to the plaintiff within such reasonable time, and the plaintiff received and accepted the same from the defendant.

Defence to an Action for the Price of Goods sold by Sample, where the Goods were not equal to Sample (*g*).

1. The goods were sold by sample, and were inferior in quality to the sample, and were worth £—— less than if they had been of the same quality as the sample.

2. As to £——, being the balance of the price claimed after deducting the said £—— [*here plead some defence as to the residue of the price claimed, after deducting for the deficiency in quality, or plead payment of that amount into Court: see "Payment into Court," ante*, p. 748].

Defence to an Action for the Price of Goods sold with an express Warranty, where the Goods did not correspond with such Warranty (*h*).

1. The plaintiff sold the said goods to the defendant by warranting them to be [*here state the warranty*]. The said warranty was verbal, and was given on the —— ——, 19— [*or, as the case may be*].

(*g*) As to conditions to be implied on sales by description, see *ante*, p. 319; and as to those to be implied on sales by sample, see *ante*, p. 324.

On a sale by sample, or description, the purchaser is in general entitled to reject the goods if they do not correspond with the sample, or description, and there has been nothing amounting to an acceptance thereof on his part. (See *ante*, pp. 315, 319, 324.)

(*h*) Where the goods have been sold with a warranty, either express or implied, and are not in accordance with the warranty, the buyer, although he has accepted the goods, may in general plead these facts and the consequent diminution in value of the goods by way of a defence *pro tanto*, in reduction of the amount of a claim for the agreed price. (See *ante*, p. 315.) But these facts will be a defence only to the extent to which the goods are diminished in value by reason of the breach of warranty, and if the defendant has by reason of such breach sustained any special damage apart from the diminution in value of the goods, such special damage cannot be pleaded by way of defence to an action for the price, though it may form the subject of a cross-action or counterclaim (*Ib.*; and see *Drummond* v. *Van Ingen*, 12 App. Cas. 284; *Mackay* v. *Bannister*, 16 Q. B. D. 174). In such last-mentioned case it is usually the best course to plead the diminution in value by way of defence *pro tanto*, and to counterclaim for the special damage. The defendant, however, is not compelled to adopt this course, and may, instead of pleading the diminution in value by way of defence, rely wholly upon a counterclaim in respect of the breach of warranty or sue upon it in a cross-action (*Ib.*; see *Thomson* v. *South Eastern Ry. Co.*, 9 Q. B. D. 320; *Lowe* v. *Holme*, 10 Q. B. D. 286; 52 L. J. Q. B. 270).

In cases where by reason of the breach of warranty the goods are wholly worthless, and of no value whatever, these facts may be pleaded as a complete defence to an

2. The said goods were not of the description or quality warranted, and were of an inferior description and quality. They were [*here state in what respect the goods were not in accordance with the warranty*], and by reason of such inferiority were worth £—— less than if they had been goods of the description and quality warranted.

3. [*The same as paragraph* 2 *of the preceding form.*]

The like, with a Counterclaim for Special Damages for the Breach of Warranty.

Defence.

1. } [*The same as paragraphs* 1 *and* 2 *of the last preceding form.*]
2. }

Counterclaim.

3. The defendant repeats paragraphs 1 and 2 of his defence, and says that he has further suffered damage by the said breach of the said contract of warranty, as hereinafter stated. Previously to the said sale, the defendant had, as the plaintiff well knew at the time of the said sale, entered into a contract in writing, dated the —— ——, 19—, with *E. F.*, for the sale at the price of £—— to the said *E. F.* of goods of the same description and quality, and the plaintiff sold and the defendant purchased the said goods expressly for the purpose of enabling the defendant to fulfil that contract, and the defendant, upon receiving the said goods, delivered them to the said *E. F.* in alleged fulfilment of his said contract, but the said *E. F.* refused to accept the goods as not being of the said description and quality.

4. The defendant lost £——, being the difference between the price at which the plaintiff agreed to sell the goods to him and the price at which he re-sold them to the said *E. F.*

---

action for the stipulated price (*Street* v. *Blay*, 2 B. & Ad. 456; *Poulton* v. *Lattimore*, 9 B. & C. 259).

On an executory contract for the sale of non-specific goods of a particular description, it is a condition of the contract that the goods supplied shall answer that description, and the purchaser may reject any goods tendered by the vendor which are not of that description. (See *ante*, pp. 274, 319.) But a mere breach of warranty does not entitle the purchaser to rescind the contract *in toto* and to reject or return the chattel, unless there was a condition in the contract to that effect. (See *ante*, pp. 274, 315.) It is a good defence however, to an action for the price of goods that the goods were sold upon condition, that they might be returned if not in accordance with a warranty or representation of the seller, and that they did not agree therewith, and were returned accordingly (*Street* v. *Blay*, *supra*; *Head* v. *Tattersall*, L. R. 7 Ex. 7; 41 L. J. Ex. 4; *Hinchcliffe* v. *Barwick*, 5 Ex. D. 177; 49 L. J. Ex. 495; *Elphick* v. *Barnes*, 5 C. P. D. 321).

Defence of Breach of Warranty as to Quality and Fitness, and Counterclaim for Damages.

Defence and Counterclaim.

Defence.

1. The defendants deny that the plaintiffs sold or delivered to them the goods referred to or any part thereof.

2. By an agreement in writing, dated the —— ——, 19—, it was agreed by and between the plaintiffs and the defendants that the plaintiffs should manufacture for and sell and deliver to the defendants, and that the defendants should accept and pay for, certain [marine engine castings] on the terms that the same should be, and the plaintiffs by the said agreement and impliedly warranted and agreed that the said marine engine castings should be

(a) in accordance with certain patterns supplied by the defendants ;

(b) fit for the purpose for which the defendants required the same, and which purpose is hereinafter referred to ;

(c) manufactured properly and with all due skill and diligence ;

(d) perfect and complete of their respective kinds, and free from faults and defects ;

(e) manufactured of material of good quality and of the proper description.

3. The defendants required the said castings for the purpose of making certain marine engines which they had contracted or were about to contract to deliver within limited times, and before the making of the agreement with the plaintiffs they gave the plaintiffs notice [verbally on the —— ——, 19—] of this purpose, and the plaintiffs by the aforesaid agreement agreed to manufacture and deliver the said castings within certain specified times, so as to enable the defendants to fulfil the contracts they had made or were about to make.

4. As and for the castings so agreed to be manufactured and sold and delivered, the plaintiffs delivered to the defendants such of the castings referred to in the statement of claim as they in fact delivered at all.

5. The castings so delivered were not in accordance with the said agreement and warranty. They were not in accordance with the said patterns. They were not fit for the said purpose. They were not manufactured properly or with due skill and diligence. They were not perfect and complete of their respective kinds or free from faults or defects. They were not manufactured of material of good quality or of the proper description. They were not delivered within the specified times or in time to enable the defendants to fulfil the said contracts. Particulars :—[*State them.*]

6. By reason of the premises the said castings were useless to the defendants, or in the alternative were worth far less than the prices claimed, and their value, if any, is less than the amount of damage the defendants are entitled to recover under their counterclaim.

7. The defendants are entitled to credit for £—— in respect of —— returned, and for £—— for discount at 2½ per cent., to which, under the terms on which the goods were sold, they were entitled.

Counterclaim.

8. By way of counterclaim, the defendants repeat paragraphs 2 to 6, both inclusive, of the defence, and they say that by reason of the plaintiffs' said breaches of the said agreement they were not able to complete the said contracts within the said times, and became liable to damages in respect thereof, and they incurred great trouble, delay and expense, in and about endeavouring to make use of the plaintiffs' castings and adapting them to the said purpose and to make the same in accordance with the said agreement and warranty, and were and are otherwise injured.

Particulars :—[*State them.*]

The defendants counterclaim £1,000.

Defence that the Goods delivered were not of the Quality contracted for or equal to Sample, with a Counterclaim for Damages.

1. The defendants deny that they agreed to buy the yarn in the statement of claim referred to by the letters and telegrams therein referred to or at all.

2. On the —— ——, 19—, by an agreement contained in a memorandum of agreement dated that day the defendants agreed to order from the plaintiffs from time to time [natural cashmere yarn] to the amount of —— lbs. in all.

3. The defendants, in performance of their part of the said agreement, have ordered —— lbs. of the said yarn, and the plaintiffs have delivered to the defendants the said quantities of yarn but, as hereinafter stated, not in accordance with the said agreement. Save as aforesaid the defendants deny each and every the allegations contained in the statement of claim.

4. It was a term and condition of the said agreement, and the plaintiffs sold the said yarn to the defendants by warranting to the defendants thereby that the plaintiffs would supply all yarn ordered by the defendants of a quality equal to the qualities specified in the said agreement and to samples previously supplied by the plaintiffs to the defendants, and that the plaintiffs would deliver all yarn ordered by the defendants within fourteen days of order or alternatively within a reasonable time.

5. The plaintiffs, at the times when the said agreements were made and the said orders given, knew that the defendants required the said yarn for the purpose of making hosiery goods and for the purpose of fulfilling contracts made or to be made with the defendants' customers for the sale of hosiery goods of qualities equal to the said samples of yarn supplied by the plaintiffs.

6. The plaintiffs, in breach of the said agreement and warranty, did not

supply the yarn delivered as aforesaid of the qualities specified by the said agreements or of qualities equal to the said samples or within fourteen days of the respective orders or within a reasonable time.

7. The said yarn delivered as aforesaid was wholly unsuited to be made into hosiery goods of qualities equal to the said samples of yarn supplied by the plaintiffs.

8. In addition to the yarn ordered by the defendants, in paragraph 3 hereof referred to, the defendants have in performance of the said agreements ordered further quantities of yarn from the plaintiffs amounting to —— lbs. of the qualities therein specified, and the defendants have repeatedly requested the plaintiffs to perform the said agreements and to deliver yarn within the times and of the qualities provided for by the said agreement, but the plaintiffs have refused and neglected to deliver the same or to perform their part of the said agreement and the plaintiffs on the —— ——, 19—, by a letter dated that day, repudiated the said agreement prior to the alleged breaches thereof on the part of the defendants.

Set-off and Counterclaim.

9. The defendants repeat the defence and say that by reason of the said breaches of agreement on the part of the plaintiffs the said —— lbs. of yarn delivered by the plaintiffs were worth much less to the defendants than the price paid therefor to the plaintiffs and the defendants were obliged to sell the hosiery goods made therefrom at less prices than they would otherwise have done and have been rendered unable to fulfil contracts made with the defendants' customers for the sale of hosiery goods of qualities equal to the said samples of yarn supplied by the plaintiffs and have been compelled to purchase elsewhere —— lbs. of yarn of the kinds and qualities specified by the said agreement at higher prices than by the said agreement provided and have lost the custom of Messrs. —— and of other customers and have been otherwise damnified.

10. By reason of the said breaches of agreement on the part of the plaintiffs the defendants have been rendered unable to fulfil the following contracts and have suffered loss thereby :—

Contracts for —— dozen CX. natural hosiery—cancelled ——— ——, 19—.

Loss of profit, £——.

Contract for —— dozen CX. natural hosiery—cancelled ——— ——, 19—.

Loss of profit, £——.

The defendants counterclaim :—

(1.) Damages.

(2.) To set off against or deduct from any damages or amounts due to the plaintiffs an equal sum, parcel of the damages due to the defendants.

The like, to a Claim for Goods sold and delivered and Work and Labour done.

Defence and Counterclaim.

Defence.

1. The defendant, as to each item of the goods alleged to have been sold and delivered and each item of the work and labour alleged to have been done, denies that the same was sold or delivered or done at all.

2. Further as to each item of the said goods and work and labour the defendant denies that the same was respectively ordered by or sold or delivered (if at all) to him or done (if at all) for him or at his request or under any circumstances such as would render the defendant liable in respect thereof.

3. As to such, if any, of the said goods and work and labour as the plaintiffs allege was ordered by one *G. H.*, the defendant denies that the said *G. H.* was his agent or had authority from him to order the same.

4. In the alternative the defendant says that the plaintiffs by an agreement in writing dated the —— ——, 19—, agreed to supply certain goods and do certain work and labour on the terms (1) that the same should be in accordance with the orders given for the same, (2) that the same should be of the descriptions, sizes and dimensions ordered, (3) that the same should be of the best quality and workmanship, (4) that the same should be fit for the purpose for which the same were intended, (5) that the same should be delivered within a specified time or in the alternative a reasonable time, (6) that the prices charged should be certain specified prices or in the alternative reasonable prices.

5. As and for the goods, work and labour agreed to be supplied, and in pretended performance of the said agreement, the plaintiffs delivered the goods and did the work and labour sued for in so far as the same were ordered or sold or delivered or done at all, but the said goods, work and labour were not either (1) in accordance with the order or orders given, or (2) of the descriptions, sizes and dimensions ordered, or (3) of the best quality or workmanship, or (4) fit for the purpose for which the same were intended, or (5) delivered within the specified time or a reasonable time, and (6) the prices charged are not the specified prices or reasonable prices.

6. By reason of the premises the goods, work and labour were and are worthless and useless, or in the alternative worth far less than the amounts sought to be recovered and less than the plaintiffs have already been paid.

7. The amounts claimed are excessive and unreasonable both as to the amounts and quantities charged for and the prices charged.

8. Further or in the alternative the defendant says that the goods, work and labour formed part only (namely 3 sets of engine parts) of one entire contract to manufacture and sell and deliver 6 sets of engine parts, and that unless and until the plaintiffs have completed the said contract they cannot sue for the price of part thereof.

Counterclaim.

9. The defendant repeats paragraphs 4, 5, and 6 of the defence and says that he required the said goods, as the plaintiffs well knew, for the purpose of supplying orders he had obtained or should obtain from customers, and re-selling the same at a profit, and by reason of the plaintiffs' breaches of the said terms the goods were useless and he has lost the profits he would have made and incurred much trouble, expense and delay and injury.

Particulars :—[*State them.*]

The defendant claims £——.

Defence to an Action for not Delivering Goods contracted to be Sold, denying the alleged Breach.

The defendant delivered the goods to the plaintiff according to the terms of the said contract on the —— ——, 19—.

Defence to a like Action, that the Plaintiff was not ready and willing to accept and pay for the Goods (*i*).

The plaintiff was not ready and willing to accept and pay for the goods.
(*R. S. C.*, 1883, *App. C., Sect. V.*)

Defence to an Action for not accepting Goods contracted to be Sold, that the Plaintiff was not ready and willing to deliver the Goods (*i*).

The plaintiff was not ready and willing to deliver the goods.
(*R. S. C.*, 1883, *App. D., Sect. V.*)

(*i*) By s. 28 of the Sale of Goods Act, 1893, "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

Accordingly, it is a condition precedent to a right of action for breach of the contract that the plaintiff should have been "ready and willing" to perform the contract on his part, unless there has been a waiver or dispensation on the part of the defendant (see *ante*, p. 273; *Reuter* v. *Sala*, 4 C. P. D. 239; 48 L. J. C. P. 492; *Cort* v. *Ambergate Ry. Co.*, 17 Q. B. 127; 20 L. J. Q. B. 460); and "readiness and willingness" to perform an act implies the ability to do it (*De Medina* v. *Norman*, 9 M. & W. 820; *Lawrence* v. *Knowles*, 5 Bing. N. C. 399; *Ellis* v. *Rogers*, 29 Ch. D. 661, 667). Where the delivery of the goods and the payment of the price are to be concurrent acts, such readiness and willingness is sufficient to enable either party to maintain an action for the breach by the other, and it is not necessary to prove an actual tender either of the goods or the money (*Jackson* v. *Allaway*, 6 M. & G. 942; *Boyd* v. *Lett*, 1 C. B. 222; *Rawson* v. *Johnson*, 1 East, 203).

As to conditions precedent in the case of sales of goods, see further *ante*, p. 273.

Defence to a like Action, that the Contract was for a particular description of Goods, and that the Plaintiff was not ready and willing to deliver Goods of that description (*j*).

By the terms of the said contract the goods to be supplied and delivered by the plaintiff were to be [*here state the description and quality of goods contracted for*], and the plaintiff was not ready and willing to deliver goods of that description and quality to the defendant.

Defence to a like Action, where Time is of the Essence of the Contract, that the Plaintiff was not ready and willing to deliver the Goods within the Time stipulated for Delivery (*k*).

By the terms of the said agreement the goods were to be delivered within —— months from the date of the agreement [*or, as the case may be*], and not otherwise, and the plaintiff was not ready and willing to deliver the goods within that period.

Defence to a like Action, where the Agreement did not specify any Time for Delivery, that the Plaintiff was not ready and willing to deliver the Goods within a reasonable Time (*k*).

It was an implied term of the contract that the said goods should be delivered within a reasonable time, and not otherwise, and the plaintiff was not ready and willing to deliver the goods within a reasonable time in that behalf.

Form of a Defence of Set-off of a Debt for the Price of Goods Sold and Delivered: see "Set-off," post, p. 774.

(*j*) See *ante*, p. 319.

(*k*) By s. 10 (1) of the Sale of Goods Act, 1893, "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

In the case of an ordinary mercantile contract for the supply of one entire quantity of non-specific goods, the time fixed by the contract is usually considered as being of the essence of the contract in the absence of anything in the contract to show a contrary intention (*Coddington* v. *Paleologo*, L. R. 2 Ex. 193; 36 L. J. Ex. 73; *Bowes* v. *Shand*, 2 App. Cas. 455; 46 L. J. Q. B. 561; *Reuter* v. *Sala*, 4 C. P. D. 239, 249; 48 L. J. C. P. 492).

By s. 29 (2) of the Sale of Goods Act, 1893, "Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time."

As to reasonable time, see *ante*, p. 299.

By s. 29 (4), "Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact."

By s. 10 (2), "In a contract of sale 'month' means, *primâ facie*, calendar month."

For Defences on the Ground of Fraud, see "Fraud," ante, p. 658.

Form of Counterclaim for Breach of Contract in not delivering Goods sold.

1. The defendant has suffered damage by the plaintiff's breach of a contract, made in writing and dated the —— ——, 19—, for the sale and delivery by the plaintiff to the defendant of 5,000 tons of Merthyr steam coal, at 18*s.* 6*d.* per ton, f.o.b. at Cardiff, by equal monthly deliveries over the first five months of 19—.

2. The April and May instalments were not delivered.

Particulars of the damage :—

	£	*s.*	*d.*
Difference between market price in April and May, and the contract price, 2*s.* 6*d.* per ton, on 2,000 tons	250	0	0

The defendant counterclaims £250.

(*R. S. C.*, 1883, *App. D., Sect. VIII.*)

Sale of Land.

Denial of Agreement (*l*).

The defendant denies the making of the alleged or any agreement [*or, as the case may be, according to the allegation in the statement of claim : see* "*Agreements*," *ante*, p. 575].

(*l*) An agreement is the result of the mutual assent of two parties to certain terms, and there is no concluded or binding agreement unless or until the terms are ascertained, either expressly or by implication. (See *Chinnock* v. *Marchioness of Ely*, 4 De G. J. & S. 638, 643 ; *Hussey* v. *Horne-Payne*, 4 App. Cas. 311 ; 48 L. J. Ch. 846.)

If an agreement to purchase or sell is made subject to certain conditions then specified, or to be specified by the party making it, or his solicitor, then, until those conditions are accepted, there is no concluded agreement ; so, where to a proposal an assent is given subject to a provision as to a contract being prepared and approved, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation (*Chinnock* v. *Marchioness of Ely, supra ; Winn* v. *Bull*, 7 Ch. D. 29 ; 47 L. J. Ch. 139 ; *Rossiter* v. *Miller*, 3 App. Cas. 1124, 1139, 1151 ; 48 L. J. Ch. 10 ; *Jones* v. *Daniel*, [1894] 2 Ch. 332 ; 63 L. J. Ch. 562). But if an offer to purchase or sell is accepted, and the acceptance is accompanied by a statement that the acceptor desires that the arrangement should be put into more formal language, that statement will not prevent the offer and acceptance constituting a concluded contract (*Crossley* v. *Maycock*, L. R. 18 Eq. 180 ; 43 L. J. Ch. 379 ; *Bolton* v. *Lambert*, 41 Ch. D. 295, 305 ; 58 L. J. Ch. 425 ; and see *Bristol Aerated Bread Co.* v. *Maggs*, 44 Ch. D. 616 ; 59 L. J. Ch. 472 ; *Jones* v. *Daniel, supra*).

The like, alleging further that the Agreement was subject to a Formal Contract being drawn and approved by the Solicitors of the Parties (*m*).

1. The defendant denies the making of the alleged or any agreement. There was no concluded agreement between the plaintiff and the defendant.

2. The only agreement, if any, was made subject to a condition that a formal contract should be drawn by the [plaintiff's] solicitors and approved by the [defendant's] solicitors, and no such contract has been [either drawn or] approved. The said condition is expressed in the alleged agreement in writing [*or*, in the defendant's letter of the —— ——, 19—, which formed part of the alleged agreement].

Defence of the Statute of Frauds (*n*) : *see* "*Frauds, Statute of*," *ante*, p. 663.

Defence to an Action against a Purchaser for not completing, that the Plaintiff was not ready and willing to Convey (*o*).

The plaintiff was not ready and willing to convey the said premises to the defendant according to the terms of the said agreement [*or*, the said conditions of sale].

Defence to a like Action, that the Plaintiff had no Title to the Premises (*o*).

The plaintiff had not, nor has he, any title to the premises, and could not, nor can he, convey them [*or*, grant a lease thereof] to the defendant in accordance with the said contract. [*If a specific defect is relied on, add*, Particulars of the defect of title are as follows:—*stating the defect relied on.*]

(*m*) See preceding note.

(*n*) As to defences founded on the Statute of Frauds, see *ante*, pp. 663—666.

(*o*) As to the mode of pleading the non-fulfilment of conditions precedent, see *ante*, p. 641. In determining what are conditions precedent to the right of action, it must be remembered that since the Judicature Acts time is not ordinarily of the essence of the contract in the case of sales of land, unless it is made so by express stipulation or by necessary implication ("*Sale of Land*," *ante*, p. 283).

In contracts for the sale of real estate an agreement to make a good title is implied, in the absence of express stipulation varying or destroying this implication (see *ante*, pp. 282, 283), but it is immaterial that the vendor had no title at the time of sale, if he is able to make title when called upon to do so (*Tomson* v. *Miles*, 1 Esp. 184 ; *Ellis* v. *Rogers*, 29 Ch. D. 661).

Where the defendant relies upon a specific defect in the title of the plaintiff, he should state the defect, where practicable, and not rely on a vague general allegation of want of title in the plaintiff (*Jones* v. *Watts*, 43 Ch. D. 574 ; but see *De Medina* v. *Norman*, 9 M. & W. 920).

Defence to an Action for not completing a Purchase, that the Plaintiff did not make a good Title in accordance with a Condition of the Contract (*p*).

The agreement was subject to an express [*or*, implied] condition that the plaintiff should deduce and make a good title to the premises, subject as in the said condition mentioned, and, although the defendant on the —— ——, 19—, by a letter dated that day required the plaintiff to comply with this condition, the plaintiff has never complied with it, and has thereby prevented the defendant from completing the purchase.

Defence to an Action against the Vendor for not conveying the Premises, where it was the Duty of the Purchaser to tender a Conveyance for Execution, that the Plaintiff did not tender such Conveyance (*q*).

The defendant was always ready and willing to convey the premises to the plaintiff in accordance with the contract, but the plaintiff did not tender to the defendant for execution any deed for conveying the premises to the plaintiff [*or, where the purchaser has tendered a conveyance which was not in accordance with the contract*, did not tender to the defendant for execution any proper conveyance of the premises. The instrument tendered by the defendant as such conveyance on the —— ——, 19—, was not in accordance with the said contract in the following respects, viz.: (*state particulars*)].

Defence to a like Action, that the Defendant rescinded the Contract under a Power contained in the Conditions of Sale (*r*).

The said contract was subject to an express condition contained therein that, if the purchaser should make and insist upon any requisition in respect of the vendor's title which the vendor should be unable or unwilling to comply with, the vendor should be at liberty to rescind the sale by notice in writing to the purchaser [who should thereupon be entitled to receive back the amount of his deposit without interest or expenses], and the plaintiff on the —— ——, 19—, by a notice in writing dated that day made and insisted on

---

(*p*) See preceding note.

(*q*) It is the duty of the purchaser, under ordinary circumstances, to tender a conveyance for execution by the vendor (see *ante*, p. 283), and the non-fulfilment of this duty, where there has been nothing amounting to a waiver or dispensation on the part of the vendor, will afford a defence to an action for not conveying.

(*r*) Conditions of sale permitting a vendor to rescind the contract, should he be unable or unwilling to carry it out or to make a good title, must be used reasonably, and in good faith, and not arbitrarily (*Mawson* v. *Fletcher*, 6 Ch. App. 91, 94; 40 L. J. Ch. 131; *In re Starr-Bowkett Society*, 42 Ch. D. 375; 58 L. J. Ch. 459; *Smith* v. *Wallace*, [1895] 1 Ch. 385; 64 L. J. Ch. 240; *In re Jackson* [1905] 1 Ch. 603, 74 L. J. Ch. 389). In such conditions "unable" in effect means, reasonably unable, and "unwilling," reasonably unwilling. (See *Gray* v. *Fowler*, L. R. 8 Ex. 249, 265; *In re Starr-Bowkett Society*, *supra*; and *Woolcott* v. *Peggie*, 15 App. Cas. 42; 59 L. J. P. C. 44.)

a requisition in respect of the defendant's title as follows, viz: [*here state shortly the nature of the requisition*], and the defendant, being unable [or unwilling] to remove or comply with such requisition, duly rescinded the contract on the —— ——, 19—, by notice in writing to the plaintiff in pursuance of the said condition [and returned to the plaintiff the amount of his deposit].

Defence of Fraud (*s*): *see* "*Fraud*," *ante*, p. 656.

Counterclaim by Purchaser for Specific Performance of an Agreement for the Sale of Land (*t*).

Counterclaim.

1. By an agreement [*or*, letters] dated [*or*, made verbally at interviews on or about] the —— ——, 19 —, the plaintiff agreed to sell to the defendant the Home Farm, Kent, for £——. The sale was to be completed on the —— ——, 19—.

2. [*If the agreement was verbal, add*:—The agreement so entered into has been part performed as follows:—*State how.*]

The defendant claims to have specific performance of the above agreement, and that the plaintiff may be ordered to execute a proper conveyance of the premises to the defendant.

(*See R. S. C.*, 1883, *App. C., Sect. II., No.* 12.)

(*s*) The contract may be rescinded by the purchaser if procured by the fraud of the vendor or his agent, although there may be a condition of sale to the effect that errors and misstatements of every description shall be the subject of compensation and shall not avoid the contract, such conditions not being intended or permitted to cover fraud (*Mullens* v. *Miller*, 22 Ch. D. 194, 199; 52 L. J. Ch. 380; *Terry and White's contract*, 32 Ch. D. 14, 29; 55 L. J. Ch. 343). A substantial and material misdescription of the property or of the terms upon which it is held, if of such importance as to make it probable that, but for such misdescription the purchaser would not have entered into the contract at all, may without actual fraud entitle a purchaser to rescind, and that even though there is a condition that "misstatement or error" is not to avoid the contract, but is to be the subject of compensation (*Flight* v. *Booth*, Bing. N. C. 370; *In re Arnold*, 14 Ch. D. 270; *Brewer* v. *Brown*, 28 Ch. D. 309; 54 L. J. Ch. 605; *Jacobs* v. *Revell*, [1900] 2 Ch. 858; 69 L. J. Ch. 879; *In re Puckett*, [1902] 2 Ch. 258; 71 L. J. Ch. 666).

A material misrepresentation by the vendor as to a collateral matter which formed the inducement to the purchase may, although made in ignorance and without any actual fraud, be sufficient (*Dimmock* v. *Hallett*, L. R. 2 Ch. 21; 36 L. J. Ch. 146; *Smith* v. *Land Corporation*, 28 Ch. D. 7; *Wauton* v. *Coppard*, [1899] 1 Ch. 92; 68 L. J. Ch. 8).

See further *ante*, p. 739.

(*t*) Claims for specific performance of contracts for the sale of land are assigned, by s. 34 of the Judicature Act, 1873, to the Chancery Division, and therefore, are not properly the subject of actions in the King's Bench Division, but they may occasionally be entertained by the latter Division, either where they are joined with other causes of action or where they form the subject of counterclaims. (See *Storey* v. *Waddle*, 4 Q. B. D. 289.)

Defence to Action for Specific Performance (*u*).

1. The defendant did not make the alleged or any agreement.

2. *A. B.* was not the agent of the defendant [*if alleged by plaintiff*].

3. The plaintiff has not performed the following conditions which are contained in the alleged agreement :—[*Conditions.*]

4. The defendant did not [*deny the alleged acts of part performance*].

5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matters :—[*State why.*]

6. The Statute of Frauds has not been complied with.

7. The agreement is uncertain in the following respects :—[*State them*] ;

8. [*or*] The defendant has been guilty of delay ;

9. [*or*] The defendant has been guilty of fraud [*or*, misrepresentation] ;

10. [*or*] The agreement is unfair ;

11. [*or*] The agreement was entered into by mistake.

The following are particulars of (8), (9), (10), (11) [*or, as the case may be*].

12. The agreement was rescinded under Conditions of Sale No. 11 [*or*, by mutual agreement].

Particulars :—

(*R. S. C.*, 1883, *App. D., Sect. II.*)

SET-OFF (*v*).

Defence of Set-off in an Action for Debt.

The defendant is entitled to set off £—— [*or*, to a set-off equal to the plaintiff's claim, *or*, the plaintiff's claim herein pleaded to, *as the case may be*] for [*here state the ground of set-off, as, for instance*, money lent by the

(*u*) See preceding note.

(*v*) See "*Counterclaims*," *ante*, pp. 534 *et seq.*

The defence of set-off in common law actions was first given by the statutes of set-off, 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24 (*Stooke* v. *Taylor*, 5 Q. B. D. 569, 575 ; 49 L. J. Q. B. 857 ; *Ex p. Pelly*, 21 Ch. D. 492, 502). By those statutes it was enacted that where there were "mutual debts" between the plaintiff and the defendant, or, if either party sued or was sued as executor or administrator, between the testator or intestate and either party, one debt might be set off against the other (2 Geo. 2, c. 22, s. 13 ; 8 Geo. 1, c. 24, ss. 4, 5). The debts thus dealt with by these statutes were legal debts enforceable, in general, by action (*Rawley* v. *Rawley*, 1 Q. B. D. 460 ; 45 L. J. Q. B. 675 ; *Smith* v. *Betty*, [1903] 2 K. B. 317, 323 ; 72 L. J. K. B. 853 ; and see *post*, p. 773). These enactments have been replaced by the provisions of the Judicature Act, 1873, s. 24 (3), and Ord. XIX., r. 3 (cited *ante*, p. 535 ; and see *Stumore* v. *Campbell*, [1892] 1 Q. B. 314 ; 61 L. J. Q. B. 463).

Set-off may, in general, be pleaded wherever the claims on both sides are liquidated debts or money demands, which can be ascertained with certainty at the time of pleading. The right of set-off does not apply to cases where the claim on either side is for unliquidated damages, and in such cases (with some exceptions such as those under the Bankruptcy Act, cited *post*, p. 778), the defendant cannot plead his cross demand

defendant to the plaintiff, *or*, money paid by the defendant for the plaintiff at his request, *or*, money received by the plaintiff for the use of the defendant, *or*, *as the case may be*].

Particulars are as follows :—[*State particulars of the debt sought to be set off.*]

---

against the plaintiff as a defence, and can only rely upon it as a ground of counterclaim.

Where the plaintiff claims partly a liquidated debt and partly unliquidated damages, the defendant may sever so much of the plaintiff's claim as is liquidated from the rest, and plead a defence of set-off as to that part (*Crampton* v. *Walker*, 3 E. & B. 321 ; 30 L. J. Q. B. 19 ; *Brown* v. *Tibbits*, 11 C. B. N. S. 855 ; 31 L. J. C. P. 206).

In general, in order to give a right of defence by way of set-off, the debts must be between the same parties and in the same right. If the action is for a debt due from the defendant to the plaintiff separately, the defendant cannot set off by way of defence a debt due from the plaintiff jointly with others (*Arnold* v. *Bainbrigge*, 9 Ex. 153 ; 23 L. J. Ex. 59) ; though if such last-mentioned debt is several as well as joint, it may be the subject of a defence of set-off, as in the case of a joint and several promissory note (*Owen* v. *Wilkinson*, 5 C. B. N. S. 526 ; 28 L. J. C. P. 3) ; or of a joint and several bond (*Fletcher* v. *Dyche*, 2 T. R. 32). So a defendant who is sued singly on his several liability cannot set off against the plaintiff's claim a debt due from the plaintiff to the defendant and to another person who is not a party to the action jointly (*Bowyear* v. *Pawson*, 6 Q. B. D. 540 ; 50 L. J. Q. B. 495). Similarly, in an action for a debt due from the defendant to two or more plaintiffs jointly, the defendant cannot, strictly speaking, set off a debt due to him from one of the plaintiffs separately (*France* v. *White*, 1 M. & G. 731 ; *Gordon* v. *Ellis*, 2 C. B. 821 ; *Piercy* v. *Fynney*, L. R. 12 Eq. 69 ; see *Kinnerly* v. *Hossack*, 2 Taunt. 170) ; though he may be allowed to avail himself of it by way of counterclaim against that plaintiff. (See *Manchester Ry. Co.* v. *Brooks*, 2 Ex. D. 243 ; 46 L. J. Ex. 244). But if several persons are improperly or unnecessarily joined as co-plaintiffs in an action for a debt which is in fact due to one of them alone, the defendant may show in his defence that the fact is so, and that he has a set-off in respect of a debt due to him from that plaintiff separately. (See Ord. XVI., r. 3, cited *ante*, p. 538.)

If the plaintiff sues the defendant separately for a debt due from the defendant jointly with others, the defendant, instead of applying by summons for a stay of proceedings on the ground of the non-joinder of his co-debtors as defendants (see *ante*, p. 29), may plead in his defence that the debt sued for is due from himself jointly with others, and that he and his co-debtors are entitled to a set-off of debts due to them jointly from the plaintiff. (See *Stackwood* v. *Dunn*, 3 Q. B. 822.) It seems that one of several joint defendants who are sued for a debt due from them jointly, cannot set off as a defence to the claim a debt due from the plaintiff to him separately (see *Re Exchange Banking Co.*, 46 L. T. 474 ; *Arnold* v. *Bainbrigge*, 9 Ex. 153 ; 23 L. J. Ex. 59), though he might counterclaim against the plaintiff in respect of it. (See *Manchester Ry. Co.* v. *Brooks*, *supra*.)

The principle that in cases of set-off the debts must be between the same parties and in the same right was followed in equity, but with the modifications rendered necessary by the recognition of equitable, as distinguished from legal, rights (*e.g.*, the recognition of equitable, as distinguished from legal, ownership of choses in action). Before the Judicature Acts effect was given to those equitable rights in common law actions, where the provisions of the C. L. P. Act, 1854, s. 83, were applicable (see *ante*, p. 34). Thus it was held that the defendant might plead an equitable defence of set-off in respect of a debt due from the plaintiff to a trustee for the defendant (*Cochrane* v. *Green*, 9 C. B. N. S. 448 ; 30 L. J. C. P. 97) ; or in respect of a debt due from the real plaintiff, for whom the nominal plaintiff was trustee (*Agra Bank* v. *Leighton*, L. R. 2 Ex. 56 ; *Thornton* v. *Maynard*, L. R. 10 C. P. 695 ; 44 L. J. C. P. 382) ;

Defence, as to Part of a Debt sued for, of a Set-off to a like Amount for the Price of Goods sold and delivered.

As to £50, parcel of the money claimed, the defendant is entitled to a set-off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows:—

	£	*s.*	*d.*
19—, January 25th—			
To 20 tons of Silkstone coal at £1.....	20	0	0
19—, February 1st—			
To 30 tons of Silkstone coal at £1.....	30	0	0
Total.....	£50	0	0

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

---

and that the plaintiff, in answer to a defence of set-off in respect of a debt due from him on his own account to the defendant might reply that he was suing only as trustee for a third party (*Watson* v. *Mid Wales Ry. Co.*, L. R. 2 C. P. 593; 36 L. J. C. P. 285; see *Agra Bank* v. *Leighton*, *supra*).

In an action by the plaintiff as executor, the defendant cannot set off a debt due to him from the plaintiff in the plaintiff's own right (*Hutchinson* v. *Sturges*, Willes, 261, 263); nor can a defendant sued as executor or trustee set off a debt due from the plaintiff to him personally (*Gale* v. *Luttrell*, 1 Y. & J. 180; *Stumore* v. *Campbell*, cited *ante*, p. 772). So a defendant who is sued for a debt due from him personally to the plaintiff cannot plead a defence of set-off in respect of a debt due from the plaintiff to him as executor (*Ib.*; *Bishop* v. *Church*, 3 Atk. 691; see *Macdonald* v. *Carington*, 4 C. P. D. 28; *Bailey* v. *Finch*, L. R. 7 Q. B. 34; see *Ex p. Morier*, 12 Ch. D. 491; 49 L. J. Bk. 9).

In an action by an executor for money received by the defendant to the use of the plaintiff as executor, and upon an account stated between them, the defendant cannot set off debts due to him from the testator in his lifetime (*In re Gregson*, 36 Ch. D. 223; *Schofield* v. *Corbett*, 11 Q. B. 779; *Watts* v. *Rees*, 9 Ex. 696; 11 Ex. 410; 25 L. J. Ex. 30; see *Newell* v. *National Bank of England*, 1 C. P. D. 496); and in an action against an executor for a debt due to the plaintiff from the testator, the defendant cannot set off a debt which accrued due to him as executor (*Ib.*; *Mardall* v. *Thellusson*, 6 E. & B. 976): but in such cases a defendant might ordinarily plead a counterclaim.

Where a plaintiff is suing as trustee for another the defendant may, in general, counterclaim, either to recover unliquidated damages, or a liquidated debt, due to him from such other (*Bankes* v. *Jarvis*, [1903] 1 K. B. 549; 72 L. J. K. B. 267).

In an action against an incorporated company or the public officer of a banking company, the defendants may set off calls due from the plaintiff to the company. (See *Moore* v. *Met. Sewage Co.*, 3 Ex. 333; *Melrain* v. *Mather*, 5 Ex. 55.) As to set-off under the "mutual dealings" clause of the Bankruptcy Act, see *post*, p. 778.

In the case of a limited company no set-off is permissible against a claim for calls made in, or due after the commencement of, winding-up proceedings (*In re Hiram Maxim Co.*, [1903] 1 Ch. 70; 72 L. J. Ch. 18, and see *ante*, pp. 634, 635).

Where the amount of the set-off is less than the amount of the debt claimed, the defence of the set-off should in strictness be limited to an equal amount of the money claimed (see the above form); but it will ordinarily be sufficient if the amount of the debt sought to be set off is mentioned in the defence, as in that case such a limitation of the defence will in general be implied.

Where the defendant has a set-off exceeding in amount the debt sued for, he may in general set off by way of defence to the plaintiff's claim an equal amount of the debt

Defence to a Claim for an Admitted Debt, of Set-off of a Part of a larger Debt due from the Plaintiff, with a Counterclaim for the Balance.

Defence.

1. The plaintiff [before action was and still] is indebted to the defendant in the sum of £—— for money payable for [*here state the nature of the debt, as, for instance*, money lent by the defendant to the plaintiff],

---

due to him from the plaintiff, and may counterclaim for the residue of such debt, and this is usually the best course to adopt under such circumstances.

There is no need to plead a set-off where the plaintiff has given credit for it in his statement of claim or in particulars. (See *Lovejoy* v *Cole*, [1894] 2 Q. B. 861; 64 L. J. Q. B. 120).

Where a defendant relies upon several distinct grounds of set-off founded upon separate and distinct facts, such grounds of set-off must be stated, as far as may be separately and distinctly (Ord. XX., r. 7, cited *ante*, p. 539).

Previously to the Judicature Acts it was held that debts accruing due after the commencement of the action could not be set off either at law or in equity (*Richards* v. *James*, 2 Ex. 471; *Maw* v. *Ulyatt*, 31 L. J. Ch. 33), but under the Judicature Acts the defendant may plead a set-off in respect of matters subsequent to the action, provided he pleads it as a defence arising after action under Ord. XXIV. (*Ellis* v. *Munson*, 35 L. T. 585; *Beddall* v. *Maitland*, 17 Ch. D. 174; 50 L. J. Ch. 401; and see *Toke* v. *Andrews*, 8 Q. B. D. 428; 51 L. J. Q. B. 281, and the observations thereon in *Alcoy* v. *Greenhill*, [1896] 1 Ch. 19; 65 L. J. Ch. 99). If so pleaded, the plaintiff may, by delivering a confession of the defence of set-off, entitle himself to sign a judgment for his costs under Ord. XXIV., r. 3 (*Ib.*).

If after action brought or after delivery of a defence, any ground of defence arises to any set-off or counterclaim which has been pleaded by the defendant, the plaintiff may raise such ground of defence in his reply. (See Ord. XXIV., r. 1; *Toke* v. *Andrews*, *supra*; *ante*, p. 549.) As to delivering a further reply where such ground of defence arises after reply, see Ord. XXIV., r. 2, *ante*, p. 549.

The defendant is not bound to avail himself of a set-off or counterclaim, but may reserve it for a cross-action (*Laing* v. *Chatham*, 1 Camp. 252; *Jenner* v. *Morris*, 3 De G. F. & J. 45, 54; *Davis* v. *Hedges*, L. R. 6 Q. B. 687), and it may sometimes be convenient to adopt this course. In some cases it may be the only course open to the defendant, as, for instance, where a statute prohibits set-off to a particular demand. For examples of such statutes, see the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44, s. 10); *Gathercole* v. *Smith*, 17 Ch. D. 1; 7 Q. B. D. 626; 50 L. J. Q. B. 681; the Truck Act (1 & 2 Will. 4, c. 37, s. 5); *Hewlett* v. *Allen*, [1892] 2 Q. B. 662; [1894] A. C. 383; 63 L. J. Q. B. 608.

One defence of set-off may be pleaded generally to the whole claim to which the defence is applicable, without specifying how much is intended to apply to each ground of claim. (See *Noel* v. *Davis*, 4 M. & W. 136.)

The defence of set-off is taken distributively. (See *ante*, p. 523.)

Where interest is claimed in a defence of set-off it must be claimed as a debt. Where it is merely claimable as damages, it is not the subject of a defence of set-off, though it may be the ground of a counterclaim.

A defence of set-off should state particulars of the debts sought to be set off. If such particulars exceed three folios, the defence should state that fact, and refer to full particulars already delivered, or to be delivered with the pleading (Ord. XIX., r. 6, cited *ante*, p. 37). If the particulars are insufficient, the opposite party may obtain an order for further and better particulars (Ord. XIX., r. 7; *ante*, p. 38).

If an admitted set-off is equal in amount to the claim, and is pleaded by way of defence only, the plaintiff may discontinue the action under Ord. XXVI., r. 1. If it is

and the defendant claims to set off against the plaintiff's claim an equal amount of the said debt due to the defendant, viz., £——.

Particulars of the said debt are as follows :—[*State particulars.*]

Counterclaim.

2. The defendant repeats the statements contained in his defence, and claims £—— [*the amount by which the debt due to the defendant exceeds the amount of the claim to which the set-off is pleaded*], being the balance of the amount due to him as aforesaid after deducting the amount of the plaintiff's claim.

Defence, to an Action for Debt, of Set-off upon a Bill of Exchange drawn by the Defendant upon and accepted by the Plaintiff and payable to the Defendant.

The defendant is entitled to set off £—— due from the plaintiff to the defendant upon a bill of exchange for £——, dated the —— ——, 19—, drawn by the defendant upon and accepted by the plaintiff, and payable by the plaintiff to the defendant —— months after date.

Particulars :—

Principal	£
Interest	£
Amount due	£

A like Defence, where the Defendant is an Indorsee of a Bill accepted by the Plaintiff.

The defendant is entitled to set off £—— due to him from the plaintiff upon a bill of exchange for £——, dated the —— ——, 19—, drawn by

---

pleaded as a counterclaim, the plaintiff may in his reply admit it, and state his willingness to have it set off against his claim. If the admitted set-off is larger in amount than the claim, and there is a counterclaim for the excess, the plaintiff may discontinue the action under the last-mentioned order, and pay money into Court on the counterclaim. (See Ord. XXII., r. 9, *ante*, p. 549.) If the admitted set-off is smaller in amount than the claim, and is pleaded only by way of defence, the plaintiff may amend his claim by giving credit for the set-off, or may admit the set-off in his reply.

Where a set-off is pleaded by way of defence, and not by way of counterclaim, and the plaintiff merely wishes to deny the material facts alleged in such defence, as, for instance, the contract or consideration on which the set-off is alleged to have been founded, no special reply is necessary (Ord. XIX., r. 18; see *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787). But if the plaintiff relies on any grounds of reply to a defence of set-off such as, if not specifically raised, would be likely to take the defendant by surprise, or would raise issues of fact not arising out of the previous pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds (Ord. XIX., r. 15), he should obtain leave to deliver, and deliver, a special reply. So, also, if the plaintiff relies on the non-fulfilment of conditions precedent to the case of the defendant he should state such non-fulfilment in a special reply. (See *ante*, p. 157.)

A. B. upon and accepted by the plaintiff, payable —— months after date to the order of *A. B.*, and by him indorsed to [*C. D.*, who indorsed it to] the defendant before this action.

Particulars :—[*As in the last form.*]

Defence of a Set-off on a Promissory Note made by the Plaintiff and payable to the Defendant.

The defendant is entitled to set off £—— due to him from the plaintiff as maker of a promissory note for £——, dated the —— ——, 19—, and payable to the defendant —— months after date.

Particulars :—

Defence of a Set-off on a Promissory Note indorsed by the Plaintiff to the Defendant.

The defendant is entitled to set off £——, due to him from the plaintiff as indorser of a promissory note for £——, dated the —— ——, 19—, and made by *A. B.*, payable to the order of the plaintiff —— months after date, and indorsed by the plaintiff to [*E. F.*, and by *E. F.* to] the defendant, which said note was duly presented for payment and was dishonoured whereof the plaintiff had due notice by a letter dated the —— ——, 19—.

Particulars :—

Defence, to an Action by an Executor for Debts due to the Testator in his Lifetime, of a Set-off of Debts due from the Testator in his Lifetime to the Defendant (*x*).

The said *C. D.*, at the time of his death, was indebted to the defendant in the sum of £—— for [*here state the grounds of set-off, as in a statement of claim against an executor on causes of action accrued against the testator in his lifetime, as, for instance,* money payable by the said *C. D.* to the defendant for goods sold and delivered by the defendant to the said *C. D.* in his lifetime], and the said sum at the commencement of this action was and still is due from the plaintiff, as executor of the said *C. D.*, to the defendant, and the defendant is entitled and claims to set off the said sum of £—— against the plaintiff's claim.

Particulars :—[*Here set forth particulars of the set-off.*]

(*x*) See *ante*, p. 167. If the plaintiff's claim is for debts which accrued due to the plaintiff as executor after the testator's death, as well as for debts due to the testator in his lifetime, the defence must be limited to the latter; and if the claim is ambiguous in this respect, the defence should begin by alleging that the debts accrued due to the testator in his lifetime.

Defence, to an Action against an Executor for Debts due from the Testator in his Lifetime, of a Set-off for Debts due to the Testator in his Lifetime (*y*).

The plaintiff, at the time of the death of the said *C. D.*, was indebted to the said *C. D.* in the sum of £—— for [*here state the grounds of set-off, as in a statement of claim by an executor on causes of action accrued to the deceased in his lifetime*], and the said sum at the commencement of this action was and still is due from the plaintiff to the defendant as executor as aforesaid; and the defendant, as executor of the said *C. D.*, is entitled and claims to set off the said sum of £—— against the plaintiff's claim.

Particulars :—

Defence, to an Action brought by a Trustee in Bankruptcy for Debts due to the Bankrupt, of a Set-off of Debts due from the Bankrupt before the Bankruptcy (*z*).

The said *E. F.*, before he became bankrupt, was indebted to the defendant in the sum of £—— for [*here state the nature of the debt, as, for*

(*y*) See *ante*, p. 170. As this defence can be pleaded only to claims for debts due from the testator in his lifetime, it must be limited if necessary. See the preceding note.

(*z*) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38, repeating in substance the provisions of s. 39 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and of earlier enactments as to bankrupts, it is provided that "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him."

The enactments of the above section, though primarily intended to regulate the rights of the parties as to proof in bankruptcy, apply to actions in any Division of the High Court, and enable a defendant to plead a set-off in any case falling within the provisions of the section (*Peat* v. *Jones*, 8 Q. B. D. 147; *Mersey Steel Co.* v. *Naylor*; 9 App. Cas. 434; 53 L. J. Q. B. 497; *Sovereign Life Co.* v. *Dodd*, [1892] 1 Q. B. 405; *Ib.* 2 Q. B. 573; 61 L. J. Q. B. 364; 62 *Ib.* 19).

The term "mutual credits" has been held, in cases decided under the earlier Bankruptcy Acts, to apply to mutual debts, and also to transactions which must in their nature terminate in debts (see *Rose* v. *Hart*, 8 Taunt. 499; *Stanger* v. *Miller*, L. R. 1 Ex. 58; 35 L. J. Ex. 49; *Naoroji* v. *Chartered Bank of India*, L. R. 3 C. P. 444; 37 L. J. C. P. 221; *In re Winter*, 8 Ch. D. 225; 47 L. J. Bk. 52); though not to ordinary claims for unliquidated damages (see *Ib.*, and *Rose* v. *Sims*, 1 B. & A. 521; *Bell* v. *Carey*, 8 C. B. 887).

The term "mutual dealings," which was first introduced by the Bankruptcy Act, 1869, s. 39, is of wider scope, and enables a defendant (subject to the proviso contained in the section) to set off in his defence against a trustee in bankruptcy claims for unliquidated

instance, money payable for money lent to him by the defendant, viz., £—— advanced to him by the defendant on the —— ——, 19—], and that sum was at the commencement of this action and still is due to the defendant, and the defendant is entitled and claims to set off that sum against the plaintiff's claim.

Defence, to an Action brought by a Trustee in Bankruptcy for Debts due to the Bankrupt, of a Set-off of Debts contracted by the Bankrupt after the Act of Bankruptcy without Notice (*a*).

The said *E. F.*, at the time of the making of the receiving order against him, was indebted to the defendant in the sum of £—— for [*here state the nature of the debt: see the preceding form*], and the defendant had not, at the time when he gave credit to the said *E. F.* in respect of the said [advance of £——], notice of any act of bankruptcy committed by the said *E. F.*, and available against him, and that sum at the commencement of this action was and still is due to the defendant, and the defendant is entitled and claims to set off that sum against the plaintiff's claim.

Defence of a Set-off on a Bond (*b*).

The defendant is entitled to set off £—— for principal and interest due upon the plaintiff's bond to the defendant, dated the —— ——, 19—,

damages accrued to him from the debtor in respect of mutual dealings between them (*Booth* v. *Hutchinson*, L. R. 15 Eq. 30; 42 L. J. Ch. 492; *Peat* v. *Jones*, *supra*; see *Mersey Steel Co.* v. *Naylor*, *supra*; *Jack* v. *Kipping*, 9 Q. B. D. 113; 51 L. J. Q. B. 463; *Eberles Hotels Co.* v. *Jonas*, 18 Q. B. D. 459; 56 L. J. Q. B. 278; *In re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567; 65 L. J. Ch. 250). But he is only entitled to set up such claims by way of defence, and cannot counterclaim to recover anything from the trustee in respect of such damages beyond the amount of the claim sued for (*Ib.*).

The date of the receiving order is that at which to ascertain what mutual dealings there are (*In re Daintrey*, [1900] 1 Q. B. 546; 69 L. J. Q. B. 207).

In an action by the trustee of a bankrupt upon a cause of action accruing to him as trustee since the bankruptcy, the defendant cannot set off debts due to him from the bankrupt before bankruptcy (*Groom* v. *Mealey*, 2 Bing. N. C. 138; *Wood* v. *Smith*, 4 M. & W. 522; *Alloway* v. *Steere*, 10 Q. B. D. 22; 52 L. J. Q. B. 38), except in cases where the claim sued for arose out of transactions with the bankrupt before notice of an act of bankruptcy (*Hulme* v. *Muggleston*, 3 M. & W. 30; *Bittleston* v. *Timmis*, 1 C. B. 389; *Elliott* v. *Turquand*, 7 App. Cas. 79; 51 L. J. P. C. 1; *In re Gillespie*, 14 Q. B. D. 963)

The section does not apply where the bankrupt sues as trustee for another person (see *Boyd* v. *Mangles*, 16 M. & W. 337; *De Mattos* v. *Saunders*, L. R. 7 C. P. 570), nor where the debt of the bankrupt sought to be set off is due to the defendant merely as trustee for another (*Forster* v. *Wilson*, 12 M. & W. 191; *London, &c. Bank* v. *Narraway*, L. R. 15 Eq. 93; 42 L. J. Ch. 329).

As to the application of the rule in respect of mutual dealings to the winding-up o companies, see the Judicature Act, 1875, s. 10; *ante*, p. 635.

(*a*) See preceding note.

(*b*) As the defendant is only entitled to set off the amount which is "truly and

conditioned for payment of £—— to the defendant on the —— ——, 19—, [*or*, at a time which had elapsed before this action].

Particulars are as follows :—

Principal .....£
Interest .....£

Amount due .....£

The like, on a Covenant.

The defendant is entitled to set off £—— for principal and interest due to him from the plaintiff under a covenant in a deed dated the —— ——, 19—.

Particulars :—[*As in the last form.*]

The like, upon a Judgment of the High Court of Justice (*c*).

The defendant is entitled to set off £——, due to him from the plaintiff upon a judgment recovered by the defendant on the —— ——, 19—, in the —— Division of the High Court of Justice, against the plaintiff for £—— for debt [*or*, damages], and £—— for costs.

justly due" to him upon the bond, and not the amount of the penalty (see the statute 8 Geo. 2, c. 24, s. 5, which has been repealed : see *ante*, p. 772), the defence of set-off on a bond should state the amount actually due for principal and interest on the bond. Similarly, in an action on a common money bond, if the plaintiff in his claim departs from the form given in the R. S. C., 1883 (App. C., Sect. IV., No. 7), and merely claims the amount of the penalty of the bond without noticing the condition, the defendant, if he pleads a defence of set-off, should state in his defence how much is "truly and justly due" upon the bond, and should apply his set-off to the amount really due. (See the enactment above cited, and *Symmons* v. *Knox*, 3 T. R. 65 ; *Grimwood* v. *Barrit*, 6 T. R. 460 ; *Lee* v. *Lester*, 7 C. B. 1008 ; *Collins* v. *Collins*, 2 Burr. 820.) See further *ante*, p. 133.

A defence of set-off cannot be pleaded to a bond which is not conditioned to secure a liquidated demand, as a bond to indemnify generally (*Attwooll* v. *Attwooll*, 2 E. & B. 23) ; and in such a case the cross demand can only be set up by way of counterclaim or cross action.

(*c*) See *ante*, p. 212. A judgment recovered in a County Court may be the subject of a set-off or counterclaim. (See *Stanton* v. *Styles*, 5 Ex. 578.) Where such judgment is pleaded, the County Court must be shown or stated to have had jurisdiction in the matter (*Ib.* ; and *ante*, p. 212).

Defence, to an Action by the Assignee of a Debt, of Set-off of a Debt which became due from the Assignor to the Defendant before Notice of the Assignment (*d*).

Before the defendant had any notice or knowledge of the alleged assignment to the plaintiff, the said *E. F.* [*the assignor of the debt sued for*], on the —— ——, 19—, became indebted to the defendant in the sum of £——, for [*here state the nature of the debt sought to be set off, giving particulars thereof*], and the said sum was at the commencement of this action and still is due from and payable by the said *E. F.* to the defendant, and the defendant is entitled and claims to set off the amount of the said debt of the said *E. F.* against the plaintiff's claim.

Defence of a Set-off for Liquidated Damages under a Covenant or Agreement (*e*).

The defendant is entitled to a set-off of £—— for liquidated damages due to him from the plaintiff under a deed [*or*, agreement in writing] dated the —— ——, 19—, whereby the plaintiff covenanted [*or*, whereby the plaintiff, for the considerations therein mentioned, agreed] with the defendant to pay him £—— as liquidated damages on the happening of an event which happened before this action, viz. [*here state the event on which the money became payable under the covenant or agreement*].

A like form, claiming a Set-off for Liquidated Damages under a Building Contract, and setting out some of its Provisions (*e*).

The defendant is entitled to a set-off of £—— for liquidated damages under an agreement in writing, dated the —— ——, 19—, whereby it was

(*d*) See *ante*, p. 587. Where the plaintiff sues as assignee of a debt, the defendant may plead in his defence a set off of all debts which became due from and payable by the assignor to the defendant before the defendant had notice or knowledge of the assignment. (See cases cited *ante*, p. 587.) The defendant is not allowed to set off in his defence debts which become payable to him by the plaintiff's assignor subsequently to the time when the defendant received notice of the assignment, unless such debts were connected in some manner with the debt sued for, *e.g.*, as arising out of the same contract, or unless they arose from obligations contracted by the assignor before the receipt of the notice, and under an agreement between the assignor and the defendant that they should be set-off against the debt sued for (*Ib.*). Debentures of a company drawn in the ordinary form are a floating security, and permit the company to carry on its business until something is done to render the security active, such as the appointment under such debentures of a receiver, and consequently, until that time, a debtor to the company may set off against such debt any liquidated claim he may have against the company whether on a debenture or by reason of some other contract (*Biggerstaff* v. *Rowatt's Wharf, Limited*, [1896] 2 Ch. 93; 65 L. J. Ch. 536; *Nelson* v. *Faber*, [1903] 2 K. B. 367; 72 L. J. K. B. 771).

(*e*) As to the distinction between liquidated damages and mere *penalties*, see *ante*, pp. 241, 243. A mere *penalty* would only be the subject of a counterclaim for unliquidated damages, and not of a defence of set-off.

agreed between the plaintiff and the defendant that, in consideration of the payments to be made by the defendant to the plaintiff as therein mentioned, the plaintiff should erect certain buildings for the defendant, and should complete them on or before the —— ——, 19—, and that, if the plaintiff should not complete them on or before that day, he should pay to the defendant as liquidated damages £—— for each day after the —— ——, 19—, during which the buildings should remain uncompleted, and the plaintiff did not complete the said buildings on or before the —— ——, 19—, and the same remained uncompleted for —— days after that date, viz., until the —— ——, 19—, and thereby £—— became payable by the defendant to the plaintiff as such liquidated damages as aforesaid.

For a like form, see R. S. C., 1883, *App. E., Sect. II., cited* "*Counterclaims*," *ante*, p. 36.

Defence to an Action for the Price of Goods, alleging that they were sold by the Plaintiff's Agent as apparent Principal, and claiming a Set-off which had accrued due from the Agent to the Defendant (*f*).

The goods were sold and delivered to the defendant by *J. K.*, then being the agent of the plaintiff in that behalf and entrusted by the plaintiff with the possession of the goods as apparent owner thereof; and the said *J. K.*

(*f*) If an agent entrusted with the possession of goods for the purpose of sale sells them in his own name as owner, with the authority of the principal, and the principal sues the buyer for the price, the buyer is entitled in such action to set off debts of the agent, provided he dealt with him as, and believed him to be, the principal in the transaction, and had no notice of his being an agent, and provided the set-off accrued before the defendant discovered the real facts (*George* v. *Clagett*, 7 T. R. 359; 2 Smith's L. C., 11th ed., p. 138; *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38; 43 L. J. C. P. 3; *Cooke* v. *Eshelby*, 12 App. Cas. 271). This principle is not confined to the sale of goods, but extends to other cases where an agent is allowed to deal with third parties, *e.g.*, to make contracts with them or receive moneys from them as an apparent principal (*Montagu* v. *Forwood*, [1893] 2 Q. B. 350).

The right to set off debts of the agent does not extend to the case where the buyer knew him to be dealing as an agent, though he did not know who his principal was (*Semenza* v. *Brinsley*, 18 C. B. N. S. 467; 34 L. J. C. P. 161; *Fish* v. *Kempton*, 7 C. B. 687; *Cooke* v. *Eshelby*, *supra*). If the buyer had the means of knowing him to be dealing as an agent, and negligently omitted to inform himself, this would in general be equivalent to knowledge, and would deprive him of the set-off (*Baring* v. *Corrie*, 2 B. & Ald. 137; *Cooke* v. *Eshelby*, *supra*); but it seems that the fact that the buyer had such means of knowledge is merely evidence of knowledge, and that it is not necessary that the defence should contain an express averment that the defendant had no such means of knowledge, and that, where a defence of set-off in respect of a debt accrued due from the agent to the defendant is pleaded in the form given in the text, a reply thereto which simply alleged that the defendant, before the transactions with the agent, had the means of knowing that the latter was a mere agent selling for a principal, would be insufficient in law (*Borries* v. *Imperial Ottoman Bank*, *supra*).

If the buyer deals through an agent, the knowledge of his agent that the apparent

sold and delivered the goods as aforesaid in his own name and as his own goods with the consent of the plaintiff; and at the time of the said sale and delivery of the goods the defendant believed the said *J. K.* to be the owner of the goods, and did not know that the plaintiff was the owner of the goods or any of them, or was interested therein, or in the said sale thereof, or that the said *J. K.* was an agent in that behalf; and before the defendant knew that the plaintiff was the owner of the goods or any of them, or interested therein, or that the said *J. K.* was an agent in the sale thereof, the said *J. K.* became, and at the commencement of this action was and still is, indebted to the defendant in the sum of £—— for [*here state the cause of set-off against J. K., with particulars, as, for instance*, money payable by *J. K.* for £100 lent to him by the defendant on the —— day of ——, 19—], and the defendant claims to set off that sum against the plaintiff's claim.

Particulars of set-off:—

Defence of a Set-off of Cross-demands upon an Account stated by Agreement, and Payment of the Balance: see "Payment," ante, p. 747.

For a form of Reply of the Statute of Limitations to a Defence of Set-off, see "Limitations, Statutes of," ante, p. 728.

SHARES (*g*).

seller is an agent is equivalent to knowledge of that fact in the buyer and disentitles him to the set-off (*Dresser* v. *Norwood*, 14 C. B. N. S. 574; 17 *Ib.* 466).

A set-off has been allowed upon a sale by a factor who was selling in his own name under a right to do so to repay himself advances (*Warner* v. *M'Kay*, 1 M. & W. 591: but see *Fish* v. *Kempton*, 7 C. B. 687, 694; 18 L. J. C. P. 206, and *Semenza* v. *Brinsley*, *supra*).

In an action by the agent in his own name, where the agent had acted as apparent principal, the defendant could not at common law set off a debt of the principal (*Isberg* v. *Bowden*, 8 Ex. 852); but he may now avail himself of such a defence, where he can aver and prove that the plaintiff is suing only as trustee for the alleged principal. (See *Cochrane* v. *Green*, 9 C. B. N. S. 448; 30 L. J. C. P. 97; *Agra, &c. Bank* v. *Leighton*, L. R. 2 Ex. 56; *Thornton* v. *Maynard*, L. R. 10 C. P. 695.)

(*g*) As to defences in actions brought in respect of the sale or purchase of shares, see "*Shares*," *ante*, p. 290; and see "*Broker*," *ante*, p. 621; "*Company*," *ante*, p. 632; "*Gaming*," *ante*, p. 667; "*Illegality*," *ante*, p. 682; "*Stock Exchange*," *post*, p. 792.

Shipping.

Denials of Allegations in a Claim by Shipowner against Consignee for Freight under a Bill of Lading (*h*).

1. The defendant was not the consignee named in the bill of lading.

2. The defendant did not take delivery of the said goods under the bill of lading or at all.

3. The goods were not carried to ——.

4. The goods were not shipped or carried under the said bill of lading. [No bill of lading was signed by the said master.]

[*The language of the traverses used should follow the allegations in the claim.*]

The like, to an Action for Freight under a Bill of Lading against an Indorsee of the Bill of Lading (*h*).

1. The defendant was not the indorsee of the bill of lading [*or*, The bill of lading was not indorsed to the defendant].

2. The property in the said goods did not pass to the defendant. The indorsement to the defendant was by way of pledge only [and he did not take delivery of the said goods].

Particulars :—[*State the particulars of the pledge.*]

[*Other denials can readily be framed as in actions against consignee, supra.*]

Defence to an Action on a Bill of Lading or Charterparty for Damage to Goods, that the Damage arose from a Cause excepted by the Bill of Lading or Charterparty (*i*).

The bill of lading [*or*, charterparty, *if the contract was by charterparty*] contained certain exceptions from liability, that is to say, the perils of the seas [*or, as the case may be*], and the [alleged] loss arose [if at all] from —— [*stating the excepted peril from which the loss arose*].

(*R. S. C.*, 1883, *App. D., Sect. V., No.* 9.)

(*h*) See "*Shipping*," *ante*, pp. 294 *et seq.*

(*i*) The exceptions in a bill of lading or charterparty must be clear and unambiguous in order to relieve the shipowner from liability he has otherwise undertaken therein (*Owner of Waikato* v. *New Zealand Shipping Co.*, [1899] 1 Q. B. 56, 58; 68 L. J. Q. B. 1; and see *ante*, p. 292). The phrase "dangers and accidents of the seas" is intended to cover sea damage occurring at sea without blame in the shipowner or his servants (*Hamilton* v. *Pandorf*, 12 App. Cas. 518; 57 L. J. Q. B. 24; *Wilson* v. *Xantho*, 12 App. Cas. 503; 56 L. J. Ad. 116). It would cover loss by collision where the plaintiff's ship was not in fault (*Wilson* v. *Xantho, supra*). "Perils of the sea" are perils peculiar to the sea, or to a ship engaged in maritime adventure, or to which maritime adventure is subject, and which could not be foreseen and guarded against as necessary or probable incidents of the adventure. (See *Thames Insurance Co.* v. *Hamilton*, 12 App. Cas. 484,

Reply to the preceding Defence that the Negligence of the Crew brought the said Perils into Operation (*k*).

The alleged stranding [*or, as the case may be*] was caused by the negligence of the crew of the said ship, the defendant's servants.

Particulars:—

Reply to the same Defence that those Perils arose during an improper Deviation in the Voyage (*l*).

The alleged perils occurred during an improper and unauthorised deviation of the ship from the agreed voyage, that is to say [*state the deviation*].

Defence to a like Action that the Damage arose from the bad Condition of the Goods when received: see "*Carriers*," *ante*, p. 622.

Defence to an Action on a Bill of Lading or Charterparty for Damage and Short Delivery.

1. The said wheat was not [*or*, the goods were not, nor were any of them] delivered in a damaged condition.

2. The whole of the wheat [*or*, goods] shipped was delivered, namely, —— quarters [*or, as the case may be*].

3. The damage and loss [(if any)] occurred by reason of the excepted perils mentioned in the bill of lading [*or*, charterparty], that is to say, damages and accidents of the seas and navigation [*or, as the case may be*].

492, 498; 56 L. J. Q. B. 626; *Wilson* v. *Xantho, supra*; *Hamilton* v. *Pandorf, supra*; and *ante*, pp. 201, 292.)

Where rats gnawed a hole in a pipe whereby sea water got in and damaged the cargo, it was held to be a danger or accident of the seas (*Hamilton* v. *Pandorf, supra*). An exception of pirates, robbers and thieves does not exempt from liability for thefts by persons in the service of the shipowner, such as the crew or the stevedores employed (*Steinman* v. *Angier*, [1891] 1 Q. B. 619; 60 L. J. Q. B. 425). See further, as to excepted perils, *ante*, p. 292.

(*k*) See *ante*, p. 292. If the plaintiff relies on negligence to take the case out of an exception relied on in the defence, the onus of proving the negligence lies on him, and he should reply specially (*The Glendarroch*, [1894] P. 226; 63 L. J. P. 89; *Czech* v. *General Steam Navig. Co.*, L. R. 3 C. P. 14; 37 L. J. C. P. 3).

(*l*) If goods are lost during a deviation, not justified by necessity, by perils which would be excepted perils on the proper voyage, the shipowner is liable, the exceptions not applying during the deviation (*Margetson* v. *Glynn*, [1892] 1 Q. B. 337; [1893] A. C. 351; 62 L. J. Q. B. 466). A deviation may be justified which is reasonably necessary (*Phelps* v. *Hill*, [1891] 1 Q. B. 605; 60 L. J. Q. B. 382). A deviation to save life in danger in another vessel in distress may be justified (*Scaramanga* v. *Stamp*, 5 C. P. D. 295; 49 L. J. C. P. 674).

Defence to an Action for Demurrage against the Charterer, that he did not keep the Ship on Demurrage.

The defendant did not keep the ship on demurrage.

Defence in an Action by Shipowner against Charterer for Detention beyond the Demurrage Days, denying the Detention, and alleging that the Detention (if any) was from a Cause for which the Defendant was not responsible (*m*).

1. The ship was not detained.

2. The detention (if any) was due to a strike of dock labourers at the port of loading [*or*, unloading], and by the charterparty the defendant was expressly exempted from liability for detention due to such strikes.

Defence in a like Action where the Charterparty is silent as to the Time for unloading [*or loading*], *denying the Detention* (*m*).

1. The time for unloading [*or*, loading] was not specified in the charterparty, and the defendant used all reasonable diligence in unloading [*or*, loading] the ship.

2. There was no detention of the ship. The delay (if any) was due to circumstances beyond the control of the defendant, or his agents, namely, to frost [*or*, strike, *or*, *as the case may be*].

Defence to an Action against Charterer for Freight or Demurrage, that the Charterer's Liability had ceased under an express Clause in the Charterparty (*n*).

The liability of the defendant had ceased by reason of the cesser clause in the charterparty, the cargo shipped having been worth more at the port of discharge than the freight or demurrage.

(*R. S. C.*, 1883, *App. D.*, *Sect. V.*, *No.* 12.)

(*m*) As to detention, see *ante*, pp. 299, 300; as to what is detention by ice or frost, *Grant* v. *Coverdale*, 9 App. Cas. 470; 53 L. J. Q. B. 462.

(*n*) In construing clauses for cesser of the liability of the charterer it is to be remembered that the object is to exempt the charterer from liability for matters in respect of which the shipowner has, by reason of the lien he has on the goods, a sufficient remedy or protection, and where a cesser clause is followed by a lien clause, the two should, if possible, be read as co-extensive (*French* v. *Gerber*, 1 C. P. D. 737; 2 C. P. D. 247; 46 L. J. C. P. 320; *Clink* v. *Radford*, [1891] 1 Q. B. 625; 60 L. J. Q. B. 625; *Hansen* v. *Harrold Brothers*, [1894] 1 Q. B. 612; 63 L. J. Q. B. 744; *Brankelow* v. *Canton Insurance*, [1899] 2 Q. B. 178; 68 L. J. Q. B. 811).

Defence to an Action for Freight to be advanced on the Sailing of the Ship, denying that the Ship sailed (*o*).

The ship did not sail pursuant to the charterparty [or at all].

Counterclaim to an Action for Freight, &c., that the Goods were delivered in a damaged Condition (*p*).

1. The defendant has suffered damage by breach of the contract contained in the bill of lading [*or*, charterparty] mentioned in the statement of claim.

2. Fifty bales of the cotton shipped were delivered in a damaged condition.

Particulars of damage :—

	£	*s.*	*d.*
50 Bales at £2	100	0	0

The defendant claims £100.

(*See R. S. C.*, 1883, *App. C., Sect. V., No.* 4.)

Defence to an Action against the Charterer for not loading a Cargo, that the Ship was not ready to load at the appointed Time (*q*).

The ship was not ready to load at the time [and place] appointed by the charterparty.

(*o*) Where freight is payable on sailing, the ship must have left the port for the purpose of proceeding on her voyage in order to support an action for the freight (*Price* v. *Livingstone*, 9 Q. B. D. 679, 681 ; 53 L. J. Q. B. 118 ; *Garston* v. *Hickie*, 15 Q. B. D. 580 ; 56 L. J. Q. B. 38). See further as to freight payable in advance, *ante*, p. 293, and *Smith* v. *Pyman*, [1891] 1 Q. B. 742 ; 60 L. J. Q. B. 621 ; *Oriental Steamship Co.* v. *Tylor*, [1893] 2 Q. B. 518 ; 63 L. J. Q. B. 128.

(*p*) It is no defence to an action for freight that the goods were damaged by the negligence of the master so as not to be worth the freight ; and that the defendant abandoned them to the shipowner (*Dakin* v. *Oxley*, 15 C. B. N. S. 646 ; 33 L. J. C. P. 115) ; nor is the defendant by way of defence to a like action entitled to deduct the value of missing goods from the amount claimed for freight (*Meyer* v. *Dresser*, 16 C. B. N. S. 646 ; 33 L. J. C. P. 289).

In order to establish a defence, it must be shown that the goods have been so damaged upon the voyage as to be no longer merchantable under their ordinary commercial description (*Asfar* v. *Blundell*, [1895] 2 Q. B. 196 ; [1896] 1 Q. B. 123 ; 64 L. J. Q. B. 573 ; 65 *Ib.* 138).

(*q*) A stipulation that the ship shall sail for the port of loading or be ready to load on or before a particular day, or that she has sailed from, or is about to sail from a particular port, constitutes, in general, a condition precedent to the liability of the charterer to load (*Glaholm* v. *Hays*, 2 M. & G. 257 ; *Croockewit* v. *Fletcher*, 1 H. & N. 893 ; 26 L. J. Ex. 153 ; *Oliver* v. *Fielden*, 4 Ex. 135 ; *Seeger* v. *Duthie*, 8 C. B. N. S. 45 ; 29 L. J. C. P. 253 ; *Tully* v. *Howling*, 2 Q. B. D. 182 ; 46 L. J. Q. B. 388 ; *Bentsen* v. *Taylor*, [1893] 2 Q. B. 274 ; 62 L. J. Q. B. 516). Where no particular day is specified for the ship to sail for the port of loading, or to be ready to load, a delay in sailing or arriving at the port of loading affords no defence, unless it can be shown that the object of the charterer was entirely frustrated by such delay (*Clipsham* v. *Vertue*, 5 Q. B. 265 ; *Tarrabochia* v. *Hickie*, 1 H. & N. 183 ; 26 L. J. Ex. 26 ; *McAndrew* v. *Chapple*, L. R.

Defence to a like Action, that the Charterparty was cancelled pursuant to a Cancelling Clause (r).

The charterparty was cancelled pursuant to the cancelling clause therein, the ship not having arrived at port of loading on or before —— ——, 19—.

Particulars :—[*State when and how the cancellation was effected.*]

(*R. S. C.*, 1883, *App. D., Sect. V.*)

Defence to an Action against Shipowner for not completing the Voyage, that the Defendant was prevented from so doing by Causes excepted in the Charterparty (s).

The defendant was prevented from completing the voyage by perils [and casualties] excepted in the charterparty, that is to say, by dangers and accidents of seas [rivers and navigations].

Particulars :—

The ship was wrecked by a storm on the —— ——, 19—, off——, and had to be abandoned.

---

1 C. P. 643 ; 35 L. J. C. P. 281 ; *Freeman* v. *Taylor*, 8 Bing. 124 ; *Jackson* v. *Union Marine Insurance Co.*, L. R. 10 C. P. 125 ; and see *ante*, p. 299).

It is a defence to an action for not loading that there was a branch of a warranty in the charterparty as to the place where the ship was at the date of the contract (*Olive* v. *Booker*, 1 Ex. 416 ; *Behn* v. *Burness*, 3 B. & S. 751 ; 32 L. J. Q. B. 204 ; and see *Corkling* v. *Massey*, L. R. 8 C. P. 395 ; 42 L. J. C. P. 153) ; that at the time of making the charterparty the ship was not classed as warranted by the charterparty (*Hurst* v. *Usborne*, 18 C. B. 144 ; 25 L. J. C. P. 209 ; *Fraser* v. *Telegraph Co.*, L. R. 7 Q. B. 566 ; 41 L. J. Q. B. 249 ; *French* v. *Newgass*, 3 C. P. D. 163 ; 47 L. J. C. P. 361) ; that the ship was not fit to carry a reasonable cargo of the kind for which it was chartered, and could not be rendered fit for that purpose without a delay which would have frustrated the object of the voyage (*Stanton* v. *Richardson*, L. R. 7 C. P. 421 ; *Ib.* 9 C. P. 390 ; affirmed 45 L. J. C. P. 78 ; see *ante*, p. 292) ; that the ship was not tight, staunch, and strong, as agreed in the charterparty, whereby the object of the voyage was frustrated (*Tarrabochia* v. *Hickie*, *supra* ; and see *Thompson* v. *Gillespy*, 5 E. & B. 209 ; 24 L. J. Q. B. 340) ; that the ship was damaged and rendered unfit to receive a cargo by the negligence of the master (*Taylor* v. *Clay*, 9 Q. B. 713) ; that the defendant was prevented from loading by restraint of rulers within the exception in the charterparty (*Barrick* v. *Buba*, 2 C. B. N. S. 563 ; *Bruce* v. *Nicolopulo*, 11 Ex. 129 ; *Russell* v. *Niemann*, 17 C. B. N. S. 163 ; 34 L. J. C. P. 10) ; or that a declaration of war rendered the performance of the charterparty illegal (*Avery* v. *Bowden*, 5 E. & B. 714 ; 6 *Ib.* 953, 962 ; *Reid* v. *Hoskins*, 5 E. & B. 729 ; 6 *Ib.* 953 ; *Esposito* v. *Bowden*, 7 E. & B. 763 ; *Barrick* v. *Buba*, *supra*).

(*r*) Where a charterparty contained, after the usual clause excepting perils of the seas, &c., a stipulation enabling the charterers to cancel the charterparty should the ship not arrive at the port of loading on or before a certain date, it was held that the excepting clause applied only to the voyage, and that the fact that her non-arrival by the date was the result of perils of the seas, did not prevent the charterers from cancelling the charterparty (*Smith* v. *Dart*, 14 Q. B. D. 165 ; 54 L. J. Q. B. 121).

(*s*) The contract in a charterparty is, in general, an absolute one, to carry the goods shipped to their destination, subject only to the excepted perils, and consequently it is the duty of the shipowner, if his ship is damaged on the voyage, to repair her, and complete the voyage where it is commercially possible to do so (*Moss* v. *Smith*, 9 C. B. 94 ; *Assicurazione Generale* v. *SS. Bessie Morris Co.*, [1892] 2 Q. B. 652 ; 61 L. J. Q. B. 754).

Defence to an Action against Shipowner for Loss of or Damage to Goods, that the Goods were within the Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 502, *and that the Nature and Value thereof had not been declared* (*t*).

The goods consisted of articles mentioned in s. 502, sub-s. (2), of the Merchant Shipping Act, 1894, that is to say, gold [*or, as the case may be*], and the true nature and value thereof was not at the time of shipment inserted in the bill of lading, or otherwise declared in writing to the master or owner of the ship, and the loss, in respect of which this action is brought, happened without the actual fault or privity of the defendant, by reason of robbery thereof.

SOCIETIES (*u*).

SOLICITORS.

Defence to an Action by a Solicitor for Professional Charges and Disbursements, denying the alleged Retainer and Request (*v*).

The defendant denies that the plaintiff was or acted as the defendant's solicitor. The defendant did not retain or request the plaintiff to do any of

(*t*) See *ante*, p. 293, where see also as to limitation of liability.

(*u*) See *ante*, p. 301. Where an action by or against a society is brought in respect of a dispute between the society and its members as to which the High Court of Justice has no jurisdiction, the facts showing such want of jurisdiction may be pleaded by way of defence (see *post*, p. 863), or where the absence of jurisdiction is apparent upon the face of the statement of claim, the defendant may plead an objection in point of law (*Huckle* v. *Wilson*, 2 C. P. D. 410; *ante*, p. 561). In clear cases an application may be made by summons for a stay of proceedings on that ground (*Norton* v. *Counties Building Society*, [1895] 1 Q. B. 246; 64 L. J. Q. B. 214; *Municipal Building Soc.* v. *Kent*, 9 App. Cas. 260; 53 L. J. Q. B. 290), and in such cases this is the proper course to adopt.

Where the plaintiffs sue as a registered society, and the validity of the cause of action depends on the right conferred by registration, the defendant may in general plead a denial of such registration by way of defence.

Where the trustees of a friendly society lend money of the society on personal security only to persons who are not members, the borrowers, if sued by the trustees for the amount of the loan, cannot set up by way of defence that the trustees were prohibited from so lending the money by the provisions of s. 16 (1) of the Act of 1875, as such loan, though unauthorised and a breach of trust on the part of the trustees, is not illegal (*In re Coltman*, 19 Ch. D. 64; 51 L. J. Ch. 3).

A non-registered association in the nature of a benefit or loan society, which has for its object the acquisition of gain by the association or its members, is illegal under s. 4 of the Companies Act, 1862, and therefore contracts made by a member with such an association in the course of its business are illegal. (See *ante*, pp. 605, 634, 684.)

The fact that some of the rules of a provident society are in restraint of trade does not constitute a defence to an action against the society for money due under the rules (*Swaine* v. *Wilson*, 24 Q. B. D. 252).

(*v*) It is not necessary that the retainer should be a formal or express one, as the

the work [*or*, perform any of the journeys, *or*, bestow any of the attendances], or pay [*or*, expend] any of the moneys referred to in the claim.

Defence to a like Action, denying that the alleged Work was done or the alleged Payments made.

The plaintiff did not do any of the alleged work [*or*, perform any of the alleged journeys, *or*, bestow any of the alleged attendances], or make any of the alleged payments.

Defence to a like Action, that the Plaintiff was not duly qualified as a Solicitor within the meaning of s. 12 *of the Solicitors Act*, 1874 (*x*).

The action is brought to recover costs, fees, reward and disbursements on account of and in relation to work done and proceedings taken by the plaintiff acting as a solicitor for the defendant, but the plaintiff was not duly qualified so to act within the meaning of the Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12.

Defence to a like Action, that the Plaintiff did not deliver a signed Bill of Costs a Month before Action, as required by the Solicitors Act, 1843 (*y*).

The plaintiff's claim in this action is for fees, charges and disbursements for business done by the plaintiff as a solicitor for the defendant, and the plaintiff did not one calendar month before action deliver to the defendant, being the party to be charged therewith, or send by the post to, or leave for

conduct of the parties may afford sufficient evidence of retainer (*Morgan* v. *Blyth*, [1891] 1 Ch. 337, 355; 60 L. J. Ch. 66).

(*x*) By the Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, "No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter by any person or persons whomsoever." A qualified person is one who, at the time when he acts as solicitor, has a duly stamped certificate in force. (See 23 & 24 Vict. c. 127, s. 26, and the Stamp Act, 1891, s. 43.) An unqualified person cannot recover costs either from his own client or from the opposite party (*Fowler* v. *Monmouth Canal Co.*, 4 Q. B. D. 334; 48 L. J. Q. B. 457).

(*y*) By the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37, it is enacted that "No attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last-known place of abode, a bill of such fees, charges and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill."

This requirement of delivery of a signed bill one month at least before action may be

him at his counting-house, office of business, dwelling-house, or last-known place of abode, a bill of such fees, charges, and disbursements subscribed with the proper hand of the plaintiff, or enclosed in or accompanied by a

---

dispensed with by a Judge of the Supreme Court, on proof "that there is probable cause for believing that the party chargeable therewith is about to quit England, or to become a bankrupt or a liquidating or compounding debtor, or to take any other steps or do any other act which, in the opinion of the judge, would tend to defeat or delay such creditor in obtaining payment" (38 & 39 Vict. c. 79, s. 2).

The word "assignee" in s. 37 of the Solicitors Act, 1843, applies to persons to whom the debt is assigned by operation of law, such as a trustee in bankruptcy, and also to persons to whom the debt is absolutely assigned by writing under the Judicature Act, 1873 (*Penley* v. *Anstruther*, 52 L. J. Ch. 367 ; *Ingle* v. *M'Cutchan*, 12 Q. B. D. 518 ; 53 L. J. Q. B. 311).

If the action is in respect of business done by a partnership, or is brought by an executor, administrator or assignee, the allegations with respect to non-signature must be modified accordingly. (See *Ingle* v. *M'Cutchan*, *supra*.)

The fact that no signed bill of costs was delivered does not afford a defence to an action by a solicitor on a promissory note given to him as security for his costs (*Jeffreys* v. *Evans*, 14 M. & W. 210), but it does to a claim on an account stated in respect of costs (*Scadding* v. *Gyles*, 9 Q. B. 858), unless there are cross-claims and the account is stated in respect of the balance after setting off such cross-claims (*Turner* v. *Willis*, [1905] 1 K. B. 468 ; 74 L. J. K. B. 365). The defence applies only to claims in respect of business done in the character of a solicitor (*Bush* v. *Martin*, 2 H. & C. 311 ; 33 L. J. Ex. 17 ; *In re Oliver*, 36 L. J. Ch. 261 ; *In re Jones*, L. R. 13 Eq. 336 ; 1 Chitty's Practice, 14th ed., p. 132).

As to the requisites for a proper bill of costs, and as to address and delivery within the statute, see 1 Chitty's Practice, 14th ed., pp. 132 *et seq*.

A mere oral agreement as to a solicitor's costs is not binding on the client and does not prevent him from requiring delivery of a bill of costs or from obtaining a taxation (*In re Russell*, 30 Ch. D. 114 ; 54 L. J. Ch. 948 ; *In re West*, [1892] 2 Q. B. 102 ; 61 L. J. Q. B. 639). But by the Solicitors Act, 1870 (33 & 34 Vict. c. 28), ss. 4—15, as to contentious business, and by the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 8, as to non-contentious business, a solicitor may, subject to certain conditions, make a special agreement in writing with his client for remuneration by a gross sum, commission, or salary, &c. (See *Ib.*) An agreement under the former Act cannot be enforced by action, but is enforceable by motion or petition (see s. 8 of that Act ; *Rees* v. *Williams*, L. R. 10 Ex. 200 ; 44 L. J. Ex. 266) ; an agreement under the latter Act may be enforced by action (see s. 8 (4) of that Act).

Such special agreements are not enforceable by the solicitor unless signed by the client, but if so signed they are enforceable by the solicitor, although not signed by the solicitor (*In re Lewis*, 1 Q. B. D. 724 ; 45 L. J. Q. B. 816 ; *In re Russell*, *supra* ; *In re West*, *supra* ; *In re Frape*, [1893] 2 Ch. 284 ; 62 L. J. Ch. 473 ; *In re Thompson*, [1894] 1 Q. B. 462 ; 63 L. J. Q. B. 187 ; and s. 8 (2) of the Act of 1881).

By s. 9 of the Solicitors Act, 1870, the Court is empowered to set aside agreements under that Act which are not fair or reasonable. (See *In re Stuart*, [1893] 2 Q. B. 201 ; 62 L. J. Q. B. 623.)

A solicitor may by way of defence set off amounts due to him for costs, although he has not delivered a bill of costs before the action (*Brown* v. *Tibbits*, 11 C. B. N. S. 855 ; see *Rawley* v. *Rawley*, 1 Q. B. D. 460). He cannot in such cases recover them by counterclaim. (See Chitty's Practice, 14th ed., p. 136.)

The retention by the client of his solicitor's bill for twelve months without taxation affords *primâ facie* evidence that it is reasonable in amount (*In re Park*, 41 Ch. D. 326, 333, 339).

The Statute of Limitations in cases of solicitors' bills of costs begins to run against

letter subscribed in like manner referring to such bill, as required by the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.

Defence by a Solicitor to a Claim by a Valuer for Payment for making a Valuation for the Purposes of an Action (z).

1. The work in respect of which this action is brought was not, nor was any of it, done [*or*, The valuation, &c., was not made] for the defendant, but was done [*or*, made] for and on behalf of *A. B.*, for whom the defendant was acting as solicitor.

2. It was as such solicitor for *A. B.*, and on behalf of *A. B.* only, that the defendant requested the plaintiff to do the said work [*or*, make the said valuation], and the defendant did not pledge his own credit for payment to the plaintiff of his charges therefor, but only that of *A. B.*, for whom, as above stated, and as the plaintiff knew, he was acting as solicitor.

Spirituous Liquors.

See "Illegality," ante, p. 684.

Stock Exchange.

Defence to a Claim by a Stockbroker for Commission and for Differences, &c. (a).

1. The defendant does not admit [*or*, denies] that the alleged work or any of it was done, or that the alleged money or any of it was paid, or that

them from the date of the completion of the work, and not from a month after the delivery of the signed bill (*Coburn* v. *College*, [1897] 1 Q. B. 702; 66 L. J. Q. B. 213, 462). As to champerty or maintenance, see *ante*, pp. 423, 729.

(*z*) A solicitor does not, by arranging for the attendance of a witness upon a trial in which he is engaged as solicitor for one of the parties, or by issuing a subpœna to a witness to attend such trial, thereby render himself liable to pay the expenses or charges of such witness (*Robins* v *Bridge*, 3 M. & W. 114; *Lee* v. *Everest*, 26 L. J. Ex. 334); though, of course, by express agreement to be, or by agreement implied from usage or from further circumstances, he may make himself, or may be, personally liable. In the case of a solicitor employing a shorthand writer to take notes in an action it would seem that by usage the solicitor is held personally liable to the shorthand writer, unless he stipulates that the client only is to be looked to (*Cocks* v. *Bruce*, 21 Times Rep. 62).

A solicitor does not by merely employing a sheriff to issue process for a client become thereby liable to pay the sheriff's charges, but he may by express agreement or by requiring some special bailiff to be employed for him in executing such process or the like make himself personally liable (*Royle* v. *Busby*, 6 Q. B. D. 171; 50 L. J. Q. B. 196).

So where a solicitor engages a surveyor or valuer to make surveys or valuations or computations to be used to the knowledge of the person so engaged for the benefit of a client, the solicitor is *primâ facie* not pledging his personal credit, but only that of his client (*Lee* v. *Everest*, *supra*).

(*a*) Where the broker has made real contracts for his employer, as is ordinarily the

any commission or brokerage was earned by the plaintiff, or became due to him from the defendant [*or*, that any interest became due in respect of the alleged matters, or at all].

2. If the alleged work or any of it was done by the plaintiff, or if the alleged money or any of it was paid by the plaintiff, it was not done or paid for the defendant or at his request, or under any circumstances such as would render the defendant liable in respect thereof.

A like Defence, setting out the Terms of the Plaintiff's Employment, and alleging that the Plaintiff did not act in accordance therewith, &c., with a Counterclaim for Damages for Breaches of Duty as Broker (*b*).

1 and 2. [*As in the Defence next above.*]

3. The plaintiff was, on the —— ——, 19—, employed verbally [*or, as the case may be*] by the defendant as his broker, to buy for him upon the London Stock Exchange the shares mentioned in the statement of claim [*or*, —— shares in the —— Company, *as the case may be*] for the next account day, the —— ——, 19—, at a price not exceeding ——.

4. The plaintiff, upon the —— ——, 19—, sent to the defendant a contract note purporting to show that he had bought the said shares accordingly at ——, and the defendant thereupon, on the —— ——, 19—, verbally [*or, as the case may be*] requested the plaintiff to carry over the said shares upon the said Exchange to the next account day for him, and the plaintiff then verbally [*or, as the case may be*] on the same day,

---

case in dealings on the London Stock Exchange, with third parties, the defence of gaming is, in general, no answer to the broker's action for differences or commission. (See "*Gaming*," *ante*, p. 667; and *Thacker* v. *Hardy*, cited *ante*, p. 668.)

The broker must, under a penalty of £20, stamp his contract note if the securities exceed in value £5, and if he sends a contract note unstamped or sends no note at all he cannot recover charges for commission, brokerage, or agency (Stamp Act, 1891, ss. 52, 53; Revenue Act, 1898, s. 7). It is not usual to plead as a defence to an action for such charges that the contract was unstamped, as the objection will be taken by the Court, if by reason of the contract being denied on the pleadings or otherwise, the defect is brought to the notice of the Court.

(*b*) Strictly a broker should make for his employer a contract in all respects identical with that which he puts before such employer. (See *ante*, pp. 137, 138, 621.) But in transactions on the London Stock Exchange, which are to be carried out in accordance with the reasonable usages of that Exchange, it is permissible for the broker to include in one contract with a jobber the contract for a particular employer with contracts for shares of the same kind for other employers (*Levitt* v. *Hamblet*, [1901] 2 K. B. 53; 70 L. J. K. B. 520; *Scott* v. *Godfrey*, [1901] 2 K. B. 726; 70 L. J. K. B. 954), or to spread the contract of the particular employer amongst several jobbers (*Levitt* v. *Hamblet*, *supra*; *Benjamin* v. *Barnett*, 8 Com. Cas. 244, 248; 19 Times Rep. 564).

It would, however, seem that the usage thus to "lump" an employer's contract with those of other employers must, if disputed, be proved by evidence, and the broker thus acting must be prepared to establish by entries in his books, or otherwise, that he appropriated a proper part of the entire contract made with the jobber to answer his employer's order (*Ib.*; *Beckhusen* v. *Hamblet*, [1901] 2 K. B. 73; 70 L. J. K. B. 600).

agreed with and promised the defendant that he would do so if the defendant paid him the difference which would be payable in respect of the said first purchase on the said Exchange.

5. The defendant duly paid to the plaintiff the said difference, which amounted to £——, on the —— ——, 19—, but the plaintiff did not carry over the shares upon the said Exchange or at all, but wrongfully closed the defendant's account.

6. Further, or in the alternative, the defendant says that the plaintiff never did in fact buy the said shares for him or at all, or if he did he did not buy them upon the said Exchange.

Counterclaim.

The defendant, by way of counterclaim, repeats paragraphs 3—6, both inclusive, and claims—

(1.) The return of the money paid, £——.

(2.) The profits which he would otherwise have made, £——, being the difference on the account day, —— ——, 19—.

The like, that the Plaintiffs were employed on the Terms that they should sell when there was a Profit, and that they failed to do so, with a Counterclaim for Damages.

1. The defendant denies that the plaintiffs did the alleged work, or did so, if at all, as stockbrokers for the defendant or at his request, or that the plaintiffs earned or became entitled to be paid the alleged commission or reward, or that the said commission and reward, or any part thereof, ever became or was due to the plaintiffs, or that the plaintiffs paid the said money, or any part thereof, or did so at the defendant's request.

2. The defendant employed the plaintiffs verbally on the —— ——, 19—, as his stockbrokers, to purchase —— shares in —— Gold Mines, Limited, and to sell the same as soon as there was a profit thereon.

3. The plaintiffs accepted the said employment and purchased the said shares at $2\frac{1}{4}$; and the said shares subsequently, on the —— ——, 19—, went to a profit of $\frac{1}{2}$, but the plaintiffs, in breach of their duty as the defendant's stockbrokers, and of the contract constituted by their accepting the said employment, neglected to sell the said shares when there was such profit thereon.

4. The plaintiffs alleged that they subsequently sold the said shares at a loss, as alleged in the statement of claim, but the said sale was wrongful, being contrary to the terms of the said employment, and was wholly unauthorised by the defendant.

5. In the alternative, the alleged re-sale was made negligently at a price less than the value of the shares, and at a price less than $2\frac{3}{4}$, which the plaintiffs might, on the —— ——, 19—, by due diligence have obtained for the said shares.

Counterclaim.

6. The defendant repeats paragraphs 2, 3, 4, and 5 of the defence, and says that the plaintiffs could and ought to have re-sold the said shares at a profit of £——, and that by reason of their breach of duty and negligence he lost that sum.

The defendant claims £——.

Defence that the Stockbroker did not carry out the Terms of the Employment and wrongfully Closed the Defendant's Account (*c*).

1. The defendant denies that the plaintiff purchased or sold the said stocks or shares or any of them, or paid the said money or any part thereof.

2. The defendant, on the —— ——, 19—, verbally [*or, as the case may be*] employed the plaintiff to purchase for him on the London Stock Exchange stocks and shares of the amount and description referred to in the statement of claim, on the terms—(1) that the plaintiff should purchase the said stocks and shares on the London Stock Exchange; and (2) that the plaintiff should make binding contracts between the defendant and third parties for the purchase of the said stocks and shares.

3. Further, or in the alternative, the defendant says that it was an express term of the said employment that the plaintiff should carry over the said stocks and shares until the —— account, and should not close the account or sell the said stocks and shares without reasonable notice to the defendant of his intention to do so.

4. The plaintiff, on the said day, verbally accepted the said employment on the terms aforesaid.

5. Save as aforesaid, the defendant denies that he employed or requested the plaintiff to purchase the said stocks and shares, or to pay the said money or any part thereof.

6. The plaintiff did not carry out the terms of the said employment. He did not purchase the said stocks or shares, or any part thereof, on the London Stock Exchange. He did not make any binding contracts between the defendant and third parties for the purchase of the said stocks and shares. [On the contrary, the alleged purchases and sales were wholly fictitious, *or*, the alleged sales were sales of the plaintiff's own stocks and shares to the defendant, and the alleged purchases were purchases by the plaintiff from the defendant.]

7. Further, or in the alternative, the plaintiff, contrary to the terms of the said employment, and without any notice to the defendant, on the —— ——, 19—, wrongfully closed the said account and sold the said stocks and shares, or purported to do so.

(*c*) See *ante*, pp. 311, 621. As to counterclaiming in respect of the cover deposited, see *ante*, p. 671.

8. Under the aforesaid circumstances, the defendant denies that the plaintiff paid the alleged moneys or any part thereof, if at all, for the defendant or at his request, or is entitled to be indemnified by the defendant in respect thereof, or is entitled to be paid the alleged commission or any part thereof.

Defence by Brokers (Outside) to a Claim for Damages, &c., for not buying and selling in accordance with the alleged Terms of their Employment, on the London Stock Exchange (d).

1. The defendants admit that the plaintiff employed them as his brokers to buy and sell and carry over stocks and shares during the alleged period, but it was not a term of the employment that they should do so on the London Stock Exchange, or that they should buy or sell or carry over from or to or with members of or on the said Stock Exchange.

2. The defendants rendered contract notes and accounts to [and wrote letters to] the plaintiff, but they made no representation therein or thereby, or at all, that their dealings for the plaintiff were on, or with members on or of, the said Stock Exchange. They do not admit they made any such representation as is alleged.

3. They admit that the plaintiff made the alleged payments, but they deny that he did so in the alleged belief, or on the faith of the alleged representations, and except as above they deny the allegations contained in paragraph 3 of the claim.

4. They did buy and sell the said stocks and shares for the plaintiff as his broker, and were entitled to be indemnified by the plaintiff in respect of liabilities, and to be paid for their services, and the payments made were on account of such liabilities and services, and not otherwise.

5. They deny that they did not make contracts for the plaintiff as his agents and brokers with other persons, and they say that they by their accounts, contract notes, and letters, only charged the plaintiff the prices at which they so bought for him, and allowed and paid him the full prices at which they so sold for him.

6. They were not guilty of the alleged, or of any, breach of contract with, or duty to the plaintiff.

(*d*) See *ante*, p. 312. Some persons outside the Stock Exchange act as dealers and not as brokers. Such persons may, by charging commission as brokers on their accounts and contract notes, or otherwise misrepresenting their true position, give to a person dealing with them in ignorance of their true position a right to repudiate purchases and sales made apparently through them, but in reality with them. (See *Stange* v. *Lowitz*; *Nicholson* v. *Mansfield*, cited *ante*, p. 312; and see Schwabe and Branson, pp. 133, 228.) Contracts between principals are not governed by the same Stamp Acts as those between brokers and their employers. Where therefore an outside dealer acts not as broker but as a principal, a sixpenny agreement stamp is, in general, required to be put on the contract note.

SUNDAY TRADING (*e*).

TENDER (*f*).

Defence of Tender before Action (*f*).

As to the whole [*or*, As to £——, parcel] of the money claimed, the defendant made tender before action on the —— ——, 19—, of £——, and he now brings that sum into Court.

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

(*e*) By the Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 1, "No tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof, works of necessity and charity only excepted." Hence a contract made on a Sunday in the exercise of the ordinary calling of a person is not, in general, enforceable by action (*Fennell* v. *Ridler*, 5 B. & C. 406; *Norton* v. *Powell*, 4 M. & G. 42; *Simpson* v. *Nicholls*, 3 M. & W. 240; *Scarfe* v. *Morgan*, 4 M. & W. 270; *Smith* v. *Sparrow*, 4 Bing. 84; *R.* v. *Cleworth*, 4 B. & S. 927; 33 L. J. M. C. 79). But a defence under this statute is not available in an action brought by an innocent person, who at the time of making the contract had no knowledge of the facts constituting the illegality (*Blorsome* v. *Williams*, 3 B. & C. 232).

By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 13 (2), a bill is not invalid by reason only that it bears date on a Sunday.

(*f*) This defence must not be confounded with the defence of "Tender of Amends," which is given by some special statutes as a protection to persons acting, or intending to act, under those statutes, or acting in some official capacity. (See *post*, p. 919.)

The defence of tender consists in the defendant having been always ready and willing to pay the debt and having tendered it before action to the plaintiff, who refused to accept it. It is a performance of the contract by the defendant so far as he could perform it, and was not prevented by the plaintiff's refusal. (See *Dixon* v. *Clark*, 5 C. B. 365.) It is not available in actions for unliquidated claims (*Dearle* v. *Barrett*, 2 A. & E. 82; *Davys* v. *Richardson*, 20 Q. B. D. 722; 21 *Ib.* 202; 57 L. J. Q. B. 409).

If the debt be payable on a certain day, as by a bond conditioned to pay a sum of money on a particular day, or by the acceptance of a bill, or the making of a promissory note, the debtor is bound to tender on the precise day, and cannot plead a tender made *post diem* (1 Wms. Saund., 1871 ed., p. 40; *Hume* v. *Peploe*, 8 East, 168; *Poole* v. *Tumbridge*, 2 M. & W. 223; *Dixon* v. *Clark*, 5 C. B. 365, 379; *Dobie* v. *Larkan*, 10 Ex. 776). The drawer or indorser of a bill may, perhaps, tender the amount within a reasonable time after notice of dishonour, provided he does so before action (*Walker* v. *Barnes*, 5 Taunt. 240; but see *Siggers* v. *Lewis*, 1 C. M. & R. 370). Where a bill or note is payable on demand, a tender of the amount of the note with interest may be made at any time before action (*Norton* v. *Ellam*, 2 M. & W. 461, 463).

The statute 4 & 5 Anne, c. 3, s. 12, which gives the plea of payment *post diem* to actions on money bonds, does not entitle the obligor to make or plead a tender *post diem* (*Dixon* v. *Parkes*, 1 Esp. 110; see *ante*, p. 620; though see *Murray* v. *Earl of Stair*, 2 B. & C. 82, 92). Hence, where the debt is payable on a particular day, a defence of tender should show that the tender was made on the day fixed. Where the debt is not payable at any particular time, the defendant may plead that the tender was made before action, and if the plaintiff in such case relies on the debt being payable on a particular day and the tender not being made in time, he must reply such facts specially. (See *Smith* v. *Manners*, 5 C. B. N. S. 632; 28 L. J. C. P. 220.)

Tender of a smaller sum cannot be made in respect of a single entire debt of a larger

amount, the creditor not being bound to accept less than his whole demand (*Dixon* v. *Clark*, 5 C. B. 365); and the debtor is not entitled to apply a set-off in reduction of the amount due, so as to make a tender of the residue sufficient (*Searles* v. *Sadgrove*, 5 E. & B. 639; *Phillpotts* v. *Clifton*, 10 W. R. 135). Consequently a tender of part only of an entire debt admitted to be due is invalid, and a defence setting up such tender would be open to objection in point of law if the facts appeared on the pleadings. If in such case the facts do not appear on the pleadings, the plaintiff, in answer to such defence, may reply that the sum tendered was in respect of a larger sum due on a single entire cause of action (*Hesketh* v. *Fawcett*, 11 M. & W. 356; *Dixon* v. *Clark*, 5 C. B. 365; *Searles* v. *Sadgrove*, *supra*).

Tender of a larger sum than the debt due, requiring change, is not a good tender of the smaller sum (*Robinson* v. *Cook*, 6 Taunt. 336).

If a sum is tendered in payment of several debts without appropriation, and is not sufficient to cover all, it is not a sufficient tender of any one of the debts (*Hardingham* v. *Allen*, 5 C. B. 793).

A tender must be unconditional, but it may be under protest, or with a reservation of all rights (*Scott* v. *Uxbridge, &c. Ry. Co.*, L. R. 1 C. P. 596; 35 L. J. C. P. 293; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1; 61 L. J. Ch. 59).

If a demand is made by the creditor's solicitor for payment of a debt payable on demand, a tender may be made of the amount of the debt, without tendering the costs of the solicitor's letter. (See *Kirton* v. *Braithwaite*, 1 M. & W. 310; *Caine* v. *Coulton*, 1 H. & C. 764; 32 L. J. Ex. 97.)

Tender to or by one of several joint creditors or joint debtors is a valid tender. (See *ante*, p. 746; *Douglas* v. *Patrick*, 3 T. R. 683.) Tender may be effectually made to anyone authorised to receive payment of the debt (*Goodland* v. *Blewith*, 1 Camp. 477; *Kirton* v. *Braithwaite*, 1 M. & W. 310); and it may be made by an agent of the debtor (*Read* v. *Goldring*, 2 M. & S. 86). If made to an agent of the creditor, it must be in cash unless the agent has authority to take payment otherwise than in cash. Thus a solicitor authorised to receive payment of a mortgage debt has no implied authority to take a cheque, and therefore tender to him of a cheque is not a good tender (*Blumberg* v. *Life Interests Co.*, [1897] 1 Ch. 171; 66 L. J. Ch. 127).

By Ord. XXII., r. 3, "With a defence setting up a tender before action, the sum of money alleged to have been tendered must be brought into Court."

If the defendant pleads a tender before action, without making such payment into Court, the plaintiff may apply to have the defence set aside.

If the defendant is successful on the issue of tender, he is entitled (subject to the discretion of the Court or judge) to have judgment for the costs of the action (see *Dixon* v. *Clark*, 5 C. B. 365, 377); but if there is any doubt as to the sufficiency or proof of the tender, it is safer to plead payment into Court only, because, if the defendant fails on the issue of tender, where no other defence is pleaded, he has ordinarily to pay all the costs of the action, whereas, if he pleads payment into Court, and issue is joined on that defence, he has only to pay the costs up to the time of pleading, unless the plaintiff succeeds in recovering a larger sum.

Money paid into Court under a defence of tender and taken out by the plaintiff under Ord. XXII., r. 5, is not "recovered" by the plaintiff within the meaning of the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116, as to costs. (See *James* v. *Vane*, 2 E. & E. 883; 29 L. J. Q. B. 169.)

Tender may be pleaded to a counterclaim; and if so pleaded the money must be paid into Court (Ord. XXIII., r. 4; Ord. XXII., r. 3).

If money paid into Court under a defence of tender is taken out, the plaintiff taking it out will have no right to costs until the issue of tender is determined (*Griffiths* v. *Ystradyfodwg School Board*, 24 Q. B. D. 307; 59 L. J. Q. B. 116).

Defence of Tender where the Tender was made by Cheque (g).

The defendant on the —— ——, 19—, made tender to the plaintiff of the said £——, and he now brings the same into Court.

Particulars :—

The defendant at the time of the tender tendered and produced to the plaintiff a cheque drawn by the defendant in favour of the plaintiff on Messrs. ——, bankers, requiring them to pay to the plaintiff the said £——, and the plaintiff then did not object to the tender being by cheque, but only that the amount tendered was insufficient to satisfy his claim, and waived his right to have payment otherwise than by such cheque.

Reply that a Sum larger than the Amount tendered was due in respect of an Entire Cause of Action.

At the time of the alleged tender a larger sum than the said £——, viz., the sum of £——, which is [parcel of] the plaintiff's claim in this action, and which included the said £——, was due from the defendant to the plaintiff as one entire sum and on one entire contract, in respect of the matters mentioned in [the —— paragraph of] the statement of claim, and the defendant made the alleged tender in respect of the said larger sum which was so due to the plaintiff.

Reply to a Defence of Tender before Action, denying that the Defendant was Ready and Willing to pay the Debt (h).

The defendant, after the said £—— became due and payable, was not ready and willing to pay the said £—— to the plaintiff [and on the

(g) To make a tender strictly legal the money must be actually produced unless such production is expressly or impliedly dispensed with by the creditor (*Ex p. Darch*, 24 L. J. Bank. at p. 75).

Though a tender should strictly be in current coin, or Bank of England notes, a tender in country notes or by cheque is valid if the only objection expressed is that the amount is insufficient, as the payee having stated what his objection is, will be taken to have waived the objection to the form of the tender (*Polglass* v. *Oliver*, 2 C. & J. 15 ; *Jones* v. *Arthur*, 8 Dowl. 442). A legal tender may be made in gold to any amount, in silver to an amount not exceeding forty shillings, in bronze to an amount not exceeding one shilling (33 Vict. c. 10, s. 4). Bank of England notes are legal tender in payment of sums above £5 (3 & 4 Will. 4, c. 98, s. 6).

(h) When no reply is delivered or issue is joined on a defence of tender the fact of the tender, and of its having been made at the alleged time, and in a proper manner, is put in issue.

The defence of tender involves the defendant's continued readiness and willingness to pay the debt (*Hume* v. *Peploe*, 8 East, 168, 169) ; and although the form above cited from the R. S. C., 1883, App. D., Sect. IV., contains no express averment of such readiness and willingness, such an averment is to be implied. The plaintiff may with

—— ——, 19—, verbally refused to pay the same, although payment thereof was then demanded by the plaintiff].

Truck Acts (*i*).

Waiver.

See "Bills of Exchange," ante, p. 609; *"Conversion," post,* p. 824.

Warranty (*k*).

Denial of Warranty.

The defendant did not warrant as alleged [*or* denies that he made the alleged or any warranty].

Denial of Breach of Warranty: see ante, p. 527.

Defences to Actions for the Price of Goods sold by Sample, that the Goods were not equal to sample: see "Sale of Goods," ante, pp. 760, 763.

Defences to like Actions that the Goods were sold with a Warranty, and did not correspond with such Warranty: see "Sale of Goods," ante, pp. 760 *et seq.*

For like Defences, with Counterclaims for Special Damages for the Breach of Warranty, see "Sale of Goods," ante, pp. 761, 762.

leave reply to such defence of tender by denying the continued readiness and willingness of the defendant to pay. (See *ante*, p. 797.) But this in practice is not considered necessary.

Where the plaintiff relies on the facts that he demanded the sum before or after the tender, and the defendant refused to pay it (see 1 Wms. Saund., 1871 ed., 33 (c); *Johnson* v. *Clay*, 7 Taunt. 486; *Poole* v. *Tumbridge*, 2 M. & W. 223), there seems no objection to pleading with leave a special reply stating those facts. A reply merely denying readiness and willingness to pay, or alleging a demand and refusal of payment, admits the tender to have been sufficient, and requires to be supported by proof of a subsequent demand of the exact sum tendered. (See *Spybey* v. *Hide*, 1 Camp. 181; *Rivers* v. *Griffiths*, 5 B. & Ald. 630.)

(*i*) See the Truck Acts, 1 & 2 Will. 4, c. 37; 50 & 51 Vict. c. 46; 59 & 60 Vict. c. 44; *Pillar* v. *Lynei Coal Co.*, L. R. 4 C. P. 752; *Hunt* v. *G. N. Ry. Co.*, [1891] 1 Q. B. 601; 60 L. J. Q. B. 216; *Hewlett* v. *Allen*, [1894] A. C. 383; 63 L. J. Q. B. 608; *Williams* v. *North's Nav. Collieries*, [1904] 2 K. B. 44; 73 K. B. 575. The Truck Act, 1896 (59 & 60 Vict. c. 44), contains provisions as to fines and deductions from wages of workpeople, and prohibits them when unreasonable in amount. See *Squire* v. *Midland Lace Co.*, [1905] 2 K. B. 448; 74 L. J. K. B. 614.

(*k*) See *ante*, pp. 314, 527.

WORK.

Defence denying that the alleged Work was done.

The defendant denies that the plaintiff did the alleged work [and labour, or provided the alleged materials] or any part thereof [*or* The plaintiff did not do any of the alleged work (or provide any of the alleged materials)].

Defence to an Action for the Price of Work alleged to have been done at the Request of the Defendant denying the Request.

The defendant denies that he requested [or employed] the plaintiff to do the alleged work [and labour, or to provide the alleged materials] or any part thereof [or that the same was done or provided (if at all) for him or at his request or under any circumstances such as would render him liable to pay for the same] [*or* The defendant did not request the plaintiff to do the alleged work (or to provide any of the alleged materials) or any part thereof].

Defence that the Prices charged are not Fair or Reasonable (kk).

The prices charged were not agreed prices and the defendant denies that the same are fair or reasonable.

Defence to a like Action, that the Work was done so negligently and improperly as to be of no Value (l).

The alleged work was done so negligently and improperly that it was and is of no value and absolutely useless.

Particulars:—[*Show how the work was done negligently and improperly.*]

(*kk*) Under this defence the defendant will not usually be ordered to deliver particulars (*James* v. *Radnor District Council*, 6 Times Rep. 240).

(*l*) See *ante*, pp. 325, 326. Where there is no express contract as to price, it is implied, where the work is work to be paid for, that a fair and reasonable price is to be paid, and it is in such case a defence *pro tanto* that the work was done in a negligent or improper manner (*Farnsworth* v. *Garrard*, 1 Camp. 38). Where the work is done under an express contract as to price, a counterclaim is the usual method for recovering damages for inferiority to contract of work done or materials provided (see, as examples, *Lowe* v. *Holme*, 10 Q. B. D. 286; 52 L. J. Q. B. 270; *Mackay* v. *Bannister*, 16 Q. B. D. 174; 55 L. J. Q. B. 106), though it is in such cases permissible to make use of inferiority to contract of work done as an answer *pro tanto* to the claim for the contract price. Where it is sought to recover damages arising from the inferiority of the work, it is necessary to counterclaim or bring a cross-action for that purpose. (See *Mackay* v. *Bannister*, *supra*.)

Defence that the Plaintiff used Inferior Materials and did not complete the Work according to Contract, with a Counterclaim for Damages (*m*).

Defence.

1. The defendant says that the work referred to in the statement of claim was not according to contract. By the contract in writing between the plaintiff and the defendant, dated the —— ——, 19—, under which the work was done and materials provided, it was agreed that first class materials only should be used, and that the work should be completed in the best style to the satisfaction of the architect.

2. Inferior materials were used, and the work was not completed in the best style, and was not completed to the satisfaction of the architect.

Particulars:—[*State the defects.*]

Counterc'aim.

3. The defendant repeats the defence and says that by reason of the breaches of contract stated he has sustained the following damage, viz. [*state the damage*].

The defendant claims £——.

Defence that Payment was only to be made on the Certificate of the Architect, and that he had not certified (*n*).

1. The alleged work was done and the said materials were provided, if at all, under a contract [in writing dated the —— ——, 19—], whereby payment was to be made only upon the certificate of the architect.

2. No certificate of the architect was made or given in respect of the alleged work or materials.

Defence that Extras were only to be paid for if ordered by the Architect in Writing, and that the Claim is for Extras not so ordered (*n*).

1. The claim of the plaintiff is in respect of extras or additions to the contract in writing dated the —— ——, 19—, between the plaintiff and the defendant, and it was by the said contract provided that no extras or additions should be charged for unless ordered in writing by the architect.

2. The extras and additions, the price of which is now sued for, were not ordered in writing by the architect.

(*m*) See preceding note.

(*n*) See *ante*, p. 326, as to the absence of certificates. Where a contract stipulates that no extra work shall be paid for unless ordered in writing, the price of extra work done without such order cannot be recovered (*Russel* v. *Viscount Sa da Bandiera*, 13 C. B. N. S. 149; 32 L. J. C. P. 68; *Kirk* v. *Bromley Union*, 2 Phill. 640; *Tharsis Sulphur Co.* v. *M'Elroy*, 3 App. Cas. 1040).

Defence and Counterclaim to an Action for Work and Materials (*o*).

Defence.

1. Except as to £200, parcel of the money claimed, the architect did not grant his certificate pursuant to the contract.

2. As to £200, parcel of the money claimed, the defendant brings [*or*, has brought] into Court £200, and says that sum is enough to satisfy the plaintiff's claim herein pleaded to.

Counterclaim.

3. The contract contained a clause whereby it was provided that the plaintiff should complete the works by the 31st of March, 19—, or in default pay to the defendant £1 a day for every subsequent day during which the works should remain unfinished, and they remained unfinished for sixty-one days to the 31st of May.

The defendant claims £61.

(*R. S. C.*, 1883, *App. E., Sect. II.*)

Reply to last preceding Defence and Counterclaim.

1. As to the first paragraph of the defence, he joins issue.

2. As to the second paragraph thereof, the plaintiff accepts the £200 in satisfaction.

(*o*) As to the absence of certificate, see *ante*, p. 326; and as to payment into Court see *ante*, p. 748.

Where a fixed sum per day, per week, or per month is expressed in the contract to be paid, after a certain day, until completion of the work contracted for, if it is not completed by such day, the sum thus fixed is, in general, to be regarded as liquidated damages (*Fletcher* v. *Dyche*, 2 T. R. 32; *Jones* v. *St. John's Coll.*, *infra*; *Law* v. *Local Board of Redditch*, [1892] 1 Q. B. 127; 61 L. J. Q. B. 172; *Stegmann* v. *O'Connor*, 81 L. T. 627).

In building contracts, where there is a clause that alterations or extras entailing further work are not to affect or vitiate the provisions as to time of completion, or as to penalties for delay, it is no answer to a claim for delay in completion or for such penalties that the delay was due to the act of the employer in requiring such alterations or extras (*Jones* v. *St. John's Coll.*, L. R. 6 Q. B. 115; 40 L. J. Q. B. 80). And this is so where the contract contains clauses which, by necessary implication, prevent the inference from arising that the time was to be extended, or the penalties not to be recoverable in case of the employer causing delay by requiring alterations or extras (*Ib.*). But in the absence of such clause or clauses, delay due to the acts or defaults of the employer, or of those for whose acts or defaults he is responsible, would be excused, and penalties for delay in such case could not be recovered (*Roberts* v. *Bury Commissioners*, L. R. 5 C. P. 310; 38 L. J. C. P. 367; *Lawson* v. *Wallasey Board*, 11 Q. B. D. 229; 52 L. J. Q. B. 302; *Dodd* v. *Churton*, [1897] 1 Q. B. 569; 66 L. J. Q. B. 477). The general rule of law, in the absence of stipulation to the contrary, is that a party cannot take advantage of non-fulfilment of a condition, the performance of which has been hindered by himself (Com. Dig., *Condition*, L.; *Roberts* v. *Bury Commissioners*, *supra*), and cannot sue for a breach of contract occasioned by his own breach of contract (*Ib.*; *Lawson* v. *Wallasey Board*, *supra*).

The plaintiff, as to the counterclaim, says that—

3. The liquidated damages were waived by ordering extras and material alterations in the works.

Particulars :—

4. The defendant waived the liquidated damages by preventing the plaintiff from having access to the premises till a week after the agreed time.

(*R. S. C.*, 1883, *App. E., Sect. II.*)

Defence to a Claim on a Building Contract referring to the Contract and stating the non-performance of Conditions Precedent, with a Counterclaim for Penalties and Breach of Contract.

Defence, Counterclaim, and Set-off.

Defence.

1. By a contract in writing dated the —— ——, 19—, made between the plaintiff and the defendant (to which the defendant craves leave to refer as if it were fully set out herein) the plaintiff agreed to do certain building work for the defendant for the contract price of £—— subject to (inter alia) the following conditions :—

(a) That the plaintiff should do and complete in a good and substantial manner the works referred to in a certain specification and certain plans.

(b) That he should complete the works by the —— ——, 19—, or forfeit out of the contract price [*or*, pay to the plaintiff] £5 a week until completion.

(c) That no alterations additions or extras should be paid for unless ordered in writing.

(d) That alterations, additions, or omissions should not avoid the contract, but that they should be measured and valued and added to or deducted from the aforesaid contract price.

(e) That the contract price should be payable in four payments, the fourth of which, being the balance, should be paid within three calendar months after the whole of the works should have been completed and finished, the accounts made up, and the building handed over to the defendant.

(f) That the plaintiff should not be entitled to receive the said balance until the architect had certified that the whole of the works had been completed and finished to his satisfaction.

2. The work referred to in the statement of claim is alleged to have been done under the said contract, and the balance sued for is claimed and alleged to be the balance due under the said contract, but for the reasons hereinafter stated the defendant denies that the said or any sum is due. Save as aforesaid the defendant never agreed or otherwise became liable to pay for the said work or any part thereof.

3. The said works were not done or completed, and such doing and completion was a condition precedent to the plaintiff's right to be paid the said balance (if any).

4. The works were not completed by the said —— ——, 19--, and the plaintiff forfeited £5 a week which the defendant is entitled to deduct from or set off against his claim. The works were not completed at the time of the commencement of this action, or in the alternative not until the —— ——, 19—.

5. Part of the claim is for alterations, additions and extras which were not ordered in writing.

6. The plaintiff is claiming payment for many things as extras or additions which were included in and covered by the contract price, and are not extras at all. Moreover the amounts claimed for extras and additions are excessive and unreasonable.

7. Alterations and omissions were made and the defendant is entitled to credit for the amount of these as measured and valued. The plaintiff has omitted to give credit for these. On such credit being given it will be found that the defendant has overpaid the plaintiff.

8. The defendant paid to the plaintiff the first three of the said four payments. No further payment ever became due from the defendant. The three calendar months provided for by the contract (see *ante*, paragraph 2 (e)), had not elapsed at the time of the commencement of this action.

9. The architect has not given the certificate required by the contract as a condition precedent to the defendant's liability to pay.

Counterclaim and Set-off.

10. The defendant repeats paragraphs 1, 3 and 4 hereof.

11. By reason of the works not being done and completed the defendant has had and will have to employ other persons to do and complete the same, and has incurred and will incur expenses in so doing.

12. By reason of the non-completion of the works by the said time the defendant is entitled to deduct the said £5 a week and he has overpaid the plaintiff and is entitled to recover the amount so overpaid. In the alternative the defendant says that the plaintiff did not complete the works within a reasonable time, and he claims damage for the delay and loss of use of the premises.

13. Particulars under paragraphs 5, 6, 7, 11, and 12 hereof are delivered herewith.

The defendant claims:—

(1.) £200 and to set off an equal sum parcel thereof against the amount (if any) found due to the plaintiff.

(2.) £—— damages.

Defence that the Plaintiff was employed subject to certain Conditions which were not fulfilled, and a Counterclaim for Damages.

Defence and Counterclaim.

Defence.

1. The defendant denies that the plaintiff did the said work or labour or supplied the said materials or any part thereof. He denies that the plaintiff did so (if and so far as he did so at all) for or at the request of the defendant.

2. The defendant employed the plaintiff on the terms of an agreement in writing dated the —— ——, 19—, to do certain work and labour and to provide certain materials therefor, and the plaintiff accepted the said employment and agreed to do the said work and labour and provide the said materials on the terms :—

(a) That the said work and labour should be done well and efficiently and with skill and care and in a proper and workmanlike manner.

(b) That the said materials should be good and suitable and should be properly and well and skilfully supplied applied and used.

(c) That the said work and labour should all be done and completed.

(d) That the said work and labour should be done and completed and the said materials supplied within a reasonable time.

(e) That as to part of the said work and labour and materials which were comprised in a specification sent by the plaintiff to the defendant on the —— ——, 19—, the same should be done and supplied in accordance with the terms above set out for the sum of £——.

(f) That as to part of the said work, labour, and materials, viz. the drains, the same should be done and supplied in accordance with the above-mentioned terms at a cost not exceeding £——.

3. In pretended performance of the said agreement and terms, the plaintiff did so much of the work and labour and supplied so much of the materials referred to in the statement of claim as he in fact did or supplied at all.

4. The said work and labour done and materials supplied by the plaintiff were not done or supplied in accordance with the said agreement and terms, and the plaintiff broke the said terms in the following respects, viz. :—

(a) The said work and labour was not done well or efficiently or with skill or care or in a proper, sufficient or workmanlike manner, but on the contrary was done badly and inefficiently and without skill or care and in an improper and unworkmanlike manner.

(b) The said materials were not good or suitable or properly or well or skilfully supplied applied or used, but on the contrary the said materials were bad and unsuitable and were supplied applied and used improperly badly and unskilfully.

(c) The said work and labour was not all done and completed, but on the contrary much of it was left undone altogether and much of it was left in an unfinished and incomplete state.

(d) The said work labour and materials, so far as the same were done and supplied at all, were not done or supplied within a reasonable time, but on the contrary the plaintiff greatly and unreasonably delayed the same.

(e) The part of the said work labour and materials agreed to be done for the sum of £—— and which forms the first item of the plaintiff's claim, was in the respects above mentioned not done in accordance with the said terms, and much of the work labour and materials which the plaintiff agreed to do and for which he now seeks to charge the said sum were not done or supplied at all.

(f) That as to the part of the work labour and materials which the plaintiff agreed to do and supply for £—— (and which forms the last item of the claim) the same was in the respects above mentioned not done in accordance with the said terms, and the plaintiff now seeks to charge £—— instead of £—— for the same.

5. By reason of the matters aforesaid, the said work and labour and materials were worthless or worth far less than the amount sought to be recovered by the plaintiff and less than the £50 which the defendant has already paid to the plaintiff and which is credited in the statement of claim.

6. As to the third item of the claim, viz. £——, the defendant admits the same but says that the plaintiff's claim in respect thereof was satisfied and discharged by the payment of £—— credited in the statement of claim.

7. The plaintiff's charges are excessive and unreasonable, both as regards the quantities and amounts charged for and the prices charged.

8. In the alternative and whilst denying liability the defendant brings into Court £100 (being £75 which he was ordered to pay into Court to abide the event on an application under Order XIV., and which he now appropriates for the purpose and £25 additional), which he says is sufficient to satisfy the plaintiff's claim (if any) (*p*).

Full particulars under paragraphs 4 and 7 are delivered herewith :—

Counterclaim.

9. The defendant repeats paragraph 2 of the defence, and says that the plaintiff at the times when the said agreement was made well knew that the defendant required the premises where the said work and labour was to be done, and the said materials supplied, for the purpose of carrying on there his business of a tailor, and that for that purpose it was essential that the defendant should get the said work and labour done and materials supplied as quickly as possible.

10. The defendant repeats paragraphs 3 and 4 of the defence.

(*p*) See *ante*, p. 750.

11. The defendant further says that the plaintiff did part of the said work negligently, carelessly, and unskilfully, and omitted to take proper steps to secure the safety of the premises, whereby one of the walls thereof was undermined and has subsided, and the premises have been greatly injured. The plaintiff moreover negligently allowed the water to escape and injure the ceilings and walls and other parts of the premises.

12. By reason of the breaches and matters stated in paragraphs 3, 4, 10, and 11 hereof the defendant has had and will have to do and supply much of the said work, labour and materials himself, and will have to reinstate and repair the said wall, ceilings and premises, and has had and will have to undo much of the said work and to do the same and supply the materials over again, and he has incurred and been put to, and will incur and be put to, much expense, trouble, inconvenience, delay and loss, and he has been and will be greatly hindered, delayed, and inconvenienced in his said business, and lost and will lose the profits thereof, and was and is and will be otherwise injured.

Particulars under paragraphs 11 and 12 are delivered herewith.

The defendant claims £——.

The like.

Defence and Counterclaim.

Defence.

1. The defendants deny that the plaintiff did the work, or rendered the services, or supplied the materials, referred to in paragraphs 2 and 3 of the statement of claim and the particulars thereunder, or any part thereof, or that he did so (if at all) at their request.

2. By a contract in writing dated the —— ——, 19—, and made between the plaintiff and the defendants, the plaintiff agreed to do, execute, and perform in a workmanlike and substantial manner the whole of certain work therein specified, according to the plans, specifications, and bills of quantities therein referred to, and to entirely finish and complete the same on or before the —— ——, 19—. The alleged work, services and materials referred to in the statement of claim were done, rendered and supplied (if and so far as they were so at all) in pretended performance of the said contract.

3. By the said contract the certificate of the engineers was made a condition precedent to the plaintiff's right to recover any payment. No such certificate has been granted in respect of the work, services and materials now claimed for.

4. By the said contract the plaintiff's right to payment was conditional on the plaintiff completing or being ready and willing to complete the whole of the work. The plaintiff did not complete the whole of the work, and was not ready or willing to do so, but on the contrary he abandoned

the same on or about the —— ——, 19—, and refused verbally on the —— ——, 19—, to proceed with or complete it.

5. The contract provided that in the event of the plaintiff not proceeding with the work to the satisfaction of the engineers, it should be lawful for the defendants to rescind the contract as regards the plaintiff, and that thereupon the amount then already paid to the plaintiff by the defendants should be considered to be the full value of the work executed by the plaintiff. The plaintiff did not proceed with the work to the satisfaction of the engineers, and thereupon the defendants on or about the —— ——, 19—, rescinded the contract in accordance with the said provisions, and gave the plaintiff written notice dated that day that they had done so.

6. The work was not done in a workmanlike or substantial manner, but was done so badly that it was useless.

7. The amounts claimed are excessive, both as regards the amounts and quantities claimed for and the prices charged.

Counterclaim.

8. The defendants repeat paragraphs 2, 5 and 6 of the defence.

9. By entering into the said contract the plaintiff impliedly warranted that he was competent to perform the same.

10. The plaintiff broke the said contract and warranty in the following respects :—

(a) He was not competent to perform the said contract.

(b) He did not and would not do the work in a workmanlike or substantial manner, but did so much as he did at all unskilfully and badly.

(c) He did not do the work in accordance with the plans and specifications.

(d) Contrary to the terms of the contract he sublet a portion of one of them without the consent of the engineers.

(e) He did not or would not finish or complete the said work, but on or about —— ——, 19—, abandoned the same, and on the —— ——, 19—, verbally refused to proceed with or complete it.

Particulars are delivered herewith.

11. By reason of the premises the defendants had to employ another contractor to do and complete the said work, and had to pay him £—— beyond the amount they would have had to pay the plaintiff had he performed the said contract.

12. Further, by reason of the premises the work done by the plaintiff was useless and worthless, or worth far less than the £—— paid to him by the defendants on account thereof, and the plaintiffs lost the £——.

13. Further, the plaintiff did the work so badly and unskilfully that he wrongly opened the highway in the wrong place for a distance of 63 yards and left it so open, and the defendants were compelled by the —— County Council to close it up at a cost of £——, which they lost.

14. Further, the completion of the work was greatly delayed and the defendants lost the use thereof. Under the contracts with the plaintiff completion was due on the —— ——, 19—. The work was not completed by the new contractor until the —— ——, 19—.

The defendants claim :—

(1.) £——.
(2.) £——.
(3.) £——.
(4.) Damages.

The like, to a Claim by a Sub-contractor against the Contractor.

Defence and Counterclaim.

Defence.

1. The defendant admits the making of the agreement dated the —— ——, 19—, but he requires the same to be produced and referred to for the terms thereof which he does not admit are sufficiently or correctly stated in the statement of claim.

2. By the said agreement the plaintiffs agreed to execute for the defendant the whole of that portion of certain work which the defendant had agreed to execute comprised under the heading of Plumber, Glazier, Bell Hanger, Heating Gutters, Pipes and Painting as set forth in the bill of quantities, prepared for the purpose of a contract entered into by the defendants with *G. H.*

3. By the said agreement it was agreed (inter alia)—

(a) That the whole of the work to be done by the plaintiffs should be completed to the entire satisfaction of the defendant.

(b) That the plaintiffs should be bound to comply with every condition of the contract by which the defendant had become bound to the said *G. H.*, and that it should not be lawful for the plaintiffs to claim or otherwise charge the defendant for any work or put him to any cost whatsoever which had not nor would be allowed to him by the architect, and that the plaintiffs should by the said agreement become bound to accept any settlement which might be imposed upon the defendant by the said *G. H.* or his architect, and that the plaintiffs should bear every charge and expense which the architect might impose upon the defendant in connection with the work undertaken by the plaintiffs to be executed for the defendant.

(c) That in case any variation might be necessary from any cause such variation should not be executed without a written order from the defendant or it should not be paid by him, and any such variation should be valued at the price set forth on the schedule of prices supplied by the plaintiffs to the defendant for the purpose, and in

case it would not fairly apply then the plaintiffs should be bound to accept the valuation allowed to the defendant by the architect and no more.

(d) That payment should be made periodically to the plaintiffs at the rate of eighty per cent. of the value of work actually executed and the balance twelve months after the entire completion of the work on the production of the architect's certificate of completion less any sum that became due from the plaintiffs to the defendant for work not executed or otherwise.

4. The defendant has paid the plaintiffs for all the work and for everything that has been allowed to him by the architect and the said architect has decided that no more is due and has imposed this settlement on the defendant, and the defendant says that under the said contract the plaintiffs are not entitled to claim or otherwise charge the defendant any more or to put him to any further cost.

5. The defendant has paid to the plaintiffs more than 80 per cent. of the value of the work actually executed and 12 months have not elapsed from the entire completion of the work nor has the architect's certificate of final completion been given or produced nor have 12 months elapsed from such production.

6. By the contract under which the defendant had contracted to do the said work and by which the plaintiffs under their said contract were bound it was provided (inter alia) that the whole of the works were to be carried out under the superintendence and to the satisfaction of the architect, and that his decision should be final and conclusive both as regards the interpretation of the said drawings and specification and the additional explanatory drawings and instructions and in every other question in connection with the execution of the works. The said architect on the —— ——, 19—, decided that the only works and materials for which the plaintiffs are entitled to be paid are those for which the defendant has already paid the plaintiffs and no more, and the plaintiffs are bound by such decision.

7. By the contract under which the defendant had agreed to do the said work and by which the plaintiffs under their agreement were bound, the plaintiffs were entitled to be paid only on the certificate of the said architect and such amount only as he should certify for. The defendant has paid to the plaintiffs the whole amount for which the said architect has certified.

8. The defendant denies that the plaintiffs executed the said works or supplied the said materials or that he did so to the satisfaction of the defendant or of the said architect. The said works were done badly and not in accordance with the contract.

9. The defendant denies that the plaintiffs did the said further works or supplied the said further materials or that they did so if at all to the defendant's orders or for him or at his request.

10. By the said agreement and by the said contract under which the defendant had agreed to do the said works and by the terms of which the

plaintiffs under their said agreement were bound it was provided that no further or extra works should be done, or if done should be paid for without an order or orders in writing from the architect. The further work and materials referred to in the said statement of claim were respectively done and supplied, if at all, without such order or orders in writing, and the defendant is therefore not liable in respect thereof.

11. By the said agreement, and by the said contract under which the defendant had agreed to do the said work, and by the terms of which the plaintiffs, under their said agreement are bound, it was provided that the plaintiffs should only be paid in respect of any further or extra work such as the said architect should allow. The defendant has already paid to the plaintiffs the whole of the amounts which have been so allowed in respect of such further or extra work.

12. The amounts charged for by the plaintiffs are in excess of the amount of work done and materials supplied, and the prices charged are in excess of the contract prices, and are unreasonable.

13. By the payments made to the plaintiffs, the defendant has fully paid to the plaintiffs all that they are entitled to be paid under the agreement, or for the value of the work and materials, or otherwise.

Particulars under paragraphs 4, 8, and 12 are delivered herewith.

Defence to a Claim by an Architect, that he was Negligent and his Work useless, with a Counterclaim for Damages.

1. The defendant denies that the said ——, deceased, rendered the services referred to in the statement of claim, or any part thereof.

2. The alleged services of the said —— were, under the circumstances hereinafter stated, useless and worse than useless to the defendant. And the defendant denies that the alleged balance, or any part thereof, ever became due or owing at all.

3. In the alternative, the defendant says that the amounts which he paid the said ——, and which are credited in the particulars referred to in the statement of claim, are more than the value of the services rendered, and more than sufficient to satisfy the plaintiff's claim.

4. On the —— ——, 19—, the defendant verbally employed the said ——, deceased, to act as the defendant's architect in and about the erection of a malt house and beer store at ——, and the said —— verbally accepted the said employment.

5. The terms of the said employment were agreed to verbally, and were (inter alia) that the said —— would prepare plans and specifications for the erection of the said malt house, which should be in every way an exact copy and reproduction of (but of one-third less capacity than) a certain specified malt house at ——, and also for the erection of a beer store, and would superintend the erection of such buildings in accordance with such plans and specifications, and would perform all the duties of architect in respect thereof.

6. It thereupon became the duty of the said —— to prepare plans and specifications in accordance with the instructions of the defendant, to duly superintend the work, to reject and require to be amended all inferior materials and work, and to certify such work (and such work only) as was done in accordance with the said plans and specifications, and in a workmanlike manner and of proper materials.

7. The said ——, in breach of the said terms and of his duties as architect—

(a) Specified slates of a different size, character and quality to those upon the pattern building.

(b) Permitted the contractor to use mortar of inferior quality to and different from that provided for in the specifications.

(c) Negligently superintended the said work, and allowed the slates to be improperly and insecurely fixed.

(d) Negligently certified as satisfactory work which was improper and defective.

8. By reason of the premises, the services of the said ——, deceased, were useless, and the buildings of far less value and use than they would have been, and the defendant has suffered and will suffer damage. He has had to pay £——, and will have to expend a further sum of £—— for re-pointing and re-slating the said buildings, and in doing other repairs thereto.

Particulars under paragraphs 6 and 7 are delivered herewith.

Counterclaim.

9. The defendant repeats paragraphs 4 to 8 inclusive of the defence.

The defendant counterclaims £——.

Defence to a Claim for Work done against a Part Owner of a Ship denying Liability.

1. This defendant denies that the plaintiffs did the alleged work or labour, or provided the alleged materials, or any part thereof, to the steamship "——" or to the barque "——."

2. This defendant denies that the plaintiffs did the said work or labour, or provided the said materials, or any part thereof (if at all), for or at the request of this defendant, or under any circumstances such as would render this defendant liable in respect thereof.

3. This defendant denies that the steamship "——" was his vessel.

4. As regards the claim for work, labour and materials to the steamship "——," this defendant further or in the alternative says that he did not order or request the plaintiffs to do or supply the said work, labour or materials, nor had any person or persons any authority to do so as his agent or on his behalf, or to pledge his credit in respect thereof.

5. If and so far as, if at all, the said work, labour and materials were

ordered by or on behalf of the other defendants or co-owners of the said steamship, this defendant denies that they were so ordered as agents for him or on his behalf, or that the person or persons by whom such orders (if any) were given, gave the same as his agent or on his behalf, or was in fact his agent to do so, or had any authority, express or implied, to do so.

6. Further, or in the alternative, this defendant says that he was at all the times when the said work, labour and materials were respectively ordered, done and supplied (if the same ever were so at all) in this country, and the said work, labour and materials were not necessaries or ordinary repairs, and were not ordered or done or provided (if at all) for the purpose of any adventure or purpose in which this defendant took part, or in which he was a co-adventurer or co-partner. And if and so far as the said work, labour or materials were ordered by the other co-owners of the said steamship, or any of them, they were so ordered without this defendant being in any way consulted in respect thereof or knowing thereof, and for the purpose of such co-owners only, and the said co-owners or co-owner did not order, nor had they or he any authority to order, the said work, labour or materials as agent for this defendant or on his behalf, or so as to render him liable in respect thereof.

7. As regards the claim for work, labour and materials for the barque "——," this defendant further or in the alternative says that he was not the owner or part owner of the said ship, nor had he any interest therein, and he did not order the said work, labour or materials, or request the plaintiffs to do or supply the same, nor had anyone any authority to do so on his behalf.

8. The prices charged and amount claimed by the plaintiffs are excessive and unreasonable.

9. No accounts were rendered to this defendant.

10. This defendant was no party to the acceptances for which credit is given.

CHAPTER XII.

DEFENCES AND SUBSEQUENT PLEADINGS IN ACTIONS FOR WRONGS.

For the Date, Title, and Formal Parts of Defences and Subsequent Pleadings, see "General Form of Defence," ante, p. 520; *"Counter-claims," ante,* pp. 534 *et seq.*; *"Replies, etc.," ante,* p. 545.

Accord and Satisfaction (*a*).

Defence of Accord and Satisfaction, see "Accord and Satisfaction," ante, p. 566.

(*a*) Satisfaction made by a joint tort-feasor in respect of the whole cause of action for the tort is, it would seem, a good defence to an action against the other tort-feasors for the same tort. (See *Bird* v. *Randell*, 3 Burr. 1345; *Dufresne* v. *Hutchinson*, 3 Taunt. 117; *Hey* v. *Moorhouse*, 6 Bing. N. C. 52; *Thurman* v. *Wilde*, 11 A. & E. 453; *Duck* v. *Mayeu*, [1892] 2 Q. B. 511; *"Release," post,* p. 907; *"Judgment Recovered," post,* p. 862.) But if such accord and satisfaction is only made in respect of the claim against that particular tort-feasor, the remedies against the others being reserved, it is no defence to an action against them (*Duck* v. *Mayeu, supra; post,* p. 907).

Satisfaction made by a mere stranger would not afford a defence unless the satisfaction is adopted by the parties as their own. (See *Thurman* v. *Wilde*, 11 A. & E. 453; Comyn's Dig. Accord, A. 2; and *ante,* p. 567.)

In an action under The Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), against a railway company for causing the death of a passenger by negligence, the fact that the passenger in his lifetime accepted from the company a sum of money in satisfaction of all causes of action, was held to be a good defence, on the ground that the cause of action, which was the company's negligence, had been satisfied in the passenger's lifetime, and that his death did not create a fresh cause of action (*Read* v. *Great Eastern Ry. Co.*, L. R. 3 Q. B. 555; see *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357; 51 L. J. Q. B. 543). But accord and satisfaction is no answer to an action by a passenger for injuries caused by the negligence of a railway company where the money has been accepted in respect of damage which had accrued up to that time, and the action is brought in respect of injuries which accrued subsequently to the accord and satisfaction (see *Lee* v. *Lanc. & Y. Ry. Co.*, L. R. 6 Ch. 527; *Ellen* v. *Great Northern Ry. Co.*, 17 Times Rep. 453); or where the plaintiff was induced to accept the money by the fraudulent representations of the company's agents (*Hirschfield* v. *Lond. B. & S. C. Ry. Co.*, 2 Q. B. D. 1; 46 L. J. Q. B. 94).

In cases where the cause of action is continuing, an accord and satisfaction in respect of damage already accrued is no bar to an action in respect of subsequent damage

Bankruptcy.

See "*Bankruptcy*," *ante*, pp. 99, 335, 591; "*Conversion*," *post*, p. 822.

Bill of Sale (*b*).

Defence to Claim for Trespass to House and Goods, justifying under a Bill of Sale (b).

1. The defendant denies that the said goods or any of them were the plaintiff's.

2. By a bill of sale duly registered dated the —— ——, 19—, the defendant for the consideration therein stated assigned to the plaintiff all

---

giving rise to a fresh cause of action. (See *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127; 55 L. J. Q. B. 529; *post*, pp. 874, 918.)

The insertion in a newspaper of an apology in pursuance of an agreement to accept such apology in satisfaction of a cause of action, affords a good defence of accord and satisfaction. (See *Boosey* v. *Wood*, 3 H. & C. 484; 34 L. J. Ex. 65.)

(*b*) See the Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43).

The first of these Acts relates to bills of sale in general, and defines "bills of sale" as including, *inter alia*, bills of sale, inventories of goods with receipt attached, receipts for purchase moneys of goods and other assurances of personal chattels. The later Act deals only with such bills of sale as are given as security for the payment of money. (See sect. 3.)

The above Acts do not affect completed verbal transactions where property in the goods passes accompanied by possession, even if after the transaction is completed a receipt, or inventory with receipt attached, is made out (*Charlesworth* v. *Mills*, [1892] A. C. 231; 61 L. J. Q. B. 830; *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; *London and Yorkshire Bank* v. *White*, 11 Times Rep. 570). But if the document is part of the bargain to pass property in the goods, or if it is by virtue of it that the right to seize, or some other right forming part of the transaction, arises, then it would seem in general to fall within the Acts. (See *Ramsay* v. *Margrett*, *supra*.)

The Acts, it is said, deal with documents, and do not invalidate titles *bonâ fide* acquired by verbal contract (*North Central Wagon Co.* v. *M. S. & L. Ry. Co.*, 35 Ch. D. 191).

A bill of sale given by way of security for the payment of money must be in accordance with the form prescribed by the Act of 1882, otherwise it is void even as between the parties to it (s. 9). It need not be identical in language with the form, but it must be in substantial compliance with it, and have the same meaning and effect (*Roberts* v. *Roberts*, 13 Q. B. D. 794; 53 L. J. Q. B. 313; *Thomas* v. *Kelly*, 13 App. Cas. 506, 512, 519; 58 L. J. Q. B. 66; *Weardale Coal Co.* v. *Hodson*, [1894] 1 Q. B. 598; 63 L. J. Q. B. 391).

A receipt, or inventory with receipt, to fall within the Acts, must be an assurance of chattels (*North Central Wagon Co.* v. *M. S. & L. Ry. Co.*, 35 Ch. D. 191; 56 L. J. Ch. 609; *M. S. & L. Ry. Co.* v. *North Central Wagon Co.*, 13 App. Cas. at pp. 561, 569; 58 L. J. Ch. 219; *Ramsay* v. *Margrett*, *supra*).

Where there is in fact a transaction of lending money on the security of and carried out by a document in the form of a hire-purchase agreement, such agreement is a bill of sale (*Maas* v. *Pepper*, [1905] A. C. 102; 74 L. J. K. B. 452).

It is to be noted that the failure to register a bill of sale given by way of security

the goods referred to in the statement of claim. The said bill of sale contained a proviso that if the defendant made default in payment of the sum of £—— on the —— ——, 19—, the plaintiff should be at liberty to enter into and upon the premises on which the said goods should be and to seize and take possession of the same, and after the expiration of five clear days from the day of so seizing and taking possession thereof to remove sell and dispose of the same.

3. The plaintiff made default in payment of the said sum and the defendant accordingly, as he was entitled to do, on the —— ——, 19—, entered into and upon the premises referred to in the statement of claim, where the said goods were, and seized and took possession of the said goods, and on the —— ——, 19—, after the expiration of five clear days from the said day removed and sold the same, and these are the matters complained of.

4. The defendant did nothing that was not justifiable under the said bill of sale, and save as aforesaid he denies specifically each of the allegations contained in the statement of claim.

See a like form: Greenbert v. *Smee*, 35 L. T. 168.

Carriers (*c*).

Denial that the Defendant was a Common Carrier.

The defendant denies that he was a common carrier of goods or liable as such.

Defence to an Action for refusing to Carry, that the Plaintiff was not ready to Pay the Carriage (*d*).

The plaintiff was not ready and willing to pay to the defendant his reasonable hire for the carriage of the said goods.

Denial of Negligence alleged, see "Negligence," post, p. 884.

for the payment of money within the prescribed time (seven days) makes it absolutely void as to the personal chattels comprised therein (45 & 46 Vict. c. 40, s. 8). Whilst in the case of other bills of sale, the failure to register avoids them only as against the persons named in sect. 8 of 41 & 42 Vict. c. 31, such as execution creditors, trustees in bankruptcy, &c., of the grantors, and only in respect of property in, or the right to possession of chattels comprised therein, which are, at or after the seizure in execution, petition, &c., in the possession, or apparent possession of the grantors. Although a bill of sale may be void under sect. 9 the money advanced may be recovered (*Davies* v. *Rees*, 17 Q. B. D. 408; 55 L. J. Q. B. 363; cf. *Ex p. Byrne*, 20 Q. B. D. 310; 57 L. J. Q. B 263; *Cochrane* v. *Entwistle*, 25 Q. B. D. 116; 59 L. J. Q. B. 418).

(*c*) See "*Carriers*," *ante*, pp. 141, 336, 622.

(*d*) See *Pickford* v. *Grand Junction Ry. Co.*, 8 M. & W. 372.

Defence of Contributory Negligence to an Action for Damages for Personal Injuries (*e*).

There was contributory negligence on the part of the plaintiff.

Particulars :—[*Here set out shortly the facts relied on as constituting the contributory negligence.*]

COMMON.

I. DEFENCES TO ACTIONS FOR DISTURBANCE OF COMMON (*f*).

Denial of the alleged Acts of Disturbance, see ante, pp. 527, 529.

Denial of the Plaintiff's Property in or Possession of the Land in respect of which he claims the Right of Common.

The said messuage and land were not the plaintiff's [*or*, The plaintiff was not possessed of the said messuage and land, *or, as the case may be, according to the form of the allegation traversed*].

Denial of a general Averment of the Plaintiff's Right of Common.

The plaintiff was not entitled to the said common of pasture over the said land. [*The grounds of title to the right which are alleged in the statement of claim must be specifically denied, e.g., by adding to, or substituting for the above denial, in a case where the right is claimed under the Prescription Act,* The alleged right of common was not enjoyed for thirty (*or*, sixty) years, &c. ; *or*, The alleged enjoyment of the common was not as of right, but was by the [written] permission of the then occupiers of the said land. Particulars :—*Set out the particulars of the permission relied on.*]

(*e*) See "*Negligence*," *post*, p. 884.

(*f*) In an action for disturbance of common, the plaintiff's property in or possession of the tenements in respect of which he claims, and also the averments of the right claimed must, if disputed, be specifically denied or dealt with in the defence.

The provisions contained in s. 5 of the Prescription Act (2 & 3 Will. 4, c. 71), with respect to the pleading of general allegations and denials of the right in actions for disturbance of prescriptive rights, would appear to be superseded by the Judicature Acts, and the Rules thereunder. (See Jud. Act, 1875, ss. 21, 33 (2) ; Ord. XIX., rr. 1, 4, 15, 17 ; and *ante*, p. 339.)

II. Defences setting up a Right of Common in Actions for Trespass to Land, &c. (*g*).

Defence alleging a Right of Common of Pasture under the Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 1.

The defendant at the time of the alleged trespass [*or*, at the times of the doing of the acts complained of] was possessed of [a messuage and] land

(*g*) A defendant who claims the right by prescription or otherwise to do what is complained of, must allege such right in his defence, and must state the grounds of his claim. (See *ante*, p. 339; and *post*, pp. 889, 954.)

A prescriptive right may still be pleaded in the old form, as annexed to the estate in fee, and as existing from time immemorial; but it must then be supported as such immemorial right by the evidence, and cannot be aided by the statute. (See *Welcome* v. *Upton*, 5 M. & W. 398; 6 *Ib.* 536.)

It is often advisable to plead a defence of prescription at common law as well as a defence of prescription under the statute, to meet the case of a failure of the proof under the latter in consequence of an interruption in the use. (See *Parker* v. *Mitchell*, 11 A. & E. 788; *Lowe* v. *Carpenter*, 6 Ex. 825; *Hollins* v. *Verney*, 13 Q. B. D. 304; 53 L. J. Q. B. 430; and see *post*, p. 949.) It is sometimes advisable to plead a defence of enjoyment of a prescriptive right under the statute for the period of sixty years as well as for the period of thirty years. In such cases, the enjoyment for the thirty years, and the enjoyment for the sixty years may be pleaded in separate paragraphs, of which the second may be thus worded, "The defendant repeats the allegations contained in the preceding paragraph with the substitution of 'sixty years' for 'thirty years.'"

As to defences on the ground of lost grant, see "*Ways*," *post*, p. 949.

Before the Prescription Act, 1832, the plea of a right of common or other prescriptive right claimed as *appurtenant* to land stated the defendant's title to the land by showing a seisin in fee in himself, or in some person through whom he derived title, and then stated that *he and all those whose estate he had* in the land from time immemorial had the right. (See 1 Wms. Saund., 1871 ed., 624; *Attorney-General* v. *Gauntlett*, 3 Y. & J. 93.) This mode of pleading should still be followed in defences which assert a prescriptive right at common law from time immemorial. Under the Prescription Act, the claim is made in the right of the occupier, and it is not necessary to state that the person claiming the right is owner in fee of the land or to derive title from the owner in fee. (See s. 5, cited *ante*, p. 339.)

A defence asserting a right of common *in gross*, not being appurtenant to any land, may state that the defendant and all his ancestors, whose heir he is, from time immemorial had the right, without laying title to any land. (See 1 Wms. Saund., 1871 ed., 623; and see *Welcome* v. *Upton*, *supra*.)

Claims of easements in gross or profits *a prendre* in gross are not within the Prescription Act (*Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687; 34 L. J. C. P. 309. See "*Fishery*," *post*, p. 852).

A joinder of issue operates "as a denial of every material allegation of facts" in the defence (Ord. XIX., r. 18, and see *ante*, p. 545). Thus, in the case of defences under the Prescription Act, it puts in issue an uninterrupted enjoyment as of right, and the plaintiff may show any matters inconsistent with such enjoyment (see s. 5, cited *ante*, p. 339), as that it was enjoyed during a portion of the time by licence (*Tickle* v. *Brown*, 4 A. & E. 369; *Bright* v. *Walker*, 1 C. M. & R. 211; *Beasley* v. *Clarke*, 2 Bing. N. C. 705; see *Hollins* v. *Verney*, *supra*; "*Ways*," *post*, p. 953). But it may be doubted whether such joinder of issue includes a denial of the allegation that the acts complained of were done in exercise of the right claimed, and it is advisable to reply this specially. (See *post*, p. 954.)

It was formerly held that an agreement or licence giving the right during the whole period must be specially replied (*post*, p. 954; *Kinloch* v. *Nevile*, 6 M. & W. 795, 806),

called ——, in the parish of ——, in the county of ——, and the occupiers of the said [messuage and] land for thirty [*or*, sixty] years before this action enjoyed as of right and without interruption common of pasture over the said land of the plaintiff for all their cattle levant and couchant upon the said land of the defendant at all times of the year, as appurtenant to the said land of the defendant, and the alleged trespass was [*or*, the acts complained of were] a use by the defendant of the said right of common.

Defence by a Freeholder, of a Right of Common by Prescription at Common Law.

At the time of the alleged trespass the defendant was seised in fee of land called ——, in the parish of ——, in the county of ——, and he and all those whose estate he then had in the said land from time immemorial enjoyed common of pasture over the land of the plaintiff referred to in the statement of claim for all their cattle levant and couchant upon the said land of the defendant at all times of the year, as to the said land of the defendant appertaining; and the alleged trespass was a use by the defendant of the said right of common.

Defence by a Tenant, of a Right of Common by Prescription at Common Law.

Before the alleged trespass and at the time of the making of the demise hereinafter mentioned, *J. K.* was seised in fee of land, called ——, situate at ——, and he and all those whose estate he then had in the said land from time immemorial enjoyed common of pasture for themselves and their tenants over the land of the plaintiff referred to in the statement of claim for all their cattle levant and couchant upon the said land of the said *J. K.* at all times of the year, as to the said land of the said *J. K.* appertaining; and the said *J. K.*, being so seised as aforesaid, before the alleged trespass by deed dated the —— ——, 19—, demised the said land with the appurtenances to the defendant to hold the same for —— years from the —— ——, 19— [*or*, from year to year so long as the said *J. K.* and the defendant should

and this, it is submitted, is still so. Where the defendant pleads a prescriptive right for the full period, a mere verbal licence for the whole period could not be set up in reply (*Tickle* v. *Brown*, *supra*; *Kinloch* v. *Nevile*, *supra*; *post*, p. 954; see ss. 1, 2 of the Prescription Act, cited *ante*, p. 338, and *post*, p. 947).

Unity of possession during the whole or part of the period may be proved under such joinder of issue (*Onley* v. *Gardiner*, 4 M. & W. 496; *England* v. *Wall*, 10 M. & W. 699; *Clayton* v. *Corby*, 2 Q. B. 813).

All provisoes, exceptions, incapacities, disabilities, &c. mentioned in the Prescription Act, as infancy, idiotcy, insanity, coverture, tenancy for life, pendency of action, terms of years or for life, during which the time is not computed, must be specially replied to a defence pleaded under that Act. (See 2 & 3 Will. 4, c. 71, ss. 5, 7, 8; "*Common*," *ante*, pp. 338, 339, and "*Ways*," *post*, p. 953; Ord. XIX., r. 15; *Pye* v. *Mumford*, 11 Q. B. 666.)

respectively please], by virtue of which said demise the defendant on the ——— ———, 19—, and before the alleged trespass entered into the said land, and until and at the time of the alleged trespass was possessed thereof; and the alleged trespass was a use by the defendant of the said right of common.

Reply of Approvement of Common (h).

Before the trespasses complained of in this action, the close referred to was parcel of a waste situate in the manor of ———, of which waste *J. K.*, as and being the lord of the said manor, was seised in fee, and the said *J. K.*, being so seised, on or about the ——— ———, 19—, before the said trespasses approved and enclosed the said close from the residue of the said waste [*if the enclosure was made after the 22nd of September, 1893, add* with the consent of the Board of Agriculture], leaving sufficient common of pasture there for the use of the defendant and of all other persons entitled to right of common over the said waste, together with sufficient ingress and egress for them to use their said right of common upon all the said residue of the said waste; and the said *J. K.* afterwards, and before the said trespasses, demised the said close to the plaintiff by a deed dated the ——— ———, 19—.

See forms under the old system of pleas—of a right of common of pasture by custom within a manor: Arlett v. *Ellis*, 7 B. & C. 346; 9 *Ib.* 671; *by a burgess of a right of common of pasture granted to the borough: Mellor* v. *Spateman*, 1 Wms. Saund., 1871 ed., p. 612; *Parry* v. *Thomas*, 5 Ex. 37; *of a right of sole pasturage in gross: Welcome* v. *Upton*, 5 M. & W. 398; 6 *Ib.* 536; *of rights of common of pasture pur cause de vicinage: Heath* v. *Elliott*, 4 Bing. N. C. 388; *Jones* v. *Robin*, 10 Q. B. 581; *Prichard* v. *Powell*, *Ib.* 589; *Clarke* v. *Tinker*, *Ib.* 604; *of a right of common of pasture for a certain number of cattle of a certain kind by reason of occupancy of land: Nichols* v. *Chapman*, 5 H. & N. 643; 29 L. J. Ex. 461; *by a copyhold tenant of a right of common of turbary within the manor:*

(*h*) The right of approvement exists under the statute of Westminster the second (20 Hen. 3, c. 4) and the statute of Merton (13 Edw. 1, st. 1, c. 46) (*Patrick* v. *Stubbs*, 9 M. & W. 830; *Robinson* v. *Duleep Singh*, 11 Ch. D. 798). A custom for the lords of a manor to enclose waste without limit against the rights of the commoners would be ordinarily bad as tending to the destruction of the common (*Badger* v. *Ford*, 3 B. & Ald. 153; *Arlett* v. *Ellis*, 7 B. & C. 346; see "*Common*," *ante*, p. 340; "*Custom*," *post*, p. 830). A custom to make similar enclosures with the consent of the homage may be supported (*Ramsey* v. *Cruddas*, [1893] 1 Q. B. 228), and a custom to enclose parcels of the waste, leaving a sufficiency of common with ingress and egress, may be good. (See cases cited *supra*, and *ante*, p. 340.)

By the Law of Commons Amendment Act, 1893 (56 & 57 Vict. c. 57, s. 2), "An enclosure or approvement of any part of a common purporting to be made under the statute of Merton and the statute of Westminster the second, or either of such statutes, shall not be valid unless it is made with the consent of the Board of Agriculture."

Grant v. *Gunner*, 1 Taunt. 436 ; *of a right to dig minerals* : *Paddock* v. *Forrester*, 3 M. & G. 903 ; *by a customary tenant of a right to dig coals under his tenement* : *Anglesey* v. *Hatherton*, 10 M. & W. 218 ; *Wilkinson* v. *Proud*, 11 M. & W. 33 ; *of a right to dig clay for bricks* : *Clayton* v. *Corby*, 2 Q. B. 813 ; *of a right to enter a close to take sand and marl* : *Blewett* v. *Tregonning*, 3 A. & E. 554 ; *Glover* v. *Dixon*, 9 Ex. 158. See *Heath* v. *Deane*, [1905] 2 Ch. 86 ; 74 L. J. Ch. 466.

See a Defence justifying a Right to dig Gravel, leaving sufficient Pasture for the Commoners, Robinson v. *Duleep Singh*, 11 Ch. D. 800 ; 48 L. J. Ch. 758 ; *and see a Defence of Right as Freeholders and Copyholders of a Manor to quarry Stone, Heath* v. *Deane, supra.*

Company.

See "*Corporation*," *post*, p. 828.

Confession of Defence.

See ante, p. 642.

Conversion (*i*).

Denial of the alleged Conversion.

The defendant did not deprive the plaintiff of [the possession of] the said goods or any of them. [*Add denials of any specific acts of conversion charged.*]

Defence denying the Plaintiff's Property in the Goods (*k*).

The said goods [*or*, chattels, *or, as the case may be*] were not [nor were any of them] the plaintiff's.

(*R. S. C.*, 1883, *App. D., Sect. VI.*)

(*i*) See *ante*, p. 344.

(*k*) The plaintiff's property in the goods, if disputed, must be specifically denied. (See Ord. XIX., rr. 13, 15, cited *ante*, pp. 523, 527.) The defence denying that the goods were the plaintiff's denies the plaintiff's *right to the possession* of the goods, as against the defendant, at the time of the conversion (*Nicolls* v. *Bastard*, 2 C. M. & R. 662 ; *Isaac* v. *Belcher*, 5 M. & W. 139). Thus, under this defence it seems that the defendant may show that the plaintiff's wife, with his authority, gave the goods to the defendant in discharge of a debt, so that the taking of the goods thereupon, which was the conversion complained of, was the taking of his own goods (*Ringham* v. *Clements*, 12 Q. B. 260), but it would be better in such a case to plead the facts specially.

Defence to an Action by a Trustee in Bankruptcy for a Conversion before the Bankruptcy, denying the Bankrupt's Property in the Goods (l).

The said goods were not, nor were any of them, the goods of the said *E. F.*

Defence to an Action by a Trustee in Bankruptcy for a Conversion after the Bankruptcy, denying the Trustee's Property in the Goods (l).

The said goods were not, nor were any of them, the goods of the plaintiff [as trustee] as alleged or at all.

Defence that the Goods were given to the Defendant, see "Gift," post, p. 856.

The plaintiff must prove a right of present possession of the goods, and not merely a reversionary right.

Possession in fact is *primâ facie* evidence of property, and is sufficient to maintain this issue against a wrongdoer who cannot show a better title, see *post*, p. 933.

Under the above defence the defendant was formerly allowed to set up facts amounting to an estoppel *in pais* against the plaintiff, as that the defendant purchased the goods from a person who with the plaintiff's consent sold the goods as apparent owner thereof, and that the plaintiff knowing that the defendant was an intending purchaser, purposely concealed the facts from the defendant and by his words or conduct encouraged and induced the defendant to become such purchaser in the belief that the person who sold the goods was the real owner thereof. (See *Pickard* v. *Sears*, 6 A. & E. 469; *Gregg* v. *Wells*, 10 A. & E. 90.) Now, where such defence is relied upon it should be expressly pleaded. (See Ord. XIX., r. 15; and see a similar form, *National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177.) See "*Estoppel*," *ante*, p. 546.

A wrongdoer, who has made away with the goods of another, or wrongfully parted with them cannot set up that he thus acted before the title of the plaintiff to the goods accrued, when sued for a conversion, or for detention of the goods by one having a right to the present possession of the goods (*Short* v. *Simpson*, L. R. 1 C. P. 248; 35 L. J. C. P. 147; *Bristol Bank* v. *Midland Ry. Co.*, [1891] 2 Q. B. 653; 61 L. J. Q. B. 115; *In the goods of Pryse*, [1904] p. 301).

Under the above defence it would seem permissible to prove that before the alleged conversion a person other than the plaintiff, being then the owner of the goods, gave them to the defendant, but it would in general be advisable to plead such facts specially, in order to avoid any question as to surprise. (See Ord. XIX., r. 15, and "*Gift*," *post*, p. 856.)

A judgment in conversion for the value of the goods, followed by satisfaction, vests the property in the goods in the defendant. (See *ante*, p. 349.)

(*l*) The title of a trustee in bankruptcy has in general relation back to the act of bankruptcy on which a receiving order is made, or, if there have been more acts of bankruptcy than one, to the first of the acts of bankruptcy committed within three months next before the petition. (See the Bankruptcy Act, 1883, ss. 43, 44, 54; *ante*, p. 100.)

As to transactions which are protected under the Bankruptcy Act, see s. 49.

Defence that the Defendant was Joint Owner of the Goods with the Plaintiff (*m*).

The defendant was joint owner [*or*, tenant in common] of the goods with the plaintiff, and the acts complained of were acts which he was entitled to do and did as such joint owner [*or*, tenant in common].

Defence that the Defendant did what is complained of by the Plaintiff's Leave: see "*Leave and Licence*," *post*, p. 864.

Defence that the Defendant did what is complained of in Exercise of a Right of Lien: see "*Lien*," *post*, p. 866.

For forms of Defences justifying the taking of Goods under a Distress or under Process, see "*Distress*," *post*, p. 848; "*Process*," *post*, p. 898.

Defence to an Action for Conversion by a Sale of the Goods, that the Plaintiff afterwards waived the alleged Tort by claiming the Proceeds of the Sale and receiving part thereof (*n*).

The acts complained of consisted in the defendant selling and delivering the said goods to *A. B.*, and afterwards by letter dated the —— ——, 19— [*or, as the case may be*], the plaintiff waived the wrongfulness, if any, of the said acts, and affirmed the said sale and delivery, and claimed the proceeds of the said sale, amounting to £——, as money received by the defendant for the plaintiff's use, and under that claim the defendant before

---

(*m*) An action for conversion will not lie against a joint owner (or tenant in common) unless he has done something which has destroyed the common property, or has directly excluded his co-tenant from the use thereof, and denied him the exercise of his rights in relation thereto (*Jacobs* v. *Seward*, L. R. 5 H. L. 464; 41 L. J. C. P. 221; 2 Wms. Saund., 1871 ed., pp. 111 *et seq.* See *ante*, p. 347). A mere sale by one joint tenant does not amount to a conversion, as it does not affect the property of the other joint owner; but if it be made in such a way, *e.g.*, by sale in market overt, as to pass the whole property to the purchaser, and totally deprive the joint owner of the goods, it then is a conversion (*Mayhew* v. *Herrick*, 7 C. B. 229). So, the creation of a lien by one joint owner is not a conversion (*Jones* v. *Brown*, 25 L. J. Ex. 345). A defence justifying as joint owner with the plaintiff should show that the alleged conversion was merely an exercise of the right of a joint owner. (See *Higgins* v. *Thomas*, 8 Q. B. 908; *Jones* v. *Brown*, *supra*.)

(*n*) See *ante*, p. 262. When the conversion consists of a wrongful sale of the goods, the owner may waive the tort and sue for the proceeds of the sale as money received, and it seems that, if he recover, the judgment may be pleaded as a bar to a subsequent action for the wrongful conversion (*Lythgoe* v. *Vernon*, 5 H. & W. 180; 29 L. J. Ex. 164; *Buckland* v. *Johnson*, 15 C. B. 145; *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584; 7 *Ib.* 547, 554; 40 L. J. C. P. 281; 41 *Ib.* 190).

action on the —— ——, 19—, paid to the plaintiff, and the plaintiff received from him [£——, part of] the said proceeds, as money received by the defendant for the plaintiff's use.

Defence of Stoppage in Transitu by an Unpaid Vendor (o).

Previously to the alleged conversion, viz., on the —— ——, 19—, the goods were sold by the defendant to the plaintiff on credit, and on the terms contained in a contract in writing dated the —— ——, 19— [*or*, in letters dated —— (*or*, *as the case may be*)], that they should be sent by railway to the plaintiff at *X.*, and the defendant accordingly, on the —— ——, 19—, delivered the said goods to the —— Railway Company as carriers to carry them to *X.* and there deliver them to the plaintiff; and before the said goods were delivered to the plaintiff, and whilst the said goods were in the hands of the said railway company as such carriers as aforesaid, the plaintiff became insolvent, and thereupon, the plaintiff not having paid the price of the said goods, and not being ready and willing to pay the same, the defendant, on the —— ——, 19—, took possession of the said goods, which taking of possession is the alleged conversion.

A like form (o).

The act complained of was an enforcement of the right to stop the goods in transit, to which right the defendant was and is entitled.

Particulars.

The right arose from the insolvency of the plaintiff, who bought the goods on credit from the defendant, who has not been paid for the goods. The stoppage of the goods was effected by the defendant, on the —— ——, 19—, taking the goods out of the hands of *X.*, a carrier, at ——, whilst they were in transit to ——, their destination.

(*o*) In general an unpaid vendor of goods who has delivered them to a carrier for carriage and delivery to the purchaser is entitled, in the event of the purchaser becoming insolvent, to stop and resume possession of the goods whilst they are in course of transit to the purchaser. They are considered to be in course of transit whilst in the hands of any agent whose sole duty it is to transmit them, but the transit is at an end when the goods have reached the vendee, or an agent of the vendee whose duty it is to hold for the vendee to wait further instructions as to their ultimate destination. (See Sale of Goods Act, 1893, ss. 44—46; and *Lickbarrow* v. *Mason*, 1 Sm. L. C., 11th ed., 693, 738, and *post*, p. 870.)

COPYRIGHT (*p*).

Denial of Infringement of the Copyright (*q*).

The defendant denies that he —— [*denying specifically the acts of infringement alleged*]. [*The R. S. C., App. D., Sect. VI., give the following form:* The defendant did not infringe; *but a specific traverse is better.*]

Defence where the Plaintiff claims as Author of a Book, denying that the Plaintiff was the Author (*r*).

The plaintiff was not and is not the author of the said ——.
(*R. S. C.*, 1883, *App. D., Sect. VI.*)

A like form: Hayward v. *Lely*, 56 L. T. 418.

The like, in a more specific form, where no separate Notice of Objections is delivered by the Defendant (*r*).

1. The plaintiff is not the author of the said book.
2. *J. K.* was [*or* is] the author of the book.
3. The book was first published at ——, on the —— ——, 19—, under the title of ——.

Defence where the Plaintiff claims as Proprietor of the Copyright in a Book, that the Plaintiff was not such Proprietor (*r*).

1. The plaintiff was not and is not the proprietor of the copyright in the said book.
2. *J. K.* was [and is] the proprietor of the copyright in the book.
3. [*The same as paragraph* 3 *of the preceding form.*]

(*p*) See *ante*, p. 351.

(*q*) A mere denial of alleged infringements will not put in issue the existence or validity of the copyright. If the copyright is disputed, the grounds on which it is disputed should be pleaded specially. (See *ante*, p. 527; *post*, p. 827.)

(*r*) As to copyright in books, and the meaning of that word, see *ante*, p. 352, and as to the period of limitations, *post*, p. 874.

By s. 16 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), it is enacted that in actions for infringing copyright in a book "the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such

Defence where the Plaintiff claims as Assignee of the Copyright in a Book, denying the Assignment.

The defendant denies that the plaintiff is the assignee of the said copyright [*or*, The said copyright was not assigned to the plaintiff].

(*See R. S. C.*, 1883, *App. D.*, *Sect. VI.*)

Defence to an Action for Infringement of the Copyright in a Book, that the Book was not registered (*s*).

The book was not registered.

(*R. S. C.*, 1883, *App. D.*, *Sect. VI.*)

---

book, or the proprietor of the copyright therein, together with the title of such book, and the time when, and the place where, such book was first published, otherwise the defendant in such action shall not at the trial or hearing be allowed to give any evidence " to the effect above mentioned, " and at such trial or hearing no other objections shall be allowed to be made on behalf of such defendant than the objections stated in such notice " ; and the defendant shall not be allowed to " give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice."

The information required by this section must still be given either in the defence or in a notice of objections delivered separately (*Collette* v. *Goode*, 7 Ch. D. 842 ; 47 L. J. Ch. 370 ; *Hole* v. *Bradbury*, 12 Ch. D. 886 ; 48 L. J. Ch. 673 ; *Dicks* v. *Yates*, 50 L. J. Ch. at p. 813 ; 44 L. T. at p. 664 ; *Coote* v. *Judd*, 23 Ch. D. 727 ; 53 L. J. Ch. 36 ; *Hayward* v. *Lely*, 56 L. T. 418 ; Chitty's Forms, 13th ed., p. 190). If the defendant delivers a separate notice of objections, he should do so at the time of pleading. (See *Coote* v. *Judd*, *supra* ; *Hayward* v. *Lely*, *supra*.) If subsequently to the delivery of his defence or of a notice of objections, he discovers that the information thereby given is erroneous or insufficient, he will in general be allowed to amend it or to deliver a further notice of objections, provided that he does so without delay and within a reasonable time before the trial. (See *Hayward* v. *Lely*, *supra*.)

(*s*) Registration is a condition precedent to an action for infringement of copyright under the 5 & 6 Vict. c. 45. (See s. 24 ; *Stannard* v. *Lee*, L. R. 6 Ch. 346 ; 40 L. J. Ch. 489 ; *Coote* v. *Judd*, *supra* ; *Thomas* v. *Turner*, 33 Ch. D. 292 ; 56 L. J. Ch. 56 ; *Warne* v. *Lawrence*, 54 L. T. 371 ; 34 W. R. 452 ; *Cate* v. *Devon Newspaper Co.*, 40 Ch. D. 500 ; 68 L. J. Ch. 288.) As to what is a sufficient registration, see ss. 13, 19. The registration is bad if the name entered as that of the publisher is not that of the first publisher (*Coote* v. *Judd*, *supra*), or if the date of the first publication is wrongly given (*Thomas* v. *Turner*, *supra*). A book cannot be validly registered before publication (*Maxwell* v. *Hogg*, L. R. 2 Ch. 307 ; 36 L. J. Ch. 433 ; *Henderson* v. *Maxwell*, 5 Ch. D. 892 ; 46 L. J. Ch. 891). The assignee of copyright under this Act cannot, it would seem, sue for infringement unless he is on the register (*Liverpool Brokers* v. *Commercial Press*, [1897] 2 Q. B. 1 ; 66 L. J. Q. B. 405 ; but see *Wood* v. *Boosey*, L. R. 2 Q. B. 340 ; 36 L. J. Q. B. 103).

As to the registration of newspapers under ss. 18, 19 of this Act, see *ante*, p. 352. Registration under the Newspaper Libel Act, 1881, is not a condition precedent to an action for infringement of copyright in a newspaper (*Cate* v. *Devon Newspaper Co.*, *supra*).

Defence to a like Action, that the Copyright in the Book had expired before the Date of the Infringement (*see* 5 & 6 *Vict. c.* 45, *s.* 3).

The said book was first published under the title of —— at ——, on the —— ——, 18—, more than 42 years before the date of any of the alleged infringements, and —— ——, the author of the book, died on the —— ——, 19—, more than seven years before the date of any of the alleged infringements.

Notice of Objections relied upon by the Defendant in an Action for Infringement of Copyright in a Book (*t*).

[*Title as usual.*]

Take notice that the above-named defendant intends at the trial of this action to rely on the following objections:—

1. That *J. K.* and not the plaintiff was the author of the book referred to in the statement of claim.

2. That *L. M.* and not the plaintiff was the first publisher of the said book.

3. That *N. O.* and not the plaintiff is the proprietor of the said copyright.

4. That the said book was first published with the title —— [*specify the title of the book as first published*], on the —— ——, 19— [*specify the date of first publication*], at —— [*specify the place of the first publication*].

[*State any other objections in the like manner.*]

To Mr. *E. F.*, Dated the —— ——, 19—.

The Plaintiff's solicitor [*or* agent].

G. H.,

The Defendant's solicitor [*or* agent].

CORPORATION (*u*).

COUNTY COURTS (*x*).

(*t*) As to notices of objections, see *ante*, p. 826.

(*u*) See *ante*, pp. 359, 360.

As to cases in which special protection is afforded to public authorities or their officials, see *post*, p. 902.

(*x*) See *ante*, p. 361, and as to when officials are in general entitled to the protection afforded by s. 1 of the Public Authorities Act, 1893, see *post*, p. 901.)

CUSTOM (*y*).

See forms under the old system of pleas—Of a right of common of pasture by custom within a manor: Arlett v. *Ellis*, 7 B. & C. 346 ; 9 B. & C. 671 ; *of a custom in a manor to seize heriots: Kingsmill* v. *Bull*, 9 East, 185 ; *Price* v. *Woodhouse*, 16 M. & W. 1 ; *of a custom in a manor to seize quousque to*

(*y*) A custom is a usage which obtains the force of law within a particular manor or parish or district, or at a particular place, in respect of the persons or things which it concerns. It must be certain, reasonable in itself, commencing from time immemorial and continued without interruption (1 Blackst. Com. 76 ; *Tyson* v. *Smith*, 9 A. & E. 406, 421 ; *Blewett* v. *Tregonning*, 3 A. & E. 554 ; *Rogers* v. *Taylor*, 1 H. & N. 706 ; 26 L. J. Ex. 203). Time immemorial dates from the beginning of the reign of Richard I., A.D. 1189 (2 Blackst. Com. 31). Proof of uninterrupted modern usage is presumptive evidence of the previous existence of the custom, but may be rebutted by proof of its non-existence at any time within the above period of legal memory (1 Blackst. Com. 76 ; 2 *Ib.* 31 ; *Kingsmill* v. *Bull*, 9 East, 185 ; *Jenkins* v. *Harvey*, 1 C. M. & R. 877 ; *Mercer* v. *Denne*, *infra*). Thus a custom to demand and have certain fees may be rebutted by the rankness of the fee at some previous time within that period (*Bryant* v. *Foot*, L. R. 2 Q. B. 161 ; 3 *Ib.* 497). But there may be a valid custom for the payment of a reasonable toll or fee, varying in amount with the value of the money (*Lawrence* v. *Hitch*, L. R. 3 Q. B. 521 ; 37 L. J. Q. B. 209 ; *Mills* v. *Mayor of Colchester*, L. R. 2 C. P. 476 ; 3 *Ib.* 575 ; 36 L. J. C. P. 210 ; 37 *Ib.* 278).

The payment of anchorage tolls from time immemorial by the owners of ships anchoring at a certain place to the lords of the manor was held sufficient to found an inference of the existence of a port there, to which such tolls would be lawfully incident (*Foreman* v. *Free Fishers of Whitstable*, L. R. 4 H. L. 266).

A profit *à prendre* in the soil of another cannot be claimed by custom, except in the case of a copyhold tenant against his lord (*Gateward's Case*, 6 Rep. 59 b ; 1 Wms. Saund., 1871 ed., 619, 620 ; *R.* v. *Churchill*, 4 B. & C. 750, 755 ; *Blewett* v. *Tregonning*, 3 A. & E. 562 ; *Constable* v. *Nicholson*, 14 C. B. N. S. 230 ; 32 L. J. C. P. 240 ; *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135 ; see *Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633 ; 52 L. J. Q. B. 193 ; *Smith* v. *Andrews*, [1891] 2 Ch. 678). Thus, a claim by the inhabitants of a parish to take drifted sand from the land of another cannot be supported by custom (*Blewett* v. *Tregonning*, *supra*) ; nor can a claim by the inhabitants of a township to take stones from the land of another to repair the highway (*Constable* v. *Nicholson*, *supra*). An easement may be so claimed (see *per* Lord Cairns, *Goodman* v. *Mayor of Saltash*, *supra*) as a right in the inhabitants of a parish of washing and watering cattle at a pond, or of using a pond or well (*Manning* v. *Wasdale*, 5 A. & E. 758 ; and see *Race* v. *Ward*, 4 E. & B. 702 ; 7 *Ib.* 384 ; 24 L. J. Q. B. 153 ; 26 *Ib.* 133), or of using certain land in the parish for purposes of recreation at any times in the year (*Hall* v. *Nottingham*, 1 Ex. D. 1 ; 45 L. J. Ex. 50).

A custom for all the citizens of a city to hold horse-races on a certain close on a certain day in every year is good (*Mounsey* v. *Ismay*, 1 H. & C. 729 ; 32 L. J. Ex. 94 ; and see *S. C.*, 3 H. & C. 486 ; 34 L. J. Ex. 52 ; and *Sowerby* v. *Coleman*, *infra*). A custom for all victuallers in the realm to erect booths at a fair on paying toll to the owner of the soil was allowed to be good (*Tyson* v. *Smith*, 9 A. & E. 406, 425 ; see *Elwood* v. *Bullock*, 6 Q. B. 483 ; *Simson* v. *Wells*, L. R. 7 Q. B. 214). So also was a custom for all inhabitants of a parish who were fishermen to dry their nets on a particular piece of land adjoining the sea (*Mercer* v. *Denne*, [1904] 2 Ch. 534 ; 74 L. J. Ch. 71, affd. 12 Times Rep. 760). The custom of tin-bounders in Cornwall to dig for tin in the land of another, paying a proportion of the tin as a toll, was also allowed to be good (*Rogers* v. *Brenton*, 10 Q. B. 26). A custom for the inhabitants of several parishes to exercise the right of recreation over land in one of such parishes is too wide, and is bad (*Edwards* v. *Jenkins*, [1896] 1 Ch. 308 ; 65 L. J. Ch. 222). Where the claim is by

enforce admittance and fines: Phypers v. *Eburn*, 3 Bing. N. C. 250; *of a custom in a township for the inhabitants to use a well: Race* v. *Ward*, 4 E. & B. 702; 7 *Ib.* 384; 26 L. J. Q. B. 133; *of a custom in a parish for the inhabitants to beat the bounds: Taylor* v. *Devey*, 7 A. & E. 409; *of a custom for the citizens of a city to hold horse races on a close of land on a certain day of the year: Mounsey* v. *Ismay*, 1 H. & C. 729; 32 L. J. Ex. 94; *and see* 34 L. J. Ex. 52. *Plea justifying the erection of booths, &c., by a custom to hold a fair on the spot: Tyson* v. *Smith*, 6 A. & E. 745; 9 A. & E. 406; *replication in an action for pulling down the plaintiff's booth, to which defendant pleaded that it was erected on a public highway, that there was a custom to hold a fair in the highway, and to erect booths there, leaving sufficient space for the highway: Elwood* v. *Bullock*, 6 Q. B. 383.

Damage Feasant.

See "*Distress*," *post*, p. 849, *and* "*Replevin*," *post*, p. 907.

inhabitants, they must, it would seem, be those of a parish, township, manor, or other district known to or defined by the law (*Ib.*).

A copyholder may claim common or other profit in the lord's soil by custom within the manor (1 Wms. Saund., 1871 ed., 647; *Foiston* v. *Crachroode*, 4 Co. 31 b; *Arlett* v. *Ellis*, 7 B. & C. 346; 9 *Ib.* 671).

A custom which may operate to the total destruction of the tenement on which it is exercised is deemed to be unreasonable and bad (*Broadbent* v. *Wilks*, Willes, 360; *Hilton* v. *Earl Granville*, 5 Q. B. 701); as a custom for the lord of the manor to work mines without any limit and without compensation for the damage thereby done to the surface (*Ib.*; and see *Wakefield* v. *Duke of Buccleuch*, L. R. 4 Eq. 613; 36 L. J. Ch. 763); or a custom for the lord of a manor to inclose the waste without limit, where there is a right of common (see *ante*, p. 821). A right of the lord to dig clay-pits was held to be good as against the commoners, as only temporarily depriving them of the pasture (*Bateson* v. *Green*, 5 T. R. 411). A custom for the copyholders of a manor to take unlimited turf from the common was held bad (*Wilson* v. *Willes*, 7 East, 121), but a custom for copyholders to dig clay without stint out of their own tenements was held good (*Marquis of Salisbury* v. *Gladstone*, 9 H. L. C. 692; 34 L. J. C. P. 222; and see *Hanmer* v *Chance*, 4 D. J. & S. 626; 34 L. J. Ch. 413; *Heath* v. *Deane*, [1905] 2 Ch. 85; 74 L. J. Ch. 466). So a local custom whereby agricultural tenants were allowed to take away flints which came to the surface of the land in the ordinary course of good husbandry and to sell them for their own benefit, was held to be valid (*Tucker* v. *Linger*, 21 Ch. D. 18; 8 App. Cas. 508; see *post*, p. 943). A custom for the inhabitants of a parish to exercise and train horses at all seasonable times of the year in a place beyond the limits of the parish was held to be unreasonable and bad (*Sowerby* v. *Coleman*, L. R. 2 Ex. 96; 36 L. J. Ex. 57).

As to "customs of the country" with respect to the mode of cultivating lands, &c., see "*Landlord and Tenant*," *ante*, pp. 221, 709. Such customs need not have existed from time immemorial; it is sufficient if they have existed long enough to make it reasonable to suppose that parties who have not included them by express agreement have contracted with reference to them, and have impliedly agreed to be bound by them (*Tucker* v. *Linger*, *supra*; see *Dashwood* v. *Maguire*, [1891] 3 Ch. 306). This is so also as regards usages of trade (*Crouch* v. *Credit Foncier*, L. R. 8 Q. B. 374).

DEFAMATION.

Denial of the Publishing of the Defamatory Matter in an Action for Libel (*z*).

The defendant did not write or publish [*or*, print or publish, *or*, procure the publication of] the letter [*or*, words, &c., *according to the allegations in the plaintiff's claim*] referred to in the statement of claim [*or*, The defendant denies that he wrote or published, &c.].

The like, in an Action for Verbal Slander (*z*).

The defendant did not speak or publish the words complained of [or, any of them].

(*R. S. C.*, 1883, *App. E., Sect. III., No.* 2.)

Defence to an Action for Libel or Slander, denying that the Words referred to the Plaintiff.

The words [*or*, The statements complained of, &c., *according to the allegations in the plaintiff's claim*] did not refer to and were not published of the plaintiff.

(*See R. S. C.*, 1883, *App. E., Sect. III., No.* 2.)

Defence to an Action for Verbal Slander actionable only by reason of Special Damage, denying the Publication of the Words and that they referred to the Plaintiff, together with an Objection in Point of Law (*z*).

1. The defendant did not speak or publish the words.
2. The words did not refer to the plaintiff.
3. The defendant will object that the special damage stated is not sufficient in point of law to sustain the action.

(*R. S. C.*, 1883, *App. E., Sect. III., No.* 2.)

(*z*) A mere denial that the words were spoken "falsely" or "maliciously," or "falsely and maliciously," is embarrassing, for such denial is at best an informal mode of pleading privilege or justification, and a defendant in pleading a defence of privilege or justification must set out the facts on which he relies to show that the publication was privileged or justified. (See *Belt* v. *Lawes*, 51 L. J. Q. B. 359; *Penrhyn* v. *Licensed Victuallers' Mirror*, 7 Times Rep. p. 1.)

Although by Ord. XXI., r. 4 (cited *ante*, p. 529), no denial or defence is necessary as to damages claimed or their amount, and it is, therefore, strictly speaking, unnecessary to plead matters which go merely in mitigation of damages (see *Wood* v. *Earl of Durham*, 21 Q. B. D. 501; 57 L. J. Q. B. 547), it is advisable where special damage is an essential part of the cause of action, that such damage, if disputed, should be expressly denied. (See *ante*, p. 530; and see a form of such denial in R. S. C., 1883, App. D., Sect. VI., cited *post*, p. 946.) If the special damage alleged is insufficient to sustain the action (*e.g.*, if it is too remote), the defendant may object to the claim in

Defence to a like Action, denying the Special Damage (*a*).

The plaintiff did not suffer the alleged or any damage.

Defence to a like Action that the alleged Damage did not result from the Words complained of (*a*).

The alleged damage [if any] was not caused by the speaking or publishing of the words complained of.

Defence to an Action for Slander of the Plaintiff in his Trade, denying that he carried on the Trade (*b*).

The plaintiff did not carry on the trade [*or*, business] of a ——.

Defence to a like Action, denying that the Words had Reference to the Plaintiff's Business (*b*).

The alleged words did not refer to the plaintiff's said [*or*, alleged] trade or business, or to the plaintiff in relation thereto.

Defence to an Action for Libel or Slander in respect of Words alleged with an Innuendo, denying the Meaning imputed by the Innuendo (*c*).

The words were not written [*or*, spoken] or published with, nor do they bear, the meaning [*or*, the meanings or any of the meanings] alleged by the plaintiff [or any defamatory meaning]. [*If the words are also defamatory in their natural sense apart from the innuendo, some further defence must be added as to their natural meaning.*]

---

point of law. (See R. S. C., 1883, App. E., Sect. III., No. 2, cited *ante*, p. 831 ; *Chamberlain* v. *Boyd*, 11 Q. B. D. 407 ; 52 L. J. Q. B. 277.)

A defendant in an action for slander is not entitled to set out in his defence his own version of the words and to justify them according to that version (*Rassam* v. *Budge*, [1893] 1 Q. B. 571 ; 62 L. J. Q. B. 312).

(*a*) See preceding note.

(*b*) In an action for slander of the plaintiff in his office, profession, or trade, or in any special character, the fact of the defendant holding the office or being of the profession or trade, and also the fact of the defamatory matter being written or spoken with reference thereto, must, if disputed, be specifically denied.

(*c*) In an action for libel or slander where the words are alleged with an *innuendo* (see *ante*, p. 364), the defendant, if he desires to deny that they were used in that sense, should distinctly plead such denial. If words alleged with an *innuendo* are defamatory and actionable in their natural sense apart from the meaning imputed to them by the *innuendo*, it seems that the statement of claim must be regarded as alleging two causes of action for defamation, one with the *innuendo*, and one without

Defence to an Action for Slander in respect of Words alleged with an Innuendo, denying the speaking of the Words, and also denying the meaning imputed by the Innuendo: Dalgleish v. *Lowther*, [1899] 2 Q. B. 590, 591.

Defence to an Action for Verbal Slander where the Words charged are alleged with an Innuendo that they impute a Criminal Offence, denying the meaning imputed, and alleging that the Words were merely Vulgar Abuse (*d*).

The words were not published with and did not bear the alleged meaning, they were merely words of vulgar abuse.

The like, in an Action by a Municipal Corporation for Libel where the Words only affected Personal Reputation, that they were not capable of being construed into a Libel against the Corporation: Mayor, &c. of Manchester v. *Williams*, [1891] 1 Q. B. 94.

---

the *innuendo*, so that it is necessary for the defendant to answer both charges. (See *Watkin* v. *Hall*, L. R. 3 Q. B. 396.)

Where words or statements alleged with an *innuendo* are not actionable in their natural sense, and the defendant simply pleads a denial of the *innuendo*, the plaintiff is, in the absence of amendment, bound by the meaning imputed to them by such *innuendo*, and if he fails in proving that the words were published with that meaning, he cannot, in order to establish his claim, set up that the words were spoken with some other special or secondary meaning (*Bremridge* v. *Latimer*, 12 W. R. 878; *Ruel* v. *Tatnell*, 43 L. T. 507; *Capital, &c. Bank* v. *Henty*, 5 C. P. D. 514; 7 App. Cas. 741; 49 L. J. C. P. 830; 52 *Ib.* 232).

(*d*) Where words spoken are only actionable if they impute a criminal offence, and it is desired to prove in defence that no such offence was charged or intended to be imputed by the words, this is often done by showing that the words were, and were received by the hearers as, mere angry or vulgar abuse, and not as really charging a crime.

This may be done, where the words in their ordinary meaning do not impute a criminal offence, but are followed in the claim by an *innuendo* to the effect that a criminal offence was thereby meant to be imputed, by pleading as above. Although probably it would be sufficient in such a case simply to deny the alleged meaning, it would seem, where evidence was intended to be given on the part of the defence, of the whole of the angry or abusive conversation, or language used, and of the circumstances, in support of the view that it was mere abuse, more correct to plead as above so as to give fair notice of the case intended to be set up.

Where the words in their natural meaning impute a crime, it would in the like case be correct to plead in defence that the words "did not and were not understood to impute any criminal offence [*or*, the offence of ——], but were merely words of vulgar abuse."

Objection in Point of Law to a Claim for Words which are not Defamatory in themselves, and which are alleged without any Innuendo or Statement of Facts showing them to be Defamatory (*e*).

The defendant will object that the words complained of are not defamatory in themselves, and that no circumstances are alleged showing them to have been used in any defamatory sense, and that they are insufficient in law to sustain the action.

Defence by a Newsvendor, setting out special Facts to show that he was not responsible as Publishing a Libel (*f*).

1. The defendant did not publish the words complained of.

2. The defendant is a newsvendor at ——, and he sold the copies of the S. newspaper containing the words complained of (which is the alleged publication) in the ordinary course of his business as a newsvendor, innocently, without intention to defame, in ignorance of the fact that the said copies contained matter defamatory of the plaintiff, and without any negligence on his part.

Defence of Privilege, setting out the Facts which gave rise to the Privilege (*g*).

The words [*or*, statements] complained of were written [*or*, spoken, *or*, made] and published by the defendant [if at all] without malice and in the

---

(*e*) In an action for verbal slander, where the words complained of are not actionable in themselves, or as being spoken of the plaintiff in the way of his trade, office, or profession, and there is no *innuendo* and no statement of special damage, or where it clearly appears that the special damage alleged was not the result of the words complained of, or is too remote, or is insufficient in its nature to support the action, the defendant may plead an objection in point of law. (See *Chamberlain* v. *Boyd*, 11 Q. B. D. 407; 52 L. J. Q. B. 277; and see *Simmons* v. *Mitchell*, 6 App. Cas. 156; and R. S. C., 1883, App. E., Sect. III., No. 2, cited *ante*, p. 831.)

So in an action for libel the defendant may plead an objection in point of law, if the statements are not defamatory in their natural sense, and are alleged without any *innuendo* which they are capable of supporting, and without any allegation of circumstances, showing that they were made in some defamatory sense. (See *Cox* v. *Cooper*, 12 W. R. 75; *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; *Mulligan* v. *Cole*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; *Capital, &c. Bank* v. *Henty*, *supra*.)

(*f*) Where a newsvendor in the ordinary course of his business sold copies of a newspaper which contained a libel on the plaintiff, in ignorance of the fact that it contained defamatory matter, and the jury found that there was no negligence on his part, it was held that he was not responsible as publishing the libel but was a mere innocent disseminator (*Emmens* v. *Pottle*, 16 Q. B. D. 354; 55 L. J. Q. B. 51). The same principle would appear to apply to carriers, keepers of circulating libraries and the like disseminators when acting innocently and without negligence (*Ib.*; *Vizetelly* v. *Mudie's*, [1900] 2 Q. B. 170; 69 L. J. Q. B. 645; *Glamorgan Coal Co.* v. *South Wales Miners*, [1903] 2 K. B. at p. 561; and see *ante*, p. 363).

(*g*) **Privileged Communications.**]—On certain occasions a person is privileged to write or to speak honestly according to the best of his belief, and he is not liable to an

belief that they were true, and [*here state the circumstances, e.g.*, in answer to inquiries which were made of the defendant by the said —— —— (*the*

---

action for matter written or spoken on such privileged occasions, although it be false unless he has written or spoken maliciously and has not made a *bonâ fide* use of the occasion (*Stevens* v. *Sampson*, 5 Ex. D. 53; 49 L. J. Q. B. 120; *Clark* v. *Molyneux*, 3 Q. B. D. 237, 246, 249; 47 L. J. Q. B. 230). A communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, the duty not being confined merely to legal duties, but including moral and social duties of imperfect obligation (*Harrison* v. *Bush*, 5 E. & B. 344; 25 L. J. Q. B. 25; *Henwood* v. *Harrison*, L. R. 7 C. P. 606, 622, 623; 41 L. J. C. P. 206, 215; *Davies* v. *Snead*, L. R. 5 Q. B. 608, 611; 39 L. J. Q. B. 202; *Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495; 42 L. J. C. P. 11; *Hamon* v. *Falle*, 4 App. Cas. 247; *Waller* v. *Loch*, 7 Q. B. D. 619; 51 L. J. Q. B. 274; *Stuart* v. *Bell*, [1891] 2 Q. B. 341; 60 L. J. Q. B. 577; *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B. 54; 63 L. J. Q. B. 587). A common instance of a privileged occasion is that of a master answering inquiries about a servant (*per* Blackburn, J., in *Davies* v. *Snead*, *supra*). On such occasions of privilege malice is not inferred from the mere falsehood of the defamatory statement, but must be proved to exist in fact (*Taylor* v. *Hawkins*, 16 Q. B. 308; *Hemmings* v. *Gasson*, E. B. & E. 346; 27 L. J. Q. B. 252; *Webb* v. *East*, 5 Ex. D. 108; 49 L. J. Ex. 250). The wording of the libel itself may, however, be such as to afford evidence of malice, from the language being unnecessarily exaggerated or violent (*Gilpin* v. *Fowler*, 9 Ex. 615; 23 L. J. Ex. 152; *Wright* v. *Woodgate*, 2 C. M. & R. 573; *Spill* v. *Maule*, L. R. 4 Ex. 232, 236; 38 L. J. Ex. 138). So may the mode in which the communication is made, as, for instance, where it is unnecessarily made by telegraph or postcard instead of by sealed letter (*Williamson* v. *Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161; *Hunt* v. *G. N. Ry. Co.*, [1891] 2 Q. B. 189; 60 L. J. 498; *Jenoure* v. *Delmège*, [1891] A. C. 73; 60 L. J. P. C. 11), and is such as to refer to a particular person, or to particular persons (*Sadgrove* v. *Hole*, [1901] 2 Q. B. 1, 6; 70 L. J. Q. B. 455).

Whether the occasion is privileged is a question for the judge; the existence of express malice, if there is any evidence of it, is one for the jury (*Cooke* v. *Wildes*, 5 E. & B. 328; 24 L. J. Q. B. 367; *Huntley* v. *Ward*, 6 C. B. N. S. 514; *Cowles* v. *Potts*, 34 L. J. Q. B. 247; *Gilpin* v. *Fowler*, *supra*; *Spill* v. *Maule*, L. R. 4 Ex. 232, 237; 38 L. J. Ex. 138; *Stace* v. *Griffith*, L. R. 2 C. P. 420). An unnecessary publication of defamatory matter not required for the purpose of making the privileged communication is not privileged, but it is otherwise where there is no publication beyond what is reasonably necessary and usual for such purpose (*Pullman* v. *Hill*, [1891] 1 Q. B. 524; 60 L. J. Q. B. 299; *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842; 63 L. J. Q. B. 401).

Proof that the defendant when he spoke or wrote the defamatory matter complained of knew it, or a portion of it, to be false, affords evidence of malice (*Fountain* v. *Boodle*, 3 Q. B. 5; *Royal Aquarium* v. *Parkinson*, [1892] 1 Q. B. 431, 443). If the defendant, at the time of making the privileged communication complained of, honestly believed it to be true, it is immaterial that he had no reasonable grounds for so believing (*Clark* v. *Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230).

Proof that the defendant was actuated by an indirect motive, such as anger or gross and unreasoning prejudice, in making the defamatory communication complained of is evidence of malice (*Royal Aquarium* v. *Parkinson*, *supra*).

There are some occasions which, on grounds of public policy, are absolutely privileged, and in which no inquiry is permitted as to the intent of the party making use of such occasion. Thus, the statements made by a witness in examination, or by deposition, or affidavit, in the course of a trial or inquiry before a judicial, parliamentary or military tribunal or court, with reference to such trial or inquiry, are privileged, and cannot be made the subject of an action (*Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744; 45 L. J. H. L. 8; *Seaman* v. *Netherclift*, 1 C. P. D. 540; 2 C. P. D.

person to whom the letter, or statements, were addressed or made) with respect to the character of the plaintiff, who had before then been in the

---

53 ; 45 L. J. C. P. 798 ; 46 *Ib.* 128 ; *Goffin* v. *Donnelly*, 6 Q. B. D. 307 ; 50 L. J. Q. B. 303 ; *Pedley* v. *Morris*, 61 L. J. Q. B. 21 ; *Revis* v. *Smith*, 18 C. B. 126 ; 25 L. J. C. P. 195 ; *Henderson* v. *Broomhead*, 4 H. & N. 569 ; 28 L. J. Ex. 360). This applies also to statements made by a witness in an inquiry held on a commission issued by a bishop (*Barrett* v. *Kearns*, [1905] 1 K. B. 504 ; 74 L. J. K. B. 318). The speeches or observations of an advocate, whether a barrister or solicitor, in the course of a trial or inquiry, having reference to such trial or inquiry, are absolutely privileged (*Wood* v. *Gunston*, Styles, 462 ; *R.* v. *Skinner*, Lofft, 55, 56 ; *Dawkins* v. *Rokeby*, *supra* ; *Hodgson* v. *Scarlett*, 1 B. & A. 232 ; *Mackay* v. *Ford*, 5 H. & N. 792 ; 29 L. J. Ex. 404 ; *Munster* v. *Lamb*, 11 Q. B. D. 588 ; 52 L. J. Q. B. 726) ; as also are the judgments or observations of the judge or presiding officer on such trial or inquiry (*Scott* v. *Stansfield*, L. R. 3 Ex. 220 ; 37 L. J. Ex. 155 ; *Thomas* v. *Churton*, 2 B. & S. 475 ; 31 L. J. Q. B. 139 ; *Jekyll* v. *Moore*, 2 N. R. 341). So, too, words spoken by a member of Parliament in his place in Parliament are absolutely privileged (*R.* v. *Lord Abingdon*, 1 Esp. 228 ; *Davison* v. *Duncan*, 7 E. & B. 229, 233 ; 26 L. J. Q. B. 104, 107 ; *Dillon* v. *Balfour*, 20 L. R. Ir. 600) ; as are statements made in a petition to Parliament (*Lake* v. *King*, 1 Wms. Saund., 1871 ed., p. 137 ; though see *Proctor* v. *Webster*, 16 Q. B. D. 112 ; 55 L. J. Q. B. 150) ; or made in a communication relating to State affairs in the course of official duty by one officer of State to another officer of State (*Chatterton* v. *Sec. of State for India*, [1895] 2 Q. B. 189 ; 64 L. J. Q. B. 676).

A county council, when dealing with administrative matters, such as the licences of music halls, is not a "court," and the members of such council have not then an *absolute* privilege with regard to words spoken with reference to the business before them (*Royal Aquarium* v. *Parkinson*, [1892] 1 Q. B. 431 ; 61 L. J. Q. B. 409).

Fair reports of public proceedings in courts of justice are privileged if published without malice, whether published in a newspaper, or pamphlet, or otherwise (*Macdougall* v. *Knight*, 17 Q. B. D. 636 ; 14 App. Cas. 194 ; 25 Q. B. D. 1 ; 59 L. J. Q. B. 517). And by s. 3 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), a fair and accurate contemporaneous report in a newspaper of proceedings publicly heard before any Court exercising judicial authority is privileged subject to the proviso that nothing therein shall authorise the publication of any blasphemous or indecent matter.

By s. 4 of that Act, a fair and accurate report in a newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, local board, public commissioners, select committee of either House of Parliament, justices in quarter sessions, &c., is privileged, but such privilege is destroyed by proof that such report was published or made maliciously ; and the section provides that, whilst not affecting any privilege that may exist apart from its provisions, its protection shall not be available for matter not of public concern, or of which the publication was not for the public benefit ; and further provides that proof that the defendant has refused, or neglected after request, to insert in the publication complained of a reasonable letter or statement of explanation or contradiction shall deprive the defendant of the right to rely on its provisions as a defence. (See *post*, p. 839.)

The publication of matter contained in a public document which the public have a right to inspect will, in general, be held to be privileged in the absence of evidence of malice. (See *Searles* v. *Scarlett*, [1892] 2 Q. B. 56.)

The defence of privilege must, in general, be expressly pleaded, but where the privilege is an *absolute* privilege, and the facts giving rise to such privilege appear on the face of the statement of claim, it would be sufficient to plead an objection in law to the claim as bad upon the ground of such privilege. In pleading privilege it is not enough to state generally that the defamatory matter was a privileged communication.

employment of the defendant as a ——, and who was then seeking to obtain a like employment from the said —— ——].

A like Defence in an Action against a Solicitor: see Baker v. *Carrick*, [1894] 1 Q. B. 838; 63 L. J. Q. B. 399.

Defence of Privilege, in another form (i).

The words were spoken [*or*, written] and published by the defendant [if at all] without malice and in the belief that they were true and on a privileged occasion and under such circumstances as to make them a privileged communication.

Particulars are as follows:—[*Here state the circumstances giving rise to the privilege claimed.*]

For like Defences, see Webb v. *East*, 5 Ex. D. 108; *Hunt* v. *G. N. Ry. Co.*, 60 L. J. Q. B. 498; *Allbutt* v. *General Medical Council*, 23 Q. B. D. 400; 58 L. J. Q. B. 606; *Kimber* v. *Press Association*, [1893] 1 Q. B. 65.

Defence of Absolute Privilege (k).

[*State the grounds on which the absolute privilege is claimed, as, for instance, where the privilege claimed is that of a witness in a judicial proceeding:*— The words complained of were spoken and published by the defendant [if

---

The facts and circumstances raising the privilege should, unless they appear on the face of the statement of claim, be stated in the defence in a concise form, or particulars thereof given therein, so that the ground on which the privilege is claimed may appear. If the facts appearing on the pleadings are manifestly insufficient to raise the privilege claimed, the plaintiff may object in point of law to the defence of privilege.

A question is sometimes raised as to whether it is necessary where qualified privilege is set up as a defence to specially plead express malice in the reply. It is submitted that at all events where the defence of privilege contains, as is usually the case, allegations negativing malice, no special reply is necessary and that the plaintiff may without any special reply prove that the defendant was actuated by actual, or, as it is termed, express malice (*Royal Aquarium* v. *Parkinson*, *supra*; and see note (*k*), *infra*).

(*i*) See preceding note.

(*k*) When the privilege is absolute, it is not lost even if the words are spoken maliciously and *malâ fide* (*Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255; L. R. 7 H. L. 744; *Munster* v. *Lamb*, 11 Q. B. D. 588; 52 L. J. Q. B. 726), or are irrelevant (*Scott* v. *Stansfield*, L. R. 3 Ex. 220; *Munster* v. *Lamb*, *supra*), though it would seem that they must have some sort of connection with the occasion (*Ib.*; *Seaman* v. *Netherclift*, 2 C. P. D. 53; 46 L. J. C. P. 128). In pleading a defence of absolute privilege, it is not necessary expressly to negative malice or to aver *bona fides*. This is usually done in other defences of privilege, though it would seem that strictly speaking the defendant is not bound to plead *bona fides* or an absence of malice in any case where he shows by his pleading that the statements were made on a privileged occasion, because if the occasion is shown to be privileged, the onus of proving malice or *mala fides* is cast

at all] in the course of his examination as a witness upon oath at the trial in the —— Division of the High Court of Justice, of the action of —— *v.* ——, 19—, — No ——, by the Honourable Mr. Justice ——, at the Royal Courts of Justice, on the —— ——, 19—.]

A like Defence in an Action for Statements made as a Witness before a Parliamentary Committee: Goffin v. *Donnelly*, 6 Q. B. D. 307. *Defence that the Words complained of were spoken by the Defendant, who was a Solicitor, as an Advocate in certain Proceedings before a Magistrate: Munster* v. *Lamb*, 11 Q. B. D. 588.

Defence that the Words were a fair and bonâ fide Comment in a public Newspaper upon a Matter of Public Interest, and were published without Malice (*k*).

The words complained of were [part of] an article in the defendant's [said] newspaper, called the —— ——, published at ——, and were and are a fair and bonâ fide comment upon a matter of public interest, viz. [*state the subject of the article, as for instance,* upon the conduct of the

---

upon the plaintiff (*Clark* v. *Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230); and therefore it would appear that the defendant in such case might leave those points to be set up by the plaintiff in his reply (see Ord. XIX., r. 25, cited *ante*, p. 9). But, as this would have the effect of unnecessarily lengthening the pleadings, it is better to adhere to the practice of stating these matters in the defence.

(*k*) Fair and *bonâ fide* comments or criticisms upon matters of public interest and concern are not actionable as libel or slander, although they may affect the reputation of individuals (*Parmiter* v. *Coupland*, 6 M. & W. 105; *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; 41 L. J. Q. B. 14; *Merivale* v. *Carson*, 20 Q. B. D. 275; *Davis* v. *Duncan*, L. R. 9 C. P. 396; 43 L. J. C. P. 185; *Davis* v. *Shepstone*, 11 App. Cas. 187; 55 L. J. P. C. 51). The right to publish such comments or criticisms is not confined to writers in newspapers, but is the general right of all the King's subjects (*Campbell* v. *Spottiswoode*, 3 B. & S. 769; 32 L. J. Q. B. 185; *Parmiter* v. *Coupland*, *supra*; *Merivale* v. *Carson*, *supra*; see *Kane* v. *Mulvany*, Ir. R. 2 C. L. 402), and consequently cases of such comment or criticism are rather instances of the exercise of a general right than cases of privilege (*Merivale* v. *Carson*, *supra*), and the matter thus published would seem to be regarded rather as no libel, than as a libel justified by privilege (*McQuire* v. *Western Morning News*, [1903] 2 K. B. 100; 72 L. J. K. B. 612).

This right only applies to fair and proper comments or criticisms, and if the limits of the privilege are exceeded, *e.g.*, if charges against the private character of a public man are made recklessly and without foundation in fact, and base motives are imputed to him without sufficient cause, the publication is not protected (*Campbell* v. *Spottiswoode*, *supra*; *Jenner* v. *A'Beckett*, *supra*; *Davis* v. *Duncan*, *supra*), and a plaintiff in a case of this kind was held entitled to recover, although the jury found by their verdict that the defendant honestly believed the defamatory matter to be true (*Campbell* v. *Spottiswoode*, *supra*). See, for a form of defence alleging the facts stated to be true and justifying the comments, *Penrhyn* v. *Licensed Victuallers' Mirror*, 7 Times Rep. 1.

plaintiff in his public capacity as mayor of the borough of ——, in refusing on the —— ——, 19—, to allow one —— —— to have the use of the town-hall of the said borough for the purpose of delivering a lecture therein], and the said words were published by the defendant without malice, and the publication thereof was for the public benefit.

The like, with a justification as to Statements of Fact.

The words complained of, taken in their natural meaning, so far as they purport to express facts were and are true in substance and in fact, and so far as they purport to express opinion were and are fair and honest comment and criticism on a matter of public interest, that is to say ——, and were published in the public interest and without malice.

Particulars of justification are as follows :—

Defence to an Action for an alleged Libel published in a Newspaper, that the Matter published was a fair and accurate Report of Proceedings in a Court of Justice (*l*).

The words complained of were [part of] a fair and accurate report of proceedings publicly heard on the —— ——, 19—, before the Court of ——, a Court exercising judicial authority, and were published [without malice] contemporaneously with such proceedings in the —— ——, a newspaper, and not otherwise.

Defence to an Action for an alleged Libel in a Newspaper, that the Matter published was a fair and accurate Report of the Proceedings of a Public Meeting, and that the Publication thereof was without Malice and for the Public Benefit (*m*).

1. The words complained of were [part of] a fair and accurate report published in the said newspaper of the proceedings of a public meeting

---

(*l*) See s. 3 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), *ante*, p. 836. It would seem that this enactment affords to reports falling within its protection the defence of absolute privilege, and that proof of malice would not remove that protection.

Apart from the above enactment, fair and accurate reports of proceedings in public courts of justice are privileged, but such privilege may be destroyed by proof of express malice. (See *Macdougall* v. *Knight*, 17 Q. B. D. 636; 14 App. Cas. 194; 25 Q. B. D. 1; 59 L. J. Q. B. 517; *Stevens* v. *Sampson*, 5 Ex. D. 53; 49 L. J. Q. B. 120; and *ante*, pp. 363, 836.)

(*m*) See s. 4 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), *ante*, p. 836.

"Public meeting" there means any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted (s. 4).

bonâ fide and lawfully held on the —— ——, 19—, at —— [for the purpose of furthering a matter of public concern, *or*, of the proceedings of a meeting on the —— ——, 19—, of the town council of the borough of ——, to which newspaper reporters were admitted, *or, as the case may be*].

2. The said report was published without malice, and the said proceedings were of public concern, and the said publication was for the public benefit.

Defence to an Action for a Defamatory Article in a Newspaper reflecting on the Plaintiff's System for Disposal of the Sewage of a Town, admitting and justifying the Publication (*n*).

1. The defendant admits the publication of the words complained of.

2. The words complained of are no libel (*n*).

3. The words complained of were not written or published of the plaintiff or of the character of the plaintiff, but merely of his method of treatment of sewage.

4. The words complained of are not actionable without proof of special damage, and no special or other damage has been sustained by the plaintiff in consequence of the publication of the said words (*o*).

5. In so far as the words consist of allegations of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments upon a matter of public interest and importance, namely, the treatment of town sewage. The said words were written and published honestly and in good faith and without malice.

Defence justifying an alleged Libel or Slander, on the Ground that the Statements complained of were True (*p*).

The words complained of were true in substance and in fact.

Particulars:—

Before the publishing of the said words [*here state the facts relied on as a justification, as, for instance, where the words complained of are "He is the*

(*n*) See *ante*, p. 838.

(*o*) What is called "a trade libel," reflecting not on the personal character of the plaintiff, but only on the goods he deals in or on his business, is not actionable without proof of actual damage, and it would seem that only such actual damage is recoverable. (See cases cited, *ante*, p. 481.)

(*p*) A justification of the libel or slander on the ground of truth must be pleaded specially (Ord. XIX., rr. 4, 15). It should not be pleaded without good reason to expect that it will be proved; for if it is pleaded upon insufficient grounds, the fact of the defendant's thus persisting in the charge is evidence of malice, and may be taken into consideration in assessing the damages (*Wilson* v. *Robinson*, 7 Q. B. 68; see *Simpson* v. *Robinson*, 12 Q. B. 511; *Warwick* v. *Foulkes*, 12 M. & W. 507; "*Damages*," *ante*, pp. 54, 365). It is no defence that the libel had previously been published by another, and that the defendant at the time of publishing it stated the source from

person who took my horse," with the innuendo that the plaintiff had stolen the horse, the plaintiff, on the —— ——, 19—, stole a [black] horse belonging to the defendant from the defendant's field at ——].

---

which he received it, and then believed it to be true (*Tidman* v. *Ainslie*, 10 Ex. 63); but it would seem that facts of this kind may in some cases be set up in mitigation of damages (*Watkin* v. *Hall*, L. R. 3 Q. B. 396).

If a libel consists of several distinct charges, or is divisible into distinct parts, a defence of justification may be pleaded to part only (*Mountley* v. *Watton*, 2 B. & Ad. 673; *Clarke* v. *Taylor*, 2 Bing. N. C. 664, 665; *M'Gregor* v. *Gregory*, 11 M. & W. 287; *Clarkson* v. *Lawson*, 6 Bing. 587; *Walker* v. *Brogden*, 19 C. B. N. S. 65; *Fleming* v. *Dollar*, 23 Q. B. D. 388; 58 L. J. Q. B. 548). If the defence of justification applies to part only of the defamatory matter, it should be limited accordingly. (See *ante*, p. 523.)

The mode in which a justification should be pleaded seems to depend in great measure on the nature of the alleged libel or slander. (See *Gourley* v. *Plimsoll*, L. R. 8 C. P. 362; 42 L. J. C. P. 121; *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183.) In some cases where the libel or slander alleged in the plaintiff's claim imports a direct charge by the defendant of specific acts, the defence of justification may be pleaded in a general form (see p. 842), but a general form of justification would be insufficient where the charges are general, that is, the words complained of, instead of being a direct and positive charge of specific acts, consist of an imputation on the plaintiff's general character, or of general terms of reproach or condemnation, &c., or where the complaint is of a report, or statement, that certain defamatory statements had been made of the plaintiff by others, since in such last-mentioned case it would be uncertain if it was meant to say that the original defamatory statement was true, or merely, which would in general be no answer, that it was true that such statements had been made (*Duncan* v. *Thwaites*, 3 B. & C. 556; *Hewson* v. *Cleere*, [1904] 2 Ir. R. 536, 553). In cases where the facts which constitute the justification cannot be set out without undue prolixity, the defendant may supplement the allegations of his defence by giving particulars as to the details. (See *Gourley* v. *Plimsoll*, *supra*; *Zierenberg* v. *Labouchere*, *supra*.)

Where a general justification is wrongly pleaded to charges which are general, application should be made to have such defence of justification struck out or amended, lest otherwise at the trial evidence should be adduced by the defendant, which the plaintiff has not anticipated and consequently has taken no steps to meet. (See *Hewson* v. *Cleere*, *supra*.)

Where the alleged libel or slander consists of a general charge against the plaintiff's character, or of an imputation of habitual misconduct, a justification which merely specified a single instance of misconduct would ordinarily be insufficient (*Wakley* v. *Cooke*, 4 Ex. 511; 19 L. J. Ex. 91; *D'Anson* v. *Stuart*, 1 T. R. 748; *Hickinbotham* v. *Leach*, 10 M. & W. 361). But it was held to be a defence to an action for a libel imputing a general charge of baseness, that the letter containing the libel was written and published solely in reference to a particular transaction, and that as regarded that transaction the facts which were stated in the plea were such as to justify the charge (*Tighe* v. *Cooper*, 7 E. & B. 639; 26 L. J. Q. B. 215).

A justification must be strictly proved. Thus, the fact that the plaintiff has been convicted of felony, though it may justify a statement that he has been so convicted, is no justification for a statement that he *is* a felon, after he has undergone the term of imprisonment inflicted by his sentence, as by the 9 Geo. 4, c. 32, s. 3, the fact of having undergone a sentence of imprisonment for a felony has the same effect as a pardon in purging the offence (*Leyman* v. *Latimer*, 3 Ex. D. 15, 352).

In an action for a libel in a newspaper, evidence may, by s. 6 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), be given in mitigation of damages, that the plaintiff has recovered, or brought an action for damages, or received or agreed to

For Defences of Justification, see Marriott v. *Chamberlain*, 17 Q. B. D. 154; 55 L. J. Q. B. 448; *Wood* v. *Durham*, 21 Q. B. D. 501; 57 L. J. Q. B. 547; *Allbutt* v. *General Medical Council*, 23 Q. B. D. 400; 58 L. J. Q. B. 606.

Defence of Justification in a general form, where the alleged Libel or Slander consists of a Specific Charge stated with Particularity (*q*).

The words [*or*, statements, &c.] complained of are true in substance and in fact.

Defence, denying the Innuendo, and justifying the Statements as True in their natural Meaning (*q*).

1. [*Deny the innuendo: see form of such denial, ante*, p. 832.]

2. As to the plaintiff's claim, if any, for speaking [*or*, writing] and publishing the words without the alleged meaning, the defendant further says that [*here state the facts relied on as justifying the words in their natural sense*].

Defence of Justification and Fair Comment.

In the alternative the defendant says that so far as the words and figures complained of consist of allegations of fact they are true in substance and in fact, and so far as they consist of expressions of opinion they are fair comments upon the said facts, which are matters of public interest. The said words and figures were written and published if at all in good faith.

Particulars:—

Defence of Payment into Court (*r*): *see the form, post*, p. 896.

Defence of Payment into Court, with Denial of Innuendo (*s*).

1. The defendant admits that he wrote [*or*, spoke] and published the words complained of in the statement of claim, and that he wrote [*or*, spoke] and published them of the plaintiff.

---

receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought.

(*q*) See preceding note.

(*r*) The defendant may pay money into Court in satisfaction of the plaintiff's claim in actions for libel and slander (Ord. XXII., r. 1, *ante*, p. 748). If he does so in such actions, however, he cannot at the same time deny liability (*Ib.*; and see *Fleming* v. *Dollar*, 23 Q. B. D. 388; 58 L. J. Q. B. 548). He may pay money into Court as to one of several distinct libels and deny others, but if he does so he must clearly specify in the defence what he denies, and in respect of what he makes the payment into Court (*Ib.*).

(*s*) Although under Ord. XXII., r. 1, the defendant may not in an action for libel or

2. The defendant denies that the said words were written [*or*, spoken] or published with the meaning alleged in the statement of claim, or that they bear or are capable of bearing that meaning.

3. The defendant admits that the said words in their true and ordinary meaning and without the alleged meaning are defamatory, and as to the writing [*or*, speaking] and publication thereof in their true and ordinary meaning and without the alleged meaning, he brings into Court £——, which he says is sufficient to satisfy the plaintiff's claim in respect of the writing [*or*, speaking] and publication thereof without the alleged meaning.

Notice of the Defendant's Intention of giving Evidence of an Apology in Mitigation of Damages, to be delivered with the Defence, under the Libel Act, 1843, *s.* 1 (*t*).

Take notice that the defendant intends on the trial of this cause to give in evidence in mitigation of damages that he made [*or*, offered] an apology to the plaintiff for the defamation complained of before the commencement of this action [*or*, as soon after the commencement of this action as there was an opportunity of making (*or*, offering) such apology, the action having been commenced before there was an opportunity of making (*or*, offering) such apology].

Particulars are as follows:—[*State particulars, e.g.*, The apology was inserted in the —— News, published on [*give dates*], *or*, The said offer was contained in a letter written and sent by the defendant to the plaintiff on the —— ——, 19—.]

Dated the —— ——, 19—.

G. H.,
Defendant's Solicitor [*or*, Agent].

To Mr. *C. D.*,
Plaintiff's Solicitor [*or*, Agent].

---

slander pay money into Court and at the same time deny liability, it appears that he can, if he admits the publication and that the words are defamatory, but contends that they do not bear the meaning imputed to them by the plaintiff, pay money into Court and at the same time deny the innuendo or some of the innuendoes (*Davis* v. *Billing*, 8 Times Rep. 58; *Mackay* v. *Manchester Press Co.*, 6 Times Rep. 16). In the latter case, however, the defence must show exactly what is denied and what admitted (*Ib.*; see *Fleming* v. *Dollar*, 23 Q. B. D. 388).

(*t*) By the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 1, it is enacted "that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology." Where the defendant seeks to prove in mitigation that he made or offered such apology, he should give notice of his intention at the time of delivering his defence, if any, and the notice should give particulars of the date of the apology, and of the mode in which it was made. Such notice may now be given in the defence by

Defence of an Apology and Payment into Court to an Action for a Libel contained in a public Newspaper or Periodical under the Libel Act, 1843, *s.* 2 (*u*).

1. The alleged libel was contained in a public newspaper [*or*, periodical publication] called the ——, ordinarily published at intervals not exceeding [*or*, exceeding] one week, and was inserted in such newspaper [*or*, periodical publication] without actual malice and without gross negligence; and before [*or*, at the earliest opportunity after] the commencement of this action the defendant inserted in such newspaper [*or*, periodical publication] a full apology for the said libel [*or, where the newspaper or periodical is ordinarily published at intervals exceeding one week*, offered to publish a full apology for the said libel in any newspaper or periodical publication to be selected by the plaintiff] according to the statute in such case made and provided.

Particulars are as follows:—[*See form of particulars in the last preceding form.*]

2. The defendant brings into Court £——, and says that that sum is enough to satisfy the plaintiff's claim [*or*, the plaintiff's claim herein pleaded to].

Defence of the Statute of Limitations (*x*): *see* "*Limitation, Statutes of*," *post*, p. 873.

---

being incorporated therein, and it is ordinarily most convenient so to give it, instead of delivering a notice separately. (See Ord. XIX., rr. 4, 15; Chitty's Forms, 13th ed., p. 190.)

(*u*) By the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 2, it is enacted "that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action."

It is enacted by the Libel Act, 1845 (8 & 9 Vict. c. 75), s. 2, that a defendant is not to be allowed to plead a defence under the above section without at the same time making a payment of money into Court by way of amends, and it is clear that the pleading of an apology if not accompanied by a payment into Court is not a defence (*Oxley* v. *Wilkes*, [1898] 2 Q. B. 56, 59, 60; 67 L. J. Q. B. 678), and would merely go in mitigation of damages. If the defendant pleads an apology and payment into Court under this section and at the trial fails to prove one of the essentials of the defence, as for instance the absence of gross negligence, he cannot treat the payment into Court as a separate defence under Ord. XXII., r. 1 (*Oxley* v. *Wilkes*, *supra*).

A defendant in an action for libel or slander cannot pay money into Court, together with a defence denying liability (Ord. XXII., r. 1, cited *ante*, pp. 748, 842.)

(*x*) By the 21 Jac. 1, c. 16, s. 3, actions for defamation (other than for slander) must be brought within six years after the cause of action, and actions for words within

Defence of Accord and Satisfaction (y): see ante, p. 566.

Notice of Matters the Defendant intends to rely on in Mitigation of Damages (z).

The defendant hereby gives the plaintiff notice pursuant to Ord. XXXVI., r. 37, that he intends at the trial of this action to give evidence in chief with a view to mitigation of damages as to the circumstances under which the [alleged] libel [*or*, slander] was published [*or*, as to the character of the plaintiff]. The particulars of the matters as to which the defendant intends to give such evidence are as follows:—[*Here set out in separate paragraphs the several matters relied on.*]

DETENTION OF GOODS (*a*).

two years after the words spoken. If the words are actionable only by reason of special damage, the action may be brought within six years from the accruing of the damage; but if actionable in themselves, the limit is two years, though special damage subsequently ensue (*Saunders* v. *Edwards*, T. Raym. 61; 1 Sid. 95; see *Bonomi* v. *Backhouse*, 9 H. L. C. at p. 513; *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. at p. 142; "*Limitation, Statutes of*," *post*, p. 874). The period of limitation seems to be two years in the case of actions for words spoken of the plaintiff in his office, trade, or business. (See *Turner* v. *Horton*, Willes, 438; *Grenfell* v. *Pierson*, 1 Dowl. 406.)

(*y*) Where there was an agreement between the parties that the plaintiff should waive his right of action for defamation in consideration that the defendant would destroy certain documents in his possession, and the documents were destroyed accordingly, these facts were held to be a good defence by way of accord and satisfaction (*Lane* v. *Applegate*, 1 Starkie, 97; see also *Boosey* v. *Wood*, cited *ante*, p. 816).

(*z*) By Ord. XXXVI., r. 37, "In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

Such particulars may be given either in the defence or separately. The defendant may give the notice in cases in which he admits the libel or slander and pleads payment into Court. (See *per* Vaughan Williams, L.J., *Oxley* v. *Wilkes*, [1898] 2 Q. B. at p. 60; 67 L. J. Q. B. at p. 680.)

(*a*) See *ante*, p. 370.

Where the goods have been re-delivered after the commencement of the action, the defendant should plead the re-delivery as a defence arising since action (see *ante*, p. 531), and it will then constitute a defence to the further maintenance of the claim for the return of the goods or their value, though it does not affect the claim for damages in respect of the previous detention (*Leader* v. *Rhys*, 10 C. B. N. S. 369; 30 L. J. C. P. 345).

Defence denying the Detention (*b*).

The defendant did not [*or*, does not, *or*, did not, nor does he, *according to the allegations in the plaintiff's claim*] detain the said goods [*or*, deeds, *or*, *as the case may be*], or any of them [*or*, The defendant denies that he detained or detains, &c.].

Defence denying the Plaintiff's Property in the Goods (*c*).

The said goods [*or*, chattels, *or*, *as the case may be*] were not and are not [nor were, nor are any of them] the plaintiff's.

(*See R. S. C.*, 1883, *App. D.*, *Sect. VI.*)

(*b*) A denial of the detention, whether it is *in terms* or in a general form, puts in issue the fact of a detention adverse to or against the will of the plaintiff, and not its wrongful character. (See *Clements* v. *Flight*, 16 M. & W. 42; *Mason* v. *Farnell*, 12 *Ib.* 674.) The defendant may show under this defence that the goods were before the alleged detention delivered by him to a third person with the plaintiff's consent (*Anderson* v. *Smith*, 29 L. J. Ex. 460), or that they were tendered by the defendant to the plaintiff, who refused to receive them (*Clements* v. *Flight*, *supra*), though it is generally advisable to plead such facts specifically. It was formerly held that, under the issue raised by a denial of the detention, the defendant might show that the goods were sold by him by the authority of a tenant in common with the plaintiff (*Morgan* v. *Marquis*, 9 Ex. 145), or that the acts complained of were done by the plaintiff's leave and licence (*Clements* v. *Flight*, 16 M. & W. 42), because in such cases the detention would not be adverse; but defences of this kind should now be specially pleaded. The ordinary evidence of detention is that the defendant refused to deliver the goods when demanded (*Jones* v. *Dowle*, 9 M. & W. 19). It is no defence to show that the goods were not in the possession of the defendant when demanded if he had improperly parted with the possession of them (*Ib.*; *Reece* v. *Palmer*, 5 C. B. N. S. 84; 27 L. J. C. P. 327; 28 *Ib.* 168).

(*c*) The plaintiff's property in the goods detained, if denied, must be traversed specifically. Defences impugning the title of the plaintiff to the goods detained, or going to show that the *adverse* detention was justifiable, should as formerly be pleaded specially. (See *Mason* v. *Farnell*, *supra*.) A joint ownership in the defendant with the plaintiff cannot be proved under a denial of the plaintiff's property, but must be pleaded specially. (See *Mason* v. *Farnell*, 12 M. & W. 674.)

By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22, "(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller."

"(2) Nothing in this section shall affect the law relating to the sale of horses."

But by s. 24 (1), "Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen re-vests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise."

As to what is a sale in market overt, see *Hargreave* v. *Spinks*, [1892] 1 Q. B. 25.

By the Sale of Goods Act, 1893, s. 23, "When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." And by s. 24 (2), "Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not

Defence that the Defendant was Joint Owner of the Goods with the Plaintiff: see "Conversion," ante, p. 824.

See a form of plea that the goods were delivered to the defendant by the plaintiff and others joint owners with him, and that they had not demanded the re-delivery of the goods: Atwood v. *Ernest,* 13 C. B. 881.

Defence that the Goods were given to the Defendants: see "Gift," post, p. 856.

Defence that the Defendant detained the Goods in Exercise of a Right of Lien (d).

The goods were detained for a lien to which the defendant was entitled [*or*, The defendant was entitled to a lien on the said goods, and was justified in detaining and did detain the same for such lien].

Particulars are as follows :—

19—, —— ——. To carriage of the goods claimed from London to Birmingham :—

	£	*s.*	*d.*
45 tons at 2*s.*	4	10	0

(*R. S. C.*, 1883, *App. D., Sect. IV.*)

Defence of the Statute of Limitations (e): see post, p. 873.

---

amounting to larceny, the property in such goods shall not re-vest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender."

It is a good defence that the goods had been delivered to the defendant by the plaintiff and others who were joint owners with him, and that the re-delivery of the said goods had not been demanded by or on behalf of such joint owners, and that the defendant always held the goods with their leave and licence (*Atwood* v. *Ernest,* 13 C. B. 881 ; see *Harper* v. *Godsell,* L. R. 5 Q. B. 422 ; 39 L. J. Q. B. 185 ; *Wright* v. *Robotham,* 33 Ch. D. 106 ; see *ante,* pp. 347, 824), or that the plaintiff had pawned the goods to a third party for a debt which remained unpaid, and that the latter pawned the goods to the defendant for a debt which remained unpaid (*Donald* v. *Suckling,* L. R. 1 Q. B. 585 ; 35 L. J. Q. B. 232).

(*d*) See "*Lien,*" *post,* pp. 866 *et seq.* A right of lien must be specifically pleaded. (See Ord. XIX., rr. 4, 13, 15 ; and see, under the former practice, *Mason* v. *Farnell,* 12 M. & W. 674, 683.) As to the power to order delivery to the owner thereof of goods detained as security, or under a claim of lien, upon payment into Court, see Ord. L., r. 8.

(*e*) In actions for detention or conversion, it would seem that where the defendant wrongfully takes possession of the goods in the first instance, the six years' period of limitation fixed by the 21 Jac. 1, c. 16, s. 3, runs in general in favour of a defendant

Defence of Payment into Court as to Damages for Detention (f).

As to the plaintiff's claim for damages for the detention of the goods, the defendant brings [*or*, on the —— ——, 19—, paid] into Court the sum of £——, and says that the same is enough to satisfy the plaintiff's claim herein pleaded to.

See a form of plea that the defendant delivered up the goods and the plaintiff accepted them after action brought and payment into Court of damages for detention: Crossfield v. *Such*, 8 Ex. 159.

DISTRESS (*g*).

Defence to a Claim for Trespass, justifying under a Right to Distrain.

1. Before and at the time of the committing of the acts complained of the plaintiff was tenant to the defendant of the house and premises referred to in the statement of claim under the terms of a lease dated the —— ——, 19—, whereby the defendant demised the said house and premises to the plaintiff for —— years from the —— ——, 19—, at the yearly rent of £—— payable quarterly on the usual quarter days.

2. On the —— ——, 19—, two quarters of the said rent due at ——

---

from the time of such wrongful taking. (See *Wilkinson* v. *Verity*, L. R. 6 C. P. 206; 40 L. J. C. P. 141; *Miller* v. *Dell*, [1891] 1 Q. B. 468; 60 L. J. Q. B. 404.) But where goods have been delivered to the defendant as a bailee, and have been wrongfully converted by him during the bailment, as by sale, &c., the owner, even if he has knowledge of such act of conversion, may elect to sue for detention or conversion in respect of a subsequent demand and refusal of re-delivery of the goods, and in such case the statutory period of limitation will only run from the time of such demand and refusal (*Wilkinson* v. *Verity*, *supra*; see *Spackman* v. *Foster*, 11 Q. B. D. 99; 52 L. J. Q. B. 418; *Miller* v. *Dell*, *supra*).

(*f*) Payment into Court in actions for the detention of goods, so far as regards the claim for damages for the detention as distinct from a claim for the return of the goods or their value, is regulated by the provisions of Ord. XXII., and stands on the same footing as payment into Court in other actions for damages. (See *post*, p. 896.) But the provisions of that Order appear to be restricted to the case of actions "for debt or damages" (see *Nichols* v. *Evens*, 22 Ch. D. 611), and it seems clear that they do not extend to a claim for the return of the goods or their value. (See *Allen* v. *Dunn*, 1 H. & N. 572; 26 L. J. Ex. 185; *Eberle's Hotels Co.* v. *Jonas*, 18 Q. B. D. 459.)

(*g*) See "*Distress*," *ante*, p. 373; "*Replevin*," *post*, p. 907.

By the 3 & 4 Will. 4, c. 27, s. 42, no arrears of rent shall be recovered by any distress but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent. In the case of a holding to which the Agricultural Holdings (England) Act, 1883, applies, rent which became due more than a year before the distress cannot be distrained for. (See s. 44 of that Act, *ante*, p. 373.)

and ——, 19—, were due and in arrear and unpaid to the defendant, and thereupon the defendant, as he was lawfully entitled to do, levied a distress for the said rent on the plaintiff's goods and chattels in the said house and premises, and under that distress lawfully entered the said house and premises and seized and sold the plaintiff's goods and chattels thereon, and these are the acts complained of.

Defence justifying seizing Cattle as a Distress Damage feasant (h).

At the time of the alleged trespasses the defendant was lawfully possessed of a close called ——, at ——, in the county of ——, and because the cattle referred to in the statement of claim were then wrongfully in the said close doing damage there to the defendant, the defendant seized and took the said cattle in the said close, and impounded the same in a pound overt at —— in the said county which was not above three miles distant from the place where they were so seized and taken, as a distress for the said damage, which are the alleged trespasses.

Defence justifying entering into a House to take Goods fraudulently or clandestinely removed there to avoid a Distress (11 *Geo.* 2, *c.* 19, *s.* 1) (*i*).

Before any of the alleged trespasses *J. K.* held certain premises called ——, at ——, as tenant thereof to the defendant under a lease thereof [*or*, an agreement of tenancy] in writing dated the —— ——, 19—, at a certain

---

(*h*) As to the right of a person to seize cattle, &c., *damage feasant*, see Bullen on Distress, p. 227; and see *Boden* v. *Roscoe*, [1894] 1 Q. B. 608.

Any irregularity in the treatment of a distress *damage feasant* makes the party distraining a trespasser *ab initio*, and may be replied so as to entitle the plaintiff to recover for the whole trespass. (See *Wilder* v. *Speer*, 8 A. & E. 547; *Weeding* v. *Aldrich*, 9 *Ib.* 861.) The statute 11 Geo. 2, c. 19, s. 19, cited p. 382, applies only to distresses for rent.

Tender after impounding in a common pound does not render the distress or detention wrongful, and a reply of such tender to a plea of distress *damage feasant* is bad (*Singleton* v. *Williamson*, 7 H. & N. 747; 31 L. J. Ex. 287). Where cattle distrained are impounded on private premises, and not in a common pound, a tender after such impounding of sufficient compensation for the damage actually done is good, and would render any further detainer unlawful (*Green* v. *Duckett*, 11 Q. B. D. 275; 52 L. J. Q. B. 435). See further as to tender, *ante*, p. 379.

It is a good reply to a defence of a distress *damage feasant*, that the cattle were distrained while in the actual use and possession of the plaintiff or his servants (*Field* v. *Adames*, 12 A. & E. 649; see *Bunch* v. *Kennington*, 1 Q. B. 679), or that the cattle strayed into the defendant's close by reason of the defendant neglecting to repair the fences between his close and the plaintiff's, as he was bound to do. (See *post*, p. 852.)

As to the right of supplying food and water to animals impounded in a common pound, and of selling such animals for the purpose of defraying the expense so incurred, see 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, s. 1, and see a form of plea of a distress *damage feasant* and a sale of the distress to pay for its keep in the pound, under the 17 & 18 Vict. c. 60, Bullen & Leake, 3rd ed., p. 731.

(*i*) As to this defence, see Roscoe's N. P. Ev., 17th ed., p. 1069, where see also as to

yearly rent thereby reserved payable by equal [quarterly] payments, and £—— of the said rent for —— quarters of a year of the said tenancy was then due and in arrear from the said *J. K.* to the defendant; and the said *J. K.* had then and whilst the said rent was so due and in arrear fraudulently and clandestinely carried off from the said premises certain goods of the said *J. K.*, to prevent the defendant from distraining the same for the said arrears of rent, and placed the said goods in the said messuage of the plaintiff, against the statute in such case made and provided; whereupon the defendant, whilst he was entitled to distrain for such arrears, and within the space of thirty days next ensuing such carrying off of the said goods as aforesaid, entered into the said messuage of the plaintiff (the outer door thereof being then open) in order to take and seize, and there then took and seized the said goods there being found as a distress for the said arrears of rent, which are the alleged trespasses.

Defence to an Action by a Landlord against a Tenant for Rent, and that the Plaintiff before Action distrained for the same Rent, and that the Distress was still pending at the Time of Action brought (k).

After the rent sued for became due, the plaintiff on the —— ——, 19—, distrained certain goods of the defendant on the demised premises as and for a distress for the same rent, and at the commencement of this action held and detained [and still holds and detains] the said goods as such distress for the said rent.

Defence of Not Guilty by Statute (l).

By statute 11 Geo. 2, c. 19 (Public Act), ss. 19, 21; [*Insert any other statute on which the defendant relies, as* 2 W. & M., sess. 1, c. 5 (Public Act), s. 2.] — The defendant is not guilty

---

the right given to the landlord under certain circumstances by s. 7 of the 11 Geo. 2, c. 19, of breaking open houses, barns, &c., to which the goods have been removed.

The landlord's power of distraining goods fraudulently removed from the premises only applies to the tenant's goods (*Fletcher* v. *Marillier*, 9 A. & E. 457; *Thornton* v. *Adams*, 5 M. & S. 38; *Tomlinson* v. *Consolidated Credit Corp.*, 24 Q. B. D. 135), and only exists where the landlord would have been entitled to distrain them, if they had remained on the premises (*Gray* v. *Stait*, 11 Q. B. D. 668; 52 L. J. Q. B. 412).

(*k*) As to this defence, see *ante*, pp. 375, 708.

(*l*) It would seem that the defence of not guilty by statute can still be pleaded in answer to an action for wrongful distress against a person other than a public authority. (See *post*, p. 886.) However, even in the cases where this defence can still be pleaded, it is under the present system generally advisable to plead specially. If the defendant pleads not guilty by statute he cannot plead any other defence to the same cause of action without leave (Ord. XIX., r. 12, cited *post*, p. 887).

By s. 20 of the above statute, 11 Geo. 2, c. 19, no tenant or lessee shall recover in any action for any unlawful act or irregularity in making or disposing of a distress, if

ESTOPPEL (*m*).

For forms of Defence and Reply, see ante, pp. 646, 648.

EXECUTORS (*n*).

FACTOR.

See "*Factor*," *ante*, p. 176; *and* "*Lien*," *post*, p. 869.

FELONY (*o*).

FENCES (*p*).

tender of amends has been made by the party distraining before such action brought; and by s. 21, the defendant may give such tender in evidence under the defence of not guilty by statute when that defence is applicable. (See *post*, pp. 887, 919.)

(*m*) Where the party is estopped only at and from a particular time, the estoppel pleaded should be limited to matters arising at or after that time. (See *Wilkinson* v. *Kirby*, 15 C. B. 430; *Harris* v. *Mulkern*, 1 Ex. D. 31; 45 L. J. Ex. 244.) The matter of estoppel is assumed to continue until the contrary is shown. The defendant may deny the matter of estoppel or may set up any subsequent matter showing that the estoppel has ceased (*Wilkinson* v. *Kirby*, 15 C. B. 430, 440).

A county court order for giving up possession of premises obtained by the landlord against a sub-tenant under 19 & 20 Vict. c. 108, s. 50 (see now the 51 & 52 Vict. c. 43, s. 138), was held not to be conclusive in a subsequent action against him for mesne profits (*Campbell* v. *Loader*, 3 H. & C. 520; 34 L. J. Ex. 50). So in an action for conversion of goods, which did not exceed £15 in value, a previous refusal of a metropolitan magistrate to grant the plaintiff an order for the delivery of the goods under the 2 & 3 Vict. c. 71, s. 40, was held to be no estoppel against the plaintiff (*Dover* v. *Child*, 1 Ex. D. 172; 45 L. J. Ex. 462).

If a bailee of goods accepts the bailment with full knowledge of an adverse claim by a third party, it has been held that he is estopped from afterwards setting up the title of such third party as an answer to a claim by his bailor for the goods or their proceeds (*Ex p. Davies*, 19 Ch. D. 86). As to estoppel by a bailment, see further, *Richards* v. *Jenkins*, 18 Q. B. D. 451; and *Rogers* v. *Lambert*, [1891] 1 Q. B. 318.

As to estoppels, see further, *ante*, pp. 645—647.

(*n*) See "*Executors*," *ante*, pp. 385, 648.

In an action brought by an executor or administrator under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), to recover compensation for the family of the deceased in respect of injuries which caused his death, it is a good defence that the family did not suffer any pecuniary loss from the death. (See *Duckworth* v. *Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25; and *ante*, p. 387.) It is also a good defence to such an action that an accord and satisfaction was made by the defendant, and accepted by the deceased in his lifetime, in respect of the injuries which caused the death (*Read* v. *G. E. Ry. Co.*, 3 Q. B. 555; *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357; 51 L. J. Q. B. 543; *ante*, p. 388).

(*o*) See *ante*, p. 682. A defendant may not set up as a defence that the acts complained of amounted to a felony, and that he has not been prosecuted in respect thereof. (See *post*, p. 923.)

(*p*) See *ante*, p. 390 Where a defendant justifies taking the plaintiff's cattle as a

Defence to an Action for a Trespass by the Defendant's Cattle on the Plaintiff's Land, that the Trespass was caused by Defects in the Plaintiff's Fences, which he was bound to repair.

The defendant was and is possessed of a [close] adjoining the said [close] of the plaintiff, and divided therefrom by a fence, and the plaintiff was bound [*state how, as, for instance,* by prescription] to repair the said fence, and keep the same in repair so as to prevent cattle lawfully being in either of the said [closes] from escaping into the other of them, and at the time of the alleged trespasses the said fence was out of repair, and by reason thereof the defendant's cattle, then lawfully being in the said [close] of the defendant, escaped therefrom into the said [close] of the plaintiff and remained for some time therein, which are the alleged trespasses.

Defence to an Action for Trespass to Land and destroying Fences, that the Fences were an Obstruction to the Defendant's Right of Common: see Ramsey v. *Cruddas*, [1893] 1 Q. B. 228.

Fishery (*q*).

See forms of a plea justifying a trespass under a prescriptive right of fishing: Mannall v. *Fisher*, 5 C. B. N. S. 856; *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687; 34 L. J. C. P. 309; *of a public right of fishing in an arm of the sea, and a replication of a prescriptive right of sole fishery in the same spot: Richardson* v. *Orford*, 2 H. Bl. 182; *justifying taking nets and fixed engines under the Salmon Fishery Act: Williams* v. *Blackwell*, 2 H. & C. 33; 32 L. J. Ex. 174.

---

distress *damage feasant*, it is a good reply that the cattle strayed into the defendant's land through defects in fences which he was bound to repair (see *Goodwyn* v. *Cheveley*, 4 H. & N. 631; 28 L. J. Ex. 298; *Barber* v. *Whiteley*, 34 L. J. Q. B. 212), or that the cattle were lawfully upon a public highway, and strayed thence into the defendant's adjoining land through defects of the defendant's fences and without any negligence on the part of the plaintiff or his servants, and were seized by the defendant before the plaintiff had reasonable time for removing them (*Goodwyn* v. *Cheveley*, *supra*; see *Tillett* v. *Ward*, 10 Q. B. D. 17; 52 L. J. Q. B. 61). See further, *post*, p. 911.

(*q*) The right to take fish from the waters of another, being a *profit à prendre in alieno solo*, is not claimable merely by custom (*Pearce* v. *Scotcher*, 9 Q. B. D. 162; *Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633; 52 L. J. Q. B. 193; *Tilbury* v. *Silva*, 45 Ch. D. 98; *Smith* v. *Andrews*, [1891] 2 Ch. 678, 700).

The Prescription Act (2 & 3 Will. 4, c. 71) does not apply to easements in gross, or *profits à prendre* in gross, and therefore an alleged right in gross of the defendant and his ancestors to a free fishery in the waters of the plaintiff is not under that Act a defence to an action of trespass (*Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687; 34 L. J. C. P. 309; and see *Tilbury* v. *Silva*, and *Smith* v. *Andrews*, *supra*; and *ante*, pp. 396, 819).

FRAUD (*r*).

Defence to an Action for Fraudulent Misrepresentations, denying the making of the Representations.

The defendant did not make the representation [*or*, any of the representations] complained of.

[*If the misrepresentations are alleged by the plaintiff's claim to have been contained in a letter or prospectus, &c., the defendant, if he disputes those allegations, should deny the writing or sending of the letter or the issuing of the prospectus, &c., or should show, by direct averment or by setting out the document, where he can do so without prolixity, that it did not contain any of the alleged misrepresentations.*]

Defence to a like Action, denying that the Representation was intended to induce, or did induce, the Plaintiff to make the alleged Contract, &c.

The defendant did not make the alleged representation, if at all, with the intent to induce, nor was the plaintiff induced thereby to make the said purchase [*or*, to subscribe for the said shares, *or, as the case may be*].

Defence to a like Action that the Representations were True.

The [alleged] representation complained of was true in substance and in fact. The takings of the said public-house were not less than £40 a week [*setting out the fact*] [*or*, The defendant denies that the alleged representation was false or untrue. On the contrary, —— *setting out the facts*].

Defence to a like Action, denying that the Defendant knew the Representation to be False, and stating that he bonâ fide believed it to be True.

The defendant, at the time of the making of the alleged representation, honestly believed the same to be true. He did not make it fraudulently [*or*, The defendant had no knowledge of the facts alleged by the plaintiff in paragraph —— of the statement of claim, and at the time of making the representation complained of he honestly believed it to be true].

Defence denying the alleged Damage (*s*).

The plaintiff did not suffer the alleged or any damage.

(*r*) See *ante*, pp. 397, 656, 696.

(*s*) Damage is an essential part of the action for deceit, and where it is intended to deny damage, it is advisable that there should be a specific denial of the damage. (See *ante*, pp. 529, 530.)

Defence to a Claim for Fraud in selling an Unsound Horse by falsely representing that it was Sound.

1. The defendant did not represent to the plaintiff that the horse was sound.

2. The plaintiff was not induced to buy the horse by the alleged representation.

3. The horse was not unsound.

4. If the horse was in fact unsound, the defendant was not aware of such unsoundness, and made the alleged representation, if any, honestly, and in the belief that it was true.

Defence to an Action, under the Directors Liability Act, 1890 (53 & 54 *Vict. c.* 64), *for Damages against a Director for an untrue Statement in a Prospectus, that the Defendant on reasonable Grounds believed the Statement to be true* (*t*).

The defendant had reasonable ground to believe, and did up to the time of the allotment of the shares [debentures, *or*, debenture stock] believe, that the statement referred to in paragraph —— of the statement of claim was true.

Particulars :—[*Set out the particulars of the reasonable grounds.*]

Defence to a Claim against a Company and Directors for Fraud, and under the Directors Liability Act, 1890 (*t*).

1. The prospectus of the defendant company was issued on the —— ——, 19—. For the terms and contents of the said prospectus the defendants crave leave to refer to the prospectus itself. They do not admit that such terms and contents are correctly or sufficiently stated in the statement of claim.

2. The defendants deny that the defendant *C. D.* issued or authorised the issue of the said prospectus. The defendants deny that the defendant *E. F.* was a promoter of the defendant company.

3. The defendants deny that the prospectus contained the alleged statements or representations or omissions or any of them. They deny that any of the alleged statements or representations were untrue.

4. The statement actually contained in the prospectus as to the ——, to which the defendants crave leave to refer, is true. It is neither untrue nor misleading. The defendants wholly deny the allegation that none of the

---

(*t*) See *ante*, pp. 401, 402. In stating statutory grounds of defence, the words of the statute should, as far as practicable, be followed. The *onus* of proving the reasonable ground of belief is upon the defendant. He should give particulars of the grounds of his belief (*Alman* v. *Oppert*, [1901] 2 K. B. 576 ; 70 L. J. K. B. 745).

said businesses were then, or have since been, transferred to the defendant company.

5. The defendants deny that the prospectus represented that the —— Brewery, and property connected therewith, was of the value of £——. It stated, as the fact was, that the said brewery and property had been valued at the said sum. The defendants say that the said brewery and property was of the said value, or, in the alternative, that they honestly believed it to be of that value. They deny that such value was fictitious, or that they knew it to be so. On the contrary, the statement as to the said value was believed by the defendants to be true, and was based on the valuation of competent independent valuers, which is set out in the prospectus. The ——, Limited, is now in liquidation because the defendant company has purchased and acquired all its undertakings and property, and pursuant to an arrangement that the said company should go into liquidation so soon as the purchase was completed.

6. The prospectus did not represent that the property and assets of ——, Limited, were acquired by the defendant company, or that their value amounted in the aggregate to the sum of £——. The prospectus stated, as the fact was, that the defendant company was formed to acquire the said property and assets, and that they had been valued at the said sum. The said property and assets had been valued at the said sum. The defendants say that the said property and assets were of the said value.

7. The defendants do not admit that the plaintiff received a copy of the said prospectus. They deny that he acted on the alleged representations (if any), or was misled by the alleged omissions (if any), or was ignorant of the matters alleged to have been concealed.

8. The defendants deny all the allegations in paragraph —— of the statement of claim.

9. The defendants deny that the shares in the defendant company are worthless.

10. The plaintiff subscribed for the said shares on the faith of his own judgment and inquiries, and not on the faith of the said prospectus.

11. The defendants deny that the alleged representations and omissions (if any) were material.

12. The plaintiff has been guilty of delay and acquiescence disentitling him to rescission or repayment.

Particulars:—

13. Each of the defendants (other than the defendant company) says with respect to every statement in the prospectus not purporting to be made on the authority of an expert that he had reasonable grounds for believing, and did up to the time of the allotment of shares believe it to be true, and with respect to every statement in the prospectus purporting to be a statement by, or contained in what purports to be a copy of or extract from a report or valuation of a valuer, accountant, or other expert, that it fairly represented the statement made by such valuer, accountant,

or other expert, or was a correct and fair copy of or extract from the report or valuation, and that he believed, and had reasonable ground for believing, that the person making the statement, report, or valuation was competent to make it.

14. Each of the defendants says that in respect of all the matters alleged he acted in perfect good faith, and not fraudulently, or with any desire or intention to deceive or mislead.

15. The defendant company denies that any of the other defendants were its agents in respect of any of the matters alleged, or that it issued the said prospectus, and it will submit that the statement of claim discloses no cause of action against it, and no facts entitling the plaintiff to the relief claimed against it.

16. Each of the defendants pleads the whole of the above defence severally for himself and itself, and denies that the other defendants were his or its agents in respect of any of the matters alleged, or that he or it is in any way liable for or in respect of their acts or defaults (if any).

Defence to an Action for a Fraudulent Representation as to the Solvency of a third Person that the alleged Representation was not in Writing signed by the Defendant, as required by the 9 Geo. 4, c. 14, s. 6 (u).

The requirements of the 9 Geo. 4, c. 14, s. 6, have not been complied with. [*If the representation is alleged by the plaintiff to have been contained in a letter or other writing signed by the defendant, the defendant must also specifically deny the writing or signature of the letter or document.*]

GIFT (*x*).

Defence to an Action by an Executor for the Conversion of Goods vested in him as Executor, denying his Property in the Goods, and alleging a Gift of the Goods to the Defendant by the Testator. (*See a Claim, ante*, p. 386.)

1. The said horses [*or*, goods] were not the plaintiff's.

2. The said horses [*or*, goods] were given to the defendant by the said *C. D.* (*the testator*) in his lifetime.

(*u*) See *ante*, pp. 406, 407. A signature by an agent or co-partner will not satisfy the requirements of the section. (See *Ib.*) The section applies equally whether the representation is fraudulently made or not (*Clydesdale Bank* v. *Paton*, [1896] A. C. 381; 65 L. J. P. C. 73).

(*x*) To constitute a complete gift of a chattel there must be a delivery of possession to the donee or his agent (*Irons* v. *Smallpiece*, 3 B. & Ald. 551; *Cochrane* v. *Moore*, 25 Q. B. D. 57; 59 L. J. Q. B. 377). The delivery may be before, at the time of, or after the words of gift (*Cochrane* v. *Moore*, 25 Q. B. D. at p. 70; *Alderson* v. *Peel*, 64 L. T. N. S. 645; *Cain* v. *Moon*, [1896] 2 Q. B. 283, 288; 35 L. J. Q. B. 587). It need not necessarily be a manual delivery, it is enough if it is such as the subject-matter

Particulars are as follows:—[The gift was by word of mouth on the —— ——, 19—, at ——, and the horses [*or*, goods] were fetched away from *C.*'s premises at —— by the defendant's servants on the —— ——, 19—, *or, as the case may be.*]

Defence to an Action by an Executor for the Detention of a Watch and Chain of his Testator, that they were given to the Defendant as a Donatio mortis causa (y).

1. The watch and chain were neither of them the property of the plaintiff.

2. They were on the —— ——, 19—, handed by the said *C. D.* (*the testator*), since deceased, in contemplation of his then approaching death, to the defendant and given to him by the said *C. D.* as a donatio mortis causa.

---

is reasonably capable of (*Kilpin* v. *Ratley*, [1892] 1 Q. B. 582; *Rawlinson* v. *Mort*, 21 Times Rep. 774).

Where the thing to be given is already in the possession of the intended donee a valid gift may be made by word of mouth coupled with the changed character of the possession (*Kilpin* v. *Ratley*, *supra*; *Cain* v. *Moon*, *supra*).

A gift of substantial character and importance made to one who stands in a confidential relation to the donor will be set aside by the Court on the application of the donor within a reasonable time, unless it is shown that the donor in making the gift had competent independent advice (*Rhodes* v. *Bate*, L. R. 1 Ch. 252, 257; 35 L. J. Ch. 267; *Allcard* v. *Skinner*, 36 Ch. D. 145, 185; 56 L. J. Ch. 1052; *Powell* v. *Powell*, [1900] 1 Ch. 243; *Barron* v. *Willis*, [1900] 2 Ch. 128; 69 L. J. Ch. 532).

Such gifts are voidable and not void, and may after the confidential relationship has ceased, and when the donor is no longer influenced thereby, be affirmed by the donor (*Allcard* v. *Skinner*, *supra*; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; 50 L. J. Q. B. 460).

(*y*) A *donatio mortis causa* is one given by a person in contemplation of approaching death to another, upon the terms that if death does not as anticipated take place, the gift is to revert to the donor. (See Williams on Exors., 9th ed., p. 681; *Cain* v. *Moon*, [1896] 2 Q. B. 283; 35 L. J. Q. B. 587; *Solicitor to Treasury* v. *Lewis*, [1900] 2 Ch. 812; 63 L. J. Ch. 833).

To constitute a valid *donatio mortis causa* the donor must both part with the possession and the control of the thing given (*Hawkins* v. *Blewitt*, 2 Esp. 663; *Solicitor to Treasury* v. *Lewis*, *supra*).

A bond, a policy of insurance on the donor's life, a deposit note, a bill or note indorsed to the donee or payable to bearer, or the cheque of a third party, may be the subject of such a gift (*Witt* v. *Amis*, 1 B. & S. 109; 30 L. J. Q. B. 318; *In re Dillon*, 44 Ch. D. 76; 59 L. J. Ch. 420; *Clement* v. *Cheesman*, 27 Ch. D. 631; 54 L. J. Ch. 158; Byles on Bills, 16th ed., p. 206).

So may a Post Office Savings Bank book (*In re Weston*, [1902] 1 Ch. 680; 71 L. J. Ch. 343). But not, it seems, the cheque of the donor himself drawn upon his banker, because the death operates as a revocation of the banker's authority to pay it (Byles on Bills, 16th ed., p. 206; *In re Beaumont*, [1902] 1 Ch. D. 889; 71 L. J. Ch. 478; but see *per* Lindley, L.J., in *In re Dillon*, *supra*), nor an ordinary certificate of railway or other shares requiring a further document of transfer to pass the property (*Moore* v. *Moore*, L. R. 18 Eq. 474; 43 L. J. Ch. 617; *In re Weston*, *supra*; but see *In re Dillon*, *supra*).

In pleading such a gift, the facts and circumstances should be set forth. (See *Townsend* v. *Parker*, 30 W. R. 287; 43 L. T. N. S. 755.)

Highways (*z*).

Husband and Wife (*a*).

Infancy (*b*).

(*z*) See *ante*, p. 407, and *post*, p. 952. The provisions of s. 109 of the Highways Act 1835, and s. 264 of the Public Health Act, 1875, which in certain cases required notice of action and limited the time for the bringing of the action, &c., have been repealed by s. 2 of the Public Authorities Protection Act, 1893, and the protection afforded by that Act has been substituted. (See *post*, p. 901.)

(*a*) Coverture at or after the time of action brought, is no defence to an action in respect of a wrong independent of contract brought by or against a woman, and is not in itself any sufficient ground for applying to have the husband joined as a party. (See *ante*, p. 410.) So, too, coverture at the time of the committing of the wrong is no defence to any such action. (See the M. W. P. Act, 1882, s. 1 (2); *ante*, p. 185.)

The husband and wife may, and in general should, be sued jointly for wrongs committed by the wife during coverture, and in such actions, there being no separate claim against the wife's property, they cannot plead separate defences (*Beaumont* v. *Kaye*, [1904] 1 K. B. 292; 73 L. J. K. B. 213).

Where the husband has not authorised or participated in a wrong committed by his wife during the coverture, he cannot properly be sued alone for it without the wife being joined as a defendant (see Lush, Husband and Wife, 2nd ed., p. 287); and, therefore, although, since the abolition of pleas in abatement, the non-joinder of the wife in such action is not pleadable as a defence, it will be ground for an application by him for a stay of proceedings until the wife is so joined. (See *ante*, pp. 410, 522.)

If the husband sues alone in respect of a wrong committed after 1882 to the person or to the separate property of the wife, the defendant may apply to have the wife joined as a co-plaintiff. (See *Beasley* v. *Roney*, [1891] 1 Q. B. 509; 60 L. J. Q. B. 408.)

A defendant sued by a married woman for trespass to a house which is her separate property and in her sole occupation, cannot defend himself by setting up the husband's authority for entering the house, unless, perhaps, where such entry was for the purpose only of enabling the husband to have the benefit of his wife's society (*Weldon* v. *De Bathe*, 14 Q. B. D. 339; 53 L. T. 502; see *R.* v. *Jackson*, [1891] 1 Q. B. 671).

Coverture is no longer a disability preventing a married woman from suing for a wrong done to her person or property; consequently a reply of coverture cannot be pleaded in such actions to a defence under the Statutes of Limitation. (See *post*, p. 876, and *ante*, p. 720.)

The absence of separate property is no defence for a married woman sued for a wrong independent of contract (*Whittaker* v. *Kershaw*, 45 Ch. D. 320; 60 L. J. Ch. 9).

(*b*) See "*Infancy*," *ante*, p. 688; "*Limitation, Statutes of*," *ante*, pp. 719, 723, and *post*, p. 876; and "*Negligence*," *post*, p. 884.

Infancy is no defence to an action for a wrong independent of contract. (See *Bristow* v. *Eastman*, 1 Esp. 171, 172; *Burnard* v. *Haggis*, 14 C. B. N. S. 45; 32 L. J. C. P. 189; and see *R.* v. *Macdonald*, 15 Q. B. D. 323.)

But it is in general a defence to an action for a tort arising out of a contract, where the claim is really founded on contract, as in the case of an action for negligence as a bailee (see *Ib.*, and *Jennings* v. *Rundall*, 8 T. R. 335); and it forms a defence to a common

INJUNCTION (*c*).

INNKEEPER.

Denial of the Acts complained of: see ante, p. 527, 529.

Defence denying that the Defendant was an Innkeeper (*d*).

The defendant was not an innkeeper, and did not keep a common inn for the accommodation of travellers.

law action for fraudulently obtaining a contract by a false representation that the defendant was of full age. (See *ante*, p. 688.)

An infant workman is not, by agreeing to accept or even by accepting compensation under the Workmen's Compensation Act, 1897, in respect of an accident, barred of his right to bring a common law action against his master for the same accident, where it is not for his benefit, as a whole, that such agreement or acceptance should bind him under s. 1, sub-s. 2 (b) (*Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225; 73 L. J. K. B. 739; and see *ante*, p. 688.).

An infant by a contract of service may validly contract himself out of the Employers Liability Act where the contract, as a whole, is for his benefit (*Clements* v. *L. & N. W. Ry. Co.*, [1894] 2 Q. B. 482; 63 L. J. Q. B. 837).

(*c*) In an action for an injunction, as in other actions, the defendant in his defence may deny any material facts relied upon by the plaintiff, or may plead affirmatively any facts which show that the plaintiff has no right of action, or is not entitled to the relief sought.

The defendant may also plead an objection in point of law where the facts stated by the plaintiff are insufficient to support the action. (See *ante*, p. 561; *Day* v. *Brownrigg*, 10 Ch. D. 294; 48 L. J. Ch. 173; *Siddons* v. *Short*, 2 C. P. D. 572; 46 L. J. C. P. 795; *Woolley* v. *Broad*, [1892] 1 Q. B. 806; 61 L. J. Q. B. 259.)

It is a defence to an action for an injunction that the acts complained of were required or authorised by statute, or were necessarily done in the execution of works which the defendants were required or authorised to execute by statute (*Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193; *London, B. & S. C. Ry. Co.* v. *Truman*, 11 App. Cas. 45; *Sellors* v. *Matlock Local Board*, 14 Q. B. D. 928; *Gas Light Co.* v. *St. Mary Abbotts*, 15 Q. B. D. 1; *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588; 63 L. J. Ch. 36; "*Nuisance*," *ante*, p. 454).

Where the defendant claims no right to commit the act of wrong complained of, and where it does not appear to the Court reasonably to be apprehended that it will again be committed by the defendant, an injunction will not, in general, be granted (*Original Hartlepool Collieries* v. *Gibb*, 5 Ch. D. 713; 46 L. J. Ch. 311; *Barber* v. *Penley*, [1893] 2 Ch. 447, 460; 62 L. J. Ch. 623).

Mere lapse of time alone will not prevent the Courts from granting an injunction in aid of a legal right, which has been established, and which is not itself barred by lapse of time (*Fullwood* v. *Fullwood*, 9 Ch. D. 176; 47 L. J. Ch. 459; and see *Att.-Gen.* v. *Colney Hatch Asylum*, L. R. 4 Ch. 146, 160; 38 L. J. Ch. 265). Acquiescence or laches on the part of the plaintiff may bar the right to an injunction. (See *Stanley* v. *Earl of Shrewsbury*, L. R. 19 Eq. 616; 44 L. J. Ch. 389; *Gaunt* v. *Fynney*, L. R. 2 Ch. 8; 42 L. J. Ch. 122; *Sayers* v. *Collyer*, 28 Ch. D. 103; 54 L. J. Ch. 1).

(*d*) As to what constitutes an innkeeper, and as to his duties, see *ante*, p. 415.

Defence denying that the Plaintiff was a Guest at the Inn (*e*).

The plaintiff was not a traveller, nor was he a guest at the defendant's inn.

Defence denying that the Plaintiff brought the Goods into the Inn.

The plaintiff did not bring any of the said goods into the defendant's inn, nor were any of them within the inn [or in the custody of the defendant or his servants].

Defence to an Action against an Innkeeper for the Loss of or Injury to Goods, that the Loss or Injury was occasioned by the Negligence of the Plaintiff (*f*).

The loss [*or*, injury] complained of was caused by the negligence of the plaintiff, and not by any negligence or default on the part of the defendant.

Particulars are as follows:—[*State particulars of the negligence, &c.*]

Defence to a Claim exceeding £30 for Loss of or Injury to Goods within s. 1 of the Innkeepers Act, 1863, stating Facts protecting the Defendant under that Act from Liability to any greater Amount than £30 (*g*).

Except as to £30, parcel of the money claimed, the defendant says that he was an innkeeper within the meaning of the Innkeepers Act, 1863, and the goods were [*describe the goods, showing that they were goods or property within the Act*], and were brought to his inn by the defendant as a guest at such inn, and the defendant duly complied with section 3 of the said statute, and the said goods were not, nor were any of them, lost or injured through the wilful act, default, or neglect of the defendant or of any servant in his employ, and were not, nor were any of them, deposited expressly for safe custody with the defendant.

(*e*) See preceding note.

(*f*) The defendant may rebut his *primâ facie* liability for loss of or injury to the guest's goods, while at his inn, by showing that the loss or injury was occasioned by the negligence of the plaintiff, or by the act of God, or of the King's enemies (*Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J. Ex. 261; *Armistead* v. *Wilde*, 17 Q. B. 261; *Herbert* v. *Markwell*, 45 L. T. 649; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11; 60 L. J. Q. B. 209); or perhaps by showing that the loss or injury was caused by mere accident without any negligence or default on the part of the defendant (*Dawson* v. *Chamney*, 5 Q. B. 164; but see *Morgan* v. *Ravey*, *supra*, and *Butler* v. *Quilter*, 17 Times Rep. 159).

In order that the innkeeper may be exonerated by the contributory negligence of the guest, it must appear that the loss would not have happened if the guest had used the ordinary care that a prudent man might reasonably be expected to take (*Cashill* v. *Wright*, 6 E. & B. 891, 909; *Oppenheim* v. *White Lion Hotel Co.*, L. R. 6 C. P. 515; 25 L. T. 93).

(*g*) See the Innkeepers Act, 1863 (26 & 27 Vict. c. 41), s. 1, *ante*, p. 416.

Defence denying Liability and setting up a Notice limiting Liability, and paying Money into Court.

1. The defendants deny that they or their servants were guilty of any negligence, default or wilful act, or that the plaintiffs' said goods or any of them were taken and carried away or lost (if at all) by or by reason of any negligence, default or wilful act of the defendants or their servants.

2. The taking and carrying away and loss of the said goods did not arise from any act or default on the part of the defendants or their servants or under any circumstances such as would render the defendants liable in respect thereof.

3. The said taking and carrying away and loss arose (if at all) from the negligence of the plaintiffs. Particulars :—[*State them.*]

4. The defendants do not admit that the said goods or any of them were taken or carried away or lost.

5. In the alternative the defendants say that the defendants received the plaintiffs into the said inn and the plaintiffs became guests therein on and subject to the terms contained in a printed notice exhibited in the said inn, one of which terms was that the defendants should not be responsible for property or valuables lost in the said inn unless given into the charge of the manager to be placed in the strong room. The plaintiffs' said goods were not given into the charge of the manager to be placed in the strong room, and the defendants accordingly deny that they were or are responsible in respect thereof.

6. Further in the alternative, whilst denying any liability, the defendants say that they duly complied with section 3 of the statute 26 & 27 Vict. c. 41, and that under section 1 of that statute they are not liable (if at all) to a greater amount than £30, and they bring into Court the sum of £30 and say that the same is sufficient to satisfy the plaintiffs' claim.

Defence that the Goods were detained under a Right of Lien (h) : see "Lien," post, p. 866.

(*h*) An innkeeper has a lien on the goods of his guest for the amount of his bill (*Thompson* v. *Lacy*, 3 B. & Ald. 283 ; *Allen* v. *Smith*, 12 C. B. N. S. 638 ; 31 L. J. C. P. 306 ; *Mulliner* v. *Florence*, 3 Q. B. D. 484 ; 47 L. J. Q. B. 700 ; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11 ; 60 L. J. Q. B. 209). The lien extends to goods of a third person which are brought to the inn under such circumstances as to make it the duty of the innkeeper to receive them (*Robins* v. *Gray*, [1895] 2 Q. B. 501 ; 65 L. J. Q. B. 44). It is a general lien on the property for all the innkeeper's charges against the guest (*Mulliner* v. *Florence*, *supra*). Such lien on a guest's horses is not lost by reason of their being occasionally taken out for use by the guest (*Allen* v. *Smith*, *supra*). Nor is it lost or waived by the acceptance of a security from the guest for the amount of the charges, unless there is something in the nature of the security, or in the facts of the case, inconsistent with the existence or continuance of the lien (*Angus* v. *M'Lachlan*, 23 Ch. D. 330 ; 52 L. J. Ch. 587).

At common law, an innkeeper's lien gave no right of sale, and an attempted sale by

INSANITY (*i*).

JUDGMENT RECOVERED (*k*).

See forms of pleas—To an action for negligent navigation, of a judgment against the plaintiff in the Admiralty Court respecting the same cause of action: Harris v. *Willis*, 15 C. B. 710; *Nelson* v. *Couch*, 15 C. B. N. S. 99;

---

the innkeeper was a waiver of the lien (see *Jones* v. *Pearle*, 1 Str. 556; *Mulliner* v. *Florence*, *supra*); but such right is now given by s. 1 of the Innkeepers Act, 1878 (41 & 42 Vict. c. 38), under the circumstances and subject to the provisoes therein mentioned.

(*i*) Insanity is no defence to an action for a wrong, at any rate where the wrong is independent of intention. Thus, a lunatic may be liable for an assault or other trespass (*Weaver* v. *Ward*, Hob. 134; Bac. Abr. Trespass, G. 1); and a lunatic innkeeper was held liable for the negligent loss of a guest's goods (*Cross* v. *Andrews*, Cro. Eliz. 622). See further, pp. 243, 244, 690, 933.

(*k*) See *ante*, pp. 703 *et seq.* The rule that a previous recovery of judgment is a bar to a subsequent action for the same cause applies to actions for wrongs as well as to actions on contracts. It is no defence to an action for malicious prosecution that the plaintiff has previously recovered judgment against the defendant in an action for false imprisonment in respect of the same charge (*Guest* v. *Warren*, 9 Ex. 379). So a recovery in an action for damage to the plaintiff's goods by the defendant's negligence in driving was held to be no bar to a subsequent action by the plaintiff for injuries to his person occasioned by the same act of negligence on the part of the defendant which had caused the damage to the goods (*Brunsden* v. *Humphrey*, 14 Q. B. D. 141; 53 L. J. Q. B. 476; see *Serrao* v. *Noel*, 15 Q. B. D. 549). But where a plaintiff who had recovered a judgment against the defendant in an action for libel afterwards brought another action against him in respect of other parts of the same libel, raising substantially the same points as in the former action, the statement of claim in the latter action was struck out under Ord. XXV., r. 4, cited *ante*, p. 563 (*Macdougall* v. *Knight*, 25 Q. B. D. 1; 59 L. J. Q. B. 517). Where a plaintiff in an action on a patent had obtained a judgment establishing the validity of his patent, it was held that in a second action by him against the same defendant for infringements of the same patent, the defendant could not again impeach the validity of the patent, although he alleged grounds not put forward in the first action (*Shoe Machinery Co.* v. *Cutlan*, [1896] 1 Ch. 667; 65 L. J. Ch. 314).

Where the cause of action is continuing, as in the case of trespass by placing obstructions on plaintiff's land, a judgment recovered in a former action is no defence. (See *Holmes* v. *Wilson*, 10 A. & E. 503; *Bowyer* v. *Cook*, 4 C. B. 236.) As to subsidences of land from mining, see *post*, p. 918.

A judgment recovered in replevin is a bar to a subsequent action for damages in respect of the same taking of the goods. (See *Gibbs* v. *Cruickshank*, *post*, p. 907.)

A judgment recovered against one of several joint wrongdoers is a bar to an action against the others for the same cause, even if the judgment remains unsatisfied (*Brown* v. *Wootton*, Yelv. 67; Cro. Jac. 73; *King* v. *Hoare*, 13 M. & W. 494, 504; *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584; 7 *Ib.* 547; 40 L. J. C. P. 281; 41 *Ib.* 190). But this rule does not apply where the rights of action against the different wrongdoers are different, although arising out of the same transactions. (See *Mayor of Salford* v. *Lever*, [1891] 1 Q. B. 168; 60 L. J. Q. B. 39.)

The acceptance of compensation under an award made by a London police magistrate under the 6 & 7 Vict. c. 86, s. 28, against an omnibus driver on an information

33 L. J. C. P. 46; *to an action for negligent navigation, of a foreign judgment against the plaintiff in respect of the same grievances: General Steam Navigation Co.* v. *Guilliou*, 11 M. & W. 878.

See also forms of pleas—Of a judgment recovered against a co-trespasser for the same trespasses: Basham v. *Lumley*, 3 C. & P. 489 n. (a); *in an action for a conversion of goods, that the conversion was committed by the defendant jointly with another, and a judgment recovered by the plaintiff against the latter for the same conversion: Buckland* v. *Johnson*, 15 C. B. 145; *to an action for the conversion of goods, that the plaintiff recovered judgment and received satisfaction in an action for the conversion of the same goods against a third party from whom the defendant purchased them: Cooper* v. *Shepherd*, 3 C. B. 266. *See Brinsmead* v. *Harrison, cited infra, and see ante*, "*Conversion*," p. 823.

JURISDICTION (*l*).

Defence to an Action for Trespass to Land, that the Land was situate Abroad, and that the English Courts had no Jurisdiction to adjudicate upon the Claim: British South Africa Co. v. *Companhia de Moçambique*, [1893] A. C. 602; 63 L. J. Q. B. 70.

---

for furious driving is a bar to a subsequent action for damages against his employers (*Wright* v. *London Omnibus Co.*, 2 Q. B. D. 271). But an order obtained from such magistrate under the 2 & 3 Vict. c. 71, s. 40, for the delivery up of goods detained, and the acceptance of the goods thereunder, is no bar to a subsequent action against the person who detained the goods for special damage caused by their detention (*Midland Ry. Co.* v. *Martin*, [1893] 2 Q. B. 172; 62 L. J. Q. B. 517).

The recovery of judgment in conversion or detinue, if unsatisfied, does not change the property in the goods the subject of the action (*Brinsmead* v. *Harrison, supra; Ex p. Drake*, 5 Ch. D. 866; 46 L. J. Bk. 105). But where in an action for conversion the full value of the goods has been assessed and recovered as damages, the satisfaction of the judgment has the effect of vesting the property in the defendant (*Ib.*).

In an action by an informer for a penalty under a statute, a judgment recovered in a former action brought by another informer in collusion with the defendant in respect of the same matters was held to be no defence (*Girdlestone* v. *Brighton Aquarium Co.*, 3 Ex. D. 137; 4 *Ib.* 107).

As to the defence of a judgment against the plaintiff in a former action for the same cause, see "*Estoppel*," *ante*, pp. 647, 705.

(*l*) Defences on the ground of want of jurisdiction should state the facts sufficiently to show that the Court in which the action is brought has no jurisdiction. Such defences are now pleaded in the ordinary manner, and require no special formalities.

The English Courts have no jurisdiction to entertain an action for damages for trespass to land situate in a foreign country or to decide any question as to the title to foreign land (*British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602; 63 L. J. Q. B. 70).

But an action may properly be brought in this country for a wrong committed abroad to goods or to the person, where no question arises as to the ownership of foreign land. (See *Ib.*; and *Mostyn* v. *Fabrigas*, 1 Sm. L. C., 11th ed., p. 591.)

An action cannot be maintained in this country for an act justifiable by the law of

JUSTICE OF THE PEACE (*m*).

LEAVE AND LICENCE (*n*).

Defence of Leave and Licence.

The defendant did what was complained of by the plaintiff's leave.

Particulars :—[*Set out the particulars showing when and how the leave was granted.*]

---

the place where it is committed, although if committed here it would have been an actionable wrong (*Phillips* v. *Eyre*, L. R. 6 Q. B. 1, 28 ; 40 L. J. Q. B. 28 ; *Carr* v. *Fracis*, [1902] A. C. 176 ; 71 L. J. K. B. 361).

Foreign sovereigns or states are not in general amenable to the jurisdiction of the Courts of this country, and cannot ordinarily be sued here (*Munden* v. *Duke of Brunswick*, 10 Q. B. 657 ; *The Parlement Belge*, 5 P. D. 197 ; *Varrasseur* v. *Krupp*, 9 Ch. D. 351 ; *Strousberg* v. *Republic of Costa Rica*, 44 L. T. 199 ; 29 W. R. 125 ; *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149 ; 63 L. J. Q. B. 593). But they may be sued here if they submit to the jurisdiction, or, it seems, if they are necessarily joined as defendants in respect of property held for them by trustees within the jurisdiction, and if they sue in this country, the defendant is entitled to counterclaim against them in the action (*Ib.*).

As to the privilege of ambassadors, &c., see *ante*, pp. 581, 582.

The governor of an English colony is not in general privileged from being sued here for acts done in the colony. (See *Mostyn* v. *Fabrigas*, *supra* ; *Musgrave* v. *Pulido*, 5 App. Cas. 102 ; 49 L. J. P. C. 24.)

Within the stannaries of Cornwall all privileged tinners were in general entitled to be sued only in the Court of the Vice-Warden of the Stannaries in respect of causes of action arising within that jurisdiction, and they are still exempt from being sued in the High Court of Justice in respect thereof (3 Stephen's Blackst., 11th ed., p. 323 ; *Newton* v. *Nancarrow*, 15 Q. B. 144 ; 19 L. J. Q. B. 314). The jurisdiction of the Stannaries Court is by the Stannaries Court (Abolition) Act (59 & 60 Vict. c. 45), transferred to certain County Courts. See, further, the Stannaries Act, 1869 (32 & 33 Vict. c. 19), and the Stannaries Act, 1887 (50 & 51 Vict. c. 43), and *ante*, pp. 152, 153.

As to the exclusive jurisdiction of the Courts of the Universities of Oxford and Cambridge in certain cases within their cognizance, see *Browne* v. *Renouard*, 12 East, 12 ; *Thornton* v. *Ford*, 15 *Ib.* 634 ; *Turner* v. *Bates*, 10 Q. B. 292 ; *Ginnett* v. *Whittingham*, 16 Q. B. D. 761 ; 55 L. J. Q. B. 409.

Where the defect of jurisdiction appears upon the face of the statement of claim, the defendant may raise the question of jurisdiction by an objection in point of law. (See *Mayor of London* v. *Cox*, L. R. 2 H. L. at p. 261 ; *Bradlaugh* v. *Gossett*, 12 Q. B. D. 271 ; 53 L. J. Q. B. 209 ; *Kinloch* v. *Secretary for India*, 7 App. Cas. 619.)

The superior Courts take judicial notice of their own jurisdiction ; but the jurisdiction of inferior Courts must be alleged and proved as matter of fact. (See *Mayor of London* v. *Cox*, L. R. 2 H. L. at p. 263, and see *ante*, pp. 10, 705.)

A total absence of jurisdiction over the subject-matter of the action cannot be waived, but there may be a waiver of mere matters of procedure (see *Orr-Ewing* v. *Orr-Ewing*, 9 App. Cas. 34 ; *Moore* v. *Gamgee*, 25 Q. B. D. 244), and as to what will amount to such waiver, see *Ib.*

For a statement of the usual grounds on which objection may be made to the jurisdiction, see *Mayor of London* v. *Cox*, L. R. 2 H. L. 239, 261 ; 36 L. J. Ex. 225.

(*m*) See *ante*, p. 418, and *post*, p. 901.

(*n*) In actions for wrongs independent of contract the leave and licence of the

Reply of a Revocation of the Leave (o).

On the —— ——, 19—, before any of the alleged trespasses [*or* grievances], the plaintiff revoked the alleged leave, and gave notice of such revocation to the defendant.

Particulars :—[*State when and how the leave was revoked, and when and how such revocation was notified to the defendant.*]

---

plaintiff to do the act complained of shows that it is not injurious, and constitutes a defence to an action according to the maxim of law, *volenti non fit injuria*.

In general, leave and licence, when relied upon as a defence, should be specifically pleaded (Ord. XIX., rr. 4, 15). This is always so in actions for trespasses to land and realty. (See *Karanagh* v. *Gudge*, 7 M. & G. 316.) A mere licence to enter upon land, whether given by parol or by deed, is revocable (*Wood* v. *Leadbitter*, 13 M. & W. 838, 845; *Adams* v. *Andrews*, 15 Q. B. 284; *Coleman* v. *Foster*, 1 H. & N. 37); unless valuable consideration has been given for it, and the circumstances are such as would have rendered it enforceable by the former Courts of Equity (see Roscoe's N. P. Ev., 17th ed., p. 930). A licence incident to or connected with a valid grant is irrevocable, whether made by parol or by deed (*Wood* v. *Leadbitter*, 13 M. & W. 838, 845). A grant of an interest in land cannot be made by parol except in the case of leases not exceeding three years within s. 2 of the Statute of Frauds. (See *ante*, p. 216; and 8 & 9 Vict. c. 106, s. 3, there cited.) A grant of emblements, growing crops, or other similar chattel interests, has been held to fall either within s. 4, or within s. 17 of the Statute of Frauds (now replaced by s. 4 of the Sale of Goods Act, 1893, cited *ante*, p. 664), and a licence incident to such grants when validly made may be irrevocable. (See *Wood* v. *Manley*, 11 A. & E. 34; see *Wakley* v. *Froggatt*, 2 H. & C. 669; 33 L. J. Ex. 5.) A grant of an interest in land, as a lease for a term, is not properly described as a licence, although it necessarily includes a licence commensurate with the grant. A defendant justifying under such an interest should not plead leave and licence, but should plead the interest according to its legal effect, as a lease or otherwise (*Karanagh* v. *Gudge*, 7 M. & G. 316, 320). But an express provision enabling a landlord to enter and take possession on breach of conditions by the tenant, and to plead leave and licence in any action brought for such entry, may properly be so pleaded (*Ib.*).

A mere licence to enter and eject the plaintiff would not justify a forcible entry, such as is made illegal by the 5 Ric. 2, st. 1, c. 8 (*Edwick* v. *Hawkes*, 18 Ch. D. 199; 50 L. J. Ch. 577).

As to leave and licence in actions for trespass, see further, *post*, p. 923.

Where a parol licence to place goods on the property of another is revoked, the licensee is entitled to a reasonable time for the removal of the goods (*Cornish* v. *Stubbs*, L. R. 5 C. P. 334; 39 L. J. C. P. 202; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400).

Where a hiring agreement contained a licence to the bailor to enter on the hirer's premises and seize the goods on default of payment of the hire instalments, it was held that this licence was not assignable separately from the goods (*Ex p. Rawlings*, 22 Q. B. D. 193).

Acquiescence by the plaintiff in the erection of a nuisance to his property may in some cases amount to a defence, although the facts fall short of what is required for proof of leave and licence at common law (*Davies* v. *Marshall*, 10 C. B. N. S. 697; 31 L. J. C. P. 61). In such cases the defendant, if he relies on the equitable doctrine as to standing by and encouragement, &c. (see *post*, p. 871), should plead the facts specifically.

(*o*) Formerly, where leave and licence was pleaded, a revocation of the licence might ordinarily be proved under a joinder of issue (*Barnes* v. *Hunt*, 11 East, 451; *Adams* v. *Andrews*, 15 Q. B. 284); but now, where the plaintiff relies upon such revocation, it should be specifically pleaded (Ord. XIX., rr. 4, 15).

Where the defence is restricted to certain occasions or to a certain extent, and the

LIBEL.

See "Defamation," ante, p. 831.

LIEN (*p*).

Defence to an Action for Detention of Goods, that the Goods were detained in Exercise of a Right of Lien.

The goods were detained [and are still detained] for a lien to which the defendant was [and is] entitled.

Particulars are as follows:—

The lien was [*or*, is] for, &c. [*give particulars of the debt, &c. for which the lien is claimed*].

(*See R. S. C.*, 1883, *App. D., Sect. VI.*)

---

plaintiff intends to claim in respect of other occasions, or for an excess beyond the licence, he should amend his statement of claim, or reply specially. (See *ante*, pp. 552, 553.)

In general, an abuse of a licence or authority given by law, rendering the defendant a trespasser *ab initio*, must be replied specially as new matter, avoiding the effect of the defence.

As to pleading leave and licence in answer to a claim or defence under the Prescription Act, see *ante*, pp. 819, 820; *post*, p. 953.

(*p*) Where the defence of lien is relied upon, it should in all cases be specially pleaded (Ord. XIX., rr. 4, 15; *ante*, pp. 5, 523); and particulars of the debt in respect of which the lien is claimed should be given. (See Ord. XIX., r. 6, *ante*, p. 37.)

Where a defence of lien is set up in answer to an action for the detention of goods, the plaintiff, if his title to the goods is otherwise undisputed, may apply by summons for an order giving him leave to pay money into Court to abide the event of the action, and requiring the defendant to give up the goods on such payment being made. (See Ord. L., r. 8.)

Where a bailee has expended his labour and skill on goods delivered to him for that purpose, he has a lien at common law for his charge for the work. Thus the artificer to whom goods are delivered for the purpose of being worked up into form, and the farrier by whose skill an animal is cured of a disease, and the horsebreaker by whose skill he is rendered manageable, have liens on them in respect of their charges (*Scarfe* v. *Morgan*, 4 M. & W. 270, 283). A carriage-maker has a lien for repairs done to a carriage delivered to him to be repaired (*Green* v. *Shewell*, cited 4 M. & W. 277; see *Keene* v. *Thomas*, [1905] 1 K. B. 21; 74 L. J. K. B. 21). The keeper of a stallion has a lien on a mare sent him to be covered (*Scarfe* v. *Morgan*, 4 M. & W. 270). A trainer of racehorses has a lien for his charge for keeping and training them (*Bevan* v. *Waters*, Mo. & M. 235); but if the owner expressly stipulated for the possession of his horse when required, the trainer has no lien (see *Scarfe* v. *Morgan*, 4 M. & W. 270, 284; *Jackson* v. *Cummins*, 5 M. & W. 342, 350); so a livery stable-keeper has no lien for the keep of a horse, because the owner impliedly, if not expressly, stipulates for the possession when required (*Judson* v. *Etheridge*, 1 C. & M. 743); and, in like manner, an agister of cattle has no lien, because the nature of the bailment is inconsistent with a detention by him (*Jackson* v. *Cummins*, 5 M. & W. 342).

As to an innkeeper's lien, see *ante*, p. 861; and as to an auctioneer's lien, see *ante*, p. 90.

A shipwright has a lien for repairs to a ship. (See *Franklin* v. *Hosier*, 4 B. & Ald.

Defence of Lien, in an Action for Conversion of Goods, or for Trespass to Goods.

The alleged grievances [*or*, The acts (*or*, matters) complained of] consisted in the detention of the goods by the defendant for a lien to which the defendant was entitled.

Particulars are as follows :—

---

341 ; *Ex p. Willoughby*, 16 Ch. D. 604.) The work and skill for which the lien is created must be expended upon the goods themselves, as in the above examples, and as in the case of assaying gold or jewels, or weighing or carrying goods. (See *Steadman* v. *Hockley*, 15 M. & W. 553, 556 ; *Cumpston* v. *Haigh*, 2 Bing. N. C. 449.) Work and skill expended "with and in respect of" the goods is not sufficient, and a plea which alleged that a conveyancer had transacted business "with and in respect of" deeds, and claimed a lien upon the deeds for his charges for the business, was held bad (*Steadman* v. *Hockley*, *supra*).

Where several parcels of goods are delivered under one contract for the purpose of having work done upon them, the bailee has a lien on the whole for the whole price, though the goods are delivered at different times (*Marks* v. *Lahee*, 3 Bing. N. C. 408). A bailee does not lose his lien merely by claiming it for other charges besides that for which he is entitled to hold it, or by claiming it for too great an amount, unless the proper amount is tendered, or the bailee so conducts himself as to dispense with such tender (*Scarfe* v. *Morgan*, 4 M. & W. 270 ; *Kerford* v. *Mondel*, 28 L. J. Ex. 303 ; *Allen* v. *Smith*, 12 C. B. N. S. 638 ; 31 L. J. C. P. 306). Where a chattel is detained for a lien, the party detaining it cannot charge for keeping and taking care of it during such detention (*Somes* v. *British Empire Shipping Co.*, 8 H. L. C. 338 ; 30 L. J. Q. B. 229). A lien cannot be got rid of by an offer to set off a debt against the amount of the lien (see *Clarke* v. *Fell*, 4 B. & Ad. 404) ; but an agreement that the one debt should be set off against the other would be equivalent to payment (*Pinnock* v. *Harrison*, 3 M. & W. 532 ; see *Ex p. Barnett*, L. R. 9 Ch. 293 ; 43 L. J. B. 87).

Whether taking security for a debt amounts to a waiver of the lien depends on the circumstances of the particular case (*Angus* v. *McLachlan*, 23 Ch. D. 330 ; 52 L. J. Ch. 587 ; *In re Taylor*, [1891] 1 Ch. 590 ; 60 L. J. Ch. 525).

By express agreement, or by the usage of particular trades or professions, a lien may be created for the general balance of account between the parties ; thus a solicitor has a general lien for his taxable costs charges and expenses, as such solicitor, on the deeds and papers of his clients which have come to his hands in the course of his professional employment (*Stevenson* v. *Blakelock*, 1 M. & S. 535 ; *In re Gallard*, 31 Ch. D. 296 ; *In re Taylor*, [1891] 1 Ch. 590 ; 60 L. J. Ch. 525 ; *In re Llewellin*, [1891] 3 Ch. 145 ; 60 L. J. Ch. 732 ; see 1 Chitty's Practice, 14th ed., pp. 159 *et seq.*). A banker, in the absence of agreement to the contrary, has a general lien upon the securities of his customers, which are in his hands as a banker (*Brandao* v. *Barnett*, 12 Cl. & F. 787 ; *Leese* v. *Martin*, L. R. 17 Eq. 224 ; *Misa* v. *Currie*, 1 App. Cas. 554 ; 45 L. J. Q. B. 852 ; *In re European Bank*, L. R. 8 Ch. 41 ; *In re Bowes*, 33 Ch. D. 586). As to what is a security within a banker's general lien, see *Wylde* v. *Radford*, 33 L. J. Ch. 51 ; and as to the right of a banker to retain a customer's balance against bills discounted for him, see *Agra and Masterman's Bank* v. *Hoffman*, 34 L. J. Ch. 285. A factor has a general lien upon all goods consigned to him as factor (*Dixon* v. *Stansfeld*, 10 C. B. 398 ; *Stevens* v. *Biller*, 25 Ch. D. 31 ; 53 L. J. Ch. 249). So also a packer has a general lien upon the goods of his customer which are in his hands (*In re Witt*, 2 Ch. D. 489 ; 45 L. J. B. 118). A wharfinger or warehouseman has a similar lien (*Holderness* v. *Collinson*, 7 B. & C. 212). A warehouseman cannot assert a general lien against all goods deposited by a factor in his own name whether his goods or not (*Leuckhart* v. *Cooper*, 3 Bing. N. C. 99 ; and see *Dresser* v. *Bosanquet*, 4 B. & S. 460 ; 32 L. J Q. B. 57, 374). Stockbrokers have a general lien upon the securities of their customers

Defence to an Action for Detention or Conversion of Deeds, that they were deposited as a Security for a Debt.

The plaintiff on the —— ——, 19—, before the alleged detention [*or*, grievances] deposited the said deeds with the defendant to be kept by him as a pledge and security for and until the repayment to him of £—— then lent by him to the plaintiff upon the security of the said deeds, and the defendant accordingly received them on those terms, and at the time of the alleged detention [*or*, grievances] the said sum of £—— was [and the same still is] due and unpaid to the defendant, and the defendant therefore detained [and still detains] the deeds [and refused (and still refuses) to give them up to the plaintiff], which is the alleged detention [*or*, grievances].

Reply to a Defence of Lien, of a Tender of the Debt before the alleged Conversion or Detention of the Goods (*q*).

[*If the amount tendered was less than the amount of the debt as alleged in the defence, commence by stating the true amount of the debt, as, for instance,* The amount due from and payable by the plaintiff to the defendant for the alleged work and materials was £——, and no more, that being the amount

---

(*Jones* v. *Peppercorne*, 1 Johns. 430; 28 L. J. Ch. 158; *In re London and Globe*, [1902] 2 Ch. 416; 71 L. J. Ch. 893).

Carriers of goods have at common law only a particular lien for their charges in respect of the specific goods carried, though they may obtain a general lien by express or implied contract, or by statute. (See *Butler* v. *Woolcott*, 2 B. & P. N. R. 64; *Wiltshire Iron Co.* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 776, 780; *Rushforth* v. *Hadfield*, 6 East 518; 7 *Ib.* 224; Browne on Carriers, pp. 336, 339; Hodges on Railways, 7th ed., p. 555.)

A railway company has a lien for cloak-room charges upon goods deposited in their cloak-room, and that even against a third person who is the rightful owner of the goods, see *Singer, &c. Co.* v. *London & S. W. Ry. Co.*, [1894] 1 Q. B. 833.

A mere lien is a personal right of detention, gives no right of sale, and is not assignable (*M'Combie* v. *Davies*, 7 East, 5; *Legg* v. *Evans*, 6 M. & W. 36; *Thames Ironworks Co.* v. *Patent Derrick Co.*, 1 J. & H. 93; 29 L. J. Ch. 714; *Donald* v. *Suckling*, L. R. 1 Q. B. 585; 35 L. J. Q. B. 232; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; 37 L. J. Ex. 174); but a pledge of goods to secure repayment of a debt gives a power of sale upon the debtor's default, and is assignable (*Pigot* v. *Cubley*, 15 C. B. N. S. 701; 33 L. J. C. P. 134; *Donald* v. *Suckling*, *supra*; *In re Morritt*, 18 Q. B. D. at pp. 232, 235).

As to pawnbrokers, see the Pawnbrokers Act, 1872, and *ante*, p. 270.

As to the lien of an unpaid vendor, see the Sale of Goods Act, 1893, ss. 39, 41, 42, 43, 47, 48.

(*q*) Where the plaintiff seeks to defeat the defendant's claim of lien by evidence of a tender of the amount of the debt, he should reply such tender specially.

Where a lien has arisen in respect of work done to different articles under one contract, the tender, to defeat the lien on any of the articles, must be a tender of the whole amount due for the work under the contract (*Marks* v. *Lahee*, *ante*, p. 867; *Coombs* v. *Noad*, 10 M. & W. 127).

It is not necessary that money should be paid into Court on such reply of tender, as Ord. XXII., r. 8 (*ante*, p. 798), only applies to defences and to replies to counterclaims.

which was agreed by word of mouth on the —— ——, 19— [*or, as the case may be*] to be paid by the plaintiff to the defendant for the same, and] the plaintiff on the —— ——, 19—, before the alleged detention [*or*, before any of the alleged grievances], tendered and offered to pay to the defendant [the said] £——, in satisfaction and discharge of the alleged lien, that sum being sufficient to satisfy and discharge the said lien, and then requested the defendant to deliver up the goods to the plaintiff, which the defendant refused to do.

Defence under the Factors Act, 1889, *to an Action for Detention or Conversion of Goods, that they were pledged to the Defendant by a Mercantile Agent in Possession thereof with the Owner's Consent and acting in the ordinary Course of Business* (*r*).

Before the alleged detention [*or*, conversion], *J. K.* was a mercantile agent of the plaintiff [*or*, of *L. M.*, the then owner of the goods,] within the meaning of the Factors Act, 1889, and was, with the consent of the plaintiff

---

(*r*) The Factors Act, 1889 (52 & 53 Vict. c. 45), consolidated the law, repealed the previous Factors Acts, and, with some modifications, re-enacted the provisions of those Acts.

The form in the text is founded upon s. 2 (1) of that Act, which enacts that—"Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

A revocation of the owner's consent to the possession of such agent does not affect the validity of the transaction. (See s. 1 (2).)

The Act (see s. 1) provides that "mercantile agent" shall "mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods" (*Inglis* v. *Robertson*, [1898] A. C. 616; 67 L. J. P. C. 108).

By s. 3, "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods." As to what are "documents of title," see s. 1 (4).

By s. 4, "where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge."

Where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee acquires no right or interest in the goods so pledged in excess of the value of the goods, documents, or security, when so delivered or transferred in exchange. (See s. 5.)

It would not be a good reply to a defence of a pledge of the goods under s. 2 (1) above cited, that the owner's consent to the agent's possession was procured by the fraud of the agent. (See *Sheppard* v. *Union Bank*, 7 H. & N. 661; 31 L. J. Ex. 154.)

As to dispositions of goods or documents of title by vendors who, notwithstanding a previous sale, are in possession thereof, or by buyers who with the consent of the sellers to them are in possession, see ss. 8, 9, or, the similar provisions in s. 25 of the Sale of

[*or*, the said *L. M.*] in possession of the goods, [which were goods within the meaning of that Act,] and on the —— ——, 19—, the said *J. K.*, being so in possession of the goods as such agent as aforesaid, and acting in the ordinary course of business of a mercantile agent, under a contract then made by him with the defendant in writing [*or*, verbally, *or*, *as the case may be*, *giving particulars of the contract*] in consideration of an advance of £—— then made to the said *J. K.* by the defendant, pledged and delivered the said goods to the defendant as security for the said advance [and for interest payable thereon by *J. K.* to the defendant under the said contract at the rate of —— per cent. per annum from that date until repayment of the principal], and the defendant received and held the goods on those terms, and acted throughout in good faith, and had no notice at the time of the said pledge that *J. K.* was not authorised to make the same; and the said sum of £—— [with interest thereon from the said date at the rate aforesaid] was at the time of the alleged detention [*or*, conversion] [and still is] unpaid and due to the defendant, and the defendant therefore detained [and still detains] the goods and refused [and still refuses] to deliver them to the plaintiff which is the alleged detention [*or*, conversion].

Lights (*s*).

Denial of the alleged Obstruction of the Light (*s*).

The defendant denies that the light has [*or*, the plaintiff's lights have] been obstructed or interfered with by the defendant's building [*or*, The building erected by the defendant has not obstructed or diminished the access of light to the plaintiff's windows].

Goods Act, 1893, cited *ante*, p. 348; *Helby* v. *Mathews*, [1895] A. C. 471; 64 L. J. Q. B. 465; *Payne* v. *Wilson*, [1895] 2 Q. B. 537; 65 L. J. Q. B. 150; *Hull Ropes Co.* v. *Adams*, 65 L. J. Q. B. 114; *Cahn* v. *Pockett's Bristol, &c. Co.*, [1899] 1 Q. B. 643; 68 L. J. Q. B. 515.

By s. 10, "where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*." (See "*Shipping*," *ante*, p. 295.)

The provisions of the Factors Act are not affected by those of the Sale of Goods Act, 1893. (See s. 21 (2) of that Act.)

(*s*) See *ante*, p. 419. The plaintiff's possession, or his property in the reversion, if he sues as reversioner, must, if disputed, be expressly denied.

Where the claim alleges that the lights are ancient, or that the right is claimed under the Prescription Act, the defendant cannot rely upon a mere general denial of the right as covering all the grounds of defence referred to by that section, and should therefore specifically deny such allegations of the facts constituting the right as he wishes to dispute, and plead specially the particular matters on which he relies as negativing the effect of those facts or as justifying the obstruction. (See *ante*, pp. 339, 527, 819.)

An agreement for an easement of light, &c., may be taken out of the Statute of

A like Defence to an Action for an Injunction to restrain a threatened Obstruction of Light (*t*).

The plaintiff's lights will not be materially [or at all] interfered with by the defendant's buildings.

(*R. S. C.*, 1883, *App. D., Sect. VI.*)

Denial of the Plaintiff's Possession of the House in respect of which he claims the Right of Light.

The plaintiff was not [*or*, was not and is not] the owner or occupier [*or*, lessee or occupier] of the said house [*or*, is not (*or*, was not) possessed of the said house, *according to the allegations in the statement of claim*].

Defences to an Action by a Reversioner, denying the Reversion, &c.: *see* "*Reversion*," *post*, p. 912.

Defence denying that the Lights are Ancient Lights (*u*).

The plaintiff's lights are not ancient.

(*R. S. C.*, 1883, *App. D., Sect. VI.*)

Defence to an Action in which the Claim is expressly made under the Prescription Act, 1832, *s.* 3, *denying the alleged Enjoyment* (*x*).

The access and use of light through the said window to and for the said house has not been enjoyed therewith for the said period of twenty years [*or*, was not enjoyed therewith for the statutory period of twenty years] within the meaning of the Prescription Act, 1832, ss. 3 and 4.

Frauds by the application of the equitable doctrine of part performance (*McManus* v. *Cooke*, 35 Ch. D. 681 ; 56 L. J. Ch. 662).

The right to light and air may be lost by abandonment. (See *ante*, p. 420.)

As to the defence that the plaintiff stood by and acquiesced in and impliedly consented to the erection of the defendant's building, see *Davies* v. *Marshall*, 10 C. B. N. S. 697 ; 31 L. J. C. P. 61 ; *Russell* v. *Watts*, 10 App. Cas. 590 ; "*Injunction*," *ante*, pp. 413, 859. Where the equitable doctrines of acquiescence are relied upon by the defendant, it is a good reply that the acquiescence was procured by a false representation on the part of the defendant, that the intended building would not obstruct the light (*Davies* v. *Marshall*, *supra*).

(*t*) See *ante*, pp. 421, 859.

(*u*) This denial operates as a denial that the lights have been enjoyed for twenty years before action, or from time immemorial.

(*x*) The right to light is dealt with by s. 3 of the Prescription Act, 1832, and is not dealt with by s. 2 of that Act. (See *ante*, p. 420, *post*, p. 947 ; *Wheaton* v. *Maple*, [1893] 3 Ch. 48 ; 62 L. J. Ch. 963.)

The like, alleging an Interruption of the Enjoyment (y).

The alleged enjoyment of the lights during the statutory period of twenty years was interrupted by [*state how and when, as, for instance*, the defendant erecting on his land a wooden hoarding in front of the plaintiff's said windows in ——, 19—, and maintaining the said hoarding so erected until ——, 19—], and the plaintiff submitted to and acquiesced in the said interruption for more than one year from the time of his having notice of the said interruption, and of the defendant being the person who made or authorised the same to be made.

The like, alleging that the Enjoyment was by Consent (z).

The access and use of the light through the said windows during the said twenty years [*or*, from ——, 18—, to ——, 19—,] was enjoyed by consent expressly given for that purpose by the defendant [*or*, —— ——, the defendant's predecessor in title] to the plaintiff [*or*, the plaintiff's predecessors in title] by a deed [*or*, writing] dated the —— ——, 19—.

See a form of plea justifying an obstruction as having been erected under a Railway Act: Turner v. *Sheffield Rail. Co.*, 10 M. & W. 425; *of a plea that the defendant erected his building with the knowledge acquiescence and consent of the plaintiff: Davies* v. *Marshall*, 10 C. B. N. S. 697; 31 L. J. C. P. 61 (*see ante*, p. 871); *and of a reply that the plaintiff acquiesced and consented on the faith of representations that the building would not obstruct the light* (*Ib.* p. 871).

Defence to an Action for Trespass, justifying an Entry on the Plaintiff's Land to remove an Obstruction to the Defendant's Ancient Lights (a).

At the time of the alleged trespasses the defendant was possessed of a house [called ——, *describing it*] adjoining the plaintiff's said land, and was entitled [*state how, e.g.*, by prescription under the 2 & 3 Will. 4, c. 71] to the access and use of light to and for the said house through an ancient

(*y*) "Interruption" in the Prescription Act means an adverse obstruction, not a mere discontinuance or voluntary cessation of user (*Smith* v. *Baxter*, [1900] 2 Ch. at p. 143; 69 L. J. Ch. at p. 440; *Carr* v. *Foster*, 3 Q. B. 581; 11 L. J. Q. B. 284).

(*z*) By s. 3 of the Prescription Act, enjoyment for the statutory period confers the right, unless it appears that the light was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing (*Bewley* v. *Atkinson*, 13 Ch. D. 283; 49 L. J. Ch. 153; *Mitchell* v. *Cantrill*, 37 Ch. D. 56; 57 L. J. Ch. 72; *Easton* v. *Isted*, [1903] 1 Ch. 405; 72 L. J. Ch. 189).

(*a*) See *Duke of Norfolk* v. *Arbuthnot*, 4 C. P. D. 290; 5 *Ib.* 390; 48 L. J. C. P. 737; 49 *Ib.* 382.

window therein, viz., the [library window on the ground floor of the said house]; and because the said [hoarding] had been wrongfully erected in violation of the said prescriptive right, and wrongfully obstructed the light, and prevented the same from entering the said house through the said window, the defendant on the —— ——, 19—, entered the said land and pulled down the said hoarding in order to remove the said obstruction, doing no more than was necessary for that purpose, which are the alleged trespasses.

LIMITATION, STATUTES OF (*b*).

Defence to an Action within the Statute of Limitations, 21 *Jac.* 1, *c.* 16, *s.* 3, *that the Action is barred by that Statute* (*b*).

The plaintiff's alleged right [*or*, rights] of action did not accrue, if at all, within [six] years next before the commencement of this action, and was

(*b*) The Statutes of Limitation must, in general, be specially pleaded in actions for wrongs, as in actions upon contracts, see Ord. XIX., r. 15; *ante*, p. 523. As to actions against public authorities and persons acting in execution of statutory and other public duties, see *post*, pp. 901, 904; and as to actions for the recovery of land, see *post*, p. 906.

The Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3, provides that actions for trespass to land, actions for trespass to goods, actions for conversion or detention of goods, actions of replevin, and all actions upon the case (other than for slander) must be commenced within *six* years next after the cause of such actions; actions for trespass to the person, such as assault, battery, wounding, and imprisonment, within *four* years next after the cause of such actions; actions for slanderous words within *two* years next after the words spoken.

The above limitations are applicable, wherever the facts constituting the plaintiff's case are such as, before the Judicature Acts, would have been sued on in those forms of action respectively, and would have been subject to those limitations. As to the meaning of "actions upon the case" in the above enactment, see 3 Blackst. Comm. 122; Broom's Comm., 2nd ed., p. 120; *Gibbs* v. *Guild*, 8 Q. B. D. at p. 302. That term includes actions for defamation, actions for malicious prosecution, and actions for negligence, as well as many other actions in which the injury is not the direct or immediate result of the acts complained of. (See *Ib.*; and *ante*, p. 718.)

By the 3 & 4 Will. 4, c. 42, s. 3, actions for penalties, &c., given by any statute to the party grieved must be commenced within *two* years after the cause of action accrued. (See *ante*, p. 718.) As to the limitation of actions on penal statutes by informers, see the 31 Eliz. c. 5, s. 5, and *ante*, p. 719. As to disabilities, &c., see *ante*, pp. 719 *et seq.*

An action for compensation under the Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3, not an action for penalties within 3 & 4 Will. 4, c. 42, s. 3, and the period of limitation would seem to be six years, dating from the subscription (*Thomson* v. *Clanmorris*, [1899] 2 Ch. 523; [1900] 1 Ch. 718, 726, 729).

By the 3 & 4 Will. 4, c. 42, s. 2 (cited *ante*, p. 385), an action may be maintained by the executors or administrators of a deceased person for injuries to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, "so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person." The same section

[*or*, were] barred by [*here state the statute by which the period of limitation is fixed, as, for instance*, the Limitation Act, 1623, 21 Jac. 1, c. 16].

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

---

provides that an action may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, "so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person."

Actions brought under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), or the amending Act, (27 & 28 Vict. c. 95), to recover damages for the loss occasioned by the death of persons killed through the wrongful act, neglect, or default of the defendants must be brought within twelve months after such death (see *ante*, pp. 387—389).

The period of limitation for actions brought in respect of offences against the Dramatic Copyright Act, 1833, is, by s. 3 thereof, twelve months. That for actions in respect of offences against the Copyright Act, 1842, would seem to be, in general, by s. 26 thereof, twelve months. This latter section is included in the schedule of enactments repealed by s. 2 of the Public Authorities Protection Act, 1893; but that repeal is a qualified repeal, and would seem to leave all actions not falling within the provisions of s. 1 of the last-named Act unaffected. (See *post*, p. 901.)

In actions for wrongs, the date of the cause of action, for the purpose of the limitation of the action, is, in general, the committing of the injurious act, and not the occurrence of the damage arising therefrom (*Clegg* v. *Dearden*, 12 Q. B. 576; *Violett* v. *Sympson*, 8 E. & B. 344; 27 L. J. Q. B. 138; 2 Wms. Saund., 1817 ed., p. 166). But where the act of the defendant is not injurious in itself, and only becomes injurious by reason of damage occasioned by it, no right of action accrues until the actual damage occurs, and in such cases the period of limitation dates from the damage. Thus, where slanderous words not actionable in themselves become actionable by causing subsequent damage, the period of limitation is computed, not from the date of the speaking of the words, but from the date of the damage. (See *ante*, p. 362.) So, where a person excavates his own land in a manner which causes a subsidence to take place in the land of his neighbour, no cause of action arises until the actual damage occurs, and the period of limitation dates from the damage (*Backhouse* v. *Bonomi*, 9 H. L. C. 503; 34 L. J. Q. B. 181; *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127; 55 L. J. Q. B. 529; *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503; 60 L. J. Q. B. 392). Hence, where by reason of such excavation several subsidences of the plaintiff's land occur at different periods, each fresh subsidence gives a new cause of action; and it is no defence to an action brought in respect of the damage occasioned by one of the later subsidences, that the *first* subsidence occasioned by the excavation took place more than six years before the commencement of the action. (*Ib.*; and see *post*, p. 918.)

Where the injurious act is continuing, and causes continued damage, the right of action is also continuing (*Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765; 30 L. J. C. P. 305; see *Darley Main Colliery Co.* v. *Mitchell*, *supra*; *Crumbie* v. *Wallsend Local Board*, *supra*).

The fact that the plaintiff was not aware of the committing of the wrong does not prevent the statutory period from running against him. (See *ante*, p. 720.) As to the effect of fraudulent concealment, see *ante*, p. 727.

The renewal of liability by subsequent acknowledgment, as in cases of debts, is inapplicable in actions for wrongs independent of contract (*Hurst* v. *Parker*, 1 B. & Ald. 92; *Tanner* v. *Smart*, 6 B. & C. 603, 605).

Defence that the Claim is barred by the Public Authorities Protection Act, 1893 (c): see "Public Authorities," post, p. 901.

Defence to an Action for the Recovery of Land, that the Plaintiff's Claim was barred by the Lapse of the Statutory Period of Limitation (d).

The right (if any) to bring the action for recovery of the land referred to in the statement of claim did not first accrue to the plaintiff [*or*, to *E. F.*, under whom he claims] within twelve years before the commencement of the action, and the plaintiff's alleged claim [*or*, right of action]

(*c*) See as to the special protection given by this Act to Public Authorities and Persons acting in execution of statutory and other public duties, *post*, p. 901.

(*d*) A defendant in an action for the recovery of land may avail himself of a defence founded on the Statutes of Limitation, under a simple allegation that he is in possession of the land (see Ord. XXI., r. 21; *Heath* v. *Pugh*, 6 Q. B. D. 345, 353; *Pugh* v. *Heath*, 7 App. Cas. 235; 51 L. J. Q. B. 367; *Danford* v. *McAnulty*, 8 App. Cas. 456; 52 L. J. Q. B. 652; "*Recovery of Land*," *post*, p. 905); but it is usual and convenient to plead such defence specially. (See *Pedder* v. *Hunt*, 18 Q. B. D. 565; 56 L. J. Q. B. 212; *Topham* v. *Booth*, 35 Ch. D. 607; 56 L. J. Ch. 812; *Morris* v. *Edwards*, 15 App. Cas. 309.)

Where the facts constituting a defence under the Statutes of Limitation in an action for the recovery of land or other real property appear on the face of the statement of claim, and their effect is not rebutted by any of the allegations therein contained, such defence may be raised by an objection in point of law (see *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318; 4 App. Cas. 51; 48 L. J. Ch. 304; and *ante*, p. 717); as these statutes do not merely bar the claimant's remedy after the lapse of the statutory period, but also extinguish his title. (See *Ib.*; 3 & 4 Will. 4, c. 27, s. 34; 37 & 38 Vict. c. 57, s. 9; and see *Scott* v. *Nixon*, 3 Dru. & War. 388; *In re Alison*, 11 Ch. D. 284; *Sanders* v. *Sanders*, 19 Ch. D. 373; *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219; 64 L. J. Ch. 184.)

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), repealed ss. 2, 5, 16, 17, 23, 28, and 40 of the Limitation Act, 1833 (3 & 4 Will. 4, c. 27), and replaced them by other enactments (ss. 1—8 of the first-mentioned Act), which besides making some amendments in points of detail, have shortened the times of limitation by substituting periods of 12 years, 6 years, and 30 years respectively for the periods of 20 years, 10 years, and 40 years respectively prescribed by the repealed sections of the earlier Act. The periods of 10 years and 20 years specified in s. 18 of that Act have also been altered, by s. 9 of the Act of 1874, to periods of 6 years and 12 years respectively. Section 9 of the Act of 1874 has also reduced to 12 years the period of 20 years specified in the 1 Vict. c. 28 (as to payments to mortgagees).

By s. 1 of the Act of 1874, "no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

The word "rent" in s. 1, above cited applies to rents of inheritance, rent charges, tithe rent charges, and the like (*Grant* v. *Grant*, 9 M. & W. 113; *Jones* v. *Withers*, 75 L. T. N. S. 572; *Skene* v. *Cook*, [1901] 2 Q. B. 7; 70 L. J. Q. B. 556), and does not

was and is barred by the Real Property Limitation Act, 1874 [and the plaintiff's right and title (if any) to the land were extinguished by virtue of that Act and the Limitation Act, 1833, 3 & 4 Will. 4, c. 27, s. 34].

---

apply to ordinary rents payable by tenants to their landlords under leases or agreements (*Grant* v. *Ellis*, 9 M. & W. 113; see *Howitt* v. *Earl of Harrington*, [1893] 2 Ch. 497; 62 L. J. Ch. 571).

By s. 3, "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years or six years (as the case may be) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened)." As to successive disabilities, see 3 & 4, Will. 4, c. 27, s. 18, as altered by s. 9, above cited; but, even in the case of successive disabilities, the action must be brought, &c., within 30 years from the time when the right first accrued. (See 37 & 38 Vict. c. 57, s. 5.)

The absence of the plaintiff beyond seas is no longer a disability (37 & 38 Vict. c. 57, s. 4), and coverture, though it is one of the disabilities mentioned in s. 3 of the Act, ceased to operate as a disability from the time of the coming into operation of the Married Women's Property Act, 1882 (the 1st January, 1883) (see *ante*, pp. 679, 720).

If the plaintiff relies on disability, he should plead such disability specially. A reply of disability should show that the action was brought within thirty years from the first accrual of the right, if that fact does not already appear on the pleadings.

By s. 7 of the Act of 1874, a mortgagor is barred from bringing an action for redemption at the end of twelve years from the time when the mortgagee took possession, or from the last written acknowledgment by the mortgagee. The twelve years' bar under this section is absolute, and is not to be extended by reason of any disability of the mortgagor (*Forster* v. *Patterson*, 17 Ch. D. 132; 50 L. J. Ch. 603).

The period of limitation of actions by mortgagees to recover the land is twelve years next after the last payment of any part of the principal or interest. (See 1 Vict. c. 28, as altered by the 1874 Act, s. 9; and *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219; 64 L. J. Ch. 184; *Ludbrook* v. *Ludbrook*, [1901] 2 K. B. 96; 70 L. J. K. B. 552.)

As to actions against trustees, see further, *ante*, pp. 722, 723.

Continuous and successive adverse possession by persons without title, each of whom derives title from the other, may bar the right of the true owner (*Dixon* v. *Gayfere*, 17 Beav. 421; *Trustees Co.* v. *Short*, 13 App. Cas. 793, 798; *Willis* v. *Earl Howe*, [1893] 2 Ch. 545, 553; 62 L. J. Ch. 690); and where each is an independent trespasser, not deriving title from his predecessor, and the series is absolutely continuous, it may be that the same rule would apply, though as to this there would appear to be some doubt (*Ib.*; *Doe* v. *Barnard*, 13 Q. B. 945; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Solling* v. *Broughton*, [1893] App. Cas. 556).

It is provided by the 3 & 4 Will. 4, c. 27, s. 26, that "in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered"; but the section is not to apply as against *bonâ fide* purchasers for valuable consideration, who have not assisted in the fraud or had any reason to believe that any such fraud had been committed. (See *ante*, p. 727; *Thorne* v. *Heard*, [1895] A. C. 495; 64 L. J. Ch. 652; *In re McCallum*, [1901] 1 Ch. 143; 70 L. J. Ch. 206.) Since the Judicature Acts, this section is applicable to an action for the recovery of such land or

MAINTENANCE.

See "*Maintenance*," *ante*, pp. 423, 720.

MALICIOUS PROSECUTION (*e*).

Denial of the alleged Absence of Reasonable and Probable Cause, and of the alleged Malice.

The defendant denies that he had not reasonable and probable cause for [preferring the said charge, and for] taking [and causing to be taken] the said proceedings against the plaintiff, or that the defendant in so doing acted with malice [on the contrary, he acted without malice and in the bonâ fide belief that he was discharging a public duty].

Denial that the Proceedings terminated in Favour of the Plaintiff (f).

The defendant denies that the said prosecution was [*or*, said proceedings were] determined in favour of the plaintiff [*or*, that the plaintiff was acquitted].

MANDAMUS (*g*).

For a form, see Peebles v. *Oswaldtwistle Urban Council*, [1897] 1 Q. B. 384, 625; 66 L. J. Q. B. 392.

---

rent in any Division of the High Court. (See the Judicature Act, 1873, ss. 24, 25; and see *Pugh* v. *Heath*, 7 App. Cas. 235; *Chapman* v. *Auckland Union*, 23 Q. B. D. 294, 298.)

(*e*) See *ante*, p. 424.

As the *onus* of proving that the defendant acted without reasonable and probable cause and maliciously is on the plaintiff, the proper form of defence is to deny the plaintiff's allegations, and not to plead affirmatively that the defendant had reasonable and probable cause. If the defence is pleaded in the former way the defendant is not required to give particulars of reasonable and probable cause (*Roberts* v. *Owen*, 6 Times Rep. 172). The *dictum* to the contrary in *Alman* v. *Oppert*, [1901] 2 K. B. 576, 578; 70 L. J. K. B. 745, 746, if correctly reported, cannot, it is submitted, be supported, except with reference to a case where the defendant pleads affirmatively that he had reasonable and probable cause, thus undertaking an unnecessary *onus*.

(*f*) The onus is on the plaintiff of showing that the proceedings complained of have terminated in his favour, whenever their nature is such as to be capable of such a termination. (See *ante*, p. 424.)

(*g*) The defendant in an action for a mandamus should distinctly deny any of the allegations which are disputed, and plead any facts showing that the plaintiff is not entitled to the mandamus claimed. Where it appears on the face of the claim that the facts alleged are not sufficient to support the action, and that the plaintiff is not entitled to the mandamus, the defendant may plead an objection in point of law. (See *ante*, p. 561.)

It appears that there is no statutory period of limitation for an action for a mandamus

Defence to an Action for a Mandamus to the General Council of Medical Education and Registration of the United Kingdom, the Defendants, to restore the Name of the Plaintiff to the Dentists' Register (*h*).

1. The defendants admit that they caused and directed the name of the plaintiff to be erased from the said register. Before doing so they caused inquiry to be made into the case of the plaintiff, whose name was upon the dentists' register, kept under the Dentists Act, 1878, it being alleged that he had been guilty of infamous or disgraceful conduct in a professional respect, and was liable to have his name erased from the said register.

Particulars as follows :—[*State them.*]

2. The said inquiry was held by the committee appointed under the said Act, and a report, dated the —— ——, 19—, was made by such committee, after [hearing the plaintiff in his defence, and after] a full investigation of the case, that the plaintiff had been guilty of the said infamous and disgraceful conduct in a professional respect [*or, as the case may be*].

3. And thereupon the defendants, being satisfied that the plaintiff had, as stated in the report, been guilty of infamous and disgraceful conduct in a professional respect [*or, as the case may be*], caused and directed the name of the plaintiff to be erased from the said register.

4. The defendants did not act maliciously or without reasonable and probable cause as alleged. They will, however, submit that as the charge made against the plaintiff was one which they had jurisdiction under the

---

(see *Ward* v. *Lowndes*, 1 E. & E. 940; 29 L. J. Q. B. 49), except in such cases, if any, as fall within s. 1 of the Public Authorities Protection Act, 1893. (See *post*, p. 901.)

Where a new duty of a public nature is created by a statute which provides a special remedy for a breach of such duty, there is no remedy, other than the one thus provided, open, in general, to a person aggrieved by such breach. Thus, a mandamus will not be granted to compel a local authority to make proper sewers in their district on the complaint of an individual, the remedy given by the Public Health Act, 1875 (38 & 39 Vict. c. 55), being by complaint to the Local Government Board (*Robinson* v. *Workington*, [1897] 1 Q. B. 619; 66 L. J. Q. B. 388; *Peebles* v. *Oswaldtwistle*, [1897] 1 Q. B. 625; 66 L. J. Q. B. 392; *Harrington* v. *Derby Corporation*, [1905] 1 Ch. 204; 74 L. J. Ch. 219). An action for a mandamus will not lie to a local authority to re-consider, or to pass building plans, rejected on the ground that they infringed by-laws, if the matter was one on which the local authority had jurisdiction, and if they refused the plans in good faith upon consideration of them (*Smith* v. *Chorley R. C.*, [1897] 1 Q. B. 678; 66 L. J. Q. B. 427).

(*h*) An action will not lie to restore the name of a medical practitioner or of a dentist to the register which has been erased therefrom under the Medical Act, 1858 (21 & 22 Vict. c. 90), s. 29, or the Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 13, if the subject-matter of the complaint on which it was struck off is within the jurisdiction of the "General Council of Medical Education and Registration," and if the procedure required by those statutes has been followed. Where the charge was one against a medical man of "infamous conduct in a professional respect," it was held sufficient to justify a finding against him that there was evidence before the professional tribunal created by the statute of conduct which might, not unreasonably, be thus described by his professional brethren of good repute (*Leeson* v. *Gen. Council*, 43 Ch. D. 366; 59 L. J. Ch. 233; *Allinson* v. *Gen. Council*, [1894] 1 Q. B. 750; 63 L. J. Q. B. 534).

Dentists Act, 1878, to inquire into, and one capable of being held to be infamous or disgraceful conduct in a professional respect, this Court cannot inquire into the questions of malice and absence of reasonable cause.

MASTER AND SERVANT.

I. ACTIONS BY THE MASTER AGAINST THIRD PARTIES (*i*).

Denial of the Acts complained of: see ante, p. 529.

The like, in an Action for Seduction.

The defendant did not seduce and carnally know the said *A. B.*

(*R. S. C.*, 1883, *App. D., Sect. VI.*)

Defence to a like Action, denying the alleged Service.

The said *A. B.* was not the servant of the plaintiff.

(*R. S. C.*, 1883, *App. D., Sect. VI.*)

Defence to a like Action, denying the Damage (*k*).

The plaintiff was not deprived of the services of the said *A. B.* and did not suffer the alleged or any damage.

II. ACTIONS AGAINST THE MASTER BY THIRD PARTIES (*l*).

Denial of Wrongful Acts, where the Plaintiff alleges that "the Defendant or his Servants," or "the Defendant by his Servants," did the Acts complained of.

The defendant denies that he or any servant or servants of his [drove the said carriage, *or, as the case may be*].

(*i*) In actions by a master for injuries done to the master in respect of his servants, as by enticing away or harbouring his servants, or for loss of service occasioned by the seduction of his female servant, or by personal injuries done to the servant, the defence that the person in respect of whom the wrong is alleged to have been committed was not at the time of the alleged wrongful acts the servant of the plaintiff, must be specially pleaded. (See *ante*, p. 527.) In actions for seduction very slight evidence is sufficient to prove the allegation of the service. (See *ante*, p. 433.) In such actions it is no defence that the acts charged amounted to a felony, and that the defendant has not been prosecuted for it. (See *post*, pp. 922, 923.)

(*k*) The fact that the plaintiff has sustained damage (by loss of service, &c.), in consequence of the acts of the defendant, is a material part of the cause of action, and, if disputed, should be expressly denied in the defence. (See *ante*, pp. 529, 530.)

(*l*) See "*Master and Servant*," *ante*, p. 434; "*Malicious Prosecutions*," *ante*, pp. 425, 426; and "*Negligence*," *ante*, pp. 442, 885.

Denial that a particular Person who is alleged to have committed the Acts was a Servant of the Defendant.

The said *A. B.* [*or*, The person referred to in the —— paragraph of the statement of claim] was not the servant of the defendant.

Defence that the wrongful Act alleged to have been done by the Servant was an unauthorized Act and not within the Scope of his Employment (*m*).

The said *A. B.* [*or*, The person referred to in the statement of claim as the servant of the defendant] was employed by the defendant to act as [coachman] to the defendant, and not otherwise, and the act complained of was not done by the said *A. B.* [*or*, the said person] in the course of his employment as such [coachman], and was not within the scope of such employment, and was wholly unauthorised by the defendant.

Defence in an Action for Negligent Driving.

1. The said carriage was not driven by the defendant, or by any servant of his.
2. The said carriage was not driven negligently.

III. Actions against the Master by his Servants (*n*).

See a form of plea under the old system in an action for an injury done to the plaintiff by the defendant's servant, that the plaintiff was also a servant of the defendant and engaged in the same employment with his fellow-servant

(*m*) See *ante*, pp. 359, 360, 425, 434.

(*n*) Where an action is brought in the High Court by a servant against his master to recover damages for breach of common law duty, in negligently keeping his premises in an unsafe condition, or in negligently providing unsafe materials and implements, &c., for the work, the defendant in his defence may deny the dangerous state or character of the premises, materials, or implements, the defendant's knowledge, or the plaintiff's ignorance of these circumstances, or that the damage to the plaintiff was occasioned thereby. (See *ante*, pp. 436, 437.) A master is not, either at common law or under the Employers' Liability Act, 1880, liable to his servant for personal injuries where the servant, knowing and appreciating the risk and the danger from which the injuries arose, voluntarily accepts and encounters them, as in such case the principle of *volenti non fit injuria* applies. (See *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, 695; 56 L. J. Q. B. 340; *Smith* v. *Baker*, [1891] A. C. 325; 60 L. J. Q. B. 683; and see *Williams* v. *Birmingham Battery Co.*, cited *ante*, p. 437.) Contributory negligence on the part of the plaintiff may, of course, be pleaded as a defence to such an action. (See *Griffiths* v. *Gidlow*, 3 H. & N. 648; 27 L. J. Ex. 404; and "*Negligence*," *post*, p. 884.)

who did the injury: Wiggett v. *Fox*, 11 Ex. 832; 25 L. J. Ex. 188; *Griffiths* v. *Gidlow*, 3 H. & N. 648; 27 L. J. Ex. 404 (*nn*).

Plea in a like action that the plaintiff was voluntarily assisting in the same employment in the defendant's service who did the injury: Degg v. *Midland Ry. Co.*, 1 H. & N. 773; 26 L. J. Ex. 171.

Special plea in an action by a servant against his master for an injury done by the negligence of a fellow-servant that the latter was a competent person, and that his negligence was without the authority and knowledge of the defendant: Hutchinson v. *York Etc. Ry. Co.*, 5 Ex. 343.

Defence of an Award of Compensation under the Workmen's Compensation Act, 1897, to an Action by a Workman against his Employer for Damages for Personal Injury from Negligence of the Employer (o).

The plaintiff obtained an award of compensation under the Workmen's Compensation Act, 1897, dated the —— ——, 19—, in the County Court of ——, holden at ——, whereby the defendant was ordered to pay him compensation for personal injury caused him on the —— ——, 19—, by accident arising out of and in the course of his employment by the defendant, whereby the plaintiff is barred from claiming damages in and from maintaining this action which is founded on and brought in respect of the said accident.

A like form of Defence.

The plaintiff's claim in this action is barred by the Workmen's Compensation Act, 1897, and the award made in favour of the plaintiff thereunder in the County Court of ——, holden at ——, and dated the —— ——, 19—.

(*nn*) If a servant who has suffered personal injury from the negligence of his fellow-servants in the same employment, sues his master in an action, for negligence at common law, without disclosing the facts, the defendant may plead that the plaintiff was the servant of the defendant at the time in question, and that the alleged negligence was not the negligence of the defendant personally, but was the unauthorised negligence of the plaintiff's fellow-servants engaged in a common employment with him. (See *ante*, pp. 435, 436; *Thomas* v. *Quartermaine*, *supra*.)

(*o*) A workman who has obtained an award under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), for compensation for personal injury, by accident arising out of and in the course of his employment, can maintain no action for damages for such injury or accident, either at common law, or under the Employers' Liability Act, 1880, against his employer or against a third party otherwise legally liable to pay damages in respect thereof. (See s. 1, sub-s. 2 (b), s. 6; *Campbell* v. *Caledonian Ry. Co.*, 5th series Sess. Cas., vol. i., p. 887; *Tong* v. *Great Northern Ry. Co.*, 86 L. T. N. S. 802; 18 Times Rep. 566.) Nor can one who has become a party to a contracting out scheme certified by the Registrar of Friendly Societies under s. 3 sub-s. 1 of the Act. (See s. 1, sub-s. 2 (b), s. 3; and *Taylor* v. *Hamstead Colliery Co.*, [1904] 1 K. B. 838; 73 L. J. K. B. 469.) The Workmen's Compensation Act, 1900, extends the benefits of the former Act to the employment of "workmen in agriculture by any employer who habitually employs one or more workmen in such employment."

Defence of a Claim and Acceptance of Compensation under the Workmen's Compensation Act, 1897, to an Action by a Workman against his Employer for Damages for Personal Injury from Negligence of the Employer (p).

The plaintiff [before this action] claimed and received [*or*, accepted and received] from the defendant a payment [*or*, payments] of and in respect of compensation under the Workmen's Compensation Act, 1897, for personal injury caused him, on the —— ——, 19—, by accident arising out of and in the course of his employment by the defendant, whereby the plaintiff is barred from claiming damages in, and from maintaining, this action which is founded on and brought in respect of the said accident.

Particulars :—[*State particulars of payments and of claim or acceptance.*]

Defence that the Workman was a Party to a Scheme within sect. 3 of the Workmen's Compensation Act, 1897, to a like Action (q).

The plaintiff at the time when he suffered the alleged personal injury was a workman engaged in an employment within the Workmen's Compensation Act, 1897, and had joined and was then a party to a scheme within sect. 3 of that Act, duly certified by the Registrar of Friendly Societies, whereby the plaintiff contracted with the defendants, his employers, that the provisions of the said scheme should be substituted for the provisions of the said Act, and that the defendants should be liable

---

(*p*) It is not a defence to an action by a workman that he has made a claim under the Workmen's Compensation Act, 1897, if it appears that the claim was withdrawn before any decision was arrived at (*Rouse* v. *Dixon*, [1904] 2 K. B. 628 ; 73 L. J. K. B. 662, following *Beckley* v. *Scott*, [1902] 2 Ir. R. 504), nor, it would seem, if his claim failed because it was not within the Act (*Ib.*). It would seem to be, in general, a defence to an action by a workman suing for damages for personal injury to show that he has elected to take the benefit of the Workmen's Compensation Act, 1897, by accepting payments of compensation thereunder from his employer in respect of the accident in question. (See *Campbell* v. *Caledonian Ry. Co.*, *ante*, p. 881 ; *Oliver* v. *Nautilus Co.*, [1903] 2 K. B. 639 ; 72 L. J. K. B. 857 ; *Mulligan* v. *Dick*, 5th series, Sess. Cas., vol. vi., p. 126.)

As to infant workmen, see *ante*, pp. 859, 688.

(*q*) A workman may, by a contract founded on consideration, exclude both himself and his representatives, and also persons who would otherwise be entitled, in the event of his death, to maintain an action against the master from the benefits of the Employers' Liability Act, 1880 (*Griffiths* v. *The Earl of Dudley*, 9 Q. B. D. 357 ; 51 L. J. Q. B. 543). But he cannot exclude either himself or them from the benefits of the Workmen's Compensation Act, 1897, otherwise than by a scheme certified by the Registrar of Friendly Societies. (See the Workmen's Compensation Act, 1897, s. 3.) As to infant workmen, see *Stephens* v. *Dudbridge Ironworks*, cited *ante*, p. 859.

to him for personal injury only in accordance with the said scheme and not otherwise, and this action is thereby barred.

Particulars :—[*Set out the particulars of the scheme.*]

Mischievous Animals (*r*).

Defence to Claim for Injuries inflicted by a Fierce Dog.

1. The defendant denies that he kept the said dog.

2. The defendant denies that the said dog was of a fierce or mischievous nature, or accustomed to attack or bite mankind. He denies that he knew it was of such nature or so accustomed.

3. The defendant does not admit [*or*, denies] that the said dog attacked or bit the plaintiff. He denies that the plaintiff sustained the alleged or any injuries or damages.

4. [Further, or in the alternative, the defendant says that the plaintiff brought the said injuries on himself by irritating the said dog by throwing stones at it and teasing it after the defendant had warned him verbally on the —— ——, 19—, that such conduct might or would lead the said dog to attack him (*s*).]

Negligence (*t*).

(*r*) See *ante*, p. 439. In an action for having knowingly kept a mischievous dog which injured the plaintiff, the defendant may deny that he kept the dog, that it was mischievous, that the defendant knew it to be so, or that it did the alleged injury.

Negligence in keeping the animal insecurely is no part of the cause of action (see *May* v. *Burdett*, 9 Q. B. 101 ; *Jackson* v. *Smithson*, 15 M. & W. 563 ; *Fleeming* v. *Orr*, 2 Macq. H. L. Cas. 14 ; and see *Fletcher* v. *Rylands*, L. R. 1 Ex. 265, 281 ; L. R. 3 H. L. 330) ; and the absence of such negligence cannot be pleaded as a defence.

(*s*) See *May* v. *Burdett*, *supra*.

(*t*) In action for negligence the defendant should deny specifically such allegations of the plaintiff as he intends to contest, *e.g.*, he may deny that he did the alleged act, or that he did it negligently, or that it caused the alleged damage. If the defence of contributory negligence is relied on, it should be specifically pleaded (see *post*, p. 884) ; and although the defence that the injury complained of was wholly occasioned by the negligence of the plaintiff, may be admissible under a denial of the alleged negligence, it is proper and advisable that that defence also, where relied upon, should be specifically pleaded. It seems likewise that the defence that the damage complained of arose from inevitable accident (as to which, see *Manzoni* v. *Douglas*, 6 Q. B. D. 145, cited *ante*, p. 441 ; *The Merchant Prince*, [1892] P. 179), should, if relied on, be specifically pleaded (see Ord. XIX., r. 15 ; *Winchilsea* v. *Beckley*, 2 Times Rep. 300).

As damage is an essential part of a cause of action for negligence, it seems that, where the defendant relies for his defence on the absence of such damage, he may expressly deny the allegation of damage. (See *ante*, pp. 529, 530.)

As to the duties of carriers who provide carriages for the public to travel in, or persons who let out carriages for hire, see *ante*, pp. 149, 334.

As to the liability of masters for the negligence of their servants, see *ante*, pp. 434, 435. Where there is a duty cast upon a person towards another to use skill and care, it is no defence to an action for the breach of such duty that such person employed a competent contractor to do the work in question. (See *ante*, pp. 435, 448, 458.)

Denial of the alleged Negligence (*u*).

The defendant denies that he was guilty of the alleged or any negligence [*or*, denies the alleged negligence]. He admits that he was [driving the said cart and horse], but he denies that he [drove it] negligently. He denies that —— [*here deny the particular acts alleged as constituting the negligence*].

Denial that the alleged Damage was caused by the Acts complained of (*u*).

The alleged damage (if any) was not caused or occasioned by any of the acts [*or*, matters] complained of. [*State, where practicable, how it arose, e.g.:* It arose from inevitable accident, *or, as the case may be, giving particulars.*]

Defence of Contributory Negligence (*x*).

There was contributory negligence on the part of the plaintiff [*or*, the plaintiff's servant].

Particulars :—[*Set out particulars of the acts relied on as constituting contributory negligence.*]

(*See R. S. C.*, 1883, *App. D., Sect. VI.*)

(*u*) See preceding note.

(*x*) If contributory negligence on the part of the plaintiff is relied on as a defence, it must be specifically pleaded (see the form above cited, and *Wakelin* v. *L. & S. W. Ry. Co.*, 12 App. Cas. 41 ; 56 L. J. Q. B. 229), and particulars of the matters constituting such negligence should be given.

The rule of law as to contributory negligence is, that "although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover ; if by ordinary care he might have avoided them, he is the author of his own wrong" (*per* Parke, B., in *Davies* v. *Mann*, 10 M. & W. 546, 549).

In the case of an infant plaintiff, the same rule applies, regard being had to the circumstances and the age of the infant. Where the defendant left a horse and cart in the street unattended, which some children played with, and the plaintiff, who was one of them, was injured by the horse moving on, the defendant was held liable (*Lynch* v. *Nurdin*, 1 Q. B. 29 ; and see *Crocker* v. *Banks*, 4 Times Rep. 324). Where, however, the defendant placed a shutter against the wall of a street, and a child played with the shutter and threw it down upon himself, the defendant was held not liable (*Abbott* v. *Macfie*, 2 H. & C. 744 ; 33 L. J. Ex. 177). An infant cannot recover for an injury occasioned by the negligence of the defendant, if the infant at the time was under the care of a person whose negligence contributed to cause the injury (*Waite* v. *North Eastern Ry. Co.*, E. B. & E. 728 ; 28 L. J. Q. B. 258 ; *Mills* v. *Armstrong*, 13 App. Cas. 1 ; 57 L. J. Ad. 65 ; and see *Burchell* v. *Hickisson*, 50 L. J. Q. B. 101).

In actions for negligent driving it is a good defence that the injury was caused by the negligence or bad driving of the plaintiff or his servant (*Gough* v. *Bryan*, 2 M. & W. 770 ; *Ellis* v. *L. & S. W. Ry. Co.*, 2 H. & N. 424 ; 26 L. J. Ex. 349) ; but it is not sufficient to show merely that there was contributory negligence on the part of the driver of a public carriage in which the plaintiff was riding, or of the captain of a ship

Reply thereto that the Defendant might, by the Exercise of ordinary Care, have avoided causing the Injury.

If there was any contributory negligence on the part of the plaintiff [which is denied] the defendant could, nevertheless, by the exercise of ordinary care, have avoided causing the injury complained of.

Defence in an Action for Injuries alleged to have been caused by the Negligent Driving of the Defendants' Servants, that the Carriage (or Train) was not the Defendants', or in the Charge of their Servants (y).

The said carriage [*or*, train] was not the defendants', or under their management, nor was it driven or managed by any servant [*or*, servants] of theirs.

Defence to an Action for Trespass, that it was caused by the Plaintiff's own Negligence (z).

The alleged trespass was [*or*, The matters complained of were] caused by the negligence and default of the plaintiff without any negligence or default on the part of the defendant.

Particulars are as follows :—

---

in which plaintiff was a passenger (*Mills* v. *Armstrong*, 13 App. Cas. 1 ; 57 L. J. Ad. 65 ; overruling *Thorogood* v. *Bryan*, 8 C. B. 131).

Where the injury was primarily caused by the negligent conduct of the defendant the contributory negligence or wrong of a mere stranger is no defence (*Harrison* v. *G. N. Ry. Co.*, 3 H. & C. 231 ; 33 L. J. Ex. 266 ; *Hill* v. *New River Co.*, 9 B. & S. 303 ; *Clark* v. *Chambers*, 3 Q. B. D. 327 ; 47 L. J. Q. B. 427 ; *Engelhart* v. *Farrant*, [1897] 1 Q. B. 240 ; 66 L. J. Q. B. 122 ; *Sullivan* v. *Creed*, [1904] 2 Ir. R. 317 ; cf. *McDowall* v. *G. W. Ry. Co.*, [1903] 2 Q. B. 331 ; 72 L. J. Q. B. 652). The plaintiff cannot recover if the damage is too remote, and is such as could not have been reasonably anticipated as likely to arise from the defendant's conduct (*Sharp* v. *Powell*, L. R. 7 C. P. 253 ; 41 L. J. C. P. 95 ; *Clark* v. *Chambers*, *supra*).

(*y*) In actions for negligent driving, where the statement of claim alleges, by way of inducement, that the defendant was possessed of a carriage, or that a carriage was under his management or that of his servant at the time of the injury, the defendant, if he is desirous of disputing these allegations, must expressly deny them.

Where the statement of claim charges the negligence as the act of the defendant, it is open to the plaintiff to show, in support of his case, that the injury was caused by the negligent driving of the defendant, either by himself or by his servants (see *Brucker* v. *Fromont*, 6 T. R. 659 ; *Quarman* v. *Burnett*, 6 M. & W. 499), or by a person authorised by him to drive (*Wheatley* v. *Patrick*, 2 M. & W. 650).

(*z*) Where the statement of claim charges, not negligence, but a direct trespass, the defendant, if he means to contend that the trespass was caused by the plaintiff's negligence or by inevitable accident, should plead that defence specifically (*Knapp* v. *Salsbury*, 2 Camp. 500 ; *Hall* v. *Fearnley*, 3 Q. B. 919 ; and see *ante*, p. 883).

Defence to an Action for Injuries alleged to have been caused by falling through a Hole in the Floor of Defendant's Shop: see a claim, ante, p. 447 (*a*).

1. The plaintiff was not invited by the defendant to come into or enter the said shop. The shop was not at the time in question open for business.

2. The shop was not at the time in question in the possession or occupation or under the control of the defendant. It was in the possession, occupation and control of a builder and contractor who was then engaged in repairing and altering the shop and the house of which it formed part.

3. There was no negligence on the part of the defendant.

4. There was contributory negligence on the part of the plaintiff.

Particulars :—[*State them.*]

5. The defendant denies that the trapdoor or hole into which the plaintiff alleges he fell was open or unguarded.

6. The defendant denies that the plaintiff sustained the alleged or any injuries or damages.

Not Guilty by Statute.

Defence of Not Guilty by Statute (*b*).

By statute [*state also in the margin the year or years*] of the reign in which the Act or Acts relied upon was or were passed, and the chapter and section thereof relied upon, and specify whether they are public Acts or otherwise, as in the form given, "Distress," *ante*, p. 850]. The defendant is not guilty [*or, if there are two or more defendants,* The defendants are not, nor is either (*or,* any) of them, guilty].

(*a*) When possession is parted with by an occupier of property the duty to persons coming upon the property on business, or at the invitation of the occupier, defined *ante*, pp. 447, 448, in general ceases. (See *per* Field, J., in *Heaven* v. *Pender*, 9 Q. B. D. at p. 306 ; *Smith* v. *London Docks*, L. R. 3 C. P. 326, 331 ; 37 L. J. C. P. 217.)

(*b*) By the effect of the repeals contained in the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), as to public general Acts, and in the 5 & 6 Vict. c. 97, as to local and personal Acts, the right of pleading the general issue of not guilty by statute, and of proving special defences thereunder, which had been given by a variety of statutes to persons sued in respect of things done or omitted to be done in the exercise of official or statutory duties, has been in effect abolished, except in some few cases, viz., where the privilege of so pleading has been conferred by some local and personal Act passed subsequently to the 5 & 6 Vict. c. 97 ; and where that privilege has been conferred by an unrepealed enactment contained in some public general Act, and the action brought against the defendant is not within s. 1 of the Public Authorities Protection Act, 1893. The latter enactment, however, applies only to the case of public authorities, and does not apply to persons who are not public authorities, and the repeal effected by it is confined to proceedings to which the Act applies. (See *post*, p. 901.)

The Act 5 & 6 Vict. c. 97, repealed the clauses in previous local and personal Acts permitting the defence of "Not Guilty by Statute" to be pleaded, and enacted that the period of limitations for actions for anything done under the authority or in pursuance

of such Acts should be two years, or in case of continuing damage, one year after the damage ceased. (See *Boden* v. *Smith*, 18 L. J. C. P. 120.)

Care should be taken not to plead the above defence, in actions, or to matters to which it is inapplicable, since by Ord. XIX., r. 12, no other defence can be pleaded with it to the same cause of action without the leave of the Court or a judge. In most, if not all, cases it is better, under the present system, to plead the defence specially, even where the statutory defence is available.

Under this defence, a defendant who is entitled to plead it, may ordinarily rely upon all defences formerly admissible under the general issue at common law, in addition to all the special matters arising under the statute. (See *Ross* v. *Clifton*, 11 A. & E. 631 ; *Maund* v. *Monmouth Canal Co.*, Car. & M. 606, 608 ; *Fisher* v. *Thames Junction Ry. Co.*, 5 Dowl. 773 ; *Richards* v. *Easto*, 15 M. & W. 244.)

By Ord. XXI., r. 19, "In every case in which a party shall plead the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert in the margin of his pleading the words 'by statute,' together with the year of the reign in which the Act of Parliament on which he relies was passed, and also the chapter and section of such Act, and shall specify whether such Act is public or otherwise ; otherwise such defence shall be taken not to have been pleaded by virtue of any Act of Parliament." All the statutes relied upon must be inserted in the margin (*Edwards* v. *Hodges*, 15 C. B. 477, 490 ; 24 L. J. C. P. 121 ; *Burridge* v. *Nicholetts*, 6 H. & N. 383 ; 30 L. J. Ex. 145). Where a defendant relies upon the whole of an Act, it seems to be enough to state that he does so, specifying the Act, without giving the numbers of the sections (*Saunders* v. *Warren*, 4 Times Rep. 552).

The principal public general Acts under which the defence of not guilty by statute may still be pleadable, in cases where the action is not one which falls within the provisions of s. 1 of the Public Authorities Protection Act, 1893, appear to be those below cited.

By the 11 Geo. 2, c. 19, s. 21, "In all actions of trespass, or upon the case, brought against any person or persons entitled to rents or services of any kind, his, her, or their bailiff or receiver, or other person or persons relating to any entry by virtue of this Act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale, or disposal of any goods or chattels thereupon, it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue, and give the special matter in evidence."

The defence of not guilty by statute, under the above section, appears to be still applicable to actions for *illegal*, *irregular*, or *excessive* distress brought against private persons, in respect of the making of a distress for rent. (See *ante*, p. 850.)

By the 21 Jac. 1, c. 4, s. 4, if any action shall be brought against any person or persons for any offence committed or to be committed against the form of any penal law, either by or on the behalf of the king or by any other, or on the behalf of the king and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, and to give the special matter in evidence. This section applies to subsequent statutes giving penal actions (*Earl Spencer* v. *Swannell*, 3 M. & W. 154, 165 ; *Jones* v. *Williams*, 4 M. & W. 375) ; as, for instance, the 11 Geo. 2, c. 19, s. 3, for the double value of goods fraudulently removed by a tenant (*Jones* v. *Williams*, *supra*), and the 23 & 24 Vict. c. 127, s. 26, imposing a penalty for acting as a solicitor without being duly qualified (see *Law Society* v. *Waterlow*, 9 Q. B. D. 1 ; 8 App. Cas. 407). It applies to actions given to informers and to actions for penalties given to the *party grieved*, though the previous sections of the statute do not apply to actions given to parties grieved. (See *Fife* v. *Bousfield*, 6 Q. B. 100.)

It would seem that actions under the above sections do not in general come within the operation of the Public Authorities Protection Act, 1893. (See *post*, p. 903.)

Notice of Action (*c*).

Defence that no Notice of Action was given as required by Statute.

The acts [*or*, matters] complained of [*or*, The alleged grievances, *or*, trespasses] were acts done [*or*, things omitted to be done] by the defendant under and by virtue of [*or*, in pursuance of, *or*, in execution or intended execution of, &c., *according to the words of the statute*] the —— —— Act, 18— [*specifying the statute relied upon, either by its authorised name, if any, or by its year and chapter, adding also the section or sections, where practicable*], and no notice [in writing, signed, &c., *as the case may be*] of [the plaintiff's intention to commence] this action [or of the supposed cause of action relied upon by the plaintiff, *if the statute also expressly requires that notice should be given of the cause of action*] was given to [*or*, delivered to, *or*, served upon, *according to the words of the statute*] the defendant [one calendar month] before the said action was commenced, as required by the said statute [*or*, the statutes in that behalf].

(*c*) It was provided by numerous enactments which were passed for the protection of various public bodies, and of magistrates, public officers, and other persons in respect of actions brought against them for acts done, or omitted to be done, in the execution of statutory or official duties or powers, that, in the case of such actions, previous notice of action should be given to the defendants; and it was further provided by many of those enactments that the notice should state the cause of action, and that no cause of action should be proved unless stated in the notice. But the Public Authorities Protection Act, 1893, by s. 2, has repealed, so far as relates to proceedings to which that Act applies, all enactments requiring notice of action contained in public general Acts and substituted the requirements therein specified. (See *post*, pp. 901, *et seq.*)

By the 5 & 6 Vict. c. 97, s. 4, it is enacted that in all cases where notice of action is required, such notice shall be given one calendar month at least before any action shall be commenced. The month is to be computed exclusively of the day of giving the notice, and of the day of issuing the writ (*Young* v. *Higgon*, 6 M. & W. 49; *Freeman* v. *Reed*, 4 B. & S. 174; 32 L. J. M. C. 226). This Act has been held not to apply to local and personal Acts passed subsequently to its date (*Boden* v. *Smith*, 18 L. J. C. P. 121).

Omitting to do something necessary may be within the meaning of an Act requiring notice of action, &c., although *omitting* be not expressly mentioned therein. (See *Newton* v. *Ellis*, 5 E. & B. 115; 24 L. J. Q. B. 337; *Poulsum* v. *Thirst*, L. R. 2 C. P. 449; 36 L. J. C. P. 225; *Wilson* v. *Mayor of Halifax*, L. R. 3 Ex. 114; 37 L. J. Ex. 44; *Jolliffe* v. *Wallasey Local Board*, L. R. 9 C. P. 62; 43 L. J. C. P. 41.)

The right to a notice of action may be waived, but a mere tender of amends by a defendant was held to be no proof that he had received or waived such notice (*Martins* v. *Upcher*, 3 Q. B. 662). See further as to waiver, *Jones* v. *Nicholls*, 13 M. & W. 361; *Midland Ry. Co.* v. *Withington Local Board*, 11 Q. B. D. 788; 52 L. J. Q. B. 689.

A notice of action will not be invalidated by a slight mistake in the date of the act complained of, provided the mistake is not such as to mislead or prejudice the defendant. (See *Green* v. *Hutt*, 51 L. J. Q. B. 640.)

As to former decisions with respect to when a person is deemed to have acted under or in pursuance of a statute, see *post*, pp. 904, 905.

—♦—

NUISANCE (*d*).

Defence to an Action for a Nuisance, denying the Acts complained of.

The defendant denies that he or his servants did [*or*, do] —— [*here deny specifically the acts alleged*].

Defence containing various Defences in an Action for Pollution of Water where the Plaintiff claims an Injunction and Damages: see "*Water*," *post*, p. 946.

Denial, in an Action for a Nuisance to the Plaintiff's Premises, of the Plaintiff's alleged Interest therein.

The said house [*or*, land, &c., *as the case may be*] was not [and is not] in the possession or occupation of the plaintiff, *or*, The plaintiff was not [and is not] the owner or occupier of the premises [*according to the allegations in the statement of claim*].

Defence to an Action for injuries caused by keeping Open and Unfenced a dangerous Cellar adjoining a Public Highway: see ante, p. 458.

1. The defendant did not suffer the said vault or cellar to be open without any fence, railing or other protection. It was not open at all.

2. If it was open (which is denied) it was guarded by an iron rod or rail, and was not dangerous to persons lawfully passing along the said highway.

3. It was not by reason of the said vault or cellar being open or unprotected or unfenced that the plaintiff fell into it, if (which is not admitted) he did in fact fall into it.

4. It is not admitted that the plaintiff was injured at all, or that he was injured by falling into the said vault or cellar.

5. There was no negligence on the part of the defendant; there was contributory negligence on the part of the plaintiff.

Particulars:—

(*d*) See *ante*, pp. 451—459.

All material matters of inducement, if disputed, must be denied in terms. Thus, in an action for a nuisance to the occupation of a house by carrying on an offensive trade, if the defendant does not admit the plaintiff's occupation of the house, he must deny it specifically. "If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of his claim, *i.e.*, whether by prescription, grant, or what" (R. S. C., 1883, App. D., Sect. VI., cited *post*, p. 946). As to the mode of pleading a defence of right by prescription, see "*Common*," *ante*, p. 819; "*Water*," *post*, pp. 944, 945; and "*Ways*," *post*, p. 948.

As to the defence that the nuisance complained of arose from acts directed or authorised by statute to be done by the defendants, see "*Nuisance*," *ante*, p. 454.

For Defences in a like Action by a Reversioner, see post, pp. 912, *et seq.*

Defence Justifying a Trespass to abate a Nuisance (*e*).

Before and at the time of the alleged trespasses, the defendant was possessed of a messuage and premises called ——, adjoining the said messuage and premises of the plaintiff, and the said [pipe and flue] were used by the plaintiff for the [emission of smoke and sparks therefrom] and were wrongfully a nuisance to the defendant in the use and occupation of his said messuage and premises, and were dangerous to his said messuage and premises and prevented him from conveniently and safely enjoying the same; and although before the alleged trespasses or any of them, the defendant, on the —— ——, 19—, by a letter dated that day, requested the plaintiff to remove the said [pipe and flue] and abate the said nuisance, and a reasonable time in that behalf had then elapsed, yet the plaintiff neglected and refused so to do, wherefore the defendant afterwards, on the —— ——, 19—, for the purpose of abating the said nuisance, took the said [pipe and flue] and removed them to a short and convenient distance and there left them for the plaintiff's use, doing no more than was necessary for the purpose aforesaid, which are the alleged trespasses.

Defence to an Action for Trespass, justifying an Entry on the Plaintiff's Land to remove an Obstruction to the Defendant's Ancient Lights: see "Lights," ante, p. 872.

Defence justifying the Removal of Nuisances on a Public Highway: see "Ways," post, p. 952.

(*e*) It is in many cases justifiable for a person to enter upon his neighbour's land in order to abate a nuisance existing thereon which interferes with his enjoyment of his own adjoining land (*Jones* v. *Williams*, 11 M. & W. 176; *Lane* v. *Capsey*, [1891] 3 Ch. 411; *Lemmon* v. *Webb*, [1895] A. C. 1; 64 L. J. Ch. 205; and see *post*, pp. 940, 941). Where the defendant pleads a justification on this ground to an action of trespass, it is necessary for him to be able to prove a previous request to the plaintiff to abate the nuisance, except where the plaintiff was himself the wrong-doer by creating the nuisance, or by neglecting to perform some obligation by the breach of which it was created, or where there is such immediate danger to life or health as to render it unsafe to wait to make request (*Jones* v. *Williams*, *supra*; *Lane* v. *Capsey*, *supra*; *Lemmon* v. *Webb*, *supra*).

Where the party injured by the nuisance can abate it by acts done wholly upon his own land, he is at liberty to do so without notice and without any such request, as, for instance, by lopping branches of his neighbour's trees which overhang his land, without any entry upon his neighbour's land (*Lemmon* v. *Webb*, *supra*). Similarly, branches of trees which overhang a highway may be lopped on the highway without any previous notice or request to the owner. (See *Ib.*)

See a form of plea under the old system, justifying obstructing a water-course used by plaintiff through land of a third party, because it discharged water on to defendant's land: Roberts v. *Rope*, 33 L. J. Ex. 1, 241 ; L. R. 1 Ex. 82 ; *and a plea on equitable grounds that the nuisance was erected by the defendant with the knowledge, acquiescence, and consent of the plaintiff: Davies* v. *Marshall*, 10 C. B. N. S. 697 ; 31 L. J. C. P. 61 ; *and see ante*, p. 871.

PATENTS (*f*).

Defence to an Action for Infringement, denying the Infringement (*g*).

The defendant denies that he infringed the plaintiff's alleged patent. He denies that he —— [*here deny specifically the acts of infringement alleged*].

[*The R. S. C.*, 1883, *App. D., Sect. VI., give the following form:* "The defendant did not infringe the patent" ; *but this form of denial is applicable only where the statement of claim simply alleges an infringement, without giving any details of the acts charged as infringements. Where the statement of claim alleged such acts in detail, the allegations should be dealt with accordingly.*]

Defence to a like Action, where the Plaintiff sues as Assignee of the Patent, denying the Assignment (*h*).

The patent was not assigned to the plaintiff.

(*See R. S. C.*, 1883, *App. D., Sect. VI.*)

(*f*) By s. 26 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), the proceeding by *scire facias* to repeal a patent is abolished, and a proceeding by petition for its revocation is substituted ; but, by s. 26 (3), "Every ground on which a patent might, at the commencement of this Act, be repealed by *scire facias* shall be available by way of defence to an action of infringement." (See *Siddell* v. *Vickers*, 39 Ch. D. 92 ; *Vickers* v. *Siddell*, 15 App. Cas. 497.)

A patent might formerly be repealed by *scire facias* on the following (among other) grounds, viz., that the patent had been obtained by fraud, or by false suggestion, or that the invention was not new, or was not useful, or was not sufficiently described in the specification (Webster on Patents, p. 32).

(*g*) A denial that the defendant has infringed the patent does not put in issue the validity of the patent (*Cropper* v. *Smith*, 26 Ch. D. 700 ; S. C. 10 App. Cas. 249). It is no defence that the infringement was unintentional (*Stead* v. *Anderson*, 4 C. B. 806 ; *Wright* v. *Hitchcock*, L. R. 5 Ex. 37 ; 39 L. J. Ex. 97, *ante*, p. 461).

Particulars of the objections relied upon should be delivered with the defence. (See note (*o*), *post*, p. 894.)

(*h*) As to assignment of letters patent and licences, &c., see *ante*, pp. 269, 463, 464, where see also as to registration.

Defence to an Action for Infringement of a Patent that the Invention was not New (*i*).

The plaintiff's alleged invention was not new.

Particulars :—

(*See R. S. C.*, 1883, *App. D., Sect. VI.*)

Defence to a like Action, that the Invention was not Useful (*k*).

The plaintiff's alleged invention was not useful.

(*R. S. C.*, 1883, *App. D., Sect. VI.*)

Defence to a like Action, that the Invention was not one for which Letters Patent could be granted (*l*).

The plaintiff's alleged invention [*or*, manufacture] was not one for which letters patent could by law be granted.

Particulars :—[*Here state the grounds on which the defendant relies, as, for instance,* The plaintiff's alleged invention consists only of the application of a —— machine, that being a well known mechanical contrivance, to a new use.]

(*i*) If the invention, or an essential part of it, is either not new or not useful, the patent is void. (See 21 Jac. 1, c. 3, s. 6; *Morgan* v. *Seaward*, 2 M. & W. 544; *Hill* v. *Thompson*, 3 Meriv. 629; *Russell* v. *Ledsam*, 11 M. & W. 647; *Bentley* v. *Keighley*, 6 M. & G. 1039; *Badische Fabrik* v. *Levinstein*, 24 Ch. D. 126; 12 App. Cas. 710; 52 L. J. Ch. 704; *Lane-Fox* v. *Kensington Electric Co.*, [1892] 3 Ch. 424.) So if the patent is for "improvements," it is a good defence that the invention did not constitute any improvement (*Morgan* v. *Seaward*, *supra*; *Bedells* v. *Massey*, 7 M. & G. 630). As regards the requirement of novelty, it is sufficient that the invention should be new "within this realm" (21 Jac. 1, c. 3, s. 6; *Brown* v. *Annandale*, 8 Cl. & F. 437). Previous user in a foreign country or in an English colony does not invalidate an English patent (*Rolls* v. *Isaacs*, 19 Ch. D. 268; 51 L. J. Ch. 170). A very small amount of utility is sufficient to support a patent (*Welsbach Incandescent Gas Co.* v. *New Incandescent Co.*, [1900] 1 Ch. 843; 69 L. J. Ch. 343).

As to what amounts to a previous publication, see *United Telephone Co.* v. *Harrison*, 21 Ch. D. 720; 51 L. J. Ch. 705; *Otto* v. *Steel*, 31 Ch. D. 241; *Harris* v. *Rothwell*, 35 Ch. D. 416; *Anglo-American Co.* v. *King*, [1892] A. C. 367. In cases within s. 1 of the Patent Act, 1902 (2 Ed. 7, c. 34), prior publication in a specification not less than fifty years old, or in a provisional specification of any date not followed by a complete specification, does not invalidate (2 Ed. 7, c. 34, s. 2).

As to the particulars required to be delivered in support of a defence on the ground of non-noveity, see *Smith* v. *Cropper*, 10 App. Cas. 249, and s. 29 (3), *post*, p. 894.

(*k*) See preceding note.

(*l*) As to this defence, see *Booth* v. *Kennard*, 1 H. & N. 527; 2 H. & N. 84; 26 L. J. Ex. 23; *Seed* v. *Higgins*, 8 E. & B. 755; 8 H. L. C. 550; *Harwood* v. *Great Northern Ry. Co.*, 2 B. & S. 222; 11 H. L. C. 654; 35 L. J. Q. B. 27; *Jordan* v. *Moore*, L. R. 1 C. P. 624, 635; 35 L. J. C. P. 268; *Murray* v. *Clayton*, L. R. 7 Ch. App. 570, 584; *Lane-Fox* v. *Kensington Electric Light Co.*, [1892] 3 Ch. 424.

Defence to a like Action by a Patentee, denying that the Plaintiff was the First or True Inventor (m).

The plaintiff was not the first or true inventor.

Particulars :—

(*R. S. C.*, 1883, *App. D., Sect. VI.*)

Defence to a like Action, that the Specification was Insufficient (n).

The specification did not particularly describe the nature of the invention [or the manner in which it was to be or might be performed].

Particulars :—

(*m*) See 21 Jac. 1, c. 3, s. 6; and see the recital in the form of patent in the First Schedule to the Act of 1883, and the next note. A person who imports an invention from abroad may (subject to the provisions of ss. 103, 104, above referred to) be deemed the first and true inventor in England. (See *Rolls* v. *Isaacs, supra; In re Avery*, 36 Ch. D. 307.)

Under the Act of 1883, a patent may lawfully be granted to several persons jointly for a manufacture invented only by some or one of them. (See ss. 4 (2), 5 (2), and 48 & 49 Vict. c. 63, s. 5.) As to the cases in which patents may be granted to executors or administrators of a deceased inventor, see s. 12 (3), and s. 34.

(*n*) A grant of letters patent by the Crown is void if made on a false suggestion or representation by the grantee (*Morgan* v. *Seaward*, 2 M. & W. 544, 561; *Bloxam* v. *Elsee*, 6 B. & C. 169, 178; see *In re Avery*, *supra*). The recitals of facts in the letters patent are taken to be representations made to the Crown by the grantee; and, therefore, if the recital that the inventor has, by his complete specification, particularly described the nature of his invention, is untrue, this affords a defence to an action for infringement. (See the form of patent in the first schedule to the Act of 1883; and see ss. 5 (4), 26 (3), and 33 of the Act; *Vickers* v. *Siddell*, 15 App. Cas. 497; *Nuttall* v. *Hargreaves*, [1892] 1 Ch. 23; 61 L. J. Ch. 94; *Lane-Fox* v. *Kensington Electric Co.*, [1892] 2 Ch. 66.)

It is a good defence also that the provisional specification did not describe the true nature of the invention, or that the invention which it described is not the same as that described by the complete specification (*Ib.*). It would seem also that the complete specification must have particularly described the *manner* in which the invention is to be performed. (See *Ib.*; *Crompton* v. *Anglo-American Corporation*, 35 Ch. D. 283; and see Lawson on Patents, p. 69.)

The requirement in s. 5 (5) that the complete specification shall "end with a distinct statement of the invention claimed," is directory only (*Vickers* v. *Siddell*, 15 App. Cas. 497).

As to the requirements for specifications, see further s. 5, rr. 5, 6 (2), and Forms B. and C. in the Second Schedule to the Patents Rules, 1890; and see *United Telephone Co.* v. *Harrison*, 21 Ch. D. 720; 51 L. J. Ch. 705; *Badische Fabrik* v. *Levinstein*, 12 App. Cas. 710; *Edison, &c. Co.* v. *Woodhouse*, 32 Ch. D. 520; *Proctor* v. *Bennis*, 36 Ch. D. 740; and as to particulars of objection on the ground of defects in the specification, see the next note.

A General Defence of Invalidity of the Patent referring to Particulars of Objection (o).

The patent was and is invalid on the grounds stated in the following particulars of objection, viz.:—[*or*, the particulars of objection delivered herewith].

For a like form, see Kelly v. *Heathman*, 45 Ch. D. 256.

(*o*) The 29th section of the Patents, &c. Act, 1883, contains (*inter alia*) the following provisions:—

"(2) The defendant must deliver, with his statement of defence, or by order of the Court or a judge, at any subsequent time, particulars of any objections on which he relies in support thereof.

"(3) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty, must state the time and place of the previous publication or user alleged by him.

"(4) At the hearing no evidence shall, except by leave of the Court or a judge, be admitted in proof of any alleged infringement or objection, of which particulars are not so delivered.

"(5) Particulars delivered may be, from time to time, amended by leave of the Court or a judge."

The defendant, in the absence of amendment or special leave of the Court or a judge, will be precluded from adducing evidence of objections not stated in his particulars of objections. (See s. 29 (4), above cited; *Daw* v. *Eley*, L. R. 1 Eq. 38; *Edison Telephone Co.* v. *India Rubber Co.*, 17 Ch. D. 137; *Cropper* v. *Smith*, 26 Ch. D. 700; 10 App. Cas. 249; *Shoe Machinery Co.* v. *Cutlan*, [1896] 1 Ch. 108; 65 L. J. Ch. 44.) But, if his particulars are sufficiently wide to include the objection, the mere fact that they are too vague and general, and do not give sufficiently specific information as to the defence relied upon, will not suffice to exclude the evidence. (See *Neilson* v. *Harford*, 8 M. & W. 806; *Hull* v. *Bollard*, 1 H. & N. 134; 25 L. J. Ex. 304; *Sykes* v. *Howarth*, 12 Ch. D. 826.) In such a case the proper course for the plaintiff to adopt is to apply for further and better particulars before the trial (*Ib.*; *Anglo-American Corporation* v. *Crompton*, 34 Ch. D. 152; *Crompton* v. *Anglo-American Corporation*, 35 Ch. D. 283; where see as to objections on the ground of insufficiency of the specification).

If an objection on the ground of want of novelty, &c., is not intended as an objection to the invention generally, but only to part of it, the particulars should specify the part objected to (*Russell* v. *Ledsam*, 11 M. & W. 647; *Holliday* v. *Hippenstall*, 41 Ch. D. 109). An objection that the patent was obtained by fraud must distinctly state the nature of the fraud (*Russell* v. *Ledsam*, *supra*).

See further as to what objections may be made, Terrell on Patents, 3rd ed., pp. 292—303.

Particulars of Objections to be delivered by the Defendant in an Action for the Infringement of a Patent (*p*).

19—. B. No.——.

In the High Court of Justice,
King's Bench Division.

Between *A. B.* ..... Plaintiff,

and

C. D. ..... Defendant.

The following are the particulars of the objections on which the defendant relies to impeach the validity of the patent in the statement of claim mentioned, in addition to any which he may be entitled to rely upon without particulars :—

1. The title and effect of the patent are not correctly stated in the statement of claim. The patent was for [*state the title and effect of the patent, according to the fact*].

2. The plaintiff [*or, J. K., the alleged inventor*] was not the grantee of the patent mentioned in the statement of claim.

3. The plaintiff [*or, J. K., the alleged inventor*] was not the first and true inventor. [*Here state particulars showing that the plaintiff was not the first and true inventor.*]

4. The alleged invention was not new. [*Here state particulars of the time and place of the previous user.*]

5. Before the date of the letters patent, the alleged invention was published at ——, in the following manner [*state the place and manner of publication, giving particulars, where practicable, of the dates, &c.*].

6. Before the date of the letters patent, the alleged invention was used at —— in the following manner [*state the place and manner, and also, where practicable, the names and addresses of the persons who previously used the invention, and the dates of such user*].

7. The alleged invention was not useful to the public [*or, in the case of an alleged patent for "improvements,"* The said manufacture is not any improvement or in any way useful or beneficial to the public].

8. The alleged invention was not a manufacture for which letters patent could lawfully be granted [*state why*].

9. The plaintiff's [*or J. K.'s*] specification did not particularly describe the nature of the invention, and in what manner it was to be performed. It was insufficient for the following reasons, viz. [*state the reasons*].

[*Give particulars of any other objections in like manner.*]

To Mr. *E. F.*,
The plaintiff's solicitor
[*or*, agent].

G. H.,
The defendant's solicitor
[*or*, agent].

(*p*) See preceding note.

For forms of particulars of objections, see Chitty's Forms, 13th ed., p. 189 ; *Smith* v. *Cropper*, 10 App. Cas. 249 ; 55 L. J. Ch. 12 ; *United Telephone Co.* v. *Harrison*, 21 Ch. D. 720 ; *Holliday* v. *Hippenstall*, 41 Ch. D. 109 ; *Kelly* v. *Heathman*, 45 Ch. D. 256 ; 60 L. J. Ch. 22.

PAWNBROKERS.

See "*Lien*," *ante*, pp. 866, 868.

PAYMENT INTO COURT (*q*).

Defence of Payment into Court.

The defendant as to the whole action [*or*, as to the whole of the plaintiff 's claim, *or*, *if the payment into Court is only made in respect of one of several claims*, as to the plaintiff 's claim for, *or*, in respect of, &c., *specifying the claim in satisfaction of which the payment into Court is made, as, for, instance*, the matters alleged in the —— paragraph of the statement of claim] has paid [*or*, brings] into Court £——, and says that that sum is enough to satisfy the plaintiff 's claim [*or*, the plaintiff 's claim (*or*, claims) herein pleaded to].

(*See R. S. C.*, 1883, *App. D., Sect. IV.*)

(*q*) See "*Payment into Court*," *ante*, p. 748. By the rules of Ord. XXII., there cited, payment into Court may now be made by the defendant in any action for debt or damages (r. 1), or by the plaintiff in answer to a counterclaim for debt or damages (r. 9); and, except in actions or counterclaims for libel or slander (as to which, see "*Defamation*," *ante*, p. 842), the payment into Court may be accompanied by a denial of liability (rr. 1, 6).

As to payment into Court in actions under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), or 27 & 28 Vict. c. 95, to recover damages for personal injuries causing death, see s. 2 of the last-mentioned Act, cited "*Executors*," *ante*, p. 387. As to payment into Court in actions for detention of goods, see "*Detention of Goods*," *ante*, pp. 370, 845 ; and as to payment into Court with an apology in actions for libels in newspapers, &c., see "*Defamation*," *ante*, p. 844.

As to payment into Court in actions to recover damages for things done, or omitted to be done, in pursuance or execution of any statute or of any public duty within the Public Authorities Protection Act, 1893, cited *post*, p. 901, it is by s. 1 (c), provided (*inter alia*) that if such action is proceeded with after payment into Court in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum so paid in, he shall not recover any costs incurred after the payment into Court, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the payment.

Defence of Payment into Court, together with a Defence in Denial of Liability.

1. [*Here state the defence, showing that the defendant is not liable to the claim, e.g., a denial of the acts complained of, or an allegation of some matter of excuse, justification, or discharge, &c.*]

2. In the alternative as to the whole action [*or*, as to the plaintiff's claim for, &c., *see the preceding form*], the defendant whilst denying liability brings into Court £——, and says that that sum is enough to satisfy the plaintiff's claim [herein pleaded to].

A like form in an Action for Trespass to Land: see Wheeler v. *The United Telephone Co.*, 13 Q. B. D. 597.

Defences of Payment into Court in Actions for Defamation: see ante, pp. 842.

Defence of an Apology, and Payment into Court, to an Action for a Libel contained in a public Newspaper or Periodical, under 6 & 7 Vict. c. 96, s. 2: see "Defamation," ante, p. 844.

Defence of Payment into Court as to the Claim of Damages in an Action for the Detention of Goods: see "Detention of Goods," ante, p. 848.

Reply, of Payment into Court in an Action of Replevin: see "Replevin," post, p. 911.

Replies of Acceptance of the Amount paid into Court, and the like that the Amount paid into Court is not sufficient: see "Payment into Court," ante, pp. 751, 752.

POLICE (*r*).

For forms of Defences under the Public Authorities Protection Act, 1893, *see "Public Authorities," post*, p. 901.

(*r*) Many of the statutes which gave special protection to the police in actions brought against them for things done or omitted to be done in the execution of their statutory or official duties have been repealed by s. 2 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), in cases falling within s. 1 of that Act, or by the

PROCESS (*s*).

Defence to an Action for a Wrongful Entry on Land and Seizure of Goods, of Justification under a Fi. Fa., by the Execution Creditor, the Sheriff and the Bailiff, stating the Judgment, Writ, and Warrant.

The defendant, *E. F.*, on the —— ——, 19—, in an action (19—. F. No. ——) in the King's Bench Division of the High Court of Justice at his suit against the now plaintiff, recovered judgment against the now plaintiff

---

Statute Law Revision Act, 1894. (See *post*, p. 901.) But defendants in such actions are entitled to the protection given by s. 1 of the Public Authorities Protection Act, 1893, in all cases within the provisions of that section. (See *Ib.*) They are further protected, in respect of acts done in executing warrants of justices, by the 24 Geo. 2, c. 44, s. 6, which enacts in effect that no action shall be brought against any constable head borough, or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace, until demand has been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for the space of six days after such demand; and, in case after such demand and compliance therewith by showing the said warrant to and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, head borough or other officer, or against such person or persons acting in his aid for any such cause as aforesaid, that on producing or proving such warrant at the trial of such action, the jury shall find for such constable, head borough, or other officer, and for such person and persons so acting as aforesaid, notwithstanding any defect of jurisdiction in the justice or justices who signed or sealed the said warrant.

A defence under this statute must be pleaded specially. The 8th section of the same Act, which provided that no such action should be brought unless commenced within six calendar months after the act committed, has been repealed by the general repeal contained in s. 2 of the Public Authorities Protection Act, 1893, so far as relates to actions within s. 1 of the last-named Act. (See *post*, p. 901.)

(*s*) See "*Sheriff*," pp. 476, 914; "*Trespass*," *ante*, pp. 499, 501. The party at whose suit the process issues must, in order to justify under it, state in his pleading the judgment or other proceedings on which the writ issues, as well as the writ, but it is sufficient for the sheriff to justify under the writ only. (See *Andrews* v. *Marris*, 1 Q. B. 3, 17; *Samuel* v. *Duke*, 3 M. & W. at p. 630.)

If the plaintiff sues the sheriff for conversion or trespass in respect of the seizure of goods taken under a writ of *fi. fa.* against a third party, the defendant, if the goods were the goods of the third party, may simply deny the property of the plaintiff in the goods (*Harrison* v. *Dixon*, 12 M. & W. 142). If the plaintiff's title to the goods is by an assignment from the execution debtor, which is void as against creditors, the sheriff who has taken them must prove the judgment as well as the writ in order to justify. (See *White* v. *Morris*, 11 C. B. 1015; 21 L. J. C. P. 185.)

Where the action is against the sheriff for trespass in entering the house of the plaintiff, the sheriff may plead a justification on the ground that he entered to execute a writ of *fi. fa.* against the goods of a third party therein. (See *Semayne's Case*, 1 Smith's L. C., 11th ed., p. 104; 1 Chitty's Practice, 14th ed., p. 812.)

If the sheriff is sued by the owner of goods let out to hire for a wrongful conversion of such goods, a defence stating that he took and sold them under a *fi. fa.* against the hirer, and that the plaintiff had sustained no damage, would be an answer to so much of the claim as alleged a conversion by taking and selling the goods (see *Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J. Ex. 362; *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. &

for £ ——, and £—— for costs [*or*, and costs to be taxed, which costs have been duly taxed and allowed at £——], and thereupon, the said judgment remaining in full force and unsatisfied, the defendant *E. F.* caused a writ of *fieri facias* to be issued upon the said judgment against the plaintiff, commanding the defendant *G. H.*, as and being sheriff of ——, to cause to be made of the goods and chattels of the plaintiff in his bailiwick, the sum of £——, and also interest thereon as therein mentioned [and the said sum of £—— for costs, with interest thereon as therein mentioned], and the said writ was duly indorsed with a direction to the said sheriff to levy execution as in the said indorsement mentioned, and was then delivered to the defendant *G. H.*, as such sheriff, to be executed, and thereupon the defendant, *G. H.*, as and being such sheriff, duly made and delivered his warrant to the defendant, *J. K.*, as and being the bailiff of the said sheriff, for the execution of the said judgment in pursuance of the said writ and indorsement, and thereupon the defendant *J. K.*, as such bailiff, by virtue of the said writ and warrant, entered into the now plaintiff's dwelling-house, the outer door thereof being then open [*or, state other facts showing that the entry was lawful*], in order to seize and take [and did then seize and take] the said goods and chattels of the plaintiff, the same then being in the said dwelling-house and within the said bailiwick for the purpose of levying the moneys so directed to be levied as aforesaid, which are the acts complained of.

[*Add any necessary traverses.*]

The like, by a Sheriff alone.

Before and at the time of the committing any of the acts complained of [if and so far as the same were committed at all], the defendant was the sheriff of ——, and *E. F.*, on the —— ——, 19—, sued out of the King's

---

N. 502; 30 L. J. Ex. 231; *ante*, p. 475), but would be no defence to a charge of disposing and delivering the goods to purchasers, or allowing purchasers to remove them. (See *Ib.*)

As to defences of justification under warrants granted by magistrates, see *Melling* v. *Leak*, 16 C. B. 652; *Pedley* v. *Davis*, 10 C. B. N. S. 492; 30 L. J. C. P. 374; *Henderson* v. *Preston*, 21 Q. B. D. 362; and see 24 Geo. 2, c. 44, s. 6, cited *ante*, p. 898.

As to what the sheriff and his officers may do in the execution of a writ of *fi. fa.*, see *Semayne's case*, *supra*; 1 Chitty's Practice, 14th ed., pp. 813, 837; *Harvey* v. *Harvey*, 26 Ch. D. 644; *Crabtree* v. *Robinson*, 15 Q. B. D. 312; *American Meat Co.* v. *Hendry*, W. N. 1893, pp. 67, 82; *Hodder* v. *Williams*, [1895] 2 Q. B. 663; 65 L. J. Q. B. 70. They are not entitled to break open the outer doors of a dwelling-house in the ordinary execution of such writ (*Ib.*), though they may do so in the execution of criminal or *quasi*-criminal process (*Harvey* v. *Harvey*, *supra*). They may, in the execution of a writ of *fi. fa.*, break open the outer door of a shed or shop adjoining the dwelling-house (*Hodder* v. *Williams*, *supra*).

A defence of justification under the process of an inferior Court should allege or show that the Court had jurisdiction. (See *ante*, pp. 10, 864.) For instances of pleas to this effect under the former practice, see *Sowell* v. *Champion*, 6 A. & E. 407; *Walley* v. *M'Connell*, 13 Q. B. 903; *Hayes* v. *Keene*, 12 C. B. 233.

Bench Division of the High Court of Justice a writ of *fieri facias* directed to the defendant, as and being such sheriff, commanding the defendant to, &c. [*here state the substance of the writ as in the preceding form*], and the said writ was duly indorsed with, &c. [*here state the indorsement, as in the preceding form*], and was then delivered to the defendant, as such sheriff, to be executed; and thereupon the defendant, as and being such sheriff, by virtue of the said writ, entered the plaintiff's said dwelling-house, the outer door thereof being then open, in order to seize and take [and did then seize and take] the said goods and chattels of the plaintiff, the same then being in the said dwelling-house and in the bailiwick of the defendant, as such sheriff, for the purpose of levying the moneys so directed to be levied as aforesaid, which are the acts complained of.

[*Add any necessary traverses.*]

Reply that the Writ was set aside for Irregularity (*t*).

The writ of *fieri facias* referred to in the defence was irregularly sued out, and by an order duly made on the —— ——, 19—, by Master —— [*or*, the Hon. Mr. Justice ——], the said writ and all subsequent proceedings thereon were set aside for irregularity.

See forms of pleas under the old system—Of justification under process of the County Court: Walley v. *M'Connell*, 19 L. J. Q. B. 162; *Kinning* v. *Buchanan*, 8 C. B. 271; *Abley* v. *Dale*, 1 L. M. & P. 626; 2 L. M. & P. 433; *Hayes* v. *Keene*, 12 C. B. 233; *of justification under a writ of attachment for contempt of the Court of Chancery: Smith* v. *Eggington*, 7 A. & E. 167; *a like plea for contempt of the Court of Bankruptcy: Green* v. *Elgie*, 5 Q. B. 99; *Van Sandau* v. *Turner*, 6 Q. B. 773.

See also forms of a plea—Justifying an entering upon and taking possession of demised premises, expelling the tenant and removing his goods, under a warrant of justices granted for the delivery of possession to the landlord after the determination of the tenancy under the Small Tenements Act, 1 & 2 *Vict. c.* 74, *s.* 1: *Melling* v. *Leak*, 16 C. B. 652; *Edmunds* v. *Pinniger*, 7 Q. B. 558; *Jones* v. *Chapman*, 14 M. & W. 124; *under the same Act, s.* 6, *that the alleged trespass was under a warrant obtained by the defendant, who had lawful right to the possession: Delaney* v. *Fox*, 1 C. B. N. S. 166; *justifying*

(*t*) If the judgment or writ was set aside for irregularity, or as obtained against good faith, or upon some other ground, after the acts complained of, the reply should state specifically that the process has been set aside, and should state the ground on which it was set aside, in order that it may appear on the face of the reply that it was illegal and not merely erroneous, at the time of execution (*Prentice* v. *Harrison*, 4 Q. B. 852; *Rankin* v. *De Medina*, 1 C. B. 183; *Brown* v. *Jones*, 15 M. & W. 191). See further, Chitty's Practice, 14th ed., p. 831; and *ante*, p. 497.

under the authority of the Metropolis Local Management Act to remove Nuisances, 18 & 19 *Vict. c.* 120: *Le Neve* v. *Vestry of Mile End*, 27 L. J. Q. B. 208.

See also a form of a plea that the trespass was committed under civil process, which was subsequently set aside upon the terms that the plaintiff should bring no action: Perkins v. *Plympton*, 7 Bing. 676.

PUBLIC AUTHORITIES (*u*).

Defence to an Action brought against a Public Authority or Public Officer, or a Person acting in execution or intended execution of an Act of Parliament, that the Claim is barred by Lapse of the Period of Limitation prescribed by the Public Authorities Protection Act, 1893.

The acts complained of were acts done by the defendant in pursuance or execution, or intended execution, of the [*state the statute, if any, relied upon*

(*u*) The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, enacts that "Where after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof:

(b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client:

(c) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into Court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action:

(d) If, in the opinion of the Court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the Court may award to the defendant costs to be taxed as between solicitor and client."

By s. 2 of the same Act, "There shall be repealed as to the United Kingdom so much of any public general Act as enacts that *in any proceeding to which this Act applies*:—

(a) The proceeding is to be commenced in any particular place; or

(b) The proceeding is to be commenced within any particular time; or

(c) Notice of action is to be given; or

(d) The defendant is to be entitled to any particular kind or amount of costs; or the plaintiff is to be deprived of costs in any specified event; or

(e) The defendant may plead the general issue;

or, of the defendant's public duty or authority as a ——, *state the position or office of the defendant*], [*or*, the matters complained of consisted of an alleged neglect or default in the execution of [*state the statute, if any, or*, of the defendant's duty or authority as a ——, *state the defendant's position or*

---

and in particular there shall be so repealed the enactments specified in the schedule to this Act to the extent in the schedule mentioned."

In considering whether any particular body or person comes within the expression "any person" used in this Act, reference must be made to the object of the Act, as expressed in its title, viz., "to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties," and to its general scope, as ascertained from the provisions of the Act itself (*Fielden* v. *Morley Corporation*, [1899] 1 Ch. 1; 67 L. J. Ch. 611; affirmed [1900] A. C. 133; 69 L. J. Ch. 314; *Att.-Gen.* v. *Margate Pier Co.*, [1900] 1 Ch. 749; 69 L. J. Ch. 331; *Ambler* v. *Bradford Corporation*, [1902] 2 Ch. 505; 71 L. J. Ch. 744, 747; and see *Fenton* v. *Thorley*, [1903] A. C. at p. 447); and to its short title, as indicating a main object of the Legislature (*Middlesex JJ.* v. *Reg.*, 9 App. Cas. at p. 772; *The Ydun*, [1899] P. 236, 239; 68 L. J. P. 101; *Spittal* v. *Glasgow Corporation*, 5th Ser. Sess. Cas., vol. vi., p. 828).

It only applies to public authorities and does not apply to bodies or persons who are mere traders and are not public bodies. (See *per* V. Williams, L.J., *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, 13; 74 L. J. K. B. 484.) It applies to the case of an action against a municipal corporation or body constructing or carrying on under statutory authority works outside its strictly municipal duties, the profits, if any, o which go in relief of the rates, as for instance a tramway (*Lyles* v. *Southend-on-Sea Corporation*, *supra*, following *Parker* v. *London C. C.*, [1904] 2 K. B. 501; 73 L. J. K. B. 561), or docks (*The Ydun*, *supra*), for injuries caused by the negligence of its servants in so doing, in the one case to a passenger carried, in the other to a ship entering its docks (*Ib.*); or works for the supply of electric light causing injury to others, by obstructing the flow of water and causing flooding (*Ambler* v. *Bradford Corporation*, *supra*). But it is confined to "public authorities" and does not apply to the case of a commercial company earning or entitled to earn a dividend for the benefit of its shareholders (*Att.-Gen.* v. *Margate Pier Co.*, *supra*; see *per* V. Williams, L.J., [1905] 2 K. B. at pp. 13 and 17). It is not confined to public authorities themselves, but extends to officers and persons acting under their directions in the performance of their statutory duties (*Greenwood* v. *Hewell*, [1900] 1 Q. B. 535; 69 L. J. Q. B. 461). It applies to the case of a medical practitioner giving the statutory notice as to a patient suffering from an infectious disease (*Salisbury* v. *Gould*, 68 J. P. 155), but not to the trustees of a local loan society (*O'Brien Mitchelstown Local Fund*, [1903] 1 Ir. R. 282). It would appear to apply to the case of a justice of the peace. (See *Polley* v. *Fordham*, [1904] 2 Q. B. 345; 73 L. J. K. B. 687.) It has been held to apply to the case of a volunteer colonel engaged in his military duties (*Wilson* v. *Mackay*, 5th Ser. Sess. Cas., vol. vii., p. 165).

The Act does not apply to the case of acts done by an independent contractor, employed by a public authority under a contract and not as a mere servant or agent, to do work which the latter is empowered to do (*Tilling* v. *Dick*, [1905] 1 K. B. 562; 74 L. J. K. B. 359; *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620; 74 L. J. K. B. 352).

The Act applies to actions against public authorities for damages for negligence (*Lyles* v. *Southend-on-Sea Corporation*, *supra*; *Parker* v. *London C. C.*, *supra*); for injunctions (*Fielden* v. *Morley Corporation*, *supra*; *Harrop* v. *Osett Corporation*, [1898] 1 Ch. 535; 67 L. J. Ch. 611; *Southwark Water Co.* v. *Wandsworth Board of Works*, 67 L. J. Ch. 657); for infringement of patent (*Chamberlain* v. *Bradford Corporation*, 83 L. T. 518); for declarations of right (*Grand Junction Waterworks* v. *Hampton Council*, 63 J. P. 503; 15 Times Rep. 503). But not to actions in respect of

office], and the action was not commenced within six months after the alleged acts or neglect or default complained of [*or*, within six months of the ceasing of any continuing injury or damage], and the plaintiff's alleged cause of action is barred by the Public Authorities Protection Act, 1893,

---

debts as for goods sold, or work done (*Milford Docks* v. *Milford Council*, 65 J. P. 843); or for breaches of an express private contract (*Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 499; 73 L. J. Ch. 777; *Clarke* v. *Lewisham*, 19 Times Rep. 62; *National Telephone Co.* v. *Hull Corporation*, 52 W. R. 26. See *per* V. Williams, L.J., [1905] 2 K. B. at pp. 14 and 18.) It has been held to apply to an action to recover back from a public authority money which such authority had improperly required the plaintiff to pay for sanitary repairs (*Cree* v. *St. Pancras Vestry*, 68 L. J. 389). It does not apply to an action to recover a penalty for acting in contravention of a statute (*Humphries* v. *Worwood*, 64 L. J. Q. B. 437).

The six months limited by the Act runs in the case of actions in respect of personal injuries, from the time of the doing of the act which causes the injuries (*Carey* v. *Bermondsey Borough*, 20 Times Rep. 2; *Parker* v. *London C. C.*, *supra*; *Spittal* v *Glasgow*, *supra*; *Harrington* v. *Derby Corporation*, *infra*). In such cases there is no continuance of the injury within the Act (*I*.). In cases within the Act, actions under the Fatal Injuries Act, 1846, must, notwithstanding s. 3 of that Act, be commenced within six months from the time when the injury was done to the deceased (*Markey* v. *Tolworth Joint Hospital Board*, [1900] 2 Q. B. 454; 69 L. J. Q. B. 738), although he did not die until after that time (*Williams* v. *Mersey Docks, &c. Board*, [1905] 1 K. B. 804; 74 L. J. K. B. 481). In the case of an action against a justice of the peace for illegal distress under a warrant issued without jurisdiction the time runs from the wrongful entry, and not from the issue of the warrant (*Polley* v. *Fordham*, *supra*). In the case of a continuous injury, as, for instance, the pollution of a stream, the time runs from the ceasing of the continuance of the injury, and if the action is commenced within that time, damages arising within six years are recoverable (*Harrington* v. *Derby Corporation*, [1905] 1 Ch. 205; 74 L. J. Ch. 219).

The provisions of the Act awarding solicitor and client costs in certain cases apply only where the defendants are entitled to costs, and do not interfere with the discretion of the judge to deprive the defendants of costs altogether (*Bostock* v. *Ramsey Urban Council*, [1900] 2 Q. B. 616; 69 L. J. Q. B. 945). They apply when the plaintiff fails as to part of the claim, and is ordered to pay costs as to that part (*Roberts* v. *Gwyrfai D. C.*, [1899] 1 Ch. 583; 68 L. J. Ch. 233). They do not apply to appeals, or interlocutory applications (*Fielden* v. *Morley Corporation*, *supra*); nor where money is paid into Court with a denial of liability, and where by reason of the plaintiff subsequently accepting the money there is no judgment for the defendant's subsequent costs (*Smith* v. *Northleach*, *R. C.*, [1902] 2 Ch. 197; 71 L. J. Ch. 8). A consent order dismissing an action with costs is a judgment within the Act (*Shaw* v. *Herefordshire C. C.*, [1899] 2 Q. B. 282; 68 L. J. Q. B. 857). In cases within the Act, a simple judgment for the defendant with costs carries solicitor and client costs without any special direction to that effect (*North Metropolitan Tramway Co.* v. *London C. C.*, [1898] 2 Ch. 147; 67 L. J. Ch. 449).

The provisions for a local venue contained in any Act passed prior to 1883 were repealed by the Rules of the Supreme Court (R. S. C., 1875, Ord. XXXVI., r. 1); and the Public Authorities Protection Act, 1893, has, as to actions within s. 1 of that Act, repealed any provisions for local venues contained in then (1st of January, 1894) existing public general Acts. (See *Buckley* v. *Hull Docks Co.*, [1893] 2 Q. B. 93; 62 L. J. Q. B. 449.)

It will be observed that the repeal effected by s. 2 of the Public Authorities Protection Act, 1893, is confined to proceedings to which the Act applies, and the repeal of protection previously given, would seem to operate only where the new protection

s. 1 (a) [*or, more simply*, The plaintiff's alleged cause of action is barred by the Public Authorities Protection Act, 1893, s. 1 (a)].

See a form in Lyles v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1 ; 74 L. J. K. B. 484.

Defence to a like Action, of Tender of Amends under the same Act : see post, p. 919.

Defence to a like Action, of Payment into Court : see ante, p. 896.

---

afforded by this Act is substituted for it. Consequently in cases not within the Act the old statutes as to notice of action, pleading not guilty by statute, &c., still apply.

It is to be noted that the protection given by s. 1 of the Act applies alike to general Acts and to local and personal Acts, where the case is otherwise within the section, thus effecting in many cases a shortening of the period of limitations by making it a period of six months, or in cases of continuing causes of action six months from the ceasing thereof.

The defences, formerly not unfrequently used, of want of notice of action, and of "Not Guilty by Statute," have now, by reason of the above Act, become of comparative rarity. (See *ante*, pp. 886, 888.)

Under various statutes prior to and containing provisions analogous to those of the Public Authorities Protection Act, 1893, it was held that a person was to be considered as having acted in pursuance or execution of a statute, or in the exercise of the powers or duties of a public office, so as to be entitled to the benefit of any statutory privilege conferred upon persons so acting, where he had grounds for believing, and *bonâ fide* believed, in the existence of facts which, if existing, would have justified him in doing the acts complained of under the statute, or in the execution of his office (*Roberts* v. *Orchard*, 2 H. & C. 769 ; 33 L. J. Ex. 65 ; *Downing* v. *Capel*, L. R. 2 C. P. 461 ; 36 L. J. M. C. 97 ; *Leete* v. *Hart*, L. R. 3 C. P. 322 ; 37 L. J. C. P. 332 ; *Ib.* 157), and that it was not necessary to show that such grounds were reasonable (*Chamberlain* v. *King*, L. R. 6 C. P. 474 ; 40 L. J. C. P. 273 ; *Griffith* v. *Taylor*, 2 C. P. D. 194 ; 46 L. J. C. P. 152 ; *Lea* v. *Facey*, 19 Q. B. D. 352). It was held sufficient if the defendant believed he was acting under some law, though he did not know of the particular enactment (see *Leete* v. *Hart*, L. R. 3 C. P. 322, 325 ; *Selmes* v. *Judge*, L. R. 6 Q. B. 724) ; but if the law would not justify him upon the facts *bonâ fide* believed, he was not deemed to be acting in pursuance of the statute (*Downing* v. *Capel*, L. R. 2 C. P. 461 ; 36 L. J. M. C. 97 ; *Griffith* v. *Taylor*, *supra*) ; nor was he deemed to be so acting if he wilfully acted in a manner which he knew to be unauthorised by the statute (see *Selmes* v. *Judge*, L. R. 6 Q. B. 724, 727).

It was held, under former enactments, that provisions requiring notice of action in favour of persons "acting or intending to act in pursuance of," or "execution of," a statute applied only to those cases where there was some act done, or fact committed, in respect of which the action was brought (*Umphelby* v. *McLean*, 1 B. & A. 42 ; *Royal Aquarium* v. *Parkinson*, [1892] 1 Q. B. 431 ; 61 L. J. Q. B. 409) ; and that such provisions had no application to actions for injunctions (*Flower* v. *Leyton Local Board*, 5 Ch. D. 347 ; 49 L. J. Ch. 621 ; *Chapman* v. *Auckland Union*, 23 Q. B. D. 294 ; 58 L. J. Q. B. 504). A railway company sued for default of duty as common carriers were

PUBLIC HEALTH (*x*).

For forms of Defences under the Public Authorities Protection Act, 1893, *see ante*, pp. 901 *et seq.*

RAILWAYS (*y*).

RECOVERY OF LAND (*z*).

held not to be entitled to statutory protection, as not being sued for anything done or omitted to be done in pursuance of their Act, or in the execution of the powers and authorities given by it (*Carpue* v. *London and Brighton Ry. Co.*, 5 Q. B. 747; *Palmer* v. *Grand Junction Ry. Co.*, 4 M. & W. 749); but in an action to recover back excessive charges for the carriage of goods, a railway company, under their special Act, were held to be entitled to such protection (*Kent* v. *G. W. Ry. Co.*, 3 C. B. 714; see *Edwards* v. *G. W. Ry. Co.*, 11 C. B. 588).

In general, enactments conferring statutory protection in respect of things done under the statutes have been held not to apply to any action for breach of a specific contract entered into by the defendant (*Davies* v. *Mayor of Swansea*, 8 Ex. 808; *Midland Ry. Co.* v. *Withington Local Board*, 11 Q. B. D. 788; 52 L. J. Q. B. 189); but were held to apply to cases where the action was brought in respect of a tort which had been waived by the plaintiff (*Selmes* v. *Judge*, L. R. 6 Q. B. 724; 40 L. J. Q. B. 287; *Midland Ry. Co.* v. *Withington Local Board*, *supra*); as, for instance, where an action for money received was brought to recover money paid by mistake of fact to a local board in respect of rates illegally made (*Midland Ry. Co.* v. *Withington Local Board*, *supra*).

(*x*) See "*Public Health*," *ante*, p. 465.

(*y*) See "*Carriers*," *ante*, pp. 622, 817; "*Corporation*," *ante*, p. 359; "*Negligence*," *ante*, pp. 441, 442; "*Trespass*," *post*, pp. 930, 937.

(*z*) The defendant may, except where he relies on an equitable title or defence, plead that he is in possession by himself or his tenant without disclosing the title on which he relies. (See Ord. XXI., r. 21, *post*, p. 906.)

By Ord. XII., r. 25, "Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or a judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant"; and by Ord. XII., r. 27, every person so appearing must forthwith give notice of such appearance to the plaintiff's solicitor (or to the plaintiff if he sues in person), "and shall in all subsequent proceedings be named as a party defendant to the action."

By Ord. XII., r. 28, "Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the action and signed by him or his solicitor. Such notice shall be served within four days after appearance; and an appearance, where the defence is not limited as above mentioned, shall be deemed an appearance to defend for the whole." A defendant who has thus limited his defence to a part only of the premises claimed, should show by his defence that it is pleaded as to that part only, and, except where the fact that his defence has been limited by his memorandum of

Defence to an Action for the Recovery of Land that the Defendant, by himself or his Tenant, is in Possession of the Premises sought to be recovered (a).

The defendant is in possession of the premises [*or*, the land] referred to in the statement of claim by himself or his tenant [and he pleads that he is so pursuant to Ord. XXI., r. 21].

(*See R. S. C.*, 1883, *App. D., Sect. VII.*)

---

appearance, or by such notice as above mentioned, sufficiently appears from the statement of claim, that fact should be expressly mentioned in the defence.

As to claims for mesne profits, see *ante*, pp. 233, 466. A claim for *mesne profits* is subject to the statutory limitation of the period of six years for an action of trespass to land (21 Jac. 1, c. 16, s. 3, cited *ante*, p. 873).

The Courts of this country have no jurisdiction to entertain an action in which the title to land situate abroad comes into question. (See *ante*, p. 863.)

A defendant in an action for recovery of land may in some cases obtain leave to join as a third party, under Ord. XVI., r. 48, a person who has conveyed the land to him with a covenant for title, and who, in the event of the plaintiff succeeding in the action, will be liable to the defendant for breach of such covenant (*Page* v. *Midland Ry. Co.*, [1894] 1 Ch. 11; and see *Baxter* v. *France*, [1895] 1 Q. B. 455, 591).

(*a*) By Ord. XXI., r. 21, "No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim. He may, nevertheless, rely upon any ground of defence which he can prove, except as hereinbefore mentioned."

A defence of "possession" operates not only as a denial of the allegations of fact contained in the statement of claim, but also as an affirmative pleading of every *legal* title and *legal* defence which the defendant may be able to prove in answer to the plaintiff's claim. (See *Danford* v. *McAnulty*, 8 App. Cas. 456; 52 L. J. Q. B. 652, decided under the former Ord. XIX., r. 15, which was less widely expressed than the rule above cited; see *Heath* v. *Pugh*, 6 Q. B. D. 345, 353; *Pugh* v. *Heath*, 7 App. Cas. 235.) It will include all such defences as a denial of an allegation of notice to quit, or a legal defence under the Statutes of Limitation. But where it is desired to admit part of the allegations in the claim, or where the defendant relies only on some particular grounds of defence, it is often expedient, for the sake of defining the issues to be tried, of preventing unnecessary costs, or of preventing the plaintiff from afterwards setting up surprise, that the defence should be pleaded specially, as in other actions.

Any *equitable* defence, or any defence depending on an *equitable* title, must be specifically pleaded (see Ord. XXI., r. 21, *supra*; and Jud. Act, 1873, s. 24 (2), cited *ante*, pp. 33, 34), and the material facts constituting such equitable title or equitable defence must be distinctly stated (Ord. XIX., rr. 4, 15; *Sutcliffe* v. *James*, 40 L. T. 875; 27 W. R. 750; see *Williams* v. *Walker*, 9 Q. B. D. 576).

It would seem that, where a defendant has been let into possession and allowed to occupy under a parol agreement for a lease which he is entitled to enforce against the plaintiff by way of specific performance, he may now plead the facts by way of equitable defence to an action for the recovery of the land (see Jud. Act, 1873, ss. 24 (2), 25 (11); *Walsh* v. *Lonsdale*, 21 Ch. D. 9; 52 L. J. Ch. 2; *Allhusen* v. *Brooking*, 26 Ch. D. 559; 53 L. J. Ch. 520; *Ex p. Monkhouse*, 14 Q. B. D. 956; 54 L. J. Q. B. 128);

A like form, by a Defendant not named in the Writ, who has obtained Leave to appear and defend under Ord. XII., r. 25, and has limited his Defence to a Part only of the Premises.

Defence of the Defendant *E. F.*

1. This defendant, under and by virtue of an order made in this action, dated the —— ——, 19—, has appeared, as landlord of the defendant *C. D.*, to defend, [and has by his memorandum of appearance (*or*, by a duly signed notice served within four days after his appearance) in this action limited his defence to part of the premises claimed, namely, the close called the Big Field], and says as follows :—

2. The defendant is in possession of the said [close] by himself or his tenant [and he pleads that he is so pursuant to Ord. XXI., r. 21].

For forms of Defences in Actions by Landlords against Tenants to recover the Demised Premises, see "Landlord and Tenant," ante, pp. 714 *et seq.*

Defence that the Plaintiff's Claim was barred by the Lapse of the Statutory Period of Limitation: see "Limitation, Statutes of," ante, pp. 875, 876.

RELEASE (*b*).

REPLEVIN (*c*).

---

and may counterclaim for specific performance of the agreement. (See the Jud. Act, 1873, s. 24 (3) (7); Ord. XIX., r. 3; *ante*, pp. 216, 217; and *Wood* v. *Beard*, 2 Ex. D. 30.)

(*b*) See *ante*, p. 753.

A release to one of several joint tort-feasors operates in general as a discharge of the other joint tort-feasors also, and is a bar to any action against them for the same tort (Co. Litt. 232a; Bac. Abr., "Release"; *Cocke* v. *Jennor*, Hob. 66; *Kiffin* v. *Willis*, 4 Mod. 379; and see "*Accord and Satisfaction*," *ante*, p. 815; "*Judgment Recovered*," *ante*, p. 862; *Mayor of Salford* v. *Lever*, 25 Q. B. D. 262; [1891] 1 Q. B. 188; *Duck* v. *Mayeu*, [1892] 2 Q. B. 511). But this does not apply to cases where the rights of action against the other tort-feasors, though arising out of the same transactions, are different and distinct from the rights of action against the tort-feasor who has been released. (See *Mayor of Salford* v. *Lever*, *supra*.) If a release to one of joint tort-feasors reserves the releasor's claims and remedies against the others for the joint tort, it amounts merely to a covenant not to sue the particular tort-feasor, and does not release the others (*Duck* v. *Mayeu*, *supra*).

(*c*) A judgment for the plaintiff in replevin is a bar to a subsequent action of trespass for the same taking of the goods and for any special damage therefrom, though it is no bar to an action for trespass to the land (*Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454; 42 L. J. C. P. 273; *ante*, pp. 472, 862).

Denial of the Acts complained of (*d*).

The defendant did not take or detain any of the goods, *or*, cattle, &c. [*or*, did not distrain any of the goods, &c., *as the case may be, following the form of the allegation traversed*].

Defence denying the Plaintiff's Property in the Goods (*e*).

The said goods were not the plaintiff's.

Defence, in the nature of an Avowry, that the Goods were taken as a Distress for Rent in Arrear from the Plaintiff to the Defendant, with a Counterclaim for a Return of the Goods and for Damages (*f*).

Defence.

1. The plaintiff from the —— ——, 19—, to the —— ——, 19— [*the period during which the rent distrained for accrued due*], and thenceforth until the [alleged] taking [*or*, distraining] of the said goods, held the said

(*d*) The defendant cannot claim judgment for a return of the goods under a mere denial of the acts complained of. (See Com. Dig. Pleader, 3 K. 12, 13.)

(*e*) The plaintiff must be entitled to a possessory property in the goods in order to maintain replevin; and a denial that the goods were the plaintiff's may therefore be pleaded as a defence to the action. But if the defendant further alleges that the goods are his own property, he may also claim judgment for a return of the goods on proof of that allegation (Com. Dig. Pleader, 3 K. 13; *Butcher* v. *Porter*, 1 Salk. 94; and see *post*, note (*f*), *infra*).

(*f*) Under the former practice, where a defendant in an action of replevin admitted the taking of the goods, but justified it for lawful cause, as a distress for rent, he usually did so by a pleading called an *avowry* or a *cognizance*. An *avowry* was a justification in his own right; a *cognizance*, a justification in the right of another (Com. Dig. Pleader, 3 K. 13, 14). Under an avowry or cognizance, the defendant, if successful, was entitled to have judgment for a return of the goods, and also for such damages as had been sustained by reason of the replevin (Com. Dig. Pleader, 3 K. 12).

The plaintiff's pleading in answer to an avowry or cognizance was called a *plea in bar*; and the names of each of the subsequent pleadings were similarly postponed one step (Bullen & Leake, 3rd ed., p. 777; Com. Dig. Pleader, 3 K. 13, 14, 16). Under the present system, the pleadings in actions of replevin are called by their ordinary names, and are subject to the ordinary rules of pleading.

Previously to the Common Law Procedure Act, 1852, an avowry or cognizance concluded with a formal prayer of judgment for a return of the goods and for the defendant's damages and costs, but as that Act, by s. 67 (now repealed), rendered such formal conclusion unnecessary, the defendant could under that Act obtain such judgment without making any express claim for it in his pleadings. But under the present system of pleading it seems proper that a defendant who wishes to obtain such relief should expressly claim it by way of counterclaim as in the above form. (See 2 Chitty's Practice, 14th ed., p. 1262, and *ante*, p. 472.)

An avowry or cognizance was required at common law to set out a good title in order to give the defendant a return of the goods (2 Wms. Saund., 1871 ed., 668;

[dwelling-house] as tenant thereof to the defendant under a lease dated the —— ——, 19— [*or*, an agreement in writing dated the —— ——, 19—, *or*, *as the case may be*], at the yearly rent of £——, payable quarterly on the usual quarter days [*or*, *as the case may be*], and the defendant avows the taking [*or*, distraining] of the goods in the said [dwelling-house] as a distress for £—— of the said rent, being a quarter's rent from the —— ——, 19—, to the —— ——, 19—, which then was [and still is] due and in arrear from the plaintiff as such tenant as aforesaid to the defendant.

Counterclaim.

2. The defendant repeats the statements contained in the defence, and claims a return of the goods, and £—— damages for the loss which he has sustained by reason of the replevin.

Particulars of damages are as follows :—[*State same.*]

Defence, in the nature of a Cognizance, that the Goods were taken as a Distress for Rent due from the Plaintiff to the Landlord, and that the Defendant acted as Bailiff to the Landlord (*g*).

The plaintiff from the —— ——, 19—, to the —— ——, 19— [*the period during which the rent distrained for accrued due*], and thenceforth

---

Hawkins v. *Eckles*, 2 B. & P. 359, 361 (*a*)) ; and this must still be shown in the defence or counterclaim where a return is claimed in the case of distresses other than distresses for rent (*vide infra*). But, in the case of a distress for rent, a general form of avowry or cognizance, without setting forth the title of the landlord or lessor, was allowed by the statute 11 Geo. 2, c. 19, s. 22, and although that enactment has been repealed by 42 & 43 Vict. c. 59, and 46 & 47 Vict. c. 49, the practice introduced under it appears to be still in force, so that in the case of a distress for rent, though it is necessary to show that the person distrained upon held of the person distraining, it is unnecessary to set out the landlord's title in detail. (See *Bank* v. *Angell*, 7 A. & E. 843.) But in the case of a distress *damage feasant*, the title of the person distraining must be set forth. (See 2 Wms. Saund., 1871 ed., p. 670 ; *Hawkins* v. *Eckles*, *supra*.) So, also, in the case of a distress for a rentcharge (*Pinhorn* v. *Souster*, 8 Ex. 763 ; and see *Mitchell* v. *Holmes*, L. R. 8 Ex. 119 ; 42 L. J. Ex. 98). It is not necessary for the defendant to allege that the rent "still remains due," and a denial of that averment would be no defence (*Clark* v. *Davies*, 7 Taunt. 72).

Where both the landlord and his bailiff who made the distress on his behalf are sued and defend jointly, the two forms of defences in the nature of an avowry and a cognizance respectively may be combined in one paragraph by alleging the tenancy to have been "to the defendant *E. F.*" (*the landlord*), and by proceeding thus :—"and the defendant *E. F.* avows, and the defendant *G. H.*, as and being bailiff to the defendant *E. F.*, acknowledges, the taking, &c.," continuing as in the first of the above two forms, substituting for the words "to the defendant" the words "to the defendant *E. F.*" (See *Banks* v. *Angell*, 7 A. & E. 843.) Where the avowry or cognizance is for rent in arrear under a demise to a *third party*, and not under a demise to the plaintiff himself, the form of the defence must be varied accordingly. (See Bullen & Leake, 3rd ed., p. 779.)

A person entitled to distrain is not bound by the cause of the distress alleged at the time of making it, but may in his avowry set up any sufficient ground of justification (*Phillips* v. *Whitsed*, 2 E. & E. 804 ; 29 L. J. Q. B. 164 ; see *Trent* v. *Hunt*, 9 Ex. 14).

(*g*) See preceding note.

until the [alleged] taking [*or*, distraining] of the said goods, held the said dwelling-house as tenant thereof to *E. F.* under a lease dated the —— ——, 19— [*or, as the case may be*], at the yearly rent of £——, payable quarterly on the usual quarter days [*or, as the case may be*], and the defendant, as and being bailiff of the said *E. F.*, acknowledges the taking [*or*, distraining] of the said goods in the said dwelling-house as a distress for £—— of the said rent, being a quarter's rent from the —— ——, 19—, to the —— ——, 19—, which then was, and still is, due and in arrear from the plaintiff as such tenant as aforesaid to the said *E. F.*

[*The Defendant may usually add a counterclaim for the return of the goods and for damages: see the last preceding form, which can easily be adapted to the case of a bailiff.*]

Reply to the preceding forms, denying the alleged Tenancy (*h*).

The plaintiff did not hold the dwelling-house as tenant thereof to the defendant [*or*, to the said *E. F.*]. *The making of the lease or agreement, if any, referred to in the defence should be specifically denied.*

(*h*) Where it is desired merely to traverse the defence it is now unnecessary to deliver any reply (see *ante*, p. 545), but in all cases where the defendant sets up a counterclaim or where it is desired to reply specially, leave to deliver a reply should be obtained and a special reply delivered.

A reply that the landlord had no title to the premises at the time of the demise (*nil habuit in tenementis*), or any pleading in substance amounting to the same thing, is bad (*Alchorne* v. *Gomme*, 2 Bing. 54; see *Dancer* v. *Hastings*, 4 Bing. 2; *Wheeler* v. *Branscombe*, 5 Q. B. 373; *Evans* v. *Elliot*, 9 A. & E. 342; and see *ante*, pp. 232, 712). But the tenant may deny the landlord's reversion and right to distrain (*Preece* v. *Corrie*, 5 Bing. 24; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898; see *Hooker* v. *Nye*, 1 C. M. & R. 258, 260; *Downs* v. *Cooper*, 2 Q. B. 256; *Lewis* v. *Baker*, [1905] 1 Ch. 46; 74 L. J. Ch. 39).

Formerly a plaintiff in replevin was allowed to plead, in answer to an avowry or cognizance, a general statement that no rent was due or in arrear, or that no part of the rent distrained for was due or in arrear; but it seems clear that, though such a reply may be admissible to a mere *defence* in the nature of an avowry or cognizance, it would not be a sufficient reply to a counterclaim for a return of the goods, or for damages, &c. (Ord. XIX., rr. 4, 15). The plaintiff, in his reply to such a counterclaim, should therefore show the grounds on which he relies, as, for instance, that the rent was paid or satisfied before the distress. Thus, he may plead compulsory payments of charges on the land paramount to the claim of the landlord (*Jones* v. *Morris*, 3 Ex. 742); *e.g.*, payment of rent to the ground landlord (*Sapsford* v. *Fletcher*, 4 T. R. 511); payment of the land-tax (*Stubbs* v. *Parsons*, 3 B. & Ald. 516); payment of the income-tax (*Franklin* v. *Carter*, 1 C. B. 750; *Taylor* v. *Evans*, 1 H. & N. 101; 25 L. J. Ex. 269; *Clennell* v. *Read*, 7 Taunt. 50); payment to a mortgagee claiming under a mortgage prior to the demise (*Johnson* v. *Jones*, 9 A. & E. 809; *Dyer* v. *Bowley*, 2 Bing. 94); payment under a distress of an annuity charged on the land by the landlord prior to the demise (*Taylor* v. *Zamira*, 6 Taunt. 524).

The following, among other grounds of reply, may be relied upon by the plaintiff in cases of distress for rent: that he tendered the rent and expenses before impounding (*Evans* v. *Elliott*, 5 A. & E. 142; *Thomas* v. *Harries*, 1 M. & G. 695; *Tennant* v. *Field*, 8 E. & B. 336; 27 L. J. Q. B. 33; see "*Distress*," *ante*, p. 379); that the goods taken were goods privileged from distress (see *ante*, p. 376); that a previous distress had been taken by the defendant for the same rent, and that he might then have distrained

The like, denying that any Rent was in Arrear (i).

No part of the rent alleged to have been distrained for was due or in arrear from the plaintiff to the defendant [*or*, to the said *E. F.*]. [*The grounds of this denial should be stated, as, for instance,* The plaintiff, before the making of the said distress, satisfied and discharged the said rent by payment of the same to the defendant in cash on the —— ——, 19—.]

Reply of Payment into Court to a Defence and Counterclaim in the nature of an Avowry (k).

The plaintiff, [as to, &c. *as the case may be*], has paid [*or*, brings] into Court £——, and says that that sum is enough to satisfy the claim of the defendant [in respect of the matter herein pleaded to].

Defence in the nature of an Avowry by a Freeholder for a Distress Damage Feasant (l).

At the time of the alleged taking of the [cattle], the said close was the close and freehold of the defendant, and because the said [cattle] were then wrongfully in the said close, doing damage there to the defendant, the defendant avows the taking of the said [cattle] in the said close as a distress for the said damage.

[*A counterclaim may be added for the return of the cattle, &c., as in the case of an avowry for rent: vide ante,* p. 909.]

---

enough goods to satisfy the rent, whereof he had notice (*Owens* v. *Wynne*, 4 E. & B. 579; see *Lee* v. *Cooke*, 2 H. & N. 584; 3 H. & N. 203; and see *ante*, p. 375); that the plaintiff was evicted from the demised premises before the alleged rent became due. (See *ante*, p. 711.)

For other grounds of reply in such cases, see Bullen & Leake, 3rd ed., pp. 780 *et seq.*

A plaintiff cannot plead a set-off as a reply to a defence in the nature of an avowry or cognizance; nor, it would seem, to a counterclaim for a return of the goods. (See *Eberle's Hotels Co.* v. *Jonas*, 18 Q. B. D. 459.)

(*i*) See preceding note.

(*k*) A defendant in replevin may pay money into Court, as in other actions for damages (Ord. XXII., r. 1; *ante*, p. 748).

(*l*) See *ante*, p. 849. For examples of former avowries and cognizances for a distress taken damage feasant on a spot where the defendant had common of pasture, see *Jones* v. *Richard*, 5 A. & E. 413; *Prichard* v. *Powell*, 10 Q. B. 589; *Hulls* v. *Estcourt*, 2 H. & C. 47; 32 L. J. Ex. 193. The plaintiff, in his reply to defences and counterclaims of this kind, may set up that he had on the land in question a right of common of pasture by prescription (see *Jones* v. *Richard*, 5 A. & E. 413; *Warburton* v. *Parke*, 2 H. & N. 64; 26 L. J. Ex. 295), or *pur cause de vicinage* (*Prichard* v. *Powell*, 10 Q. B. 589; *Heath* v *Elliott*, 4 Bing. N. C. 388); or that his cattle strayed on to defendant's close through defects of fences which it was the defendant's duty to repair (*Bailey* v. *Appleyard*, 8 A. & E. 161; and see *Carruthers* v. *Hollis*, 8 A. & E. 113; *Singleton* v. *Williamson*, 7 H. & N. 410; 31 L. J. Ex. 17; "*Fences*," *ante*, p. 851).

The like, by a Tenant (*m*).

Before the alleged taking of the [cattle], *J. K.*, being seised in fee of the said close, demised the same to the defendant by a lease dated the —— ——, 19— [*or, as the case may be*], for the term of —— years, and by virtue of the said demise the defendant at the time of the alleged taking of the said [cattle] was possessed of the said close, and because the said [cattle] were then wrongfully in the said close doing damage there to the defendant, the defendant avows the taking of the said [cattle] in the said close as a distress for the said damage.

Reversion (*n*).

Denial that the Defendant did the Acts which are alleged to have injured the Reversion (*o*).

The defendant did not do any of the acts complained of. He did not [nor did any of his servants or workmen, &c.] pull down the wall [*or*, alter the watercourse, *or*, cut down any of the trees on the land, *or, as the case may be, denying specifically the acts which are alleged to have caused the injury to the reversion*].

Defence, denying the Plaintiff's Reversion (*o*).

The reversion of the land, *or*, of the dwelling-house, [*or*, The reversionary interest in the goods, &c., *as the case may be*], did not belong to the plaintiff.

The like, with a Denial of the alleged Tenancy of the Plaintiff's Tenant (*o*).

The said *E. F.* was not tenant of the said land [*or*, dwelling-house] to the plaintiff, and the reversion of the said land [*or*, dwelling-house] did not belong to the plaintiff.

(*m*) See preceding note.

(*n*) See *ante*, p. 473.

(*o*) The defendant should plead in such a manner as to show distinctly whether he merely means to deny that he did the specific acts which he is alleged to have done, or to deny that the reversion was thereby injured. The reversionary title of the plaintiff must, if disputed, be expressly denied, and any justification for the acts complained of should be specially pleaded.

Where the defence is that a wrongful act alleged to have been done by the defendant's servants was not authorised by the defendant, and was not within the scope of the servant's employment, or that the persons who did the act were not servants of the defendant, such defence should be distinctly raised in the defendant's pleading. (See *ante*, pp. 434, 880.)

Denial of the alleged Injury or Damage to the Reversion (p).

The plaintiff's reversion [*or*, reversionary interest] has not been injured [*or*, damaged] in the alleged or any way by reason of any of the acts alleged to have been done by the defendant or his servants [*or*, The defendant denies the alleged injury to the plaintiff's reversion or that the same arose from the acts [*or*, matters] complained of].

The like, where the Plaintiff claims an Injunction (q).

The defendant denies that the plaintiff's reversion has been, or will be, injured [*or*, damaged] in the alleged or any way by reason of any of the acts [*or*, matters] complained of [*or*, None of the acts alleged to have been done or threatened to be done by the defendant or his servants have caused, or will cause, the alleged or any damage or injury whatever to the plaintiff's reversion in the property].

Defence, in an Action by a Landlord against his Tenant for removing Fixtures from a Dwelling-house, justifying the Removal of them as Tenant's Fixtures (r).

The said goods were tenant's fixtures belonging to the defendant, which he, as tenant of the said dwelling-house, was lawfully entitled to pull down and remove during his tenancy of the said dwelling-house; and the defendant during his said tenancy carefully pulled down and removed the same, and in so doing unavoidably a little damaged the walls of the said dwelling-house, doing no unnecessary damage thereto, and the defendant, before the end of his said tenancy, repaired and restored the said walls; which are the alleged grievances.

The like, in respect of Trade Fixtures erected and affixed by the Tenant (r).

The said fixtures were trade fixtures, which, during the tenancy, were erected and fixed upon the said messuage and premises by the defendant in the course and for the purposes of his trade as a ——, and were proper and necessary for those purposes, and belonged to, and were of right removable

---

(*p*) The injury or damage to the reversion is part of the gist of the action (see *ante*, p. 473), and should, if disputed, be expressly denied. But this defence is not admissible where the acts done by the defendant are such as must necessarily be injurious to the reversion. If it appears on the face of the claim that the acts alleged to have been done by the defendant are such as, from their nature, cannot be injurious to the reversion, the claim may be objected to in point of law.

(*q*) See *ante*, p. 859.

(*r*) As to the tenant's right to remove fixtures in certain cases, see the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), ss. 34 and 54; and see *Elwes* v. *Maw*, 2 Smith's L. C., 11th ed., pp. 189, 204.

by the defendant, and the defendant, during the said tenancy, carefully pulled down and removed them, without doing any unnecessary damage to the said messuage and premises, and before the end of the tenancy the defendant repaired the damage thereto occasioned by the said pulling down and removal of the fixtures, and, except as aforesaid, the defendant wholly denies the matters complained of.

[*If the statement of claim does not disclose the fact of the defendant's tenancy to the plaintiff, that fact must be expressly stated in the defence, and particulars of the tenancy given.*]

Sheriff (*s*).

Defence to an Action against a Sheriff for not levying, denying the Default in levying (*t*).

The defendant denies that he made default in the execution of the said writ, and says that on the —— ——, 19—, he levied the money and interest which he was commanded and directed by the said writ to levy.

The like, denying that there were any Goods within the Bailiwick.

There were not, at or after the delivery of the said writ to the defendant, any goods or chattels of the said *G. H.* within the bailiwick of the defendant whereof the defendant could or ought to have levied the money and interest indorsed on the writ as alleged.

The like, alleging that the Plaintiff countermanded the Writ (*u*).

After the delivery of the writ to the defendant, and before the alleged grievance, the plaintiff, on the —— ——, 19—, by a letter dated the —— ——, 19— [*or, as the case may be*], countermanded the said writ and ordered the defendant not to levy the said money or interest under the said writ, and so discharged him from executing the same.

(*s*) See "*Sheriff*," *ante*, p. 476; "*Process*," *ante*, p. 898; "*Trespass*," *post*, p. 922.

(*t*) Where in actions against a sheriff for not levying, or for a false return, the defendant is desirous of denying the acts or defaults complained of, it is advisable that he should plead such denial specifically, as in the forms above given. All necessary matters of inducement, as, for instance, the debt, the judgment, the writ, the delivery of it to the sheriff, the levy, that the defendant was sheriff, &c., if disputed, must also be specifically denied.

(*u*) A countermand of a writ of *fi. fa.* by the plaintiff's solicitor is a sufficient discharge to the sheriff (*Levi* v. *Abbott*, 4 Ex. 588; 19 L. J. Ex. 62; *Lovegrove* v. *White*, L. R. 6 C. P. 440; 40 L. J. C. P. 253; Chitty's Practice, 14th ed., p. 811).

Defence to an Action for a False Return of Nulla Bona, denying the Falseness of the Return (x).

The defendant denies that the return made by him to the Court was false, and says that [*here deny any facts alleged by the plaintiff which are inconsistent with the truth of the return, e.g., if the plaintiff has alleged that the judgment debtor had goods upon which the defendant might have levied, deny that allegation as in the last form but one. The defendant may also plead affirmatively any facts justifying the return, as, for instance, that there was a prior writ of fi. fa, which exhausted the proceeds of the levy*].

Defence to an Action for not Levying, or for a False Return, denying the Judgment (y).

The defendant denies that the plaintiff recovered the said judgment against *A. B.*

(*x*) Where the sheriff has in his hands various writs of *fi. fa.* against the same debtor, he is bound to levy under all the writs, if valid, but should, in applying the proceeds in satisfaction of the writs, give priority to each in the order in which they came into his hands, and if the proceeds are not sufficient to satisfy more than the first writ and the expenses of the levy, he may return *nulla bona* to the subsequent writs (*Heenan* v. *Evans*, 3 M. & G. 398; *Drewe* v. *Lainson*, 11 A. & E. 529; *Wintle* v. *Freeman*, *Ib.* 539; *Dennis* v. *Whetham*, L. R. 9 Q. B. 345; 43 L. J. Q. B. 129; *Ex p. Crossthwaite*, 14 Q. B. D. 966; Chitty's Practice, 14th ed., p. 860). A justification of such return on this ground should, if relied upon, be specifically pleaded. The plaintiff in such case may reply facts showing that the prior writ was invalid (*Dennis* v. *Whetham*, *supra*). As to the rights and duties of sheriffs in cases where concurrent writs of *fi. fa.* on the same judgment are issued into different counties, see *Lee* v. *Dangar*, [1892] 2 Q. B. 337; 61 L. J. Q. B. 780.

Where rent is due to the landlord of the premises on which the goods are seized, one year's arrears of such rent must, in cases within the 8 Anne, c. 14, s. 1, be paid to the landlord before removing the goods or satisfying the claim of the execution creditor (*Thomas* v. *Mirehouse*, 19 Q. B. D. 563; see *ante*, p. 478); and in such case, if the rent exceeds the amount of the proceeds of the levy, the sheriff is entitled to make a return of *nulla bona*, as there are no goods available for the satisfaction of the writ. (See *Wintle* v. *Freeman*, *supra*; *Dennis* v. *Whetham*, *supra*.) In an action by a landlord against a sheriff for the removal of goods taken in execution against the tenant without payment of one year's arrears of rent, the defendant may plead that the execution debtor was not tenant to the plaintiff (*Riseley* v. *Ryle*, 11 M. & W. 16; *Gore* v. *Lloyd*, 12 M. & W. 463), or that the rent was not due (*Reed* v. *Thoyts*, 6 M. & W. 412; *Gore* v. *Lloyd*, *supra*), or that the defendant had no notice of the rent being due (*Reed* v. *Thoyts*, *supra*).

(*y*) As it is necessary, in an action against the sheriff for not levying, or for a false return, to prove a judgment in support of the writ of execution, it is open to the defendant to show by way of defence that there was no judgment, or that the judgment was fraudulent or void against the creditors. (See *Shattock* v. *Carden*, 6 Ex. 725; *Lane* v. *Chapman*, 11 A. & E. 966; *Imray* v. *Magnay*, 11 M. & W. 267; *Dennis* v. *Whetham*, L. R. 9 Q. B. 345; 43 L. J. Q. B. 129; Chitty's Practice, 14th ed., p. 821.) In such last-mentioned case, he should expressly state in his pleading the facts upon which such defence is grounded.

The like, denying the Process.

The defendant denies that plaintiff sued out the alleged or any writ of *fieri facias*.

The like, denying the Delivery of the Process to the Defendant.

The alleged writ was not delivered to the defendant.

For Defences by a Sheriff to Actions for Trespass or Conversion, or Justification under Process, see "*Process*," *ante*, p. 898.

SHIPPING (*z*).

SLANDER OF TITLE (*a*).

STOPPAGE IN TRANSITU.

See ante, p. 825.

SUPPORT OF LAND (*b*).

Denial of the Plaintiff's Possession of the Premises.

The said land was not [*or*, The said land, houses, and buildings, &c. were not] the plaintiff's, *or*, The plaintiff was not [and is not] possessed [*or*, the owner or occupier] of the said land [&c. *according to the form of the allegation which is denied*].

(*z*) As to limitation of liability, see *ante*, pp. 293, 789; and as to collisions, *ante*, p. 479.

By s. 633 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), "An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law." The owner or master is exonerated under this section only when the negligence in respect of which the action is brought is that of the pilot exclusively (*The Iona*, L. R. 1 P. C. 426; *Clyde Nav. Co.* v. *Barclay*, 1 App. Cas. 790; *The Ripon*, 10 P. D. 65; 54 L. J. Ad. 56; *The Oakfield*, 11 P. D. 34; *The Indus*, 12 P. D. 46; *The Schwan*, [1892] P. 419, 438, 441, 442; and see, further, Marsden on Collisions, 5th ed., pp. 221 *et seq.*).

The exemption applies to the owner or master of a steam tug towing a vessel which is compulsorily in charge of a pilot (*Spaight* v. *Tedcastle*, 6 App. Cas. 217).

A like exemption applies where pilotage is compulsory by the law of a foreign country (*The Halley*, L. R. 2 P. C. 193; 37 L. J. Ad. 1).

(*a*) See *ante*, pp. 481, 482.

(*b*) See *ante*, p. 483.

Denial of the Removal of Support.

The defendant denies that he has excavated, worked, dug out, or removed any mines or minerals under or near to or adjacent to the land, house and premises of the plaintiff. He further denies that he has done so (if at all) either,

Without leaving proper and sufficient support, vertical and lateral, for the plaintiff's land or for his land with the buildings thereon ; or

So that the plaintiff has suffered any damage.

He denies that he has thereby or otherwise removed or lessened the support of the plaintiff's land, house or premises.

Defence alleging a Right to let down the Surface.

1. The plaintiff is not the absolute owner of the said land, dwelling-house and premises. The mines and minerals under and near to the said land, and the right to win, work and take away the same and to let down the surface were leased and granted to the defendant by *E. F.*, who was then the owner and in possession of the said land, dwelling-house and premises, and of the mines and minerals thereunder and adjacent thereto, by a lease, dated the —— ——, 19—, prior to the purchase by the plaintiff of his said land, and he purchased his said land subject to and with notice of the said lease [and in the conveyance to him the said mines and minerals and the defendant's right to win, work and take away the same and let down the surface are excepted and reserved to the defendant.]

2. The plaintiff purchased his said land and always held the same subject to the right of the defendant to win, work and take away the said mines and minerals, and to remove and lessen the said support, and to do the other acts complained of.

3. Under the circumstances aforesaid the defendant denies that the plaintiff was or is entitled to have the said land supported by the soil and minerals either adjacent thereto or under the same.

Defence alleging Title in the Defendant to make the Excavations, &c. complained of, on Condition of leaving sufficient Support, and that sufficient Support was left.

The defendant admits that he made the excavations [&c., *as the case may be*] complained of but says that he did so under and by virtue of a lease by deed dated the —— ——, 19—, whereby *E. F.*, who was then the owner in fee simple of the said land and of the mines and minerals thereunder, demised the said mines and minerals to the defendant for the term of —— years from that date, with liberty to the defendant to work the said mines and get and carry away the said minerals, leaving proper and sufficient support for the

said land [and for any houses which should thereafter be erected thereon], and the defendant in making the said excavations, &c. [used due care and skill and] left proper and sufficient support for the said land [and for the houses thereon.]

Defence to a Claim founded on an acquired Right of Support, denying the Facts alleged by the Plaintiff as constituting his Title to such Support (*e*).

1. The plaintiff's house was not [*or*, buildings, &c., were not] ancient [*or, as the case may be, according to the form of the allegation traversed.*]

2. The defendants deny that the plaintiff was or is entitled, or had or has acquired any right, to have the said house and premises or the said land encumbered by the said house and premises supported by the soil and minerals adjacent thereto or under the same.

Defence denying the alleged Damage, and alleging that the Damage, if any, was not caused by the Acts of the Defendant (*d*).

1. The defendant denies that the plaintiff's land sank or gave way [or, that the plaintiff's buildings, &c., *according to the allegations in the statement of claim*, were injured or damaged], and the defendant denies that the plaintiff suffered the alleged, or any, damage.

2. The alleged damage, if any, was not, nor was any part thereof, caused (if at all) by any of the [alleged] acts of the defendant.

(*e*) Where the plaintiff sues in respect of an acquired right of support for buildings or for land which has subsided in consequence of the weight of buildings erected thereon, and the claim discloses that the defendant has some right, by ownership of the adjacent or subjacent land or otherwise, to make excavations, &c., therein, it will be a good defence to deny the plaintiff's averments of title to the support and any material facts alleged by him as constituting such title. But where the claim does not disclose that the defendant had any right to or interest in the adjacent or subjacent land, and thus treats him *primâ facie* as a wrongdoer (*Jeffries* v. *Williams*, 5 Ex. 792; *Bibby* v. *Carter*, 4 H. & N. 153; 28 L. J. Ex. 182), it would seem that a mere denial of averments of title to support, or of any facts alleged as constituting such title, would not be a complete defence, unless accompanied by a statement showing that the defendant had some *primâ facie* right, by ownership, grant, or otherwise, to make the excavations.

As to defences to a claim of right of support under s. 2 of the Prescription Act, see *post*, pp. 944, 947.

(*d*) As the damage from the acts complained of is part of the gist of the action for deprivation of support, it is advisable that such damage, if disputed, should be expressly denied in the defence. (See *ante*, p. 530.)

Where distinct subsidences take place at different times in consequence of the same original excavations, each fresh subsidence, as it occurs, gives the plaintiff a fresh cause of action; and, therefore, a judgment obtained by the plaintiff in an action for damages in respect of the first of the subsidences is no bar to a subsequent action brought by the same plaintiff to recover damages for another subsidence which afterwards takes place in consequence of the same original workings of the defendants (*Darley Main Colliery Co.* v. *Mitchell*; *Crumbie* v. *Wallsend Local Board*, cited *ante*, p. 874; and see *ante*, p. 484).

[*Or*, The defendant denies that the said land, house and premises have sunk or given way, or that the said house and premises have been weakened, cracked or injured, or that any of these matters have arisen or happened in consequence of any act or default on the part of the defendant.]

[The defendant denies that the said land would have sunk or given way without the weight of the said house and premises.]

Defence denying that the alleged Damage arose from the Acts of the Defendant, and alleging that it arose from the Acts of the Defendant's Predecessor in Title: see form of claim, ante, p. 485 (*e*).

1. The said field did not sink or give way by reason of the alleged or any acts of the defendant.

2. The subsidence complained of was caused, if at all, by the working of the said mines by *A. B.*, the predecessor in title of the defendant.

Particulars :—

[*A. B.* worked the mines up to the —— ——, 19—, when the defendant first entered into possession of and began to work the said mines.]

Defences to Actions for Injury to the Reversion: see "Reversion," ante, p. 912.

TENDER OF AMENDS (*f*).

Defence of Tender of Amends under the Public Authorities Protection Act, 1893 (*f*).

The matters complained of were acts done by the defendants in pursuance or execution, or intended execution, of the —— [*state the statute, if any,*

(*e*) See *ante*, p. 485.

(*f*) Tender of amends is no defence at common law to an action for a wrong. (See *Dearle* v. *Barrett*, 2 A. & E. 82; *Davys* v. *Richardson*, 20 Q. B. D. 722; 21 *Ib.* 202; 57 L. J. Q. B. 409.) But it was made a defence in some cases by particular statutes, where the action was brought in respect of matters done (or omitted) by the defendant in the execution, or intended execution, of certain official or statutory duties.

Many of the former enactments giving this defence have now been repealed; but s. 1 (c) of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), contains a general enactment to the effect that, in actions within that section, for damages for any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, "tender of amends before the action was commenced may, in lieu of, or in addition to any other plea be pleaded," and that, if the plaintiff in such action does not recover more than the sum so tendered before action, he shall not recover any costs incurred after such tender, and the defendant shall be entitled to costs as between solicitor and client, as from the time of such tender. (See *ante*, p. 901.)

If, in the opinion of the Court, the plaintiff has not given the defendant a sufficient

under which the defendant acted, or, were acts done by the defendant in pursuance, or execution, or intended execution, of the defendants' public duty or authority as ——, *state the office or position of the defendants, or,* consisted of alleged neglects or defaults by the defendants in the execution of the ——(*state the statute, if any, or*), in the execution of their public duty or authority as —— (*state office or position*)], and afterwards the defendant, on the —— ——, 19—, before the commencement of this action, tendered and offered to pay to the plaintiff £—— as amends for the said matters complained of, the said sum being enough to satisfy the claim of the plaintiff in respect of such matters, and the plaintiff refused to accept the same.

Defence in an Action for Trespass by the Defendant's Cattle on the Plaintiff's Land, of Disclaimer of Title and Tender of Amends (g).

The defendant never had, and disclaims to have, any title or interest in the said land of the plaintiff, and the defendant's cattle, without his knowledge and against his will, strayed into the said land, which is the alleged trespass; and afterwards, on the —— ——, 19—, and before action brought, the defendant tendered to the plaintiff £—— as amends for the alleged

---

opportunity of tendering amends before action, the Court may award costs, as between solicitor and client. (See s. 1 (d), cited *Ib.*)

Where a statute makes tender of amends a sufficient answer to an action, it is not necessary for the defendant to pay the money into Court, unless the statute requires it (*Jones* v. *Gooday*, 9 M. & W. 736, 745). Ord. XXII., r. 3, requiring the money tendered to be brought into Court, does not apply to a defence of tender of amends under a statute in an action for a wrong. (See *Davys* v. *Richardson*, *supra.*)

If the amount tendered as amends has been accepted in full satisfaction of the cause of action, such acceptance may be pleaded as a defence of accord and satisfaction (See *ante*, pp. 566. 815); but in such a case it is usually advisable also to plead a defence of tender under the statute, lest proof of an acceptance in full satisfaction of the cause of action should fail.

(*g*) By the 21 Jac. 1, c. 16, s. 5, it is enacted that in all actions of trespass *quare clausum fregit*, wherein the defendant shall disclaim in his plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon, or upon some of them, the plaintiff shall be forced to join issue, and if the said issue be found for the defendant, or the plaintiff shall be nonsuited, the plaintiff shall be clearly barred from the said action or actions, and all other suit concerning the same. (See for a plea under the former system, *Williams* v. *Price*, 3 B. & A. 695.) The effect of this statute, coupled with the present rules of pleading is, to render a defence in the form given in the text good. The statute applies only to such trespasses as are involuntary, and does not afford any defence in cases of voluntary trespasses, though committed by mistake (*Basely* v. *Clarkson*, 3 Lev. 37). It does not apply in actions for taking away goods (*Bailee* v. *Vivash*, 1 Str. 549; and see *Thompson* v. *Jackson*, 1 M. & G. 242, 245 (*a*)).

As to actions for trespasses to land by cattle, see further *ante*, pp. 390, 501; **and as to** the effect of tender of amends in cases of distress *damage feasant*, see *ante*, p. 849.

trespass, the same being enough to satisfy the plaintiff's claim in respect thereof, and the plaintiff refused to accept the same.

TRADE MARKS.

Defence to an Action for Infringement, denying the Plaintiff's Property in the Trade Mark, the Validity of the Mark, and the alleged Infringement (*h*).

1. The trade mark is not the plaintiff's.

2. The alleged trade mark is not a trade mark. [*State the grounds of objection to it.*]

3. The defendant did not infringe. [*The alleged acts of infringement should be specifically denied.*]

(*R. S. C.*, 1883, *App. D., Sect. VI.*)

Defence to an Action by the Assignee of a Trade Mark, denying the alleged Assignment (*i*).

The defendant denies that the trade mark was assigned by the said *E. F.* to the plaintiff.

Defence to a like Action, that the Trade Mark was capable of Registration, but was not Registered (*k*).

The trade mark was capable of being registered under the 46 & 47 Vict. c. 57 [*or*, under the Trade Marks Act, 1905, *as the case may be*], and has not been registered under that Act or under any enactment thereby repealed.

(*h*) As to those defences, see *ante*, p. 495.

(*i*) As to the registration of the assignment of trade marks, see the Patents, &c. Act, 1883, s. 87, cited *ante*, p. 494, and after the 1st April, 1906, the Trade Marks Act, 1905, s. 33.

By s. 70 of the first-mentioned Act, "A trade mark, when registered, shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill." (See *Edwards* v. *Dennis*, 30 Ch. D. 454; 55 L. J. Ch. 125; *In re Wellcome*, 32 Ch. D. 213.)

Previous registration of an assignment is not a necessary condition precedent to an action by the assignee of a registered trade mark for infringement (*Ihlee* v. *Henshaw*, 31 Ch. D. 323; 55 L. J. Ch. 273).

(*k*) By s. 77, "A person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade mark, unless, in the case of a trade mark capable of being registered under this Act, it has been registered in pursuance of this Act, or of an enactment repealed by this Act, or in the case of any other trade mark in use before the 13th of August, 1875, registration thereof under" this Act, or an enactment repealed by this Act, "has been refused." (See *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. at p. 498; 48 L. J. Ch. 707; *Goodfellow* v. *Prince*, 35 Ch. D. 9; 56 L. J. Ch. 545.) See after the 1st April, 1906, the Trade Marks Act, 1905 (5 Edw. 7, c. 15).

TRESPASS.

I. TO THE PERSON (*l*).

Denial of Assault alleged.

The defendant denies that he assaulted or beat the plaintiff.

(*l*) See *ante*, p. 496. A denial of the acts or matters complained of will not (except in the now rare cases where a defendant is entitled to plead Not Guilty by Statute, as to which see *ante*, p. 886) cover any other defence than a denial of their having been in fact committed by the defendant. (See *ante*, p. 529.)

All matters of excuse or justification should be expressly pleaded. (Ord. XIX., rr. 4, 15). Under the former practice matters amounting to a justification, if not pleaded, could not be given in evidence even in mitigation of damages (*Watson* v. *Christie*, 2 B. & P. 224; *Yardley* v. *Hine*, 17 L. T. 264; see *Linford* v. *Lake*, 3 H. & N. 276; 27 L. J. Ex. 334), and it would seem that this is still in general the rule. Matters not amounting to a justification may nevertheless afford ground for mitigation of damages, and although it is in general unnecessary to plead such matters specially, it is advisable so to plead them where they might otherwise take the plaintiff by surprise. (See Ord. XIX., rr. 4, 15; Ord. XXI., r. 4; *Wood* v. *Earl of Durham*, 21 Q. B. D. 501; 57 L. J. Q. B. 547; and *Scott* v. *Sampson*, 8 Q. B. D. 491; 51 L. J. Q. B. 380, decided under the former Rules of 1875; and see *ante*, pp. 6, 523.)

If the facts relied on by the defendant only justify a part of the matters complained of, the defence of justification should be limited to such part. Where the facts alleged in a defence of justification are manifestly insufficient to justify the causes of action which it professes to justify, the defence will be open to objection in point of law (*Gregory* v. *Hill*, 8 T. R. 299; *Phillips* v. *Howgate*, 5 B. & Ald. 220; *Bush* v. *Parker*, 1 Bing. N. C. 72; *Lamb* v. *Burnett*, 1 C. & J. 291; see *Oakes* v. *Wood*, 2 M. & W. 791).

Where the acts complained of are stated generally in the claim as an "assault," "battery," &c., without particulars being given of them, so that the facts alleged in the defence are *primâ facie* sufficient to justify the acts charged, the plaintiff, if he wishes to prove that the acts complained of included matters to which the justification does not apply, should either amend his claim by stating them distinctly therein, or plead a reply in the nature of a new assignment in respect of them. (See *ante*, p. 551.)

If an owner of land or goods, who is justified in using some force in asserting his right to their possession, uses more force than is necessary for that purpose, such excess of force on his part may be the subject of a reply of excess to a defence of justification. (See *Bone* v. *Daw*, 3 A. & E. 711; *Penn* v. *Ward*, 2 C. M. & R. 338; *Oakes* v. *Wood*, 2 M. & W. 791.) But where the defence of justification contains an averment to the effect that the defendant did no more than was necessary for the lawful purpose alleged in the defence, a special reply is not necessary to entitle the plaintiff to show that an excess of force was employed by the defendant.

Where the acts complained of are not merely matters of excess, but are of a different kind from those which would be covered by the justification pleaded, the plaintiff, if this sufficiently appears on the pleadings, may object in point of law to the justification (see *Gregory* v. *Hill*, 8 T. R. 299), or, if it does not appear on the pleadings, may either amend his statement of claim by stating therein the particulars of the acts complained of, or may by leave plead a special reply in the nature of a new assignment, *ante*, p. 551 *et seq.* (See *Weaver* v. *Bush*, 8 T. R. 78; *Bone* v. *Daw*, 3 A. & E. 711.)

It would appear that a defendant cannot in any action (whether of contract or of

Denial of Arrest, &c. of the Plaintiff alleged.

The defendant denies that he arrested the plaintiff or gave him into custody.

Defence that the alleged Trespass was caused by Inevitable Accident (m).

The alleged trespass and the injury to the plaintiff [*or*, The acts and matters complained of] were caused by inevitable accident without any negligence or default on the part of the defendant.

Particulars are as follows :—

Defence of Leave and Licence (m) : see ante, p. 864.

---

tort) plead that the acts complained of or the matters sued upon amounted to a felony, and that no prosecution has been brought in respect of the felony (*Wells* v. *Abrahams*, L. R. 7 Q. B. 554 ; 41 L. J. Q. B. 306 ; *Appleby* v. *Franklin*, 17 Q. B. D. 93 ; 55 L. J. Q. B. 129 ; see *Ex p. Ball*, 10 Ch. D. 667 ; 48 L. J. B. 57 ; *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561 ; 50 L. J. Q. B. 329 ; and see *Vernon* v. *Watson*, [1891] 2 Q. B. at p. 290) ; nor can he, in cases where the fact of the felony appears on the face of the statement of claim, object on this ground in point of law (*Roope* v. *D'Avigdor*, 10 Q. B D. 412 ; *Appleby* v. *Franklin, supra*). But it seems that a summary application may be made to have the claim struck out or stayed on this ground where the plaintiff is the person immediately injured by the criminal act (*Appleby* v. *Franklin, supra*).

For instances of former pleas of justification by the master of an apprentice on the ground that the alleged assault consisted only of moderate chastisement of the apprentice for misconduct, see *Penn* v. *Ward*, 2 C. M. & R. 338 ; *Linford* v. *Lake*, 3 H. & N. 276 ; 27 L. J. Ex. 334 ; and as to like justifications by schoolmasters, see *Cleary* v. *Booth*, [1893] 1 Q. B. 465 ; 62 L. J. M. C. 87.

As to actions for assaults upon married women, see *ante*, pp. 409, 858.

(*m*) Defences on the ground that the matter complained of was the result of inevitable accident (*Knapp* v. *Salsbury*, 2 Camp. 500 ; *Hall* v. *Fearnley*, 3 Q. B. 919 ; see *Winchilsea* v. *Beckly*, 2 Times Rep. 300 ; *Sadler* v. *South Staff. Tram. Co.*, 23 Q. B. D. 17, 21 ; 58 L. J. Q. B. 421 ; *Stanley* v. *Powell*, [1891] 1 Q. B. 86 ; 60 L. J. Q. B. 52, cited *ante*, p. 496), or that it was caused by the plaintiff's own negligence without any default on the part of the defendant (*Knapp* v. *Salsbury, supra*), should, in general, be specially pleaded. So also a defence of leave and licence should, in general, be specially pleaded (see *ante*, p. 865), though, perhaps, the defence of leave and licence might be given in evidence under a denial of the acts complained of, in cases where the plaintiff merely alleges in terms an "assault," "battery," or "imprisonment," without giving any further particulars of the acts complained of. (See *Christopherson* v. *Bare*, 11 Q. B. 473 ; *Matthew* v. *Ollerton*, Comberbach, 218 ; *Kavanagh* v. *Gudge*, 7 M. & G. 316.)

Defence to an Action for Assault and Battery, &c., that the Acts complained of were done in Self-Defence (n).

The defendant did the acts complained of in necessary self-defence.
Particulars:—[*State them.*]
(*See R. S. C.*, 1883, *App. D., Sect. VI.*)

Reply thereto that the Plaintiff was lawfully endeavouring to prevent the Defendant from trespassing on the Plaintiff's Land, and that the Defendant thereupon committed the Acts complained of (o).

Before and at the time when the defendant assaulted and beat the plaintiff the defendant was trespassing [and doing damage] upon the plaintiff's land, viz., upon [a field called ——, part of the plaintiff's farm at ——], and, although [verbally] requested by the plaintiff to leave the said land refused to do so, whereupon the plaintiff gently laid hands on the defendant in order to remove him, using no unnecessary force in that behalf, and the defendant then did the wrongful acts complained of, which were done under the circumstances aforesaid, and not otherwise.

Defence by two Defendants, Master and Servant, that the Acts complained of were done in Defence of the Master's Land (o).

At the time of the acts complained of, the defendant *E. F.* was possessed of land, viz. [a close called ——, at ——], and the plaintiff was trespassing

(*n*) The defence should give particulars showing how the necessity for the self-defence arose, as for instance, that the plaintiff first assaulted and beat the defendant. It was held, previously to the Judicature Acts, that under a joinder of issue upon a similar defence in the form given by the C. L. P. Act, 1852, the plaintiff might give evidence of excess on the part of the defendant without replying such excess specially (*Dean* v. *Taylor*, 11 Ex. 68). The plaintiff would now in general be entitled to give evidence of such excess without specially replying it.

(*o*) The owner of land is justified, as against a trespasser who disturbs his possession, in using force, if necessary, for the purpose of keeping possession of the land and of removing the trespasser from it (*Weaver* v. *Bush*, 8 T. R. 78; *Bush* v. *Parker*, 1 Bing. N. C. 72; *Oakes* v. *Wood*, 2 M. & W. 791; 3 *Ib.* 150). So if an owner of land, who has been wrongfully kept out of possession by a person without title, forcibly enters thereon, no action will lie against him for damages for the forcible entry, although he may thereby render himself indictable under the 5 Ric. 2, stat. 1, c. 8 (*Harrey* v. *Brydges*, 14 M. & W. 437; *Blades* v. *Higgs*, 10 C. B. N. S. 713; 11 H. L. C. 621; 30 L. J. C. P. 347; 34 *Ib.* 286); but it seems that he may be liable for an independent wrong committed by him in the course of such entry. (See *ante*, p. 503.)

If a trespass on land is forcibly made, the owner justifying an assault, &c., in defence of his possession need not allege or prove a previous request to the plaintiff to desist (*Polkinhorn* v. *Wright*, 8 Q. B. 197; *Green* v. *Goddard*, 2 Salk. 641; *Weaver* v. *Bush*, 8 T. R. 78).

A defendant may plead in justification of an assault that it was necessarily committed in order to prevent the plaintiff from continuing, in spite of protest, to interrupt the taking of goods as a distress by the defendant. (See *Field* v. *Adames*, 12 A. & E. 649.)

upon and doing damage to the said land, whereupon the defendant *E. F.* [verbally] requested the plaintiff to leave the said land, which the plaintiff refused to do; and thereupon the defendant *E. F.*, in his own right, and the defendant *G. H.*, as the servant of the defendant *E. F.* and by his command, gently laid their hands on the plaintiff in order to remove him [and removed him] from the said land, doing no more than was necessary for that purpose, which is what is complained of.

Defence that the Acts complained of were done by the Defendant in Defence of his House (*p*).

At the time of the alleged trespasses the defendant was possessed of a dwelling-house [*describe the house shortly, e.g.*, No. —, —— Street, ——], and the plaintiff was trespassing therein and making a noise and disturbance, whereupon the defendant [verbally] requested the plaintiff to cease from so doing and to leave the said house, which the plaintiff refused to do; and thereupon the defendant gently laid his hands on the plaintiff in order to remove him [and removed him] from the said house, doing no more than was necessary for that purpose, which are the alleged trespasses.

See also forms of pleas under the old system justifying an assault in preventing the plaintiff from breaking into the defendant's house: Weaver v. *Bush*, 8 T. R. 78; *Grant* v. *Moser*, 5 M. & G. 123; *or into the defendant's close: Tooker* v. *Halcomb*, 4 Bing. 183; *Polkinhorn* v. *Wright*, 8 Q. B. 197; *and justifying an arrest, in defence of the defendant's house and because the plaintiff was committing a breach of the peace: Timothy* v. *Huskisson*, 2 M. & W. 477; *Webster* v. *Watts*, 11 Q. B. 311; *and see Grant* v. *Moser*, 5 M. & G. 123; *Baynes* v. *Brewster*, 2 Q. B. 375; *Simmons* v. *Millingen*, 2 C. B. 524; *Jordan* v. *Gibbon*, 3 F. & F 607; 8 L. T. N. S. 391.

Defence that the Acts complained of were done in the Defence of the Possession of Goods (*q*).

Before and at the time of the alleged trespasses the plaintiff had wrongfully in his possession goods of the defendant [*or*, of *J. K.*], that is to say, [*describe the goods shortly,*] against the will of the defendant [*or*, of the said

---

(*p*) See preceding note.

(*q*) An owner of goods is justified in using force, if necessary, in order to defend his possession of them and to prevent their wrongful removal (*Blades* v. *Higgs*, *ante*, p. 924; and see also, as to this defence, *Polkinhorn* v. *Wright*, 8 Q. B. 197; *Wisdom* v. *Hodson*, 3 Tyrrw. 811; *Chambers* v. *Miller*, 13 C. B. N. S. 125; 32 L. J. C. P. 30; *Morant* v. *Chamberlin*, 6 H. & N. 540; *Gaylard* v. *Morris*, 3 Ex. 695; *Hudson* v. *Slade*, 3 F. & F. 390).

J. K.], and was about unlawfully to take and carry away the said goods and convert them to his own use; and the defendant [as the servant of the said *J. K.* and by his command] then [verbally] requested the plaintiff to refrain from carrying away the said goods and to give them up to the defendant, which the plaintiff then refused to do; and thereupon the defendant [as the servant of the said *J. K.*, and by his command] gently laid his hands on the plaintiff in order to take [and took] the said goods from him, doing no more than was necessary for that purpose, which are the alleged trespasses.

Defence justifying an Arrest and Imprisonment on Suspicion of Felony (r).

On [*or*, On or about] the —— ——, 19—, [*or*, Before any of the alleged trespasses], certain goods of the defendant, viz. [*describe the goods shortly*],

---

(*r*) The justification of an arrest and imprisonment on the ground of an offence having been committed differs in the case of a private individual and in that of a constable.

If a *private individual* states facts to a constable, who thereupon on his own responsibility arrests a person, or if he procures a magistrate to issue a warrant for taking a person, the imprisonment is not his act, and he may show this under a denial that he arrested or imprisoned the plaintiff (*Stonehouse* v. *Elliott*, 6 T. R. 315; *Barber* v. *Rollinson*, 1 C. & M. 330; *West* v. *Smallwood*, 3 M. & W. 418; *Brown* v. *Chapman*, 6 C. B. 365; *Brandt* v. *Craddock*, 27 L. J. Ex. 314; *Grinham* v. *Willey*, 4 H. & N. 496; 28 L. J. Ex. 242). A private individual is justified in himself arresting a person, or ordering him to be arrested, where a *felony* has been committed, and he has reasonable ground of suspicion that the person arrested is guilty of it (*Beckwith* v. *Philby*, 6 B. & C. 635; *Mathews* v. *Biddulph*, 3 M. & G. 390). A private individual is justified in arresting persons committing a breach of the peace in his presence, or in giving them in charge to a constable at the time of the breach and so long as there is danger of a renewal (*Timothy* v. *Simpson*, 1 C. M. & R. 760; *Ingle* v. *Bell*, 1 M. & W. 516; *Grant* v. *Moser*, 5 M. & G. 123; *Baynes* v. *Brewster*, 2 Q. B. 375; *Price* v. *Seeley*, 10 Cl. & Fin. 28). A private individual is not justified in arresting or causing a person to be arrested on a charge of *misdemeanor* (*Mathews* v. *Biddulph*, 3 M. & G. 390), except in the case of a breach of the peace under the circumstances above mentioned, and except in cases where there is special statutory provision enabling such arrest to be made. (See, for instance, 24 & 25 Vict. c. 96, s. 103.)

A *constable* is justified in arresting a person without a warrant, upon a reasonable suspicion of a *felony* having been committed and of the person being guilty of it, although no felony has in fact been committed, and whether the reasonable grounds for suspicion are matters within his own knowledge or are facts stated to him by another (*Beckwith* v. *Philby*, 6 B. & C. 635; *Hobbs* v. *Branscomb*, 3 Camp. 420; *Davis* v. *Russell*, 5 Bing. 354; *Hogg* v. *Ward*, 3 H. & N. 417; 27 L. J. Ex. 443). A constable is not in general justified in arresting a person for a *misdemeanor* without a warrant (*Fox* v. *Gaunt*, 3 B. & Ad. 798; *Griffin* v. *Coleman*, 4 H. & N. 265; 28 L. J. Ex. 134); but he is justified in arresting without a warrant persons committing a breach of the peace in his presence (*Timothy* v. *Simpson*, 1 C. M. & R. 760; *Derecourt* v. *Corbishley*, 5 E. & B. 188), and whilst there is danger of a renewal (*R.* v. *Light*, 27 L. J. M. C. 1), though not after the breach and danger of renewal have ceased (*R.* v. *Walker*, 23 L. J. M. C. 123; *R.* v. *Marsden*, L. R. 1 C. C. 131); and he may arrest persons given in charge by one who has witnessed the breach of the peace, where there is danger of immediate renewal (*Timothy* v. *Simpson*, *supra*). A constable at common law is not

were feloniously stolen from the [defendant's] house, No. —, —— Street, ——, by some person unknown to the defendant; whereupon the defendant, having, on the grounds hereinafter mentioned, reasonable and probable cause for suspecting, and suspecting that the plaintiff was the person who had feloniously stolen the said goods as aforesaid, gave the plaintiff into custody to a policeman duly authorised in that behalf and caused the plaintiff to be imprisoned in a police station [*according to the allegations in the statement of claim*] in order that he might be dealt with according to law in respect of the premises, which are the matters complained of [*or*, the alleged trespasses].

Particulars of the grounds of suspicion above referred to are as follows :— [*State them.*]

---

justified in imprisoning a person on suspicion that he has committed a misdemeanor (*Griffin* v. *Coleman*, 4 H. & N. 265 ; 28 L. J. Ex. 134) ; but he is justified in doing so in certain cases under the Metropolitan Police Acts (see *Justice* v. *Gosling*, 12 C. B. 39 ; *Bowditch* v. *Balchin*, 5 Ex. 378 ; *Hadley* v. *Perks*, L. R. 1 Q. B. 444 ; 35 L. J. M. C. 177) ; and see as to arresting offenders under the 24 & 25 Vict. c. 96 (relating to larceny and similar offences), ss. 103, 104 ; under the 24 & 25 Vict. c. 97 (relating to malicious injuries to property), s. 57 ; under the 24 & 25 Vict. c. 99 (relating to offences respecting the coin), s. 31 ; under the 24 & 25 Vict. c. 100 (relating to offences against the person), s. 66.

Under the former practice it was necessary to aver in the plea with particularity the grounds of suspicion, in order that the Court might judge whether the suspicion was reasonable, and if the grounds of suspicion were insufficient, the plea was bad on demurrer (*Mure* v. *Kaye*, 4 Taunt. 34 ; *Smith* v. *Shirley*, 3 C. B. 142 ; see *Broughton* v. *Jackson*, 18 Q. B. 279). It seems that particulars of the grounds of suspicion should likewise be given in defences under the Judicature Acts.

The reasonable and probable cause for suspicion is a question of law for the Court to decide, upon the facts found by the jury (*Davis* v. *Russell*, 5 Bing. 354 ; *Panton* v. *Williams*, 2 Q. B. 169 ; *West* v. *Baxendale*, 9 C. B. 141 ; *Hailes* v. *Marks*, 7 H. & N. 56 ; 30 L. J. Ex. 389 ; *Lister* v. *Perryman*, L. R. 4 H. L. 521 ; 39 L. J. Ex. 177, where see also as to what constitutes reasonable and probable cause ; and see *ante*, p. 424).

It is the duty of every person arresting another for an offence to take him before a justice as soon as he reasonably can ; and the law gives no authority even to a justice to detain a person suspected, except for a reasonable time until the case may be examined into (*Wright* v. *Court*, 4 B. & C. 596). A constable cannot justify handcuffing a person except by the necessity to prevent his escape (*Ib.*).

An action will lie against the governor of a gaol for detaining a prisoner after the expiration of his sentence (*Migotti* v. *Colvill*, 4 C. P. D. 233) ; but the governor is protected if he has acted in obedience to and in conformity with a warrant of commitment issued by a Court having jurisdiction, and on the face of it valid (*Henderson* v *Preston*, 21 Q. B. D. 362 ; 57 L. J. Q. B. 607).

As to special statutory defences in actions against public authorities or persons acting in execution, or intended execution, of a statute, or of public official duties, see "*Public Authorities*," *ante*, p. 901 ; and see "*Limitation, Statutes of*," *ante*, p. 875 "*Police*," *ante*, p. 897 ; "*Tender of Amends*," *ante*, p. 919.

As to justification under process, see *ante*, p. 898.

Defence justifying an Assault in stopping an Affray, and to preserve the Peace (s).

At the time of the alleged trespasses [*or*, the acts complained of] the plaintiff made an assault upon *J. K.* and was beating him, in breach of the peace, whereupon the defendant gently laid his hands on the plaintiff in order to preserve the peace, and to prevent the plaintiff from further beating the said *J. K.*, doing no more than was necessary for that purpose, which are the alleged trespasses [*or*, the matters complained of].

Defence justifying an Imprisonment to prevent an Assault on the Defendant and to preserve the Peace (s).

Immediately before the alleged trespasses [*or*, the acts complained of] the plaintiff assaulted and beat the defendant in breach of the peace, and was about further to assault and beat the defendant and to break the peace, whereupon the defendant, to prevent the plaintiff from further assaulting and beating him and to preserve the peace, gave the plaintiff into custody to a policeman duly authorised in that behalf, in order that he might be dealt with according to law [and the said policeman accordingly took the plaintiff into custody, and conveyed him in custody to, and imprisoned him for a reasonable time at the said police station, for the purpose of taking him before a police magistrate] in respect of the premises, which are the alleged trespasses [*or*, the matters complained of].

Defence justifying an Arrest for a Felony committed by the Plaintiff (t).

On the —— ——, 19— [*or*, Before the alleged trespasses], the plaintiff had, at ——, in the county of ——, feloniously stolen certain goods [of the defendant], namely, [*describe the goods shortly*]; wherefore the defendant gave the plaintiff into custody to a policeman duly authorised in that behalf, and caused him to be imprisoned in a police station in order that he might be dealt with according to law in respect of the said offence, which are the matters complained of [*or*, the alleged trespasses].

See forms of a plea—That the plaintiff seized the defendant's horse whilst the defendant was driving along a highway, and the defendant committed

(*s*) See preceding note.

(*t*) A justification alleging the commission of a felony by the plaintiff should not be pleaded except where the defendant cannot support a defence of justification on reasonable grounds of suspicion at the time, and can certainly prove the felony. The fact that such a defence has been pleaded without sufficient grounds may be taken into account by the jury in estimating the damages (*Warwick* v. *Foulkes*, 12 M. & W. 507).

the trespass in removing him: see Gaylard v. *Morris*, 3 Ex. 695; *of justification of an assault to prevent the plaintiff unlawfully rescuing a distress taken by the defendant: Field* v. *Adames*, 12 A. & E. 649; *of justification of an assault by a landlord in turning a tenant out of his house after the expiration of the tenancy: Newton* v. *Harland*, 1 M. & G. 644; *and see Harvey* v. *Bridges*, 14 M. & W. 437; *Davison* v. *Wilson*, 11 Q. B. 890; *of justification of an assault in turning the plaintiff out of a public house for disorderly conduct: Oakes* v. *Wood*, 2 M. & W. 791; *Howell* v. *Jackson*, 6 C. & P. 723; *Ingle* v. *Bell*, 1 M. & W. 517; *Webster* v. *Watts*, 11 Q. B. 311.

See a plea to an action for an assault and battery, that the defendant was summoned by the plaintiff for the same trespasses before justices, who dismissed the complaint, and delivered to the defendant a certificate of such dismissal (9 *Geo.* 4, *c.* 31, *ss.* 27, 28; 24 *& 25 Vict. c.* 100, *ss.* 42—46): *Skuse* v. *Davis*, 10 A. & E. 635; *Queen* v. *Robinson*, 12 A. & E. 672; *Tunnicliffe* v. *Tedd*, 5 C. B. 553; *Hancock* v. *Somes*, 1 E. & E. 795; 28 L. J. M. C. 196; *Costar* v. *Hetherington*, 28 L. J. M. C. 198; 1 E. & E. 802; *and see, as to this defence, Bradshaw* v. *Vaughton*, 9 C. B. N. S. 103; 30 L. J. C. P. 93 (*u*).

See a plea of conviction of the assault and payment of the penalty imposed: Hartley v. *Hindmarsh*, L. R. 1 C. P. 553; 35 L. J. M. C. 254. (*See also the statute* 16 *Vict. c.* 30 (*an Act for the Prevention of Assaults on Women and Children*), *s.* 1, *which makes a conviction under that statute a bar to all future proceedings, civil or criminal, in respect of the same assault; and see* 24 *& 25 Vict. c.* 100, *s.* 43.)

See a plea of justification of an assault by justices in turning the plaintiff out of their Court; Collier v. *Hicks*, 2 B. & Ad. 663 (*x*).

(*u*) It is a good defence to an action for assault or battery that a complaint has previously been made against the defendant before magistrates in respect of the same assault or battery, and that the defendant thereupon either obtained a certificate of dismissal of the complaint after a hearing thereof on the merits, or was convicted of the offence charged and paid the whole amount adjudged to be paid, or suffered the imprisonment awarded in respect of it. (See 24 & 25 Vict. c. 100, ss. 44, 45; *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553; 35 L. J. M. C. 254; *Lowe* v. *Horwarth*, 13 L. T. 297; *Masper* v. *Brown*, 1 C. P. D. 97; 45 L. J. C. P. 203; and see *Hancock* v. *Somes*, *supra*; *Costar* v. *Hetherington*, *supra*; *Reed* v. *Nutt*, 24 Q. B. D. 669.) But the fact that a servant who has committed an assault in the course of his employment has been convicted and has paid a fine for it, is no defence to an action against the master for the same assault (*Dyer* v. *Munday*, [1895] 1 Q. B. 742; 64 L. J. Q. B. 582).

(*x*) Justices of the peace may justify expelling from their Court a person who wrongfully persists in interfering with the proceedings (*Collier* v. *Hicks*, *supra*); and revising barristers may plead a similar justification. (See 28 Vict. c. 36, s. 16, and *Willis* v. *Maclachlan*, 1 Ex. D. 376; 45 L. J. Q. B. 689.)

Defence by a Railway Company to an Action for Assault and False Imprisonment, denying the Charges, and alleging that, if committed by a Servant of the Company, it was not within the Scope of his Employment (*y*).

1. The defendants, did not, by themselves or by their servants, assault or imprison the plaintiff, or give him into custody.

2. If, which is not admitted, any servant of the defendants committed the acts complained of, or any of them, it was not within the scope of his employment so to do, and he did not do so by the direction of the defendants, or on their behalf.

Defence by a Railway Company to an Action for Assault in ejecting the Plaintiff from one of their Carriages, that he was unlawfully travelling without a Ticket (*z*).

1. The acts complained of were done by the servants of the defendants under the circumstances following, and not otherwise. The plaintiff was at the time of the committing of the said acts unlawfully travelling or attempting to travel in a carriage of the defendants upon their railway without a ticket and without having previously paid his fare [and with intent to avoid payment thereof], and the said servants, after requesting the plaintiff to alight from the said carriage, upon his refusing and neglecting so to do, gently removed him from such carriage, using no more force than was necessary for such purpose, which is the alleged assault.

2. Except so far as they are above admitted the defendants deny each and all of the allegations in the statement of claim.

Defence by a Railway Company under the Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 5, justifying the Detaining of a Passenger (*a*).

The plaintiff, being a passenger on the defendants' said railway, was requested by a duly authorised servant of the defendants to produce and

---

(*y*) See *ante*, p. 434.

(*z*) A person unlawfully in one of the carriages of a railway company, attempting to travel without having paid his fare and without a ticket, may, after being requested to alight, upon his neglect to alight, be removed therefrom by force, no more force being used towards him than is necessary for effecting his removal. (See *Glover* v. *L. & S. W. Ry. Co.*, L. R. 3 Q. B. 25, 28; 37 L. J. Q. B. 57; *McCarthy* v. *Dublin and Wexford Ry. Co.*, 18 W. R. 762, 763; Ir. R. 5 C. L. 244; *Butler* v. *M. S. & L. Ry. Co.*, 21 Q. B. D. 207, 210; 57 L. J. Q. B. 564.)

A person found travelling without a ticket, who has previously paid his fare and taken a ticket which he has lost or mislaid, cannot be regarded as a trespasser and thus ejected (*Butler* v. *M. S. & L. Ry. Co.*, *supra*).

(*a*) The principal enactment giving to railway companies a special power to detain

deliver up a ticket showing that his fare was paid, and the plaintiff, having failed either to produce or deliver up such ticket or to pay his fare, refused on request by such servant of the defendants to give his name and address whereupon the plaintiff was detained by an officer of the defendants until he gave his name and address [*or*, until he could conveniently be brought before a justice], which is the alleged grievance.

See a plea by a railway company justifying an arrest under the authority of their Act for an offence committed against a bye-law of the company: Chilton v. *London and Croydon Railway Co.*, 16 M. & W. 212; *Eastern Counties Ry. Co.* v. *Broom*, 6 Ex. 314; *and a plea of justification by a railway company of an assault in removing the plaintiff from the line: Manning* v. *Eastern Counties Ry. Co.*, 12 M. & W. 237.

Defence to an Action for Damages for Assault in forcibly ejecting the Plaintiff from a Public Meeting, brought against the Chairman of the Meeting and another person: see ante, p. 499 (*b*).

1. There was no special invitation given to the plaintiff to attend the said meeting. The meeting was one in support of the candidature of

---

offending passengers is the Regulation of Railways Act, 1889, s. 5 (2), which is as follows: "If a passenger having failed either to produce, or if requested to deliver up, a ticket showing that his fare is paid, or to pay his fare, refuses, on request by an officer or servant of a railway company, to give his name and address, any officer of the company or any constable may detain him until he can be conveniently brought before some justice or otherwise discharged by due course of law."

Under this section there is no justification for detaining a passenger after he has in fact given his true name and address, for the purpose of enabling inquiry to be made as to whether the name and address is truly given or not; and if the passenger is thus detained pending inquiry the company must, to justify, prove that it was not truly given (*Knights* v. *L. C. & D. Ry. Co.*, 62 L. J. Q. B. 378). If after a passenger has paid his fare and given up his ticket to the company's servants, the ticket is again asked for by another servant, a detention of the passenger who is thus without a ticket cannot be justified although he refuses to give his name and address (*per* Darling, J., *Saunders* v. *L. & S. W. Ry. Co.*, Feb., 1900, *ex rel. edit.*).

By s. 103 of the Railways Clauses Act, 1845 (as amended by the Stat. Law Rev. Act, 1892), "if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit" the carriage, he is liable to a penalty not exceeding forty shillings, and by s. 104 of that Act he may be apprehended and detained until he can conveniently be taken before a justice, or until he be otherwise discharged by due course of law.

(*b*) The chairman of a meeting is not regarded as the master of those attending or keeping order at the meeting, so as to be liable for acts done by them without his express order or directions. He is liable only for what he does or orders to be done (*Lucas* v. *Mason*, L. R. 10 Ex. 251; 44 L. J. Ex. 145).

If the meeting is on land which is at the time private property, so that the plaintiff is only there by the leave and licence of the proprietor, whether the permanent or temporary proprietor, such licence may in general be revoked, and the plaintiff thereupon

Mr. —— for the representation of —— in Parliament, and for no other purpose, and the only invitation was a general one inviting those interested in that object to attend. The room in which it was held was engaged by the said Association and was in their occupation and control, and the defendant *C. D.* was, by their consent and on their behalf, the chairman of and in control of such meeting.

2. The plaintiff noisily interrupted the speakers at the said meeting and prevented them from being heard, and disturbed the said meeting, and prevented it from proceeding, and thereupon and to restore order the said *C. D.* requested the plaintiff to refrain from further thus interrupting the speakers and obstructing and disturbing the said meeting, and, upon his continuing to do so, requested the persons near him, including the said *E. F.*, to try to keep him quiet, whereupon the said *E. F.*, finding it impossible to do so, requested him to retire from the said meeting and to leave the said room, and upon his refusal so to do gently laid hands upon him and removed him from the said room and the said meeting, using no more force than was necessary for that purpose.

3. Except so far as is above stated the alleged assault and trespass is denied.

4. The plaintiff was not injured to the extent alleged or at all.

5. The defendant *C. D.* did not direct the defendant *E. F.* either to remove or to eject the plaintiff, and if the said *E. F.* did (which, except so far as is above expressly admitted, is denied) commit the acts complained of, it was not by the direction or with the authority or under the orders of the defendant *C. D.*

6. If the plaintiff was in the said room and at the said meeting by the invitation of and with the leave and licence of the said Association such invitation and leave and licence were, under the circumstances aforesaid, withdrawn, before the commission of the acts complained of, and he was removed therefrom as stated in paragraph 2 above, after having been requested to retire, and after having refused so to do as in that paragraph stated.

See a plea of justification of an assault in expelling the plaintiff from a church for indecent conduct: Hartley v. *Cook*, 9 Bing. 728; *Williams* v. *Glenister*, 2 B. & C. 699; *Worth* v. *Terrington*, 13 M. & W. 781 (*c*); *of justification of an assault by the minister of a church in turning the plaintiff*

becomes a trespasser who may, after refusing to withdraw on request, be ejected. (See *Wood* v. *Leadbitter*, 13 M. & W. 838; *Tullay* v. *Reed*, 1 C. & P. 6.)

This would not apply, it is supposed, to a person having an absolute right to attend the meeting, as, for instance, a shareholder attending a general meeting of the company.

(*c*) As to justifications in actions brought by persons who have been turned out of a church for wrongfully persisting in interrupting the service, see *Hartley* v. *Cook*, 9 Bing. 728; *Worth* v. *Terrington*, 13 M. & W. 781; and as to a churchwarden forcibly

who was clerk to the church, out of the vestry-room after an order to leave it: Jackson v. *Courtenay*, 8 E. & B. 8; *of justification of an assault in expelling the plaintiff from a select vestry meeting as an intruder: Dobson* v. *Fussey*, 7 Bing. 305.

Defence of the Statute of Limitations (*d*): *see ante*, pp. 873, 874.

II. To Goods (*e*).

Denial of the Seizure alleged.

The defendant did not take or seize or carry away the said goods or any of them.

Denial of the Plaintiff's Property in the Goods (*f*).

The said goods [*or*, chattels, *or*, *as the case may be*] were not [nor were any of them] the plaintiff's.

(*See R. S. C.*, 1883, *App. D.*, *Sect. VI.*)

---

preventing a person from entering a church for the purpose of attending service there see *Taylor* v. *Timson*, 20 Q. B. D. 671; 57 L. J. Q. B. 216.

By the Lunacy Acts, 1890 and 1891 (53 Vict. c. 5; 54 & 55 Vict. c. 65), protection is afforded to persons acting in good faith and with reasonable care for acts done by them in pursuance of those statutes, and they are further entitled to the benefit of the provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which repeals s. 331 of the Lunacy Act, 1890. By s. 330 of the last-mentioned Act, such persons are not to be liable, whether on the ground of want of jurisdiction or on any other ground, for acts done in pursuance of those statutes, and a power is, by s. 330 (2), given to stay proceedings if the Court or judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care. (See under former Acts, *Norris* v. *Seed*, 3 Ex. 782; *Lowe* v. *Fox*, 15 Q. B. D. 667; 54 L. J. Q. B. 561; 12 App. Cas. 206; 56 L. J. Q. B. 480.)

(*d*) The period of limitation under the 21 Jac. 1, c. 16, s. 3, for actions for trespass to the person is four years. (See *ante*, p. 873.) As to limitation in actions against public authorities or persons specially privileged by statute, see "*Police*," *ante*, p. 897; "*Justice of the Peace*," *ante*, p. 418; "*Public Authorities*," *ante*, p. 901.

(*e*) See *ante*, p. 499. As to the effect of a denial of the acts complained of, see *ante*, pp. 527, 529.

All matters of excuse or justification must be specially pleaded, and the plaintiff's property in the goods, if disputed, must be expressly denied, or stated not to be admitted.

As to cases in which public authorities or persons acting in execution of a statute, or of public official duties, are privileged to avail themselves of special statutory defences see "*Public Authorities*," *ante*, p. 901.

(*f*) Under the issue raised by a denial of the plaintiff's property in the goods, the plaintiff must prove that he had possession of the goods, or a right to immediate possession of them at the time of the trespass. (See *ante*, p. 822.) The fact of possession is *primâ facie* evidence of the right of present property, and therefore sufficiently establishes this issue against a wrong-doer who does not show a better right or authority (*Elliott* v. *Kemp*, 7 M. & W. 312; *Carnaby* v. *Welby*, 8 A. & E. 872). The defendant

Defence of Leave and Licence: see ante, p. 864.

Defence that the Defendant was Joint Owner of the Goods with the Plaintiff: see "Conversion," ante, p. 824.

Defence justifying the Removal of Goods encumbering the Defendant's Premises (g).

At the time of the alleged trespass the defendant was possessed of a house, No. —, —— Street, ——, and the goods referred to in the statement of claim were then wrongfully in the said house, encumbering the same [and doing damage there to the defendant], whereupon the defendant took the said goods and removed them from his said house to a small and convenient distance, and there left the same for the plaintiff's use doing no more than was necessary for that purpose, which is the alleged trespass.

Defence justifying the Taking and Detaining of Cattle which had strayed on to the Defendant's Close (g).

At the time of the alleged trespasses [*or*, matters complained of] the defendant was possessed of a close, at ——, called ——, whereon the cattle

---

cannot in such a case set up a *jus tertii*, unless he can also show an authority in himself to act under it. (See *ante*, pp. 347, 500.) But where the plaintiff was not in actual possession in fact at the time of the trespass, and therefore relies on evidence of mere legal title, the evidence may set up a *jus tertii* to rebut the plaintiff's evidence (*Gadsden* v. *Barrow*, 9 Ex. 514; *Leake* v. *Loveday*, 4 M. & G. 972; *Richards* v. *Jenkins*, 17 Q. B. D. 544; 18 Q. B. D. 451).

(*g*) A person may remove from his land the goods of another which are there wrongfully, and is not bound to impound them (*Rea* v. *Sheward*, 2 M. & W. 424, 426; *Ackland* v. *Lutley*, 9 A. & E. 879; and see *Drewell* v. *Towler*, 3 B. & Ad. 735; *Pratt* v. *Pratt*, 2 Ex. 413). So also if a man finds cattle trespassing on his land, he may chase them out, and is not bound to distrain them *damage feasant* (*Tyrringham's case*, 4 Rep. 38 b, cited in *Rea* v. *Sheward*, *supra*). But, if the plaintiff's cattle have strayed upon the land by reason of the defendant's neglect to repair fences which he was bound to repair between his land and the plaintiff's adjoining close, the defendant, though he may drive them back into the plaintiff's close, is not justified in chasing them into an adjoining highway and leaving them there (*Carruthers* v. *Hollis*, 8 A. & E. 113). If in such case the defendant justifies on the ground that the cattle were trespassing on his land, a reply that they strayed on to the defendant's land by reason of his breach of an obligation to repair fences may easily be framed from the form of defence given, *ante*, p. 911. (See *Goodwyn* v. *Cheveley*, 4 H. & N. 631; 28 L. J. Ex. 298; Bullen & Leake, 3rd ed., p. 800; and see also *Barber* v. *Whiteley*, 34 L. J. Q. B. 212; "*Replevin*," *ante*, p. 911.) So the plaintiff may reply any facts showing that the goods or cattle removed by the defendant were rightfully on the defendant's land. (See *Holding* v. *Pigott*, 7 Bing. 465.)

If the defendant justifies as the servant of another who was possessed of the house

were wrongfully trespassing and doing him damage; and the defendant, not knowing to whom they belonged, took them in his said close, and led them away to a convenient place near to the said close, and placed them therein for the purpose of safely keeping them for the owner thereof, and there kept them in safe custody until he had notice that they were the cattle of the plaintiff, which are the alleged trespasses [*or*, matters complained of].

See a form of defence justifying a seizure under a bill of sale, "*Bill of Sale*," *ante*, p. 816.

See a form of a plea that the plaintiff had mixed up his goods with those of the defendant so that they could not be separated, and the defendant unavoidably committed the alleged trespass in taking possession of his own goods: *Wyatt* v. *White*, 5 H. & N. 371; 29 L. J. Ex. 193; *of a plea to an action of trespass, for driving and chasing the plaintiff's sheep, that the defendant drove them off his land on which they had strayed;* *Stennel* v. *Hogg*, 1 Wms. Saund. 220; *Carruthers* v. *Hollis*, 8 A. & E. 113; *and see Rea* v. *Sheward*, 2 M. & W. 424, 426; *of a plea justifying the removal of the plaintiff's waggon which was encumbering the defendant's close:* *Holding* v. *Pigott*, 7 Bing. 465; *of a replication of a right by the custom of the country to come on the land with a waggon to remove a crop as outgoing tenant:* *Ib.*

III. To Land (*h*).

Denial of the Breaking or Entry alleged.

The defendant did not [by himself or by his servants] break or enter [*or*, trespass upon] the said close [*or*, the said land, *or*, *as the case may be, denying specifically the acts alleged in the statement of claim*].

---

or land, &c., from which the goods were removed, he must state that he was such servant and that he acted under his master's authority. (See *post*, p. 938; and see, for instances of former pleas of this kind, *Ackland* v. *Lutley*, *supra*; *Melling* v. *Leak*, 16 C. B. 652; *Pratt* v. *Pratt*, 2 Ex. 413.)

(*h*) See *ante*, pp. 501—504. As to actions to recover mesne profits, see *ante*, p. 233. A denial of the acts complained of operates only as a denial that the defendant committed the alleged trespass to the land mentioned.

All matters of excuse or justification must be specially pleaded, and if the plaintiff's property in the land is disputed, the defendant must expressly deny or refuse to admit it, or must set up title in himself or in some third party by whose authority he acted.

As to the title necessary to maintain trespass, see *ante*, p. 502; and, as to actions by a married woman, see *ante*, pp. 409, 858; and, as to actions by a mortgagor who is in possession, see the Judicature Act, 1873, s. 25 (5), *ante*, p. 265; *Fairclough* v. *Marshall*, 4 Ex. D. 37; 48 L. J. Ex. 146; see *Van Gelder* v. *Sowerby Society*, 44 Ch. D. 374. The fact of possession is *primâ facie* evidence of title, and therefore is sufficient to sustain the plaintiff's case against a mere wrong-doer who

Defence justifying under Statutory Powers (*i*).

The acts complained of were acts done by the defendants under and by virtue of and in pursuance of the powers conferred upon them by the statute [*state what, setting forth or specifying the sections relied on*].

Denial of the Plaintiff's Property in the Land (*k*).

The said land [*or*, house, &c., *as the case may be*] was not the plaintiff's.

---

cannot show a better title (*Purnell* v. *Young*, 3 M. & W. 288; *Heath* v. *Milward*, 2 Bing. N. C. 98; *Matson* v. *Cook*, 4 Bing. N. C. 392; *Newlands* v. *Holmes*, 3 Q. B. 679; *Every* v. *Smith*, 26 L. J. Ex. 344).

(*i*) Where an act which would otherwise be a trespass or wrongful is done under the authority of an Act of Parliament, it is, in general, necessary to plead specially in the defence that it was so done, giving either in the body of the pleading or in the particulars a reference to the statute relied on (see *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186, 189; 62 L. J. Ch. 699). In the few cases in which the defence of Not Guilty by Statute is still pleadable, that defence may be used but it will generally be found better to plead specially. (See *ante*, p. 886.)

As to the defence that the acts complained of were acts which the defendants were required or authorised to do by statute, see further, "*Injunction*," *ante*, p. 859; *L. B. & S. C. Ry. Co.* v. *Truman*, 11 App. Cas. 45; 55 L. J. Ch. 354; *Ecans* v. *M. S. & L. Ry. Co.*, 36 Ch. D. 626; *Harrison* v. *Southwark Water Co.*, [1891] 2 Ch. 409; 60 L. J. Ch. 630; *Rapier* v. *London Tram. Co.*, [1893] 2 Ch. 588; 63 L. J. Ch. 36; *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; 62 L. J. Ch. 699; *Att-Gen.* v. *Met. Ry. Co.*, [1894] 1 Q. B. 384; *East Fremantle Corporation* v. *Annois*, [1902] A. C. 213; 71 L. J. P. C. 39; *Canadian Pacific Rail.* v. *Roy*, [1902] A. C. 220; 71 L. J. P. C. 51; *Jordeson* v. *Sutton, &c. Gas Co.*, [1899] 2 Ch. 217; 68 L. J. Ch. 457; and see further, *ante*, p. 454.

In certain cases public authorities, or persons acting in execution of a statute, or of public official duties, are privileged to rely upon special statutory defences, such as tender of amends. (See "*Public Authorities*," *ante*, p. 901.)

As to injunctions to restrain trespasses, see *ante*, pp. 413, 502.

(*k*) It seems that under the denial of an allegation that the land, &c., was the plaintiff's, the defendant, to disprove the plaintiff's right of possession, may assert a right of possession or title in himself, or in another under whose authority he acted (see, as to the construction of former pleas of this kind, *Purnell* v. *Young*, 3 M. & W. 288; *Jones* v. *Chapman*, 2 Ex. 803; *Slocombe* v. *Lyall*, 6 Ex. 119; *Wilkinson* v. *Kirby*, 15 C. B. 430, 443; *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454; 42 L. J. C. P. 273), but it would be advisable in most cases to plead these facts specially.

Under the above defence, it is not sufficient for the defendant to prove that the plaintiff, being in possession, is not the true owner, unless he himself is, or unless he can justify his acts by the authority of the true owner. He cannot assert the bare title of a third person, except for the purpose of proving that he acted under the authority of that title (*Chambers* v. *Donaldson*, 11 East, 66; *Jones* v. *Chapman*, 2 Ex. 803). The plaintiff may show a better right in a third person in order to rebut a *primâ facie* title asserted by the defendant. (See *Brest* v. *Lerer*, 7 M. & W. 593; and see *Ryan* v. *Clark*, 14 Q. B. 65.) A person who obtains possession by turning another out without any right or title to do so, cannot assert possession so obtained against the prior possession of the latter (*Rerett* v. *Brown*, 5 Bing. 7; *Browne* v. *Dawson*, 12 A. & E. 629; *Scott* v. *Brown*, 51 L. T. 746; see *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454; 43 L. J. C. P. 273).

Under this issue it is sufficient for the defendant to show that he is the owner of

Defence that the Land was the Freehold of the Defendant (*l*).

At the time of the alleged trespass the land [*or*, house, &c.] referred to in the statement of claim was the freehold of the defendant.

---

that part only of the land described in the claim on which the trespasses were committed (*Bassett* v. *Mitchell*, 2 B. & Ad. 99; *Tapley* v. *Wainwright*, 5 B. & Ad. 395; *Smith* v. *Royston*, 8 M. & W. 381). But it is better to allege that the acts complained of were done on that part of the land only, and to deny the plaintiff's property in that part.

The evidence necessary to support a defence of freehold title may be given under a denial that the land is the plaintiff's (*Jones* v. *Chapman*, 2 Ex. 803; *Slocombe* v. *Lyall*, 6 Ex. 119; *Wilkinson* v. *Kirby*, 15 C. B. 430, 443). But the two defences are not necessarily founded on the same ground of answer; the denial that the land is the plaintiff's disputes his possession and his title, whereas the defence that the land is the defendant's freehold disputes the plaintiff's title only, and that only by asserting a title in the defendant (*Morse* v. *Apperley*, 6 M. & W. 145; *Slocombe* v. *Lyall*, 6 Ex. 119). Hence a freehold title in the defendant is often pleaded specially, with or without a denial of the plaintiff's property.

The defendant, by setting out his title in full on the record, shows clearly the grounds of his defence and enables the plaintiff to take issue on some specific step in the title, admitting what he does not intend to dispute, or to raise the question of its insufficiency by pleading an objection to the defence in point of law.

(*l*) This defence is the same as the former plea of *liberum tenementum*, as to which see Bullen & Leake, 3rd ed., p. 802; Steph. Pl., 6th ed., p. 240. That plea was construed as admitting the actual possession of the plaintiff, but as containing by implication an assertion of a right of possession in the defendant as owner of the freehold (*Ib.*; *Morse* v. *Apperley*, 6 M. & W. 145; *Doe* v. *Wright*, 10 A. & E. 763; *Brest* v. *Lacer*, 7 M. & W. 593; *Roberts* v. *Taylor*, 1 C. B. 125; *Ryan* v. *Clark*, 14 Q. B. 65).

Where the defendant's title is a freehold one, it seems sufficient to allege that the land, &c. is "the freehold" of the defendant without further stating his title or the nature or quantity of his estate. If, however, he wishes to plead a title which is not a freehold one, he must in general show that it was derived from a person seised in fee of the land. (See a form of such defence, *post*, p. 938; and for instances of former pleas of this kind, see *Holmes* v. *Newlands*, 11 A. & E. 44; 3 Q. B. 679; *Wilkins* v. *Boutcher*, 3 M. & G. 807; *Kavanagh* v. *Gudge*, 5 M. & G. 726; *Wright* v. *Burroughes*, 3 C. B. 685; *Dyne* v. *Nutley*, 14 C. B. 122; *Mayhew* v. *Suttle*, 4 E. & B. 347; *Jacobs* v. *Seward*, L. R. 4 C. P. 328; L. R. 5 H. L. 464; 41 L. J. C. P. 221; *Darlington* v. *Pritchard*, 4 M. & G. 783; *Keyse* v. *Powell*, 2 E. & B. 132.) For instances of former pleas of title by copyholders, or their servants, or lessees, see *Lempriere* v. *Humphrey*, 3 A. & E. 181; *Brown* v. *Storey*, 1 M. & G. 117; *Darlington* v. *Pritchard*, 4 *Ib.* 783; *Keyse* v. *Powell*, 2 E. & B. 132.

It is also a good defence to plead that the land was the freehold of another, and to justify under the authority of the latter, or his lessees. (See a form of such defence, *post*, p. 938; and see for instances of former pleas of this kind by servants or bailiffs, &c., *Brown* v. *Storey*, 1 M. & G. 117; *Darlington* v. *Pritchard*, 4 *Ib.* 783; *Wilkins* v. *Boutcher*, *supra*; *Phypers* v. *Eburn*, 3 Bing. N. C. 250; *Melling* v. *Leak*, 16 C. B. 652; *Kavanagh* v. *Gudge*, 5 M. & G. 726; *Jacobs* v. *Seward*, *supra*.)

If the defendant pleads title in a third person, and justifies under his authority, the plaintiff may reply specially, denying the alleged authority or "command" (*Chambers* v. *Donaldson*, 11 East, 66).

If the defendant pleads freehold in another person who has demised the land to him, the plaintiff may reply specially, that the alleged lessor of the defendant had previously demised the land to the plaintiff (*Wilkins* v. *Boutcher*, *supra*; *Wright* v. *Burroughes*, *supra*).

The plaintiff may reply specially to a defence of freehold in the defendant by alleging

Defence justifying under the Authority of the Owner (m).

At the time of the alleged trespasses the said land was the freehold of *J. K.*, and the defendant as the servant and by the command [*or*, authority] of the said *J. K.*, entered the close and committed the alleged trespasses [*or*, did the acts complained of].

Defence stating the Defendant's Title under a Demise from the Person seised in Fee.

On the —— ——, 19—, before the alleged trespasses [*or*, the doing of the acts complained of], *J. K.*, being seised in fee of the said [close], demised the same to the defendant [by deed dated the —— ——, 19—] for the term of —— years from the —— ——, 19—, by virtue of which demise the defendant entered upon the said close and became possessed thereof for the term aforesaid, and the alleged trespasses [*or*, the acts complained of] were committed [*or*, done] during the said term.

Defence by the Owner of a House and his Servant, justifying entering the House and removing the Plaintiff's Goods (n).

At the time of the alleged trespasses the said messuage was the messuage and freehold of the defendant *E. F.*, wherefore the defendant *E. F.*, in his own right, and the defendant *G. H.*, as his servant, and by his command, entered the said messuage, and because the goods referred to in the statement of claim were then wrongfully in the said messuage encumbering the same and doing damage there to the defendant *E. F.*, the defendant *E. F.*, in his own right, and the defendant *G. H.*, as his servant, and by his command, took the said goods and removed them to a small and convenient distance, and there left the same for the plaintiff's use, doing no

a subsisting term of years either in himself (*Doe* v. *Wright*, *supra*; *Mayhew* v. *Suttle*, 4 E. & B. 347), or in a third person (*Lambert* v. *Strowther*, Willes, 218; *Ryan* v. *Clark*, *supra*), and in the last-mentioned case it is not necessary that he should himself trace title through, or allege authority under such third person, as the existence of such outstanding term, even in a stranger, is inconsistent with and negatives the right of possession asserted by the defendant (*Ib.*).

Where the claim shows that the entry was a forcible one, such as is rendered illegal by the statute 5 Ric. 2, st. 1, c. 8, the defence of freehold title in the defendant or in a third person under whom he acted would be no answer in itself to a claim for any independent wrong. (See *ante*, p. 503.)

(*m*) A justification under the authority of the owner may be given in evidence under a denial of the property of the plaintiff (*Jones* v. *Chapman*, 2 Ex. 803, see *ante*, p. 936); but it is usually advisable that this defence, where relied upon, should be pleaded specially in addition to such denial.

(*n*) See a former plea of this kind in *Melling* v. *Leak*, 16 C. B. 652; and see *Kavanagh* v. *Gudge*, 5 M. & G. 726.

more than was necessary for that purpose, which are the alleged trespasses [*or*, the acts complained of].

Defence that the Freehold belonged to the Plaintiff and the Defendant as Tenants in Common, and that the Acts complained of were merely an Exercise of the Defendant's Rights as such Tenant in Common (*o*).

At the time of the alleged trespasses [*or*, the acts complained of] the land [*or*, messuage, &c.] referred to in the statement of claim was the freehold of the plaintiff and the defendant as tenants in common thereof [in fee simple] in [equal] undivided shares, and the alleged trespasses [*or*, the acts complained of] were merely an exercise by the defendant of his rights as such tenant in common [*or*, were acts which the defendant was entitled to do, and did, by virtue of his rights as such tenant in common].

Defence of Leave and Licence (*p*): *see ante*, p. 864.

(*o*) Where the plaintiff claims as sole owner, it is a good defence for the defendant to show that he was tenant in common with the plaintiff, or that he was authorised by one who was tenant in common with the plaintiff, if he can also show that the alleged trespass was merely an exercise of the right of a tenant in common (*Jacobs* v. *Seward*, L. R. 4 C. P. 328; L. R. 5 H. L. 464; 41 L. J. C. P. 221). Any defence of this kind should now be specially pleaded (Ord. XIX., rr. 4, 15, 17). But a joint tenant or tenant in common may be guilty of a trespass against his co-tenant, as by an actual ouster of him from the land, or by destruction of buildings, or by carrying away the soil. (See *ante*, p. 503.) In such case, where the plaintiff claimed as sole owner, it was formerly held that the defendant might pay money into Court as to the plaintiff's share, and as to the residue plead a freehold title in himself, or traverse the plaintiff's property (*Cresswell* v. *Hedges*, 1 H. & C. 421; 31 L. J. Ex. 497). But the more proper mode of pleading in such a case under the present system would seem to be to state expressly the tenancy in common, and the fact that the defendant, or the third party by whose authority he acted, were entitled to so many undivided shares in the property, and then to plead payment into Court in satisfaction of the claim.

(*p*) As to the defence of leave and licence generally, see *ante*, p. 864. Where there was no actual consent on the part of the plaintiff to the defendant's entry, and the defendant relies only upon an implied licence, or upon an irrevocable parol licence which the plaintiff has attempted to revoke, the facts which raise the implication of the licence, or which show the parol licence to be irrevocable, should in general be expressly pleaded, as where the defence is that the defendant entered the plaintiff's land to retake the defendant's goods, which had been wrongfully placed there by the plaintiff (see *Patrick* v. *Colerick*, 3 M. & W. 483), or to obtain possession of goods sold to him by the plaintiff with a parol licence to enter and remove them from the plaintiff's land (see *Wood* v. *Manley*, 11 A. & E. 34; *Marshall* v. *Green*, 1 C. P. D. 35; 45 L. J. C. P. 158), or to deposit on the plaintiff's land the plaintiff's own goods, which he had wrongfully placed on land of the defendant (see *Rea* v. *Sheward*, 2 M. & W. 424; and *ante*, p. 934).

Where the defendant has entered under an express licence given by deed, *e.g.*, where he has entered under the express powers of a bill of sale, he should, in general, state that fact, and refer to the deed in his pleading, instead of simply pleading a general defence of leave and licence.

Defence of Estoppel: see ante, p. 851.

Defence of Judgment Recovered: see ante, p. 862.

Defence of the Statute of Limitations: see ante, p. 873.

Defences to Actions by Reversioners: see ante, pp. 912 *et seq.*

Defence of Justification under a Bill of Sale: see "Bills of Sale," ante, p. 816.

Defence to an Action for a Trespass by Cattle, that the Trespass was caused by Defects in the Plaintiff's Fences, which he was bound to repair: see "Fences," ante, p. 852.

Defence to an Action for Trespass and Destruction of Fences, that the Fences were an Obstruction to the Defendant's Right of Common: see Ramsey v. *Cruddas*, [1893] 1 Q. B. 228. Cf. *Broome* v. *Wenham*, 68 L. T. 651.

Defence to a like Action of Disclaimer of Title and Tender of Amends: see ante, p. 920.

Defence justifying an Entry on the Plaintiff's Land to remove an Obstruction to the Defendant's Ancient Lights: see ante, p. 872.

A like Defence, with a Counterclaim for Damages for wrongfully erecting the Obstruction and for a Mandatory Injunction for the Removal thereof: Duke of Norfolk v. *Arbuthnot*, 4 C. P. D. 290; 5 *Ib.* 390.

Defence to a Claim for Damages and an Injunction, that the Building was the Chancel of a Church, and that the Defendant as Vicar was entitled to Possession thereof: Duke of Norfolk v. *Arbuthnot*, 4 C. P. D. 290; 5 *Ib.* 390.

Defence to an Action for an Injunction against entering on Plaintiff's Land and opening his Lock Gates, justifying the Defendant's Acts as done in exercise of Rights acquired by actual or presumed Grant, or under the Prescription Act, 1832: *see Simpson* v. *Mayor of Godmanchester*, [1896] 1 Ch. 214, 216; 65 L. J. Ch. 154.

For other Defences of Justification to Actions of Trespass to Land (*q*), *see* "*Common*," *ante*, p. 819; "*Distress*," *ante*, p. 848; "*Process*," *ante*, p. 898; "*Ways*," *post*, pp. 946 *et seq.*

See forms of pleas of defendant's title to customary tenements of a manor: Lempriere v. *Humphrey*, 3 A. & E. 181; *Brown* v. *Storey*, 1 M. & G. 117; *Darlington* v. *Pritchard*, 4 M. & G. 783; *stating title by demise from a copyhold tenant: Keyse* v. *Powell*, 2 E. & B. 132; *by the lord of a manor justifying as a seizure quousque to enforce admittance and fines: Phypers* v. *Eburn*, 3 Bing. N. C. 250; *justifying a trespass under a right of fishing in a public river: Maunall* v. *Fisher*, 5 C. B. N. S. 856; *justifying under a public right to fish in the arm of the sea: Richardson* v. *Orford*, 2 H. Bl. 182; *and of a replication of a prescriptive right of fishery in the same spot: Ib.*

See a form of a plea justifying under a grant of liberty to hunt and shoot: Wickham v. *Hawker*, 7 M. & W. 63; *Moore* v. *Lord Plymouth*, 7 Taunt.

(*q*) For instances of former pleas justifying an entry on lands demised under a power of re-entry contained in the lease upon a forfeiture, see *Hammond* v. *Colls*, 3 D. & L. 164; and see a former rejoinder on the same ground in *Wright* v. *Burroughes*, 3 C. B. 685.

For instances of former pleas justifying under prescriptive rights of mining, or under grants or reservations of minerals, &c., see *Rogers* v. *Taylor*, 1 H. & N. 706; 26 L. J. Ex. 203; *Roberts* v. *Davey*, 4 B. & Ad. 664; *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; *Dand* v. *Kingscote*, 6 M. & W. 174.

As to the defence that the defendant entered the land in the exercise of a public right of fishing in an arm of the sea or tidal river, see *ante*, pp. 396, 852.

As to defences justifying under a grant of liberty to hunt and shoot, or under a prescriptive right to hunt and shoot, see *Wickham* v. *Hawker*, 7 M. & W. 63; *Moore* v. *Lord Plymouth*, 7 Taunt. 614; *Pickering* v. *Noyes*, 4 B. & C. 639; *Pannell* v. *Mill*, 3 C. B. 625.

It is no justification for a trespass on the land of another that the entry on the land was made for the purpose of the sport of fox-hunting (*Paul* v. *Summerhayes*, 4 Q. B. D. 9; 48 L. J. M. C. 33), though perhaps an entry on the land of another for the sole purpose of destroying a noxious animal, and as the only means of doing so, would be justifiable (*Ib.*; see *Gundry* v. *Feltham*, 1 T. R. 334).

As to justifications under a custom, see *ante*, pp. 829, 830. As to justifications of entry in order to abate a nuisance, see *ante*, p. 890; and *Lemmon* v. *Webb*, [1894] 3 Ch. 1; [1895] A. C. 1; 64 L. J. Ch. 205.

614 ; *Pickering* v. *Noyes*, 4 B. & C. 639 ; *Pannell* v. *Mill*, 3 C. B. 625 ; *of a like plea under the Prescription Act* 2 & 3 *Will.* 4, *c.* 71 : *Wickham* v. *Hawker*, *supra* ; *of pleas justifying under a grant of liberty to dig minerals* : *Roberts* v. *Davey*, 4 B. & Ad. 664 ; *justifying under a prescriptive right to dig brick clay as appurtenant to a brick kiln* : *Clayton* v. *Corby*, 2 Q. B. 813 ; *justifying under a reservation of the right to get coals* : *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197 (*where see as to the rights impliedly incidental to the right to coals*) ; *of a plea under a reservation in a grant of a close of way leave and liberty to dig pits for coals* : *Dand* v. *Kingscote*, 6 M. & W. 174 ; *Smart* v. *Morton*, 5 E. & B. 36 ; *of pleas justifying in respect of the ownership of mines and quarries under a prescriptive right to enter upon lands to dig through to the quarries, and raise and carry away the stone* : *Dand* v. *Kingscote*, 6 M. & W. 174 ; *Rogers* v. *Taylor*, 1 H. & N. 706 ; 26 L. J. Ex. 203 ; *justifying an entry on lands demised upon forfeiture of the lease for a condition broken* : *Hammond* v. *Colls*, 3 D. & L. 164 ; *Roberts* v. *Tayler*, 1 C. B. 117 ; 7 M. & G. 659.

See a form of a plea that the defendant entered the plaintiff's close to retake his goods, which had been placed there by the plaintiff : *Patrick* v. *Colerick*, 3 M. & W. 483 ; *Wood* v. *Manley*, 11 A. & E. 34 ; *Anthony* v. *Haneys*, 8 Bing. 186 ; *and see Webb* v. *Beavan*, 6 M. & G. 1055 ; *Burridge* v. *Nicholetts*, 6 H. & N. 383 ; 30 L. J. Ex. 145 ; *Blades* v. *Higgs*, 10 C. B. N. S. 713 ; 30 L. J. C. P. 347, 349 ; *plea that the defendant entered the plaintiff's close to deposit there the plaintiff's own goods, which he had wrongfully placed on the defendant's land* : *Rea* v. *Sheward*, 2 M. & W. 424 ; *see ante*, p. 934 ; *of a plea justifying entry to take goods assigned by plaintiff to defendant by bill of sale* : *Toms* v. *Wilson*, 4 B. & S. 442.

See also form of pleas justifying an entry on the plaintiff's land to remove an obstruction to the defendant's ancient lights : see "*Lights*," *ante*, p. 872 ; *justifying an entry upon the plaintiff's land to abate a nuisance of filth* : *Jones* v. *Williams*, 11 M. & W. 175 ; *see ante*, p. 890, *justifying an entry upon the plaintiff's land to repair a pier in a public navigable river, which was necessary for defendant's use of the river* : *see Earl Lonsdale* v. *Nelson*, 2 B. & C. 302 ; *by a railway company justifying an entry, &c. under the Lands Clauses Act* : *Hosking* v. *Phillipps*, 3 Ex. 168 : *Knapp* v. *London, Chatham and Dover Ry. Co.*, 2 H. & C. 212 : 32 L. J. Ex. 236 ; *by the vicar of a church, in an action of trespass at the suit of the lay rector, justifying a breaking into the chancel* : *Griffin* v. *Dighton*, 5 B. & S. 93 ; 33 L. J. Q. B. 29, 181.

Waiver.

See ante, pp. 262, 824.

Waste (*r*).

Denial of the alleged Waste.

The defendant did not commit [*or*, permit, *as the case may be*] the alleged or any waste. He did not [*here traverse specifically the acts or omissions alleged in the statement of claim*].

Defence to an Action by a Landlord, denying the Tenancy.

The defendant was not tenant to the plaintiff of the said dwelling-house [farm, lands, or woods].

For forms of Defences in Actions against Tenants for wrongful Removal of Fixtures, see "*Reversion*," *ante*, p. 913.

Water and Watercourses (*s*).

Defence to an Action for Disturbance of Water Rights, denying the Plaintiff's Possession of the Land, &c.

The land [*or*, mill, &c., *as the case may be*] referred to in the statement of claim was not [and is not] in the possession or occupation of the plaintiff

(*r*) Acts which are merely a reasonable and proper use of a building or other property are not actionable as waste, even though they may have caused the destruction of the building or property (*Saner* v. *Bilton*, 7 Ch. D. 815; 47 L. J. Ch. 267; *Manchester Warehouse Co.* v. *Carr*, 5 C. P. D. 507; 49 L. J. C. P. 809; and see *Tucker* v. *Linger*, cited *ante*, p. 506). The same principles were applied to a case where the alleged waste consisted in cutting trees locally considered as timber-trees, and it was accordingly held that, as it was the usage of the district to thin the woods periodically by cutting down such trees when fit for sale, and as such thinning for the purpose of sale was a proper use of the woods, and even beneficial to them, the acts charged did not amount to waste (*Dashwood* v. *Magniac*, [1891] 3 Ch. 306).

A termor who continues to work mines which had been opened and worked for profit by the reversioner before the commencement of the term is not thereby guilty of waste (*Elias* v. *Snowdon Slate Co.*, 4 App. Cas. 454; 48 L. J. Ch. 811).

An action for waste is an action on the case within the meaning of the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, cited *ante*, p. 873 (*Greene* v. *Cole*, 2 Wms. Saund., 1871 ed., p. 644). As to actions by or against executors for waste, see 3 & 4 Will. 4, c. 42, s. 2, cited *ante*, p. 385.

(*s*) If the defendant disputes the plaintiff's allegations with respect to the right, he must specifically deny or refuse to admit them. (See *ante*, pp. 527, 529.) He must also specially plead any affirmative grounds of defence on which he relies, and any

[*or*, The plaintiff was not [and is not] the owner [*or*, lessee] or occupier of the land, &c., *according to the allegations in the statement of claim*].

---

grounds of defence which would otherwise be likely to take the plaintiff by surprise (see *Ib.*); and if he disputes the plaintiff's possession of the land through which the water flows, he must specifically deny or refuse to admit the plaintiff's allegations of such possession.

Section 2 of the Prescription Act, 1832 (cited *post*, p. 947), which is the section applicable to easements of this nature, and to rights of way, requires the enjoyment to have been an enjoyment "as of right" (*Tickle* v. *Brown*, 4 A. & E. 369; *Mason* v. *Shrewsbury Ry. Co.*, L. R. 6 Q. B. 578; 40 L. J. Q. B. 293; *Chamber Colliery Co.* v. *Hopwood*, 32 Ch. D. 549).

A right to discharge noxious matters into a stream is an easement which may be acquired by user under that section (*Wright* v. *Williams*, 1 M. & W. 77; see *Murgatroyd* v. *Robinson*, 7 E. & B. 391; 26 L. J. Q. B. 233; *Carlyon* v. *Lovering*, 1 H. & N. 784; 26 L. J. Ex. 251). But no right can be claimed against the plaintiffs under that section where an express grant by them to the like effect would have been illegal by statute (*Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287; 21 L. J. Q. B. 297).

It may be advisable to plead a prescriptive right at common law as well as defences of prescription under the statute where there is any danger of the latter defences failing in proof by reason of an interruption in the enjoyment, or by reason of the enjoyment not being continued down to the commencement of the action. (See *ante*, p. 819; *post*, p. 949. For instances of such pleading under the former system, see *Carlyon* v. *Lovering*, *supra*; *Moore* v. *Webb*, 1 C. B. N. S. 673; *Northam* v. *Hurley*, 1 E. & B. 665; 22 L. J. Q. B. 183.) In some cases, *e.g.*, where it is doubtful whether the defendant can prove a prescription from time immemorial, it may be also advisable to plead a defence on the ground of a lost grant. (See *post*, p. 949; and see a former plea of this kind in Bullen & Leake, 3rd ed., p. 810.)

A defence of a prescriptive right to take water for various purposes will be construed distributively, so that, if the defendant proves the right for some of the purposes and not for others, the judgment will be entered for him as to so much of the defence as is proved, and for the plaintiff as to the residue. (See *Rochdale Canal Co.* v. *Radcliffe*, *supra*.)

If, in an action for the abstraction or diversion of water, the plaintiff relies on his natural rights as a riparian proprietor, and the defence is that the acts complained of were a mere exercise by the defendant of like riparian rights, such defence should be specially pleaded. (See a former plea of this description in *Embrey* v. *Owen*, 6 Ex. 353.)

As to the rights and duties of riparian proprietors, see *ante*, p. 508.

Where the plaintiffs had constructed a watercourse and thereby wrongfully discharged water on to the defendant's land, the defendant was held to be justified as against the plaintiffs in obstructing the watercourse, though he was obliged by the circumstances of the case to place the obstruction on the land of an intermediate owner (*Roberts* v. *Rose*, L. R. 1 Ex. 82; 33 L. J. Ex. 1).

As to the defence that the acts complained of were acts which the defendants were required or authorised to do by statute, see *ante*, p. 454; and see, for instances of such pleadings, *Nat. Teleph. Co.* v. *Baker*, [1893] 2 Ch. 186; *Green* v. *Chelsea Waterworks Co.*, 70 L. T. 547.

Where unauthorised obstructions have been placed in a public navigable river, the defendant may justify their removal on the ground that the river is a public highway, and that his acts were necessary to enable him to use the way. (See *Williams* v. *Wilcox*, 8 A. & E. 314; *Eastern Counties Ry. Co.* v. *Dorling*, 5 C. B. N. S. 821; 28 L. J. C. P. 202.)

Defence to a like Action by a Reversioner, denying the Reversion: see "*Reversion*," *ante*, p. 912.

Defence denying the Right to the Watercourse, &c.

The plaintiff was not entitled to the flow of the said stream or watercourse to and through the said land of the plaintiff as alleged or at all. [*If the grounds on which the right is claimed are alleged in the statement of claim, they must be specifically denied, or facts must be stated which show that the plaintiff was not entitled to the right claimed: see ante*, pp. 870, 871.]

Defence of a Right under the Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2, *to use the Water for Agricultural Purposes.*

At the times of the alleged grievances, the defendant was possessed of land abutting upon the said watercourse, viz., of a close called ——, at ——, the occupiers whereof for twenty years [*or*, forty years, *as the case may be*, *or say* or in the alternative forty years] before this action enjoyed as of right, and without interruption, the right of diverting and using the water of the said stream for the purpose of irrigating the said land for the better cultivation thereof as to the said land of the defendant appertaining; and the alleged grievances were uses by the defendant of the said right.

Defence of a Right under the Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2, *to use the Water for a Mill.*

At the time of the acts complained of, the defendant was possessed of a mill called the —— mill at —— the occupiers whereof for twenty years [*or*, forty years, *as the case may be*] before this action enjoyed as of right, and without interruption, the right of diverting and using the water of the said river for working the said mill, as to the said mill of the defendant appertaining; and the acts complained of were a use by the defendant of the said right.

Defence of a Prescriptive Right at Common Law to use the Water for a Mill.

At the time of the acts complained of, the defendant was seised in fee of a mill called —— Mill, at ——, and he and all those whose estate he then had therein, from time immemorial enjoyed the right of diverting and using the water of the said river for working the said mill, as to the said mill of the defendant appertaining; and the acts complained of were a use by the defendant of the said right. [*If the defendant is a tenant*,

state the seisin in fee and the right to use the water in the person so seised for himself and his tenants, and then state the demise to the defendant and his entry and use of the right: see the form, ante, pp. 820, 821.

Defences to an Action for the Pollution of Water, &c., where the Plaintiff claims an Injunction and Damages.

1. The defendant denies that he or his servants pollute the water [*or*, do what is complained of].

[*If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of his claim, i.e., whether by prescription, grant, or what.*]

2. The plaintiff has been guilty of laches, of which the following are particulars:—

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First complaint.

3. As to the plaintiff's claim for damages, the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated, e.g., the Statute of Limitations as to past damage.*]

(*R. S. C.*, 1883, *App. D., Sect. VI.*)

Ways (*t*).

Denial of the Plaintiff's Possession of a Messuage or Land in respect of which the Right of Way is claimed.

The plaintiff was not [and is not] the owner [*or*, lessee] or occupier [*or*, was not (and is not) possessed] of the said messuage [*or*, land].

(*t*) See *ante*, pp. 407, 517.

In actions for obstructing a right of way, the allegations of the right must, if disputed, be specifically denied, or stated not to be admitted. So also the allegations of the plaintiff's possession, where he claims in right of such possession.

The provisions contained in s. 5 of the Prescription Act, 1832, with respect to general allegations and denials of the right claimed in actions for disturbance would appear to be superseded by the Judicature Acts and the Rules thereunder. (See *ante*, pp. 339, 818.)

A person entitled to the use of a private way over the land of another has no right to deviate from it in consequence of its being impassable, unless the owner of the land has obstructed the way (*Abson* v. *French*, 2 Show. 28; *Selby* v. *Nettlefold*, L. R. 9 Ch. 111); or was under an obligation to repair the way, and has allowed it to become impassable through his default in not repairing (*Taylor* v. *Whitehead*, 2 Doug. 744; *Bullard* v. *Harrison*, 4 M. & S. 387).

The grantor of the way or owner of the servient tenement is not bound to repair it by the common law (*Ib.*; 1 Wms. Saund., 1871 ed., p. 565; and see *Goodhart* v. *Hyett*, 25 Ch. D. 182). It has been said that if a public way is impassable, a person using it has a right to deviate *extra viam* (*Taylor* v. *Whitehead*, *supra*; *Bullard* v. *Harrison*,

Denial of an alleged Title by Enjoyment to a Right of Way, and Averment that the User was not of Right (*u*).

1. The plaintiff was not [and is not] entitled to the right of way alleged.

2. The plaintiff and his predecessors in title have not enjoyed the said right of way for twenty [*or*, forty] years before this action.

3. If they have so enjoyed it, such enjoyment has not been as of right, but has been a secret enjoyment without the knowledge of the defendant, the owner of the said messuage, or of his predecessors in title [*or*, was an enjoyment by the permission and licence of the defendant, the owner of the said messuage, and of his predecessors in title.

Particulars of the permission and licence are as follows:—]

Defence of a Private Right of Way under the Prescription Act, 1832 (*x*).

At the time of the alleged trespass [*or*, of the acts complained of] the defendant was possessed of [*or*, was the owner and occupier of] certain

---

supra); but it seems that this doctrine only applies in cases where there is a prescriptive right justifying such deviation (*Arnold* v. *Holbrook*, L. R. 8 Q. B. 96, 100; 42 L. J. Q. B. 80).

(*u*) The user required by the Prescription Act, 1832, must be such as to raise a reasonable inference of a fairly continuous enjoyment of the right claimed; a user on infrequent and special occasions is not sufficient (*Hollins* v. *Verney*, 13 Q. B. D. 304; 53 L. J. Q. B. 430).

It is enacted by s. 2 of that Act, that "no claim which may be lawfully made at the common law, by custom, prescription, or grant to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over, or from any land or water, . . . when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." The enjoyment required by this section must be "as of right." (See *ante*, p. 420.)

There would seem to be no enjoyment as of right when the enjoyment is under a yearly or other payment, paid as the price of permission to enjoy from time to time; and it is clear that the enjoyment cannot be "of right" where the grantor has reserved to himself the power at any time of revoking or recalling the permission (*Gardner* v. *Hodgson's Breweries Co.*, [1901] 2 Ch. 198; [1903] A. C. 229; 70 L. J. Ch. 504; 72 *Ib.* 558).

"Interruption" means adverse interruption. (See *ante*, p. 872.)

(*x*) A defendant who justifies under a right of way must show by his pleadings on what grounds he claims to be entitled to the right. (See *ante*, p. 819; and R. S. C., 1883, App. D., Sect. VI., cited *ante*, p. 946.)

Where it is wished to repeat the defence of a right of way by prescription under the

land, viz. [a close called ——, at ——], the occupiers whereof for twenty years [*or*, forty years, *as the case may be*] before this action enjoyed as of right, and without interruption, a way [for themselves and their servants] on foot and with cattle [*or*, with horses and carriages, &c., *as the case may be*] from a public highway called ——, in the parish of ——,* over the plaintiff's land to the said land of the defendant and from the said land of the defendant over the plaintiff's land to the said highway [at all times of the year], for the more convenient occupation of the said land of the defendant, and the alleged trespass was [*or*, the acts complained of were] a use by the defendant [and his servants] of the said way [and was (*or*, were) necessarily done for the purpose of using and in using the same].

A like form, specially justifying the Removal of Fences and other alleged Acts of Trespass (*y*).

At the time of the alleged trespasses [*proceed as in the last form down to the words* land of the defendant, *and continue as follows*, and the defendant entered the said land of the plaintiff for the purpose of using the said way, and in using the same necessarily trod down the grass growing thereon, and because the said [fences and gates] were then wrongfully in the said way obstructing the same, the defendant necessarily broke down and destroyed the said [fences and gates] for the purpose of using the said way, doing no unnecessary damage in that behalf, which are the alleged trespasses [*or*, the acts complained of].

Defence of a Private Right of Way by Prescription at Common Law (*z*).

At the time of the alleged trespass the defendant was seised in fee of land called ——, in the parish of ——, and he and all those whose estate he then had therein from time immemorial enjoyed a way on foot and with

---

Prescription Act, 1832, in respect of a period of forty years as well as a period of twenty years, it may be done shortly by alleging the enjoyment for twenty years in one paragraph, and then stating in the next paragraph that "the defendant repeats the statements contained in the preceding paragraph, with the substitution of 'forty years' for 'twenty years.'"

(*y*) A defendant who justifies under a private right of way must show by his pleadings on what grounds he claims to be entitled to the right. (See R. S. C., 1883, App. D., Sect. VI., cited *ante*, p. 946.) In pleading a private right of way over another's land, the *termini* of the way must be stated, and the title should be in general stated. (See *ante*, p. 517.)

(*z*) A right of way may be claimed by immemorial prescription at common law. Such mode of claiming the right of way may, in some cases, be applicable where the enjoyment cannot be proved continuously and without interruption, or be brought down to the commencement of the action as required for the periods fixed by the Prescription Act. (See *Parker* v. *Mitchell*, 11 A. & E. 788; *Lowe* v. *Carpenter*, 6 Ex. 825; and see *Hollins* v. *Verney*, 11 Q. B. D. 715; 13 *Ib.* 304; 53 L. J. Q. B. 30; *Ib.*

cattle, and with horses, carriages, and carts, from a public highway called ——, in the parish of ——, over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway [at all times of the year], for the more convenient occupation of the said land of the defendant, as to the said land of the defendant appertaining; and the alleged trespass was a use by the defendant of the said way. [*If the defendant is a tenant, state the seisin in fee and the right of way in the person so seised for himself and his tenants, and then state the demise to the defendant and his entry and use of the right, as in the form, ante*, p. 820.]

See forms of pleas of rights of way for special purposes: Parker v. *Mitchell*, 11 A. & E. 788; *Monmouth Canal Co.* v. *Harford*, 1 C. M. & R. 614; *Bennison* v. *Cartwright*, 5 B. & S. 1; 33 L. J. Q. B. 137.

Defence of a Private Right of Way by Non-existing Grant (*a*).

At the time of the alleged trespass the defendant was seised in fee of a close called ——, at ——, and long before the alleged trespass, by a deed

---

430). It may be advisable to plead a prescription at common law, as well as a prescription under the statute, in cases where there is any risk of the latter failing in proof from the above causes.

If the defendant is a servant who justifies under his master's right of way, he must state in his defence that he is such servant and acted by the authority of the master. (See *ante*, pp. 924, 938.)

If the plaintiff relies upon uses of the way beyond those claimed and justified by the defence, or for trespasses *extra viam*, he should in general raise the point specifically, either by an amendment of his statement of claim or by his reply. (See *post*, p. 953.)

(*a*) The defence of a right of way, or of any other prescriptive right by non-existing grant, may sometimes be supported by evidence which would fail to support a prescriptive right under the Prescription Act, as where there has been an interruption of enjoyment within the period prescribed by the stutute, or where the enjoyment cannot be brought down to the commencement of the action, or of some other action in which the right claimed has been in question. (See *Parker* v. *Mitchell*, 11 A. & E. 788; *Onley* v. *Gardiner*, 4 M. & W. 496; *Lowe* v. *Carpenter*, 6 Ex. 825.) It may also sometimes be supported by evidence which would fail to support a plea of prescription at common law, by reason of the right being shown to have commenced within the period of legal memory. (See *Bryant* v. *Foot*, L. R. 2 Q. B. 161, 181; 36 L. J. Q. B. 65, 77; *Dalton* v. *Angus*, 6 App. Cas. 740, 810 *et seq.*; 50 L. J. Q. B. 689.) Hence it is frequently advisable to plead together in the same case defences of prescription by the statute, of prescription at common law, and of non-existing grant.

Such a grant may be presumed from acts of ownership or of enjoyment for twenty years and upwards consistent with the grant alleged in the plea (*Bright* v. *Walker*, 1 C. M. & R. 211, 217; *Campbell* v. *Wilson*, 3 East, 294; *Lirett* v. *Wilson*, 3 Bing. 115; *Bass* v. *Gregory*, 25 Q. B. D. 481; 59 L. J. Q. B. 574). But if the enjoyment has been

which has been lost or destroyed by accident, [*J. K.*,] the then owner in fee of the said land now of the plaintiff, granted to [*L. M.*], the then owner in fee of the said close called ——, and to his heirs and assigns, a way on foot and with horses and carriages from a public highway called —— over the said land of the plaintiff to the said close, and from the said close over the said land of the plaintiff to the said highway [at all times of the year] for the more convenient occupation of the said close; and the defendant at the time of the alleged trespass had the estate of the said grantee [*or*, of the said *L. M.*] in the said close, and was entitled to the said way under the said grant, and the alleged trespass was a use by the defendant of the said way. [*If the defendant is a tenant, the defence must be modified accordingly: see the last form.*]

See forms of pleas of a right of way by express grant: Senhouse v. *Christian*, 1 T. R. 561; *Campbell* v. *Wilson*, 3 East. 294; *Plant* v. *James*, 5 B. & Ad. 791; *Ackroyd* v. *Smith*, 10 C. B. 164; *Tatton* v. *Hammersley*, 3 Ex. 279; *Henning* v. *Burnet*, 8 Ex. 187; *and of a plea of a devise by will of tenements*

---

only during a lease for lives or years and without the consent of the owner of the inheritance, no such grant of the right will be presumed as against him so as to bind the fee (*Bright* v. *Walker*, *supra*). Nor will a grant be presumed which would be contrary to the provisions of a statute (*Neaverson* v. *Peterborough R. C.*, [1902] 1 Ch. 557; 71 L. J. Ch. 378).

Before the C. L. P. Act, 1852, the particularity required in pleading made it necessary that the plea of lost grant should specify the particulars of the supposed deed as to the date and the names of the parties (see *Hendy* v. *Stephenson*, 10 East, 55), and the evidence must have been consistent with the particulars stated in the plea (*Blewett* v. *Tregonning*, 3 A. & E. 554, 583, 585). The defence, however, is now often pleaded without mentioning the names of the supposed parties to the deed (see *Duke of Norfolk* v. *Arbuthnot*, 4 C. P. D. 290; 5 *Ib.* 390); and it would seem that the presumption of a grant may more properly be applied on a general statement that some former owner of the servient tenement granted the easement to some former owner of the dominant tenement, than on a limited allegation that such a grant was made by a particular named grantor to a particular named grantee.

A defence justifying a trespass, &c., on the ground of an *express* grant of the right claimed must be pleaded according to the facts and the nature of the grant. If the defendant was not himself the grantee under the grant, he must show how he derives title from the grantee.

In order that a right of way, &c. may pass from the original grantee by a conveyance of his land with the appurtenances to an assignee, it must be a right to be used for purposes connected with the use of the dominant tenement (*Ackroyd* v. *Smith*, 10 C. B. 164; *Bailey* v. *Stevens*, 12 C. B. N. S. 91; 31 L. J. C. P. 226).

Where the owner of two tenements has been in the habit of using a way over one of them to the other, such way, even if it was first created and used since the commencement of the unity of ownership, will in general pass under a conveyance by him of the latter tenement containing a grant of "all ways therewith used or enjoyed," or words to that effect (*Plant* v. *James*, *supra*; *Watts* v. *Kelson*, L. R. 6 Ch. 166; 40 L. J. Ch. 126; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; 44 L. J. Q. B. 210; *Brett* v. *Clowser*, 5 C. P. D. 376; *Barkshire* v. *Grubb*, 18 Ch. D. 616; 50 L. J. Ch. 731; *Bayley* v. *G. W. Ry. Co.*, 26 Ch. D. 434; *Thomas* v. *Owen*, 20 Q. B. D. 225).

with a right of way: Pearson v. *Spencer*, 1 B. & S. 571; 3 *Ib.* 761; *Bennison* v. *Cartwright*, 5 B. & S. 1; *and of a plea of a right of way under an award of enclosure commissioners: Logan* v. *Burton*, 5 B. & C. 513.

Defence of a Private Way of Necessity (*b*).

At the time of the alleged trespass the defendant was seised in fee of a close, called ——, next adjoining the close of the plaintiff, and before the alleged trespass, by a deed dated the —— ——, 19—, *J. K.*, who was then seised in fee of both the said closes, and whose estate in the said close called —— the defendant had at the time of the alleged trespass, granted and conveyed the said close of the plaintiff to *L. M.*, and his heirs and assigns, and *J. K.*, had not, at the time of the said conveyance, or at any time afterwards, nor had the defendant or any other person having the estate of *J. K.* in the close called —— at any time, any way to or from the close called —— otherwise than by a certain way leading from or to a public highway over the said close of the plaintiff; and by reason thereof *J. K.*, and the defendant, and all other persons having the estate of *J. K.* in the said close called ——, from the time of the said conveyance, had of necessity a right of way on foot and with horses and carriages from the said public highway over the said close of the plaintiff to the said close called ——, and from the said close called —— over the said close of the plaintiff to the said public highway at all times of the year, for the necessary use and occupation of the said close called ——, the same way being the nearest and most convenient way over the said close of the plaintiff to and from the said close called ——; and the alleged trespass was a use by the defendant of the said way.

(*b*) A right of way of necessity is an incident to a grant of land, where there is no access to the land granted except over remaining land of the grantor; also where there is no access to remaining land of the grantor except over the land granted (1 Wms. Saund., 1871 ed., 570, 573; *Howton* v. *Frearson*, 8 T. R. 50; *Pinnington* v. *Galland*, 9 Ex. 1; *Brown* v. *Alabaster*, 37 Ch. D. 490, 500; *Ford* v. *Met. Ry. Co.*, 17 Q. B. D. 12; *Serff* v. *Acton Local Board*, 31 Ch. D. 679). Mere necessity, apart from the relation of grantor and grantee, does not give any right of way over the land of another (*Bullard* v. *Harrison*, 4 M. & S. 387; see *Proctor* v. *Hodgson*, 10 Ex. 824); and a defence on the ground of a right of way of necessity must show how it arises by way of grant (*Ib.*). The right of way continues only so long as the necessity lasts, and is extinguished by the grantor or grantee obtaining access to the land by other ways (*Holmes* v. *Goring*, 2 Bing. 76); hence the defence must show a necessity, by reason of there being no other way, at the time of the trespass (*Ib.*; *Proctor* v. *Hodgson*, 10 Ex. 824). A way of necessity which has become extinguished by unity of possession of the two tenements, may revive upon their subsequent severance (*Buckley* v. *Coles*, 5 Taunt. 311, where see a plea of a way of necessity by a tenant from year to year). It seems that the way of necessity is the way most convenient for the purpose. (See *Morris* v. *Edgington*, 3 Taunt. 24). A right of way may be also implied, by reason of necessity, upon the devise of several lands in several parcels (*Pearson* v. *Spencer*, 1 B. & S. 571; 3 *Ib.* 761).

See a form of a plea of a right of way of necessity created by devise of the tenements to separate devisees, there being no way to the one except over the other : Pearson v. *Spencer*, 1 B. & S. 371 ; 3 *Ib.* 761 ; *and of a plea of a right of way across a railway between lands of the defendant severed by the railway under the Companies Act : Grand Junction Ry. Co.* v. *White*, 8 M. & W. 214.

Defence of a Public Right of Way (*c*).

At the time of the alleged trespass [*or*, of the acts complained of] there was of right a common and public highway over the said land of the plaintiff for all persons to go and return on foot and with horses, cattle, and carriages [at all times of the year] at their free will and pleasure ; and the alleged trespass was [*or*, the acts complained of were] a use by the defendant of the said highway [and was (*or*, were) necessarily done for the purpose of using, and in using the said way].

A like Defence, specially justifying the Removal of Obstructions.

At the time of the alleged trespasses [*or*, of the acts complained of], &c. [*proceed as in the preceding form down to the word* "pleasure," *and continue as follows*], and the defendant, having occasion to use the said way, then entered upon the said land of the plaintiff and passed along the said highway, then using the same as he lawfully might for the cause aforesaid, and because the said [wall] had been erected, and then was wrongfully on the said highway, obstructing the same, the defendant necessarily pulled down the said [wall] for the purpose of using the said highway, doing no

(*c*) In pleading a public right of way, it is not necessary to state the *termini* of the way (*Rouse* v. *Bardin*, 1 H. Bl. 351) ; though a public highway must *primâ facie* lead from one public place to another (*Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 188, 206 ; 74 L. J. Ch. 599). In some cases there may have been a limited dedication of the highway, subject, for instance, to a right of ploughing the land, and thereby rendering the way impassable at certain times (*Arnold* v. *Blaker*, L. R. 6 Q. B. 433 ; 40 L. J. Q. B. 185 ; *Arnold* v. *Holbrook*, L. R. 8 Q. B. 86 ; 42 L. J. Q. B. 80), or the highway may be subject to a right of disposing goods thereon by prescription or custom (*Elwood* v. *Bullock*, 6 Q. B. 383 ; *Morant* v. *Chamberlain*, 6 H. & N. 541 ; 30 L. J. Ex. 299), or of using the land as a canal towing-path (*Grand Junction Canal Co.* v. *Petty*, 21 Q. B. D. 273 ; 57 L. J. Q. B. 572.) In such cases the right should be pleaded as a qualified one. A public highway may cease to be such, *e.g.*, where there is no access to it except by roads which have been closed by orders duly made under the Highway Acts (*Bailey* v. *Jamieson*, 1 C. P. D. 329).

A former judgment against the plaintiff on an indictment for obstructing the alleged highway cannot be pleaded by the defendant as an estoppel (*Petrie* v. *Nuttall*, 11 Ex. 569). As to estoppel, see *ante*, p. 851.

For former pleas justifying the removal of obstructions from a public highway under statutory authority, see *Le Neve* v. *Vestry of Mile End*, 8 E. & B. 1054 ; 27 L. J. Q. B. 208 ; *Morant* v. *Chamberlain*, *supra*.

As to obstructions of public highways, see further, *ante*, p. 451 ; and as to obstructions of public navigable rivers, see *ante*, p. 944.

unnecessary damage in that behalf, which are the alleged trespasses [*or*, acts complained of].

Reply to a Defence of Right of Way, that the Acts complained of were in Excess of the alleged Right, &c. (*d*).

The acts complained of were not an exercise of the alleged right of way. They were acts committed by the defendant in excess of the alleged right of way [and also in other parts of the said land and on other occasions and for other purposes than those referred to in the defence].

Particulars are as follows :—

See a form of a replication that the way was enjoyed during the whole period by the leave and licence of the plaintiff : Colchester v. *Roberts*, 4 M. & W. 769 ; *Bennison* v. *Cartwright*, 5 B. & S. 1 ; 33 L. J. Q. B. 137 ; *and that the way claimed was enjoyed under a local Act until within twenty years, when a new Act passed extinguishing that way and setting out a new one : Kinlock* v. *Nevile*, 6 M. & W. 795.

See a form of a replication to a plea of twenty or thirty years' prescription that a term for life was subsisting during the period of prescription (2 & 3 Will. 4. *c.* 71, *s.* 7(*e*)) ; *Clayton* v. *Corby*, 2 Q. B. 813 : *see Bright* v. *Walker*,

(*d*) A joinder of issue operates as a denial of the alleged right of way, and also of the defendant's possession of the land in respect of which it is claimed. How far such joinder of issue will also operate as a denial of the allegation that the acts complained of were done in exercise of the right, or were the same as those which the defence professes to justify, is more doubtful. It was held previously to the Judicature Acts that a joinder of issue under s. 79 of the C. L. P. Act, 1852, did not operate as a denial of them, and that, if the plaintiff disputed them, he must raise the point by a new assignment. (See *Glover* v. *Dixon*, 9 Ex. 158 ; *Eastern Counties Ry. Co.* v. *Dorling*, 5 C. B. N. S. 821 ; 28 L. J. C. P. 202 ; Bullen & Leake, 3rd ed., p. 815 ; "*Replies*," *ante*, pp. 551, 552.) Ord. XIX., r. 18, cited *ante*, p. 546, is more widely expressed than the last-mentioned section (which is now repealed), but it would seem that under ordinary circumstances it is better, where the above-mentioned allegation is disputed, to meet the defence either by an amendment of the statement of claim, or by a reply in the nature of a new assignment. (See *ante*, p. 553.) Any use of the way beyond what is justified by the right is a trespass (*Colchester* v. *Roberts*, 4 M. & W. 769 ; *Henning* v. *Burnet*, 8 Ex. 187 ; *Williams* v. *James*, L. R. 2 C. P. 577 ; 35 L. J. C. P. 256 ; and see *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142).

(*e*) By 2 & 3 Will. 4, c. 71, s. 8, it is provided that "when any land or water upon, over, or from which any such way or other convenient (*sic*) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

1 C. M. & R. 211 : *Pye* v. *Mumford*, 11 Q. B. 666 ; *and of a replication to a plea of forty years' prescription of a term for life or years, and that the plaintiff was the reversioner expectant upon it, and resisted the claim within three years after the determination of such term* (2 & 3 Will. 4, *c.* 71, *s.* 8) : *see Wright* v. *Williams*, 1 M. & W. 77 ; *and see Bright* v. *Walker*, *supra*. [*This replication only applies to easements within the second section of the statute. The preceding form applies to prescriptive rights within the first and second sections.*]

See a form of a plea justifying the removal of an obstruction from a public highway under the authority of the Metropolis Local Management Act : Le Neve v. *Vestry of Mile End*, 8 E. & B. 1054 ; 27 L. J. Q. B. 208 ; *of a like plea of justification under the authority of a local Board of Health : Morant* v. *Chamberlain*, 6 H. & N. 540 ; 30 L. J. Ex. 299.

See a form of replication of a right by custom to erect booths on the highway at a fair : Elwood v. *Bullock*, 6 Q. B. 383 ; *of a replication of a prescriptive right to place goods upon the public way : Morant* v. *Chamberlain*, *supra*.

See a form of plea of a public right of way along a navigable river, justifying the destruction of a weir fixed in the channel : Williams v. *Wilcox*, 8 A. & E. 314 ; *and of a like plea justifying trespasses on a landing stage of the plaintiff : Eastern Counties Ry. Co.* v. *Dorling*, 5 C. B. N. S. 821 ; 28 L. J. C. P. 202.

Reply joining Issue on the Defence, and further stating that the Matters complained of include other Acts than those admitted by the Defence(*e*).

1. The plaintiff joins issue.

2. Besides the acts of the defendant which are referred to in the defence, the plaintiff also complains of other acts of the defendant which were in excess of the alleged rights, and were committed in other parts of the plaintiff's land and on other occasions and for other purposes than those referred to in the defence.

Particulars are as follows :—

[*Here state particulars of such of the acts complained of as appear to be excluded by the defence and have not been sufficiently specified by the claim.*]

(*e*) Formerly under a joinder of issue on a plea alleging an enjoyment "as of right," the plaintiff might prove applications by the defendant during the prescribed period for leave to use the way, leave and licence during a portion of the period being inconsistent with an enjoyment as of right. (See *Monmouth Canal Co.* v. *Harford*, 1 C. M. & R. 614 ; *Beasley* v. *Clarke*, 2 Bing. N. C. 705 ; *Tickle* v. *Brown*, 4 A. & E. 369.) But under the present system such leave and licence should be replied specially.

See further *ante*, pp. 819, 820, 953.

WITNESS (*f*).

Defence to an Action for not attending in pursuance of a Subpœna, that the Testimony of the Defendant was not Material.

The testimony of the defendant was not necessary or material on behalf of the plaintiff on the trial of the said action [*or*, of any of the said issues].

(*f*) See *ante*, p. 518. The defence that the evidence of the defendant was not material on the trial of the former action must be expressly pleaded. (See *Needham* v. *Fraser*, 1 C. B. 815; *Mullett* v. *Hunt*, 1 C. & M. 752, 764.)

It is a good defence that a reasonable sum was not paid or tendered to the defendant for his expenses as a witness. (See *Betteley* v. *M'Leod*, 3 Bing. N. C. 405.)

INDEX.

(*The references in italics in the inner margin relate to the notes.*)

ABANDONMENT,
of ship insured, notice of, 202.
of ancient lights, 420, 871.

ABATEMENT,
plea in, abolished, 29, 522.
actions not now abated by marriage, death, bankruptcy, &c., of parties, 30.
abatement of nuisances, 890.

ACCEPTANCE. *See* BILLS OF EXCHANGE: SALE OF GOODS.

ACCIDENT,
claim by executor or administrator on an accident policy, 208.
claim by assured on a policy for allowance during incapacity, 209.
defence of inevitable accident, 923.
insurance against accidents, what are accidents, 208.
claims by executors for accidental death caused by negligence, 387.
accident, when primâ facie *evidence of negligence*, 441.
inevitable accident a defence to actions for negligence or trespass, 883, 885, 923.
And see ALTERATION; CARRIERS.

ACCOMMODATION BILL,
claim by the acceptor of an accommodation bill on the contract to indemnify him, 195.
defence stating that a bill or note was given for accommodation, 599, 600, 614.
And see BILLS OF EXCHANGE; INDEMNITIES.

ACCORD AND SATISFACTION,
defence of accord and satisfaction by the delivery of goods, 566.
the like, by work done, 567.
the like, by substituted agreement, 568.
the like, by giving a bill of exchange, 569.
the like, by indorsing to the plaintiff a promissory note, 569.
the like, by payment of a smaller sum by a third party, 570.
defence of an agreement between the plaintiff, the defendant, and a third party, that the defendant should be discharged and the third party be accepted by the plaintiff as his debtor instead, 570.
defence of accord and satisfaction by a composition made by a debtor with his creditors, 570.
reply thereto that the deed or instrument was not registered, 641.
what amounts to an accord and satisfaction, 566, 567.
payment of smaller sum in discharge of larger debt; some new consideration necessary, 566, 745.
giving negotiable instrument, &c., 566, 567, 615, 746.
accord and satisfaction by one of several joint-debtors, or with one of several joint-creditors, 567.
equity rule where such creditor acts in fraud of partners, 568.
accord and satisfaction must be after breach, 568.
effect of accord and satisfaction as to contracts by specialty, 569.

ACCORD AND SATISFACTION—*continued.*
equitable doctrines as to parol release, &c.; effect of the Judicature Acts, 568, 753, 755.
effect of accord and satisfaction, where further damage accrues subsequently, 815.
accord and satisfaction procured by fraud, 815.
bills or notes given "in accord and satisfaction," or "for and on account" of a debt, 569, 615, 746.
accord and satisfaction by way of novation of a debt, 570.
effect of satisfaction by a joint tort-feasor, 815.
by a stranger, 815.
a fresh cause of action is not barred by satisfaction given for previous damage, 815, 816.
accord and satisfaction by inserting apology in newspaper, 816, 845.
a receipt in full is not an estoppel, but is evidence of discharge, 753.

ACCOUNT,
action of, at common law and by statute, 69.
reference to former pleadings in actions of account, 70, 571.
actions for taking partnership or other accounts, assignment of, to the Chancery Division, 69, 267.
jurisdiction of King's Bench Division to order account, 69.
claims for an account in various cases, 69, 70.
exception of merchants' accounts from Statute of Limitations abolished, 718.
to re-open a settled account, errors or at least one important error must be specifically pleaded, 572.

ACCOUNT STATED,
claim on account stated, 70.
defence denying the statement of the accounts, 571.
defence alleging that the amount found to be due on the accounts stated was a smaller sum than that claimed, 572.
account stated; what mode of pleading, 70.
statement of account as to part of a larger debt claimed, 70.
account stated by mistake; for debt without consideration; for illegal debt; for debt within the Statute of Frauds, or the Statutes of Limitation, 71, 571, 572.
how made; by writing, as by bill or note or I O U, or by oral statement, 70, 71.
must be before action, and of sum certain, 71, 72.
to whom and by whom made, 71.
account stated of future debt; of debt payable by instalments, or upon a contingency, 71, 72.
effect of an acknowledgment under seal, 72.
defences applicable to claims on accounts stated, 571, 572.

ACKNOWLEDGMENT, 723. *See* LIMITATION, STATUTES OF.

ACQUIESCENCE, 859, 871. *See* INJUNCTION; LACHES; LEAVE AND LICENCE.

ACT OF GOD, 141, 453. *See* CARRIERS.

ACTION,
the old forms of action abolished, 3, 45.
action on the case, what it included, 718, 873.
actions on contracts and actions for wrongs, 2.
actions partaking of both characters, 3.
assignment of certain actions to particular Divisions of the High Court, 33: *see* ACCOUNT.
classification of actions, 2.
place of trial is, in each case, fixed by an order, 58.
joinder of causes of action, 52—54.
parties to actions, 19: *see* PARTIES.
discontinuance of actions, 538, 642.

ACTION, NOTICE OF, 888. *See* NOTICE OF ACTION.

ACTION PENDING,
for same cause; application to stay proceedings, 522, 523, 537.
And see CROSS-ACTION.

ADMINISTRATOR. *See* EXECUTORS.

ADMISSION,
implied, of allegations not denied specifically or by necessary implication, or stated to be not admitted, 527.
exception of allegations as to damages, 529, 530.
infants and lunatics, &c. not within the rule, 527.
the rule not applicable where joinder of issue implied, 545.
judgment on admissions, 572.

ADMISSIONS IN PLEADINGS,
defence containing admission of fact, 572.
defence admitting some facts and denying other facts, 525, 574.

AGENT,
statements of claim:
by an agent for remuneration for work done, &c., 72.
by a house agent for commission, 73.
by a share broker for commission, 137.
by an agent against his employer for breach of agreement to accept a draft for the price of goods bought under the employment, 73.
against an agent employed to sell goods, for not accounting or paying over, 74.
against an agent, for not using due care and diligence in collecting moneys, 75.
against an agent employed to purchase goods, for negligently disregarding his instructions, 75.
against a *del credere* agent on his guarantee of the price of goods sold by him, 75.
for breach of an implied warranty of authority to contract with the plaintiff, 76.
against an agent, to recover the amount of a secret commission received by him from persons dealing with his employer, 77.

defences:
denial of agency, 572.
denial of the alleged terms of employment, 572.
defence to an action for commission, denying the alleged services, 573.
defence to an action against an agent for not accounting, that the plaintiff never requested the defendant to account, 573.
defence to claim by house agent for commission, 573.
defence to an action on a verbal agreement, that the defendant contracted solely as agent for a disclosed principal, 573.
denial of receipt of an alleged secret commission, 574.
denial that the alleged commission was received corruptly, secretly or improperly, 574.
denial of an alleged warranty of authority to contract as agent, 575.
denial of the alleged breach of warranty of authority, 575.
defence to an action for the price of goods sold, alleging that they were sold by the plaintiff's agent as apparent principal, and claiming to set off a debt due from the agent to the defendant, 782.
reply of ratification, 575.
contracts by agents: liability of principal, 140, 573, 574.
agent, when personally liable; signing contract in his own name as principal; usage of trade, or market; foreign principal, 72, 573, 574.
gratuitous agent, liable for misfeasance, 72.
revocation of agency, 72, 73, 256, 257.
house agents, &c., when entitled to commission, 73.
actions against agents for money received, or for account, 74, 79.
agency for purchase of goods on commission, 75.
del credere agency, 75, 76.
implied warranty of authority by contracting as agent, 76, 77.
suing principal and agent in the alternative, 77.

AGENT—*continued.*
principal's rights, where secret profits, douceurs, &c., received by agent, 77, 78, 79.
mistake in written contract, 574.
undisclosed principal; election to charge principal or agent, 574.
ratification of contract of agent, 575.
when set-off against agent is pleadable in action by principal, 782, 783.
pledges, &c. by agents in possession of goods; effect of Factors Act, 869.
fraud of agent, when it invalidates a contract, 78, 657
negligence of agent, principal when liable for, 434.
And see MASTER AND SERVANT; INDEMNITY; BROKER.

AGISTMENT,
claim for the agistment of horses and cattle, 79.
for the keep of horses, 79.
for the use of pasture, 79.
duties and liabilities of an agister of cattle, 79.
agisted cattle, in what cases privileged from distress, 378.

AGREEMENTS,
claim for damages for breach of an agreement not under seal, 80.
claim for damages for breach of an agreement not under seal, setting out the agreement more fully, 81.
claim for a debt due under a covenant in a deed, 81.
claim for damages for breach of covenant, 81, 219, 220.
defence denying the making of an agreement not under seal, 575, 576.
defence denying the agreement, and alleging that it was subject to a formal contract being drawn and approved by the solicitors, 769.
denial of the making of the agreement alleged, with a statement of the agreement actually made, 576.
defence setting forth a material condition which does not appear from the statement of claim, 577.
denial of the execution of a deed, 577.
defence denying the making of the deed alleged, and stating the terms of the deed actually made, 578.
denial of a particular covenant, 578.
defence to an action on a deed, that the alleged deed was only delivered by the defendant as an escrow, 578.
denial of breaches, 579.
mode of pleading agreements, in actions for breach, 45, 47, 51, 80.
setting out verbatim, 7, 8.
rule that consideration should be shown for simple contract, 47, 49, 80.
exception, where consideration presumed, as for a bill, 80, 108.
usually unnecessary to allege consideration for a contract by deed, 47, 49, 80, 81.
when contract made by posting letter of acceptance, 80, 154.
how construed where capable of either of two meanings, 80.
mode of pleading denials of the contract, 575, 576.
pleading defences under the Statute of Frauds, &c., 576, 663.
illegality; conditions precedent; substituted agreement, want of consideration, &c., 576.
alteration of written agreements, 579.
alteration of contract by subsequent agreement, rescission, &c., 580, 755.
seal of corporation or company improperly affixed, 577, 632, 633.
deed executed in blank, and afterwards filled in, 577.
deed delivered only as an escrow, 578.
similar defences as to parol agreements, bills, notes, &c., 578, 612.
stipulations, when to be implied in written agreements, 80, 577.
verbal agreement collateral to written agreement when admissible, 315, 612, 224.

AGRICULTURAL HOLDINGS ACTS, 163, 221, 234, 373, 378, 848, 913.

AIR,
rights to passage of, 422. *See* LIGHTS.

ALIEN ENEMY,
defence that the plaintiff is an alien enemy, 579.
alien enemies, who are, 579.

ALTERATION OF WRITTEN DOCUMENTS,
defence that a written agreement was made void by an alteration, 579.
a like defence in an action on a bill, cheque, or note, 608, 613, 614.
mode of pleading when the final contract is the result of alterations of previous agreements, 48, 49.
alteration of written documents by the plaintiff, or by a stranger with his privity, 579.
alteration by a stranger without plaintiff's privity, &c., 579, 580.
alterations of bills and notes, &c., 580, 608.
alteration by accident or by mistake, 580.
immaterial alteration: what alterations are material, 580, 608.
alteration by consent, stamp, &c., 580, 608.
mode of pleading the defence of alteration, 580, 608.
alteration by one party not avoiding the document for all purposes, 581.

ALTERNATIVE,
forms of alternative defences, 522, 523, 662.
joinder of plaintiffs alternatively entitled, or of defendants alternatively liable, 23, 52, 77: *see* PARTIES.
claims on alternative causes of action, 23.
pleading alternative or inconsistent defences or replies, 524, 547.
claims on alternative covenants or promises, 50, 51, 52.

AMBASSADOR,
privilege of foreign ambassadors, secretaries, &c., of embassies, 581.

AMENDMENT OF PLEADINGS, &c.,
form of an amended statement of claim, 59.
form of an amended defence, 526.
power of the Court or a judge to allow amendments, 14, 15.
amendment of statement of claim or counterclaim without leave; within what time, 14, 15, 540.
time within which the opposite party may in such case plead to the amended pleading, or amend his own pleading, 15, 16.
leave for amending pleadings, when necessary, 15.
application for, and principles on which granted, 15, 16.
time for delivering pleadings amended under an order, 17.
mode of amending pleadings, 17.
amendment of claim under an order does not, in itself, give defendant any further time to plead or entitle him to amend, 16.
amendment of particulars, 40.

AMENDS. *See* TENDER OF AMENDS.

ANCIENT LIGHTS. *See* LIGHTS.

ANIMALS. *See* MISCHIEVOUS ANIMALS; DISTRESS; CATTLE.

ANNUITY, 82, 582. *And see* BONDS.

APOLOGY. *See* DEFAMATION.

APOTHECARY. *See* MEDICAL ATTENDANCE.

APPORTIONMENT, 227, 228. *See* ANNUITY; LANDLORD AND TENANT.

APPRENTICE,
claim by an apprentice against his master on the indenture of apprenticeship, 82.
claim by the master against the father or guardian on the indenture of apprenticeship, 83.
defence to an action by the father of an apprentice for not instructing the apprentice, 582.
liability of father or surety on covenants in the deed, 82.
infant apprentice not liable thereon, unless the contract was reasonable and for his benefit, 82.

APPRENTICE—*continued.*
avoidance after full age; no discharge to father or surety, 83.
effect of removal of business, changes in firm, &c., 83, 582, 583.
no return of premium on death, but allowance on bankruptcy, 83.
covenants in apprenticeship deeds, usually independent, 582.
what are defences to actions on the covenants, 582.
incapacity from illness; death of master or apprentice, 583.

ARBITRATION AND AWARD,
statements of claim:
for debt on an arbitrator's award, 84.
for money due under an award of an umpire, 86.
for non-performance of an award of an arbitrator directing that certain acts should be done by the defendant, 86.
on an award under the Lands Clauses Act, 156.
consolidation effected by the Arbitration Act, 1889...84.
awards on written submissions thereunder, how enforceable, 84.
such submissions usually irrevocable, except by leave, 84, 584.
oral agreements of reference, revocable before award, 84, 584.
action to enforce award, when necessary, 84, 156.
references merely for valuation, not within the Act, 84, 85.
arbitrations under the Lands Clauses Act, &c., 156, 343, 584.
arbitrator disqualified by misconduct, &c., removal, 84.
injunction to restrain arbitration, rarely granted, 85.
action for damages for breach of agreement to refer, 85.
arbitrators' fees; action for; lien; overcharges, 86.
arbitrator not liable for negligence, &c.; valuer may be, 86, 87.
Defences:—I. to actions on awards:
denial of the submission, 583.
denial of the making of the award, 584.
denial that the award was to the effect alleged, 584.
defence that the arbitrator exceeded his authority, 584.
defence of revocation of the arbitrator's authority, 584.
defence to an award under Lands Clauses Act, 638.
defences on ground of invalidity of the award, 583.
collusion or misconduct of arbitrator, 583.
notice of award, not usually a condition precedent, 583.
II. of reference to arbitration:
defence of a reference to arbitration by agreement and of an award thereunder respecting the causes of action, 585.
agreement to refer to arbitration, not in general a defence, 585.
but agreement making ascertainment of amount, &c., by arbitration a condition precedent, may be a defence, 585.
applications for stay of proceedings under s. 4 of the Arbitration Act, 1889...585.
effect of award ascertaining amount, &c., 585.
in what cases award without performance is a defence, 585.
estoppel by an award, 647.

ARRANGEMENTS WITH CREDITORS. *See* BANKRUPTCY *and* COMPOSITION WITH CREDITORS.

ARREST,
claims for malicious arrest: *see* MALICIOUS PROSECUTION.
claims for false imprisonment: *see* TRESPASS TO THE PERSON.
defences justifying arrest for felony, &c., 926, 928.
privilege from arrest, 427.

ASSAULT, 497. *See* TRESPASS TO THE PERSON.

ASSETS. *See* EXECUTORS.

ASSIGNMENT,
statements of claim:
by the assignee of a debt under s. 25 (6) of the Judicature Act, 1873...88.
the like, where the assignment was of a debt due and of other moneys to become due under an agreement, 89.

ASSIGNMENT—*continued.*
statements of claim—continued.
by the assignee of the book debts of a bankrupt on an assignment thereof under the Bankruptcy Act, 1883, s. 56...105.
by the assignee of a debt under the Companies Acts, 1862 to 1890...155.
by the assignee of a policy of life insurance under 30 & 31 Vict. c. 144...206.
by or against the indorsee of a bill of lading, where the property passed by the indorsement, 296, 297, 298.
defences:
denial of the assignment, 586.
defence to an action by an assignee under s. 25 (6) of the Judicature Act, 1873, denying that the assignment was an absolute one, 586.
the like, denying that the assignment was in writing, 587.
the like, denying that notice in writing of the assignment was given to the defendant, 587.
the like, alleging a set-off of a debt which became due from the assignor to the defendant before notice of the assignment, 781.
defence to an action by the original creditor that the debt sued for was absolutely assigned, and notice of such assignment given, under s. 25 (6) of the Judicature Act, 1873, before action brought, 587.
debts and choses in action formerly not assignable at law (with certain exceptions) though assignable in equity, 87.
contracts assignable by law merchant or by special statutes, 87.
what was a valid equitable assignment, 87, 88.
absolute assignment under the Judicature Act, 1873, *s.* 25 (6), *what amounts to*, 89, 586, 587.
what debts and choses in action are unassignable, 586.
notice of such assignment after death of assignor, 587.
set-off of debts due from assignor to defendant before notice of assignment, 587, 588, 781.
other cross-claims against assignor, when admissible as defences, 587.
suing in assignor's name, or adding him as co-plaintiff, 87, 89.
assignment of term of years, or of reversion: see LANDLORD AND TENANT.

ASSOCIATION,
unregistered associations for the purposes of gain, when illegal, 634, 684, 789.

ASSUMPSIT,
former action of, 2, 528.

ASSURANCE. *See* INSURANCE.

ATTACHMENT OF DEBT,
defence of payment to a judgment creditor of the plaintiff, or into Court, 588.
payment or execution under garnishee proceedings in general a discharge of garnishee pro tanto, 588.
effect of garnishee order nisi, *or garnishee order absolute*, 589.

ATTORNEY. *See* SOLICITORS.

AUCTION,
sale of goods by: see AUCTIONEER.
sale of land by, 286, 287: *see* SALE OF LAND *and* AUCTIONEER.

AUCTIONEER,
claim for remuneration for work done as an auctioneer, 91.
claim by an auctioneer against the purchaser for the price of goods sold by auction, 91.
claim by the auctioneer against the purchaser of goods for not taking them away and paying for them in accordance with the conditions of sale, 92.
claim by a vendor against a purchaser of land sold by auction for not completing the purchase, 286.

AUCTIONEER—*continued.*
auctioneer's special property in goods, and lien for charges, 90.
auctioneer receiving deposit as stakeholder, 91, 287.
effect of signature of memorandum by auctioneer or his clerk, in cases within the Statute of Frauds, 91.
liability for negligence, where memorandum insufficient, 91.
auctioneer, when liable to action for conversion of goods, 91, 350.
auctioneer contracting in his own name, actions by or against, 91, 92.
revocation of bid or offer to sell, 92.
advertisement of sale, withdrawal of goods after, 92.
no right of resale on buyer's default apart from conditions, 92.
And see SALE OF LAND.

AVERAGE,
what is general average; what is particular average, 203, 692.

AVOWRY. *See* REPLEVIN.

AWARD. *See* ARBITRATION.

BAILIFF. *See* DISTRESS; PROCESS; SHERIFF; REPLEVIN, *and* PUBLIC AUTHORITIES.

BAILMENTS,
statements of claim:
by a warehouseman for keeping and taking care of goods, 93.
by a wharfinger for wharfage and warehouse room, 93.
against a picture dealer for not taking proper care of a picture entrusted to him for the purpose of being cleaned, 94.
against a livery stable keeper for not taking care of a horse, 94.
against a railway company for not safely keeping goods left in the cloak room at one of their stations, 95.
against a bailee for negligence in keeping goods, 334.
by a gratuitous bailee of a horse for injuries caused by its viciousness, 335.
defences:
defence to an action by a warehouseman for reward, denying the warehousing, and further denying that the warehousing was at the request of the defendant, 589.
defence to a like action, disputing the amount charged, 590.
defence to an action against a bailee, denying the alleged purpose or terms of the bailment, 590.
defence to an action for not redelivering on request, denying the request, 590.
defence to an action for not taking care of the goods and for not redelivering them to the plaintiff, denying the alleged breaches, 590.
contract of bailment, 93.
lien for charges, in what cases, 866, 867, 868.
liability of railway company as to goods deposited in cloak-room; conditions, when binding, 95.
bailor of carriages for hire; duty as to fitness, 334.
gratuitous bailments; duties and liabilities thereunder, 334.
bankers not gratuitous bailees of customers' securities, 334.
gratuitous lending of chattels, 334, 335.
carriers, after completion of contract, becoming involuntary bailees, 147.
rights and duties of involuntary bailees, 147, 336.
And see CONVERSION; DETENTION; CARRIERS.

BANKERS,
claim by bankers for money due to them from a customer, 96.
claim against bankers for not paying a customer's cheque, 98.
claim by the public officer of a banking co-partnership suing as nominal plaintiff under a statute, 98.
claim against the public officer of a banking co-partnership sued as nominal defendant, 99.
actions by or against incorporated banking companies, banking co-partnerships suing or sued by public officer, 95, 96.
relation of banker and customer; duty to pay customer's cheque; refusal to pay, when justified, 96.

BANKERS—*continued.*
damages in actions for refusing to pay cheques, 96.
a mere payee or holder cannot maintain such action, 97.
banker cannot recover from payee money paid by mistake as to assets, 97, 260.
branch banks distinct from principal bank for some purposes, 96.
payment of forged cheques, &c.; customer's negligence, 97.
provisions of Bills of Exchange Act, 1882, *as to crossed cheques*, 97, 127, 128.
when protected, as collecting only for customer, 97.
moneys paid in by several persons to joint account, not usually repayable to one only, unless a surviving partner, 98.
lien of bankers, 867.
loss of customer's documents, liability as bailees, 334.
defences under the Statute of Limitations, 591, 717.
See BILLS OF EXCHANGE; GUARANTEES.

BANKRUPTCY,
statements of claim:
by a trustee in bankruptcy for a debt due to the bankrupt before the bankruptcy, 99.
by a trustee in bankruptcy for breach of a contract made with the bankrupt before his bankruptcy, 102.
by a trustee in bankruptcy for a debt which accrued to him as such trustee after the bankruptcy, 103.
by a trustee in bankruptcy and a solvent partner of the bankrupt for a debt due to the firm, 103.
by a trustee in bankruptcy of a sole plaintiff where the trustee has been substituted for him as plaintiff before delivery of a claim, 104.
by a trustee in bankruptcy upon a bill of exchange drawn by the bankrupt, 121.
by the assignee of book debts sold to him by a trustee in bankruptcy, 105.
by a trustee in whom the property of a debtor has vested under a scheme of arrangement in pursuance of the Bankruptcy Acts, 1883 and 1890, for a debt due to a debtor, 106.
by a trustee in bankruptcy to recover damages for a wrong committed before the bankruptcy and affecting the bankrupt's estate, 335.
defences, &c.
defence of the bankruptcy of the defendant, 591, 592.
reply thereto that the debt was incurred or forbearance thereof was obtained by the fraud of the defendant, 593.
defence of the bankruptcy of the plaintiff, 593.
defence that the alleged cause of action vested in the trustee of the plaintiff's property under a scheme of arrangement, 594.
defence of a composition or scheme of arrangement under the Bankruptcy Act, 1890, s. 3...594.
a like defence under s. 23 of the Bankruptcy Act, 1883...595.
defence of a composition with creditors apart from the Bankruptcy Acts, 639.
reply that the deed was not registered, 641.
defence to actions brought by a trustee in bankruptcy for debts due to the bankrupt of a set-off of debts due from the bankrupt to the defendant, 778, 779.
defences to actions by a trustee in bankruptcy for wrongful conversion of goods, 823.
on presentation of petition, receiving order, 99.
after petition, action against debtor may be stayed, 32, 99, 591.
actions should be brought or continued by debtor until adjudication, 102, 593.
adjudication of bankruptcy; vesting of property in trustee, 99.
official receiver acting as trustee; his powers, 100, 101, 102.
relation back of bankruptcy and of trustee's title, 100.
what property passes to trustee, 99, 100, 102.
bankrupt's personal earnings during bankruptcy so far as necessary for support of himself and his family excepted, 100.
goods in order and disposition; reputed ownership, 100.
property acquired or contracts made by undischarged bankrupt, actions as to; dealings with third persons, 100, 101, 102 594

BANKRUPTCY—*continued.*
actions by or against trustee; official name, &c., 101.
solvent partner of bankrupt; action in names of trustee and solvent partner, 103.
bankruptcy of plaintiff or defendant after action brought; change of parties, &c., 104, 105; *see* CHANGE OF PARTIES.
rights of action for personal injuries do not pass to trustee, 101, 335.
a breach of promise to marry considered a personal injury, 101.
actions by bankrupt on contracts made during the bankruptcy, 101, 102, 593, 594.
executory contracts not depending on personal qualifications, completion of, by trustee, 102.
disclaimer by trustee of leases, unprofitable contracts, &c., 102, 713.
sale and assignment of book debts by trustee; action by assignee, 105.
bankrupt is not released until the order of discharge, 99, 592.
what debts or liabilities are not discharged thereby, 591, 592.
joint contractors or sureties not thereby discharged, 592.
subsequent promise to pay debt barred by bankruptcy or composition; not actionable, unless made on new consideration, 592.
discharge by foreign bankruptcy, 593.
debt incurred by fraud, &c., not released by order of discharge, 593.
effect of bankruptcy of the plaintiff in an action, 593, 594.
bankrupt, undischarged, when he may sue if trustee does not intervene, 102, 335, 594.
defences of set-off and mutual dealings in actions brought by the trustee, 778, 779.
compositions or arrangements under the Bankruptcy Acts, 106, 594.
what debts released thereby, 594, 595.
no revival of creditor's original debt or claim on default in making the stipulated payments, 106, 107, 595.
creditor's remedy in such case, by application to the Court, 107.
staying actions by creditors for their original debts, 107, 595.
pleading such compositions or arrangements as a defence, 595.
rights of trustee thereunder, 106, 107.
promise by compounding debtor to pay one creditor more than the others is a fraud on the others, 640.
composition or arrangement after adjudication, 107, 595.
compositions and arrangements with creditors independently of the Bankruptcy Acts, 639, 640, 641.
action by trustee for wrongs affecting bankrupt's property, 335.
when bankrupt may himself sue for wrongs, 335, 336.
action for maliciously taking bankruptcy proceedings, 335.

BATTERY, 496. *See* TRESPASS TO THE PERSON.

BETTING. *See* GAMING.

BILL OF SALE,
claim by grantee of bill of sale for conversion, 351.
defence to a claim for trespass, justifying under bill of sale, 816.
Bills of Sale Acts; that of 1878 *deals with bills of sale in general*, 816.
that of 1882, *with bills of sale given as security for payment of money*, 816.
what documents are within the Bills of Sale Acts, 816.
failure to register, effect of, 816, 817.
bill of sale of stock in trade which is to be carried on, effect of, 351.
power of sale not implied in bill of sale under Act of 1882, 264.
mode of pleading justification of entry under, 939, 816.

BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES.
I. *Inland Bills of Exchange.*
statements of claim:
by drawer against acceptor on a bill payable to drawer, 108, 110.
by drawer against acceptor on a bill payable on a future event which is certain to happen, 110.
by drawer against acceptor on a bill accepted payable on a future event or contingency, 111.

BILLS OF EXCHANGE, &c.—*continued.*
I. *Inland Bills of Exchange—continued.*
statements of claim—continued.
by drawer against acceptor on a bill accepted payable only at a particular specified place, 111.
by drawer against acceptor on a bill payable to a third person, 112.
by payee against acceptor, 112.
by indorsee against acceptor, 112, 114.
by indorsee against acceptor and drawer severally, 114.
by payee against drawer for default of acceptance, 115.
by indorsee against drawer for default of acceptance, 116.
by payee against drawer for default of payment, 116.
by payee against drawer for default of payment, on a bill drawn payable at a particular place, 117.
by payee against drawer for default of payment, with an excuse for not giving notice of dishonour, 117.
by payee against drawer for default of payment, alleging notice of dishonour, and also, as an alternative case, facts dispensing with notice of dishonour, 119.
by indorsee against drawer for default of payment, on a bill payable to the drawer or order, 119.
by indorsee against indorser for default of acceptance, 119.
by indorsee against indorser for default of payment, 120.
by executor or administrator of drawer against acceptor, 120.
by executor or administrator of indorsee against acceptor, 120.
by drawer against executor or administrator of acceptor, 120.
by indorsee of executor or administrator of drawer against acceptor, 121.
by trustee of property of bankrupt drawer against acceptor, 121.
by a surviving drawer against acceptor, where the other drawer has died before action, 121.
against a surviving joint acceptor, 121.
effect of the Bills of Exchange Act, 1882...108.
application of the Act to cheques and promissory notes, 125, 129.
joinder of parties in actions on bills or notes, 108.
actions by or against partners, firm-names, &c., 265.
days of grace, 108, 125.
not necessary to allege consideration, 108.
alternative claims on the consideration and on an account stated, when advisable, 108.
setting out doubtful instruments verbatim, 108.
what claims may be specially indorsed on the writ, 65, 108, 109.
inland bills, what, 108.
bills or notes payable on demand; demand before action unnecessary, 109, 129.
bills or notes payable at a fixed period after demand or sight; demand or sight necessary, 109, 130.
"*month*" *in a bill or note means calendar month*, 108.
measure of damages in action on bill; liquidated damages which may be specially indorsed, 65, 68, 109.
interest, expenses of noting, &c., 109, 110, 122.
noting or protest of inland bills, not necessary, 110.
bills or notes drawn or accepted payable on a future event; distinction as to contingency, 110.
acceptance, general or qualified; effect of qualified acceptance, 110, 111.
bills or notes payable at a particular place, 111.
presentment not necessary against acceptor on general acceptance, 111.
indorsement; imports delivery and transfer of property, 112, 113.
delivery or transfer without indorsement, 112, 113.
indorsement in blank, 113, 131.
conditional or restrictive indorsements, 113.
fictitious or non-existing payee, 113.
bills or notes payable to bearer, transferable by delivery, 113.
effect of indorsing them, 113, 119.
striking out intermediate indorsements, 113.
presentment for payment, when necessary, 111, 114, 117, 126, 130.
pleading excuses for non-presentment, &c., 115, 116.
presentment for acceptance; when excused; pleading excuses, 115, 116.

BILLS OF EXCHANGE, &c.—*continued.*
I. *Inland Bills of Exchange—continued.*
statements of claim—continued.
notice of dishonour by non-acceptance; by non-payment, 116, 117.
what sufficient notice, and when excused; pleading notice of dishonour or matter of excuse, 117, 118.
what is evidence of such notice or of waiver, 118.
acceptor of bill, or maker of note, not entitled to notice of dishonour, 118.
defences, &c.:
denial of the drawing of the bill, 596.
denial of the acceptance of the bill, 596.
denial of the indorsement of the bill to a party under whom the plaintiff claims, 596.
denial of the indorsement of the bill to the plaintiff, 596.
defence by an acceptor that the bill was accepted payable on an event or contingency which has not happened, 597.
a like defence, setting out the acceptance *verbatim*, 598.
defence by an acceptor that the bill was accepted payable only at a particular place specified in the acceptance, and was not presented there, 598.
defence to an action for default of acceptance, denying the presentment for acceptance, 598.
defence to a like action, denying the default of acceptance, 598.
defence to an action for default of payment, denying the presentment for payment, 598.
defence to a like action, denying that the bill was duly presented, 599.
denial of due notice of dishonour, 599.
defence that the plaintiff was not the holder, 599.
defence that the defendant accepted the bill for the plaintiff's accommodation, 599.
defence that the defendant accepted the bill for the accommodation of the drawer, who indorsed it to the plaintiff without consideration, 600.
defence that the bill was accepted in payment for goods sold, which the plaintiff failed to deliver, 600.
defence to an action by indorsee against acceptors of failure of consideration, and that the bill was indorsed to plaintiff when overdue, without consideration and with notice, 601, 602.
defence to an action by indorsee against acceptor that the bill was accepted in payment for goods sold by the drawer which he failed to deliver, and that the bill was indorsed by the drawer to the plaintiff, without consideration, or with notice, or when overdue, 601.
defence to an action by indorsee against acceptor that the defendant was induced to accept the bill by the fraud of the drawer, who indorsed it to the plaintiff without consideration, or with notice, or when overdue, 603.
defence by the acceptor that the bill was accepted without consideration, and delivered to the drawer for the purpose of his getting it discounted, and was indorsed by him to the plaintiff in fraud of that purpose, and without consideration, or with notice, or when overdue, 604.
defence by the drawer that he drew and indorsed the bill without consideration, for the purpose of getting it discounted, and that it was negotiated in fraud of that purpose, and came to the plaintiff without value, 604.
defence that the bill was given for an illegal consideration, 604.
defence that the bill was accepted for money won by gaming, &c., 670. *See* GAMING.
defence in an action by the indorsee against the indorser of a bill that the plaintiff and drawer are the same person, 605.
reply to the preceding defence, that the plaintiff indorsed the bill without consideration for the purpose of the defendant indorsing it to him as surety for the acceptor, and the defendant indorsed it accordingly, 605.
defence that the defendant was induced to accept the bill sued on and others in payment of the price of a business by fraud, and counterclaim for return of the bills and damages, 606, 607.
defence of an alteration of the bill, 608.
defence that the bill has been lost by the plaintiff, 608.
defence of a discharge of the bill by absolute renunciation in writing, 609.

BILLS OF EXCHANGE, &c.—*continued.*
I. *Inland Bills of Exchange—continued.*
defences, &c.—continued.
defence of an absolute renunciation in writing by the plaintiff of the defendant's liabilities on the bill, 609.
defence, in an action against the drawer, that the plaintiff agreed with the acceptor to give him time for payment, 609.
defence of payment by the defendant to the plaintiff. *See* PAYMENT.
defence to an action by the indorsee against the drawer of payment by the acceptor, 610.
defence that the bill was duly paid, and after payment it was indorsed to plaintiff, 611.
defence of payment to a prior holder not mentioned in the statement of claim, and subsequent indorsement to the plaintiff after maturity, 611.
defence in an action by the drawer against the acceptor of a contemporaneous agreement in writing between the parties for the renewal of the bill on request, 611.
defence to an action for the price of goods that the goods were to be paid for by a bill of exchange, and that the period for which the bill was to run has not expired, 759.
defences in denial must deny some matter of fact, 596.
estoppels of drawer, acceptor, and indorser, 596, 597.
who is an indorser, what an indorsement, 112, 113, 119, 597.
every party to a bill primâ facie *deemed a party for value*, 599.
valuable consideration, what it means, 600.
accommodation party, who is; accommodation bills, 600.
signature of bills, what sufficient signature by agents, &c., 574.
bills of corporations or companies, 632.
signing bill otherwise than as drawer or acceptor, 597.
effect of signature in blank; filling up omissions, 597.
stamp defects; not in general remediable after issue, 597.
stamp objections not usually pleaded, 597.
between what parties absence of consideration is a defence, 599, 600.
liability of "accommodation party" to holder for value, 600.
total failure of consideration, when a good defence, 601.
partial failure of consideration, may be ground for counterclaim where the action is between immediate parties, 601.
acceptance procured by fraud, 597, 603.
holder of bill, 599, 603, 604.
rights of "a holder in due course," 603.
onus of proof, when shifted by evidence of previous fraud, duress, or illegality, 604.
illegality; illegal consideration not severable, 605, 682.
bill reindorsed to a previous indorser; circuity of action, 605.
alteration in a bill or note, what material, 608.
effect of, as to stamp, and as to pleading, 608.
defence of lost bill, &c.; indemnity under judge's order, 608, 609.
discharge by absolute renunciation in writing, or by cancellation, 609.
effect upon the liability of other parties of giving time for payment of a bill, 609, 610.
payment "in due course," what, 610.
effect of payment by drawer or indorser, 610.
negotiation of bill when overdue, 611.
bills payable on demand, when deemed overdue, 611.
effect of agreements relating to bills or notes upon the rights of the parties, 611, 612.
contemporary verbal agreement cannot vary rights, 611.
defence that bill was accepted and delivered merely as an escrow, 612.

II. *Foreign Bills of Exchange:*
statements of claim:
by drawer against acceptor, 122.
by drawer against acceptor where the bill was drawn in a set, 122.
by payer supra protest for honour of drawer against acceptor, 123.
by payee against acceptor supra protest, 123.
by indorsee against acceptor on a foreign bill payable at usances, 123.

BILLS OF EXCHANGE, &c.—*continued.*
II. *Foreign Bills of Exchange—continued.*
statements of claim—continued.
by payee against drawer for default of acceptance, 124.
by indorsee against drawer for default of payment, 125.
bills and notes other than inland are foreign, 122.
by what law governed, 122.
stamping, 122.
what claims may be specially indorsed, 124.
statement of claim should show the bill to be foreign, 122.
interest on foreign bills, 122.
bills drawn in a set, 122.
acceptance or payment supra protest, 123, 124.
intervention for honour, 123, 124.
usances, 123.
protest of foreign bill, when and against whom necessary, 124.
excuses for non-protest or delay of protest, 124.
protest unnecessary on dishonour of a foreign note, 124.
claim for re-exchange and interest thereon, 124.
defence that an indorsement was invalid by foreign law, 612.

III. *Bankers' Cheques:*
statements of claim:
by the payee of a cheque against the drawer, 125.
by bearer or indorsee of cheque against drawer, 126.
by indorsee of cheque against indorser, 127.
by bearer or indorsee of a crossed cheque against drawer, 127.
defences:
denial of the drawing of the cheque, 612.
defence of an alteration of the cheque, 613.
defence that the note or cheque was drawn for money lost to the plaintiff upon a wager, 669.
provisions of the Bills of Exchange Act, 1882, *as to bills payable on demand, in general applicable to cheques*, 125.
stamps, postdated cheques, &c., 125.
countermand of payment; death of drawer, 125.
when subject of a valid donatio mortis causa, 857.
banker, when a holder for value of cheques paid in by customer, 97, 125.
effect of delay in presenting cheque for payment, 125, 126.
what is reasonable time for presentment, 126.
notice of dishonour; pleading excuses, 126.
indorsement, 112, 126.
crossed cheques, provisions of the Bills of Exchange Act, 1882...96, 97, 127, 128.
general crossing; special crossing; who may cross, 127, 128.
effect of adding "not negotiable," 128.
payment of crossed cheques; banker, when protected, 128: *and see* BANKERS.

IV. *Promissory Notes:*
statement of claim:
by payee against maker, 129.
by payee against maker on a note payable on demand, 129.
by payee against maker on a note payable at a fixed period after demand, 130.
by payee against maker on a note made payable at a particular place in the body of it, 130.
by payee against maker on a note payable by instalments in which the whole sum is made payable on any default, 130.
by payee against the makers of a joint and several promissory note, 131.
by indorsee against maker, 131.
by indorsee against payee, 131.
by indorsee against indorser, 132.
defences:
denial of the making of the note, 613.
defence that the defendant made the note for the plaintiff's accommodation, 614.

BILLS OF EXCHANGE, &c.—*continued.*
IV. *Promissory Notes—continued.*
defences—continued.
defence that the note was made in payment for goods sold which the plaintiff failed to deliver, 614.
defence of an alteration of the note, 614.
defence that the note was made for money lost to the plaintiff upon a wager, 669.
defence to an action against one of several joint makers of a promissory note that the defendant made the note as surety only for another maker, to whom the plaintiff gave time, 614.
promissory note; definition; note incomplete till delivery, 129.
option of treating certain instruments either as bills or as notes; fictitious drawee, &c., 129.
provisions of the Bills of Exchange Act, 1882, *as to bills, how far applicable to notes*, 129.
stamps on promissory notes, 613.
what claims may be specially indorsed, 129.
notes payable "on demand"; statute of limitations, 129, 721.
interest thereon, from what time it runs, 129, 130.
when to be deemed overdue as against indorsee, 129, 613.
notes payable at a fixed period after demand or sight, 130.
presentment for payment, necessary as against indorser, 130, 613.
presentment, where note made payable at a particular place, 130.
excuses for non-presentment; pleading excuses, 114, 130.
indorsement, 131.
effect of unreasonable delay in presenting after indorsement, 613.
note may be made payable by instalments, 130.
foreign promissory notes, 122.
estoppel of maker of note, 613, 596.
joint promissory note; surety; defence of time given to principal without surety's consent, 614, 615.
reservation of remedies against surety, 615.
V. *Miscellaneous Statements of Claim relating to Bills.*
for the breach of a promise to retire a bill of maturity in consideration of a renewal, 132.
by an agent against his employer for breach of agreement to accept a draft for the price of goods bought under the employment, 73.
by the acceptor of an accommodation bill on the contract to indemnify him, 195.
contemporaneous agreement to renew should be in writing, 132, 611, 612.

BILL OR NOTE TAKEN FOR THE DEBT,
defence that the defendant accepted on account of the debt a bill of exchange, which is still running, 615.
a like form, where the bill has arrived at maturity, and has been duly paid, 616.
a like form, stating that the bill was indorsed away by the plaintiff, and is still outstanding, 617.
a like form, stating that the bill has been lost by the plaintiff, 617.
defence that the defendant indorsed to the plaintiff on account of the debt a bill accepted by a third party, 617.
reply to the last preceding defence, that the bill is overdue and dishonoured, 617.
giving a negotiable security on account of a debt; when a defence, 615.
good defence plaintiff no longer holder, 615.
defence of lost note, indemnity under judge's order, 609, 615.
how pleaded and replied to; where defendant primarily liable on bill; where only secondarily liable, 616.
no defence to an action on a bond or other specialty, or for rent, previously to the Judicature Acts, 615, 616.
now affords evidence of agreement to suspend remedy, 616.
promissory note given for judgment debt, 616.
bills or notes taken in satisfaction and discharge of debt, 616.

BILLS OF LADING. *See* SHIPPING.
BOARD AND LODGING, 218: *see* LANDLORD AND TENANT.

BONDS,
statements of claim:
for debt due on a common money bond, 135.
on a bond without assigning a breach, 135.
special indorsement for the amount of a common money bond, 136.
on an annuity bond stating the condition and assigning a breach, 136.
on a bond with a special condition setting out the condition and assigning breaches, 136.
claims against an heir on the bond of his ancestor, 182.
on a replevin bond, 137.

defences:
denial of the execution of the bond, 618.
denial that the bond is correctly stated in the statement of claim, 578.
defence that the bond was delivered merely as an escrow, 578.
defence to an action on a bond with a special condition denying the alleged breaches, 619.
defence to a like action of matters excusing performance of the condition, 619.
defence to a like action, where the condition is not set out in the claim, stating the condition and alleging performance generally, 619.
defence to an action on a common money bond of payment on the day named in the bond, 620.
defence to a like action of payment after the day named in the bond, 620.
defence to a like action of payment into Court, 620.
defence of payment into Court in an action upon a bond with a special condition, 620.
defence of set-off on a bond, 779.
bonds; penalty recoverable at common law; relief against the penalty in equity; by statute, 133.
common money bonds; payment post diem; *payment into Court of the principal and interest*, 133, 620.
bonds with special conditions; assignment of breaches; suggestion of breaches; inquiry and assessment of damages; stay of execution on payment into Court of the damages; judgment for penalty as security for future breaches; scire facias *on; entry of judgment*, 133, 134, 135, 619, 621.
distinction between common money bonds and bonds with special conditions, 134.
covenants and agreements with penalties for non-performance, 133, 134.
actions on bonds with special conditions; procedure and mode of pleading, 134, 135, 136, 621.
assignment of breaches; suggestion of breaches, 135, 136.
scire facias *as to subsequent breaches*, 135.
actions on common money bonds; interest; special indorsement, 68, 135.
liability on bond is limited to amount of penalty, 135.
injunction to enforce contract contained in a bond, 135.
bonds conditioned to obey an injunction, 134.
annuity bonds, 134, 136.
replevin bonds, 137.
single bonds, 136.
defences in actions on bonds, how pleaded and replied to, 619.
suggestions of breaches; cannot be pleaded to, 619.
payment into Court in actions on bonds with special conditions, 621.

BOOK. *See* COPYRIGHT.

BREACH,
of contract, mode of alleging, 50, 51.
particulars of the breaches should be given, 50, 51.
assignments and suggestions of breaches in actions on bonds; see BONDS.

BREACH OF PROMISE OF MARRIAGE. *See* MARRIAGE.

BREACH OF THE PEACE,
defences justifying an assault or arrest to prevent, 926, 928.
private person, when justified in arresting another for, or to prevent, 926.
constable, when justified in arresting, 926.

BROKER,
claim by a broker for commission, &c., 137.
claim against a stockbroker for not purchasing according to order, 310.
claim against a broker who, by the usage of a particular trade, is liable as a principal for not accepting goods sold, 138.
defence to a claim by a broker for commission, &c., 621.
distinction between broker and factor, 137.
usages of particular trade or market, 137, 622.
when broker is personally liable, 137.
wagering contracts made by broker, 137, 138.
must in general not act as principal, 138.
title to be indemnified by his principal, 138.
broker making contract at variance with that authorised by employer: rights and remedies of employer, 621, 622.
And see AGENT, SHARES, *and* STOCK EXCHANGE.

BUILDING CONTRACT, 243, 326, 803. *See* WORK.

BUILDING SCHEME, 226.

BUILDING SOCIETY, 301. *See* SOCIETIES.

CAB,
a cab proprietor is liable for negligence of his driver, 434.

CALLS. *See* COMPANY; SHARES.

CANAL. *See* CARRIERS; WATER.

CARRIERS.
I. *Carriers of Goods by Land.*
statements of claim in contract:
for the carriage of goods, 141.
the like by a railway company, 142.
by a carrier for the carriage of a horse, and for expenses occasioned by non-removal thereof within a reasonable time after arrival at destination, 147.
against a carrier for not carrying and delivering goods, 143.
against a carrier for injury to goods, 145.
against a carrier for not carrying and delivering within a reasonable time, 145.
against a carrier for damage done to furniture in removing it, 145.
against a carrier for not carrying and delivering goods in time for a market, 146.
against a railway company to recover overcharges extorted contrary to s. 90 of the Railway Clauses Consolidation Act, 1845...147.
statements of claim in tort:
against a common carrier for refusing to carry goods, 336.
against carriers for losing goods, 336.
against a carrier for misdelivery of goods, 337.
against a railway company for personal injuries, 337: *see* NEGLIGENCE; EXECUTORS.
duties of carrier at common law; implied contract with carrier, 139, 141—143, 336, 337.
statement of claim against carriers; may in general be framed either in contract or in tort, 139, 337.
test of action being of contract or of tort, 139, 140.
effect of entrusting to a carrier goods or passengers to be carried, 139, 337.
mode of charging liability of carrier, 139, 140.
parties in actions against carriers, 140, 141.
in whose name action should be brought; when the consignee should sue, and when the consignor, 140.
waiver of lien, a consideration for express or implied promise, 140, 141.
loss of passenger's luggage; who to sue for, 141, 150, 151.
parties to be made defendants, 142, 143, 625.
duties of carriers of goods by land, 141.
acts of God, carriers not liable for, 141, 142.
not liable for damage caused by defects of the thing carried without default on their part, 142.

CARRIERS—*continued.*
I. *Carriers of Goods by Land—continued.*
common carriers, who are, 142.
when justified in refusing to carry, 142.
railway and canal companies; special contracts carying liability; conditions under the Railway and Canal Traffic Act, 1854...142, 627—630.
railway companies carrying over other companies' lines, 142, 143, 629.
carrying from or to a place beyond the realm, 143.
delivery should be within reasonable time, 143.
Railway and Canal Traffic Acts, &c.; companies to give reasonable facilities for traffic; prohibition of undue preferences, &c.; railway commissioners, 143, 144, 623.
companies to charge all persons equally; actions for overcharges, 143, 144, 147, 148, 623.
no action lies for contravention of Railway and Canal Traffic Acts as to undue preferences, 143, 144.
damages against carriers, what recoverable; remoteness; effect of notice, &c., 144, 146.
public carriers in the absence of stipulation liable as though common carriers, 145.
after completion of the contract of carriage, carriers are only liable for negligence as bailees, 147, 336.
action for expenses reasonably incurred as such bailees, 147.
misdelivery of goods by carrier may be a conversion, 336, 346.

defences, &c., in actions of contract:
defences to an action for the carriage of goods, denying that the goods were carried for the defendant, 622.
defence to an action against a carrier, denying the receipt of the goods on the terms alleged, with a statement of the terms on which they were received, 622.
defence by carriers, showing that the damage or loss occurred through no fault on their part, 622.
the like, showing that the damage or loss occurred through defective packing, 623.
denial of alleged damage to goods, 623.
denial of failure to deliver within a reasonable time, 623.
denial of an alleged contract to deliver in time for a particular market, 623.
defence to an action against a railway company for overcharges that the alleged overcharges were paid voluntarily and with full knowledge of the facts, 623.
defence to an action under s. 90 of the Railways Clauses Consolidation Act, 1845, that the charges were not contrary to that enactment, 623.
defence that the goods were within the Carriers Act, 1830, and were above the value of £10, and were not declared or insured, 624.
reply to a defence under the Carriers Act, 1830, that the loss was occasioned by the felonious acts of the defendants' servants, 626.
defence to an action against a railway company for loss of or injury to goods that the goods were received and carried under a special contract exempting the defendants from liability under the Railway and Canal Traffic Act, 1854...627.

defences in actions of tort:
denial that the defendant was a common carrier, 817.
defence to an action for refusing to carry that the plaintiff was not ready to pay the carriage, 817.
denial of alleged negligence, 884.
defence to an action for detention that the goods were detained in exercise of a right of lien, 866.
no defence to action for charges that they are contrary to s. 2 of the Traffic Act, 1854...623.
the Carriers Act; articles to be declared; increased charges; notices of increased rates; special contracts, &c., 624, 625.
when unnecessary to join partners as defendants, 625.
felony of servants, 625, 626, 627.
what articles are within the Act, 625, 626.

CARRIERS—*continued.*
I. *Carriers of Goods by Land—continued.*
carrier bound to demand increased charge on declared value, 626.
the Act only applies to carriage by land, 624, 625.
servants of sub-contractors, &c., 626, 627, 629.
special contracts with carriers, 627—630.
what are reasonable conditions under Railway and Canal Traffic Act, 1854...627, 628.
effect of alternative rates of charge, 628.
passengers' luggage, 630, 631.
the Act does not apply to goods merely received for safe custody, 630.
loss or injury from accident, or from plaintiff's default, 631.
loss or injury from defective packing or inherent vice or defect of the thing carried, 142.
limitation of liability as to horses, cattle, sheep, and pigs under Railway and Canal Traffic Act, 1854...627, 629.
lien of carrier, 868.
II. *Carriers of Passengers, and their luggage.*
statements of claim:
by a passenger against a railway company, for personal injuries sustained in a collision, 337.
forms of statement of claim in actions against railway companies for personal injuries sustained from other kinds of negligence, 444, 445: see NEGLIGENCE.
against carriers by the executor or administrator of a passenger killed by the negligence of the defendants, under 9 & 10 Vict. c. 93...387.
against a railway company for loss of a passenger's luggage, 150.
defences:
denial that the plaintiff was a passenger, 630.
denial of the alleged want of care and skill, and of the alleged injuries, 630.
defence of a special contract by which the passenger agreed to relieve the defendants from all liability for personal injury, 630.
denial of alleged negligence, 630, 884.
defence of contributory negligence to an action for damages for personal injuries, 818.
defence to an action for loss of a passenger's luggage that the loss arose from the conduct of the plaintiff, 631.
defence to a like action that it was not ordinary passengers' luggage, 631.
in what cases carriers may refuse to receive a passenger, 148.
carriers of passengers, liable only for negligence, 148, 149.
action by passengers; who to sue or be sued, 141, 143, 149.
duty to use care arises from the mere fact of receiving a person as a passenger, 337.
railway company, liable for negligence of other companies on the journey contracted for, 148, 149.
special contracts relieving railway companies from liability for negligence, 148, 149, 630, 631.
no warranty by carrier that the carriages are road-worthy, but liability for discoverable defects, 148, 149.
railway company bound to provide reasonable accommodation, 148, 149.
railway company, duty of as to crossings at stations, 394.
implied contract to carry within reasonable time; special conditions, when binding, 149.
damages for not carrying or for delay, 149, 150.
damages for personal injuries by negligence, 150.
actions by executors, &c., for death caused by negligence, 387: *see* EXECUTORS.
liability for loss of or injuries to passengers' luggage, 150, 151, 631.
special conditions as to luggage within the Railway and Canal Traffic Act, 1854...631.
railway company not usually liable for merchandise brought as personal luggage, 150, 151.
personal or ordinary luggage, what, 151.
receipt at commencement and delivery of luggage at end of journey, 150, 151.
III. *Carriers by Water. See* SHIPPING.

CATTLE. *See* AGISTMENT; COMMON; DISTRESS; REPLEVIN; TRESPASS.

CERTIFICATE,
want of, a defence to solicitor's action for costs, 790.
also to action by apothecary for charges, 252.
architect's certificate, when a condition precedent to actions by a builder or contractor, 326, 802.

CERTIORARI,
commencements of statements of claim in actions removed by certiorari from a County Court or other inferior Court, 64.
certiorari in actions under the Employers' Liability Act, 1880...425.
statement of claim in action under the Employers' Liability Act, after removal into High Court by certiorari, 435.

CHAMPERTY. *See* MAINTENANCE.

CHANGE OF PARTIES,
on marriage, death, bankruptcy, &c., 30—33.
how shown on pleadings, 32.

CHARACTER,
in which parties sue or are sued, 44.
representative character must be stated in the writ and statement of claim, 44.
denial thereof, or refusal to admit, must be specific, 44, 527, 528, 648.
defences of set-off must be in the same character as that in which the parties sue or are sued, 773, 774.
the same rule applies in general to counterclaims, 538, 539.
injuries to character: see DEFAMATION.
character of servant, 835.
representations as to character or credit, 406, 407: *see* FRAUD.

CHARTERPARTY. *See* SHIPPING.

CHEQUES, 125, 612. *See* BILLS OF EXCHANGE, &c., *and* BILL OR NOTE TAKEN FOR THE DEBT.

CHOSE IN ACTION. *See* ASSIGNMENT; HUSBAND AND WIFE, &c.

CHURCH. *See* DILAPIDATIONS, 372; TRESPASS TO LAND, 932, 940.

CIRCUITY OF ACTION,
defences on the ground of, 605, 754.

CLAIM,
of debt or damages in statement of claim, 54—57.
in counterclaims, 542.
for an injunction, 414.
See DAMAGES; RELIEF OTHER THAN DAMAGES; EQUITABLE CLAIMS.

CLASS,
claim by a person suing on behalf of a class, 62.
suing or being sued on behalf of a, 25, 26, 153, 340.

CLASSIFICATION OF ACTIONS, 2.

CLUB,
actions by some of the members on behalf of all, 25.
liability of members, 273.

COGNIZANCE. *See* REPLEVIN.

COLLISION. *See* CARRIERS; NEGLIGENCE; SHIPPING, &c.

COLONIAL LAW, 655. *See* FOREIGN LAW.

COMMENCEMENTS OF STATEMENTS OF CLAIM, 35, 42, 46, 50, 59—64.

COMMON,
statements of claim:
for a disturbance of the plaintiff's right of common or pasture by digging up the turf and soil and enclosing, 338.
for a disturbance of a right of common of pasture by wrongfully putting cattle on the common, 341.
for disturbing a right of pasturage, 341.
by freehold and copyhold tenants of a manor on behalf of themselves and other tenants for disturbing rights of common, 341.
defences to actions for disturbance to common:
denial of the alleged acts of disturbance, 818.
denial of the plaintiff's possession of the land in respect of which he claims the right of common, 818.
denial of a general averment of the plaintiff's right of common, 818.
defences setting up a right of common in actions for trespass to land, &c.:
defence alleging a right of common of pasture under the 2 & 3 Will. IV. c. 71, s. 1...819.
defence by a freeholder of a right of common by prescription at common law, 820.
defence by a tenant of a right of common by prescription at common law, 820.
reply of approvement of common, 821.
defence justifying a right to dig gravel, 822.
forms of pleas under former system, 821, 822.
instances of former declarations for disturbance of common, 341.
provisions of the Prescription Act, 1832...338 *et seq.*, 818, 819.
interruption means adverse interruption, 338.
right of common of pasture; cattle levant and couchant, &c., 339.
mode of pleading prescriptive rights; mere general allegations of the right not now sufficient, 339, 340.
restricted or qualified rights should be so pleaded, 339, 340.
divisible allegations of the right; verdict for divisible part, 340.
claims of injunctions, &c., 340.
actions by one of a class of commoners on behalf of himself and all others of that class, 340, 25.
lord of manor, enclosure or approvement by; taking gravel, &c.; statutes, 340, 821.
right of common not in general claimable for an indeterminate body of persons, 340.
defences in actions for disturbance of common, pleading, 818.
defences, a right of common; how pleaded, 819.
right of common appurtenant and right of common in gross, 819.
easement in gross, or profits à prendre *in gross, not within the Act*, 819, 852.
pleading prescriptive rights under the statute and at common law, 819.
lost grant, 819, 950.
in what cases special reply necessary, 819, 820.
approvement and enclosure, 821.
customs to enclose part of the waste of a manor, 821, 830.
when leave of Board of Agriculture required for enclosure, 821.

COMMON COUNTS,
under the former system of pleading, what they were, 47.

COMPANY,
statements of claim in contract:
by a company under the Companies Acts, 1862 to 1900, against a shareholder for allotment money and calls, 151.
by a company formed by an Act of Parliament, incorporating the provisions of the Companies Clauses Consolidation Act, 1845, against a shareholder for a call, 153.
by a company for allotment money, 154.
against a like company, under s. 65 of the Companies Clauses Consolidation Act, 1845, for costs and expenses incurred in obtaining the company's special Act, 154.
by the assignee of a debt assigned by a liquidator appointed under the Companies (Winding-up) Act, 1890...155.
by a director for his fees, 155.

COMPANY—*continued.*
statements of claim in contract—continued.
by or against the public officer of a banking co-partnership, suing or being sued as nominal plaintiff or defendant under a statute, 98, 99.
statement of claim by a foreign corporation or company, 161.
on an award under the Lands Clauses Act, 1845...156.
other forms of claims in contract by or against companies : *see* CARRIERS, INSURANCE, &C.
statements of claim in tort :
against railway companies for negligence causing personal injury to a passenger, 337, 444 : *see* CARRIERS *and* NEGLIGENCE.
by an owner of land against a company for a mandamus requiring them to issue their warrant to the sheriff to summon a jury to assess a disputed compensation under the Lands Clauses Consolidation Act, 1845...342.
defences in contract :
defence to an action for a call that the call was not duly made, 636.
defence to an action for calls that the defendant was induced to take the shares by fraud, 658, 659.
defence to an action for calls that the defendant was an infant at the time of taking the shares, 689.
defence that the contract sued on was not under seal, 643.
defences to actions brought against railway companies as carriers of goods or passengers : *see* CARRIERS *and* NEGLIGENCE.
incorporated companies ; how to sue and be sued, 151.
banking co-partnerships suing or sued by public officer, 95.
companies under the Companies Acts, 1862 ; *registered name*, 151.
winding-up thereunder ; liquidator bringing or defending actions in the company's name, 151.
statutory provisions simplifying pleadings and proofs in actions for calls, 151, 152.
such calls constitute a specialty debt, 152, 637, 718.
statement of claim for calls under the Companies Clauses, &c., Act, 1845 ; *interest on calls ; calls payable by instalments*, 152.
action for calls by companies, within the Stannaries Act, 1869, *in name of the purser*, 152, 153.
liability to calls is on person on register at time of call, 153.
actions for calls by unincorporated companies, in absence of statutory powers, 153.
where parties numerous some may sue or be sued on behalf of all, 25, 153.
allottee of shares bound to accept if due notice of allotment is posted to him, 154.
claims under the Companies Clauses, &c., Act, for costs and expenses of obtaining special Act, 154.
promoters' contracts to repay preliminary expenses in general not ratifiable by the company, 155.
assignment of things in action by liquidator, 155.
directors' fees cannot be sued for in the absence of a contract for them, 155, 156.
award under Lands Clauses Acts, how enforced, 156, 343.
contracts by companies, how made, 632, 633.
in what cases directors or agents, signing bills or notes, are personally liable, 632.
defence to actions on contracts under seal, that the company's seal was improperly affixed, when available, 632, 633.
defence that the contract was not under seal, when available, 643, 644.
contracts ultra vires *of the company ; incapable of ratification*, 633.
contracts made by promoters before incorporation, 633, 634.
persons dealing with company deemed to have notice of matters stated in its Act of Parliament, or in its memorandum or articles of association, 633.
personal liability of directors for breach of warranty of authority, 76, 634.
liability to account for profits gained as trustees or agents, 77, 634.
liability to make good losses sustained by misappropriation or misfeasance, 634.
liability for false statements in prospectus, 401, 402, 634.
prospectus must contain statements required by the Companies Act, 1900, 401.

COMPANY—*continued.*
liquidator not personally liable to shareholders or creditors for non-performance of duties, 634.
illegality of contracts with unregistered companies required to be registered under the Companies Act, 1862...634.
set-off of calls by company, when sued by shareholder, 774.
shareholder, sued for calls, may set off debts due from the company, except in cases of winding-up, 634, 774.
effect of winding-up as to set-off and counterclaim, 634, 635, 774.
application of the "mutual dealings" clause of the Bankruptcy Act, 1883, *in cases of winding-up*, 635, 778.
power of staying actions against company after commencement of winding-up proceedings, 635.
after winding-up order, no action to be commenced or proceeded with against company without leave, 635.
transfer of actions after winding-up order, 635, 636.
pleading in actions for calls, 636.
evidence; register of shareholders, 636.
allottee, when not bound by allotment, 636.
what are good defences to actions for calls, 636, 637.
set-off against calls not allowed under the Companies Acts, where the company is being wound up, 637, 774.
period of limitation in actions for calls, what, 637, 718, 719.
shares under the Companies Acts to be paid in cash, unless there is a registered contract to the contrary, 637, 638.
what amounts to payment in cash, 638.
shares of limited companies not issuable at a discount, 638.
estoppel of company by statements in share certificates, 633.
actions by or against incorporated companies for wrongs, 359, 341.
action by shareholder against a company for fraudulent misrepresentations, 341.
action for rescission of contract, 341.
against directors or promoters for misrepresentations in prospectus, 341, 401.
maliciously presenting a winding-up petition, 342, 425.
register of shareholders; action for not registering, or for wrongfully removing name; mandamus, &c., 342.
rectification of register; summary jurisdiction, 342.
effect of notice to treat under the Lands Clauses, &c., Act, 1845...342, 343.
procedure as to compensation for lands taken or injuriously affected, 343, 156.
defences to action on a verdict or award under the Lands Clauses, &c., Act, 343, 584, 638.
"*injuriously affecting*"; *compensation for, when claimable*, 344.
See CORPORATION, COMPENSATION, FRAUD.

COMPENSATION,
defence to action for compensation awarded for land taken that the plaintiff had not executed a conveyance of the land, 638.
under the Lands Clauses, &c., Act, 156, 342, 343, 344, 584, 638: *see* ARBITRATION.
under the Workmen's Compensation Acts, 881, 882.
under the Agricultural Holdings Act, 1883...163.
when the only remedy for acts authorised by statute, 454.

COMPOSITION WITH CREDITORS,
I. *Compositions or arrangements with creditors under the Bankruptcy Acts*, 106, 107.
an action does not lie to enforce payment of a composition under these Acts, 106, 107.
See BANKRUPTCY.

II. *Compositions and arrangements with creditors apart from the Bankruptcy Acts*, 639, 640.
defence that the defendant paid a composition for the debt under an agreement with the plaintiff and other creditors, 639.
reply that the deed or instrument was not registered, 641.
payment of composition under a valid agreement with creditors, a satisfaction of the debt, 639.

COMPOSITION WITH CREDITORS—*continued.*
II. *Compositions and arrangements with creditors apart from the Bankruptcy Acts—continued.*
defence of tender of composition, with payment into Court, 640.
effect of default by debtor; revival of original debts, unless otherwise provided, 640.
conditional execution of deed, 640.
creditor not bound, where bad faith on part of debtor, corrupt preference, &c., 640.
Deeds of Arrangement Act, 1887; *deeds or written agreements assigning property for benefit of creditors or arranging for a composition, &c., void, unless registered*, 641.
adding names of creditors in schedule after registration, 641.

COMPOUNDING FELONY, &c., 683. *See* ILLEGALITY.

COMPROMISE, 177, 306. *See* FORBEARANCE; SOLICITORS.

CONCEALMENT. *See* FRAUD; INSURANCE.

CONDITION. *See* BONDS; CONDITIONS PRECEDENT, &c.

CONDITIONS PRECEDENT,
averment in a statement of claim that performance of a condition precedent was excused by the defendant, 157.
a like form, alleging prevention of performance by a breach of the contract on the part of the defendant, 157.
a like form, alleging that the defendant disabled himself from performing the contract, 157.
statement of claim containing a specific averment that a particular condition has been fulfilled, 245.
defences denying the fulfilment of conditions precedent, 577, 641, 672, 802, 804.
defence setting up a material condition precedent which was not performed, 641.
conditions performance of which is contested must be distinctly specified, 10, 157, 641.
conditions precedent in actions on contracts, 156.
general averment of performance of, formerly in use, 156.
such general averment is now implied under Ord. XIX., r. 14...10, 50, 157.
matter of excuse for non-performance should be pleaded in the first instance, 50, 157.
what amounts to excuse or waiver of performance, 158.
absolute refusal to perform a contract, or preventing its performance, &c., 158.

CONFESSION,
confession of a defence arising after action, 642.
signing judgment for costs on delivery of such confession, where defence sets up matters arising after action, 532, 642.
its effect in preventing another action for same cause, 642.
And see DEFENCES ARISING AFTER ACTION.

CONFESSION AND AVOIDANCE,
pleadings in; meaning of the term, 1, 2, 531.

CONSIDERATION,
what is consideration, 600.
debt for executed consideration, how sued for, 49.
a contract by deed requires no consideration, 47, 49, 80.
consideration for a simple contract (other than a bill or note) must be stated; mode of stating, 47, 49, 80, 81, 177, 181.
unnecessary to allege consideration for a bill or note, 80, 108.
failure of consideration; partial failure of consideration; complete failure of part, 261, 600, 601.
forbearance, when a sufficient consideration, 177, 639.
illegality of consideration, pleading, 682.
part of consideration illegal, 49, 682.

CONSPIRACY. *See* TRADE DISPUTES.

CONSTABLE. *See* POLICE.

CONTRACT,
when relied on, how to be pleaded, 7, 9, 45—51, 80.
distinction in pleading between contracts under seal and simple contracts, that in pleading the former consideration need not be stated, 47, 49, 80, 81.
if in writing, that fact should appear, 47, 80.
actions for debt on contract; actions for damages for breach of contract, 47, 48—51.
distinction between actions on contracts and actions for wrongs, 2, 139, 140.
parties to actions on contracts, 19, 20.
when to be construed as joint contracts, and when as several, 20.
And see AGREEMENTS; CONSIDERATION; DEED.

CONTRACTOR,
actions by and against, on building contracts, &c.: see WORK.
employer, when liable for negligence of contractor, 435, 458, 459.

CONTRIBUTION. *See* GUARANTEES; MONEY PAID; THIRD PARTY.

CONVERSION,
statements of claim:
for conversion of goods, 344, 350.
the like by a trustee in bankruptcy, 335.
against an auctioneer for a conversion of the defendant's goods by selling them for a third person, and delivering them to the purchaser, 350.
against a warehouseman for wrongly delivering a motor car to a person, with a claim for conversion against such person, 350.
for trespass to the house of the plaintiff, and wrongful seizure of the goods of the plaintiff therein, with a claim for conversion of the goods seized, 503.
by the grantee of a bill of sale of household furniture against a person who has taken possession thereof under a wrongful sale by the grantor, 351.
for wrongful conversion of cheques and bills belonging to the plaintiff, with an alternative claim for the proceeds thereof, 263.

defences:
denial of the alleged conversion, 822.
defence denying the plaintiff's property in the goods, 822.
defence to an action by a trustee in bankruptcy for a conversion before the bankruptcy, denying the bankrupt's property in the goods, 823.
defence to an action by a trustee in bankruptcy for a conversion after the bankruptcy, denying the trustee's property in the goods, 823.
defence that the goods were a gift: *see* GIFT.
defence that the defendant was joint owner of the goods with the plaintiff, 824.
defence that the defendant did what is complained of by the plaintiff's leave, 864.
defence that the defendant did what is complained of in exercise of a right of lien, 867, 868.
forms of defences justifying the taking of goods under a distress or under process, 848, 898.
defence to an action for conversion by a sale of the goods that the plaintiff afterwards waived the alleged tort by claiming the proceeds of the alleged sales and receiving part thereof, 824.
defences of stoppage *in transitu* by an unpaid vendor, 825.
action of trover or conversion, what is a conversion, 344, 345.
a demand and refusal is evidence of, 345.
distinction between conversion and trespass, 346.
when there is a conversion by bailees, carriers, warehousemen, auctioneers, &c., 346, 350, 351.
determination of bailment by conduct inconsistent therewith, 346.
distinction between pledge and bailment; right of lien, what it is, 346, 868.
title of the plaintiff; right to immediate possession; special ownership with possession, 346, 347.

CONVERSION—*continued.*
when bailor may sue, when bailee; joint ownership, 347, 824.
possession in fact is evidence of right to possess, and sufficient against wrongdoer having no title, 347, 500.
when jus tertii *may be set up*, 347.
sales procured by fraud; property passing till disaffirmance, 347, 348, 846.
stolen goods, vesting of property on conviction, 348, 846.
sales or pledges by persons in possession of goods or documents of title; statutory protection in certain cases, 348, 869.
sale by person in possession having option to buy under a hiring agreement is not protected, 348.
in respect of what subjects of property the action lies; specific personal property; money; fixtures; minerals, 348, 349.
measure of damages; the full value not always recoverable; special damage; damages in nature of interest, 349.
staying proceedings on return of the goods; practice, 349, 350.
effect of bill of sale authorising continuance of grantor's trade, 351.
denial of plaintiff's property; its effect, 822.
judgment followed by satisfaction, passes property, 349, 823.
estoppels by words or conduct; should be expressly pleaded, 823.
wrongdoer may not set up as a defence against one entitled to possession that such wrong was prior to plaintiff's title, 823, 371.
gift should be pleaded specially, 823.
title of trustee in bankruptcy; relation back, 823.
waiver of tort; receiving proceeds of sale of goods, &c., 824.
stoppage in transitu, 825.
sales in market overt, 345, 824, 846.
what title a finder of lost property has, 347.

CONVEYANCE. *See* SALE OF LAND.

CONVEYANCING ACTS. *See* HEIRS AND DEVISEES; LANDLORD AND TENANT; SALE OF LAND, &C.

CONVICTION OF FELONY.
vesting of property in stolen goods on conviction, 348, 846.
And see FELONY.

COPYHOLD. *See* CUSTOM; COMMON; HEIRS AND DEVISEES, &C.
form of claim for copyhold fines, 158.
claim to recover land by devisee of copyhold, 469.

COPYRIGHT.
statements of claim:
for the infringement of copyright in a book, 351.
the like, a fuller form, with claims for delivery unauthorised copies of the book and for an injunction, 354.
for infringement of musical copyright, 355.
for infringement of musical and dramatic copyright, 356.
for infringement of copyright in a design, 356.
for infringement of copyright in a foreign painting, 357.
defences:
denial of infringement of the copyright, 826.
defence where the plaintiff claims as author of a book, denying that the plaintiff was the author, 826.
the like, in a more specific form, where no separate notice of objections is delivered by the defendant, 826.
defence where the plaintiff claims, as proprietor of the copyright in a book, that the plaintiff was not such proprietor, 826.
defence where the plaintiff claims as assignee of the copyright in a book, denying the assignment, 827.
defence to an action for infringement of the copyright in a book that the book was not registered, 827.
defence to a like action that the copyright in the book had expired before the date of the infringement, 828.
notice of objections relied upon by the defendant in an action for infringement of copyright in a book, 828.
remedies against wrongful copying before publication; statutory copyright after publication, 351.

COPYRIGHT—*continued.*
literary copyright in books under the Copyright Act, 1842...351—353.
definition of "books"; what it includes, 351, 352.
action for infringement; limitation of time for, 874.
registration, when a condition precedent, 352, 827.
copyright in periodicals and newspapers; registration, 352.
assignment of copyright, how made, 352.
infringing, instances of, 352, 353.
publication in United Kingdom; publication in foreign country, 353
copyright in oral lectures under 5 & 6 Will. IV. c. 65...353.
dramatic and musical copyright; statutes, 353, 354.
registration thereunder not a condition precedent, 353.
infringement of right of representation; liquidated damages, 353.
dramatising a novel, 354.
infringement of copyright in a drama, 354.
artistic copyright in sculptures, engravings, paintings, photographs, &c.; statutes, 354.
what amounts to infringement thereof, 354.
lump sum may be awarded under s. 6 of the Copyright Act, 1862, 354.
copyright in designs for manufactures, &c., remedies for infringement, 356.
international and colonial copyright, 357.
defences to actions for infringement of copyright in books, mode of pleading; notice of objections, 826—828.
registration of newspapers, 827.

CORPORATION,
statements of claims:
by or against an incorporated company in actions on contracts: *see* COMPANY; CARRIERS; INSURANCE; SOCIETIES.
the like in actions for wrongs: *see* CARRIERS; COMPANY; NEGLIGENCE; TRESPASS TO THE PERSON.
commencements of statements of claim:
by a municipal corporation, 159.
by a county council, 159.
against a rural district council, 159.
against a board of guardians of the poor of a union, 160.
by a foreign corporation, 161.
defences:
defence that the contract was not under seal, 643: *see further* CARRIERS; COMPANY; INSURANCE, &c.
defence justifying under statutory powers, 936.
corporations aggregate and corporations sole; mode of suing and being sued, 151, 158.
municipal corporations, 159.
county councils; district councils, 159.
parish councils; chairman and overseers of parish where no parish council, 160.
guardians of the poor, 160.
foreign or colonial corporations, companies, &c., 161.
actions by or against foreign sovereigns or states, 161.
liability of corporations for wrongs; instances, 359—361.
how far liable for acts of their servants or agents, 359—361.
action for individual injury from non-performance of public statutory duties, 360.
liability for performing statutory duties negligently, 360.
local authority acting as surveyor of highways not liable for mere omission to repair, 361, 408, 409.
in what cases corporations may sue for libel, 361.
liability of corporation for negligence of its servants, though executing public duties without profit, 361, 442.
general rule at common law that corporations aggregate can only contract under seal, 643.
exceptions to the rule, 160, 643, 644.
contracts of trading companies, 643.
statutory enactments in particular cases, &c., 644.

CORPORATION—*continued.*
not available, where consideration executed by corporation, or can be specifically enforced against them, 643, 644.
contracts by urban district councils, when required to be under seal, 644.
defence that the contract was ultra vires *of the corporation must be expressly pleaded*, 644.
contracts ultra vires *of a company are incapable of ratification*, 633.
improper affixing of a company's seal, 633.
defence in actions for wrongs that the acts complained of were authorised by statute and done without negligence, 360, 454, 859, 936.
defences under the Public Authorities Protection Act, 1893, *&c.*, 901.
And see COMPANY; MANDAMUS.

COSTS,
distinction as to costs between actions of contract and actions of tort under the County Courts Acts and O. LXV. r. 12...3, 139, 140.
distinction between set-off and counterclaim as to costs, 537, 538.
costs of counterclaims not governed by County Courts Acts, 538.
usual order as to costs where proper particulars are not given in or with the pleading, 38.

COUNSEL,
barristers cannot sue for fees, &c., in respect of professional services, 161.
nor can client sue them for non-performance of contract, 162.

COUNTERCLAIMS,
form of counterclaim where no defence is pleaded, 536.
form of defence and counterclaim, 534.
counterclaim for a debt for money lent, and for damages for non-delivery of goods sold, 538.
defence to, and counterclaim against a claim on a bill given in payment of part of the price of a business sold, alleging that the sale was procured by fraud, and seeking rescission, damages, cancellation of bill, &c., 606, 607.
defence that defendant was induced to take the shares by fraud and misrepresentation, and counterclaim for rescission, rectification of register, &c., 659—661.
defence to, and counterclaim against a claim by the plaintiff's agent or broker for the price of shares, alleging fraud, 662, 663.
counterclaim by tenant for relief against forfeiture, 717.
counterclaim for rectification of an agreement, 740.
counterclaim for relief under the Money-lenders Act, 1900...742.
defence and counterclaim to a claim for goods sold and delivered and work and labour done, 765.
defence to a claim by a stockbroker with a counterclaim for damages for breaches of duty as broker, 793, 794.
counterclaim in a replevin for a return of the goods and damages, 909.
counterclaim for breach of contract in not delivering goods sold, 768.
counterclaim for specific performance of an agreement for the sale of land, 771.
defence and counterclaim in action for the price of goods sold on the ground of breach of warranty, 761, 762, 763.
defences and counterclaims in actions for work done and materials provided under building contracts, 802—814.
defence in an action for a debt of set-off of a part of a larger debt due from the plaintiff, with a counterclaim for the balance, 775.
forms of counterclaim against the plaintiff and a third person, or co-defendant, joined as defendant along with the plaintiff to a counterclaim, 541, 542.
defences of set-off, &c., previously to the Judicature Acts, 534.
extension under the Judicature Acts of the defendant's rights in respect of cross-claims against the plaintiff, 534, 772.
provisions of O. XIX. r. 3, *and O. XXI. r.* 17, *and of s.* 24 (3) *and* (7) *of the Judicature Act*, 1873...534, 535.
joinder of different grounds of cross-claim in the same counterclaim, 535.

COUNTERCLAIMS—*continued.*
power to disallow or exclude a counterclaim under O. XIX. r. 3, *and O. XXI. r.* 15...535, 536.
frivolous or vexatious counterclaims may be struck out, 536.
embarrassing or scandalous counterclaims may be ordered to be struck out or amended, 536.
where liquidated claims on both sides, defendant may plead either a defence of set-off or a counterclaim, or may set off part of debt and counterclaim for residue, 536.
in what cases the cross-claim can only be set up by way of counterclaim, 536.
a defendant, instead of pleading his cross-claim as a set-off or counterclaim, may in general reserve it for cross-action, 536, 537.
but proceedings in such cross-action may be stayed, if the claim arises out of the same transactions, 537.
counterclaim may be proceeded with, though the plaintiff has discontinued his action, 538.
points to be considered, including those as to costs, in deciding when there is an option whether to set-off or counterclaim, or proceed by cross-action, 536—538.
parties to counterclaims, 538, 539, 541—543.
counterclaims should generally be in the same character *as that in which the parties sue or are used*, 539.
mode of pleading counterclaims, title, &c., 539, 540, 543.
the principles in general applicable are the same as would apply to a statement of claim in a cross-action, 539.
a counterclaim may be objected to in point of law where the facts stated would not support an action for the same cause, 539, 544.
counterclaim may by reference incorporate statements already made in the defence, 539.
particulars, when necessary, 540.
implied admissions by pleading a counterclaim without any other defence, 540.
amendment of counterclaim, when it may be without leave, 540.
time for delivering a defence containing a counterclaim, 520, 521, 540.
counterclaims in respect of matter arising after action; how to be pleaded, 540.
counterclaims where new parties are added as defendants thereto, 541.
in these cases relief claimed must relate to, or be connected with subject of action, 542, 543.
replies to counterclaims and subsequent pleadings thereto:
general form of reply to a defence and counterclaim, 548.
general form of reply to a counterclaim where no defence is pleaded, 550.
reply, in an action on a guarantee, to a defence of time given to the principal and counterclaim for damages for non-delivery of goods sold, 550.
example of a statement of claim, defence, and counterclaim, and reply, 35.
rejoinder to a reply to a counterclaim, 550.
forms of reply by a third person, or co-defendant, joined as defendant along with the plaintiff to a counterclaim, 551.
the pleading in answer to a counterclaim is called a reply, 548.
it is in the nature of a defence, and is subject substantially to same rules as a defence, 548, 549.
it cannot be delivered without an order, 548.
it is not permissible to join issue thereon, 548.
time for delivering such replies is, in the absence of an order, ten days, 548.
reply must deal specifically with each disputed allegation of fact, except damages, 548.
reply of possession to counterclaim for recovery of land, 548.
pleading an objection to the counterclaim in point of law, 549.
payment of money into Court in satisfaction of a counterclaim, 549.
replies of matters arising after delivery of statement of defence, 549.
further reply of matters arising after delivery of a reply, 549.
replies of matters arising after action and before delivery of the statement of defence, 549.

COUNTERCLAIMS—*continued.*
replies to counterclaims and subsequent pleadings thereto—continued.
in some cases plaintiff in reply to counterclaim may himself counterclaim in respect of cross-claims accrued since delivery of the defence, 549.
pleadings subsequent to a reply to a counterclaim; rules applicable to, 549.
reply by a third person, or co-defendant, joined as defendant along with the plaintiff to a counterclaim, 551.
And see PLEADING IN GENERAL; DEFENCES IN GENERAL; REPLIES, &c.

COUNTS. *See* COMMON COUNTS; DECLARATIONS.

COUNTY COUNCIL, 159, 407.

COUNTY COURTS,
provisions of the County Courts Act, 1888, *as to actions against bailiffs or high bailiff, &c.*, 361.
County Court officers, executing warrants, not rendered trespassers by irregularities, &c., but action lies for special damage, 361.
application of the Public Authorities Protection Act to actions for things done under the County Courts Act, 828, 901.
provisions of the County Courts Act as to costs of actions in the High Court, 3, 139, 140, 537, 538.
And see CERTIORARI; ESTOPPEL; JUDGMENTS; JUDGMENT RECOVERED; PROCESS, &c.

COURT,
assignment of particular kinds of actions to the Chancery Division of the High Court; transfer of actions, &c., 25, 33, 34, 69.
See JUDGMENTS, JURISDICTION, &c.

COVENANT. *See* AGREEMENTS; DEED; LANDLORD AND TENANT; MORTGAGE; RELEASE; RESCISSION, &c.

COVERTURE,
marriage of female plaintiff or defendant, pending action, does not cause action to abate, 30, 31, 32, 186.
And see HUSBAND AND WIFE.

CREDIT,
defence that credit was given, and that the period of credit had not expired at time of action brought, 672, 758.
See GUARANTEES; SALE OF GOODS.

CROPS,
statements of claim:
for crops sold, 162.
by an outgoing tenant against the landlord for tillages, &c., according to the custom of the country, 162.
by an outgoing tenant against an incoming tenant upon an agreement for tillages, &c., according to the custom of the country, 163.
the like, a more concise form, 164.
for work and labour expended in cultivation by an outgoing tenant, 164.
sales of growing crops, when within the Statute of Frauds, or the Sale of Goods Act, 1893...162, 273.
custom of the country as to crops, &c.; claims against landlord thereunder, 163.
claims against incoming tenant on express or implied agreements, 162, 163.
action for preventing valuation, 163.
distress of growing crops, 376.

CROSS-ACTION,
may be stayed, in what cases, 522, 523, 537.

CUSTOM,
forms of pleas of, under former system, 829.
what is a custom; requisites for its validity, 829.
time immemorial, what, 829.
what is claimable by custom; easements, &c., 829.
profit à prendre in another's soil not usually so claimable, 829.
copyholders, 829, 830.

CUSTOM—*continued.*
what customs are reasonable, 829, 830.
customs of the country, 221, 709, 830.
usages of trade, 137, 138, 309, 830.

DAMAGE.
actual damage, in some cases, essential to the cause of action, 55, 362, 382, 481, 484.
mode of denying, when part of the gist of the cause of action, 529, 530, 832, 918.
And see DAMAGES.

DAMAGE FEASANT. *See* DISTRESS; FENCES; REPLEVIN.

DAMAGES.
claim of damages in statement of claim, 54.
if amount specified, plaintiff cannot recover more without amendment, 54.
claims of interest as damages, 210, 211.
general and special damages; nominal damages, 54, 55.
special damage must be stated, if claimed, particularity required, 54, 55.
special damage, when the gist of the action, 55.
matters in aggravation of damages, 6, 55.
distinction between actions of tort and actions of contract, 55, 57.
damages for expenses incurred; for liability to pay expenses, 56.
failure to prove alleged special damage, 56.
damages not recoverable, if too remote, 56.
notice of the facts, when preventing remoteness, 57, 144, 146, 279.
pleading such notice, 57.
damages for prospective loss, when recoverable, 56.
damages from same cause of action must be assessed once for all, 56.
damages on continuing causes of action, down to time of assessment, 56.
distinct cause of action not chargeable as damage, 57.
evidence in mitigation of damages, 530, 831, 843.
damages in lieu of injunction, 414.
treble damages for pound breach, 383.
whether, where liability is joint, damages can, in any cases, be assessed separately, 21, 57.
unnecessary to plead to damages; damages impliedly put in issue, unless expressly admitted, 529, 530.
but denial may be pleaded, where damage is of the gist of the action, 529, 530.
matter which goes merely in mitigation of damages should not be pleaded, 6: *see* LIQUIDATED DAMAGES; RELIEF OTHER THAN DAMAGES.

DAMAGES AGAINST CARRIERS,
of goods, 144, 146.
of passengers, 149, 150.
by sea, 293, 294.

DAMAGES IN CONVERSION,
primâ facie *the value of the goods converted*, 349.
but not in all cases, 349.

DATE, TITLE, AND DESCRIPTION, &c., OF PLEADINGS,
provisions of O. XIX. r. 11 *as to date, title, description, &c.*, 4.
further title added, where counterclaim against plaintiff and a third person, 543.
date of amending to be marked on amended pleadings, 17, 526.
names of parties, misnomer, &c., 43, 44: *see* STATEMENT OF CLAIM; DEFENCES IN GENERAL, &C.

DEATH,
effect on actions, 30, 31.
effect on contracts, 83, 125, 171, 266, 673, 735.
See PARTIES; EXECUTORS; HEIRS AND DEVISEES; INSURANCE MASTER AND SERVANT.

DEBT,
statements of claim in actions for, 47, 48, 65.
denial in such actions, 527, 740, 742, 743, 756.
And see SPECIAL INDORSEMENTS; ASSIGNMENT.
DECLARATIONS,
declarations under the former system, the equivalents of statements of claim, 47, 48.
statutory provisions as to declarations by companies for calls applicable, mutatis mutandis, *to statements of claim*, 151, 152.

DEED. *See* AGREEMENTS; BONDS; CORPORATION; COVENANT; ILLEGALITY; LANDLORD AND TENANT; LIEN; LIMITATION, STATUTES OF; MERGER; RELEASE, &c.

DEFAMATION,
statements of claim:
general form of action for a libel, 362.
for a libel in a newspaper, 366.
for sending a libellous letter to and publishing it in a newspaper, 367.
for a libel imputing a felony to the plaintiff, 367.
for a libel on a limited company, 367.
for a libel in a foreign language, 368.
for slander imputing a criminal offence, 368.
the like with an innuendo that the words used imputed the criminal offence of cheating at cards, 369.
the like by an agent of the British Museum with an innuendo that the words complained of imputed the indictable offence that he had wrongfully appropriated property belonging to the Museum, 369.
for a slander of the plaintiff in his trade, 369.
by a jockey for words charging him with unfair and dishonest riding in races, 369.
by a wine merchant for words contained in a notice charging him with fraudulently using in his business the trade mark of another merchant, 369.
by a tradesman against the publishers of a newspaper for publishing a statement imputing that a judgment previously obtained against him remained unsatisfied, 370.
by an actor for a slander of him as such, 370.
for a slander in respect of words not actionable without special damage, 370.
denial of the publishing of the defamatory matter in an action for libel, 831.
the like in an action for verbal slander, 831.
defence to an action for libel or slander, denying that the words referred to the plaintiff, 831.
defence to an action for verbal slander actionable only by reason of special damage, denying the publication of the words, and that they referred to the plaintiff, together with an objection in point of law, 831.
defence to a like action, denying the special damage, 832.
defence to a like action that the alleged damage did not result from the words complained of, 832.
defence to an action for slander of the plaintiff in his trade, denying that he carried on the trade, 832.
defence to a like action, denying that the words had reference to the plaintiff's business, 832.
defence to an action for libel or slander in respect of words alleged with an innuendo, denying the meaning imputed by the innuendo, 832, 833.
defence to an action for verbal slander that the words were merely vulgar abuse, 833.
objection in point of law to a claim for words which are not defamatory in themselves, and which are alleged without any innuendo or statement of facts showing them to be defamatory, 834.
the like in an action by a municipal corporation for libel, where the words only affected personal reputation, that they were not capable of being construed into a libel against the corporation, 833.
defence by a newsvendor setting out special facts to show he was not responsible for publishing a libel, 834.
defence of privilege, setting out the facts which gave rise to the privilege, 834.
a like defence in an action against a solicitor, 837.
defence of privilege in another form, 837.

DEFAMATION—*continued.*
defence of absolute privilege, 837.
a like defence in an action for statements made as a witness before a parliamentary committee, 838.
defence that the words complained of were spoken by the defendant, who was a solicitor, as an advocate in certain proceedings before a magistrate, 838.
defence that the words were a fair and *bonâ fide* comment in a public newspaper upon a matter of public interest, and were published without malice, 838.
the like with a justification as to statements of fact, 839.
defence to an action for an alleged libel published in a newspaper that the matter published was a fair and accurate report of proceedings in a Court of justice, 839.
defence to an action for an alleged libel published in a newspaper that the matter published was a fair and accurate report of the proceedings of a public meeting, and that the publication thereof was without malice, and for the public benefit, 839.
defence to an action for a defamatory article in a newspaper reflecting on the plaintiff's system for disposal of the sewage of a town, admitting and justifying publication, 840.
defence justifying an alleged libel or slander, on the ground that the statements complained of were true, 840.
defence of justification in a general form, where the alleged libel or slander consists of a specific charge stated with particularity, 842.
defence denying the innuendo, and justifying the statements as true in their natural meaning, 842.
defence of justification and fair comment, 842.
notice of the defendant's intention of giving evidence of an apology in mitigation of damages to be delivered, with the defence, under 6 & 7 Vict. c. 96, s. 1...843.
defence of an apology, and payment into Court, to an action for a libel contained in a public newspaper or periodical under 6 & 7 Vict. c. 96, s. 2...844.
defence of payment into Court in other cases, 748, 896.
defence of the Statute of Limitations, 873.
defence of accord and satisfaction, 816, 845.
notice of matters relied on in mitigation of damages, 845.
libel and slander defined and distinguished, 361, 362.
defamatory matter, when actionable as libel or slander respectively, 361, 362.
provisions of the Slander of Women Act, 1891...362.
defamation of a person in his trade or business, 362, 834.
action by an incorporated company for such defamation, 363.
whether matter is defamatory is a question for the jury, 363.
malice primâ facie *inferred from publishing defamatory matter*, 363.
what amounts to publication, 363.
effect of actual malice in rebutting privilege, 363.
innocent dissemination of defamatory matter by carriers or newspaper vendors, &c., 363, 834.
false statements intentionally causing actual damage may be actionable, though not defamatory, 363.
joinder of parties in actions for defamation, 22.
form of statement of claim in such actions, 364.
mode of stating the defamatory matter; the words must be set out, 364.
innuendo; allegation of defamatory meaning, 364, 365.
damage, what recoverable; when essential to the action; special damage; mode of stating, 365, 366.
damage by repetition of defamatory statements, when recoverable, 365.
evidence in aggravation of damages; express malice; subsequent libels; conduct of defendant, 366.
injunctions, when granted, 366.
false statements disparaging a tradesman's goods, &c., when actionable, 481, 840.
no denial or defence necessary as to damages, 529, 530, 831.
informal to plead matters going merely in mitigation, 831, 6.

DEFAMATION—*continued.*
special damage, where of the gist, may be expressly denied, 530, 831, 832, 840.
if insufficient, defendant may object in point of law, 831, 832.
innuendo, denial of, &c., 832, 833.
privileged communications; what occasions are privileged, 834—838.
privilege prevents the primâ facie *inference of malice from the mere falsehood*, 835.
county council not a court when dealing with administrative matters, 836.
but may be destroyed by proof of actual malice, except in cases of absolute privilege, 835, 837.
what is evidence of such malice, 835.
absolute privilege; in what cases, 835, 836, 837, 839.
mode of pleading privilege; distinction where the privilege is absolute, 836, 837.
a special reply to defence of privilege other than absolute is not generally necessary, 837.
right of fair and bonâ fide *comment on public matters; not confined to newspapers*, 838.
fair reports of legal proceedings, &c., how far privileged, 836, 839.
newspaper reports of such proceedings or of public meetings, &c., when privileged under the 51 *&* 52 *Vict. c.* 64...836, 839.
justification on ground of truth, when and how to be pleaded, 840, 841.
justification, what sufficient; strict proof necessary, 841.
evidence in mitigation of damages for libels in newspapers under 51 *&* 52 *Vict. c.* 64, *s.* 6...841.
proof of apology in mitigation of damages, notice to be given, 843.
payment of money into Court in actions for defamation, 842.
not allowed together with an alternative defence denying liability, 844.
statutory defence of apology and payment into Court in actions for libels in newspapers or periodicals, 844.
periods of limitations applicable to actions for defamation, 844, 845.
defences of accord and satisfaction by destroying documents, or by inserting apology in newspaper, 845.
evidence in mitigation of damages; provisions of O. XXXVI. r. 37 *requiring particulars thereof to be delivered in certain cases*, 845.
See SLANDER OF TITLE.

DEFAULT OF PLEADING,
judgment for default, where defendant fails to deliver a statement of defence within the time allowed for that purpose, 521.
effect of not delivering within the prescribed time a reply to a counterclaim, 546, 548.
effect of not delivering within the time allowed for that purpose a reply to a defence or rejoinder, &c.; implied joinder of issue, 545.

DEFENCES ARISING AFTER ACTION,
defence arising after action, and before delivery of defence, 531.
defence of payment after action of a simple contract debt, 748.
defence arising after action, and after delivery of defence, 532.
defences arising after action, mode of pleading, 531, 532.
set-off or counterclaim arising after action, 540, 775.
time for pleading defences arising after action, 531.
leave, when necessary, 531.
confession of such defences; judgment for costs, 532, 642: *see* CONFESSION.
replies to a set-off or counterclaim of matters arising after action, or after delivery of defence, 549.

DEFENCES IN GENERAL,
general forms of defence:
ordinary form of defence, where there is no counterclaim, 520.
skeleton forms of defence, 521.
the like, where there are two defendants, and one of them defends separately from the other, 526.
form of defence, where different grounds of defence are pleaded to different parts of the plaintiff's claim, 523.
a like form to a claim in respect of a simple contract debt other than a bill, note, or cheque, 525.

DEFENCES IN GENERAL—*continued.*
general forms of defence—continued.
a like form, 525.
form admitting certain facts alleged, and denying other facts, 525.
forms of defence where there is a counterclaim, 534, 542.
form of a paragraph stating a distinct ground of defence, and repeating allegations contained in a preceding paragraph, 526.
form of an amended defence, 526.
defences arising after action, 531, 532.
forms of defence stating an objection in point of law, 562—564.
form of particulars of defence delivered in pursuance of an order under r. 7 of O. XIX., 532.
defence, when necessary, 520.
formal parts of the defence, title, date, &c., 4, 42, 520.
time for delivering defence, 520, 521.
summons for time, if then attendable, prevents judgment being signed, 521.
the body of the defence, mode of pleading, 3—17, 522—525.
classification of defences, those by way of denial and those in confession and avoidance, 522.
former system of pleading; pleas in bar and dilatory pleas, 522.
abolition of pleas in abatement; applications at chambers substituted, 29, 522.
stay of proceedings, where plaintiff brings two actions against defendant for same cause, 522, 523.
equitable defences, now substantially on same footing as legal defences, 33, 34, 906.
names of parties, misnomer, &c., 43, 44.
two or more defendants delivering separate defence, 526.
husband and wife sued jointly for a joint tort cannot deliver separate defences, 526, 858.
damages need not be pleaded to, 523, 529, 530.
particulars need not, and properly should not, be pleaded to, 524, 525.
order of pleading the different defences, 524.
partial defences should be limited to that part of the claim to which they apply, 523.
defences usually construed distributively, 523.
pleading alternative or inconsistent defences, 524.
mode of pleading denials in defences, 527—529: *see* PLEADING IN GENERAL; DENIALS, &C.
admission of allegations of fact by not denying them, 527.
exception as to damages, and as to infants, lunatics, &c., 523, 527, 529, 530.
former system of pleading, certain "general issues" used, 528.
when a comprehensive denial may be used, 530.
mode of pleading defences other than denials, 530, 531.
mode of pleading defences arising after action, 531, 532: *see* DEFENCES ARISING AFTER ACTION.
particulars, when required, of matters in defences, 39, 532, 533.
computation of time; long vacation, &c., 17, 18.
time for pleading after delivery of particulars, 18, 41.
after service of order for security for costs, 18.
service or delivery of pleadings; within what hours, 17.
time for delivering amended defences, or defences to amended statements of claim, 15, 16.
time for pleading further defence of matter arising after delivery of a defence, 531.
extension of time by consent, 19.
extension of time by order, 18, 19.
computation of time in such cases, 19.
defence purporting to answer part only of claim, 523, 524.
defence delivered after time is not a nullity, 521, 522.
See DEFENCES ARISING AFTER ACTION, *supra*.

DEL CREDERE AGENT, 75, 76. *See* AGENT.

DELIVERY OF PLEADINGS,
how and to whom pleadings should be delivered, 13, 14.
time for delivering: see TIME, *post*.

DEMAND,
when necessary, in contracts of guarantee, 179.
note payable on demand, 129, 613, 721.
demand of debt after tender, 800.
a demand and refusal of goods is evidence of a conversion, 345.
a demand and refusal of goods is the ordinary evidence of a detention, 846.

DEMURRAGE,
forms of claim for demurrage in respect of ships, 298, 301 : *see* SHIPPING.
claim for demurrage of waggons at an agreed rate, 265.
claim for damages for detention of waggons beyond a reasonable time in loading, 165.
meaning of the word "demurrage," 164, 165.
implied contract to load or unload in reasonable time, 165.
notice by carrier of intended charges for delay, &c., 165.
And see SHIPPING.

DEMURRER. *See* PROCEEDINGS IN LIEU OF DEMURRER.

DENIALS AND TRAVERSES, 527—530.
general forms of denial or traverses, 527, 530.
the like where the acts complained of are alleged to have been done by the defendant or his servants, or by the servants of the defendant, 880.
former system, certain general denials allowed, 528.
how denials should now be pleaded, 528, 529.
allegation compounded of law and fact may be denied, 529.
denial of "the acts, or matters, complained of," its effect, 529.
matters of inducement not put in issue by denial of acts, &c., complained of, 527.
actions for wrongs arising out of contract ; mode of denying the contract or duty, &c., 529.
mere denial that defendant did the acts "wrongfully," "negligently," &c., insufficient, 529.
denial of damages claimed implied, 529.
distinction where damage part of gist of action, 530.

DEPARTURE,
what defect in pleading is so termed, 547.

DESCRIPTION OF PLEADINGS. *See* DATE, TITLE, AND DESCRIPTION, &C., OF PLEADINGS.

DESIGNS, 356. *See* COPYRIGHT AND PATENTS.

DETENTION OF GOODS,
claim for the detention of goods, 370.
claim for the detention of a lease, with claims for special damage, 372.
defence denying the detention, 846.
defence denying the plaintiff's property in the goods, 846.
defence that the defendant was joint owner of the goods with the plaintiff, 824, 847.
defence that the defendant detained the goods in exercise of a right of lien, 847.
defence of the Statute of Limitations, 847, 873.
defence of payment into Court as to damages for detention, 848.
defence that the goods were given to the defendants, 856.
detention of goods ; action of detinue, 370.
it is in general an action of tort, 370.
property of the plaintiff necessary to support the action, 370.
title deeds ; who entitled to bring the action for, 370.
evidence of detention ; demand of and refusal to deliver the goods, 371.
judgment for the plaintiff ; option of the defendant to retain the goods ; power to order execution for delivery of the goods without option, 371.
assessment of value of the goods ; damages for detention ; special damage, 371.
stay of proceedings on delivery up of the goods, &c., 371.

DETENTION OF GOODS—*continued.*
judgment without satisfaction does not change property, 371.
defence of redelivery after action, its effect, 845.
effect of denial of the detention, 846, 847.
what defences must be specially pleaded; denial of property, lien; justification, joint ownership, &c., 846, 847.
stolen goods; market overt; property revesting on conviction, 348, 846.
goods obtained by fraud, &c.; bonâ fide *purchaser before avoidance*, 347, 348, 846, 847.
deposit by joint owners; pawn, &c., 347, 847.
defence of lien; order for delivery of property on paying amount of lien into Court, 847.
Statute of Limitations; from what time it runs, 847, 848.
payment into Court, to what claims applicable, 848.

DEVASTAVIT. *See* EXECUTORS.

DEVIATION. *See* INSURANCE, MARINE.

DEVISEES. *See* HEIRS AND DEVISEES.

DILAPIDATIONS,
duty of incumbent to keep the buildings of the benefice in repair, 372.
action at common law for damages for dilapidations now rarely available, 372.
substitution of action for debt on an order for cost of repairs, under 34 *&* 35 *Vict. c.* 43...372.

DILATORY PLEAS,
nature of, under former system, 522.

DIRECTORS' FEES, 155, 156.

DIRECTORS' LIABILITY ACT, 1890...401, 402, 854: *and see* FRAUD; COMPANY.

DISCLAIMER,
by tenant, 234, 235.
by trespasser: see TENDER OF AMENDS.
disclaimer, by trustee in bankruptcy, 102, 713.
by patentee, 462.

DISMISSAL. *See* MASTER AND SERVANT.

DISTRESS,
statements of claim:
general form for illegal distress, 373.
for distraining and selling, where no rent was due, for double value of the goods sold, under 2 W. & M., sess. 1, c. 5, s. 5...374.
for distraining twice for the same rent, 375.
for distraining beasts of the plough contrary to 51 Hen. III. c. 4...376.
for refusing to restore goods distrained on tender of the rent and charges before impounding, 379.
for taking an excessive distress, contrary to the Statute of Marlbridge, 380.
for selling without the statutory notice, 381.
for not selling for the best price, under 2 W. & M., sess. 1, c. 5, s. 2... 382.
for pound-breach, claiming treble damages, under 2 W. & M., sess. 1, c. 5, s. 4...383.
for making an excessive distress for poor's rate, 383.
defences:
defence to a claim for trespass justifying under a right to distrain, 848.
defence justifying seizing cattle as a distress damage feasant, 849.
defence justifying entering into a house to take goods fraudulently or clandestinely removed there to avoid a distress, 849.

DISTRESS—*continued.*
defences—continued.
defence to an action by a landlord against a tenant for rent that the plaintiff before action distrained for the same rent, and that the distress was still pending at the time of action brought, 850.
defence of Not Guilty by Statute, 850.
illegal, excessive, and irregular distresses, proceedings for, 373, 380, 381.
bailiffs distraining for rent required to have certificate from County Court, 373.
landlords of agricultural holdings not to distrain for rent accrued due more than one year before distress, 373, 848.
what amounts to a valid distress, 373.
entry to distrain must be in a legal manner and at a legal time, 374.
distress, where the tenant has entered under an agreement which can be specifically enforced, 373, 374.
action given by statute for distraining where no rent due to recover double value of the goods, 374.
statute enables sale of distress for rent, 374, 381.
distraining twice for same rent; action for trespass or conversion; excepted cases, 375.
no action lies for rent pending a distress for it, 375, 850.
distraining things privileged from distress; action for trespass, or conversion, or replevin, 376.
what things are absolutely or conditionally privileged from distress; beasts of the plough, implements of trade, fixtures, perishable commodities, goods delivered to a person in the way of his trade, things in actual use, &c., 376—379.
wearing apparel and implements of trade, to value of 5l., in general privileged under 51 & 52 Vict. c. 21...376.
growing crops distrainable by landlord, 376.
provisions of the Lodgers' Goods Protection Act, 377, 778.
who is a lodger, 378.
Agricultural Holdings Act, 1883: *hired machinery, live stock agisted, &c.*, 378.
privilege of certain property of gas and water companies, and of railway rolling stock, 378, 379.
keeping goods distrained after tender of rent; tender before and after impounding; selling after tender; what actions will lie, 379.
excessive distress; excessive claim not actionable without special damage; excess paid under distress cannot be recovered as money received; excessive taking actionable without sale or removal; test of value of goods taken; measure of damages, 380.
irregular distress; statutes regulating sale of distress, 381, 382.
provisions of the Law of Distress Amendment Act, 1888...381.
sale to landlord not within the statute, 382.
landlord to sell for best price obtainable, 382.
irregular distress a trespass ab initio *at common law actionable for special damage only under the statute*, 382.
liability of landlord for acts of bailiff, 382.
recovery of extorted overcharges, 257, 382, 383.
abusing a distress, as by working it, 382.
when an action for pound breach or for rescue, claiming treble damages, lies, 383.
action lies for excessive and unreasonable distress for poor's rate, &c., 383.
mode of distraining for poor's and other rates, 383, 384.
costs upon such distresses, 384.
when local authority may be liable for acts of bailiff, 384.
principal statutes as to distress for poor's rate, 384.
defence of Not Guilty by Statute, when applicable, 850.
defence of tender of amends, 849, 850, 919.
limitation of time for distraining for ordinary rents, 848.
limitation of time for distraining for rent-charges, &c., 875, 876.
distress damage feasant; effect of irregularity, 849.
tender after impounding such distress, 849.
right of supplying food, &c., to animals impounded, 849.
defects of fences, &c., 849, 851, 852.

DISTRESS—*continued.*
goods fraudulently removed to avoid distress, 849, 850.
distress pending, a defence to action for rent, 375, 850.
taking a bill or note for the rent is some evidence of agreement not to distrain for it during currency thereof, 616.
And see REPLEVIN.

DIVORCE. *See* HUSBAND AND WIFE.

DOG. *See* MISCHIEVOUS ANIMALS.

DOUBLE RENT, 232. *See* LANDLORD AND TENANT.

DOUBLE VALUE, 231, 374. *See* LANDLORD AND TENANT *and* DISTRESS.

DRUNKENNESS,
defence that the defendant was drunk at the time of contracting, 644.
drunkenness, when a defence; reply of subsequent ratification, &c., 644, 645.
necessaries supplied to a drunken person, 645.

DURESS,
defence that the defendant was induced to contract by duress, 645.
duress, what amounts to, 645.
when it is a defence; ratification, &c., 645.

DUTY,
facts raising duty relied on should be stated, or necessarily appear from the pleadings, 45, 46, 140, 443.
express allegations of duty unnecessary, 45, 443.
allegation of duty is a mere inference of law, 140, 443.
how such allegations may be dealt with in pleading, 529.

EASEMENTS. LIGHTS; WATER; WAYS.

EJECTMENT,
former action of ejectment, no pleadings in, 465: *see* RECOVERY OF LAND.

ENEMY, 579: *see* ALIEN ENEMY.

EQUITABLE CLAIMS AND DEFENCES, &c.
law and equity administered concurrently under the Judicature Acts, 33.
jurisdiction of High Court to give effect to equitable claims, subject to the provisions for assigning particular actions to the Chancery Division, 33.
equitable defences and replies, &c., now substantially on same footing as legal ones, 33, 34, 906.
provisions of the Judicature Acts with respect to equitable estates or rights, or relief upon equitable grounds, &c., 33, 34, 534.
See RECOVERY OF LAND *and* PART PERFORMANCE.

ESCROW, 578, 612. *See* AGREEMENTS.

ESTOPPEL,
general form of a defence of estoppel, 646.
defence of estoppel by a judgment against the plaintiff in a former action, 647.
general form of a reply of estoppel, 648.
defences of estoppel should be specially pleaded, 645, 646.
mode of pleading, 646, 851.
estoppels by record or by deed, 646, 647.
estoppels in pais, 646.
between whom estoppel operates, 646.
character in which a party sues: executor, &c., 646.

ESTOPPEL—*continued.*
extent of estoppel by deed, 646.
effect of judgment in former action for same cause, 647.
pendency of appeal, no answer, 647.
foreign judgment; judgment of County Court, &c., 647.
estoppel by delivering confession of defence, &c., 647.
by award, 647.
estoppels in cases of bailment, 851.
estoppel of tenant from denying landlord's title, 225, 226, 232, 712.
estoppels on bills or notes, 596, 597.

EVICTION. *See* LANDLORD AND TENANT.

EVIDENCE,
mere evidence not to be pleaded, 5, 6.

EXCEPTION,
in a contract, how pleaded, 50.

EXCESS. *See* TRESPASS TO THE PERSON; WAYS; *and* REPLIES IN THE NATURE OF A NEW ASSIGNMENT, 551.

EXCESSIVE DISTRESS. *See* DISTRESS.

EXCHANGE,
statement of claim upon a contract of exchange, 166.

EXECUTION. *See* PROCESS *and* SHERIFF.

EXECUTORS AND ADMINISTRATORS,
statements of claim:
by an executor or administrator for debts accrued to the deceased, 166.
by an executor or administrator for debts accrued since the death of the deceased, 168.
by an executor or administrator for damages for breach of a contract made with the deceased, 168.
by an executor of an executor, 169.
by an administrator with the will annexed, 169.
by an administrator *de bonis non* with the will annexed, 169.
by an administrator *de bonis non* after the death of the first administrator, 169.
by an administrator during the minority of an executor, 170.
by an administrator during the absence of the executor, 170.
by or against an executrix or administratrix who is a married woman, 170.
against an executor or administrator for debts accrued from the deceased in his lifetime, 170.
the like on a bond or covenant of the testator, 172.
against an executor or administrator for debts incurred by him in that character after the death, 173.
the like for damages on causes of action accrued against the deceased in his lifetime, 173.
against an executor or administrator for damages for the breach of a contract made by the deceased which was broken after his death, 174.
against an executor of an executor, or against an administrator with the will annexed, or an administrator *de bonis non*, &c., 174.
by an executor or administrator continuing an action brought by a sole plaintiff who has died after writ issued and before delivery of statement of claim, 174.
statement of claim where an action brought against a sole defendant who died after writ issued, and before delivery of statement of claim, is continued against his executor or administrator, 175.
statement of claim by executors against an agent of the testator for not accounting, 175.
other forms of statements of claim by and against executors or administrators: *see* BILLS OF EXCHANGE, &C.; INSURANCE; LANDLORD AND TENANT.
by an executor or administrator for a wrong done to the property of the deceased in his lifetime, 385.

EXECUTORS AND ADMINISTRATORS—*continued.*
statements of claim—continued.
by an executor or administrator for a wrong done since the death to property vested in him in that character, 386.
against carriers under the Fatal Accidents Act, 1846, by the executor of a passenger killed, 387.
particulars delivered by an executor thereunder, 389.
actions by or against executors or administrators; character in which they sue or are sued should be shown, 44, 166.
how described, 166, 169, 173, 648.
what claims may be joined in actions by or against them, 166.
actions by executors or administrators upon contracts with the testator or intestate, 166.
contracts affecting real estate; the Land Transfer Act, 1897...167, 227, 386.
causes of action arising in lifetime of deceased and after his death, 167.
executors ought to join in suing; effect of non-joinder or misjoinder, 27, 167.
administrator cannot begin an action before administration granted, 167, 168.
executor may begin an action before probate, 167.
title of executor arises on the death, 168.
title of administrator on the grant of administration, 168.
administrator during minority; during absence, 170.
married woman executrix or administratrix, 170.
actions against executors and administrators, 170, 171, 172.
not liable except for breaches committed before the death on contracts personal in their nature, 171, 385.
carrying on the business of the deceased are personally liable for debts they so incur, 171.
may be liable as executor on accounts stated, or money paid; and for interest on contract with testator, 171.
liability of executor for funeral expenses, 178.
Statute of Frauds as to promise of executor, 171.
liability of executor for legacies, 171.
creditor may follow assets paid over to legatees, 172.
actions against executors, parties to be sued, 172.
executor cannot be sued until he has either proved or intermeddled, 172.
executor de son tort, 172, 648.
continuance of actions by or against executors, &c., where cause of action survives, 30, 174, 175.
actions by and against executors and administrators for wrongs; to the personal estate; to the real estate; statutes, 385, 386.
actions for injuries to the person—not surviving, 385.
mode of pleading in actions under 3 & 4 Will. IV. c. 42, s. 2...385, 386.
actions for wrongs amounting to breach of contract or benefiting deceased's estate, 386.
actions for injuries resulting in death under the Fatal Accidents Act, 1846, or the 27 & 28 Vict. c. 95...387, 851.
particulars under the Fatal Accidents Act, 1846...37, 387, 389.
nature of the liability under the Act, 388.
where the negligence was a breach of contract, an action also lies to recover losses occasioned to deceased's estate, 388.
application of Fatal Accidents Act to collisions at sea, 389.
actions under the Employers' Liability Act, 1880...389, 882.
defences:
denial that the defendant (or plaintiff) is executor (or administrator), 648.
defence by an executor or administrator to an action for the price of goods sold to the deceased, and on accounts stated with the defendant, denying the sale and the stating of the accounts, 648.
defence of *plene administravit*, 649.
defence of *plene administravit præter*, 651.
defence of *plene administravit* by the executor of an executor, 651.
defence of a judgment debt outstanding against the deceased, and *plene administravit præter*, 651.
defence of a judgment recovered against the defendant as executor, and *plene administravit præter*, 653.

EXECUTORS AND ADMINISTRATORS—*continued.*
defences—continued.
defence that notices were given and assets distributed by the defendant under 22 & 23 Vict. c. 35, s. 29, before he had notice of the plaintiff's claim, 654.
defence to an action charging the defendant for rent as assignee of the term that the defendant became assignee only as executor, and that the premises yielded no profit, and *plene administravit*, 654.
reply to a set-off that an order had been made in an administration action, &c., 653.
denial of executorship, &c., must be pleaded specially, 648.
limitation of actions by or against executors, &c., 721, 723, 873, 874.
what judgment is given in actions against executors, 649.
defence of plene administravit ; *its effect*, 649, 650.
judgment of assets quando acciderint, 649, 650, 651.
evidence under plene administravit, 649, 650.
retainer by executor for his own debt, in what cases, 650.
interrogatories to discover assets, &c., 650.
execution on judgment ; devastavit, &c., 650.
defence of plene administravit præter, 651.
executor of an executor, 651.
priorities of different kinds of debts, 652.
foreign judgments are regarded as simple contract debts, 653.
replies to defences of outstanding judgments, &c., 653.
executor not bound to plead Statute of Limitations as defence, 653.
transfer of actions after administration order, 653.
statutory provisions as to relief from claims of which he has no notice, after notices published by him, 654.
defences by tenant's executor sued as assignee of the term, 654.
actions for wrongs ; application of maxim actio personalis moritur cum personâ, 385, 386.
actions by executors under the Fatal Accidents Act, 1846, *defences to*, 387, 851.
payment into Court in such actions, 896, 387.
defences to claims under the Employers' Liability Act, 880—882.

EXONERATION. *See* RESCISSION.

EXTORTION,
money obtained by, when recoverable, 257.
excessive charges by carriers, 143, 144, 147, 148, 623.
excessive charges of bailiff for a distress, 257, 382, 383.

FACTOR, 176 : *see* AGENT ; BROKER ; SET-OFF.

FACTORS ACTS, 348, 0 : *see* LIEN.

FALSE IMPRISONMENT. *See* TRESPASS TO THE PERSON.

FALSE REPRESENTATION. *See* FRAUD, *and* SALE OF LAND.

FALSE RETURN. *See* SHERIFF.

FARRIER, 866 : *ee* LIEN.

FEES. *See* ARBITRATION ; COUNSEL ; CUSTOM ; MEDICAL ATTENDANCE.

FELONY,
claims for defamation imputing felony, 367, 368.
justification of an arrest for a felony committed, or on suspicion of felony, 926, 928.
reply to defence of the Carriers Act, that the loss was occasioned by the felony of the carrier's servants, 626.
right to arrest for felony, or suspicion of felony, 926, 927, 928.
action for matters amounting to ; defendant cannot plead that there has been no prosecution for it, 851, 879, 923.
effect of compounding felony, 683 : *see* ILLEGALITY.

FENCES,
claim for not repairing a fence between adjacent closes of land, 390.
claim against a railway company for neglect of obligation to fence, 391, 392.
against a railway company for injuries caused by negligence at a level crossing, 393.
against an employer for neglect to fence machinery, 394.
defence to an action for a trespass by the defendant's cattle on the plaintiff's land that the trespass was caused by defects in the plaintiff's fences, which he was bound to repair, 852.
defence to an action for trespass to land and destroying fences that the fences were an obstruction to the defendant's right of common, 852.
liability to fence, how arising, 390, 391.
trespasses by cattle through defects of fences; remedies, 390, 391, 851, 852.
statutory duties of railway companies as to fences, gates, &c., 391, 392.
duty of railway companies as to crossings, 392, 393, 394.
statutory duty to fence machinery in factories, 394.
defects of fences; reply to justification of distress of cattle damage feasant, 851, 852.

FERRY,
claim for disturbing the plaintiff's ferry, 395.
right of ferry; what amounts to disturbance, 395.
injunction, when obtainable, 395.

FIERI FACIAS. *See* PROCESS; SHERIFF.

FIRE INSURANCE. *See* INSURANCE.

FIRM. *See* PARTNERS; NAMES OF PARTIES; PARTIES.

FISHERY,
claim for trespass to the plaintiff's fishery, 396.
several fishery; action for trespass; evidence, 396.
arms of the sea and navigable rivers; ownership of soil; right of fishing, 396.
no public right of fishing in non-tidal rivers, 396.
foreshore, primâ facie *title of Crown to*, 396, 852.
common of fishery or free fishery, 396.
Crown grants of fishery, 396.
right to take fish from the waters of another not claimable merely by custom, 852.
free fishery in gross not claimable under the Prescription Act, 852.

FIXTURES,
statement of claim for the price of fixtures, 176.
defences justifying the removal of tenant's fixtures, 913.
the like in respect of trade fixtures, 913.
right of removing tenant's fixtures; trade fixtures, &c., 913.
sale of fixtures to landlord or incoming tenant not within s. 4 of the Statute of Frauds, 176.
conversion of fixtures after severance; how described, 348, 349.
fixtures privileged from distress, 376: *see* DISTRESS.

FORBEARANCE,
statement of claim on a promise made in consideration of forbearance to prosecute an action, 177.
defence denying consideration for the defendant's promise, 655.
forbearance, when a sufficient consideration for a contract, 177.
compromise of an action enforced in the action itself, 177.
action to set aside such compromise, 177.
And see GUARANTEES.

FORCIBLE ENTRY, 503, 924, 938.

FOREIGN ATTACHMENT, 588.

FOREIGN BANKRUPTCY, 593, 655: *see* BANKRUPTCY; FOREIGN LAW.

FOREIGN BILLS, NOTES, &c., 122 : *see* BILLS OF EXCHANGE, &c.

FOREIGN COMPANY. *See* COMPANY, *and* LIMITATION, STATUTES OF.

FOREIGN JUDGMENTS. *See* ESTOPPEL; JUDGMENTS; JUDGMENT RECOVERED.

FOREIGN LAW,
defence of French law, discharge by French bankruptcy, 655.
defence of colonial law and reply thereto, stating objection in point of law, 656.
defence that a foreign indorsement was invalid, 656.
defence of French law, 656.
foreign or colonial law must be specially pleaded, 10, 45, 655.
law applicable as to foreign bills, &c., 122.
debts or liabilities arising in this country are not discharged by a foreign bankruptcy, 655.
debts or liabilities arising abro if discharged by the foreign law are discharged here, 593, 655.
when contracts are to be governed by foreign law, 655.
foreign or colonial law is matter of fact to be proved by evidence, 10, 655.
foreign laws as to limitation of actions, 722, 655.
And see JUDGMENTS.

FOREIGN SOVEREIGN OR STATE,
actions by or against, 161, 730, 864.

FORFEITURE. *See* LANDLORD AND TENANT.

FRAUD,
I. *Actions for fraud,*
statements of claim :
for breach of warranty and fraud on sale of a horse, 317.
the like on letting a house, 224.
for damages for fraudulent misrepresentation on the sale of the goodwill and lease of a public-house, 397, 399.
for fraud in selling an unsound horse by a false representation that it was sound, 400.
against a director of a company for inducing a person to take shares by fraudulent representations contained in a prospectus, 401.
against a director of a company for compensation for loss or damage from untrue statements in a prospectus under the Directors' Liability Act, 1890...404.
the like with a claim for fraud at common law, 404, 405.
against promoters for fraudulent misrepresentation, 403.
for fraudulently representing that a third person might safely be trusted with goods on credit, 406.
defences to actions for fraud :
defence to an action for fraudulent misrepresentations, denying the making of the representations, 853.
defence to a like action, denying that the representation was intended to induce, or did induce, the plaintiff to make the alleged contract, &c., 853.
defence to a like action that the representations were true, 853.
defence to a like action, denying that the defendant knew the representation to be false, and stating that he *bonâ fide* believed it to be true, 853.
defence denying the alleged damage, 853.
general defence to a claim for fraud in selling an unsound horse by falsely representing that it was sound, 854.
defence to a claim against a company and directors for fraud and under the Directors' Liability Act, 1890...854.
defence to an action for a fraudulent representation as to the solvency of a third person that the alleged representation was not in writing signed by the defendant, as required by s. 6 of the 9 Geo. IV. c. 14...856.
II. *Defences of fraud in actions on contracts :*
defence that the contract was procured by the fraud of the plaintiff, 656.
defence that the defendant was induced to contract by fraud, and afterwards repudiated the contract, 658.

FRAUD—*continued.*
II. *Defences of fraud in actions on contracts—continued.*
defence to an action for the price of goods sold and delivered that the defendant was induced to purchase the goods by fraud, and returned them on discovery of the fraud, 658.
defence to an action for calls that the defendant was induced to become a shareholder by fraud, and repudiated the shares, 658.
defence and counterclaim on the ground of misrepresentation and fraud to an action for calls, 659.
defence to an action for price of shares that the plaintiff was induced by fraud to purchase, and counterclaim for rescission, &c., 662.
action for damages for fraud, when it lies, 397.
mere negligence, if honest, will not support the action, 397.
active concealment may amount to fraud, 397.
not so mere silence when no duty to speak, 397.
fraudulent warranty on sale of goods; option to sue either on contract or for wrong; alternative claims, 397.
fraud, where charged, should be distinctly alleged, 398.
principal when responsible for fraud of agent, 398.
damages recoverable in action for fraud, 398.
misrepresentation as to matter of law, 398.
officers or promoters of a company making false statements in prospectus, &c., when action lies, 401, 402.
one officer or promoter is not necessarily agent for the others to bind them, 401.
prospectus when deemed fraudulent, 401.
liability for false statements in prospectus under the Directors' Liability Act, 1890...401, 402, 854.
damage an essential part of action for deceit, advisable if disputed to deny it, 853.
onus of proving reasonable grounds of belief is on defendants, who should give particulars thereof, 854.
representations as to character and credit must be in writing, and signed by the party; representations partly written and partly verbal, 406, 407, 856.
money obtained by fraud in general recoverable by the person defrauded, 258.
fraud, how pleaded; what particulars requisite, 656, 854.
contracts procured by fraud voidable, but valid till disaffirmed, 656.
fraud a defence to an action for breach of promise of marriage, 732.
disaffirmance must be without unreasonable delay, and while original position can be restored, 656.
rights previously acquired by innocent third parties, 657.
fraud of agents, directors, &c., 657.
defence of fraud in action against shareholder for calls, &c., when available, 657.
winding-up before disaffirmance; action against directors, &c., for misrepresentations, 657.
mere fact that defendant had means of knowledge no reply to defence of fraud, 657.
innocent misrepresentations, when an equitable ground for rescinding contract, 739.
fraud when it prevents trustees from claiming benefit of any statute of limitations, 723.
fraudulent concealment, in what cases an answer to defence under Statute of Limitations, 727.
counterclaim for fraud, when advisable to add, 658.
fraud on third party; illegality, 658.
See INSURANCE; SALE OF LAND, &C.

FRAUDS, STATUTE OF,
defence under s. 4 of the Sale of Goods Act, 1893, to an action upon a contract for the sale of goods of the value of £10 or upwards, 663, 665.
defence to an action upon a contract within s. 4 of the Statute of Frauds, where the claim shows that the contract is within that section, 665.
a like form in an action upon a guarantee, 666, 672.

FRAUDS, STATUTE OF—*continued.*
the like to an action for wrongful dismissal of a servant, where it does not appear, from the statement of claim, that the contract was one which could not be performed within a year from the making thereof, 666.
defence of the Statute of Frauds to an action for specific performance, 772.
Statute of Frauds; how pleaded, 663.
provisions of s. 17 *of the Statute of Frauds and of Lord Tenterden's Act as to the sale of goods, now repealed*, 663, 664.
like provisions of s. 4 *of the Sale of Goods Act*, 1893...664.
what is evidence of an acceptance within s. 4 *of the Sale of Goods Act*, 1893...664.
"*acceptance and actual receipt*," *what is*, 664.
memorandum required by s. 4, *when and how to be made, what it must contain*, 664, 665.
provisions of s. 4 *of the Statute of Frauds*, 216, 217, 665.
promises by executors; guarantees; agreements in consideration of marriage; sale of land; agreements not to be performed within a year, 665.
what a sufficient description of the parties to satisfy s. 4 *of the Statute of Frauds*, 665, 666.
what are agreements "not to be performed within a year," 666.
equitable doctrine as to part performance, taking a case out of the statute, when applicable, 666, 735.
And see LANDLORD AND TENANT; RESCISSION; PART PERFORMANCE.

FREIGHT. *See* SHIPPING.

FRIENDLY SOCIETIES, 302, 303: *see* SOCIETIES.

FRIVOLOUS OR VEXATIOUS PLEADINGS, 563, 564.

FUNERAL EXPENSES,
statement of claim by an undertaker for funeral expenses, 178.
liability of executor for, 178.
liabilty of husband for funeral of wife, &c., 178.
whether recoverable under the Fatal Accidents Act, 1846...38 8

FURTHER PARTICULARS, 38: *see* PARTICULARS.

GAME, 480: *see* SHOOTING.

GAMING,
defence that the contract sued on was a gaming or wagering contract, 667.
defence under the Gaming Act, 1892, to a claim for money paid at the request of the defendant, that the payment was made in respect of a gaming or wagering contract, 668.
the like to claims by a betting agent for money lent to the defendant and for money paid and work done for him at his request, 669.
defence to an action on a promissory note or cheque that the note or cheque was made or drawn for money lost to the plaintiff upon a wager, 669.
defence to an action on a bill of exchange that the bill was accepted by the defendant for money won by the plaintiff from the defendant by gaming, 670.
defence to a like action by an indorsee that the bill was accepted by the defendant for money won by the drawer from the defendant by gaming, and that the bill was afterwards indorsed to the plaintiff with notice, or without consideration, or when overdue, 670.
defence to a claim against a dealer in shares for wrongful detention of securities that the securities were deposited as cover and had been appropriated duly before action, 670.
what is a wager, 667.
provisions as to bills or notes for money won by gaming; illegal consideration, 667, 669, 670.
provisions of the Gaming Act, 1845, *as to gaming or wagering contracts*, 667, 668.

GAMING—*continued.*
provisions of the Gaming Act, 1892...667, 668.
provisions of the Betting and Loans (Infants) Act, 1892...687.
money paid by betting agent to discharge lost bets, &c., not recoverable, 668.
his liability for money received from losers of bets, 668.
not liable for neglecting to make bets for principal, 668.
money lent for playing at an illegal game, not recoverable, 668.
stakeholder, when liable to be sued for the deposit, 668, 669.
wagering contracts of insurance, 200, 205, 691, 694.
wagering contracts as to stocks or shares, what are, 668.
lotteries, 669.
distinction between bills for consideration which is illegal and for that which is merely void, 669, 670.
cover for differences on wagering transactions in shares, when it may be recovered, 670, 671.

GARNISHEE. *See* ATTACHMENT OF DEBT.

GENERAL ISSUES,
under former system of pleading, 528: *see* DENIALS.

GIFT,
defence to action for money lent that it was a gift, 740.
defence to action by executor for conversion alleging a gift of the goods by the testator, 856.
defence to action by executor for detention alleging *donatio mortis causâ* of the goods by the testator, 857.
a gift of chattels requires a delivery of possession, 856.
what is a sufficient delivery, 856, 857.
gifts to persons in confidential relationship to donor when voidable, 857.
what is a valid donatio mortis causâ, *and how pleaded*, 857.

GOODS. *See* SALE OF GOODS; TRESPASS; CONVERSION; DETENTION.

GOODWILL. *See* TRADE.

GRANT. *See* LIGHTS; WAYS; LOST GRANT; FISHERY; MARKET; SHOOTING, &C.

GUARANTEES,
statements of claim:
upon a guarantee of a debt, 179.
upon a guarantee for the price of goods, 180.
against a principal debtor and his surety on a guarantee for goods sold, 181.
on a guarantee for due accounting by a collector, 181.
a like form for special indorsement upon a writ, 182.
defences:
denial of the contract of guarantee, 671.
defence that the contract did not satisfy the Statute of Frauds, 672.
defence to an action on a guarantee for the price of goods sold that the plaintiff did not supply the goods on the guarantee, 672.
defence to a like action that the plaintiff did not supply the goods according to the terms of the guarantee, 672.
defence to a like action that the goods were sold to the principal on credit, and that the period of credit had not expired at the time of action brought, 672.
defence to an action on the guarantee of a debt of payment by the principal, 673.
defence to an action on a continuing and revocable guarantee that the defendant revoked the guarantee before the transactions alleged, 673.
defence that the guarantee was procured by fraud, 656.

GUARANTEES—*continued.*
defences—continued.
defence to a like action that the plaintiff discharged the defendant by giving time to the principal debtor, 674.
a like defence where the surety is sued as principal upon a promissory note on which he appears as primarily liable, 614.
reply to the preceding defences, that the remedies against the surety were reserved by the agreement for giving time, 676.
reply to like defences, that the time was given in pursuance of provisions contained in the guarantee, 676.
defence including an objection in point of law that the guarantee discloses a past consideration on the face of it, 564.
defence to an action on a guarantee for due accounting by a collector that he did duly account, 677.
defence to a like action that the collector was, without the assent of the guarantor, continued in the service after discovery of acts of dishonesty on the part of the collector, which rendered it the duty of the plaintiff to discharge such collector, 677.
a guarantee is an accessory or secondary contract, 179.
guarantees must be in writing by the Statute of Frauds, 179.
what amounts to a guarantee within the statute, 179.
evidence of the circumstances, &c., how far admissible, 179.
the consideration need not appear in writing; effect of the Mercantile Law Amendment Act, 179, 663, 672.
statement of claim, mode of pleading, 179.
surety not entitled to demand or notice of default, unless stipulated for, 179.
right of surety after paying the debt, &c., to assignment of securities held by the creditor, 179, 180, 674.
action by surety against principal for money paid, 180.
right of contribution between co-sureties, 180.
representations as to credit or solvency of a third person, 406, 407, 856.
guarantees for honesty, &c., of a servant; mere negligence of employer no defence; knowingly continuing the employment after acts of dishonesty, when a defence, 181, 182, 677.
defence of the Statute of Frauds, 660, 665.
continuing guarantee usually revocable as to future transactions, 673.
effect of notice of guarantor's death, 673.
guarantee for good conduct, when revocable as to future matters, 673.
guarantee given to a firm; change in firm, 673.
creditor not bound to disclose all material facts to surety, 674.
effect of creditor's giving time to principal; when a discharge of surety, 674.
reservation of rights against surety, 674, 675.
mere giving time, without binding agreement to give it, usually no discharge, 675.
alteration of principal contract without the assent of the surety may discharge the surety, 675.
where the guarantee is for performance by a person of the duties of an office change in the duties may discharge surety, 675.
dealings between the principals which deprive the surety of the benefit of his remedies discharge the surety, 675.
loss or wasting of securities by the creditor operates pro tanto *in discharge of surety*, 675, 676.
mere inactivity or laches of the creditor or employer does not discharge surety, 676, 677.
principal's discharge under the Bankruptcy Act does not discharge surety, 676.
surety after payment usually entitled to dividends in such bankruptcy, &c., 676.
but the terms of limited guarantees sometimes exclude this right, 676.
defences by sureties, where sued on instruments which appear to make them primarily liable as principals, 676.

GUARDIAN. *See* INFANT *and* INFANCY.

GUARDIANS OF THE POOR,
statement of claim against, 160,
incorporated by statute, 160.
may be sued for goods supplied for the necessary purposes of their workhouse under a contract not under seal, 160.
special limitation of actions against, for debts, 719.
See POOR'S RATE.

HEIRS AND DEVISEES,
statements of claim:
against heir and devisee for a debt due under a covenant by the testator, 182.
by heir of lessor against lessee (on a covenant in the lease), 228.
by devisee of lessor against lessee (on a covenant in the lease), 229.
defences:
denial of heirship, in an action on a bond or covenant of the alleged ancestor, 677.
defence by an heir of *riens per descent* (11 Geo. IV. & 1 Will. IV. c. 47, s. 7), 678.
denial by a defendant, sued as devisee, that he is devisee, 678.
defence by a devisee of *riens per devise*, 678.
reply to a defence of *riens per descent*, that the defendant had lands, &c., from his ancestor (11 Geo. IV. & 1 Will. IV. c. 47, s. 7), 679.
liability of heir at common law on covenants expressly binding the heirs, 182.
a like liability imposed by statute on devisees, 182.
important change in devolution effected by the Land Transfer Act, 1897...182, 467.
action against heir and devisee on specialties binding heir; against devisee of devisee; against devisee where no heir, 182, 183.
distinction between specialties expressly binding and those not expressly binding the heirs immaterial as regards deeds under the Conveyancing Act, 1881...182.
pleading in actions against heir, 183.
defences by heirs or devisees, when sued on specialties binding the heir, 677, 678.
See EXECUTORS AND ADMINISTRATORS; RECOVERY OF LAND.
defences of riens per descent *and* riens per devise, 678.
pleading payment of other specialty debts, 678.

HIGHWAYS,
claim against a highway authority for misfeasance, 408.
claim for placing on a highway an obstruction over which the plaintiff fell, 457.
claim for injuries caused by leaving a horse in a street unattended, 445.
defence, to an action for trespass, of a public highway over the land, 952.
statutes regulating highways, 407.
provisions of the Local Government Acts, 1888 *and* 1894, *and of the Public Health Acts*, 1875 *and* 1895...407, 408.
ownership of the soil of highways apart from statute, 408.
ownership of "streets" under the Public Health Act, 1875...408.
liability to repair; local authorities, &c., 407, 408.
corporate bodies acting as surveyors of highways not liable for damages to individuals by non-repair, 408.
but may be liable for injuries caused by negligence, 408, 409.
liability of tramway companies, 409.
liability of owner of locomotive for damage from sparks, 409.
motor-cars on, by what statutes and orders regulated, 409, 446.
obstructions to highways, 451, 452.
defences of public highway, how pleaded, 952.
defences under the Public Authorities Protection Act, 1893, *in actions for things done under the Acts relating to highways, &c.*, 858, 901.
And see NEGLIGENCE; NUISANCE; WAYS, &C.

HIRE,
statements of claim:
for the hire of goods, 183.
against the hirer of goods for breaches of agreement, 184.

HIRE—*continued.*
statements of claim—continued.
against a hirer of wagons for demurrage of the wagons, 165.
the like for damages for detention beyond the allowed time, 165.
See BAILMENTS; CONVERSION; REVERSION.

HIRE-PURCHASE AGREEMENT, 348, 816.

HOUSING OF THE WORKING CLASSES ACT, 1890...222.

HUNTING, 941: *see* TRESPASS TO LAND.

HUSBAND AND WIFE.
statements of claim in contract:
by a married woman suing alone for debts contracted or on contracts made during coverture, 184.
by a married woman for a debt contracted or on a contract made after marriage, 185.
against a married woman for a debt contracted or on a contract made during coverture, and since 5th December, 1893...193.
against a married woman for debts contracted or on contracts made during coverture after 1882, but prior to 5th December, 1893...193.
against a married woman for a debt contracted before marriage when the marriage took place after 1882...193.
against husband and wife, married after 1882, for a debt contracted by the wife before the marriage, 194.

defences in contract:
defence to a claim against a married woman in respect of a contract made or debt incurred that she was then under coverture, and only subject to have judgment against separate estate, 679.
defence by a married woman that she made the contract or incurred the debt only as agent for her husband, 680.
defence by a husband married after 1882 to an action in respect of the wife's ante-nuptial debts, contracts, or wrongs, that he never had any property from or through his wife, 680.
the like where the husband had property from or through his wife, but claims to deduct payments, &c., 680.
defence by a husband that his wife had no authority to pledge his credit, 681.
defence by a husband that the goods were supplied to and on the credit of his wife, 681.
Position of Married Women at common law; incapacities as to actions and contracts, 185.
Procedure in Actions by and against Married Women, 185, 186.
Contracts during Coverture, 186, 187.
Ante-nuptial Debts and Liabilities of Wife, 187, 188, 189.
date of marriage determines rights and liabilities in respect of ante-nuptial debts, contracts, and torts, 187.
where marriage was after 1882 they are regulated by ss. 13, 14, 15, of M. W. P. Act, 1882...188, 189.
under these sections husband and wife may be sued either separately or together, 189.
liability under these sections is separate, 189.
what that liability is and how enforced, 189.
Property of the Wife, 189, 190, 191.
her position and that of her husband at common law as to property, 189, 190.
position as to property in equity, separate estate, 190.
restraint on anticipation, effect of, 190.
M. W. P. Acts, 1882, 1893, *effect of*, 190, 191, 410.
Wife's Contracts as Agent, 191, 192.
authority for household matters and necessaries, 191.
what are necessaries, 689.
authority not implied during separation, except where the separation is owing to husband's misconduct, 191.
Actions between Husband and Wife, 192.
Judicial Separations, Protection Orders, &c., 192.

HUSBAND AND WIFE—*continued.*
defences in contract—continued.
Wife Executrix, &c., 192.
in the case of debts contracted or contracts made by a woman under coverture after 5th December. 1893, *not necessary to allege separate estate*, 193.
form of judgment in such case, 193.
form of judgment in respect of ante-nuptial liability of women where marriage after 1882...193, 194.
Defences to Actions:
coverture in itself now no defence, 679.
effect of judgment against husband on contract made by him and wife jointly, 679.
coverture after 1882 *not a disability under the Statutes of Limitation*, 679.
defence that the contract sued on was made by defendant solely as agent for her husband, &c., 680.
defences by husband sued on wife's ante-nuptial debts or liabilities: Statutes of Limitation, &c., 187—189, 680.
when a defence by the husband that his wife had no authority to pledge his credit, 191, 681.
statements of claim in tort:
by a married woman suing alone in respect of a wrong committed during the coverture, 409.
by husband and wife for damages for negligence causing personal injury to the wife after marriage, the husband claiming in respect of the damage to himself, 411.
against a married woman for a wrong committed by her during the coverture, 411.
against husband and wife for a wrong committed by the wife during the coverture, 412.
against husband and wife, married after 1882, for a wrong committed by the wife before marriage, 412.
by a husband for enticing away and wrongfully harbouring his wife, 412.
actions by or against a married woman for wrongs, 185, 186, 409, 410, 858.
in what cases husband may be joined as co-plaintiff, 410.
option of suing husband jointly with wife for wrongs committed by her during coverture, 410.
his liability terminates on determination of coverture, 410.
husband not liable for wrongs committed by wife during judicial separation, &c., 410.
wife may sue husband for wrongs to her separate property, 185, 192, 410.
no action between them for wrongs in other cases, 410.
injunction restraining husband from entering wife's house, in what cases, 411, 858.
husband may be sued alone for wrongs committed by him jointly with wife, 412.
husband and wife in general to be sued jointly and to defend jointly for wrongs committed by wife during coverture, 858.
action for wrongs committed by wife before marriage, 188, 189.
actions for enticing away and wrongfully harbouring wife, 412.
coverture in general; no defence to action by or against a married woman for a wrong, 858.
applications for joinder of wife in actions by or against the husband, 858.
coverture now no disability under the Statutes of Limitation, 858, 876.

IDIOTCY. *See* LUNATICS; INSANITY.

ILLEGALITY,
defence to an action on a bond that the bond was given for an immoral consideration, 682.
defence to an action on a separation deed that the deed illegally provided for future separation, 683.
defence to an action for the price of goods sold, and on accounts stated in respect of the same matters, that the debt was for spirits sold in quantities of less value than twenty shillings, 684.

ILLEGALITY—*continued.*
defence that a contract sued upon was a contract by way of gaming or wagering within the 8 & 9 Vict. c. 109, s. 18...684.
defence to an action on a marine policy, denying the plaintiff's interest (19 Geo. II. c. 37), 691.
objection in point of law to a like action on the ground that the policy was avoided by 19 Geo. II. c. 37, s. 1...563.
defence that a bill of exchange was given for an illegal consideration, 604.
defence that the contract sued on was one for forming and carrying on, or for carrying on, an illegal unregistered company of more than twenty persons, 684.
defence of illegality under the Ground Game Act, 685.
defence that the contract is void as being in illegal restraint of trade, 683.
defence of illegality; how pleaded, 682.
effect of illegality, though not pleaded, appearing on plaintiff's own evidence, 682.
illegality in promise, 71, 682.
illegality in consideration, 71, 682.
severable premises, 682.
contracts in unlimited or unreasonable restraint of trade, 682.
illicit cohabitation, &c., 682.
compounding a felony or other public offence, 683.
money paid under illegal contract or for illegal purpose, 683.
separation deeds, 683.
illegality in sales of spirits, 684.
Sunday trading, 797.
And see COMPANY *and* SOCIETIES.

IMPOSSIBILITY OF PERFORMANCE, 685.
destruction of subject matter of contract, 577.

IMPRISONMENT. *See* TRESPASS TO THE PERSON *and* PROCESS.

INCONSISTENCY,
alternative or inconsistent defences or replies may be pleaded, 524, 547.
pleadings must not contain allegations inconsistent with the party's previous pleadings, 547.

INDEBITATUS COUNTS. *See* COMMON COUNTS.

INDEMNITIES,
statements of claim:
by the acceptor of an accommodation bill on the contract to indemnify him, 195.
on a promise to indemnify the plaintiff against defending an action, 196.
other forms of statements of claim on contracts of indemnity, 196.
defences:
denial of the alleged breach, 685.
denial that the plaintiff was damnified, 685.
the like where the plaintiff sues upon a bond, and the statement of claim does not disclose that the bond sued on was a contract of indemnity, 685.
defence that the alleged loss or damage, &c., did not result from the matters indemnified against, 686.
defence that the plaintiff was damnified by his own wrong or default, 686.
a mere indemnity need not be in writing, 194.
notice of damnification not a condition precedent unless stipulated for, 194, 686.
what costs recoverable on indemnity against claim, 194, 195.
indemnity, when implied; assignees of lease and original lessee: principal and agent, &c., 195, 229, 309.
implied indemnity to drawer or acceptor of accommodation bill, 195.
costs of action, when recoverable, as money paid under indemnity, 195.
indemnity against costs, 196.
indemnity for calls on sales of shares, 290.
Statute of Limitations running from damnification, 195.
third-party procedure; adding persons liable to indemnify as third parties, 685, 555.
damnification usually a condition precedent to action or indemnity, 255, 685, 686.
in what cases mere liability *is sufficient*, 685.

INDENTURE. *See* DEED.

INDORSEMENT. *See* BILLS OF EXCHANGE; SHIPPING; SPECIAL INDORSEMENTS; WRIT OF SUMMONS.

INDUCEMENT,
matters of inducement, what, 51, 527.
denial of, 527, 889.

INDUSTRIAL SOCIETIES. *See* SOCIETIES.

INFANCY, 687, 858: *see* INFANT.

INFANT,
commencement of statement of claim by an infant, 197.
defence of the infancy of the defendant at the time of the alleged contract, 687.
the like where the defendant is still an infant, 688.
reply, that the debt sued for was for necessaries supplied to the defendant, 689.
defence to an action for calls that the defendant was an infant at the time of taking the shares, 689.
reply of infancy to defences under the Statutes of Limitation, 777.
infants; how to sue and defend, 196, 688.
infant plaintiff repudiating action after coming of age, 196.
infant co-contractor repudiating contract, 196.
action against firm, where one partner an infant, 196.
no objection can be taken to non-joinder of infant co-contractor as defendant where the action is not one for necessaries, 29, 30.
claims by or on behalf of infants under the Fatal Injuries Act, 1846... 387, 388, 389.
effect of Infants' Relief Act, 1874...687, 688.
no action on any ratification of infant's contracts after full age, or on promise after full age to pay debt contracted during infancy, 687.
distinction between ratification and new independent promise, 687.
provisions of Betting and Loans (Infants) Act, 1892...687.
bills accepted after majority in respect of loan contracted during infancy, 687.
money paid by infants under void or voidable contracts, repudiation of contracts, 687, 688.
infancy a defence to actions for wrongs founded on contract, 688, 858.
no defence to actions for pure torts, 688, 858.
infant representing himself as of full age; not a good reply to defence of infancy, 688.
contracts to prejudice of infants void; but contract containing some stipulations against infant may be good, 688, 859.
implied admissions in pleading not binding infants, 688.
infancy no defence to contract for necessaries, 689.
what are necessaries, 689.
contracts of apprenticeship, 82, 83, 689.
obligations arising out of property, to what extent binding on infant, 689.

INJUNCTION,
I. *In actions on contracts:*
forms of injunctions to restrain breaches of contract, 197, 198.
negative contracts enforceable by injunction; implied contracts; severable stipulations; contracts affirmative in form, 197, 198.
stipulations for penalty on breach, no bar to injunction, 198.
stipulations for liquidated damages, may prevent injunction; in what cases, 198.

II. *In actions for wrongs:*
claims for injunction:
a common form, 413.
in an action for infringement of copyright, 355—358.
in an action for obstruction of light, 422.
in an action for nuisance by smells, 454.

INJUNCTION—*continued.*
II. *In actions for wrongs—continued.*
claims for injunction—continued.
in an action for nuisance by pollution of water, 514.
in an action for infringement of patent, 462.
in an action for disturbance of a right of shooting, 480.
in an action for publication of a trade libel, 481.
in an action for infringement of a trade mark, 495.
for claims of an injunction in other cases: *see* SUPPORT; TRADE DISPUTES; TRESPASS; WATER; WAYS.
effect of the Judicature Acts as to injunctions, 34, 35, 413, 414.
principles on which injunctions are granted or refused not altered, 35, 413.
power to grant injunctions to prevent continued publication of libels, 366, 481.
whether limited to those injurious to trade or property, 366.
injunction against threatened wrongs to property, 413, 414.
against wrongfully inciting persons to break contracts, 490—492.
injunction grantable against commencing proceedings in another division, but not to restrain pending proceedings therein, 414.
jurisdiction to give damages in lieu of injunction, in what cases exercised, 414.
injunction not in general obtainable by a plaintiff against a person added as third party, 414.
mode of pleading, where an injunction is claimed, 413, 414, 859.
defendant may claim an injunction by counterclaim, 415.
mandatory injunction to pull down a building, when granted, 421.
defences to actions for injunction, objections of law, &c., 859.
defences under statutes authorising works, &c., 859.
mere lapse of time no bar; acquiescence or laches, when a defence, 859.

INNKEEPER,
claim against an innkeeper for refusing to lodge the plaintiff, 415.
the like, when goods were deposited for safe custody, 417.
claims by a guest against an innkeeper for loss of goods, 417.
denial of the acts or matters complained of, 527, 529.
defence denying that the defendant was an innkeeper, 859.
defence denying that the plaintiff was a guest at the inn, 860.
defence denying that the plaintiff brought the goods into the inn, 860.
defence to an action against an innkeeper for the loss of, or injury to, goods, that the loss or injury was occasioned by the negligence of the plaintiff, 860.
defence to a claim exceeding £30 for loss of, or injury to, goods within s. 1 of the Innkeepers Act, 1863, stating facts protecting the defendant under that Act from liability to any greater amount than £30...860.
defence denying liability and setting up a notice limiting liability and paying money into Court, 861.
defence that the goods were detained under a right of lien, 866.
who is liable to be sued as a common innkeeper, 415, 416.
Innkeepers Act, 1863, *what protection it affords to innkeepers*, 416.
innkeeper bound to receive travellers, 415.
not an insurer of goods; duty to take care of them, 416, 860.
the action for loss of goods may be either in tort or on implied contract, 416.
liability as to goods of third persons, in what cases, 416.
limitation of liability under the Innkeepers Act, 1863...416.
how far innkeepers responsible for state of premises, 416, 454.
what amounts to contributory negligence of plaintiff, 860.
lien of innkeeper a general lien; goods of third persons, &c., 861.
waiver or loss of lien, 861, 862.
qualified right of sale under the Innkeepers Act, 1878...861, 862.

INNUENDO. *See* DEFAMATION.

INSANITY,
commencement of defences by lunatics and persons of unsound mind, 243, 729.
defence that the defendant was insane at the time of contracting, 690.

INSANITY—*continued.*
reply of insanity to defence under the Statute of Limitations, 724.
actions by or against lunatics, &c., 243 : *see* LUNATICS.
insanity, when a defence to an action on contract, 690.
obligation of lunatic to pay for necessaries supplied, 690.
not generally any defence to an action for a wrong, 862.
agent of lunatic ; revocation of authority, 690.
Statutes of Limitation ; disability : see LIMITATION, STATUTES OF.
lunatic not bound by implied admissions in pleading, 690.
justification of confinement of lunatic ; statutory privileges of persons acting under the Lunacy Acts, 933.
See LUNATICS.

INSURANCE,
1. *Marine policies :*
statements of claim :
against an underwriter on a policy of insurance on a ship for a loss, 202.
the like against an incorporated company, 202.
against an underwriter on a marine policy for a constructive total loss, 202.
against an underwriter on a policy of insurance on cargo for a loss, 203.
on a policy of insurance upon goods to recover for a general average loss, 203.
for return of a premium paid on a policy of insurance, where the risk never attached, 204.
defences :
denial of the making of the policy, 691.
defence denying the plaintiff's interest, 691.
objection in point of law that the policy was avoided by 19 Geo. II. c. 37, s. 1...563.
defence denying that the loss was by the perils insured against, 692.
defence that the loss was an average loss within the exception in the policy, 692.
defence that the ship was not seaworthy, 692.
defence that the ship did not sail on the day warranted, 693.
defence that the ship deviated from the voyage insured, 693.
defence that the policy was obtained by fraud, 693.
defence of misrepresentation of a material fact respecting the risk, 694.
defence of concealment of a material fact, 694.
marine insurance ; a policy necessary ; matters to be specified therein ; limit of time ; stamp, &c., 198, 199.
"slip" or memorandum in marine insurance not binding ; how far evidence ; relation back to, for some purposes, 199, 208.
partnership subscribing policy ; firm name, 199.
contract for payment out of the funds of a company, 199.
policies effected by agents ; who to sue thereon, 199.
what names must be specified in policy, 198, 199, 200, 691.
wagering policies, or policies made "interest or no interest," &c., prohibited as to British ships, 200, 691.
insurable interest, what ; how stated in pleading, 200.
assignee of policy may sue in his own name under Policies of Marine Insurance Act, 1868...200.
assignor cannot in general sue after assignment, 200.
policies "lost or not lost," 200, 691.
what is a loss by perils of the seas ; proximate cause, 201.
collisions ; collision clause ; running-down clause, 201.
insurance in general a contract of indemnity, 201.
subrogation of insurer, after payment, to insured's rights against wrong-doers who caused the loss ; action in name of insured, 201.
damages in nature of interest in actions on policies, 201.
mutual insurance societies ; effect of their rules, 201.
valued policies, 201.
total or partial loss ; constructive total loss ; notice of abandonment, 202.
general average ; particular average, 203, 204, 692.
premium recoverable back, in what cases, 204.
not where risk has attached, or policy is void for illegality or avoided for insured's fraud, 204.

INSURANCE—*continued.*
I. *Marine policies—continued.*
defences—continued.
warranty of seaworthiness, meaning of seaworthiness, 293, 692, 693.
insurers not liable for loss of goods by inherent vice therein, 693.
defence of deviation, 693.
defence of misrepresentation or concealment of material facts, 694.

II. *Life policies:*
statements of claim:
by executors against an insurance company upon a policy of insurance on the life of the testator, 205.
the like, by an assignee, under 30 & 31 Vict. c. 144...206.
on a policy of insurance on the life of a third person, 207.

defences:
denial of the making of the policy, 694.
defence denying the plaintiff's interest in the life assured, 694.
defence that the policy was obtained by fraud, 695.
defence that the policy was obtained by the fraudulent concealment of a material fact, 695.
defence that the declaration agreed upon as the basis of the insurance was untrue, 695, 696.
defence that the person whose life was insured departed beyond Europe, whereby the policy was avoided, 697.
defence that the person whose life was insured died by his own hand, whereby the policy became void, 697.
policies without interest or by way of wagering void, 205.
names of person interested must be inserted in policy, 205.
only value of interest in the life recoverable, 205, 206.
what is sufficient interest in the life to support an insurance, 205.
stamping of life policies, 206.
provisions of the Married Women's Property Act, 1882...206.
certain companies empowered to sue or be sued by public officer, 206.
if policy not under seal, consideration should be stated, 206.
assignee of policy may sue in his own name after written notice under the Policies of Assurance Act, 1867...206.
provided the assignment is duly stamped, 206.
misrepresentations; warranty of declarations; concealment, 695.
misstatements by persons referred to, 695.
suicide, 697.

III. *Fire policies,*
statement of claim on a policy of insurance against fire, 207.
denial of the making of the policy, 698.
denial that the loss or damage was caused by fire, 698.
denial of the fact of loss or damage, 698.
defence denying the plaintiff's interest, 698.
defence that the plaintiff did not give notice of the loss, according to a condition of the policy, 698.
defence that the plaintiff did not give in an account of his loss to the office, according to a condition of the policy, 699.
defence that the plaintiff made a fraudulently exaggerated claim, 699.
defence that the plaintiff obtained the policy by the concealment of a material fact, 699.
defence that the policy was obtained by fraud, 700.
provisions of 14 Geo. III. c. 48 as to insurable interest, names in policy, &c., 205, 207.
insurable interest, what sufficient, 207.
fire insurance a contract of indemnity; subrogation of insurer after payment to insured's rights, &c., 207, 208, 698.
"slip" or "provisional insurance" may in fire insurance make a contract, 208.
stamping of fire policies, 208.
condition as to double insurance, 698.
what is loss or damage by fire, 698.
notice of loss and particulars of damage when conditions precedent, 698, 699.

INSURANCE—*continued.*
III. *Fire policies—continued.*
misrepresentation or concealment, 699.
alteration of premises; description in policy, 699, 700.
IV. *Insurance against accidents*,
claim by executor or administrator on accident policy, 208.
claim by assured for allowance during incapacity, 209.
what is an "accident," 208.
stamping of accident policies, 209.
proximate cause only regarded in policies of insurance, 208.

INTEREST,
claim for interest where it is not sought to recover the principal, 209, 265.
claim for principal and interest on a mortgage, 264.
claim for principal and interest on a covenant in a bond, 81.
claim for principal and interest on a common money bond, 135.
claim for the amount of, and interest on a judgment, 212, 214.
claim for interest on bills of exchange, 109, 110, 113, 115.
claim for interest on a cheque, 125, 126.
claim for interest on a promissory note, 129.
instances of claims for interest as unliquidated damages, 74.
interest; when a debt; when damages; at common law; under the statute 3 & 4 *Will. IV. c.* 42...209, 210, 211.
on mercantile securities; by usage; on contracts to give or pay bills or notes, 210.
compound interest; previous dealings, 210.
what claims for interest may be specially indorsed, 210.
interest on bills or notes; liquidated damages, 68, 109, 210.
interest in actions by a company for calls: see COMPANY.
interest may be given as damages in actions of tracer or trespass to goods, 211.
and in actions on policies of insurance, 201, 206, 211.
when jury or judge may give interest on debts or sums certain under 3 & 4 *Will. IV. c.* 42...210, 211.
mode of claiming interest as a debt; as damages, 210, 211.
claims of interest "until payment or judgment," 68, 109, 110, 210, 214.
interest on common money bond, 212.
interest on judgment debts, 213.
effect of stipulation for payment on a certain day, with interest at a specified rate, 211, 212.
jurisdiction to give equitable relief against unconscionable bargains with expectant heirs, &c., has been extended by the Money-lenders Act, 1903...212.

INTOXICATION. *See* DRUNKENNESS.

I. O. U. *See* ACCOUNT STATED; MONEY LENT.

IRREGULARITY,
setting aside proceedings for non-compliance with the rules, 13, 53, 54.

ISSUE. *See* JOINDER OF ISSUE.

ISSUES,
issues of fact; issues of law; distinction, 2.

JOINDER OF CAUSES OF ACTION,
provisions of O. XVIII., as to, 52—54.
joinder of alternative and inconsistent claims, 23, 52.
power of Court or judge to order separate trials, or to exclude some of the causes of action, &c., 21, 23, 52.
what causes of action may be joined in an action or counterclaim for recovery of land, 52, 53, 535.
leave to join other causes of action, when and how obtained, 53.

JOINDER OF CAUSES OF ACTION—*continued.*
what is an action for recovery of land within the rule, 53.
joinder of claims in action by trustees in bankruptcy; in actions by or against husband and wife; in actions by or against executors, &c., 53.
applications to set aside proceedings in cases of misjoinder of claims, 53, 54.

JOINDER OF ISSUE,
when to be implied, 545, 546, 547.
its effect, 546.
not allowed to be pleaded in reply to a counterclaim, 546, 548.
And see REPLIES AND SUBSEQUENT PLEADINGS.

JOINDER OF PARTIES, 19–26. *See* PARTIES.

JOINT AND SEVERAL,
contracts, when construed as joint, when as several, wording being ambiguous, 20.
set-off in respect of such contracts, 773.
joint and several promissory notes, 131.
effect of release of one of joint and several debtors, 753.
of judgment obtained against one of them, 704.
joint tort-feasors, jointly and severally liable, 21.
effect of judgment against one of several joint tort-feasors, 862.
effect of release, or accord and satisfaction, by one of them, 815, 907.
And see JOINT CONTRACTS, &C.

JOINT CONTRACTS, JOINT DEBTS, JOINT TORTS.
parties to actions; joinder, &c., 19, 20.
survivorship, 30, 31.
joint tort-feasors; when liability is joint, can damages in any cases be assessed separately, 21, 57.
no right of contribution between joint tort-feasors, in respect of acts wilfully committed, 255.
See PARTIES; LIMITATION, STATUTES OF; RELEASE; SET-OFF; *and see* JOINT AND SEVERAL, *supra*.

JOINT-STOCK COMPANY. *See* COMPANY.

JOINT TENANT. *See* TENANT IN COMMON.

JUDGE,
not liable for judicial acts in matters within his jurisdiction, 418.
liability of judge of limited jurisdiction, for acts not within jurisdiction, 418.
judges not liable for acts of officers of Court, 418.
privilege as to defamatory words, 418, 836, 837.
protection under Public Authorities Protection Act, 418.
And see JUDGE'S ORDER; JUSTICE OF THE PEACE.

JUDGE'S ORDER,
defence of payment under, by a garnishee: *see* ATTACHMENT.
action on, when it lies, 212.

JUDGMENTS AND ORDERS,
statements of claim:
on a judgment of the High Court, 212.
on an order made in an action in the High Court, 214.
on a judgment of a French Court, 214.
on a judgment of a Russian Court, 214.
defences:
defence denying the alleged judgment, 700.
defence to an action on a foreign judgment that the defendant was not a subject of the foreign country, nor resident there, and that he did not appear in the foreign suit, and had no notice thereof, 701.
defence to an action on a Spanish judgment that the judgment was not a final judgment, 702.
defence to an action on a Russian judgment that the judgment was obtained by fraud, 702.
the like to an action on an Italian judgment, 702.

JUDGMENTS AND ORDERS—*continued.*
defence of set-off of the amount due to the defendant upon a judgment of the High Court of Justice, 780.
on what judgments or orders actions will lie, 212, 213.
final judgment of Court of competent jurisdiction creates an actionable debt, 212.
action on interlocutory order of Supreme Court for payment of money or costs, 212.
actions on judgments of inferior Courts, jurisdiction must be shown, 212.
no action in High Court on judgment or order of County Court, 212.
costs in actions on judgments, 212, 213.
effect of foreign or colonial judgments; actions thereon, &c., 213, 749.
foreign or colonial judgment creating a debt may be the subject of special indorsement, 213.
Irish and Scotch judgments and decrees are, subject to provisions as to registering, considered as foreign, 213.
Irish and Scotch judgments; statutory provisions as to registering and enforcing judgments in England, 213.
interest on judgment debts, 213.
denial of the judgment, how pleaded, 700.
defendant cannot plead facts which might have been pleaded in original action, 700.
defences of payment; release; fraud; Statute of Limitations, 700, 701.
foreign or colonial judgments; what defences pleadable to actions thereon, 701, 702.

JUDGMENT RECOVERED,
defence of judgment recovered by the plaintiff in a former action for the same debt or cause of action in the High Court of Justice, 703.
defence of judgment recovered in a like action against a co-debtor with the defendant, 704.
defence of judgment recovered by the plaintiff in a former action for the same debt, or cause of action, in a County Court, 704.
defence of judgment recovered against the plaintiff upon the same matter in a former action between the parties: *see* ESTOPPEL.
forms of pleas under former system, 862.
judgment recovered by plaintiff in previous action, when a defence, 703—705, 862, 863.
merger of origional cause of action, 703, 705, 736.
effect of judgment recovered, where the cause of action is continuing, 862.
judgment recovered against one of joint debtors a bar to subsequent action against the others, 704.
exception, where the other joint debtors were then beyond seas, 704.
election, where several parties alternatively chargeable, by suing one to judgment, 704.
judgments of inferior Courts of record; County Courts, &c., 704, 705.
foreign or colonial judgments, no defence, unless satisfied, 705.
but may be ground for stay of proceedings, 705.
Scotch and Irish judgments, 213.
judgment against *plaintiff in former action an estoppel*, 647, 705.
what causes of action are covered by previous judgments in actions for wrongs, 862.
judgment against one of several joint tort-feasors a bar, though unsatisfied, to an action against the others, 862.
action by an informer for penalty, not barred by previous recovery in collusive action by another informer, 863.
orders of magistrates, when a bar to subsequent action, 862, 863

JUDICATURE ACTS,
in general do not affect rights, but improve procedure for giving effect to them, 35.

JUDICIAL NOTICE,
matters whereof the Court takes judicial notice; need not be pleaded, 10, 45.

JUDICIAL SEPARATION. *See* HUSBAND AND WIFE.

JURISDICTION,
defence to an action for trespass to land that the land was situate abroad, and that the English Courts had no jurisdiction to adjudicate upon the claim, 863.
jurisdiction ousted in some cases by statute, 705.
defences of want of jurisdiction should state facts sufficiently to show such want, 863.
usual grounds for such defences, &c., 863, 864.
objection in point of law on this ground, when pleadable, 864.
jurisdiction in English Courts as to wrongs to person or goods abroad, but not as to foreign land, 863, 864.
foreign sovereigns or states, 864, 161, 730.
the Stannaries Court now abolished, and its jurisdiction transferred to County Courts, 864.
Courts of the universities of Oxford and Cambridge, 864.
jurisdiction of inferior Courts must be alleged and proved as a fact, 864.
total absence of jurisdiction cannot be waived; matters of procedure may be, 864.

JUS TERTII, 347, 500, 502, 934, 936.

JUSTICE OF THE PEACE,
statements of claim against justices for acts within their jurisdiction must state that the act was done maliciously and without reasonable cause, 418.
action for acts without or in excess of jurisdiction, 418.
provisions of 11 *&* 12 *Vict. c.* 44, *ss.* 2, 7, *as to actions against justices*, 418, 419.
protection under the Public Authorities Protection Act, 419, 901.
privilege as to defamatory statements, 836.

JUSTIFICATION, 531: *see* DEFAMATION; PROCESS; TRESPASS, &C.

KNOWLEDGE,
may be pleaded as a fact, without setting out the circumstances, 9.
And see MASTER AND SERVANT; MISCHIEVOUS ANIMALS, &C.

LACHES, 721, 865, 871: *see* INJUNCTION.

LAND. *See* RECOVERY OF LAND; SALE OF LAND; SUPPORT OF LAND; TRESPASS TO LAND, &C.

LANDLORD AND TENANT,
Actions on contracts,
statements of claim:
for the use of a house and land by the permission of the plaintiff, 215.
for rent, 216.
for rent under a covenant in a lease, 217.
for rent of a furnished house under an agreement in writing, 218.
for board and lodging, 218.
by landlord against tenant for damages for not keeping the premises in tenantable repair, 218.
for not using the premises in a tenant-like manner, 218.
for not delivering up fixtures upon the premises in good repair, 219.
by landlord against tenant for breach of covenant to repair, 219.
a like form upon an agreement to repair, 220.
by landlord against tenant for not farming according to the custom of the country, 221.
statements of claim against tenant for waste, 505: *see* WASTE.
by an outgoing tenant for tillages left on the land at the expiration of his tenancy, 162: *see* CROPS.
by lessee against lessor for breach of covenants for quiet enjoyment and for title, 221.
by landlord against tenant for not giving up possession at the end of the term, 223.

LANDLORD AND TENANT—*continued.*
Actions on contracts—continued.
statements of claim—continued.
by lessor against lessee for breach of a covenant to pay rates, &c., 224.
by lessee against lessor on warranty and fraud on letting house, 224.
by assignee of lessor against lessee, 225.
by executor of lessor possessed of a term against lessee, 227.
by heir of lessor against lessee, 228.
by devisee of lessor against lessee, 229.
by lessee against assignee of lease (for money paid), 230.
by lessor against assignee of lessee upon a covenant in the lease, 229.
by lessor against executor of lessee, 230.
for double value under 4 Geo. II. c. 28, s. 1...231.
for double rent under 11 Geo. II. c. 19, s. 18...232.
to recover possession, where the tenancy has expired or been determined by notice to quit, and for mesne profits, 232.
to recover possession upon a forfeiture for breach of covenant to repair, with claims for damages for breach of covenant, for arrears of rent, and for mesne profits, 234, 236.
for possession on forfeiture and damages by assignee of lessor against assignee of lessee, 237.
for possession on forfeiture for breach of covenant not to assign, 239.
to recover possession on a forfeiture for non-payment of rent, 240.
action for use and occupation; when it lies; by and against whom maintainable; evidence, 215, 216.
action for rent under a demise; demise how made, 216.
provisions of ss. 1, 2, of the Statute of Frauds and of 8 & 9 Vict. c. 106, s. 3; what leases must be by deed, 216.
instruments void as leases may be good as agreements, 216.
provisions of s. 4 of the Statute of Frauds, 216, 665.
an agreement for a lease is within that section, 216.
position of a tenant who has entered under an agreement for a lease, and is entitled to specific performance of it, 216, 217.
specific performance of oral agreement, in what cases, 216, 217.
effect of entry and payment of rent under a void lease or an agreement for a lease, 217.
lease of incorporeal hereditament, as a right of shooting, must be by deed, 217.
liability of lessor and of lessee after assignment, 217, 227, 713.
contract for board and lodging, 218.
implied contract to use premises in tenant-like or husband-like manner, 218, 219.
contracts to repair; measure of damages, &c., 219, 220.
lessee must give notice of want of repair to his lessor, who covenants to repair, before he sues him on such covenant, 220, 709.
"*good tenantable repair*," *what it is*, 220.
promise to cultivate in a husband-like manner and according to custom, when implied, 221.
an action lies on a parol warranty collateral to the lease as to the state of the premises, 224.
no implied warranty on letting land or unfurnished houses of fitness for occupation, 222.
implied warranty on letting furnished houses or rooms, 222.
statutory warranty on letting workmen's houses, 222.
covenant for quiet enjoyment, when implied; covenants for title; action on such covenants; measure of damages, 221—223.
covenants for payment of rates, taxes, &c., 224.
rights and liabilities of assignees of lessor and lessee on covenants; covenants running with the land, 225—227.
title, when and how pleaded, 225, 226, 229, 232, 237, 238.
lessee or tenant when estopped from denying landlord's title; reversion by estoppel, 225, 226, 232, 706, 712.
restrictive covenants; binding on assignees with notice, 226.
restrictive covenants in building schemes; rights of the different lessees or purchasers against each other, or against assignees, 226, 227.
assignee of rent; may sue without attornment, 227.
covenants running with land pass in general with the reversion, 227.

LANDLORD AND TENANT—*continued.*
Actions on contracts—continued.
when executor or administrator may sue, 227.
apportionment of rent under the Apportionment Act, 1870...227, 228.
assignee when bound to indemnify lessee against breaches of covenant, 229.
actions for rent against executor of tenant, 230.
liability of executor for rent; for breaches of covenant, 230, 231.
protection of executor under 22 *&* 23 *Vict. c.* 35.. 231.
action for double value under 4 *Geo. II. c.* 28; *special damage also recoverable*, 231.
action for double rent under 11 *Geo. II. c.* 19...232.
action by landlord to recover possession of premises, 232, 233.
statement of claim in such action; estoppel of tenant, 232.
in what cases the claim may be specially indorsed on writ; adding claims for rent or mesne profits, 233, 240.
mesne profits; damages for trespass, 233.
duty of tenant to give up possession at end of term; his liability where his sub-tenant holds over, 233.
notice to quit in cases of tenancies from year to year, 233.
notice to quit in other cases, 233, 234.
Agricultural Holdings Act, 1883, *provisions as to notice to quit*, 234.
Agricultural Holdings Acts do not invalidate special agreements as to compensation on quitting, 221.
provisions of Tenants' Compensation Act, 1890, 53 *&* 54 *Vict. c.* 57, *as to notice by mortgagee to mortgagor's tenants*, 470.
disclaimer of landlord's title a waiver of notice to quit, and a ground of forfeiture, 234, 235.
forfeiture clauses in leases; leases voidable thereunder at option of lessor, 234, 235.
provisions of the Conveyancing Acts, 1881 *and* 1892, *as to forfeitures in certain cases*, 235, 715, 716.
forfeitures for non-payment of rent, 235.
common law demand of the rent, what, and when necessary for enforcing such forfeiture, 235.
assignee of reversion enforcing forfeiture; notice of assignment, when necessary, 235.
relief against forfeiture, 235, 715.
covenants not to assign, or not to assign without licence, 239.
liabilities of tenants and occupiers to persons injured on the premises by unexpected and unusual condition thereof, 447, 448, 454.
liabilities of landlord to person injured on the premises by want of repair, 448, 449.
premises let out in flats, liability of landlord having control of staircase, 448, 449.

defences, &c.
defence to an action for the use and occupation of a house and land, denying the use and occupation, 706.
defence to a like action that the use and occupation were not by the permission of the plaintiff, 707.
defence to a like action, where no express agreement is alleged by the plaintiff, that the tenancy was under an express agreement, and that by the terms of such agreement no rent is due, 707.
defence to an action for breach of an agreement of tenancy which was not by deed, denying the letting upon the terms alleged, 707.
defence to an action for the breach of a covenant contained in a lease by deed, denying the making of the deed, 577, 578.
defence to an action for rent of payment of the rent, 745.
defence that the rent sued for was satisfied by a distress, 707.
defence that the plaintiff distrained for the rent, and still holds the distress, 708.
defence as to part of the rent claimed of a deduction by the defendant for property tax paid in respect of the premises, 708.
defence to an action for not keeping the premises in tenantable repair, denying the alleged breach, 708.
defence to an action for not using the premises in tenant-like manner, 709.

LANDLORD AND TENANT—*continued.*
Actions on contracts—continued.
defences, &c.—continued.
defence denying the alleged breach of a covenant or agreement to repair, 709.
defence to an action for not cultivating a farm according to the custom of the country, denying the alleged breach, 709.
defence to a like action, denying the alleged custom of the country, 709.
defence to an action for breach of the covenant for title in a lease, denying the alleged breach, 709.
defence to an action for breach of the covenant for quiet enjoyment, denying the alleged breach, 710.
defence to a like action, denying the title of the person evicting the plaintiff, 710.
defence of a surrender, 710.
defence of a surrender by operation of law, 711.
defence to an action against a tenant from year to year that the tenancy was determined by a notice to quit before the alleged rent became due or the alleged breaches were committed, 711.
reply that the notice was afterwards waived, 711.
defence of eviction, 711.
defence to an action against an assignee of a lease (or reversion), denying the assignment, 712.
form of defence in an action against an executor as assignee of a term, 654.
defence to an action by an assignee of the reversion, denying that the lessor, the assignor, was entitled to the reversion, 712.
defence by the assignee of a lease that he had assigned the term, 713.
defence to an action by the lessor on the covenants in the lease that the lessor assigned the reversion before breach, 713.
defence to an action by a landlord for double value under 4 Geo. II. c. 28, s. 1, that the defendant held over under a *bonâ fide* claim of title, 714.
general defence under O. XXI. r. 21 to an action by landlord against tenant for recovery of land, 714.
defence to an action by landlord against tenant to recover possession of the demised premises on an alleged determination of the tenancy by a notice to quit, denying the notice, 714.
defence to a like action that the notice was waived, 714.
defence to an action by a landlord for recovery of the demised premises for a forfeiture that the forfeiture was waived, 714.
defence to an action by landlord against tenant to recover possession of the demised premises on an alleged forfeiture that no notice specifying the breach complained of had, as required by the Conveyancing Acts, 1881, 1892, been served on the tenant, 715.
defence to an action for possession on forfeiture for breach of covenant to repair, with counterclaim for relief, 717.
defences to action for use and occupation; surrender, eviction, &c.; how pleaded, 706, 710, 711, 712.
expiration of title may be shown, 706.
defence of payment of rent to mortgagee, 706.
payment of rent to mortgagor before notice of mortgage, 706.
unfitness of premises for occupation; furnished house, &c., 706, 222.
counterclaim on collateral contract as to state of premises, 724.
destruction of buildings by fire during term, no defence, 706.
defence of payment; mere readiness to pay not sufficient, 707.
distress pending, a bar to action for rent, 708.
tenant's right to deduct payments of landlord's property tax, &c., 708.
when notice necessary on covenant by lessor to repair, 709.
custom of the country as to cultivation, when excluded by terms of lease or agreement, 709.
surrender by deed; statutes, 710.
what amounts to surrender by operation of law, 710.
surrender of part of the premises, 710.
eviction, what, 711, 712.
effect of eviction from part of the premises, 712.
assignment of term, &c., how made, 712.
liability of assignee of term, 713.
liability of lessee after assignment, 713.
effect of disclaimer by assignee's trustee in bankruptcy, 713.

LANDLORD AND TENANT—*continued.*
Actions on contracts—continued.
in what cases lessee may bring in assignee as third party, 713.
effect of the Apportionment Act, 1870, *in cases of assignment*, 713.
assignment of the reversion, when a defence, 713.
action for double value; defences, how pleaded; limitation, 714.
action by landlord to recover the demised premises; effect of defence of possession, 714, 906.
equitable defences must be specially pleaded, 714, 906.
waiver of forfeiture by unequivocal act recognising tenancy, 714, 715.
after issue and service of writ to recover the land a previous forfeiture is not thus waived, 715.
provisions of the Conveyancing Acts, 1881 *and* 1892, *as to certain forfeitures, requiring service of notice before enforcing them, and allowing applications for relief*, 715, 716.
application for relief under those provisions, how made, 716.
relief under the Common Law Procedure Acts in cases of non-payment of rent, 235, 715.
for statements of claim and defences, &c., in actions for wrongs by or against landlords or tenants, see DISTRESS; NEGLIGENCE; RECOVERY OF LAND; REPLEVIN; REVERSION; *and* WASTE.

LANDS CLAUSES CONSOLIDATION ACT, 156, 342, 343, 344, 584: *see* ARBITRATION; COMPANY.

LEASE. *See* AGREEMENTS; SALE OF LAND; LANDLORD AND TENANT.

LEAVE AND LICENCE,
defence of leave and licence, 864.
reply of a revocation of the leave, 865.
nature of this defence; should generally be specifically pleaded, 865.
in what cases a licence is not revocable, 865, 939.
a licence incident to a valid grant is irrevocable, 865.
distinction between licence and grant; mode of pleading, 865.
mere licence no justification for forcible entry, 865.
removing goods after revocation of licence, 865.
acquiescence in nuisance should be pleaded specially, 865.
revocation of licence should be replied specially, 865.
replies in nature of a new assignment, when necessary, 865, 866.
reply of abuse of licence; trespass ab initio, 866.
licence, when pleaded in answer to claims or defences under the Prescription Act, 819, 820.
And see TRESPASS.

LEGACY. *See* EXECUTORS.

LIBEL. *See* DEFAMATION.

LIBERUM TENEMENTUM, 937.

LICENCE. *See* LEAVE AND LICENCE.

LIEN,
defence to an action for detention of goods that the goods were detained in exercise of a right of lien, 866.
defence of lien by a carrier, 847.
defence of lien in an action for conversion of goods, or for trespass to goods, 867.
defence to an action for detention or conversion of deeds that they were deposited as a security for a debt, 868.
reply to a defence of lien of a tender of the debt before the alleged detention or conversion of the goods, 868.
defence under the Factors Act, 1889, to an action for detention or conversion of goods, that they were pledged with the defendant by a mercantile agent in possession thereof with the owner's consent and acting in the ordinary course of business, 869.
a right of lien proper is a personal right of detention, 346.
pledge, and lien without power of sale, distinction between, 346.
defences of lien must be specifically pleaded, 866.

LIEN—*continued.*
order for delivery of the goods to plaintiff on payment into Court; in what cases, 866.
lien at common law for work done upon goods, 866, 867.
general lien by agreement or trade usage, 867, 868.
no right of sale under mere lien, 868.
right of sale or assignment under pledge for loan, 868.
the Pawnbrokers Act, 270.
the Innkeepers Act, 1878...862.
the Factors Acts, transfers of documents of title, 869, 870, 348.
the Factors Acts, pledges by mercantile agents, or vendors, or purchasers, in possession of goods, 869, 870.
lien of carriers, 868.
lien of unpaid vendor, 276, 868.
lien, how lost or waived, 867.
reply of tender; payment into Court unnecessary, 868.
See CONVERSION; DETENTION.

LIFE POLICIES. *See* INSURANCE.

LIGHTS,
statements of claim:
for an injunction to restrain a threatened obstruction of the plaintiff's ancient lights, with a further claim for a mandatory injunction or damages in lieu thereof, 422.
for obstructing the access of light to a house where the right is claimed by prescription, 423.
by a reversioner for obstructing his ancient lights, 423.
defences:
denial of the alleged obstruction of the light, 870.
a like defence to an action for an injunction to restrain a threatened obstruction of light, 871.
denial of the plaintiff's possession of the house in respect of which he claims the right of light, 871.
defence to an action by a reversioner, denying the reversion, 912.
defence denying that the lights are ancient lights, 871.
defence to an action in which the claim is expressly made under the Prescription Act, 1832, s. 3, denying the alleged enjoyment, 871.
the like, alleging an interruption of the enjoyment, 872.
the like, alleging that the enjoyment was by consent, 872.
defence to an action for trespass, justifying an entry on the plaintiff's land to remove an obstruction to the defendant's ancient lights, 872.
right to light under s. 3 of the Prescription Act, 1832...419, 420, 872.
what amounts to actual enjoyment, 419.
no action unless the diminution of light renders the premises to a sensible degree less fit for business or occupation, 420.
effect of unity of possession, 420.
effect of altering windows, pulling down buildings, &c., 419.
what amounts to abandonment of the right, 420.
implied grants of rights to light; reservations in conveyances, &c., 420, 421.
repeated actions for continued obstruction, 421.
injunction against obstruction, 421.
rights to light by immemorial prescription; by lost grant, 421
right to air, when and how acquired, 421, 422.
obstructions of air, when actionable as a nuisance, 422.
mode of pleading the right to light, 422.
defences to actions for obstructing lights, mode of pleading, 870, 871.
right, when lost by abandonment, acquiescence, &c., 420, 871.
enjoyment for statutory period; interruption; consent by deed or writing, 872.

LIMITATION, STATUTES OF,
in actions on contracts, &c.
defence of the Statute of Limitations in an action for a simple contract debt, 717.
the like in an action for a specialty debt within s. 3 of the 3 & 4 Will. IV. c. 42...719.

LIMITATION, STATUTES OF—*continued.*
in actions on contracts, &c.—continued.
the like in an action for money due under a covenant in a deed, 720.
defence of the Statutes of Limitation in actions to recover damages for breach of a parol contract, 721.
the like in an action to recover damages for breach of covenant, or in an action upon a bond where the plaintiff's claim in respect of the alleged breaches is barred by the statute, 722.
reply in a case within 21 Jac. I. c. 16, s. 7, or 3 & 4 Will. IV. c. 42, s. 4, that the plaintiff was under the disability of infancy until within the prescribed period before action, 723.
reply in a case within 21 Jac. I. c. 16, or 3 & 4 Will. IV. c. 42, s. 4, that the plaintiff was under the disability of insanity, 723.
reply in a case within 21 Jac. I. c. 16, or 3 & 4 Will. IV. c. 42, that the defendant was under the disability of insanity, 724.
the like under 3 & 4 Will. IV. c. 42, s. 4...725.
reply that defendant was abroad, 726.
reply of a concealed fraud, 727.
a defence of like fraud under the statute 21 Jac. I. c. 16, s. 3, and the Trustees Act, 1888...728.
reply, in an action on a specialty, of an acknowledgment within twenty years, 728.
reply of the Statute of Limitations to a defence of set-off, 728.
defences under Statutes of Limitation, how pleaded, 717.
modes of raising such defences in actions for recovery of land, 717, 875.
limitation of actions on contracts, statutes relating to, 717 et seq.
actions for rent; parol demise; demise by deed; remedies against the land, 718.
actions for debt on a statute, 718.
actions for calls on shares, 718.
actions under the Directors' Liability Act, 1890...719.
actions for penalties under statutes, 719, 873.
actions for debts incurred by guardians, 719.
actions subject to the Public Authorities Protection Act, 1893...719.
disabilities suspending the Statutes of Limitation; should be specially pleaded, 719, 720.
coverture; not operating as a disability since 1882...720, 876.
defendant beyond seas; one of several joint debtors beyond seas, 720.
time when limitation begins to run; subsequent disability does not suspend the statute, 720, 721.
mere ignorance of its accrual does not prevent time running, 720.
mere laches of creditor raises no equity, 721.
time of limitation, how computed; time of the commencement of the action; renewal of writ of summons, 721.
defence of the statute in actions against executors, 721.
foreign law of limitation, when pleadable, 722.
limitation of actions, &c., for money secured by mortgage or judgment, or otherwise charged on land, 722.
claims against trustees; express trusts, &c., 722, 723.
statutes as regards personal property only bar the remedy, 723.
renewal of simple contract debts by promise to pay; promise implied from acknowledgment, 723.
conditional renewal; effect of qualified promise, 724.
renewal by part payment, or by payment of interest, 724, 725.
acknowledgment required to be in writing, signed by the party or his agent, 723, 724, 725.
what is a sufficient acknowledgment; to whom made, &c., 725.
renewal of liability by acknowledgment confined to debts, 725, 726.
mode of pleading in cases of renewal of liability by promise to pay, part payment, &c., 726.
renewal of specialty debts by written acknowledgment signed by debtor or his agent, by part payment or satisfaction of principal or interest, 726.
mode of pleading such acknowledgment, 726, 728.
effect of acknowledgment or payment by one of several joint debtors, 726.
application of Statutes of Limitation to cases of set-off and counterclaim, 728.
rules of equity, effect of fraudulent concealment of cause of action, 727.

LIMITATION, STATUTES OF—*continued.*
in actions for wrongs, &c.,
defence to an action within the Statute of Limitations, 21 Jac. I. c. 16, s. 3, that the action is barred by that statute, 873.
defence that the claim is barred by the Public Authorities Protection Act, 1893...901.
defence to an action for the recovery of land that the plaintiff's claim was barred by the lapse of the statutory period of limitation, 875.
defences under Statutes of Limitation must generally be specially pleaded, 873.
limitation of actions for wrong, statutes relating to, 873 et seq.
actions upon the case, what they were, 718, 873.
actions for penalties; action on penal statutes, 873.
actions under the Directors' Liability Act, 1890...873.
actions by executors for injuries to deceased's real estate, 873, 874.
actions against executors for wrongs committed by deceased against another's property, 874.
actions under the Fatal Accidents Act, 1846...874.
actions under the Dramatic Copyright Act, 874.
date of accruing of cause of action; actions where damage essential to cause of action; continuing injuries, &c., 874.
renewal of liability by acknowledgment inapplicable in actions for wrongs, 874.
limitation of actions in cases within the Public Authorities Protection Act, 1893...901.
actions for recovery of land, limitations of, 875, 876.
mode of pleading; objection in point of law, &c., 875, 906.
effect of the statutes in extinguishing title, 875.
effect of disabilities; infancy, insanity, &c.; successive disabilities, 876.
coverture not operating as a disability since 1882...876.
limitations of actions between mortgagors and mortgagees, 876.
successive occupation by persons without title, 876.
concealed fraud; in what cases it prevents operation of the statute, 727, 876.

LIQUIDATED DAMAGES,
claim on breach of covenant to pay liquidated damages, 241.
claim on a covenant in a deed of sale of a business to pay liquidated damages in the event of the defendant carrying on the business, 242.
set-off of liquidated damages under a covenant or agreement, 781.
set-off and counterclaim of liquidated damages with an alternative claim for unliquidated damages under a building contract, 805.
set-off of liquidated damages under a building contract, 781.
counterclaim for liquidated damages, 36, 803.
reply thereto of waiver, 36.
distinction between liquidated damages and penalty; construction of contracts as to, 241, 243, 803.
mode of suing upon contract with penalty, 241, 242.
mode of suing for liquidated damages; special indorsement, 242.
plaintiff cannot obtain both liquidated damages and an injunction in respect of the same breach, 242.
stipulations for liquidated damages, when preventing injunction, 198, 242.
penalties in building contracts usually are liquidated damages, 243, 803.

LIQUIDATOR. *See* COMPANY.

LIVERY STABLE KEEPER. *See* BAILMENTS; LIEN.

LOAN SOCIETY. *See* SOCIETIES.

LOCAL AUTHORITIES. *See* CORPORATION; PUBLIC AUTHORITIES PUBLIC HEALTH.

LOCAL GOVERNMENT ACTS, 159, 160: *see* CORPORATION, &C

LOCOMOTIVES ON HIGHWAYS, 409, 446.

LOSS. *See* BAILMENTS ; CARRIERS ; INSURANCE.

LOST ARTICLES,
title of finder, of owner or occupier of land where it is found to article found, 347.

LOST BILL, 608 : *see* BILLS OF EXCHANGE.

LOST GRANT, 944, 949, 950, 422.

LOTTERY, 669 : *see* GAMING.

LUGGAGE. *See* CARRIERS (OF PASSENGERS).

LUNATICS,
commencement of statement of claim by a person of unsound mind so found by inquisition, 243.
the like by a person of unsound mind not so found by inquisition, 244.
the like against a person of unsound mind so found by inquisition, 244.
commencement of defence by person of unsound mind not so found, 729.
actions by and against lunatics and persons of unsound mind ; mode of suing and being sued, 243, 244, 690.
contracts by lunatics ; defences, 690 : *see* INSANITY.

MACHINERY. *See* FENCES ; MASTER AND SERVANT.

MAGISTRATE. *See* JUSTICE OF THE PEACE.

MAINTENANCE,
defence of maintenance or champerty, 729.
maintenance and champerty ; what amounts to, 423.
illegality of ; agreements by way of, not enforceable, 729.
what agreements with solicitors are illegal on this ground, 730.
action for maintenance, when it lies, 423, 424.

MALICIOUS PROSECUTION,
statements of claim :
for a malicious prosecution before a justice of the peace, and at quarter sessions, 424.
the like before a justice of the peace, 426.
the like when plaintiff was committed for trial, and the bill was thrown out by the grand jury, 426.
for a malicious prosecution at assizes, 427.
for a malicious arrest under s. 6 of the Debtors Act, 1869...427.
defences :
denial of the alleged absence of reasonable and probable cause, and of the alleged malice, 877.
denial that the proceedings terminated in favour of the plaintiff, 877.
action for malicious prosecution, when it lies, 424, 425.
statement of claim, what it must show, 424, 425, 877.
termination of the proceedings in plaintiff's favour, 424, 877.
absence of reasonable and probable cause, 424, 877.
malice, what it is, and how alleged, 425.
action for malicious civil proceedings ; bankruptcy or winding-up petitions, &c. ; special damage, 425.
employer when liable for arrest or prosecution by servant, 425.
the prosecutor may be liable for maliciously procuring a remand, 427.
action for maliciously procuring arrest under s. 6 of the Debtors Act, 1869...427.
malicious arrest of a person privileged as witness, 427.
defence to actions for malicious prosecution should deny want of reasonable and probable cause and malice, not plead affirmatively, 877.

MANDAMUS,
claim for a mandamus against a company which has given notice to treat under the Lands Clauses, &c., Act, 342.
general claim for a mandamus, 428.
claim for a mandamus to poor law guardians, 429.
defence to action for a mandamus to the General Council of Medical Education, 878.

MANDAMUS—*continued.*
action for mandamus; jurisdiction given by the C. L. P. Act, 1854, *preserved by the Judicature Acts*, 428.
claim in action for mandamus, how made, 428.
it may be made either together with claims for damages, &c., or separately, 428.
in what cases the action lies; instances, 428, 429.
defences to such actions; objection in point of law, when pleadable, 877.
no statutory period of limitation for such actions, 877, 878.
new duty created by a statute which provides a mode of enforcing it can only be enforced in that mode, 878.
mandamus to restore name of medical practitioner or dentist to register, 878.

MANOR. *See* COMMON; CUSTOM, &C.

MARINE POLICIES. *See* INSURANCE.

MARKET,
claims for disturbance of market and refusal to pay tolls, 430 431.
action for disturbance, when it lies, 430.
grants of market; prescription, &c., 430.
statutes incorporating Markets and Fairs Clauses Act 1847...430.
duty of owners of market to see to safety of place, 431.
market overt, effect of sales in, 846, 348.

MARRIAGE,
statement of claim for breach of promise of marriage, 244.
the like alleging seduction, 245.
the like upon an absolute repudiation of a promise to marry upon the happening of a future event made before the happening of the said event, 246.
denial of an alleged promise of marriage, 730.
defence of the infancy of the defendant at the time of the promise, 688.
defence that the plaintiff was not ready and willing to marry the defendant, 730.
defence to an action on a promise to marry within a reasonable time that a reasonable time had not elapsed, 731.
defence that the promise was conditional, and that the condition has not been performed, 731.
defence that after making the promise the defendant discovered that the plaintiff was not chaste, 731.
defence that the defendant was induced to make the promise by fraud, 696, 732.
defence of rescission or exoneration before breach, 732.
promises to marry not within Statute of Frauds, 244.
promises to pay money, &c., in consideration of marriage are within the statute, 244.
promise to marry within a reasonable time, 244.
promise by person already married, 244.
breach of promise by marrying third party, 245.
breach by absolute renunciation before time for performance; option of promisee, 245, 730.
executor cannot sue for breach of promise made to or by deceased, except in respect of damage to property, 245.
measure of damages; conduct of parties, &c., 245.
action by infant, 245, 730.
parties are competent as witnesses; plaintiff's evidence requires corroboration, 245.
defences; how pleaded; what sufficient, 730, 731.
defence of defendant's infancy, 687, 730.
defence of fraud; exoneration, &c., 732.
marriage of party pending action, 30, 32, 189, 190: *see* HUSBAND AND WIFE; CHANGE OF PARTIES.

MARRIED WOMAN. *See* HUSBAND AND WIFE.

MASTER AND SERVANT,
actions on contracts,
statements of claim:
against a master for salary or wages due, 246.

MASTER AND SERVANT—*continued.*
actions on contracts—continued.
statements of claim—continued.
for a wrongful dismissal by a servant employed for a definite time, 247.
the like by a servant entitled to notice, 249.
the like by a commercial traveller, and for commission, 249.
like forms by labourer, bailiff, gardener, &c., 250, 251.
the like on special contracts by manager, clerk, editor, &c., 251.
against a servant for breach of contract by carrying on business within a certain distance, 251.
defences, &c., in actions on contracts:
denial of an alleged contract of employment, 732.
denial of the alleged terms of the employment, 732.
defence to an action for wrongful dismissal, denying the alleged breach, 733.
defence to a like action that the service was determined by due notice, 733.
the like where the fact that the service was determinable by notice is not shown in the plaintiff's claim, or where the defendant relies upon a local custom as annexing that term to the agreement, 733.
reply that the notice was waived, 734.
defence justifying a dismissal on the ground of misconduct, 734.
defence justifying a dismissal on the ground of incompetency, 735.
defence of the Statute of Frauds in actions for wrongful dismissal, 665, 666.
actions for wages; actions for wrongful dismissal, 246, 247, 248.
effect of dismissal in middle of a quarter, &c., 246.
measure of damages for wrongful dismissal, 246.
contracts of service for indefinite time, 247.
distinction between contracts of service and those of agency as to implied right of notice, 72, 247, 249.
contract with domestic servants, custom, 247.
instances of lengths of notice customary in various cases, 247, 249.
custom of trade as to determining service, 247.
construction of contracts as to notice, 247, 248.
contracts implied from continuing service, 248.
absolute renunciation of contract before the time may be treated as an immediate breach, 248.
effect of winding up, of appointing a receiver and manager, 248.
what amounts to dismissal, 733.
negative stipulations in contracts, enforceable by injunction, 248.
master's rights as to bribes, &c., received by servant, 248.
warranty of skill, what implied, 249, 330.
when a traveller paid by commission entitled to notice, 249.
on what orders he is entitled to commission, 249.
defences to actions for wrongful dismissal, 733—735.
defence that the service was determined by notice, 733.
dismissal without notice; misconduct or incompetence, when a justification, 734, 735.
particulars of acts of misconduct or incompetence required, 734.
permanent incapacity from illness is in general a defence, 735.
death of either party primâ facie *terminates a contract for personal service*, 735.
defence of Statute of Frauds; doctrine of part-performance not applicable to contracts of service, 735.
And see APPRENTICE; TRUCK ACTS; WORK, &C.
actions for wrongs:
I. *Actions by master or servant against third parties:*
claim for enticing away the plaintiff's servant, 432.
a form under the old practice for maliciously enticing away a singer and procuring her to break her engagements, 433.
statement of claim for loss of services by the seduction of the plaintiff's servant, 433: *see* TRADE DISPUTES.
defences:
denial of seduction in an action for seduction, 879.
defence to a like action, denying the alleged service, 879.
defence to a like action, denying the damage, 879.
action for loss of services by injury to servants, when it lies, 432.
action for enticing away servant, when it lies, 432.

MASTER AND SERVANT—*continued.*
actions for wrongs—continued.
action for seduction of servant; allegation and evidence of service; loss of service, 433, 879.
II. *Actions against the master by third parties:*
claim against a master for injuries caused by the negligent driving of his servant, 434, 440.
claim against a railway company for negligence of their servants at a level crossing, 393.
claims against a master for trespasses by his servants: *see* TRESPASS.
denial of wrongful acts, where the plaintiff alleges that "the defendant or his servants," or "the defendant by his servants," did the acts complained of, 879.
the like in an action for negligent driving, 880.
denial that a particular person who is alleged to have committed the acts was a servant of the defendant, 880.
defence that the act alleged to have been done by the servant was an unauthorised act and not within the scope of his employment, 880.
nature and extent of master's liability for wrongful acts of his servant, 359, 361, 425, 434.
when liability extends to acts of servants in arresting or prosecuting offenders, 425, 426.
who are servants within the rule, 434.
in what cases a man is liable for acts of contractors, 435.
liability of corporations for acts of servants, &c., 359, 360, 361.
III. *Actions against the master by his servants:*
commencement of statement of claim in an action under the Employers' Liability Act, 1880, removed into the High Court by certiorari, 435.
claim for employing servant to work upon unsafe scaffolding, 436.
claim for injuries caused by neglect of employer to fence dangerous machinery, 394.
claim for requiring servant to use unsafe floor and ways, 437.
defence of an award under the Workmen's Compensation Act, 881.
defence of compensation under that Act, 882.
defence of a scheme under that Act, 882.
forms of pleas under former system of defence of common employment, 880.
actions against a master under the Employers' Liability Act, 1880; *power to transfer from County Court to High Court*, 435.
negligence of fellow-servant no defence in such cases, 435.
negligence of fellow-servant engaged in a common employment for a common master with the plaintiff may be a defence in a common law action, 435, 436, 881.
when a servant is considered to have undertaken a risk of danger in the service, 436.
when servant can sue master for negligence as to the condition of his premises, or of the materials or implements he supplies for servants' use, 880.
volenti non fit injuria, *principle of, how applicable*, 880.
Workmen's Compensation Acts, 1897, 1900...436, 881.
award or scheme under those Acts is a defence to an action, 881.
a claim which is withdrawn or fails because not within those Acts is not, 882.
workman may contract himself out of Employers' Liability Act, 882.
contributory negligence directly causing injury a defence, 880.
And see AGENT; APPRENTICE; INFANCY.

MEDICAL ATTENDANCE,
statement of claim for medical or surgical attendance and medicines, &c., 251.
actions for medical or surgical attendance, &c., who may bring; registration under the Medical Acts, 251, 252.
actions by apothecaries; certificate under the Apothecaries Act, 1815...252.
provisions of the Dentists Act, 1878; *of the Veterinary Surgeons Act*, 1881; *registration, &c.*, 252.
defence of want of registration, &c., 252.
defence or counterclaim on ground of negligence or want of skill, 438, 735.
mandamus to restore name of medical practitioner or dentist to register, 878.

MEDICAL PRACTITIONERS,
claim against a medical practitioner for negligence and unskilfulness in the treatment of a patient, 438: *see* MANDAMUS; NEGLIGENCE; WORK *and* MEDICAL ATTENDANCE.

MERCHANT SHIPPING ACTS. *See* SHIPPING.

MERGER,
defence to an action for a simple contract debt of merger by a covenant of the defendant to pay the debt, 736.
defence to an action on a contract of a judgment recovered by the plaintiff for the same claim in a former action, 703.
merger of debt in higher security, 736.
no merger unless the debts and the parties are the same, 736.
merger by judgment recovered, 703, 736.
merger by deed, in what cases, 736, 737.
merger of part of a simple contract debt, 737.
collateral securities, 737.
bond for rent due under parol demise no merger, 737.

MESNE PROFITS. *See* LANDLORD AND TENANT; RECOVERY OF LAND; TRESPASS TO LAND.

MINES. *See* SUPPORT OF LAND; TRESPASS TO LAND.

MISCHIEVOUS ANIMALS,
claim for damages for knowingly keeping fierce dog which injured the plaintiff, 439.
defence to claim for damages from bite of fierce dog, 883.
distinction between animals presumed by law to be dangerous and ordinary domestic animals, 439.
action for knowingly keeping a mischievous domestic animal; knowledge must be proved; evidence in such action, 439.
defences to such actions, 439, 883.
mere absence of negligence no defence, 883.
provisions as to injuries to cattle by dogs, 439, 440.

MISJOINDER. *See* JOINDER.

MISNOMER, 43.

MISREPRESENTATION. *See* FRAUD; MISTAKE; SALE OF LAND.

MISTAKE,
defence of mistake in an action upon a deed or agreement in writing, 737.
the like with a counterclaim for rectification, 738.
the like in an action for specific performance, 772.
defence of mistake, 737—740.
should be mistake of fact common to both parties, 737, 738, 739.
counterclaims for rectifying or setting aside documents; powers of King's Bench Division, 737, 738.
pleading facts entitling defendant to rectification, &c., 738.
innocent misrepresentation, may be ground for rescission, though not for damages, 739, 771.
clerical errors, 739.
latent ambiguity evidence of mistake, 739, 740.
defence that document was executed on a misrepresentation and under total mistake as to its nature, 737.
payments made by mistake, 259.

MONEY COUNTS. *See* COMMON COUNTS.

MONEY LENT,
claim for money lent, 253.
the like with a claim for interest, 253.
defence denying the lending, 740.
defence that the sum lent was less than the amount claimed, 740.
counterclaim for money lent, 538.
defence and counterclaim under the Money-lenders Act, 1900...741.

MONEY LENT—*continued.*
claim for money lent, when appropriate; evidence, 253.
effect of acknowledgment under seal, 253.
money lent for illegal purpose, 253.
in what cases demand is necessary before action, 253, 254.
defences of infancy, 687.
relief in cases under the Money-lenders Act, 1900, *and of unconscionable bargains with expectant heirs, &c.*, 741, 742.
And see GAMING; ILLEGALITY.

MONEY PAID,
statement of claim for money paid, 254.
defence denying the payment, 742.
denial of request, 742.
claim for money paid, when applicable; where actual payment of money of plaintiff; what is equivalent to payment, 254.
payment at request of defendant; request implied from course of dealing, &c.; from notice without dissent; from wrongful act of defendant, &c., 254, 255.
payment under legal compulsion, 254, 255.
debt paid by a surety; payment of acceptance by an indorser; contribution between co-debtors, co-sureties, &c., 255.
in general no contribution between wrong-doers, 255.
payment under indemnity, 255.
payment by accommodation acceptor, &c., of bill, 256.
payment in execution of an illegal contract, &c., 256: *see* ILLEGALITY; GAMING.

MONEY RECEIVED,
statement of claim for money received, 256.
against a collector and estate agent, 259.
where the money has been paid by mistake, 259,
where the money was paid for a consideration which has failed, 261.
against a wrongdoer waiving the tort and claiming the proceeds, 262.
claim for wrongful conversion of cheques and bills belonging to the plaintiff, with an alternative claim for the proceeds thereof, 263.
for money admitted to have been received for the use of the plaintiff, 263.
by a principal for money received by his agent as a bribe or secret commission, 77.
against an agent employed to sell goods for not accounting for or paying over moneys received by him, 74.
against a carrier for overcharges, 147.
for the return of a premium paid on a policy of insurance, where the risk never attached, 204.
defence denying the receipt of the money, 743.
denial of the receipt of the money for the use of the plaintiff, 743.
defence that the money was received in a joint venture which failed, 743.
claim for money received, when applicable, 256.
money; what is equivalent to money, 256.
money received by sheriff in execution of writ, 256.
agent receiving money from principal to pay over to third party; agent holding money after revocation of authority, 256, 257.
authority when it cannot be revoked, 256, 257.
money paid under duress of person; of goods; under extortion and oppression; by abuse of legal process; under distress, 257.
money paid under illegal demand; excessive fees and overcharges, 257.
money paid upon disputed claim; recovered in action; voluntary payment, 257, 259, 260.
money wrongfully obtained by defendant; by fraudulent misrepresentations; under fraudulent contract, 258.
money improperly received as commission by agent or servant, 258.
money paid upon illegal contract; for illegal purpose; money deposited with stakeholder for a wager; parties not in pari delicto; *after execution of illegal purpose*, 258.
agent receiving money for principal not liable to third parties after payment over to principal, 259.
agent receiving for principal a payment made by mistake, 259.

MONEY RECEIVED—*continued.*
sub-agent employed without authority ; absence of privity, 259.
money paid under a mistake of fact ; under a mistake of law, 258, 259, 260.
demand before action, when required, to recover money paid by mistake, 260.
money paid under compulsion of law, 260.
money paid for consideration which has failed ; money paid for void or forged bills, notes, shares, securities, &c., 261.
partial failure of consideration ; complete failure of part, 261, 262.
freight paid in advance not in general recoverable on failure of voyage, 262, 293.
goods or securities wrongfully obtained and converted into money ; waiver of tort, 262.
agent receiving money for payment to third party not liable to third party before acknowledgment, 263.
trustee not liable to common law action for trust money ; may be charged after admission that trust executed, 263.
executor or administrator, when chargeable for money received in respect of legacy ; after acknowledgment, &c., 263.

MORTGAGE,
claim on the covenant for payment in a mortgage deed, 264.
for interest due under a covenant in a mortgage deed, where the plaintiff does not claim repayment of the principal sum due, 265.
a like form by the transferee of a mortgage, 265.
claim by mortgagee against mortgagor for recovery of the land, 469.
the like on determination of a tenancy at will created by an attornment clause, 471.
defence to an action upon a covenant for payment in a mortgage deed, 743.
in what cases mortgage debt recoverable as money lent, 264.
when covenant implied in mortgage deed, 253.
when power of sale implied in mortgage deed, 264.
actions by mortgagee to recover the mortgaged land, 469—471.
powers of sale of pledgees, &c., of chattels, 264.
actions by mortgagor of land against third persons, 265.
actions for foreclosure or redemption are assigned to the Chancery Division, 264, 265.
devolution on death of sole mortgagee to his personal representatives, 265.
mortgage of a debt, &c., may be an absolute assignment, 265.
mortgagor attorning tenant to mortgagee, 67.
power to stay actions to enforce mortgages on payment of what is due and costs, 743, 744.
payment of rent to mortgagee : see LANDLORD AND TENANT.
mortgage of debts or choses in action, 89, 265.
defences to actions, 743 : *see* LIMITATION, STATUTES OF, &C.
leases by mortgagor in possession ; leases by mortgagee in possession, 470.

MOTOR CAR, 409, 446.

MUTUAL CREDIT. *See* SET-OFF.

NAME,
restraining deceptive use of trade names, 496.

NAMES OF PARTIES, 43, 151, 158, 268.

NECESSARIES. *See* HUSBAND AND WIFE ; INFANCY ; INSANITY.

NECESSITY, WAY OF. *See* WAYS.

NEGLIGENCE,
statements of claim :
for injuries done by the negligent driving of the defendant or his servant, 440.
by a passenger against a railway company for damages for personal injuries sustained in a collision, 337.

NEGLIGENCE—*continued.*
statements of claim—continued.
by a married woman for personal injury by shock caused by a van being negligently driven into the public-house where she was serving, 443.
for negligently driving a train against the plaintiff, 444.
against a railway company for the negligence of their porter, who knocked the plaintiff down with a truck, 444.
the like where the injuries arose from the negligence of the defendants in not sufficiently lighting a station, 444.
for injuries caused by a railway company at a level crossing, 393, 394.
for injuries by neglect of employer to fence dangerous machinery, 394.
for injury caused by negligently leaving a horse and van unattended in a public street, 445.
against the owner of a motor for injuries caused by negligent management of it by his servant, 446.
the like by a married woman, 446.
for damage done to the plaintiff's house by the defendant negligently pulling down the adjoining house, 447.
against the occupier of a shop by a customer injured by there falling through a trapdoor left open, 447.
against the landlord of flats for injury to visitor of tenant, 448.
against carriers by the executor of a passenger killed by the negligence of the defendants, 387.
by a servant against his master for employing him to work upon an unsafe scaffolding, 436.
for injuries to a ship and cargo by the defendant's negligent navigation of another ship, 480.
against a solicitor for negligence in the conduct of his client's business, 306, 307.
by husband and wife for damages for negligence causing personal injury to the wife, the husband claiming in respect of the damage to himself, 411.
against a medical practitioner for negligence in the treatment of a patient, 438.
defences, &c.:
denial of the alleged negligence, 884.
denial that the alleged damage was caused by the acts complained of, 884.
defence of contributory negligence, 884.
reply thereto that the defendant might, by the exercise of ordinary care, have avoided causing the injury, 885.
defence in an action for injuries alleged to have been caused by the negligent driving of the defendants' servants that the carriage (or train) was not the defendants', nor in the charge of their servants, 885.
defence to an action for trespass that it was caused by the plaintiff's own negligence, 885.
defence to an action by customer for injuries from falling through a hole in a shop floor, 886.
action for negligence, when it lies, 440.
evidence of negligence; presumption from accident, when, 440, 441, 442.
how negligence described or defined, 441.
railway companies: their liabilities considered, 393, 394, 441, 442.
liability of corporate bodies, public trustees, commissioners, &c., for negligence, 361, 442.
negligence of Government officers, 442.
statement of claim must show breach of duty; where duty arises from contract; where independently of contract, 442, 443.
express allegations of duty unnecessary, 443.
measure of damages; remoteness, 56, 443, 885.
claims under the Fatal Accidents Act, 1846...387.
negligence in general to leave horse and van unattended in public street, 445.
provisions of Motor Car Act, 1903; *requirements as to use of motors*, 409, 446.
duty of occupier to persons coming at his invitation or on business, 447, 448.
duty of landlord or occupier of property; liability of landlord or occupier, 448, 449, 886.
damage is gist of action, and may be denied, 883.

NEGLIGENCE—*continued.*
negligently pulling down adjoining house; rights and duties of owners of adjoining houses, 447.
liability of carrier for negligently supplying defective carriage, 139, 334.
liability of master for negligence of servant, 361, 434, 883.
liability for negligence of contractors, 435, 458, 459, 883.
contributory negligence of plaintiff, 884, 885.
of infant or of person in charge of infant, 884.
of driver of public vehicle or captain of ship no defence to action by passenger, 884, 885.
of a mere stranger no defence, 885.
defences in actions for negligent driving, 885.
distinction between negligence and trespass, inevitable accident, 885.
And see CARRIERS; MASTER AND SERVANT; SHIPPING.

NEVER INDEBTED. *See* GENERAL ISSUES.

NEW ASSIGNMENT,
under former system of pleading, 551: *see* REPLIES.

NEWSPAPER. *See* DEFAMATION.

NON ASSUMPSIT, NON EST FACTUM, &c. *See* GENERAL ISSUES.

NON JOINDER. *See* PARTIES.

NOT GUILTY. *See* GENERAL ISSUES; NOT GUILTY BY STATUTE.

NOT GUILTY BY STATUTE,
defence of Not Guilty by Statute, 886.
the right of pleading this defence now, with few exceptions, abolished, 886.
repeals effected by the Public Authorities Protection Act, 1893, *of enactments giving this defence*, 886, 901.
in what cases this defence is still pleadable, 886, 887.
mode of pleading it; marginal note of statute relied upon, 887.
no other defence to be pleaded therewith, unless by leave, 887.
defences admissible thereunder, 887.
defences of statutory authority by persons not entitled to plead Not Guilty by Statute, 454, 859, 936: *see* PUBLIC AUTHORITIES.

NOTICE OF ACTION,
defence that no notice of action was given as required by statute, 888.
repeal by the Public Authorities Protection Act, 1893, *of most of the former enactments requiring notice of action*, 888, 901.
provisions of 5 & 6 Vict. c. 97, s. 4, as to length of notice of action, 888.
in what cases defendants are entitled to notice of action, 888, 904, 905.
waiver of notice of action, what amounts to; what is a sufficient notice of action, 888.

NOTICES. *See* BILLS OF EXCHANGE; LANDLORD AND TENANT; NOTICE OF ACTION; PAYMENT INTO COURT; THIRD PARTY, &c.

NOVATION, 570, 744.

NUISANCE,
statements of claim:
for causing a nuisance by smells and vapours; claiming damages and an injunction, 451.
for a nuisance in carrying on a noxious manufacture near the plaintiff's land, 455, 456.
by a riparian proprietor for a nuisance by pollution of the water in a river, claiming an injunction and damages, 514.
for placing on a highway an obstruction over which the plaintiff fell, 457.
for keeping open and unfenced a dangerous cellar adjoining a public highway, 458.

NUISANCE—*continued.*
statements of claim—continued.
claim alleging that the defendant artificially raised the surface of his land above the level of the plaintiff's adjoining land, whereby rainwater falling on the defendant's land percolated into the adjoining house of the plaintiff, 460.
claim for negligently allowing sewage to escape into a neighbour's premises, 460.
defences:
denial of the acts complained of, 889.
statement of defence in an action for pollution of water where the plaintiff claims an injunction and damages, 946.
denial, in an action for a nuisance to the plaintiff's premises, of the plaintiff's alleged interest therein, 889.
defence to an action for injuries caused by keeping open and unfenced a dangerous cellar adjoining a public highway, 889.
defence justifying an entry on the plaintiff's land to remove an obstruction to the defendant's ancient lights, 872.
defence justifying the removal of nuisances on a public highway, 952.
nuisance, public and private, 451.
actions for public nuisance will not lie without special damage; what amounts to special damage, 451, 452.
obstructions to highway, 451, 452.
dedication of highway subject to obstruction or right, 452.
repeated actions for continued nuisance; damages for continuing nuisance; injunction, 452.
action by reversioner, when it lies; not for mere temporary nuisance, 452.
who liable for injuries caused by real property, 452, 453.
in what cases a landlord is liable for nuisances on premises occupied by tenant, 452, 453.
duty of occupier towards persons coming by invitation, 447, 448, 454.
damage caused by negligence of contractors, 435, 458, 459.
duty of occupier to keep sewage, &c., from escaping on to neighbour's land, 453.
a person bringing dangerous things on to his own land primâ facie *liable for injury done by their escaping*, 453.
rights and liabilities, where parts of a house are let to different tenants, 453, 454.
acts authorised by statute not actionable, unless done negligently, 454.
nuisances of smoke, noise, smells, noxious trades, &c., 455.
acts of several persons together causing a nuisance, 455.
liability for dangerous cellars, &c., near highway, 458, 459.
mode of pleading defences in actions for nuisance, 889.
entry for abatement of nuisances; previous request to abate, when necessary, 890.
request unnecessary, where the party abates the nuisance by acts done on his own land, by lopping overhanging trees, &c., 890.

OBJECTION IN POINT OF LAW, 561: *see* PROCEEDINGS IN LIEU OF DEMURRER.

OFFICERS.
of Government not responsible for negligence of subordinate officers, 442.
of public authorities, protection of, 460, 901, 902.

ORDER OF DEFENCES, 524.

OVERSEERS, 160, 384.

PART PERFORMANCE,
counterclaim for specific performance, 771.
must be unequivocally referable to the contract sought to be enforced, 216, 217, 666.
the equitable doctrine not extended by Judicature Acts to any new class of case, 34, 666, 735.

PART PERFORMANCE—*continued.*
effect of part performance in claims for specific performance, 216.
the equitable doctrine not extended to contracts of service, 735.

PARTICULARS,
form of particulars not stated in the pleadings, 37.
form of particulars delivered pursuant to an order, 532.
particulars of charges claimed, 93, 94, 141.
particulars of principal and interest due, 109, 135, 172.
particulars of damages for unreasonable detention of wagons sent to be loaded, 165.
particulars of a request to be implied from circumstances, 230.
particulars of breaches, 221, 236, 238.
particulars in actions for the price of goods, 273, 274.
particulars in actions for damages for not accepting goods, 276.
particulars of stockbrokers' accounts, 308, 309, 310.
particulars of work, &c., by a builder, 327.
particulars in actions for personal injuries, particulars of expenses, &c., 337, 434.
particulars of publication of a libel, 367.
particulars under the Fatal Accidents Act, 1846...389.
particulars of fraud, 407, 657—659.
particulars of negligence, 411, 444, 446.
particulars of breaches in action for infringement of a patent, 464.
particulars of dealings in stocks and shares, 671.
particulars of surrender by operation of law, 711.
particulars of representation and warranty, how made, or from what to be implied, 735.
particulars of right to stop in transit, showing from what it is implied, 825.
particulars of agreement, how made or from what to be implied, 745.
particulars of the rescission of a contract, 755.
particulars of damage from non-delivery of goods sold, 768.
notice of objections relied on by the defendant in an action for infringement of copyright in a book, 828.
notice of intention to give in mitigation of damages in a libel action evidence of an apology, containing particulars of such apology, 843.
notice of matters the defendant in a libel action intends to rely on in mitigation of damages, 845.
particulars of grounds of defence in an action for infringement of a patent, 892.
particulars of objections by the defendant in a like action, 895.
See for further forms the various subject-headings *passim*.
particulars, when required, and how delivered, 6, 7, 37—40, 50, 51, 532.
object of particulars is to prevent surprise and to limit or define the issues, 37.
the general principles as to particulars apply to all pleadings, 532.
further and better particulars, costs, 38.
application for particulars sometimes adjourned till after discovery or inspection given, 38, 75.
amendment of particulars, 40.
where fraud or misconduct is charged definite particulars of the charge are required, 38, 656, 734.
where particulars of payments into Court, specifying the heads of claim in regard to which they are made, may be ordered, 39, 749.
time for pleading after delivery of particulars under an order, 41.
it is not necessary or regular to plead to particulars, 524, 525.
when in practice particulars are occasionally pleaded to, 524, 525.
when a request, an agreement, a belief, or suspicion, or other like result is to be implied from circumstances, the circumstances giving rise to such implication should, unless stated in the body of the pleading, be given in particulars, 38, 256, 854, 927.
particulars required in action for slander of title, 482.
particulars required of affirmative pleadings, as, for instance, of dates and items of payments, of facts constituting a rescission, justification, discharge, or release, 533, 841, 877.
facts constituting negligence or contributory negligence must, unless stated in the body of the pleading, be given in particulars, 39, 440, et seq., 884.

PARTICULARS—*continued.*
particulars required of breaches complained of, 51.
particulars of breaches complained of required in actions for infringement of patents, 462, 464, 465.
defendant in action for infringement of patent must deliver notice of objections relied on, 894, 895.
defendant in action for infringement of copyright in a book must deliver notice of objections relied on, 826—828.
where a set-off is pleaded particulars must be given of the debts sought to be set off, 775.
particulars required under the Fatal Accidents Act, 1846...40, 387, 389.
actions for defamation, when particulars of privilege or other justification must be given, 837, 841.
actions for defamation, when particulars must be given of matters intended to be given in evidence in mitigation, 843, 845.
when notice must be given of intention to prove in mitigation in a like action an apology or offer of apology, 843, 844.
malicious prosecution, mode of pleading to avoid having to give unnecessary particulars, 877.

PARTIES,
parties to action dealt with by O. XVI., 21.
general rules as to parties to actions, 19—26.
in actions on contracts, 19, 20.
contracts, joint and several, joint or several, 19, 20.
parties in actions for wrongs, 21.
names of parties; how stated in pleadings; names of dignity, 43, 151, 158.
initials and contractions in written instruments, 43.
misnomer, consequences of; how amended, 43, 44.
number of the parties, 44.
what parties may be plaintiffs, 19, 21.
what parties may be defendants, 20, 22, 23.
character in which parties sue, or are sued, 44.
action in name of wrong plaintiff; leave to add or substitute plaintiffs, 26.
misjoinder or non-joinder of parties, 27—30.
change of parties on marriage, death, bankruptcy, 30, 32, 679, 174, 104.
when numerous, power to one or more to sue, or be authorised to defend, on behalf of all, 25, 26, 62, 153, 340.

PARTNERS,
statements of claim:
by and against a firm in the firm's name, 267, 744.
by a surviving partner, 268.
against a surviving partner, 269.
against a new firm for a debt due from the old firm for which they have by agreement become liable, 269.
by a trustee in bankruptcy and a solvent partner of a bankrupt, 103.

defences:
defence by a defendant firm, 744.
defence by an individual partner, 744.
defence of a retired partner of a discharge by agreement, 744.
Partnership Act, 1890, *codifies the law*, 265.
change in constitution of firm, effect on contracts, 266.
contract for partnership made with *one partner in his name only, who may sue*, 266.
contract for partnership made by *one partner in his own name only, who may be sued*, 267.
actions between partners, 267, 744.
when partners may sue or be sued in the firm's name, 43, 267, 268.
how they must defend when sued as a firm, 744.
what constitutes partnership, 265.
liability of partners, 265—268, 460, 461.
rights of partners, 266, 267, 268, 460.
bankruptcy of a partner, effect of, 103, 592.
executors of deceased partner, liability of, 266, 267.

PASSENGER. *See* CARRIERS; CARRIERS OF PASSENGERS.

PASTURE,
statement of claim:
for the use of pasture, 79.
pasture, when the subject of trespass, 501.
And see COMMON.

PATENTS,
statements of claim:
by a patentee for infringement, 461, 462.
the like after amendment of specification, 462.
by an assignee for infringement, 463.
particulars of breaches, 464.
defences:
denial of infringement, 891.
denial of assignment, 891.
denial of novelty of invention, 892.
denial of utility of invention, 892.
defence that invention not one for which patent could be granted, 892.
that plaintiff was not first inventor, 893.
that the specification was insufficient, 893.
general defence, referring to particulars of objection, 894.
particulars of objections, 895.
statutes regulating patents, 461.
assignment of patent, 463, 464, 745.
licence to use patent, 464.
particulars of breaches in actions for infringement, 462, 464, 465.
scire facias *abolished*, 891.
specifications, 893.
particulars of objections to validity of patent, 891, 894.

PAWNBROKERS. *See* LIEN.
Pawnbrokers Act, 1872, *does interfere with owner's rights in property wrongfully pledged without his authority*, 270, 346.
what delivery necessary to constitute a pledge, 270.
persons selling pledges do not impliedly warrant title, 324.

PAYMENT,
defence to an action for a simple contract debt of payment before action 745.
defence to an action for a simple contract debt of payment after action 748.
defence to an action upon a covenant for the payment of a liquidated amount in money at a specified time of payment on the day named in the covenant, 746.
defence to a like action of payment after the day named in the covenant, 747.
defence to an action on a common money bond of payment on the day named in the bond, 620.
defence to a like action of payment after the day named in the bond, 620.
defence of payment by set-off of cross-demands in an account stated, and payment of the balance, 747.
defence of satisfaction by payment of a smaller sum by a third party, 570.
defence of payment to a judgment creditor of the plaintiff under an order of attachment under O. XLV., 588.
payment must be specially pleaded, 745.
payment need not be pleaded of sums specifically credited in statement of claim or particulars, 745.
duty in general of debtor to pay where the creditor is, unless he is out of the realm, 745.
payment to an agent is primâ facie *to be in cash*, 746.
appropriation of payments, 747.
particulars of dates and amounts of payments required, 533.
payment of smaller sum usually no satisfaction of greater debt, 745.
limiting defence, where payment was only of part, 745.

PAYMENT—*continued.*
negotiable security given on account of a debt, or in satisfaction and discharge, 746.
payment by cheque; effect of delay in presentment, 125, 126, 746.
payment by or to one of several joint debtors or joint creditors, 746.
pleading, where doubtful whether payment or set-off, 746.
payment before action a complete defence, 746, 747.

PAYMENT INTO COURT,
in actions on contracts:
defence of payment into Court, 748.
defence of payment into Court as to part of a liquidated claim, with a defence on the facts as to the residue of the claim, 748.
defence appropriating money paid into Court pursuant to an order under O. XIV., 750.
defence of payment into Court together with a defence in denial of liability, 751.
defence of payment into Court in an action on a common money bond, 620.
defence to an action on a bond with a special condition under the 8 & 9 Will. III. c. 11 of payment into Court as to a particular breach of the condition, 620.
reply of acceptance of the amount paid into Court, 751.
reply, to a defence in which payment into Court is pleaded, with a denial of liability, that the sum paid in is insufficient, 752.
rules governing payment into Court in actions for debt or damages, 748—752.
payment into Court with a defence denying liability; its effect and the procedure thereon, 748, 750, 751.
effect of payment into Court is an admission, unless made with a defence denying liability, 750.
where the payment into Court is as to part only, plaintiff may discontinue as to the residue, 749.
amount to be paid into Court, where damages or interest have accrued after action, 749.
particulars of items to which money paid in, when ordered, 749.
appropriation by the defence of money paid into Court under O. XIV., 750.
payment into Court on a counterclaim, 750.
plaintiff cannot deliver a "confession" of a payment into Court, 750.
payment into Court by one only of two defendants, 750.
payment into Court in actions on bonds, 620, 621, 751.
when plaintiff should deliver notice of acceptance instead of replying, 751.
payment into Court with defence of tender, 797, 798.

in actions for wrongs:
defence of payment into Court in an action for a wrong, 896.
defence of payment into Court with a denial of liability, 897.
defence of payment into Court as to the claim for damages in an action for the detention of goods, 848.
defence of apology and payment into Court to action for a libel in a newspaper or periodical, 844.
reply of payment into Court in an action of replevin, 911.
reply of acceptance of the amount paid into Court, or that the amount paid into Court is not sufficient, 751, 752.
rules as to payment into Court: vide supra.
payment into Court with defence denying liability not allowed in actions or counterclaims for libel or slander, 896.
payment into Court in actions for detention, 848.
in actions for libels in newspapers, with apology, 844.
in actions under the Fatal Accidents Act, 1846...896.
in actions against defendants specially privileged by statute, 896, 901.
tender of amends, when pleadable without payment into Court, 920.
payment into Court by one of two or more defendants, effect of, 750.
payment into Court not necessary with reply of tender to a defence of lien, 868.

PENAL STATUTES,
statement of claim by an informer in a *qui tam* action, 270.
statutory penalty not subject of special indorsement, 65, 270.
mode of pleading in action for penalty, 271.
construction of statutes imposing penalty; when an action lies, 271.
limitation in penal actions, 718, 719, 873.
declarations under the former system, 272.
forms under R. S. C., 1875...272.

PENALTY. *See* PENAL STATUTES *and* LIQUIDATED DAMAGES.

PERFORMANCE,
defence of performance of condition of bond, 619.
defence excusing performance of condition of bond, 619.
general averment of performance of conditions precedent implied in pleadings, 156, 157.
impossibility of performance in some cases a defence, 577.
See BONDS *and* CONDITIONS PRECEDENT.

PHYSICIAN,
Fellow of Royal College of Physicians cannot sue for fees, though member may, 252.
See MEDICAL ATTENDANCE.

PILOT,
shipowner not liable for acts of pilot where pilotage compulsory, 916.

PLEADING IN GENERAL,
object of pleadings, 1.
rules now in force as to pleading; former rules superseded, 3.
date, title, and description of pleadings, 4.
mode of pleading, principal rules to be observed, 5.
facts are to be pleaded, not the evidence of facts, 3.
distinct claims or distinct defences to be pleaded, as far as may be, separately and distinctly, 7, 52, 522.
where contract relied on is in writing, this should usually be so stated, 7, 47, 80.
written contracts, how pleaded, 7, 8, 9, 47, 48, 49.
implied contracts or implied relations between persons, how pleaded, 9, 80.
malice, fraudulent intention, knowledge, or other condition of mind, may be pleaded as facts, 9.
notice to any person of anything may be alleged as a fact, 9.
matters of which Court takes judicial notice, 10, 45.
material facts to be pleaded, 5, 6, 45.
contracts how pleaded in claims founded thereon, 45.
in actions for wrongs facts showing the right of the plaintiff must in some cases be alleged, 46.
breaches of contract, mode of alleging them, 50.
when breach of duty is charged the facts from which the duty arises must be stated, 45, 140.
conditions precedent, how dealt with in pleadings, 10, 52, 156.
matter unnecessary, scandalous, or embarrassing may be struck out or amended, 11, 12.
inconsistent claims, defences, or replies permissible, 2.
vexatious or oppressive pleadings may be struck out, 13.
signature of pleadings, 13.
printing of pleadings, 13.
delivery of pleadings, 13.
amendment of pleadings, 14: *see* AMENDMENT.
time for delivering pleadings, 17, 520, 521, 545, 548.
denials must be specific, 527.
damages, 54—57.
damages, when permissible to plead thereto, 530, 831.
admissions, 525, 527, 572.
defences by way of confession and avoidance must be specifically pleaded, 530, 531.

PLEADING IN GENERAL—*continued.*
equitable claims or defences, 33, 906.
objections in point of law, 561.
particulars when required. *See* PARTICULARS.

PLEADINGS,
when necessary, 4.
order for, when required, 4, 520, 531, 545, 546.
cannot be delivered pending a stay of proceedings in general, 19.
See PLEADING IN GENERAL, *supra.*

PLENE ADMINISTRAVIT. *See* EXECUTORS.

POINTS OF CLAIM OR DEFENCE,
pleadings in actions in Commercial List called, 2.

POLICE,
entitled to the protection given by Public Authorities Act in cases within that statute, 897, 898 : *see* PUBLIC AUTHORITIES.
protection of police in executing warrants, 898.

POLICY OF INSURANCE. *See* INSURANCE.

POOR'S RATE,
claim for making an excessive distress for, 383.
action lies for excessive and unreasonable distress for poor's or other rate, 383.
mode of distraining, 383, 384.
costs of distraining for rates, 384.
when public authority liable for acts of plaintiff distraining for a rate, 384.
principal statutes as to distresses for rates, 384.

POST,
contract made by post is complete on posting of letter accepting the offer made, 80, 154.

POUND. *See* DISTRESS ; RESCUE.

PRESCRIPTION ACT. *See* COMMON ; LIGHTS ; WAYS ; WATER.

PRINCIPAL AND AGENT. *See* AGENT.

PRINCIPAL AND SURETY. *See* GUARANTEES.

PRINTING,
of pleadings, 13.

PRIVILEGE. *See* DEFAMATION ; DISTRESS.

PROCEEDINGS IN LIEU OF DEMURRER,
defence consisting of an objection in point of law, 561.
defence including an objection in point of law to an action for verbal slander actionable only by reason of special damage, 562.
the like to an action on a marine policy stated to contain clauses that the policy was to be proof of interest and without benefit of salvage, 563.
the like to an action on a guarantee for the price of goods, 564.
defence including objections in point of law to distinct parts of the alleged causes of action, 564.
reply of an objection in point of law, 564.
reply including an objection in point of law as well as other grounds of reply, 565.
objection that the agreement is void under the Ground Game Act, 1880... 565.
objection that the damage is too remote, 565.
objection that the remedy is not by action, but by petition of right, 565.
objection that the words are not capable of being a libel, 565.

PROCEEDINGS IN LIEU OF DEMURRER—*continued.*
objection that the special damage stated is insufficient to support the action, 831.
objection that words are not defamatory, and that no defamatory meaning is shown, 834.
nature and objects of demurrers previously to the Judicature Acts, 561.
abolition of demurrers by the R. S. C., 1883, *and substitution of other proceedings in lieu thereof*, 561, 562.
an objection in point of law may be pleaded together with grounds of defence on the facts without leave, 562.
mode of pleading such objection, 562, 563.
if frivolous or vexatious, it may be struck out, 563, 564.
it must be an objection of substance, and not for mere defects of form, 562.
objection in point of law should in general be founded on matters appearing on the pleadings, though no absolute restriction to that effect, 563.
effect of setting out documents verbatim *in pleadings in forcing the other party to plead an objection in point of law or to amend*, 563.
objections in point of law to counterclaims, 549, 562.
defences founded on the Statute of Frauds or s. 4 of the Sale of Goods Act, 1893, *or on the Statutes of Limitation, not in general proper subjects for objections in point of law*, 523, 663, 717.
in what cases an order will be made for disposal of an objection in point of law before trial of the issues in fact, 563.
inherent jurisdiction of the Court to dismiss frivolous or vexatious actions, 563, 564.

PROCESS,
defence to an action for a wrongful entry on land and seizure of goods of justification under a fi. fa. by the execution creditor, the sheriff, and the bailiff, stating the judgment, writ, and warrant, 898.
the like by a sheriff alone, 899.
reply that the writ was set aside for irregularity, 900.
defence of justification under process; by the party; by the sheriff or officer, 898.
a reply that the process was set aside for irregularity must be specially pleaded, 900.
justification under process of inferior Court, 899.
writ of fi. fa., what may be done in execution of, 899.
And see SHERIFF.

PROMISSORY NOTES, 129, 613: *see* BILLS OF EXCHANGE, &c.

PROTECTION ORDER, 192, 410.

PROVIDENT SOCIETIES. *See* SOCIETIES.

PUBLIC AUTHORITIES,
defence that the claim is barred by the Public Authorities Protection Act, 1893...901.
defence of tender of amends under the Public Authorities Protection Act, 1893...919.
provisions of the Public Authorities Protection Act, 1893, *giving protection for acts done in execution or intended execution of any Act of Parliament, public duty, or authority, &c.*, 901.
six months to be the period of limitation in such cases, 901.
defence of tender of amends before action in such cases, 901, 919, 920.
application of the Act, 902, 903.
the title of the statute may be looked at in aid of interpretation of its provisions, 902.
it does not apply to mere commercial undertaking earning dividends for its shareholders, 902.
nor to acts of independent contractor working for a public authority, 902.
time from which the six months runs, 903.
when statute gives solicitor and client costs, 903.
analogous provisions in former Acts, how construed 904

PUBLIC AUTHORITIES—*continued.*
actions for breaches of specific contracts not within former Acts, 905.
acts and contracts of local authorities, if done or entered into for the purpose of executing the Public Health Act, 1875, *not to subject individual members or servants to liability*, 465.
And see CORPORATION; JUSTICE OF THE PEACE; POLICE; SHERIFF; HIGHWAYS; TENDER OF AMENDS.

PUBLIC HEALTH, 465, 905.

PUIS DARREIN CONTINUANCE,
plea under former system, 532.

RAILWAYS AND RAILWAY COMPANIES,
instances of what is negligence in railway companies, 441, 442.
conditions on voucher or ticket, when binding on recipient, 95, 149.
what duties as to crossings and gates, 392, 393, 394.
what duty of railway company as to fences, 391, 392.
prosecution of offenders by servants, 425.
when protected by the Carriers Act, 1830...624—627.
when protected by special contract under the Railway and Canal Traffic Act, 1854...627—630.
limitation of liability under that Act as to cattle, horses, etc., 627, 629.
mandamus to issue a warrant to summon a jury to assess compensation for land, 429.
fires occasioned by engines, general law as to, liability for, 441.
special provisions in favour of agriculture as to such fires of the Railway Fires Act, 1905, 442.
overcharges made by railway companies, 143, 147, 257, 623.
no power to draw or accept bills, 632.
stoppage in transitu, 825.
sea traffic, 294.
lien of railway companies on goods carried, stored, or warehoused, 868.
ejecting persons from carriages of railway company, 930.
travelling without a ticket on railway, 930, 931.
Fatal Accidents Act, 1846, *damages under*, 387, 388.
See CARRIERS; COMPANY; FENCES; NEGLIGENCE, &c.

RATES, 224: *see* LANDLORD AND TENANT; REPLEVIN; POOR'S RATE.

RATIFICATION,
instances of ratification of wrongful acts, 382, 384, 425.
when contracts may be ratified made by another, 575, 633.
unauthorized notice to quit cannot be made good by ratification, 233.
See; DRUNKENNESS; INFANCY.

RECEIPT,
a receipt for a debt is only evidence of payment; not an estoppel, 753.

RECORD. *See* JUDGMENTS; JUDGMENT RECOVERED.

RECOVERY OF LAND,
statements of claim:
by landlord against tenant where the tenancy has expired or been determined by notice to quit, and for mesne profits, 232.
by landlord against tenant upon a forfeiture for breach of covenant to repair, with claims for damages, &c., 234, 236.
by assignee of lessor on forfeiture and for damages against assignee of lessee, 237.
by lessor against lessee and assignee of lessee on forfeiture for breach of covenant not to assign, 239.
by landlord against tenant upon a forfeiture for non-payment of rent, 240.
by heir against a stranger, with a claim for mesne profits, 465.
the like against a tenant and a person who defends as landlord, 467.
by devisee of freehold, 468.
by legatee of leasehold, 468.
by devisee of copyhold, 469.
by mortgagee against mortgagor, 469, 471.

RECOVERY OF LAND—*continued.*
defences:
defence that the defendant is in possession of the premises, 714, 906.
by tenant to action by landlord on an alleged determination of the tenancy by notice, denying the notice to quit, 714.
that the alleged forfeiture was waived, 714.
by tenant that no notice specifying the breach relied on for forfeiture was given, as required by the Conveyancing Acts, 1881, 1892...715.
defence to action for recovery of possession on forfeiture for breach of covenant to repair, with counterclaim for relief, 717.
a like form by a defendant not named in the writ, limiting his defence to a part of the premises, 907.
that the claim was barred by the Statutes of Limitation, 907.
what causes of action may be joined without leave with claim for recovery of land, 52, 53.
what claims may be specially indorsed on writ, 65, 67, 233, 465, 466, 471.
title to recover land, how pleaded, 232, 465—468.
effect of Real Property Limitation Acts, 466.
effect of Land Transfer Act, 1897...467, 468.
what a sufficient possession to give title, 467.
title of devisee and of legatee, and how pleaded, 468, 469.
rights of mortgagor and of mortgagee, 469, 470, 471.
claims by landlord against tenant, 232—241.
claims for mesne profits, 52, 233, 466, 906.
real estate of married woman, her rights in respect thereof, 190, 191.
tenants to mortgagor in possession, their rights, 470.
when defence of being in possession may be pleaded, and its effect, 875, 905, 906.
equitable titles or defences must be specially pleaded, 906.
person not named in writ, if in possession by himself or his tenant, may by leave defend as to the whole or part of the land, 467, 905.
effect of Statutes of Limitation, 717, 718, 875, 876.
when defendant may bring in third party, 906.
when defendant may counterclaim for specific performance of agreement, 906, 907.
objections in point of law, 561, 875.
And see LANDLORD AND TENANT.

REJOINDER, 547.

RELEASE,
defence of release, 753.
defence of the release of a co-contractor, 754.
reply that the deed contained a reservation of the right of action against defendant, 754.
reply that the release was obtained by fraud, 754.
reply that the release was subject to a condition, and that such condition had not been satisfied, 755.
release must be specifically pleaded, 753, 533.
at common law required to be by deed, 753.
effect of parol discharge of cause of action; equitable doctrines, 568, 753.
effect of a receipt for a debt, 753.
release of one of co-debtors; reservation of right of action against others, 753.
release by a co-creditor; where given by collusion, 753.
release by bankruptcy, scheme of arrangement, or composition, 592, 593, 594, 639.
covenant not to sue, effect of, 754.
release to one of several joint tort-feasors in general discharges the others, 907.
when it does not so discharge, 907.

RELIEF OTHER THAN DAMAGES, 58.

RENT,
statements of claim by landlord against tenant for rent, 216 217. 218, 232

RENT—*continued.*
the like to recover possession for a forfeiture on non-payment of rent, 234, 236, 237, 240.
See LANDLORD AND TENANT. *And see* DISTRESS; REPLEVIN.

RENTCHARGE, 273.

REPAIRS,
claims by landlord against tenant for not repairing, 218, 219, 220, 234, 236.
claims on a forfeiture for non-repair, 234, 236.
defences denying the non-repair complained of, 708, 709.
the like with a counterclaim for relief against a forfeiture claimed, 717.
See LANDLORD AND TENANT; WASTE.

REPLEVIN,
claim in replevin where a distress was taken for rent, when no rent due, 471.
action of replevin, what it is, and when it will lie, 471, 472, 908.
when it may be moved from the County Court by certiorari, 472.
denial of the acts complained of, 908.
defence denying the plaintiff's property in the goods, 908.
defence, in the nature of an avowry, that the goods were taken as a distress for rent in arrear from the plaintiff to the defendant, with a counterclaim for a return of the goods and for damages, 908.
defence, in the nature of a cognizance, that the goods were taken as a distress for rent in arrear from the plaintiff to the landlord, and that the defendant acted as bailiff to the landlord, 909.
reply to the preceding forms denying the alleged tenancy, 910.
the like denying that any rent was in arrear, 911.
reply of payment into Court to a defence and counterclaim in the nature of an avowry, 911.
defence in the nature of an avowry by a freeholder for a distress damage feasant, 911.
the like by a tenant, 912.
judgment for plaintiff when a bar to subject action of trespass, 907.
mode of pleading defences, 908, 909.
pleas formerly used called an avowry *and a* cognizance, *what they were and their effect*, 908, 909.
reply of plaintiff under present rules to defence in the nature of an avowry or cognizance, 910, 911.
See DISTRESS.

REPLEVIN BONDS, 137, 472.

REPLIES AND SUBSEQUENT PLEADINGS,
ordinary form of reply to a defence, where the defendant has not pleaded a counterclaim, 545.
forms of reply where the defendant has pleaded a defence and counterclaim, 548 *et seq.*
forms of reply stating an objection in point of law, 561—565.
reply stating different grounds of reply to different grounds of defence alleged by the defendant, 546.
reply to a defence pleaded by one of several defendants who have severed in their defences, 547.
reply to counterclaim where no defence is pleaded, 550.
form of rejoinder to a reply where the defendant has not pleaded a counterclaim, 547.
form of rejoinder to a reply to a counterclaim, 550.
reply by person not party to original action to a counterclaim against him and the plaintiff, 551.
reply by a defendant to original action to a counterclaim against him and the plaintiff, 551.
no reply to be delivered unless ordered, 545.
unless there is a counterclaim, reply not generally necessary, 545.
joinder of issue implied from non-delivery of reply, 545.
effect of joinder of issue, whether express or implied, is, that all material facts stated in previous pleading are denied, 545, 546.

REPLIES AND SUBSEQUENT PLEADINGS—*continued.*
when delivery of a reply is necessary, 545, 546.
replies which answer part only of the defence should be limited accordingly, 546.
alternative or inconsistent grounds of reply, 547.
the reply must be consistent with the statement of claim, 547.
delivery of rejoinder, when necessary, leave required, 547.
the answer to a counterclaim is called a reply, 548.
it cannot be delivered without leave, 548.
it must be specific, and is governed substantially by same rules as a defence, 548.
mode of pleading replies to counterclaims, 548, 549.
mode of pleading ground of reply arising after action, 549.
replies when new parties are added as defendants to a counterclaim, 551.
replies in the nature of a new assignment, 551—553.
time for delivering replies and subsequent pleadings, 547, 548.
reply that the breaches are not the same as those referred to in the defence, 551.
reply joining issue on the defence, and stating that the breaches include breaches other than those which are admitted by the defence, 553.
reply stating that the wrongful acts complained of are different from those which are admitted in the defence, 553.
reply joining issue on the defence and stating that the plaintiff also complains of other wrongful acts of the defendant, 554.
a like reply to a defence of justification, where the plaintiff complains of an excess, 554.
like forms of reply to defences setting up a right of way, 953, 954.
matters formerly alleged by way of new assignment may now be introduced either by amendment of statement of claim or by way of special reply, 553.

RESCISSION,
defence that the contract was rescinded before breach, 755.
defence to an action on a contract for the sale of land that the defendant rescinded the contract under a power contained in the conditions of sale, 770.
rescission of contract before breach, 755.
substituted contract a good defence without performance, 755.
contracts under seal can be discharged by deed, or by parol, if founded on consideration, 755.
agreement not to enforce the covenants in a deed, 755.
contract, required by law to be in writing can only be altered in writing, 755.
but may be wholly rescinded by parol agreement, 756.
effect of oral assent to substituted performance, 755, 756.
contract merely put into writing by consent of parties may be altered by parol, 756.
rescission after breach no defence, 756.
vested right of action for a breach, how discharged, 756.
renunciation of bills or notes, 609, 756.
effect of renunciation or total refusal to perform a contract, 756.

RESCUE,
statement of claim for pound breach, 383.
action for pound breach, when it lies, 383.

RESTRAINT OF TRADE,
statement of claim on covenant to pay liquidated damages in event of carrying on a particular business, 242.
defence that the contract is void as being in illegal restraint of trade, 683.
contracts in restraint of trade, when illegal and unenforceable, 682.
when they may be enforced by action for injunction or damages, 198, 242, 314.

RETAINER,
defence to an action by a solicitor, denying his retainer, 789.

REVERSION,
statements of claim:
for an injury to the plaintiff's reversion in land, 473.
for injury to a reversion by obstruction of light, 423.
for injury to reversion by disturbance of water rights, 474.
for an injury to a reversionary property in goods, 475.

REVERSION—*continued.*
defences:
denial that the defendant did the acts which are alleged to have injured the reversion, 912.
defence denying the alleged tenancy of the plaintiff's tenant, 912.
denial of the alleged injury or damage to the reversion, 913.
a like denial where an injunction is claimed, 913.
defence, in an action by a landlord against his tenant for removing fixtures from a dwelling-house, justifying the removal of them as tenant's fixtures, 913.
the like in respect of trade fixtures, 913.
mode of pleading injury to a reversion, 473.
what amounts to an injury to the reversion in land; temporary acts; acts done with intent to establish an easement, 473, 474, 452.
continuing injury, repeated actions, 474.
reversioner and tenant may join in action, 474.
liability of reversioner or landlord for nuisance on his property, when it arises, 452.
injury to reversionary property in goods, 475.
mode of pleading defences to actions for injury to reversion, 912.
See LANDLORD AND TENANT.

RIENS PER DESCENT, 678.

RIENS PER DEVISE, 678.

RIOT,
actions against the police authorities, 24.

RIVER. *See* WATER AND WATERCOURSES.

RULES NOW IN FORCE AS TO PLEADINGS, 3.

SALE OF GOODS,
statements of claim:
for the price of goods sold and delivered, 273.
for the price of goods bargained and sold, but not delivered, 275.
for damages for not accepting goods, 275.
for damages on a sale by instalments for refusal to accept goods, and repudiation of the contract, and to recover the price of goods actually delivered under the contract, 277.
for damages for not delivering goods, 278, 280.
for damages for delivering goods inferior to contract, and for non-delivery of part of the goods contracted for, 281.
for damages for breach of contract to supply goods of specified description: *see* WARRANTY.
defences:
denial of sale and delivery, 756.
denial of alleged contract, 757.
defence that s. 4 of Sale of Goods Act, 1893, has not been complied with, 757.
defence denying the price alleged, 757.
defence that the price claimed is unreasonable, 757.
defence denying delivery of the goods, 758.
form of defence to a part only of a claim, 758.
defence that the defendant did not order the goods, 758.
defence that the goods were sold upon credit, and that the period of credit has not expired, 758.
defence that the goods were to be paid for by a bill of exchange, and that the period for which the bill was to run has not expired, 759.
forms of defences on the ground that a bill of exchange or promissory note has been taken for the debt, 569, 615.
defence that the goods were on sale or return and part returned and rest paid for, 759.
defence to an action for the price of goods sold and delivered that the goods were not equal to sample, 760.
defence that the goods were sold with an express warranty, and did not correspond with such warranty, 760.

SALE OF GOODS—*continued.*
defences—continued.
the like with a counterclaim for special damages for the breach of warranty, 761.
defence of breach of warranty as to quality and fitness and counterclaim for damages, 762, 763.
defence that goods were not of quality contracted for or equal to sample, and counterclaim for damages, 763, 764.
a like defence and counterclaim to a claim for goods sold, &c., and for work and labour done, 765, 766.
defence to an action for not delivering the goods sold, denying the alleged breach, 766.
defence to a like action that the plaintiff was not ready and willing to accept and pay for the goods, 766.
defence to an action for not accepting goods sold that the plaintiff was not ready and willing to deliver the goods, 766.
defence that the contract was for a particular description of goods, and that the plaintiff was not ready and willing to deliver goods of that description, 767.
defence, where time is of the essence of the contract, that the plaintiff was not ready and willing to deliver the goods within the time stipulated for delivery, 767.
defence, where the agreement did not specify any time for delivery, that the plaintiff was not ready and willing to deliver the goods within a reasonable time, 767.
form of a counterclaim for breach of contract in not delivering goods sold, 768.
form of a defence of set-off of a debt for the price of goods sold and delivered, 774.
defences of fraud, 658.
codification of the law upon sale of goods by the Sale of Goods Act, 1893, *with slight modifications*, 273.
definition in the Act of "goods"; food included in, 273, 322.
liability of members of clubs or associations, 273.
when the action should be for the price of goods sold and delivered, and when for that of goods bargained and sold, 273, 274.
when a buyer is deemed to have accepted the goods as a performance of the contract, 274.
buyer, when entitled to reject the goods, may do so by giving notice to the seller, and need not, in general, return them, but may leave it to the seller to fetch them, 274.
property in the goods, when it passes, 274, 275.
sale or return and sale on approval, 275, 759.
action, when property has not passed, for non-acceptance, 275, 276.
when no stipulation as to price, a reasonable price is to be implied, 275.
damages in action for non-acceptance, 276, 277.
action for non-delivery, 278, 279.
sales of goods to be delivered in instalments, 277.
effect of forbearance to claim delivery or to make delivery, 278, 279.
Court may order specific performance of contracts to deliver specific or ascertained goods, 279.
vendor's lien, 273, 276.
effect of default in payment and of insolvency, 277.
mode of pleading defences to actions of debt for the price of goods; mere denial of debt not sufficient, 756, 757.
a person ordering on credit primâ facie *pledges his own credit*, 758.
where goods are sold on credit, no action lies for the price until the period of credit has expired, 273, 758.
sale of goods by description or sample, 281, 319, 324, 760.
sale of goods with an express warranty, 314, 760, 761.
conditions concurrent and precedent in sales, 273, 760, 766.
stipulations as to time of payment, when of the essence of the contract, 767.
acceptance and receipt under s. 4 of Sale of Goods Act, 1893...664.
distinction between acceptance under s. 4 and acceptance as a performance of the contract, 274.
And see FRAUDS, STATUTE OF; CARRIERS; LIEN; MARKET; STOPPAGE IN TRANSITU; SET-OFF; WARRANTY.

SALE OF LAND,
statements of claim :
by vendor for the price of land sold, 285.
by vendor on a sale by private contract for not completing, 286.
by vendor on a sale by auction for not completing, 286.
by purchaser on a sale by private contract for not completing, and for a return of the deposit, 288.
the like for not deducing a good title, and for a return of the deposit, 288
defences :
denial of the contract, 768.
the like alleging further that the agreement was subject to a formal contract being approved, 769.
defence of the Statute of Frauds, 663.
defence to an action against a purchaser for not completing that the plaintiff was not ready and willing to convey, 769.
defence that the plaintiff had no title to the premises, 769.
defence to an action for not completing a purchase that the plaintiff did not make a good title in accordance with a condition of the contract, 770.
defence to an action against the vendor for not conveying the premises, where it was the duty of the purchaser to tender a conveyance for execution, that the plaintiff did not tender such conveyance, 770.
defence to a like action that the defendant rescinded the contract under a power contained in the conditions of sale, 770.
defence of fraud, 656.
counterclaim for specific performance, 771.
defences to actions for specific performance, 772.
requirements of the Statute of Frauds, 282, 665, 666.
sales by auction, 91, 282, 286, 287.
when action for deposit lies against auctioneer, 91, 287.
vendors' obligations as to making out a good title, 282, 283, 769.
purchasers' obligations as to preparing and tendering conveyance, 283 770.
stipulations as to time, when of the essence of the contract, 283, 769.
deposit when a return may be claimed, 283, 284
damages on breach of contract, 284, 285.
after conveyance purchasers' remedy is in general on the covenants, 285.
position of vendor in possession after contract, 285.
no concluded agreement for sale until the terms are ascertained expressly or by implication, 768.
when reference to formal contract to be prepared prevents agreement being a concluded one, 768.
power to rescind contained in conditions of sale, 770.
effect of misrepresentations, 771.
specific performance, claims or counterclaims for, when enforceable in the King's Bench Division, 771.

SAMPLE, 324, 760.

SCHOOLMASTER,
statements of claim :
by a schoolmaster for tuition, board, &c., 289.
by a schoolmaster for removing a pupil without notice, 289.
removal of pupil without notice, 289.
pupil, moderate chastisement of, 923.

SEAL, 632, 633, 643, 644.

SEAWORTHINESS,
defence that the ship was not seaworthy, 692
what seaworthiness is, 292, 293, 693.
See SHIPPING.

SEDUCTION, 433, 879 : *see* MASTER AND SERVANT.

SEPARATION DEED,
defence that the deed illegally provided for future separation, 683.
a deed made upon an actual separation, settling rights, is not illegal, 192, 683.
molestation no answer to claim on covenant in a separation deed to pay an annuity unless expressly made so, 582.

SERVANT. *See* MASTER AND SERVANT.

SET-OFF,
defence of set-off in an action for debt, 772.
defence, as to part of a debt sued for, of a set-off to a like amount for the price of goods sold and delivered, 774.
defence to a claim for an admitted debt of set-off of a part of a larger debt due, with a counterclaim for the balance, 775.
defence to an action for debt of set-off upon a bill of exchange drawn by the defendant upon and accepted by the plaintiff and payable to the defendant, 776.
a like defence where the defendant is the indorsee of a bill accepted by the plaintiff, 776.
defence of a set-off on a promissory note made by the plaintiff and payable to the defendant, 777.
defence of a set-off on a promissory note indorsed by the plaintiff to the defendant, 777.
defence to an action by an executor for debts due to the testator in his lifetime of a set-off of debts due from the testator in his lifetime to the defendant, 777.
defence to an action against an executor for debts due from the testator in his lifetime of a set-off of debts due to the testator in his lifetime, 778.
defence to an action brought by a trustee in bankruptcy for debts due to the bankrupt of a set-off of debts due from the bankrupt before the bankruptcy, 778.
defence to an action brought by a trustee in bankruptcy for debts due to the bankrupt of a set-off of debts contracted by the bankrupt after the act of bankruptcy without notice, 779.
defence of a set-off on a bond, 779.
the like on a covenant, 780.
the like upon a judgment of the High Court of Justice, 780.
defence to an action by the assignee of a debt of set-off of a debt which became due from the assignor to the defendant before notice of the assignment, 781.
defence of a set-off for liquidated damages under a covenant or agreement, 781.
a like form claiming a set-off for liquidated damages under a building contract, and setting out some of its provisions, 781.
a like form claiming the amount by way of counterclaim, 36.
defence to an action for the price of goods alleging that they were sold by the plaintiff's agent as apparent principal, and claiming a set-off which had accrued due from the agent to the defendant, 782.
defence of a set-off of cross demands upon an account stated by agreement and payment of the balance, 747.
reply of the Statute of Limitations to a defence of set-off, 728.
statutes of set-off, 772.
distinction between set-off and counterclaim, 534, 537, 538, 772, 773.
set-off in general can be of liquidated debts only; not of claims for unliquidated damages, 772.
the debts must be mutual debts; between the same parties and in the same rights, 772, 773.
effect of this rule as to joint debtors and joint creditors; distinction as to joint and several debts, 538, 773.
counterclaims, when pleadable in such cases, 539, 773.
equitable defences of set-off, 773, 774.
set-off or counterclaim in actions by or against executors, 538, 774, 777.
set-off in actions by or against a company; effect of winding-up proceedings, 634, 635, 774.
set-off in actions between trustee in bankruptcy and creditors, 778, 779.
set-off of debts due from the bankrupt before defendant had notice of any act of bankruptcy, 779.
a sufficient part of a debt to meet claim may be set off, and the residue may be used as a counterclaim, 774, 775.
set-off arising after action; how pleaded, 775.
reply to set-off or counterclaim may state grounds of reply arising after action or after delivery of defence, 775.

SET-OFF—*continued.*
defendant not bound to plead set-off or counterclaim, but may bring cross-action, 775.
particulars must be given of debts sought to be set off, 775.
set-off of money due on a bond must be of the principal and interest really due, not the penalty, 779, 780.
a mere penalty is a subject for counterclaim only, 781.
set-off of judgment debt; how pleaded, 780.
set-off in actions by assignee of debt, 781.
in what cases defendant may plead set-off against agent in action by principal, 782.
set-off of debt due from principal in action brought by agent as trustee for principal, 783.
solicitor may set off costs, although he has not delivered a signed bill, 791.

SHARES,
statements of claim:
for the price of shares, 290.
for damages for not accepting shares, 290.
against a broker for not purchasing shares according to order, 139.
for other forms by and against a stockbroker: *see* STOCK EXCHANGE, 308.
for claims by a company for allotment money or calls: *see* COMPANY, 151.
defences:
defence to an action for a call that the call was not duly made, 636.
defence to a like action that the defendant was an infant, &c., 689.
defence to a like action that the defendant was induced to become a shareholder by fraud, &c., 658, 659.
defence to an action for differences on the price of shares that the contract was a gaming or wagering contract, 667.
contracts relating to sale of shares in general regulated by usage of stock exchange on which it takes place, 290.
shares in joint stock banking companies, 290.
who should pay calls when there is a sale, 290.
damages, measure of, for not accepting or delivering shares according to contract, 290, 291.
when the contract is to be deemed one of gaming or wagering, 668.
liability of infant holding shares, 689.
See STOCK EXCHANGE.

SHERIFF,
statements of claim:
against a sheriff for not levying under a writ of *fi. fa.*, 476.
against a sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, 477.
by a landlord against a sheriff for removal of goods without payment of rent due, 478.
defences:
defence to an action against a sheriff for not levying denying the default in levying, 914.
the like denying that there were any goods within the bailiwick, 914.
the like alleging that the plaintiff countermanded the writ, 914.
defence to an action for a false return of *nulla bona* denying the falseness of the return, 915.
defence to an action for not levying or for a false return denying the judgment, 915.
the like denying the process, 916.
the like denying the delivery of the process to the defendant, 916.
defences by a sheriff to actions for trespass or conversion of justification under process, 898, 899.
consolidation of law as to sheriffs by the Sheriffs Act, 1887...476.
liability of sheriff or his officer to penalties for misconduct, 476.
period of limitation for action for penalty, 476.
sheriff, when guilty of misconduct in his office, would seem not entitled to the protection of Public Authorities Protection Act, 1893...476.
liability of sheriff to action for damages for neglect or default of his officers, 476.

SHERIFF—*continued.*
actual damage generally required to support action against sheriff for breach of duty, 476, 477.
sheriff's fees and poundage, 477.
when sheriff must pay rent due before he removes goods seized, 478, 915.
execution of fi. fa. *by sheriff*, 477.
in action against sheriff for not levying, or for a false return, a judgment must be proved in support of the writ, 915.
mode of pleading in actions against, for not levying or for a false return, 914, 915.
sheriff not liable for arresting under process a person privileged from arrest by reason of attending a Court of justice, 477, 427.
See PROCESS.

SHIPPING.
statements of claim:
for freight, 294.
the like against consignee named in bill of lading, 294.
the like against indorsee of bill of lading, 296, 297.
for lighterage, 297.
for towage, 297.
by shipper against master, on bill of lading, for damage to goods, 297.
by shipper against shipowner, on bill of lading, for damage and short delivery, 298.
by indorsee of bill of lading against shipowner for not delivering, 298.
the like with alternative claim for loss through collision, 298.
by shipowners against indorsee of bill of lading for freight and demurrage, "as per charterparty," 298.
against charterer for freight under the charterparty, 299.
the like for demurrage under a charterparty, 301.
by shipowner against charterer for detention beyond the demurrage days, 301.
the like for not loading pursuant to charterparty, 301.
for injury to ship and cargo by the defendant's negligent navigation of another ship, 480.
defences, &c.:
denials of allegations in a claim by shipowner against consignee for freight under bill of lading, 784.
the like in an action against indorsee of bill of lading, 784.
defence to an action for damage to goods that the damage arose from excepted perils, 784.
reply to preceding defence that the negligence of the crew brought the excepted perils into operation, 785.
reply to same defence that those perils arose during an unauthorised deviation, 785.
defence that the damage arose from the bad condition of the goods when received, 622.
defence to action for damage and short delivery, 785.
defence denying that the defendant kept the ship on demurrage, 786.
defence to action for detention beyond demurrage days, 786.
defence denying detention where charterparty silent as to time, 786.
defence of cesser clause in charterparty, 786.
defence denying that the ship sailed pursuant to charterparty, 787.
counterclaim that the goods were delivered in a damaged condition, 787.
defence denying that ship was ready to load pursuant to charterparty, 787.
defence that charterparty was cancelled pursuant to a clause therein, 788.
defence that defendant was prevented from completing voyage by excepted perils, 788.
defence by shipowner, for loss or damage to goods, that the goods were within s. 502 (2) of the Merchant Shipping Act, 1894...789.
liability of carriers by sea, 292.
exceptions in bills of lading: their effect, 292, 784, 785.
implication of seaworthiness in contracts of affreightment at commencement of voyage, 292, 293.
obligations of shipowners to passengers and to crew, 293.

SHIPPING—*continued.*
what is meant by "seaworthy," 293, 693.
when contract not by deed, either master or owner may sue for freight, 293.
advanced freight and freight pro rata, 293, 787.
shipowner's liability, how limited by statute, 293, 294, 789.
damages, measure of, 293.
sea traffic of railway companies, 294.
bill of lading, 294, 295, 296, 784, 785.
charterparty, 299, 300, 784—788.
effect of pledge of bill of lading, 295.
when indorsement for value of bill of lading defeats stoppage in transitu, 295.
how far signature of master to bill of lading binds owner, 295.
bills of lading usually are in sets, 296.
duties of shipowner and charterer, 299, 300.
lay days, demurrage, 164, 300.
collision, Admiralty rule as to damages, 479.
Admiralty rule does not apply to actions under Fatal Accidents Act, 1846...479.
action against Secretary of Board of Trade for compensation for unreasonable detention of ship, 479.
action seems to lie for maliciously arresting a ship under process, 479.
deviation, exceptions do not apply during, 785.
construction of clauses for cesser of liability of charterer, 786.
no freight in general payable if goods so damaged upon voyage as to be unmerchantable, 787.
when a delay in arriving at the port of loading will justify charterer in not loading ship, 787.
when charterer justified in not loading ship, 787, 788.
contract in charterparty in general to carry subject only to the excepted bills, 788.
defence of compulsory pilotage, 916.
And see INSURANCE.

SHOOTING,
claim for disturbance of a right of shooting, 480.
defence stating illegality under the Ground Game Act, 1880...685.
right of shooting, licence to shoot, agreements as to shooting, 480.
a collateral verbal promise to keep down game in consideration of tenant taking lease held enforceable, 480.
effect of Ground Game Act, 1880...481.

SLANDER. *See* DEFAMATION.

SLANDER OF TITLE,
claim for injunction and damages for defamation of plaintiff, and of the machines sold by him, 481.
what constitutes slander of title, 481.
no action lies without actual damage, 481, 482.
mode of pleading, particulars to be given, 482.
limitation of action: the period is six years, 482, 873.
cause of action usually survives to executor, 482.
injunction to restrain slander of title, 413.

SOCIETIES,
I. *Building societies:*
commencement of claim by or against an incorporated building society, 301.
statutes in force, 301.
rules must state how disputes are to be settled; meaning of disputes, 302.
when jurisdiction of the High Court ousted by the rules, 302.
want of jurisdiction to be pleaded generally, though in a clear case application may be made to stay the action, 789.
effect of society receiving deposits or loans in excess of its powers, 302.
personal liability of directors or officers of societies, 302.

SOCIETIES—*continued.*
II. *Friendly Societies:*
commencement of claim by a friendly society, 302.
statute in force, 302, 303.
rules must state the manner in which disputes are to be settled, 303.
when jurisdiction of High Court ousted, 303.
want of jurisdiction may be pleaded, or in some cases action may be stayed, 789.
III. *Industrial and Provident Societies: statutes in force*, 304.
IV. *Loan Societies: statutes in force*, 304, 789.
V. *Trade Unions:*
commencement of claim by or against a trade union, 304.
statutes in force, 304.
general effect of statutes, 305.
their property is vested in trustees, who may sue or be sued concerning the property, right, or claim to property of the union, 304.
may be sued in their registered name, 304.
when trustees are made parties to actions, 304.
what contracts of unions Court has no jurisdiction to directly enforce, 304, 305.
meaning of "directly" enforcing, 305.
where the main purposes of a trade union are lawful, the association may maintain actions to enforce such purposes, and is liable to be sued in respect of such purposes, 305, 789.
as to when the purposes of a society are illegal, 304, 305, 684, 789.
See TRADE DISPUTES *and* ASSOCIATION.

SOLICITORS,
statements of claim:
by a solicitor for work done, &c., 305.
by a client against his solicitor for negligence, 306.
the like for negligent advice and misrepresentation as to investment, 307.
defences:
defence denying retainer, 789.
defence denying that the alleged work was done or payments made, 790.
defence that the plaintiff was not a duly qualified solicitor, 790.
defence that the plaintiff did not deliver a signed bill of costs a month before action, 790.
defence to claim by valuer for making a valuation for an action, 792.
summary jurisdiction over solicitors, 305.
mode of pleading in actions against solicitors for negligence, 306.
an unqualified person acting as solicitor cannot recover professional fees or disbursements, 790.
an untaxed bill may be specially indorsed upon the writ, 305.
retention by client of bill for twelve months without taxation primâ facie *evidence that amount reasonable*, 791.
no privity of contract between the client and the town agent of the client's solicitor, 305, 306.
when solicitor may compromise a client's claim, 306.
liable if the compromises contrary to client's express instructions, 306.
a retainer need not be formal or express, 789, 790.
requirements of the statute as to a signed bill being delivered one month at least before action, 790, 791.
a solicitor may set off costs due to him although he has not delivered a bill of them, 791.
agreement by solicitor as to costs, 791.
a solicitor contracts to use reasonable skill, but he is not liable for an error of judgment upon a doubtful point of law, 306.
solicitor is not by arranging for attendance of a witness, or employment of a valuer, or of the sheriff, for a client, made personally liable to pay them, 792.
solicitor is by usage primâ facie *liable to the shorthand writer he employs in an action*, 792.

SPECIAL INDORSEMENTS, 65—68.

SPECIFIC PERFORMANCE, 58, 216, 279, 771.

SPIRITUOUS LIQUORS,
defence that the debt was for spirits sold in quantities of less value than twenty shillings, 684.

STAKEHOLDER, 91, 258, 287, 668.

STAMP,
on bills or notes, a defect in stamp cannot in general be remedied after issue, 597.
stamp objection seldom pleaded; how raised, 597, 793.
material alteration after issue of bill or note or making of agreement in general renders fresh stamp necessary, 608.
foreign bills, 122.
cheques, 125.
brokers' contract notes, 193.
contracts between principals, outside broker acting as dealer in shares, 796.
marine policies, 198, 199.
life policies, 206.
fire policies, 208.
policies against accident or for payments during sickness, &c., 209.

STANNARIES, 152, 153, 864.

STATEMENT OF CLAIM,
example of claim, defence, and reply, 35, 36.
commencements of claims,
general form of claim, 42.
the like where there are several plaintiffs and defendants, 46.
the like where there are alternative causes of action, 50.
by a plaintiff who had sued by a wrong name, 59.
against a defendant who had been sued by a wrong name, 59.
amended statement of claim, 59.
by a surviving joint contractor, 60.
by a surviving plaintiff, 60.
against a surviving joint contractor, 60.
after change of parties, and an order for new parties, 61.
where one only of several defendants appears, and judgment has been entered against the others, 61.
by a person suing on behalf of a class, 62.
where the action has been removed by certiorari from a County Court, 64, 435.
where the action has been removed by certiorari from some other inferior Court, 64.
delivery of, when necessary, 42.
how delivered, 14.
parties, names of, 43.
number of the parties, 44.
character in which parties sue or are sued, 44.
parties under disabilities, 44.
the body of the statement of claim, 44.
joinder of causes of action, 52.
the claim of debt or damages, 54—57.
relief other than damages or payment on debt, 58.
venue, 58.
time for delivery of statement of claim, 58.
what facts must be pleaded, 45.
particulars, 37, 45.
amendment, 14.
the claim on the writ may be modified or extended by the statement of claim without amending the writ, 51.
See PLEADING IN GENERAL; PARTICULARS, *and for forms in particular cases see the various headings.*

STATUTE OF FRAUDS. *See* FRAUDS, STATUTE OF.

STATUTES OF LIMITATION. *See* LIMITATION, STATUTES OF.

STATUTORY AUTHORITY, 454, 859, 936.
defence justifying under statutory powers, 936.
defence that the act was done under authority of a statute can now seldom be raised under defence of Not Guilty by Statute, 886.

STAYING PROCEEDINGS,
until joinder of proper parties, 29, 522.
where want of jurisdiction is clear, 789, 705.
stay of frivolous or unnecessary and oppressive action, 522, 523, 563.
bankruptcy, when proceedings may be stayed in consequence of, 32, 99.
compositions or arrangements, when proceedings stayed in consequence of, 107.
judgment recovered in a foreign Court, when a ground for, 705.
winding-up of companies, when proceedings stayed in consequence of, 635.

STIPULATIONS,
when to be implied in written agreements, 80, 83, 218, 221, 222, 745.
warranties implied on sales of goods, 316.
implied promises only exist in the absence of express stipulation, 230, 709.

STOCK EXCHANGE,
claim by a stockbroker for money paid, commission, &c., 308.
claim by a stockbroker for differences, &c., 309.
claim against a stockbroker for differences, 310.
against a stockbroker for not purchasing according to order, 310.
against a stockbroker for wrongly closing the plaintiff's account, 311.
against brokers (outside) employed to buy and sell on the exchange for not so buying and selling, 312.
claim for the price of shares, 290.
claim by vendor against purchaser for not accepting the shares, 290.
defence to a claim by a stockbroker for commission and for differences, &c., 792.
a like defence setting out the terms of employment and alleging breaches of duty as broker, with a counterclaim for damages, 793.
the like that the plaintiffs were employed to sell when there was a profit, that they failed to do so, with a counterclaim for damages, 794.
defence that the stockbroker wrongly closed the defendant's account, 795.
defence by outside brokers to claim for not buying and selling in accordance with the terms of their employment on the London Stock Exchange, 796.
duty of broker to establish for his employer privity of contract with a third person, 137, 138, 308.
contracts made with jobber on London Stock Exchange, 308.
duty of broker to put before employer the identical terms which he gets, 137, 138, 793.
duty of broker to use reasonable efforts and skill, 310.
duty of broker to render accounts, 309.
broker must not buy from or sell to his employer, 138, 312.
when customer may repudiate, 138, 312, 621, 622.
persons employing brokers on the London Stock Exchange bound by the rules, &c., so far as not unreasonable, or contrary to law, or to the terms of employment, 137, 309.
when employer may object to name passed, 308, 309.
usage of brokers to lump contracts of several employers, 793.
stamps on contract notes, 793, 796.
"*contango*" *and* "*backwardation*," 309.
carrying over, 309.
closing accounts, 311, 795.
duty of employer to indemnify broker, 309, 195.
duty of employer to put broker in funds, 311.
where broker makes real contracts for his employer defence of gaming inapplicable, 792, 793.
securities deposited as cover, 671, 795.
outside brokers as dealers, position of, 796.

STOPPAGE IN TRANSITU,
defences of stoppage in transitu by an unpaid vendor, 825.
indorsement for value of bill of lading, when it defeats the right to stop in transit, 295.
when the right to stop in transit may be exercised, 825.
transfer of document of title by a person as owner or buyer, when it defeats the right to stop in transit, 870.

STRIKING OUT PLEADINGS, 11, 13, 563.

SUBSTITUTED AGREEMENT, 755, 756.

SUGGESTION OF BREACHES, 133—136, 619.

SUGGESTION OF DEATH,
commencement of statement of claim suggesting the death of one of the plaintiffs, 60.
the like by an executor continuing an action after the death of a sole plaintiff, 174.
the like against the executor of a deceased defendant, 175.
change of parties on death, marriage, &c., 30, 174.

SUNDAY TRADING, 797.

SUPPORT OF LAND,
statements of claims:
for damage caused by taking away the support of plaintiff's land by mining, 485.
the like with an alternative claim for compensation under a lease, 485.
for damage to land and buildings, 486.
for wrongful and negligent removal of support, 487.
the like where the working was under a lease giving a right to work mines subject to leaving support for houses, 487.
for taking away from plaintiff's house the support to which it was entitled from the adjoining house, 488.
the like against the owner of adjoining house, and the builders employed by him, 488.
defences:
denial of plaintiff's possession of premises, 916.
denial of the removal of support, 917.
defence alleging a right to let down the surface, 917.
defence alleging title in defendant to make excavations, &c., complained of on condition of leaving support, which was left, 917.
defence denying facts alleged by plaintiff as constituting his title to support, 918.
defence denying alleged damage, and alleging that the damage, if any, was not caused by the acts of defendant, 918.
defence denying alleged damage arose from the acts of defendant, and alleging it arose from the acts of defendant's predecessor in title, 919.
right to support, 483, 484.
mere possession will support action against stranger interfering with support of building by adjacent land, 484.
doubtful whether any natural right to support of subterraneous water, 484.
damage is gist of action, and may be denied, 484, 918.
what damage is recoverable, 484.
no cause of action until actual damage occurs, 874.
the period of limitation dates from the damage, 874.
fresh subsidences create fresh causes of action, 874, 918.
support to land of adjacent and subjacent land is a natural right, 483, 485.
statutes, deeds, or documents not to be construed to destroy natural rights without clear words, 487.
mode of pleading defence to claim in respect of acquired right of support to buildings, 918.
no defence that subsidence took place after defendant ceased to be in occupation, 485.
obligations between adjoining householders, 488.
right to injunction, 484.

SURETY. *See* GUARANTEES.

SURRENDER,
defence of a surrender, 710.
the like by operation of law, 711.
as to what constitutes a surrender by operation of law, 710.

TAXES,
defence as to part of rent claimed of a deduction for property tax, 708.
right to deduct property tax out of next payment of rent, 708.
deductions by tenant of payments or charges on the land, 708.
cases on construction of covenants with regard to rates, taxes, &c., 224.

TENANT IN COMMON,
when action for an account between tenants in common lay, 69.
when one tenant in common of land may maintain trespass against another, 503.
when one tenant in common of a chattel may maintain trespass or conversion against another, 347, 500, 824.

TENDER,
defence of tender before action, 797.
reply that a sum larger than the amount tendered was due in respect of an entire cause of action, 799.
reply to a defence of tender before action denying that the defendant was ready and willing to pay the debt, 799.
reply to a defence of lien of a tender of the debt before the detention or conversion of the goods, 868.
defence of tender where the tender was made by cheque, 799.
defence of tender, what it is, 797, 798, 799.
tender how and when to be made, 797, 798, 799.
tender to or by one of several joint creditors or debtors is good, 798.
with a defence of tender the money tendered must be brought into Court, 798.
legal tender, what may be tendered, 799.
tender after impounding a distress for rent too late, 379.
tender in case of distress damage feasant, 849.

TENDER OF AMENDS,
defence of tender of amends under the Public Authorities Protection Act, 1893...919.
defence in an action for trespass by cattle of disclaimer of title, and tender of amends, 920.
statutes giving right to tender amends in cases of wrongs, 919, 920.
right to tender amends given by the Public Authorities Protection Act, 1893...901, 919, 920.
the money tendered need not be brought into Court, 920.
tender accepted as sufficient may be pleaded as an accord and satisfaction, 920.
statutory defence to actions for trespass to land of disclaimer of title and tender of amends, 920.

THIRD PARTY,
form of third party notice, 555.
claim by defendant against third party, 558.
defence of third party, 559.
third party procedure, 555—560.
applies only where defendant claims contribution or indemnity over against a third person or a co-defendant, 555.
after appearance defendant may apply for directions, 556.
power to direct mode of trial, or to order judgment, &c., 556.
liberty may be given to the third party to defend the action, or to take part in the trial, &c., 557.
whether third party can bring in a fourth party as liable to contribution or indemnity over, 557.
pleadings may be ordered to be delivered between third party and plaintiff, or between third party and defendant, 557, 558.

THIRD PARTY—*continued.*
married woman may be added as third party in respect of separate property, 557.
application of third party procedure to the case of a co-defendant liable for contribution or indemnity over, 559.

THIRD PARTY, RIGHT OR TITLE OF,
in what cases it may be set up by defendant, 347, 500, 502, 936, 937.

TICKET,
conditions on ticket or voucher, when binding, 95, 149.
through tickets, 149.
travelling on railway without a ticket, law as to, 930, 931.

TIME,
stipulation as to time, when of essence of contract, 283, 767, 769.
how reckoned under R. S. C., 1883...17, 18.
month means calendar month in rules, 18; *in bills of exchange*, 108; *on sales of goods*, 275; *on notice to leave given to or by servant*, 247.
month in other documents primâ facie *lunar month, it is said*, 108.
reasonable time, what is meant by, 143, 299.
long vacation, 18.
time immemorial, 829.

TIME FOR DELIVERING PLEADINGS,
general rules as to, 17—19.
for delivering statement of claim, 58.
for delivering defence, 520, 521, 540.
for delivering further defence of matter arising after delivery of a defence, 531.
for delivering amended defences and defences to amended statements of claim, 15.
for delivering reply and subsequent pleadings, 545, 548.
hours for service of pleadings, 17.

TITLE,
mode of pleading title, 226, 232, 238, 466.

TITLE DEEDS,
detention of title deeds, who should sue for, 370, 371.

TITLE OF DIGNITY, 43.

TITLE OF PLEADINGS, 4.

TOLLS, 313.
instances of declarations under former system for market tolls and stallage, 313.

TRADE,
statements of claim:
by vendor against purchaser of a business to recover the price, 313.
by purchaser against vendor of a business for fraudulent misrepresentations as to the takings, 397.
by purchaser against vendor on sale of a public house business with alternative claims for fraud and breach of warranty, 399.
by purchaser against vendor on a covenant to pay liquidated damages in the event of his carrying on a like business within a certain distance, 242.
by master against former servant for breach of agreement not to carry on business within a certain distance, 314.
defence that the contract is void as being in illegal restraint of trade, 683.
sale of goodwill, 313, 314.
contracts not to carry on a particular business, when and how enforceable, 242, 314.
restraint of trade, what contracts are illegal, 682.

TRADE DISPUTES,
claim for damages and injunction against persons by threats, &c., procuring plaintiff's servants and workmen to leave their employment, and his customers to leave dealing with him, 489.

TRADES DISPUTES—*continued.*
for wrongfully and maliciously inducing servants or customers of plaintiff to break their contracts with plaintiff, 490.
for damages to trade by a conspiracy, 491.
for damages and injunction for maliciously inducing and conspiring to induce persons to break their contracts with, and to refuse to contract with, the plaintiff, 492.
claim for injunction to prevent watching and besetting, 494.
damage to a lawful trade by the exercise of threats of violence is a cause of action, 489.
damage caused by interference without excuse with lawful contractual relations is a cause of action, 490.
a conspiracy to injure, carried out by unlawful means, causing injury to the plaintiff is a cause of action, 491.
conspiracy when a ground of action, 491.
watching and besetting, when a ground of action for damages or for injunction, 491.
actions to prevent wrongful application of funds of a trade union to aid a strike not authorised by the union, 305.
See SOCIETIES.

TRADE FIXTURES,
defence justifying removal of trade fixtures, 913.

TRADE LIBEL. *See* SLANDER OF TITLE.

TRADE MARKS,
claim for the infringement of a trade mark, 494.
defences to actions for the infringement of trade marks, 921.
defence to an action by assignee of trade mark denying assignment, 921.
defence to a like action that the trade mark was not registered, 921.
statutes in force relating to trade marks, 494, 495.
no action lies for infringement of trade mark capable of registration, unless it has been registered, 495, 921.
provisions of the Trade Marks Act, 1905...495, 921.
actions for infringement of trade marks, 495, 496.
registered mark, when assignable, 921.
registration of assignment, 921.

TRADE UNIONS, 304, 305: *see* SOCIETIES *and* TRADE DISPUTES.

TRESPASS,
I. *To the Person.*
statements of claim:
for assault and battery, 496.
for false imprisonment, 498.
against a railway company for assault and false imprisonment, 498.
for assault in forcibly ejecting plaintiff from a meeting, 499
defences, &c.:
denial of assault alleged, 922.
denial of arrest alleged, 923.
defence that trespass was caused by inevitable accident, 923.
defence of leave and licence, 864.
defence that the acts complained of were done in self-defence, 924.
reply thereto that plaintiff was lawfully endeavouring to prevent defendant from trespassing on plaintiff's land, and defendant thereupon committed acts complained of, 924.
defence by master and servant that acts complained of were done in defence of master's land, 924.
defence that acts complained of were done by defendant in defence of his house, 925.
defence that acts complained of were done in defence of possession of goods, 925.
defence justifying an arrest and imprisonment on suspicion of felony, 926.
defence justifying assault in stopping an affray and to preserve the peace, 928.
defence justifying imprisonment to prevent an assault on defendant and to preserve the peace, 928.
defence justifying an arrest for a felony committed by plaintiff, 928.

TRESPASS—*continued.*
I. *To the Person—continued.*
defences, &c.—continued.
defence by a railway company to an action for assault and false imprisonment denying the charges, and alleging if committed by a servant of the company it was not within the scope of his employment, 930.
defence by a railway company to an action for an assault in ejecting plaintiff from one of their carriages that he was unlawfully travelling without a ticket, 930.
defence justifying the detaining of a passenger, 930.
defence justifying ejecting plaintiff from a public meeting, 931.
trespass to the person; battery, assault, imprisonment, 496—498.
giving in charge to policeman, 497.
distinction between trespass and malicious prosecution, 497.
imprisonment under legal process afterwards set aside, 497.
liability of party and of solicitor, 497, 498.
acts by command of Crown, 497.
matters of excuse or justification must be expressly pleaded in defence, 922.
mode of pleading; particulars, 922, 923, 533.
what force owner of land or goods may use against trespasser, 922, 924, 925.
reply in nature of new assignment, use of, 922, 923, 924.
a justification alleging acts sued for constitute a felony is not to be pleaded, 923.
moderate chastisement of pupil or apprentice, 923.
inevitable accident should be pleaded specially, 923.
action does not lie for damages for forcible entry contrary to 5 Ric. II. stat. 1, c. 8...924.
but is said to lie for independent wrongs in course of such entry, 924.
justification for an arrest and imprisonment by a private individual, 926.
justification imputing felony to plaintiff, caution as to pleading, 928.
the like by a constable, 926, 927.
mode of pleading; particulars, 927.
reasonable and probable cause, 927.
statutory protection of public authorities and officials, 927.
justification under process, 898.
previous hearing of same matter resulting in dismissal or conviction, when a defence, 929.
justification for expelling person from justices' or revision Court, or from church, 929, 930, 932.
persons travelling on railway without a ticket, 930, 931.
when passenger may or may not be detained, 930, 931.
public meetings and liability of chairman, 931, 932.
justification under Lunacy Acts of trespass to person, 933.
limitation, period of, 933.

II. *To Goods.*
statements of claim:
for trespass to goods, 499, 500.
defences:
denial of the seizure complained of, 933.
denial of the plaintiff's property in the goods, 933.
defence of leave and licence, 934.
defence that defendant was joint owner of the goods with plaintiff, 824.
defence justifying removal of goods encumbering defendant's premises, 934.
defence justifying taking and detaining of cattle which had strayed on defendant's close, 934.
defence under a bill of sale, 816.
what constitutes an act of trespass, 499.
what possession necessary to maintain trespass, 500.
trustee, special property, right to possess, 500.
matters of excuse or justification must be specially pleaded, 935.
possession primâ facie *evidence of right*, 500, 933.
when a jus tertii *may be set up*, 500, 933, 934.
removal of goods or cattle of another encumbering a close, 934.
mode of pleading defences; justification as servant of another, 934, 935.

TRESPASS—*continued.*
III. *To Land.*
statements of claim :
for trespass to land, 501.
the like claiming an injunction, 502.
for trespass to a house and seizure of furniture therein, 503.
for trespass to coal, 504.
for other forms for trespass to land, 504.
defences :
denial of the breaking or entry, 935.
defence justifying under statutory powers, 936.
denial of plaintiff's property in the land, 936.
defence that the land was the freehold of defendant, 937.
defence justifying under the authority of the owner, 938.
defence stating defendant's title under demise from person seised in fee, 938.
defence by owner of a house and his servant justifying entering the house and removing plaintiff's goods, 938.
defence that the freehold belonged to plaintiff and defendant as tenants in common, and that the acts complained of were merely an exercise of defendant's rights as such tenant, 939.
defence of leave and licence, 864.
defence to action for trespass by cattle of disclaimer of title and tender of amends, 920.
defences justifying the alleged trespasses, 940, 941.
trespass to land, what constitutes act of trespass ; breaking and entering, 501.
trespasses by animals, 501.
liability of owner of land for escape of water or filth artificially collected and kept by him on his land, 453, 501.
unintentional acts ; mistake, 501, 920.
property subject to trespass ; incorporeal rights ; meaning of term close, 501, 502.
to maintain action possessory title required ; no action before actual entry, 502.
actual entry may relate back to time of legal right to enter, 502.
possession evidence of property ; jus tertii, 502, 935, 936.
trespasses between joint tenants, or tenants in common, 503.
disputed possession ; possession follows the title, 503, 924, 938.
forcible eviction ; forcible entry, 503.
no jurisdiction in trespass to land situate abroad, 503.
coal trespass measure of damages, 504.
mesne profits, 233, 906.
justification under statutory powers or other matter of justification or excuse should be specially pleaded, 935, 936.
protection by Public Authorities Protection Act, 1893, *when applicable,* 901.
traverse of property, effect of, 936.
liberum tenementum, 937.
justification under authority of owner, 938.
rights of tenants in common and joint tenants, 939.
leave and licence, mode of pleading, 939.
instances of justifications to abate nuisances, remove obstructions, &c. 940—942.

TROVER. *See* CONVERSION.

TRUCK ACTS, 775, 800.

TRUSTEE,
trustees may, in general, sue and be sued as representing the estate or property, 25.
period of limitation in actions against trustees, where not fraudulent or dishonest, under the Trustee Act, 1888...723.
express trust ; meaning of the term, 723.

USE AND OCCUPATION,
statement of claim for use and occupation of a house and land, 215.
defence of denial of the use or occupation, 706.
defence that the use and occupation were not by permission of plaintiff, 707.
defence that the tenancy was under an express agreement, &c., 707.
action for use and occupation, when it lies, 215, 706.

VALUATION, 84, 85, 87, 792 : *see* ARBITRATION.

VENUE OR PLACE OF TRIAL,
place of trial is in all cases fixed by an order, 58.

WAGER, 667 : *see* GAMING.

WAIVER,
claim against a wrongdoer waiving the tort and claiming the proceeds as money received, 262.
reply (or defence) of waiver of notice to quit, 711.
defence of waiver of a forfeiture, 714.
defence to an action for conversion of waiver of tort, 824.
reply of waiver to a counterclaim for liquidated damages, 804.
And see BILLS OF EXCHANGE ; CONDITIONS PRECEDENT ; RESCISSION.

WARRANT, 898 : *see* POLICE.

WARRANTY,
statements of claim :
for the breach of a warranty of a horse, 316.
for breach of warranty and fraud on sale of a horse, 317.
for breach of warranty of the quality of goods sold and delivered, with a claim for costs incurred in defending an action brought by a sub-vendee, 318.
for breach of a contract to supply goods of a specified description, 319.
the like where there has also been a breach by non-delivery of part of the goods sold, 281.
for breach of warranty on a sale of goods by description and sample, 320, 321.
for breach of warranty on sale of goods by sample, 324.
for breach of an implied warranty that goods sold and supplied by the defendant in the course of his business for a particular purpose were reasonably fit for that purpose, 322, 323.
for breach of warranty of title and quiet possession on a sale of goods, 324.
for breach of warranty and fraud as to its sanitary condition on letting a house, 224.
claim for misrepresentation on sale of a public-house business with alternative claims for fraud and breach of warranty, 399.

defences :
denial of warranty, 800.
denial of breach of warranty, 800.
defence to an action for the price of goods sold by sample that the goods were not equal to sample, 760, 763.
defence to a like action that the goods were sold with an express warranty, and did not correspond with such warranty, 760, 761, 762.
the like with counterclaims for special damages for the breach of warranty, 761, 762.
codification of law of warranties by the Sale of Goods Act, 1893...315.
warranty is a contract collateral to the main purpose of the contract of sale or other principal contract, 314.
what amounts to a warranty, 314, 315.
distinction between conditions and warranties ; when buyer may elect to rescind for breach of condition or to claim damages for breach of warranty, 315.
rights of buyer in cases of breach of warranty ; reduction of price ; action or counterclaim for damages, 315, 760.

WARRANTY—*continued.*
parol collateral warranty or promise may be proved, though principal contract is in writing, 315, 480.
action may lie on such warranty as to the sanitary state of a house on letting it, 224.
implied warranty or condition as to quality or fitness, in what cases, 316, 322.
statutory warranties; warranty of trade mark or trade description under the Merchandise Marks Act, 1887, *&c.*, 316.
sale or exchange of specific goods; opportunity to inspect, 316.
warranty by agent or servant, when binding, 316.
apparent defects not included in a general warranty, 316.
warranty of soundness of horse; what is unsoundness; qualified warranty, 316.
measure of damages in actions for breach of warranty, 316, 317.
sale by description, by sample and description of goods, 319, 324.
sale of goods by person whose business it is to make or deal in such goods, 319.
condition, when implied that the goods are fit for the purpose for which they are bought, 322.
food for human consumption is "goods," within the Act, 322.
condition of title to goods and warranty of quiet possession, &c., when implied under the Sale of Goods Act, 1893; *previous law*, 324.
what implied warranty on sales by pawnbrokers of forfeited pledges, 324.
no implied warranty of title on sales of goods taken in execution or under a distress, 324, 325.
See SALE OF GOODS.

WARRANTY OF AUTHORITY. *See* AGENT; COMPANY.

WASTE,
statements of claim:
for voluntary or commissive waste in a dwelling-house, 505.
for permissive waste in a dwelling-house against a tenant for years, bound by the terms of his tenancy to repair, 508.
for voluntary waste in woods, hedges, &c., 508.
other forms, 508.
defences:
denial of waste, 943.
defence to an action by a landlord denying the tenancy, 943.
defence to an action by a landlord against his tenant for removing fixtures from a dwelling-house justifying the removal of them as tenant's fixtures, 913.
the like in respect of trade fixtures erected and affixed by the tenant, 913.
voluntary or commissive waste; permissive waste, 505.
what amounts to waste, 505, 506, 943.
action for waste; at common law; by statute; against whom it lies, 506, 507.
who may sue for waste, 506, 507.
one person may sue on behalf of all having same interest, 507.
equitable waste; action for, when it lies, 507.
measure of damages in actions for waste, 507.
injunction, when granted, 507, 508.
ameliorating waste, 508.
working mines opened before tenancy is not waste, 943.
Statute of Limitations, 943.
And see REVERSION.

WATER AND WATERCOURSES,
statements of claim:
for disturbance of the plaintiff's natural right to the flow of a stream by obstructing and diverting the water, 511.
for disturbance of a prescriptive right to the flow of water for a mill, 513
for penning back the water of a stream on to the plaintiff's land, 513.
by a riparian proprietor for a nuisance by pollution of the water in a river, claiming an injunction and damages, 514.
against a waterworks company for wrongfully erecting a reservoir and for polluting a stream, 515.

WATER AND WATERCOURSES—*continued.*
defences:
denial of the acts complained of, 530, 946.
defence to an action for disturbance of water rights denying plaintiff's possession of the land, &c., 943.
defence to a like action by a reversioner denying the reversion, 945.
denial of the right to the watercourse, &c., 945.
defence of a right under the Prescription Act, 1832, to use the water for agricultural purposes, 945.
the like to use the water for a mill, 945.
defence of a prescriptive right at common law to use the water for a mill, 945.
defences to an action for the pollution of water, &c., where plaintiff claims an injunction and damages, 946.
rights of riparian proprietor in respect of the flow of natural streams and the use of the water, 508, 509.
such rights are subject to like rights of other riparians, 509.
ownership of bed of stream; of bed of navigable tidal rivers, 509.
rights acquired by grant or by prescription at common law or under the statute, 509.
actions for diverting or abstracting the water, or obstructing its flow, &c.; when they lie, 509.
water not running in defined streams; underground water, 484, 510.
rights of riparian owner not grantable to non-riparian, 509.
mining operations, &c., causing flooding of adjoining mines or land, when actionable, 510.
landowner artificially bringing water on to his land primâ facie *liable for injury to neighbour from its escape*, 510.
effect of statutory authority in absence of negligence, 510.
acquired right of discharging water on to another's land, 511.
artificial streams of water, rights in relation to, 511.
natural streams in artificial channels, 511.
express and implied grants and reservations of water rights, 511.
actions by reversioners, 511.
claim for disturbance of water rights, how pleaded; when the ground for claiming the right must be stated; mode of stating the right, &c., 511, 512.
pollution of stream, when actionable as a nuisance, 514.
injunction, when claimable in such cases, 514.
neglect of sanitary authority to drain is no ground of action by an individual injured, 514.
powers of County Courts under Rivers Pollution Acts, 514.
actions for disturbance of prescriptive rights; mere general denials of the right insufficient, 943, 944.
defences on the ground of rights acquired under Prescription Act, 944.
the enjoyment under s. 2 must be as of right, 944.
defences of prescription at common law, 944.
defences of lost grant, 944, 950.
defences of justification under a statute, 454, 935, 936, 944.
removal of obstructions from public navigable river, 944.

WAYS,
statements of claim:
for obstructing a private right of way, 517.
for placing on a highway an obstruction over which the plaintiff fell, 408, 457.
defences:
denial of plaintiff's possession of a messuage or land in respect of which the right of way is claimed, 946.
denial of an alleged title by enjoyment to a right of way and averment that the user was not of right, 947.
defence of a private right of way under the Prescription Act, 1832...947.
a like form specifically justifying the removal of fences, and other alleged acts of trespass, 948.
defence of a private right of way by prescription at common law, 948.
defence of a private right of way by non-existing grant, 949.
defence of a private way of necessity, 951.

WAYS—*continued.*
defences—continued.
defence of a public right of way, 952.
a like defence specially justifying the removal of obstructions, 952.
reply to a defence of right of way that the acts complained of were in excess of the alleged right, &c., 953.
reply joining issue on the defence, and further stating that the matters complained of include other acts than those admitted by the defence, 954.
way, public and private; action for obstructing, 517.
obstruction of public way actionable in respect of special damage only, 451, 459.
mode of pleading rights of way; the ground of claim should be stated, and where a private right of way is claimed the termini should be stated, 517, 952.
purposes for which ways may be used; distinction between ways by user and ways by express grant, 517.
grants of ways, when implied; express reservations of ways, 517.
defences to actions for obstruction of ways, how pleaded, 946.
non-repair of public or private way, deviation when justifiable, 946, 947.
grantor of way not bound to repair at common law, 946.
provisions of s. 2 of the Prescription Act, 1832; *enjoyment must be as of right, and user fairly continuous*, 947.
interruption means adverse interruption, 947.
justifications under rights of way; how pleaded, 947, 948.
justification by a servant; how pleaded, 949.
defences under s. 2 of the Prescription Act, 1832, *pleading right by enjoyment for different periods*, 947, 948.
defence of right of way by prescription at common law; in what cases applicable, &c., 948, 949.
defence of right of way by lost grant; how pleaded; evidence, 949, 950.
express grants or reservations of rights of way; construction; mode of pleading, 517, 950.
grant by owner of the two tenements, what it passes, 950.
ways of necessity, what, and how pleaded; extinguishment, 951.
in pleading a public right of way, the termini need not be stated, 952.
limited dedication of highway; qualified right, &c., 952.
public highway may cease to be such, 952.
no estoppel by previous judgment against plaintiff on indictment for obstructing, 952.
defences justifying removal of obstructions from public highway or from public navigable river, 944.
effect of joinder of issue, whether express or implied, on defences of right of way, 953, 954.
reply in the nature of a new assignment, 551, 953.
leave and licence, advisable to reply it specially, 954.

WHARFINGER, 93: *see* BAILMENTS.

WIFE. *See* HUSBAND AND WIFE.

WILL. *See* EXECUTORS *and* HEIRS AND DEVISEES.

WINDOWS. *See* LIGHTS.

WITNESS,
statement of claim against a witness for not attending in pursuance of a subpœna, 518.
defence to the above action that the testimony of the defendant was not material, 955.
witness may sue the party by whom he is subpœnaed for his expenses, 325.
solicitor is not in general liable for those expenses, 325.
conduct money paid may be recovered back if witness fails to attend, 325.
remedies against witness for not attending on subpœna, 518.
remedy by action for damages; actual damage must be shown, 519.
privilege of witness as to defamatory statements, 835, 836.
privilege from arrest, 427, 477.
a witness is entitled to require a reasonable sum to be paid him for his expenses of attending a civil action, 955.

WORK,
statements of claim:
for work done and materials provided, 325, 327.
by a servant against a master for salary or wages due, 246.
by an agent for remuneration for work done, 72.
the like by an auctioneer, 91.
by a broker for commission, &c., 137.
by a carrier for the carriage of goods, 141, 147.
by a medical practitioner for medical attendance, &c., 251.
by a solicitor for work done, &c., 305.
by stockbrokers for work done in purchasing shares for commission, 308.
the like in purchasing, selling, and carrying over shares, 309.
for preventing plaintiff completing a contract for work, 327.
for work under contract with alternative on a quantum meruit, 328.
for using bad materials, &c., 329, 330.
against a coachmaker for not using reasonable care and skill in repairing a carriage, 330.
against an architect for negligent work, 331.
against a solicitor for negligence, 306.
against a medical attendant for negligence, 438.
for liquidated damages on a building contract, 243.
by a master against workmen or others for wrongfully procuring his servants to break their contracts with him, or for illegally conspiring to hinder the master's customers from dealing with him: *see* TRADE DISPUTES.
defences, &c.:
defences that the alleged work was not done, 801.
defence to an action for work done, &c., denying the request, 801.
defence that the work was done so negligently and improperly as to be of no value, 801.
defence with counterclaim for damages for using inferior materials and not completing the work according to contract, 802.
defence that payment was only to be made on the certificate of the architect, and that he had not certified, 802.
defence that extras were only to be paid for if ordered by the architect in writing, and that the claim is for extras not so ordered, 802.
defence and counterclaim to an action for work and materials, 803.
reply to the preceding defence and counterclaim, 803.
set-off of liquidated damages due under a building contract, 803.
defence to a claim on a building contract stating non-performance of a condition precedent and counterclaim for penalties and breach of contract, 804.
defence that the plaintiff was employed subject to conditions not fulfilled and counterclaim for damages, 806.
a like defence and counterclaim, 808.
defence and counterclaim to a claim by a sub-contractor for the plumbing work, 810.
defence to claim by architect with counterclaim for negligence, 812.
defence to claim for work against a part owner of a ship who denies liability, 813.
claims for work done, &c., when applicable and how pleaded, 325.
claim for materials; when recoverable as goods sold, 325.
ordinary contracts for work and materials not within s. 4 of the Sale of Goods Act, 1893...326.
work done under special contract, but not according to its terms; right to reject; what amounts to acceptance, 326.
where remuneration contingent on completion, no claim for part-performance, unless completion is prevented by the employer, 326.
effect of revocation of employment before completion, 326.
architect's certificate, when a condition precedent, 326.
action where certificate withheld by wrongful collusion of employer and architect, 326.
when architect acts as arbitrator he cannot be sued for negligence in giving his certificate, 327.
implied contract by trader or artificer to use reasonable skill, 330, 331.
no claim for work, where useless from want of proper skill or care, 331.

WORK—*continued.*
implied contract for reasonable price, where no price fixed, 801.
negligence and inferiority of work ; when a defence pro tanto, 801.
counterclaim on that ground, where express, contract as to price, 801.
building contracts, effect of various ordinary stipulations therein, 326, 327, 802, 803.
stipulation in building contracts that no payment for extras unless ordered in writing, 802.
stipulation for liquidated damages for delay ; in what cases a defence that the delay was caused by acts or defaults of the employer, 803.

WORKMEN,
injunction to restrain illegal acts of, 489, 492, 494.
Employers' Liability Act, 1880...435, 880, 881.
See MASTER AND SERVANT ; CERTIORARI.

WORKMEN'S COMPENSATION ACTS, 1897, 1900,
defence of award under the Workmen's Compensation Act, 1897...881.
defence of claim and acceptance of compensation under the Workmen's Compensation Act, 1897...882.
defence that the workman was a party to a scheme within s. 3 of the Workmen's Compensation Act, 1897...882.
proceedings to obtain compensation under the Workmen's Compensation Acts, 1897, 1900, *cannot be taken in the High Court*, 436.
infant workman not barred of his common law rights, where it is not for his benefit, by agreement or by acceptance of compensation under those Acts, 859.
award or scheme under those Acts, effect of, 881.
extension by the Act of 1900 *to workmen in agriculture in some cases* 881.

WRIT. *See* PROCESS ; SHERIFF ; WRIT OF SUMMONS.

WRIT OF SUMMONS,
special indorsement, 65 : *see* SPECIAL INDORSEMENTS.
general indorsement ; may be altered, modified, or extended by statement of claim subsequently delivered, 51.
renewal of writ, 721.

WRITING.
in actions on contracts the pleading or particulars should show whether the contract was in writing, or verbal, or implied, and give its date and description, 7, 38, 80.
See AGREEMENTS ; DEED ; FRAUDS, STATUTE OF ; LIMITATION, STATUTES OF ; PARTICULARS.

WRONGS,
mode of pleading statements of claim in actions for wrongs, 45, 46 ; *and see* STATEMENT OF CLAIM.
mode of pleading denials of acts, &c., complained of in actions for wrongs, 529.
distinction between actions for wrongs and actions on contracts, 2, 3, 45, 139.
effect as to costs under the County Courts Acts, &c., 3, 139.

THE END.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.