MINNESOTA PLEADING

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PREFACE

Aside from the forms which it contains, this work lays no claim to any other or higher merit than that of presenting our decisions upon the law of civil pleading in a convenient form for ready reference. No attempt has been made to write an original treatise. The endeavor has been to state the law of pleading, so far as possible, in the language of our own decisions. Liberal quotations have been made from Pomeroy, whose incomparable work should be in the hands of every student of code pleading. Not a little matter has been introduced with the sole object of rendering the book more helpful to the student.

Our supreme court has recently and with some reason expressed apprehension lest pleading should become one of the lost arts in this state. Certainly our pleadings are for the most part inexcusably prolix, abounding in irrelevant, immaterial and probative matter. Especially inartistic and objectionable is the qualified general denial so common in our practice. Doubtless any marked improvement must come as the result of a higher professional education, but it is believed that the following changes in our law would hasten a renaissance of the art:

(1) A very grave fault in our system is the lack of any simple, convenient and inexpensive remedy for the correction of formal defects in pleadings. Our motion before term is so inconvenient and expensive that it is resorted to with reluctance. Some provision ought to be made for the hearing of such motions on the first day of the term. This could well be done by adopting some such practice as that which prevails in Indiana and Iowa. There the answer is not filed until the second day of the term, or at such time as the court directs. Motions for the correction of informal complaints are

made on the first day of the term and the issues are formed under the supervision of the court to a far greater extent than with us. By thus forming the issues during the first days of the term, litigation is rendered far more expeditious than under our practice.

(2) Our rule of court which requires the folios of pleadings to be marked and numbered should be superseded by a rule requiring each material allegation and each specific denial to be stated in a separate and numbered paragraph. Folios are utterly useless for purposes of reference in answering and they produce confusion when the pleading is incorporated in the paper-book on appeal.

(3) The verification of pleadings should be abolished. It offers a premium to perjury and puts the conscientious pleader at a serious and unmerited disadvantage by converting the complaint into a bill of discovery. If it is deemed expedient to impose a penalty on false pleading, a general law would be equally effectual and far more convenient.

(4) The rule that a mere denial may be stricken out as sham should be changed. No such rule obtains in any other jurisdiction. However desirable it may be that denials should be truthful, there is no justification for trying a case on affidavits. A party who is sued ought to have the right to put the plaintiff to the proof of his claim in the ordinary course of trial and in accordance with the established rules of evidence.

Should this work chance to find favor with the profession of the state it would probably be followed by a volume of practice forms and notes.

M. B. D.

CHAPTER I

GENERAL PRINCIPLES

Definition of pleadings.

§ 1. Pleadings are the written allegations made in alternate series by the plaintiff and the defendant, of their respective grounds of action and defence, terminating in propositions, distinctly affirmed on one side, and denied on the other, called the *issue*.[1] Pleading is the statement in a logical and legal form of the *facts* which constitute the plaintiff's cause of action or the defendant's ground of defence. It is the formal mode of alleging that on the record, which would be the support of the action or the defence of the party in evidence.[2] The pleadings are, in short, a series of alternate assertions and denials by the plaintiff and defendant of their respective grounds of action and defence; all superfluous and irrelevant matter being thrown off at each stage of this exhaustive process, till the exact point of difference—the very apple of discord— is developed and disclosed.[3]

[1] Heard, Civil Pl. 1. See also Desnoyer v. L'Hereux, 1 M. 17 G. 1.

[2] Bouvier, Dict. title, "Pleading."

[3] Heard, Civil Pl. 6.

Object of pleadings.

§ 2. The fundamental objects of written pleadings are:

(a) To apprise each party of the grounds of claim or defence asserted by the other in order that he may come to trial with the necessary proof and be saved the expense and trouble of preparing to prove or disprove facts about which there is no real controversy between the parties.[1]

(b) To inform the court of the nature of the claim or defence in order that the court may,

(1) Determine the legal sufficiency of the claim or defence.

(2) Determine what substantive rules of law control the case and what rules of procedure should govern the trial.

(3) Restrict the proof to the issues formed by the parties.

(c) To evolve, by a process of elimination through alternate affirmations and denials, the exact questions in controversy between the parties which they desire to submit to the tribunal for adjudication.

(d) To make clearly apparent, by the record, the facts adjudicated so that there may be no further litigation thereof.

[1] Kingsley v. Gilman, 12 M. 515, 430; Finley v. Quirk, 9 M. 194 G. 179, 186; Lawrence v. Willoughby, 1 M. 87 G. 65; Dennis v. Johnson, 47 M. 56; Huey v. Pinney, 5 M. 310 G. 246, 257.

General theory and nature of pleading.

§ 3. The law of pleading is grounded upon the idea that every controversy between litigants, however complicated, may be resolved into its elements and shown to spring from one or at least a few points of difference, either upon questions of law or fact. The fundamental object of pleading is to separate such points of controversy from the mass of unimportant and irrelevant matter with which they are usually connected and present them in a convenient form to the tribunal provided by law to pass upon them. The method adopted by the common law and followed by the code differs radically from other systems of pleading. Under systems other than the English the parties are allowed to make their statements at large, and with no view to the extrication of the precise question in controversy. The different statements are then examined for the purpose of sifting out the irrelevant and undisputed matter. In some countries this examination is made by the parties, while in others the points for decision are selected and formulated by the court or its officers in advance of the trial.[1] The common law of England pursued

from the outset a different course. It obliged the parties themselves to so state their cause, or, as it was called, to plead, as to develop a single issue by means of their opposing statements; it further compelled them to agree upon this issue as the sole point for decision in the cause.[2] More than one issue in a single cause was not allowed[3] prior to 4 Anne, ch. 16, § 4, and this restriction was no doubt due to the character of the jury. Possibly the fact that pleadings were originally oral may have contributed to this result.[4] The manner of allegation in the courts of England may be said to have been first methodically formed, and cultivated as a science, in the reign of Edward I. (1292–1307). Prior to that time the alternate statements of the parties before the tribunal were not regulated by any fixed rules, and often became lengthy debates. From the time of Edward I. the judges began systematically to prescribe and enforce certain rules of statement, of which some had been established at periods considerably more remote, and others were apparently then, from time to time, first introduced. None of them seem to have been originally of legislative enactment, or to have had any authority, except usage or judicial regulation; but by degrees they acquired the character of fixed and positive institutions, and grew up into an entire and connected system of pleading.[5] During the reign of Edward III. (1327–1377) English was substituted for Norman French and the declarations and pleas began to be prepared out of court. The common law system did not, however, reach its full development until the period of Henry VI. and Edward IV. (1422–1483). Pleading in court was oral until the time of Henry VIII., and Latin was used for enrolment until 4 Geo. II. ch. 26.

As the object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England is to ascertain it by the production of an *issue*. And this appears to be peculiar to that system. The term "issue" occurs as early as the commencement of the Year Books, in the first year of Edward II., and from that time, at least, the

production of the issue has been not only the constant effect, but the professed aim and object, of pleading.[6] The code adopts the common law method of presenting the case by the production of an issue but allows several issues to be formed in the same cause. Our system of pleading is a product of the jury system. The general result contemplated is the development of the point in controversy between the parties in order that, if it should be a matter of law, it may be referred to the decision of the court; or if matter of fact, to trial by jury. When this result is attained, the parties are said to be at issue (*ad exitum*), that is, at the end of their pleading; and the emergent question itself is termed *the issue*; and, according to the nature of the case, may turn out to be an issue *in law* or an issue *in fact*.[7] It is apparent, therefore, that our system of pleading under the code is not a special creation of the legislature, finding its justification in logic, but rather the product of a long course of development in which its character has been mainly determined by the existence of the jury. A comparison of the common law and equity systems of pleading, which were both produced by the same race of men, makes clearly apparent the controlling influence of the jury upon the character of our system of pleading.[8]

[1] Prof. Pepper, 18 Am. & Eng. Ency. Law, 469; Perry, Common Law Pl. 226; Stephen, Pl. 125.

[2] Perry, Common Law Pl. 226.

[3] Derby v. Gallup, 5 M. 119 G. 85, 108.

[4] Stephen, Pl. 126.

[5] Stephen, Pl. 124.

[6] Stephen, Pl. 129.

[7] Heard, Civil Pl. 3.

[8] The student should consult for the history of common-law pleading, Pollock & Maitland's History English Law, Reeves' History English Law, Bigelow's History of Procedure in England. Excellent summaries may be found in 18 Am. & Eng. Ency. of Law, 472, and the Ency. Brit. title, Pleading. Perry's Common Law Pleading is the best general work on the subject for the student, as it embodies the results of modern scholar-

ship and at the same time states the rules of pleading in the language of Stephen and the rules as to parties in the language of Dicey.

BUT ONE FORM OF ACTION IN THIS STATE

The statute.

§ 4. "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished; and there shall be in this state but one form of action, for the enforcement or protection of private rights, and the redress of private wrongs; which shall be called a civil action." G. S. '94, § 5131.

Unification of pleading and procedure.

§ 5. This statute is the foundation of our entire system of civil procedure. From the fundamental principle which it embodies flow as corollaries most of our rules of procedure and many of our rules of pleading. It creates a form of action which is the sole instrumentality for the assertion and enforcement of all those primary rights and duties which make up the substantive civil law of the state. It establishes absolute uniformity in the forms of pleading. The rules governing the external forms of actions and the mode of stating the cause of action or defence are the same in all cases. Whether the case is to be tried by court or jury the pleadings are the same. The statute also establishes uniformity of procedure so far as it was possible to do so without abolishing the jury system. The legislature might have secured absolute uniformity of procedure but no attempt at so radical an innovation was made. "The distinction in the forms of actions,—that is, in the modes of commencing them, in the number, names, and forms of the pleadings, and in those matters of practice necessary for presenting causes to the court for its determination—can be and has been abolished. The distinction in the mode of trial, or rather in the tribunal that may try causes, is substantially preserved by G. S. '94, §§ 5359, 5360, 5361." Berkey v. Judd, 14 M. 394 G. 300.

Abolition of forms of actions.

§ 6. The various forms of action of the common law, and the writs by which they were instituted, are abolished.[1] A "form of action" was a peculiar technical mode of framing a writ and pleadings appropriate to the particular injury which the action was designed to redress.[2] Technical forms of expression characteristic of each form of action were invariably followed. The courts were inflexible in requiring the "boundaries" of the different forms of action to be preserved. It mattered not that the declaration stated a cause of action; the plaintiff could not recover if he had mistaken his form of action. Each form of action had distinctive rules of pleading. The scope of the general issue in one form was not the same as in another.[3] Pleas appropriate to each form were fixed and slavishly followed. There was no safety for the pleader except in the established formulas. These various forms of action had no justification other than historical. The relation which they bore to the substantive law was historical rather than logical. In reason the remedial law should be flexible and readily adapted to a developing substantive law, but the common law is a product of experience and not of reason. Its development has been determined by the forms of action existing for its enforcement. It is not until late in the history of a nation that its remedial law becomes subordinate to the substantive law.[4] "So great is the ascendency of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms" [5] Pollock and Maitland have shown in detail how the development of the common law was determined by the development of forms of writs. "Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials; they are institutes of the law; they are, we say it without scruple, living things." [6] "We shall do well to remember that the rule of law is the rule of writs." [7] The code has happily

freed the substantive law from this illogical dependence upon forms. The remedial law is now rightly subordinated to the substantive law. The pleader is no longer the slave of formulas, and pleading has been relegated to its true place in the administration of justice. It matters not now that the plaintiff has mistaken the nature of his cause of action or the relief to which he is entitled. If in his complaint he states a cause of action of any nature, the court is bound to grant him the appropriate relief, and it may be either legal or equitable or a blending of both. The old terminology, however, unhappily remains. Ejectment, replevin, trover and assumpsit are commonly used to denominate actions under the code having the same object as such common-law actions. It is a matter of convenience and custom with the profession, but "it is a custom more honored in the breach than the observance." "Words are things" and dominate the mind. Nothing but confusion and error result from using the old terminology, for it is well-nigh impossible for the mind to disassociate the words from the technical rules with which they were inseparably connected under the common-law system.[8] Our reports are not free from positive errors resulting from this custom.[9] The use of these terms in the formal judgments of our supreme court is simply inexcusable.

[1] Adams v. Castle, 64 M. 505, 508; Breault v. Merrill, etc. Co., 72 M. 143.

[2] Heard, Civil Pl. 22.

[3] Pomeroy, Remedies, § 645.

[4] Pomeroy, Remedies, § 6. The student should not fail to read Maine's "Ancient Law" and "Early Law and Custom."

[5] Maine's "Early Law and Custom."

[6] 2 P. & M. History English Law, 559.

[7] 2 P. & M. History English Law, 561.

[8] Pomeroy, Remedies, § 111.

[9] See §§ 798, 1118.

Rights and remedies unaffected by the statute.

§ 7. The statute simply abolishes the old forms of action.

It does not abolish old rights or remedies. Where upon a given state of facts a party was entitled under the old system to a legal remedy obtainable through a particular form of action he is now entitled to exactly the same remedy. Where upon a given state of facts a party was entitled under the old system to an equitable remedy obtainable through a suit in equity he is now entitled to exactly the same remedy, which is still called equitable but is obtained through the same form of action as legal remedies. "The statute has not changed the character of the relief to which a party is entitled, but only the form and manner of obtaining it." [1] "The new system has not produced, and was not intended to produce, any alteration of, nor direct effect upon, the primary rights, duties, and liabilities of persons created by either department of the municipal law. Whatever may have been the nature or extent of these primary rights and duties, from whatever causes, facts, acts or omissions they took their rise, whether they were denominated legal or equitable, they remain exactly the same as before. The codes do not assume to abolish the distinctions between 'law' and 'equity,' regarded as two complementary departments of the municipal law; not a clause is to be found which suggests such a revolution in the essential nature of the jurisprudence which we have inherited from England. The principles by which the courts determine the primary rights and duties of litigant parties remain unaltered; upon the acts or omissions which were the occasions of a right called equitable the same right is based, and is still properly termed equitable; from the acts or omissions which were the occasions of a right called legal the same right still arises, and is still with propriety termed legal." [2] "The statute abolishing the distinction between actions at law and suits in equity only affects the form of action, and does not confer any new rights of action, or make any state of facts a cause of action; which, before the statute, would have been insufficient to sustain any form of action." [3] Nor has the statute enlarged or restricted the defences which a party may invoke.[4] It is limited in its effect to the mode of invoking them. A

party may now plead all the defences he has regardless of whether they are legal or equitable, whereas, under the old system, he could plead an equitable defence only in a suit in equity.

[1] Russell v. Minnesota Outfit, 1 M. 162 G. 136, 139.

[2] Pomeroy, Remedies, § 68.

[3] Banning v. Bradford, 21 M. 308, 312.

[4] Folsom v. Carli, 6 M. 420 G. 284.

Legal and equitable rights and remedies enforced in a common form of action.

§ 8. This statute provides a single instrumentality for the enforcement of all rights and remedies regardless of whether they are legal or equitable in their nature. It unifies the system of pleading and, so far as was possible without abolishing the jury, the system of procedure. The same court administers both law and equity.[1] "The question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or equitable defence against the plaintiff's claim, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right that he seeks to establish, or the defendant shows that the plaintiff ought not have the relief sought for." [2] Both a legal and an equitable cause of action may be alleged and both a legal and equitable remedy obtained; [3] both a legal and equitable cause of action may be alleged and the single remedy obtained may be legal or equitable; [4] upon an equitable cause of action, that is an equitable primary right alleged to have been invaded, a legal remedy may be obtained; [5] and upon a legal cause of action, that is a legal primary right alleged to have been invaded, an equitable remedy may be obtained.[6] When the plaintiff possesses both legal and equitable rights growing out of the same transaction and is entitled to some equitable relief, such as reformation, specific performance or cancellation, and also to legal relief based upon the assumption that the former relief is awarded, the court, instead of formally conferring the special equitable remedy and then

proceeding to grant the ultimate legal remedy, may treat the former as though accomplished and render a simple common-law judgment embracing the final legal relief which was the real object of the action.[7]

[1] First Division, etc. Ry. Co., 25 M. 278, 292; Holmes v. Campbell, 12 M. 221 G. 141; Berkey v. Judd, 14 M. 394 G. 300; Allen v. Walsh, 25 M. 543, 556; Bell v. Mendenhall, 71 M. 331.

[2] Merrill v. Dearing, 47 M. 137.

[3] Pomeroy, Remedies, § 77 et seq.; Guernsey v. Ins. Co., 17 M. 104 G. 83; Montgomery v. McEwen, 7 M. 351 G. 276; Greenleaf v. Egan, 30 M. 316; Erickson v. Fisher, 51 M. 300.

[4] Greenleaf v. Egan, 30 M. 316; Pomeroy, Remedies, § 81.

[5] Buckley v. Patterson, 39 M. 250; Sanborn v. Nockin, 20 M. 178 G. 163; Merrill v. Dearing, 47 M. 137; Pomeroy, Remedies, § 82.

[6] Pomeroy, Remedies, § 83.

[7] Pomeroy, Remedies, § 80; Rogers v. Castle, 51 M. 428.

Common law and code pleading fundamentally the same.

§ 9. The code introduces far more radical changes in the law of procedure than in the law of pleading. The form only and not the substance of pleading, as it formerly existed, has been changed.[1] Our law of pleading is a product of experience and not of logic. It is largely an outgrowth of the jury system. It cannot be understood except in the light of the past which produced it. "However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is."[2] Our code is a reformation rather than an independent creation. Its terms are meaningless except as interpreted by the past. It is an offspring of the common-law

system of pleading. The statement of facts and not conclusions of law; the presentation of the claim and defence by means of the production of an "issue" rather than by stating the case at large as in the civil law; the statement of ultimate facts and the exclusion of evidentiary matter; and the use of a demurrer to test the sufficiency in law of the pleadings, were the distinguishing characteristics of the common-law system of pleading and they are all retained by the code. The fundamental principles of the two systems are identical. Both are grounded upon the cardinal principle that the ultimate facts constituting the cause of action or defence should be stated to the exclusion of conclusions of law and probative matter.[3] This principle, however, was but imperfectly developed in the former system.[4] It was rare, indeed, that a pleading contained a simple narrative of the facts constituting the claim or defence to the exclusion of legal inferences, and it was the invariable rule to state facts according to their legal effect rather than as they actually occurred. In marked contrast to this method the code requires the pleader to state the facts constituting his claim or defence as they actually occurred in a simple, narrative form, avoiding all fictions, technicalities, formulas and conclusions of law. While, therefore, the code system is to be considered historically as an outgrowth of the common law system, it is nevertheless a new and independent system to be interpreted and applied in accordance with its own principles.[5]

[1] Foerster v. Kirkpatrick, 2 M. 210 G. 171.

[2] Holmes, Common Law, 37.

[3] Caldwell v. Auger, 4 M. 217 G. 156, 161; Solomon v. Vinson, 31 M. 205.

[4] Pomeroy, Remedies, §§ 508–512.

[5] See § 10.

GENERAL STATUTORY PROVISIONS

Pleadings regulated by statute.

§ 10. "The forms of proceedings in civil actions, and the

rules by which the sufficiency of pleadings is to be determined, shall be regulated by statute." G. S. '94, § 5228.

That is, the code provides in itself a complete system of pleading. "The statute should be construed in its own spirit as an independent creation, and not in the light of ancient dogmas which it was designed to supersede." [1] The doctrines and rules of the common law and equity systems of pleading no longer exist as authoritative and controlling,—that is, as controlling *because* rules of the common law or equity. "The general principles and fundamental requirements of the codes have been substituted in their place, completely abrogating them, and constituted by the legislature as the only sources of authority to the bench and bar in shaping the details of the reformed procedure. If any particular doctrine or rule which formerly prevailed is also found existing to-day, it so exists not because it is a part of the common law or of the equity system, but because it is either expressly or impliedly contained in and enacted by the reformatory statute. When, therefore, in discussing and interpreting such a doctrine, a resort is had to the former methods for aid, the reference is, not to obtain authority, but to find an analogy or explanation. In other words, the system introduced by the codes is regarded as complete in itself, entirely displacing the ancient modes. In several particulars, however, its doctrines and rules are either identical with or closely resemble those which existed before; and, in their judicial construction, recourse must be had, by way of explanation and analogy merely, to these original forms, but no such recourse is to be had for the purpose of obtaining the authority for any proposed measure or practical regulation connected with the pleading under the new procedure." [2]

[1] Pomeroy, Remedies, § 694.

[2] Pomeroy, Remedies, § 514. See, also, Bush v. Prosser, 11 N. Y. 354.

Denomination of parties.

§ 11. "The party complaining shall be known as the plaintiff, and the adverse party as the defendant." G. S. '94, § 5132.

What pleadings allowed.

§ 12. "The only pleadings on the part of the plaintiff are:
First. The complaint;
Second. The demurrer or reply.
And on the part of the defendant:
First. Demurrer;
Second. The answer." G. S. '94, § 5229.

Pleadings must be subscribed by the attorney.

§ 13. "Every pleading in a court of record shall be subscribed by the attorney of the party." G. S. '94, § 5244. See § 17.

Pleadings part of record and must be filed.

§ 14. "Each party shall, on or before the second day of the term for which any cause is noticed, file his pleadings in the office of the clerk of the court." [1] Whenever any party to an action fails to file any pleading therein as required by this statute, the action shall, upon the application of the adverse party, be continued to the next general term of said court, and if both parties fail to so file their pleadings, the action shall be stricken from the calendar.[2] The pleadings constitute a part of the record and are included in the judgment roll.[3] "If an original pleading is lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original." [4]

[1] G. S. '94, § 5220.
[2] District Court Rules, XVI.
[3] G. S. '94, § 5423.
[4] G. S. '94, § 5424.

Immaterial defects disregarded.

§ 15. "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect." G. S. '94, § 5269.

Extensions of time—general discretionary power of court over pleadings.

§ 16. "The court may likewise, in its discretion, allow an answer or reply to be made, or other act to be done, after the time limited by this chapter * * * ." G. S. '94, § 5267.

Not only as respects extension of time but in many other particulars the court is clothed with a discretionary power over the pleadings. Judicial discretion is defined as "that part of the judicial power which depends, not upon the application of rules of law or the determination of questions of strict right, but upon personal judgment to be exercised in view of the circumstances of each case, and which therefore is not usually reviewed by an appellate tribunal, unless abused." Austin Abbott in Century Dictionary. This discretionary power of the court must be exercised judicially, with close regard to all the facts of the particular case and in furtherance of justice. If it is clearly apparent that the court has acted wilfully, arbitrarily or capriciously, its action may be reversed on appeal, for the power is not absolute but judicial. Potter v. Holmes, 77 N. W. 416.

RULES OF COURT

RULE IV

Attorneys must subscribe papers and give address.

§ 17. On process or papers to be served, the attorney, besides subscribing or indorsing his name, shall add thereto his place of residence and the particular location of his place of business by street, number, or otherwise; and if he shall neglect to do so, papers may be served on him through the mail, by directing them according to the best information that can conveniently be obtained concerning his residence. This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

RULE V

Copies must be legible.

§ 18. All copies of papers served shall be legible, and if not legible may be returned within twenty-four hours after service thereof, and the service of an illegible paper so returned shall be deemed of no force or effect.

RULE VI

Causes of action separately stated and numbered.

§ 19. In all cases of more than one distinct cause of action, defence, counterclaim or reply, the same shall not only be separately stated, but plainly numbered; and all pleadings not in conformity with this rule may be stricken out on motion. See §§ 271, 474.

RULE VII

Numbering and marking folios.

§ 20. The attorney or other officer of court who draws any pleading, affidavit, case, bill of exceptions or report, decree or judgment, exceeding two folios in length, shall distinctly number and mark each folio of one hundred words in the margin thereof, or shall number the pages and the lines upon each page, and all copies, either for the parties or court, shall be numbered and marked, so as to conform to the originals. And if not so marked and numbered, any pleading, affidavit, bill of exceptions, or case, may be returned by the party on whom the same is served.

RULE XII

Correction of pleadings—time of motion.

§ 21. Motions to strike out or correct any pleading under section 107 of chapter 66, General Statutes 1878 (G. S. '94, § 5248), must be heard before demurrer to or answering such pleading, and before the time for demurrer to or answering such pleading expires, unless the court, for good cause shown, shall extend the time for demurring to or answering such pleading to permit such motion to strike out or correct such pleading to be heard. See §§ 634, 643, 666.

RULE XVIII

Order extending time to answer.

§ 22. No order extending the time to answer or reply shall be granted, unless the party applying for such order shall present to the judge to whom the application shall be made an affidavit of merits, or an affidavit of his attorney or counsel that from the statement of the case made to him by such party he verily believes that he has a good and substantial defence, upon the merits to the pleading or some part thereof.

RULE XIX

Affidavit of merits.

§ 23. In an affidavit of merits, the affiant shall state that he has fully and fairly stated the case and facts in the case to his counsel, and that he has a good and substantial defence or cause of action on the merits, as he is advised by his counsel after such statement, and verily believes true, and shall also give the name and place of residence of such counsel.

RULE XX

Amendment of pleadings—affidavit of merits.

§ 24. In all cases where an application is made for leave to amend a pleading or for leave to answer or reply after the time limited by statute or to open a judgment and for leave to answer and defend, such application shall be accompanied with a copy of the proposed amendment, answer or reply as the case may be, and an affidavit of merits, and be served upon the opposite party.

RULE XXVII

Time to answer when demurrer overruled.

§ 25. When a demurrer is overruled with leave to answer or reply, the party demurring shall have twenty days after notice of the order, if no time is specified therein, to file and serve an answer or reply, as the case may be.

CHAPTER II

PARTIES TO ACTIONS

Preliminary statement.

§ 26. In all the code states except Minnesota there are statutes defining in general terms who shall be made parties plaintiff and defendant. They are all substantially in the following form: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title." "Any person may be made a defendant who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint." (See § 68.) It is to be observed that these are the general rules of equity and are applied in this state, without statutory enactment, in all actions of an equitable nature. Applied to actions of a legal nature, they arrive, in the great majority of cases, at the same result as the common-law rules. It is for that reason that we have not suffered any great inconvenience from not adopting the rules of the other code states. In the absence of any general statute in this state defining who shall be made parties plaintiff and defendant, the common law and equity rules remain in full force. In actions of a legal nature the common-law rules apply, and in actions of an equitable nature the equity rules apply, except in a few instances where changes have been made by statute. The statutory rules will be found embodied in the text. It was thought that our law of parties in actions of a legal nature could in no way be better presented than in the

form of annotations to the authoritative rules of Dicey, omitting such as have been superseded by statutory rules in this state.

GENERAL RULES

RULE 1

§ 27. "All persons can sue and are liable to be sued in an action at law.

Exception 1. Felons, outlaws and alien enemies cannot sue.

Exception 2. The sovereign, foreign sovereigns and ambassadors cannot be sued." Dicey, Rule 1.

Idiots and insane persons may sue and be sued, appearing by a next friend or guardian ad litem (Plymton v. Hall, 55 M. 22); alien enemies may be sued (McNair v. Toler, 21 M. 175); alien friends may sue and be sued (Stinson v. Ry. Co., 20 M. 492 G. 446); the state may sue (State v. Grant, 10 M. 39 G. 22) but cannot be sued without its consent (St. Paul etc. Ry. Co. v. Brown, 24 M. 517, 574); a sister state may sue in the courts of this state (State v. Torinus, 22 M. 272); a foreign minister or ambassador cannot be sued (Reynolds v. Packet Co., 10 M. 178 G. 144); married women may sue and be sued (See § 81); infants may sue and be sued, appearing by a guardian ad litem (see §§ 35, 1812); a foreign receiver may sue in this state (Comstock v. Frederickson, 51 M. 350); foreign administrators and executors may sue (See § 90); receivers and assignees may be sued without leave of court (G. S. '94, § 5174; Schmidt v. Gayner, 59 M. 303); foreign corporations may sue and be sued (see G. S. '94, §§ 3420, 3421, 3425, 3426, 5890, 5892; Laws 1899, ch. 69).

RULE 2

§ 28. "No action can be brought except for the infringement of a right." Dicey, Rule 2.

That is, there must be a primary legal right in the plaintiff and a breach of the correlative duty of the defendant. The right and duty must be legal and not merely moral. See for example, Trask v. Shotwell, 41 M. 66; Akers v. Ry. Co., 58 M. 540; Bucknam v. Ry. Co., 79 N. W. 98.

RULE 3

§ 29. An action may be brought for every infringement of a legal right. Wherever there is a right there is a remedy.

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character."

Const. Minn. Art. 1, § 8; Davis v. Pierse, 7 M. 13 G. 1; Weller v. St. Paul, 5 M. 95 G. 70; Baker v. Kelley, 11 M. 480 G. 358; Willis v. Mabon, 48 M. 153; Bank of United States v. Owens, 2 Peters (U. S.) 538; Birkley v. Pesgrave, 1 East 226; Yates v. Joyce, 11 Johns. (N. Y.) 140; Ashby v. White, 2 Ld. Raym. 953; Laing v. Whaley, 3 H. & N. 678.

RULE 4

§ 30. "Every action shall be prosecuted in the name of the real party in interest, except as hereinafter provided; but this section does not authorize the assignment of a thing in action not arising out of contract. *Provided*, when the question is one of a common or general interest to many persons, or when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." G. S. '94, § 5156 (as amended, Laws 1899, ch. 4.)

§ 31. Under this statute the assignee of a thing in action is deemed the "real party in interest" and must sue in his own name. Russell v. Minnesota Outfit, 1 M. 162 G. 136; McDonald v. Kneeland, 5 M. 352 G. 283; Tuttle v. Howe, 14 M. 145 G. 113; Bennett v. McGrade, 15 M. 132 G. 99; Maxcy v. Ins. Co., 54 M. 272; Bates v. Lumber Co., 56 M. 14; Hurley v. Bendel, 67 M. 41; Laramee v. Tanner, 69 M. 156 (equitable assignee); Castner v. Austin, 2 M. 46 G. 32; Helfer v. Alden, 3 M. 332 G. 232; Schlieman v. Bowlin, 36 M. 198; Lahmers v. Schmidt, 35 M. 434; Anchor Invest. Co. v. Kirkpatrick, 59 M. 378.

§ 32. When the cause of action relates to property and property rights the party vested with the legal title is the "real party in interest" and may sue in his own name although other parties have an equitable interest therein. Winona etc. Ry. Co. v. Ry. Co., 23 M. 359; Triggs v. Jones, 46 M. 277; St. Paul Title Ins. Co. v. Thomas, 60 M. 140.

§ 33. "A pledgee may sue in his own name upon a promissory note payable to order, though it is not indorsed to him." White v. Phelps, 14 M. 27 G. 21. See Castner v. Austin, 2 M. 46 G. 32.

§ 34. "A promissory note, payable to order, may be transferred without indorsement, so that the transferee may maintain an action thereon in his own name." Pease v. Rush, 2 M. 107 G. 89. See Cassidy v. First Nat. Bank, 30 M. 86; Conger v. Nesbitt, 30 M. 436.

§ 35. An infant must sue, when the real party in interest, in his own

name by his guardian ad litem. Price v. Ins. Co., 17 M. 497 G. 473; Perine v. Grand Lodge, 48 M. 82; Peterson v. Baillif, 52 M. 386.

§ 36. An action on a contract made by a government official in behalf of the government must be brought by the government. Balcombe v. Northrup, 9 M. 172 G. 159.

§ 37. A salaried officer whose duty it is to collect fees pertaining to his office is not the proper party to collect such fees by action. Willis v. Oil Co., 50 M. 290.

§ 38. An indorsee "for collection" is not the "real party in interest." Rock County Bank v. Hollister, 21 M. 385; Third Nat. Bank v. Clark, 23 M. 263. See Minnesota Thresher Mfg. Co. v. Heipler, 49 M. 395.

§ 39. "The holder of a promissory note under the unconditional and unrestricted indorsement of the payee has the legal title and may sue in his own name, although, as between themselves, the assignor possesses the beneficial interest in the proceeds." Elmquist v. Markoe, 45 M. 305; Rosemond v. Graham, 54 M. 323.

§ 40. Where the owner of a thing in action executes to another an assignment of it, absolute in terms, such assignee is the party in legal interest, and may maintain an action on the demand in his own name, although there be a verbal agreement between the assignor and assignee that the latter, when he collects the money, shall hold it as trustee for the former. Anderson v. Reardon, 46 M. 185; Struckmeyer v. Lamb, 64 M. 57.

§ 41. The payee of a bill of exchange is the real party in interest although he was made payee only for collection. Vanstrom v. Liljengren, 37 M. 191; Minnesota Thresher Co. v. Heipler, 49 M. 395.

§ 42. The trustee having deceased and no successor having been appointed, the cestui que trust, as the real party in interest, is the proper party plaintiff in an action concerning the trust property. Judd v. Dike, 30 M. 380.

EXCEPTION I

§ 43. A person with whom, or in whose name, a contract is made for the benefit of another may sue in his own name thereon without joining the beneficiary.

G. S. '94, § 5158; Cooper v. Hayward, 71 M. 374; Price v. Ins. Co., 17 M. 497 G. 473 (the statute is not imperative).

§ 44. When a contract has been made by an agent in his own name, although for the benefit of his principal, he may sue thereon without joining his principal. Lake v. Albert, 37 M. 453; Cremer v. Wimmer, 40 M. 511; Lundberg v. Elevator Co., 42 M. 37; Close v. Hodges, 44 M.

204; Murphin v. Schovell, 44 M. 530. But see, Miller v. Bank, 57 M. 319.

§ 45. A guardian may sue in his own name on a note payable to himself, although the consideration paid for it was funds of his ward and the note was taken or purchased by him for the benefit of the ward. McLean v. Dean, 66 M. 369.

§ 46. "A sheriff selling real estate on execution may maintain an action in his individual name for the sum bid at the sale." Armstrong v. Vrom, 11 M. 220 G. 142.

§ 47. A guardian of minors may sue to recover money collected for him by an attorney although the minors have become of age. Huntsman v. Fish, 36 M. 148.

EXCEPTION II

§ 48. A trustee of an express trust may sue in his own name without joining the *cestui que trust*. G. S. '94, § 5158.

§ 49. Receivers are within the statute. Henning v. Raymond, 35 M. 303; Williamson v. Selden, 53 M. 73; Minnesota Thresher Mfg. Co. v. Langdon, 44 M. 37; Prosser v. Hartley, 35 M. 340; Ueland v. Haugan, 70 M. 349.

§ 50. Assignees in insolvency are within the statute. Langdon v. Thompson, 25 M. 509; St. Anthony Mill Co. v. Vandall, 1 M. 246 G. 195; Williamson v. Selden, 53 M. 73.

§ 51. A guardian appointed by the probate court is not a trustee of an express trust but an officer of the court. Perine v. Grand Lodge, 48 M. 82.

§ 52. Statute applied. Seibert v. Ry. Co., 52 M. 148; Moulton v. Haskell, 50 M. 367; Struckmeyer v. Lamb, 64 M. 57.

EXCEPTION III

§ 53. An administrator or executor may sue without joining the heirs or beneficiaries. G. S. '94, § 5158; Cooper v. Hayward, 71 M. 374.

EXCEPTION IV

§ 54. Persons expressly authorized by statute to sue may do so without joining the persons for whom the action is prosecuted. G. S. '94, § 5158.

See Board County Commissioners v. Smith, 22 M. 97; Willis v. Oil Co., 50 M. 290.

ACTIONS ON CONTRACTS—PLAINTIFFS

GENERAL RULES

RULE 5

§ 55. "No one can sue for the breach of a contract who is not a party to the contract." Dicey, Rule 10.

§ 56. It is the general rule that an action upon contract can be maintained only where there is privity of contract between the parties. Jefferson v. Asch, 53 M. 446; Follansbee v. Johnson, 28 M. 311; Brown v. Stillman, 43 M. 126; Nelson v. Rogers, 47 M. 103; State Bank v. Heney, 40 M. 145; Union Ry. Storage Co. v. McDermott, 53 M. 407; Walsh v. Featherstone, 67 M. 103; Armstrong v. Vroman, 11 M. 220 G. 142; McCarthy v. Couch, 37 M. 124.

§ 57. "A stranger to a contract between others, in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, cannot recover upon it." Jefferson v. Asch, 53 M. 446; Union Ry. Storage Co. v. McDermott, 53 M. 407; Lorrillard v. Clyde, 122 N. Y. 498.

EXCEPTION I

§ 58. If A. transfers property to B. who, in consideration therefor, promises A. to pay C. a debt due him from A., C. may sue B. on his promise to A.

Sanders v. Classon, 13 M. 379 G. 352; Jordon v. White, 20 M. 91 G. 77; Sullivan v. Murphy, 23 M. 6; Follansbee v. Johnson, 28 M. 311; Sherin v. Larson, 28 M. 521; Maxfield v. Schwartz, 43 M. 221; Lovejoy v. Howe, 55 M. 353; Bell v. Mendenhall, 71 M. 331; Stariha v. Greenwood, 28 M. 521; Sayre v. Burdick, 47 M. 367; Rogers v. Castle, 51 M. 428; Clark v. Howard, 150 N. Y. 234.

§ 59. In such an action B. may set up any equities he may have as against A. Rogers v. Castle, 51 M. 428; Maxfield v. Schwartz, 45 M. 150; Gold v. Ogden, 61 M. 88.

EXCEPTION II

§ 60. If A. promises B. to pay a debt which B. owes C. the latter may sue A. on his promise to B.

Hawley v. Wilkinson, 18 M. 525 G. 468; Pulliam v. Adamson, 43 M. 511. See Van Eman v. Stanchfield, 10 M. 255 G. 197; Barnes v. Ins. Co., 56 M. 38.

EXCEPTION III

§ 61. A person not named as obligee may sue upon a bond given in accordance with law for his security.

Jefferson v. Asch, 53 M. 449; City of St. Paul v. Butler, 30 M. 459; Morton v. Power, 33 M. 521; Freeman v. Berkey, 45 M. 438; Sepp v. McCann, 47 M. 364.

EXCEPTION IV

§ 62. "An action may be brought against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as surety." G. S. '94, § 5272.

Huey v. Pinney, 5 M. 310 G. 246; Miller v. Rouse, 8 M. 124 G. 97; Wendlandt v. Sohre, 37 M. 162; Metzner v. Baldwin, 11 M. 150 G. 92; Benedict v. Olson, 37 M. 431.

RULE 6

§ 63. "The person to sue for the breach of a simple contract must be the person from whom the consideration for the promise moves.[1]

Exception 1. Actions by a person appointed by statute to sue on behalf of others.

Exception 2. Actions which can be brought either by a principal or an agent.

Exception 3. Some actions for money had and received." Dicey, Rule 11.

[1] 15 Ency. Pl. & Prac. 500. This is the general rule in this state for the "real party in interest" will generally be the "person from whom the consideration for the promise moves." For an exception to the foregoing rule see, Van Eman v. Stanchfield, 10 M. 255 G. 197.

RULE 7

§ 64. "The person to sue for the breach of a contract by deed is the person with whom the contract is expressed by the deed to be made: i. e., the covenantee.[1]

Subordinate rule. No one can sue on a covenant in an indenture who is not mentioned among the parties to the indenture." [2] Dicey, Rule 12.

[1] 15 Ency. Pl. & Prac. 507. This rule is subject to the same exceptions as Rule 5. A stranger to a contract by deed may sue thereon whenever he might sue on a simple contract of the same nature. In this state there is no distinction, as respects parties, between simple contracts and specialties. Jefferson v. Asch, 53 M. 446; Durnherr v. Rau, 135 N. Y. 219. See cases cited under Rule 5.

[2] Henricus v. Englert, 137 N. Y. 488.

RULE 8

§ 65. "All the persons with whom a contract is made must join in an action for the breach of it." Dicey, Rule 13.

This common law rule remains in force in this state unaffected by legislation. Hedderly v. Downs, 31 M. 183; Porter v. Fletcher, 25 M. 493; Moore v. Bevier, 60 M. 240; Sprague v. Wells, 47 M. 504; 15 Ency. Pl. & Prac. 528.

EXCEPTION I

§ 66. When there has been a severance by agreement of the parties.

Pratt v. Pratt, 22 M. 148.

EXCEPTION II

§ 67. When the interest of each is several and the damages accruing to each in case of a breach are severable.

Brown v. Farnham, 55 M. 27. See also Sprague v. Wells, 47 M. 504; Moede v. Haines, 66 M. 419.

EXCEPTION III

§ 68. When one of the parties refuses to join. In such cases the reason for the non-joinder should be stated in the complaint and if such party is within the jurisdiction he should be made a defendant.

Peck v. McLean, 36 M. 228 and see § 220.

RULE 9

§ 69. "The right of action on a contract made with several persons jointly passes on the death of each to the survivors, and on the death of the last to his representatives.[1]

Exception. Covenants with tenants in common." Dicey, Rule 16.

[1] Hedderly v. Downs, 31 M. 183; Freeman v. Curran, 1 M. 170 G. 144.

PRINCIPAL AND AGENT

RULE 10

§ 70. "A contract entered into with a principal through an agent is in law made with the principal, and the principal, not the agent, is the proper person to sue for the breach of it.[1]

Exception 1. Where an agent is contracted with by deed in his own name.[2]

Exception 2. Where the agent is named as a party to a bill of exchange or other commercial paper.[3]

Exception 3. Where the right to sue on a contract is, by the terms or circumstances of it, expressly restricted to the agent.[4]

Exception 4. Where the contract is made with the agent himself; i. e., where the agent is treated as the actual party with whom the contract is made.[5]

Exception 5. Where the agent is the only known or ostensible principal, or where the agent has made a contract not under seal in his own name for an undisclosed principal.[6]

Exception 6. Where an agent has made a contract, in the subject-matter of which he has a special interest or property.[7]

Exception 7. Where the agent has paid away money of the principal's under circumstances which give a right to recover it back." [8] Dicey, Rule 17.

[1] State v. Torinus, 26 M. 1; Morton v. Stone, 39 M. 275.

[2] Mechem Agency, § 769. Henricus v. Englert, 137 N. Y. 488.

[3] In this state the action might be brought either by the agent or the principal. See Conger v. Nesbitt, 30 M. 436; 2 Daniel Neg. Inst. § 1187.

[4] See Mechem Agency, § 771.

[5] See § 44.

[6] Ames v. Ry. Co., 12 M. 412 G. 295; Lough v. Thornton, 17 M. 253 G. 230; Gage v. Stimson, 26 M. 64.

[7] 1 Am. & Eng. Ency. of Law (2nd Ed.) 1165.

[8] See Mechem Agency, § 778. Third Nat. Bank v. Gas Co., 36 M. 75.

RULE 11

§ 71. "A person who enters into a contract in reality for himself, but apparently as agent for another person, whom he does not name, can sue on the contract as principal." Dicey, Rule 18.

See Mechem Agency, § 760.

RULE 12

§ 72. "A person who contracts in reality for himself, but, apparently, as agent for another person, whose name he gives, cannot sue on the contract as principal." Dicey, Rule 19.

See Mechem Agency, § 760.

PARTNERS AND UNINCORPORATED COMPANIES

RULE 13

§ 73. "A firm or an unincorporated company cannot sue in its name as a firm or as a company, but must sue in the names of the individual members of the firm or of the company." Dicey, Rule 20.

Diamond v. Minnesota Savings Bank, 70 M. 298.

RULE 14

§ 74. "All persons who are partners in a firm, or members of an unincorporated company, at the time when a contract is made with the firm or the company, should join in an action for the breach of it.[1]

Exception. One partner must or may sue alone, on contracts made with him on behalf of the firm, in the same cases in which an agent must or may sue on contracts made with him on behalf of his principal." Dicey, Rule 21.

[1] This rule prevails in this state unimpaired by statute and is simply an application of the general rule that all persons with whom a contract is made must sue for its breach. Davis v. Chouteau, 32 M. 548; Cushing v. Marston, 12 Cush. 431; Fish v. Gates, 133 Mass. 441; Vinal v. Oil Co., 110 U. S. 215; Slutts v. Chaffee, 48 Wis. 617.

RULE 15

§ 75. "One partner or member of an unincorporated company cannot sue another upon any matter involving the accounts of the partnership or company.[1]

Exception 1. Where there is an agreement which, though relating to partnership business, can be treated as separate and distinct from other matters in question between the partners.[2]

Exception 2. Where the matters, in respect of which an action is brought, are connected with the partnership business only through the wrongful act of the partner sued."[3] Dicey, Rule 22.

[1] The only action which may be maintained is for an accounting. Wood v. Cullen, 13 M. 394 G. 365; Russell v. Minnesota Outfit, 1 M. 162 G. 136; Crosby v. Timolat, 50 M. 171; Wilcox v. Comstock, 37 M. 65.

[2] See Russell v. Minnesota Outfit, 1 M. 162 G. 136; Bohrer v. Drake, 33 M. 408.

[3] See Cochrane v. Quackenbush, 29 M. 376; Bohrer v. Drake, 33 M. 408.

RULE 16

§ 76. "On the death of a partner, the surviving partners and ultimately the last survivor, or his representative, must sue on contracts made with the firm." Dicey, Rule 24.

Hedderly v. Downs, 31 M. 183; Hanson v. Metcalf, 46 M. 25; Freeman v. Curran, 1 M. 170 G. 144.

CORPORATIONS

RULE 17

§ 77. "A corporation or incorporated company must sue in its corporate name." Dicey, Rule 25.

See G. S. '94, § 2595. 1 Chitty Pleading, 271; Curtiss v. Murray, 26 Cal. 633; Leonardville Bank v. Willard, 25 N. Y. 574; Hewett v. Storey, 39 Fed. Rep. 719. A stockholder cannot ordinarily sue for the corporation. Mealey v. Nickerson, 44 M. 430; Baldwin v. Canfield, 26 M. 433; Morrill v. Little Falls Mfg. Co., 46 M. 260.

RULE 18

§ 78. A corporation may sue on a contract not under its seal.

7 Am. & Eng. Ency. of Law (2nd Ed.) 762.

RULE 19

§ 79. A corporation may sue on executed contracts *ultra vires.*

Baker v. Guaranty Loan Co., 36 M. 185; St. Paul Land Co. v. Dayton, 37 M. 364; Central etc. Asso. v. Lampsen, 60 M. 422.

RULE 20

§ 80. A corporation may sue and be sued in its corporate name after its dissolution. G. S. '94, §§ 3431, 3432.

Farmers' Nat. Bank v. Backus, 77 N. W. 142.

MARRIED WOMEN

RULE 21

§ 81. "A married woman may sue or be sued as if unmarried and without joining her husband, in all cases where the husband would not be a necessary party aside from the marriage relation." G. S. '94, § 5159. See also Laws 1899, ch. 325.

Nininger v. County Commissioners, 10 M. 133 G. 106; Spencer v. Sheehan, 19 M. 338 G. 292; Spencer v. Ry. Co., 22 M. 29; Colville v. Langdon, 22 M. 565; Wampach v. Ry. Co., 22 M. 34; Knopf v. Hansen, 37 M. 215; Farr v. Dunsmore, 36 M. 437; Barton v. Drake, 21 M. 299.

RULE 22

§ 82. In actions concerning the real property of either spouse the other is not rendered a necessary party solely by reason of his or her inchoate statutory interest therein.

Leonard v. Green, 34 M. 137; Williamson v. Selden, 53 M. 73; Tatum v. Roberts, 59 M. 52.

RULE 23

§ 83. A married woman may sue her husband upon contract or to protect her separate property rights.

Rich v. Rich, 12 M. 468 G. 369; Gillespie v. Gillespie, 64 M. 381.

RULE 24

§ 84. "When a husband has deserted his family, the wife may prosecute or defend, in his name, any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had." G. S. '94, § 5165.

Allen v. Minnesota Trust Co., 68 M. 8; Davis v. Woodward, 19 M. 174 G. 137.

EXECUTORS AND ADMINISTRATORS

RULE 25

§ 85. An administrator or executor may sue without joining the heirs or beneficiaries. G. S. '94, § 5158.

RULE 26

§ 86. An administrator or executor may sue on any cause of action, not arising out of injury to the person, existing in favor of the decedent at the time of his death.

See G. S. '94, §§ 5912, 4519, 4497, 5149, 5158. Connolly v. Connolly, 26 M. 350; Lowry v. Tilleny, 31 M. 500; Bomash v. Iron Hall, 42 M. 241 (not upon contract in favor of heirs).

RULE 27

§ 87. An administrator or executor must sue in his representative capacity when the cause of action accrued prior to the death of the decedent.

Lawrence v. Vilas, 20 Wis. 381; Haskell v. Bowen, 44 Vt. 579; Hone v. De Peyster, 106 N. Y. 645.

RULE 28

§ 88. An administrator or executor may sue either in his representative or private capacity when the cause of action, whether *ex contractu* or *ex delicto*, accrues after the death of the decedent and money recovered will be assets in his hands.

Bond v. Corbett, 2 M. 248 G. 209; Noon v. Finnegan, 32 M. 81; Merritt v. Seaman, 6 N. Y. 168; Lawrence v. Vilas, 20 Wis. 381.

RULE 29

§ 89. An administrator or executor may sue to recover

possession of the real property of the decedent. G. S. '94, §§ 4496, 4497.

Miller v. Hoberg, 22 M. 249; Paine v. Ry. Co., 14 M. 65 G. 49 (action to remove a cloud).

RULE 30

§ 90. "Any administrator or executor, duly appointed in any other state or country, may commence and prosecute any action in any court of this state, in his capacity of executor or administrator, in like manner and under like restrictions as a resident may do; provided that before commencing any action, an authenticated copy of his appointment as such executor or administrator is filed in the probate court of the county in which such action is to be commenced." G. S. '94, § 5917.

Fogle v. Schaeffer, 23 M. 304; Brown v. Brown, 35 M. 191; Babcock v. Collins, 60 M. 73; Pott v. Pennington, 16 M. 509 G. 460; Drake v. Sigafoos, 39 M. 367; Putnam v. Pitney, 45 M. 242.

ACTIONS ON CONTRACTS—DEFENDANTS—GENERAL RULES

RULE 31

§ 91. "No person can be sued for a breach of contract who is not a party to the contract." Dicey, Rule 46.

15 Ency. Pl. & Prac. 524; Wheeler v. Johnson, 21 M. 507; Campbell v. Rotering, 42 M. 115.

RULE 32

§ 92. "The person to be sued for the breach of a simple contract is the person who promises or who allows credit to be given to him.[1]

Exception 1. Actions against a person appointed by statute to be sued on behalf of others.

Exception 2. Actions on some contracts implied by law or actions *quasi ex contractu.*" Dicey, Rule 47.

[1] 15 Ency. Pl. & Prac. 525.

RULE 33

§ 93. "The person to be sued for the breach of a contract

by deed is the person by whom the contract is expressed by the deed to be made, i. e., the covenantor." Dicey, Rule 48.

Mahoney v. McLean, 26 M. 415; Henricus v. Englert, 137 N. Y. 488.

RULE 34

§ 94. Parties to a joint obligation may be sued jointly, separately or severally.

Laws 1897, ch. 303. The statute abrogates the common law rule that where several persons are jointly liable on an obligation they must all be sued for the breach thereof (Dicey, Rule 49). It is of course practically advisable to follow the common law rule when jurisdiction of all the parties can be conveniently obtained. The statute is designed to meet exceptional cases. Upon the common law rule generally see Whittaker v. Collins, 34 M. 299; Little v. Lee, 53 M. 511; Davison v. Harmon, 65 M. 402; Pfefferkorn v. Haywood, 65 M. 429.

RULE 35

§ 95. "When two or more persons are indebted on any joint contract, or upon a judgment founded on a joint contract and either of them die, his estate is liable therefor." G. S. '94, § 4521.

Berryhill v. Peabody, 72 M. 232. This statute abrogates the common law rule that "The liability to an action on a contract by several persons jointly, passes at the death of each to the survivors, and on the death of the last to his representatives." Dicey, Rule 52; Pomeroy, Remedies, § 302. This statute would undoubtedly be held to authorize the joinder of the personal representatives and the surviving obligors. Colt v. Learned, 133 Mass. 409.

RULE 36

§ 96. "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same instrument, may all or any of them be included in the same action, at the option of the plaintiff." G. S. '94, § 5166.

Lanier v. Irvine, 24 M. 116; 15 Eng. Pl. & Prac. 741.

§ 97. "The absolute guarantor, upon the same instrument, of the payment of a promissory note, may be joined as defendant in the same action with the maker." Hammel v. Beardsley, 31 M. 314; Lucy v. Wilkins, 33 M. 21; First Nat. Bank v. Burkhardt, 71 M. 185.

§ 98. This statute applies to parties liable on a joint and several obligation. Steffes v. Lemke, 40 M. 27; Lanier v. Irvine, 24 M. 116.

PRINCIPAL AND AGENT

RULE 37

§ 99. "A contract entered into by a principal, through an agent, is in law made by the principal, and the principal, not the agent, is the person to be sued for the breach of it.[1]

Only agent can be sued.

Exception 1. Where an agent contracts by deed in his own name.[2]

Exception 2. Where an agent draws, indorses, or accepts a bill of exchange or promissory note, in his own name.[3]

Exception 3. Where credit is given exclusively to the agent.[4]

Exception 4. Where an agent contracts for persons incapable of contracting.[5]

Either principal or agent can be sued.

Exception 5. Where the contract is made by the agent himself, i. e., where the agent is treated as the actual party by whom the contract is made, or in other words, where the agent, though acting as such, incurs a personal liability.[6]

Exception 6. Where the agent is the only known or ostensible principal, or where a contract (not under seal) has been made by an agent in his own name for an undisclosed principal.[7]

Exception 7. Where money received by an agent for his principal has been paid under a mistake of fact, or obtained by means of a tort." [8] Dicey, Rule 53.

[1] Hayes v. Crane, 48 M. 39; Brunswick-Balke Callender Co. v. Boutell, 45 M. 21.

[2] Mahoney v. McLean, 26 M. 415.

[3] Daniel Neg. Insts. §§ 303, 305. Aliter if there is some word such as "agent," "trustee" or the like to indicate that the nominal party was acting for a third person. Souhegan Nat. Bank v. Board-

man, 46 M. 292, and cases cited. Kraniger v. Building Society, 60 M. 94. See Dunnell's Trial Book, §§ 1359–1362.

[4] Mechem Agency, §§ 558, 771.

[5] Mechem Agency, § 557.

[6] Mechem Agency, § 558.

[7] Amans v. Campbell, 70 M. 493; William Lindeke Land Co. v. Levy, 79 N. W. 314; Mechem Agency, § 554.

[8] Mechem Agency, § 560 et. seq.; Shepard v. Sherin, 43 M. 382.

RULE 38

§ 100. "An agent who, without having authority, enters into a contract on behalf of a principal, cannot himself be sued on the contract, but is otherwise liable.[1]

Exception. Where the authority of an agent has without his knowledge expired at the time of his making the contract." Dicey, Rule 54.

[1] Sheffield v. Ladue, 16 M. 388 G. 346; Skaaraas v. Finnegan, 32 M. 107.

PARTNERS

RULE 39

§ 101. "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the process in such case being served on one or more of the associates; the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants." G. S. '94, § 5177.

Gale v. Townsend, 45 M. 357; Hinkley v. St. Anthony etc. Co., 9 M. 55 G. 44; Cooper v. Breckenridge, 11 M. 341 G. 241; Dimond v. Minnesota Savings Bank, 70 M. 298; Cornfield v. Order Brith Abraham, 64 M. 261; Martin v. Northern etc. Asso., 68 M. 521.

RULE 40

§ 102. "All persons who are partners in a firm, or members of an unincorporated company, at the time when a contract is made by or on behalf of the firm or company, should be joined in an action for the breach of it.[1]

Exception. One partner must or may be sued alone, on contracts made by him on behalf of the firm, in the same cases in which an agent must or may be sued on contracts made by him on behalf of his principal." [2] Dicey, Rule 56.

[1] Sandwich Mfg. Co. v. Herriott, 37 M. 214; Wood v. Cullen, 13 M. 394 G. 365 (dormant partner). This rule is no longer imperative. See Rule 34.

[2] McKinnon v. Palen, 62 M. 188.

RULE 41

§ 103. "On the death of a partner, the surviving partners, and ultimately the last survivor or his representative, must be sued on contracts made with the firm." Dicey, Rule 58.

This common law rule is affected by statute. See Rule 35 and Hanson v. Metcalf, 46 M. 25, 30.

CORPORATIONS

RULE 42

§ 104. "A corporation or incorporated body must be sued in its corporate name." Dicey, Rule 59.

Rule 43

§ 105. A corporation may be sued on a contract not under its seal.

7 Am. & Eng. Ency. of Law (2nd ed.) 762.

RULE 44

§ 106. A corporation may be sued on contracts *ultra vires*.

Central etc. Asso. v. Lampson, 60 M. 422; Erb v. Yoerg, 64 M. 463.

RULE 45

§ 107. A corporation may be sued after its dissolution on contracts made prior thereto.

See § 80.

INFANTS

RULE 46

§ 108. An infant cannot be sued on any contracts made by him except for necessaries.

Miller v. Smith, 26 M. 248; Conrad v. Lane, 26 M. 389; Miller v. Smith, 26 M. 248; Alt v. Graff, 65 M. 191; Folds v. Allardt, 35 M. 488.

HUSBAND AND WIFE—MARRIED WOMEN

RULE 47

§ 109. A married woman may be sued as if unmarried and without joining her husband, on contracts made by her either before or after marriage. See § 81.

RULE 48

§ 110. A wife may be sued by her husband in an action *ex contractu*. See G. S. '94, § 5530.

EXECUTORS AND ADMINISTRATORS

RULE 49

§ 111. "The personal representatives of a deceased person (i. e., his executors or administrators) can be sued on all contracts made with him, whether broken before or after his death.[1]

Exception 1. Contracts limited to the lifetime of the deceased.[2]

Exception 2. Covenants in law not broken during the lifetime of the deceased.[3]

Exception 3. Contracts on which the deceased must have been sued jointly with other persons.[4]

Subordinate rule 1. An action can be commenced against an executor before probate, but an action cannot be commenced against an administrator before letters of administration granted to him.

Subordinate rule 2. On the death of a defendant the action may be carried on against his executor or administrator." [5] Dicey, Rule 73.

[1] See G. S. '94 § 5912. This common law rule, however, has been very greatly restricted by statute in this state. See G. S. '94 §§ 4511, 4514, 4517; Commercial Bank v. Slater, 21 M. 174; Fern v. Leuthold, 39 M. 212; Hill v. Townley, 45 M. 168; Comstock v. Matthews, 55 M. 111; Hill v. Nichols, 47 M. 382; Cummings v. Halsted, 26 M. 151; Oswald v. Pillsbury, 61 M. 520; McKeen v. Waldron, 25 M. 466; State v. Probate Court, 66 M. 246; Hantzch v. Massolt, 61 M. 361; O'Brien v. Larson, 71 M. 371; Nelson v. Rogers, 65 M. 246; Fitzhugh v. Harrison, 78 N. W. 95; Berryhill v. Peabody, 72 M. 232.

[2] That is, contracts founded upon a personal relation or requiring personal skill.

[3] See 2 Williams Executors, 1752.

[4] This common law rule has been abrogated by statute. See G. S. '94, §§ 4521, 5912.

[5] See G. S. '94, § 4518.

RULE 50

§ 112. "An executor or administrator must be sued in his representative character; i. e., as executor or administrator, on all contracts made by the deceased." Dicey, Rule 74.

He cannot be charged personally. Mattison v. Farnham, 44 M. 95.

RULE 51

§ 113. "An executor or administrator must be sued in his personal character on contracts made by himself.[1]

Exception. Contracts made by executor distinctly as executor.

Subordinate rule. In an action against an executor or administrator, claims made against him in his representative character cannot be joined with claims made against him in his personal character."[2] Dicey, Rule 75.

[1] Germania Bank v. Michaud, 62 M. 459.

[2] 8 Ency. Pl. & Prac. 681.

RULE 52

§ 114. "All co-executors or co-administrators who have administered, should be joined as defendants." Dicey, Rule 76.

ACTIONS FOR TORT

PLAINTIFFS—GENERAL RULES

RULE 53

§ 115. "No one can bring an action for any injury which is not an injury to himself." Dicey, Rule 78.

Waseca County Bank v. McKenna, 32 M. 468; 15 Ency. Pl. & Prac. 517. See § 1189 (death by wrongful act.)

EXCEPTION I

§ 116. "A father, or in case of his death, or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward is not living with, or in the service of the plaintiff at the time of the seduction, or afterward, and there is no loss of service." G. S. '94, § 5163.

Perine v. Grand Lodge, 48 M. 82; Schmit v. Mitchell, 59 M. 251.

EXCEPTION II

§ 117. "A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury of the child; and the guardian for the injury of the ward; provided further, that a guardian *ad litem* duly appointed by the court may in all cases, either before or after death of the said father or mother, maintain such action for injury to any minor child, in the name of such minor by himself as guardian *ad litem*." G. S. '94, § 5164 as amended by Laws 1895, ch. 45.

§ 118. This statute authorizes an action by the father or mother in all cases where an action might be maintained by the child. No damages are recoverable except those suffered by the child. The action is not for the benefit of the parent but for the child; whatever is recovered is held in trust by the parent for the child and the action is a bar to a subsequent independent action by the child. The action lies only for an injury to a minor child. Gardner v. Kellogg, 23 M. 463; Schmit v. Mitchell, 59 M. 251; Buechner v. Columbia Shoe Co., 60 M. 477; Lathrop v. Schulte, 61 M. 196; Hess v. Mfg. Co., 66 M. 79; Bamka v. Ry. Co., 61 M. 549; Perine v. Grand Lodge, 48 M. 82.

RULE 54

§ 119. "The person who sustains an injury is the person to bring an action for the injury against the wrong-doer.[1]

Subordinate rule 1. The person to sue for any interference with the immediate enjoyment or possession of land or other real property is the person who has possession of it, and no one can sue merely for such an interference who has not possession.[2]

Subordinate rule 2. For any permanent injury to the value of land, or other real property, i. e., for any act which interferes with the future enjoyment of it, or title to the land, an action may be brought by the person entitled to a future estate in it, i. e., by the reversioner.[3]

Subordinate rule 3. Any person may sue for an interference with the possession of goods who, as against the defendant, has a right to the immediate possession of such goods; and no person can sue for what is merely an interference who has not a right to the immediate possession of the goods.[4]

Subordinate rule 4. Any person entitled to the reversionary interest in goods (i. e., the reversioner) may bring an action for any damage to such interest, or, in other words, to his right of ultimate possession." [5] Dicey, Rule 79.

[1] 15 Ency. Pl. & Prac. 517.

[2] Gould v. School District, 7 M. 203 G. 145, 154; Moon v. Avery, 42 M. 405; Sherin v. Larson, 28 M. 523; 15 Ency. Pl. & Prac. 519.

[3] See G. S. '94, §§ 5879, 5882. Moriarty v. Ashworth, 43 M. 1; Curtis v. Livingston, 36 M. 380; 15 Ency. Pl. & Prac. 519.

[4] See §§ 804–806, 1127, 1118. Lang v. Nelson, 41 M. 521.

[5] See § 1118.

RULE 55

§ 120. "1. Persons who have a separate interest and sustain a separate damage must sue separately.[1]

2. Persons who have a separate interest, but sustain a joint

damage, may sue either jointly or separately in respect thereof.[2]

3. Persons who have a joint interest must sue jointly for any injury to it." [3] Dicey, Rule 80.

[1] Ency. Pl. & Prac. 541. "Where a personal tort has been done to a number of individuals, but no joint injury has been suffered and no joint damages sustained in consequence thereof, the interest and right are necessarily several, and each of the injured parties must maintain a separate action for his own personal redress. It follows, therefore, that when a tort of a personal nature, an assault and battery, a false imprisonment, a libel, a slander, a malicious prosecution, and the like, is committed upon two or more, the right of action must, except in a very few special cases, be several." Pomeroy Remedies, § 231.

[2] 15 Ency. Pl. & Prac. 543.

[3] Pomeroy, Remedies, § 230; 15 Ency. Pl. & Prac. 544. See Peck v. McLean, 36 M. 228; Miller v. Darling, 22 M. 303; Allis v. Ware, 28 M. 171.

RULE 56

§ 121. "Where several persons have a joint right of action for a tort it passes on the death of each to the survivors, and on the death of the last (if the right of action be one that survives) to his representatives." Dicey, Rule 82.

It would probably be held in this state that this rule is abrogated by statute.

PRINCIPAL AND AGENT

RULE 57

§ 122. "A principal (or employer) can never sue for what is merely an injury to his agent (or servant), nor an agent (or servant) for what is merely an injury to his principal (or employer)." Dicey, Rule 83.

PARTNERS

RULE 58

§ 123. "All the partners in a firm or members of an unincorporated company, should join in an action for a wrong done to the firm or company." Dicey, Rule 84.

Zabriskie v. Smith, 13 N. Y. 322.

HUSBAND AND WIFE—MARRIED WOMEN

RULE 59

§ 124. A married woman may sue for a tort committed against her as if unmarried and without joining her husband.

See § 81.

RULE 60

§ 125. "A married woman can maintain an action against persons who wrongfully entice her husband from her and alienate his affections and thereby cause a separation."

Lockwood v. Lockwood, 67 M. 476.

RULE 61

§ 126. A married woman cannot sue another woman for criminal conversation with her husband.

Kroessin v. Keller, 60 M. 372.

EXECUTORS AND ADMINISTRATORS

RULE 62

§ 127. "The personal representatives of the deceased (i. e., his executors or administrators) can sue for injuries to the property of the deceased done during his life time." Dicey, Rule 92.

Also for injuries after his death in certain cases. Noon v. Finnegan, 29 M. 418.

RULE 63

§ 128. "The personal representatives of the deceased cannot sue for injuries to the person, feelings, or reputation of the deceased.[1]

Exception. Where deceased has been killed by wrongful act or by negligence." Dicey, Rule 93.

[1] Hunt v. Conrad, 47 M. 557.

RULE 64

§ 129. "The personal representatives of the deceased can sue for injuries to his personal property committed after his death." Dicey, Rule 94.

RULE 65

§ 130. "The real representative of the deceased (i. e., his heir or devisee) cannot sue for any wrong done to him." Dicey, Rule 95.

DEFENDANTS—GENERAL RULES

RULE 66

§ 131. "No person is liable to be sued for any injury of which he is not the cause." Dicey, Rule 96.

See for example, Briggs v. Ry. Co., 52 M. 36; Koslowski v. Thayer, 66 M. 150.

RULE 67

§ 132. "Any person who causes an injury to another is liable to be sued by the person injured.

Exception. Where persons are protected from actions for torts by their positions, e. g., a judge."[1] Dicey, Rule 97.

[1] Stewart v. Cooley, 23 M. 347; Stewart v. Case, 53 M. 62.

RULE 68

§ 133. "One, or any, or all of several joint wrong-doers may be sued.[1]

Exception. Persons sued as joint owners of land."[2] Dicey, Rule 98.

[1] Whittaker v. Collins, 34 M. 299; Heartz v. Klinkhammer, 39 M. 488; Hurlburt v. Schulenburg, 17 M. 22 G. 5; Flaherty v. Ry. Co., 39 M. 328; Sloggy v. Dilworth, 38 M. 179; McClellan v. Ry. Co., 58 M. 104; Warren v. Westrup, 44 M. 237. "Where the liability of one defendant for a wrongful act depends upon a state of facts not affecting his co-defendant, a joint action cannot be maintained against them, though each may be liable." Trowbridge v. Forepaugh, 14 M. 133 G. 100.

[2] Low v. Mumford, 14 Johns. (N. Y.) 426.

RULE 69

§ 134. "Each wrong-doer's separate liability to be sued for a tort passes on his death (if it survives at all) to his personal

representatives.[1] The joint liability of several wrong-doers passes on the death of each to the survivors." [2] Dicey, Rule 100.

[1] See Rule 78.

[2] Doubtless not the rule in this state.

PRINCIPAL AND AGENT—MASTER AND SERVANT

RULE 70

§ 135. "A principal is liable to be sued for the torts of an agent either committed by the command of the principal, or subsequently assented to or ratified by him." Dicey, Rule 101.

Mechem Agency, § 732; Larson v. Fidelity Mut. Life Asso., 71 M. 101.

RULE 71

§ 136. "An employer or master is liable to be sued for the torts of his servant if committed in the course of the servant's employment, and for his master's benefit, or in other words, in the service of his master.[1]

Exception 1. Where the servant is injured by a fellow servant.[2]

Exception 2. Where the master is compelled by statute to employ a particular person.

Exception 3. Where the employer is a public officer under government." [3] Dicey, Rule 102.

[1] Malvehill v. Bates, 31 M. 364; Morier v. Ry. Co., 31 M. 351; Osborne v. McMasters, 40 M. 103; Potulni v. Saunders, 37 M. 517; Gunderson v. Elevator Co., 47 M. 161; Ellegard v. Acklund, 43 M. 352; Brazil v. Peterson, 44 M. 212; Fay v. Davidson, 13 M. 523 G. 491; Johanson v. Pioneer Fuel Co., 72 M. 405; Campbell v. Ry. Co., 51 M. 488; Smith v. Munch, 65 M. 256.

[2] Fraser v. Lumber Co., 45 M. 235; Lindvall v. Woods, 41 M. 212; Bergquist v. Minneapolis, 43 M. 471; Marsh v. Herman, 47 M. 537; Brown v. Ry. Co., 27 M. 162; Brown v. Ry. Co., 31 M. 553; Fraker v. Ry. Co., 32 M. 54; Gonsier v. Ry. Co., 36 M. 385; Olson v. Ry. Co., 38 M. 117; Cornelison v. Ry. Co., 50 M. 23; Ling v. Ry. Co., 50 M. 160; Hefferen v. Ry. Co., 45 M. 471; Soutar v. Elevator Co., 68 M. 18.

[3] 19 Am. & Eng. Enc. Law 495.

RULE 72

§ 137. "A servant or other agent is liable to the person wronged for acts of misfeasance, or positive wrong, in the course of his employment,[1] but not for acts of non-feasance, or mere omission.

Subordinate rule. An action for tort may be brought either against the principal or against the immediate actor in the wrong, but cannot be brought against an intermediate agent." Dicey, Rule 103.

[1] Clark v. Lovering, 37 M. 120.

PARTNERS

RULE 73

§ 138. "One, or any, or all of the partners in a firm, or members of an unincorporated company, may be sued jointly for a wrong committed by the firm or company.[1]

Exception. Where partners are sued as co-owners of land." [2] Dicey, Rule 104.

[1] Coleman v. Pearce, 26 M. 123; Woodling v. Knickerbocker, 31 M. 268; Vanderburgh v. Bassett, 4 M. 242 G. 171; Fay v. Davidson, 13 M. 523 G. 491; Walker v. Johnson, 28 M. 147.

[2] 1 Lindley, Partnership, 198.

CORPORATIONS

RULE 74

§ 139. "A corporation or incorporated body can be sued for torts." Dicey, Rule 105.

Aldrich v. Printing Co., 9 M. 133 G. 123; Cooley, Torts, p. 119; Larson v. Fidelity Mutual Life Asso., 71 M. 101.

INFANTS

RULE 75

§ 140. "An infant may be sued for torts committed by him.[1]

Exception. Where his fraud is closely connected with a contract." [2] Dicey, Rule 106.

[1] Cooley, Torts, p. 103.

[2] Cooley, Torts, p. 106. Conrad v. Lane, 26 M. 389; Alt v. Graff, 65 M. 191.

HUSBAND AND WIFE—MARRIED WOMEN

RULE 76

§ 141. A husband cannot be sued for the torts of his wife. Laws 1897, ch. 10.

RULE 77

§ 142. A married woman may be sued for torts committed by her. G. S. '94, § 5532.

EXECUTORS AND ADMINISTRATORS

RULE 78

§ 143. An executor or administrator may be sued for any tort, not personal, committed by the decedent. G. S. '94, § 5912.

Sloggy v. Dilworth, 38 M. 179; Comstock v. Matthews, 55 M. 111; Green v. Thompson, 26 M. 500.

PARTIES IN ACTIONS OF AN EQUITABLE NATURE

General principles.

§ 144. "The grand principle which underlies the doctrine of equity in relation to parties is, that every judicial controversy should, if possible, be ended in one litigation; that the decree pronounced in the single suit should determine all rights, interests, and claims, should ascertain and define all conflicting relations, and should forever settle all questions pertaining to the subject matter." Pomeroy, Remedies, § 247. See also, Fish v. Berkey, 10 M. 199 G. 161; Winslow v. Ry. Co., 4 M. 313 G. 230; Johnson v. Robinson, 20 M. 170 G. 153; Crump v. Ingersoll, 44 M. 84; Graham v. Minneapolis, 40 M. 436; Jackson v. Holbrook, 36 M. 494, 501.

§ 145. "It is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject-

matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind them all." Winslow v. Ry. Co., 4 M. 313 G. 230; North v. Broadway, 9 M. 183 G. 169.

§ 146. "The question of who shall be made parties to a proceeding in equity, is a question of convenience and discretion, rather than of absolute right, and a question to be determined according to the exigencies of the particular case." Baldwin v. Canfield, 26 M. 43, 59; Northwestern Cement Co. v. Augsburg Seminary, 43 M. 449.

§ 147. "The complaint must show that the person sought to be made defendant has an interest in the subject-matter of the action, and it is not sufficient that the defendant may be in some way affected by the decree." Newman v. Ins. Co., 20 M. 422 G. 378; McNair v. Toler, 21 M. 175; Banning v. Bradford, 21 M. 308.

Who should be joined as plaintiffs.

§ 148. At common law one judgment had to be rendered alike for all the plaintiffs and against all the defendants on the record. In consequence it was a matter of primary importance whether a party was plaintiff or defendant. It was otherwise in equity practice. The decree was flexible and the rights and obligations of the parties could be defined regardless of whether they were plaintiffs or defendants. As a result of this flexibility in equity procedure there are no sharply defined rules as to parties. In an equitable action it matters little whether a party is made a plaintiff or defendant. In every action there is one person or a group of persons seeking equitable relief. All persons whose rights and interests are concurrent with the plaintiff's must be made parties and may be made co-plaintiffs, though in practice they are usually made defendants. See Pomeroy, Remedies, § 248 *et seq.* For an excellent statement of the equity rules see the code rules given under § 25.

§ 149. In equitable actions there is a necessary and im-

portant distinction as respects parties defendant between those who are necessary and those who are merely proper. Necessary parties are those without whom no decree at all can be effectively made determining the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy and conclude the rights of all the persons who have any interest in the subject matter of the litigation. Pomeroy, Remedies, § 329. Reiser v. Gigrich, 59 M. 368; Tatum v. Roberts, 59 M. 52. See Foster v. Landon, 71 M. 494, and North v. Bradway, 9 M. 183 G. 169, as to multifariousness.

MISCELLANEOUS CASES DETERMINING QUESTIONS AS TO PARTIES

Accounting.

§ 150. Fish v. Berkey, 10 M. 199 G. 161; Palmer v. Tyler, 15 M. 106 G. 81; Wilcox v. Comstock, 37 M. 65; Reiser v. Gigrich, 59 M. 368; Smith v. Glover, 44 M. 260; Judd v. Dike, 30 M. 380.

Account stated.

§ 151. Reed v. Pixley, 22 M. 540.

Adverse claims—action to determine.

§ 152. Baker v. Thompson, 36 M. 314; Ware v. Easton, 46 M. 180; Shepherd v. Ware, 46 M. 174 (unknown claimants); Hunter v. Cleveland Stove Co., 31 M. 505 (action by assignee for creditors); Campbell v. Jones, 25 M. 155.

Assignor in action against assignee.

§ 153. Redin v. Branhan, 43 M. 283.

Bonds.

§ 154. Commissioners v. Knudson, 74 N. W. 158 (county treasurer's bond); Steffes v. Lemke, 40 M. 27 (mechanic's lien bond); Prosser v. Hartley, 35 M. 340 (assignee's bond); Lanier v. Irvine, 24 M. 116 (administrator's bond); Sprague v. Wells, 47 M. 504 (ordinary penal bond for the performance of a building contract); St. James v. Hingtgen, 47 M. 521 (liquor seller's

bond); Breen v. Kelley, 45 M. 352; St. Paul v. Butler, 30 M. 459; Morton v. Power, 33 M. 521; State Bank v. Heney, 40 M. 141; Tompkins v. Forrestal, 54 M. 119 (bonds given to municipalities by contractors for the payment of wages, etc.); Commissioners v. Smith, 22 M. 97 (county official's bond); First Nat. Bank v. How, 28 M. 150; O'Gorman v. Lendeke, 26 M. 92; Berkey v. Judd, 31 M. 271 (executor's bond); Longfellow v. McGregor, 61 M. 494 (bond by mortgagor to mortgagee for rebuilding house destroyed by fire); Moede v. Haines, 66 M. 419 (election bond under G. S. '94, § 193); Bohn v. McCarthy, 29 M. 23 (mechanic's lien bond—right of action in sub-contractor); Buck v. Lewis, 9 M. 314 G. 298 (replevin bond).

Cancellation of instruments.

§ 155. Smith v. Lytle, 27 M. 184; Crump v. Ingersoll, 44 M. 85.

Certiorari.

§ 156. State v. Fitch, 30 M. 532.

Cloud upon title—action to remove.

§ 157. Sanborn v. Eads, 38 M. 211; Baldwin v. Canfield, 26 M. 43; Village of Mankato v. Willard, 13 M. 13 G. 1; Johnson v. Robinson, 20 M. 170 G. 153; Redin v. Branhan, 43 M. 283; Paine v. Ry. Co., 14 M. 65 G. 49; Styler v. Sprague, 63 M. 414.

Conspiracy.

§ 158. Jones v. Morrison, 31 M. 140.

Composition agreement—action on.

§ 159. Brown v. Farnham, 55 M. 27.

Corporations.

§ 160. Rothwell v. Robinson, 39 M. 1; Horn Silver Mining Co. v. Ryan, 42 M. 196; Hodgson v. Ry. Co., 46 M. 454; Mitchell v. Bank, 7 M. 252 G. 192; Jones v. Morrison, 31 M. 140; Joslyn v. St. Paul Distilling Co., 44 M. 183; Dunn v. State Bank, 59 M. 221; Baldwin v. Canfield, 26 M. 43; Morrill v. Little Falls Mfg. Co., 46 M. 260; Mealey v. Nickerson, 44 M. 430.

Death by wrongful act.

§ 161. Nash v. Towsley, 28 M. 5.

Divorce—action to set aside for fraud.

§ 162. Bomsta v. Johnson, 38 M. 230.

Divorce—action to secure and alimony.

§ 163. Thurston v. Thurston, 58 M. 279.

Ejectment.

§ 164. Bagley v. Sternberg, 34 M. 470; Marks v. Jones, 71 M. 274 (servant).

Fraud.

§ 165. Smith v. Glover, 44 M. 260.

Fraudulent conveyances.

§ 166. Johnston v. Piper, 4 M. 192 G. 133; North v. Bradway, 9 M. 183 G. 169; Campbell v. Jones, 25 M. 155; Leonard v. Green, 34 M. 137; Sawyer v. Harrison, 43 M. 297; Tatum v. Roberts, 59 M. 52; Nat. Ger. Am. Bank v. Lawrence, 79 N. W. 1016.

Garnishment.

§ 167. Ide v. Harwood, 30 M. 191; Lord v. Meachem, 32 M. 66.

Injunction.

§ 168. Graham v. Minneapolis, 40 M. 436; Waseca County Bank v. McKennon, 32 M. 468.

Insurance.

§ 169. Allis v. Ware, 28 M. 166; Graves v. Ins. Co., 46 M. 130; Maxcy v. Ins. Co., 54 M. 272; Kausal v. Ins. Asso., 31 M. 17; Ermentrout v. Ins. Co., 60 M. 418.

Judgments—actions to set aside.

§ 170. McNair v. Toler, 21 M. 175; Stewart v. Duncan, 40 M. 410.

Landlord and tenant.

§ 171. Lucy v. Wilkins, 33 M. 21 (action for rent); Dickinson Company v. Fitterling, 72 M. 483 (action on lease by party to whom rent was payable).

Malicious prosecution.

§ 172. Cochrane v. Quackenbush, 29 M. 376.

Malpractice.

§ 173. Whittaker v. Collins, 34 M. 299.

Mechanics' liens—foreclosure of.

§ 174. The original contractor is a necessary party to an action by a subcontractor. Northwestern etc. Co. v. Norwegian Seminary, 43 M. 449. The owner is a necessary party. Jewett v. Land Co., 64 M. 531. If the property changes hands before the commencement of the suit to foreclose the owner at that time should be made a party. Corser v. Kindred, 40 M. 467; Burbank v. Wright, 44 M. 544; Hokanson v. Gunderson, 54 M. 499. Other claimants of record under the lien law are necessary parties. Menzel v. Tubbs, 51 M. 364. All incumbrancers should be made parties. Finlayson v. Crooks, 47 M. 74; Bassett v. Menage, 52 M. 121; Moran v. Clarke, 59 M. 456. Bringing in parties. Wheaton v. Berg, 50 M. 525. Where an insolvent debtor is entitled to a lien for labor or materials, his assignee in insolvency may prosecute and enforce the same. Miller v. Condit, 52 M. 455.

Mortgage—action to have mortgage adjudged paid.

§ 175. Redin v. Branhan, 43 M. 283.

Mortgage—action to foreclose.

§ 176. Banning v. Bradford, 21 M. 308; Finlayson v. Crooks, 47 M. 74; Foster v. Johnson, 44 M. 290; Hill v. Townley, 45 M. 167; Nichols v. Randall, 5 M. 304 G. 240; Hawke v. Banning, 3 M. 67 G. 30; Wilson v. Jamison, 36 M. 59; Morey v. Duluth, 69 M. 5; Rogers v. Holyoke, 14 M. 220 G. 158; First Nat. Bank v. Lambert, 63 M. 263.

Negligence.

§ 177. Moran v. St. Paul, 54 M. 279; Flaherty v. Ry. Co., 39 M. 328.

Negotiable instruments.

§ 178. Sandwich Mfg. Co. v. Herriott, 37 M. 214; Vanstrom v. Liljengren, 37 M. 191; Hammel v. Beardsley, 31 M. 314.

Nuisance.

§ 179. Eastman v. Water Power Co., 12 M. 137 G. 77;

Grant v. Schmidt, 22 M. 1; Ofstie v. Kelly, 33 M. 440; Sloggy v. Dilworth, 38 M. 179; Township of Hutchinson v. Filk, 44 M. 536 (town may sue in its own name); Kray v. Muggli, 79 N. W. 964.

Partition.

§ 180. Welsh v. Marks, 39 M. 481; Bonham v. Weymouth, 39 M. 92.

Partnership.

§ 181. Whittaker v. Collins, 34 M. 299; Palmer v. Tyler, 15 M. 106 G. 81; Berkey v. Judd, 22 M. 287; Miles v. Wann, 27 M. 56; Walker v. Johnson, 28 M. 147; Hoard v. Clum, 31 M. 186; Fuller v. Nelson, 35 M. 213; Henning v. Raymond, 35 M. 303; Sandwich Mfg. Co. v. Herriott, 37 M. 214; Crosby v. Timolat, 50 M. 171; Baker v. Thompson, 36 M. 314; Wood v. Cullen, 13 M. 394 G. 365; Pease v. Rush, 2 M. 107 G. 89.

Penalties.

§ 182. Soule v. Thelander, 31 M. 227.

Principal and agent.

§ 183. Miller v. Bank, 57 M. 319.

Quo warranto.

§ 184. State v. Somerby, 42 M. 55.

Reformation of deed.

§ 185. Watson v. Ry. Co., 46 M. 321; Newman v. Home Ins. Co., 20 M. 422 G. 378.

Replevin.

§ 186. Miller v. Darling, 22 M. 303; Chadbourn v. Rahilly, 34 M. 346.

Seduction.

§ 187. Schmidt v. Mitchell, 59 M. 251.

Sheriff—action against.

§ 188. Richardson v. McLaughlin, 55 M. 489.

Specific performance.

§ 189. Steele v. Taylor, 1 M. 274 G. 210; Seager v. Burns,

4 M. 141 G. 93; Oliver Mining Co. v. Clark, 65 M. 277; Morton v. Stone, 39 M. 275; McCarthy v. Couch, 37 M. 124.

Trespass to land.

§ 190. Morrell v. Ry. Co., 49 M. 526; Hertz v. Klinkhammer, 39 M. 488; Noon v. Finnegan, 29 M. 418 (action by administrator).

Trusts.

§ 191. Fish v. Berkey, 10 M. 199 G. 161; Winslow v. Ry. Co., 4 M. 313 G. 230; Redin v. Barnhan, 43 M. 283; Leonard v. Green, 34 M. 137; Mayall v. Mayall, 63 M. 511; Third Nat. Bank v. Stillwater Gas Co., 36 M. 75; Nat. Ger. Am. Bank v. Lawrence, 79 N. W. 1016.

Unlawful detainer.

§ 192. Judd v. Arnold, 31 M. 430; Burton v. Rohrbeck, 30 M. 393; Bagley v. Sternberg, 34 M. 470.

Warranty of title—action upon.

§ 193. Bausman v. Eads, 46 M. 148.

CHAPTER III

BRINGING IN PARTIES

§ 194. "Whenever the plaintiff, or defendant, in case of a counterclaim or of a demand for affirmative relief, or his agent or attorney, in any action now or hereafter pending in any of the district courts of this state, shall discover that any party ought, in order to a full determination of such action, to have been made a plaintiff, or defendant therein, and shall make an affidavit stating the pendency of such action, and the reasons why the party ought to have been made a plaintiff or defendant therein, and present the same to said court or to a judge thereof, the said court or judge shall, if such reasons are deemed sufficient, grant an order reciting the summons by which the action was commenced, and requiring the said party to appear and answer the complaint in said summons named, or reply to the answer when the same contains a counterclaim or a demand for affirmative relief, within twenty (20) days after the service of such order upon him, exclusive of the day of such service; and in default thereof, the judgment or relief demanded in such complaint or answer will be rendered against him, in all respects as though he had been made a party to such action in the first instance. The order shall be served upon the party in the manner now provided by law for the service of a summons in said court in civil actions. The said court or judge may, upon application of the plaintiff or of the defendant, as the case may be, at the time of applying for the order named in section forty-three (43) aforesaid, or at any time thereafter, make an order staying all further proceedings in said action for such time as may be necessary to enable the plaintiff or defendant as the case may be, to have the additional party in said action named brought into court. After a party has been brought into court under the provisions of this act, the action shall proceed against all the parties thereto in the same manner as though they had all

been originally named as parties therein." Laws 1895, ch. 29. State v. Ry. Co., 39 M. 219; Northwestern Cement Co. v. Augsburg Seminary, 43 M. 449; Chadbourn v. Rahilly, 34 M. 346; Cover v. Baytown, 12 M. 124 G. 71; Johnson v. Robinson, 20 M. 170 G. 153; Harper v. Carroll, 66 M. 507; Smith v. St. Paul, 65 M. 295; Davis v. Sutton, 23 M. 307; Penfield v. Wheeler, 27 M. 358; Boen v. Evans, 72 M. 169; Markell v. Ray, 77 N. W. 788 (a minor).

§ 195. Failure to bring in parties as ordered may be made ground for dismissal. Johnson v. Robinson, 20 M. 170 G. 153; Northwestern Cement Co. v. Augsburg Seminary, 43 M. 449.

CHAPTER IV

REMEDIES FOR NONJOINDER AND MISJOINDER OF PARTIES

Defect of parties plaintiff or defendant.

§ 196. Where there is a defect of parties plaintiff or defendant, if the defect appears on the face of the complaint, the objection must be taken by demurrer; if the defect does not appear on the face of the complaint, the objection may be taken by answer; and if no such objection is taken either by demurrer or answer, the defendant is deemed to have waived the same. The objection cannot be raised on the trial by motion for dismissal, for judgment on the pleadings or for a directed verdict or by objection to evidence. The rule is the same in actions *ex contractu* and actions *ex delicto*. There is no distinction between a defect of parties plaintiff and of parties defendant. Davis v. Chouteau, 32 M. 548 (leading case); Lowry v. Harris, 12 M. 255 G. 166; Stewart v. Trans. Co., 17 M. 372 G. 348; McRoberts v. Ry. Co., 18 M. 108 G. 91; Blakeley v. Le Duc, 22 M. 476; Miller v. Darling, 22 M. 303; Jones v. Minneapolis, 31 M. 230; Tarbox v. Gorman, 31 M. 62; Allis v. Ware, 28 M. 166; Baldwin v. Canfield, 26 M. 43; Sandwich Mfg. Co. v. Herriott, 37 M. 214; Arthur v. Willius, 44 M. 409; Densmore v. Shepard, 46 M. 54; Christian v. Bowman, 49 M. 99; Thurston v. Thurston, 58 M. 279; Moore v. Bevier, 60 M. 240; Stewart v. Ry. Co., 65 M. 515; Harper v. Carroll, 66 M. 487; Northwestern Cement Co. v. Augsburg Seminary, 43 M. 449; Graham v. Minneapolis, 40 M. 436; Porter v. Fletcher, 25 M. 493; Cover v. Baytown, 12 M. 124 G. 71; Benson v. Silvey, 59 M. 73; Bell v. Mendenhall, 71 M. 331; Pomeroy, Remedies, § 207.

Bringing in party.

§ 197. If a party is named as a defendant in the title of the action but is not brought in as a party by service of the summons on him, the proper practice is for the court to continue

the action or delay the trial until he is brought in as a party. Northwestern Cement Co. v. Augsburg Seminary, 43 M. 449.

Defect how pleaded.

§ 198. The objection of defect of parties whether raised by demurrer or answer must be distinctly raised and must specifically show wherein the defect consists, naming the person who should have been joined. Davis v. Chouteau, 32 M. 548; Jones v. Minneapolis, 31 M. 230; Jaegar v. Sunde, 70 M. 356; Mitchell v. Thorne, 134 N. Y. 536.

Misjoinder of parties plaintiff.

§ 199. If a party is unnecessarily or improperly joined as a plaintiff the defendant may raise the objection on the trial by a motion to strike out the name of the party improperly joined; or by a motion for a dismissal of the action as respects such party; or by a demurrer, not specifically on the ground of misjoinder but on the ground that the complaint does not state facts sufficient to constitute a cause of action as respects such party; or by answer if the misjoinder does not appear upon the face of the complaint. Wiesner v. Young, 50 M. 21; Pomeroy, Remedies, §§ 209–216. The objection cannot be raised for the first time on appeal. Breault v. Lumber Co., 72 M. 143.

Misjoinder of parties defendant.

§ 200. Misjoinder of parties is not specifically a ground for demurrer but if it appears upon the face of a complaint that a party has been improperly joined as a defendant such party may demur on the ground that the complaint does not state facts sufficient to constitute a cause of action. Such a demurrer should be interposed only by the party improperly joined for a joint demurrer fails if the complaint is good as to any of the joint demurrants. The safer practice, therefore, is for each defendant who wishes to raise the objection to demur separately. If the misjoinder does not appear upon the face of the complaint the objection may be raised by a separate answer. The objection may also be raised on the trial by a motion for dismissal as to the party improperly

joined or by a motion to strike out his name. Pomeroy, Remedies, § 291; Lewis v. Williams, 3 M. 151 G. 95; Mitchell v. Bank, 7 M. 252 G. 192; Goncelier v. Foret, 4 M. 13 G. 1.

§ 201. A party who is properly made a defendant cannot raise the objection that others are improperly joined with him as defendants by demurrer. Lewis v. Williams, 3 M. 151 G. 95; Mitchell v. Bank, 7 M. 252 G. 192; Nichols v. Randall, 5 M. 304 G. 240; Seager v. Burns, 4 M. 141 G. 93.

CHAPTER V

ABATEMENT OF ACTIONS

The statute.

§ 202. "An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest, if the cause of action survives or continues. In case of the death, marriage, or other disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be added or substituted in the action. After a verdict of a jury, decision or finding of a court or report of a referee, in any action for a wrong, such action shall not abate by the death of any party." G. S. '94, § 5171.

A court has no jurisdiction over a deceased person.

§ 203. Although it is error for a court to exercise jurisdiction over a person after his death by rendering a judgment for or against him, yet if the court had jurisdiction of the person and subject-matter such a judgment would not be void but merely voidable. Hayes v. Shaw, 20 M. 405 G. 355; Stocking v. Hanson, 22 M. 542.

Motion for a continuance.

§ 204. "A motion to substitute in an action the successor in interest of a party deceased takes the place of the former bill of revivor and original bill in the nature of revivor and is the proper mode for allowing such substitution in all cases. Upon such a motion the facts on which it is based may be contested." Landis v. Olds, 9 M. 90 G. 79. See also Lee v. O'Shaughnessy, 20 M. 173 G. 157; Chisholm v. Clitherall, 12 M. 375 G. 251. The remedy by substitution is exclusive. Lough v. Pitman, 25 M. 120.

When motion must be made.

§ 205. Whether a party has exercised proper diligence in moving for a substitution is a question that is necessarily left to the discretion of the trial court. See Waite v. Coaracy, 45 M. 159; Boeing v. McKinley, 44 M. 392. See also under old statute, Lee v. O'Shaughnessy, 20 M. 173 G. 157; Stocking v. Hanson, 22 M. 542.

How far substitution a matter of discretion.

§ 206. "Although the statute in terms is permissive and not mandatory of the substitution, yet it is not to be understood that the court is at liberty to exercise an arbitrary discretion in regard thereto, but in case of death, at least of the plaintiff, where the action cannot proceed without substitution, it should always be allowed unless good cause be shown to the contrary. In case of the death of the plaintiff, his executor would usually be entitled to substitution, though not necessarily so, as he might not be the 'successor in interest' of the particular property in litigation." Landis v. Olds, 9 M. 90 G. 79.

§ 207. In an action on a joint and several contract, if one of the defendants dies, the action may be continued against the survivors, without joining the representatives of the deceased defendant. Lanier v. Irvine, 24 M. 116.

§ 208. Statute applied: Waite v. Coaracy, 45 M. 159; Cooper v. Ry. Co., 55 M. 134; Brown v. Brown, 35 M. 191 (foreign administrator).

Assignee must prosecute.

§ 209. An action may be continued in the name of the original plaintiff although he has assigned the right of action *pendente lite*. Whitaker v. Culver, 9 M. 295 G. 279; Chisholm v. Clitherall, 12 M. 375 G. 251; Bennett v. McGrade, 15 M. 132 G. 99; Nichols v. Ry. Co., 36 M. 452.

§ 210. "The real party in interest must prosecute the action, but it may be continued in the name of the original party. When the transfer is made the rights of the assignor terminate, and he can take no further steps in the action, and the

assignee will be recognized in all future proceedings, although he may proceed in the name of the assignor. But the court cannot take judicial notice of such transfer, and the parties on the record are the only ones who are entitled to the notice of the court, and until such transfer is properly brought to the attention of the court the parties to the record are *prima facie* entitled to proceed. If, therefore, a transfer of interest takes place *pendente lite*, and the assignee desires to proceed, whether in the name of the original party or otherwise, he must, in a proper proceeding, establish the fact of the transfer and obtain the leave of the court to continue the action in the name of the original plaintiff or be added or substituted in the action; for, if a person claiming to be the assignee of a cause of action, whose title is denied by the plaintiff of record, is permitted to proceed in the action without first having a favorable determination of his right, it is manifest that persons representing conflicting interests may be proceeding at the same time as plaintiffs, in the same cause, whose number will be limited only by the number of persons claiming to be assignees, thus producing interminable confusion. But since under our statute the court will recognize the real owner of the claim as the proper party, the assignee must present his claim for adjudication upon the record, and be permitted to continue the action with notice to all the parties; and if the plaintiff has taken any proceedings without his consent, unless the rights of other parties prevent, they may then be set aside." Chisholm v. Clitherall, 12 M. 375 G. 251. See further, Slosson v. Ferguson, 31 M. 448; Bradley v. Ry. Co., 38 M. 234; Keough v. McNitt, 7 M. 29 G. 15.

§ 211. Whether there shall be a substitution of the assignee or the action proceed in the name of the original party is a matter of discretion with the trial court. Brown v. Kohout, 61 M. 113.

§ 212. A person cannot sue upon a claim which he has assigned. Saint Anthony Mill Co. v. Vandall, 1 M. 246 G. 195; Johnson v. Robinson, 20 M. 170 G. 153; Maloney v. Finnegan, 40 M. 281.

Substitution of administrator or executor.

§ 213. An administrator or executor may be substituted for the decedent in an action begun prior to his death. Brown v. Brown, 35 M. 191; Stocking v. Hanson, 22 M. 542.

CHAPTER VI

ASSIGNMENT OF THINGS IN ACTION

Common law rule.

§ 214. "At common law, a chose in action was not assignable, and the assignee could not maintain an action in his own name, but the action must be prosecuted in the name of the person in whom the legal title existed. In equity it was otherwise, and the action was prosecuted in the name of the real party in interest. The courts of law, however, long since recognized the equitable principle that a chose in action was assignable; not, however, to the extent of allowing the assignee to bring an action in his own name, but so far as to protect his rights as against the assignor, and all other persons, and permit him to use the name of the assignor in an action for his benefit." Chisholm v. Clitherall, 12 M. 375, G. 251.

Assignee may now sue in his own name.

§ 215. The primary object of G. S. '94, § 5156, requiring every action to be prosecuted in the name of the real party in interest was to enable the assignee of a thing in action to sue in his own name.[1] But that statute does not render any cause of action assignable which was not assignable before its enactment. "The assignability of demands lying in action was well known prior to the codes of procedure. All contracts in the form of negotiable paper were of course transferable, so that the holder could sue upon them in courts of law in his own name. Other things in action were truly assignable, so that the assignee was regarded as the real owner, but on account of certain ancient technical rules of the common law, which had never been abrogated, he was obliged to bring an action on them at law in the name of the assignor; but if the subject was within the cognizance of a court of equity, he could sue in that tribunal in his own name. The effect of the codes is to extend this equity rule to legal ac-

tions. To ascertain what demands are thus transferable, we must recur to rules established prior to and independent of the new system which regulates procedure." [2]

[1] Castner v. Austin, 2 M. 46 G. 32.

[2] Pomeroy, Remedies, § 145.

Test of assignability.

§ 216. The test of assignability is somewhat arbitrary. The title of an executor or administrator is regarded by common law as a title by assignment. In determining what causes of action survived to the personal representatives the courts were necessarily determining questions of assignability and so, naturally enough but nevertheless arbitrarily, they adopted survivability as a general test of assignability. This test remains unaffected by modern legislation. "Whatever rights of action or of property survive to an executor or administrator are assignable." While modern legislation has left the test of assignability unchanged it has greatly enlarged the common law right of assignment in statutes defining what rights of action survive to the personal representatives of a deceased person. Pomeroy, Remedies, § 145; Tuttle v. Howe, 14 M. 145 G. 113 (mechanic's lien); Harbord v. Cooper, 43 M. 466; Sibley v. County of Pine, 31 M. 201 (lien of attorney). But see Hammond v. Peyton, 34 M. 529; Law v. Butler, 44 M. 482, (vendor's lien).

What causes of action survive and therefore assignable.

§ 217. "A cause of action arising out of an injury to the person dies with the person of either party, except as provided in the next section. All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former, and against the personal representatives of the latter." G. S. '94, § 5912; Billson v. Linderberg, 66 M. 66.

Rights of action ex contractu.

§ 218. All rights of action arising out of contracts not purely personal in their nature are assignable. Pomeroy, Remedies, § 147; Bates v. Lumber Co., 56 M. 14 (the beneficial

interest in a contract for work and labor); Kimball v. Bryant, 25 M. 496; Lowry v. Tilleny, 31 M. 500 (a right of action for the breach of a covenant of seizin); Harbord v. Cooper, 43 M. 466 (a contract guaranteeing the payment of a note). Anchor Invest. Co. v. Kirkpatrick, 59 M. 378 (a guaranty of payment of an indebtedness); Blakeley v. Le Duc, 22 M. 476 (a right of action against a carrier for failure to carry safely); Sepp v. McCann, 47 M. 364 (a right of action on a contractor's bond); Hurley v. Bendel, 67 M. 41 (a claim for services of threshing machine); Brown v. Equitable Life Assur. Soc., 78 N. W. 103, 79 N. W. 968 (a policy of insurance).

Rights of action ex delicto.

§ 219. It is the general rule that a right of action for a personal tort is not assignable,[1] but a verdict in an action for a personal tort may be assigned [2] and a right of action for a tort other than personal is assignable.[3]

[1] Green v. Thompson, 26 M. 500; Hunt v. Conrad, 47 M. 557; Hammons v. Ry. Co., 53 M. 249.

[2] Kent v. Chapel, 67 M. 420.

[3] Pomeroy, Remedies, § 147; 2 Am. & Eng. Ency. Law (2nd Ed.) 1020.

Partial assignments.

§ 220. An assignment of a part interest in a demand or obligation may be made and the courts will recognize and protect the equitable interest of the assignee. But a separate and independent action cannot be maintained by such assignee, to recover his share of the debt, where the debtor refuses to consent to, or recognize, the assignment. The proper practice is for the assignee and assignor to join as plaintiffs. If the assignor refuses to join as plaintiff he may be made a defendant, the reasons therefor being stated in the complaint. Schilling v. Mullen, 55 M. 122; Dean v. Ry. Co., 53 M. 504; Canty v. Latterner, 31 M. 242. See Wheaton v. Spooner, 52 M. 417.

Mode of assignment.

§ 221. No particular form of words is necessary in mak-

ing an assignment of a thing in action. An oral assignment is sufficient and the delivery of the written evidence of a debt with intent to assign is equally so. Crone v. Braun, 23 M. 239; McDonald v. Kneeland, 5 M. 352 G. 283; Blakeley v. Le Duc, 22 M. 476; Hurley v. Bendel, 67 M. 41.

Effect of assignment.

§ 222. An assignee of a thing in action stands in the shoes of the assignor. He acquires equal but no greater rights than his assignor. The purchaser of a thing in action must always abide by the case of the person from whom he buys. McDonald v. Kneeland, 5 M. 352 G. 283; Linn v. Rugg, 19 M. 181 G. 145.

Assignee takes subject to defences and setoffs.

§ 223. "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defence existing at the time of, or before notice of, the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before due." G. S. '94, § 5157; Pomeroy, Remedies, § 154; Brisbin v. Newhall, 5 M. 273 G. 217; State v. Lake City, 25 M. 404; Wilcox v. Comstock, 37 M. 65; Way v. Colyer, 54 M. 14; Davis v. Sutton, 23 M. 307; Webb v. Michener, 32 M. 48; Wyvell v. Barwise, 43 M. 171; Lynch v. Free, 64 M. 277. But an assignee of a thing in action takes it free from equities of third parties of which he has no notice. Moffett v. Parker, 71 M. 139 and cases cited.

§ 224. Suppose A. has a claim against B. (1) If A. assigns the claim to C. and C. sues B. thereon, B. may set up all defences, whether legal or equitable, he had to the claim at the time he received notice of the assignment and if he has a counterclaim against A. existing at the time of the assignment, which he might have set up in an action by A. he may set it up as a setoff (but not as a counterclaim) against C. Davis v. Sutton, 23 M. 307; Linn v. Rugg, 19 M. 181 G. 145; Webb v. Michener, 32 M. 48; Lynch v. Free, 64 M. 277.

(2) If C. assigns the claim to D. and D. sues B. thereon, B. may plead all the defences which he had against A. and

he may set up all the defences or setoffs that he has against A. C. or D. and which existed at the time he received notice of the several assignments. Bryant, Code Pl., § 95.

Assignment of mortgage.

§ 225. An assignment of a mortgage, although it secures a negotiable promissory note, passes to the assignee as an ordinary thing in action, subject to all equities in favor of the mortgagor, prior to notice of the assignment. Johnson v. Carpenter, 7 M. 176 G. 120; Hostetter v. Alexander, 22 M. 559; Oster v. Mickley, 35 M. 245; Redin v. Branhan, 43 M. 283; Blumenthal v. Jassoy, 29 M. 177; Scott v. Austin, 36 M. 460; White v. Miller, 52 M. 367; Olson v. Guaranty Loan Co., 65 M. 475; Watkins v. Goessler, 65 M. 120; Commonwealth Title Ins. Co. v. Dokko, 72 M. 229. But not as to equities of third parties. Moffett v. Parker, 71 M. 139.

Overdue commercial paper.

§ 226. According to the commercial law, the rule formerly was that an indorsee of an overdue bill of exchange or negotiable promissory note took it subject only to such equities or defences as attached to the bill or note itself, and not to offsets or other claims arising out of collateral matters or independent transactions against the payee or an intermediate holder. But the statute places an overdue negotiable instrument on the same footing as any other thing in action, and, if assigned after due, a setoff to the amount of the note or bill may be made of any demand existing against any person who has assigned or transferred such note or bill after it became due, if the demand is such as might have been set off against the assignor while the note or bill belonged to him. La Due v. First Nat. Bank, 31 M. 33. See also, Linn v. Rugg, 19 M. 181 G. 145; Martin v. Pillsbury, 23 M. 175; Tuttle v. Wilson, 33 M. 422. But not as to equities of strangers to the paper. Plymouth Cordage Co. v. Seymour, 67 M. 311; Moffett v. Parker, 71 M. 139.

Latent equities.

§ 227. If A. assigns to B. a right of action against C. and

B. assigns the same to D. the latter takes it subject to any equities existing in A. against B. in the absence of any element of estoppel. Brown v. Equitable Life Assur. Soc., 78 N. W. 103; Id., 79 N. W. 968; Pomeroy, Remedies, § 158. See MacDonald v. Kneeland, 5 M. 352 G. 283.

Estoppel.

§ 228. If A., the owner of a thing in action against B., delivers the evidence of the thing in action to C. and upon the face thereof assigns it absolutely to C. and C. in turn assigns it to D. the latter takes it free of any equities existing in favor of A. against C. if he is a purchaser for a valuable consideration and without notice of A.'s equities. This is an application of the general rule that where one of two persons must suffer by the fraud of a third, he who has put it in the power of such third person to commit the fraud must be the sufferer. The equity of the innocent purchaser, though subsequent in time, is superior in degree to that of the defrauded assignor. Cochran v. Stewart, 21 M. 435; Newton v. Newton, 46 M. 33; McLaren v. Cochran, 44 M. 255; Globe Milling Co. v. Elevator Co., 44 M. 153; Cochran v. Stewart, 57 M. 499.

Notice.

§ 229. Notice to the obligor is not essential to the validity of an assignment of a thing in action as between the assignor and the assignee or as between the assignee and creditors of the assignor. MacDonald v. Kneeland, 5 M. 352 G. 283; Lewis v. Bush, 30 M. 244.

§ 230. Until receiving notice of the assignment the debtor or obligor may regard the assignor as owner and pay him the debt or acquire a claim against him which may be used as a setoff against the assignee. Dodd v. Brott, 1 M. 270 G. 205; Olson v. Guaranty Loan Co., 65 M. 475; Chisholm v. Clitherall, 12 M. 375 G. 251; Linn v. Rugg, 19 M. 181 G. 145; Martin v. Pillsbury, 23 M. 175.

Conflict between several assignees of same assignor.

§ 231. As between different assignees of a thing in action by express assignment from the same person, the one prior

in point of time will be protected, though neither the debtor nor the subsequent assignee had notice. MacDonald v. Kneeland, 5 M. 352 G. 283. To same effect, Fairbanks v. Sargent, 104 N. Y. 108.

An assignment carries securities and remedies.

§ 232. "The assignment of a demand entitles the assignee to every assignable remedy, lien, or security available by the assignor as a means of indemnity or payment, unless expressly excepted or reserved in the transfer of the demand." Schlieman v. Bowlin, 36 M. 198; Johnson v. Carpenter, 7 M. 176 G. 120; Bennett v. McGrade, 15 M. 132 G. 99; Lahmers v. Schmidt, 35 M. 434; Sherwood v. O'Brien, 58 M. 76; Anchor Invest. Co. v. Kirkpatrick, 59 M. 378; Blakeley v. Le Duc, 22 M. 476; Meeker Co. Bank v. Young, 51 M. 254; Hill v. Edwards, 11 M. 22 G. 5; Humphrey v. Buisson, 19 M. 221 G. 182; Johnson v. Lewis, 13 M. 364 G. 337; Harbord v. Cooper, 43 M. 466; Clifford v. Ry. Co., 55 M. 150; Kinney v. Duluth Ore Co., 58 M. 455; Bovey De Laittre Lumber Co. v. Tucker, 48 M. 223; Wood v. Bragg, 78 N. W. 93; Waller v. Staples, 77 N. W. 570.

CHAPTER VII

ELECTION OF REMEDIES

Definition.

§ 233. Election of remedies is the adoption of one of two or more coexisting and alternative remedies which the law affords upon the same state of facts.

Finality of election.

§ 234. Where it becomes necessary to elect between inconsistent remedies the election, when made with full knowledge of the facts, is final and cannot be reconsidered, even where no injury has been done by the choice or would result from setting it aside. Dyckerman v. Sevatson, 39 M. 132; Rheiner v. Union Depot etc. Co., 31 M. 289; Marshall v. Gilman, 52 M. 88; Quimby v. Shearer, 56 M. 534; Macomb etc. Co. v. Hanley, 61 M. 350; Thomas v. Joslin, 36 M. 1; Douglas v. Hermes, 53 M. 204; Johnson v. Johnson, 62 M. 302; Barnes v. Ins. Co., 56 M. 38; Smith v. Carlson, 36 M. 220; Ironton Land Co. v. Butchart, 75 N. W. 749; Bell v. Mendenhall, 71 M. 331; Roberge v. Winne, 144 N. Y. 709 and cases cited. See as to election to rescind a contract for fraud, Parsons v. McKinley, 56 M. 464; Crooks v. Nippolt, 44 M. 239 and cases under § 242.

§ 235. "A mere attempt to claim a right or pursue a remedy to which a party is not entitled, and without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of a right or remedy which he originally had a right to claim or resort to." In re Van Norman, 41 M. 494; Marshall v. Gilman, 52 M. 88; Bottineau v. Ins. Co., 31 M. 125; Rogers v. Benton, 39 M. 39; Cobb v. Bord, 40 M. 479; Cumbey v. Ueland, 72 M. 453; Schrepfer v. Ins. Co., 79 N. W. 1005.

§ 236. If the election proceeded upon a justifiable ignorance of material facts it will not be conclusive. Kraus v. Thompson, 30 M. 64.

§ 237. "One who has sought a legal remedy, but who has

withdrawn or discontinued the proceeding before any action had been had upon it, is not thereby debarred from seeking a different remedy, based upon a ground not inconsistent with that before taken." Bitzer v. Bobo, 39 M. 18; Spurr v. Ins. Co., 40 M. 424.

Statute of limitations.

§ 238. If a party has a right to several actions, one is not necessarily barred because the others are. Jackson v. Holbrook, 36 M. 494, 504. See Dole v. Wilson, 39 M. 330.

Election between actions ex contractu and ex delicto.

§ 239. In many instances a party who has a cause of action in tort may waive the tort and sue upon an implied contract. Where a party had a right of action at common law based upon a legal obligation which, by way of fiction and to meet the requirements of common law pleading, was called an "implied contract," he has the same right under the present system. The code has in no way impaired remedial rights based upon the common law doctrine of implied contracts. The only change is in the form of pleading. It is not now proper to allege the fictitious promise as was done in assumpsit. The facts giving rise to the legal obligation are to be set forth. The general principle as to election in this class of cases is thus formulated by Pomeroy: "From certain acts or omissions of a party creating a liability to make compensation in damages, the law implies a promise to pay such compensation. Whenever this is so, and the acts or omissions are at the same time tortious, the twofold aspect of the single liability at once follows, and the injured party may treat it as arising from the tort, and enforce it by an action setting forth the tortious acts or defaults; or he may treat it as arising from an implied contract, and enforce it by an action setting forth the facts from which the promise is inferred by the law." Pomeroy, Remedies, §§ 567–573.

§ 240. The following are the most frequent instances:

(a) When personal property has been converted the owner may waive the tort and sue on an implied contract to pay the

value of the goods or the contract price. This right of election exists although the wrong-doer retains possession of the property. Brady v. Brennan, 25 M. 210; Downs v. Finnegan, 58 M. 112; Town of Plainview v. Ry. Co., 36 M. 505, 515; McArthur v. Murphy, 76 N. W. 955; Terry v. Munger, 121 N. Y. 161; Norden v. Jones, 33 Wis. 600.

§ 241. (b) Where the law imposes a legal duty independent of contract relations, as, for example, in the case of carriers, innkeepers and physicians. Catlin v. Adirondack Co., 11 Abb. N. C. 377; Pomeroy, Remedies, § 570.

§ 242. (c) Where sales of personal property upon credit have been made through the fraudulent representations of the vendee the vendor has an election:

(1) To treat the sale as one for cash and sue immediately for the contract price. He may rescind the credit stipulation without rescinding the contract of sale. Kayser v. Sichel, 34 Barb. (N. Y.) 84; Foerster v. Gallinger, 62 Hun (N. Y.) 439; Crossman v. Universal Rubber Co., 127 N. Y. 34.

(2) To treat the contract as void and sue for conversion. Roth v. Palmer, 27 Barb. (N. Y.) 652; Dietz v. Sutcliffe, 80 Ky. 650.

(3) To treat the contract as void and replevy the property. Hannequin v. Naylor, 24 N. Y. 139; Roth v. Palmer, 27 Barb. (N. Y.) 652; Newell v. Randall, 32 M. 171; Slagie v. Goodnow, 45 M. 531; Moline-Milburn Co. v. Franklin, 37 M. 137.

§ 243. (d) Where money has been obtained by fraudulent representations or practices of any kind the injured party may waive the tort and sue for money had and received. Byxbie v. Wood, 24 N. Y. 607; People v. Wood, 121 N. Y. 522; Rothschild v. Mack, 115 N. Y. 1.

§ 244. In determining whether to sue on the contract or for the tort the following considerations are controlling:

(a) The action for tort may be barred by the statute of limitations while the action on contract is not.

(b) If the defendant is an infant he could plead infancy

in an action on contract while he could not in an action for tort.

(c) If the defendant is insolvent replevin is more effective than an action for conversion.

(d) If the defendant has wrongfully sold the property of the plaintiff for more than its value the latter should sue for money had and received and recover all rather than sue for conversion and recover actual value; but if he has sold it for less than value it would be better to sue for conversion and recover full value. For further considerations see 1 Chitty Pl. 229.

Election upon sale of property with warranty of quality.

§ 245. If under an executory contract for the sale of personal property of a particular quality the vendor transfers in fact to the vendee property in discharge of the contract which the vendee has not had an opportunity to examine, the vendee, if the right of property in the subject-matter of the contract has not passed to him by the bargain, may receive and retain the same sufficiently long to make a fair examination thereof and if it is substantially inferior in quality to the property bargained for he has an election of remedies; he may rescind the contract and within a reasonable time return the property to the vendor or notify him of the rejection and recover the price paid or he may retain the property and sue on the breach of warranty or recoup in an action for the price. Knoblauch v. Kronschnabel, 18 M. 300 G. 272; Cosgrove v. Bennett, 32 M. 371; Mandel v. Buttles, 21 M. 391; Fitzpatrick v. Osborne & Co., 50 M. 261; Scott v. Raymond, 31 M. 437; Parsons v. McKinley, 56 M. 464; Thompson v. Libby, 36 M. 287; McCormick Harvester Co. v. Chesrown, 33 M. 32. The rule is otherwise as respects executed sales. Close v. Crossland, 47 M. 500.

Election between statutory and common law remedies.

§ 246. If a statute creates a new substantive right and also a remedy for its enforcement such remedy is exclusive. So, also, if a statute provides a new remedy in a case already

remediable such remedy is exclusive if such was clearly the intent of the statute. City of Faribault v. Misener, 20 M. 396 G. 347; Abel v. Minneapolis, 68 M. 89; Allen v. Walsh, 25 M. 543; Griffin v. Chadbourne, 32 M. 126, 129; State Bank v. Heney, 40 M. 145; Johnson v. Fischer, 30 M. 173; Buffum v. Hale, 71 M. 190.

§ 247. On the other hand a new statutory remedy for a pre-existing substantive right will be deemed cumulative and concurrent unless the statute clearly intends the contrary. Eliason v. Sidle, 61 M. 285; Wacholz v. Griesgraber, 70 M. 220; Miller v. Chatterton, 46 M. 338; State v. American etc. Asso., 64 M. 349; State v. Educational Endow. Asso., 49 M. 158.

CHAPTER VIII

JOINDER OF CAUSES OF ACTION

The statutes.

§ 248. "The plaintiff may unite several causes of action in the same complaint, whether legal or equitable, when they are included in either of the following classes:

First. The same transaction, or transactions connected with the same subject of action;

Second. Contracts express or implied;

Third. Injuries, with or without force, to person and property, or either;

Fourth. Injuries to character; or,

Fifth. Claims to recover real property, with or without damages for withholding thereof, and the rents and profits of the same; or,

Sixth. Claims to recover personal property, with or without damages for the withholding thereof; or,

Seventh. Claims against a trustee by virtue of a contract, or by operation of law.

But the causes of action so united shall belong to one only, of these classes, and affect all the parties to the action, and not require different places of trial, and shall be separately stated." G. S. '94, § 5260.

"Whenever two or more actions are pending at any time between the same parties, and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated." G. S. '94, § 5271.

First subdivision.

§ 249. Gertler v. Linscott, 26 M. 82; Humphrey v. Merriam, 37 M. 502; Northwestern Railroader v. Prior, 68 M. 95 (a cause of action for tort may be joined with one on contract if they arise out of the same transaction or transactions connected with the same subject of action); Churchill v. Proctor, 31 M.

129 (action to foreclose and for an accounting); Greenleaf v. Egan, 30 M. 316 (action by principal against agent for conversion and an accounting); Winona etc. Ry. Co. v. Ry. Co., 26 M. 179 (action to compel conveyance from legal to equitable owner and for an accounting); Palmer v. Tyler, 15 M. 106 G. 81 (action for an accounting, the appointment of a receiver and to set aside a conveyance); First Division etc. Ry. Co. v. Rice, 25 M. 278 (action for the possession of a railroad, the appointment of a receiver, the payment of money and an accounting); Montgomery v. McEwen, 7 M. 351 G. 276 (action for the recovery of amount due on a note, and for delivery of and cancelling a note and mortgage forming a part of the same transaction); Aldrich v. Wetmore, 56 M. 20 (action for injuries from noxious vapors from cesspool in an excavation and for damages from depositing dirt from such excavation); Fish v. Berkey, 10 M. 199 G. 161 (action against trustee as such and against him personally); Shackleton v. Kneisley, 48 M. 451 (action for an accounting and to wind up a copartnership); Jones v. Morrison, 31 M. 140 (action for several acts of conspiracy); Whiting v. Clugston, 75 N. W. 759 (action for appointment of a receiver, collection of rents and application of same on debt and a personal judgment); Kraemer v. Deustermann, 37 M. 469 (for money wrongfully withheld and for money wrongfully or fraudulently exacted and paid); Mulvehill v. Bates, 31 M. 364 (action by parent for damages resulting from injury to child with claim for sickness and suffering of child); Nichols v. Randall, 5 M. 304 G. 240 (action for sale of mortgaged premises, surrender of a quitclaim deed and personal judgment against maker of note for any deficiency); Little v. Willford, 31 M. 176 (an action for an injunction and for damages); Ham v. Johnson, 51 M. 105 (reformation and specific performance may be granted in same action). See also cases cited under §§ 560–565.

Fifth subdivision.

§ 250. Armstrong v. Hinds, 8 M. 254 G. 221; Holmes v. Williams, 16 M. 164 G. 146; Merrill v. Dearing, 22 M. 376;

Lord v. Dearing, 24 M. 110; Pierro v. Ry. Co., 37 M. 314. See § 887.

Must affect all the parties.

§ 251. Saunders v. Classon, 13 M. 379 G. 352; Trowbridge v. Forepaugh, 14 M. 100 G. 133; Berg v. Stanhope, 43 M. 176; Langevin v. St. Paul, 49 M. 189; Anderson v. Scandia Bank, 53 M. 191; Nichols v. Randall, 5 M. 304 G. 240; Sturtevant-Larrabee Co. v. Mast etc. Co., 66 M. 437; Foster v. Landon, 71 M. 494 (not necessary that all parties should be equally affected).

Must not be inconsistent.

§ 252. Inconsistent causes of action cannot be joined although arising out of transactions connected with the subject of action or forming part of the same transaction. Vaule v. Steenerson, 63 M. 110; Hause v. Hause, 29 M. 252; Plummer v. Mold, 22 M. 215; Wagner v. Nagel, 33 M. 348; Davis v. Severance, 49 M. 528; Thoreson v. Minneapolis Harvester Works, 29 M. 341.

Remedy for misjoinder.

§ 253. Objection to a complaint for misjoinder of causes of action must be taken by demurrer or answer or it is waived. James v. Wilder, 25 M. 305; Densmore v. Shepard, 46 M. 54; Gardner v. Kellogg, 23 M. 463; Mulvehill v. Bates, 31 M. 364.

§ 254. When the objection that a complaint contains inconsistent causes of action is raised for the first time on the trial it is wholly discretionary with the court to compel an election. Rhodes v. Pray, 36 M. 392 and cases cited; Davis v. Severance, 49 M. 528.

CHAPTER IX

INTERVENTION

Definition.

§ 255. Intervention is the act by which one voluntarily becomes a party to an action pending between others.

In equity.

§ 256. In equity it is common practice to allow strangers to intervene and assert their interest in the subject-matter of the suit whenever such a course will avoid multiplicity of suits or when there is no other adequate remedy by which such parties might protect their interest. And independently of statute this practice prevails under the code in actions of an equitable nature. Billings v. Mining Co., 51 Fed. Rep. 338; Krippendorf v. Hyde, 110 U. S. 276; French v. Gapen, 105 U. S. 509; Winslow v. Ry. Co., 4 M. 313, 230; State v. Merchants' Bank, 67 M. 506; Smith v. Nat. Credit Co., 72 M. 364.

Under statute.

§ 257. "Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause, and before the trial commences. The court shall determine upon the issues made by the intervention at the same time that the issue in the main action is decided, and the intervener has no right to delay; and if the claim of the intervener is not sustained, he shall pay all the costs of the intervention. The intervention shall be by complaint, which must set forth the facts on which the interven-

tion rests; and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings. But if such complaint is filed during term, the court shall direct a time in which an answer shall be filed thereto." G. S. '94, § 5273.

Origin of statute.

§ 258. Our statute is far broader than that of the majority of code states. "The doctrine of intervention, as embodied in the statute, evidently originated, in this country, in the civil code of Louisiana, whence it was subsequently taken and incorporated into the jurisprudence of the states of California and Iowa, whose statutes upon this subject have been copied by us in almost their identical language." Bennett v. Whitcomb, 25 M. 148; Lewis v. Harwood, 28 M. 428.

Nature of interest entitling party to intervene.

§ 259. To entitle a party to intervene under the statute his interest must be in the matter in litigation in the suit as originally brought and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment thereon. Bennett v. Whitcomb, 25 M. 148; Lewis v. Harwood, 28 M. 428; Wohlwend v. Threshing Machine Co., 42 M. 500; Dennis v. Spencer, 51 M. 259; Becker v. Northway, 44 M. 61; Shepard v. County of Murray, 33 M. 519; Steenerson v. Ry. Co., 60 M. 461; Smith v. St. Paul, 65 M. 295; Masterman v. Lumbermen's Bank, 61 M. 299.

§ 260. "The intervener's interest must be such, that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or if the action had first been brought against him as the defendant, he would have been able to defeat the recovery in part at least. His interest may be either legal or equitable. If equitable, it must be of such a character as would be the foundation for a recovery or for a de-

fence, as the case might be, in an independent action in which he was an original party. As the new system permits legal and equitable causes of action or defences to be united by those who are made the parties to an original suit, for the same reason either or both may be relied upon by an intervener. In short the same rules govern his rights which govern those who originally sue or defend. The proceeding by intervention is not an anomalous one, differing from other judicial controversies, after it has been once commenced. It is, in fact, the grafting of one action upon another, and the trying of the combined issues at one trial, and the determining them by one judgment." Pomeroy, Remedies, § 430; Pool v. Sanford, 52 Tex. 621.

Complaint.

§ 261. Intervention is by complaint setting forth the grounds and presented in the same form as a complaint in an ordinary action. The intervener must set out his claim or defence with as much particularity and fullness as if he were an original plaintiff or defendant. Shepard v. County of Murray, 33 M. 519; Clapp v. Phelps, 16 La. Ann. 461; Coffey v. Greenfield, 62 Cal. 602; People v. Talmage, 6 Cal. 256; Ward v. Healy, 114 Cal. 191.

Answer.

§ 262. If the original parties wish to controvert the facts alleged by the intervener they must deny them in an answer framed as in an ordinary action. Facts alleged in a complaint in intervention are admitted if not denied by answer. See Smith v. Barclay, 54 M. 47; Pierce v. Wagner, 64 M. 265, 268.

Intervener cannot delay trial or change form of action.

§ 263. "An intervener cannot be allowed to tender an issue which can be tried only by a change in the form of proceeding and a continuance of the cause for testimony. If the person intervening has rights which require protection, and which cannot be determined by intervention in the main action without delaying the trial, he ought not to intervene, but should

commence an original action." Van Gorden v. Ormsby, 55 Iowa 657; Taylor v. Boedicker, 22 La. Ann. 79; Teachout v. Ry. Co., 75 Iowa 722.

Voluntary dismissal.

§ 264. The intervener may dismiss his intervention any time before final submission without prejudice to a subsequent action. Woodward v. Jackson, 85 Iowa 432.

Application to intervene unnecessary.

§ 265. In proceeding under the statute it is not necessary to secure an order of the court. Intervention under the statute is a matter of strict right which cannot be controlled by the court if the intervener brings himself within the provisions of the statute. Bennett v. Whitcomb, 25 M. 148.

Remedy for wrong intervention.

§ 266. The objection that the intervener has no right to intervene may be raised by:

(a) Demurrer. Shepard v. County of Murray, 33 M. 519; Seibert v. Ry. Co., 52 M. 148.

(b) By motion for dismissal on the trial. Lewis v. Harwood, 28 M. 428.

(c) By motion to strike out complaint. Dennis v. Spencer, 51 M. 259.

Waiver of objection to intervention.

§ 267. Intervention cannot be objected to for the first time on appeal. McKenty v. Gladwin, 10 Cal. 227; People v. Reis, 76 Cal. 269; Sanxey v. Glass Co., 63 Iowa 707.

CHAPTER X

COMPLAINT

The statutes.

§ 268. "The first pleading on the part of the plaintiff is the complaint." G. S. '94, § 5230.

§ 269. "The complaint shall contain:

First. The title of the cause, specifying the court in which the action is brought, the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant;

Second. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition;

Third. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount thereof shall be stated." G. S. '94, § 5231.

The title.

§ 270. The number of the judicial district is not an essential element of the title.[1] Where several counties are attached together for judicial purposes a complaint is properly entitled if it names them all.[2] The full Christian names of the parties should be given, the use of initials being objectionable as leaving the record doubtful as to the parties concluded by the judgment.[3] The middle name need not ordinarily be given but it is proper practice to insert it by initial.[4] "Jr." need not be inserted.[5] "When the plaintiff is ignorant of the name of a defendant, such defendant may be designated, in any process, pleading or proceeding, by any name; and when his true name is discovered, the process, pleading or proceeding may be amended accordingly." [6]

[1] State v. Munch, 22 M. 67.

[2] Young v. Young, 18 M. 90 G. 72. See also, State v. Stokely, 16 M. 282 G. 249; State v. McCartey, 17 M. 76 G. 54.

[3] Gardner v. McClure, 6 M. 250 G. 167; Kenyon v. Semon, 43 M. 180; Pinney v. Russell, 52 M. 443.

[4] Stewart v. Colter, 31 M. 385; State v. Higgins, 60 M. 1.

[5] McFarland v. Butler, 11 M. 77 G. 44.

[6] G. S. '94, § 5268.

Several causes of action in a single complaint.

§ 271. When a complaint contains more than one cause of action each must be separately stated and plainly numbered. Each separate statement of a distinct cause of action in such cases is termed a count. Newell v. How, 31 M. 235; West v. Eureka Imp. Co., 40 M. 394; Fredin v. Richards, 61 M. 490; See §§ 19, 248.

§ 272. Each count must be complete in itself or must be made so by express reference to other counts. Allegations of one count will not aid the allegations of another count unless they are expressly referred to in the latter and by apt phrase made a part thereof. Newell v. How, 31 M. 235; Gertler v. Linscott, 26 M. 82; Merrill v. Dearing, 22 M. 376; Knappen v. Freeman, 47 M. 491; La Plant v. Ins. Co., 68 M. 82; Pomeroy. Remedies, § 575.

§ 273. Matters of mere inducement, such as incorporation, partnership, appointment as receiver, executor or administrator, may be alleged at the beginning of the pleading, distinct from the other facts and need not be made a part of each count. A single demand of judgment may serve for all the counts. West v. Eureka Imp. Co., 40 M. 394; Curtis v. Moore, 15 Wis. 134; 1 Chitty, Pl. 423; Pomeroy, Remedies, § 575; Spears v. Ward, 48 Ind. 541.

§ 274. The objection that several causes of action are not separately stated should be raised by motion before pleading and not on the trial or by demurrer. Newell v. How, 31 M. 235; Craig v. Cook, 28 M. 232; Humphrey v. Merriam, 37 M. 502; Freer v. Denton, 61 N. Y. 492.

Several counts for same cause of action—duplicity.

§ 275. A party must know the facts before pleading and he must plead them truly. There can be but one true state

of facts constituting a single cause of action and it follows that the plaintiff cannot set out a single cause of action in more than one count. The exclusive remedy for this defect in a complaint is a motion before trial. If the objection is not raised until the trial it is wholly discretionary with the court to compel the plaintiff to elect upon which count he will proceed. Dean v. Leonard, 9 M. 190 G. 176; Hawley v. Wilkinson, 18 M. 525 G. 468; Plummer v. Mold, 22 M. 15; Wagner v. Nagel, 33 M. 348; Rhodes v. Pray, 36 M. 392; Hewitt v. Brown, 21 M. 163; Exley v. Berryhill, 36 M. 117; Humphrey v. Merriam, 37 M. 502; Whelan v. Commissioners, 28 M. 80; Marsh v. Webber, 13 M. 109 G. 99; Pomeroy, Remedies, § 576.

A complaint speaks as of the commencement of the action.

§ 276. The plaintiff must allege a cause of action existing in his favor at the time of the commencement of the action and if he did not at that time have a cause of action he cannot recover upon one subsequently acquired. Allegations in the complaint are presumed to speak of existing conditions. Allegations in the present tense relate to the date of verification. Eide v. Clarke, 65 M. 466; Prindle v. Caruthers, 15 N. Y. 425. See §§ 813, 868.

Labeling complaint.

§ 277. The nature of a cause of action is to be determined by the facts alleged and not by the formal character of the complaint. Forms of action are abolished and it is therefore unnecessary to label a complaint to characterize it. Breault v. Merrill & Ring Lumber Co., 72 M. 143.

Paragraphing.

§ 278. Each material fact constituting the cause of action or ground of relief should be stated separately in distinct and numbered paragraphs. This mode of statement has the merit of clearly presenting the essential facts and facilitates reference for purposes of denial. It also conduces to that conciseness of statement which is the cardinal virtue of good pleading. The several allegations of a composite fact may of course be appropriately included in a single paragraph.

Language employed in pleading.

§ 279. Simple colloquial English is the language of code pleading. The statutory requirement of "a plain and concise statement of the facts" was designed to abolish the artificial and technical phraseology of common law pleading. It does not, however, forbid the use of words which have a well-defined legal meaning such as "executed," "made," "indorsed," "assigned." The aim of the pleader should be to present a clear and concise narrative of the material facts in such manner that the legal rule which they involve may be inferred with ease and certainty and their denial raise sharply defined issues. "Since all the arbitrary and technical dogmas of the common law procedure have been abandoned, the art of pleading has been made a department of the broader art of narrative composition." [1] "To combine with the requisite certainty and precision the greatest possible brevity is now justly considered as the perfection of pleading." "A terse style of allegation, involving a strict retrenchment of unnecessary words, is the aim of the best practitioners." [2]

[1] Pomeroy, Remedies, § 39.

[2] Stephen, Pl. § 423.

Facts alleged on information and belief.

§ 280. Facts may be alleged in a complaint upon information and belief. But this mode of pleading is not often permissible for the plaintiff. It cannot be employed in alleging facts which are actually or presumptively known to the pleader. "Whatever is essential to the rights of the plaintiff and is necessarily within his knowledge, ought to be alleged positively and with precision." State v. Cooley, 58 M. 514; Lockwood v. Bigelow, 11 M. 113 G. 70.

Theory of case.

§ 281. A complaint should be drawn in accordance with a definite theory as to the nature of the cause of action and the relief to which the plaintiff is entitled. "It is essential to the formation of issues and the intelligent and just trial of causes, that a complaint should proceed upon a distinct and definite

theory. It would violate all rules of pleading to permit a complaint to be construed as best suited the exigencies of the case; to allow such a course of procedure would produce uncertainty and confusion, and materially trench upon the right of the defendant to be informed of the issue he is required to meet." Chicago etc. Ry. Co. v. Bills, 104 Ind. 13; Mescall v. Tully, 91 Ind. 96; Supervisors v. Decker, 30 Wis. 624; Dean v. Leonard, 9 M. 190 G. 176; Hewitt v. Brown, 21 M. 163.

§ 282. The absence of a definite theory, however, is a defect of form rather than substance in this state. The objection cannot be raised by demurrer. This defect is a violation of the fundamental requirements of definiteness and certainty and must be objected to by motion to make more definite and certain or to compel an election. Unless the defendant raises the objection before trial the plaintiff may prove a cause of action of any nature whatever so long as he keeps within the allegations of the complaint. "To allow a party to recover upon a theory of the case different from that on which his complaint was drawn (suggested often for the first time in this court) may be misleading to trial courts and opposing counsel, and be practically offering a premium for careless pleading; yet the doctrine of the code, liberally construed by our own decisions, is that a party may have any relief to which, upon the allegations and proof, he is entitled." Farmer v. Crosby, 43 M. 459; Dean v. Leonard, 9 M. 190 G. 176; Hewitt v. Brown, 21 M. 163; Wilson v. Fuller, 58 M. 149; Brown v. Doyle, 69 M. 543.

At law or in equity.

§ 283. In this state there is but one form of action and whether the rights asserted are legal or equitable in their nature is determined, not by the form of the complaint but by the facts alleged. Although a party is not required to disclose the nature of his cause of action by the form of his complaint as under the old system, it is still incumbent upon him to do so by the facts which he alleges. Under allegations showing a legal right he cannot prove facts constituting an equitable right. The complaint must be drawn upon a defi-

nite theory as to whether the rights alleged are legal or equitable. The code does not abolish the distinction between legal and equitable rights and remedies. Although a party may have either legal or equitable relief if the facts proved within the allegations of the complaint warrant it, he is nevertheless rigorously restricted to his allegations. Under a complaint alleging a legal title an equitable title cannot be proved. See §§ 680, 721, 867, 870.

Ex delicto or ex contractu.

§ 284. The complaint should be framed upon a definite theory as to whether the cause of action is for tort or for breach of contract for where the one is alleged the other cannot be proved.[1] It is held, however, in this state, that where a party alleges that certain representations, amounting to a warranty, were fraudulently made, and proves the warranty and its breach, but fails to prove the fraud, he may recover for the breach of the warranty.[2]

[1] Truesdell v. Bourke, 145 N. Y. 612. See § 722.

[2] Wilson v. Fuller, 58 M. 149; Brown v. Doyle, 69 M. 543.

Facts constituting cause of action must be alleged.

§ 285. A cause of action is the violation of a right. It is a composite conception made up of the following elements:

(1) A primary right in the plaintiff.

(2) A correlative duty in the defendant not to violate, by act or omission, the primary right of the plaintiff.

(3) A violation by the defendant of the primary right of the plaintiff.

§ 286. "Every remedial right arises out of an antecedent primary right and corresponding duty and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff and a remedial duty resting on

the defendant springing from this delict, and finally the remedy itself. Every action, however complicated, or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action." Pomeroy, Remedies, § 453. As to meaning of "primary rights" see Pomeroy, Remedies, § 1.

§ 287. "Cause of action" should not be confused with "subject of action" which is synonymous with "subject-matter of the action"—the contract, tort, or physical thing in controversy or the right connected therewith;[1] nor with "object of the action," which is the "remedy" or "relief" which the law allows for the invasion of plaintiff's primary right and which is embodied in the judgment. The cause of action gives the plaintiff a remedial right to one or more forms of "relief." This remedial right is frequently denominated a right of action although that term is also used synonymously with cause of action.

[1] Wisconsin v. Torinus, 28 M. 175; Pomeroy, Remedies, §§ 452, 475, 487. See *infra*, § 562.

§ 288. The statute provides that the complaint shall contain a statement of the facts constituting a cause of action. These facts may be analyzed as follows:

(1) The primary right of the plaintiff.
(2) The correlative duty of the defendant.
(3) The facts giving rise to the primary right of the plaintiff and the correlative duty of the defendant.
(4) The facts constituting the violation of plaintiff's primary right by the defendant.
(5) The rules of law out of which spring the primary right of the plaintiff and the correlative duty of the defendant.

§ 289. All these facts, however, are not pleaded. The code system of pleading like that of the common law is a "fact" system. Rules of law and conclusions of law are not pleaded. The theory of the system is that the court and the parties are

familiar with all the rules of law applicable to every conceivable state of facts, so that, when a given state of facts is presented by the pleadings, they will at once perceive and know what rules of law apply and the resulting rights and obligations. It is conceived to be useless to encumber the record with the rules and inferences therefrom which everyone is assumed to know. The substantive rules of law out of which spring the primary right of the plaintiff and the correlative duty of the defendant are therefore not pleaded. These primary rights and duties themselves are but conclusions or inferences of law and are therefore not pleaded. Omitting these elements of the analysis given above we have remaining as the facts constituting a cause of action which must be alleged:

(1) The facts giving rise to the primary right of the plaintiff and the correlative duty of the defendant.

(2) The facts constituting the violation of plaintiff's primary right—the wrongful acts or omissions of the defendant.

§ 290. "The object of every action is to obtain a judgment of the court sustaining or protecting some primary right or enforcing some primary duty; every such primary right and duty results from the operation of the law upon certain facts, in the experience of the person holding the right or subjected to the duty; every wrong or violation of this primary right or duty consists in certain facts, either acts or omissions of the person committing the wrong. A statement, therefore, of the facts from which the primary right or duty arises, and also of the facts which constitute the wrong or violation of such primary right or duty, shows, and must of necessity show, at once a complete cause of action; that is, the court before which this statement is made can perceive from it the entire cause of action, the remedial right flowing therefrom, and the remedy or remedies which should be awarded to the injured party." Pomeroy, Remedies, § 73.

§ 291. This statement of the rule as to what must be pleaded is subject to the qualification that in actions for cer-

tain personal wrongs "the facts giving rise to the primary right of the plaintiff and the correlative duty of the defendant" need not be alleged. They are the facts that the plaintiff and defendant are human beings and as these are facts which the law presumes they need not be pleaded. In such actions all that need be pleaded is the act or omission constituting the wrongful invasion of plaintiff's primary right, as, for example, the assault, libel or slander. In actions on contract the contract itself, its execution and breach are the facts constituting the cause of action. In actions concerning property, the ownership or possession of the plaintiff will generally be the fact giving rise to the primary right of the plaintiff and the correlative duty of the defendant; while the conversion, trespass or wrongful withholding possession will usually be the fact or facts constituting the violation of plaintiff's primary right. Pomeroy, Remedies, §§ 452, et seq.; 519 et seq. See also in this connection, Distler v. Dabney, 3 Wash. 200; Green v. Palmer, 15 Cal. 414; Chambers v. Glen, 18 S. C. 471; Nance v. Ry. Co., 35 S. C. 307.

Only material facts should be alleged.

§ 292. Of the facts giving rise to the cause of action, as defined in the preceding section only those which are material should be alleged. Material facts are those which the plaintiff, under a general denial, must prove in order to recover; they are the ultimate facts constituting the cause of action or ground of relief as distinguished from the evidentiary facts by which they may be proved on the trial. In an action of a legal nature they are those facts which have always been termed "issuable"; the facts which a jury must find in a special verdict in order to warrant a judgment. In an action of an equitable nature they are those facts which justify or in any way affect the award of the relief sought. Pomeroy, Remedies, § 526; Vermilye v. Vermilye, 32 M. 499; Rollins v. St. Paul Lumber Co., 21 M. 5; Jones v. Rahilly, 16 M. 320 G. 283; Marshall v. Gilman, 52 M. 88; Thomson-Houston Electric Co. v. Palmer, 52 M. 174; O'Neil v. Johnson, 53 M. 439;

Jones v. Ewing, 22 M. 157; People v. Ryder, 12 N. Y. 433; Green v. Palmer, 15 Cal. 414.

Every material fact must be alleged.

§ 293. "Every fact which the plaintiff must prove to enable him to maintain his action must be distinctly averred." Griggs v. St. Paul, 9 M. 246 G. 231; Bernheimer v. Marshall. 2 M. 79 G. 61, 68.

§ 294. Everything beyond this may be treated as surplusage. If a complaint contains all the essential allegations of a cause of action and also non-essential allegations the plaintiff is not bound to prove the latter in order to recover upon the former. Steamboat War Eagle v. Nutting, 1 M. 256 G. 201; Jagger v. Nat. German-American Bank, 53 M. 386; Marquat v. Marquat, 12 N. Y. 336. See Dennis v. Johnson, 47 M. 56.

Plaintiff should limit himself to a prima facie case.

§ 295. The plaintiff is required to allege in his complaint only those facts which, under a general denial, it would be necessary for him to prove in the first instance in order to recover. That is, it is only necessary that he should make out a *prima facie* case.[1] It is a matter of very great practical importance to the plaintiff that he should carefully limit himself to these essential allegations for if he goes beyond he may assume an unnecessary burden of proof and restrict the scope of his evidence. Just here it is important to discriminate between material and necessary allegations. It is a rule of pleading that an issue cannot be formed on an immaterial allegation but within the meaning of this rule an allegation which is not necessary may yet be material. The greatest reproach of our law is its inexact terminology. We have here an illustration. For the purpose of stating a cause of action or defence an allegation is said to be material when it is necessary; but for the purpose of forming an issue an allegation is material when, though not necessary, its proof or disproof would affect the right of plaintiff to recover.[2]

[1] See § 310.

[2] Dennis v. Johnson, 47 M. 56.

Evidentiary facts should not be pleaded.

§ 296. Only the ultimate, issuable facts should be alleged and not the evidentiary facts by which they may be proved on the trial. Zimmerman v. Morrow, 28 M. 367; Vermilye v. Vermilye, 32 M. 499; Thomson-Houston Electric Co. v. Palmer, 52 M. 174; Cathcart v. Peck, 11 M. 45 G. 24; O'Neil v. Johnson, 53 M. 439; Wilcox v. Davis, 4 M. 197 G. 139.

§ 297. "This is now the universal rule, whether the action be one which under the former practice would have been an action at law or one in equity. Of course, from the nature of the case, the same brevity of statement is not usually attainable in the latter class of cases as in the former, but in neither case is it proper to plead mere evidence. The old chancery practice of pleading mere matters of evidence which might be material in establishing the general allegations of the bill is not now proper. Undoubtedly, from the very nature of the primary rights invaded and of the remedies demanded, the narrative of facts will generally be much more minute, detailed, and circumstantial in actions brought to maintain equitable rights than in those based upon legal rights and pursuing legal relief, but this incident does not alter or affect the principle which governs all cases; the pleader in both cases sets out the facts which entitle him to the remedy asked, and no more; it simply happens that legal remedies usually depend upon a few positive facts, while equitable remedies often arise from a multitude of circumstances, events, and acts, neither of which, taken by itself, would have created any right or imposed any duty." Vermilye v. Vermilye, 32 M. 499; Pomeroy, Remedies, §§ 75, 527.

Effect of pleading evidence.

§ 298. "If in any case a pleading which states only evidence can be held good, it can only be where the evidence stated is such that the conclusions of fact necessary to sustain the action or defence must inevitably follow."[1] Pleading evidentiary matter, however, does not vitiate a complaint so as to

render it demurrable if the essential facts are also alleged and alleged directly.[2] Such matter may be treated as evidence in the case if it is expressly admitted in the answer.[3] The remedy for this vice is a motion, before pleading, to strike out.[4] Evidentiary matter is not admitted by a failure to deny.[5] By pleading evidence a party does not limit himself in his proof to the evidence pleaded,[6] nor is he required to prove it.[7]

[1] Zimmerman v. Morrow, 28 M. 367.

[2] Loomis v. Youle, 1 M. 175 G. 150; Fish v. Berkey, 10 M. 199 G. 161.

[3] Dexter v. Moodey, 36 M. 205.

[4] Cathcart v. Peck, 11 M. 45 G. 24. See § 658.

[5] Racoulliat v. Rene, 32 Cal. 455.

[6] Patterson v. Mining Co., 30 Cal. 360. See § 321.

[7] Jagger v. Nat. German-American Bank, 53 M. 386.

Facts should be alleged as they actually occurred.

§ 299. The facts constituting the cause of action should ordinarily be alleged as they actually exist or occurred rather than according to their legal effect. But a pleading which alleges facts according to their legal effect or operation is sufficient and is sometimes to be commended as avoiding objectionable prolixity of statement. Elliot v. Roche, 64 M. 482; Estes v. Farnham, 11 M. 423 G. 312; Weide v. Porter, 22 M. 429; Larson v. Schmaus, 31 M. 410; Gould v. School District, 7 M. 203 G. 145; Todd v. Ry. Co., 37 M. 358; Lee v. Ry. Co., 34 M. 225; Stees v. Kranz, 32 M. 313; Marshall v. Gilman, 52 M. 88; Rochester Ry. Co. v. Robinson, 133 N. Y. 242; New York etc. Co. v. Steamship Co., 148 N. Y. 39; Pomeroy, Remedies, § 529; Bliss, Code Pl. § 158; Bryant, Code Pl. p. 187.

Conclusions of law must not be pleaded.

§ 300. The code system of pleading like that of the common law is a fact system. A pleading must allege facts and not inferences or conclusions of law. Griggs v. St. Paul, 9 M. 246 G. 231; Clark v. Ry. Co., 28 M. 69; Buck v. Colbath, 7 M. 310 G. 238.

Allegations compounded of fact and law.

§ 301. "It is, of course, an elementary rule of pleading that

facts, and not mere conclusions of law, are to be pleaded. But this rule does not limit the pleader to the statement of pure matters of fact, unmixed with any matter of law. When a pleader alleges title to or ownership of property, or the execution of a deed in the usual form, these are not statements of pure fact. They are all conclusions from certain probative or evidential facts not stated. They are in part conclusions of law, and in part statements of facts, or rather the ultimate facts drawn from these probative or evidential facts not stated; yet these forms are universally held to be good pleading. Some latitude must therefore be given to the term 'facts,' when used in a rule of pleading. It must of necessity include many allegations which are mixed conclusions of law and statements of fact; otherwise pleadings would become intolerably prolix, and mere statements of the evidence. Hence, it has become a rule of pleading that, while it is not allowable to allege a mere conclusion of law containing no element of fact, yet it is proper, not only to plead the ultimate fact inferable from certain other facts, but also to plead anything which, according to the common and ordinary use of language, amounts to a mixed statement of fact and of a legal conclusion. It may not be possible to formulate a definition that will always describe what is a mere conclusion of law, so as to distinguish it from a pleadable, ultimate fact, or that will define how great an infusion of conclusions of law will be allowed to enter into the composition of a pleadable fact. Precedent and analogy are our only guides." Clark v. Ry. Co., 28 M. 69; Curtiss v. Livingston, 36 M. 380; Rolseth v. Smith, 38 M. 17; First Nat. Bank v. Boom Co., 41 M. 141; Nininger v. Commissioners, 10 M. 133 G. 106; O'Neill v. Johnson, 53 M. 439; Mitchell v. Mitchell, 45 M. 50; Nixon v. Reeves, 65 M. 159; Foran v. Levin, 78 N. W. 1047.

Allegations held conclusions of law.

§ 302. Allegations of illegality without the facts showing the illegality, Kelly v. Wallace, 14 M. 236 G. 173; Webb v. Bidwell, 15 M. 479 G. 394; Knudson v. Curley, 30 M. 433; allegations of fraud without the facts showing the fraud, Kelly

v. Wallace, 14 M. 236 G. 173, see § 351; "constituted and was a valid lien upon the premises," Price v. Doyle, 34 M. 401; "that said sale of land was made without authority of law and is void," Knudson v. Curley, 30 M. 433; "that said defendant neglected and refused to furnish to him, the plaintiff, freight for transportation, according to the terms of said agreement," Wilson v. Clarke, 20 M. 367 G. 318; "which amended complaint set forth an entirely different and distinct cause of action from that set forth in the original complaint in said action," Dennis v. Nelson, 55 M. 144; "wrongfully took," Buck v. Colbath, 7 M. 310 G. 238; that a person "was not a person of suitable age and discretion," Temple v. Norris, 53 M. 286; that defendant "has also neglected to keep and perform its covenants to keep in good repair the rolling stock, * * * and to replace such rolling stock when lost or destroyed." Seibert v. Ry. Co., 58 M. 39 M. 50.

Allegations held of fact.

§ 303. "Purchased," Nininger v. Commissioners, 10 M. 113 G. 106; "levied upon," First Nat. Bank v. Rogers, 13 M. 407 G. 376, Rohrer v. Turrill, 4 M. 407 G. 309; "duly assigned," Hoag v. Mendenhall, 19 M. 335 G. 289; "conveyed," Curtiss v. Livingston, 36 M. 380; that plaintiff is the "owner," Curtiss v. Livingston, 36 M. 380, Clark v. Ry. Co. 28 M. 68; "duly foreclosed," Pinney v. Fridley, 9 M. 34 G. 23; "duly levied and assessed," taxes, Webb v. Bidwell, 15 M. 479 G. 394; "duly contracted," Folsom v. Chisago, 28 M. 324; "duly organized," Minneapolis etc. Ry. Co. v. Morrison, 23 M. 308; "a duly qualified teacher," Goetz v. School District, 31 M. 164; "duly printed and published," Folsom v. Chisago, 28 M. 324; "negligently," Clark v. Ry. Co., 28 M. 69, Rolseth v. Smith, 38 M. 17; "converted," First Nat. Bank v. Boom Co., 41 M. 141; "in the lawful and actual possession," Steele v. Fish, 2 M. 153 G. 129; "want of probable cause," O'Neil v. Johnson, 53 M. 439; "imprisoned," Nixon v. Reeves, 65 M. 159; "duly filed and recorded," Glass v. Sleigh Co., 43 M. 228; "assaulted," Mitchell v. Mitchell, 45 M. 50; "duly authorized," State v. Ames, 30 M. 440.

Effect of pleading conclusions of law.

§ 304. The allegation of a conclusion of law is a mere nullity. It is effective for no purpose whatever and a pleading is to be treated exactly as if such an allegation had not been introduced.

(a) If essential facts are not otherwise alleged the complaint is demurrable, but the allegation of conclusions of law does not vitiate a pleading otherwise good. Griggs v. St. Paul, 9 M. 246 G. 231; Price v. Doyle, 34 M. 400; Downer v. Read, 17 M. 493 G. 470.

(b) An allegation which is merely a legal conclusion is not traversable. It is not admitted by a demurrer or a failure to deny. See §§ 467, 401.

Facts must be alleged directly and positively.

§ 305. Facts must be alleged directly and positively and not by way of rehearsal, argument, inference or reasoning and if not so stated they are not admitted by a failure to traverse them. Moulton v. Doran, 10 M. 67 G. 49; Taylor v. Blake, 11 M. 255 G. 170; Johnson v. Howard, 20 M. 370 G. 322; Biron v. Commissioners, 41 M. 519; Welch v. Bradley, 45 M. 540; Chesterson v. Munson, 27 M. 498; Coolbaugh v. Roemer, 30 M. 424; Carlson v. Tribune Co., 47 M. 337; Hall v. Williams, 13 M. 260 G. 242; Zimmerman v. Morrow, 28 M. 367; Rossman v. Mitchell, 75 N. W. 1053; Sprague v. Wells, 47 M. 504.

§ 306. A complaint in which an essential fact is alleged only by way of recital is demurrable. Hall v. Williams, 13 M. 260 G. 242; Board County Commissioners v. Trust Co., 67 M. 112.

§ 307. A complaint in which an essential fact is alleged only by way of inference is demurrable unless the fact so alleged may, by reasonable and fair intendment, be implied from other allegations made directly. Biron v. Water Commissioners, 41 M. 519; Zimmerman v. Morrow, 28 M. 367; Carlson v. Tribune Co., 47 M. 337; Rossman v. Mitchell, 75 N. W. 1053; Spottswood v. Herrick, 22 M. 548; Brunswick etc. Co. v. Brackett, 37 M. 58; Maxcy v. Ins. Co., 54 M. 272; Dugan v. Ry. Co., 40 M. 544; Topping v. Clay, 65 M. 346; Foster v. Johnson, 39 M.

378; Perkins v. Merrill, 37 M. 40; County of Redwood v. Tower, 28 M. 45; Nash v. St. Paul, 8 M. 172 G. 143.

§ 308. A fact which is sufficiently alleged by way of inference is traversable. Sage v. Culver, 147 N. Y. 245.

Allegations must not be hypothetical or in the alternative.

§ 309. Facts must not be alleged in the alternative or hypothetically. That is, the pleader must not allege that a fact is so or so; or that if a fact is so, then another fact is so. Such allegations are intrinsically indefinite and are subject to correction by motion before answering. Clague v. Hodgson, 16 M. 321 G. 291; Wheeler v. Thayer, 121 Ind. 64; Jamison v. King, 50 Cal. 132; Highland Ave. etc. Ry. Co. v. Dusenberry, 94 Ala. 413; Mitchell v. Williamson, 6 Md. 210.

Complaint should not anticipate and negative a possible defence.

§ 310. "If a complaint contain a distinct statement of all the facts which, upon a general denial, the plaintiff will be bound to prove, in the first instance, to protect himself from a nonsuit, and to show himself entitled to a judgment, it is a good pleading. It is sufficient if it shows a *prima facie* right in the plaintiff to recover, and it is not necessary that it should negative a possible defence; or state matter which would come more properly from the other side. These are general and elementary rules of pleading, applicable as well under the code as under the former practice." It is not simply unnecessary to anticipate a defence but it is improper to do so as it operates as a mode of discovery wholly unauthorized by the code. Jones v. Ewing, 22 M. 157 (leading case); Hocum v.Weitherick, 22 M. 152; Clark v. Ry. Co., 28 M. 69; Hennessy v. Ry. Co., 30 M. 55; Young v. Young, 18 M. 90 G. 72; Laudenschlager v. Legacy Asso., 36 M. 131; Meyer v. Berlandi, 53 M. 59; Gray v. Ry. Co., 13 M. 315 G. 289; St. Paul Land Co. v. Dayton, 37 M. 364; Root v. Childs, 68 M. 142; Shartle v. Minneapolis, 17 M. 308 G. 284; McMillan v. Cheeney, 30 M. 519; St. Paul Foundry Co. v. Wegmann, 40 M. 419; Hospes v. Northwestern Car Co., 48 M. 174; Spink & Keyes Drug Co. v. Ryan Drug Co., 72 M. 178.

§ 311. It is not necessary to allege time in order to avoid the defence of the statute of limitations. Backus v. Clark, 1 Kans. 287; Huckaber v. Shepherd, 75 Ala. 342. See Kennedy v. Williams, 11 M. 314 G. 219; Bomsta v. Johnson, 38 M. 230; Duxbury v. Boice, 70 M. 113.

§ 312. It is not necessary to state that a contract within the statute of frauds is in writing. Benton v. Schulter, 31 M. 312; Randall v. Constans, 33 M. 329.

§ 313. Matter in a complaint anticipating and negativing a defence may be stricken out on motion. Brooks v. Bates, 7 Colo. 576.

§ 314. If a complaint states facts constituting a cause of action but also states facts which constitute a good defence thereto it is demurrable. Millette v. Mehmke, 26 M. 306; Calvo v. Davies, 73 N. Y. 211; Behrley v. Behrley, 93 Ind. 255.

Facts which need not be alleged.

§ 315. It is not necessary to allege facts of which the court will take judicial notice. Finney v. Callendar, 8 M. 41 G. 23.

§ 316. It is not necessary to allege facts which the law will presume or imply. Nininger v. Commissioners, 10 M. 133 G. 106; Smith v. Jordan, 13 M. 264 G. 246; Finley v. Quirk, 9 M. 194 G. 179; Pinney v. King, 21 M. 514; Randall v. Constans, 33 M. 329; Chamberlain v. Tiner, 31 M. 371; Folsom v. Chisago, 28 M. 324; Ennis v. Pub. Co., 44 M. 105; Dennis v. Johnson, 47 M. 56; Jagger v. Nat. Ger.-Am. Bank, 53 M. 386; Oevermann v. Loebertmann, 68 M. 162; Irvine v. Irvine, 5 M. 61 G. 44.

§ 317. It is not necessary to allege facts to show regularity or legality. When it is stated generally in a pleading that a contract was made the court will presume it was legal until the contrary appears and when an act is alleged to have been done the law presumes that it was duly and regularly done and the facts showing regularity need not be alleged. Nininger v. Commissioners, 10 M. 133 G. 106; Folsom v. Chisago, 28 M. 324; Randall v. Constans, 33 M. 329; Ryan v. School District, 27 M. 433; Soule v. Thelander, 31 M. 227; Collom v. Bix-

by, 33 M. 50; Walsh v. Kattenburgh, 8 M. 127 G. 99; Rohrer v. Turrill, 4 M. 407 G. 309; Nelson v. Nugent, 62 M. 203; Dodge v. Chandler, 13 M. 114 G. 105.

§ 318. The pleader should be careful not to allege a fact which the law will presume for if he does so and his allegation is denied he imposes upon himself an unnecessary burden of proof. Dennis v. Johnson, 47 M. 56; Lotto v. Davenport, 50 M. 99.

Written contracts—pleading by copy.

§ 319. In actions on a written contract it is proper to plead the contract by copy rather than according to its legal effect and it is often advisable to do so in order to force the defendant to a more specific answer than he would otherwise be compelled to make. This form of pleading has the further advantages of presenting a neat record on appeal and of avoiding the danger of wrongly interpreting the legal effect of the instrument. It is of course often prudent to plead the contract according to its legal effect and thereby lessen the burden of proof. In declaring on an acknowledged instrument the acknowledgment may ordinarily be omitted. See Elliot v. Roche, 64 M. 482 and § 1063.

Exhibits.

§ 320. In actions on a written contract the contract or a copy thereof may be attached to the complaint as an exhibit and may be deemed a part of the complaint for purposes of essential averment if made so by a proper allegation. Elliot v. Roche, 64 M. 482; Sprague v. Wells, 47 M. 504.

Title.

§ 321. Whenever it is necessary to plead title to real property it is sufficient, if the title of the plaintiff is a legal one, to allege that he is the owner in fee. It is not necessary to plead the sources of title. The technical rules of the common-law system as to pleading title do not obtain under the code. Daley v. St. Paul, 7 M. 390 G. 311; Curtiss v. Livingston, 36 M. 380.

§ 322. Under an allegation of ownership in fee only a legal

title may be proved. An equitable title must be specifically pleaded. See §§ 680, 870.

§ 323. "Where a pleading attempts to show title to real estate in the party by stating the specific facts through which he claims it, if any fact necessary to the passing of the title to him be omitted, the pleading is bad, even though it concludes that by reason of such facts he is seized in fee simple." Pinney v. Fridley, 9 M. 34 G. 23; Schultz v. Hadler, 39 M. 191; Jellison v. Halloran, 40 M. 485; Casey v. McIntyre, 45 M. 526; Bell v. Dangerfield, 26 M. 307; Gehr v. Knight, 79 N. W. 652. See Cleveland v. Stone, 51 M. 274.

§ 324. A general allegation of title will admit proof of any title the party may have but if he pleads a specific title or one acquired in a particular way he will be limited in his proofs to the particular title pleaded. O'Malley v. Ry. Co., 43 M. 289; Pinney v. Fridley, 9 M. 34 G. 23.

Illegality.

§ 325. In pleading illegality, all the facts necessary to show the illegality must be specifically alleged. It is insufficient to allege generally that an act or contract is unlawful. Taylor v. Blake, 11 M. 255 G. 170; Woodbridge v. Sellwood, 65 M. 135.

Conditions precedent—necessity of pleading.

§ 326. Where the plaintiff's right of action is conditional upon the performance of some act or the occurrence of some event the performance of the act or the occurrence of the event must be alleged in the complaint. Root v. Childs, 68 M. 142; Mosness v. Ins. Co., 50 M. 341; Biron v. Water Commissioners, 41 M. 519; Johnson v. Howard, 20 M. 370 G. 322; Potter v. Holmes, 65 M. 377; Lane v. Ins. Co., 50 M. 227; Wilson v. Clarke, 20 M. 367 G. 318; Parr v. Johnson, 37 M. 457; Snow v. Johnson, 1 M. 48 G. 32; St. Paul etc. Ry. Co. v. Robbins, 23 M. 439; Minneapolis Harvester Works v. Libby, 24 M. 327.

§ 327. Where there has been a waiver of performance of a condition precedent or other excuse for non-performance exists, it should be so alleged in the complaint and under an al-

legation of performance of conditions precedent evidence of waiver or excuse for non-performance is inadmissible. Boon v. Ins. Co., 37 M. 426; Hand v. Ins. Co., 57 M. 519. See Potter v. Holmes, 72 M. 153. See § 523.

Conditions precedent—how alleged under statute.

§ 328. "In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated, generally, that the party duly performed all the conditions on his part; and if such allegation is controverted, the party pleading is bound to establish, on the trial, the facts showing such performance." G. S. '94, § 5250; Wood Harvester Co. v. Robbins, 56 M. 48; Taylor v. Marcum, 60 M. 292; Mosness v. Ins. Co., 50 M. 341; Andreas v. Holcombe, 22 M. 339.

§ 329. This short form of pleading is limited to the performance of conditions precedent in contracts and to performance by the parties. It does not extend to performance by third parties but it would undoubtedly be held to include performance by a party to the contract although such person was not a party to the action. Johnson v. Howard, 20 M. 370 G. 322; Bergmeier v. Eisenmenger, 59 M. 175; Biron v. Water Commissioners, 41 M. 519.

Conditions precedent—how alleged generally.

§ 330. Except as provided by the statute given in the preceding section the plaintiff must, in pleading the performance of a condition precedent, state the facts showing precisely what he has done. It is not enough for him to allege in a general way that he has performed all the conditions by him to be performed. Jonson v. Howard, 20 M. 370 G. 322; Biron v. Water Commissioners, 41 M. 519; Mosness v. Ins. Co., 50 M. 341.

Conditions precedent—effect of not pleading.

§ 331. A complaint which fails to plead the performance of a condition precedent or to allege facts in excuse is fatally defective and demurrable if the defect appears upon the face thereof. Wilson v. Clarke, 20 M. 367 G. 318; Biron v. Water

Commissioners, 41 M. 519; Johnson v. Howard, 20 M. 370 G. 322.

§ 332. If the defect appears on the face of the complaint or is admitted by the reply the objection may be raised by a motion for dismissal on the trial, by objecting to the introduction of evidence or for the first time on appeal. Mosness v. Ins. Co., 50 M. 341; Parr v. Johnson, 37 M. 457.

§ 333. Failure to perform a condition precedent may be set up by answer. Nichols v. Minneapolis, 30 M. 545.

Conditions subsequent need not be alleged.

§ 334. "Where the obligation of a party to a contract is to pay only upon the happening of a contingency, its occurrence must be alleged in the complaint, in an action for the recovery of the money. But, if payment is not to be made if a certain contingency happens, it is not necessary to allege in the complaint the non-happening of the contingency." Root v. Childs, 68 M. 142. See also, Shartle v. Minneapolis, 17 M. 308 G. 284.

Time.

§ 335. If the time when an act or event occurred is an essential element of a cause of action it must be alleged with precision and proved as alleged. It is insufficient in such cases to allege that the act or event occurred "on or about" a certain day. Lockwood v. Bigelow, 11 M. 113 G. 70; Balch v. Wilson, 25 M. 299; Griggs v. St. Paul, 9 M. 246 G. 231.

§ 336. Ordinarily time is not an essential element of a cause of action and its omission does not render a complaint demurrable. Finley v. Quirk, 9 M. 194 G. 179; McMurphy v. Walker, 20 M. 382 G. 334; Clague v. Hodgson, 16 M. 329 G. 291; Backus v. Clark, 1 Kans. 287; People v. Ryder, 12 N. Y. 433.

§ 337. Although an allegation of time is not commonly indispensable yet it is a requirement of good pleading to state, as an essential element of definite description, the time when a tort was committed or an agreement entered into. Haven v. Shaw, 23 N. J. L. 309; Conroy v. Const. Co., 23 Fed. Rep. 71.

§ 338. When time is not material it is sufficient to allege that the event occurred "on or about" a given day but this phrase should be avoided as it is insufficient if time is essential. It is advisable for the pleader to form the habit of always alleging time as of a particular day for then his pleading will be sufficient whether time is essential or not. Under such an allegation he is allowed as much latitude in his proof as when he uses the phrase "on or about." Lockwood v. Bigelow, 11 M. 113 G. 70; Clague v. Hodgson, 16 M. 329 G. 291.

§ 339. Remedy for failure to allege time:

(a) If time is essential the objection may be raised by demurrer. Lockwood v. Bigelow, 11 M. 113 G. 70.

(b) If time is not material but should be alleged for definiteness of description the objection should be raised by a motion, before answering, to make the pleading more definite and certain. People v. Ryder, 12 N. Y. 433.

Place—venue.

§ 340. The common law strictness in pleading place does not prevail under the code. In transitory actions it is not necessary to state the place where the contract was made or tort committed except when it is sought to invoke the law of the place. Although not necessary in such cases an allegation of place is proper as an element of definite description and is commonly made. On the other hand, in local actions the place must be alleged and alleged truly. It is sufficient to describe the place as "in the county and state aforesaid" if the proper county is stated in the title.[1]

[1] See State v. Bell, 26 M. 388; Doll v. Feller, 16 Cal. 432.

Account—bill of particulars.

§ 341. "It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect

that he believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further, or more particular bill." G. S. '94, § 5246.

§ 342. A bill of particulars may be demanded only in actions on an account. In other cases, if a party wishes a more particular statement of the cause of action or defence, he must resort to a motion to make the pleading more definite and certain. Under the code there is no such general right to demand a bill of particulars as existed under the former system. Commissioners v. Smith, 22 M. 97; Jones v. Northern Trust Co., 67 M. 410; Board of Commissioners v. Amer. Loan & Trust Co., 78 N. W. 113.

§ 343. The term "account" as used in the statute is limited to its mercantile sense and means items of work and labor, of goods sold and delivered and the like. Jones v. Northern Trust Co., 67 M. 410.

§ 344. To bring an account within the statute it is not necessary that the plaintiff should have entered the items in a book. Lonsdale v. Oltman, 50 M. 52.

§ 345. The proper remedy for a failure to furnish a bill of particulars under the statute is to bring to the knowledge of the court on the trial the fact of a demand having been properly made and to object to the admission of evidence of the account. The objection cannot be raised by answer. Henry v. Bruns, 43 M. 295; Tuttle v. Wilson, 42 M. 233; Lonsdale v. Oltman, 50 M. 52; Jones v. Northern Trust Co., 67 M. 410.

§ 346. Objection to the sufficiency of a bill of particulars cannot be made on the trial. The exclusive remedy is a motion, before trial, for a more specific bill. Minneapolis Envelope v. Vanstrum, 51 M. 512.

§ 347. A stipulation to furnish a bill of particulars within a certain time waives the necessity of making the statutory demand and has the same effect. Tuttle v. Wilson, 42 M. 233.

Judgments—how pleaded.

§ 348. "In pleading a judgment or other determination of a

court or officer of special or general jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. In cases of special jurisdiction, if such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction." G. S. '94, § 5249. See Gunn v. Peakes, 36 M. 177 (overruling Karns v. Kunkle, 2 M. 313 G. 268; Smith v. Mulliken, 2 M. 319, G. 273); Scanlan v. Murphy, 51 M. 536.

Private statutes—how pleaded.

§ 349. "In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title, and the day of its approval, and the court shall thereupon take judicial notice thereof." G. S. '94, § 5251.

Municipal ordinances—how pleaded.

§ 350. "It shall not be necessary, in any pleading or complaint in civil or criminal proceedings for a violation of any ordinance of any city or village in this state, to set out or recite such ordinance, or any section thereof, at large; but it shall be sufficient in all such pleadings or complaints to state that the offense set forth in such complaint was committed contrary to the form of such ordinance, or of any specified section thereof." G. S. '94, § 5252.

Fraud.

§ 351. In pleading fraud all the facts necessary to disclose the fraud must be specifically alleged. A general charge of fraud is unavailing. Cummings v. Thompson, 18 M. 246 G. 228; Rand v. County Commissioners, 50 M. 391; Morrill v. Mfg. Co., 53 M. 371; Smith v. Prior, 58 M. 247; Egan v. Gordon, 65 M. 505; Kelley v. Wallace, 14 M. 236 G. 173; Kraemer v. Deustermann, 37 M. 469.

§ 352. But a general statement of the matters of fact constituting the fraud is all that is required. It is not necessary to allege minutely all the circumstances which may tend to prove the general charge. Cummings v. Thompson, 18 M. 246 G. 228; Brown v. Manning, 3 M. 35 G. 13.

§ 353. In an action for the rescission of a contract on the ground of fraud it is not necessary to allege a disaffirmance or a previous offer to return what the plaintiff has received under the contract nor make an offer to do what the court may require as a condition of granting relief. Knappen v. Freeman, 47 M. 491. See also, Nelson v. Carlson, 54 M. 92; Carlton v. Hulett, 49 M. 320; Nye v. Swan, 49 M. 437; Temple v. Norris, 53 M. 289.

§ 354. In pleading fraud it should be made to appear that damage has resulted therefrom. Parker v. Jewett, 52 M. 514; McNair v. Toler, 21 M. 175.

Duress.

§ 355. "In an action to recover back money paid under duress, it is not sufficient to allege generally that the payment was compulsory. The facts constituting or creating the duress must be pleaded." Rand v. County Commissioners, 50 M. 391; Taylor v. Blake, 11 M. 255 G. 170; Kraemer v. Deustermann, 37 M. 469.

Mistake.

§ 356. "In an action to recover money paid under mistake, a general allegation that it was paid under mistake is not enough. The facts constituting the mistake must be alleged." Rand v. County Commissioners, 50 M. 391.

Value.

§ 357. In actions upon an implied obligation to pay the reasonable value of services or goods sold and delivered allegations of value are material and are therefore admitted if not denied in the answer. The plaintiff is not, however, held to strict proof of the value as alleged. Gregory v. Wright, 11 Abb. Pr. (N. Y.) 417; Dexter v. Moodey, 36 M. 205; Iverson v. Dubay, 39 M. 325.

§ 358. Where value is alleged as a basis of unliquidated damages the allegation is not traversable and is therefore not admitted by a failure to deny. Unliquidated damages must be assessed in all cases regardless of the pleadings. See §§ 467, 458.

Damages—necessity of pleading.

§ 359. The amount of damages which a party has suffered is ordinarily no part of his cause of action and as the code provides only that the facts constituting the cause of action shall be stated an *ad damnum* clause cannot be held essential. Although not necessary it is nevertheless universal practice in actions for unliquidated damages to allege in the body of the complaint the amount of damages suffered. Except in actions where damages are the very gist of the action failure to allege damages does not render a complaint demurrable. Cowley v. Davidson, 10 M. 392 G. 314; Wilson v. Clarke, 20 M. 367 G. 318; Burns v. Jordan, 43 M. 25; Weaver v. Boom Co., 28 M. 543; Mattingly v. Darwin, 23 Ill. 567; Bartlett v. Bank, 79 Cal. 218; Loeb v. Kamak, 1 Mont. 152.

§ 360. Where damages are the gist of the action they must be stated with particularity in an issuable form. Simmer v. St. Paul, 23 M. 408 (loss of retail business). See § 354.

§ 361. To recover damages in the form of interest no demand therefor is necessary. Talcott v. Marston, 3 M. 339 G. 238; Cooper v. Reaney, 4 M. 528 G. 413; Brown v. Doyle, 69 M. 543; Ormond v. Sage, 69 M. 523.

§ 362. "It is immaterial whether the plaintiff has demanded the proper amount of damages or not or understood the true measure of damages. It is the duty of the court to see that damages are assessed in accordance with the proper rule." Colrick v. Swinburne, 105 N. Y. 503.

Damages—general.

§ 363. General damages are such as naturally and necessarily result from the wrongful act of the defendant. The law presumes that the plaintiff has suffered such damages and consequently they need not be pleaded specially. A general allegation of damage in a specified sum is sufficient. Chamberlain v. Porter, 9 M. 260 G. 244; Pioneer Press Co. v. Hutchinson, 63 M. 481; Meacham v. Cooper, 36 M. 227; Ennis v. Pub. Co., 44 M. 105; Partridge v. Blanchard, 23 M. 69; Hershey Lumber Co. v. St. Paul etc. Lumber Co., 66

M. 449; Andrews v. Stone, 10 M. 72 G. 52; Stone v. Evans, 32 M. 243; Smith v. Ry. Co., 30 M. 169.

Damages—special.

§ 364. Special damages are such as result naturally and proximately, but not necessarily and immediately, from the wrongful act of the defendant. Chamberlain v. Porter, 9 M. 260 G. 244; Spencer v. Ry. Co., 21 M. 362; Cushing v. Seymour Sabin & Co., 30 M. 301.

Damages—special—necessity of pleading.

§ 365. "Whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it." Spencer v. Ry. Co., 21 M. 362 (trespass on land); Wampach v. Ry. Co., 21 M. 364 (trespass on land); Cushing v. Seymour Sabin & Co., 30 M. 301 (conversion); Brackett v. Edgerton, 14 M. 174 G. 134 (shipment of wheat); Gray v. Bullard, 22 M. 278 (trespass de bonis asportatis); Frohreich v. Gammon, 28 M. 476 (warranty of harvester); Liljengren etc. Co. v. Mead, 42 M. 420 (contract for building material); Hitchcock v. Turnbull, 44 M. 475 (contract for boiler plates); Holston v. Boyle, 46 M. 432 (libel); Stone v. Evans, 32 M. 243 (malpractice); Ward v. Haws, 5 M. 440 G. 359 (assault and battery); Loudy v. Clarke, 45 M. 477 (injury to business from selling defective goods).

§ 366. "As the object of stating special damage is to let the defendant know what charges he must prepare to meet, the statement must always be as full and specific as the facts will admit of." Ward v. Haws, 5 M. 440 G. 359.

§ 367. The objection that special damages are not pleaded is waived unless the evidence in proof thereof is seasonably objected to on the ground that it is inadmissible under the pleadings. Isaacson v. Ry. Co., 27 M. 463.

Damages—how pleaded.

§ 368. It is not necessary to itemize the damages. It is sufficient to state them in gross. Allis v. Day, 14 M. 516 G. 388; Bast v. Leonard, 15 M. 304 G. 235; Lindholm v. St. Paul, 19 M. 245 G. 204.

Damages—allegations of not traversable.

§ 369. Allegations of damage whether general or special, except when the gist of the action, are not traversable. See §§ 458, 467.

Damages—matter in mitigation of.

§ 370. "The general rule of pleading is that matter in mitigation of damages, at least when it could not be used as a bar of plaintiff's cause of action, need not be pleaded." Hoxsie v. Empire Lumber Co., 41 M. 549. (This is probably not true in actions for slander or libel. See G. S. '94, § 5258.) See § 510.

Damages—matter in aggravation of.

§ 371. Matter in aggravation of damages need not be specially pleaded. Frederickson v. Johnson, 60 M. 337; Reitan v. Goebel, 33 M. 151; Gribble v. Pioneer Press, 34 M. 342; Larrabee v. Tribune Co., 36 M. 141; Schofield v. Ferres, 46 Pa. St. 439; Brzezinski v. Tierney, 60 Conn. 55. See §§ 1060, 1061.

Prayer for relief—nature of.

§ 372. The statute provides that the complaint shall contain "a demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount thereof shall be stated." The prayer is no part of the cause of action and no issue can be formed thereon. It becomes of real importance only in case of default. Hatch v. Coddington, 32 M. 92; Colstrum v. Ry. Co., 31 M. 367.

Prayer for relief—effect of demanding wrong relief.

§ 373. The prayer for relief is no part of the cause of action and a prayer for greater or less or different relief than the facts alleged warrant does not render the complaint demurrable. See § 404.

§ 374. Although it is true that the plaintiff should draft

his complaint in accordance with a distinct theory as to the nature of the primary right that has been invaded and the remedial right to which he is entitled the relief which he may receive is not conclusively determined by the form in which he has stated the facts or the relief for which he has prayed. It is for the court and not the pleader to determine the nature of the relief which he shall receive. Under our practice the plaintiff receives the kind of relief to which he is entitled by the facts proved within the allegations of the complaint regardless of his own theory of the nature of his cause of action and consequent remedial right as shown by his prayer for relief and attempts at proof on the trial. The plaintiff cannot be thrown out of court because he has mistaken the character of his cause of action and remedial right but only when he has failed to show himself entitled to any relief upon the facts proved within the allegations of the complaint. The court, disregarding plaintiff's theory of the case and prayer for relief, considers the facts proved within the allegations of the complaint in connection with the whole body of the substantive and remedial law of the state and grants relief accordingly—either legal or equitable[1] or a blending of both.[2] "The relief granted to the plaintiff, if there is no answer, cannot exceed that which he has demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue."[3] Relief of an equitable nature may be awarded in an action of a legal nature and relief of a legal nature in an action of an equitable nature.[4] When a court once takes jurisdiction of a case it is its duty to determine all rights and obligations pertaining to the subject-matter and grant full measure of relief;[5] and when parties voluntarily go to trial on the merits in an action of an equitable nature it is too late to raise the objection that the plaintiff had an adequate remedy at law.[6] Though the plaintiff fail to prove some fact alleged, necessary to the full measure of the relief demanded, if he proves facts within the allegations of the complaint entitling him to some relief it must be awarded to him.[7]

[1] Greenleaf v. Egan, 30 M. 316; Canty v. Latterner, 31 M. 239; Merrill v. Dearing, 47 M. 137

[2] Erickson v. Fischer, 51 M. 300; Whiting v. Clugston, 75 N. W. 759; Bell v. Mendenhall, 71 M. 331; Little v. Willford, 31 M. 173.

[3] Farmer v. Crosby, 43 M. 549 and cases cited; Seibert v. Ry. Co., 58 M. 39 and cases cited; Wilson v. Fuller, 58 M. 149; Abbott v. Nash, 35 M. 451; Smith v. Gill, 37 M. 455; Triggs v. Jones, 46 M. 277; Spooner v. Bay St. Louis Syndicate, 47 M. 464; Nichols & Shepard Co. v. Wiedmann, 72 M. 344; Henry v. Meighen, 46 M. 548; Brown v. Doyle, 69 M. 543; Norton v. Myers, 77 N. W. 539.

[4] Erickson v. Fischer, 51 M. 300; Crump v. Ingersoll, 47 M. 179; Marshall v. Gilman, 47 M. 131; Sanborn v. Nockin, 20 M. 178 G. 163; Little v. Willford, 31 M. 173.

[5] Sewell v. St. Paul, 20 M. 511 G. 459; Crump v. Ingersoll, 47 M. 179; Erickson v. Fischer, 51 M. 300; Thompson v. Myrick, 24 M. 4; Thwing v. Hall etc. Co., 40 M. 184; Nichols v. Randall, 5 M. 304 G. 240.

[6] St. Paul etc. Ry. Co. v. Robinson, 41 M. 394; Newton v. Newton, 46 M. 33.

[7] Wilson v. Fairchild, 45 M. 203 and cases cited under § 404(3).

Prayer for relief—relief limited by.

§ 375. If the defendant appears the relief granted is not in any way limited or controlled by the prayer for relief except that in actions for damages greater damages cannot be awarded than prayed, but this limitation may always be avoided by amendment. Elfelt v. Smith, 1 M. 126 G. 101; Eaton v. Caldwell, 3 M. 134 G. 80; Nichols & Shepard Co. v. Wiedmann, 72 M. 344.

§ 376. If the defendant does not appear and answer, the relief which may be awarded the plaintiff is strictly limited in nature and degree to the relief prayed and it matters not that the allegations and proof would justify different or

greater relief. G. S. '94, § 5413; Minnesota Linseed Oil Co. v. Maginnis, 32 M. 193; Prince v. Farrell, 32 M. 293; Exley v. Berryhill, 37 M. 182; Doud v. Duluth Milling Co., 55 M. 53; Spooner v. Bay St. Louis Syndicate, 47 M. 464; Northern Trust Co. v. Albert Lea College, 68 M. 112.

Prayer for relief—general prayer.

§ 377. To a specific demand of relief many pleaders add, "and for such other and further relief as to the court may seem just." This general prayer is wholly meaningless and futile under our practice. It is a useless "survival" of the old system and in nowise enlarges the relief which the plaintiff may receive. In case of default it cannot be used as a basis for awarding any relief whatever.[1] The defendant has a right to suffer judgment by default in perfect confidence that no greater or different relief will be awarded than specifically prayed.[2]

[1] Simonson v. Blake, 20 How. Pr. (N. Y.) 484; Prince v. Farrell, 32 M. 293.

[2] Northern Trust Co. v. Albert Lea College, 68 M. 112.

Prayer for relief in the alternative.

§ 378. The plaintiff may pray for relief in the alternative, that is, for one kind of relief or another, as the court may deem proper. Lyke v. Port, 65 How. Pr. (N. Y.) 298; Reubens v. Joel, 13 N. Y. 488. See Henry v. Meighen, 46 M. 548; Connor v. Board of Education, 10 M. 439 G. 352.

VERIFICATION

The statute.

§ 379. "When any pleading in a case is verified, all subsequent pleadings, except demurrers, shall be verified also. The verification shall be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on his information and belief, and as to those matters that he believes it to be true, and shall be made by the party, or, if there are several parties united in interest and

pleading together, by one at least of such parties acquainted with the facts, if such party is within the county where the attorney resides, and capable of making the affidavit. The verification may also be made by the agent or attorney, if the party making such pleading is absent from the county where the attorney resides, or for some cause is unable to verify it; and shall be to the effect that the same is true to the best of his knowledge, information and belief. When a corporation is a party, the verification may be made by any officer thereof; and when the state or any officer thereof in its behalf is a party, the verification may be made by the attorney general. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony." G. S. '94, §§ 5244, 5245; State v. Cooley, 58 M. 514.

Remedy for defective verification.

§ 380. The want of a verification or a defect in a verification is not a ground of demurrer. The exclusive remedy for such a defect is a return of the pleading. The retention of a defectively verified pleading is deemed a waiver of the defect. McMath v. Parsons, 26 M. 246; Smith v. Mulliken, 2 M. 319 G. 273; Hayward v. Grant, 13 M. 165 G. 154.

Forms of verifications.

§ 381. [By party.]

State of Minnesota } ss.
County of }

, being duly sworn, says that he is the plaintiff [one of the plaintiffs] in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

[Jurat] [Signature]

§ 382. [By attorney.]

[Venue as above]

, being duly sworn, says that he is the attorney for the plaintiff in the above entitled action;

that he has read the foregoing complaint and knows the contents thereof; that the same is true to the best of his knowledge, information and belief; that the reason why this verification is not made by the plaintiff is that he is absent from the county of wherein affiant resides.

[Jurat] [Signature]

§ 383. [By officer of corporation.]

[Venue as above]

, being duly sworn, says that he is the president of the , plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

[Jurat] [Signature]

Before whom made.

§ 384. The verification may be made before any person authorized to administer oaths. It may be made before the attorney in the action if he is a notary. See Young v. Young, 18 M. 90 G. 72.

CROSS-COMPLAINTS

§ 385. "It was at one time doubted whether a cross-bill would lie in those code states where the code made no express provisions for it, but it has since been properly held that it will. The order should provide for the service of the cross-bill on all the parties against whom it is directed, and they should answer it." [1] This would seem to settle the question of the existence of the right but the practice is still in a formless condition. "The cause of action which one defendant may set up against his co-defendant by a cross-complaint must be one

arising out of, or having reference to, the subject of the original action." [2]

[1] Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 M. 386. (It is to be observed that this decision contravenes G. S. '94, § 5228.)

[2] American Exchange Bank v. Davidson, 69 M. 319 and see further upon the general subject of cross-complaints: Jewett v. Land Co., 64 M. 531; Spooner v. Bay St. Louis Syndicate, 47 M. 464; Howe v. Spalding, 50 M. 157; Maxwell v. Northern Trust Co., 70 M. 334; Sturtevant-Larrabee Co. v. Mast, Buford & Burwell Co., 66 M. 437; Palmer v. Bank of Zumbrota, 65 M. 90.

CHAPTER XI

THE DEMURRER

Demurrer defined.

§ 386. A demurrer is an objection that the facts alleged in the pleading against which it is directed, assuming them to be true in fact, are insufficient in law to require the demurrant to plead further. See Bouvier, Law Dict.; Stephen, Pl. 140; 1 Chitty, Pl. 693.

Effect of demurrer.

§ 387. "The demurrer conceding all the facts alleged in the complaint, raises an issue of law to be determined by the court, and, as the word itself implies, when a demurrer is served, all other proceedings in the cause stop until the question of law raised thereon is decided." [1] "A demurrer raises an issue of law upon which the court is to render judgment." [2]

[1] Cashman v. Reynolds, 123 N. Y. 141.

[2] Knoblauch v. Fogelsong, 38 M. 459.

Demurrer at common law and under code compared.

§ 388. Every pleading must be true in fact and sufficient in law. If it is not true in fact it may be traversed. If it is insufficient in law it is demurrable. It is upon this double necessity that every pleading must be both true in fact and sufficient in law that the whole system of pleading rests. The insufficiency of a pleading in law may be either of substance—failing to state a cause of action or defence—or of form. At common law defects of substance were reached by a general demurrer. It was called general because it did not specify the defects at which it was aimed. Formal defects in a pleading were reached by a special demurrer, that is, a demurrer specifying the defect of form to which objection was made. Under our practice the scope of the demurrer is somewhat different. We may raise objection to the jurisdiction of the court, the legal capacity of a party to sue, that another action is pending

or that there is a defect of parties, by demurrer. No such practice prevailed at common law or in equity. Such objections were formerly raised by pleas in abatement. The common law special demurrer for informality in the statement of the cause of action or defence is abrogated.[1] Defects of form are now reached by motion. Under code practice a demurrer for insufficiency of the facts alleged to constitute a cause of action or defence is frequently characterized as a general demurrer but such a demurrer should not be confounded with the general demurrer of common law practice for it is by no means so broad in its effect. The general demurrer of the old system has not been retained by the code.[2]

[1] Marie v. Garrison, 83 N. Y. 14.

[2] Stephen, Pl. 140; 1 Chitty, Pl. 693; Pomeroy, Remedies, § 596; Bliss, Code Pl. § 404; Bryant, Code Pl. § 158.

Statutory grounds of demurrer to complaint.

§ 389. "The defendant may demur to the complaint within twenty days after the service thereof, when it appears upon the face thereof, either:

First. That the court has no jurisdiction of the person of the defendant [1] or the subject of the action; [2]

Second. That the plaintiff has not legal capacity to sue; [3]

Third. That there is another action pending between the same parties for the same cause; [4]

Fourth. That there is a defect of parties, plaintiff or defendant; [5]

Fifth. That several causes of action are improperly united; [6]

Sixth. That the complaint does not state facts sufficient to constitute a cause of action." [7] G. S. '94, § 5232.

[1] Reynolds v. Packet Co., 10 M. 178 G. 144.

[2] Powers v. Ames, 9 M. 178 G. 164; Ames v. Boland, 1 M. 365 G. 268; Stratton v. Allen, 7 M. 502 G. 409; Benson v. Silvey, 59 M. 73; Kretzschmar v. Meehan, 77 N. W. 41 (failure to bring action affecting real property in the county where the land lies).

[3] "To sustain a demurrer upon the ground that it appears upon the face of the complaint" that the plaintiff has not legal capacity to sue, "it is not enough that it does not appear that the plaintiff has legal capacity to sue, but the want of such legal capacity must appear affirmatively." Minneapolis Harvester Works v. Libby, 24 M. 327; Wisconsin v. Torinus, 22 M. 272; Walsh v. Byrnes, 39 M. 527; Soule v. Thelander, 31 M. 227.

[4] Coles v. Yorks, 31 M. 213. See §§ 931–943.

[5] Porter v. Fletcher, 25 M. 493; Mendenhall v. Duluth Dry Goods Co., 72 M. 312 and cases cited under § 196.

[6] Smith v. Jordan, 13 M. 264 G. 246; Colstrom v. Ry. Co., 31 M. 367; Anderson v. Scandia Bank, 53 M. 191; Sanders v. Classon, 13 M. 379 G. 352. It is not necessary for all the defendants to join in the demurrer. Trowbridge v. Forepaugh, 14 M. 133 G. 100.

[7] This is commonly called a general demurrer but it is not identical in its effect with the general demurrer of common law pleading. See § 388.

General demurrer.

§ 390. The following are the commonest defects reached by a general demurrer:

(a) When the facts alleged are intrinsically insufficient to constitute a cause of action in favor of any one, that is, when they show no infraction of a legal right.

(b) When the facts alleged tend to make out a good cause of action but there is an omission of one or more of the essential elements of such a cause of action.

(c) When the complaint discloses some fact which, as a matter of law, defeats plaintiff's right to recover, as for example:

(1) When it shows that the action is brought prematurely.

(2) When it shows contributory negligence on the part of the plaintiff.

(3) When it shows that the action is barred by the statute of limitations.

(4) When it shows a prior adjudication.

(5) When it shows an oral contract within the statute of frauds.

(d) When the complaint states a cause of action but not in favor of the plaintiff.

(e) When the complaint states a cause of action but not against the defendant.

(f) When the complaint shows that the plaintiff once had a cause of action which he afterwards assigned. See § 408.

Forms of demurrer.

§ 391. [General demurrer.]

[Title.]

The defendant demurs to the complaint herein on the ground that it does not state facts sufficient to constitute a cause of action.

[No demand of judgment.]

§ 392. [Other forms of demurrer.]

The defendant demurs to the complaint herein on the ground that it appears upon the face thereof that

the court has no jurisdiction of the [person of this defendant] [subject of this action].

the plaintiff has not legal capacity to sue.

there is another action pending between the same parties for the same cause.

there is a defect of parties plaintiff [defendant] herein, by reason of the omission of one who [stating the facts which make the party specified a necessary party].

[No demand of judgment.]

Statutory grounds exclusive.

§ 393. Demurrer will not lie except on the grounds stated in the statute. Campbell v. Jones, 25 M. 155; Leuthold v. Young, 32 M. 124; Nelson Lumber Co. v. Pelan, 34 M. 243; Powers v. Ames, 9 M. 178 G. 164; Reynolds v. Packet Co., 10 M. 178 G. 144; Seager v. Burns, 4 M. 141 G. 93.

Defect must appear on face of pleading.

§ 394. It is a fundamental rule that demurrer will not lie except for defects apparent upon the face of the pleading against which it is directed. Minneapolis Harvester Works v. Libby, 24 M. 327; Reynolds v. Packet Co., 10 M. 178 G. 144; Powers v. Ames, 9 M. 178 G. 164; Mendenhall v. Duluth Dry Goods Co., 72 M. 312; Bell v. Mendenhall, 71 M. 331, 337; Mitchell v. Thorne, 134 N. Y. 536.

Joint demurrer.

§ 395. When several parties unite in a demurrer it must be overruled if the pleading against which it is directed is good as to any of the demurrants. Goncelier v. Foret, 4 M. 13 G. 1; Lewis v. Williams, 3 M. 151 G. 95; Clark v. Lovering, 37 M. 120; Petsch v. Printing Co., 40 M. 291; Palmer v. Zumbrota, 65 M. 91.

Demurrer to the whole of a pleading.

§ 396. It is expressly provided (See § 405) that a demurrer may be to the whole complaint or to any of the causes of action stated therein but if it is made to the whole complaint it will be overruled if any one of the causes of action therein stated is good. "A general demurrer to a whole pleading must be overruled if there be one good cause of action or one good defence in the pleading to which it is interposed. It must be sustained or fail to the whole extent to which it is interposed." First Nat. Bank v. How, 28 M. 150; Armstrong v. Hinds, 9 M. 356 G. 341; Winona etc. Ry. Co. v. Ry. Co., 26 M. 179; Grant v. Grant, 53 M. 181; Vaule v. Steenerson, 63 M. 110; Miller v. Rouse, 8 M. 124 G. 97; Gammons v. Johnson, 69 M. 488; American etc. Asso. v. Stoneman, 52 M. 212.

Demurrer to part of pleading.

§ 397. "A demurrer will only lie to a whole pleading, or to the whole of a single cause of action or defence." Knoblauch v. Fogelsong, 38 M. 459; Bass v. Upton, 1 M. 408 G. 292; Armstrong v. Hinds, 9 M. 356 G. 341; Pratt v. Sparkman, 42 M. 448; Dean v. Howard, 49 M. 350; Steenerson v. Ry. Co., 64 M. 216; Palmer v. Smith, 21 M. 419.

§ 398. A demurrer will lie to a single cause of action although it is not separately stated. Bass v. Upton, 1 M. 408 G. 292; Anderson v. Scandia Bank, 53 M. 191.

A party cannot demur and answer.

§ 399. The primary object of pleading under the code as well as at common law is to evolve a distinct issue of law or fact for the determination of the court or jury. It follows as a corollary that a party cannot at the same time demur and answer to the same matter. A demurrer must be a separate pleading. A party cannot insert a demurrer in the body of an answer. Lace v. Fixen, 39 M. 46; Cashman v. Reynolds, 123 N. Y. 141.

A demurrer admits the facts.

§ 400. A demurrer admits all the material facts well pleaded. The facts are admitted, however, solely for the purpose of testing their sufficiency in law upon the demurrer. After the disposition of the demurrer the demurrant is not estopped to deny them or avoid their effect by new matter. Griggs v. St. Paul, 9 M. 246 G. 231; Nininger v. Commissioners, 10 M. 133 G. 106; Baker v. Guaranty Loan Co., 36 M. 105; St. Paul Land Co. v. Dayton, 37 M. 364; Flaherty v. Ry. Co., 39 M. 328; Reiser v. Gigrich, 59 M. 368; Whitcomb v. Handy, 68 M. 265; State v. Ehrmantraut, 63 M. 105; Cowley v. Davidson, 10 M. 392 G. 314; Birch v. Security Loan Asso., 71 M. 112.

§ 401. It does not admit conclusions of law or facts alleged by way of recital or remote inference or in other respects not well pleaded. Griggs v. St. Paul, 9 M. 246 G. 231; Taylor v. Blake, 11 M. 255 G. 170; Johnson v. Howard, 20 M. 370 G. 322.

A demurrer runs through the record.

§ 402. A demurrer raises an issue of law upon which the court must render judgment. A demurrant in effect asks the court to assume that the facts as alleged in the record are true and upon such facts to render judgment in his favor. If a party asks the court to render a judgment in his favor upon the evidence the court will consider all the evidence. So when a party asks the court to render judgment in his favor upon the

record the court will consider the whole record and render judgment accordingly. Hence the rule that a demurrer runs through the record and reaches back to the first fault of substance. "Under our code, as at common law, the rule still obtains that, upon demurrer to an answer, the sufficiency of the complaint as to matters of substance may be considered. A party whose pleading is demurred to may now, as formerly, go back and attack the pleading of his adversary, and judgment will be given against the party committing the first error of substance. The rule is not affected by the insufficiency of the pleading demurred to. Upon a demurrer to a reply the complaint may be attacked. First Nat. Bank v. How, 28 M. 150; Loomis v. Youle, 1 M. 175 G. 150; Smith v. Mulliken, 2 M. 319 G. 273; Stratton v. Allen, 7 M. 502 G. 409; Lockwood v. Bigelow, 11 M. 113 G. 70; Bausman v. Woodman, 33 M. 512; Yoss v. De Freudenrich, 6 M. 95 G. 45; Townsend v. Fenton, 30 M. 528.

§ 403. The only defects of substance under this rule are want of jurisdiction of the subject-matter and insufficiency of the facts alleged to constitute a cause of action or defence. Stratton v. Allen, 7 M. 502 G. 409; Lockwood v. Bigelow, 11 M. 113 G. 70; Menifee v. Clark, 35 Ind. 304.

Defects for which demurrer will not lie.

§ 404. Demurrer will not lie for a defect in the prayer for relief. If a complaint states facts constituting a cause of action entitling the plaintiff to any relief, either legal or equitable, it is not demurrable because it prays for the wrong relief [1] or for inconsistent relief [2] or for greater relief than the facts alleged warrant.[3] Demurrer does not lie for a defect in the allegation of damages. Insufficient or improper allegations of damages should be met on the trial by objection to the admission of evidence and not by demurrer.[4] Demurrer does not lie for misjoinder or excess of parties; [5] nor for indefiniteness; [6] nor for redundancy; [7] nor for non-existence of the facts alleged; [8] nor for suing by initials; [9] nor for failure to state several causes of action separately; [10] nor for a defective

prayer for relief;[11] nor for irrelevancy;[12] nor for a defect in the verification;[13] nor for failure to obtain leave to sue a receiver or other officer of court;[14] nor for bringing an action in the wrong county, unless it is an action involving real property;[15] nor that plaintiff's exclusive remedy is in equity.[16]

[1] Canty v. Latterner, 31 M. 239; Leuthold v. Young, 32 M. 122; Connor v. Board of Education, 10 M. 439 G. 352; Metzner v. Baldwin, 11 M. 150 G. 92; Dye v. Forbes, 34 M. 13; Crosby v. Timolat, 50 M. 171; Bay View Land Co. v. Myers, 62 M. 265; Morey v. Duluth, 69 M. 5; Bohrer v. Drake, 33 M. 408; Rule v. Omega etc. Co., 64 M. 326; Bell v. Mendenhall, 71 M. 331; Third Nat. Bank v. Stillwater Gas Co., 36 M. 75.

[2] Leuthold v. Young, 32 M. 122; Connor v. Board of Education, 10 M. 439 G. 352; Metzner v. Baldwin, 11 M. 150 G. 92; Colstrom v. Ry. Co., 31 M. 367.

[3] Seibert v. Ry. Co., 58 M. 39; Lockwood v. Bigelow, 11 M. 113 G. 70; First Division St. Paul etc. Ry. Co. v. Rice, 25 M. 278; Flynn v. Little Falls Electric & Water Co., 77 N. W. 38.

[4] Cowley v. Davidson, 10 M. 392 G. 314; Partridge v. Blanchard, 23 M. 69; Steenerson v. Ry. Co. 64 M. 216.

[5] Hoard v. Clum, 31 M. 186; Lewis v. Williams, 3 M. 151 G. 95; Goncelier v. Foret, 4 M. 13 G. 1; Nichols v. Randall, 5 M. 304 G. 240.

[6] Chouteau v. Rice, 1 M. 106 G. 83; Dewey v. Leonard, 14 M. 153 G. 120; Spotswood v. Herrick, 22 M. 548; Nininger v. Commissioners, 10 M. 133 G. 106; Curtiss v. Livingston, 36 M. 380; Clark v. Ry. Co., 28 M. 69; Snowberg v. Nelson Paper Co., 43 M. 532; American Book Co. v. Pub. Co., 71 M. 363. See § 666.

[7] Loomis v. Youle, 1 M. 175 G. 150; Fish v. Berkey, 10 M. 199 G. 161. See § 659.

[8] Williams v. Langevin, 40 M. 180; Stevens v. Staples, 64 M. 3; Royal Ins. Co. v. Clark, 61 M. 476.

[9] Gardner v. McClure, 6 M. 250 G. 167.

[10] Newell v. How, 31 M. 235; Craig v. Cook, 28 M. 232; Humphrey v. Merriam, 37 M. 502. See § 271.

[11] Colstrom v. Ry. Co., 31 M. 367.

[12] Fish v. Berkey, 10 M. 199 G. 161. See § 652.

[13] McMath v. Parsons, 26 M. 246.

[14] Leuthold v. Young, 32 M. 122.

[15] Merrill v. Shaw, 5 M. 148 G. 113; Nininger v. Carver Co., 10 M. 133 G. 106; Gill v. Bradley, 21 M. 15; Kipp v. Cook, 46 M. 537; Tullis v. Brawley, 3 M. 277 G. 191; Kretzschmar v. Meehan, 77 N. W. 41.

[16] Bell v. Mendenhall, 71 M. 331; Benson v. Silvey, 59 M. 73.

Grounds of demurrer must be specified.

§ 405. "The demurrer shall distinctly specify the grounds of objection to the complaint; unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the causes of action stated therein." G. S. '94, § 5233.

§ 406. A party may specify as many of the statutory grounds as he desires but he is limited to those specified. Seager v. Burns, 4 M. 141 G. 93; Powers v. Ames, 9 M. 178 G. 164; Smith v. Jordon, 13 M. 264 G. 246; Soule v. Thelander, 31 M. 227; Walsh v. Byrnes, 39 M. 527; Rossman v. Mitchell, 76 N. W. 48; Bell v. Mendenhall, 71 M. 331; Northwestern Railroader v. Prior, 68 M. 95 (ground cannot be shifted on appeal).

§ 407. The grounds may be stated in the language of the statute except as to defect of parties.[1] A general demurrer to a pleading that it does not state facts sufficient to constitute a cause of action or defence is sufficient without further specification.[2]

[1] Getty v. Ry. Co., 8 How. Prac. (N. Y.) 177.

[2] Monette v. Cratt, 7 M. 234 G. 176.

§ 408. Under a general demurrer for insufficiency of the facts to constitute a cause of action the demurrant may raise the following objections:

(a) Former adjudication. State v. Bachelder, 5 M. 223 G. 178; Monette v. Cratt, 7 M. 234 G. 176.

(b) That the action is barred by the statute of limitations. Trebby v. Simmons, 38 M. 509; West v. Hennessey, 58 M. 133. (This is now doubtful. See § 1741.)

(c) Contributory negligence. Clark v. Ry. Co., 28 M. 69.

(d) That the complaint does not state facts constituting a cause of action against the defendant and in favor of the plaintiff although it may state a cause of action between others. Rossman v. Mitchell, 76 N. W. 48.

(e) That the action is brought prematurely. Iselin v. Simon, 62 M. 128.

(f) That the contract alleged is void under the statute of frauds. Wentworth v. Wentworth, 2 M. 277 G. 238; Wilson v. Schnell, 20 M. 40 G. 33; Russell v. Ry. Co., 39 M. 145.

(g) Failure to plead a foreign statute. Myers v. Ry. Co., 69 M. 476.

(h) *Bona fide* purchaser. Newton v. Newton, 46 M. 33.

(i) That the facts alleged do not authorize equitable relief. Sanborn v. Eads, 38 M. 211.

(j) Misjoinder of parties. See §§ 199, 200.

§ 409. Under such a general demurrer the following objections cannot be raised:

(a) Legal capacity or authority to sue. Soule v. Thelander, 31 M. 227; Walsh v. Byrnes, 39 M. 527; Rossman v. Mitchell, 76 N. W. 48.

(b) Misjoinder of causes of action. Smith v. Jordan, 13 M. 264 G. 246.

(c) Defect of parties. Bell v. Mendenhall, 71 M. 331; Svenburg v. Fosseen, 78 N. W. 4.

(d) Want of jurisdiction. Powers v. Ames, 9 M. 178 G. 164.

Effect of overruling demurrer.

§ 410. When a demurrer is overruled without leave to withdraw the demurrer and plead over the case stands exactly as if no answer had been interposed and the plaintiff is entitled to enter judgment on his complaint for all the relief therein prayed, as in case of default. G. S. '94, § 5387; Daniels v. Bradley, 4 M. 158 G. 105; Deuel v. Hawke, 2 M. 50 G. 37.

Pleading over.

§ 411. It is left to the discretion of the court to allow a party to withdraw his demurrer and plead over upon such terms as may be just. In ordinary cases it is allowed as a matter of course. G. S. '94, § 5265; Potter v. Holmes, 77 N. W. 416; Flaherty v. Ry. Co., 39 M. 328. The supreme court will rarely grant leave to plead over. See § 417.

§ 412. "In allowing a party to withdraw a demurrer, and plead to the facts alleged against him, a court may properly, in the exercise of its discretion, impose such reasonable conditions as may prevent unnecessary delay in the trial and determination of the cause." Flaherty v. Ry. Co., 39 M. 328; Denton v. Scully, 26 M. 325.

§ 413. When a party withdraws his demurrer and with leave of court pleads over he is held to waive his exception to the decision on demurrer. Coit v. Waples, 1 M. 134 G. 110; Thompson v. Ellenz, 58 M. 301; Cook v. Kittson, 68 M. 474.

§ 414. He does not of course waive the right to question the jurisdiction of the court over the subject-matter or the sufficiency of the facts alleged to constitute a cause of action. He is simply estopped to question the decision of the court on the demurrer. He must raise his objection in another form.

Effect of sustaining demurrer.

§ 415. When a demurrer is sustained without leave to amend the defendant is entitled to a judgment of dismissal with his costs. Deuel v. Hawke, 2 M. 50 G. 37. See Aetna Ins. Co. v. Swift, 12 M. 437 G. 326.

Amendment of pleading after demurrer.

§ 416. When a demurrer is sustained it is left to the discretion of the court to allow the plaintiff to amend his complaint on such terms as may be just. Amendment is allowed in ordinary cases as a matter of course if the defect is remediable by amendment. G. S. '94, § 5265.

§ 417. The supreme court will rarely allow an amendment upon sustaining a demurrer but will leave it to the court below

to grant or refuse leave to amend after the case is remanded. Farley v. Kittson, 27 M. 102; Haven v. Place, 28 M. 550.

§ 418. By amending his pleading after demurrer a party waives his exception to the decision on demurrer. Becker v. Sandusky City Bank, 1 M. 311 G. 243.

§ 419. Unless the decision on demurrer involves plaintiff's right of action under any complaint which the facts would warrant it is ordinarily advisable for the plaintiff to amend his complaint to conform to the views of the court rather than to appeal. Benton v. Schulte, 31 M. 312.

Demurrer to answer.

§ 420. "The statute allows only one ground of demurrer to an answer—to-wit, that it does not contain a defence or counterclaim; but under this ground, the objection to a counterclaim, that it cannot be determined without the presence of other parties may be raised." Campbell v. Jones, 25 M. 155. For statute see § 599.

§ 421. That a cause of action pleaded as a counterclaim is not a proper subject of counterclaim is ground for demurrer. Campbell v. Jones, 25 M. 155; Walker v. Johnson, 28 M. 147; Lace v. Fixen, 39 M. 46.

§ 422. "An answer not containing new matter but consisting only of denials of what is alleged in the complaint, is not subject to demurrer." Nelson Lumber Co. v. Pelan, 34 M. 243.

§ 423. This is so although the denials are so indefinite or otherwise insufficient as not to form an issue. The remedy in such cases is a motion for judgment on the pleadings or to make more definite and certain. Pomeroy, Remedies, § 596.

§ 424. Where the plaintiff demurs to the answer and raises the question of its sufficiency in law, whether it is sufficient or not, the judgment of the court is invoked upon the law of the case as presented by the pleadings. Lewis v. Cook, 150 N. Y. 163.

Demurrer to answer—forms of.

§ 425. The plaintiff demurs to the second defence set forth

in the answer herein on the ground that it does not state facts sufficient to constitute a defence.

§ 426. The plaintiff demurs to the counterclaim set forth in the answer herein on the ground that it does not state facts sufficient to constitute a counterclaim.

Demurrer to reply.

§ 427. "If a reply to any new matter set up in the answer is insufficient, the defendant may demur thereto, stating the ground thereof." G. S. '94, § 5243.

§ 428. "A reply is demurrable for insufficiency when, if true, it is in law, for any reason, no answer to the new matter set up in the defendant's answer, even though its insufficiency be such that it could properly be stricken out upon motion. A reply which is responsive to nothing in the answer but merely attempts to remedy the shortcomings of the complaint is demurrable." Bausman v. Woodman, 33 M. 512.

Demurrer to reply—form of.

§ 429. The defendant demurs to the reply herein on the ground that it does not state facts sufficient to constitute a defence.

CHAPTER XII

THE ANSWER

The answer in general.

§ 430. The defendant in response to the complaint, must either demur or answer. He cannot demur and answer at the same time.[1] If he does neither he suffers a default. The general function of the answer is to apprise the plaintiff and the court what particular facts in the complaint the defendant controverts and puts in issue and what defences he may have thereto. The answer of code procedure is a wholly new creation. It is a radical departure from the common law system in that it allows the defendant to plead as many defences as he may have, either legal or equitable, and also to set up a wholly independent cause of action against the plaintiff upon which he may have affirmative relief.

[1] See § 399.

Must be responsive to complaint.

§ 431. An answer must be responsive to the allegations of fact in the complaint and raise an issue thereon or set up new matter constituting a defence or counterclaim thereto. It cannot be used for any other purpose. Hall v. Southwick, 27 M. 234; Henry v. Bruns, 43 M. 295.

Joint answer.

§ 432. "A joint answer must be good as to all of the defendants. If it does not state a defence as to all of them it is bad as to all." Whitcomb v. Hardy, 68 M. 265; Pomeroy, Remedies, § 606.

§ 433. All the allegations and denials in a joint answer are to be taken as made by all the parties joining. Lampsen v. Brander, 28 M. 526.

The statutes.

§ 434. "The answer of the defendant shall contain:

First. A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

Second. A statement of any new matter constituting a defence or counterclaim, in ordinary and concise language, without repetition;

Third. All equities existing at the time of the commencement of any action, in favor of a defendant therein, or discovered to exist after such commencement, or intervening before a final decision in such action. And if the same are admitted by the plaintiff, or the issue thereon is determined in favor of the defendant, he shall be entitled to such relief, equitable or otherwise, as the nature of the case demands, by judgment or otherwise." G. S. '94, § 5236.

"The counterclaim mentioned in the last section must be an existing one in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

First. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

Second. In an action arising on contract, any other cause of action, arising also on contract, and existing at the commencement of the action." G. S. '94, § 5237.

"When any of the matters enumerated in section seventy-four (G. S. '94, § 5232; § 389 *supra*) do not appear upon the face of the complaint, the objection may be taken by answer." G. S. '94, § 5234.

General denial.

§ 435. Denials are either general or specific. General, when they deny each and every allegation of the complaint. Specific, when they deny some particular allegation. Although the general denial is not expressly authorized by our statute it has been in common use ever since the adoption of the code. "This form of denying, instead of specific denials, was adopted from motives of convenience, and it has consider-

ations of convenience to commend it." Stone v. Quaal, 36 M. 46.

§ 436. General denial—approved form of.

[Title.]

The defendant for answer to the complaint herein denies each and every allegation thereof.[1]

[1] Pomeroy, Remedies, § 613; Moen v. Eldred, 22 M. 538; Stone v. Quaal, 36 M. 46. For forms held "sufficient" but not approved, see Moen v. Eldred, 22 M. 538; Fogle v. Schaeffer, 23 M. 304; Peterson v. Rhunke, 46 M. 115 (in reply). For forms held insufficient, see Dodge v. Chandler, 13 M. 114 G. 105; Montour v. Purdy, 11 M. 384 G. 278; Starbuck v. Dunklee, 10 M. 168 G. 136.

General denial—effect of.

§ 437. A general denial has the same effect as a specific denial of each allegation. It has as wide a scope as the allegations of the pleading to which it is directed and puts in issue every material allegation thereof. Stone v. Quaal, 36 M. 46; German American Bank v. White, 38 M. 471; Nunnemacker v. Johnson, 38 M. 390; Fogle v. Schaeffer, 23 M. 304; Fetz v. Clark, 7 M. 217 G. 159; Kingsley v. Gilman, 12 M. 515 G. 425 and cases cited; Conway v. United States, 95 Fed. Rep. 615.

§ 438. A general denial puts in issue material allegations of value in the complaint. German Am. Bank v. White, 38 M. 471. Overruling McClung v. Bergfield, 4 M. 148 G. 99; Dean v. Leonard, 9 M. 190 G. 176; Pottgeiser v. Dorn, 16 M. 204 G. 180; Hecklin v. Ess, 16 M. 51 G. 38; Coleman v. Pearce, 26 M. 123; Moulton v. Thompson, 26 M. 120; Steele v. Thayer, 36 M. 174. See § 458.

General denial—what admissible under.

§ 439. Under a general denial the defendant may give evidence tending to disprove any fact which the plaintiff is bound to prove in order to recover or which he is permitted to prove for that purpose under his complaint. He is not limited to

matters of mere denial, but may prove affirmative matter if it is inconsistent with the allegations of the complaint. In other words, any fact is admissible which is inconsistent with the existence of any fact which the plaintiff is bound to prove in order to recover. Bond v. Corbett, 2 M. 248 G. 209; Caldwell v. Bruggerman, 4 M. 270 G. 190; Jones v. Rahilly, 16 M. 320 G. 283; McClellan v. Nichols, 24 M. 176; Tupper v. Thompson, 26 M. 385; Furman v. Tenny, 28 M. 77; Cushing v. Seymour Sabin Co., 30 M. 301; Webb v. Michener, 32 M. 48; Scone v. Amos, 38 M. 79; King v. Lacrosse, 42 M. 489; Johnson v. Oswald, 38 M. 550; Wakefield v. Day, 41 M. 344; Johnson v. Morstad, 63 M. 397; Beard v. First Nat. Bank, 41 M. 153; Sloan v. Becker, 31 M. 414; Terry v. Wilson's Estate, 50 M. 570; Roberts v. Nelson, 65 M. 240; Christianson v. Ry. Co., 61 M. 249; Commonwealth Title Ins. Co. v. Dokko, 72 M. 229; Griffin v. Ry. Co., 101 N. Y. 348; Milbank v. Jones, 141 N. Y. 340; Roemer v. Striker, 142 N. Y. 134; Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354; Pomeroy, Remedies, § 670.

§ 440. But facts consistent with the existence of the facts which the plaintiff must prove in order to recover and which tend to impair or affect their legal operation or validity are inadmissible under a general denial. "A general denial goes to the facts alleged, and not to the liability arising from those facts." Iselin v. Simon, 62 M. 128; Dodge v. McMahan, 61 M. 175; Finley v. Quirk, 9 M. 194 G. 179; Brown v. Eaton, 21 M. 409; Lautenschlager v. Hunter, 22 M. 267; Register Printing Co. v. Willis, 57 M. 93; Roberts v. Nelson, 65 M. 240.

Specific denials.

§ 441. The object of a specific denial is to put in issue some particular allegation of the complaint. To constitute a defence and create an issue to be tried it must be a denial of a material allegation, that is, an allegation of a fact which the plaintiff must prove in order to recover. The denial of an immaterial allegation forms no issue for trial. It follows that a specific denial should not ordinarily be aimed at an allegation of time, place, quantity, value, description, damages and

the like for these allegations are not material. For the same reason the defendant should never specifically deny a legal conclusion or evidentiary matter. There may be several specific denials in the same answer. Indeed, the defendant may deny each allegation of the complaint specifically instead of pleading a general denial, but this is very unusual practice. Inasmuch as a specific denial is aimed at a particular allegation it should expressly and unequivocally designate the allegation sought to be denied in order that a distinct issue may be formed. Pomeroy, Remedies, § 614; Bryant, Code Pl. § 179.

Each specific denial should be a complete defence in form and substance.

§ 442. "Each specific denial should be an entire defence by itself, and should be so pleaded, because it should be the denial of some single, material, issuable matter averred in the complaint necessary to the existence of the cause of action, so that, if sustained, it would entirely defeat a recovery on that cause of action. As the code requires each defence to be separately stated, it follows that a specific denial should always constitute by itself a distinct and complete defence, and should be pleaded in such form, as much so as any defence of new matter." [1] Each specific denial should be stated in a separate and numbered paragraph.[2]

[1] Pomeroy, Remedies, § 719.

[2] See § 278.

Specific denials—how made.

§ 443. A denial, whether specific or general, should leave no room for doubt as to what is denied and what admitted.[1] Specific denials by reference to lines or folios are to be avoided as they become indefinite when the pleadings are incorporated in a case on appeal. Neither is it good practice to deny portions of a complaint by reference to the first and last words of such portions. In embodying the language of the complaint in the denial care should be used not to deny a conjunctive allegation conjunctively.[2] It is usually better practice to deny the allegations of the complaint in substance rather than to

repeat at length the words used in the complaint. If the essential facts are separately stated in the complaint in numbered paragraphs, as they always should be, they may be denied by reference to the paragraphs.[3]

[1] Montour v. Purdy, 11 M. 384 G. 278.

[2] See § 456.

[3] See Nunnemacker v. Johnson, 38 M. 390.

§ 444. Specific denials—forms of.

[Title.]

The defendant for answer to the complaint herein denies that he made the promissory note therein described.

[Title.]

The defendant for answer to the complaint herein denies each and every allegation contained in the second and fourth paragraphs thereof.

Denials of knowledge or information.

§ 445. If the defendant has no personal knowledge of the facts alleged in the complaint or any of them and no information regarding them sufficient to form a belief as to their truth or falsity he may put them in issue by simply denying any knowledge or information sufficient to form a belief. Smalley v. Isaacson, 40 M. 450; Schroeder v. Capehart, 49 M. 525; Mower v. Stickney, 5 M. 397 G. 325; Ames v. Ry. Co., 12 M. 412 G. 295; Morton v. Jackson, 2 M. 219 G. 180; Pomeroy, Remedies, § 640.

§ 446. This form of denial, however, is not permissible where the facts are within the knowledge of the defendant. Facts concerning the defendant's own acts, property or personal affairs are presumed to be within his knowledge and if, as to such matters, he employs this form of denial it may be stricken out as sham. If he is ignorant of his own affairs it is his duty to investigate and learn the truth before answering. If there is justification for ignorance the facts showing the justification should be alleged. Minor v. Willoughby, 3 M. 225 G. 154; Wheaton v. Briggs, 35 M. 470; C. N. Nelson Lumber

Co. v. Richardson, 31 M. 267; Smalley v. Isaacson, 40 M. 450; Schroeder v. Capehart, 49 M. 525; Starbuck v. Dunklee, 10 M. 168 G. 136; Morton v. Jackson, 2 M. 219 G. 180; Pomeroy, Remedies, § 641.

§ 447. A denial in this form when the facts are within the knowledge of the defendant makes a good issue so long as it remains in the record. The only way to object to it is to move to strike it out as sham before pleading. Smalley v. Isaacson, 40 M. 450; Schroeder v. Capehart, 49 M. 525.

Denials of knowledge or information—forms.

§ 448. The pleader must be careful to follow the exact words of the statute. When the denial is general the following form is held good. Trustees Macalester College v. Nesbit, 65 M. 17.

[Title.]

The defendant for answer to the complaint herein denies that he has any knowledge or information sufficient to form a belief as to any or all the allegations thereof.

Form of specific denial:

[Title.]

The defendant for answer to the complaint herein denies that he has any knowledge or information sufficient to form a belief as to whether [here give the allegation denied].

Denials upon information and belief.

§ 449. When the defendant has no personal knowledge of any or all the facts alleged in the complaint but has information sufficient to form a belief as to their falsity he should deny them upon information and belief. State v. Cooley, 58 M. 514; Brotherton v. Downey, 21 Hun (N. Y.) 436; Stacy v. Bennett, 59 Wis. 235.

§ 450. The defendant cannot use this form of denial, either generally or specifically, if the facts are actually or presumptively within his knowledge. Edwards v. Lent, 8 How. Prac. (N. Y.) 282; Kellogg v. Baker, 15 Abb. Pr. (N. Y.) 286.

§ 451. Denials upon information and belief—forms.

[Title.]

The defendant for answer to the complaint herein upon information and belief denies each and every allegation thereof.

[Title.]

The defendant for answer to the complaint herein upon information and belief denies that [here give allegation denied].

Specific denials control.

§ 452. If there is a specific denial and also a general denial in the same answer the former controls and if insufficient no issue is made. Pullen v. Wright, 34 M. 314. See Brandt v. Shephard, 39 M. 454.

Denials controlled by subsequent admissions.

§ 453. If there is a denial and also an admission the latter controls. McClung v. Bergfeld, 4 M. 148 G. 99; Derby v. Gallup, 5 M. 119 G. 85; Scott v. King, 7 M. 494 G. 401; Henry v. Hinman, 21 M. 378; Lampsen v. Brander, 28 M. 526; Gaffney v. Ry. Co., 38 M. 111; Sladtler v. School District, 71 M. 311; St. Anthony, etc. Co. v. King, etc. Co., 23 M. 186.

A denial must not be a negative pregnant.

§ 454. All allegations of fact must be made positively and unambiguously. Pleadings must be certain and definite else they fail to perform their function of apprising the opposite party and the court of the true nature of the ground of claim or defence. A negative pregnant is a violation of the fundamental requirement of certainty. It is a denial that implies an affirmative. It is inherently ambiguous and therefore bad. German Am. Bank v. White, 38 M. 471; Paine v. Smith, 33 M. 495; Stone v. Quaal, 36 M. 46; Pound v. Pound, 60 M. 214; McMurphy v. Walker, 20 M. 382 G. 334; Frasier v. Williams, 15 M. 288 G. 219; Pomeroy, Remedies, § 618.

§ 455. A general denial can never be construed as a negative pregnant. German Am. Bank v. White, 38 M. 471; Stone v. Quaal, 36 M. 46.

§ 456. When several facts are alleged conjunctively a con-

junctive denial is a species of negative pregnant and raises no issue. Pullen v. Wright, 34 M. 314.

Negative pregnant—effect of.

§ 457. The effect of a negative pregnant is the admission of the fact sought to be denied. Paine v. Smith, 33 M. 495; Pullen v. Wright, 34 M. 314; Pound v. Pound, 60 M. 214; Curtiss v. Livingston, 36 M. 312; Pomeroy, Remedies, § 623.

§ 458. A negative pregnant has this effect, however, only when the fact denied is a material, traversable fact. In actions for unliquidated damages, allegations of value are not traversable. They must be proved though not denied. Hence denials in the form of negative pregnant do not admit the value as alleged. German Am. Bank v. White, 38 M. 471; Pullen v. Wright, 34 M. 314. Overruling Burt v. McKinstry, 4 M. 204 G. 146; Durfee v. Pavitt, 14 M. 424 G. 319; Lynd v. Picket, 7 M. 184 G. 128. See § 438.

Argumentative denials.

§ 459. A denial is argumentative when, instead of a direct contradiction, it asserts facts inconsistent with the facts alleged in the complaint. It leaves the denial to be made out by inference. It is pleading matter which would be admissible under a denial as if it were new matter. It is a violation of the fundamental requirements of certainty and definiteness. "It is plain that the defendant has gained nothing by such a mode of pleading; he has not added anything to his case; he has not stated a fact which he could not have proved under a simple answer of denial. On the contrary, in limiting the scope of his proofs at the trial to the particular matter which he has pleaded, he may have weakened his defence by shutting out the consideration of other facts which he could have given in evidence under a proper denial. At all events, he has unnecessarily disclosed his case to the adverse party. It is not merely a scientific blemish, but a great practical evil, to have the record incumbered by a mass of unnecessary allegations, and matters purely evidentiary, when a short and comprehensive denial would the better subserve the rights of the parties,

and more clearly bring out and exhibit the issues designed to be raised by the answer." Pomeroy, Remedies, §§ 624–628.

Argumentative denials coupled with general denials.

§ 460. Where a party has pleaded a general denial he should not go further and plead specific denials or affirmative matter amounting to an argumentative denial. "This mode of pleading is faulty in the extreme; it has not a single reason in its favor, not an excuse for its existence; it overloads the record with superfluous matter, and produces nothing but confusion and uncertainty." The court will always grant a motion to strike out such matter as redundant. Pomeroy, Remedies, §§ 630–632; Jellett v. Ry. Co., 30 M. 265, 269.

Argumentative denials—effect of.

§ 461. This defect is one of form rather than substance and is not a ground for demurrer. So long as it remains in the answer it raises an issue. The remedy is by motion to make more definite and certain and to strike out the redundant matter. Pomeroy, Remedies, § 627; Becker v. Sweetzer, 15 M. 427 G. 346.

General denials coupled with admissions.

§ 462. A qualified general denial is an unfortunately common form of answer in this state. It generally begins with specific admissions, denials, explanations, qualifications and sometimes a re-statement of the facts alleged in the complaint. This precious jumble is followed by some such saving phrase as this: "And the defendant denies each and every other allegation in said complaint not hereinbefore expressly admitted, qualified or stated." If the wit who said that language was given to man to conceal his thought had practiced law in this state he would have delighted in this form of pleading. Pomeroy very justly condemns this form of pleading as "mongrel," "vicious," "slovenly" and "a contrivance of ignorance or indolence." [1]

[1] Pomeroy, Remedies, § 633. See also, Maxwell, Code Pl. § 388; Bryant, Code Pl. 179.

§ 463. It is tolerated but not approved by our supreme court, being held "sufficient" if there is no ambiguity as to the allegations "admitted, qualified or stated." Kingsley v. Gilman, 12 M. 515 G. 425; Becker v. Sweetzer, 15 M. 427 G. 346; Leyde v. Martin, 16 M. 38 G. 24; Davenport v. Ladd, 38 M. 545; Horn v. Butler, 39 M. 515; Jellison v. Halloran, 40 M. 485; Fegelson v. Dickerman, 70 M. 471.

§ 464. There is some justification for this form of answer in cases where a verified complaint contains numerous allegations not stated separately in numbered paragraphs and the defendant is compelled to admit one or two of the allegations and wishes to deny the rest. But there is no justification whatever if the essential allegations of the complaint are stated separately, as they invariably should be, in numbered paragraphs, for then a short, certain and artistic answer may be made in the form given in § 444.

Express admissions.

§ 465. It is quite common practice in this state to insert in the answer express admissions. This is bad form. The artistic way to admit an allegation is not to deny it,—to omit any reference to it. Maxwell, Code Pl. § 388; Bryant, Code Pl. p. 236.

Facts admitted by failure to deny.

§ 466. "Every material allegation of the complaint not specifically controverted by the answer as prescribed * * * shall, for the purpose of the action, be taken as true." G. S. '94, § 5261; Pomeroy, Remedies, § 617; Olson v. Hurley, 33 M. 39; Fetz v. Clark, 7 M. 217 G. 159;Wilcox v. Davis, 4 M. 197 G. 139. As to what is a material allegation see cases under § 292 and also, Wilder v. St. Paul, 12 M. 192 G. 116; First Nat. Bank v. Strait, 71 M. 69.

Non-traversable allegations.

§ 467. Allegations of immaterial matters,[1] of legal conclusions,[2] of unliquidated damages,[3] of time generally[4] and the prayer for relief[5] are not traversable.

[1] Dennis v. Johnson, 47 M. 56; Wilder v. St. Paul, 12 M. 192

G. 116; McMurphy v. Walker, 20 M. 382 G. 334; Gross v. Diller, 33 M. 424; Freeman v. Curran, 1 M. 170 G. 144; Finley v. Quirk, 9 M. 194 G. 179; Newman v. Ins. Co., 17 M. 123 G. 98; First Nat. Bank v. Strait, 73 N. W. 645.

[2] Downer v. Read, 17 M. 493 G. 470; Frasier v. Williams, 15 M. 288 G. 219; Holbrook v. Sims, 39 M. 122; Finley v. Quirk, 9 M. 194 G. 179.

[3] Pullen v. Wright, 34 M. 314.

[4] Finley v. Quirk, 9 M. 194 G. 179.

[5] Hatch v. Coddington, 32 M. 92.

Demand of judgment.

§ 468. Except when a counterclaim or equity requiring affirmative relief is pleaded an answer should not contain a demand of judgment. Following the common law practice many pleaders conclude an answer with, "Wherefore, the defendant prays that he be hence dismissed with his costs, etc.," but this is not good form under the code for it is not necessary. Dawley v. Brown, 9 Hun (N. Y.) 461; Bendit v. Annesley, 42 Barb. (N. Y.) 192.

CHAPTER XIII

NEW MATTER CONSTITUTING A DEFENCE

Definition.

§ 469. New matter may consist of matter constituting a defence or of matter constituting a counterclaim. Facts which, if proved, would not tend to disprove any of the allegations of the complaint but would simply avoid the legal conclusions otherwise to be drawn therefrom are termed "new matter" because they are new to the case as presented by the complaint. New matter is in the nature of confession and avoidance. That is, it tacitly admits all the allegations of the complaint and avoids their legal operation by interposing facts constituting a partial or complete defence thereto. Facts which are inconsistent with the existence of the facts alleged in the complaint are never new matter. Whether a fact is new matter depends, not upon its intrinsic nature, but upon the allegations of the complaint. A fact which would be new matter in one case might not be new matter in a similar case owing to differences in the forms of complaint. Pomeroy, Remedies, §§ 673, 690; Craig v. Cook, 28 M. 232; Nash v. St. Paul, 11 M. 174 G. 110; Finley v. Quirk, 9 M. 194 G. 179; Robert v. Nelson, 65 M. 240.

Compared with denial.

§ 470. A denial serves merely to put in issue the allegations denied. A defence of new matter dos not put in issue the allegations of the complaint but merely seeks to avoid their legal consequences. If affirmative matter is set up in the answer which controverts the allegations of the complaint inferentially it is to be deemed a denial and not a defence. Craig v. Cook, 28 M. 232.

Defendant must not be a stranger to new matter.

§ 471. "One may not defend an action by asserting facts or rights which do not concern him and in which he has no law-

ful interest." Herber v. Christopherson, 30 M. 395; Cathcart v. Peck, 11 M. 45 G. 24. But see Bausman v. Eads, 46 M. 148.

When one of several obligors is sued.

§ 471 (a). If A. sue B. on an obligation of B. and C., B. may set up any defence which B. and C. might have set up had they been sued jointly. Nichols & Shepherd Co. v. Soderquist, 80 N. W. 630.

New matter must be pleaded.

§ 472. Matter in the nature of confession and avoidance cannot be proved unless specially pleaded. Finley v. Quirk, 9 M. 194 G. 179; Warner v. Myrick, 16 M. 91 G. 81; Livingston v. Ives, 35 M. 55; Gaffney v. Ry. Co., 38 M. 111; MacFee v. Horan, 40 M. 30; Kennedy v. McQuaid, 56 M. 450; O'Gorman v. Sabin, 62 M. 46; Roberts v. Nelson, 65 M. 240; Iselin v. Simon, 62 M. 128.

Partial defences.

§ 473. Although not expressly authorized by statute the defendant has the unquestioned right to plead partial defences.[1] They should be pleaded as such.[2]

[1] Stevens v. Johnson, 28 M. 172; Torinus v. Buckham, 29 M. 128; Durment v. Tuttle, 50 M. 426; Aultman v. Torrey, 55 M. 492; Pomeroy, Remedies, § 607.

[2] Pomeroy, Remedies, § 608; Fitzsimmons v. Ins. Co., 18 Wis. 234.

Several defences—pleading separately.

§ 474. "The defendant may set forth by answer as many defences and counterclaims as he has; they shall each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished; the defendant may also demur to one or more of several causes of action in the complaint, and answer the residue." G. S. '94, § 5239; Bass v. Upton, 1 M. 408 G. 292. See § 19.

Each defence must be complete in substance and form.

§ 475. "Assuming that the defences are not intended to be

partial, each must of itself be a complete answer to the whole cause of action against which it is directed, as perfectly so as though it were pleaded alone. It is not necessary that each defence should answer the entire complaint when that contains two or more distinct causes of action, because these causes of action may depend upon separate circumstances, and demand separate answers. If a defence, however, is addressed to the whole complaint, as such, it must completely controvert the whole. The rule, as stated in its general form, is, that each defence must be sufficient in itself, in its material allegations or its denials, to constitute an answer to the cause or causes of action against which it is directed, and thus to defeat a recovery thereon. This proposition refers to the substance of the defence. In reference to the form and manner of stating this substance, it must, either by actual statement in full, or by a proper reference to and adoption of matter in another defence found in the same answer, contain averments of all the material facts or denials which together make up the defence. Each must in its composition be complete, sufficient and full; it must stand upon its own allegations: it cannot be aided, nor its imperfect and partial statements helped out, by matter found in another defence, unless such matter is expressly referred to and in an express manner adopted or borrowed from that other and made a part of itself. The reference, however, to the former defence, and the adoption of its matter, if permitted at all, must be express; for otherwise the allegations of one cannot be treated as incorporated in or helping out those of another." Pomeroy, Remedies, § 716. See La Plant v. Ins. Co., 68 M. 82.

The several defences must be consistent.

§ 476. A defendant may plead as many defences, either legal or equitable, as he may have provided they are not inconsistent. "Separate and distinct defences are consistent when both may be true, and are only held inconsistent when the proof of one necessarily disproves the other." Derby v. Gallup, 5 M. 119 G. 85; Steenerson v. Waterbury, 52 M. 211.

This rule is constitutional, not statute.

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As to the right to plead inconsistent defenses, see 48 L. R. A. 177 n.

§ 477. Cases holding defences consistent: Steenerson v. Waterbury, 52 M. 211 (general denial and payment); Minneapolis Coöperative Co. v. Williamson, 51 M. 53; Backdahl v. United Workmen, 46 M. 61; Gammon v. Ganfield, 42 M. 368; Warner v. Lockerby, 31 M. 421; Roblee v. Secrest, 28 M. 43; Conway v. Wharton, 13 M. 158 G. 145; First Nat. Bank v. Lincoln, 36 M. 132; Booth v. Sherwood, 12 M. 426 G. 310; Kennedy v. McQuaid, 56 M. 450; Hausman v. Mulheran, 68 M. 48; Osborne v. Waller, 75 N. W. 732; Branham v. Bezanson, 33 M. 49; La Plant v. Ins. Co., 68 M. 82.

§ 478. Cases holding the defences inconsistent: Derby v. Gallup, 5 M. 119 G. 85; Cook v. Finch, 19 M. 407 G. 350; Scott v. King, 7 M. 494 G. 401.

§ 479. It is no test of inconsistency that if one is proved true the other is unnecessary. Gammon v. Ganfield, 42 M. 368; Backdahl v. United Workmen, 46 M. 61.

§ 480. When inconsistent defences are pleaded the remedy is by motion to compel an election. Conway v. Wheaton, 13 M. 158 G. 145; Cook v. Finch, 19 M. 407 G. 350; Osborne v. Waller, 75 N. W. 732.

Hypothetical admissions.

§ 481. Hypothetical statements or admissions may be made in an answer for the purpose of enabling a defendant to plead all his defences. McKasy v. Huber, 65 M. 9; Nunnemacker v. Johnson, 38 M. 390.

Matters of abatement.

§ 482. The plea in abatement of the common-law system does not exist under the code. Matters in abatement appearing upon the face of a pleading are now taken advantage of by demurrer and if not so appearing are set up in the answer or reply as new matter constituting a defence. They may be united with defences in bar. Page v. Mitchell, 37 M. 368; Porter v. Fletcher, 25 M. 493. See §§ 486, 484, 931; Pomeroy, Remedies, § 721.

CASES DETERMINING WHAT IS NEW MATTER

Accord and satisfaction.

§ 483. Dibble v. Dimick, 143 N. Y. 549.

Action prematurely brought.

§ 484. Iselin v. Simon, 62 M. 128.

Alteration of instrument.

§ 485. Roberts v. Nelson, 65 M. 240; Babcock v. Murray, 58 M. 385; Howlett v. Bell, 52 M. 257.

Another action pending.

§ 486. If the pendency of the other action appears upon the face of the complaint the objection should be raised by demurrer, otherwise by answer. Williams v. McGrade, 18 M. 82 G. 65, 71; Gerrish v. Pratt, 6 M. 53 G. 14; Oswald v. St. Paul Globe Pub. Co., 60 M. 82.

Arbitration and award.

§ 487. Lautenschlager v. Hunter, 22 M. 267; Brazil v. Isham, 12 N. Y. 9.

Bona fide purchaser—defence of.

§ 488. Newton v. Newton, 46 M. 33.

Cancellation of contract.

§ 489. Rothschild v. Burritt, 47 M. 28.

Defect of parties.

§ 490. See § 196.

Discharge of obligation.

§ 491. Jackson v. Packing Co., 42 M. 382.

Discharge in bankruptcy.

§ 492. Cornell v. Dakin, 38 N. Y. 253; Goodhue v. King, 55 Cal. 377.

Equities.

§ 493. Gates v. Smith, 2 M. 31 G. 21; McClane v. White, 5 M. 178 G. 139; Knoblauch v. Foglesong, 37 M. 320; Crockett v. Phinney, 33 M. 157.

Estoppel in pais.

§ 494. When the facts giving rise to an estoppel *in pais* appear upon the face of the complaint or the evidence of the plaintiff the defendant may invoke the rule of estoppel without having pleaded it specially. A party is never bound to plead the law. Caldwell v. Augur, 4 M. 217 G. 156; Coleman v. Pearce, 26 M. 123.

§ 495. When such facts do not so appear it is perhaps still an open question in this state whether the defendant can prove independently facts giving rise to an estoppel. At all events, the defendant should plead them as a matter of prudence. It it difficult to see how, on principle, such facts can be admitted under a denial if they are consistent with the existence of the facts alleged in the complaint. By the great weight of authority they must be specially pleaded. Wood v. Ostram, 29 Ind. 177; Anderson v. Hubble, 93 Ind. 570; Clark v. Huber, 25 Cal. 594; Warder v. Baldwin, 51 Wis. 459; Burlington etc. Ry. Co. v. Harris, 8 Neb. 140; Cobbey v. Buchanan, 48 Neb. 391; Walker v. Baxter, 6 Wash. 244; Dwelling House Ins. Co. v. Johnson, 47 Kans. 1; Independent District v. Bank, 68 Iowa, 343; Poynter v. Chipman, 8 Utah, 442; Hanson v. Chiatiovich, 13 Nev. 395; Rugh v. Ottenheimer, 6 Or. 232; State v. Ry. Co., 140 Mo. 539.

Express contract in action on implied contract.

§ 496. Lautenschlager v. Hunter, 22 M. 267; Register Printing Co. v. Willis, 57 M. 93.

Excuse for non-performance.

§ 497. See *Waiver.*

Former adjudication.

§ 498. Bowe v. Milk Co., 44 M. 460; Swank v. Ry. Co., 61 M. 426. See Dunnell's Trial Book, § 1121.

Fraud.

§ 499. Daly v. Proctz, 20 M. 411 G. 363; MacFee v. Horan, 40 M. 30; Merrill v. Mfg. Co., 53 M. 371; Anderson v. Rockwood, 62 M. 1; Livingston v. Ives, 35 M. 55; Duford v. Lewis, 43 M. 26; Christianson v. Ry. Co., 61 M. 249.

Homestead exemption.

§ 500. Brown v. Eaton, 21 M. 409.

Illegality.

§ 501. The defendant may always take advantage of illegality in a contract if it appears on the face of the complaint or the evidence of the plaintiff but if it does not so appear he cannot introduce evidence of the facts necessary to show the illegality unless he has specially pleaded them. Handy v. Globe Pub. Co., 41 M. 188; Finley v. Quirk, 9 M. 194 G. 179; Woodbridge v. Sellwood, 65 M. 135; Netzer v. Crookston, 59 M. 244; Dodge v. McMahan, 61 M. 175; Nash v. St. Paul, 11 M. 174 G. 110; Van Dusen v. Jungeblut, 77 N. W. 970; Babcock v. Murray, 58 M. 385 (usury); Wiley v. Board of Education, 11 M. 371 G. 268.

Immaturity of claim.

§ 502. Iselin v. Simon, 62 M. 128; Hargan v. Burch, 8 Iowa, 309.

Infancy.

§ 503. Klason v. Rieger, 22 M. 59; Rush v. Wick, 31 Ohio St. 521.

Insurance.

§ 504. Ganser v. Ins. Co., 38 M. 74.

Justification.

§ 505. Linton v. Fireworks Co., 124 N. Y. 533; Atkinson v. Harran, 68 Wis. 405 (assault and battery); Klais v. Pulford, 36 Wis. 587; O'Brien v. St. Paul, 18 M. 176 G. 163.

License to do an otherwise unlawful act.

§ 506. Snowden v. Wilas, 19 Ind. 11; Alfred v. Barnum, 45 Cal. 482; Beaty v. Swarthout, 32 Barb. (N. Y.) 293.

Misjoinder of parties.

§ 507. See § 199.

Misnomer.

§ 508. Lyons v. Rafferty, 30 M. 526.

Mistake.

§ 509. Warner v. Myrick, 16 M. 91 G. 81; Leighton v. Grant, 20 M. 345 G. 298; Almich v. Downey, 45 M. 460.

Mitigation of damages.

§ 510. Matter in mitigation of damages is admissible without being specially pleaded.[1] But matter in mitigation of unliquidated damages must be carefully distinguished from partial defences.[2] It is always the part of prudence to plead matter in mitigation.

[1] Hoxsie v. Empire Lumber Co., 41 M. 548.

[2] See Horn v. Western Land Asso., 22 M. 233.

Modification of contract.

§ 511. Phister v. Gove, 48 Mo. App. 455.

No funds—in action against municipalities.

§ 512. Netzer v. Crookston, 59 M. 244.

Non-joinder of parties.

§ 513. See § 196.

Payment.

§ 514. Whether payment may be proved under a denial or must be specially pleaded as new matter is determined by no general rule but depends on the nature of the cause of action and the allegations of the complaint. The question is still involved in so much doubt in this state that the prudent practitioner will always plead payment as new matter. See § 1675.

(a) When a complaint contains an allegation of non-payment and such allegation is necessary to show a cause of action, as, for example, to show a breach of a contract to pay money, proof of payment is admissible under a general denial. Knapp v. Roche, 94 N. Y. 333; Richards v. Land Co., 115 Cal. 642 and cases cited; Cochran v. Reich, 91 Hun (N. Y.) 440; State v. Peterson, 142 Mo. 526; McArdle v. McArdle, 12 M. 98 G. 53 (by necessary implication). As touching upon this question see, First Nat. Bank v. Strait, 71 M. 69; Marshall & Illsley Bank v. Child, 78 N. W.

1048; St. Paul Foundry Co. v. Wegmann, 40 M. 419; Jackson v. Kansas City Packing Co., 42 M. 382; Farnham v. Murch, 36 M. 328; Voak v. Nat. Invest. Co., 51 M. 450.

(b) When the complaint contains no allegation of non-payment, or an unnecessary allegation of non-payment the defence of payment is new matter to be specially pleaded. McKyring v. Bull, 16 N. Y. 297; Cochran v. Reich, 91 Hun (N. Y.) 440 and cases *supra*.

(c) When the action is for a balance due, payment is made an issuable fact and is put in issue by a general denial. Quin v. Lloyd, 41 N. Y. 349.

Ratification.

§ 515. Noble v. Blout, 77 Mo. 235. See Janney v. Boyd, 30 M. 319; Newell v. Randall, 32 M. 171.

Recoupment.

§ 516. Leeds v. Little, 42 M. 414; Horn v. Western Asso., 22 M. 223.

Release.

§ 517. Rothschild v. Burritt, 47 M. 28; Christianson v. Ry. Co., 61 M. 249; McKyring v. Bull, 16 N. Y. 297; Bostwick v. McEvoy, 62 Cal. 503.

Rescission.

§ 518. Brown v. Welden, 27 Mo. App. 251; Home Ins. Co. v. Berg, 46 Neb. 600.

Statute of frauds.

§ 519. See § 1085.

Statute of limitations.

§ 520. See § 1737.

Subrogation.

§ 521. Aldrich v. Willis, 55 Cal. 81.

Tender.

§ 522. Meredith v. Mining Asso., 56 Cal. 178.

Waiver.

§ 523. Murphy v. Sherman, 25 M. 196; Rothschild v. Burritt, 47 M. 28; Hand v. Ins. Co., 57 M. 519 and cases cited; Newell v. Randall, 32 M. 171.

Want of consideration.

§ 524. Where a contract is such that the law presumes a consideration a want of consideration is new matter. Dubois v. Hermance, 56 N. Y. 673; University v. Livingston, 57 Iowa, 302; Beeson v. Howard, 44 Ind. 413. See Bausman v. Credit Guarantee Co., 47 M. 377. Failure of consideration is always new matter. Moore v. Boyd, 95 Ind. 134; Smith v. Rembaugh, 21 Mo. App. 390.

CHAPTER XIV

NEW MATTER CONSTITUTING A COUNTERCLAIM

[For statute see § 434.]

Historical statement.

§ 525. At common law one cause of action could not be set off against another. Gradually by a process of judicial legislation in actions *ex contractu* the defendant was allowed to plead in reduction of damages for the breach, the damages which he himself had suffered by reason of the non-compliance of the plaintiff with the conditions or terms of the same contract. This was termed recoupment of damages. In 1729 (2 Geo. II., ch. 22, § 13) a statute was passed authorizing mutual "debts" to be set off against each other. This statute was copied in the legislation of this country at an early day. Even before the code, however, the tendency of American legislation on the subject was to enlarge the right of setoff beyond the scope of the English statute. See Folsom v. Carli, 6 M. 420 G. 284; Townsend v. Freezer Co., 46 M. 121; Pomeroy, Remedies, § 729 *et seq.*; 1 Chitty, Pl. 595; Steck v. Colorado Iron Co., 142 N. Y. 236.

Setoff and recoupment compared.

§ 526. Setoff and recoupment are alike in that they must both arise out of contract and cannot be set up except in actions on contract. They are unlike in the following respects:

(a) Setoff is wholly of statutory origin while recoupment is of judicial creation.

(b) Setoff, under the original English statute, was allowed only for liquidated damages. Recoupment may be allowed for both liquidated and unliquidated damages.

(c) A setoff must have arisen out of a contract other than the one sued on. A claim for recoupment can only arise out of the contract sued on.

(d) In the case of setoff judgment may be given the defendant for any excess of his damages over those of plaintiff. Recoupment, at common law, can only be used defensively in reduction or bar of the damages of the plaintiff. It never authorizes a judgment for the defendant. See §§ 532, 533.

Definition of counterclaim.

§ 527. A counterclaim is a cause of action pleaded by the defendant to dimish, defeat or modify the relief otherwise recoverable by the plaintiff. Dietrich v. Koch, 35 Wis. 618.

§ 528. "A counterclaim is in the nature of a cross-action, and a defendant who pleads one is, as to that, considered as if he had brought his action." Slocum v. Millers' Asso., 33 M. 438; Eastman v. Linn, 20 M. 433 G. 387; Wilson v. Fairchild, 45 M. 206.

§ 529. There can be no counterclaim to a mere defence. Townsend v. Freezer Co., 46 M. 121.

§ 530. The effect of a counterclaim may be to just balance the claim set up in the complaint but there is no such thing in the law as setting up one right of action as a *bar* to another right of action. Cooper v. Simpson, 41 M. 46.

Compared with a defence.

§ 531. Matter may be of such a nature as to be a defence and also a counterclaim.[1] A defence, as such, is never an independent cause of action authorizing affirmative relief in behalf of the party alleging it. It is wholly negative in its operation. On the other hand, a counterclaim is always an independent cause of action. Unlike a defence it does not directly attack the cause of action alleged by the plaintiff. It lessens, defeats or modifies the relief sought by the plaintiff indirectly by authorizing an independent judgment for the defendant.

[1] Eastman v. Linn, 20 M. 433 G. 387; Griffin v. Jorgenson, 22 M. 92; Wilson v. Fairchild, 45 M. 203; Townsend v. Freezer Co., 46 M. 121; Paine v. Sherwood, 21 M. 225.

Compared with a setoff.

§ 532. The setoff, under the original English statutes, was limited to mutual debts. Unliquidated damages *ex contractu* could not be set off. The American statutes have generally extended the rule so as to include all claims arising *ex contractu*. Our G. S. '94, § 4993, is typical of such statutes. In district court practice the setoff *eo nomine* does not exist. It has been merged in the counterclaim. Whatever claims might have been set up as setoffs under the earlier statutes may now be set up as counterclaims. It was the design of our statute (G. S. '94, § 5237) to extend the doctrine of setoff so as to include all causes of action arising *ex contractu*, whether the damages are liquidated or unliquidated. Morrison v. Lovejoy, 6 M. 319 G. 224, 236.

Compared with recoupment.

§ 533. Recoupment is defined by Bouvier as "that right of the defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some cross-obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract." "The common law doctrine of recoupment is not affected by the statute of counterclaims, except that the right is thereby extended, so that the party entitled to recoup may, if he so elect, go beyond abating or barring the plaintiff's claim, and recover an affirmative judgment for the difference in his favor." Townsend v. Freezer Co., 46 M. 121; Morrison v. Lovejoy, 6 M. 319 G. 224, 235; Mason v. Heyward, 3 M. 182 G. 116; Smith v. Dukes, 5 M. 373 G. 301.

§ 534. The same facts may be treated as a counterclaim or as defensive matter by way of recoupment. Take the familiar case of a sale with warranty of quality. When the defendant is sued for the price he may set up his damages flowing from the breach of warranty as defensive matter by way of recoupment and thereby reduce the damages recoverable by the plaintiff, or he may set up the same facts as a counterclaim and if his damages exceed those suffered by the plaintiff recover a

judgment for the excess. Facts pleaded by way of recoupment never authorize an affirmative judgment. To have that effect they must be pleaded as a counterclaim. On the other hand facts alleged as a counterclaim may be utilized for defence. Townsend v. Freezer Co., 46 M. 121.

§ 535. Recoupment was held permissible in the following cases: Harlan v. Ry. Co., 31 M. 427; Stevens v. Johnson, 28 M. 172; Mass. Loan & Trust Co. v. Welch, 47 M. 183; Rugland v. Thompson, 48 M. 539; McKinnon v. Palen, 62 M. 188; Pioneer Press Co. v. Hutchinson, 63 M. 481; Aultman v. Torrey, 55 M. 492; Duluth Land Co. v. Klovdahl, 55 M. 341; Townsend v. Freezer Co., 46 M. 121; Sykes v. St. Cloud, 60 M. 454; Long v. Gieriet, 57 M. 278; Peterson v. Mayer, 46 M. 468; Abrahamson v. Lamberson, 68 M. 454; Id., 72 M. 308.

Compared with equitable setoff.

§ 536. In the absence of special circumstances courts of equity follow the statute regulating counterclaims. But the equitable right of setoff was not derived from and is not dependent on the statute regulating counterclaims. In cases not within the statute a court of equity will permit an equitable setoff, if from the nature of the claim or from the situation of the parties it would be impossible to secure full justice in a cross-action. When such equities exist, a court of equity will set off a separate debt against a joint debt, or, conversely, a joint debt against a separate debt. Becker v. Northway, 44 M. 63; Laybourn v. Seymour, 53 M. 109; Richardson v. Merritt, 77 N. W. 234; Markell v. Ray, 77 N. W. 788; Gallagher v. Brewing Co., 53 M. 214; Wallrich v. Hall, 19 M. 383 G. 329; Fitzgerald v. State Bank, 64 M. 469; Balch v. Wilson, 25 M. 299; Northwestern Trust Co. v. Rogers, 60 M. 208; Knutson v. Northwestern etc. Asso., 67 M. 201; Becker v. Seymour, 71 M. 394.

§ 537. If A. has a demand against B. which is due and B. one against A. not due, A. may in equity compel a setoff if B. is insolvent. Martin v. Pillsbury, 23 M. 175; Cosgrove v. McKasy, 65 M. 426.

§ 538. If A. has a demand against B. which is due and B.

one against A. which is not due, equity will allow B. to set off his claim if A. is insolvent. St. Paul Trust Co. v. Leck, 57 M. 87; Stolze v. Bank, 67 M. 172; Sweetser v. Bank, 69 M. 196. The fact that A. has made an assignment before the maturity of B.'s claim does not affect the rule (Id.).

§ 539. If A. has a demand against B. which is mature and B. a demand against A. which is mature the insolvency of either party is ground for setting off the demands in equity. Hunt v. Conrad, 47 M. 557; Laybourn v. Seymour, 53 M. 109; St. Paul Trust Co. v. Leck, 57 M. 87.

ESSENTIALS OF A COUNTERCLAIM

I. Must be an independent cause of action.

§ 540. It must be a complete and independent cause of action, either legal or equitable. While it may be an equitable cause of action it must be something more than a mere equitable defence. The test is, Would it authorize an independent action by the defendant against the plaintiff? Swift v. Fletcher, 6 M. 550 G. 386; Lash v. McCormick, 17 M. 403 G. 381; Englebrecht v. Rickert, 14 M. 140 G. 108; First Nat. Bank v. Kidd, 20 M. 234 G. 212; Banning v. Bradford, 21 M. 318; Reed v. Newton, 22 M. 541; Linn v. Rugg, 19 M. 181 G. 145; Campbell v. Jones, 25 M. 155; Sylte v. Nelson, 26 M. 105; Ward v. Anderberg, 36 M. 300; McPherson v. Runyon, 41 M. 524; Lynch v. Free, 64 M. 277; Spencer v. Levering, 8 M. 461 G. 410.

II. Must exist in favor of the defendant who pleads it.

§ 541. It is the general rule that the defendant cannot set up as a counterclaim a cause of action existing in favor of another person whatever his relations with such person may be.[1] The demands of stockholders individually cannot be set off in an action against the corporation[2] and in an action against stockholders a cause of action in favor of the corporation cannot be set up.[3]

[1] Carpenter v. Leonard, 5 M. 155 G. 119.

[2] Gallagher v. Germania Brewing Co., 53 M. 214.

[3] Mealey v. Nickerson, 44 M. 430.

§ 542. If a surety is sued alone or together with his principal he cannot set up as a counterclaim a cause of action existing in favor of his principal—not even one arising out of the contract in suit. Pomeroy, Remedies, § 749; Becker v. Northway, 44 M. 61; Gillespie v. Torrence, 25 M. 306.

§ 543. But if the principal is a party and insolvent a court of equity will allow the surety to set off (not counterclaim) a debt due the principal from the debtor. If the action is brought against the surety alone the principal may be allowed to intervene and set off his claim. Becker v. Northway, 44 M. 61.

§ 544. If a partner is sued on what is really a partnership obligation he may avail himself of any recoupment of which the partners would have a right to avail themselves if the suit were against all of them. McKinnon v. Palen, 62 M. 188.

III. Must exist against the plaintiff.

§ 545. The counterclaim must be a cause of action existing against the plaintiff which would authorize a judgment against him. If A. the assignee of B. sues C. the latter cannot set up as a counterclaim a cause of action against B. Spencer v. Levering, 8 M. 461 G. 410; Linn v. Rugg, 19 M. 181 G. 145. See § 225.

§ 546. But in an action by an executor or administrator the defendant may set off any claim he has against the deceased. G. S. '94, § 4520; Gerdtsen v. Cockrell, 52 M. 501.

§ 547. And in an action by an undisclosed principal the defendant may sometimes set off a claim against the agent. Baxter v. Sherman, 76 N. W. 211.

IV. Must exist in defendant at commencement of action.

§ 548. In actions on contract a cause of action arising on another contract cannot be set up as a counterclaim unless it was an accrued right of action existing in the defendant at the commencement of the action.

(a) A cause of action that was not mature at the commencement of the action cannot be set up as a coun-

terclaim. Orton v. Noonan, 29 Wis. 541; Stensgaard v. Ins. Co., 50 M. 429; Milliken v. Mannheimer, 49 M. 521. *Aliter* in equity if plaintiff is insolvent. See § 537.

(b) A cause of action assigned to the defendant after the commencement of the action cannot be set up as a counterclaim. A person who is sued cannot buy up a claim against the plaintiff for the purpose of pleading it as a counterclaim. Northern Trust Co. v. Hiltgen, 62 M. 361; Rickard v. Kohl, 22 Wis. 506.

§ 549. It must have been acquired before the other party has made an assignment. A party owing an insolvent cannot buy a claim against the insolvent and set it up as a counterclaim in an action brought against him by the assignee or receiver of the insolvent. Neither can he buy up such a claim prior to the assignment of the insolvent if he knew or had reasonable ground for believing that an assignment was about to be made. Northern Trust Co. v. Rogers, 60 M. 208; Northern Trust Co. v. Hiltgen, 62 M. 361; Northern Trust Co. v. Healy, 61 M. 230. See federal bankruptcy act, § 68.

ery.

V. It must tend to lessen, defeat or modify plaintiff's recovery.

§ 550. The counterclaim must be such as to lessen, defeat or in some way modify the relief otherwise recoverable by the plaintiff. Pomeroy, Remedies, § 744; Bliss, Code Pl. § 386; Bryant, Code Pl. 255; Deitrich v. Koch, 35 Wis. 618; Heckman v. Schwartz, 55 Wis. 173; Weatherby v. Meicklejohn, 56 Wis. 73; Moore v. Smead, 89 Wis. 558; Scott v. Mewasha, 84 Wis. 73.

VI. Must exist against a plaintiff and in favor of a defendant.

§ 551. The words of the statute are that the counterclaim "must be an existing one in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action." The counterclaim may be in favor of one or more of several defendants, and against one or more of several plaintiffs provided a several judgment may be rendered between them but a joint debt cannot be set off against a separate debt

and, conversely, a separate debt cannot be set off against a joint debt. See § 536.

§ 552. If A. and B. sue C. on a joint claim, C. cannot set up as a counterclaim a demand against A. or B. individually. Birdsall v. Fischer, 17 M. 100 G. 76; Peck v. Snow Church Co., 47 M. 398; Spoffer v. Rowan, 124 N. Y. 108.

§ 553. If A. sue B. on a claim in favor of A. alone, B. cannot set up as a counterclaim a demand against A. in favor of B. and C. jointly. Hopkins v. Lane, 87 N. Y. 501; Spoffer v. Rowan, 124 N. Y. 108.

§ 554. If A. sue B. and C. on a claim against them jointly, neither B. nor C. can set up an individual demand against A. as a counterclaim. Cooper v. Brewster, 1 M. 94 G. 73; Birdsall v. Fischer, 17 M. 100 G. 76; Balch v. Wilson, 25 M. 299.

§ 555. If A. sue B., the latter cannot set up as a counterclaim a demand in his favor against A. and C. jointly. McKinney v. Bellows, 3 Blackf. (Ind.) 31; Howard v. Shores, 20 Cal. 277.

§ 556. If A. sue B. and C. upon a joint and several liability, B. or C. may set up as a counterclaim an individual claim against A. Hunt v. Conrad, 47 M. 557; Staddler v. Parmalee, 10 Iowa, 23; Briggs v. Briggs, 20 Barb. (N. Y.) 477; Conway v. Smith, 13 Wis. 125.

§ 557. If A. and B. sue C. jointly but on distinct and several causes of action, counterclaims against them severally may be set up. More v. Rand, 60 N. Y. 208.

§ 558. A cause of action which cannot be determined without bringing in new parties cannot be set up as a counterclaim. Campbell v. Jones, 25 M. 155; Walker v. Johnson, 28 M. 147; Wilcox v. Comstock, 46 M. 380; Little v. Simonds, 46 M. 380.

VII. Must arise out of one of the following causes of action.

§ 559. "First. A cause of action arising out of the contract [1] or transaction [2] set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action.[3]

Second. In an action arising on contract, any other cause of action, arising also on contract, and existing at the commencement of the action." [4] G. S. '94, § 5237.

§ 560. [1] Under this section fall:

(a) Those cases where, under the former practice, the cause of action would have been pleaded by way of recoupment. They include counterclaims for breach of warranty in actions for the price of goods sold. Schurmeier v. English, 46 M. 306; Morrison v. Lovejoy, 6 M. 319 G. 224; Koempel v. Shaw, 13 M. 488 G. 451; Cooper v. Simpson, 41 M. 46; Mass. Loan & Trust Co. v. Welch, 47 M. 183.

(b) Those cases where, under equity practice, the contract sued on, might, in a separate action, be cancelled or reformed or the defendant given other equitable relief against the enforcement of the contract, affirmative in its nature. In other words, when a party is sued on contract, he may by way of counterclaim set up equitable rights and secure such relief as he might have secured under the former practice in a separate action. Gallup v. Bernd, 132 N. Y. 370; Lahiff v. Loan Asso., 61 M. 226; Walker v. Ins. Co., 143 N. Y. 167.

§ 561. [2] "Transaction" means a commercial or business transaction or dealing. Baker v. Walbridge, 14 M. 469 G. 351. See further under this section, Steele v. Ethridge, 15 M. 501 G. 413; Allen v. Coates, 29 M. 46; Schmidt v. Bickenbach, 29 M. 122; Jones v. Swank, 54 M. 259; Lahiff v. Loan Asso., 61 M. 226; Lowry v. Hurd, 7 M. 356 G. 282; Fergus etc. Co. v. Commissioners, 60 M. 212; McLane v. Kelly, 72 M. 395.

§ 562. [3] The meaning of the term "subject of the action" has not yet been defined in this state and the like uncertainty prevails in New York. The better view is that it should be considered synonymous with "subject matter of the action"—the property in controversy or the plaintiff's primary right either of person or property the invasion of which constitutes his

"cause of action." Thompson v. Kessel, 30 N. Y. 383; Carpenter v. Ins. Co., 93 N. Y. 552; The Glen Mfg. Co. v. Hall, 61 N. Y. 226; Barker v. Walbridge, 14 M. 469 G. 351. See also, Bliss, Code Pl. §§ 126, 373; Pomeroy, Remedies, § 775; Bryant, Code Pl. 260.

§ 563. The "connection" must be direct and immediate. The counterclaim must have such a relation to and connection with the subject of the action "that the determination of plaintiff's cause of action would not do exact justice without at the same time determining defendant's cause of action." Baker v. Walbridge, 14 M. 469 G. 351; Carpenter v. Ins. Co., 93 N. Y. 552.

§ 564. In the following cases the counterclaim was held "connected with the subject of the action": Goebel v. Hough, 26 M. 252; Matthews v. Torinus, 22 M. 132; Eastman v. Linn, 20 M. 433 G. 387; Lahiff v. Loan Asso., 61 M. 226; Pioneer Press Co. v. Hutchinson, 63 M. 483; Vaule v. Miller, 69 M. 440.

§ 565. In the following cases the counterclaim was held "unconnected": Schmidt v. Bickenbach, 29 M. 122; Allen v. Coates, 29 M. 46; Jones v. Swank, 54 M. 259; Illingworth v. Greenleaf, 11 M. 235 G. 154; Barker v. Walbridge, 14 M. 469 G. 351; Majerus v. Hoscheid, 11 M. 243 G. 160; McLane v. Kelly, 72 M. 395.

§ 566. [4] Under this section a cause of action *ex contractu* may be set up as a counterclaim although wholly unconnected with the cause of action alleged in the complaint. Implied contracts are within the statute and it matters not whether the damages recoverable are liquidated or unliquidated. Folsom v. Carli, 6 M. 420 G. 284; Bidwell v. Madson, 10 M. 13 G. 1; Morrison v. Lovejoy, 6 M. 319 G. 224; Downs v. Finnegan, 58 M. 112; Brady v. Brennan, 25 M. 210; Midland Co. v. Broat, 50 M. 562; Burns v. Jordan, 43 M. 25; Lowry v. Hurd, 7 M. 356 G. 282; Laybourn v. Seymour, 53 M. 105; Hausman v. Mulheran, 68 M. 48; Lancoure v. Dupre, 53 M. 301. See cases cited under §§ 533–535.

§ 567. A judgment whether rendered in an action *ex con-*

tractu or *ex delicto*, is a contract within the meaning of the statute. One judgment may be set off against another. Temple v. Scott, 3 M. 419 G. 306; Irvine v. Myers, 6 M. 562 G. 398; Hunt v. Conrad, 47 M. 557; Midland Co. v. Broat, 50 M. 562; Way v. Colyer, 54 M. 14; Lindholm v. Itasca Lumber Co., 64 M. 46; Gutta Percha Mfg. Co. v. Mayor, 108 N. Y. 276.

§ 568. When an injured party may waive a tort and sue on the contract implied by law his demand may be set up as a counterclaim in an action *ex contractu* and when he is the plaintiff and sues upon the implied contract it may be opposed by a counterclaim arising out of contract. Downs v. Finnegan, 58 M. 112.

When a tort may be set up as a counterclaim.

§ 569. In an action *ex delicto* another tort cannot be set up as a counterclaim unless it arises out of the same transaction or is connected with the subject of the action. Allen v. Coates, 29 M. 46; Rothschild v. Whitman, 132 N. Y. 472.

§ 570. In an action *ex contractu* a cause of action *ex delicto* cannot be set up as a counterclaim unless it arises out of the same transaction or is connected with the subject of the action. Warner v. Foote, 40 M. 176; Steinhart v. Pitcher, 20 M. 102 G. 86; Schmidt v. Bickenbach, 29 M. 122; Jones v. Swank, 54 M. 259; McLane v. Kelly, 72 M. 395.

§ 571. But when the defendant may waive a tort and sue upon the contract implied by law he may set up his claim. Downs v. Finnegan, 58 M. 112.

Construction of statute.

§ 572. The statute being remedial in its nature should be liberally construed. Goebel v. Hough, 26 M. 252; Midland Co. v. Broat, 50 M. 562; Glen Mfg. Co. v. Hall, 61 N. Y. 237.

Several counterclaims may be pleaded.

§ 573. The defendant may plead as many counterclaims as he has but they must be stated separately and refer to the cause of action which they are intended to answer if more than one is alleged in the complaint. G. S. '94, § 5239. Campbell v. Jones, 25 M. 155.

Effect of failure to plead counterclaim.

§ 574. The defendant is not bound to plead a counterclaim. He may reserve his cause of action for a separate action. Douglas v. Bank, 17 M. 35 G. 18; Osborne v. Williams, 39 M. 353; Jordahl v. Berry, 72 M. 119; Paine v. Sherwood, 21 M. 225; Thorson v. Minneapolis Harvester Works, 29 M. 341.

Pleading counterclaim not an admission.

§ 575. "The pleading of a setoff or counterclaim by a defendant in any action, in any of the courts of this state, shall not be held or construed to be an admission of any cause of action on the part of plaintiff against such defendant." G. S. '94, § 5238.

§ 576. This statute overrules a long line of cases. See Trainor v. Worman, 34 M. 237; Paine v. Sherwood, 21 M. 225; Paine v. Sherwood, 19 M. 315 G. 270; Koempel v. Shaw, 13 M. 488 G. 451; Whalon v. Aldrich, 8 M. 346 G. 305; Mason v. Heyward, 3 M. 182 G. 116.

Rules as to pleading counterclaim.

§ 577. "To constitute new matter set up in an answer, a counterclaim, so as to require a reply, it must be pleaded as such and so that, if true, the court must grant affirmative relief to the defendant upon it. This may be done by stating in the pleading that it is pleaded as a counterclaim or by a demand for affirmative relief upon it. There are good reasons for requiring this, one of which is that the opposite party may be apprised that he is called on, not merely to make good the claim he asserts in his pleading, but to defend himself against affirmative relief sought by his opponent." Inasmuch as the plaintiff is required to reply to a counterclaim under penalty of having it considered true if not denied he should not be subjected to such a penalty unless he is apprised in the most unequivocal manner that the matter set up is a counterclaim and not merely a defence. The proper practice is for the defendant to introduce his counterclaim by a distinctive phrase. Broughton v. Sherman, 21 M. 431; Griffin v. Jorgenson, 22 M. 92; Townsend v. Freezer Co. 46 M. 123; Aultman v. Torrey, 55

M. 492; Cooper v. Simpson, 41 M. 46; Farrell v. Burbank, 57 M. 395 (waiver of defect in form); Phelps v. Compton, 72 M. 109 (trial by consent).

§ 578. The same rules that govern the statement of the facts constituting the original cause of action govern equally the statement of the counterclaim. The defendant must allege all the material facts constituting his cause of action in the same manner as if he were drafting a complaint against the plaintiff and he must likewise demand the relief to which he believes himself entitled. Allegations may be made by reference to the complaint. Pomeroy, Remedies, § 689; Eastman v. Linn, 20 M. 433 G. 387; Wilson v. Fairchild, 45 M. 206; Holgate v. Broome, 8 M. 243 G. 210; Curtiss v. Livingston, 36 M. 312.

§ 579. A defendant may set up any cause of action that would be a proper counterclaim to any cause of action which the plaintiff may prove within the allegations of the complaint although such cause of action may not be of the precise character indicated by those allegations and although the cause of action might not be a proper counterclaim if all such allegations should be proved. Smalley v. Isaacson, 40 M. 450.

§ 580. "Matter pleaded expressly as a counterclaim though not proper as such, may, if it constitute a defence to a claim in the opposite pleading, be available as a defence." Townsend v. Freezer Co., 46 M. 121; Walker v. Ins. Co., 143 N. Y. 167.

§ 581. If a counterclaim is pleaded in a reply it can only be used as a defence. Townsend v. Freezer Co., 46 M. 121.

§ 582. A counterclaim being "new matter," is admitted if not controverted. But to require a reply it must be pleaded as such. See § 604; Leyde v. Martin, 16 M. 38 G. 24; Schurmeier v. English, 46 M. 306; Matthews v. Torinus, 22 M. 132; Linn v. Rugg, 19 M. 181 G. 145.

§ 583. "The only way in which a plaintiff may object, that a cause of action pleaded as a counterclaim is not the proper subject of counterclaim in the particular action, is by de-

murrer. If he omits to demur he waives the objection, and the cause of action must be tried as though a proper one to plead as a counterclaim." Walker v. Johnson, 28 M. 147. Followed in, Miss. Boom Co. v. Prince, 34 M. 71; Lace v. Fixen, 39 M. 46. See also, Warner v. Foote, 40 M. 176; Matthews v. Torinus, 22 M. 132; Downs v. Finnegan, 58 M. 112.

§ 584. The objection that two counterclaims are not stated separately cannot be raised by demurrer. The proper practice is to object by motion before replying. Campbell v. Jones, 25 M. 155.

§ 585. That a counterclaim cannot be determined without the presence of other parties may be raised by demurrer. Campbell v. Jones, 25 M. 155.

§ 586. The objection that the facts set up in the answer as a counterclaim do not constitute a cause of action is not waived by a failure to demur or reply but may be taken on the trial by motion for dismissal or after verdict in arrest of judgment. Schurmeier v. English, 46 M. 306; Lace v. Fixen, 39 M. 46. See Stensgaard v. Ins. Co., 50 M. 429.

Relief awarded.

§ 587. "If a counterclaim established at the trial exceeds the plaintiff's demand so established, judgment for the defendant shall be given for the excess, or, if it appears that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly." G. S. '94, § 5419.

§ 588. "When in an answer matter is pleaded as a counterclaim, the defendant must have such relief, though not specially demanded in the answer, as the facts proved within its allegations show him entitled to." Wilson v. Fairchild, 45 M. 203.

CHAPTER XV

NEW MATTER CONSTITUTING EQUITIES

[For statute see § 434.]

Nature of equities pleadable under statute.

§ 589. An equity, to be pleadable under the statute, must be one which, according to the rules governing courts of equity under the former system, would have entitled the defendant to relief, wholly or in part, against the liability set forth in the complaint. "Under the head of equitable defences are included all matters which would have authorized an application to the court of chancery for relief against a legal liability but which, at law, could not have been pleaded at bar." An equitable defence should contain in substance the elements of a bill in equity and its sufficiency other than as to matters of mere form is to be determined by the application of the rules observed in courts of equity when relief was granted there under the former practice. Gates v. Smith, 2 M. 31 G. 21; McClane v. White, 5 M. 178 G. 139; Barker v. Walbridge, 14 M. 469 G. 351; Birdsall v. Fischer, 17 M. 100 G. 76; Walrich v. Hall, 19 M. 383 G. 329; First Nat. Bank v. Kidd, 20 M. 234 G. 212; Williams v. Murphy, 21 M. 534; Crockett v. Phinney, 33 M. 157; Knoblauch v. Foglesong, 37 M. 320; Becker v. Northway, 44 M. 61; Probstfield v. Czizek, 37 M. 420; Rogers v. Castle, 51 M. 428; Kean v. Connelly, 25 M. 222; Richardson v. Merritt, 77 N. W. 234; Thwing v. Hall Lumber Co., 40 M. 184; Kentfield v. Hayes, 57 Cal. 409; Deering v. Posten, 80 N. W. 783.

§ 590. If the facts giving rise to the equity also constitute a cause of action at law it must be shown that the remedy at law is inadequate and the answer should allege facts showing this inadequacy. Gates v. Smith, 2 M. 31 G. 21; Barker v. Walbridge, 14 M. 469 G. 351; Birdsall v. Fischer, 17 M. 100 G. 76; Probstfield v. Czizek, 37 M. 420.

Need not demand affirmative relief.

§ 591. Although the equity must be such as would have authorized affirmative relief under the former system the defendant, under our practice, may set it up for defensive purposes alone and need not ask for any affirmative relief whatever. Pomeroy, Remedies, § 88; Probstfield v. Czizek, 37 M. 420; Rogers v. Castle, 51 M. 428; Arguello v. Bours, 65 Cal. 447; Bruck v. Tucker, 42 Cal. 346; Hoppough v. Struble, 60 N. Y. 430.

Equities must be pleaded.

§ 592. Equities being new matter must be specially pleaded. See § 493.

Effect of failure to plead equities.

§ 593. Equities entitling a party to affirmative relief are not waived by a failure to plead them. The defendant has a right to bring a separate action. McCreary v. Casey, 45 Cal. 128; Fowler v. Atkinson, 6 M. 503 G. 350, was under the old statute. See § 574.

Effect of pleading equities.

§ 594. If the defendant pleads his equities and there is a trial on the merits he cannot bring a subsequent action on the same equities. St. Louis v. Lumber Co., 98 Mo. 616.

Facts admitted by failure to reply.

§ 595. The facts pleaded as an equitable defence are new matter and must therefore be denied in a reply under penalty of being considered true. G. S. '94, § 5261. First Nat. Bank v. Kidd, 20 M. 234 G. 212, was decided before the amendment of 1881.

Practice.

§ 596. When an equity is pleaded in a legal action the issue thereon is to be decided by the court without a jury and should ordinarily be taken up first, as its disposition may make it unnecessary to submit the legal issue to the jury. The order of trial, however, is a matter of discretion with the trial court to be determined by the exigencies of the particular case. Swasey v. Adair, 88 Cal. 179; Suessenbach v. First Nat. Bank,

5 Dak. 477, 504 and cases cited; Pomeroy, Remedies, § 86. See Guernsey v. Ins. Co., 17 M. 104 G. 83.

Burden of proof.

§ 597. The burden of proving the facts giving rise to his equities rests on the defendant if they are controverted by the plaintiff. Dyke v. Sparger, 143 N. Y. 653. See Am. Button-Hole etc. Co. v. Thornton, 28 M. 418.

CHAPTER XVI

THE REPLY

Office of reply.

§ 598. The last pleading of fact is the reply. "The allegation of new matter in a reply is to be deemed controverted by the defendant, who may on the trial controvert it by proofs, either in direct denial or by way of avoidance." [1] The office of a reply is:

To a counterclaim:

(a) To raise an issue of fact thereon by a general or specific denial; or,

(b) To meet it with new matter constituting a defence.

To new matter of a defensive nature:

(a) To raise an issue of fact thereon by a general or specific denial; or,

(b) To meet it with new matter in avoidance.

[1] G. S. '94, § 5261.

The statute.

§ 599. "When the answer contains new matter, the plaintiff shall within twenty days reply to such new matter, denying each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief, and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defence to such new matter in the answer, or he may demur to an answer containing new matter, when upon its face it does not constitute a counterclaim or defence, and the plaintiff may demur to one or more of such defences or counterclaims, and reply to the residue in the answer." G. S. '94, § 5241.

Rules governing statement of matter in replies.

§ 600. The rules governing the statement of the cause of action and defence in the complaint and answer apply in full

force to the statement of matter in the reply. General and specific denials are of the same form and discharge the same function in the reply as in the answer. Although not expressly authorized the plaintiff has the unquestioned right to set up in the reply as many consistent defences or matters in avoidance as he may have to the new matter alleged in the answer but they must be separately stated and plainly numbered. The reply must not contain matter inconsistent with the facts alleged in the complaint. In other words there must not be a departure in the reply. See § 614.

Counterclaim in reply.

§ 601. A counterclaim, as such, cannot be set up in a reply. Townsend v. Minneapolis etc. Co., 46 M. 121.

Waiver of reply.

§ 602. When a reply should have been made to matter in the answer but such matter is treated on the trial as controverted without a reply, the want of a reply will be deemed waived. Matthews v. Torinus, 22 M. 132.

Admissions by failure to reply.

§ 603. "If the answer contains new matter, and the plaintiff fails to reply or demur thereto, within the time allowed by law, the defendant may move on notice for such judgment as he may be entitled to upon such statement, and the court may thereupon render judgment, or order a reference or assessment of damages by jury, as the case requires." G. S. '94, § 5242.

§ 604. (a) Admission of counterclaim: Schurmeier v. English, 46 M. 306; Leyde v. Martin, 16 M. 38 G. 24. See Matthews v. Torinus, 22 M. 132; Reed v. Newton, 22 M. 541; First Nat. Bank v. Kidd, 20 M. 234 G. 212. See § 582.

§ 605. (b) Admission of defensive matter: Affirmative matter in the answer which merely tends to deny the allegations of the complaint is not new matter requiring a reply. New defensive matter to require a reply must be in the nature of confession and avoidance. Craig v. Cook, 28 M. 232; Olson v. Tvete, 46 M. 225; McArdle v. McArdle, 12 M. 98 G. 53; Reed

v. Newton, 22 M. 541; Conway v. Elgin, 38 M. 469; Engle v. Bugbee, 40 M. 492; Pinger v. Pinger, 40 M. 417; West v. Hennessey, 58 M. 133; Williams v. Mathews, 30 M. 131; Lyons v. Red Wing, 78 N. W. 868.

§ 606. (c) The objection that the facts set up in the answer as a counterclaim do not constitute a cause of action is not waived by a failure to reply. See § 769.

§ 607. (d) The objection that the answer does not state a defence is not waived by failure to reply. See § 770.

Forms of reply.

§ 608. [Where answer contains nothing but new defensive matter.]

The plaintiff for reply to the answer herein denies each and every allegation thereof.[1]

[No demand of judgment.]

[1] See for a general denial held sufficient on the trial, Peterson v. Rhunke, 46 M. 115.

§ 609. [Where answer contains both denials and new matter.]

The plaintiff for reply to the answer herein denies each and every allegation contained in the second and third paragraphs thereof.

§ 610. The plaintiff, replying to the second defence set forth in the answer herein:

I. Alleges that—

II. Denies that—

[No demand of judgment.]

§ 611. The plaintiff for reply to the answer herein:

As to the first defence therein:

I. Denies that—

II. Alleges that—

As to the second defence therein:

Denies each and every allegation thereof.

As to the counterclaim therein:

I. For a first defence denies that—

II. For a second defence alleges that—

[No demand of judgment.]

§ 612. The plaintiff for reply to the counterclaim set forth in the answer herein denies each and every allegation thereof.

[No demand of judgment.]

§ 613. The plaintiff, replying to the counterclaim set forth in the answer herein:

I. For a first defence denies that—

II. For a second defence alleges that—

[No demand of judgment.]

DEPARTURE

Definition.

§ 614. "There is a departure when a party quits or departs from the case or defence which he first made and has recourse to another." Trainor v. Worman, 34 M. 237; Estes v. Farnham, 11 M. 423 G. 312; Bishop v. Travis, 51 M. 183; Mosness v. Ins Co., 50 M. 341; Hoxsie v. Kempton, 80 N. W. 353.

Test.

§ 615. A test of departure is, Could evidence of the facts alleged in the reply be received under the allegations of the complaint? If not then there is a departure. Trainor v. Worman, 34 M. 237; Estes v. Farnham, 11 M. 423 G. 312; Mosness v. Ins. Co., 50 M. 341.

Reason of rule against.

§ 616. One of the primary objects of pleading is the formation of an issue between the parties. If a party were allowed to change his position the formation of the issue would be retarded and the record encumbered with a confusing mass of affirmations and denials. To the end that an issue may be quickly formed the rule against departure is rigorously enforced. The practical effect of allowing the plaintiff to change his position would be so mischievous that it is better to force him to dismiss his complaint and sue over if he is dissatisfied with the position which he has taken. Stephen, Pl. 418.

Complaint cannot be aided by reply.

§ 617. The plaintiff must recover, if at all, upon the cause of action set out in his complaint. This is a necessary consequence of the rule against departure. A complaint cannot be aided by the reply. The office of a reply is to meet the allegations of the answer and not to change the character of the action or enlarge the rights and remedies of the plaintiff. Bausman v. Woodman, 33 M. 512; Hatch v. Coddington, 32 M. 92; Bernheimer v. Marshall, 2 M. 79 G. 61; Tullis v. Orthwein, 5 M. 377 G. 305; Webb v. Bidwell, 15 M. 479 G. 394; Trainor v. Worman, 34 M. 237; Boon v. Ins. Co., 37 M. 426; Townsend v. Freezer Co., 46 M. 121; James v. St. Paul, 72 M. 138.

Fortifying complaint by reply—new assignment.

§ 618. Although a distinct cause of action or ground for relief cannot be set up in the reply allegations which explain or fortify the complaint or controvert or avoid the matter set up in the answer are permissible. A more particular and exact statement of the facts constituting the cause of action is not a departure. Bishop v. Travis, 51 M. 183; Estes v. Farnham, 11 M. 423 G. 312; Trainor v. Worman, 34 M. 237; Johnston v. Hillstrom, 37 M. 122; Rosby v. Ry. Co., 37 M. 171; Larson v. Schmaus, 31 M. 410; Minneapolis etc. Ry. Co. v. Ins. Co., 64 M. 61.

No departure except upon material matters.

§ 619. A variance or inconsistency between the reply and complaint upon immaterial matters does not constitute a departure. Bishop v. Travis, 51 M. 183.

Remedy for departure.

§ 620. A departure is a defect of substance which may be taken advantage of:

(a) By demurrer. Bausman v. Woodman, 33 M. 512; Bishop v. Travis, 51 M. 183; James v. St. Paul, 72 M. 138.

(b) By motion to strike out. Bausman v. Woodman, 33 M. 512; James v. St. Paul, 72 M. 138.

(c) By request for instructions. Trainor v. Worman, 34 M. 237.

(d) By motion for judgment on the pleadings. Townsend v. Freezer Co., 46 M. 121; Webb v. Bidwell, 15 M. 479 G. 394.

Waiver of defect.

§ 621. Objection to departure must be taken before verdict. Otherwise it will be deemed waived. Whitney v. Accident Asso., 57 M. 472; Ankeny v. Clark, 148 U. S. 345.

CHAPTER XVII

SUPPLEMENTAL PLEADINGS

The statute.

§ 622. "The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the former complaint, answer or reply." G. S. '94, § 5270.

§ 623. This statute was designed to provide a remedy that should perform the office of the supplemental bill in equity and the common law plea *puis darreign continuance*. It is, however, an entirely new remedy and is not to be restricted by the rules governing the former practice. Holyoke v. Adams, 59 N. Y. 235.

Distinguished from amendment.

§ 624. Pleadings must always allege a cause of action or defence in the present tense. It follows that it is only facts existing prior to the original pleading that can be introduced by amendment. On the other hand it is only facts arising subsequent to the original pleading that can be introduced by supplemental pleading. McCaslan v. Latimer, 17 S. C. 123; Guptil v. Red Wing, 78 N. W. 970.

A matter of right.

§ 625. "When, subsequent to the party's last pleading, facts have transpired which are material to his cause and of which he can avail himself only by supplemental pleading, if he makes a proper showing, and is not guilty of unreasonable delay in moving for leave to serve and file such pleading, the court has no discretion, but it is its duty to grant such leave." Malmsten v. Berryhill, 63 M. 1.

§ 626. But it is left for the court to determine, in its discretion, whether the party has applied for leave with reasonable promptness. Malmsten v. Berryhill, 63 M. 1; Lough v.

Bragg, 19 M. 357 G. 309; Reilly v. Bader, 50 M. 199; Stickney v. Jordain, 50 M. 258; Voak v. Invest. Co., 51 M. 450; Lathrop v. Dearing, 59 M. 234.

Nature of supplemental complaint.

§ 627. It does not supersede the original which remains the basis of the action. Slauson v. Englehart, 34 Barb. (N. Y.) 198; Nave v. Adams, 107 Mo. 414.

§ 628. It cannot set up a distinct cause of action accruing subsequent to the service of the original complaint. Meyer v. Berlandi, 39 M. 438; Eastman v. Power Co., 17 M. 48 G. 31.

§ 629. A party cannot sue on an unripe claim and afterwards by supplemental complaint set up the fact of the maturing of the claim.. A party must recover on a right existing at the commencement of the action. Eide v. Clarke, 65 M. 466; Tiffany v. Bowerman, 2 Hun (N. Y.) 643; Farmers' Trust Co. v. United etc. Co., 47 Hun (N. Y.) 315.

§ 630. A party cannot, by supplemental complaint, set up a title acquired since the commencement of the action. But he may allege facts strengthening his title. If in his complaint he alleges an equitable title he may by supplemental complaint set up a legal title subsequently acquired. The function of a supplemental complaint is to strengthen the plaintiff's cause of action by alleging material facts, occurring subsequent to the commencement of the action. Facts may be thus alleged which will enlarge or change the kind of relief to which the plaintiff is entitled. Meyer v. Berlandi, 39 M. 438; Lowry v. Harris, 12 M. 255 G. 166. See Chouteau v. Rice, 1 M. 106 G. 83.

Supplemental answers.

§ 631. Far greater liberality is shown in allowing supplemental answers than complaints. This is so far the reason that if the plaintiff is dissatisfied with the case which he has made out he may dismiss and sue over. The defendant has no such liberty. Any material matter of defence, either complete or partial, arising since the original answer may be set up by supplemental answer. Harrington v. Ry. Co., 17 M. 215 G.

188; Hursh v. Ry. Co., 17 M. 439 G. 417; Guptil v. Red Wing, 78 N. W. 970.

Supplemental replies.

§ 632. Supplemental answers and replies are governed by substantially the same rules. A supplemental reply must be directed to the new matter alleged in the answer. It cannot be employed to supplement a weak complaint. Ormsbee v. Brown, 50 Barb. (N. Y.) 436.

§ 633. Form of supplemental complaint.

[Title.]

The plaintiff, for supplemental complaint herein, served under and pursuant to an order of this court made on the day of 19 , to which reference is hereby made, alleges [here setting forth the additional facts without repeating the allegations of the original pleading].

CHAPTER XVIII

SHAM, IRRELEVANT, FRIVOLOUS, REDUNDANT AND INDEFINITE PLEADINGS

The statutes.

§ 634. "Sham, irrelevant, or frivolous answers, defences, or replies, and frivolous demurrers, may be stricken out, or judgment rendered notwithstanding the same, on motion as for want of an answer." G. S. '94, § 5240.

"If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion; and when a pleading is double, or does not conform to the statute, or when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may strike it out on motion, or require it to be amended." G. S. '94, § 5248.

I. SHAM PLEADINGS

Definition of sham pleading.

§ 635. A sham pleading is one that is so palpably false that it presents no real issue for trial. The essence of a sham pleading is its falsity. Although such pleadings are generally introduced in bad faith for purposes of delay it is not necessary to prove that they were so introduced in the particular case. It is sufficient if it appears that the pleading is so palpably false that it presents no real issue for trial and the opposite party should therefore not be put to proof and the time of the court consumed in trying a merely fictitious issue. Courts sit and jurors are summoned to try real and not fictitious issues and it is a fraud upon them for a pleader to present such an issue by a palpably false pleading. Under the code as well as every system of pleading it is a rule that all pleadings should be true but it is "to be observed that in general there is no means of enforcing it, because regularly there is

no proper way of proving the falsehood of an allegation, till issue has been taken, and trial had upon it." Stephen, Pl. 442; 1 Chitty, Pl. 542; Morton v. Jackson, 2 M. 219 G. 180; Barker v. Foster, 29 M. 166; Nichols v. Jones, 6 How. Prac. (N. Y.) 355; People v. McCumber, 18 N. Y. 315.

Power to strike out should be cautiously exercised.

§ 636. To justify a court in striking out a pleading as sham its falsity must be clear and indisputable. It is the duty of the court to discriminate carefully between its right to determine whether there is a real issue to be tried and the trial itself of an issue upon motion. If the evidence, upon such a motion, is conflicting or not convincing and there is any substantial doubt upon the subject the court should not interfere. Barker v. Foster, 29 M. 166; Wright v. Jewell, 33 M. 505; White v. Moquist, 61 M. 103.

§ 637. When the allegations of an answer or defence are fairly supported by the affidavits of the defendant and other persons, against like affidavits on behalf of plaintiff, it cannot ordinarily be said that the falsity of the answer is clear and indisputable. For a court to assume to say this, unless in very extraordinary circumstances, would in effect be to try the controversy between the parties upon affidavits and to deprive the defendant of his right to a regular trial by jury or otherwise, with all its manifest advantages. Wright v. Jewell, 33 M. 505.

§ 638. "An answer alleging a material fact constituting a defence, and verified by the defendant, should not be stricken out as sham upon affidavit of the plaintiff simply denying the fact alleged, the falsity of the answer not being clearly and indisputably shown." City Bank v. Doll, 33 M. 507.

A verified pleading may be stricken out.

§ 639. A sham pleading may be stricken out though verified. Conway v. Wharton, 13 M. 158 G. 145; Hayward v. Grant, 13 M. 165 G. 154; Barker v. Foster, 29 M. 166; C. N. Nelson Lumber Co. v. Richardson, 31 M. 267; Wheaton v. Briggs, 35 M. 470; Stevens v. McMillan, 37 M. 509; Dobson v. Hallowell, 53 M. 98; White v. Moquist, 61 M. 103.

Denials may be stricken out.

§ 640. A denial may be stricken out as sham. C. N. Nelson Lumber Co. v. Richardson, 31 M. 267; Stevens v. McMillan, 37 M. 509; Smalley v. Isaacson, 40 M. 450; Bardwell-Robinson Co. v. Brown, 57 M. 140.

§ 641. A denial of any knowledge or information of facts which ought to be known to the pleader is sham and may be stricken out. Wheaton v. Briggs, 35 M. 470; C. N. Nelson Lumber Co. v. Richardson, 31 M. 267; State v. Sherwood, 15 M. 221 G. 172; Larson v. Shook, 68 M. 30.

When part only is sham.

§ 642. "Where part of an answer is sham and frivolous, but another part is good, and puts in issue material allegations of the complaint, the court cannot strike out the whole, and order judgment for the plaintiff notwithstanding the answer." Schmidt v. Cassilius, 31 M. 7.

Time of making motion.

§ 643. The motion to strike out should be made promptly upon service of the sham pleading but it is discretionary with the court to entertain the motion any time before trial. Barker v. Foster, 29 M. 166.

Affidavits on motion.

§ 644. Whether a pleading is sham or not may be determined by inspection alone but resort may be had to documentary evidence and affidavits of the parties or third persons. Barker v. Foster, 29 M. 166; Dobson v. Hallowell, 53 M. 98; Fletcher v. Byers, 55 M. 419; Bardwell-Robinson Co. v. Brown, 57 M. 140; White v. Moquist, 61 M. 103; Sandwich Mfg. Co. v. Earl, 56 M. 390.

§ 645. Where affidavits in support of the motion make out a clear *prima facie* case of falsity they will be taken as true for the purposes of the motion, if not met by counter affidavits, and the motion granted. Barker v. Foster, 29 M. 166; Van Loon v. Griffin, 34 M. 444; Dobson v. Hallowell, 53 M. 98; White v. Moquist, 61 M. 103; City Bank v. Doll, 33 M. 507.

§ 646. "When disposing of a motion made by a plaintiff to strike out defendant's answer as sham, the court may take into consideration the quibbling and evasive character of defendant's counter affidavits." Hertz v. Hartman, 77 N. W. 232; Thul v. Ochsenreiter, 72 M. 111.

Amendment discretionary.

§ 647. It is wholly discretionary with the court to order judgment as for want of answer or to allow an amended answer to be served. Hertz v. Hartman, 77 N. W. 232.

Motion granted.

§ 648. Hayward v. Grant, 13 M. 165 G. 154; Barker v. Foster, 29 M. 166; C. N. Nelson Lumber Co. v. Richardson, 31 M. 267; Schmidt v. Cassilius, 31 M. 7; Van Loon v. Griffin, 34 M. 444; Wheaton v. Briggs, 35 M. 470; Stevens v. McMillan, 37 M. 509; Smalley v. Isaacson, 40 M. 450; Dennis v. Nelson, 55 M. 144; Sandwich Mfg. Co. v. Earl, 56 M. 390; Bardwell-Robinson Co. v. Brown, 57 M. 140; White v. Moquist, 61 M. 103; Dobson v. Hallowell, 53 M. 98; Hertz v. Hartman, 77 N. W. 232; Thul v. Ochsenreiter, 72 M. 111; Larson v. Shook, 68 M. 30; Fletcher v. Byers, 55 M. 419.

Motion denied.

§ 649. Morton v. Jackson, 2 M. 219 G. 180; Conway v. Wharton, 13 M. 158 G. 145; State v. Sherwood, 15 M. 221 G. 172; Roblee v. Secrest, 28 M. 43; City Bank v. Doll, 33 M. 507; Wright v. Jewell, 33 M. 505; Smith v. Betcher, 34 M. 218; McDermott v. Deither, 40 M. 86; Smith v. Mussetter, 58 M. 159.

II. IRRELEVANT PLEADINGS

Definition.

§ 650. "An irrelevant pleading is one which has no substantial relation to the controversy between the parties to the suit." [1] "An allegation is irrelevant when the issue formed by its denial can have no connection with nor effect upon the cause of action." [2]

[1] Morton v. Jackson, 2 M. 219 G. 180.

[2] Pomeroy, Remedies, § 551.

Cases containing irrelevant allegations.

§ 651. Brisbin v. Express Co., 15 M. 43 G. 25; Berkey v. Judd, 12 M. 52 G. 23; Clague v. Hodgson, 16 M. 329 G. 291, 298; State v. Lake City, 25 M. 404; Stewart v. Tribune Co., 41 M. 71; Winona etc. Ry. Co. v. Ry. Co., 23 M. 359; Pye v. Bakke, 54 M. 107; Haug v. Haugan, 51 M. 558; Wheeler v. Paper Mills, 62 M. 429; Security Bank v. Holmes, 68 M. 538; Oleson v. Printing Co., 47 M. 300; Quinby v. Tribune Co., 38 M. 528; Jellett v. Ry. Co., 30 M. 265; Oliver Mining Co. v. Clark, 65 M. 277; Lovejoy v. Morrison, 10 M. 136 G. 108; Harbo v. Commissioners, 63 M. 238; James v. St. Paul, 72 M. 138.

Remedy.

§ 652. The exclusive remedy is a motion to strike out. G. S. '94, § 5248; Russell v. Chambers, 31 M. 54; Fish v. Berkey, 10 M. 199 G. 161.

Power to strike out should be exercised cautiously.

§ 653. It is only when matter is clearly and indisputably irrelevant that an order striking it out is justifiable. Walter v. Fowler, 85 N. Y. 621; Averill v. Taylor, 5 How. Prac. (N. Y.) 476; Stewart v. Tribune Co., 41 M. 71.

III. FRIVOLOUS PLEADINGS

Frivolous answer or reply.

§ 654. A frivolous answer or reply is one which on its face is so manifestly insufficient as a defence that the court upon bare inspection can determine it without argument. Morton v. Jackson, 2 M. 219 G. 180; Roblee v. Secrest, 28 M. 43; Dennis v. Nelson, 55 M. 144.

§ 655. Since the amendment of 1881 such an answer or reply may be stricken out on motion and judgment ordered accordingly. The effect of such a motion is the same as a demurrer to the pleading. It is of course discretionary with the court to allow an amended pleading to be served instead of ordering judgment.

Frivolous demurrer.

§ 656. "A demurrer should not be struck out as frivolous unless it be manifest from mere inspection, and without argument, that there was no reasonable ground for interposing it, and hence that it was presumably put in in bad faith, for mere purposes of delay. It should not be struck out where there is such room for debate, as to the sufficiency of the pleading demurred to, that an attorney of ordinary intelligence might have interposed a demurrer in entire good faith." Hatch & Essendrup Co. v. Schusler, 46 M. 207; Olsen v. Cloquet Lumber Co., 61 M. 17; Jaeger v. Hartman, 13 M. 55 G. 50; Wisconsin v. Torinus, 22 M. 272; Quinn v. Shortall, 29 M. 106; Perry v. Reynolds, 40 M. 499; Hulbert v. Schulenburg, 17 M. 22 G. 5; Nelson v. Nugent, 62 M. 203.

§ 657. When a demurrer is stricken out as frivolous it is usual to allow the demurrant to plead over if such leave would have been granted had the demurrer been overruled after argument. The effect of striking out a demurrer as frivolous is the same as overruling the demurrer after argument. The difference is only one of form in the proceeding. "If a demurrer is bad, but not frivolous, and the court erroneously strikes it out as frivolous, but grants the party leave to plead over, it is error without prejudice, and on appeal the order striking out the demurrer will not be reversed." Friesenhahn v. Merrill, 52 M. 55.

IV. REDUNDANT PLEADINGS

§ 658. The code provides that the facts constituting the cause of action shall be stated in concise language without unnecessary repetition. Redundancy is a violation of this requirement. It was one of the primary objects of the reform introduced by the code to do away with the artificial, prolix and iterative style of the common law system. A terse and simple style is the ideal of the code. In an action of a legal nature, all allegations in addition to allegations of the issuable facts, and in actions of an equitable nature all allegations in

addition to the material facts which justify or in any way affect the award of the relief sought, are redundant. Evidentiary matter stated in addition to the material facts is always redundant and motions to strike it out are to be encouraged. If such matter is allowed to remain it not only encumbers the record but also operates as a mode of discovery wholly unauthorized by the code. Pomeroy, Remedies, § 551; Wooden v. Strew, 10 How. Prac. (N. Y.) 48; Williams v. Hayes, 5 How. Prac. (N. Y.) 470; Carpenter v. West, 5 How. Prac. (N. Y.) 411; Racouillat v. Rene, 32 Cal. 450; Green v. Palmer, 15 Cal. 414. And see the following Minnesota cases: West v. Eureka Imp. Co., 40 M. 394; Fraker v. Ry. Co., 30 M. 103; State v. Lake City, 25 M. 404, 421; Pye v. Bakke, 54 M. 107; Security Bank v. Holmes, 68 M. 538; Jellett v. Ry. Co., 30 M. 265; Oliver Mining Co. v. Clark, 65 M. 277.

Remedy.

§ 659. The exclusive remedy for redundancy is a motion to strike out made before pleading. Russell v. Chambers, 31 M. 54; Loomis v. Youle, 1 M. 175 G. 150; Fish v. Berkey, 10 M. 199 G. 161; Cathcart v. Peck, 11 M. 45 G. 24.

V. INDEFINITE PLEADINGS

General rule.

§ 660. The facts constituting a cause of action or defence must be set forth with certainty in order that they may be clearly understood by the court and the opposite party and their denial give rise to a sharply defined issue. A violation of this fundamental requirement of pleading is termed indefiniteness and renders the pleading subject to be stricken out or made more definite and certain on motion. There is no clear line of demarcation between indefiniteness and insufficiency. The one shades off into the other so that between what is clearly mere indefiniteness and what is clearly insufficiency there is a debatable territory within which cases are determined by the mental temper of the individual judge. No more than reasonable certainty is required. To require

more would often prevent any statement of a cause of action and would impose an unreasonable burden upon the pleader. Upon a motion to make more definite and certain or to strike out it is for the court to consider whether the pleader has been as definite and certain as in the nature of the case could reasonably be expected of him. No general rule can be laid down except that a pleading is subject to such a motion only where its allegations are so indefinite that the precise nature of the charge or defence is not apparent. Fraker v. Ry. Co., 30 M. 103; Bowers v. Schuler, 54 M. 99; Whelan v. Commissioners, 28 M. 80; Orth v. Ry. Co., 43 M. 208; Scofield v. Elevator Co., 64 M. 527; Freeman v. Freeman, 39 M. 370; Am. Book Co. v. Pub. Co., 71 M. 363.

§ 661. A motion to make more definite and certain or to strike out cannot be allowed to take the place of demurrer. Am. Book Co. v. Pub. Co., 71 M. 363; Whelan v. Commissioners, 28 M. 80; Truesdell v. Hull, 35 M. 468; King v. Nichols, 53 M. 453.

Defect must appear upon face of pleading.

§ 662. "The indefiniteness or uncertainty to be relieved against on motion is only such as appears on the face of the pleading itself and not an uncertainty arising from extrinsic facts as to what particular evidence may be produced to support it." Lee v. Ry. Co., 34 M. 225; Todd v. Ry. Co., 37 M. 358; Bowers v. Schuler, 54 M. 99. Overruling Colter v. Greenhagen, 3 M. 126 G. 74.

Motion granted in the following cases.

§ 663. Colter v. Greenhagen, 3 M. 126 G. 74; Cathcart v. Peck, 11 M. 45 G. 24; Madden v. Ry. Co., 30 M. 453; Pugh v. Ry. Co., 29 M. 390; Freeman v. Freeman, 39 M. 370.

Motion denied in the following cases.

§ 664. Fraker v. Ry. Co., 30 M. 103; Lehnertz v. Ry. Co., 31 M. 219; Tierney v. Ry. Co., 31 M. 234; Bowers v. Schuler, 54 M. 99; Todd v. Ry. Co., 37 M. 358; Lee v. Ry. Co., 34 M. 225; Orth v. Ry. Co., 43 M. 208; Whelan v. Commissioners, 28 M. 80;

Truesdell v. Hull, 35 M. 468. And see, Babcock v. Ry. Co., 36 M. 147; Dunn v. Ry. Co., 35 M. 73.

Motion papers.

§ 665. "Upon a motion to strike out, or make more definite, particular allegations objected to should be specifically pointed out in the motion papers." Truesdell v. Hull, 35 M. 468.

Remedy for indefiniteness.

§ 666. The exclusive remedy for indefiniteness is by motion to strike out or make more definite and certain before pleading. While the court may entertain such a motion on the trial it is then a mere matter of favor and is usually denied. Barnsback v. Reiner, 8 M. 59 G. 37; Cathcart v. Peck, 11 M. 45 G. 24; Stickney v. Smith, 5 M. 486 G. 390; Clark v. Ry. Co., 28 M. 69; Madden v. Ry. Co., 30 M. 453; Guthrie v. Olson, 32 M. 465; Pugh v. Ry. Co., 29 M. 390; Peterson v. Runke, 46 M. 115; King v. Nichols, 53 M. 453; Dean v. Goddard, 55 M. 291. See § 21.

§ 667. The defect of indefiniteness cannot be reached:

(a) By demurrer. See § 404.

(b) By request for instruction to disregard. Barnsback v. Reiner, 8 M. 59 G. 37.

(c) By motion for judgment on the pleadings. Webb v. Bidwell, 15 M. 479 G. 394; Stewart v. Trans. Co., 17 M. 372 G. 348; Malone v. Stone Co., 36 M. 325.

(d) By objection to the admission of evidence. Pugh v. Ry. Co., 29 M. 390; St. Paul Trust Co. v. Chamber Commerce, 70 M. 486.

(e) By motion to dismiss. Schmidt v. Bank, 64 Hun (N.Y.) 298; James v. Ry. Co., 90 Ga. 695.

(f) By motion in arrest of judgment. McIlroy v. Adams, 32 Ark. 315.

Order.

§ 668. The order should specify wherein the pleading is to be made more definite and certain and it may direct that the pleading be stricken out if not amended. A pleading should

not be stricken out without leave to amend being first given. See Colter v. Greenhagen, 3 M. 126 G. 74; Cathcart v. Peck, 11 M. 45 G. 24; Pugh v. Ry. Co., 29 M. 390.

Action of trial court generally final.

§ 669. The matter of compelling a pleading to be made more definite and certain lies very much in the discretion of the trial court and its action will not be reversed upon appeal where upon the merits the substantial rights of the party are not affected. Cathcart v. Peck, 11 M. 45 G. 24; Madden v. Ry. Co., 30 M. 453; Lehnertz v. Ry. Co., 31 M. 219; Fraker v. Ry. Co., 30 M. 103; Tierney v. Ry. Co., 31 M. 234; Am. Book Co. v. Pub. Co., 71 M. 363 (appealability of order).

CHAPTER XIX

VARIANCE

General rule.

§ 670. It is a fundamental rule of code procedure that the proof and pleadings must correspond. A violation of this rule is termed a variance. The evidence must follow the allegations. *Secundum allegata et probata.* In order to recover it is not enough for the plaintiff to prove a cause of action. He must prove the cause of action alleged in his complaint. "Pleadings and a distinct issue are essential in every system of jurisprudence and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. It is no answer to this objection that the defendant was probably not misled in his defence. A defendant may learn outside of the complaint what he is sued for and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is his right to have a complaint, to learn from that what he is sued for and to insist that that shall state the cause of action which he is called upon to answer, and when a plaintiff fails to establish the cause of action alleged the defendant is not to be deprived of his objection to a recovery by any assumption or upon any speculation that he has not been injured." Southwick v. Fishkill Bank, 84 N. Y. 420; Reed v. McConnell, 133 N. Y. 425. See also, Lawrence v. Willoughby, 1 M. 87 G. 65; Karns v. Kunkle, 2 M. 314 G. 268; Register Printing Co. v. Willis, 57 M. 93; Burton v. Ry. Co., 33 M. 189; Cremer v. Miller, 56 M. 52; In re Ward's Estate, 57 M. 377; Marshall v. Gilman, 47 M. 131; Desnoyer v. L'Hereux, 1 M. 17 G. 1; Cummings v. Long, 25 M.

337; Gaar v. Fritz, 60 M. 346; Johannin–Hansen Co. v. W. A. Barnes & Co., 80 N. W. 364.

The statutes.

§ 671. "No variance between the allegation in the pleading and the proof is material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits. Whenever it is alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and it shall be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just." G. S. '94, § 5262.

"When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." G. S. '94, § 5263.

"When, however, the allegation of the cause of action or defence to which the proof is directed is unproved not in some particulars only, but in its entire scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof." G. S. '94, § 5264.

THREE GRADES OF VARIANCE

Immaterial variance.

§ 672. When the disagreement between the facts alleged and the facts proved or sought to be proved is so slight that it is perfectly obvious that the adverse party could not have been misled in his preparation for trial, the variance is deemed immaterial and the court will either disregard it altogether or order an immediate amendment without costs. Caldwell v. Bruggerman, 4 M. 270 G. 190; Chapman v. Dodd, 10 M. 350 G. 277; Rau v. Ry. Co., 13 M. 442 G. 407; Sonnenberg v. Riedel, 16 M. 83 G. 72; Blakeman v. Blakeman, 31 M. 397; Iverson v. Dubay, 39 M. 325; Erickson v. Schuster, 44 M. 441; Fravell v. Nett, 46 M. 31; Johnston Harvester Co. v. Clark, 30 M. 308;

Mosner v. Ry. Co., 42 M. 480; Mykleby v. Ry. Co., 39 M. 54; Nichols & Shepard Co. v. Dedrick, 61 M. 513.

Material variance.

§ 673. When the disagreement between the facts alleged and the facts proved or sought to be proved is so great that the adverse party might reasonably have been misled in his preparation for trial and such party makes it appear to the court that he was actually misled the variance cannot be disregarded and an amendment will be ordered with costs, or a continuance granted with leave to amend with or without costs, in the discretion of the court. Under common law practice the determination of the question of material variance was made by a comparison of the facts alleged and the evidence. Under the code it is not enough that there is a material variance appearing on the face of the pleadings and evidence, but the fact that the adverse party has been misled must be proved *aliunde* the pleadings and evidence. Short v. McRea, 4 M. 119 G. 78; Washburn v. Winslow, 16 M. 33 G. 19; Catlin v. Gunter, 11 N. Y. 368; Place v. Minster, 65 N. Y. 89.

Fatal variance—failure of proof.

§ 674. When the disagreement between the facts alleged and the facts proved is of such a character that a different cause of action than the one set up in the pleading is proved the court cannot order or grant an amendment over objection but must dismiss the action. To prove fatal the disagreement need not extend to all the facts. The same facts may enter into two different causes of action. A disagreement as to a single material fact may prove fatal. The test is not the extent of disagreement in the facts, but the different character of the causes of action made out by the facts. Scofield v. Elevator Co., 64 M. 527; Downs v. Finnegan, 58 M. 112; Lawrence v. Willoughby, 1 M. 87 G. 65; White v. Culver, 10 M. 192 G. 155; Irish-American Bank v. Bader, 59 M. 329; McCarty v. Barrett, 12 M. 494 G. 398; Minneapolis Harvester Works v. Smith, 30 M. 399; Snow v. Johnson, 1 M. 48 G. 32; Helfer v. Alden, 3 M. 332 G. 232; Cummings v. Long, 25 M. 337; Gaar v. Fritz, 60 M. 346; First Nat. Bank v. Strait, 71 M. 69.

§ 675. "Under a complaint for one kind of nuisance, one of an essentially different character cannot be proved." O'Brien v. St. Paul, 18 M. 176 G. 163.

§ 676. "The complaint disclosed a contract terminable at the pleasure of either party. On the trial the contract proved by plaintiff was one that by its terms was to continue for a period of time longer than one year from the making thereof. Held a fatal variance." Cowles v. Warner, 22 M. 449.

§ 677. "Under an allegation of a contract between the plaintiff and defendant, proof of a contract made between the defendant and another party, and assigned by the latter to the plaintiff, is not an immaterial variance, but a failure of proof." Dennis v. Spencer, 45 M. 250.

§ 678. "In an action to recover the value of goods alleged to have been sold by plaintiff to defendant, proof only of a sale by plaintiff to a third party, and of a subsequent contract between such third party and the defendant, whereby the latter agreed to pay to the plaintiff the original price of the goods sold, presents a case of fatal variance." Benson v. Dean, 40 M. 445.

§ 679. Under an allegation of fraud mistake cannot be proved. Leighton v. Grant, 20 M. 345 G. 298.

§ 680. Under an allegation of facts constituting a legal title, facts constituting an equitable title cannot be proved. Merrill v. Dearing, 47 M. 137; Stuart v. Lowry, 49 M. 95; Hersey v. Lambert, 50 M. 373; Freeman v. Brewster, 70 M. 203. See Smith v. St. Paul, 72 M. 472.

Waiver of variance—voluntary trial of issues without the pleadings.

§ 681. Parties may waive the requirement that the proof shall follow the pleadings and by consent or without objection try issues not made by the pleadings and when they do so the case is to be determined exactly as if such issues had been formed by the pleadings and full measure of relief awarded. City of Winona v. Minnesota etc. Co., 27 M. 415; Warner v. Foote, 40 M. 176; Dean v. Hitchings, 40 M. 31; Abraham v.

Holloway, 41 M. 163; Ambuehl v. Matthews, 41 M. 537; Whalon v. Aldrich, 8 M. 346 G. 305; Village of Wayzata v. Ry. Co., 50 M. 438; Bassett v. Haren, 61 M. 346; Clark v. City of Austin, 38 M. 487; Erickson v. Fisher, 51 M. 300; Lyons v. Red Wing, 78 N. W. 868.

§ 682. After having litigated a question of fact without objection, it is too late to claim that the pleading of the adverse party did not sufficiently aver the fact in controversy. Osborne v. Williams, 37 M. 507; Butler v. Winona Mill Co., 28 M. 205; Keene v. Masterman, 66 M. 72; Almich v. Downey, 45 M. 460.

§ 683. A consent to try issues not made by the pleadings must clearly appear and such consent cannot be inferred merely from the fact that evidence pertinent to such issues was received without objection if such evidence was also pertinent to issues actually made by the pleadings. City of Winona v. Minnesota etc. Co., 27 M. 415; O'Neil v. Ry. Co., 33 M. 489; Livingston v. Ives, 35 M. 60; Payette v. Day, 37 M. 366; Fergestadt v. Gjertsen, 46 M. 369; Mahoney v. Ry. Co., 35 M. 361; Farnham v. Murch, 36 M. 328.

§ 684. Where the case was tried by the court without a jury, and there is no settled case or bill of exceptions, this court will presume that at the trial the parties by consent litigated all the matters of fact in the findings, though some of the facts found be not within the issues made by the pleadings. Baker v. Byerly, 40 M. 489; Olson v. Ry. Co., 38 M. 479; Deiber v. Loehr, 44 M. 451; Ahlberg v. Swedish Am. Bank, 51 M. 162; Abbott v. Morrissette, 46 M. 10; Jones v. Wilder, 28 M. 238; Wyvell v. Jones, 37 M. 68; Salisbury v. Bartleson, 39 M. 365; St. Paul etc. Ry. Co. v. Bradbury, 42 M. 222; Yorks v. City of St. Paul, 62 M. 250.

CHAPTER XX

AMENDMENT OF PLEADINGS

GENERAL RULES

Time when an amended pleading takes effect.

§ 685. An amended pleading is construed as of the date of the original pleading. Monticello v. Grant, 104 Ind. 168; Schuyler Nat. Bank v. Bollong, 28 Neb. 684; Clark v. Canal Co., 11 R. I. 36.

Time of matter introduced.

§ 685 (a). Matter arising subsequent to the original pleading cannot be introduced by amendment. See § 624.

Effect of amendment.

§ 686. An amended pleading supersedes the original and is to be construed as the only one interposed in the case. Ermentrout v. Ins. Co., 63 M. 194; Oleson v. Newell, 12 M. 186 G. 114; Hanscom v. Herrick, 21 M. 9; Barber v. Reynold, 33 Cal. 497.

§ 687. Unless the amendment introduces a new cause of action the statute of limitations is arrested by the service of the original pleading. Bruns v. Schreiber, 48 M. 366; Case v. Blood, 71 Iowa, 632; McKeighan v. Hopkins, 19 Neb. 33.

§ 688. If the amendment introduces a new cause of action the pleading is to be construed as of its own date and the statute of limitations runs against it to the date of service. Schulze v. Fox, 53 Md. 37; Atkinson v. Amador etc. Canal Co., 53 Cal. 102; Hester v. Mullen, 107 N. C. 724; Hills v. Ludwig, 46 Ohio St. 374; Monticello v. Grant, 104 Ind. 168.

§ 689. "Where a complaint is amended after answer, the defendant may answer anew if he elects, but he is not bound to do so; and, if he does not, the answer to the original will stand as the answer to the amended complaint, and the defendant will not be in default except as to the new or additional facts

not put in issue by his answer." Ermentrout v. Ins. Co., 63 M. 194.

§ 690. A notice of trial is not avoided by a subsequent amendment of the pleadings. Griggs v. Edelbrock, 59 M. 485; Stevens v. Curry, 10 M. 316 G. 249.

AMENDMENTS OF COURSE

Before service of answer, demurrer or reply.

§ 691. "Any pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering it expires." [1] It is prudent for counsel to assume that the right of amendment under this provision terminates, if the pleader does not take his full twenty days, when the demurrer, answer or reply is in fact served. Thereafter the only right of amendment of course is under the second clause of the section.[2] A party does not secure double time in which to amend of course by serving his pleading by mail.[3]

[1] G. S. '94, § 5265.

[2] See Griggs v. Edelbrock, 59 M. 485.

[3] Armstrong v. Phillips, 60 Hun (N. Y.) 243. See Griggs v. Edelbrock, 59 M. 485.

After service of answer, demurrer or reply.

§ 692. Any pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had, at any time within twenty days after service of the answer, demurrer or reply to such pleading, provided such amendment would not delay the trial. G. S. '94, § 5265; Swank v. Barnum, 63 M. 447.

§ 693. It is safe for counsel to assume, in the absence of any ruling by the supreme court, that the right of amendment of course does not exist under the second clause of § 5265 if there are less than twenty-eight days intervening before the next term of court—twenty days to which the opposite party is

entitled for answering the amended pleading and eight days notice of trial.

Scope of amendment of course.

§ 694. There is apparently no case in this state authoritatively defining the scope of permissible amendment of course. It is believed, however, that the practical construction which the bench and bar of the state have placed upon § 5265 forbids the introduction of an entirely new cause of action. It is so held in Wisconsin. Carmichael v. Argard, 52 Wis. 607.

§ 695. On the other hand the defendant may unquestionably introduce an entirely new defence. See § 712.

§ 696. A party may amend either a demurrer or an answer but he cannot withdraw the one and plead the other as a matter of amendment, of course. If it be an answer, the facts may be stated in another way, or other facts added, or some of those facts first stated omitted entirely. If it be a demurrer, its form may be changed or other additional grounds may be alleged. But an issue of law cannot be changed by an amendment, of course, to an issue of fact nor can the latter be by such a process converted into an issue of law. When a party has made a mistake by serving a demurrer when he should have served an answer, or by serving an answer when he should have served a demurrer, he can be relieved from the consequences of his mistake by an application to the court, and in that way permitted to substitute an answer for a demurrer, or *vice versa*; which the court may allow to be done when satisfied that justice requires it, and upon such terms as it may consider just. Cashman v. Reynolds, 123 N. Y. 138.

§ 697. When a pleading is demurred to or a motion is made to correct it in any manner, as, for example, to strike out irrelevant, redundant, frivolous or sham matter therein or to make it more definite and certain, the pleader may defeat the object of the demurrer or motion and avoid the payment of costs thereon by amending his pleading of course and in a way to fully meet the objections raised by the demurrer or motion.

Cooper v. Jones, 4 Sandf. (Superior Ct. Rep. N. Y.) 699; Welch v. Preston, 58 How. Prac. (N. Y.) 52; Sutton v. Wegner, 72 Wis. 294; Burrall v. Moore, 5 Duer (N. Y.) 654; Spuyten Duyvil etc. Co. v. Williams, 1 Civ. Prac. Rep. (N. Y.) 280.

Illustrations of allowable amendment of course.

§ 698. Striking out or withdrawing one or more of the causes of action stated (Watson v. Rushmore, 15 Abb. Prac. [N. Y.] 51); changing prayer for relief (Getty v. Ry. Co., 6 How. Prac. [N. Y.] 269; Holmes v. Campbell, 12 M. 221 G. 141; Lockner v. Turnbull, 7 Wis. 105); amplifying or changing the statement of the manner in which the contract was broken or the injury inflicted (Cashman v. Reynolds, 123 N. Y. 141; Bruns v. Schreiber, 48 M. 311); setting up the statute of limitations or usury (Macqueen v. Babcock, 13 Abb. Prac. [N. Y.] 268; Bradley v. Ins. Co., 28 Mo., App. 7).

But one amendment of course.

§ 699. A party cannot amend his pleading more than once of course. If the plaintiff amends his complaint before answer or demurrer, his right to amend of course is exhausted and if his amended complaint is demurred to he cannot amend it a second time without leave of court. When a demurrer has been interposed to an answer and the defendant amends of course and the plaintiff also demurs to the amended answer the defendant cannot serve a second amended answer, of course. Sands v. Calkins, 30 How. Prac. (N. Y.) 1; White v. Mayor, 14 How. Prac. (N. Y.) 495.

AMENDMENTS BY ORDER OF COURT

The statute.

§ 700. "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defence, by

conforming the pleading or proceeding to the fact proved." G. S. '94, § 5266.

A matter of discretion.

§ 701. "To this end the trial court must necessarily exercise its discretion, in view of the circumstances of each particular case, and no fixed rule can be laid down by which the propriety of such amendments shall be determined. So long as the court in such matters acts within the limits of its discretion, its action will not be reviewed and its propriety or expediency considered. It is only when it is claimed that the limits of discretion have been exceeded that an appellate court will look into the matter and only when there has been a plain abuse of discretion will the action of the court below be set aside." Winona v. Construction Co., 29 M. 68; Fowler v. Atkinson, 5 M. 505 G. 399; White v. Culver 10 M. 192 G. 155.

§ 702. "The discretion of a court, in relieving from mistakes or defaults, is not confined to cases involving no fault or negligence of the moving party. To the end that justice may be done, relief may, within proper limits, be granted from the consequences of positive negligence." Winona v. Construction Co., 29 M. 68.

Statute construed liberally.

§ 703. This statute being remedial in nature is to be liberally construed and applied. Burns v. Scooffy, 98 Cal. 271; Brown v. Bosworth, 62 Wis. 542; Gilchrist v. Gilchrist, 44 How. Prac. (N. Y.) 317; Tiffany v. Henderson, 57 Iowa, 490.

In furtherance of justice—unconscionable defences.

§ 704. "A court may, to a certain extent, take into account the nature of the defence, in determining, in the exercise of its discretion, whether it should grant leave to amend a pleading by setting it up." Minneapolis etc. Ry. Co. v. Ins. Co., 62 M. 315.

§ 705. But a court cannot discriminate against legal defences on account of their character. When the legislature has authorized such defences as the statute of limitations and usury it is not for the courts to brand them as unconscionable

and refuse to allow them to be set up by amendment. They are to be treated exactly like any other good defence. The legislature has closed the question as to whether they "further justice" or not. Sheldon v. Adams, 41 Barb. (N. Y.) 54; Gilchrist v. Gilchrist, 44 How. Prac. (N. Y.) 317; Arnold v. Chesebrough, 33 Fed. Rep. 571.

Must be material.

§ 706. An amendment introducing immaterial averments will not be allowed. Newman v. Ins. Co., 17 M. 123 G. 98; Carli v. Union Depot etc. Co., 32 M. 101.

Allowance affected by time of motion.

§ 707. The allowance of an amendment is materially affected by the time when the application is made. An amendment which would be freely allowed before trial might reasonably be denied on the trial. After verdict amendments other than to conform the pleadings to the proof are generally disallowed. Before trial amendments are allowed almost as a matter of course if they would not necessarily delay the trial. Brown v. Bosworth, 62 Wis. 542.

Terms.

§ 708. The imposition of terms upon the allowance of amendment lies in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. "Courts have uniformly sanctioned the practice of allowing amendments, after issue joined, upon such terms as the circumstances of each particular case might require, as payment of costs up to the time of amendment, accepting short notice of trial, rejecting certain defences or causes of action, or requiring a party to admit the truth of his adversary's plea or a part of the same." Caldwell v. Bruggerman, 8 M. 286 G. 252.

Motion for.

§ 709. The motion for leave to amend, except when made on the trial, is regularly made upon notice and "in all cases where an application is made for leave to amend a pleading

* * * such application shall be accompanied with a copy of the proposed amendment * * * and an affidavit of merits and be served upon the opposite party." § 24; Barker v. Walbridge, 14 M. 469 G. 351.

Service of order.

§ 710. An order granting leave to amend need not be served upon the opposite party unless it so directs. Holmes v. Campbell, 12 M. 221 G. 141.

AMENDMENTS BEFORE TRIAL

Scope of amendment allowable under this statute.

§ 711. There is no express limitation on the power of the court to order an amendment of pleadings under this statute before trial except that it shall be "in furtherance of justice." The language of the statute, however, carries the necessary implication that an entirely new and distinct cause of action shall not be introduced. Amendment does not mean substitution. At common law the plaintiff could not introduce an entirely new cause of action by amendment and there is no apparent intention in the code to revolutionize the former practice. Bruns v. Schreiber, 48 M. 366; Traynor v. Sielaff, 62 M. 420; Swank v. Barnum, 63 M. 447; Brayton v. Jones, 5 Wis. 117, 627; Supervisors v. Decker, 34 Wis. 378; Stevens v. Brooks, 23 Wis. 196; Cook v. Ry. Co., 75 Iowa, 171; Hackett v. Bank, 57 Cal. 335; Givens v. Wheeler, 6 Colo. 149. In Holmes v. Campbell, 12 M. 221 G. 141 the plaintiff was allowed to amend by asking for equitable relief instead of damages but the cause of action was not changed—the same invasion of the same right was alleged.

§ 712. While there is apparently no case in this state expressly holding that an answer may be amended by order of court before trial to the extent of introducing an entirely new defence, the power of the court to allow such amendment, in its discretion, is unquestioned. In the absence of peculiar circumstances rendering it unjust such an amendment should be allowed before trial as a matter of course if it

would not necessarily delay the trial. The following statement of the rule by Chief Justice Dixon commends itself to the reason and is supported by well considered cases: "Any amendment of the answer is permissible, provided the facts introduced constitute a defence, and this, though they may be inconsistent with the grounds of defence first stated, or depart from them, or bring in a new and distinct defence. Herein the rule respecting the amendment of the answer, while proceeding upon the same principle, yet operates quite otherwise than when applied to the case of a complaint. It, is, however, the same harmonious, consistent rule in both cases. Any defence to an action—facts going to constitute it, whether originally pleaded or subsequently brought in by amendment—cannot but be pertinent to the cause of action stated. It cannot be said to be a departure from the subject of the action. The plaintiff may amend in any particular pertinent to that subject, and which does not change it, and the defendant may do the same thing, although amendment by him may involve departure from or inconsistency with former defences, or introduce those which are new and different. The plaintiff must adhere to the cause of action originally stated, or sued upon, and cannot substitute another in its place. The defendant is subject to the same general limitation upon the power of amendment. If the plaintiff finds he is wrong or fails to establish that cause he may sue again. Refusing the application to amend does not defeat his right. But it is not so with the defendant, who, by mistake or otherwise, has omitted to plead his defence. If not permitted to amend his right is forever lost." Brayton v. Jones, 5 Wis. 628. See also, Brown v. Bosworth, 62 Wis. 542; Phœnix etc. Co. v. Walrath, 53 Wis. 669; Diamond v. Ins. Co., 4 Daly (N. Y.) 498; Minneapolis etc. Ry. Co. v. Ins. Co., 62 M. 315; Fowler v. Atkinson, 5 M. 505 G. 399; Burke v. Baldwin, 54 M. 514.

§ 713. "Great liberality should be shown by a trial court in permitting, where it can be done without working great delay, such amendments to pleadings as facilitate the production of all the facts bearing upon the question involved in the action.

To refuse permission to answer with a valid defence in hand can only be justified in the face of facts showing wilful neglect, inexcusable carelessness or irreparable injury to the plaintiff; and it is no ground for refusing such permission that the new or amended answer would necessitate a continuance, as the court can impose terms to prevent an injury to the plaintiff and compensate him for the detriment suffered in consequence thereof." Burns v. Scooffy, 98 Cal. 271.

AMENDMENTS ON THE TRIAL

A matter of discretion.

§ 714. The amendment of pleadings on the trial is a matter lying almost wholly in the discretion of the trial court. Its action in granting or refusing leave to amend or in conforming the pleadings to the proof will not be reversed on appeal except for a clear abuse of discretion.

(a) Granting or refusing leave to amend: Morrison v. Lovejoy, 6 M. 319 G. 224; Brazil v. Moran, 8 M. 236 G. 205; Butler v. Paine, 8 M. 324 G. 284; White v. Culver, 10 M. 192 G. 155; Kiefer v. Rogers, 19 M. 32 G. 14; Osborne v. Williams, 37 M. 507; Iltis v. Ry. Co., 40 M. 273; Bitzer v. Campbell, 47 M. 221; Stensgaard v. Ins. Co., 50 M. 437; Kennedy v. McQuaid, 56 M. 450; Luse v. Reed, 63 M. 5; Nevin v. Craig, 63 M. 20; St. Paul Trust Co. v. Chamber Commerce, 70 M. 486; Boen v. Evans, 72 M. 169; Board of Commissioners v. Amer. Trust Co., 78 N. W. 113.

(b) Conforming the pleadings to the proof. Cairncross v. McGrann, 37 M. 130; Erickson v. Bennet, 39 M. 326; Almich v. Downey, 45 M. 460; Dougan v. Turner, 51 M. 330; Adams v. Castle, 64 M. 505; Minneapolis etc. Packing Co. v. Cunningham, 59 M. 325.

New cause of action cannot be introduced.

§ 715. The only limitation on the discretion of the court in granting leave to amend the pleadings on the trial is that a new cause of action cannot be introduced. Reeder v. Sayer.

70 N. Y. 180; Harris v. Tumbridge, 83 N. Y. 97; Price v. Brown, 98 N. Y. 388; Stevens v. Brooks, 23 Wis. 196; Newton v. Allis, 12 Wis. 378; Larkin v. Noonan, 19 Wis. 93. This limitation is impliedly recognized in the following Minnesota cases: Bruns v. Schreiber, 48 M. 371; Iverson v. Dubay, 39 M. 325; Smith v. Prior, 58 M. 247; Minneapolis Stock Yards v. Cunningham, 59 M. 325.

§ 716. A new cause of action cannot be introduced under the guise of conforming the pleadings to the proof where the evidence was received over objection. Southwick v. Bank, 84 N. Y. 420; Freeman v. Grant, 132 N. Y. 22. See § 727.

Test.

§ 717. A fair test to determine whether a new cause of action would be introduced by the amendment is to ask, Would a recovery on the original complaint be a bar to a recovery on the amended complaint? Davis v. Ry. Co., 110 N. Y. 646.

New defence.

§ 718. Whether a court may grant the defendant leave to amend his answer on the trial before proof by introducing an entirely new defence has never been authoritatively determined in this state. Undoubtedly it would be held a matter of discretion with the trial court, for such is the practical construction which the bench and bar have placed upon the statute. It is, however, a power to be sparingly and cautiously exercised. A continuance should be granted if plaintiff requests it. Phœnix Mutual Life Ins. Co. v. Walrath, 53 Wis. 669. See Wood v. Cullen, 13 M. 394 G. 365; Burke v. Baldwin, 54 M. 514; Newman v. Ins. Co., 17 M. 123 G. 98.

§ 719. ' Of course after the evidence is in over objection the answer cannot be amended so as to introduce an entirely new defence under the guise of conforming the pleadings to the proof. See § 727.

General rule.

§ 720. Any amendment is permissible which is merely an amplification or change in the statement of the manner in

which the contract was broken or the injury inflicted. A cause of action is the violation of a right and so long as the same violation of the same right is preserved, any amendment in the statement of the particulars of the violation is allowable. Bruns v. Schreiber, 48 M. 366; Dougan v. Turner, 51 M. 330; Daley v. Gates, 65 Vt. 591.

Changing a legal cause of action into an equitable cause and vice versa.

§ 721. The relief asked is no part of the cause of action and it is discretionary with the court to allow an amendment of the prayer for relief so long as the cause of action remains unchanged, and when the facts stated entitle a party to either an equitable or legal remedy, the prayer may be amended so as to ask for the relief desired. But facts constituting a legal cause of action cannot be amended on the trial so as to constitute an equitable cause of action or *vice versa*. Bockes v. Lansing, 74 N. Y. 437; Carmichael v. Argard, 52 Wis. 607; Walsh v. McKeen, 75 Cal. 519; Holmes v. Campbell, 12 M. 221 G. 141; Stevens v. Brooks, 23 Wis. 196; Fisher v. Laack, 76 Wis. 313; Powell v. Allen, 103 N. C. 46.

Changing action ex contractu to action ex delicto.

§ 722. A cause of action arising on contract cannot be converted into a cause of action in tort by amendment on the trial or *vice versa*. Neudecker v. Kohlberg, 81 N. Y. 296; Carmichael v. Argard, 52 Wis. 607; Smith v. Prior, 58 M. 247; Mykleby v. Ry. Co., 39 M. 54. See Minneapolis Harvester Works v. Smith, 30 M. 399.

Amendment of parties.

§ 723. The court may at any time amend the name of any party except for the purpose of acquiring jurisdiction. McEvoy v. Bock, 37 M. 402; Atwood v. Landis, 22 M. 558; Hinkley v. Water Power Co., 9 M. 55 G. 44. See Erskine v. McIlrath, 60 M. 485. See § 199.

§ 724. In an action brought in favor of a minor in the name of the guardian, it was held allowable to amend the record by

adding the name of the ward. Perine v. Grand Lodge, 48 M. 82; Beckett v. Aid Asso. 67 M. 298.

Amendment increasing damages.

§ 725. The court may allow a complaint to be amended on the trial by increasing the amount of damages claimed. Austin v. Ry. Co., 34 M. 473.

§ 726. "When the district court acquires jurisdiction of a cause upon appeal from justice's court upon law and fact, the trial proceeds *de novo*, and the appellate court may allow an amendment of the complaint increasing the amount of plaintiff's claim beyond that to which the jurisdiction of the justice is limited." McOmber v. Balow, 40 M. 388; Bingham v. Stewart, 14 M. 153 G. 214.

AMENDMENTS AFTER VERDICT

§ 727. A court has no power to grant an amendment of a complaint after verdict to conform to evidence which was seasonably objected to on the trial as inadmissible under the pleadings and without which the plaintiff could not have recovered. Guerin v. Ins. Co., 44 M. 20. *Aliter* if the evidence was unobjected to. Cairncross v. McGrann, 37 M. 130. See Adams v. Castle, 64 M. 505; Aultman & Taylor Co. v. O'Dowd, 75 N. W. 756.

AMENDMENTS AFTER JUDGMENT

§ 728. "While our statute gives the court power to amend a pleading after judgment, yet it is a power that should be exercised sparingly." North v. Webster, 36 M. 99; Pfefferkorn v. Hayward, 65 M. 429; Adams v. Castle, 64 M. 505; Aultman & Taylor Co. v. O'Dowd, 75 N. W. 756.

§ 729. An amendment after judgment of an insufficient statement for judgment by confession will not be allowed to the prejudice of third parties. Wells v. Gieseke, 27 M. 478; Auerbach v. Gieseke, 40 M. 258.

Amendment after appeal.

§ 730. "A trial court, in the exercise of its proper discretion may allow pleadings to be amended so as to raise new issues after the cause has been disposed of in this court on findings of fact and conclusions of law, and, as a necessary result of its power to permit such amendments, may grant a new trial. The court should act with great caution, however, on such applications." Burke v. Baldwin, 54 M. 514; Winona v. Construction Co., 29 M. 68.

How made.

§ 731. The amendment should be made:

(a) When of course, by serving a new pleading with amendments incorporated. The pleading should be denominated "amended complaint," "amended answer," etc., and so endorsed.

(b) When upon leave of court, the same as in (a) unless the order otherwise directs.

(c) When upon the trial, as the court may direct. The order noted in the minutes should specify the manner of amendment. Slight amendments are made by erasure and interlineations but if the amendment is substantial and extensive the party should be required to file an entirely new pleading.

(d) When after trial the order should specify what the amendment is and direct the mode of its incorporation into the record.

CHAPTER XXI

CONSTRUCTION OF PLEADINGS

General rule—statute.

§ 732. "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties." G. S. '94, § 5247; State v. Cooley, 58 M. 514; Hoag v. Mendenhall, 19 M. 335 G. 289.

Common law rules abrogated.

§ 733. Under the common law system it was the settled and rigorously enforced rule that doubtful pleadings should be construed most strongly against the pleader. "The evident intent of the legislature in this clause was to abrogate at one blow the ancient dogma, and to introduce in its place the contrary principle of a liberal and equitable construction; that is, a construction in accordance with the general nature and design of the pleading as a whole. This mode of interpretation does not require a leaning *in favor* of the pleader in place of the former tendency against him; it demands a natural spirit of fairness and equity in ascertaining the meaning of any particular averment or group of averments from their relation and connection with the entire pleading and from its general purpose and object." Pomeroy, Remedies, § 546; Cone v. Ivinson, 4 Wyoming, 234; Coatsworth v. Ry. Co., 156 N. Y. 457.

§ 734. "The tendency of modern legislation justly favors a liberal construction of pleadings in the interest of substantial justice. The code requires that the allegations of a pleading shall be liberally construed to promote this object. The courts, adopting the new spirit, no longer apply the technical and artificial rules which formerly prevailed, whereby the rights of parties were often subordinated to the mere form in which they were asserted." Reed v. McConnell, 133 N. Y. 433.

§ 735. It is sometimes stated as a rule of construction under the code, that every doubt should be resolved in favor of the pleading—that where a pleading is susceptible of two meanings that shall be taken which will support it.[1] This form of statement is very misleading and as applied to construction on demurrer is erroneous. It is true in its full sense only when it is applied to construction on the trial or after verdict. It is not true that there should be a leaning in favor of the pleader on demurrer. Although a liberal construction must be given a pleading, even on demurrer, yet, if a doubt remains as to the meaning of the language used or as to whether a fact is alleged or not, *after giving to the pleading every fair and reasonable intendment*, it should be resolved against the pleader. To this extent the common law rule that a pleading must be taken most strongly against the pleader still obtains.[2] "A construction of doubtful or uncertain allegations in a pleading, which enables a party by thus pleading to throw upon his adversary the hazard of correctly interpreting their meaning, is no more allowable now than formerly, and when a pleading is susceptible of two meanings, that shall be taken which is most unfavorable to the pleader. It is in the nature of things that a party who is required to frame his issues for the information of his adversary, and the court, must be responsible for any failure to express his meaning clearly and unmistakably."[3] But this resolving of doubt against the pleader can be done, according to the better cases, only upon a doubt which exists after applying to the pleading a fair and liberal construction.

[1] Allen v. Patterson, 7 N. Y. 476 (citing the common law rule which was adopted in mitigation of the other common law rule that every doubtful pleading should be construed most strongly against the pleader. Both these rules are superseded by the code rule of liberal construction and that rule does not require, on demurrer, a leaning in favor of the pleader).

[2] Thompson Mfg. Co. v. Perkins, 97 Iowa, 607; Loehr v. Murphy, 45 Mo. App. 519; Gibson v. Parlin, 13 Neb. 292; Na-

tion v. Cameron, 2 Dak. 347; People v. Supervisors, 34 N. Y. 268; Wagner v. Finnegan, 54 M. 251; Irvine v. Irvine, 5 M. 61 G. 44; Coolbaugh v. Roemer, 30 M. 424.

[3] Clark v. Dillon, 97 N. Y. 375.

§ 736. Although a pleading is to be liberally construed every fact essential to constitute the cause of action or defence must be alleged directly or inferentially. Nothing will be assumed in favor of the pleader for he is presumed to have stated the facts in his favor as strongly as the truth would permit. Cruger v. Ry. Co., 12 N. Y. 190; Smith v. Buttner, 90 Cal. 95; Emery v. Pease, 20 N. Y. 62; Overton v. Overton, 131 Mo. 559.

§ 737. Where a pleading contains inconsistent allegations the one most unfavorable to the pleader will be taken as true. Board of Education v. Shaw, 15 Kans. 33; Derby v. Gallup, 5 M. 119 G. 85, 96.

Construction as affected by time of objection.

§ 738. The degree of strictness with which pleadings are construed depends upon the time and mode of objection to their sufficiency. A pleading which would be good on demurrer may be bad on motion to make more definite and certain, and a pleading that would be held bad on demurrer may be held good on motion for dismissal, in arrest of judgment or on appeal. Seibert v. Ry. Co., 58 M. 39.

Construction on motion before trial.

§ 739. See §§ 636, 653, 656, 660.

Construction on demurrer.

§ 740. Even upon demurrer a pleading is to be liberally construed and it is sufficient if the facts appear substantially. Chamberlain v. Tiner, 31 M. 371; Hoag v. Mendenhall, 19 M. 335 G. 289; Dewey v. Leonard, 14 M. 153 G. 120 and cases cited under § 307.

§ 741. "It is not sufficient to sustain a demurrer to show that the facts are improperly or informally averred, or that the

pleading lacks definiteness or that the material facts are argumentatively stated. In determining the sufficiency of the pleading demurred to, it must be assumed that the facts stated therein, as well as such as may by reasonable and fair intendment be implied from the allegations made, are true." Milliken v. Tel. Co., 110 N. Y. 403; Coatsworth v. Ry. Co., 156 N. Y. 451; Sage v. Culver, 147 N. Y. 241.

Construction on motion for dismissal, judgment on the pleadings or objection to the admission of evidence.

§ 742. When the sufficiency of a pleading is questioned on the trial by a motion for dismissal, or judgment on the pleadings or by objection to the admission of evidence, every reasonable intendment is indulged in its support. It will be sustained if it contains the essential facts even by remote inference. A far more liberal construction is permissible than on demurrer. The reasons for this rule are obvious and cogent. Parties should be compelled, so far as possible, to resort to the simple, speedy, effective and inexpensive remedy of demurrer for the purpose of questioning the sufficiency of pleadings. In cases where, owing to the insufficiency of the pleadings, there is no real issue of fact for trial, litigants should not be put to the annoyance and expense of preparing for trial, witnesses and jurors should not be taken from their business, the time of the court and its officers consumed in impaneling a jury and the consideration of other cases postponed. Seibert v. Ry. Co., 58 M. 39; Newton v. Improvement Co., 62 M. 436; Kelly v. Rogers, 21 M. 146; Holmes v. Campbell, 12 M. 221 G. 141; Dunham v. Byrnes, 36 M. 106; Malone v. Stone Co., 36 M. 325; McAllister v. Welker, 39 M. 535; Fountain v. Menard, 53 M. 443; Beatty v. Ambs, 11 M. 331 G. 234; Dunning v. Pond, 5 M. 302 G. 238; Welch v. Bradley, 45 M. 540; Glass v. Sleigh Co., 43 M. 228; Commonwealth Title Ins. Co., v. Dokko, 71 M. 533; Cochrane v. Quackenbush, 29 M. 376; Barnsback v. Reiner, 8 M. 59 G. 37; St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 M. 486; Hausman v. Mulheran, 68 M. 48; Johnson v. Robinson, 20 M. 189 G. 169; Doyle v. Duluth, 76 N. W. 1029.

Construction on motion in arrest of judgment.

§ 743. On a motion in arrest of judgment every reasonable intendment is indulged in support of the complaint. The test is not whether the complaint would be sufficient on demurrer. Smith v. Dennett, 15 M. 81 G. 59; Lee v. Emery, 10 M. 187 G. 151. See Dunnell's Trial Book, § 570.

Construction on appeal.

§ 744. When the sufficiency of a pleading is questioned for the first time on appeal every reasonable intendment is indulged in its support. It will be sustained if it contains the essential facts of a cause of action or defence even by remote inference. The test is not whether a demurrer would have been sustained. This rule rests upon the same reasons as the rule of liberal construction on the trial and upon the additional ground that an amendment might have been secured if the objection had been raised below. Smith v. Dennett, 15 M. 81 G. 59; Piper v. Johnson, 12 M. G. 27; Phœnix v. Gardner, 13 M. 430 G. 396; Holmes v. Campbell, 12 M. 221 G. 141; McArdle v. McArdle, 12 M. 98 G. 53; Hurd v. Simonton, 10 M. 423 G. 340; Drake v. Barton, 18 M. 462 G. 414; Spencer v. Ry. Co., 21 M. 362; Soloman v. Vinson, 31 M. 205; Frankoviz v. Smith, 34 M. 403; Cochrane v. Quackenbush, 29 M. 376; Dorr v. McDonald, 43 M. 458; Trustees Macalester College v. Nesbitt, 65 M. 17; Northern Trust Co. v. Markell, 61 M. 271; Campbell v. Worman, 58 M. 561; Trebby v. Simmons, 38 M. 510; Bromberg v. Fire Asso., 45 M. 318; Minneapolis etc. Ry. Co. v. Ins. Co., 64 M. 61. See § 682 as to waiver of defects by voluntary litigation.

§ 745. "Where a case has been tried by the parties, and submitted to the jury by the court without objection, upon a certain construction of the pleadings, such construction will be conclusive on the parties." Keyes v. Ry. Co., 36 M. 290; Fritz v. McGill, 31 M. 536.

Aider by answer.

§ 746. When objection to the sufficiency of a complaint is made on the trial or in arrest of judgment or on appeal the

objection will be overruled if the deficiencies of the complaint are made good by the answer. If essential facts omitted in the complaint are alleged in the answer the defect is cured. The complaint is said to be "aided" by the answer. Bennett v. Phelps, 12 M. 326 G. 216; Shartle v. Minneapolis, 17 M. 308 G. 284; Rollins v. St. Paul Lumber Co., 21 M. 5; Gibbens v. Thompson, 21 M. 398; Warner v. Lockerby, 28 M. 28; Lesher v. Getman, 30 M. 321; Hedderly v. Downs, 31 M.183; McMahon v. Merrick, 33 M. 262; Monson v. Ry. Co., 34 M. 269; Ritchie v. Ege, 58 M. 291.

§ 747. But a party cannot rely on allegations in his adversary's pleadings to make out his cause of action and at the same time put such allegations in issue by denials. Mosness v. Ins. Co., 50 M. 341.

§ 748. "An admission, in an answer, of a cause of action in favor of the plaintiff, wholly different from that alleged in the complaint, does not entitle the plaintiff to a recovery under such complaint." Brandt v. Shepard, 39 M. 454.

Aider by reply.

§ 749. A defective answer may be cured by the reply in the same way and with the same effect as a defective complaint may be cured by the answer. Pye v. Bakke, 54 M. 107.

Aider by verdict.

§ 750. When objection is made to the sufficiency of a pleading after verdict the defect may have been aided by the verdict. "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." 1 Williams' Saunders, 227, 228; Hurd v. Simonton, 10 M. 423 G. 340; Coit v. Waples, 1 M. 134 G. 110; Daniels v. Winslow, 2 M. 113 G. 93; Smith v. Dennett, 15 M. 81 G. 59; Lee v. Emery,

10 M. 187 G. 151; Chesterson v. Munson, 27 M. 498. See § 682 as to waiver of defects by voluntary litigation.

A question for the court.

§ 751. The construction of pleadings should never be referred to the jury; it is purely a question for the determination of the court. Earle v. Ins. Co., 29 Mich. 414; Taylor v. Middleton, 67 Cal. 656.

Specific allegations prevail over general.

§ 752. If general and specific allegations or denials in the same pleading are inconsistent the latter control. Specific allegations cannot be aided by a general allegation. Where a general result or fact is alleged and also the specific facts by which such general result is reached the latter control and if insufficient to support the general result the pleading is bad. Pinney v. Fridley, 9 M. 34 G. 23; Gould v. School District, 7 M. 203 G. 145; First Nat. Bank v. Boom Corporation, 41 M. 141; Jellison v. Halloran, 40 M. 485; Gowan v. Bensel, 53 M. 46; Coe v. Ware, 40 M. 404; Horn v. Butler, 39 M. 515; Parker v. Jewett, 52 M. 514; Carlson v. Board of Relief, 67 M. 436; Holbrook v. Sims, 39 M. 122; Perry v. Reynolds, 40 M. 499; McClung v. Bergfeld, 4 M. 148 G. 99; Davenport v. Ladd, 38 M. 545; Casey v. McIntyre, 45 M. 526; Dana v. Porter, 14 M. 478 G. 355; First Nat. Bank v. Strait, 71 M. 69.

Miscellaneous rules.

§ 753. A pleading is to be construed according to the language used. The intent of the pleader is immaterial. Gould v. Glass, 19 Barb. (N. Y.) 179.

§ 754. Words are to be taken in their ordinary and popular sense. Starkey v. Minneapolis, 19 M. 203 G. 166; Trustees School Section v. Odlin, 8 Ohio St. 293; Murry v. Coal Co., 51 Conn. 103; Rathburn v. Ry. Co., 16 Neb. 441.

§ 755. When a word has a well defined legal meaning and also a popular meaning the former will be taken unless it is obvious that the pleader used the word in its popular sense. Cook v. Warren, 88 N. Y. 37.

§ 756. A pleading is to be construed as a whole and according to its general tenor. Clore v. McIntire, 120 Ind. 262; Bates v. Babcock, 95 Cal. 479; Calvo v. Davies, 73 N. Y. 211; Merrill v. Dearing, 22 M. 376; Stein v. Passmore, 25 M. 256; Hanscom v. Herrick, 21 M. 9.

§ 757. A complaint cannot be aided by averments in the *ad damnum* clause. Lee v. Emery, 10 M. 187 G. 151.

§ 758. In case of doubt a complaint will be construed to state a cause of action *ex contractu* rather than *ex delicto*. Goodwin v. Griffs, 88 N. Y. 631; Lindskog v. Schouweiler, 80 N. W. (S. D.) 190.

CHAPTER XXII

OBJECTIONS TO PLEADINGS ON THE TRIAL

I. SUFFICIENCY OF COMPLAINT

Motion for dismissal.

§ 759. The defendant has an absolute right to move on the trial for a dismissal of the action on the ground that the complaint does not state facts sufficient to constitute a cause of action. The right is not affected by a failure to demur and the motion is not addressed to the discretion of the court. G. S. '94, § 5235; Tooker v. Arnoux, 76 N. Y. 397; Holmes v. Campbell, 12 M. 221 G. 141.

Allowing amendment to supply defects.

§ 760. But it is within the discretion of the court to allow an amendment to remedy defects in a complaint, upon a motion for dismissal, provided the cause of action is not entirely changed so as to require a different mode of trial or a substantially different defence. Ordinarily the defendant should not be heard to say that he would be prejudiced by an amendment when he has failed to demur. Caldwell v. Bruggerman, 8 M. 286 G. 252; Bauman v. Bean, 57 Mich. 1; Bockes v. Lansing, 74 N. Y. 437.

Motion disfavored.

§ 761. Motions for dismissal on this ground are disfavored. They should not be granted if the complaint can be sustained by the most liberal construction. The test is not whether a demurrer would have been sustained. Seibert v. Ry. Co., 58 M. 39; Newton v. Improvement Co., 62 M. 436; Kelly v. Rogers, 21 M. 146; Holmes v. Campbell, 12 M. 221 G. 141; Dunham v. Byrnes, 36 M. 106; Commonwealth Title Ins. Co. v. Dokko, 72 M. 229; Cochrane v. Quackenbush, 29 M. 376; Johnson v. Robinson, 20 M. 189 G. 169.

§ 762. The action cannot be dismissed if the complaint states facts constituting any cause of action, either legal or equitable. Greenleaf v. Egan, 30 M. 318; Cantieny v. Latterner, 31 M. 239; Pressnell v. Lundin, 44 M. 551.

Motion should specify defect.

§ 763. The defendant should specifically point out the defect in the complaint so that it may be remedied, if possible, by an amendment. In the absence of such a specification it is not error to deny the motion if the defect is of such a nature that it might have been remedied by an amendment. See Cochrane v. Quackenbush, 29 M. 376, and § 767.

When motion should be made.

§ 764. The proper time to make the motion is at the opening of the case but it may be made at any stage of the trial. When it is made after the introduction of evidence it will not be granted if a cause of action has been made out by evidence unobjected to by defendant. Holmes v. Campbell, 12 M. 221 G. 141; Frank v. Irgens, 27 M. 43; Seibert v. Ry. Co., 58 M. 39.

When there are several defendants.

§ 765. The motion may be made and granted in favor of one or more of several defendants. Ermentrout v. Ins. Co., 60 M. 418; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459.

Objection to the introduction of any evidence.

§ 766. It is common practice to test the sufficiency of a complaint by an objection, at the opening of the case, to the introduction of any evidence under it. The practice, however, is objectionable for the reasons stated in § 742, and the objection will be overruled if the complaint can be held sufficient by indulging the most liberal construction. If the defect is remediable by amendment an amendment should be ordered forthwith and without terms. Zimmerman v. Morrow, 28 M. 368; Thoreson v. Minneapolis Harvester Co., 29 M. 341; Keating v. Brown, 30 M. 9; Rand v. Commissioners, 50 M. 391; Richmond v. Post, 69 M. 457; Welch v. Bradley, 45 M. 540; Pressnell v. Lundin, 44 M. 551; Holly v. Bennett,

46 M. 386; Village of Benson v. Ry. Co., 62 M. 198; Johnson v. Robinson, 20 M. 189 G. 169; Guptil v. Red Wing, 78 N. W. 970; Bauman v. Bean, 57 Mich. 1; Sackman v. Sackman, 143 Mo. 576.

§ 767. The particular defect in the complaint must be specifically pointed out. In the absence of such a specification it is not error for the trial court to overrule the objection if the defect is of such a nature that it might have been remedied by amendment. See Thoreson v. Minneapolis Harvester Works, 29 M. 341; Smith v. Kingman & Co., 70 M. 453; Menke v. Gerbracht, 75 Hun (N. Y.) 181.

II. SUFFICIENCY OF ANSWER

By motion for dismissal.

§ 768. The objection that the facts set up in the answer by way of counterclaim do not constitute a cause of action is not waived by a failure to demur but may be raised on the trial by a motion for dismissal. Schurmeier v. English, 46 M. 306; Lace v. Fixen, 39 M. 46. See Stensgaard v. Ins. Co., 50 M. 429.

By objection to the introduction of any evidence.

§ 769. The objection that the facts set up in the answer do not constitute a defence is not waived by failure to demur but may be raised on the trial by objection to the introduction of any evidence under it. See Pomeroy's Remedies, § 597; Aultman v. Falkum, 51 M. 562; St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 M. 486; Larson v. Shook, 68 M. 30.

III. JUDGMENT ON THE PLEADINGS

§ 770. Judgment on the pleadings may be ordered:

(a) When the answer admits or fails to deny all the material allegations of the complaint. Norton v. Beckman, 53 M. 456; Lloyd v. Secord, 61 M. 448; Horn v. Butler, 39 M. 515; Freeman v. Curran, 1 M. 170 G. 144.

(b) When the reply admits or fails to deny the defence set up in the answer. Gaffney v. Ry. Co., 38 M. 111; McAllister v. Welker, 39 M. 535. See Craig v. Cook, 28 M. 232.

(c) When the reply admits or fails to deny the counterclaim set up in the answer. Schurmeier v. English, 46 M. 306.

(d) When a plea confesses but does not sufficiently avoid. Gaffney v. Ry. Co., 38 M. 111.

(e) When the new matter set up in the answer or reply does not constitute a defence. Clarke v. Patrick, 60 M. 269.

When a counterclaim is pleaded.

§ 771. When the defendant in his answer sets up a counterclaim a motion by the plaintiff for judgment on the pleadings is properly denied. Cummings v. Taylor, 21 M. 366.

§ 772. But it is not error to order judgment on the pleadings when the answer states a counterclaim or setoff for merely nominal damages. Hitchcock v. Turnbull, 44 M. 475.

Motion admits facts well pleaded.

§ 773. A motion for judgment on the pleadings is in the nature of a demurrer and admits the facts well pleaded by the opposite party. Stewart v. Erie etc. Co., 17 M. 372 G. 348; Jellison v. Halloran, 40 M. 485; Winston v. Young, 47 M. 80.

Motion must be based on the pleadings alone.

§ 774. Judgment cannot be ordered on the pleadings and evidence. Woodling v. Knickerbocker, 31 M. 268. See Duluth Chamber of Commerce v. Knowlton, 42 M. 229.

When motion should be made.

§ 775. The motion is properly made at the opening of the trial but it may be made at any time before final submission. Duluth Chamber of Commerce v. Knowlton, 42 M. 229. See Freeman v. Curran, 1 M. 170 G. 144.

Motion disfavored.

§ 776. Judgment on the pleadings is not ordered except in

unequivocal cases. The test is not whether a demurrer would have been sustained. Upon a motion for such a judgment every reasonable intendment is indulged in favor of the sufficiency of the pleading. Malone v. Minnesota Stone Co., 36 M. 325; McAllister v. Welker, 39 M. 535; Fountain v. Menard, 53 M. 443; Beatty v. Ambs, 11 M. 331 G. 234; Dunning v. Pond, 5 M. 302 G. 238.

§ 777. Mere indefiniteness in a pleading cannot be reached by motion for judgment on the pleadings. Webb v. Bidwell, 15 M. 479 G. 394; Stewart v. Erie etc. Co., 17 M. 372 G. 348; Malone v. Minnesota Stone Co., 36 M. 325.

IV. SUFFICIENCY OF REPLY

§ 778. The sufficiency of a reply may be questioned on the trial in the same way as the sufficiency of an answer. See § 598.

CHAPTER XXIII

WAIVER OF OBJECTIONS

Waiver by not making a motion before trial.

§ 779. The following defects cannot be objected to of right on the trial; they are deemed waived unless corrected on motion before trial and as a general rule before pleading: That a pleading is irrelevant,[1] redundant,[2] double,[3] indefinite,[4] sham[5] or frivolous;[6] misnomer;[7] failure to state distinct causes of action or defences separately[8] and in general all defects of a merely formal nature.[9]

[1] § 652. [2] § 659. [3] § 275. [4] §§ 281, 666. [5] § 643. [6] § 634. [7] § 275. [8] § 274. [9] § 634.

Waiver by failure to demurrer or answer.

§ 780. The following objections cannot be raised as of right on the trial; they are waived if not raised by demurrer or answer: Want of jurisdiction of the person;[1] want of legal capacity to sue;[2] that there is another action pending for the same cause;[3] that there is a defect of parties, plaintiff or defendant;[4] that several causes of action are improperly united;[5] that a cause of action is not a proper subject of counterclaim;[6] that the cause of action alleged is barred by the statute of limitations;[7] and all other matter in abatement.[8]

[1] G. S. '94, § 5235. See Dunnell's Trial Book § 101.

[2] G. S. '94, § 5235; Tapley v. Tapley, 10 M. 448 G. 360; McNair v. Toler, 21 M. 175; Rich v. Rich, 12 M. 468 G. 369.

[3] G. S. '94, § 5235. See §§ 931, 486.

[4] G. S. '94, § 5235. See § 196.

[5] G. S. '94, § 5235. See § 253.

[6] See § 583.

[7] Harwick v. Icler, 71 M. 25.

[8] Gerish v. Pratt, 6 M. 53 G. 14; Stein v. Swensen, 44 M. 218; Fitterling v. Welch,, 79 N. W. 500.

Objections that are never waived.

§ 781. The objection that a pleading sets forth a subject-matter of which the court has not jurisdiction is never waived but may be raised by either party and at any stage of the action.[1] As a general rule the objection that a pleading does not state a cause of action or defence is never waived but may be taken on the trial,[2] or after verdict[3] or for the first time on appeal.[4] This rule, however, is not absolute but is subject to the qualification that a pleading which is defective by reason of the omission of essential allegations may be aided by answer,[5] reply,[6] verdict [7] or the reception of evidence without objection.[8]

[1] Stratten v. Allen, 7 M. 502 G. 409; Ames v. Boland, 1 M. 365 G. 268; Hagemeyer v. Commissioners, 71 M. 42. See Dunnell's Trial Book, § 100.

[2] §§ 759–779.

[3] § 743 and Dunnell's Trial Book, §§ 569–574.

[4] § 744. [5] § 746. [6] § 749. [7] § 750. [8] § 682.

CHAPTER XXIV

FORMAL PARTS OF PLEADINGS

[For formal parts of demurrers and replies see §§ 391, 608.]

§ 782. Skeleton form of complaint.

State of Minnesota — District Court
County of Hennepin — Fourth Judicial District

John Doe,
Plaintiff.
vs.
Richard Roe,
Defendant.
} Complaint

The plaintiff complains of defendant and alleges:

1. [Here state the ultimate facts constituting the cause of action or ground of relief. State each of such facts separately in numbered paragraphs and mark each folio.]

Wherefore plaintiff demands judgment:

(1) For the sum of dollars and cents, with interest thereon from the day of , 19 . [with interest on dollars thereof from the day of , 19 , and on dollars thereof from the day of , 19 .]

(2) For the costs and disbursements of this action.

[No date]

John Smith,
Attorney for Plaintiff.
[Office and postoffice address]

[Verification]

Complaint setting forth several causes of action.

[Title as above]

The plaintiff complains of defendant and alleges:

For a first cause of action:

I. That—

II. That—

For a second cause of action:

I. The plaintiff repeats and makes a part of this cause of action each and every allegation contained in the first four paragraphs of the first cause of action herein set forth and further alleges:

II. That—

III. That—

Wherefore [demanding judgment].

Complaint by executor.

[Title of court]

John Doe, as executor of the last will and testament of Richard Roe, deceased, Plaintiff. vs. John Smith, Defendant.	Complaint

The plaintiff, as executor of the last will and testament of Richard Roe, deceased, complains of defendant and alleges:

I. That on the day of , 19 , the said Richard Roe died leaving a last will and testament which on the day of , 19 , was duly admitted to probate and allowed by the probate court of county, state of Minnesota; and on the day of , 19 , letters testamentary thereon were duly issued and granted by said court to the plaintiff as executor of said will, who thereupon duly qualified and entered upon the duties of and now is such executor.

II. That—

III. That—

Wherefore plaintiff, as such executor, demands judgment:

Complaint by administrator.

[Title of court]

John Doe, as administrator with the will annexed of the estate of Richard Roe, Plaintiff. vs. John Smith, Defendant.	Complaint

The plaintiff, as administrator with the will annexed of the estate of Richard Roe, deceased, complains of defendant and alleges:

I. That on the day of , 19 , the said Richard Roe died leaving a last will and testament which on the day of , 19 , was duly admitted to probate and allowed by the probate court of county, state of Minnesota; that on the day of , 19 , letters testamentary thereon were duly issued and granted by said court to the plaintiff appointing him administrator with the will annexed of the estate of the said Richard Roe, and the plaintiff thereupon duly qualified and entered upon the duties of and now is such administrator.

II. That—

III. That—

Wherefore plaintiff, as such administrator, demands judgment:

Complaint by administrator.

[Title same as in preceding form omitting, "with the will annexed"]

The plaintiff, as administrator of the estate of Richard Roe, deceased, complains of defendant and alleges:

I. That on the day of , 19 , the said Richard Roe died intestate; that on the day of , 19 , letters of administration on his estate were duly issued and granted to the plaintiff by the probate court of county,

state of Minnesota, whereupon the plaintiff duly qualified and entered upon the duties of and now is such administrator.

II. That—

III. That—

Wherefore plaintiff, as such administrator, demands judgment:

Complaint by partners.

[Title of court]

John Doe, Richard Doe and John Smith, Plaintiffs. vs. John Jones. Defendant.	Complaint

The plaintiffs complain of defendant and allege:

I. That at all the times hereinafter mentioned the plaintiffs were co-partners, doing business in the city of under the firm name of John Doe & Co.

II. [Continuing as in an ordinary action.]

FORMAL PARTS OF THE ANSWER

[Title as above]

The defendant, answering the complaint herein:

I. For a first defence denies that—

II. For a second defence denies that—

III. For a third and partial defence alleges that—

Or as follows:

The defendant, answering the complaint herein:

As to the first cause of action therein:

I. For a first defence denies that—

II. For a second defence alleges that—

As to the second cause of action therein:

I. For a first defence denies that—

II. For a second defence alleges that—

III. For a counterclaim alleges that—

Or as follows:

The defendant, answering the complaint herein, denies each and every allegation contained in the third and fourth paragraphs thereof and for a counterclaim alleges:

I. That—

II. That—

III. That—

Wherefore defendant demands judgment:

[As in a complaint.]

Or as follows:

The defendant, answering the complaint herein:

I. For a first defence denies that—

II. For a second defence alleges that—

III. For a third defence repeats and makes a part of this defence all the allegations contained in the second paragraph of this answer and further alleges that—

Or as follows:

The defendant, answering the complaint herein:

I. For a first defence denies that—

II. For a second defence alleges that—

For a counterclaim alleges:

I. That—

II. That—

III. That—

Wherefore [demanding judgment].

Or as follows:

The defendant, answering the complaint herein:

I. For a first defence denies each and every allegation contained in the first and fourth paragraphs thereof.

II. For a second defence alleges that—

III. For a third and partial defence alleges that—

CHAPTER XXV

ACCOUNT STATED

§ 783. General form of complaint.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , an account was stated between plaintiff and defendant.

II. That upon such statement a balance of dollars was found due plaintiff from defendant.

III. That no part thereof has been paid.

Wherefore [demanding judgment].

[1] Held sufficient in Heinrich v. Englund, 34 M. 395.

NOTES

Account stated must be pleaded as such.

§ 784. "To enable a plaintiff to recover, as upon an account stated, upon written statements or accounts made out and rendered by defendant, he must declare upon them as such. If, in his complaint, he sets out the original transactions, and not the account stated, as the grounds of his action, either party may prove what the original transactions were." Northern Line Packet Co. v. Platt, 22 M. 413; McCormick etc. Co. v. Wilson, 39 M. 467.

Questioning items of an account—general denial.

§ 785. "The very purpose of declaring upon an account stated is to save the necessity of proving the correctness of the items composing the same, the effect of the account being to establish *prima facie* the accuracy of the items without further proof, and the party seeking to impeach the account is therefore bound to show affirmatively any mistake or error complained of. If a party desires to attack the account for mistake or error in the statement of the same, he should apprise his adversary of his intention to do so by specially pleading the

incorrectness upon which he relies. A bare general denial that an account was stated, raises no proper issue upon the correctness of the account." Warner v. Myrick, 16 M. 91 G. 81; Moody v. Thwing, 46 M. 511; Christofferson v. Howe, 57 M. 67; Commissioners v. Smith, 22 M. 97, 115; Wharton v. Anderson, 28 M. 301.

Effect of account stated as evidence.

§ 786. "An account stated is only *prima facie* evidence of the correctness of the balance, and not conclusive upon it, unless, in arriving at the agreed balance, there has been some concession made upon items disputed between the parties, so that the balance is the result of a compromise, or some act has been done or forborne in consequence of the accounting, and relying upon it, which would put the party claiming the benefit of it in a worse position than as though it had not been had, so as to bring the case within the principles of an estoppel *in pais*." Wharton v. Anderson, 28 M. 301; Schultz v. Morette, 146 N. Y. 137. See Hanley v. Noyes, 35 M. 174.

Retention of bill rendered.

§ 787. A bill rendered, wherein the items and charges are stated, may be treated as an account stated if it is retained without question by the debtor for more than a reasonable time. Robson v. Bohn, 22 M. 410; Beals v. Wagener, 47 M. 489; I. L. Elwood Mfg. Co. v. Betcher, 72 M. 103.

CHAPTER XXVI

ACTION FOR RECOVERY OF PERSONAL PROPERTY

CLAIM AND DELIVERY

§ 788. For property wrongfully taken from possession of owner and for damages for the detention.[1]

The plaintiff complains of defendant and alleges:

I. That at the time stated in the next paragraph he was and still is the owner[2] of the following described personal property:

[Describing property in general terms.]

II. That on the day of , 19 , defendant took said property from the possession of plaintiff and still detains the same from him, in the county and state aforesaid, to his damage dollars.[3]

III. That the value thereof is dollars.

Wherefore plaintiff demands judgment:

(1) For the recovery of the possession of said property or the sum of dollars, in case a recovery of possession cannot be had.[4]

(2) For the sum of dollars as damages for the detention thereof.

(3) For the costs and disbursements of this action.

[1] This is the form which should be used where it is unquestionable that the property was taken out of the possession of the plaintiff. It has the advantage, if verified, of forcing the defendant to admit the taking and to assume the burden of justifying the taking and proving title. Possession in itself is prima facie evidence of title and right to immediate possession. It follows that if the defendant admits the taking he assumes the burden of going on with the evidence. If the forms given in §§ 789, 790 are used the plaintiff has the burden of proving title or possession in the first instance. Of course if the defendant denies the taking the burden of proof under this form of complaint is the same as under the others. The plaintiff may always ignore the wrongful taking and allege simply a detention as in the

forms given in §§ 789, 790. The only advantage of this form is to force an admission as to the taking. The same damages may be recovered under the form given in § 789 as under this form.

[2] Common practice to add here, "and entitled to the immediate possession." See § 814.

[3] This is a sufficient allegation for the recovery of general damages only. If special damages are sought such as injury to the property they must be specially pleaded. If the property has a usable value special damages may be recovered if pleaded. See § 838.

In such cases add the following paragraph omitting the ad damnum clause in paragraph II:

IV. That the value of the use thereof during said detention is dollars.

[4] Washburn v. Mendenhall, 21 M. 333.

§ 789. Where the property was not wrongfully taken from the possession of plaintiff—demand of substantial damages for the detention.[1]

The plaintiff complains of defendant and alleges:

I. That at the time stated in the next paragraph he was and still is the owner[2] of the following described personal property:

[Describing property in general terms.]

II. That defendant is in possession of said property and detains the same from plaintiff, in the county and state aforesaid, and has so detained it ever since the day of , 19 , to the damage of plaintiff dollars.

III. That the value thereof is dollars.

Wherefore [demanding judgment as in § 788].

[1] This form is adapted to all cases regardless of whether the original taking was wrongful or not. See § 800. See note to preceding form.

[2] Common practice to add here, "and entitled to the immediate possession." See § 814.

§ 790. General form with demand for nominal damages from commencement of action.[1]

The plaintiff complains of defendant and alleges:

I. That he is the owner[2] of the following described personal property:

[Describing property in general terms.]

II. That defendant is in possession thereof and detains the

same from plaintiff, in the county and state aforesaid, to his damage dollars.

III. That the value thereof is dollars.

Wherefore [demanding judgment as in § 788].

[1] This form may be used in all cases where only nominal damages are sought. See note to first form.

[2] Common practice to add here, "and entitled to the immediate possession." See § 814.

§ 791. Affidavit by general owner under G. S. '94, § 5275.

[Title of action]

State of Minnesota)
County of) ss.

, being duly sworn says:

I. That he is the plaintiff in the above entitled action.

II. That he is the owner of the following described personal property: [Describing property in general terms.]

III. That the same is wrongfully detained by the defendant.

IV. That the same has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff.

V. That the actual value thereof is dollars.

[Jurat] .....

§ 792. Requisition indorsed on affidavit.

To the sheriff of county:

You are hereby required to take the property described in the within affidavit from the defendant and deliver the same to the plaintiff in this action.

[Date] .....

Attorney for Plaintiff.

§ 793. Affidavit by special owner.

[Title as in preceding form]

I. That he is lawfully entitled to the immediate possession of the personal property hereinafter described by virtue of a special property therein arising out of the following facts, to-

wit: that [stating the facts giving rise to the special property].

II. That said personal property is described as follows:

[Continuing as in preceding form.]

§ 794. Bond of plaintiff under G. S. '94, § 5276.

[Title of action]

Know all men by these presents that we, as principal, and and , as sureties, are bound unto , the defendant in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the plaintiff in the above entitled action has made affidavit that the defendant therein wrongfully detains from him certain specified personal property of the value of dollars and has demanded the immediate delivery thereof as authorized by statute,

Now, therefore, if said plaintiff shall prosecute said action with effect and said property shall be returned to said defendant if a return shall be adjudged and payment shall be made to said defendant of such sum as for any cause may be recovered against the plaintiff in said action, then this obligation, which is given in pursuance of General Statutes 1894, § 5276, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

In the presence of: [No seal]

[Acknowledgment as in § 993 and justification as in § 994]

The foregoing bond is hereby approved.

[Date] .....

Sheriff of County.

§ 795. Bond of defendant under G. S. '94, § 5278.

[Title of action]

Know all men by these presents that we, as prin-

cipal, and as sureties, are bound unto , the plaintiff in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas certain personal property has been seized in the above entitled action by the sheriff of county, under and by virtue of an affidavit and demand of immediate delivery made by the plaintiff therein as provided by statute,

Now, therefore, if said property shall be delivered to said plaintiff if a delivery is adjudged and if said plaintiff shall be paid such sum as for any cause may be recovered against the defendant in said action, then this obligation, which is given in pursuance of General Statutes 1894, § 5278, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

In presence of: [No seal]

[Acknowledgment as in § 993 and justification as in § 994]

To the sheriff of county:

You are hereby required to return to the defendant the property which you have taken from him in this action.

[Date] .....

Attorney for Defendant.

§ 796. Exception to sufficiency of sureties—G. S. '94, § 5277.

[Title of action]

To , Esq.,

Sheriff of county:

Take notice that the defendant excepts to the sufficiency of the sureties on the bond which the plaintiff herein has given for the purpose of obtaining the immediate delivery of the property which he claims and that such sureties are required to justify as provided by statute.

[Date] .....

Attorney for Defendant.

§ 797. Notice of justification by sureties—G. S. '94, § 5279.

[Title of action]

To , Esq.,

Attorney for Defendant:

Take notice that the sureties on the bond given by the plaintiff herein, excepted to by the defendant, will justify before the Hon. , judge of the district court in and for the county of , at his chambers in the courthouse in the city of , on the day of , 19 , at o'clock in the forenoon.

[Date] .....

Attorney for Plaintiff.

NOTES

Nature of action.

§ 798. It has been said by our supreme court that an action of claim and delivery under the statute "is, in substance and effect, the former action of replevin, * * * the nature of the action and the fundamental principles formerly applicable to the action and the fundamental requisites to sustain it must still be recognized."[1] This unfortunate expression was not necessary to a determination of the action before the court. Nothing but confusion and error can result from an attempt to apply old rules and dogmas to an action under the code; for the nature of every such action is determined, not by any general rules, but by the allegations of the particular complaint. A complaint in an action for the recovery of personal property may allege a wrongful taking and detention or simply a wrongful detention. It may allege a transfer fraudulent as to creditors or a sale induced by the fraudulent representations of the defendant. Indeed, there is no limit to the form which the complaint may take provided the facts alleged entitle the plaintiff to the immediate possession of the property. There is no "form of action" of claim and delivery. Under any form of complaint showing a right of immediate possession the plaintiff may take advantage of the statute and obtain an immediate delivery of the property. The statutory pro-

ceeding is ancillary to the main action, like an attachment. The statute prescribes a form of affidavit but not a form of complaint. The plaintiff may allege a wrongful taking but the wrongful detention is the gist of the action. An action under the code generally resembles detinue more than replevin. The common law distinctions between replevin in the *cepit*, in the *detinet* and in the *detinuit* do not exist in this state.

[1] Ames v. Mississippi Boom Co., 8 M. 467 G. 417.

§ 799. "The action for possession of personal property is commenced by the service of summons, as other actions are, and not, as was the former action of replevin, by writ requiring a seizure of the property." Benjamin v. Smith, 43 M. 146.

Waiving wrongful taking and suing for detention.

§ 800. It was well settled at common law that for property wrongfully taken an action for the wrongful detention would lie. The plaintiff was at liberty to waive his right to proceed as for the force, to disregard it in declaring and to sue for the wrongful detention alone. The plaintiff has the same election under the code and an allegation of detention is sustained by proof of a wrongful taking or conversion. Oleson v. Merrill, 20 Wis. 487; Guthrie v. Olson, 44 M. 404.

Subject-matter of action.

§ 801. The subject-matter of the action must be specific personal property capable of identification. Ames v. Mississippi Boom Co., 8 M. 467 G. 417.

§ 802. "Replevin will lie for things which have formed part of the realty, if they have been taken away after severance from the freehold. But, in order to maintain such action, the plaintiff must have had the actual or constructive possession of the land; and as the title to land cannot be tried, *ex directo*, in replevin, if the series of acts in which the severance and taking away has occurred, are sufficient to create an adverse possession in the defendant, replevin cannot be maintained." Washburn v. Cutter, 17 M. 361 G. 343.

Object of action.

§ 803. "Replevin, being for the recovery of the thing claimed, and not its value, can only be maintained against a defendant, who at the time of the commencement of the action has the possession of the subject-matter, and is capable of complying with the prayer of the complaint. If the property has passed beyond the control of the defendant, then trespass, trover, or some action aimed at a recovery of its value is the proper remedy." Bradley v. Gamelle, 7 M. 331 G. 260.

Title of plaintiff.

§ 804. Plaintiff must have an interest in the property carrying with it the right of immediate possession. Loomis v. Youle, 1 M. 176 G. 150; Kellogg v. Anderson, 40 M. 207; Miller v. Adamson, 45 M. 99; Nichols v. Knutson, 62 M. 237; Deal v. Osborne, 42 M. 102.

§ 805. "Bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger to the property who takes it from him." Anderson v. Gouldberg, 51 M. 294.

§ 806. One tenant in common cannot maintain an action against his co-tenant. Sheldon v. Brown, 72 M. 496.

Against whom action should be brought.

§ 807. "As respects the matter of possession, an action of claim and delivery is properly brought against the person who is in actual physical possession of the property involved, although he may be keeping it for another person." Flatner v. Good, 35 M. 395.

§ 809. The property must be either in the actual possession of the defendant or under his control. Bradley v. Gamelle, 7 M. 331 G. 260; Ames v. Mississippi Boom Co., 8 M. 467 G. 417, 424; Washburn v. Cutler, 17 M. 361 G. 335, 343; Hardin v. Palmerlee, 28 M. 450; Tozier v. Merriam, 12 M. 87 G. 46.

The affidavit.

§ 810. The affidavit for immediate delivery forms no part

of the pleadings and cannot be referred to or otherwise used to supply deficiencies in the complaint.[1] The complaint need not contain all the allegations required in the affidavit.[2]

[1] Loomis v. Youle, 1 M. 176 G. 150.

[2] Bosse v. Thomas, 3 Mo. App. 472.

Allegation of title.

§ 811. The plaintiff may allege generally that he is the owner and under it prove any right of property, general or special, that entitles him to possession. Miller v. Adamson, 45 M. 99; Adamson v. Wiggins, 45 M. 448; Furman v. Tenny, 28 M. 77; Carlson v. Small, 32 M. 492; Tupper v. Thompson, 26 M. 385; Cumbey v. Lovett, 79 N. W. 99.

§ 812. But to recover under such a general allegation he must have a property right. If he has a mere lien he must allege the facts giving rise to it. Scofield v. Nat. Elevator Co., 64 M. 527.

§ 813. The allegation of ownership must be in the present tense. Tancre v. Reynolds, 35 M. 476; Loomis v. Youle, 1 M. 176 G. 150.

Allegation of right of immediate possession.

§ 814. It is usual to add after the allegation of ownership, "and entitled to the immediate possession." It would be difficult to imagine a better example of a pure conclusion of law.[1] It has again and again been decided that such an allegation is ineffectual for any purpose.[2] It is true that the plaintiff cannot recover unless he has a right of immediate possession but such right is the result of ownership, either general or special, or some other fact. Ownership is the ultimate fact to be alleged. If the plaintiff, being the owner, has not the right of immediate possession that is a matter of defence for the defendant to plead and prove.[3] And this is so, for the reason that the owner of property, either personal or real, is presumed to have the right of immediate possession.[4] It follows that a complaint alleging ownership in the plaintiff and detention of possession from him by defendant states a good cause of action.[5] It is to be observed that a complaint

for the recovery of personal property is in substance the same as a complaint for the recovery of real property.

[1] Payne v. Treadwell, 16 Cal. 221, 243.

[2] Pattison v. Adams, 7 Hill (N. Y.) 126; Bond v. Mitchell, 3 Barb. (N. Y.) 304.

[3] Payne v. Treadwell, 16 Cal. 221, 243 (an action in the nature of ejectment but the principle is the same); Childs v. Hart, 7 Barb. (N. Y.) 370.

[4] See cases cited under §§ 857, 1093.

[5] See Pattison v. Adams, 7 Hill (N. Y.) 126; Oleson v. Merrill, 20 Wis. 487; Adams v. Corriston, 7 M. 456 G. 365; 1 Abbott's Prac. & Pl. Form 616.

Description of property.

§ 815. "An action of 'claim and delivery' is one for the recovery of specific property, and hence, to maintain it, a right to specific property must be alleged and shown." Ellingboe v. Brakken, 36 M. 156.

Allegation of demand.

§ 816. It is not necessary to allege a demand of possession before the commencement of the action. Whether the unlawful detention consists in the refusal of the defendant to deliver the property on demand or of a conversion of the property is a matter of evidence and need not be pleaded.[1] In Stratton v. Allen, 7 M. 502 G. 409 it was held that where no unlawful taking is alleged the possession of the defendant must be presumed to have been acquired lawfully and an allegation of demand necessary. The case proceeds upon the assumption "that where a person comes lawfully into the possession of personal property, an action cannot be maintained against him to recover possession thereof, until the property shall have been demanded of him, and he shall have refused to give it up." This indefensible case has been overruled by Guthrie v. Olson, 44 M. 404 which holds that a demand need not be proved although the possession of the defendant was rightful in its inception, if a subsequent wrongful conversion can be proved. If it need not be proved, it necessarily follows that

it need not be alleged. Of course it is often practically advisable to allege a demand and refusal in order to force an admission and obviate the necessity of proof.

[1] Olson v. Merrill, 20 Wis. 847; Simser v. Cowan, 56 Barb. (N. Y.) 395. See Lynd v. Picket, 7 M. 184 G. 128; Hurd v. Simonton, 10 M. 423 G. 340.

Allegation that the taking was unlawful.

§ 817. It is common practice to allege that the defendant took the property "wrongfully" or "unlawfully." This is objectionable as involving a legal conclusion. It is sufficient to allege ownership and possession in plaintiff and a taking by the defendant. Every taking of possession from the owner is *prima facie* unlawful and wrongful. If it was not so in the particular case that is a matter of defence. Childs v. Hart, 7 Barb. (N. Y.) 370. See § 1097.

Allegation that detention is wrongful or unlawful.

§ 818. It is quite common practice to allege that defendant "wrongfully" or "unlawfully" or "unjustly" detains possession. These words do not vitiate a pleading but inasmuch as they involve a conclusion of law they should be omitted. If inserted they are mere surplusage and in no way add to the force of the pleading.[1] It is true the plaintiff cannot recover unless the defendant detains possession "unlawfully" but the unlawfulness of his detention must be made to appear by the allegation of facts and not conclusions of law.[2] When the plaintiff alleges ownership and detention by the defendant the unlawfulness of the detention sufficiently appears, for the owner of property is *prima facie* entitled to the possession. The practice of using these words is a "survival" of the old system.

[1] Halleck v. Mixer, 16 Cal. 574; Buck v. Colbath, 7 M. 310 G. 238; Scofield v. Whitelegge, 49 N. Y. 259.

[2] Adams v. Corriston, 7 M. 456 G. 365.

Allegation of place of detention.

§ 819. The complaint should allege the place of detention

as the action is local. G. S. '94, § 5182; Hinds v. Backus, 45 M. 170; Leonard v. Maginnis, 34 M. 506.

Allegation of possession and detention by defendant.

§ 820. It is proper to allege directly that the defendant is in possession of the property but that is not enough. It must be distinctly alleged that he detains possession. Tozier v. Merriam, 12 M. 87 G. 46. See Adams v. Corriston, 7 M. 456 G. 365.

Allegation of value.

§ 821. If the complaint prays for a personal judgment for the value of the property there should be an allegation of value and it should be made in an issuable form and not by way of recital as in the common law forms.[1] Such an allegation is admitted by a failure to deny [2] and is put in issue by a general denial.[3] It must be proved if controverted.[4] The plaintiff is bound by his allegation of value. He cannot prove it less nor can he recover more.[5]

[1] Tucker v. Parks, 7 Colo. 62.

[2] Tucker v. Parks, 7 Colo. 62. By implication, Thompson v. Scheid, 39 M. 102.

[3] Thompson v. Scheid, 39 M. 102.

[4] Thompson v. Scheid, 39 M. 102.

[5] Weyerhaeuser v. Foster, 60 M. 223; Peterson v. Hall, 61 M. 268; Pabst Brewing Co. v. Butchart, 68 M. 303.

Complaints considered as to sufficiency.

§ 822. Plano Mfg. Co. v. Hallberg, 61 M. 528; Loomis v. Youle, 1 M. 176 G. 150; Stickney v. Smith, 5 M. 486 G. 390; Lynd v. Picket, 7 M. 184 G. 128; Stratton v. Allen, 7 M. 502 G. 409; Hurd v. Simonton, 10 M. 423 G. 340.

Defences.

§ 823. If the defendant took the property out of the possession of plaintiff he cannot defend by proving title in a third party unless he connects himself with such title. This rule is grounded in public policy. "Any other rule would lead to an endless series of unlawful seizures and reprisals in every case

where property had once passed out of the possession of the rightful owner." King v. Lacrosse, 42 M. 488; Anderson v. Gouldberg, 51 M. 294. (Overruling, Loomis v. Youle, 1 M. 176 G. 150.)

§ 824. If the defendant did not take the property from the possession of the plaintiff he may prove title in a third party without connecting himself with such title. Caldwell v. Bruggerman, 4 M. 270 G. 190; Griffin v. Ry. Co., 101 N. Y. 348.

§ 825. If defendant justifies under an execution against one person who, he alleges, was owner at the time of the taking, he cannot prove that such person before the taking had assigned the property to another. McClung v. Bergfeld, 4 M. 148 G. 99.

§ 826. Proof of exemption of property is admissible in rebuttal of justification under execution by sheriff. Furman v. Tenny, 28 M. 77; Carlson v. Small, 32 M. 492.

§ 827. If the defendant claims possession by virtue of a lien he should allege the facts giving rise to the lien and prove the amount of his claim. See Shearer v. Gunderson, 60 M. 525.

Reply.

§ 828. If the defendant alleges title in himself or a third party from whom he derives title no reply is necessary. Such an allegation is not new matter but simply an argumentative denial. Williams v. Mathews, 30 M. 131.

General denial—evidence admissible under.

§ 829. When the plaintiff alleges ownership in general terms the defendant may introduce under a general denial any evidence tending to controvert or impeach the title which the plaintiff seeks to prove under his general allegation. Caldwell v. Bruggerman, 4 M. 270 G. 190; Tupper v. Thompson, 26 M. 385; Furman v. Tenny, 28 M. 77; Johnson v. Oswald, 38 M. 550; Grinnell v. Young, 41 M. 186; Adamson v. Wiggins, 45 M. 448; McClung v. Bergfeld, 4 M. 148 G. 99; King v. Lacrosse, 42 M. 488; Miller v. Adamson, 45 M. 99; Bassett v.

Haren, 61 M. 346; Aultman & Taylor Co. v. O'Dowd, 75 N. W. 756; Cumbey v. Lovett, 79 N. W. 99.

§ 830. "The defendant may avail himself of the defence that the conveyance under which the plaintiff claims title was fraudulent and void as to the defendant." Mullen v. Noonan, 44 M. 541; Tupper v. Thompson, 26 M. 385; Furman v. Tenny, 28 M. 77; Kenney v. Goergen, 36 M. 190; Johnson v. Oswald, 38 M. 550; McClung v. Bergfeld, 4 M. 148 G. 99.

Effect of not claiming immediate delivery.

§ 831. An action of claim and delivery is not changed into one of conversion by plaintiff omitting to claim immediate delivery. Benjamin v. Smith, 43 M. 146; White v. Flamme, 64 M. 5.

Dismissal of right.

§ 832. Where the property is taken by the plaintiff and returned to the defendant on the statutory bond the plaintiff cannot dismiss as of right. Blandy v. Raguet, 14 M. 491 G. 368; Williams v. McGrade, 18 M. 82 G. 65.

Proof of demand.

§ 833. "Error is not unfrequently fallen into upon this question of demand before suit by not keeping in mind the object of a demand, and the underlying principle upon which it is required in certain cases. The main object of a demand is to afford the defendant an opportunity to restore the property to the rightful owner without being put to the expense and annoyance of litigation, and the principle of the rule is that it should be made in all cases where presumably the person in possession would surrender the property at once on request. When his possession was rightfully acquired, the law presumes, in the absence of facts rebutting the presumption, that he would at once deliver the property on demand to the rightful owner; and this presumption is so strong that the law will not permit him to be sued until he has had an opportunity of doing so. But where the defendant's possession was acquired wrongfully, or where, although it was rightful in its inception, he has subsequently wrongfully converted

it to his own use, which is equivalent to an original wrongful taking, the law presumes that he remains in the same state of mind in which he committed the wrongful taking or wrongful conversion, and hence would not have surrendered the property even if a demand had been made." Guthrie v. Olson, 44 M. 404. See also, Kellogg v. Olson, 34 M. 103; Stratton v. Allen, 7 M. 502 G. 409; Hurd v. Simonton, 40 M. 426 G. 340; Lynd v. Picket, 7 M. 184 G. 128.

Waiver of demand.

§ 834. "If the defendant executes a bond and requires a return of the property from the sheriff and in his answer denies plaintiff's title and right of possession and alleges a right of possession in himself it constitutes a waiver of the failure of the plaintiff to make a demand before suit." Miller v. Adamson, 45 M. 99; Guthrie v. Olson, 44 M. 404; Kellogg v. Olson, 34 M. 103; Tancre v. Reynolds, 35 M. 476; Ellingboe v. Brakken, 36 M. 156.

Burden of proof.

§ 835. The plaintiff, under a general denial has the burden of making out a case by proof of some interest in the property which, as a matter of law, carries with it the right of immediate possession and he must show a right of possession in the specific property claimed.[1] He must recover if at all upon the strength of his own title and not upon the weakness of that of the defendant.[2] Under a general denial coupled with a claim of title in defendant the plaintiff still has the burden of proof.[3] The plaintiff may make out a *prima facie* case by proving peaceable possession in his grantor.[4] If the property was taken out of the possession of the plaintiff by the defendant the former may make out a *prima facie* case by evidence of his prior peaceable possession, either actual or constructive, and the taking by defendant.[5] If the taking is admitted by the defendant in his answer he must allege title in himself or other matter in justification and the burden of proof rests upon him at the outset.[6] As against one who is admitted to be the general owner a party claiming the right of possession

by virtue of a lien must prove the amount of his claim.[7] In an action for the possession of goods sold and delivered to defendant on the ground that the sale was induced by the fraudulent representations of the defendant the burden is on the plaintiff to prove that such representations were made with intent to deceive him.[8] In actions by an assignee or receiver to recover property fraudulently conveyed by the debtor the same rules apply as in an action to set aside a fraudulent conveyance.[9]

[1] Christianson v. Nelson, 78 N. W. 875.

[2] Kavanaugh v. Broardball, 40 Neb. 875; Keniston v. Stevens, 66 Vt. 351.

[3] Wheeler Mfg. Co. v. Teetzlaff, 53 Wis. 211; Haveron v. Anderson, 3 N. D. 540.

[4] Rollofson v. Nash, 77 N. W. 954.

[5] Game v. Whaley, 43 M. 234; Anderson v. Goulberg, 51 M. 294; Goodell v. Ward, 17 M. 17 G. 1; Derby v. Gallup, 5 M. 119 G. 85; Schulenberg v. Harriman, 21 Wall. (U. S.) 59; Morris v. Danielson, 3 Hill (N. Y.) 168; Barkley v. Leiter, 49 Neb. 123.

[6] Derby v. Gallup, 5 M. 119 G. 85; Shearer v. Gunderson, 60 M. 525. See Blunt v. Barrett, 124 N. Y. 117.

[7] Shearer v. Gunderson, 60 M. 525.

[8] Coffin v. Hollister, 124 N. Y. 644. See also, Newell v. Randall, 32 M. 171.

[9] See Dunnell's Trial Book, §§ 1535-1544 and further, Manwaring v. O'Brien, 78 N. W. 1; Rossman v. Mitchell, 75 N. W. 1053.

Damages—generally.

§ 836. The general rule of damages for the detention is interest on the value of the property during the unlawful detention. Caldwell v. Arnold, 8 M. 265 G. 231, 238; Berthold v. Fox, 13 M. 501 G. 462. See Leonard v. Maginnis, 34 M. 506 as to recovery of expense of procuring a return of the property.

§ 837. If the property has been enhanced in value by the labor of the defendant, the measure of damages will be de-

termined by the presence or absence of good faith in the wrongdoer. State v. Shevlin-Carpenter Co., 62 M. 96.

§ 838. "In an action for claim and delivery, where the subject-matter of the action has a usable value, the reasonable value of the use of it during the time of its wrongful detention may be properly shown and considered in the assessment of the damages for such detention, if properly pleaded." Williams v. Wood, 61 M. 194; Sherman v. Clark, 24 M. 37; Ferguson v. Hogan, 25 M. 135; Peerless Machine Co. v. Gates, 61 M. 124; Thompson v. Scheid, 39 M. 102; Keyes v. Ry. Co., 36 M. 290.

§ 839. "In replevin, where the plaintiff's title or right of possession is legally divested after suit brought and before trial, he can, as against the owner or person entitled to the possession, recover only damages for the unlawful detention up to the time his title or right of possession was divested. He is not entitled to judgment for the return of the property, or for its value." Deal v. Osborne, 42 M. 102.

Damages—mitigation.

§ 840. Lynd v. Picket, 7 M. 184 G. 128.

Damages—punitive.

§ 841. Yallop v. De Groot, 33 M. 482.

Counterclaims.

§ 842. Sylte v. Nelson, 26 M. 105; Ward v. Anderberg, 36 M. 300; Townsend v. Freezer Co., 46 M. 121.

Bar of former judgment in action for conversion.

§ 843. Hatch v. Coddington, 32 M. 92; Hardin v. Palmerlee, 28 M. 450.

Jurisdiction of justice—amount in controversy.

§ 844. Parker v. Bradford, 68 M. 437; McKee v. Metraw, 31 M. 429.

General verdict—effect of.

§ 845. Adamson v. Sundby, 51 M. 460; Ladd v. Newell, 34 M. 107.

Verdict—form of—assessing property and damages.

§ 846. "In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, and the jury find that he is entitled to a recovery thereof, or if the property is not in the possession of the defendant, and by his answer he claims a return thereof, and the verdict is in his favor, the jury shall assess the value of the property, and the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or taking and withholding such property. Whenever the verdict is in favor of the party having possession of the property, the value thereof shall not be found." G. S. '94, § 5383.

§ 847. If the property is in the possession of the party in whose favor the verdict is given its value need not be assessed and this is true regardless of whether such party is the general or special owner. Leonard v. Maginnis, 34 M. 509; Cumbey v. Lovett, 79 N. W. 99.

Assessment of interest of special owner.

§ 848. Where the plaintiff has only a special interest in the property or lien thereon the alternative value of the property is assessed, as against the general owner, only to the extent of such interest or lien. State v. Shevlin-Carpenter Co., 62 M. 99; La Crosse etc. Co. v. Robertson, 13 M. 291 G. 269; Dodge v. Chandler, 13 M. 114 G. 105; Wheaton v. Thompson, 20 M. 196 G. 175; Deal v. Osborne, 42 M. 102; Flint v. Luhrs, 66 M. 57; Cumbey v. Lovett, 79 N. W. 99.

Assessment of property as of what time.

§ 849. If the plaintiff recovers, the practice is to assess the value as of the time of the wrongful taking or of the commencement of the wrongful detention, as the case may be; and if the defendant recovers, to assess it as of the time when the property is replevied from him. Sherman v. Clark, 24 M. 37, 42; Berthold v. Fox, 13 M. 501 G. 462; McLeod v. Capehart, 50 M. 101; Howard v. Rugland, 35 M. 388.

Judgment must be in the alternative.

§ 850. The judgment, if the prevailing party has not possession, must always be in the alternative, that is, for the possession of the property, or the value thereof in case possession cannot be obtained. Neither party has an election to take a mere money judgment for the value of the property. New England etc. Co. v. Bryant, 64 M. 256; French v. Ginsburg, 57 M. 264; Berthold v. Fox, 21 M. 51 (amendment of judgment); Sherman v. Clark, 24 M. 37; Kates v. Thomas, 14 M. 460 G. 343; Robertson v. Davidson, 14 M. 554 G. 422.

§ 851. Where the property in controversy has been delivered to the plaintiff, and upon the trial the action is dismissed on the ground that he has failed to substantiate his cause of action and right to recover, the defendant is entitled to a judgment for a return of the property or for its value in case a return cannot be had, if in his answer he has demanded such return. Pabst Brewing Co. v. Butchart, 68 M. 303.

§ 852. "If a part only of the property can be obtained, the plaintiff should be allowed to elect to take that part, and judgment for the value of the remainder, and, if he demand it, that the jury shall assess the value of the articles separately." Caldwell v. Bruggerman, 4 M. 270 G. 190.

§ 853. The plaintiff is entitled to the value of the property to him although it has no market value. Bradley v. Gamelle, 7 M. 331 G. 260; Drake v. Auerbach, 37 M. 505.

Judgment—right to.

§ 854. The successful party has a right to a judgment for possession although the property is in his possession, for such a judgment determines the title. Oleson v. Newell, 12 M. 186 G 114; Leonard v. Maginnis, 34 M. 506.

Waiver of judgment for value.

§ 855. "The right of a party to an alternative judgment for the value of the property, if a return of it cannot be obtained, is exclusively for his own benefit. He may waive it, and take judgment merely for the return of the property." Thompson

v. Scheid, 39 M. 102; Stevens v. McMillin, 37 M. 509; Shearer v. Gunderson, 60 M. 525; Adamson v. Sundby, 51 M. 460.

Miscellaneous cases.

§ 856. Kellogg v. Anderson, 40 M. 207 (mortgagee against stranger); Boice v. Boice, 27 M. 371; Ellingsen v. Cooke, 37 M. 401; Nichols v. Knudson, 62 M. 237 (mortgagor against mortgagee); Miller v. Darling, 22 M. 303 (one of several joint owners against stranger); Tolbert v. Horton, 31 M. 518 (between junior and senior mortgagees); Drake v. Auerbach, 37 M. 505 (to recover papers left with defendant for inspection); Simmonsen v. Curtiss, 43 M. 539 (to recover a deed, fact of delivery in controversy); Whitney v. Swensen, 43 M. 337 (against officer seizing property on execution); Hazeltine v. Swensen, 38 M. 424 (against sheriff); Caldwell v. Arnold, 8 M. 265 G. 231 (against sheriff seizing property under attachment); Vose v. Stickney, 8 M. 75 G. 51 (against sheriff); Tullis v. Orthwein, 5 M. 377 G. 305 (against sheriff); Lynd v. Picket, 7 M. 184 G. 128 (against sheriff); Dodge v. Chandler, 9 M. 97 G. 87 (against sheriff); Williams v. McGrade, 13 M. 46 G. 39 (against sheriff); Hanson v. Bean, 51 M. 546 (against sheriff); Ladd v. Newell, 34 M. 107 (to recover wheat wrongfully seized on execution); Chadbourn v. Rahilly, 34 M. 346 (to recover wheat); Howard v. Rugland, 35 M. 388 (against sheriff); Scofield v. Nat. Elevator Co., 64 M. 527 (mortgagee against stranger); Turnbull v. Seymour Sabin Co., 31 M. 196 (against vendor for notes given by vendee as purchase price); Leonard v. Maginnis, 34 M. 507 M. 7 (against sheriff); Adams v. Corriston, 7 M. 456 G. 365 (against sheriff—measure of damages); Hines v. Chambers, 29 (mortgagee against mortgagor).

CHAPTER XXVII

ACTION TO RECOVER REAL PROPERTY

§ 857. General form[1]—no demand of damages.[2]

The plaintiff complains of defendant and alleges:

I. That he is the owner in fee[3] of [describing premises as in a deed], in the county and state aforesaid.

II. That defendant is in possession thereof and withholds the same from plaintiff.

Wherefore plaintiff demands judgment:

(1) For the recovery of the possession of said premises.

(2) For the costs and disbursements of this action.

[1] This is the general form used to try title and recover possession. It is based on Payne v. Treadwell, 16 Cal. 221, 243 (a leading case with the opinion by Justice Field) and Halsey v. Gerdes, 17 Abb. N. C. (N. Y.) 395. It is quite common practice to add to the allegation of ownership, "and entitled to the immediate possession." This is a mere conclusion of law and while it does not vitiate a pleading it adds nothing. Payne v. Treadwell, 16 Cal. 221, 243. See Sheridan v. Jackson, 72 N. Y. 170. The owner in fee is presumptively entitled to the immediate possession or, to state the presumption in another form, one who withholds possession from the owner of property is presumed to do so unlawfully. Payne v. Treadwell, 16 Cal. 221, 243. Consequently it is not necessary to allege that the plaintiff is entitled to the immediate possession or that the defendant "wrongfully" or "unlawfully" withholds possession. It is not necessary to anticipate and negative matters of defence. In this state no particular form has been approved and in consequence there is no uniformity in practice. See upon the subject generally, McClane v. White, 5 M. 178 G. 139; Wells v. Masterson, 6 M. 566 G. 401; Pinney v. Fridley, 9 M. 34 G. 23; Merrill v. Dearing, 22 M. 376; May v. Ry. Co., 26 M. 74; Hennessy v. Ry. Co., 30 M. 55; Holmes v. Williams, 16 M. 164 G. 146; Armstrong v. Hinds, 8 M. 254 G. 221; Schultz v. Hadler, 39 M. 191.

The following form of complaint is in frequent use by the profession in this state and has been held "sufficient" in Pinney v. Fridley, 9 M. 34 G. 23; Merrill v. Dearing, 22 M. 376:

The plaintiff complains of defendant and alleges:

I. That he is the owner in fee and entitled to the immediate possession of [describing premises], in the county and state aforesaid.

II. That defendant is in possession thereof and unlawfully withholds the same from plaintiff.

[Demand of judgment as above]

[2] No more than nominal damages, if any, are recoverable under this form of complaint and hence no demand for damages is inserted. If plaintiff desires to secure substantial damages for withholding, that is for mesne profits, he should adopt the form given in § 858. See Larned v. Hudson, 57 N. Y. 151; Livingston v. Tanner, 12 Barb. (N. Y.) 481; Payne v. Treadwell, 16 Cal. 221 and cases cited in § 887.

[3] Or other estate, as for years or for life as the fact may be. The interest alleged must of course be one that carries with it the immediate right of possession. Schultz v. Hadler, 39 M. 191; Pace v. Chadderdon, 4 M. 499 G. 390.

§ 858. Complaint where plaintiff seeks mesne profits under G. S. '94, § 5747.[1]

The plaintiff complains of defendant and alleges:

I. That at the time stated in the next paragraph plaintiff was and still is the owner in fee of [describing premises as in a deed], in the county and state aforesaid.

II. That on the day of , 19 , and when plaintiff was in possession as such owner, defendant entered into said premises and ousted plaintiff and still withholds possession thereof from him.

III. That the value of the use and occupation of said premises since said day and while plaintiff has been excluded therefrom by defendant, is dollars.

IV. [Allege damage to the freehold, if any.[2]]

Wherefore plaintiff demands judgment:

(1) For the recovery of the possession of said premises.

(2) For the sum of dollars, the value of the use and occupation of said premises.

(3) [For the further sum of dollars as damages for injuries to said premises.]

(4) For the costs and disbursements of this action.

[1] Based on Payne v. Treadwell 16 Cal. 220.

[2] See § 889.

§ 859. Form where plaintiff and defendant derive title from a common source.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , one was the owner in fee and in possession of [describing premises as in a deed], in the county and state aforesaid.

II. That on said day and while in such possession and ownership the said conveyed the same in fee to plaintiff who is still the owner in fee thereof.[2]

III. [Continuing as in § 857 or § 858.]

[1] This form is advantageous when the plaintiff and defendant both claim title from a common source for it relieves the plaintiff of the burden of proving title prior to such common source and forces the defendant to plead specifically any defences which he may have. See § 886 (e).

[2] See Cleveland v. Stone, 51 M. 274.

§ 860. Alleging title by devise.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , one was the owner in fee and in possession of [describing premises as in a deed], in the county of , state of Minnesota.

II. That on said day and when in such ownership and possession the said died, leaving a last will, wherein he devised to plaintiff the said premises.

III. That on the day of , 19 , said will was duly proved and admitted to probate in the probate court in and for the county of , state of Minnesota.

IV. That on the day of , 19 , in a decree of final distribution which was duly made by said court, said premises were assigned [1] to plaintiff in fee and such estate he still retains.

V. [Continuing as in § 857 or § 858 as the case may require.]

[1] G. S. '94, § 4642; Greenwood v. Murray, 26 M. 259; Farnham v. Thompson, 34 M. 330; Ladd v. Weiskoff, 62 M. 29.

§ 861. Alleging title by descent.

The plaintiffs complain of defendant and allege:

I. [As in preceding form.]

II. That on said day and when in such ownership and possession the said died intestate, leaving these plaintiffs his only children and heirs at law.

III. That thereafter the estate of the said was duly administered upon in the probate court in and for the county of , state of Minnesota and that on the day of , 19 , in a decree of final distribution, which was duly made by said court, said premises were assigned in fee to plaintiffs and such estate they still retain.

IV. [Continuing as in § 857 or § 858 as the case may require.]

NOTES

Nature of action.

§ 862. The common law action of ejectment with its fictions and distinctive rules does not exist in this state. Sioux City Ry. Co. v. Singer, 49 M. 301; Doyle v. Hallam, 21 M. 515; Merrill v. Dearing, 47 M. 137.

§ 863. An action for the recovery of real property is commonly called ejectment by the profession but merely as a matter of convenience. The decisions respecting ejectment under the old system have no proper force as precedents in this state and nothing but confusion and error result from an application of common law rules to an action under the code. An action for the recovery of real property in this state is not a "form of action." There are no general rules governing it for it has no fixed form. The character of the particular action is determined by the allegations of the particular complaint and not by any general rules. The plaintiff is not restricted to a single form of complaint. He may allege that he is the owner in fee or seized of an estate for life or for years; or he may content himself with an allegation of prior possession and ouster by the defendant or a leasing to the defendant and a default in the condition of the lease. The character of the action will be wholly determined by the form of the complaint

and the form and effect of the judgment will vary accordingly.[1] What is commonly termed an action of ejectment in this state is a possessory action. It is not an action for the recovery of title[2] and yet it is the usual mode of trying title where the plaintiff is out of possession and the land is occupied. The determination of title is an indirect rather than direct result of the action. The action is for possession. The proper prayer of the plaintiff is for possession and not that he be adjudged the owner and the proper judgment is for recovery of possession and not that the plaintiff or defendant is the owner. How, then, does the action determine title? There is an estoppel by verdict. The plaintiff alleges that he is the owner. The defendant denies this allegation and there is a material issue formed thereon. The verdict of the jury necessarily involves a determination of such issue and consequently there is an estoppel by verdict of the issue of ownership in all future actions—that is, ownership at the time of the verdict. It is to be observed that it is an estoppel by verdict as distinguished from an estoppel by judgment.[3] At common law a judgment in an action of ejectment was not a bar to a second action but under the code the contrary is well established.[4] The judgment operates as an estoppel, however, only as to the title actually litigated and as to defences that were actually interposed or might have been interposed. It is not a bar to a second action or defence founded upon an after acquired title.[5]

[1] See Caperton v. Schmidt, 26 Cal. 479; Payne v. Treadwell, 16 Cal. 221 (leading cases under the code).

[2] Marshall v. Shafter, 32 Cal. 177; City of Winona v. Huff, 11 M. 119 G. 75, 85.

[3] Swank v. Ry. Co., 61 M. 423; Doyle v. Hallam, 21 M. 515; Dawley v. Brown, 79 N. Y. 390.

[4] Doyle v. Hallam, 21 M. 515; Bazille v. Murray, 40 M. 48; Lewis v. Hogan, 51 M. 221; Cameron v. Ry. Co., 51 M. 153; G. S. '94, § 5846.

[5] Hailey v. Ano, 136 N. Y. 569; Dawley v. Brown, 79 N. Y. 390; Barrows v. Kindred, 4 Wall. (U. S.) 399; Northern

Pacific Ry. Co. v. Smith, 69 Fed. Rep. 579; Doyle v. Hallam, 21 M. 515.

For what the action will lie.

§ 864. Wherever a right of entry exists and the interest is tangible so that possession can be delivered an action in the nature of ejectment will lie. City of Winona v. Huff, 11 M. 119 G. 75, 85.

Who may maintain the action.

§ 865. A vendor against a vendee in default;[1] a landlord against a tenant;[2] a tenant in common against a stranger;[3] a municipality where land has been dedicated to public uses;[4] a grantor upon the breach of a condition subsequent;[5] one tenant in common against another where there has been an ouster.[6]

[1] Thompson v. Ellenz, 58 M. 301; McClane v. White, 5 M. 178 G. 139; Mitchell v. Chisholm, 57 M. 148; Williams v. Murphy, 21 M. 534.

[2] State v. District Court, 53 M. 483.

[3] Sherin v. Larson, 28 M. 523; Easton v. Scofield, 66 M. 429.

[4] City of Winona v. Huff, 11 M. 119 G. 75.

[5] Sioux City etc. Ry. Co. v. Singer, 49 M. 301.

[6] Cameron v. Ry. Co., 60 M. 100.

Who may not maintain the action.

§ 866. A mortgagor or one in privity with him cannot maintain an action against a mortgagee lawfully in possession after condition broken;[1] a mortgagee where the mortgage is a deed absolute in form;[2] "a mortgage of real property is not to be deemed a conveyance, so as to entitle the owner of the mortgage to recover possession of the real property without a foreclosure."[3]

[1] Pace v. Chadderdon, 4 M. 499 G. 390; Jones v. Rigby, 41 M. 530; Lane v. Holmes, 55 M. 385; Cargill v. Thompson, 57 M. 550; Johnson v. Sandhoff, 30 M. 197; Backus v. Burke, 63 M. 272; Holton v. Bowman, 32 M. 191.

[2] Meighen v. King, 31 M. 115.

[3] G. S. '94, § 5861; Meighen v. King, 31 M. 115; Seibert v.

Ry. Co., 52 M. 246; Cullen v. Minnesota Trust Co., 60 M. 6; Lowell v. Doe, 44 M. 144; Rogers v. Benton, 39 M. 39; Ferman v. Lombard Invest. Co., 56 M. 166.

Plaintiff may recover on an equitable title.

§ 867. In this state an equitable owner may recover in an action in the nature of ejectment. "Under our system of practice, a plaintiff may allege and prove the facts showing himself the equitable owner of land, and thereupon recover the possession thereof as against the holder of the naked legal title or a stranger." In pleading an equitable title plaintiff should set out all the facts with as must particularity as if he were drawing a bill in equity to cancel the deed of the party holding the legal title. Merrill v. Dearing, 47 M. 137; Freeman v. Brewster, 70 M. 203; Hersey v. Lambert, 50 M. 373.

Title how alleged.

§ 868. Title must be alleged as of the time of the commencement of the action as well as of the time of the ouster. Armstrong v. Hinds, 8 M. 254 G. 221; Miller v. Hoberg, 22 M. 249; Holmes v. Williams, 16 M. 164 G. 146.

§ 869. The nature of plaintiff's estate should be disclosed, whether in fee or for life or for years as the fact may be and an estate must be shown which carries with it a right to immediate possession.

§ 870. Under an allegation of ownership in fee plaintiff cannot prove an equitable title and *vice versa*. Merrill v. Dearing, 47 M. 137; Hersey v. Lambert, 50 M. 373; Houghton v. Mendenhall, 50 M. 40. See §§ 283, 867.

§ 871. Ownership must be alleged as an ultimate fact and a complaint which alleges merely the evidence of title is ordinarily insufficient. Schultz v. Hadler, 39 M. 191; Pinney v. Fridley, 9 M. 34 G. 23.

§ 872. The plaintiff should not ordinarily allege title as acquired in a particular way unless he wishes to force the defendant to make a specific defence. Under a general allegation of ownership he may prove a legal title acquired in any way but if he alleges title as acquired in a particular way he

will be restricted in his proof accordingly. O'Malley v. Ry. Co., 43 M. 289; Pinney v. Fridley, 9 M. 34 G. 23.

Possession of defendant.

§ 873. Possession by the defendant is an essential fact and must be alleged unequivocally.[1] The possession of the defendant must be wrongful as against the plaintiff. If the plaintiff is the owner possession by another is presumptively wrongful but when it appears from the complaint that defendant's possession was rightful when plaintiff acquired title the latter must allege facts showing that it has since become wrongful.[2]

[1] Gowan v. Bensel, 53 M. 46; Payne v. Treadwell, 16 Cal. 243; Pence v. Ry Co., 28 M. 488, 495; Allis v. Nininger, 25 M. 525.

[2] Holmes v. Williams, 16 M. 164 G. 146.

Description of premises.

§ 874. The premises should be described with sufficient accuracy to enable the sheriff to execute the judgment. There is, however, no general test of sufficiency. The practice is to describe the land according to the government survey or plats duly filed. See May v. Ry. Co., 26 M. 74.

Re-entry not necessary.

§ 875. "One entitled to recover the possession of real estate may prosecute an action therefor without first performing the common law ceremony of re-entry." Sioux City etc. Ry. Co. v. Singer, 49 M. 301.

General denial—what admissible under.

§ 876. When the plaintiff alleges ownership in general terms, as in the foregoing forms, without tracing the source of his title, a general denial is the most common form of answer. Under it the defendant may prove title in himself and he may introduce any evidence tending to disprove or invalidate the title of the plaintiff. The defendant is not bound to anticipate what the plaintiff will rely upon to establish his general allegation of title, but, when plaintiff's proofs are in, may disprove the facts, or show that for any cause the

plaintiff did not, by means of the facts so proved, acquire the title. Kipp v. Bullard, 30 M. 84; Wakefield v. Day, 41 M. 344; Commonwealth Title Ins. Co. v. Dokko, 72 M. 229; Henderson v. Wanamaker, 79 Fed. Rep. 736.

§ 876 (a). Where the complaint alleges the title of the plaintiff generally, without disclosing the source of it, the defendant, under a general denial, may prove an equity which, as it exists, and without any affirmative relief, defeats plaintiff's right of recovery. But if the equity is such that it does not give the defendant the right of possession, as against the legal title, without affirmative relief enforcing it, then he must plead the facts entitling him to such relief, the matter being in the nature of a counterclaim. Travellers' Ins. Co. v. Walker, 80 N. W. 618. See § 879.

§ 877. If the plaintiff pleads the source of his title the defendant cannot, under a mere denial, prove facts in the nature of confession and avoidance. He cannot introduce facts tending to invalidate the title alleged by the plaintiff. Kennedy v. McQuaid, 56 M. 450; Kipp v. Bullard, 30 M. 84; Wakefield v. Day, 41 M. 344.

Title in third party.

§ 878. It is the general rule that the defendant may defeat the action by proving title in a third party and he may do so under a general denial if the plaintiff alleges title in general terms;[1] but where the defendant has ousted the plaintiff who was in the actual and peaceable possession of the premises, under claim of title, he cannot prove as a defence an outstanding title in a third party unless he connects himself with such title.[2] This is not a rule of pleading but of substantive law grounded in public policy. If the defendant went into possession peaceably and under claim of title he may prove an outstanding title in a third party without connecting himself therewith.[3]

[1] Henderson v. Wanamaker, 79 Fed. Rep. 736. See § 824.

[2] Christy v. Scott, 14 How. (U. S.) 282; Haws v. Victoria etc. Co., 160 U. S. 303. See § 823.

[3] Drew v. Swift, 46 N. Y. 204; Sabariego v. Maverick, 124 U. S. 261. See Mercil v. Broulette, 66 M. 416.

Equitable defences.

§ 879. "The owner of the legal title to real estate may bring ejectment, whatever equities may be claimed by defendant. The defendant may, in his answer, set up his equities, so far at least as they relate to the right of possession, and the action is a proper one in which to litigate them. To prevail against the plaintiff's legal right to the possession, the equities pleaded as a defence must be such that, under the former practice, a court of equity would, upon a bill filed setting up the facts, have enjoined the legal owner from proceeding at law." Williams v. Murphy, 21 M. 534. See also, McClane v. White, 5 M. 178 G. 139; Probstfield v. Czizek, 37 M. 420; Freeman v. Brewster, 70 M. 203; Coolbaugh v. Roemer, 32 M. 445.

Improvements and taxes.

§ 880. The defendant in his answer may allege the amount and value of all improvements made by himself or those under whom he claims, and also the amount of all taxes and assessments paid upon such land by himself or those under whom he claims, and, if the claim be under an official deed, the purchase money paid therefor.[1] Such allegations are not admitted by a failure to reply.[2]

[1] Laws 1897, ch. 38; G. S. '94, § 5849 et seq.; Seigneuret v. Fahey, 27 M. 60; O'Mulcahy v. Florer, 27 M. 449; McLellan v. Omodt, 37 M. 157; Wheeler v. Merriman, 30 M. 372; Wilson v. Red Wing School District, 22 M. 488; Flynn v. Lemieux, 46 M. 458; Craig v. Dunn, 47 M. 59; Everett v. Boyinton, 29 M. 264; Hall v. Torrens, 32 M. 527; Pfefferle v. Wieland, 55 M. 202; Id. 60 M. 328; Goodrich v. Florer, 27 M. 98; Smalley v. Isaacson, 40 M. 450; Ogden v. Ball, 38 M. 237; Id. 40 M. 94; Jewell v. Truhn, 38 M. 433; Windom v. Schuppel, 39 M. 35; Sanborn v. Mueller, 38 M. 27; Mueller v. Jackson, 39 M. 431.

[2] Reed v. Newton, 22 M. 541.

Estoppel.

§ 881. In an action by a vendor against a vendee in default the vendee is estopped to deny the title of the vendor. Mitchell v. Chisholm, 57 M. 148; Thompson v. Ellenz, 58 M. 301; Preiner v. Meyer, 67 M. 197.

§ 882. A grantee of a mortgagor is not, as against the mortgagee, estopped from asserting a paramount title. Preiner v. Meyer, 67 M. 197.

§ 883. A tenant is estopped to deny the title of his landlord. "Whenever any person enters into the possession of any lands or tenements in this state under or pursuant to a lawful lease thereof, he shall not be permitted while so in possession to dispute or deny the title of his landlord in any action brought by such landlord, or any one claiming under or through him, to recover possession of any such lands or tenements. But such estoppel shall not apply to any lessee who at and prior to the time of accepting any such lease, is already in possession of the leased lands or tenements under any claim or title adverse or hostile to that of such lessor." Laws 1899, ch. 13; St. Anthony etc. Co. v. Morrison, 12 M. 249 G. 162; Morrison v. Bassett, 26 M. 235; Sage v. Halversen, 72 M. 294; Clary v. O'Shea, 72 M. 105; Tilleny v. Knoblauch, 75 N. W. 1039.

Burden of proof.

§ 884. The plaintiff must recover upon the strength of his own title and not upon the weakness of that of the defendant. Pace v. Chadderdon, 4 M. 499 G. 390; Henderson v. Wanamaker, 79 Fed. Rep. 736; Greve v. Coffin, 14 M. 345 G. 263.

§ 885. He must prove some title in himself carrying the right of immediate possession. Society of the Most Precious Blood v. Moll, 51 M. 277.

§ 886. The plaintiff may make out a *prima facie* case in any of the following modes:

(a) By showing a paper title running back to the government. Mobley v. Griffin, 104 N. C. 114; Graham v. Mitchell, 78 Ga. 310; Miller v. Ry. Co., 71 N. Y. 383.

See G. S. '94, §§ 5753, 5754; Schultz v. Hadler, 39 M. 191 (as to proof of title by land office certificates).

(b) By showing a paper title from a grantor who is admitted by the defendant to have been an owner. Horning v. Sweet, 27 M. 277.

(c) By proof of the possession of his ancestor. "Proof of the possession of the ancestor under color of title, at the time of his death, is sufficient to establish the right to the title and possession by the heir as against parties in possession without any claim of right." Sherin v. Larson, 28 M. 523; McRoberts v. Bergman, 132 N. Y. 73.

(d) As against a defendant who has disseized the plaintiff, by proof of actual and peaceable possession, under color of title, at the time of the ouster by the defendant. As against one showing no title in himself possession is title. Sherin v. Brackett, 36 M. 152; Carleton v. Darcey, 90 N. Y. 566; Mayor v. Carlton, 113 N. Y. 284.

(e) By proving title from the person under whom the defendant claims. Horning v. Sweet, 27 M. 277; Thompson v. Ellenz, 58 M. 301; Kennedy v. McQuaid, 56 M. 450; Preiner v. Meyer, 67 M. 197; McRoberts v. McArthur, 62 M. 310; Wilson v. Peele, 78 Ind. 384; Conger v. Converse, 9 Iowa, 554; Orton v. Noonan, 19 Wis. 350; Robertson v. Pickrell, 109 U. S. 608; Spect v. Gregg, 51 Cal. 198; Anderson v. Reid, 10 App. Cases (D. C.) 428; Carson v. Dundas, 39 Neb. 503.

(f) By proving adverse possession for the statutory period. Baker v. Oakwood, 123 N. Y. 16.

(g) By proving facts which estop the defendant from disputing the title of the plaintiff. See §§ 881–883.

Where the plaintiff claims title under a junior deed of record to which he is a party, he is bound, as against a defendant claiming under a senior unrecorded deed from the same grantor, to prove that he purchased in good faith and for a valuable

consideration.[1] The rule is otherwise where the defendant is a stranger to the senior unrecorded deed.[2]

[1] Mead v. Randall, 68 M. 233 and cases cited.

[2] Barber v. Robinson, 80 N. W. 968.

Damages—mesne profits.

§ 887. "At common law the possession of land unlawfully detained from the party rightfully entitled thereto was recoverable in an action of ejectment, together with nominal damages for the supposed ouster. The real damages, however, sustained by such party by reason of having been thus unlawfully kept out of the possession and deprived of the use of the land, and which were termed mesne profits, were only recoverable after judgment in ejectment, in a separate action, either of trespass for damages, or, in case the party elected to waive the tort, by assumpsit for the use and occupation of the land during the time the defendant in ejectment had thus held illegal possession of said premises." Now, by statute (G. S. '94, § 5260) the claim of the plaintiff for mesne profits or damages for withholding may be treated as a part of the original cause of action and recovered in the ejectment suit under appropriate allegations. In such an action a claim of damages for withholding and a claim for mesne profits are one and the same thing in effect. The plaintiff cannot recover substantial damages for withholding and for mesne profits. The statute has not changed the measure of damages but simply the mode of recovering them. The plaintiff may bring an action in the nature of ejectment without claiming damages in the nature of mesne profits and then after judgment pursue his separate remedies as at common law. Lord v. Dearing, 24 M. 110; Nash v. Sullivan, 32 M. 189; Armstrong v. Hinds, 8 M. 254 G. 221; Merrill v. Dearing, 22 M. 376; Holmes v. Williams, 16 M. 164 G. 146.

§ 888. "The general principle on which damages are allowed is that the plaintiff is entitled to recover all damages fairly resulting from his having been wrongfully kept out of possession. Compensation is the measure of damages. Hence

on principle and according to the weight of authority, the amount of recovery for mesne profits is the annual value of the premises wrongfully withheld from the time plaintiff's title accrued." [1] Damages should be assessed up to the day of the trial.[2]

[1] Nash v. Sullivan, 32 M. 189.

[2] Abrahanson v. Lamberson, 68 M. 454.

§ 889. With an action for the recovery of real property and for the use and occupation of the same, may properly be united a claim for injuries done to the estate by the defendant while in possession. Such a claim is substantially a part of the same cause of action as that for which the rental value may be recovered. Pierro v. Ry. Co., 37 M. 314; Id. 39 M. 451.

Judgment—form of.

§ 890. The proper form of judgment in ejectment is for the recovery of the possession of the premises and for the damages awarded. See as to various forms of judgment: King v. Hartley, 38 M. 354; Trustees of Lutheran Church v. Halvorson, 42 M. 503; Laramy v. Ruschke, 46 M. 125; Coolbaugh v. Roemer, 30 M. 424; Id. 32 M. 445.

CHAPTER XXVIII

ACTION TO DETERMINE ADVERSE CLAIMS

§ 891. Complaint where plaintiff is in possession.[1]

The plaintiff complains of defendant and alleges:

I. That he is in the actual possession [2] of [describing premises as in a deed], in the county and state aforesaid.

II. That defendant claims an estate or interest in said premises or lien thereon adverse to plaintiff.

Wherefore plaintiff demands judgment:

(1) That defendant has no estate or interest in said premises or lien thereon.

(2) For the costs and disbursements of this action.

[1] Sustained by Barber v. Evans, 27 M. 92; Steele v. Fish, 2 M. 153 G. 129.

[2] It is useless to allege ownership. If alleged and denied no issue thereon is formed. Wilder v. St. Paul, 12 M. 192 G. 116.

§ 892. Complaint where land is vacant.

The plaintiff complains of defendant and alleges:

I. That he is the owner in fee of [describing premises as in a deed], in the county and state aforesaid.

II. That said premises are vacant and unoccupied.

III. That defendant claims an estate or interest in said premises or lien thereon adverse to plaintiff.

Wherefore plaintiff demands judgment:

(1) That he is the owner in fee of said premises.

(2) That defendant has no estate or interest in said premises or lien thereon.

(3) For the costs and disbursements of this action.

§ 893. Answer when complaint is in the form of § 891 and defendant is the legal owner in fee and wishes to recover possession.[1]

The defendant for answer and counterclaim to the complaint herein alleges:

I. That he is the owner in fee [2] of the premises therein described.

II. That plaintiff is in possession thereof and withholds the same from defendant.

Wherefore defendant demands judgment:

(1) For the recovery of the possession of said premises.

(2) That plaintiff has no estate or interest in said premises or lien thereon.

(3) For the costs and disbursements of this action.

[1] Of course this form of answer admits that the plaintiff is in possession. The advantages of stating the answer in the form of a counterclaim are that it makes it impossible for the plaintiff to dismiss the action and enables the defendant to secure an affirmative judgment or a second trial of right. If the defendant wishes to secure mesne profits he should allege his counterclaim in the form of a complaint given in § 858. See Eastman v. Linn, 20 M. 433 G. 387; Knight v. Valentine, 35 M. 367; Broughton v. Sherman, 21 M. 431.

[2] This form of answer can be used only when the defendant claims the legal title in fee. If he has an equitable title all the facts must be pleaded. See § 921. If he has a lien he should allege the facts giving rise to his lien and demand judgment that he has a lien and such relief (naming it) as may be necessary to make his lien effective, varying of course with the nature of the lien.

§ 894. Answer when complaint is in the form of § 892 and defendant claims to be legal owner and admits that the land is vacant.

The defendant, answering the complaint herein:

I. Denies that plaintiff is the owner in fee of the premises therein described.

II. Alleges that he is the owner in fee [1] thereof.

Wherefore defendant demands judgment:

(1) That he is the owner in fee of said premises.

(2) That plaintiff has no estate or interest in said premises or lien thereon.

(3) For the costs and disbursements of this action.

[1] Or allege title as in §§ 859–861 as the case may require.

§ 895. Answer when complaint is in the form of § 892 and defendant admits that plaintiff has the legal title but claims to be the equitable owner.

The defendant for answer to the complaint herein alleges:

I. [Setting forth with particularity each material fact giving rise to the equity.]

Wherefore defendant demands judgment:

(1) That he is the equitable owner of said premises.

(2) That the legal title of plaintiff is void as against defendant.

(3) For the costs and disbursements of this action.

§ 896. Answer when complaint is in the form of § 892 and defendant admits that plaintiff has the fee and claims that he has a lien to which the fee is subject.

The defendant for answer to the complaint herein alleges:

I. [Setting forth with particularity each material fact giving rise to the lien.]

Wherefore [demanding judgment that he has a lien on the premises and such relief as may be necessary to make the lien effective, varying of course with the nature of the lien].

NOTES

Historical statement and statute.

§ 897. G. S. 1866, ch. 75 provided, "An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest." It was held under this statute that actual possession by the plaintiff or his tenant was essential. Murphy v. Hinds, 15 M. 182 G. 139. By Laws 1867, ch 72, the statute was amended by adding the following clause: "Any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and the rights of the parties respectively." In Bidwell v. Webb, 10 M. 59 G. 41; Brackett v. Gilmore, 15 M. 245 G. 190; Turrell v. Warren, 25 M. 9 it was held that a lien was not an estate or interest within the meaning of the statute. These decisions were overruled by Laws 1874, ch. 68, which added the

words "or lien upon the same" to the first clause of the statute. By judicial legislation (Donohue v. Ladd, 31 M. 244) the same addition was made to the second clause of the statute.

The statute now reads as follows: "An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien or interest; and any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and the rights of the parties respectively." G. S. '94, § 5817.

General nature and object of action.

§ 898. "As the statute has been construed in this state, the action given by it is in some of its features extraordinary, and contrary to the usual course of action. All that the complaint need allege of defendant is that he claims some estate or interest in or lien on the land, without showing that the claim is invalid, or that defendant does plaintiff any wrong in making it. The plaintiff having proved his possession (or title, if the lands are vacant), the burden is then on the defendant to prove his adverse claim. The object of the action is to force one claiming an adverse interest or lien to establish or abandon his claim. With respect to the claim of the defendant, the position of the parties is the reverse of that occupied by the parties in an ordinary action. The defendant becomes practically the plaintiff, and takes the affirmative in pleading and proof, while the plaintiff becomes practically the defendant, and defends against the action. In an ordinary action, the plaintiff must tender the issues to defendant, and if defendant takes issue on the facts alleged, plaintiff must prove enough of them to entitle him to recover. An action under the statute is brought to compel the defendant to tender issues, unless he chooses to abandon his claim. In the particulars, therefore, that the complaint need not allege any

wrongful act of the defendant, and that the object of it is to force him to tender issues upon and set forth the matters sought to be litigated, the action is anomalous." "No such action could be maintained at the common law; no bill in equity alleging only the facts necessary to a complaint in this statutory action could be supported." "The evident design of the legislature in passing this act, was to give to parties in possession of real property, the same facilities for testing the merits of adverse claims of title, that are always at hand for those who are excluded from the possession, but claim an estate therein adverse to that of the occupant. The latter may, at any time, before they are barred by the statute of limitations, bring an action against the occupant to recover possession of which they are deprived; while the occupant, being in the enjoyment of all his rights, has, without the aid of the statute, no right of action until he has in some manner been interfered with. He would therefore have to await the leisure of those claiming adversely, and they may never urge their claims until the evidences of which the title of the occupant is established, or their own repelled, may become lost or obscured. To avoid such a contingency the statute authorizes the occupant to institute proceedings against any one claiming an adverse interest or estate to establish his claim, or abandon it altogether." "This statute is intended to afford an easy and expeditious mode of quieting conflicting claims to land and in a state where real property is the subject of constant traffic, is very beneficial in clearing up and removing doubts which may hang over titles and embarrass both purchaser and seller." Steele v. Fish, 2 M. 153 G. 129; Meighen v. Strong, 6 M. 177 G. 111; Walton v. Perkins, 28 M. 413; Bausman v. Faue, 45 M. 412.

Whether legal or equitable.

§ 899. The action is to be deemed legal or equitable according as the issues present legal or equitable rights or titles to be determined. Morris v. McClary, 43 M. 346; Bausman v. Faue, 45 M. 412; Roussain v. Patten, 46 M. 308; Scofield v.

Quinn, 54 M. 9; Stuart v. Lowry, 49 M. 91; Barber v. Evans, 27 M. 93.

Kinds of interests determined.

§ 900. Any interest or estate in or lien upon land claimed adversely to the plaintiff, whether claimed under the same or a different and independent source from that under which the plaintiff claims may be determined. State v. Bachelder, 5 M. 223 G. 178; Barber v. Evans, 27 M. 92; School District v. Wrabeck, 31 M. 77; Donohue v. Ladd, 31 M. 244; Walton v. Perkins, 33 M. 357; Bausman v. Faue, 45 M. 412; Stuart v. Lowry, 49 M. 91; Scofield v. Quinn, 54 M. 9; Alt v. Graff, 65 M. 191; Banning v. Bradford, 21 M. 308; Brown v. Jones, 52 M. 484.

§ 901. The statute authorizes an action to determine one particular adverse claim which may be specified or described in the complaint, and if an equitable action to remove a cloud cannot be sustained as such, it may still be sustained as an action to determine adverse claims under the statute, if the complaint is sufficient for that purpose. Palmer v. Yorks, 79 N. W. 587. Overruling in this particular, Walton v. Perkins, 28 M. 413; Knudson v. Curley, 30 M. 433; Bovey De Laittre Co. v. Dow, 68 M. 273.

Who may maintain an action.

§ 902. An equitable owner may bring an action under the statute and secure a judgment barring the defendant from asserting title. Roy v. Ry. Co., 69 M. 547; School District v. Wrabeck, 31 M. 77.

§ 903. "One having no property interest in real estate, and who is not in possession, is not entitled to maintain an action under the statute to determine a claim of title asserted by another." Jellison v. Halloran, 40 M. 485; James v. St. Paul, 72 M. 138; Eide v. Clarke, 65 M. 466.

Complaint—generally.

§ 904. It is not necessary for the plaintiff, in his complaint, to anticipate or state the nature of the adverse claim. "All

that the complaint need allege of defendant is that he claims some estate or interest in or lien on the land, without showing that the claim is invalid, or that defendant does plaintiff any wrong in making it." Walton v. Perkins, 28 M. 415; Stuart v. Lowry, 49 M. 91; Barber v. Evans, 27 M. 92; Bovey De Laittre Lumber Co. v. Dow, 68 M. 273.

§ 905. The statutory conditions entitling the plaintiff to relief must be alleged. Jellison v. Halloran, 40 M. 485.

Complaint—when plaintiff is in possession.

§ 906. All that plaintiff need allege is that he is in actual possession and that defendant claims an estate or interest in or lien on the land. Steele v. Fish, 2 M. 153 G. 129; Wilder v. St. Paul, 12 M. 192 G. 116; Barber v. Evans, 27 M. 92; Herrick v. Churchill, 35 M. 318; Baker v. Thompson, 36 M. 314; Knight v. Alexander, 38 M. 384; Child v. Morgan, 51 M. 116; Eide v. Clarke, 65 M. 466. See § 913.

Complaint—when land is vacant or unoccupied.

§ 907. When the land is vacant plaintiff must allege some title or interest in himself.[1] If he is the equitable owner he should allege the facts giving rise to his equity.[2]

[1] Myrick v. Coursalle, 32 M. 153; Herrick v. Churchill, 35 M. 318; Jellison v. Halloran, 40 M. 485; Wakefield v. Day, 41 M. 344; Pinney v. Russell & Co., 52 M. 443; Wheeler v. Paper Mills, 62 M. 429; James v. St. Paul, 72 M. 138.

[2] See Duford v. Lewis, 43 M. 26 and § 921.

§ 908. It is not sufficient for the plaintiff to allege that he "claims" title. Herrick v. Churchill, 35 M. 318.

§ 909. Plaintiff must allege that the land is vacant or unoccupied. Conklin v. Hinds, 16 M. 457 G. 411; Jellison v. Halloran, 40 M. 485.

Burden of proof—generally.

§ 910. Whether plaintiff is or is not in possession or the land vacant or not does not go to the merits of the controversy and if the defendant in his answer demands affirmative relief he is held to waive the question and the plaintiff is accordingly relieved of the necessity of proving possession or va-

cancy. Hooper v. Henry, 31 M. 264; Windom v. Schuppel, 39 M. 35; Abraham v. Halloway, 41 M. 163; Burk v. Lacock, 41 M. 250; Mitchell v. McFarland, 47 M. 535; Todd v. Johnson, 56 M. 60; McRoberts v. McArthur, 62 M. 310; Palmer v. Yorks, 79 N. W. 587; Kipp v. Hagman, 75 N. W. 746.

Burden of proof—plaintiff in possession.

§ 911. To make out a *prima facie* case plaintiff must prove his possession if it is denied in the answer.[1] It is not indispensable that he should prove possession of all of the land described in the complaint. He may succeed as to a part of the land and fail as to the remainder.[2]

[1] Wilder v. St. Paul, 12 M. 192 G. 116; Murphy v. Hinds, 15 M. 182 G. 139; Walton v. Perkins, 28 M. 413; Herrick v. Churchill, 35 M. 318; Stuart v. Lowry, 49 M. 91; Lind v. Lind, 53 M. 48; Miesen v. Canfield, 64 M. 513.

[2] Wellendorf v. Tesch, 80 N. W. 629.

§ 912. To prove possession is all that plaintiff need do to throw the burden upon defendant of proving his claim. Plaintiff is not required to go further and prove title. His title or interest in the land is in nowise in issue. Even though he has alleged title in his complaint and it is denied in the answer no issue is formed thereon. The statute proceeds upon the theory that possession is itself sufficient title to compel a person out of possession asserting an adverse claim to come forward and prove the validity of his claim. "Possession is *prima facie* evidence of title, and in all cases may ripen into title, and every false or unfounded adverse claim is a trespass on the rights of the person in possession which no third party has a right, either morally or legally, to commit." The only question involved is the validity of the claim of the defendant. If the claim of the defendant is unfounded judgment must be given the plaintiff regardless of his own title. Whether plaintiff has a good title against the world is no concern of one who makes an unfounded claim and the statute gives a party in the actual possession of land the right to have adverse claims determined although in point of fact he has not a good title

as against other parties. Under no circumstances can the defendant in this form of action attack the title of the plaintiff. See the cases cited under §§ 911, 914.

§ 913. The possession which plaintiff must prove is an actual possession. A mere constructive possession is insufficient. Steele v. Fish, 2 M. 153 G. 129; State v. Batchelder, 5 M. 239 G. 178; Hamilton v. Batlin, 8 M. 404 G. 359; Wilder v. St. Paul, 12 M. 192 G. 116; Eastman v. Lamprey, 12 M. 153 G. 89; Murphy v. Hinds, 15 M. 182 G. 139; Byrne v. Hinds, 16 M. 521 G. 469; Conklin v. Hinds, 16 M. 457 G. 411; Greene v. Dwyer, 33 M. 403; Miesen v. Canfield, 64 M. 513.

§ 914. When the plaintiff has made out a *prima facie* case in proof of his actual possession the burden of proof shifts and the defendant must either overcome plaintiff's *prima facie* proof of possession or prove a valid claim. The plaintiff carries the burden of proving possession against every attack of the defendant. The defendant carries the burden of proving his claim against every attack of the plaintiff. Defendant cannot attack plaintiff's title. His own title and plaintiff's possession are the only questions at issue. Wilder v. St. Paul, 12 M. 192 G. 116; Walton v. Perkins, 28 M. 413; Stuart v. Lowry, 49 M. 91; Herrick v. Churchill, 35 M. 318.

Burden of proof—land vacant.

§ 915. Plaintiff has the burden of establishing a good title in himself and he carries this burden throughout the trial against every attack. He has no right to compel the defendant to disclose and prove his claim unless he himself has a good title. But all that he need to do in the first instance to shift the burden of going on with the evidence is to make out his title *prima facie*. Walton v. Perkins, 28 M. 413; Myrick v. Coursalle, 32 M. 153; Jellison v. Halloran, 40 M. 485; Wakefield v. Day, 41 M. 344; Pinney v. Russell & Co., 52 M. 443; Wheeler v. Paper Mills, 62 M. 429; McRoberts v. McArthur, 62 M. 310.

§ 916. He must prove an estate or interest. A mere right of action is insufficient. James v. St. Paul, 72 M. 138.

§ 917. When the plaintiff has made out a *prima facie* case in proof of his title the burden of going on with the evidence shifts. Two courses are open to the defendant:

(a) He may attack the title of plaintiff. If he succeeds in overcoming plaintiff's *prima facie* case the burden of going on with the evidence shifts back upon the plaintiff for he must prove a good title against every attack. If, when all the evidence is in bearing on plaintiff's title, it appears that he has not a good title, the action should be dismissed upon motion of defendant. The latter is not called upon to disclose and prove a claim against a person who has no title. Wakefield v. Day, 41 M. 344; Pinney v. Russell & Co., 52 M. 443; Campbell v. Jones, 25 M. 155.

(b) He may if unable to attack successfully the title of the plaintiff, prove his own claim. The burden of establishing his claim rests upon the defendant throughout the trial. He must meet every attack of the plaintiff. The burden of going on with the evidence shifts to the plaintiff when the defendant has made out a *prima facie* case in proof of a valid claim but the burden of establishing the claim of the latter does not shift. Walton v. Perkins, 28 M. 413; Campbell v. Jones, 25 M. 155; Alt v. Graff, 65 M. 191.

Answer.

§ 918. If the defendant does not wish to litigate his claim and is able to disprove the possession or title of the plaintiff he may content himself with a general denial but this is very rarely the case.[1] The form of the answer is necessarily determined by the form of the complaint. Assuming that the complaint is in the forms given in the text, what should be the form of the answer? The practice is very variant. It depends somewhat upon the nature of defendant's claim. If he has an estate carrying the right of immediate possession and the plaintiff is in possession it is advisable for him to allege his claim in the form of a counterclaim and demand possession

as in an action in the nature of ejectment. See § 893. By this means he secures the right of a second trial under the statute. The forms given in §§ 893–896 indicate sufficiently the general requirements of answers.

[1] See Wheeler v. Winnebago Paper Co., 62 M. 429.

§ 919. The defendant should draft his answer as if he were the plaintiff setting forth his claim against a defendant. Walton v. Perkins, 28 M. 415; Stuart v. Lowry, 49 M. 91.

§ 920. The defendant may set up a claim of title from several sources. Branham v. Bezanson, 33 M. 49.

§ 921. If defendant's claim or title is an equitable one the facts constituting the equity must be alleged with as much particularity as in a bill in equity and cannot be shown under an allegation of title and ownership in fee. Stuart v. Lowry, 49 M. 91.

§ 922. If the defendant claims a lien he should set forth all the facts giving rise to the lien.

§ 923. "It is for the defendant to disclose the nature of his claim in his answer, and thereupon a case is presented for the determination of the court, upon the pleadings and proofs, as to the validity of such claim as against the plaintiff. If his claim rests upon a legal title to the property, the sole question for determination is as to the sufficiency of such title, as against the plaintiff's possession, under the rules of law applicable to questions of that character. If the claim is an equitable one, equitable principles and rules must govern in its determination; and in settling the rights of the parties in respect thereto the court may exercise its equity powers in granting whatever relief the nature of the case, upon the facts, may require, upon such terms and conditions as may be necessary to do complete justice." Barber v. Evans, 27 M. 93; Stuart v. Lowry, 49 M. 91; Morris v. McClary, 43 M. 346.

Reply.

§ 924. When the defendant asserts a legal title in himself a plaintiff in possession may, in reply, plead facts showing an equitable title of such a nature that it should prevail over the

alleged title of the defendant. State v. Bachelder, 5 M. 223 G. 178; School District v. Wrabeck, 31 M. 77; Scofield v. Quinn, 54 M. 9; James v. St. Paul, 72 M. 138. See further as to replies in this form of action and the issues that may be raised: Broughton v. Sherman, 21 M. 431; Bailey v. Galpin, 40 M. 319; Weider v. Gehl, 21 M. 449; Mueller v. Jackson, 39 M. 431; Alt v. Graff, 65 M. 191; Scofield v. Quinn, 54 M. 9; Hunter v. Cleveland Stove Co., 31 M. 505; Eide v. Clarke, 65 M. 466; James v. St. Paul, 72 M. 138.

Second trial of right under G. S. '94, § 5845.

§ 925. If the plaintiff is in possession and the defendant in his answer alleges ownership, possession of plaintiff and a withholding and demands possession either party has a right to a new trial. Eastman v. Linn, 20 M. 433 G. 387; Knight v. Valentine, 35 M. 367.

Statute of limitations.

§ 926. London etc. Co. v. Gibson, 80 N. W. 205 (waiver by asserting title and claiming affirmative relief); City of St. Paul v. Ry. Co., 45 M. 387.

Right to jury trial.

§ 927. Ordinarily there is no constitutional right to a jury trial in this form of action. Roussain v. Patten, 46 M. 308.

Disclaimer.

§ 928. Perkins v. Morse, 30 M. 11; Brackett v. Gilmore, 15 M. 245 G. 190; Donohue v. Ladd, 31 M. 244; Morrill v. Little Falls Mfg. Co., 46 M. 260.

Judgment on the pleadings.

§ 929. Jellison v. Halloran, 40 M. 485; Morrill v. Little Falls Mfg. Co., 46 M. 260; Perkins v. Morse, 30 M. 11; Wheeler v. Winnebago Paper Mills, 62 M. 429. Overruling, Donohue v. Ladd, 31 M. 244.

Judgment.

§ 930. Walton v. Perkins, 33 M. 357; Windom v. Wolverton, 40 M. 439; School District v. Wrabeck, 31 M. 77; Myrick v. Coursalle, 32 M. 153; Perkins v. Morse, 30 M. 11; Donohue v. Ladd, 31 M. 244.

CHAPTER XXIX

ANOTHER ACTION PENDING

§ 931. Form of answer.

The defendant for answer to the complaint herein alleges that at the commencement of this action there was and still is another action pending in the district court in and for the county of , in this state, between the parties to this action and for the same cause of action as that set forth in the complaint.[1]

[1] Wilson v. Ry. Co., 44 M. 445.

NOTES

Nature of defence.

§ 932. "The great end to be subserved by the rule which recognizes the plea of another action pending between the same parties, for the same cause of action, as a good defence, is to prevent a party from being harassed by a multiplicity of suits for the same cause of action, and that he may not be compelled to maintain the issues on his part in any action so long as they are in possession of another tribunal competent to determine such issues, where they may be disposed of." Merriam v. Baker, 9 M. 40 G. 28.

In what cases allowed.

§ 933. "The pendency of a former action for the same cause, and between the same parties, may be shown in abatement, where a judgment in such action would be a bar to a judgment in the second action; and it is not material that the form of the two actions may differ, or that there are additional parties defendant in such former suit, if each action is predicated upon substantially the same facts as respects the defendants named in both." Beyersdorf v. Sump, 39 M. 495; Drea v. Cariveau, 28 M. 280; Matthews v. Hennepin County

Bank, 44 M. 442; Coles v. Yorks, 31 M. 213; Wilson v. Ry. Co., 44 M. 445; Majerus v. Hoscheid, 11 M. 243 G. 160; Welsh v. Ry. Co., 25 M. 314; Williams v. McGrade, 18 M. 82 G. 65; Porter v. Fletcher, 25 M. 493; Wetherell v. Stewart, 35 M. 496; Robinson v. Hagenkamp, 52 M. 101; Oswald v. St. Paul Globe Pub. Co., 60 M. 82; Richardson v. Merritt, 77 N. W. 234 (pendency of another action as ground for a stay); Wolf v. Ry. Co., 72 M. 435 (effect of unauthorized action).

§ 934. The pendency of an action *in personam* in another state is no ground for abatement. Sandwich Mfg. Co. v. Earl, 56 M. 390.

§ 935. The pendency of a prior action by attachment in another state is ground for a continuance or stay of execution. Harvey v. Ry. Co., 50 M. 405.

§ 936. The garnishment of a defendant by a creditor of the plaintiff is ground for a stay. Blair v. Hilgedick, 45 M. 23.

§ 937. Proceedings in insolvency are not an "action pending." Leuthold v. Young, 32 M. 122.

§ 938. It must affirmatively appear that the other action is still pending. Phelps v. Ry. Co., 37 M. 485; Capeheart v. Van Campen, 10 M. 158 G. 127; Larson v. Shook, 68 M. 30; Thornton v. Webb, 13 M. 498 G. 457; Blandy v. Raguet, 14 M. 491 G. 368.

§ 939. "Where a defendant attempts to plead in abatement the pendency of a former action, which has been dismissed by the court below, but which he claims is pending on appeal to this court, it is essential to allege at least that such appeal was taken and the *supersedeas* bond filed prior to the commencement of the present suit." Althen v. Tarbox, 48 M. 18.

§ 940. "Upon a plea or answer showing the pendency of a former suit between the same parties for the same cause, it is competent for the plaintiff to dismiss the first suit, and to set up such dismissal in his reply, which will constitute a good answer to such plea." Page v. Mitchell, 37 M. 368;

Nichols v. State Bank, 45 M. 102; Althen v. Tarbox, 48 M. 18. See Wolf v. Ry. Co., 72 M. 435.

§ 941. If the complaint in the former action does not state a cause of action it will not sustain a plea of former action pending but the plaintiff cannot take advantage of anything short of a fatal defect in his own pleading. Drea v. Cariveau, 28 M. 280.

§ 942. "Under a plea of another action pending, such action is to be deemed pending, if the court in which it is has jurisdiction of actions of that class or character, although there be a question yet undecided by that court, whether it has acquired jurisdiction of that particular case." Merriam v. Baker, 9 M. 40 G. 28.

§ 943. "Upon a plea of a former action pending, when it appears that such former action has been tried, it is competent for the party to prove that at such trial and before submission of the cause, he withdrew a portion of the demand." Estes v. Farnham, 11 M. 423 G. 312.

CHAPTER XXX

ASSAULT AND BATTERY

§ 944. Assault.[1]

The plaintiff complains of defendant and alleges:

That on the day of , 19 , in the city of , defendant assaulted plaintiff to his damage dollars.

Wherefore [demanding judgment].

[1] Sustained by Mitchell v. Mitchell, 45 M. 50; State v. Bell, 26 M. 388.

§ 945. For assault and battery without special damages.[1]

The plaintiff complains of defendant and alleges:

That on the day of , 19 , in the city of defendant [wilfully and maliciously [2]] assaulted and beat plaintiff to his damage [3] dollars.

Wherefore [demanding judgment].

[1] Sustained by Andrews v. Stone, 10 M. 72 G. 52; Greenman v. Smith, 20 M. 418 G. 370; Mitchell v. Mitchell, 45 M. 50; State v. Bell, 26 M. 388; Foran v. Levin, 78 N. W. 1047. See as to essentials of complaint against master for assault of servant, Campbell v. Ry. Co., 51 M. 488; Johanson v. Pioneer Fuel Co., 72 M. 405.

[2] Add when punitive damages are sought.

[3] Andrews v. Stone, 10 M. 72 G. 52; Crosby v. Humphreys, 59 M. 92; Fredericksen v. Singer Mfg. Co., 38 M. 356; Warren v. Westrup, 44 M. 237.

§ 946. Assault and battery with special damages.

The plaintiff complains of defendant and alleges:

I. [As in preceding form.]

II. That plaintiff was thereby disabled and prevented from attending to his business for weeks to his loss dollars and was compelled to pay for medical attendance and medicines dollars.

Wherefore [demanding judgment].

§ 947. Answer setting up self-defence.

The defendant for answer to the complaint herein alleges that plaintiff first assaulted defendant who thereupon necessarily committed the acts complained of in self-defence.

CHAPTER XXXI

ATTACHMENT

Nature of proceeding.

§ 948. "The proceeding by writ of attachment is in its nature anomalous, and, being unknown to the common law, has never been particularly favored by the courts. It appears to have been derived from a custom of the City of London, but has been materially varied and the remedy enlarged as adopted in this country. As it is a mere statutory remedy, it varies, of course, with the legislation of the different states. In some, it can be issued only upon a debt; in others, it extends to unliquidated damages arising from a breach of contract, if the contract affords a rule by which the damages can be ascertained; and in others it would seem to apply to all actions *ex contractu*. The tendency of modern legislation has been to enlarge this remedy. And, in proportion as the debtor's person and property have been relieved from the rigorous harshness of the common law, the grounds for which his property may be attached have been multiplied, and the list of causes of action for which an attachment will lie, has been extended. No state, however, has gone to such an extent as our's; for, while other states confine the writ to actions for debt, or, at most, to actions *ex contractu*, Minnesota has overstepped the bounds of precedent, if not, indeed, of prudence, and allows it to issue, upon the proper showing, in all actions for the recovery of money commenced in the district court, without even making a distinction between actions in tort and those arising out of contract." Davidson v. Owens, 5 M. 69 G. 50. See § 955.

§ 949. Attachment is a proceeding *in rem*. Harvey v. Ry. Co., 50 M. 405. See § 1250.

§ 950. It is a provisional remedy prosecuted not as an independent proceeding but in aid of the main action to which

it is ancillary and as security for the satisfaction of such judgment as the plaintiff may recover therein. Heffner v. Gunz, 29 M. 109; Day v. McQuillan, 13 M. 205 G. 192; Barber v. Morris, 37 M. 194; Atwater v. Savings Bank, 45 M. 346.

Construction of statute.

§ 951. "It has always been held that the proceeding by attachment not being of a remedial nature, the statute must be strictly construed. It cannot be extended by implication, to enforce rights or claims of the creditor beyond what the letter of the statute allows." Caldwell v. Sibley, 3 M. 406 G. 300. See, however, Cole v. Aune, 40 M. 80; Baxter v. Nash, 70 M. 20.

A matter of right.

§ 952. The statute gives a party an absolute right to the allowance of the writ upon filing the requisite affidavit and bond. Nelson v. Gibbs, 18 M. 541 G. 485.

In what actions allowed.

§ 953. "In an action for the recovery of money, the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover." G. S. '94, § 5287.

§ 954. Attachment may issue in any action for the recovery of money whether arising *ex contractu* or *ex delicto*, except as provided in the next section. Davidson v. Owens, 5 M. 69 G. 50; Morrison v. Lovejoy, 6 M. 183 G. 117.

§ 955. "The writ of attachment shall not be allowed in actions for libel, slander, seduction, breach of promise of marriage, false imprisonment or assault and battery." G. S. '94, § 5289.

At what time may issue.

§ 956. An attachment may issue simultaneously with the summons or any time thereafter. Blackman v. Wheaton, 13

M. 326 G. 299. See Blake v. Sherman, 12 M. 420 G. 305. See § 953.

Jurisdiction—how acquired.

§ 957. The action is not commenced by the attachment but by service of summons and the failure to make such service of the summons, actual or constructive, as is authorized by statute, leaves the court without jurisdiction to enter a judgment against the defendant. Heffner v. Gunz, 29 M. 108; Barber v. Morris, 37 M. 194.

§ 958. An action against a non-resident, although in form *in personam* is in effect *in rem* as it is only by attaching property that the court acquires jurisdiction to proceed further and then only to the extent of the property attached. Kenney v. Goergen, 36 M. 190; Plummer v. Hatton, 51 M. 181; Cousins v. Alworth, 44 M. 505; Daly v. Bradbury, 46 M. 396.

Who may allow writ.

§ 959. "A writ of attachment shall be obtained from a judge of the court in which the action is brought, or a court commissioner of the county." G. S. '94, § 5288. See Laws 1897, ch. 311, as to authority of court commissioners.

§ 960. The clerk has no authority to issue the writ. Morrison v. Lovejoy, 6 M. 183 G. 117; Zimmerman v. Lamb, 7 M. 421 G. 336; Guerin v. Hunt, 8 M. 477 G. 427; Jacoby v. Drew, 11 M. 408 G. 301; Merritt v. St. Paul, 11 M. 223 G. 145.

Property subject to attachment.

§ 961. "All goods and chattels, real and personal, all property, real, personal and mixed, including all rights and shares in the stock of any corporation, all money, bills, notes, book-accounts, debts, credits, and all other evidences of indebtedness, belonging to the defendant, are subject to attachment." G. S. '94, § 5292; Merriam v. Wagener, 77 N. W. 44.

§ 962. The interest of one member of a partnership in the property of the firm, whether tangible property or things in action, is attachable in a suit against such single member. But such attachment is subject to all partnership accounts.

Caldwell v. Auger, 4 M. 217 G. 156; Barrett v. McKenzie, 24 M. 20; Day v. McQuillan, 13 M. 205 G. 192; Hankey v. Becht, 25 M. 212; Wickham v. Davis, 24 M. 167; Allis v. Day, 13 M. 199 G. 189; Moquist v. Chapel, 62 M. 258.

§ 963. An equitable interest, at least if it is vested, is subject to attachment. Atwater v. Savings Bank, 45 M. 341, 345.

§ 964. Property *in custodia legis* cannot be attached. Noyes v. Beaupre, 32 M. 496; North Star etc. Co. v. Lovejoy, 33 M. 229; Strong v. Brown, 41 M. 304.

§ 965. The interest of the vendee under a subsisting contract for the sale of land, under which he has entered and made improvements and paid part of the purchase money is attachable. Reynolds v. Fleming, 43 M. 513.

§ 966. The interest of the vendor under such contract is attachable. Wells v. Baldwin, 28 M. 408.

§ 967. Before foreclosure the interest of a mortgagee cannot be attached. Butman v. James, 34 M. 547.

§ 968. An interest to be attachable must be a property interest and not merely an interest in the profits growing out of the use of property. Vose v. Stickney, 8 M. 75 G. 51; Hankey v. Becht, 25 M. 212.

§ 969. If the real property of a married person be attached and sold on execution the purchaser takes subject to the statutory interest of the other spouse. Dayton v. Corser, 51 M. 406.

§ 970. "The federal statutes (U. S. Rev. St. § 5242) prohibit the issuance of writs of attachment by the state courts before final judgment against national banking associations or their property." First Nat. Bank v. La Due, 39 M. 415.

§ 971. Money or other personal property of the debtor in his pocket which he refuses to deliver into the custody of the officer cannot be attached and the general rule, except as expressly limited by statute, is that personal property not in view and such property incapable of being reduced to possession by the officer is unattachable. Caldwell v. Libley, 3 M. 406 G. 300.

§ 972. A creditor may attach real estate of his debtor previously transferred with intent to defraud creditors. Arper v. Baze, 9 M. 108 G. 98.

Grounds of attachment—affidavit.

§ 973. "The writ of attachment shall be allowed whenever the plaintiff, his agent or attorney, shall make affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof; and that the plaintiff's debt was fraudulently contracted; or that the defendant is either a foreign corporation, or not a resident of this state; or has departed therefrom, as deponent verily believes, with intent to defraud or delay his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent; or has assigned, secreted or disposed of, or is about to assign, secrete or dispose of his property with intent to delay or defraud his creditors." G. S. '94, § 5289.

Who is a non-resident.

§ 974. "A debtor may reside or remain out of the state so long and under such circumstances as to be a non-resident, within the meaning of the statute relating to attachments, although by reason of his intention to return his political domicile continues to be in the state. It is a question of actual residence, and not of domicile merely, and this is a question of fact to be determined by the ordinary and obvious indicia of residence. But a mere casual or temporary absence of a debtor from the state on business or pleasure will not render him a non-resident, even although he may not have a house of usual abode here, at which a summons against him might be served during such absence." Keller v. Carr, 40 M. 428. See also, Lawson v. Adlard, 46 M. 243; Fitzgerald v. McMurran, 57 M. 312.

Debts fraudulently contracted.

§ 975. Lewis v. Pratt, 11 M. 57 G. 31; Cole v. Aune, 40 M. 80; Baxter v. Nash, 70 M. 20.

Affidavit for attachment—rules governing.

§ 976. Under the old statute it was necessary to allege

facts from which it would affirmatively appear to the court that one of the specified grounds for attachment existed. Curtis v. Moore, 3 M. 29 G. 7; Pierse v. Smith, 1 M. 82 G. 60; Hinds v. Fagebank, 9 M. 68 G. 57; Morrison v. Lovejoy, 6 M. 183 G. 117; Keigher v. McCormick, 11 M. 545 G. 420; Blake v. Sherman, 12 M. 420 G. 305. All these cases were overruled by the amendment of 1867.

§ 977. The allegations of the affidavit must be positive. They cannot be "upon information and belief." Except in the cases specified it is insufficient to allege a fact "as deponent verily believes." Murphy v. Purdy, 13 M. 422 G. 390; Ely v. Titus, 14 M. 125 G. 93; Feikert v. Wilson, 38 M. 341; Morrison v. Lovejoy, 6 M. 183 G. 117.

§ 978. The plaintiff may make his application on several grounds provided they are not inconsistent. Hinds v. Fagebank, 9 M. 68 G. 57; Nelson v. Munch, 23 M. 229.

§ 979. When two or more grounds are assigned they must not be stated disjunctively. Guile v. McNanny, 14 M. 520 G. 391; Auerbach v. Hitchcock, 28 M. 72.

§ 980. It is not necessary to allege that summons has issued or suit commenced. Blake v. Sherman, 12 M. 420 G. 305.

§ 981. In an affidavit for an attachment against a non-resident it is not necessary to state that he has property in the state subject to attachment. Kenney v. Goergen, 36 M. 190.

§ 981a. The affidavit is a jurisdictional prerequisite to the issuance of a valid writ of attachment against the property of a non-resident, and if none be filed, or one be filed which wholly fails to set out some fact required by law to be stated therein, no writ can lawfully issue. If a writ of attachment be issued upon such a defective affidavit and the defendant does not appear in the action, the writ and all subsequent proceedings, including the publication of the summons, entry of judgment and issuance of execution and sale thereunder are null and void and may be assailed collaterally. An affidavit

for attachment which wholly fails to state the grounds of plaintiff's claim against defendant is fatally defective, and confers no jurisdiction to allow the writ. Duxbury v. Dahle, Dec. 1899.

§ 982. Although it is the proper practice yet it is not indispensable that the affiant should sign his name to the affidavit. Norton v. Hauge, 47 M. 405.

§ 983. When the affidavit is made by an agent or attorney it should state or recite that affiant is such agent or attorney. West v. Berg, 66 M. 287.

§ 984. Form of affidavit for attachment.

[Title of action]

State of Minnesota)
County of) ss.

, being duly sworn says:

I. That he is [the agent of] [the attorney of] the plaintiff in the above entitled action.

II. That it is brought for the recovery of money.

III. That a cause of action exists in favor of the plaintiff against the defendant therein.

IV. That the amount of said claim is dollars.

V. That the ground of said claim is [giving a summarized statement of the complaint].

VI. [That said debt of the plaintiff owing by the defendant was fraudulently contracted.] [That the defendant is a foreign corporation.] [That the defendant is not a resident of this state.] [That the defendant has departed from this state, as deponent verily believes, with intent to defraud or delay his creditors.] [That the defendant has departed from this state, as deponent verily believes, to avoid the service of a summons.] [That the defendant, as deponent verily believes, keeps himself concealed within this state to avoid the service of a summons.] [That the defendant has assigned, secreted or disposed of his property with intent to delay or defraud his creditors.[1]] [That the defendant is about to assign, secrete or dispose of his property with intent to delay or

defraud his creditors.[1]] [That defendant has disposed of a part of his property, with intent thereby to delay and defraud the plaintiff and is about to dispose of the rest of his property with the same intent.[2]]

Wherefore the plaintiff, who has made no other application therefor, prays that a writ of attachment issue out of this court in the above entitled action against the property of the defendant therein.

[Jurat] .....

Upon the filing of the foregoing affidavit and an indemnifying bond approved by me let a writ of attachment issue out of this court in the above entitled action against the property of the defendant therein.

[Date] .....

District Judge.

[1] Sustained by Brown v. Minneapolis Lumber Co., 25 M. 461; Guile v. McNanny, 14 M. 520 G. 391.

[2] Sustained by Nelson v. Munch, 23 M. 229; Auerbach v. Hitchcock, 28 M. 73.

Indemnifying bond—the statute.

§ 985. "Before issuing the writ, the judge or court commissioner shall require a bond on the part of the plaintiff, with sufficient sureties, conditioned that if the defendant recovers judgment, or if the writ shall be set aside or vacated, the plaintiff will pay all costs that may be awarded to the defendant, and all damages that he may sustain by reason of the attachment, not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars." G. S. '94, § 5290.

Indemnifying bond—rules governing.

§ 986. The giving of a proper bond is jurisdictional. In its absence the attachment is void.[1] An undertaking is sufficient.[2]

[1] Gable v. Brooks, 48 Md. 115; Baldwin v. Ferguson, 35 Ill. App. 393. But see Blake v. Sherman, 12 M. 420 G. 305; Schweigel v. L. A. Shackman Co., 80 N. W. 871.

[2] Schweigel v. L. A. Shackman Co., 80 N. W. 871.

§ 987. A bond executed for an attachment allowed by the clerk is void. Jacoby v. Drew, 11 M. 408 G. 301.

§ 988. The plaintiff is not an essential party to the bond. A principal obligor is not essential. Howard v. Manderfield, 31 M. 337.

§ 989. The obligors are liable for all costs that may be awarded the defendant and not merely such as may result from the attachment. Greaves v. Newport, 41 M. 240.

§ 990. The obligors are not liable for attorney's fees expended in defending the main action. Frost v. Jordan, 37 M. 544.

§ 991. The liability of the obligors is dependent upon recovery of judgment by the defendant. Crandall v. Rickley, 25 M. 119.

§ 992. Form of indemnifying bond.

[Title of action]

State of Minnesota)
County of) ss.

Know all men by these presents that we , as principal, and and , as sureties, are bound unto , the defendant in the above entitled action in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the plaintiff in the above entitled action has applied for a writ of attachment against the property of the defendant therein,

Now, therefore, if the defendant shall recover judgment in said action or the writ of attachment therein granted shall be set aside or vacated and the plaintiff therein shall pay all costs that may be awarded to the defendant therein and all damages that he may sustain by reason of said attachment, not exceeding the penalty of this bond, then this obligation,

which is given in pursuance of General Statutes 1894, § 5290, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

In the presence of: [No seal]

§ 993. Acknowledgment.

State of Minnesota }
County of } ss.

On the day of , 19 , before me a notary public within and for said county, personally appeared

to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal] .....

Notary Public, County.

§ 994. Justification.

State of Minnesota }
County of } ss.

being duly sworn, say, each for himself, that he is one of the sureties named in the foregoing bond; that he is a resident and freeholder of this state and worth the amount of dollars specified in said bond, above his debts and liabilities and exclusive of his property exempt from execution.

[Jurat] .....

.....

The foregoing bond is hereby approved.

[Date] .....

District Judge.

Writ—statute.

§ 995. "The writ shall be directed to the sheriff of any county in which the property of such defendant may be, and require him to attach and safely keep all the property of such defendant within his county, and not exempt from execution,

or so much thereof as may be sufficient to satisfy the plaintiff's demand, with costs and expenses, the amount of which demand shall be stated in conformity with the complaint. Several writs may be issued at the same time to the sheriffs of different counties." G. S. '94, § 5291.

Writ—rules governing.

§ 996. The writ need not show by what officer it was allowed. Shaubert v. Hilton, 7 M. 506 G. 412.

§ 997. A slight variance in the amounts stated in the writ and complaint is immaterial. Shaubert v. Hilton, 7 M. 506 G. 412.

§ 998. It must issue under the seal of the court, be dated, signed by the clerk and tested in the name of the presiding judge. G. S. '94, §§ 4847, 4848; Wheaton v. Thompson, 20 M. 196 G. 175; O'Farrell v. Heard, 22 M. 189.

§ 999. Form of writ of attachment.

[Title of action]

The State of Minnesota to the sheriff of county, Greeting:

Whereas in the above entitled action an application has been duly made for a writ of attachment against the property of defendant therein and such application was on the day of , 19 , allowed and a writ ordered by the Honorable , judge of said court, and the bond required by law has been duly executed and filed,

Now, therefore, you are hereby commanded and required to attach and safely keep all the property of said within your county and not exempt from execution, or so much thereof as may be sufficient to satisfy the demand of the plaintiff in said action, which amounts to the sum of dollars, with costs and expenses, and that you proceed herein and make return as provided by law.

Witness the Honorable , judge of said district court and the seal thereof this day of , 19 .

[Seal] .....

Clerk.

Execution of the writ.

§ 1000. (a) First section: G. S. '94, § 5293: Corser v. Shoemaker, 55 M. 386, 397.

(b) Second section: The statute is imperative. Personal property, physically capable of manual delivery, cannot be attached by service of a notice and a certified copy of the writ, but only by taking it into custody. Caldwell v. Sibley, 3 M. 406 G. 300.

(c) Third section: Caldwell v. Sibley, 3 M. 406 G. 300; Molm v. Barton, 27 M. 530.

(d) Fifth section: Ide v. Harwood, 30 M. 191, 196; Lesher v. Getman, 30 M. 321; Swart v. Thomas, 26 M. 141.

Sheriff may sell perishable property and collect debts.

§ 1001. "If any of the property attached is perishable, the sheriff shall sell the same, in the manner in which property is sold on execution. He may also take such legal proceedings, either in his own name, or in the name of the defendant, as are necessary to collect all debts, credits and effects of said defendant, and discontinue the same at such times, or on such terms, as the court or judge may direct." G. S. '94, § 5295; Caldwell v. Sibley, 3 M. 406 G. 300; Rohrer v. Turrill, 4 M. 407 G. 310; Wheaton v. Thompson, 20 M. 196 G. 180.

Sheriff has a special property.

§ 1002. A levy on goods gives the sheriff a special property therein. Wheaton v. Thompson, 20 M. 196 G. 175.

Return of officer.

§ 1003. "When the writ of attachment is fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought." G. S. '94, § 5301; Allis v. Day, 13 M. 199 G. 189; Cousins v. Alworth, 44 M. 505; State v. Penner, 27 M. 269; Butler v. White, 25 M. 432; Ryan Drug Co. v. Peacock, 40 M. 470.

Judgment—relation of to attachment.

§ 1004. When judgment is recovered in the action the

practice is to enter a general money judgment and issue a general execution without referring specially to the attachment. Hencke v. Twomey, 58 M. 550.

§ 1005. After the judgment is entered the lien of the attachment is merged in the judgment. McDonald v. Clark, 53 M. 230.

Claim of property by third party—affidavit—statute.

§ 1006. "If any property levied upon or taken by a sheriff, by virtue of a writ of execution, attachment, or other process, or in an action of claim and delivery, is claimed by any other person than the defendant or his agent, and such person, his agent or attorney, makes affidavit of his title thereto, or right to the possession thereof, stating the value thereof, and the ground of such title or right, the sheriff may release such levy or taking, unless the plaintiff, on demand, indemnify the sheriff against such claim, by bond executed by two sufficient sureties, accompanied by their affidavit that they are each worth double the value of the property as specified in the affidavit of the claimant of such property, and are freeholders and residents of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless so made; and notwithstanding such claim, when so made, he may retain such property under a levy a reasonable time to demand such indemnity." G. S. '94, § 5296, as amended by Laws 1897, ch. 171.

§ 1007. This statute is applicable only to cases where the property seized was found in the possession of the defendant named in the writ or his agent so as to create an appearance or presumption of ownership in him. Barry v. McGrade, 14 M. 163 G. 126; Tyler v. Hanscom, 28 M. 1; Ohlson v. Manderfeld, 28 M. 390; Granning v. Swenson, 49 M. 381; Butler v. White, 25 M. 432; Lampsen v. Brander, 28 M. 526; Moulton v. Thompson, 26 M. 120; Livingston v. Brown, 18 M. 308 G. 278; Lesher v. Getman, 30 M. 321; Perkins v. Varracher, 32 M. 71; Hazeltine v. Swensen, 38 M. 424; Johnson v. Bray, 35 M. 248.

§ 1008. A statement in the affidavit that the claimant is

the owner of the property is a sufficient statement of the ground of his title or right to possession. An agent making an affidavit under the statute may state the facts as upon information furnished him by his principal. The affidavit should allege the claimant's ownership at the time of the levy as well as at the time of the demand. Carpenter v. Bodkin, 36 M. 183; Schneider v. Anderson, 79 N. W. 603.

§ 1009. The affidavit and notice may be served on the deputy sheriff who made the levy and has the property in his possession. Williams v. McGrade, 13 M. 174 G. 165.

§ 1010. The statute is designed for the protection of the officer in the discharge of his duties. Heberling v. Jaggar, 47 M. 70; Schneider v. Anderson, 79 N. W. 603.

§ 1011. An attorney of a non-resident has implied authority to execute a bond, in the name of his client, under this statute. Schoregge v. Gordon, 29 M. 367.

§ 1012. Claim of property by third party—form of affidavit and notice.

[Title of action]

State of Minnesota }
County of } ss.

, being duly sworn says:

I. That on the day of , 19 , the sheriff of the county of , seized upon a writ of attachment issued in the above entitled action, the following described property:

[Describing property in general terms.]

II. That at the time of such seizure affiant was and still is the owner thereof.

III. That the same is of the value of dollars.

[Jurat] .....

To , Esq.,
Sheriff of county.

Take notice that I claim the property mentioned in the foregoing affidavit and demand the delivery thereof.

[Date] .....

Impleading plaintiff and obligors in bond under G. S. '94, § 5296, in action against sheriff.

§ 1013. "If, in such case, the person claiming ownership of such property commences an action against the sheriff for the taking thereof, the obligors in the bond provided for in the preceding section, and the plaintiff in such execution, attachment or other process, or action of claim and delivery, shall, on motion of such sheriff, be impleaded with him in such action. When, in such case, a judgment is rendered against the sheriff and his co-defendants, an execution shall be immediately issued thereon, and the property of such co-defendants shall be first exhausted before that of the sheriff is sold to satisfy such execution." G. S. '94, § 5297 as amended by Laws 1897, ch. 171; Lesher v. Getman, 30 M. 321; Richardson v. McLaughlin, 55 M. 489.

Bond for release of attachment—statute.

§ 1014. "A defendant whose property has been attached, may, at any time before trial, execute to the plaintiff a bond, in double the amount claimed in the complaint, or, if the value of the property attached be less than the amount claimed, then in double the value of the property, with two or more sureties, to be approved by the officer allowing the writ of attachment, or by the court commissioner of the county in which the defendant resides, conditioned that if the plaintiff recover judgment in the action, he will pay such judgment, or an amount thereof equal to the value of the property attached; and the officer approving such bond shall make an order discharging such attachment." G. S. '94, § 5299.

§ 1015. Where the defendant secures the discharge of the writ by executing a bond under this statute he thereby waives his right to move to dissolve under G. S. '94, § 5300. Rachelman v. Skinner, 46 M. 196.

§ 1016. Where the attachment is dissolved by the execution of a bond under this statute and without an opportunity to the opposite party to test its validity in the same proceeding, an action for wrongfully procuring it to issue cannot ordinarily be maintained. Id.

§ 1017. The obligors on such a bond are liable to an assignee of the plaintiff. Bond held sufficient. Slosson v. Ferguson, 31 M. 448.

§ 1018. The obligors on such a bond cannot when sued object that there were no sureties. Nor can they question the validity of the officer's levy. Scanlan v. O'Brien, 21 M. 434.

§ 1019. No one but the defendant can take advantage of this statute. Kling v. Child, 30 M. 366.

§ 1020. Appealability of order discharging attachment. Gale v. Seifert, 39 M. 171; State v. District Court, 52 M. 283.

§ 1021. Want of acknowledgment by sureties may be excused by judge. Gale v. Seifert, 39 M. 171. See Wheeler v. Paterson, 64 M. 231.

§ 1022. Bond for release of attachment—form of.

[Title of action]

Know all men by these presents that we, , as principal, and and , as sureties, are bound unto , the plaintiff in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas a writ of attachment has been issued in the above entitled action against the property of the defendant therein,

Now, therefore, if the plaintiff shall recover judgment in said action and the defendant shall pay the same or an amount thereof equal to the value of the property attached, then this obligation, which is given in pursuance of General Statutes 1894, § 5299, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

In the presence of: [No seal]

[Acknowledgment as in § 993 and justification as in § 994.]

Upon the filing of the foregoing bond which is hereby ap-

proved it is ordered that the writ of attachment issued out of this court in the above entitled action on the day of , 19 , be and the same is hereby discharged.

[Date] .....

District Judge.

MOTION TO VACATE

The statute.

§ 1023. "The defendant may, at any time before the time for answering expires, or at any time thereafter when he has answered, and before trial, apply to the court, on notice, to vacate the writ of attachment. If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits in addition to those on which the writ of attachment was allowed." G. S. '94, § 5300.

When may be made.

§ 1024. It may be made before levy, and it may be made after answering although the answer may be insufficient. See G. S. '94, § 5302 (5); McDonald v. Clark, 53 M. 230; First Nat. Bank v. Randall, 38 M. 382.

Must be made upon notice.

§ 1025. The statute expressly provides that the motion shall be made on notice. See Blake v. Sherman, 12 M. 420 G. 305.

Who may move.

§ 1026. An insolvent who has made an assignment. First Nat. Bank v. Randall, 38 M. 382; Richards v. White, 7 M. 345 G. 271.

§ 1027. A *bona fide* purchaser. Trows Printing Co. v. Hart, 85 N. Y. 500.

§ 1028. Subsequent lien claimants. Baird v. Williams, 19 Pick. 381; Dolan v. Topping, 51 Kans. 321; Gilbert v. Gilbert, 33 M. App. 259.

§ 1029. Claimants generally. Hines v. Kimball, 47 Ga. 587; Long v. Murphy, 27 Kans. 375.

Effect of failure to move.

§ 1030. "Where a void warrant of attachment is issued in an action, the defendant does not waive the objection to it, by not moving to vacate it." Merritt v. St. Paul, 11 M. 223 G. 145.

Practice on the hearing.

§ 1031. On a motion to vacate an attachment the court may determine the truth or falsity of the allegations of fact in the affidavit on which it is issued. Nelson v. Gibbs, 18 M. 541 G. 485; Drought v. Collins, 20 M. 374 G. 325.

§ 1032. If the motion is made upon affidavit the plaintiff may oppose the same by affidavits in addition to those upon which the writ was allowed. See § 1022.

§ 1033. "In the exercise of sound discretion it is competent for the court, upon the hearing of such motion, to permit the defendant to read affidavits rebutting the affidavits of the plaintiff read upon such hearing." Nelson v. Munch, 23 M. 229; Carson v. Getchell, 23 M. 571.

§ 1034. What affidavits may be read and in what order, and whether a continuance shall be granted to give a party opportunity to procure further proof are matters of discretion with the trial court. Carson v. Getchell, 23 M. 571.

§ 1035. The defendant may use his verified answer as an affidavit so far as its contents are pertinent. Nelson v. Munch, 23 M. 229.

§ 1036. Where the affidavits offered in opposition to the motion show that the moving party is entitled to the relief sought, though upon a ground not stated in the moving papers, he may take advantage of the ground thus shown. Richards v. White, 7 M. 345 G. 271.

Grounds for vacating.

§ 1037. The defendant may apply to have the writ vacated either because the statute has not been complied with in the

allowance and issuance of the writ or because the statements found in plaintiff's affidavit of the matters prescribed by statute as grounds for the allowance of the writ are untrue. Nelson v. Gibbs, 18 M. 541 G. 485.

§ 1038. It is no ground for vacating the writ that the officer has levied upon property not subject to levy. The question upon such a motion is the validity of the writ and it cannot be vitiated by any irregularity in the officer executing it. Davidson v. Owens, 5 M. 69 G. 50; Rosenberg v. Burnstein, 60 M. 18.

§ 1039. Upon such a motion the court cannot try the question whether the plaintiff has or has not a cause of action or the defendant a valid defence. Davidson v. Owens, 5 M. 69 G. 50. See Richards v. White, 7 M. 345 G. 271; Rosenberg v. Burnstein, 60 M. 18.

Burden of proof.

§ 1040. "When, upon a motion to vacate an attachment as improvidently issued, the defendant traverses the facts alleged as the grounds of the attachment, the burden is upon the plaintiff to prove their truth, and this he must do by competent evidence. A mere reiteration of the general statement of his original affidavit in the language of the statute, or a statement of mere opinion or belief, is not sufficient." Jones v. Swank, 51 M. 285.

§ 1041. Where the plaintiff's counter affidavits clearly and specifically state a badge of fraud they are not overcome or sufficiently contradicted by the general statements in the moving affidavits denying fraud. Rosenberg v. Burnstein, 60 M. 18.

Amendment of complaint and affidavit.

§ 1042. Heidel v. Benedict, 61 M. 170.

Possession of property pending appeal.

§ 1043. "Upon the dissolution of a writ of attachment the officer is not bound to retain the property to enable the plaintiff to appeal from the order dissolving it, and give a stay bond." Ryan Drug Co. v. Peacock, 40 M. 470.

§ 1044. Upon the dissolution of an attachment the special property of the officer in the attached effects is at end, and he is bound to restore them to defendant, if he is still the owner of them, or, if not, to the owner. It is true that under our practice the plaintiff may, by appealing from the order and giving bond for a stay, suspend the operation of the order, and that such suspension will relate back to the date of the order, so that, if the officer still has the property, his right to hold it is restored but it is for the plaintiff and not the sheriff to do what may be necessary to preserve the interests of the former in case of a dissolution of the writ. This he may do by procuring and serving on the officer an order directing him, in case the writ shall be dissolved, to retain the property, or staying the operation of the order dissolving in case it shall be made. (Id.)

Appeal.

§ 1045. "An appeal from an order refusing to dissolve an attachment cannot be prosecuted after the attachment has been released by executing and filing the statutory bond for that purpose." Thomas v. Craig, 60 M. 501.

Question on appeal.

§ 1046. The decision of the trial court on a motion to dissolve an attachment is conclusive on appeal unless there is a clear preponderance of evidence opposed to such decision. Finance Co. v. Hursey, 60 M. 17; Rosenberg v. Burnstein, 60 M. 18; Blandy v. Raguet, 14 M. 243 G. 179; First Nat. Bank v. Randall, 38 M. 382; Rand v. Getchell, 24 M. 319; Jones v. Swank, 51 M. 285; Brown v. Lumber Co., 25 M. 461; First Nat. Bank v. Buchan, 78 N. W. 878. See further: Eaton v. Wells, 18 M. 410 G. 369; Davidson v. Owens, 5 M. 69 G. 50.

CHAPTER XXXII

BONDS

[Non-negotiable]

§ 1047. Skeleton form of complaint.

The plaintiff complains of defendants and alleges:

I. That on the day of , 19 , defendants made to plaintiff their bond of which the following is a copy:

[Insert exact copy of bond omitting acknowledgment and justification.]

II. [Allege the consideration for the bond unless it is expressed therein.]

III. [Allege facts constituting a breach and if it is an indemnifying bond allege facts showing that actual damages have been suffered.]

Wherefore [demanding judgment].

NOTES

Complaint.

§ 1048. It is generally advisable to set out the bond *in haec verba* but in doing so it is to be remembered that a mere recital in the bond will not take the place of an essential allegation. See Hall v. Williams, 13 M. 260 G. 242; Commissioners v. Trust Co., 67 M. 112; Sprague v. Wells, 47 M. 504.

§ 1049. "Made" is a sufficient allegation of execution. La-Fayette Insurance Co. v. Rogers, 30 Barb. (N. Y.) 491.

§ 1050. The complaint should disclose a consideration, and the mere presence of a seal is no longer sufficient for that purpose. Laws 1899, ch. 86.

§ 1051. A breach must be directly alleged, as for example, non-payment. In an action on an indemnifying bond it is necessary to allege facts showing that actual damages have

been suffered. Gilbert v. Wiman, 1 N. Y. 550; Sprague v. Wells, 47 M. 504; State v. Grant, 10 M. 39 G. 22; Reitan v. Goebel, 35 M. 384; Freisenhahn v. Merrill, 52 M. 55; Guptil v. Red Wing, 78 N. W. 970; Vent v. Duluth Trust Co., 80 N. W. 640.

§ 1052. In an action on a guardian's bond the complaint need not state that the action is brought by the permission and direction of the judge of probate. Hantzch v. Massolt, 61 M. 361; Litchfield v. McDonald, 35 M. 167.

§ 1053. In an action on an attachment bond given under G. S. '94, § 5290, it must be alleged that a judgment has been recovered by the defendant in the action in which the attachment issued. Crandall v. Rickley, 25 M. 119.

Complaints considered as to sufficiency.

§ 1054. Commissioners v. Tower, 28 M. 45; State v. Grant, 10 M. 39 G. 22; Sprague v. Wells, 47 M. 504; Nininger v. Commissioners, 10 M. 133 G. 106; Hantzch v. Massolt, 61 M. 361; First Nat. Bank v. How, 28 M. 150; O'Gorman v. Lindeke, 26 M. 93; Friesenhahn v. Merrill, 52 M. 55; Guptil v. Red Wing, 78 N. W. 970.

Defences—new matter.

§ 1055. Romer v. Conter, 53 M. 171; Commissioners v. Butler, 25 M. 363; Brackett v. Osborne, 31 M. 454; Commissioners v. Tower, 28 M. 45.

Statute of limitations.

§ 1056. Lanier v. Irvine, 24 M. 116; Flood v. Myrick, 16 M. 494 G. 447; Litchfield v. McDonald, 35 M. 167.

CHAPTER XXXIII

BREACH OF PROMISE

§ 1057. Time not agreed upon.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant mutually promised to marry each other.

II. That plaintiff has ever since been ready and willing to marry defendant.

III. That defendant has neglected and refused to marry plaintiff to her damage dollars.

Wherefore [demanding judgment].

§ 1058. Time agreed upon.

The plaintiff complains of defendant and alleges:

I. That heretofore plaintiff and defendant mutually promised to marry each other on the day of , 19 .

II. That plaintiff was ready and willing to marry defendant on said day.

III That defendant neglected and refused to marry plaintiff on said day to her damage dollars.

Wherefore [demanding judgment].

§ 1059. Marriage to another.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant mutually promised to marry each other.

II. That thereafter defendant married another person.

III. That until said marriage plaintiff was always ready and willing to marry defendant but he neglected and refused to marry her to her damage dollars.

Wherefore [demanding judgment].

NOTES

Complaint.

§ 1060. The foregoing forms are based on 2 Chitty Pl. 205

and cases cited. See also Jones v. Layman, 123 Ind. 571; Hook v. George, 108 Mass. 324; Roper v. Clay, 18 Mo. 383; Graham v. Martin, 64 Ind. 567. If punitive or special damages are sought it is prudent to plead the facts to justify them. See Tamke v. Vangsnes, 72 M. 236.

Seduction.

§ 1061. Whether seduction can be proved in aggravation of damages without being specially pleaded is an open question in this state. It is therefore advisable to plead it. See Cotes v. McKinney, 48 Ind. 562, Tyler v. Salley, 82 Me. 128; Levitt v. Cutler, 37 Wis. 46; Schmidt v. Durnham, 46 M. 227. The allegation may be in the following form:

"That by reason of his said promise the defendant was enabled and did seduce and debauch the plaintiff and otherwise injure her to her damage dollars."

CHAPTER XXXIV

CONTRACTS

How alleged.

§ 1062. A contract may be alleged according to its legal effect. Estes v. Farnham, 11 M. 423 G. 312; Weide v. Porter, 22 M. 429; Larson v. Schmaus, 31 M. 410; New York etc. Co. v. Steamship Co., 148 N. Y. 39.

§ 1063. It may also be alleged *in haec verba*. Sprague v. Wells, 64 M. 482; Elmquist v. Markoe, 39 M. 494. If a contract is set out, its terms will control any inconsistent allegations in the complaint. Doud, Sons & Co. v. Duluth Milling Co., 55 M. 53; Beatty v. Howe Lumber Co., 79 N. W. 1013.

How much alleged.

§ 1064. Only such portions of a contract as plaintiff claims have been broken need be alleged in the complaint. Estes v. Farnham, 11 M. 423 G. 312; Rollins v. St. Paul Lumber Co., 21 M. 5; Wright v. Tileston, 60 M. 34.

How modified contract alleged.

§ 1065. Where an agreement is modified by a subsequent agreement it may be declared on as modified without reference to the original contract. Estes v. Farnham, 11 M. 423 G. 312.

Must be alleged as either express or implied.

§ 1066. The complaint must be drawn upon a definite theory as to whether the contract sued upon is express or implied by law and where one form of contract is alleged the other cannot be proved. Elliott v. Caldwell, 43 M. 357; Hewitt v. Brown, 21 M. 163; Dean v. Leonard, 9 M. 190 G. 176; Starkey v. Minneapolis, 19 M. 203 G. 166; Evans v. Miller, 37 M. 371; Gaar v. Fritz, 60 M. 346.

Implied contract—how alleged.

§ 1067. In declaring upon a contract implied by law the facts giving rise to the obligation or, in other words, the facts

from which the law implies the promise, should be alleged. A promise should not be alleged, for it is purely a legal inference. Pomeroy, Remedies, § 537; Heinrich v. Englund, 34 M. 395.

Execution.

§ 1068. An allegation that a written agreement was "made and entered into" includes its delivery. Romans v. Langevin, 34 M. 312.

Consideration.

§ 1069. Except where a consideration is implied by law it is necessary that it should appear from the complaint that the contract alleged is founded upon a consideration. Frank v. Irgens, 27 M. 43; Becker v. Sweetzer, 15 M. 427 G. 346; Wilson Sewing Machine Co. v. Schnell, 20 M. 40 G. 33; Spear v. Downing, 34 Cal. 522.

Exceptions:

(a) Contracts under seal. Wills v. Kempt, 17 Cal. 99; Bush v. Stevens, 24 Wend. 256. See however, Laws 1899, ch. 86.

(b) Negotiable instruments. Pinney v. King, 21 M. 514; Moore v. Waddel, 34 Cal. 145; Keesling v. Watson, 91 Ind. 579.

Consideration—how pleaded.

§ 1070. "If a written contract for the payment of money, which states that it is 'for value received,' be set forth in a complaint according to its terms, the recital in the instrument is a sufficient allegation of a consideration." Elmquist v. Markoe, 39 M. 494; Frank v. Irgens, 27 M. 43. See also, Dole v. Wilson, 16 M. 525 G. 472; Mendenhall v. Duluth Dry Goods Co., 72 M. 312.

§ 1071. "When the consideration of a contract, which is the basis of the action, is an executory agreement, such agreement must be pleaded, and performance averred." Becker v. Sweetzer, 15 M. 427 G. 346. See Starkey v. Minneapolis, 19 M. 203 G. 166.

Breach.

§ 1072. A breach of the contract is the very gist of the cause of action and must always be alleged. Wilson v. Clarke, 20 M. 367 G. 318; Thoreson v. Minneapolis Harvester Works, 29 M. 341; Tracy v. Tracy, 59 Hun (N. Y.) 1; Lent v. Ry. Co., 130 N. Y. 504; Holman v. Criswell, 13 Tex. 38.

Performance.

§ 1073. Performance by the plaintiff of all the terms of the contract on his part must be alleged or an offer and readiness so to do. Andreas v. Holcombe, 22 M. 339; Morrison v. Lovejoy, 6 M. 319 G. 224; Johnson v. Howard, 20 M. 370 G. 322; Bergmeier v. Eisenmenger, 59 M. 175; Latham v. Bausman, 39 M. 57.

§ 1074. "Facts excusing the plaintiff for the non-performance of the conditions of the contract, when essential to a right of action, must be alleged." Johnson v. Howard, 20 M. 370 G. 322; Boon v. State Ins. Co., 37 M. 426.

(a) Defendant disabling himself. Hawley v. Keeler, 53 N. Y. 116.

(b) Repudiation of contract by defendant. Dowd v. Clarke, 54 Cal. 48; Smith v. Lewis, 24 Conn. 624; Potts v. Land Co., 49 N. J. L. 415.

(c) Prevention of performance by defendant. Ruble v. Massey, 2 Ind. 636.

(d) Waiver of performance by defendant. Boon v. Ins. Co., 37 M. 426; Mackey v. Swartz, 60 Iowa, 710; Romeyn v. Sickles, 108 N. Y. 653.

Anticipating statute of frauds.

§ 1075. In declaring on a contract within the statute of frauds it is not necessary to allege that it is in writing. Collom v. Bixby, 33 M. 50; Randall v. Constans, 33 M. 329; Walsh v. Kattenburgh, 8 M. 127 G. 99; Armstrong v. Vroman, 11 M. 220 G. 142.

Demand.

§ 1076. Whenever a demand of performance is a condition precedent it should be alleged. Parr v. Johnson, 37 M.

457; Malone v. Stone Co., 36 M. 325; Newton v. Imp. Co., 62 M. 436; Hall v. Williams, 13 M. 260 G. 242; Snow v. Johnson, 1 M. 48 G. 32; Jarrett v. Ry. Co., 77 N. W. 304.

Promise to pay money on demand.

§ 1077. "A promise to pay money, no time being expressed, is deemed in law a promise to pay on demand. It is sufficient to plead such a promise as made, without pleading the construction which the law places upon it by alleging a promise to pay on demand." Chamberlain v. Tiner, 31 M. 371.

Several promises.

§ 1078. "A plaintiff may allege and prove as many promises as he may have to pay the debt sued for, if they are separate, distinct and valid undertakings." Walsh v. Kattenburgh, 8 M. 127 G. 99.

Joint contract.

§ 1079. All the obligees must ordinarily join in an action for breach of contract running to them jointly. If any fact takes a case out of the rule it should be alleged in the complaint. Hedderly v. Downs, 31 M. 183. See § 65.

Denial of execution.

§ 1080. Under a general denial the defendant may prove that the contract alleged was never made. McCormick v. Doucette, 61 M. 40; Scone v. Amos, 38 M. 79; Suits v. Taylor, 20 Mo. App. 166; Jones v. Pincheon, 6 Ind. App. 460.

§ 1081. Under a general denial the defendant may prove that the contract actually entered into was different from the one alleged. Scone v. Amos, 38 M. 79; Ortt v. Ry. Co., 36 M. 396; Lake v. Cruikshank, 31 Iowa, 395; Simmons v. Green, 35 Ohio St. 104; Wilkerson v. Farnham, 82 Mo. 672.

§ 1082. If the contract is in writing and purports to have been signed or executed by the defendant, he must, if he desires to throw the burden of proving execution upon the plaintiff, specifically deny the execution and personally verify the pleading. The verification must be positive and not on information and belief. A general denial is insufficient. G. S.

'94, § 5751; Cowing v. Peterson, 36 M. 130; Bausman v. Credit Co., 47 M. 377; Burr v. Crichton, 51 M. 343; McCormick v. Doucette, 61 M. 40; Johnson Harvester Co. v. Clark, 30 M. 308; Moore v. Holmes, 68 M. 108.

Want of consideration.

§ 1083. If the law does not presume a consideration the want of consideration may be proved under a general denial. Wheeler v. Billings, 38 N. Y. 263; Nixon v. Beard, 111 Ind. 137.

§ 1084. In pleading want of consideration it is not necessary to state the facts showing want of consideration. It is sufficient to allege that the contract was executed without any consideration. Webb v. Michener, 32 M. 48; Fisher v. Fisher, 113 Ind. 474; Miller v. Brumbaugh, 7 Kans. 344.

Statute of frauds—necessity of pleading.

§ 1085. A party who has denied the execution of the contract alleged may invoke the statute without having pleaded it. Tatge v. Tatge, 34 M. 272; Fontaine v. Bush, 40 M. 142; Wentworth v. Wentworth, 2 M. 277 G. 238; Russell v. Ry. Co. 39 M. 145. See Wilson Sewing Machine Co. v. Schnell, 20 M. 40 G. 33.

§ 1086. If a party in his pleading has admitted the execution of the contract alleged he must claim the statute in the same pleading. Iverson v. Cirkel, 56 M. 299. See, however, Taylor v. Allen, 40 M. 433.

MODE OF PLEADING STATUTE OF FRAUDS

§ 1087. Sale of goods.

The defendant for answer to the complaint herein alleges that although the contract therein set forth was for the sale of [goods] [chattels] [things in action] for the price of fifty dollars or more no note or memorandum thereof was ever made in writing and subscribed by him; nor has he ever accepted or received [part of such goods] [any of the evidences of such things in action] or paid any part of the purchase money.

§ 1088. Agreement not to be performed within a year.

The defendant for answer to the complaint herein alleges that although the agreement therein set forth was by its terms not to be performed within one year from the making thereof, neither said agreement nor any note or memorandum thereof, expressing the consideration, is in writing and subscribed by him.

§ 1089. Special promise to answer for another.

The defendant for answer to the complaint herein alleges that although the promise therein set forth was a special promise to answer for the debt, default or doings of another, to-wit, mentioned therein, neither said promise nor any note or memorandum thereof, expressing the consideration, is in writing and subscribed by the defendant.

§ 1090. Contract for sale of lands.

The defendant for answer to the complaint herein alleges that neither the contract for the sale of lands therein set forth, nor any note or memorandum thereof, expressing the consideration, is in writing and subscribed by the defendant or his lawful agent thereunto authorized in writing.

CHAPTER XXXV

CONVERSION

§ 1091. General form of complaint—plaintiff general or special owner.[1]

The plaintiff complains of defendant and alleges:

I. That at the time stated in the next paragraph he was the owner of the following described personal property:

[Describing property in general terms.]

II. That on the day of , 19 , defendant [took said property from the possession of plaintiff and] converted the same to his own use.

III. That the value thereof was dollars.

Wherefore plaintiff demands judgment:

(1) For the sum of dollars with interest from the day of , 19 .

(2) For the costs and disbursements of this action.

[1] Sustained by 2 Chitty Pl. 621 (1a); Green v. Palmer, 15 Cal. 414 (a leading case with the opinion by Field, C. J.); Brunswick etc. Co. v. Brackett, 37 M. 58; Baals v. Stewart, 109 Ind. 371.

NOTES

Allegation of ownership.

§ 1092. Ownership is a necessary allegation but it may be alleged in general terms. The nature of plaintiff's title and the sources thereof need not be set forth.[1] Under a general allegation of ownership either a general or special property may be proved,[2] but it has been held in this state that where the plaintiff has a mere lien he cannot recover under an allegation of ownership.[3] Title must be alleged in plaintiff as of the date of the conversion.[4]

[1] First Nat. Bank v. St. Croix Boom Co., 41 M. 141; Jones v. Rahilly, 16 M. 320 G. 283; Scofield v. Nat. Elevator Co., 64 M. 527; Reed v. McRill, 41 Neb. 206.

[2] Heine v. Anderson, 2 Duer (N. Y.) 318; Duggan v. Wright, 157 Mass. 228. See Cushing v. Seymour, Sabin & Co., 30 M. 301; Clague v. Hodgson, 16 M. 329 G. 291, and cases cited under (1) and § 811.

[3] Scofield v. Nat. Elevator Co., 64 M. 527.

[4] Smith v. Force, 31 M. 119. See § 1107.

Allegation of taking and right of immediate possession.

§ 1093. When the property was in fact taken from the possession of the plaintiff by the defendant it is advisable to allege the taking in order to force an admission from the defendant and restrict him in his defences. If he admits the taking he assumes the burden of proof and must allege matter in justification. As property out of possession of the owner may be converted it is never necessary to allege possession in the plaintiff. In all cases it is sufficient to allege that at the time of the conversion plaintiff was the owner. It is common practice, in cases where the property was not taken from the possession of the plaintiff, to add to the allegation of ownership, "and entitled to the immediate possession." This is a pure legal conclusion and neither necessary nor proper. The owner of property has, presumptively, the right of immediate possession and if such right were essential in an action for conversion it would be implied from the allegation of ownership.[1] As a matter of fact, a right of immediate possession in the plaintiff at the time of the conversion is not essential [2] and the plaintiff makes out a *prima facie* case by simply alleging ownership in him at the time of the conversion and the conversion by defendant.[3]

[1] Clague v. Hodgson, 16 M. 329 G. 291, 297; Fletcher v. Neudeck, 30 M. 125; Haven v. Place, 28 M. 551, 553.

[2] § 1118.

[3] Baals v. Stewart, 109 Ind. 371; Brunswick etc. Co. v. Brackett, 37 M. 58.

Allegation of conversion.

§ 1094. An allegation of conversion is necessary. Brunswick etc. Co. v. Brackett, 37 M. 58.

§ 1095. It is neither necessary nor proper to allege the specific facts constituting the conversion. It is sufficient to allege that the defendant "converted the property to his own use." First Nat. Bank v. St. Croix Boom Corporation, 41 M. 141; Nichols etc. Co. v. Mfg. Co., 70 M. 528; Green v. Palmer, 15 Cal. 414.

§ 1096. "The allegation that the defendant has converted the plaintiff's property to his own use is not an allegation of a conclusion of law, but of a fact which may be described as composite, and it allows evidence to be introduced of all such unjustified dealing with the property named as may tend to show a wrongful taking and disposal of it to the prejudice of the plaintiff's rights." Duggan v. Wright, 157 Mass. 228.

§ 1097. It is quite common practice to allege that the defendant "wrongfully" or "unlawfully" converted the property. Such an allegation is a mere conclusion of law and improper under the code. It is sufficient to allege that the defendant converted to his own use the property of the plaintiff. Buck v. Colbath, 7 M. 310 G. 238; Clague v. Hodgson, 16 M. 329 G. 291. See also Adams v. Corriston, 7 M. 456 G. 365.

Allegation of value.

§ 1098. The value of the property should be alleged. Brunswick etc. Co. v. Brackett, 37 M. 58.

Allegation of demand and refusal.

§ 1099. It is not necessary to allege a demand of delivery and refusal. Adams v. Castle, 64 M. 505; Brunswick etc. Co. v. Brackett, 37 M. 58; Proctor v. Cole, 66 Ind. 576; Johnson v. Lumber Co., 45 Wis. 119; Norman v. Horn, 36 Mo. App. 419.

Complaints considered as to sufficiency.

§ 1100. Jones v. Rahilly, 16 M. 320 G. 283; Kendall v. Duluth, 64 M. 295; Hurlburt v. Schulenburg, 17 M. 22 G. 5; St. Paul etc. Ry. Co. v. Gardner, 19 M. 132 G. 99, 112; Jorgensen v. Tait, 26 M. 327; Haven v. Place, 28 M. 551; First Nat. Bank v. St. Croix Boom Corporation, 41 M. 141; Smith v. Force, 31 M. 119; Morish v. Mountain, 22 M. 564; Tyler v. Hanscom, 28 M. 1; Norman v. Eckern, 60 M. 531; Washburn v. Mendenhall,

21 M. 332; Strickland v. Minnesota Type Foundry Co., 79 N. W. 674; Town of Clayton v. Bennington, 24 M. 14; Schneider v. Anderson, 79 N. W. 603.

General denial—facts admissible under.

§ 1101. Jones v. Rahilly, 16 M. 320 G. 283; Chandler v. De Graff, 27 M. 208; Cushing v. Seymour, Sabin & Co., 30 M. 301, 307; Johnson v. Oswald, 38 M. 550; Johnson v. Morstad, 63 M. 397; Nichols etc. Co. v. Mfg. Co. 70 M. 528.

§ 1102. The defendant may show title in himself or a third person. McClelland v. Nichols, 24 M. 176; Jones v. Rahilly, 16 M. 320 G. 283; Johnson v. Oswald, 38 M. 550; Johnson v. Morstad, 63 M. 397. See § 1104.

Bill of particulars.

§ 1103. A bill of particulars cannot be demanded. Commissioners v. Smith, 22 M. 97.

Defences.

§ 1104. "In an action for conversion, title in a third person is no defence, unless the defendant can in some manner connect himself with such person, and claim under him." Brown v. Shaw, 51 M. 266. See also, Anderson v. Gouldberg, 51 M. 294; Vandiver v. O'Gorman, 57 M. 64; Stonebridge v. Perkins, 141 N. Y. 1.

§ 1105. It is no defence that the defendant honestly believed that the property was his own. Kronschnable v. Knoblauch, 21 M. 56.

§ 1106. A judgment in an action in the nature of replevin is a bar to an action for conversion for the same cause of action. Hardin v. Palmerlee, 28 M. 450; Woodcock v. Carlson, 49 M. 536.

§ 1107. If the defendant had possession of the property at the time of the conversion it is immaterial that he did not have it at the commencement of the action. Morish v. Mountain, 22 M. 564.

§ 1108. There can be no recovery if the plaintiff consented to the conversion. Chase v. Blaisdell, 4 M. 90 G. 60; Freeman v. Etter, 21 M. 2; Kronschnable v. Knoblauch, 21 M. 56;

Person v. Wilson, 25 M. 189; Wetherell v. Stewart, 35 M. 496; Tousley v. Board of Education, 39 M. 419; Griffin v. Bristle, 39 M. 456; Kendall v. Duluth, 64 M. 295; Penny v. Investment Co., 54 M. 541.

§ 1109. It is no defence that the defendant offered to return the property. Carpenter v. Loan Asso., 54 M. 403.

Consistency of defences.

§ 1110. First Nat. Bank v. Lincoln, 36 M. 132; Derby v. Gallup, 5 M. 119 G. 85.

Necessity of demand.

§ 1111. Demand and refusal of possession are merely evidence of conversion. They are not a condition precedent to the right to bring an action. They are "necessary" only in the sense that otherwise there would often be no evidence of conversion.

(a) Refusal to restore goods on demand is only evidence of conversion, and whenever the conversion can be otherwise proved, it is not necessary for the plaintiff to prove a demand and refusal. Adams v. Castle, 64 M. 505; Hogan v. Atlantic Elevator Co. 66 M. 344.

(b) When the original taking was unlawful a demand is unnecessary. Murphy v. Sherman, 25 M. 196.

(c) When the defendant has sold the property no demand is necessary. Kronschnable v. Knoblauch, 21 M. 56; Kenrick v. Rogers, 26 M. 344.

(d) When property is placed in the hands of an agent for a particular purpose and he employs it for another no demand is necessary. Farrand v. Hulburt, 7 M. 477 G. 383; Cock v. Van Etten, 12 M. 522 G. 431.

(e) When the evidence shows that defendant purchased the property in good faith from the apparent owner and there is no evidence of a sale by defendant or other exercise of dominion a case is not made out unless a demand and refusal of possession are proved. Plano Mfg. Co. v. Elevator Co., 51 M. 167; Nichols etc. Co. v. Mfg. Co., 70 M. 528; Kellogg v. Olson, 34 M. 103.

(f) When the defendant purchased from a vendor who had converted the property and afterwards himself sold it or otherwise exercised dominion over it no demand is necessary although defendant purchased in good faith. Adams v. Castle, 64 M. 505; Hogan v. Atlantic Elevator, 66 M. 344.

(g) See further as to necessity of demand: Person v. Wilson, 25 M. 189 (demand of one of two cotenants); Fletcher v. Neudeck, 30 M. 125 (demand by mortgagee); Coleman v. Pearce, 26 M. 126; Hay v. Tuttle, 67 M. 56; Kendall v. Duluth, 64 M. 295; Ambuehl v. Matthews, 41 M. 537; Stout v. Stoppel, 30 M. 56; Shapira v. Barney, 30 M. 59; Jorgensen v. Tait, 26 M. 327; Chase v. Blaisdell, 4 M. 90 G. 60; Close v. Hodges, 44 M. 204; Medicke v. Sauer, 61 M. 15; Lundberg v. N. W. Elevator Co., 42 M. 37 (demand on agent); Tarbell v. Farmers' Mutual Elevator Co., 44 M. 471.

§ 1112. The jury may find a conversion prior to the demand and refusal. McLennan v. Elevator Co., 57 M. 317.

Burden of proof.

§ 1113. Under a general denial the plaintiff has the burden of proving ownership at the time of the conversion and the fact of conversion by the defendant. These are the two essential facts constituting the cause of action.[1] It is not necessary for him to prove a paper title. He may make out a *prima facie* case and shift the burden of proof by showing that the defendant took the property from his possession or that of his grantor; for possession is itself *prima facie* evidence of ownership and a taking of property from the possession of the owner is *prima facie* wrongful and a conversion.[2] If the defendant in his answer admits the taking from plaintiff he must allege and prove title in himself, or title in a third party, connecting himself therewith, or other matter in justification, otherwise plaintiff is entitled to judgment.[3] In an action against a bailee the plaintiff makes out a *prima facie* case by proof of failure or refusal on the part of the bailee to return the property on demand.[4]

[1] Vanderburgh v. Bassett, 4 M. 242 G. 171. See § 1118.

[2] Derby v. Gallup, 5 M. 119 G. 85; Jellett v. Ry. Co., 30 M. 265; Hendricks v. Decker, 35 Barb. (N. Y.) 298; Rollofson v. Nash, 77 N. W. 954.

[3] Blunt v. Barrett, 124 N. Y. 117; Thompson v. Stever, 11 St. Rep. (N. Y.) 784; Derby v. Gallup, 5 M. 119 G. 85; Kellogg v. Olson, 34 M. 103.

[4] Davis v. Tribune Job Printing Co., 70 M. 95. See further upon the general subject cases under § 1111 and Windham County Savings Bank v. O'Gorman, 66 M. 361; Avery v. Stewart, 77 N. W. 560, 78 N. W. 244. In connection with the last case see Christianson v. Nelson, 78 N. W. 875.

Definition of conversion.

§ 1114. Any unauthorized act of dominion over the personal property of another in denial of his right or inconsistent with it is a conversion. Hossfeldt v. Dill, 28 M. 475; Carpenter v. Loan Asso., 54 M. 403; Nichols etc. Co. v. Mfg. Co., 70 M. 528; Cumbey v. Ueland, 72 M. 453.

§ 1115. "The general rule is that an owner of personal property cannot be deprived of his right to it through the unauthorized act of another." Hall v. Pillsbury, 43 M. 33.

§ 1116. As to what acts constitute a conversion see further: Hay v. Tuttle, 67 M. 56; Leuthold v. Fairchild, 35 M. 99; Moore v. Hayes, 35 M. 205; Comfort v. Creelman, 52 M. 280; McClelland v. Nichols, 24 M. 176; Coleman v. Pearce, 26 M. 123; Holland v. Bishop, 60 M. 23; Johnson v. Dun, 78 N. W. 98.

§ 1117. An action will lie for the conversion of personal property although it has been attached to realty. Stout v. Stoppel, 30 M. 56; Shapira v. Barney, 30 M. 59.

Essentials of a cause of action for conversion.

§ 1118. In order to recover in an action for conversion the plaintiff must prove ownership, either general or special, and a conversion by the defendant.[1] In a recent case [2] it was said that he must also prove possession or a right of immediate

possession at the time of the conversion. This was true in the common law action of trover but at common law an owner not entitled to immediate possession might maintain a special action on the case for any permanent injury to his interest though the wrongful act might also be a conversion as against the immediate possessor.[3] The gist of the action for conversion under the code is not the injury to the possession or right of possession as in trover and it is not indispensable that the plaintiff should prove possession or right of immediate possession. The question is simply whether the defendant has unlawfully exercised dominion over the personal property of the plaintiff. The action under the code is not governed by the same rules as the common law action of trover and a failure to keep this fundamental fact in mind has led courts into positive error. The question has never received from our supreme court the careful consideration which it deserves, but it has been held in several cases that a right of immediate possession is not essential.[4]

[1] Vanderburgh v. Bassett, 4 M. 242 G. 171, 176.

[2] Hodge v. Ry. Co., 70 M. 193.

[3] Googins v. Gilmore, 47 Me. 1.

[4] Adams v. Castle, 64 M. 505; Whitney v. Huntington, 34 M. 458; Breault v. Merrill & Ring Lumber Co., 72 M. 143; Pollock, Torts, 289.

§ 1119. It is not necessary that the property should have been taken from the possession of the plaintiff. Lampsen v. Brander, 28 M. 526.

Object of action.

§ 1120. The object of the action is to recover damages for the wrongful conversion and not to regain possession.. Carpenter v. Loan Asso., 54 M. 403.

Effect of claiming possession.

§ 1121. When the facts stated in the complaint are sufficient a recovery may be had as for conversion although the relief prayed was the possession of the property. Washburn v. Mendenhall, 21 M. 332; Morish v. Mountain, 22 M. 564; Howard v. Barton, 28 M. 116.

Waiving trespass.

§ 1122. If the owner brings an action for conversion he waives his right of action for the trespass. Vanderburgh v. Bassett, 4 M. 242 G. 171.

Intent—motive.

§ 1123. The intent, knowledge or motive of the defendant is irrelevant except as affecting damages. Kronschnable v. Knoblauch, 21 M. 56; Jesurun v. Kent, 45 M. 222.

Who liable.

§ 1124. The members of a partnership may be liable for a conversion by one of them. Vanderburgh v. Bassett, 4 M. 242 G. 171.

§ 1125. "An agent for a bailee of property is not liable for a conversion by his principal in which he does not actually participate." McLennan v. Minneapolis etc. Elevator Co., 57 M. 317.

§ 1126. "An agent or servant who, acting solely for his master or principal, and by his direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property." Leuthold v. Fairchild, 35 M. 99.

Who may maintain action.

§ 1127. "A bailee of property gratuitously loaned to him by the owner may maintain an action to recover the value thereof against a stranger who has converted the property, or through whose negligence or failure of duty it is lost. He may do so, although not responsible to the general owner for the loss." Chamberlain v. West, 37 M. 54. See also as to actions by bailees: Brown v. Shaw, 51 M. 266; Benjamin v. Levy, 39 M. 11; Houghton v. Lynch, 13 M. 85 G. 80.

§ 1128. "A sale and delivery of personal property, owned jointly or in common, by one of several cotenants, as his own exclusively, will sustain an action for a conversion by the other cotenants for their share." Pearson v. Wilson, 25 M.

189; Shepard v. Pettit, 30 M. 119; Strong v. Colter, 13 M. 82 G. 77.

Damages—general rule.

§ 1129. The general rule of damages in an action for conversion is the value of the property at the time of the conversion with interest thereon from the time of the conversion to the entry of judgment. Derby v. Gallup, 5 M. 119 G. 85 (stock of goods); Nininger v. Banning, 7 M. 274 G. 210 (promissory note); Zimmerman v. Lamb, 7 M. 421 G. 336 (cattle); Farrand v. Hulburt, 7 M. 477 G. 383 (money placed with agent to loan); Jones v. Rahilly, 16 M. 320 G. 283 (horses and buggy); Coleman v. Pearce, 26 M. 123 (wheat); Jellett v. Ry. Co., 30 M. 265 (carload of corn); First Nat. Bank v. Lincoln, 36 M. 132 (insurance money); Hersey v. Walsh, 38 M. 521 (promissory note); Beebe v. Wilkinson, 30 M. 548 (stock of millinery goods); Winona v. Construction Co., 29 M. 68 (coupon bonds); Murphy v. Sherman, 25 M. 196 (horse); Dallemand v. Janney, 51 M. 514 (stock of wines); Judd v. Dike, 30 M. 380; St. Paul Trust Co. v. Kittson, 62 M. 408; Berryhill v. Peabody, 79 N. W. 651 (conversion of trust funds); Johnson v. Dun, 78 N. W. 98 (conversion of bond).

§ 1130. For the rule where the property has been enhanced in value by the labor of the parties converting it see: Nesbitt v. St. Paul Lumber Co., 21 M. 491; Hinman v. Heyderstadt, 32 M. 250; Whitney v. Huntington, 37 M. 197; Viliski v. Minneapolis, 40 M. 304; Hoxsie v. Empire Lumber Co., 41 M. 548; King v. Merriman, 38 M. 47; Mississippi etc. Co. v. Page, 68 M. 269; State v. Shevlin-Carpenter Co., 62 M. 99; Shepard v. Pettit, 30 M. 481.

§ 1131. "If converting part of an article renders the whole article valueless for any purpose, the measure of damages is the value of the article at the time of converting the part, with interest. If converting a part does not leave the remaining wholly valueless, it is proper to arrive at the damages by proving the value of the article entire, and the value of the part remaining after the severance; the difference, with

interest, being the damages." Walker v. Johnson, 28 M. 147.

§ 1132. The expenses of the suit cannot be recovered as damages. Seeman v. Feeney, 19 M. 79 G. 54.

§ 1133. One having a special property in goods may recover the full value as against a stranger. Chamberlain v. West, 37 M. 54; Jellett v. Ry. Co., 30 M. 265; Adamson v. Petersen, 35 M. 529; Brown v. Shaw, 51 M. 266; Dyer v. Ry. Co., 51 M. 348; Vandiver v. O'Gorman, 57 M. 64; Strickland v. Minnesota Type Foundry Co., 79 N. W. 674.

§ 1134. As against the general owner or one in privity with him he can recover only the value of his special property. Chamberlain v. West, 37 M. 54; Jellett v. Ry. Co., 30 M. 265; La Crosse etc. Co. v. Robertson, 13 M. 29 G. 269; Dodge v. Chandler, 13 M. 114 G. 105; Becker v. Dunham, 27 M. 32; Cushing v. Seymour, Sabin & Co., 30 M. 301; Torp v. Gulseth, 37 M. 135; Deal v. Osborne, 42 M. 102; Strickland v. Minnesota Type Foundry Co., 79 N. W. 674.

Damages—mitigation of.

§ 1135. The "defendant may show, in mitigation of damages, any lawful application of the property or its avails to the use of the owner, though the latter is not a party to the suit, because the plaintiff is not answerable over in such a case. So, also, where the property has been returned and received by the plaintiff in the suit, or its proceeds have, by due process gone to pay his debts. And, in general, the right of the plaintiff in trover to recover the full value of the goods is subject to any lawful lien, claim or interest which the defendant may have in them, to be adjudicated in the same action." Jellett v. Ry. Co., 30 M. 265; First Nat. Bank v. Lincoln, 36 M. 132; Coleman v. Pearce, 26 M. 123; Howard v. Manderfield, 31 M. 337; Beyersdorf v. Sump, 39 M. 495.

§ 1136. Matter in mitigation of damages need not be pleaded. Hoxsie v. Empire Lumber Co., 41 M. 548.

Damages—exemplary.

§ 1137. Dallemand v. Janney, 51 M. 514; Jones v. Rahilly,

16 M. 320 G. 283, 290; Seeman v. Feeney, 19 M. 79 G. 54; Lynd v. Picket, 7 M. 184 G. 128.

Damages—special.

§ 1138. Cushing v. Seymour, Sabin & Co., 30 M. 301; Jones v. Rahilly, 16 M. 320 G. 283, 290.

Damages—treble under G. S. '94, § 5415.

§ 1139. Berg v. Baldwin, 31 M. 541.

CASES

Actions against sheriff.

§ 1140. Ohlson v. Manderfeld, 28 M. 390; Lampsen v. Brander, 28 M. 526; Barry v. McGrade, 14 M. 163 G. 126; Tyler v. Hanscom, 28 M. 1; Moulton v. Thompson, 26 M. 120; Young v. Ege, 63 M. 219; Mohn v. Barton, 27 M. 530; Murphy v. Sherman, 25 M. 196; Hossfeldt v. Dill, 28 M. 469; Howard v. Rugland, 35 M. 388; Homberger v. Brandenberg, 35 M. 401; Noyes v. Beaupre, 36 M. 49; Sanders v. Chandler, 26 M. 273.

Actions by mortgagor against mortgagee.

§ 1141. Wetherell v. Stewart, 35 M. 496; Cushing v. Seymour, Sabin & Co., 30 M. 301; Powell v. Gagnon, 52 M. 232; Torp v. Gulseth, 37 M. 135; Deal v. Osborne & Co., 42 M. 102; Donovan v. Sell, 64 M. 212; Penney v. Investment Co., 54 M. 541.

Actions by mortgagor against stranger.

§ 1142. Vandiver v. O'Gorman, 57 M. 64.

Actions by mortgagee against purchaser from mortgagor.

§ 1143. Jorgensen v. Tait, 26 M. 327; Fletcher v. Neudeck, 30 M. 125; Close v. Hodges, 44 M. 204; Adamson v. Petersen, 35 M. 529; Strickland v. Minnesota Type Foundry Co., 79 N. W. 674.

Actions by mortgagee against mortgagor.

§ 1144. Fletcher v. Neudeck, 30 M. 125; Adamson v. Petersen, 35 M. 529.

Actions by mortgagee against sheriff.

§ 1145. Edson v. Newell, 14 M. 228 G. 167; Appleton Mill Co. v. Warder, 42 M. 117; Becker v. Dunham, 27 M. 32.

Actions by holder of seed grain note.

§ 1146. Nash v. Brewster, 39 M. 530; Scofield v. Nat. Elevator Co., 64 M. 527.

Actions involving conversion by elevator companies.

§ 1147. Scofield v. Nat. Elevator Co., 64 M. 527; Plano Mfg. Co. v. Northern Pacific Elevator Co., 51 M. 167; Hogan v. Atlantic Elevator Co., 66 M. 344; Leuthold v. Fairchild, 35 M. 99; Daniels v. Palmer, 41 M. 116; Osborne v. Cargill Elevator Co., 62 M. 400; McLennan v. Minneapolis etc. Elevator Co., 57 M. 317; Chezick v. Minneapolis etc. Elevator Co., 66 M. 300; Avery v. Stewart, 77 N. W. 560; Id., 78 N. W. 244; Lundberg v. Northwestern Elevator Co., 42 M. 37; Hall v. Pillsbury, 43 M. 33; Tarbell v. Farmers Mutual Elevator Co., 44 M. 471; Wallace v. Minneapolis etc. Elevator Co., 37 M. 464; Lewis v. Ry. Co., 20 M. 260 G. 234; Close v. Hodges, 44 M. 204.

Miscellaneous cases.

§ 1148. Hall v. Pillsbury, 43 M. 33 (action by holder of warehouse receipt against purchaser from warehouseman); Jesurun v. Kent, 45 M. 222 (conversion of household furniture by warehousemen); Heberling v. Jaggar, 47 M. 70 (against purchaser at execution sale upon an unlawful levy); Kronschnable v. Knoblauch, 21 M. 56 (action against purchaser upon an unauthorized private sale after judgment); Nininger v. Banning, 7 M. 274 G. 210 (promissory note); Vanderburgh v. Bassett, 4 M. 242 G. 171 (property attached—replevied and delivered to plaintiff in replevin—retaken on same attachment—held a conversion); Crockett v. Phinney, 33 M. 157 (action by vendee against attaching creditors of vendor); Cohen v. Goldberg, 65 M. 473 (action by third party against a judgment creditor for conversion of property levied on as the property of the judgment debtor but claimed by the plaintiff as his own); Upham v. Barbour 65 M. 364, 64 M. 505 (conversion by pledgee); Adams v. Castle (conversion by vendor of piano sold on contract); Foy v. Ry. Co., 63 M. 255 (delivery by railroad to wrong person); Johnson v. Morstad, 63 M. 397 (overcoat); Freeman v. Kraemer, 63 M. 242 (delivery by rail-

road to wrong person); Clark v. C. N. Nelson Lumber Co., 34 M. 289 (wrongful commingling and conversion of logs); Medicke v. Sauer, 61 M. 15 (bar fixtures); Farrand v. Hurlburt, 7 M. 477 G. 383 (agent loaning money of principal in his own name); Coleman v. Pearce, 26 M. 123 (conversion by factor to sell wheat); McClelland v. Nichols, 24 M. 176 (action against vendor on a conditional sale for retaking property); Reynolds v. Trust Co., 51 M. 236 (withdrawal of bank account by administrator); Allen v. Loan Asso., 49 M. 544; Carpenter v. Loan Asso., 54 M. 403; Allen v. Loan Asso., 55 M. 86 (unauthorized sale of stock by corporation); Windham Bank v. O'Gorman, 66 M. 361 (conversion of stock by pledgee); Nickerson v. Mercantile Co., 71 M. 230 (conversion of saw-mill and tools); Cumbey v. Ueland, 72 M. 453 (conversion of notes by bank); Derby v. Gallup, 5 M. 119 G. 85 (stock of goods); Zimmerman v. Lamb, 7 M. 421 G. 336 (cattle); Jones v. Rahilly, 16 M. 320 G. 283 (horses and buggy); Jellett v. Ry. Co., 30 M. 265 (carload of corn); First Nat. Bank v. Lincoln, 36 M. 132 (insurance money); Hersey v. Walsh, 38 M. 521 (promissory note); Beebe v. Wilkinson, 30 M. 548 (stock of millinery goods); Winona v. Construction Co., 29 M. 68 (coupon bonds); Dallemand v. Janney, 51 M. 514 (stock of wines); Person v. Wilson, 25 M. 189 (action by one covenant against another); Kendall v. Duluth, 64 M. 295 (wagon); Ambuehl v. Matthews, 41 M. 537 (crops); Stout v. Stoppel, 30 M. 56 (fixtures); Shapira v. Barney, 30 M. 59 (fixture); Cock v. Van Etten, 12 M. 522 G. 431 (conversion of funds by agent); Nichols & Shepard Co. v. Mfg. Co., 70 M. 528 (threshing machine); Kenrick v. Rogers, 26 M. 344 (wheat); Hoxsie v. Empire Lumber Co., 41 M. 548 (logs); Viliski v. Minneapolis, 40 M. 304 (action against city for stone quarried from street); King v. Merriman, 38 M. 47 (cutting timber); Walker v. Johnson, 28 M. 147 (conversion of wagon by servant); Seeman v. Feeney, 19 M. 79 G. 54 (horse); Nesbitt v. Lumber Co., 21 M. 491 (logs); Hinman v. Heyderstadt, 32 M. 250 (cutting grass); Whitney v. Huntington, 37 M. 197 (logs); Chamberlain v. West, 37 M. 54 (action by guest against hotelkeeper); Brown v. Shaw, 51 M. 26 (conversion

of money by bailee); Benjamin v. Levy, 39 M. 11 (money); Smith v. Force, 31 M. 119 (post office boxes); Commissioners v. Smith, 22 M. 97 (conversion of county funds); Leuthold v. Fairchild, 35 M. 99 (conversion of wheat by warehouseman); Holland v. Bishop, 60 M. 23 (money obtained by fraud); Greenleaf v. Egan, 30 M. 316 (conversion by agent); Bennett v. Denny, 33 M. 530; Marsh v. Armstrong, 20 M. 81 G. 66 (conversion by United States marshal); McKusick v. Seymour, Sabin & Co., 48 M. 172 (certificates of stock); Johnson v. Dun, 78 N. W. 98 (conversion of bond by attorney).

CHAPTER XXXVI

CORPORATIONS

I. GENERAL RULES

Alleging corporate existence.

§ 1149. "In an action by or against a corporation it is not necessary to allege that it is a corporation except in cases where the fact of corporate existence enters into and constitutes a part of the cause of action itself." Holden v. Great Western Elevator Co., 69 M. 527. See further, West v. Improvement Co., 40 M. 397; Howland v. Jeuel, 55 M. 102; Becht v. Harris, 4 M. 504 G. 394; Monson v. Ry. Co., 34 M. 269; Dodge v. Minnesota etc. Co., 14 M. 49 G. 39; St. Paul Sons of Temperance v. Brown, 9 M. 157 G. 144; Woodson v. Ry. Co., 21 M. 60.

§ 1150. "In actions by or against corporations, domestic or foreign, it shall in any pleading be a sufficient allegation that the plaintiff or defendant is a corporation, to aver substantially that the plaintiff or defendant, as the case may be, is a corporation duly organized and created under the laws of the state, territory or government by which it may have been incorporated." G. S. '94, § 5253; Northern Trust Co. v. Jackson, 60 M. 116.

§ 1151. In actions by a foreign corporation it is not necessary to allege compliance with state laws. Langworthy v. Garding, 77 N. W. 207; Langworthy v. Washburn Flour-Mills Co., 79 N. W. 974.

Denial of corporate existence.

§ 1152. "In all actions brought by or against a corporation, it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall in his answer expressly aver that the plaintiff or defendant is not

a corporation." G. S. '94, § 5254; State v. Ames, 31 M. 444; Chicago etc. Ry. Co. v. Porter, 43 M. 529.

§ 1153. A denial upon information and belief is insufficient. G. S. '94, § 5256; First Nat. Bank v. Loyhed, 28 M. 396.

Miscellaneous rules.

§ 1154. "A complaint by a corporation for the enforcement of a contract made by it with the defendant need not allege that the plaintiff was empowered to make the contract." St. Paul Land Co. v. Dayton, 37 M. 364; Baker v. Northwestern Guaranty Loan Co., 36 M. 185; La Grange Mill Co. v. Bennerwitz, 28 M. 62; State v. Torinus, 22 M. 272; Gebhard v. Gibson, 7 M. 56 G. 40; Merchants Nat. Bank v. Hanson, 33 M. 40.

§ 1155. In actions by or against corporations it is not necessary to name the officers or agents by whom a corporate act was done. It is enough to allege that it was done by the corporation. Gould v. School District, 7 M. 203 G. 145; Todd v. Ry. Co., 37 M. 358.

§ 1156. An action against a corporation where the name of the corporation has been changed after the cause of action accrued, should be brought against it by its new name. Gould v. School District, 7 M. 203 G. 145.

§ 1157. The admission of the execution of a contract by a corporation includes an admission of the power of the corporation to make it and of the authority of the officer or agent who executed it in its behalf. Bausman v. Credit Guarantee Co., 47 M. 377; Monson v. Ry. Co., 34 M. 269; La Grange Mill Co. v. Bennerwitz, 28 M. 62.

II. ACTIONS TO ENFORCE STOCK SUBSCRIPTIONS

Essentials of complaint.

§ 1158. Duluth Investment Co. v. Witt, 63 M. 538; Walter A. Wood Harvester Co. v. Robbins, 56 M. 48; Minneapolis Harvester Works v. Libby, 24 M. 327; Minneapolis etc. Ry. Co. v. Morrison, 23 M. 308; Smith v. Prior, 58 M. 247; Walter A. Wood Harvester Co. v. Jefferson, 57 M. 456; St. Paul etc. Ry.

Co. v. Robbins, 23 M. 439; Marson v. Deither, 49 M. 427; Minneapolis Thresher Machine Co. v. Crevier, 39 M. 417.

III. ACTIONS UNDER CHAPTER 76

Who may bring sequestration proceedings.

§ 1159. In the case of moneyed corporations described in § 5900 an action may be instituted by a simple contract creditor to sequester and administer the corporate assets and to enforce the individual liability of stockholders for the deficiency. Minneapolis Paper Co. v. Swinburne Printing Co., 66 M. 378; American Savings & Loan Asso. v. Farmers etc. Bank, 65 M. 139.

§ 1160. In the case of corporations other than moneyed the statute provides that the action shall be brought by a judgment creditor. Klee v. E. H. Steele Co., 60 M. 355.

§ 1161. If the corporate assets have been turned over to a receiver or trustee in bankruptcy the right to institute sequestration proceedings under the state statute is of course cut off.

Who may bring action to enforce liability of stockholders.

§ 1162. In the case of moneyed corporations a simple contract creditor may bring an action. Minneapolis Paper Co. v. Swinburne Printing Co., 66 M. 378.

§ 1163. In the case of corporations other than moneyed an action may be maintained only by a judgment creditor if there are any corporate assets subject to sequestration. Minneapolis Paper Co. v. Swinburne Printing Co., 66 M. 378.

§ 1164. If an assignment has been made under the insolvency laws of this state or sequestration proceedings instituted and a receiver appointed under chapter 76 or Laws 1895, ch. 145 § 20 no one except the assignee or receiver can bring an action as of right to enforce the liability of stockholders. Ueland v. Haugan, 70 M. 349; Anderson v. Seymour, 70 M. 358; Laws 1899, ch. 272. The latter statute is yet to be construed by the supreme court but it will doubtless be held to overrule Minneapolis Paper Co. v. Swinburne Paper Co., 66 M. 378;

Sturtevant Larrabee Co. v. Mast-Buford & Burwell Co., 66 M. 437; Minneapolis Baseball Co. v. City Bank, 66 M. 441; Olson v. Cook, 57 M. 552; International Trust Co. v. Am. Loan & Trust Co., 62 M. 501 and prevent an action by a creditor as of right.

§ 1165. Under what conditions a creditor may bring an action to enforce the liability of stockholders in a corporation which has taken advantage of the federal bankruptcy act is yet to be determined.

§ 1166. A stockholder who is also a creditor of the corporation may bring an action. Mendenhall v. Duluth Dry Goods Co., 72 M. 312; Maxwell v. Northern Trust Co., 70 M. 334.

Parties defendant—who may bring in stockholders.

§ 1167. The plaintiff may, in the first instance, make the corporation the sole defendant but the ordinary and correct practice is to make the stockholders parties defendants at the outset. Arthur v. Willius, 44 M. 409; Nat. German-American Bank v. St. Anthony etc. Co., 61 M. 359; Palmer v. Bank of Zumbrota, 65 M. 90.

§ 1168. If the original plaintiff does not make the stockholders defendants at the outset he may do so later by means of supplemental complaint. Palmer v. Bank of Zumbrota, 65 M. 90.

§ 1169. If the original plaintiff does not make the stockholders defendants for the purpose of enforcing their liability it may be done, on leave of court, by other creditors. Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 M. 386; Nat. German-American Bank v. St. Anthony etc. Co., 61 M. 359; Palmer v. Bank of Zumbrota, 65 M. 90; McKusick v. Seymour, Sabin & Co., 48 M. 158.

§ 1170. If the original plaintiff has filed a supplemental complaint bringing in the stockholders other creditors cannot file supplemental complaints without leave of court. Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 M. 386; Maxwell v. Northern Trust Co., 70 M. 334.

§ 1171. All of the stockholders within the jurisdiction of

the court should be made defendants. Allen v. Walsh, 25 M. 543; Clarke v. Cold Spring Opera House Co., 58 M. 16; Hanson v. Davison, 76 N. W. 254. See however, Laws 1899, ch. 272.

General nature of action under chapter 76.

§ 1172. The remedy for enforcing the liability must be an action of an equitable nature. The statute indicates and regulates to some extent the remedy, leaving to the court the duty of making the remedy effectual by an application of the principles of equitable procedure. The statute prescribes an exclusive remedy only to the extent that an equitable action of the character therein indicated must be first instituted for the enforcement of the liability of stockholders. Such an action, though provided by statute, is essentially an equitable proceeding and the rules of equity are to be followed unless inconsistent with the statute. The object of the action is to wind up the affairs of the corporation, collect and convert all the corporate assets, appropriating them ratably among all the creditors, and to enforce the individual liability of stockholders and others to the extent of the deficiency of assets. "It is an action not proceeding in the ordinary way of actions at law by trial of simple issues, judgment and execution, but by the exercise of powers peculiar to the former courts of chancery. The proceedings are susceptible of being moulded into almost any form necessary to accomplish their purpose of securing a full and final adjustment of the rights and liabilities of all parties growing out of the corporate business. During the progress of the proceedings new parties may be admitted or brought in, and new issues introduced from time to time, as they become necessary for the final winding up of the affairs of the corporation, and the enforcement of all the rights of creditors. The original complaint need not state more than a case for the sequestration of the corporate assets. Neither stockholders, directors, nor creditors (save the one who institutes the suit), need be made parties in the first instance. Other creditors may subsequently come in or be brought in. Stockholders and directors may also be brought in for the purpose of enforcing their individual liability. This

may be done at the instance or upon the complaint of any creditor who has become a party to the proceedings. In short, the proceedings are intended to be so elastic as to be susceptible of development during their successive stages of progress, as to reach not only all the corporate assets, but also all liabilities of stockholders and others so far as necessary for the payment of creditors." Johnson v. Fischer, 30 M. 173; Merchants Nat. Bank v. Bailey Mfg. Co., 34 M. 323; Arthur v. Willius, 44 M. 412; Willis v. Mabon, 48 M. 140; McKusick v. Seymour, Sabin & Co., 48 M. 158; State v. Bank of New England, 55 M. 142; Harper v. Carroll, 66 M. 487, 509; Northwestern Railroader v. Prior, 68 M. 95; Mendenhall v. Duluth Dry Goods Co., 72 M. 312; Hanson v. Davison, 76 N. W. 254.

§ 1173. The proceeding to ascertain and enforce the liability of the stockholders is not an independent action but a step in the original action against the insolvent corporation for the sequestration of its property and the appointment of a receiver. Hospes v. N. W. Mfg. Co., 48 M. 190; Palmer v. Bank of Zumbrota, 65 M. 90; Ueland v. Haugan, 70 M. 352.

§ 1174. Chapter 76 applies to all corporations. Allen v. Walsh, 25 M. 543, 555; McKusick v. Seymour, Sabin & Co., 48 M. 158; Anchor Investment Co. v. Columbia Electric Co., 61 M. 510.

§ 1175. The remedy afforded by chapter 76 is exclusive. Allen v. Walsh, 25 M. 543; Johnson v. Fischer, 30 M. 173; McKusick v. Seymour, Sabin & Co., 48 M. 158; Winnebago Paper Mills v. N. W. Printing and Publishing Co., 61 M. 373; In re Martin's Estate, 56 M. 420; In re People's Live Stock Ins. Co., 56 M. 180.

§ 1176. The proceeding is under the control of the court and not of the individual creditor who brings the original action. "After the proceeding is begun, and the complaint is filed, it is no more that of the plaintiff than it is of any other creditor who appears, files a claim, and thus takes part in the litigation. The discretion of the court may be exercised at any time as to which creditor shall have general management

of the proceeding." Maxwell v. Northern Trust Co., 70 M. 334; Mendenhall v. Duluth Dry Goods Co., 72 M. 312; Nat. German-American Bank v. St. Anthony etc. Co., 61 M. 359.

§ 1177. A creditor cannot bring an action of this nature solely for his own benefit. Whether the original complaint so states or not the action is in behalf of all the creditors who may come in. Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 M. 386; Allen v. Walsh, 25 M. 543; Hanson v. Davison, 76 N. W. 254; Nat. German-American Bank v. St. Anthony etc. Co., 61 M. 359; Farmers Loan & Trust Co. v. Minneapolis Engine & Machine Works, 35 M. 543.

Liabilities which may be enforced in this action.

§ 1178. All liabilities of the stockholders to the corporation and to the creditors as a body may be enforced in this action but not liabilities to individual creditors. Hospes v. N. W. Mfg Co., 48 M. 174; Northwestern Railroader v. Prior, 68 M. 95; Spooner v. Bay St. Louis Syndicate, 47 M. 464; Sturtevant-Larrabee Co. v. Mast, Buford & Burwell Co., 66 M. 437; Hastings Malting Co. v. Iron Range Brewing Co., 65 M. 28; Wallace v. Carpenter Electric Heating Mfg Co., 70 M. 321; Winthrop Nat. Bank v. Mpls. Terminal Elevator Co., 79 N. W. 1010; Patterson v. Stewart, 41 M. 84; Minnesota Thresher Mfg. Co. v. Langdon, 44 M. 37; Basting v. Ankeny, 64 M. 133.

Powers of receiver.

§ 1179. "The sequestration of the property of a corporation by an adjudication of its insolvency, and the appointment of a receiver of its property and effects, under the provisions of chapter 76, is in the nature of an attachment or execution in behalf of all its creditors. The receiver has substantially the same powers and functions as an assignee in bankruptcy, or a receiver upon a creditors' bill or proceedings supplementary to execution. He succeeds to the rights of the creditors as well as of the insolvent corporation, and has the power to enforce the rights which the creditors, but for the proceedings, might have enforced in their own behalf. Everything becomes assets in his hands, and hence in the custody of the law,

which were assets as to creditors, as well as what were assets as to the corporation. Among the rights which pass to the receiver as the representative of the creditors is the right to recover property conveyed by the corporation in fraud of its creditors, or capital withdrawn and refunded to the stockholders without provision for full payment of the corporate debts. This right of the receiver does not depend upon any express statute granting it, but rests upon the general equitable doctrine that the capital of a corporation is a trust fund for the benefit of its creditors, and that those to whom it has been refunded will be held trustees for their benefit. It follows that a receiver of an insolvent corporation, as the representative of its creditors, can assert many claims against stockholders which the corporation itself could not have maintained." Minnesota Thresher Mfg. Co. v. Langdon, 44 M. 37; St. Louis Car Co. v. Stillwater Street Ry. Co., 53 M. 129; Minneapolis Baseball Co. v. City Bank, 66 M. 441; O'Gorman v. Sabin, 62 M. 46; Basting v. Ankeny, 64 M. 133; Farmers Loan & Trust Co. v. Minneapolis etc. Works, 35 M. 543; Palmer v. Bank of Zumbrota, 72 M. 266 (cannot allow or disallow claims).

Right of creditors to recover corporate assets.

§ 1180. After a receiver has been appointed under chapter 76 a creditor cannot maintain an action for the recovery of corporate assets. The right of action passes to the receiver upon his appointment. Minnesota Thresher Mfg. Co. v. Langdon, 44 M. 37; Merchants Nat .Bank v. Northwestern etc. Co., 48 M. 361; Farmers Loan & Trust Co. v. Minneapolis Engine & Machine Works, 35 M. 543.

What will prevent sequestration proceedings.

§ 1181. Where a general assignment of all corporate assets for the benefit of creditors has been made either under the assignment law of 1876 or the insolvency law of 1881 creditors cannot institute sequestration proceedings as of right;[1] but a receivership in an action to foreclose a mortgage on property of a corporation will not prevent such proceedings[2] nor will

an action by a stockholder to set aside a fraudulent transfer of the corporate assets have that effect.[3]

[1] International Trust Co. v. American etc. Co., 62 M. 501. See § 1161.

[2] St. Louis Car Co. v. Stillwater Street Ry. Co., 53 M. 129.

[3] Oswald v. St. Paul Globe Pub. Co., 60 M. 82.

What will prevent an action by creditors to enforce stockholders' liability.

§ 1182. As stated above the sequestration of corporate assets for the benefit of creditors under the assignment law of 1876 or the insolvency law of 1881 or Laws 1895, ch. 145, § 20 cuts off the right of a creditor to bring an independent action to enforce the liability of stockholders. The pendency of an action by the attorney general for the forfeiture of the charter of a corporation also cuts off this right. State v. Merchants' Bank, 67 M. 506.

Miscellaneous decisions in actions under chapter 76.

§ 1183. Merchants Nat. Bank v. Northwestern etc. Co., 48 M. 349; Spooner v. Bay St. Louis Syndicate, 48 M. 313 (creditor allowed to file claim after time set); Nelson v. Jenks, 51 M. 108 (creditors coming in and filing claims pursuant to notice are parties and bound by the judgment); Frost v. St. Paul Banking & Investment Co., 57 M. 325 (a judgment against a corporation and others jointly is a debt for the purposes of this chapter); Freeman v. Children's Endowment Society, 63 M. 393 (appeal by creditor from allowance of claim); Basting v. Ankeny, 64 M. 133 (equitable defences—appointment of receiver cannot be attacked collaterally); Spooner v. Bay St. Louis Syndicate, 47 M. 464 (default judgment against stockholder); Arthur v. Clarke, 46 M. 491 (findings held sufficient); Harper v. Carroll, 66 M. 487; Hanson v. Davison, 76 N. W. 254 (the liability of stockholders is several and a judgment against a part does not release the others—the liability is contractual and must be enforced as such—stockholders omitted in the original action may be sued in an ancillary action and the judgment in the original action, so far as it determines the amount of the corporate debts after exhausting the corporate

assets, is conclusive on such stockholder unless impeached for fraud); Oswald v. Minneapolis Times Co., 65 M. 249; Holland v. Duluth etc. Co., 65 M. 324; Mendenhall v. Duluth Dry Goods Co., 72 M. 312 (the judgment on which the action is based is conclusive on the stockholders); Danforth v. Nat. Chemical Co., 68 M. 308 (a judgment by default entered after the appointment of a receiver cannot be allowed against the estate as a claim without proof); First Nat. Bank v. Northern Trust Co. (vacating judgment and allowing creditor to file claim after time set); Hove v. Bankers' Exchange Bank, 77 N. W. 967 (leave to file claim after time set); In re Northern Trust Co., 77 N. W. 219 (fees of attorney of intervening creditor); State v. Bell, 64 M. 400 (the state a preferred creditor); Sjoberg v. Security Savings & Loan Asso., 75 N. W. 1116 (as to when a corporation is insolvent); Harper v. Carroll, 66 M. 487 (form of judgment—extent of judgment—successive executions—general practice as to judgment and executions); Winthrop Nat. Bank v. Minneapolis Terminal Elevator Co., 79 N. W. 1010 (creditors need not first exhaust remedies against stockholders guaranteeing bonds of the corporation); Rogers v. Peoples Gas & Electric Co., 78 N. W. 12 (reducing liability on account of bonus stock—form of judgment); Palmer v. Bank of Zumbrota, 72 M. 266 (interest—purchase of claims—increased stock—extent of judgment); Mendenhall v. Duluth Dry Goods Co., 72 M. 312 (extent of judgment which a creditor stockholder may recover); Commercial Bank of St. Paul v. Azotine Mfg. Co., 66 M. 413 (findings as to stock of nonresidents unnecessary); Olson v. State Bank, 72 M. 320 (allowance of counsel fees).

Questions of pleading.

§ 1184. International Trust Co. v. Am. Loan & Trust Co., 62 M. 501 (complaint in action to enforce stockholder's liability held insufficient); Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 M. 386; Windham County Savings Bank v. O'Gorman, 66 M. 361, 368; Helm v. Smith Fee Co., 79 N. W. 313 (a claim should be presented by a petition or complaint—when such petition is filed all of its allegations are to be taken as

denied and must be proved at the hearing unless expressly admitted—no answer or reply to such a petition or complaint is necessary); Helm v. Smith Fee Co., 79 N. W. 313 (counterclaim); Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 M. 386; Palmer v. Bank of Zumbrota, 65 M. 90; Maxwell v. Northern Trust Co., 70 M. 334 (if any creditor filing a claim desires, besides the allowance of his claim, to demand other relief which cannot be had under the allegations of the original complaint, he should apply to the court for leave to insert the additional allegations in his petition. In other words, he should apply for leave to file a cross-bill, which the general order for creditors to exhibit their claims and become parties does not permit him to do. The order should provide for the service of the cross-bill on all the parties against whom it is directed and they should answer it); Mendenhall v. Duluth Dry Goods Co., 72 M. 312 (complaint not demurrable for defect of parties); Richardson v. Merritt, 77 N. W. 968 (setoff by stockholder); Basting v. Ankeny, 64 M. 133 (equitable defences in action for unpaid subscription); Densmore v. Shepard, 46 M. 54; Harper v. Carroll, 66 M. 487, 507 (waiver of defect of parties); Markell v. Ray, 77 N. W. 788 (setoff); Anderson v. Seymour, 70 M. 358 (action by receiver to charge stockholders propertly instituted by a supplemental complaint); Smith v. Prior, 58 M. 247 (complaint in action to recover unpaid subscription for stock held insufficient); Hospes v. Northwestern Mfg. Co., 48 M. 174 (complaint in action to recover for bonus stock held sufficient).

Actions under G. S. '94, § 5900 and Laws 1895, ch. 145.

§ 1185. State v. Bell, 64 M. 400; State v. American Savings & Loan Asso., 64 M. 349; Palmer v. Bank of Zumbrota, 65 M. 90; American Savings & Loan Asso. v. Farmers & Mechanics State Bank, 65 M. 139; Minneapolis Paper Co. v. Swinburne Printing Co., 66 M. 378; Harper v. Carroll, 66 M. 487; State v. Merchants Bank, 67 M. 506; Merchants Bank v. Moore, 68 M. 468; Walther v. Seven Corners Bank, 58 M. 434; Olson v. Cook, 57 M. 552; State v. Bank of New England, 55 M. 139; Minneapolis Baseball Co. v. City Bank, 76 N. W. 1024; Ueland

v. Haugan, 70 M. 349; Anderson v. Seymour, 70 M. 358; Bank of Minnesota v. Anderson, 70 M. 414; Minneapolis Baseball Co. v. City Bank, 66 M. 441; Allen v. Walsh, 25 M. 543; Mercantile Nat. Bank v. Macfarlane, 71 M. 497; International Trust Co. v. American Loan & Trust Co., 62 M. 501; Palmer v. Bank of Zumbrota, 72 M. 266.

Actions under G. S. '94, §§ 3430-3435.

§ 1186. In re People's Live Stock Ins. Co., 56 M. 180; In re Educational Endowment Asso., 56 M. 171; Olson v. Cook, 57 M. 552; Kalkhoff v. Nelson, 60 M. 284.

Actions under G. S. '94, §§ 2600-2602.

§ 1187. Merchants Nat. Bank v. Bailey Mfg. Co., 34 M. 323; Nolan v. Hazen, 44 M. 478; Flowers v. Bartlett, 66 M. 213; State v. Probate Court, 66 M. 246; Sturtevant-Larrabee Co. v. Mast, Buford & Burwell, 66 M. 437; Nat. New Haven Bank v. N. W. Guaranty Loan Co., 61 M. 375; Winnebago Paper Mills v. N. W. Printing & Publishing Co., 61 M. 373; Rule v. Omega Stove & Grate Co., 64 M. 326; Dodge v. Minnesota etc. Co., 16 M. 368 G. 327.

Actions under G. S. '94, §§ 2822-2825.

§ 1188. Patterson v. Stewart, 41 M. 84; Minnesota Thresher Mfg. Co. v. Langdon, 44 M. 37; Merchants Nat. Bank v. Northwestern Mfg. Co., 48 M. 349.

CHAPTER XXXVII

DEATH BY WRONGFUL ACT

§ 1189. Complaint in action by administrator.

The plaintiff, as administrator of the estate of deceased, complains of defendant and alleges:

I. [Set forth the facts constituting a cause of action for negligence as in an ordinary action.]

II. [Allege the fact and time of death and that it resulted from the injuries received in the accident or otherwise make it appear that it was due to the negligence of defendant.]

III. That the said left a widow, , and as next of kin minor children, to wit:

IV. That on the day of , 19 , the said having died intestate, letters of administration on his estate were duly issued and granted to the plaintiff by the probate court of county, state of Minnesota, whereupon the plaintiff duly qualified and entered upon the duties of and now is such administrator.

V. That by the death of said his widow and next of kin, for whose benefit this action is brought by the plaintiff in his representative capacity, suffered damage in the sum of dollars.

VI. That there are outstanding claims for the support of the said during his last sickness and for his funeral amounting to dollars.

Wherefore plaintiff, as such administrator, demands judgment:

[As in an ordinary action.]

§ 1190. By executor.

The plaintiff, as executor of the last will and testament of deceased, complains of defendant and alleges:

I. [As in preceding form.]

II. [As in preceding form.]

III. [As in preceding form.]

IV. That the said died leaving a last will and testament which on the day of . , 19 , was duly admitted to probate and allowed by the probate court of county, state of Minnesota; and on the day of , 19 , letters testamentary thereon were duly issued and granted by said court to the plaintiff as executor of said will, who thereupon duly qualified and entered upon the duties of and now is such executor.

V. [As in preceding form.]

VI. [As in preceding form.]

Wherefore plaintiff, as such executor, demands judgment: [As in an ordinary action.]

NOTES

The statute.

§ 1191. "When death is caused by the wrongful act or omission of any party or corporation, the personal representative of the deceased may maintain an action if he might have maintained an action, had he lived, for an injury caused by the same act or omission by which the death was caused. But the action shall be commenced within two years after the act or omission by which the death was caused. The damages therein cannot exceed five thousand dollars, and the amount received is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportion as the personal property of deceased persons; Provided, that any demand for the support of the deceased, and funeral expenses, duly allowed by the probate court, shall be first deducted and paid; Provided, that if an action had been commenced by such deceased person during his lifetime for such injury which had not been finally determined, such action does not abate by the death of the plaintiff, but may be continued by the personal representatives of the deceased, for the benefit of the same persons and limited to the same amount of recovery as herein provided, and the court on

motion may allow the action to be continued by such personal representatives and order pleadings to be filed and issues made conformably to the practice in cases brought under the provisions of this chapter." G. S. '94, § 5913 as amended by Laws 1897, ch. 261.

Construction of statute.

§ 1192. "The statute is to be construed as a remedial one, and must have a liberal interpretation to effectuate the evident purpose of its enactment." Bolinger v. Ry. Co., 36 M. 418.

§ 1193. The word "wrongful" is not used in the sense of wilful or malicious. An action will lie under the statute for the same kind of act or omission, causing death, for which the deceased might have maintained an action if the resulting injury had fallen short of death. McLean v. Burbank, 12 M. 530 G. 438; Boutiller v. The Milwaukee, 8 M. 97 G. 72 (action against a steamboat).

Who may sue.

§ 1194. No one is authorized to bring an action under the statute except the administrator or executor of the deceased. Nash v. Tousley, 28 M. 5; Scheffer v. Ry. Co., 32 M. 125; Boutiller v. The Milwaukee, 8 M. 97 G. 72.

§ 1195. An administrator appointed in this state where the deceased had his domicile may sue in this state upon a cause of action arising in another state. Myers v. Ry. Co., 69 M. 476.

Who next of kin.

§ 1196. A husband is not next of kin of his wife within the meaning of the statute. Next of kin means the nearest blood relation. Watson v. Ry. Co., 70 M. 514.

Jurisdiction.

§ 1197. A probate court of this state may direct administration for the purpose of enforcing a right of action under the statute arising from the death of a person caused by a wrongful act or omission of another committed in this state

although the deceased was a non-resident and left no property here. Hutchins v. Ry. Co., 44 M. 5.

§ 1198. "The states of Wisconsin and Minnesota have concurrent jurisdiction upon the St. Croix river and its waters, the same being a common highway between them; and for an injury resulting in the death of a party while navigating its waters, an action may be brought in the proper court in this state, and the jurisdiction of such court is not affected by the fact that the boat was at the time on the east or Wisconsin side of the center of the stream." Opsahl v. Judd, 30 M. 126.

§ 1199. "An action will lie in the courts of this state for a wrongful act or omission occurring out of this state, and within the bounds of another state, by which death is caused, if the statute of the latter state gives a cause of action for such wrong." Myers v. Ry. Co., 69 M. 476.

§ 1200. It is not necessary that the statute in this state should be the same as that of the state in which the accident occurred. Herrick v. Ry. Co., 31 M. 11; Myers v. Ry. Co., 69 M. 476; Nicholas v. Ry. Co., 80 N. W. 776.

Complaint.

§ 1201. The complaint must show that the deceased left a widow or next of kin. Schwarz v. Judd, 28 M. 371; Sykora v. Threshing Machine Co., 59 M. 130.

§ 1202. It is not necessary to allege that the widow or next of kin had a pecuniary interest in the deceased. Johnson v. Ry. Co., 31 M. 283; Barnum v. Ry. Co., 30 M. 461.

§ 1203. A general allegation of damages is sufficient. Barnum v. Ry. Co., 30 M. 461; Johnson v. Ry. Co., 31 M. 283.

§ 1204. The existence and amount of claims for support of deceased during his last illness and for funeral expenses must be alleged. Sykora v. Threshing Machine Co., 59 M. 130.

§ 1205. If the action is brought under a foreign statute such statute must be fully pleaded and proved. Myers v. Ry. Co., 69 M. 476. See § 1849.

Abatement by death.

§ 1206. A cause of action under this statute abates with the death of the tort-feasor. Green v. Thompson, 26 M. 500.

Defences.

§ 1207. It is no defence that the deceased was violating the Sunday law at the time of the accident. Opsahl v. Judd, 30 M. 126.

§ 1208. Contributory negligence is a defence as in an action by the injured party. Judson v. Ry. Co., 63 M. 248; Nelson v. Ry. Co., 78 N. W. 1041.

§ 1209. A release given, for a valuable consideration, to the person liable by those entitled to the benefits of the statute, is a bar to a subsequent action brought by the personal representative of the deceased. Sykora v. Threshing Machine Co., 59 M. 130.

Limitations.

§ 1210. The period intervening the death and the appointment of a personal representative cannot be excluded in computing the time within which an action may be brought. Rugland v. Anderson, 30 M. 386.

Damages.

§ 1211. The damages awarded must be solely by way of compensation for pecuniary loss. Punitive damages are not allowed. No compensation can be awarded for wounded feelings, for the loss of the companionship and comfort of the deceased or for his pain and suffering. The true test is, What, in view of all the facts in evidence, was the probable pecuniary interest of the beneficiaries in the continuance of the life of the deceased? The proper estimate may be arrived at by taking into account the calling of the deceased and the income derived therefrom, his health, age, probable duration of life, talents, habits of industry, success in life in the past and the amount of aid in money or services which he was accustomed to furnish the beneficiaries. If the deceased was the head of a family the value of his services to the family

cannot be limited in a pecuniary sense to the amount of his daily wages earned for their support. His constant daily services, attention, and care in their behalf, in the relation which he sustained to them, may be considered as well, and the jury must judge of the circumstances in each case. The determination of the amount of damages, however, is not left to the uncontrolled discretion of the jury. Their estimate must be based on the facts in evidence and confined to those damages which are pecuniary in their nature and result from the death of the deceased. Hutchins v. Ry. Co., 44 M. 5; Bolinger v. Ry. Co., 36 M. 418; Gunderson v. N. W. Elevator Co., 47 M. 161; O'Malley v. Ry. Co., 43 M. 289; Shaber v. Ry. Co., 28 M. 106; Phelps v. Ry. Co., 37 M. 485; Opsahl v. Judd, 30 M. 126; Deisen v. Ry. Co., 43 M. 454; Scheffler v. Ry. Co., 32 M. 518; Clapp v. Ry. Co., 36 M. 6; Strutzel v. Ry. Co., 47 M. 543; Schwarz v. Judd, 28 M. 371; Robel v. Ry. Co., 35 M. 84; Seiber v. Ry. Co. 79 N. W. 95.

CHAPTER XXXVIII

DECEIT

§ 1212. Skeleton form of complaint.

The plaintiff complains of defendant and alleges:

I. [State the representations made by the defendant.[1]]

II. That said representations were false.[2]

III. That defendant made such representations knowing them to be false[3] and with intent to deceive plaintiff.[4]

IV. That plaintiff, believing such representations to be true, was thereby induced[5] to [stating what plaintiff did in reliance on the representations].

V. [State facts showing a damage to plaintiff resulting from the deceit.[6]]

[1] Barber v. Morgan, 51 Barb. (N. Y.) 116; Wells v. Jewett, 11 How. Prac. (N. Y.) 242.

[2] Furlong v. Gair, 46 N. Y. Superior Ct. 573; Barber v. Morgan, 51 Barb. (N. Y.) 116; Byard v. Holmes, 34 N. J. L. 296; Catlin v. Fletcher, 9 M. 85 G. 75; Faribault v. Sater, 13 M. 223 G. 210.

[3] Byard v. Holmes, 34 N. J. L. 296; Duffaney v. Ferguson, 66 N. Y. 482; Kountze v. Kennedy, 147 N. Y. 127; Holst v. Stewart, 154 Mass. 445; Busterud v. Farrington, 36 M. 320; Smith v. Kingman & Co., 70 M. 453; Faribault v. Sater, 13 M. 223 G. 210. This allegation is sustained by proof that the defendant either knew the representations to be false, or made them as of his own knowledge in utter disregard of whether they were true or false, or made them believing them to be true, but without reasonable ground for such belief and under such circumstances that he was bound to know the truth. Bullitt v. Farrar, 42 M. 8; Busterud v. Farrington, 36 M. 320; Humphrey v. Merriam, 32 M. 197; Wilder v. De Cou, 18 M. 470 G. 421; Merriam v. Pine City Lumber Co., 23 M. 314; Haven v. Neal, 43 M. 315; Riggs v. Thorpe, 67 M. 217; Lofgren v. Peterson, 54 M. 343; Carlton v. Hulett, 49 M. 319; Winston v. Young, 47 M. 80; Kiefer v. Rogers, 19 M. 32 G. 14.

[4] Fraudulent intent is an element of deceit and should be directly alleged. Humphrey v. Merriam, 32 M. 197; Riggs v. Thorpe, 67 M. 217; Haven v. Neal, 43 M. 315; Nash v. Trust Co., 163 Mass. 578; Zabriskie v. Smith, 13 N. Y. 322. See Hodsen v. Hodsen, 69 M. 486. While fraudulent intent should always be alleged directly and in issuable

form yet the absence of such an allegation will not render the pleading demurrable if such intent is fairly inferable from other allegations. It may be inferred from an allegation that false statements were made with a knowledge of their falsity. Haven v. Neal, 43 M. 315; Byard v. Holmes, 34 N. J. L. 296; Brady v. Finn, 162 Mass. 260; Zabriskie v. Smith, 13 N. Y. 322; Barber v. Morgan, 51 Barb. (N. Y.) 116.

[5] Barber v. Morgan, 51 Barb. (N. Y.) 116; Sheldon v. Davidson, 85 Wis. 138; Hone v. Woodruff, 1 M. 418 G. 303; Traphagen v. Sagar, 63 M. 317.

[6] Parker v. Jewell, 52 M. 514; McNair v. Toler, 21 M. 175; Alden v. Wright, 47 M. 225; Taylor v. Guest, 58 N. Y. 262; Hotchkin v. Third Nat. Bank, 127 N. Y. 329; Byard v. Holmes, 34 N. J. L. 296; Stetson v. Riggs, 37 Neb. 797.

Deceit as a defence is to be pleaded in the same way as when set up as a cause of action. Wilder v. De Cou, 18 M. 470 G. 421. Complaints held sufficient: Winston v. Young, 47 M. 80; Egan v. Gordon, 65 M. 505.

CHAPTER XXXIX

DIVORCE

§ 1213. Adultery.

The plaintiff complains of defendant and alleges:

I. That the plaintiff , aged years and the defendant , aged years, are husband and wife, and were married in the city of , state of , on the day of , 19 .

II. That plaintiff is a resident of this state and has resided therein continuously for more than one year immediately preceding the exhibiting of this complaint.

III. [That on the day of , 19 , defendant committed adultery with one at (giving number and street if possible or otherwise describing house), in the city of , state of .] [That between the day of , 19 , and the day of , 19 , at times which the plaintiff is unable to state more definitely, defendant committed (continuing as in preceding paragraph)] [On information and belief, that on the day of , 19 , at some place in the city of , state of , which the plaintiff is unable to specify, defendant committed adultery with one .] [On information and belief, that on the day of , 19 , at the house of (giving name of owner or keeper with number and street), in the city of , state of , defendant committed adultery with a woman whose name is unknown to plaintiff.]

IV. That there are living of the issue of said marriage children named , aged years and , aged years.

V. [That the moral character of defendant is bad and such as to render him unfit to have the custody of said children.] [That defendant has no proper home for said children.]

VI. That defendant is possessed of real property of the value of dollars and personal property of the value of dollars.[1]

VII. [That the maiden name of plaintiff was .]

Wherefore plaintiff demands judgment:

(1) Dissolving the marriage relation of plaintiff and defendant.

(2) [Awarding the custody of the minor children of said marriage to plaintiff.]

(3) [Restoring to plaintiff her maiden name.]

(4) [Awarding to plaintiff such alimony as to the court may seem just.]

(5) For the costs and disbursements of this action.

[1] Wilson v. Wilson, 67 M. 444.

§ 1214. Cruel and inhuman treatment.

The plaintiff complains of defendant and alleges:

I. [As in § 1213.]

II. [As in § 1213.]

III. That since said marriage defendant has treated plaintiff in a cruel and inhuman manner; and as particular instances of cruelty [among many constituting a long and systematic course of ill treatment] plaintiff alleges that [giving a few acts of cruelty with time, place and circumstances].

IV. [Continuing as in § 1213.]

§ 1214 a. Habitual drunkenness.

The plaintiff complains of defendant and alleges:

I. [As in § 1213.]

II. [As in § 1213.]

III. That defendant has been in a state of habitual drunkenness for the space of one year immediately preceding the filing of this complaint.[1]

IV. [Continuing as in § 1213.]

[1] Sustained by Forney v. Forney, 80 Cal. 528; Bishop, Marriage and Divorce, § 1503.

§ 1215. Imprisonment.

The plaintiff complains of defendant and alleges:

I. [As in § 1213.]

II. [As in § 1213.]

III. That on the day of , 19 , defendant was sentenced by the district court in and for the county of , state of Minnesota, to imprisonment for the term of years in the state prison of the state of Minnesota where he is now confined under said sentence.

IV. [Continuing as in § 1213.]

§ 1216. Desertion.

The plaintiff complains of defendant and alleges:

I. [As in § 1213.]

II. [As in § 1213.]

III. That on the day of , 19 , defendant wilfully deserted plaintiff and has ever since and for more than one year next preceding the filing of this complaint uninterruptedly continued said desertion.[1]

IV. [Continuing as in § 1213.]

[1] Based on Bishop, Marriage and Divorce, § 1464.

NOTES

Joinder of causes of action.

§ 1217. "Facts which would entitle plaintiff to a limited divorce may be joined in a complaint with those justifying an absolute divorce and thereupon relief may be sought in alternative form." Grant v. Grant, 53 M. 181; Wagner v. Wagner, 36 M. 239.

Jurisdiction and collateral attack of judgments.

§ 1218. Morey v. Morey, 27 M. 265; State v. Armington, 25 M. 29; In re Matthews Estate, 55 M. 401; Thurston v. Thurston, 58 M. 279; Marvin v. Foster, 61 M. 154; Thelan v. Thelan, 78 N. W. 108; Sprague v. Sprague, 73 M. 474 (alimony awarded without any demand therefor in the complaint).

Complaint.

§ 1219. Residence in the state for the statutory period must be alleged but it is not necessary to allege that the

plaintiff resides in the county where the action is brought. Young v. Young, 18 M. 90 G. 72; Thelan v. Thelan, 78 N. W. 108.

§ 1220. It is not necessary to anticipate and negative the defences of condonation, procurement and connivance. They must be specially pleaded by defendant. Young v. Young, 18 M. 90 G. 22; Clague v. Clague, 46 M. 461.

§ 1221. In charging adultery the time, place and person should ordinarily be alleged. Freeman v. Freeman, 39 M. 370.

§ 1222. In charging cruelty it is not necessary to specify every instance of cruelty which the plaintiff desires to prove. Segelbaum v. Segelbaum, 39 M. 258.

§ 1223. It is permissible to insert allegations as to the fitness of the other party to have the custody of the children. Vermilye v. Vermilye, 32 M. 499.

§ 1224. It is a common and convenient practice to allege in the complaint the faculties of the defendant, that is, facts justifying the award of permanent alimony. An issue is formed thereon but it is not necessarily tried at the same time as the main issues. It is left to the discretion of the court to determine the time and mode of taking testimony and considering the question according to the exigencies of the particular case. Galusha v. Galusha, 138 N. Y. 272.

CHAPTER XL

FALSE IMPRISONMENT

§ 1225. Common form without special damages.[1]

The plaintiff complains of defendant and alleges:

That on the day of , 19 , in the city of , defendant, without probable cause, imprisoned plaintiff for hours to his damage[2] dollars.

Wherefore [demanding judgment].

[1] Sustained by Nixon v. Reeves, 65 M. 159. See also, Quinn v. Shortall, 29 M. 106.

[2] Woodward v. Glidden, 33 M. 108; Judson v. Reardon, 16 M. 431 G. 387; Quinn v. Shortall, 29 M. 106; Ward v. Haws, 5 M. 440 G. 359.

CHAPTER XLI

FORCIBLE ENTRY

§ 1226. General form of complaint.[1]

The plaintiff complains of defendant and alleges:

I. That at the time stated in the next paragraph he was in the actual and peaceable possession of [describing premises as in a deed], in the county and state aforesaid.

II. That on the day of , 19 , defendant forcibly [and with a multitude of people [2]] entered upon said premises and disseized plaintiff and still forcibly withholds possession from him.

Wherefore plaintiff demands judgment:

(1) For the restitution of said premises.

(2) For the costs and disbursements of this action.

[Verification]

[1] Sustained by Davis v. Woodward, 19 M. 174 G. 137; Peyton v. Peyton, 34 Kans. 624, 628. See Anderson v. Schultz, 37 M. 76.

[2] Three persons constitute a multitude. State v. Davis, 109 N. C. 809.

NOTES

Nature of action.

§ 1227. This action is quasi criminal in its nature. Its objects are to punish the disseizor by fine for his breach of the peace and to restore in a summary manner the disseizee to his possession regardless of his title or right of possession. The only questions involved are (1) whether the plaintiff was in the actual and peaceable possession of the premises at the time of the forcible entry and (2) whether that possession has been forcibly and illegally invaded by the defendant. The remedy deals only with the question of possession leaving the question of title to be determined in another action.[1] The defendant cannot plead title in himself or a third party as a defence or in any way raise an issue as to the respective rights

of the parties to possession if his entry was forcible and the possession of the plaintiff was peaceable.[2] He may deny that his entry was forcible and he may deny that the possession of the plaintiff was actual and peaceable. Under a general denial or plea of not guilty he may prove every fact which constitutes a defence if the complaint is in the form given in the text. A peaceable entry under claim of title is a good defence. "If possession of real property has been taken or is detained from the person entitled to it, his method of recovering or obtaining will depend upon circumstances. At common law he might use force to regain or obtain possession, but, as this led to serious breaches of the public peace, St. 5 Rich. II., ch. 7, was enacted. This statute has been re-enacted in most of the states, and, in substance, is found in G. S. '94, § 6108. It forbids entry upon lands and tenements except in a peaceable manner. But if a person lawfully entitled to possession of real property can make peaceable entry, even while another is in occupation, the entry, in contemplation of law, gives or restores to him complete possession."[3] The possession of the plaintiff, in order to maintain an action under the statute, must have been actual and peaceable. It is not necessary that he should be living on the land but he must be exercising dominion and his possession must be exclusive. A mere scrambling possession is insufficient but a possession which originated in force may by lapse of time and absence of attack become peaceable and exclusive. How long a possession obtained by force must continue undisturbed to ripen into a peaceable possession sufficient to sustain an action under the statute is undetermined in this state. In many states the period is defined by statute.[4]

[1] O'Neil v. Jones, 72 M. 446; Bridges v. Branam, 133 Ind. 488; Emsley v. Bennett, 37 Iowa, 15; Stuckey v. Carleton, 66 Ga. 215; Iron Mountain Ry. Co. v. Johnson, 119 U. S. 608; City of Oklahoma v. Hill, 4 Okla. 521; Peyton v. Peyton, 34 Kans. 624, 628.

[2] Stephens v. McCloy, 36 Iowa, 659; Bridges v. Branam, 133 Ind. 488; Kelley v. Andrew, 3 Colo. App. 122.

[3] Mercil v. Broulette, 66 M. 416.

[4] O'Neil v. Jones, 72 M. 446.

Compared with actions under G. S. '94, § 6118.

§ 1228. The chapter of our statutes regulating actions for forcible entry and unlawful detainer is a very unworkmanlike piece of legislation. It attempts to regulate by common rules two distinct and very dissimilar actions. An action under §§ 6108, 6109 is quasi criminal in its nature. A fine is imposed for the breach of the public peace. On the other hand the action under § 6118 is purely civil in nature and the judgment is solely for restitution and costs. In the latter action title is frequently in issue and the case is necessarily certified to the district court. See § 1537. On the other hand, in an action under § 6109 the defendant cannot raise an issue of title and the justice is never authorized to certify the case.[1] If the pleadings seek to raise an issue of title they should be stricken out as irrelevant or treated as surplusage.

[1] Bridges v. Branam, 133 Ind. 488; Kelley v. Andrew, 3 Colo. App. 122.

CHAPTER XLII

FRAUDULENT CONVEYANCES

§ 1229. Actions under G. S. '94, § 4222.

The plaintiff complains of defendants and alleges:

I. That on the day of , 19 , plaintiff recovered a personal judgment in the district court in and for the county of , state of Minnesota, which was duly made by said court, against the defendant , for the sum of dollars, in an action upon a claim which accrued prior to the conveyance hereinafter mentioned.

II. That on said day said judgment was duly docketed in the office of the clerk of court for the county of , wherein said defendant then resided.

III. [That on the day of , 19 , plaintiff caused an execution thereon to be issued out of said court against the property of said defendant, to the sheriff of the county of , wherein said defendant then resided; and that said execution was, on the day of , 19 , returned by said sheriff wholly unsatisfied.[1]]

IV. That said judgment is still owned by plaintiff and remains wholly unsatisfied.

V. That on the day of , 19 , the defendant , being then the owner thereof, conveyed to the defendant , the following described real property:

[Describing premises as in a deed.]

VI. That the defendant made said conveyance with the intent to hinder, delay and defraud plaintiff in the collection of his claim and the same was received by the defendant with full knowledge of such intent.

Wherefore plaintiff demands judgment:

(1) That said conveyance is void as to plaintiff.

(2) For the costs and disbursements of this action.

[1] May be omitted except in actions to reach equitable assets. §§ 1230, 1234.

This form may be made sufficient to reach equitable assets by simply changing paragraph V. to meet the facts of the particular case and praying for the appropriate relief. In Spooner v. Ins. Co., 79 N. W. 305 it is said obiter that in an action to reach equitable assets it is necessary for the plaintiff to allege that he has no legal remedy, that the debtor is insolvent and has no other property from which his debt may be satisfied. A bare allegation of no legal remedy is of course a mere nullity. Facts showing exhaustion of legal remedies must be alleged but where the plaintiff alleges, as in the foregoing form, that an execution has been returned unsatisfied it is not necessary to allege further that the debtor is insolvent and has no other property out of which the judgment may be made. Such a return is conclusive that the plaintiff has exhausted his legal remedy. Daskam v. Neff, 79 Wis. 161; Wadsworth v. Schisselbauer, 32 M. 84.

I. ACTIONS TO REACH EQUITABLE ASSETS

When may be brought.

§ 1230. "In a creditor's suit, strictly so called, where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor, which could not be reached on execution, he must have first exhausted his remedy at law by the issue of execution, and its return unsatisfied. This execution must be issued to the county where the debtor resided, if a resident of the state." Wadsworth v. Schisselbauer, 32 M. 84; Banning v. Armstrong, 7 M. 40 G. 24; Spooner v. Ins. Co., 79 N. W. 305.

§ 1231. The rule is otherwise when the debtor is a non-resident. Rule v. Omega etc. Co., 64 M. 326.

Under G. S. '94, § 4281—resulting trust.

§ 1232. An action under this statute cannot be maintained, except where the debtor is a non-resident, until the creditor has obtained a judgment and had an execution returned unsatisfied. Moffatt v. Tuttle, 35 M. 301; Overmire v. Haworth, 48 M. 372; Dale v. Wilson, 39 M. 330 (right of action limited to life of judgment).

§ 1233. In an action under this statute against a married woman the husband is not a necessary party. Leonard v. Green, 30 M. 496.

II. ACTIONS TO REACH PROPERTY SUBJECT TO EXECUTION

§ 1234. Actions under G. S. '94, § 4222—when may be brought

(a) Real property:

A simple contract creditor cannot bring the action. The creditor must first obtain a judgment and docket it in the county where the land lies. It is not, however, necessary to issue execution. Massey v. Gorton, 12 M. 145 G. 83; Banning v. Armstrong, 7 M. 40 G. 24; Wadsworth v. Schisselbauer, 32 M. 84; Rounds v. Green, 29 M. 139; Scanlan v. Murphy, 51 M. 536; Spooner v. Ins. Co., 79 N. W. 305; Cales v. Allen, 149 U. S. 451.

(b) Personal property:

The creditor must first obtain a judgment and levy upon the property. Wadsworth v. Schisselbauer, 32 M. 84.

§ 1235. A simple contract creditor may bring an action where the debtor has absconded or is a non-resident. Rule v. Omega etc. Co., 64 M. 326.

Complaint.

§ 1236. Fraudulent intent must be alleged directly and not left to inference. McKibbin v. Ellingson, 58 M. 205.

§ 1237. Plaintiff must allege facts showing that he occupies a status entitling him to assail the conveyance on the ground of fraud; that he himself is a creditor or authorized to sue in behalf of creditors. Sawyers v. Harrison, 43 M. 297; Tvedt v. Mackel, 67 M. 24.

§ 1238. It is not necessary to allege that the debtor has no other property out of which the judgment can be made. Wadsworth v. Schisselbauer, 32 M. 84; Rounds v. Green, 29 M. 139; Spooner v. Ins. Co., 79 N. W. 305.

§ 1239. It should affirmatively appear that the debt due the plaintiff was incurred prior to the conveyance. Anderson

v. Lindberg, 64 M. 476; Piper v. Johnston, 12 M. 60 G. 27; Walsh v. Byrnes, 39 M. 527.

§ 1240. In pleading the judgment it is sufficient to allege that it was duly made or words to that effect. G. S. '94, § 5249; Scanlan v. Murphy, 51 M. 536.

§ 1241. The debt for which the judgment was rendered need not be stated with the definiteness required in a complaint to recover the debt, the only purpose of such allegation being to show that the judgment was recovered on a debt accruing prior to the fraudulent conveyance. Scanlan v. Murphy, 51 M. 536; Welch v. Bradley, 45 M. 540.

Actions under G. S. '94, § 4218.

§ 1242. "This section of the statute is limited by its terms to goods and chattels but the principle upon which it rests is a part of the common law and applies to realty as well as personality." Witherill v. Canney, 62 M. 341; Anderson v. Lindberg, 64 M. 476.

§ 1243. As to the requirements of a complaint under this section see, Anderson v. Lindberg, 64 M. 476.

Actions by receivers and assignees under G. S. '94, § 4233.

§ 1244. This statute gives to the assignee or receiver the same right to avoid a fraudulent conveyance as the creditors whom he represents and he is not required to have the claim first reduced to judgment. Merrill v. Ressler, 37 M. 82; Chamberlain v. O'Brien, 46 M. 80; Thomas Mfg. Co. v. Foote, 46 M. 240; Rossman v. Mitchell, 75 N. W. 1053. He need not first obtain leave of court. Moore v. Hayes, 35 M. 205.

§ 1245. After the appointment of a receiver or assignee the creditors cannot avoid a fraudulent conveyance. Rossman v. Mitchell, 75 N. W. 1053.

§ 1246. "Where an insolvent debtor has transferred his personal property to defraud his creditors, his assignee or receiver in insolvency may avoid such sale by demanding of the fraudulent vendee a return of the property; and, if the demand is refused, he may replevy the property, or sue the vendee for

the value thereof. He is not required to first bring an equitable action to set aside the sale." Rossman v. Mitchell, 75 N. W. 1053.

Action by receiver appointed under G. S. '94. § 5392.

§ 1247. "A receiver appointed in proceedings supplementary to execution may maintain an action to avoid a fraudulent conveyance of real estate by the judgment debtor, although there has been no transfer of the property in question to the receiver." Dunham v. Byrnes, 36 M. 106.

CHAPTER XLIII

GARNISHMENT

Nature of proceeding.

§ 1248. Garnishment is a mode of attaching property to secure and make effectual any judgment that may be rendered in the main action to which it is ancillary. Benton v. Snyder, 22 M. 247; Banning v. Sibley, 3 M. 389 G. 282, 297; Olson v. Brady, 78 N. W. 864.

§ 1249. It is a species of attachment differing from ordinary attachment in that in the latter certain specific property or indebtedness is seized and taken into the actual or constructive possession of the officer holding the writ while the former is a drag-net which impounds everything in the hands of the garnishee belonging to the defendant. Greengard v. Fretz, 64 M. 10, 15; North Star etc. Co. v. Ladd, 32 M. 381.

§ 1250. It is a proceeding *in rem.* Swedish-Am. Nat. Bank v. Bleecker, 72 M. 383; Harvey v. Great Northern Ry. Co., 50 M. 405; Aultman, Miller & Co. v. Markley, 61 M. 404.

Construction of statute.

§ 1251. The statute is to be construed in favor of the debtor. See Ide v. Harwood, 30 M. 191; Cole v. Sater, 5 M. 468 G. 378; Stevenot v. Ry. Co., 61 M. 104.

Rights of garnishee unaffected.

§ 1252. It is a fundamental proposition in the law of garnishment that the debt or property is arrested if at all subject to all the rights of the garnishee. Stevenot v. Ry. Co., 61 M. 104; Cooley v. Ry. Co., 53 M. 327; Vanderhoof v. Halloway, 41 M. 498.

§ 1253. The fact that the garnishee has an unliquidated lien on the property of defendant in his hands will not defeat the garnishment. Trunkey v. Crosby, 33 M. 464.

§ 1254. A garnishee cannot defeat garnishment by bringing an independent suit, on a claim of defendant's, after the commencement of garnishment proceedings. Trunkey v. Crosby, 33 M. 464.

Jurisdiction in the main action.

§ 1255. As garnishment is purely an ancillary proceeding the court has no jurisdiction to proceed therein unless it has jurisdiction both of the person and subject-matter in the main action. Lackett v. Rumbaugh, 45 Fed. Rep. 23; Axtel v. Gibbs, 52 Mich. 640; Beaupre v. Brigham, 79 Wis. 436; Washburn v. Mining Co., 41 Vt. 50. See Aultman, Miller & Co. v. Markley, 61 M. 404; Olson v. Brady, 78 N. W. 864; Swedish-Am. Nat. Bank v. Bleecker, 72 M. 383.

Effect of voluntary appearance of defendant.

§ 1256. If, before the commencement of the garnishment proceedings, the defendant voluntarily appears in the main action, it will give the court jurisdiction in the garnishment proceedings if it has acquired jurisdiction over the garnishee. Washburn v. Mining Co., 41 Vt. 50; Baldwin etc. Ry. Co. v. Taylor, 81 Ind. 24.

Aliter if his appearance in the main action is subsequent to the commencement of the garnishment proceedings. Isabelle v. Iron Cliffs Co., 57 Mich. 126.

§ 1257. The voluntary appearance of the defendant in the garnishment proceedings is ineffectual to give the court jurisdiction either in the main action or the garnishment proceedings. Beaupre v. Brigham, 79 Wis. 436.

Jurisdiction over the garnishee.

§ 1258. If the court had jurisdiction of the person of the defendant the voluntary appearance and disclosure of the garnishee waives as to him any defects in the affidavit or summons in the garnishment proceedings. Aultman, Miller & Co. v. Markley, 61 M. 404; Hinkley v. St. Anthony Water Power Co., 9 M. 55 G. 44; Howland v. Jeuel, 55 M. 102.

§ 1259. But such an appearance does not waive, as to the

garnishee, objection to jurisdiction in the main action. He may raise such an objection at any stage of the proceedings. Everett v. Ins. Co., 4 Colo. App. 509; Dennison v. Taylor, 142 Ill. 45.

§ 1260. The defendant cannot object to any irregularity in the summons against the garnishee. Hinkley v. St. Anthony Water Power Co., 9 M. 55 G. 44. See § 1292.

Jurisdiction of the res.

§ 1261. The *res* must be within the state so that it may be seized and sold to satisfy any judgment obtained against the principal debtor. Stevenot v. Ry. Co., 61 M. 104; Swedish-American Nat. Bank v. Bleecker, 72 M. 383.

§ 1262. The garnishee cannot be compelled to bring the property within the jurisdiction of the court although he may "control" it in another state. Bates v. Ry. Co., 60 Wis. 296; Penn. Ry. Co. v. Pennock, 51 Pa. St. 244.

§ 1263. A debt owing to a non-resident has a *situs* here for purposes of garnishment if the debtor can be found here. Harvey v. Ry. Co., 50 M. 405; Lewis v. Brush, 30 M. 244; Swedish-American Nat. Bank v. Bleecker, 72 M. 383; Chicago etc. Ry. Co. v. Sturm, 174 U. S. 710.

Who may be garnished.

§ 1264. "Corporations may be summoned as garnishees, and may appear by their cashier, treasurer, secretary, or such officer as they may appoint, and the disclosure of such person or officer shall be considered the disclosure of the corporation, provided, that if it appears to the court that some other member or officer of the corporation is better acquainted with the subject-matter than the one making disclosure, the court may cite in such person to make answer in the premises; and in case such person neglects or refuses to attend, judgment may be entered as hereinafter provided upon default; and service of the summons upon the agent of any corporation not located in this state, but doing business therein through such agent, shall be a valid service upon said corporation." G. S. '94, § 5311.

§ 1265. "A party who obtains possession of a definite sum of money belonging to another, which he has no right in justice or equity to retain, may be garnished as his debtor for such sum by a creditor of the latter." De Graff v. Thompson, 24 M. 452.

What may be garnished.

§ 1266. "The service of the summons upon the garnishee shall attach and bind all the property, money or effects in his hands, or under his control, belonging to the defendant, and any and all indebtedness owing by him to the defendant, at the date of such service, to respond to final judgment in the action." G. S. '94, § 5309; Puget Sound Nat. Bank v. Mather, 60 M. 362; Nash v. Gale, 2 M. 310 G. 265; McLean v. Swortz, 69 M. 128.

§ 1267. As to what is under the "control" of the garnishee: Farmers & Mechanics Bank v. Welles, 23 M. 475.

§ 1268. As to what are "effects": Leighton v. Heagerty, 21 M. 42; Banning v. Sibley, 3 M. 389 G. 282; Ide v. Harwood, 30 M. 191; Puget Sound Nat. Bank v. Mather, 60 M. 362.

§ 1269. "Any money or other thing due or belonging to the defendant may be attached by this process, before it has become payable, provided it is due or owing absolutely, and without depending on any contingency, as aforesaid (§ 1273); but the garnishee shall not be compelled to pay or deliver the same before the time appointed therefor by the contract." G. S. '94, § 5315.

§ 1270. "Bills of exchange and promissory notes, whether under or over due, drafts, bonds, certificates of deposits, bank-notes, money, contracts for the payment of money, and other written evidence of indebtedness, in the hands of the garnishee at the time of the service of the summons, shall be deemed 'effects' under the provisions of this section." G. S. '94, § 5316.

§ 1271. "Any debt or legacy due from an executor or administrator, and any other property, money or effects in the

hands of an executor or administrator, may be attached by this process." G. S. '94, § 5310.

§ 1272. An indebtedness incurred by the receivers of a railway company, appointed by the federal court, while operating the road under the authority of the court, may be garnished in a state court. Irwin v. McKechnie, 58 M. 145.

In what cases garnishment not allowed.

§ 1273. "No person or corporation shall be adjudged a garnishee in either of the following cases, viz:

First. By reason of any money or any other thing due to the defendant, unless, at the time of the service of the summons, the same is due absolutely, and without depending on any contingency;

Second. By reason of any debt due from said garnishee on a judgment, so long as he is liable to an execution thereon;

Third. By reason of any liability incurred, as maker or otherwise, upon any draft, bill of exchange or promissory note." G. S. '94, § 5312. See Laws 1899, ch. 301 (exempting cash bail in municipal court).

§ 1274. "That any and all police department relief associations and fire department associations organized under the laws of this state shall not be subject to the laws relating to life insurance companies, and shall not be summoned, nor liable as garnishee or trustee, in any garnishee proceeding, nor in any action or proceeding against any person or persons who may be entitled to assistance from said association or associations under the articles of incorporation, or by-laws thereof." G. S. '94, § 5313.

§ 1275. "The wages of any person or of the minor children of any person in any sum not exceeding twenty-five dollars due for any services rendered by any such person or the minor children of any such person for any other person during thirty days preceding the issue of any process of attachment, garnishment or execution in any action against any such person or persons shall be exempt from such process." G. S. '94, § 5314.

§ 1276. Contingent liability. Durling v. Peck, 41 M. 317; Gies v. Ins. Co., 12 M. 279 G. 182; Wheeler v. Day, 23 M. 545; Irwin v. McKechnie, 58 M. 145.

§ 1277. When the liability was incurred upon a draft, bill of exchange or promissory note. Hubbard v. Williams, 1 M. 54 G. 37; Cole v. Sater, 5 M. 468 G. 378; Groh v. Bassett, 7 M. 325 G. 254; Trunkey v. Crosby, 33 M. 464.

§ 1278. When the debt accrued or possession or control was acquired after service of the garnishee summons. Nash v. Gale, 2 M. 310 G. 265; McLean v. Sworts, 69 M. 128.

§ 1279. When the property is *in custodia legis*. In re Mann, 32 M. 60; Simon v. Mann, 32 M. 65; Lord v. Meachem, 32 M. 66; Davis v. Seymour, 16 M. 210 G. 184; Irwin v. McKechnie, 58 M. 145; Second Nat. Bank v. Schranck, 43 M. 38; Marine Nat. Bank v. Paper Mills, 49 M. 133; Trunkey v. Crosby, 33 M. 464; May v. Walker, 35 M. 194.

§ 1280. A debt owing by a municipality. McDougal v. Supervisors, 4 M. 184 G. 130; Knight v. Nash, 22 M. 452; Roeller v. Ames, 33 M. 132; Sandwich Mfg. Co. v. Krake, 66 M. 110.

§ 1281. The salary of a public official or employee. Roeller v. Ames, 33 M. 132; Pioneer Printing Co. v. Sanborn, 3 M. 413 G. 304; Sandwich Mfg. Co. v. Krake, 66 M. 110; Leighton v. Heagerty, 21 M. 42; Sexton v. Brown, 72 M. 371;

§ 1282. Real property. See Banning v. Sibley, 3 M. 389 G. 282.

§ 1283. Property without the state. Stevenot v. Ry. Co., 61 M. 104. See Puget Sound Nat. Bank v. Mather, 60 M. 362.

§ 1284. "Property in the hands of a common carrier to transmit to a place outside of the state is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons." Stevenot v. Ry. Co., 61 M. 104. *Aliter* when the carrier holds property as a warehouseman. Cooley v. Ry. Co., 53 M. 327.

§ 1285. A debt assigned before service of summons al-

though the garnishee had no notice thereof. Lewis v. Bush, 30 M. 244; Union Iron Works Co. v. Kilgore, 65 M. 497; Lewis v. Traders Bank, 30 M. 134; Williams v. Pomeroy, 27 M. 85.

Affidavit—summons—statute regulating.

§ 1286. "In any action in a court of record or justice's court, for the recovery of money, if the plaintiff, his agent or attorney, at the time of filing the complaint or issuing the summons therein, or at any time during the pendency of the action, or after judgment therein against the defendant, makes and files, with the clerk of the court, or, if the action is in a justice's court, with the justice, an affidavit stating that he believes that any person (naming him) has property, money or effects in his hands, or under his control, belonging to the defendant in such action, or that such person is indebted to the defendant, and that the value of such property or effects, or the amount of such money or indebtedness, if the action is in the district court, exceeds the sum of twenty-five dollars, or, if the action is in a justice's court, ten dollars, a summons may be issued against such person, as hereinafter provided; in which summons and all subsequent proceedings the plaintiff in the action shall be known and designated as plaintiff, the defendant as defendant, and the person against whom the summons is issued as garnishee." G. S. '94, § 5306.

Affidavit—rules governing.

§ 1287. While the affidavit is somewhat in the nature of a complaint against the garnishee its sufficiency is not to be determined by the ordinary rules of pleading. Aultman, Miller & Co. v. Markley, 61 M. 404.

§ 1288. An affidavit is sufficient if it conforms to the statute. Howland v. Jeuel, 55 M. 102.

§ 1289. "When the affidavit contains all the terms of the statute, connected by conjunctives, not by disjunctives, we are of the opinion that, under the rules which should be applied to the summary proceeding of garnishment, it covers all property, effects, and indebtedness in the hands of the garnishee which can, by garnishment proceedings, be appropriated to

the payment of the plaintiff's judgment against the defendant." Aultman, Miller & Co. v. Markley, 61 M. 404.

§ 1290. The affidavit must be filed before the garnishee summons is issued. Black v. Brisbin, 3 M. 360 G. 253.

§ 1291. It need not allege that the garnishee is a corporation. Howland v. Jeuel, 55 M. 102.

Affidavit—when jurisdictional.

§ 1292. "If the defendants are non-residents, or if personal service cannot be had on them in the main action, so that the action is merely one *in rem*,—against the property or assets in the hands of the garnishee,—then the garnishee affidavit is the foundation of both the main action and the garnishment proceeding, and is jurisdictional. Jurisdiction of the *res* cannot be obtained by proceedings *in personam* against the garnishee alone. To get jurisdiction over the *res* by proceedings *in personam*, jurisdiction must be acquired over the persons of both the defendant and the garnishee. If personal jurisdiction is acquired over the garnishee, but not over the defendant, the plaintiff must still proceed *in rem* against the effects in the hands of the garnishee. But, when the court already has jurisdiction of the person of the defendant, the proceedings against the garnishee are much in the nature of proceedings to bring in additional parties defendant, and in such a case, when the garnishee is brought in, the action is *in personam*, as to all the parties, and takes on a double aspect,—that of an action against the defendant to recover judgment for the debt, and that of a sort of a creditors' bill against him and the garnishee, to reach assets in the hands of the garnishee, to be applied in satisfaction of the judgment. In such a case the garnishee affidavit and summons are the process by which personal jurisdiction is obtained over the additional party, the garnishee, and, as to himself, he may waive such process by voluntarily appearing. It is true that the garnishee cannot waive the rights of the defendant. The defendant, as well as the garnishee, may object to the failure to file a proper affidavit; and the defendant is, in certain cases, entitled to notice

of the bringing in of the garnishee, and of the time set for the disclosure. But, if personal jurisdiction has been obtained over the defendant, none of these steps are jurisdictional as to him. On the contrary, the failure to take these steps properly, is, as to him, a mere irregularity occurring after jurisdiction has been once acquired, and does not render void a judgment charging the garnishee, but such judgment is binding on all the parties until set aside." Aultman, Miller & Co. v. Markley, 61 M. 404. See also, Prince v. Heenan, 5 M. 347 G. 279; Black v. Brisbin, 3 M. 360 G. 253; Hinkley v. St. Anthony Falls etc. Co., 9 M. 55 G. 44.

§ 1293. Form of affidavit for garnishment.

[Title of action]

State of Minnesota } ss.
County of }

, being duly sworn, says that he is the [agent of the] [attorney of the] plaintiff in the above entitled action; that it is an action for the recovery of money; that a summons has been issued therein; that he believes that one is indebted to the defendant therein to an amount exceeding the sum of twenty-five dollars and has property, money and effects in his hands or under his control, exceeding in value the sum of twenty-five dollars, belonging to said defendant.

[Jurat] .....

Summons—service of—contents—notice to defendant.

§ 1294. "In actions in a district court, such summons may be issued by the plaintiff or his attorney in the action, and shall be served and returned in the same manner as a summons issued against a defendant in other cases in said court, except that the service shall in all cases be personal. It shall require the garnishee to appear before the court in which the action is pending, or the judge or the clerk thereof, or the court commissioner in the county in which the action is pending, at a time and place mentioned therein, not less than twenty days from the service thereof, and answer touching his

indebtedness to the defendant, and any property, money or effects of the defendant in his possession or under his control. A copy of the summons, together with a notice to the defendant stating the time, place and manner of service thereof upon the garnishee, and signed by the plaintiff or his attorney, or the person or officer who served the summons upon the garnishee, and requiring such defendant to appear and take part in such examination, shall be served upon the defendant at least ten days before the time specified in the same for the appearance of the garnishee. Such notice and copy of the summons may be served in the manner provided by law for the service of a summons in ordinary cases. The garnishee shall be entitled in all cases, whether the action is in a district court or before a justice of the peace, to the same fees as if he were subpoenaed as a witness in such action, and may be compelled to testify and disclose respecting any matters contained in the affidavit, in the same manner as if he were a witness duly subpoenaed for that purpose. But no person shall be obliged to appear as garnishee, unless his fees for one day's attendance, and mileage according to law, is paid or tendered in advance." G. S. '94, § 5308.

Summons—rules governing.

§ 1295. The affidavit is a condition precedent to the issuance of the summons. The latter is a process and must issue in the name of the state. The issuance of a summons is not a judicial act. It may be issued by the attorney of the plaintiff. It issues of course upon the filing of the statutory affidavit. Service upon one member of a firm is sufficient to justify a judgment against the firm which will bind the firm property. Proof of service of summons may be amended. Hinkley v. St. Anthony Water Power Co., 9 M. 55 G. 44.

§ 1296. Any number of persons may be included in the same summons as garnishees. A summons which requires the garnishee to appear at a time and place named, at a special term of a particular court, then and there to be held, sufficiently designates the court or officer before whom the sum-

mons is returnable. Northwestern Fuel Co. v. Kofod, 77 N. W. 206.

§ 1297. Form of garnishee summons.

State of Minnesota — District Court
County of — Judicial District

.....
Plaintiff.
vs.
.....
Defendant.
.....
Garnishee.

The State of Minnesota to the above named garnishee, Greeting:

You are hereby summoned and required to appear before [the above named district court] [the Honorable , judge of the above named district court, at his chambers] [, clerk of the above named district court, at his office], in the courthouse, in the city of , on the day of , 19 , at o'clock in the forenoon, and answer touching your indebtedness to the above named defendant and as to any property, money or effects of said defendant in your possession or under your control.

.....
Attorney for Plaintiff.
[Address]

To , the above named defendant:

Take notice that the foregoing summons was served by , upon , the above named garnishee, on the day of , 19 , in the city of , by handing to and leaving with him personally a true copy thereof.

You are required to appear and take part in the examination of said garnishee at the time and place specified in the foregoing summons.

.....
Attorney for Plaintiff.
[Address]

State of Minnesota }
County of } ss.

, being duly sworn, says that on the day of , 19 , in the city of , he served the foregoing summons upon , the above named garnishee, by handing to and leaving with him personally a true copy thereof; that he then and there paid to the said , one dollar and cents, his fees in advance for one day's attendance and mileage; that on the day of , 19 , in the city of , he served upon , the above named defendant, the foregoing notice of garnishee examination and a copy of the foregoing garnishee summons by

[Jurat] .....

Objections to affidavit or garnishee summons.

§ 1298. If the garnishee wishes to question the sufficiency of the affidavit or summons he should do so before disclosing for otherwise he will be deemed to have waived all objections going to the jurisdiction of the court over his person. Aultman, Miller & Co. v. Markley, 61 M. 404; Howland v. Jeuel, 55 M. 102; Hinkley v. St. Anthony Water Power Co., 9 M. 55 G. 44.

Examination of garnishee—disclosure.

§ 1299. "After the appearance of the garnishee before the court or officer named in the summons, on the day specified therein, or on the day to which an adjournment may be had, the said garnishee shall be examined on oath touching the matters alleged in the affidavit, and the examining officer shall take full minutes of such examination, and file the same with the other papers in the cause: provided, that, unless the defendant in the action appears at the time and place specified in the summons for the appearance of the garnishee, such officer or court shall not proceed to the examination of such garnishee, or to the taking of any evidence whatever therein, until the plaintiff produces and files an affidavit, or return of an officer, showing the service of the summons and notice upon the defendant as prescribed in sections one hundred and forty-

eight and one hundred and forty-nine aforesaid; but in case the plaintiff is unable so to notify such defendant, the said court or officer may postpone the examination for such reasonable time as may be necessary to enable the plaintiff to notify such defendant, and he may then be notified of the day to which such postponement is had in the manner provided by law for the service of a summons in ordinary cases, except that it shall be a notice of ten days in a district court, and of four days in a justice court: provided, that when the defendant does not appear at the time and place specified in the summons for the appearance of the garnishee, and the plaintiff, or his agent or attorney, files an affidavit stating that the defendant is not a resident of this state, and is not within the same, as the affiant verily believes, it shall not be necessary to serve upon the defendant a copy of such garnishee summons, or any notice to the defendant in such action, in any court; and the examination shall proceed in the same manner as if the defendant had been duly served with such copy and notice, or had appeared at the time and place specified in the summons for the appearance of the garnishee." G. S. '94, § 5317.

§ 1300. No provision is made in this state for any pleading on the part of the garnishee. Peterson v. Lake Tetonka Park Co., 72 M. 263.

§ 1301. The plaintiff has the right to examine the garnishee so as to bring out all the facts in order that the court and not the garnishee may determine the liability of the latter. The garnishee, however, cannot be subjected to a searching examination, as in proceedings supplementary to execution, if he unequivocally denies indebtedness or the possession of any property. In such a case the only resource of the plaintiff is a supplemental complaint. The freest scope must be given the garnishee upon the examination. He cannot be restricted to a categorical answer but must be permitted to qualify or explain any of his statements. He must be afforded a full opportunity to state matters in defence or setoff. See Peterson

v. Lake Tetonka Park Co., 72 M. 263; Milliken v. Mannheimer, 49 M. 521, and cases under §§ 1303, 1304, 1345.

Further disclosure.

§ 1302. Applications for a further disclosure on the ground of mistake, inadvertence or excusable neglect are addressed to the discretion of the court. Milliken v. Mannheimer, 49 M. 521.

Witnesses.

§ 1303. Upon the examination witnesses may be heard in corroboration of the testimony of the garnishee. Evidence in contradiction is inadmissible, the disclosure of the garnishee being conclusive on the plaintiff. Leighton v. Heagerty, 21 M. 42; Chase v. North, 4 M. 381 G. 288.

Conclusiveness of disclosure.

§ 1304. The disclosure of the garnishee is conclusive on the plaintiff who is not permitted to introduce evidence in contradiction. Chase v. North, 4 M. 381 G. 288; Cole v. Sater, 5 M. 468 G. 378; Banning v. Sibley, 3 M. 389 G. 282, 293; Vanderhoof v. Holloway, 41 M. 498.

Motion to dismiss—action prematurely brought.

§ 1305. The garnishee proceedings are ancillary to the main action and the decision therein that the claim of the plaintiff is due and that he is entitled to judgment is, until set aside, conclusive on a motion to dismiss the garnishment proceedings on the ground that the main action was prematurely brought. Iselin v. Simon, 62 M. 128.

Setoff.

§ 1306. Milliken v. Mannheimer, 49 M. 521.

Estoppel.

§ 1307. Where a creditor has consented to an assignment of the property of his debtor he cannot garnish it in the hands of the assignee. Aberle v. Schlichenmeir, 51 M. 1.

Findings.

§ 1308. Where no supplemental complaint is filed and no

claim made by third parties the statute does not contemplate findings of fact. Wildner v. Ferguson, 42 M. 112.

Who may take disclosure.

§ 1309. "Court commissioners, clerks of the district court or any referee appointed by the court for that purpose, are hereby authorized and required to take the disclosure of any garnishee in writing, together with any other testimony offered by the parties to the action, and report the same to the court; all testimony offered by the parties to be taken subject to any objection seasonably interposed thereto." G. S. '94, § 5323. See Laws 1897, ch. 311, as to authority of court commissioners.

Fees of officer taking disclosure.

§ 1310. "Any court commissioner, clerk or referee shall receive from the plaintiff ten cents per folio for all evidence taken and reduced to writing; and the fees so paid by the plaintiff may be taxed in the judgment against the garnishee." G. S. '94, § 5324.

Disclosure before return day.

§ 1311. "Whenever any person is summoned as a garnishee in the district court, he may, at any time before the return-day of the summons, appear before the officer named therein, or any justice of the peace competent to try causes between the parties, and, with the consent of the plaintiff, to be certified by said officer or justice, make his disclosure upon oath, with the like effect as if made on the day named in the summons; in case such disclosure is taken by a justice, he shall receive the same fees as are allowed by section one hundred and sixty-three (§ 1310) aforesaid. G. S. '94, § 5332.

§ 1312. "If the plaintiff will not consent to such examination and disclosure, the garnishee, in case he is compelled to be absent from the county until after the return-day of the summons, may make affidavit to that effect, which, with a notice of time, place, and the officer or justice, he shall serve upon the plaintiff or his attorney, at least twenty-four hours previous to the time specified in it for the disclosure; and upon due proof of such service, his disclosure shall be taken as pro-

vided in the preceding section, and with like effect." G. S. '94, § 5333.

Judgment upon disclosure.

§ 1313. When judgment is asked against the garnishee upon a disclosure which is not evasive it will not be granted if the disclosure does not affirmatively show the liability of the garnishee to the defendant. McLean v. Swortz, 69 M. 129.

§ 1314. "Judgment can be rendered against a garnishee on his disclosure only when he admits that he is owing the principal debtor, or that he has in his possession or under his control property belonging to him, or when the facts stated by him in his disclosure clearly and beyond doubt show that such is the case." Vanderhoof v. Holloway, 41 M. 498; Cole v. Sater, 5 M. 468 G. 378; Schafer v. Vizena, 30 M. 387; Banning v. Sibley, 3 M. 389 G. 282, 293; Chase v. North, 4 M. 381 G. 288; Pioneer Printing Co. v. Sanborn, 3 M. 413 G. 304.

§ 1315. If the garnishee makes full disclosure and the facts stated therein clearly establish his liability judgment should be rendered against him regardless of denials of indebtedness. Milliken v. Mannheimer, 49 M. 521.

§ 1316. If the debt sought to be reached appears from the disclosure to belong to a third party the garnishee should be discharged unless the third party is brought in under the statute. Mansfield v. Ins. Co., 31 M. 40; Levy v. Miller, 38 M. 526.

Default of garnishee—removing default.

§ 1317. "When any person duly summoned as a garnishee neglects to appear at the time specified in the summons, or within two hours thereafter, he shall be defaulted, and judgment shall be rendered against him for the amount of damages and costs recovered by the plaintiff in the action against the defendant, payable in money; and execution may issue directly against the goods and chattels and estate of said garnishee therefor: provided, the court may, upon good cause shown, remove such default, and permit the garnishee to appear and answer, on such terms as may be just." G. S. '94, § 5320.

Goodrich v. Hopkins, 10 M. 162 G. 130; Segog v. Engle, 43 M. 191; Peterson v. Lake Tetonka Park Co., 72 M. 263.

Judgment against garnishee—transfer of action.

§ 1318. "No judgment shall be rendered against any garnishee until after judgment is rendered against the defendant; but a garnishee may be discharged after examination and disclosure, if it appears that he ought not to be held; whenever a garnishee is not discharged as aforesaid, the cause shall be continued to abide the result of the original action. And in case such original action pending in any court not a court of record shall, under the provisions of law, be transferred to any other court, except by appeal, any garnishee action, the judgment in which is conditioned on the judgment in such original action, shall be also transferred with such original action; and written notice of such transfer shall be served on the garnishee defendant or defendants, by the plaintiff in such action, specifying the court to which such transfer is made, and the time when such garnishee action will be heard, which shall be not less than two days from the service of such notice; and such garnishee action, so transferred, shall carry with it all proceedings already had, and any disclosure already made therein." G. S. '94, § 5321.

§ 1320. If a garnishee is discharged he is not entitled to costs. McConnell v. Rakness, 41 M. 3. Judgment cannot be ordered until the disclosure is closed. Williams v. Pomeroy, 27 M. 85.

Judgment—order of court for.

§ 1321. "No judgment shall be rendered upon the disclosure of a garnishee, except by order of the judge of the court in which the action is pending, or, in case of his absence or inability to act, by order of a judge of another district." G. S. '94. § 5322.

Judgment—for what amount rendered.

§ 1322. "Judgment against a garnishee shall be rendered, if at all, for the amount due the defendant, or so much thereof as may be necessary to satisfy the plaintiff's judgment against

said defendant, with costs taxed and allowed in the proceeding against the garnishee." G. S. '94, § 5331. Nash v. Gale, 2 M. 310 G. 265.

§ 1323. The garnishee is not ordinarily chargeable with interest on money which he is restrained by the garnishment from paying over. Ray v. Lewis, 67 M. 365.

§ 1324. "No judgment shall be rendered against a garnishee in a justice's court, where the judgment against the defendant is less than ten dollars, exclusive of costs, nor where the indebtedness of the garnishee to the defendant, or the value of the property, money or effects of the defendant in the hands or under the control of the garnishee, as proved, is less than ten dollars. If the action is in a district court, no judgment shall be rendered against the garnishee, where the indebtedness proved against him, or the value of the money, property or effects of the defendant in his hands or under his control, shall be less than twenty-five dollars; but in all such cases the garnishee shall be discharged, and shall recover his costs, and have execution therefor against the plaintiff." G. S. '94, § 5338.

Judgment—effect of.

§ 1325. Upon claimants.

(a) If they are cited to appear or do so voluntarily a judgment against the garnishee concludes them and constitutes a bar to a subsequent assertion of their claim against the garnishee. McMahon v. Merrick, 33 M. 262.

(b) If they are not cited and do not voluntarily appear they are unaffected by the judgment. McMahon v. Merrick, 33 M. 262; Levy v. Miller, 38 M. 526.

§ 1326. Upon garnishee:

(a) "The judgment against a garnishee shall acquit and discharge him from all claims of all parties to the process, in and to the property, money or effects paid, delivered or accounted for by such garnishee by force of such judgment." G. S. '94, § 5339; Troyer v.

Schweizer, 15 M. 241 G. 187; Black v Brisbin, 3 M. 360 G. 253.

(b) "If any person summoned as a garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant or other claimants for the same demand." G. S. '94, § 5340.

§ 1327. Upon the *res*:

While garnishment is often called a mode of attachment it does not like attachment effect a specific lien on any property or debt of the garnishee. The effect of the judgment is merely to determine the existence and amount of the debt and to substitute the plaintiff for the defendant as the person to whom the debt is to be paid or the property to be delivered. Irwin v. McKechnie, 58 M. 145; Banning v. Sibley, 3 M. 282 G. 282, 297; Cooley v. Ry. Co., 53 M. 327, 332.

Duty of garnishee to deliver property to sheriff.

§ 1328. "When any person is charged as garnishee by reason of any property or effects, other than an indebtedness payable in money, which he holds, or is bound to deliver to the defendant, such garnishee shall deliver the same, or so much thereof as may be necessary, to the officer holding the execution, and the said property shall be sold by the officer, and the proceeds accounted for, in the same manner as if it had been taken on execution against the defendant: provided, the garnishee shall not be compelled to deliver any specific articles at any other time or place than as stipulated in the contract between him and the defendant." G. S. '94, § 5325; Langdon v. Thompson, 25 M. 509; Stevenot v. Ry. Co., 61 M. 104.

Court may make orders regarding the property and determine its value.

§ 1329. "Upon application and notice to the parties, the court may determine the value of any property or effects so in the hands of the garnishee for delivery, and may make any order relative to the keeping, delivery and sale of the same,

that is necessary to protect the rights of those interested, and may make any order touching the property attached, that is necessary for the protection of all parties interested, upon the application of any party in interest; and may require, at any time after the service of such garnishee summons, the property, money or effects so attached to be brought into court, or delivered to a receiver appointed by the court." G. S. '94, § 5326.

Proceedings when garnishee has lien on property.

§ 1330. "Whenever it appears that any property or effects in the hands of the garnishee, belonging to the defendant, are properly mortgaged, pledged, or in any way liable for the payment of any debt due to said garnishee, the plaintiff may be allowed, under a special order of court, to pay or tender the amount due; and the garnishee shall thereupon deliver the property or effects, as hereinbefore provided, to the officer holding the execution, who shall sell the same as in other cases, and out of the proceeds shall repay the plaintiff the amount paid by him to the garnishee for the redemption of such property or effects, with legal interest thereon, and apply the balance upon the execution." G. S. '94, § 5327; Becker v. Dunham, 27 M. 32.

§ 1331. "If any garnishee refuses or neglects to deliver any property or effects as provided in the preceding section, he may be punished for contempt of court, and shall, in addition, be liable to the plaintiff for the value of such property or effects, less the amount of the lien, if any, to be recovered by action." G. S. '94, § 5328.

§ 1332. "Nothing herein shall prevent the garnishee from selling such property or effects so in his hands, for the payment of the demand for which they are mortgaged, pledged, or otherwise liable, at any time before payment or tender of the amount due to him: provided, such sale is authorized by the terms of the contract between said garnishee and the defendant." G. S. '94, § 5329.

§ 1333. "If any such property or effects are destroyed, with-

out any negligence or default of the garnishee, after judgment and before demand by the officer holding the execution, such garnishee shall be discharged from all liability to the plaintiff for the non-delivery of such property or effects." G. S. '94, § 5330.

Fees and expenses of garnishee.

§ 1334. "If any person summoned as a garnishee appears and submits himself to an examination upon oath, as herein provided, he shall be allowed his costs for travel and attendance, and, in special and extraordinary cases, such further sum as the court shall deem reasonable for his counsel fees and other necessary expenses." G. S. '94, § 5334. Counsel fees: Schwerin v. De Graff, 19 M. 414 G. 359.

Costs to be deducted from property garnished.

§ 1335. "If any such person is adjudged chargeable as a garnishee, his said costs and allowance shall be deducted and retained out of the property, money or effects in his hands, and he shall be accountable only for the balance, to be paid on the execution." G. S. '94, § 5335. Costs include disbursements: Woolsey v. O'Brien, 23 M. 71.

Property may be held till payment of costs.

§ 1336. "If such person is charged on account of any specific articles or personal property, he shall not be obliged to deliver the same to the officer serving the execution, until his costs allowed and taxed are fully paid or tendered; and if he is discharged for any cause he shall recover judgment against the plaintiff for his costs, and have execution therefor." G. S. '94, § 5336.

Costs of plaintiff limited.

§ 1337. "The plaintiff, under the provisions of this section, shall in no cases, except in cases provided for in section one hundred and fifty-nine aforesaid (§ 1317), recover a greater sum for costs, including the costs allowed to the garnishee, than the amount of damages recovered." G. S. '94, § 5337.

Appeal.

§ 1338. "Any party to a proceeding under this title, deem-

ing himself aggrieved by any order or final judgment therein, may remove the same from a justice's court to the district court; or from a district court to the supreme court, by appeal, in the same cases, in like manner, and with like effect, as in a civil action." G. S. '94, 5341; McConnell v. Rakness, 41 M. 3; Prince v. Heenan, 5 M. 347 G. 279; Albachten v. Ry. Co., 40 M. 378; Hollinshead v. Banning, 4 M. 116 G. 77; Donnelly v. O'Connor, 22 M. 309.

Disharge of garnishment on bond.

§ 1339. "A defendant, when property, money or effects has been garnished, may, at any time, execute to the plaintiff a bond, in double the amount claimed in the complaint, with two or more sureties, who shall justify and be approved by the judge of the district court or court commissioner of the county in which garnishee proceedings were instituted, and if in justice court by such justice, and if in municipal court by a judge of said court, conditioned that if the plaintiff recover judgment in the action, he will pay such judgment, or an amount thereon equal to the value of the money, property or effects so garnisheed. And the officer approving such bond shall make an order discharging such garnishment, and releasing such money, property or effects therefrom, upon filing such bond with the court in which the garnishee proceedings were instituted, and serving upon the garnishee a copy of the order discharging such proceedings. The defendant shall have the same power to receive or collect the money, property or effects so garnisheed, in the same manner as if such garnishee proceedings had never been instituted. * * * " G. S. '94, § 5342.

§ 1340. Action on bond—burden of proof—estoppel—statute construed. Greengard v. Fretz, 64 M. 10.

§ 1341. Statute cited. Langdon v. Thompson, 25 M. 513; Maxfield v. Edwards, 38 M. 539.

§ 1342. Bond for release of garnished property.

[Title of action]

Know all men by these presents that we, , as prin-

cipal, and and , as sureties, are bound unto , the plaintiff in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the plaintiff in the above entitled action has garnished the money, property and effects of the defendant , in the hands of , the above named garnishee,

Now, therefore, if the said defendant shall pay any judgment which may be recovered against him in said action or an amount thereon equal to the value of the money, property and effects so garnished, then this obligation, which is given in pursuance of ~~General Statutes, 1894~~, § 5342, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

In the presence of: [No seal]

[Acknowledgment as in § 993—~~Justification~~ as in § 994]

Upon the filing of the ~~foregoing~~ bond, which is hereby approved, and proof of service of a copy of this order on , garnishee herein, it is ordered that the garnishment of the money, property and effects of the defendant , in the hands of said , which has heretofore been made in this action, be and the same is hereby discharged and the money, property and effects so garnished released therefrom.

[Date] .....

District Judge.

Effect of judgment for defendant—institution of garnishment proceedings by defendant.

§ 1343. "* * * All of the provisions of this title shall apply to all actions in which the defendant has or shall recover a judgment against the plaintiff, and all actions in which a counterclaim is interposed in the answer of the defendant, which counterclaim exceeds in amount the amount admitted to

be due in said answer, and in all such cases the defendant may institute proceedings under this title, and conduct them to a determination with like force and effect and in like manner, as if he was a plaintiff, and in such cases the word 'plaintiff,' wherever it is used in this title, shall be considered to mean 'defendant,' and the word 'complaint,' shall be considered to mean 'answer.'" G. S. '94, § 5342.

SUPPLEMENTAL COMPLAINT

The statute.

§ 1344. "If any person has in his possession any property or effects of the defendant, which he holds by a conveyance or title that is void as to creditors of said defendant, he may be charged therefor, although the defendant could not have maintained an action against him for the same; but in such cases, and in all cases where the garnishee, upon full disclosure, denies any indebtedness to, or the possession or control of any property, money or effects of the defendant, there shall be no further proceeding, except in the manner following: If the plaintiff in such case believes that such garnishee does not answer truly in response to the questions put to him upon such examination, or that the conveyance under which he claims title to property is void as against the creditors of the defendant, he may, on notice to such garnishee and to the defendant, at any time before the garnishee has been discharged by the court or officer, of not less than six days, apply to the court in which the action is pending, or a judge thereof, for permission to file a supplemental complaint in the action, making the garnishee a party thereto, and setting forth the facts upon which he claims to charge such garnishee; and if probable cause is shown by the plaintiff, permission shall be granted, and such supplemental complaint shall be filed and served upon both the defendant and garnishee, either or both of whom may answer the same, and the plaintiff may reply if necessary; and the issues thus made up shall then be brought to trial, and tried, in the same manner, in all respects, as civil

actions. The provisions of this section shall not apply to proceedings in justices' courts." G. S. '94, § 5319.

Exclusive mode of controverting disclosure.

§ 1345. The only way in which the plaintiff may controvert the truth of the disclosure of the garnishee is by proceeding by supplemental complaint as provided in the foregoing statute. Davis v. Mendenhall, 19 M. 149 G. 113, 128; Ingersoll v. First Nat. Bank, 10 M. 396 G. 315; Mahoney v. McLean, 28 M. 63; Leighton v. Heagerty, 21 M. 42; Vanderhoof v. Halloway, 41 M. 498.

Not a matter of right.

§ 1346. "A plaintiff cannot have leave to file a supplemental complaint merely because he believes that the garnishee does not answer truly, or that the title by which the garnishee holds property is void as to creditors of the defendant. He must make that appear probable to the court." Mahoney v. McLean, 28 M. 63.

When application must be made.

§ 1347. The application must be made upon notice of at least six days and before the garnishee has been discharged. See § 1344.

Waiver of right.

§ 1348. When the plaintiff submits the liability of the garnishee to the court upon the disclosure alone he cannot thereafter petition for leave to file a supplemental complaint. Mahoney v. McLean, 28 M. 63.

Service of notice and complaint.

§ 1349. Notice of application for leave to serve a supplemental complaint and the supplemental complaint may be served on the attorney who has appeared for the defendant. Trunkey v. Crosby, 33 M. 464.

When not allowed.

§ 1350. A supplemental complaint will not be allowed if the facts disclosed by the garnishee in themselves warrant a

judgment against him. Farmers & Mechanics Bank v. Welles, 23 M. 475; Leighton v. Heagerty, 21 M. 42.

Trial.

§ 1351. Upon the issues formed by the supplemental complaint and answer thereto the trial is governed by the same rules of procedure and evidence as the ordinary civil action. First Nat. Bank v. Brass, 71 M. 211; § 1344.

§ 1352. The court will take judicial notice of the entry of judgment against the defendant in the main action. Olson v. Brady, 78 N. W. 864.

Jury trial.

§ 1353. Neither party is entitled to a jury trial as a matter of constitutional right. Weibeler v. Ford, 61 M. 398.

Construction of complaint.

§ 1354. The supplemental complaint is to be construed in connection with the original complaint and it is not necessary to repeat in the former the allegations of the latter. See First Nat. Bank v. Brass, 71 M. 211; Smith v. Barclay, 54 M. 47; Olson v. Brady, 78 N. W. 864.

Burden of proof.

§ 1355. First Nat. Bank v. Brass, 71 M. 211.

A continuance of the garnishment proceedings.

§ 1356. The proceedings under the supplemental complaint are to be deemed a continuation of the garnishment proceedings. Mahoney v. McLean, 28 M. 63; Trunkey v. Crosby, 33 M. 464; Olson v. Brady, 78 N. W. 864.

Impeachment of garnishee.

§ 1357. If the plaintiff calls the garnishee as a witness in his own behalf it is in the discretion of the court to permit him to question the garnishee as to former statements inconsistent with his testimony. Trunkey v. Crosby, 33 M. 464.

Cases involving fraudulent conveyances.

§ 1358. Benton v. Snyder, 22 M. 247; First Nat. Bank v. Brass, 71 M. 211. See Staneka v. Libera, 75 N. W. 1124 (a

creditor cannot attack a transaction solely upon the ground that it was a fraud on his debtor, although the effect of it may have been to reduce the debtor's ability to pay).

INTERVENING CLAIMANTS

Claimant may appear and be joined as a party.

§ 1359. "If it appears from the evidence taken, or otherwise, that any person, not a party to the action, is interested or claims any interest in any of the property or effects in the hands of the garnishee, by virtue of any agreement or matter which existed prior to the service of the summons, the examining officer, upon application, may permit such person to appear in the action and maintain his right; and if he does not voluntarily appear, notice may be given him to appear or be barred of his claims, which notice may be served as such officer shall direct. In case such person voluntarily appears, or notice is given as aforesaid, he shall be joined as a party to the action, and judgment therein shall bind him in the same manner as if he had been an original party." G. S. '94, § 5318; Crone v. Braun, 23 M. 239; King v. Carroll-Porter Boiler & Tank Co., 77 N. W. 409; McArthur v. Murphy, 76 N. W. 955. See Laws 1895, ch. 329, as to depositing money or property in court.

Statute exclusive.

§ 1360. Where the money or property in the hands of the garnishee is claimed by a person not a party to the action the mode of procedure authorized by the preceding statute is exclusive. Smith v. Barclay, 54 M. 47.

Pleading—complaint in intervention—burden of proof.

§ 1361. The affirmative in maintaining his right to the property is on the claimant who must serve the first pleading in the nature of a complaint in intervention, setting up his claim, to which the plaintiff may answer. Smith v. Barclay, 54 M. 47; Donnelly v. O'Connor, 22 M. 309; North Star Shoe Co. v. Ladd, 32 M. 381; Conroy v. Ferree, 68 M. 325.

§ 1362. An insufficient complaint in intervention may be aided by the answer. McMahon v. Merrick, 33 M. 262.

§ 1363. The claimant may rest his claim upon the disclosure of the garnishee. Donnelly v. O'Connor, 22 M. 309.

Answer.

§ 1364. After the claimant serves his complaint in intervention the plaintiff has twenty days in which to answer. Leslie v. Godfrey, 55 M. 231.

§ 1365. In his answer to the complaint in intervention the plaintiff is not required to allege facts already alleged in his original complaint or which otherwise appear in the main action. Smith v. Barclay, 54 M. 47.

Practice.

§ 1366. Upon the issues formed by the complaint in intervention and the answers thereto the parties are entitled to a trial as in ordinary actions. Leslie v. Godfrey, 55 M. 231; Wildner v. Ferguson, 42 M. 112.

§ 1367. Neither party is entitled to a jury trial as a constitutional right. See Weibeler v. Ford, 61 M. 398; Smith v. Barclay, 54 M. 47.

§ 1368. "A claimant must have the same opportunity to protect his interest as is accorded to any party to an action." Donnelly v. O'Connor, 22 M. 309.

§ 1369. Findings should be made, in the trial by the court, as in ordinary actions. Wildner v. Ferguson, 42 M. 112.

§ 1370. Claimants should be brought in or allowed to intervene by a formal order. Williams v. Pomeroy, 27 M. 85; Levy v. Miller, 38 M. 526.

§ 1371. Personal service of an order outside the state is ineffectual to confer jurisdiction. Levy v. Miller, 38 M. 526.

§ 1372. Intervening claimants may move for an order discharging the garnishee although such a motion made by the garnishee before the intervention was denied. McMahon v. Merrick, 33 M. 262.

Evidence.

§ 1373. "The disclosure of the garnishee is competent evidence in favor of a claimant, and against the plaintiff, for the purpose of showing what property had been impounded by the garnishee proceedings, and thus identifying it as the same property to which the claimant is asserting a right." Bradley v. Thorne, 67 M. 281.

§ 1374. Under an allegation of ownership in the complaint of the claimant and a denial in the answer of the plaintiff the latter may introduce any evidence to impeach the title of claimant. Smith v. Barclay, 54 M. 47; Coyendall v. Ladd, 32 M. 529; North Star Shoe Co. v. Ladd, 32 M. 381.

Judgment.

§ 1375. "Where, in garnishee proceedings, the garnishee discloses an indebtedness, but also shows that it is claimed to have been assigned, and to be due to a third person named, it is error to order judgment against the garnishee before the claimant is cited in and made a party; and the rights of such claimant cannot be barred or affected by the judgment, unless he is duly summoned to appear, and is made a party to the proceeding." Levy v. Miller, 38 M. 526.

Costs.

§ 1376. A claimant who succeeds is entitled to the same costs as a defendant in an action. Mahoney v. McLean, 28 M. 63.

CHAPTER XLIV

GOODS SOLD AND DELIVERED

§ 1377. Short form upon account, in the nature of indebitatus assumpsit at common law.[1]

The plaintiff complains of defendant and alleges:

I. That on the day [2] of , 19 , defendant was indebted to plaintiff in the sum of dollars and cents on account for goods sold and delivered by plaintiff to defendant [on said day] [on the day of , 19] [between the day of , 19 , and the day of , 19].

II. That no part thereof has been paid [except the sum of].

Wherefore plaintiff demands judgment:

(1) For the sum of dollars and cents, with interest thereon from the day [2] of . 19 .

(2) For the costs and disbursements of this action.

[1] Sustained by Solomon v. Vinson, 31 M. 205; Pioneer Fuel Co. v. Hager, 57 M. 76; Boosalis v. Stevenson, 62 M. 193; Allen v. Patterson, 7 N. Y. 476; Doherty v. Shields, 86 Hun (N. Y.) 303. See also Kelly v. Struck, 31 M. 446; Danahey v. Pagett, 76 N. W. 949 and § 1777. This form is admittedly a violation of code principles but its utility has won for it the reluctant sanction of the courts in spite of considerations of principle. It is perhaps best to consider it as an exception authorized by G. S. '94, § 5246 and to limit it strictly to cases of account. Its merit lies in the fact that under it the plaintiff can go into court without fear of a variance, for he may recover either upon an express or implied contract and for any kind, quality or quantity of goods. In practice this form of complaint works no hardship to the defendant for he may demand a bill of particulars under the above statute. This form, however, can be employed only in cases where there is a complete and absolute sale and nothing remains to be done but the payment of the money by defendant. 2 Ency. Pl. & Prac. 1002, 1005. It is frequently advisable to sue as upon an account stated in cases where this form might be used. See § 783. This form may be employed in all cases where the form given under § 1378 would be applicable, but

the contrary is not true. See cases cited above and Parker v. Macomber, 17 R. I. 674.

[2] Insert the date on which the debt became payable. Where goods are sold at an agreed price but without any fixed term of credit the debt becomes payable on demand. In actions on an ordinary running account between a merchant and his customer the debt becomes due and interest begins to run from the presentation of a bill, in the absence of any agreement to the contrary. Beers v. Reynolds, 11 N. Y. 97; Tipton v. Feitner, 20 N. Y. 423; Cooper v. Reaney, 4 M. 528 G. 413.

§ 1378. Action for reasonable value of goods sold and delivered, in the nature of quantum valebant at common law.

The plaintiff complains of defendant and alleges:

I. That [on the day of , 19 ,] [between the day of , 19 , and the day of , 19 ,] plaintiff sold and delivered to defendant [describing goods in general terms].

II. That the same were reasonably worth dollars and cents.

III. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1377].

§ 1379. For goods sold and delivered at an agreed price.

The plaintiff complains of defendant and alleges:

I. That [on the day of , 19 ,] [between the day of , 19 , and the day of , 19 ,] plaintiff sold and delivered to defendant [describing goods in general terms].

II. That defendant then promised to pay plaintiff therefor dollars and cents [within days from said sale and delivery] [on the day of , 19].

III. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1377].

NOTES

Interest.

§ 1380. It is not necessary to lay a foundation for interest in the complaint or in the prayer for relief, but to avoid any question upon default it is advisable to demand interest from a

specified day. Interest, in the nature of damages, is allowed in actions for goods sold and delivered, whether upon an express or implied agreement, from the time when the debt became payable. Cooper v. Reaney, 4 M. 528 G. 413. See Leyde v. Martin, 16 M. 38 G. 24; Mason v. Callender, 2 M. 350 G. 302.

Variance.

§ 1381. Plaintiff is not held to strict proof of his allegations of time and value. Iverson v. Dubay, 39 M. 325.

Counterclaim.

§ 1382. Schurmeier v. English, 46 M. 306; Latham v. Bausman, 39 M. 57.

Running account.

§ 1383. An indebtedness of a customer to a retail merchant upon a running account constitutes but a single cause of action. The complaint may allege an indebtedness in a gross sum for various sales made between two specified dates. See Memmer v. Carey, 30 M. 458.

CHAPTER XLV

HABEAS CORPUS

§ 1384. General form of petition.

PETITION OF FOR A WRIT OF HABEAS CORPUS

To the Honorable , judge of the district court in and for the county of , state of Minnesota:

Your petitioner, , respectfully represents:

I. That he is imprisoned in the county jail of county, in the city of , state of Minnesota, by , sheriff of said county.

II. That he is not imprisoned by virtue of the final judgment or decree of any competent tribunal nor by virtue of an execution issued upon any such judgment or decree.

III. That he is informed and believes that he is imprisoned by virtue of a warrant, a copy of which is hereto attached.

IV. That said imprisonment is illegal [setting forth the grounds of illegality as, for example] in that chapter of General Laws, 19 , of this state, approved on the day of , 19 , under and by virtue of which your petitioner is imprisoned, is unconstitutional and void, being in contravention of section , of title , of the constitution of this state.

Wherefore your petitioner, who has made no other application therefor, prays that a writ of habeas corpus may issue, as provided by law, to the end that he be released from his illegal imprisonment.

[Date] .....

[Verification]

Upon the filing of the foregoing petition it is ordered that a writ of habeas corpus issue out of and under the seal of the district court in and for the county of , directed to

the said , commanding him to have the body of the said , before me at chambers, in the courthouse, in the city of , on the day of , 19 , at o'clock in the noon, to do and receive what shall then and there be considered concerning the said , together with the time and cause of his detention and that he have then and there the said writ.

[Date] .....
District Judge,
Judicial District.

NOTES

To whom application shall be made and how.

§ 1385. "Application for such writ shall be made by petition, signed and verified, either by the party for whose relief it is intended, or by some person in his behalf, as follows: to the supreme or district court, or to any judge thereof being within the county where the prisoner is detained; or if there is no such officer within such county, or if he is absent, or from any cause is incapable of acting, or has refused to grant such writ, then to some officer having such authority residing in any adjoining county." G. S. '94, § 5996.

Applications to:

(a) Court commissioners: Laws 1897, ch. 311; State v. Hill, 10 M. 63 G. 45; State v. Barnes, 17 M. 340 G. 315; Hoskins v. Baxter, 64 M. 226.

(b) Judges of the district courts: State v. Hill, 10 M. 63 G. 45; Hoskins v. Baxter, 64 M. 226.

(c) Judges of the supreme court: State v. Grant, 10 M. 39 G. 22; In re Snell, 31 M. 110; In re Doll, 47 M. 518.

§ 1386. "Under the provisions of G. S. '94, §§ 5996, 5997, a person applying for the writ of *habeas corpus* must apply for it to a court or judge thereof, if there be one capable and willing to act, in the county where he is restrained of his liberty, and, if there be none in that county, then to the nearest or

most accessible court or judge capable and willing to act; and he cannot pass over such near or accessible court or judge, and go to any court or judge in the state that he may select, either to a district court or judge thereof, or to the supreme court or a judge thereof." In re Doll, 47 M. 518.

The petition.

§ 1387. The petition should state in what the illegality of the imprisonment consists, and this should be done by stating facts as distinguished from mere conclusions of law. If the confinement is by virtue of any warrant a copy thereof should be annexed or a reason averred for not doing so. State v. Goss, 75 N. W. 1132.

When application may be denied.

§ 1388. "The writ of *habeas corpus*, although a constitutional and imperative writ of right, does not issue, as a matter of course, to every applicant. The petition for the writ must show probable cause for issuing it, and where the petition, or its face, shows no sufficient *prima facie* ground for the discharge of the applicant, the writ may be legally refused." Hoskins v. Baxter, 64 M. 226; State v. Goss, 75 N. W. 1132.

Repeated applications.

§ 1389. "A decision of one court or officer upon a writ of *habeas corpus*, refusing to discharge a prisoner, is not a bar to the issue of another writ, based upon the same state of facts as the former writ, by another court or officer, or to a hearing or discharge thereupon." In re Snell, 31 M. 110; State v. Bechdel, 37 M. 360. *Aliter* in *habeas corpus* proceedings for the possession of a child. State v. Bechdel, 37 M. 360; State v. Flint, 61 M. 539.

Traverse of return—allegation of new matter.

§ 1390. "The party brought before any such officer, on the return of any writ of *habeas corpus*, may deny any of the material facts set forth in the return, or allege any fact to show, either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, which allegations or denials

shall be on oath; and thereupon such officer shall proceed, in a summary way, to hear such allegations and proofs as are legally produced in support of such imprisonment or detention, or against the same, and so dispose of such party as justice requires." G. S. '94, § 6016.

§ 1391. "In other words, the existence of the alleged process, judgment, or proceeding, under which the relator is claimed to be held, may be controverted, its validity may be questioned, the jurisdiction of the court, or officer commanding the imprisonment, to issue the process or render the judgment may be contested, and any *ex post facto* matter, such as a pardon after conviction and sentence, may also be set up, showing that the alleged cause of imprisonment has become inoperative, and of no further force or effect." State v. Sheriff of Hennepin Co., 24 M. 87, 90; State v. Toole, 69 M. 104 (revocation of warrant in extradition proceedings).

§ 1392. If the petitioner does not plead, the petition must be disposed of forthwith upon the return alone without the introduction of evidence. State v. Billings, 55 M. 467.

In what cases allowed.

§ 1393. If the law under which the petitioner is imprisoned is unconstitutional he may be discharged on *habeas corpus* even though he is held under a final judgment. In re White, 43 M. 250; State v. Billings, 55 M. 467; State v. Sheriff of Ramsey Co., 48 M. 236.

§ 1394. A judgment void for want of jurisdiction in the court either over the person or the subject-matter may be inquired into despite G. S. '94, § 5995, and the person imprisoned thereunder discharged. State v. West, 42 M. 147; State v. Kinmore, 54 M. 135.

§ 1395. But *habeas corpus* cannot be allowed to perform the function of a writ of error or appeal. If the judgment was informal, irregular or erroneous the objection cannot be raised by *habeas corpus*. If a court has jurisdiction of the person and subject-matter and could have rendered the judgment upon any state of facts, the judgment, however erroneous or irregu-

lar or unsupported by the evidence, is not void but merely voidable and *habeas corpus* is not the proper remedy to correct the error. State v. Sheriff of Hennepin Co., 24 M. 87; In re Williams, 39 M. 172; State v. Kinmore, 54 M. 135; State v. Billings, 55 M. 467; State v. McMahon, 69 M. 265; State v. Norby, 69 M. 451; State v. Wolfer, 68 M. 465; State v. Kilbourne, 68 M. 320; State v. Phillips, 73 M. 77.

When the evidence may be reviewed.

§ 1396. When a person is restrained under a final judgment the evidence introduced on the trial cannot be reviewed and its sufficiency determined on *habeas corpus*. State v. Norby, 69 M. 451 and cases cited.

§ 1397. But the evidence upon which a committing magistrate has committed a person may be reviewed. In re Snell, 31 M. 110; State v. Hayden, 35 M. 283; State v. Sargent, 71 M. 28.

CHAPTER XLVI

INJUNCTIONS

Definition.

§ 1398. "A writ of injunction may be defined as a judicial process, operating *in personam* and requiring the person to whom it is directed to do or to refrain from doing a particular thing. In its broadest sense the process is restorative as well as preventive, and it may be used both in the enforcement of rights and the prevention of wrongs. In general, however, it is used to prevent future injury rather than to afford redress for wrongs already committed, and it is therefore to be regarded more as a preventive than as a remedial process." High, Injunctions, § 1.

§ 1399. An injunction which commands a party to do an affirmative act is termed mandatory. Although such injunctions are still allowed with caution they are not regarded with the same disfavor as formerly. Central Trust Co. v. Moran, 56 M. 188. See also Wayzata v. Ry. Co., 67 M. 386; 12 Harvard Law Review, 95.

General rules as to allowance of writ.

§ 1400. "Courts ought not to interfere by injunction except in cases where irreparable injury would otherwise be done to the parties or they show themselves entitled to more immediate relief than can be obtained by the ordinary course of proceedings." Hart v. Marshall, 4 M. 294 G. 211; Goodrich v. Moore, 2 M. 61 G. 49; Minnesota Linseed Oil Co. v. Maginnis, 32 M. 193; Montgomery v. McEwen, 9 M. 103 G. 93.

§ 1401. "Courts of equity will not exercise their powers for the enforcement of right or the prevention of wrong, in the abstract, and where no actual benefit is to be derived by the party who seeks to exercise such right, nor injury suffered by

the commission of the wrong complained of." Goodrich v. Moore, 2 M. 61 G. 49.

§ 1402. "The writ of injunction is only used for the protection of rights which are clear, or at least free from reasonable doubt." Montgomery v. McEwen, 9 M. 103 G. 93, 98.

§ 1403. An injunction will not be granted where the plaintiff has an adequate remedy at law. Minnesota Linseed Oil Co. v. Maginnis, 32 M. 193; Schurmeier v. Ry. Co., 8 M. 113 G. 88; Normandin v. Mackey, 38 M. 417; Weber v. Timlin, 37 M. 274; and see other cases cited under §§ 1444–1456.

§ 1404. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Rich v. Braxton, 158 U. S. 406; Kilbourn v. Sunderland, 130 U. S. 505.

§ 1405. The writ of injunction cannot be employed to enforce the criminal laws. "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. The court is conversant only with questions of property and the maintenance of civil rights and exercises no jurisdiction in matters merely political, illegal, criminal or immoral." Fuller, C. J., World's Fair Exposition v. United States, 56 Fed. Rep. 667.

§ 1406. The prevention of a multiplicity of suits is a ground for injunction. Harrington v. Ry. Co., 17 M. 215 G. 188, 204; McRoberts v. Washburne, 10 M. 23 G. 8; Gustafson v. Hamm, 56 M. 334; Althen v. Kelly, 32 M. 280; Albrecht v. St. Paul, 47 M. 531; Chadbourne v. Zilsdorf, 34 M. 43; Cotton v. Mississippi etc. Boom Co., 19 M. 497 G. 429.

Statute.

§ 1407. "Writs of injunction, attested and sealed as other process of the courts, may issue, upon order of the court or a judge thereof as hereinafter set forth; but the period during which performance of an act is stayed by injunction forms no part of the time for performance of such act." G. S. '94, § 5343.

Jurisdiction.

§ 1408. The district courts in term time, and the judges thereof in vacation, have power to award throughout the state, returnable to the proper county, writs of injunction. G. S. '94, § 4837, as amended Laws 1897, ch. 7.

§ 1409. "A court of equity of this state has the power and will restrain one of its own citizens, of whom it has jurisdiction, from prosecuting an action in a foreign state or jurisdiction, whenever the facts of the case make it necessary so to do to enable the court to do justice, and prevent one citizen from obtaining an inequitable advantage of another." Hawkins v. Ireland, 64 M. 339; First Nat. Bank v. La Due, 39 M. 415.

§ 1410. An injunction acts only on the person. Mann v. Flower, 26 M. 479; Hawkins v. Ireland, 64 M. 339.

Pleading.

§ 1411. "In all cases where equitable relief is sought through the extraordinary remedy of an injunction, the facts entitling the party to such relief must be clearly and positively alleged and shown. It is not enough that their existence may be inferred from the averments in the complaint." Warsop v. Hastings, 22 M. 437; Mead v. Stirling, 62 Conn. 586.

§ 1412. An injunction will not ordinarily be granted on facts stated on "information and belief." Armstrong v. Sanford, 7 M. 49 G. 34. See also McRoberts v. Washburne, 10 M. 23 G. 8; Gorton v. Forest City, 67 M. 36.

§ 1413. A mere allegation of irreparable injury is insufficient. Facts must be alleged showing that such injury would necessarily result. Clarke v. Ganz, 21 M. 387; Schurmeier v. Ry. Co., 8 M. 113 G. 88; Montgomery v. McEwen, 9 M. 103 G. 93; Laird, Norton Co. v. County of Pine, 72 M. 409; Mead v. Stirling, 62 Conn. 586.

§ 1414. A bare allegation that the plaintiff has no adequate remedy at law is insufficient. Facts must be alleged from which the inadequateness of the legal remedy is apparent. Goodrich v. Moore, 2 M. 61 G. 49; Hart v. Marshall, 4 M. 294 G.

211; Schurmeier v. Ry. Co., 8 M. 113 G. 88; Bonnell v. Allen, 53 Ind. 130.

Complaint for damages and injunction.

§ 1415. In an action for damages and injunction the latter does not follow as a matter of course the recovery of the former. Finch v. Green, 16 M. 355 G. 315. See Little v. Willford, 31 M. 173.

Modification of permanent injunction.

§ 1416. A permanent injunction may be modified or set aside on motion after judgment. Weaver v. Mississippi etc. Boom Co., 30 M. 477; Colstrum v. Ry. Co., 33 M. 516.

Estoppel.

§ 1417. A judgment in an action for injunction is not a bar to another action for the same relief if there has been a material change in the facts although the subject-matter remains the same. Wayzata v. Ry. Co., 67 M. 385.

TEMPORARY INJUNCTIONS

The statute.

§ 1418. "When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or when, during the litigation, it appears that the defendant is about to do, or is doing, or threatening, or procuring, or suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And where, during the pendency of an action, it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition." G. S. '94, § 5344.

§ 1419. A temporary mandatory injunction may be allowed under this statute. Central Trust Co. v. Moran, 56 M. 188.

§ 1420. A temporary injunction will not be allowed for the enforcement of rights depending on an unsettled question of law. Citizens' Coach Co. v. Ry. Co., 29 N. J. Eq. 299; Long v. Ry. Co., 29 N. J. Eq. 566. See also, Montgomery v. McEwen, 9 M. 103 G. 93, 98.

Object of.

§ 1421. "The purpose of a temporary injunction is to maintain the matter in controversy in its present condition until a decree, so that the effect of the decree shall not be impaired by acts of the parties during the litigation." Mann v. Flower, 26 M. 479.

Allowed upon complaint alone.

§ 1422. "A temporary injunction may issue on the complaint alone if it make out a sufficient cause for it, and if it be verified and its allegations are positive." Stees v. Kranz, 32 M. 313; McRoberts v. Washburne, 10 M. 23 G. 8.

Allowed on affidavit.

§ 1423. "The injunction may be granted at the time of commencing the action, or at any time afterward before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction." G. S. '94, § 5345.

On notice after answer—restraining order.

§ 1424. "An injunction shall not be allowed after answer unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction." G. S. '94, § 5346.

When not allowed on petition.

§ 1425. "When the answer denies all the equities set up in the complaint, and a petition for an injunction pending the action discloses no others, it is improper to grant the injunc-

tion." Montgomery v. McEwen, 9 M. 103 G. 93; Hagemeyer v. St. Michael, 70 M. 482.

May be allowed though permanent injunction not asked.

§ 1426. "It is not necessary, in all cases where a temporary injunction is sought in an action, that the plaintiff should ask for a permanent injunction in his complaint." Hamilton v. Wood, 55 M. 482.

Largely a matter of discretion.

§ 1427. "The granting, refusing or dissolving of a temporary injunction *pendente lite*, while the issues involved in the action are untried, must necessarily rest largely in judicial discretion, to be exercised with regard to the circumstances of the case. That discretion will be influenced by a consideration of the relative injury and inconvenience which may be likely to result to the parties, respectively, from the allowance or disallowance of such relief." Myers v. Ry. Co., 53 M. 335.

§ 1428. The action of the trial court in this regard will not be reversed on appeal except for an abuse of discretion. Pineo v. Heffelfinger, 29 M. 183; Hart v. Marshall, 4 M. 294 G. 211; Gorton v. Forest City, 67 M. 36.

Motion to modify or vacate.

§ 1429. "If the injunction is granted without notice, the defendant, at any time before trial, may apply, upon notice, to the judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint, and the affidavits on which the injunction was granted, or upon the answer, or affidavits on the part of the defendant, with or without the answer." G. S. '94, § 5349.

§ 1430. "If the application is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the injunction was granted." G. S. '94, § 5350.

§ 1431. Where the answer is verified and denies positively and fully all the equities set up in the complaint a temporary injunction should ordinarily be dissolved, on motion of defend-

ant, upon the coming in of the answer. Moss v. Pettingill, 3 M. 217 G. 145; Armstrong v. Sanford, 7 M. 49 G. 34; Montgomery v. McEwen, 9 M. 103 G. 93; Pineo v. Heffelfinger, 29 M. 183; Stees v. Kranz, 32 M. 313; Knoblauch v. Minneapolis, 56 M. 321; Hamilton v. Wood, 55 M. 486.

§ 1432. Exceptions:

(a) Where the circumstances are such as to lead the court to believe it quite probable that, upon a final hearing, the material allegations of the complaint will turn out to be true. Pineo v. Heffelfinger, 29 M. 183; Stees v. Kranz, 32 M. 313; Knoblauch v. Minneapolis, 56 M. 321.

(b) Where irreparable injury would result. Pineo v. Heffelfinger, 29 M. 183.

(c) Where fraud is the ground of action. Stewart v. Johnston, 44 Iowa, 435.

§ 1433. Where the answer does not deny the allegations of the complaint but sets up new matter as a defence a temporary injunction will ordinarily be allowed to continue until the hearing unless the new matter is admitted. Moss v. Pettingill, 3 M. 217 G. 143.

§ 1434. Where the answer sets up new matter the court should not entertain a motion to dissolve the injunction until after the time to reply has expired or at least should only entertain it to deny it. Id.

§ 1435. Upon a motion to modify objection cannot be made to the allowance of any writ. Albrecht v. St. Paul, 47 M. 531.

§ 1436. Upon a motion to dissolve the complaint cannot be dismissed over objection. Goodrich v. Moore, 2 M. 61 G. 49.

§ 1437. "An *ex parte* injunction, in whatever form and however worded, does not differ in character or legal *status* from a temporary restraining order expressly conditioned to continue only until otherwise ordered by the court or until a hearing can be had. No court ever held that an *ex parte* injunction could be issued without an implied right of the opposite party to a review upon a hearing upon counter-affidavits or other-

wise. In the case of a temporary restraining order, the express reservation of control over it or limitation upon its duration is no more unmistakable than that which is implied in the case of an *ex parte* injunction from its very nature and purpose. The hearing upon the motion to dissolve an *ex parte* injunction is the first hearing ever had in the matter, and, while the order may be in form one dissolving, it is essentially one refusing to grant, an injunction, and the legal *status* of the matter is, in effect, the same." State v. Duluth Street Ry. Co., 47 M. 369, 372.

Bond for temporary injunction—statute.

§ 1438. "When no special provision is made by law as to security upon injunction, the court or judge allowing the writ shall require a bond on behalf of the party applying for such writ, in a sum not less than two hundred and fifty dollars, executed by him or some person for him, as principal, together with one or more sufficient sureties, to be approved by said court or judge, to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he sustains by reason of the writ, if the court finally decide that the party was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct." G. S. '94, § 5347.

§ 1439. Actions upon bond: Hayden v. Keith, 32 M. 277; Lamb v. Shaw, 43 M. 507; Curtis v. Hart, 34 M. 329; Safranski v. Ry. Co., 72 M. 185.

§ 1440. Form of bond for injunction.

[Title of action]

Know all men by these presents that we, , as principal, and and , as sureties, are bound unto , the defendant in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the

plaintiff in the above entitled action has applied for a writ of injunction against the defendant therein,

Now, therefore, if the plaintiff shall pay to the defendant such damages as he may sustain by reason of said writ, if the court finally decides that the plaintiff was not entitled thereto, then this obligation, which is given in pursuance of General Statutes 1894, § 5347, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

In presence of: [No seal]

[Acknowledgment as in § 993. Justification as in § 994.]

The foregoing bond is hereby approved.

[Date] .....

District Judge.

Appeal—effect of.

§ 1441. "An *ex parte* order granting an injunction is not appealable, the remedy being, in the first instance, by application to the court granting such order. Hence an appeal from such an order, and the filing of a *supersedeas* bond, is not effectual to stay or suspend the operation of the order." State v. District Court, 52 M. 283.

§ 1442. An appeal, with the stay bond provided by G. S. '94, § 6142, from an order dissolving an injunction, suspends the operation of the order dissolving, and the injunction remains in force. It is immaterial that the injunction was issued *ex parte*. State v. Ry. Co., 47 M. 369.

§ 1443. An order setting aside or modifying a permanent injunction is appealable. Weaver v. Mississippi etc. Boom Co., 30 M. 477.

CASES

To restrain taxation proceedings.

§ 1444. "Upon the propriety of issuing injunctions in such cases, the general rule appears to be that equity will not in-

terfere, merely because the tax is illegal and void, but there must be some special circumstances attending the threatened injury, to distinguish it from a mere trespass and thus bring the case within some recognized head of equity jurisprudence." Clarke v. Ganz, 21 M. 387; Weibeler v. Sullivan, 34 M. 317; Kelly v. Minneapolis, 57 M. 294; Sinclair v. Commissioners, 23 M. 404; Bradish v. Lucken, 38 M. 186; Eastman v. St. Anthony etc. Co., 12 M. 137 G. 77; Albrecht v. St. Paul, 47 M. 531; Curran v. Commissioners, 56 M. 432; Laird, Norton & Co. v. County of Pine, 72 M. 409.

To restrain the probate courts.

§ 1445. Where the probate courts have exclusive jurisdiction they cannot be controlled by injunctions issued out of the district courts. O'Brien v. Larson, 71 M. 371.

To restrain the members of the executive department.

§ 1446. Injunction will not issue to restrain or control the action of the executive officers of the state government. Secomb v. Kittleson, 29 M. 555; Western Ry. Co. v. De Graff, 27 M. 1.

To restrain a public nuisance.

§ 1447. An action cannot be maintained by a private party to restrain or remove an obstruction or other nuisance in a public street or highway where he has not suffered special or peculiar damages to his property or business. Shaubut v. Ry. Co., 21 M. 502; Rochette v. Ry. Co., 32 M. 201; Barnum v. Ry. Co., 33 M. 365; Shero v. Carey, 35 M. 423; Thelan v. Farmer, 36 M. 225; Osborne v. Knife Falls Boom Cor., 32 M. 412; Gundlach v. Hamm, 62 M. 42; Swanson v. Mississippi etc. Boom Co., 42 M. 532; Long v. Minneapolis, 61 M. 46.

§ 1448. Held to have suffered special damages: Aldrich v. Wetmore, 52 M. 164; Brakken v. Ry. Co., 29 M. 41; Wilder v. De Cou, 26 M. 10; Aldrich v. Wetmore, 56 M. 20; Kaje v. Ry. Co., 57 M. 422; County of Stearns v. Ry. Co., 36 M. 425; Page v. Lumber Co., 53 M. 492, overruling Swanson v. Boom Co., 42 M. 532.

To restrain nuisances—G. S. '94, § 5881.

§ 1449. Railroad cases: Harrington v. Ry. Co., 17 M. 215 G. 188; Schurmeier v. Ry. Co., 10 M. 82 G. 59; Gray v. Ry. Co., 13 M. 315 G. 289; Hursh v. Ry. Co., 17 M. 439 G. 417; Colstrum v. Ry. Co., 33 M. 516; Gustafson v. Hamm, 56 M. 334; County of Stearns v. Ry. Co., 36 M. 425.

§ 1450. Miscellaneous cases: Finch v. Green, 16 M. 355 G. 315; City of Red Wing v. Guptil, 72 M. 259.

To restrain public works.

§ 1451. Courts will not interfere by injunction with the prosecution of public works except in very clear cases. Bass v. Shakopee, 27 M. 250; Gorton v. Town of Forest City, 67 M. 36; Myers v. Duluth etc. Co., 53 M. 335.

To restrain foreclosure proceedings.

§ 1452. Conkey v. Dike, 17 M. 457 G. 434, (disapproving Montgomery v. McEwen, 9 M. 103 G. 93); O'Brien v. Oswald, 45 M. 59; Armstrong v. Sanford, 7 M. 49 G. 34; Buettel v. Harmount, 46 M. 481; Normandin v. Mackey, 38 M. 417; Yager v. Merkle, 26 M. 429; Delvin v. Quigg, 44 M. 534; Bay View Land Co. v. Meyers, 62 M. 265; Nolan v. Rankin, 77 N. W. 786.

Cases of permanent injunctions held proper.

§ 1453. Kolf v. Fuel Exchange, 48 M. 215 (to restrain, at instance of stockholder an unauthorized corporate act); Butman v. James, 34 M. 547 (to restrain the cutting of growing timber); Chadbourne v. Zilsdorf, 34 M. 43 (to restrain the cutting down of trees, fences and the commission of other trespasses); Morrill v. St. Anthony etc. Co., 26 M. 222 (to restrain interference with the right of a riparian owner to use water flowing past his land); Cotton v. Mississippi, 19 M. 497 G. 429 (to restrain the construction of a log boom to the injury of a riparian owner); Newton v. Newton, 46 M. 33 (to restrain holder of note equitably owned by another from collecting and appropriating the proceeds thereof); State v. American etc. Asso., 64 M. 349 (to restrain at instance of state the unlawful exercise of corporate powers); Kern v. Field, 68 M. 317 (to restrain divorced

husband from interfering with the hotel business of his former wife and her possession of the hotel); Farmer v. St. Paul, 65 M. 176 (to restrain at instance of tax-payer a city from entering into an unauthorized contract); Schmidt v. Cassilius, 31 M. 7 (to restrain a tenant who is insolvent from disposing of landlord's share of crops); Hodgman v. Ry. Co., 20 M. 48 G. 36 (to restrain at instance of tax-payer the illegal issuance of municipal bonds); Spaulding Hotel Co. v. Emerson, 69 M. 292 (to restrain a tenant from using the leasehold contrary to the lease); Kugath v. Meyers, 62 M. 399 (to restrain the sale on execution of a homestead); Eisenmenger v. Water Commissioners, 44 M. 457 (to restrain the overflowing of land by a water company); State v. Minnesota etc. Co., 40 M. 213 (to restrain at instance of state unauthorized acts of a corporation); Harrington v. Plainview, 27 M. 224 (to restrain the issuance of bonds by a municipality); County of Stearns v. Ry. Co., 36 M. 425 (to restrain at instance of county commissioners a railroad company from laying its track along a county road); Althen v. Kelly, 32 M. 280 (to restrain trespasses to land—quarrying and removing stone from street); Bennett v. Murtaugh, 20 M. 151 G. 135 (to restrain the digging of a ditch to a lake which was the source of a stream upon which plaintiff had a water-power); Stewart v. Transp. Co., 17 M. 372 G. 348 (to restrain at instance of a dissenting stockholder a corporation from using its powers or funds for an unauthorized purpose or for creating a monopoly); Streissguth v. Geib, 67 M. 360 (to restrain county commissioners and auditor from taking action on a petition for removal of county seat); Gustafson v. Hamm, 56 M. 334 (to restrain the operation of a private railroad constituting a nuisance to the abutting owner); Flynn v. Little Falls etc. Co., 77 N. W. 38 and cases cited (to restrain at instance of tax-payer an illegal disposition of public money); Carlson v. St. Louis etc. Co., 75 N. W. 1041 (to restrain the overflow of lands resulting from the construction of dams).

Cases of permanent injunction held improper.

§ 1454. Warsop v. Hastings, 22 M. 437 (to restrain issuance

of bonds by city—complaint insufficient); Schurmeier v. Ry. Co., 8 M. 113 G. 88 (to restrain trespass to land); Hanson v. Johnson, 20 M. 194 G. 172 (to restrain execution on a judgment more than ten years after entry); Moriarty v. Ashworth, 43 M. 1 (to restrain waste by mortgagor); Norwood v. Holden, 45 M. 313 (to restrain a public official from performing the duties of his office pending *quo warranto* proceedings); University of Minnesota v. Ry. Co., 36 M. 447 (to restrain condemnation proceedings); Jenks v. Ludden, 34 M. 482 (to restrain a citizen of this state from enforcing his attachment lien on real property in another state); Wickham v. Davis, 24 M. 167 (to restrain sale of partner's interest on execution); Rogers v. Holyoke, 14 M. 220 G. 158 (to restrain a motion to set aside a foreclosure sale); Chamblin v. Schlichter, 12 M. 276 G. 181 (to restrain a sheriff from paying redemption money to purchaser at foreclosure sale); Weber v. Timlin, 37 M. 274 (to restrain county commissioners from ordering an election for the removal of a county seat); Napa Valley Wine Co. v. Boston Block Co., 44 M. 130 (to restrain a sub-tenant from selling liquor contrary to a contract to which he was not a party); Chicago etc. Ry. Co. v.Union Depot Co., 68 M. 220 (to restrain a union depot association at the instance of one of its members from enforcing one of its by-laws); Wayzata v. Ry. Co., 67 M. 385 (to compel a railroad company to change its tracks); Russell v. Merchants' Bank, 47 M. 286 (to restrain waste by one tenant in common); Blair v. Hilgedick, 45 M. 26 (to restrain garnishment proceedings); Marks v. Jones, 71 M. 136 (to restrain at instance of purchaser at foreclosure sale a person holding under mortgagor from harvesting and disposing of crops); School District v. Weise, 79 N. W. 668 (to restrain parties from acting as trustees of a school district); McLean v. North St. Paul, 75 N. W. 1042 (to restrain at instance of tax-payer a village from paying out money for the construction of a bicycle path).

Cases of temporary injunction held proper.

§ 1455. Stees v. Kranz, 32 M. 313 (to restrain the violation of a lease against the sale of liquor); McRoberts v. Washburne,

10 M. 26 G. 8 (to restrain the unlawful establishment of a rival ferry); Hamilton v. Wood, 55 M. 482 (to restrain a sale on execution which would create a cloud on title); Small v. Matrix Co., 45 M. 264 (to restrain at instance of stockholder an unauthorized transfer of corporate property); Mann v. Flower, 26 M. 479 (to restrain proceedings in another action in the same court); Rogers v. Le Sueur Co., 57 M. 434 (to restrain county commissioners from illegally issuing bonds for the construction of a court-house); Flaten v. Moorhead, 51 M. 518 (to restrain the construction of a jail on property dedicated to a city for a park); Wilkin v. St. Paul, 33 M. 181 (to restrain the alteration of a street grade).

Cases of temporary injunction held improper.

§ 1456. Hart v. Marshall, 4 M. 294 G. 211 (to restrain execution pending an action to set aside the judgment); Goodrich v. Moore, 2 M. 61 G. 49 (to restrain the violation of a printing contract); Knoblauch v. Minneapolis, 56 M. 321 (to restrain condemnation proceedings); Pelican River Milling Co. v. Maurin, 67 M. 418 (to restrain a sale on execution); Tozer v. O'Gorman, 65 M. 1 (to restrain a party from entering a verdict in his favor); Slingerland v. Norton, 59 M. 351 (to restrain county auditor from calling a meeting of the county commissioners to consider the withdrawal of names signed to a petition for removal of county seat); Bohn Mfg. Co. v. Hollis, 54 M. 223 (to restrain the carrying out of an agreement between the members of an association not to deal with a particular person); Rockwood v. Davenport, 37 M. 533 (to restrain clerk from entering judgment *nunc pro tunc*); Minnesota Linseed Oil Co., v. Maginnis, 32 M. 193 (to restrain the sale of a chattel by a mortgagor); Nichols v. Walter, 37 M. 264 (to restrain county commissioners from changing county seat); Mower v. Staples, 32 M. 284 (to restrain stockholders from altering charter); Bass v. Shakopee, 27 M. 250 (to restrain public authorities from taking property before condemnation proceedings); Burke v. Leland, 51 M. 355 (to restrain the performance of the duties of a public office and thereby test the right to such office).

CHAPTER XLVII

INSURANCE

§ 1457. Complaint by wife on life policy of husband.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant, in consideration of the payment to it of a premium of dollars, made to one John Doe its policy of insurance and thereby insured the life of the said John Doe in the sum of dollars, payable to plaintiff within days after notice and proof of the death of the said John Doe.

II. That on the day of , 19 , in the city of , the said John Doe died.

III. That plaintiff was the wife of the said John Doe at the time of his death and also at the time said policy was issued to him.

IV. That up to the time of the death of the said John Doe all premiums which accrued on said policy were paid at the time they accrued and that in all other respects the said John Doe duly performed all the conditions of said policy on his part.

V. That on the day of , 19 , plaintiff furnished defendant with notice and proof of the death of the said John Doe and in all other respects duly performed the conditions of said policy on her part.

VI. That no part of said sum has been paid.

Wherefore [demanding judgment].

§ 1458. Complaint by owner on standard fire policy.

The plaintiff complains of defendant and alleges:

I. That at all the times hereinafter mentioned he was [and still is] the owner of [describing property insured in general terms].

II. That on the day of , 19 , defendant, in con-

sideration of the payment to it of a premium of dollars, made to plaintiff its policy of insurance on said property and thereby insured plaintiff, for a period of one year from said day, against loss or damage by fire in respect to said property, to the amount of dollars.

III. That on the day of , 19 , said dwelling house and furniture were [totally destroyed] [greatly damaged and in part destroyed] by fire.

IV. [That the loss to plaintiff from said fire was dollars.] [That thereafter and before the commencement of this action three referees were duly selected in accordance with the terms of said policy to adjust and determine the amount of the loss to plaintiff from said fire and that said referees duly made their award in writing, finding said loss to be the sum of dollars.]

V. [That plaintiff had no other insurance on said property.] [That plaintiff had upon said property, in addition to said policy of defendant, insurance amounting to dollars and no more.]

VI. That plaintiff has duly performed all the conditions of said policy on his part.

VII. [That no part of said loss has been paid.] [That defendant has not paid its proportionate share of said loss, amounting to dollars.]

Wherefore [demanding judgment].

NOTES

Complaints considered as to sufficiency.

§ 1459. Minneapolis etc. Ry. Co. v. Ins Co., 64 M. 61; Guerin v. Ins. Co., 44 M. 20; Laudenschlager v. Legacy Asso., 36 M. 131; Maxcy v. Ins. Co., 54 M. 272; Place v. St. Paul etc. Co., 67 M. 126; Schrepfer v. Ins. Co., 79 N. W. 1005.

Complaint need not anticipate matter of defence.

§ 1460. Price v. Ins Co., 17 M. 497 G. 473; Ermentrout v. Ins. Co., 60 M. 418; Laudenschlager v. Legacy Asso., 36 M. 131;

Newman v. Ins. Co., 17 M. 123 G. 981; Mistiliski v. Ins. Co., 64 M. 366; Chambers v. Ins. Co., 64 M. 495; Schrepfer v. Ins. Co., 79 N. W. 1005.

Conditions precedent.

§ 1461. The performance of conditions precedent by plaintiff may be alleged generally under G. S. '94, § 5250. Mosness v. Ins. Co., 50 M. 341; Hand v. Ins. Co., 57 M. 519.

Waiver or excuse for non-performance.

§ 1462. Hand v. Ins. Co., 57 M. 519. See also La Plant v. Fireman's Ins. Co., 68 M. 82; Lane v. Ins. Co., 50 M. 227.

Demand.

§ 1463. Ganser v. Ins. Co., 34 M. 372.

Allegation of loss.

§ 1464. Maxcy v. Ins. Co., 54 M. 272.

Allegations of other insurance.

§ 1465. "In an action upon a fire insurance policy which provides that the amount to be paid thereunder should not exceed the proportion which the amount insured under the policy bears to all the insurance upon the property, the complaint should show that there is no other insurance upon the property, or in case there is other insurance, should give the amount thereof." Coats v. Ins. Co., 4 Wash. 375. See Guerin v. Ins. Co., 44 M. 20; Minneapolis etc. Ry. Co. v. Ins. Co., 64 M. 61; Ermentrout v. Ins. Co., 60 M. 418.

Conditions subsequent.

§ 1466. The complaint need not negative conditions subsequent. Newman v. Ins. Co., 17 M. 123 G. 98; Mistiliski v. Ins. Co., 64 M. 366.

Allegations of assignment.

§ 1467. Morley v. Liverpool etc. Ins. Co., 79 N. W. 103.

Compliance of company with state laws.

§ 1468. Ganser v. Ins. Co., 34 M. 372; Fidelity & Casualty Co. v. Eickhoff, 63 M. 170. See also, Langworthy v. Garding, 77 N. W. 207; Langworthy v. Flour Mill Co., 79 N. W. 974.

Forfeiture a matter of defence to be specially pleaded.

§ 1469. Brigham v. Wood, 48 M. 344; Ganser v. Ins. Co., 38 M. 74; Caplis v. Ins. Co., 60 M. 376; Bromberg v. Minnesota Fire Asso., 45 M. 318; Doten v. Ins. Co., 80 N. W. 630 (vacancy as a defence—how pleaded).

Limitations.

§ 1470. Willoughby v. Ins. Co., 68 M. 373.

Answer setting up fraud.

§ 1471. In an answer setting up fraud in the representations or warranties of the insured the particular statements alleged to be false must be specified. Chambers v. Ins. Co., 64 M. 495. See Cerys v. Ins. Co., 71 M. 338.

Burden of proof.

§ 1472. Chambers v. Ins. Co., 64 M. 495; Mistiliski v. Ins. Co., 64 M. 366; Perine v. United Workmen, 51 M. 224; Hale v. Invest. Co., 61 M. 516 and 65 M. 548 (suicide); Beckett v. Aid Asso., 67 M. 298; Mosness v. Ins. Co., 50 M. 341; Ganser v. Ins. Co., 34 M. 372; Swing v. Akeley Lumber Co., 62 M. 169; Fidelity & Casualty Co. v. Eickhoff, 63 M. 170; Schrepfer v. Ins. Co., 79 N. W. 1005 and cases under preceding sections.

CHAPTER XLVIII

INTERPLEADER

§ 1473. Form of complaint.

The plaintiff complains of defendants and alleges:

I. That the defendants have each preferred a claim against the plaintiff respecting [specifying the debt, thing or duty with particularity and showing that the property is in the possession of the plaintiff].

II. That the defendant, , claims the same [specifying with particularity the grounds of claim].

III. That the defendant, , claims the same [specifying with particularity the grounds of claim].

IV. That the plaintiff is ignorant of the respective rights of the defendants and cannot determine the same without hazard to himself.

V. That the plaintiff has no claim upon the said property [money] and is ready and willing to deliver [pay] it to such person as the court may direct.

VI. That this action is not brought by collusion with either of the defendants.

Wherefore plaintiff demands judgment:

(1) That the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation thereto.

(2) That they be required to interplead together concerning their claims to the said property.

(3) That some person be authorized to receive the said property pending such litigation.

(4) That upon delivering the same to such person the plaintiff be discharged from all liability to either of the defendants in relation thereto.

(5) That the plaintiff's costs be paid out of the same.

[1] Based on Code Commissioners' Form, No. 156; Crane v. McDonald, 118 N. Y. 648; Bassett v. Leslie, 123 N. Y. 396.

I. EQUITABLE INTERPLEADER

Code remedy not exclusive.

§ 1474. The statutory remedy is not exclusive. If no action has been commenced a party holding money or effects in his hands to which there are conflicting claimants between whom he is indifferent may bring an action against such claimants in the nature of an equitable bill of interpleader. The code has not abolished the remedy but simply the form of the pleadings. St. Louis Life Ins. Co. v. Ins. Co., 23 M. 7; Smith v. St. Paul, 65 M. 295; Beck v. Stephani, 9 How. Pr. (N. Y.) 193; Crane v. McDonald, 118 N. Y. 648; Board of Education v. Scoville, 13 Kans. 17.

When action will lie.

§ 1475. The plaintiff must stand indifferent between the claimants and as respects the subject of the action he must not have incurred a personal obligation to one of them independent of the question between them.[1] The plaintiff must have no interest in or claim to the subject-matter.[2] He must be without adequate remedy at law.[3] According to the better view it is not necessary that there should be privity between the claimants.[4] It may be laid down as a general rule that whenever a party without collusion is subjected to a double demand to pay an acknowledged debt or deliver a specific thing and it appears that at least a fair doubt exists, either upon questions of law or fact, as to the rights of the conflicting claimants, he may bring an action of interpleader against them.[5]

[1] Cullen v. Dawson, 24 M. 66.

[2] Newman v. Home Ins. Co., 20 M. 422 G. 378.

[3] Blair v. Hilgedick, 45 M. 23.

[4] Crane v. McDonald, 118 N. Y. 648. See, however, Newman v. Home Ins. Co., 20 M. 422 G. 378.

[5] Crane v. McDonald, 118 N. Y. 648; Pomeroy, Equity, § 1320.

Object of action.

§ 1476. The object of the action is to relieve the plaintiff of

the risk, uncertainty and expense of determining, by litigation or otherwise, as to which of several conflicting claimants he is owing and ought to pay an acknowledged debt or duty. The object of the action is not to relieve the plaintiff of a double liability but rather a double vexation on account of one liability. St. Louis Life Ins. Co. v. Ins. Co., 23 M. 7; Crane v. McDonald, 118 N. Y. 648; Pomeroy, Eq. § 1320, note.

Practice.

§ 1477. "In interpleader proceedings the better practice is to determine first whether the interpleader will lie. If it will not, it is unnecessary to go further. If it will, then, upon bringing the money or other thing in dispute into court, the plaintiff should be discharged from liability, and the action proceed upon the issues between the parties defendant. Nevertheless, it is admissible that the whole controversy between the parties to the action, including as well the issues between the plaintiff and the defendants as the issues between the defendants, be submitted upon one trial. Whichever course is adopted, the preliminary question is, Will the interpleader action lie? Unless the complaint upon its face shows that the action will not lie, if the defendants put in an answer denying the allegations of the complaint, or set up new matter in bar of the action, the plaintiff must reply, (when a reply is required by our rules of pleading,) and the issues raised must be tried in order to determine the preliminary question mentioned." [1] If it appears by the answers of the defendants that each claims the fund or thing in dispute, no other evidence of that fact is required to entitle the plaintiff to a decree.[2] After it has been determined that the action of interpleader will lie and the money or property has been paid into court the plaintiff is out of the action altogether, the defendants alone being left to contest their conflicting claims without any aid or interference on his part. Costs may be awarded against a party who brings an action of interpleader in bad faith.[3]

[1] Cullen v. Dawson, 24 M. 66.

[2] Crane v. McDonald, 118 N. Y. 648.

[3] St. Louis Life Ins. Co. v. Ins. Co., 23 M. 7.

II. STATUTORY INTERPLEADER

The statute.

§ 1478. "A defendant against whom an action is pending, upon contract, or for money, or specific real or personal property, may, at any time before answer, upon affidavit that a person, not a party to the action, and without collusion with him, makes a demand against him for the same money, debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge the defendant from liability to either party, on his depositing in court the amount of the debt or money, or delivering the property or its value to such person as the court may direct; and the court may thereupon make the order; and thereafter the action shall proceed between the plaintiff and person so substituted; and the court may compel them to interplead." G. S. '94, § 5273; Rohrer v. Turrill, 4 M. 407 G. 309; Cassidy v. Bank, 30 M. 86.

Practice under statute.

§ 1479. "It is the proper practice for the court, in its order of interpleader, to direct that the summons and complaint amended, with a copy of the order, be served by plaintiff upon the substituted defendant within a specified time thereafter, or in default thereof, that the action be dismissed. Such party may voluntarily appear and move for such dismissal, upon plaintiff's default in making such service, and the court may order the property or fund in controversy, and in its custody, to be delivered over to him." Hooper v. Balch, 31 M. 276.

CHAPTER XLIX

JUDGMENTS

§ 1480. Complaint in action on judgment.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff recovered a personal judgment, in the district court in and for the county of , state of , which was duly made by said court,[1] against defendant, for the sum of dollars, in an action wherein this plaintiff was plaintiff and the defendant herein defendant.

II. That plaintiff still owns said judgment.

III. That no part thereof has been paid.

Wherefore [demanding judgment].

[1] § 348. Holmes v. Campbell, 12 M. 222 G. 141. This form is sufficient in an action on a foreign judgment (Gunn v. Peakes, 36 M. 177) except that it is advisable to add: III. That by the law of said state the interest upon a judgment runs at the rate of per cent. per annum.

NOTES

Leave of court.

§ 1481. Add to the above form:

IV. That before the commencement of this action and on the day of , 19 , an order was duly made and entered in this court, upon application of plaintiff, granting him leave to bring this action.

See G. S. '94, § 5503; Ringle v. Wallis Iron Works, 16 Misc. (N. Y.) 167.

Actions on a domestic judgment.

§ 1482. An action may be maintained upon a domestic judgment and it is no objection that an execution might issue. Dole v. Wilson, 39 M. 330; Merchants Nat. Bank v. Gaslin, 41 M. 552; Sandwich Mfg. Co. v. Earl, 56 M. 390.

Defence.

§ 1483. "An answer alleging that the judgment is not owned by the plaintiff, but by another person, naming him, presents a good defence, though the particulars of the assignment be not stated." Holcombe v. Tracy, 2 M. 241 G. 201.

Variance.

§ 1484. Lawrence v. Willoughby, 1 M. 87 G. 65.

Costs.

§ 1485. See G. S. '94, § 5503.

Statute of limitations.

§ 1486. See Laws 1899, ch. 123; Holcombe v. Tracy, 2 M. 241 G. 201; Sandwich Mfg. Co. v. Earl, 56 M. 390.

Counterclaim—equitable defence.

§ 1487. The defendant may, by way of counterclaim and equitable defence, set up facts which would justify a court of equity in cancelling the judgment. Vaule v. Miller, 69 M. 440; Deering v. Poston, 80 N. W. 783.

ACTION TO VACATE JUDGMENT UNDER G. S. '94, § 5434

Nature of action.

§ 1488. This action is in the nature of a bill in equity to set aside the judgment and the relief asked is of an extraordinary character. Schweinfurter v. Schmahl, 69 M. 418.

§ 1489. The statute is not designed to give an action which shall take the place of a motion for a new trial. Hulett v. Hamilton, 60 M. 21.

Constitutional.

§ 1490. The statute is constitutional. Spooner v. Spooner, 26 M. 137; Weiland v. Shillock, 24 M. 345.

Construction of statute.

§ 1491. "This statute is in derogation of the well-established and salutary principle and policy of the common law, which forbids the retrial of issues once determined by a final judgment. The statute should not, therefore, be so construed

as to extend its operation beyond its most obvious import." Stewart v. Duncan, 40 M. 410; Hass v. Billings, 42 M. 63; Watkins v. Landon, 67 M. 136; O'Brien v. Larson, 71 M. 371.

Who is party aggrieved.

§ 1492. One not a party to the action, though directly interested in the result, cannot maintain the action. Stewart v. Duncan, 40 M. 410.

Complaint.

§ 1493. The complaint must clearly point out the act of perjury or subornation thereof, or the fraudulent acts or practices relied upon and show upon its face that the action is brought within the statutory time. A general charge of fraud is insufficient. Bomsta v. Johnson, 38 M. 230; Hass v. Billings, 42 M. 63; Wilkins v. Sherwood, 55 M. 154.

§ 1494. If plaintiff claims that he was defaulted or prevented from defending he must in his complaint state facts from which it affirmatively appears that he was entirely free from contributory negligence in suffering judgment to be taken against him. Schweinfurter v. Schmahl, 69 M. 418; O'Brien v. Larson, 71 M. 371.

§ 1495. The complaint should show that the plaintiff has suffered damage. McNair v. Toler, 21 M. 175.

When action will not lie for perjury.

§ 1496. When the pleadings disclose the fact to be proved so that the opposite party knows what the pleader will attempt to prove, and is not under any necessity to depend on the other to prove the fact as he himself claims it, the mere allegation of the defeated party that there was, as to such issue, false or perjured testimony by the successful party or his witnesses, will not be sufficient to sustain an action under the statute. It was not the design of the statute to excuse a party from exercising proper diligence in preparing for trial or to make unnecessary the ordinary prudence and reasonable diligence required in cases of applications for new trials on the ground of surprise or newly discovered evidence. Hass

v. Billings, 42 M. 63; Wilkins v. Sherwood, 55 M. 154; Colby v. Colby, 59 M. 432; Watkins v. Landon, 67 M. 136. See Johnston v. Paul, 23 M. 46.

New defence.

§ 1497. Under this statute a judgment will not be vacated and a new trial granted to enable a party to make a defence which ought to have been asserted in the original action. Clark v. Lee, 58 M. 410; Hulett v. Hamilton, 60 M. 21; Watkins v. Landon, 67 M. 136; O'Brien v. Larson, 71 M. 371.

Fraudulent practices.

§ 1498. "Where a defeated party in judicial proceedings has been prevented from fully exhibiting his case by his adversary, as by keeping him away from court through a false promise of a compromise, or where a defendant never had knowledge of a suit, being kept in ignorance by the acts of the plaintiff, these and similar cases which show that there has never been a real contest in the trial or hearing are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair trial." Street v. Alden, 62 M. 160.

Relief which the court may award.

§ 1499. Baker v. Sheehan, 29 M. 235; Spooner v. Spooner, 26 M. 137; Henry v. Meighen, 46 M. 548; Colby v. Colby, 64 M. 549.

FORMER JUDGMENT IN ESTOPPEL

Form of plea.

§ 1500. That on the day of , 19 , in an action brought by the plaintiff against the defendant in the district court in and for the county of , in this state, wherein the facts alleged in the complaint were the same facts set forth in the complaint herein,[1] the plaintiff recovered a judgment, duly made[2] upon the merits,[3] against the defendant herein for dollars.

[1] Whitcomb v. Hardy, 68 M. 265.

[2] § 348.

[3] Andrews v. School District, 35 M. 70; Gunn v. Peakes, 36 M. 177.

CHAPTER L

LANDLORD AND TENANT

I. UNLAWFUL DETAINER

§ 1501. Action by landlord against tenant under G. S. '94 § 6118 for possession for non-payment of rent.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant entered into an agreement in writing whereby plaintiff demised to defendant for the term of years from that day the premises known as No. , street, in the city of , county and state aforesaid, and defendant promised to pay to plaintiff rent therefor at the rate of dollars per month, payable in advance.

II. That thereafter defendant went into possession of said premises under said agreement and still retains possession thereof.

III. That defendant has not paid the rent for the month beginning on the day of , 19 , yet withholds possession from plaintiff.

Wherefore plaintiff demands judgment:

(1) For the restitution of said premises.

(2) For the costs and disbursements of this action.

[Verification]

[1] It is common practice to allege that the defendant "wrongfully" or "unlawfully" withholds possession. This is obviously a mere conclusion of law. The practice of making such an allegation is a "survival" of the time when the action was quasi criminal in nature. The action in this state is now purely civil and the pleadings should conform to the rules governing the ordinary civil action. The landlord is entitled to restitution immediately upon the non-payment of rent and the possession of the defendant becomes at once, by virtue of the statute, "wrongful" or "unlawful." If there are any facts rendering his retention of possession lawful it is for the defendant to set them up in the answer.

§ 1502 Oral lease.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant entered into an agreement whereby plaintiff leased to defendant [for the term of one year] [from month to month] from that day [continuing as in § 1501].

§ 1503. Action by landlord against tenant under G. S. '94, § 6118, for possession after expiration of term.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff by written lease demised to defendant for the term of years from that day the premises known as No. , street, in the city of , county and state aforesaid.

II. That thereafter defendant went into possession of said premises under said lease and still retains possession thereof.

III. That the term for which said premises were so demised has expired yet defendant withholds [1] possession thereof from plaintiff.

Wherefore [demanding judgment as in § 1501].

[1] As between landlord and tenant, the former is prima facie entitled to possession at the termination of the lease and if facts exist which justify the tenant in refusing to surrender to him, the tenant must allege and prove such facts. It is not necessary for plaintiff to anticipate a possible defence by alleging that the defendant "wrongfully" or "unlawfully" or "without the permission of plaintiff" withholds possession. Engles v. Mitchell, 30 M. 122.

§ 1504. Action under G. S. '94, § 6118, upon termination of lease from month to month.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff leased to defendant from month to month from that day the premises known as No. , street, in the city of , county and state aforesaid.

II. That thereafter defendant went into possession of said premises under said lease and still retains possession thereof.

III. That on the day of , 19 , plaintiff served upon defendant a written notice to quit on the day of , 19 .

IV. That the term of defendant's tenancy of said premises has expired yet he withholds possession thereof from plaintiff.

Wherefore [demanding judgment as in § 1501].

NOTES

Election of remedies.

§ 1505. A landlord from whom a tenant wrongfully withholds possession has a choice of remedies. He may bring an action in the nature of ejectment in the district court and recover possession and damages for withholding possession or he may bring an action under G. S. '94, § 6118, in a justice court and recover possession summarily, but without damages. State v. District Court, 53 M. 483; Ferguson v. Kumler, 25 M. 183.

Nature of action.

§ 1506. The sole object of the statute as respects landlord and tenant is to provide a summary remedy by which the landlord may be restored to possession of leased premises, on the expiration of the lease, or the failure of the lessee to comply with the provisions of the lease. But this object obtained, the statute goes no further. Any other right which the landlord may have, arising out of his contract, must be enforced, if at all, by another action. Damages for withholding or rent cannot be recovered. Chandler v. Kent, 8 M. 524 G. 467; State v. District Court, 53 M. 483.

Jurisdiction.

§ 1507. The district courts do not have original jurisdiction in actions under the statute. State v. District Court, 53 M. 483.

Venue.

§ 1508. The action is a local one and must be brought in the county where the land lies. The statute provides that "any justice of the peace of the county" may try the case. Gibbens v. Thompson, 21 M. 398. See, however, Laws 1897, ch. 241.

When action will lie under statute.

§ 1509. A landlord may bring an action under the statute when the tenant withholds possession:

(a) After the expiration of his term. Steele v. Bond, 28 M. 267; Burton v. Rohrbeck, 30 M. 393; Judd v. Arnold, 31 M. 430; Norton v. Beckman, 53 M. 456.

(b) Contrary to the conditions or covenants of the lease or agreement. Steele v. Bond, 28 M. 267; Bauer v. Knoble, 51 M. 358; Peterson v. Kreuger, 67 M. 449; Gluck v. Elkan, 36 M. 80; State v. Burr, 29 M. 432.

(c) After any rent becomes due according to the terms of the lease or agreement, whether the lease contains a forfeiture or re-entry clause or not. Suchaneck v. Smith, 45 M. 26; Woodcock v. Carlson, 41 M. 542, 546; Lloyd v. Secord, 61 M. 448; Spooner v. French, 22 M. 37; Gibbens v. Thompson, 21 M. 398; George v. Mahoney, 62 M. 370; Douglas v. Harms, 53 M. 204; Seeger v. Smith, 77 N. W. 3.

(d) After the determination of his estate at will by a notice to quit. Hunter v. Frost, 47 M. 1.

§ 1510. The action will lie only when there is a conventional relation of landlord and tenant. Steele v. Bond, 28 M. 267; Pioneer etc. Loan Co. v. Powers, 47 M. 269; Burton v. Rohrbeck, 30 M. 393.

§ 1511. It is not necessary that the detainer should be forcible. Gluck v. Elkan, 36 M. 80.

Complaint.

§ 1512. It is not necessary to allege that the plaintiff is the owner or that he is entitled to the immediate possession if the complaint shows a leasing by the plaintiff to the defendant and an entry and possession by the latter under such leasing. Engels v. Mitchell, 30 M. 122.

§ 1513. It should affirmatively appear from the complaint that the conventional relation of landlord and tenant exists. See § 1510.

§ 1514. The complaint should particularly describe the

premises. Lewis v. Steele, 1 M. 88 G. 67; Gibbens v. Thompson, 21 M. 398.

Answer.

§ 1515. The statute (G. S. '94, § 6125) provides that "all matters in excuse, justification or avoidance of the allegations in the complaint, shall be set up in the answer." "This must be understood to refer to matters which *per se* constitute an excuse, justification, or avoidance, which of themselves, and without affirmative aid from a court, entitle the defendant to retain the present possession and not to include those matters upon which a proper court might afford the defendant affirmative relief, and which go to his right of possession only after such relief has been granted." Petsch v. Biggs, 31 M. 393; Steele v. Bond, 28 M. 267, 272; Norton v. Beckman, 53 M. 456; Tilleny v. Knoblauch, 75 N. W. 1039.

§ 1516. "Matters which control the legal effect of the lease on which the complaint is founded, and show, if true, that the relation of landlord and tenant was not created by it, and does not exist between the parties" are a good defence and may be set up by answer. Steele v. Bond, 28 M. 267.

§ 1517. Matter held no defence: Peterson v. Kreuger, 67 M. 449; Lloyd v. Secord, 61 M. 448; Douglas v. Herms, 53 M. 204; Gluck v. Elkan, 36 M. 80.

Construction of pleadings.

§ 1518. The pleadings are to be construed as in an ordinary civil action. Norton v. Beckman, 53 M. 456.

Counterclaim.

§ 1519. The defendant cannot set up a counterclaim. Peterson v. Kreuger, 67 M. 449; Barker v. Walbridge, 14 M. 469 G. 351.

Burden of proof.

§ 1520. Chandler v. Kent, 8 M. 524 G. 467.

Demand—notice to quit before suit.

§ 1521. If the action is based on the ground of non-payment of rent no notice to quit or demand of rent is necessary before

bringing suit and this is so regardless of whether the tenancy is for a fixed term or at will. G. S. '94, §§ 5865, 6118; Gibbens v. Thompson, 21 M. 398; Spooner v. French, 22 M. 37; Seeger v. Smith, 77 N. W. 3; Caley v. Rogers, 72 M. 100.

§ 1522. If the action is based on the ground of expiration of the term no notice to quit is necessary if the tenancy was for a fixed term. Engels v. Mitchell, 30 M. 122.

§ 1523. If the tenancy was at will, as, for example, from month to month, G. S. '94, § 5873, applies, and a notice to quit is necessary to determine the lease and a condition precedent to an action for restitution on the ground of expiration of the term; but not a condition precedent to an action based on the ground of non-payment of rent. In the latter case payment of rent would defeat the action. The only way in which a landlord can dispossess a tenant at will who pays his rent when due is by a notice to quit and if the tenancy is from month to month a month's notice is necessary. If a tenant at will fails to pay his rent when due he may be dispossessed on the ground of expiration of his lease upon a written notice of fourteen days and if the action is based on the ground of expiration of the lease an offer to pay the rent would not defeat the action. Eastman v. Vetter, 57 M. 164; Shirk v. Hoffman, 57 M. 230; Hunter v. Frost, 47 M. 1; Finch v. Moore, 50 M. 116 and cases cited; Grace v. Michaud, 50 M. 139; Ingalls v. Oberg, 70 M. 102; Pendergast v. Searle, 77 N. W. 231.

§ 1524. The duty to give notice to quit is reciprocal and the notice must terminate with the month, quarter or year, according to the nature of the tenancy. A present demand or notice to quit is insufficient. Hunt v. Frost, 47 M. 1; Grace v. Michaud, 50 M. 139; Finch v. Moore, 50 M. 116; Shirk v. Hoffman, 57 M. 230.

Damages.

§ 1525. Damages for withholding or for rent cannot be recovered. The only judgment that can be rendered is for restitution and costs. State v. District Court, 53 M. 483.

Not necessary to wait an hour.

§ 1526. The justice may proceed to hear the case at the time appointed in the summons without waiting an hour. Spooner v. French, 22 M. 37.

Tender of rent and costs.

§ 1527. "When in an action brought under the provisions of G. S. '94, § 6118, by a landlord, to have restitution of demised premises because of non-payment of rent upon the day specified in the lease, the tenant tenders to the landlord the amount due, with interest, and offers to pay all costs which have accrued in the proceedings, and these facts are alleged in the answer, and stand admitted upon the trial, the plaintiff is not entitled to restitution, and on actual payment to plaintiff, or into court, as he may demand, the action should be dismissed." George v. Mahoney, 62 M. 370; Seeger v. Smith, 77 N. W. 3; Wacholz v. Griesgraber, 70 M. 220; Cook v. Parker, 67 M. 374.

Judgment on the pleadings.

§ 1528. If the answer admits the material allegations of the complaint and alleges no defence judgment on the pleadings may be rendered. Norton v. Beckman, 53 M. 456; Lloyd v. Secord, 61 M. 448.

Judgment by default.

§ 1529. To entitle plaintiff to restitution he must prove his case unless it is admitted. The default of defendant to appear does not authorize a judgment of restitution without proof. Hennessey v. Pederson, 28 M. 461.

Findings.

§ 1530. The justice must enter findings of fact, but if the complaint is in the ordinary form it is sufficient to find "that the allegations of the complaint are true." Hennessey v. Pederson, 28 M. 461; Wright v. Gribble, 26 M. 99.

Form of judgment.

§ 1531. Norton v. Beckman, 53 M. 456.

Entry of judgment.

§ 1532. The justice has a reasonable time within which to make findings and enter judgment. Gibbens v. Thompson, 21 M. 398.

Statute of limitations.

§ 1533. Action may be brought any time during the continuance of the lease and within three years after its termination. G. S. '94, § 6119; Suchaneck v. Smith, 45 M. 26. Overruling Brown v. Brackett, 26 M. 292.

Jury trial.

§ 1534. Trial by jury is waived unless demanded upon the return and before the justice proceeds to hear the case. Gibbens v. Thompson, 21 M. 398.

No second trial of right.

§ 1535. The statute allowing a second trial of right in actions for the recovery of real property does not apply to actions under the unlawful detainer act. Whitaker v. McClung, 14 M. 170 G. 131. But see, Ferguson v. Kumler, 25 M. 183.

Certifying case to district court.

§ 1536. An ordinary complaint under the statute does not raise a question of title so as to authorize or require the justice to certify the case to the district court under G. S. '94, § 4991. Suchaneck v. Smith, 45 M. 26.

§ 1537. When the answer raises a question of title and it appears from the evidence on the trial that the defendant has a real defence which cannot be determined without necessarily determining the title to the land the case must be certified to the district court. Goenen v. Schroeder, 8 M. 391 G. 344; Same, 18 M. 66 G. 51; Merriam v. Baker, 9 M. 40 G. 28; Ferguson v. Kumler, 25 M. 183; Steele v. Bond, 28 M. 267; Radley v. O'Leary, 36 M. 173; Bassett v. Fortin, 30 M. 27; Steele v. Bond, 32 M. 14; State v. Municipal Court, 26 M. 162.

§ 1538. But to justify or require the certification of the case to the district court there must be a real defence necessarily

involving the determination of the title to the land in controversy. The mere assertion of title by defendant or the introduction of evidence tending to raise an issue of title is insufficient to justify or require the certification of the case. It must clearly appear that the issue as to title is one which, if decided in favor of the defendant, would necessarily defeat the right of restitution. Every doubt should be resolved against a motion to certify. Otherwise the statute giving the landlord a summary remedy would be emasculated. The defendant should not be permitted to raise a sham issue as to title for the purpose of delay. Merriam v. Baker, 9 M. 40 G. 28; Judd v. Arnold, 31 M. 430; Petsch v. Briggs, 31 M. 392; Radley v. O'Leary, 36 M. 173; Norton v. Beckman, 53 M. 456; Herrick v. Newell, 49 M. 198.

Judgment of restitution—effect of appeal.

§ 1539. Except where the action is upon a written lease and is brought on the ground that the tenant is holding over after the expiration of his term the defendant may, in case of appeal, stay restitution by giving a bond. G. S. '94, §§ 6119, 6120, 6121; State v. Burr, 29 M. 432; State v. District Court, 53 M. 483.

Actions against mortgagors holding over.

§ 1540. Anderson v. Schultz, 37 M. 76; Pioneer Savings & Loan Co. v. Powers, 47 M. 269; Cullen v. Trust Co., 60 M. 6; Heaton v. Darling, 66 M. 262; Preiner v. Meyer, 67 M. 197; Aultman & Taylor Co. v. O'Dowd, 75 N. W. 756.

Actions against debtor holding over after execution sale.

§ 1541. Ferguson v. Kumler, 25 M. 183.

II. ACTION FOR RENT

§ 1542. General form on written lease.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant entered into an agreement in writing whereby plaintiff demised to defendant for the term of years from that

day, the premises known as No. street, in the city of , and defendant promised to pay rent therefor to plaintiff at the rate of dollars per month, payable in advance.

II. That defendant has not paid the rent for the months of , amounting to dollars.

Wherefore [demanding judgment].

§ 1543. General form—either oral or written lease.

The plaintiff complains of defendant and alleges:

I. That from the day of , 19 , until the day of , 19 , defendant occupied the premises known as No. , street, in the city of , as the tenant of plaintiff and under an agreement whereby he promised to pay plaintiff therefor dollars rent per month, payable in advance.

II. That defendant has not paid the rent for the months of , amounting to dollars.

Wherefore [demanding judgment].

§ 1544. Complaint setting out lease.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant entered into an agreement in writing of which the following is a copy:

[Setting out the lease in full except the acknowledgment.]

II. That plaintiff has duly performed all the conditions thereof on his part.[1]

III. That defendant has not paid the rent for the months of , amounting to dollars.

Wherefore [demanding judgment].

[1] Omit if rent is payable in advance.

NOTES

Complaint.

§ 1545. Dean v. Leonard, 9 M. 190 G. 176 (complaint for agreed price and use and occupation); Rhone v. Gale, 12 M.

54 G. 25 (held to allege delivery and possession sufficiently); Lucy v. Wilkins, 33 M. 441 (held not to admit a surrender and acceptance); Finch v. Moore, 50 M. 116; Prendergast v. Searle, 77 N. W. 231 (held that rent might be recovered under complaints).

Answer—defences.

§ 1546. Lafferty v. Hawes, 63 M. 13 (answer held sufficient to admit proof of a surrender); Bell v. Baker, 43 M. 86; Wilkinson v. Clauson, 29 M. 91 (answers setting up fraud as defence); Minneapolis Co-operative Co. v. Williamson, 51 M. 53 (alleging a surrender); Hausman v. Mulheren, 68 M. 48; Minneapolis Co-operative Co. v. Williamson, 51 M. 53 (answers held to set up defences not inconsistent); Fegelson v. Dickerman, 70 M. 471 (answer held to put in issue allegations of complaint); Collins v. Lewis, 53 M. 78 (answer held to state a breach of covenant for quiet enjoyment); Bass v. Rollins, 63 M. 226 (failure to heat premises).

Defence under G. S. '94, § 5871.

§ 1547. Roach v. Peterson, 47 M. 291; Wampler v. Weinmann, 56 M. 1; Boston Block Co. v. Buffington, 39 M. 385; Minneapolis Co-operative Co. v. Williamson, 51 M. 53; Damkroger v. Pearson, 76 N. W. 960; Flint v. Sweeney, 49 M. 509.

Counterclaim and recoupment.

§ 1548. Goebel v. Hough, 26 M. 252; Collins v. Lewis, 53 M. 78; City Power Co. v. Fergus Falls Water Co., 55 M. 172; Hausman v. Mulheran, 68 M. 48; Long v. Gieriet, 57 M. 278.

III. USE AND OCCUPATION

§ 1549. General form of complaint.

The plaintiff complains of defendant and alleges:

I. That from the day of , 19 , to the day of , 19 , defendant used and occupied the premises known as No. , street, in the city of , by permission of plaintiff and as his tenant.

II. That the value of the use of said premises for said period was dollars.

III. That no part thereof has been paid [except the sum of dollars].

Wherefore [demanding judgment].

This form is based on Dean v. Leonard, 9 M. 190 G. 176. See Commonwealth Title Ins. Co. v. Dokko, 71 M. 533.

NOTES

When action lies.

§ 1550. "An action in the nature of assumpsit, for use and occupation of real property, lies only where the relation of landlord and tenant subsists between the parties, founded on an agreement express or implied. A trespasser cannot be converted into a tenant without his consent." Hurley v. Lamoreaux, 29 M. 138; Folsom v. Carli, 6 M. 420 G. 284; Holmes v. Williams, 16 M. 164 G. 146; Reed v. Lammel, 40 M. 397; Commonwealth Title Ins. Co. v. Dokko, 71 M. 533; Crosby v. Horne & Danz Co., 45 M. 249; McLane v. Kelly, 72 M. 395; Central Mills v. Hart, 124 Mass. 123.

§ 1551. One tenant in common cannot ordinarily bring an action for use and occupation against a co-tenant. See Holmes v. Williams, 16 M. 164 G. 146; Cook v. Webb, 21 M. 428; Kean v. Connelly, 25 M. 222; Cook v. Webb, 21 M. 428.

§ 1552. Where there is a written lease an action for use and occupation will not lie for rent accruing *before* the termination of the lease unless it appears that the defendant went into possession and occupied the premises under an independent agreement. Plaintiff should declare on the covenant. Codman v. Jenkins, 14 Mass. 93; Kiersted v. Ry. Co., 69 N. Y. 343; Glover v. Wilson, 2 Barb. (N. Y.) 264; Gage v. Smith, 14 Me. 466.

Measure of damages.

§ 1553. "The defendant can be held liable only for the value of such use and occupation of the premises as he is shown to have actually enjoyed." Sanford v. Johnson, 26 M. 314; Steele v. Thayer, 36 M. 174.

CHAPTER LI

MALICIOUS PROSECUTION

§ 1554. General form of complaint.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant maliciously and without probable cause preferred a false charge of against plaintiff before , a police magistrate of the city of .

II. That on said charge plaintiff was arrested and imprisoned for hours [days] and was compelled to give bail in the sum of dollars to obtain his release.

III. That on the day of , 19 , the said magistrate dismissed the complaint of defendant and acquitted plaintiff [or state other proceedings with a final determination in favor of plaintiff].

IV. That by reason of said prosecution plaintiff has [here stating with particularity any special damages suffered, such as attorney's fees, expense of securing bail, absence from business, loss of employment, loss of trade] and has been otherwise injured in his reputation to his damage dollars.

Wherefore [demanding judgment].

NOTES

Termination favorable to plaintiff.

§ 1555. Pixley v. Reed, 26 M. 80; Swensgaard v. Davis, 33 M. 369; Rossiter v. Minnesota etc. Co., 37 M. 296.

Malicious prosecution of a civil action.

§ 1556. O'Neill v. Johnson, 53 M. 439 (complaint held sufficient); Burton v. Ry. Co., 33 M. 189; McPherson v. Runyon, 41 M. 524 (complaint held sufficient); Eickhoff v. Fidelity & Casualty Co., 76 N. W. 1030.

Malicious attachment.

§ 1557. Pixley v. Reed, 26 M. 80 (plaintiff must allege that the attachment was vacated in the action in which it was issued or that he had no opportunity to make a motion to vacate it); Rossiter v. Minnesota etc. Paper Co., 37 M. 296 (complaint held sufficient); Rachelman v. Skinner, 46 M. 196 (action will not lie where defendant procures discharge by executing bond); Cochrane v. Quackenbush, 29 M. 376 (complaint held sufficient); Beyersdorf v. Sump, 39 M. 495 (essentials of complaint).

Variance.

§ 1558. Chapman v. Dodd, 10 M. 350 G. 277; Cole v. Curtis, 16 M. 182 G. 161.

New matter.

§ 1559. Olson v. Tvete, 46 M. 225.

Damages.

§ 1560. Mitchell v. Davies, 51 M. 168 (attorney's fees).

Statute of limitations.

§ 1561. Bryant v. American Surety Co., 69 M. 30.

CHAPTER LII

MANDAMUS

Jurisdiction.

§ 1562. "The district court has exclusive original jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity, in which case the supreme court has exclusive original jurisdiction; and in such case the supreme court, or a judge thereof, shall first make a rule, returnable in term, that such district court, or judge thereof, show cause before the court why a peremptory writ of mandamus should not issue; and upon the return-day of such rule, such district court or judge may show cause against the rule, by affidavit or record evidence; and upon the hearing thereof the supreme court shall award a peremptory writ or dismiss the rule. In case of emergency, a judge of the supreme court, at the time of making the rule to show cause, may also appoint a special term of the court for hearing the motion, and at which the rule shall be made returnable." G. S. '94, § 5985; State v. Burr, 28 M. 40; State v. Whitcomb, 28 M. 50; State v. Ry. Co., 38 M. 281; Harkins v. Supervisors, 2 M. 342 G. 294; State v. Churchill, 15 M. 455 G. 369; State v. Meeker Co., 79 N. W. 960.

To whom the writ may issue.

§ 1563. "It may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion." G. S. '94, § 5975.

When the writ cannot be issued.

§ 1564. To the governor or other members of the executive

department. Rice v. Austin, 19 M. 103 G. 74; Chamberlain v. Sibley, 4 M. 309 G. 228; State v. Whitcomb, 28 M. 50; State v. Dike, 20 M. 363 G. 314; Western Railroad Co. v. De Graff, 27 M. 1; Secomb v. Kittleson, 29 M. 555; State v. Berry, 3 M. —— G. 190; St. Paul etc. Co. v. Brown, 24 M. 517; People v. Morton, 156 N. Y. 136.

§ 1565. To test the right to a public office. State v. Williams, 25 M. 340; State v. Sherwood, 15 M. 221 G. 172; O'Ferrall v. Colby, 2 M. 180 G. 148; State v. Churchill, 15 M. 455 G. 369; Allen v. Robinson, 17 M. 113 G. 90; Burke v. Leland, 51 M. 355.

§ 1566. To enforce equitable rights. State v. Ry. Co., 18 M. 40 G. 21; Chosen Freeholders v. Bank, 48 N. J. Eq. 51.

§ 1567. To enforce rights that are doubtful. The duty must be a clear, complete, legal obligation. State v. Ry. Co., 18 M. 40 G. 21; State v. Reed, 27 M. 458; Warner v. Commissioners, 9 M. 139 G. 130; Allen v. Robinson, 17 M. 113 G. 90, 97.

§ 1568. Where it would prove unavailing. State v. Secrest, 33 M. 381; State v. Archibald, 43 M. 328.

§ 1569. To compel an official to do what the law gives him no authority to do. State v. Secrest, 33 M. 381; State v. Hill, 32 M. 275; Clark v. Buchanan, 2 M. 346 G. 298; State v. Commissioners, 27 M. 90.

§ 1570. To control discretion. State v. Medical Examining Board, 32 M. 324; State v. Otis, 58 M. 275; State v. Somerset, 44 M. 549; State v. Commissioners, 60 M. 510; State v. Geib, 66 M. 266; Brown v. Winona etc. Land Co., 38 M. 397; State v. Teall, 72 M. 37.

§ 1571. Where there is a plain, speedy and adequate remedy in the ordinary course of the law. Baker v. Marshall, 15 M. 177 G. 136; State v. Nelson, 41 M. 25; State v. Williams, 25 M. 340; State v. Churchill, 15 M. 455 G. 369; State v. Sherwood, 15 M. 221 G. 172; State v. Ames, 31 M. 440; Harrington v. Ry. Co., 17 M. 215 G. 188, 202; State v. District Court, 79 N. W. 960.

§ 1572. To perform the office of an appeal or writ of error even though no writ of error is given by law. It cannot be

issued to compel the court below to decide a matter before it in any particular way or to review its judicial action had in the exercise of legitimate jurisdiction. In re Parsons, 150 U. S. 150; In re Rice, 155 U. S. 396.

On whose information issued.

§ 1573. "The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. It shall issue on the information of the party beneficially interested." G. S. '94, § 5976. See § 1571.

§ 1574. When mandamus is resorted to for the purpose of enforcing a private right the person directly interested in having the right enforced must be the relator. State v. Weld, 39 M. 426.

§ 1575. Where the object is to enforce a public duty not due the government as such any private citizen may move to enforce it and it is not necessary that he should have any greater interest than other citizens. State v. Weld, 39 M. 426; State v. Archibald, 43 M. 328.

Demand.

§ 1576. Before a writ will issue to require a public officer to do an official act owing an individual there must be a demand upon him to do it and a refusal on his part. State v. Schaack, 28 M. 358; State v. Davis, 17 M. 429 G. 406. See State v. Olson, 55 M. 118.

§ 1577. Where the duty is owing the public generally no demand is necessary. The law itself is a continuing demand. State v. Weld, 39 M. 426.

Peremptory writ in first instance.

§ 1578. "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases, the alternative writ shall be first issued." G. S. '94, § 5978.

§ 1579. The peremptory writ of mandamus should be issued in the first instance only upon a state of unquestionable facts,

leaving no room for doubt as to the right to the performance of the act sought to be compelled, and when it is apparent and manifest that no valid excuse can be given for non-performance. Except under extraordinary circumstances the writ should not be allowed without notice or an order to show cause. Home Ins. Co. v. Scheffer, 12 M. 382 G. 261; Clark v. Buchanan, 2 M. 346 G. 298; Harkins v. Supervisors, 2 M. 342 G. 294; Harkins v. Sencerbox, 2 M. 345 G. 297; State v. Commissioners, 42 M. 284.

Allowance of writ—service.

§ 1580. "The court or judge, by an endorsement on the writ, shall allow the same, and designate the return day thereof, and direct the manner of the service thereof; provided, that such service shall be by copy of the writ, and of the allowance thereof, and of any order or direction of said court or judge endorsed upon said writ." G. S. '94, § 5979. Held constitutional, State v. Adams Express Co., 66 M. 271.

Pleadings.

§ 1581. "No other pleading or written allegation is allowed than the writ and answer. They shall be construed and amended in the same manner as pleadings in a civil action, and the issues thereby joined shall be tried, and further proceedings had, in the same manner as in a civil action." G. S. '94, § 5982; State v. Cooley, 58 M. 514.

§ 1582. Application for the writ is made by a verified petition setting forth all the facts essential to warrant its issuance. The alternative writ repeats the allegations of the petition and performs the function of a complaint in an ordinary action. By way of return the defendant answers in the same manner as in an ordinary action and with the same effect. There is no reply or demurrer. If the defendant wishes to question the sufficiency of the alternative writ it is done by a motion to quash which performs the function of a demurrer in an ordinary action.

§ 1583. "On the return day of the alternative writ, or such further day as the court allows, the party on whom the writ is

served may show cause by answer, made in the same manner as an answer to a complaint in a civil action." G. S. '94, § 5980.

§ 1584. "If no answer is made, a peremptory mandamus shall be allowed against the defendant; if an answer is made containing new matter, the plaintiff may, on the trial or other proceedings, avail himself of any valid objection to its sufficiency; or may countervail it by evidence, either in direct denial, or by way of avoidance." G. S. '94, § 5981.

§ 1585. "Denials on information and belief, and affirmative allegations in the same form, are permissible and sufficient in the return to a writ of mandamus." State v. Cooley, 58 M. 514; State v. Sherwood, 15 M. 221 G. 172.

§ 1586. Sufficiency of pleadings considered. Clark v. Buchanan, 2 M. 346 G. 298; State v. Sherwood, 15 M. 221 G. 172; State v. Lake City, 25 M. 404; State v. Ames, 31 M. 440; State v. Somerset, 44 M. 549; State v. Olson, 55 M. 118; State v. Macdonald, 29 M. 440.

Form of peremptory writ.

§ 1587. "The peremptory writ need not precisely follow the alternative writ, in matters of detail. Upon the hearing the court may grant the relief in any form consistent with the case made by the complaint presented, and embraced within the issues." The manner of performing the duty may be specifically directed. State v. Weld, 39 M. 426; State v. Ry. Co., 39 M. 219.

Jury trial.

§ 1588. In the district court either party has the right to a jury trial as in an ordinary civil action. G. S. '94, § 5986; State v. Burr, 28 M. 40; State v. Town of Lake, 28 M. 362.

Judgment—entry of.

§ 1589. The statute requires a formal entry of judgment as in an ordinary civil action. State v. Copeland, 77 N. W. 221.

Estoppel.

§ 1590. A denial of a petition on the merits is a bar to another application upon the same state of facts. State v. Hard, 25 M. 460.

§ 1591. Skeleton forms in mandamus proceedings.

[Title of action]

To the Honorable District Court of County:

Your petitioner, , respectfully represents:

I. [Here set out all the material facts justifying the issuance of the writ.]

Wherefore your petitioner, who has made no other application therefor, prays that a writ of mandamus issue, commanding the said , to [specifying with particularity the acts to be done], or show cause before this court, at a time and place specified, why he has not done so.

.....

[Verification]

[Form of alternative writ]

[Title of action]

The State of Minnesota to , Greeting:

Whereas it manifestly appears to us by the petition of :

I. That [here repeating verbatim all the allegations of the petition, omitting only the introduction and prayer].

Therefore you are commanded immediately after the receipt of this writ to [specifying with particularity the acts to be done, as in the petition], or show cause before this court, at a special term thereof to be held at the courthouse, in the city of , on the day of , 19 , at o'clock in the forenoon, why you have not done so, and that you then and there make return to this writ with your certificate on such return of having done as you are commanded.

Witness the Honorable , judge of said court, and the seal thereof, this day of , 19 .

[Seal of court] .....

Clerk.

[Order allowing writ]

The within alternative writ of mandamus is hereby allowed, returnable at a special term of the district court of county, to be held at the courthouse, in the city of , on the day of , 19 , at o'clock in the forenoon; service thereof is hereby directed to be made by delivery to and leaving with , a copy of said writ, together with a copy of this order and the petition for said writ.

[Date] .....

District Judge.

Cases holding mandamus proper.

§ 1592. State v. Olson, 58 M. 1 (to compel county commissioners to refund money paid on a void tax sale); O'Ferrall v. Colby, 2 M. 180 G. 148 (to compel the issuance of a certificate of election to the legislature); Supervisors v. Heenan, 2 M. 330 G. 281 (to compel register of deeds to deliver books of supervisors to them); Crowell v. Lambert, 10 M. 369 G. 295; State v. Sherwood, 15 M. 221 G. 172 (to compel the turning over of an office, records, etc., to the person to whom a certificate of election has been granted); State v. Cox, 26 M. 214; State v. McDonald, 30 M. 98; State v. Baxter, 38 M. 137 (to compel a judge to settle and certify a case); State v. Holden, 62 M. 246 (to compel auditor to allow a redemption from a tax sale and issue a certificate); State v. McCardy, 62 M. 509 (to compel a city comptroller to audit and adjust an account and report it to the city council for payment); State v. Ames, 31 M. 440 (to compel a mayor to sign a warrant on the treasurer for the payment of a claim that has been audited by the comptroller and allowed by the council); State v. Ry. Co., 35 M. 131; State v. Ry. Co., 38 M. 246; State v. Ry. Co. 39 M. 219 (to compel a railroad to bridge its tracks); State v. Gieb, 66 M. 266 (to compel county commissioners to restore names of electors to petition for removal of county seat); State v. Myers, 70 M. 179 (to compel a justice to issue execution); State v. Patton, 62 M. 388 (to compel a county surveyor to turn over to his successor official field notes); State v. District Court, 79 N. W. 960 (to compel a dis-

trict court and its clerk to transfer an action and the files to another county upon a statutory change of venue); State v. Chamber of Commerce, 79 N. W. 1026 (to compel a corporation to transfer a certificate of membership).

Cases holding mandamus improper.

§ 1593. State v. Secrest, 33 M. 381 (to compel a justice to proceed with a case which he has dismissed); State v. Reed, 27 M. 458 (to compel warden of state prison to execute a lease of the prison shops, etc.); State v. Nelson, 41 M. 25 (to compel a county treasurer to certify that all taxes are paid when there are illegal taxes remaining unpaid); County of Brown v. Winona etc. Land Co., 38 M. 397 (to compel a judge to certify a case on a particular ground); State v. Medical Board, 32 M. 324 (to compel the state board of medical examiners to issue a certificate); State v. Archibald, 43 M. 328 (to compel assessor to assess property); State v. Barrows, 71 M. 178 (to compel the reinstatement of a deputy oil inspector whose term had expired); State v. Commissioners, 60 M. 510 (to compel county commissioners to grant a license to sell liquors); State v. Olson, 55 M. 118 (to compel county commissioners to refund a void tax); State v. Commissioners, 9 M. 139 G. 130 (to compel county commissioners to open a street); Harrington v. Ry. Co., 17 M. 215 G. 188 (to compel a railroad to institute condemnation proceedings); Clark v. Buchanan, 2 M. 346 G. 298 (to compel board of election canvassers to act after they have adjourned *sine die*); State v. Somerset, 44 M. 549 (to compel town supervisors to improve a highway); State v. Weld, 66 M. 219 (to compel auditor to indorse on a deed "taxes paid and transfer entered"); State v. Minneapolis, 40 M. 483 (to compel a city to pay relator damages under condemnation proceedings that had been abandoned); State v. Teall, 72 M. 37 (to compel the approval of an official bond); State v. Copeland, 77 N. W. 221 (to compel the employment of a veteran); State v. Board of Education, 76 N. W. 43 (to compel a board of education to provide a room for the superintendent of schools).

CHAPTER LIII

MECHANICS' LIEN—ACTIONS TO FORECLOSE

§ 1594. Action by material man—materials furnished directly to owner.

The plaintiff complains of defendants and alleges:

I. That on the day of , 19 , [or between two specified dates] plaintiff sold and delivered to the defendant , certain building materials, the nature quantity and value of which are specifically set forth in the bill of particulars hereto attached, marked Exhibit "A" and made a part of this complaint.

II. [That said materials were reasonably worth dollars.] [That said defendant then promised to pay for the same dollars.] [That said defendant promised to pay for the same dollars on or before the day of , 19 .]

III. That no part thereof has been paid [except].

IV. That said materials were so sold and delivered to be used and were in fact used in the construction of a dwelling house upon the following described premises:

[Describing premises as in a deed], in the county and state aforesaid.

V. That at the time said materials were so sold and delivered the defendant was and still is the owner in fee of said premises.

VI. That on the day of , 19 , and within ninety days after the last item of said materials was so delivered plaintiff filed for record, in the office of the register of deeds in and for the county of , state of Minnesota, a verified lien statement, a copy of which is hereto attached, marked Exhibit "B" and made a part of this complaint.

VII. [That defendants and have lien

claims of record upon said premises for materials furnished for or labor performed upon said dwelling house.]

Wherefore plaintiff demands judgment:

(1) Against the defendant , for the sum of dollars, with interest thereon from the day of , 19 , and adjudging the same a lien upon said premises.

(2) Determining and adjudging the amount and validity of the lien claims of defendants and .

(3) Adjudging and directing a sale of said premises and the application of the proceeds thereof to the payment of the claims herein adjudged liens thereon and the costs and disbursements of this action.

§ 1595. Action by principal contractor.

The plaintiff complains of defendants and alleges:

I. That on the day of , 19 , plaintiff and the defendant entered into an agreement whereby plaintiff agreed to build a dwelling house for the said defendant upon the premises hereinafter described, furnishing the materials and labor therefor, and the said defendant agreed to pay plaintiff for the same upon its completion dollars.

II. That no part thereof has been paid [except].

III. That plaintiff has duly performed all the conditions of said agreement on his part.

IV. That the premises upon which said dwelling house was built by plaintiff for said defendant under said agreement are described as follows:

[Describing premises as in a deed], in the county and state aforesaid.

V. That at the time said agreement was entered into the said defendant was and still is the owner in fee of said premises.

VI. That on the day of , 19 , plaintiff began to furnish materials and perform labor in the erection of said building in accordance with said agreement and that all the

materials furnished for and labor performed upon said building were furnished and performed between that day and the day of , 19 , when said building was completed; and of all of said materials and labor a bill of particulars is hereto attached marked exhibit "A" and made a part of this complaint.

VII. [As VI. in § 1594.]

VIII. [As VII. in § 1594.]

Wherefore [demanding judgment as in § 1594].

See Laws 1899, ch. 277.

§ 1596. Action by subcontractor, laborer or material man where his contract was with the principal contractor.

The plaintiff complains of defendants and alleges:

I. That on the day of , 19 , the defendant [principal contractor] entered into an agreement with the defendant [owner] whereby he promised to build a dwelling house upon the premises hereinafter described for the said [owner]; agreeing to furnish all the materials and labor therefor.

II. That between the day of , 19 , and the day of , 19 , plaintiff in pursuance of an agreement theretofore entered into by him with the defendant [principal contractor] and in conformity with the said agreement between the defendant [owner] and the defendant [principal contractor] [furnished to the defendant (principal contractor) certain building materials] [performed for the defendant (principal contractor) certain labor], the nature, amount and value of which are specifically set forth in the bill of particulars hereto attached, marked Exhibit "A" and made a part of this complaint.

III. That said materials [services] were reasonably worth dollars.[1]

IV. That no part thereof has been paid [except].

V. [That said materials were so furnished to be used and were in fact used in building.] [That said labor was performed in the construction of] a dwelling house upon the following described premises:

[Describing premises as in a deed], in the county and state aforesaid.

VI. That at the time said [materials were so furnished] [labor was so performed] the defendant [owner] was and still is the owner in fee of said premises.

VII. That on the day of , 19 , and within ninety days after the last item of said materials [labor] was so furnished [performed] plaintiff filed for record in the office of the register of deeds, in and for the county of , state of Minnesota, a verified lien statement, a copy of which is hereto attached, marked Exhibit "B," and made a part of this complaint.

VIII. [As VII. in § 1594.]

Wherefore [demanding judgment as in § 1594].

[1] Laird v. Moonan, 32 M. 358.

NOTES

Nature of action.

§ 1597. An action to enforce a mechanic's lien is not a special statutory proceeding, but an ordinary civil action, proceeding according to the usual course of the law, and governed by the same rules of procedure as other similar actions, except as otherwise expressly provided in the statute itself. Finlayson v. Crooks, 47 M. 74; Jewett v. Iowa Land Co., 64 M. 531; Bardwell v. Collins, 44 M. 97.

§ 1598. It is an action *in personam*. Bardwell v. Collins, 44 M. 97.

§ 1599. "The statute intends that when an action is brought by any mechanic's lien claimant, it shall be a proceeding to enforce all such liens on the same property, the holders of which choose to appear or who may be required to appear therein. When not named as plaintiffs, they appear and make their claim by filing their answers, of which all parties to the action must take notice. That being the nature of the action, the owner has notice by the service of the summons that he may be called on to meet those claims, and that he is brought

into court for that purpose, for the summons must state that the action is brought for the foreclosure of a mechanic's lien. The action, as the owner is thus apprised, is one to marshal the liens upon the property, and, being in court for that purpose, he has notice of each lien claim by the filing of the answer." Menzel v. Tubbs, 51 M. 364; Jewett v. Iowa Land Co., 64 M. 531.

Construction of statute.

§ 1600. "It is said in argument that the statute relating to mechanic's liens is remedial, and should, therefore, be liberally construed. It is true that the statute gives a security where none existed before; but the lien, being the creature of the statute, can only exist in virtue of a compliance with its provisions. Whatever is necessary to the existence of the lien must be fulfilled, or the attempt to create it will be futile. The statute should be fairly and reasonably construed and applied, so as to afford the security intended, upon a substantial compliance with its requirements, and at the same time afford reasonable protection to the rights of other parties who may have acquired an interest in the property." Rugg v. Hoover, 28 M. 404. See Tulloch v. Rogers, 52 M. 114, 118.

Complaint.

§ 1601. A contract with the owner or contractor in the performance of which the work was done or the material furnished must be alleged. O'Neil v. St. Olaf's School, 26 M. 329. See Keller v. Struck, 31 M. 446; Meyer v. Berlandi, 39 M. 438.

§ 1602. The complaint must allege that the claim of lien was duly filed within the statutory time. Hulbert v. New Ulm Basket Works, 47 M. 81; Moran Mfg. Co. v. Clarke, 59 M. 457; Price v. Doyle, 34 M. 400; Rugg v. Hoover, 28 M. 404; Frankovitz v. Ireland, 34 M. 403; Meyer v. Berlandi, 39 M. 438.

§ 1603. It is good practice to attach a copy of the lien statement filed in order that its sufficiency may affirmatively appear. In the absence of such an exhibit a fulfillment of all the requirements of the statute should be specifically alleged.

See Glass v. St. Paul etc. Co., 43 M. 228; Houlihan v. Keller, 34 M. 407.

§ 1604. The complaint must describe the property on which a lien is sought with sufficient accuracy to enable the court to decree the sale and the purchaser to find the land under such description. As much certainty is required as in a conveyance. Knox v. Starks, 4 M. 20 G. 7; McCarty v. Van Etten, 4 M. 461 G. 358; Tuttle v. Howe, 14 M. 145 G. 113; Boyd v. Blake, 42 M. 1.

§ 1605. It is not necessary for the complaint to show that the quantity of land on which the lien is claimed is within the statutory limit. Boyd v. Blake, 42 M. 1.

§ 1606. A bill of particulars need not be attached where the claim is for a single item. Menzel v. Tubbs, 51 M. 364.

§ 1607. It is not necessary for the complaint to allege the filing of *lis pendens*. John Paul Lumber Co. v. Hormel, 61 M. 303; Julius v. Callahan, 63 M. 154.

§ 1608. The statute provides that the complaint should pray "the determination and adjudication of the amount and validity" of the claims of the other lien holders who are made defendants. The plaintiff should specifically pray for a lien upon the premises. McCarty v. Van Etten, 4 M. 461 G. 358.

§ 1609. In an action where the labor or material was furnished to a contractor it is not necessary to allege that the contractor has duly performed his contract with the owner. See St. Paul Foundry Co. v. Wegmann, 40 M. 419.

§ 1610. To establish and enforce a lien for labor performed or materials furnished, as against the title or interest of a vendor of real property who has entered into an executory contract of sale contingent upon or providing for the erection or construction of a building thereupon, and as a condition precedent to his right to recover, it is incumbent on the claimant to allege in his complaint, and prove on the trial, if the allegation be controverted, that the contract has been forfeited or surrendered. Nolander v. Burns, 48 M. 13. See

also, Hill v. Aldrich, 48 M. 73; Althen v. Tarbox, 48 M. 18; Brown v. Jones, 52 M. 484.

Answer.

§ 1611. New matter in defence must be pleaded as in an ordinary action. See Bergsma v. Dewey, 46 M. 357; Egan v. Menard, 32 M. 273; St. Paul Foundry Co. v. Wegmann, 40 M. 419. As to when a cross-complaint may be filed see Jewett v. Iowa Land Co., 64 M. 531.

Answer by other lien claimants—effect of.

§ 1612. Each defendant makes the action his, for the purpose of enforcing his lien, from the moment he appears in it for that purpose and he is not affected by the failure of the plaintiff to make out a cause of action. Burns v. Phinney, 53 M. 431.

Reply.

§ 1613. No reply is necessary. Bruce v. Lennon, 52 M. 547; Johnson v. Lau, 58 M. 508; Davis v. Crookston etc. Co., 57 M. 402.

Variance.

§ 1614. Althen v. Tarbox, 48 M. 18.

Jury trial.

§ 1615. There is no constitutional right to a jury trial. Sumner v. Jones, 27 M. 312.

Consolidation of separate actions.

§ 1616. Miller v. Condit, 52 M. 455.

Statute of limitations.

§ 1617. Falconer v. Cochran, 68 M. 405; Sandberg v. Palm, 53 M. 252; Burns v. Phinney, 53 M. 431; Steinmetz v. St. Paul Trust Co., 50 M. 445; Smith v. Hurd, 50 M. 503; Malmgren v. Phinney, 50 M. 457; North Star etc. Co. v. Strong, 33 M. 1; Nystrom v. London etc. Co., 47 M. 31; Flenniken v. Liscoe, 64 M. 269.

Judgment.

§ 1618. The judgment should declare the claim a lien on

the premises from the proper date. Mason v. Heyward, 5 M. 74 G. 55; McCarty v. Van Etten, 4 M. 461 G. 358.

§ 1619. Under the old law no provision was made for the entry of a personal judgment. Thompson v. Dale, 58 M. 365. The present law seems to contemplate a personal judgment but the right to an execution thereon is in abeyance until the termination of the foreclosure proceedings. After the application of the proceeds of the sale to the satisfaction of the personal judgment the clerk, acting under G. S. '94, § 6063, satisfies the judgment to the extent of the amount received and then execution for the deficiency may issue as of right without further order of the court. If a plaintiff establishes a cause of action for the recovery of money, but fails to establish his right to a specific lien, he may have an ordinary personal judgment with all its incidents. Thompson v. Dale, 58 M. 365; Smith v. Gill, 37 M. 455; Abbott v. Nash, 35 M. 451; J. D. Moran Mfg. Co. v. Clarke, 59 M. 456.

Distribution of proceeds of sale.

§ 1620. Finlayson v. Crooks, 47 M. 74; Malmgren v. Phinney, 50 M. 457; Gardner v. Leck, 52 M. 522; Miller v. Stoddard, 54 M. 486.

CHAPTER LIV

MONEY HAD AND RECEIVED

§ 1621. Skeleton form of complaint.

The plaintiff complains of defendant and alleges:

I. [State the receipt by defendant of a specified sum of money, the time of the receipt and the persons from whom and the circumstances under which it was received. State the relation between plaintiff and defendant or the other facts giving rise to the duty of defendant to pay the money over to plaintiff.]

II. That on the day of , 19 , plaintiff demanded [1] payment thereof from defendant.

III. That no part thereof has been paid.

IV. [Aver that plaintiff is ready and willing to restore to defendant anything which he has received under the agreement [2] or a willingness and offer to perform the stipulations of the agreement on his part.[3]]

Wherefore [demanding judgment].

[1] See as to necessity of a demand, Ford v. Brownell, 13 M. 184 G. 174; Bennett v. Phelps, 12 M. 326 G. 216; McNamara v. Pengilly, 58 M. 353; Village of Glencoe v. County of McLeod, 40 M. 44; Davenport v. Ladd, 38 M. 545; Sibley v. County of Pine, 31 M. 201; Jensen v. Weide, 42 M. 59; Bailey v. Merritt, 7 M. 159 G. 102.

[2] Bennett v. Phelps, 12 M. 326 G. 216.

[3] Taylor v. Read, 19 M. 372 G. 317; Sennett v. Shehan, 27 M. 328; McNamara v. Pengilly, 58 M. 353.

NOTES

Pleadings generally.

§ 1622. It is apparently still an open question in this state whether a complaint in the form of the common count for money had and received to the use of the plaintiff is sufficient, but it is well-nigh certain that it would be held insufficient on

demurrer. Distler v. Dabney, 3 Wash. 200. See upon the general subject the following cases: Spottswood v. Herrick, 22 M. 548 (complaint held sufficient); Carlson v. Presbyterian Board of Relief, 67 M. 436 (complaint held insufficient); Jackson v. Kansas etc. Co., 42 M. 382 (evidence admissible under general denial); Third Nat. Bank v. Stillwater, 36 M. 75 (not necessary to allege that defendant still retains the money); Sibley v. County of Pine, 31 M. 201 (interest recoverable); Jones v. Northern Trust Co., 67 M. 410 (bill of particulars cannot be demanded); Auerbach v. Gieseke, 40 M. 258 (interest recoverable); Whiting v. Clugston, 75 N. W. 759 (complaint held sufficient).

When action will lie.

§ 1623. An action for money had and received can be maintained whenever one man has received or obtained the possession of the money of another which he ought in equity and good conscience to pay over. There need not be any privity between the parties, or any promise to pay, other than that which results or is implied from one man's having another's money, which he has no right to retain. When the fact appears that he has the money, if he cannot show a legal and equitable ground for retaining it, the law creates the privity and the promise. It is no defence to such an action that the party from whom defendant received the money paid it to him in his own wrong, and that plaintiff might still have his remedy against him. Brand v. Williams, 29 M. 238 (leading case); Borough of Henderson v. County of Sibley, 28 M. 515; Sibley v. County of Pine, 31 M. 201; Valentine v. St. Paul, 34 M. 446.

Cases.

§ 1624. Crump v. Ingersoll, 44 M. 84 (money received by agent); Brady v. Brennan, 25 M. 210 (conversion—waiving tort and suing on implied promise); Libby v. Johnson, 37 M. 220 (conversion); McClure v. Bradford, 39 M. 118 (purchase on joint account—abandonment of contract); Sibley v. County of Pine, 31 M. 201 (action against county for money belonging to

plaintiff and paid to defendant by mistake); Borough of Henderson v. Sibley, 28 M. 515 (money wrongfully received by county and used in construction of courthouse); Village of Glencoe v. County of McLeod, 40 M. 44 (preceding case followed); Leveroos v. Reis, 52 M. 259 (money paid on illegal contract); Langevin v. City of St. Paul, 49 M. 189 (money paid by mistake); Ford v. Brownell, 13 M. 184 G. 174 (money paid by mistake); Holmes v. Campbell, 10 M. 401 G. 320 (purchase at execution sale by one of two joint creditors); Commissioners v. Gilbert, 19 M. 214 G. 176 (action by county against county treasurer); Van Hoesen v. Minnesota Baptist State Convention, 16 M. 96 G. 86 (defendant must have received money); Eliason v. Sidle, 61 M. 285 (excessive attorney's fees on foreclosure); Holland v. Bishop, 60 M. 23 (recovery of money obtained from plaintiff by fraud); The St. Peter Co. v. Bunker, 5 M. 192 G. 153 (will not lie to recover money paid on a contract against public policy); Young v. Board of Education, 54 M. 385 (will not lie against municipality for money borrowed unlawfully); Valentine v. St. Paul, 34 M. 446 (action against city for recovery of assessment for improvements abandoned); City of Duluth v. McDonnell, 61 M. 288 (money paid by mistake); Erkens v. Nicolin, 39 M. 461 (action will not lie for mistake of law); State v. Nelson, 41 M. 25 (taxes paid under protest); Auerbach v. Gieseke, 40 M. 258 (money received by one judgment creditor due the others); Shepard v. Sherin, 43 M. 382 (money received by agent); Jensen v. Weide, 42 M. 59 (recovery of part of purchase price); Scanlon v. Oliver, 42 M. 538 (recovery of money upon a contract which was in contemplation but was afterwards abandoned); Cornell v. Smith, 27 M. 132 (recovery of unlawful interest voluntarily paid); Shane v. St. Paul, 26 M. 543 (money voluntarily paid to redeem from void tax judgment); Taylor v. Burgess, 26 M. 547 (recovery of unlawful interest voluntarily paid); McNamara v. Pengilly, 58 M. 353 (money paid on contract for sale of land upon vendor refusing to convey); County of Hennepin v. Robinson, 16 M. 381 G. 340 (money received by agent without authority); Farguson

v. Winslow, 34 M. 384 (to recover money paid to obtain one's own property unjustly detained); Freeman v. Etter, 21 M. 3 (to recover money paid to plaintiff on a debt of defendant); Commissioners v. Parker, 7 M. 267 G. 207 (illegal taxes); Wilkinson v. Tousley, 16 M. 299 G. 263 (money deposited with a stockholder on a bet); Smith v. Schroeder, 15 M. 35 G. 18 (taxes voluntarily paid); Shillock v. Gilbert, 23 M. 386 (taxes voluntarily paid by person without title); Bruggerman v. Hoerr, 7 M. 337 G. 264; Beford v. Small, 31 M. 1; St. Peter Co. v. Bunker, 5 M. 192 G. 153 (money paid on illegal contracts with settlers on the public lands cannot be recovered); Nutting v. McCutcheon, 5 M. 382 G. 310 (illegal interest); Woolfolk v. Bird, 22 M. 341 (illegal interest); Brown v. Manning, 3 M. 35 G. 13 (grantee cannot in the absence of fraud rescind the contract for defect of title and recover purchase price); Bernheimer v. Marshall, 2 M. 79 G. 61 (money paid on forged draft); Taylor v. Blake, 11 M. 255 G. 170 (money paid for compounding a felony); Andrews v. School District, 37 M. 96 (school supplies used by a school district); Zeglin v. Commissioners, 72 M. 17 (money paid for license fee); Smith v. St. Paul, 65 M. 295 (money paid to wrong person in condemnation proceedings).

§ 1625. Money paid on an agreement for the sale of lands void under the statute of frauds may be recovered if the defendant refuses to perform. Bennett v. Phelps, 12 M. 326 G. 216; Taylor v. Read, 19 M. 372 G. 317; McKinney v. Harvie, 38 M. 18; Johnson v. Krassin, 25 M. 117; Sennett v. Shehan, 27 M. 328; Herrick v. Newell, 49 M. 198; Pressnell v. Lundin, 44 M. 551; Wyvell v. Jones, 37 M. 68; McClure v. Bradford, 39 M. 118; Murphin v. Scovell, 44 M. 530; Horn v. Butler, 39 M. 515.

§ 1626. A mortgagor or his assigns may recover the amount bid at a foreclosure sale in excess of the amount due on the mortgage unless there has been a waiver. Bidwell v. Whitney, 4 M. 76 G. 45; Culbertson v. Lennon, 4 M. 51 G. 26; Dickerson v. Hayes, 26 M. 100; Taylor v. Burgess, 26 M. 547; Seiler v. Wilber, 29 M. 307; Fagan v. Loan Asso., 55 M. 441; Bennett v. Healey, 6 M. 240 G. 158; Bailey v. Merritt,

7 M. 159 G. 102; Spottswood v. Herrick, 22 M. 548; Eliason v. Sidle, 61 M. 285; Simmer v. Blabon, 77 N. W. 233 (burden of proof); Perkins v. Stewart, 77 N. W. 434; Johnson v. Stewart, 77 N. W. 435.

CHAPTER LV

MORTGAGES—FORECLOSURE OF

§ 1627. General form of complaint.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , the defendant made to plaintiff his promissory note of which the following is a copy: [1]

[Insert here exact copy of note.]

II. That at the same time and to secure the payment of said note the defendant made to plaintiff a mortgage of which the following is a copy:[2]

[Insert here exact copy of mortgage omitting only the acknowledgment.]

III. That said mortgage was acknowledged and recorded in the office of the register of deeds in and for the county of , on the day of , 19 , at o'clock . m., in Book of Mortgages.[3]

IV. That no part of the principal or interest of said note and mortgage has been paid [except].

V. That the defendants and , claim to have some interest in or lien on said mortgaged premises, but said interests or liens, if any exist, accrued since the lien of said mortgage and are subject thereto.[4]

VI. [That the defendant failed to keep said premises insured and in consequence thereof plaintiff caused them to be insured in the Insurance Company of for the term of , from the day of , 19 , and paid therefor the premium of dollars.]

VII. [That the defendant failed to pay the taxes on said premises for the years , amounting in all to the sum of dollars and in consequence thereof plaintiff paid the same.][5]

Wherefore plaintiff demands judgment: [6]

(1) Adjudging the amount due from the defendant to plaintiff on said note and mortgage, including dollars as attorneys' fees [7] [and dollars paid by plaintiff for taxes and insurance on said premises].

(2) Adjudging and directing a sale of said mortgaged premises and the application of the proceeds thereof to the payment of the costs and disbursements of this action and the amount due plaintiff with interest thereon to the time of payment.

(3) Barring and foreclosing each and all the defendants and all persons claiming under them or either of them of all equity of redemption or interest in said mortgaged premises except the right to redeem, as provided by statute, from the sale herein adjudged and directed.[8]

[1] Or plead note according to its legal effect.

[2] Or plead the mortgage according to its legal effect setting out in full the condition whose breach authorizes the foreclosure. It is better practice, however, to set out the mortgage in full.

[3] Omit when the mortgagor is the only defendant.

[4] Banning v. Bradford, 21 M. 308; Finlayson v. Crooks, 47 M. 74; Foster v. Johnson, 44 M. 290; Hill v. Townley, 45 M. 167; Churchill v. Proctor, 31 M. 129. It is not necessary to state the nature of the interests claimed by defendants. It is for them to come forward and disclose the nature of their interests in their answers. Howard v. Iron & Land Co., 62 M. 298; Seager v. Burns, 4 M. 141 G. 93.

[5] G. S. '94, § 1619; Gorham v. Ins. Co., 62 M. 327; Truesdale v. Sidle, 65 M. 315; Wyatt v. Quinby, 65 M. 537; Northwestern etc. Ins. Co. v. Allis, 23 M. 336; Spencer v. Levering, 8 M. 461 G. 410; Jones v. Cooper, 8 M. 334 G. 294; Martin v. Lennon, 19 M. 67 G. 45; Coles v. County of Washington, 35 M. 124; Hill v. Townley, 45 M. 167; County of Martin v. Drake, 40 M. 137; Nopson v. Horton, 20 M. 268 G. 239.

[6] G. S. '94, § 6059, prescribes the form of judgment to be entered. It is quite common practice to pray for a personal judgment for any deficiency which may remain after applying the proceeds of the sale to the satisfaction of the amount adjudged due but such a prayer is improper. No personal judgment for the deficiency is authorized apart from the "adjudication of the amount due." The clerk satisfies the general judgment to the extent of the net proceeds of the sale and execution may issue for the balance due without any order for a further

judgment. G. S. '94, § 6063; Thompson v. Dale, 58 M. 365. See Louisville Banking Co. v. Blake, 70 M. 252.

[7] G. S. '94, § 6074; Eliason v. Sidle, 61 M. 285; Seibert v. Ry. Co., 58 M. 58; Seibert v. Ry. Co., 58 M. 69; Morse v. Loan Asso. 60 M. 316; Campbell v. Worman, 58 M. 561; Murray v. Chamberlain, 67 M. 12.

[8] The mortgagor and subsequent lien holders cannot be cut off from their statutory right to redeem and the judgment should expressly reserve them this right. G. S. '94, §§ 6066, 6073, 6041, 6044; Hollingsworth v. Campbell, 28 M. 18; Whittacre v. Fuller, 5 M. 508 G. 401; Carberry v. Benson, 18 Wis. 489; Harlan v. Smith, 6 Cal. 173; Brine v. Ins. Co., 96 U. S. 627; Clark v. Reyburn, 8 Wall. (U. S.) 318. The judgment cannot bar an adverse prior estate or interest. McLaughlin v. Nicholson, 70 M. 71; Banning v. Bradford, 21 M. 308.

NOTES

Complaint.

§ 1628. It is not necessary to allege that no action or proceeding has been instituted at law to recover the debt secured by the mortgage or any part thereof. That is matter of defence. See Jones v. Ewing, 22 M. 157.

Defence.

§ 1629. An abortive attempt to foreclose by advertisement is no bar to the right to resort to foreclosure by action. Rogers v. Benton, 39 M. 39.

A proceeding in personam.

§ 1630. An action to foreclose a mortgage is a proceeding *in personam*. Whalley v. Eldridge, 24 M. 358; Bardwell v. Collins, 44 M. 97; Carson v. Cochran, 52 M. 67.

Statute of limitations.

§ 1631. Whalley v. Eldridge, 24 M. 358; Rogers v. Benton, 39 M. 39; Foster v. Johnson, 44 M. 290; Carson v. Cochran, 52 M. 67; Slingerland v. Sherer, 46 M. 422; Ozman v. Reynolds, 11 M. 459 G. 341; Bradley v. Norris, 63 M. 156.

CHAPTER LVI

NEGLIGENCE

§ 1632. Against railroad company for collision at crossing.

The plaintiff complains of defendant and alleges:

I. That at the time stated in the next paragraph defendant was a railroad company operating a railroad running through the cities of and , in this state.

II. That on the day of , 19 , plaintiff was travelling in a wagon drawn by two horses, along a public highway between said cities which crosses said railroad about miles north of the said city of ; and as plaintiff reached said public crossing defendant negligently ran one of its locomotives, with a train of cars attached, across said highway at said crossing so that said locomotive struck the horses which plaintiff was driving, killing one of them immediately and so seriously injuring the other as to render him practically worthless and destroying the harness which they wore; and overthrew said wagon, breaking it to pieces and rendering it worthless; and threw plaintiff out upon the ground with such force as to break his collar bone and fracture his right arm [or otherwise according to the fact].

III. That plaintiff was the owner of said horses, harness and wagon and that the same were worth dollars.

IV. That plaintiff necessarily spent dollars for medical attendance and medicines in an endeavor to cure himself of said injury and for a period of months was unable to attend to his business as , in consequence of said injury and is permanently injured so that he will never be able again to carry on said business as efficiently as before, and was otherwise greatly injured, to his damage dollars.

Wherefore [demanding judgment].

[1] Based on Clark v. Ry. Co., 28 M. 69. Under this form the plaintiff may prove negligence in omitting to give signals or in reckless speed, or in any other particular in the management of the train.

§ 1633. Complaint under G. S. '94, §§ 2692-2695, for killing of stock.[1]

The plaintiff complains of defendant and alleges:

I. That at the time stated in the next paragraph defendant was and still is a railroad company operating a railroad which runs through the county of , in this state.

II. That on the day of , 19 , two horses belonging to plaintiff and of the value of dollars, in consequence of the negligent failure of defendant to repair the fence along its right of way at a point about miles north of the city of , in the county and state aforesaid, strayed upon the track of defendant and were then and there negligently run into and killed by a train of defendant to the damage of plaintiff dollars.

Wherefore plaintiff demands judgment:

(1) For the sum of dollars with interest thereon from the day of , 19 .

(2) For double costs and disbursements under General Statutes 1894, § 2694.

[1] It is sufficient under the statute to allege merely the failure to repair and the killing but it is advisable to go further and allege that the stock was negligently killed in order that a recovery may be had for negligence in killing if there is a failure to prove negligence in keeping the fence in repair. See Mooers v. Ry. Co., 69 M. 90.

§ 1634. Complaint under G. S. '94, § 2700, for fires set by locomotive.[1]

The plaintiff complains of defendant and alleges:

I. That at the time hereinafter stated defendant was and still is a railroad company operating a railroad which runs through the county of , in this state.

II. That at said time plaintiff was the owner of the premises known as [describing premises according to government survey], lying along the right of way of said company, in the county and state aforesaid.

III. That at said time there were upon said premises stacks of hay belonging to plaintiff and of the value of dollars.

IV. That on the day of , 19 , at about o'clock in the noon defendant, while running one of its trains on said road past said premises of plaintiff, negligently allowed the engine thereof to throw, drop and scatter sparks of fire; that said sparks caused a fire in the grass and other combustible materials upon the right of way of defendant which spread to and upon said premises of plaintiff and completely consumed said stacks of hay; that defendant negligently allowed dry grass and other combustible materials to remain and accumulate upon its right of way opposite said premises before and at said time; that defendant negligently allowed said fire to originate in and escape from its right of way and consume the said property of plaintiff to his damage dollars.

Wherefore [demanding judgment].

[1] Based on Weber v. Ry. Co., 63 M. 66; Solum v. Ry. Co., 63 M. 233. See Missouri etc. Ry. Co. v. Cornell, 30 Kans. 35. Although it is sufficient under the statute simply to charge negligence in allowing fire to escape from the engine, yet it is practically advisable to go further and charge negligence in allowing combustible materials to remain on the right of way and in allowing the fire to spread beyond the right of way in order that a recovery may be had on those grounds if there is a failure to prove negligence in the management of the engine. See Hayes v. Ry. Co., 45 M. 17; Clarke v. Ry. Co., 33 M. 359; Mahoney v. Ry. Co., 35 M. 361.

NOTES

Essentials of complaint.

§ 1635. An action for negligence is grounded upon the breach of a duty to exercise due care which the defendant owed the plaintiff under the circumstances.[1] The facts constituting the cause of action which it is necessary to allege are (1) the relation between the plaintiff and the defendant at the time of the accident, giving rise to the duty of the defendant to exercise due care, (2) the acts or omissions of the defendant consti-

tuting the breach of such duty and (3) the injury suffered by the plaintiff as the natural and proximate result of such wrongful acts or omissions.

[1] Trask v. Shotwell, 41 M. 66; Akers v. Ry. Co., 58 M. 540; Rosse v. Ry. Co., 68 M. 216; Hamilton v. Minneapolis Desk Mfg. Co., 80 N. W. 693.

Duty of defendant.

§ 1636. The facts giving rise to defendant's duty must be alleged. The duty must be a necessary legal inference of the facts alleged. The relative positions of the parties at the time of the accident, the existence of the relation of master and servant, carrier and passenger or other relation imposing the duty to exercise care are the facts giving rise to the legal duty and they must always appear. An allegation that it was the duty of the defendant to do so and so is a mere conclusion of law and a nullity. Heron v. Ry. Co., 68 M. 542; Seymour v. Maddox, 16 Q. B. 326; Buffalo v. Holloway, 7 N. Y. 493; Kennedy v. Morgan, 57 Vt. 46; Smith v. Tripp, 13 R. I. 152; Funk v. Piper, 50 Ill. App. 163; Marvin Safe Co. v. Ward, 46 N. J. L. 19.

§ 1637. "It is not enough to state a relation from which the duty may arise under certain circumstances, but, unless the duty necessarily results from the relation, the circumstances which give rise to it must likewise be stated." Smith v. Tripp, 13 R. I. 152.

§ 1638. A complaint charging a railroad only with negligence in the movement of a particular train does not involve as a cause of action the neglect of the company to establish general regulations for the conduct of its servants in such cases. Connelly v. Ry. Co., 38 M. 80.

Breach.

§ 1639. The complaint must allege facts constituting a breach of duty or negligence on the part of defendant. Johnson v. Ry. Co., 31 M. 283; Lydecker v. Ry. Co., 61 M. 414.

Negligence—how alleged.

§ 1640. It is sufficient to allege that the act the commission

or omission of which caused the injury was negligently or carelessly done or omitted. It is not necessary to allege specifically all the acts or omissions constituting the negligence. Clark v. Ry. Co., 28 M. 69 (leading case); Rogers v. Truesdale, 57 M. 126; Keating v. Brown, 30 M. 9; McCauley v. Davidson, 10 M. 418 G. 335; Johnson v. Ry. Co., 31 M. 283; Ekman v. Ry. Co., 34 M. 24; Rolseth v. Smith, 38 M. 14; Stendal v. Boyd, 67 M. 279; Weber v. Ry. Co., 63 M. 66; Birmingham v. Ry. Co., 70 M. 474; Holly v. Bennett, 46 M. 386; Hinton v. Ry. Co., 72 M. 339 (negligent carriage of goods by common carrier).

§ 1641. "The word 'negligently' is not a mere conclusion of law, unless all the force is taken out of it by the further statement of the particular acts or omissions which constitute the negligence. But it must affirmatively appear that this further statement is so specific as to put the court in possession of all the exact details which go to make up the negligence."[1] "Negligence is a mixed question of law and fact; and hence an allegation of negligence, as applied to the conduct of a party, is not a mere conclusion of law, but, rather, a statement of an ultimate fact. Under such an allegation, a party may prove any facts or circumstances, not inconsistent with the particular facts alleged, which would tend to prove that the acts alleged were negligent. Hence in an action for damages resulting from certain acts of another alleged to have been negligent, the complaint is not demurrable, as not stating a cause of action, unless the particular acts alleged are such that they could not be negligent under any evidence admissible under the allegations of the complaint."[2]

[1] Rogers v. Truesdale, 57 M. 126.

[2] Stendal v. Boyd, 67 M. 279; Rolseth v. Smith, 38 M. 14; Birmingham v. Ry. Co., 70 M. 474.

§ 1642. In actions against railroads it is not necessary to make it appear by the complaint whether the negligent act was committed by a vice-principal of the defendant or a fellow servant. A general allegation that the "defendant" negligently did the act is sufficient.[1] In charging negligence in the

employment of unfit servants their names and particular employments should be stated.[2] It should be alleged that the defendant knowingly kept the unfit servant. It is sufficient, as to the servant, to allege that he was "incompetent and careless." [3]

[1] Olson v. Ry. Co., 34 M. 477.

[2] Fraker v. Ry. Co., 30 M. 103.

[3] Jenson v. Ry. Co., 72 M. 175.

§ 1643. Where a railroad delivers an unsafe car to a connecting railroad and an injury results while the car is under the control of the latter, it is necessary, in a complaint against the former, to allege that the car was in an unsafe condition at the time it was delivered to the latter. Olson v. Pennsylvania etc. Co., 80 N. W. 698.

Injuries—how alleged.

§ 1644. It is not necessary to state with particularity the nature of the injuries suffered. Babcock v. Ry. Co., 36 M. 147; Smith v. Ry. Co., 30 M. 169.

Contributory negligence.

§ 1645. The complaint need not negative contributory negligence. Hocum v. Weitherick, 22 M. 152; Clark v. Ry. Co., 28 M. 69; Ekman v. Ry. Co., 34 M. 24; Rolseth v. Smith, 38 M. 14; Lydecker v. Ry. Co., 61 M. 414; Leier v. Ry. Co., 63 M. 203; Thompson v. Ry. Co., 70 M. 219 (assumption of risk); Birmingham v. Ry. Co., 70 M. 474.

Proximate result.

§ 1646. It must appear by the complaint, either by direct averment or as a necessary inference of the facts alleged, that the injury was the natural and proximate result of the negligence of defendant. It is not necessary, however, that it should appear in what way the alleged breach of duty caused the injury. Dugan v. Ry. Co., 40 M. 544; Lee v. Emery, 10 M. 187 G. 151; Johnson v. Ry. Co., 31 M. 283; Hocum v. Weitherick, 22 M. 152. See Greenman v. Smith, 20 M. 418 G. 370.

Allegation of notice and demand.

§ 1647. In actions against municipalities the complaint

should allege the service of notice and demand upon the council or other governing body. Laws 1897, ch. 248; Pye v. Mankato, 38 M. 536; Moran v. St. Paul, 54 M. 279; Bausher v. St. Paul, 75 N. W. 745; Doyle v. Duluth, 76 N. W. 1029; Lyons v. Red Wing, 78 N. W. 868; Roberts v. St. James, 79 N. W. 519; Kelley v. Minneapolis, 79 N. W. 653.

§ 1648. The allegation under the general law may be as follows:

That on the day of , 19 , and within thirty days after receiving the injury herein alleged plaintiff served upon the council of the city of , defendant herein, a written notice and claim, stating the time when, the place where and the circumstances under which such injury [and loss] occurred and the amount of compensation demanded by plaintiff from defendant for such injury [and loss]; and that, although more than ten days have since elapsed defendant has not satisfied said claim.

Demurrer.

§ 1649. A complaint showing on its face conclusively that plaintiff was guilty of contributory negligence is demurrable. Swanson v. Ry. Co., 68 M. 184; Reiter v. Ry. Co. 72 M. 225; Clark v. Ry. Co., 28 M. 69.

§ 1650. But to render a complaint demurrable on this ground the contributory negligence must so clearly appear that there could be no room for different minds reasonably arriving at any different conclusion, upon any possible evidence admissible under and consistent with the allegations of the pleading. Rolseth v. Smith, 38 M. 14; Lydecker v. Ry. Co., 61 M. 414; Clark v. Ry. Co., 28 M. 69; Leier v. Ry. Co., 63 M. 203; Nicholas v. Ry. Co., 80 N. W. 776 (complaint against master for not furnishing servant a safe place to work in held sufficient).

General denial—contributory negligence under.

§ 1651. Contributory negligence may be proved under a general denial.[1] If the defendant expects to defeat the action by proof of contributory negligence it is better to content him-

self with a general denial than to plead specific acts of plaintiff showing contributory negligence for in so doing he unnecessarily restricts his proof to such acts.[2]

[1] St. Anthony etc. Co. v. Eastman, 20 M. 277 G. 249, 265; Hocum v. Weitherick, 22 M. 152; O'Malley v. Ry. Co., 43 M. 289.

[2] O'Malley v. Ry. Co., 43 M. 289.

Damages.

§ 1652. A general allegation of damages is ordinarily sufficient. Special damages must be pleaded, but it is not necessary to itemize them. See Palmer v. Winona etc. Co., 80 N. W. 869; Collins v. Dodge, 37 M. 503; Stone v. Evans, 32 M. 243; Lindholm v. St. Paul, 19 M. 245 G. 204; Bast v. Leonard, 15 M. 304 G. 235; Smith v. Ry. Co., 30 M. 169.

Reply.

§ 1653. Lyons v. Red Wing, 78 N. W. 868 (necessity of).

Variance.

§ 1654. Olson v. Ry. Co., 68 M. 155; Mosner v. Ry. Co., 42 M. 480.

Statute of limitations.

§ 1655. Actions for negligence may be brought any time within six years, except against municipalities. Laws 1897, ch. 248; Brown v. Heron Lake, 67 M. 146; Ott v. Ry. Co., 70 M. 50.

CHAPTER LVII

NEGOTIABLE INSTRUMENTS

§ 1656. Payee against maker.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant made to plaintiff his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That no part thereof has been paid [except].

Wherefore plaintiff demands judgment:

(1) For the sum of dollars and cents [1] with interest thereon from the day of , 19 ,[2] at the rate of per cent. per annum.

(2) For the costs and disbursements of this action.

[1] Total of unpaid principal.

[2] If interest at different rate after maturity substitute "with interest thereon at the rate of per cent. per annum from the day of , 19 , to the day of , 19 , and thereafter at the rate of per cent. per annum."

§ 1657. Payee against maker on two notes.

The plaintiff complains of defendant and alleges:

For a first cause of action:

I. That on the day of , 19 , defendant made to plaintiff his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That no part thereof has been paid [except].

For a second cause of action:

I. [As above.]

II. [As above.]

Wherefore plaintiff demands judgment:

(1) For the sum of [aggregate of principals] dollars, with interest on dollars thereof at the rate of per cent per annum, from the day of , 19 , and

with interest on dollars thereof at the same rate, from the day of , 19 .

(2) For the costs and disbursements of this action.

§ 1658. Payee against maker and irregular indorser.[1]

The plaintiff complains of defendants and alleges:

I. That on the day of , 19 , the defendant John Doe made to plaintiff his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That prior to the delivery thereof to plaintiff by the defendant John Doe the defendant Richard Roe indorsed the same for the purpose of giving credit thereto with plaintiff.[2]

III. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1656].

[1] For the cases on this subject see Dunnell's Trial Book, § 1340.

[2] Stein v. Passmore, 25 M. 256.

§ 1659. Payee, having paid note, against maker.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant made to plaintiff his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That thereafter plaintiff indorsed and transferred the same.

III. That at maturity the same was duly presented for payment to defendant and payment thereof demanded but the same was not paid.

IV. That notice was duly given plaintiff of said demand and non-payment.

V. That on the day of , 19 , plaintiff paid to one John Doe the holder of said note dollars in payment thereof.

VI. That no part thereof has been repaid to plaintiff.

Wherefore [demanding judgment as in § 1656].

§ 1660. Payee against maker on note payable a specified time after sight.

The plaintiff complains of defendant and alleges:

I. [Allege making of note as in § 1656.]

II. That on the day of , 19 , the same was duly presented to defendant with notice that payment was required according to the terms thereof.

III. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1656].

§ 1661. Payee against maker on note wrongly dated.

The plaintiff complains of defendant and alleges:

I. That on the [true date] day of , 19 , defendant made to plaintiff his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That the same was by mistake wrongly dated on the day of , 19 , whereas it was intended that it should bear date on the day of , 19 .[1]

III. [Continuing as in other cases.]

[1] Almich v. Downing, 45 M. 460.

§ 1662. Note with interest coupons and default clause—action by payee.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant made to plaintiff his promissory note whereby he promised to pay [to the order of] plaintiff dollars years after said date [on the day of , 19 ,] with interest thereon at the rate of per cent. per annum payable annually according to the tenor of interest coupons attached thereto.

II. That it was stipulated in said note that, in case of default in the payment of any installment of interest thereon when it should become due, the principal should forthwith, at the option of plaintiff,[1] become due and payable.

III. That defendant has made default in the payment of the installment of interest which became due and payable on the day of , 19 .

IV. That no part of said note or the interest thereon has been paid [except].

Wherefore [demanding judgment as in § 1656].

[1] Or the legal holder. This paragraph is a mere suggestion. It should be modified by the pleader so as to follow the default clause of the particular note. It is not necessary to allege the option of plaintiff to declare the principal due. The institution of the suit is sufficient. Northwestern etc. Ins. Co. v. Allis, 23 M. 337; Fowler v. Woodward, 26 M. 347; St. Paul etc. Trust Co. v. Thomas, 60 M. 140.

§ 1663. Complaint for contribution between joint makers.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant made their joint [joint and several] note to one John Doe of which the following is a copy:

[Insert here exact copy of note.]

II. That at the maturity of said note plaintiff necessarily paid the same in full.

III. That although plaintiff has demanded of defendant the repayment of one half of said sum no part thereof has been repaid.

Wherefore [demanding judgment].

§ 1664. First indorsee against maker.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant made to one John Doe his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That the said John Doe indorsed the same to plaintiff.

III. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1656].

§ 1665. Indorsee against payee.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , one John Doe made to defendant his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That defendant indorsed the same to plaintiff.

III. That on the day of , 19 , the same was

duly presented for payment to the said John Doe and payment thereof demanded but the same was not paid.

IV. That notice of said demand and non-payment was duly given defendant.

V. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1656].

§ 1666. Indorsee against all prior parties.

The plaintiff complains of defendants and alleges:

I. That on the day of , 19 , the defendant John Doe made to defendant Richard Roe his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That the defendant Richard Roe indorsed the same to the defendant John Smith.

III. That thereafter the defendant John Smith indorsed the same to plaintiff.

IV. That on the day of , 19 , the same was duly presented for payment to the defendant John Doe and payment thereof demanded but the same was not paid.

V. That notice of said demand and non-payment was duly given defendants Richard Roe and John Smith.

VI. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1656].

§ 1667. Indorsee against indorser.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , one John Doe made to one Richard Roe his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. [That the said Richard Roe indorsed the same to defendant.] [That the said Richard Roe indorsed the same to one John Smith who in turn thereafter indorsed the same to defendant.]

III. That thereafter defendant indorsed the same to plaintiff.

IV. That on the day of , 19 , the same was

duly presented for payment to the said John Doe and payment thereof demanded but the same was not paid.

V. That notice was duly given defendant of said demand and non-payment.

VI. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1656].

§ 1668. Holder of note indorsed in blank or to bearer against maker.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant made to one John Doe his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That the said John Doe indorsed the same [in blank] [to bearer].

III. That plaintiff is the owner and holder thereof.

IV. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1656].

§ 1669. On note with clause making principal due immediately upon default in payment of an installment of interest.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant made to plaintiff his promissory note of which the following is a copy:

[Insert here exact copy of note.]

II. That defendant has made default in the payment of the interest thereon which became due on the day of , 19 .

III. That no part of said note or interest thereon has been paid [except].

Wherefore [demanding judgment as in § 1656].

§ 1670. Payee against drawer of check.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant made to plaintiff his check drawn on the Bank of , of which the following is a copy:

[Insert here exact copy of check.]

II. That the same was indorsed by plaintiff and duly presented for payment to said bank and payment thereof demanded but the same was not paid.

III. That no part thereof has been paid.

Wherefore [demanding judgment].

[1] Based on Spink & Keyes Drug Co. v. Ryan Drug Co., 72 M. 178. See 12 Harvard Law Review, 213.

NOTES

Pleading note by copy.

§ 1671. It is the better practice, in suing on a note, to set it out *in haec verba*. This mode of pleading lessens the danger of inadvertent omissions, avoids any misconstruction of the legal effect of the instrument by the pleader, forces the defendant to a specific denial or admission and presents a convenient record on appeal. See Elliot v. Roche, 64 M. 482.

Consideration.

§ 1672. A promissory note is presumed to have been executed for a consideration and it is therefore not necessary to allege a consideration. Pinney v. King, 21 M. 514; Adams v. Adams, 25 M. 72. See also, Priedman v. Johnson, 21 M. 12; Frank v. Irgens, 27 M. 43; Elmquist v. Markoe, 39 M. 494; Campbell v. Worman, 58 M. 561; Hayward v. Grant, 13 M. 165 G. 154.

Revenue stamp.

§ 1673. It is not necessary to allege that the note was stamped. Cabbott v. Radford, 17 M. 320 G. 296; Smith v. Jordan, 13 M. 264 G. 246.

Agency.

§ 1674. In an action on a note made by the defendant through an agent it is not necessary to mention the agency or to allege that the agent was authorized to act. It is the better practice simply to declare upon the note as made by defendant ignoring the agency. "What a person does by another he does himself and things may be pleaded according to their

legal effect and operation." When the note purports on its face to be the note of the defendant made by the hand of an agent it is not necessary to prove the authority of the agent unless it is denied on oath by the defendant. Lee v. Ry. Co., 34 M. 225; Moore v. McClure, 8 Hun (N. Y.) 558; Tarbox v. Gorman, 31 M. 62; Moore v. Holmes, 68 M. 108.

Non-payment.

§ 1675. An allegation of non-payment is essential, for otherwise no breach of the contract is shown. Tracy v. Tracy, 59 Hun (N. Y.) 1; Knapp v. Roche, 94 N. Y. 329; Cochran v. Reich, 91 Hun (N. Y.) 440; Lent v. Ry. Co., 130 N. Y. 504; Scroupe v. Clay, 71 Cal. 123; Ryan v. Halliday, 110 Cal. 335; Stafford v. Davinson, 47 Ind. 319; Holman v. Criswell, 13 Tex. 38; Villers v. Lewis, 1 Handy (Ohio) 39; Wilcox v. Nelson, Dist. Court, Hennepin Co. (1899) File 80575; Abbott, Forms of Pl. (1898) p. 220; McArdle v. McArdle, 12 M. 98 G. 53 (by implication). See, however, First Nat. Bank v. Strait, 71 M. 69 (to the effect that an allegation of non-payment is unnecessary —an *obiter* not likely to be followed). In Marshall & Illsley Bank v. Child, 78 N. W. 1048, it is said that where the complaint alleges non-payment and the answer affirmatively alleges payment the burden of showing payment is upon the defendant. It is incumbent upon the party suing on a note to show a breach of the contract—that is, the burden of showing non-payment rests upon the plaintiff but proof of non-payment is made out by the production of the past due note. Possession of such a note carries the presumption that it has not been paid and the plaintiff, therefore, shows a breach—non-payment—*prima facie*, by simply producing the note. The burden thereupon shifts to the defendant to prove payment. Because the plaintiff is not required, in the first instance, to introduce extrinsic evidence of non-payment, it has sometimes been said that it is not necessary for him to plead and prove non-payment. It is misleading to say, as in the above case, that "payment is an affirmative defence, to be pleaded and established by the party asserting it." That case was rightly

decided because the plaintiff made out a *prima facie* case of non-payment by producing the overdue note and not because payment is always an "affirmative defence" to be pleaded and proved by the party asserting it. Whether it is such a defence depends upon the allegations of the complaint and if the complaint contains an allegation of non-payment of the note the defendant may prove payment under a general denial.

Partnership.

§ 1676. In an action on a partnership note it is not ordinarily necessary to allege partnership or that the note was made by the defendants as partners. Under an allegation that the note was made by the defendants a note signed with a firm name may be introduced with evidence that the defendants were partners. Freeman v. Curran, 1 M. 170 G. 144; Mack v. Spencer, 4 Wend. (N. Y.) 411; Vallett v. Parker, 6 Wend. (N. Y.) 615; Danaher v. Hitchcock, 34 Mich. 516; Pollock v. Glazier, 20 Ind. 262; Napier v. Mayhew, 35 Ind. 276; Swinney v. Burnside, 17 Ark. 38; Nutt v. Hunt, 4 Smed. & M. (Miss.) 702; Stix v. Mathews, 63 Mo. 371; Jemison v. Dearing, 41 Ala. 283. See Birdsall v. Fischer, 17 M. 100 G. 76; Dobson v. Hallowell, 53 M. 98.

Title in plaintiff.

§ 1677. Where the plaintiff is the payee and the note is set out no further allegation of title in plaintiff is necessary. Title once shown to exist is presumed to continue until the contrary is shown. When the complaint shows that the plaintiff is the person to whom the note is made payable it is not necessary for the plaintiff to allege that he is still the owner and holder of the note or to make any other allegation to show title. Jaeger v. Hartman, 13 M. 55 G. 50; Holbrook v. Sims, 39 M. 122; Bennett v. Crowell, 7 M. 385 G. 306; Hayward v. Grant, 13 M. 165 G. 154; Cabott v. Radford, 17 M. 320 G. 296; Nelson v. Nugent, 62 M. 203.

§ 1678. Where the note is made payable "to the order of" plaintiff or to plaintiff "or order" the effect is the same as if it were made payable simply to plaintiff and it may be declared

on accordingly. Bennett v. Crowell, 7 M. 385 G. 306; Sherman v. Globe, 4 Conn. 246; Howard v. Palmer, 64 Me. 86.

§ 1679. Where the plaintiff is not the payee and the note is not indorsed in blank or to bearer he must show title by alleging an indorsement or assignment to him by the payee or an indorsee of the payee. It is not sufficient for him merely to allege that he is the owner and holder of the note. Topping v. Clay, 62 M. 3; Red River Valley Invest. Co. v. Cole, 62 M. 457; Foster v. Johnson, 39 M. 378; Topping v. Clay, 65 M. 346; Hoag v. Mendenhall, 19 M. 335 G. 281; Perkins v. Merrill, 37 M. 40; Downer v. Read, 17 M. 493 G. 470; Frasier v. Williams, 15 M. 288 G. 219; Cabbott v. Radford, 17 M. 320 G. 296; Marine Nat. Bank v. Humphreys, 62 M. 141.

§ 1680. When the note is indorsed in blank or to bearer it is transferable by mere delivery and the holder is *prima facie* the owner and entitled to recover thereon. In such cases plaintiff sufficiently shows title by alleging that he is the owner and holder. Eames v. Crosier, 101 Cal. 260; Black v. Duncan, 60 Ind. 522; Dabney v. Reed, 12 Iowa, 315; Dole v. Weeks, 4 Mass. 451; Topping v. Clay, 62 M. 3.

Execution and delivery of note.

§ 1681. The execution and delivery of the note are best averred by the term "made" which has acquired a technical significance. It imports signing and delivery. Hoag v. Mendenhall, 19 M. 335 G. 289; Romans v. Langevin, 34 M. 312; Churchill v. Gardner, 7 T. R. 596; Smith v. Waite, 103 Cal. 372; Prindle v. Caruthers, 15 N. Y. 425. See also, Topping v. Clay, 65 M. 346.

Indorsement.

§ 1682. The indorsement of a note may be alleged by the single word "indorsed" which has a technical significance and imports everything necessary to pass title from the indorser to the indorsee. Hoag v. Mendenhall, 19 M. 335 G. 289; Perkins v. Bradley, 24 Vt. 66. See Red River Invest. Co. v. Cole, 62 M. 457 (sold, assigned and delivered).

§ 1683. In order to claim the rights of a *bona fide* purchaser before maturity it is not necessary for the plaintiff to allege that he was a *bona fide* purchaser or that the note was indorsed to him before maturity or for value. These facts are presumed. The single allegation "indorsed to plaintiff" is sufficient. Under such an allegation the plaintiff may introduce the note with its indorsement to him. A presumption thereupon arises that he became the holder *bona fide* for value and before maturity in the usual course of business and without notice of anything impeaching his title. Cummings v. Thompson, 18 M. 246 G. 228; Merchans etc. Bank v. Cross, 65 M. 154; Miller v. Griswold, 40 Ind. 209; Clark v. Schneider, 17 Mo. 295; Slaughter v. Bank, 109 Ala. 158; Smith v. Bank, 74 Tex. 545; Smith v. Schanck, 18 Barb. (N. Y.) 344; James v. Chalmers, 6 N. Y. 209; Pinkerton v. Bailey, 8 Wend. (N. Y.) 600.

§ 1684. A title once shown to exist in the plaintiff is presumed to continue until the contrary is shown. If the plaintiff alleges that the note was made to him or the note is set up and it so appears it is not necessary to allege that he is still the owner and holder, and the same is true after an allegation of indorsement to plaintiff. Holbrook v. Sims, 39 M. 122; Jaeger v. Hartman, 13 M. 55 G. 50; Pryce v. Jordan, 69 Cal. 569.

§ 1685. "Where a note has passed through the hands of several successive transferees a plaintiff may ignore all intermediate transfers not necessary to show title and allege a transfer by the payee directly to himself." Crosby v. Wright, 70 M. 251; Preston v. Mann, 25 Conn. 127; Mitchell v. Fuller, 15 Pa. St. 268.

Assignment.

§ 1686. A general allegation of assignment is sufficient. Hoag v. Mendenhall, 19 M. 335 G. 289; Topping v. Clay, 65 M. 346.

Variance.

§ 1687. Nichols & Shepard Co. v. Dedrick, 61 M. 513; Henry v. Hinman, 21 M. 378.

Demand—notice of dishonor.

§ 1688. In an action against the maker of a note payable on demand, or demand after a certain time, it is not necessary to allege a demand. The bringing of suit is a sufficient demand. Harrisburg Trust Co. v. Shufeldt, 78 Fed. Rep. 292; Daniel, Neg. Insts. §§ 645, 646.

§ 1689. In an action against the maker of a note payable at a specified place it is not necessary to allege a demand at such place. Daniel, Neg. Insts. § 643.

§ 1690. In an action against an indorser it is necessary to allege a demand of the maker but a general allegation of demand is sufficient. Although the note provides for payment at a particular place it is not necessary under the code to allege that the demand was made at such place. Nor is it necessary to state when or by whom the demand was made. Under G. S. '94, § 5250, it is sufficient to allege that demand was "duly" made, and notice of dishonor "duly" given. Gay v. Paine, 5 How. Prac. (N. Y.) 107; Adams v. Sherrill, 14 How. Prac. (N. Y.) 297; Ferner v. Williams, 37 Barb. (N. Y.) 10; Frankford Bank v. Countryman, 11 Wis. 398; Cutler v. Ainsworth, 21 Wis. 381.

Denial of execution.

§ 1691. Freeman v. Curran, 1 M. 170 G. 144; Hayward v. Grant, 13 M. 165 G. 154; Henry v. Hinman, 21 M. 378.

Denial of indorsement.

§ 1692. Tarbox v. Gorman, 31 M. 62; Downer v. Read, 17 M. 493 G. 470; Morton v. Jackson, 2 M. 219 G. 180 (denial of knowledge or information); Frasier v. Williams, 15 M. 288 G. 219; Dunning v. Pond, 5 M. 296 G. 234.

Denial of title in plaintiff.

§ 1693. Holbrook v. Sims, 39 M. 122; Nunnemacker v. Johnson, 38 M. 390; Hartshorn v. Green, 1 M. 92 G. 71 (transfer by plaintiff to third person admissible under).

Want of consideration—failure of consideration.

§ 1694. Dunning v. Pond, 5 M. 296 G. 234; Durment v.

Tuttle, 50 M. 426; Webb v. Michener, 32 M. 48; Parker v. Jewett, 52 M. 514; Lebanon v. Penney, 44 M. 214 (accommodation); Nichols & Shepard Co. v. Soderquist, 80 N. W. 630 (partial failure of consideration).

Fraud.

§ 1695. Knappen v. Freeman, 47 M. 491; Parker v. Jewett, 52 M. 514; Bank of Montreal v. Richter, 55 M. 362; Cummings v. Thompson, 18 M. 246 G. 228.

Alteration.

§ 1696. Howlett v. Bell, 52 M. 257.

Without recourse.

§ 1697. Howlett v. Bell, 52 M. 257.

Accommodation indorsement.

§ 1698. Dunning v. Pond, 5 M. 296 G. 234.

Usury.

§ 1699. W. B. Clark Invest. Co. v. McNaughton, 46 M. 8.

Equitable defences.

§ 1700. Knoblauch v. Fogelsong, 37 M. 320; Wilcox v. Comstock, 37 M. 65; Nunnemacker v. Johnson, 38 M. 390.

CHAPTER LVIII

QUO WARRANTO

Jurisdiction.

§ 1701. The supreme court has jurisdiction to issue writs of *quo warranto* and this jurisdiction is original.[1] But that court will not issue the writ if there is a remedy in the district court unless under special and exceptional circumstances; as, for instance, that there will be great injury or inconvenience to the public by reason of the delay and uncertainty caused by commencing proceedings in the lower court and awaiting a final determination on appeal.[2] The district courts of the state also have original jurisdiction to issue writs of *quo warranto* in accordance with common law principles.[3]

[1] State v. Sharp, 27 M. 38; State v. Ry. Co., 35 M. 222; State v. Ry. Co., 36 M. 246; State v. Minnesota Thresher Mfg. Co., 40 M. 213; State v. Dahl, 69 M. 108; G. S. '94, § 4823.

[2] State v. Otis, 58 M. 275.

[3] State v. Otis, 58 M. 275.

Upon whose information issued.

§ 1702. It is the general rule that the writ will issue as of right only upon the information of the attorney general. Granting leave to a private party to file an information is discretionary with the court. State v. Dahl, 69 M. 108; State v. Lockerby, 57 M. 411; Barnum v. Gilman, 27 M. 466; Taylor v. Sullivan, 45 M. 309; State v. Tracy, 48 M. 497; State v. Harrison, 34 M. 526; State v. Dowlan, 33 M. 536.

Nature of proceeding.

§ 1703. The ancient common law writ of *quo warranto* does not exist in this state. Our proceeding is the information in the nature of *quo warranto* substantially as left by the changes introduced by the statute of 9 Anne, ch. 20. State v. Minnesota Thresher Mfg. Co., 40 M. 213, 225; State v. Stacy, 48 M. 497.

Common law rules govern.

§ 1704. In the absence of legislation or any controlling considerations to the contrary, the action is governed, as respects procedure, by the rules of the common law. State v. Sharp, 27 M. 38; State v. Dahl, 69 M. 108.

Burden of proof.

§ 1705. The burden of proof is upon the respondent. The ordinary rules of pleading and proof do not apply. It is for the respondent to allege and prove facts which justify him in exercising the powers which he does. He is called upon to disclose "by what warrant" he exercises the powers specified. State v. Sharp, 27 M. 38; State v. Commissioners, 66 M. 519, 532.

Practice.

§ 1706. A writ of *quo warranto* is issued upon an information which is nothing more than a verified petition praying the issuance of the writ. The information states the facts justifying the allowance of the writ and in this state the practice has been to state such facts quite fully and not simply charge a usurpation. Where the proceeding is instituted upon the information of the attorney general no preliminary application for a rule to show cause is made. The attorney general presents the information *ex parte* to one of the justices of the supreme court or a judge of the district court, as the case may be, who indorses thereon an order, granted ordinarily as a matter of course, allowing the writ and prescribing the time, place and mode of return and the service. The clerk thereupon issues the writ as directed by the order. The writ recites the facts alleged in the information and commands the respondent to appear before the court at a specified time and place and respond to said writ by answer, plea or demurrer as he may be advised and to show by what warrant he exercises the powers specified and to abide the judgment of the court. When issue has been joined it is left to the discretion of the court to determine the mode of trial. In the supreme court it is common practice to appoint a referee to take and report the

testimony. There is no constitutional right of trial by jury.[1] Although the proceeding is quasi criminal in form yet it is treated in this state as substantially civil in nature and the ordinary rules of civil procedure, except as to pleading and burden of proof, are applied.

[1] State v. Minnesota Thresher Mfg. Co., 40 M. 213.

§ 1707. Skeleton forms in quo warranto proceedings.

[Title of action]

INFORMATION

The above named attorney general, on behalf of the state of Minnesota, respectfully shows to the court and alleges:

I. [Alleging all the material facts justifying the issuance of the writ.]

Wherefore the attorney general prays this court to issue its proper writ and process directed to the said , respondent herein, commanding him, at a time and place to be named in said writ, to be and appear before this court and show by what warrant he exercises and claims the right to exercise jurisdiction as , and abide the order and judgment herein, and that the court direct the time and manner of the service of such writ.

.....

Attorney General.

[Order allowing writ]

The within information having been presented to me this day of , 19 ;

It is ordered that the same be filed in this court, and that a writ of *quo warranto* therein issue out of this court as prayed for in said information and that the same be made returnable before this court on the day of , 19 , at the opening of court on said day and that a copy of said writ be served on , the respondent herein, on or before the day of , 19 , by any sheriff or elector of this state.

[Any Justice of Supreme Court.]

[Form of writ]

[Title of action]

The State of Minnesota to , Greeting:

Whereas it has been made to appear to this court upon the relation of , as attorney general for the state of Minnesota:

I. That [repeating verbatim all the allegations of the information, omitting only the introduction and prayer].

Now therefore, in the name of the state of Minnesota, you the said , are hereby commanded and required to appear before this court, in the courtroom, in the capitol building of said state, in the city of St. Paul, on the day of , 19 , at the opening of this court on said day, then and there to respond to this writ by answer, plea or demurrer, as you may be advised and to show by what warrant you assume to exercise jurisdiction as , and to abide the judgment of this court herein.

Witness the Honorable Charles M. Start, Chief Justice of the Supreme Court of Minnesota, this day of , 19 .

[Seal of court] .....

Clerk.

Cases.

§ 1708. State v. Fidelity etc. Ins. Co., 39 M. 538 (to oust a foreign corporation doing business in this state unlawfully); State v. Somerby, 42 M. 55 (same nature as preceding case—action must be against the corporation and not its officers merely); State v. Commissioners, 66 M. 519 (to oust county from adjoining territory illegally annexed and over which the county has assumed jurisdiction); State v. Tracy, 48 M. 497 (to oust a pretended municipal corporation); State v. Sharp, 27 M. 38 (to test the validity of a school district organization); Barnum v. Gilman, 27 M. 466 (to test the right to a public office upon relation of contestant); State v. Dowlan, 33 M. 536 (to test the right to public office upon relation of contestant); State v. Minnesota Thresher Mfg. Co., 40 M. 213 (to oust a corporation for misuser of franchise); State v. Dahl, 69 M.

108 (to oust a court stenographer who was also member of legislature); Taylor v. Sullivan, 45 M. 309 (to test right to public office upon relation of contestant); State v. Minnetonka Village, 57 M. 526 (to oust a municipal corporation); State v. Village of Fridley Park, 61 M. 146 (to oust a municipal corporation); State v. Lockerby, 57 M. 411 (to oust an officer of a private corporation); State v. Sibley, 25 M. 387 (to test the membership of the Minnesota Historical Society); State v. Sanderson, 26 M. 333 (to test the right to a public office upon information of attorney general); State v. Guiney, 26 M. 313 (same as preceding); State v. Ry. Co., 35 M. 222 (to oust a railroad company of its franchises); State v. Gates, 35 M. 385 (to test right to public office); State v. Williams, 25 M. 340 (a proper remedy to try title to public office); Burke v. Leland, 51 M. 355 (following preceding case); State v. Park & Nelson Lumber Co., 58 M. 330 (to annul the charter of a corporation for failure to comply with statute); State v. Minnesota Central Ry. Co., 36 M. 246 (to forfeit a railroad charter); State v. School District, 54 M. 214 (to test legal existence of a school district); State v. Holman, 58 M. 219 (to test respondents' title to office of assemblymen in St. Paul); State v. Gallagher, 42 M. 449 (to test the legal existence of a village).

ACTIONS UNDER G. S. 1878, Ch. 79

§ 1709. This chapter was designed to afford a civil action which should be a substitute for the writ of *quo warranto* and information in the nature of *quo warranto*. As originally enacted in 1851 its first section expressly abolished those common law remedies. The statutes of 1866 repealed this section but adopted, in substance, the remainder of the original chapter. It has been held that this repeal had the effect of restoring to the district courts power to issue writs of *quo warranto* [1] and by statute in 1876 the supreme court was clothed with a like power.[2] It results that in many cases we have in this state concurrent remedies afforded by this chapter and the common law information in the nature of *quo warranto*.[3] The two rem-

edies are in substance the same and governed by the same general principles.[4] The difference is merely a difference in the form of pleading and the mode of commencing the action. The statutory action, however, has a somewhat broader scope than the common law remedy.[5] It is left to the discretion of the attorney general to determine whether he shall proceed by civil action in the district court or by information in the supreme court.[6] "But while, *quo warranto* having been revived in this state, we now have the two remedies, yet the office of the writ of *quo warranto* ought not to be extended beyond what it was at common law. The remedy by civil action is more in accordance with the ordinary mode of judicial procedure in determining property rights, and ought to be pursued except in those special or exceptional cases where the public interests seem to demand a more speedy or summary mode of procedure than by action in the district court."[7] The statutory action is an ordinary civil action commenced by summons and, aside from burden of proof and trial by jury, is governed by the general rules of pleading and procedure. The defendant must show, before he can have a judgment in his favor, that he has a legal title to the office. Possession is not, in such action, evidence of his right; the burden is upon him to prove that his possession is a legal and rightful one. When, however, the action is brought on the relation of one claiming the office, the failure of the defendant to prove his title does not establish that of the relator. Upon that issue the plaintiff has the affirmative and the burden is upon him to maintain it. The defendant makes out a *prima facie* case by the production of a certificate of election issued to him by the proper officers.[8]

[1] State v. Lockerby, 57 M. 411.

[2] Laws 1876, ch. 58, § 1.

[3] State v. Ry. Co., 35 M. 222; State v. Minnesota Thresher Mfg. Co., 40 M. 213, 224.

[4] People v. Thatcher, 55 N. Y. 529; People v. Hall, 80 N. Y. 117.

[5] State v. Parker, 25 M. 215, 218; State v. Minnesota Thresher Mfg. Co., 40 M. 213, 224.

[6] State v. Ry. Co., 35 M. 222.

[7] State v. Minnesota Thresher Mfg. Co., 40 M. 213, 224.

[8] People v. Thatcher, 55 N. Y. 525; State v. Norton, 46 Wis. 342; State v. Sharp, 27 M. 38; State v. Commissioners, 66 M. 519, 532; State v. Gay, 59 M. 6, 23. See State v. Oftedal, 72 M. 498.

§ 1710. Cases under G. S. '94, § 5962: State v. Gay, 59 M. 6; State v. Parker, 25 M. 215; State v. Murray, 41 M. 123; State v. Smith, 3 M. 240 G. 164.

CHAPTER LIX

SLANDER AND LIBEL

SLANDER

§ 1711. Common form—words defamatory on their face.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , in the city of , defendant maliciously spoke, in the presence and hearing of others, of and concerning plaintiff, these words:

[Give in full and verbatim the words uttered.]

II. That said words were false.

III. That by reason of the speaking of said words plaintiff has suffered in his reputation to his damage dollars.

Wherefore [demanding judgment].

[1] Based on Warner v. Lockerby, 28 M. 28.

§ 1712. Defamation in relation to one's business or calling—no special damages claimed.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , in the city of , defendant maliciously spoke, in the presence and hearing of others, of and concerning plaintiff in relation to his [profession of physician which he was then and there practicing] [business as retail dry goods merchant in which he was then and there engaged] these words:

[Give in full and verbatim the words uttered.]

II. That said words were false.

III. That by reason of the speaking of said words plaintiff has suffered in his reputation in said calling [business] to his damage dollars.[2]

[1] Based on 2 Chitty Pl. 547; Warner v. Lockerby, 28 M. 28.

[2] Landon v. Watkins, 61 M. 137.

§ 1713. Words not defamatory on their face.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , in the city of , defendant maliciously spoke, in the presence and hearing of others, of and concerning plaintiff, these words:

"I am going to build an addition to my store. I am going to get out stone and put a good foundation under it, and when I get it done, I am going to paint it red and run opposition to [plaintiff] and . If they can make money dishonestly, I have the same right."

II. That said words were false.

III. That at the time said words were spoken by defendant there was in said city a house painted red, well known in the community to be a house of prostitution and said words were spoken by defendant with reference to such fact.

IV. That defendant meant by said words and was so understood by his hearers that plaintiff was keeping a house of prostitution.

V. That by reason of the speaking of said words plaintiff has suffered in her reputation to her damage dollars.

Wherefore [demanding judgment].

[1] Based on Richmond v. Post, 69 M. 457.

LIBEL

§ 1714. Words defamatory on their face—no special damages claimed.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , in the city of , defendant maliciously published, in a daily newspaper called the , of and concerning plaintiff these words:

[Giving article in full and verbatim.]

II. That said words were false.

III. That by reason of the publication of said words plaintiff has suffered in his reputation to his damage dollars.

Wherefore [demanding judgment].

§ 1715. Words not defamatory on their face—no claim for special damages.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , in the city of , defendant maliciously published, in a daily newspaper called the , of and concerning plaintiff these words:

[Setting out article in full and verbatim.]

II. That said words were false.

III. [Allege extrinsic facts essential to disclose defamatory character of words published as in paragraph III, § 1713, and add 'and said words were published by defendant with reference to such facts'].

IV. That defendant meant by said words and was so understood by persons reading the same that plaintiff [stating defamatory charge as in paragraph IV, § 1713].

V. That by reason of the publication of said words plaintiff has suffered in his reputation to his damage dollars.

Wherefore [demanding judgment].

NOTES

Inducement—colloquium.

§ 1716. If the words alleged are not actionable on their face but owe their defamatory significance to extraneous facts, such facts must be alleged by way of inducement and connected with the words alleged by a colloquium, that is, an averment that the words were spoken or published with reference to such facts. See for example paragraph III, § 1713; Smith v. Coe, 22 M. 276; Stewart v Wilson, 23 M. 450; Petsch v. Printing Co., 40 M. 291; Newell v. How, 31 M. 235; Carlson v. Tribune Co., 47 M. 337; Knox v. Meehan, 64 M. 280; Traynor v. Sielaff, 62 M. 421; Richmond v. Post, 69 M. 457.

Innuendo.

§ 1717. In the cases described in the preceding section the complaint must contain an averment that the defendant spoke

or published the words alleged with a specified defamatory meaning or application. See for example paragraph IV, § 1713. Such an averment is termed an *innuendo* from the old form of pleading. Pollock, Torts, 217; Glatz v. Thein, 47 M. 278; Hemphill v. Holley, 4 M. 233 G. 166; Schmidt v. Witherick, 29 M. 156; Knox v. Meehan, 64 M. 281; Traynor v. Sielaff, 62 M. 421; Richmond v. Post, 69 M. 457.

§ 1718. When words are in themselves obviously defamatory an *innuendo* is unnecessary and if inserted may be treated as surplusage. Frederickson v. Johnson, 60 M. 337; Sharpe v. Larson, 70 M. 209.

Setting out defamatory matter.

§ 1719. The defamatory words must be set out in full and verbatim. It is not sufficient merely to state the effect of the language or that the publication was of a certain defamatory tenor and import. American Book Co. v. Kingdom Pub. Co., 71 M. 363; Warner v. Lockerby, 28 M. 28.

§ 1720. But where a libellous charge is contained in an article published in a newspaper the complaint need set out only so much of the article as contains the libel. The defendant in his answer may set up the remainder of the article if it in any way qualifies the part set up in the complaint or renders it less libellous. Blethen v. Stewart, 41 M. 205; Oleson v. Printing Co., 47 M. 300.

§ 1721. If the defamatory words were spoken or written in a foreign language they must be alleged *in haec verba* in such language coupled with a literal translation thereof and an averment that the words were understood by the persons who heard or read them. See Glatz v. Thein, 47 M. 278; Simonsen v. Herald Co., 61 Wis. 626.

Application of words to plaintiff.

§ 1722. "In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state, generally, that the same was

published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff is bound to establish, on trial, that it was so published or spoken." G. S. '94, § 5257; Petsch v. Printing Co., 40 M. 291; Richmond v. Post, 69 M. 457.

§ 1723. But it must be alleged that the defamatory words were spoken or published of and concerning the plaintiff. Gove v. Blethen, 21 M. 80; Smith v. Coe, 22 M. 276; Carlson v. Tribune Co., 47 M. 337; Stoll v. Houde, 34 M. 193; Warner v. Lockerby, 28 M. 28; Cady v. Minneapolis Times Co., 58 M. 329.

Publication.

§ 1724. It is necessary that the complaint should allege that the words were published, that is, spoken in the presence of others. But it is not necessary to give the names of such persons. Warner v. Lockerby, 28 M. 28.

§ 1725. In the case of a libel it is sufficient merely to allege that defendant "published" the words but it is the usual and better practice to specify the mode of publication, as for example, in a designated newspaper, in a book of a designated title or in a letter to a designated person. Sproul v. Pillsbury, 72 Me. 20. See Hemphill v. Holley, 4 M. 233 G. 166.

Published by defendant.

§ 1726. It is necessary to allege that the words were spoken or published by the defendant. Warner v. Lockerby, 28 M. 28; Hemphill v. Holley, 4 M. 233 G. 166.

Service of notice.

§ 1727. In actions against newspapers for libel the complaint should allege service of notice as provided by G. S. '94, § 5417. See Clementson v. Minnesota Tribune Co., 45 M. 303.

Falsity and malice.

§ 1728. It is necessary to allege the falsity of the words spoken or published. Warner v. Lockerby, 28 M. 28; Wilcox v. Moore, 69 M. 49; Bottomly v. Bottomly, 80 Md. 159.

§ 1729. It is usual, following ancient precedents, to allege in addition to the falsity of the words that they were spoken or published "maliciously." It may be prudent to do so in

order to avoid question but it is not necessary. If malice in law as distinguished from malice in fact is an essential element of defamation it is presumed from the intentional speaking or publication of false and defamatory words concerning another. It is not necessary to allege what the law will presume. Pollock, Torts, 214; Bigelow, L. C. Torts, 117; Holmes, Common Law, 138; Burton v. Beasley, 88 Ind. 401; Hudson v. Garner, 22 Mo. 423.

Variance.

§ 1730. McCarthy v. Barrett, 12 M. 494 G. 398; Irish-American Bank v. Bader, 59 M. 329.

Damages for libel.

§ 1731. When the matter alleged is libellous *per se* no special damages need be alleged to constitute a cause of action but if special damages are not alleged plaintiff can recover only such damages as are the natural consequence of the libel.[1] When the matter alleged is not libellous *per se* special damages must be alleged in order to constitute a cause of action.[2]

[1] Holston v. Boyle, 46 M. 432; Landon v. Watkins, 61 M. 137; Pratt v. Pioneer Press Co., 35 M. 251.

[2] Stewart v. Tribune Co., 40 M. 101; Wilson v. Dubois, 35 M. 471.

Damages for slander.

§ 1732. The only difference in the rules governing the allegation of damages in libel and slander grows out of the fact that many defamatory charges actionable *per se* if written or printed are not actionable when spoken unless special damages resulted. See Holston v. Boyle, 46 M. 432; Richmond v. Post, 69 M. 457.

Damages—matter in mitigation.

§ 1733. "In an action for slander or libel, the defendant may in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances."

G. S. '94, § 5258; Marks v. Baker, 28 M. 165; Hewitt v. Pioneer Press Co., 23 M. 178; Stewart v. Tribune Co., 41 M. 71; Quinby v. Tribune Co., 38 M. 528; Quinn v. Scott, 22 M. 456; Larrabee v. Tribune Co., 36 M. 141; Warner v. Lockerby, 31 M. 421; Dressel v. Shipman, 57 M. 23; Landon v. Watkins, 61 M. 137; Sharpe v. Larson, 77 N. W. 233; Palmer v. Smith, 21 M. 419.

CHAPTER LX

SPECIFIC PERFORMANCE

§ 1734. General form of complaint.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant entered into an agreement in writing of which the following is a copy:

[Insert here exact copy of agreement.]

II. That on said day defendant was and still is the owner in fee of the premises therein described.

III. That plaintiff has duly performed all the conditions of said agreement on his part.

IV. That on the day of , 19 , plaintiff duly tendered dollars to defendant and demanded a warranty deed of said premises but defendant refused and still refuses to execute such a deed to the damage of plaintiff dollars.

V. That plaintiff is still ready and willing to pay to defendant the purchase money upon receiving a full warranty deed of said premises.

Wherefore plaintiff demands judgment:

(1) That defendant execute to plaintiff a full warranty deed of said premises upon payment by plaintiff of the purchase money.

(2) For the sum of dollars as damages for withholding the same.

(3) For the costs and disbursements of this action.

[1] This form is merely a suggestion. Paragraphs IV. and V. must be changed to meet the conditions of the particular contract.

NOTES

Complaints.

§ 1735. St. Paul Sons of Temperance v. Brown, 9 M. 157 G.

144 (an allegation that plaintiff offered to perform and the defendant refused is sufficient); Pawlak v. Granowski, 54 M. 130 (necessity of alleging demand); Lewis v. Prendergast, 39 M. 301; Minneapolis etc. Ry. Co. v. Chisholm, 55 M. 374 (unnecessary to allege a tender or offer of performance and a demand). Complaints considered as to sufficiency: Seager v. Burns, 4 M. 141 G. 93; Drake v. Barton, 18 M. 462 G. 414; Williams v. Langevin, 40 M. 180; Benton v. Schulte, 31 M. 312; Slingerland v. Slingerland, 46 M. 100; Dye v. Forbes, 34 M. 13; Alworth v. Seymour, 42 M. 526; Chicago etc. Ry. Co. v. Durant, 44 M. 361; Mealey v. Finnegan, 46 M. 507; Sawyer v. Wallace, 47 M. 395; Northern Trust Co. v. Markell, 61 M. 271 (contract for sale of chattel); Oliver Mining Co. v. Clark, 65 M. 277; Townsend v. Fenton, 30 M. 528; Minneapolis Mill Co. v. Bassett, 31 M. 390.

Miscellaneous cases.

§ 1736. Cairncross v. Grann, 37 M. 130 (variance); Brown v. Eaton, 21 M. 409 (necessity of pleading defence of homestead and failure of wife to join); Minor v. Willoughby, 3 M. 225 G. 154 (defence of *bona fide* purchaser insufficiently pleaded); St. Paul Land Co. v. Dayton, 39 M. 315 (answer held not to state a defence); Caldwell v. Depew, 40 M. 528 (answer sufficiently alleging mistake); Coolbaugh v. Roemer, 32 M. 445 (answer demanding an accounting and specific performance).

CHAPTER LXI

STATUTE OF LIMITATIONS

Form of plea.

§ 1737. The defendant for answer to the complaint herein alleges that the cause of action therein set forth did not accrue within years before the commencement of this action.

Or as follows:

The defendant, answering the complaint herein:

I. For a first defence alleges that the cause of action therein set forth did not accrue within years before the commencement of this action.

II. For a second defence alleges that—

Anticipating defence.

§ 1738. While it is not generally necessary to anticipate the defence of the statute of limitations by alleging time (See § 311) yet, where upon the face of the complaint it appears that the statute has run, plaintiff must aver matters which avoid the bar. Otherwise the complaint is demurrable. Kennedy v. Williams, 11 M. 314 G. 219; Hoyt v. McNeil, 13 M. 390 G. 362; Humphrey v. Carpenter, 39 M. 115; Morrill v. Mfg. Co., 53 M. 371; Bomsta v. Johnson, 38 M. 230; West v. Hennessey, 58 M. 133; Duxbury v. Boice, 70 M. 113.

Partial payments.

§ 1739. "An allegation in a complaint is sufficient which alleges an indebtedness and part payments thereon at such times as would prevent the statute from operating as a bar to the cause of action. Words or acts indicating that the debtor acknowledged that more was due and would be paid need not be alleged." Overmann v. Loebertmann, 68 M. 162. See Kennedy v. Williams, 11 M. 314 G. 219.

Statute—how pleaded.

§ 1740. It is not necessary, in a plea of a statute of limitations, to negative exceptions to the same. McMillan v. Cheeney, 30 M. 519.

Modes of taking advantage of statute.

§ 1741. By demurrer:

Where it clearly appears on the face of the complaint that the cause of action therein stated is barred by the statute of limitations a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action will lie. Kennedy v. Williams, 11 M. 314 G. 219; Eastman v. St. Anthony Water Power Co., 12 M. 137 G. 77; Hoyt v. McNeil, 13 M. 390 G. 362; Davenport v. Short, 17 M. 24 G. 8; Trebby v. Simmons, 38 M. 508; Humphrey v. Carpenter, 39 M. 115; Henkel v. Pioneer etc. Loan Co., 61 M. 35.

These cases are inconsistent with Hardwick v. Ickler, 71 M. 25, and there is consequently a strong probability that they will be overruled when the question is again raised. Certainly they ought to be. The statute is merely a defence and does not go to the cause of action. If it goes to the cause of action then a failure to invoke it by demurrer or answer cannot, under G. S. '94, § 5235, be held a waiver thereof and the Hardwick case is wrong. How fundamentally erroneous these cases are appears from the resulting necessity for the plaintiff to plead in his complaint a waiver of the statute before the defendant has invoked it. See 12 Harvard Law Review, 355; O'Connor v. Waterbury, 69 Conn. 206; Trebby v. Simmons, 38 M. 508.

§ 1742. By answer:

Unless it clearly appears on the face of the complaint that the action is barred the statute must be pleaded by answer as "new matter." Davenport v. Short, 17 M. 24 G. 8; Hardwick v. Ickler, 71 M. 25.

§ 1743. By motion on the trial:

The objection that the action is barred cannot be raised for

the first time on the trial by a motion for dismissal. Hardwick v. Ickler, 71 M. 25.

§ 1744. On appeal:

The objection that the action is barred cannot be raised for the first time on appeal, except, possibly, on appeal from a judgment by default. Hardwick v. Ickler, 71 M. 25. Overruling Kennedy v. Williams, 11 M. 314 G. 219; McArdle v. McArdle, 12 M. 98 G. 53; Wood v. Cullen, 13 M. 394 G. 365; Millette v. Mehmke, 26 M. 306; Trebby v. Simmons, 38 M. 508.

Foreign statute.

§ 1745. The statute of limitations of a sister or foreign state must be pleaded and proved as a fact. Hoyt v. McNeil, 13 M. 390 G. 362.

Necessity of reply.

§ 1746. "Where the complaint alleges the date when a cause of action accrued, showing that it was within the time within which, under the statute of limitations, an action may be brought, and the answer alleges that the cause of action did not accrue within that time, a reply is not necessary." West v. Hennessey, 58 M. 133.

CHAPTER LXII

TRESPASS TO PERSONAL PROPERTY

§ 1747. Action in nature of de bonis asportatis.[1]

The plaintiff complains of defendant and alleges:

I. That at the time stated in the next paragraph he was the owner of the following described personal property of the value of dollars:

[Describing property in general terms.]

II. That on the day of , 19 , defendant took said property from the possession of plaintiff and carried away and converted the same to his own use, to the damage of plaintiff dollars.

Wherefore [demanding judgment].

[1] Based on Clague v. Hodgson, 16 M. 329 G. 291. This form is not now much used in our practice, resort being had to an action for conversion or for the recovery of the property.

NOTES

Possession.

§ 1748. "The actual possession of property by a bailee is sufficient to sustain an action for an injury thereto by a mere trespasser." Laing v. Nelson, 41 M. 521.

§ 1749. Possession must be alleged and proved as of the date of the trespass. Williams v. McGrade, 18 M. 82 G. 65.

Wrongful taking.

§ 1750. "A complaint in trespass, for taking personal property, if it shów a wrongful taking, is good, although it do not, in terms, allege the taking to have been wrongful." Buck v. Colbath, 7 M. 310 G. 238; Clague v. Hodgson, 16 M. 329 G. 291.

Damages.

§ 1751. Gray v. Bullard, 22 M. 278; Wampach v. Ry. Co.,

21 M. 364; Welsh v. Wilson, 34 M. 92; Lammeland v. Ry. Co., 35 M. 412.

Treble damages under G. S. '94, § 5415.

§ 1752. Berg v. Baldwin, 31 M. 541.

When action will lie.

§ 1753. "An action for trespass may be maintained in the state courts against the United States marshal for the wrongful taking, under process of the federal court, of plaintiff's property." Buck v. Colbath, 7 M. 310 G. 238.

§ 1754. Trespass will not lie by one tenant in common of personal property against his co-tenant unless the property has been actually converted or destroyed. Strong v. Colter, 13 M. 82 G. 77.

§ 1755. A principal is liable for a trespass committed by his agent in the line of his employment. Potulni v. Saunders, 37 M. 517.

§ 1756. Trespass will not lie against an agent unless it would lie against the principal who authorized the act. Strong v. Colter, 13 M. 82 G. 77.

CHAPTER LXIII

TRESPASS TO REAL PROPERTY

§ 1757. General form of complaint.

The plaintiff complains of defendant and alleges:

I. That at the time stated in the next paragraph he was the owner and in possession of [describing premises as in a deed], in the county and state aforesaid.

II. That [on the day of , 19] [at divers times between the day of , 19 , and the day of , 19], defendant entered upon said premises and [describing in general terms the acts of depredation], to the damage of plaintiff dollars.

Wherefore [demanding judgment].

NOTES

Allegation of title.

§ 1758. Plaintiff should allege that he was the owner and in possession as of the date of the trespass. He should allege ownership to show rightful possession and constructive possession if the land is vacant, but it is not ordinarily necessary for him to deraign his title if he is in possession although his ownership is denied. To make out a *prima facie* case all that he need do is to prove actual possession, for possession is the gist of the action and is *prima facie* evidence of ownership in fee. Wilder v. St. Paul, 12 M. 192 G. 116; Rau v. Ry. Co., 13 M. 442 G. 407; St. Paul etc. Ry. Co. v. Matthews, 16 M. 341 G. 303; Sherwood v. Ry. Co., 21 M. 127; Witt v. Ry. Co., 38 M. 122; Moe v. Chesrown, 54 M. 118.

Possession.

§ 1759. Possession must be alleged for without possession, either actual or constructive, trespass will not lie. Gould v. School District, 7 M. 203 G. 145, 154; Moon v. Avery, 42 M. 405.

§ 1760. An allegation of ownership imports possession sufficient to sustain an action. Daley v. St. Paul, 7 M. 390 G. 311; Booth v. Sherwood, 12 M. 426 G. 310; Leihy v. Ashland Lumber Co., 49 Wis. 165.

§ 1761. A complaint which negatives possession is insufficient. Moon v. Avery, 42 M. 405; Gould v. School District, 7 M. 203 G.145.

§ 1762. Possession as of the date of the trespass must be alleged. Moon v. Avery, 42 M. 405; Gould v. School District, 7 M. 203 G. 145; Williams v. McGrade, 18 M. 82 G. 61, 71.

Force.

§ 1763. It is unnecessary to allege that the entry was forcible. Darst v. Rush, 14 Cal. 82.

Title—how far involved.

§ 1764. "While it is true that the gist of such action is the injury to the plaintiff's possession, yet in it the right of property often comes in controversy. A plaintiff's possession, even though wrongful, is sufficient to support this action against a person having neither title nor right of possession; but if the defendant claims and proves title, he will in such case prevail—or the land on which the trespass is committed may not be in the occupation of any person, yet the plaintiff may in such case prove a constructive possession by showing his title." Booth v. Sherwood, 12 M. 426 G. 310. See Downs v. Finnegan, 58 M. 112; Hoxsie v. Empire Lumber Co., 41 M. 548.

§ 1765. To sustain an action for trespass it is not necessary to establish a title in fee. Rau v. Ry. Co., 13 M. 442 G. 407.

§ 1766. "As against the owner of the soil a trespasser cannot interpose as a defence the existence of an easement which the public or a third person may have in the premises." Hurley v. Boom Co., 34 M. 143.

When action will lie.

§ 1767. One who is rightfully entitled to possession is not

a trespasser if he enters peaceably. Sharon v. Woolrick, 18 M. 354 G. 325; Mercil v. Broulette, 66 M. 416.

§ 1768. "As a general rule one tenant in common cannot have an action of trespass *quare clausum* against another, but he may have an action on the case in the nature of waste, for any misfeasance injurious to the common property and in such action the question of title may arise." Booth v. Sherwood, 12 M. 426 G. 310.

§ 1769. "One who, without the owner's consent, sells the right to cut trees standing and growing on the land of another, is liable for the trespass committed by his purchasers in cutting and removing them, and a claim or color of title is no justification." Sanborn v. Sturtevant,, 17 M. 200 G. 174.

§ 1770. One whose entry is rightful may become a trespasser by refusing to leave on demand. Mitchell v. Mitchell, 54 M. 301.

§ 1771. "Mere silence, in the presence of a wilful trespass upon one's property, waives nothing and consents to nothing." Leber v. Ry. Co., 29 M. 256.

Damages—generally.

§ 1772. Ziebarth v. Nye, 42 M. 541; Wampach v. Ry. Co., 22 M. 34; Spencer v. Ry. Co., 22 M. 29; Mississippi etc. Logging Co. v. Page, 68 M. 269; Nelson v. West Duluth, 55 M. 497; Karst v. Ry. Co., 22 M. 118; Baldwin v. Ry. Co., 35 M. 354; Barnett v. Water Power Co., 33 M. 265; Karst v. Ry. Co., 23 M. 401; Leber v. Ry. Co., 29 M. 256; Hueston v. Mississippi etc. Co., 79 N. W. 92. 76 M. 251.

Damages—aggravation of.

§ 1773. Mitchell v. Mitchell, 54 M. 301; Spencer v. Ry. Co., 22 M. 29.

Damages—punitive.

§ 1774. Carli v. Union Depot etc. Co., 32 M. 101.

Damages—mitigation of.

§1775 Hoxsie v. Empire Lumber Co., 41 M. 548.

Damages—treble under G. S. '94, § 5884.

§ 1776. The court may instruct the jury to assess the actual damage and render their verdict for treble that amount or it may instruct them to return the single damage, and the fact whether the trespass was wilful or involuntary and the court may then treble the damage so found. Tait v. Thomas, 22 M. 537.

CHAPTER LXIV

WORK, LABOR AND SERVICES

§ 1777. Short form on account, in the nature of indebitatus assumpsit at common law.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , defendant was indebted to plaintiff in the sum of dollars and cents on account for services rendered [as a book-keeper] [as a farm laborer] [in and about the construction of], by plaintiff for defendant at his request, [on said day] [between the day of , 19 , and the day of , 19].

II. That no part thereof has been paid [except].

Wherefore plaintiff demands judgment:

(1) For the sum of dollars and cents, with interest thereon from the day of , 19 .

(2) For the costs and disbursements of this action.

[1] Sustained by Larson v. Schmaus, 31 M. 410; Guthrie v. Olson, 32 M. 465; Danahey v. Pagett, 76 N. W. 949; Farron v. Sherwood, 17 N. Y. 227; Emslie v. Leavenworth, 20 Kans. 562; Hosley v. Block, 28 N. Y. 438; Hurst v. Litchfield, 39 N. Y. 377; Higgins v. Ry. Co., 66 N. Y. 605; New York etc. Co. v. Nat. S. S. Co., 148 N. Y. 39. What was said under § 1377 is applicable here. It frequently happens that it is uncertain whether work was done under an express or implied agreement or whether plaintiff can prove an express agreement although one in fact exists. In such cases this form is exceedingly advantageous for under it the plaintiff may recover upon proof of either an express or implied agreement. If the evidence shows an express agreement its terms will control. If the evidence fails to disclose an express agreement the plaintiff may nevertheless recover the reasonable value of his services if he proves that they were rendered by him for and at the request of the defendant. This form may be used where there is a special contract if such contract has been fully performed on the part of the plaintiff and nothing remains to be done but the payment of the money by the defendant. It may be used where there is a special contract which has been altered or deviated from in particulars by com-

mon consent, if the work has been accepted by the defendant and nothing remains to be done under the contract except the payment of the money by the defendant. It may also be used where there is a special contract and the plaintiff has performed a part of it according to its terms and has been prevented by the act or consent of the defendant, the act of God or the law from performing the remainder. In general it cannot be used where there is a subsisting special agreement unless the work under the contract has been fully performed and accepted by the defendant. See Cutler v. Powell, 2 Smith's Leading Cases, Pt. I, 33; 2 Ency. Pl. & Prac. 1008.

§ 1778. General form for services rendered on express contract.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , [between the day of , 19 , and the day of , 19 ,] plaintiff rendered services to defendant at his request as [describing services in general terms].

II. That defendant promised to pay plaintiff therefor [dollars per month] [the sum of dollars].

III. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1777].

§ 1779. Action for reasonable value of services, in the nature of quantum meruit at common law.

The plaintiff complains of defendant and alleges:

I. [As in § 1778.]

II. That the same were reasonably worth dollars.

III. That no part thereof has been paid [except].

Wherefore [demanding judgment as in § 1777].

In all cases where this form may be used the plaintiff may recover under the form given in § 1777. See cases cited under §§ 1377, 1777.

§ 1780. Breach of contract to employ.[1]

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant entered into an agreement whereby defendant promised to employ plaintiff as [stating nature of employment] for a period of , beginning on the day of , 19 , at a salary of dollars per month, and plaintiff promised to render such services.

II. That on the said day of , 19 , plaintiff duly offered to render said services and to perform all the conditions of said agreement on his part, but defendant refused to permit him so to do, to his damage dollars.

Wherefore [demanding judgment as in § 1777].

[1] Sustained by Starkey v. Minneapolis, 19 M. 203 G. 166; Drea v. Carlveau, 28 M. 280, 284.

§ 1781. Complaint for wrongful discharge from employment.

The plaintiff complains of defendant and alleges:

I. That on the day of , 19 , plaintiff and defendant entered into an agreement whereby defendant promised to employ plaintiff as [stating nature of employment], [from month to month], [for a period of], beginning on the day of , 19 , at a salary of dollars per month and plaintiff promised to render such services.

II. That on the day of , 19 , plaintiff entered the service of defendant under said agreement and remained in such service until the day of , 19 , when he was discharged by defendant although the term of his employment had not yet expired.

III. That plaintiff duly performed all the conditions of said agreement on his part and at the time of his discharge was willing and able to continue in said service and duly perform said agreement on his part.[1]

IV. That the salary of plaintiff from the day of , 19 , to the day of , 19 , amounting to dollars, remains unpaid.

Wherefore [demanding judgment as in § 1777].

[1] Not necessary to allege an offer to perform. McMullan v. Dickinson Co., 63 M. 405.

NOTES

Complaint in action for services.

§ 1782. The plaintiff must declare upon an express or implied contract. He cannot so frame his complaint as to admit proof of either an express or implied contract. An allegation

of agreed price is not sustained by proof of the reasonable value of the services and *vice versa*. Hewitt v. Brown, 21 M. 163; Plummer v. Mold, 22 M. 15; Wagner v. Nagel, 33 M. 348; Evans v. Miller, 37 M. 371; Wernli v. Collins, 87 Iowa, 548; Imhoff v. House, 36 Neb. 28.

§ 1783. If materials were furnished by plaintiff in connection with the work add to I in the forms given under §§ 1778, 1779: "and that plaintiff then and there, at the request of defendant, furnished the materials necessary in said work."

Evidence admissible under general denial.

§ 1784. Rothschild v. Burritt, 47 M. 28; Scone v. Amos, 38 M. 79.

Recoupment.

§ 1785. "In an action brought upon contract for services, the defendant may plead, by way of recoupment and setoff, damages sustained by him through the negligence of plaintiff in the performance of the same contract of employment upon which the action is brought." Harlan v. Ry. Co., 31 M. 427.

Action in nature of quantum meruit.

§ 1786. If services have been rendered under an express contract which remains in force plaintiff must declare upon such contract. He cannot sue for their value. Bond v. Corbett, 2 M. 248 G. 209; Macubin v. Clarkson, 5 M. 247 G. 193.

§ 1787. "Where there is an express contract to perform labor and after the employee has partly performed, the employer discharges him without just cause, he may treat the contract as abandoned and sue for the value of the labor performed." Macubin v. Clarkson, 5 M. 247 G. 193; Marcotte v. Beaupre, 15 M. 152 G. 117; Williamson v. Anderson, 9 M. 50 G. 39; Siebert v. Leonard, 17 M. 433 G. 410; Brown v. Ry. Co., 36 M. 236.

§ 1788. As to when an action in the nature of *quantum meruit* will lie see the following cases: Hawkins v. Lange, 22 M. 557; Robson v. Bohn, 27 M. 333; Belt v. Stetson, 26 M. 411; Schwarb v. Pierro, 43 M. 520; McKee v. Vincent, 33 M. 508;

Kriger v. Leppel, 42 M. 6; Gammons v. Johnson, 69 M. 488; Brown v. Ry. Co., 36 M. 236; La Du-King Mfg. Co. v. La Du, 36 M. 473; Rogers v. Ry. Co., 22 M. 25; Boardman v. Ward, 40 M. 399; O'Dea v. Winona, 41 M. 424; Smith v. Nat. Credit Ins. Co., 65 M. 283; Keogh v. Wendelschafer, 76 N. W. 46; Gammons v. Gulbranson, 80 N. W. 779 (party cannot waive an express illegal contract and recover value of services rendered thereunder).

Failure of plaintiff to seek other employment.

§ 1789. In an action for breach of contract to employ or for wrongful discharge it is not necessary for the plaintiff to allege that he has sought but been unable to find other employment. If the plaintiff has failed to seek other employment, that is a matter of defence for the defendant to plead and prove. Drea v. Cariveau, 28 M. 284; Horn v. Western Land Co., 22 M. 233, 237; Bennett v. Morton, 46 M. 113; Macubin v. Clarkson, 5 M. 247 G. 193; McMullan v. Dickinson Co., 63 M. 405 (syllabus misleading).

CHAPTER LXV

MISCELLANEOUS CASES

Accounting.

§ 1790. Smith v. Glover, 44 M. 260 (complaint held sufficient); Coolbaugh v. Roemer, 32 M. 445 (averment of willingness to pay unnecessary); McClung v. Capehart, 24 M. 17 (no demand before suit necessary); Stern v. Harris, 40 M. 209 (complaint held sufficient); Mathews v. Hennepin etc. Bank, 44 M. 442 (complaint for accounting against mortgagee in possession).

Administrators and executors.

§ 1791. Chamberlain v. Tiner, 31 M. 371 (it is not necessary to make profert of letters testamentary or of administration—when an executor or administrator sues he should allege in a direct and issuable form that he is such); Miller v. Hoberg, 22 M. 249 (in actions by an executor or administrator for possession of the real estate of the decedent title must be alleged as of the date of the commencement of the action); Fogle v. Schaeffer, 23 M. 304 (allegation by foreign administrator of appointment and qualification held to be put in issue by general denial); Cohu v. Husson, 113 N. Y. 662 (an allegation that letters of administration were duly issued and granted to the plaintiff at a specified time by a specified court or that a will was duly admitted to probate and allowed and letters testamentary thereon duly issued to plaintiff as executor at a specified time by a specified court is sufficient under G. S. '94, § 5249).

Attorney.

§ 1792. Huntsman v. Fish, 36 M. 148 (necessity of demand in action against attorney for money collected); Wetherby v. Weaver, 51 M. 72 (action by attorney against assignee of judgment upon which attorney claimed a lien); Huber v. Johnson,

68 M. 74; Gammons v. Johnson, 78 N. W. 1035; Gammons v. Gulbranson, 80 N. W. 779 (actions by attorney for services—contracts held barratrous); Gammons v. Johnson, 69 M. 488; Gammons v. Gulbranson, 80 N. W. 779 (recovery for services rendered on an illegal contract); Cooper v. Stinson, 5 M. 201 G. 160 (answer in action for services held not to state a defence).

Auditor—county.

§ 1793. Fleming v. Roverud, 30 M. 273; Corbin v. Morrow, 46 M. 522 (action against auditor to compel him to issue a warrant on the treasurer).

Bill of exchange.

§ 1794. Freeman v. Curran, 1 M. 170 G. 144 (necessity of pleading presentment and demand at place of payment).

Bona fide purchaser.

§ 1795. "He who is resisting a prior title on the ground that he purchased in good faith, must not only allege the payment of a valuable consideration but must also deny notice," at the time of said payment, of the rights of the other party. Bank of Farmington v. Ellis, 30 M. 270. See also, Minor v. Willoughby, 3 M. 225 G. 154; Newton v. Newton, 46 M. 33; Plymouth Cordage Co. v. Seymour, 67 M. 311; Moffett v. Parker, 71 M. 139; Anderson v. Lee, 76 N. W. 24. He who seeks equitable relief must disclose in his complaint his own equities. Hospes v. Northwestern Car Co., 48 M. 174. This case is limited in Mendenhall v. Duluth Dry Goods Co., 72 M. 312.

Broker—action for services.

§ 1796. Coe v. Ware, 40 M. 404 (fraud and negligence, how pleaded as defence); McFee v. Horan, 40 M. 30 (evidence admissible under general denial); Rothschild v. Burritt, 47 M. 28 (evidence admissible under a general denial); Peet v. Sherwood, 47 M. 347 (defence not pleaded); McAllister v. Welker, 39 M. 535 (complaint held sufficient on trial); Vaughnan v. McCarthy, 59 M. 199 (tender of purchase money unnecessary); Hewitt v. Brown, 21 M. 163 (complaint held sufficient); Harriott v. Holmes, 79 N. W. 1003 (complaint held sufficient).

Building contract—action for extras.

§ 1797. Meyer v. Berlandi, 53 M. 59 (answer).

Cloud on title—action to remove.

§ 1798. Sanborn v. Eads, 38 M. 211 (complaint not demurrable as showing laches); Redin v. Branhan, 43 M. 283 (complaint held sufficient); Cleveland v. Stone, 51 M. 274 (complaint held insufficient); Maloney v. Finnegan, 38 M. 70 (complaint held insufficient); Bausman v. Kelley, 38 M. 197 (action may be maintained by one out of possession against one in possession); Lake Superior Land Co. v. Emerson, 38 M. 406 (a grantee of the abutting shore may maintain an action against the grantee [from the same grantor] in a prior deed, purporting to convey the soil under the water, to remove the cloud upon his riparian rights created by such deed); Styer v. Sprague, 63 M. 415 (who may maintain); Bennett v. Hotchkiss, 17 M. 89 G. 66 (complaint held sufficient); Johnson v. Robinson, 20 M. 189 G. 169 (complaint held sufficient on trial);Lowry v. Harris, 12 M. 255 G. 166 (supplemental complaint); Griffin v. Jorgenson, 22 M. 92 (counterclaim); Palmer v. Yorks, 79 N. W. 589 (a complaint which is insufficient to remove a cloud will be sustained if it states a cause of action to determine adverse claims under the statute. See § 901). See further as to when action will lie: Hamilton v. Wood, 55 M. 482; New England Mutual Life Ins. Co. v. Capehart, 63 M. 120; Maloney v. Finnegan, 38 M. 70; Hunter v. Cleveland Stove Co., 31 M. 505; Mayall v. St. Paul, 30 M. 294; Bausman v. Kelley, 38 M. 197; Lake Superior Land Co. v. Emerson, 38 M. 406; Weller v. St. Paul, 5 M. 95 G. 70; Scribner v. Allen, 12 M. 148 G. 85; Conkey v. Dike, 17 M. 463 G. 434; Baldwin v. Canfield, 26 M. 43; Gilman v. Van Brunt, 29 M. 271; Mogan v. Carter, 48 M. 501; Dean v. Goddard, 55 M. 290; Redin v. Branhan, 43 M. 283; Donnelly v. Simonton, 7 M. 167 G. 110; Butman v. James, 34 M. 547; Bennett v. Hotchkiss, 17 M. 89 G. 66; Banning v. Armstrong, 7 M. 40 G. 24; Minnesota Linseed Oil Co. v. Palmer, 20 M. 468 G. 424; Hanson v. Johnson, 20 M. 194 G. 172; Hart v. Marshall, 4 M. 294 G. 211; Armstrong v. Sanford, 7 M. 53 G. 34; Smith v.

Dennett, 15 M. 81 G. 59; Dahl v. Pross, 6 M. 89 G. 38; Yoss v. Fruedenrich, 6 M. 95 G. 45; Yager v. Merkle, 26 M. 429; Barton v. Drake, 21 M. 299; MacDonald v. Kneeland, 5 M. 352 G. 283; Merriam v. Wagener, 77 N. W. 44.

Common carrier.

§ 1799. Armstrong v. Ry. Co., 45 M. 85 (action for negligent carriage of mare); Myers v. Ry. Co., 50 M. 371 (action for discrimination and refusal to build side track); Jarrett v. Ry. Co., 77 N. W. 304 (action by assignor for breach of contract to convey—demand must be alleged).

Conspiracy.

§ 1800. O'Connor v. Jefferson, 45 M. 162 (complaint held sufficient); Whiting v. Clugston, 73 M. 6 (joinder of causes of action).

Covenants—action for breach.

§ 1801. Bruns v. Schreiber, 48 M. 366 (permissible amendment of complaint for); Cargill v. Thompson, 50 M. 211 (complaint held sufficient); Wagner v. Finnegan, 54 M. 251 (complaint held not to show breach of covenant of warranty); Lewis v. Prendergast, 39 M. 301 (in order to put a party in default in case of dependent covenants there must be tender or offer of performance and a demand of performance).

Dedication of land to public.

§ 1802. Village of Buffalo v. Harling, 50 M. 551 (complaint held sufficient); Village of Benson v. Ry. Co., 62 M. 198 (complaint held sufficient).

Demand—how alleged.

§ 1803. Hall v. Williams, 13 M. 260 G. 242.

Election.

§ 1804. Wiley v. Board of Education, 11 M. 371 G. 268 (how alleged).

Eminent domain.

§ 1805. Fletcher v. Ry. Co., 67 M. 339 (petition in condemnation proceedings); Coles v. Stillwater, 64 M. 105 (action for amount of award).

Estoppel in pais.

§ 1806. Moore v. St. Paul Ice Co., 59 M. 23 (insufficiently pleaded); Norman v. Eckern, 60 M. 531 (well pleaded).

Execution sale—action to redeem from.

§ 1807. Dunn v. Dewey, 77 N. W. 793 (complaint held insufficient).

Fraudulent preference.

§ 1808. Reilly v. Bader, 46 M. 212 (held sufficiently alleged).

Guaranty.

§ 1809. Walsh v. Kattenburgh, 8 M. 127 G. 99 (need not allege that promise was in writing); Fall v. Youmans, 67 M. 83 (guaranty of note—removal of maker from state—unnecessary to allege that maker has property in state out of which note might be made); Straight v. Wight, 60 M. 515 (necessity of alleging acceptance of guaranty); Fideuity & Casualty Co. v. Eickhoff, 63 M. 170, and Fidelity & Casualty Co. v. Lawler, 64 M. 144 (complaints on contracts guaranteeing fidelity of employees); Nichols, Shepard & Co. v. Allen, 22 M. 283 (complaint on guaranty held insufficient); Osborne v. Waller, 75 N. W. 732 (defence of payment and extension not inconsistent). See §§ 97, 1824.

Guardian's bond—action on.

§ 1810. Hantzch v. Massolt, 61 M. 361 (complaint need not allege permission to sue from the probate court).

Highway.

§ 1811. Farrant v. Ry. Co., 13 M. 311 G. 286 (sufficient allegation that a street was a public highway).

Infants—guardians ad litem.

§ 1812. Infants must sue and be sued in their own names appearing by their guardians *ad litem*. Germain v. Sheehan, 25 M. 338; Price v. Ins. Co., 17 M. 497; Perine v. Grand Lodge, 48 M. 82; Peterson v. Bailif, 52 M. 386; G. S. '94, §§ 5160, 5161. As respects proceedings to probate a will, no appointment of a guardian *ad litem* for any minor interested in testator's estate is necessary. Mousseau's Will, 30 M. 202. It is not neces-

sary, before the administration account of an executor or administrator is allowed, to appoint guardians *ad litem* for minor heirs or legatees interested in the estate. Balch v. Hooper, 32 M. 158. A guardian *ad litem* is not a party to the action. Bryant v. Livermore, 20 M. 313 G. 271. If an infant becomes of age during the pendency of an action begun without the appointment of a guardian *ad litem* he may affirm the action and thereby avoid the effect of the irregularity. Germain v. Sheehan, 25 M. 338. Objection to the regularity of the appointment of a guardian must be taken by motion and not by answer. Schueck v. Hagar, 24 M. 339. Failure to appoint a guardian *ad litem* does not render the judgment void. Eisenmenger v. Murphy, 42 M. 84.

Interest.

§ 1813. "Interest is incident to the principal debt; and, although a creditor may recover interest as it falls due, though it be before any part of the principal becomes due, yet if he forbear to bring his action to recover such interest, the interest remains incident to the debt, and may be recovered with it." Cushman v. Commissioners, 19 M. 295 G. 252.

§ 1814. "The general rule is that in all cases where the money of another is received or acquired by mistake merely, without fraud, interest does not run until the party in whose possession it is, is put in default by a demand by the party to whom it is justly due." Sibley v. Pine Co., 31 M. 201; Perkins v. Stewart, 77 N. W. 434.

§ 1815. Interest is recoverable as damages for the non-payment of money from the time it becomes due upon either an express or implied agreement. Mason v. Callender, 2 M. 350 G. 302; Talcott v. Marston, 3 M. 339 G. 238; Auerbach v. Gieseke, 40 M. 258; County of Redwood v. Winona & St. Peter Land Co., 40 M. 512; J. D. Moran etc. Co. v. St. Paul, 65 M. 300; Abrahamson v. Lamberson, 68 M. 454; Welsh v. Ry. Co., 25 M. 314; Ormond v. Sage, 69 M. 523.

§ 1816. "In tresspass, trover, and the like actions, where personal property has been wrongfully taken and converted or

wrongfully destroyed, and the owner is entitled to recover, and must accept the value in place of the property itself, it is now well settled that interest, as part of the damages, should be allowed on the value of the property from the date of the conversion or destruction, or whatever time, by defendant's fault, the loss occurred." Triggs v. Jones, 46 M. 277; Mason v. Callender, 2 M. 550 G. 302; Varco v. Ry. Co., 30 M. 18.

Levy.

§ 1817. In pleading a levy made by an officer it is sufficient to allege that he levied without setting out the particular acts done by him. Rohrer v. Turrill, 4 M. 407 G. 309; First Nat. Bank v. Rogers, 13 M. 407 G. 376.

Malpractice.

§ 1818. Jacobs v. Cross, 19 M. 523 G. 454 (complaint construed). See Chamberlain v. Porter, 9 M. 260 G. 244; Getchell v. Lindley, 24 M. 265; Getchell v. Hill, 21 M. 464; Bennison v. Walbank, 38 M. 313; Whittaker v. Collins, 34 M. 299; Stone v. Evans, 32 M. 243; Moratzky v. Wirth, 67 M. 46.

Mechanic's lien bond—action on.

§ 1819. St. Paul Foundry Co. v. Wegmann, 40 M. 419 (complaint held sufficient).

Misnomer.

§ 1820. If a party who was in fact intended to be sued is served with process in which he is incorrectly designated he must appear and object to the misnomer and if he fails to do so any judgment rendered in the action will bind him until set aside or amended. Casper v. Klippen, 61 M. 353. The proper mode of raising the objection is as yet undetermined in this state. The objection must be taken specially. It is too late after pleading to the merits and going to trial. French v. Donohue, 29 M. 111. A plea or answer in abatement must be so full as to wholly exclude plaintiff's right to sue defendant by the name used. Lyons v. Rafferty, 30 M. 526. Upon the subject generally see: Kenyon v. Semon, 43 M. 180; Clary v. O'Shea, 72 M. 105; Morse v. Barrows, 37 M. 239; Blinn v.

Chessman, 49 M. 140; Lane v. Innes, 43 M. 137; Pinney v. Russell & Co., 52 M. 443; Nystrom v. Quinby, 68 M. 4; Bradley v. Sandilands, 66 M. 40; Massillon etc. Co. v. Holdridge, 68 M. 393; Rodes v. St. Anthony etc. Co., 49 M. 370; Newton v. Newell, 26 M. 529; State v. Sannerud, 38 M. 229; State v. Timmens, 4 M. 325 G. 241, and cases cited under § 723.

Money loaned.

§ 1821. Fravel v. Nett, 46 M. 31 (pleadings considered); Dodge v. McMahan, 61 M. 175 (complaint held sufficient).

Money paid for another—action to recover.

§ 1822. Johnson v. Krassin, 25 M. 117 (complaint held sufficient).

Mortgage—real—action to foreclose.

§ 1823. Hawke v. Banning, 3 M. 67 G. 30 (sufficient allegation of joint interest); Wolf v. Banning, 3 M. 202 G. 133 (in action against husband and wife they should answer jointly); Borup v. Nininger, 5 M. 523 G. 417 (necessity of pleading fraud); Churchill v. Proctor, 31 M. 129 (joinder of action to foreclose and for an accounting); Herber v. Christopherson, 30 M. 395 (answer held not to state a defence); Foster v. Johnson, 39 M. 378 (sufficient allegation of ownership of mortgage by assignment); Howard v. Iron & Land Co., 62 M. 298 (complaint sufficient as against junior incumbrancers); Coles v. Yorks, 31 M. 213 (action to foreclose and to have a homestead set off).

Mortgage—action against assignee.

§ 1824. Clifford v. Minor, 67 M. 512 (complaint against party assuming mortgage insufficient); Connecticut etc. Co. v. Knapp, 62 M. 405 (answer held not to state a defence or counterclaim).

Mortgage—action to recover excess at sale.

§ 1825. Bailey v. Merritt, 7 M. 159 G. 102 (complaint held sufficient); Perry v. Reynolds, 40 M. 499 (complaint construed.

Mortgage—real—action to set aside sale on foreclosure.

§ 1826. Swain v. Lynd, 76 N. W. 958 (action by judgment

creditor—complaint held sufficient; Ramsey v. Merriam, 6 M. 168 G. 104 (complaint insufficient); Abbott v. Peck, 35 M. 499 (complaint insufficient); Bottineau v. Ins. Co., 31 M. 125 (action to set aside foreclosure); Hull v. King, 38 M. 349 (statute of limitations); Clark v. Kraker, 51 M. 444 (sale en masse); Temple v. Norris, 53 M. 286 (insufficient allegation of notice); Mason v. Goodnow, 41 M. 9 (complaint held sufficient); Gilman v. Holyoke, 14 M. 138 G. 104 (action prematurely brought).

Mortgage—real—action to redeem from foreclosure.

§ 1827. Thompson v. Foster, 21 M. 319 (allegations of complaint as to title and tender held sufficient); Kling v. Childs, 30 M. 366; Nye v. Swan, 49 M. 431 (necessity of alleging tender); Ritchie v. Ege, 58 M. 291 (action maintainable without paying amount necessary to redeem into court); Floberg v. Joslin, 77 N. W. 557 (complaint held sufficient).

Mortgage—action to have absolute deed declared a.

§ 1828. Phœnix v. Gardner, 13 M. 430 G. 396 (complaint held sufficient on appeal); McClane v. White, 5 M. 178 G. 139 (complaint held insufficient); Miller v. Smith, 44 M. 127 (complaint held insufficient); Sloan v. Becker, 31 M. 414 (evidence admissible under general denial); Livingston v. Ives, 35 M. 55 (evidence admissible under general denial).

Mortgage—action to cancel.

§ 1829. Payne v. Loan & Guaranty Co., 54 M. 255 (action held to lie); Birch v. Security Savings & Loan Asso., 71 M. 112 (on the ground of usury—complaint held sufficient).

Mortgage—chattel—action to foreclose.

§ 1830. Massachusetts etc. Co. v. Welch, 47 M. 183 (counterclaim for breach of warranty); Forepaugh v. Pryor, 30 M. 35 (action held to lie).

Municipal bonds—actions on.

§ 1831. Wiley v. Board of Education, 11 M. 371 G. 268; Cushman v. Commissioners, 19 M. 295 G. 252 (essentials of complaint considered).

Nuisance.

§ 1832. "In a civil action for a nuisance the complaint must state facts which in law constitute a nuisance from which the plaintiff has suffered special injury." O'Brien v. St. Paul, 18 M. 176 G. 163. In an action for a private nuisance a general allegation of damage is sufficient to enable the plaintiff to recover all the damages that are the natural and necessary consequence of the nuisance to himself and family. Pierce v. Wagner, 29 M. 355. In a private action for a public nuisance the complaint must state facts to show that the plaintiff has suffered peculiar and special damages differing in kind from those suffered by the general public. Lakkie v. Ry. Co., 44 M. 438 and cases cited; Ofstie v. Kelly, 33 M. 440; Aldrich v. Wetmore, 52 M. 164; Thelan v. Farmer, 36 M. 225; Shero v. Carey, 35 M. 423; Aldrich v. Wetmore, 56 M. 20. Under a complaint for one kind of nuisance one of an entirely different character cannot be proved. O'Brien v. St. Paul, 18 M. 176 G. 163. Matter in justification or excuse must be specially pleaded by the defendant. Id.

Novation.

§ 1833. Johnson v. Rumsey, 28 M. 531 (complaint construed).

Partition.

§ 1834. Bell v. Dangerfield, 26 M. 307 (complaint held insufficient); Bonham v. Weymouth, 39 M. 92 (issues that may be tried in action for partition); Smalley v. Isaacson, 40 M. 450 (titles of all parties may be determined—will not lie against life tenant); Cook v. Webb, 19 M. 167 G. 129 (action lies though premises in possession of tenant for term of years); How v. Spalding, 50 M. 157 (judgment in); Smalley v. Isaacson, 40 M. 450 (occupying claimant act applies); Hurley v. Hamilton, 37 M. 160; Horton v. Maffitt, 14 M. 289 G. 216 (when action lies).

Partnership.

§ 1835. In actions by or against partners it is not ordinarily necessary to allege partnership. Jaeger v. Hartman, 13 M. 55

G. 50; Birdsall v. Fischer, 17 M. 100 G. 76; Boosalis v. Stevenson, 62 M. 193; Dessaint v. Elling, 31 M. 287; Dobson v. Hallowell, 53 M. 98; Freeman v. Curran, 1 M. 170 G. 144; Hayward v. Grant, 13 M. 165 G. 154. See, however, Foerster v. Kirkpatrick, 2 M. 210 G. 171; Irvine v. Myers, 4 M. 229 G. 164; Fetz v. Clark, 7 M. 217 G. 159; Stickney v. Smith, 5 M. 486 G. 390.

§ 1836. If the instrument sued on is pleaded as having been made to the partners as such or is executed under an apparent firm name it is sometimes necessary to allege partnership in order to connect the partners with the instrument. Dessaint v. Elling, 31 M. 287; Birdsall v. Fischer, 17 M. 100 G. 76; Hayward v. Grant, 13 M. 165 G. 154.

§ 1837. Miscellaneous cases: Fetz v. Clark, 7 M. 217 G. 159; Boosalis v. Stevenson, 62 M. 192; McKasy v. Huber, 65 M. 9 (a general denial puts in issue an allegation of partnership); Dessaint v. Elling, 31 M. 287 (allegation of partnership held to be put in issue by a specific denial); Peek v. Snow, Church & Co., 47 M. 398 (counterclaim); Shackleton v. Kneisley, 48 M. 451 (action for an accounting and to wind up partnership—complaint held sufficient); Wilcox v. Comstock, 37 M. 65; Little v. Simonds, 46 M. 380 (counterclaim).

§ 1838. "In all actions brought by any persons as copartners, upon any contract, verbal or written, made or entered into by or between the defendant and the plaintiff as copartners, it shall not be necessary to prove on the trial of the cause that the persons named as plaintiffs were, at the time of making such contract, or any time subsequent thereto, the persons composing such copartnership, unless the defendant shall in his answer expressly deny that the persons named as plaintiffs are or were such partners." G. S. '94, § 5255. Hardin v. Jamison, 60 M. 348; McKasy v. Huber, 65 M. 9. A denial upon information and belief is insufficient. G. S. '94, § 5256.

Payment.

§ 1839. Esch v. Hardy, 22 M. 65 (plea of payment held in-

sufficient); Colter v. Greenhagen, 3 M. 126 G. 74 (held sufficient).

Platting.

§ 1840. Cathcart v. Peck, 11 M. 45 G. 24 (how alleged).

Principal and agent.

§ 1841. Weide v. Porter, 22 M. 429 (in pleading a contract made by a duly authorized agent for and on behalf of his principal, it is sufficient to aver it as the contract of the principal, without disclosing the fact of agency); Stees v. Kranz, 32 M. 313 (an allegation in a complaint that by a lease, of which a copy is attached, the plaintiff "demised, leased, and let" the premises, includes the authority of an agent by whom the lease appears to have been executed on the part of the plaintiff); Scone v. Amos, 38 M. 79 (under a general denial the defendant may prove that a contract alleged to have been executed by him was, to the knowledge of the plaintiff, executed by him in behalf of a principal); Hillis v. Stout, 42 M. 410 (complaint of principal against agent for fraud held sufficient); Davenport v. Ladd, 38 M. 545 (agency insufficiently alleged); Janney v. Boyd, 30 M. 319 (an allegation of authority may be established by ratification); Lee v. Ry. Co., 34 M. 225 (in pleading an act done by a principal through an agent the agency may be ignored); Marshall v. Gilman, 52 M. 88 (an allegation of notice to a party may be sustained by proof of a notice to an authorized agent, although the agency be not pleaded).

Receiver—action by—allegation of appointment.

§ 1842. "An allegation in general terms by the plaintiff that at such a time, in such an action or proceeding and by such a court or officer he was duly appointed receiver of the estate of such a person is sufficient." Rossman v. Mitchell, 73 M. 198. See Sawyer v. Harrison, 43 M. 297; Tvedt v. Mackel, 67 M. 24; Nelson v. Nugent, 62 M. 203; Northern Trust Co. v. Jackson, 60 M. 116.

Recognizance—action on.

§ 1843. State v. McGuire, 42 M. 27 (complaint held sufficient).

Reformation of instrument.

§ 1844. Ham v. Johnson, 51 M. 105 (complaint held sufficient); Newman v. Home Ins. Co., 20 M. 422 G. 378 (complaint held sufficient); Lahiff v. Loan Asso., 61 M. 226 (counterclaim in action to reform mortgage); Hall v. Leland, 64 M. 71 (answer considered).

Replevin bond—action on.

§ 1845. Boom v. St. Paul Mfg. Co., 33 M. 253 (judgment not a condition precedent).

Rescission of contract.

§ 1846. Knappen v. Freeman, 47 M. 491 (essentials of complaint); Hodsden v. Hodsden, 69 M. 486 (fraud insufficiently pleaded); Foster v. Landon, 71 M. 494 (for fraud—complaint held sufficient).

School district.

§ 1847. Ryan v. School District, 27 M. 433 (action against by teacher—requisites of complaint); Soule v. Thelander, 31 M. 227 (existence of—how alleged).

Slander of title.

§ 1848. Wilson v. Dubois, 35 M. 471 (complaint held insufficient).

Statute of foreign state.

§ 1849. In pleading a right claimed under the statute of another state, the statute must be set out at length. Becht v. Harris, 4 M. 504 G. 394; Myers v. Ry. Co., 69 M. 476.

§ 1850. The laws of another state, as to pleading and proof, stand upon the same footing as any other facts, and are not required to be pleaded when they are mere matters of evidence. Thomson-Houston Electric Co. v. Palmer, 52 M. 174. See Nichols & Shepard Co. v. Minnesota etc. Co., 70 M. 528.

Subrogation.

§ 1851. Knoblauch v. Foglesong, 37 M. 320 (answer setting up right to); Barton v. Moore, 45 M. 98 (preceding case followed).

Supersedeas bond—action on.

§ 1852. Estes v. Roberts, 63 M. 265 (complaint held sufficient).

Suretyship.

§ 1853. Kimmel v. Lowe, 28 M. 265 (complaint of surety against principal for reimbursement held sufficient); Washington Slate Co. v. Burdick, 60 M. 270 (surety must allege that extension was made without his consent); Farrell v. Fabel, 47 M. 11 (answer in action on surety bond held insufficient); Leonard v. Swanson, 58 M. 231 (surety when sued for debt may demand in his answer surrender of securities); First Nat. Bank v. Rogers, 13 M. 407 G. 376 (surety may set up any defence available to the principal); Huey v. Pinney, 5 M. 310 G. 246 (answer setting up an extension as a defence held sufficient); Becker v. Northway, 44 M. 61 (setoff); Fidelity & Casualty Co. v. Eickhoff, 63 M. 170 (action by surety company against party for whose conduct the company was bound—complaint held sufficient); Fidelity & Casualty Co. v. Lawler, 64 M. 144 (preceding case followed); St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 M. 486 (answer held to plead a release).

Taxation.

§ 1854. Webb v. Bidwell, 15 M. 479 G. 394 (action for the redemption of land sold for taxes—requisites of complaint); Wade v. Drexel, 60 M. 164 (no formal pleadings necessary in proceedings under Laws 1893, ch. 118); St. Peter's Church v. Commissioners, 12 M. 395 G. 280 (when a complaint attacks the validity of a tax it must show it illegal); Willard v. Commissioners, 22 M. 61 (requisites of complaint in action to test validity of forfeiture of land to state for taxes); Knudson v. Curley, 30 M. 433 (requisites of complaint to set aside a tax sale and tax certificate as a cloud upon title).

Tax titles.

§ 1855. It is the general rule that where a tax title is pleaded specially all the facts essential to its validity must be alleged. This rule is not affected by the statute making

a tax certificate *prima facie* evidence of regularity. Russell v. Mann, 22 Cal. 131; Durrett v. Stewart, 88 Ky. 665.

§ 1856. Laws 1897, ch. 266, authorizes a special action to test the validity of tax titles. The following form of complaint is sufficient under this statute. Lewis v. Bartleson, 39 M. 89.

The plaintiff complains of defendant and alleges:

I. That he is the owner in fee [and in possession] of [describing premises as in a deed], in the county and state aforesaid.

II. [That said premises are vacant and unoccupied.]

III. That defendant claims a title or interest in said premises or lien thereon adverse to plaintiff, by or through certain tax certificates or tax deeds.

Wherefore plaintiff demands judgment:

(1) That said tax certificates or tax deeds are void.

(2) For the costs and disbursements of this action.

§ 1857. The defendant, in response to this form of complaint, must come forward and disclose in his answer any tax titles or liens which he may have. He cannot content himself with general allegations of ownership, but must allege compliance with all the statutory requirements essential to the validity of his title or lien. The plaintiff, in his reply, is governed by the general rules of pleading. If the defendant, in his answer, has alleged all the facts essential to constitute, *prima facie*, a valid tax title or lien, the plaintiff, in his reply, must allege facts in avoidance. Under a general denial he cannot prove facts in avoidance consistent with the existence of the facts alleged in the answer.

§ 1858. The action under the statute is in many respects anomalous, and is governed by substantially the same rules as the statutory action to determine adverse claims. A party wishing to contest an outstanding tax title has an election to proceed under either statute. The advantage of proceeding under this statute is that the defendant is compelled to plead his title specifically. On the other hand, the action to deter-

mine adverse claims entitles the plaintiff to a more comprehensive judgment. See under this statute: Sanborn v. Mueller, 38 M. 27; Lewis v. Bartleson, 39 M. 89; Sharp v. Merril, 41 M. 492; O'Connor v. Finnegan, 60 M. 455; Kipp v. Hagman, 73 M. 5.

Treasurer's bond—action on.

§ 1859. County of Waseca v. Sheehan, 42 M. 57 (action by county without leave of court).

Trust.

§ 1860. Cheever v. Converse, 35 M. 179 (action to enforce—grantee may plead adverse title); Petzold v. Petzold, 53 M. 39 (action to enforce resulting trust—requisites of complaint).

Usury.

§ 1861. Cleveland v. Stone, 51 M. 274 (action to cancel as usurious a mortgage on real estate—requisites of complaint); Stevens v. Staples, 64 M. 3 (answer held to state a defence to the charge of usury); Endres v. First Nat. Bank, 66 M. 257 (complaint against national bank to recover penalty—held to state a cause of action); Stein v. Swensen, 44 M. 218 (an assignee in insolvency may assert the invalidity of mortgages by reason of usury upon the assigned property given by the assignor); Fredin v. Richards, 61 M. 490 (complaint in action to recover principal and interest held insufficient); Central etc. Asso. v. Lampsen, 60 M. 424 (essentials of pleading setting up usury); Birch v. Security Loan Asso., 71 M. 112 (complaint for cancellation of instrument on the ground of usury held sufficient); Mathews v. Missouri etc. Trust Co., 69 M. 318 (complaint for cancellation of instrument on the ground of usury need not offer to return money received).

Vendor and purchaser.

§ 1862. Denton v. Scully, 26 M. 325 (action by vendor to forfeit bond for deed—complaint held sufficient); Walter v. Hanson, 33 M. 474 (complaint in action to have declared and enforced a vendor's lien for the purchase money of real estate held sufficient); Paget v. Barton, 58 M. 510 (complaint to enforce vendor's lien for purchase money held sufficient); Fleck-

ten v. Spicer, 63 M. 454 (action by vendee against vendor upon failure of title—damages, etc); Lathrop v. O'Brien, 44 M. 15 (complaint by vendor for breach of contract held sufficient); McManus v. Blackmarr, 47 M. 331 (complaint for recovery of money paid held insufficient); Dahl v. Pross, 6 M. 89 G. 38 (cancellation of bond for deed—allegation of tender of performance held sufficient); Sennett v. Shehan, 27 M. 328 (complaint to recover money paid held insufficient).

Videlicet—to wit.

§ 1863. The office and effect of the phrase "to-wit" or *videlicet*, is to particularize what is too general in a preceding sentence, and render clear and of certain application what might seem otherwise doubtful or obscure. Buck v. Lewis, 9 M. 314 G. 298; Sawyer v. Wallace, 47 M. 395.

Warranty—general rules.

§ 1864. In pleading a warranty it should appear that the warranty was made in connection with and in consideration of the sale. Lincoln v. Ragsdale, 7 Ind. App. 354. The fact of warranty should be averred unequivocally. Zimmerman v. Morrow, 28 M. 367. It is the better practice to allege directly that defendant "warranted," and this alone is sufficient. Hoe v. Sanborn, 21 N. W. 552. A breach of the warranty must be alleged, but it is generally sufficient to do so by simply negativing the warranty. Wheeler v. Wheelock, 33 Vt. 144; Leeper v. Shawman, 12 Ind. 463. It must affirmatively appear that the plaintiff relied upon the warranty in making the purchase. Torkelson v. Jorgenson, 28 M. 383; Zimmerman v. Morrow, 28 M. 367; Richardson v. Coffman, 87 Iowa, 121. It must appear that plaintiff has suffered pecuniary damage. A general allegation is ordinarily sufficient, but if special damages have been suffered, they must be pleaded specially. Meachem v. Cooper, 36 M. 227; Frohreich v. Gammon, 28 M. 476. In the case of a general warranty the pleading need not state whether it was express or implied. Hoe v. Sanborn, 21 N. Y. 552. It is not necessary to allege *scienter*, and if alleged, it need not be proved. Wilson v. Fuller, 58 M. 149; Shippen v. Bowen,

122 U. S. 575. It is neither necessary nor proper to allege that the warranty or representations were fraudulently made. A party cannot so state a single cause of action as to recover either for deceit or breach of warranty. If an allegation of fraud is introduced, it may be stricken out on motion, or the party compelled to elect to proceed either for the tort or breach of contract. Marsh v. Webber, 13 M. 109 G. 99. But if no objection by motion is made to such a double pleading, the pleader may recover either for deceit or breach of warranty. Marsh v. Webber, 13 M. 109 G. 99; Johnson v. Wallower, 15 M. 472 G. 387; Wilson v. Fuller, 58 M. 149; Brown v. Doyle, 69 M. 543. While a party cannot state a single cause of action so as to recover either for deceit or breach of warranty, he may join in the same complaint a cause of action for deceit and a cause of action for breach of warranty, if they arise out of the same transaction. Humphrey v. Merriam, 37 M. 502.

Warranty—miscellaneous decisions.

§ 1865. Finley v. Quirk, 9 M. 194 G. 179 (action for warranty of horse—under a denial of warranty, held that defendant could not prove that contract was made on Sunday); Johnson v. Wallower, 15 M. 472 G 387 (upon a complaint alleging a breach of warranty, and also fraudulent false representations in the sale of personal property, the plaintiff may recover upon the warranty without proof of the fraud—defence held inadmissible because not pleaded); Frohreich v. Gammon, 28 M. 476 (necessity of pleading special damages); Zimmerman v. Morrow, 28 M. 367 (complaint for breach of warranty of horse held insufficient); Stevens v. Johnson, 28 M. 172 (in an action on non-negotiable instruments for the payment of money, a breach of warranty on the part of the parties to whom the instruments were originally given, in reference to an article of personal property, in consideration of the sale of which the instruments were executed, may be pleaded and proved as a defence of partial want of or failure of consideration); Geiser etc. Co. v. Farmer, 27 M. 428; Minneapolis Harvester Works

v. Bonnallie, 29 M. 373 (in an action on one of several notes given for a chattel, the defendant, alleging a breach of warranty, may interpose a counterclaim for his entire cause of action for damages growing out of the alleged false warranty); Thoreson v. Minneapolis Harvester Works, 29 M. 341 (defective allegation of breach of warranty—plaintiff may bring action before having paid purchase price); Pullen v. Wright, 34 M. 314 (insufficient denial of warranty—necessity of proving damages); Meachem v. Cooper, 36 M. 227 (general allegation of damages sufficient to admit proof of general damages); Bausman v. Eads, 46 M. 148 (a grantor of real estate by warranty deeds, sued with his grantees in an action to set aside the title which he assumed to have and convey, may defend in his own name for the defendants served but not answering); Schurmeier v. English, 46 M. 306 (action for price—counterclaim for breach of warranty); Massachusetts etc. Co. v. Welch, 47 M. 183 (chattel mortgage for purchase money—action to foreclose—counterclaim for breach of warranty); Dean v. Howard, 49 M. 350 (demurrer to part of an answer setting up breach of warranty overruled); Aultman & Co. v. Falkum, 51 M. 562 (answer held to set up breach of warranty); Wagner v. Finnegan, 54 M. 251 (in an action for the breach of the covenant of warranty the complaint must allege facts showing an eviction, actual or constructive); Aultman & Co. v. Torrey, 55 M. 492 (a breach of warranty may be the subject of counterclaim, or it may be set up as a defence by way of recoupment, in an action for the purchase price of property sold with warranty); Allen v. Swenson, 53 M. 133 (answer held to state a defence in nature of breach of warranty); Brown v. Doyle, 69 M. 543 (where the plaintiff alleges that certain representations amounting to a warranty, were fraudulently made, and proves the warranty and its breach, but fails to prove the fraud, he may recover for the breach of warranty—interest recoverable from time of breach).

Waste.

§ 1866. Curtiss v. Livingston, 36 M. 380 (complaint held sufficient).

INDEX

Abatement—Matter in.
no proper plea in abatement, 482.
is new matter, 482.
objection may be raised by demurrer, 388.
may be joined with defences in bar, 482.
waiver of, 780.
Abatement of actions.
general rules, 202–213.
actions for personal injuries, 1191, 1206.
Abatement of causes of action.
in what cases, 217–219, 1191, 1206.
Accord and satisfaction.
is new matter, 483.
Account.
how pleaded, 341.
items of running account one cause of action, 1383.
for goods sold and delivered, complaint, 1377.
for services rendered, complaint, 1777.
Account stated.
form of complaint in action on, 783.
parties to action on, 151.
notes on action, 784–787.
incorrectness of new matter, 785.
Accounting.
parties to action for a, 150.
pleading in action for, 1790.
Action.
one form of in this state, 4–8.
common law forms of abolished, 6.
distinction between legal and equitable abolished, 8.
cause of action, defined, 285.
subject of action, defined, 287, 562.
object of, 287.
Action prematurely brought.
new matter, 484.
ground for demurrer, 408.
Adequate remedy at law.
waiver of objection, 374.
in connection with equitable defences, 590.
Administrator. See Executors and administrators.

Admissions.
express, 465.
coupled with general denial, 462.
by failure to answer, 466, 467.
by failure to reply, 595, 603–607.
none by pleading counterclaim, 575.
by demurring, 400.
by motion for judgment on the pleadings, 773.
control denials, 453.
hypothetical, 481.
of execution of instrument, 1157.
Adverse claims—Actions to determine.
forms of complaints and answers in, 891–896.
history of statute, 897.
statute, 897.
general nature and object of action, 898.
kinds of interests determined, 900, 901.
who may maintain action, 902.
complaint,
generally, 904.
when plaintiff is in possession, 906.
when land is vacant, 907.
burden of proof,
generally, 910.
when plaintiff is in possession, 911–914.
when land is vacant, 915–917.
answer, general nature of, 918–923.
reply, 924.
second trial of right, 925.
statute of limitations, 926.
right to jury trial, 927.
disclaimer, 928.
judgment on the pleadings, 929.
judgment, 930.
parties to action, 152.
will lie to determine a single claim, 901.
equitable title,
in plaintiff, 902.
in defendant, 921, 924.
Affidavit of merits.
rule of court, 23, 24.
Agents. See Principal and agent.
Aggravation of damages.
necessity of pleading matter in, 371.
Agreements. See Contracts.

Aider.
by answer, 746.
by reply, 749.
by verdict, 750.
Aliens.
when may sue and be sued, 27.
Allegations.
upon information and belief, 280.
proofs must correspond with, 670.
admitted by failure to deny, 466, 467, 595, 603–607.
material, what are, 292, 466.
immaterial, effect of, 294.
denial of, raises no issue, 467.
in one count not aided by those of another, 272.
in one defence not aided by those of another, 475.
must be direct and positive, 305.
hypothetical, 309.
inferential, 305, 307.
argumentative, 305, 307.
alternative, 309.
of fact, 303.
of law, 302.
Alteration of instruments.
new matter, 485.
Alternative allegations.
rule against, 309.
Ambassadors.
cannot be sued, 27.
Ambiguity.
resolved against pleader, 735–737.
Amendment.
general rules,
time when amendment takes effect, 685.
must introduce matter existing prior to pleading, 685a.
effect of amendment, 686.
statute of limitations, 687, 688.
not necessary to answer amended complaint, 689.
notice of trial not affected by, 690.
amendments of course,
before service of answer, demurrer, or reply, 691.
when right expires, 691.
after service of answer, demurrer, or reply, 692.
when right expires, 693.
scope of amendment of course,
new cause of action, 694.

new defence, 695.
demurrer changed to answer and vice versa, 696.
to defeat demurrer or motion to correct, 697.
illustrations of, 698.
but one allowed, 699.
amendments by order of court, generally,
statute, 700.
a matter of discretion, 701.
statute liberally construed, 703.
in furtherance of justice, 704.
unconscionable defences, 705.
must be material, 706.
allowance affected by time of motion, 707.
terms, 708.
motion for, how made, 709.
order for, service of, 710.
amendments before trial, by order of court,
scope of,
new cause of action, 711.
new defence, 712.
great liberality shown, 713.
amendments on the trial by order of court,
a matter of discretion, 714.
new cause of action, 715.
new defence, 718.
general rule as to permissible amendment, 720.
illustrations of allowable, 721–726.
cannot change capacity in which party is sued, 723.
amendments after verdict, 727.
judgment, 728.
appeal, 730.
how made, 731.
Another action pending.
form of plea, 931.
nature of defence, 932.
in what cases allowed, 933–942.
dismissal of prior action as a defence, 940.
new matter, 486.
Answer.
formal parts of, 782.
function of, 430.
must be responsive to complaint, 431.
joint, 432, 433.
statutory regulations, 434.
general denial, 435. See General denial.

form of, 436.
effect of, 437.
evidence admissible under, 439.
qualified, 462.
coupled with admissions, 462.
specific denial, 441.
must be complete defence in form and substance, 442.
how made, 443.
forms of, 444.
control general, 452.
must leave no room for doubt, 443.
denials of knowledge or information, 445–447.
forms of, 448.
denials upon information and belief, 449, 450.
forms of, 451.
denials controlled by admissions, 453.
negative pregnants, 454–458.
argumentative denials, 459.
coupled with general denials, 460.
effect of, 461.
admissions by failure to deny, 466.
express admissions, 465.
non-traversable allegations, 467.
demand of judgment in, 468.
hypothetical statements or admissions in, 481.
defences in nature of new matter. See New matter.
equitable defences. See Equities.
demurrer to, 420–424.
forms of, 425, 426.
objections to on the trial, 768–777.
Anticipating defences.
statute of limitations, 311.
statute of frauds, 312.
striking out such matter, 313.
rendering complaint demurrable by, 314.
contributory negligence, 1645.
assumption of risk, 1645.
Arbitration and award.
new matter, 487.
Argumentative allegations.
rule against, 305.
when traversable, 308.
when complaint containing, demurrable, 307.
Argumentative denials.
rule against, 459.

coupled with general, 460.
effect of, 461.
Assault and battery.
form of complaint, 944.
Assignee of insolvent.
may be sued without leave of court, 27.
may sue in his own name, 50.
may avoid fraudulent conveyances, 1244–1247.
Assignee of thing in action.
must sue in his own name, 31, 215.
substitution of, 210.
rights and obligations of. See Assignment of things in action.
parties in action against, 153.
Assignment of things in action.
common law rule, 214.
assignee must sue in his own name, 31, 215.
test of, assignability, 216.
rights of action ex contractu, 218.
ex delicto, 219.
partial, 220.
mode of, 221.
effect of, 222.
assignee takes subject to defences and setoffs, 223, 224.
of mortgage, 225.
overdue commercial paper, 226.
latent equities, 227.
estoppel, 228.
notice of, 229, 230.
conflict between several assignees, 231.
carries securities and remedies, 232.
assignee takes free of counterclaims, 224, 545.
allegation of assignment held sufficient, 1467, 1686.
Attachment.
nature of proceeding, 948.
a proceeding in rem, 949.
an ancillary proceeding, 950.
construction of statute, 951.
a matter of right, 952.
in what actions allowed, 953, 955.
at what time may issue, 956.
jurisdiction, how acquired, 957, 958.
who may allow writ, 959, 960.
property subject to, 961–972.
affidavit for,
statute, 973.

rules governing, 976–983.
form of, 984.
indemnifying bond,
statute, 985.
rules governing, 986–991.
form of, 992.
writ of,
statute, 995.
rules governing, 996–998.
form of, 999.
execution of, 1000.
sheriff may sell perishable property, 1001.
levy gives sheriff a special property, 1002.
return of officer, 1003.
judgment in main action, effect on attachment, 1004, 1005.
claim of property by third party,
statute, 1006.
in what cases applicable, 1007.
affidavit and notice,
rules governing, 1008–1011.
form of, 1012.
impleading obligors on bond with sheriff, 1013.
bond for release of,
statute, 1014.
rules governing, 1015–1021.
form of, 1022.
order releasing property, 1022.
motion to vacate,
statute, 1023.
when may be made, 1024.
upon notice, 1025.
who may move, 1026–1029.
effect of failure to move, 1030.
waiver of right by releasing property on bond, 1015.
practice on hearing, 1031–1036.
grounds for vacating, 1037–1039.
burden of proof, 1040–1041.
amendment of complaint and affidavit, 1042.
possession of property pending appeal, 1043, 1044.
appeal, 1045.
question in supreme court, 1046.
malicious, 1557.
Attorneys.
must subscribe pleadings and papers, 13, 17.
must give their address, 17.

actions by and against, 1792.
Auditor—County.
actions against, 1793.
Bank check.
form of complaint on, 1670.
Bankruptcy.
defence of discharge in, new matter, 492.
Bar.
pleas in, joined with pleas in abatement, 482.
of former judgment, how pleaded, 1500.
Bill of particulars.
statute, 341.
in what cases demandable, 342–344, 1103.
remedy for failure to furnish, 345.
objection to sufficiency of, 346.
waiver of demand for, 347.
Bills of exchange.
pleading in action on, 1794.
Bona fide purchaser.
new matter, 448.
may be raised by demurrer, 408
defence of, how pleaded, 1795.
burden of proof, 886.
Bonds.
form of complaint in action on, 1047.
parties in actions on, 154.
rules of pleading, 1048–1055.
statute of limitations, 1056.
municipal, 1831.
Breach of promise.
complaints for, 1057–1059.
notes on action for, 1060, 1061.
Bringing in parties.
general rule, 194, 195, 197.
Broker.
actions by for services, 1796.
Building contract.
action for extras, 1797.
Cancellation of instruments.
parties in actions for, 155.
rules of pleading, 1861.
new matter, 489
Cause of action.
defined, 285–287.
running account a single, 1383.

code does not affect, 7, 8.
facts constituting, 288–291.
prayer for relief no part of, 373.
counterclaims must be. 540.
one in two or more counts, 275.
Certainty. See Indefinite pleadings.
Certiorari.
parties in, 156.
Cestui que trust.
need not be joined with trustee, 48.
Check.
complaint in action on, 1670.
Child. See Infants.
action by father or mother for injuries to, 117.
Choses in action. See Assignment of things in action.
Claim and delivery.
complaints in, 788–790.
bond of plaintiff, form of, 794.
bond of defendant for release of property, form of, 795.
exception to sureties, 796.
justification of sureties, 797.
nature of action, 798.
waiving wrongful taking and suing as for detention, 800.
subject-matter of action, 801.
object of action, 803.
title of plaintiff necessary to maintain, 804.
against whom brought, 807.
one tenant in common against a cotenant, 806.
pleadings.
allegation of title, 811.
of right of immediate possession, 814.
of demand, 816.
that taking was wrongful. 817.
that detention is wrongful, 818.
describing property. 815.
of place of detention, 819.
of possession and detention by defendant, 820.
of value, 821.
complaints considered as to sufficiency, 822.
answer—defences, 823.
reply, 828.
general denial, 829.
facts admissible under, 829, 830.
counterclaim. 842.
effect of not claiming immediate delivery, 831.

dismissal of right, 832.
proof of demand, 835.
waiver of demand, 834.
burden of proof, 835.
damages, generally, 836–841.
bar of judgment for conversion, 843.
jurisdiction of justice of the peace, 844.
affidavit,
forms of, 791, 793.
rules governing, 810.
verdict,
general effect of, 845.
form of, assessing property and damages, 846.
assessment of interest of special owner, 848.
assessment as of what time, 849.
judgment,
in the alternative, 850.
right to in all cases, 854.
waiver of judgment for value, 855.
miscellaneous cases, 856.
parties, 186.
joinder of causes of action in, 248.
notice of claim by third party, 1006.
Cloud on title.
actions to remove, 1798, 901.
parties, 157.
Code.
rights and remedies unaffected by, 7.
creates a complete system of pleading, 10.
Code pleading.
fundamentally same as common-law pleading, 9.
regulated by statute, 10.
Common carrier.
actions against, 1799.
Common counts.
complaints in the nature of,
for goods sold and delivered, 1377.
for services rendered, 1777.
insufficient, for money had and received, 1622.
Common-law pleading.
fundamentally same as code pleading, 9.
rules of, not now authoritative, 10.
Complaint.
statutory regulations, 268, 269.
title of action, 270.

formal parts of, 782.
several causes of action in single complaint, 271.
counts, 271, 272.
inducement, matter of, 273.
separate statement of several causes of action, 271, 274.
several counts for same cause of action, 275.
duplicity, 275.
speaks as of what time, 276.
labeling, 277.
paragraphing, 278.
language employed in, 279.
technical terms in, 279.
allegations on information and belief, 280.
theory of case, 275, 281–284.
facts constituting cause of action to be alleged, 285.
only material facts to be alleged, 292, 295, 296.
every material fact to be alleged, 293.
plaintiff should limit himself to prima facie case, 295.
evidence not to be pleaded, 296–298.
facts to be alleged as they occurred, 299.
alleging facts according to legal effect, 299.
conclusions of law not to be pleaded, 302–304.
facts must be alleged directly, 305.
inferential allegations, 305–308.
hypothetical allegations, 309.
alternative allegations, 309.
anticipating and negativing defences, 310–314.
facts which need not be alleged.
    such as the court will judicially notice, 315.
    such as the law will presume or infer, 316.
    to show regularity or legality, 317.
written contracts, pleading by copy, 319.
exhibits, 320.
title, how pleaded, 321–324.
illegality, how pleaded, 325.
conditions precedent, 326–333.
conditions subsequent, 334.
time, 335–338.
place, 340.
venue, 340.
account, 341–347.
bill of particulars, 341.
judgments, how pleaded, 348.
statutes, how pleaded, 349.
municipal ordinances, how pleaded, 350.

fraud, how pleaded, 351–354.
duress, how pleaded, 355.
mistake, how pleaded, 356.
value, when material, 357.
damages, 359–371.
prayer for relief, 372–378. See Relief.
verification, 379–384. See Verification.
cross-complaints, 385.
objections to on the trial, 759–767.
Composition agreement.
parties to action on, 159.
Conclusions of law.
rule against, 300.
allegations held conclusions of law, 302.
allegations held of fact, 303.
effect of pleading conclusions of law, 304.
Conditions precedent.
necessity of pleading, 326, 1076.
waiver of, 327.
how pleaded under statute, 328, 1461.
how pleaded generally, 330.
effect of not pleading, 331.
objection, how raised, 332, 333.
Conditions subsequent.
performance of need not be pleaded, 334.
Confession and avoidance.
matter in, must be pleaded, 440, 472.
Consent of court.
before suing on domestic judgment, 1481.
before suing receiver or assignee, 27.
how pleaded, 1481.
Consideration. See Contracts.
Consolidation of actions.
statute, 248.
instances of, 1616.
Conspiracy.
parties to actions for, 158.
pleadings in actions for, 1800.
Construction of pleadings.
statutes, 15, 732.
all pleadings to be liberally construed, 732–734.
common-law rules abrogated, 733.
doubts resolved against pleader, 735–737.
as affected by time, 738.
on motion before trial, 739.

on demurrer, 307, 735, 740, 741.
on trial, 742, 761, 766.
on motion in arrest of judgment, 743.
on appeal, 744.
of parties, 745.
aider by answer, 746.
reply, 749.
verdict, 750.
voluntary litigation, 682.
a question for the court, 751.
specific allegations control general, 752.
according to language used, 753.
words, when to be taken in popular sense, 754, 755.
to be construed as a whole, 756.
actions construed as ex contractu rather than ex delicto, 758.
specific denials control, 452.
joint pleading construed as made by all, 432, 433, 395.
Contracts.
how alleged,
according to legal effect, 1062.
in haec verba, 1063.
written, by copy, 319.
how much of, 1064.
modified contract, 1065.
as either express or implied, 1066.
implied, 1067.
execution, 1068.
consideration,
necessity of pleading, 1069.
how pleaded, 1070.
want of, under general denial, 1083.
want of, new matter when, 524.
want of, how pleaded, 1084.
failure of, new matter, 524.
breach, 1072.
performance, 1073.
excuse for non-performance, 1074.
statute of frauds,
not necessary to allege contract to be in writing, 1075.
necessity of pleading, 1085, 1086.
how pleaded, 1087–1090.
demand, 1076.
promise to pay on demand, 1077.
several promises, 1078.
joint, 1079.

denial of execution, 1080–1082.
Conversion.
form of complaint for, 1091.
pleadings in action for.
allegation of ownership, 1092.
of taking by defendant, 1093.
of right of immediate possession, 1093.
of conversion, 1094–1097.
of value, 1098.
of demand and refusal, 1099.
general denial, 1101, 1102.
complaints considered, 1100.
bill of particulars, 1103.
defences,
title in third party, 1102, 1104.
honest error of defendant as to title, 1105.
former judgment in action for possession, 1106.
consent of plaintiff to, 1108.
offer to return property, 1109.
consistency of, 1110.
necessity of demand, 1111.
burden of proof, 1113.
definition of, 1114–1117.
of property attached to realty, 1117.
essentials of a cause of action for, 1118.
object of action, 1120.
effect of claiming possession, 1121.
waiving trespass, 1122.
intent or motive of defendant, 1123.
who liable for, 1124–1126.
who may maintain action, 1127.
damages.
general rule, 1129.
when property has been enhanced by labor of defendant, 1130.
when conversion of part only, 1131.
expenses of suit, 1132.
special owner, 1133, 1134.
mitigation of, 1135, 1136.
exemplary, 1137.
special, 1138.
treble, 1139.
cases.
actions against sheriff, 1140.
by mortgagor against mortgagee, 1141.

by mortgagor against stranger, 1142.
by mortgagee, 1143, 1145.
by holder of seed grain note, 1146.
against elevator companies, 1147.
miscellaneous, 1148.
waiving tort and suing on implied contract, 240.
fraudulent vendee may be sued as for, 242.
Copies of pleadings.
must be legible, 18.
when originals lost, 14.
Corporations.
general rules,
alleging corporate existence, 1149.
statutory mode of alleging corporate existence, 1150.
compliance with state laws by foreign corporation, 1151.
denial of corporate existence, 1152, 1153.
capacity to make contract alleged, 1154.
not necessary to name officers by whom a corporate act was done, 1155.
change of name, 1156.
admission of corporate power, 1157.
actions to enforce stock subscriptions,
essentials of complaint, 1158.
actions under chapter 76,
who may bring sequestration proceedings, 1159.
who may bring action to enforce liability of stockholders, 1162–1166.
parties defendant, 1167.
general nature of action, 1172–1177.
liabilities enforceable in, 1178.
powers of receiver, 1179.
rights of creditors to recover assets, 1180.
what will prevent sequestration proceedings, 1181.
what will prevent stockholder's liability action, 1182.
miscellaneous decisions, 1183.
questions of pleading in, 1184.
actions under G. S. '94, § 5900, and Laws 1895, ch. 145, 1185.
actions under G. S. '94, §§ 3430–3435, 1186.
actions under G. S. '94, §§ 2600–2602, 1187.
actions under G. S. '94, §§ 2822–2825, 1188.
parties generally,
as plaintiffs in actions on contract, 77–80.
as defendants in actions on contract, 104–107.
as defendants in actions for torts, 139.
miscellaneous decisions, 160.

must sue and be sued in corporate name, 77, 104.
may sue or be sued on contracts not under their seal, 78, 105.
may sue or be sued on executed contracts ultra vires, 79, 106.
may sue and be sued after dissolution, 80, 107.
stockholders cannot sue for, 77.
Counterclaim.
statute, 434.
essentials of,
must be an independent cause of action, 540.
must exist in favor of party pleading it, 541.
must exist against plaintiff, 545.
must exist at commencement of action, 548.
must lessen or defeat recovery of plaintiff, 550.
must exist against a plaintiff and in favor of a defendant, 551.
must either,
arise out of contract set forth in complaint, 560.
arise out of transaction set forth in complaint, 561.
be connected with subject of action, 562–565.
or in an action on contract arise out of contract, 566.
historical statement, 525.
setoff and recoupment compared, 526.
definition of, 527.
does not lie to a defence, 529.
compared with defence, 531.
with setoff, 532.
with recoupment, 533.
with equitable setoff, 536.
judgments are contracts within rule, 567.
waiving tort, 568, 571.
when a tort may be set off, 569–571.
construction of statute, 572.
several counterclaims may be pleaded, 573.
must be pleaded separately, 19, 573, 584.
effect of failure to plead, 574.
pleading of, not an admission, 575.
in case of assignment of things in action, 545.
want of necessary parties as defence, 420, 558, 585.
may be either equitable or legal causes of action, 434, 540.
where there is an election between tort and contract, 568.
cannot be set up in a reply, 581, 601.
demurrer to, 420, 421, 426, 583–586.
buying up claims to use as, 548, 549.
one right of action cannot be set up as a bar to another, 530.
rules as to pleading counterclaims, 577–586.
must be pleaded as such, 577, 582.

subject-matter of, stated as in a complaint, 578.
matter pleaded as counterclaim used for defence, 580.
admitted if not denied in reply, 582.
objection that matter does not constitute a counterclaim, 583.
objection that two counterclaims are not stated separately, 584.
objection of want of necessary parties, 585.
objection that facts stated do not constitute cause of action, 586.
relief awarded, 587, 588.
cannot be set up in unlawful detainer cases, 1519.
Counts. See Common counts.
definition of, 271.
each must be complete in itself, 272, 273.
several for same cause of action, 275.
Court.
discretion of, over pleadings, 16.
Covenants.
actions for breach of, 1801.
Creditors' suits. See Fraudulent conveyances.
Cross-complaints.
when allowable, 385.
Damages.
necessity of pleading, 359.
general damages, definition of, 363.
special damages, definition of, 364.
necessity of pleading, 365.
how pleaded, 366.
waiver of failure to plead, 367.
how pleaded, generally, 368.
allegations of, not traversable, 369.
mitigation of, matter in need not be pleaded, 370.
aggravation of, matter in need not be pleaded, 371.
Daughter.
action by father or mother for seduction of, 116.
Death.
abatement of action by, 202, 1191, 1206.
Death by wrongful act.
forms of complaints, 1189, 1190.
statute, 1191.
construction of statute, 1192, 1193.
who may bring action, 1194, 1195.
who next of kin, 1196.
jurisdiction, 1197–1200.
complaint, 1201–1205.
defences, 1207–1209.

abatement of cause of action, 1206.
of action on death of injured person, 1191.
statute of limitations, 1210.
damages, 1211.
De bonis asportatis.
form of complaint for, 1747.
Deceit.
form of complaint for, 1212.
Dedication.
of land to public, 1802.
Default.
relief awarded upon, 376, 377.
Defect of parties.
general rules, 196–201.
new matter, 490.
Defective pleadings. See Formal defects.
Defences. See New matter—Equities.
nature of defensive matter, 469, 470.
pleader cannot set up defences belonging to another, 471.
when one of several obligors is sued, 471 (a).
must be pleaded, 472.
partial defences, 473.
party may plead several defences, 474.
must be consistent, 476, 1110.
each defence must be complete, 475.
each defence must be pleaded separately, 475.
matter in abatement, 482.
need not be anticipated, 310–314.
equitable, 589–597. See Equities.
effect upon, of assignment of things in action, 223.
of denial. See Answer.
statute, 434.
cause of action and defence thereto in same pleading, 314.
Demand.
how pleaded, 1803.
Demand of judgment. See Prayer for relief.
Demurrer.
definition, 386.
effect of, 387.
at common law and under code compared, 388.
statutory grounds, 389.
exclusive, 393.
general demurrer,
defects reached by, 390, 408, 266, 306, 307, 339.
form of, 391.

reaches only defects appearing on face of pleading, 394.
joint, must be good as to all demurrants, 395.
to whole of a pleading, 396.
to part of a pleading, 397, 474.
party cannot demur and answer at same time, 399.
admits the facts well pleaded, 400, 401.
runs through the record, 402.
defects not reached by demurrer, 404.
grounds of, must be specified, 405–409.
effect of overruling, 410.
pleading over, 411–414.
time of, 25.
effect of sustaining, 415.
amendment of pleading after, 416–419.
to answer, 420–424.
forms of, 425, 426.
to reply, 427, 428.
form of, 429.
forms of, 391, 392, 425, 429.
for misjoinder of parties, 199, 200.
for wrong intervention, 266.
when facts are alleged by way of recital, 306.
when facts are alleged inferentially, 307.
when complaint states a cause of action and also a defence thereto, 314.
defeating, by amending of course, 697.
construction of, 307, 735, 740, 741.
Denials. See Answer.
Departure.
rules against, 614–621.
Detinue.
compared with action under code for possession of chattels, 798.
Discharge in bankruptcy.
new matter, 492.
Discharge of obligation.
new matter, 491.
Discretion of court.
nature of, over pleadings, 16.
Dismissal.
for defective complaint, 759.
answer, 768.
of wrong intervention, 266.
voluntary, of intervention, 264.
when demurrer sustained, 415.
to defeat plea of former action pending, 940.

Divorce.
forms of complaints for, 1213–1216.
joinder of causes of action, 1217.
jurisdiction, 1218.
complaint, 1219–1224.
parties, 162, 163.
Double pleadings.
rule against, 275.
motion to correct, when must be made, 21.
Duly.
allegation that things were "duly" done, 303.
a short form of alleging performance, 328.
Duplicity.
rule against, 275.
motion to correct, when must be made, 21.
Duress.
how pleaded, 355.
Ejectment—Action in nature of.
impropriety of present use of term, 6.
complaints in, 857–861.
nature of action, 862, 863.
for what action will lie, 864
who may maintain, 865, 866.
recovery in on equitable title, 867.
title, how alleged, 868, 321.
possession of defendant, 873.
description of premises, 874.
re-entry unnecessary, 875.
general denial, 876.
equitable defences, 876 (a), 879.
title in third party, 878.
improvements and taxes recoverable in, 880.
estoppel, 881.
burden of proof, 884–886.
damages, 887.
judgment, 890.
parties, 164.
joinder of causes of action, 248, 887, 889.
a local action, 389.
Election.
how alleged, 1804.
Election of remedies.
definition of, 233.
finality of election, 234–237.
statute of limitations, 238.

between actions ex delicto and ex contractu, 239.
considerations affecting, 244.
upon sale with warranty, 245.
between statutory and common-law remedies, 246.
unlawful detainer, 1505.
between inconsistent causes of action, 254.
Elevator companies.
actions against for conversion of grain, 1147.
Eminent domain.
pleadings, 1805.
Employment. See Work, labor and services.
Equitable actions.
distinction between legal and, abolished, 5–8.
parties in, 144.
Equitable causes of action.
not abolished by code, 7.
joinder of, with legal causes, 248.
Equitable defences. See Equities.
Equitable relief. See Relief.
Equitable rights and remedies.
unaffected by code, 7.
enforced in same action as legal rights and remedies, 8.
Equitable setoffs.
when allowed, 536.
Equitable title.
plaintiff may recover possession upon, 867.
how alleged, 867.
cannot be proved under general allegation of ownership, 867, 870, 283.
Equities—Equitable defences.
statute, 434.
nature of, 589.
how pleaded, 589, 590.
may be used defensively, 591.
must be pleaded specially, 493, 592.
effect of failure to plead, 593.
effect of pleading, 594.
must be replied to, 595.
trial of, 596.
burden of proof, 597.
in actions to recover land, 876, 879.
in actions on judgments, 1487.
assignee of thing in action takes subject to, 223.
in actions on negotiable instruments, 1700.

Estoppel.
in pais, new matter when, 494.
how pleaded, 1806.
upon assignment of thing in action, 228.
of tenant to question title of landlord, 883.
of vendee to question title of vendor, 881.
by former judgment, how pleaded, 1500.
new matter, 498.
Evidentiary matter.
must not be pleaded, 296, 297.
effect of pleading, 298.
striking out, 658.
Execution of instruments.
denial of, must be specific and on oath, 1080–1082.
Execution sale.
action to redeem from, 1807.
Executors and administrators.
forms of alleging representative capacity, 782.
may sue without joining heirs, 53, 85.
must allege appointment and qualification, 1791.
foreign, may sue, 90.
plaintiffs in action ex contractu, 85–90.
defendants in action ex contractu, 111–114.
plaintiffs in action ex delicto, 127–130.
defendants in action ex delicto, 143.
may sue in case of death by wrongful act, 1194.
may be substituted upon death of a party, 202, 206, 213.
what rights of action survive to, 86–89, 127–129, 217.
joinder of, with surviving joint obligors, 95.
when right of action on a joint obligation passes to, 69, 76.
right of action upon death of a partner, 76.
when a joint right of action for a tort passes to, 121.
when liability for a tort passes to, 134, 217.
when may be sued on contracts of decedent, 111, 217.
counterclaims in actions by, 546.
joinder of all, 114.
may sue to recover real property of decedent, 89.
causes of action against personally cannot be joined with causes of action against in representative capacity, 113.
Exhibits.
use of, 320.
Express contract.
in action on implied contract, is new matter, 496.
no recovery upon, in action on implied contract, 1066.
no action upon implied contract, when there is an, 1786, 1787.

Extensions of time.
may be granted by court, 16, 22.
Facts.
constituting cause of action,
what are the, 285–291.
must be pleaded, 269.
only, to be pleaded, 294.
issuable facts to be pleaded, 292.
material facts to be pleaded, 292.
constituting new matter, 469.
how stated, 299.
what are allegations of, 303.
Failure of consideration.
new matter, 524.
partial, may be pleaded, 1094.
Failure of proof.
effect of, 670, 671, 674–680.
False imprisonment.
form of complaint for, 1225.
Father.
may sue for seduction of daughter, 116.
may sue for injury to child, 117.
desertion of family by, 84, 116, 117.
Felons.
cannot sue, 27.
Fellow servants.
master not liable for negligence of, 136.
negligence of, in action against railroad, how pleaded, 1642.
Filing pleadings.
rule regarding, 14.
Folios.
to be numbered, 20.
Forcible entry.
form of complaint for, 1226.
notes, 1227, 1228.
Foreign corporations.
may sue and be sued, 27.
need not allege compliance with state laws, 1151.
Foreign executors and administrators.
may sue, 27, 90.
Foreign receivers.
may sue, 27.
Foreign sovereigns.
cannot be sued, 27.

Foreign statutes.
must be pleaded in full, 1849.
Formal defects.
remedy for, is a motion, 388, 634.
when motion made, 21, 643.
immaterial defects of form disregarded, 15.
sham pleadings, 635–649.
irrelevant pleadings, 650–653.
frivolous pleadings, 654–657.
redundant pleadings, 658, 659.
indefinite pleadings, 660–669.
absence of a definite theory, 282.
double pleading, 275.
duplicity, 275.
want of conformity with statute, 634.
defective verification, 380.
failure to state causes separately, 19, 274, 474.
in the prayer for relief, 373, 374.
failure to number and mark folios, 20.
failure of attorney to give his address, 17.
cannot be raised on the trial. See Waiver.
Former judgment.
as a bar, how pleaded, 1500.
new matter, 498.
Forms of actions.
abolished, 6.
Fraud. See Deceit.
how pleaded, 351.
new matter, 499.
parties in actions for, 165.
Frauds. See Statute of frauds.
Fraudulent conveyances.
form of complaint, 1229.
actions to reach equitable assets, 1230, 1231.
under G. S. '94, § 4281, resulting trust, 1322.
under G. S. '94, § 4222, 1234, 1235.
complaint, 1236–1241.
actions under G. S. '94, § 4218, 1242.
by assignees and receivers under G. S. '94, § 4233, 1244.
by receiver under G. S. '94, § 5492, 1247.
parties, 166.
Fraudulent preference.
pleading, 1808.
Fraudulent representations. See Deceit.
in sales, election of remedies upon, 242.

Frivolous pleadings.
statute, 634.
definition of, 654.
may be stricken out, 655.
demurrers, 656.
amendment, 657.
Garnishment.
nature of proceeding, 1248, 1249, 1327.
a proceeding in rem, 1250.
construction of statute, 1251.
rights of garnishee unaffected by, 1252.
what will defeat, 1253, 1254.
jurisdiction,
in the main action, 1255.
effect of voluntary appearance of defendant, 1256.
in the garnishment proceedings,
over the garnishee, 1258.
voluntary appearance of garnishee, 1258, 1259.
of defendant, 1257.
of the res, 1261–1263.
compelling garnishee to bring res into state, 1262.
situs of debt, 1263.
who may be garnished, 1264.
what may be garnished, 1266–1272.
effect of garnishment, 1266, 1327.
what may not be garnished, 1273–1285.
affidavit,
statute, 1286.
rules governing, 1287–1291.
when jurisdictional, 1292.
form of, 1293.
objections to, 1298.
summons,
statute, 1286, 1294.
rules governing, 1295, 1296.
form of, 1297.
objections to, 1298.
notice to defendant,
statute, 1294.
form of, 1297.
objections to, 1298.
disclosure—examination of garnishee,
statute, 1299.
scope of, 1301.
no pleading on part of garnishee, 1300.

further disclosure, 1302.
witnesses on, 1303.
conclusiveness of, 1304, 1345.
before return day, 1311, 1312.
who may take, 1309.
findings on, 1308.
fees of officer taking, 1310.
motion to dismiss, 1305.
setoff, 1301, 1306.
estoppel, 1307.
judgment upon disclosure,
when may be rendered, 1313–1316, 1318, 1324.
must be by order of court, 1321.
for what amount rendered, 1322.
default of garnishee, 1317.
transfer of action, 1318.
discharge of garnishee,
when may be ordered, 1318, 1320.
costs on, 1320.
judgment, effect of,
upon claimants, 1325.
upon garnishee, 1326.
upon the res, 1327.
delivery of property to sheriff, 1328.
orders of court respecting property, 1329.
when garnishee has a lien, 1330.
garnishee liable for contempt, 1331.
garnishee may sell property garnished, 1332.
garnishee not liable for destruction of property, 1333.
fees and expenses of garnishee, 1334, 1335.
property held till payment of costs, 1336.
costs of garnishee, 1320, 1337.
appeal, 1338.
bond for discharge of garnishee and release of property,
statute, 1339.
action on, 1340.
form of, 1342.
institution of garnishment proceedings by defendant, 1343.
supplemental complaint,
statute, 1344.
exclusive mode of controverting disclosure, 1345.
not a matter of right, 1346.
when application must be made, 1347.
waiver of right, 1348.
service of notice and complaint, 1349.

when not allowed, 1350.
trial, 1351.
right to jury trial, 1353.
construction of complaint, 1354.
burden of proof, 1355.
a continuance of the garnishment proceedings, 1356.
impeachment of garnishee, 1357.
cases involving fraudulent conveyances, 1358.
intervening claimants,
statute, 1359.
remedy afforded by statute exclusive, 1360.
complaint, 1361, 1362.
answer, 1364, 1365.
resting on disclosure alone, 1363.
burden of proof, 1361.
practice, 1366-1372.
evidence, 1373, 1374.
judgment, 1375.
costs, 1376.
parties, 167.
General denial.
definition, 435.
approved form of, 436.
effect of, 437.
what admissible under, 439, 785, 829, 830, 876–879, 1028, 1080–1083, 1101, 1102, 1374, 1651, 1693, 1796, 1841.
what inadmissible under, 140. See New matter.
of knowledge or information, form of, 448.
upon information and belief, form of, 451.
coupled with argumentative denials, 460.
coupled with admissions, 462–464.
in reply, form of, 608.
of execution of instrument insufficient, 1082.
Goods sold and delivered.
forms of complaints, 1377–1379.
interest recoverable, 1380.
variance, 1381.
counterclaim, 1382.
running account, 1383.
Guaranty. See Warranty.
pleading in actions on, 1809.
parties, 97.
Guardian.
when may sue in his own name, 45, 47, 51.
bond of, action on, 1810.

Guardian ad litem.
infants, idiots and insane persons sue and are sued, appearing by, 27, 35, 1812.
Habeas corpus.
form of petition for, 1384.
to whom application made, and how, 1385, 1386.
the petition, 1387.
when application may be denied, 1388.
repeated applications, 1389.
traverse of return, new matter, 1390.
when petition disposed of on return alone, 1392.
in what cases allowed, 1393.
when evidence may be reviewed, 1396.
Highway.
how alleged, 1811.
Homestead.
exemption, new matter, 500.
Husband and wife—Married women.
married woman may sue and be sued alone, 81, 109, 124.
one spouse not a necessary party in actions concerning the real property (not homestead) of the other, 82.
wife may sue husband on contract or to protect her property rights, 83.
husband not liable for torts of wife, 141.
married woman liable for her torts, 142.
wife may be sued by husband, 110.
wife may prosecute or defend in husband's name when he has deserted his family, 84.
wife may sue for alienation of husband's affection, 125.
wife cannot sue for criminal conversation with her husband, 126.
husband or wife may sue for seduction of daughter, 116.
injury to child, 117.
Hypothetical admissions.
when permissible, 481.
Hypothetical allegations.
rule against, 309.
Idiots.
may sue and be sued, 27.
appear by guardian ad litem, 1812.
Illegality.
how pleaded, 325.
new matter, 501.
Immaturity of claim.
new matter, 502.
as ground for demurrer, 408.

Implied contracts.
how pleaded, 239, 1067.
doctrine of, unaffected by code, 239.
cannot be sued on when express contract exists, 1786, 1787.
when the law raises, 239–244, 1623, 1624, 1788.
complaint cannot allege either an express or implied contract, 1066.
Inconsistent causes of action.
cannot be joined, 252.
remedy for joinder of, 253.
election between, when compelled on trial, 254, 275, 282.
Inconsistent defences.
cannot be joined, 476.
remedy for joinder, 480.
Indebitatus assumpsit. See Common counts.
Indefinite pleadings.
statute, 634.
definition of, 660.
defect must appear on face of pleading, 662.
cases where motion was granted, 663.
denied, 664.
motion papers, 665.
remedy, by motion, 666.
when motion must be made, 21.
how objection cannot be raised, 667, 282.
order, 668.
the question in supreme court, 669.
time, 335.
place, 340.
account, 341.
bill of particulars, 341.
defeating motion to strike out by amendment of course, 697.
Inducement.
matter in the nature of, 273.
Infancy.
new matter, 503.
Infants.
may sue and be sued, 27.
may be brought in as parties, 194.
must appear by guardian ad litem, 35, 1812.
not generally liable for contracts, 108.
liable for their torts, 140.
injuries to, action by father or mother, 117.
Inferences of law. See Conclusions of law.
Inferential allegations.
rule against, 305.

when demurrer will lie, 307.
when traversable, 308.
Information and belief.
facts alleged upon, 280.
denials upon, 449.
may be stricken out as sham, 450.
Injunctions.
definition, 1398.
mandatory, 1399.
general rules as to allowance of, 1400–1406.
statute, 1407.
jurisdiction, 1408.
pleading, 1411–1414.
complaint for damages and injunction, 1415.
modification of permanent injunction, 1416.
estoppel, 1417.
temporary,
general nature of, 1437.
statute, 1418.
mandatory, 1419.
when not allowed, 1420.
object of, 1421.
allowed on complaint alone, when, 1422.
allowed on affidavit, 1423.
on notice after answer, 1424.
restraining orders, 1424.
when not allowed on petition, 1425.
not necessary that permanent injunction should have been asked, 1426.
allowance a matter of discretion, 1427, 1428.
motion to modify or vacate,
statute, 1429.
affidavits on, 1430.
upon answer denying equities, 1431.
when answer does not deny but sets up a defence, 1433.
on motion to modify no objection to allowance, 1435.
dismissal by plaintiff on motion, 1436.
bond for temporary injunction,
statute, 1438.
action on, 1439.
form of, 1440.
appeal, 1441–1443.
to restrain taxation proceedings, 1444.
the probate courts, 1445.
the members of executive department, 1446.

a public nuisance, 1447.
a private nuisance, 1449.
public works, 1451.
foreclosure proceedings, 1452.
cases of permanent injunction held proper, 1453.
cases of permanent injunction held improper, 1454.
cases of temporary injunctions held proper, 1455.
cases of temporary injunctions held improper, 1456.
parties, 168.
Insane persons.
may sue and be sued, 27.
appear by guardian ad litem, 1812.
Insurance.
forms of complaints, 1457, 1458.
complaints considered, 1459.
anticipating matter of defence, 1460.
conditions precedent, 1461.
waiver or excuse for non-performance, 1462.
demand, 1463.
allegation of loss, 1464.
allegation of other insurance, 1465.
conditions subsequent, 1466.
allegation of assignment, 1466.
compliance with state laws, 1468.
forfeiture, 1469.
limitations, 1470.
fraud, how pleaded, 1471.
burden of proof, 1472.
new matter, 504.
parties, 169.
Interest.
necessity of demanding, 361.
when allowed, 1813–1816, 1380, 1865.
Interpleader.
form of complaint, 1473.
equitable,
code remedy not exclusive, 1474.
when will lie, 1475.
object of action, 1476.
practice, 1477.
statutory,
statute, 1478.
practice, 1479.
Intervention.
definition of, 255.

in equity practice, 256.
under statute, 257.
origin of statute, 258.
nature of interest entitling party to intervene, 259, 260.
complaint, 261.
answer, 262.
cannot delay trial, 263.
voluntary dismissal, 264.
a matter of right, 265.
remedy for wrong, 266.
waiver of objection to wrong, 267.
by principal in action against surety, 543.
Irrelevant pleading.
statute, 634.
definition of, 650.
cases, 651.
remedy, 652.
when may be stricken out, 653.
defeating motion to strike out by amendment of course, 697.
Joinder of causes of action.
statutes, 248.
in what cases generally, 248–250.
actions ex contractu and ex delicto, 249.
actions in nature of ejectment, 250.
for deceit and breach of warranty, 1864.
must affect parties in same capacity, 113.
running account one cause, 1383.
must affect all parties, 251.
must not be inconsistent, 252.
remedy for misjoinder, 253.
improper commingling in one count, 275.
separately stated, 19, 271, 274.
one demand of judgment for all, 273.
multifariousness, 149.
Joinder of parties defendant.
no general rule in this state, 26.
one or all of several joint obligors may be sued, 94.
personal representatives and surviving obligors may be joined, 95.
of parties liable on same instrument, 96.
of partners, in action on contract, 102.
of partners, in actions for tort, 138.
co-executors and co-administrators, 114.
one or any or all of several joint wrong-doers, 133.
who should be joined as, in an action of an equitable nature, 149.

Joinder of parties plaintiff.
no general rule in this state, 26.
all joint obligees must join, 65, 74.
all having a joint interest in property must join in an action for an injury to it, 120.
all partners must join in an action for injury to the firm, 123.
who should be joined as, in an action of an equitable nature, 148.
when party refuses to join, 68.
Joint obligations and rights.
the rules of survivorship, 69, 76, 95, 103, 121, 134.
Joint pleadings.
must be good as to all, 395, 432, 433.
Judgment on the pleadings.
when may be ordered, 770, 929, 1528.
when counterclaim is pleaded, 771.
motion admits facts well pleaded, 773.
based on pleadings alone, 774.
when made, 775.
disfavored, 776.
Judgments.
how pleaded, 848, 1240.
former, as an estoppel,
how pleaded, 1500.
as counterclaims, 567.
actions on,
form of complaint, 1480.
leave of court, 1481.
domestic, 1482.
defence, 1483, 1487.
variance, 1484.
costs, 1485.
statute of limitations, 1486.
counterclaim, 1487.
action to vacate under G. S. '94, § 5434.
nature of action, 1488.
constitutional, 1490.
construction of statute, 1491.
who party aggrieved, 1492.
complaint, 1493.
when action will not lie, 1496.
new defence, 1497.
fraudulent practices, 1498.
relief awarded, 1499.
parties, 170.

Judicial discretion.
definition of, 16.
Judicial notice.
facts judicially noticed need not be alleged, 315.
Jurisdiction.
want of, as ground for demurrer, 389.
when objection to, waived, 780.
Justification.
new matter, 505.
Labeling pleadings.
unnecessary, 277.
Landlord and tenant.
action by landlord for possession—unlawful detainer,
form of complaint, non-payment of rent, 1501.
form of complaint, termination of lease, 1503.
election of remedies, 1505.
nature of action, 1506.
compared with action for forcible entry, 1228.
jurisdiction, 1507.
venue, 1508.
when action will lie, 1509–1511.
complaint, 1512–1514.
answer, 1515–1517.
construction of pleadings, 1518.
counterclaim, 1519.
burden of proof, 1520.
demand, notice to quit, 1521–1524.
damages, judgment, 1525, 1531.
unnecessary to wait an hour, 1526.
tender of rent and costs, 1523, 1527.
judgment on the pleadings, 1528.
judgment by default, 1529.
findings, 1530.
form of judgment, 1531.
statute of limitations, 1533.
jury trial, 1534.
no second trial of right, 1535.
certifying case to district court, 1536–1538.
appeal, effect of on judgment of restitution, 1539.
parties, 192.
action by landlord for rent,
form of complaint on written lease, 1542.
short form of complaint, 1544.
form of complaint setting out lease, 1544.
complaint, 1545.

answer, 1546.
defences generally, 1546.
defences under G. S. '94, § 5871, 1547.
counterclaim and recoupment, 1548.
parties, 171.
action by landlord for use and occupation,
form of complaint, 1549.
when action will lie, 1550–1552.
measure of damages, 1553.
estoppel of tenant to question title of landlord, 883.
Latent equities.
assignee takes subject to, 227.
Laws.
foreign, must be pleaded, 1849.
not generally pleaded, 289.
private statutes, how pleaded, 349.
municipal ordinances, how pleaded, 350.
compliance of foreign corporations with state, 1151.
Legal actions.
distinction between, and equitable abolished, 6.
Legal conclusions. See Conclusions of law.
Legal rights and remedies.
unaffected by code, 7.
enforced in same action as equitable, 8.
Legality.
facts to show, need not be alleged, 317.
Levy.
how pleaded, 1817.
License.
new matter, 506.
Liens.
how pleaded, 812, 922.
Limitations. See Statute of limitations.
Litigation of issues by consent.
when presumed, 681.
Local actions.
failure to bring in proper county as ground for demurrer, 389, 404.
Lost pleadings.
remedy, 14.
Malicious prosecution.
form of complaint, 1554.
termination favorable to plaintiff, 1555.
of a civil action, 1556.
of attachment, 1557.
variance, 1558.

new matter, 1559.
damages, 1560.
statute of limitations, 1561.
parties, 172.
Malpractice.
cases in action for, 1818.
parties in action for, 173.
Mandamus.
jurisdiction, 1562.
to whom writ may issue, 1563.
cases where writ cannot issue, 1564–1572.
on whose information issued, 1573–1575.
demand, 1576, 1577.
peremptory writ in first instance, 1578, 1579.
allowance of writ, 1580.
service of writ, 1580.
pleadings, 1581–1586.
form of peremptory writ, 1587.
jury trial, 1588.
judgment, 1589.
estoppel, 1590.
forms in, 1591.
cases holding mandamus proper, 1592.
improper, 1593.
Married women. See Husband and wife.
Master and servant.
when master liable for torts of servant, 136.
Material facts.
only to be alleged, 292.
what are, 292.
all, to be alleged, 293.
Mechanics' liens—Actions to foreclose.
forms of complaints in, 1594–1596.
nature of action, 1597–1599.
construction of statute, 1600.
complaint, 1601–1610.
answer, 1611, 1612.
reply, 1613.
variance, 1614.
jury trial, 1615.
consolidation of separate actions, 1616.
statute of limitations, 1617.
judgment, 1618, 1619.
distribution of proceeds of sale, 1620.
parties, 174.

Mechanic's lien bond.
action on, 1819.
Minors. See Infants.
Misjoinder of causes of action.
cases, 251, 252.
remedy for, 253, 254.
Misjoinder of parties.
of parties plaintiff, 199.
of parties defendant, 200.
remedy for, 199, 200.
a ground for demurrer, 408.
new matter, 507.
cannot be raised for the first time on appeal, 199.
Misnomer.
new matter, 508.
rules governing, 1820.
Mistake.
new matter, 509.
how pleaded, 356.
Mitigation of damages.
matter in, need not be pleaded, generally, 370, 510.
Modification of contract.
new matter, 511.
Money had and received.
form of complaint in action for, 1621
pleadings generally, 1622.
when action will lie, 1623, 243.
cases, 1624–1626.
Money loaned.
action for, 1821.
Money paid for another.
action to recover, 1822.
Mortgages, chattel.
actions to foreclose, 1830.
Mortgages, real.
actions to foreclose,
form of complaint, 1627.
notes on, 1628–1631, 1823.
parties, 176.
actions to recover excess at sale, 1825, 1626.
to set aside sale on foreclosure, 1826.
to redeem from foreclosure, 1827.
to have deed declared mortgage, 1828.
to cancel, 1829.
to have mortgage declared paid, 175.

assignment of,
subject to equities, 225.
action against assignee, 1824.
Motions. See Formal defects.
Multifariousness.
cases, 149.
Municipal bonds.
actions on, 1831.
Municipal ordinances.
how pleaded, 350.
Names of parties. See Misnomer.
must be given in the title, 269.
how given in title, 270.
course when name is unknown, 270.
may be amended or stricken out, 700, 723.
Negative pregnant.
rules concerning, 454–458.
Negativing defences. See Anticipating defences.
Negligence.
forms of complaints in actions for, 1632–1634.
essentials of complaint, 1635.
duty of defendant, how alleged, 1636–1638.
breach of duty to be alleged, 1639.
how alleged, 1640.
"negligently" not a conclusion of law, 1641.
of railroads, how alleged, 1642.
in employing unfit servants, how alleged, 1642.
in case of connecting lines of railroad, 1643.
injuries, how alleged, 1644.
proximate result of, must appear, 1646.
notice and demand in actions against municipalities, 1647, 1648.
damages, how alleged, 1652.
reply, 1653.
variance, 1654.
statute of limitations, 1655.
assumption of risk need not be negatived, 1645.
contributory negligence,
unnecessary to negative in complaint, 1645.
proof of under general denial, 1651.
when complaint demurrable for, 1649, 1650.
complaints held sufficiently definite, 1640, 664.
Negotiable instruments.
forms of complaints in actions on, 1656–1670.
parties, 33, 34, 38, 39, 41, 177, 178.
pleading by copy, 1671.

allegations of,
consideration, 1672.
revenue stamp, 1673.
agency, 1674.
non-payment, 1675.
partnership, 1676.
title in plaintiff, 1677–1680, 1684, 1685.
execution and delivery, 1681.
indorsement, 1682.
bona fide purchaser, 1683.
assignment, 1686.
demand, notice of dishonor, 1688–1690.
variance, 1687.
denial of execution, 1691.
of indorsement, 1692.
of title in plaintiff, 1693.
want of consideration, 1694.
failure of consideration, 1694.
fraud, 1695.
alteration, 1696.
without recourse, 1697.
accommodation indorsement, 1698.
usury, 1699.
equitable defences, 1700.
assignment of past due, 226.
New assignment.
allowed under the code, 618.
New matter.
statute, 434.
definition of, 469.
compared with denials, 470.
defendant must not be stranger to, 471.
when one of several obligors is sued, 471 (a).
must be specially pleaded, 472.
partial defences, 473.
several defences, 474.
each defence must be complete in form and substance, 475.
each defence must be pleaded separately, 475.
defences must be consistent, 476–480, 1110.
hypothetical statements or admissions to introduce, 481.
matters in abatement, 482.
cases determining what is new matter, 483–524.
Non-joinder of parties.
rules concerning, 196–201.
new matter, 513.

Non-payment.
necessary to allege to show breach of contract to pay money, 514, 1675.
Non-performance.
new matter, 497.
Novation.
pleadings, 1833.
Nuisance.
parties, 179.
injunctions against, 1447–1450.
pleadings in actions for, 1832.
Objections to pleadings on the trial.
sufficiency of complaint,
motion for dismissal, 759.
amendment on, 760.
disfavored, 761.
must specify defects, 763.
when made, 764.
when several defendants, 765.
objection to introduction of evidence, 766.
practice disfavored, 766.
defects must be specified, 767.
sufficiency of answer,
motion for dismissal, 768.
objection to introduction of evidence, 769.
judgment on the pleadings, 770–777.
sufficiency of reply, 778.
defects that cannot be objected to on the trial, 779, 780. See Waiver.
One form of action.
in this state, 4–8.
One suing for many.
statute, 30.
Ownership. See Title.
Paragraphing.
rule as to, 278.
Partial defences.
may be pleaded, 473.
Parties to actions.
preliminary statement, 26.
denomination of, 11.
actions of an equitable nature, 144–149.
in particular actions, 150–193.
bringing in parties, 194, 195.
nonjoinder and misjoinder of, 196–201.

general rules, 27–54.
who may sue and be sued, 26, 27.
real party in interest must sue, 30–54.
exceptions,
party in whose name contract is made, 43.
trustee of express trust, 48.
administrator or executor, 53.
persons authorized by statute to sue for others, 54.
one suing for many, 30.
actions on contract,
plaintiffs,
must be party to contract, 55.
stranger to contract cannot sue on, 55–62.
party for whose benefit contract was made, 58–61.
surety against principal and third party, 62.
person to sue on simple contract, 63.
on contract by deed, 64.
all obligees must join, 65.
exceptions, 66–68.
effect of death of one of several obligees, 69.
principal and agent, 70–72.
partners, 73–76.
corporations, 77–80.
married women—husband and wife, 81–84.
executors and administrators, 85–90.
defendants,
general rules, 91–98.
principal and agent, 99–100.
partners, 101–103.
corporations, 104–107.
infants, 108.
husband and wife—married women, 109, 110.
executors and administrators, 111–114.
actions for tort,
plaintiffs,
general rules, 115–121.
principal and agent, 122.
partners, 123.
husband and wife—married women, 124–126.
executors and administrators, 127–130.
tenants in common, 120.
defendants,
general rules, 131–134.
principal and agent, 135.

master and servant, 136, 137.
partners, 138.
corporations, 139.
infants, 140.
husband and wife—married women, 141, 142.
executors and administrators, 143.

Partition.
parties in actions for, 180.
pleadings in actions for, 1834.

Partners. See Parties.
parties plaintiff, 73–76, 123.
parties defendant, 101–103, 138.
may be sued in firm name, 101.
partnership, how alleged, 782.
the doctrine of survivorship, 76, 103.
miscellaneous rules of pleading in relation to, 1835.
miscellaneous cases as to parties, 181.
denial of partnership, 1838.
counterclaims, 544.

Payment.
when new matter, 514.
partial, as defence, 1694.
how pleaded, 1839.

Penalties.
parties in actions for, 182.

Personal injuries. See Negligence.
assignment of claim for, 219.
release of claim for, 1209.
cause of action for, abates when, 217.
action for, when abates, 202, 1191, 1206.

Place. See Venue.
when must be alleged, 340.

Platting.
how pleaded, 1840.

Pleading by copy.
permissible in case of written contracts, 319.

Pleadings.
definition of, 1.
objects of, 2.
general theory and nature of, 3.
regulated by statute, 10.
what pleadings allowed, 12.
must be subscribed by attorney, 13, 17.
part of record, 14.
must be filed, 14.

lost, 14.
immaterial defects in, disregarded, 15.
must be legible, 18.
numbering and marking folios of, 20.
indefinite, 660–669.
irrelevant, 650–653.
sham, 635–649.
double, 275.
frivolous, 654–657.
redundant, 658, 659.
not conforming to statute, 634.
construction of, 732–758.
supplemental, 622–633.
joint, 395, 432, 433.
labeling, 277.
objection to, on the trial, 759–780.
formal defects in, 634–669.
Prayer for relief.
no part of cause of action, 372.
effect of demanding wrong relief, 373.
relief limited by, 375.
general, 377.
in the alternative, 378.
in answer, 468.
Presumptions.
facts presumed need not be alleged, 316.
that fact once shown to exist continues, 868, 1677, 1684.
that issues not made by pleadings were voluntarily litigated, 681.
Prima facie case.
sufficient in complaint, 295, 310.
Principal and agent.
parties plaintiff, 70–72, 122.
parties defendant, 99, 100, 135.
when principal liable for torts of agent, 135.
agent may sue in his own name, 44.
general rules of pleading as to, 1841.
parties, 183.
counterclaims, 547.
Promise, See Contracts.
Quantum meruit.
when action in nature of will lie, 1786–1788.
complaint in action for, 1779.
Quantum valebant.
complaint in action in the nature of, 1378.

Quo warranto.
jurisdiction, 1701.
upon whose information issued, 1702.
nature of proceeding, 1703.
common-law rules govern, 1704.
burden of proof, 1705.
practice, 1706.
skeletonf forms of practice, 1707.
cases, 1708.
actions in nature of under G. S. '78, ch. 79, 1709.
parties, 184.
Ratification.
new matter, 515.
Real party in interest.
must sue, 30.
Receivers.
may sue in their own name, 40.
appointment, how alleged, 1842.
foreign, may sue, 27.
may be sued without leave of court, 27.
may avoid fraudulent conveyances, 1244–1247.
Recital.
facts must not be alleged by way of, 305.
Recognizance.
action on, 1843.
Recoupment.
nature of, 533.
cases in which recoupment allowed, 535, 1548, 1785.
by partner sued individually, 544.
when one of several obligors is sued, 471 (a).
new matter, 516.
Redundant pleadings.
statute, 634.
nature of, 658.
non-essential allegations, 294.
remedy for, 659.
when motion to strike out must be made, 21.
defeating motion to strike out by an amendment of course, 697.
Reformation of instruments.
parties in actions for, 185.
pleadings in actions for, 1844.
Regularity.
facts to show, need not be alleged, 317.
Release.
new matter, 517.

of claim for personal injuries, 1209.
Relief.
legal and equitable awarded in single action, 8.
general nature of which may be awarded, 8, 374.
granting full, when court once takes jurisdiction, 374.
when no answer, limited, 374, 376.
when answer, any consistent with issue made, 374, 282.
not for greater damages than claimed, 375.
legal relief, upon equitable relief assumed given, 8.
equitable, of a defensive nature, 591.
on counterclaim, 587, 588.
Remedies. See Relief.
statutory, when exclusive, 246, 1175.
ubi jus ubi remedium, 29.
not affected by code, 7.
Replevin. See Claim and delivery.
impropriety of present use of term, 6, 798.
bond, action on, 1845.
Reply.
office of, 598.
when necessary, 603–605, 1653, 1746.
statute, regulating, 599.
rules governing statement, 600.
counterclaim in, 601.
waiver of, 602.
admissions by failure to, 603–607.
forms of, 608–613.
departure, 614–621.
demurrer to, 427, 428.
form of, 429.
objections to on the trial, 778.
Rescission.
actions for, 1846.
new matter, 518.
how alleged, 353.
Right of action.
definition, 287.
Rights.
unaffected by code, 7.
legal and equitable enforced in same action, 8.
Rules of court.
respecting pleadings, 17–25.
Salary. See Work, labor and services.
Sales. See Goods sold and delivered.
induced by fraud, election of remedies, 242.

with warranty, election of remedies, 245.
School district.
action against, 1847.
Seduction.
of daughter, action by parent, 116.
with promise of marriage, 1061.
parties, 187.
Services. See Work, labor and services.
Setoff. See Counterclaim.
Sham pleadings.
statute, 634.
definition of, 635.
stricken out cautiously, 636.
verified, may be stricken out, 639.
when part only is sham, 642.
time of motion to strike out, 643.
affidavits on motion, 644.
amendment discretionary, 647.
denials, 640.
denials of knowledge or information, 446, 447.
denials upon information and belief, 450.
defeating motion by an amendment of course, 697.
cases where motion granted, 648.
denied, 649.
Sheriff.
may sue in his own name, 46, 1001.
notice to, by parties claiming property seized, 1006.
actions against for conversion, 1140.
parties, 188.
Sister state.
may sue, 27.
statutes of, must be pleaded, 1849.
Slander and libel.
forms of complaints in actions for, 1711–1715.
inducement, 1716.
colloquium, 1716.
innuendo, 1717, 1718.
setting out defamatory matter, 1719–1721.
application of words to plaintiff, 1722, 1723.
publication, 1724, 1726.
service of notice on newspaper, 1727.
falsity and malice, 1728, 1729.
variance, 1730.
damages, 1731–1733.

Slander of title.
action for, 1848.
Specific performance.
complaint, form of by vendee, 1734.
cases on questions of pleading, 1735, 1736.
parties in actions for, 189.
State.
may sue, but cannot be sued without consent, 27.
Statute of frauds.
form of plea, 1087.
necessity of pleading, 1085, 1086.
need not be anticipated, 1075, 312.
objection raised by demurrer, 408.
Statute of limitations.
form of plea, 1737.
anticipating defence of, 1738, 311.
partial payments, 1739.
how pleaded, 1740.
modes of taking advantage of,
by demurrer, 1741.
by answer, 1742.
by motion on the trial, 1743.
on appeal, 1744.
foreign statute, 1745.
necessity of reply, 1746.
new matter, 520.
Statutes.
how pleaded, 349.
foreign, must be pleaded in full, 1849.
Statutory remedies.
when exclusive, 246, 1175.
Subject of the action.
meaning of phrase, 562.
Subrogation.
new matter, 521.
pleading, 1851.
Substitution of parties.
statute, 202.
motion for 204, 205.
how far a matter of discretion, 206, 211.
in case of assignment pendente lite, 209.
of assignee, 210.
of administrator or executor, 213.
Supersedeas bond.
action on, 1852.

Supplemental pleadings.
statute, 622.
distinguished from amendment, 624.
a matter of right, 625.
complaint, 627.
answer, 631.
reply, 632.
form of supplemental complaint, 633.
Suretyship.
pleading, 1853.
counterclaims, 542, 544.
Surplusage.
need not be proved, 294.
Survivorship.
the doctrine of, 69, 76, 95, 103, 121, 134.
Taxation.
actions concerning, 1854.
Tax titles.
how pleaded, 1855.
action to determine, 1856–1858.
Technical terms.
may be used in pleading, 279.
how construed, 755.
Tenants in common.
when action will lie between, 806, 865, 1128, 1551.
must join in actions for injury to property, 120.
Tender.
new matter, 522.
Theory of case.
necessity of a definite, 281.
at law or in equity, 283.
action ex contractu or ex delicto, 284.
action on express or implied contract, 1066.
mode of objection for absence of, 282.
Time.
an element of definite description, 337.
as of what, allegations presumed to speak, 276.
not generally necessary to allege, 311, 335, 336.
extension of time to plead, 16.
how alleged, 338.
remedy for failure to allege, 339.
Title of pleadings.
statute, 269.
what alleged in, 270.

Title to property—How pleaded.
personal property,
generally sufficient to allege that party is the owner, 811, 1092.
facts giving rise to lien must be alleged, 812, 1092.
real property,
legal title may be alleged in general terms, 321–324, 867–872.
all the material facts giving rise to equitable title must be alleged, 322, 680, 867, 870, 907, 921.
all the material facts giving rise to a lien must be alleged, 922.
Torts. See Implied contracts.
parties plaintiff in actions for, 115–130.
parties defendant in actions for, 131–143.
waiving, and suing on implied contract, 239–243.
assignability of claims for, 219.
release of claims for, 1209.
husband not liable for, of wife, 141.
cannot be proved where contract alleged, 284.
changing action for, by amendment, 722.
cause of action for, as a counterclaim, 568–571.
cause of action for, joinder of, 249.
master liable for; of servant, 136.
master not liable for, of fellow servant, 136.
complaint construed as on contract rather than for, 758.
cause of action for, as counterclaim, 569, 571.
Transaction.
meaning of term, 561.
Traversable allegations.
what are not, 467.
inferential allegations are, 308.
Treasurer's bond.
action on, 1859.
Trespass to personal property.
form of complaint in action for, 1747.
notes on action for, 1748–1756.
Trespass to real property.
form of complaint in action for, 1757.
allegation of,
title, 1758.
possession, 1759–1762.
force, 1763.
title, how far involved, 1764–1766.
when action will lie, 1767–1771.
damages, 1772–1776.
parties, 190.
Trover. See Conversion.

impropriety of present use of term, 6, 1118.
Trustees of express trust.
may sue in their own name, 48.
Trusts.
parties in actions concerning, 191.
pleading in actions concerning, 1860.
Uncertainty. See Indefinite pleadings.
Unlawful detainer. See Landlord and tenant.
statutory action, 1501–1539.
Use and occupation.
action for, 1549.
Usury.
pleading, 1861.
Value.
allegations of, when material, 357, 1098.
Variance.
statute, 671.
general rule, 670.
immaterial, 672.
material, 673.
fatal, 674.
cases of fatal variance, 674-680.
waiver of by voluntary litigation, 681.
Vendor and purchaser.
pleadings concerning, 1862.
estoppel, 881.
Venue.
necessity of pleading, 340.
failure to bring local action in proper county as ground for demurrer, 389, 404.
Verification.
statute, 379.
remedy for defective, 380.
forms of, 381–383.
before whom made, 384.
Videlicet.
use of, 1863.
Voluntary litigation.
when presumed, 681.
Wages. See Work, labor and services.
Waiver of objections.
defects waived by failure to move before trial, 779.
defects waived by failure to demur or answer, 780.
defects that are never waived, 781.
misjoinder of parties, 196, 199.

Want of consideration.
new matter, 524, 1083.
Ward. See Guardians.
Warranty. See Guaranty.
action for breach of, 1864, 1865.
recovery for breach of, in action for deceit, 284, 1865.
Warranty of title.
parties in action on, 193.
Waste.
action for, 1866.
Where there is a right there is a remedy.
general rule, 29.
Work, labor and services.
forms of complaints for, 1777–1781.
either express or implied contract, 1782.
materials furnished in connection with, 1788.
general denial, 1784.
recoupment, 1785.
quantum meruit, 1786–1788.
seeking other employment, 1789.
Written contracts.
pleading by copy, 319.
Wrong.
a remedy for every, 29.

NOTICE TO TERMINATE CONTRACT OF SALE.

To George R. Beach and William D. Crowley:

WHEREAS, Heretofore to-wit: on or about the 15th day of August, A. D. 1910, we, the undersigned, Ida M. Chappell and Sherman L. Chappell, her husband, did by contract in writing, sell and agree to convey to said George R. Beach the following described premises situated in the County of Hennepin and State of Minnesota, to-wit:

Lot thirty-seven (37) Morningside, an addition to the City of Minneapolis, according to the recorded plat thereof on file and of record in the office of the Register of Deeds in and for said Hennepin County, Minnesota, and

WHEREAS, You, the said George R. Beach, agreed to pay as and for the purchase price of the premises hereinbefore described, the sum of Four thousand three hundred ($4,300) Dollars at the times and in the manner specified in said contract, and

WHEREAS, You each have failed and neglected to pay the installment of Thirty-five ($35) Dollars due to us under said contract on July 15th, A. D. 1911.

NOW, THEREFORE, You are hereby notified that said contract will terminate thirty (30) days after the service of this notice upon you, unless prior thereto you shall comply with the conditions of said contract and pay said installment of Thirty-five ($35) Dollars as specified in said contract and also the costs of serving this notice.

Dated July 29th, 1911.

IDA M. CHAPPELL,
SHERMAN L. CHAPPELL.

7148