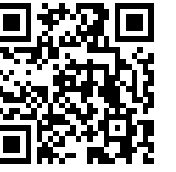
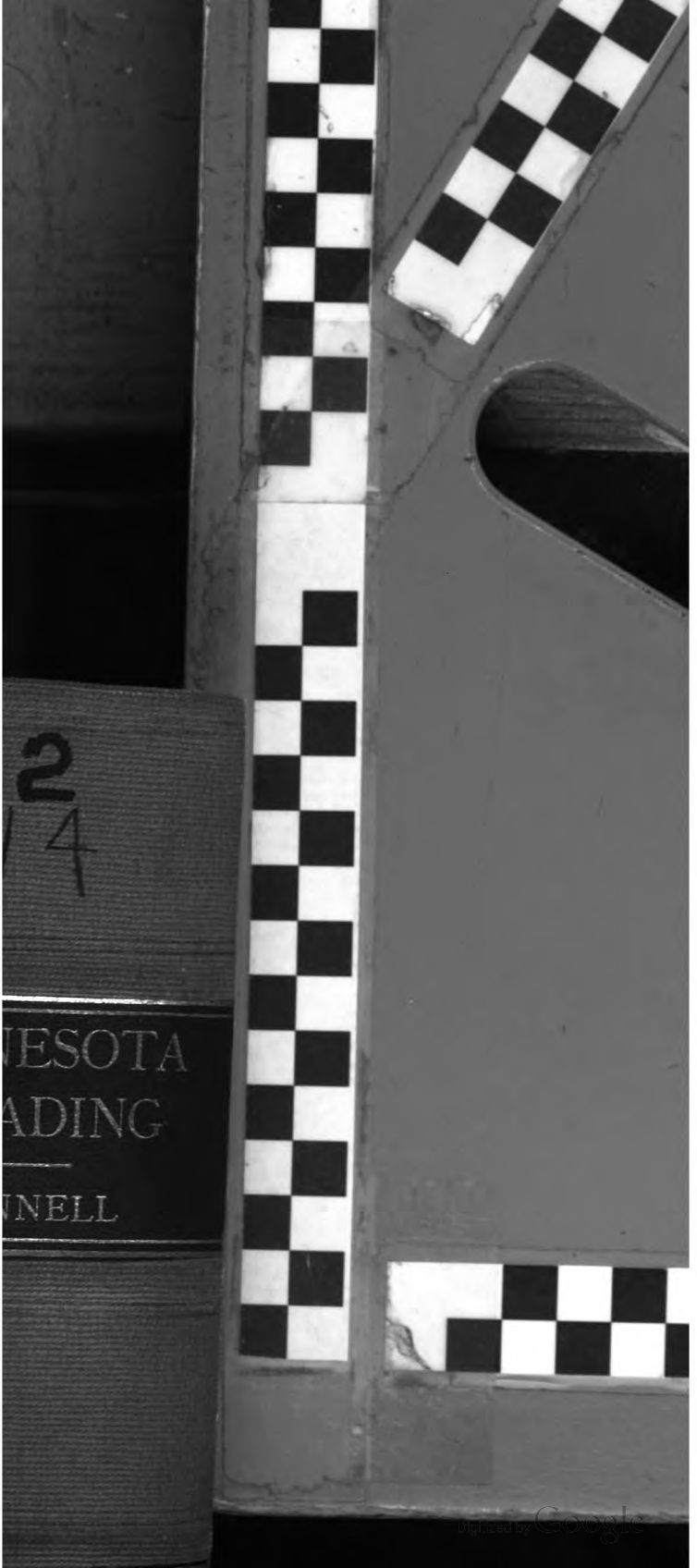
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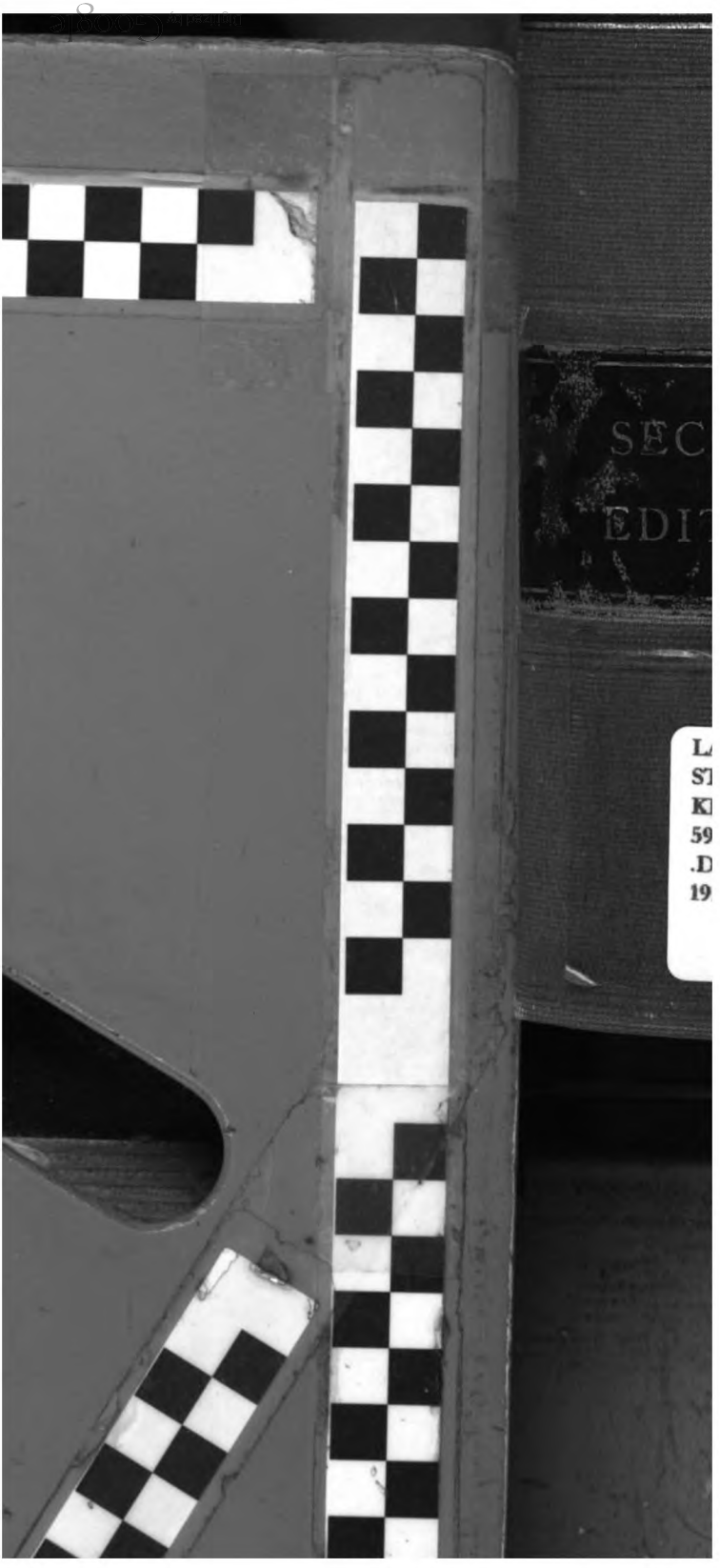
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MINNESOTA PLEADING

LAW OF CIVIL PLEADING AND PARTIES OF THE STATE OF MINNESOTA WITH FORMS

BY

MARK B. DUNNELL

SECOND EDITION

OWATONNA, MINNESOTA

MINNESOTA LAW BOOK COMPANY

1914

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PREFACE

The first edition of this work, published in 1899, was exhausted several years ago. In the absence of any other local work on the subject of pleading there has long been a real need of a new edition. While nominally a new edition this is substantially a new book, being entirely rewritten and greatly enlarged. It covers the Minnesota Reports, 1–126, and the Northwestern Reporter, 1–148. In this edition I have included a large number of forms taken from the records of the Supreme Court. Most of them have been sustained on general demurrer and therefore have a practical value for the local practitioner, regardless of their artistic deficiencies. They have not been selected as models of pleading to be copied literally, but rather for purposes of suggestion and illustration. They might easily have been improved by condensation and change of phraseology, but it was thought that the practitioner would prefer to have them substantially in the form in which they were considered by the Supreme Court. Some changes of phraseology, of an unimportant nature, have been made in the interest of uniformity.

The large number of cases cited in this volume is conclusive evidence that our system of pleading does not work very well in practice. Questions of pleading ought rarely to occupy the attention of an appellate court. I think that we should restrict the right to question a pleading on the trial and on appeal. When objection is made on the trial to a remediable defect in a pleading an amendment should be ordered, without costs. The demurrer, the reply and the verification might well be abolished. Our statute providing for a bill of particulars should be enlarged. Our statutes relating to counterclaims, the joinder of causes of action, and defences should be made more liberal, leaving more to the discretion of the trial court. When a party pleads title to property in general terms he should be required, on written demand from the adverse party, to disclose the source of his title. Upon like demand a party should be required to state the theory of his action, as, for example, whether he is suing on contract or for tort, or waiving tort and suing on implied contract, or at law or in equity, or at common law or upon a statute. In actions for services and for goods sold a party should be permitted to recover upon proof of either an express or implied promise.

Owatonna, Minnesota,
November 18, 1914.

M. B. D.

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THE LAW OF CIVIL PLEADING

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NATURE OF PLEADINGS

1. Definition of pleadings—Pleadings are the written allegations made in alternate series by the plaintiff and the defendant of their respective grounds of action or defence.[1]

2. Object of pleadings—The fundamental objects of pleadings are:

1. To apprise each party of the grounds of claim or defence asserted by the other in order that he may not be taken by surprise, but 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.[2]

2. To inform the court of the nature of the claim or defence in order that the court may,

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

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

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

3. 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.

4. To make clearly apparent, by the record, the facts adjudicated so that there may be no further litigation thereof.[3]

3. General theory and nature of pleading—Historical statement—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

[1] Heard, Civil Pl. 1; Century Dict. Pleadings are the written allegations of what is affirmed on the one side, or denied on the other, disclosing to the court or jury, who have to try the cause, the real matter of dispute between the parties. Desnoyer v. L'Hereux, 1 Minn. 17(1). 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. Heard, Civil Pl. 6.

[2] Lawrence v. Willoughby, 1 Minn. 87(65); Huey v. Pinney, 5 Minn. 310 (246, 257); Finley v. Quirk, 9 Minn. 194 (179, 186); Kingsley v. Gilman, 12 Minn. 515(425, 430); Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383; Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4. See Heard, Civil Pl. ch. I. The object of all rules of pleading is to secure the brief, orderly and plain statement of the facts on which the respective contentions of the parties are based, so as to produce definite issues. Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[3] See Heard, Civil Pl. ch. I.

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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.[4] 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.[5] More than one issue in a single cause was not allowed prior to 4 Anne, ch. 16, § 4,[6] 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.[7] 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. (1272–1307). 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.[8] 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

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

[5] Perry, Common Law Pl. 226.

[6] Derby v. Gallup, 5 Minn. 119 (85, 108).

[7] Stephen, Pl. 126.

[8] Stephen, Pl. 124.

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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.[9] 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.[10] 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.[11]

4. **Common-law and code pleading fundamentally the same**—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.[12] 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."[13] 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;

[9] Stephen, Pl. 129.

[10] Heard, Civil Pl. 3.

[11] See, for the history of common-law pleading, Bigelow, History of Procedure in England; Ames, Lectures on Legal History; Pollock & Maitland, History of English Law; Reeves, History of English Law; Street, Foundations of Legal Liability; Perry's Common Law Pl.; Stephen, Pl.; Hepburn, Development of Code Pleading.

[12] Foerster v. Kirkpatrick, 2 Minn. 210(171).

[13] Holmes, Common Law, 37.

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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.[14] This principle, however, was but imperfectly developed in the former system.[15] The chief effect of the code upon pleading has been to relieve it of excessive technicality and justly subordinate it to the substantive law.[16] The code system of pleading is designed to administer the substantive law unhampered by the subtle distinctions and technicalities incident to the forms of action at common law and the distinction between law and equity.[17] In practice code pleading has not proved so successful in forming sharply defined issues as common-law pleading,[18] and in some ways is more difficult.[19]

5. Defects of code pleading—Code pleading has the defects of its qualities. Its chief defects are its uncertainty, its laxity and easy tolerance of loose practice, its prolixity, its want of a definite theory of the nature of the cause of action, its lack of uniformity and consequent want of controlling precedents, and its disregard of established forms and approved technical phraseology. Senator Root relates having heard Mr. David Dudley Field, the father of code pleading, during the argument of a cause many years ago, ask Mr. Charles O'Conor a question concerning the effect of the pleadings in the case. Mr. O'Conor turned, and, with that intensity that characterized him, especially when dealing with some one he did not like, he answered: "I understand that under your code, Mr. Field, the plaintiff comes into court and tells his story like an old woman and the defendant comes in and tells his story like another old woman."[20] This aptly characterizes many of our pleadings, especially in actions for personal injury. Our supreme court has expressed apprehension lest pleading should become one of the lost arts in this state.[21] Some of our rules put a premium on careless pleading.[22] But with all its defects code pleading is an improvement on common-law pleading. Its chief merits are its liberality; its subordination of the adjective law to the substantive law, its refusal to sacrifice substance to form and make the manner of statement more important than the thing stated; its liberal construction of pleadings; and its encouragement of amendments. Forms are no longer controlling and pleading

[14] Caldwell v. Auger, 4 Minn. 217 (156, 161); Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340.

[15] Pomeroy, Remedies, §§ 508–512.

[16] Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[17] Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443.

[18] Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751.

[19] Barnsback v. Reiner, 8 Minn. 59 (37, 43).

[20] 23 Green Bag, 115.

[21] Topping v. Clay, 62 Minn. 3, 63 N. W. 1038.

[22] Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866.

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is justly regarded as a mere means to an end. It cannot be said, however, that code pleading is a satisfactory system. In many ways it is just as technical as common-law pleading. The enormous number of decisions in the code states upon questions of pleading shows how unsatisfactory the system is in its practical working. Most of these decisions are of trifling value as precedents. In New York and in some of the other code states conditions are well-nigh intolerable and there are loud cries for reform. One feels like crying with Hamlet, "O, reform it altogether."

6. Pleadings are a means to an end—Relatively unimportant—Pleadings are a part of the remedial or adjective law and compared with the substantive law are relatively unimportant. They are but means to an end, the end being the proper administration of the substantive law. The rules of pleading are to be applied and enforced so as to disclose fully and freely the respective claims of the parties and facilitate and hasten the trial of issues. They are not to be applied and enforced in a narrow, rigid or technical spirit, but liberally and in strict subordination to the substantive law.[23] In laying down rules of pleading courts should have in view their practical working more than their logical consistency with general principles.[24] Forms of actions should not be allowed to cover a wrong and logic should yield to justice. As the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice.[25]

7. Conflict of laws—Rules of pleading are a part of the remedial law and are therefore governed by the law of the forum.[26]

[23] Rees v. Storms, 101 Minn. 381, 384, 112 N. W. 419; Jacobson v. Great Northern Ry., 120 Minn. 52, 56, 139 N. W. 142. See §§ 505, 506, 517.

[24] See, for example, Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340.

[25] Olson v. Northern Pacific Ry., 148 N. W. 67.

[26] Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137; Kaufman v. Barbour, 98 Minn. 158, 107 N. W. 1128; Fryklund v. Great Northern Ry., 101 Minn. 37, 111 N. W. 727; Vander Wegan v. Great Northern Ry., 114 Minn. 118, 130 N. W. 70.

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8. Pleadings regulated by statute—What pleadings allowed—Statute—The forms of proceedings in civil actions, and the rules by which the sufficiency of pleadings is to be determined, shall be governed by statute. The pleadings shall be:

1. On the part of the plaintiff, a complaint, and a demurrer, or a reply.
2. On the part of the defendant, a demurrer, or an answer.[27]

9. Lost pleadings—If any pleading is lost or withheld the court may permit a copy to be filed and used in its stead.[28]

10. Extensions of time—A court is authorized, in its discretion, to permit an answer or reply to be made, or other act to be done, after the time limited by statute, or may by its order enlarge such time.[29]

11. Pleadings are a part of the record—Judgment roll—Pleadings constitute a part of the record of a case and are included in the judgment roll.[30]

12. Pleadings must be subscribed by party or attorney—Every pleading in a court of record shall be subscribed by the party or his attorney.[31]

13. Pleadings must be filed—All pleadings, affidavits, bonds, and other papers in an action shall be filed with the clerk, unless otherwise provided by law or by order of the court. And all pleadings shall be so filed on or before the second day of the term at which the action is noticed for trial; otherwise the court may continue the action or strike it from the calendar.[32] It is unnecessary to file pleadings in a case not noticed for trial.[33] Where a pleading was handed to a clerk when he was out of his office with the request that he file it, but it was never deposited in his office and no entry was made in his office of its filing, it was held that there was no filing, though the clerk made an indorsement on it of filing.[34] The clerk has no discretion in the matter. He cannot refuse to file a pleading on the ground that it contains libelous matter.[35]

[27] R. L. 1905 § 4126; G. S. 1913 § 7752.
[28] R. L. 1905 § 4271; G. S. 1913 § 7903.
[29] R. L. 1905 § 4160; G. S. 1913 § 7786; Potter v. Holmes, 74 Minn. 508, 77 N. W. 416; State v. Ward, 79 Minn. 362, 82 N. W. 686; McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.
[30] R. L. 1905 § 4271; G. S. 1913 § 7903.
[31] R. L. 1905 § 4142; G. S. 1913 § 7768.
[32] R. L. 1905 § 4121; G. S. 1913 § 7747.
[33] Young v. Young, 18 Minn. 90(72).
[34] Schulte v. First Nat. Bank, 34 Minn. 48, 24 N. W. 320.
[35] Nixon v. Dispatch Printing Co., 101 Minn. 309, 112 N. W. 258.

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RULES OF DISTRICT COURT

RULE 4.

14. Attorneys must subscribe papers and give address—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.[36]

RULE 5.

15. Copies must be legible—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.[37]

RULE 6.

16. Causes of action and defences separately stated and numbered—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.[38]

RULE 7.

17. Numbering and marking folios—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 15.

18. Order extending time to answer—Affidavit of merits—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

[36] See, as to service through the mail, Dunnell, Minn. Pr. § 2034.

[37] See Dunnell, Minn. Pr. § 2040.

[38] See §§ 242, 295, 329, 374.

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a good and substantial defence, upon the merits, to the pleading or some part thereof.[39]

RULE 16.

19. Affidavit of merits—Contents—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.[40]

RULE 17.

20. Amendment of pleadings—Affidavit of merits—In all cases where an application is made for leave to amend a pleading [41] or for leave to answer or reply [42] 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 23.

21. Time to answer when demurrer overruled—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.[43]

[39] See Dunnell, Minn. Pr. § 2508.
[40] See Dunnell, Minn. Pr. §§ 2432, 2467, 2468.
[41] See Dunnell, Minn. Pr. § 2512.
[42] See Dunnell, Minn. Pr. § 2507.
[43] See § 290.

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ONE FORM OF ACTION

22. Statute—The distinction between actions at law and suits in equity, and the forms of such actions and suits, are abolished. 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. This shall be called a civil action, and the party complaining shall be styled the plaintiff, and the adverse party the defendant.[44]

23. Uniformity of pleading—One form of action—The above 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, in ordinary civil actions. 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.[45] 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. 1913, § 7792.[46] There is but one form of action in this state, called a "civil action," and this is true though the action is based on a foreign statute.[47]

24. Common-law forms of actions abolished—The various forms of action of the common law, and the writs by which they were instituted, are abolished.[48] 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.[49] Technical forms of expression characteristic of each form

[44] R. L. 1905 § 4052; G. S. 1913 § 7673.

[45] Pomeroy, Remedies, §§ 44–75; Bond v. Penn. Ry., 124 Minn. 195, 144 N. W. 942.

[46] Berkey v. Judd, 14 Minn. 394(300).

[47] Bond v. Penn. Ry., 124 Minn. 195, 144 N. W. 942.

[48] R. L. 1905 § 4052; G. S. 1913 § 7673; Folsom v. Carli, 6 Minn. 420(284); Berkey v. Judd, 14 Minn. 394(300); Stout v. Stoppel, 30 Minn. 56, 58, 14 N. W. 268; Bonham v. Weymouth, 39 Minn. 92, 96, 38 N. W. 805; Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972; Hobe v. Swift, 58 Minn, 84, 91, 59 N. W. 831; Adams v. Castle, 64 Minn. 505, 508, 67 N. W. 637; Breault v. Merrill & Ring Lumber Co., 72 Minn. 143, 75 N. W. 122; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751; Gregory Co. v. Cale, 115 Minn. 508, 513, 133 N. W. 75.

[49] Heard, Civil Pl. 22.

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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.[50] 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.[51] 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 rational. 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 largely 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.[52] 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.[53] 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." [54] "We shall do well to remember that the rule of law was the rule of writs." [55] 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, remains. Ejectment, replevin, trover, trespass and assumpsit are commonly used to denominate actions under the code having the same object as such common-law actions. The use of this old terminology will doubtless continue indefinitely, regardless of theoretical objections, as a matter of custom and practical convenience. As Maitland has said, we have buried the forms of action, but they still rule us

[50] Pomeroy, Remedies, §§ 5–43; Folsom v. Carli, 6 Minn. 420(284).

[51] Pomeroy, Remedies, § 645.

[52] Pomeroy, Remedies, § 6. The student should read Maine, Ancient Law, and Early Law and Custom.

[53] Maine, Early Law and Custom, Eng. ed. 1883, 389.

[54] 2 Pollock and Maitland, History of English Law, 559.

[55] 2 Pollock and Maitland, History of English Law, 561.

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from their graves.[56] While the common-law forms of action are abolished many of the distinctive technical rules of such forms are still in force. This is especially true of general assumpsit.[57]

25. Substantive rights and remedies not abolished—The statute simply abolishes the old common-law forms of action—their distinctive phraseology and rules of pleading. It does not abolish old substantive rights or old remedies. 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.[58] While the forms of action have been abolished and the same court exercises jurisdiction both at law and in equity, the rules governing the exercise of the two jurisdictions are distinct.[59] The statute does not create any new causes of action. It does not make any state of facts a cause of action which, before the statute, would have been insufficient to sustain any form of action.[60] Substantive rights and duties remain unchanged. The delicts or wrongs which are the violation of such rights or duties are still committed in the same manner as before; and as these substantive rights and duties, and the wrongs which violate them, constitute the causes of action over which the courts exercise their remedial jurisdiction, it is obvious that a statute relating solely to procedure will not increase, diminish, or modify the causes of action which exist independent of procedure. In some instances particular parties are permitted to maintain an action who could not have done so under the old practice. But in no instance can this now be done where, upon the same facts, a similar action could not have been maintained by any one under the old practice.[61] The statute has not enlarged or restricted the defences which a party may invoke.[62] It merely affects 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 practice, he could plead an equitable defence only in a suit in equity.

26. Distinction between actions at law and suits in equity abolished—Legal and equitable relief—When allowable—The statute abolishes the distinction between actions at law and suits in equity and provides a single instrumentality, called a civil action, for the enforcement of all rights and remedies, regardless of whether they are legal or equitable in their nature. It

[56] Maitland, Equity, 296.

[57] See §§ 528–534.

[58] Pomeroy, Remedies, § 68; Russell v. Minnesota Outfit, 1 Minn. 162(136, 139); Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 23, 115 N. W. 751.

[59] Carroll v. Bullock, 207 N. Y. 567, 101 N. E. 438.

[60] Banning v. Bradford, 21 Minn. 308, 312.

[61] Pomeroy, Remedies, § 68.

[62] Folsom v. Carli, 6 Minn. 420(284).

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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.[63] 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 to have the relief sought for.[64] An action will not be dismissed for the insufficiency of a complaint if it states either a legal or an equitable cause of action. The principal reason for uniting in one court legal and equitable jurisdiction was to avoid the inconvenience and practical injustice, which often occurred when courts of law and equity were separate, of a plaintiff being dismissed out of court, not because he had no cause of action, but because he had mistaken its character.[65] Both a legal and an equitable cause of action may be alleged and both a legal and equitable remedy obtained.[66] Both a legal and equitable cause of action may be alleged and the single remedy obtained may be legal or equitable;[67] upon an equitable cause of action, that is, an equitable primary right alleged to have been invaded, a legal remedy may be obtained;[68] and upon a legal cause of action, that is, a legal primary right alleged to have been invaded, an equitable remedy may be obtained.[69] 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 cancelation,

[63] R. L. 1905 § 4052; G. S. 1913 § 7673; Holmes v. Campbell, 12 Minn. 221(141, 150); Berkey v. Judd, 14 Minn. 394(300); First Div. etc. Ry. v. Rice, 25 Minn. 278, 292; Allen v. Walsh, 25 Minn. 543, 556; Lewis v. Harwood, 28 Minn. 428, 438, 10 N. W. 586; McKinney v. Bode, 33 Minn. 450, 454, 23 N. W. 851; Klatt v. Dummert, 70 Minn. 467, 470, 73 N. W. 404; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Gilbert v. Boak Fish Co., 86 Minn. 365, 368, 90 N. W. 767; Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443. The code unites in one form of action the efficacy of the common law and chancery systems. Lewis v. Harwood, 28 Minn. 428, 438, 10 N. W. 586.

[64] Merrill v. Dearing, 47 Minn. 137, 140, 49 N. W. 693. See Todd v. Bettingen, 109 Minn, 493, 124 N. W. 443, and Dunnell, Minn. Digest, § 5041.

[65] Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254.

[66] Pomeroy, Remedies, § 77; Montgomery v. McEwen, 7 Minn. 351(276, 280); Guernsey v. American Ins. Co., 17 Minn. 104(83); Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751.

[67] Pomeroy, Remedies, § 81; Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254.

[68] Pomeroy, Remedies, § 82; Sanborn v. Nockin, 20 Minn. 178(163); Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490; Merrill v. Dearing, 47 Minn. 137, 49 N. W. 693; Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N. W. 767. An equitable owner of land may maintain ejectment against the legal owner or a stranger. Merrill v. Dearing, 47 Minn. 137, 49 N. W. 693.

[69] Pomeroy, Remedies, § 83.

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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 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.[70] In case of conflict between legal and equitable rules the latter should be applied.[71]

[70] Pomeroy, Remedies, §§ 78, 80. See Rogers v. Castle, 51 Minn. 428, 53 N. W. 651; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 155 N. W. 751.

[71] Flanigan v. Sable, 44 Minn. 417, 46 N. W. 854.

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PARTIES TO ACTIONS

27. In general—No general statutes as to joinder—Dicey's rules—In all the code states except Minnesota there are statutes defining in general terms who shall be joined as 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. 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.

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. Except as modified or superseded by statute the common-law and equity rules are in full force in this state.[72] 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 of his rules as have been wholly superseded by statute in this state.

28. Conflict of laws—The law governing parties to actions is that of the forum.[73]

GENERAL RULES

29. Who may sue and be sued—General rule—All persons can sue and are liable to be sued in an action at law.

Exception 1. Felons,[74] outlaws [75] and alien enemies [76] cannot sue.

[72] See Mayberry v. Northern Pacific Ry., 100 Minn. 79, 82, 110 N. W. 356.

[73] Fryklund v. Great Northern Ry., 101 Minn. 37, 111 N. W. 727.

[74] It is possible that felons may sue in this state, at least if they have not been sentenced for life. See R. L. 1905 §§ 4774, 4777; G. S. 1913 §§ 8493, 8499; Kenyon v. Saunders, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

[75] Outlawry does not exist in this state.

[76] Davis v. Pierse, 7 Minn. 13(1). An alien enemy may be sued. McNair v. Toler, 21 Minn. 175.

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Exception 2. The sovereign,[77] foreign sovereigns [78] and ambassadors [79] cannot be sued. Dicey, Rule 1.

The state may sue in its own courts.[80] When a state institutes suit in its own behalf, it to some extent subjects itself to the same rules which apply to ordinary suitors. If it brings an equitable action, whatever may properly affect the relief demanded may be urged against it. If the action is to recover money, the defendant may plead and prove any claims which are connected with and arise out of the same transactions; but claims and demands arising out of independent transactions are in effect suits against the state, and cannot, without the consent of the state, be asserted as a setoff or counterclaim.[81] The state cannot be sued by an individual without its consent. This exemption is not based on any constitutional provision, but rests on grounds of public policy. It may be waived by the legislature.[82] Though a state may be sued by the United States without its consent the United States cannot be sued by a state without its consent.[83] A sister state may sue in the courts of this state.[84] Alien friends may sue and be sued.[85] Insane persons may sue and be sued, appearing by a next friend or guardian.[86] Married women may sue and be sued as if single.[87] Receivers, assignees for the benefit of creditors and trustees in bankruptcy may sue and be sued.[88] So may corporations,[89] guardians,[90] executors and administrators.[91] Foreign receivers may sue in the courts of this state.[92] Foreign executors and administrators may sue under statutory provisions.[93]

30. Infringement of legal right essential—No action can be brought except for the infringement of a right.[94] Dicey, Rule 2.

[77] See cases under note 82 infra.

[78] See 22 Cyc. 1717n.

[79] Reynolds v. LaCrosse etc. Co., 10 Minn. 178(144).

[80] State v. Grant, 10 Minn. 39(22).

[81] State v. Holgate, 107 Minn. 71, 119 N. W. 792.

[82] St. Paul etc. Ry. v. Brown, 24 Minn. 517, 574; Sanborn v. Minneapolis, 35 Minn. 314, 318, 29 N. W. 126; Berman v. Minn. State Agr. Soc., 93 Minn. 125, 100 N. W. 732; Berman v. Cosgrove, 95 Minn. 353, 104 N. W. 534; State v. Holgate, 107 Minn. 71, 119 N. W. 792; George v. University of Minn. Athletic Assn., 107 Minn. 424, 120 N. W. 750; Wilkinson v. Mercer, 125 Minn. 201, 146 N. W. 362; Kawananakoa v. Polyblank, 205 U. S. 349. State charities cannot be sued for negligence. McInerny v. St. Luke's Hospital Assn., 122 Minn. 10, 13, 141 N. W. 837.

[83] Kansas v. U. S., 204 U. S. 331.

[84] See State v. Torinus, 22 Minn. 272.

[85] See Stinson v. St. Paul etc. Ry., 20 Minn. 492(446).

[86] Plympton v. Hall, 55 Minn. 22, 56 N. W. 351. See § 36.

[87] See § 107.

[88] See Dunnell, Minn. Digest, §§ 604, 747, 4589, 4590, 8260, 8261.

[89] See §§ 89–92.

[90] See § 36.

[91] See §§ 36, 93–106.

[92] Comstock v. Frederickson, 51 Minn. 350, 53 N. W. 713.

[93] See § 97.

[94] As the ground of an action is always an interference with some right of the person aggrieved, every plaintiff must, in order to support his case,

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31. A remedy for every legal wrong—An action may be brought for every infringement of a legal right.[95] Where there is a right there is a remedy. Ubi jus ibi remedium.[96] Our constitution provides that "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." [97] A remedy is the means employed to enforce a right or redress an injury.[98] It includes the law of pleading and evidence,[99] and the right to apply to a court and show reasons why the remedy should be made available.[1] Whenever a statute creates a new right,

prove that his rights have been interfered with, by showing that the defendant has by his acts or omissions either broken a contract made with the plaintiff, or interfered with some right of the plaintiff existing independently of any contract. No man can support an action simply on the ground that he suffers damage from another's conduct. It constantly happens that acts which are popularly called injurious, because they occasion damage to a particular person, do not enable that person to sue, because they do not amount to an interference with his rights, and do not, therefore, constitute what in the legal sense of the term is an "injury." On the other hand, when a man can sue because he suffers damage, the cause of action is not, strictly speaking, the damage, but the interference with his right. This is expressed in technical language by the maxim, that "damage without injury is never a cause of action." The rule needs to be borne in mind, not only in determining whether a given person has any right of action, but also, frequently, in ascertaining by which of two persons a wrongdoer ought to be sued; since it often happens, that a wrongful act, which causes substantial damage to A, infringes upon the rights, not of A, but of B, who perhaps may be little damaged. Under such circumstances an action in the name of A will fail, while an action in the name of B will succeed. Dicey's note to Rule 2.

To support an action 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 Minn. 66, 42 N. W. 699; Akers v. Chicago etc. Ry., 58 Minn. 540, 60 N. W. 669; Bucknam v. Great Northern Ry., 76 Minn. 373, 79 N. W. 98; Depue v. Flatau, 100 Minn. 299, 303, 111 N. W. 1; Dunnell, Minn. Digest, §§ 6973, 6976.

[95] Dicey, Rule 4. To make up a cause of action there must exist both damage and injury, and as an action does not lie for damage without injury, so also, it does not lie for injury without damage. In this connection the word damage is used in two senses—either actual perceptible loss or a loss which by a fiction of law is assumed to exist whether in fact it exists or not. Some acts are injurious and actionable, whether they cause damage or not, while other acts are injurious and actionable only when followed by actual damage or loss. There is no general test by which to distinguish these two classes of acts. Precedent is our only guide. Dicey's note to Rule 4.

[96] Willis v. Mabon, 48 Minn. 140, 153, 50 N. W. 1110; United States etc. Co. v. Sullivan, 113 Minn. 27, 32, 128 N. W. 1112; Way v. Barney, 116 Minn. 285, 133 N. W. 801.

[97] Const. Art. 1, § 8. See Dunnell, Minn. Digest, §§ 1656–1660.

[98] Warren v. First Div. etc. Ry., 18 Minn. 384(345, 357).

[99] Kaufman v. Barbour, 98 Minn. 158, 107 N. W. 1128.

[1] State v. Young, 29 Minn. 474, 548, 9 N. W. 737.

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but omits to prescribe a remedy for its enforcement, the common law affords a remedy.[2] Where jurisdiction over a certain subject-matter is conferred upon a court, and no procedure is provided by the statute, the court may proceed under its general powers, and adopt such procedure as in necessary to enable it to exercise and make effective such jurisdiction.[3]

32. A party must be a natural or artificial person—To be entitled to recognition in the courts of this state, a party must, in the absence of statutory provisions to the contrary, be either a natural or artificial person.[4] There is a very material difference between the lack of legal entity and the lack of capacity to sue. In the latter case the defect does not go to the merits; it is waived unless a specific objection is taken at the threshold. But if there is a lack of legal entity the whole action fails.[5]

33. Real party in interest must sue—It is provided by statute that "except when otherwise expressly provided by law, every action shall be prosecuted in the name of the real party in interest."[6] The phrase real party in interest has a double meaning. It may mean the person having the beneficial ownership, or it may mean the person who, though without the beneficial ownership, is clothed with the entire legal title. This results from the adoption of one form of action for the enforcement of both legal and equitable rights.[7] So far as the defendant is concerned the test of the real party in interest is not found in the question whether plaintiff is the person who is actually and substantially interested in the subject-matter of the action, but rather in the question whether a payment to or a recovery by the plaintiff will fully protect defendant in the event of another action on the same cause.[8] The following persons have been held the real party in interest within the meaning of the statute: An assignee, legal or equitable, of a chose in action;[9] a party holding the legal

[2] McCarthy v. St. Paul, 22 Minn. 527; Bott v. Pratt, 33 Minn. 323, 326, 23 N. W. 237; United States etc. Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112; Way v. Barney, 116 Minn. 285, 133 N. W. 801.

[3] Whaley v. Bayer, 99 Minn. 397, 109 N. W. 596, 820; J. T. McMillan Co. v. State Board of Health, 110 Minn. 145, 149, 124 N. W. 828.

[4] St. Paul Typothetae v. St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725.

[5] 30 Cyc. 27.

[6] R. L. 1905 § 4053; G. S. 1913 § 7674.

[7] 30 Cyc. 82. See cases under notes 8 and 10, this section.

[8] 30 Cyc. 84; Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555; Elmquist v. Markoe, 45 Minn. 305, 47 N. W. 970; Anderson v. Reardon, 46 Minn. 185, 48 N. W. 777; Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113.

[9] Russell v. Minn. Outfit, 1 Minn. 162 (136) (assignee of claim of partnership against one of the partners); Castner v. Austin, 2 Minn. 44(32) (assignee of note assigned as security); Helfer v. Alden, 3 Minn. 332(232) (an indorsee of a note); McDonald v. Kneeland, 5 Minn. 352(283, 294) (assignee of bond); Tuttle v. Howe, 14 Minn. 145(113) (assignee of mechanic's lien); Bennett v. McGrade, 15 Minn. 132(99) (assignee of a claim pendente lite—action on appeal bond); Lahmers v. Schmidt, 35 Minn. 434, 29 N. W. 169 (assignee of mortgage and

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title, though others may have an equitable interest;[10] a pledgee of a note payable to order and not indorsed;[11] a holder of a certificate of deposit acquiring title by delivery without indorsement;[12] the owner of a note indorsed by mistake to his agent;[13] a holder of a note unconditionally indorsed by the payee;[14] a payee of a bill of exchange made payable, really but not expressly, for collection;[15] a cestui que trust, the trustee having died and no successor having been appointed;[16] an executor;[17] an infant;[18] one in possession of property

debt); Schlieman v. Bowlin, 36 Minn. 198, 30 N. W. 879 (assignee of judgment and bond to secure same); Anderson v. Reardon, 46 Minn. 185, 48 N. W. 777 (assignee in trust for assignor); Maxcy v. New Hampshire Fire Ins. Co., 54 Minn. 272, 55 N. W. 1130 (assignee of a claim under a fire insurance policy); Bates v. B. B. Richards Lumber Co., 56 Minn. 14, 57 N. W. 218 (assignee of a contract for work and labor); Anchor Invest. Co. v. Kirkpatrick, 59 Minn. 378, 61 N. W. 29 (assignee of a guaranty of payment); Struckmeyer v. Lamb, 64 Minn. 57, 65 N. W. 930 (assignee of notes and chattel mortgages in trust for assignor); Dobberstein v. Murphy, 64 Minn. 127, 66 N. W. 204 (assignee of right of dower); Lynott v. Dickerman, 65 Minn. 471, 67 N. W. 1143 (assignee of claim to surplus on foreclosure); Hurley v. Bendel, 67 Minn. 41, 69 N. W. 477 (assignee of account); Laramee v. Tanner, 69 Minn. 156, 71 N. W. 1028 (assignee of subscription contract); Wood v. Bragg, 75 Minn. 527, 78 N. W. 93 (assignee of note and of contract of guaranty of the payment thereof); Jackson v. Sevatson, 79 Minn. 275, 82 N. W. 634 (assignee of a claim for conversion of grain); Horgan v. Duluth Log Co., 120 Minn. 244, 139 N. W. 491 (assignee of a log lien).

[10] Winona etc. Ry. v. St. Paul etc. Ry., 23 Minn. 359 (action by railroad company for lands claimed as a part of its land grant); Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555 (action by payee of a bill for collection); Elmquist v. Markoe, 45 Minn. 305, 47 N. W. 970 (action by indorsee of note where indorser has a beneficial interest); Anderson v. Reardon, 46 Minn. 185, 48 N. W. 1134 (action by assignee of chose in action in trust for assignor); Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113 (action to cancel deed by legal owner of land); St. Paul etc. Co. v. Thomas, 60 Minn. 140, 61 N. W. 1134 (action by trustee holding legal title to note); Struckmeyer v. Lamb, 64 Minn. 57, 65 N. W. 930 (action by assignee of notes and chattel mortgages held in trust for assignor); Dobberstein v. Murphy, 64 Minn. 127, 66 N. W. 204 (action by assignee of dower).

[11] Pease v. Rush, 2 Minn. 107(89); White v. Phelps, 14 Minn. 27(21). See Castner v. Austin, 2 Minn. 44(32); Peters v. Cannon River etc. Co., 110 Minn. 121, 124 N. W. 826.

[12] Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. 363.

[13] Conger v. Nesbitt, 30 Minn. 436, 15 N. W. 875.

[14] Elmquist v. Markoe, 45 Minn. 305, 47 N. W. 970; Rosemond v. Graham, 54 Minn. 323, 56 N. W. 38; Citizens' State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

[15] Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555; Minnesota Thresher Mfg. Co. v. Heipler, 49 Minn. 395, 52 N. W. 33; Citizens' State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

[16] Judd v. Dike, 30 Minn. 380, 15 N. W. 672.

[17] Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118.

[18] Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497(473); Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022;

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as agent, factor or bailee;[19] an indorsee of a check for collection, the indorsement being unrestricted;[20] a wife joining with her husband in an absolute deed designed as a mortgage;[21] a consignee of freight.[22] The following persons have been held not the real party in interest: An indorsee of a note, the indorsement being expressly "for collection;"[23] a public officer;[24] a corporation, the injury being to a stockholder.[25]

34. Exception—Party to contract for another—It is provided by statute that a person with whom, or in whose name, a contract is made for the benefit of another, may sue without joining with him the person for whose benefit the action is brought.[26] The statute is permissive rather than obligatory.[27] An agent may sue on a contract made by him in his own name for the benefit of his principal,[28] and this applies to a partner.[29] A sheriff selling realty on execution may sue in his own name for the amount bid at the sale.[30] A guardian of minors may sue for money collected for him by an attorney though the minors have become of age.[31] A guardian may sue in his own name on a note payable to himself, though 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.[32] Where a note is taken in the name of one person for the benefit of another the administrator of the payee may sue thereon.[33]

35. Exception—Trustee of an express trust—It is provided by statute that a trustee of an express trust may sue without joining with him the person for whose benefit the action is brought.[34] The statute is permissive rather

Peterson v. Baillif, 52 Minn. 386, 54 N. W. 185.

[19] Grinnell v. Illinois Central Ry., 109 Minn. 513, 124 N. W. 377.

[20] Citizens' State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

[21] Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638.

[22] Sleepy Eye Milling Co. v. Chicago etc. Ry., 119 Minn. 199, 137 N. W. 813.

[23] Rock County Nat. Bank v. Hollister, 21 Minn. 385; Third Nat. Bank v. Clark, 23 Minn. 263. See Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555; Minn. Thresher Mfg. Co. v. Heipler, 49 Minn. 395, 52 N. W. 33; Jackson v. Sevatson, 79 Minn. 275, 82 N. W. 634; Citizens' State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

[24] Balcombe v. Northrup, 9 Minn. 172 (159); Willis v. Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

[25] Waseca County Bank v. McKenna, 32 Minn. 468, 21 N. W. 556.

[26] R. L. 1905 § 4055; G. S. 1913 § 7676.

[27] Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497 (473).

[28] Lake v. Albert, 37 Minn. 453, 35 N. W. 177; Cremer v. Wimmer, 40 Minn. 511, 42 N. W. 467; Close v. Hodges, 44 Minn. 204, 46 N. W. 335, Murphin v. Scovell, 44 Minn. 530, 47 N. W. 256; Struckmeyer v. Lamb, 64 Minn. 57, 65 N. W. 930; Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415. See Miller v. State Bank, 57 Minn. 319, 59 N. W. 309.

[29] Lundberg v. N. W. El. Co., 42 Minn. 37, 43 N. W. 685.

[30] Armstrong v. Vroman, 11 Minn. 220 (142).

[31] Huntsman v. Fish, 36 Minn. 148, 30 N. W. 455.

[32] McLean v. Dean, 66 Minn. 369, 69 N. W. 140.

[33] Cooper v. Hayward, 71 Minn. 374, 74 N. W. 152.

[34] R. L. 1905 § 4055; G. S. 1913 § 7676.

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than obligatory.[35] The following persons have been held trustees within the statute: An assignee for the benefit of creditors;[36] a receiver;[37] a trustee under a mortgage;[38] an assignee of a note and chattel mortgage to be collected and the proceeds turned over to the assignor.[39] A guardian appointed by the probate court is not a trustee of an express trust within this provision;[40] but another provision expressly authorizes him to sue in his own name.[41] Mere authority to collect moneys belonging to another does not make the person so authorized a trustee of an express trust.[42]

36. Exception—Executors, administrators and guardians—It is provided by statute that an executor, administrator or guardian may sue without joining the person for whose benefit the action is brought.[43]

37. Exception—Persons expressly authorized to sue—It is provided by statute that a person expressly authorized by statute to sue may sue without joining the person for whose benefit the action is brought.[44]

38. Exception—Assignment pendente lite—An exception to the general rule that an action must be prosecuted in the name of the real party in interest is made where a party dies or a transfer of interest is made pendente lite.[45]

39. Exception—One suing for many—It is provided by statute that "when the question is one of common or general interest to many persons, or when those who might be made parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."[46]

[35] Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497(473).

[36] St. Anthony Mill Co. v. Vandall, 1 Minn. 246(195); Langdon v. Thompson, 25 Minn. 509; Donohue v. Ladd, 31 Minn. 244, 17 N. W. 381; Ueland v. Haugan, 70 Minn. 349, 73 N. W. 169; State v. Nelson, 79 Minn. 373, 82 N. W. 674.

[37] Henning v. Raymond, 35 Minn. 303, 29 N. W. 132; Williamson v. Selden, 53 Minn. 73, 54 N. W. 1055; Ueland v. Haugan, 70 Minn. 349, 73 N. W. 169.

[38] Moulton v. Haskell, 50 Minn. 367, 52 N. W. 960; Seibert v. Minneapolis etc. Ry., 52 Minn. 148, 53 N. W. 1134.

[39] Struckmeyer v. Lamb, 64 Minn. 57, 65 N. W. 930.

[40] Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022.

[41] R. L. 1905 § 4055; G. S. 1913 § 7676.

[42] Willis v. Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

[43] R. L. 1905 § 4055; G. S. 1913 § 7676; Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118 (executor). Prior to the revision of 1905 no provision was made for a guardian appointed by the probate court to sue in his own name. Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022. Where a note is taken in the name of one person for the benefit of another the administrator of the payee may sue thereon. Cooper v. Hayward, 71 Minn. 374, 74 N. W. 152.

[44] R. L. 1905 § 4055; G. S. 1913 § 7676; Mower County v. Smith, 22 Minn. 97 (county held authorized to sue county treasurer for conversion of public funds); Willis v. Standard Oil Co, 50 Minn. 290, 52 N. W. 652 (state inspector of oils held not expressly authorized to sue).

[45] See §§ 125, 126.

[46] R. L. 1905 § 4053; G. S. 1913 § 7674. See Pencille v. State Farmers' Mut. Hail Ins. Co., 74 Minn. 67, 76 N. W. 1026.

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40. Associates doing business under common name—It is provided by statute that "when two or more persons transact business as associates and under a common name, whether such name comprise the names of such persons or not, they may be sued by such common name, and the summons may be served on one or more of them. The judgment in such case shall bind the joint property of all the associates, the same as though all had been named as defendants." [47] The statute is applicable to fraternal or benevolent associations engaged in business.[48] It has been held applicable to trustees holding stock in corporations for the benefit of a railway company.[49] It is inapplicable to unincorporated associations not engaged in business, such as labor unions [50] or athletic associations.[51] It does not authorize an association to sue in its associate name.[52] The action is against the associates; not against the association.[53] The complaint need not name the associates.[54] Service of summons on one member of the association will authorize a judgment which will bind all the associate property.[55] A judgment against the association does not bind the individual property of the associates, but a personal judgment against the associates personally served may be entered. Before ordering such a judgment the court should insert the names of the associates personally served.[56] An affidavit of service of summons to the effect that the persons served are members of the association and doing business under the associate name is sufficient to confer jurisdiction.[57] The mere fact that one is an agent of certain persons in a business does not authorize him to transact the business for them by a common name so as to render them liable under the statute.[58]

[47] R. L. 1905 § 4068; G. S. 1913 § 7689. See 20 Harv. L. Rev. 58.

[48] Cornfield v. Order Brith Abraham, 64 Minn. 261, 66 N. W. 970; Martin v. Northern Pacific Beneficial Assn., 68 Minn. 521, 71 N. W. 701; Taylor v. Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684. See Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022.

[49] Venner v. Great Northern Ry., 108 Minn. 62, 121 N. W. 212.

[50] St. Paul Typothetae v. St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725.

[51] George v. University of Minn. Athletic Assn., 107 Minn. 424, 120 N. W. 750.

[52] Dimond v. Minn. Savings Bank, 70 Minn. 298, 73 N. W. 182; St. Paul Typothetae v. St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725.

[53] Gale v. Townsend, 45 Minn. 357, 47 N. W. 1064; Dimond v. Minnesota Savings Bank 70 Minn. 298, 73 N. W. 182.

[54] Dimond v. Minnesota Savings Bank, 70 Minn. 298, 73 N. W. 182.

[55] Hinkley v. St. Anthony Falls Water Power Co., 9 Minn. 55(44).

[56] Gale v. Townsend, 45 Minn. 357, 47 N. W. 1064; Dimond v. Minnesota Savings Bank, 70 Minn. 298, 73 N. W. 182.

[57] Id.; Taylor v. Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684.

[58] Cooper v. Breckenridge, 11 Minn. 341(241).

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ACTIONS ON CONTRACTS—PLAINTIFFS
GENERAL RULES

41. Only party to contract may sue—Privity—As a general rule no one can sue for the breach of a contract who is not a party to the contract.[59] In other words, there must be privity of contract between the parties.[60]

42. Exception—Contract for benefit of third party—The mere fact that a stranger to a contract is to be benefited thereby does not give him a right of action thereon. 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.[61] But a third party, for whose benefit a contract is made, has a right of action on it, if there is a duty or obligation to him on the part of the promisee, or he is connected with the consideration, or has a legal or equitable claim to the benefit of the promise.[62] It is not essential that he be specifically named or designated in the agreement.[63] 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.[64] In such an action B may set up any defences, either

[59] Dicey, Rule 10; Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604; Union Railway Storage Co. v. McDermott, 53 Minn. 407, 55 N. W. 606; Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925. See Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638 (contract made in interest of plaintiff, who was a party to it, and in consideration thereof parted with his interest in certain land—plaintiff held proper party to sue); Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428 (landlord held liable to a third party for negligent failure to heat premises as agreed).

[60] Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882; Greenwood v. Sheldon, 31 Minn. 254, 17 N. W. 478; McCarthy v. Couch, 37 Minn. 124, 33 N. W. 777; State Bank v. Heney, 40 Minn. 145, 41 N. W. 411; Brown v. Stillman, 43 Minn. 126, 45 N. W. 2; Nelson v. Rogers, 47 Minn. 103, 49 N. W. 526; Union Railway Storage Co. v. McDermott, 53 Minn. 407, 55 N. W. 606; Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604; Walsh v. Featherstone, 67 Minn. 103, 69 N. W. 811; Klemer v. Sheffield, 78 Minn. 224, 80 N. W. 1055; Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925.

[61] Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604; Union Railway Storage Co. v. McDermott, 53 Minn. 407, 55 N. W. 606; Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925; Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333. See Van Eman v. Stanchfield, 13 Minn. 75(70); Sherwood v. O'Brien, 58 Minn. 76, 59 N. W. 957; Basting v. Northern Trust Co., 61 Minn. 307, 314, 63 N. W. 721; Michaud v. Erickson, 108 Minn. 356, 122 N. W. 324; Pollock, Contracts, (Williston's ed. 1906), pp. 237–278; 9 Harv. L. Rev. 233; 15 Id. 767; 21 Id. 426.

[62] Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333. See Michaud v. Erickson, 108 Minn. 356, 122 N. W. 324; Wasgatt v. First Nat. Bank, 117 Minn. 9, 134 N. W. 324.

[63] Maxfield v. Schwartz, 43 Minn. 221, 45 N. W. 429; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086.

[64] Sanders v. Classon, 13 Minn. 379 (352); Jordan v. White, 20 Minn. 91 (77); Sullivan v. Murphy, 23 Minn. 6; Merriam v. Pine City Lumber Co., 23

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legal or equitable, which he may have against A.[65] If A promises B to pay a debt which B owes C the latter may sue A on his promise to B.[66] The beneficiary in an insurance policy may sue in his own name[67] and so in certain cases one may sue for whose benefit a bond is given.[68] As regards the right of a beneficiary to sue, there is no distinction between sealed and unsealed contracts.[69] Our supreme court has not attempted to formulate a general rule as to when a stranger to a contract may sue thereon.[70] One who seeks to enforce a promise made to another for his benefit is bound, the same as the promisee would be, by the rule excluding parol proof to vary a written contract.[71]

43. Exception—Action by surety—It is provided by statute that "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."[72] This statute affords a substitute for the old bill in equity for exoneration,[73] and deprives the surety of the right to compel the creditor to sue the principal.[74]

44. Simple contracts—Proper parties plaintiff—The person to sue for the breach of a simple contract must be the person from whom the consideration for the promise moves.[75]

Minn. 314; Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882; Starlha v. Greenwood, 28 Minn. 521, 11 N. W. 76; Maxfield v. Schwartz, 43 Minn. 221, 45 N. W. 429; Sayre v. Burdick, 47 Minn. 367, 50 N. W. 245; Rogers v. Castle, 51 Minn. 428, 53 N. W. 651; Lovejoy v. Howe, 55 Minn. 353, 57 N. W. 57; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Scanlan v. Grimmer, 71 Minn. 351, 74 N. W. 146.

[65] Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. 448; Rogers v. Castle, 51 Minn. 428, 53 N. W. 651; Gold v. Ogden, 61 Minn. 88, 63 N. W. 266.

[66] Hawley v. Wilkinson, 18 Minn. 525(468); Pulliam v. Adamson, 43 Minn. 511, 45 N. W. 1132; Barnes v. Hekla Fire Ins. Co., 56 Minn. 38, 57 N. W. 314.

[67] See Dunnell, Minn. Digest, § 4734.

[68] Michaud v. Erickson, 108 Minn. 356, 122 N. W. 324; Koski v. Pakkala, 121 Minn. 450, 141 N. W. 793. See Dunnell, Minn. Digest, § 6720.

[69] Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604.

[70] Id.

[71] Sayre v. Burdick, 47 Minn. 367, 50 N. W. 245.

[72] R. L. 1905 § 4063; G. S. 1913 § 7684; Miller v. Rouse, 8 Minn. 124(97); Metzner v. Baldwin, 11 Minn. 150(92); Benedict v. Olson, 37 Minn. 431, 35 N. W. 10.

[73] Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700.

[74] Huey v. Pinney, 5 Minn. 310(246).

[75] 15 Ency. Pl. & Pr. 500. This common-law rule is superseded by our statute requiring actions to be brought in the name of the real party in interest. The result will generally be the same under either rule. See cases under §§ 33–40. It has been held in this state that a promise to one person, upon a consideration coming from another, the latter assenting to the promise, is valid, and an action may be maintained by the promisee for a breach of it. Van Eman v. Stanchfield, 10 Minn. 255(197). Where A promises B to pay a debt of B to C, B may sue A on the promise without first paying the debt. Merriam v. Pine City Lumber Co., 23 Minn. 314;

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Exception 1. Actions by a person appointed by statute to sue on behalf of others.[76]

Exception 2. Actions which can be brought either by a principal or an agent.[77]

Exception 3. Some actions for money had and received.[78] Dicey, Rule 11.

45. Contracts by deed—Proper parties plaintiff—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.[79]

Subordinate rule. No one can sue on a covenant in an indenture who is not mentioned among the parties to the indenture.[80] Dicey, Rule 12.

46. All parties to contract must join—All the persons with whom a contract is made must join in an action for the breach of it.[81]

Exception 1. When there has been a severance by agreement of the parties.[82]

Exception 2. When the interest of each is several and the damages accruing to each in case of a breach are severable.[83]

Exception 3. When one of the parties refuses to join. In such cases the

Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

[76] See § 37.

[77] See § 67.

[78] 15 Ency. Pl. & Pr. 507.

[79] 15 Ency. Pl. & Pr. 507. This common-law rule is superseded by our statute requiring actions to be brought in the name of the real party in interest, but under the statutory rule the covenantee will generally be the proper party to sue. See §§ 33–40. The right to sue for breach of covenants which run with the land rests exclusively with the last covenantee, and an intermediate covenantor has no right of action thereon until he has indemnified such subsequent covenantee. Allis v. Foley, 126 Minn. 14, 147 N. W. 670. See as to right of third parties to sue on restrictive covenants, Velie v. Richardson, 126 Minn. 334, 148 N. W. 286. In this state a third party may sue on a contract by deed whenever he might sue on a simple contract with like terms. Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604. The distinction between simple contracts and specialties has been abolished in this state. R. L. 1905 § 2652; G. S. 1913 § 5704.

[80] Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550. This rule does not prevail in this state. See preceding note.

[81] Dicey, Rule 13. This common-law rule remains in force in this state. Hedderly v. Downs, 31 Minn. 183, 17 N. W. 274; Davis v. Chouteau, 32 Minn. 548, 21 N. W. 748; Peck v. McLean, 36 Minn. 228, 30 N. W. 759; Moore v. Bevier, 60 Minn. 240, 62 N. W. 281; Mason v. St. Paul etc. Co., 82 Minn. 336, 85 N. W. 13; Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041 (several joint debtors agreeing among themselves to apportion the debt among them—one failed to pay his share—held that all the others might join in an action against him for contribution). See 9 Cyc. 703; 15 Ency. Pl. & Pr. 528.

[82] Pratt v. Pratt, 22 Minn. 148. See 9 Cyc. 706.

[83] Sprague v. Wells, 47 Minn. 504, 50 N. W. 535; Brown v. Farnham, 55 Minn. 27, 56 N. W. 352; Moede v. Haines, 66 Minn. 419, 69 N. W. 216. See Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041.

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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.[84]

47. Death of joint parties—Survivorship—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.[85]

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

ACTIONS ON CONTRACTS—DEFENDANTS
GENERAL RULES

48. Only party to contract may be sued—No person can be sued for a breach of contract who is not a party to the contract.[86] Dicey, Rule 46.

49. Simple contracts—Proper parties defendant—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.[87]

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.[88] Dicey, Rule 47.

50. Contracts by deed—Proper parties defendant—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.[89] Dicey, Rule 48.

51. Joint obligations—Proper parties defendant—By virtue of statute all parties to a joint obligation may be sued either jointly or separately, subject to the right of the court to require the plaintiff to bring in as defendants all the parties jointly liable.[90] Prior to Laws 1897, c. 303, the common-law rule,

[84] Peck v. McLean, 36 Minn. 228, 30 N. W. 759; Rowland v. McLaughlin Bros., 110 Minn. 398, 125 N. W. 1019.

[85] Freeman v. Curran, 1 Minn. 169(144); Hedderly v. Downs, 31 Minn. 183, 17 N. W. 274; Northness v. Hillestad, 87 Minn. 304, 91 N. W. 1112; Semper v. Coates, 93 Minn. 76, 100 N. W. 662. See 15 Ency. Pl. & Pr. 531; 9 Cyc. 656; Pomeroy, Remedies, §§ 188, 226.

[86] Graves v. Moses, 13 Minn. 335(307); Wheeler v. Johnson, 21 Minn. 507; Mahoney v. McLean, 26 Minn. 415, 4 N. W. 784; 9 Cyc. 702; 15 Ency. Pl. & Pr. 524. See Campbell v. Rotering, 42 Minn. 115, 43 N. W. 795 (one who executes a bond may be liable upon it though his name does not appear in the body of it).

[87] 15 Ency. Pl. & Pr. 525.

[88] See 15 Ency. Pl. & Pr. 526.

[89] 15 Ency. Pl. & Pr. 525; Mahoney v. McLean, 26 Minn. 415, 4 N. W. 784; Briggs v. Partridge, 64 N. Y. 357; Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550. There is an exception to this general rule in the case of an undisclosed principal. J. B. Streeter Jr. Co. v. Janu, 90 Minn. 393, 96 N. W. 1128; Davidson v. Hurty, 116 Minn. 280, 153 N. W. 862.

[90] R. L. 1905 § 4282; G. S. 1913 § 7916; Hollister v. United States etc. Co., 84 Minn. 251, 87 N. W. 776 (statute applicable to all contracts—applicable to bond for removal of cause from federal circuit court to federal circuit court of appeals); Sundberg v. Goar, 92 Minn. 143,

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that where several persons are jointly liable on an obligation they must all be joined in an action for the breach thereof, prevailed in this state.[91] The common-law rule was founded in a purpose to protect persons jointly liable, and to secure to them the right of contribution in case judgment was ordered against them. If a joint judgment were recovered, and one of the defendants compelled to pay it, he could, in turn, compel his codefendants to reimburse him to the extent of their portion of the liability. But where all persons jointly liable were not made parties, this right of contribution was lost, for the cause of action was held merged in the judgment, and all persons who were not parties were released and discharged from liability.[92] The statute is applicable to all contracts,[93] to obligations ex delicto,[94] and to actions in this state on obligations arising out of the state.[95] An application to bring in additional parties defendant must be made with reasonable promptness after notice of the necessity of bringing them in.[96] If one of the parties to a joint contract, when sued separately, pleads a general denial and makes no objection either by answer or at the trial, he is not, after a decision in the case, entitled to amend his answer and set up the fact that such contract was joint. An order of court allowing such an amendment is an abuse of discretion.[97] Where an action is brought against one of the parties to a joint contract and the complaint alleges a contract made by him, but the evidence on the trial shows a

99 N. W. 638 (statute inapplicable to actions on contracts existing at the time of its enactment—bringing in additional parties—application must be made with reasonable promptness); Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311 (statute applicable to a lease); Fryklund v. Great Northern Ry., 101 Minn. 37, 111 N. W. 727 (statute applicable to actions ex delicto—governs action in this state on cause of action arising in another state); Morgan v. Branch, 104 Minn. 247, 116 N. W. 490 (drainage contract); Kettle River v. Bruno, 106 Minn. 58, 118 N. W. 63 (action between towns to enforce contribution on an indebtedness of an old town). The statute was probably not intended to abrogate all equitable priorities of partnership and individual creditors, respectively, in the partnership and individual estates, or to introduce any new rule for marshaling the assets of the joint and separate estates. Hawkins v. Mahoney, 71 Minn. 155, 164, 73 N. W. 720. See Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973 (a contract by the holder of the fee and by the holder of the life estate to convey both estates held a joint contract to be enforced as to both or not at all).

[91] Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632; Little v. Lee, 53 Minn. 511, 55 N. W. 737; Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015; Pfefferkorn v. Haywood, 65 Minn. 429, 68 N. W. 68; Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638. For the common-law rule see Dicey, Rule 49.

[92] Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638.

[93] Hollister v. United States etc. Co., 84 Minn. 251, 87 N. W. 776.

[94] Fryklund v. Great Northern Ry., 101 Minn. 37, 111 N. W. 727.

[95] Id.

[96] Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638. See Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311.

[97] Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311.

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joint contract with defendant and others, there is no fatal variance, in the absence of a showing of prejudice.[98]

52. Joint contracts—Death of party—Liability of estate—It is provided by statute that "whenever two or more persons are indebted on any joint contract, or upon a judgment founded on a joint contract, and one of them dies, his estate shall be liable therefor, and the amount thereof may be allowed by the probate court the same as though the contract had been joint and several or the judgment had been against him alone."[99] At common law the liability to an action on a contract by several persons jointly, passed at the death of each to the survivors, and on the death of the last to his representatives.[1] Our statute was designed to abolish the common-law rule. It is applicable to an action in the district court on a claim not provable in the probate court.[2] It doubtless authorizes the joinder of personal representatives and the surviving obligors.[3]

53. Persons severally liable on same instrument—Joinder—It is provided by statute that "persons severally liable upon the same obligation or instrument, including 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."[4] The statute abrogates the common-law rule that persons holding different relations to the same instrument could not be joined in an action thereon. It is designed to avoid multiplicity of actions by uniting in one action all who are liable in any way on the same obligation or instrument.[5] It does not change the relative rights of the parties.[6] It is permissive rather than obligatory.[7] It is applicable to parties liable on a joint and several obligation.[8] The maker and guarantor of payment of the same instrument may be joined.[9] It is immaterial that a party's obligation is indorsed on the principal agreement instead of being incorporated in it or written under it.[10]

[98] Morgan v. Brach, 104 Minn. 247, 116 N. W. 490.

[99] R. L. 1905 § 3738; G. S. 1913 § 7331; Hawkins v. Mahoney, 71 Minn. 155, 164, 73 N. W. 720 (effect of statute in case of partnership debts).

[1] Dicey, Rule 52; Pomeroy, Remedies, §§ 280, 302; 9 Cyc. 653; 15 Ency. Pl. & Pr. 551; Berryhill v. Peabody, 72 Minn. 232, 75 N. W. 220.

[2] Berryhill v. Peabody, 72 Minn. 232, 75 N. W. 220.

[3] Colt v. Learned, 133 Mass. 409. See 15 Ency. Pl. & Pr. 743; 9 Cyc. 653; Pomeroy, Remedies, § 303.

[4] R. L. 1905 § 4062; G. S. 1913 § 7683.

[5] Folsom v. Carli, 5 Minn. 333(264); Hammel v. Beardsley, 31 Minn. 314, 17 N. W. 858.

[6] Folsom v. Carli, 5 Minn. 333(264).

[7] Bank of Commerce v. Smith, 57 Minn. 374, 59 N. W. 311.

[8] Lanier v. Irvine, 24 Minn. 116; Steffes v. Lemke, 40 Minn. 27, 41 N. W. 302. See Laramee v. Tanner, 69 Minn. 156, 71 N. W. 1028.

[9] Hammel v. Beardsley, 31 Minn. 314, 17 N. W. 858; Lucy v. Wilkins, 33 Minn. 21, 21 N. W. 849; Bank of Commerce v. Smith, 57 Minn. 374, 59 N. W. 311; First Nat. Bank v. Burkhardt, 71 Minn. 185, 73 N. W. 858.

[10] Lucy v. Wilkins, 33 Minn. 21, 21 N. W. 849.

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ACTIONS FOR TORTS—PLAINTIFFS
GENERAL RULES

54. Real party in interest must sue—Under the statute an action for a tort must be prosecuted in the name of the real party in interest, subject to the same exceptions as actions on contract.[11]

55. Proper party plaintiff—Common-law rule—The person who sustains an injury is the person to bring an action for the injury against the wrongdoer.[12]

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.[13]

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, 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.[14]

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.[15]

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.[16] Dicey, Rule 79.

56. Plaintiff must be the person injured—It is the general rule that "no one can bring an action for any injury which is not an injury to himself."[17]

[11] R. L. 1905 § 4053; G. S. 1913 § 7674; Grinnell v. Illinois Central Ry., 109 Minn. 513, 124 N. W. 377. See cases under §§ 33–40.

[12] 15 Ency. Pl. & Pr. 517. The person who sustains an injury is the real party in interest and hence the proper person to bring an action for the injury under our statute as well as at common law.

[13] 15 Ency. Pl. & Pr. 519. See Dunnell, Minn. Digest, § 9688.

[14] See R. L. 1905 §§ 4444, 4447; G. S. 1913 §§ 8083, 8088; Dunnell, Minn. Digest, §§ 9688, 10151; Little v. Willford, 31 Minn. 173, 181, 17 N. W. 282; Salmond, Torts, 2 ed., p. 318; Pollock, Torts, 8 ed., p. 356.

[15] 15 Ency. Pl. & Pr. 520. A person in possession as agent, factor or bailee may sue. Chamberlain v. West, 37 Minn. 54, 33 N. W. 114; Laing v. Nelson, 41 Minn. 521, 43 N. W. 476; Brown v. Shaw, 51 Minn. 266, 53 N. W. 633; Grinnell v. Illinois Central Ry., 109 Minn. 513, 516, 124 N. W. 377.

[16] For any permanent injury an action may be brought by either the actual possessor or the general owner, as the interests of both are affected by such injuries. 15 Ency. Pl. & Pr. 524. The right of the general owner of property, and of one having a special property in it, to sue for a conversion of it, is an instance of a right at common law in two different persons suing for the same thing. Mower County v. Smith, 22 Minn. 97, 111.

[17] Dicey, Rule 78; 15 Ency. Pl. & Pr.

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For the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest of the party complaining. Neither one without the other is sufficient. This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, though it may have caused him mental suffering.[18] A corporation cannot sue for an injury to its stockholders, which is not an injury to itself.[19] A parent cannot sue for the negligent killing of his child.[20] A wife cannot sue for an injury to her husband.[21] A man cannot sue for the seduction of his affianced wife or for the alienation of her affections.[22]

57. Exception—Seduction of daughter or ward—It is provided by statute that "a father, or, in case of his death or desertion of his family, the mother, may maintain an action for the seduction of the daughter, and the guardian for the seduction of the ward, though such daughter or ward is not living with, or in the service of, the plaintiff at the time of the seduction or afterwards, and there is no loss of service." [23]

58. Exception—Injury to child—Action by parent or guardian—It is provided by statute that "a father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury of a minor child, and a general guardian may maintain an action for the injury of his ward. Provided, that if no such action is brought by the father or mother, an action for such injury may be maintained by a guardian ad litem either before or after the death of such parent." [24]

59. Exception—Death by wrongful act—Provision is made by statute for an action by a personal representative in case of death by wrongful act.[25]

60. Joinder of parties plaintiff—Persons who have a separate interest and sustain a separate damage must sue separately.[26] Persons who have a separate

517; Waseca County Bank v. McKenna, 32 Minn. 468, 21 N. W. 556; Bucknam v. Great Northern Ry., 76 Minn. 373, 79 N. W. 98; Sanderson v. Northern Pacific Ry., 88 Minn. 162, 92 N. W. 542.

[18] Larson v. Chase, 47 Minn. 307, 311, 50 N. W. 238; Bucknam v. Great Northern Ry., 76 Minn. 373, 79 N. W. 98.

[19] Waseca County Bank v. McKenna, 32 Minn. 468, 21 N. W. 556. See Advance Realty Co. v. Nichols, 126 Minn. 267, 148 N. W. 65 (action by corporation for fraud of promoters).

[20] Scheffler v. Minneapolis etc. Ry., 32 Minn. 125, 19 N. W. 656.

[21] Bucknam v. Great Northern Ry., 76 Minn. 373, 79 N. W. 98.

[22] Davis v. Condit, 124 Minn. 365, 144 N. W. 1089.

[23] R. L. 1905 § 4059; G. S. 1913 § 7680; Schmit v. Mitchell, 59 Minn. 251, 61 N. W. 140; Hein v. Holdridge, 78 Minn. 468, 81 Minn. 522. See Dunnell, Minn. Digest, §§ 8709–8716.

[24] R. L. 1905 § 4060; Laws 1907 c. 58; G. S. 1913 § 7681. See Dunnell, Minn. Digest, § 7300.

[25] R. L. 1905 § 4503; Laws 1911 c. 281; G. S. 1913 § 8175. See § 634, and Dunnell, Minn. Digest, §§ 2600–2621.

[26] 15 Ency. Pl. & Pr. 541; 30 Cyc. 113. Where a personal tort has been done to a number of individuals but no joint injury has been suffered and no joint dam-

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interest, but sustain a joint damage, may sue either jointly or separately in respect thereto.[27] Persons who have a joint interest must sue jointly for an injury to it.[28] Dicey, Rule 80.

61. Death of party—Survivorship—Common-law rule—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.[29] Dicey, Rule 82.

ages 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. Persons who have a separate interest affected by a nuisance cannot sue jointly for their separate damages though they may maintain a joint equitable action to abate the nuisance. Grant v. Schmidt, 22 Minn. 1; Nahte v. Hansen, 106 Minn. 365, 119 N. W. 55.

[27] 15 Ency. Pl. & Pr. 543; 30 Cyc. 112. All persons interested in a single cause of action may join in an action to recover thereon, though their interests are distinct and severable. Fegelson v. Niagara Fire Ins. Co., 94 Minn. 486, 103 N. W. 495; Carlton County Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727. See Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154; Knight v. Leighton, 110 Minn. 254, 124 N. W. 1090. All persons whose property is affected by a nuisance, though they own the property in severalty, may join in an action to abate the nuisance. Grant v. Schmidt, 22 Minn. 1; Kray v. Muggli, 77 Minn. 231, 79 N. W. 964, 1026, 1064; Nahte v. Hansen, 106 Minn. 365, 119 N. W. 55; Burghen v. Erie Ry., 108 N. Y. S. 311; Warren v. Parkhurst, 186 N. Y. 45, 78 N. E. 579.

[28] 15 Ency. Pl. & Pr. 544; 30 Cyc. 112; Pomeroy, Remedies, § 230. When two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must, in general, join in an action for any injury to it. The rule is designed to protect defendants against a multiplicity of actions and is a sound one, but is subject to exceptions where otherwise a party would be deprived of a remedy. Peck v. McLean, 36 Minn. 228, 30 N. W. 759. One tenant in common of either personalty or realty may sue a stranger to recover the property or damages for an injury thereto without joining his cotenants. Miller v. Darling, 22 Minn. 303; Allis v. Ware, 28 Minn. 166, 9 N. W. 666; Sherin v. Larson, 28 Minn. 523, 11 N. W. 70; Melin v. Reynolds, 32 Minn. 52, 19 N. W. 81; Peck v. McLean, 36 Minn. 228, 30 N. W. 759; Easton v. Scofield, 66 Minn. 425, 429, 69 N. W. 326. Where several parties have suffered a joint injury, caused by the issuance of an attachment in a civil action sued out maliciously and without probable cause, they may unite in an action to recover their joint damages. In such action special damages may be alleged and proved for injuries to their joint credit, business and property. Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154.

[29] See R. L. 1905 § 4502; G. S. 1913 § 8174.

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ACTIONS FOR TORTS—DEFENDANTS
GENERAL RULES

62. No general statutory rule—We have no general statutory rule in this state defining who shall be made parties defendant in actions ex delicto.[30]

63. Defendant must have caused the injury—No person is liable to be sued for any injury of which he is not the cause.[31] Dicey, Rule 96.

64. Person causing injury may be sued—Any person who causes an injury to another is liable to be sued by the person injured.[32]

Exception. Where persons are protected from actions.[33] Dicey, Rule 97.

65. Joint wrongdoers—Joinder—One, or any, or all of several joint wrongdoers may be sued.[34]

Exception. Persons sued as joint owners of land.[35] Dicey, Rule 98.

[30] Mayberry v. Northern Pacific Ry., 100 Minn. 79, 82, 110 N. W. 356.

[31] 15 Ency. Pl. & Pr. 526. See Dunnell, Minn. Digest, §§ 6999–7011.

[32] 15 Ency. Pl. & Pr. 527; 30 Cyc. 103.

[33] As, for example, judges. Stewart v. Cooley, 23 Minn. 347; Stewart v. Case, 53 Minn. 62, 54 N. W. 938; Murray v. Mills, 56 Minn. 75, 57 N. W. 324.

[34] 15 Ency. Pl. & Pr. 557. Where several persons join in the commission of a tort they are jointly and severally liable. In other words, an action may be maintained against one or more of them at the option of the plaintiff. Hurlburt v. Schulenburg, 17 Minn. 22(5); Walker v. Johnson, 28 Minn. 147, 149, 9 N. W. 632; Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632; Heartz v. Klinkhammer, 39 Minn. 488, 490, 40 N. W. 826; Warren v. Westrup, 44 Minn. 237, 46 N. W. 347; St. Paul Distilling Co. v. Pratt, 45 Minn. 215, 220, 47 N. W. 789; McClellan v. St. Paul etc. Ry., 58 Minn. 104, 59 N. W. 978; Engstrand v. Kleffman, 86 Minn. 403, 90 N. W. 1054; Malmsted v. Minneapolis Aerie, 111 Minn. 119, 126 N. W. 486; Almquist v. Wilcox, 115 Minn. 37, 39, 131 N. W. 796. An action may be maintained in this state, either upon contract or for a tort, against one of several persons jointly liable. Fryklund v. Great Northern Ry., 101 Minn. 37, 111 N. W. 727. This rule now applies to actions for tort arising out of contract—actions quasi ex contractu. The rule laid down in Whittacre v. Collins, 34 Minn. 299, 25 N. W. 632, was abrogated by R. L. 1905 § 4282; G. S. 1913 § 7916. Fryklund v. Great Northern Ry., 101 Minn. 37, 111 N. W. 727. Several persons acting independently, but together causing a single injury, are joint wrongdoers within this rule and may be sued jointly or severally. 15 Ency. Pl. & Pr. 558; Flaherty v. Minneapolis etc. Ry., 39 Minn. 328, 40 N. W. 160; Fortmeyer v. Nat. Biscuit Co., 116 Minn. 158, 133 N. W. 461 (overruling Trowbridge v. Forepaugh, 14 Minn. 133[100]); Pelowski v. J. R. Watkins Medical Co., 120 Minn. 108, 115, 139 N. W. 289, 618; Jackson v. Orth Lumber Co., 121 Minn. 461, 141 N. W. 518; Petcoff v. St. Paul City Ry., 124 Minn. 531, 144 N. W. 474. See Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451; Mayberry v. Northern Pacific Ry., 100 Minn. 79, 110 N. W. 356. Whenever a duty is owing by several and a breach occurs, though by the act of one alone, all the persons owing the duty are liable to be sued jointly or severally. 15 Ency. Pl. & Pr. 559. Persons acting severally and independently, each causing a separate and distinct injury, cannot be sued jointly. 15 Ency. Pl. & Pr. 562.

[35] 15 Ency. Pl. & Pr. 560; 30 Cyc. 122.

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66. Death of wrongdoer—Survival—Each wrongdoer's separate liability to be sued for a tort passes on his death (if it survives at all) to his personal representatives.[36] The joint liability of several wrongdoers passes on the death of each to the survivors.[37] Dicey, Rule 100.

PRINCIPAL AND AGENT

67. Actions ex contractu—Plaintiffs—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.[38]

Only agent may sue:

Exception 1. Where an agent is contracted with by deed in his own name.[39]

Exception 2. Where the agent is named as a party to a bill of exchange (or other commercial paper).[40]

Exception 3. Where the right to sue on a contract is, by the terms or circumstances of it, expressly restricted to the agent.[41]

Either principal or agent may sue:

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.[42]

Exception 5. Where the agent is the only known or ostensible principal,[43]

Joint ownership of land is almost wholly abolished in this state. See R. L. 1905 § 3233; G. S. 1913 § 6694. This common-law rule may be partially abrogated by R. L. 1905 § 4282; G. S. 1913 § 7916.

[36] See § 106. Upon the death of one joint wrongdoer, if the cause of action survives, the survivors and the representative of the deceased may each be sued separately, or the survivors, if more than one, may be sued jointly. But the representative of the deceased and a survivor cannot be sued jointly. 17 Ency. Pl. & Pr. 562.

[37] This common-law rule is doubtless abrogated by statute in this state. See §§ 65, 106.

[38] 31 Cyc. 1563; 1 A. & E. Ency. of Law, 2 ed. 1168; 59 Am. L. Reg. 517, 587. This common-law rule is materially modified by statute in this state. If the contract is in the name of the agent the action may be brought either by the agent or the principal. Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415. See § 34. As the real party in interest the principal may always sue. See § 33; State v. Torinus, 26 Minn. 1, 49 N. W. 259; Conger v. Nesbitt, 30 Minn. 436, 15 N. W. 875; Morton v. Stone, 39 Minn. 275, 39 N. W. 496.

[39] 31 Cyc. 1621; Henricus v. Englert, 137 N. Y. 488, 33 N. E. 550. This common-law rule no longer prevails in this state. Here the action may be brought either by the principal or the agent. J. B. Streeter Jr. Co. v. Janu, 90 Minn. 393, 96 N. W. 1128. See Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415, and § 50.

[40] 31 Cyc. 1622. In this state the action may be brought either by the principal or the agent. See §§ 33, 34; Conger v. Nesbitt, 30 Minn. 436, 15 N. W. 875; 2 Daniel, Neg. Inst. 4 ed. § 1187; 30 Cyc. 58.

[41] See Mechem, Agency, § 771.

[42] 31 Cyc. 1619. In this state the action may be brought either by the principal or the agent. See §§ 33, 34; Conger v. Nesbitt, 30 Minn 436, 15 N. W. 875.

[43] 31 Cyc. 1619; 1 A. & E. Ency. of Law, 2 ed., 1164. See § 34.

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or where the agent has made a contract not under seal in his own name for an undisclosed principal.[44]

Exception 6. Where an agent has made a contract, in the subject-matter of which he has a special interest or property.[45]

Exception 7. Where the agent has paid away money of the principal under circumstances which give a right to recover it back.[46] Dicey, Rule 17.

68. Same—Apparent agent not naming principal—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.[47] Dicey, Rule 18.

69. Same—Apparent agent naming principal—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.[48] Dicey, Rule 19.

70. Actions ex contractu—Defendants—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.[49]

Only agent can be sued:

Exception 1. Where an agent contracts by deed in his own name.[50]

Exception 2. Where an agent draws, indorses, or accepts a bill of exchange (or promissory note), in his own name.[51]

Exception 3. Where credit is given exclusively to the agent.[52]

Exception 4. Where an agent contracts for persons incapable of contracting.[53]

[44] In this state it is immaterial whether the contract is under seal or not. The action may be brought either by the agent or the principal. Ames v. First Div. etc. Ry., 12 Minn. 412(295); Lough v. Thornton, 17 Minn. 253(230); J. B. Streeter Jr. Co. v. Janu, 90 Minn. 393, 96 N. W. 1128; Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862; Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415.

[45] 1 A. & E. Ency. of Law, 2 ed. 1165; 31 Cyc. 1564, 1621.

[46] Parks v. Fogleman, 97 Minn. 157, 105 N. W. 560. See 31 Cyc. 1565; 1 A. & E. Ency. of Law, 2 ed., 1166.

[47] See 31 Cyc. 1564. Doubtless such a person could sue as the real party in interest under our statute. See § 34.

[48] See Mechem, Agency, § 760.

[49] 31 Cyc. 1552; 1 A. & E. Ency. of Law, 2 ed., 1119; Hayes v. Crane, 48 Minn. 39, 50 N. W. 925; Moran v. Clarke, 59 Minn. 456, 61 N. W. 556.

[50] This common-law rule no longer prevails in this state where the distinction between simple contracts and specialties has been abrogated by statute. In this state either the agent or principal may be sued. J. B. Streeter Jr. Co. v. Janu, 90 Minn. 393, 96 N. W. 1128. See for the common-law rule, Mahoney v. McLean, 26 Minn. 415, 4 N. W. 784; Huffcut, Agency, 2 ed. 127.

[51] 1 A. & E. Ency. of Law, 2 ed., 1141; Huffcut, Agency, 2 ed., § 128; Daniel, Neg. Inst. §§ 303, 305. If the agent adds after his own name "as agent" or the like the principal may be sued. Souhegan Nat. Bank v. Boardman, 46 Minn. 293, 48 N. W. 1116. See Dunnell, Minn. Digest, § 8770.

[52] Mechem, Agency, §§ 558, 771.

[53] 31 Cyc. 1548; 1 A. & E. Ency. of Law, 2 ed., 1122; Spencer v. Tozer, 15 Minn. 146(112). See Germania Bank v. Michaud, 62 Minn. 459, 465, 65 N. W. 70.

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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 responsibility.[54]

Exception 6. Where the agent is the only known or ostensible principal,[55] or where a contract (not under seal), has been made by an agent in his own name for an undisclosed principal.[56]

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.[57] Dicey, Rule 53.

71. Same—Agent acting without authority—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.[58]

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

[54] 31 Cyc. 1555; Rondquist v. Higham, 33 Minn. 490, 24 N. W. 190.

[55] One who enters into a contract as an agent, but without disclosing the fact of agency (including, at least in some cases, the name of the principal), is liable thereon personally, to the same extent as if he were the principal in interest. Bacon v. Rupert, 39 Minn. 512, 40 N. W. 832; Brown v. Ames, 59 Minn. 476, 61 N. W. 448; Amans v. Campbell, 70 Minn. 493, 73 N. W. 506; 1 A. & E. Ency. of Law, 2 ed., 1122.

[56] Parol evidence is admissible to disclose the principal. Lindeke v. Levy, 76 Minn. 364, 79 N. W. 314 (overruling Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227); Pleins v. Wachenheimer, 108 Minn. 342, 122 N. W. 166; Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862. See 18 Yale Law Journal, 443; 23 Harv. Law Rev. 513. Dunnell, Minn. Digest, § 216. In this state the rule applies to contracts under seal. J. B. Streeter Jr. Co. v. Janu, 90 Minn. 393, 96 N. W. 1128; Efta v. Swanson, 115 Minn. 373, 132 N. W. 335. Where the undisclosed principal denies that he is the principal, the party who seeks to enforce the contract may sue both principal and agent to determine the facts. In such a case a dismissal of the action at the close of plaintiff's case in response to a motion to elect, is equivalent to an election to hold the other defendant. Gray v. Kelley, 109 Minn. 101, 123 N. W. 295. If an agent contracts in his own name without disclosing his principal, the other contracting party is entitled to hold either, but not both. If he sue both, however, the only remedy of defendants is by motion to compel him to elect. They cannot move a dismissal as to either. The option as to which shall be held rests with plaintiff, not with defendants. Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173.

[57] 1 A. & E. Ency. of Law, 2 ed., 1129. An agent to whom money is paid for his principal by mistake is not liable to the party paying it, if he has paid it over to the principal before notice of the mistake and that he is required not to pay it over. The notice need not be formal, but it must apprise him of the mistake, and that the party intends by reason of it to reclaim the money. One having no interest or authority in the matter cannot give the notice. Shepard v. Sherin, 43 Minn. 382, 45 N. W. 718.

[58] Pratt v. Beaupre, 13 Minn. 187(177, 179); Sheffield v. Ladue, 16 Minn. 388

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72. Actions ex delicto—Plaintiffs—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).[59] Dicey, Rule 83.

73. Actions ex delicto—Defendants—Liability of principal for torts of servant—A principal is liable to be sued for the torts of his agent committed in the course, and within the scope, of the agency, and in furtherance of the principal's business, regardless of whether the principal authorized, participated in, or ratified them.[60] As a general rule a principal is not liable where the tort is not committed in furtherance of his business,[61] but an exception is made when the agent is in the discharge of duties which the principal owes to the public or third persons.[62] A principal, while insisting upon retaining the benefit of a contract, cannot deny the authority of his agent to make the representations by which he procured the other party to execute it.[63]

74. Same—Liability of agent to third parties—A servant or other agent is liable to the person wronged for acts of misfeasance, or positive wrong, in

(346); Skaaraas v. Finnegan, 31 Minn. 48, 16 N. W. 456; Id., 32 Minn. 107, 19 N. W. 729; Newport v. Smith, 61 Minn 277, 63 N. W. 734. See Rollins v. Phelps, 5 Minn. 463(373); Note, 34 L. R. A. 518; 1 A. & E. Ency. of Law, 2 ed., 1125, 1126. When the agent, acting in good faith, fully discloses to the other party, at the time, all the facts touching the authority under which he assumes to act, he is not personally liable. Newport v. Smith, 61 Minn. 277, 63 N. W. 734.

[59] An agent who is in the possession of or entitled to the possession of property of his principal may sue a third party who converts it, or injures it, or takes it from him unlawfully. 1 A. & E. Ency. of Law, 2 ed., 1166; Parks v. Fogleman, 97 Minn. 157, 105 N. W. 560; Grinnell v. Illinois Central Ry., 109 Minn. 513, 516, 124 N. W. 377. See Hodgson v. St. Paul Plow Co., 78 Minn. 172, 80 N. W. 956.

[60] Davies v. Lyon, 36 Minn. 427, 31 N. W. 688 (deceit); Rich v. Minneapolis, 37 Minn. 423, 35 N. W. 2 (contractor removing dirt from a street); Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533 (deceit); Larson v. Fidelity M. L. Assn., 71 Minn, 101, 73 N. W. 711 (malicious prosecution—general rule stated); Anderson v. International Harvester Co., 104 Minn. 49, 116 N. W. 101 (assault); Atherton v. Barber, 112 Minn. 523, 128 N. W. 827 (deceit). See 4 Mich. L. Rev. 199; 16 Harv. L. Rev. 61; Huffcut, Agency, 2 ed., §§ 148–161; and Note, 88 Am. St. Rep. 779. As to the liability of a master for the torts of his servant see Dunnell, Minn. Digest, §§ 5833–5843. As to the liability of a parent for the negligence of a child in running an automobile of the parent see Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091.

[61] Larson v. Fidelity M. L. Assn., 71 Minn. 101, 73 N. W. 711 (malicious prosecution). See Simmons v. Holster, 13 Minn. 249(232) (libel).

[62] McCord v. Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315; Penas v. Chicago etc. Ry., 112 Minn. 203, 216, 127 N. W. 926. See 14 Harv. L. Rev. 297.

[63] Albitz v. Minneapolis etc. Ry., 40 Minn. 476, 42 N. W. 394; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Atherton v. Barber, 112 Minn. 523, 128 N. W. 827.

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the course of his employment,[64] but not for acts of nonfeasance, or mere omission.[65]

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.

INFANTS

75. Must sue and be sued through a guardian—Infants must sue and be sued in their own names, appearing by a general guardian, a testamentary guardian, or a guardian ad litem.[66] It is unnecessary to have a guardian ad litem appointed if there is a general or testamentary guardian. Our statutes provide that a general or testamentary guardian "shall appear for and represent his ward in all legal proceedings, unless another person is appointed for that purpose." [67] This does not in any way impair the power of the district court to appoint a guardian ad litem.[68] A minor may appear by a guardian ad litem though there is a general guardian competent to act.[69] As respects proceedings to probate a will no appointment of a guardian ad litem for any minor interested in the estate is necessary.[70] Nor is it necessary, before the administration account of an executor or administrator is allowed, to appoint a guardian ad litem for minor heirs or legatees.[71]

[64] 31 Cyc. 1559; 1 A. & E. Ency. of Law, 2 ed., 1132; Strong v. Colter, 13 Minn. 82(77) (trespass); Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218 (conversion); Clark v. Lovering, 37 Minn. 120, 33 N. W. 776 (deceit); McLennan v. Minneapolis etc. Co., 57 Minn. 317, 59 N. W. 628 (conversion); Hedin v. Minneapolis M. & S. Institute, 62 Minn. 146, 64 N. W. 158 (deceit); Schall v. Northland, 123 Minn. 214, 143 N. W. 357 (conversion). See, as to liability of servant to third parties for negligence, Griffiths v. Wolfram, 22 Minn. 185; Brower v. Northern Pacific Ry., 109 Minn. 385, 124 N. W. 10. The servant and master may be joined in an action by a third party where their negligence concurs to cause the injury. Mayberry v. Northern Pacific Ry., 100 Minn. 79, 110 N. W. 356; Jackson v. Orth Lumber Co., 121 Minn. 461, 141 N. W. 518.

[65] 31 Cyc. 1559; 1 A. & E. Ency. of Law, 2 ed., 1131.

[66] Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497(473); Germain v. Sheehan, 25 Minn. 338; Eisenmenger v. Murphy, 42 Minn. 84, 43 N. W. 784; Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Peterson v. Baillif, 52 Minn. 386, 54 N. W. 185; Beckett v. Northwestern Masonic Aid Assn., 67 Minn. 298, 69 N. W. 923. The laws of this state govern as to who shall represent an infant in an action in this state. Brunette v. Minneapolis etc. Ry., 118 Minn. 444, 137 N. W. 172.

[67] R. L. 1905 § 3838; G. S. 1913 § 7446; Patterson v. Melchior, 102 Minn. 363, 113 N. W. 902.

[68] R. L. 1905 § 3825; G. S. 1913 § 7432; Plymton v. Hall, 55 Minn. 22, 56 N. W. 351.

[69] Peterson v. Baillif, 52 Minn. 386, 54 N. W. 185.

[70] In re Mousseau, 30 Minn. 202, 14 N. W. 887; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99.

[71] Balch v. Hooper, 32 Minn. 158, 20 N. W. 124; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99.

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76. Effect of infant appearing without a guardian—A judgment rendered upon default against an infant over fourteen years of age, after service of summons upon him, but without the appointment of a guardian ad litem is erroneous and voidable, but not void.[72] A guardian ad litem may be appointed after the commencement of an action, nunc pro tunc.[73] It is improper for an infant to appear by attorney. But if, during the pendency of the action, the infant reaches majority, it is competent for him to adopt an action thus erroneously commenced, and to ratify what has been done therein.[74]

77. Voluntary appearance—Waiving service of summons—An infant is incompetent to give jurisdiction by a voluntary appearance or to waive or admit service of summons upon him.[75]

78. Defendants in actions ex contractu—An infant cannot be sued on any contract made by him except for necessaries.[76]

79. Defendants in actions ex delicto—An infant may be sued for torts committed by him.[77]

Exception. Where his fraud is closely connected with a contract.[78] Dicey, Rule 106.

PARTNERS AND UNINCORPORATED COMPANIES

80. Cannot sue in name of firm—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.[79] Dicey, Rule 20.

81. Actions ex contractu—Plaintiff—Joinder of partners—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.[80]

[72] Eisenmenger v. Murphy, 42 Minn. 84, 43 N. W. 784; Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990; Brunette v. Minneapolis etc. Ry., 118 Minn. 444, 137 N. W. 172.

[73] Patterson v. Melchior, 106 Minn. 437, 119 N. W. 402.

[74] Germain v. Sheehan, 25 Minn. 338.

[75] Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990.

[76] See Dunnell, Minn. Digest, §§ 4435–4450

[77] 16 A. & E. Ency. of Law, 2 ed. 307.

[78] 16 A. & E. Ency. of Law, 2 ed. 308; Conrad v. Lane, 26 Minn. 389, 4 N. W. 695; Alt v. Graff, 65 Minn. 191, 68 N. W. 9. See 14 Harv. L. Rev. 71.

[79] R. L. 1905 § 4068 (G. S. 1913 § 7689) does not authorize partners to sue in the firm name. Dimond v. Minn. Savings Bank, 70 Minn. 298, 73 N. W. 182. Objection that an action is brought in the firm name without specifying the partners is waived by pleading to the merits and proceeding to trial. French v. Donohue, 29 Minn. 111, 12 N. W. 354.

[80] This common-law rule prevails in this state unaffected by statute and is simply an application of the general rule that all persons with whom a contract is made must join in an action for its breach. Davis v. Chouteau, 32 Minn. 548, 21 N. W. 748. See § 46. Partners may sue in the firm name for a firm debt or for the recovery of firm prop-

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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.

82. Actions between partners—One partner or member of an unincorporated company cannot sue another upon any matter involving the accounts of the partnership or company.[81]

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.[82]

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.[83] Dicey, Rule 22.

83. Death of partner—Survival—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.[84] Dicey, Rule 24.

84. Partners may be sued in firm name—By virtue of statute partners may be sued in their firm name.[85]

85. Actions ex contractu—Defendants—Joinder of partners—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.[86]

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.[87] Dicey, Rule 56.

erty, though the interest of one of them therein has been levied on. Day v. McQuillan, 13 Minn. 205(192); Barrett v. McKenzie, 24 Minn. 20; Lane v. Lenfest, 40 Minn. 375, 42 N. W. 84.

[81] That is, an action at law cannot be maintained. The proper action is an equitable one for an accounting. Christopherson v. Olson, 104 Minn. 330, 116 N. W. 840. See Russell v. Minn. Outfit, 1 Minn. 162(136); Wood v. Cullen, 13 Minn. 394(365); Wilcox v. Comstock, 37 Minn. 65, 33 N. W. 42. An action will lie by one firm against another having a common member. Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526.

[82] See Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840.

[83] See Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154.

[84] Freeman v. Curran, 1 Minn. 170 (144); Hedderly v. Downs, 31 Minn. 183, 17 N. W. 274; Hanson v. Metcalf, 46 Minn. 25, 48 N. W. 441.

[85] See § 40.

[86] This common-law rule is modified by statute in this state. An action may be maintained against one or more of the partners. See § 51. See as to joining a dormant partner, Wood v. Cullen, 13 Minn. 394(365). See as to mode of objecting to non-joinder of partner under common-law rule, Davis v. Chouteau, 32 Minn. 548, 21 N. W. 748; Sandwich Mfg. Co. v. Herriott, 37 Minn. 214, 33 N. W. 782.

[87] See McKinnon v. Palen, 62 Minn. 188, 64 N. W. 387.

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86. Death of partner—Survival—Common-law rule—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.[88] Dicey, Rule 58.

87. Actions ex delicto—Plaintiffs—Joinder of partners—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.[89] Dicey, Rule 84.

88. Actions ex delicto—Defendants—Joinder of partners—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.[90]

Exception. Where partners are sued as co-owners of land.[91] Dicey, Rule 104.

CORPORATIONS

89. Must sue in corporate name—A corporation or incorporated body must sue in its corporate name.[92] Dicey, Rule 25.

90. Must be sued in corporate name—A corporation or incorporated body must be sued in its corporate name.[93] Dicey, Rule 59.

91. After dissolution—By virtue of statute every corporation may sue and be sued within three years after its dissolution for the purpose of closing up its affairs.[94] The statute is inapplicable to a foreign corporation.[95]

[88] This common-law rule is abrogated by statute. See § 52. For a reference to the common-law rule see Hanson v. Metcalf, 46 Minn. 25, 30, 48 N. W. 441.

[89] Zabriskie v. Smith, 13 N. Y. 322. See Peck v. McLean, 36 Minn. 228, 30 N. W. 759; Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154.

[90] Vanderburgh v. Bassett, 4 Minn. 242(171) (conversion); Fay v. Davidson, 13 Minn. 523(491) (negligence); Berkey v. Judd, 22 Minn. 287 (fraud); Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846 (fraud); Walker v. Johnson, 28 Minn. 147, 9 N. W. 632 (conversion); Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387 (libel); Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632 (negligence).

[91] See 1 Lindley, Partnership, 7 ed., 228, 316, 320.

[92] Winona etc. Ry. v. St. Paul etc. Ry., 23 Minn. 359, 361. All corporations are authorized by statute to sue and be sued in any court. R. L. 1905 § 2852(2); G. S. 1913 § 6151. Ordinarily a stockholder cannot sue for the corporation. See Dunnell, Minn. Digest, § 2069.

[93] All corporations are liable to be sued in any court of the state. R. L. 1905 § 2852(2); G. S. 1913 § 6151.

[94] R. L. 1905 § 2883; G. S. 1913 § 6198; Minn. Central Ry. v. Donaldson, 38 Minn. 115, 35 N. W. 725; Bowe v. Minn. Milk Co., 44 Minn. 460, 47 N. W. 151; In re People's Live Stock Ins. Co., 56 Minn. 180, 184, 57 N. W. 468; Kalkhoff v. Nelson, 60 Minn. 284, 289, 62 N. W. 332; Sage v. Crowley, 83 Minn. 314, 320, 86 N. W. 409; Norton v. Frederick, 107 Minn. 36, 119 N. W. 492; Hanan v. Sage, 58 Fed. 651. See Note, 134 Am. St. Rep. 309.

[95] Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992. See Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 118 Minn. 273, 136 N. W. 738.

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92. May be sued for torts—A corporation or incorporated body can be sued for torts.[96] Dicey, Rule 105.

EXECUTORS AND ADMINISTRATORS

93. May sue in own name—An executor or administrator may sue in his own name without joining the heirs or other beneficiaries.[97]

94. Joinder—Co-executors or co-administrators must all join as plaintiffs in an action.[98]

Exception 1. Where a contract is made with some of several co-executors only.

Exception 2. Where an executor renounces the executorship.

Subordinate rule. One co-executor or co-administrator cannot bring an action against another concerning matters connected with the executorship. Dicey, Rule 43.

95. When must sue in representative capacity—An action by an executor or administrator upon a cause of action belonging to him in his representative capacity must be brought by him in that capacity.[99]

96. On what causes of action—Survival—An executor or administrator may sue on any cause of action, either ex contractu or ex delicto existing in favor of the decedent at the time of his death, except causes of action arising out of injury to the person.[1] He may maintain an action to recover possession of the realty of the decedent or to quiet the title thereto.[2] He may sue to

[96] As a general rule corporations are liable to the same extent as natural persons for the torts of their agents. Gould v. Sub-Dist., 7 Minn. 203(145) (negligence); Aldrich v. Press Pub. Co., 9 Minn. 133(123) (libel); Smith v. Library Board, 58 Minn. 108, 59 N. W. 979 (negligence); Lane v. Minn. etc. Soc., 62 Minn. 175, 64 N. W. 382 (negligence); Minneapolis Trust Co. v. Menage, 73 Minn. 441, 76 N. W. 175 (fraud). Whether a corporation organized for purely charitable purposes, and dependent upon voluntary contributions for its support, is liable for the negligence of its officers and agents is an open question in this state. Craig v. Benedictine Sisters Hospital Assn., 88 Minn. 535, 93 N. W. 669. See 9 Harv. L. Rev. 541; 12 Id. 128; 16 Id. 530. It is liable under the statute to its servants for failure to guard dangerous machinery. McInerny v. St. Luke's Hospital Assn., 122 Minn. 10, 141 N. W. 837. The fact that a corporation was acting ultra vires at the time of an accident will not relieve it from liability for negligence. Gould v. Sub-Dist., 7 Minn. 203(145).

[97] R. L. 1905 § 4055; G. S. 1913 § 7676; Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118.

[98] 18 Cyc. 963; 8 Ency. Pl. & Pr. 661.

[99] Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118. See Bond v. Corbett, 2 Minn. 248(209).

[1] R. L. 1905 § 4502; G. S. 1913 § 8174; Connolly v. Connolly, 26 Minn. 350, 4 N. W. 233. See as to what causes of action survive, §§ 154–161.

[2] R. L. 1905 § 3705; G. S. 1913 § 7296. See Dunnell, Minn. Digest, §§ 2722, 3567; Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170; Note, 136 Am. St. Rep. 81. Prior to statute he could not maintain an ac-

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recover assets of the estate until his discharge. The fact that his final account has been allowed and an order of distribution made does not affect his authority.[3] He may foreclose mortgages of the decedent.[4] He may maintain an action to set aside a fraudulent conveyance by the decedent,[5] for a trespass to the realty committed after the death of the decedent, if he has taken possession thereof,[6] on a note payable to the decedent,[7] on a covenant of seizin,[8] on an agreement to pay a mortgage debt or reconvey,[9] to recover an award in condemnation proceedings,[10] on a contract for the sale of standing timber, though the sole heir has conveyed the premises and received the consideration,[11] and for death by wrongful act.[12] An administrator de bonis non may sue on the bond of the original administrator for a conversion of funds from the settlement of a cause of action for the death of the intestate.[13]

97. Foreign executors—Without statutory authority an executor or administrator cannot sue in a foreign jurisdiction.[14] It is provided by statute that "any foreign executor or administrator may commence and prosecute an action in this state, in his representative capacity, in the same manner and under the same restrictions as in case of a resident: Provided, that before commencing such action he shall file an authenticated copy of his appointment as executor or administrator with the probate court of the county in which such action is to be commenced."[15] A failure to file before suit is not cured by a subsequent filing.[16] A failure to file merely affects the capacity to sue in our courts and is waived unless the objection is raised by answer or demurrer.[17] A

tion to remove a cloud if he had not obtained possession or a license to sell. Paine v. First Div. etc. Ry., 14 Minn. 65(49).

[3] Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452.

[4] R. L. 1905 § 3717; G. S. 1913 § 7310. See Dunnell, Minn. Digest, § 6323.

[5] R. L. 1905 § 3720; G. S. 1913 § 7313; Bennett v. Schuster, 24 Minn. 383; Little v. Simonds, 46 Minn. 380, 382, 49 N. W. 186; Richmond v. Campbell, 71 Minn. 453, 73 N. W. 1099; McCord v. Knowlton, 79 Minn. 299, 304, 82 N. W. 589; Donohue v. Campbell, 81 Minn. 107, 83 N. W. 469; Ober v. Brewster, 113 Minn. 388, 129 N. W. 776.

[6] Noon v. Finnegan, 29 Minn. 418, 13 N. W. 197; Id. 32 Minn. 81, 19 N. W. 391.

[7] Cooper v. Hayward, 71 Minn. 374, 74 N. W. 152.

[8] Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452.

[9] Connolly v. Connolly, 26 Minn. 350, 4 N. W. 233.

[10] Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

[11] Vachon v. Nichols-Chisholm Lumber Co., 126 Minn. 303, 148 N. W. 288.

[12] See §§ 59, 634.

[13] Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

[14] Pott v. Pennington, 16 Minn. 509 (460); Fogle v. Schaeffer, 23 Minn. 304; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Cone v. Nimocks, 78 Minn. 249, 80 N. W. 1056; Pulver v. Leonard, 176 Fed. 586. While a foreign representative cannot sue in this state on a chose in action, without statutory authority, his assignee may do so. Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790; Cone v. Nimocks, 78 Minn. 249, 254, 80 N. W. 1056.

[15] R. L. 1905 § 4506; G. S. 1913 § 8178.

[16] Fogle v. Schaeffer, 23 Minn. 304.

[17] Pope v. Waugh, 94 Minn. 502, 103 N. W. 500; Pulver v. Leonard, 176 Fed. 586.

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foreign representative cannot sue for trespass to realty in this state, if the will has not been proved or letters issued in this state, though an authenticated copy of his foreign appointment is filed under the statute.[18]

98. Actions ex contractu—Defendants—An action will lie against a personal representative on a claim ex contractu against the decedent which survives and is not provable in the probate court; otherwise, if it is so provable.[19]

99. When must be sued in representative character—An executor or administrator must be sued in his representative character; i. e., as executor or administrator, on all contracts made by the deceased.[20] Dicey, Rule 74.

100. When must be sued in personal character—An executor or administrator must be sued in his personal character on contracts made by himself.[21]

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.[22] Dicey, Rule 75.

101. Joinder as defendants—All co-executors or co-administrators who have administered, should be joined as defendants.[23] Dicey, Rule 76.

102. Actions between executors—A court of equity will entertain an action brought by an executor on the part of the estate against a co-executor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case, where justice requires it, there being no remedy at law.[24]

103. Actions ex delicto—Plaintiffs—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 lifetime.[25] Dicey, Rule 92.

104. Same—The personal representatives of the deceased cannot sue for injuries to the person, feelings, or reputation of the deceased.[26]

Exception. Where deceased has been killed by wrongful act or by negligence.[27] Dicey, Rule 93.

[18] Pott v. Pennington, 16 Minn. 509 (460).

[19] See Dunnell, Minn. Digest, §§ 3592–3616; Koski v. Pakkala, 121 Minn. 450, 141 N. W. 793.

[20] 18 Cyc. 881. See Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347.

[21] Germania Bank v. Michaud, 62 Minn. 459, 65 N. W. 70. See 18 Cyc. 881.

[22] Fritz v. McGill, 31 Minn. 536, 18 N. W. 753. See Whitney v. Pinney, 51 Minn. 146, 53 N. W. 198; Pabst Brewing Co. v. Small, 83 Minn. 445, 86 N. W. 450; 8 Ency. Pl. & Pr. 681; 18 Cyc. 975.

[23] 18 Cyc. 965; 8 Ency. Pl. & Pr. 680.

[24] Peterson v. Vanderburgh, 77 Minn. 218, 79 N. W. 828.

[25] If a representative takes possession of the realty of the decedent he may sue for a trespass committed thereon before he took possession and after the death of the decedent. Noon v. Finnegan, 29 Minn. 418, 13 N. W. 197; Id. 32 Minn. 81, 19 N. W. 391.

[26] Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614.

[27] See §§ 59, 634, and Dunnell, Minn. Digest, §§ 2600–2621.

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105. Same—The personal representatives of the deceased can sue for injuries to his personal property committed after his death.[28] Dicey, Rule 94.

106. Actions ex delicto—Defendants—An executor or administrator may be sued for any tort, not personal, committed by the decedent.[29]

HUSBAND AND WIFE—MARRIED WOMEN

107. Married women as plaintiffs—In general—It is provided by statute that "in cases where the husband, except for the marriage relation, would not be a necessary party, a married woman may sue and be sued as if unmarried and without joining her husband." [30] She may sue for an assault and battery upon herself,[31] for a trespass upon her realty,[32] for a personal injury resulting from negligence,[33] or for unlawful detainer.[34] In an action for negligence the negligence of her husband is not imputable to her on account of their relation.[35] She cannot recover expenses incurred for medical treatment, as her husband, and not she, is liable therefor.[36] A married woman has been held entitled to recover damages for loss of earning capacity as a singer.[37] A married woman cannot maintain an action against another woman for criminal conversation with her husband.[38] In an action by a married woman for a nuisance she cannot recover for injuries to the family.[39] A married woman may sue a third party for services rendered to him by her if there is an agreement between her and her husband that the compensation for the services should belong to her.[40] She cannot sue for an injury to her husband which is not a legal injury to her.[41] To an extent not well defined she may protect by action her contingent, statutory interest in her husband's realty.[42] She may defend it in an action to quiet title against her husband and herself.[43]

[28] See Noon v. Finnegan, 29 Minn. 418, 13 N. W. 197; Id. 32 Minn. 81, 19 N. W. 391.

[29] R. L. 1905 § 4502; G. S. 1913 § 8174; Comstock v. Matthews, 55 Minn. 111, 56 N. W. 583. See, as to what causes of action survive against the personal representative of a decedent, §§ 154–161.

[30] R. L. 1905 § 4056; G. S. 1913 § 7677.

[31] Colvill v. Langdon, 22 Minn. 565.

[32] Spencer v. St. Paul etc. Ry., 22 Minn. 29.

[33] Mageau v. Great Northern Ry., 103 Minn. 290, 115 N. W. 651; Libaire v. Minneapolis etc. Ry., 113 Minn. 517, 130 N. W. 8.

[34] Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785.

[35] Finley v. Chicago etc. Ry., 71 Minn. 471, 74 N. W. 174.

[36] Belyea v. Minneapolis etc. Ry., 61 Minn. 224, 63 N. W. 627.

[37] Libaire v. Minneapolis etc. Ry., 113 Minn. 517, 130 N. W. 8.

[38] Kroessin v. Keller, 60 Minn. 372, 62 N. W. 438.

[39] Friburk v. Standard Oil Co., 66 Minn. 277, 68 N. W. 1090.

[40] Riley v. Mitchell, 36 Minn. 3, 29 N. W. 588; Bodkin v. Kerr, 97 Minn. 301, 107 N. W. 137; Libaire v. Minneapolis etc. Ry., 113 Minn. 517, 130 N. W. 8.

[41] Bucknam v. Great Northern Ry., 76 Minn. 373, 79 N. W. 98.

[42] Minneapolis etc. Ry. v. Lund, 91 Minn. 45, 97 N. W. 452; Slingerland v. Slingerland, 109 Minn. 407, 124 N. W. 19. See Dunnell, Minn. Digest, § 4279.

[43] Minneapolis etc. Ry. v. Lund, 91 Minn. 45, 97 N. W. 452.

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108. Actions by wife against husband—A wife may sue her husband in her own name in any form of action to enforce or protect her property rights.[44] If justifiably living apart she may sue him for separate support.[45] She cannot, either before or after divorce, sue him for a personal tort committed by him against her during coverture.[46] It is possible that a wife owning realty as tenant in common with her husband may maintain an action for partition against him, but she cannot have a partition of his homestead, even though she leaves him for just cause.[47]

109. Desertion by husband—Actions by or against wife—It is provided by statute that "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 as he might have had." [48]

110. Actions by or against wife—Necessity of joining husband—By statute a wife may sue and be sued in her own name as if unmarried and without joining her husband, in all cases where, except for the marriage relation, the husband would not be a necessary party.[49] The unnecessary joinder of a husband as plaintiff is a mere irregularity which may be disregarded or corrected by striking out his name.[50] The fact that a husband is living with his wife on her land does not make him a necessary party in an action by her for a trespass on the land.[51] In an action to enforce a resulting trust under R. L. 1905, § 3246, the judgment debtor is a proper, but not a necessary, party defendant; and where a wife in such a case is sought to be charged as trustee, her husband need not be made a party.[52] In unlawful detainer proceedings brought by a married woman to recover possession of her own property her husband is not a necessary party.[53]

[44] Gillespie v. Gillespie, 64 Minn. 381, 67 N. W. 206; Slingerland v. Slingerland, 109 Minn. 407, 124 N. W. 19. See Rich v. Rich, 12 Minn. 468(369); Muus v. Muus, 29 Minn. 115, 12 N. W. 343; Grace v. Grace, 96 Minn. 294, 104 N. W. 969.

[45] Baier v. Baier, 91 Minn. 165, 97 N. W. 671. See Stephen v. Stephen, 102 Minn. 301, 113 N. W. 913. See Note, 77 Am. St. Rep. 228.

[46] Strom v. Strom, 98 Minn. 427, 107 N. W. 1047. See Thompson v. Thompson, 218 U. S. 611; 24 Harv. L. Rev. 403.

[47] Grace v. Grace, 96 Minn. 294, 104 N. W. 969.

[48] R. L. 1905 § 4061; G. S. 1913 § 7682; Davis v. Woodward, 19 Minn. 174(137); Allen v. Minnesota L. & T. Co., 68 Minn. 8, 70 N. W. 800.

[49] R. L. 1905 § 4056; G. S. 1913 § 7677; Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785. See, under former statutes, Wolf v. Banning, 3 Minn. 202(133); Nininger v. Carver County, 10 Minn. 133(106); Kennedy v. Williams, 11 Minn. 314(219); Spencer v. Sheehan, 19 Minn. 338(292).

[50] Colvill v. Langdon, 22 Minn. 565.

[51] Spencer v. St. Paul etc. Ry., 22 Minn. 29; Wampach v. St. Paul etc. Ry., 22 Minn. 34.

[52] Leonard v. Green, 34 Minn. 137, 24 N. W. 915. See Nat. G. A. Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363.

[53] Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785.

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111. Actions by or against husband—Necessity of joining wife—In an action against a husband his wife is not a necessary party solely by reason of her contingent statutory interest in his realty,[54] but if a wife is not made a party to an action to foreclose a mortgage on her husband's property her equity of redemption will be unaffected by the judgment and sale.[55] Though a wife is not generally a necessary party to an action to quiet title to her husband's realty,[56] if she is made a party to such an action she may assert and defend therein her contingent, statutory interest.[57]

112. Actions for torts of wife—A married woman may be sued for torts committed by her.[58] A husband cannot be sued for the torts of his wife.[59]

113. Actions by husband—Loss of wife's services and society—Where damages to a wife, resulting from defendant's actionable fault, have in no part been caused by the wife's own wrong, two distinct causes of action may accrue—one to her, for the direct injuries to her person and the like; the other to her husband, for the consequential injuries to him, consisting of loss of her services and society, and of the expense to which he may have been put, and the like. That such injuries have resulted in the death of the wife, and that an action has been brought under the statute by the administrator for the statutory beneficiaries and a verdict recovered therein, constitute no bar to the action by the husband to recover damages inflicted on him by defendant's wrong.[60] A husband may maintain an action against a municipality to recover consequential damages sustained by him in the loss of the services of his wife on account of injuries received by her by reason of a defective sidewalk, and also for the recovery of moneys expended by him for medical attendance.[61] Where husband and wife were injured by the same act of negligence, a recovery by the husband for his personal injury was held not a bar to an action by him to recover for loss of the society and services of his wife and expenses in effecting her cure.[62]

[54] Stitt v. Smith, 102 Minn. 253, 113 N. W. 632. See Leonard v. Green, 34 Minn. 137, 24 N. W. 915; Williamson v. Selden, 53 Minn. 73, 54 N. W. 1055; Tatum v. Roberts, 59 Minn. 52, 60 N. W. 848.

[55] Spalti v. Blumer, 56 Minn. 523, 58 N. W. 156; Northwestern Trust Co. v. Ryan, 115 Minn. 143, 132 N. W. 202.

[56] Stitt v. Smith, 102 Minn. 253, 113 N. W. 632.

[57] Minneapolis etc. Ry. v. Lund, 91 Minn. 45, 97 N. W. 452.

[58] R. L. 1905 § 3607; G. S. 1913 § 7144; Chamberlain v. O'Brien, 46 Minn. 80, 48 N. W. 447.

[59] R. L. 1905 § 3608; G. S. 1913 § 7146. Prior to Laws 1897, c. 10, the rule was otherwise. Pett-Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912. See Brazil v. Moran, 8 Minn. 236(205).

[60] Mageau v. Great Northern Ry., 103 Minn. 290, 115 N. W. 651; Libaire v. Minneapolis etc. Ry., 113 Minn. 517, 130 N. W. 8.

[61] McDevitt v. St. Paul, 66 Minn. 14, 68 N. W. 178.

[62] Skoglund v. Minneapolis St. Ry., 45 Minn. 330, 47 N. W. 1071. See Belyea v. Minneapolis etc. Ry., 61 Minn. 224, 63 N. W. 627.

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114. Alienation of affections—A married woman may maintain an action against one who wrongfully entices her husband from her and alienates his affections, so as to cause a separation between them.[63] So a married man may sue for the alienation of his wife's affections, causing her to leave him.[64] An affianced husband cannot sue for the seduction of his affianced wife or for the alienation of her affections.[65]

EQUITABLE ACTIONS

115. In general—The general principle underlying the doctrine of parties in equity is that the court should seek in the single action to do complete justice by determining the rights of all parties interested in the subject-matter, so that the performance of the decree may be perfectly safe to those who are compelled to obey it and future litigation avoided.[66] As a general rule all persons materially interested, either legally or beneficially, in the subject-matter of the action, should be made parties, either plaintiffs or defendants, however numerous they may be, so that there may be a complete decree that will bind them all. This rule does not extend to those who are only consequentially interested in the subject-matter.[67] The complaint must show that the person sought to be made a defendant has an interest in the subject-matter of the action. It is not sufficient that the defendant may be affected in some way by the decree.[68] In an equitable action a court should not proceed until it has before it all parties necessary for the full protection of each.[69] Who should be made parties is a question of convenience and discretion, rather than of absolute right, to be determined according to the exigencies of the particular case.[70]

[63] Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784; McAllen v. Hodge, 92 Minn. 68, 99 N. W. 424; White v. White, 101 Minn. 451, 112 N. W. 627; Weber v. Weber, 116 Minn. 494, 134 N. W. 124.

[64] Huot v. Wise, 27 Minn. 68, 6 N. W. 425; Bathke v. Krassin, 78 Minn. 272, 80 N. W. 950; Id., 82 Minn. 226, 84 N. W. 796; Korby v. Chesser, 98 Minn. 509, 108 N. W. 520.

[65] Davis v. Condit, 124 Minn. 365, 144 N. W. 1089.

[66] Fish v. Berkey, 10 Minn. 199(161, 165); Johnson v. Robinson, 20 Minn. 170 (153); Graham v. Minneapolis, 40 Minn. 436, 42 N. W. 291; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751. In most of the code states it is provided that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the questions involved therein." This is an admirably succinct and accurate statement of the equity rule and may well be taken as a guide in this state without statutory enactment.

[67] Winslow v. Minn. etc. Ry., 4 Minn. 313(230); Graham v. Minneapolis, 40 Minn. 436, 42 N. W. 291.

[68] Newman v. Home Ins. Co., 20 Minn. 422(378); McNair v. Toler, 21 Minn. 175; Banning v. Bradford, 21 Minn. 308.

[69] P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417.

[70] Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; Northwestern etc. Co. v. Norwegian etc. Seminary, 43 Minn. 449, 45 N. W. 868; Pencille v. State etc. Co., 74 Minn. 67, 76 N. W. 1026.

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In granting relief care should be taken not to affect the interest of persons not parties, or whose interests are not represented by some party.[71]

116. Necessary and proper parties—There is an important 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 case. 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.[72] Persons not interested in the subject-matter of an action, and whose rights will not be affected in any way by a judgment therein, are not necessary parties thereto.[73] As a general rule, in the absence of statute to the contrary, a person whose interest in the subject-matter in litigation and whose liability to respond to the plaintiff's demand is determinable wholly from his independent relation thereto, unaffected by and disconnected from the liability of the defendant named in the action, is not a necessary party to the action.[74]

117. Who should be joined as plaintiffs—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.[75] 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.[76]

118. One suing for many—Where the questions to be litigated are of common interest to a large number of persons, and it is impracticable to bring

[71] Baldwin v. Canfield, 26 Minn. 43, 59, 1 N. W. 261.

[72] Tatum v. Roberts, 59 Minn. 52, 60 N. W. 848; Reiser v. Gigrich, 59 Minn. 368, 61 N. W. 30; Lumbermen's Ins. Co. v. St. Paul, 77 Minn. 410, 80 N. W. 357; Rudd v. Fosseen, 82 Minn. 41, 84 N. W. 496; Cornish v. West, 82 Minn. 107, 84 N. W. 750; Disbrow v. Creamery Package Co., 104 Minn. 17, 115 N. W. 751; Id., 115 Minn. 434, 132 N. W. 913. See also, Crump v. Ingersoll, 44 Minn. 84, 46 N. W. 141; Watson v. Chicago etc. Ry., 46 Minn. 321, 48 N. W. 1129.

[73] Anderson v. Scandia Bank, 53 Minn. 191, 54 N. W. 1062; Rudd v. Fosseen, 82 Minn. 41, 84 N. W. 496. See Banning v. Bradford, 21 Minn. 308.

[74] Kettle River v. Bruno, 106 Minn. 58, 118 N. W. 63.

[75] Pomeroy, Remedies, §§ 112, 247, 248.

[76] Pomeroy, Remedies, § 249; Jackson v. Holbrook, 36 Minn. 494, 501, 32 N. W. 852; Crump v. Ingersoll, 44 Minn. 84, 46 N. W. 141.

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them all into court, one or more may proceed in equity for the benefit of all.[77]

119. Persons parties by representation—In some cases the parties in court may be deemed to represent others who are not made parties. In this way persons holding contingent interests in realty may be bound by a decree in an action to which they are not actual parties.[78]

DEFECT OF PARTIES

120. Objection must be taken by demurrer or answer—Waiver—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 for the first time 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.[79] Where there is a defect of parties plaintiff, and the objection is taken by answer, defendant is not, on the defect being shown on the trial, entitled to a verdict on the merits of the action, but at most only to a dismissal; and when, in such

[77] Jackson v. Holbrook, 36 Minn. 494, 501, 32 N. W. 852; Pencille v. State etc. Co., 74 Minn. 67, 76 N. W. 1026. See Goncelier v. Foret, 4 Minn. 13(1), and § 39.

[78] Winslow v. Minn. etc. Ry., 4 Minn. 313(230); Mayall v. Mayall, 63 Minn. 511, 65 N. W. 942; Mathews v. Lightner, 85 Minn. 333, 88 N. W. 992.

[79] Davis v. Chouteau, 32 Minn. 548, 21 N. W. 748; Cover v. Baytown, 12 Minn. 124(71); Lowry v. Harris, 12 Minn. 255 (166); Stewart v. Erie etc. Co., 17 Minn. 372(348); McRoberts v. Southern Minn. Ry., 18 Minn. 108(91); Blakeley v. LeDuc, 22 Minn. 476; Miller v. Darling, 22 Minn. 303; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; Allis v. Ware, 28 Minn. 166, 9 N. W. 666; Jones v. Minneapolis, 31 Minn. 230, 17 N. W. 377; Tarbox v. Gorman, 31 Minn. 62, 16 N. W. 466; Sandwich Mfg. Co. v. Herriott, 37 Minn. 214, 33 N. W. 782; Graham v. Minneapolis, 40 Minn. 436, 42 N. W. 291; Arthur v. Willius, 44 Minn. 409, 46 N. W. 851; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528; Christian v. Bowman, 49 Minn. 99, 51 N. W. 663; Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017; Benson v. Silvey, 59 Minn. 73, 60 N. W. 847; Moore v. Bevier, 60 Minn. 240, 62 N. W. 281; Stewart v. Great Northern Ry., 65 Minn. 515, 68 N. W. 208; Harper v. Carroll, 66 Minn. 487, 507, 69 N. W. 610, 1069; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Mason v. St. Paul etc. Co., 82 Minn. 336, 85 N. W. 13; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751; Budds v. Frey, 104 Minn. 481, 116 N. W. 158; Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987; Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606; Holden & Wheeling Mut. Fire Ins. Co. v. Chicago G. W. Ry., 120 Minn. 230, 139 N. W. 157.

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case, no motion is made to dismiss the action because of such defect, it is waived.[80]

121. Objection must be specific—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.[81]

MISJOINDER OF PARTIES

122. Misjoinder of parties plaintiff—The misjoinder of two parties as plaintiffs, when the cause of action is in one alone, is no ground for a dismissal of the complaint as to both. It is a mere irregularity which may be corrected at any time, before or after judgment, by striking out the name of the party improperly joined.[82] The objection cannot be raised for the first time on appeal.[83]

123. Misjoinder of parties defendant—A defendant improperly joined may demur on the ground that the complaint does not state facts sufficient to constitute a cause of action.[84] A party who is properly made a defendant cannot object by demurrer that others are improperly joined with him.[85]

BRINGING IN PARTIES

124. In general—Statute—It is provided by statute that "whenever it shall be made to appear, upon motion of the plaintiff in any pending action, or of any defendant in such action who has alleged a counterclaim or other ground for affirmative relief, that in order to a full determination of such action another should have been made a party defendant or plaintiff therein, the court, upon such terms as may be proper, shall order such additional party to be brought in, and may stay other proceedings in the action for such time as may be necessary for that purpose. The order, in addition to the other proper directions thereof, shall briefly recite the grounds of such motion, direct that the complaint, or the answer, as the case may be, with such amendment thereof as

[80] Mason v. St. Paul Fire & Marine Ins. Co., 82 Minn. 336, 85 N. W. 13.

[81] Jones v. Minneapolis, 31 Minn. 230, 17 N. W. 377; Davis v. Chouteau, 32 Minn. 548, 21 N. W. 748; Jaeger v. Sunde, 70 Minn. 356, 73 N. W. 171; Anderson v. W. J. Dyer & Bro., 94 Minn. 30, 101 N. W. 1061; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751; Holden & Wheeling Mut. Fire Ins. Co. v. Chicago G. W. Ry., 120 Minn. 230, 139 N. W. 157.

[82] Wiesner v. Young, 50 Minn. 21, 52 N. W. 390.

[83] Breault v. Merrill & Ring Lumber Co., 72 Minn. 143, 75 N. W. 122.

[84] Lewis v. Williams, 3 Minn. 151(95).

[85] Lewis v. Williams, 3 Minn. 151 (95); Goncelier v. Foret, 4 Minn. 13(1); Nichols v. Randall, 5 Minn. 304(240); Mitchell v. Bank of St. Paul, 7 Minn. 252 (192).

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may be necessary as against such added party, be filed with the clerk, prescribe the time within which the order shall be served, and require the party so brought in to answer or reply within twenty days after such service. The manner of service shall be the same as is prescribed by law for the service of a summons, and when service is made the action shall proceed, by or against all the parties, as though all had ordiginally been joined." [86] An order bringing in parties should be made only when it is necessary to secure a full determination of the controversy between the original parties tendered by the complaint, answer or counterclaim.[87] An infant may be made a defendant under the statute.[88] Where a complaint fails to state a cause of action against a person he cannot be brought in except on an amended complaint.[89] In an action on a joint obligation the court may require any of the obligors who are not parties to be brought in as defendants.[90] If a necessary party is named as a defendant in the title of the action, but is not brought in as a party by service of 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.[91] An application to bring in other parties will be denied if not made with reasonable diligence, if the other defendants would be prejudiced by granting it.[92] The court on its own motion

[86] R. L. 1905 §§ 4069, 4070; G. S. 1913 §§ 7690, 7691. Statute cited and applied: Chadbourn v. Rahilly, 34 Minn. 346, 25 N. W. 633 (replevin); State v. Minneapolis etc Ry., 39 Minn. 219, 39 N. W. 153 (mandamus to compel bridging of railroad tracks at street crossing); Farmers' Nat. Bank v. Backus, 64 Minn. 43, 66 N. W. 5 (action to foreclose a mortgage); Bishop Iron Co. v. Hyde, 66 Minn. 24, 68 N. W. 95 (ejectment); Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610 (action for breach of contract to furnish materials for the construction of a house—counterclaim for unpaid balance of contract price for materials—plaintiff's wife brought in to enforce lien); Devaney v. Ancient Order of Hibernians, 122 Minn. 221, 142 N. W. 316 (action on benefit certificate—statute held not to justify bringing in of administrator); Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66 (statute applicable to mandamus proceedings).

[87] Clay County Land Co. v. Alcox, 88 Minn. 4, 92 N. W. 464. In the following cases an application to bring in parties was denied: Davis v. Sutton, 23 Minn. 307 (action on note); Welch v. Marks, 39 Minn. 481, 40 N. W. 611 (partition); Boen v. Evans, 72 Minn. 169, 75 N. W. 116 (action by taxpayer to recover public funds illegally paid out by city treasurer); Kettle River v. Bruno, 106 Minn. 58, 118 N. W. 63 (action between parent town against one of two new towns to compel contribution for indebtedness of old town—other new town not a necessary party).

[88] Markell v. Ray, 75 Minn. 138, 77 N. W. 788.

[89] Penfield v. Wheeler, 27 Minn. 358, 7 N. W. 364.

[90] R. L. 1905 § 4282; G. S. 1913 § 7916.

[91] Northwestern etc. Co. v. Norwegian etc. Seminary, 43 Minn. 449, 45 N. W. 868. See Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017; Julius v. Callahan, 63 Minn. 154, 65 N. W. 267.

[92] Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638.

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may order new parties to be brought in and may continue a cause for that purpose.[93] Failure to bring in a party as ordered is a ground for dismissal.[94]

SUBSTITUTION OF PARTIES

125. On transfer of interest—An action does not abate because of the transfer of the interest of a party.[95] It is discretionary with the court either to allow the action to continue in the name of the original plaintiff or to order the substitution of the successor in interest.[96] An action may be continued in the name of the original plaintiff though he has assigned the right of action pendente lite,[97] but the assignee is the real party in interest and master of the action.[98] Where one suing for many assigns his claim pendente lite, and before others join, the action may continue in the name of the original plaintiff, but the assignee is master of the action.[99] The court does not take judicial notice of a transfer pendente lite. It is the duty of the transferee to acquaint the court with the fact of transfer and ask leave either to continue the action in the name of the original plaintiff or to be substituted.[1] The right of substitution, and the consequent complete elimination of a party to the record, arises only in those cases where the whole beneficial interest in the cause of action is assigned and transferred pendente lite. If by the terms of such an assignment the plaintiff retains any substantial interest in the further prosecution of the action, or may become liable to the assignee if the action fails, in-

[93] Cover v. Baytown, 12 Minn. 124 (71); Johnson v. Robinson, 20 Minn. 170(153); Harper v. Carroll, 66 Minn. 487, 507, 69 N. W. 610; P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417; Kanne v. Kanne, 119 Minn. 265, 271, 138 N. W. 25.

[94] Cover v. Baytown, 12 Minn. 124 (71); Johnson v. Robinson, 20 Minn. 170 (153); Northwestern etc. Co. v. Norwegian etc. Seminary, 43 Minn. 449, 45 N. W. 868.

[95] R. L. 1905 § 4064; G. S. 1913 § 7685.

[96] Brown v. Kohout, 61 Minn. 113, 63 N. W. 248; American Engine Co. v. Crowley, 105 Minn. 233, 117 N. W. 428. In the following cases a substitution was allowed: Slosson v. Ferguson, 31 Minn. 448, 18 N. W. 281; Bradley v. Northern Pacific Ry., 38 Minn. 234, 36 N. W. 345; Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537; Willoughby v. St. Paul etc. Co., 80 Minn. 432, 83 N. W. 377.

[97] Whitacre v. Culver, 9 Minn. 295 (279); Chisholm v. Clitherall, 12 Minn. 375(251); Rogers v. Holyoke, 14 Minn. 220(158); Bennett v. McGrade, 15 Minn. 132(99); Nichols v. Chicago etc. Ry., 36 Minn. 452, 32 N. W. 176; Brown v. Kohout, 61 Minn. 113, 63 N. W. 248. If an assignor dies after an assignment and pendente lite the action may continue in the name of the deceased plaintiff. Tuffree v. Stearns Ranchos Co., 124 Cal. 306, 57 Pac. 69.

[98] Chisholm v. Clitherall, 12 Minn. 375(251); Bennett v. McGrade, 15 Minn. 132(99).

[99] Hirshfield v. Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839.

[1] Chisholm v. Clitherall, 12 Minn. 375 (251); Rogers v Holyoke, 14 Minn. 220 (158).

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tervention by the assignee, and not substitution, is the proper remedy.[2] The statute has been held applicable to a transfer to a receiver.[3] The supreme court may order a substitution.[4]

126. On death or disability of a party—Statute—It is provided by statute that "no action shall abate by reason of the death or disability of a party, or the transfer of his interest, if the cause of action continues or survives. In such cases the court, on motion, may substitute the representative or successor in interest, or, in cases of transfer of interest, may allow the action to proceed in the name of the original party. And after a verdict, decision, or report of a referee, fixing the amount of damages for a wrong, such action shall not abate by the death of any party thereto."[5] The remedy by motion is exclusive. It is a substitute for the former bill of revivor and original bill in the nature of revivor. The facts upon which the motion is based may be contested.[6] Whether the motion is made within a reasonable time is a question for the trial court, and its determination will rarely be reversed on appeal.[7] Though the statute is in terms permissive, and not mandatory, the court is not at liberty to exercise an arbitrary discretion, but in case of death, at least of the plaintiff, where the action cannot otherwise proceed, substitution should always be allowed unless good cause is shown to the contrary.[8] In the case of the death of a plaintiff his executor or administrator is ordinarily substituted as a matter of course.[9] A foreign administrator may be substituted.[10] The term "representative" as used in the statute includes not only executors and administrators, but also all who occupy the position held by the decedent, succeeding to his rights and liabilities.[11] In an action on a joint and several contract, if one of the defendants dies, the action may be continued against the

[2] Walker v. Sanders, 103 Minn. 124, 114 N. W. 649.

[3] American Engine Co. v. Crowley, 105 Minn. 233, 117 N. W. 428. See Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992 (receiver of foreign corporation held not entitled to substitution).

[4] Keough v. McNitt, 7 Minn. 29(15).

[5] R. L. 1905 § 4064; G. S. 1913 § 7685.

[6] Landis v. Olds, 9 Minn. 90(79); Lough v. Pitman, 25 Minn. 120; Willoughby v. St. Paul etc. Co., 80 Minn. 432, 83 N. W. 377. See, under former statute, Lee v. O'Shaughnessy, 20 Minn. 173(157).

[7] Hunt v. O'Leary, 78 Minn. 281, 80 N. W. 1120; Willoughby v. St. Paul etc. Co., 80 Minn. 432, 83 N. W. 377; St. Paul etc. Ry. v. Eckel, 82 Minn. 278, 84 N. W. 1008. See Boening v. McKinley, 44 Minn. 392, 46 N. W. 766; Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537. See, under former statute, Lee v. O'Shaughnessy, 20 Minn. 173(157); Stocking v. Hanson, 22 Minn. 542.

[8] Landis v. Olds, 9 Minn. 90(79).

[9] Landis v. Olds, 9 Minn. 90(79); Stocking v. Hanson, 22 Minn. 542; Jordan v. Secombe, 33 Minn. 220, 224, 22 N. W. 383; Brown v. Brown, 35 Minn. 191, 28 N. W. 238; Cooper v. St. Paul etc. Ry., 55 Minn. 134, 56 N. W. 588.

[10] Brown v. Brown, 35 Minn. 191, 28 N. W. 238.

[11] Willoughy v. St. Paul etc. Co., 80 Minn. 432, 83 N. W. 377. See Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537.

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survivor without joining the representative of the deceased defendant.[12] Where one of two joint parties on the same side of a contract dies, the survivor may maintain an action without having the representatives of the decedent substituted.[13]

127. Who may object—A stranger to an action cannot object to a substitution of parties.[14]

[12] Lanier v. Irvine, 24 Minn. 116.

[13] Hedderly v. Downs, 31 Minn. 183, 17 N. W. 274; Northness v. Hillestad, 87 Minn. 304, 91 N. W. 1112.

[14] Hunt v. O'Leary, 78 Minn. 281, 80 N. W. 1120.

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INTERVENTION

128. Definition—Intervention is an act by which one voluntarily becomes a party to an action pending between others.[15]

129. Statute—Any person having such an interest in the matter in litigation between others that he may either gain or lose by the direct legal effect of the judgment therein may serve a complaint in the pending action, at any time before the trial begins, alleging the facts which show such interest, and demanding appropriate relief against either or both of the parties. Such intervener shall not be entitled to delay, and, if a continuance be occasioned by him, it may be granted at his expense. The ordinary rules of pleading shall govern, except that the court, in order to avoid delaying the trial, may shorten the time within which subsequent pleadings shall be served. All the issues shall be determined together, and if the intervener's claim be not sustained he shall pay the costs resulting therefrom.[16]

130. Origin of statute—Our statute derives from the code of Louisiana, through the statutes of California and Iowa.[17]

131. As of right—If a party brings himself within the terms of the statute he has an absolute right to intervene. It is unnecessary to apply to the court for leave to intervene.[18]

132. Nature of interest entitling a party to intervene—To entitle a party to intervene under the statute he must have an interest in the matter in litigation in the action of such a direct and immediate character that he would either gain or lose by the direct legal operation and effect of the judgment therein.[19]

[15] Century Dict.; Farley v. St. Paul Investment & Savings Soc., 110 Minn. 311, 125 N. W. 676; Rocca v. Thompson, 223 U. S. 317.

[16] R. L. 1905 § 4140; G. S. 1913 § 7766.

[17] Bennett v. Whitcomb, 25 Minn. 148; Lewis v. Harwood, 28 Minn. 428, 10 N. W. 586; McAllen v. Hodge, 92 Minn. 68, 99 N. W. 424. See Pomeroy, Remedies, § 416.

[18] Bennett v. Whitcomb, 25 Minn. 148.

[19] Bennett v. Whitcomb, 25 Minn. 148 (general rule of text stated—action to reform powers of attorney and a deed—party claiming title to land but not under parties to action or instruments to be reformed held not entitled to intervene); Mann v. Flower, 26 Minn. 479, 5 N. W. 365 (equitable action—fund in court to abide event of action—claimant to fund may intervene); Lewis v. Harwood, 28 Minn. 428, 10 N. W. 586 (general rule of text stated—action on notes—attachment issued under which property belonging to two of the defendants was seized—parties setting up claims against such defendants for goods sold and delivered and asserting that the notes were given in fraud of creditors held not entitled to intervene—intervention would have introduced a new subject into the litigation); Wohlwend v. J. I. Case Threshing Machine Co., 42 Minn. 500, 44 N. W. 517 (general rule of text stated—action for negligent destruction of property—party having a lien on the property by chattel mortgage held entitled to intervene); Becker v. Northway, 44 Minn. 61, 46 N. W. 210 (action against a

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But it is not essential to his right to intervene that he would either gain or lose by the judgment if he did not become a party to the action.[20] It has been held that he need not have a property or pecuniary interest.[21] 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

surety—principal may intervene and set off a claim due him from the plaintiff); Dennis v. Spencer, 51 Minn. 259, 53 N. W. 631 (action for price of goods sold and delivered—party claiming that amount due was not owing to the plaintiff but to a third party, a judgment creditor of the intervener—garnishment proceedings pending—intervention denied); Steenerson v. Great Northern Ry., 60 Minn. 461, 62 N. W. 826 (proceedings before railroad and warehouse commission concerning railroad rates—another railroad company held not entitled to intervene); Larsen v. Nichols, 62 Minn. 256, 64 N. W. 553 (replevin against agent or bailee—principal entitled to intervene); Masterman v. Lumbermen's Nat. Bank, 61 Minn. 299, 63 N. W. 723 (action by receiver of one member of a firm to set aside a fraudulent conveyance of the firm—intervention by other member of firm); Smith v. St. Paul, 65 Minn. 295, 68 N. W. 32; Id., 69 Minn. 276, 72 N. W. 104; Id., 111 Fed. 308 (condemnation proceedings—in action for award a third party claimant may intervene); American Exchange Bank v. Davidson, 69 Minn. 319, 72 N. W. 129 (general rule of text stated—claim of intervener must relate to the subject-matter of the original action); Holcomb v. Stretch, 74 Minn. 234, 76 N. W. 1132 (action to determine adverse claims—claimant under a tax title unaffected by the pending action held not entitled to intervene); A. E. Johnson Co. v. White, 78 Minn. 48, 80 N. W. 838 (action against a partner on a note—other partners held entitled to intervene); Schuler v. T. M. McCord Co., 79 Minn. 39, 81 N. W. 547 (where the owner brings an action for the purchase price of property sold by him a third party claiming a lien on the property under a foreign statute may intervene); Cone v. Wold, 85 Minn. 302, 88 N. W. 977 (proceedings for the dissolution of a police relief association—taxpayer with claim against association held entitled to intervene); Walker v. Sanders, 103 Minn. 124, 114 N. W. 649 (action by A to set aside a deed by A to defendant B—intervention by C to whom A had given another deed of the same property after the commencement of the action held proper); Erickson v. Revere Elevator Co., 110 Minn. 443, 126 N. W. 130 (sale of entire capital stock of a corporation—query whether purchaser might intervene for the protection of his interest in the corporation); Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727 (action for negligence in starting a fire—insurance company paying for property destroyed may intervene). See Hunter v. Cleveland Co-operation Stove Co., 31 Minn. 505, 18 N. W. 645 (action to determine adverse claims); Maxcy v. New Hampshire Fire Ins. Co., 54 Minn. 272, 55 N. W. 1130 (action on fire insurance policy—right of owner and mortgagee to intervene).

[20] Faricy v. St. Paul Investment & Savings Soc., 110 Minn. 311, 125 N. W. 676.

[21] McAllen v. Hodge, 92 Minn. 68, 99 N. W. 424. The wording of the statute

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legal or equitable. If equitable, it must be of such a character as would be the foundation for a recovery or for a defence, as the case might be, in an independent action in which he was an original party. As the new system permits legal and equitable causes of action or defences to be united by those who are made the parties to an 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. The intervener brings himself into court, and becomes a litigant party by filing and serving his complaint, which is answered by the adverse parties in the same manner as though it was the pleading of a plaintiff. The issues on all the pleadings are tried as a whole. If the intervener fails judgment for costs is rendered against him. If he succeeds judgment is given in his favor according to the facts of the particular case.[22] The statute is to be liberally construed. A person may intervene though he has another remedy. The statute applies alike to legal and equitable actions and to controversies involving either real or personal property.[23]

133. Intervener cannot delay, terminate, or change action—A party cannot intervene in an action to object to a trial thereof or to move for a dismissal.[24] An intervener is not entitled to delay an action, and if a continuance is occasioned by him it may be granted at his expense.[25] He cannot be allowed to tender an issue which can be tried only by a change in the form of the action. 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 be permitted to intervene, but should be remitted to an original action.[26]

134. Pleading—Complaint—Answer—Demurrer—The ordinary rules of pleading apply, except that the court, in order to avoid delaying the trial, may shorten the time within which subsequent pleadings may be served.[27] Intervention is by complaint setting forth the grounds in the same form as a complaint in an ordinary action. The intervener must set out his cause of action

has been somewhat changed since this decision.

[22] Pomeroy, Remedies, § 430; Pool v. Sanford, 52 Tex. 621.

[23] Walker v. Sanders, 103 Minn. 124, 114 N. W. 649; Faricy v. St. Paul Investment & Savings Soc., 110 Minn. 311, 125 N. W. 676.

[24] Mann v. Flower, 26 Minn. 479, 5 N. W. 365; Hunt v. O'Leary, 84 Minn. 200, 87 N. W. 611.

[25] See § 129; R. L. 1905 § 4140; G. S. 1913 § 7766.

[26] VanGorden v. Ormsby, 55 Iowa 657, 8 N. W. 625; Taylor v. Boedicker, 22 La. Ann. 79; Teachout v. Des Moines etc. St. Ry. Co., 75 Iowa 722, 38 N. W. 145.

[27] See § 129; R. L. 1905 § 4140; G. S. 1913 § 7766.

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or defence with as much particularity as if he were an original plaintiff or defendant.[28] 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.[29] There may be a demurrer to a complaint in intervention for its failure to state a cause of action or ground of intervention.[30]

135. Voluntary dismissal—The intervener may dismiss his intervention any time before final submission, without prejudice to a subsequent action.[31]

136. Remedy for wrong intervention—Waiver—The objection that the intervener has no right to intervene may be raised by demurrer;[32] by motion for dismissal on the trial;[33] or by motion on the trial to strike out the complaint in intervention.[34] Objection to an intervention cannot be made after trial[35] or for the first time on appeal.[36]

137. In equity—In an equitable action the court may allow a party interested in the subject-matter of an action to intervene without reference to the statute.[37]

[28] Shepard v. Murray County, 33 Minn. 519, 24 N. W. 291; People v. Talmage, 6 Cal. 256; Coffey v. Greenfield, 62 Cal. 602; Ward v. Healy, 114 Cal. 191, 45 Pac. 1065.

[29] See Smith v. Barclay, 54 Minn. 47, 55 N. W. 827; Pierce v. Wagner, 64 Minn. 265, 66 N. W. 977, 67 N. W. 537.

[30] Shepard v. Murray County, 33 Minn. 519, 24 N. W. 291.

[31] Woodward v. Jackson, 85 Iowa 432, 52 N. W. 358.

[32] Shepard v. Murray County, 33 Minn. 519, 24 N. W. 291; Seibert v. Minneapolis etc. Ry., 52 Minn. 148, 53 N. W. 1134.

[33] Lewis v. Harwood, 28 Minn. 428, 10 N. W. 586.

[34] Dennis v. Spencer, 51 Minn. 259, 53 N. W. 631.

[35] Lougee v. Bray, 42 Minn. 323, 44 N. W. 194; Holcomb v. Stretch, 74 Minn. 234, 76 N. W. 1132; Boxell v. Robinson, 82 Minn. 26, 84 N. W. 635.

[36] McKenty v. Gladwin, 10 Cal. 227; People v. Reis, 76 Cal. 269, 18 Pac. 309; Sanxey v. Iowa City Glass Co., 63 Iowa 707, 17 N. W. 429.

[37] Winslow v. Minn. etc. Ry., 4 Minn. 313(230); State v. Merchants' Bank, 67 Minn. 506, 70 N. W. 803; Smith v. National Credit Ins. Co., 72 Minn. 364, 75 N. W. 596. See Smith v. St. Paul, 65 Minn. 295, 68 N. W. 32.

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INTERPLEADER

138. Statute—In an action for the recovery of money upon contract, or of specific real or personal property, if any person not a party to the action demands of the defendant the same debt or property, the defendant may move the court to substitute such claimant as defendant in his stead, and that he be permitted to pay the money into court, or deliver the property or its value to such person as the court may direct. If it be made to appear that such demand is without collusion with the defendant, the motion may be granted, and upon compliance with the order the defendant shall be discharged. Thereafter the action shall proceed against the substituted defendant, and the court may compel the parties to interplead.[38]

139. Practice under statute—It is the proper practice for the court, in its order of interpleader, to direct that the summons and complaint, properly 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. Its right to make such disposition of the property is not affected by a voluntary dismissal of the action by plaintiff.[39] The practice under the statute is substantially the same as under a bill of interpleader in equity. After claimants to an offered reward have interpleaded under the statute and raised an issue as to their respective rights in the reward, a case is made properly triable by the court without a jury. On the trial the right of each claimant to the whole or a portion of the reward should be determined, even though by consent a jury trial is had.[40]

140. In equity—Code remedy not exclusive—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.[41]

[38] R. L. 1905 § 4138; G. S. 1913 § 7764. Statute cited: Rohrer v. Turrill, 4 Minn. 407(309); Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. 363; Schuler v. T. M. McCord Co., 79 Minn. 39, 85 N. W. 547 (right of holder of lien under a foreign statute); Schuler v. Wood, 81 Minn. 372, 84 N. W. 121; Devaney v. Ancient Order etc. Ins. Fund, 122 Minn. 221, 142 N. W. 316.

[39] Hooper v. Balch, 31 Minn. 276, 17 N. W. 617.

[40] Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025.

[41] St. Louis Life Ins. Co. v. Alliance Mutual Life Ins. Co., 23 Minn. 7; Smith

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141. When action lies—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.[42] He must stand in a position of indifference between the rival claimants and must have no interest in or claim to the subject-matter.[43] He must be without adequate remedy at law.[44] It has been said that there must be privity between the claimants,[45] but this is doubtful.[46]

142. Object of action—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. It is not to relieve the plaintiff of a double liability; but rather a double vexation on account of one liability.[47]

143. Practice—Upon the trial it is the better practice first to determine whether the interpleader will lie. If it will not lie it is unnecessary to go further.[48] After it has been determined that the action will lie and the money or property has been paid into court the plaintiff is out of the action and the defendants are left to contest their claims without any aid or interference from him. Costs may be awarded against a party who brings an action in bad faith.[49] The trial is properly by the court.[50] 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.[51]

v. St. Paul, 65 Minn. 295, 68 N. W. 32; Beck v. Stephani, 9 How. Pr. (N. Y.) 193; Board of Education v. Scoville, 13 Kan. 17; Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991.

[42] Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991; Pomeroy, Equity, § 1320.

[43] Newman v. Home Ins. Co., 20 Minn. 422(378); St. Louis Life Ins. Co. v. Alliance Mutual Life Ins. Co., 23 Minn. 7; Cullen v. Dawson, 24 Minn. 66; Austin v. March, 86 Minn. 232, 90 N. W. 384. See Maxcy v. New Hampshire Fire Ins. Co., 54 Minn. 272, 55 N. W. 1130 and Note, 10 L. R. A. (N. S.) 748.

[44] Blair v. Hilgedick, 45 Minn. 23, 47 N. W. 310.

[45] Newman v. Home Ins. Co., 20 Minn. 422(378).

[46] See Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991.

[47] St. Louis Life Ins. Co. v. Alliance Mutual Life Ins. Co., 23 Minn. 7; Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991; Pomeroy, Equity, § 1320.

[48] Cullen v. Dawson, 24 Minn. 66.

[49] St. Louis Life Ins. Co. v. Alliance Mutual Life Ins. Co., 23 Minn. 7.

[50] See Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025.

[51] Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991.

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ASSIGNMENTS

144. Definition—In its general sense an assignment is a transfer of a right or interest. To assign is to make over a right to another.[52] An assignment is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.[53] It is now generally limited to the transfer of chattels, either real or personal, including choses in action and equitable interests.[54]

145. What constitutes—An order on a debtor by his creditor directing him to pay his indebtedness to the person named therein, and an acceptance thereof by the debtor, operate as an assignment of the debt.[55] An order attached to an account, directing its payment to the party named in the order, and delivered to him, operates as an assignment of the debt or account, though the order is not accepted by the debtor, and is valid as against a subsequent garnishment.[56] A promise by a debtor to pay his creditor out of a certain fund is not ordinarily an assignment of the fund.[57] An order or draft on a fund is sometimes an assignment of the fund.[58] An agreement between an attorney and client has been held not an assignment of a cause of action.[59]

146. Equitable assignment—There may be an equitable assignment where the owner of property, intending to transfer it to another, does all that is in his power to give effect to such intention, or where, by mistake or inadvertence, some formality to a legal transfer is omitted, but there can be none except to carry into effect the actual intention.[60]

147. A contract—An assignment is a contract between the assignor and assignee.[61] It is a transfer by contract or act of the parties, rather than by operation of law.[62]

[52] Century Dict.; Banning v. Sibley, 3 Minn. 389(282); Guile v. McNanny, 14 Minn. 520(391); Hoag v. Mendenhall, 19 Minn. 335(289); Paine v. Smith, 33 Minn. 495, 499, 24 N. W. 305; Burke v. Backus, 51 Minn. 174, 178, 53 N. W. 458.

[53] Brown v. Crookston Agricultural Assn., 34 Minn. 545, 26 N. W. 907.

[54] Banning v. Sibley, 3 Minn. 389(282).

[55] Baylor v. Butterfass, 82 Minn. 21, 84 N. W. 640. See Conroy v. Ferree, 68 Minn. 325, 71 N. W. 383; Laramee v. Tanner, 69 Minn. 156, 71 N. W. 1028.

[56] Union Iron Works Co. v. Kilgore, 65 Minn. 497, 67 N. W. 1017.

[57] Hale v. Dressen, 76 Minn. 183, 78 N. W. 1045. See Canty v. Latterner, 31 Minn. 239, 17 N. W. 385; Second Nat. Bank v. Sproat, 55 Minn. 14, 56 N. W. 254.

[58] Lewis v. Traders' Bank, 30 Minn. 134, 14 N. W. 587; Griggs v. St. Paul, 56 Minn. 150, 57 N. W. 461; Brady v. Chadbourne, 68 Minn. 117, 70 N. W. 981; Wasgatt v. First Nat. Bank, 117 Minn. 9, 134 N. W. 224. See Dunnell, Minn. Digest, § 982.

[59] Herrick v. Minneapolis etc. Ry., 32 Minn. 435, 21 N. W. 471.

[60] Simonton v. First Nat. Bank, 24 Minn. 216, 219.

[61] St. Anthony Mill Co. v. Vandall, 1 Minn. 246(195).

[62] Burke v. Backus, 51 Minn. 174, 178, 53 N. W. 458.

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148. Consideration—A pre-existing indebtedness is a sufficient consideration for an assignment.[63]

149. Mode of assigning things in action—No particular form of words is necessary in making an assignment of things in action. The delivery of the written evidence of a debt with intent to assign is sufficient.[64] Except as provided by R. L. 1905, § 3502,[65] and the statute of frauds[66] an oral assignment is sufficient.[67] The words "right, title, and interest" are often employed.[68] There must be a delivery of the instrument to the assignee.[69]

150. Duty of assignor to assignee—An assignor occupies a position of trust toward his assignee and is not allowed to thwart him in realizing on the claim.[70]

151. Partial assignments—An assignment of a part of an entire thing in action may be made and the equitable interests of the assignee will be protected. But the assignee cannot maintain a separate and independent action for his share, unless the debtor recognizes the assignment. The proper practice is for the assignee and assignor to join as plaintiffs. If the assignor refuses to join as a plaintiff, he may be made a defendant, the reasons being stated in the complaint.[71] An assignment of a judgment in part is not valid unless recorded as provided by statute.[72]

152. Notice—Notice to the obligor is not essential to the validity of an assignment, as between the assignor and the assignee, or as between the assignee and creditors of the assignor.[73] But until receiving notice of an assignment

[63] Bradley v. Thorne, 67 Minn. 281, 69 N. W. 909.

[64] MacDonald v. Kneeland, 5 Minn. 352(283); Chemedlin v. Prince, 15 Minn. 331(263, 269); Blakely v. LeDuc, 22 Minn. 476; Crone v. Braun, 23 Minn. 239; State v. Hastings, 24 Minn. 78; Lord v. Dearing, 24 Minn. 110; Hurley v. Bendel, 67 Minn. 41, 69 N. W. 477; Jackson v. Sevatson, 79 Minn. 275, 82 N. W. 634; Smith v. Meyer, 84 Minn. 455, 87 N. W. 1122.

[65] Baylor v. Butterfass, 82 Minn. 21, 84 N. W. 640; Burton v. Gage, 85 Minn. 355, 88 N. W. 997.

[66] Burton v. Gage, 85 Minn. 355, 88 N. W. 997. See Shove v. Martine, 85 Minn. 29, 88 N. W. 254, 412.

[67] Hurley v. Bendel, 67 Minn. 41, 69 N. W. 477. See Shove v. Martine, 85 Minn. 29, 88 N. W. 254, 412.

[68] Comfort v. Creelman, 52 Minn. 280, 53 N. W. 1157.

[69] Kersten v. Kersten, 114 Minn. 24, 129 N. W. 1051 (evidence held to show a delivery of an assignment of a mortgage).

[70] Sherwood v. O'Brien, 58 Minn. 76, 59 N. W. 957.

[71] Canty v. Latterner, 31 Minn. 239, 17 N. W. 385; Dean v. St. Paul etc. Ry., 53 Minn. 504, 55 N. W. 628; Schilling v. Mullen, 55 Minn. 122, 56 N. W. 586; Cross v. Page & Hill Co., 116 Minn. 123, 133 N. W. 178.

[72] Wheaton v. Spooner, 52 Minn. 417, 54 N. W. 372.

[73] MacDonald v. Kneeland, 5 Minn. 352(283); Williams v. Pomeroy, 27 Minn. 85, 6 N. W. 445; Lewis v. Bush, 30 Minn. 244, 15 N. W. 113; Riley v. Mitchell, 36 Minn. 3, 29 N. W. 588; Quigley v. Welter, 95 Minn. 383, 104 N. W. 236; Cross v. Page & Hill Co., 116 Minn. 123, 133 N. W. 178.

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the obligor may regard the assignor as owner and pay the debt to him or effect a settlement, or acquire a claim against him which may be used as a setoff against the assignee.[74] Until the obligor receives such notice he may deal with the assignor as if no assignment had been made. The general rule applies between attorney and client.[75] A cashier has been held not authorized to receive notice of an assignment of wages by an employee.[76] Notice fixes the rights of the parties and protects the assignee. Payment to the assignor after notice will not prejudice the assignee.[77] Knowledge of facts sufficient to put the obligor upon inquiry may possibly be equivalent to notice.[78] A notice of an assignment may protect an assignee under a subsequent assignment.[79]

153. Who may contest—One having no interest in property cannot question an assignment of it by the owner.[80] If the assignor admits an assignment, and the rights of third parties are not involved, the debtor cannot question it, when he has no defence to the claim as against the assignor.[81] A provision in a contract for the purchase of land to the effect that no assignment shall be binding on the vendor, unless approved, cannot be taken advantage of by a subsequent assignee of the contract, as against a prior assignee.[82]

WHAT ASSIGNABLE

154. Choses in action not assignable at common law—At common law a chose in action, other than a negotiable instrument, was not generally assignable so as to authorize an assignee to sue thereon in his own name.[83] In equity the rule was otherwise,[84] and the assignor held the legal title in trust for the assignee.[85]

155. Test of assignability—If a cause of action survives to the personal representatives of a decedent it is assignable; otherwise not.[86] This is the only

[74] Dodd v. Brott, 1 Minn. 270(205); Chisholm v. Clitherall, 12 Minn. 375 (251); Linn v. Rugg, 19 Minn. 181(145); Martin v. Pillsbury, 23 Minn. 175; Graham v. Evans, 39 Minn. 382, 40 N. W. 368; Olson v. N. W. etc. Co., 65 Minn. 475, 68 N. W. 100; Nielsen v. Albert Lea, 91 Minn. 388, 98 N. W. 195; Cross v. Page & Hill Co., 116 Minn. 123, 133 N. W. 178. See Hage v. Benner, 111 Minn. 365, 127 N. W. 3.

[75] Nielsen v. Albert Lea, 91 Minn. 388, 98 N. W. 195.

[76] Strauch v. May, 80 Minn. 343, 83 N. W. 156.

[77] Schilling v. Mullen, 55 Minn. 122, 56 N. W. 586; Brady v. Chadbourne, 68 Minn. 117, 70 N. W. 981.

[78] Nielsen v. Albert Lea, 91 Minn. 388, 98 N. W. 195; Hage v. Benner, 111 Minn. 365, 127 N. W. 3.

[79] Linn v. Rugg, 19 Minn. 181(145).

[80] Haubrick v. Johnston, 23 Minn. 237.

[81] Cornish, Curtis & Greene Co. v. Marty, 76 Minn. 493, 79 N. W. 507.

[82] McPheeters v. Ronning, 95 Minn. 164, 103 N. W. 889.

[83] Spencer v. Woodbury, 1 Minn. 105(82); Chisholm v. Clitherall, 12 Minn. 375(251); Anchor Investment Co. v. Kirkpatrick, 59 Minn. 378, 383, 61 N. W. 29; Pomeroy, Remedies, § 145.

[84] Id.

[85] Sherwood v. O'Brien, 58 Minn. 76, 59 N. W. 957.

[86] Tuttle v. Howe, 14 Minn. 145(113);

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general test of assignability. It is not a rational test, but it may be explained historically. The title of an executor or administrator is regarded by the 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, but nevertheless arbitrarily, they adopted survivability as a general test of assignability. This test remains unaffected by modern legislation, but the right of assignment has been greatly enlarged indirectly by statutes defining what causes of action survive.[87] In England the Judicature Act makes all choses in action assignable.[88]

156. Rights of action ex delicto—It is the general rule that a right of action for a personal tort is not assignable,[89] but a verdict in an action for a personal tort may be assigned.[90] A right of action for an injury to property is assignable.[91]

157. Wages—An assignment of wages to be earned in the future under an existing contract of employment, if made in good faith and for a valuable consideration, is valid, even though the employment is for no definite period and terminable at any time by either party. And such an assignment may be made as security for either present indebtedness or future advances.[92] But an assignment of wages to become due, without limit as to amount or time, and without acceptance by the employer, and without notice to an attaching creditor, is void as to such creditor.[93]

Harbord v. Cooper, 43 Minn. 466, 45 N. W. 860; Haugen v. Sundseth, 106 Minn. 129, 134, 118 N. W. 666; State v. Great Northern Ry., 106 Minn. 303, 327, 119 N. W. 202; Babcock v. Canadian Northern Ry., 117 Minn. 434, 136 N. W. 275; Zabriskie v. Smith, 13 N. Y. 322. See for a possible exception to the general rule, Hammond v. Peyton, 34 Minn. 529, 27 N. W. 72; Law v. Butler, 44 Minn. 482, 47 N. W. 53.

[87] Pomeroy, Remedies, § 146; 24 Harv. L. Rev. 670.

[88] See 24 Harv. L. Rev. 670.

[89] Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614 (false imprisonment); Hammons v. Great Northern Ry., 53 Minn. 249, 54 N. W. 1108 (assault); Boogren v. St. Paul City Ry., 97 Minn. 51, 106 N. W. 104 (personal injury resulting from negligence). See 24 Harv. L. Rev. 670.

[90] Kent v. Chapel, 67 Minn. 420, 70 N. W. 2. And so may a judgment in a tort action. Williams v. West Chicago St. Ry., 199 Ill. 57.

[91] Billson v. Linderberg, 66 Minn. 66, 68 N. W. 771 (fraud in the exchange of property); Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 N. W. 926 (malicious attachment); Babcock v. Canadian Northern Ry., 117 Minn. 434, 136 N. W. 275 (destruction of property by fire through negligence).

[92] O'Connor v. Meehan, 47 Minn. 247, 49 N. W. 982; Quigley v. Welter, 95 Minn. 383, 104 N. W. 236. See 14 Harv. L. Rev. 378; 5 Mich. L. Rev. 115; Mutual Loan Co. v. Martell, 222 U. S. 225. One who has contracted to perform certain specified work may assign his claim for the compensation before the work has been completed. Failure to file the assignment of a debt as required by G. S. 1913, § 7017, does not render the assignment void, but casts on the assignee the burden of proving that it was made in good faith and for a valuable consideration. Leonard v. Farrington, 124 Minn. 160, 144 N. W. 763.

[93] Steinbach v. Brant, 79 Minn. 383, 82

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158. Official fees—It is the general rule that official salaries and fees cannot be assigned,[94] but it has been held that a sheriff may assign to a deputy all the fees pertaining to the services to be rendered by such deputy.[95]

159. Liens—A mechanic's lien is assignable,[96] and so is the lien of an attorney on a judgment.[97]

160. Held assignable—A beneficial interest in a contract for work and labor;[98] a right of action for breach of a covenant of seizin;[99] a right of action for a breach of a covenant against incumbrances;[1] a right of action on a public contractor's bond;[2] an indorsement of a note including a contract guaranteeing its payment;[3] a guarantee of payment;[4] a right of action against a carrier for failure to carry safely;[5] a claim for rents to accrue;[6] a claim against a mortgagee for money misappropriated on foreclosure;[7] a claim of a contractor against a city;[8] a claim of a landlord for his share of a crop;[9] a right to a soldier's additional homestead;[10] an account for the services of a threshing machine outfit;[11] the right of a ward to recover his estate;[12] a consummate right of dower;[13] right of action on an obligation in favor of joint payees;[14] a time check issued to an employee;[15] a cause of action for malicious

N. W. 651; Leitch v. Northern Pacific Ry., 95 Minn. 35, 103 N. W. 704. See Baylor v. Butterfass, 82 Minn. 21, 23, 84 N. W. 640; Dyer v. Schneider, 106 Minn, 271, 118 N. W. 1011.

[94] 10 Harv. L. Rev. 315.

[95] Pioneer Printing Co. v. Sanborn, 3 Minn. 413(304).

[96] Tuttle v. Howe, 14 Minn. 145(113); Kinney v. Duluth Ore Co., 58 Minn. 455, 60 N. W. 23.

[97] Sibley v. Pine County, 31 Minn. 201, 17 N. W. 337.

[98] Bates v. B. B. Richards Lumber Co., 56 Minn. 14, 57 N. W. 218; Burton v. Gage, 85 Minn. 355, 88 N. W. 997. See § 157.

[99] Kimball v. Bryant, 25 Minn. 496; Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452.

[1] Randall v. Macbeth, 81 Minn. 376, 84 N. W. 119.

[2] Sepp v. McCann, 47 Minn. 364, 50 N. W. 246; Salisbury v. Keigher, 47 Minn. 367, 50 N. W. 246.

[3] Harbord v. Cooper, 43 Minn. 466, 45 N. W. 860; Phelps v. Sargent, 69 Minn. 118, 71 N. W. 927; Wood v. Bragg, 75 Minn. 527, 78 N. W. 93.

[4] Anchor Investment Co. v. Kirkpatrick, 59 Minn. 378, 61 N. W. 29.

[5] Blakeley v. LeDuc, 22 Minn. 476.

[6] Farmers' Trust Co. v. Prudden, 84 Minn. 126, 86 N. W. 887. See Potts v. Newell, 22 Minn. 561.

[7] Lynott v. Dickerman, 65 Minn. 471, 67 N. W. 1143.

[8] Dickson v. St. Paul, 97 Minn. 258, 106 N. W. 1053.

[9] Potts v. Newell, 22 Minn. 561.

[10] Webster v. Luther, 50 Minn. 77, 52 N. W. 271; Tuman v. Pillsbury, 60 Minn. 520, 63 N. W. 104; Rogers v. Clark Iron Co., 104 Minn. 198, 116 N. W. 739.

[11] Hurley v. Bendel, 67 Minn. 41, 69 N. W. 477. See Baylor v. Butterfass, 82 Minn. 21, 84 N. W. 640; Shove v. Martine, 85 Minn. 29, 88 N. W. 254, 412.

[12] Jordan v. Secombe, 33 Minn. 220, 22 N. W. 383.

[13] Dobberstein v. Murphy, 64 Minn. 127, 66 N. W. 204.

[14] Semper v. Coates, 93 Minn. 76, 100 N. W. 662.

[15] Citizens State Bank v. Bonnes, 76 Minn. 45, 78 N. W. 875.

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attachment of property;[16] the good will of a business;[17] a claim for the destruction of personal property by fire through negligence.[18]

161. Held not assignable—A right of re-entry for breach of a condition subsequent before the breach;[19] a vendor's lien;[20] a license to maintain a sluice-dam;[21] and an exemption from taxation,[22] have been held not assignable. Possibly a cause of action for negligence in not notifying an indorser is not assignable.[23] A right of action to set aside a fraudulent conveyance is probably not assignable by an assignee in insolvency.[24] At common law no interest could vest by an assignment of chattels not in esse, but this rule did not apply to crops to be raised by the assignor on land then owned by him or in his possession.[25]

EFFECT OF ASSIGNMENT

162. In general—An assignee of a non-negotiable thing in action stands in the shoes of his 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.[26] An assignee of a thing in action subject to a lien takes subject to the lien.[27] An assignee is not necessarily limited to the remedies of his assignor.[28] An assignment of a claim for damages from fire to an insurance company which had paid the loss to the owner has been held not based on the policy pursuant to which the payment was made and hence not affected by any illegality which may have affected the policy.[29]

163. Assignee takes subject to equities—It is the general rule that an assignee of a non-negotiable thing in action takes it subject to all equities existing against it in the hands of his assignor at the time of the assignment or before notice thereof. The term "equities" in this connection means any defence, legal or equitable, or setoff.[30] But such an assignee does not take subject to

[16] Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 N. W. 926.

[17] Haugen v. Sundseth, 106 Minn. 129, 118 N. W. 666.

[18] Babcock v. Canadian Northern Ry., 117 Minn. 434, 136 N. W. 275.

[19] Ohio Iron Co. v. Auburn Iron Co., 64 Minn. 404, 67 N. W. 221.

[20] Hammond v. Peyton, 34 Minn. 529, 27 N. W. 72; Law v. Butler, 44 Minn. 482, 47 N. W. 53.

[21] Mille Lacs Improvement Co. v. Bassett, 32 Minn. 375, 20 N. W. 363.

[22] State v. Great Northern Ry., 106 Minn. 303, 327, 119 N. W. 202.

[23] Borup v. Nininger, 5 Minn. 523 (417).

[24] Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 44, 46 N. W. 310.

[25] Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193, 20 N. W. 85.

[26] MacDonald v. Kneeland, 5 Minn. 352 (283).

[27] Comfort v. Creelman, 52 Minn. 280, 53 N. W. 1157.

[28] Anderson v. Amidon, 114 Minn. 202, 130 N. W. 1002.

[29] Babcock v. Canadian Northern Ry., 117 Minn. 434, 136 N. W. 275.

[30] R. L. 1905 § 4054; G. S. 1913 § 7675; Brisbin v. Newhall, 5 Minn. 273(217);

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the equities of third parties of which he had no notice.[31] The doctrine of "latent equities" does not prevail in this state. 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 in A against B, in absence of an estoppel.[32] A counterclaim can only be used against an assignee as a setoff and not as the basis of an affirmative judgment.[33] The statute saving the right of defence and setoff in case of assignment is intended solely for the benefit of the debtor. Where a third party stood in the position of the debtor it was held that he could not interpose a claim of his own.[34] A right of action under a covenant against incumbrances is not an ordinary thing in action within the rule allowing a setoff or defence by the covenantor.[35]

164. Same—Successive assignees—As between successive 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 has notice.[36]

165. Implied warranty of title, etc.—An assignor of a claim impliedly warrants that it is a valid obligation of the obligor and that his own title is good, but there is no implied warranty as to the value of the claim.[37] One who purchases from the owner thereof an order from the manufacturer for the delivery of personalty is justified in assuming that the order is valid and free from defences, in the absence of any representations to the contrary.[38]

166. Assignment carries securities and remedies—The assignment of a thing in action carries with it, unless expressly reserved, every assignable remedy, lien or security available by the assignor.[39] An assignment of a debt se-

Martin v. Pillsbury, 23 Minn. 175; State v. Lake City, 25 Minn. 404; Ames v. Richardson, 29 Minn. 330, 13 N. W. 137; Webb v. Michener, 32 Minn. 48, 19 N. W. 82; Wyvell v. Barwise, 43 Minn. 171, 45 N. W. 11; Way v. Colyer, 54 Minn. 14, 55 N. W. 744.

[31] Newton v. Newton, 46 Minn. 33, 48 N. W. 450; Plymouth Cordage Co. v. Seymour, 67 Minn. 311, 69 N. W. 1079; Moffett v. Parker, 71 Minn. 139, 73 N. W. 850. See Quigley v. Welter, 95 Minn. 383, 104 N. W. 236.

[32] Brown v. Equitable Life Assurance Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968. See MacDonald v. Kneeland, 5 Minn. 352(283).

[33] Davis v. Sutton, 23 Minn. 307; Webb v. Michener, 32 Minn. 48, 19 N. W. 82; Lynch v. Free, 64 Minn. 277, 66 N. W. 973.

[34] Quigley v. Welter, 95 Minn. 383, 104 N. W. 236.

[35] Randall v. Macbeth, 81 Minn. 376, 84 N. W. 119.

[36] MacDonald v. Kneeland, 5 Minn. 352(283); Burton v. Gage, 85 Minn. 355, 88 N. W. 997; Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. 870.

[37] Paine v. Smith, 33 Minn. 495, 24 N. W. 305. See Dunnell, Minn. Digest, §§ 931, 8571.

[38] Riley v. Galarneault, 103 Minn. 165, 114 N. W. 755.

[39] Bennett v. McGrade, 15 Minn. 132 (99) (appeal bond); Blakeley v. LeDuc, 22 Minn. 476 (rights growing out of a judgment); Lahmers v. Schmidt, 35 Minn. 434, 29 N. W. 169 (promise to pay a debt); Schlieman v. Bowlin, 36 Minn. 198, 30 N. W. 879 (replevin bond); Harbord v. Cooper, 43 Minn. 466, 45 N.

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cured by mortgage carries the mortgage as an incident of the debt.[40] An assignment of a note has been held not to carry a cause of action for negligence in not notifying the indorser.[41] An assignment of a debt carries a security though the debt and security are in a different form from what the parties supposed.[42]

167. Estoppel—The obligor may be estopped from asserting equities against an assignee.[43]

168. Assignee may sue in his own name—An assignee of a thing in action is authorized by statute to sue in his own name.[44]

169. Pleading—An assignment of a chose in action may be alleged in general terms without specifying the particulars.[45] A general allegation that an

W. 860 (a guaranty of payment); Sepp v. McCann, 47 Minn. 364, 50 N. W. 246 (right of action on public contractor's bond); Bovey-DeLaittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038 (a right to redeem); Clifford v. Northern Pacific Ry., 55 Minn. 150, 56 N. W. 590 (a right to costs); Longfellow v. McGregor, 56 Minn. 312, 57 N. W. 926 (bond for security of debt); Kinney v. Duluth Ore Co., 58 Minn. 455, 60 N. W. 23 (right to file a lien statement); Anchor Investment Co. v. Kirkpatrick, 59 Minn. 378, 61 N. W. 29 (a guaranty of payment); Longfellow v. McGregor, 61 Minn. 494, 63 N. W. 1032 (bond to rebuild a house); Kent v. Chapel, 67 Minn. 420, 70 N. W. 2 (judgment subsequently recovered); Anderson v. Minn. L. & T. Co., 68 Minn. 491, 71 N. W. 665, 819 (right to surplus on foreclosure sale); Wood v. Bragg, 75 Minn. 527, 78 N. W. 93 (guaranty of payment); Abrahamson v. Lamberson, 72 Minn. 308, 75 N. W. 226 (damages for waste); Abrahamson v. Lamberson, 79 Minn. 135, 81 N. W. 768 (right of vendee to offset his damages); Woodland Co. v. Mendenhall, 82 Minn. 483, 85 N. W. 164 (vendor's lien); Spoon v. Frambach, 83 Minn. 301, 86 N. W. 106 (right to take possession of property under a conditional sale note); Farmers' Trust Co. v. Prudden, 84 Minn. 126, 86 N. W. 887 (remedies for collection of rent).

[40] See Dunnell, Minn. Digest, § 6276.

[41] Borup v. Nininger, 5 Minn. 523 (417).

[42] Meeker County Bank v. Young, 51 Minn. 254, 53 N. W. 630.

[43] Cochran v. Stewart, 21 Minn. 435; Id., 57 Minn. 499, 59 N. W. 543; Brown v. Equitable Life Assurance Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968.

[44] See § 33.

[45] Hoag v. Mendenhall, 19 Minn. 335 (289) (assignment of note—"duly assigned" sufficient); Foster v. Johnson, 39 Minn. 378, 40 N. W. 255 (assignment of mortgage and note); Topping v. Clay, 65 Minn. 346, 68 N. W. 34 (an allegation that, in writing, and prior to the commencement of the action, a note had been duly assigned and transferred to the plaintiff, and that he has ever since been the holder thereof, is a sufficient allegation that it has been assigned and transferred by the payee named therein); Morley v. Liverpool etc. Ins. Co., 76 Minn. 285, 79 N. W. 103 (action by the assignee of the insured on a policy of insurance against loss by fire—complaint alleged the total loss and destruction of the property covered by the policy and that thereafter the insured transferred and assigned to the plaintiff "all its interest in said policy of insurance"—sufficient averment of assignment of the claim for loss); Fay v. Bankers' Surety Co., 125 Minn. 211, 146 N. W. 359 (assignment of wages).

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assignment was made for a valuable consideration is sufficient.[46] A complaint on an assigned claim for the payment of money does not state a cause of action if it fails to allege non-payment.[47] An allegation of an assignment of the principal obligation sufficiently imports, on demurrer, the assignment of collateral security therefor,[48] and an allegation of an assignment of a security may be sufficient, on demurrer, to include an assignment of the debt.[49] Where a plaintiff shows a claim he need not negative its assignment prior to action; that is a matter of defence.[50] Cases are cited below involving questions of pleading.[51]

[46] Russell v. Minnesota Outfit, 1 Minn. 162(136). See § 590.

[47] Dickinson v. Tyson, 110 N. Y. S. 269.

[48] Thomson v. Madison etc. Assn., 103 Ind. 279, 2 N. E. 735; Kurtz v. Sponable, 6 Kan. 395.

[49] Foster v. Johnson, 39 Minn. 378, 40 N. W. 255.

[50] Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490.

[51] Isakson v. Nelson, 94 Minn. 522, 102 N. W. 1133 (assignment of farm contract admitted by answer—no issue as to validity of assignment raised by answer); Fay v. Bankers' Surety Co., 125 Minn. 211, 146 N. W. 359 (assignment of wages—issue as to non-compliance with statute requiring notice of assignment of wages held raised by a general denial).

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ELECTION OF REMEDIES

170. **Definition**—Election of remedies is the adoption of one of two or more coexisting and inconsistent remedies which the law affords upon the same state of facts.[52]

171. **Basis of doctrine**—The doctrine of election rests on the idea that a party ought not to be permitted to consume the time of the courts and to harass the adverse party by experimenting with the different remedies which the law affords on the same state of facts. The doctrine is not one to be extended freely. It ought not to be applied except in very clear cases where injustice or substantial inconvenience would otherwise result.[53]

172. **Distinguished from estoppel**—The doctrine of election of remedies differs from that of estoppel, in its broadest sense, in that the party invoking it need not show that he will suffer some material disadvantage unless his adversary is required to abide by his election.[54]

173. **Necessity**—A party is put to an election only where his remedies are inconsistent and not where they are consistent and concurrent.[55]

174. **Between forms of action at common law**—At common law a party frequently had a choice of various forms of action on the same state of facts and success or failure often depended upon the choice.[56]

175. **Between inconsistent causes of action**—When a party pleads inconsistent causes of action he may be required to elect between them.[57]

176. **Trespass to personalty**—Where personalty is wrongfully taken from the possession of a person he has an election of remedies. He may maintain replevin,[58] trover,[59] or trespass de bonis asportatis.[60] He may waive the tort and sue on implied contract.[61] If he elects trover, trespass, or assumpsit he voluntarily relinquishes the right to the property in specie.[62]

177. **Conversion**—Where personalty is wrongfully converted the owner has an election of remedies. He may sue in replevin for the recovery of the prop-

[52] See Bierce v. Hutchins, 205 U. S. 340, and cases under § 182.

[53] See 26 Harv. L. Rev. 707.

[54] Pederson v. Christofferson, 97 Minn. 491, 106 N. W. 958; Aho v. Republic Iron & Steel Co., 104 Minn. 322, 116 N. W. 590.

[55] Barnes v. Hekla Fire Ins. Co., 56 Minn. 38, 57 N. W. 314; Bell v. Mendenhall, 71 Minn. 331, 337, 73 N. W. 1086. See Smith v. Carlson, 36 Minn. 220, 222, 30 N. W. 761; Piper v. Sawyer, 78 Minn. 221, 223, 80 N. W. 970; Aho v. Republic Iron & Steel Co., 104 Minn. 322, 324, 116 N. W. 590.

[56] Folsom v. Carli, 6 Minn. 420(284, 289).

[57] See §§ 207, 246.

[58] Caldwell v. Arnold, 8 Minn. 265 (231).

[59] Vanderburgh v. Bassett, 4 Minn. 242(171, 176).

[60] Id.

[61] See § 183.

[62] State v. Shevlin-Carpenter Co., 62 Minn. 99, 108, 64 N. W. 81.

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erty in specie, or sue for the trespass and recover damages, or sue for the conversion and recover the value of the property,[63] or waive the tort and sue on an implied contract to pay the value of the property or the amount received on its sale.[64] If he sues for conversion he waives the trespass.[65]

178. Conditional sales—Where, in a conditional sale of a chattel, the seller retains the title until the purchase price is fully paid, he has three remedies when the purchaser in possession defaults. He may foreclose his lien, or replevy the property, or sue for the unpaid purchase price.[66]

179. Constructive trusts—The beneficiary of a constructive trust has an election to follow the property with a mere charge or lien or to pursue the res as such.[67]

180. Between express and implied contract—Where a party has fully performed an express contract he may generally sue on the contract or in indebitatus assumpsit on an implied contract.[68]

181. Between statutory and common-law remedies—Where the common law gives a remedy and another is provided by statute a party has an election between them.[69]

182. Finality of election—One who has voluntarily chosen and carried into effect an appropriate legal remedy, with full knowledge of the facts and of his rights, is barred from pursuing another inconsistent remedy, even though no injury has been done by his choice or would result from resorting to the other remedy.[70] But a futile attempt to enforce a right or remedy which one does

[63] Vanderburgh v. Bassett, 4 Minn. 242(171, 176); Johnson v. Dunn, 75 Minn. 533, 539, 78 N. W. 98; Mueller v. Olson, 90 Minn. 416, 97 N. W. 115. See State v. Shevlin-Carpenter Co., 62 Minn. 99, 108, 64 N. W. 81.

[64] See § 186.

[65] Vanderburgh v. Bassett, 4 Minn. 242(171, 176).

[66] A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113.

[67] Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861. See Dunnell, Minn. Digest, § 9876.

[68] See §§ 534, 915.

[69] Daniels v. Palmer, 41 Minn. 116, 42 N. W. 855; Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109; State v. Educational Endowment Assn., 49 Minn. 158, 51 N. W. 908; Eliason v. Sidle, 61 Minn. 285, 63 N. W. 730; State v. American Savings & Loan Assn., 64 Minn. 349, 67 N. W. 1; Wacholz v. Griesgraber, 70 Minn. 220, 73 N. W. 7; Somers v. Dawson, 86 Minn. 42, 90 N. W. 119; Merz v. Wright County, 114 Minn. 448, 131 N. W. 635; Zetterberg v. Great Northern Ry., 117 Minn. 495, 136 N. W. 295; Sullivan v. Minneapolis etc. Ry., 121 Minn. 488, 142 N. W. 3. See Dunnell, Minn. Digest, § 87.

[70] Rheiner v. Union Depot etc. Co., 31 Minn. 289, 295, 17 N. W. 623 (election between questioning the jurisdiction of commissioners in condemnation proceedings over the person and appealing from their award); Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344 (election between specific performance and reformation); Dyckman v. Sevatson, 39 Minn. 132, 39 N. W. 73 (election of mortgagee of chattels between recovering the property by virtue of his title as mortgagee and, after the maturity of the mortgage, causing the property to be taken under an attachment for the

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not possess is not a bar to the enforcement of rights or remedies he does possess.[71] One who has sought a legal remedy, but has withdrawn or discontinued the proceedings before any action has been had upon it, is not barred from pursuing a different remedy, at least if the adverse party is not thereby

mortgage debt); Quimby v. Shearer, 56 Minn. 534, 58 N. W. 155 (election between an action to cancel a contract on the sole ground that the other party has refused to perform it and refusing to stand on the contract as he executed it); Johnson v. Johnson, 62 Minn. 302, 64 N. W. 905 (election of landlord to treat his tenant as a trespasser or as a tenant holding over); Wright etc. Co. v. Robinson, 79 Minn. 272, 82 N. W. 632 (election of creditor to affirm an order directing a receiver to retain certain moneys until the final determination of the litigation by basing an action thereon or to repudiate it by appeal); Pederson v. Christofferson, 97 Minn. 491, 106 N. W. 958 (election between contesting the probate of a will and taking under the will); Johnson v. Clontarf, 98 Minn. 231, 108 N. W. 521 (laying out highway —election to proceed in equity by way of injunction); Aho v. Republic Iron & Steel Co., 104 Minn. 322, 116 N. W. 590 (fraudulent settlement by administrator of claim for death by wrongful act—subsequent action by administratrix); Shearer v. Barnes, 118 Minn 179, 136 N. W. 861 (constructive trust—election of beneficiary to follow property with a mere charge or lien); C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164 (conditional sale—title reserved—if seller retakes property he cannot thereafter maintain an action to recover unpaid instalments of the purchase price); A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113 (id.); Olson v. Northern Pacific Ry., 126 Minn. 229, 148 N. W. 67 (sale of land—fraud).

[71] In re Van Norman, 41 Minn. 494, 43 N. W. 334 (attaching creditors unsuccessfully contesting assignment in insolvency allowed to prove claim); Marshall v. Gilman, 52 Minn. 88, 53 N. W. 811 (a party who had lost by laches his right to maintain an action to rescind a contract held not barred from maintaining an action for breach of the contract); Cumbey v. Ueland, 72 Minn. 453, 458, 75 N. W. 727 (the mere fact that an assignee in insolvency brought an action claiming to recover the merchandise which was the consideration for which certain notes were given, and dismissed the action before trial without having obtained any relief therein, does not bar him from recovering the notes as a preference); Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005 (the fact that an insured person, acting in good faith, refused to consent to a reference and brought an action on the policy, which was dismissed on the ground that a reference was a condition precedent to an action, held not to bar a subsequent action by the insured for the loss, the insurer refusing to submit to a reference); Pederson v. Christofferson, 97 Minn. 491, 106 N. W. 958 (contesting probate of a will and taking thereunder); Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474 (action for conversion of timber cut from public land—prior action which was dismissed held not a bar); Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930 (a suit on a cause of action that does not in fact exist is not an election of remedies). See Christianson v. Norwich Union Fire Ins. Co., 84 Minn. 526, 533, 88 N. W. 16 (refusal to accept award of referees in case of loss on a fire policy); Bierce v. Hutchins, 205 U. S. 340.

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prejudiced.[72] If an election is based on a justifiable ignorance of material facts it will not conclude the party.[73]

WAIVING TORT AND SUING ON CONTRACT

183. In general—In certain cases a party has an election between an action ex delicto and an action ex contractu. From certain acts or omissions giving rise to a liability to make compensation in damages the law implies a promise to pay such compensation. Whenever this is so, and such acts or omissions are tortious, the injured party may sue either for the tort or for the breach of the promise implied by law. The promise was implied by law to enable the injured party to sue in general assumpsit. In what cases will a tort give rise to an implied promise to make compensation? The law has no general answer to this question. In certain cases the common law implied the promise and in other cases not. Chance and practical convenience determined the matter and the existing rules upon this subject are to be justified historically rather than rationally. Whenever a promise would have been implied at common law, it will be implied under the code and a party may waive the tort and sue on the implied contract. We have abolished the common-law action of assumpsit, but we retain a rule that was established at common law because of the great practical advantage of suing in assumpsit.[74] Though it is customary to speak of the tort being "waived" in such cases, as a matter of fact, it is not waived. There is simply an election of remedies. The plaintiff elects to treat the cause of action as based on an implied contract, or obligation imposed by law, instead of upon the tort—in other words to sue in an action ex contractu instead of an action ex delicto.[75] The tort is waived only in the sense that a party having a right to sue in tort or assumpsit will not, after he has elected to sue in assumpsit, be allowed to sue in tort. By such an election that which was before the election tortious does not cease to be so. In fact, when the assumpsit is brought, it is only by showing that the defendant did a tortious act that the plaintiff is able to recover. There being no contract between the parties, unless the defendant is guilty of some wrong the plaintiff can establish no cause of action against him.[76]

184. Basis of obligation—The basis of the obligation is the unjust enrich-

[72] Bitzer v. Bobo, 39 Minn. 18, 38 N. W. 609; Spurr v. Home Ins. Co., 40 Minn. 424, 42 N. W. 206; Cumbey v. Ueland, 72 Minn. 453, 75 N. W. 727; Mulcahy v. Dieudonne, 103 Minn. 352, 115 N. W. 636; Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474. See Note, 34 L. R. A. (N. S.) 309; 26 Harv. L. Rev. 712.

[73] Kraus v. Thompson, 30 Minn. 64, 14 N. W. 266; Bitzer v. Bobo, 39 Minn. 18, 38 N. W. 609. See Pederson v. Christofferson, 97 Minn. 491, 106 N. W. 958.

[74] Pomeroy, Remedies, §§ 567-573; Keener, Quasi Contracts, 159-213; 19 Yale Law Journal, 221; Note, 134 Am. St. Rep. 188.

[75] Id.

[76] Keener, Quasi Contracts, 159.

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ment of the defendant [77]—the benefit which he has received.[78] The enrichment may be negative. One who saves an expenditure by using property of another thereby enriches himself and is liable.[79] It is essential that the defendant be unjustly enriched by the tort. That the plaintiff has been impoverished by the tort is not alone sufficient.[80]

185. Bailment—For the negligence of a bailee the aggrieved party has an election to sue either ex contractu or ex delicto.[81]

186. Conversion—If personal property is converted the owner may waive the tort and sue the converter on an implied contract to pay the value of the property or the amount received on its sale. It is immaterial whether the converter has disposed of the property or not. If he has, recovery may be had as for money had and received; if he has not, recovery may be had as for goods sold and delivered.[82] It is immaterial that the property came into the hands of the converter by means of a bailment. If he refuses to deliver it on demand the owner may recover its value on implied contract. The demand and refusal may be shown under a common count.[83]

187. Money wrongfully obtained—Fraud—Where money has been tortiously taken the wrongdoer may be sued in assumpsit, the count being for money had and received.[84] The claim may be asserted not only against the original wrongdoer, but also against any one into whose hands the money may be traced, until it reaches the hands of a holder for value without notice,[85] but not against such a holder.[86] Where money has been obtained by fraud the injured party may waive the tort and sue for money had and received.[87]

[77] Keener, Quasi Contracts, 160; 19 Yale Law Journal, 225.

[78] Downs v. Finnegan, 58 Minn. 112, 118, 59 N. W. 981; Pomeroy, Remedies, § 571.

[79] Keener, Quasi Contracts, 165; 19 Yale Law Journal, 227.

[80] Keener, Quasi Contracts, 160.

[81] Wickstrom v. Swanson, 107 Minn. 482, 120 N. W. 1090.

[82] Brady v. Brennan, 25 Minn. 210; Plainview v. Winona etc. Ry., 36 Minn. 505, 32 N. W. 745; Libby v. Johnson, 37 Minn. 220, 222, 33 N. W. 783; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981; McArthur v. Murphy, 74 Minn. 53, 76 N. W. 955; Northness v. Hillestad, 87 Minn. 304, 91 N. W. 1112; Terry v. Munger, 121 N. Y. 161, 24 N. E. 272; Doherty v. Shields, 33 N. Y. S. 497; Reynold v. New York T. Co., 188 Fed. 611; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Bechtel v. Chase, 156 Cal. 707; 711, 116 Pac. 81; Nordeen v. Jones, 33 Wis. 600; Braithwaite v. Aiken, 3 N. D. 365, 56 N. W. 133; Whitaker v. Poston, 120 Tenn. 207, 110 S. W. 1019; Challis v. Wylie, 35 Kan. 506, 11 Pac. 438; Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313; Doon v. Ravey, 49 Vt. 293. See Keener, Quasi Contracts, 193–195; Pomeroy, Remedies, § 569; 3 Street, Foundations of Legal Liability, 195; 19 Yale Law Journal, 229; Note, 17 Am. Dec. 242; 134 Am. St. Rep. 193, and § 193, infra.

[83] Doherty v. Shields, 33 N. Y. S. 497.

[84] Keener, Quasi Contracts, 180; 19 Yale Law Journal, 228; Note, 134 Am. St. Rep.

[85] Keener, Quasi Contracts, 183.

[86] Stephens v. Board of Ed., 79 N. Y. 183; Keener, Quasi Contracts, 185.

[87] Byxbie v. Wood, 24 N. Y. 607; Rothschild v. Mack, 115 N. Y. 1, 21 N. E.

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188. Trespass to realty—Where a trespasser occupies realty the owner cannot waive the tort and sue the trespasser in assumpsit for use and occupation.[88] The justification for this rule is historical rather than rational.[89]

189. Sales upon credit—Where a sale of personal property upon credit is made through the fraudulent representations of the buyer the seller has an election to treat the sale as one for cash and sue immediately for the contract price,[90] or to treat the contract as void and sue for conversion,[91] or to treat the contract as void and replevy the property,[92] or to waive the tort and recover under a common indebitatus count for goods sold and delivered.[93] He may pursue his remedies against a third party who took with notice or without consideration.[94]

190. Carriers—For breach of duty by a common carrier the aggrieved party often has an election to sue either ex contractu or ex delicto.[95]

191. Survival—In all cases where the injured party may waive the tort and sue in assumpsit his tort remedy may not survive while his remedy in assumpsit may.[96]

192. Measure of damages—The measure of damages is the reasonable value of the goods, or use, or labor,[97] or the amount which the defendant cannot in conscience keep.[98] Other elements of damage are waived. This is what waiving the tort and suing in assumpsit really means. It means suing for a par-

726; People v. Wood, 121 N. Y. 522, 24 N. E. 952; Note, 134 Am. St. Rep. 194. See § 762.

[88] Folsom v. Carli, 6 Minn. 420(284); Holmes v. Williams, 16 Minn. 164(146); Hurley v. Lamoreaux, 29 Minn. 138, 12 N. W. 447; Crosby v. Horne, 45 Minn. 249, 47 N. W. 717; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981; Commonwealth etc. Co. v. Dokko, 71 Minn. 533, 74 N. W. 891; McLane v. Kelly, 72 Minn. 395, 75 N. W. 601; Begin v. Begin, 98 Minn. 122, 107 N. W. 149. See Weaver v. Miss. etc. Co., 28 Minn. 542, 11 N. W. 113.

[89] Keener, Quasi Contracts, 191; 19 Yale Law Journal, 221.

[90] 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, 27 N. E. 400.

[91] Roth v. Palmer, 27 Barb. (N. Y.) 652; Dietz v. Sutcliffe, 80 Ky. 650; Keener, Quasi Contracts, 196–199. See § 193.

[92] Newell v. Randall, 32 Minn. 171, 19 N. W. 972; Moline-Milburn Co. v. Franklin, 37 Minn. 137, 33 N. W. 323; Hannequin v. Naylor, 24 N. Y. 139; Roth v. Palmer, 27 Barb. (N. Y.) 652. See § 193.

[93] Roth v. Palmer, 27. Barb. (N. Y.) 652; Heilbroun v. Herzog, 165 N. Y. 98, 58 N. E. 759. See F. M. Slagle & Co. v. Goodnow, 45 Minn. 531, 48 N. W. 402; 15 Cyc. 256; 24 Am. & Eng. Ency. of Law (2 ed.), 1137, and § 193, infra.

[94] F. M. Slagle & Co. v. Goodnow, 45 Minn. 531, 48 N. W. 402; 24 Am. & Eng. Ency. of Law (2 ed.), 1137.

[95] Beaulieu v. Great Northern Ry., 103 Minn. 47, 59, 114 N. W. 353.

[96] Head v. Porter, 70 Fed. 498; 19 Yale Law Journal, 238.

[97] 19 Yale Law Journal, 243.

[98] Keener, Quasi Contracts, 183.

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ticular reparation for the tort. The waiver is really a waiver of a part of the damage.[99] The recovery cannot exceed the unjust enrichment.[1]

193. Pleading—Where a tort is waived and an action brought on the implied contract the complaint need not allege the tort or the waiver thereof.[2] In the case of a conversion recovery may be had on a common count for money had and received if the property has been sold by the converter,[3] or on a common count for goods sold and delivered if the property is retained by the converter.[4] Where goods are obtained on credit through fraud a common indebitatus count for goods sold and delivered is sufficient,[5] and in such cases in replevin for the goods an ordinary form of complaint is sufficient. It is not necessary to plead the fraud or set out the facts.[6] Where an agent fraudulently obtains and withholds profits belonging to his principal the latter may recover them under a common count without setting out the facts showing the fraud.[7] A complaint may be so framed as to justify a recovery either ex contractu or ex delicto.[8]

194. Considerations affecting election—In determining whether to sue ex delicto or ex contractu the following considerations are important:

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

2. A plea of infancy may be set up in one action but not in the other.

3. One cause of action may survive and the other not.

4. If the defendant is insolvent replevin is more effective than an action for conversion.

5. The measure of damages may be greater in one action than in the other. If the defendant has wrongfully sold the property of the plaintiff for more than its value an action for money had and received is obviously more advantageous than one for conversion. On the other hand if the sale was for less than actual value it would be advisable to sue for conversion and recover actual value. Moreover, exemplary damages may be recoverable in one action and not in the other.

[99] 19 Yale Law Journal, 243.

[1] 19 Yale Law Journal, 227; Huganir v. Cotter, 102 Wis. 323, 78 N. W. 423.

[2] Schick v. Suttle, 94 Minn. 135, 102 N. W. 217; Doherty v. Shields, 33 N. Y. S. 497; Nelson v. Kilbridge, 113 Mich. 637, 71 N. W. 1089.

[3] Harpending v. Shoemaker, 37 Barb. (N. Y.) 270, 291; Putnam v. Wise, 1 Hill 234, 240, 37 Am. Dec. 309; Keener, Quasi Contracts, 170.

[4] Kleimbohe v. Hoffman House, 97 N. Y. S. 1122; Doherty v. Shields, 33 N. Y. S. 497, 86 Hun (N. Y.) 303; Davidson Grocery Co. v. Johnston, 24 Idaho, 336, 133 Pac. 929; 3 Street, Foundations of Legal Liability, 197.

[5] Roth v. Palmer, 27 Barb. (N. Y.) 652; Heilbroun v. Herzog, 165 N. Y. 98, 58 N. E. 759. See 15 Cyc. 256.

[6] Hunter v. Hudson River Iron Co., 20 Barb. (N. Y.) 493; Bliss v. Cottle, 32 Barb. (N. Y.) 322.

[7] Schick v. Suttle, 94 Minn. 135, 102 N. W. 217.

[8] Wickstrom v. Swanson, 107 Minn. 482, 120 N. W. 1090.

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6. In one action plaintiff may be required to prove full legal title while in the other a bare possessory title may be sufficient.

7. More defendants may be required in one action than in the other.

8. A counterclaim may be pleadable in one action and not in the other.

9. The defence of bankruptcy may be pleadable in one action and not in the other.[9]

[9] See Chitty, Pl. 16 Am. Ed., 229; Folsom v. Carli, 6 Minn. 420(284, 289).

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JOINDER OF CAUSES OF ACTION

195. Statute—Two or more consistent causes of action, whether legal or equitable, may be united in one pleading, being separately stated therein: Provided, that they must affect all parties to the action, must not require separate places of trial, and must be included in one only of the following classes:

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

2. Contracts, express or implied;

3. Injuries to either person or property, or both;

4. Injuries to reputation;

5. For the recovery of real property, with or without damages for withholding the same, and of the rents and profits thereof;

6. For the recovery of personal property, with or without damages for withholding the same; or

7. Claims against a trustee by virtue of a contract, or arising by operation of law.[10]

196. Test of single cause of action—The question whether a complaint states more than one cause of action is to be determined, not by its form, nor by the numbering and labeling of its different paragraphs by the pleader, but by the facts alleged therein.[11] The mere fact that relief may be partly legal and partly equitable is not decisive as to whether there is one or more causes of action.[12] A complaint alleging that three defendants contracted to pay a debt of plaintiff to a third party, and also that one of the defendants had previously contracted to make such payment and had failed to do so, has been held to state but a single cause of action.[13]

197. Legal and equitable—Legal and equitable causes of action may be joined provided they satisfy the other requirements of the statute.[14]

198. Must affect all the parties—Causes of action cannot be joined unless they affect all the parties to the action;[15] but it is unnecessary that all the

[10] R. L. 1905 § 4154; G. S. 1913 § 7780.

[11] Dewing v. Dewing, 112 Minn. 316, 127 N. W. 1051. See King v. Chicago etc. Ry., 80 Minn. 83, 82 N. W. 1113; John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180; Liimatainen v. St. Louis River Dam & Improv. Co., 119 Minn. 238, 137 N. W. 1099; and §§ 242, 246, 248.

[12] Gilbert v. Boak Fish Co., 86 Minn. 365, 368, 90 N. W. 767.

[13] Klemik v. Hendricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

[14] Montgomery v. McEwen, 7 Minn. 351(276); First Div. etc. Ry. v. Rice, 25 Minn. 278, 292; Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254; Todd v. Bettingen, 98 Minn. 170, 175, 107 N. W. 1049; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751; Pleins v. Wachenheimer, 108 Minn. 342, 122 N. W. 166; Fish v. Chase, 114 Minn. 460, 131 N. W. 631.

[15] Sanders v. Classon, 13 Minn. 379(352); Trowbridge v. Forepaugh, 14 Minn. 133(100); Berg v. Stanhope, 43

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parties be affected alike.[16] All persons interested in a single cause of action may join in an action to recover thereon though their interests are distinct and severable.[17] All persons whose property is affected by a nuisance, though they own the property in severalty and not jointly, may join in an action to abate the nuisance, but they cannot join with a cause of action for that relief their several claims for damages, in which there is no joint or common interest.[18]

199. Must be consistent—Inconsistent causes cannot be joined though they arise out of the same transaction or are connected with the same subject of action.[19]

200. Arising out of same transaction—It is provided by statute that causes of action may be joined if they arise out of "the same transaction, or transactions connected with the same subject of action." [20] This provision is incapable of exact definition.[21] It is so obscure and general as to justify the construction which shall be found most convenient and best calculated to promote the ends of justice. It is broad enough to include the former equity rule.[22] It includes causes of action ex delicto. The word "transaction" embraces something more than contractual relations. It includes any occurrences or affairs the result of which vests in a party the right to maintain an action, whether the occurrence is in the nature of tort or otherwise.[23] A cause of action ex delicto and one ex contractu may be joined if they arise out of the

Minn. 176, 45 N. W. 15; Langevin v. St. Paul, 49 Minn. 189, 51 N. W. 817; Anderson v. Scandia Bank, 53 Minn. 191, 54 N. W. 1062; Sturtevant-Larrabee Co. v. Mast, Buford & Burwell Co., 66 Minn. 437, 69 N. W. 324; Hanna v. Duxbury, 94 Minn. 8, 101 N. W. 971; State v. Knife Falls Boom Corp., 96 Minn. 194, 104 N. W. 817. See cases under § 116 and Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461 (overruling Trowbridge v. Forepaugh, 14 Minn. 133, 100). See also Ramsey County v. Elmund, 89 Minn. 56, 93 N. W. 1054; Nahte v. Hansen, 106 Minn. 365, 119 N. W. 55.

[16] Jones v. Morrison, 31 Minn. 140, 16 N. W. 864; Foster v. Landon, 71 Minn. 494, 74 N. W. 281; State v. Knife Falls Boom Corp., 96 Minn. 194, 104 N. W. 817; Mayberry v. Northern Pacific Ry., 100 Minn. 79, 110 N. W. 356; Pleins v. Wachenheimer, 108 Minn. 342, 122 N. W. 166; Fish v. Chase, 114 Minn. 460, 131 N. W. 631; Venner v. Great Northern Ry., 117 Minn. 447, 136 N. W. 271.

[17] Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727.

[18] Grant v. Schmidt, 22 Minn. 1; Kray v. Muggli, 77 Minn. 231, 79 N. W. 964, 1026; Nahte v. Hansen, 106 Minn. 365, 119 N. W. 55; Burghen v. Erie Ry., 108 N. Y. S. 311; Warren v. Parkhurst, 186 N. Y. 45, 78 N. E. 579.

[19] Vaule v. Steenerson, 63 Minn. 110, 65 N. W. 257. See Plummer v. Mold, 22 Minn. 15; Hawley v. Wilkinson, 18 Minn. 525(468); Hause v. Hause, 29 Minn. 252, 13 N. W. 43; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; Davis v. Severance, 49 Minn. 528, 52 N. W. 140; Anderson v. W. J. Dyer & Bro., 94 Minn. 30, 36, 101 N. W. 1061; and § 246.

[20] R. L. 1905 § 4154; G. S. 1913 § 7780. See § 195.

[21] Gertler v. Linscott, 26 Minn. 82, 1 N. W. 579.

[22] Fish v. Berkey, 10 Minn. 199(161).

[23] Mayberry v. Northern Pacific Ry., 100 Minn. 79, 110 N. W. 356.

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same transaction or transactions connected with the same subject of action.[24] The mere fact that relief may be partly legal and partly equitable is not decisive as to whether there is one or more causes of action. The manifest design of the statute is to avoid a multiplicity of suits by enabling parties to settle in one action all their differences arising out of and relating to the same transaction.[25] In the following cases it was held that causes of action were properly joined: A cause of action for deceit and one for breach of warranty;[26] a cause of action for rent and one for damages occasioned by the wrongful act of the tenant in setting fire to the leased building;[27] an action for the abatement of a nuisance and for damages;[28] an action for several acts of negligence;[29] an action for the sale of mortgaged premises, surrender of a quitclaim deed and personal judgment for damages;[30] an action for the recovery of the amount due on a note and for the delivery and cancelation of a note and mortgage;[31] an action against a trustee as such and against him personally;[32] an action for an accounting between partners, the appointment of a receiver, and to set aside a conveyance;[33] an action for the possession of a railroad, the appointment of a receiver, the payment of money, and an accounting;[34] an action to compel a conveyance from a legal to an equitable owner and for an accounting;[35] an action by a principal against his agent for conversion and for an accounting;[36] an action to foreclose a mortgage and for an accounting;[01] an action against directors of a corporation for several acts of conspiracy against a stockholder;[37] an action for an injunction against interference with a building and for damages for injury to the inheritance;[38] an action by a parent for damages resulting from injury to a child, with a claim for the sickness and suffering of the child;[39] an action for an accounting between partners and to wind up the

[24] Gertler v. Linscott, 26 Minn. 82, 1 N. W. 579; Humphrey v. Merriam, 37 Minn. 502, 35 N. W. 365; Reed v. Bernstein, 103 Minn. 66, 114 N. W. 261. See Northwestern Railroader v. Prior, 68 Minn. 95, 70 N. W. 869.

[25] First Div. etc. Ry. v. Rice, 25 Minn. 278, 293; Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N. W. 767; Fish v. Chase, 114 Minn. 460, 131 N. W. 631.

[26] Humphrey v. Merriam, 37 Minn. 502, 35 N. W. 365.

[27] Reed v. Bernstein, 103 Minn. 66, 114 N. W. 261.

[28] Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N. W. 767.

[29] Mayberry v. Northern Pacific Ry., 100 Minn. 79, 110 N. W. 356.

[30] Nichols v. Randall, 5 Minn. 304 (240).

[31] Montgomery v. McEwen, 7 Minn. 351(276).

[32] Fish v. Berkey, 10 Minn. 199(161).

[33] Palmer v. Tyler, 15 Minn. 106(81).

[34] First Div. etc. Ry. v. Rice, 25 Minn. 278.

[35] Winona etc. Ry. v. St. Paul etc. Ry., 26 Minn. 179, 2 N. W. 489.

[36] Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254.

[01] Churchill v. Proctor, 31 Minn. 129, 16 N. W. 694.

[37] Jones v. Morrison, 31 Minn. 140, 16 N. W. 854.

[38] Little v. Willford, 31 Minn. 173, 17 N. W. 282.

[39] Mulvehill v. Bates, 31 Minn. 364, 67 N. W. 959.

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partnership;[40] an action for reformation and for specific performance;[41] an action for injuries from noxious vapors arising from a cesspool in an excavation and for damages from depositing dirt from such excavation;[42] an action against a mortgagor for the appointment of a receiver, and for the collection of rents and their application on a personal judgment;[43] an action by a trustee in bankruptcy to set aside a preferential payment and a fraudulent transfer of property by the bankrupt;[44] an action to abate a nuisance and for an injunction;[45] an action by a receiver against several subscribers to an insurance "guaranty fund;"[46] an action to set aside a fraudulent conveyance and to subject separate tracts of land to the satisfaction of a judgment;[47] an action against several insurance companies to set aside an award;[48] an action for conspiracy of several corporations against a stockholder of an independent company;[49] an action for the recovery of money lost at gambling at different times;[50] an action against several insurance companies for adjustment of the proportionate liability of each for a loss;[51] an action by the state to determine the relative rights of the public, the relator, and several defendants to the use of the St. Louis river;[52] an action for relief on account of alleged fraud in connection with a contract for the purchase of land;[53] an action for cancelation and for damages;[54] an action by an insurance company and the owner of insured property for the negligent destruction of the property by fire;[55] an action for a conspiracy on the part of parents of plaintiff's husband to deprive her of her inchoate interest in his lands and the threatened execution of the conspiracy by means of fraudulent judgments;[56] an action for money had and received;[57] an action to recover an assessment on the capital stock of an insolvent corporation and to recover the amount remaining unpaid on the stock when issued;[58] an action by a minority stockholder to compel the restoration

[40] Shackleton v. Kneisley, 48 Minn. 451, 51 N. W. 470.

[41] Ham v. Johnson, 51 Minn. 105, 52 N. W. 1080.

[42] Aldrich v. Wetmore, 56 Minn. 20, 57 N. W. 221.

[43] Whiting v. Clugston, 73 Minn. 6, 75 N. W. 759.

[44] French v. Smith, 81 Minn. 341, 84 N. W. 44.

[45] Albert Lea v. Knatvold, 89 Minn. 480, 95 N. W. 309.

[46] Dwinnell v. Minneapolis etc. Co., 90 Minn. 383, 97 N. W. 110.

[47] Hunt v. Dean, 91 Minn. 96, 97 N. W. 574.

[48] Redner v. New York etc. Co., 92 Minn. 306, 99 N. W. 886.

[49] Anderson v. W. J. Dyer & Bro., 94 Minn. 30, 101 N. W. 1061.

[50] Parsons v. Wilson, 94 Minn. 416, 103 N. W. 163.

[51] Fegelson v. Niagara Fire Ins. Co., 94 Minn. 486, 103 N. W. 495.

[52] State v. Knife Falls Boom Corp., 96 Minn. 194, 104 N. W. 817.

[53] Wilson v. Youngman, 96 Minn. 288, 104 N. W. 946.

[54] Pleins v. Wachenheimer, 108 Minn. 342, 122 N. W. 166.

[55] Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727.

[56] Dewing v. Dewing, 112 Minn. 316, 127 N. W. 1051.

[57] Benson v. United States Instalment Realty Co., 113 Minn. 346, 129 N. W. 594,

[58] Fish v. Chase, 114 Minn. 460, 131 N. W. 631.

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of corporate property illegally transferred to different persons;[59] an action for the reasonable value of services and for an agreed compensation.[60] In the following cases causes of action were held improperly joined: An action for damages for withholding one piece of realty and to recover possession of another, with damages for detaining the same;[61] a cause of action ex contractu and for a tort disconnected with the subject of the contract;[62] a cause of action in a child for personal injury and one in a parent for loss of the child's services resulting from the same injury.[63]

201. Injuries to person or property or both—Fraud—Negligence—The statute provides for joining causes of action for "injuries to either person or property, or both."[64] A cause of action for trespass to realty may be joined with one for an assault.[65] A cause of action for money wrongfully withheld may be joined with one for money wrongfully or fraudulently exacted.[66] When several acts of negligence concur in giving rise to a single right of action they may be united in the same complaint.[67]

202. Actions against trustees—The statute provides for joining causes of action "against a trustee by virtue of a contract or arising by operation of law."[68]

203. Ejectment—The statute provides for joining a cause of action "for the recovery of real property, with or without damages for withholding the same, and of the rents and profits thereof," that is, mesne profits.[69] A cause of action for damages for the withholding of one parcel of land cannot be joined with a cause of action to recover possession of another parcel, with damages for the withholding thereof.[70] A cause of action for injury to the estate may be joined with one for the recovery of the land and for the use and occupation thereof.[71]

204. Complaint insufficient in part—Where one of two causes of action

[59] Venner v. Great Northern Ry., 117 Minn. 447, 136 N. W. 271.

[60] Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124.

[61] Holmes v. Williams, 16 Minn. 164 (146).

[62] Gertler v. Linscott, 26 Minn. 82, 1 N. W. 579.

[63] Gardner v. Kellogg, 23 Minn. 463.

[64] R. L. 1905 § 4154(3); G. S. 1913 § 7780(3).

[65] Craig v. Cook, 28 Minn. 232, 9 N. W. 712.

[66] Kraemer v. Deustermann, 37 Minn. 469, 35 N. W. 276.

[67] Mayberry v. Northern Pacific Ry., 100 Minn. 79, 110 N. W. 356.

[68] R. L. 1905 § 4154(7); G. S. 1913 § 7780(7); Winona etc. Ry. v. St. Paul etc. Ry., 26 Minn. 179, 2 N. W. 489. See Fish v. Berkey, 10 Minn. 199(161).

[69] R. L. 1905 § 4154(5); G. S. 1913 § 7780(5); Armstrong v. Hinds, 8 Minn. 254(221); Holmes v. Williams, 16 Minn. 164(146); Merrill v. Dearing, 22 Minn. 376; Lord v. Dearing, 24 Minn. 110.

[70] Holmes v. Williams, 16 Minn. 164 (146).

[71] Pierro v. St. Paul etc. Ry., 37 Minn. 314, 34 N. W. 38; Id., 39 Minn. 451, 40 N. W. 520.

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attempted to be stated in a complaint is bad for want of facts constituting a cause of action there is no misjoinder of causes of action.[72]

205. Alternative relief—A complaint containing a statement of facts showing plaintiff entitled to some relief is not demurrable, as improperly joining two causes of action, because alternative relief is sought.[73]

206. In equity—Multifariousness—In equity causes of action may be joined if they might have been included in a bill in equity under the old practice without making it multifarious. A bill in equity is not multifarious, where one general right only is claimed by it, though the defendants have only separate interests in distinct questions which arise out of or are connected with such right. All of the defendants, however, must be affected in some respect by the action, or by some part thereof, but they need not be equally affected.[74]

207. Remedy for misjoinder—Objection to a misjoinder is to be taken by demurrer or answer and if not so taken it is waived.[75] When the objection is first raised on the trial it is wholly discretionary with the court to compel an election.[76]

[72] Howe v. Coates, 90 Minn. 508, 97 N. W. 129; Minneapolis etc. Ry. v. Brown, 99 Minn. 384, 109 N. W. 817. See John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180.

[73] Howard v. Erbes, 112 Minn. 479, 128 N. W. 674.

[74] State v. Knife Falls Boom Corp., 96 Minn. 194, 104 N. W. 817; Nichols v. Randall, 5 Minn. 304(240); North v. Bradway, 9 Minn. 183(169); Fish v. Berkey, 10 Minn. 199(161); Palmer v. Tyler, 15 Minn. 106(81); Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; First Nat. Bank v. Lambert, 63 Minn. 263, 65 N. W. 451; Foster v. Landon, 71 Minn. 494, 74 N. W. 281; Dwinnell v. Minneapolis etc. Co., 90 Minn. 383, 97 N. W. 110; Redner v. N. Y. Fire Ins. Co., 92 Minn. 306, 99 N. W. 886; Hanna v. Duxbury, 94 Minn. 8, 14, 101 N. W. 971; Anderson v. W. J. Dyer & Bro., 94 Minn. 30, 101 N. W. 1061; Fegelson v. Niagara Fire Ins. Co., 94 Minn. 486, 103 N. W. 495; Wilson v. Youngman, 96 Minn. 288, 104 N. W. 946; Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727; Venner v Great Northern Ry., 117 Minn. 447, 136 N. W. 271.

[75] Gardner v. Kellogg, 23 Minn. 463; James v. Wilder, 25 Minn. 305; Mulvehill v. Bates, 31 Minn. 364, 17 N. W. 959; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528; Davis v. Hamilton, 85 Minn. 209, 88 N. W. 744; Campbell v. Railway Transfer Co., 95 Minn. 375, 104 N. W. 547; Lyon County v. Lien, 105 Minn. 55, 116 N. W. 1017; Sleepy Eye Milling Co. v. Chicago etc. Ry., 119 Minn. 199, 137 N. W. 813.

[76] Hawley v. Wilkinson, 18 Minn. 525(468); Plummer v. Mold, 22 Minn. 15; Hause v. Hause, 29 Minn. 252, 13 N. W. 43; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; Rhodes v. Pray, 36 Minn. 392, 32 N. W. 86; Davis v. Severance, 49 Minn. 528, 52 N. W. 140; Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 126 Minn. 176, 148 N. W. 43. See Armstrong v. Chicago etc. Ry., 45 Minn. 85, 47 N. W. 459; John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180.

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ENTITLING ACTIONS

208. In general—The title of an action includes the names of the parties, plaintiff and defendant, and the name of the court, including the name of the county in which the action is brought.[77] It is usual and correct practice to state in the title the number of the judicial district, but this is not essential.[78] Where several counties are joined for judicial purposes it is proper to name them all in the title.[79] After a change of venue the venue in the title should be changed accordingly.[80] Good practice requires that the full Christian names of the parties should be given, but the use of initials is not a fatal defect.[81] It is not essential to give the middle name of a party, but it is proper practice to give the initial thereof.[82] The suffix "Jr." need not be given.[83] The addition of the word executor, administrator, receiver, and the like, to the name of a party, without anything more, is mere description of the person and surplusage.[84] Entitling a cause in a particular county and bringing the action therein is a designation of that county as the place of trial.[85]

[77] See R. L. 1905 § 4127; G. S. 1913 § 7753; Hurning v. Hurning, 80 Minn. 373, 379, 83 N. W. 342.

[78] State v. Munch, 22 Minn. 67.

[79] Young v. Young, 18 Minn. 90(72). See State v. Stokely, 16 Minn. 282 (249); State v. McCartey, 17 Minn. 76 (54).

[80] R. L. 1905 § 4088; G. S. 1913 § 7714; Nystrom v. Quimby, 68 Minn. 4, 70 N. W. 777.

[81] Kenyon v. Semon, 43 Minn. 180, 45 N. W. 10. See Dunnell, Minn. Digest, § 6913.

[82] See Stewart v. Colter, 31 Minn. 385, 18 N. W. 98; State v. Higgins, 60 Minn. 1, 61 N. W. 816. See Dunnell, Minn. Digest, § 6912.

[83] Bidwell v. Coleman, 11 Minn. 78 (45).

[84] Jaeger v. Hartman, 13 Minn. 55 (50).

[85] Hurning v. Hurning, 80 Minn. 373, 379, 83 N. W. 342.

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209. Language employed in pleading—Simple colloquial English is the language of code pleading. The statute calls for a plain and concise statement of facts constituting a cause of action, without unnecessary repetition,[86] and a statement, in ordinary and concise language, of any new matter constituting a counterclaim or defence.[87] The statutory requirement was designed to abolish the redundant and artificial phraseology of common-law pleading. It does not, however, forbid the use of words which have a well-defined technical legal meaning.[88] 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.[89] To combine with the requisite certainty and precision the greatest possible brevity is 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.[90] No particular form of words is necessary,[91] but there are obviohs reasons why it is good practice to follow approved modes of expression which have been judicially construed and sustained.

210. Allegations on information and belief—Facts may be alleged in a complaint upon information and belief.[92] But this mode of pleading is not often permissible for the plaintiff, for it cannot be employed in alleging facts actually or presumptively known to him. If he does not know the facts of his case he is bound to investigate and learn them, when reasonably possible.[93] Whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively and with precision.[94]

211. Facts may be alleged as they exist or occurred or according to their legal effect—It was a rule of common-law pleading that facts should be

[86] R. L. 1905 § 4127; G. S. 1913 § 7753. Statute cited: West v. Eureka Improvement Co., 40 Minn. 394, 42 N. W. 87; State v. Cooley, 58 Minn. 514, 60 N. W. 338; Scofield v. National Elevator Co., 64 Minn. 527, 67 N. W. 645; Atwater v. Spalding, 86 Minn. 101, 90 N. W. 370; Lovering v. Webb Publishing Co., 108 Minn. 201, 120 N. W. 688, 121 N. W. 911.

[87] R. L. 1905 § 4130; G. S. 1913 § 7756. Statute cited: State v. Cooley, 58 Minn. 514, 60 N. W. 338.

[88] See §§ 217, 218.

[89] See Pomeroy, Remedies, § 39.

[90] Stephen, Pl. § 423. Simplicity and terseness should be the aim of the pleader. West v. Eureka Improvement Co., 40 Minn. 394, 42 N. W. 87.

[91] Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383.

[92] State v. Cooley, 58 Minn. 514, 60 N. W. 338; Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450.

[93] See § 320.

[94] Lockwood v. Bigelow, 11 Minn. 113(70).

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pleaded according to their legal effect or operation.[95] Under the code it is permissible to plead facts according to their legal effect or operation and such a mode of pleading is often to be commended as avoiding objectionable prolixity and uncertainty.[96] But as a general rule facts should be alleged as they actually exist or occurred rather than according to their legal effect or operation.[97] Precedent and practice are our only guides in this connection.

212. Allegations must be true—Inconsistency—Repugnance—It is a requirement of code pleading that a party should plead his facts truly.[98] He is not allowed to plead inconsistent causes of action,[99] defences,[1] or allegations,[2] but inconsistency in allegations is waived if timely objection is not made.[3] Inconsistent or repugnant allegations are not admitted by a demurrer.[4]

213. Facts must be alleged directly and positively—Argumentative allegations—Facts must be alleged directly and positively, and not by way of rehearsal, argument, inference or reasoning; and if not so alleged they are not admitted by a failure to traverse them, or by a demurrer.[5] A pleading which is faulty in this regard is demurrable, if the essential facts are not otherwise

[95] Elliot v. Roche, 64 Minn. 482, 67 N. W. 539; Pomeroy, Remedies, §§ 510–512.

[96] Gould v. Sub-Dist., 7 Minn. 203 (145); Estes v. Farnham, 11 Minn. 423(312, 319); Weide v. Porter, 22 Minn. 429; Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273; Stees v. Kranz, 32 Minn. 313, 20 N. W. 241; Lee v. Minneapolis etc. Ry., 34 Minn. 225, 25 N. W. 399; Todd v. Minneapolis etc. Ry., 37 Minn. 358, 35 N. W. 5; Marshall v. Gilman, 52 Minn. 88, 53 N. W. 811; Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462; Rochester Ry. Co. v. Robinson, 133 N. Y. 242, 30 N. E. 1008; New York etc. Co. v. Nat. Steamship Co., 148 N. Y. 39, 42 N. E. 514; Goodman v. Alexander, 165 N. Y. 289, 59 N. E. 145; Hatch v. Leonard, 165 N. Y. 435, 59 N. E. 270; Kronan v. Weisberg, 135 N. Y. S. 404. See §§ 543, 557, 584, 608.

[97] Elliot v. Roche, 64 Minn. 482, 67 N. W. 539; Pomeroy, Remedies, § 529; Bliss, Code Pl. § 158; Bryant, Code Pl. p. 187.

[98] Folsom v. Carli, 6 Minn. 420(284, 290); Madden v. Minneapolis etc. Ry., 30 Minn. 453, 16 N. W. 263. See § 424.

[99] See § 199.

[1] See § 334.

[2] See Chouteau v. Rice, 1 Minn. 106 (83, 90); Hausman v. Mulheran, 68 Minn. 48, 70 N. W. 866.

[3] Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Urbas v. Duluth etc. Ry., 113 Minn. 309, 129 N. W. 513.

[4] Chouteau v. Rice, 1 Minn. 106(83, 90).

[5] Moulton v. Doran, 10 Minn. 67(49) (allegations of title); Taylor v. Blake, 11 Minn. 255(170) (complaint for duress by process—an allegation that the adverse party "well knew" that certain facts existed is insufficient); Hall v. Williams, 13 Minn. 260(242) (complaint on bond of deputy collector of internal revenue—recital of appointment of deputy in bond set out in complaint held insufficient); Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593 (action for services); Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869 (ejectment—allegations of answer as to sale of land under execution as one tract though in fact it consisted of several tracts—a fact is not well pleaded when it is only to be inferred as a conclusion from other facts stated which are not inconsistent with an opposite conclusion); Biron v. Board

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sufficiently pleaded,[6] but it is not demurrable if the essential facts may fairly and reasonably be inferred from the facts directly alleged.[7] The better practice and present tendency is to treat this defect, whenever reasonably possible, as one of form, which is waived if not objected to by motion before trial.[8] Ordinarily the defect is waived if not objected to before trial by motion or demurrer.[9] It is cured by a verdict or judgment.[10] A fact which is sufficiently alleged inferentially is traversable.[11]

214. Alternative allegations—Allegations must not be in the alternative. In other words it is not permissible to allege that a fact is so or so. Where the only effect of alternative allegations is to render the pleading indefinite or uncertain the remedy is by motion; but where a pleading alleges two statements of fact in the alternative, one of which constitutes a cause of action and the other not, the allegations neutralize each other, and a general demurrer will

of Water Commissioners, 41 Minn. 519, 43 N. W. 482 (action for damages for drawing water from a lake—allegations held not to show that the lake was a natural body of water, or that a creek, its outlet, was a natural watercourse); Welch v. Bradley, 45 Minn. 540, 48 N. W. 440 (action to set aside a fraudulent conveyance—allegations as to indebtedness upon which the judgment and execution were founded); Carlson v. Minn. Tribune Co., 47 Minn. 337, 50 N. W. 229 (action for libel—allegations as to person of whom defamatory statement was made); Sprague v. Wells, 47 Minn. 504, 50 N. W. 535 (action on penal bond—the recitals contained in a copy of a written instrument annexed to a complaint do not, as a matter of pleading, serve the purpose of an allegation that the facts are as recited); Petzold v. Petzold, 53 Minn. 39, 54 N. W. 933 (action to enforce a trust); Rossman v. Mitchell, 73 Minn. 198, 75 N. W. 1053 (argumentative allegations as to appointment of a receiver); Berry v. Dole, 87 Minn. 471, 92 N. W. 334 (action for negligence—no direct allegation that accident was caused by negligence of defendant); Anderson v. Settergren, 100 Minn. 294, 111 N. W. 279 (action for negligence—sale of firearms to a minor).

[6] Carlson v. Minn. Tribune Co., 47 Minn. 337, 50 N. W. 229; Rossman v. Mitchell, 73 Minn. 198, 75 N. W. 1053; Olson v. Penn. & Ohio Fuel Co., 77 Minn. 528, 80 N. W. 698; Berry v. Dole, 87 Minn. 471, 92 N. W. 334; Minneapolis Brewing Co. v. Grathen, 111 Minn. 265, 268, 126 N. W. 827.

[7] Brunswick-Balke-Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. 214; Dugan v. St. Paul & Duluth Ry., 40 Minn. 544, 42 N. W. 538; Mastad v. Swedish Brethren, 83 Minn. 40, 44, 85 N. W. 913; Vukelis v. Virginia Lumber Co., 107 Minn. 68, 119 N. W. 509; Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490; McElrath v. Electric Investment Co., 114 Minn. 358, 131 N. W. 380.

[8] Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868; Anderson v. Settergren, 100 Minn. 294, 299, 111 N. W. 279; Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490.

[9] Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593; Welch v. Bradley, 45 Minn. 540, 48 N. W. 440; Anderson v. Settergren, 100 Minn. 294, 299, 111 N. W. 279; Minneapolis Brewing Co. v. Grathen, 111 Minn. 265, 126 N. W. 827.

[10] Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593.

[11] Sage v. Culver, 147 N. Y. 245, 41 N. E. 513.

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lie.[12] In an action for trespass an allegation that the defendant "took or caused to be taken" the property in controversy is unobjectionable.[13]

215. Ultimate and not evidentiary facts to be alleged—Only the ultimate, issuable facts, should be alleged and not the evidentiary facts by which they may be proved on the trial.[14] This is now the universal rule, whether the action is 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,

[12] Anderson v. Minneapolis etc. Ry., 103 Minn. 224, 114 N. W. 1123; Grbich v. Pittsburgh Iron Ore Co., 119 Minn. 365, 138 N. W. 309; Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450. See Wheeler v. Thayer, 121 Ind. 64, 22 N. E. 972; Jamison v. King, 50 Cal. 132; Highland Ave. etc. Ry. v. Dusenberry, 94 Ala. 413; Mitchell v. Williamson, 6 Md. 210.

[13] Clague v. Hodgson, 16 Minn. 329 (291).

[14] Wilcox v. Davis, 4 Minn. 197(139) (intention or motive); Cummings v. Thompson, 18 Minn. 246(228) (fraud); Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139 (general rule stated—action for breach of warranty); Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736 (general rule stated—action for divorce—allegations as to fitness of parties for custody of children); Hitchcock v. Turnbull, 44 Minn. 475, 47 N. W. 153 (action for goods sold and delivered—practice of pleading evidence condemned); Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137 (foreign laws); O'Neill v. Johnson, 53 Minn. 439, 55 N. W. 601 (want of probable cause); Carver County v. Bongard, 82 Minn. 431, 85 N. W. 214 (action on bond of county treasurer—allegations that the treasurer converted the funds of the county, abandoned his office, absconded, was suspended by the governor and his successor appointed); Eisenberg v. Matthews, 84 Minn. 76, 86 N. W. 870 (agency); Johnson v. Velve, 86 Minn. 46, 90 N. W. 126 (fraud—undue influence—duress); Lovering v. Webb Publishing Co., 106 Minn. 62, 118 N. W. 61 (negligence); Burgett v. Wisconsin Central Ry., 109 Minn. 216, 123 N. W. 411 (an allegation that a locomotive was run at a dangerous rate of speed); Bgelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922 (negligence); Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022 (unnecessary to plead a judgment when mere matter of evidence—neither necessary nor good practice to plead mere evidence); Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429 (foreign laws).

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and acts, neither of which, taken by itself, would have created any right or imposed any duty.[15] In an equitable action matter may be inserted which is designed to appeal to the conscience of the court but it must be pertinent to the issues.[16]

216. Same—Effect of pleading evidence—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.[17] Evidentiary matter does not render a pleading demurrable if the essential facts are also directly alleged.[18] Such matter may be treated as evidence in the case if it is admitted by the answer but it is not admitted by a mere failure to deny.[19] By pleading evidence a party does not limit himself in his proof to the evidence pleaded,[20] nor is he required to prove it.[21] The remedy for evidentiary matter in a pleading is a motion to strike it out before answering.[22]

217. Facts and not conclusions of law must be alleged—A pleading must allege facts and not mere conclusions of law.[23] But this rule does not forbid the pleading of composite facts including elements of both law and fact, or the use of technical terms having a well settled legal significance. The 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

[15] Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736; Pomeroy, Remedies, §§ 75, 527. In equitable actions the pleadings are broader and more elastic. Delcambre v. Delcambre, 210 N. Y. 460, 104 N. E. 950.

[16] Kolb v. Mortimer, 120 N. Y. S. 543; Gutta Percha & Rubber Mfg. Co. v. Holman, 135 N. Y. S. 766. See Martin County Nat. Bank v. Bird, 92 Minn. 110, 112, 99 N. W. 780 (matter addressed to the discretion of the court).

[17] Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139; City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817.

[18] Loomis v. Youle, 1 Minn. 175(150); Fish v. Berkey, 10 Minn. 199(161, 166).

[19] Dexter v. Moodey, 36 Minn. 205, 30 N. W. 667.

[20] Patterson v. Keystone Mining Co., 30 Cal. 360.

[21] Jagger v. Nat. G. A. Bank, 53 Minn. 386, 55 N. W. 545.

[22] Loomis v. Youle, 1 Minn. 175(150); Cathcart v. Peck, 11 Minn. 45(24); Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736.

[23] Finley v. Quirk, 9 Minn. 194(179, 187); Griggs v. St. Paul, 9 Minn. 246 (231); Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75.

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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.[24]

218. Same—Allegations held of fact—The following allegations have been held allegations of fact: Negligently and carelessly;[25] conveyed;[26] contracted;[27] agreed;[28] converted;[29] owner;[30] seized in fee simple;[31] assigned;[32] indorsed;[33] made;[34] paid;[35] sold and delivered;[36] executed;[37] assaulted;[38] purchased;[39] levied;[40] account stated;[41] without probable cause;[42] duly foreclosed;[43] duly levied and assessed taxes;[44] duly organized;[45] a duly qualified

[24] Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75; Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357; Lovering v. Webb Publishing Co., 106 Minn. 62, 118 N. W. 61; Laun v. Kipp, 155 Wis. 347, 145 N. W. 183.

[25] Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75. See § 816.

[26] Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357. See McClane v. White, 5 Minn. 178(139, 143); Clark v. Chicago etc. Co., 28 Minn. 69, 71, 9 N. W. 75 (execution of a deed).

[27] Folsom v. Chisago County, 28 Minn. 324, 9 N. W. 881 (duly contracted); Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357.

[28] Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357.

[29] See § 603.

[30] See § 227.

[31] See § 227.

[32] Hoag v. Mendenhall, 19 Minn. 335 (289).

[33] Hoag v. Mendenhall, 19 Minn. 335 (289); Citizens' State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

[34] Hoag v. Mendenhall, 19 Minn. 335 (289).

[35] Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748.

[36] State v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

[37] Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524. See Nininger v. Carver County, 10 Minn. 133(106) (executed in due form of law and issued); Clark v. Chicago etc. Ry., 28 Minn. 69, 71, 9 N. W. 75 (execution of a deed).

[38] Mitchell v. Mitchell, 45 Minn. 50, 47 N. W. 308; Foran v. Levin, 76 Minn. 178, 78 N. W. 1047.

[39] Nininger v. Carver County, 10 Minn. 133(106).

[40] Rohrer v. Turrill, 4 Minn. 407(309); First Nat. Bank v. Rogers, 13 Minn. 407 (376).

[41] Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122.

[42] O'Neill v. Johnson, 53 Minn. 439, 55 N. W. 601; Nixon v. Reeves, 65 Minn. 159, 67 N. W. 989.

[43] Pinney v. Fridley, 9 Minn. 34(23); Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357. See Casey v. McIntyre, 45 Minn. 526, 48 N. W. 402.

[44] Webb v. Bidwell, 15 Minn. 479 (394).

[45] Minneaolis etc. Ry. v. Morrison, 23 Minn. 308.

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teacher of and in the schools of the state;[46] actual possession and occupancy;[47] duly filed and recorded;[48] duly authorized;[49] duly taken and received;[50] duly qualified;[51] without fault and in the due performance of duty;[52] course of employment and scope of employment;[53] preference;[54] that a person succeeded to and became possessed of said life interest and estate;[55] that a person leased premises and became the tenant of another;[56] that a lien statement was filed within ninety days after the furnishing and delivery of the last items of material and labor;[57] allegations as to the agreed surrender value and the actual value of an insurance policy;[58] allegations as to the holding of an election;[59] allegations for money had and received;[60] allegations in an action for false imprisonment "that the said warrant was void," "that the said warrant appeared void upon its face," "that the defendant knew at the time when he signed and allowed the said warrant that he had no power to sign or allow it, and that it was void, and that the arrest and imprisonment thereunder would be illegal;"[61] that a locomotive was run at a dangerous rate of speed;[62] that a party with full knowledge thereof ratified and confirmed an act.[63]

219. Same—Allegations held mere conclusions of law—The following allegations have been held allegations of mere conclusions of law: That an act was not "lawfully" done;[64] that an act was "wrongful" or "unlawful;"[65] a bare allegation of indebtedness;[66] that said defendant neglected and refused to furnish to him, the plaintiff, freight for transportation, according to the terms

[46] Goetz v. School Dist., 31 Minn. 164, 17 N. W. 276.

[47] Steele v. Fish, 2 Minn. 153(129).

[48] Glass v. St. Paul Park Carriage & Sleigh Co., 43 Minn. 228, 45 N. W. 150.

[49] State v. Ames, 31 Minn. 440, 18 N. W. 277.

[50] Meeker County v. Butler, 25 Minn. 363.

[51] Northern Trust Co. v. Jackson, 60 Minn. 116, 61 N. W. 908.

[52] Pope v. Great Northern Ry., 94 Minn. 429, 103 N. W. 331.

[53] Kuhl v. U. S. etc. Co., 112 Minn. 197, 127 N. W. 628.

[54] In re Stevens, 38 Minn. 432, 38 N. W. 111.

[55] Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357.

[56] Commonwealth Ins. & Trust Co. v. Dokko, 71 Minn. 533, 74 N. W. 891.

[57] Stewart v. Simmons, 101 Minn. 375, 112 N. W. 282.

[58] Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

[59] Wiley v. Board of Ed., 11 Minn. 371(268).

[60] Lovering v. Webb Publishing Co., 106 Minn. 62, 118 N. W. 61.

[61] Sweeney v. O'Dwyer, 197 N. Y. 499, 90 N. E. 1129.

[62] Burgett v. Wisconsin Central Ry., 109 Minn. 216, 123 N. W. 411.

[63] Pollitz v. Wabash Ry., 207 N. Y. 113, 100 N. E. 721.

[64] Banning v. Armstrong, 7 Minn. 46 (31).

[65] Buck v. Colbath, 7 Minn. 310(238).

[66] Freeman v. Curran, 1 Minn. 169 (144); Foerster v. Kirkpatrick, 2 Minn. 210(171); Bennett v. Crowell, 7 Minn. 385(306, 310); Holgate v. Broome, 8 Minn. 243(209); Frasier v. Williams, 15 Minn. 288(219). But an allegation of indebtedness coupled with allegations of facts from which the indebtedness arose is sufficient. Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340.

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of said agreement;[67] that said sale of said land was made without authority of law, and is void;[68] constituted and was a valid lien upon the premises;[69] that one was the equitable owner of certain land, or had some equitable interest in it;[70] that one was "compelled" to pay;[71] that one was not a person of suitable age and discretion;[72] which amended complaint set forth an entirely different and distinct cause of action from that set forth in the original complaint in said action;[73] has long 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;[74] that certain words were inserted in a deed by mistake and are surplusage;[75] an allegation that it was the "duty" of a railway company to do certain things;[76] that a party did not have "legal cause" for making an application to a court in insolvency proceedings;[77] that an obligation was an obligation and liability of a firm;[78] that the plaintiffs were not the real parties in interest;[79] that certain tax titles are wholly and absolutely void, and of no force or effect;[80] that a duebill is now due and payable;[81] that a mortgage was duly foreclosed;[82] that certain certificates were worthless and not a lien upon and not collectible out of certain lots;[83] that certain results would not benefit the public, but would deprive the party of his property without due process of law;[84] bald charges of perjury, fraudulent practices, collusion and tampering with the records.[01]

220. Same—Effect of pleading legal conclusions—Where the essential facts of a cause of action or defence are alleged in the form of bare conclusions of law the pleading is demurrable,[85] unless such facts are otherwise sufficiently alleged.[86] Some of our decisions are excessively technical in holding allega-

[67] Wilson v. Clarke, 20 Minn. 367 (318).

[68] Knudson v. Curley, 30 Minn. 433, 15 N. W. 873.

[69] Price v. Doyle, 34 Minn. 400, 26 N. W. 14.

[70] Hoxsie v. Empire Lumber Co., 41 Minn. 548, 43 N. W. 476.

[71] Rand v. Hennepin County, 50 Minn. 391, 52 N. W. 901.

[72] Temple v. Norris, 53 Minn. 286, 55 N. W. 133.

[73] Dennis v. Nelson, 55 Minn. 144, 56 N. W. 589.

[74] Selbert v. Minneapolis etc. Ry., 58 Minn. 39, 50, 59 N. W. 822.

[75] Clifford v. Minor, 67 Minn. 512, 70 N. W. 798.

[76] Heron v. St. Paul etc. Ry., 64 Minn. 542, 71 N. W. 706.

[77] Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N. W. 591.

[78] Moon v. Allen, 82 Minn. 89, 84 N. W. 654.

[79] Esch v. White, 82 Minn. 462, 85 N. W. 238.

[80] Fitzpatrick v. Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378.

[81] Vachon v. Nichols, 111 Minn. 45, 126 N. W. 278.

[82] Itasca Investment Co. v. Dean, 84 Minn. 388, 87 N. W. 1020.

[83] Griggs v. St. Paul, 9 Minn. 246 (231).

[84] State v. St. Paul City Ry., 122 Minn. 163, 142 N. W. 136.

[01] Young v. Lindquist, 126 Minn. 414, 148 N. W. 455.

[85] Griggs v. St. Paul, 9 Minn. 246 (231); Price v. Doyle, 34 Minn. 400, 26 N. W. 14; Esch v. White, 82 Minn. 462, 85 N. W. 238.

[86] Fitzpatrick v. Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378.

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tions mere conclusions of law. Whenever it is reasonably possible to do so an allegation of a conclusion of law should be deemed sufficient on demurrer. The question ought to be viewed from a practical standpoint. If the pleading gives the adverse party reasonably definite notice of the nature of the cause of action or defence it should be deemed sufficient. It should always be held sufficient when objection is first made on appeal.[87] When objection is first made on the trial the defect should be disregarded or an amendment allowed without costs. The defect is essentially one of form and ought to be corrected by motion before answering.[88] An allegation which is a mere legal conclusion is not traversable,[89] and is not admitted by a demurrer,[90] or a failure to deny.[91] It may be stricken out on motion as sham or irrelevant.[92] A party is not estopped by a mistaken averment of law in his pleading.[93]

221. Unnecessary to allege facts presumed or implied—Legality—Regularity—It is unnecessary to allege facts which the law will presume or imply.[94] Thus, in actions to enforce quasi or implied contracts, it is unnecessary

[87] Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 51, 59 N. W. 822; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 126, 143 N. W. 253. See, for an illustration of the right way for a court to consider such an objection, Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340.

[88] Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 126, 143 N. W. 253.

[89] See § 322.

[90] See § 271.

[91] See § 306.

[92] Dennis v. Nelson, 55 Minn. 144, 56 N. W. 589; Young v. Lindquist, 126 Minn. 414, 148 N. W. 455.

[93] Union Bank v. Bush, 36 N. Y. 631.

[94] Finley v. Quirk, 9 Minn. 194(179, 186) (that a sale was not made on Sunday—everything is presumed to have been legally done until the contrary is proved); Nininger v. Carver County, 10 Minn. 133(106) (that a bond was executed by county commissioners legally at a regular session); Wiley v. Board of Ed., 11 Minn. 371(268) (in action on a municipal bond it is unnecessary to allege facts showing that it was legally issued, the presumption being that it was legally issued); Smith v. Jordan, 13 Minn. 264(246) (that an instrument required by law to be stamped was in fact stamped); Pinney v. King, 21 Minn. 514 (that a note was given for a consideration); Meeker County v. Butler, 25 Minn. 363 (action on bond of county depositary—presumption that county treasurer made deposits in the name of his county); Benton v. Schulte, 31 Minn. 312, 17 N. W. 621 (that a contract within the statute of frauds was in writing); Chamberlain v. Tiner, 31 Minn. 371, 18 N. W. 97 (that a promise to pay money was a promise to pay on demand); Randall v. Constans, 33 Minn. 329, 23 N. W. 530 (that a contract within the statute of frauds was in writing); Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466 (that a foreign judgment, complete and regular on its face, was rendered by a court having jurisdiction of the subject-matter and the parties); Ennis v. Buckeye Pub. Co., 44 Minn. 105, 46 N. W. 314 (general damages from breach of contract); Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383 (good reputation—action for libel); Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084 (part payment of debt—unnecessary to plead implied promise to pay balance); Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207 (that a foreign corporation had complied with the law and obtained a license to do business in this state); Mobile

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to allege the promise implied by law, though it was customary to do so at common law.[95] And in actions on contracts within the statute of frauds it is unnecessary to allege that the contract was in writing.[96] A pleading which avers facts from which the law presumes another fact sufficiently avers such other fact.[97] When it is alleged that a contract was made it is unnecessary to allege facts to show that it was legally made, and when it is alleged that any other act was done it is unnecessary to allege facts to show that it was legally or regularly done.[98] As a general rule it is unnecessary to allege that the plaintiff is of age and entitled to sue in his own name, for that will be presumed, but this does not apply to an action to disaffirm a deed made by the plaintiff while an infant.[99] If a party unnecessarily alleges a fact which would be presumed in the absence of an allegation the adverse party may raise an issue thereon by a denial.[1]

222. Continuance of state of facts alleged—Presumption—It is a general rule that where a fact or state of facts of a continuous nature is alleged

Fruit & Trading Co. v. Potter, 78 Minn. 487, 81 N. W. 392 (sale by broker—presumption that he sold to solvent purchasers and hence unnecessary to allege that purchasers were solvent); Lyford v. Martin, 79 Minn. 243, 82 N. W. 479 (that a plaintiff was a licensed veterinary surgeon); Brown v. Fitcher, 91 Minn. 41, 97 N. W. 416 (action on school district order—presumption that officers drew it for a valid consideration).

[95] See § 588.

[96] See § 883.

[97] Bishop v. Middleton, 43 Neb. 10, 61 N. W. 129.

[98] Roher v. Turrill, 4 Minn. 407(309) (in pleading a levy by an officer it is unnecessary to plead the facts showing the regularity of the levy); Bailey v. Merritt, 7 Minn. 159(102) (an allegation that a foreclosure sale was made at public auction to the highest bidder, agreeably to the provisions of the statute in such case made and provided, and pursuant to the power of sale in said mortgage deed contained held sufficient); Nininger v. Carver County, 10 Minn. 133(106) (that county commissioners executed a bond legally at a regular session of the board); Dodge v. Chandler, 13 Minn. 114(105) (that an execution did not issue till after the docketing of the judgment); Ryan v. School Dist., 27 Minn. 433, 8 N. W. 146 (that a contract between a school district and a teacher was entered into as required by statute); Folsom v. Chisago County, 28 Minn. 324, 9 N. W. 881 (that a contract between a county and a publisher of a newspaper for publishing a delinquent tax list was entered into in conformity to law); Soule v. Thelander, 31 Minn. 227, 17 N. W. 373 (that a school meeting was valid); Stees v. Kranz, 32 Minn. 313, 20 N. W. 241 (an allegation that the plaintiff demised, leased and let premises includes the authority of an agent by whom the lease appears to have been executed on the part of the plaintiff); Collom v. Bixby, 33 Minn. 50, 21 N. W. 855 (that a contract was legally made); Nelson v. Nugent, 62 Minn. 203, 64 N. W. 392 (that a receiver was duly and legally appointed); Lyford v. Martin, 79 Minn. 243, 82 N. W. 479 (that a veterinary surgeon was duly licensed); Carver County v. Bongard, 82 Minn. 431, 85 N. W. 214 (that prerequisites to an action on a treasurer's bond had been complied with); Brown v. Fitcher, 91 Minn. 41, 97 N. W. 416 (that a school order was drawn for a proper purpose).

[99] Irvine v. Irvine, 5 Minn. 61(44).

[1] Dennis v. Johnson, 47 Minn. 56, 49

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to exist its continuance is presumed until the contrary appears and need not be alleged.[2] It has been held, however, that this does not apply to an allegation of ownership by the plaintiff in ejectment.[3]

223. Facts judicially noticed need not be alleged—Facts of which judicial notice will be taken need not be alleged.[4]

224. Time—If the time of an act, event, condition or other fact is an essential element of a cause of action or defence it must be alleged with precision and proved as alleged, and in such a case it is insufficient to plead the time as "on or about" a certain date.[5] Ordinarily time is not material and need not be proved as laid.[6] An allegation of time as on or about a certain day of a certain month does not specify any particular day of the month.[7] An allegation that a condition has existed since a certain date does not ordinarily include that date.[8] While an allegation of time is not ordinarily essential it is a requirement of good pleading to state, as an element of definite description, the time when a tort was committed, or a contract entered into, or an instrument executed.[9] Where several facts are stated in one continuous sentence, or in several sentences connected by the conjunction "and," time, though al-

N. W. 383; Lotto v. Davenport, 50 Minn. 99, 52 N. W. 130; State v. H. C. Akeley Lumber Co., 107 Minn. 54, 119 N. W. 387.

[2] Rhone v. Gale, 12 Minn. 54(25); Jaeger v. Hartman, 13 Minn. 55(50); Smith v. Dennett, 15 Minn. 81(59, 65); Willard v. Redwood County, 22 Minn. 61, 64; Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75, 79, 30 N. W. 440; Laudenschlager v. N. W. etc. Assn., 36 Minn. 131, 30 N. W. 447. See Irvine v. Irvine, 5 Minn. 61(44); Clayton v. Bennington, 24 Minn. 14; and Dunnell, Minn. Digest, § 3438.

[3] See § 644.

[4] Finney v. Callendar, 8 Minn. 41(23) (fact that a certain date fell on Sunday); Shartle v. Minneapolis, 17 Minn. 308(284) (provision of municipal charter); Webb v. Kennedy, 20 Minn. 419 (374) (fact that a certain date fell on Sunday); Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428 (general statutes of this state); Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386 (that a bank was not a bank of issue); A. A. White Townsite Co. v. Moorhead, 120 Minn. 1, 138 N. W. 939 (home rule charters and amendments); Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175 (federal statute); McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177 (id.); Ahrens v. Chicago etc. Ry., 121 Minn. 335, 141 N. W. 297 (id.); Bond v. Penn. Ry., 124 Minn. 195, 144 N. W. 942 (proceeding by which the court acquired jurisdiction).

[5] Griggs v. St. Paul, 9 Minn. 246(231); Lockwood v. Bigelow, 11 Minn. 113(70); Adams v. Minneapolis, 20 Minn. 484 (438); Balch v. Wilson, 25 Minn. 299. See Gilbert v. Gilbert, 120 Minn. 45, 49, 138 N. W. 943.

[6] Finley v. Quirk, 9 Minn. 194(179); Clague v. Hodgson, 16 Minn. 329(291); Hayden v. Albee, 20 Minn. 159(143); McMurphy v. Walker, 20 Minn. 382(334); Backus v. Clark, 1 Kan. 287; People v. Ryder, 12 N. Y. 433.

[7] Clague v. Hodgson, 16 Minn. 329 (291); Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943.

[8] Lawver v. Great Northern Ry., 97 Minn. 36, 105 N. W. 1129.

[9] See Haven v. Shaw, 23 N. J. L. 309; Conroy v. Oregon Construction Co., 23 Fed. 71.

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leged but once, applies to every fact.[10] If time is essential the objection that it is not pleaded may be taken by demurrer,[11] but where it should be alleged merely as an element of definiteness of description the objection must be made by motion, before answering, to make more definite and certain.[12] It is generally unnecessary to allege what was a reasonable time under the circumstances.[13]

225. Place—It is sufficient to describe a place as "in the county and state aforesaid" if the names of the county and state are in the title.[14]

226. Intention and motive—The intention or motive with which an act was done may be directly alleged as a fact.[15]

227. Title—In pleading title to either real or personal property a general allegation of ownership is sufficient to admit proof of any legal title, general or special,[16] but not of an equitable title.[17] Where a pleading attempts to show title to realty in a party by stating the specific facts through which he claims it, if any fact necessary to the passing of the title to him is omitted, the pleading is bad though it concludes that by reason of such facts he is seized in fee simple.[18] If a party pleads a specific title, or one acquired in a particular way, he will be limited in his proofs to the particular title pleaded.[19] In pleading title to realty it is sufficient to allege that a party is the owner,[20] or owner in fee,[21] or is seized in fee or in fee simple.[22] In pleading title to

[10] Royce v. Maloney, 58 Vt. 437, 5 Atl. 395.

[11] Lockwood v. Bigelow, 11 Minn. 113(70).

[12] People v. Ryder, 12 N. Y. 433.

[13] Palmer v. Atkinson etc. Ry., 101 Cal. 187, 35 Pac. 630 (action against carrier).

[14] State v. Bell, 26 Minn. 388, 5 N. W. 970; Hughes v. Meehan, 84 Minn. 226, 87 N. W. 768; Doll v. Feller, 16 Cal. 432.

[15] Wilcox v. Davis, 4 Minn. 197(139).

[16] Daley v. St. Paul, 7 Minn. 390(311); Topping v. Clay, 62 Minn. 3, 63 N. W. 1038; Atwater v. Spalding, 86 Minn. 101, 90 N. W. 370; McArthur v. Clark, 86 Minn. 165, 90 N. W. 369; Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748; Citizens' State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178. See §§ 603 (conversion); 644 (ejectment); 840 (action to determine adverse claims); 853 (replevin); 895 (trespass).

[17] See §§ 644, 840, 841.

[18] Pinney v. Fridley, 9 Minn. 34(23); Bell v. Dangerfield, 26 Minn. 307, 3 N. W. 698; Schultz v. Hadler, 39 Minn. 191, 39 N. W. 97; Jellison v. Halloran, 40 Minn. 485, 488, 42 N. W. 392; First Nat. Bank v. St. Croix Boom Corp., 41 Minn. 141, 42 N. W. 861; Gehr v. Knight, 77 Minn. 88, 79 N. W. 652; Bloemendal v. Albrecht, 79 Minn. 304, 82 N. W. 585; Bartleson v. Munson, 105 Minn. 348, 117 N. W. 512. See Buckholz v. Grant, 15 Minn. 406(329); Atkinson v. Duffy, 16 Minn. 45(30); Cleveland v. Stone, 51 Minn. 274, 53 N. W. 647.

[19] Pinney v. Fridley, 9 Minn. 34(23); O'Malley v. St. Paul etc. Ry., 43 Minn. 289, 294, 45 N. W. 440.

[20] Hennessy v. St. Paul etc. Ry., 30 Minn. 55, 14 N. W. 269; McArthur v. Clark, 86 Minn. 165, 90 N. W. 369.

[21] Wells v. Masterson, 6 Minn. 566 (401); Daley v. St. Paul, 7 Minn. 390 (311); Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868; Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947. See § 644.

[22] McClane v. White, 5 Minn. 178(139); Pinney v. Fridley, 9 Minn. 34(23); Buckholz v. Grant, 15 Minn. 406(329); Woll v. Voigt, 105 Minn. 371, 117 N. W. 608.

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personalty it is sufficient to allege that a party is the owner,[23] or to describe the property as "belonging to plaintiff," [24] or "of the plaintiff," [25] or "the property of plaintiff," [26] or that a party was possessed of the property "as of his own proper goods." [27] A bare allegation of possession is a sufficient allegation of title for some purposes.[28] A general allegation that a person was seized, or was not seized, without stating particulars, is an issuable allegation and sufficient on demurrer, and imports possession as well as title.[29] An allegation that one is or was "entitled" to a thing, without alleging ownership, is a mere conclusion of law, and insufficient on demurrer.[30] In pleading title from a mortgagor it is sufficient to allege that the mortgagor was the owner of the property when he executed the mortgage and that since the execution of the mortgage the party succeeded to, and now holds, the title which the mortgagor then had.[31] After the creation of a life estate has been stated, an allegation that "the defendants succeeded to and became possessed of said life interest and estate" is, as against a demurrer, a sufficient allegation of a transfer to defendants.[32] In a complaint in an action to foreclose a mortgage, executed to one of the plaintiffs, an averment that the mortgagee, plaintiff, "holds the said mortgage and obligation in his name, for the joint use and benefit of the said plaintiffs," sufficiently shows joint ownership of the mortgage, by both plaintiffs.[33] An allegation that a person executed a mortgage "whereby he mortgaged" certain property, implies that he owned it, or at least had a mortgageable interest in it.[34] Where A alleges that at a prior time B was the owner, A cannot allege title in himself by merely alleging that he is the owner without alleging a transfer to him from B.[35] Where a judgment is necessary to authorize a certificate of sale and a deed, the judgment must, in pleading, be alleged, although, as evidence, the certificate or deed may, prima facie, prove the judgment. It is not sufficient in pleading to allege only the execution of the deed or certificate, or both.[36] Courts are very liberal in sustaining allega-

See Moulton v. Doran, 10 Minn. 67(49); Merrill v. Dearing, 22 Minn. 376 ("the owner in fee simple of, and seized of an estate of inheritance in").

[23] McArthur v. Clark, 86 Minn. 165, 90 N. W. 369. See §§ 603, 853.

[24] Zalk v. Great Northern Ry., 98 Minn. 65, 107 N. W. 814; Warnick v. Baker, 42 Mo. App. 439.

[25] Scofield v. Whitelegge, 49 N. Y. 259.

[26] Duggan v. Wright, 157 Mass. 228, 32 N. E. 159.

[27] Stickney v. Smith, 5 Minn. 486(390).

[28] Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490.

[29] Gage v. Kaufman, 133 U. S. 471; Woll v. Voight, 105 Minn. 371, 117 N. W. 608.

[30] Garner v. McCullough, 48 Mo. 318 (trespass); Sheridan v. Jackson, 72 N. Y. 170 (ejectment); Pattison v. Adamson, 7 Hill 126 (replevin); Brown v. Phillips, 71 Wis. 239, 26 N. W. 242 ("entitled to vote").

[31] Cleveland v. Stone, 51 Minn. 274, 53 N. W. 647.

[32] Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357.

[33] Hawke v. Banning, 3 Minn. 67(30).

[34] Brunswick-Balke-Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. 214.

[35] Topping v. Clay, 62 Minn. 3, 63 N. W. 1038.

[36] Bell v. Dangerfield, 26 Minn. 307, 3 N. W. 698.

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tions of title when the objection is made by demurrer. Ordinarily the proper remedy is a motion to make more definite and certain.[37]

228. Possession—An allegation of ownership imports possession and right to possession.[38] An allegation that the defendant forcibly took property from the possession of the plaintiff sufficiently alleges that the property was in the actual possession of the plaintiff at the time.[39] After allegations of possession allegations "so possessed" and "in possession as aforesaid" have been held sufficient to show possession at the time of an injury.[40] An allegation of delivery to a person imports his acceptance and possession.[41] An allegation that parties were possessed of personal property "as of their own proper goods" is equivalent to an allegation of ownership and possession.[42]

229. Conveyance—An allegation that one person "conveyed" property to another is an allegation of fact and sufficient without disclosing the details.[43] An allegation of a sale of realty is not ordinarily equivalent to an allegation of conveyance.[44]

230. Purchase—An allegation that one person "purchased" property of another is an allegation of fact and is sufficient without disclosing the details.[45]

231. Consent—An allegation or denial of consent is an allegation of fact, without stating how the consent was given or in what terms, and a material issue may be formed thereon.[46]

232. Delivery and acceptance—An allegation of delivery imports acceptance and an allegation of acceptance imports delivery.[47] An allegation of delivery imports possession in the person to whom the delivery is made.[48]

233. Authority—Ratification—Under an allegation of authority evidence of ratification is admissible where it would be equivalent to prior authority.[49] A general allegation that a party with full knowledge thereof ratified and confirmed an act is sufficient.[50]

[37] Perkins v. Merrill, 37 Minn. 40, 33 N. W. 3.

[38] Clague v. Hodgson, 16 Minn. 329 (291, 297); Gage v. Kaufman, 133 U. S. 471. See §§ 603, 645, 853, 894, 895.

[39] Stickney v. Smith, 5 Minn. 486 (390).

[40] Gould v. Sub-Dist., 7 Minn. 203 (145).

[41] Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490. See § 232.

[42] Stickney v. Smith, 5 Minn. 486 (390).

[43] Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357. See McClane v. White, 5 Minn. 178 (139, 143). See, as to effect of "caused to be conveyed to," Hanscom v. Herrick, 21 Minn. 9, 11.

[44] Hill v. Edwards, 11 Minn. 22 (5).

[45] Nininger v. Carver County, 10 Minn. 133 (106); Rosenbaum v. New York, 109 N. Y. S. 775 (that A "purchased" the right, title and interest of B).

[46] Kemeys v. Richards, 11 Barb. (N. Y.) 312. See Petzold v. Petzold, 53 Minn. 39, 54 N. W. 933.

[47] Gazley v. Price, 16 Johns. 267; Davenport v. Whisler, 46 Iowa 287. See Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490.

[48] Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490.

[49] Janney v. Boyd, 30 Minn. 319, 15 N. W. 308.

[50] Pollitz v. Wabash Ry., 207 N. Y. 113, 100 N. E. 721.

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234. Demand and refusal—In pleading a demand the allegation "although often requested" is sufficient as against a demurrer.[51] An allegation of refusal is equivalent to an allegation of demand and refusal.[52]

235. Cause and effect—The word "thereby" is appropriate to express the relation of cause and effect.[53]

236. Written instruments—Pleading by copy—In actions on written instruments it is proper to plead the instrument by copy, that is, by setting out a copy of it in haec verba.[54] In pleading by copy it is ordinarily unnecessary to include the names of witnesses or an acknowledgment.[55] It is often advisable to plead an instrument by copy in order to force the defendant to a more specific answer than he would otherwise be compelled to make. On the other hand it is often prudent to plead an instrument according to its legal effect in order to lessen the burden of proof. Pleading by copy avoids the danger of wrongfully interpreting the legal effect of the instrument and presents a neat record on appeal.

237. Exhibits—A written instrument or a copy thereof may be attached to a pleading and made a part thereof for purposes of essential averment by appropriate allegation.[56] And in any case papers may be attached to pleadings as exhibits in explanation of the facts alleged in the pleading.[57] Recitals in exhibits are not to be taken as essential averments of the facts constituting a cause of action or defence unless they are clearly made so by appropriate allegations in the pleading to which they are attached.[58] When an exhibit is made a part of a pleading by appropriate allegation and is the foundation of the cause of action or defence to which it relates, the validity or sufficiency thereof, as a matter of law, to constitute such cause of action or defence, may be determined on demurrer to the pleading to which it is attached.[59] In such a case a demurrer admits the recitals in the exhibit.[60]

[51] Hall v. Williams, 13 Minn. 260(242); Malone v. Minnesota Stone Co., 36 Minn. 325, 31 N. W. 170.

[52] Malone v. Minnesota Stone Co., 36 Minn. 325, 31 N. W. 170; Hammond v. Mason etc. Co., 92 U. S. 724.

[53] Greenman v. Smith, 20 Minn. 418 (370).

[54] Elliot v. Roche, 64 Minn. 482, 67 N. W. 539; Minneapolis etc. Ry. v. Grethen, 86 Minn. 323, 90 N. W. 573. See § 584.

[55] Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14.

[56] Elliot v. Roche, 64 Minn. 482, 6 N. W. 539; Union Sewer Pipe Co. v. Olson, 82 Minn. 187, 84 N. W. 756; Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868; Brown v. Fitcher, 91 Minn. 41, 97 N. W. 416.

[57] Union Sewer Pipe Co. v. Olson, 82 Minn. 187, 84 N. W. 756.

[58] Taylor v. Blake, 11 Minn. 255(170, 182); Sprague v. Wells, 47 Minn. 504, 50 N. W. 535; Realty R. G. Co. v. Farm etc. Co., 79 Minn. 465, 82 N. W. 857; Union Sewer Pipe Co. v. Olson, 82 Minn. 187, 84 N. W. 756; Stewart v. Simmons, 101 Minn. 375, 112 N. W. 282. See St. Louis County v. American Loan & Trust Co., 67 Minn. 112, 69 N. W. 704; Minneapolis etc. Ry. v. Grethen, 86 Minn. 323, 90 N. W. 573; Danvers F. E. Co. v. Johnson, 93 Minn. 323, 328, 101 N. W. 492.

[59] Union Sewer Pipe Co. v. Olson, 82 Minn. 187, 84 N. W. 756.

[60] Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868.

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COMPLAINT

238. Contents—Statute—The complaint shall contain:

1. The title of the action, naming the court and the county in which it is brought, and the parties, plaintiff and defendant, therein.

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

3. A demand for the relief desired by the plaintiff; and, if a recovery of money be demanded, the amount shall be stated.[61]

239. Improper to label—It is unnecessary and improper to label a complaint to characterize it. Forms of action are abolished and the nature of a cause of action is to be determined by the facts alleged and not by the formal character of the complaint.[62] It is unnecessary and improper to label a complaint so as to show that it is an action ex contractu or ex delicto.[63]

240. Function—The primary function of a complaint is to state the facts constituting the cause of action so as to apprise the defendant of what the plaintiff relies upon and intends to prove.[64]

241. Speaks as of date of commencement of action—Dating—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.[65] Allegations in a complaint are presumed to speak of then existing conditions. Allegations in the present tense relate to the date of verification.[66] If a complaint is dated the date is not necessarily the date of the commencement of the action.[67]

242. Separate statement of causes of action—When a complaint includes more than one cause of action each must be separately stated and plainly numbered.[68] Each must be complete in itself, but the allegations of one may be made a part of another by apt words of reference.[69] Matters of mere induce-

[61] R. L. 1905 § 4127; G. S. 1913 § 7753. The plaintiff is not required to allege more than the statute requires. Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175.

[62] Breault v. Merrill & Ring Lumber Co., 72 Minn. 143, 75 N. W. 122. The defendant cannot defeat an action by merely giving it a name. Adams v. Corriston, 7 Minn. 456(365).

[63] See § 245.

[64] Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4; Sorenson v. School Dist., 122 Minn. 59, 141 N. W. 1105. See also, Scofield v. National Elevator Co., 64 Minn. 527, 67 N. W. 645.

[65] Eide v. Clarke, 65 Minn. 466, 68 N. W. 98.

[66] State v. Snure, 29 Minn. 132, 12 N. W. 347; Prindle v. Caruthers, 15 N. Y. 425.

[67] Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 166, 126 N. W. 524.

[68] R. L. 1905 § 4154; G. S. 1913 § 7780; Rule 6, Dist. Ct.; Newell v. How, 31 Minn. 235, 17 N. W. 383; West v. Eureka Improvement Co., 40 Minn. 394, 42 N. W. 87.

[69] Gertler v. Linscott, 26 Minn. 82, 1 N. W. 579; Newell v. How, 31 N. W. 235, 17 N. W. 383; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; La Plant v.

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ment, such as incorporation, partnership, appointment as receiver, executor, and the like, may be alleged at the beginning of the pleading, distinct from the other allegations, and need not be made a part of each cause of action.[70] A general allegation of damages at the close of the complaint is sufficient to cover all the causes of action alleged.[71] Each cause of action is sometimes called a count.[72] The mere fact that the several paragraphs of a complaint are separately numbered is of itself insufficient to determine their character as separate and distinct counts, or causes of action.[73] A complaint setting forth in one count different acts of fraud in obtaining payment of many different fraudulent claims at different times has been held not to show distinct causes of action required to be separately stated.[74] In an action for personal injuries resulting from negligence the plaintiff may allege in a single count all the facts which he claims contributed to or caused the accident.[75] The exclusive remedy for a failure to state several causes of action separately is a motion before trial.[76]

243. Paragraphing—It is good practice to state the issuable facts of the cause of action in separate numbered paragraphs. Several allegations relating to a composite fact, including the various acts or omissions constituting negligence or other tort, may appropriately be included in a single paragraph. This mode of statement has the merit of presenting the essential facts clearly and in such a form that they may be denied by mere reference to the number of the paragraph. It also conduces to that conciseness of statement which is the cardinal virtue of good pleading.

244. Theory of case—Good practice requires that 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.[77] In some states a complaint must be drawn on a definite theory and if it is not good on that theory it is bad on demurrer.[78] Happily no such rule prevails in this state. Though

Firemen's Ins. Co., 68 Minn. 82, 70 N. W. 856; Realty R. G. Co. v. Farm etc. Co., 79 Minn. 465, 82 N. W. 857.

[70] West v. Eureka Improvement Co., 40 Minn. 394, 42 N. W. 87; Curtis v. Moore, 15 Wis. 134; Spears v. Ward, 48 Ind. 541; 1 Chitty, Pl. 16 Am. ed., 423; Pomeroy, Remedies, § 575.

[71] Spears v. Ward, 48 Ind. 541.

[72] Winslow v. Boyden, 1 Minn. 383 (285); Bass v. Upton, 1 Minn. 408(292); Holmes v. Williams, 16 Minn. 164(146); Merrill v. Dearing, 22 Minn. 376; Fredin v. Richards, 61 Minn. 490, 494, 63 N. W. 1031.

[73] Merrill v. Dearing, 22 Minn. 376.

[74] People v. Tweed, 63 N. Y. 194.

[75] Payne v. New York etc. Ry., 201 N. Y. 436, 95 N. E. 19. See § 816.

[76] Rule 6, District Court; Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Newell v. How, 31 Minn. 235, 17 N. W. 383; Davis v. Hamilton, 85 Minn. 209, 88 N. W. 744; Freer v. Denton, 61 N. Y. 492. See §§ 246, 466.

[77] Sorenson v. School Dist., 122 Minn. 59, 141 N. W. 1105. See Cressy v. Republic Creosoting Co., 108 Minn. 349, 353, 122 N. W. 484.

[78] 31 Cyc. 116; 4 Ency. Pl. & Pr. 601; 8 Col. L. Rev. 523; Note, 50 L. R. A. (N. S.) 3. See Cressy v. Republic Cre-

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a definite theory is obviously desirable, to hold it essential is to sacrifice substance to form and pay too high a price for artistic pleading.[79] In this state the absence of a definite theory is regarded as a defect of form merely, and is not a ground for demurrer, the remedy being a motion to make more definite and certain or to compel an election. A party may have any relief to which the facts proved within the allegations of his pleading entitle him regardless of his theory of the case.[80] A party is entitled to definite information as to the theory upon which it is claimed he is liable, but if the complaint does not disclose a definite theory, but does disclose facts entitling the plaintiff to some form of judicial relief, the remedy of the defendant is a motion and not a demurrer.[81] One of the primary objects of the reformed procedure is to enable the court to give judgment according to the facts stated and proved, without reference to the form used or to the legal conclusions adopted by the pleader.[82] If a party adopts a wrong theory and fails to prove the cause of action intended, yet if he proves any other cause of action within the allegations of his pleading he may recover on that.[83] A complaint stating a cause of action is not

osoting Co., 108 Minn. 349, 353, 122 N. W. 484. In Supervisors v. Decker, 30 Wis. 624, it is said that "the court must in the first instance decide with certainty what the specific cause of action counted and relied upon is, and, having decided that, must next determine whether the complaint contains a sufficient statement of such cause." This case has been overruled. See Hall v. Bell, 143 Wis. 296, 127 N. W. 967; Bruheim v. Stratton, 145 Wis. 271, 129 N. W. 1092.

[79] See Roscoe Pound, 8 Col. L. Rev. 617; 3 Nev. State Bar Assn. Reports, 243; 24 Harv. L. Rev. 602.

[80] Farmer v. Crosby, 43 Minn. 459, 462, 45 N. W. 866; Cock v. Van Etten, 12 Minn. 522(431, 436); Washburn v. Mendenhall, 21 Minn. 332; Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Finch v. Moore, 50 Minn. 116, 52 N. W. 384; Wilson v. Fuller, 58 Minn. 149, 59 N. W. 988; Rule v. Omega Stove & Grate Co., 64 Minn. 326, 329, 67 N. W. 60; Brown v. Doyle, 69 Minn. 543, 72 N. W. 814; Breault v. Merrill & Ring Lumber Co., 72 Minn. 143, 75 N. W. 122; Pendergast v. Searle, 74 Minn. 333, 77 N. W. 231; Palmer v. Yorks, 77 Minn. 20, 79 N. W. 587; Heinze v. Heinze, 107 Minn. 43, 119 N. W. 489; Freeman v. Paulson, 107 Minn. 64, 119 N. W. 651; Wickstrom v. Swanson, 107 Minn. 482, 120 N. W. 1090; Cressy v. Republic Creosoting Co., 108 Minn. 349, 122 N. W. 484; Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922; Foster v. Clifford, 110 Minn. 79, 124 N. W. 632; Zimmerman v. Burchard etc. Co., 111 Minn. 17, 126 N. W. 282; Bark v. Dixson, 115 Minn. 172, 131 N. W. 1078; National Citizens' Bank v. McKinley, 115 Minn. 378, 132 N. W. 290; Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Ahrens v. Chicago etc. Ry., 121 Minn. 335, 141 N. W. 297. See Barton v. St. Paul etc. Ry., 33 Minn. 189, 193, 22 N. W. 300; Olson v. Northern Pacific Ry., 126 Minn. 229, 148 N. W. 67.

[81] Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922.

[82] Wright v. Hooker, 10 N. Y. 54; Union Bank v. Bush, 36 N. Y. 631; Conaughty v. Nichols, 42 N. Y. 83. Where a complaint states facts authorizing some form of relief it cannot be challenged on demurrer as not in any particular form. Graham v. Graham, 119 N. Y. S. 1013. See Minnesota cases under §§ 278, 517.

[83] Emery v. Pease, 20 N. Y. 62; Conaughty v. Nichols, 42 N. Y. 83. See Minnesota cases under §§ 278, 517.

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demurrable because it proceeds on a wrong theory and though it specifies only items of damage to which the plaintiff is not entitled.[84] The test of a complaint on general demurrer is not whether it states the precise cause of action intended, or whether the pleader appreciated the nature of his remedy, or asked for appropriate relief, but whether the facts stated, expressly or inferentially, giving to the language the benefit of all reasonable intendments, show the plaintiff to be entitled to some judicial relief.[85] On appeal the theory of the case adopted at the trial will be followed.[86]

245. Ex delicto or ex contractu—In an action founded on either contract or tort the plaintiff is not required to state on which he relies, and, if he makes such a statement and is mistaken the statement is immaterial.[87] Recovery may be had either for tort or breach of contract, if the facts proved within the allegations of the pleading justify it, though the pleader was mistaken as to the nature of his cause of action.[88] 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.[89] Where the facts alleged and proved justify it a recovery may be had as for conversion though the relief prayed was the possession of the property.[90] So a recovery may be had either for conversion or for money had and received.[91] Where an action is maintainable for a tort simply, without reference to any contract between the parties, the action is one of tort purely, though the existence of a contract may have been the occasion or furnished the opportunity for committing the tort. But where the action is not maintainable without pleading and proving the contract it is an action on contract, whatever may be the form of the pleading.[92]

246. Duplicity—Election—A complaint should not be double, that it, it should not state the facts constituting a single cause of action in a double and inconsistent aspect, or state two causes of action in one count. The appropriate remedy for this defect, which is merely formal, is a motion before answering. If the objection is first raised on the trial it is wholly discretionary with the

[84] Coppola v. Kraushaar, 92 N. Y. S. 436; Hemmingway v. Poucher, 98 N. Y. 281; Chatfield v. Simonson, 92 N. Y. 209.

[85] Hall v. Bell, 143 Wis. 296, 127 N. W. 967; Bruheim v. Stratton, 145 Wis. 271, 129 N. W. 1092, and Minnesota cases under §§ 278, 517. For a case apparently at variance with this rule, see Olson v. Northern Pacific Ry., 126 Minn. 229, 148 N. W. 67.

[86] First Nat. Bank v. Stadden, 103 Minn. 403, 115 N. W. 198; Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120; Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156. See § 520.

[87] Cockerell v. Henderson, 81 Kan. 335, 105 Pac. 443.

[88] Wickstrom v. Swanson, 107 Minn. 482, 120 N. W. 1090.

[89] Wilson v. Fuller, 58 Minn. 149, 59 N. W. 988; Brown v. Doyle, 69 Minn. 543, 72 N. W. 814.

[90] Washburn v. Mendenhall, 21 Minn. 332; Morish v. Mountain, 22 Minn. 564; Howard v. Barton, 28 Minn. 116, 9 N. W. 584; National Citizens' Bank v. McKinley, 115 Minn. 378, 132 N. W. 290.

[91] Northness v. Hillestad, 87 Minn. 304, 91 N. W. 1112.

[92] Whittaker v. Collins, 34 Minn. 299,

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court to compel an election.[93] In an action by several plaintiffs the complaint is not double merely because, in alleging a cause of action in favor of all, it alleges facts which might sustain an action brought by one only.[94] The objections to duplicity are more theoretical than practical and courts are rightly

25 N. W. 632; Finch v. Bursheim, 122 Minn. 152, 142 N. W. 143; East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181; Koski v. Pakkala, 121 Minn. 450, 141 N. W. 793.

[93] Dean v. Leonard, 9 Minn. 190(176) (complaint for rent framed so as to justify a recovery on either a written lease or for use and occupation); Marsh v. Webber, 13 Minn. 109(99) (for breach of warranty or for deceit in sale of chattel); Hawley v. Wilkinson, 18 Minn. 525(468) (action for price of goods sold —goods sold to third party on defendant's credit); Hewitt v. Brown, 21 Minn. 163 (action by broker for commission—complaint framed so as to recover on an express or implied promise); Plummer v. Mold, 22 Minn. 15 (action for services —complaint alleged express contract and also the reasonable value of the services); Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308 (id.); Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436 (action for cancelation of certain deeds and mortgages and for an accounting); Ingle v. Angell, 111 Minn. 63, 126 N. W. 400 (action for services—complaint alleged express contract and also the reasonable value of the services); John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180 (allegations suggestive of a breach of warranty of personal property sold, but which, standing alone, were insufficient to state a cause of action therefor, held not to require plaintiff to elect whether to rely upon a breach of warranty or upon a mutual rescission and promise to repay the purchase price paid, a cause of action for the latter being sufficiently alleged); O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399 (action by servant against master for negligence in furnishing an unsafe place for work and unsafe appliances); Jones v. Magoon, 119 Minn. 434, 138 N. W. 686 (plaintiff required to elect whether to proceed on the theory that a contract had been rescinded for fraud or for damages from the fraud); Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 141 N. W. 481 (action for services—complaint alleged express contract and reasonable value of services—practice of requiring an election disapproved); Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124 (action for services—complaint alleged express contract and reasonable value of services—motion to compel plaintiff to elect denied—recovery on either express or implied promise allowable—judgment a bar to a second action); Bouck v. Shere, 125 Minn. 122, 145 N. W. 808 (action on an express promise to pay the value of plaintiff's interest in a firm on its dissolution and for an account stated—plaintiff not required to elect—recovery on either express or implied promise allowable); Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444 (action for services—allegation of reasonable value of services—effect of alleging a promise to pay such amount); Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 126 Minn. 176, 148 N. W. 43 (plaintiff held properly required to elect to proceed either for rescission or for damages). A complaint for services which alleges an express promise to pay a stipulated amount therefor and also the reasonable value of the services in separate counts is not double. The two causes of action are not inconsistent and the plaintiff cannot be required to elect between them. Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124. See §§ 587, 911.

[94] Whelan v. Sibley County, 28 Minn. 80, 9 N. W. 175.

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rather impatient of objection on this ground. In most cases where the pleader is tempted to resort to a double pleading it is advisable for him to adopt a common indebitatus count and thereby avoid the danger of a variance.

247. Complaint good at common law generally good under code—The code was not intended to exact a more formal complaint than was required at common law, but instead to abolish the forms, technicalities and fictions of common-law practice. A complaint containing the essential allegations of a common-law declaration in the same kind of action will generally be sufficient.[95] A complaint in the form of a common count, or substantially in that form, is sufficient.[96]

248. Cause of action—Definition—The maintenance of an action depends upon the existence of what is termed a "cause of action," that is, of a right on the part of one person (the plaintiff), combined with the violation of, or infringement upon, such right by another (the defendant). There goes, it should be noticed, to make up the cause of action at once the "existence" and the "violation" of a right, and the expression cause of action means, in strictness, the whole cause of action, that is, all the facts which together constitute the plaintiff's right to maintain the action.[97] In short, a cause of action is the violation of a legal right.[98] It may be otherwise defined as, a right belonging to the plaintiff and a wrongful act or omission of the defendant violating such right;[99] the combination of facts giving rise to a right of action;[1] the situation or state of facts which entitles a party to sustain an action; a right of recovery.[2] The term is often used synonymously with "right of action."[3] It is sometimes used in a strict, technical sense, and sometimes is a loose colloquial sense.[4] It is to be distinguished from subject-matter of action.[5]

249. Facts constituting cause of action must be alleged—The statute requires a complaint to contain a plain and concise statement of facts constituting a cause of action. The facts giving rise to a cause of action are: (1) The primary right of the plaintiff, (2) the correlative duty of the defendant, (3) the

[95] Goodman v. Alexander, 165 N. Y. 289, 59 N. E. 145.

[96] See § 531.

[97] Dicey, Parties, 6. See also 1 Ency. L. & P. 1006. When used with reference to the pleadings by which the cause of action is alleged the phrase signifies the facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong. Hutchinson v. Ainsworth, 73 Cal. 452, 15 Pac. 82. See notes to §§ 30, 31.

[98] 1 Ency. L. & P. 1008.

[99] Veeder v. Baker, 83 N. Y. 156; Goodrich v. Alfred, 72 Conn. 257, 43 Atl. 1041; Wildman v. Wildman, 70 Conn. 700, 45 Atl. 1; 1 Ency. L. & P. 1009.

[1] Mason v. Union Pac. Ry., 7 Utah 77, 24 Pac. 796, 798; Bruil v. N. W. etc. Assn., 72 Wis. 430, 39 N. W. 529, 530.

[2] Century Dict.

[3] Bruil v. Northwestern Mut. Relief Assn., 72 Wis. 430, 39 N. W. 529, 530.

[4] Payne v. New York etc. Ry., 201 N. Y. 436, 95 N. E. 19.

[5] State v. Torinus, 28 Minn. 175, 9 N. W. 725.

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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, and (5) the rules of law out of which spring the primary right of the plaintiff and the correlative duty of the defendant. 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 every one 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, and (2) the facts constituting the violation of plaintiff's primary right—the wrongful act or omission of the defendant. This general statement of the facts which must be pleaded is subject to the qualification that in actions for certain 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.[6] The term "primary right" is here used in the sense of "substantive right"—a right based on the substantive law as distinguished from the remedial or adjective law. The act or conduct constituting that element of a cause of action which is commonly called the delict, may consist either of a single specific act or omission, or may be the resultant of several acts or omissions or of both acts and

[6] Pomeroy, Remedies, §§ 73, 452–454, 519–521; King v. Chicago etc. Ry., 80 Minn. 83, 82 N. W. 1113; Lilmatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 242, 137 N. W. 1099 (tort); East Grand Forks v. Steele, 121 Minn. 296, 298, 141 N. W. 181 (breach of contract); Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1; Green v. Palmer, 15 Cal. 414; Chambers v. Glen, 18 S. C. 471; Nance v. Ry. Co., 35 S. C. 307; Distler v. Dabney, 3 Wash. 200, 28 Pac. 335.

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omissions, and in either of the latter cases the singleness and indivisibility of the delict is not affected by the number of the specific occurrences out of which it grows. In other words, a cause of action for wrong is predicated upon the violation of an ultimate duty, and though the performance of such duty may require the doing or omission of many separate and distinct acts, the omission or doing of which would constitute a violation of the ultimate duty, it is nevertheless the violation of the latter, and not the specific acts or omissions, which constitutes the actionable wrong or delict. The singleness of a cause of action is not necessarily affected by the variety or severability of the damages suffered.[7]

250. Different causes of action from the same act—Different causes of action may arise from the same act, as, for instance, a cause of action for injury to the person and one for injury to property; or a cause of action for injury to real property, and one for injury to personal property.[8]

251. Injury to person and to property from same wrongful act—Injuries to the person and injuries to the property of the person injured, both resulting from the same tortious act, are separate items of damage, and constitute but one cause of action.[9]

252. Every material fact must be alleged—Every fact which the plaintiff must prove in order to maintain his action must be alleged.[10]

253. Only a prima facie case need be shown—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.[11] If the plaintiff goes beyond this and alleges facts which are material but not essential he will assume an unnecessary burden of proof if they are denied.[12]

254. Only material, issuable facts should be alleged—Of the facts giving rise to the cause of action 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—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

[7] Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 243, 137 N. W. 1099.

[8] Wilson v. St. Paul etc. Ry., 44 Minn. 445, 46 N. W. 909. See King v. Chicago etc. Ry., 80 Minn. 83, 82 N. W. 1113.

[9] King v. Chicago etc. Ry., 80 Minn. 83, 82 N. W. 1113.

[10] Bernheimer v. Marshall, 2 Minn. 78(61, 68); Griggs v. St. Paul, 9 Minn. 246(231); Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450.

[11] Jones v. Ewing, 22 Minn. 157; Spink & Keyes Drug Co. v. Ryan Drug Co., 72 Minn. 178, 75 N. W. 18; Crawford v. Lillibridge, 89 Minn. 276, 278, 94 N. W. 868.

[12] Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383. See State v. H. C. Akeley Lumber Co., 107 Minn. 54, 61, 119 N. W. 387, and § 255.

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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.[13]

255. Surplusage—If a complaint alleges all the essential facts of a cause of action and also non-essential facts the latter need not be proved in order to recover on the former. They may be treated as surplusage, and either disregarded[14] or stricken out on motion.[15] The affirmance and denial of immaterial facts does not present an issue to be tried.[16] But a plaintiff may unnecessarily aver in his complaint a material fact which would be presumed in the absence of any averment, or concerning which the burden of pleading and proof would ordinarily rest upon the defendant, and by so doing enable the defendant, by a general or specific denial of such averment, to raise an issue as to the fact.[17] This does not mean that where a fact is presumed the presumption falls because one party alleges and the other denies the fact, nor that when the parties come to trial the existence of the presumption depends in any manner upon how the issue is made.[18] It is sometimes the case that unnecessary averments require proof that would not have been essential if the pleading had been confined to allegations indispensable to a statement of the cause of action. But this is true only when immaterial averments constitute an essential part of the cause of action as it is pleaded. If the cause is well stated without them—if their removal from the complaint would still leave averments sufficient to constitute a cause of action, they are mere surplusage and may be disregarded.[19]

256. Anticipating defences—It is unnecessary in a complaint to anticipate and negative possible defences, or to state matters which would come more

[13] Rollins v. St. Paul Lumber Co., 21 Minn. 5; Welde v. Porter, 22 Minn. 429; Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736; People v. Ryder, 12 N. Y. 433; Green v. Palmer, 15 Cal. 411; 31 Cyc. 76; Pomeroy, Remedies, §§ 526–528.

[14] Steamboat War Eagle v. Nutting, 1 Minn. 256(201); Sanders v. Classon, 13 Minn. 379(352); Meyenberg v. Eldred, 37 Minn. 508, 35 N. W. 371; Smalley v. Isaacson, 40 Minn. 450, 455, 42 N. W. 352; Jagger v. Nat. G. A. Bank, 53 Minn. 386, 55 N. W. 545; Wright v. Tileston, 60 Minn. 34, 37, 61 N. W. 823; Buffalo Land & Exploration Co. v. Strong, 91 Minn. 84, 87, 97 N. W. 575; Cressy v. Republic Creosoting Co., 108 Minn. 349, 122 N. W. 484; John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180; Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943; Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128; Bruheim v. Stratton, 145 Wis. 271, 129 N. W. 1092; Marquat v. Marquat, 12 N. Y. 336; Bedell v. Carll, 33 N. Y. 581; Union Bank v. Bush, 36 N. Y. 631. See Benton v. Schulte, 31 Minn. 312, 17 N. W. 621.

[15] Conaughty v. Nichols, 42 N. Y. 83.

[16] See § 322.

[17] Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383. See Pink v. Catanich, 51 Cal. 420; Gattis v. Kilgo, 128 N. C. 402, 38 S. E. 931.

[18] Lotto v. Davenport, 50 Minn. 99, 52 N. W. 130; State v. H. C. Akeley Lumber Co., 107 Minn. 54, 119 N. W. 387.

[19] Geer v. Ouray County, 97 Fed. 435.

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properly from the adverse party.[20] It is unnecessary to allege time in order

[20] Faribault v. Hulett, 10 Minn. 30(15) (unnecessary to negative consent to an injury); Gray v. First Div. etc. Ry., 13 Minn. 315(289) (action by owner against railroad for using street—unnecessary to negative that defendant has taken proceedings to ascertain and pay the compensation); Shartle v. Minneapolis, 17 Minn. 308(284) (action against municipality for defective street—unnecessary to allege funds for repair); Young v. Young, 18 Minn. 90(72) (action for divorce—unnecessary to negative condonation, procurement or connivance); Hocum v. Weitherick, 22 Minn. 152 (action for negligence—unnecessary to negative contributory negligence); Jones v. Ewing, 22 Minn. 157 (in pleading foreclosure proceedings it is unnecessary to aver that no action or proceeding has been instituted at law to recover the debt—general rule as to anticipating defences stated); Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75 (action for negligence — unnecessary to negative contributory negligence); Hennessy v. St. Paul etc. Ry., 30 Minn. 55, 14 N. W. 269 (ejectment against railroad for undivided interest in tract of land—unnecessary to negative condemnation proceedings or that defendant was owner of the other undivided interest or in possession under such owner); McMillan v. Cheeney, 30 Minn. 519, 16 N. W. 404 (unnecessary to negative exceptions in statute of limitations); Laudenschlager v. N. W. etc. Co., 36 Minn. 131, 30 N. W. 447 (action on life insurance policy—unnecessary to negative that decedent had directed payment to any other person than wife); St. Paul Land Co. v. Dayton, 37 Minn. 346, 34 N. W. 335 (a complaint by a corporation for the enforcement of a contract made by it with the defendant need not allege that the plaintiff was authorized to make the contract—defence of ultra vires need not be negatived); St. Paul Foundry Co. v. Wegmann, 40 Minn. 419, 42 N. W. 288 (action on mechanic's lien bond—unnecessary to negative payment by sureties); Blethen v. Stewart, 41 Minn. 205, 42 N. W. 932 (action for libel—unnecessary to negative that other parts of article qualified libelous matter); Hospes v. N. W. etc. Co., 48 Minn. 174, 50 N. W. 1117 (action to charge stockholders for bonus stock—unnecessary for subsequent creditor to allege that he relied on the stock having been paid in full); Meyer v. Berlandi, 53 Minn. 59, 54 N. W. 937 (action for extras on a building contract—unnecessary to negative matter defeating or diminishing claim for extras); Romer v. Conter, 53 Minn. 171, 54 N. W. 1052 (action on bond —unnecessary to negative payment); Root v. Childs, 68 Minn. 142, 70 N. W. 1087 (action on contract—if payment is not to be made if a certain contingency happens it is unnecessary to allege the non-happening of the contingency); Spink & Keyes Drug Co. v. Ryan Drug Co., 72 Minn. 178, 75 N. W. 18 (action against drawer of check—unnecessary to allege that notice of its dishonor was given to the defendant); Sprague v. Sprague, 73 Minn. 474, 76 N. W. 268 (action for divorce—unnecessary to anticipate claim for alimony); Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005 (action on fire insurance policy—unnecessary to negative losses from excepted causes); Lyford v. Martin, 79 Minn. 243, 82 N. W. 479 (action by veterinary surgeon for services—unnecessary to allege a license); Carver County v. Bongard, 82 Minn. 431, 85 N. W. 214 (action on bond of county treasurer—leave of court — resolution of county board—settlement with auditor); Bennett v. Rainy Lake River Boom Corp., 115 Minn. 96, 131 N. W. 1059 (action by surveyor general for his fees—unnecessary to negative payment); Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253 (sale of lumber with privilege of reserving a cer-

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to avoid the defence of the statute of limitations,[21] or to allege that a contract was in writing in order to avoid the defence of the statute of frauds.[22] Matter in a complaint anticipating and negativing a defence may be stricken out on motion.[23] If a complaint states facts constituting a cause of action, but also states facts which constitute a defence thereto, it is demurrable.[24] A defendant need not allege new matter as a defence to facts alleged in the complaint which are in anticipation of a defence.[25] Allegations in anticipation of a defence are not admitted by a failure to deny them.[26]

257. Conditions precedent—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.[27] Where the promises of the respective parties to a contract are concurrent and dependent a party suing thereon must allege performance or tender of performance on his part.[28] Where the obligation of a party to a contract is to pay only on the happening of a contingency, its occurrence must be alleged in the complaint, in an action for the recovery of the money.[29] Upon a contract for the payment of a certain sum in goods, the goods being deliverable upon demand, an action for a recovery in money cannot be maintained without an allegation and proof of a demand or refusal to deliver the goods.[30] Under a statute prescribing specified conditions to be performed before a right of action shall accrue, a complaint is insufficient which merely alleges that the

tain quantity for a certain purpose—unnecessary for plaintiff to negative reservation); Penhall v. Minn. State Medical Assn., 126 Minn. 323, 148 N. W. 472 (action by member of medical association against association for expenses of action which member claimed association should have conducted — unnecessary to negative that claim was not one upon which member was not entitled to aid of association). See §§ 684, 726, 727, 740–742, 816, 883.

[21] See § 724.

[22] See § 883.

[23] Brooks v. Bates, 7 Colo. 576.

[24] Millette v. Mehmke, 26 Minn. 306, 3 N. W. 700; Clark v. Chicago etc. Ry., 28 Minn. 69, 72, 9 N. W. 75; Calvo v. Davies, 73 N. Y. 211.

[25] Dennis v. Snell, 50 Barb. (N. Y.) 95.

[26] Canfield v. Tobias, 21 Cal. 349.

[27] Wilson v. Clarke, 20 Minn. 367(318) (condition as to delivery of freight—general rule stated); Johnson v. Howard, 20 Minn. 370(322) (condition calling for measurement of property by a third party); St. Paul etc. Ry. v. Robbins, 23 Minn. 439 (action on stock subscription — condition as to issuing stock); Minneapolis Harvester Works v. Libby, 24 Minn. 327 (id.); Mosness v. German Am. Ins. Co., 50 Minn. 341, 52 N. W. 932 (condition for arbitration); Potter v. Holmes, 65 Minn. 377, 68 N. W. 63 (action for purchase price of goods—condition as to inspection and acceptance of goods); Hobart v. Kehoe, 110 Minn. 490, 126 N. W. 66 (condition as to obtaining a license from a probate court to sell land); Vachon v. Nichols-Chisholm Lumber Co., 111 Minn. 45, 126 N. W. 278 (condition as to issuance and delivery of a patent); State Bank v. Vlaar, 124 Minn. 78, 144 N. W. 458 (condition as to inspection of ditch and certification of completion).

[28] Snow v. Johnson, 1 Minn. 48(32); St. Paul etc. Ry. v. Robbins, 23 Minn. 439.

[29] Root v. Childs, 68 Minn. 142, 70 N. W. 1087; Briggs v. Rutherford, 94 Minn. 23, 101 N. W. 954.

[30] Parr v. Johnson, 37 Minn. 457, 35 N. W. 176.

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plaintiff has performed all of the acts by the statute required. The facts showing compliance with the statute should be alleged.[31]

258. Same—How pleaded—Denial—By virtue of statute it is unnecessary, in pleading the performance of conditions precedent in contracts, to plead the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part.[32] The statute applies only to contracts and does not apply to performance of the conditions of a statute.[33] It is inapplicable to performance by a stranger to the contract.[34] Except as provided by the statute it is necessary for the plaintiff to allege the facts showing performance. It is not enough for him to allege in a general way that he has performed all the conditions by him to be performed.[35] When performance is alleged in general terms a general or specific denial is sufficient to raise an issue and throw the burden of proof upon the plaintiff. The answer may be as general as the complaint.[36] Waiver or excuse for non-performance cannot be proved under a general allegation of performance.[37]

259. Same—Effect of not pleading—Demurrer—Answer—Failure to allege performance, or facts in excuse, renders a complaint demurrable if the defect appears on the face thereof.[38] Objection to the defect may also be made on the trial or on appeal.[39] Failure to perform a condition precedent may be set up by answer.[40]

[31] Biron v. Board of Water Commissioners, 41 Minn. 519, 43 N. W. 482. See Bailey v. Merritt, 7 Minn. 159(102); Folsom v. Chisago County, 28 Minn. 324, 9 N. W. 881; and § 218.

[32] R. L. 1905 § 4150; G. S. 1913 § 7776; Mosness v. German Am. Ins. Co., 50 Minn. 341, 52 N. W. 932; Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317; Taylor v. Marcum, 60 Minn. 292, 62 N. W. 330. See Andreas v. Holcombe, 22 Minn. 339; Lane v. St. Paul F. & M. Ins. Co., 50 Minn. 227, 52 N. W. 649.

[33] Biron v. Board of Water Commissioners, 41 Minn. 519, 43 N. W. 482. A general allegation of compliance with the provisions of a statute is sometimes sufficient. Bailey v. Merritt, 7 Minn. 159(102); Folsom v. Chisago County, 28 Minn. 324, 9 N. W. 881.

[34] Johnson v. Howard, 20 Minn. 370 (322); Bergmeier v. Eisenmenger, 59 Minn. 175, 60 N. W. 1097.

[35] Johnson v. Howard, 20 Minn. 370 (322); Biron v. Board of Water Commissioners, 41 Minn. 519, 43 N. W. 482; Mosness v. German Am. Ins. Co., 50 Minn. 341, 52 N. W. 932. See, however, Andreas v. Holcombe, 22 Minn. 339, holding that an allegation in a complaint that plaintiff "has fully performed all the terms and conditions of said contract to be done and performed by him in accordance therewith" was a sufficient averment of the doing of the things required to render the promise obligatory.

[36] Taylor v. Marcum, 60 Minn. 292, 62 N. W. 330; Hudson Cos. v. Briemer, 113 N. Y. S. 997.

[37] Hand v. National Live-stock Ins. Co., 57 Minn. 519, 59 N. W. 538; Rowe v. Gerry, 83 N. Y. S. 740; Victors v. Nat. Pro. Union, 99 N. Y. S. 299. See §§ 339, 593, 685.

[38] Wilson v. Clarke, 20 Minn. 367 (318); Johnson v. Howard, 20 Minn. 370(322); Biron v. Board of Water Commissioners, 41 Minn. 519, 43 N. W. 482.

[39] Parr v. Johnson, 37 Minn. 457, 35 N. W. 176; Mosness v. German Am. Ins. Co., 50 Minn. 341, 52 N. W. 932.

[40] Nichols v. Minneapolis, 30 Minn. 545, 16 N. W. 410.

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260. Conditions subsequent—A condition subsequent is a matter of defence and need not be noticed in a complaint.[41] If payment is not to be made if a certain contingency happens it is unnecessary to allege in the complaint the non-happening of the contingency.[42]

261. Demand for relief—The statute requires the complaint to contain "a demand for the relief desired by the plaintiff; and, if a recovery of money be demanded, the amount shall be stated."[43] The demand for relief is no part of the cause of action and is not traversable,[44] or subject to demurrer,[45] but may be referred to in aid of construction.[46] A party cannot recover greater damages than he demands,[47] but this limitation may be avoided by an amendment.[48] If the defendant appears the demand for relief is of slight importance, for the plaintiff may be awarded any relief consistent with the complaint and within the issues actually tried.[49] In case of default the demand for relief becomes of great importance, for then it limits strictly the relief which may be awarded.[50] The demand for relief may be in the alternative.[51] To a specific demand for relief is often added, especially in equitable actions, a general demand, "and for such other and further relief as to the court may seem just" or "and for such other relief as may be just." Such a demand, though not improper, is of no force or effect whatever. If the defendant appears it does not enlarge the relief which may be awarded,[52] and it cannot be made the basis

[41] Shartle v. Minneapolis, 17 Minn. 308(284, 290); Penhall v. Minn. State Medical Assn., 126 Minn. 323, 148 N. W. 472. See § 684.

[42] Root v. Childs, 68 Minn. 142, 70 N. W. 1078; Penhall v. Minn. State Medical Assn., 126 Minn. 323, 148 N. W. 472.

[43] See § 238.

[44] Colstrum v. Minneapolis etc. Ry., 31 Minn. 367, 18 N. W. 94; Hatch v. Coddington, 32 Minn. 92, 19 N. W. 393; Albert Lea v. Knatvold, 89 Minn. 480, 95 N. W. 309; Minneapolis etc. Ry. v. Brown, 99 Minn. 384, 109 N. W. 817; Upton v. Merriman, 122 Minn. 158, 142 N. W. 150.

[45] See § 284.

[46] See § 514.

[47] Elfelt v. Smith, 1 Minn. 125(101); Eaton v. Caldwell, 3 Minn. 134(80); Nichols & Shepard Co. v. Wiedemann, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41; Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

[48] Id.

[49] R. L. 1905 § 4264; G. S. 1913 § 7896. See Dunnell, Minn. Digest, § 5041; Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952. The form of prayer is immaterial after an answer. Bell v. Merrifield, 109 N. Y. 202, 16 N. E. 55; Prout v. Chisolm, 34 N. Y. S. 1066.

[50] See Dunnell, Minn. Digest, § 4996.

[51] Connor v. Board of Ed., 10 Minn. 439(352); Sanborn v. Nockin, 20 Minn. 178(163); Henry v. Meighen, 46 Minn. 548, 49 N. W. 323, 646; Howard v. Erbes, 112 Minn. 479, 128 N. W. 674; Reubens v. Joel, 13 N. Y. 488; Lyke v. Post, 65 How. Pr. (N. Y.) 298; Hiatt v. Parker, 29 Kan. 765.

[52] The court is bound to grant all the relief to which the plaintiff is entitled upon the evidence regardless of his demand for relief. See Dunnell, Minn. Digest, § 5041; Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952. Some of our cases seem to attach some importance to a general prayer, but they are mere survivals of old habits of thought. See Barnes v. Kerlinger, 7 Minn. 82(55); Sanborn v. Nockin, 20 Minn. 178(163). It has

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of any relief whatever on default.[53] The relief demanded may be either legal or equitable or both.[54] The nature of an action and the nature and extent of the relief awarded are determined by the facts alleged and proved and not by the demand for relief.[55] If the facts stated in a complaint constitute a single cause of action a demand for inconsistent forms of relief will not render the pleading demurrable on the ground of a misjoinder of several causes of action.[56] It is a general rule of pleading that a party does not lose the benefit of matter pleaded by asking for it a greater effect than it is entitled to.[57] It is usual to ask for costs, but this is probably unnecessary, at least in legal actions. Disbursements are recoverable in all actions as of right and it is good practice not to ask for them. When special costs are sought they should be demanded in the complaint.[58] The omission of a demand for judgment is not a fatal defect.[59]

been said that a general prayer for relief is always implied. Knight v. Honghtalling, 85 N. C. 17.

[53] Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193, 20 N. W. 85; Prince v. Farrell, 32 Minn. 293, 20 N. W. 234; Sache v. Wallace, 101 Minn. 169, 112 N. W. 386; Staacke v. Bell, 125 Cal. 309, 57 Pac. 1012. See Dunnell, Minn. Digest, § 4996.

[54] See Dunnell, Minn. Digest, § 5041.

[55] Minneapolis etc. Ry. v. Brown, 99 Minn. 384, 109 N. W. 817; Upton v. Merriman, 122 Minn. 158, 142 N. W. 150. See Wildermann v. Donnelly, 86 Minn. 184, 187, 90 N. W. 366.

[56] Colstrum v. Minneapolis etc. Ry., 31 Minn. 367, 18 N. W. 94.

[57] Townsend v. Minneapolis etc. Co., 46 Minn. 121, 124, 48 N. W. 682. See § 284.

[58] Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359.

[59] Burnham etc. Co. v. Hill, 128 Pac. 62 (N. M.).

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CROSS-COMPLAINT

262. In general—A cross-complaint is a suit brought by a defendant against the plaintiff, or against him and a codefendant, to obtain independent relief.[60] A cross-complaint will lie in this state though it is not expressly authorized by statute. The order granting leave to file a cross-complaint should provide for the service of the complaint on all the parties against whom it is directed, and they should answer it.[61] The cause of action which one defendant may set up against his codefendant by a cross-complaint must be one arising out of, or having reference to, the subject of the original action.[62]

[60] Spooner v. Bay St. Louis Syndicate, 47 Minn. 464, 50 N. W. 601.

[61] Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 Minn. 386, 67 N. W. 217; Pine Tree Lumber Co. v. McKinley, 82 Minn. 419, 86 N. W. 414. See Spooner v. Bay St. Louis Syndicate, 47 Minn. 464, 50 N. W. 601; Howe v. Spalding, 50 Minn. 157, 52 N. W. 527; Jewett v. Iowa Land Co., 64 Minn. 531, 67 N. W. 639; Palmer v. Bank of Zumbrota, 65 Minn. 90, 67 N. W. 893; Sturtevant etc. Co. v. Mast etc. Co., 66 Minn. 437, 69 N. W. 324; Maxwell v. Northern Trust Co., 70 Minn. 334, 73 N. W. 173.

[62] American Exchange Bank v. Davidson, 69 Minn. 319, 72 N. W. 129.

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DEMURRER

263. To complaint—Grounds—Statute—Within the time allowed by law for answering the complaint, the defendant may demur thereto if it shall appear therefrom either:

1. That the court has not jurisdiction of the defendant's person or of the subject of the action;

2. That the plaintiff has not legal capacity to sue;

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

4. That there is a defect of parties, plaintiff or defendant;

5. That several causes of action are improperly united;

6. That the facts stated do not constitute a cause of action.[63]

264. Definition—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.[64] The word is derived from the Latin demorari, or old French demorer, demurer, to "wait" or "stay" and imports that the objecting party will not proceed with the pleading, because no sufficient statement has been made on the other side, but will wait the judgment of the court whether he is bound to answer.[65] A demurrer is not an "answer" within the statute relating to the relief allowable if there is no answer.[66]

265. Utility—The demurrer as a separate pleading has been abolished in England and there is no substantial reason why it should be continued here.[01] It would be very easy to provide a substitute which would be equally effective and incapable of being used for purposes of delay. The legislature of 1913 made a start in the right direction by abolishing the demurrer to a reply.

266. Must be separate pleading—A party cannot at the same time demur and answer to the same matter. A demurrer must be a separate pleading. It cannot be inserted in an answer.[67] This is a survival of the old common-law rule and has no rational justification. In England a party may reserve a question of law in an answer.[68]

267. Effect—Raises issue of law—A demurrer raises an issue of law for the determination of the court. As the word itself implies, when a demurrer

[63] R. L. 1905 § 4128; G. S. 1913 § 7754.

[64] See Bouvier, Law Dict.; Stephen, Pl. 140; 1 Chitty, Pl. 16 Am. ed., 693.

[65] Century Dict.; Heard, Civil Pl. 49.

[66] Kelly v. Downing, 42 N. Y. 71.

[01] See Hepburn, Development of Code Pleading, §§ 262, 263.

[67] Lace v. Fixen, 39 Minn. 46, 38 N. W. 762; Cashman v. Reynolds, 123 N. Y. 141, 25 N. E. 162.

[68] See Hepburn, Development of Code Pleading, §§ 278, 280.

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is served, all other proceedings in the action stop until the question of law raised thereon is decided.[69]

268. Nature and scope—Common-law and code practice compared—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. 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.[70]

269. Statutory grounds exclusive—A demurrer will not lie except on the grounds specified in the statute.[71]

270. Defect must appear on face of pleading—It is a fundamental and invariable rule that demurrer will not lie except for defects apparent on the face of the pleading to which it is directed.[72]

271. Admits material facts well pleaded—A demurrer admits all the material facts well pleaded in the pleading to which it is directed. The facts are

[69] Porter v. Fletcher, 25 Minn. 493, 495; Knoblauch v. Foglesong, 38 Minn. 459, 38 N. W. 366; Cashman v. Reynolds, 123 N. Y. 141, 25 N. E. 162. See Deuel v. Hawke, 2 Minn. 50(37, 43).

[70] Stephen, Pl. 140; 1 Chitty, Pl. 16 Am. ed., 693; Pomeroy, Remedies, § 596; Bliss, Code Pl. § 404; Bryant, Code Pl. § 158; Marie v. Garrison, 83 N. Y. 14.

[71] Seager v. Burns, 4 Minn. 141(93); Powers v. Ames, 9 Minn. 178(164); Reynolds v. La Crosse etc. Co., 10 Minn. 178(144); Campbell v. Jones, 25 Minn. 155; Leuthold v. Young, 32 Minn. 122, 124, 19 N. W. 652; C. N. Nelson Lumber Co. v. Pelan, 34 Minn. 243, 25 N. W. 406; Freeman v. Paulson, 107 Minn. 64, 119 N. W. 651. See § 284.

[72] Powers v. Ames, 9 Minn. 178(164); Reynolds v. La Crosse etc. Co., 10 Minn. 178(144); Minneapolis Harvester Works v. Libby, 24 Minn. 327; Bell v. Mendenhall, 71 Minn. 331, 337, 73 N. W. 1086; Mendenhall v. Duluth Dry Goods Co., 72 Minn. 312, 75 N. W. 232; Everett v. O'Leary, 90 Minn. 154, 95 N. W. 901;

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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 from denying them or avoiding their effect by new matter.[73] A demurrer admits all necessary inferences or conclusions of law, whether stated or not, which follow from facts well pleaded. In other words it admits the whole of the pleading to which it is interposed according to its legal effect.[74] It also admits inferences of fact which may fairly and reasonably be drawn from the facts expressly pleaded.[75] It does not admit bare conclusions of law,[76] or facts not well pleaded.[77] It admits only material or issuable facts.[78] It does not admit any construction put upon the facts by the pleader. A demurrer is to be determined by the facts alleged and not by the pleader's theory thereof.[79] Allegations of foreign law contained in a pleading are not admitted by a demurrer thereto.[80] Allegations in an exhibit attached to and made a part of a pleading are admitted.[81]

272. To whole of pleading—A demurrer must be good to the whole extent to which it is interposed. It cannot be good in part and bad in part. If it is interposed to a whole pleading, and such pleading contains at least one good cause of action or defence, it is bad.[82]

Peterson v. Steenerson, 113 Minn. 87, 129 N. W. 147; Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

[73] Nininger v. Carver County, 10 Minn. 133(106); Cowley v. Davidson, 10 Minn. 392(314); Baker v. N. W. Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464; St. Paul Land Co. v. Dayton, 37 Minn. 364, 34 N. W. 335; Reiser v. Gigrich, 59 Minn. 368, 61 N. W. 30; Birch v. Security Savings & Loan Assn., 71 Minn. 112, 73 N. W. 513; Sacks v. Minneapolis, 75 Minn. 30, 77 N. W. 563; Kosmerl v. Snively, 85 Minn. 228, 88 N. W. 753; Sorenson v. Carey, 96 Minn. 202, 104 N. W. 958; Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947; Wessel v. Wessel Mfg. Co., 106 Minn. 66, 118 N. W. 157; Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333; Hawkins v. Langum, 115 Minn. 100, 131 N. W. 1014; Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

[74] Baker v. N. W. Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464; Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947; Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490. See Pond v. Carpenter, 12 Minn. 430(315).

[75] Wessel v. Wessel Mfg. Co., 106 Minn. 66, 118 N. W. 157; Vukelis v. Virginia Land Co., 107 Minn. 68, 119 N. W. 509; First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296; Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871; Clark v. West, 193 N. Y. 349, 86 N. E. 1. See §§ 278, 517.

[76] Griggs v. St. Paul, 9 Minn. 246 (231).

[77] Chouteau v. Rice, 1 Minn. 106(83, 90); Johnson v. Howard, 20 Minn. 370 (322).

[78] Kittinger v. Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081.

[79] Greef v. Equitable etc. Soc., 160 N. Y. 19, 54 N. E. 712. See §§ 244, 278. Where a written contract is set out in haec verba a demurrer thereto does not admit any construction put upon it by the pleader, nor the correctness of any inference drawn by him from the facts alleged. Hamilton Trust Co. v. Shevlin, 141 N. Y. S. 232.

[80] Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77 N. E. 877.

[81] Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868.

[82] Miller v. Rouse, 8 Minn. 124(97); Armstrong v. Hinds, 9 Minn. 356(341);

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273. To part of pleading—A demurrer will only lie to a whole pleading or to the whole of a single cause of action or defence.[83] It will lie to a single cause of action or defence though not separately stated.[84]

274. To amended complaint—A defendant may demur to an amended complaint on the ground that it does not state a cause of action, though that ground was not assigned on demurrer to the original complaint.[85] On such a demurrer the original complaint will not be considered.[86]

275. Joint—If several parties join in a demurrer it must be overruled if the pleading against which it is directed is good as to any of the demurrants.[87]

276. Reaches first defective pleading—As a general rule a demurrer searches the whole record and reaches the first pleading defective in substance. On a demurrer to an answer or reply the sufficiency of the complaint may generally be questioned. A demurrant, in effect, asks the court to give judgment in his favor on the record and hence the court will consider the whole record and give judgment accordingly.[88] Whether this rule applies where by the answer the complaint has become the subject of an issue of fact is an open question in this state.[89] In New York, on a demurrer to a counterclaim, the

Winona etc. Ry. v. St. Paul etc. Ry., 26 Minn. 179, 2 N. W. 489; First Nat. Bank v. How, 28 Minn. 150, 9 N. W. 626; Grant v. Grant, 53 Minn. 181, 54 N. W. 1059; American Building & Loan Assn. v. Stoneman, 53 Minn. 212, 54 N. W. 1115; Vaule v. Steenerson, 63 Minn. 110, 65 N. W. 257; Gammons v. Johnson, 69 Minn. 488, 72 N. W. 563; A. E. Johnson Co. v. White, 78 Minn. 48, 80 N. W. 838; Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1.

[83] Bass v. Upton, 1 Minn. 408(292); Daniels v. Bradley, 4 Minn. 158(105); Armstrong v. Hinds, 9 Minn. 356(341); Palmer v. Smith, 21 Minn. 419; Knoblauch v. Foglesong, 38 Minn. 459, 38 N. W. 366; Pratt v. Sparkman, 42 Minn. 448, 44 N. W. 663; Dean v. Howard, 49 Minn. 350, 51 N. W. 1102; Steenerson v. Great Northern Ry., 64 Minn. 216, 66 N. W. 723. See Seibert v. Minneapolis etc. Ry., 52 Minn. 148, 53 N. W. 1134.

[84] Bass v. Upton, 1 Minn. 408(292); Anderson v. Scandia Bank, 53 Minn. 191, 54 N. W. 1062.

[85] Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

[86] Robert v. Hefner, 81 Neb. 460, 116 N. W. 36.

[87] Clark v. Lovering, 37 Minn. 120, 33 N. W. 776; Petsch v. Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034; Palmer v. Bank of Zumbrota, 65 Minn. 90, 67 N. W. 893; Johnson v. Velve, 86 Minn. 46, 90 N. W. 126; Howley v. Scott, 123 Minn. 159, 143 N. W. 257. See Lewis v. Williams, 3 Minn. 151(95); Goncelier v. Foret, 4 Minn. 13(1).

[88] Loomis v. Youle, 1 Minn. 175(150); Smith v. Mulliken, 2 Minn. 319(273); Yoss v. DeFreudenrich, 6 Minn. 95(45); Stratton v. Allen, 7 Minn. 502(409); Lockwood v. Bigelow, 11 Minn. 113 (70); First Nat. Bank v. Howe, 28 Minn. 150, 9 N. W. 626; Townsend v. Fenton, 30 Minn. 528, 66 N. W. 421; Bausman v. Woodman, 33 Minn. 512, 24 N. W. 198; Brown v. Baker, 65 Minn. 133, 67 N. W. 793; Dwinnell v. Kramer, 87 Minn. 392, 92 N. W. 227; Hanson v. Byrnes, 96 Minn. 50, 104 N. W. 762; Branton v. McLaughlin, 109 Minn. 244, 128 N. W. 808; Keith v. Keith, 112 Minn. 183, 127 N. W. 567; Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777; Hirsch v. St. Paul, 117 Minn. 476, 136 N. W. 269; Bond v. Penn. Ry., 124 Minn. 195, 144 N. W. 942.

[89] Hanson v. Byrnes, 96 Minn. 50, 104

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sufficiency of the complaint will not be considered.[90] On demurrer to special defences in a reply to a counterclaim the sufficiency of the counterclaim will be considered.[91] The only defects of substance within the rule are want of jurisdiction of the subject-matter and insufficiency of the facts alleged to constitute a cause of action.[92]

277. Grounds must be specified—The statute provides that unless a demurrer distinctly specifies the grounds of objection it may be disregarded.[93] A general demurrer to a pleading to the effect that it does not state facts sufficient to constitute a cause of action or defence is sufficient without further specification.[94] A party may specify as many of the statutory grounds as he desires, but he is limited to those specified.[95] The ground of objection cannot be shifted on appeal.[96] A demurrer for defect of parties must point out the defect and name the persons omitted.[97]

278. For insufficiency of the facts to state a cause of action—General demurrer—A demurrer on the ground that a pleading does not state facts sufficient to constitute a cause of action or defence is called a general demurrer.[98] If a complaint, liberally construed, states facts entitling the plaintiff to any relief, either legal or equitable, it is not subject to a general demurrer, though the plaintiff misconceived the nature of his cause of action and demanded inappropriate relief.[99] The test of a complaint on general demurrer is not whether it states the precise cause of action intended, or whether the pleader appreciated the nature of his remedy, or asked for appropriate relief, but whether the facts stated, expressly and inferentially, giving to the language the benefit of all reasonable intendments, show the plaintiff entitled to some judicial relief.[1] A general demurrer to a complaint, however well the allega-

N. W. 762; Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777. See Note, 26 L. R. A. (N. S.) 166.

[90] Fulton County etc. Co. v. Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052.

[91] Fehlinger v. Boos, 118 N. Y. S. 167.

[92] Stratton v. Allen, 7 Minn. 502(409); Lockwood v. Bigelow, 11 Minn. 113 (70); Hanson v. Byrnes, 96 Minn. 50, 104 N. W. 762.

[93] R. L. 1905 § 4129; G. S. 1913 § 7755; Powers v. Ames, 9 Minn. 178(164).

[94] Monette v. Cratt, 7 Minn. 234(176).

[95] Seager v. Burns, 4 Minn. 141(93); Powers v. Ames, 9 Minn. 178(164); Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Rossman v. Mitchell, 73 Minn. 198, 75 N. W. 1053; Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

[96] Northwestern Railroader v. Prior, 68 Minn. 95, 70 N. W. 869.

[97] See § 121.

[98] See § 268.

[99] Canty v. Latterner, 31 Minn. 239, 17 N. W. 385; Leuthold v. Young, 32 Minn. 122, 19 N. W. 652; Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030; Bay View Land Co. v. Myers, 62 Minn. 265, 64 N. W. 816; Kenaston v. Lorig, 81 Minn. 454, 84 N. W. 323; Lovering v. Webb Publishing Co., 106 Minn. 62, 118 N. W. 61; Vukelis v. Virginia Lumber Co., 107 Minn. 68, 119 N. W. 509; Mogren v. Finley, 112 Minn. 453, 128 N. W. 828; Venner v. Great Northern Ry., 117 Minn. 447, 136 N. W. 271; and cases under §§ 244, 517.

[1] Hall v. Bell, 143 Wis. 296, 127 N. W.

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tions thereof may be stated, raises the question whether the facts pleaded entitle the plaintiff to the relief demanded or any relief.[2] Under a general demurrer the following objections, if they appear on the face of the complaint, may be raised: That the complaint does not state facts constituting a cause of action against the defendant and in favor of the plaintiff, though it may state a cause of action between others;[3] a former adjudication;[4] that the action is barred by the statute of limitations;[5] laches;[6] contributory negligence;[7] assumption of risk;[8] that the action is prematurely brought;[9] that the contract alleged is void under the statute of frauds;[10] a failure to plead a foreign statute;[11] the fact that a person was a bona fide purchaser;[12] that the facts alleged do not authorize equitable relief;[13] misjoinder of parties;[14] that the plaintiff has an adequate remedy at law;[15] that the allegations are in the alternative;[16] that the contract sued upon is void.[17] The following objections cannot be raised under a general demurrer: Want of legal capacity or authority to sue;[18] misjoinder of causes of action;[19] defect of parties;[20] want of jurisdiction of the subject-matter;[21] inconsistency between the relief to which the complaint entitles the plaintiff and the prayer in the summons;[22] want of authority in a court to appoint receivers.[23]

967; Laun v. Kipp, 155 Wis. 347, 145 N. W. 183. See Minnesota cases under §§ 244, 517.

[2] Basting v. Minneapolis, 112 Minn. 306, 127 N. W. 1131.

[3] Rossman v. Mitchell, 73 Minn. 198, 75 N. W. 1053.

[4] Monette v. Cratt, 7 Minn. 234(176).

[5] See § 729.

[6] Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882. See § 694.

[7] See § 817.

[8] See § 741.

[9] Iselin v. Simon, 62 Minn. 128, 64 N. W. 143.

[10] Wentworth v. Wentworth, 2 Minn. 277(238); Wilson v. Schnell, 20 Minn. 40(33); Russell v. Wisconsin etc. Ry., 39 Minn. 145, 39 N. W. 302.

[11] Myers v. Chicago etc. Ry., 69 Minn. 476, 72 N. W. 694.

[12] Newton v. Newton, 46 Minn. 33, 48 N. W. 450.

[13] Sanborn v. Eads, 38 Minn. 211, 36 N. W. 338; Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902; Basting v. Minneapolis, 112 Minn. 306, 127 N. W. 1131.

[14] See § 123.

[15] Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902. See Canty v. Latterner, 31 Minn. 239, 17 N. W. 385; Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

[16] Anderson v. Minneapolis etc. Ry., 103 Minn. 224, 114 N. W. 1123.

[17] Bjelland v. Mankato, 112 Minn. 24, 127 N. W. 397.

[18] Gould v. Sub. Dist., 7 Minn. 203 (145); Soule v. Thelander, 31 Minn. 227, 17 N. W. 373; Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831; Rossman v. Mitchell, 73 Minn. 198, 75 N. W. 1053; Palmer v. Roods, 101 N. Y. S. 186. See Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

[19] Smith v. Jordan, 13 Minn. 264 (246).

[20] Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4.

[21] Powers v. Ames, 9 Minn. 178(164); Benson v. Silvey, 59 Minn. 73, 60 N. W. 847. See Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

[22] Freeman v. Paulson, 107 Minn. 64, 119 N. W. 651.

[23] Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

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279. For want of jurisdiction—A demurrer will lie for want of jurisdiction of the person of the defendant,[24] or of the subject-matter of the action.[25]

280. For defect of parties—A demurrer for defect of parties must state specifically wherein the defect consists and name the parties omitted.[26] Such a demurrer is not a substitute for the common-law plea in abatement. Where a complaint shows a cause of action to have accrued to plaintiff and others jointly, a demurrer for the non-joinder of such others will lie, though the complaint does not show that they are alive.[27] The defect of parties must affirmatively appear on the face of the pleading.[28] An excess of parties is not a ground for demurrer as a defect of parties.[29]

281. For want of capacity to sue—To sustain a demurrer for want of capacity to sue it is not enough that such want does not appear; it is essential that it should appear affirmatively.[30]

282. For pendency of another action—The pendency of another action between the same parties is ground for demurrer when it appears on the face of the complaint.[31]

283. For misjoinder of causes of action—The proper remedy for a misjoinder of causes of action is a demurrer on that ground, if the defect appears on the face of the pleading.[32] A general demurrer does not cover the objection.[33] All the defendants need not join in a demurrer.[34] If the facts stated in a complaint constitute a single cause of action, a demand for inconsistent forms of relief does not render the pleading demurrable on the ground of a misjoinder of causes of action.[35] A complaint containing a statement of facts entitling the plaintiff to some relief is not demurrable, as improperly joining two causes of action, because alternative relief is demanded.[36] A demurrer on this ground should be sustained if the pleader has attempted to set forth causes

[24] Reynolds v. La Crosse etc. Co., 10 Minn. 178(144).

[25] Powers v. Ames, 9 Minn. 178(164); Benson v. Silvey, 59 Minn. 73, 60 N. W. 847; Sullivan v. Minneapolis etc. Ry., 121 Minn. 488, 142 N. W. 3 (jurisdiction of state court—interstate commerce).

[26] Jaeger v. Sunde, 70 Minn. 356, 73 N. W. 171; Anderson v. Dyer, 94 Minn. 30, 101 N. W. 1061; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751.

[27] Porter v. Fletcher, 25 Minn. 493.

[28] Mendenhall v. Duluth Dry Goods Co., 72 Minn. 312, 75 N. W. 232.

[29] Hoard v. Clum, 31 Minn. 186, 17 N. W. 275.

[30] State v. Torinus, 22 Minn. 272; Minneapolis Harvester Works v. Libby, 24 Minn. 327; Soule v. Thelander, 31 Minn. 227, 17 N. W. 373; Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831; Lehigh Valley Coal Co., v. Gilmore, 93 Minn. 432, 101 N. W. 796.

[31] Coles v. Yorks, 31 Minn. 213, 17 N. W. 341; Somers v. Dawson, 86 Minn. 42, 90 N. W. 119.

[32] See § 207.

[33] Smith v. Jordan, 13 Minn. 264 (246).

[34] Trowbridge v. Forepaugh, 14 Minn. 133(100).

[35] Colstrom v. Minneapolis etc. Ry., 31 Minn. 367, 18 N. W. 94.

[36] Howard v. Erbes, 112 Minn. 479, 128 N. W. 674.

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of action which cannot be joined. It is not necessary that the causes of action attempted to be joined should be sufficiently alleged.[37]

284. Defects for which demurrer will not lie—A demurrer will not lie because the complaint demands the wrong relief,[38] or inconsistent relief,[39] or greater relief than the facts alleged warrant.[40] It will not lie for a defect in the allegation of damages;[41] or for misjoinder or excess of parties defendant;[42] or for indefiniteness;[43] or for redundancy;[44] or for non-existence of the facts

[37] Witherbee v. Bowles, 201 N. Y. 427, 95 N. E. 27.

[38] Connor v. Board of Ed., 10 Minn. 439(352); Metzner v. Baldwin, 11 Minn. 150(92); First Div. etc. Ry. v. Rice, 25 Minn. 278; Canty v. Latterner, 31 Minn. 239, 17 N. W. 385; Leuthold v. Young, 32 Minn. 122, 19 N. W. 652; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Dye v. Forbes, 34 Minn. 13, 24 N. W. 309; Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75, 30 N. W. 440; Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030; Crosby v. Timolat, 50 Minn. 171, 52 N. W. 526; Payne v. Loan & Guaranty Co., 54 Minn. 255, 55 N. W. 1128; Bay View Land Co. v. Myers, 62 Minn. 265, 64 N. W. 816; Rule v. Omega Stove & Grate Co., 64 Minn. 326, 67 N. W. 60; Morey v. Duluth, 69 Minn. 5, 71 N. W. 694; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Kenaston v. Lorig, 81 Minn. 454, 84 N. W. 323; Albert Lea v. Knatvold, 89 Minn. 480, 95 N. W. 309; Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751; Lovering v. Webb Publishing Co., 106 Minn. 62, 118 N. W. 61.

[39] Connor v. Board of Ed., 10 Minn. 439(352); Metzner v. Baldwin, 11 Minn. 150(92); Colstrom v. Minneapolis etc. Ry., 31 Minn. 367, 18 N. W. 94; Leuthold v. Young, 32 Minn. 122, 19 N. W. 652.

[40] Lockwood v. Bigelow, 11 Minn. 113 (70); First Div. etc. Ry. v. Rice, 25 Minn. 278; Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 59 N. W. 822; Minneapolis etc. Ry. v. Brown, 99 Minn. 384, 109 N. W. 817; Mogren v. Finley, 112 Minn. 453, 128 N. W. 828.

[41] Cowley v. Davidson, 10 Minn. 392 (314); Partridge v. Blanchard, 23 Minn. 69; Steenerson v. Great Northern Ry., 64 Minn. 216, 66 N. W. 723.

[42] Lewis v. Williams, 3 Minn. 151 (95); Goncelier v. Foret, 4 Minn. 13 (1); Hoard v. Clum, 31 Minn. 186, 17 N. W. 275.

[43] Chouteau v. Rice, 1 Minn. 106(83); Nininger v. Carver County, 10 Minn. 133(106); Dewey v. Leonard, 14 Minn. 153(120); Spottswood v. Herrick, 22 Minn. 548; Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75; Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357; Snowberg v. Nelson-Spencer Paper Co., 43 Minn. 532, 45 N. W. 1131; American Book Co. v. Kingdom Publishing Co., 71 Minn. 363, 73 N. W. 1089; Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868; Smith v. Great Northern Ry., 92 Minn. 11, 99 N. W. 47; Anderson v. Minneapolis etc. Ry., 103 Minn. 224, 114 N. W. 1123; Matteson v. U. S. etc. Co., 103 Minn. 407, 115 N. W. 195; Blunt v. Egeland, 104 Minn. 351, 116 N. W. 653; Lovering v. Webb Publishing Co., 106 Minn. 62, 118 N. W. 61; Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922; Rasmussen v. Hutchinson, 111 Minn. 457, 127 N. W. 182; Kuhl v. U. S. etc. Co., 112 Minn. 197, 127 N. W. 628; Urbas v. Duluth etc. Ry., 113 Minn. 309, 129 N. W. 513; Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716.

[44] Loomis v. Youle, 1 Minn. 175(150); Fish v. Berkey, 10 Minn. 199(161); Urbas v. Duluth etc. Ry., 113 Minn. 309, 129 N. W. 513.

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alleged;[45] or for suing by initials;[46] or for failure to state several causes of action separately;[47] or for irrelevancy;[48] or for repugnancy;[49] or for a defect in a verification;[50] or for failure to obtain leave of court to sue;[51] or for bringing an action in the wrong county;[52] or because plaintiff's remedy is in equity;[53] or because the summons is not served on a codefendant;[54] or because several counterclaims are not stated separately;[55] or for a discrepancy between the relief to which the complaint entitles the plaintiff and the prayer in the summons;[56] or to determine a moot controversy;[57] or for failure to amend the title when parties are impleaded;[58] or to a general denial.[59]

285. Hearing—Notice and place—An issue of law arising upon a demurrer may be noticed for hearing before the court in the county wherein the action is pending at any time, whether it be at a term of the court or not.[60]

286. Effect of sustaining a demurrer—Judgment—When a demurrer to a complaint is sustained, without leave to amend, the defendant is entitled to a judgment of dismissal with costs.[61] An order sustaining a demurrer to a complaint is of no effect as determining the law of the case after the service of an amended complaint.[62]

287. Amendment after demurrer is sustained—When a demurrer is sustained it is left to the discretion of the trial court to allow the party to amend his pleading upon proper terms. In ordinary cases an amendment is allowed as a matter of course if the defect is remediable by amendment.[63] The su-

[45] Williams v. Langevin, 40 Minn. 180, 41 N. W. 936; Royal Ins. Co. v. Clark, 61 Minn. 476, 63 N. W. 1029; Stevens v. Staples, 64 Minn. 3, 65 N. W. 959.

[46] Gardner v. McClure, 6 Minn. 250 (167).

[47] Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Newell v. How, 31 Minn. 235, 17 N. W. 383.

[48] Fish v. Berkey, 10 Minn. 199(161); Erickson v. Child, 87 Minn. 487, 92 N. W. 1130.

[49] Urbas v. Duluth etc. Ry., 113 Minn. 309, 129 N. W. 513.

[50] McMath v. Parsons, 26 Minn. 246, 2 N. W. 703.

[51] Leuthold v. Young, 32 Minn. 122, 19 N. W. 652; Litchfield v. McDonald, 35 Minn. 167, 28 N. W. 191; McCollister v. Bishop, 78 Minn. 228, 80 N. W. 1118.

[52] Tullis v. Brawley, 3 Minn. 277 (191); Merrill v. Shaw, 5 Minn. 148 (113); Nininger v. Carver County, 10 Minn. 133(106); Gill v. Bradley, 21 Minn. 15. See Kipp v. Cook, 46 Minn. 535, 49 N. W. 257; Smith v. Barr, 76 Minn. 513, 79 N. W. 507.

[53] Benson v. Silvey, 59 Minn. 73, 60 N. W. 847; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086.

[54] St. Paul Land Co. v. Dayton, 37 Minn. 364, 34 N. W. 335.

[55] Campbell v. Jones, 25 Minn. 155.

[56] Freeman v. Paulson, 107 Minn. 64, 119 N. W. 651.

[57] Kuhl v. U. S. etc. Co., 112 Minn. 197, 127 N. W. 628.

[58] Richardson v. McLaughlin, 55 Minn. 489, 57 N. W. 210.

[59] Henry v. White, 121 Minn. 527, 140 N. W. 1034. See § 291.

[60] Johnson v. Velve, 86 Minn. 46, 90 N. W. 126.

[61] Deuel v. Hawke, 2 Minn. 50(37, 43); Aetna Ins. Co. v. Swift, 12 Minn. 437(326).

[62] First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101.

[63] R. L. 1905 § 4156; G. S. 1913 § 7782.

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preme court will rarely allow an amendment upon sustaining a demurrer, but will leave it to the trial court to grant or refuse leave to amend after the case is remanded.[64] If a party amends his pleading after demurrer he cannot thereafter question the decision on the demurrer.[65] But an application to be allowed to amend which is denied is not a waiver.[66] A right to amend may be waived.[67]

288. Appeal from order sustaining demurrer disfavored—Unless the decision on demurrer involves the plaintiff's right of action under any complaint which the facts would warrant, it is ordinarily advisable for him to amend his complaint to conform to the views of the trial court rather than to appeal. The supreme court strongly disfavors appeals where the defect is technical and remediable by amendment—where the complaint is predicated on an actionable wrong but is defective in its allegations.[68] An appeal from a judgment entered upon demurrer, after leave to amend is denied, carries up for review the order sustaining the demurrer, as well as that denying leave to amend.[69]

289. Effect of overruling a demurrer—Judgment—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 judgment on his complaint for all the relief demanded therein, as in case of default.[70]

290. Pleading over—A demurrant has no absolute right to withdraw his demurrer and plead over after it is overruled. The trial court has discretionary power in the matter and in allowing a party to plead over it may impose reasonable conditions.[71] If a demurrant desires to plead over he should ask leave.[72] Ordinarily leave is granted as of course.[73] When a party

[64] Farley v. Kittson, 27 Minn. 102, 6 N. W. 450, 7 N. W. 267; Haven v. Place, 28 Minn. 551, 11 N. W. 117.

[65] Becker v. Sandusky City Bank, 1 Minn. 311(243).

[66] Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

[67] Aetna Ins. Co. v. Swift, 12 Minn. 437(326).

[68] Benton v. Schulte, 31 Minn. 312, 17 N. W. 621; Cordill v. Minnesota Elevator Co., 89 Minn. 442, 95 N. W. 306; Martin v. Great Northern Ry., 110 Minn. 118, 124 N. W. 825; Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450.

[69] Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

[70] R. L. 1905 § 4186; G. S. 1913 § 7816; Deuel v. Hawke, 2 Minn. 50(37, 43); Daniels v. Bradley, 4 Minn. 158(105).

[71] R. L. 1905 § 4156; G. S. 1913 § 7782; Denton v. Scully, 26 Minn. 325, 4 N. W. 41 (leave to plead over granted on condition that the action be placed on the calendar for trial at the then present term of court); Flaherty v. Minneapolis etc. Ry., 39 Minn. 328, 40 N. W. 160 (id.); Potter v. Holmes, 74 Minn. 508, 77 N. W. 416 (trial court held to have abused its discretion in refusing leave); Feters v. Needham etc. Co., 109 N. Y. S. 572.

[72] Potter v. Holmes, 72 Minn. 153, 75 N. W. 591.

[73] Hentz v. Havenmeyer, 116 N. Y. S. 317. See Potter v. Holmes, 74 Minn. 508, 77 N. W. 416.

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withdraws his demurrer and pleads over he cannot thereafter question the decision on the demurrer.[74] 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 from questioning the decision of the court on the demurrer. He must raise his objection in another form, as, for example, by answer or a motion on the trial for a dismissal.[75] The fact that a defendant interposed a general demurrer to a complaint does not, when the demurrer is withdrawn and leave to answer is given, preclude defendant from setting up any facts which he might originally have set up by answer. The demurrer in such case forms no part of the record and defendant may raise any objection to the maintenance of the action which he does not waive by answering.[76]

291. Demurrer to answer—Statute—The statute provides that "the plaintiff, within twenty days after the answer is served, may demur thereto, or to any counterclaim or defence pleaded therein, upon the ground that the same does not state facts sufficient to constitute a defence or a counterclaim, as the case may be; and he may demur to one or more of such defences or counterclaims, and reply to the remainder."[77] The statute provides but one ground of demurrer to an answer, but under that ground the objection may be raised that a counterclaim cannot be determined without the presence of other parties.[78] That a cause of action pleaded as a counterclaim is not a proper subject of counterclaim is ground for demurrer.[79] If any one of the counterclaims or defences stated in an answer is good a general demurrer to the whole answer is properly overruled.[80] An answer not containing new matter but consisting only of denials is not subject to demurrer.[81] Where new matter is set up in an answer which is demurred to, all the allegations of the complaint and answer are to be taken as true for the purposes of the demurrer. Where an answer is demurred to, the allegations of the complaint referred to in the answer are to be treated as incorporated in the answer for the purposes of the demurrer.[82]

[74] Coit v. Waples, 1 Minn. 134(110); Thompson v. Ellenz, 58 Minn. 301, 59 N. W. 1023; Cook v. Kittson, 68 Minn. 474, 71 N. W. 670; Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 244, 125 N. W. 115.

[75] See Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 244, 125 N. W. 115.

[76] McCargo v. Jergens, 206 N. Y. 363, 99 N. E. 838.

[77] R. L. 1905 § 4134; Laws 1913 c. 54; G. S. 1913 § 7760.

[78] Campbell v. Jones, 25 Minn. 155.

[79] Campbell v. Jones, 25 Minn. 155; Walker v. Johnson, 28 Minn. 147, 9 N. W. 632; Lace v. Fixen, 39 Minn. 46, 38 N. W. 762.

[80] See § 272.

[81] C. N. Nelson Lumber Co. v. Pelan, 34 Minn. 243, 25 N. W. 406. See § 284.

[82] Douglas v. Coonley, 156 N. Y. 521, 51 N. E. 283.

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292. Demurrer to reply—No provision is now made in our statutes for a demurrer to a reply.[83] Prior to 1913 the statute provided that "if the reply be insufficient, the defendant may demur thereto, stating the ground thereof."[84]

[83] See Laws 1913 c. 54; G. S. 1913 § 7760.

[84] R. L. 1905 § 4134. See Bausman v. Branton v. McLaughlin, 109 Minn. 244, Woodman, 33 Minn. 512, 24 N. W. 198; 123 N. W. 808.

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ANSWER

293. Contents—Statute—The answer shall contain:

1. A denial of each allegation of the complaint controverted by the defendant, or an averment that he has not knowledge or information thereof sufficient to form a belief.

2. A statement, in ordinary and concise language, of any new matter constituting a counterclaim or defence.

3. All equities in favor of the defendant existing at the time of the commencement of the action, or afterwards and before the service of the answer. If the same be admitted or the issue thereon be determined in favor of the defendant, he shall be entitled to such relief as the nature of the case demands.[85]

294. Same—Counterclaims—The pleading of a counterclaim shall not be construed as an admission of any cause of action alleged in the complaint. Such 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, and must be:

1. A cause of action arising out of the contract or transaction pleaded in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action; or

2. In an action arising on contract, another cause of action arising also on contract, and existing when the action was begun.[86]

295. Same—Pleading several defences or counterclaims—The defendant may set forth by answer as many defences and counterclaims as he has. They shall be separately stated, and so framed as to show the cause of action to which each is intended to be opposed. He may also demur to one or more of several causes of action in the complaint and answer to the remainder.[87]

296. Nature and function—In response to a complaint the defendant must either demur or answer or suffer a default. He cannot demur and answer in the same pleading.[88] The primary function of an answer is to apprise the plaintiff of the particular allegations of the complaint which the defendant controverts and puts in issue and what defences or counterclaims he intends to assert on the trial.[89] The form or nature of the allegations of the complaint determines the nature of the answer.[90] The answer of code pleading is a substitute for the plea in the common-law system and of the answer in equity. It is a radical departure in that it allows the defendant to

[85] R. L. 1905 § 4130; G. S. 1913 § 7756.
[86] R. L. 1905 § 4131; G. S. 1913 § 7757.
[87] R. L. 1905 § 4132; G. S. 1913 § 7758.
[88] See § 266.
[89] Huey v. Pinney, 5 Minn. 310(246, 257); Finley v. Quirk, 9 Minn. 194 (179); Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383; Sorenson v. School Dist., 122 Minn. 59, 141 N. W. 1105.
[90] Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383.

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plead as many defences as he may have, either legal or equitable, and to set up a wholly independent cause of action against the plaintiff upon which he may have affirmative relief.

297. Defence—What constitutes—Whatever tends to diminish a plaintiff's cause of action or to defeat recovery in whole or in part amounts in law to a defence.[91] In New York it is a controverted question whether a denial is a defence,[92] but it is generally so considered.[93]

298. Must be responsive to complaint—An answer must be responsive to the allegations of fact in the complaint and either admit them, or deny them, or set up new matter constituting a counterclaim or defence thereto.[94] A defendant may in his answer allege matters that will be a defence to any cause of action which the plaintiff may prove and recover for within the allegations, though such cause of action may not be of the precise character indicated by all those allegations, and such matter might not be a defence if all such allegations should be proved.[95]

299. Must be complete in itself—An answer must be complete in itself without reference to any other pleading,[96] but it is to be construed with reference to the complaint,[97] and facts alleged in a complaint need not be realleged in a defence thereto.[98]

300. Objections which may not be raised by answer—It is not permissible to object by answer that the action was commenced and prosecuted without authority of the plaintiff;[99] or that the plaintiff has not filed security for costs.[1]

301. Need not anticipate defence—A defendant need not anticipate matter in avoidance of his defence.[2]

302. Arguments improper—It is improper to insert arguments in an answer.[3]

303. Express admissions—It is common practice to insert in an answer express admissions of specified allegations in the complaint, and this is often

[91] Whitfield v. Aetna Life Ins. Co., 205 U. S. 489.

[92] Jaeger v. City of New York, 80 N. Y. S. 356; Stroock Plush Co. v. Talcott, 113 N. Y. S. 214; Staten Island Midland Ry. v. Hinchcliffe, 170 N. Y. 473, 63 N. E. 545.

[93] Pomeroy, Remedies, § 719. See § 329. In passing on the consistency of defences our court has always assumed that a denial was a defence. See § 334.

[94] See §§ 293, 300.

[95] Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352.

[96] Baylis v. Stimson, 110 N. Y. 621, 17 N. E. 144.

[97] See § 518.

[98] Corcoran v. Sumpton, 79 Minn. 108, 81 N. W. 761; Schattman v. Maze Realty Co., 135 N. Y. S. 47.

[99] Hall v. Southwick, 27 Minn. 234, 6 N. W. 799.

[1] Henry v. Bruns, 43 Minn. 295, 45 N. W. 444.

[2] Grum v. Barney, 55 Cal. 254.

[3] Finley v. Quirk, 9 Minn. 194(179, 187); Lewis v. Kendall, 6 How. Pr. (N. Y.) 59.

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desirable. But generally the artistic way to admit an allegation is not to deny it—to omit any reference to it.[4]

304. Joint—All the allegations in a joint answer are to be taken as made by all the parties joining.[5] A joint answer must be good as to all the defendants joining. If it is not good as to all it is bad as to all.[6]

305. Defences must be pleaded separately and numbered—When several defences are pleaded they must be separately stated and plainly numbered.[7] It seems never to have been decided in this state whether denials are defences within this rule, but it is good practice to so treat them.[8] The requirement that several defences shall be separately numbered is not complied with by simply numbering the separate paragraphs of the answer.[9] The proper way to number defences is to introduce them with, "For a first defence," "For a second defence," and so on. To add that each defence is a "separate and distinct defence" is unnecessary and bad form.[10]

306. Facts admitted by failure to deny—Every material allegation of the complaint not controverted by the answer is admitted.[11] Every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse.[12] Non-traversable allegations are not admitted.[13] A defendant need not allege new matter as a defence to facts alleged in the complaint which are in anticipation of a defence.[14]

307. Demand of judgment—When defendant seeks affirmative relief, as upon a counterclaim or equity, he should demand judgment accordingly.[15] But where no affirmative relief is sought there should be no demand of judgment. Following common-law practice some pleaders conclude an ordinary answer thus: "Wherefore, the defendant prays that he be hence dismissed with his costs, etc." This is not good practice under the code.[16]

[4] Maxwell, Code Pl. § 388; Bryant, Code Pl. 236; Stroock Plush Co. v. Talcott, 113 N. Y. S. 214.

[5] Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94.

[6] Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263; Pomeroy, Remedies, § 606.

[7] R. L. 1905 § 4132; G. S. 1913 § 7758; Rule 6, Dist. Ct. See Bass v. Upton, 1 Minn. 408(293).

[8] See § 329.

[9] Fay v. Hauerwas, 57 N. Y. S. 155. See Dean v. Howard, 49 Minn. 350, 51 N. W. 1102.

[10] Stroock Plush Co. v. Talcott, 113 N. Y. S. 214.

[11] R. L. 1905 § 4145; G. S. 1913 § 7771; Olson v. Hurley, 33 Minn. 39, 21 N. W. 842.

[12] Fetz v. Clark, 7 Minn. 217(159).

[13] See § 322.

[14] Dennis v. Snell, 50 Barb. (N. Y.) 95; Canfield v. Tobias, 21 Cal. 349.

[15] Bendit v. Annesley, 42 Barb. (N. Y.) 192. See Wildermann v. Donnelly, 86 Minn. 184, 90 N. W. 366 (a demand of judgment for equitable relief in an action at law held unnecessary and not to characterize the action).

[16] Dawley v. Brown, 9 Hun (N. Y.) 461, 79 N. Y. 390; Bendit v. Annesley, 42 Barb. (N. Y.) 192.

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DENIALS

308. Denials must be definite—A denial, whether specific or general, should leave no room for doubt as to what is denied and what admitted.[17]

309. Test of sufficiency—A denial is sufficient if it clearly manifests an intention on the part of the pleader to controvert certain allegations of the pleading to which it is directed. If it is informal the court should order an amendment as a matter of course when objection is made on the trial.[18]

310. Denials with reference to paragraphs—If the complaint is divided into numbered paragraphs, as it always should be,[19] it is proper practice to deny each and every allegation in specified paragraphs.[20] This form of denial has the cardinal virtues of brevity and certainty and avoids the danger of a negative pregnant.

311. Denials with reference to folios—A denial should never be made with reference to the folios of the complaint. Such a denial may be so indefinite as to render the answer a nullity.[21]

312. Denials must be substantial—A denial must deny the substance of the allegations controverted.[22]

313. Denials may be in affirmative form—A denial need not be expressed in negative words. An affirmative allegation that certain facts do not exist its equivalent to a denial that they do exist.[23] A proper way to controvert a negative allegation is to affirm the opposite.[24] An allegation of payment in an answer is equivalent to a denial of non-payment.[25] In an action on a note an allegation that defendant never gave the note to plaintiff is a denial of an allegation in the complaint that defendant made the note and delivered the same to plaintiff.[26] In such an action an allegation by the defendant in his

[17] Montour v. Purdy, 11 Minn. 384 (278).

[18] Trustees v. Nesbitt, 65 Minn. 17, 67 N. W. 652.

[19] See § 243.

[20] Nunnemacker v. Johnson, 38 Minn. 390, 38 N. W. 351; Thompson v. Erie Ry., 45 N. Y. 468; Allis v. Leonard, 46 N. Y. 688; Kelly v. Sammis, 53 N. Y. S. 825; Mutual Life Ins. Co. v. Toplitz, 68 N. Y. S. 680; Pigot v. McKeever, 65 N. Y. S. 380; Donovan v. Main, 77 N. Y. S. 229; Etchas v. Orena, 121 Cal. 270, 53 Pac. 798.

[21] Baylis v. Stimson, 110 N. Y. 621, 17 N. E. 144; Thompson v. Wittkop, 184 N. Y. 117, 76 N. E. 1081.

[22] Hayward v. Grant, 13 Minn. 165 (154); Elton v. Markham, 20 Barb. (N. Y.) 343; Dimon v. Dunn, 15 N. Y. 498; Knight v. Denman, 64 Neb. 814, 90 N. W. 863.

[23] Engle v. Bugbee, 40 Minn. 492, 42 N. W. 351; Cilley v. Preferred Acc. Ins. Co., 96 N. Y. S. 282, affirmed, 187 N. Y. 517, 79 N. E. 1102.

[24] Frisch v. Caler, 21 Cal. 71.

[25] McArdle v. McArdle, 12 Minn. 98 (53); Van Giesen v. Van Giesen, 10 N. Y. 316.

[26] Sawyer v. Warner, 15 Barb. (N. Y.) 282.

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answer that he did not sign the note is a good denial of the execution of the note.[27]

314. Denial of intention or qualifying facts—If a complaint alleges a fact which is qualified by a particular intention, or by its connection with other qualifying facts, the intention or other qualifying facts may be denied, leaving the main fact admitted.[28]

315. Denials of admissions—An allegation that defendant does not admit certain allegations in the complaint is not a denial thereof.[29]

316. Denials must not be argumentative—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 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.[30] Argumentative denials, unaccompanied by a general or specific denial, do not raise an issue.[31]

317. Denials must not contain a negative pregnant—A negative pregnant is a negative that implies an affirmative. A denial in the form of a negative pregnant is ineffectual as a denial and operates as an admission of the fact sought to be denied.[32] This rule is an unfortunate survival of the

[27] Edmonston v. Henry, 45 Mo. App. 346.

[28] Kingsley v. Gilman, 12 Minn. 515 (425).

[29] Raleigh etc. Ry. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008; Lake v. Steinbach, 5 Wash. 659, 32 Pac. 767.

[30] Pomeroy, Remedies, §§ 624–628.

[31] Wilcox v. Davis, 4 Minn. 194(139); Smith v. Coe, 170 N. Y. 162, 63 N. E. 57; Altman v. Cochrane, 115 N. Y. S. 870; Kraus Engineering Co. v. McKinnon, 121 N. Y. S. 396.

[32] Kingsley v. Gilman, 12 Minn. 515 (425, 429) (formal denials); Frasier v. Williams, 15 Minn. 288(219) (where the precise time of an act alleged is not material a denial that it was done at the time alleged is a negative pregnant); McMurphy v. Walker, 20 Minn. 382(334) (id.); Paine v. Smith, 33 Minn. 495, 34 N. W. 305 (denial as to receipt of notes in payment held a negative pregnant); Stone v Quaal, 36 Minn. 46, 49, 29 N. W. 326 (negative pregnant defined); Curtiss v. Livingston, 36 Minn. 312, 30 N. W. 814 (denial of unlawful possession); Fredericksen v.

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common-law system of pleading and is an illustration of "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." [33] It is a sacrifice of substance to form and is shockingly at variance with the statutory rule requiring pleadings to be liberally contrued. It was long ago abandoned in England and its survival here is a striking illustration of how far we are behind the mother country in many matters of procedure. The defect ought to be deemed one of form to be disregarded unless objected to by motion before the trial.[34] A general denial is never a negative pregnant.[35] It was formerly held that a general denial was a negative pregnant as regards material allegations of value.[36] A specific denial of value as alleged in the complaint is often held a negative pregnant.[37] When several facts are alleged conjunctively a conjunctive denial is a species of negative pregnant.[38] But if an allegation states conjunctively several facts all of which are together essential to constitute a material allegation a conjunctive denial is good.[39] A denial which merely denies the literal truth of an allegation is generally bad.[40] A denial in the precise language of the complaint,[41] or "as alleged" [42] is bad unless all the allegations of the

Singer Mfg. Co., 38 Minn, 356, 37 N. W. 453 (denial following language of complaint); German-Am. Bank v. White, 38 Minn. 471, 38 N. W. 361 (negative pregnant defined—general denial never a negative pregnant); Pound v. Pound, 60 Minn. 214, 62 N. W. 264 (action for conversion—denial as to ownership); Jarrett v. Great Northern Ry., 74 Minn. 477, 480, 77 N. W. 304 (an allegation in a complaint against a carrier that "the defendant did not safely carry and deliver said goods" held a "sort" of negative pregnant).

[33] Justice Holmes in Paraiso v. U. S., 207 U. S. 372.

[34] In Missouri a negative pregnant is regarded as a defect of form merely. First Nat. Bank v. Hogan, 47 Mo. 472. In Iowa it raises an issue. Doolittle v. Greene, 32 Iowa 123. In Washington it is sufficient if the intention of the pleader is apparent. O'Brien v. Seattle Ice Co., 43 Wash. 217, 86 Pac. 399. In New York the defect is to be corrected by motion at or before the trial. Objection cannot be raised for the first time on appeal. Wall v. Buffalo Water Works, 18 N. Y. 119; Kay v. Whittaker, 44 N. Y. 565; Cochran v. Whitney, 120 N. Y. S. 724. A denial should not be held a negative pregnant unless it is manifestly so. Electrical Accessories Co. v. Mittenthal, 194 N. Y. 473, 87 N. E. 684.

[35] German-American Bank v. White, 38 Minn. 471, 38 N. W. 361.

[36] See § 323.

[37] Burt v. McKinstry, 4 Minn. 204 (146); Lynd v. Picket, 7 Minn. 184 (128); Durfee v. Pavitt, 14 Minn. 424 (319); Hertz v. Hartmann, 74 Minn. 320, 77 N. W. 232.

[38] Pullen v. Wright, 34 Minn. 314, 26 N. W. 394; Stuber v. McEntee, 142 N. Y. 206, 36 N. E. 878; More v. Del Valle, 28 Cal. 170.

[39] Kay v. Whittaker, 44 N. Y. 565.

[40] Doll v. Good, 38 Cal. 287; Argard v. Parker, 81 Wis. 581, 51 N. W. 1012.

[41] Fredericksen v. Singer Mfg. Co., 38 Minn. 356, 37 N. W. 453; Mitterwallner v. Supreme Lodge, 78 N. Y. S. 1127; Shepard v. Wood, 102 N. Y. S. 306; U. S. v. Larkin, 153 Fed. 113. See Bennett v. Crowell, 7 Minn. 385(306).

[42] Hutchinson v. Bien, 93 N. Y. S. 216; Knight v. Denman, 64 Neb. 814, 90 N. W.

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complaint are material.[43] In an action on contract a denial that the plaintiff has performed all the conditions is not a negative pregnant.[44] A denial that the plaintiffs were partners "as alleged in the complaint or otherwise" is sufficient.[45] Denials so broad as to involve such immaterial matters as time,[46] place,[48] quality,[49] the exact amount of damages,[50] or other immaterial circumstances,[51] are bad. A denial in the form of a negative pregnant has the effect of an admission only when the fact sought to be 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.[52]

318. Denials controlled by admissions—If an answer includes a denial and also an admission of the same matter the admission controls.[53]

319. Specific denials control general denials—If there is a specific denial and also a general denial in the same pleading the former controls and if insufficient no issue is formed.[54]

320. Denials of knowledge or information—If the defendant has no personal knowledge of the facts alleged in the complaint, or of a part 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 as to them.[55] But this form of denial is

863; Robbins v. Lincoln, 12 Wis. 1; Crane Bros. Mfg. Co. v. Morse, 49 Wis. 368, 5 N. W. 814; Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 703.

[43] Donovan v. Main, 77 N. Y. S. 229.

[44] Donovan v. Main, 77 N. Y. S. 229; Hudson Cos. v. Briemer, 113 N. Y. S. 997.

[45] Dessaint v. Elling, 31 Minn. 287, 17 N. W. 480.

[46] Cathcart v. Peck, 11 Minn. 45(24); Frasier v. Williams, 15 Minn. 288(219); McMurphy v. Walker, 20 Minn. 382(334); O'Gorman v. Sabin, 62 Minn. 46, 54, 64 N. W. 84. See Pound v. Pound, 60 Minn. 214, 62 N. W. 264.

[48] McClave v. Gibb, 31 N. Y. S. 847.

[49] McClave v. Gibb, 31 N. Y. S. 847.

[50] Huston v. Tevin etc. Co., 45 Cal. 550.

[51] Arthur v. Brooks, 14 Barb. (N. Y.) 533; Castro v. Wetmore, 16 Cal. 379.

[52] Pullen v. Wright, 34 Minn. 314, 26 N. W. 394; German-Am. Bank v. White, 38 Minn. 471, 38 N. W. 361.

[53] McClung v. Bergfeld, 4 Minn. 148 (99); Derby v. Gallup, 5 Minn. 119(85); Scott v. King, 7 Minn. 494(401); Hayward v. Grant, 13 Minn. 165(154); Henry v. Hinman, 21 Minn. 378; St. Anthony Falls etc. Co. v. King, 23 Minn. 186; Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94; Gaffney v. St. Paul etc. Ry., 38 Minn. 111, 35 N. W. 728; Stadtler v. School Dist., 71 Minn. 311, 73 N. W. 956.

[54] Pullen v. Wright, 34 Minn. 314, 26 N. W. 394. See Brandt v. Shepard, 39 Minn. 454, 40 N. W. 521; Horn v. Butler, 39 Minn. 515, 40 N. W. 833; First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645.

[55] R. L. 1905 § 4130; G. S. 1913 § 7756; Morton v. Jackson, 2 Minn. 219(180); Mower v. Stickney, 5 Minn. 397(321); Ames v. First Div. etc. Ry., 12 Minn. 412(295); Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352; Schroeder v. Capehart, 49 Minn. 525, 52 N. W. 140; Pomeroy, Remedies, § 640; 2 Ency. L. & P. 1291. This form of denial is insufficient to compel a corporation plaintiff to prove an allegation of incorporation. First Nat. Bank v. Loyhed, 28 Minn. 396, 10 N. W. 420. Nor is it sufficient as a de-

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not permissible when the facts are actually or presumptively 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 he employs this form of denial as to such matters 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 constituting the justification should be alleged.[56] Matters of public record easily accessible to the defendant cannot be denied in this manner.[57] A denial in this form when the facts are actually or presumptively 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 trial.[58] In using this form of denial it is advisable to follow the exact language of the statute.[59] A mere allegation that the defendant is ignorant of the facts alleged in the complaint is insufficient to raise an issue.[60]

321. Denials upon information and belief—If 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 may deny them upon information and belief.[61] He cannot do so if the facts are actually or presumptively within his knowledge.[62]

nial of the execution of an instrument under the statute. See § 323.

[56] Morton v. Jackson, 2 Minn. 219 (180); Minor v. Willoughby, 3 Minn. 225(154); Starbuck v. Dunklee, 10 Minn. 168(136); C. N. Nelson Lumber Co. v. Richardson, 31 Minn. 267, 17 N. W. 388; Wheaton v. Briggs, 35 Minn. 470, 29 N. W. 170; Schroeder v. Capehart, 49 Minn. 525, 52 N. W. 140; Larson v. Shook, 68 Minn. 30, 70 N. W. 775; Rochkind v. Perlman, 108 N. Y. S. 224; Dahlstrom v. Gemunder, 198 N. Y. 449, 92 N. E. 106; Pomeroy, Remedies, § 641; Note, 30 L. R. A. (N. S.) 771.

[57] Wheaton v. Briggs, 35 Minn. 470, 29 N. W. 170; Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352; Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140; People v. Kenyon, 134 N. Y. S. 1007; Dahlstrom v. Gemunder, 198 N. Y. 449, 92 N. E. 106; Allen v. Nat. Surety Co., 129 N. Y. S. 228. Such denials are only presumptively sham. The pleader should be given an opportunity to overcome the presumption. Harley v. Plant, 210 N. Y. 405, 104 N. E. 946.

[58] Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352; Schroeder v. Capehart, 49 Minn. 525, 52 N. W. 140; Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140. In New York a denial of matters clearly within the knowledge of the pleader may be regarded as frivolous and judgment on the pleadings awarded, or it may be stricken out as sham. Dahlstrom v. Gemunder, 198 N. Y. 449, 92 N. E. 106. Where the matters are only presumptively within the knowledge of the pleader, or where the defect in the pleading is such that the court may, upon proper terms, permit it to be amended, the proper remedy is a motion before trial. Kirschbaum v. Eschmann, 205 N. Y. 127, 98 N. E. 328; Harley v. Plant, 210 N. Y. 405, 104 N. E. 946.

[59] See Trustees v. Nesbitt, 65 Minn. 17, 67 N. W. 652.

[60] Maxwell v. Higgins, 38 Neb. 671, 57 N. W. 388; Sweet v. Davis, 90 Wis. 40, 63 N. W. 1047.

[61] State v. Cooley, 58 Minn. 514, 60 N. W. 338; Brotherton v. Downey, 21 Hun (N. Y.) 436; Stacy v. Bennett, 59 Wis. 234, 18 N. W. 26; Bennett v. Leeds Mfg. Co., 110 N. Y. 150, 17 N. E. 669.

[62] Edwards v. Lent, 8 How. Pr. (N. Y.) 282; Kellogg v. Baker, 15 Abb. Pr. (N. Y.)

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322. Non-traversable allegations—An issue can be formed only on material allegations. The denial of an immaterial allegation does not raise an issue to be tried.[63] A material allegation is one which the plaintiff is bound to prove in order to establish his cause of action.[64] Allegations of immaterial matters, [65] of legal conclusions,[66] of unliquidated damages,[67] are not traversable. Allegations of time are not ordinarily traversable.[68] The demand for relief is never traversable.[69] Allegations of place, quantity, quality, value and other matters of description are not ordinarily traversable.[70] The denial of an immaterial allegation may be stricken out.[71]

323. General denial—Form and effect—A general denial is one which denies each and every allegation of the pleading to which it is directed. While not expressly authorized by statute it has been in common use in this state ever since the adoption of the code. Its convenience and certainty have made it deservedly popular.[72] The general denial of code pleading is not the same as the general issue of common-law pleading. In some respects it is broader in its scope and in other respects narrower, but it often has the same general effect. Its scope necessarily varies with the nature of the allegations which it

286; Note, 133 Am. St. Rep. 105; Note, 30 L. R. A. (N. S.) 771; 3 Ency. L. & P. 1301.

[63] Wilder v. St. Paul, 12 Minn. 192 (116); First Nat. Bank v. Strait, 71 Minn. 69, 75, 73 N. W. 645.

[64] First Nat. Bank v. Strait, 71 Minn. 69, 75, 73 N. W. 645.

[65] Freeman v. Curran, 1 Minn. 169(144) (allegation of partnership); Bennett v. Crowell, 7 Minn. 385(306) (certain allegations in an action on a note held material and traversable); Finley v. Quirk, 9 Minn. 194(179) (general rule stated that issues can be formed only by the denial of material allegations); Wilder v. St. Paul, 12 Minn. 192(116) (allegations of title of plaintiff in action to determine adverse claims, the plaintiff being in possession); Hayward v. Grant, 13 Minn. 165(154) (allegation of partnership); Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123(98) (action on policy of fire insurance—application to amend by inserting an immaterial denial held properly denied); Gross v. Diller, 33 Minn. 424, 23 N. W. 837 (an issue of warranty held immaterial); Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383 (action for libel—allegation of plaintiff's good reputation held material); First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645 (allegation of non-payment).

[66] Freeman v. Curran, 1 Minn. 169(144) (denial of indebtedness); Bennett v. Crowell, 7 Minn. 385(306, 310) (id.); Finley v. Quirk, 9 Minn. 194(179) (legality of a sale); Cathcart v. Peck, 11 Minn. 45(24) (general rule stated and applied); Hayward v. Grant, 13 Minn. 165(154) (denial of allegation of ownership of note); Frasier v. Williams, 15 Minn. 288(219) (id.); Downer v. Read, 17 Minn. 493(470) (id.); Holbrook v. Sims, 39 Minn. 122, 39 N. W. 74, 140 (id.).

[67] Pullen v. Wright, 34 Minn. 314, 26 N. W. 394; German-American Bank v. White, 38 Minn. 471, 38 N. W. 361.

[68] Finley v. Quirk, 9 Minn. 194(179); Cathcart v. Peck, 11 Minn. 45(24); McMurphy v. Walker, 20 Minn. 382(334).

[69] Hatch v. Coddington, 32 Minn. 92, 19 N. W. 393.

[70] 1 Ency. Pl. & Pr. 790.

[71] Cathcart v. Peck, 11 Minn. 45(24).

[72] Kingsley v. Gilman, 12 Minn. 515 (425); Stone v. Quaal, 36 Minn. 46, 29 N. W. 326.

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controverts.[73] It 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,[74] including material allegations of value,[75] and inferences of fact implied by law from the facts expressly alleged.[76] By virtue of statute it has not the same effect as a specific denial to put in issue an allegation of incorporation,[77] or the execution of a written instrument.[78] It puts in issue the execution of a written instrument, but it does not have the same effect as a specific denial in shifting the burden of proof as to the signature.[79] It puts in issue a general allegation of the performance of conditions in an action on contract.[80] The approved form of a general denial is "the defendant for answer to the complaint herein denies each and every allegation thereof." [81] Various forms have been held sufficient,[82] or insufficient.[83]

[73] Pomeroy, Remedies, §§ 643–657; Hepburn, Development of Code Pleading, §§ 283–302; Fetz v. Clark, 7 Minn. 217(159); Trainor v. Schutz, 98 Minn. 213, 218, 107 N. W. 812; Girls' Industrial Home v. Fritchey, 10 Mo. App. 344; McKyring v. Bull, 16 N. Y. 297.

[74] Fetz v. Clark, 7 Minn. 217(159); Kingsley v. Gilman, 12 Minn. 515(425); Fogle v. Schaeffer, 23 Minn. 304; Stone v. Quaal, 36 Minn. 46, 29 N. W. 326; German-American Bank v. White, 38 Minn. 471, 38 N. W. 361; Nunnemacker v. Johnson, 38 Minn. 390, 38 N. W. 351; Johnson v. Oswald, 38 Minn. 550, 38 N. W. 630; Conway v. U. S., 95 Fed. 615.

[75] German-American Bank v. White, 38 Minn. 471, 38 N. W. 361 (overruling McClung v. Bergfeld, 4 Minn. 148, 99; Dean v. Leonard, 9 Minn. 190, 176; Pottgieser v. Dorn, 16 Minn. 204, 180; Hecklin v. Ess, 16 Minn. 51, 38; Moulton v. Thompson, 26 Minn. 120, 1 N. W. 836; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Jellett v. St. Paul etc. Ry., 30 Minn. 265, 15 N. W. 237; Steele v. Thayer, 36 Minn. 174, 30 N. W. 758).

[76] Hodgson v. Mather, 92 Minn. 299, 100 N. W. 87.

[77] Crow River Valley Creamery Co. v. Strande, 104 Minn. 46, 115 N. W. 1038.

[78] Cowing v. Peterson, 36 Minn. 130, 30 N. W. 461; Bausman v. Credit Guaranty Co., 47 Minn. 377, 50 N. W. 496; McCormick Harvesting Machine Co. v. Doucette, 61 Minn. 40, 63 N. W. 95.

[79] McCormick Harvesting Machine Co. v. Doucette, 61 Minn. 40, 63 N. W. 95; Moore v. Holmes, 68 Minn. 108, 70 N. W. 872.

[80] See § 258.

[81] See Caldwell v. Bruggerman, 4 Minn. 270(190); Moen v. Eldred, 22 Minn. 538; Stone v. Quaal, 36 Minn. 46, 29 N. W. 326; Hodgson v. Mather, 92 Minn. 299, 100 N. W. 87; Pomeroy, Remedies, § 613.

[82] Moen v. Eldred, 22 Minn. 538 ("the defendant, for answer to plaintiff's complaint, respectfully states and shows to this court that he denies each and every allegation in said plaintiff's complaint contained"); Fogle v. Schaeffer, 23 Minn. 304 (for answer to the complaint the defendant "denies the same, and each and every part and portion thereof"); Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768 ("plaintiff, replying to the answer of the defendants herein, specifically denies each and every allegation of new matter and thing in said answer contained and alleged").

[83] Starbuck v. Dunklee, 10 Minn. 168 (136) (a denial of each and every allegation in a complaint, except so far as the court may construe the statements in the answer as admissions, is bad); Montour v. Purdy, 11 Minn. 384(278) (a denial of each and every material allegation of a pleading is bad); Dodge v. Chandler, 13 Minn. 114(105) (id.).

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324. Qualified general denial—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 restatement of the facts as the defendant claims them to be. 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." This form of denial has been very justly condemned as "mongrel," "vicious," "slovenly" and a "contrivance of ignorance or indolence."[84] It is tolerated but disapproved by our supreme court, being held sufficient if there is no ambiguity as to the allegations admitted, qualified or stated.[85] 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 in the form of a denial of each and every allegation in specified paragraphs of the complaint.

325. Argumentative denials coupled with general denials—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. He should not make a re-statement of the facts as he claims them to be.[86] In actions on contract it is not good form to plead affirmatively the contract as the defendant understands it, in addition to a general denial.[87] Argumentative denials coupled with general denials are common in our practice. It would seem as though the pleader, after he had written the brief general denial, could not be satisfied with its efficacy, and considered it necessary to add in separate divisions of the answer a further statement of the very facts which he knew would constitute the defence, and which could all be proved under the general denial. This mode of pleading is highly objectionable because it overloads the record with superfluous matter, produces confusion and uncertainty, limits the scope of the party's proofs on the trial, and unnecessarily discloses his case to his adversary.[88] This form of denial is a de-

[84] Pomeroy, Remedies, §§ 633–636. See also Maxwell, Code Pl. § 388; Bryant, Code Pl. 179.

[85] Kingsley v. Gilman, 12 Minn. 515 (425); Becker v. Sweetzer, 15 Minn. 427(346); Leyde v. Martin, 16 Minn. 38(24); Davenport v. Ladd, 38 Minn. 545, 38 N. W. 622; Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Jellison v. Halloran, 40 Minn. 485, 42 N. W. 392; Fegelson v. Dickerman, 70 Minn. 471, 73 N. W. 144; Fitzpatrick v. Simonson, 86 Minn. 140, 90 N. W. 378; Loveland v. Gravel, 95 Minn. 135, 103 N. W. 721; Elliott v. McAllister, 106 Minn. 25, 117 N. W. 921.

[86] See Jellett v. St. Paul etc. Ry., 30 Minn. 265, 269, 15 N. W. 237.

[87] Trumbull v. Jackman, 9 Wash. 524, 37 Pac. 600. See Becker v. Sweetzer, 15 Minn. 427(346).

[88] Pomeroy, Remedies, §§ 624–632.

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fect of form rather than of substance and is not a ground for demurrer. The proper remedy is a motion to make more definite and certain and to strike out the redundant matter.[89]

326. General denial and new matter—The allegations of fact in a separate defence do not affect the force of a general denial. In other words under a general denial plaintiff must prove all the essential allegations of the complaint, though the answer contains a defence in the nature of confession and avoidance which technically admits the allegations of the complaint.[90]

327. General denial—Evidence admissible under—Under a general denial any evidence is admissible which tends directly to controvert the allegations of the pleading to which it is directed,[91] or the evidence admitted there-

[89] Pomeroy, Remedies, §§ 627, 632; Becker v. Sweetzer, 15 Minn. 427(346); Jellett v. St. Paul etc. Ry., 30 Minn. 265, 269, 15 N. W. 237.

[90] Troy etc. Ry. v. Kerr, 17 Barb. (N. Y.) 581; Manhattan Brick Co. v. Clark, 69 N. Y. S. 649; Miller v. Chandler, 59 Cal. 540; Pike v. Sutton, 21 Colo. 84, 39 Pac. 1084.

[91] Bond v. Corbett, 2 Minn. 248(209) (action for money loaned—evidence in denial of loan admissible—general rule stated); Caldwell v. Bruggerman, 4 Minn. 270(190) (replevin—fact that delivery necessary to vesting title in plaintiff was not made held admissible—general rule stated); Jones v. Rahilly, 16 Minn. 320(283) (action for conversion—evidence that a tender was insufficient to discharge a lien held admissible); McClellan v. Nichols, 24 Minn. 176 (action for conversion—evidence of right of possession in defendant at time of conversion held admissible); Tupper v. Thompson, 26 Minn. 385, 4 N. W. 621 (replevin against sheriff—evidence of fraud on creditor held admissible); Chandler v. DeGraff, 27 Minn. 208, 6 N. W. 611 (action for conversion—evidence of title in defendant admissible); Furman v. Tenny, 28 Minn. 77, 9 N. W. 172 (replevin against sheriff—evidence of fraud on creditor held admissible); Kipp v. Bullard, 30 Minn. 84, 14 N. W. 364 (ejectment—evidence of homestead exemption held admissible); Cushing v. Seymour, Sabin & Co., 30 Minn. 301, 15 N. W. 249 (action for conversion—evidence of mortgage and note affecting plaintiff's title held admissible); Sloan v. Becker, 31 Minn. 414, 18 N. W. 143 (action for accounting—allegation that deed was in fact a mortgage—evidence tending to show that the deed was not intended as a mortgage held admissible); Webb v. Michener, 32 Minn. 48, 19 N. W. 82 (action on note—denial of consideration—evidence that it was made in fraud of creditors held admissible); Kenney v. Goergen, 36 Minn. 190, 31 N. W. 210 (replevin against sheriff—evidence of fraud on creditors held admissible); Ortt v. Minneapolis etc. Ry., 36 Minn. 396, 31 N. W. 519 (action against carrier on special contract—evidence that injury occurred after the property had passed beyond the defendant's terminus held admissible); Ellingsen v. Cooke, 37 Minn. 400, 34 N. W. 747 (replevin—evidence to show that certain acts were not in violation of the terms of a chattel mortgage held admissible); Scone v. Amos, 38 Minn. 79, 35 N. W. 575 (complaint alleged that defendant hired plaintiff to work—evidence that defendant acted in the hiring as the agent of another whom he disclosed to plaintiff held admissible); Johnson v. Oswald, 38 Minn. 550, 38 N. W. 630 (action for conversion—evidence of fraud in sale through which plaintiff claimed title held admissible—general rule stated); Beard v. First Nat. Bank, 41 Minn. 153, 43 N. W. 7 (action

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on certificate of deposit—evidence of transfer of title by gift held admissible); Grinnell v. Young, 41 Minn. 186, 42 N. W. 929 (replevin—evidence that a bill of sale was a mere escrow held admissible); Wakefield v. Day, 41 Minn. 344, 43 N. W. 71 (general allegation of title—evidence that deed under which plaintiff claimed title was in fact a mortgage which had been satisfied held admissible); King v. Lacrosse, 42 Minn. 488, 44 N. W. 517 (replevin—evidence of chattel mortgage to third party held admissible—evidence of title in third party admissible—general rule stated); Mullen v. Noonan, 44 Minn. 541, 47 N. W. 164 (replevin — evidence of fraud in transfer held admissible); Adamson v. Wiggins, 45 Minn. 448, 48 N. W. 185 (replevin by chattel mortgagee—general averment of title—evidence of usury held admissible); Smith v. Barclay, 54 Minn. 47, 55 N. W. 827 (garnishment—third party claimants—evidence to impeach validity of transfer held admissible); Penny v. Mutual Investment Co., 54 Minn. 541, 56 N. W. 165 (action for conversion—evidence that the acts of alleged conversion were authorized by the party and hence that there was no conversion held admissible); Christianson v. Chicago etc. Ry., 61 Minn. 249, 63 N. W. 639 (action for personal injuries—allegation of a release—evidence in denial of release held admissible); Iselin v. Simon, 62 Minn. 128, 64 N. W. 143 (general rule stated); Johnson v. Morstad, 63 Minn. 397, 65 N. W. 727 (action for conversion—books of account of defendant tending to show a purchase of the property from plaintiff by defendant held admissible—general rule stated); Nichols & Shepard Co. v. Minn. Thresher Mfg. Co., 70 Minn. 528, 73 N. W. 415 (action for conversion—general allegation of conversion—any evidence to disprove conversion held admissible); Commonwealth Title Ins. & Trust Co. v. Dokko, 72 Minn. 229, 75 N. W. 106 (ejectment—evidence of usury in mortgage by virtue of which plaintiff claimed title held admissible); Aultman & Taylor Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756 (replevin—evidence of any fact tending to show that plaintiff is not entitled to possession held admissible); Cumbey v. Lovett, 76 Minn. 227, 79 N. W. 99 (replevin—general allegation of title in plaintiff—evidence of title in defendant held admissible); Travelers' Ins. Co. v. Walker, 77 Minn. 438, 80 N. W. 618 (ejectment — general allegation of title in plaintiff—evidence of equity in defendant defeating plaintiff's right to possession held admissible); Cool v. Kelly, 78 Minn. 102, 80 N. W. 861 (ejectment—evidence of title in defendant through a tax certificate held admissible); Hanson v. Diamond Iron Mining Co., 87 Minn. 505, 92 N. W. 447 (action for money had and received—general rule stated and applied); Loftus-Hubbard El. Co. v. Smith, 90 Minn. 418, 97 N. W. 125 (action on note—evidence that note was indorsed by defendant in a representative capacity held admissible — general rule stated); Kramer v. N. W. Elevator Co., 91 Minn. 346, 349, 98 N. W. 96 (action for conversion—evidence of fraud held admissible); Hodgson v. Mather, 92 Minn. 299, 100 N. W. 87 (action on note — evidence to show that plaintiff was not a bona fide holder held admissible); Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597 (action to recover money loaned—evidence that money was paid as a gift held admissible—general rule stated); Sodini v. Gaber, 101 Minn. 155, 111 N. W. 962 (unlawful detainer proceedings—evidence tending to show that the relation of landlord and tenant did not exist between the parties held admissible—general rule stated); Stitt v. Rat Portage Lumber Co., 101 Minn. 93, 111 N. W. 948 (action on a logging contract—evidence of another contract held admissible); Rogers v. Clark Iron Co., 104 Minn. 198, 116 N. W. 739 (action to determine adverse claims—title in third party held admissible); Walker v. Ward, 104 Minn. 386, 116 N. W. 647 (replevin—evidence of fraud in transfer held admissible); Martinsburg v. Butler, 112 Minn. 1, 127 N. W. 420 (complaint al-

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under.[92] Any evidence is admissible which tends to disprove any fact which the plaintiff is bound to prove in order to recover,[93] or upon which he relies for that purpose.[94] In other words the defendant may prove any fact inconsistent with the allegations of the complaint. He is not limited to mere matters of denial, but may prove affirmative new matter, if it is inconsistent with the allegations of the complaint.[95] While matter in the nature of confession and avoidance of the allegations of the complaint cannot be proved under a general denial,[96] matter in the nature of confession and avoidance of facts proved by the plaintiff under a general allegation in his complaint are admissible. Where the plaintiff pleads his cause of action in general terms, so that it does not disclose the facts, the defendant, under a general denial, may introduce any evidence which tends to contradict, explain, or avoid the facts proved by the plaintiff on the trial.[97] The defendant is not bound to plead

leged an unlawful appropriation of public funds, specifying particular items so paid—evidence to show that such appropriations were lawful held admissible); Hill v. Minneapolis St. Ry., 112 Minn. 503, 128 N. W. 831 (action for negligence — if complaint negatives plaintiff's negligence contributory negligence of plaintiff is admissible under a general denial, otherwise not); Johnson v. Carlin, 115 Minn. 430, 132 N. W. 750 (unlawful detainer proceedings—that defendant was entitled to compensation for plowing before surrendering possession of a farm held admissible); Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861 (action to enforce a trust—evidence as to ownership of property held admissible); Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147 (action for libel or slander—bad reputation of plaintiff admissible); Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359 (allegation of assignment of wages—issue as to notice of assignment under statute raised by general denial).

[92] Plummer v. Mold, 14 Minn. 532 (403); Hanson v. Diamond Iron Mining Co., 87 Minn. 505, 92 N. W. 447; Lofgus-Hubbard Elevator Co. v. Smith-Alvord Co., 90 Minn. 418, 97 N. W. 125; Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597.

[93] Cushing v. Seymour, Sabin & Co., 30 Minn. 301, 15 N. W. 249; Sodini v. Gaber, 101 Minn. 155, 111 N. W. 962.

[94] Lautenschlager v. Hunter, 22 Minn. 267; Register Printing Co. v. Willis, 57 Minn. 93, 58 N. W. 825.

[95] Cushing v. Seymour, Sabin & Co., 30 Minn. 301, 15 N. W. 249; Christianson v. Chicago etc. Ry., 61 Minn. 249, 63 N. W. 639; Sodini v. Gaber, 101 Minn. 155, 111 N. W. 962. See Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[96] See § 339.

[97] Jones v. Rahilly, 16 Minn. 320(283) (action for conversion—under a complaint alleging ownership and right of possession plaintiff may show a purchase from a former owner who had pledged the property, and his redemption of the same by a tender to the pledgee, the defendant—under a general denial defendant may show tender insufficient); Tupper v. Thompson, 26 Minn. 385, 4 N. W. 621 (replevin—evidence of fraud invalidating transfer); Furman v. Tenny, 28 Minn. 77, 9 N. W. 172 (id.); Cushing v. Seymour, 30 Minn. 301, 15 N. W. 249 (action for conversion — mortgagor against mortgagee — evidence as to amount remaining unpaid); Ellingsen v. Cooke, 37 Minn. 400, 34 N. W. 747 (where an answer alleged that plaintiff "violated the terms and broke the conditions" of a certain chattel mortgage, without specifying in what particular or by what act, and on the trial the defendant proves certain acts of plaintiff in support of such allegation, the latter may, under a general denial in his reply,

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more specifically than the plaintiff. He is not bound in his answer to anticipate, and confess and avoid, the facts which the plaintiff may prove under a general allegation in his complaint.[98] A general denial will admit evidence tending to controvert the inferences of fact implied by law from the express allegations of the complaint,[99] or facts which may be reasonably implied from the direct allegations.[1] If doubt exists as to whether defensive matter is admissible under a general denial great liberality should be shown in allowing an amendment to render it admissible.[2]

328. Specific denials—In general—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 ordinarily material. For the same reason the defendant should never specifically deny a legal conclusion or evidentiary matter. There

show, by any evidence, that such acts were not a violation of such terms or conditions); Johnson v. Oswald, 38 Minn. 550, 38 N. W. 630 (action for conversion —evidence to show fraud in sale under which plaintiff claims title); Wakefield v. Day, 41 Minn. 344, 43 N. W. 71 (action to quiet title—evidence to show deed a mortgage); Adamson v. Wiggins, 45 Minn. 448, 48 N. W. 185 (replevin by chattel mortgagee—general averment of title—proof of usury under general denial); Terry v. Wilson's Estate, 50 Minn. 570, 52 N. W. 973 (evidence to show deed a mortgage); Nichols & Shepard Co. v. Minn. T. Mfg. Co., 70 Minn. 528, 73 N. W. 415 (action for conversion — proof of foreign statute affecting title); Commonwealth etc. Co. v. Dokko, 72 Minn. 229, 75 N. W. 106 (ejectment—usury in mortgage); Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81, 91 N. W. 257 (action for money had and received —general rule stated and applied); Walker v. Ward, 104 Minn. 386, 116 N. W. 647 (replevin—evidence of fraud invalidating title); Dickson v. St. Paul, 105 Minn. 165, 117 N. W. 426 (general rule stated); Bartleson v. Munson, 105 Minn. 348, 117 N. W. 512 (ejectment—general rule stated); Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359 (general allegation of assignment of wages —fact that no notice of assignment was given as required by statute admissible). See §§ 539 (account stated); 543 (agency); 546 (alteration of instruments); 548 (arbitration and award); 566–569 (bills and notes); 576 (cancelation of instruments); 601 (contracts); 604 (conversion); 653, 654 (ejectment); 669 (fraud); 685 (insurance); 720–722 (libel and slander); 744 (master and servant); 753 (money had and received); 791 (money lent); 818, 819 (negligence); 831 (payment); 854, 855 (replevin); 861 (sales); 883 (statute of frauds); 912, 916 (work and labor); and other specific heads.

[98] Wakefield v. Day, 41 Minn. 344, 43 N. W. 71, and cases under preceding note.

[99] Hodgson v. Mather, 92 Minn. 299, 100 N. W. 87.

[1] Vukelis v. Virginia Lumber Co., 107 Minn. 68, 119 N. W. 509; First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296.

[2] Rees v. Storms, 101 Minn. 331, 112 N. W. 419.

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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.[3]

329. Same—Each should be complete defence in form and substance—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.[4] Each specific denial should be stated in a separate and numbered paragraph.[5]

330. Same—Form and sufficiency—A denial, whether specific or general, should leave no room for doubt as to what is denied and what admitted.[6] 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.[7] In embodying the language of the complaint in the denial care should be used not to deny a conjunctive allegation conjunctively.[8] 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 with reference to the paragraphs.[9]

[3] Pomeroy, Remedies, § 614; Bryant, Code Pl. § 179.

[4] Pomeroy, Remedies, § 719.

[5] See § 295.

[6] Montour v. Purdy, 11 Minn. 384(278).

[7] Baylis v. Stimson, 110 N. Y. 621, 17 N. E. 144; Thompson v. Wittkop, 184 N. Y. 120, 76 N. E. 1081.

[8] See § 317.

[9] Thompson v. Erie Ry., 45 N. Y. 468; Allis v. Leonard, 46 N. Y. 688; Donovan v. Main, 77 N. Y. S. 229. See Nunnemacker v. Johnson, 38 Minn. 390, 38 N. W. 351, and § 310.

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NEW MATTER IN DEFENCE

331. Definition and nature—New matter constituting a defence is matter in the nature of confession and avoidance. In other words, it is matter which, admitting the facts alleged in the complaint to be true as facts, avoids their legal effect or operation and defeats the action, in whole or in part. Facts which are inconsistent with the existence of the facts alleged in the complaint are never new matter. 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. Whether a fact is new matter depends, not upon its intrinsic nature or the nature of the particular action, 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 allegations of the complaints.[10]

332. Compared with a denial—A denial serves merely to put in issue the allegations denied. A defence of new matter does not put in issue the allegations of the complaint but merely seeks to avoid their legal consequences. If affirmative matter which controverts the allegations of the complaint is set up in the answer it is to be deemed a denial and not new matter.[11] A statement of new matter is never a denial.[12]

333. Matters in abatement—The plea in abatement of the common law does not exist under the code. If matters in abatement appear upon the face of a pleading, they are now taken advantage of by demurrer, and if they do not so appear, they are set up in the answer or reply as new matter constituting a defence. Matters in abatement may be joined in the same pleading with defences in bar.[13] The demurrer in such cases is not a mere substitute for the plea in abatement. The former raises a question of law upon the facts stated in the complaint. The latter presented an issue of fact, and as it was regarded as a dilatory plea, strict rules were applied to it, and it was required to state the facts so fully as to exclude the possibility of its having been improperly interposed.[14] Objection to the jurisdiction of the state court may be

[10] Finley v. Quirk, 9 Minn. 194 (179, 187); Nash v. St. Paul, 11 Minn. 174 (110, 113); Craig v. Cook, 28 Minn. 232, 234, 9 N. W. 712; Roberts v. Nelson, 65 Minn. 240, 242, 68 N. W. 14. See Pomeroy, Remedies, §§ 672, 673.

[11] Craig v. Cook, 28 Minn. 232, 9 N. W. 712.

[12] Carpenter v. Mergert, 80 N. Y. S. 615.

[13] Porter v. Fletcher, 25 Minn. 493 (defect of parties); Page v. Mitchell, 37 Minn. 368, 34 N. W. 896 (pendency of another action — matters in abatement may be joined with defences in bar); Somers v. Dawson, 86 Minn. 42, 90 N. W. 119 (another action pending); Druhe Hardwood Lumber Co. v. Fischbein, 101 Minn. 81, 111 N. W. 950 (want of jurisdiction in state court). See Pomeroy, Remedies, § 721.

[14] Porter v. Fletcher, 25 Minn. 493.

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taken by answer when the facts showing want of jurisdiction do not appear on the face of the complaint.[15]

334. Defences must be consistent in fact—A defendant may plead as many defences, either legal or equitable, as he may have, if they are not inconsistent; and the pleading of one defence cannot be construed as a waiver of another.[16] Two defences are consistent if both may be true and they are to be held inconsistent only when the proof of one necessarily disproves the other.[17] It is no test of inconsistency between two defences that if one is proved the other is unnecessary.[18] The inconsistency that is prohibited is inconsistency of fact and not of law. The decisions are nearly uniform in holding that under the code a defendant may set up in the same answer defences that are inconsistent in law, in other words, defences that are based on inconsistent legal theories.[19] The objection that defences are inconsistent is disfavored.[20] It is to be taken by a motion to compel an election.[21] Cases are cited below holding particular defences either inconsistent[22] or consistent.[23]

[15] Druhe Hardwood Lumber Co. v. Fischbein, 101 Minn. 81, 111 N. W. 950.

[16] R. L. 1905 § 4132; G. S. 1913 § 7758; Derby v. Gallup, 5 Minn. 119(85, 95); Booth v. Sherwood, 12 Minn. 426(310, 314); Conway v. Wharton, 13 Minn. 158 (145, 148); Warner v. Lockerby, 31 Minn. 421, 423, 18 N. W. 145, 821; Lane v. St. Paul Fire & Marine Ins. Co., 50 Minn. 227, 231, 52 N. W. 649; Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[17] Roblee v. Secrest, 28 Minn. 43, 8 N. W. 904; Gammon v. Ganfield, 42 Minn. 368, 44 N. W. 125; Backdahl v. Grand Lodge, 46 Minn. 61, 48 N. W. 454; Steenerson v. Waterbury, 52 Minn. 211, 53 N. W. 1146; Rees v. Storms, 101 Minn. 381, 112 N. W. 419; Minneapolis Threshing Machine Co. v. Peters, 112 Minn. 429, 128 N. W. 578.

[18] Gammon v. Ganfield, 42 Minn. 368, 44 N. W. 125; Backdahl v. Grand Lodge, 46 Minn. 61, 48 N. W. 454; Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[19] 3 Ency. L. & P. 1330; Hepburn, Development of Code Pleading, § 279. See cases supra.

[20] Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[21] Conway v. Wharton, 13 Minn. 158 (145); Cook v. Finch, 19 Minn. 407(350).

[22] Derby v. Gallup, 5 Minn. 119(85) (action for conversion—general denial and justification for taking); Zimmerman v. Lamb, 7 Minn. 421(336) (id.); Scott v. King, 7 Minn. 494(401) (replevin—general denial and justification for taking); Cook v. Finch, 19 Minn. 407 (350) (contract revoked, annuled and modified); Stadtler v. School Dist., 71 Minn. 311, 73 N. W. 956 (denial and admission of same matter).

[23] Booth v. Sherwood, 12 Minn. 426 (310) (license and denial of title); Conway v. Wharton, 13 Minn. 158(145) (statute of limitations and accord and satisfaction); Roblee v. Secrest, 28 Minn. 43, 8 N. W. 904 (non-delivery of goods sold and fraud in sale); Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145, 821 (action for slander—denial and matter in mitigation); Branham v. Bezanson, 33 Minn. 49, 21 N. W. 861 (claim of title from different sources in action to determine adverse claims); First Nat. Bank v. Lincoln, 36 Minn. 132, 30 N. W. 449 (general denial and payment); Gammon v. Ganfield, 42 Minn. 368, 44 N. W. 125 (failure of machine to conform to sample and breach of warranty); Backdahl v. Grand Lodge, 46 Minn. 61, 48

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335. Partial defences—Though partial defences are not expressly authorized by statute the right to plead them is unquestioned.[24] They should be pleaded as such.[25] This is a statutory requirement in New York.[26]

336. Defendant must not be stranger to new matter—One may not defend an action by asserting facts or rights which do not concern him and in which he has no lawful interest.[27]

337. Action against one of several obligors—If A sues 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.[28] An answer good as to the plaintiff is not vitiated

N. W. 454 (two suspensions from a benefit society); Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 52 N. W. 986 (surrender of premises to landlord and neglect of landlord rendering premises untenantable); Steenerson v. Waterbury, 52 Minn. 211, 53 N. W. 1146 (general denial and payment); Kennedy v. McQuaid, 56 Minn. 450, 58 N. W. 35 (general denial and conveyance to third party); La Plant v. Firemen's Ins. Co., 68 Minn. 82, 70 N. W. 856 (denial of liability by insurer and action prematurely brought); D. M. Osborne & Co. v. Waller, 73 Minn. 52, 75 N. W. 732 (extension of time and payment); Bank of Glencoe v. Cain, 89 Minn. 473, 95 N. W. 308 (signatures not genuine and fraud in procuring them); Ferguson v. Trovaten, 94 Minn. 209, 102 N. W. 373 (contract for sale of land and performance taking oral contract out of statute of frauds); Rees v. Storms, 101 Minn. 381, 112 N. W. 419 (action for rent — general denial and subsequent oral agreement); Minneapolis Threshing Machine Co. v. Peters, 112 Minn. 429, 128 N. W. 578 (action on note —breach of warranty and fraud); Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834 (action for conversion of grain—lien for threshing plaintiff's share of grain and delivery to plaintiff upon condition). See Peters v. Cannon River Electric Power Co., 110 Minn. 121, 124 N. W. 826 (defendant held not restricted by the old common-law rule as to inconsistency of defences).

[24] Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677 (partial failure of consideration through breach of warranty); Torinus v. Buckham, 29 Minn. 128, 12 N. W. 348 (a partial failure of consideration may be set up in defence to an action on a negotiable note brought by the original holder or one who stands in his shoes); Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145, 821 (action for slander—provocation in mitigation of damages); Durment v. Tuttle, 50 Minn. 426, 52 N. W. 909 (partial failure of consideration for note); C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211 (action on note for goods sold—breach of warranty); Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817 (action for damages for breach of contract to convey—part of premises contracted for homestead—failure of wife to join in contract); Nichols & Shepard Co. v. Soderquist, 77 Minn. 509, 80 N. W. 630 (in an action brought against one of the makers of a joint and several promissory note, he may interpose, to defeat recovery pro tanto, the defence that there was a partial failure of consideration, arising out of a breach of a contract of warranty, entered into with all of said makers, as to a part of the property for which the note was given).

[25] Pomeroy, Remedies, § 608; 3 Ency. L. & P. 1315.

[26] Thompson v. Halbert, 109 N. Y. 329, 16 N. E. 675; Browning King & Co. v. Terwillinger, 129 N. Y. S. 431.

[27] Cathcart v. Peck, 11 Minn. 45(24); Herber v. Christopherson, 30 Minn. 395, 15 N. W. 676. See Bausman v. Eads, 46 Minn. 148, 48 N. W. 769.

[28] Nichols & Shepard Co. v. Soderquist, 77 Minn. 509, 80 N. W. 630.

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by asking relief which cannot be granted for want of proper parties to the action.[29]

338. Hypothetical admissions—Hypothetical statements or admissions may be made in an answer for the purpose of enabling a defendant to plead all his defences.[30]

339. New matter must be specially pleaded—New matter in the nature of confession and avoidance, that is, matter which, admitting the truth of the facts alleged in the complaint, would tend to avoid their legal effect and operation, must be specially pleaded.[31] A denial goes to the facts alleged and not

[29] Campbell v. Jones, 25 Minn. 155.

[30] Nunnemacker v. Johnson, 38 Minn. 390, 38 N. W. 351; McKasy v. Huber, 65 Minn. 9, 67 N. W. 650.

[31] Bank of Commerce v. Selden, 1 Minn. 340(251) (action on check of firm—fact that check was for the individual benefit of partner who drew it, that he applied the money raised by it to his own use, and that such facts were known to plaintiff held new matter); American Button-Hole etc. Co. v. Thornton, 28 Minn. 418, 10 N. W. 421 (in an action to recover in several counts the price of goods sold at various times, an answer, admitting the several sales and the prices, but pleading in bar of a recovery that the sales were made under such an agreement, and the circumstances such, as to merge all the items in a general running account and one entire demand, and pleading a former recovery as to one of such sales, is a pleading in the nature of a confession and avoidance, and the burden of proving such facts is upon the defendant); Livingston v. Ives, 35 Minn. 55, 27 N. W. 74 (action to redeem from absolute deed given to secure a debt—fact that deed was given to hinder and delay creditors held new matter); MacFee v. Horan, 40 Minn. 30, 41 N. W. 239 (action by real estate broker for commission—fact that he was acting as agent of buyer held new matter); Kennedy v. McQuaid, 56 Minn. 450, 58 N. W. 35 (when plaintiff pleads title in himself by alleging the source of his title, the fact that after he acquired the title he conveyed it to a third party is new matter); Netzer v. Crookston, 59 Minn. 244, 61 N. W. 21 (if want of funds is a defence to an action against a municipality for defective sewers, etc. it is new matter); Anderson v. Rockwood, 62 Minn. 1, 63 N. W. 1023 (action to recover money collected under a judgment assigned to defendant in trust for plaintiff—that assignment was designed to defraud creditors held new matter); O'Gorman v. Sabin, 62 Minn. 46, 59, 64 N. W. 84 (action on undertaking — that defendant's undertaking was merely as security for another held new matter); Iselin v. Simon, 62 Minn. 128, 64 N. W. 143 (action for price of goods sold—that goods were sold on credit the term whereof has not expired held new matter); Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429 (where the issue made by the pleadings is whether an alleged contract was actually made evidence to show the invalidity of the contract or that it was not fairly made is new matter); McClellan v. Louis F. Dow Co., 114 Minn. 418, 131 N. W. 485 (action by parent for loss of services of child—emancipation of child and a former recovery by the parent held new matter); Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422 (waiver of written notice of breach of warranty held possibly new matter); Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315 (action by foreign receivers—existence of domestic creditors who would be prejudiced by the suit held new matter).

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to the liability arising from those facts.[32] In pleading new matter it is unnecessary to state that it is pleaded as a defence. If it is in a defensive pleading, and is a defence, it is enough.[33] New matter may be taken advantage of as a defence though not pleaded if it appears upon the evidence of the adverse party,[34] or if proof is made without objection or by consent.[35] Matter which is ordinarily new matter to be specially pleaded may be admitted under a denial where the adverse party pleads his cause of action in general terms so as not to disclose the facts. The defendant is not bound to plead more specifically than the plaintiff. He is not bound to anticipate, and confess and avoid, the facts which the plaintiff may prove under a general allegation in his complaint.[36] What constitutes new matter to be specially pleaded depends, not upon its intrinsic nature, or upon the nature of the action, but upon the allegations of the complaint. Consequently cases are to be used as precedents with great caution.[37] The following defences are generally new matter to be specially pleaded where they do not appear upon the face of the complaint: Abandonment of contract;[38] accord and satisfaction;[39] accounting and settlement;[40] action prematurely brought;[41] alteration of instruments;[42] another action pending;[43] arbitration and award;[44] assignment of claim;[45] assumption of risk;[46] bankruptcy;[47] cancelation of contract;[48] contributory negligence;[49] dedication of locus in quo;[50] defect of parties;[51] discharge of obligation;[52] equities;[53] express contract in action on implied contract;[54] ex-

[32] Lautenschlager v. Hunter, 22 Minn. 267; Register Printing Co. v. Willis, 57 Minn. 93, 58 N. W. 825; Iselin v. Simon, 62 Minn. 128, 64 N. W. 143.

[33] Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682.

[34] Handy v. St. Paul Globe Publishing Co., 41 Minn. 188, 42 N. W. 872; Iselin v. Simon, 62 Minn. 128, 64 N. W. 143.

[35] Bowe v. Minn. Milk Co., 44 Minn. 460, 47 N. W. 151; Almich v. Downey, 45 Minn. 460, 48 N. W. 197.

[36] Kipp v. Bullard, 30 Minn. 84, 14 N. W. 364; Ellingsen v. Cooke, 37 Minn. 400, 34 N. W. 747; Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81, 91 N. W. 257; and cases under § 327.

[37] See § 331.

[38] Rothschild v. Burritt, 47 Minn. 28, 49 N. W. 393.

[39] Dibble v. Dimick, 143 N. Y. 549, 38 N. E. 724.

[40] Mower County v. Smith, 22 Minn. 97, 115.

[41] Iselin v. Simon, 62 Minn. 128, 64 N. W. 143.

[42] See § 546.

[43] See § 537.

[44] Lautenschlager v. Hunter, 22 Minn. 267; Brazil v. Isham, 12 N. Y. 9.

[45] Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490.

[46] See § 741.

[47] Cornell v. Dakin, 38 N. Y. 253; Goodhue v. King, 55 Cal. 377.

[48] Rothschild v. Burritt, 47 Minn. 28, 49 N. W. 393.

[49] See § 818.

[50] Case v. Favier, 12 Minn. 89(48).

[51] See § 120.

[52] Jackson v. Kansas City Packing Co., 42 Minn. 382, 44 N. W. 126.

[53] See § 341.

[54] Lautenschlager v. Hunter, 22 Minn. 267; Register Printing Co. v. Willis, 57 Minn. 93, 58 N. W. 825.

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cuse for non-performance;[55] failure of consideration;[56] former adjudication;[57] fraud;[58] homestead exemption;[59] illegality in a contract;[60] immaturity of claim;[61] infancy;[62] justification;[63] license;[64] lien;[65] misnomer;[66] mistake;[67] modification of contract;[68] non-compliance with law;[69] payment;[70] ratification;[71] recoupment;[72] release;[73] rescission of contract;[74] res judicata;[75] set-

[55] Hand v. National Live Stock Ins. Co., 57 Minn. 519, 59 N. W. 538. See § 593.

[56] A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113; Moore v. Boyd, 95 Ind. 134; Smith v. Rembaugh, 21 Mo. App. 390.

[57] American Button-Hole etc. Co. v. Thornton, 28 Minn. 418, 10 N. W. 425; Bowe v. Minn. Milk Co., 44 Minn. 460, 47 N. W. 151; Swank v. St. Paul City Ry., 61 Minn. 423, 63 N. W. 1088; McClellan v. Louis F. Dow Co., 114 Minn. 418, 131 N. W. 485.

[58] See § 669.

[59] Brown v. Eaton, 21 Minn. 409; Bergama v. Dewey, 46 Minn. 357, 49 N. W. 57. See Kipp v. Bullard, 30 Minn. 94, 14 N. W. 364.

[60] Finley v. Quirk, 9 Minn. 194(179); Nash v. St. Paul, 11 Minn. 174(110); Wiley v. Board of Ed., 11 Minn. 371 (268); First Nat. Bank v. Kidd, 20 Minn. 234(212); Adams v. Adams, 25 Minn. 72, 76; Handy v. St. Paul Globe Publishing Co., 41 Minn. 188, 42 N. W. 872; Duford v. Lewis, 43 Minn. 26, 44 N. W. 522; Babcock v. Murray, 58 Minn. 385, 59 N. W. 1038; Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487; Woodbridge v. Sellwood, 65 Minn. 135, 67 N. W. 799; VanDusen-Harrington Co. v. Jungeblut, 75 Minn. 298, 77 N. W. 970; Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429; Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

[61] Iselin v. Simon, 62 Minn. 128, 64 N. W. 143.

[62] Klason v. Rieger, 22 Minn. 59; Rush v. Wick, 31 Ohio St. 521.

[63] Case v. Favier, 12 Minn. 89(48); O'Brien v. St. Paul, 18 Minn. 176(163); Linton v. Unexcelled Fireworks Co., 124 N. Y. 533, 27 N. E. 406. See Ellingsen v. Cooke, 37 Minn. 400, 34 N. W. 747.

[64] Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Lyford v. Martin, 79 Minn. 243, 82 N. W. 479.

[65] Bassett v. Haren, 61 Minn. 346, 63 N. W. 713.

[66] Lyons v. Rafferty, 30 Minn. 526, 16 N. W. 420.

[67] Warner v. Myrick, 16 Minn. 91(81); Leighton v. Grant, 20 Minn. 345(298); Almich v. Downey, 45 Minn. 460, 48 N. W. 197.

[68] Phister v. Gove, 48 Mo. App. 455.

[69] Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Lyford v. Martin, 79 Minn. 243, 82 N. W. 479.

[70] See § 831.

[71] Newell v. Randall, 32 Minn. 171, 19 N. W. 972; Noble v. Blout, 77 Mo. 235. See Janney v. Boyd, 30 Minn. 319, 15 N. W. 308.

[72] Leeds v. Little, 42 Minn. 414, 44 N. W. 309. See Horn v. Western Land Assn., 22 Minn. 233; Bennett v. Morton, 46 Minn. 113, 48 N. W. 678.

[73] Rothschild v. Burritt, 47 Minn. 28, 49 N. W. 393; Christianson v. Chicago etc. Ry., 61 Minn. 249, 63 N. W. 639; McKyring v. Bull, 16 N. Y. 297; Bostwick v. McEvoy, 62 Cal. 496.

[74] Rothschild v. Burritt, 47 Minn. 28, 49 N. W. 393.

[75] American Button-Hole etc. Co. v. Thornton, 28 Minn. 418, 10 N. W. 425; Bowe v. Minn. Milk Co., 44 Minn. 460, 47 N. W. 151; Swank v. St. Paul City Ry., 61 Minn. 423, 63 N. W. 1088; McClellan v. Louis F. Dow Co., 114 Minn. 418, 131 N. W. 485.

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tlement;[76] statute of frauds;[77] statute of limitations;[78] subrogation;[79] suretyship;[80] tender;[81] usury;[82] wager;[83] waiver;[84] want of consideration where the law presumes a consideration.[85]

[76] Mower County v. Smith, 22 Minn. 97, 115; Hall v. Skahen, 101 Minn. 460, 112 N. W. 865.

[77] See § 883.

[78] See § 724.

[79] Aldrich v. Willis, 55 Cal. 81.

[80] O'Gorman v. Sabin, 62 Minn. 46, 64 N. W. 84.

[81] Meredith v. Santa Clara Mining Assn., 56 Cal. 178.

[82] Babcock v. Murray, 58 Minn. 385, 59 N. W. 1038; Dickson v. St. Paul, 105 Minn. 165, 117 N. W. 426.

[83] Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487.

[84] Murphy v. Sherman, 25 Minn. 196; Newell v. Randall, 32 Minn. 171, 19 N. W. 972; Rothschild v. Burritt, 47 Minn. 28, 49 N. W. 393; Hand v. National Live-Stock Ins. Co., 57 Minn. 519, 59 N. W. 538; Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422.

[85] Bausman v. Credit Guarantee Co., 47 Minn. 377, 50 N. W. 496; Dubois v. Hermance, 56 N. Y. 673; University v. Livingston, 57 Iowa, 307. See A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113.

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EQUITIES

340. Nature—The statute provides for pleading equities in an answer.[86] 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. 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.[87] If the facts

[86] See § 293; R. L. 1905 § 4130; G. S. 1913 § 7756.

[87] Gates v. Smith, 2 Minn. 30(21) (in an action, after default in a chattel mortgage, by the mortgagee, against the mortgagor, to recover the property, the facts, that there was a partial failure of the consideration for the mortgage, and that the mortgagee was otherwise indebted to the mortgagor, both amounts exceeding the amount of the mortgage, do not constitute such an equity as may be set up in defence, without showing that defendant has no adequate remedy at law); McClane v. White, 5 Minn. 178(139) (in ejectment an equitable defence may be set up, but the equities should be strong, such as would entitle defendant to a conveyance, on a bill filed for that purpose); Barker v. Walbridge, 14 Minn. 469(351) (unlawful detainer proceedings—a note held by the tenant against the landlord cannot be set up as an equity unless there is no remedy on it by action); Birdsall v. Fischer, 17 Minn. 100(76) (action on note—general rule of text stated); Wallrich v. Hall, 19 Minn. 383(329) (action to cancel contract to convey—failure to pay instalment due—amount due for rent properly set off as an "equity"); Wheaton v. Thompson, 20 Minn. 196(175, 183) (action on replevin bond—equitable defence that judgment had been satisfied in attachment proceedings); First Nat. Bank v. Kidd, 20 Minn. 234(212) (action to foreclose a mortgage—defence that plaintiff should be required to exhaust other security held for the debt before resorting to the mortgaged property); Williams v. Murphy, 21 Minn. 534 (ejectment — what equities pleadable); Kean v. Connelly, 25 Minn. 222, 228 (action by one cotenant against another for share of rents and profits—taxes paid properly set off); Crockett v. Phinney, 33 Minn. 157, 22 N. W. 292 (action for conversion by buyer against attaching creditors of seller—part payment by buyer—right of creditors to rescind sale on the ground that it was fraudulent as to them); McKinney v. Bode, 33 Minn. 450, 454, 23 N. W. 851 (ejectment — what equities pleadable); Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. 865 (action on note secured by mortgage — right to subrogation pleadable as an equity); Probstfield v. Czizek, 37 Minn. 420, 34 N. W. 896 (ejectment—estoppel of one who has assumed a mortgage from asserting title under mortgage pleadable as an equity); Thwing v. Hall, 40 Minn. 184, 41 N. W. 815 (action for specific performance—right to cancelation on the ground of mistake as an equity); Becker v. Northway, 44 Minn. 61, 46 N. W. 210 (action against surety—setoff of debt due principal—intervention and setoff by principal); Rogers v. Castle, 51 Minn. 428, 53 N. W. 651 (equitable defence by grantee against personal liability for incumbrances); Vaule v. Miller, 69 Minn. 440, 72 N. W. 452 (action on judgment—fact that summons was not served pleadable as an equity—cancelation of judgment);

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giving rise to the equity also constitute a cause of action at law the answer should allege facts showing the inadequacy of the remedy at law.[88] The equity must be perfect at the time it is pleaded and not depend on the happening of a contingent event. It is perfect if the relief sought will make it so.[89]

341. Must be pleaded specially—An "equity" is new matter and must generally be pleaded specially,[90] but it is sometimes admissible for defensive purposes under a denial.[91]

342. Affirmative relief need not be sought—While an "equity" may be such as would have authorized affirmative relief by a court of equity under the former system it may now be pleaded for defensive purposes solely without asking for affirmative relief.[92]

343. Effect of pleading as a bar—If the defendant pleads his equities and there is a trial on the merits he cannot bring a subsequent independent action on the same equities.[93]

344. Failure to plead—Effect—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 thereon.[94]

Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068 (ejectment—what equities pleadable); Richardson v. Merritt, 74 Minn. 354, 77 N. W. 234 (principal and surety—insolvency—another action pending—setoff); Deering v. Poston, 78 Minn. 29, 80 N. W. 783 (action on judgment—fact that summons was not served pleadable as an equity—requisites of answer for cancelation of judgment); Crosby v. Scott, 93 Minn. 475, 101 N. W. 610 (action for breach of contract for materials for a house—lien for materials pleadable as an equity); Stephenson v. Murphy, 106 Minn. 243, 119 N. W. 47 (action on judgment — want of jurisdiction pleadable as an equity—requisites of answer); Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142 (a claim against an individual member of a firm cannot be offset against a debt due such firm, but an answer alleging that defendants became sureties upon a bond upon the representation of a member of the firm, now bringing suit, that he held as security sufficient property to meet any liability upon the bond, and that he would save defendants harmless from any liability thereunder, states an equitable defence, which, under the circumstances of this action, may be pleaded and shown).

[88] Gates v. Smith, 2 Minn. 30(21); Barker v. Walbridge, 14 Minn. 469(351); Birdsall v. Fischer, 17 Minn. 100(76); Probstfield v. Czizek, 37 Minn. 420, 34 N. W. 896.

[89] Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. 865.

[90] Crockett v. Phinney, 33 Minn. 157, 22 N. W. 292; Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068; Travelers' Ins. Co. v. Walker, 77 Minn. 438, 80 N. W. 618.

[91] Travelers' Ins. Co. v. Walker, 77 Minn. 438, 80 N. W. 618.

[92] Probstfield v. Czizek, 37 Minn. 420, 34 N. W. 896; Rogers v. Castle, 51 Minn. 428, 53 N. W. 651; Travelers' Ins. Co. v. Walker, 77 Minn. 438, 80 N. W. 618. See Chicago etc. Ry. v, McKeigue, 126 Wis. 574, 105 N. W. 1030.

[93] St. Louis v. Schulenburg & Boeckler Lumber Co., 98 Mo. 613.

[94] McCreary v. Casey, 45 Cal. 128. The rule was otherwise in this state under a former statute. Fowler v. Atkinson, 6 Minn. 503(350).

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345. Burden of proof—The burden of proving the facts giving rise to the equities rests on the defendant if they are controverted by the plaintiff.[95]

346. Practice—Trial—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 a jury. The order of trial however, is a matter of discretion with the court, to be determined by the exigencies of the particular case.[96]

[95] Dyke v. Spargur, 143 N. Y. 651, 38 N. E. 269.

[96] Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610. See Guernsey v. American Ins. Co., 17 Minn. 104 (83); Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876; Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119; Suessenbach v. First Nat. Bank, 5 Dak. 477, 504, 41 N. W. 662; Pomeroy, Remedies, § 86.

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RECOUPMENT

347. Definition—Recoupment, in this connection, means the right of a defendant, in an action on contract, to plead and prove as a defence, in whole or in part, the damages, whether liquidated or unliquidated, which he has sustained by reason of the plaintiff's breach of the contract sued upon or wrongful act in connection therewith.[97] Recoupment is sometimes regarded as a cross-demand rather than a defence.[98]

348. Basis of doctrine—Some cases give as a reason for the doctrine that it is to avoid circuity of action, but the more satisfactory reason is that there is a natural equity, especially as to claims arising out of the same transaction, that one claim should compensate the other, and that the balance only should be recovered.[99] The doctrine is sometimes grounded on the idea of a partial or complete failure of consideration.[1]

349. Effect of statute of counterclaims—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 elects, go beyond abating or barring the plaintiff's claim, and recover an affirmative judgment for the difference in his favor.[2] But in order to recover an affirmative judgment he must plead his counterclaim as such.[3]

350. When allowable—In an action for services the defendant may recoup the damages resulting from the negligence of the plaintiff in the performance of his contract of employment.[4] Damages from a breach of warranty upon a sale of goods may be recouped in an action for the price or on a note therefor.[5] Damages from a failure to fully perform a contract may be recouped where the

[97] Harlan v. St. Paul etc. Ry., 31 Minn. 427, 18 N. W. 147; Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682; C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211; General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404.

[98] Merchants H. & L. Co. v. Clow & Sons, 204 U. S. 286.

[99] Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682.

[1] Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677; Wilson v. Reedy, 33 Minn. 503, 24 N. W. 191; C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211.

[2] Mason v. Heyward, 3 Minn. 182(116, 121); Smith v. Dukes, 5 Minn. 373(301, 305); Morrison v. Lovejoy, 6 Minn. 319 (224, 235); Folsom v. Carli, 6 Minn. 420 (284, 289); Harlan v. St. Paul etc. Ry., 31 Minn. 427, 18 N. W. 147; Townsend v. Minneapolis Cold Storage & Freezer Co., 46 Minn. 121, 124, 48 N. W. 682.

[3] See § 373.

[4] Harlan v. St. Paul etc. Ry., 31 Minn. 427, 18 N. W. 147. See Mason v. Heyward, 3 Minn. 182(116, 118); Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245; Lyford v. Martin, 79 Minn. 243, 82 N. W. 479.

[5] Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677; Wilson v. Reedy, 33 Minn. 503, 24 N. W. 191; Mass. Loan & Trust Co. v. Welch, 47 Minn. 183, 49 N. W. 740; Rugland v. Thompson, 48 Minn. 539, 51 N. W. 604; C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211.

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plaintiff is allowed to recover for a substantial performance.[6] In an action for goods sold and delivered the buyer may recoup his damages from fraud if the contract is not wholly executory.[7] He may also recoup his damages from delay in delivery.[8] Various cases are cited below in which the right of recoupment was recognized.[9]

351. Pleading—Recoupment is new matter to be specially pleaded.[10] It would seem that the proper mode of pleading recoupment in this state is as a defence.[11] In New York it is properly pleaded as a counterclaim.[12] The same facts may constitute a defence by way of recoupment or a counterclaim. To be available as a counterclaim they must be pleaded as such, but if they are pleaded as a counterclaim they are nevertheless available as a defence by way of

[6] Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845; Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245; Sykes v. St. Cloud, 60 Minn. 442, 62 N. W. 613; Gray v. New Paynesville, 89 Minn. 258, 94 N. W. 721; Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179. See Dunnell, Minn. Digest, § 1850.

[7] Thompson v. Libby, 36 Minn. 287, 31 N. W. 52; General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404.

[8] Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 44 N. W. 306. See, for a form of answer, Paine v. Sherwood, 21 Minn. 225.

[9] Jellett v. St. Paul etc. Ry., 30 Minn. 265, 15 N. W. 237 (conversion — lien, claim or interest of defendant in property—mitigation of damages); Duluth Loan & Land Co. v. Klovdahl, 55 Minn. 341, 56 N. W. 1119 (damages from defect in title of land sold); Sykes v. St. Cloud, 60 Minn. 442, 454, 62 N. W. 613 (damages for failure to supply water for extinguishment of fires); McKinnon v. Palen, 62 Minn. 188, 64 N. W. 387 (action against partner — recoupment of damages allowed as if all partners were sued); Pioneer Press Co. v. Hutchinson, 63 Minn. 481, 65 N. W. 938 (action for rent — recoupment of damages from breach of covenant to make improvements); Abrahamson v. Lamberson, 68 Minn. 454, 71 N. W. 676; Id., 72 Minn. 308, 75 N. W. 226 (vendor of land entitled to recoup interest on unpaid purchase money); General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404 (action for price of goods sold—recoupment of damages from fraud in obtaining contract sued upon); Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426 (action on note secured by mortgage on chattel in possession of a bailee—bankruptcy of bailee — recoupment allowed for damages from breach of contract of bailment whether they accrued while the property was in the hands of the bailee or trustee in bankruptcy). See Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993 (building contract — sale of stone — recoupment for defects in stone disallowed because there was no severance of the items of damages in the pleading or proof).

[10] Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Richard Deeves & Sons v. Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395. See Horn v. Western Land Assn., 22 Minn. 233; Bennett v. Morton, 46 Minn. 113, 48 N. W. 678.

[11] See §§ 347, 349.

[12] Richard Deeves & Sons v. Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395.

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recoupment.[13] A party has been denied recoupment because he did not sever certain items of damages in his pleading.[14]

352. Statute of limitations does not run against—The right of recoupment continues as long as the claim. The statute of limitations does not run against it.[15]

[13] Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682; General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404.

[14] Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993.

[15] C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211.

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COUNTERCLAIM

353. Definition and nature—A counterclaim is a cause of action pleaded by the defendant to diminish, defeat or modify the relief otherwise recoverable by the plaintiff.[16] It 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. The part of an answer alleging a counterclaim is in the nature of a complaint by the defendant against the plaintiff.[17] 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.[18] There can be no counterclaim to a mere defence.[19]

354. May be used defensively—Matter may be such that it is available either as a defence or a counterclaim.[20] Matter pleaded expressly as a counterclaim, though not proper as such, may be available as a defence.[21] If a counterclaim is pleaded in a reply it can only be used as a defence.[22]

355. Statute liberally construed—The statute authorizing the pleading of counterclaims is to be liberally construed.[23] It is the policy of the code to prevent multiplicity of actions.[24]

356. Must be within jurisdiction of court—A counterclaim cannot exceed in amount the jurisdiction of the court, but a counterclaim exceeding the jurisdiction of the court may be pleaded as defensive matter, where no affirmative

[16] Dietrich v. Koch, 35 Wis. 618.

[17] Mason v. Heyward, 3 Minn. 182 (116); Eastman v. Linn, 20 Minn. 433 (387); Slocum v. Minneapolis Millers Assn., 33 Minn. 438, 23 N. W. 862; Wilson v. Fairchild, 45 Minn. 203, 206, 47 N. W. 642; Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530; Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

[18] Cooper v. Simpson, 41 Minn. 46, 42 N. W. 601; Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682; Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

[19] Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682.

[20] Eastman v. Linn, 20 Minn. 433(387); Griffin v. Jorgenson, 22 Minn. 92; Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682; C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211.

[21] Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682; Germania Bank v. Osborne, 81 Minn. 272, 83 N. W. 1084. See Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530; General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404; and § 373.

[22] Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682.

[23] Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972; Hackett v. Kanne, 98 Minn. 240, 107 N. W. 1131; W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307.

[24] Morrison v. Lovejoy, 6 Minn. 319 (224); Barker v. Walbridge, 14 Minn. 469(351); Hall v. Parsons, 105 Minn. 96, 117 N. W. 240.

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relief is demanded, or the defendant may waive the excess by his pleading and demand judgment for an amount within the jurisdiction of the court.[25]

357. Must be an independent cause of action—A counterclaim 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.[26]

358. Must exist against a plaintiff and in favor of a defendant—A 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." [27] If A sues B and C on a joint obligation an individual claim of B or C against A cannot be pleaded as a counterclaim.[28] If A and B sue C on a joint claim C cannot plead as a counterclaim a claim against A or B individually.[29] A cause of action which cannot be determined without bringing in new parties cannot be pleaded as a counterclaim.[30] If the subject of counterclaim is a tort it is no objection that all the tortfeasors are not parties.[31] A counterclaim must be a cause of action in the defendant against the plaintiff, which may be adjudicated and determined between them. If the cause of action is such that an action upon it could not be maintained by the defendant alone against the plaintiff alone it cannot be made the subject of counterclaim.[32]

359. Must exist against the plaintiff—A counterclaim must be a cause of action existing against the plaintiff which would authorize a judgment against

[25] Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530.

[26] Mason v. Heyward, 3 Minn. 182 (116); Culbertson v. Lennon, 4 Minn. 51(26); Folsom v. Carli, 6 Minn. 420 (284); Swift v. Fletcher, 6 Minn. 550 (386, 392); Englebrecht v. Rickert, 14 Minn. 140(108); Lash v. McCormick, 17 Minn. 403(381); Linn v. Rugg, 19 Minn. 181(145); First Nat. Bank v. Kidd, 20 Minn. 234(212); Banning v. Bradford, 21 Minn. 308, 313; Reed v. Newton, 22 Minn. 541; Campbell v. Jones, 25 Minn. 155; Garner v. Reis, 25 Minn. 475; Sylte v. Nelson, 26 Minn. 105, 1 N. W. 811; Brackett v. Osborne, 31 Minn. 454, 18 N. W. 153; Ward v. Anderberg, 36 Minn. 300, 30 N. W. 890; McPherson v. Runyon, 41 Minn. 524, 43 N. W. 392; Lynch v. Free, 64 Minn. 277, 66 N. W. 973; Gordon v. New England Furniture & Carpet Co., 117 Minn. 525, 135 N. W. 1135.

[27] R. L. 1905 § 4131; G. S. 1913 § 7757.

[28] Cooper v. Brewster, 1 Minn. 94(73); Birdsall v. Fischer, 17 Minn. 100(76). See Balch v. Wilson, 25 Minn. 299.

[29] Peck v. Snow Church & Co., 47 Minn. 398, 50 N. W. 470; Maurin v. Lyon, 69 Minn. 257, 261, 72 N. W. 72; Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142 (a claim against an individual member of a firm cannot be counterclaimed against a debt due the firm).

[30] See Campbell v. Jones, 25 Minn. 155; Wilcox v. Comstock, 37 Minn. 65, 33 N. W. 42; Little v. Simonds, 46 Minn. 380, 49 N. W. 186; Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610; Baremore v. Selover, Bates & Co., 100 Minn. 23, 110 N. W. 66; Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441.

[31] Walker v. Johnson, 28 Minn. 147, 9 N. W. 632.

[32] Campbell v. Jones, 25 Minn. 155. See Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441; Ecorse v. Earhart, 96 Fed. 925.

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him.[33] But in an action by an executor or administrator the defendant may set off any claim he has against the estate.[34] And in an action by an undisclosed principal the defendant may sometimes set off a claim against the agent.[35]

360. Must exist in favor of the defendant—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.[36] A claim of stockholders individually cannot be interposed in an action against the corporation,[37] and in an action against stockholders a claim of the corporation cannot be interposed.[38] 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. But if the principal is a party, and insolvent, a court of equity will allow the surety to set off a debt due the principal from the plaintiff. If the action is brought against the surety alone the principal may intervene and set off his claim.[39] If a partner is sued on what is really a firm obligation, he may avail himself of any recoupment of which the partners would have a right to avail themselves if the action were against all of them.[40] In an action against a firm a cause of action against a partner individually cannot be counterclaimed.[41]

361. Must exist in defendant at commencement of action—A cause of action which is not mature at the commencement of the action cannot be set up as a counterclaim.[42] A cause of action assigned to the defendant after the commencement of the action cannot be set up as a counterclaim.[43] A cause of action cannot be pleaded as a counterclaim unless it existed in favor of the defendant at the commencement of the action.[44] A cause of action for damages for breach of contract, arising simultaneously and concurrently with the commencement of an action, may be interposed as a counterclaim therein.[45]

[33] Spencer v. Levering, 8 Minn. 461 (410); Linn v. Rugg, 19 Minn. 181 (145); Campbell v. Jones, 25 Minn. 155, 157.

[34] R. L. 1905 § 3737; G. S. 1913 § 7330; Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. 58; Talty v. Torling, 79 Minn. 386, 82 N. W. 632; Martin County Nat. Bank v. Bird, 92 Minn. 110, 113, 99 N. W. 780.

[35] Baxter v. Sherman, 73 Minn. 434, 76 N. W. 211.

[36] Carpenter v. Leonard, 5 Minn. 155 (119).

[37] Gallagher v. Germania Brewing Co., 53 Minn. 214, 54 N. W. 1115.

[38] Mealey v. Nickerson, 44 Minn. 430, 46 N. W. 911.

[39] Becker v. Northway, 44 Minn. 61, 46 N. W. 210.

[40] McKinnon v. Palen, 62 Minn. 188, 64 N. W. 387.

[41] Maurin v. Lyon, 69 Minn. 257, 72 N. W. 72.

[42] Brackett v. Osborne, 31 Minn. 454, 18 N. W. 153; Stensgaard v. St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910; Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128. See Milliken v. Mannheimer, 49 Minn. 521, 52 N. W. 139.

[43] Northern Trust Co. v. Hiltgen, 62 Minn. 361, 64 N. W. 909.

[44] Fergus Printing & Publishing Co. v. Otter Tail County, 60 Minn. 212, 62 N. W. 272; Northern Trust Co. v. Hiltgen, 62 Minn. 361, 64 N. W. 909.

[45] Hall v. Parsons, 105 Minn. 96, 117 N. W. 240. See 8 Col. L. Rev. 591.

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362. Consistency with remainder of answer—A counterclaim for breach of warranty has been held not inconsistent with a denial of the plaintiff's title to the notes sued upon.[46] In an action by a landlord against a tenant to recover rent, there is no inconsistency between an admission in the answer that the defendant is indebted for rent and a counterclaim for repairs made by the defendant for which the plaintiff agreed to pay him.[47]

363. Responsive to complaint—A counterclaim which asserted rights wholly foreign to the purposes of the original action has been held improper.[48] 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, though such cause of action may not be of the precise character indicated by those allegations and though the cause of action might not be a proper counterclaim if all such allegations should be proved.[49]

364. Claims connected with the subject of the action—The statute provides for the pleading as a counterclaim of a cause of action, whether ex contractu or ex delicto, connected with the subject of the action.[50] The phrase "subject of the action" is indefinite, and should be liberally construed.[51] It is apparently synonymous with "subject-matter of the action."[52] The connection must be such 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.[53] Cases are cited below holding particular claims either connected[54]

[46] Wilson v. Reedy, 32 Minn. 256, 20 N. W. 153.

[47] Hausman v. Mulheran, 68 Minn. 48, 70 N. W. 866.

[48] Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441.

[49] Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352.

[50] R. L. 1905 § 4131; G. S. 1913 § 7757. See § 294.

[51] Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1; W. W. Kimball Co. v. Massey, 126 Minn. 465, 148 N. W. 307.

[52] Hanson v. Byrnes, 96 Minn. 50, 104 N. W. 762; Hackett v. Kanne, 98 Minn. 240, 107 N. W. 1131; Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1.

[53] Barker v. Walbridge, 14 Minn. 469 (351).

[54] Eastman v. Linn, 20 Minn. 433(387) (action to determine adverse claims—counterclaim in nature of ejectment); Matthews v. Torinus, 22 Minn. 132 (action to remove a cloud—counterclaim to enforce a trust for creditors and to enforce a lien); Goebel v. Hough, 26 Minn. 252, 2 N. W. 847 (action for rent—counterclaim for interference by landlord with premises); Lahiff v. Hennepin County Catholic B. & L. Assn., 61 Minn. 226, 63 N. W. 493 (action for reformation of a bond and mortgage given by a borrowing member of a mutual benefit society—counterclaim for foreclosure); Pioneer Press Co. v. Hutchinson, 63 Minn. 481, 65 N. W. 938 (action for rent—counterclaim for damages for breach of covenant to make improvements); Vaule v. Miller, 69 Minn. 440, 72 N. W. 452 (action on judgment—counterclaim for cancelation of judgment on the ground that the summons was not served); Hackett v. Kanne, 98 Minn. 240, 107 N. W. 1131 (action to enjoin trespass upon land—counterclaim to have boundaries established); Palmer

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or not connected [55] with the subject of the action.

365. Claims arising out of the "transaction" alleged—The statute provides for the pleading as a counterclaim of a cause of action, whether ex contractu or ex delicto, arising out of the transaction pleaded in the complaint as the foundation of plaintiff's claim.[56] As pointed out elsewhere the term "transaction" is incapable of exact definition.[57] It includes contracts and other business transactions or a series of contracts or business dealings relating to the same subject-matter, but it is not limited to such matters.[58] The transaction is not necessarily limited to the facts stated in the complaint, but the defendant may set up new facts to show the entire transaction and counterclaim accordingly. Under this provision of the statute a claim ex contractu may be

v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250 (action on life policy—counterclaim on loan for which policy was pledged to company); Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1 (action to enjoin destruction of a logging road—counterclaim for interference with defendant's right of possession in the land over which the road extended); Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530 (action for negligence—collision between wagon and automobile—counterclaim for injury from collision); Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128 (action by landlord against tenant for wrongful entry after abandonment of lease—counterclaim for wrongful entry by landlord and wrongful acts committed in connection therewith); W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307 (replevin—counterclaim for breach of warranty and to recover instalment of purchase price paid).

[55] Morrison v. Lovejoy, 6 Minn. 319 (224) (counterclaim arising out of a contract entirely distinct from that on which the complaint was based); Illingworth v. Greenleaf, 11 Minn. 235(154) (action for conversion—counterclaim for goods sold and delivered of which article converted was not a part); Majerus v. Hoscheid, 11 Minn. 243(160) (action for conversion of wheat—counterclaim for breach of replevin bond and conversion of wheat by another); Barker v. Walbridge, 14 Minn. 469(351) (unlawful detainer proceedings—counterclaim in note); Allen v. Coates, 29 Minn. 46, 11 N. W. 132 (action for conversion—counterclaim for malicious prosecution of a previous action for the same cause); Schmidt v. Bickenbach, 29 Minn. 122, 12 N. W. 349 (action for goods sold and delivered — counterclaim for malicious prosecution of action for price before it became due and for a wrongful attachment); Jones v. Swank, 54 Minn. 259, 55 N. W. 1126 (action for goods sold and delivered—counterclaim for wrongful attachment); McLane v. Kelly, 72 Minn. 395, 75 N. W. 601 (action by vendee against vendor for damages for breach of an executory contract of sale in being wrongfully ousted from the possession of the premises by the vendor—counterclaim for the value of the use of the land for a period of time prior to the making of the contract, during which time the vendee wrongfully entered upon the land and occupied it); Thomssen v. Ertz, 93 Minn. 280, 101 N. W. 304 (action for libel—counterclaim for goods sold and delivered); Hanson v. Byrnes, 96 Minn. 50, 104 N. W. 762 (action for fraud—counterclaim for services and for money loaned); Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1 (action to restrain destruction of logging road — counterclaim for damages from the negligent operation of plaintiff's locomotive).

[56] See § 294; R. L. 1905 § 4131; G. S. 1913 § 7757.

[57] See § 200.

[58] Barker v. Walbridge, 14 Minn. 469 (351); King v. Coe Commission Co., 93 Minn. 52, 100 N. W. 667.

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counterclaimed in an action ex delicto.[59] Cases are cited below holding claims to arise out of the transaction alleged,[60] or the reverse.[61]

366. Claims "arising out of the contract" alleged—The statute provides for the pleading, as a counterclaim, of a cause of action, whether ex contractu or ex delicto, arising out of the contract pleaded in the complaint as the foundation of plaintiff's claim.[62] This provision covers cases in which recoupment would be allowed at common law.[63] It includes claims for breach of warranty.[64] In an action on contract for services the defendant may counterclaim

[59] King v. Coe Commission Co., 93 Minn. 52, 100 N. W. 667.

[60] Lowry v. Hurd, 7 Minn. 356(282) (action to foreclose a mortgage given for purchase-money — mortgagor may counterclaim damages from breach of the covenants in the deed to him); Steele v. Etheridge, 15 Minn. 501(413, 420) (action for goods sold and delivered—counterclaim to effect that goods were delivered to defendant as agent for sale); Lahiff v. Hennepin County Catholic B. & L. Assn., 61 Minn. 226, 63 N. W. 493 (action for reformation of a bond and mortgage given by a borrowing member of a mutual benefit society—counterclaim for foreclosure); King v. Coe Commission Co., 93 Minn. 52, 100 N. W. 667 (action for fraud—counterclaim for money advanced in grain speculation); Hackett v. Kanne, 98 Minn. 240, 107 N. W. 1131 (action to enjoin trespass upon land—counterclaim to have boundaries established); Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250 (action on life policy—counterclaim on loan for which policy was pledged to company); Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128 (action by landlord against tenant for wrongful entry after abandonment of lease—counterclaim for wrongful entry by landlord and wrongful acts committed in connection therewith).

[61] Barker v. Walbridge, 14 Minn. 469 (351) (unlawful detainer proceedings—counterclaim on a note); Allen v. Coates, 29 Minn. 46, 11 N. W. 132 (action for conversion—counterclaim for malicious prosecution of a previous action for the same cause); Schmidt v. Bickenbach, 29 Minn. 122, 12 N. W. 349 (action for goods sold and delivered—counterclaim for malicious prosecution of action for price before it became due and for a wrongful attachment); Jones v. Swank, 54 Minn. 259, 55 N. W. 1126 (action for goods sold and delivered—counterclaim for wrongful attachment); Fergus Printing & Publishing Co. v. Otter Tail County, 60 Minn. 212, 62 N. W. 272 (action for publishing tax list — counterclaim for overpayments for publishing lists for prior years); McLane v. Kelly, 72 Minn. 395, 75 N. W. 601 (action by vendee against vendor for damages for breach of an executory contract of sale in being wrongfully ousted from the possession of the premises by the vendor —counterclaim for the value of the use of the land for a period of time prior to the making of the contract, during which time the vendee wrongfully entered upon the land and occupied it); Thomssen v. Ertz, 93 Minn. 280, 101 N. W. 304 (action for libel—counterclaim for goods sold and delivered).

[62] See § 294; R. L. 1905 § 4131; G. S. 1913 § 7757; Folsom v. Carli, 6 Minn. 420 (284, 289); Koempel v. Shaw, 13 Minn. 488(451); Lahiff v. Hennepin County Catholic B. & L. Assn., 61 Minn. 226, 63 N. W. 493; Pioneer Press Co. v. Hutchinson, 63 Minn. 481, 65 N. W. 938; Jourdain v. Luchsinger, 91 Minn. 111, 97 N. W. 740.

[63] See § 349.

[64] Schurmeier v. English, 46 Minn. 306, 48 N. W. 1112; Mass. Loan & Trust Co. v. Welch, 47 Minn. 183, 49 N. W. 740; Felsenthal v. Hawks, 50 Minn. 178, 52 N. W. 528. See § 865.

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his damages resulting from the negligence of the plaintiff in the performance of the same contract of employment.[65] Cases are cited below holding various causes of action not to arise out of the contract alleged.[66]

367. Claims ex contractu in actions ex contractu—A cause of action arising on contract may be counterclaimed in an action on contract. It is unnecessary that the counterclaim should be connected with the subject of the action or arise out of the transaction pleaded in the complaint as the foundation of the plaintiff's claim,[67] or that the damages recoverable should be liquidated.[68] A judgment, whether rendered in an action ex contractu or ex delicto, is a contract within the meaning of the statute.[69] An action on a judgment is an action on contract within the statute.[70] Where an injured party may waive the tort and sue on the contract implied by law his cause of action may be counterclaimed in an action ex contractu; and when he is the plaintiff suing on such an implied contract the defendant may plead a counterclaim arising out of contract.[71]

368. Claims ex contractu in actions ex delicto—In an action ex delicto a cause of action ex contractu may be counterclaimed if it arises out of the same contract or transaction or is connected with the subject of the action;[72] otherwise not.[73]

369. Claims ex delicto—In an action ex delicto a cause of action ex delicto cannot be counterclaimed unless it arises out of the same contract or transaction or is connected with the subject of the action.[74] In an action ex contractu a cause of action ex delicto may be counterclaimed if it arises out of the same

[65] Harlan v. St. Paul etc. Ry., 31 Minn. 427, 18 N. W. 147. See § 912.

[66] Majerus v. Hoscheid, 11 Minn. 243 (160); Schmidt v. Bickenbach, 29 Minn. 122, 12 N. W. 349; McLane v. Kelly, 72 Minn. 395, 75 N. W. 601; Thomssen v. Ertz, 93 Minn. 280, 101 N. W. 304.

[67] See § 294; R. L. 1905 § 4131(2); G. S. 1913 § 7757(2); Morrison v. Lovejoy, 6 Minn. 319(224); Folsom v. Carli, 6 Minn. 420(284); Lowry v. Hurd, 7 Minn. 356 (282); Bidwell v. Madison, 10 Minn. 13(1); Brady v. Brennan, 25 Minn. 210; Burns v. Jordan, 43 Minn. 25, 44 N. W. 523; Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972; Laybourn v. Seymour, 53 Minn. 105, 54 N. W. 941; Way v. Colyer, 54 Minn. 14, 55 N. W. 744; Hausman v. Mulheran, 68 Minn. 48, 70 N. W. 866; Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610; Schick v. Suttle, 94 Minn. 135, 102 N. W. 217; Baremore v. Selover, Bates & Co., 100 Minn. 23, 110 N. W. 66.

[68] Morrison v. Lovejoy, 6 Minn. 319 (224).

[69] Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972.

[70] Way v. Colyer, 54 Minn. 14, 55 N. W. 744.

[71] Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981; Schick v. Suttle, 94 Minn, 135, 102 N. W. 217.

[72] King v. Coe Commission Co., 93 Minn. 52, 100 N. W. 667.

[73] Illingworth v. Greenleaf, 11 Minn. 235(154); Thomssen v. Ertz, 93 Minn. 280, 101 N. W. 304; Hanson v. Byrnes, 96 Minn. 50, 104 N. W. 762.

[74] Allen v. Coates, 29 Minn. 46, 11 N. W. 132; Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530.

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contract or transaction or is connected with the subject of the action;[75] otherwise not.[76]

370. Claims against insolvents—Bankruptcy—Claims against an insolvent cannot be counterclaimed against the assignee or receiver of the insolvent if they were acquired by the defendant after the assignment of the insolvent, or in anticipation of insolvency.[77] The setting off of claims in insolvency proceedings and in actions by assignees or receivers in insolvency is generally governed by the rules of equity.[78] It is provided by the bankruptcy act that a setoff or counterclaim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate.[79]

371. Public funds—An attorney cannot, under the statute of counterclaims, offset his claim for services against public funds.[80]

372. Equitable causes of action—An equitable cause of action may be counterclaimed in an action at law.[81]

373. Mode of pleading counterclaims—In pleading a counterclaim all the material facts constituting the cause of action must be alleged, with a demand for relief, as in a complaint. The general rules governing the statement of a cause of action in a complaint apply to the statement of a counterclaim.[82] Allegations may be made by reference to the complaint.[83] It is unnecessary to repeat the allegations of the complaint.[84] Good practice requires that a counterclaim should not only demand affirmative relief but should also be introduced by "For a counterclaim," or "For a first counterclaim," and the like. The phrase "by way of counterclaim" is not good form.[85] A counterclaim should not be pleaded as "a further defence."[86] A counterclaim must be pleaded as such; otherwise it can only be used defensively, and it is not ad-

[75] Harlan v. St. Paul etc. Ry., 31 Minn. 427, 18 N. W. 147; McLane v. Kelly, 72 Minn. 395, 75 N. W. 601; Jourdain v. Luchsinger, 91 Minn. 111, 97 N. W. 740.

[76] Steinhart v. Pitcher, 20 Minn. 102 (86); Schmidt v. Bickenbach, 29 Minn. 122, 12 N. W. 349; Warner v. Foote, 40 Minn. 176, 41 N. W. 935; Jones v. Swank, 54 Minn. 259, 55 N. W. 1126; McLane v. Kelly, 72 Minn. 395, 75 N. W. 601.

[77] Northern Trust Co. v. Rogers, 60 Minn. 208, 62 N. W. 273; Northern Trust Co. v. Healy, 61 Minn. 230, 63 N. W. 625; Northern Trust Co. v. Hiltgen, 62 Minn. 361, 64 N. W. 909.

[78] See § 381.

[79] Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

[80] Washington County v. Clapp, 83 Minn. 512, 86 N. W. 775.

[81] Vaule v. Miller, 69 Minn. 440, 72 N. W. 452; Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610.

[82] Holgate v. Broome, 8 Minn. 243 (209); Eastman v. Linn, 20 Minn. 433 (387); Curtiss v. Livingston, 36 Minn. 312, 30 N. W. 814; Wilson v. Fairchild, 45 Minn. 203, 47 N. W. 642; Independent Brewing Assn. v. Burt, 109 Minn. 323, 123 N. W. 932; Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118; Pomeroy, Remedies, § 689.

[83] Curtiss v. Livingston, 36 Minn. 312, 30 N. W. 814.

[84] Corcoran v. Sumpton, 79 Minn. 108, 81 N. W. 761.

[85] Pomeroy, Remedies, § 748; Bates v. Rosekrans, 37 N. Y. 409; Stroock Plush Co. v. Talcott, 113 N. Y. S. 214.

[86] Bates v. Rosekrans, 37 N. Y. 409.

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mitted by a failure to deny.[87] But it is not indispensable that the new matter be expressly designated as a counterclaim. It is sufficient if it appears that it was pleaded as a counterclaim. A demand for affirmative relief on the new matter sufficiently characterizes it as a counterclaim.[88] It is immaterial that new matter is pleaded both as a defence and a counterclaim. If the pleading states the facts sufficient to entitle the defendant to either the proper relief will be administered.[89] Matter may be voluntarily litigated as a counterclaim though not pleaded as such.[90]

374. Pleading several counterclaims—A party may plead several counterclaims in the same answer. They should be pleaded separately. If not so pleaded the remedy is not a demurrer but a motion.[91] Where two counterclaims are pleaded, one proper and the other not, a demurrer to the whole pleading is properly overruled.[92]

375. Mode of objecting to counterclaims—The only way 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 demurrer. If he fails to demur he waives the objection and the counterclaim must be tried as if proper.[93] That a counterclaim cannot be determined without the presence of other parties may be raised by demurrer.[94] The objection that the facts pleaded in the answer as a counterclaim do not constitute a cause of action is not waived by a failure to demurrer or reply, but may be taken on the trial or after verdict.[95] Objection that the counterclaim exceeds the jurisdiction of the court may be made by demurrer.[96] The objection that the cause of action counterclaimed is immature may be waived by trial without objection.[97] A counterclaim may be stricken out as sham.[98]

[87] Broughton v. Sherman, 21 Minn. 431; Griffin v. Jorgenson, 22 Minn. 92; Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682; C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211; Regan v. Jones, 14 N. D. 591, 105 N. W. 613.

[88] Griffin v. Jorgensen, 22 Minn. 92; Farrell v. Burbank, 57 Minn. 395, 59 N. W. 485.

[89] Germania Bank v. Osborne, 81 Minn. 272, 83 N. W. 1084. See § 379.

[90] Phelps v. Compton, 72 Minn. 109, 75 N. W. 19.

[91] Campbell v. Jones, 25 Minn. 155.

[92] Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1.

[93] Walker v. Johnson, 28 Minn. 147, 9 N. W. 632; Mississippi etc. Co. v. Prince, 34 Minn. 71, 24 N. W. 344; Lace v. Fixen, 39 Minn. 46, 38 N. W. 762; Warner v. Foote, 40 Minn. 176, 41 N. W. 935; Talty v. Torling, 79 Minn. 386, 82 N. W. 632. See Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981.

[94] Campbell v. Jones, 25 Minn. 155.

[95] Lace v. Fixen, 39 Minn. 46, 30 N. W. 762; Schurmeier v. English, 46 Minn. 306, 48 N. W. 1112.

[96] Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530.

[97] Stensgaard v. St. Paul etc. Co., 50 Minn. 429, 52 N. W. 910.

[98] Monitor Drill Co. v. Moody, 93 Minn. 232, 100 N. W. 1104.

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376. Litigation by consent—A counterclaim may be litigated by consent or without objection though it is not a proper subject of counterclaim,[99] or is not pleaded as a counterclaim.[1]

377. Failure to plead counterclaim—Effect—Waiver—The defendant is not bound to plead a counterclaim. He may reserve it for a separate action.[2] If he pleads it he may waive it without waiving the right to sue thereon subsequently.[3]

378. Pleading counterclaim not an admission—It is now provided by statute that the pleading of a counterclaim shall not be construed as an admission of any cause of action alleged in the complaint.[4] The rule was formerly otherwise.[5]

379. Relief awarded—When matter is pleaded in an answer as a counterclaim, the defendant must have such relief, though not specifically demanded in the answer, as the facts proved within its allegations show him entitled to.[6] He may have an affirmative judgment against the plaintiff if he proves facts justifying it.[7]

[99] Warner v. Foote, 40 Minn. 176, 41 N. W. 935.

[1] Phelps v. Compton, 72 Minn. 109, 75 N. W. 19.

[2] Douglas v. First Nat. Bank, 17 Minn. 35(18); Paine v. Sherwood, 21 Minn. 225, 230; Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; D. M. Osborne & Co. v. Williams, 39 Minn. 353, 40 N. W. 165; Jordahl v. Berry, 72 Minn. 119, 75 N. W. 10; Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530; Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

[3] Honsinger v. Union Carriage Co., 175 N. Y. 229, 67 N. E. 436; Barber v. Ellingwood, 122 N. Y. S. 369.

[4] See § 294; R. L. 1905 § 4131; G. S. 1913 § 7757.

[5] Mason v. Heyward, 3 Minn. 182(116); Morrison v. Lovejoy, 6 Minn. 319(224); Whalon v. Aldrich, 8 Minn. 346(305); Koempel v. Shaw, 13 Minn. 488(451); Steele v. Etheridge, 15 Minn. 501(413); Paine v. Sherwood, 19 Minn. 315(270); Id., 21 Minn. 225; Trainor v. Worman, 34 Minn. 237, 25 N. W. 401.

[6] Wilson v. Fairchild, 45 Minn. 203, 47 N. W. 642; Germania Bank v. Osborne, 81 Minn. 272, 83 N. W. 1084; Crosby v. Scott-Graff Lumber Co., 93 Minn. 475, 101 N. W. 610.

[7] Mason v. Heyward, 3 Minn. 182(116).

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SETOFF

380. At law—In district court practice the setoff of common law is now merged in the counterclaim. Whenever a claim might have been set off at common law it may now be counterclaimed.[8] The term "setoff" is still retained in justice court practice.[9]

381. In equity—In the absence of special circumstances courts of equity follow the statute of counterclaims. But the equitable right of setoff was not derived from and is not dependent upon the statute of 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 a joint debt against a separate debt.[10] The insolvency of a party is sufficient ground for equitable setoff in cases where a counterclaim could not be interposed under the statute,[11] and the equitable powers of a court in such cases is not affected by the fact that the party has made an assignment under the insolvency act.[12] Demands cannot be set off in equity unless they are mutual.[13] The right of setoff must be mutual.[14] A party may be estopped from claiming a setoff in equity.[15]

[8] Folsom v. Carli, 6 Minn. 420(284); Morrison v. Lovejoy, 6 Minn. 319(224).

[9] R. L. 1905 §§ 3920–3922; G. S. 1913 §§ 7538–7540; Folsom v. Carli, 6 Minn. 420(284); La Due v. First Nat. Bank, 31 Minn. 33, 16 N. W. 426; Ward v. Anderberg, 36 Minn. 300, 30 N. W. 890.

[10] Birdsall v. Fischer, 17 Minn. 100 (76); Wallrich v. Hall, 19 Minn. 383 (329); Becker v. Northway, 44 Minn. 61, 46 N. W. 210; Laybourn v. Seymour, 53 Minn. 105, 54 N. W. 941; Gallagher v. Germania Brewing Co., 53 Minn. 214, 54 N. W. 1115; Wunderlich v. Merchants' Nat. Bank, 109 Minn. 468, 124 N. W. 223. See Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142.

[11] Martin v. Pillsbury, 23 Minn. 175; Becker v. Northway, 44 Minn. 61, 46 N. W. 210; Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614; Laybourn v. Seymour, 53 Minn. 105, 54 N. W. 941; St. Paul etc. Co. v. Leck, 57 Minn. 87, 58 N. W. 826; Cosgrove v. McKasy, 65 Minn. 426, 68 N. W. 76; Richardson v. Merritt, 74 Minn. 354, 77 N. W. 234; Markell v. Ray, 75 Minn. 138, 146, 77 N. W. 788; Seymour v. Burton, 78 Minn. 79, 80 N. W. 846; Wunderlich v. Merchants Nat. Bank, 109 Minn. 468, 124 N. W. 223. See Note, 47 Am. St. Rep. 578.

[12] Laybourn v. Seymour, 53 Minn. 105, 54 N. W. 941; St. Paul etc. Co. v. Leck, 57 Minn. 87, 58 N. W. 826; Cosgrove v. McKasy, 65 Minn. 426, 68 N. W. 76; Becker v. Seymour, 71 Minn. 394, 73 N. W. 1096. See Balch v. Wilson, 25 Minn. 299; Northern Trust Co. v. Rogers, 60 Minn. 208, 62 N. W. 273; Northern Trust Co. v. Healy, 61 Minn. 230, 63 N. W. 625; Northern Trust Co. v. Hiltgen, 62 Minn. 361, 64 N. W. 909; Fitzgerald v. State Bank, 64 Minn. 469, 67 N. W. 361.

[13] Balch v. Wilson, 25 Minn. 299.

[14] Gallagher v. Germania Brewing Co., 53 Minn. 214, 54 N. W. 1115.

[15] Fitzgerald v. State Bank, 64 Minn. 469, 67 N. W. 361.

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The mere non-residence of a debtor is not a ground for equitable setoff.[16] The demands of stockholders individually cannot be interposed as equitable setoffs to a demand against the corporation, even though the plaintiff is insolvent.[17]

[16] Birdsall v. Fischer, 17 Minn. 100 (76).

[17] Gallagher v. Germania Brewing Co., 53 Minn. 214, 54 N. W. 1115.

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REPLY

382. Statute—The statute provides that "if the answer contain new matter not demurred to, the plaintiff shall reply thereto, denying the averments controverted by him, or averring that he has not knowledge or information thereof sufficient to form a belief, or alleging any new matter, not inconsistent with the complaint, constituting a defence thereto." [18]

383. Last pleading—The reply is the last pleading either of fact or law. Prior to Laws 1913 c. 54 a demurrer to a reply was authorized. It is provided by statute that "all allegations of new matter in the reply shall be deemed denied, and may be controverted by defendant at the trial by proofs, either in direct denial or in avoidance thereof." [19] There is no substantial reason for a reply. Practically the pleadings might just as well stop with the answer as with the reply and such is the practice in some states. Our legislature has taken a step in the right direction in abolishing the demurrer to a reply.

384. Rules governing statement of matter in reply—The rules governing the statement of matter 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. Though 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 in the answer, but they must be separately stated and plainly numbered.[20] 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.[21]

385. Counterclaim—The statute does not authorize a counterclaim in a reply. If one is pleaded it can only be used defensively.[22]

386. Denials of knowledge or information—A reply may be in the following form: The plaintiff for reply to the answer herein denies that he has any knowledge or information sufficient to form a belief as to the truth of any or all the allegations thereof.[23]

387. General denial—The rules governing the form and effect of the general denial in an answer are applicable to a general denial in a reply. Cases

[18] R. L. 1905 § 4134; Laws 1913 c. 54; G. S. 1913 § 7760.

[19] R. L. 1905 § 4145; G. S. 1913 § 7771; Estes v. Farnham, 11 Minn. 423 (312, 322).

[20] See § 16.

[21] See § 388.

[22] Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682.

[23] Trustees of Macalester College v. Nesbitt, 65 Minn. 17, 67 N. W. 652 (a reply in these words, the plaintiff "denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said answer," held sufficient against objection first made after trial and verdict).

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are cited below involving the sufficiency of various forms of general denials in replies.[24]

388. Departure—There is a departure when a party quits or departs from the case or defence which he first made and has recourse to another. 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.[25] One of the primary objects of pleading is the formation of an issue or issues 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.[26] If the complaint fails to state a cause of action there cannot be a departure, strictly speaking, in the reply.[27] A variance or inconsistency between a complaint and reply upon immaterial matters is not a departure.[28] Where a complaint alleges and relies upon a complete performance of a contract, a reply admitting a failure to perform the contract and alleging facts to excuse complete performance, is a departure.[29]

[24] Leyde v. Martin, 16 Minn. 38(24) (a qualified general denial held sufficent—the reply denied each and every statement, matter, and thing, etc., in the answer, "save as hereinafter stated, admitted, or qualified, and save as stated in his amended complaint," and then admitted some of the items in part, and denied them in part, denied others entirely, and omitted to refer to others—held that the items not referred to were admitted); Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768 ("plaintiff, replying to the answer of the defendants herein, specifically denies each and every allegation of new matter and thing in said answer contained and alleged"—held sufficient against objection on the trial); Fitzpatrick v. Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378 (an allegation in a reply denying "each and every * * * matter and thing in said answer contained, save as the same * * * may have been heretofore stated in his complaint," is sufficient to put in issue the traversable facts of the answer, and is not vitiated by the addition of unnecessary conclusions of law not inconsistent with such denial).

[25] Estes v. Farnham, 11 Minn. 423 (312); Trainor v. Worman, 34 Minn. 237, 25 N. W. 401; Lane v. St. Paul etc. Co., 50 Minn. 227, 52 N. W. 649; Bishop & Co. v. Travis, 51 Minn. 183, 53 N. W. 461; James v. St. Paul, 72 Minn. 138, 75 N. W. 5; Hoxsie v. Kempton, 77 Minn. 462, 80 N. W. 353; Chicago B. & I. Co. v. Olson, 80 Minn. 533, 83 N. W. 461; Strauch v. Flynn, 108 Minn. 313, 122 N. W. 320; Johnson v. Fehsefeldt, 113 Minn. 118, 129 N. W. 146; Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850; Ahrens v. Chicago etc. Ry., 121 Minn. 335, 141 N. W. 297; and cases under § 389.

[26] Stephen, Pl. 418.

[27] Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932.

[28] Bishop & Co. v. Travis, 51 Minn. 183, 53 N. W. 461.

[29] Trainor v. Worman, 34 Minn. 237, 25 N. W. 401; Boon v. State Ins. Co., 37 Minn. 426, 34 N. W. 902; Lane v. St. Paul Fire & Marine Ins. Co., 50 Minn. 227, 52 N. W. 649; Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850.

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A departure is a defect of substance which may be taken advantage of by demurrer,[30] by motion for dismissal,[31] by motion to strike out,[32] by request for instructions,[33] by objecting to the introduction of evidence,[34] or by motion for judgment on the pleadings.[35] Objection to a departure must be taken before verdict or it is waived.[36] It is discretionary with the court to allow a departure to be corrected by an amendment.[37]

389. Same—Complaint cannot be aided by reply—The plaintiff must recover, if at all, upon the cause of action set out in his complaint. A complaint cannot be aided by a reply. This is a necessary consequence of the rule against departure. The office of a reply is to meet the allegations of the answer and not to change the character of the action or to enlarge the rights and remedies of the plaintiff.[38]

390. Same—Fortifying complaint by reply—New assignment—Though 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 pleaded in the answer, are permissible. A more particular and exact statement of the facts constituting the cause of action is not a departure.[39]

391. Failure to reply—Admission of new matter in answer—Judgment—Statute—It is provided by statute that "if the plaintiff shall fail, within the time allowed by law, to demur or reply to new matter contained in the answer,

[30] Bausman v. Woodman, 33 Minn. 512, 24 N. W. 198; Bishop & Co. v. Travis, 51 Minn. 183, 53 N. W. 461; James v. St. Paul, 72 Minn. 138, 75 N. W. 5. Since Laws 1913 c. 54 a demurrer will not lie.

[31] Hoxsie v. Kempton, 77 Minn. 462, 80 N. W. 353.

[32] Bausman v. Woodman, 33 Minn. 512, 24 N. W. 198; James v. St. Paul, 72 Minn. 138, 75 N. W. 5; Strauch v. Flynn, 108 Minn. 313, 122 N. W. 320.

[33] Trainor v. Worman, 34 Minn. 237, 25 N. W. 401.

[34] Johnson v. Fehsefeldt, 113 Minn. 118, 129 N. W. 146.

[35] Webb v. Bidwell, 15 Minn. 479(394); Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682.

[36] Abraham v. Holloway, 41 Minn. 163, 42 N. W. 870; Whitney v. Nat. Masonic Accident Assn., 57 Minn. 472, 59 N. W. 543; International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395; Ankeny v. Clark, 148 U. S. 345.

[37] Hoxsie v. Kempton, 77 Minn. 462, 80 N. W. 353.

[38] Bernheimer v. Marshall, 2 Minn. 78 (61); Tullis v. Orthwein, 5 Minn. 377 (305); Webb v. Bidwell, 15 Minn. 479 (394); Hatch v. Coddington, 32 Minn. 92, 19 N. W. 393; Bausman v. Woodman, 33 Minn. 512, 24 N. W. 198; Trainor v. Worman, 34 Minn. 237, 25 N. W. 401; Boon v. State Ins. Co., 37 Minn. 426, 34 N. W. 902; Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682; James v. St. Paul, 72 Minn. 138, 75 N. W. 5.

[39] Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273; Johnson v. Hillstrom, 37 Minn. 122, 33 N. W. 547; Rosby v. St. Paul etc. Ry., 37 Minn. 171, 33 N. W. 698; Bishop & Co. v. Travis, 51 Minn. 183, 53 N. W. 461; Minneapolis etc. Ry. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132; Niebels v. Howland, 97 Minn. 209, 106 N. W. 337; Johnson v. Fehsefeldt, 113 Minn. 118, 129 N. W. 146; Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850; International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 80, 137 N. W. 395.

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the court, on motion, may order such judgment in defendant's favor as he may be entitled to upon his answer, or may direct a reference or an assessment of damages by a jury, as the case requires." [40] Affirmative matter in the answer which merely tends to controvert the allegations of the complaint is not new matter requiring a reply. New defensive matter in an answer, to require a reply, must be in the nature of confession and avoidance.[41] A reply is unnecessary in any case where its allegations would be a mere repetition of those

[40] R. L. 1905 § 4135; G. S. 1913 § 7761; Geib v. Morrison County, 119 Minn. 261, 138 N. W. 24 (action to set aside ditch proceedings).

[41] Cooper v. Stinson, 5 Minn. 201(160) (action for services—answer amounting to a denial of the value of the services held not to require a reply); McArdle v. McArdle, 12 Minn. 98(53) (action on note—when complaint alleges that note has not been paid an averment in the answer of payment is not new matter requiring a reply); Mower County v. Smith, 22 Minn. 97, 115 (action against county treasurer for conversion of public funds — accounting and settlement not new matter requiring a reply); Reed v. Newton, 22 Minn. 541 (ejectment—claims for improvements and taxes not new matter); Craig v. Cook, 28 Minn. 232, 9 N. W. 712 (general rule of text stated—action for trespass—plea of title in defendant); Williams v. Mathews, 30 Minn. 131, 14 N. W. 577 (replevin—answer pleading title in defendant not new matter); Conway v. Elgin, 38 Minn. 469, 38 N. W. 370 (action for cancelation of mortgage — answer denying fraud not new matter); Pinger v. Pinger, 40 Minn. 417, 42 N. W. 289 (action for cancelation of a deed on the ground of undue influence—answer denying fraud and alleging that no conditions were imposed upon defendant at the time of the transaction held not new matter); Engel v. Bugbee, 40 Minn. 492, 42 N. W. 351 (complaint alleged that a certain assignment of a note and mortgage was without consideration and for the purpose of collection — answer alleging that it was upon a sale and for a valuable consideration held not new matter); Olson v. Tvete, 46 Minn. 225, 48 N. W. 914 (action for malicious prosecution—defence of advice of counsel not new matter); West v. Hennessey, 58 Minn. 133, 59 N. W. 984 (where a 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 unnecessary); Lyons v. Red Wing, 76 Minn. 20, 78 N. W. 868 (complaint alleged that plaintiff was carefully passing along the sidewalk in question and was injured by a defect therein — answer alleged that if the plaintiff was injured the injury was occasioned by his negligence in using and walking along and upon the sidewalk—reply probably unnecessary); King v. Burnham, 93 Minn. 288, 101 N. W. 302 (action for goods sold and delivered of the "agreed and reasonable" value of a certain amount—answer denied that the agreed value was that amount and alleged that the goods were sold at the agreed value of a certain amount and no more—reply unnecessary); Strauch v. Flynn, 108 Minn. 313, 122 N. W. 320 (action on note—plea of discharge in bankruptcy — reply unnecessary); Pott v. Hanson, 109 Minn. 416, 124 N. W. 17 (complaint alleged fraud in conveyance —answer alleged that defendant purchased the property for value and in good faith—reply unnecessary); Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112 (action for breach of a compromise contract—plea of want of consideration and that contract was made by agent without authority—reply unnecessary).

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contained in the complaint.[42] A counterclaim is new matter and consequently admitted by a failure to reply.[43] But to require a reply a counterclaim must be pleaded as such.[44] If the facts pleaded as a counterclaim do not constitute a counterclaim they are not admitted by a failure to reply.[45] Under a former statute an equity was not admitted by a failure to reply.[46] If allegations in the answer are treated on the trial as in issue by consent or without objection, it is immaterial that there is no reply.[47]

392. Waiver—When a reply should have been made to new matter in the answer, but such matter is treated on the trial as in issue without a reply, the want of a reply will be deemed waived.[48]

[42] Pott v. Hanson, 109 Minn. 416, 124 N. W. 17. See also, Williams v. Mathews, 30 Minn. 131, 14 N. W. 577; West v. Hennessey, 58 Minn. 133, 59 N. W. 984; King v. Burnham, 93 Minn. 288, 101 N. W. 302; McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

[43] Schurmeier v. English, 46 Minn. 306, 48 N. W. 1112.

[44] See § 373.

[45] Englebrecht v. Rickert, 14 Minn. 140 (108); Lash v. McCormick, 17 Minn. 403 (381); Linn v. Rugg, 19 Minn. 181(145); First Nat. Bank v. Kidd, 20 Minn. 234(212); Reed v. Newton, 22 Minn. 541; Sylte v. Nelson, 26 Minn. 105, 1 N. W. 811; Ward v. Anderberg, 36 Minn. 300, 30 N. W. 890; McGee v. Felter, 135 N. Y. S. 267.

[46] First Nat. Bank v. Kidd, 20 Minn. 234(212).

[47] See § 392.

[48] Matthews v. Torinus, 22 Minn. 132; Lyons v. Red Wing, 76 Minn. 20, 78 N. W. 868; Merchants Nat. Bank v. Barlow, 79 Minn. 234, 82 N. W. 364; Lyford v. Martin, 79 Minn. 243, 82 N. W. 479.

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SUPPLEMENTAL PLEADINGS

393. Statute—The statute provides that "the plaintiff may be permitted, on motion, to file a supplemental complaint or reply, and the defendant a supplemental answer, alleging material facts which have occurred since the former pleading." [49]

394. A new remedy—The 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 at law or in equity.[50]

395. Distinguished from amended pleadings—An amended pleading introduces facts existing at the time of the original pleading. A supplemental pleading introduces facts occurring after the original pleading.[51]

396. A matter of right—Diligence—Upon a proper showing a party is entitled as of right to an order allowing him to serve a supplemental pleading.[52] But it is left to the discretion of the court to determine whether the applicant has exercised proper diligence in making his application,[53] and the court may refuse to allow a party to serve a supplemental pleading which is manifestly false,[54] or one which pleads only immaterial matter.[55]

397. Supplemental complaint—A supplemental complaint cannot set up a distinct cause of action accruing subsequent to the service of the original complaint. If the original complaint is wholly defective it cannot be sustained by a supplemental one.[56] 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.[57] While a party cannot set up, by supplemental complaint, a title acquired since the commencement of the action he may allege facts strengthening his title.

[49] R. L. 1905 § 4137; G. S. 1913 § 7763.

[50] Holyoke v. Adams, 59 N. Y. 233.

[51] Guptill v. Red Wing, 76 Minn. 129, 78 N. W. 970; State v. Dist. Ct., 91 Minn. 161, 97 N. W. 581; McCaslan v. Latimer, 17 S. C. 123.

[52] Malmsten v. Berryhill, 63 Minn. 1, 65 N. W. 88. See Lough v. Bragg, 19 Minn. 357(309).

[53] Voak v. National Investment Co., 51 Minn. 450, 53 N. W. 708; Malmsten v. Berryhill, 63 Minn. 1, 65 N. W. 88; Evans v. Staalle, 88 Minn. 253, 92 N. W. 951. See Reilly v. Bader, 50 Minn. 199, 52 N. W. 522; Lathrop v. Dearing, 59 Minn. 234, 61 N. W. 24; Stacy v. Stephen, 78 Minn. 480, 81 N. W. 391; Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

[54] Malmsten v. Berryhill, 63 Minn. 1, 65 N. W. 88.

[55] Evans v. Staalle, 88 Minn. 253, 92 N. W. 951.

[56] Eastman v. St. Anthony Falls etc. Co., 17 Minn. 48(31); Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513.

[57] Elde v. Clarke, 65 Minn. 466, 68 N. W. 98; Tiffany v. Bowerman, 2 Hun (N. Y.) 643; Farmers' Loan & Trust Co. v. United etc. Co., 47 Hun (N. Y.) 315.

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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.[58] A supplemental complaint does not supersede the original complaint. The latter remains the basis of the action.[59]

398. Supplemental answer—Facts material to the case occurring subsequent to the original answer may be set up by supplemental answer.[60] Where new matter of independent defence arises after verdict, the remedy is not a motion for a new trial on the ground of newly discovered evidence, which has no relevancy to the issues litigated by the trial, but by a motion to be permitted to make a supplemental answer, with a stay of proceedings on the verdict until the issue tendered by the supplemental answer can be determined.[61]

399. Necessity—Admission of evidence—In the absence of a supplemental answer evidence of facts occurring after the service of the original answer is generally inadmissible.[62]

400. Supplemental reply—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.[63]

401. Allowable after judgment—A supplemental pleading is allowable after as well as before judgment.[64]

402. Objection—When must be made—Objection to a supplemental complaint cannot be made for the first time on the trial.[65]

[58] Lowry v. Harris, 12 Minn. 255(166); Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513. See Chouteau v. Rice, 1 Minn. 106(83); Ness v. Davidson, 49 Minn. 469, 476, 52 N. W. 46; Todd v. Johnson, 56 Minn. 60, 64, 57 N. W. 320; Hall v. Sauntry, 80 Minn. 348, 83 N. W. 156.

[59] Slauson v. Englehart, 34 Barb. (N. Y.) 198; Nave v. Adams, 107 Mo. 414, 17 S. W. 958.

[60] See Harrington v. St. Paul etc. Ry., 17 Minn. 215(188); Hursh v. First Div. etc. Ry., 17 Minn. 439(417); Voak v. National Investment Co., 51 Minn. 450, 53 N. W. 708; Guptill v. Red Wing, 76 Minn. 129, 78 N. W. 970; Poehler v. Reese, 78 Minn. 71, 78, 80 N. W. 847; Hall v. Sauntry, 80 Minn. 348, 83 N. W. 156; State v. Dist. Ct., 91 Minn. 161, 97 N. W. 581.

[61] Bandler v. Bradley, 110 Minn. 66, 124 N. W. 644.

[62] Harrington v. St. Paul etc. Ry., 17 Minn. 215(188); Guptill v. Red Wing, 76 Minn. 129, 78 N. W. 970; Hall v. Sauntry, 80 Minn. 348, 83 N. W. 156.

[63] Ormsbee v. Brown, 50 Barb. (N. Y.) 436.

[64] State v. Dist. Ct., 91 Minn. 161, 97 N. W. 581. See Ness v. Davidson, 49 Minn. 469, 52 N. W. 46.

[65] Lowry v. Harris, 12 Minn. 255(166).

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VERIFICATION

403. Statute—Every pleading in a court of record shall be subscribed by the party or his attorney, and may be verified in the manner following:

1. By the affidavit of the party, or of one or more of the parties pleading together, that the affiant knows the contents of the pleading, that the averments thereof are true of his own knowledge, save as to such as are therein stated on information and belief, and that as to those he believes them to be true.

2. If the party be a corporation, the affidavit may be made by any officer thereof having knowledge of the facts sworn to; if the state, or any officer thereof acting in its behalf, by the attorney general.

3. If no party or officer acquainted with the facts and capable of making such affidavit be within the county where the attorney resides, the pleading may be verified by the attorney or agent of the party, stating the fact of such absence, and that the pleading is true to the best of his knowledge and belief.

When any pleading is so verified, all subsequent pleadings in the case, except demurrers, shall be verified also. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony.[66]

404. In general—A verification may be made before an attorney in the action if he is a notary.[67] The court may allow a pleading to be amended by the insertion of a verification.[68] A pleading not properly verified may be treated as not verified at all.[69] The remedy for a defective verification, or for the want of a verification, is a prompt return of the pleading.[70] A verification is not a part of a cause of action or defence. It is a distinct proceeding and not subject to demurrer.[71]

[66] R. L. 1905 § 4142; G. S. 1913 § 7768; State v. Cooley, 58 Minn. 514, 60 N. W. 338.

[67] See Young v. Young, 18 Minn. 90 (72).

[68] State v. Ward, 79 Minn. 362, 82 N. W. 686.

[69] Smith v. Mulliken, 2 Minn. 319 (273).

[70] Smith v. Mulliken, 2 Minn. 319 (273); Folsom v. Carli, 5 Minn. 333 (264); Hayward v. Grant, 13 Minn. 165 (154); Taylor v. Parker, 17 Minn. 469 (447); McMath v. Parsons, 26 Minn. 246, 2 N. W. 703.

[71] McMath v. Parsons, 26 Minn. 246, 2 N. W. 703.

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BILL OF PARTICULARS

405. Statute—The items of an account need not be set forth in a pleading, but the party alleging it, if a written demand therefor be served by the adverse party, shall deliver a copy of the account within ten days after such demand, verified by the affidavit of himself, or of some person having knowledge thereof, as in the case of a pleading. If such copy be withheld, or if a further or more particular bill be not furnished when ordered by the court, evidence of the account may be excluded.[72]

406. When demandable—A bill of particulars is demandable only in actions on 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.[73] It is not demandable in any case except where the account is set forth in a pleading—that is, alleged as a cause of action, counterclaim, or setoff.[74] The term "account" means items of work and labor, of goods sold and delivered, of professional services, and the like.[75] To bring an account within the statute the items thereof need not have been entered in a book.[76]

407. Demand—Waiver—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 as such a demand.[77]

408. Effect—The furnishing of a bill of particulars of professional services does not exclude expert testimony as to the value of such services.[78]

409. Remedy for failure to furnish—The remedy for a failure to furnish a bill of particulars 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 made by answer.[79] Objection to the sufficiency of a bill of particulars cannot be made on the trial, but only by motion, before trial, for a more specific bill.[80] To warrant the

[72] R. L. 1905 § 4151; G. S. 1913 § 7777.

[73] Mower County v. Smith, 22 Minn. 97 (not demandable in action for conversion); Jones v. Northern Trust Co., 67 Minn. 410, 69 N. W. 1108 (not demandable in action for money had and received); St. Louis County v. American Loan & Trust Co., 75 Minn. 489, 78 N. W. 113 (not demandable in action on bond).

[74] St. Louis County v. American Loan & Trust Co., 75 Minn. 489, 78 N. W. 113.

[75] Jones v. Northern Trust Co., 67 Minn. 410, 69 N. W. 1108; Davis v. Johnson, 96 Minn. 130, 104 N. W. 766.

[76] Lonsdale v. Oltman, 50 Minn. 52, 52 N. W. 131.

[77] Tuttle v. Wilson, 42 Minn. 233, 44 N. W. 10.

[78] Calhoun v. Akeley, 82 Minn. 354, 85 N. W. 170.

[79] Tuttle v. Wilson, 42 Minn. 233, 44 N. W. 10; Henry v. Bruns, 43 Minn. 295, 45 N. W. 444; Lonsdale v. Oltman, 50 Minn. 52, 52 N. W. 131; Jones v. Northern Trust Co., 67 Minn. 410, 69 N. W. 1108.

[80] Minneapolis Envelope Co. v. Vanstrom, 51 Minn. 512, 53 N. W. 768; Davis v. Johnson, 96 Minn. 130, 104 N. W. 766.

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court in refusing to receive any evidence in support of the complaint upon the ground that a party has not complied with the order of the court to serve a bill of particulars, it should clearly appear that the party's attorney had notice of such order, or had waived notice thereof.[81]

See Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339.

[81] Kramer v. N. W. El. Co., 91 Minn. 346, 98 N. W. 96.

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INDEFINITE PLEADINGS

410. In general—The facts constituting a cause of action or defence must be alleged with certainty, but no more than reasonable certainty is required. The requisite degree of certainty necessarily depends upon the nature of the cause of action or defence and the circumstances of the particular case. No general rule can be laid down except that a party may be required on motion to make his allegations more definite and certain when they are so indefinite that the precise nature of his cause of action or defence is not apparent.[82] To

[82] Colter v. Greenhagen, 3 Minn. 126 (74) (action on note—answer held indefinite as to time of a part payment); Cathcart v. Peck, 11 Minn. 45(24) (action to set aside conveyances—answer held indefinite); Kingsley v. Gilman, 12 Minn. 515(425) (qualified general denial held sufficiently definite and certain—the certainty required in pleading is that the allegation must be so certain and explicit as to exclude ambiguity and make the meaning of the averments clearly intelligible); Whelan v. Sibley County, 28 Minn. 80, 9 N. W. 175 (action by taxpayers to prevent construction of county and city building—the objection that a pleading is indefinite or uncertain, for the purpose of a motion to strike out, can be made only when the allegations are so confused that what facts are intended to be charged is not apparent, or it is not apparent upon what facts the party relies to sustain the action or defence); Pugh v. Winona & St. Peter Ry., 29 Minn. 390, 13 N. W. 189 (action by servant against master for injury from defective car—indefinite allegations held properly stricken out); Keating v. Brown, 30 Minn. 9, 13 N. W. 909 (action for negligence in setting and tending a fire—complaint held sufficiently definite); Fraker v. St. Paul etc. Ry., 30 Minn. 103, 14 N. W. 366 (action by servant against master for injury in coupling cars—complaint held sufficiently definite—only reasonable certainty required); Madden v. Minneapolis etc. Ry., 30 Minn. 453, 16 N. W. 263 (action by servant against master for injury from defective roadbed—complaint held indefinite); Lehnertz v. Minneapolis etc. Ry., 31 Minn. 219, 17 N. W. 376 (action for collision at railroad crossing—complaint held sufficiently definite); Tierney v. Minneapolis etc. Ry., 31 Minn. 234, 17 N. W. 377 (action by servant against master for injury in coupling cars—complaint held sufficiently definite); Dunn v. Burlington etc. Ry., 35 Minn. 73, 80, 27 N. W. 448 (action against carrier by passenger for negligence—derailment—injury from fire—certain allegations of complaint held indefinite); Freeman v. Freeman, 39 Minn. 370, 40 N. W. 167 (action for divorce on the ground of adultery—complaint held indefinite); Orth v. St. Paul, 43 Minn. 208, 45 N. W. 151 (action by servant against master for injury from defective locomotive—complaint held sufficiently definite); Bowers v. Schuler, 54 Minn. 99, 55 N. W. 817 (action for partition—answer held sufficiently definite—general rule stated); Scofield v. National Elevator Co., 64 Minn. 527, 67 N. W. 645 (action for conversion—indefinite allegation of plaintiff's title—general rule stated); American Book Co. v. Kingdom Publishing Co., 71 Minn. 363, 73 N. W. 1089 (action for libel—complaint held sufficiently definite — general rule stated); Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623, 624 (action for negligence in construction of bridge —general allegation of negligence sufficient); Matteson v. United States & Canada Land Co., 103 Minn. 407, 115 N. W. 195 (action for breach of contract

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require anything more than reasonable certainty would often prevent any statement of a cause of action, and would put an unnecessary burden upon the pleader. Upon a motion to make a pleading more definite and certain, it is for the court to consider whether the pleader has been as definite and certain as in the nature of the case he could reasonably be expected to be.[83] In order to conform to the statute, a pleading should disclose, as clearly and concisely as the circumstances reasonably admit, the facts relied upon by the pleader. Where general allegations are mingled with specific in a pleading, so as to leave the intention of the pleader uncertain and ambiguous as to the nature and extent of the proof which he may offer in addition to the matters particularly alleged, the court may, on proper application, order the same to be made more definite, or to be stricken out.[84] A party is entitled to definite information as to the theory upon which it is claimed that he is liable, and if a pleading does not disclose a definite theory it is proper to require it to be made more definite and certain.[85] The indefiniteness must appear on the fact of the pleading, and not relate to the evidence by which the allegations may be proved on the trial. A party cannot be required to plead his evidence.[86] The maxim id certum est quod certum reddi potest is applicable to pleadings.[87] A motion to make more definite and certain or to strike out cannot be allowed to take the place of a demurrer.[88]

411. Discretion of trial court—Question on appeal—The matter of requiring 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 on appeal where, upon the merits, the substantial rights of the party are not affected.[89]

412. Remedy by motion before trial exclusive—The exclusive remedy for indefiniteness is a motion, before trial, to make more definite and certain

for sale of land—complaint held indefinite as to value of land at the time of defendant's repudiation of the contract).

[83] Fraker v. St. Paul etc. Ry., 30 Minn. 103, 14 N. W. 366; Orth v. St. Paul etc. Ry., 43 Minn. 208, 45 N. W. 151.

[84] Madden v. Minneapolis etc. Ry., 30 Minn. 453, 16 N. W. 263.

[85] Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922. See § 244.

[86] Lee v. Minneapolis etc. Ry., 34 Minn. 225, 25 N. W. 399; Todd v. Minneapolis etc. Ry., 37 Minn. 358, 35 N. W. 5; Bowers v. Schuler, 54 Minn. 99, 55 N. W. 817; St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408. See Madden v. Minneapolis etc. Ry., 30 Minn. 453, 16 N. W. 263.

[87] St. Paul Div., Sons of Temperance v. Brown, 9 Minn. 157(144).

[88] Whelan v. Sibley County, 28 Minn. 80, 84, 9 N. W. 175; Truesdell v. Hull, 35 Minn. 468, 29 N. W. 72; King v. Nichols & Shepard Co., 53 Minn. 453, 55 N. W. 604; American Book Co. v. Kingdom Publishing Co., 71 Minn. 363, 73 N. W. 1089.

[89] Cathcart v. Peck, 11 Minn. 45(24); Fraker v. St. Paul etc. Ry., 30 Minn. 103, 14 N. W. 366; Madden v. Minneapolis etc. Ry., 30 Minn. 453, 16 N. W. 263; Lehnertz v. Minneapolis etc. Ry., 31 Minn. 219, 17 N. W. 376; Tierney v. Minneapolis etc. Ry., 31 Minn. 234, 17 N. W. 377; Orth v. St. Paul etc. Ry., 43 Minn. 208, 45 N. W. 151; Young v. Lindquist, 126 Minn. 414, 148 N. W. 455.

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or to strike out.[90] It is discretionary with the court to entertain a motion after a demurrer has been overruled and before an answer has been served.[91] Indefiniteness cannot be objected to by demurrer,[92] or by motion for judgment on the pleadings,[93] or by a request for instructions to disregard,[94] or by objection to the admission of evidence,[95] or by motion to dismiss,[96] or by motion in arrest of judgment,[97] or for the first time on appeal.[98]

413. Motion papers—The moving papers should specify the particular allegations objected to.[99]

414. Proof aliunde inadmissible—It was held in an early case that where a pleading is attacked as evasive and uncertain the court is not confined to the pleading itself, but proof aliunde may be considered,[1] but such is not now the law.[2]

415. Order—Appeal—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 ordinarily be stricken out without leave to amend being first given.[3] An order denying a motion to make a pleading more definite and certain or to strike it out is not appealable,[4] but an order striking out a pleading is appealable.[5]

[90] R. L. 1905 § 4144; G. S. 1913 § 7770; Stickney v. Smith, 5 Minn. 486(390); Barnsback v. Reiner, 8 Minn. 59(37); Pugh v. Winona etc. Ry., 29 Minn. 390, 13 N. W. 189; Madden v. Minneapolis etc. Ry., 30 Minn. 453, 16 N. W. 263; Guthrie v. Olson, 32 Minn. 465, 21 N. W. 557; Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768; King v. Nichols & Shepard Co., 53 Minn. 453, 55 N. W. 604; Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868; Anderson v. Minneapolis etc. Ry., 103 Minn. 224, 114 N. W. 1123; Matteson v. United States & Canada Land Co., 103 Minn. 407, 115 N. W. 195; Rasmussen v. Hutchinson, 111 Minn. 457, 127 N. W. 182; Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748.

[91] Lovering v. Webb Publishing Co., 108 Minn. 201, 120 N. W. 688, 121 N. W. 911.

[92] See § 284.

[93] See § 464.

[94] Barnsback v. Reiner, 8 Minn. 59 (37). See Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768.

[95] Allis v. Day, 14 Minn. 516(388); Pugh v. Winona etc. Ry., 29 Minn. 390, 13 N. W. 189; Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768; St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408; Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748.

[96] Schmidt v. Garfield Nat. Bank, 64 Hun (N. Y.) 298; James v. Atlanta St. Ry. Co., 90 Ga. 695, 16 S. E. 642.

[97] McIlroy v. Adams, 32 Ark. 315.

[98] Slater v. Olson, 83 Minn. 35, 85 N. W. 825; Larson v. Great Northern Ry., 108 Minn. 519, 121 N. W. 121.

[99] Truesdell v. Hull, 35 Minn. 468, 29 N. W. 72.

[1] Colter v. Greenhagen, 3 Minn. 126 (74).

[2] See § 410.

[3] See Colter v. Greenhagen, 3 Minn. 126(74); Cathcart v. Peck, 11 Minn. 45 (24); Pugh v. Winona etc. Ry., 29 Minn. 390, 13 N. W. 189.

[4] American Book Co. v. Kingdom Publishing Co., 71 Minn. 363, 73 N. W. 1089.

[5] Lovering v. Webb Publishing Co., 108 Minn. 201, 120 N. W. 688.

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IRRELEVANT PLEADINGS

416. Definition—An irrelevant allegation is one which has no material relation to the case—one which does not form or tender any material issue.[6]

417. What constitutes—Cases are cited below involving the relevancy of particular allegations.[7]

[6] Morton v. Jackson, 2 Minn. 219(180); Hayward v. Grant, 13 Minn. 165(154). See Goodrich v. Parker, 1 Minn. 195 (169); Pomeroy, Remedies, § 551. Irrelevant allegations are such as have no substantial relation to the controversy and which cannot affect the result, and the test of any allegation is whether it tends to constitute a cause of action or defence. Kolb v. Mortimer, 120 N. Y. S. 543.

[7] Morton v. Jackson, 2 Minn. 219(180) (action on note—answer denying indorsement held not irrelevant); Lovejoy v. Morrison, 10 Minn. 136(108) (action for breach of contract whereby defendant agreed to furnish logs to be sawed at a sawmill of plaintiff—allegations in complaint as to lease of mill to plaintiff held irrelevant); Berkey v. Judd, 12 Minn. 52(23) (action by retiring partner against remaining partners for fraud in settlement — allegation in complaint that one of the defendants received and retained money of the firm held irrelevant); Hayward v. Grant, 13 Minn. 165 (154) (action on note—various denials in answer held immaterial—the denial of a legal conclusion may be irrelevant); Brisbin v. American Express Co., 15 Minn. 43(25) (action on a verdict—allegations in answer held irrelevant); Clague v. Hodgson, 16 Minn. 329(291) (trespass de bonis—allegation as to value of use held irrelevant); Winona etc. Ry. v. St. Paul etc. Ry., 23 Minn. 359 (action by railroad for lands claimed as part of its land grant—allegations in answer to effect that another party had become the owner of the sole beneficial interest in the rights, property, and immunities of the corporation held irrelevant); State v. Lake City, 25 Minn. 404, 421 (action on municipal bonds given in aid of railroad—allegations in answer that voters were inhuenced by false promises held irrelevant—allegations as to corruption of board of town supervisors by company held not irrelevant); Jellett v. St. Paul etc. Ry., 30 Minn. 265, 15 N. W. 237 (action against carrier for conversion by unauthorized delivery—allegations of matters in mitigation of damages held not irrelevant); Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736 (action for divorce—answer charging plaintiff with various acts of misconduct in business transactions, and with making false charges of adultery against defendant, for the purpose of extorting money and property from the person falsely charged to be her paramour held irrelevant); Quinby v. Minnesota Tribune Co., 38 Minn. 528, 38 N. W. 623 (action for libel—allegations in answer as to provocation by a previous publication of the plaintiff held irrelevant); Stewart v. Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787 (action for libel—certain allegations in mitigation of damages held irrelevant and others not irrelevant); Henry v. Bruns, 43 Minn. 295, 45 N. W. 444 (answer setting up failure of non-resident plaintiff to file security for costs and a failure to serve a bill of particulars held irrelevant); Oleson v. Journal Printing Co., 47 Minn. 300, 50 N. W. 80 (action for libel—answer setting out parts of article not alleged in complaint held immaterial); Haug v. Haugan, 51 Minn. 558, 53 N. W. 874 (complaint by real estate broker for commission—allegations in complaint held not irrelevant); Pye v. Bakke, 54 Minn. 107, 55 N. W. 904 (action for extras on building contract—

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418. More objectionable in complaint than in answer—Irrelevant, redundant and evidentiary matter in a complaint is a much more serious violation of the rules of good pleading, than in an answer, for the defendant is required to make a general or specific denial of each material allegation of the complaint controverted by him. It is not fair to defendant to compel him to determine, at his peril, what particular allegations in a great mass of clearly irrelevant matter may be held on the trial to be material.[8]

419. Remedy—Striking out—The remedy for irrelevancy in a pleading is a motion, before trial, to strike out or for judgment as for want of an answer, or reply.[9] It is only when matter is clearly and indisputably irrelevant that an order striking it out is justifiable.[10] On a motion to strike out the trial judge need not separate the good allegations from the bad where that would require a re-drafting of the pleading.[11] A motion to strike out does not put the moving party in the position of a demurrant.[12]

420. Discretion of trial court—Question on appeal—Whether matter should be stricken out as irrelevant is a question addressed to the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[13]

allegations of answer as to an oral contract held irrelevant); Dennis v. Nelson, 55 Minn. 144, 56 N. W. 589 (allegations of conclusions of law held irrelevant); Harbo v. Blue Earth County, 63 Minn. 238, 65 N. W. 457 (action to restrain trespass—allegations in answer held irrelevant); Oliver Mining Co. v. Clark, 65 Minn. 277, 68 N. W. 23 (action for specific performance—allegations of complaint held irrelevant); Security Bank v. Holmes, 68 Minn. 538, 71 N. W. 699 (action by purchaser at a foreclosure sale upon a covenant against incumbrances contained in the mortgage—allegations of answer held irrelevant); Erickson v. Child, 87 Minn. 487, 92 N. W. 1130 (action for specific performance—complaint held to contain some irrelevant matter); Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985 (action for libel—allegations in answer held irrelevant); Young v. Lindquist, 126 Minn. 414, 148 N. W. 455 (action to set aside a judgment for fraud—allegations of contradiction between witnesses and of perjury and fraudulent practices).

[8] Gutta Percha & Rubber Mfg. Co. v. Holman, 135 N. Y. S. 766.

[9] R. L. 1905 §§ 4136, 4144; G. S. 1913 §§ 7762, 7770; Fish v. Berkey, 10 Minn. 199(161, 166); Russell v. Chambers, 31 Minn. 54, 16 N. W. 458; Henry v. Bruns, 43 Minn. 295, 45 N. W. 444; Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985.

[10] Stewart v. Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787; Hansen v. St. Paul Gaslight Co., 82 Minn. 84, 84 N. W. 727; Walter v. Fowler, 85 N. Y. 621; Averill v. Taylor, 5 How. Pr. (N. Y.) 476.

[11] Gutta Percha & Rubber Mfg. Co. v. Holman, 135 N. Y. S. 766. See Brisbin v. American Express Co., 15 Minn. 43 (25).

[12] Brisbin v. American Express Co., 15 Minn. 43(25).

[13] Bingham v. Winona County, 6 Minn. 136(82, 87); Brisbin v. American Express Co., 15 Minn. 43(25); Haug v. Haugan, 51 Minn. 558, 53 N. W. 874.

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REDUNDANT PLEADINGS

421. Definition and nature—The code provides that the facts constituting the cause of action or defence 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 the 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. Statements of legal conclusions are generally redundant.[14] Redundant matter in a complaint is more objectionable than in an answer.[15]

422. What constitutes—Cases are cited below involving redundant allegations.[16]

[14] Pomeroy, Remedies, § 551; Green v. Palmer, 15 Cal. 411; Racouillat v. Rene, 32 Cal. 450; Wooden v. Strew, 10 How. Pr. (N. Y.) 48; Williams v. Hays, 5 How. Pr. (N. Y.) 470; Carpenter v. West, 5 How. Pr. (N. Y.) 53; Kolb v. Mortimer, 120 N. Y. S. 543; Gutta Percha & Rubber Mfg. Co. v. Holman, 135 N. Y. S. 766. See Minnesota cases under § 422.

[15] See § 418.

[16] State v. Lake City, 25 Minn. 404, 421 (action on municipal bonds given in aid of a railroad—allegations in answer that voters were influenced by false promises held redundant); Fraker v. St. Paul etc. Ry., 30 Minn. 103, 14 N. W. 366 (complaint by servant against master for injury in coupling cars—complaint held inexcusably redundant); Jellett v. St. Paul etc. Ry., 30 Minn. 265, 15 N. W. 237 (action for conversion by carrier by unauthorized delivery—evidentiary matter admissible under the denial of the conversion held properly stricken out); Russell v. Chambers, 31 Minn. 54, 16 N. W. 458 (action for seduction); Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736 (action for divorce—evidentiary matter held properly stricken out); West v. Eureka Improvement Co., 40 Minn. 394, 42 N. W. 87 (general rule against prolixity and repetition stated); Pye v. Bakke, 54 Minn. 107, 110, 55 N. W. 904 (action for extras on a building contract—allegations of answer as to an oral contract held redundant); Oliver Mining Co. v. Clark, 65 Minn. 277, 68 N. W. 23 (action for specific performance—allegations of complaint held redundant); Security Bank v. Holmes, 68 Minn. 538, 71 N. W. 699 (action by purchaser at a foreclosure sale on covenant against incumbrances in mortgage—parts of answer held redundant); Young v. Lindquist, 126 Minn. 414, 148 N. W. 455 (action to set aside a judgment for fraud—allegations of contradiction between witnesses and of perjury and fraudulent practices).

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423. Remedy—Striking out—The exclusive remedy for redundancy in a pleading is a motion, before answering, to strike out.[17]

[17] R. L. 1905 § 4144; G. S. 1913 § 7770; Loomis v. Youle, 1 Minn. 175(150); Fish v. Berkey, 10 Minn. 199(161, 166); Cathcart v. Peck, 11 Minn. 45(24); Russell v. Chambers, 31 Minn. 54, 16 N. W. 458.

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SHAM PLEADINGS

424. Definition and nature—A sham pleading is one that is false. Though such pleadings are generally introduced in bad faith for purposes of delay it is unnecessary 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 adverse 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.[18] A pleading may be sham though interposed in good faith and in the belief of its truth.[19]

425. Remedy—Striking out—The exclusive remedy for a sham pleading is a motion, before trial, to strike it out, or for judgment as for want of an answer or reply.[20] 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 on motion. Every reasonable doubt should be resolved against striking out.[21] When the allegations of an answer are fairly supported by the affidavits of the defendant and others, against like affidavits on behalf of the 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.[22]

[18] Stephen, Pl. 442; 1 Chitty, Pl. 16 Am. ed., 542; Morton v. Jackson, 2 Minn. 219(180); Barker v. Foster, 29 Minn. 166, 12 N. W. 460; State v. Weber, 96 Minn. 422, 105 N. W. 490; Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787; People v. McCumber, 18 N. Y. 315; Nichols v. Jones, 6 How. Pr. (N. Y.) 355. See Note, 113 Am. St. Rep. 639.

[19] State v. Weber, 96 Minn. 422, 105 N. W. 490.

[20] R. L. 1905 § 4136; G. S. 1913 § 7762. The statute is a regulation and not a grant of power. All courts have inherent power to strike out sham pleadings. Barker v. Foster, 29 Minn. 166, 12 N. W. 460.

[21] Barker v. Foster, 29 Minn. 166, 12 N. W. 460; Wright v. Jewell, 33 Minn. 505, 24 N. W. 299; Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995; Pfaender v. Winona etc. Ry., 84 Minn. 224, 87 N. W. 618; First Nat. Bank v. Lang, 94 Minn. 261, 102 N. W. 700; State v. Weber, 96 Minn. 422, 425, 105 N. W. 490; Brown v. Peterson, 101 Minn. 53, 111 N. W. 733; Estate of Beckwith v. Golden Rule Co., 108 Minn. 89, 121 N. W. 427.

[22] Wright v. Jewell, 33 Minn. 505, 24 N. W. 299; City Bank v. Doll, 33 Minn.

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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.[23]

426. When part is sham—When part of an answer is sham, 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.[24]

427. Verified pleading may be stricken out—A sham pleading may be stricken out on motion though it is verified.[25]

428. Denials may be stricken out—A pleading containing a general or specific denial may be stricken out as sham.[26] This is contrary to the well-nigh universal rule in this country.[27] It would be well if our courts would exercise the power to do so only in very exceptional cases. A denial of any knowledge or information of facts which the pleader knows or ought to know is sham and may be stricken out.[28]

429. Sham counterclaims—A sham counterclaim may be stricken out on motion.[29]

430. Time of motion to strike out—A motion to strike out should be made promptly upon service of the sham pleading, but it is discretionary with the court to entertain such a motion at any time before trial.[30]

431. Affidavits on motion—A motion to strike out is usually based on the pleadings and files in the case and affidavits of the parties and third persons and other documentary evidence.[31] Where affidavits in support of the motion

507, 24 N. W. 300; Smith v. Betcher, 34 Minn. 218, 25 N. W. 347.

[23] City Bank v. Doll, 33 Minn. 507, 24 N. W. 300; First Nat. Bank v. Lang, 94 Minn. 261, 102 N. W. 700.

[24] Schmitt v. Cassilius, 31 Minn. 7, 16 N. W. 453.

[25] Conway v. Wharton, 13 Minn. 158 (145); Hayward v. Grant, 13 Minn. 165 (154); Barker v. Foster, 29 Minn. 166, 12 N. W. 460; C. N. Nelson Lumber Co. v. Richardson, 31 Minn. 267, 17 N. W. 388; Wheaton v. Briggs, 35 Minn. 470, 29 N. W. 170; Stevens v. McMillin, 37 Minn. 509, 35 N. W. 372; Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939; White v. Moquist, 61 Minn. 103, 63 N. W. 255; State v. Weber, 96 Minn. 422, 105 N. W. 490; Towne v. Dunn, 118 Minn. 143, 136 N. W. 562.

[26] C. N. Nelson Lumber Co. v. Richardson, 31 Minn. 267, 17 N. W. 388; Stevens v. McMillin, 37 Minn. 509, 35 N. W. 372; Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939; Bardwell-Robinson Co. v. Brown, 57 Minn. 140, 58 N. W. 872; First Nat. Bank v. Lang, 94 Minn. 261, 102 N. W. 700; Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

[27] See Morton v. Jackson, 2 Minn. 219 (180).

[28] Wheaton v. Briggs, 35 Minn. 470, 29 N. W. 170; Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352; Larson v. Shook, 68 Minn. 30, 70 N. W. 775.

[29] Monitor Drill Co. v. Moody, 93 Minn. 232, 100 N. W. 1104.

[30] Barker v. Foster, 29 Minn. 166, 12 N. W. 460.

[31] See Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 394, 57 N. W. 938;

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make out a clear prima facie case of falsity they will be taken as true for the purpose of the motion, if not met by counter-affidavits, and the motion granted.[32] The court may take into consideration the quibbling and evasive character of the defendant's counter-affidavits.[33]

432. Burden of proof to show falsity—On a motion to strike out an answer as sham the defendant is not required to prove the truth of his defence or the truth of the allegations called in question. The burden of proving their falsity is on the plaintiff.[34] Ordinarily it will be presumed that a sham pleading was introduced in bad faith for the purpose of delay.[35]

433. Amendment discretionary—Upon striking out a sham pleading it is discretionary with the court to order judgment or allow an amended pleading to be served.[36]

434. Pleadings held sham or the reverse—Cases are cited below holding particular pleadings to be sham,[37] or the reverse.[38]

Bardwell-Robinson Co. v. Brown, 57 Minn. 140, 58 N. W. 872; White v. Moquist, 61 Minn. 103, 63 N. W. 255; Towne v. Dunn, 118 Minn. 143, 136 N. W. 562 (motion based on the complaint, answer, records and files in the action and on affidavits).

[32] Barker v. Foster, 29 Minn. 166, 12 N. W. 460; Van Loon v. Griffin, 34 Minn. 444, 26 N. W. 601; Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939; White v. Moquist, 61 Minn. 103, 63 N. W. 255; Towne v. Dunn, 118 Minn. 143, 136 N. W. 562.

[33] Thul v. Ochsenreiter, 72 Minn. 111, 75 N. W. 4; Hertz v. Hartmann, 74 Minn. 320, 77 N. W. 232; Towne v. Dunn, 118 Minn. 143, 136 N. W. 562.

[34] Schmitt v. Cassilius, 31 Minn. 7, 16 N. W. 453; Pfaender v. Winona etc. Ry., 84 Minn. 224, 87 N. W. 618.

[35] Barker v. Foster, 29 Minn. 166, 12 N. W. 460; State v. Weber, 96 Minn. 422, 105 N. W. 490.

[36] Hertz v. Hartmann, 74 Minn. 320, 77 N. W. 232; First Nat. Bank v. Lang, 94 Minn. 261, 102 N. W. 700; Towne v. Dunn, 118 Minn. 143, 136 N. W. 562.

[37] Hayward v. Grant, 13 Minn. 165 (154); Barker v. Foster, 29 Minn. 166, 12 N. W. 460; C. N. Nelson Lumber Co. v. Richardson, 31 Minn. 267, 17 N. W. 388; Schmitt v. Cassilius, 31 Minn. 7, 16 N. W. 453; Van Loon v. Griffin, 34 Minn. 444, 26 N. W. 601; Wheaton v. Briggs, 35 Minn. 470, 29 N. W. 170; Stevens v. McMillin, 37 Minn. 509, 35 N. W. 372; Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352; Dennis v. Nelson, 55 Minn. 144, 56 Minn. 589; Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939; Fletcher v. Byers, 55 Minn. 419, 57 N. W. 139; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; Bardwell-Robinson Co. v. Brown, 57 Minn. 140, 48 N. W. 872; White v. Moquist, 61 Minn. 103, 63 N. W. 255; Larson v. Shook, 68 Minn. 30, 70 N. W. 775; Thul v. Ochsenreiter, 72 Minn. 111, 75 N. W. 4; Hertz v. Hartmann, 74 Minn. 320, 77 N. W. 232; Monitor Drill Co. v. Moody, 93 Minn. 232, 100 N. W. 1104; First Nat. Bank v. Lang, 94 Minn. 261, 102 N. W. 700; State v. Weber, 96 Minn. 422, 105 N. W. 490; W. R. Lynn Shoe Co. v. Schunk, 101 Minn. 22, 111 N. W. 729; Brown-Forman Co. v. Peterson, 101 Minn. 53, 111 N. W. 733; First State Bank v. Schatz, 104 Minn. 425, 116 N. W. 917; Swedish-American Nat. Bank v. Lindquist, 110 Minn. 533, 126 N. W. 1134; Dennis v. Firth, 113 Minn. 235, 129 N. W. 387; Pothen v. Pothen, 116 Minn. 32, 133 N. W. 72; Towne v. Dunn, 118 Minn. 143, 136 N. W. 562; Orr v. Sutton, 119 Minn. 193, 137 N. W. 973; Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

[38] Morton v. Jackson, 2 Minn. 219 (180); Conway v. Wharton, 13 Minn. 158

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(145); State v. Sherwood, 15 Minn. 221 (172); Roblee v. Secrest, 28 Minn. 43, 8 N. W. 904; City Bank v. Doll, 33 Minn. 507, 24 N. W. 300; Wright v. Jewell, 33 Minn. 505, 24 N. W. 299; Smith v. Betcher, 34 Minn. 218, 25 N. W. 347; McDermott v. Deither, 40 Minn. 86, 41 N. W. 544; Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995; Pfaender v. Winona etc. Ry., 84 Minn. 224, 87 N. W. 618; Estate of Beckwith v. Golden Rule Co., 108 Minn. 89, 121 N. W. 427; Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 118 Minn. 273, 136 N. W. 738.

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435. Frivolous answer or reply—Definition—A frivolous answer is one which is so glaringly insufficient as a defence that the court can determine its insufficiency upon bare inspection, without argument.[39] A frivolous reply is one that does not in any view of the facts pleaded present a defence to the matter pleaded in the answer.[40]

436. Same—Striking out—Amendment—Frivolous answers, defences or replies, may on motion be stricken out, or judgment rendered notwithstanding the same, as for want of an answer or reply.[41] A motion to strike out an answer as frivolous will be granted only in extraordinary cases, in which the propriety of doing so is free from reasonable doubt.[42] The effect of a motion to strike out is the same as a general demurrer to the pleading. It is discretionary with the court to allow the party to serve an amended pleading.[43]

437. Same—Frivolous in part—Where part of an answer is 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.[44]

438. Frivolous demurrers—Striking out—A frivolous demurrer may be stricken out on motion, or judgment rendered notwithstanding the same, as for want of an answer or reply.[45] A demurrer should not be stricken out as frivolous unless it is 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 stricken 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.[46] An application for an order

[39] Morton v. Jackson, 2 Minn. 219 (180); Roblee v. Secrest, 28 Minn. 43, 8 N. W. 904; First Nat. Bank v. Lang, 94 Minn. 261, 102 N. W. 700; State v. Weber, 96 Minn. 422, 105 N. W. 490 (a frivolous answer is one that does not, in any view of the facts pleaded, present a defence to the action); Pothen v. Pothen, 116 Minn. 32, 133 N. W. 72.

[40] Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

[41] R. L. 1905 § 4136; G. S. 1913 § 7762; Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787. See cases under § 435.

[42] First Nat. Bank v. Lang, 94 Minn. 261, 102 N. W. 700.

[43] See Hertz v. Hartmann, 74 Minn. 320, 77 N. W. 232; First Nat. Bank v. Lang, 94 Minn. 261, 102 N. W. 700; Towne v. Dunn, 118 Minn. 143, 136 N. W. 562.

[44] Schmitt v. Cassilius, 31 Minn. 7, 16 N. W. 453.

[45] R. L. 1905 § 4136; G. S. 1913 § 7762; Jaeger v. Hartmann, 13 Minn. 55(50); Hulburt v. Schulenburg, 17 Minn. 22(5); State v. Torinus, 22 Minn. 272; Quinn v. Shortall, 29 Minn. 106, 12 N. W. 153; Nelson v. Nugent, 62 Minn. 203, 64 N. W. 392.

[46] Hatch-Essendrup Co. v. Schusler, 46 Minn. 207, 48 N. W. 782; Perry v. Rey-

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"overruling the demurrer as frivolous" has been held an application for an order overruling the demurrer.[47]

439. Same—Pleading over—When a demurrer is stricken out as frivolous it is usual to allow the demurrant to plead over. 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.[48] 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.[49] After judgment on a frivolous demurrer the demurrant should not have leave to plead over before satisfying the court that the frivolous demurrer was interposed in good faith and that he has a valid plea.[50]

440. Frivolous counterclaims—Striking out—A frivolous counterclaim may be stricken out on motion.[51]

nolds, 40 Minn. 499, 42 N. W. 471; Olsen v. Cloquet Lumber Co., 61 Minn. 17, 63 N. W. 95.

[47] Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

[48] Friesenhahn v. Merrill, 52 Minn. 55, 53 N. W. 1024.

[49] Id.

[50] McNeil v. Board, 115 N. Y. S. 215.

[51] Monitor Drill Co. v. Moody, 93 Minn. 232, 100 N. W. 1104.

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VARIANCE

441. In general—It is a fundamental rule of code procedure that the proof and pleadings must substantially correspond. A violation of this rule is termed a variance. The evidence must follow the allegations. 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 legal system 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.[52] The very object and design of all pleading by the plaintiff, and of all pleading of new matter by the defendant, is that the adverse party may be informed of the real cause of action or defence relied upon by the pleader, and may thus have an opportunity of meeting and defeating it, if possible, at the trial. Unless the complaint on the one hand, and the answer on the other, fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands and defences orally before the court at the time of the trial.[53] While it is essential that the allegations and proof should correspond it is sufficient if they correspond substantially.[54] Evidence pertinent to the issue made by the pleadings can-

[52] Southwick v. First Nat. Bank, 84 N. Y. 420; Reed v. McConnell, 133 N. Y. 425, 31 N. E. 22; Gordon v. Ellenville etc. Ry., 195 N. Y. 137, 88 N. E. 44; Desnoyer v. L'Hereux, 1 Minn. 17(1); Snow v. Johnson, 1 Minn. 48(32); Lawrence v. Willoughby, 1 Minn. 87(65); Karns v. Kunkle, 2 Minn. 313(268); Helfer v. Alden, 3 Minn. 332(232); Folsom v. Carli, 6 Minn. 420(284, 290); Cochrane v. Halsey, 25 Minn. 52, 61; Burton v. St. Paul etc. Ry., 33 Minn. 189, 22 N. W. 300; Marshall v. Gilman, 47 Minn. 131, 49 N. W. 688; Cremer v. Miller, 56 Minn. 52, 57 N. W. 318; Joannin-Hansen Co. v. Barnes & Co., 77 Minn. 428, 80 N. W. 364; Ecker v. Isaacs, 98 Minn. 146, 107 N. W. 1053; First Nat. Bank v. Stadden, 103 Minn. 403, 115 N. W. 198; Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4.

[53] Pomeroy, Remedies, § 554.

[54] Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103; Irish-American Bank v. Bader, 59 Minn. 329, 61 N. W. 328. See § 820.

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not be considered upon an issue not made therein, though it would have been pertinent to such issue if it had been made.[55]

442. Material and immaterial variances—Statute—No variance between the allegations 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 on the merits. Whenever a party alleges that he has been so misled, he shall prove the fact to the satisfaction of the court, showing 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. When the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.[56]

443. Immaterial variance—Effect—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.[57]

[55] Payette v. Day, 37 Minn. 366, 34 N. W. 592.

[56] R. L. 1905 § 4158; G. S. 1913 § 7784.

[57] R. L. 1905 § 4158; G. S. 1913 § 7784; Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472 (action to enforce a materialman's lien—general rule of text stated and applied—variance between express and implied contract); Short v. McRea, 4 Minn. 119(78) (action on logging contract); Caldwell v. Bruggerman, 4 Minn. 270(190) (replevin—proof of title); Chapman v. Dodd, 10 Minn. 350 (277) (action for malicious prosecution); Rau v. Minn. Valley Ry., 13 Minn. 442(407) (action for negligence—excavation—surface waters); Sonnenberg v. Riedel, 16 Minn. 83(72) (action for balance due on debt—variance as to payment held immaterial); Hartz v. St. Paul etc. Ry., 21 Minn. 358 (trespass to realty—variance as to description of locus in quo held immaterial); Johnston Harvester Co. v. Clark, 30 Minn. 308, 15 N. W. 252 (action on note—variance as to note held immaterial); Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103 (action for slander—variance as to words spoken held immaterial); Myerly v. Chicago etc. Ry., 39 Minn. 54, 38 N. W. 763 (action against carrier for ejection of passenger—fact that evidence showed plaintiff a trespasser instead of a passenger held immaterial); Iverson v. Dubay, 39 Minn. 325, 40 N. W. 159 (action for price of goods sold and delivered—proof that the purchase price was more than that alleged held immaterial); Moser v. St. Paul etc. Ry., 42 Minn. 480, 44 N. W. 530 (action for negligence in failing to fence whereby plaintiff's horse was killed—variance as to manner in which horse was killed held immaterial); Erickson v. Schuster, 44 Minn. 441, 46 N. W. 914 (action for rent—variance as to commencement of term held immaterial); Fravell v. Nett, 46 Minn. 31, 48 N. W. 446 (action for money loaned—variance as to form of loan held immaterial); Nichols & Shepard Co. v. Dedrick, 61 Minn. 513, 63 N. W. 1110 (action on note—proof of joint and several note under allegation of separate note of defendant held not a material variance); Anderson v. Johnson, 74 Minn. 171, 77 N. W. 26 (action for rescission of a contract for the sale of land—recovery on ground that agent had no authority to make contract held not a fatal variance); St. Louis County v.

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444. Material variance—Effect—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. 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.[58]

American Loan & Trust Co., 75 Minn. 489, 78 N. W. 113 (action on bond of depositary — complaint alleged a demand for the payment of a fund—proof of facts which rendered a demand unnecessary held not prejudicial); Nutzmann v. Germania Life Ins. Co., 82 Minn. 116, 84 N. W. 730 (action for personal injury from elevator—variance as to movement of elevator held immaterial); Olson v. Minn. etc. Ry., 89 Minn. 280, 94 N. W. 871 (trespass quare clausum—variance as to title of plaintiff held immaterial); Gaar, Scott & Co. v. Brundage, 89 Minn. 412, 94 N. W. 1091 (action for balance due for goods sold and delivered—variance as to sale of goods to defendant held immaterial); Lemon v. De Wolf, 89 Minn. 465, 95 N. W. 316 (action by real estate broker for commission—variance as to contract between the parties held immaterial); Briggs v. Rutherford, 94 Minn. 23, 101 N. W. 954 (action for money had and received—variance held immaterial); Kaufman v. Barbour, 103 Minn. 173, 114 N. W. 738 (action on note —variance as to capacity in which defendant signed note held immaterial); Banks v. Penn. Ry., 111 Minn. 48, 126 N. W. 410 (action against carrier for negligence in carrying goods—complaint alleged a delivery of the goods to defendant by the plaintiff at Jersey City—proof of delivery by a connecting carrier at that point held not a material variance); Snyder v. Crescent Creamery Milling Co., 111 Minn. 234, 126 N. W. 822 (action on express contract for services—proof of reasonable value held not a material variance); Larson v. Barlow, 112 Minn. 246, 127 N. W. 924 (action for goods sold and delivered—variance between express and implied agreement held immaterial); Sturm v. Northwest Mills Co., 144 Minn. 420, 131 N. W. 472 (action for personal injuries by servant against master—variance as to defect in instrumentality held immaterial); O'Brien v. Northwestern Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399 (action for personal injuries by servant against master—variance between unsafe instrumentality and unsafe place in which to work); Johnson v. Scott, 119 Minn. 470, 138 N. W. 694 (action for negligence in management of an automobile —variance between ordinary and wilful negligence); Lindquist v. Young, 119 Minn. 219, 138 N. W. 28 (action to foreclose mechanic's lien—variance between lien statement and proof); Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703 (action for negligence of driver of hired automobile—variance as to possession of automobile); Derham v. Donohue, 155 Fed. 385 (rule of text stated and applied).

[58] R. L. 1905 § 4158; G. S. 1913 § 7784; Short v. McRea, 4 Minn. 119(78); Washburn v. Winslow, 16 Minn. 33(19); Hayden v. Albee, 20 Minn. 159(143); Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472; Kaufman v. Barbour, 103 Minn. 173, 114 N. W. 738; Catlin v. Gunter, 11 N. Y. 368; Place v. Minster, 65 N. Y. 89; and cases under § 443.

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445. Same—Amendment ordered on appeal—When it clearly appears that a variance has not misled the adverse party to his prejudice in maintaining his cause of action or defence on the merits, the supreme court, on appeal, will affirm and remand the cause, with directions to the trial court to permit the party to amend his pleading so as to conform it to the facts proved.[59]

446. Fatal variance—Failure of proof—Effect—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 or direct a verdict. 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.[60] Where the complaint states

[59] Adams v. Castle, 64 Minn. 505, 67 N. W. 637; First Nat. Bank v. Mitchell, 71 Minn. 69, 76, 73 N. W. 645.

[60] Pomeroy, Remedies, § 554; White v. Culver, 10 Minn. 192(155) (action on contract to collect a judgment); McCarty v. Barrett, 12 Minn. 494(398) (action for slander—an allegation of words in the second person is not proved by evidence of words in the third person); Leighton v. Grant, 20 Minn. 345(298) (where an answer alleges only actual fraud as a defence a mere mistake cannot be proved under it); O'Brien v. St. Paul, 18 Minn. 176(163) (under a complaint for one kind of a nuisance one of an essentially different kind cannot be proved); Cowles v. Warner, 22 Minn. 449 (complaint alleged a contract terminable at the pleasure of either party —proof of one to continue in force for a period of time longer than one year from the making thereof—held a fatal variance); Cummings v. Long, 25 Minn. 337 (complaint for money loaned—proof of money paid but not lent held a fatal variance); Benson v. Dean, 40 Minn. 445, 42 N. W. 207 (action for goods sold —proof of sale to third party and a contract between him and the defendant whereby the latter agreed to pay the plaintiff the original price of the goods held a fatal variance); Dennis v. Spencer, 45 Minn. 250, 47 N. W. 795 (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 a failure of proof); Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981 (a counterclaim alleged that certain stone had been quarried and removed under license from defendant while the proof showed that plaintiff was simply a trespasser—variance held material); Irish-American Bank v. Bader, 59 Minn. 329, 61 N. W. 328 (action for slander—variance as to words spoken held fatal); Scofield v. National Elevator Co., 64 Minn. 527, 67 N. W. 645 (action for conversion — allegation of ownership not sustained by proof of a mere lien on the property); Commonwealth Title etc. Co. v. Dokko, 71 Minn. 533, 74 N. W. 891 (action for use and occupation—proof that defendant was a trespasser held a fatal variance); Waggoner v. Preston, 83 Minn. 336, 86 N. W. 335 (unlawful detainer proceedings—failure of proof as to service of a sufficient notice to vacate); Donahue v. N. W. Tel. Exchange Co., 103 Minn. 432, 115 N. W. 279 (action for negligence—recovery cannot be had for a ground of negligence not assigned); Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4 (id.).

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a cause of action ex delicto a recovery cannot be had upon a cause of action ex contractu not embraced in such statement.[61] Under an allegation of legal title an equitable title cannot be proved.[62] By statute all parties to a joint contract are jointly and severally liable, and may be sued jointly or severally at the election of plaintiff. Where an action is brought against one of the parties so liable, and the complaint alleges a contract made by him, and the evidence on the trial shows a joint contract with defendant and other persons, there is, in the absence of a showing that defendant was misled to his prejudice, no fatal variance between the allegations and the proof.[63] When the averment to which the proof is directed is unproved, not in some particulars only, but in its entire scope and meaning, there is a failure of proof or fatal variance.[64]

447. Waiver—Trial of issues by consent—Presumption—The parties to an action may, 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,[65] and full measure of relief awarded.[66] 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.[67] A party waives a variance if he himself calls out

[61] Minneapolis Harvester Works v. Smith, 30 Minn. 399, 16 N. W. 462.

[62] See § 227.

[63] Morgan v. Brach, 104 Minn. 247, 116 N. W. 490.

[64] R. L. 1905 § 4159; G. S. 1913 § 7785.

[65] Whalon v. Aldrich, 8 Minn. 346 (305); Rogers v. Hastings etc. Ry., 22 Minn. 25; Winona v. Minn. etc. Co., 27 Minn. 415, 6 N. W. 795, 8 N. W. 148; Warner v. Foote, 40 Minn. 176, 41 N. W. 935; Abraham v. Holloway, 41 Minn. 163, 42 N. W. 870; Ambuehl v. Matthews, 41 Minn. 537, 43 N. W. 477; Wayzata v. Great Northern Ry., 50 Minn. 438, 52 N. W. 913; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Bassett v. Haren, 61 Minn. 346, 63 N. W. 713; Lyons v. Red Wing, 76 Minn. 20, 78 N. W. 868; Merchants Nat. Bank v. Barlow, 79 Minn. 234, 82 N. W. 364; Madson v. Madson, 80 Minn. 501, 83 N. W. 396; Maul v. Steele, 95 Minn. 292, 104 N. W. 4; Bradley v. Bradley Estate Co., 97 Minn. 130, 106 N. W. 338; Hostetter v. Illinois Central Ry., 104 Minn. 25, 115 N. W. 748; James v. Merchants' L. & C. Co., 118 Minn. 146, 136 N. W. 582; Johnson v. Scott, 119 Minn. 470, 138 N. W. 694; Wright v. Waite, 126 Minn. 115, 148 N. W. 50. See Bick v. Minneapolis etc. Ry., 107 Minn. 78, 82, 119 N. W. 505, and § 392.

[66] Bassett v. Haren, 61 Minn. 346, 63 N. W. 713.

[67] Isaacson v. Minneapolis etc. Ry., 27 Minn. 463, 8 N. W. 600; Butler v. Winona Mill Co., 28 Minn. 205, 9 N. W. 697; Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Spear v. Snider, 29 Minn. 463, 13 N. W. 910; D. M. Osborne & Co. v. Williams, 37 Minn. 507, 35 N. W. 371; Almich v. Downey, 45 Minn. 460, 48 N. W. 197; Wilson v. N. W. etc. Assn., 53 Minn. 470, 477, 55 N. W. 626; Keene v. Masterman, 66 Minn. 72, 68 N. W. 771; Vaillancour v. Minneapolis etc. Ry., 106 Minn. 348, 119 N. W. 53; Woodruff v. Bearman Fruit Co., 108 Minn. 118, 121 N. W. 426; Fink v. Weinholzer, 109 Minn. 381, 123 N. W. 931; McCauley v. Wuest, 110 Minn. 529, 125 N. W. 1021; Johnson v. Scott, 119 Minn. 470, 138 N. W. 694.

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the objectionable evidence,[68] or fails to make timely and specific objection to it.[69] Evidence is presumed to have been offered and received with reference to the issues made by the pleadings. Where there is no express or formal waiver, but it is to be gathered from the course of the trial, the record of the trial must make it appear very clearly that the parties did in fact, and without objection, litigate the issue not pleaded as though it were in the pleadings. Any other rule would be liable to operate as a surprise and to work injustice. A consent to try issues not made by the pleadings 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.[70] If the record on appeal does not contain the evidence it will be presumed that issues not made by the pleadings were litigated by consent or without objection.[71] The rule as to waiver of a reply is stated elsewhere.[72]

448. Objections—When must be made—Objection to a variance between the pleadings and proof cannot be made for the first time on appeal.[73] It must be made on the trial, and if the variance is material but not fatal, it

[68] Reed v. Great Northern Ry., 76 Minn. 163, 78 N. W. 974. See Spear v. Snider, 29 Minn. 463, 13 N. W. 910.

[69] Cummings v. Petsch, 41 Minn. 115, 42 N. W. 789; Johnson v. Avery, 41 Minn. 485, 43 N. W. 340; Adams v. Castle, 64 Minn. 505, 67 N. W. 637; Raitila v. Consumers Ore Co., 107 Minn. 91, 119 N. W. 490.

[70] Winona v. Minn. etc. Co., 27 Minn. 415, 6 N. W. 795, 8 N. W. 148; O'Neil v. Chicago etc. Ry., 33 Minn. 489, 24 N. W. 192; Livingston v. Ives, 35 Minn. 55, 27 N. W. 74; Mahoney v. St. Paul etc. Ry., 35 Minn. 361, 29 N. W. 6; Farnham v. Murch, 36 Minn. 328, 31 N. W. 453; Payette v. Day, 37 Minn. 366, 34 N. W. 592; Barteau v. Barteau, 45 Minn. 132, 47 N. W. 645; Fergestad v. Gjertsen, 46 Minn. 369, 49 N. W. 127; Bowen v. Thwing, 56 Minn. 177, 57 N. W. 468; Elston v. Fieldman, 57 Minn. 70, 58 N. W. 830; Diamond v. Dennison, 102 Minn. 302, 113 N. W. 696; Hostetter v. Illinois Central Ry., 104 Minn. 25, 115 N. W. 748; Williison v. Great Northern Ry., 111 Minn. 370, 127 N. W. 4; Creteau v. Chicago etc. Ry., 113 Minn. 418, 129 N. W. 555; Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

[71] Peach v. Reed, 87 Minn. 375, 92 N. W. 229.

[72] See § 392.

[73] St. Paul v. Kuby, 8 Minn. 154(125, 142); Washburn v. Winslow, 16 Minn. 33(19); Lough v. Thornton, 17 Minn. 253(230); Cushman v. Carver County, 19 Minn. 295(252); Hartz v. St. Paul etc. Ry., 21 Minn. 358; Rogers v. Hastings & Dakota Ry., 22 Minn. 25; Messerschmidt v. Baker, 22 Minn. 81; Merriam v. Pine City Lumber Co., 23 Minn. 314; Nelson v. Thompson, 23 Minn. 508; Cairncross v. McGrann, 37 Minn. 130, 33 N. W. 548; Clark v. Austin, 38 Minn. 487, 38 N. W. 615; Johnson v. Avery, 41 Minn. 485, 43 N. W. 340; Ambuehl v. Matthews, 41 Minn. 537, 43 N. W. 477; Almich v. Downey, 45 Minn. 460, 48 N. W. 197; Wayzata v. Great Northern Ry., 50 Minn. 438, 52 N. W. 913; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; O'Connor v. Delaney, 53 Minn. 247, 54 N. W. 1108; Hand v. Nat. Live-Stock Ins. Co., 57 Minn. 519, 59 N. W. 538; Red River Valley Investment Co. v. Cole, 62 Minn. 457, 64 N. W. 1149; Lyons v. Red Wing, 76 Minn. 20, 78 N. W. 868; Madson v. Madson, 80 Minn. 501, 83 N. W. 396; Thomas v. Murphy, 87 Minn. 358, 91 N. W. 1097; Lemon v. DeWolf, 89 Minn. 465, 95 N. W. 316; O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399.

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must be made as soon as the evidence is offered.[74] It is ordinarily too late when plaintiff rests.[75] It cannot be made for the first time on a motion for a new trial.[76] If the variance is fatal the objection may be made to the evidence,[77] or by a motion for a dismissal,[78] or by exception to instructions,[79] or by requests for instructions.[80]

[74] Adams v. Castle, 64 Minn. 505, 67 N. W. 637.

[75] Id.

[76] Johnson v. Avery, 41 Minn. 485, 43 N. W. 340.

[77] First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4 (party held not bound to move to make pleadings more definite and certain).

[78] Cowles v. Warner, 22 Minn. 449; Irish-American Bank v. Bader, 59 Minn. 329, 61 N. W. 328; Gaar, Scott & Co. v. Fritz, 60 Minn. 346, 62 N. W. 391.

[79] Benson v. Dean, 40 Minn. 445, 42 N. W. 207.

[80] Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4.

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OBJECTIONS ON THE TRIAL

DISMISSAL

449. Insufficiency of complaint—Motion by defendant—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.[81]

450. Time of motion—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.[82] When it is made after the introduction of evidence it will not be granted if a cause of action has been proved by evidence unobjected to by the defendant.[83]

451. Motion should specify defect—The motion 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.[84]

452. When there are several defendants—The motion may be made and granted in favor of one or more of several defendants.[85]

453. Amendment to defeat motion—It is discretionary with the court to allow an amendment of the complaint to cure the defects pointed out in the motion to dismiss. Ordinarily the court should allow or order such an amendment as a matter of course. A defendant ought not to be heard to say that he would be prejudiced by an amendment if he has failed to demur.[86] A trial judge is not a mere umpire of a game of skill between opposing counsel.

[81] R. L. 1905 § 4129; G. S. 1913 § 7755; Holmes v. Campbell, 12 Minn. 221(141, 145); Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118; Tooker v. Arnoux, 76 N. Y. 397. It seems that the overruling of a demurrer does not prevent the defendant from raising the objection on the trial. First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101.

[82] Holmes v. Campbell, 12 Minn. 221 (141, 145); Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 59 N. W. 822.

[83] Frank v. Irgens, 27 Minn. 43, 6 N. W. 380. See Rogers v. St. Paul, 86 Minn. 98, 90 N. W. 155; Welde v. St. Paul, 126 Minn. 491, 148 N. W. 304.

[84] See Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154; Smith v. Kingman & Co., 70 Minn. 453, 460, 73 N. W. 253; and § 456.

[85] Montgomery County Bank v. Albany City Bank, 7 N. Y. 459.

[86] Caldwell v. Bruggerman, 8 Minn. 286 (252, 258); Cordill v. Minn. Elevator Co., 89 Minn. 442, 444, 95 N. W. 306; Bauman v. Bean, 57 Mich. 1, 23 N. W. 451; Bockes v. Lansing, 74 N. Y. 437; Lounsbury v. Purdy, 18 N. Y. 515; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057.

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He represents society, and it is the interest of society that cases should be tried on the merits and upon a full disclosure of all the relevant facts. It is therefore the duty of a trial judge to discourage objections to pleadings on the trial and to obviate them when possible by ordering an amendment. It should be the settled policy in this state never to throw a party out of court on account of a remediable defect in his pleading, when objection is first made on the trial.

454. Construction of complaint on motion—On a motion to dismiss every reasonable intendment will be indulged in favor of the sufficiency of the complaint. The motion will be denied if the complaint can be sustained by the most liberal construction. The test is not whether a demurrer would have been sustained.[87] Even a conclusion of law may be sustained, if, by any reasonable intendment, it can be held to contain an inference of the necessary fact.[88] The action cannot be dismissed if the complaint states facts constituting any cause of action, either legal or equitable.[89] A complaint will be construed with especial liberality if the defendant does not call the attention of the court to the particular defect relied on.[90]

455. Insufficiency of counterclaim—Motion by plaintiff—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 to dismiss.[91]

OBJECTION TO EVIDENCE

456. By defendant—Insufficient complaint—The defendant has a right to question the sufficiency of the complaint on the trial by objecting, at the opening of the case, to the introduction of any evidence under it,[92] and the practice is a common one in this state.[93] The overruling of such an objection is probably not error unless the defendant calls the attention of the court to

[87] Holmes v. Campbell, 12 Minn. 221 (141, 145); Johnson v. Robinson, 20 Minn. 189(169); Kelly v. Rogers, 21 Minn. 146, 151; Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154; Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 51, 59 N. W. 822; Newton v. Highland Improvement Co., 62 Minn. 436, 64 N. W. 1146; Zalk v. Great Northern Ry., 98 Minn. 65, 107 N. W. 814; Koreis v. Minneapolis etc. Ry., 108 Minn. 449, 122 N. W. 668.

[88] Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 51, 59 N. W. 822.

[89] Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254; Canty v. Latterner, 31 Minn. 239, 17 N. W. 385; Pressnell v. Lundin, 44 Minn. 551, 47 N. W. 161.

[90] Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154; Smith v. Kingman & Co., 70 Minn. 453, 73 N. W. 253.

[91] See Lace v. Fixen, 39 Minn. 46, 38 N. W. 762; Schurmeier v. English, 46 Minn. 306, 48 N. W. 1112.

[92] Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 125, 143 N. W. 253. A supplemental complaint cannot be objected to in this way. Lowry v. Harris, 12 Minn. 255(166).

[93] See, for example, Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139;

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the particular defect to which objection is made, if the defect is remediable by amendment. Such ought to be the rule if it is not.[94] Upon such an objection every reasonable intendment will be indulged in favor of the sufficiency of the complaint. The test is not whether a demurrer would have been sustained. The objection will be overruled if the complaint can be sustained by the most liberal construction. Even conclusions of law will be held sufficient if the necessary facts may reasonably be inferred therefrom.[95] A ruling of the court sustaining an objection to any evidence under a complaint need not be followed by an offer of evidence in support of the allegations of the pleading. The objection goes to the sufficiency of the pleading and not to the relevancy of the evidence.[96] If the defect in the complaint is remediable by amendment the court should ordinarily order an amendment to obviate the objection.[97]

457. By plaintiff—Insufficient answer—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.[98] A ruling of the court sustaining an objection to any evidence under an answer need not be followed by an offer of evidence in support of the allegations of the pleading. The objection goes to the sufficiency of the pleading and not to the relevancy of the evidence.[99]

JUDGMENT ON THE PLEADINGS

458. When allowable—In general—Judgment on the pleadings may be ordered when the answer admits or fails to deny all the material allegations of

Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Keating v. Brown, 30 Minn. 9, 13 N. W. 909; Pressnell v. Lundin, 44 Minn. 551, 47 N. W. 161; Rand v. Hennepin County, 50 Minn. 391, 52 N. W. 901; Benson v. St. Paul etc. Ry., 62 Minn. 198, 64 N. W. 393; Richmond v. Post, 69 Minn. 457, 72 N. W. 704.

[94] See Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Beyersdorf v. Sump, 39 Minn. 495, 41 N. W. 101; Bromberg v. Minn. Fire Assn., 45 Minn. 318, 47 N. W. 975; Peterson v. Alden, 49 Minn. 428, 52 N. W. 39; Smith v. Kingman & Co., 70 Minn. 453, 73 N. W. 253; Bartleson v. Munson, 105 Minn. 348, 117 N. W. 512; Sleeper v. Baker, 22 N. D. 386, 134 N. W. 716.

[95] Johnson v. Robinson, 20 Minn. 189 (169); Keating v. Brown, 30 Minn. 9, 13 N. W. 909; Welch v. Bradley, 45 Minn. 540, 48 N. W. 440; Holly v. Bennett, 46 Minn. 386, 49 N. W. 189; Commonwealth etc. Co. v. Dokko, 71 Minn. 533, 74 N. W. 891; Doyle v. Duluth, 74 Minn. 157, 76 N. W. 1029; Brown v. Fitcher, 91 Minn. 41, 97 N. W. 416; Batcher v. Staples, 120 Minn. 86, 139 N. W. 140; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253; Eppley v. Kennedy, 198 N. Y. 348, 91 N. E. 797.

[96] Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748.

[97] See § 453.

[98] Farrell v. Fabel, 47 Minn. 11, 49 N. W. 303; C. Aultman & Co. v. Falkum, 51 Minn. 562, 53 N. W. 875; Larson v. Shook, 68 Minn. 30, 70 N. W. 775; St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408; Loveland v. Gravel, 95 Minn. 135, 103 N. W. 721.

[99] Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748.

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the complaint;[1] when a reply admits or fails to deny the defence pleaded in the answer;[2] when the reply admits or fails to deny the counterclaim pleaded in the answer;[3] when a plea admits but does not sufficiently avoid;[4] when the new matter pleaded in an answer does not constitute a defence;[5] when there is a departure in the reply;[6] when the complaint is insufficient;[7] when there is no reply to an answer containing new matter.[8] There can be no judgment on the pleadings when any of the essential allegations are denied.[9]

459. When counterclaim pleaded—When the defendant pleads a counterclaim a motion by the plaintiff for judgment on the pleadings is properly denied,[10] unless the counterclaim is for merely nominal damages.[11]

460. Motion in nature of a demurrer—A motion for judgment on the pleadings is in the nature of a demurrer.[12] It is in substance both a motion and a demurrer. It is a demurrer for the reason that it attacks the sufficiency of the pleadings; and it is a motion in that it is an application for an order for judgment.[13] Like a demurrer it searches the record, and the court will give judgment for the party who, on the whole record, appears entitled to it.[14]

461. Motion by plaintiff—Complaint insufficient—Partial relief—A motion by the plaintiff for judgment on the pleadings is properly denied if his complaint is insufficient.[15] Where the plaintiff is entitled to only partial relief he must limit his motion accordingly.[16]

462. Must be based on pleadings—A judgment on the pleadings, other than for a mere dismissal, cannot be ordered on the pleadings and the evidence. It must be based on the pleadings alone.[17]

[1] Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Norton v. Beckman, 53 Minn. 456, 55 N. W. 603; Lloyd v. Secord, 61 Minn. 448, 63 N. W. 1099.

[2] Gaffney v. St. Paul etc. Ry., 38 Minn. 111, 35 N. W. 728.

[3] Schurmeier v. English, 46 Minn. 306, 48 N. W. 1112.

[4] Gaffney v. St. Paul etc. Ry., 38 Minn. 111, 35 N. W. 728. See Edwards v. Smith, 124 Minn. 538, 144 N. W. 1090.

[5] Clarke v. Patrick, 60 Minn. 269, 62 N. W. 284.

[6] See § 388.

[7] Bjoin v. Anglim, 97 Minn. 526, 107 N. W. 558; Ames v. Brandvold, 119 Minn. 521, 138 N. W. 786.

[8] McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134. See § 391.

[9] Harley v. Plant, 210 N. Y. 405, 104 N. E. 946.

[10] Cummings v. Taylor, 21 Minn. 366.

[11] Hitchcock v. Turnbull, 44 Minn. 475, 47 N. W. 153.

[12] Stewart v. Erie etc. Co., 17 Minn. 372(348); Taylor v. Palmer, 31 Cal. 240.

[13] Haug v. Great Northern Ry., 102 Fed. 74.

[14] Van Alstyne v. Freday, 41 N. Y. 174; McCarthy v. Heiselman, 125 N. Y. S. 13; Rockford Shoe Co. v. Jacob, 6 Wash. 421, 33 Pac. 1057; People v. Brown, 23 Colo. 425, 48 Pac. 661.

[15] Balcombe v. Northup, 9 Minn. 172 (159).

[16] Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25.

[17] Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387. See Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2.

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463. Motion admits facts—A motion for judgment on the pleadings is in the nature of a demurrer and admits the facts well pleaded,[18] even though they are indefinitely pleaded.[19]

464. Pleadings liberally construed—Amendment to defeat motion—Upon a motion for judgment on the pleadings every reasonable intendment will be indulged in favor of the sufficiency of the pleading. The test is not whether a demurrer would have been sustained. The motion will be denied if the pleading can be sustained by the most liberal construction.[20] The mere fact that a pleading is indefinite is not a ground for granting the motion.[21] One reason for a liberal construction is that a judgment on the pleadings may foreclose the party absolutely though he has a good cause of action in point of fact.[22] A motion for judgment on the pleadings ought not to be encouraged so as to be a substitute for a demurrer.[23] Where the defect in the pleading is remediable by amendment the court should ordinarily deny the motion and order an amendment.[24]

465. Time of motion—A motion for judgment on the pleadings is regularly made at the opening of the trial,[25] but it may be made at any time during the trial.[26]

[18] Stewart v. Erie etc. Co., 17 Minn. 372(348); Jellison v. Halloran, 40 Minn. 485, 42 N. W. 392; Tripp v. N. W. Nat. Bank, 41 Minn. 400, 43 N. W. 60; Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N. W. 591; Welcher v. Cargill, 82 Minn. 265, 84 N. W. 1007.

[19] Stewart v. Erie etc. Co., 17 Minn. 372(348).

[20] Kelly v. Rogers, 21 Minn. 146, 151; Malone v. Minn. Stone Co., 36 Minn. 325, 31 N. W. 170; McAllister v. Welker, 39 Minn. 535, 41 N. W. 107; Fountain v. Menard, 53 Minn. 443, 55 N. W. 601; Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N. W. 591; Welcher v. Cargill, 82 Minn. 265, 84 N. W. 1007; Roebuck v. Wick, 98 Minn. 130, 107 N. W. 1054; Anderson v. Settergren, 100 Minn. 294, 111 N. W. 279; Twin City Separator Co. v. Chicago etc. Ry., 118 Minn. 491, 137 N. W. 193; Ames v. Brandvold, 119 Minn. 521, 138 N. W. 786; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812.

[21] Webb v. Bidwell, 15 Minn. 479(394); Stewart v. Erie etc. Co., 17 Minn. 372 (348); Malone v. Minn. Stone Co., 36 Minn. 325, 31 N. W. 170.

[22] Ames v. Brandvold, 119 Minn. 521, 138 N. W. 786.

[23] McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

[24] Bergerow v. Parker, 4 Cal. App. 169, 87 Pac. 248. See § 453.

[25] See Horn v. Butler, 39 Minn. 515, 40 N. W. 833.

[26] Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2. See Freeman v. Curran, 1 Minn. 169 (144, 150).

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466. In general—A complaint cannot be stricken out on motion before trial on the ground that it does not state a cause of action.[27] If a defence is insufficient in law it may be stricken out on the trial.[28] An improper counterclaim may be stricken out on the trial.[29] An improper cross-complaint may be stricken out on motion.[30] 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 thereof 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.[31] Sham, irrelevant or frivolous answers, defences, or replies and frivolous demurrers, may be stricken out on motion.[32]

[27] Whelan v. Sibley County, 28 Minn. 80, 84, 9 N. W. 175; Truesdell v. Hull, 35 Minn. 468, 29 N. W. 72.

[28] Ampersand Hotel Co. v. Home Ins. Co., 198 N. Y. 495, 91 N. E. 1099.

[29] Fergus Printing & Publishing Co. v. Otter Tail County, 60 Minn. 212, 62 N. W. 272.

[30] American Exchange Bank v. Davidson, 69 Minn. 319, 72 N. W. 129.

[31] R. L. 1905 § 4144; G. S. 1913 § 7770. See §§ 412, 419, 423.

[32] R. L. 1905 § 4136; G. S. 1913 § 7762. See §§ 419, 424–434, 435–440.

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WAIVER OF OBJECTIONS

467. By failure to demur or answer—The following objections cannot be raised as of right on the trial, being waived if not raised by demurrer or answer: Want of jurisdiction of the person; want of legal capacity to sue; the pendency of another action for the same cause; a defect of parties; a misjoinder of causes of action;[33] that a cause of action is not a proper subject of counterclaim;[34] that a cause of action is barred by the statute of limitations;[35] and all matter in abatement.[36]

468. By failure to move before trial—The following objections cannot be raised as of right on the trial, being waived if not raised by motion before trial: That a pleading is irrelevant,[37] redundant,[38] double,[39] indefinite,[40] sham,[41] or frivolous,[42] or failure to state distinct causes of action or defences separately.[43]

469. By failure to object to evidence—A variance is waived by a failure to make timely objection to the introduction of evidence.[44] If a pleading fails to allege a material fact, and the fact is proved without objection, the defect is waived.[45]

470. Objections that are never waived—The objection that a pleading sets forth a subject-matter of which the court has no jurisdiction is never waived, but may be raised by either party and at any stage of the action.[46] As a general rule the objection that a pleading does not state a cause of action is never waived,[47] but may be taken for the first time at the trial,[48] or after verdict in arrest of judgment,[49] or on appeal.[50] This rule, however, is subject to the qualification that a pleading which is defective, not because it is not predicated upon an actionable wrong, but because it fails to include an essen-

[33] R. L. 1905 § 4129; G. S. 1913 § 7755. See §§ 120 (defect of parties); 207 (misjoinder of causes of action).

[34] See § 375.

[35] Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276; Hardwick v. Ickler, 71 Minn. 25, 73 N. W. 519. See § 725.

[36] See § 537.

[37] Fish v. Berkey, 10 Minn. 199(161, 166). See § 419.

[38] See § 423.

[39] Dean v. Leonard, 9 Minn. 190(176). See § 246.

[40] See § 412.

[41] Barker v. Foster, 29 Minn. 166, 12 N. W. 460. See § 425.

[42] See § 436.

[43] Craig v. Cook, 28 Minn. 232, 9 N. W. 712. See § 242.

[44] Adams v. Castle, 64 Minn. 505, 67 N. W. 637.

[45] See § 447.

[46] R. L. 1905 § 4129; G. S. 1913 § 7755. See § 526.

[47] R. L. 1905 § 4129; G. S. 1913 § 7755; Stratton v. Allen, 7 Minn. 502(409); Lee v. Emery, 10 Minn. 187(151); Northern Trust Co. v. Markell, 61 Minn. 271, 273, 63 N. W. 735; Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118. This rule applies to counterclaims. See § 375.

[48] See §§ 449, 456.

[49] Lee v. Emery, 10 Minn. 187(151). See § 519.

[50] See § 527.

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tial allegation, may be aided by answer,[51] reply,[52] verdict,[53] or the reception of evidence without objection.[54] Furthermore the right to question a pleading on appeal may be lost by a failure to present a sufficient record.[55]

[51] Bennett v. Phelps, 12 Minn. 326 (216). See § 521.

[52] See § 522.

[53] Coit v. Waples, 1 Minn. 134(110). See § 523.

[54] See § 447.

[55] Peach v. Reed, 87 Minn. 375, 92 N. W. 229.

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AMENDMENT

471. General statute—The court, in furtherance of justice and upon proper terms, may amend any pleading, process, or proceeding, either before or after judgment, by adding or striking out the name of a party, by correcting a mistake in the name of a party or in any other particular, by inserting other material allegations, or, if the amendment does not substantially change the claim or defence, by conforming any pleading or proceeding to the facts proved.[56]

472. Discretion of trial court—The amendment of pleadings is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[57] The power of the trial court in this regard is very great. It must exercise its discretion with reference to the facts of the particular case and in furtherance of justice.[58] This power of the trial court, however, is not absolute, and in a few cases the supreme court has reversed for an abuse of discretion.[59]

473. To be allowed liberally—Amendments are to be allowed with liberality where justice would be furthered, especially where a meritorious defence is sought to be interposed.[60] If a court is in doubt whether defensive matter is admissible under a general denial it should ordinarily allow an amendment to render it admissible.[61]

[56] R. L. 1905 § 4157; G. S. 1913 § 7783.

[57] Fowler v. Atkinson, 5 Minn. 505 (399); Holmes v. Campbell, 13 Minn. 66(58, 65); Winona v. Minn. etc. Co., 29 Minn. 68, 11 N. W. 228; Forman v. Saunders, 92 Minn. 369, 100 N. W. 93; Wasser v. Western Land Securities Co., 97 Minn. 460, 107 N. W. 160; Seager v. Armstrong, 99 Minn. 526, 109 N. W. 1134; Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387. See § 494.

[58] Pfefferkorn v. Hayward, 65 Minn. 429, 68 N. W. 68.

[59] Rice v. Longfellow Bros. Co., 78 Minn. 394, 81 N. W. 207; Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311; Todd v. Bettingen, 102 Minn. 260, 113 N. W. 906; Kulberg v. Supreme Ruling, 126 Minn. 494, 148 N. W. 299.

[60] Burke v. Baldwin, 54 Minn. 514, 520, 56 N. W. 173; Rice v. Longfellow Bros. Co., 78 Minn. 394, 81 N. W. 207; Cool v. Kelly, 85 Minn. 359, 362, 88 N. W. 988; Reese v. Storms, 101 Minn. 381, 112 N. W. 419; Todd v. Bettingen, 102 Minn. 260, 262, 113 N. W. 906; Gilchrist v. Gilchrist, 44 How. Pr. (N. Y.) 317; Brown v. Bosworth, 62 Wis. 542, 22 N. W. 521; Tiffany v. Henderson, 57 Iowa, 490, 10 N. W. 884. 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, 33 Pac. 86.

[61] Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

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474. Dependent on stage of action—The liberality to be shown in the allowance of amendments depends very much upon the stage of the action. Before trial amendments are allowed with great liberality and almost as a matter of course. On the trial they are allowed liberally, but less liberally than before trial. After trial they are allowed cautiously and sparingly—especially after judgment and after a disposition of the case on appeal.[62] It is the general rule that a party seeking an amendment must move with reasonable diligence.[63]

475. Meritoriousness of defence—While all defences are equally good in law, yet a court may, to a certain extent, take into account the nature of a defence in determining whether to allow it to be set up by amendment.[64] It is not improper to allow an amendment setting up the statute of limitations or usury.[65]

476. Time of matter introduced—Matter arising subsequent to the original pleading cannot be introduced by amendment. Such matter is to be introduced by supplemental pleading.[66]

477. As to parties—The court may at any time amend the name of any party, except for the purpose of acquiring jurisdiction.[67] In an action brought in favor of a minor in the name of the guardian the name of the minor may be added by amendment.[68] The name of a plaintiff improperly joined may be stricken out.[69]

478. Immaterial matters—An amendment will not be allowed as to immaterial matters.[70]

479. Motion—Notice—Affidavit of merits—Default—When a party asks leave to amend his pleading he must inform the court in what particular he

[62] Todd v. Bettingen, 102 Minn. 260, 113 N. W. 906; Brown v. Bosworth, 62 Wis. 542, 22 N. W. 521.

[63] Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638.

[64] Minneapolis etc. Ry. v. Firemen's Ins. Co., 62 Minn. 315, 64 N. W. 902. See Boen v. Evans, 72 Minn. 169, 75 N. W. 116.

[65] 3 Ency. L. & P. 624.

[66] Guptill v. Red Wing, 76 Minn. 129, 78 N. W. 970; State v. Dist. Ct., 91 Minn. 161, 97 N. W. 581; McCaslan v. Latimer, 17 S. C. 123.

[67] McEvoy v. Bock, 37 Minn. 402, 34 N. W. 740; Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987. See Atwood v. Landis, 22 Minn. 558; Davis v. Chouteau, 32 Minn. 548, 21 N. W. 748; Erskine v. McIlrath, 60 Minn. 485, 62 N. W. 1130; Casper v. Klippen, 61 Minn. 353, 63 N. W. 737. Possibly an amendment may be made changing the capacity in which the plaintiff sues, as from a personal to a representative capacity or conversely. See Hardy v. Woods, 146 N. W. 568 (S. D.).

[68] Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Beckett v. N. W. etc. Assn., 67 Minn. 298, 69 N. W. 923; Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973; Willard v. Mohn, 24 N. D. 390, 139 N. W. 979.

[69] Wiesner v. Young, 50 Minn. 21, 52 N. W. 390.

[70] Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123(98); Carli v. Union Depot etc. Co., 32 Minn. 101, 20 N. W. 89; Fidelity Mutual Life Assn. v. Germania Bank, 74 Minn. 154, 76 N. W. 968.

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desires to amend it.[71] Affidavits and counter-affidavits are often submitted.[72] It has been held that an error, if any, in granting an ex parte order for an amendment is cured by a subsequent allowance of the same amendment upon due notice.[73] 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 must 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 adverse party.[74] An order for amendment may be made on default by the adverse party.[75]

480. Service of order allowing amendment—An order granting leave to amend need not be served upon the adverse party unless it so directs.[76]

481. Terms—The imposition of terms upon the allowance of an 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.[77] Granting leave to the adverse party to have the case continued if he desires is common practice.[78] Where in the course of trial, the court grants plaintiff's motion to amend the complaint by omitting certain facts which had been admitted in the answer and by tendering entirely new issues, and the defendant claims to have been misled, and is not prepared to proceed with the trial, and requests a continuance of the case, the defendant cannot be required to disclose by affidavit the names of witnesses, or what particular evidence he desires to produce upon another trial, as a condition to a continuance.[79]

482. Effect—Limitations—Answering—Demurrer—Notice of trial—An amended pleading supersedes the original and is to be construed as the

[71] Barker v. Walbridge, 14 Minn. 469 (351).

[72] See St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408; Boen v. Evans, 72 Minn. 169, 75 N. W. 116.

[73] Markell v. Ray, 75 Minn. 138, 77 N. W. 788.

[74] Rule 17, District Court. See Dunnell, Minn. Pr. § 2512.

[75] Bruns v. Schreiber, 48 Minn. 366, 51 N. W. 120.

[76] Holmes v. Campbell, 12 Minn. 221 (141).

[77] Caldwell v. Bruggerman, 8 Minn. 286(252); Deering v. McCarthy, 36 Minn. 302, 30 N. W. 813; Nichols-Shepard Co. v. Dedrick, 61 Minn. 513, 63 N. W. 1110; Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915. See 3 Ency. L. & P. 818; 31 Cyc. 377.

[78] Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915.

[79] Despatch Laundry Co. v. Employers' Liability Assurance Corp., 105 Minn. 384, 117 N. W. 506, 118 N. W. 152.

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only one interposed in the case.[80] Unless the amendment introduces a new cause of action the statute of limitations is arrested by the service of the original pleading.[81] If the amendment introduces a new cause of action the amended pleading is to be construed as of its own date and the statute of limitations runs against it to the date of service.[82] 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.[83] A defendant may demur, and allege that an amended complaint states no cause of action, though that ground was not assigned upon demurrer to the original complaint.[84] A notice of trial is not avoided by a subsequent amendment of the pleadings.[85]

483. When amended pleading takes effect—An amended pleading is construed as of the date of the original pleading if it does not introduce a new cause of action or defence.[86]

484. How made—Amendments "of course" should be made by serving a new pleading with the amendments incorporated. The pleading should be denominated "amended complaint," "amended answer," etc., and so indorsed. Amendments before trial by leave of court should be made in the same manner unless the order otherwise directs. Amendments on the trial should be made as the court may direct. The order noted in the minutes should specify the manner of amendment. Slight amendments are often made by erasure and interlineation, but if an amendment is substantial and extensive the party should be required to file an entirely new pleading; and this is the better prac-

[80] Becker v. Sandusky City Bank, 1 Minn. 311(243); Oleson v. Newell, 12 Minn. 186(114); Hanscom v. Herrick, 21 Minn. 9; Hastay v. Bonness, 84 Minn. 120, 86 N. W. 896; Loftus-Hubbard Elevator Co. v. Smith-Alvord Co., 90 Minn. 418, 97 N. W. 125; Pleins v. Wachenheimer, 108 Minn. 342, 122 N. W. 166; First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101. See § 487; 3 Ency. L. & P. 793; 31 Cyc. 465.

[81] Bruns v. Schreiber, 48 Minn. 366, 51 N. W. 120. See Boen v. Evans, 72 Minn. 169, 75 N. W. 116; Markell v. Ray, 75 Minn. 138, 77 N. W. 788; 3 Ency. L. & P. 781; Note, 3 L. R. A. (N. S.) 259; 33 L. R. A. (N. S.) 196.

[82] Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943 (rule assumed but held inapplicable to facts of case); Schulze v. Fox, 53 Md. 37; Atkinson v. Amador etc. Co., 53 Cal. 102; Hester v. Mullen, 107 N. C. 724, 12 S. E. 447; Hills v. Ludwig, 46 Ohio St. 373; Monticello v. Grant, 104 Ind. 168, 1 N. E. 302. See 3 Ency. L. & P. 787.

[83] Ermentrout v. American Fire Ins. Co., 63 Minn. 194, 65 N. W. 270; Avery Planter Co. v. Peck, 80 Minn. 519, 83 N. W. 455, 1083. See 3 Ency. L. & P. 795; 31 Cyc. 459.

[84] Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

[85] Stevens v. Curry, 10 Minn. 316 (249); Griggs v. Edelbrock, 59 Minn. 485, 61 N. W. 555.

[86] Monticello v. Grant, 104 Ind. 168, 1 N. E. 302; Schuyler Nat. Bank v. Bollong, 28 Neb. 684, 45 N. W. 164; Clark v. Canal Co., 11 R. I. 36; 3 Ency. L. & P. 780; 31 Cyc. 464.

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tice in all cases. The original pleading should be withdrawn from the files, or a notation made thereon to the effect that it has been superseded by an amended pleading. When an amendment is made after trial the order should specify what the amendment is and direct the mode of its incorporation into the record.[87]

OF COURSE

485. Statute—A pleading may be once amended, without costs and without prejudice to proceedings already had, at any time before the period for answering it has expired; or, if the trial be not delayed thereby, it may be so amended within twenty days after the same has been answered, demurred to or replied to, in which case the adverse party shall have twenty days after service of the amended pleading in which to plead thereto. Upon the decision of a demurrer which appears to have been interposed in good faith, the court, in its discretion, may permit the party to plead over, or, if the demurrer be sustained, may allow an amendment upon proper terms.[88]

486. Supplemental pleadings—A supplemental complaint may be amended of course.[89]

487. Only one amendment of course allowable—A party cannot amend his pleading of course more than once. 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.[90] Where a party allows the time to amend of course to elapse and amends by leave of court or stipulation he cannot amend of course the pleadings so served.[91] But if the time has not elapsed he may amend of course though he has already amended by leave of court.[92] When a complaint is amended by order of court on sustaining a demurrer thereto, the amendment is not made of course and plaintiff may serve a second amendment of course.[93] A second amended answer takes the place of the first amended answer, which takes the place of the original answer.[94]

[87] 3 Ency. L. & P. 812; 31 Cyc. 388.

[88] R. L. 1905 § 4156; G. S. 1913 § 7782; Swank v. Barnum, 63 Minn. 447, 65 N. W. 722.

[89] Divine v. Duncan, 52 How. Pr. (N. Y.) 446.

[90] Sands v. Calkins, 30 How. Pr. (N. Y.) 1; White v. Mayor, 14 How. Pr. (N. Y.) 495; Tripp v. Yankton, 10 S. D. 516, 74 N. W. 447.

[91] Hancock v. Delaware etc. Ry. 113 N. Y. S. 80.

[92] O'Connell v. Wilson, 147 N. Y. S. 570; Hall v. Galban, 148 N. Y. S. 517.

[93] Backes v. Mechanics' & Traders' Bank, 114 N. Y. S. 459.

[94] Block v. Nussbaum, 148 N. Y. S. 594. See § 482.

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488. Time—When an answer is served by mail the defendant may amend it, of course, within forty days.[95] Under the first section of the statute the right to amend, if the pleader does not take his full twenty days, probably terminates when the demurrer, answer or reply is in fact served, and thereafter the only right to amend of course is under the second section of the statute.[96] Probably the right to amend of course does not exist under the second section of the statute if there are less than twenty-eight days intervening before the next term of court—twenty days to which the adverse party is entitled for answering the amended pleading and eight days' notice of trial.[97]

489. Scope of allowable amendment—An amendment of course may introduce an entirely new cause of action, if it is appropriate to the summons,[98] or an entirely new defence.[99] It may strike out or withdraw one or more of the causes of action stated,[1] change the prayer for relief,[2] change the place of trial,[3] set up the statute of limitations,[4] or usury,[5] or amplify or change the manner in which the contract was broken or the injury inflicted.[6] It cannot introduce matters occurring subsequent to the commencement of the action.[7] 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.[8] The statute limiting relief on default does not prevent plaintiff from amending his complaint, after service of summons, by demanding a larger sum.[9]

[95] Schlegel v. Roman Catholic Church, 194 N. Y. 391, 87 N. E. 426.

[96] See Griggs v. Edelbrock, 59 Minn. 485, 61 N. W. 555.

[97] Id.

[98] Brown v. Leigh, 49 N. Y. 78; Sullivan v. Sullivan, 24 S. C. 474.

[99] Wyman v. Remond, 18 How. Pr. (N. Y.) 272; McQueen v. Babcock, 3 Keyes (N. Y.) 428.

[1] Watson v Rushmore, 15 Abb. Prac. (N. Y.) 51.

[2] Getty v. H. R. Ry., 6 How. Pr. (N. Y.) 269; Lackner v. Turnbull, 7 Wis. 105.

[3] Stryker v. New York Exch. Bank, 42 Barb. (N. Y.) 511.

[4] McQueen v. Babcock, 13 Abb. Prac. (N. Y.) 268.

[5] Bradley v. Phœnix Ins. Co., 28 Mo. App. 7.

[6] Cashman v. Reynolds, 123 N. Y. 141, 25 N. E. 162.

[7] Hornfager v. Hornfager, 6 How. Pr. (N. Y.) 13.

[8] Cashman v. Reynolds, 123 N. Y. 141, 25 N. E. 162.

[9] Carr v. Sterling, 114 N. Y. 558, 22 N. E. 37.

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490. Effect on notice of trial—An amendment of course has been held not to avoid a notice of trial previously served by the adverse party.[10]

491. Effect in avoiding objections—The effect of serving an amended pleading of course is to supersede the original. 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.[11]

492. Waiver—The right to amend of course is waived by noticing the issues for trial,[12] and by appealing from an order giving leave to amend.[13] It is not waived by amending with leave.[14] A party can amend of course but once and where, having allowed the time to amend of course to elapse he does so by leave of court, he cannot amend of course the pleading so served.[15]

BY LEAVE OF COURT

493. Before trial—The amendment of pleadings before the trial is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[16] For obvious reasons amendments are more freely granted before than upon the trial.[17] It has even been held immaterial that an amendment changes the nature of the cause of action.[18] It has been held permissible to allow a complaint to be amended so as to ask for equitable relief though it originally asked for damages.[19]

494. On the trial—In general—The amendment of pleadings on the trial is a matter lying almost wholly in the discretion of the trial court and its ac-

[10] Griggs v. Edelbrock, 59 Minn. 485, 61 N. W. 555. See Ullman v. Tanner, 111 N. Y. S. 844.

[11] Cooper v. Jones, 4 Sandf. (N. Y.) 699; Welch v. Preston, 58 How. Pr. (N. Y.) 52; Burrall v. Moore, 5 Duer (N. Y.) 654; Frank v. Bush, 63 How. Pr. (N. Y.) 282; Rider v. Bates, 66 How. Pr. (N. Y.) 129; Ullman v. Tanner, 111 N. Y. S. 844.

[12] Phillips v. Suydam, 54 Barb. (N. Y.) 153. See Clifton v. Brown, 27 Hun (N. Y.) 231.

[13] Shibley v. Angle, 37 N. Y. 626.

[14] O'Connell v. Wilson, 147 N. Y. S. 570; Hall v. Galban, 148 N. Y. S. 517.

[15] Hancock v. Delaware etc. Ry., 113 N. Y. S. 80.

[16] Fowler v. Atkinson, 5 Minn. 505 (399); Winona v. Minn. etc. Co., 29 Minn. 68, 11 N. W. 228; Minneapolis etc. Ry. v. Firemen's Ins. Co., 62 Minn. 315, 64 N. W. 902; Swank v. Barnum, 63 Minn. 447, 65 N. W. 722; Boen v. Evans, 72 Minn. 169, 75 N. W. 116; Patterson v. Melchior, 106 Minn. 437, 119 N. W. 402.

[17] See § 474.

[18] Myrick v. Purcell, 99 Minn. 457, 109 N. W. 995; Deyo v. Morss, 144 N. Y. 216, 39 N. E. 81; Lovell v. Hammond, 66 Conn. 500, 34 Atl. 511. See Holmes v. Campbell, 12 Minn. 221(141).

[19] Holmes v. Campbell, 12 Minn. 221 (141).

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tion will not be reversed on appeal except for a clear abuse of discretion.[20] The fact that a proposed amendment would enlarge and change the basis of the cause of action is a persuasive, though not decisive, reason for disallowing it.[21] Where a party knew, or ought to have known, of a fact at the time of pleading, his application on the trial to be allowed to set up the fact by an amendment of his pleading will be regarded with disfavor.[22] Cases are cited below sustaining an order on the trial allowing an amendment of a complaint;[23] disallowing an amendment of a complaint;[24] allowing an amendment of an

[20] See cases below.

[21] Cunningham v. Minneapolis etc. Co., 59 Minn. 325, 61 N. W. 329; Byard v. Palace C. H. Co., 85 Minn. 363, 88 N. W. 998; Gracz v. Anderson, 104 Minn. 476, 116 N. W. 1116.

[22] Newman v. Springfield etc. Co., 17 Minn. 123(98, 109); Minneapolis etc. Ry. v. Firemen's Ins. Co., 62 Minn. 315, 64 N. W. 902; Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638; Hall v. Skahen, 101 Minn. 460, 112 N. W. 865.

[23] Caldwell v. Bruggerman, 8 Minn. 286(252) (replevin—adding allegations of demand and refusal); Rau v. Minnesota Valley Ry., 13 Minn. 442 (407) (action for injury to lot—correcting mistake in number of lot); Sheehy v. Hinds, 27 Minn. 259, 6 N. W. 781 (action to determine adverse claims—amendment striking out averment of possession and inserting an averment that the premises were vacant and unoccupied); Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915 (action for libel—adding application of words to plaintiff); Niven v. Craig, 63 Minn. 20, 65 N. W. 86 (action for price of stone sold and delivered—amendment adding allegations as to acceptance by superintendent in charge); Berryhill v. Healey, 89 Minn. 444, 95 N. W. 314 (unlawful detainer proceedings—amendment adding allegations as to absence of defendant from county so as to allow substituted service of summons); Despatch Laundry Co. v. Employers' Liability Assur. Corp., 105 Minn. 384, 117 N. W. 506, 118 N. W. 152 (action to recover on employers' liability insurance policy—amendment striking out certain admissions and substituting entirely new issues—adverse party entitled to continuance); Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987 (action against partnership—amendment adding name of another partner); Stuhr v. Wright County Telephone Co., 119 Minn. 508, 138 N. W. 693 (action for personal injuries—amendment of allegations of damage so as to authorize a recovery for loss of time); Wilson v. Blackwood, 120 Minn. 227, 139 N. W. 151 (action for goods sold and delivered); Lockway v. Modern Woodmen, 121 Minn. 170, 141 N. W. 1 (action on a benefit certificate).

[24] White v. Culver, 10 Minn. 192(155) (action to recover for collection of judgment—application to amend by alleging payment in fact instead of acknowledgment of payment—application made to defeat motion to dismiss when plaintiff rested); Carli v. Union Depot etc. Co., 32 Minn. 101, 20 N. W. 89 (trespass to realty—amendment as to damages); Smith v. Prior, 58 Minn. 247, 59 N. W. 1016 (action against stockholders to recover unpaid subscriptions to stock—amendment to effect that corporation had accepted, as full payment for the stock, property that was greatly overvalued and grossly inadequate in value to the par value of the shares); Luse v. Reed, 63 Minn. 5, 65 N. W. 91 (action by husband to have it declared that his wife held realty in trust for him—amendment denying marriage and seeking to charge defendant as trustee ex maleficio); St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408 (action to charge sureties on note—amendment as to payment of interest); Fidelity Mut. Life

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answer;[25] disallowing an amendment of an answer;[26] allowing an amendment

Assn. v. Germania Bank, 74 Minn. 154, 76 N. W. 968 (action to recover deposit made by plaintiff with defendant bank —amendment as to assignment by defendant under insolvency laws of this state denied because immaterial); Porter v. Winona etc. Co., 78 Minn. 210, 80 N. W. 965 (action on note of corporation payable to its officer—amendment to charge president as anomalous indorser). Byard v. Palace C. H. Co., 85 Minn. 363, 88 N. W. 998 (action for negligence—injury caused by a basket falling from a cash and bundle carrier system—amendment charging improper operation of system); Gracs v. Anderson, 104 Minn. 476, 116 N. W. 1116 (action for negligence—amendment inserting additional grounds of negligence).

[25] Caldwell v. Bruggerman, 8 Minn. 256(252) (replevin—amendment introducing inconsistent defences—defendant required to elect); D. M. Osborne & Co. v. Williams, 37 Minn. 507, 35 N. W. 371 (replevin—amendment as to the value of the use of property); Brown v. Radebaugh, 84 Minn. 347, 87 N. W. 937 (action for libel); Davis v. Hamilton, 88 Minn. 64, 73, 92 N. W. 512 (action for libel—amendment denying that portion of article had reference to plaintiff); Wilson v. N. W. etc. Co., 103 Minn. 35, 114 N. W. 251 (action for services—amendment as to accord, satisfaction and settlement); Segerstrom v. Swenson, 105 Minn. 115, 117 N. W. 475 (action on note and conditional sale contract—amendment enlarging claim of payment); Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429 (action for conversion by carrier—amendment as to law of another state); Lew v. Webster, 118 Minn. 375, 136 N. W. 1098 (ejectment—answer pleading a former judgment).

[26] Morrison v. Lovejoy, 6 Minn. 319 (324) (action for breach of contract—amendment laying a foundation for a reformation of the contract); Brazil v. Doran, 8 Minn. 236(205) (action for tort committed by wife in presence of her husband); Butler v. Paine, 8 Minn. 324(284) (action on note—amendment to show mercantile usage as to meaning of currency); Newman v. Springfield etc. Co. 17 Minn. 123(98) (action on policy of fire insurance—amendment as to judgment liens on the property at the time of the application—amendment inserting an immaterial denial); Kiefer v. Rogers, 19 Minn. 32 (14) (action to rescind contract for exchange of property on the ground of fraud—amendment alleging a tender); Iltis v. Chicago etc. Ry., 40 Minn. 273, 41 N. W. 1040 (action for death by wrongful act—amendment withdrawing admission of cause of death); Bitzer v. Campbell, 47 Minn. 221, 49 N. W. 691 (action to determine adverse claims—amendment striking out an allegation as to right of defendant to possession of the premises); Kennedy v. McQuaid, 56 Minn. 450, 58 N. W. 35 (ejectment—amendment alleging a conveyance to a third party); Ingals v. Oberg, 70 Minn. 102, 72 N. W. 841 (unlawful detainer proceedings—amendment alleging that defendant was holding over as a tenant at will and that his term had not expired); Dennis v. Pabst Brewing Co., 80 Minn. 15, 82 N. W. 978 (action to recover money paid to secure a liquor license); Pierce v. Brennan, 88 Minn. 50, 92 N. W. 507 (action for death by wrongful act—amendment alleging that train was not under control of or operated by defendant); Hall v. Skahen, 101 Minn. 460, 112 N. W. 865 (action for money had and received—amendment alleging a settlement); Goess v. Chicago etc. Ry., 104 Minn. 495, 116 N. W. 1115 (action for negligence—amendment alleging a release); Wheelock v. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081 (action on a life insurance policy); Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387 (action for divorce—amendment abandoning issues tendered by the original answer and substituting entirely new ones); A. F.

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of a reply;[27] disallowing an amendment of a reply;[28] disallowing an amendment of a counterclaim.[29]

495. Same—Scope of allowable amendment of complaint—It has never been squarely decided in this state that a trial court cannot, in its discretion, allow an amendment on the trial introducing an entirely new cause of action, but there is dictum to that effect.[30] We have several cases holding it not an abuse of discretion to refuse such an amendment.[31] It is contrary to modern, liberal ideas of procedure to lay down an inflexible rule forbidding such an amendment under any circumstances. The matter ought to be left to the discretion of the trial court to be determined with reference to the facts of the particular case. As a general rule such an amendment ought not to be allowed, but the trial court ought to have discretionary power to allow it in exceptional cases, especially where the facts to be proved would be substantially the same under the amendment as under the original complaint.[32] Any amendment is permissible which is merely an amplification or change in the statement of the manner in which a contract was broken or 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.[33] In those states where it is held that an amendment cannot introduce a new cause of action it is generally held that an equitable cause of action cannot be converted by amendment into a legal cause

Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113 (action on note—counterclaim for depriving defendant of use of automobile for which note was given—amendment increasing the value of the use per day).

[27] Atherton v. Barber, 112 Minn. 523, 128 N. W. 827 (amendment to effect that a third party was apparently acting as the agent of respondent in the execution of certain contracts when in fact he was the representative of appellants).

[28] Stensgaard v. St. Paul etc. Co., 50 Minn. 429, 52 N. W. 910 (action on policy insuring title to realty—amendment as to execution and knowledge of contents).

[29] Iverson v. Dubay, 39 Minn. 325, 40 N. W. 159 (action for price of wagon sold and delivered—answer alleging breach of warranty—amendment seeking to make counterclaim applicable to another wagon).

[30] Bruns v. Schreiber, 48 Minn. 366, 51 N. W. 120. See, for contrary rule before trial, Myrick v. Purcell, 99 Minn. 457, 109 N. W. 995. The cause of action cannot be substantially changed by amendment to conform to the proof if the evidence was objected to as inadmissible under the pleadings. See § 446. On the general subject see, Note, 51 Am. St. Rep. 414.

[31] Smith v. Prior, 58 Minn. 247, 59 N. W. 1016; Porter v. Winona etc. Co., 78 Minn. 210, 80 N. W. 965; Byard v. Palace Clothing House Co., 85 Minn. 363, 88 N. W. 998. See Minneapolis etc. Co. v. Cunningham, 59 Minn. 325, 61 N. W. 329.

[32] See 3 Ency. L. & P. 677; 31 Cyc. 409; Hepburn, Development of Code Pleading, § 306; Bruheim v. Stratton, 145 Wis. 279, 129 N. W. 1092 (amending from trespass to conversion).

[33] Daley v. Gates, 65 Vt. 591, 27 Atl. 193; Bruns v. Schreiber, 48 Minn. 366, 51 N. W. 120; Dougan v. Turner, 51 Minn. 330, 53 N. W. 650. See 3 Ency. L. & P. 699; 31 Cyc. 417.

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of action or the reverse,[34] and that an action ex delicto cannot be converted by amendment into an action ex contractu or the reverse.[35]

496. Same—Test of new cause of action—A test as to whether an amendment would introduce a new cause of action is whether a recovery on the original complaint would be a bar to a recovery on the amended complaint.[36] As long as the plaintiff adheres to the contract or the injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter—another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the evidence.[37]

497. Same—Increasing damages—The amount of damages claimed may be increased by amendment on the trial,[38] and on appeal from a justice court they may be increased beyond the jurisdiction of the justice.[39]

498. Same—Scope of allowable amendment of answer—A court should be especially liberal in allowing a defendant to amend his answer on the trial so as to set up all the defences he has. It is proper to allow him to set up an entirely new defence by amendment, upon such terms as may be just. If there is doubt whether a defence is admissible under a denial the court should be very liberal in allowing an amendment to let it in.[40]

499. Same—To cure defective pleadings—When objection is made on the trial to a defect in a pleading which may be cured by an amendment the court should grant or order the amendment as a matter of course; and if an amendment is ordered the party should ordinarily acquiesce and not appeal.[41] If a denial is defective in form or certainty the court should order an amendment on the trial as a matter of course.[42]

500. Conforming pleadings to proof—Variance—Where it clearly appears that a variance between the pleadings and proof has not misled the adverse party to his prejudice in maintaining his action or defence on the merits the

[34] 3 Ency. L. & P. 703; 31 Cyc. 432. See Holmes v. Campbell, 12 Minn. 221 (141); Hepburn, Development of Code Pleading, § 306.

[35] 3 Ency. L. & P. 702; 31 Cyc. 431. See Smith v. Prior, 58 Minn. 247, 59 N. W. 1016; Hepburn, Development of Code Pleading, § 306.

[36] Davis v. N. Y. etc. Ry., 110 N. Y. 646, 17 N. E. 733.

[37] 3 Ency. L. & P. 699; 31 Cyc. 417; Hepburn, Development of Code Pleading, § 306; Daley v. Gates, 65 Vt. 591, 27 Atl. 193; Texas & Pac. Ry. v. Cox, 145 U. S. 593.

[38] Austin v. Northern Pacific Ry., 34 Minn. 473, 26 N. W. 607. See 3 Ency. L. & P. 731; 31 Cyc. 440; Stuhr v. Wright County Telephone Co., 119 Minn. 508, 138 N. W. 693.

[39] McOmber v. Balow, 40 Minn. 388, 42 N. W. 83.

[40] Rees v. Storms, 101 Minn. 381, 112 N. W. 419. See § 473.

[41] Cordill v. Minn. Elevator Co., 89 Minn. 442, 95 N. W. 306. See §§ 453, 464.

[42] Trustees v. Nesbitt, 65 Minn. 17, 67 N. W. 652.

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trial court, either upon the trial or thereafter, may order the pleadings amended to conform to the proofs.[43] And in such a case the supreme court may remand the case with directions to the trial court to allow such an amendment.[44] But a court has no power to grant an amendment of a complaint at the close of the case,[45] or 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.[46] Where issues not formed by the pleadings are tried by consent or without objection it is always proper for the court to order an amendment to conform the pleadings to the proof, but it is not necessary to do so.[47] The court cannot conform the pleadings to the proof where the amendment would "substantially change the claim or defence," [48] except where issues outside the pleadings have been tried by consent or without objection.

501. After judgment—The statute gives a trial court discretionary power to amend pleadings after judgment,[49] but it is a power to be cautiously exercised.[50] Pleadings may be amended after judgment to conform to the proof.[51] A complaint on a joint debt may be changed to one on a joint and several

[43] Adams v. Castle, 64 Minn. 505, 67 N. W. 637; Cairncross v. McGrann, 37 Minn. 130, 33 N. W. 548; Ericson v. Bennet, 39 Minn. 326, 40 N. W. 157; Almich v. Downey, 45 Minn. 460, 48 N. W. 197; Dougan v. Turner, 51 Minn. 330, 53 N. W. 650; Nichols & Shepard Co. v. Dedrick, 61 Minn. 513, 63 N. W. 1110; O'Gorman v. Sabin, 62 Minn. 46, 64 N. W. 84; St. Louis County v. American Loan & Trust Co., 75 Minn. 489, 78 N. W. 113; Klein v. Funk, 82 Minn. 3, 84 N. W. 460; Forman v. Saunders, 92 Minn. 369, 100 N. W. 93; Briggs v. Rutherford, 94 Minn. 23, 101 N. W. 954; Foster v. Gordon, 96 Minn. 142, 104 N. W. 765; English v. Minneapolis etc. Ry., 96 Minn. 213, 104 N. W. 886; Shaw v. Staight, 107 Minn. 152, 119 N. W. 951; Babcock v. Canadian Northern Ry., 117 Minn. 434, 136 N. W. 275; O'Brien v. N. W. etc. Co., 119 Minn. 4, 137 N. W. 399.

[44] Adams v. Castle, 64 Minn. 505, 67 N. W. 637; First Nat. Bank v. Strait, 71 Minn. 69, 76, 73 N. W. 645.

[45] Gracz v. Anderson, 104 Minn. 476, 116 N. W. 1116; Audley v. Townsend, 110 N. Y. S. 575; Southwick v. First Nat. Bank, 84 N. Y. 420; Freeman v. Grant, 132 N. Y. 22, 30 N. E. 247.

[46] Guerin v. St. Paul etc. Co., 44 Minn. 20, 46 N. W. 138. See Minneapolis etc. Co. v. Cunningham, 59 Minn. 325, 61 N. W. 329; First Nat. Bank v. Stadden, 103 Minn. 403, 115 N. W. 198; Gracz v. Anderson, 104 Minn. 476, 116 N. W. 1116.

[47] Isaacson v. Minneapolis etc. Ry., 27 Minn. 463, 8 N. W. 600; Maul v. Steele, 95 Minn. 292, 104 N. W. 4; Gracz v. Anderson, 104 Minn. 476, 478, 116 N. W. 1116; Red Lake Falls Milling Co. v. Thief River Falls, 109 Minn. 52, 122 N. W. 872. See Martini v. Christensen, 65 Minn. 489, 67 N. W. 1019.

[48] R. L. 1905 § 4157; G. S. 1913 § 7783; Dougan v. Turner, 51 Minn. 330, 53 N. W. 650. See Foster v. Gordon, 96 Minn. 142, 104 N. W. 765.

[49] R. L. 1905 § 4157; G. S. 1913 § 7783; Pfefferkorn v. Hayward, 65 Minn. 429, 68 N. W. 68; C. Aultman & Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756; Western Land Assn. v. Thompson, 79 Minn. 423, 82 N. W. 677; State v. Dist. Ct., 91 Minn. 161, 97 N. W. 581; Church v. Odell, 100 Minn. 98, 100 N. W. 346.

[50] North v. Webster, 36 Minn. 99, 30 N. W. 429; Lamm v. Armstrong, 95 Minn. 434, 104 N. W. 304. See Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

[51] See § 445.

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debt.[52] An amendment of an insufficient statement for judgment by confession will not be allowed to the prejudice of third parties.[53]

502. On motion for new trial—A refusal to allow an amendment of an answer, involving a complete change in the theory of the defence, has been held proper, two amendments of the answer having been allowed on the trial.[54] An order allowing an amendment of an answer setting up the defence that the obligation sued upon was joint has been held an abuse of discretion.[55]

503. After appeal and remand—The district court has discretionary power to grant an amendment raising new issues after a case has been disposed of on appeal to the supreme court and remanded, but it is a power to be sparingly and cautiously exercised.[56] When an affirmance is of the trial court's order for judgment, it ordinarily amounts to a direction not to proceed to a determination, as in case of reversal on appeal, but to enter the judgment affirmed. After such affirmance amendments to the pleading which involve a new trial should not be allowed, except possibly in extraordinary cases, and then only when the proposed amendment sets forth, clearly and distinctly, a basis for relief which has not before been presented for judicial determination.[57]

504. In supreme court—The supreme court will rarely allow a pleading to be amended on appeal, especially if it will necessitate a remand of the case for the trial of new issues.[58]

[52] Pfefferkorn v. Hayward, 65 Minn. 429, 68 N. W. 68.

[53] Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380; Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. 946.

[54] Wasser v. Western Land Securities Co., 97 Minn. 460, 107 N. W. 160.

[55] Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311.

[56] Winona v. Minn. etc. Co., 29 Minn. 65, 11 N. W. 228; Burke v. Baldwin, 54 Minn. 514, 56 N. W. 173; Reeves & Co. v. Cress, 80 Minn. 466, 83 N. W. 443; Cool v. Kelly, 85 Minn. 359, 88 N. W. 988.

[57] Todd v. Bettingen, 102 Minn. 260, 113 N. W. 906. See 6 Mich. L. Rev. 353.

[58] State v. Great Northern Ry., 106 Minn. 303, 336, 119 N. W. 202 (application of state for an amendment to enable it to recover a penalty under R. L. 1905 § 1009 denied).

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CONSTRUCTION

505. Statutory rule—Liberal construction—Immaterial defects disregarded—It is provided by statute that "for the purpose of determining the effect of a pleading, it shall be liberally construed, with a view to substantial justice between the parties;" [59] and "in every stage of an action, the court shall disregard all errors or defects in the pleadings and proceedings which do not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason thereof." [60]

506. Liberal construction—In general—Pleadings are to be liberally construed in support of their sufficiency.[61] Our court has said that it intends to be extremely liberal in the construction of pleadings.[62] Hair-splitting in the construction of pleadings is no longer tolerated.[63] In construing a pleading it is the duty of the court to lay aside all nice verbal criticism and consider it from a practical standpoint.[64] This liberality is in accordance with the modern tendency to subordinate the adjective or remedial law to the substantive law.[65] We have outgrown "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." [66] Where there is enough in a pleading to enable the opposite party and the court to understand what is intended, the purpose of pleading is accomplished.[67]

507. In favor of pleader—A pleading is to be construed liberally in favor of the pleader and not strictly against him as at common law.[68] The old com-

[59] R. L. 1905 § 4143; G. S. 1913 § 7769. Statute cited: Hoag v. Mendenhall, 19 Minn. 335(289, 291); Johnson v. Robinson, 20 Minn. 189(169); State v. Cooley, 58 Minn. 514, 520, 60 N. W. 338; Moon v. Allen, 82 Minn. 89, 95, 84 N. W. 654; Redner v. New York F. Ins. Co., 92 Minn. 306, 99 N. W. 886; Strand v. Loyal Americans, 122 Minn. 118, 142 N. W. 10; McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

[60] R. L. 1905 § 4161; G. S. 1913 § 7789. Statute cited: Hurd v. Simonton, 10 Minn. 423(340); Cock v. Van Etten, 12 Minn. 522(431, 436); State v. Cooley, 58 Minn. 514, 520, 60 N. W. 338; Pfefferkorn v. Haywood, 65 Minn. 429, 68 N. W. 68; St. Louis County v. American Loan & Trust Co., 75 Minn. 489, 78 N. W. 113; Jacobson v. Great Northern Ry., 120 Minn. 52, 139 N. W. 142.

[61] Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623. See §§ 505, 507, 517, 519, 520.

[62] Willison v. Northern Pacific Ry., 111 Minn. 370, 373, 127 N. W. 4.

[63] Trustees v. Nesbitt, 65 Minn. 17, 67 N. W. 652; Redner v. New York Fire Ins. Co., 92 Minn. 306, 99 N. W. 886.

[64] Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340.

[65] Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[66] Justice Holmes in Paraiso v. U. S., 207 U. S. 372.

[67] Redwood County v. Tower, 28 Minn. 45, 8 N. W. 907.

[68] Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623; Branton v. McLaughlin, 109 Minn. 244, 123 N. W. 808; Martin v. Great Northern Ry., 110 Minn. 118, 124 N. W. 825; Allen v. Eneroth, 111 Minn. 395, 398, 127 N. W. 426;

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mon-law rule has been inadvertently cited in a few of our cases.[69] Under the more recent authorities pleadings are not to be construed strictly against the pleader, but averments that sufficiently point out the nature of the pleader's claims are sufficient, if under them he would be entitled to give the necessary evidence to establish his cause of action.[70]

508. Intention of pleader immaterial—A pleading is to be construed according to the language used. The intention of the pleader is immaterial.[71] A cause of action is to be classified with regard to the facts alleged, unaffected by the conclusions of the pleader.[72]

509. As a whole—A pleading is to be construed as a whole and according to its general tenor.[73]

510. Ordinary sense of words—The words used in a pleading are to be construed in their ordinary, popular sense, unless they are obviously used in a technical sense.[74] 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.[75]

511. As affected by time—The degree of strictness with which pleadings are to be construed depends upon the time and mode of objection to their sufficiency. A pleading which would be good on demurrer may be bad on a motion to make more definite and certain, and a pleading which would be bad on demurrer may be good on motion for dismissal, in arrest of judgment, or on appeal.[76]

512. Facts alleged and not form controlling—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 therefor unnecessary to label a complaint to characterize it.[77] A defendant cannot defeat an action by merely giving it a name.[78]

Laun v. Kipp, 155 Wis. 347, 145 N. W. 183.

[69] Derby v. Gallup, 5 Minn. 119 (85, 96); Irvine v. Irvine, 5 Minn. 61(44); Buckholz v. Grant, 15 Minn. 406(329, 333); Wagner v. Finnegan, 54 Minn. 251, 254, 55 N. W. 1129.

[70] Coatsworth v. Lehigh Valley Ry., 156 N. Y. 451, 51 N. E. 301; Clark v. West, 193 N. Y. 349, 86 N. E. 1.

[71] Gould v. Glass, 19 Barb. (N. Y.) 179. A pleading is to be construed in the light of the facts alleged and not in the light of what the party's counsel asserts he intended to plead. Schnabel v. Hanover Nat. Bank, 137 N. Y. S. 727. See §§ 244, 517.

[72] Western Union Tel. Co. v. Harris, 6 Ga. App. 260, 64 S. E. 1123.

[73] Hanscom v. Herrick, 21 Minn. 9; Merrill v. Dearing, 22 Minn. 376; Stein v. Passmore, 25 Minn. 256, 258; Barkey v. Johnson, 90 Minn. 33, 95 N. W. 583; Calvo v. Davies, 73 N. Y. 211; Bates v. Babcock, 95 Cal. 479; Clore v. McIntire, 120 Ind. 262, 22 N. E. 128.

[74] Starkey v. Minneapolis, 19 Minn. 203(166); Endres v. First Nat. Bank, 66 Minn. 257, 261, 68 N. W. 1092.

[75] Cook v. Warren, 88 N. Y. 37.

[76] Barnsback v. Reiner, 8 Minn. 59 (37, 44); Smith v. Dennett, 15 Minn. 81 (59, 63); Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 51, 59 N. W. 822.

[77] Breault v. Merrill & Ring Lumber Co., 72 Minn. 143, 75 N. W. 122.

[78] Adams v. Corriston, 7 Minn. 456 (365, 370).

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513. Reference to summons—The summons cannot be resorted to in aid of construction.[79]

514. Reference to demand for relief—At law or in equity—The formal demand for relief with which the complaint concludes is not decisive of the legal or equitable character of the action;[80] but where the complaint sets forth an ambiguous state of facts, such as may support equally an action at law or in equity, the character of the action may be determined by reference to the relief demanded.[81]

515. Ex delicto or ex contractu—If it is doubtful whether the action is ex delicto or ex contractu it will be held to be ex contractu.[82] On demurrer it is immaterial what may have been the theory of the plaintiff in framing his pleading. A complaint may be sustained as one ex contractu though the plaintiff intended to plead a tort.[83]

516. Specific allegations prevail over general—If general and specific allegations or denials in the same pleading are inconsistent the latter control.[84] Specific allegations cannot be aided by general allegations.[85] 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.[86] To control general allegations specific allegations must be sufficient for all legal purposes.[87] Where general allegations of negligence are followed by allegations of specific acts of negligence, the general allegations are restricted and qualified by the specific allegations.[88]

517. On demurrer—On general demurrer a pleading is to be construed liberally in support of its sufficiency. It is not to be construed strictly against

[79] Graves v. Waite, 59 N. Y. 156.

[80] Bell v. Merrefield, 109 N. Y. 202, 16 N. E. 55. See, as to effect of prayer in determining the nature of an action, Wildermann v. Donnelly, 86 Minn. 184, 187, 90 N. W. 366; Minneapolis etc. Ry. v. Brown, 99 Minn. 384, 109 N. W. 817; Upton v. Merriman, 122 Minn. 158, 142 N. W. 150.

[81] O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 371.

[82] Goodwin v. Griffis, 88 N. Y. 629; People v. Wood, 121 N. Y. 522, 24 N. E. 952; Barber v. Ellingwood, 122 N. Y. S. 369. See Beaulieu v. Great Northern Ry., 103 Minn. 47, 114 N. W. 353.

[83] Dresser v. Mercantile Trust Co., 108 N. Y. S. 577.

[84] Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Perry v. Reynolds, 40 Minn. 499, 42 N. W. 471; Gowan v. Bensel, 53 Minn. 46, 54 N. W. 934; Martin County Bank v. Day, 73 Minn. 195, 198, 75 N. W. 1115; Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 1115. See Hayes v. St. Louis T. Co., 137 Fed. 80. As to effect of "to wit" or "viz." see Buck v. Lewis, 9 Minn. 314(298); Sawyer v. Wallace, 47 Minn. 395, 50 N. W. 366; Dunnell, Minn. Digest, § 4396.

[85] Coe v. Ware, 40 Minn. 404, 42 N. W. 205; Parker v. Jewett, 52 Minn. 514, 55 N. W. 56.

[86] Dana v. Porter, 14 Minn. 478(355); State v. Ring, 29 Minn. 78, 81, 11 N. W. 233; Casey v. McIntyre, 45 Minn. 526, 48 N. W. 402; Carlson v. Presbyterian Board, 67 Minn. 436, 70 N. W. 3; Moon v. Allen, 82 Minn. 89, 93, 84 N. W. 654. See § 227.

[87] Fitzpatrick v. Simonson Bros. Mfg. Co., 86 Minn. 140, 142, 90 N. W. 378.

[88] Williston v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4.

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the pleader, as at common law, but liberally in favor of the pleader, and sustained if by any fair and reasonable construction a cause of action of any kind can be spelled out of the allegations. It is sufficient if the necessary facts appear substantially, however inartistically or illogically they may be stated. Not only the facts directly alleged, but also such as may fairly and reasonably be inferred from the allegations, must be assumed to be true.[89] A complaint, to be bad on general demurrer, must be wholly insufficient; if to any extent, on any reasonable theory, it presents facts sufficient to justify a recovery, it will be sustained, however inartificially the facts may be stated.[90] The rule guiding the supreme court is that a general demurrer will be overruled if, on any view of the facts pleaded, a cause of action is stated. It will not ordinarily go beyond this inquiry, or attempt to pass on the question whether recovery may or may not be had upon all the different theories to which the facts pleaded may be susceptible. It limits its inquiry to the question whether, upon any particular theory, a cause of action is stated.[91] When a complaint presents two apparent theories of plaintiff's cause of action, one sufficiently pleaded and

[89] Vukelis v. Virginia Lumber Co., 107 Minn. 68, 119 N. W. 509; Warren Brothers Co. v. King, 96 Minn. 190, 104 N. W. 816; Chamber of Commerce v. Wells, 96 Minn. 492, 105 N. W. 1124; Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623; Colbroth v. Flick etc. Co., 90 Minn. 489, 97 N. W. 375; Moon v. Allen, 82 Minn. 89, 95, 84 N. W. 654; Mastad v. Swedish Brethren, 83 Minn. 40, 44, 85 N. W. 913; Dugan v. St. Paul etc. Ry., 40 Minn. 544, 42 N. W. 538; Chamberlain v. Tiner, 31 Minn. 371, 18 N. W. 97; Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340; Hoag v. Mendenhall, 19 Minn. 335(289); Perkins v. Merrill, 37 Minn. 40, 33 N. W. 3; Dewey v. Leonard, 14 Minn. 153(120); Wessel v. Wessel Mfg. Co., 106 Minn. 66, 118 N. W. 157; Koeper v. Louisville, 106 Minn. 269, 118 N. W. 1025; Branton v. McLaughlin, 109 Minn. 244, 123 N. W. 808; Martin v. Great Northern Ry., 110 Minn. 118, 124 N. W. 825; Allen v. Eneroth, 111 Minn. 395, 398, 127 N. W. 426; Gulledge etc. Co. v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395; Rasmussen v. Hutchinson, 111 Minn. 457, 127 N. W. 182; Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490; Kuhl v. U. S. etc. Ins. Co., 112 Minn. 197, 127 N. W. 628; McElrath v. Electric Investment Co., 114 Minn. 358, 131 N. W. 380; Venner v. Great Northern Ry., 117 Minn. 447, 136 N. W. 271; Jacobson v. Lac Qui Parle, 119 Minn. 14, 17, 137 N. W. 419; First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296; Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748; Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315; State v. St. Paul City Ry., 122 Minn. 163, 170, 142 N. W. 136; Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871; Preiss v. Zins, 122 Minn. 441, 142 N. W. 822; Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; Coatsworth v. Lehigh Valley Ry., 156 N. Y. 451, 51 N. E. 301; Abbey v. Wheeler, 170 N. Y. 122, 62 N. E. 1074; Chark v. West, 193 N. Y. 349, 86 N. E. 1; Dresser v. Mercantile Trust Co., 108 N. Y. S. 577; Laun v. Kipp, 155 Wis. 347, 145 N. W. 183.

[90] Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623, 624; Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899.

[91] First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296; Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

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the other insufficiently, the theory which will sustain the action is to be adopted.[92] In determining the sufficiency of a complaint on demurrer a court should lay aside all nice, verbal criticism, and consider it from a practical standpoint. If it fairly advises the defendant of the nature of the claim against him it should be sustained.[93] On demurrer the theory of the plaintiff as to the nature of his cause of action is not controlling.[94]

518. Answer—Reference to complaint—An answer is to be construed with reference to the facts alleged in the complaint.[95]

519. On the trial—Arrest of judgment—When the sufficiency of a pleading is questioned on the trial by a motion for dismissal, or for 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. Even conclusions of law may be resorted to and held sufficient if the necessary facts may reasonably be inferred therefrom. A far more liberal construction is permissible than on demurrer.[96] 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. The rules for the construction of pleadings on a motion for dismissal,[97] on a motion for judgment on the pleadings,[98] and when objection is made to the admission of evidence,[99] are stated elsewhere. On a motion in arrest of judgment pleadings are construed with great liberality.[1]

520. On appeal—When the sufficiency of a pleading is questioned for the first time on appeal it will be sustained if by any reasonable inference or intendment a cause of action or defence can be spelled out of the matters alleged. The test is not whether a demurrer would be sustained.[2] Remote inferences

[92] Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623.

[93] Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340; Andreas v. Holcombe, 22 Minn. 339, 341.

[94] Rule v. Omega Stove & Grate Co., 64 Minn. 326, 329, 67 N. W. 60. See §§ 244, 508.

[95] Munger v. Shannon, 61 N. Y. 251.

[96] Newton v. Highland Improvement Co., 62 Minn. 436, 439, 64 N. W. 1146; Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 51, 59 N. W. 822; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

[97] See § 454.

[98] See § 464.

[99] See § 456.

[1] Lee v. Emery, 10 Minn. 187(151); Smith v. Dennett, 15 Minn. 81(59); Baker v. Warner, 231 U. S. 588. See § 523, and Dunnell, Minn. Pr. § 934.

[2] Smith v. Dennett, 15 Minn. 81(59); Hurd v. Simonton, 10 Minn. 423(340); Piper v. Johnston, 12 Minn. 60(27); McArdle v. McArdle, 12 Minn. 98(53);

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will be indulged in its support.[3] Even a conclusion of law may be sustained, if, by any reasonable intendment, it can be held to contain an inference of a necessary fact.[4] The pleading will be sustained if the defect is of such a nature that it might have been remedied by an amendment in the trial court,[5] or if the omission of essential allegations has been cured by answer,[6] reply,[7] verdict[8] or the reception of evidence without objection.[9] A construction of the pleadings adopted by the parties on the trial will be followed on appeal.[10]

521. Aider by answer—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 from the complaint are alleged or admitted in the answer the defect is cured. The complaint is said to be "aided" by the answer.[11] But a party cannot rely on allegations in his adversary's pleadings to

Holmes v. Campbell, 12 Minn. 221 (141); Drake v. Barton, 18 Minn. 462 (414); Spencer v. St. Paul etc. Ry., 21 Minn. 362; Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154; Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340; Frankoviz v. Smith, 34 Minn. 403, 26 N. W. 225; Trebby v. Simmons, 38 Minn. 508, 38 N. W. 693; Dorr v. McDonald, 43 Minn. 458, 45 N. W. 864; Bromberg v. Minn. Fire Assn., 45 Minn. 318, 47 N. W. 975; Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 51, 59 N. W. 822; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668; Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735; Minneapolis etc. Ry. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132; Trustees v. Nesbitt, 65 Minn. 17, 67 N. W. 652; Bendikson v. Great Northern Ry., 80 Minn. 332, 83 N. W. 194; Slater v. Olson, 83 Minn. 35, 85 N. W. 825; Miller v. Ganser, 87 Minn. 345, 92 N. W. 3; Peach v. Reed, 87 Minn. 375, 380, 92 N. W. 229; Halvorsen v. Orinoco Mining Co., 89 Minn. 470, 95 N. W. 320; Norton v. Wilkes, 93 Minn. 411, 101 N. W. 619; Kubesh v. Hanson, 93 Minn. 259, 101 N. W. 73; Carey v. Switchmen's Union, 98 Minn. 28, 107 N. W. 129; Vance v. Great Northern Ry., 106 Minn. 172, 118 N. W. 674; Christiansen v. Chicago etc. Ry., 107 Minn. 341, 120 N. W. 300; McCauley v. Wuest, 110 Minn. 529, 125 N. W. 1021; Collins v. School District, 114 Minn. 307, 131 N. W. 322; International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395; McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708; Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343.

[3] Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343.

[4] Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 51, 59 N. W. 822. See Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

[5] See § 527.

[6] Bennett v. Phelps, 12 Minn. 326(216). See § 521.

[7] See § 522.

[8] Colt v. Waples, 1 Minn. 134(110). See § 523.

[9] See § 447.

[10] Fritz v. McGill, 31 Minn. 536, 18 N. W. 753; Keyes v. Minneapolis etc. Ry., 36 Minn. 290, 30 N. W. 888; Peteler etc. Co. v. N. W. etc. Co., 60 Minn. 127, 61 N. W. 1024. See § 244.

[11] Bennett v. Phelps, 12 Minn. 326 (216); Shartle v. Minneapolis, 17 Minn. 308(284); Rollins v. St. Paul Lumber Co., 21 Minn. 5; Gibbens v. Thompson, 21 Minn. 398; Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879; Lesher v. Getman, 30 Minn. 321, 15 N. W. 309; Hedderly v. Downs, 31 Minn. 183, 17 N. W. 274; McMahon v. Merrick, 33 Minn. 262, 22 N. W. 543; Monson v. St. Paul etc. Ry., 34 Minn. 269, 25 N. W. 595; Erickson v. Fisher, 51 Minn. 300, 304,

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make out his cause of action or defence and at the same time put such allegations in issue by denials.[12] 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.[13]

522. Aider by reply—A defective answer may be aided by a reply.[14]

523. Aider by 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 is 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.[15]

524. A question for the court—The construction of pleadings is for the court and should never be referred to a jury.[16]

53 N. W. 638; Ritchie v. Ege, 58 Minn. 291, 59 N. W. 1020; Nixon v. Reeves, 65 Minn. 159, 67 N. W. 989; Zalk v. Great Northern Ry., 98 Minn. 65, 107 N. W. 814.

[12] Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932; Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983.

[13] Brandt v. Shepard, 39 Minn. 454, 40 N. W. 521.

[14] Pye v. Bakke, 54 Minn. 107, 110, 55 N. W. 904.

[15] 1 Williams' Saunders, 227, 228; Heard, Civil Pl. 113; Baker v. Warner, 231 U. S. 588; Coit v. Waples, 1 Minn. 134(110); Daniels v. Winslow, 2 Minn. 113(93); Lee v. Emery, 10 Minn. 187 (151); Hurd v. Simonton, 10 Minn. 423 (340); Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593; Christiansen v. Chicago etc. Ry., 107 Minn. 341, 120 N. W. 300; Weicherding v. Krueger, 109 Minn. 461, 124 N. W. 225.

[16] Earle v. Westchester Fire Ins. Co., 29 Mich. 414; Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594.

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OBJECTIONS ON APPEAL

525. In general—It is the general rule, subject only to the exceptions stated in sections 470, 526, 527, that a pleading cannot be attacked for the first time on appeal. All formal defects are waived unless objected to before or on the trial.[17]

526. Want of jurisdiction of subject-matter—The objection that a pleading sets forth a subject-matter of which the court has not jurisdiction is never waived and may be raised by either party for the first time on appeal.[18]

527. Failure to state cause of action—In this state the objection that a complaint does not state facts sufficient to constitute a cause of action may be raised for the first time on appeal.[19] This is an exception to the general rule that the supreme court will only consider questions already passed upon by the lower court. It is apparently authorized by statute,[20] in this state, but independent of statute the supreme court undoubtedly has authority, by virtue of its general supervisory jurisdiction, to set aside a judgment which is not based on any actionable wrong.[21] The objection may be raised in the supreme court though the judgment was rendered on default and no application to set it aside has been made below.[22] Though the right exists to set aside a judgment on appeal because of the insufficiency of the complaint it is rarely exercised. An objection to a pleading for insufficiency raised for the first time in the supreme court will be overruled if the defect is of such a nature that it might have been remedied by an amendment on the trial if the attention of the trial court and the adverse party had been called to it by a timely and specific objection;[23] or if the omission of essential allegations has been cured

[17] Howland v. Fuller, 8 Minn. 50(30); Holmes v. Campbell, 12 Minn. 221 (141); Lowry v. Harris, 12 Minn. 255 (166); Cock v. Van Etten, 12 Minn. 522 (431); Taylor v. Parker, 17 Minn. 469 (447); Reed v. Pixley, 25 Minn. 482. See §§ 467–470.

[18] Ames v. Boland, 1 Minn. 365(268); Stratton v. Allen, 7 Minn. 502(409); Hagemeyer v. Wright County, 71 Minn. 42, 73 N. W. 628. See Lee v. Parrett, 25 Minn. 128; Anderson v. Hanson, 28 Minn. 400, 10 N. W. 429; Wrolson v. Anderson, 53 Minn. 508, 55 N. W. 597 (rule on appeal from justice court).

[19] Stratton v. Allen, 7 Minn. 502(409); Lee v. Emery, 10 Minn. 187(151); McArdle v. McArdle, 12 Minn. 98(53); Holmes v. Campbell, 12 Minn. 221(141). See Milton Dairy Co. v. Great Northern Ry., 124 Minn. 239, 144 N. W. 764.

[20] R. L. 1905 § 4129; G. S. 1913 § 7755.

[21] Slocum v. Pomeroy, 6 Cranch (U. S.) 221; Teal v. Walker, 111 U. S. 242; Maher v. Ashmead, 30 Pa. St. 344.

[22] Smith v. Dennett, 15 Minn. 81(59); Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735.

[23] Merriam v. Pine City Lumber Co., 23 Minn. 314; Trustees v. Nesbitt, 65 Minn. 17, 67 N. W. 652; Getty v. Alpha, 115 Minn. 500, 503, 133 N. W. 159; Wood v. Johnson, 117 Minn. 267, 271, 135 N. W. 746; Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; Mizell v. Ruffin, 118 N. C. 69, 23 S. E. 927. See also, Hartz v. St.

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by answer,[24] reply,[25] verdict,[26] or the reception of evidence without objection;[27] or if it can be sustained by the most liberal construction.[28] The sufficiency of a complaint cannot be questioned for the first time on appeal in the absence of a record containing all the evidence, except on appeal from a default judgment.[29]

Paul etc. Ry., 21 Minn. 358; Spencer v. St. Paul etc. Ry., 21 Minn. 362; Wampach v. St. Paul etc. Ry., 21 Minn. 364; Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343.

[24] Bennett v. Phelps, 12 Minn. 326 (216). See § 521.

[25] See § 522.

[26] Coit v. Waples, 1 Minn. 134(110). See § 523.

[27] See § 447.

[28] See § 520.

[29] Peach v. Reed, 87 Minn. 375, 92 N. W. 229.

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COMMON COUNTS

528. Assumpsit—Historical statement—The action of assumpsit was originally a specialized form of trespass on the case.[30] It gradually acquired recognition as a distinct form of action in the fifteenth century as an appropriate remedy for the breach of a simple contract. Originally an action for tort it was gradually transformed into an action on contract. The term indebitatus assumpsit is used in two senses. In its original sense it is used to denote that form of assumpsit which lies for the recovery of any simple common-law debt. The term is a fragment of the ancient declaration in assumpsit on a debt. The plaintiff in that action alleged that the defendant, being indebted, undertook and promised to pay. From the Latin words of the declaration the name of the action is taken. In this original sense indebitatus assumpsit passed through two important stages of development. It began to appear about the middle of the sixteenth century. In its first stage it lay to recover on an express promise to pay an antecedent simple debt. In its second stage, beginning with Slade's Case in 1602,[31] it lay to recover on any simple debt without regard to any express promise to pay the debt. In both of these stages of the remedy the existence of an actual debt in the strict common-law sense of the term was essential. A third and final stage of development, in which the action became independent of debt, started in 1609 when the common counts began to take form. When these counts were finally settled indebitatus assumpsit became synonymous with the common counts, and it is in this sense that the term is now generally used. In this final stage of development the action came to be recognized as the appropriate remedy to enforce various obligations upon the theory of an implied promise based, not on an antecedent debt as theretofore, but upon the facts of the case, such as work done or goods sold and delivered upon request, but without any express promise to pay for them. The quantum meruit and quantum valebant counts became established early in the seventeenth century, and the counts for money paid, money lent, money had and received, and for an account stated, came into use about the same time. The common counts were an outgrowth of the original indebitatus assumpsit and retained most of its form. They alleged an indebtedness and a promise to pay it, but they were not grounded on a debt in the strict common-

[30] For the history of assumpsit see, Prof. Ames, 2 Harv. L. Rev. 1, 53 (these articles are reproduced in Ames, Lectures on Legal History, 128–166; 3 Select Essays in Anglo-American Legal History, 259); 3 Street, Foundations of Legal Liability, 172–206; Anson, Contract, 277, 363–367; Jenks, History of English Law 137–142; 3 Reeves' History of English Law, 434; 4 Id. 243, 529; Pollock, Contracts, (Williston's ed.) p. 154; Langdell, Summary of Contracts, §§ 46–49, 65; Perry, Common Law Pl. 82–89; Pomeroy, Remedies, § 512; Blackstone, Commentaries, Bk. III. 158–162; Holmes, Common Law, 274–288, 290, 296.

[31] 4 Coke 92. See § 532.

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law sense of the term, but upon an obligation which the courts treated as a debt for the purpose of a remedy. Under them it was not necessary to prove a debt or an express promise to pay. The doctrine of implied promises developed rapidly after Slade's Case and indebitatus assumpsit, in its modern sense of the common counts, became the instrument by which such promises were enforced. The promises were implied to make the remedy available. The common counts soon became very popular and entered upon a wonderful course of development. Indebitatus assumpsit largely superseded debt, became concurrent with account, with case on a bailment, a warranty and bills of exchange, and competed with equity in the essentially equitable quasi contracts growing out of the principle of unjust enrichment. The rivalry between the law and equity courts worked for the expansion of the remedy. The history of pleading in relation to contract is largely the history of the encroachment of the action of assumpsit upon the field of the action of debt. It was preferred to debt because it was not subject to wager of law and might be maintained against personal representatives. It was popular for the further reason that the pleading was comparatively simple. In an action of debt the cause of action had to be stated with great particularity and nicety, while in indebitatus assumpsit it was only necessary to set out the debt generally as matter of inducement to the promise which was the foundation of the action. The decision in Slade's Case made it possible to plead a cause of action on a contract in a double aspect—in the form of a contract which had been broken, and in the form of a debt resulting from an agreement and consequently importing a promise to pay it. After the common counts were established it was usual to plead a breach of an express contract and then add all the common counts, thereby avoiding the danger of a variance, for recovery could be had upon proof of either an express or implied contract. This was of immense practical value at a time when a variance was far more disastrous than now. Indebitatus assumpsit is in the nature of an action of debt on the case derived from assumpsit, having far more in common with case than with assumpsit or debt. Like case it is based directly on legal obligation. To the fact that it is in reality a pure action on the case in disguise it owes that remarkable flexibility which has enabled the courts to extend it with such freedom into the field of pure legal duty. It is at the point of confluence of three actions—assumpsit, debt and case; and it derives important features from each of them. Its form, theory and procedure are derived from assumpsit. From debt it inherits the limitation that it can be maintained only where there is a claim for money or chattels in the nature of debt. Its flexibility and power are largely due to the fact that it is essentially an action on the case.[32] Though our legislature has declared it abolished it still lives in our every day practice, and is essentially a part of code pleading. There is much in our law that cannot be understood without a knowledge of the history of assumpsit.

[32] 3 Street, Foundations of Legal Liability, 205.

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A wealth of judicial precedent has crystalized around the common counts during the last three hundred years, and a large and important part of our substantive law was cast in the mold of assumpsit. A party may go into one of our courts to-day and allege briefly that the defendant is indebted to him for goods sold and delivered to defendant at his request, and recover upon proof of a conversion of his goods by defendant. Here there is no real debt, no promise to pay, no sale or delivery. All is fiction. The pleading gives no inkling of the real cause of action. Why can such a recovery be had? The whole proceeding is utterly inexplicable without a knowledge of the history of assumpsit.

529. Common counts—Definition and nature—Common counts are certain counts, based on implied promises to pay money in consideration of a precedent debt, commonly inserted in a declaration in assumpsit. The promises were fictitious, being implied for the purpose of enabling parties to enforce debts by the common-law action of assumpsit instead of the action of debt. It was the usual practice to include all the counts in a single declaration in order to avoid the possibility of a variance. They include the indebitatus count (1) for goods sold and delivered, (2) for goods bargained and sold, (3) for work done and materials furnished, (4) for money lent, (5) for money paid for defendant's use, (6) for money had and received by the defendant for plaintiff's use, (7) for interest, and (8) for money found due on an account stated. In addition to the indebitatus count there was the quantum meruit count for labor and the quantum valebant count for goods furnished. Long before the adoption of the reformed procedure the quantum meruit and quantum valebant counts had become obsolete in England. This was due to a holding that a recovery might be had under an indebitatus count in all cases where a recovery might be had under a quantum meruit count or a quantum valebant count. Parties resorted to the indebitatus count in preference to the quantum meruit and quantum valebant counts because it was more comprehensive and there was less likelihood of a variance under it. The fourth, fifth, sixth, seventh and eighth counts enumerated above were called the money counts because they related exclusively to money transactions as the basis of the debt alleged. Counts for board and lodging and for use and occupation are often classified as common counts.[33]

530. Form of common counts—The form of the common counts varied from time to time in the course of their development, gradually becoming more concise. Prior to the Common Law Practice Act of 1852 they had assumed the following form: 1. For goods sold and delivered by the plaintiff to the defendant at his request. 2. For goods bargained and sold by the plaintiff to the defendant at his request. 3. For work done and materials for the same provided by the plaintiff for the defendant at his request. 4. For

[33] See Chitty, Pl., 16 Am. ed., 297-309; Bouvier, Law Dict. title, Common Counts.

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money lent by the plaintiff to the defendant at his request. 5. For money paid by the plaintiff for the use of the defendant at his request. 6. For money had and received by the defendant for the use of the plaintiff. 7. For interest upon and for the forbearance by the plaintiff to the defendant at his request of moneys due and owing from the defendant to the plaintiff. 8. For money found due from the defendant to the plaintiff on an account stated between them. In the Common Law Practice Act of 1852 these forms were shortened so as to read as follows: 1. For goods bargained and sold by the plaintiff to the defendant. 2. For work done and materials provided by the plaintiff for the defendant at his request. 3. For money lent by the plaintiff to the defendant. 4. For money paid by the plaintiff for the defendant at his request. 5. For money received by the defendant for the use of the plaintiff. 6. For interest upon and for the forbearance by the plaintiff to the defendant at his request of money due from the defendant to the plaintiff. 7. For money found to be due from the defendant to the plaintiff on accounts stated between them. No change was made by the act in the count for goods sold and delivered, but owing to a judicial decision that a request was implied in the allegation of a sale, this count in its final form was, For goods sold and delivered by the plaintiff to the defendant. These counts were preceded by an allegation to the effect that the defendant, at a specified time prior to the writ was indebted to the plaintiff in a specified amount for goods sold and delivered, etc., inserting, generally all the common counts. After the counts the plaintiff alleged, in effect, "and the defendant, in consideration thereof, promised the plaintiff to pay him the said sum of money on request." The introductory and closing clauses varied from time to time. The time of the indebtedness was always laid prior to the writ so as to form a basis for the promise which was the gist of the action. The promise was implied to pay an antecedent debt and hence the allegation of indebtedness was always in the past tense. The action was predicated, not upon the sale, or work done, or money loaned, etc., but upon the implied promise to pay the debt arising therefrom. The allegations as to a debt, sale, etc., were mere matter of inducement. The introductory and concluding clauses were greatly shortened and simplified by the Common Law Practice Act of 1852. The quantum meruit count was substantially as follows: For that whereas on , at , the defendant was indebted to the plaintiff in the sum of for work done and materials provided by the plaintiff for the defendant, at his request, the defendant undertook and then and there faithfully promised the plaintiff to pay him so much money as he therefore reasonably deserved to have of the defendant, when he, the defendant, should be thereunto afterwards requested; and the plaintiff avers that he therefore reasonably deserved to have of the defendant the sum of , whereof the defendant then and there had notice. The quantum valebant count was substantially as follows: For that whereas on , at , the defendant was indebted to the

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plaintiff in the sum of , for goods sold and delivered by the plaintiff to the defendant, at his request, the defendant undertook and then and there faithfully promised the plaintiff to pay him so much money as said goods at the time of the said sale and delivery thereof were reasonably worth, when he, the defendant should be thereunto afterwards requested; and the plaintiff avers that said goods at the time of the said sale and delivery thereof were reasonably worth the sum of , whereof the defendant then and there had notice. It is to be observed that in these counts the action is not based on a promise to pay an antecedent debt as in the indebitatus counts, but a promise to pay what the goods or services were reasonably worth. These counts did not always contain an allegation of indebtedness. The common count for use and occupation was, For the defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff.[34]

531. Good under the code—A complaint in the form of a common count, or substantially in that form, is good in this state and in nearly all the code states.[35] The use of the common counts ought to be encouraged by the courts in order to introduce certainty and uniformity in our practice. Their merits are obvious and very great. They are the product of a long course of development and have stood the test of time and change. In the course of their development they have been pruned and trimmed until they are perfect models of conciseness and certainty. Their scope and effect have been determined by a long line of judicial decisions in England and this country, so that a party who uses them knows with certainty when they will lie and what can be proved under them. It is of the utmost practical importance that this line of decisions should be continued and augmented in the interest of uniformity and certainty. In the constantly recurring cases where the common counts may be used it is highly objectionable that each pleader should adopt his own mode of stating the facts, for nothing but confusion, uncertainty, and needless waste of time, money and energy can result. The objections that have been urged against the use of the common counts under the code are purely theoretical, and are trifling in view of the immense countervailing practical advantages. For a court which holds that a general allegation of ownership is sufficient to admit proof of any legal title, and that a general allegation of conversion is sufficient to admit proof of any form of conversion, and that a general allega-

[34] See the various editions of Chitty, Pl., titles, Assumpsit, Common Counts; Saunders, Pl.; Ency. of Forms, title, Assumpsit; 2 B. & Ad. 783; 7 Bing. 774.

[35] Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340 (overruling Foerster v. Kirkpatrick, 2 Minn. 210, 171; Holgate v. Broome, 8 Minn. 243, 209); Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273; Guthrie v. Olson, 32 Minn. 465, 21 N. W. 557; Todd v. Bettingen, 109 Minn. 493, 497, 124 N. W. 443. See Keller v. Struck, 31 Minn. 446, 18 N. W. 280; Pioneer Fuel Co. v. Hager, 57 Minn. 76, 58 N. W. 828; Boosalis v. Stevenson, 62 Minn. 193, 64 N. W. 380; Danahey v. Pagett, 74 Minn. 20, 76 N. W. 949; Foster v. Gordon, 96 Minn. 142, 104 N. W. 765; 4 Cyc. 340; 4 Ency. Pl. & Pr. 611; 14 Id. 47; 19 Id. 21; Note, 34 L. R. A. (N. S.) 364; Note, 57 Am. Dec. 544; Bates, Pl. & Pr. 206–212.

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tion of negligence is sufficient to admit proof of the particulars of the negligence, to condemn the common courts is a risible absurdity. In most of the cases where a common count will lie the adverse party is entitled to a bill of particulars as of right, and in the other cases a motion to make more definite and certain would be granted as a matter of course. In ejectment and replevin, in actions to determine adverse claims and for conversion, and in some of the other common actions, we have gone far toward standardizing our forms of pleading and it is important that we should do so in the cases where the common counts will lie. Just as in manufacturing the standardization of parts promotes efficiency and avoids waste, the standardization of forms of pleadings promotes certainty and efficiency in the administration of the law and avoids waste. We need standard forms about which our decisions can crystalize and form a useful body of precedents. A decision on an uncommon form of complaint is of trifling value as a precedent.

532. Basis of action on common counts—Effect of express contract— An action on the common counts is always based on a contract or promise implied by law, but it will lie in some cases though there is a subsisting express contract between the parties in relation to the subject-matter of the action. In the latter class of cases the action is based exclusively on the promise implied by law. The express contract is admissible to prove the request, receipt and value of the goods, services and the like. If the express contract is still subsisting between the parties so that the plaintiff cannot disregard it and sue for the reasonable value of the services or goods, it is not only admissible, but is conclusive as to the amount recoverable, for the law will not allow a party to cut loose from a subsisting, valid, express contract and recover an amount in excess of that stipulated therein. But though controlling in this sense the express contract is not the basis of the action. The plaintiff is not bound to introduce it in order to recover. If it is not introduced in evidence the plaintiff may recover the reasonable value of the goods or services, or other legal damages.[36] Where there is an express simple contract fully performed by the plaintiff and nothing remains to be done thereunder except the payment of a stipulated amount of money by the defendant, and the payment is due, the plaintiff may declare specially on the contract or he may recover under a common indebitatus count on an implied promise. In such a case the law implies a promise to pay the stipulated amount.[37] This rule goes back to Slade's Case, decided in 1602, which held that assumpsit would lie upon any simple debt without proof of a promise—that every simple debt carries with it, from its inception, an implied promise on the part of the debtor to pay the debt. The theory of the case was that the creation of a simple debt has a double aspect

[36] 2 Smith's Leading Cases, 8 ed. Pt. II. p. 48.

[37] Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273; Farron v. Sherwood, 17 N. Y. 227; Dermott v. Jones, 2 Wall. (U. S.) 1; Emslie v. Leavenworth, 20 Kan. 562; Pomeroy, Remedies, § 543. See § 534, infra.

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for the purpose of a remedy, giving rise to a contractual duty on which an action of debt might be maintained, and also importing a promise on which assumpsit might be maintained.[38] This fiction of an implied promise was adopted to enable parties to resort to assumpsit instead of debt. The question involved was one of remedy. The decision in Slade's Case started indebitatus assumpsit on its wonderful expansion, in the course of which the common counts were invented, the action of debt largely superseded, the law of simple contracts set free from the limitations of debt and given an opportunity to expand freely, and the law of quasi contracts developed.[39] One of the controlling motives of the King's Bench in adopting this rule was a desire to extend its jurisdiction, as it did not have jurisdiction by original writ in debt but did have it in assumpsit.[40] But aside from that it was extremely desirable on broad grounds of public policy that the law of simple contract should be freed from the rigid limitations of the action of debt. The easiest way to accomplish this by judicial legislation was to hold that upon the creation of a simple debt the law raises an implied promise to pay the debt such as will support assumpsit. This step was taken in Slade's Case, with far-reaching effects in our law.[41] We still retain this rule under code pleading though the necessity for the rule has long ceased.[42] The only justification it now has is one of practical convenience. It enables a party to so plead as to recovery upon proof of either an express or implied contract, and so avoid the danger of a variance. In actions under the common counts there are two kinds of promises implied by law and forming the basis of the action. If an express contract is in evidence and still controlling on the parties the promise implied is that the defendant will pay the amount stipulated in the express contract. If there is no express contract in evidence, or if one in evidence has been modified or abandoned or for any other reason has ceased to be controlling, the promise implied is that the defendant will pay the reasonable value of the services, goods, and the like, the express contract being merely evidence of such value. The one promise is based on the debt created by the contract, the other upon the facts of the case and expresses the obligation created by the law upon the facts of the case independent of the intention of the parties. The great practical utility of indebitatus assumpsit is due to the fact that the plaintiff may

[38] 2 Street, Foundations of Legal Liability, 61-66. In Slade's Case it was said that "every contract executory imports in itself an assumpsit, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay or deliver it." The law will always raise an implied promise to pay a simple debt. Byxbie v. Wood, 24 N. Y. 607. See Salmond, Jurisprudence, 2 ed. § 170. Blackstone said, with characteristic looseness, that "implied contracts are such as reason and justice dictate, and which, therefore, the law presumes that every man has contracted to perform." Deane v. Hodge, 35 Minn. 146, 150, 27 N. W. 917.

[39] See § 528.

[40] 2 Harv. L. Rev. 17; 2 Street, Foundations of Legal Liability, 63.

[41] 2 Street, Foundations of Legal Liability, 65.

[42] Pomeroy, Remedies, § 543. See § 916, infra.

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rely on either one of these two implied promises, and so avoid any danger of a variance between an express and an implied contract. He may recover upon proof of either.[43] This second form of implied promise did not have its birth in Slade's Case, but first appears in 1609.[44]

533. Indebitatus count for reasonable value of goods or services—A recovery may be had under an indebitatus count in all cases where a recovery might be had under a quantum meruit count or a quantum valebant count, but the contrary is not true.[45]

534. When common count lies—In general—Where there is a subsisting express contract, open and unexecuted, the plaintiff must declare specially on it and cannot recover on a common count, there being no fault or omission on the part of defendant. The law will not imply a contract where an express one exists in full force.[46] But where an express contract has been fully performed on plaintiff's part, and nothing remains to be done under it but the payment of money by defendant, the time of payment having passed, plaintiff may declare specially on the express contract or on a common indebitatus count, and in the latter case the measure of compensation will be that fixed by the express contract.[47] So also, if an express contract has been abandoned by defendant, or by mutual consent, or if plaintiff has been prevented from performing it by the act or default of defendant, plaintiff may recover on a common count.[48] So, in like manner, plaintiff may recover under a common count even though he has not strictly complied with the terms of a special contract, if that which has been done by him is beneficial to defendant, and has been accepted and enjoyed, or the default has been waived.[49] But where

[43] See § 914, infra.

[44] See 3 Street, Foundations of Legal Liability, 187; Prof. Ames, 2 Harv. L. Rev. 53.

[45] 1 Chitty, Pl., 16 Am. ed., 352; 22 Ency. Pl. & Pr. 1363; Parker v. Macomber, 17 R. I. 674; Londregon v. Crowley, 12 Conn. 558; Manning v. Dallas, 73 Cal. 420; Donegan v. Houston, 5 Cal. App. 626, 90 Pac. 1073; Andre v. Hardin, 32 Mich. 324.

[46] 4 Cyc. 326; 9 Cyc. 685; 4 Ency. Pl. & Pr. 923; 2 Greenleaf, Ev. § 104; 2 Smith's Leading Cases, 8 ed. Pt. II., p. 33. See §§ 862, 915, infra, and Dunnell, Minn. Digest, § 10366.

[47] 4 Cyc. 328; 9 Cyc. 685; 1 Chitty, Pl. 16 Am. ed. 350; 4 Ency. Pl. & Pr. 923; 2 Smith's Leading Cases, 8 ed. Pt. II., p. 33; 2 Greenleaf, Ev. § 104; Pomeroy, Remedies, § 543; 7 Lawson, Rights & Remedies, §§ 3689-3696; 3 Standard Ency. of Procedure 196; 1 Wait's Actions & Defences, 382; Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273; Farron v. Sherwood, 17 N. Y. 227; Dermott v. Jones, 2 Wall. (U. S.) 1; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; Emslie v. Leavenworth, 20 Kans. 562. See §§ 862, 915, infra.

[48] 4 Cyc. 329; 9 Cyc. 688; 4 Ency. Pl. & Pr. 926; 2 Greenleaf, Ev. § 104; 2 Smith's Leading Cases, 8 ed. Pt. II. p. 35; Lawson, Rights & Remedies, §§ 3689-3696; 3 Standard Ency. of Procedure, 201; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127. See § 915; Dunnell, Minn. Digest, § 10369; 2 Street, Foundations of Legal Liability, 220-227.

[49] 4 Cyc. 330; 9 Cyc. 686; Smith's Leading Cases, 8 ed. Pt. II. p. 35; 2 Greenleaf, Ev. § 104; Lawson, Rights & Remedies, §§ 3689-3696; 3 Standard Ency. of Procedure, 201; 1 Wait's Ac-

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there is an entire executory contract, and the plaintiff has performed a part of it, and then wilfully refuses, without legal excuse and against the defendant's consent, to perform the rest, he cannot recover either on the special contract or on a common count.[50] A recovery may be had under a common count where an express contract stipulates for no more than the law implies from the circumstances.[51] At common law a common count would never lie where there was a subsisting contract under seal. This limitation on the use of the common counts does not prevail in states where, as here, the distinction between sealed and unsealed contracts has been abolished.[52]

tions & Defences, 382; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127; Dermott v. Jones, 2 Wall. (U. S.) 1. See §§ 862, 915, infra, and Dunnell, Minn. Digest, §§ 1792, 1793, 1850, 1858, 10369.

[50] 40 Cyc. 2833; 15 Am. & Eng. Ency. of Law, 2 ed., 1087; Smith's Leading Cases, 8 ed. Pt. II. p. 37; Dunnell, Minn. Digest, §§ 1792, 1793, 1850, 10369; Dermott v. Jones, 2 Wall. (U. S.) 1. See § 915, infra.

[51] See §§ 759, 803.

[52] Protection Life Ins. Co. v. Palmer, 81 Ill. 88. See G. S. 1913 § 5704.

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SPECIFIC ACTIONS AND SUBJECTS

ABATEMENT AND REVIVAL

535. Pendency of another action—An answer pleading the pendency of another action must show clearly the identity of the two causes of action.[1] 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 in the supreme court, it is essential to allege at least that such appeal was taken and the supersedeas bond filed prior to the commencement of the second action.[2] After a defendant has served an answer pleading the pendency of a former action the plaintiff may dismiss such former action and plead the dismissal in his reply.[3]

536. Action prematurely brought—At common law and under the code the defence that the action is prematurely brought is matter in abatement to be specially pleaded as new matter unless it appears on the face of the complaint. If it so appears the objection may be raised by demurrer, or, if it appears from the plaintiff's own evidence, by motion for a nonsuit.[4]

537. Matter in abatement—Mode of pleading—Waiver—If matters in abatement are not asserted by demurrer or answer they are waived.[5]

ACCORD AND SATISFACTION

538. Sufficiency of pleas—Cases are cited below involving the sufficiency of particular pleas.[6]

[1] Majerus v. Hoscheid, 11 Minn. 243 (160); Wilson v. St. Paul etc. Ry., 44 Minn. 445, 46 N. W. 909. See West v. Hennessey, 58 Minn. 133, 59 N. W. 984.

[2] Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018.

[3] Page v. Mitchell, 37 Minn. 368, 34 N. W. 896; Nichols v. State Bank, 45 Minn. 102, 47 N. W. 462; Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018; Gibson v. Nelson, 111 Minn. 183, 192, 126 N. W. 731. See Peterson v. Alden, 49 Minn. 428, 52 N. W. 39; Wolf v. Great Northern Ry., 72 Minn. 435, 439, 75 N. W. 702.

[4] Iselin v. Simon, 62 Minn. 128, 64 N. W. 143.

[5] Gerrish v. Pratt, 6 Minn. 53(14) (former judgment); Williams v. McGrade, 18 Minn. 82(65, 71) (pendency of former action); Fitterling v. Welch, 76 Minn. 441, 79 N. W. 500 (absence of present right to relief sought); Somers v. Dawson, 86 Minn. 42, 90 N. W. 119 (pendency of another action). See Iselin v. Simon, 62 Minn. 128, 64 N. W. 143 (action prematurely brought).

[6] Wilson v. N. W. Nat. Life Ins. Co., 103 Minn. 35, 114 N. W. 251 (action for services in soliciting applications for insurance—answer held to allege properly a settlement of the claim); Forster County Bank v. Lammers, 117 Minn. 94, 134 N. W. 501 (acceptance of less than whole amount due on claim — answer held not to show a bona fide dispute).

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ACCOUNTS

539. Account stated—To enable one to recover as upon an account stated he must declare upon it as such. If, in his pleading, he relies on the original transactions or the items of the account, they are open to proof by either party.[7] In an action on an account stated it is unnecessary to allege a promise to pay the balance found due. It is sufficient to allege the facts from which the duty to pay arises.[8] The account cannot be impeached under a general denial. Mistake or error must be specially pleaded.[9] An "account stated" as a defence must be specially pleaded as new matter. When so pleaded it needs no reply.[10] Cases are cited below involving the sufficiency of particular pleadings.[11]

540. Accounting—In an action for an accounting it is unnecessary to allege a willingness to pay the amount found due.[12]

ACKNOWLEDGMENT

541. Pleading—In general—In declaring on an acknowledged instrument it is not essential to allege that it was acknowledged unless that fact is involved in the action.[13] A general allegation of acknowledgment is sufficient.[14] The fact of acknowledgment may be inferred from an allegation that the instrument was recorded.[15]

ADVERSE POSSESSION

542. Pleading—Necessity—Title by adverse possession may always be proved under a general allegation of ownership or title in fee.[16] A party may deny the title of the plaintiff and also plead adverse possession.[17] He may

[7] Northern Line Packet Co. v. Platt, 22 Minn. 413; McCormick Harvesting Machine Co. v. Wilson, 39 Minn. 467, 40 N. W. 571.

[8] Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122.

[9] Warner v. Myrick, 16 Minn. 91(81); Moody v. Thwing, 46 Minn. 511, 49 N. W. 229.

[10] Mower County v. Smith, 22 Minn. 97, 114.

[11] Reed v. Pixley, 25 Minn. 482 (answer pleading an account stated sustained); Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122 (complaint sustained); Black v. Berg, 101 Minn. 9, 111 N. W. 386 (complaint in justice court held not to show an account stated); Bouck v. Shere, 125 Minn. 122, 145 N. W. 808 (action on an express promise to pay the value of plaintiff's interest in a firm on its dissolution and for an account stated —recovery on express or implied promise allowable).

[12] Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472.

[13] Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14; Munger v. Baldridge, 41 Kan. 236, 21 Pac. 159; Laurent v. Lanning, 32 Or. 11, 51 Pac. 80. See § 585.

[14] Roy v. Bremoad, 22 Tex. 626.

[15] Smith v. Dennett, 15 Minn. 81(59).

[16] McArthur v. Clark, 86 Minn. 165, 90 N. W. 369; Sawbridge v. Fergus Falls, 101 Minn. 378, 112 N. W. 385.

[17] Willson v. Cleaveland, 30 Cal. 192.

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plead title by deed and also by adverse possession.[18] He may deny that he was in possession and also plead adverse possession.[19]

AGENCY

543. Pleading—In general—In pleading an act of a principal done through an agent the agency may be ignored and the act alleged as the act of the principal.[20] One may plead a contract made by him personally and prove thereunder a contract made by an undisclosed agent.[21] An allegation that one person was the agent of another in a specified transaction is an allegation of fact and sufficient.[22] Under such a general allegation of agency evidence is admissible of a general course of dealing between the parties as to prior and similar transactions to prove the agency.[23] An allegation of authority in an agent to do an act may be established by proof of ratification.[24] An allegation of notice to a person may be sustained by proof of notice to his agent, though the agency is not pleaded.[25] An allegation that by a lease 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.[26] Under a general denial of a complaint alleging that defendant hired plaintiff to work, and agreed to pay him, defendant may prove that he, as agent for another, made the contract of hiring alleged, and disclosed his principal to the plaintiff.[27] An admission in an answer that the defendant executed a bond sued on, in the form and manner set out in the complaint, carries with it an admission of all that is essential to a valid execution of the bond, with the terms contained therein, including the full authority of the agents by whom it was executed.[28] Cases are cited below involving the sufficiency of particular pleadings.[29]

[18] Leibheit v. Enright, 77 Kan. 321, 94 Pac. 203; Gilman v. Brown, 115 Wis. 1, 91 N. W. 227.

[19] Dillon v. Center, 68 Cal. 561, 10 Pac. 176.

[20] Weide v. Porter, 22 Minn. 429; Stees v. Kranz, 32 Minn. 313, 20 N. W. 241; Lee v. Minneapolis etc. Ry., 34 Minn. 225, 25 N. W. 399; Todd v. Minneapolis etc. Ry., 37 Minn. 358, 35 N. W. 5; Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462. See § 211.

[21] Kelly v. Barber, 120 N. Y. S. 163. See § 70.

[22] Spelman v. Fisher Iron Co., 56 Barb. (N. Y.) 151. See Eisenberg v. Matthews, 84 Minn. 76, 86 N. W. 870.

[23] Eisenberg v. Matthews, 84 Minn. 76, 86 N. W. 870.

[24] Janney v. Boyd, 30 Minn. 319, 15 N. W. 308.

[25] Marshall v. Gilman, 52 Minn. 88, 53 N. W. 811.

[26] Stees v. Kranz, 32 Minn. 313, 20 N. W. 241.

[27] Scone v. Amos, 38 Minn. 79, 35 N. W. 575.

[28] First State Bank v. C. E. Stevens Land Co., 123 Minn. 218, 143 N. W. 355.

[29] Cooper v. Stinson, 5 Minn. 201(160) (action for services—answer alleging payment to an agent without alleging the authority of the agent to receive the payment held insufficient); Horn v. Western Land Assn., 22 Minn. 233 (an allegation in an answer that an agent "had no authority to appoint or employ an attorney for his principal until a vacancy should exist in that position" is an admission of such authority in case such vacancy exists); Davenport v. Ladd, 38 Minn. 545, 38 N. W. 622 (an

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544. Counterclaim—A claim on the part of a principal against his agent for a profit alleged to have been made by him in the course of his employment, founded on the rule of law that all such profits, whether resulting from the performance or a violation of the agent's duties, belong to the principal, may be interposed as a counterclaim in an action by the agent against the principal to recover for services rendered in a transaction other than that in which the profit was made. If the profit was the result of a fraudulent violation of the agent's duties, the tort may be waived and a recovery had on an implied contract under a count for money had and received, without alleging the fraud or the facts showing it.[30]

ALIENS

545. Objection that plaintiff is alien enemy—Objection that the plaintiff is an alien enemy is waived unless taken by answer or demurrer.[31]

ALTERATION OF INSTRUMENTS

546. Pleading—In general—As a general rule the alteration of an instrument so as to affect its validity is new matter to be specially pleaded and cannot be admitted under a mere denial. But where the terms of a written contract have been altered and the contract is declared on as altered the alteration may be proved under a denial.[32] In an action on a note, where the answer denies an unqualified indorsement as alleged in the complaint, and alleges that it was without recourse, the defendant may prove that an attempted alteration by drawing pen and ink through the words "without recourse" was made after the indorsement was made.[33] In an action on a note the defendant, under a general denial, may prove that the note produced by plaintiff has been altered since its execution by the addition of the words "with interest."[34] Cases are cited below involving questions of pleading.[35]

allegation of agency and authority held insufficient); Hillis v. Stout, 42 Minn. 410, 44 N. W. 982 (complaint by principal against agent for fraud sustained); Mobile Fruit & Trading Co. v. Potter, 78 Minn. 487, 81 N. W. 392 (action by principal against agent refusing to disclose names of purchasers of goods sold by the agent for the principal—complaint sustained—presumption that agent acted properly and in the discharge of his duty).

[30] Schick v. Suttle, 94 Minn. 135, 102 N. W. 217. See §§ 183, 765.

[31] McNair v. Toler, 21 Minn. 175.

[32] Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14; Schwarz v. Oppold, 74 N. Y. 307; Farmers etc. Co. v. Siefke, 144 N. Y. 354, 39 N. E. 358. See Howlett v. Bell, 52 Minn. 257, 53 N. W. 1154; Babcock v. Murray, 58 Minn. 385, 59 N. W. 1038.

[33] Howlett v. Bell, 52 Minn. 257, 53 N. W. 1154.

[34] Schwarz v. Oppold, 74 N. Y. 307.

[35] White v. Johns, 24 Minn. 387 (held unnecessary for defendant to deny that he made a notation on an instrument); Babcock v. Murray, 58 Minn. 385, 59 N. W. 1038 (answer held not to admit proof of an alteration).

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APPEARANCE

547. Pleading—In general—A general allegation that a party "appeared" in an action is sufficient, without stating facts showing that the appearance was regular.[36]

ARBITRATION AND AWARD

548. Pleading—In general—In an action on contract an agreement to submit controversies arising out of the contract to arbitration is generally new matter to be specially pleaded and cannot be admitted under a denial.[37] In pleading an arbitration and award, if the award is set out, it must appear to be final and certain.[38]

ASSAULT AND BATTERY

549. Pleading—In general—It is unnecessary to specify the acts constituting the assault. It is sufficient to allege that the defendant "assaulted" the plaintiff.[39] In an action for simple assault and battery it is unnecessary to allege that it was wilful or malicious.[40] A complaint which shows actual violence inflicted on the person need not state that it was "with force" or "with force and arms."[41] An allegation immediately following a statement of the acts of violence that "thereby said plaintiff was greatly wounded and bruised," etc., is a sufficient averment that plaintiff's injuries were caused by the acts of defendant.[42] General allegations of the injuries inflicted are sufficient on demurrer or against objection on the trial.[43] Cases are cited below involving the sufficiency of complaints against masters for assaults committed by their servants,[44] and questions of variance.[45]

ASSUMPSIT

550. Pleading—In general—Pleadings in the form of the common counts under the common-law system of pleading, or substantially in that form, are sufficient under the code.[46] In actions on a promise implied by law it is un-

[36] Thomas v. Cameron, 17 Wend. (N. Y.) 59.

[37] Lautenschlager v. Hunter, 22 Minn. 267. See Brazill v. Isham, 12 N. Y. 9.

[38] Holt v. Berger-Crittenden Co., 81 Minn. 356, 84 N. W. 48.

[39] Mitchell v. Mitchell, 45 Minn. 50, 47 N. W. 308; Foran v. Levin, 76 Minn. 178, 78 N. W. 1047.

[40] Andrews v. Stone, 10 Minn. 72(52). See Mohr v. Williams, 95 Minn. 261, 104 N. W. 12.

[41] Greenman v. Smith, 20 Minn. 418 (370).

[42] Id.

[43] Evertson v. McKay, 124 Minn. 260, 144 N. W. 950.

[44] Campbell v. Northern Pacific Ry., 51 Minn. 488, 53 N. W. 768; Johanson v. Pioneer Fuel Co., 72 Minn. 405, 75 N. W. 719; Foran v. Levin, 76 Minn. 178, 78 N. W. 1047.

[45] Ward v. Haws, 5 Minn. 440(359); Jacobs v. Hoover, 9 Minn. 204(189).

[46] See § 631.

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necessary to allege the promise. It is sufficient to allege the facts from which the law implies the promise or imposes the obligation.[47] At common law it was necessary to alleged the promise.[48]

ATTACHMENT

551. Actions on bond—Pleading—A complaint on an attachment bond has been held insufficient on demurrer for failure to allege a recovery of judgment by defendant.[49]

ATTORNEY AND CLIENT

552. Actions for services—Pleading—An attorney may recover for his services under a common indebitatus count.[50] A complaint for services and for money expended in connection therewith has been sustained against an objection first made on the trial though it did not specifically describe the services or their value and the amount expended was alleged in gross.[51] A complaint by one attorney against two others for a balance due upon an agreement between the three to divide the fees in a case has been sustained, the defendants having received all the fees.[52] An answer that the services were rendered almost exclusively by an agent of plaintiff, and that defendant had paid the agent, without alleging the authority of the agent to receive the payment, presents no defence.[53]

BAIL

553. Pleading—In general—Cases are cited below involving the sufficiency of particular complaints on recognizances.[54]

BAILMENT

554. Pleading—In general—A complaint alleging that plaintiff intrusted money to defendant upon his promise to keep it safely and return it to the plaintiff on demand, and that defendant converted the money to his own use and refused to repay the same to plaintiff on demand, has been held to state a

[47] See § 588.

[48] Foerster v. Kirkpatrick, 2 Minn. 210 (171); Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

[49] Crandall v. Rickley, 25 Minn. 119. See, Dunnell, Minn. Digest, § 638.

[50] See § 910.

[51] Allis v. Day, 14 Minn. 516(388).

[52] Comstock v. Baldwin, 125 Minn. 357, 147 N. W. 278.

[53] Cooper v. Stinson, 5 Minn. 201(160) (answer alleging a payment to an agent of plaintiff held not to state a defence).

[54] State v. Grant, 10 Minn. 39(22) (unnecessary to plead non-payment of penalty—necessary to allege filing of recognizance in proper court); State v. McGuire, 42 Minn. 27, 43 N. W. 687 (complaint sustained); State v. Bongard, 89 Minn. 426, 94 N. W. 1093 (complaint sustained).

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cause of action ex contractu for a breach of the contract of bailment.[55] A complaint against a bailee for the destruction of the property bailed, where the bailment is reciprocally beneficial to the parties, must show negligence on the part of the bailee.[56]

BANKRUPTCY

555. Pleading—In general—Under the statute[57] it is sufficient to allege that one was "duly adjudged" a bankrupt, specifying the court and time.[58] A plea in bankruptcy is good, the bankrupt having no interest in what he is suing for. If a bankrupt sues a demurrer will lie, as the interest which he has in the fund, founded upon the prospect of a surplus, is not sufficient to entitle him to sue. The supposition of law is that there will be no surplus.[59] It is provided by the bankruptcy act that no setoff or counterclaim shall be allowed in favor of any debtor of the bankrupt which is not provable against the estate.[60]

BASTARDY

556. Proceedings to charge father—Complaint—A complaint substantially in the language of the statute is sufficient.[61] It is not essential to state the time or place of the sexual intercourse resulting in pregnancy.[62] An allegation that the child "is a bastard" implies that it is alive at the time of the complaint.[63] In the district court the trial proceeds on the complaint filed in the justice court, but the defendant does not waive a valid objection to the complaint because taken for the first time in the district court. If the complaint is indefinite it may be made more definite in the district court.[64]

BILLS AND NOTES

557. Complaint—Pleading by copy or legal effect—Common counts—A bill or note may be pleaded according to its legal effect, or by setting it out in haec verba, or by attaching it to a pleading as an exhibit and making it a part thereof by appropriate reference.[65] It is not necessary to declare specially

[55] Wickstrom v. Swanson, 107 Minn. 482, 120 N. W. 1090.

[56] St. Paul & Sioux City Ry. v. Minneapolis etc. Ry., 26 Minn. 243, 2 N. W. 700.

[57] R. L. 1905 § 4146; G. S. 1913 § 7772.

[58] Broadway Trust Co. v. Manheim, 95 N. Y. S. 93.

[59] Donohue v. Ladd, 31 Minn. 244, 17 N. W. 381.

[60] Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

[61] State v. Snure, 29 Minn. 132, 12 N. W. 347; State v. Smith, 47 Minn. 475, 50 N. W. 605; State v. Brathovde, 81 Minn. 501, 84 N. W. 340.

[62] State v. Smith, 47 Minn. 475, 50 N. W. 605; State v. Brathovde, 81 Minn. 501, 84 N. W. 340.

[63] State v. Snure, 29 Minn. 132, 12 N. W. 347.

[64] State v. Brathovde, 81 Minn. 501, 84 N. W. 340.

[65] Elliot v. Roche, 64 Minn. 482, 67 N. W. 539.

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on a bill, note or check, but recovery thereon may be had under the common counts.[66] The practice of using the common counts has never been followed in this state.

558. Same—Consideration—It is unnecessary to allege a consideration,[67] and if one is alleged it need not be proved by affirmative evidence.[68] If the bill or note is set out and contains the words "for value received," such recital is a sufficient allegation of a consideration.[69]

559. Same—Execution and delivery—The execution and delivery of the bill or note are sufficiently alleged by the word "made." This word has a technical significance and includes delivery.[70] Where it is alleged that defendant made, executed and delivered a note, whereby he promised to pay a specified sum of money to a certain payee therein named, it is unnecessary to allege that the note was delivered to such payee.[71]

560. Same—Title of plaintiff—Title once shown to exist is presumed to continue until the contrary is shown. If the complaint shows that the plaintiff is the person to whom the note is made payable, it is unnecessary for him to allege that he is still the owner and holder, or to make any other allegation to show the continuance of his title.[72] If the plaintiff is not the payee and the note is not indorsed in blank or to bearer, the plaintiff must show title in himself by alleging an indorsement, assignment, or delivery to him by the payee, or an indorsee of the payee. It is insufficient for him merely to allege that he is the owner and holder of the note.[73] If a note is indorsed in blank or to bearer it is perhaps sufficient for the plaintiff merely to allege that he is the owner and holder thereof.[74] If a note is made payable to the plaintiff "or order," the effect is the same as if it were payable simply to the plaintiff, and it

[66] 8 Cyc. 18; 14 Ency. Pl. & Pr. 561.

[67] Pinney v. King, 21 Minn. 514; Hayward v. Grant, 13 Minn. 165(154); Adams v. Adams, 25 Minn. 72.

[68] Friedman v. Johnson, 21 Minn. 12.

[69] Frank v. Irgens, 27 Minn. 43, 6 N. W. 380; Elmquist v. Markoe, 39 Minn. 494, 40 N. W. 825; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668.

[70] Hoag v. Mendenhall, 19 Minn. 335 (259, 291). See Romans v. Langevin, 24 Minn. 312, 25 N. W. 638; Holbrook v. Sims, 39 Minn. 122, 39 N. W. 74, 140; Topping v. Clay, 65 Minn. 346, 68 N. W. 1.

[71] Topping v. Clay, 65 Minn. 346, 68 W. 34.

[72] Jaeger v. Hartman, 13 Minn. 55(50); Hayward v. Grant, 13 Minn. 165(154); Cabbott v. Radford, 17 Minn. 320(296).

[73] Topping v. Clay, 62 Minn. 3, 63 N. W. 1038; Foster v. Johnson, 39 Minn. 378, 40 N. W. 255; Nat. Life & Trust Co. v. Gifford, 90 Minn. 358, 96 N. W. 919. See Bennett v. Crowell, 7 Minn. 385 (306); Welsh v. First Nat. Bank, 103 Minn. 186, 114 N. W. 765. This rule may have been abrogated by statute. See G. S. 1913 §§ 5863, 5871, 6003.

[74] Topping v. Clay, 62 Minn. 3, 63 N. W. 1038. See G. S. 1913 §§ 5863, 5871, 6003.

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may be declared on accordingly.[75] Cases are cited below holding various allegations of title in the plaintiff sufficient,[76] or insufficient.[77]

561. Same—Indorsement and assignment—An indorsement may be alleged by the single word "indorsed," which imports everything necessary to pass the title.[78] An allegation that a note was "sold, assigned, and delivered," is sufficient to admit evidence of an indorsement to show a transfer.[79] An allegation that a note was duly assigned and transferred to plaintiff has been held sufficient though it did not directly allege that the assignment was made by the payee.[80] A general allegation of assignment is sufficient.[81] To claim

[75] Bennett v. Crowell, 7 Minn. 385 (306).

[76] Hayward v. Grant, 13 Minn. 165 (154) (the complaint alleged the making and delivery to plaintiffs of a note payable to H. C. & H., the surnames of plaintiffs, but did not allege plaintiffs to be the payees—held that they are presumed to be the payees); Frasier v. Williams, 15 Minn. 288(219) ("that before the maturity of the said note the said Aaron March, for value received, sold, transferred, indorsed, and delivered it to the plaintiff"); Cabbott v. Radford, 17 Minn. 320(296) (presumption that persons to whom note is alleged to have been delivered were the payees and owners thereof); Downer v. Read, 17 Minn. 493(470) (complaint alleged the execution and delivery of the note to A., the payee, and that before maturity he duly indorsed and transferred it to plaintiff); State v. Torinus, 22 Minn. 272 (an allegation "that the said note, before maturity, was, for a valuable consideration, duly indorsed, transferred and delivered to this plaintiff, who is now the owner and holder thereof" shows sufficiently that plaintiff has capacity or authority to take and hold the note); Perkins v. Merrill. 37 Minn. 40, 33 N. W. 3 (note payable to order of A—complaint alleged death of A and that the note was subsequently transferred and assigned by the executor of A to plaintiff and that plaintiff held and owned the note as heir of A); Holbrook v. Sims, 39 Minn. 122, 39 N. W. 74, 140 (allegation of making of note and mortgage in favor of plaintiff); Nelson v. Nugent, 62 Minn. 203, 64 N. W. 92 (action on note by A as receiver of —complaint alleged that note was made by defendants to the order of "plaintiff" —this amounted to an allegation that in the note A was described as receiver of B—unnecessary for A to allege in his complaint other facts sufficient to show that he was duly appointed such receiver); Red River Valley Invest. Co. v. Cole, 62 Minn. 457, 64 N. W. 1149 (complaint against an administrator personally); Topping v. Clay, 65 Minn. 346, 68 N. W. 34 (allegation that defendant made, executed and delivered a note, whereby he promised to pay a specified sum to a certain payee therein named—unnecessary to allege that note was delivered to such payee).

[77] Marine Nat. Bank v. Humphreys, 62 Minn. 141, 64 N. W. 148 (action by bank to which note had been delivered by another bank for collection—subrogation).

[78] Hoag v. Mendenhall, 19 Minn. 335 (289, 291); Citizens' State Bank v. E. A. Tessman & Co., 121 Minn. 34, 45, 140 N. W. 178. See Downer v. Read, 17 Minn. 493(470); G. S. 1913 § 6003.

[79] Red River Valley Invest. Co. v. Cole, 62 Minn. 457, 64 N. W. 1149.

[80] Topping v. Clay, 65 Minn. 346, 68 N. W. 34.

[81] Hoag v. Mendenhall, 19 Minn. 335 (289, 290). See Foster v. Johnson, 39 Minn. 378, 40 N. W. 255; Red River Valley Invest. Co. v. Cole, 62 Minn. 457, 64 N. W. 1149; Topping v. Clay, 65 Minn. 346, 68 N. W. 34.

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the benefits of a bona fide purchaser it is unnecessary to allege expressly that the indorsement was for value, before maturity, and in the due course of business, as these things are implied in a general allegation of indorsement or assignment.[82] If 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.[83] To charge an irregular indorser it is sufficient to allege that prior to the delivery of the note to the plaintiff by the defendant A, the defendant B indorsed the same for the purpose of giving credit thereto with plaintiff.[84]

562. Same—Demand and notice of dishonor—In an action against an indorser the complaint must allege a demand of payment and notice of dishonor.[85]

563. Same—Date of maturity—In an action on a note it is unnecessary to allege the date when the note fell due. In the absence of any such allegation it will be presumed that it was due presently, or at least on demand.[86]

564. Same—Mistake—A mistake in a note should be alleged in the complaint, but a defect in this regard may be disregarded where the evidence of the mistake is received without objection.[87]

565. Answer—Denial of execution or indorsement—By virtue of statute the denial of the execution or indorsement of a bill or note must be specific and personally verified in order to shift the burden of proof.[88] A denial insufficient under the statute may nevertheless be sufficient to raise an issue.[89] An answer denying that a note was ever transferred to the plaintiff, and alleging that the payee is still the owner of it, puts in issue an alleged sale and indorsement to the plaintiff.[90] Cases are cited below involving the sufficiency of various forms of denial.[91]

[82] Hodgson v. Mather, 92 Minn. 299, 100 N. W. 87. See G. S. 1913 §§ 5857, 5864, 5871.

[83] Crosby v. Wright, 70 Minn. 251, 73 N. W. 162.

[84] Stein v. Passmore, 25 Minn. 256.

[85] Michaud v. Lagarde, 4 Minn. 43(21); Burwell v. Gaylord, 119 Minn. 426, 138 N. W. 685.

[86] Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668.

[87] Almich v. Downey, 45 Minn. 460, 48 N. W. 197.

[88] R. L. 1905 § 4730; G. S. 1913 § 8448. See Dunnell, Minn. Digest, § 3365.

[89] McCormick Harvesting Machine Co. v. Doucette, 61 Minn. 40, 63 N. W. 95; Porter v. Winona & Dakota Grain Co., 78 Minn. 210, 80 N. W. 965.

[90] Tarbox v. Gorman, 31 Minn. 62, 16 N. W. 466.

[91] Morton v. Jackson, 2 Minn. 219(180) (complaint alleged the making of a note and its indorsement to plaintiff—answer admitted the making, but, as to the other allegations of the complaint, denied any knowledge or information thereof sufficient to form a belief — denial held good); Hayward v. Grant, 13 Minn. 165 (154) (answer admitted the making of a note similar to that described in the complaint, but denied that defendant delivered to plaintiffs the note described in the complaint and alleged that he delivered it to A—held the legal effect of

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566. Same—Denial of plaintiff's title—It has been held that a denial of an allegation that the plaintiff "is the owner and holder" of a note was ineffectual;[92] that a general denial put in issue the transfer and ownership of a note;[93] that a general denial put in issue an allegation of transfer before maturity;[94] that a denial that the defendants ever promised "to pay the plaintiffs or their order" raised an issue;[95] that a setoff for breach of warranty was not inconsistent with a denial of plaintiff's ownership.[96]

567. Same—Want or failure of consideration—Cases are cited below involving the sufficiency of pleas of want of consideration,[97] and failure of consideration.[98]

568. Same—Various defences—Cases are cited below involving the sufficiency of answers pleading fraud;[99] duress;[1] payment;[2] part payment;[3] an

the delivery to A was a delivery to the payees—denial of delivery to plaintiffs held immaterial—an allegation that plaintiffs have not now the possession of the note and that when the action was commenced the note was in the possession of a third party held immaterial); Frasier v. Williams, 15 Minn. 288(219) (a general denial in an answer of the allegations in a complaint, "that before the maturity of said note the said A. M., for value received, sold, transferred, indorsed and delivered it to plaintiff," held to put in issue only the time, not the fact of transfer); Downer v. Read, 17 Minn. 493(470) (denial that transfer was before maturity—denial that plaintiff "is now, or that he was at the time of the commencement of this action, the legal or bona fide owner and holder of the said note"); Henry v. Hinman, 21 Minn. 378 (a denial of execution coupled with an allegation that it was obtained from defendant when he was drunk held not a denial of execution).

[92] Freeman v. Curran, 1 Minn. 170 (144); Frasier v. Williams, 15 Minn. 288(219); Downer v. Read, 17 Minn. 493(470); Holbrook v. Sims, 39 Minn. 122, 39 N. W. 74, 140. These cases are to be followed with caution.

[93] Nunnemacker v. Johnson, 38 Minn. 390, 38 N. W. 351; Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637.

[94] Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637.

[95] Bennett v. Crowell, 7 Minn. 385 (306).

[96] Wilson v. Reedy, 32 Minn. 256, 20 N. W. 153.

[97] Dunning v. Pond, 5 Minn. 296(234); Dunning v. Pond, 5 Minn. 302(238); Lamprey v. Munch, 21 Minn. 379; Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N. W. 591; Parker v. Jewett, 52 Minn. 514, 55 N. W. 56; Grimes v. Ericson, 94 Minn. 461, 103 N. W. 334; Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111 (answer held to show want of consideration and that the note was for accommodation).

[98] Conroy v. Logue, 87 Minn. 289, 91 N. W. 1105; Grimes v. Ericson, 94 Minn. 461, 103 N. W. 334.

[99] Cummings v. Thompson, 18 Minn. 246(228); Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Parker v. Jewett, 52 Minn. 514, 55 N. W. 56; Bank of Montreal v. Richter, 55 Minn. 362, 57 N. W. 61.

[1] Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N. W. 591.

[2] Esch v. Hardy, 22 Minn. 65.

[3] Colter v. Greenhagen, 3 Minn. 126 (74).

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extension of a collateral note;[4] that defendant was a bona fide indorsee;[5] a written agreement that defendant should not be held on his indorsement;[6] the commencement of an action to rescind for fraud.[7]

569. Issues—Evidence admissible under pleadings—Under a general denial to a complaint in the usual form evidence that an indorsee took the note with notice or after maturity is admissible.[8] Cases are cited below involving questions as to the issues formed by particular pleadings and the evidence admissible thereunder.[9]

BONDS

570. Pleading—In general—An allegation that a bond was "made" or "made and delivered" is a sufficient allegation of its execution.[10] It is the usual and the better practice to set out the bond in full in the body of the complaint. If the consideration does not appear in the bond it should be directly alleged. A breach must be directly alleged, as, for example, non-payment. In actions on indemnifying bonds the complaint must show actual damages.

[4] Harm v. Davies, 79 Minn. 311, 82 N. W. 585.

[5] Welsh v. First Nat. Bank, 103 Minn. 186, 114 N. W. 765.

[6] Collom v. Bixby, 33 Minn. 50, 21 N. W. 855.

[7] Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533.

[8] Hodgson v. Mather, 92 Minn. 299, 100 N. W. 87; Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637.

[9] Hartshorn v. Green, 1 Minn. 92(71) (under a plea that plaintiff has no title defendant may prove a transfer by plaintiff to a third party); Webb v. Michener, 32 Minn. 48, 19 N. W. 82 (under a denial in an answer that the note sued on was given for any consideration, defendant may show that it was given in connection with a mortgage for a fraudulent purpose, to shield his property from his creditors and that he was not in fact indebted to the plaintiff); Clark v. McNaughton, 46 Minn. 8, 48 N. W. 412 (a reply construed as forming an issue on a question of usury); Howlett v. Bell, 52 Minn. 257, 53 N. W. 1154 (a denial of unqualified indorsement held to admit proof of an alteration); Babcock v. Murray, 58 Minn. 385, 59 N. W. 1038 (proof of an illegal consideration held inadmissible under an allegation of no consideration); Red River etc. Co. v. Cole, 62 Minn. 457, 64 N. W. 1149 (evidence of an indorsement held admissible under an allegation that the note was "sold, assigned, and delivered"); Klein v. Funk, 82 Minn. 3, 84 N. W. 460 (proof of a transfer of a note for indemnity held admissible under the issues); Kaufman v. Barbour, 103 Minn. 173, 114 N. W. 738 (held that there was no such variance between pleadings and proof as to prevent recovery for contribution upon the theory that the note was joint and several); Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637 (answer held not to admit that plaintiff became owner of note for value before maturity); Reeves & Co. v. Boyd, 114 Minn. 378, 131 N. W. 336 (allegations held sufficient to constitute a counterclaim and to raise issues thereon—breach of warranty); Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940 (held error to exclude evidence of knowledge by the purchaser concerning fraudulent means employed in obtaining the signature to the instrument).

[10] La Fayette Ins. Co. v. Rogers, 30 Barb. (N. Y.) 491; Hazelet v. Holt County, 51 Neb. 716, 71 N. W. 717.

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Cases are cited below involving the sufficiency of various complaints.[11] admission is an answer that the defendant executed a bond sued on, in t form and manner set out in the complaint, carries with it an admission all that is essential to a valid execution of the bond, with the terms contain therein, including the full authority of the agents by whom it was executed

BOUNDARIES

571. Statutory action—Pleading—The pleadings in a statutory action determine boundaries are governed by the general rules of pleading except otherwise provided by the statute.[13]

572. Counterclaim—In an action to enjoin a trespass on the land of th plaintiff, the defendant may plead and prove as a counterclaim that the allege claim of trespass rests upon a disputed boundary line between the parties, an have the true line determined by the judgment of the court.[14]

BREACH OF PROMISE OF MARRIAGE

573. Pleading—In general—To justify the recovery of punitive damages the complaint must allege that the defendant acted maliciously, wantonly, or

[11] State v. Grant, 10 Minn. 39(22) (in a complaint on a recognizance it is unnecessary to allege non-payment of the penalty); Nininger v. Carver County, 10 Minn. 133(106) (in an action on a bond of county commissioners it is sufficient to allege that the defendants executed in due form of law and issued the bond); Hall v. Williams, 13 Minn. 260(242) (bond of deputy revenue collector—appointment not sufficiently alleged—recital in bond insufficient—demand sufficiently alleged); Sprague v. Wells, 47 Minn. 504, 50 N. W. 535 (complaint on penal bond held to show only nominal damages—recitals in bond as an exhibit ineffectual); Friesenhahn v. Merrill, 52 Minn. 55, 53 N. W. 1024 (complaint on stay bond on appeal held insufficient); Bates v. Watson, 76 Minn. 332, 79 N. W. 309 (complaint on a fidelity bond sustained); Vent v. Duluth Trust Co., 77 Minn. 523, 80 N. W. 640 (complaint on stay bond on appeal—necessity of showing damages); McCollister v. Bishop, 78 Minn. 228, 80 N. W. 1118 (complaint on bond of assignee in insolvency sustained —unnecessary to allege leave of court to sue on bond); Union Sewer Pipe Co. v. Olson, 82 Minn. 187, 84 N. W. 756 (complaint on bond of public contractor held insufficient—effect of bond as an exhibit); Hollister v. United States F. & G. Co., 84 Minn. 251, 87 Minn. 776 (complaint on bond for removal of case in federal courts sustained); Portner v. Wilfahrt, 85 Minn. 73, 88 N. W. 418 (bond for support of parents sustained); Michaud v. Erickson, 108 Minn. 356, 122 N. W. 324 (complaint on bond to secure performance of grading contract sustained); Farmers Co-operative Elevator Co. v. Enge, 122 Minn. 316, 142 N. W. 328 (complaint on bond of commission merchant sustained).

[12] First State Bank v. C. E. Stevens Land Co., 123 Minn. 218, 143 N. W. 355.

[13] R. L. 1905 § 4455; G. S. 1913 § 8096. See Rock v. Donora Mining Co., 91 Minn. 259, 97 N. W. 889 (complaint under statute sustained).

[14] Hackett v. Kanne, 98 Minn. 240, 107 N. W. 1131.

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to oppress or injure the plaintiff.[15] If it is desired to prove seduction in aggravation of damages it may be necessary to allege it.[16]

BRIDGES

574. Actions for injuries from defective bridges—Pleading—Cases are cited below involving the sufficiency of complaints for personal injuries resulting from defective bridges.[17]

BROKERS

575. Real estate brokers—Actions for commission—Pleading—A broker may recover his commission under a common indebitatus count.[18] Where a complaint, in an action for compensation for services rendered, alleges the reasonable value thereof, and also that defendant agreed to pay a certain sum therefor, and there is no election at the trial upon which theory, quantum meruit or express contract, plaintiff will proceed with the trial, and both issues are retained in the case, plaintiff is at liberty to prove either the agreed or reasonable value, and recover a verdict accordingly. Where, in such a case, a general verdict is returned for defendant, a judgment rendered thereon is res judicata, and constitutes a complete bar to a subsequent action for the reasonable value of the services, even though no evidence thereof was presented on the trial of the first action.[19] Cases are cited below involving questions of pleading.[20]

[15] Hively v. Golnick, 123 Minn. 498, 144 N. W. 213.

[16] See Schmidt v. Durnham, 46 Minn. 227, 49 N. W. 126; Note, 33 L. R. A. (N. S.) 702.

[17] Shartle v. Minneapolis, 17 Minn. 308 (284) (complaint against municipality sustained); Berry v. Dole, 87 Minn. 471, 92 N. W. 334 (complaint against private individuals—defective bridge over gutter in street—complaint held insufficient for failure to show that injury was caused by the negligence of defendants); Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623, 624 (complaint against contractor sustained).

[18] See § 910.

[19] Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124.

[20] McAllister v. Welker, 39 Minn. 535, 41 N. W. 107 (complaint sustained); MacFee v. Horan, 40 Minn. 30, 41 N. W. 239 (defence that broker was acting double inadmissible under a general denial); Rothschild v. Burritt, 47 Minn. 28, 49 N. W. 393 (release or waiver of commission inadmissible under a general denial); Harriott v. Holmes, 77 Minn. 245, 79 N. W. 1003 (complaint sustained); Hanson v. Diamond Iron Mining Co., 87 Minn. 505, 92 N. W. 447 (fact that money received by broker was not paid as a commission held admissible under a general denial in the reply); Lemon v. DeWolf, 89 Minn. 465, 95 N. W. 316 (complaint sustained — variance if any held waived); Reishus Remer Land Co. v. Benner, 91 Minn. 401, 98 N. W. 186 (complaint on implied contract for reasonable value of services — defence that services were rendered under an express contract inadmissible under a general denial); Schick v. Suttle, 94 Minn. 135, 102 N. W. 217 (a claim on the part of the principal against his broker for a profit alleged to have been made by him in the course of his employment, founded on the rule of law

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576. Pleading—In general—It is unnecessary in a complaint for cancel tion to allege a disaffirmance, or a previous offer to return what plaintiff h received under the contract, or to offer to do what the court may require as condition of granting relief.[21] In an action to set aside an instrument on tl ground of fraud, undue influence, or duress, the complaint must allege the ult mate facts of the fraud, undue influence, or duress, but it is unnecessary t allege mere evidentiary facts, by proof of which such ultimate facts are to b established.[22] Where a conveyance was in fact the deed of a corporation, bu voidable because of fraud, if stockholders desire to have it set aside on tha ground, they must allege the facts constituting the alleged fraud, and ask th appropriate relief; they cannot prove the fraud under a mere denial of th execution of the deed by the corporation.[23] Cases are cited below involving the sufficiency of particular complaints.[24]

577. Variance—It is an established doctrine of the courts of equity, that where a bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not, in general, entitled to a decree, by establishing some one or more of the facts, quite independent of fraud, but which might of themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated. This is not in conflict with the rule that in a bill alleging fraud the facts may be of such

that all such profits, whether resulting from the performance or a violation of the broker's duty, belong to the principal, may be interposed as a counterclaim in an action by the broker against the principal to recover for services rendered in a transaction other than that in which the profit was made); Remple v. Hopkins, 101 Minn. 3, 111 N. W. 385 (complaint held sufficient and not to show bad faith on part of broker); Annabil v. Traverse Land Co., 108 Minn. 37, 121 N. W. 233 (answer a general denial—right of broker to commission from both parties not in issue); Hill v. Glasspoole, 117 Minn. 537, 136 N. W. 261 (complaint against corporation sustained); Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347 (complaint on express contract—answer held to raise issue as to whether contract was entire or severable—recovery on quantum meruit not allowed).

[21] Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533. See Marple v. Minneapolis etc. Ry., 115 Minn. 262, 267, 132 N. W. 333.

[22] Johnson v. Velve, 86 Minn. 46, 90 N. W. 126.

[23] Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547.

[24] Buckholz v. Grant, 15 Minn. 406 (329) (allegations of title held not predicated on other allegations in respect to how title was acquired); Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533 (complaint based on fraud sustained); Mogren v. Finley, 112 Minn. 453, 128 N. W. 828 (complaint by person arriving at majority to cancel land contract entered into while he was an infant sustained); Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735 (complaint for cancelation of an insurance policy for fraud after a loss held not to show irreparable injury—held to show an adequate remedy at law).

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a character, and be so stated, that relief may be granted on the ground of a gross mistake.[25]

CARRIERS

578. Actions for loss or non-delivery of goods or injury thereto—Pleading—Here, as elsewhere,[26] negligence may be charged in general terms.[27] It is sufficient to allege in general terms the delivery of the goods to the carrier and their injury in transit. It is unnecessary to specify the particular cause which produced the injury.[28] An allegation of a loss of "certain goods, the property of the plaintiff" sufficiently shows the interest of the plaintiff.[29] An allegation that the property "belonged" to the plaintiff is sufficient.[30] A mere allegation of delivery by plaintiff has been held sufficient to show his ownership or interest.[31] In an action for non-delivery the complaint must allege a demand,[32] but a defect in this regard may be cured by the answer.[33] Cases are cited below involving various questions of pleading.[34]

579. Injuries to passengers—Defective appliances—Under an allegation in a complaint that the defendant negligently made up its train upon an

[25] Leighton v. Grant, 20 Minn. 345 (298, 306).

[26] See § 816.

[27] McCauley v. Davidson, 10 Minn. 418 (335); Hinton v. Eastern Ry., 72 Minn. 339, 75 N. W. 373; Smith v. Great Northern Ry., 92 Minn. 11, 99 N. W. 47. General allegations of negligence are controlled and limited by specific allegations. Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4. See Note, 59 L. R. A. 239.

[28] Boehl v. Chicago etc. Ry., 44 Minn. 191, 194, 46 N. W. 333.

[29] Ames v. First Div. etc. Ry., 12 Minn. 412(295).

[30] Zalk v. Great Northern Ry., 98 Minn. 65, 107 N. W. 814.

[31] Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490.

[32] Jarrett v. Great Northern Ry., 74 Minn. 477, 77 N. W. 304; Zalk v. Great Northern Ry., 98 Minn. 65, 107 N. W. 814.

[33] Zalk v. Great Northern Ry., 98 Minn. 65, 107 N. W. 814.

[34] Ames v. First Div. etc. Ry., 12 Minn. 412(295) (interest of plaintiff sufficiently alleged—denial of value of goods held to raise an issue—ownership of goods in issue); Ortt v. Minneapolis etc. Ry., 36 Minn. 396, 31 N. W. 519 (fact that goods were damaged after they had passed beyond defendant's line held admissible under a general denial); Armstrong v. Chicago etc. Ry., 45 Minn. 85, 47 N. W. 459 (a complaint charging negligence in the care of property in transit and also after arrival while in the custody of the carrier as a warehouseman held to state a single cause of action); Jarrett v. Great Northern Ry., 74 Minn. 477, 77 N. W. 304 (complaint alleged that defendant agreed to carry the goods "for a valuable consideration"—unnecessary to allege that freight was paid or offered to be paid); Smith v. Great Northern Ry., 92 Minn. 11, 99 N. W. 47 (complaint for loss of horses sustained); Banks v. Penn. Ry., 111 Minn. 48, 126 N. W. 410 (variance as to delivery held not fatal); Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490 (informal complaint for damage to cattle sustained—plaintiff was consignor and consignee—an assignment by him of his right to receive the goods would be new matter—informal allegation of damages held not fatal).

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improper and unsafe plan, and negligently failed to provide sufficient a proper couplings between the cars, evidence was admissible to show that the brake hose had not been connected at the time the train started.[35] A complaint by a passenger in an automobile has been construed as charging negligence not only as to speed but also as to its management.[36]

580. Wrongful ejection of passengers—Pleading—A complaint alleged that plaintiff was a passenger on defendant's train, and that the agents of defendant in charge of the train wilfully, maliciously, forcibly and violently, and while the train was running at a rapid rate of speed, kicked and ejected him from the steps of the car onto the ground, and under the cars, whereby he sustained certain damages. It was held that the cause of action so pleaded was one in tort; the gravamen of the complaint being an intentional and personal assault and battery.[37]

581. Connecting carriers—Defective cars—A complaint has been held not to state a cause of action against either of the appellants because it failed to allege that the car by which the plaintiff, a servant of a shipper, was injured, was in an unsafe condition when it left the respective lines of the appellants, or either of them.[38]

582. Demurrage—Pleading—Cases are cited below involving questions of pleading under the demurrage law.[39]

CONSPIRACY

583. Pleading—In general—Cases are cited below involving various questions of pleading.[40]

[35] Campbell v. Duluth & Northeastern Ry., 111 Minn. 410, 127 N. W. 413.

[36] Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434.

[37] Mykleby v. Chicago etc. Ry., 39 Minn. 54, 38 N. W. 763.

[38] Olson v. Penn. & Ohio Fuel Co., 77 Minn. 528, 80 N. W. 698.

[39] Martin v. Great Northern Ry., 110 Minn. 118, 124 N. W. 825 (answer held to state facts bringing case within an exception from liability under the statute); W. H. Ferrel & Co. v. Great Northern Ry., 114 Minn. 531, 131 N. W. 1135 (complaint held to state a cause of action independent of the demurrage act); Zetterberg v. Great Northern Ry., 117 Minn. 495, 136 N. W. 295 (complaint sustained though it did not allege a written demand for cars—statute does not diminish common-law rights of shippers—case held not within demurrage act).

[40] Stewart v. Cooley, 23 Minn. 347 (complaint against judge for conspiring with others to maliciously prosecute plaintiff sustained); Jones v. Morrison, 31 Minn. 140, 16 N. W. 854 (conspiracy of directors of a corporation—action by stockholder — what matters may be joined in complaint); O'Connor v. Jefferson, 45 Minn. 162, 47 N. W. 538 (complaint charging a conspiracy to defraud the plaintiff of his property sustained); Whiting v. Clugston, 73 Minn. 6, 75 N. W. 759 (conspiracy in execution of a mortgage—fraudulent appropriation of sum loaned — complaint in foreclosure and for a receiver—joinder of causes of action); Ertz v. Produce Exchange, 79 Minn. 140, 81 N. W. 737 (complaint by

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584. How alleged—A contract may be alleged either according to its legal effect,[41] or according to its terms—in haec verba.[42] If a written contract is pleaded according to its terms it may be set out in the body of the pleading or it may be attached to the pleading as an exhibit and made a part thereof by apt reference.[43] If a contract is pleaded in haec verba its terms will control any inconsistent allegations,[44] and it is neither necessary nor proper for the pleader to state the legal inferences which he draws from them.[45] In setting out an instrument it is not generally necessary to include the names of witnesses or an acknowledgment.[46] An allegation that it was "mutually agreed" is one of fact and appropriate.[47]

585. Execution of written contracts—An allegation that a person "made" or "entered into" or "executed" or "indorsed" or "assigned" a written instrument or contract sufficiently imports, on demurrer, everything essential to a valid execution, including signing, sealing, attestation, acknowledgment and delivery to the proper person and acceptance.[48] It implies the capacity or

commission merchant charging a produce exchange with conspiracy to injure his business sustained); Boasberg v. Walker, 111 Minn. 445, 127 N. W. 467 (complaint for conspiracy to secure the vacation of an alley held insufficient); Sawyer v. Nat. Surety Co., 112 Minn. 28, 127 N. W. 435 (complaint against a surety company—plaintiff's name placed on "declined list"—complaint held not to state a cause of action for conspiracy); Dewing v. Dewing, 112 Minn. 316, 127 N. W. 1051 (complaint held to state a cause of action for conspiracy to defraud a wife of her interest in her husband's realty by means of fraudulent judgments).

[41] Estes v. Farnham, 11 Minn. 423(312, 319); Weide v. Porter, 22 Minn. 429; McArthur v. Times Printing Co., 48 Minn. 319, 322, 51 N. W. 216; Elliot v. Roche, 64 Minn. 482, 67 N. W. 539.

[42] Elliot v. Roche, 64 Minn. 482, 67 N. W. 539; Minneapolis etc. Ry. v. Grethen, 86 Minn. 323, 90 N. W. 573.

[43] Elliot v. Roche, 64 Minn. 482, 67 N. W. 539. See § 237.

[44] Doud v. Duluth Milling Co., 55 Minn. 53, 56 N. W. 463; Beatty v. Howe Lumber Co., 77 Minn. 272, 79 N. W. 1013.

[45] Bently v. Edwards, 125 Minn. 179, 146 N. W. 347.

[46] Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14.

[47] Starkey v. Minneapolis, 19 Minn. 203(166); Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39.

[48] Hoag v. Mendenhall, 19 Minn. 335 (289) ("made" — "indorsed" — "assigned"); Romans v. Langevin, 34 Minn. 312, 25 N. W. 638 ("executed"—"made and entered into"); Topping v. Clay, 65 Minn. 346, 68 N. W. 34 ("made, executed and delivered" — imports delivery to proper person); Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524 (admission of execution includes admission of delivery); Chappell v. Bissell, 10 How. Pr. 274 (made); La Fayette Ins. Co. v. Rogers, 30 Barb. (N. Y.) 491 (executed); Robert v. Good, 36 N. Y. 408 (id.); Prindle v. Caruthers, 15 N. Y. 425 (id.); Peets v. Bratt, 6 Barb. (N. Y.) 662; Douthit v. Mohr, 116 Ind. 482, 8 N. E. 449 ("entered into"); Laurent v. Lanning, 32 Or. 11, 51 Pac. 80 (an allegation that a party made, executed and delivered a mortgage includes the

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authority of the person to enter into the contract.[49]

586. Legality presumed—When it is alleged generally in a pleading that a contract was made it will be presumed that it was legal, unless the contrary affirmatively appears.[50]

587. As express or implied—In this state a party is not allowed, if timely objection is made, to allege in the same count both an express contract and a contract implied by law on the same state of facts. In other words he must proceed on the theory of a real contract, either express or implied in fact, or upon a quasi contract, that is, a contract implied by law. If seasonable objection is made a party who declares on an express contract cannot recover on a contract implied by law,[51] nor can he recover on an express contract when he declares on a contract implied by law,[52] unless the court orders an amendment to conform to the proof. If seasonable objection is not made a recovery may be had in any case upon proof of either an express or implied contract.[53] If a party declares upon both an express and implied contract in a single count the court may require him on the trial to elect between them,[54] but as a general rule a party ought not to be required to elect.[55] A party in doubt as to whether he can prove an express or implied contract can avoid the danger of a variance by declaring on both an express and implied contract in separate counts. The two causes of action are not inconsistent and may be joined. This practice, though permissible, is rarely, if ever, resorted to in this state.[56] The best way is to use a common indebitatus count when possible, under which either an express or implied contract may be proved and an election cannot be ordered.[57] As a general rule a variance between an express and implied contract does not

signing, sealing, attestation and acknowledgment); Cheney v. Cook, 7 Wis. 413 (an allegation that a party "executed" a written instrument is equivalent to saying that he subscribed it). See, as to allegation of execution by a corporation, Wiley v. Board of Ed., 11 Minn. 371(268).

[49] State v. Torinus, 22 Minn. 272; La Grange Mill Co. v. Bennewitz, 28 Minn. 62, 9 N. W. 80.

[50] Nininger v. Carver County, 10 Minn. 133(106). See § 221.

[51] Elliot v. Caldwell, 43 Minn. 357, 45 N. W. 845; Ecker v. Isaacs, 98 Minn. 146, 107 N. W. 1053; Bernth v. Smith, 112 Minn. 72, 127 N. W. 427; Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179. See Cremer v. Miller, 56 Minn. 52, 57 N. W. 318; Mead v. Rat Portage Lumber Co., 93 Minn. 343, 101 N. W. 299.

[52] Gaar-Scott Co. v. Fritz, 60 Minn. 346, 62 N. W. 391; Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137. See Evans v. Miller, 37 Minn. 371, 34 N. W. 596.

[53] Dean v. Leonard, 9 Minn. 190(176); Hewitt v. Brown, 21 Minn. 163; Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472; Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Laird Norton Yards v. Rochester, 117 Minn. 114, 134 N. W. 644; Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444. See §§ 911, 913.

[54] See § 246.

[55] Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 141 N. W. 481. See Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137.

[56] Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124.

[57] See §§ 533, 860, 862, 914, 915.

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mislead or materially prejudice the adverse party, and the court should either disregard it, or order an immediate amendment without costs.[58] Objection to such a variance is purely technical except in very rare instances and courts ought to discourage it. Especially is this true in actions for goods sold and delivered and for services. Where it is certain that the plaintiff has rendered services for the defendant or sold him goods and is entitled under the law to compensation, it is a reproach to the administration of the law that he should fail to recover simply because his counsel has made a slight technical mistake in framing the complaint, or was doubtful, at the time of pleading, as to what he could prove on the trial.[59]

588. Implied or quasi contracts—Allegation of promise—In pleading a contract implied by law, that is, a quasi contract, it is unnecessary to allege the fictitious promise which the law implies. It is sufficient to allege the facts from which the law implies the promise.[60] The allegation of a promise does not make the action one exclusively on express contract; it makes it one on both an express and implied contract, and if no objection is made a recovery may be had on either an express or implied contract.[61] At common law it was necessary to allege a promise.[62]

589. How much of contract must be alleged—A party pleading the breach of a contract is required to plead only those portions of the contract which he claims have been broken. In other words, it is unnecessary that a complaint, whether upon a special contract or otherwise, should set out facts not material to the cause of action.[63] If the other facts are set out they may be treated as surplusage.[64]

590. Consideration—Except where a consideration is implied by law,[65] a consideration must be alleged.[66] A general allegation "for a valuable consid-

[58] Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472; Rettner v. Minnesota Cold-Storage Co., 88 Minn. 352, 93 N. W. 120; Snyder v. Crescent Milling Co., 111 Minn. 234, 126 N. W. 822; Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137.

[59] See Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 141 N. W. 481.

[60] Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122; Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084; Boston Clothing Co. v. Garland, 90 Minn. 520, 97 N. W. 433; Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444; Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39.

[61] Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

[62] Foerster v. Kirkpatrick, 2 Minn. 210(171); Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

[63] Estes v. Farnham, 11 Minn. 423 (312); Rollins v. St. Paul, 25 Minn. 5; Wright v. Tileston, 60 Minn. 34, 61 N. W. 823.

[64] Wright v. Tileston, 60 Minn. 34, 61 N. W. 823.

[65] See § 558.

[66] Abbott v. Western Union Tel. Co., 86 Minn. 44, 90 N. W. 1.

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eration,"[67] or "for a sufficient consideration,"[68] is sufficient, unless the c tract is one for which the law requires a peculiar consideration.[69] If a writ contract which recites a consideration is set out in haec verba a considerat is sufficiently alleged.[70] In such a case a recital of "for value received" is s ficient.[71] Where the consideration is an executory contract the contract m be alleged and performance averred.[72] A failure to allege a consideration m be cured by evidence admitted without objection.[73]

591. Want of consideration—In pleading want of consideration for a cc tract it is unnecessary to plead the facts showing the want of consideration. is sufficient to allege in general terms that the contract was executed witho any consideration.[74]

592. Failure of consideration—In pleading a failure of consideration f a contract the facts constituting the failure must be alleged. It is not su ficient to allege in general terms that there has been a failure of consideration.

593. Performance by plaintiff—Excuse for non-performance—Whe performance by the plaintiff is a condition precedent to an action by him must be alleged, or an offer or readiness to perform,[76] or facts excusing hi from performance.[77] Where a complaint sets out a special contract and allege performance evidence excusing non-performance is inadmissible, but the com plaint may be amended on the trial to meet the proof.[78] An allegation of ful performance is not sustained by proof that plaintiff was ready and offered t perform, but was prevented by defendant.[79] Where concurrent acts are to be performed by the parties to a contract at the same time, the party suing for damages for the non-performance by the other party, is required only to aver

[67] Russell v. Minnesota Outfit, 1 Minn. 162(136); Jarrett v. Great Northern Ry., 74 Minn. 477, 77 N. W. 304.

[68] Oslin v. Telford, 108 Ga. 803, 34 S. E. 168.

[69] River Falls Bank v. German Am. Ins. Co., 72 Wis. 535, 40 N. W. 506.

[70] Sullivan v. Spring Garden Ins. Co., 54 N. Y. S. 629; Leftkovits v. First Nat. Bank, 152 Ala. 521, 530, 44 So. 613; Prindle v. Caruthers, 15 N. Y. 425; Leonard v. Sweetzer, 16 Ohio, 1; Aetna Ins. Co. v. Stout, 16 Ind. App. 160, 44 N. E. 934.

[71] Frank v. Irgens, 27 Minn. 43, 6 N. W. 380; Elmquist v. Markoe, 39 Minn. 494, 40 N. W. 825; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668; A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1112; Prindle v. Caruthers, 15 N. Y. 425.

[72] Becker v. Sweetzer, 15 Minn. 427 (346).

[73] Frank v. Irgens, 27 Minn. 43, 6 N. W. 380.

[74] Grimes v. Ericson, 94 Minn. 461, 103 N. W. 334. See Webb v. Michener, 32 Minn. 48, 19 N. W. 82; Wells v. Moses, 87 Minn. 432, 92 N. W. 334.

[75] Grimes v. Ericson, 94 Minn. 461, 103 N. W. 334.

[76] See Johnson v. Howard, 20 Minn. 370(322); Andreas v. Holcombe, 22 Minn. 339.

[77] Johnson v. Howard, 20 Minn. 370 (322); Boon v. State Ins. Co., 37 Minn. 426, 34 N. W. 902; Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850.

[78] Hand v. Nat. Live Stock Ins. Co., 57 Minn. 519, 59 N. W. 538; Hosley v. Black, 28 N. Y. 438; Hecla Iron Works v. Hall, 100 N. Y. S. 696.

[79] Glaspie v. Glassow, 28 Minn. 158, 9 N. W. 699.

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that he was ready and willing (without alleging an offer) to perform the agreement on his part, and that the defendant was requested to perform it on his part but refused or neglected to do so.[80] By virtue of statute a general allegation of performance is sufficient.[81] A substantial performance may be proved under a general allegation of performance.[82]

594. Breach—How alleged—Non-payment—A complaint on a contract must show a breach thereof.[83] A complaint on a contract, express or implied, for the payment of money, must allege the non-payment thereof.[84] A complaint on an assigned claim for the payment of money does not state a cause of action if it fails to allege non-payment.[85] But as a general rule a complaint need not allege non-payment.[86] A complaint to recover damages for the breach of a contract, where the obligation of the defendant depends on a contingency other than an act to be done by plaintiff, must allege the happening of such contingency. A general allegation that defendant refused to perform "according to the terms of said agreement" is not sufficient.[87] Where plaintiff alleges performance of conditions generally, an answer sufficiently alleges a breach by setting out a condition and alleging non-performance thereof.[88]

595. Demand—Where a demand of performance is a condition precedent it must be alleged.[89] A demand of performance is not a condition precedent un-

[80] Tinney v. Ashley, 15 Pick. (Mass.) 546, approved in St. Paul etc. Sons of Temperance v. Brown, 9 Minn. 157 (144).

[81] See § 258.

[82] Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179.

[83] See Burns v. Jordan, 43 Minn. 25, 44 N. W. 523; Blunt v. Egeland, 104 Minn. 351, 116 N. W. 653; Branton v. McLaughlin, 109 Minn. 244, 123 N. W. 808; Colliton v. Warden, 111 Minn. 435, 127 N. W. 1.

[84] Lent v. New York etc. Ry., 130 N. Y. 504, 29 N. E. 988; Conkling v. Weatherwax, 86 N. Y. S. 139, affirmed, 181 N. Y. 258, 73 N. E. 1028; Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094; State v. Peterson, 142 Mo. 526, 39 S. W. 453; Hudelson v. First Nat. Bank, 51 Neb. 557, 71 N. W. 304; Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93; Stanton v. Kenrick, 135 Ind. 382, 35 N. E. 19; Harrod v. Wineman, 146 Iowa, 718, 125 N. W. 812. See, however, First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Marshall & Illsley Bank v. Child, 76 Minn. 173, 78 N. W. 1048; Montgomery v. Leuwer, 94 Minn. 133, 102 N. W. 367. These Minnesota cases seem to confuse a question of pleading and a question of proof. No doubt the production of the instrument makes out a prima facie case and shifts the burden of going on with the evidence, but the question of pleading is a very different one.

[85] Dickinson v. Tyson, 110 N. Y. S. 269.

[86] Hitchings v. Kayser, 72 N. Y. S. 749, affirmed, 171 N. Y. 636, 63 N. E. 1118; Meating v. Tigerton L. Co., 113 Wis. 379, 89 N. W. 152; State v. Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; Kirk v. Roberts, 31 Pac. 620 (Cal.).

[87] Wilson v. Clarke, 20 Minn. 367 (318).

[88] Birmingham v. Farmers' Joint Stock Ins. Co., 67 Barb. (N. Y.) 595.

[89] Snow v. Johnson, 1 Minn. 48(32) (action in covenant upon a contract to deliver certain articles when called for); Malone v. Minn. Stone Co., 36 Minn. 325, 31 N. W. 170 (action for price of goods sold); Parr v. Johnson, 37 Minn. 457, 35 N. W. 176 (upon a contract for the payment of a certain sum

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less there is an express stipulation therefor in the contract or the pecu nature of the contract requires it. Ordinarily a party is bound to perform contract without being requested to do so, as in the common case of a cont to pay a sum of money generally, or upon a certain day.[90] No demand is n essary where defendant has disabled himself,[91] or repudiated or denied the c tract.[92] An allegation "although often requested" is sufficient as against a murrer.[93]

596. Modified contract—A modified contract may be declared on as mo fied without reference to the original contract.[94] Where the stipulations o written contract have been altered, and the contract declared on as altered, alteration may be proved under a denial.[95]

597. Several promises to pay debt—A plaintiff may allege and prove many promises as he may have to pay the debt sued for, if they are separa distinct, and valid undertakings.[96]

598. Allegation that contract is in writing—In declaring on a contra t within the statute of frauds it is unnecessary to allege that it is in writing.[97]

599. Promise to pay on demand—Upon a promise to pay money, no tim e for payment being expressed, the law implies a promise to pay presently or o n demand. In declaring on such a promise to pay it is unnecessary to plead th e implied promise.[98]

in goods, the goods being deliverable on demand, an action for recovery in money cannot be maintained without an allegation and proof of a demand, or refusal to deliver the goods); Newton v. Highland Improvement Co., 62 Minn. 436, 64 N. W. 1146 (action on construction contract—demand for estimates and payments); Jarrett v. Great Northern Ry., 74 Minn. 477, 77 N. W. 304 (action against carrier for failure to deliver goods). See Bailey v. Merritt, 7 Minn. 159(102) (action for excess on foreclosure—no demand necessary); Smith v. Jordan, 13 Minn. 264(246) (no demand necessary where defendant has disabled himself); White v. Phelps, 14 Minn. 27(21) (action by pledgee on note—no demand necessary); Board of Ed. v. Moore, 17 Minn. 412(391) (where a defendant has denied any contract to deliver personal property, no demand for a specific quantity is necessary before bringing an action for damages); McClung v. Capehart, 24 Minn. 17 (action for accounting between partners—no demand necessary).

[90] Bailey v. Merritt, 7 Minn. 159(102); Ganser v. Firemen's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943.

[91] Smith v. Jordan, 13 Minn. 264(246).

[92] Board of Ed. v. Moore, 17 Minn. 412 (391).

[93] Hall v. Williams, 13 Minn. 260 (242); Malone v. Minnesota Stone Co., 36 Minn. 325, 31 N. W. 170.

[94] Estes v. Farnham, 11 Minn. 423 (312); Swank v. Barnum, 63 Minn. 447, 451, 65 N. W. 722.

[95] Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14. See § 546.

[96] Walsh v. Kattenburgh, 8 Minn. 127 (99).

[97] See § 883.

[98] Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Chamberlain v. Tiner, 31 Minn. 371, 18 N. W. 97; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668.

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600. Allegation of indebtedness—A bare allegation of indebtedness, without stating the facts from which it arose, is a mere legal conclusion and ineffectual for any purpose.[99] But an allegation of indebtedness followed by a statement of the facts giving rise to the indebtedness, as in the common counts, is of course sufficient.[1] An allegation that "there is now due and owing from defendant," etc., is insufficient, in the absence of an allegation of the facts giving rise to the indebtedness.[2] An allegation that defendant is indebted to plaintiff in a specified amount and that no part thereof has been paid is equivalent to an allegation that the amount is due and unpaid, there being no allegation as to time, terms or circumstances to the contrary.[01] An allegation that a debt or an amount is due imports that it is payable.[02] An allegation that a due bill "is now due and payable" has been held a conclusion of law and not a sufficient allegation of the performance of conditions precedent.[3] A denial of a bare allegation of indebtedness raises no issue.[4]

601. Denial of execution—Under a general denial the defendant may prove that the contract alleged was never made,[5] or that the contract actually made was different from the one alleged.[6] The denial of the execution of a written instrument, in order to shift the burden of proof, must be positive, specific, and personally verified by the defendant.[7]

602. Variance—The rule as to a variance between an express and an implied contract is stated elsewhere.[8] Where the plaintiff seeks to recover upon a special contract, he cannot depart therefrom in his evidence on the trial, and base his right of recovery upon the evidence of the defendant, showing a different contract, and offered by him to contradict the evidence of the plaintiff, and to disprove the alleged contract sued upon.[9] A variance as to the parties to the contract is generally fatal.[10]

[99] Frasier v. Williams, 15 Minn. 288 (219); Seeley v. Engell, 17 Barb. (N. Y.) 530.

[1] See § 531.

[2] Richards v. Lake View Land Co., 115 Cal. 642, 47 Pac. 683.

[01] Wilcox v. Jamieson, 20 Colo. 158, 36 Pac. 902; Messenger v. Woge, 20 Colo. App. 275, 78 Pac. 314.

[02] Gies v. Bechtner, 12 Minn. 279 (183); Fowler v. Johnson, 26 Minn. 338, 3 N. W. 986; Bowers v. Hechtman, 45 Minn. 238, 47 N. W. 792; Ball v. N. W. etc. Assn., 56 Minn. 414, 57 N. W. 1063; Allen v. Patterson, 7 N. Y. 476.

[3] Vachon v. Nichols-Chisholm Lumber Co., 111 Minn. 45, 126 N. W. 278.

[4] Freeman v. Curran, 1 Minn. 170 (144).

[5] Scone v. Amos, 38 Minn. 79, 35 N. W. 575; McCormick Harvesting Machine Co. v. Doucette, 61 Minn. 40, 63 N. W. 95.

[6] Scone v. Amos, 38 Minn. 79, 35 N. W. 575; Ortt v. Minneapolis etc. Ry., 36 Minn. 396, 31 N. W. 519; Stitt v. Rat Portage Lumber Co., 101 Minn. 93, 111 N. W. 948.

[7] See § 323.

[8] See § 587.

[9] Cremer v. Miller, 56 Minn. 52, 57 N. W. 318.

[10] Benson v. Dean, 40 Minn. 445, 42 N. W. 207; Dennis v. Spencer, 45 Minn. 250, 47 N. W. 795.

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603. Complaint—The essential allegations in an action for conversion are (1) a description of the property converted, (2) the plaintiff's right to the property, (3) the conversion by the defendant, and (4) the damages sustained by the plaintiff.[11] A general allegation of ownership is sufficient, and under it either a general or special title may be proved,[12] but a mere lien under a seed-grain note has been held inadmissible under a general allegation of ownership.[13] An allegation that the property converted was the property of the plaintiff is not an averment that the plaintiff was the absolute owner, but makes admissible evidence showing that the plaintiff stood in such relation to the property that he had a right to maintain the action.[14] It is unnecessary to allege expressly a right of immediate possession. An allegation of ownership sufficiently imports a right of immediate possession.[15] Where the facts given rise to plaintiff's title are alleged, and they are insufficient to confer title, they are not helped by a general allegation of ownership.[16] Ownership must be alleged as of the date of the conversion.[17] It is unnecessary to allege title in plaintiff at the commencement of the action.[18] The specific facts constituting the conversion need not be alleged, it being sufficient and the better practice to allege merely that the defendant "converted" the property.[19] It is unnecessary to allege expressly that the property was "wrongfully" or "unlawfully"

[11] Brunswick-Balke-Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. 214.

[12] Jones v. Rahilly, 16 Minn. 320 (283); First Nat. Bank v. St. Croix Boom Corp., 41 Minn. 141, 42 N. W. 861; Pound v. Pound, 64 Minn. 428, 432, 67 N. W. 200; Scofield v. Nat. El. Co., 64 Minn. 527, 530, 67 N. W. 645; McArthur v. Clark, 86 Minn. 165, 90 N. W. 369; First Nat. Bank v. St. Anthony & Dakota El. Co., 103 Minn. 82, 114 N. W. 265. In pleading the title of the plaintiff it may be alleged that he was the "owner," Baals v. Stewart, 109 Ind. 371, 9 N. E. 403; Kerner v. Boardman, 14 N. Y. S. 787, 133 N. Y. 539, 30 N. E. 1148; McAllister v. Kuhn, 96 U. S. 87; or the property may be described as "belonging to plaintiff," Warnick v. Baker, 42 Mo. App. 439; or "of the plaintiff," Scofield v. Whitelegge, 49 N. Y. 259; or "the property of plaintiff," Duggan v. Wright, 157 Mass. 228, 32 N. E. 159.

[13] Scofield v. Nat. El. Co., 64 Minn. 527, 67 N. W. 645.

[14] Duggan v. Wright, 157 Mass. 228, 32 N. E. 159.

[15] Duggan v. Wright, 157 Mass. 228, 32 N. E. 159; Baals v. Stewart, 109 Ind. 371, 9 N. E. 403; Kerner v. Boardman, 14 N. Y. S. 787, 133 N. Y. 539, 30 N. E. 1148; Warnick v. Baker, 42 Mo. App. 439. See Clague v. Hodgson, 16 Minn. 329(291, 297); Fletcher v. Neudeck, 30 Minn. 125, 14 N. W. 513.

[16] First Nat. Bank v. St. Croix Boom Corp., 41 Minn. 141, 42 N. W. 861. See Bloemendal v. Albrecht, 79 Minn. 304, 82 N. W. 585.

[17] Smith v. Force, 31 Minn. 119, 16 N. W. 704. See Morish v. Mountain, 22 Minn. 564; Northness v. Hillestad, 87 Minn. 304, 307, 91 N. W. 1112.

[18] Hunt v. Hammel, 142 Cal. 456, 76 Pac. 378.

[19] First Nat. Bank v. St. Croix Boom Corp., 41 Minn. 141, 42 N. W. 861; Nichols & Shepard Co. v. Minn. Thresher Mfg. Co., 70 Minn. 528, 73 N. W. 415. See State v. Munch, 22 Minn. 67, 73; Kendall v. Duluth, 64 Minn. 295, 66 N. W. 1150; McCarthy v. Heiselman, 125 N. Y. S. 13.

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converted. The word "converted" has a well-defined meaning in the law, and when used in connection with the taking and appropriation of the personal property of another implies a wrongful act.[20] It is the better practice to allege directly the value of the property converted,[21] but this is not indispensable where there is an allegation of damages.[22] Where there is an allegation of conversion an allegation of demand and refusal is unnecessary, as evidence of a demand and refusal is admissible under a general allegation of conversion.[23] If special [24] or exemplary [25] damages are sought the facts justifying them must be alleged. When an answer is interposed a recovery may be had as in an action for conversion, if the facts stated in the complaint are sufficient, though the relief prayed is for a recovery of the property or its value as in replevin.[26] An allegation in the alternative that one or the other of two defendants converted the goods, but which one plaintiff is unable to determine, is bad.[27] Cases are cited below holding particular complaints sufficient,[28] or insufficient.[29]

[20] Cordill v. Minn. El. Co., 89 Minn. 442, 95 N. W. 306. See Clague v. Hodgson, 16 Minn. 329(291, 297).

[21] Brunswick-Balke-Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. 214.

[22] Brunswick-Balke-Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. 214; Humphreys v. Minn. Clay Co., 94 Minn. 469, 103 N. W. 338.

[23] Adams v. Castle, 64 Minn. 505, 67 N. W. 637; Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995; Berney v. Drexel, 33 Hun (N. Y.) 34; Daggett v. Gray, 110 Cal. 169, 42 Pac. 568; Baltimore etc. Ry. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476; Johnson v. Ashland Lumber Co., 45 Wis. 119; 38 Cyc. 2071(17). See Lynd v. Picket, 7 Minn. 184(128); St. Paul etc. Ry. v. Gardner, 19 Minn. 132(99, 112); Homberger v. Brandenberg, 35 Minn. 401, 29 N. W. 123; Brunswick-Balke-Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. 214; Kendall v. Duluth, 64 Minn. 295, 66 N. W. 1150; Jarrett v. Great Northern Ry., 74 Minn. 477, 77 N. W. 304.

[24] Chase v. Blaisdell, 4 Minn. 90(60); Humphreys v. Minn. Clay Co., 94 Minn. 469, 103 N. W. 338. See § 624.

[25] Vine v. Casmey, 86 Minn. 74, 90 N. W. 158. See § 630.

[26] Washburn v. Mendenhall, 21 Minn. 332; Morish v. Mountain, 22 Minn. 564; Howard v. Barton, 28 Minn. 116, 9 N. W. 584; Hardin v. Palmerlee, 28 Minn. 450, 10 N. W. 773; Nat. Citizens Bank v. McKinley, 115 Minn. 378, 132 N. W. 290.

[27] Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450.

[28] Hurlburt v. Schulenburg, 17 Minn. 22(5); St. Paul etc. Ry. v. Gardner, 19 Minn. 132(99, 112); Washburn v. Mendenhall, 21 Minn. 332; Morish v. Mountain, 22 Minn. 564; Jorgensen v. Tait, 26 Minn. 327, 4 N. W. 44; Tyler v. Hanscom, 28 Minn. 1, 8 N. W. 825; Melin v. Reynolds, 32 Minn. 52, 19 N. W. 81; McKusick v. Seymour Sabin Co., 48 Minn. 172, 50 N. W. 1116; Schneider v. Anderson, 77 Minn. 124, 79 N. W. 603; Strickland v. Minn. Type-Foundry Co., 77 Minn. 210, 79 N. W. 674; Northness v. Hillestad, 87 Minn. 304, 91 N. W. 1112; Kramer v. N. W. El. Co., 91 Minn. 346, 98 N. W. 96; Rector v. Anderson, 91 Minn. 123, 104 N. W. 884; First Nat. Bank v. St. Anthony etc. Co., 103 Minn. 82, 114 N. W. 265; Nat. Citizens Bank v. McKinley, 115 Minn. 378, 132 N. W. 290.

[29] Clayton v. Bennington, 24 Minn. 14; Haven v. Place, 28 Minn. 551, 11 N. W. 117; Sprague v. Stroud, 114 Minn. 64, 129 N. W. 1053.

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604. Answer—General denial—Various defences—Where the complaint alleges ownership in the plaintiff and conversion by the defendant in general terms, the defendant is entitled, under a general denial, to prove any fact inconsistent with such ownership and conversion.[30] If there is doubt as to whether matter is admissible under a general denial the court should be very liberal in allowing an amendment on the trial to let it in.[31] Title in a third person is no defence unless the defendant can in some manner connect himself with such person and claim under him.[32] In an action by a mortgagor against a wrongdoer who is a stranger to the mortgage, it is no defence that there is a default in the mortgage which is held by a third party, and that it is due and payable.[33] It is no defence that the defendant honestly believed that the property was his own.[34] Good faith is not a defence; it is matter in mitigation of damages only, and need not be pleaded to be proved.[35] It is no defence that the defendant offered to return the property.[36] A conversion cannot be purged.[37] It is no defence that the defendant did not have possession at the commencement of the action.[38] A judgment in replevin for the same cause of

[30] Jones v. Rahilly, 16 Minn. 320(283) (general rule stated—fact that a tender was insufficient to confer upon the plaintiff the right to the possession of property pledged); McClelland v. Nichols, 24 Minn. 176 (right of possession in defendant); Chandler v. DeGraff, 27 Minn. 208, 6 N. W. 611 (title in defendant); Cushing v. Seymour, 30 Minn. 301, 15 N. W. 249 (general rule stated—mortgage and notes admissible to show that plaintiff's right was a right of redemption); Johnson v. Oswald, 38 Minn. 550, 38 N. W. 630 (general rule stated—if plaintiff claims title through a sale by defendant the latter may show fraud to avoid the sale and the rescission of it); Penney v. Mutual Invest. Co., 54 Minn. 541, 56 N. W. 165 (upon the issue of an unlawful and unauthorized sale and disposition of property under a chattel mortgage by the mortgagee it is proper for the latter to show that it was sold or disposed of with the consent and by the direction of the mortgagor); Johnson v. Morstad, 63 Minn. 397, 65 N. W. 727 (title in defendant); Nichols & Shepard Co. v. Minn. Thresher Mfg. Co., 70 Minn. 528, 73 N. W. 415 (any fact may be proved tending to show that defendant did not convert the property—foreign statute admitted as to effect of chattel mortgage on title); Kramer v. N. W. El. Co., 91 Minn. 346, 349, 98 N. W. 96 (fraud).

[31] See Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[32] Brown v. Shaw, 51 Minn. 266, 53 N. W. 633. See Hoxsie v. Empire Lumber Co., 41 Minn. 548, 43 N. W. 476; Anderson v. Gouldberg, 51 Minn. 294, 53 N. W. 636; Vandiver v. O'Gorman, 57 Minn. 64, 58 N. W. 831; Jones v. Bradley etc. Co., 114 Minn. 415, 131 N. W. 494; Nat. Citizens Bank v. McKinley, 115 Minn. 378, 132 N. W. 290.

[33] Vandiver v. O'Gorman, 57 Minn. 64, 58 N. W. 831.

[34] See Dunnell, Minn. Digest, § 1928.

[35] Hoxsie v. Empire Lumber Co., 41 Minn. 548, 43 N. W. 476; Hoyt v. Duluth & Iron Range Ry., 103 Minn. 396, 115 N. W. 263.

[36] Carpenter v. Am. B. & L. Assn., 54 Minn. 403, 56 N. W. 95. See Sutton v. Great Northern Ry., 99 Minn. 376, 109 N. W. 815; Fidalgo Island Shingle Co. v. Brown, 61 Wash. 516, 112 Pac. 629.

[37] Sutton v. Great Northern Ry., 99 Minn. 376, 109 N. W. 815.

[38] Morish v. Mountain, 22 Minn. 564.

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action is a bar.[39] In an action against a carrier the fact that the property was taken from the carrier by one having a title paramount to that of the plaintiff is a defence.[40] In an action for conversion by execution sale, the fact that the defendant had deposited the surplus with the justice who issued the execution, has been held not a defence.[41] An offer to reinstate a shareholder on payment of accrued dues and fees has been held not a defence in an action for the conversion of stock.[42] Where two or more persons are jointly and severally liable for conversion a recovery against one is not a defence to the others unless the recovery is followed by payment, which, to be availing, must be shown.[43] The defence of an accounting or settlement is new matter to be specially pleaded by the defendant.[44] A denial of taking and converting has been held inconsistent with a plea that the goods were the property of a third person and that the defendant took them under a writ duly issued against such person.[45] A plea of payment has been held not inconsistent with a general denial.[46] Cases are cited below involving the construction of particular answers.[47]

605. Variance—Where the conversion is alleged in general terms it may be proved either by evidence of a demand and refusal or by evidence of a wrongful sale and disposition of the property.[48] Under a general allegation of ownership proof of a lien under a seed-grain note has been held a fatal variance.[49] Recovery as for conversion has been held permissible under a prayer for possession as in replevin.[50] In an action brought for the conversion of money recovery may be sustained for money had and received.[51] A conversion may be found to have occurred prior to a demand and refusal.[52] Proof as to title in a

[39] Hardin v. Palmerlee, 28 Minn. 450, 10 N. W. 773; Veline v. Dahlquist, 64 Minn. 119, 121, 66 N. W. 141. See Hatch v. Coddington, 32 Minn. 92, 19 N. W. 393; Woodcock v. Carlson, 49 Minn. 536, 52 N. W. 142.

[40] Nat. Bank of Commerce v. Chicago etc. Ry., 44 Minn. 224, 46 N. W. 342, 560; Merz v. Chicago etc. Ry., 86 Minn. 33, 90 N. W. 7.

[41] Allen v. Coates, 29 Minn. 46, 11 N. W. 132.

[42] Allen v. Am. B. & L. Assn. 49 Minn. 544, 52 N. W. 144; Carpenter v. Am. B. & L. Assn., 54 Minn. 403, 56 N. W. 95.

[43] Squire v. Ordemann, 194 N. Y. 394, 87 N. E. 435.

[44] Mower County v. Smith, 22 Minn. 97, 114.

[45] Derby v. Gallup, 5 Minn. 119(85). See Zimmerman v. Lamb, 7 Minn. 421 (336).

[46] First Nat. Bank v. Lincoln, 36 Minn. 132, 30 N. W. 449.

[47] Derby v. Gallup, 5 Minn. 119(85) (answer held to admit a taking); Chandler v. DeGraff, 27 Minn. 208, 6 N. W. 611 (answer held to deny plaintiff's ownership and the conversion charged); Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94 (answer held to admit a taking); McCauley v. Wuest, 110 Minn. 529, 125 N. W. 1021 (answer held to put in issue plaintiff's title to grain converted as against an objection first made after trial).

[48] Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995. See § 603.

[49] Scofield v. Nat. El. Co., 64 Minn. 527, 67 N. W. 645.

[50] See § 603.

[51] Cohen v. Jacobwitz, 102 N. Y. S. 519.

[52] McLennon v. Minneapolis etc. Ry., 57 Minn. 317, 59 N. W. 628.

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third party has been held a variance.[53] A variance may be waived by failu to object.[54]

CORPORATIONS

606. Necessity of alleging incorporation—In an action by or against corporation it is unnecessary to allege that it is a corporation, or where it w incorporated, except in cases where the fact of corporate existence, or the pla of incorporation, enters into and constitutes a part of the cause of action itself.

607. Mode of alleging incorporation—Statute—By virtue of statute it sufficient in case of either a domestic or foreign corporation to allege that it a corporation duly organized and existing under the laws of a designated stat country or place.[56] The statute is designed merely to simplify the form c pleading where an averment of incorporation is necessary.[57] An allegation s to the corporate existence of a corporation may be stated in a complaint by wa of inducement and independent of the statement of the cause of action o causes of action.[58]

608. Unnecessary to name officer or agent—In actions by or against cor porations it is ordinarily unnecessary to name the officer or agent by whom t corporate act was done, it being sufficient to allege that it was done by the cor poration.[59]

609. Alleging authority to contract—A complaint by a corporation for the enforcement of a contract made by it with the defendant need not allege that the plaintiff was authorized to make the contract, or that the officer purporting to make it was authorized to do so.[60] An allegation that a corporation "entered into" a contract implies its authority to make the contract.[61] An allega-

[53] Derby v. Gallup, 5 Minn. 119(85).

[54] Adams v. Castle, 64 Minn. 505, 67 N. W. 637.

[55] Howland v. Jeuel, 55 Minn. 102, 56 N. W. 581; Holden v. Great Western El. Co., 69 Minn. 527, 72 N. W. 805; Hollister v. U. S. etc. Co., 84 Minn. 251, 87 N. W. 776; Klemik v. Hendricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871; Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37.

[56] R. L. 1905 § 4148; G. S. 1913 § 7774; Northern Trust Co. v. Jackson, 60 Minn. 116, 61 N. W. 908 (allegation following statute held sufficient). See, as to rules independent of statute, Becht v. Harris, 4 Minn. 504(394); St. Paul etc. Sons of Temperance v. Brown, 9 Minn. 157 (144); Dodge v. Minn. etc. Co., 14 Minn. 49(39); Minneapolis etc. Ry. v. Morrison, 23 Minn. 308.

[57] Howland v. Jeuel, 55 Minn. 102, 56 N. W. 581.

[58] West v. Eureka Imp. Co., 40 Minn. 394, 42 N. W. 87.

[59] Gould v. Sub-District, 7 Minn. 203 (145); Todd v. Minneapolis etc. Ry., 37 Minn. 358, 35 N. W. 5. See § 543.

[60] St. Paul Land Co. v. Dayton, 37 Minn. 364, 34 N. W. 335; Baremore v. Selover, Bates & Co., 100 Minn. 23, 110 N. W. 66. See Gebhard v. Eastman, 7 Minn. 56(40); Baker v. N. W. Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464.

[61] Le Grange Mill Co. v. Bennewitz, 28 Minn. 62, 9 N. W. 80. See Monson v. St. Paul etc. Ry., 34 Minn. 269, 25 N. W. 595.

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tion that a note was indorsed to a corporation and that the corporation was the owner and holder of it implies authority on the part of the corporation to take and hold the note.[62] In an action against a corporation on its contract it is unnecessary to allege its authority to make the contract.[63]

610. Compliance of foreign corporation with state laws—In an action by a foreign corporation it is unnecessary for it to allege that it has complied with the laws of this state and obtained a license to do business here.[64]

611. Denial of corporate existence—By virtue of statute there must be a specific denial of corporate existence to put the adverse party to proof of such existence.[65] The statute is inapplicable to condemnation proceedings.[66]

612. Admissions in pleadings—The admission of the execution of a contract by a corporation includes an admission of the corporate existence,[67] of the power of the corporation to make it, and of the authority of the officer or agent who executed it in its behalf.[68] Cases are cited below in which particular answers were held to admit the corporate existence of the plaintiff.[69]

613. Actions on stock subscriptions—Pleading—It is not generally necessary to allege a tender or delivery of the stock.[70] In actions to recover the full amount of a subscription, or the amount of a final instalment, it is sometimes necessary to allege a readiness and willingness to deliver the stock.[71] A complaint has been sustained though it did not allege that all the shares had been subscribed.[72] Cases are cited below involving various questions of pleading.[73]

[62] State v. Torinus, 22 Minn. 272.

[63] Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

[64] Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207. See, to effect that compliance will be presumed, Langworthy v. C. C. Washburn Flouring Mills Co., 77 Minn. 256, 79 N. W. 974; Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616; Lehigh Valley Coal Co. v. Gilmore, 93 Minn. 432, 101 N. W. 796; Mason v. Edward Thompson Co., 94 Minn. 472, 103 N. W. 507; Krafve v. Roy, 98 Minn. 141, 107 N. W. 966.

[65] R. L. 1905 § 4148; G. S. 1913 § 7774; First Nat. Bank v. Loyhed, 28 Minn. 396, 10 N. W. 421 (denial on information and belief insufficient); State v. Ames, 31 Minn. 440, 18 N. W. 277 (argumentative denial insufficient); Crow River Valley Creamery Co. v. Strande, 104 Minn. 46, 115 N. W. 1038 (general denial insufficient).

[66] Chicago etc. Ry. v. Porter, 43 Minn. 527, 46 N. W. 75.

[67] Monson v. St. Paul etc. Ry., 34 Minn. 269, 25 N. W. 595; St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66.

[68] Bausman v. Credit Guarantee Co., 47 Minn. 377, 50 N. W. 496.

[69] Woodson v. Milwaukee etc. Ry., 21 Minn. 60; St. Anthony etc. Co. v. King, 23 Minn. 186.

[70] Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244; Marson v. Deither, 49 Minn. 423, 52 N. W. 38; Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317.

[71] Walter A. Wood Harvester Co. v. Jefferson, 57 Minn. 456, 59 N. W. 532; Id., 71 Minn. 367, 74 N. W. 149.

[72] Duluth Investment Co. v. Witt, 63 Minn. 538, 65 N. W. 956. See Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317.

[73] Robertson v. Sibley, 10 Minn. 328 (253) (action by sheriff levying on unpaid subscription—essentials of complaint); St. Paul etc. Ry. v. Robbins, 23

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614. Actions to enforce stockholders' liability—Cases are cited below involving questions of pleading in actions to enforce stockholders' liability brought under R. L. 1905 §§ 3184–3190 [74] and under R. L. 1905 § 3173.[75]

Minn. 439 (complaint not alleging issuance of stock, or offer to issue, held insufficient); Minneapolis Harvester Works v. Libby, 24 Minn. 327 (complaint not showing authority of corporation, or transfer of subscription, or tender of stock, held insufficient); Farnsworth v. Robbins, 36 Minn. 369, 31 N. W. 349 (answer held insufficient to admit proof of defence that all the capital stock was not taken); Minneapolis Threshing Machine Co. v. Crevier, 39 Minn. 417, 40 N. W. 507 (complaint in action on subscription to stock in unformed company sustained); Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317 (allegations that a call was duly made and that a notice was duly given held sufficient—allegations as to organization of company and of full subscription of shares held sufficient—unnecessary to allege a tender of stock before suit); Smith v. Prior, 58 Minn. 247, 59 N. W. 1016 (complaint held insufficient to admit proof that company accepted, in payment of stock, property greatly overvalued—application on trial for amendment of complaint properly denied); McConey v. Belton Oil & Gas Co., 97 Minn. 190, 106 N. W. 900 (action by creditor—complaint sustained).

[74] Tiffany v. Giesen, 96 Minn. 488, 105 N. W. 901 (where the complaint states facts sufficient to establish a stockholder's liability under the constitution by reason of his ownership of stock at a time when the corporation was in debt and insolvent, such issue is not waived by the additional allegation that the stock had subsequently been transferred in bad faith and without consideration); Fish v. Chase, 114 Minn. 460, 131 N. W. 631 (complaint held to state a cause of action against C for the collection of an assessment on stock owned by him and to recover from him the amount unpaid on the stock when issued—wife of C made a defendant to determine her husband's interest in stock in her name —an action to recover an assessment on the capital stock of an insolvent corporation may be joined with an action to recover the amount remaining unpaid on the stock when issued).

[75] Arthur v. Willius, 44 Minn. 409, 46 N. W. 851 (defect of parties waived by failure to demur or answer); Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681 (id.); McKusick v. Seymour, Sabin & Co., 48 Minn. 172, 50 N. W. 1116 (supplemental complaint based on a wrongful distribution of corporate assets among stockholders by the officers of a corporation sustained); Hospes v. N. W. etc. Co., 48 Minn. 174, 50 N. W. 1117 (complaint in action to recover for bonus stock held insufficient); Smith v. Prior, 58 Minn. 247, 59 N. W. 1016 (action for unpaid subscription—complaint held insufficient to admit proof that the corporation had accepted, in payment of the stock, property that was greatly overvalued and grossly inadequate in value — variance — application on the trial to amend properly denied); Moore v. St. Paul Ice Co., 59 Minn. 23, 60 N. W. 816 (an answer alleging an estoppel as a defence to a claim held insufficient); Harper v. Carroll, 62 Minn. 152, 64 N. W. 145 (requisites of complaint in action by creditor to enforce liability of stockholder in a bank); International Trust Co. v. American L. & T. Co., 62 Minn. 501, 65 N. W. 78, 632 (complaint under R. L. 1905 § 3173 held insufficient —failure to show any one of the defendants was a stockholder when the corporate debt in suit was contracted or at any subsequent time); Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 Minn. 386, 67 N. W. 217 (cross-bill by creditor filing claim—original complaint limits issues unless court allows other issues to be formed); Harper v. Carroll, 66 Minn. 487, 507, 69 N. W. 610, 1069 (defect of parties waived by failure to

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COUNTIES

615. Pleading—In general—Cases are cited below involving the sufficiency of pleadings in actions against counties.[76]

616. Actions on bond of county treasurer—Pleading—Cases are cited below involving the sufficiency of complaints on the bonds of county treasurers.[77]

COVENANTS

617. Action for breach of covenant of warranty—Pleading—In an action for the breach of a covenant of warranty the complaint must allege facts showing an eviction, actual or constructive.[78]

demur or answer); Maxwell v. Northern Trust Co., 70 Minn. 334, 73 N. W. 173 (complaint by a creditor who is also a stockholder—cross-bill by another creditor if original complaint does not truly state liability of plaintiff as stockholder—second supplemental complaint cannot be filed without leave of court); Mendenhall v. Duluth Dry Goods Co., 72 Minn. 312, 75 N. W. 232 (action under G. S. 1894 § 5905 to charge stockholders—complaint held not demurrable for defect of parties—assignee of claim as plaintiff—unnecessary to allege money consideration for assignment); Robinson v. Nashville Center etc. Assn., 115 Minn. 43, 131 N. W. 856 (complaint held insufficient in not alleging that any stock was ever issued or that members were entitled to have it issued to them—no cause of action for equitable relief stated—adequate remedy at law—no cause of action stated upon agreement of incorporators).

[76] Folsom v. Chisago County, 28 Minn. 324, 9 N. W. 881 (complaint against a county for the publication of a delinquent tax list sustained); First Nat. Bank v. Becker County, 81 Minn. 95, 83 N. W. 468 (complaint in an action against an organized county, on orders which its auditor had issued against the funds of an unorganized county attached to it, held insufficient); Mahlum v. Crow Wing County, 99 Minn. 523, 109 N. W. 1133 (complaint by county auditor against county to recover compensation for preparing certain records held insufficient); Armstrong v. St. Louis County, 103 Minn. 1, 114 N. W. 89 (action by road overseer for salary—counterclaim for recovery of difference between contract price paid and reasonable value of services held insufficient).

[77] Mower County v. Smith, 22 Minn. 97 (in action by county against treasurer for conversion of public funds held unnecessary to allege that there was an accounting and settlement by the treasurer or to state wherein his accounts were incorrect); Redwood County v. Tower, 28 Minn. 45, 8 N. W. 907 (complaint on treasurer's bond sustained—averment as to successor in office); Carver County v. Bongard, 82 Minn. 431, 85 N. W. 214 (complaint on treasurer's bond sustained—unnecessary to allege resolution of county board authorizing action, or a settlement between the county auditor and defaulting treasurer, or authority from state auditor to bring suit); Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276 (complaint by county board on treasurer's bond held to state a cause of action based upon the treasurer's failure to account for and to pay over the full amount of taxes collected—held to state a cause of action with respect to the treasurer's failure to collect penalties on delinquent taxes—held not to state a cause of action based upon the failure of the treasurer to collect all interest on county funds payable by the bank designated as a depositary).

[78] Wagner v. Finnegan, 54 Minn. 251, 55 N. W. 1129. See Dunnell, Minn. Digest, § 2372.

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618. Action for breach of covenant of seizin—Pleading—It is unnecessary to set out the title in detail. The allegations that the defendant was not the true owner and was not seized of the premises in fee are allegations of fact.[78]

CREDITORS' SUIT

619. Pleading—In general—A complaint in a creditors' suit must show the prior exhaustion of legal remedies.[80] If it is alleged that the creditor has recovered a judgment against the debtor, and that an execution thereon has been returned unsatisfied, it is unnecessary to allege that the debtor is insolvent and has no other property out of which to satisfy the judgment.[81] It is proper to allege that the action is brought on behalf of the plaintiff and all other creditors who may choose to come in,[82] but such an allegation is doubtless unnecessary. In an action to subject to the lien of a judgment lands owned by one not a judgment debtor, an answer alleging that the judgment debtor has property which is or may be made available to the payment of the judgment states a defence.[83]

620. Intervening creditors—Cross-bill—If an intervening creditor desires, besides the allowance of his claim, to demand other relief which cannot be had under the allegations of the original complaint, he must obtain leave of court to file a cross-bill.[84]

CUSTOMS AND USAGES

621. Necessity of pleading—It is not generally necessary to plead a custom specially in order to render it admissible.[85]

DAMAGES

622. Necessity of pleading—In general—Except in actions where damages are the very gist of the action a failure to allege damages does not render a complaint demurrable.[86] If a complaint states the facts showing damage it is

[78] Wooley v. Newcombe, 87 N. Y. 606.

[80] Banning v. Armstrong, 7 Minn. 40 (24); Massey v. Gorton, 12 Minn. 145 (83); Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390; Moffatt v. Tuttle, 35 Minn. 301, 28 N. W. 509; Spooner v. Travelers Ins. Co., 76 Minn. 311, 39 N. W. 305; Fryberger v. Berven, 88 Minn. 311, 92 N. W. 1125; Williams v. Kemper, 99 Minn. 301, 109 N. W. 242; Keith v. Keith, 112 Minn. 183, 127 N. W. 567; Bruce v. Hoidal, 119 Minn. 362, 138 N. W. 313. See Note, 23 L. R. A. (N. S.) 1; 66 Am. St. Rep. 271.

[81] Williams v. Kemper, 99 Minn. 301, 109 N. W. 242.

[82] Goncelier v. Foret, 4 Minn. 13(1).

[83] Keith v. Keith, 112 Minn. 183, 127 N. W. 567.

[84] Pioneer Fuel Co. v. St. Peter Street Imp. Co., 64 Minn. 386, 67 N. W. 217.

[85] Breen v. Moran, 51 Minn. 525, 53 N. W. 755.

[86] Cowley v. Davidson, 10 Minn. 392 (314) (a complaint which sets up a contract and alleges a breach is not demurrable for failing to allege any damages, for the plaintiff is entitled to at least

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sufficient though it does not formally close with an ad damnum clause.[87] It is sufficient if it appears by legal inference from the facts alleged that the plaintiff has been damaged.[88] Where damages are the gist of the action they must be alleged in an issuable form.[89] It is never necessary to plead the evidence of damages.[90]

623. General damages—A general allegation of damages in a specified amount is sufficient for the recovery of general damages, whether the action is ex delicto or ex contractu.[91]

624 Special damages—Special damages are not recoverable under a general allegation of damage but must be specially pleaded.[92] As the object of stating special damages is to let the adverse party know what charges he must prepare

nominal damages); Weaver v. Miss. etc. Co., 28 Minn. 542, 11 N. W. 113 (trespass to realty); Burns v. Jordan, 43 Minn. 25, 44 N. W. 523 (breach of contract).

[87] Weaver v. Miss. etc. Co., 28 Minn. 542, 11 N. W. 113.

[88] Croff v. Great Northern Ry., 112 Minn. 14, 127 N. W. 490.

[89] McNair v. Toler, 21 Minn. 175 (action to vacate fraudulent judgment); Simmer v. St. Paul, 23 Minn. 408 (injury to business); Wilson v. Dubois, 35 Minn. 471, 29 N. W. 68 (slander of title); Parker v. Jewett, 52 Minn. 514, 55 N. W. 56 (fraud). See § 669.

[90] Barnum v. Chicago etc. Ry., 30 Minn. 461, 463, 16 N. W. 364.

[91] Andrews v. Stone, 10 Minn. 72(52) (assault and battery); Bast v. Leonard, 15 Minn. 304(235) (negligence—fall of building—injury to business—loss of use of premises); Lindholm v. St. Paul, 19 Minn. 245(204) (personal injury); Wilson v. Clarke, 20 Minn. 367(318) (breach of contract); Partridge v. Blanchard, 23 Minn. 69 (breach of contract for sale of personalty); Smith v. St. Paul etc. Ry., 30 Minn. 169, 14 N. W. 797 (personal injury); Barnum v. Chicago etc. Ry., 30 Minn. 461, 16 N. W. 364 (death by wrongful act); Stone v. Evans, 32 Minn. 243, 20 N. W. 149 (malpractice—action by husband); Mallory v. Pioneer Press Co., 34 Minn. 521, 26 N. W. 904 (libel); Meacham v. Cooper, 36 Minn. 227, 30 N. W. 669 (breach of warranty of a horse); Collins v. Dodge, 37 Minn. 503, 35 N. W. 368 (personal injury); Ennis v. Buckeye Pub. Co., 44 Minn. 105, 46 N. W. 314 (breach of contract—loss of profits); Pioneer Press Co. v. Hutchinson, 63 Minn. 481, 65 N. W. 938 (breach of covenant in lease); Hershey Lumber Co. v. St. Paul etc. Co., 66 Minn. 449, 69 N. W. 215 (breach of contract—loss of profits); Palmer v. Winona etc. Co., 78 Minn. 138, 80 N. W. 869 (personal injury); Rathborne etc. Co. v. Wheelihan, 82 Minn. 30, 84 N. W. 638 (breach of contract—prospective damages); Palmer v. Winona etc. Co., 83 Minn. 85, 85 N. W. 941 (personal injury); Reed v. Bernstein, 103 Minn. 66, 114 N. W. 261 (damages from wrongful act of a tenant in setting fire to a building); Ward v. Meeds, 114 Minn. 18, 130 N. W. 2 (personal injury); Reeves & Co. v. Boyd, 114 Minn. 378, 131 N. W. 336 (action on note—counterclaim for breach of warranty).

[92] Chase v. Blaisdell, 4 Minn. 90(60) (conversion); Ward v. Haws, 5 Minn. 540(359) (assault and battery); Brackett v. Edgerton, 14 Minn. 174(134) (contract to deliver wheat); Spencer v. St. Paul etc. Ry., 21 Minn. 362 (trespass on land); Wampach v. St. Paul etc. Ry., 21 Minn. 364 (trespass on land); Gray v. Bullard, 22 Minn. 278 (trespass de bonis); Ferguson v. Hogan, 25 Minn. 135 (replevin); Isaacson v. Minneapolis etc. Ry., 27 Minn. 463, 8 N. W. 600 (trespass on land); Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88 (breach of warranty of harvester); Cushing v. Seymour, Sabin & Co., 30 Minn. 301, 15 N.

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to meet the statement of such damages must be as full and specific as the facts will permit.[93] The objection that special damages are not pleaded is waived unless seasonably made on the trial.[94] When special damages are alleged the recovery therefor should be limited to the amount alleged.[95] Amendments on the trial are freely granted to let in evidence of special damages.[96] An allegation that a party necessarily incurred expenses is equivalent to an allegation that he incurred necessary expenses.[97]

625. Prospective damages—In actions on contract prospective damages are recoverable under a general allegation of damages.[98] Where, however, the complaint contains no general allegation of damages, but specifically itemizes the breaches of the contract complained of, and alleges that by reason of such specific breaches plaintiff has been damaged in a stated amount, recovery must be limited to the particular damages so claimed.[99] All the damages which have been or will be sustained from a breach of contract may be alleged and recovery had for such as have actually been sustained up to the time of the trial.[1]

626. Profits—Loss of profits resulting directly and necessarily from the breach of a contract are recoverable under a general allegation of damages,[2] but when such a loss does not necessarily result the circumstances from which it ought reasonably to have been anticipated that it would result must be alleged.[3]

W. 249 (conversion by mortgagee—profits—expenses); Stone v. Evans, 32 Minn. 243, 20 N. W. 149 (malpractice—action by husband); Meacham v. Cooper, 36 Minn. 227, 30 N. W. 669 (breach of warranty of horse); Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 44 N. W. 306 (breach of contract to furnish building material—delay in delivery—loss of rents); Hitchcock v. Turnbull, 44 Minn. 475, 47 N. W. 153 (breach of contract to furnish boiler plates—loss of profits); Loudy v. Clarke, 45 Minn. 477, 48 N. W. 25 (sale of defective manufactured goods—loss of profits); Holston v. Boyle, 46 Minn. 432, 49 N. W. 203 (libel); Rauma v. Bailey, 80 Minn. 336, 83 N. W. 191 (wrongful eviction of tenant); Qualy v. Johnson, 80 Minn. 408, 83 N. W. 393 (replevin—value of use of property); Independent Brewing Assn. v. Burt, 109 Minn. 323, 23 N. W. 932 (sale of goods—damage from delivery of unmarketable goods—profits); Skoog v. Mayer Bros. Co., 122 Minn. 209, 214, 142 N. W. 193 (sale of goods—breach of warranty); Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693 (personal injury—loss of time).

[93] Ward v. Haws, 5 Minn. 440(359).

[94] Isaacson v. Minneapolis etc. Ry., 27 Minn. 463, 8 N. W. 600; Qualy v. Johnson, 80 Minn. 408, 83 N. W. 393.

[95] Blomquist v. Minneapolis Furniture Co., 112 Minn. 143, 127 N. W. 481.

[96] Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693.

[97] Glover v. Tuck, 1 Hill (N. Y.) 66.

[98] Ennis v. Buckeye Pub. Co., 44 Minn. 105, 46 N. W. 314; Hershey Lumber Co. v. St. Paul etc. Co., 66 Minn. 449, 69 N. W. 215; Rathborne etc. Co. v. Wheelihan, 82 Minn. 30, 84 N. W. 638.

[99] Rathborne etc. Co. v. Wheelihan, 82 Minn. 30, 84 N. W. 638.

[1] Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426; Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424.

[2] Ennis v. Buckeye Pub. Co., 44 Minn. 105, 46 N. W. 314; Hershey Lumber Co. v. St. Paul etc. Ry., 66 Minn. 449, 69 N. W. 215.

[3] Frohreich v. Gammon, 28 Minn. 476,

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627. Personal injuries—A general allegation of physical injuries is sufficient, and a recovery may be had for medical attendance, loss of time, etc., under general allegations without specifying the amount of these items.[4] Under a general allegation as to loss of wages or earnings a party may prove the wages he received before the injury, the wages he received after the injury, and that he received no more before, and no less after, than he was able to earn.[5] Under allegations that "the plaintiff was thereby grievously injured; that among the injuries so caused her ankle bones were broken, her leg injured, her nervous system was incurably injured, and she was otherwise injured" it is competent to show any injury to plaintiff's person or health resulting proximately from the cause alleged.[6] A complaint alleged that a woman suffered external and internal injury. This was followed by an allegation "that her entire body was bruised, jarred, and injured, her left limb and knee, and the bones thereof fractured and broken, her face, arms and limbs otherwise cut and bruised, and the plaintiff's said daughter otherwise injured and made sick, sore and lame in her entire body." Under the allegations that she was injured otherwise than as particularly described, and made sick and sore and lame in her entire body, it was held that evidence as to the nature of the injury to her shoulder and back was admissible.[7] An allegation that plaintiff suffered serious bodily injury and pain and would continue to suffer pain and permanent bodily injury has been held sufficient as against a demurrer.[8] Under proper allegations a recovery may be had for the reasonable value of nursing by members of the family of the injured person though rendered without expectation of payment.[9]

628. Matter in mitigation—Matter in mitigation of damages need not be specially pleaded, at least where it could not be used as a bar.[10]

11 N. W. 88; Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 44 N. W. 306; Hitchcock v. Turnbull, 44 Minn. 475, 47 N. W. 153; Singer Mfg. Co. v. Potts, 59 Minn. 240, 61 N. W. 23; Independent Brewing Assn. v. Burt, 109 Minn. 323, 123 N. W. 932; Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343 (profits from sale of automobiles—allegations held sufficient after judgment).

[4] Lindholm v. St. Paul, 19 Minn. 245 (204); Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623; Evertson v. McKay, 124 Minn. 260, 144 N. W. 950. See § 1250, and Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693 (damages for loss of time—held proper to allow an amendment on the trial).

[5] Collins v. Dodge, 37 Minn. 503, 35 N. W. 368; Palmer v. Winona etc. Co., 78 Minn. 138, 80 N. W. 869; Id., 83 Minn. 85, 85 N. W. 941.

[6] Smith v. St. Paul etc. Ry., 30 Minn. 169, 14 N. W. 797.

[7] Ward v. Meeds, 114 Minn. 18, 130 N. W. 2.

[8] Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623, 624; Evertson v. McKay, 124 Minn. 260, 144 N. W. 950.

[9] Wells v. Minneapolis B. & A. Assn., 122 Minn. 327, 142 N. W. 706.

[10] Hoxsie v. Empire Lumber Co., 41 Minn. 548, 43 N. W. 476 (action for conversion—fact that defendant acted in good faith admissible in mitigation of damages without being pleaded); Hoyt v. Duluth etc. Ry., 103 Minn. 396, 115 N. W. 263 (id.); Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147 (action for libel or slander—bad reputation of plain-

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629. Matter in aggravation—In actions for slander or libel other defa tions of similar import are admissible to prove malice and aggravate the da ages without being specially pleaded.[11]

630. Exemplary damages—If exemplary damages are sought the facts j tifying their allowance must be alleged, at least if the tort for which the acti is brought does not imply malice. It is unnecessary to claim exemplary da ages specifically or to plead the evidence of the ultimate facts justifying the It is enough to allege that the wrongful act was done wilfully, wantonly or m liciously or that it was done to oppress or insult the plaintiff.[12]

631. Interest—To recover damages in the form of interest no specific d mand therefor is necessary.[13]

632. Allegations of unliquidated damages not traversable—In an actic for unliquidated damages an allegation of their amount is not traversable.[14]

633. Pleading in gross—Itemizing—Damages may be alleged in gross. is unnecessary to itemize them.[15] By itemizing his damages a party may b limited in the amount of his recovery accordingly.[16]

DEATH BY WRONGFUL ACT

634. Pleading—In general—In a complaint under the statute for death b wrongful act it is necessary to allege that the decedent left a spouse or next o kin.[17] A complaint which alleges that the decedent left surviving him a certain person as his next of kin and heir at law, without stating the relation of this person or that the decedent left no widow, is good as against a demurrer, but might be made more definite on motion.[18] It is unnecessary to allege that

tiff—good faith and absence of malice in defendant). See Jellett v. St. Paul etc. Ry., 30 Minn. 265, 15 N. W. 237 (action for conversion).

[11] Gribble v. Pioneer Press, 34 Minn. 342, 25 N. W. 710; Fredrickson v. Johnson, 60 Minn. 337, 62 N. W. 388.

[12] Vine v. Casmey, 86 Minn. 74, 90 N. W. 158; Hively v. Golnick, 123 Minn. 498, 144 N. W. 213. See Carli v. Union Depot etc. Co., 32 Minn. 101, 20 N. W. 89; Tamke v. Vangsnes, 72 Minn. 236, 75 N. W. 217.

[13] Talcott v. Marston, 3 Minn. 339 (238); Cooper v. Reaney, 4 Minn. 528 (413); Ormond v. Sage, 69 Minn. 523, 72 N. W. 810; Brown v. Doyle, 69 Minn. 543, 72 N. W. 814; Larson v. Anderson, 122 Minn. 39, 141 N. W. 847; Jones v. Burgess, 124 Minn. 265, 144 N. W. 954.

[14] Pullen v. Wright, 34 Minn. 314, 26 N. W. 394 (damages from breach of warranty); German-American Bank v. White, 38 Minn. 471, 38 N. W. 361 (ejectment—allegations as to value of rents and profits).

[15] Allis v. Day, 14 Minn. 516(388); Bast v. Leonard, 15 Minn. 304(235); Lindholm v. St. Paul, 19 Minn. 245 (204); Wilson v. Clarke, 20 Minn. 367 (318).

[16] Rathborne etc. Co. v. Wheelihan, 82 Minn. 30, 84 N. W. 638.

[17] Schwartz v. Judd, 28 Minn. 371, 10 N. W. 208; Sykora v. Case Threshing Machine Co., 59 Minn. 130, 60 N. W. 1008; Lahti v. Oliver Iron Mining Co., 106 Minn. 241, 118 N. W. 1018; Vander Wegen v. Great Northern Ry., 114 Minn. 118, 130 N. W. 70.

[18] Lahti v. Oliver Iron Mining Co., 106 Minn. 241, 118 N. W. 1018.

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the spouse or next of kin had a pecuniary interest in the decedent.[19] It is necessary to allege the existence and amount of claims for the support of the decedent or for funeral expenses, if a recovery is sought therefor.[20] A general allegation of damages is sufficient.[21] In an action under a foreign statute the statute must be pleaded,[22] but the sufficiency of the pleading is governed by the law of this state.[23] A settlement with one of several next of kin is not a bar to an action under the statute, but it may be set up by petition or supplemental complaint.[24]

DEDICATION

635. Pleading—In general—A general allegation of dedication is sufficient without showing whether the dedication is of a statutory or common-law nature.[25] An allegation in a complaint that plaintiff on a certain day caused certain described lands to be duly surveyed, marked, and platted, according to the statute in such case made and provided, by a competent surveyor, and the plat to be recorded, is, after judgment, a sufficient allegation of a legal platting.[26] Cases are cited below involving questions of pleading in relation to dedication.[27]

DEPOSITARIES

636. Actions on bonds of depositaries—Pleading—Cases are cited below involving the sufficiency of complaints on the bonds of official depositaries.[28]

[19] Barnum v. Chicago etc. Ry., 30 Minn. 461, 16 N. W. 364; Johnson v. St. Paul etc. Ry., 31 Minn. 283, 17 N. W. 622.

[20] Sykora v. Case Threshing Machine Co., 59 Minn. 130, 60 N. W. 1008.

[21] Barnum v. Chicago etc. Ry., 30 Minn. 461, 16 N. W. 364; Johnson v. St. Paul etc. Ry., 31 Minn. 283, 17 N. W. 622.

[22] Meyers v. Chicago etc. Ry., 69 Minn. 476, 72 N. W. 694; Stewart v. Great Northern Ry., 103 Minn. 156, 114 N. W. 953.

[23] Vander Wegen v. Great Northern Ry., 114 Minn. 118, 130 N. W. 70.

[24] McVeigh v. Minneapolis etc. Ry., 110 Minn. 184, 124 N. W. 971.

[25] Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931.

[26] Cathcart v. Peck, 11 Minn. 45(24).

[27] Case v. Favier, 12 Minn. 89(48) (trespass quare clausum fregit—defence of dedication new matter—answer held to plead a statutory and a common-law dedication); Benson v. St. Paul etc. Ry., 62 Minn. 198, 64 N. W. 393 (complaint held not to show a common-law dedication).

[28] Meeker County v. Butler, 25 Minn. 363 (complaint sustained); St. Louis County v. American L. & T. Co., 67 Minn. 112, 69 N. W. 704 (complaint held insufficient for failure to allege a designation of the depositary before the approval of his bond or the receipt of deposits thereafter); St. Louis County v. Manufacturers' Bank, 69 Minn. 421, 72 N. W. 701 (id.); St. Louis County v. American L. & T. Co., 75 Minn. 489, 78 N. W. 113 (indefinite complaint—remedy by motion—bill of particulars not demandable). See Dunnell, Minn. Digest, § 2701.

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DESCENT AND DISTRIBUTION

637. Pleading—In general—An allegation that premises descended to a person named, as the heir of another, sufficiently imports that he was such heir.[29]

DIVORCE

638. Complaint—It is provided by statute that a complaint for divorce shall state the names and ages of the parties, the name of the court in which the action is brought, and the facts constituting the cause or grounds of action, in ordinary and concise language, without repetition.[30] It is necessary to allege that the plaintiff has resided in this state for the statutory period.[31] It is unnecessary to allege that the plaintiff resides in the county where the action is brought, or to anticipate and negative the defences of condonation, procurement, or connivance.[32] In charging adultery the time, place and person should be alleged with as much definiteness as possible.[33] In charging cruelty it is unnecessary to allege every act of cruelty which the plaintiff wishes to prove.[34] In charging desertion it is necessary to allege wilful desertion for a full year next before the commencement of the action.[35] In charging drunkenness it is sufficient to allege that the defendant has been in a state of habitual drunkenness for one year immediately preceding the filing of the complaint.[36] It is unnecessary to anticipate a claim for alimony or to make any allegations as to the property.[37] It is permissible to allege facts as to fitness for the custody of children.[38] Facts justifying a limited divorce may be joined with facts justifying an absolute divorce and relief may be sought in the alternative.[39] Under a complaint for an absolute divorce on the ground of cruel and inhuman treatment a court may grant a limited divorce. Good practice requires, however, that a complaint should make it clear what kind of a divorce is sought.[40]

[29] St. John v. Northrup, 23 Barb. (N. Y.) 25.

[30] R. L. 1905 § 3578; G. S. 1913 § 7115.

[31] Thelen v. Thelen, 75 Minn. 433, 78 N. W. 108; Salzbrun v. Salzbrun, 81 Minn. 287, 83 N. W. 1088. See Sprague v. Sprague, 73 Minn. 474, 479, 76 N. W. 268; Wilson v. Wilson, 95 Minn. 464, 104 N. W. 300; Bechtel v. Bechtel, 101 Minn. 511, 112 N. W. 883.

[32] Young v. Young, 18 Minn. 90(72).

[33] Freeman v. Freeman, 39 Minn. 370, 40 N. W. 167.

[34] Segelbaum v. Segelbaum, 39 Minn. 258, 39 N. W. 492; Westphal v. Westphal, 81 Minn. 242, 83 N. W. 988.

[35] Stocking v. Stocking, 76 Minn. 292, 79 N. W. 172, 668.

[36] Forney v. Forney, 80 Cal. 528, 22 Pac. 294; Bishop, Marriage and Divorce, § 1503. See Newman v. Newman, 68 Minn. 1, 70 N. W. 776 (complaint held insufficient).

[37] Sprague v. Sprague, 73 Minn. 474, 483, 76 N. W. 268.

[38] Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736.

[39] Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766; Grant v. Grant, 53 Minn. 181, 54 N. W. 1059; Heinze v. Heinze, 107 Minn. 43, 119 N. W. 489.

[40] Heinze v. Heinze, 107 Minn. 43, 119 N. W. 489.

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The statute requires that the complaint shall state the name of the court. This is properly done by stating the name of the court in the title.[41]

639. Answer—The defendant has thirty days in which to answer.[42] An answer may contain allegations as to the unfitness of the plaintiff for the custody of the children.[43] If the plaintiff seeks alimony the defendant may plead her adultery as a defence, in whole or in part, to the claim.[44] Condonation, procurement and connivance are new matter to be pleaded by the defendant.[45] An adultery committed after an answer may be set up by supplemental answer and a divorce granted therefor without proof of the facts alleged in the original answer.[46]

DRAINS

640. Pleading—In general—A complaint in an action to vacate a ditch assessment has been held not to allege fraud or demonstrable mistake of fact and therefore demurrable.[47] A complaint for the contract price of a ditch has been held insufficient for failure to allege an inspection by the proper officers and an issue by them of a certificate of completion.[48]

DURESS

641. Pleading—In general—In pleading duress the ultimate facts constituting the duress must be specifically alleged. A general allegation of duress is insufficient.[49] But it is unnecessary to allege the evidentiary facts by which the ultimate facts are to be proved.[50] A recovery of money paid under duress may be had under a common count without alleging the duress or the facts constituting it.[51]

EASEMENTS

642. Pleading—In general—An answer pleading in general terms that the defendant had a prescriptive right in a driveway has been held sufficient as a defence in an action on a bond for a deed.[52]

[41] Young v. Young, 18 Minn. 90(72).

[42] R. L. 1905 § 3580; G. S. 1913 § 7117; Fagebank v. Fagebank, 9 Minn. 72(61).

[43] Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736.

[44] Buerfening v. Buerfening, 23 Minn. 563.

[45] Young v. Young, 18 Minn. 90(72); Williams v. Williams, 101 Minn. 400, 112 N. W. 528.

[46] Sodini v. Sodini, 96 Minn. 329, 104 N. W. 976.

[47] Jacobson v. Lac Qui Parle County, 119 Minn. 14, 137 N. W. 419.

[48] State Bank v. Vlaar, 124 Minn. 78, 144 N. W. 458.

[49] Taylor v. Blake, 11 Minn. 255(170); Kraemer v. Deustermann, 37 Minn. 469, 35 N. W. 276; Rand v. Hennepin County, 51 Minn. 391, 52 N. W. 901.

[50] Johnson v. Velve, 86 Minn. 46, 90 N. W. 126.

[51] See § 762.

[52] Dryer v. Kistler, 118 Minn. 112, 136 N. W. 750.

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643. Complaint—In general—A complaint which alleges that the plaintiff is the owner in fee of the premises sought to be recovered, and that the defendant is in possession thereof and withholds the same from plaintiff, is sufficient.[53] A complaint which in substance alleges that the plaintiff is the owner in fee and entitled to the immediate possession of the premises sought to be recovered and that the defendant is in possession thereof, and unlawfully or wrongfully withholds the same from the plaintiff, is sufficient.[54] Cases are cited below involving the sufficiency of various complaints.[55]

644. Same—Allegation of title—A complaint must allege ownership or other interest carrying the right of immediate possession.[56] To prove a legal title, of whatever nature or however acquired, it is sufficient to allege that the plaintiff is the "owner," without disclosing the nature or source of the title.[57] Such a general allegation will admit proof of title by adverse possession.[58] But it will not admit proof of an equitable title. In pleading an equitable title the plaintiff must set out all the facts with as much particularity as if he were drawing a bill for equitable relief under the old practice, except that it is improper to plead mere evidentiary matter.[59] It is proper practice to allege title as an ultimate fact without alleging the facts by which it was acquired. If such facts are alleged, and an essential fact in the chain of title is omitted, the complaint is bad though it contains a general allegation of title.[60] If the

[53] Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947, sustaining the form in § 1287.

[54] Merrill v. Dearing, 22 Minn. 376. See, to the same general effect, McClane v. White, 5 Minn. 178(139); Wells v. Masterson, 6 Minn. 566(401); Pinney v. Fridley, 9 Minn. 34(23); May v. First Div. etc. Ry., 26 Minn. 74, 1 N. W. 584; Hennessy v. St. Paul etc. Ry., 30 Minn. 55, 14 N. W. 269; Schultz v. Hadler, 39 Minn. 191, 39 N. W. 97; Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357; Atwater v. Spalding, 86 Minn. 101, 90 N. W. 370.

[55] Lawver v. Great Northern Ry., 97 Minn. 36, 105 N. W. 1129 (complaint by a purchaser of school lands from the state against a railway company sustained); Howard v. Erbes, 112 Minn. 479, 128 N. W. 674 (a complaint, alleging among other things that a certain conveyance was an absolute conveyance of the fee, held to state a cause of action in ejectment).

[56] Armstrong v. Hinds, 8 Minn. 254 (221); Schultz v. Hadler, 39 Minn. 191, 39 N. W. 97.

[57] Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357; Parker v. Minneapolis etc. Ry., 79 Minn. 372, 82 N. W. 673; Atwater v. Spalding, 86 Minn. 101, 90 N. W. 370; McArthur v. Clark, 86 Minn. 165, 90 N. W. 369; Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022.

[58] McArthur v. Clark, 86 Minn. 165, 90 N. W. 369.

[59] Merrill v. Dearing, 47 Minn. 137, 49 N. W. 693; Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662; Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068; Olson v. Minn. etc. Ry., 89 Minn. 280, 94 N. W. 871. See § 645.

[60] Pinney v. Fridley, 9 Minn. 34(23); Schultz v. Hadler, 39 Minn. 191, 39 N. W. 97; Bartleson v. Munson, 105 Minn. 348, 117 N. W. 512. See § 227.

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plaintiff alleges ownership in general terms he may prove a legal title acquired in any way, but if he alleges a specific title or one acquired in a particular way he is restricted in his proof accordingly.[61] Title must be alleged as of the time of the commencement of the action as well as of the time of the ouster.[62]

645. Same—Allegation of right of possession—To recover in ejectment the plaintiff must have the immediate right of possession.[63] It is customary to allege specifically that he has this right,[64] but it is unnecessary to do so if the right otherwise appears, as, for example, from an allegation of ownership. An allegation that plaintiff is the owner in fee of the property sought to be recovered implies a right to the immediate possession and the right need not be expressly averred.[65] A bare allegation that the plaintiff is entitled to the immediate possession is a conclusion of law and ineffectual without an allegation of facts giving rise to the right.[66]

646. Same—Allegation of possession of defendant—Possession by the defendant is an essential fact and must be alleged unequivocally.[67] A general allegation that defendant wrongfully detains the possession is of no effect against specific facts showing that he is not in possession.[68]

647. Same—Allegation of wrongful detention—It is common practice to allege that the defendant "wrongfully" or "unlawfully" withholds possession from the plaintiff.[69] This is unnecessary if it otherwise appears that the withholding is wrongful. A general allegation that the defendant withholds possession from the plaintiff, the pleading showing a right of possession in the plaintiff, is sufficient to require the defendant to show his right, if any he has.[70] If a complaint shows that the defendant's possession was originally lawful it must allege facts showing that it subsequently became unlawful.[71]

648. Same—Description of premises—Matters of description need not be averred with the certainty and positiveness required in pleading the material

[61] Pinney v. Fridley, 9 Minn. 34(23); O'Malley v. St. Paul etc. Co., 43 Minn. 289, 294, 45 N. W. 440.

[62] Armstrong v. Hinds, 8 Minn. 254 (221); Holmes v. Williams, 16 Minn. 164(146); Miller v. Hoberg, 22 Minn. 249. See Rhone v. Gale, 12 Minn. 54 (25).

[63] Pace v. Chadderdon, 4 Minn. 499 (390); Schultz v. Hadler, 39 Minn. 191, 39 N. W. 97. See Dunnell, Minn. Digest, § 2870.

[64] See cases under § 643.

[65] Bena Township Co. v. Sauve, 104 Minn. 472, 116 N. W. 947. See Wells v. Masterson, 6 Minn. 566(401); Norton v. Frederick, 107 Minn. 36, 119 N. W. 492.

[66] See Schultz v. Hadler, 39 Minn. 191, 39 N. W. 97, and § 227.

[67] See Allis v. Nininger, 25 Minn. 525; Pence v. St. Paul etc. Ry., 28 Minn. 488, 11 N. W. 80; Gowan v. Bensel, 53 Minn. 46, 54 N. W. 934; Payne v. Treadwell, 16 Cal. 220, 243.

[68] Gowan v. Bensel, 53 Minn. 46, 54 N. W. 934.

[69] See cases under § 643.

[70] Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947. See Adams v. Corriston, 7 Minn. 456(365); Cordill v. Minn. El. Co., 89 Minn. 442, 95 N. W. 306.

[71] Holmes v. Williams, 16 Minn. 164 (146).

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facts constituting the cause of action. In describing the premises by reference to monuments it is unnecessary to allege positively the existence of such monuments.[72] A description is sufficient if, by the aid of a survey, and persons knowing the monuments and boundaries mentioned, the land can be found.[73]

649. Same—Recording of deeds—It is unnecessary to allege that deeds in a chain of title were recorded.[74]

650. Same—Demand of possession—If a demand of possession is a condition precedent to an action it must be alleged. Ordinarily no demand is necessary.[75]

651. Same—For undivided interest—In an action to recover an undivided interest it is unnecessary to allege that the defendant is not the owner of the other undivided interest, or in possession under such owner.[76]

652. Same—Demand for judgment—It is sufficient to demand judgment for the possession of the premises and such is the common-law form,[77] but it is common practice and often practically advisable to demand judgment that the plaintiff is owner in fee and for possession.[78]

653. Answer—General denial—Evidence admissible under—Where the plaintiff alleges his title in general terms, without disclosing its source, the defendant, under a general denial, may prove any fact which tends to controvert or defeat the title which the plaintiff attempts to prove on the trial. He may prove title in himself or in a third party. He may controvert the facts which the plaintiff seeks to prove or he may introduce new matter tending to invalidate or defeat the title sought to be proved by the plaintiff. He is not bound to anticipate what the plaintiff will rely upon to establish his allegation of title.[79] He may prove an equity which, without any affirmative relief, defeats plaintiff's right to possession.[80] If the plaintiff pleads the source of his

[72] May v. First Div. etc. Ry., 26 Minn. 74, 1 N. W. 584.

[73] Off v. Heinrichs, 124 Wis. 440, 102 N. W. 904.

[74] Fifield v. Norton, 79 Minn. 264, 82 N. W. 581.

[75] McClane v. White, 5 Minn. 178 (139).

[76] Sherin v. Larson, 28 Minn. 523, 11 N. W. 70; Hennessy v. St. Paul etc. Ry., 30 Minn. 55, 14 N. W. 269.

[77] See Doyle v. Hallam, 21 Minn. 515; Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022.

[78] See Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022.

[79] Kipp v. Bullard, 30 Minn. 84, 14 N. W. 364 (that land acquired under execution was a homestead); Commonwealth Title Ins. & Trust Co. v. Dokko, 72 Minn. 229, 75 N. W. 106 (that a mortgage was usurious); Cool v. Kelly, 78 Minn. 102, 80 N. W. 861 (a tax certificate); McArthur v. Clark, 86 Minn. 165, 90 N. W. 369 (adverse possession); Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 462, 92 N. W. 340 (statute of limitations); Rogers v. Clark, 104 Minn. 198, 116 N. W. 739 (title in third party). See Wakefield v. Day, 41 Minn. 344, 43 N. W. 71 (that a deed absolute in form was intended as a mortgage).

[80] Travelers' Ins. Co. v. Walker, 77 Minn. 438, 80 N. W. 618.

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title the defendant cannot, under a mere denial, prove facts in the nature of confession and avoidance.[81] If there is doubt as to the admissibility of a defence under a general denial the court should be very liberal in allowing an amendment on the trial to let it in.[82] An allegation of the value of the rents and profits or use and occupation is not traversable.[83]

654. Same—Title in third party—As a general rule the defendant may defeat the action by pleading and proving title in a third party, even though he does not connect himself with such title. He may do so under a general denial where the plaintiff pleads his title in general terms.[84] But a mere intruder or trespasser cannot defeat an action by proof of title in a third party unless he connects himself with such title.[85]

655. Same—Equitable defences—An equitable defence may be interposed in ejectment, as in other actions, if it relates to the right of possession and is a proper one to be litigated in the action. To prevail against the plaintiff's legal right to the possession an equity must be such that, under the former practice, a count of equity, upon a bill filed setting up the facts, would have enjoined an action of ejectment.[86]

656. Same—Disclaimer—Where a defendant disclaims any interest in the property he is not entitled to litigate the title with the plaintiff. All that he is entitled to is a judgment of dismissal, with costs.[87]

657. Same—Waiver of possession—A party sued in ejectment may waive the objection that he is not in possession.[88]

658. Same—Various defences and answers—The fact that one of two defendants was acting as the agent of the other has been held no defence as to either.[89] A lien of a purchaser at a void guardian's sale has been held no de-

[81] Kennedy v. McQuaid, 56 Minn. 450, 48 N. W. 35 (conveyance to third party); Travelers' Ins. Co. v. Walker, 77 Minn. 438, 80 N. W. 618 (an equity requiring affirmative relief); Dickson v. St. Paul, 105 Minn. 165, 117 N. W. 426 (general rule stated as to matters in confession and avoidance); Bartleson v. Munson, 105 Minn. 348, 117 N. W. 512 (id.).

[82] See Cool v. Kelly, 85 Minn. 359, 362, 88 N. W. 988; Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[83] German-American Bank v. White, 38 Minn. 471, 38 N. W. 361.

[84] Rogers v. Clark, 104 Minn. 198, 116 N. W. 739; Kinney v. Munch, 107 Minn. 378, 120 N. W. 374; Henderson v. Wanamaker, 79 Fed. 736; McGuire v. Blunt, 199 U. S. 142.

[85] Kinney v. Munch, 107 Minn. 378, 120 N. W. 374; Christy v. Scott, 14 How. (U. S.) 282; Haws v. Victoria etc. Co., 160 U. S. 303.

[86] McClane v. White, 5 Minn. 178 (139); Williams v. Murphy, 21 Minn. 534; Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472; McKinney v. Bode, 33 Minn. 450, 454, 23 N. W. 851; Probstfield v. Czizek, 37 Minn. 420, 34 N. W. 896; Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068; Travelers' Ins. Co. v. Walker, 77 Minn. 438, 80 N. W. 618; Howard v. Erbes, 112 Minn. 479, 128 N. W. 674. See O'Connor v. Gertgens, 85 Minn. 481, 89 N. W. 866.

[87] Marks v. Jones, 71 Minn. 274, 73 N. W. 961.

[88] Allis v. Nininger, 25 Minn. 525.

[89] Wells v. Atkinson, 24 Minn. 161.

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fence to an action by a ward.[90] The defence of title by a parol gift, accepted and executed, is permissible.[91] Cases are cited below involving the construction of particular answers.[92]

ELECTIONS

659. Pleading—In general—Certain allegations as to the holding of an election to authorize the issue of municipal bonds have been held sufficient.[93]

ESTOPPEL

660. Pleading—In general—It is unnecessary to plead an estoppel in pais.[94] Cases are cited below involving the sufficiency of particular pleadings.[95]

EXECUTION

661. Pleading—Levy—Sale—In pleading a levy of an execution it is sufficient to allege in general terms that the officer "levied" upon specified property without setting out the particular acts.[96] An answer has been construed as not alleging that land sold as one tract consisted of several tracts.[97]

EXECUTORS AND ADMINISTRATORS

662. Actions by—Pleading—It is no longer necessary to make profert of letters testamentary or of administration. But one who sues as an executor or

[90] Mountour v. Purdy, 11 Minn. 384 (278).

[91] Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125.

[92] Curtiss v. Livingston, 36 Minn. 312, 30 N. W. 814 (answer held not a counter claim); Bendikson v. Great Northern Ry., 80 Minn. 332, 82 N. W. 194 (answer held to allege sufficiently that defendant leased the land from the owner and was occupying it under the lease); Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 1115 (answer held to admit possession of the premises as alleged in the complaint); Edwards v. Smith, 124 Minn. 538, 144 N. W. 1090 (supplemental answer—plaintiff entering into possession after commencement of action—judgment on the pleadings); Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125 (question of an executed parol gift held in issue).

[93] Wiley v. Board of Ed., 11 Minn. 371 (268).

[94] Caldwell v. Auger, 4 Minn. 217 (156); Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Schmitt v. Hager, 88 Minn. 413, 416, 93 N. W. 110; Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 145 N. W. 622; Feinberg v. Allen, 103 N. Y. S. 339, 208 N. Y. 215, 101 N. E. 893. See Smith v. St. Paul, 72 Minn. 472, 474, 75 N. W. 708. See 9 Mich. L. Rev. 484, 576; Note, 27 Am. St. Rep. 344.

[95] Moore v. St. Paul Ice Co., 59 Minn. 23, 60 N. W. 816 (answer held insufficient in failing to allege that a representation was false); Norman v. Eckern, 60 Minn. 531, 63 N. W. 170 (complaint for misrepresentations as to ownership of land sustained).

[96] Rohrer v. Turrill, 4 Minn. 407 (309); First Nat. Bank v. Rogers, 13 Minn. 407(376).

[97] Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869.

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administrator must allege, in a direct and issuable form, that he is such. This is properly done by alleging that he is executor or administrator by virtue of letters duly issued by a probate court of a specified county at a specified time.[98] In an action by an administrator de bonis non the name of the original administrator should be given and it should be alleged that he is dead, or has resigned, or has been discharged, or his letters revoked, as the case may be.[99] In an action purporting to be brought by plaintiff as a foreign administrator, allegations in the complaint to the effect that plaintiff has been duly appointed such foreign administrator, and has duly filed in the proper probate court of this state a duly authenticated copy of his appointment, are put in issue by an answer denying the complaint, and "each and every part and portion thereof." [1] Where the averments of a complaint show that the plaintiff sues solely as executor the omission in the title to the action of the word "as" is immaterial.[2] Where, in the title of an action, the plaintiff's name is followed by "executor of the last will and testament of A., deceased," and the complaint shows no liability to plaintiff except in his individual capacity, the quoted words may be rejected as surplusage.[3]

663. Actions on bonds—Pleading—Leave of the probate court is a prerequisite to an action, but it need not be alleged in the complaint.[4] A complaint on an executor's bond has been held insufficient in not making it appear that the plaintiff's claim had been duly allowed against the estate.[5]

EXEMPTIONS

664. Pleading—In general—Cases are cited below involving questions of pleading in relation to exemptions.[6]

[98] Chamberlain v. Tiner, 31 Minn. 371, 18 N. W. 97; Perkins v. Merrill, 37 Minn. 40, 33 N. W. 3; Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118; Cohu v. Husson, 113 N. Y. 662, 21 N. E. 703. See Hughes v. Meehan, 84 Minn. 226, 87 N. W. 768 (allegation of appointment in "said county"—admission of due appointment in answer).

[99] Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118.

[1] Fogle v. Schaeffer, 23 Minn. 304.

[2] Beers v. Shannon, 73 N. Y. 292.

[3] Litchfield v. Flint, 104 N. Y. 543, 11 N. E. 58.

[4] Ganser v. Ganser, 83 Minn. 199, 201, 86 N. W. 18.

[5] First Nat. Bank v. How, 28 Minn. 150, 9 N. W. 626.

[6] Keegan v. Peterson, 24 Minn. 1 (whether a harvester is a "farming utensil" and therefore exempt must be raised by answer and not by demurrer); Carlson v. Small, 32 Minn. 492, 21 N. W. 737 (exemption held admissible in justice court without being pleaded); Murphy v. Sherman, 25 Minn. 196 (necessity of pleading a waiver); Cable v. Hoolihan, 98 Minn. 143, 107 N. W. 967 (unnecessary to plead facts showing loss of exemption by abandonment of trade). See § 653n.

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FALSE IMPRISONMENT

665. Pleading—In general—A complaint which alleges that, at a time and place stated, the defendant imprisoned the plaintiff without probable cause, is sufficient.[7]

FORCIBLE ENTRY AND DETAINER

666. Pleading—In general—Cases are cited below involving questions of pleading in actions for forcible entry and detainer.[8]

FOREIGN LAWS

667. Necessity of pleading—Matters of fact—Foreign laws, whether common law or statutes, are not judicially noticed, but must be alleged and proved like other matters of fact.[9] Like other matters of fact they need not be pleaded when they are mere matters of evidence.[10] The question of what is the law of another state is one of fact and not of law, and so not disposable of on demurrer.[11]

[7] Nixon v. Reeves, 65 Minn. 159, 67 N. W. 989. See Townsend v. Kendall, 4 Minn. 412(315); Quinn v. Shortall, 29 Minn. 106, 12 N. W. 153.

[8] Davis v. Woodward, 19 Minn. 174 (137) (complaint sustained); Anderson v. Shultz, 37 Minn. 76, 33 N. W. 440 (complaint held possibly sufficient). See § 697.

[9] Townsend v. Kendall, 4 Minn. 412 (315, 323); Becht v. Harris, 4 Minn. 504(394); Brimhall v. VanCampen, 8 Minn. 13(1); Hoyt v. McNeil, 13 Minn. 390(362); Reiff v. Bakken, 36 Minn. 333, 31 N. W. 348; Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137; Way v. Colyer, 54 Minn. 14, 17, 55 N. W. 744; Myers v. Chicago etc. Ry., 69 Minn. 476, 72 N. W. 694; Crandall v. Great Northern Ry., 83 Minn. 190, 86 N. W. 10; Wilcox v. Bergmann, 96 Minn. 219, 104 N. W. 955; Swing v. Red River Lumber Co., 101 Minn. 428, 112 N. W. 392; Stewart v. Great Northern Ry., 103 Minn. 156, 114 N. W. 953; Lando v. Lando, 112 Minn. 257, 262, 127 N. W. 1125; Twin City Box Factory v. Adirondack Fire Ins. Co., 114 Minn. 475, 131 N. W. 497; Kolliner v. Western Union Tel. Co., 126 Minn. 122, 147 N. W. 961. See Kern v. Field, 68 Minn. 317, 319, 71 N. W. 393 (for purpose of giving full faith and credit to judgment of a sister state).

[10] Thompson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137 (under a general plea of payment by note, a party may introduce in evidence the laws of the state where the note was given and payable to show that in that state this paid and extinguished the original debt); Nichols & Shepard Co. v. Minn. Thresher Mfg. Co., 70 Minn. 528, 73 N. W. 415 (action for conversion—foreign statute admissible to show that in fact there was no conversion); O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112 (action for specific performance—foreign law admissible on issue as to whether a tendered deed was sufficient to pass title); Wood v. Johnson, 117 Minn. 267, 135 N. W. 746 (assumption of mortgage—foreign law admissible to prove enforceability of agreement to assume mortgage).

[11] Van Slochem v. Villard, 207 N. Y. 587, 101 N. E. 467. See Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 118 Minn. 273, 136 N. W. 738.

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668. How pleaded—In pleading a foreign statute it must be set out in full, or at least so much of it as may be material to the cause of action or defence.[12] In pleading the common law of another state it is sufficient to state as a fact what the law is, without setting out decisions of the courts.[13]

FRAUD

669. Pleading—In general—In pleading fraud the material facts constituting the fraud must be specifically alleged. A general charge of fraud is insufficient.[14] But a general statement of the matters of fact constituting the fraud is sufficient. It is unnecessary to allege minutely all the circumstances that may tend to prove the general charge.[15] A complaint for deceit should allege that the defendant made certain representations to the plaintiff;[16] that the representations were false;[17] that defendant made the representations knowing them to be false,[18] and with intent to deceive plaintiff;[19] that plain-

[12] Becht v. Harris, 4 Minn. 504(394); Hoyt v. McNeil, 13 Minn. 390(362).

[13] Crandall v. Great Northern Ry., 83 Minn. 190, 86 N. W. 13; Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429.

[14] Kelley v. Wallace, 14 Minn. 236 (173); Brooks v. Hamilton, 15 Minn. 26(10, 15); Cummings v. Thompson, 18 Minn. 246(228); Kraemer v. Deustermann, 37 Minn. 469, 35 N. W. 276; Rand v. Hennepin County, 50 Minn. 391, 52 N. W. 901; Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547; Smith v. Prior, 58 Minn. 247, 59 N. W. 1016; Alden v. Christianson, 83 Minn. 21, 85 N. W. 824; Johnson v. Velve, 86 Minn. 46, 90 N. W. 126. A general allegation that an act was fraudulently done is sometimes sufficient. Laun v. Kipp, 155 Wis. 347, 145 N. W. 183.

[15] Cummings v. Thompson, 18 Minn. 246(228); Johnson v. Velve, 86 Minn. 46, 90 N. W. 126.

[16] Barber v. Morgan, 51 Barb. (N. Y.) 116; Wells v. Jewett, 11 How. Pr. (N. Y.) 242.

[17] Barber v. Morgan, 51 Barb. (N. Y.) 116; Byard v. Holmes, 34 N. J. L. 296.

[18] Smith v. Kingman, 70 Minn. 453, 73 N. W. 253; Byard v. Holmes, 34 N. J. L. 296; Duffaney v. Ferguson, 66 N. Y. 482; Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414; Holst v. Stewart, 154 Mass. 445, 28 N. E. 574. This allegation is sustained by proof that the defendant either knew the representations to be false, or made them as of his own knowledge, 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. See Dunnell, Minn. Digest, § 3819. An allegation that defendant falsely and fraudulently made certain representations implies that he knew them to be false. Davis v. Central Land Co., 143 N. W. 1073 (Iowa); Laun v. Kipp, 155 Wis. 347, 145 N. W. 183.

[19] McKibbin v. Ellingson, 58 Minn. 205, 59 N. W. 1003; Hodsden v. Hodsden, 69 Minn. 486, 72 N. W. 562; Holt v. Sims, 94 Minn. 157, 102 N. W. 386; Ahern v. Hindman, 101 Minn. 34, 111 N. W. 734; Zabriskie v. Smith, 13 N. Y. 322. See Dunnell, Minn. Digest, § 3819. While good practice requires a direct allegation of intent to deceive, yet the absence of such an allegation will not render a 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. Byard v. Holmes, 34 N. J. L. 296; Zabriskie v. Smith, 13 N. Y. 322; Barber v. Morgan, 51 Barb. (N. Y.) 116; Fredericks v. Keuder, 121 N. Y. S. 1001; Brady v. Finn,

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tiff, believing the representations to be true, was thereby induced to do or to forbear from doing certain specified things;[20] and that by reason thereof plaintiff was damaged in a certain sum.[21] In pleading fraud as a defence the same allegations should be made as when it is pleaded affirmatively as a cause of action.[22]. Fraud is ordinarily new matter to be specially pleaded and inadmissible under a denial.[23] But when a written instrument is introduced under a general allegation not disclosing its existence the adverse party may introduce evidence of fraud in its execution or procurement under a denial.[24] A waiver or ratification of fraud is ordinarily new matter to be specially pleaded.[25] Cases are cited below involving the sufficiency of particular pleadings.[26] Under an allegation of actual fraud the plaintiff cannot recover for constructive

162 Mass. 260, 38 N. E. 506. See Dunnell, Minn. Digest, § 3819.

[20] Barber v. Morgan, 51 Barb. (N. Y.) 116; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161. See Dunnell, Minn. Digest, § 3821. An allegation that plaintiff relied upon and was induced by the representations to enter into a contract is equivalent to an allegation that he believed them to be true. Jones v. Magoon, 119 Minn. 434, 138 N. W. 686.

[21] McNair v. Toler, 21 Minn. 175; Alden v. Wright, 47 Minn. 225, 49 N. W. 767; Parker v. Jewett, 52 Minn. 514, 55 N. W. 56; Anderson v. G. Heileman Brewing Co., 104 Minn. 327, 116 N. W. 655; Merchants & Miners State Bank v. Chisholm, 119 Minn. 459, 138 N. W. 682; Berry v. Kolb, 120 Minn. 522, 139 N. W. 138; Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118; Taylor v. Guest, 58 N. Y. 262; Byard v. Holmes, 34 N. J. L. 296; Stetson v. Riggs, 37 Neb. 797, 56 N. W. 628. See Dunnell, Minn. Digest, § 3828.

[22] Wilder v. De Cou, 18 Minn. 470 (421); Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

[23] Daly v. Proetz, 20 Minn. 411(363); Livingston v. Ives, 35 Minn. 55, 27 N. W. 74; MacFee v. Horan, 40 Minn. 30, 41 N. W. 239; Duford v. Lewis, 43 Minn. 26, 44 N. W. 522; Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547; Christianson v. Chicago etc. Ry., 61 Minn. 249, 63 N. W. 639; Marshall-Wells Hardware Co. v. Emde, 121 Minn. 524, 140 N. W. 1027.

[24] Reeves & Co. v. Cress, 80 Minn. 466, 83 N. W. 443.

[25] Newell v. Randall, 32 Minn. 171, 69 N. W. 972.

[26] Brown v. Manning, 3 Minn. 35(13) (answer to a charge of fraud sustained); Howland v. Fuller, 8 Minn. 50(30) (defects in an answer waived by taking issue and not objecting until after trial); Gaffney v. St. Paul etc. Ry., 38 Minn. 111, 35 N. W. 728 (answer alleging fraud in settlement held insufficient); Egan v. Gordon, 65 Minn. 505, 68 N. W. 103 (action to recover on a guaranty of the payment of rent—answer setting up fraud in procuring signature to guaranty sustained); Minazek v. Libera, 83 Minn. 288, 86 N. W. 100 (complaint for fraud in procurement of contract sustained); Loveland v. Gravel, 95 Minn. 135, 103 N. W. 721 (action for goods sold and delivered pursuant to a written contract — answer held insufficient to show that contract was procured by fraud); Ritko v. Grove, 102 Minn. 312, 113 N. W. 629 (fraud in contract for exchange of lands—complaint held to state a cause of action to recover damages for the alleged fraud and not one to recover, on the basis of a rescission by act of the parties, what they parted with by reason of the fraud); Haarstad v. Gates, 107 Minn. 565, 119 N. W. 390 (complaint to recover money paid to a physician in reliance upon his fraudulent representations as to his ability to make a cure sustained); Newstrom v. Turnblad, 108 Minn. 58, 121 N. W. 236

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fraud or other ground for equitable relief.[27] Recovery may often be had for fraud under a common indebitatus count.[28]

FRAUDULENT CONVEYANCES

670. Complaint—A complaint in an action to set aside a fraudulent conveyance must allege facts which show that the plaintiff occupies a status, either as creditor or as representative of creditors, which entitles him to assail the transfer.[29] The recovery and docketing of a judgment must ordinarily be alleged, but it is not generally necessary to allege the return of an execution unsatisfied.[30] In the case of personalty the return of an execution unsatisfied should be alleged.[31] Special rules apply where the debtor has absconded or is a non-resident.[32] If an execution on a judgment is returned unsatisfied in the county in which the judgment was obtained, it is unnecessary that another execution should be issued in another county, where the judgment is docketed, before bringing an action in the latter county.[33] In pleading the judgment it is sufficient to allege that it was "duly rendered" or words to that effect.[34] It is unnecessary to allege that the debtor had no other property, at the time of

(complaint for fraud in sale of corporate stock sustained); Providence Jewelry Co. v. Crowe, 108 Minn. 84, 121 N. W. 415 (action for goods sold and delivered—answer alleging fraud in procuring signature to written contract sustained); McElrath v. Electric Invest. Co., 114 Minn. 358, 131 N. W. 380 (complaint for fraud in inducing plaintiff to lease certain hotel property sustained in part); Olson v. Smith, 116 Minn. 430, 134 N. W. 117 (complaint for fraudulent representations as to intention to furnish logs for plaintiff's sawmill, whereby they were induced to move the mill, sustained); Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754 (complaint for the recovery of money obtained by fraudulent representations of intention to organize a corporation sustained); Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9 (complaint held to state a cause of action for deceit and not for breach of contract—exchange of property); Flaherty v. Till, 119 Minn. 191, 137 N. W. 815 (complaint for deceit in promising a cure for a disease sustained); Jones v. Magoon, 119 Minn. 434, 138 N. W. 686 (complaint for deceit in selling an automobile sustained).

[27] Leighton v. Grant, 20 Minn. 345 (298, 306); Cochrane v. Halsey, 25 Minn. 52, 61.

[28] See §§ 187, 193, 544, 762, 765.

[29] Sawyer v. Harrison, 43 Minn. 297, 45 N. W. 434; Tvedt v. Mackel, 67 Minn. 24, 69 N. W. 475.

[30] Banning v. Armstrong, 7 Minn. 40 (24); Massey v. Gorton, 12 Minn. 145 (83); Rounds v. Green, 29 Minn. 139, 12 N. W. 454; Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390; Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799; Spooner v. Travelers' Ins. Co., 76 Minn. 311, 316, 79 N. W. 305; Peaslee v. Ridgway, 82 Minn. 288, 84 N. W. 1024; Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

[31] Banning v. Armstrong, 7 Minn. 40 (24); Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390.

[32] See Overmire v. Haworth, 48 Minn. 372, 51 N. W. 121; Rule v. Omega Stove & Grate Co., 64 Minn. 326, 67 N. W. 60.

[33] Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

[34] Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799.

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the conveyance, out of which the judgment might have been satisfied.[35] It is unnecessary to allege that there is no other property out of which the judgment might be satisfied,[36] or that the defendant is insolvent.[37] If the plaintiff is a subsequent creditor he must allege facts showing that the transfer was fraudulent as to him and not merely as to existing creditors.[38] If the plaintiff was a creditor at the time of the transfer the fact should be affirmatively alleged.[39] The fraudulent intent should be directly alleged in issuable form and not left to inference.[40] The debt for which the judgment was rendered may be alleged in general terms, the only purpose of such an allegation being to show that the judgment was recovered on a debt accruing prior to the transfer.[41] If it appears from the complaint that six years have elapsed since the commission of the fraud, the plaintiff must allege that he did not discover the fraud until within six years of the commencement of the action.[42] If a complaint shows that the plaintiff's judgment has been satisfied by a sale on execution it is demurrable.[43]

671. Answer—The invalidity of the judgment is a matter of defence to be made by answer and not by demurrer.[44] An answer has been held insufficient in not denying facts from which fraud might be inferred.[45]

GUARANTY

672. Pleading—In general—A complaint on a promise to pay the debt of another need not allege that the promise was in writing.[46] In an action against a guarantor on a note it has been held that a plea of payment and of extension of time of payment were not inconsistent.[47] Cases are cited below involving the sufficiency of particular pleadings.[48]

[35] Rounds v. Green, 29 Minn. 139, 12 N. W. 454.

[36] Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390; Spooner v. Travelers' Ins. Co., 76 Minn. 311, 316, 79 N. W. 305.

[37] Spooner v. Travelers' Ins. Co., 76 Minn. 311, 316, 79 N. W. 305.

[38] Anderson v. Lindberg, 64 Minn. 476, 67 N. W. 538; Williams v. Kemper, 99 Minn. 301, 109 N. W. 242. See Dunnell, Minn. Digest, § 3900.

[39] See Piper v. Johnston, 12 Minn. 60 (27); Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831; Welch v. Bradley, 45 Minn. 540, 48 N. W. 440.

[40] See McKibbin v. Ellingson, 58 Minn. 205, 212, 59 N. W. 1003.

[41] Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799. See Welch v. Bradley, 45 Minn. 540, 48 N. W. 440.

[42] Duxbury v. Boice, 70 Minn. 113, 72 N. W. 838; Minneapolis Threshing Machine Co. v. Jones, 89 Minn. 184, 94 N. W. 551; Schmitt v. Hager, 88 Minn. 413, 93 N. W. 110.

[43] Minneapolis Threshing Machine Co. v. Jones, 89 Minn. 184, 94 N. W. 551.

[44] Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

[45] Johnston v. Piper, 4 Minn. 192(133).

[46] Walsh v. Kattenburgh, 8 Minn. 127 (99).

[47] D. M. Osborne & Co. v. Waller, 73 Minn. 52, 75 N. W. 732.

[48] Nichols, Shepard & Co. v. Allen, 22 Minn. 283 (complaint on a guaranty of the collection of a note held insuffi-

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GUARDIAN AND WARD

673. Action on guardian's bond—Pleading—The consent of the probate court is a prerequisite to an action on the bond, but it need not be alleged in the complaint.[49] A bill in equity by a foreign guardian has been held not demurrable for failure to allege a filing of his letters in this state.[50]

HIGHWAYS

674. Pleading—In general—A complaint has been sustained on demurrer though the existence of a street as a public highway was alleged only by way of inference.[51]

IMPROVEMENTS

675. Occupying claimants' act—Pleading—A party cannot have the benefits of the act without appropriate allegations in his pleadings.[52] But a court should be very liberal in allowing a party to amend his pleadings so as to claim such benefits.[53] Allegations in an answer setting forth such a claim are not admitted by a failure to reply.[54] It is for the occupant to allege his good faith and to negative notice, and for the owner, if he wishes to force the occupant to buy the land, to negative notice on his part.[55]

INDEMNITY

676. Pleading—In general—Where there is an express contract of indemnity and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare on a common count for money paid or upon the contract.[56] A complaint on a bond of indemnity not signed by the principal has been held insufficient in not alleging that the sureties waived its execution by the principal, and authorized its delivery to the obligee as a valid obligation.[57] Cases are cited below involving the sufficiency of complaints on various forms of indemnity bonds.[58]

cient); Straight v. Wight, 60 Minn. 515, 63 N. W. 105 (failure of complaint to allege notice of acceptance of guaranty held waived by answer); Egan v. Gordon, 65 Minn. 505, 68 N. W. 103 (answer alleging that signing of a guaranty on a lease was induced by fraud sustained).

[49] Hantzch v. Massolt, 61 Minn. 361, 63 N. W. 1069. See Dunnell, Minn. Digest, § 4103.

[50] Pulver v. Leonard, 176 Fed. 586.

[51] Farrant v. First Div. etc. Ry., 13 Minn. 311(286).

[52] Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 1115.

[53] Cool v. Kelly, 85 Minn. 359, 88 N. W. 988.

[54] Reed v. Newton, 22 Minn. 541.

[55] Jewell v. Truhn, 38 Minn. 433, 38 N. W. 106.

[56] 22 Cyc. 101. See § 802.

[57] Bjoin v. Anglim, 97 Minn. 526, 107 N. W. 558.

[58] Dunham v. Johnson, 85 Minn. 268, 88 N. W. 737 (bond to indemnify retiring partner against firm debts — com-

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INFANTS

677. Pleading—In general—A complaint to disaffirm a conveyance made by an infant must show that the plaintiff is of age when the action is commenced.[59] In an action prosecuted by an infant through his next friend, the answer denying the alleged infancy, the plaintiff need not prove that he is an infant, his right of action not depending upon that fact.[60]

INJUNCTION

678. Pleading—In general—Whenever an injunction is sought 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.[61] An injunction will not ordinarily be granted where the essential facts are alleged only on information and belief.[62] A bare allegation of irreparable injury is insufficient. Facts must be alleged, in a traversable form, showing that such injury would result.[63] A bare allegation of no adequate remedy at law is insufficient. Facts must be alleged from which the inadequateness of the legal remedy is apparent.[64] It has been said that an injunction cannot be granted in any case without a proper complaint framed for that purpose.[65] It is not necessary in all cases where a temporary injunction is sought that the plaintiff should ask for a permanent injunction in his complaint. Other equivalent relief may be sought, appropriate to the nature of the case, and it is enough that it be made to appear that the defendant is threatening to do some act in violation of plaintiff's rights, in respect to the subject of the action, and tending to render the judgment ineffectual.[66]

679. Complaint for damages and injunction—In an action for damages and for an injunction the latter does not follow as a matter of course the recovery of the former.[67]

plaint held insufficient); Minneapolis etc. Ry. v. Grethen, 86 Minn. 323, 90 N. W. 573 (garnishment — complaint on bond to indemnify defendant sustained).

[59] Irvine v. Irvine, 5 Minn. 61(44).

[60] Meyenberg v. Eldred, 37 Minn. 508, 35 N. W. 371.

[61] Warsop v. Hastings, 22 Minn. 437; Maloney v. Finnegan, 38 Minn. 70, 35 N. W. 723.

[62] Armstrong v. Sanford, 7 Minn. 49 (34). See McRoberts v. Washburne, 10 Minn. 23(8); Conkey v. Dike, 17 Minn. 457(434); Gorton v. Forest City, 67 Minn. 36, 69 N. W. 478.

[63] Schurmeier v. St. Paul etc. Ry., 8 Minn. 113(88); Montgomery v. McEwen, 9 Minn. 103(93); Clarke v. Ganz, 21 Minn. 387; Laird, Norton Co. v. Pine County, 72 Minn. 409, 75 N. W. 723; Jordan v. Leonard, 119 Minn. 162, 137 N. W. 740.

[64] Goodrich v. Moore, 2 Minn. 61(49); Clarke v. Ganz, 21 Minn. 387; Laird, Norton Co. v. Pine County, 72 Minn. 409, 75 N. W. 723; Cobb v. French, 111 Minn. 429, 127 N. W. 415.

[65] Pine Tree Lumber Co. v. McKinley, 83 Minn. 419, 86 N. W. 414.

[66] Hamilton v. Wood, 55 Minn. 482, 57 N. W. 208.

[67] Finch v. Green, 16 Minn. 355(315). See Little v. Williford, 31 Minn. 173, 17 N. W. 282.

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680. Cross-complaint—In a proper case a defendant may seek an injunction against the plaintiff by means of a cross-complaint.[68]

681. Answer—The defendant has twenty days in which to answer.[69]

682. Trespass—Disputed boundaries—Counterclaim—In an action to enjoin a trespass upon land of the plaintiff, the defendant may plead and prove as a counterclaim that the alleged claim of trespass rests upon a disputed boundary line between the parties, and have the true line determined by the judgment of the court.[70]

683. Action on bond—Pleading—A complaint on a bond which alleged that the court finally decided the injunction suit and dismissed it has been sustained against objection first made on the trial.[71]

INSURANCE

684. Complaint on fire or life policy—It has been held unnecessary to allege that an arbitration was or was not had or was waived;[72] or to allege that representations or warranties were true;[73] or to negative excepted risks;[74] or to negative an increase of risk;[75] or to allege the amount of other insurance;[76] or to negative the existence or breach of a condition against incumbrances;[77] or to negative a change of beneficiary;[78] or to allege a demand;[79] or to allege a compliance with state laws by a foreign company;[80] or to allege due exertion to save property.[81] An allegation that a policy was "executed" imports its de-

[68] Pine Tree Lumber Co. v. McKinley, 83 Minn. 419, 86 N. W. 414.

[69] J. T. McMillan Co. v. State Board of Health, 110 Minn. 145, 124 N. W. 828.

[70] Hackett v. Kanne, 98 Minn. 240, 107 N. W. 1131.

[71] Guptill v. Red Wing, 76 Minn. 129, 78 N. W. 970. See, as to actions on bonds, Dunnell, Minn. Digest, § 4499.

[72] Kelly v. Liverpool etc. Ins. Co., 94 Minn. 141, 102 N. W. 380; Fegelson v. Niagara Fire Ins. Co., 94 Minn. 486, 103 N. W. 495. See Mosness v. German-Am. Ins. Co., 50 Minn. 341, 52 N. W. 932; Fletcher v. German-Am. Ins. Co., 79 Minn. 337, 82 N. W. 647.

[73] Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497(473); Chambers v. N. W. Mut. Life Ins. Co., 64 Minn. 495, 67 N. W. 367.

[74] Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005. See Note, 50 L. R. A. (N. S.) 1007.

[75] Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123(98).

[76] Ermentrout v. American Fire Ins. Co., 60 Minn. 418, 62 N. W. 543. See Guerin v. St. Paul Fire & Marine Ins. Co., 44 Minn. 20, 46 N. W. 138; Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

[77] Mistilski v. German Ins. Co., 64 Minn. 366, 67 N. W. 80.

[78] Laudenschlager v. N. W. etc. Assn., 36 Minn. 131, 30 N. W. 447.

[79] Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943.

[80] Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943; Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351; Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207.

[81] Fletcher v. German-Am. Ins. Co., 79 Minn. 337, 82 N. W. 647.

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livery.[82] The performance of conditions precedent may be alleged in general terms under the statute.[83] In an action on an oral contract it is unnecessary to set forth the terms of a written policy issued after the loss.[84] If the insured relies on a waiver or excuse for non-performance he must allege the facts in his complaint.[85] After a loss under a standard form of fire insurance policy, the insured may sue as for a total loss, and allege in addition thereto the actual amount of the damage. If the evidence fails to establish a total loss there may be a recovery in the same action for the actual damages as proved.[86] In a complaint on a life policy matured by the death of the insured it is unnecessary to plead or prove payment or tender of a loan as security for which the policy was pledged to the insurer. All such indebtedness may be interposed by the insurer as a counterclaim or setoff.[87] Cases are cited below involving the sufficiency of particular complaints.[88]

685. Answer—New matter—Matter in the nature of confession and avoidance must be specially pleaded by the defendant.[89] In pleading misrepresen-

[82] Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

[83] R. L. 1905 § 4150; G. S. 1913 § 7776; Mosness v. German-Am. Ins. Co., 50 Minn. 341, 52 N. W. 932. See Hand v. Nat. Live-Stock Ins. Co., 57 Minn. 519, 59 N. W. 538.

[84] Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943.

[85] Hand v. Nat. Live-Stock Ins. Co., 57 Minn. 519, 59 N. W. 538. See Boon v. State Ins. Co., 37 Minn. 426, 34 N. W. 902; Williams v. Fire Assn., 104 N. Y. S. 100.

[86] Moore v. Sun Ins. Office, 100 Minn. 374, 111 N. W. 260; Moore v. Phoenix Ins. Co., 100 Minn. 393, 111 N. W. 263.

[87] Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

[88] Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943 (complaint held not to show that an action was prematurely brought — unnecessary to allege a demand); Boon v. State Ins. Co., 37 Minn. 426, 34 N. W. 902 (necessity of excusing delay in bringing action); Guerin v. St. Paul Fire & Marine Ins. Co., 44 Minn. 20, 46 N. W. 138 (complaint held defective in not alleging that the insurer had notice of or consented to other insurance referred to in the complaint); Maxcy v. New Hampshire Fire Ins. Co., 54 Minn. 272, 55 N. W. 1130 (allegation of loss by a mortgagee held sufficient); Ermentrout v. American Fire Ins. Co., 60 Minn. 418, 62 N. W. 543 (complaint in an action by an assignee of an assignee of a mortgagee sustained); Minneapolis etc. Ry. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132 (complaint in action by common carrier sustained); Morley v. Liverpool etc. Ins. Co., 76 Minn. 285, 79 N. W. 103 (an allegation of an assignment of a claim for loss sustained); Gallenbeck v. N. W. Mut. Relief Assn., 84 Minn. 184, 87 N. W. 614 (complaint held to show action prematurely brought—held not to state a cause of action against the defendant, the policy issued by the defendant to the plaintiff having been surrendered and a new policy issued by another company); Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524 (complaint on fire policy sustained—other insurance); Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250 (allegations in reference to agreed surrender value and the actual value of policy held to present questions of fact).

[89] Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123(98) (increase of risk); Ganser v. Fireman's Fund Ins. Co., 38 Minn. 74, 35 N. W. 584 (fraud in proof of loss); Brigham v. Wood, 48 Minn. 344, 51 N. W. 228 (change of own-

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tations the particular statements claimed to be false must be specified.[90] By denying in an answer any liability for loss the insurer does not waive the right to plead that the action is prematurely brought.[91] A vacancy has been held sufficiently pleaded without alleging that it increased the risk.[92] If a controversy exists as to the amount of a fire loss the insurer may plead in its answer the failure to arbitrate the question and thus defeat the action.[93] Where plaintiff alleges performance of conditions generally, an answer sufficiently alleges a breach by setting out a condition and alleging non-performance thereof.[94]

686. Issues—Variance—After a loss under a standard form of fire insurance policy, the insured may sue as for a total loss, and allege in addition thereto the actual amount of the damage. If the evidence fails to establish a total loss, there may be a recovery in the same action for the actual damages as proved.[95] Under an allegation of performance of conditions precedent evidence of a waiver or excuse for non-performance is inadmissible.[96] Cases are cited below involving questions as to the issues in particular actions.[97]

687. Mutual benefit insurance—Pleading—Cases are cited below involving questions of pleading in actions for the recovery of benefits.[98]

ership); Caplis v. American Fire Ins. Co., 60 Minn. 376, 62 N. W. 440 (concealment—misrepresentations); Cruikshank v. St. Paul Fire & Marine Ins. Co., 75 Minn. 266, 77 N. W. 958 (breach of warranty of title); Fletcher v. German-Am. Ins. Co., 79 Minn. 337, 82 N. W. 647 (failure to make due exertion to prevent loss). See § 684, and Dunnell, Minn. Digest, § 4738.

[90] Chambers v. N. W. Mut. Life Ins. Co., 64 Minn. 495, 67 N. W. 367. See Cerys v. State Ins. Co., 71 Minn. 338, 340, 73 N. W. 849.

[91] La Plant v. Fireman's Ins. Co., 68 Minn. 82, 70 N. W. 856.

[92] Doten v. Aetna Ins. Co., 77 Minn. 474, 80 N. W. 630.

[93] Kelly v. Liverpool etc. Ins. Co., 94 Minn. 141, 146, 102 N. W. 380.

[94] Birmingham v. Farmers' Joint Stock Ins. Co., 67 Barb. (N. Y.) 595.

[95] Moore v. Sun Ins. Office, 100 Minn. 374, 111 N. W. 260; Moore v. Phoenix Ins. Co., 100 Minn. 393, 111 N. W. 263.

[96] Hand v. Nat. Live-Stock Ins. Co., 57 Minn. 519, 59 N. W. 538.

[97] Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 123(98) (under an allegation of defects in the roof of a building evidence of the condition of the building as a whole held inadmissible); Ganser v. Fireman's Fund Ins. Co., 38 Minn. 74, 35 N. W. 584 (question of fraud in proof of loss held not within issues); Guerin v. St. Paul Fire & Marine Ins. Co., 44 Minn. 20, 46 N. W. 138 (evidence to show that the insurer consented to other insurance held inadmissible under the pleadings); Bromberg v. Minn. Fire Assn., 45 Minn. 318, 47 N. W. 975 (evidence of a mistake in the description of the property insured held inadmissible under the pleadings); James v. Merchants' L. & C. Co., 118 Minn. 146, 136 N. W. 582 (issue as to waiver of prompt payment of premium litigated by consent).

[98] Neskern v. N. W. etc. Assn., 30 Minn. 406, 15 N. W. 683 (complaint in an action on a certificate held sufficient though it did not allege a failure to make an assessment or the receipt of money on an assessment); Laundenschlager v. N. W. etc. Assn., 36 Minn. 131, 30 N. W. 447 (in a complaint by the beneficiary named in a policy it is unnecessary to negative a change of beneficiary); Backdahl v. Grand Lodge, 46 Minn. 61, 48 N. W. 454 (defence of sus-

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688. Live stock insurance—Pleading—A complaint, in an action to recover on a live stock insurance policy conditioned to indemnify plaintiff for loss by death from disease or accident of the animals insured, has been held defective on demurrer, in not alleging that the death of the animal sued for was caused either by disease or accident. In such a case the naked allegation that the animal died does not show a liability under the contract. The nature of the disease need not be specified.[99]

JUDGMENTS

689. How pleaded—Statute—It is provided by statute that "in pleading a judgment or other determination of a court or officer, of general or special jurisdiction, it shall be sufficient to allege that the same was duly made or given, without stating the facts conferring jurisdiction. In case of special jurisdiction, if such allegation be controverted, the party pleading the judgment or determination must prove the facts conferring jurisdiction."[1] It is not essential to follow the exact language of the statute. An allegation that a judgment was duly "rendered" is sufficient. It is not indispensable that the word "duly" should be used.[2] An allegation that a judgment was "duly rendered" in the court of another state is a sufficient averment of the jurisdiction of the court as against a general demurrer.[3]

690. As a bar or estoppel—As evidence—Pleading—The defence of a bar by former judgment is in the nature of confession and avoidance and must be specially pleaded as new matter.[4] In pleading the defence it is sufficient to allege in general terms that the facts alleged in the complaint in the former action were the same facts alleged in the complaint in the pending action.[5] It

pension for non-payment of assessments and defence of suspension for non-payment of dues held not inconsistent); Lake v. Minn. Masonic Relief Assn., 61 Minn. 96, 63 N. W. 261 (objection to the form of a complaint held waived by the issues tendered in the answer and the course of the trial); Carey v. Switchmen's Union, 98 Minn. 28, 107 N. W. 129 (complaint sustained against objection first made on appeal that it failed to allege an appeal to the next convention of the society from a disallowance of the claim); Kulberg v. Supreme Ruling, 126 Minn. 494, 148 N. W. 299 (action on benefit certificate—answer held not to admit cause of action—held error not to allow amendment to answer). See Penhall v. Minn. State Medical Assn., 126 Minn. 323, 148 N. W. 472 (unnecessary for complaint to negative conditions subsequent).

[99] Knutzen v. Nat. Live Stock Ins. Co., 108 Minn. 163, 121 N. W. 632. See Hand v. Nat. Live Stock Ins. Co., 57 Minn. 519, 59 N. W. 538.

[1] R. L. 1905 § 4146; G. S. 1913 § 7772. Statute cited: Bailey v. Merritt, 7 Minn. 159(102).

[2] Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799.

[3] Benedict v. Clarke, 123 N. Y. S. 964.

[4] Bowe v. Minn. Milk Co., 44 Minn. 460, 47 N. W. 151; Swank v. St. Paul City Ry., 61 Minn. 423, 63 N. W. 1088; Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022. See Schurmeier v. Johnson, 10 Minn. 319(250) (defence insufficiently pleaded).

[5] Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263.

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should be alleged that the judgment was rendered on the merits.[6] A former judgment on a different cause of action need not be pleaded in order to take advantage of it as an estoppel by verdict.[7] When a judgment is sought to be used as evidence, rather than as a bar or an estoppel, it stands on the same footing as any other evidence and need not be pleaded.[8] If it appears on the face of a complaint that the cause of action therein alleged is res judicata a general demurrer will lie.[9]

691. Action on judgment—Pleading—Counterclaim—Equitable defence—In an action on a foreign judgment the complaint need not allege that the court rendering the judgment had jurisdiction of the parties or the subject-matter.[10] By way of counterclaim or equitable defence, the defendant may plead facts which would justify a court of equity in canceling the judgment on the ground of want of jurisdiction in the court rendering it. A general denial of jurisdiction, or of service of summons is insufficient. The facts must be pleaded as fully as in an original action for the cancelation of the judgment.[11] Cases are cited below involving the sufficiency of particular pleadings.[12]

692. Statutory action to vacate for fraud—A complaint under the statute[13] must specifically point out the act of perjury, or subornation thereof, or the fraudulent acts or practices relied on, and show on its face that the action is brought within the statutory period.[14] Where the plaintiff claims that he was prevented from defending by the fraud of the prevailing party, he must show in his complaint that he was entirely free from contributory negli-

[6] Terryll v. Bailey, 27 Minn. 304, 7 N. W. 261; Andrews v. School Dist., 35 Minn. 70, 27 N. W. 303.

[7] Swank v. St. Paul City Ry., 61 Minn. 423, 63 N. W. 1088.

[8] Knox v. Randall, 24 Minn. 479, 494; Marvin v. Dutcher, 26 Minn. 391, 403, 4 N. W. 685; McClung v. Condit, 27 Minn. 45, 6 N. W. 399; Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022.

[9] Monette v. Cratt, 7 Minn. 234(176).

[10] Gunn v. Peakes, 36 Minn. 177, 30 N. W. 460 (overruling Karns v. Kunkle, 2 Minn. 313, 268; Smith v. Mulliken, 2 Minn. 319, 273).

[11] Vaule v. Miller, 69 Minn. 440, 72 N. W. 452; Deering v. Poston, 78 Minn. 29, 80 N. W. 783; Stevenson v. Murphy, 106 Minn. 243, 119 N. W. 47.

[12] Lawrence v. Willoughby, 1 Minn. 87(65) (requisite particularity in averments—variance in the amount and in the names of the parties held fatal); Holcombe v. Tracy, 2 Minn. 241(201) (answer alleging that judgment is not owned by plaintiff, but by another person, naming him, presents a good defence, though the particulars of the assignment are not stated); Holmes v. Campbell, 12 Minn. 221(141) (defective complaint sustained as against objection first made after order for judgment).

[13] R. L. 1905 § 4277; G. S. 1913 § 7910; Baker v. Sheehan, 29 Minn. 235, 12 N. W. 704 (complaint held to state but a single cause of action under the statute). See Dunnell, Minn. Digest, §§ 5126–5136.

[14] Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341; Hass v. Billings, 42 Minn. 63, 43 N. W. 797; Wilkins v. Sherwood, 55 Minn. 154, 56 N. W. 591; Colby v. Colby, 59 Minn. 432, 61 N. W. 460 (complaint held to state a cause of action for fraudulent practices by husband to prevent wife from defending an action for

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gence in suffering the judgment to be taken against him.[15] Cases are cited below in which complaints were sustained.[16]

693. Equitable action to vacate for fraud—A complaint in an equitable action to vacate a judgment for fraud must show not only the commission of the fraud, but also damage resulting therefrom to the plaintiff. An action will not lie against one innocent of the fraud, not a party to the judgment, and claiming nothing under it.[17]

LACHES

694. Pleading—Demurrer—A complaint in an equitable action should state facts explaining or excusing delays which appear to be unreasonable,[18] but owing to the nature of laches it is rare that a complaint is demurrable for failing to do so.[19] One may taken advantage of laches without pleading it.[20]

LANDLORD AND TENANT

695. Leases—How alleged—In alleging a leasing it is proper to allege in general terms that the party "leased" or "let" the premises.[21] A general allegation that a person took possession of land as a lessee has been held a sufficient allegation that it was leased to him, as against an objection first raised on appeal.[22] An allegation 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.[23]

696. Eviction—How pleaded—An eviction may be charged as an ultimate fact without alleging the means of its accomplishment.[24]

divorce); National Council v. Ruder, 126 Minn. 154, 147 N. W. 959 (perjury—complaint held insufficient); Young v. Lindquist, 126 Minn. 414, 148 N. W. 455 (irrelevant and redundant allegations and conclusions of law as to perjury and fraudulent practices properly stricken out—order requiring complaint to be made more definite and certain sustained).

[15] Schweinfurter v. Schmahl, 69 Minn. 418, 72 N. W. 702; O'Brien v. Larson, 71 Minn. 371, 74 N. W. 148.

[16] Spooner v. Spooner, 26 Minn. 137, 1 N. W. 838; Baker v. Sheehan, 29 Minn. 235, 12 N. W. 704.

[17] McNair v. Toler, 21 Minn. 175. See Dunnell, Minn. Digest, § 5125.

[18] Marcotte v. Hartman, 46 Minn. 202, 48 N. W. 767.

[19] Sanborn v. Eads, 38 Minn. 211, 36 N. W. 338. See Mowry v. McQueen, 80 Minn. 385, 83 N. W. 348; Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882.

[20] Schmitt v. Hagar, 88 Minn. 413, 93 N. W. 110.

[21] See Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. 147; Commonwealth etc. Co. v. Dokko, 71 Minn. 533, 74 N. W. 891; Bendikson v. Great Northern Ry., 80 Minn. 332, 83 N. W. 194.

[22] Bendikson v. Great Northern Ry., 80 Minn. 332, 83 N. W. 194. See also Commonwealth etc. Co. v. Dokko, 71 Minn. 533, 74 N. W. 891.

[23] Stees v. Kranz, 32 Minn. 313, 20 N. W. 241.

[24] Jennings v. Kiernan, 35 Or. 349, 55 Pac. 44, 56 Pac. 72.

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697. Unlawful detainer proceedings—Complaint—A complaint in unlawful detainer proceedings need not allege that the plaintiff is the owner, or that he is entitled to the possession, of the demised premises, if it shows a leasing by him to defendant, and an entry and possession by the latter under such leasing.[25] The premises must be described,[26] including the place where they are located.[27] Cases are cited below involving the construction of particular complaints.[28]

698. Same—Answer—Plea of not guilty—The answer must be made, if at all, at the opening of the court upon the day the summons is made returnable, or at such other time as may be designated by the court.[29] An oral plea of "not guilty" is sufficient to put in issue the allegations of the complaint, and is equivalent to a general denial. Facts which tend to contradict the allegations of the complaint are admissible under a plea of not guilty. Matters in excuse, justification, or avoidance must be alleged by a written answer.[30]

699. Same—Counterclaim—A defendant is not authorized to plead a counterclaim in unlawful detainer proceedings.[31]

700. Same—Defences—Facts calling for affirmative equitable relief cannot be pleaded in defence and do not justify the certification of the case to the district court.[32] Matters which control the legal effect of the lease, and show that the legal relation of landlord and tenant was not created by it and does not exist between the parties, may be pleaded in defence.[33] The defendant may assert as a defence that the plaintiff has executed to him a lease for a further term not yet expired.[34] It has been held no defence that the defend-

[25] Engels v. Mitchell, 30 Minn. 122, 14 N. W. 510. See Pinney v. Fridley, 9 Minn. 34(23).

[26] Lewis v. Steele, 1 Minn. 88(67) (statute since changed as to particularity of description).

[27] See Gibbens v. Thompson, 21 Minn. 398.

[28] Dorr v. McDonald, 43 Minn. 458, 45 N. W. 864 (complaint sustained against objection first raised on appeal—fairly inferable that while the original letting was for only a month the defendant continued in the occupancy of the premises as tenant from month to month); Pendergast v. Searle, 81 Minn. 291, 84 N. W. 107 (certain allegations as to service of notice to quit held sufficient).

[29] Universalist General Convention v. Bottineau, 42 Minn. 35, 43 N. W. 687.

[30] Berryhill v. Healey, 89 Minn. 444, 95 N. W. 314; Sodini v. Gaber, 101 Minn. 155, 111 N. W. 962; Bartleson v. Munson, 105 Minn. 348, 117 N. W. 512; Johnson v. Carlin, 115 Minn. 430, 132 N. W. 750.

[31] See Barker v. Walbridge, 14 Minn. 469(351); Peterson v. Kreuger, 67 Minn. 449, 70 N. W. 567.

[32] Steele v. Bond, 28 Minn. 267, 9 N. W. 772; Petsch v. Briggs, 31 Minn. 392, 18 N. W. 101; Norton v. Beckman, 53 Minn. 456, 55 N. W. 603; Lundberg v. Davidson, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71; Tilleny v. Knoblauch, 73 Minn. 108, 75 N. W. 1039; Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565. See Stewart v. Murray, 13 Minn. 426(393); Barker v. Walbridge, 14 Minn. 469(351).

[33] Steele v. Bond, 28 Minn. 267, 9 N. W. 772. See Sodini v. Gaber, 101 Minn. 155, 111 N. W. 962.

[34] Judd v. Arnold, 31 Minn. 430, 18 N. W. 151.

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ant owned and occupied a building on the premises as a homestead;[35] or that the plaintiff had broken his covenant to keep the premises in good repair;[36] or that the plaintiff had waived prior defaults of the tenant.[37]

701. Same—Issues—Variance—The action is not designed for the trial of title,[38] or as a substitute for ejectment,[39] or for the recovery of rent,[40] or to enforce agreements for the surrender of realty when the relation of landlord does not exist.[41] A variance as to the time a notice to quit was served has been held fatal.[42]

702. Same—Construction of pleadings—The pleadings are to be construed and have the same effect as in an ordinary civil action.[43]

703. Same—Judgment on the pleadings—If the answer admits the material allegations of the complaint, and alleges no defence, judgment on the pleadings may be rendered as in ordinary civil actions.[44]

704. Action for rent—Pleading—In general—Rent may be recovered under a common count for use and occupation.[45] Where the plaintiff pleads double by declaring on a lease, and also for use and occupation, he may recover upon proof of either a lease or a tenancy by permission, if the defendant fails to make proper objection to the double pleading.[46] A complaint on a lease, which alleges that the lease was executed with a certain date, the term to commence on that date, and that the lessee took possession under the lease, sufficiently avers possession by the lessee from the date of the lease. Upon an allegation of ownership by the lessor at the date of the lease such ownership is presumed to continue till the contrary appears.[47] Cases are cited below involving the construction of particular complaints,[48] answers,[49] and re-

[35] Lloyd v. Secord, 61 Minn. 448, 63 N. W. 1099.

[36] Peterson v. Kreuger, 67 Minn. 449, 70 N. W. 567.

[37] Douglas v. Herms, 53 Minn. 204, 54 N. W. 1112.

[38] Ferguson v. Kumler, 25 Minn. 183. See as to the action in general, Dunnell, Minn. Digest, §§ 5448–5475.

[39] Ferguson v. Kumler, 25 Minn. 183; Steele v. Bond, 28 Minn. 267, 9 N. W. 772; Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454.

[40] Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565.

[41] Steele v. Bond, 28 Minn. 267, 9 N. W. 772.

[42] Waggoner v. Preston, 83 Minn. 336, 86 N. W. 335.

[43] Norton v. Beckman, 53 Minn. 456, 55 N. W. 603.

[44] Norton v. Beckman, 53 Minn. 456, 55 N. W. 603; Lloyd v. Secord, 61 Minn. 448, 63 N. W. 1099.

[45] 15 Am. & Eng. Ency. of Law, 2 ed., 1111; 18 Id. 428. See § 901.

[46] Dean v. Leonard, 9 Minn. 190(176). Ordinarily the plaintiff should not be required to elect as the objection is purely technical.

[47] Rhone v. Gale, 12 Minn. 54(25).

[48] Lucy v. Wilkins, 33 Minn. 441, 23 N. W. 861 (complaint held not to admit a surrender and acceptance).

[49] Roach v. Peterson, 47 Minn. 291, 50 N. W. 80 (answer held insufficient in not showing that a building was destroyed or injured without the fault of the tenant); Collins v. Lewis, 53 Minn. 78, 54 N. W. 1056 (answer held to allege a breach of a covenant for quiet enjoyment); Lafferty v. Hawes, 63 Minn. 13,

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plies.[50]

705. Same—Counterclaim—Recoupment—A cause of action for interference with the enjoyment of possession by the tenant or for an eviction may be counterclaimed.[51] So may a cause of action for repairs made by the defendant under agreement with the plaintiff.[52] Where a lessee enters into and retains possession under a covenant in the lease that the landlord will make improvements, which he fails to do, the lessee, when sued for the rent, may recoup the damages resulting from such breach of the covenant, or set up the resulting damages as a counterclaim.[53] A failure to furnish certain material for repairs has been held not a ground for a counterclaim,[54] and so has a claim for damages resulting from the suspension of certain railway privileges.[55] An amendment setting up a counterclaim growing out of a sale by plaintiff of furniture and fixtures covered by a mortgage in the lease has been held properly denied.[56]

706. Same—Defences—Consistency—The failure of the landlord to maintain fire escapes as required by statute is a good defence.[57] In an action for rent for a part of the term it is a good defence that the tenant had previously surrendered the premises to the landlord and that the latter had accepted the same. Such a defence is not inconsistent with the defence that the premises became untenantable, so that the tenant was compelled to abandon them.[58] An admission of indebtedness for rent is not inconsistent with a counterclaim for repairs made by the defendant under agreement with the

65 N. W. 87 (answer held sufficient to admit proof of a surrender by operation of law as well as by agreement of the parties); Pioneer Press Co. v. Hutchinson, 63 Minn. 481, 65 N. W. 938 (answer held sufficient to admit proof of damages arising from the lessor's failure to make improvements); Hausman v. Mulheran, 68 Minn. 48, 70 N. W. 866 (answer setting up a counterclaim for repairs held sufficient though it did not allege that the repairs were necessary); Fegelson v. Dickerman, 70 Minn. 471, 73 N. W. 144 (answer held to put in issue the material allegations of the complaint); Trainor v. Schutz, 98 Minn. 213, 107 N. W. 812 (necessity of alleging facts constituting fraud); Viehman v. Boelter, 105 Minn. 60, 116 N. W. 1023 (constructive eviction—held unnecessary to allege surrender of building); Kingsted v. Wright County Co-op. Co., 116 Minn. 131, 133 N. W. 399 (answer held to present an issue as to a surrender of the premises).

[50] Johnson v. Sackrison, 78 Minn. 107, 80 N. W. 858 (attornment held sufficiently pleaded).

[51] Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Collins v. Lewis, 53 Minn. 78, 54 N. W. 1056. See City Power Co. v. Fergus Falls Water Co, 55 Minn. 172, 56 N. W. 685; Chapman-Drake Co. v. Frank Fabian Mfg. Co., 104 Minn. 176, 116 N. W. 207.

[52] Hausman v. Mulheran, 68 Minn. 48, 70 N. W. 866.

[53] Pioneer Press Co. v. Hutchinson, 63 Minn. 481, 65 N. W. 938. See Long v. Gieriet, 57 Minn. 278, 59 N. W. 194.

[54] Hall v. Smith, 16 Minn. 58(46).

[55] McCormick v. Milburn & Stoddard Co., 57 Minn. 6, 58 N. W. 600.

[56] Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

[57] Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856.

[58] Minneapolis Co-op. Co. v. Williamson, 51 Minn. 53, 52 N. W. 986.

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plaintiff.[59] A general denial and a subsequent oral agreement inconsistent with plaintiff's right to recover have been held not inconsistent.[60]

707. Same—Issues—Variance—When the plaintiff declares on a written lease he may recover upon proof of possession by the defendant as tenant, though the lease is void.[61] Cases are cited below involving questions of variance.[62]

LIBEL AND SLANDER

708. Inducement—Colloquium—Innuendo—If the words alleged are not actionable per se, 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.[42] And, generally, in addition, the complaint must also contain an innuendo, that is, an averment that the defendant spoke or published the words alleged with a specified defamatory meaning or application and was so understood by the persons hearing or reading them.[43] But where the words, read in connection with the inducement are obviously defamatory, no innuendo is necessary.[44] An innuendo cannot take the place of an inducement and colloquium. It cannot change the ordinary

[59] Hausman v. Mulheran, 68 Minn. 48, 70 N. W. 866.

[60] Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[61] Finch v. Moore, 50 Minn. 116, 52 N. W. 384; Steele v. Anheuser-Busch Brewing Co., 57 Minn. 18, 58 N. W. 685; Prendergast v. Searle, 74 Minn. 333, 77 N. W. 231; Buckingham Apartment House Co. v. Dafoe, 78 Minn. 268, 80 N. W. 974; Van Brunt v. Wallace, 88 Minn. 116, 92 N. W. 521.

[62] Nelson v. Thompson, 23 Minn. 508 (variance disregarded where objection was first made on appeal); Erickson v. Schuster, 44 Minn. 441, 46 N. W. 914 (variance as to time of commencement of term held immaterial); Weide v. St. Paul Boom Co., 92 Minn. 76, 99 N. W. 421 (assignee of lease held not entitled to object to a variance relating to the assignment); Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566 (illegality of a lease, as contemplating a violation of the liquor laws, held not available as a defence where it neither appeared from the complaint, nor was alleged in the answer, and was not litigated by consent).

[42] Smith v. Coe, 22 Minn. 276; Stewart v. Wilson, 23 Minn. 449; Newell v. How, 31 Minn. 235, 17 N. W. 383; Richmond v. Post, 69 Minn. 457, 72 N. W. 704; Radke v. Kolbe, 79 Minn. 440, 82 N. W. 977; Quist v. Klichli, 92 Minn. 160, 99 N. W. 642. Complaints held sufficient in this regard: Glatz v. Thein, 47 Minn. 278, 50 N. W. 127; Traynor v. Sielaff, 62 Minn 420, 64 N. W. 915; Knox v. Meehan, 64 Minn. 280, 66 N. W. 1149.

[43] Schmidt v. Witherick, 29 Minn. 156, 12 N. W. 448; Petsch v. Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034; Glatz v. Thein, 47 Minn. 278, 50 N. W. 127. Complaints held sufficient in this regard: Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915; Knox v. Meehan, 64 Minn. 280, 66 N. W. 1149.

[44] Sharpe v. Larson, 70 Minn. 209, 72 N. W. 961.

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meaning of words.[45] If an innuendo is inserted unnecessarily, it does not vitiate the complaint, but may be treated as surplusage.[46]

709. Good reputation of plaintiff—It is unnecessary to allege the good reputation of the plaintiff, but if such an allegation is made an issue thereon may be made by a denial in the answer.[47]

710. Jurisdiction of officer—A complaint in an action for slander charging a justice of the peace with rendering a corrupt decision has been held to allege sufficiently the jurisdiction of the justice.[48]

711. Setting out defamatory matter—The defamatory matter must be set out in haec verba. It is not sufficient merely to state the effect of the language, or that the publication was of a certain defamatory tenor or import.[49] But where a libelous 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, if it in any way qualifies the part set up in the complaint or renders it less libelous.[50] 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.[51]

712. Uniting several libels—Whether, in an action for libel based on a defamatory publication containing several independent libels, plaintiff should plead them as separate causes of action, is an open question. The failure to do so is waived by answering to the merits.[52] When the entire publication is set out, the plaintiff may indicate by his allegations an intention to rely exclusively on a particular portion thereof, and if he does, his damages must be restricted accordingly.[53]

[45] Fredrickson v. Johnson, 60 Minn. 337, 62 N. W. 388; Richmond v. Post, 69 Minn. 457, 72 N. W. 704; Radke v. Kolbe, 79 Minn. 440, 82 N. W. 977; State v. Shippman, 83 Minn. 441, 86 N. W. 431; Herringer v. Ingberg, 91 Minn. 71, 97 N. W. 460.

[46] Fredrickson v. Johnson, 60 Minn. 337, 62 N. W. 388; State v. Shippman, 83 Minn. 441, 86 N. W. 431.

[47] Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383. See Lotto v. Davenport, 50 Minn. 99, 52 N. W. 130; Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147; Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897.

[48] Gove v. Blethen, 21 Minn. 80.

[49] American Book Co. v. Kingdom Publishing Co., 71 Minn. 363, 73 N. W. 1089. See Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879.

[50] Blethen v. Stewart, 41 Minn. 205, 42 N. W. 932; Oleson v. Journal Printing Co., 47 Minn. 300, 50 N. W. 80.

[51] See Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103; Glatz v. Thein, 47 Minn. 278, 50 N. W. 127.

[52] Davis v. Hamilton, 85 Minn. 209, 88 N. W. 744. See Realty Revenue Guaranty Co. v. Farm, Stock and Home Pub. Co., 79 Minn. 465, 82 N. W. 857.

[53] Davis v. Hamilton, 85 Minn. 209, 88 N. W. 744.

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713. Charge of crime—In a complaint for a charge of crime it is unnecessary to allege the actual commission of a crime, or aver any fact to exist, the existence of which would be a necessary element in the crime.[54]

714. Application of words to plaintiff—It is provided by statute that in actions for libel or slander, it shall be sufficient instead of stating extrinsic facts showing the application to plaintiff of the defamatory matter complained of, to allege, generally, that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on the trial that it was so published or spoken.[55] But this statute does not obviate the necessity of alleging that the defamatory words were spoken or published of and concerning the plaintiff.[56] The actionable quality of the words, as respects the plaintiff, must be made to appear.[57] Where the words amount to a libelous charge against some person, but it is left uncertain as to the application thereof to the plaintiff, such application may be shown by proof of extrinsic facts, and under this statute it is unnecessary to allege them in the complaint.[58] The statute merely dispenses with an inducement to show the application of the language to the plaintiff. It does not dispense with the necessity of averments of extrinsic facts to show the meaning of ambiguous language, and what it was understood to mean.[59] While a party is not required to plead extrinsic facts to show the application to the plaintiff, yet if he does so, and the facts thus pleaded show that it applied to some one else, and not to him, the special allegation would control the general and the complaint would be bad.[60] Where the language of a libel as pleaded shows on its face that it was used of and concerning the plaintiff in an official capacity or special character, an express averment that it was so used is unnecessary.[61] Though a defamatory article appears on its face to refer to the managing agent of a corporation individually, it may be shown by extrinsic facts that it was published of and concerning the corporation.[62]

[54] West v. Hanrahan, 28 Minn. 385, 10 N. W. 415.

[55] R. L. 1905 § 4152; G. S. 1913 § 7778; Martin County Bank v. Day, 73 Minn. 195, 75 N. W. 1115.

[56] Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879; Carlson v. Minn. Tribune Co., 47 Minn. 337, 50 N. W. 229; Palmerlee v. Nottage, 119 Minn. 351, 138 N. W. 312. Complaints held sufficient in this regard: Cady v. Minneapolis Times Co., 58 Minn. 329, 59 N. W. 1040; Knox v. Meehan, 64 Minn. 280, 66 N. W. 1149; Martin County Bank v. Day, 73 Minn. 195, 75 N. W. 1115.

[57] Gove v. Blethen, 21 Minn. 80; Smith v. Coe, 22 Minn. 276; Petsch v. Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034; Carlson v. Minn. Tribune Co., 47 Minn. 337, 50 N. W. 229.

[58] Petsch v. Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034.

[59] Richmond v. Post, 69 Minn. 457, 72 N. W. 704.

[60] Martin County Bank v. Day, 73 Minn. 195, 75 N. W. 1115.

[61] Stoll v. Houde, 34 Minn. 193, 25 N. W. 63. See Gove v. Blethen, 21 Minn. 80.

[62] Martin County Bank v. Day, 73 Minn. 195, 75 N. W. 1115; Realty Revenue Guaranty Co. v. Farm, Stock and Home Pub. Co., 79 Minn. 465, 82 N. W. 857.

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715. Publication—In an action for slander it is necessary to allege that the words were spoken in the presence and hearing of others, but it is unnecessary to allege the names of such third parties.[63] In an action for libel an allegation of publication has been held sufficient and the defendant estopped by his answer from questioning its sufficiency.[64]

716. Publication by defendant—It is necessary to allege that the words were spoken or published by the defendant.[65]

717. Falsity and malice—It is necessary to allege the falsity of the words spoken or published.[66] It is customary to allege that they were spoken or published maliciously.[67] It is necessary to allege malice when the words are privileged.[68]

718. Service of notice—In an action for libel against a newspaper, where general damages are sought, the service of notice as provided by G. S. 1913 § 7901 must be alleged.[69]

719. Damages—When the words are actionable per se no special damages need be alleged to constitute a cause of action,[70] but if the words are not actionable per se special damages must be alleged to constitute a cause of action.[71] In no case can special damages be recovered unless they are pleaded.[72] A general allegation of loss of trade is ordinarily sufficient.[73] When words are actionable per se such general facts as the vocation and position in life of the plaintiff are admissible on the question of general damages without being specially pleaded.[74]

720. Matter in mitigation—Bad reputation of plaintiff—Good faith—The statute provides that the defendant "may" allege in his answer any matter

[63] Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879. See Weicherding v. Krueger, 109 Minn. 461, 124 N. W. 225 (objection that complaint for slander did not name the person to whom the words were addressed and the other circumstances held waived when not raised until after verdict).

[64] Hemphill v. Holley, 4 Minn. 233 (166).

[65] Hemphill v. Holley, 4 Minn. 233 (166); Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879.

[66] Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879; Wilcox v. Moore, 69 Minn. 49, 71 N. W. 917.

[67] See Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879.

[68] Aldrich v. Press Publishing Co., 9 Minn. 133(123).

[69] Clementson v. Minn. Tribune Co., 45 Minn. 303, 47 N. W. 781.

[70] West v. Hanrahan, 28 Minn. 385, 10 N. W. 415; Pratt v. Pioneer Press Co., 35 Minn. 251, 28 N. W. 708; Holston v. Boyle, 46 Minn. 432, 49 N. W. 203; Lysacker v. Bemidji Pioneer Pub. Co., 114 Minn. 179, 130 N. W. 850; Beek v. Nelson, 126 Minn. 10, 147 N. W. 668.

[71] Stewart v. Minn. Tribune Co., 40 Minn. 101, 41 N. W. 457.

[72] Holston v. Boyle, 46 Minn. 432, 49 N. W. 203 (loss of appointment to an office); Metcalf v. Collinson, 95 Minn. 238, 103 N. W. 1022 (subsequent discharge of employee).

[73] Landon v. Watkins, 61 Minn. 137, 63 N. W. 615.

[74] Mallory v. Pioneer Press Co., 34 Minn. 521, 26 N. W. 904.

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in mitigation.[75] Prior to the statute there was much uncertainty as to when a defendant might prove mitigating circumstances.[76] Where the complaint claims more than nominal damages to the reputation of plaintiff, defendant may, under a general denial, prove the bad reputation of plaintiff at and prior to the time of the slander or libel, though the complaint does not specifically allege plaintiff's good reputation. Where the complaint alleges that defendant acted maliciously, and states a case for the recovery of punitive damages, defendant may, under a general denial, prove facts tending to show good faith and absence of malice on his part.[77] A plea in mitigation has been held not inconsistent with a general denial.[78] Matter in mitigation has been held improperly stricken out on motion before trial.[79]

721. Privilege—Though never explicitly decided it is probable that the defence of privilege cannot be proved unless pleaded.[80] A plea of privilege on the ground that the article related to a public trial held sufficient.[81]

722. Truth of charge in justification—Under a general denial defendant may show in diminution of damages that plaintiff's reputation was bad, but this must be shown by evidence of his common repute in the local community and not by specific acts of wrongdoing. Plaintiff's reputation is presumed good and is not in issue unless attacked by defendant; if so attacked and put in issue, defendant presents the issue regardless of the form of the pleadings. In order to justify defendant must plead specific facts showing the truth of the charge, and may then prove specific acts of wrongdoing tending to establish such facts.[82] Certain matter pleaded in justification has been held properly stricken out as irrelevant.[83]

723. Variance—In actions for slander, it is enough that the words proved are the same in substance as those set out in the complaint. A verbal difference, not changing the meaning of the slanderous words, is immaterial.[84] While it is unnecessary to prove the exact words charged, yet the words proved must be substantially the same. Proof of different words, though conveying

[75] R. L. 1905 § 4152; G. S. 1913 § 7778.

[76] Hewitt v. Pioneer Press Co., 23 Minn. 178.

[77] Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147; Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897. See Hewitt v. Pioneer Press Co., 23 Minn. 178; Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383; Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985.

[78] Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145, 821.

[79] Stewart v. Minn. Tribune Co., 41 Minn. 71, 42 N. W. 787.

[80] See Aldrich v. Press Printing Co., 9 Minn. 133(123); Quinn v. Scott, 22 Minn. 456; Realty Revenue Guaranty Co. v. Farm, Stock and Home Pub. Co., 79 Minn. 465, 82 N. W. 857; Brown v. Radebaugh, 84 Minn. 347, 87 N. W. 937.

[81] Moore v. Dispatch Printing Co., 87 Minn. 450, 92 N. W. 396.

[82] Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897. See R. L. 1905 § 4152; G. S. 1913 § 7778; Trebby v. Transcript Publishing Co., 74 Minn. 84, 76 N. W. 961; Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985.

[83] Stewart v. Minn. Tribune Co., 41 Minn. 71, 42 N. W. 787.

[84] Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103; Wischstadt v. Wisch-

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the same general idea, is not sufficient.[85] An allegation of words in the second person is not proved by evidence of words spoken in the third person.[86] Evidence pertinent to the issues made by the pleadings cannot be considered upon an issue not made therein.[87]

LIMITATION OF ACTIONS

724. Defence of statute new matter—The statute of limitations is an affirmative defence to be pleaded in the answer as new matter.[88]

725. Waiver by not pleading—The statute of limitations is an affirmative defence and is ordinarily waived unless asserted by answer.[89] If a party answers without pleading the statute and goes to trial without invoking it, he waives it, even though it conclusively appears on the face of the complaint that the cause of action is barred.[90] This applies to equitable as well as legal actions.[91] If a party does not answer or demur he may, perhaps, on an appeal from a default judgment, raise the objection that it conclusively appears on the face of the complaint that the cause of action is barred.[92]

726. Anticipating defence—Negativing exceptions—Fraud—In an action for fraud, brought more than six years after the fraudulent acts, it is necessary for the plaintiff to allege in his complaint that he did not discover the fraud until within six years before the commencement of the action, and if he fails to do so the complaint is subject to a general demurrer.[93] This rule is opposed to the general principle that a complaint need not anticipate

stadt, 47 Minn. 358, 50 N. W. 225; Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915; Earle v. Johnson, 81 Minn. 472, 84 N. W. 332. See Argall v. Sutor, 114 Minn. 371, 131 N. W. 466 (a failure to prove that defendant was publisher and proprietor of a paper held not to show a variance as to the publication of the paper).

[85] Irish-Am. Bank v. Bader, 59 Minn. 329, 61 N. W. 328.

[86] McCarty v. Barrett, 12 Minn. 494 (398).

[87] Payette v. Day, 37 Minn. 366, 34 N. W. 592.

[88] Davenport v. Short, 13 Minn. 24 (8); Hardwick v. Ickler, 71 Minn. 25, 73 N. W. 519; Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276.

[89] Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276.

[90] Hardwick v. Ickler, 71 Minn. 25, 73 N. W. 519; Gilbert v. Hewetson, 79 Minn. 326, 82 N. W. 655; Schmitt v. Hager, 88 Minn. 413, 93 N. W. 110. See Savage v. Madelia Farmers' Warehouse Co., 98 Minn. 343, 108 N. W. 296; Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

[91] Schmitt v. Hager, 88 Minn. 413, 93 N. W. 110.

[92] See Trebby v. Simmons, 38 Minn. 508, 35 N. W. 693, and cases cited; Hardwick v. Ickler, 71 Minn. 25, 73 N. W. 519. It might well be held in such cases that a party waives the defence by failing to move to open the default.

[93] Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67; Burk v. Western Land Assn., 40 Minn. 506, 42 N. W. 479; Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547; Id., 60 Minn. 405, 62 N. W. 548; Duxbury v. Boice, 70 Minn. 113, 72 N. W. 838; First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Brasie v. Minneapolis Brewing Co., 87

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and negative possible defences,[94] and to the rule that the statute of limitations is an affirmative defence and the plaintiff is not required to negative all exceptions which prevent the running of the statute.[95] It is permissible to allege in a complaint facts taking the case out of the statute.[96]

727. Negativing exceptions—In pleading the statute of limitations as a defence it is unnecessary to negative exceptions thereto.[97] It is unnecessary for the plaintiff to negative all possible exceptions which prevent the running of the statute.[98]

728. Part payment—Acknowledgment of debt—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. The rule that part payment of a debt will not take the case out of the statute unless the payment is made under circumstances which will warrant the jury in inferring therefrom a promise to pay the residue is one of evidence and not of pleading. It is unnecessary to plead implied promises.[99]

729. Demurrer—It is the rule in this state, though wrong on principle,[1] that if it conclusively appears on the face of a complaint that the cause of action therein alleged is barred by the statute of limitations a general demurrer will lie.[2] But inasmuch as it is unnecessary to negative in a complaint all the exceptions which prevent the running of the statute it is rare indeed that a complaint is demurrable on this ground,[3] except in actions for fraud.[4] A general demurrer will lie whether the limitation is fixed by statute

Minn. 456, 92 N. W. 340; Schmitt v. Hager, 88 Minn. 413, 93 N. W. 110; Minneapolis Threshing Machine Co. v. Jones, 89 Minn. 184, 94 N. W. 551; Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777; Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

[94] See § 256.

[95] Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276. See 14 Harv. L. Rev. 623.

[96] Hoyt v. McNeil, 13 Minn. 390(362).

[97] McMillan v. Cheeney, 30 Minn. 519, 16 N. W. 404.

[98] Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276.

[99] Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084. See Kennedy v. Williams, 11 Minn. 314(219); Davenport v. Short, 17 Minn. 24(8).

[1] See Trebby v. Simmons, 38 Minn. 508, 38 N. W. 693; 12 Harv. L. Rev. 355; 14 Id. 623.

[2] Trebby v. Simmons, 38 Minn. 508, 38 N. W. 693, and cases cited; Thornton v. East Grand Forks, 106 Minn. 233, 118 N. W. 834; Swing v. Barnard-Cope Mfg. Co., 115 Minn. 47, 131 N. W. 855; Fitger Brewing Co. v. American Bonding Co., 115 Minn. 78, 131 N. W. 1067.

[3] Trebby v. Simmons, 38 Minn. 508, 38 N. W. 693; Henkel v. Pioneer Savings & Loan Co., 61 Minn. 35, 63 N. W. 243; Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276; Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395, 923; Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943.

[4] See § 726.

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or contract.[5] In demurring it is unnecessary to specify the point of the statute of limitations. A general demurrer is sufficient.[6]

730. Reply—A reply to a plea of the statute of limitations simply alleging that the cause of action did arise within six years from the commencement of the action has been held sufficient.[7] 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 unnecessary.[8]

731. Effect of amendment of complaint—An amended complaint has been held not to allege a new cause of action which would be barred by the running of the statute subsequent to the filing of the original complaint.[9]

732. Foreign statutes—Foreign statutes of limitations must be pleaded and proved as matters of fact.[10]

LOGS AND LOGGING

733. Scaling—Action for fees of surveyor general—Pleading—A complaint by a surveyor general for his fees against a boom company has been sustained on demurrer. In such a complaint it is unnecessary to negative payment of the fees by the owners of the logs.[11] In an action by a surveyor for his fees damages caused by a failure to complete the scaling may be counterclaimed.[12]

LOST INSTRUMENTS

734. Action to establish lost deed—Pleading—A complaint, in an action to establish an unrecorded lost deed, has been sustained, as against an objection, first made on appeal, that the plaintiff had an adequate remedy at law and was guilty of laches.[13]

[5] Fitger Brewing Co. v. American Bonding Co., 115 Minn. 78, 131 N. W. 1067.

[6] Swing v. Barnard-Cope Mfg. Co., 115 Minn. 47, 131 N. W. 855.

[7] Barnsback v. Reiner, 8 Minn. 59 (37).

[8] West v. Hennessey, 58 Minn. 133, 59 N. W. 984.

[9] Bruns v. Schreiber, 48 Minn. 366, 51 N. W. 120; Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943. See § 482, and Note 47 L. R. A. (N. S.) 932.

[10] Hoyt v. McNeil, 13 Minn. 390(362); Way v. Colyer, 54 Minn. 14, 55 N. W. 744; Mowry v. McQueen, 80 Minn. 385, 83 N. W. 348.

[11] Bennett v. Rainy Lake River Boom Corp., 115 Minn. 96, 131 N. W. 1059.

[12] See Brown v. Potter, 81 Minn. 4, 83 N. W. 457.

[13] Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902.

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MALICIOUS PROSECUTION

735. Pleading—In general—It is sufficient to allege that the action or prosecution was instituted "maliciously and without probable cause."[14] An inferential allegation of malice and want of probable cause has been held sufficient, where objection was first made on the trial.[15] A termination of the action or proceeding favorable to the plaintiff must be alleged.[16] The defence of advice of counsel is not new matter requiring a reply.[17] Special damages must be pleaded.[18]

736. Issues—Variance—In an action for malicious prosecution and attachment plaintiff cannot recover as for the conversion of the goods attached.[19] Cases are cited below involving questions of variance.[20]

737. Malicious attachment—Pleading—An action for malicious attachment is in the main governed by the same rules as an ordinary action for malicious prosecution. The plaintiff must allege and show that the attachment was vacated in the action in which it issued, or that he had no opportunity to make a motion to vacate it.[21] It must be alleged that the attachment was issued maliciously and without probable cause.[22] A complaint has been held sufficient though it did not explicitly negative the truth of the matters alleged in the affidavit for the attachment, the affidavit being annexed to the complaint.[23]

MANDAMUS

738. Pleading—In general—No pleading or written allegation, other than the writ, answer, or demurrer is allowed.[24] The petition and writ take the place of a complaint in an ordinary civil action, and if the facts alleged therein are not in substance legally sufficient the respondent may demur thereto.[25] Allegations in an answer may be on information and belief.[26] Cases are cited below involving the sufficiency of particular pleadings.[27]

[14] O'Neil v. Johnson, 53 Minn. 439, 55 N. W. 601.

[15] Beyersdorf v. Sump, 39 Minn. 495, 41 N. W. 101.

[16] Pixley v. Reed, 26 Minn. 80, 1 N. W. 800.

[17] Olson v. Tvete, 46 Minn. 225, 48 N. W. 914.

[18] Reisan v. Mott, 42 Minn. 49, 43 N. W. 691.

[19] Burton v. St. Paul etc. Co., 33 Minn. 189, 22 N. W. 300.

[20] Chapman v. Dodd, 10 Minn. 350 (277) (variance as to termination of the prosecution before a justice of the peace held immaterial); Cole v. Curtis, 16 Minn. 182(161) (variance as to complaint and proceedings before a justice of the peace).

[21] Pixley v. Reed, 26 Minn. 80, 1 N. W. 800; Rossiter v. Minn. etc. Co., 37 Minn. 296, 33 N. W. 855.

[22] Beyersdorf v. Sump, 39 Minn. 495, 41 N. W. 101. See Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154.

[23] Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154.

[24] R. L. 1905 § 4563; G. S. 1913 § 8273.

[25] State v. Cook, 119 Minn. 407, 138 N. W. 432.

[26] State v. Cooley, 58 Minn. 514, 60 N. W. 338.

[27] Clark v. Buchanan, 2 Minn. 346 (298) (complaint in action to compel

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739. Actions by third parties against master for tort of servant—Pleading—In an action against a master for an act of his servant the act may be alleged as the act of the master without mentioning the servant.[28] But if the act is pleaded as the act of a servant the complaint must show that the tort was committed while the servant was acting within the course and scope of his employment as the servant of defendant.[29] It is sufficient to allege directly that the servant was acting within the course and scope of his employment.[30]

740. Action by servant against master for negligence—Pleading—A general allegation of negligence is sufficient.[31] Such an allegation admits proof of negligence of master or vice-principal.[32] It is unnecessary to negative contributory negligence,[33] or assumption of risk on the part of the servant,[34] or that the injury resulted from the negligence of a fellow servant.[35] It is necessary to allege that the instrumentality or place of work was owned,

recanvass of vote in election of county treasurer held insufficient); State v. Sherwood, 15 Minn. 221(172) (action to obtain the office and effects of clerk of court—denial in answer of any knowledge or information sufficient to form a belief as to whether the relator had received the certificate of election sustained against a motion to strike out as sham); State v. Lake City, 25 Minn. 404, 421 (action to compel issue of municipal bonds in aid of a railroad—irrelevant and redundant matter in answer); State v. Macdonald, 29 Minn. 440, 13 N. W. 671 (action to compel restoration of certain matter in a proposed case—affidavit on application insufficient—variance between affidavit and writ); State v. Ames, 31 Minn. 440, 18 N. W. 277 (action to compel mayor to sign order—allegation of incorporation —"duly authorized"—unnecessary to plead charter); State v. Somerset, 44 Minn. 549, 47 N. W. 163 (petition for writ to compel improvement of highway held insufficient); State v. Olson, 55 Minn. 118, 56 N. W. 585 (petition for writ to compel refundment on invalid tax sale held insufficient); State v. Dist. Ct., 77 Minn. 302, 79 N. W. 960 (petition for writ to compel transfer of papers on change of venue sustained).

[28] Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462. See §§ 211, 543.

[29] Campbell v. Northern Pacific Ry., 51 Minn. 488, 53 N. W. 768; Johanson v. Pioneer Fuel Co., 72 Minn. 405, 75 N. W. 719; Foran v. Levin, 76 Minn. 178, 78 N. W. 1047; Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462.

[30] Kuhl v. United States H. & A. Ins. Co., 112 Minn. 197, 127 N. W. 628.

[31] Olson v. St. Paul etc. Ry., 34 Minn. 477, 26 N. W. 605; Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565; Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688; Christiansen v. Chicago etc. Ry., 107 Minn. 341, 120 N. W. 300; Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922. See § 816.

[32] Olson v. St. Paul etc. Ry., 34 Minn. 477, 26 N. W. 605.

[33] Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565; Thompson v. Great Northern Ry., 70 Minn. 219, 72 N. W. 962; Birmingham v. Duluth etc. Ry., 70 Minn. 474, 73 N. W. 409. See § 816.

[34] Thompson v. Great Northern Ry., 70 Minn. 219, 72 N. W. 962; Shaw v. Feltman, 106 N. Y. S. 1043.

[35] Fraser v. Red River Lumber Co., 42 Minn. 520, 44 N. W. 878; Shaw v. Feltman, 106 N. Y. S. 1043.

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controlled or operated by the defendant.[36] It is unnecessary to allege that the defendant had knowledge of the danger or defect when such knowledge is necessarily implied from the facts alleged. It is implied in an allegation that the defendant negligently furnished defective or unsafe instrumentalities or an unsafe place in which to work, or that he negligently permitted them to become unsafe or defective.[37] A general allegation of knowledge on the part of the defendant is sufficient to admit proof of constructive as well as actual knowledge.[38] In charging knowledge it is proper to allege that the defendant knew, or, but for the want of reasonable care and diligence, would have known, of the defect or danger.[39] It is unnecessary to negative knowledge on the part of the servant.[40] In charging negligence in the employment of unfit servants their names and particular employments should be alleged.[41] It should be alleged that the defendant employed or kept the servant with knowledge of his unfitness. It is sufficient to allege of the servant that he was "incompetent and careless."[42] If the complaint specifies particulars of unfitness the proof must be limited to such particulars.[43] It should be alleged that the plaintiff or person injured was in the employ of the defendant at the time of the injury.[44] An allegation that the servant was injured while acting within the course and scope of his employment is not a mere conclusion of law and is sufficient on demurrer.[45] To take advantage of the federal safety appliance act it is unnecessary to mention it.[46] Cases are cited below involving the sufficiency of particular complaints.[47]

[36] Miller v. Coffin, 19 R. I. 164, 36 Atl. 6; Louisville etc. Ry., v. Hall, 87 Ala. 708, 6 So. 277.

[37] O'Connor v. Illinois Central Ry., 83 Iowa 105, 48 N. W. 1002; Chicago etc. Ry. v. Kellogg, 55 Neb. 748, 76 N. W. 462; Hollingsworth v. Davis, 38 Mont. 143, 99 Pac. 142.

[38] Louisville etc. Ry. v. Miller, 140 Ind. 685, 40 N. E. 116; Southern State etc. Co. v. Helms, 2 Ga. App. 308, 58 S. E. 524.

[39] Cox v. Providence Gas Co., 17 R. I. 199, 21 Atl. 344.

[40] Thompson v. Great Northern Ry., 70 Minn. 219, 72 N. W. 962.

[41] Fraker v. St. Paul etc. Ry., 30 Minn. 103, 14 N. W. 366.

[42] Jenson v. Great Northern Ry., 72 Minn. 175, 75 N. W. 3.

[43] Ransier v. Minneapolis etc. Ry., 30 Minn. 215, 14 N. W. 883.

[44] Vukelis v. Virginia Lumber Co., 107 Minn. 68, 119 N. W. 509. See Kitman v. Chicago etc. Ry., 113 Minn. 350, 129 N. W. 844.

[45] Kuhl v. U. S. etc. Ins. Co., 112 Minn. 197, 127 N. W. 628. See Foran v. Levin, 76 Minn. 178, 78 N. W. 1047. See § 218.

[46] Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Ahrens v. Chicago etc. Ry., 121 Minn. 335, 141 N. W. 297.

[47] Pugh v. Winona & St. Peter Ry., 29 Minn. 390, 13 N. W. 189 (complaint charging negligence in furnishing a defective car held sufficiently definite); Fraker v. St. Paul etc. Ry., 30 Minn. 103, 14 N. W. 366 (complaint charging negligence in not keeping couplings in safe condition held sufficiently definite); Madden v. Minneapolis etc. Ry., 30 Minn. 453, 16 N. W. 263 (injury from derailment—held proper to require complaint to be made more definite); Tierney v. Minneapolis etc. Ry., 31 Minn. 234, 17 N. W. 377 (complaint charging negligence in not providing safe couplings held sufficiently definite); Jor-

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genson v. Smith, 32 Minn. 79, 19 N. W. 388 (complaint for injury to servant in moving a house held not to show any negligence on the part of the master); Olson v. St. Paul etc. Ry., 34 Minn. 477, 26 N. W. 605 (sectionman run over and killed by snow plow — complaint sustained); Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565 (laborer in sawmill injured while handling boards about an edger—complaint sustained); Connelly v. Minneapolis Eastern Ry., 38 Minn. 80, 35 N. W. 582 (a charge of negligence in the movement of a train does not involve a charge of negligence in not establishing regulations for the conduct of servants in such cases); Fraser v. Red River Lumber Co., 42 Minn. 520, 44 N. W. 878 (complaint for negligence in constructing steps in a lumber pile sustained); Snowberg v. Nelson-Spencer Paper Co., 43 Minn. 532, 45 N. W. 1131 (injury to operator of a straw-cutter—complaint held indefinite but sufficient on demurrer and not to show assumption of risk or contributory negligence); Orth v. St. Paul etc. Ry., 43 Minn. 208, 45 N. W. 151 (complaint for injury from defective locomotive held sufficiently definite on motion to make more definite and certain); Schumaker v. St. Paul & Duluth Ry., 46 Minn. 39, 48 N. W. 559 (car-repairer sent out on line to repair a wrecked caboose—failure of defendant to send for car-repairer when the latter was through with his work and consequent exposure to cold from which injury resulted—complaint sustained); Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688 (brakeman killed by slipping from flat car loaded with cordwood—charge of negligence in manner of loading car—complaint sustained); Thompson v. Great Northern Ry., 70 Minn. 219, 72 N. W. 962 (freight train conductor injured by falling from car with a defective ladder—complaint sustained); Birmingham v. Duluth etc. Ry., 70 Minn. 474, 73 N. W. 409 (injury to member of crew operating a steam shovel—complaint sustained); Jenson v. Great Northern Ry., 72 Minn. 175, 75 N. W. 3 (complaint charging carelessness and incompetency of fellow servant sustained); Nicholas v. Burlington etc. Ry., 78 Minn. 43, 80 N. W. 776 (workman on railway bridge killed—complaint charging failure to furnish safe place in which to work sustained); Lindgren v. Minneapolis etc. Ry., 86 Minn. 152, 90 N. W. 381 (sectionman injured while removing handcar from rails—negligence of fellow servant—complaint sustained); Boyer v. Eastern Ry., 87 Minn. 367, 92 N. W. 326 (bridge carpenter ordered to assist in unloading poles from a flat car struck by a pole—complaint held to show assumption of risk from negligence of fellow servant); Morris & Eastern Ry., 88 Minn. 112, 92 N. W. 535 (complaint for injury from defective flogging hammer sustained); Swartz v. Great Northern Ry., 93 Minn. 339, 101 N. W. 504 (sectionman hit by stone thrown from engine—complaint sustained); Pesek v. New Prague, 97 Minn. 171, 106 N. W. 305 (injury from failure to guard machinery—complaint sustained); Vukelis v. Virginia Lumber Co., 107 Minn. 68, 119 N. W. 509 (complaint for injuries received by laborer in logging operations sustained); Christiansen v. Chicago etc. Ry., 107 Minn. 341, 120 N. W. 300 (sectionman injured by falling on crowbar which he was holding under a rail—negligence of fellow servant—railroad hazard—complaint sustained); Manks v. Moore, 108 Minn. 284, 122 N. W. 5 (servant ordered by superior to work in a trench which was a dangerous place—assurance of protection from all injury—complaint sustained); Floody v. Great Northern Ry., 108 Minn. 216, 121 N. W. 875 (injury due to defective switch—complaint sustained); Koreis v. Minneapolis etc. Ry., 108 Minn. 449, 122 N. W. 668 (complaint charging a defect in the eccentric of a locomotive sustained); Burgett v. Wisconsin Central Ry., 109 Minn. 216, 123 N. W. 411 (complaint by fireman injured while riding on a locomotive by invitation of

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defendant sustained); Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922 (action against manager and company—injury in iron mine from caving of bank—failure to warn—incompetent manager—complaint held indefinite but sufficient on demurrer); Morey v. Shenango Furnace Co., 112 Minn. 528, 128 N. W. 1134 (engineer of steam shovel killed while attempting to cross the engine house to reach the levers of the engine—incompetence of fellow servants—complaint against master and superintendent sustained); Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472 (workman injured while helping to lower a metallic curtain—complaint held to be unnecessarily specific in pointing out defects in curtain); Breske v. Minneapolis etc. Ry., 115 Minn. 386, 132 N. W. 337 (injury from defective railroad car—complaint held insufficient at common law and independent of the federal statute); O'Brien v. N. W. etc. Co, 119 Minn. 4, 137 N. W. 399 (complaint construed to allege a failure to furnish a safe place in which to work though it alleged the furnishing of an unsafe instrumentality—election between two grounds); Webster v. Chicago etc. Ry., 119 Minn. 72, 137 N. W. 168 (action against railroad company and engineer —complaint held to include negligence of other servants and to be sufficient); Grbich v. Pittsburgh Iron Ore Co., 119 Minn. 365, 138 N. W. 309 (servant working in iron mine—gopher holes—failure to warn of impending explosions—alternative allegations held not to vitiate complaint); Anderson v. Brooks-Scanlon Lumber Co., 119 Minn. 542, 138 N. W. 1033 (failure to furnish servant a safe place for work—flagrantly indefinite complaint sustained on demurrer); Jacobson v. Great Northern Ry., 120 Minn. 52, 139 N. W. 142 (servant injured while unloading coal from a coal shed—alleging two concurrent causes of the injury—failure to prove one not a failure of proof requiring a dismissal); Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716 (servant injured while working in a municipal gas plant—explosion due to clogging of drain pipes—complaint indefinite as to cause of accident sustained on demurrer); Kommerstad v. Great Northern Ry., 120 Minn. 376, 139 N. W. 713 (failure of railroad to fence—horse getting on right of way thrown by engine against sectionman—complaint alleged negligence in failure to fence and also in management of train—held to show assumption of risk as to first ground but sustained as to the latter); Crotty v. Great Northern Ry., 120 Minn. 535, 139 948 (servant furnished with a defective monkey wrench—complaint sustained—held not to show assumption of risk); Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175 (injury in coupling cars—unnecessary to mention federal safety appliance act in order to recover under it—complaint sustained); McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177 (id.); Ahrens v. Chicago etc. Ry., 121 Minn. 335, 141 N. W. 297 (id.); Jackson v. Orth Lumber Co., 121 Minn. 461, 141 N. W. 518 (belt off pulley—servant injured while attempting to catch belt and keep it out of machinery—failure to guard machinery—action against company and general manager—complaint sustained); Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045 (servant in brewery injured by explosion of bottle—failure to guard machinery—complaint sustained); Laine v. Consolidated Vermillion & Extension Co., 123 Minn. 254, 143 N. W. 783 (servant injured while thawing out frozen stick of dynamite—complaint held not to show that negligence of defendant was the proximate cause of the injury); Sheehy v. Minneapolis etc. Ry., 126 Minn. 133, 147 N. W. 964 (moving cars over crossing without customary signals to crossing flagman —complaint sustained).

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741. Assumption of risk—Demurrer—It is unnecessary for the plaintiff to negative assumption of risk in his complaint. It is a matter of defence.[48] It must generally be pleaded as new matter by the defendant to enable him to take advantage of it.[49] Whether he must plead it depends on the allegations of the particular complaint.[50] If assumption of risk appears on the plaintiff's evidence of course the defendant may take advantage of it without having pleaded it.[51] Assumption of risk cannot be taken advantage of on demurrer unless it so unequivocally appears that there is no room for reasonable difference of opinion upon any possible evidence admissible under and consistent with the allegations of the complaint.[52] If a complaint discloses assumption of risk unequivocally it is demurrable.[53]

742. Same—Fellow servant—It is unnecessary for the plaintiff to deny in his complaint that the injury was due to the negligence of a fellow servant.[54] Whether the defendant must plead this defence as new matter depends on the allegations of the complaint. Ordinarily he must plead it as new matter.[55] If plaintiff's evidence shows that the injury was due to the negligence of a fellow servant the defendant can take advantage of the fact, though he did not plead it.[56] This defence cannot be taken advantage of by demurrer unless it appears conclusively from the allegations of the complaint.[57]

743. Same—Answer—An answer has been construed as admitting the employment of the plaintiff though it alleged in addition that the plaintiff was in the employ of another railroad company and had released that company from further liability by accepting benefits from its relief department.[58]

744. Same—Reply—A general denial constitutes a good reply to an answer alleging contributory negligence and assumption of risk.[59]

[48] Thompson v. Great Northern Ry., 70 Minn. 219, 72 N. W. 962; Crotty v. Great Northern Ry., 120 Minn. 535, 139 N. W. 948; Shaw v. Feltman, 106 N. Y. S. 1043. See 26 Cyc. 1397

[49] Oswald v. Donahue, 215 Mass. 574, 102 N. E. 925. See 26 Cyc. 1402; 13 Ency. Pl. & Pr. 914; Labatt, M. & S. 2 ed. § 1636; Sweeney v. Poppenberger, 116 Minn. 134, 133 N. W. 474.

[50] See § 818.

[51] 26 Cyc. 1403.

[52] Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565; Snowberg v. Nelson-Spencer Paper Co., 43 Minn. 532, 45 N. W. 1131; Manks v. Moore, 108 Minn. 284, 122 N. W. 5; Crotty v. Great Northern Ry., 120 Minn. 535, 139 N. W. 948.

[53] Boyer v. Eastern Ry., 87 Minn. 367, 92 N. W. 326; Kommerstad v. Great Northern Ry., 120 Minn. 376, 139 N. W. 713.

[54] Fraser v. Red River Lumber Co., 42 Minn. 520, 44 N. W. 878; Shaw v. Feltman, 106 N. Y. S. 1043.

[55] 26 Cyc. 1394, 1402; 13 Ency. Pl. & Pr. 906, 913.

[56] See § 818.

[57] Fraser v. Red River Lumber Co., 42 Minn. 520, 44 N. W. 878; Birmingham v. Duluth etc. Ry., 70 Minn. 474, 73 N. W. 409.

[58] Kitman v. Chicago etc. Ry., 113 Minn. 350, 129 N. W. 844.

[59] American S. & R. Co. v. Karape, 173 Fed. 607.

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745. Same—Issues—Variance—Where distinct acts of negligence are alleged as the ground for recovery a recovery cannot be had for other distinct acts of negligence not specified.[60] A substantial correspondence between the allegations and the proof is sufficient. The plaintiff is not required to prove every detail as alleged.[61] An allegation that defendant negligently ran cer-

[60] Connelly v. Minneapolis Eastern Ry., 38 Minn. 80, 35 N. W. 582 (complaint charged railroad company only with negligence in the movement of a particular train without warning—recovery not allowed for neglect to establish general regulations for the conduct of its servants in such cases); Doyle v. St. Paul etc. Ry., 42 Minn. 79, 43 N. W. 787 (plaintiff injured because his foot was caught by a splinter in a rail while he was coupling cars—recovery not allowed for another act of negligence charged which did not in fact cause the injury); Moody v. Smith, 64 Minn. 524, 67 N. W. 633 (complaint charged negligence in not guarding machinery—recovery not allowed for injury resulting from another cause); Morrow v. St. Paul City Ry., 65 Minn. 382, 67 N. W. 1002 (complaint charged incompetency in servant and defective appliances—recovery not allowed for failure to furnish a safe place in which to work); Pierce v. Brennan, 88 Minn. 50, 92 N. W. 507 (in an action based upon the death of plaintiff's intestate by the negligent operation of a railroad construction train, the issue as tendered by the answer and made by the pleadings was that the decedent's direct employer was an employee of appellants, who operated the train, and consequently that the decedent was a fellow servant of the trainmen—held, that under the pleadings, evidence was inadmissible which was offered to show that in fact the train was not under the control of or operated by appellants); Scarlotta v. Ash, 95 Minn. 240, 103 N. W. 1025 (allegation of defect in a mechanical device that manipulated a "nigger" in a sawmill—plaintiff held not entitled to an instruction that he might recover without showing the exact nature of the defect); Jemming v. Great Northern Ry., 96 Minn. 302, 104 N. W. 1079 (allegation of negligence in handling an iron scoop—no recovery allowed for negligence in failing to establish rules); Donahue v. N. W. Tel. Exchange Co., 103 Minn. 432, 115 N. W. 279 (complaint charged negligence in failing to furnish a safe place in which to work and safe instrumentalities and to warn and instruct—proof of other negligence not admissible); Hostetter v. Illinois Central Ry., 104 Minn. 25, 115 N. W. 748 (complaint charged negligence only on part of the superintendent and of the servants who were engaged in moving and operating an engine—proof of negligence on part of crew inadmissible).

[61] Lund v. E. S. Woodworth & Co., 75 Minn. 501, 78 N. W. 81 (workman injured while working in a dark bin of bran—complaint held to tender an issue on failure of defendant to warn servant of danger); Sours v. Great Northern Ry., 81 Minn. 337, 84 N. W. 114 (allegation that man always stood at the front of a car—proof that he sometimes stood there and sometimes at the rear); Nutzmann v. Germania Life Ins. Co., 82 Minn. 116, 84 N. W. 730 (allegation that operator of an elevator suddenly and violently started the elevator upward with great force and rapidity, by reason of which plaintiff was unable to enter the same, and then carelessly and negligently stopped and suddenly lowered it a short distance—proof that after being stopped, it was again moved upward, not lowered, with great rapidity); Poczerwinski v. C. A. Smith Lumber Co., 105 Minn. 305, 117 N. W. 486 (allegation that plaintiff was injured by being struck by a flying panel, which was caused by the defective condition of a box—immaterial whether he

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tain cars against a tender with such force as to injure the plaintiff is sustained by proof that it negligently omitted to do an act from which such result followed.[62] Under an allegation of negligence in furnishing an unsafe instrumentality evidence of a failure to make due inspection of its condition is admissible.[63] Where an action was predicated on a statute of Wisconsin abolishing the fellow-servant doctrine as respects railroad employment, and the action was tried on that theory, it was held error to submit the case under the federal employer's liability act.[64] A variance will be disregarded when objected to for the first time on appeal.[65] The court may cure a variance by ordering an amendment on the trial to conform to the proof.[66]

MECHANICS' LIENS

746. Complaint—A complaint must allege all the essential facts entitling the plaintiff to a lien.[67] It must allege the due filing of the lien statement within the statutory time,[68] and describe the premises with reasonable certainty.[69] It is perhaps unnecessary to allege that the work was done or ma-

was struck in any particular spot, or whether at the time he was engaged in picking up sticks, or was standing still and looking at the box); Raitila v. Consumers Ore Co., 107 Minn. 91, 119 N. W. 490 (pleadings held sufficient to admit proof that servant was ordered into a place of danger which was afterwards rendered more dangerous without giving him proper warning); Bigum v. St. Paul Sash, Door & Lumber Co., 107 Minn. 567, 119 N. W. 481 (complaint charged negligence in failing to maintain an automatic guard—recovery allowable on proof of either a stationary or automatic guard); Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472 (injury from defective metallic curtain—complaint unnecessarily specific in pointing out precise defect — variance held immaterial); O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399 (a variance between an allegation of an unsafe instrumentality and proof of an unsafe place in which to work held immaterial). Where it is alleged generally that a machine which plaintiff was ordered to operate was defective and dangerous, which condition caused the injury, the fact that plaintiff incidentally specified particular defects does not limit him to proof of such specific defects. U. S. Express Co. v. Wahl, 168 Fed. 848. It is sufficient if the allegations and proof correspond substantially. Standard Oil Co. v. Brown, 218 U. S. 78.

[62] Olson v. Great Northern Ry., 68 Minn. 155, 71 N. W. 5.

[63] McMahon v. Lehigh Valley Ry., 122 N. Y. S. 689.

[64] Creteau v. Chicago etc. Ry., 113 Minn. 418, 129 N. W. 855.

[65] Vaillancour v. Minneapolis etc. Ry., 106 Minn. 348, 119 N. W. 53. See O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399.

[66] O'Brien v. Northwestern Consolidated Milling Co., 119 Mnin. 4, 137 N. W. 399.

[67] See McCarty v. Van Etten, 4 Minn. 461(358, 361).

[68] Price v. Doyle, 34 Minn. 400, 26 N. W. 14; Frankoviz v. Smith, 34 Minn. 403, 26 N. W. 225; Glass v. St. Paul Park Carriage & Sleigh Co., 43 Minn. 228, 45 N. W. 150; Hurlbert v. New Ulm Basket Works, 47 Minn. 81, 49 N. W. 521; J. D. Moran Mfg. Co. v. Clarke, 59 Minn. 456, 61 N. W. 556; Stewart v. Simmons, 101 Minn. 375, 112 N. W. 282.

[69] Knox v. Starks, 4 Minn. 20(7); McCarty v. Van Etten, 4 Minn. 461(358); Boyd v. Blake, 42 Minn. 1, 43 N. W. 485.

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terials furnished by virtue of a contract with the owner or at his instance, but the cautious pleader will make such fact appear.[70] Formerly such an allegation was essential.[71] It is unnecessary to allege the filing of a notice of lis pendens,[72] or that the land sought to be charged is within the statutory limit.[73] In pleading a claim of a subcontractor it is unnecessary to allege that the principal contractor has duly performed his contract with the owner.[74] As against a vendor in an executory contract for the sale of the premises, it is sometimes necessary to allege that the contract has been forfeited or surrendered.[75] It is proper to demand a lien on the premises.[76] An allegation that the lien statement was filed on a certain date and within ninety days after the furnishing and delivery of the last item of materials and labor, is one of fact, and sufficient as against a general demurrer, though the exact date of furnishing the last item is not alleged. The lien statement may be attached to the complaint and by apt reference made a part thereof for purposes of essential averment.[77] Cases are cited below involving the sufficiency of particular complaints.[78]

747. Cross-complaint—One defendant cannot have a judgment against a codefendant upon a cross-complaint demanding affirmative relief upon new issues and for new objects, and not germane to the matter alleged in the original complaint, without notice to such codefendant.[79]

748. Bill of particulars—The statute requires a bill of particulars to be attached to a complaint or answer asserting a lien.[80] None is required where the claim involves only a single item.[81] A variance between the dates of some of the items stated in a bill of particulars and the true dates is immaterial.[82]

[70] See Hurlbert v. New Ulm Basket Works, 47 Minn. 81, 49 N. W. 521. Note the statement in this case that what the statute requires in the lien statement should not be confounded with the conditions of fact which may be necessary to the existence of a lien.

[71] O'Neil v. St. Olaf's School, 26 Minn. 329, 4 N. W. 47.

[72] John Paul Lumber Co. v. Hormel, 61 Minn. 303, 63 N. W. 718.

[73] Boyd v. Blake, 42 Minn. 1, 43 N. W. 485.

[74] See St. Paul Foundry Co. v. Wegmann, 40 Minn. 419, 42 N. W. 288.

[75] Nolander v. Burns, 48 Minn. 13, 50 N. W. 1016.

[76] McCarty v. Van Etten, 4 Minn. 461 (358).

[77] Stewart v. Simmons, 101 Minn. 375, 112 N. W. 282.

[78] Keller v. Struck, 31 Minn. 446, 18 N. W. 280; Dye v. Forbes, 34 Minn. 13, 24 N. W. 309; Cornish & Co. v. West, 82 Minn. 107, 84 N. W. 750; Stewart v. Simmons, 101 Minn. 375, 112 N. W. 282.

[79] Jewett v. Iowa Land Co., 64 Minn. 531, 67 N. W. 639.

[80] R. L. 1905 § 3516; G. S. 1913 § 7031; Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339 (motion to strike out complaint for want of a bill of particulars and for defects in a supplemental bill held properly denied).

[81] Menzel v. Tubbs, 51 Minn. 364, 53 N. W. 653.

[82] Coughlan v. Lorgini, 77 Minn. 514, 80 N. W. 695.

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749. Answer—New matter in defence must be pleaded as in an ordinary action.[83] When a lien claimant appears and answers, setting up his claim, he makes the action his own for the purpose of enforcing his lien, and the failure of the plaintiff to recover from any cause, will not affect him.[84] One who has no interest in the property cannot interpose a defence to a lien claim.[85] An answer has been held properly stricken out as sham.[86]

750. Reply unnecessary—No reply is necessary. All averments of the answer are taken as denied without further pleading.[87] This applies to the answer of an intervener.[88]

751. Variance—An immaterial variance between the pleading and proof will be disregarded.[89] The fact that the last item stated in a lien statement is not proved is not fatal to the whole claim, if the statement was filed in due time after the last item stated in it and proved.[90] A statement in a lien filed, as to a matter not required to be stated, does not prevent the lien claimant from pleading and proving the facts where no one has been misled by such statement.[91] Additional findings upon issues not formed by the pleadings have been held properly denied.[92]

MONEY HAD AND RECEIVED

752. Complaint—Common count—A complaint in the form of the common indebitatus count for money had and received, or substantially in that form, is sufficient.[93] It is necessary to allege that the money was received to

[83] Bergsma v. Dewey, 46 Minn. 357, 49 N. W. 57 (matter limiting extent of lien).

[84] Burns v. Phinney, 53 Minn. 431, 55 N. W. 540.

[85] Cogel v. Mickow, 11 Minn. 475(354).

[86] Hertz v. Hartmann, 74 Minn. 320, 77 N. W. 232.

[87] R. L. 1905 § 3514; G. S. 1913 § 7029; Bruce v. Lennon, 52 Minn. 547, 54 N. W. 739; Davis v. Crookston etc. Co., 57 Minn. 402, 59 N. W. 482; Johnson v. Lau, 58 Minn. 508, 60 N. W. 342.

[88] Davis v. Crookston etc. Co., 57 Minn. 402, 59 N. W. 482.

[89] Linne v. Stout, 41 Minn. 483, 43 N. W. 377; Wisconsin etc. Co. v. St. Peter etc. Co., 46 Minn. 231, 48 N. W. 1022; Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018; Miller v. Condit, 52 Minn. 455, 55 N. W. 47; Coughlan v. Longini, 77 Minn. 514, 80 N. W. 695; Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472.

[90] Lundell v. Ahlman, 53 Minn. 57, 54 N. W. 936.

[91] Lindquist v. Young, 119 Minn. 219, 138 N. W. 28.

[92] Fergestad v. Gjertsen, 46 Minn. 369, 49 N. W. 127.

[93] Meagher v. Morgan, 3 Kan. 372, 87 Am. Dec. 476; Ball v. Fulton County, 31 Ark. 379; McDonald v. Pac. Deb. Co., 146 Cal. 667, 80 Pac. 1090; Fulton v. Met. Life Ins. Co., 23 N. Y. S. 598; Richardson v. Moffitt, 92 Mo. App. 515, 69 S. W. 398; Keene v. Eldridge, 47 Or. 179, 82 Pac. 803; Grannis v. Hooker, 29 Wis. 65; Thompson v. Elton, 109 Wis. 689, 85 N. W. 425; Reister v. Bruning, 47 Ind. App. 570, 94 N. E. 1019; Miller v. Abrahamson, 9 Cal. App. 396, 99 Pac. 534; Harpending v. Shoemaker, 37 Barb. (N. Y.) 270, 291 (conversion); 27 Cyc. 877. A common count for money had and received is frequent in our practice and its sufficiency seems to be taken for

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or for plaintiff's use,[94] and the failure of the defendant to pay over the money.[95] It is unnecessary to allege a promise of the defendant to pay the money to plaintiff, if the facts giving rise to the obligation to pay it are alleged.[96] It is unnecessary to allege a demand if the complaint is in the form of the common count.[97] It has been held that a party seeking to recover as for money had and received in the value of property other than money delivered by him to the party sought to be charged must allege the return or tender of specific property delivered to him by that party, or must allege an excuse for his failure to do so.[98] The rule that where a general fact or result is pleaded, and also the special facts by which such result is reached, and they do not support the result, the special facts control, and the pleading is bad, applies.[99] Cases are cited below involving the sufficiency of particular complaints.[1]

granted. See McCormick Harvesting Machine Co. v. Wilson, 39 Minn. 467, 40 N. W. 571; Jones v. Northern Trust Co., 67 Minn. 410, 69 N. W. 1108; Scanlon-Gipson Lumber Co. v. Germania Bank, 90 Minn. 478, 97 N. W. 380; Schick v. Suttle, 94 Minn. 135, 102 N. W. 217 (counterclaim—fraud—held unnecessary to allege all the facts showing the fraud —sufficiency of common count inferentially sustained); Hall v. Skahen, 101 Minn. 460, 112 N. W. 865; Todd v. Bettingen, 109 Minn. 493, 497, 124 N. W. 443 ("this court has for convenience adopted the use of the common counts"); Benson v. U. S. Instalment Realty Co., 113 Minn. 346, 129 N. W. 594; First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599; Aetna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 470, 149 N. W. 955.

[94] 27 Cyc. 878; State v. Sims, 76 Ind. 328.

[95] 27 Cyc. 878; London etc. Co. v. Liebes, 105 Cal. 203, 38 Pac. 691; Mumford v. Wright, 12 Colo. App. 214, 55 Pac. 744.

[96] Mumford v. Wright, 12 Colo. App. 214, 55 Pac. 744; Tamm v. Kellogg, 49 Mo. 118; Byxbie v. Wood, 24 N. Y. 607; Waite v. Willis, 42 Or. 288, 70 Pac. 1034. See Briggs v. Rutherford, 94 Minn. 23, 101 N. W. 954; Benson v. United States Instalment Realty Co., 113 Minn. 346, 129 N. W. 594.

[97] Samuels v. Larrimore, 11 Cal. App. 337, 104 Pac. 1001; Reister v. Bruning, 47 Ind. App. 570, 94 N. E. 1019. See Davenport v. Ladd, 38 Minn. 545, 38 N. W. 622; Briggs v. Rutherford, 94 Minn. 23, 101 N. W. 954; and 27 Cyc. 878.

[98] Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443. The soundness of this rule is questionable. The court might better have followed the rule laid down in Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533. Of course the rule would not apply where the complaint is in the form of a common count.

[99] Carlson v. Presbyterian Board of Relief, 67 Minn. 436, 70 N. W. 3.

[1] Spottswood v. Herrick, 22 Minn. 548; Whiting v. Clugston, 73 Minn. 6, 75 N. W. 759; Slater v. Olson, 83 Minn. 35, 85 N. W. 825; Conron v. Hoerr, 83 Minn. 183, 85 N. W. 1012; Merriam v. Johnson, 86 Minn. 61, 90 N. W. 116; Proctor v. Stevens, 94 Minn. 181, 102 N. W. 395; First Nat. Bank v. Stadden, 103 Minn. 403, 115 N. W. 198; Lovering v. Webb Publishing Co., 106 Minn. 62, 118 N. W. 61; Smith v. Brigham, 106 Minn. 91, 118 N. W. 150; Remillard v. Robinson, 108 Minn. 81, 121 N. W. 217; Peters v. Cannon River Electric Power Co., 110 Minn. 121, 124 N. W. 826; Gillen v. South St. Paul, 111 Minn. 172, 126 N. W. 624; Benson v. U. S. etc. Co., 113 Minn. 346, 129 N. W. 594; Vetter v. Sandbo, 114 Minn. 144, 130 N. W. 450; Mayor v. Lunn, 115 Minn. 404, 132 N. W. 321; Farrington v. Farrington, 117 Minn. 272, 135 N. W. 815; Schaeffer v. Rush, 118 Minn. 174,

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753. Answer—General denial—Burden of proof—Matter in the nature of confession and avoidance must be specially pleaded.[2] The general rules, stated elsewhere,[3] as to the evidence admissible under a general denial, are applicable here.[4] Under a general denial the plaintiff must prove not only the receipt of the money by the defendant, but also that he received it under circumstances making it his duty to pay it over to the plaintiff. Under a general denial the defendant may prove any fact which will defeat or tend to defeat plaintiff's right to recover, at least, if the complaint is in the form of a common count or in general terms. He may prove that he did not receive it to plaintiff's use—that he is under no obligation to pay it to plaintiff.[5] The burden of proving payment to or on account of plaintiff of moneys received for plaintiff's use is generally on the defendant.[6] If defendant claims the money as due him under a contract with the plaintiff he should plead the facts giving rise to the right.[7]

754. Issues—Variance—Under a complaint alleging false representations of defendant by which the plaintiff was induced to pay him money a recovery as for money had and received may be had.[8] Under a complaint on a bill of exchange a recovery cannot be had, over objection, as for money had and received.[9]

755. When common count will lie—In general—A common count for money had and received will lie whenever one person has possession of money which in equity and good conscience belongs to another and ought to be delivered to him. It is not essential that there should be any privity between the parties, or contract to deliver the money. The law imposes an obligation to deliver the money regardless of privity or contract.[10] It is not necessary that

136 N. W. 754; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253; Olson v. Northern Pacific Ry., 126 229, 148 N. W. 67.

[2] See Hall v. Skahen, 101 Minn. 460, 112 N. W. 865 (settlement); Comstock v. Baldwin, 125 Minn. 357, 147 N. W. 278 (reasons for not paying where there is prima facie a liability to pay).

[3] See § 327.

[4] Brandt v. Shepard, 39 Minn. 454, 40 N. W. 521; Jackson v. Kansas City Packing Co., 42 Minn. 382, 44 N. W. 126; Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81, 91 N. W. 257; Hanson v. Diamond Iron Mining Co., 87 Minn. 505, 92 N. W. 447. See Hall v. Skahen, 101 Minn. 460, 112 N. W. 865. If there is doubt as to the admissibility of evidence under a general denial the court should be very liberal in allowing an amendment to let it in. Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[5] Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81, 91 N. W. 257; Hanson v. Diamond Iron Mining Co., 87 Minn. 505, 92 N. W. 447; Hawks v. Haws, 124 Mass. 457; Gile v. Inter-State Motor Car Co., 145 N. W. 732 (N. D.). See 27 Cyc. 881.

[6] Farmers' Warehouse Assn. v. Montgomery, 92 Minn. 194, 99 N. W. 776.

[7] Smith v. Wigton, 35 Neb. 460, 53 N. W. 374.

[8] Byxbie v. Wood, 24 N. Y. 607.

[9] First Nat. Bank v. Stadden, 103 Minn. 403, 115 N. W. 198.

[10] Van Hoesen v. Minn. Baptist State Convention, 16 Minn. 96(86) (general rule stated—money received from voluntary subscriptions—gratuitous promise to pay debt owing to plaintiff—held

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the defendant should have accepted the money under an agreement to hold it for the benefit of the plaintiff, or that the person from whom he received it intended it for the plaintiff's benefit,[11] or that the money received be an exact and specific amount, belonging exclusively to the plaintiff, and entirely distinct from other moneys.[12] It is immaterial that the defendant has used the

that money was not received to plaintiff's use); Taylor v. Read, 19 Minn. 372(317) (general rule stated—failure of consideration — money paid on contract to convey realty); De Graff v. Thompson, 24 Minn. 452, 456 (general rule stated — money obtained through mistake as to legal rights—the party liable may be garnished as a debtor); Henderson v. Sibley County, 28 Minn. 515, 11 N. W. 91 (general rule stated—money obtained by a county under an ultra vires contract and used by it); Brand v. Williams, 29 Minn. 238, 13 N. W. 42 (general rule stated at length—leading case—money received by judgment creditor on execution sale); Sibley v. Pine County, 31 Minn. 201, 17 N. W. 337 (general rule stated—money received by county without authority); Valentine v. St. Paul, 34 Minn. 446, 26 N. W. 457 (money paid on an assessment for a local improvement subsequently abandoned); Libby v. Johnson, 37 Minn. 220, 33 N. W. 783 (general rule stated—money received upon a conversion of another's property); Milton v. Johnson, 79 Minn. 170, 81 N. W. 842 (general rule stated—money received by an agent); Merriam v. Johnson, 86 Minn. 61, 65, 90 N. W. 116 (general rule stated —money received by a real estate broker —profits); Hanson v. Diamond Iron Mining Co., 87 Minn. 505, 92 N. W. 447 (money paid for commission on sale of realty—payment to two of three brokers —third broker held entitled to recover his share); Quigley v. Welter, 95 Minn. 383, 104 N. W. 236 (assignment of wages —money paid to creditor of assignor by debtor of assignor under invalid judgment in garnishment proceedings—recovery by assignee of wages); Johnson v. Ogren, 102 Minn. 8, 13, 112 N. W. 894 (general rule stated — money received by principal through unauthorized act of his agent subsequently ratified); Sammons v. Pike, 105 Minn. 106, 117 N. W. 244 (money obtained in an action subsequently dismissed); Stoakes v. Larson, 108 Minn. 234, 121 N. W. 1112 (general rule stated — money received by a partner); Fink v. Weinholzer, 109 Minn. 381, 123 N. W. 931 (money paid for rent in advance — building subsequently burned — failure of consideration); Peters v. Cannon River Electric Power Co., 110 Minn. 121, 124 N. W. 826 (money due as a balance on mutual claims — promissory note marked paid with understanding that there should be an accounting between the parties and a settlement—no settlement was had); Vetter v. Sandbo, 114 Minn. 144, 130 N. W. 450 (plaintiff sold land to defendant and defendant deducted from the price the amount of a ditch tax and paid the tax—later the tax was declared invalid by decision of court—defendant collected and retained amount of the tax). See, upon the general subject, 27 Cyc. 847; 2 Ency. Pl. & Pr. 1016; 15 Am. & Eng. Ency. of Law, 2 ed. 1096; Keener, Quasi Contracts; 2 Greenleaf, Ev. 16 ed. §§ 118–125; 2 Chitty, Contracts, 11 Am. ed. 898–950; 2 Chitty, Pl. 16 Am. ed. 29; 4 Waits' Actions & Defences, 469; 3 Street, Foundations of Legal Liability, 194; Roberts v. Ely, 113 N. Y. 128, 20 N. E. 606.

[11] Brand v. Williams, 29 Minn. 238, 13 N. W. 42.

[12] Brand v. Williams, 29 Minn. 238, 13 N. W. 42. See Van Hoesen v. Minn. B. S. Convention, 16 Minn. 96(86, 89) (holding that an action will not lie in any event unless the defendant received the specific sum for plaintiff's use).

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money,[13] or how it came into his hands,[14] or that the person from whom defendant received the money paid it to him in his own wrong and is liable therefor to plaintiff,[15] or that defendant has paid over the money to another by mistake.[16] It is not necessary to prove that the money was actually and physically given to and received by the defendant. It is sufficient if it be shown that defendant has money belonging to the plaintiff which he cannot conscientiously retain.[17] It is necessary for the plaintiff to prove that the defendant has received money belonging to the plaintiff, or to which he is entitled; it is not sufficient to prove that he has by fraud or other wrong caused the plaintiff to pay money to others, or to sustain loss or damages.[18]

756. Same—Nature of action—Legal or equitable—The action is one at law and triable by jury.[19] It is often said, with questionable accuracy, that the action is of an equitable nature or governed by equitable principles.[20] The use of this language is probably traceable to Lord Mansfield. He was exceedingly jealous of the courts of equity and endeavored to restrict their jurisdiction by greatly enlarging the scope of this action and making it a kind of equitable action in which the court should administer justice according to the facts of the particular case. In his day the action was still in its formative period and had not yet been caught in the net of precedent. It then rested in the vagueness of moral obligation. It was said by Lord Mansfield to be governed "by the true equity and conscience of the case." [21] After his death a reaction occurred, or at least the boundaries of the action were not extended in accordance with his extravagant notions. At the present time this action is as much governed by precedent as any other action. The defendant can always defeat the action by showing "a legal or equitable ground for retaining" the money.[22] The question in the action is whether the defendant has received money which he is under a legal obligation to pay to the plaintiff, not whether he is under a moral obligation to do so. If, under a general rule of law or equity, he is bound to pay it over to the plaintiff, he may be compelled to do so in this action, though ethically he is entitled to retain it, in view of the facts

[13] Henderson v. Sibley County, 28 Minn. 515, 11 N. W. 91.

[14] Stoakes v. Larson, 108 Minn. 234, 121 N. W. 1112.

[15] Brand v. Williams, 29 Minn. 238, 13 N. W. 42; Sibley County v. Pine County, 31 Minn. 201, 17 N. W. 337.

[16] Landin v. Moorhead Nat. Bank, 74 Minn. 222, 77 N. W. 35.

[17] Roberts v. Ely, 113 N. Y. 128, 20 N. E. 606; La Forge v. Cornell, 127 N. Y. S. 453.

[18] National Trust Co. v. Gleason, 77 N. Y. 400; New York Guaranty etc. Co. v. Gleason, 78 N. Y. 503.

[19] Merriam v. Johnson, 86 Minn. 61, 90 N. W. 116; Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443.

[20] Brand v. Williams, 29 Minn. 238, 13 N. W. 42; Seaward v. Tasker, 143 N. Y. S. 257; Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443. See 15 Am. & Eng. Ency. of Law, 2 ed., 1098.

[21] Todd v. Bettingen, 109 Minn. 493, 497, 124 N. W. 443.

[22] See Brand v. Williams, 29 Minn. 238, 13 N. W. 42.

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of the particular case. The vague ethical language which the courts use in connection with this action is very misleading and inaccurate. The code has not changed the substantive law applicable to the subject. A recovery may be had in our practice whenever an action for money had and received would lie at common law.[23] In other words the action is essentially the same as indebitatus assumpsit for money had and received at common law.[24]

757. Same—Basis of liability—Fiction of a contract—Our decisions, following the language of the common law, often speak of the obligation to deliver the money as an implied contract.[25] In reality the obligation is imposed by law regardless of the intention of the parties and is therefore not strictly of a contractual nature.[26] It is a quasi contractual obligation.[27] The action is in the nature of an equitable remedy to compel one unjustly enriched at the expense of another to disgorge.[28] The legal liability rests on the moral obligation to deliver the money to the person entitled to it in equity and good conscience.[29] The fiction of an implied promise was resorted to at common law in order that the obligation might be enforced by assumpsit, which required a promise to sustain it.[30] There seems to be no excuse for resorting to the fiction under our practice.[31]

758. Same—Tendency to extend scope of action—Limited by trial by jury—The present tendency of the courts is to extend the scope of this action.[32] Its scope has been gradually extended to embrace many cases which were originally cognizable only in a court of equity. Whenever one has money in his possession which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted

[23] See Valentine v. St. Paul, 34 Minn. 446, 448, 26 N. W. 457.

[24] See Taylor v. Read, 19 Minn. 372 (317, 321).

[25] De Graff v. Thompson, 24 Minn. 452, 456 (the law implies the privity and the promise); Brand v. Williams, 29 Minn. 238, 13 N. W. 42 (the law creates the privity and the promise); Sibley v. Pine County, 31 Minn. 201, 17 N. W. 337 (no promise to pay is necessary other than that which is implied); First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599 (implied contract).

[26] 2 Harv. L. Rev. 63.

[27] See Keener, Quasi Contracts, 14, 211; Brown's Estate v. Stair, 25 Colo. App. 140, 136 Pac. 1003.

[28] Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443; Peters v. Cannon River Electric Power Co., 110 Minn. 121, 124 N. W. 826.

[29] Henderson v. Sibley County, 28 Minn. 515, 520, 11 N. W. 91; Sibley v. Pine County, 31 Minn. 201, 17 N. W. 337; First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599.

[30] Keener, Quasi Contracts, 14; Prof. Ames, 2 Harv. L. Rev. 63; Pomeroy, Remedies, § 512. Having money that rightfully belongs to another is said to create a debt. Byxbie v. Wood, 24 N. Y. 607. This is stretching debt so as to render assumpsit available.

[31] See Keener, Quasi Contracts, 211; Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443.

[32] Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443.

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to the exigencies of the particular case, and that the rights of the parties are capable of adjustment by that procedure without prejudice to the interests of third parties.[33]

759. Same—Effect of express contract—This count will not lie where there is an express contract open and unexecuted and the breach of the contract is the basis of the action.[34] But if the express contract is fully performed and nothing remains to be done except to pay over the money this count will lie for its recovery,[35] and it will also lie if the express contract contains nothing more than the law will imply.[36] Where it is stipulated in a contract that if defendant breaches the contract he will refund money paid to him by plaintiff under the contract, the money may be recovered, in case of a breach, under this count.[37]

760. Same—Trusts—This form of action is not excluded because, in a general sense, there is a relation of trust between the parties arising out of the transaction. There are many cases of trust cognizable only in a court of equity. The cases of express trust of property are generally of this kind. The duty of the trustee to the cestui que trust to perform the trust and to account according to its terms and conditions is, in general, enforceable only in an equitable action. The necessity of taking an account, the frequent complexity of details, the separate and varied interests often affected, and the necessity of moulding the relief to suit the circumstances, render the procedure of courts of equity peculiarly suitable in the administration of formal trusts, and in many cases indispensable to the ascertainment and enforcement of the rights and obligations of the parties. But the fact that money in the hands of one person is impressed with a trust in favor of another, or that the relation between them has a trust character, does not, ipso facto, in all cases, exclude the jurisdiction of courts of law.[38]

761. Same—Failure of consideration—Contract rescinded or abandoned—Failure or refusal of other party to perform contract—Project abandoned This count will lie to recover money paid by plaintiff to defendant upon a consideration that has wholly failed.[39] Thus it will lie where money is paid on a

[33] Roberts v. Ely, 113 N. Y. 128, 20 N. E. 606.

[34] 27 Cyc. 867; Brown v. Babcock E. C. Co., 125 N. Y. S. 544.

[35] 27 Cyc. 867; Jackson v. Creek, 47 Ind. App. 541, 94 N. E. 416. See Comstock v. Baldwin, 125 Minn. 357, 147 N. W. 278.

[36] 27 Cyc. 867; Phippen v. Morehouse, 50 Mich. 537, 15 N. W. 895.

[37] Briggs v. De Peiffer, 214 Mass. 52, 100 N. E. 1085.

[38] Roberts v. Ely, 113 N. Y. 128, 20 N. E. 606. See Holmes v. Campbell, 10 Minn. 401(320); Ford v. Brownell, 13 Minn. 184(174).

[39] Chamblin v. Schlichter, 12 Minn. 276(181) (money paid to redeem a void mortgage); Bennett v. Phelps, 12 Minn. 326(216) (money paid on a contract which the other party refuses or is unable to perform—contract to convey); Taylor v. Read, 19 Minn. 372(317) (money paid on a contract which the other party has disabled himself to perform—contract to convey); Bedford v.

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contract which the other party to the contract refuses, or fails, or disqualifies himself, or is unable to perform,[40] or on a contract subsequently rescinded by mutual consent or under a term thereof,[41] or for a project subsequently abandoned or which cannot be accomplished,[42] or for a particular purpose and the party receiving it refuses or neglects to apply it to that purpose,[43] or on a judgment subsequently reversed or vacated,[44] or in an action subsequently dis-

Small, 31 Minn. 1, 16 N. W. 452 (general rule—limitations); Valentine v. St. Paul, 34 Minn. 446, 26 N. W. 457 (money paid on an assessment for a local improvement subsequently abandoned); Scanlon v. Oliver, 42 Minn. 538, 44 N. W. 1031 (money paid pursuant to negotiations for a contract never consummated —contract to convey); Herrick v. Newell, 49 Minn. 198, 51 N. W. 819 (money paid on contract for sale of standing timber—other party disabled himself to perform); Zeglin v. Carver County, 72 Minn. 17, 74 N. W. 901 (money paid for a license to sell liquor — license tendered not in accordance with application); Dennis v. Pabst Brewing Co., 80 Minn. 15, 82 N. W. 978 (money paid to defendant to procure a liquor license for plaintiff—defendant refused to carry out agreement); McCallum v. National Credit Ins. Co., 84 Minn. 134, 86 N. W. 892 (money paid as premium on insurance policy subsequently canceled); Payne v. Hackney, 84 Minn. 195, 87 N. W. 608 (money paid on a contract to convey which the vendor refused to carry out); Williams v. Peterson, 95 Minn. 98, 103 N. W. 722 (money paid on contract rescinded by mutual consent); Leininger v. Clarke Nat. Bank, 97 Minn. 364, 107 N. W. 396 (money paid for a lease — failure to secure possession); Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443 (failure to convey—stock in corporation paid); Jacobson v. McCullough, 113 Minn. 332, 129 N. W. 759 (contribution to a fund the purpose of which has failed—subscription to a corporation never organized); Bernard v. Dr. Nelson Co., 123 Minn. 468, 143 N. W. 1133 (money paid to physician guaranteeing a cure). See 27 Cyc. 855; 15 Am. & Eng. Ency. of Law, 2 ed. 1108; 22 Id. 631; 2 Ency. Pl. & Pr. 1019; 2 Chitty, Contracts, 11 Am. ed. 921; 2 Greenleaf, Ev. § 124.

[40] Bennett v. Phelps, 12 Minn. 326 (216); Knoblauch v. Kronschnabel, 18 Minn. 300(272); Taylor v. Read, 19 Minn. 372(317); Reynolds v. Franklin, 41 Minn. 279, 43 N. W. 53; Herrick v. Newell, 49 Minn. 198, 51 N. W. 819; Dennis v. Pabst Brewing Co., 80 Minn. 15, 82 N. W. 978; Morrissey v. Guaranty Savings & Loan Assn., 81 Minn. 426, 84 N. W. 219; McCallum v. National Credit Ins. Co., 84 Minn. 134, 86 N. W. 892; Payne v. Hackney, 84 Minn. 195, 87 N. W. 608; Proctor v. C. E. Stevens Land Co., 94 Minn. 181, 102 N. W. 395; Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443. See McClure v. Bradford, 39 Minn. 118, 38 N. W. 753; Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071; Clark v. Thrope Bros., 117 Minn. 202, 135 N. W. 387; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253. See Dunnell, Minn. Digest, § 10098.

[41] Williams v. Peterson, 95 Minn. 98, 103 N. W. 722. See 27 Cyc. 867; 15 Am. & Eng. Ency. of Law, 2 ed. 1110; 22 Id. 632; 2 Chitty, Contracts, 11 Am. ed. 924; Note, 30 L. R. A. 50.

[42] Valentine v. St. Paul, 34 Minn. 446, 26 N. W. 457; Jacobson v. McCullough, 113 N. W. 332, 129 N. W. 759. See McClure v. Bradford, 39 Minn. 118, 38 N. W. 753; 27 Cyc. 862; Note, 30 L. R. A. 50.

[43] 27 Cyc. 862; 2 Greenleaf, Ev. § 119. This count will lie to recover money paid to a trustee for a specific purpose, if it has not been applied to that purpose. Guthrie v. Hyatt, 1 Harr. (Del.) 446.

[44] Berryhill v. Gasquoine, 88 Minn. 281, 92 N. W. 1121; Sammons v. Pike, 105 Minn. 106, 117 N. W. 244. See 2

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missed.[45] The count will not lie if the consideration is of some value in law, or of a nature that may enure to the benefit of the party paying the money.[46]

762. Same — Fraud—Duress—Embezzlement—Forgery—Theft—This count will lie for the recovery of money obtained by fraud,[47] duress, extortion or oppression,[48] embezzlement,[49] forgery,[50] or theft.[51] It lies not only against the person who wrongfully appropriates the money of another, but also against the person who receives it, if he had notice that the person paying it to him had no title or right to do so.[52]

763. Same—Conversion—This count will lie for the recovery of money obtained through a conversion.[53]

764. Same—Public officers—If a county officer wrongfully obtains fees from his county for alleged services the money may be recovered under this count.[54]

765. Same—Money obtained by agent—Factors and brokers—This count lies by a principal against his agent to recover money collected or received by the agent for the principal's use, including the proceeds of goods sold

Ency. Pl. & Pr. 1020; 22 Am. & Eng. Ency. of Law, 2 ed. 635.

[45] Sammons v. Pike, 105 Minn. 106, 117 N. W. 244.

[46] Bedford v. Small, 31 Minn. 1, 16 N. W. 452. See McClure v. Bradford, 39 Minn. 118, 38 N. W. 753 (money paid on a joint adventure).

[47] Lund v. Davis, 47 Minn. 290, 50 N. W. 79 (overpayment induced by fraud); Schaller v. Borger, 47 Minn. 357, 50 N. W. 247 (payments on a note procured by fraud); Holland v. Bishop, 60 Minn. 23, 61 N. W. 681 (money paid on a false and fraudulent promise to use it to purchase certain property); I. L. Corse & Co. v. Minn. Grain Co., 94 Minn. 331, 102 N. W. 728 (contract induced by fraud — election of remedies — duty to offer to return property received); McBrady v. Monarch El. Co., 113 Minn. 104, 109, 129 N. W. 163 (money paid on a fraudulent misrepresentation of an indebtedness); Benson v. United States Instalment Realty Co., 113 Minn. 346, 129 N. W. 594 (money paid on a policy through fraud); Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754 (money paid upon fraudulent misrepresentations as to the formation of a corporation); Olson v. Northern Pacific Ry., 126 Minn. 229, 148 N. W. 67 (money paid by purchaser of land upon fraudulent misrepresentations of the vendor as to its quality and character). See 27 Cyc. 863; 14 Am. & Eng. Ency. of Law, 2 ed., 165; 2 Ency. Pl. & Pr. 1020; 2 Chitty, Contracts, 11 Am. ed. 937–939; 2 Greenleaf, Ev. §§ 120–122; Note, 36 L. R. A. (N. S.) 602 (money paid under or in pursuance of a contract induced by the fraud of the payee).

[48] 27 Cyc. 863; 2 Ency. Pl. & Pr. 1020; 15 Am. & Eng. Ency. of Law, 2 ed. 1101; 22 Id. 612. See, as to payment under duress, Dunnell, Minn. Digest, § 7462.

[49] 2 Ency. Pl. & Pr. 1023.

[50] 2 Ency. Pl. & Pr. 1023.

[51] 2 Ency. Pl. & Pr. 1023.

[52] Marotta v. Duluth News Tribune Co., 116 Minn. 51, 153 N. W. 89 (money received by A from B with knowledge that it belonged to C and was wrongfully taken from C by B); Amidon v. Wheeler, 3 Hill 137; Heidenheimer v. Boyd, 44 N. Y. S. 687; Town of Bleeker v. Balje, 123 N. Y. S. 809.

[53] See § 186 and 27 Cyc. 861; 2 Ency. Pl. & Pr. 1022; 15 Am. & Eng. Ency. of Law, 2 ed. 1113; Note, 8 L. R. A. 216.

[54] Megaarden v. Hennepin County, 102 Minn. 134, 112 N. W. 899.

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by the agent for his principal and profits realized by the agent to which the principal is entitled, whether resulting from a performance or a violation of the agent's duties.[55] It lies against an agent who discharges his own debt by offsetting it against an amount due his principal, though no money actually passes or comes into his hands.[56] It lies against factors and brokers.[57] After the lapse of a reasonable time from the receipt of the goods by a factor and a neglect to account for them the fair presumption is that they have been sold and the money received for them and this count will lie.[58]

766. Same—Wrong credit on account—Where through wrong, inadvertence or mistake, one person is improperly credited on account, or in settlement of accounts, with the payment of money to which another is, in equity and good conscience, entitled, the latter may recover the amount so credited from the former under this count.[59]

767. Same—Overpayment of debt—This count lies where a debt is overpaid or paid twice through mistake.[60] An applicant for a liquor license who, under protest, pays the amount exacted in excess of the established fee, may recover the excess as for money had and received.[61]

768. Same—Surplus on sale or payment of security—Any surplus arising on the sale or payment of security for a debt may be recovered under this

[55] P. P. Mast & Co. v. Easton, 33 Minn. 161, 22 N. W. 253; Huntsman v. Fish, 36 Minn. 148, 30 N. W. 455; Davenport v. Ladd, 38 Minn. 545, 38 N. W. 622; Brandt v. Shepard, 39 Minn. 454, 40 N. W. 521; Jackson v. Kansas City Packing Co., 42 Minn. 382, 44 N. W. 126; Milton v. Johnson, 79 Minn. 170, 81 N. W. 842; Merriam v. Johnson, 86 Minn. 61, 90 N. W. 116; Bauer v. Sawyer & Britsch Land Co., 90 Minn. 536, 97 N. W. 428; Farmers' Warehouse Assn. v. Montgomery, 92 Minn. 194, 99 N. W. 776; Schick v. Suttle, 94 Minn. 135, 102 N. W. 217; Burgraf v. Byrnes, 94 Minn. 418, 103 N. W. 215; Christopherson v. Olson, 104 Minn. 330, 116 N. W. 840; Greenberg v. Millette, 110 Minn. 161, 124 N. W. 824; Gedney v. Ayers, 111 Minn. 66, 126 N. W. 398; Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812; Sandoval v. Randolph, 222 U. S. 161. See 31 Cyc. 1609; 2 Chitty, Contracts, 11 Am. ed. 916; Note, 23 L. R. A. (N. S.) 553.

[56] Allen v. Brown, 44 N. Y. 228; Beardsley v. Root, 11 Johns. (N. Y.) 464. See Milton v. Johnson, 79 Minn. 170, 81 N. W. 842.

[57] 8 Ency. Pl. & Pr. 836; 12 Am. & Eng. Ency. of Law, 2 ed., 698.

[58] 2 Ency. Pl. & Pr. 1017.

[59] 27 Cyc. 852; 2 Chitty, Contracts, 11 Am. ed. 931; Putnam v. Field, 103 Mass. 556; Haddock v. Kelsey, 3 Barb. (N. Y.) 100.

[60] Mississippi Rafting Co. v. Ankeny, 18 Minn. 17(1, 9); Lund v. Davies, 47 Minn. 290, 50 N. W. 79; Farrell v. Burbank, 57 Minn. 395, 59 N. W. 485; Conron v. Hoerr, 83 Minn. 183, 85 N. W. 1012; Aetna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955. See Henry v. Meighen, 46 Minn. 548, 49 N. W. 323, 646 (excess collected on a judgment); 27 Cyc. 862; Note, 24 L. R. A. (N. S.) 517; Fowler v. Shearer, 7 Mass. 14; Graves v. Harwood, 9 Barb. (N. Y.) 477; Harris v. Wicks, 28 Wis. 198; Wagner v. U. S. Nat. Bank, 63 Or. 299, 127 Pac. 778, 42 L. R. A. (N. S.) 1135 (debtor's check for more than amount due).

[61] Gillen v. South St. Paul, 111 Minn. 172, 126 N. W. 624.

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count by the person entitled thereto, whether the original debtor or a subsequent mortgagee.[62]

769. Same—Cotenants—This count will lie by one tenant in common to recover his share of the proceeds of the common property, real or personal, against his cotenant, by whom they have been received, if the question of title to land is not involved.[63]

770. Same—Share of indemnity—This count will lie to recover a share in an indemnity.[64]

771. Same—Emoluments of office—This count will lie to recover emoluments of a public office received by a usurper.[65]

772. Same—Sheriff—This count lies against a sheriff where he seizes and sells the property of plaintiff under a process against the property of a third party, or where he neglects or refuses to pay over to the person entitled thereto money collected by him or his deputy, or pays money in his hands to a person other than the one really entitled thereto, or sells property under process and delivers the property to the purchaser without collecting the purchase money, or money received by a tortious act on his part.[66] If a sheriff wrongfully collects fees from his county a recovery may be had under this count.[67]

773. Same—Money received under a claim of right—Conflicting claimants—Assignor—Where a creditor receives money from his debtor in payment of a debt in the regular course of business and without knowledge that it did not belong to the debtor, the owner cannot recover it under this count;[68] otherwise if the creditor had notice that the money belonged to plaintiff.[69] Money fraudulently obtained from A by B, and received by C from B in good faith in the usual course of business and in partial liquidation of an actually

[62] 27 Cyc. 861; 22 Am. & Eng. Ency. of Law, 2 ed., 893, 904; Note, 44 L. R. A. (N. S.) 1041; Johnson v. Cobleigh, 152 Mass. 17, 25 N. E. 73; Cope v. Wheeler, 41 N. Y. 303. See, as to surplus on mortgage foreclosure sales, Dunnell, Minn. Digest, §§ 6475, 6479.

[63] 27 Cyc. 856; 2 Ency. Pl. & Pr. 1023; 17 Am. & Eng. Ency. of Law, 2 ed. 704; 2 Chitty, Pl. 16 Am. ed. 30; Haven v. Foster, 9 Pick, 112, 19 Am. Dec. 353; Miller v. Miller, 7 Pick. 133, 19 Am. Dec. 264; Note, 29 L. R. A. (N. S.) 231; Note, 52 Am. St. Rep. 924. See Holmes v. Campbell, 10 Minn. 401(320); Dunnell, Minn. Digest, § 9600.

[64] 27 Cyc. 856; Cutler v. Rand, 8 Cush. 89. See Austin v. March, 86 Minn. 232, 90 N. W. 384.

[65] 27 Cyc. 863; 17 Ency. Pl. & Pr. 166; 23 Am. & Eng. Ency. of Law, 2 ed., 403; 2 Chitty, Contracts, 11 Am. ed. 948; Kessel v. Zeiser, 102 N. Y. 114, 6 N. E. 574. See G. S. 1913 § 8259.

[66] 35 Cyc. 1789; 20 Ency. Pl. & Pr. 129; 25 Am. & Eng. Ency. of Law, 2 ed. 717; 2 Chitty, Contracts, 11 Am. ed. 950. See Dunnell, Minn. Digest, §§ 8745–8747.

[67] Megaarden v. Hennepin County, 102 Minn. 134, 112 N. W. 899.

[68] Newhall v. Wyatt, 139 N. Y. 452, 34 N. E. 1045; Gale v. Chase Nat. Bank, 104 Fed. 214.

[69] Heidenheimer v. Boyd, 162 N. Y. 603, 57 N. E. 1112. See Marotta v. Duluth News Tribune Co., 116 Minn. 51, 133 N. W. 89.

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existing indebtedness, cannot be recovered from C by A under this count.[70] Where there are simply two parties claiming to own the same debt or chose in action, the party having the superior title may recover under this count against the claimant who receives the money.[71] Where the liability of the person from whom money was due has been discharged by payment to one claimant, who does not assert any hostile claim to the whole amount, another claimant who is entitled to a share in the money may recover it under this count.[72] Where A receives money from B which he knew was claimed by C, it may be recovered by C under this count, if in equity he ought to have it, though A received it under a claim of right and was legally entitled to receive it from B.[73] Where an assignor of a claim receives payment thereon after the assignment the assignee may recover it under this count.[74] If an award in condemnation proceedings is paid to one who is not the true owner the latter may recover it under this count.[75]

774. Same—Order of creditor on debtor—This count will lie in some cases to recover a debt transferred by a creditor's order on his debtor to pay plaintiff.[76]

775. Same—Order of principal on agent—This count will lie in some cases to recover money which a principal orders his agent to pay to plaintiff.[77]

776. Same—Contract not perfected—This count will lie to recover money paid pending negotiations for a contract, if the negotiations are broken off and there is no valid contract formed between the parties.[78]

777. Same—Mistake—Whenever money paid through mistake may be recovered it may be recovered under this count.[79]

[70] Nassau Bank v. Nat. Bank of Newburgh, 159 N. Y. 456, 54 N. E. 66; Ball v. Shepard, 202 N. Y. 247, 95 N. E. 719; Carlisle v. Norris, 142 N. Y. S. 393. See Marotta v. Duluth News Tribune Co., 116 Minn. 51, 133 N. W. 89; Bradley Lumber Co. v. Bradley County Bank, 206 Fed. 41.

[71] Quigley v. Welter, 95 Minn. 383, 104 N. W. 236; Carnegie Trust Co. v. Battery Place Realty Co., 122 N. Y. S. 697. See Hanson v. Diamond Iron Mining Co., 87 Minn. 505, 92 N. W. 447.

[72] Webb v. Myers, 18 N. Y. S. 711; Brown's Estate v. Stair, 25 Colo. App. 140, 136 Pac. 1003. See 27 Cyc. 859.

[73] Spengeman v. Palestine Bldg. Assn., 60 N. J. L. 357, 37 Atl. 723. See Hanson v. Diamond Iron Mining Co., 87 Minn. 505, 92 N. W. 447.

[74] Camp v. Tompkins, 9 Conn. 545; Goodrich v. Alfred, 72 Conn. 257, 261.

[75] Smith v. St. Paul, 65 Minn. 295, 68 N. W. 32; Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

[76] 2 Chitty, Contracts, 11 Am. ed. 912. See Gray v. Barge, 47 Minn. 498, 50 N. W. 1014.

[77] 2 Chitty, Contracts, 11 Am. ed. 914. See Moore v. Norman, 52 Minn. 83, 53 N. W. 809.

[78] Scanlon v. Oliver, 42 Minn. 538, 44 N. W. 1031; Smith v. Independent School District, 108 Minn. 322, 122 N. W. 173; Collins v. Pearsall, 119 N. Y. S. 203.

[79] 30 Cyc. 1313, 1316; 2 Ency. Pl. & Pr. 1018; 15 Am. & Eng. Ency. of Law, 2 ed. 1102; 22 Id. 621; 2 Chitty, Contracts, 11 Am. ed. 928; Keener, Quasi Contracts, 26–158; 2 Greenleaf, Ev. § 123. See Dunnell, Minn. Digest, § 7464.

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778. Same—Contract void under statute of frauds—This count will lie for the recovery of money paid under a contract void under the statute of frauds.[80]

779. Same—Money in hands of stakeholder—This count will lie for money in the hands of a stakeholder after the event has been determined in favor of the plaintiff, or to abide the event of a wager repudiated by plaintiff before the result is ascertained, or, if the wager is illegal, before the money has been paid over.[81]

780. Same—Property other than money—Negotiable paper—A count for money had and received will lie though the party sought to be charged received property other than money.[82] It will lie where property belonging to the plaintiff was reduced to money after it was received and before the action is brought.[83] Where one of two joint owners of a judgment caused execution to issue thereon, and bid in certain realty sold thereon, paying no part of the purchase price, it was held that an action for money had and received would not lie by the other joint owner for one-half of the purchase money.[84] This count will lie where negotiable paper is received as the equivalent of money.[85]

781. Same—Account stated—Proof of an account stated supports a count for money had and received.[86]

782. Same—Illegal contracts—Usury—Whenever money paid on an illegal contract may be recovered it may be recovered under this count.[87] Where, pursuant to an illegal contract between A and B, A delivers money to C for the use of B, this count will lie by B against C.[88] This count may be used to recover usurious interest.[89]

783. Same—Award in condemnation proceedings—If an award in condemnation proceedings is paid to one who is not the true owner the latter may recover it under this count.[90]

[80] 29 Am. & Eng. Ency. of Law, 2 ed. 838; 20 Cyc. 298; 22 Ency. Pl. & Pr. 669; Keener, Quasi Contracts, 277; Note, 105 Am. St. Rep. 793. See Dunnell, Minn. Digest, § 8856.

[81] Wilkinson v. Tousley, 16 Minn. 299 (263); Pabst Brewing Co. v. Liston, 80 Minn. 473, 83 N. W. 448; 20 Cyc. 956; 14 Am. & Eng. Ency. of Law, 2 ed. 631–636; 2 Chitty, Pl. 16 Am. ed. 30; 2 Chitty, Contracts, 11 Am. ed. 919. See Dunnell, Minn. Digest, § 10132.

[82] Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443.

[83] Devlin v. Houghton, 202 Mass. 75, 88 N. E. 580.

[84] Holmes v. Campbell, 10 Minn. 401 (320).

[85] 27 Cyc. 851; Ehrman v. Rosenthal, 117 Cal. 491, 49 Pac. 460.

[86] 27 Cyc. 853; Lincoln v. Butler, 14 Gray (Mass.) 129; Morse v. Allen, 44 N. H. 33.

[87] 2 Chitty, Contracts, 11 Am. ed. 944; 15 Am. & Eng. Ency. of Law, 2 ed. 1110. See Glencoe v. McLeod County, 40 Minn. 44, 41 N. W. 239.

[88] 15 Am. & Eng. Ency. of Laws, 2 ed. 1007.

[89] 39 Cyc. 1049. See Dunnell, Minn. Digest, § 9991.

[90] Smith v. St. Paul, 65 Minn. 295, 68

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784. Same—Demand—Where it is not the duty of the defendant to turn the money over immediately upon its receipt a demand is sometimes necessary before bringing an action.[91] If there is such a duty, or if, under the circumstances, it is obvious that a demand would be unavailing, a demand is unnecessary.[92] It is unnecessary where the defendant sets up a claim or defence of such a nature that it is obvious that a demand would have been unavailing.[93] Where the receipt of the money was wrongful no demand is necessary.[94]

785. Same—Interest—Interest is recoverable on the money from the time the defendant is in default.[95] Where a party has received or acquired the money of another by mistake merely, without fraud, the general rule is that interest does not run upon it until the party, in whose possession it is, is put in default by a demand by the party to whom it is justly due, in which case, if the money is not returned after demand, interest begins to run.[96]

786. Same—Restoration of property received by plaintiff—When a party seeks to rescind a contract induced by fraud and to recover payments made thereunder, he must restore or offer to restore whatever of value he received by virtue of the contract. In such a case it is sufficient for the defrauded party to make a fair offer to return what he received, and demand what he parted with; and, if his offer and demand be refused, a strict and technical tender is not essential, but it is sufficient if proof of such offer and demand is made on the trial, with restoration in such practical way as the court may direct.[97] Where a party seeks to recover money paid on a contract which the other party fails or refuses to perform he must make restitution of whatever he has received thereunder.[98]

N. W. 32; Eyre v. Faribault, 121 Minn. 233, 242, 141 N. W. 170. See 27 Cyc. 856.

[91] Ford v. Brownell, 13 Minn. 184 (174). See Sibley v. Pine County, 31 Minn. 201, 204, 17 N. W. 337; 15 Am. & Eng. Ency. of Law, 2 ed. 1098.

[92] Bailey v. Merritt, 7 Minn. 159(102); P. P. Mast & Co. v. Easton, 33 Minn. 161, 22 N. W. 253; Huntsman v. Fish, 36 Minn. 148, 30 N. W. 455; Auerbach v. Gieseke, 40 Minn. 258, 262, 41 N. W. 946; Pabst Brewing Co. v. Liston, 80 Minn. 473, 83 N. W. 448; Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443. See 15 Am. & Eng. Ency, of Law, 2 ed. 1098.

[93] Davenport v. Ladd, 38 Minn. 545, 38 N. W. 622; Jensen v. Weide, 42 Minn. 59, 43 N. W. 688.

[94] Glencoe v. McLeod County, 40 Minn. 44, 41 N. W. 239.

[95] Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. 946; Pabst Brewing Co. v. Liston, 80 Minn. 473, 83 N. W. 448. See Perkins v. Stewart, 75 Minn. 21, 77 N. W. 434; Jacobson v. McCullough, 113 Minn. 332, 129 N. W. 759; 16 Am. & Eng. Ency. of Law, 2 ed., 1012.

[96] Sibley v. Pine County, 31 Minn. 201, 17 N. W. 337; I. L. Corse & Co. v. Minn. Grain Co., 94 Minn. 331, 102 N. W. 728.

[97] I. L. Corse & Co. v. Minn. Grain Co., 94 Minn. 331, 102 N. W. 728.

[98] Bennett v. Phelps, 12 Minn. 326 (216); Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443.

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787. Same—Defences—The fact that the money was paid to the defendant by the plaintiff as part of a conspiracy to defraud him is a good defence.[99] It is no defence that the person from whom the defendant received the money paid it to him in his own wrong and is liable therefor to plaintiff,[1] or that defendant has used the money,[2] or has paid it over to another by mistake.[3] The defendant can always defeat recovery by showing some legal or equitable ground for retaining it.[4]

788. Same—Parties plaintiff—If an agent by mistake pays to a third party money in his possession belonging to his principal, he may maintain in his own name an action for money had and received to recover it.[5] A guardian of minors may maintain such an action to recover money collected for him as guardian by an attorney, though after the collection and before the commencement of the action, some of the minors have become of age.[6] A municipality may recover money paid on a contract beyond its corporate powers, or by mistake. But it cannot recover money paid on a contract which was within its corporate powers, but was illegal because in violation of charter or statutory provisions, if the other party has performed in good faith.[7]

789. Same—Parties defendant—Municipalities—An action for money had and received will lie against a municipality.[8]

MONEY LENT

790. Complaint—Common count—A complaint in the form of the common indebitatus count for money lent, or substantially in that form, is sufficient.[9] A complaint alleging that the defendant, at a certain time, had and received a sum of money from plaintiff, which he then agreed to repay to plaintiff upon demand, states a cause of action for money loaned, and not for money had and received.[10] It is unnecessary to allege when the money was to be repaid except to fix a date for interest. The presumption is that it was to

[99] Bauer v. Sawyer, 90 Minn. 536, 97 N. W. 428.

[1] Brand v. Williams, 29 Minn. 238, 13 N. W. 42; Sibley v. Pine County, 31 Minn. 201, 17 N. W. 337.

[2] Henderson v. Sibley County, 28 Minn. 515, 11 N. W. 91.

[3] Landin v. Moorhead Nat. Bank, 74 Minn. 222, 77 N. W. 35.

[4] See Brand v. Williams, 29 Minn. 238, 13 N. W. 42.

[5] Parks v. Fogleman, 97 Minn. 157, 105 N. W. 560.

[6] Huntsman v. Fish, 36 Minn. 148, 30 N. W. 455.

[7] See Dunnell, Minn. Digest, § 6711.

[8] Henderson v. Sibley County, 28 Minn. 515, 11 N. W. 91; Sibley v. Pine County, 31 Minn. 201, 17 N. W. 337; Valentine v. St. Paul, 34 Minn. 446, 26 N. W. 457; Glencoe v. McLeod County, 40 Minn. 44, 41 N. W. 239; First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599.

[9] Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998. See Chamberlain v. Tiner, 31 Minn. 371, 18 N. W. 97; Fravel v. Nett, 46 Minn. 31, 48 N. W. 446; Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487; Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084.

[10] Farrington v. Farrington, 117 Minn. 272, 135 N. W. 815.

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be repaid immediately or on demand.[11] It is unnecessary to allege that the money had become payable at the commencement of the action. If it had not, that is a matter of defence to be alleged in the answer.[12] Possibly an allegation of non-payment is essential to show a breach.[13]

791. Answer—General denial—The general rules, stated elsewhere,[14] as to the evidence admissible under a general denial, are applicable here.[15]

792. Issues—Variance—Under a complaint for money lent a cause of action for money paid out for the defendant, under circumstances not amounting to a loan, cannot be proved.[16] An immaterial variance will be disregarded.[17]

793. When common count will lie—As a general rule a common count for money lent will lie where plaintiff loans or advances money at the request of defendant.[18] A loan of money raises an implied promise to repay it.[19] This count will lie where the defendant was the real borrower—where the credit was given to him, though the money was delivered to a third party at defendant's request,[20] but it will not lie if the money was not lent to defendant and upon his sole credit, but was lent and actually delivered to a third party, who was to become primarily liable to plaintiff, so that defendant's undertaking was merely collateral, that is, to pay if the party receiving the money did not.[21] It will lie against two persons to whom a loan is made though the money is paid to one of them only.[22] It is sustained by a bill, note or check, accompanied by evidence that the instrument was given for a loan.[23]

[11] Chamberlain v. Tiner, 31 Minn. 371, 18 N. W. 97; Peets v. Bratt, 6 Barb. (N. Y.) 662.

[12] Smith v. Holmes, 19 N. Y. 271; Maynard v. Talcott, 11 Barb. (N. Y.) 569.

[13] Cochran v. Reich, 91 Hun (N. Y.) 440.

[14] See § 327.

[15] Bond v. Corbett, 2 Minn. 248(209); Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487; Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597.

[16] Cummings v. Long, 25 Minn. 337.

[17] Fravell v. Nett, 46 Minn. 31, 48 N. W. 446; Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487.

[18] 27 Cyc. 826; 2 Ency. Pl. & Pr. 1015; 4 Wait's Actions & Defences, 444; 2 Chitty, Contracts, 11 Am. ed. 876; 2 Greenleaf, Ev. § 112. It has been said that the action is of an equitable nature and that it is unnecessary that there should be any privity between the parties except such as arises out of circumstances showing an equitable obligation. Commercial Nat. Bank v. Slowman, 106 N. Y. S. 508.

[19] Brown v. Spencer, 163 Cal. 589, 126 Pac. 493.

[20] 27 Cyc. 827; 2 Ency. Pl. & Pr. 1016; 2 Chitty, Contracts, 11 Am. ed. 877; Isaacson v. Etkin, 132 N. Y. S. 1044; Clarkson v. Kennett, 17 Mont. 563, 44 Pac. 88.

[21] 27 Cyc. 826; 2 Ency. Pl. & Pr. 1016; 2 Chitty, Contracts, 11 Am. ed. 876.

[22] Isaacson v. Etkin, 132 N. Y. S. 1044.

[23] 8 Cyc. 18; 14 Ency. Pl. & Pr. 561; 2 Chitty, Contracts, 11 Am. ed. 879; Russell v. Amlot, 116 N. Y. S. 1080 (check); Siebrecht v. Siebrecht, 137 N. Y. S. 1073 (check).

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794. Same—Defences—It is no defence that the plaintiff obtained the money under an illegal contract with a third party.[24] The defendant may show that the money was loaned in a representative capacity; not as a bar to the action, but for his future protection.[25]

795. Same—Demand—No demand is necessary before bringing an action for money lent.[26]

MONEY PAID

796. Complaint—Common count—A complaint in the form of the common indebitatus count for money paid, or substantially in that form, is sufficient.[27] Under this form of complaint a recovery may be had either on an express or implied agreement.[28] Instead of proving the payment of money, proof of the payment of its equivalent, as a negotiable note or bill of exchange, is permissible.[29]

797. When common count will lie—A common count for money paid will lie in all cases where the plaintiff has paid money to a third party, at the request, express or implied, of the defendant, and with an undertaking, express or implied, on his part, to repay it.[30] It is immaterial whether the defendant is relieved from a liability by the payment or not. The request to

[24] Wintermute v. Stinson, 16 Minn. 468(420).

[25] Bond v. Corbett, 2 Minn. 248(209).

[26] 27 Cyc. 827; Walloch v. Dryfoos, 125 N. Y. S. 305.

[27] Freeborn v. Glazer, 10 Cal. 337; Campbell v. Shiland, 14 Colo. 491, 23 Pac. 324. See Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487 (complaint for "money loaned to defendant and paid for his use and benefit"); Foster v. Gordon, 96 Minn. 142, 104 N. W. 765 (informal pleading for money had and received changed by amendment to a complaint for money paid). Complaints substantially in the form of the common count are frequent in our practice and their sufficiency is unquestioned. See Rosemond v. Northwestern etc. Co., 62 Minn. 374, 64 N. W. 925; Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81, 91 N. W. 257; Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N. W. 1056.

[28] 27 Cyc. 843.

[29] 27 Cyc. 843.

[30] Harlev v. Davis, 16 Minn. 487(441) (judgment against maker and indorser of note—payment of judgment by indorser); Freeman v. Etter, 21 Minn. 3 (payment of debt of another under an express agreement); Johnson v. Krassin, 25 Minn. 117 (general rule stated—money paid to third party on oral trust within statute of frauds—payment for property taken in name of defendant); Murphin v. Scovell, 41 Minn. 262, 43 N. W. 1 (payment on contract to convey realty); Rosemond v. N. W. etc. Co., 62 Minn. 374, 64 N. W. 925 (payment of debt of corporation by an officer and stockholder thereof); Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N. W. 1056 (payment of the note of another at his request); Foster v. Gordon, 96 Minn. 142, 104 N. W. 765 (payment of the mortgage of another at his request). See, in general, as to when action will lie, 27 Cyc. 833; 2 Ency. Pl. & Pr. 1012; 15 Am. & Eng. Ency. of Law, 2 ed. 1099; 4 Wait's Actions and Defences, 449; Keener, Quasi Contracts, 388; 2 Chitty, Pl. 16 Am. ed., 28; 2 Chitty, Contracts, 11 Am. ed., 879–898; 2 Greenleaf, Ev. §§ 113–116.

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pay and the payment constitute the debt upon which the action is founded.[31] This count will lie where the plaintiff, in order to protect his own interests, pays a debt for which the defendant is legally and personally liable;[32] where the plaintiff pays off an incumbrance on his property, real or personal, which the defendant has undertaken or is legally liable to pay;[33] where the plaintiff makes a payment for which the defendant is primarily liable, though plaintiff is himself liable to pay it, and in such case it is not necessary that plaintiff should have been coerced by actual legal proceedings;[34] where a surety,[35] or guarantor[36] pays the debt of his principal; where there is a right of contribution,[37] as for example, between sureties,[38] guarantors,[39] tenants in common[40] and joint debtors,[41] including joint judgment debtors;[42] where plaintiff is compelled to make a payment because of the act of the defendant, for which he would not have been liable but for the act;[43] where the plaintiff has made a payment in discharge of a liability which he has taken upon himself at defendant's instance or by his authority;[44] where the plaintiff has been com-

[31] 27 Cyc. 834; 2 Chitty, Contracts, 11 Am. ed. 881; Brittain v. Lloyd, 14 M. & W. 762; Lewis v. Campbell, 8 C. B. 541; Post v. Gilbert, 44 Conn. 1.

[32] 27 Cyc. 834; 2 Ency. Pl. & Pr. 1013; 15 Am. & Eng. Ency. of Law, 2 ed. 1108; 2 Chitty, Contracts, 11 Am. ed. 883; Keener, Quasi Contracts, 388–410.

[33] 27 Cyc. 834; Lovejoy v. Chandler, 93 Cal. 376, 28 Pac. 935 (incumbrance on land sold by defendant to plaintiff); Post v. Campau, 42 Mich. 90, 3 N. W. 272 (id.); Hale v. Huse, 10 Gray (Mass.) 99 (mechanic's lien); Gleason v. Dyke, 22 Pick. (Mass.) 390 (payment of mortgage by purchaser of equity of redemption, who afterwards released his rights to the mortgagor); Sargent v. Currier, 49 N. H. 310 (incumbrance on personalty sold by defendant to plaintiff); Finnell v. Finnell, 159 Cal. 535, 114 Pac. 820 (vendor's lien on land sold by defendant to plaintiff—payment of outstanding purchase-money note secured by the lien).

[34] 27 Cyc. 835; Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320.

[35] 32 Cyc. 261; 2 Ency. Pl. & Pr. 1014; 7 Am. & Eng. Ency. of Law, 2 ed. 345; 15 Id. 1109; 27 Id. 474; 2 Chitty, Contracts, 11 Am. ed. 889; Willis v. Davis, 3 Minn. 17(1, 5); Barnsback v. Reiner, 8 Minn. 59(37); Harlev v. Davis, 16 Minn. 487(441). See Kimmel v. Lowe. 28 Minn. 265, 9 N. W. 764; Pitzl v. Winter, 96 Minn. 499, 504, 105 N. W. 673.

[36] 20 Cyc. 1495; 14 Am. & Eng. Ency. of Law, 2 ed. 1161. See Kimmel v. Lowe, 28 Minn. 265, 9 N. W. 764.

[37] 9 Cyc. 801, 808; 2 Ency. Pl. & Pr. 1014; 2 Chitty, Contracts, 11 Am. ed. 895; Note, 1 L. R. A. 312; Pratt v. Stoner, 78 Conn. 310. See Dunnell, Minn. Digest, §§ 1919–1925.

[38] 32 Cyc. 295; 7 Am. & Eng. Ency. of Law, 2 ed. 331; 15 Id. 1110; 27 Id. 482; 2 Chitty, Contracts, 11 Am. ed. 891; Dunnell, Minn. Digest, § 9090; Weeks v. Parsons, 176 Mass. 570, 58 N. E. 157.

[39] 20 Cyc. 1496. See Young v. Shunk, 30 Minn. 503, 16 N. W. 402.

[40] 7 Am. & Eng. Ency. of Law, 2 ed. 353; 17 Id. 704. See Dunnell, Minn. Digest, § 9604; Van Brunt v. Gordon, 53 Minn. 227, 54 N. W. 1118; Oswald v. Pillsbury, 61 Minn. 520, 63 N. W. 1072.

[41] Van Brunt v. Gordon, 53 Minn. 227, 54 N. W. 1118; Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041; Larson v. Slette, 125 Minn. 267, 146 N. W. 1094.

[42] See Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; Whelan v. Reynolds, 101 Minn. 290, 112 N. W. 223.

[43] 27 Cyc. 836; Van Santen v. Standard Oil Co., 81 N. Y. 171.

[44] 2 Chitty, Contracts, 11 Am. ed. 882.

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pelled for the protection of his own interests to pay taxes for which the defendant is legally and personally liable;[45] where the plaintiff has made advances for his principal.[46] If a garnishee suffers judgment to go against him upon default of his appearance his remedy is in the same proceeding. If the judgment is in excess of the amount due from him to the principal debtor, he cannot, after satisfying the judgment, recover indemnity from the latter under a count for money paid.[47]

798. Same—Officious payment by volunteer—This count does not lie to recover a payment officiously made by a mere volunteer, unless the payment is ratified by the defendant. One cannot make himself the creditor of another by paying that other's debt against his will or without his consent.[48]

799. Same—Voluntary payment—This count will not lie to recover a voluntary payment by the plaintiff to the defendant.[49]

800. Same—Payment in other than money—The payment need not necessarily be made in money, but may be made in anything which the parties treat as the equivalent of money, as negotiable paper,[50] or goods, chattels, securities, credits, lands or services.[51] A recovery of judgment against a surety and a levy of execution on his property is a sufficient payment.[52] The giving of new security, such as a note, bond or mortgage, on the claim, will not support the action.[53]

801. Same—Payment after action—Liability incurred but no payment This count is not supported by proof of a payment made after the commence-

[45] 27 Cyc. 835; 27 Am. & Eng. Ency. of Law, 2 ed. 749. See G. S. 1913 § 2191 and Bryant v. Nelson-Frey Co., 94 Minn. 305, 102 N. W. 859.

[46] Rice v. Longfellow Bros. Co., 82 Minn. 154, 84 N. W. 660; Robbins v. Blanding, 87 Minn. 246, 91 N. W. 844. See Veltum v. Koehler, 85 Minn. 125, 88 N. W. 432; 1 Am. & Eng. Ency. of Law, 2 ed. 1117; 31 Cyc. 1533.

[47] Segog v. Engle, 43 Minn. 191, 45 N. W. 427.

[48] Shillock v. Gilbert, 23 Minn. 386; Price v. Doyle, 34 Minn. 400, 26 N. W. 14; Scharffbillig v. Scharffbillig, 51 Minn. 349, 53 N. W. 713; Edwards v. Hardwood Mfg. Co., 59 Minn. 178, 60 N. W. 1097; Rosemond v. Northwestern Autographic Register Co., 62 Minn. 374, 64 N. W. 925; Helm v. Smith-Fee Co., 76 Minn. 328, 79 N. W. 313; Bryant v. Nelson-Frey Co., 94 Minn. 305, 102 N. W. 859; 27 Cyc. 838; 15 Am. & Eng. Ency. of Law, 2 ed. 1101; 22 Id. 537; 2 Ency. Pl. & Pr. 1013. See Felton v. Bissel, 25 Minn. 15, 20; Savage v. Madelia Farmers' Warehouse Co., 98 Minn. 343, 347, 108 N. W. 296.

[49] 15 Am. & Eng. Ency. of Law, 2 ed. 1099; 22 Id. 609; Dunnell, Minn. Digest, § 7461. See Freeman v. Etter, 21 Minn. 3.

[50] 27 Cyc. 837; 15 Am. & Eng. Ency. of Law, 2 ed. 1109; Rosemond v. N. W. etc. Co., 62 Minn. 374, 64 N. W. 925 (note); Larson v. Slette, 125 Minn. 267, 146 N. W. 1094 (note); McLellan v. Crofton, 6 Me. 307; Cornwall v. Gould, 4 Pick. (Mass.) 444; Brown v. McHugh, 35 Mich. 50.

[51] 27 Cyc. 836; 2 Chitty, Contracts, 11 Am. ed. 880 n.

[52] Chitty, Contracts, 11 Am. ed. 880 n.

[53] 15 Am. & Eng. Ency. of Law, 2 ed. 1109.

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ment of the action.[54] It will not lie where there has been a mere incurring of liability or indebtedness without any payment.[55]

802. Same—Effect of express contract—This count will lie though there is a subsisting express contract to repay the money, if the express contract contains nothing more than what the law would imply from the facts,[56] and where the contract between the plaintiff and defendant has been rescinded this count will lie to recover disbursements made in reliance thereon.[57] The fact that the defendant is indebted to the plaintiff for the same money upon the covenants in a deed executed by him to the plaintiff will not defeat a recovery under this count.[58]

803. Same—Interest—Interest is recoverable from the time of the payment in the absence of an agreement to the contrary.[59]

MORTGAGES

804. Action to foreclose—Pleading—As to subsequent lienors it is sufficient to allege that they claim to have some interest in or lien upon the premises, but that such interest or lien, if any, is junior and subject to the lien of the plaintiff's mortgage. It is for them to disclose the nature of their interests by answer.[60] It is probably unnecessary to allege that no action or proceeding has been instituted at law to recover the debt secured by the mortgage.[61] Cases are cited below involving the sufficiency of particular counterclaims,[62] answers,[63] and complaints.[64]

[54] Johnson v. Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

[55] Hilliard v. Douglas Oil Fields, 20 Wyo. 201, 122 Pac. 626.

[56] Weeks v. Parsons, 176 Mass. 570, 58 N. E. 157 (express contract for contribution). See 22 Cyc. 101 (indemnity contracts); 4 Ency. Pl. & Pr. 926 (indemnity contracts); 27 Cyc. 840; and § 676, supra.

[57] 27 Cyc. 840.

[58] Boylston v. Chase, 2 Colo. 612.

[59] Bull v. Rich, 92 Minn. 481, 100 N. W. 213, 101 N. W. 490.

[60] Howard v. Iron & Land Co., 62 Minn. 298, 64 N. W. 896. See Seager v. Burns, 4 Minn. 141(93).

[61] See Jones v. Ewing, 22 Minn. 157.

[62] Lowry v. Hurd, 7 Minn. 356(282) (in an action to foreclose a purchase-money mortgage the mortgagor may plead as a counterclaim damages from breach of the covenants in the deed to him); Lash v. McCormick, 17 Minn. 403 (381) (certain facts alleged held to show a partial failure of consideration, but not to constitute a counterclaim); Phelps v. Compton, 72 Minn. 109, 75 N. W. 19 (a counterclaim for services held sufficiently pleaded and proved).

[63] Wolf v. Banning, 3 Minn. 202(133) (under R. S. 1851 c. 70 § 30 it was necessary for husband and wife to answer jointly); Wilcox v. Davis, 4 Minn. 197(139) (the intention with which a mortgage was purchased may be alleged directly and an answer to be good as a denial must deny the intention); Wheaton v. Briggs, 35 Minn. 470, 29 N. W. 170 (an answer denying any knowledge or information sufficient to form a belief as to an assignment of a mortgage held properly stricken out as sham).

[64] Hawke v. Banning, 3 Minn. 67(30) (an allegation that one of the plaintiffs,

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805. Absolute deed as mortgage—Pleading—In a complaint to have an absolute deed declared a mortgage it is unnecessary to allege damage or any special value.[65] In an action to have an absolute deed declared a mortgage and to be allowed to redeem therefrom it is unnecessary to allege a tender before suit or an offer to pay.[66] Evidence to show that an absolute deed was intended as a mortgage is sometimes admissible under a denial.[67] Cases are cited below involving various questions of pleading.[68]

806. Action to recover excess at foreclosure sale—Pleading—Recovery may be had under a common count for money had and received.[69] Cases are cited below involving various questions of pleading.[70]

the mortgagee, "holds the said mortgage and obligation in his name, for the joint use and benefit of the said plaintiffs" held sufficient to show a joint interest); Volmer v. Stagerman, 25 Minn. 234 (a complaint where a mortgage was give in consideration of the satisfaction of a judgment against the mortgagor held sufficient, the mortgagor having failed to execute a note to accompany the mortgage); Foster v. Johnson, 39 Minn. 378, 40 N. W. 255 (an allegation of ownership of a note and mortgage by assignment held sufficient); Seibert v. Minneapolis etc. Ry., 58 Minn. 39, 59 N. W. 822 (railroad mortgage—failure to allege specifically a default in the mortgage held waived by failure to object in season—granting foreclosure held not a departure from the complaint); Whiting v. Clugston, 73 Minn. 6, 75 N. W. 759 (a complaint, charging a conspiracy of the defendants against the plaintiff in negotiating a mortgage loan, one of the defendants being a loan agent of the plaintiff, held sufficient); Piper v. Sawyer, 73 Minn. 332, 76 N. W. 57 (a complaint and findings held to entitle the plaintiff to a foreclosure of an equitable mortgage).

[65] Holton v. Meighen, 15 Minn. 69 (50).

[66] Nye v. Swan, 49 Minn. 431, 52 N. W. 39.

[67] Wakefield v. Day, 41 Minn. 344, 43 N. W. 71; Terry v. Wilson's Estate, 50 Minn. 570, 52 N. W. 973.

[68] Nichols v. Randall, 5 Minn. 304 (240) (held no misjoinder of parties or causes of action in an action to foreclose); Phoenix v. Gardner, 13 Minn. 430(396) (complaint in action to foreclose sustained); Holton v. Meighen, 15 Minn. 69(50) (complaint in action to have an absolute deed declared a mortgage and to redeem sustained); Sloan v. Becker, 31 Minn. 414, 18 N. W. 143 (a prior deed held admissible under a denial that deed in controversy was intended as a mortgage); Livingston v. Ives, 35 Minn. 55, 27 N. W. 74 (action to have an absolute deed declared a mortgage and to redeem therefrom—defence that deed was in fraud of creditors must be specially pleaded); Miller v. Smith, 44 Minn. 127, 46 N. W. 324 (complaint in action to have a deed adjudged a mortgage and for an accounting held insufficient because showing laches); Howard v. Erbes, 112 Minn. 479, 128 N. W. 674 (ejectment—prayer that if an absolute deed be found a mortgage it be foreclosed).

[69] See § 768, supra, and Dunnell, Minn. Digest, § 6475.

[70] Bailey v. Merritt, 7 Minn. 159(102) (complaint sustained—foreclosure sale may be alleged in general terms—facts giving rise to an estoppel should be set up by answer); Spottswood v. Herrick, 22 Minn. 548 (complaint sustained though flagrantly indefinite—demurrer held not frivolous).

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807. Action to redeem from foreclosure sale—Pleading—Cases are cited below involving the sufficiency of particular complaints.[71]

808. Action to redeem from mortgage—Pleading—If a claim is made for rents and profits there should be a foundation therefor laid in the complaint.[72]

809. Action to set aside a foreclosure sale—Pleading—Cases are cited below involving the sufficiency of particular pleadings.[73]

810. Action for costs under statute—Pleading—A complaint in an action under the statute has been sustained against objection that it did not show a valid foreclosure.[74]

MUNICIPAL CORPORATIONS

811. Ordinances—Pleading—In pleading a municipal ordinance, it is unnecessary to set it out in full. By virtue of statute it is sufficient to refer to its title and date of approval,[75] or, in the case of village ordinances, to the section and number, or chapter.[76] The statutory provisions are not mandatory. It is sufficient to refer to an ordinance by its date and purpose, or by its title, and the number of the section violated, or by its substance, or in any general

[71] Thompson v. Foster, 21 Minn. 319 (allegations as to title and tender sustained); Kling v. Childs, 30 Minn. 366, 15 N. W. 673 (plaintiff unlawfully deprived of the privilege of redeeming by the defendant—complaint need not allege a tender or contain an offer to pay the amount due); Dunn v. Dewey, 75 Minn. 153, 77 N. W. 793 (allegation of tender held sufficient—complaint defective in not alleging that plaintiff produced to the sheriff a certified copy of his mortgage, or an affidavit showing the amount actually due thereon, when offering or attempting to redeem).

[72] Hollingsworth v. Campbell, 28 Minn. 18, 8 N. W. 873.

[73] Johnson v. Williams, 4 Minn. 260 (183) (allegations excusing failure to apply for relief before the sale); Ramsey v. Merriam, 6 Minn. 168(104) (an allegation that the sale did not take place at the time specified in the notice, and that no postponement of the sale was ever given alleges no fact on which issue can be taken—the facts constituting the irregularity must be alleged); Abbott v. Peck, 35 Minn. 499, 29 N. W. 194 (complaint held not to excuse delay and not to show any special equities in the plaintiff); Marcotte v. Hartman, 46 Minn. 202, 48 N. W. 767 (complaint must disclose facts explaining delays which would, unexplained, appear to be unreasonable); Mason v. Goodnow, 41 Minn. 9, 42 N. W. 482 (complaint sustained—separate mortgages on distinct lots in one instrument—notice of sale did not state the amount due on each tract separately); Temple v. Norris, 53 Minn. 286, 55 N. W. 133 (complaint held insufficient—an allegation that a person on whom service was made "was not a person of suitable age and discretion" held a mere conclusion of law); Swain v. Lynd, 74 Minn. 72, 76 N. W. 958 (action by judgment creditor to set aside a sale because of failure to serve notice of sale on an occupant—complaint sustained).

[74] Itasca Investment Co. v. Dean, 84 Minn. 388, 87 N. W. 1020.

[75] R. L. 1905 § 4147; G. S. 1913 § 7773. See Faribault v. Wilson, 34 Minn. 254, 25 N. W. 449; Fairmont v. Meyer, 83 Minn. 456, 86 N. W. 457.

[76] R. L. 1905 § 724; G. S. 1913 § 1265.

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way, with a degree of precision sufficiently direct to identify it.[77] It is not generally necessary to plead a village ordinance, as the statute gives it the force of a general law within the village.[78] City charters generally make it unnecessary to plead the local ordinances.[79] But in the absence of provision to the contrary it is necessary to plead and prove ordinances.[80]

812. Defective streets and sidewalks—Pleading—In an action against a village incorporated under the general statutes it is unnecessary to plead them in order to show the duty of the village to maintain its streets in a safe condition.[81] It is unnecessary to allege in a complaint that the municipality had funds to make repairs; want of funds, if a defence at all, is new matter to be pleaded by the defendant.[82] It must be alleged in a complaint that the street was a public street of the defendant.[83] Cases are cited below involving the sufficiency of particular complaints.[84]

813. Sewers and drains—Pleading—Cases are cited below involving questions of pleading in actions relating to sewers and drains.[85]

814. Municipal bonds—Actions on—Pleading—Cases are cited below involving questions of pleading in actions on municipal bonds.[86]

[77] Fairmont v. Meyer, 83 Minn. 456, 86 N. W. 457.

[78] R. L. 1905 § 724; G. S. 1913 § 1265. Fairmont v. Meyer, 83 Minn. 456, 86 N W. 457.

[79] See State v. Gill, 89 Minn. 502, 95 N. W. 449; State v. Overby, 116 Minn. 304, 133 N. W. 752.

[80] Winona v. Burke, 23 Minn. 254; State v. Oleson, 26 Minn. 507, 513, 5 N. W. 959.

[81] Peterson v. Cokato, 84 Minn. 205, 87 N. W. 615.

[82] Shartle v. Minneapolis, 17 Minn. 308(284); Lindholm v. St. Paul, 19 Minn. 245(204); Netzer v. Crookston, 59 Minn. 244, 61 N. W. 21.

[83] See Farrant v. First Div. etc. Ry., 13 Minn. 311(286); Shartle v. Minneapolis, 17 Minn. 308(284); Furnell v. St. Paul, 20 Minn. 117(101); Phelps v. Mankato, 23 Minn. 276; Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908.

[84] Lindholm v. St. Paul, 19 Minn. 245 (204) (complaint held sufficient to justify a recovery for medical attendance, loss of time, etc.); Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908 (complaint for negligence in stretching a rope across a street sustained); Marsh v. Minneapolis Brewing Co., 92 Minn. 182, 99 N. W. 630 (complaint against abutting owner sustained).

[85] Starkey v. Minneapolis, 19 Minn. 203(166) (action for breach of contract for construction of sewers—complaint held not to show a valid contract between plaintiff and defendant); Simmer v. St. Paul, 23 Minn. 408 (action for negligence in construction of sewers—complaint defective in not showing damage to plaintiff—destruction of plaintiff's business—loss of future profits); Netzer v. Crookston, 59 Minn. 244, 61 N. W. 21 (fact that municipality is without funds to repair its sewers, if a defence at all, must be pleaded by defendant).

[86] Nininger v. Carver County, 10 Minn. 133(106) (allegation as to execution of bonds sustained); Wiley v. Board of Ed., 11 Minn. 371(268) (complaint on bond sustained); Cushman v. Carver County, 19 Minn. 295(252) (variance waived).

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NAMES

815. Misnomer—Unknown defendant—Pleading—A plea of misnomer must be so full as wholly to exclude plaintiff's right to sue defendant by the name used.[87] When the plaintiff is ignorant of the name of a defendant, and shall so allege in his complaint, such defendant may be designated by any name; and when his true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the same.[91]

NEGLIGENCE

816. Complaint—In a complaint for negligence 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 unnecessary to allege specifically all the acts or omissions constituting the negligence.[88] Under such a general allegation a party may prove any facts, not inconsistent with the facts alleged, which would tend to prove that the acts alleged were negligent. A complaint with such an allegation 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 possible evidence admissible under the allegations of the complaint.[89] If the plaintiff specifies the particulars in which defendant was negligent he is confined in his proof to such acts.[90] Where general allegations of negligence are followed by specific allegations the former are restricted and qualified by the latter.[91] Several acts of negligence on the part of the defendant contrib-

[87] Lyons v. Rafferty, 30 Minn. 526, 16 N. W. 420.

[91] G. S. 1913 § 7781.

[88] Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75 (leading case); McCauley v. Davidson, 10 Minn. 418(335, 339); Keating v. Brown, 30 Minn. 9, 13 N. W. 909; Johnson v. St. Paul & Duluth Ry., 31 Minn. 283, 17 N. W. 622; Ekman v. Minneapolis St. Ry., 34 Minn. 24, 24 N. W. 291; Olson v. St. Paul etc. Ry., 34 Minn. 477, 26 N. W. 605; Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565; Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688; Stendal v. Boyd, 67 Minn 279, 69 N. W. 899; Birmingham v. Duluth etc. Ry., 70 Minn. 474, 73 N. W. 409; Hinton v. Eastern Ry., 72 Minn. 339, 75 N. W. 373; Ware v. Squyer, 81 Minn. 388, 84 N. W. 126; Kretzschmar v. Meehan, 81 Minn. 432, 84 N. W. 220; Smith v. Great Northern Ry., 92 Minn. 11, 99 N. W. 47; Pope v. Great Northern Ry., 94 Minn. 429, 103 N. W. 331; Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623, 624; Christiansen v. Chicago etc. Ry., 107 Minn. 341, 120 N. W. 300; Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922; Campbell v. Duluth etc. Ry., 111 Minn. 410, 127 N. W. 413; Duff v. Bayne, 112 Minn. 44, 127 N. W. 385; City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817. See Note, 59 L. R. A. 210–277.

[89] Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565; Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688; Stendal v. Boyd, 67 Minn. 279, 69 N. W. 899; Birmingham v. Duluth etc. Ry., 70 Minn. 474, 73 N. W. 409.

[90] O'Malley v. St. Paul etc. Ry., 43 Minn. 289, 45 N. W. 440. See §§ 745, 820.

[91] Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4.

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uting to a single injury may be alleged in one count or paragraph as a single cause of action,[92] and this though part of them give rise to a cause of action at common law and a part of them to a cause of action under a statute.[93] It must appear from the facts alleged in the complaint that the defendant owed to the plaintiff or person injured the duty to exercise due care at the time of the accident.[94] A bare allegation that it was the duty of the defendant to do a specified thing is a mere conclusion of law and a nullity.[95] A breach of duty must appear.[96] It must appear by direct allegation or necessary inference that the injury was caused by the act or omission of the defendant.[97] If only the evidentiary facts are alleged the inference of negligence must inevitably follow or the complaint is demurrable.[98] It must appear that the injury was the natural and proximate result of the alleged negligent act or omission of the defendant, but it is unnecessary that it should appear just how the injury resulted therefrom.[99] It is unnecessary to negative contributory negligence,[1] or knowledge of the defect or danger on the part of the plaintiff.[2] An allegation that the plaintiff was without fault on his part sufficiently negatives contributory negligence.[3] The maxim res ipsa loquitur is not a rule of pleading and

[92] This practice is common and unquestioned. See Armstrong v. Chicago etc. Ry., 45 Minn. 85, 47 N. W. 459; Mooers v. Northern Pacific Ry., 69 Minn. 90, 71 N. W. 905; Reishus v. Willmar & Sioux Falls Ry., 92 Minn. 371, 100 N. W. 1; Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922; Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4; Jacobson v. Great Northern Ry., 120 Minn. 52, 139 N. W. 142; Kommerstad v. Great Northern Ry., 120 Minn. 376, 139 N. W. 713. See cases under §§ 740–745, and Note, 27 L. R. A. (N. S.) 792.

[93] Payne v. New York etc. Ry., 201 N. Y. 436, 95 N. E. 19.

[94] See Dunnell, Minn. Digest, § 6973.

[95] Heron v. St. Paul etc. Ry., 68 Minn. 542, 71 N. W. 706; Berry v. Dole, 87 Minn. 471, 92 N. W. 334.

[96] See Johnson v. St. Paul & Duluth Ry., 31 Minn. 283, 19 N. W. 622; Lydecker v. St. Paul City Ry., 61 Minn. 414, 63 N. W. 1027; Berry v. Dole, 87 Minn. 471, 92 N. W. 334.

[97] Lee v. Emery, 10 Minn. 187(151); Berry v. Dole, 87 Minn. 471, 92 N. W. 334; City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817; Laine v. Consolidated Vermillion & Extension Co., 123 Minn. 254, 143 N. W. 783.

[98] City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817.

[99] Lee v. Emery, 10 Minn. 187(151); Hocum v. Weitherick, 22 Minn. 152, 156; Johnson v. St. Paul & Duluth Ry., 31 Minn. 283, 17 N. W. 622; Dugan v. St. Paul & Duluth Ry., 40 Minn. 544, 42 N. W. 538; Berry v. Dole, 87 Minn. 471, 92 N. W. 334; Floody v. Great Northern Ry., 104 Minn. 474, 116 N. W. 943.

[1] Hocum v. Weitherick, 22 Minn. 152; Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75; Ekman v. Minneapolis St. Ry., 34 Minn. 24, 24 N. W. 291; Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565; Lydecker v. St. Paul City Ry., 61 Minn. 414, 63 N. W. 1027; Leier v. Minn. etc. Co., 63 Minn. 203, 65 N. W. 269; Birmingham v. Duluth etc. Ry., 70 Minn. 474, 73 N. W. 409; Thompson v. Great Northern Ry., 70 Minn. 219, 72 N. W. 962.

[2] Union Stockyards Co. v. Conoyes, 38 Neb. 488, 56 N. W. 1081.

[3] Pope v. Great Northern Ry., 94 Minn. 429, 103 N. W. 331; Hoblit v. Minneapolis St. Ry., 111 Minn. 77, 126 N. W. 407. See Ware v. Squyer, 81 Minn. 388, 84 N. W. 126 (a finding "without

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does not supply an allegation of an essential ultimate fact.[4] The allegations "scope of employment" and "course of employment" are allegations of fact and not mere conclusions of law.[5] A general allegation as to the injuries received is sufficient.[6] In actions against municipalities there must be an allegation of the service of notice of claim as required by statute.[7] If recovery is sought for wilful or wanton negligence or injury a proper foundation must be laid.[8]

817. Demurrer—Contributory negligence—Proximate cause—A complaint showing on its face that the plaintiff was guilty of contributory negligence is demurrable.[9] 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.[10] In other words the contributory negligence must conclusively appear.[11] An allegation that the plaintiff was without fault and that he was in the due performance of his duty, are not mere legal conclusions, and are to be given due weight in construing a pleading, to repel the inference of contributory negligence.[12] The question of proximate cause is one of fact and not ordinarily to be determined on demurrer.[13]

fault or negligence" implies the exercise of due care).

[4] City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817.

[5] Kuhl v. U. S. etc. Co., 112 Minn. 197, 127 N. W. 628. See Foran v. Levin, 76 Minn. 178, 78 N. W. 1047; Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462.

[6] Smith v. St. Paul etc. Ry., 30 Minn. 169, 14 N. W. 797; Babcock v. St. Paul etc. Ry, 36 Minn. 147, 30 N. W. 449; Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623; Evertson v. McKay, 124 Minn. 260, 144 N. W. 950.

[7] See Dunnell, Minn. Digest, §§ 6739, 6740, and McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

[8] Anderson v. Minneapolis etc. Ry., 103 Minn. 224, 114 N. W. 1123. See Burgett v. Wisconsin Central Ry., 109 Minn. 216, 123 N. W. 411 (complaint sustained); Johnson v. Scott, 119 Minn. 470, 138 N. W. 694 (query whether wilful negligence is provable under an allegation of ordinary negligence—variance—trial of issue of wilful negligence by consent); Howell v. Great Northern Ry., 125 Minn. 137, 145 N. W. 804 (allegation that defendant "so carelessly, negligently and wantonly" operated a train of cars held to charge both wilful and ordinary negligence); Demerany v. Great Northern Ry., 114 Minn. 496, 131 N. W. 634 (allegations that the acts of defendant's servants were wilful and in reckless disregard of plaintiff's safety held to add nothing to the facts—complaint held to state a cause of action for wilful negligence).

[9] Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75.

[10] Rolseth v. Smith, 38 Minn. 14, 35 N. W. 565; Lydecker v. St. Paul City Ry., 61 Minn. 414, 63 N. W. 1027; Leier v. Minn. etc. Co., 63 Minn. 203, 65 N. W. 269; Birmingham v. Duluth etc. Ry., 70 Minn. 474, 73 N. W. 409.

[11] Lydecker v. St. Paul City Ry., 61 Minn. 414, 63 N. W. 1027.

[12] Pope v. Great Northern Ry., 94 Minn. 429, 103 N. W. 331.

[13] Morey v. Shenango Furnace Co., 112 Minn. 528, 127 N. W. 1134.

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818. Answer—General denial—Contributory negligence—If a complaint does not negative negligence on the part of the plaintiff contributory negligence on his part is new matter to be specially pleaded and is not admissible under a general denial.[14] If the complaint negatives negligence on the part of the plaintiff contributory negligence is admissible under a general denial.[15] If contributory negligence on the part of the plaintiff appears from his evidence, or from evidence unobjected to, the defendant may take advantage of it though he did not plead it.[16] Whether a general plea of contributory negligence is sufficient in this state appears to be an open question. It is therefore advisable for the defendant to specify wherein the plaintiff failed to exercise due care.[17] If he specifies the acts of contributory negligence he will be restricted in his proof accordingly.[18] A plea of contributory negligence need not deny, but may expressly admit, the negligence alleged.[19] A general denial and a plea of contributory negligence are not inconsistent.[20] An amendment on the trial to let in the defence of contributory negligence should ordinarily be allowed as a matter of course.[21]

819. Reply—General denial—A general denial is a good reply to averments in an answer of contributory negligence and assumption of risk.[22] Where an answer alleged contributory negligence it was held that no reply was necessary in view of the allegations of the complaint.[23]

820. Issues—Variance—Where the complaint alleges specific acts of negligence the proof must be limited to such acts. A plaintiff must recover, if at all, by proving substantially the facts alleged in the complaint.[24] But a substantial correspondence between the allegations and proof is all that is re-

[14] Hill v. Minneapolis St. Ry., 112 Minn. 503, 128 N. W. 831; Lee v. H. N. Leighton Co., 113 Minn. 373, 129 N. W. 767.

[15] St. Anthony Falls etc. Co. v. Eastman, 20 Minn. 277(249, 265); Hocum v. Weitherick, 22 Minn. 152, 156; O'Malley v. St. Paul etc. Ry., 43 Minn. 289, 294, 45 N. W. 440; Hoblit v. Minneapolis St. Ry., 111 Minn 77, 126 N. W. 407. See Note, 33 L. R. A. (N. S.) 1207.

[16] Blakeley v. Le Duc, 19 Minn. 187 (152); Woodruff v. Bearman Fruit Co., 108 Minn. 118, 121 N. W. 426; Mellon v. Great Northern Ry., 116 Minn. 449, 134 N. W. 116; Erickson v. Great Northern Ry., 117 Minn. 351, 135 N. W. 1129. See Note, 33 L. R. A. (N. S.) 1207.

[17] See 29 Cyc. 582; Note, 59 L. R. A. 275. In this state a general allegation is very common and would doubtless be held sufficient except on a motion to make more specific.

[18] O'Malley v. St. Paul etc. Ry., 43 Minn. 289, 45 N. W. 440.

[19] Birmingham etc. Co. v. Yates, 53 So. 915 (Ala.).

[20] Leavenworth etc. Co. v. Waller, 65 Kan. 514, 70 Pac. 365; Pugh v. Oregon Imp. Co., 14 Wash. 331, 44 Pac. 547, 689.

[21] See Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[22] American S. R. Co. v. Karapa, 173 Fed. 607.

[23] McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

[24] Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4. See cases under § 745.

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quired.[25] A variance between ordinary and wilful negligence has been held not fatal.[26]

821. Amendment of complaint—The assignment of additional specifications of negligence in an amended complaint does not introduce a new cause of action.[27] The court may allow an amendment on the trial adding other specifications of negligence.[28]

NOTICE

822. Pleading—In general—An allegation of knowledge or notice will admit proof of either constructive or actual notice.[29] Upon the principle that the greater includes the less, evidence of constructive notice is admissible under an allegation of actual notice.[30]

NOVATION

823. Pleading—In general—A complaint alleging in substance that one A. B. was the original debtor of plaintiff, but that subsequently there was a novation of parties, whereby, by accession and agreement of all the parties interested, the debt of A. B. was extinguished, and defendant, for a valuable consideration, assumed the debt as his own, has been held sufficient.[31]

NUISANCE

824. Complaint—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.[32] 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 damage.[33] In an action for a private nuisance a general allegation of damages is sufficient to enable the plaintiff to recover all the damages that are the natural and neces-

[25] Moser v. St. Paul & Duluth Ry., 42 Minn. 480, 44 N. W. 530; Vance v. Great Northern Ry., 106 Minn. 172, 118 N. W. 674; Hoppe v. Winona, 113 Minn. 252, 258, 129 N. W. 577. See Standard Oil Co. v. Brown, 218 U. S. 78; Louisville etc. Ry. v. Wilson, 188 Fed. 417, and § 745.

[26] Johnson v. Scott, 113 Minn. 470, 138 N. W. 694.

[27] Cross v. Evans, 86 Fed. 1.

[28] Davis v. New York etc. Ry., 110 N. Y. 646, 17 N. E. 733. See Byard v. Palace Clothing House Co., 85 Minn. 363, 88 N. W. 998 (amendment denied).

[29] See § 740.

[30] Maki v. Cloquet, 116 Minn. 17, 133 N. W. 80.

[31] Johnson v. Rumsey, 28 Minn. 531, 11 N. W. 69.

[32] Rochette v. Chicago etc. Ry., 32 Minn. 201, 20 N. W. 140; Shero v. Carey, 35 Minn. 423, 29 N. W. 58; Thelan v. Farmer, 36 Minn. 225, 30 N. W. 670; Lammers v. Brennan, 46 Minn. 209, 48 N. W. 766; Guilford v. Minneapolis etc. Ry., 94 Minn. 108, 102 N. W. 365; Painter v. Gunderson, 123 Minn. 323, 143 N. W. 910; and cases in Dunnell, Minn. Digest, §§ 7285–7287.

[33] O'Brien v. St. Paul, 18 Minn. 176 (163).

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sary consequence of the nuisance to himself and family.[34] If damages are sought in an action to abate a nuisance they should be claimed in the complaint.[35] Where the action is against a mere continuer of a nuisance it is necessary to allege the service of notice to abate before suit, whether the action is for damages or for an abatement.[36] In an action against a railway company for obstructing a street, it may be necessary to allege that the railway was "unlawfully" or "wrongfully" built in or across the street.[37] Cases are cited below involving the sufficiency of particular complaints.[38]

825. Answer—Matter in justification or excuse must be specially pleaded by the defendant.[39]

826. Issues—Variance—Under a complaint for one kind of a nuisance one of an entirely different character cannot be proved.[40]

PARENT AND CHILD

827. Action by parent for injury to child—Pleading—In a complaint under the statute it is unnecessary to allege expressly that the action is brought for the benefit of the child, if the only damages alleged or claimed are those sustained by the child.[41]

PARTITION

828. Statutory action—Pleading—The requisites of a complaint for partition are prescribed by statute.[42] The general rules of pleading in ordinary civil actions are applicable.[43]

[34] See Pierce v. Wagner, 29 Minn. 355, 13 N. W. 170.

[35] See Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N. W. 767.

[36] Thornton v. Smith, 11 Minn. 15(1).

[37] Rochette v. Chicago etc. Ry., 32 Minn. 201, 20 N. W. 140; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072.

[38] Aldrich v. Wetmore, 56 Minn. 20, 57 N. W. 221 (complaint held sufficient to admit evidence of personal discomfort and suffering on account of noxious odors); Albert Lea v. Knatvold, 89 Minn. 480, 95 N. W. 309 (complaint for an obstruction of a public highway, of certain public lands contiguous to a lake, and a public drainage system, sustained); Batcher v. Staples, 120 Minn. 86, 139 N. W. 140 (complaint for damages from discharge of a sewer sustained).

[39] O'Brien v. St. Paul, 18 Minn. 176 (163).

[40] O'Brien v. St. Paul, 18 Minn. 176 (163).

[41] Buechner v. Columbia Shoe Co., 60 Minn. 477, 62 N. W. 817.

[42] R. L. 1905 § 4394; G. S. 1913 § 8030; Martin v. Parker, 14 Minn. 13(1); Bell v. Dangerford, 26 Minn. 307, 3 N. W. 698; Hennes v. Huston, 93 Minn. 334, 101 N. W. 1133.

[43] Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352 (sham denial of knowledge or information); McArthur v. Clark, 86 Minn. 165, 90 N. W. 369 (general allegation of ownership sufficient to admit proof of any legal title—title by adverse possession admissible under a general denial).

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829. Pleading—In general—In actions by or against partners it is not ordinarily necessary to allege partnership, and if such an allegation is made it is immaterial and its denial raises no issue.[44] Where a partnership is the gist or basis of the action, as in an action between partners for an accounting, an allegation of partnership is essential.[45] If an instrument sued on is pleaded as having been made by partners, as such, or is executed under an apparent firm name, it may be necessary to allege partnership in order to connect the partners with the instrument.[46] If an allegation of partnership is material it must be proved if denied. It is put in issue by a general denial.[47] A denial that the plaintiffs "were copartners, as alleged in the complaint, or otherwise" is sufficient to put an allegation of partnership in issue.[48] If a partnership is alleged and proved in an action of replevin the firm name is immaterial and need not be proved though alleged.[49] A complaint against several as partners may be amended by striking out the name of one of the defendants to conform to the proof.[50] A failure to allege partnership may be waived by voluntarily litigating issues without objection.[51]

830. Actions for accounting—Pleading—Cases are cited below involving questions of pleading in actions for an accounting between partners.[52]

[44] Freeman v. Curran, 1 Minn. 169 (144); Jaeger v. Hartman, 13 Minn. 55 (50); Hayward v. Grant, 13 Minn. 165 (154); Birdsall v. Fischer, 17 Minn. 100 (76); Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939; Boosalis v. Stevenson, 62 Minn. 193, 64 N. W. 380; Klemik v. Hendricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871. See, however, Foerster v. Kirkpatrick, 2 Minn. 210(171); Irvine v. Myers, 4 Minn. 229(164); Stickney v. Smith, 5 Minn. 486(390); Fetz v. Clark, 7 Minn. 217(159).

[45] Bausman v. Woodman, 33 Minn. 512, 24 N. W. 198.

[46] See Hayward v. Grant, 13 Minn. 165(154); Birdsall v. Fischer, 17 Minn. 100(76); Dessaint v. Elling, 31 Minn. 287, 17 N. W. 480.

[47] Fetz v. Clark, 7 Minn. 217(159); Irvine v. Myers, 4 Minn. 229(164); McKasy v. Huber, 65 Minn. 9, 67 N. W. 650.

[48] Dessaint v. Elling, 31 Minn. 287, 17 N. W. 480.

[49] Stickney v. Smith, 5 Minn. 486 (390).

[50] Miles v. Wann, 27 Minn. 56, 6 N. W. 417.

[51] Keene v. Masterman, 66 Minn. 72, 68 N. W. 771.

[52] Chouteau v. Rice, 1 Minn. 106(83) (supplemental bill sustained); Berkey v. Judd, 12 Minn. 52(23) (in an action by a partner, who has retired from and sold his interest in the firm to the remaining partners, against such partners, charging fraud by them in settling with him, and asking only a joint judgment against them, an allegation in the complaint that one of the defendants received and retained money of the firm is immaterial and may be stricken out); Bausman v. Woodman, 33 Minn. 512, 24 N. W. 198 (complaint sustained—sufficiency of allegation of partnership); Stern v. Harris, 40 Minn. 209, 41 N. W. 1036 (complaint sustained); Shackleton v. Kneisley, 48 Minn. 451, 51 N. W. 470 (id.); Fountain v. Menard, 53 Minn. 443, 55 N. W. 601 (id.); Corcoran v. Sumption, 79 Minn. 108, 81 N. W. 761 (pleading counterclaim for misconduct of plaintiff—

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831. Pleading—In general—A complaint on a contract, express or implied, for the payment of money, must allege the non-payment thereof in order to show a breach of the contract.[53] But where the answer in such cases denies the allegation of non-payment and affirmatively alleges payment, the burden of showing payment is on the defendant.[54] In actions other than on contract for the payment of money it is generally unnecessary to allege non-payment, payment being matter of defence.[55] Where there is no allegation of non-payment in the complaint, payment is new matter to be specially pleaded in the answer, and is inadmissible under a denial.[56] Where there is a necessary allegation of non-payment in the complaint it would seem logical to admit evidence of payment under a denial,[57] but in this state it is generally inadmissible,[58] and it is practically advisable to plead payment in all cases. The rule that payment is an affirmative defence, and must be specially pleaded, does not apply where plaintiff declares generally on a balance due, in which both sides of the account are open under a denial; but, where the complaint alleges a specific amount as originally due and admits partial payments thereon, additional payments relied on must be specially pleaded, and cannot be proved under a denial.[59] When objection is made on the trial to the admission of evidence of payment under a general denial the court should be very liberal in allowing an amendment to let it in.[60] A defendant who neglects to plead and prove a partial payment on a debt sued upon is concluded by the judgment and cannot thereafter maintain an action to recover such payment.[61] Facts excusing non-payment are inadmissible under a plea of payment.[62] Where a complaint on a note alleges non-payment, an allegation in an answer of payment is not new matter requiring a reply. Such an allega-

unnecessary to allege bringing of action); Gee v. Gee, 84 Minn. 384, 386, 87 N. W. 1116 (complaint held one for an accounting); Shipley v. Bolduc, 93 Minn. 414, 101 N. W. 952 (id.). See Dunnell, Minn. Digest, § 7403; Bruner v. Jacobson, 115 Minn. 425, 132 N W. 995.

[53] See § 594.

[54] First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Marshall & Illsley Bank v. Child, 76 Minn. 173, 78 N. W. 1048; Montgomery v. Leuwer, 94 Minn. 133, 102 N. W. 367.

[55] St. Paul Foundry Co. v. Wegmann, 40 Minn. 419, 42 N. W. 288; Romer v. Conter, 53 Minn. 171, 54 N. W. 1052; Bennett v. Rainy Lake River Boom Corp., 115 Minn. 96, 131 N. W. 1059. See Strickland v. Minn. Type Foundry Co., 77 Minn. 210, 79 N. W. 674.

[56] Farnham v. Murch, 36 Minn. 328, 31 N. W. 453.

[57] McArdle v. McArdle, 12 Minn. 98 (53, 57) (by necessary implication). See Marley v. Smith, 4 Kan. 184(155); Parker v. Hays, 7 Kan. 412(257); Quinn v. Lloyd, 41 N. Y. 349; Pomeroy, Remedies, § 700.

[58] See cases supra.

[59] Acharan v. Samuel Bros., 128 N. Y. S. 943. See Harbeck v. Carpenter-Robinson Co., 123 Minn. 389, 143 N. W. 916.

[60] See Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[61] Harbeck v. Carpenter-Robinson Co., 123 Minn. 389, 143 N. W. 916.

[62] Voak v. National Investment Co., 51 Minn. 450, 53 N. W. 708.

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tion is a proper way to put in issue the allegation of non-payment in the complaint and forms an issue thereon.[63] An allegation of a payment, without showing that it was paid on the claim sued upon, is insufficient.[64] An allegation of payment on a contract implies its acceptance by the other party to the contract.[65] Under a general allegation of payment any proper form of payment may be proved,[66] but if payment is alleged to have been made in a particular way the proof must be restricted accordingly.[67] But a court ought to allow an amendment in such a case. Cases are cited below involving the sufficiency of particular pleas.[68]

832. Recovery—Mistake or duress—Pleading—In an action for the recovery of money paid under duress, or by mistake, the facts constituting the duress or mistake must be specifically alleged. A general allegation of duress or mistake is insufficient.[69] Recovery may be had, however, under a common count.[70]

PHYSICIANS AND SURGEONS

833. Actions for services—Pleading—Recovery may be had for services under a common indebitatus count.[71] In an action for services it is unnecessary to allege a license to practice.[72] A complaint alleging the reasonable value of the services and that defendant agreed to pay such value has been sustained. Under such a complaint a recovery may be had upon proof of either an express or implied promise.[73]

834. Actions for malpractice—Pleading—Cases are cited below involving the sufficiency of particular complaints for malpractice.[74]

[63] McArdle v. McArdle, 12 Minn. 98 (53).

[64] Esch v. Hardy, 22 Minn. 65.

[65] Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395, 923.

[66] Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748.

[67] First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645.

[68] Colter v. Greenhagen, 3 Minn. 126 (74) (an indefinite allegation of part payment sustained); Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395, 923 (allegations of payment held to take a case out of the statute of limitations); Allen v. Enereth, 111 Minn. 395, 127 N. W. 426 (allegation that payments were made "at various times during the construction of said building" construed).

[69] Kraemer v. Deustermann, 37 Minn. 469, 35 N. W. 276; Rand v. Hennepin County, 50 Minn. 391, 52 N. W. 901; Minneapolis Stock Yards & Packing Co. v. Cunningham, 59 Minn. 325, 61 N. W. 329.

[70] See § 762.

[71] See § 910.

[72] Lyford v. Martin, 79 Minn. 243, 82 N. W. 479.

[73] Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

[74] Jacobs v. Cross, 19 Minn. 523(454) (allegations as to damages construed); Finch v. Bursheim, 122 Minn. 152, 142 N. W. 143 (general allegation of negligence sufficient — complaint for negligence in setting and caring for a dislocated hip joint sustained).

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PROCESS

835. Pleading—In general—In pleading process of a court of inferior and limited jurisdiction it is necessary, except when relieved by statute, to allege every fact requisite to show that such court had acquired jurisdiction of the subject-matter, the parties, and the process.[75]

836. Abuse of process—A complaint to recover property on the ground that it was obtained from plaintiff by duress of imprisonment, if it shows the imprisonment to have been under process, prima facie valid, must allege facts to show the invalidity of the process.[76]

PUBLIC LANDS

837. Fraud—Pleading—An allegation in a pleading that certain decisions of the United States Land Department and the acts done thereunder were against an act of Congress and in fraud of the party, without averring any facts, is not a sufficient allegation of fraud to admit proof under it.[77]

PUBLIC OFFICERS

838. Actions on bonds—Pleading—In an action on a bond of a deputy appointive officer it is necessary to allege his appointment.[78] A complaint has been held to show sufficiently that there was a successor in office.[79]

QUIETING TITLE

839. Action to remove a cloud—Complaint—If a complaint is insufficient as a complaint in an action to remove a cloud, it may be sustained as a complaint in an action under the statute to determine adverse claims, if it contains the necessary allegations.[80] The complaint must allege facts showing the invalidity of the instrument or proceeding constituting the cloud.[81] It must show that the instrument or proceeding complained of is a cloud on the plaintiff's title.[82] An indefinite complaint has been sustained where objection was first made on appeal.[83]

[75] Clark v. Norton, 6 Minn. 412(277). See R. L. 1905 § 4146; G. S. 1913 § 7772.

[76] Taylor v. Blake, 11 Minn. 255(170).

[77] Kelley v. Wallace, 14 Minn. 236 (173).

[78] Hall v. Williams, 13 Minn. 260 (242).

[79] Redwood County v. Tower, 28 Minn. 45, 8 N. W. 907.

[80] Palmer v. Yorks, 77 Minn. 20, 79 N. W. 587 (overruling Walton v. Perkins, 28 Minn. 413, 10 N. W. 424; Knudson v. Curley, 30 Minn. 433, 15 N. W. 873; Bovey v. Dow, 68 Minn. 273, 71 N. W. 2). See Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441.

[81] Walton v. Perkins, 28 Minn. 413, 10 N. W. 424; Knudson v. Curley, 30 Minn. 433, 15 N. W. 873.

[82] Cleveland v. Stone, 51 Minn. 274, 53 N. W. 647.

[83] Smith v. Dennett, 15 Minn. 81(59).

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840. Statutory action to determine adverse claims—Complaint—It is unnecessary for the plaintiff, in his complaint, to anticipate or specify the nature of the adverse claim. He need only allege that the defendant claims some estate or interest in, or lien upon the land, without alleging that the claim is invalid, or that the defendant does him a wrong in making it.[84] When the plaintiff is in possession all that he need allege is that he is in actual possession and that the defendant claims an estate or interest in, or lien upon the land,[85] but the plaintiff may in addition allege his own title.[86] When the land is vacant the plaintiff must allege some title or interest in himself.[87] It is insufficient for him merely to allege that he "claims" title.[88] It is unnecessary for him to plead the sources of his title.[89] If he is the equitable owner he must plead the facts giving rise to his equity.[90] Under a general allegation of ownership title by adverse possession may be shown.[91] It must be alleged that the land is vacant or unoccupied.[92] In general, the statutory conditions entitling the plaintiff to relief must be alleged.[93] Cases are cited below involving the sufficiency of particular complaints.[94]

[84] Barber v. Evans, 27 Minn. 92, 6 N. W. 445; Walton v. Perkins, 28 Minn. 413, 415, 10 N. W. 424; Stuart v. Lowry, 49 Minn. 91, 97, 51 N. W. 662.

[85] Steele v. Fish, 2 Minn. 153(129); Wilder v. St. Paul, 12 Minn. 192(116, 121); Barber v. Evans, 27 Minn. 92, 6 N. W. 445.

[86] This is common practice. See, for example, Shelley v. Lash, 14 Minn. 498 (373); Major v. Owen, 126 Minn. 1, 147 N. W. 662. What is said in Wilder v. St. Paul, 12 Minn. 192(116) as to the impropriety of trying an issue as to plaintiff's title in this form of action is misleading, if not erroneous. The statute now provides for a determination of the respective rights of the parties.

[87] Myrick v. Coursalle, 32 Minn. 153, 19 N. W. 736; Herrick v. Churchill, 35 Minn. 318, 29 N. W. 129; Jellison v. Halloran, 40 Minn. 485, 42 N. W. 392; Wakefield v. Day, 41 Minn. 344, 43 N. W. 71; Wheeler v. Winnebago Paper Mills, 62 Minn. 429, 64 N. W. 920.

[88] Herrick v. Churchill, 35 Minn. 318, 29 N. W. 129.

[89] Buffalo Land & Exploration Co. v. Strong, 91 Minn. 84, 97 N. W. 575.

[90] Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662; Hersey v. Lambert, 50 Minn. 373, 52 N. W. 963; Major v. Owen, 126 Minn. 1, 147 N. W. 662. See § 227.

[91] McArthur v. Clark, 86 Minn. 165, 90 N. W. 369.

[92] Conklin v. Hinds, 16 Minn. 457 (411).

[93] Jellison v. Halloran, 40 Minn. 485, 42 N. W. 392.

[94] Foster v. Clifford, 110 Minn. 79, 124 N. W. 632 (complaint held sufficient either under R. L. 1905 § 972 to quiet a tax title or under R. L. 1905 § 4424 to determine adverse claims); Axdell v. Tonnesson, 111 Minn. 541, 126 N. W. 1134 (complaint by Osman Axdell to determine an adverse claim of defendant under a docketed judgment against Osman Axtell, which alleged that the claim was "unfounded both in fact and in law," sustained); Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441 (a complaint held sufficient to clear the record of obstructions on a title regardless of whether the action be called one to determine adverse claims, to remove a cloud, or to quiet title); Howard v. Erbes, 112 Minn. 479, 128 N. W. 674 (a complaint alleging title in plaintiff and possession in defendant, and demanding that plaintiff be adjudged entitled to possession, does not state a cause of ac-

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841. Same—Answer—It is for the defendant to disclose the nature of his claim in his answer.[95] He should draft his answer as if he were the plaintiff setting forth his claim against a defendant.[96] If his title or interest is an equitable one the ultimate facts giving rise to the equity must be alleged with particularity and cannot be shown under a bare allegation of title and ownership in fee.[97] He may claim title from several sources.[98] A general allegation of ownership is sufficient to admit proof of any legal title, as, for example, title by adverse possession.[99] Where the complaint discloses the source of plaintiff's title, plaintiff may perhaps insist that any adverse title relied upon by defendant be specifically set out in his answer. But a general allegation of ownership is sufficient as against an objection, made for the first time on the trial.[1] If the defendant pleads one source of title he cannot prove another.[2] He may plead a cause of action in ejectment by way of counterclaim if the plaintiff is in possession.[3] A general allegation of title in the complaint may be met by a general denial in the answer where the land is vacant and under such a denial it may be shown that a deed absolute in form under which plaintiff claims title, was in fact a mortgage and that it had been paid.[4] The defendant may sometimes, under a general denial, prove title in a third party, even without connecting himself with such title.[5] The defendant may not only attack the cause of action alleged in the complaint, but he may also allege any estate or interest, legal or equitable, he has in the land, which is good against the plaintiff's cause of action.[6] A qualified general denial has been held sufficient.[7] All claims not asserted by the defendant are waived, if they might have been asserted.[8]

842. Same—Disclaimer—It is provided by statute that if the defendant enters a disclaimer or suffers a default no costs can be recovered against him.[9]

tion to determine adverse claims under the statute).

[95] Barber v. Evans, 27 Minn. 92, 6 N. W. 445; Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662.

[96] Walton v. Perkins, 28 Minn. 413, 10 N. W. 424; Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662.

[97] Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662; Hersey v. Lambert, 50 Minn. 373, 52 N. W. 963; Major v. Owen, 126 Minn. 1, 147 N. W. 662. See § 237.

[98] Branhan v. Bezanson, 33 Minn. 49, 21 N. W. 861.

[99] McArthur v. Clark, 86 Minn. 165, 90 N. W. 369; Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748. See § 227.

[1] Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748. See Mason v. Fichner, 120 Minn. 185, 192, 139 N. W. 485.

[2] Hall v. Sauntry, 80 Minn. 348, 83 N. W. 156.

[3] Eastman v. Linn, 20 Minn. 433(387); Mueller v. Jackson, 39 Minn. 431, 40 N. W. 565; Godfrey v. Valentine, 50 Minn. 284, 52 N. W. 643.

[4] Wakefield v. Day, 41 Minn. 344, 43 N. W. 71.

[5] Rogers v. Clark, 104 Minn. 198, 116 N. W. 739.

[6] Campbell v. Jones, 25 Minn. 155, 158.

[7] Jellison v. Halloran, 40 Minn. 485, 42 N. W. 392.

[8] Weide v. Gehl, 21 Minn. 449, 455. See Major v. Owen, 126 Minn. 1, 147 N. W. 662.

[9] R. L. 1905 § 4426; G. S. 1913 § 8062;

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A disclaimer sometimes entitles the plaintiff to judgment on the pleadings.[10] A disclaimer has been held not to control a judgment.[11]

843. Same—Reply—When the defendant asserts a legal title a plaintiff in possession may, in reply, plead facts showing an equitable title of such a nature that it ought to prevail over the legal title.[12] Whether a reply is necessary depends upon the nature of the answer.[13] Where the answer denies generally the title of the plaintiff, and by way of new matter sets forth the defendant's title, without alleging the source of plaintiff's title and defendant's prior right, the plaintiff may reply by simply taking issue upon such new matter, without denying notice or alleging superior equities. The pleadings will then present simply the issue of the ownership of the legal title.[14] Where the defendant interposes an answer in the nature of a cross-action in ejectment for the recovery of the possession, and the plaintiff in reply sets up a claim for improvements under the occupying claimants' act in case defendant establishes title, the matters set up in the reply constitute no part of plaintiff's case in chief under the complaint, but are only defensive to defendant's answer.[15] A reply setting up a cause of action for the reformation of the deed under which the defendant claimed title has been held a departure from the complaint.[16] Cases are cited below involving the sufficiency and construction of particular replies.[17]

RAILROADS

844. Injury from defective fences—Pleading—A complaint for an injury to a child has been held defective in not alleging sufficiently that the child entered the right of way at a point where it was unfenced or which the com-

Steele v. Fish, 2 Minn. 153(129) (statute cited); Wilder v. St. Paul, 12 Minn. 192(116, 121) (id.); Brackett v. Gilmore, 15 Minn. 245(190) (overruled by change of statute).

[10] Dunnell, Minn. Digest, § 8057.

[11] Minneapolis Trust Co. v. Eastman, 47 Minn. 301, 50 N. W. 82, 930.

[12] State v. Bachelder, 5 Minn. 223 (178); School District v. Wrabeck, 31 Minn. 77, 16 N. W. 493; Scofield v. Quinn, 54 Minn. 9, 55 N. W. 745; James v. St. Paul, 72 Minn. 138, 75 N. W. 5; Bingham v. Bingham, 105 Minn. 271, 117 N. W. 488. See Probstfield v. Czizek, 37 Minn. 420, 34 N. W. 896.

[13] See Broughton v. Sherman, 31 Minn. 431; Fifield v. Norton, 79 Minn. 264, 82 N. W. 581. Where plaintiff alleges that he is the owner and defendant alleges that he is the owner it would seem that no reply is necessary. See Williams v. Mathews, 30 Minn. 131, 14 N. W. 577. In practice the plaintiff generally puts in a general denial of the new matter in the answer. See § 936.

[14] Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054.

[15] Mueller v. Jackson, 39 Minn. 431, 40 N. W. 565.

[16] James v. St. Paul, 72 Minn. 132, 75 N. W. 5.

[17] Weide v. Gehl, 21 Minn. 449; Hunter v. Cleveland Co-operative Stove Co., 31 Minn. 505, 18 N. W. 645; Scofield v. Quinn, 54 Minn. 9, 55 N. W. 745; Alt v. Graff, 65 Minn. 191, 68 N. W. 9; Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

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pany might lawfully have protected by a fence.[18] An allegation of a failure to build and maintain a fence will admit proof of a failure to build and maintain a cattle guard.[19] A complaint may be so framed as to justify a recovery either for negligence in failing to fence or for negligence in the management of the train causing the injury.[20] A variance as to the manner in which a horse was killed has been held immaterial.[21]

845. Frightening horses—Blowing whistle—Pleading—A complaint for the negligent blowing of a whistle near a crossing in a city whereby a team of horses was frightened has been sustained, though it did not directly allege that the accident was caused by the negligence of the defendant.[22]

846. Injury to persons on or near tracks—Pleading—Where a trespasser, who is injured while on or near the tracks of a railroad company, seeks to recover on the ground of wilful or wanton injury, he must frame his complaint accordingly. He must do more than charge ordinary negligence.[23]

847. Accidents at crossings—Pleading—A general allegation of negligence is sufficient.[24] It is unnecessary to allege that the traveler looked and listened.[25] Cases are cited below involving the sufficiency of particular complaints.[26]

848. Fires caused by locomotives—Pleading—Cases are cited below involving questions of pleading in actions for fires caused by locomotives.[27]

[18] Erickson v. Great Northern Ry., 82 Minn. 60, 84 N. W. 462.

[19] Mattes v. Great Northern Ry., 95 Minn. 386, 104 N. W. 234.

[20] Mooers v. Northern Pacific Ry., 69 Minn. 90, 71 N. W. 905; Kommerstad v. Great Northern Ry., 120 Minn. 376, 139 N. W. 713; Stewart v. Manhattan etc. Ry., 27 Kan. 631.

[21] Moser v. St. Paul & Duluth Ry., 42 Minn. 480, 44 N. W. 530.

[22] Dugan v. St. Paul & Duluth Ry., 40 Minn. 544, 42 N. W. 538.

[23] Anderson v. Minneapolis etc. Ry., 103 Minn. 224, 114 N. W. 1123 (complaint held insufficient); Demerany v. Great Northern Ry., 114 Minn. 496, 131 N. W. 634 (complaint held to state a cause of action for wilful injury). See § 816.

[24] Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75; Johnson v. St. Paul & Duluth Ry., 31 Minn. 283, 17 N. W. 622.

[25] Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75.

[26] Lehnertz v. Minneapolis etc. Ry., 31 Minn. 219, 17 N. W. 376 (charge that crossing was improperly constructed and in unsafe condition and that train was being run at an excessive speed and without signaling its approach—complaint held sufficiently definite); Urbas v. Duluth etc. Ry., 113 Minn. 309, 129 N. W. 513 (child three years old injured by cars being backed across a public crossing—complaint sustained); Gibson v. Chicago etc. Ry., 117 Minn. 143, 134 N. W. 516 (conductor of freight train caught his foot between a rail and the planking of a crossing—complaint alleged that the space underneath the ball of the rail was left unfilled, but did not allege that the failure to fill or block the space was negligence—complaint held sufficient to justify recovery for such defect); Howell v. Great Northern Ry., 125 Minn. 137, 145 N. W. 804 (complaint held to allege both wilful and ordinary negligence—no variance).

[27] Weber v. Winona etc. Ry., 63 Minn. 66, 65 N. W. 93 (allegations of com-

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RECEIVERS

849. Allegation of appointment—An allegation by a receiver, in general terms, that at a specified time he was duly appointed by a specified court or officer, in a specified action or proceeding, receiver of the estate of a specified person, is a sufficient allegation of his appointment. A complaint by a receiver which does not state the action or proceeding or the court in and by which he was appointed is demurrable.[28] In an action by a receiver to set aside a fraudulent conveyance his appointment must be alleged so as to make it appear that he is authorized to bring the action as the representative of creditors.[29] Where there was nothing in a complaint by foreign receivers of a foreign corporation to recover a stock subscription to show, either expressly or by implication, that the appointing court made its adjudication under its general equity powers or without statutory authority or that it exceeded its jurisdiction, a general demurrer founded upon the existence of such jurisdictional defects was properly overruled.[30]

850. Actions against—Leave of court—Demurrer—A failure to obtain leave of court before suing a receiver is not a ground for demurrer.[31]

REFORMATION OF INSTRUMENTS

851. Pleading—In general—Cases are cited below involving questions of pleading in actions for the reformation of instruments.[32]

plaint held sufficiently broad to admit evidence of negligence as respects the condition of the engine and the manner of operating it); Solum v. Great Northern Ry., 63 Minn. 233, 65 N. W. 443 (id.); Reishus v. Willmar etc. Ry., 92 Minn. 371, 100 N. W. 1 (action to recover for hay destroyed by fire—complaint construed as to issues formed—two acts of negligence charged); Patry v. Northern Pacific Ry., 114 Minn. 375, 131 N. W. 462 (a complaint which alleges that a railway company was negligent in failing to patrol its right of way to prevent and extinguish fires, and in not equipping certain locomotive engines with proper spark arresters, that certain engineers negligently failed to inspect their engines before taking them out on the road, and that a section boss was negligent in failing to keep the right of way clear from combustible matter which resulted in starting a fire from sparks from the engines, which destroyed the property of another on adjoining premises, states a cause of action against each defendant).

[28] Rossman v. Mitchell, 73 Minn. 198, 75 N. W. 1053. See, for various allegations of appointment, Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831; Sawyer v. Harrison, 43 Minn. 297, 45 N. W. 434; Northern Trust Co. v. Jackson, 60 Minn. 116, 61 N. W. 908; Nelson v. Nugent, 62 Minn. 203, 64 N. W. 392; Tvedt v. Mackel, 67 Minn. 24, 69 N. W. 475; Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

[29] Sawyer v. Harrison, 43 Minn. 297, 45 N. W. 434; Tvedt v. Mackel, 67 Minn. 24, 69 N. W. 475.

[30] Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

[31] Leuthold v. Young, 32 Minn. 122, 19 N. W. 652.

[32] Newman v. Home Ins. Co., 20 Minn. 422(378) (action to reform mortgage

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RELEASE

852. Pleading—In general—A release is in the nature of confession and avoidance and must be specially pleaded.[33] Facts tending to disprove the execution of a release are admissible under a general denial.[34]

REPLEVIN

853. Complaint—The plaintiff need not plead specially the source of his title, or the particular facts which entitle him to the possession of the property. He may allege generally that he is the "owner" and under such general allegation prove any right of property, general or special, that entitles him to possession.[35] The allegation of ownership and right of possession should be in the present tense.[36] It is customary and proper to allege that the plaintiff is entitled to the immediate possession of the property,[37] but this is not essential where it is alleged that the plaintiff is the owner, for ownership implies a right to the immediate possession, in the absence of allegation or proof to the contrary.[38] The property sought must be described with reasonable certainty.[39] It has been held that where no unlawful taking is alleged it is necessary to allege a demand before suit.[40] A general allegation of demand will

on the ground of mistake—complaint sustained as against mortgagor); Ham v. Johnson, 51 Minn. 105, 52 N. W. 1080 (indefinite complaint to reform a contract for the sale or exchange of lands sustained); Lahiff v. Hennepin County Catholic B. & L. Assn., 61 Minn. 226, 63 N. W. 493 (action to reform a mortgage—counterclaim alleging default and demanding a foreclosure sustained); Hall v. Leland, 64 Minn. 71, 66 N. W. 202 (answer held not to admit a mistake in a deed); Kelly v. Liverpool & London & Globe Ins. Co., 94 Minn. 141, 102 N. W. 380 (complaint to reform and enforce a fire insurance policy sustained).

[33] Rothschild v. Burritt, 47 Minn. 28, 49 N. W. 393.

[34] Christianson v. Chicago etc. Ry., 61 Minn. 249, 63 N. W. 639.

[35] Carlson v. Small, 32 Minn. 492, 21 N. W. 737; Miller v. Adamson, 45 Minn. 99, 47 N. W. 452; Cumbey v. Lovett, 76 Minn. 227, 79 N. W. 99; Atwater v. Spalding, 86 Minn 101, 90 N. W. 370; McArthur v. Clark, 86 Minn. 165, 90 N. W. 369.

[36] Loomis v. Youle, 1 Minn. 175(150); Tancre v. Reynolds, 35 Minn. 476, 29 N. W. 171.

[37] See the cases cited under this section.

[38] Illinois S. M. Co. v. Harrison, 43 Colo. 362, 96 Pac. 177; Griswold v. Manning, 73 N. Y. S. 702; Pattison v. Adams, Lalor, (N. Y.) 426, 428; Id., 7 Hill (N. Y.) 126. The requirements of a complaint in replevin are essentially the same as those of a complaint in ejectment. Atwater v. Spalding, 86 Minn. 101, 90 N. W. 370. It has been held unnecessary to allege a right to the immediate possession in ejectment. Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947.

[39] See Ames v. Miss. Boom Co., 8 Minn. 467(417); Ellingboe v. Brakken, 36 Minn. 156, 30 N. W. 659.

[40] Stratton v. Allen, 7 Minn. 502(409). It is extremely unlikely that this case would be followed if the point should be again raised. It is inconsistent with the reasoning of Guthrie v. Olson, 44 Minn. 404, 46 N. W. 853. See Hurd v. Simonton, 10 Minn. 423(340); C. W.

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admit proof of either a personal demand or one by an authorized agent.[41] It is customary and proper to allege directly that the taking or detention is "wrongful" or "unlawful,"[42] but this is not necessary. Such an allegation is in itself a mere conclusion of law.[43] It is sufficient to allege ownership and possession in plaintiff and a taking by the defendant. Every taking of possession from the owner is presumptively wrongful and unlawful. If it was not so in the particular case that is a matter of defence.[44] A complaint averring that defendant is in possession of property owned by plaintiff, which he refuses, after demand made, to deliver, sufficiently avers that the detention is wrongful.[45] The possession of the defendant should be directly alleged.[46] If a personal judgment for the value of property is sought, in case the property cannot be recovered, good practice requires an allegation of the value in direct and issuable form, and not by way of recital as was usual at common law.[47] Such an allegation is admitted by a failure to deny it,[48] and is put in issue by a general denial.[49] It must generally be proved if controverted.[50] The plaintiff is bound by his allegation of value. Save in exceptional cases he cannot prove it less or recover more.[51] A defective complaint cannot be helped by the affidavit for immediate delivery.[52] The demand for relief is properly in the alternative—for the possession of the property or for a certain sum of money in case possession cannot be had.[53] The requisites of a com-

Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164; Oleson v. Merrill, 20 Wis. 462; Simser v. Cowan, 56 Barb. (N. Y.) 395. If objection is made on the trial to the want of an allegation of demand an amendment should be ordered as a matter of course. See Caldwell v. Bruggerman, 8 Minn. 286(252, 258). While not essential it is often practically advisable to allege a demand and refusal in order to force an admission and obviate the necessity of proof.

[41] Griswold v. Manning, 73 N. Y. S. 702.

[42] See cases under this section.

[43] See Coit v. Waples, 1 Minn. 134 (110) (this case was before the adoption of the code); Adams v. Corriston, 7 Minn. 456(365); Buck v. Colbath, 7 Minn. 310(238); Hurd v. Simonton, 10 Minn. 423(340); Cordill v. Minn. Elevator Co., 89 Minn. 442, 95 N. W. 306; Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947; Halleck v. Mixer, 16 Cal. 574; Scofield v. Whitelegge, 49 N. Y. 259.

[44] Childs v. Hart, 7 Barb. (N. Y.) 370. See Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947.

[45] Griswold v. Manning, 73 N. Y. S. 702.

[46] See Tozier v. Merriam, 12 Minn. 87(46).

[47] Tucker v. Parks, 7 Colo. 62, 1 Pac. 427.

[48] Thompson v. Scheid, 39 Minn. 102, 38 N. W. 801 (by implication); Tucker v. Parks, 7 Colo. 62, 1 Pac. 427.

[49] Thompson v. Scheid, 39 Minn. 102, 38 N. W. 801.

[50] Thompson v. Scheid, 39 Minn. 102, 38 N. W. 801; Sauer v. Traeger, 56 Minn. 364, 57 N. W. 935; North Star House Furnishing Co. v. Rinkey, 92 Minn. 80, 99 N. W. 429. See Dunnell, Minn. Digest, § 8419.

[51] Weyerhaeuser v. Foster, 60 Minn. 223, 61 N. W. 1129; Peterson v. Hall, 61 Minn. 268, 63 N. W. 733; Pabst Brewing Co. v. Butchart, 68 Minn. 303, 71 N. W. 273.

[52] Loomis v. Youle, 1 Minn. 175(150).

[53] See Washburn v. Mendenhall, 21 Minn. 332.

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plaint in replevin are essentially the same as those for a complaint in ejectment.[54] Cases are cited below involving the sufficiency of particular complaints.[55]

854. Answer—Demand for return—Amendment—General denial—A demand in the answer for a return of the property is necessary only to obtain that relief in case of default. Such a demand does not raise an issue of fact and may be inserted as an amendment at any time, with leave of court.[56] 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—any evidence tending to show that the plaintiff is not entitled to the possession of the property.[57] When the plaintiff pleads the source of his title the defendant cannot introduce matter in confession and avoidance under a general denial.[58] If there is doubt whether matter is admissible under a general denial the court should be very liberal in allowing an amendment on the trial to let it in.[59] In an action by a mortgagee against the mortgagor the latter may plead a mistake in the mortgage and ask to have the mortgage reformed.[60]

[54] See Atwater v. Spalding, 86 Minn. 101, 90 N. W. 370.

[55] Coit v. Waples, 1 Minn. 134(110) (necessary, before adoption of code, to allege that the taking was wrongful); Stickney v. Smith, 5 Minn. 486(390) (allegation of possession "as of their own proper goods"—allegation of taking "from the possession of the plaintiffs" implies that plaintiffs were in the actual possession at the time of the taking); Hurd v. Simonton, 10 Minn. 423(340) (omission to allege demand cured by verdict); Plano Mfg. Co. v. Hallberg, 61 Minn. 528, 63 N. W. 1114 (complaint by mortgagee held sufficient); National Citizens Bank v. McKinley, 115 Minn. 378, 132 N. W. 290 (complaint in the usual form—recovery as for conversion).

[56] Aultman & Taylor Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756.

[57] Caldwell v. Bruggerman, 4 Minn. 270(190) (want of a delivery of property sufficient to vest title in plaintiff); Tupper v. Thompson, 26 Minn. 385, 4 N. W. 621 (fraudulent conveyance); Furman v. Tenny, 28 Minn. 77, 9 N. W. 172 (id.); Kenney v. Goergen, 36 Minn. 190, 31 N. W. 210 (id.); Johnson v. Oswald, 38 Minn. 550, 38 N. W. 630 (id.); Grinnell v. Young, 41 Minn. 186, 42 N. W. 929 (no delivery of bill of sale—escrow—fraud); King v. La Crosse, 42 Minn. 488, 44 N. W. 517 (title in third party); Mullen v. Noonan, 44 Minn. 541, 47 N. W. 164 (fraudulent conveyance); Adamson v. Wiggins, 45 Minn. 448, 48 N. W. 185 (usury); Bassett v. Haren, 61 Minn. 346, 63 N. W. 713 (lien); Aultman & Taylor Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756 (general rule stated—right of possession in defendant or third party); Cumbey v. Lovett, 76 Minn. 227, 79 N. W. 99 (general rule stated—special property in defendant entitling him to immediate possession); Walker v. Ward, 104 Minn. 386, 116 N. W. 647 (fraud).

[58] Johnson v. Oswald, 38 Minn. 550, 552, 38 N. W. 630 (fraud); Bassett v. Haren, 61 Minn. 346, 63 N. W. 713 (lien); Dickson v. St. Paul, 105 Minn. 165, 117 N. W. 426 (general rule stated).

[59] See Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

[60] Plano Mfg. Co. v. Hallberg, 61 Minn. 528, 63 N. W. 1114.

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855. Reply—If the defendant alleges title in himself, or from a third party from whom he derives title, no reply is necessary; such an allegation is not new matter, but simply an argumentative denial.[61] A claim of defendant for damages for the detention of the property needs no reply.[62] Where an answer alleges that plaintiff "violated the terms and broke the conditions" of a certain chattel mortgage, without specifying in what particular or by what act, and on the trial the defendant proves certain acts of plaintiff in support of such allegation, the latter may, under a general denial in his reply, show, by any evidence, that such acts were not a violation of such terms or conditions.[63]

856. Counterclaim—A counterclaim may be pleaded in replevin as in other actions.[64] The right of a defendant to a return of the property and for damages for the taking and detention is not a cause of action and hence cannot constitute a counterclaim.[65]

857. Issues—Variance—A defendant who in his answer justifies the taking under an execution against A cannot prove that prior to the taking A had assigned the property to B.[66]

SALES

858. Allegation of sale—The word "sold" implies a contract to sell and also a contract to buy.[67] A promise to sell may be inferred from an allegation of a contract to buy.[68] The allegation "sold and delivered" is an approved form.[69]

859. Running account—One cause of action—In a running account for goods sold the various items between specified dates may ordinarily be treated as one cause of action and declared on accordingly.[70]

860. Common count for goods sold and delivered—A complaint in the form of the common indebitatus count for goods sold and delivered, or sub-

[61] Williams v. Mathews, 30 Minn. 131, 14 N. W. 577.

[62] Ward v. Anderberg, 36 Minn. 300, 30 N. W. 890.

[63] Ellingsen v. Cooke, 37 Minn. 400, 34 N. W. 747.

[64] W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307 (conditional sale—counterclaim for breach of warranty and for recovery of instalment of purchase price paid). See Townsend v. Minneapolis Cold-Storage & Freezer Co., 46 Minn. 121, 48 N. W. 682.

[65] Sylte v. Nelson, 26 Minn. 105, 1 N. W. 811; Ward v. Anderberg, 36 Minn. 300, 30 N. W. 890.

[66] McClung v. Bergfeld, 4 Minn. 148 (99).

[67] Butler v. Thompson, 92 U. S. 412, 414; Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39.

[68] First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253; Hudson Canal Co. v. Penn. Coal Co., 8 Wall. (U. S.) 276, 289; Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39.

[69] State v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

[70] Memmer v. Carey, 30 Minn. 458, 15 N. W. 877; Frankoviz v. Smith, 34

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stantially in that form, is sufficient.[71] It must be alleged that the goods were sold by the plaintiff.[72] It is unnecessary to allege where the goods were sold.[73] It is unnecessary to allege a promise to pay. Where it is alleged that goods were sold and delivered to a person at his request an implied promise arises on his part to pay for them, if there are no further allegations negativing such implication.[74] The proper allegation of the sale is "sold and delivered."[75] An averment that defendant is indebted to plaintiff in a specified amount and that no part thereof has been paid is equivalent to an averment that the amount is due and unpaid, there being no averment as to time, terms or circumstances to the contrary.[76]

861. Same—Answer—General denial—A bare denial of indebtedness is insufficient to raise an issue.[77] A denial that plaintiff "sold and delivered" the goods is sufficient.[78] The usual answer is a general denial and under it the defendant may prove that he purchased the goods of a third person claiming to sell in his own right; or that the reasonable value or agreed price was otherwise than as alleged; or that the article delivered was not the one purchased or agreed upon; or that the transaction was a gift and not a sale; or that the transaction was not a sale to the defendant, but a sale to a third party; or that the sale was in payment of a debt to the defendant; or that the sale was in fact on a consideration fully executed and created no indebtedness; or that the contract was rescinded before the goods were shipped; or that there was no acceptance of the terms of the contract as proposed; or that there was no delivery of the goods; or that only a part of the goods were delivered.[79] The fact that the goods were sold, in whole or in part, on credit and that the

Minn. 403, 406, 26 N. W. 225. See American Button-Hole etc. Co. v. Thornton, 28 Minn. 418, 10 N. W. 425.

[71] Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340 (overruling Foerster v. Kirkpatrick, 2 Minn. 210, 171; Holgate v. Broome, 8 Minn. 243, 209); Allen v. Patterson, 7 N. Y. 476; Moffet v. Sackett, 18 N. Y. 522; Doherty v. Shields, 86 Hun (N. Y.) 303; Abadie v. Carrillo, 32 Cal. 172; Freeborn v. Glazer, 10 Cal. 337; Salinas Valley Lumber Co. v. Magne-Silicia Co., 159 Cal. 182, 112 Pac. 1089; Higgins v. Germaine, 1 Mont. 230; Messenger v. Woge, 20 Colo. App. 275, 78 Pac. 314; 35 Cyc. 552; 19 Ency. Pl. & Pr. 21, 25. See Keller v. Struck, 31 Minn. 446, 18 N. W. 280; Boosalis v. Stevenson, 62 Minn. 193, 64 N. W. 380; Danahey v. Pagett, 74 Minn. 20, 76 N. W. 949; Mead v. Rat Portage Lumber Co., 93 Minn. 343, 101 N. W. 299.

[72] Pioneer Fuel Co. v. Hager, 57 Minn. 76, 58 N. W. 828.

[73] Behlow v. Shore, 91 Cal. 141, 27 Pac. 546. See 35 Cyc. 553; 19 Ency. Pl. & Pr. 28.

[74] Bennett v. Thuet, 98 Minn. 497, 108 N. W. 1; Glenny v. Hitchins, 4 How. Pr. (N. Y.) 98; 19 Ency. Pl. & Pr. 30.

[75] State v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

[76] Wilcox v. Jamieson, 20 Colo. 158, 36 Pac. 902; Messenger v. Woge, 20 Colo. App. 275, 78 Pac. 314. See § 600.

[77] Higgins v. Germaine, 1 Mont. 230; Moffit v. Lyneman, 10 Colo. App. 249, 50 Pac. 736. See 35 Cyc. 554; 19 Ency. Pl. & Pr. 38.

[78] Feldmann v. Shea, 7 Idaho, 717, 59 Pac. 537.

[79] 35 Cyc. 560; 19 Ency. Pl. & Pr. 37.

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term of the credit has not expired is new matter to be specially pleaded.[80] Under a general denial the defendant may introduce an express contract relating to the sale,[81] and if it is a valid and subsisting contract between the parties it will be conclusive as to the price or value of the goods.[82] If the express contract has been modified or abandoned, or the circumstances otherwise justify the plaintiff in disregarding it and suing for the reasonable value of the goods, the defendant may introduce it as evidence of the value, but it will not be conclusive.[83]

862. Same—When common count lies—The common indebitatus count for goods sold and delivered will lie where the title has passed and the goods have been delivered, actually or constructively, to the buyer or his agent, and the price is payable or there is an obligation to pay the reasonable value of the goods—where the contract of sale is completely executed so that nothing remains to be done but to pay over the money. It will lie to recover either an agreed price or the reasonable value of the goods.[84] It will lie whenever a quantum valebant will lie.[85] It will lie where the goods are delivered to a third party on the buyer's request and direct promise to pay;[86] where a note has been given for the price and the note has matured;[87] where the goods are sold on credit and the period of credit has expired;[88] where the goods are sold subject to the right of inspection or trial and the time for inspection or trial and a return of the goods has expired;[89] where the goods have been obtained on credit by fraud;[90] where the goods were to be paid for by a bill or note and the buyer has refused to give it and the time during which it was to run has expired;[91] where the contract of sale has been abandoned by the buyer or by mutual consent, or where the seller has been prevented from fully performing by the act or default of defendant;[92] where the defendant has converted the goods of the plaintiff;[93] where the goods have been delivered upon a con-

[80] Iselin v. Simon, 62 Minn. 128, 64 N. W. 143; Smith v. Holmes, 19 N. Y. 271; Swan Lamp Mfg. Co. v. Brush etc. Co, 18 N. Y. S. 869.

[81] See § 916.

[82] City & Suburban Ry. v. Basshor, 82 Md. 397, 33 Atl. 635.

[83] See §§ 532, 916.

[84] 2 Ency. Pl. & Pr. 1005; 19 Ency. Pl. & Pr. 14; 4 Cyc. 326; 35 Cyc. 535; 24 Am. & Eng. Ency. of Law, 2 ed., 1121; 3 Wait's Actions and Defences 524; 1 Chitty, Contracts, 11 Am. ed., 614; 2 Chitty, Pl. 16 Am. ed., 27; and cases under § 860.

[85] See § 533.

[86] 19 Ency. Pl. & Pr. 17.

[87] 35 Cyc. 536; 19 Ency. Pl. & Pr. 19; 24 Am. & Eng. Ency. of Law, 2 ed., 1123. See Devlin v. Chamblin, 6 Minn. 468 (325, 332).

[88] 35 Cyc. 535; 24 Am. & Eng. Ency. of Law, 2 ed., 1122.

[89] 2 Ency. Pl. & Pr. 1006; 19 Id. 18; 24 Am. & Eng. Ency. of Law, 2 ed., 1122.

[90] See § 189, supra; Roth v. Palmer, 27 Barb. (N. Y.) 652; Heilbroun v. Herzog, 165 N. Y. 98, 58 N. E. 759; 24 Am. & Eng. Ency. of Law, 2 ed., 1122; 15 Cyc. 256.

[91] 35 Cyc. 536; 19 Ency. Pl. & Pr. 20; 24 Am. & Eng. Ency. of Law, 2 ed., 1124. See Barron v. Mullin, 21 Minn. 374.

[92] See § 534.

[93] See § 186.

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ditional sale and the sale has become absolute by the performance of the condition;[94] where goods are sold to be paid for in other goods and an agreed sum of money in addition and the contract has been fully executed so far as the exchange of property is concerned and nothing remains but to pay over the additional sum of money;[95] where the plaintiff has partially performed a contract whereby defendant has received and appropriated the goods.[96] The common count will not lie where the contract has not been fully performed by the seller;[97] where the goods have not been fully delivered, but a recovery may be had for a partial delivery if the buyer accepts and appropriates the goods;[98] where the sale and delivery were upon the condition that the title should remain in the seller until payment;[99] where the contract is not merely one for the sale of goods but requires the performance of work and labor as well;[1] where the goods are sold to be paid for wholly or in part by other goods or by labor, or otherwise than by money.[2]

863. Common count for goods bargained and sold—A complaint in the form of the common indebitatus count for goods bargained and sold, or substantially in that form, is sufficient.[3] This count will lie where a sale is executed and the title has passed, but there has been no delivery to the buyer and delivery was not a part of the consideration for the price or a condition precedent to its payment. Upon a sale of unascertained goods by mere description this count will not lie; but upon a subsequent appropriation of specific goods made by the seller and assented to by the buyer the price may be recovered under this count.[4]

864. Action by seller for agreed price of goods sold and delivered—Pleading—A recovery may be had under a common indebitatus count for goods sold and delivered, though there is a subsisting express contract, if the contract has been completely executed except that the price remains to be paid by the defendant and it is due.[5] Cases are cited below involving questions of pleading in actions on an express contract.[6]

[94] See Dunnell, Minn. Digest, § 8651; 6 Am. & Eng. Ency. of Law, 2 ed., 480.

[95] 19 Ency. Pl. & Pr. 18.

[96] 19 Ency. Pl. & Pr. 16; 24 Am. & Eng. Ency. of Law, 2 ed., 1122n. See Dunnell, Minn. Digest, §§ 8526, 8645.

[97] 19 Ency. Pl. & Pr. 16; 35 Cyc. 534; 24 Am. & Eng. Ency. of Law, 2 ed., 1121.

[98] 19 Ency. Pl. & Pr. 16. See Churchill v. Holton, 38 Minn. 519, 38 N. W. 611.

[99] 19 Ency. Pl. & Pr. 18.

[1] 19 Ency. Pl. & Pr. 18.

[2] 19 Ency. Pl. & Pr. 18.

[3] 19 Ency. Pl. & Pr. 20.

[4] 19 Ency. Pl. & Pr. 20; 24 Am. & Eng. Ency. of Law, (2 ed.) 1121; 3 Wait's Actions and Defences, 512.

[5] See § 862.

[6] Blaise v. Anderson, 35 Minn. 306, 28 N. W. 922 (an allegation in an answer that "plaintiff's title to said horses was not satisfactory to defendants" held sufficient to admit evidence to show that plaintiff's title to the horses was incumbered with a chattel mortgage); Malone v. Minnesota Stone Co., 36 Minn. 325, 31 N. W. 170 (as against a motion for judgment on the pleadings, an allegation that the plaintiff, though often requested so to do, has failed and refused to pay such charges,

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865. Same—Counterclaim—A claim in an answer for damages for a breach of warranty constitutes a counterclaim.[7] 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 growing out of the breach.[8] Where the goods were sent, but not ordered, and the defendant paid the freight charges, it was held that he could not recover such charges as a counterclaim in an action for the price.[9] A defendant has been held not entitled to recover for commissions on the sale of a threshing machine.[10]

and has failed and refused to deliver the goods, or any part thereof, is sufficient to show a demand); Farnham v. Murch, 36 Minn. 328, 31 N. W. 453 (evidence of payment inadmissible under a denial); Latham v. Bausman, 39 Minn. 57, 38 N. W. 776 (an allegation in an answer that the buyer "has duly offered to return, and has been ready and willing to return, said engine to plaintiff ever since its insufficiency for the purposes aforesaid was ascertained" held not to show compliance with a condition of the contract requiring notice to the seller that the engine was not as represented and an offer to return it); Hitchcock v. Turnbull, 44 Minn. 475, 47 N. W. 153 (answer alleging failure to deliver goods on time held insufficient); Rugland v. Thompson, 48 Minn. 539, 51 N. W. 604 (action on note given for purchase price—recoupment for breach of warranty held sufficiently pleaded); Krause v. Thomas, 53 Minn. 209, 54 N. W. 1114 (action for price of curbing and cut stone—answer setting up defects in stone and dressing held not to state a defence or counterclaim); Potter v. Holmes, 65 Minn. 377, 64 N. W. 63 (contract provided for inspection and acceptance of goods by third party—complaint held defective in failing to allege either such inspection and acceptance, or facts which would relieve the plaintiff from the necessity of making and proving such allegation); Reeves & Co. v. Cress, 73 Minn. 261, 76 N. W. 26 (answer alleged that machines were sold on trial and if not satisfactory to buyer might be returned—that they were unsatisfactory and were returned—a warranty and its breach were also alleged, but there was no allegation of damages for such breach or counterclaim therefor—evidence of warranty held immaterial under the pleadings); Loveland v. Gravel, 95 Minn. 135, 103 N. W. 721 (fraud insufficiently alleged); Sherwood v. Graham, 106 Minn. 542, 118 N. W. 1011 (sale of corporate stock—retention of possession by seller as security for purchase price—resale for non-payment—action for balance—complaint sustained); Providence Jewelry Co. v. Crowe, 108 Minn. 84, 121 N. W. 415 (fraud in securing signature sufficiently alleged); Independent Brewing Assn. v. Burt, 109 Minn. 323, 123 N. W. 932 (a counterclaim held not to state a cause of action for damages for loss of profits due to unmarketable goods being furnished); Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422 (an answer held to allege sufficiently a waiver of a written notice of a breach of warranty).

[7] Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677; Wyckoff v. Horan, 39 Minn. 429, 40 N. W. 563; Schurmeier v. English, 46 Minn. 306, 48 N. W. 1112; Knudtson v. Schjelderup, 98 Minn. 531, 107 N. W. 1134. See § 366.

[8] Geiser Threshing Machine Co. v. Farmer, 27 Minn. 428, 8 N. W. 141; Minneapolis Harvester Works v. Bonnallie, 29 Minn. 373, 13 N. W. 149; C. Aultman & Co. v. Falkum, 47 Minn. 414, 50 N. W. 471.

[9] Edwards v. Hardwood Mfg. Co., 59 Minn. 178, 60 N. W. 1097.

[10] Garr, Scott & Co. v. Brundage, 89 Minn. 412, 94 N. W. 1091.

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866. Same—Recoupment—In an action for the price of goods solds, or on a note or chattel mortgage given therefor, the buyer may plead and prove by way of recoupment his damages for breach of warranty.[11] The statute of limitations does not run against such a defence.[12] Where the buyer could not return the goods it was held that he might recoup his damages from defective quality in an action for the price. The measure of his damages was held to be the difference between the market value of the goods delivered at the various dates of delivery and the market value at the same dates of the goods of the quality called for by the contract.[13] The buyer may recoup his damages from fraud if the contract is not wholly executory.[14] He may also recoup his damages from delay in delivery.[15] The damages from breach of warranty should be estimated and applied in reduction of plaintiff's claim as of the date of the sale.[16]

867. Same—Variance—Cases are cited below involving the effect of a variance.[17]

868. Action by seller for reasonable value of goods sold—Quantum valebant—Pleading—Wherever a recovery may be had on an implied contract for the reasonable value of goods sold a recovery may be had under a common indebitatus count for goods sold and delivered.[18] Though it is never necessary to adopt a quantum valebant count, a complaint substantially in

[11] Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677; Wilson v. Reedy, 33 Minn. 503, 24 N. W. 191; Massachusetts Loan & Trust Co. v. Welch, 47 Minn. 183, 49 N. W. 740; Rugland v. Thompson, 48 Minn. 539, 51 N. W. 604; C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211; Wilson v. Danderand, 124 Minn. 120, 144 N. W. 460.

[12] C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211.

[13] St. Anthony Lumber Co. v. Bardwell-Robinson Co., 60 Minn. 199, 62 N. W. 274. See Wheaton v. Lund, 61 Minn. 94, 63 N. W. 251.

[14] Thompson v. Libby, 36 Minn. 287, 31 N. W. 52; General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404.

[15] Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 44 N. W. 306. See, for a form of answer, Paine v. Sherwood, 21 Minn. 225.

[16] Wilson v. Reedy, 33 Minn. 503, 24 N. W. 191.

[17] Iverson v. Dubay, 39 Minn. 325, 40 N. W. 159 (a variance of a few dollars in the contract price held immaterial); Benson v. Dean, 40 Minn. 445, 42 N. W. 207 (a variance as to the parties to the contract held fatal); Dennis v. Spencer, 45 Minn. 250, 47 N. W. 795 (id.); Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472 (express contract alleged—proof of an implied agreement—variance held immaterial); Garr, Scott & Co. v. Brundage, 89 Minn. 412, 94 N. W. 1091 (evidence showed that goods were not sold to the defendant, nor did he promise to pay for them, but they were delivered to him and a settlement made therefor, and a balance found due to the plaintiff—variance held immaterial); Larson v. Barlow, 112 Minn. 246, 127 N. W. 924 (action for reasonable value of goods—proof that a part of the goods were sold at an agreed price—variance held immaterial).

[18] See §§ 533, 862.

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that form is common in our practice.[19] The defence that the goods were sold on credit, and that the period of credit has not expired, is new matter which must be specially pleaded.[20] Where the complaint alleged that the goods were of the "agreed and reasonable" value of a specified sum, an answer denying that allegation and alleging that the "agreed and reasonable" value thereof was a lesser specified amount and no more was held not new matter requiring a reply.[21]

869. Same—When action will lie—The action will lie where the buyer accepts the goods but refuses without excuse to pay for them, and there was no agreed price.[22] Where, after a partial delivery, the contract is abandoned, the seller can recover, if at all, only on an implied promise to pay the value of the part delivered and accepted.[23] Where the buyer waives a full delivery the seller may recover the value of the part delivered and accepted.[24] This count will not lie where the goods are delivered under an express contract and the defendant justifiably refuses to accept them as not in accordance with the contract.[25] When the plaintiff can disregard an express contract and sue on a quantum valebant the express contract is admissible as evidence of the value of the goods, though not conclusive.[26]

870. Action by buyer for non-delivery—Pleading—A general allegation of damages is sufficient for the recovery of all general damages, present or prospective.[27] If the damages are itemized recovery will generally be limited accordingly.[28] A promise to sell may be inferred from an allegation of a contract to buy. Where a contract for the sale of all the lumber in a certain lumber yard gave the seller the privilege of reserving an indefinite amount of lumber for use in the erection of a certain building, it was incumbent upon the

[19] See, for example, Liljengren F. & L. Co. v. Mead, 42 Minn. 420, 44 N. W. 306; Gaar, Scott & Co. v. Fritz, 60 Minn. 346, 62 N. W. 391; Iselin v. Simon, 62 Minn. 128, 64 N. W. 143; Niven v. Craig, 63 Minn. 20, 65 N. W. 86; A. Hirschman Co. v. Keiwel, 79 Minn. 239, 82 N. W. 574; Fitzgerald v. King, 79 Minn. 313, 82 N. W. 584; Marshall-Wells Hardware Co. v. Moody, 92 Minn. 66, 99 N. W. 356; King v. Burnham, 93 Minn. 288, 101 N. W. 302; Mead v. Rat Portage Lumber Co., 93 Minn. 343, 101 N. W. 299; Keystone Lubricating Co. v. Charles E. Willhelm Co., 103 Minn. 527, 115 N. W. 1134; Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Green & DeLaittre Co. v. Fasbender & Son, 122 Minn. 17, 141 N. W. 789.

[20] Iselin v. Simon, 62 Minn. 128, 64 N. W. 143.

[21] King v. Burnham, 93 Minn. 288, 101 N. W. 302.

[22] See Bridgman v. Hallberg, 52 Minn. 376, 54 N. W. 752; Gaar, Scott & Co. v. Fritz, 60 Minn. 346, 62 N. W. 391.

[23] Robson v. Bohn, 22 Minn. 410; Id., 27 Minn. 333, 7 N. W. 357.

[24] Churchill v. Holton, 38 Minn. 519, 38 N. W. 611; Mobile Fruit & Trading Co. v. McGuire, 81 Minn. 232, 83 N. W. 833; Mead v. Rat Portage Lumber Co., 93 Minn. 343, 101 N. W. 299.

[25] Belt v. Stetson, 26 Minn. 411, 4 N. W. 779.

[26] Lehigh v. Standard Tie Co., 149 Mich. 102, 112 N. W. 481.

[27] Partridge v. Blanchard, 23 Minn. 69; Rathborne, Hair & Ridgeway Co. v. Wheelihan, 82 Minn. 30, 84 N. W. 638.

[28] Rathborne, Hair & Ridgeway Co. v. Wheelihan, 82 Minn. 30, 84 N. W. 638.

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seller, when sued for failure to deliver as agreed, to plead and prove the facts necessary to a reduction of liability in consequence of the exercise of the privilege so reserved.[29] An allegation of a demand is sometimes necessary.[30]

871. Action by buyer for recovery of price paid—Pleading—A recovery may be had under a common indebitatus count for money had and received.[31] Cases are cited below involving the sufficiency of complaints.[32]

872. Action by buyer for breach of warranty—Complaint—The essential allegations are the warranty, the facts constituting its breach, and the facts from which damages for its breach are to be implied.[33] It is necessary to allege what the property was actually worth, as well as what it would have been worth if it had been as warranted, or to allege that it was worth a specified amount less than if it had been as warranted.[34] A general allegation that the seller "warranted" the goods is sufficient, and will admit proof of either an express or implied warranty.[35] The contract of warranty must be alleged di-

[29] Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

[30] Snow v. Johnson, 1 Minn. 48(32).

[31] See § 761.

[32] Gilfoil v. Western Mfg. Co., 108 Minn. 193, 121 N. W. 904 (sale of jewelry to merchant under contract guaranteeing sales—exchange of goods—liability for goods remaining on hand after a certain time—allegations as to selling same line of goods to another in prohibited district held sufficient though objectionably indefinite — complaint sustained); John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180 (action on contract to rescind sale and return purchase price—complaint sustained—allegations suggestive of a breach of warranty disregarded); Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253 (complaint sustained).

[33] Plano Mfg. Co. v. Richards, 86 Minn. 94, 90 N. W. 120; Segerstrom v. Swenson, 105 Minn. 115, 117 N. W. 478; John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180. See Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156 (breach insufficiently alleged); C. Aultman & Co. v. Falkum, 51 Minn. 562, 53 N. W. 875 (informal answer held sufficient to admit proof of damages—warranty of harvester); Sloggy v. Crescent Creamery Co., 72 Minn. 316, 75 N. W. 225 (complaint held sufficient to justify recovery of nominal damages); Conroy v. Logue, 87 Minn. 289, 91 N. W. 1105 (breach of warranty as to capacity of a well—answer held sufficient as to damages); Mulcahy v. Dieudonne, 103 Minn. 352, 115 N. W. 636 (breach of warranty of engine and separator—sufficiency of allegations as to damages); John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180 (allegations suggestive of a breach of warranty of personal property sold, but which, standing alone, were insufficient to state a cause of action therefor, held not to require the plaintiff to elect whether to rely upon a breach of warranty or upon a mutual rescission and promise to repay the purchase price paid, a cause of action predicated upon the latter being sufficiently alleged).

[34] Plano Mfg. Co. v. Richards, 86 Minn. 94, 90 N. W. 120; Segerstrom v. Swenson, 105 Minn. 115, 117 N. W. 478; John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180. See Sloggy v. Crescent Creamery Co., 72 Minn. 316, 75 N. W. 225; Conroy v. Logue, 87 Minn. 289, 91 N. W. 1105; Mulcahy v. Dieudonne, 103 Minn. 352, 115 N. W. 636.

[35] Segerstrom v. Swenson, 105 Minn. 115, 117 N. W. 478. See Meshbesher v.

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rectly and unequivocally.[36] If there was no express warranty it must affirmatively appear that the buyer relied on the representations in making the purchase.[37] It is unnecessary to allege scienter, and if alleged, it need not be proved.[38] A general allegation of damages is sufficient [39] unless special damages are sought.[40]

873. Same—Answer—A denial in a conjunctive form of several conjunctive allegations has been held insufficient as involving a negative pregnant.[41]

874. Same—Issues—Variance—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.[42] A pleading which is double in this regard may be corrected on motion.[43] While a party is not entitled to 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.[44]

875. Interest—Interest, in the nature of damages, is allowed on an indebtedness for goods sold and delivered, whether upon an express or implied agreement, from the time the same 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 ordinary running accounts 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. In an action for goods sold it is practically advisable, though not essential, to demand interest from a specified date.[45]

876. Part payment—Necessity of pleading and proving—The defendant is bound to plead and prove any partial payments which he may have made for the goods. If he fails to do so he is concluded by the judgment.[46]

Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428.

[36] Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139.

[37] Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139; Torkelson v. Jorgenson, 28 Minn. 383, 10 N. W. 416.

[38] Wilson v. Fuller, 58 Minn. 149, 59 N. W. 988.

[39] Meacham v. Cooper, 36 Minn. 227, 30 N. W. 669. See Plano Mfg. Co. v. Richards, 86 Minn. 94, 90 N. W. 120, and cases under note 34, supra.

[40] Meacham v. Cooper, 36 Minn. 227, 30 N. W. 669; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88.

[41] Pullen v. Wright, 34 Minn. 314, 26 N. W. 394. See § 317.

[42] Marsh v. Webber, 13 Minn. 109(99); Johnson v. Wallower, 15 Minn. 472(387); Wilson v. Fuller, 58 Minn. 149, 59 N. W. 988; Brown v. Doyle, 69 Minn. 543, 72 N. W. 814.

[43] Marsh v. Webber, 13 Minn. 109(99).

[44] Humphrey v. Merriam, 37 Minn. 502, 35 N. W. 365.

[45] Cooper v. Reaney, 4 Minn. 528(413); Beers v. Reynolds, 11 N. Y. 97; Tipton v. Feitner, 20 N. Y. 423. See Dunnell, Minn. Digest, § 4882.

[46] Harbeck v. Carpenter-Robinson, 123 Minn. 389, 143 N. W. 916.

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SCHOOLS AND SCHOOL DISTRICTS

877. Pleading—In general—In an action by a school teacher against a school district for his salary it is necessary for the complaint to show that the plaintiff is a duly qualified teacher, possessing a certificate.[1] Cases are cited below involving questions of pleading relating to school districts.[2]

SHERIFFS AND CONSTABLES

878. Pleading—In general—When a sheriff is sued for conversion, or trespass, or in replevin, the ordinary forms of complaint may be used. It is unnecessary and generally inadvisable to describe him as a sheriff or sue him in his official capacity.[3] When he wrongfully withholds money received in his official capacity a common count for money had and received will lie.[4] It is provided by statute that under certain circumstances a sheriff seizing property under a writ cannot be sued by third party claimants unless they serve upon him a notice of claim,[5] but it is not ordinarily necessary to allege the service of such notice in a complaint.[6] A sheriff suing on a note upon which he has levied must allege and prove not only the execution, but a valid judgment upon which it issued.[7] A sheriff suing to recover property, or its value, by virtue of process in his hands, must allege and prove the process and a valid judgment upon which it issued.[8] If a sheriff wrongfully obtains money from his

[1] Jenness v. School Dist., 12 Minn. 448(337) (possession of certificate must be alleged); Ryan v. School Dist., 27 Minn. 433, 8 N. W. 146 (possession of certificate must be alleged—allegation that teacher and district "entered into an agreement in writing" implies that statutory requirements have been complied with); Goetz v. School Dist., 31 Minn. 164, 17 N. W. 276 (allegation that the plaintiff is a "duly qualified teacher of and in the public schools of the state" held sufficient); Norton v. Wilkes, 93 Minn. 411, 101 N. W. 619 (allegation to effect that plaintiff was a legally qualified teacher held sufficient).

[2] School District v. Thompson, 5 Minn. 280(221) (complaint on a note given by the trustees of a district held insufficient in not showing authority for execution of note); Gould v. Sub.-Dist., 7 Minn. 203(145) (acts of the district by its officers may be alleged to have been done directly by the district itself); Soule v. Thelander, 31 Minn. 227, 17 N. W. 373 (allegation of existence of school district held sufficient—from an allegation that a regular meeting of a district was held, at which a certain vote was had, it will be presumed that the meeting was legal); Brown v. Fitcher, 91 Minn. 41, 97 N. W. 416 (complaint on a district order sustained); Scott-Graff Lumber Co. v. Independent School Dist., 112 Minn. 474, 128 N. W. 672 (complaint against district for failure to take a public contractor's bond sustained).

[3] Dennis v. Snell, 50 Barb. (N. Y.) 95; Bedell v. Carll, 33 N. Y. 581.

[4] See § 772.

[5] G. S. 1913 § 7843. See Dunnell, Minn. Digest, §§ 3528, 8755.

[6] Perkins v. Zarracher, 32 Minn. 71, 19 N. W. 385; Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995. See, as to the necessity of a demand, Dunnell, Minn. Digest, § 8755; Hicks v. Cleveland, 48 N. Y. 84.

[7] Mower v. Stickney, 5 Minn. 397(321).

[8] Clark v. Norton, 6 Minn. 412(277).

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county for alleged official fees it may be recovered from him under a count for money had and received.[9] Cases are cited below involving the sufficiency of complaints on the official bonds of sheriffs.[10]

SPECIFIC PERFORMANCE

879. Complaint—It is unnecessary to allege a tender or offer of performance and a demand before suit. It is sufficient to make a tender of performance in the complaint.[11] In declaring on a contract within the statute of frauds it is unnecessary to allege that the contract is in writing.[12] Where strangers to the contract are made defendants because they have an interest in the premises, it is sufficient to allege generally that they have or claim to have an estate or interest in the premises.[13] A complaint in an action for the specific performance of a contract for the sale of personalty must show affirmatively that an action for damages would be an inadequate remedy.[14] An allegation that a contract was "made and entered into" is a sufficient allegation of execution, including delivery.[15] In an early case it was intimated that in an action to enforce an oral contract to convey land it is necessary to allege in the complaint that the defendant is unable to respond in damages.[16] It is proper to pray for damages.[17] Cases are cited below involving the sufficiency of particular complaints.[18]

[9] Megaarden v. Hennepin County, 102 Minn. 134, 112 N. W. 899.

[10] Ramsey County v. Brisbin, 17 Minn. 451(429) (complaint for failure to pay over money received on redemption—held to show delivery of bond and redemptioner's right to redeem); Hall v. Tierney, 89 Minn. 407, 95 N. W. 219 (complaint for wrongful levy and assault and battery sustained); Manter v. Petrie, 123 Minn. 333, 143 N. W. 907 (complaint for wrongful seizure of intoxicating liquors under a search warrant held insufficient). See Dunnell, Minn. Digest, § 8738.

[11] Lewis v. Prendergast, 39 Minn. 301, 39 N. W. 802; Minneapolis etc. Ry. v. Chisholm, 55 Minn. 374, 57 N. W. 63. See St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66; Pawlak v. Granowski, 54 Minn. 130, 55 N. W. 831.

[12] Benton v. Schulte, 31 Minn. 312, 17 N. W. 621. See Slingerland v. Slingerland, 46 Minn. 100, 48 N. W. 605.

[13] Seager v. Burns, 4 Minn. 141(93).

[14] Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735; Moulton v. Warren Mfg. Co., 81 Minn. 259, 83 N. W. 1082.

[15] Romans v. Langevin, 34 Minn. 312, 25 N. W. 638.

[16] McClane v. White, 5 Minn. 178(139).

[17] Hopkins v. Baremore, 99 Minn. 413, 109 N. W. 831.

[18] Baldwin v. Winslow, 2 Minn. 213 (174) (allegation of performance by plaintiff held sufficient); St. Paul Division, Sons of Temperance v. Brown, 9 Minn. 157(144) (allegation that plaintiff offered to perform and defendant refused held sufficient); Drake v. Barton, 18 Minn. 462(414) (allegation of execution of a contract by an agent held sufficient); Dye v. Forbes, 34 Minn. 13, 24 N. W. 309 (a complaint insufficient to sustain an action to enforce a mechanic's lien held sufficient to authorize specific performance); St. Paul Land Co. v. Dayton, 37 Minn 364, 34 N. W. 335 (complaint by corporation held to show authority of the corporation to enter into the contract); Ham v. Johnson, 51 Minn. 105, 52 N. W. 1080 (complaint in an action to reform and en-

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880. Demurrer—Generally, in actions for specific performance, the merits can best be determined on the evidence after answer rather than on demurrer.[19] That the description of land in a complaint is false is not a ground for demurrer.[20]

881. Answer—The defence that land is a homestead and the wife did not join in the contract must be specially pleaded.[21] Where a complaint sets forth a contract for the sale of realty in which the description is complete and certain on its face the falsity of the description is a matter of defence to be set up by answer.[22] Cases are cited below involving the sufficiency of particular answers.[23]

force a contract to exchange land sustained); Oliver Mining Co. v. Clark, 65 Minn. 277, 68 N. W. 23 (allegations with reference to liens and a fraudulent conveyance held properly stricken out as irrelevant and redundant); Oliver Mining Co. v. Clark, 69 Minn. 75, 71 N. W. 908 (complaint sustained as against the vendor and a third party to whom the land had been conveyed); Storch v. Duhnke, 76 Minn. 521, 79 N. W. 533 (allegation of acceptance of an offer held insufficient in not making it appear that the notice of acceptance was complete before the offer was withdrawn); Erickson v. Child, 87 Minn. 487, 92 N. W. 1130 (complaint in an action to enforce a contract to satisfy a judgment sustained); Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868 (complaint in an action to enforce a contract for a lease sustained); Halvorsen v. Orinoco Mining Co., 89 Minn. 470, 95 N. W. 320 (complaint in action to enforce a contract for the delivery of corporate stock for personal services sustained against objection first made on appeal); Selover v. Isle Harbor Land Co., 91 Minn. 451, 98 N. W. 344 (complaint in action to enforce a contract of a corporation to issue thirty per cent. of its common stock in consideration of the transfer to it of certain land contracts sustained); Grout v. Stewart, 96 Minn. 230, 104 N. W. 966 (in action to enforce an oral contract to take and hold land as security for a loan held unnecessary to allege damages or special value); Hopkins v. Baremore, 99 Minn. 413, 109 N. W. 831 (complaint held to state a cause of action for specific performance and not a cause of action for damages for fraud, or for failure to perform the contract); Cummings v. Wilson, 99 Minn. 502, 110 N. W. 4 (complaint held defective in not alleging a refusal or failure to deliver an abstract as agreed); Hobart v. Kehoe, 110 Minn. 490, 126 N. W. 66 (defendant agreed to convey if he could obtain a license from a probate court authorizing him to do so—complaint held insufficient for failure to allege performance of this condition precedent); O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112 (land situated in foreign state—complaint by vendor sustained); First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296 (complaint for corporate stock sustained—a promise to sell inferred from an allegation of a contract to buy); Freeburg v. Honemann, 126 Minn. 52, 147 N. W. 827 (complaint for specific performance and for cancelation of a real estate security given by the vendee sustained).

[19] Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056; Chicago etc. Ry. v. Durant, 44 Minn. 361, 46 N. W. 676.

[20] Williams v. Langevin, 40 Minn. 180, 41 N. W. 936.

[21] Brown v. Eaton, 21 Minn. 409.

[22] Williams v. Langevin, 40 Minn. 180, 41 N. W. 936.

[23] Minor v. Willoughby, 3 Minn. 225 (154) (complaint alleged possession by the plaintiff—answer by one claiming

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882. Variance—Cases are cited below involving questions of variance.[24]

STATUTE OF FRAUDS

883. Pleading—In general—In declaring on a contract within the statute it is unnecessary to allege that it was in writing.[25] A complaint which shows on its face that it is based on an oral contract within the statute is demurrable, in the absence of an allegation of facts taking it out of the statute.[26] Allegations of the payment of earnest money or of the part-acceptance of goods are put in issue by a general denial.[27] A defendant who denies in his answer the making of the contract alleged in the complaint may invoke the statute without pleading it;[28] otherwise, if he admits the contract.[29] Where a pleading alleges a contract within the statute, without stating whether it was oral or written, evidence is admissible either of a written contract satisfying the statute, or an oral contract with proof of sufficient part performance to take it out of the statute.[30]

to be a bona fide purchaser held defective in not denying notice of the possession); St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66 (answer alleging fraud, mistake and ignorance, held insufficient); Caldwell v. Depew, 40 Minn. 528, 42 N. W. 479 (answer alleging a mistake in a contract for the sale of realty sustained); Sawyer v. Wallace, 47 Minn. 395, 50 N. W. 366 (in an action on a contract to convey certain realty "already agreed upon," held that the answer raised an issue as to the property included).

[24] Cairncross v. McGrann, 37 Minn. 130, 33 N. W. 548 (variance as respects the boundaries and the nature of the grant or conveyance held immaterial); Slingerland v. Slingerland, 46 Minn. 100, 48 N. W. 605 (complaint did not state whether contract was oral or written—proof of partly performed oral contract held not a variance); Mealey v Finnegan, 46 Minn. 507, 49 N. W. 207 (contract for exchange of lands—action for damages for breach—answer asking specific performance—issues); Laybourn v. Zinns, 95 Minn. 7, 103 N. W. 563 (evidence held not to establish the contract alleged in the complaint whereby the defendant agreed to take from plaintiff certain mining stock at one dollar per share and the plaintiff agreed to deliver it to him for that price).

[25] Walsh v. Kattenburgh, 8 Minn. 127 (99); Armstrong v. Vroman, 11 Minn. 220(142); Benton v. Schulte, 31 Minn. 312, 17 N. W. 621; Collom v. Bixby, 33 Minn. 50, 21 N. W. 855; Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Laybourn v. Zinns, 92 Minn. 208, 99 N. W. 798; Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9. See Note, 49 L. R. A. (N. S.) 1.

[26] Wentworth v. Wentworth, 2 Minn. 277(238); Wilson v. Schnell, 20 Minn. 40(33); Russell v. Wisconsin Central Ry., 39 Minn. 145, 39 N. W. 302.

[27] Russell v. Wisconsin Central Ry., 39 Minn. 145, 39 N. W. 302.

[28] Tatge v. Tatge, 34 Minn. 272, 25 N. W. 596, 26 N. W. 121; Fontaine v. Bush, 40 Minn. 141, 41 N. W. 465; Bean v. Lamprey, 82 Minn. 320, 84 N. W. 1016.

[29] Iverson v. Cirkel, 56 Minn. 299, 57 N. W. 800; Bean v. Lamprey, 82 Minn. 320, 84 N. W. 1016. See Wentworth v. Wentworth, 2 Minn. 277(238); Taylor v. Allen, 40 Minn. 433, 42 N. W. 292.

[30] Slingerland v. Slingerland, 46 Minn. 100, 48 N. W. 605; Ferguson v. Trovaten, 94 Minn. 209, 102 N. W. 373.

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STATUTES

884. Pleading—In general—General or public statutes of this state and of the United States need not be pleaded as the courts are bound to take judicial notice of them.[31] In pleading a special or local statute, or any right thereunder, it is sufficient to refer to the statute by its title and the date of its approval, and thereupon the court is bound to take judicial notice of it.[32] Foreign statutes must be pleaded and proved like other matters of fact.[33] An exception in the enacting clause of a statute must be negatived in pleading, but a proviso need not be.[34]

STREET RAILWAYS

885. Pleading—In general—Cases are cited below involving questions of pleading.[35]

SUBROGATION

886. Pleading—In general—Where a defendant, upon paying a debt sued for, will be subrogated to the rights of the plaintiff in a security for the debt, he may in his answer allege the facts showing that he will be so entitled to subrogation; and the court, before rendering judgment, may require the plaintiff to execute and file a transfer to defendant of the security, to be delivered upon payment of the judgment.[36]

SUNDAY

887. Pleading—In general—The defence that a contract is illegal under the Sunday laws must be pleaded by the defendant as new matter, unless the facts

[31] Sanborn v. People's Ice Co., 82 Minn. 43, 84 N. W. 641; Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428; Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175 (federal statute); McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177 (id.); Ahrens v. Chicago etc. Ry., 121 Minn. 335, 141 N. W. 257 (id.). See, as to pleading the federal employers' liability act, Note, 47 L. R. A. (N. S.) 74.

[32] R. L. 1905 § 4147; G. S. 1913 § 7773. See § 223.

[33] See § 667.

[34] Faribault v. Hulett, 10 Minn. 30 (15); Lawver v. Slingerland, 11 Minn. 447(330). See Shartle v. Minneapolis, 17 Minn. 308(284, 290).

[35] Ekman v. Minneapolis St. Ry., 34 Minn. 24, 24 N. W. 291 (turntable case—complaint sustained); Lydecker v. St. Paul City Ry., 61 Minn. 414, 63 N. W. 1027 (passenger alighting from a car and passing behind it upon parallel tracks was struck by a car coming from the opposite direction—complaint held not to allege any negligence in defendant).

[36] Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. 865; Barton v. Moore, 45 Minn. 98, 47 N. W. 460. See Dunnell, Minn. Digest, § 9044.

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appear in the complaint,[37] or upon the evidence.[38] If it is alleged that an act was done on a specified date the court will take notice that the date fell on Sunday.[39]

SURETYSHIP

888. Pleading—In general—In pleading a release of the surety by an extension of time by the creditor to the principal debtor it is sufficient to allege in general terms that at the request of the principal debtor, and for a valuable consideration, the creditor extended the time for the payment of the debt to a specified time, without the consent of the surety.[40] The surety may plead any defence available to the principal.[41] If a surety pays the debt of his principal he may recover the amount paid from his principal under a common indebitatus count for money paid.[42] Cases are cited below involving various questions of pleading.[43]

TAXATION

889. Statutory actions to test tax titles—Pleading—There was formerly a special statutory action in which to test tax titles.[44] Cases are cited below

[37] Woodbridge v. Sellwood, 65 Minn. 135, 67 N. W. 799.

[38] Handy v. St. Paul Globe Publishing Co., 41 Minn. 188, 42 N. W. 872.

[39] Finney v. Callendar, 8 Minn. 41(23); Webb v. Kennedy, 20 Minn. 419(374).

[40] Huey v. Pinney, 5 Minn. 310(246) (an answer held sufficient though it did not state the time of the extension or the nature of the consideration); Washington Slate Co. v. Burdick, 60 Minn. 270, 62 N. W. 285 (surety must allege that extension was given without his consent); St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408 (informal plea sustained against objection on the trial).

[41] First Nat. Bank v. Rogers, 13 Minn. 407(376).

[42] See § 797.

[43] Kimmel v. Lowe, 28 Minn. 265, 9 N. W. 764 (complaint in action by surety against principal for reimbursement sustained); Becker v. Northway, 44 Minn. 61, 46 N. W. 210 (surety held entitled to set off a debt due the principal); Farrell v. Fabel, 47 Minn. 11, 49 N. W. 303 (answer alleging conditional delivery of bond held insufficient); Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351 (complaint on fidelity bond sustained); Fuller v. Quesnel, 63 Minn. 302, 65 N. W. 634 (reply construed as admitting that an extension of time was given); Fidelity & Casualty Co. v. Lawler, 64 Minn. 144, 66 N. W. 143 (complaint on fidelity bond sustained); Bates v. Watson, 76 Minn. 332, 79 N. W. 309 (id.); Bjoin v. Anglim, 97 Minn. 526, 107 N. W. 558 (complaint on bond which principal failed to sign held insufficient); Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426 (complaint on a contractor's bond—allegation that payments made "during construction" exceeded eighty per cent. of contract price held on demurrer not to show such payments to have been made before final completion of contract—breach of bond sufficiently alleged); Pulaski Hall Assn. v. American Surety Co., 123 Minn. 222, 143 N. W. 715 (release of surety by extension of time to complete building—release by payment after default—necessity of pleading such releases).

[44] G. S. 1894 § 5821; Laws 1887 c. 127; Laws 1897 c. 266. See Dunnell, Minn. Digest, § 9531; Minn. Tax Law, § 643.

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involving questions of pleading in such action.[45] The present statute authorizes a special action by a certificate-holder to quiet his title.[46] Cases are cited below involving questions of pleading relating to tax titles.[47]

890. Miscellaneous cases—Pleading—Cases are cited below involving various questions of pleading relating to taxes.[48]

TENDER

891. Pleading—In general—Cases are cited below involving the sufficiency of particular pleadings alleging a tender.[49]

[45] Lewis v. Bartleson, 39 Minn. 89, 38 N. W. 707 (complaint need not set forth specifically, as in a suit to remove a cloud, the particular tax deed or proceedings upon which the hostile claim is based); Kipp v. Hagman, 73 Minn. 5, 75 N. W. 746 (where the defendant in his answer alleges title in himself and demands affirmative relief he waives proof of allegation in complaint that land is vacant); Owen v. Ruthruff, 81 Minn. 397, 84 N. W. 217 (action not governed by equity rules in actions to remove a cloud—defendant not required to assert his claim—it is proper practice for the plaintiff to specify in his complaint the particular tax certificate or deed which he assails).

[46] R. L. 1905 § 972; G. S. 1913 § 2168; Foster v. Clifford, 110 Minn. 79, 124 N. W. 632 (complaint held sufficient under statute).

[47] Moulton v. Doran, 10 Minn. 67(49) (complaint in action under Laws 1862 c. 4 § 7 to test the validity of a tax sale held insufficient); St. Peter's Church v. Scott County, 12 Minn. 395(280) (when a complaint attacks a tax title it must show the grounds of its invalidity); Bracket v. Gilmore, 15 Minn. 245(190) (an answer in an action to determine adverse claims which denies that defendant claims any estate, interest, or lien, except a lien under a certificate of sale for delinquent taxes, amounts to a disclaimer); Webb v. Bidwell, 15 Minn. 479(394) (requisites of complaint to enforce a lien for taxes under Laws 1862 c. 4 § 8); Willard v. Redwood County, 22 Minn. 61 (requisites of complaint under G. S. 1866 c. 11 § 154 as amended by Laws 1869 c. 23 to test the validity of forfeiture of land to the state for non-payment of taxes); Bell v. Dangerfield, 26 Minn. 307, 3 N. W. 698 (where a judgment is necessary to authorize a certificate of sale and a deed it must be alleged); Branham v. Bezanson, 33 Minn. 49, 21 N. W. 861 (in action to determine adverse claims a defence of title under a tax sale is not inconsistent with a defence of ownership in fee under a prior source); Foster v. Clifford, 110 Minn. 79, 124 N. W. 632 (complaint held sufficient under either § 972 or § 4424 of R. L. 1905).

[48] Clayton v. Bennington, 24 Minn. 14 (complaint for conversion of taxes held insufficient—action between two towns); Folsom v. Chisago County, 28 Minn. 324, 9 N. W. 881 (complaint in action against county for publishing a delinquent tax list sustained).

[49] St. Paul Division, Sons of Temperance v. Brown, 9 Minn. 157(144, 152) (allegation of tender held sufficient though it did not state the exact amount tendered); Thompson v. Foster, 21 Minn. 319 (allegation as to keeping tender good sustained); Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834 (allegations of tender held insufficient—date and amount of offer not stated); Dunn v. Dewey, 75 Minn. 153, 77 N. W. 793 (allegation as to keeping tender good sustained).

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TOWNS

892. Actions against towns—Pleading—A complaint in an action against a town for damages caused by its officers must show that such acts were within the scope of the officers' authority.[50]

TRADE-MARKS AND TRADE-NAMES

893. Action to enjoin use of trade-mark—Pleading—Cases are cited below involving the sufficiency of particular complaints in actions to enjoin the use of trade-marks.[51]

TRESPASS

894. Trespass to personalty—Pleading—In a complaint for trespass de bonis asportatis it is unnecessary to allege that the plaintiff was entitled to the immediate possession or that the taking was wrongful or unlawful.[52] The property must be described with reasonable certainty.[53] If special damages are sought they must be pleaded.[54]

895. Trespass to realty—Pleading—The common-law action of trespass is abolished in this state. It is immaterial whether the facts alleged are sufficient to sustain a common-law action of trespass quare clausum fregit or trespass on the case; it is enough if the facts alleged show a wrong committed by the defendant against the plaintiff for which the law affords relief.[55] A complaint which alleges plaintiff's ownership and possession at the time of the entry, defendant's wrongful entry and acts of trespass, and plaintiff's damages, is sufficient.[56] It is essential to allege possession of the plaintiff at the time of the entry,[57] or a title carrying a right of immediate possession.[58] A general allegation of ownership is a sufficient allegation of possession.[59] The wrongful entry may be alleged in general terms.[60] A complaint which alleges a trespass upon realty, and that the plaintiff was thereby deprived of the use of the

[50] Kreger v. Bismark, 59 Minn. 3, 60 N. W. 675.

[51] Cigar Makers' Protective Union v. Conhaim, 40 Minn. 243, 41 N. W. 943 (complaint held insufficient); J. R. Watkins Medical Co. v. Sands, 80 Minn. 89, 82 N. W. 1109 (complaint sustained).

[52] Buck v. Colbath, 7 Minn. 310(238); Clague v. Hodgson, 16 Minn. 329(291).

[53] See State v. Hinckley, 4 Minn. 345 (261, 268).

[54] Gray v. Bullard, 22 Minn. 278. See Gervais v. Powers, 1 Minn. 45(30).

[55] Weaver v. Miss. etc. Co., 28 Minn. 542, 11 N. W. 113; Mitchell v. Mitchell, 54 Minn 301, 55 N. W. 1134.

[56] Michaelis v. Michaelis, 43 Minn. 123, 44 N. W. 1149.

[57] Gould v. Sub.-Dist., 7 Minn. 203 (145); Moon v. Avery, 42 Minn. 405, 44 N. W. 257; Olson v. Minn. etc. Ry., 89 Minn. 280, 94 N. W. 871.

[58] Blew v. Ritz, 82 Minn. 530, 85 N. W. 548; Woll v. Voight, 105 Minn. 371, 117 N. W. 608. See Daley v. St. Paul, 7 Minn. 390(311); Booth v. Sherwood, 12 Minn. 426(310).

[59] Id.

[60] Morrell v. Chicago etc. Ry., 49 Minn. 526, 52 N. W. 140.

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property, and that such use was worth a certain sum, is sufficient, though it does not in terms allege that the plaintiff was damaged.[61] If special damages are sought they must be pleaded.[62] A plea of license is not inconsistent with a denial of plaintiff's title.[63] Wilfulness is implied from a trespass. Good faith is not a defence, but goes in mitigation of damages, and for that purpose is admissible without being pleaded.[64] Cases are cited below involving the sufficiency of particular pleadings.[65]

TRUSTS

896. Action to enforce—Adverse title—Pleading—In an action to enforce a trust it has been held that the defendant might plead and have determined an adverse title.[66]

897. Action to enforce a resulting trust for creditors—Pleading—As a general rule the complaint must allege that the plaintiff has recovered a judgment against his debtor, and that an execution thereon has been returned unsatisfied, but it is unnecessary to allege further that the debtor is insolvent and has no other property out of which the judgment may be satisfied.[67] The trust is sufficiently shown by alleging that the land in question was conveyed to the defendant, that the purchase price thereof was paid by the judgment debtor, and the title thereto taken in the name of the defendant to defraud creditors. It is unnecessary to allege that the debtor intended to defraud creditors, or that any of them were defrauded, or that the debtor was the owner of the consideration paid. It is improper to allege that he has an interest in the land.[68] It is not improper to allege that the transfer was made to defraud creditors.[69]

898. Action to enforce resulting trust—Pleading—Upon a conveyance of real estate to one person for a consideration paid by another, no trust can arise in favor of any one, not a creditor of the person paying, unless the conveyance was made to the grantee named, without the consent of the person paying, so as to be a fraud upon him. In a complaint to enforce such assumed trust, the

[61] Weaver v. Miss. etc. Co., 28 Minn. 542, 11 N. W. 113.

[62] Spencer v. St. Paul etc. Ry., 21 Minn. 362; Wampach v. St. Paul, etc. Ry., 21 Minn. 364. See Isaacson v. Minneapolis etc. Ry., 27 Minn. 463, 8 N. W. 600 (evidence of items of damages not pleaded admitted without objection).

[63] Booth v. Sherwood, 12 Minn. 310 (426).

[64] Hoyt v. Duluth & Iron Range Ry., 103 Minn. 396, 115 N. W. 263.

[65] Hartz v. St. Paul etc Ry., 21 Minn. 358 (complaint for construction of railway in street—sufficiency of the description of the locus in quo); Spencer v. St. Paul etc. Ry., 21 Minn. 362 (id.); Wampach v. St. Paul etc. Ry., 21 Minn. 364 (id.).

[66] Cheever v. Converse, 35 Minn. 179, 28 N. W. 217.

[67] Moffatt v. Tuttle, 35 Minn. 301, 28 N. W. 509; Williams v. Kemper, 99 Minn. 301, 109 N. W. 242.

[68] Evans v. Staalle, 88 Minn. 253, 92 N. W. 951.

[69] Leonard v. Green, 34 Minn. 137, 24 N. W. 915.

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fact of want of such consent ought to be expressly alleged, and not left to inference from other allegations.[70]

UNDUE INFLUENCE

899. Pleading—In general—In pleading undue influence the ultimate facts constituting the undue influence must be specifically alleged, but it is unnecessary to allege the evidentiary facts by which the ultimate facts are to be proved on the trial.[71]

UNFAIR COMPETITION

900. Interference with business of another—Pleading—A complaint which states, in substance, that the defendant, a banker and man of wealth and influence in the community, maliciously established a barber shop, employed a barber to carry on the business, and used his personal influence to attract customers from the plaintiff's barber shop, not for the purpose of serving any legitimate purpose of his own, but for the sole purpose of maliciously injuring the plaintiff, whereby the plaintiff's business was ruined, states a cause of action.[72]

USE AND OCCUPATION

901. Pleading—In general—A complaint in the form of the common indebitatus count for use and occupation, or substantially in that form, is sufficient in our practice.[73] Under such a complaint the plaintiff may prove an occupation under a written or oral agreement for hiring, or such facts as will raise an implied promise or obligation to pay for the occupation of the premises in case there was no express agreement.[74] A complaint pleading a lease and also facts justifying recovery as for use and occupation has been sustained, no objection being made before trial.[75] It is the general rule that a count for use and occupation will not lie where there is a lease under seal, but this rule is doubtless not in force in this state, where the distinction between sealed and unsealed instruments has been abolished.[01]

[70] Petzold v. Petzold, 53 Minn. 39, 54 N. W. 933.

[71] Johnson v. Velve, 86 Minn. 46, 90 N. W. 126.

[72] Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946.

[73] Waters v. Clark, 22 How. Pr. (N. Y.) 104; Armstrong v. Clark, 17 Ohio 495. See Commonwealth etc. Co. v. Dokko, 71 Minn. 533, 74 N. W. 891 (informal complaint sustained against objection first raised on the trial).

[74] Waters v. Clark, 22 How. Pr. (N. Y.) 104.

[75] Dean v. Leonard, 9 Minn. 190(176).

[01] See § 534.

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USURY

902. Pleading—In general—A plea of usury is to be liberally construed like any other plea.[76] Cases are cited below involving questions of pleading relating to usury.[77]

VENDOR AND PURCHASER

903. Bona fide purchaser—Pleading—In pleading the fact that a person was a bona fide purchaser it is necessary to deny notice positively and fully.[78] A general allegation that one was a bona fide purchaser is insufficient.[79] Where the complaint alleged that property was conveyed to defendant without consideration and to defraud the plaintiff, and the answer alleged that defendant purchased the property for value and in good faith, it was held that a reply was unnecessary.[80]

904. Various actions—Pleading—Cases are cited below involving questions of pleading in actions by a vendor for the purchase price;[81] in actions by a

[76] Lewis v. Barton, 106 N. Y. 70, 12 N. E. 437.

[77] Reiff v. Bakken, 36 Minn. 333, 31 N. W. 348 (necessity of alleging foreign statute); Adamson v. Wiggins, 45 Minn. 448, 48 N. W. 185 (replevin—usury admissible under general denial); W. B. Clark Investment Co. v. McNaughton, 46 Minn. 8, 48 N. W. 412 (reply held to put in issue allegations as to usury in answer—renewal note—proof of original note under pleadings); Cleveland v. Stone, 51 Minn. 274, 53 N. W. 647 (action to cancel usurious mortgage on realty—cloud on title—requisites of complaint); Babcock v. Murray, 58 Minn. 385, 59 N. W. 1038 (action on notes—proof of usury held inadmissible under answer); Central Building & Loan Assn. v. Lampson, 60 Minn. 422, 62 N. W. 544 (a plea of usury must negative every supposable fact which, if true, would render the transaction lawful); Fredin v. Richards, 61 Minn. 490, 63 N. W. 1031 (requisites of complaint under statute to recover amount paid); Stevens v. Staples, 64 Minn. 3, 65 N. W. 959 (question of usury not ordinarily determinable on demurrer); Endres v. First Nat. Bank, 66 Minn. 257, 68 N. W. 1092 (action against national bank to recover penalty under statute—complaint sustained); Birch v. Security Savings & Loan Assn., 71 Minn. 112, 73 N. W. 513 (complaint for cancelation of note and mortgage and to set aside a foreclosure sustained); Commonwealth etc. Co. v. Dokko, 73 Minn. 229, 75 N. W. 106 (ejectment—usury admissible under general denial); Kommer v. Harrington, 83 Minn. 114, 85 N. W. 939 (action to cancel mortgage and restrain its foreclosure on the ground of usury—complaint sustained); Wells v. Moses, 87 Minn. 432, 92 N. W. 334 (action on note—answer alleging that note was given in payment of interest on a usurious note sustained); Johnson v. Joyce, 90 Minn. 377, 97 N. W. 113 (action on note—answer alleging usury sustained).

[78] Minor v. Willoughby, 3 Minn. 225 (154); Newton v. Newton, 46 Minn. 33, 48 N. W. 450.

[79] Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713.

[80] Pott v. Hanson, 109 Minn. 416, 124 N. W. 17.

[81] Hamilton v. Hulett, 51 Minn. 208, 53 N. W. 364 (complaint sustained); Paget v. Barton, 58 Minn. 510, 60 N. W. 342 (id.). See Dunnell, Minn. Digest, § 10084.

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vendor to cancel a contract for default;[82] in actions by a vendor to rescind a contract for fraud;[83] in actions by a purchaser to cancel a contract for fraud;[84] in actions by a purchaser to recover payments;[85] in actions by a purchaser to recover damages for fraud;[86] and in actions by a purchaser to recover damages for breach of contract.[87]

WATERS

905. Pleading—In general—In an action for damages from an overflow of lands caused by a dam it is unnecessary to allege the raising of the dam at any particular time or at all,[88] or to allege that the stream was non-navigable.[89] A complaint against a municipal board of water commissioners for drawing water from a lake by means of an aqueduct and thereby diminishing the flow of water in a creek, which was an outlet of the lake, has been held insufficient on demurrer.[90]

[82] Denton v. Scully, 36 Minn. 325, 4 N. W. 41. See Dunnell, Minn. Digest, § 10087.

[83] Albitz v. Minneapolis etc. Ry., 40 Minn. 476, 42 N. W. 394; Lofgren v. Peterson, 54 Minn. 343, 56 N. W. 44.

[84] Knappen v. Freeman, 48 Minn. 491, 50 N. W. 533 (unnecessary for complaint to allege a disaffirmance or a previous offer to return or an offer to do what the court may require as a condition of granting relief—bringing action a sufficient disaffirmance); Peterson v. Landahl, 86 Minn. 32, 89 N. W. 1131 (complaint sustained). See Dunnell, Minn. Digest, § 10097.

[85] Horn v. Butler, 39 Minn. 515, 40 N. W. 833 (plaintiff held entitled to judgment on the pleadings); Gregory v. Christian, 42 Minn. 304, 44 N. W. 202 (defendant must plead and prove equities excusing his default); McManus v. Blackmarr, 47 Minn. 331, 50 N. W. 230 (complaint held insufficient); Howe v. Coates, 90 Minn. 508, 97 N. W. 129 (complaint sustained as to one cause of action and held insufficient as to another); Ballard v. Lyons, 114 Minn. 264, 131 N. W. 320 (complaint sustained); Olson v. Northern Pacific Ry., 126 Minn. 229, 148 N. W. 67 (action to recover payments — fraud — election of remedies — complaint held not one for money had and received). See Dunnell, Minn. Digest, § 10098.

[86] Porter v. Fletcher, 25 Minn. 493 (complaint held sufficient and to state a joint cause of action); Olson v. Northern Pacific Ry., 126 Minn. 229, 148 N. W. 67 (a vendee in an executory contract for the sale of land cannot maintain an action for damages for false representations when he has failed to make the stipulated payments and by reason thereof the vendor has lawfully terminated the contract—election of remedies—when action for money had and received will lie). A recovery may be had under a common count for money had and received. 39 Cyc. 2063.

[87] Matteson v. U. S. etc. Co., 103 Minn. 407, 115 N. W. 195 (complaint sustained —necessity of alleging tender). See Dunnell, Minn. Digest, § 10101.

[88] Hayden v. Albee, 20 Minn. 159(143).

[89] Rhoades v. Siman, 24 Minn. 192.

[90] Biron v. Board of Water Commissioners, 41 Minn. 519, 43 N. W. 482.

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WILLS

906. Pleading—In general—An allegation that a person named made and executed, on a day named, his last will and testament, in accordance with the laws of a named state, is sufficient.[91]

WORK AND LABOR

907. Action by servant for breach of contract of employment—Pleading—It is unnecessary to allege that the plaintiff has always been ready and willing to perform or that he has been unable to secure other employment.[92] The essential allegations are that the parties mutually agreed, the plaintiff to do the work and the defendant to employ him, and that the plaintiff offered to do the work and the defendant refused to permit him to do it.[93]

908. Action by servant for wages—Pleading—A servant may recover his wages under a common indebitatus count.[94] A complaint which alleges that the plaintiff worked for the defendant for a specified period, for which work defendant agreed to pay plaintiff a specified amount which has not been paid, is sufficient.[95] In an action for wages on an express contract it is error to instruct the jury that if the express contract is not shown they may find the reasonable value of the services if there is no evidence of such value.[96] The fact that the servant embezzled from the master throughout the term of his service may be set up as a complete defence.[97] The master may plead, by way of recoupment and setoff, damages sustained by him through the negligence of the servant in the performance of the contract of employment.[98] He may counterclaim for the conversion of funds by the servant.[99]

909. Action by servant for wrongful discharge—Pleading—It is not incumbent on the servant to allege or prove an offer to perform.[1] If a servant obtains other employment and compensation after his discharge, that is af-

[91] Norris v. Norris, 63 How. Pr. (N. Y.) 319, 325.

[92] Drea v. Carlveau, 28 Minn. 280, 9 N. W. 802. See McMullan v. Dickinson Co., 63 Minn. 405, 65 N. W. 661.

[93] Starkey v. Minneapolis, 19 Minn. 203(166). See Lasher v. Liberty Assn., 115 Minn 230, 132 N. W. 11 (complaint construed as one for breach of contract of employment).

[94] Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273. See § 910.

[95] See Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593; Hart v. Minneapolis, 81 Minn. 476, 84 N. W. 342 (action by public officer for salary).

[96] Bernth v. Smith, 112 Minn. 72, 127 N. W. 427. See § 913.

[97] Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245. See Lahr v. Kraemer, 91 Minn. 26, 97 N. W. 418; Person v. McCargar, 92 Minn. 294, 99 N. W. 885.

[98] Harlan v. St. Paul etc. Ry., 31 Minn. 427, 18 N. W. 147. See Jordahl v. Berry, 72 Minn. 119, 124, 75 N. W. 10; Lyford v. Martin, 79 Minn. 243, 82 N. W. 479.

[99] Lahr v. Kraemer, 91 Minn. 26, 97 N. W. 418.

[1] McMullan v. Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663.

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firmative matter in recoupment which the defendant is bound to allege and prove.[2]

910. Common indebitatus count for work and labor—Complaint—A complaint in the form of the common indebitatus count for work and labor, or substantially in that form, is sufficient.[3] The promise to pay implied by law need not be alleged.[4] It is probably necessary to allege non-payment.[5]

911. Quantum meruit count—A complaint in the form of the quantum meruit count at common law, or substantially in that form, is sufficient under our practice.[6] The promise to pay which the law implies need not be alleged.[7] The reasonable value of the services must be alleged.[8] It is probably necessary to allege non-payment.[9] It is necessary to allege a request by the defendant or circumstances equivalent to a request.[10] A complaint alleging in one count an express contract, and also facts justifying a recovery upon an implied contract, is theoretically objectionable, and the plaintiff may be required to elect between the two inconsistent causes of action upon proper objection being made. If no objection is made recovery may be had either on express or implied contract. Objection cannot be raised for the first time on appeal. A motion to compel an election is addressed to the discretion of the trial court. The prevailing and better practice is to deny such a motion on the trial.[11] In

[2] Williams v. Anderson, 9 Minn. 50 (39); Horn v. Western Land Assn., 22 Minn. 233; Bennett v. Morton, 46 Minn. 113, 48 N. W. 678; Beissel v. Vermillion Farmers Elevator Co., 102 Minn. 229, 113 N. W. 575.

[3] Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273; Guthrie v. Olson, 32 Minn. 465, 21 N. W. 557; Vistaunet v. Thief River Falls, 111 Minn. 537, 126 N. W. 1134; Farron v. Sherwood, 17 N. Y. 227; Messmer v. Block, 100 Wis. 664, 76 N. W. 598; Swartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41.

[4] See Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122; Boardman v. Ward, 40 Minn. 399, 401, 42 N. W. 202; Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

[5] Bacon v. Chapman, 82 N. Y. S. 545. See § 594.

[6] See, for example, Nash v. Murnan, 6 Minn. 577(411); Siebert v. Leonard, 17 Minn. 433(410); Lautenschlager v. Hunter, 22 Minn. 267; Butler v. Winona Mill Co., 28 Minn. 205, 9 N. W. 697; La Du-King Mfg. Co. v. La Du, 36 Minn. 473, 31 N. W. 938; Kriger v. Leppel, 42 Minn. 6, 43 N. W. 484; and cases under note 11.

[7] Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444. See Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122; Boardman v. Ward, 40 Minn. 399, 401, 42 N. W. 202.

[8] Farrington v. Wright, 1 Minn. 241 (191). See Spinney v. Hill, 81 Minn. 316, 84 N. W. 116.

[9] Bacon v. Chapman, 82 N. Y. S. 545; Babcock v. Anson, 106 N. Y. S. 642. See Lautenschlager v. Hunter, 22 Minn. 267, 269.

[10] Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

[11] Hewitt v. Brown, 21 Minn. 163; Plummer v. Mold, 22 Minn. 15; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; Langguth v. Burmeister, 101 Minn. 14, 111 N. W. 653; Snyder v. Crescent Milling Co., 111 Minn. 234, 126 N. W. 822; Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 141 N. W. 481; Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104; Lufkin v. Harvey, 125 Minn. 458, 147

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New York and most code states the plaintiff may introduce an express contract under a quantum meruit count. The only effect of proving an express contract fixing the price is that the stipulated price becomes the quantum meruit in the case. It is not a question of variance, but only of the mode of proving the allegations of the complaint.[12] This rule seems never to have been explicitly adopted in this state, though it has obvious practical advantages and works no substantial prejudice to the adverse party. Proof of an express contract is at most a mere variance which should be disregarded unless it is made to appear that the adverse party has been misled to his prejudice.[13] To avoid all danger of a variance it is advisable to use a common indebitatus count in all cases rather than a quantum meruit count. The former count lies in all cases in which the latter will lie.[14]

912. Same—Express contract as a defence—New matter—Recoupment
In an action on quantum meruit the defence that the services were rendered under an express contract is new matter to be specially pleaded and is inadmissible under a denial.[15] An amendment setting up the express contract should ordinarily be allowed as a matter of course.[16] In pleading an express contract as a defence its performance by the defendant should be alleged.[17] The defendant may plead in recoupment any damages he may have suffered by reason of the failure of the plaintiff to fully perform,[18] or by reason of the negligence of the plaintiff in performance.[19]

913. Complaint on express contract—Recovery on quantum meruit—
Under a complaint to recover an alleged agreed compensation for services a recovery may be had upon proof of their reasonable value. At most it is but a variance between the pleading and the proof which may be disregarded, unless it is made to appear that the adverse party has been misled.[20] If the adverse

N. W. 444. In New York a party is not required to elect. Rubin v. Cohen, 113 N. Y. S. 843.

[12] Fells v. Vestvali, 41 N. Y. 152 (2 Keyes); Ludlow v. Dole, 62 N. Y. 617; Higgins v. Newton etc. Ry., 66 N. Y. 604; Boyd v. Vale, 82 N. Y. S. 932; Rubin v. Cohen, 113 N. Y. S. 843; Nightingale v. Eagle, 126 N. Y. S. 339; West v. Eley, 39 Or. 461, 65 Pac. 798; Jenney Electric Co. v. Branham, 145 Ind. 314, 41 N. E. 448; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127.

[13] Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472; Snyder v. Crescent Milling Co., 111 Minn. 234, 126 N. W. 822; Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137.

[14] See § 533.

[15] Lautenschlager v. Hunter, 22 Minn. 267; Register Printing Co. v. Willis, 57 Minn. 93, 58 N. W. 825; Reishus v. Benner, 91 Minn 401, 98 N. W. 186.

[16] See Rees v. Storms, 101 Minn. 381, 384, 112 N. W. 419.

[17] See Butler v. Winona Mill Co., 28 Minn. 205, 9 N. W. 697.

[18] See § 350.

[19] See §§ 350, 908.

[20] Sussdorff v. Schmidt, 55 N. Y. 319 (approved in Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273); Lockhart v. Hamlin, 190 N. Y. 132, 82 N. E. 1094 (approved in Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 141 N. W. 481). See also, Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444; 40 Cyc. 2824; 22 Ency. Pl. & Pr. 1378.

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party objects on the ground of a variance the court ought generally to order an amendment to conform to the proof and without costs. The objection is purely technical and ought to be discouraged.[21] There can be no recovery on a quantum meruit if there is no evidence of the reasonable value of the services.[22]

914. When common counts will lie—No express contract—An indebitatus count will lie whenever a quantum meruit count will lie.[23] Under an indebitatus count a recovery may be had upon proof of either an express or implied contract.[24] A quantum meruit count will lie when one performs services for another at his request, but without any agreement as to compensation, unless it appears that they were rendered gratuitously, or under circumstances making it inequitable to require compensation to be made.[25] It will lie where services are rendered pending negotiations for a contract fixing the compensation, if no contract is made;[26] where services are rendered under a mistake of fact induced by the fraud or concealment of another;[27] where extra or different work than that called for by a special contract is rendered under circumstances raising an implied contract to pay for it.[28]

915. Same—When there is an express contract—When there is a valid and subsisting express executory contract between the parties under which the services are rendered a common count will not lie. The law will not raise an implied promise in such a case, and a common count does not lie except upon an implied promise.[29] But where an express contract has been fully performed

[21] Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472; Snyder v. Crescent Milling Co., 111 Minn. 234, 126 N. W. 822; Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137.

[22] Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845; Bernth v. Smith, 112 Minn. 72, 127 N. W. 427; Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347.

[23] 22 Ency. Pl. & Pr. 1363. See § 533.

[24] Swartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41. See §§ 532, 917.

[25] Rogers v. Hastings & Dakota Ry., 22 Minn. 25 (recovery by officer of a corporation); Wilson v. Minneapolis etc. Ry., 31 Minn. 481, 18 N. W. 291 (services of attorney); Dean v. Hodge, 35 Minn. 146, 27 N. W. 917 (general rule stated as to when an implied contract will be raised—recovery for use of patented article); Johanke v. Schmidt, 79 Minn. 261, 82 N. W. 582 (general rule stated—recovery for work on a farm); Dartt v. Sonnesyn, 86 Minn. 55, 90 N. W. 115 (general rule stated—services of broker); Conlon v. Holste, 99 Minn. 493, 110 N. W. 2 (fees of justice of peace); Annabil v. Traverse Land Co., 108 Minn. 37, 121 N. W. 233 (general rule stated—services of broker). See 40 Cyc. 2808; 2 Ency. Pl. & Pr. 1010; 15 Am. & Eng. Ency. of Law, 2 ed., 1081. As to services between members of a family, see Dunnell, Minn. Digest, § 7307; Note, 11 L. R. A. (N. S.) 873; 133 Am. St. Rep. 250.

[26] Hawkins v. Lange, 22 Minn. 557; McKee v. Vincent, 33 Minn. 508, 24 N. W. 353. See 40 Cyc. 2825.

[27] Boardman v. Ward, 40 Minn. 399, 42 N. W. 202. See 15 Am. & Eng. Ency. of Law, 2 ed., 1086.

[28] Fravel v. Nett, 46 Minn. 31, 48 N. W. 446. See § 917, infra; 15 Am. & Eng. Ency. of Law, 2 ed., 1094; 40 Cyc. 2828; 2 Ency. Pl. & Pr. 1010.

[29] Bond v. Corbett, 2 Minn. 248(209); Mackubin v. Clarkson, 5 Minn. 247(193, 198); Marcotte v. Beaupre, 15 Minn. 152(117); La Du-King Mfg. Co. v. La Du, 36 Minn. 473, 476, 31 N. W. 938.

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by the plaintiff and nothing remains to be done under the contract but the payment of the money by defendant, and the money is due, the law raises an implied promise to pay the debt or stipulated compensation, and a common indebitatus count will lie.[30] A common count, either indebitatus or quantum meruit, will lie where there is a special contract which has been rescinded, or abandoned, or altered, or deviated from in particulars by common consent and the work has been accepted by the defendant and nothing remains to be done under the contract but the payment of the money by defendant, and the money is due; or 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, default, or consent of the defendant, the act of God, or the law from performing the remainder.[31] It will lie where the defendant wrongfully discharges the plaintiff;[32] where the defendant assaults the plaintiff who is working under an entire contract and quits on account of the assault;[33] where plaintiff is entitled to recover for substantial performance of a building contract;[34] where plaintiff has partly performed a special contract and been prevented by illness or death from performing the remainder;[35] where it is agreed that services are to be compensated for in a particular way and such compensation is not made;[36] where the defendant fails to pay an instalment of the stipulated compensation when due and the plaintiff abandons the contract on that ground.[37] A com-

See 40 Cyc. 2824, 2834; 2 Ency. Pl. & Pr. 1009; 15 Am. & Eng. Ency. of Law, 2 ed., 1078.

[30] Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273; Farron v. Sherwood, 17 N. Y. 227; Hosley v. Black, 28 N. Y. 438; Hurst v. Litchfield, 39 N. Y. 377; Higgins v. Newton etc. Co., 66 N. Y. 604; New York News Pub. Co. v. Steamship Co., 148 N. Y. 39, 42 N. E. 514; Schulze v. Farrell, 126 N. Y. S. 678. See 40 Cyc. 2835; 15 Am. & Eng. Ency. of Law, 2 ed., 1079.

[31] Marcotte v. Beaupre, 15 Minn. 152 (117) (performance prevented by defendant); Siebert v. Leonard, 17 Minn. 433(410) (id.); Peet v. East Grand Forks, 101 Minn. 518, 112 N. W. 1003 (breach of contract by defendant—failure to pay instalment of stipulated compensation when due); 2 Ency. Pl. & Pr. 1010; 4 Cyc. 326; 40 Cyc. 2829–2833; 15 Am. & Eng. Ency. of Law, 2 ed., 1079–1096; 2 Chitty, Contracts, 11 Am. ed., 796–875; Note, Cutter v. Powell, 2 Smith's Leading Cases, 8 ed. Pt. II. p. 33; Castagnina v. Balletta, 82 Cal. 250, 23 Pac. 127. See Dunnell, Minn. Digest, §§ 1792, 1793, 1850, 1858, 10366–10376.

[32] Mackubin v. Clarkson, 5 Minn. 247 (193); Marcotte v. Beaupre, 15 Minn. 152(117); 20 Am. & Eng. Ency. of Law, 2 ed. 36.

[33] Erickson v. Sorby, 90 Minn. 327, 96 N. W. 791; Langguth v. Burmeister, 101 Minn. 14, 111 N. W. 653.

[34] See § 917, infra.

[35] La Du-King Mfg. Co. v. La Du, 36 Minn. 473, 477, 31 N. W. 938. See 15 Am. & Eng. Ency. of Law, 2 ed., 1089; 20 Id. 43.

[36] Brown v. St. Paul etc. Ry., 36 Minn. 236, 31 N. W. 941 (services rendered under a contract for a pass on a railroad—pass refused); Schwab v. Pierro, 43 Minn. 520, 46 N. W. 71 (services rendered in contemplation of a devise); New York News Pub. Co. v. Nat. Steamship Co., 148 N. Y. 39, 42 N. E. 514 (services rendered to be paid for in goods—indebitatus count). See 30 Cyc. 2832.

[37] Newton v. Highland Improvement

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mon count will not lie where the plaintiff performs services in part performance of an entire contract and then, without legal excuse or the consent of the defendant, abandons or refuses to perform it.[38] A contract of employment from month to month at a stipulated wage or salary, payable for each month at the end thereof, is an entire contract, within this rule.[39] It will not lie where services are performed under an illegal contract and the parties are in pari delicto,[40] but it will lie where services are performed under a contract unenforceable under the statute of frauds.[41]

916. Same—Admissibility and effect of express contract—In an action on the common counts an express contract between the parties relating to the subject-matter of the action is admissible and may go to the jury to prove the request and as evidence of the value of the services,[42] or to prove that the plaintiff is not entitled to recover on an implied contract.[43] If the express contract has been modified, or abandoned, or rescinded, or the circumstances otherwise entitle the plaintiff to recover on an implied contract for the reasonable value of the services, the defendant may introduce the express contract as evidence of the reasonable value of the services, but it is not conclusive.[44] On the other hand, if the express contract is a valid and subsisting contract between the patries it is not only admissible, but is conclusive in all respects, including the value of the services. The law will not allow a party to cut loose from a valid, subsisting express contract and recover more or otherwise than as stipulated therein.[45] When the action is on an indebitatus count the defend-

Co., 62 Minn. 436, 64 N. W. 1146; Peet v. East Grand Forks, 101 Minn. 518, 112 N. W. 1003; White v. Livingston, 75 N. Y. S. 466, affirmed, 174 N. Y. 538, 66 N. E. 1118.

[38] Nelichka v. Esterly, 29 Minn. 146, 12 N. W. 457; Kohn v. Fandel, 29 Minn. 470, 13 N. W. 904; Kriger v. Leppel, 42 Minn. 6, 8, 43 N. W. 484; Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245; Johnson v. Fehsefeldt, 106 Minn. 202, 118 N. W. 797; Bozzone v. Stafford, 146 N. Y. S. 1076. See Mason v. Heyward, 3 Minn. 182(116); Weber v. Clark, 24 Minn. 354; 40 Cyc. 2833; 15 Am. & Eng. Ency. of Law, 2 ed., 1087.

[39] Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245.

[40] Ingersoll v. Randall, 14 Minn. 400 (304); O'Brien v. St. Paul, 72 Minn. 256, 75 N. W. 375; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035; Leland v. School District, 77 Minn. 469, 80 N. W. 354; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779. See Alworth v. Seymour, 42 Minn. 526, 529, 44 N. W. 1030; Gammons v. Johnson, 69 Minn. 488, 72 N. W. 563; State v. Clark, 116 Minn. 500, 134 N. W. 129; 40 Cyc. 2825; 15 Am. & Eng. Ency. of Law, 2 ed., 1092.

[41] See Dunnell, Minn. Digest, § 8862.

[42] Siebert v. Leonard, 17 Minn. 433 (410); Boyd v. Bargagliotti, 12 Cal. App. 228, 107 Pac. 150; Naylor v. Adams, 15 Cal. App. 548, 115 Pac. 335; Swartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41. See §§ 532, 861, 917.

[43] La Du-King Mfg. Co. v. La Du, 36 Minn. 473, 31 N. W. 938. See Dunnell, Minn. Digest, § 8862.

[44] Adams v. Burbank, 103 Cal. 646, 37 Pac. 640.

[45] Hartley v. Laimbeer, 66 N. Y. 604; Schulze v. Farrell, 126 N. Y. S. 678; Kronan v. Weisberg, 135 N. Y. S. 404; Dermott v. Jones, 2 Wall. (U. S.) 1; Emslie v. Leavenworth, 20 Kan. 562. See §§ 532, 917.

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ant may introduce the express contract under a denial.[46] When the action is on a quantum meruit count the defendant cannot introduce an express contract under a denial, at least as a defence to the action or for the purpose of controlling the rights of the parties, and not merely in reduction of damages.[47] Clearly the defendant is entitled to introduce the express contract under a denial for the purpose of proving that the services were worth less than claimed by the plaintiff.[48] If objection is made to the introduction of an express contract under a denial the court should ordinarily order an amendment as a matter of course.[49] Where the express contract is unenforceable because within the statute of frauds it is admissible under the common counts and regulates the rights of the parties.[50]

917. Building and construction contracts—In an action on a building or construction contract the complaint may be in the form of a common indebitatus count for work and labor. Under such a count the contract may be introduced to prove the request and as evidence of the value of the services, etc. It is unnecessary to allege a modification of the contract or to excuse a failure to obtain a certificate from the architect. The plaintiff may rely either upon the special contract or on the contract implied by law. It may be shown that the contract was modified and performed as modified. Recovery may be had for a substantial performance, and for extras without special reference thereto in the complaint. All the various items of claim may be grouped under one count.[51] That plaintiff did not complete a building contract by the stipulated time does not necessarily show that the contract was not performed, as affecting his right to recover under a common indebitatus count.[52] If the special agreement has been abandoned by the defendant, or the plaintiff has been prevented from performing it by the act of the defendant, or has performed it substantially, but not in strict conformity with the agreement, he may recover under the common counts for the labor or services actually rendered. The only effect in such a case of proof of an express contract fixing the price is that the stipulated price becomes the quantum meruit in the case.[53] Where the

[46] Swartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41.

[47] Lautenschlager v. Hunter, 22 Minn. 267; Register Printing Co. v. Willis, 57 Minn. 93, 58 N. W. 825; Reishus v. Benner, 91 Minn. 401, 98 N. W. 186.

[48] See Swartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41; Schermerhorn v. Van Allen, 18 Barb. (N. Y.) 29.

[49] See Rees v. Storms, 101 Minn. 381, 384, 112 N. W. 419.

[50] La Du-King Mfg. Co. v. La Du, 36 Minn. 473, 31 N. W. 938; Kriger v. Leppel, 42 Minn. 6, 43 N. W. 484; Spinney v. Hill, 81 Minn. 316, 84 N. W. 116; Lally v. Crookston Lumber Co., 85 Minn. 257, 88 N. W. 846; Jeffery v. Walker, 25 N. Y. S. 161; Nightingale v. Eagle, 126 N. Y. S. 339; 27 Harv. L. Rev. 286.

[51] Kronan v. Weisberg, 135 N. Y. S. 404; Larson v. Schmaus, 31 Minn. 410, 18 N. W. 273; Donegan v. Houston, 5 Cal. App. 626, 90 Pac. 1073; Crane Elevator Co. v. Clark, 80 Fed. 705 (excuse for not obtaining architect's certificate).

[52] Schulze v. Farrell, 126 N. Y. S. 678.

[53] Siebert v. Leonard, 17 Minn. 433 (410); Peltier v. Sewell, 12 Wend (N.

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complaint is on a quantum meruit and the answer sets up a written contract and non-performance thereof, the plaintiff, without further pleading, may show substantial performance.[54] Under a quantum meruit count a recovery for extras may be had without any separate averment.[55] When a party has substantially complied with the terms of a contract which he is to perform to the satisfaction or approval of the other party, whereby the property of the latter has been materially benefited, the improvements and benefits being of such a character that they must necessarily be appropriated and retained by the party for whom they are made, a recovery therefor may be had either on the contract or on the common counts.[56] A general allegation of the performance of all the conditions of a contract on the part of the plaintiff includes obtaining a certificate from the architect.[57] In an action for extras upon a building, which is constructed under a contract for a gross price, if the complaint does not set out the contract, and it contains anything to defeat or diminsh the claim for extras, it is for the defendant to set it up in his answer as a defence, and then for plaintiff in his reply to set up any matter in avoidance.[58] The defendant may plead in recoupment any damages he may have suffered from a failure of plaintiff to fully perform the contract.[59]

Y.) 386; Fells v. Vestvali, 41 N. Y. 152 (2 Keyes); Kronan v. Weisberg, 135 N. Y. S. 404.

[54] Smith v. Russell, 125 N. Y. S. 952.

[55] Gregg v. Dunn, 38 Mo. App. 283.

[56] O'Dea v. Winona, 41 Minn. 424, 43 N. W. 97; Handy v. Bliss, 204 Mass. 513, 90 N. E. 864. See Dunnell, Minn. Digest, § 1850.

[57] Davis v. Badders, 95 Ala. 348, 10 So. 422; Willcox v. Stephenson, 30 Fla. 377, 11 So. 659; Weeks v. O'Brien, 141 N. Y. 199, 36 N. E. 185.

[58] Meyer v. Berlandi, 53 Minn. 59, 54 N. W. 937.

[59] Mason v. Heyward, 3 Minn. 182 (116); Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Madden v. Oestrich, 46 Minn. 538, 49 N. W. 301; Gray v. New Paynesville, 89 Minn. 258, 94 N. W. 721. See Dunnell, Minn. Digest, § 1850.

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FORMS OF PLEADING

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918. Skeleton form of complaint.

State of Minnesota, County of Hennepin. | District Court, Fourth Judicial District.

John Doe,
Plaintiff,
vs.
Richard Roe,
Defendant.

[Amended] [Supplemental] Complaint.

The plaintiff complains of defendant and alleges:

I. [Here state the ultimate facts constituting the cause of action or grounds for relief in separate and numbered paragraphs. Mark and number the folios if the complaint contains more than two folios.]

Wherefore plaintiff demands judgment [as in § 919 or otherwise according to the relief sought].

John Smith,
Attorney for Plaintiff.
[Office and post office address.]

[Verification.]

Do not date the complaint. The date of verification or date of service controls. See § 241. Upon a change of venue change the venue in the title accordingly. See § 208.

919. Demand for money judgment—General form.

Wherefore plaintiff demands judgment for $ damages, [with interest thereon from 19 ,] [with interest on $ thereof from 19 , and on $ thereof from 19 ,] with costs.

920. Complaint setting forth several causes of action.

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 in the first [four] paragraphs of the first cause of action above set forth and further alleges:

II. That—

III. That—

Wherefore [demanding judgment on both counts].

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921. Form of amended complaint.

The plaintiff, for amended complaint herein, alleges:

I. [As in an original complaint.]

922. Form of supplemental complaint.

The plaintiff, for supplemental complaint herein, served under an order of this court made on 19 , alleges:

I. [Set out the additional facts without repeating the allegations of the original pleading.]

923. Form of complaint in intervention.

A. B. hereby intervenes in this action and for complaint alleges:

I. [As in an ordinary complaint.]

924. Complaint by executor.

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. [Allege appointment as in §§ 1314, 1315.]

II. That—

III. That—

Wherefore plaintiff, as such executor, demands judgment:

925. Complaint by administrator.

John Doe, as administrator [with the will annexed] of the estate of Richard Roe, deceased,
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. [Allege appointment as in §§ 1316, 1317.]

II. That—

III. That—

Wherefore plaintiff, as such administrator, demands judgment:

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926. Complaint by partners.

John Doe, Richard Doe and John Smith,
Plaintiffs,
vs.
John Jones,
Defendant.
} Complaint.

The plaintiffs complain of defendant and allege:

I. That at the times hereinafter mentioned the plaintiffs were partners, doing business in the city of , under the firm name of John Doe & Co.

II. [Continuing as in an ordinary action.]

927. Verification by party.

State of Minnesota,
County of .
} ss.

, 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.]

928. Verification 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.]

929. Verification 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.]

930. Formal parts of an answer.

The defendant, answering the complaint herein:

I. For a first defence denies that—

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II. For a second defence denies that—
III. For a third and partial defence alleges that—

* * *

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—

* * *

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.]

* * *

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—

* * *

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].

* * *

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—

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931. Formal parts of replies.

The plaintiff, replying to the second defence set forth in the answer herein:
I. Alleges that—
II. Denies that—

* * *

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—

* * *

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—

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DENIALS

932. General denial.

The defendant for answer to the complaint herein denies each and every allegation thereof.

See § 323.

933. General denial with exceptions.

The defendant for answer to the complaint herein denies each and every allegation thereof except,

1. The allegation that—
2. The allegation that—

See, in approval of this form, Pigot v. McKeever, 65 N. Y. S. 380.

934. Denial with reference to paragraphs of complaint.

The defendant for answer to the complaint herein denies each and every allegation in the [first] and [third] paragraphs thereof.

See § 310.

935. Denials avoiding negative pregnant.

The defendant for answer to the complaint herein denies that at , or at any other place, and on , or at any other time, he [negative allegations of complaint].

See § 317.

936. Denial of new matter in answer.

The plaintiff for reply to the answer herein denies each and every allegation of new matter therein.

Sustained by Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768.

937. General denial of counterclaim.

The plaintiff for reply to the counterclaim set forth in the answer herein denies each and every allegation thereof.

938. Specific denial in reply.

The plaintiff for reply to the answer herein denies each and every allegation in the [second] and [third] paragraphs thereof.

939. General denial on information and belief.

The defendant for answer to the complaint herein upon information and belief denies each and every allegation thereof.

See § 321.

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940. Specific denial on information and belief.

The defendant for answer to the complaint herein upon information and belief denies [that] [each and every allegation in the paragraph thereof.]

See § 321.

941. General denial of knowledge or information.

The defendant for answer to the complaint herein [denies that he has any] [alleges that he has no] knowledge or information sufficient to form a belief as to any or all the allegations thereof.

See § 320.

942. Specific denial of knowledge or information.

The defendant for answer to the complaint herein [denies that he has any] [alleges that he has no] knowledge or information [as in whether] [as to any or all the allegations of the paragraph thereof].

See § 320.

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DEMURRER

943. For insufficiency—General demurrer.

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

944. For want of jurisdiction.

The defendant demurs to the complaint herein on the ground that it appears on the face thereof that the court has not jurisdiction of the [person of the defendant] [subject of the action].

945. For want of capacity to sue.

The defendant demurs to the complaint herein on the ground that it appears on the face thereof that the plaintiff has not legal capacity to sue.

946. For pendency of another action.

The defendant demurs to the complaint herein on the ground that it appears on the face thereof that there is another action pending between the same parties for the same cause.

947. For defect of parties.

The defendant demurs to the complaint herein on the ground that it appears on the face thereof that there is a defect of parties [plaintiff] [defendant] herein, by reason of the omission of one A. B. who [state the facts which make him a necessary party].

948. For misjoinder of causes of action.

The defendant demurs to the complaint herein on the ground that it appears on the face thereof that several causes of action are improperly united.

949. To defence in answer.

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

950. To one of several defences.

The plaintiff demurs to the [second] defence pleaded in the answer herein on the ground that it does not state facts sufficient to constitute a defence.

951. To counterclaim.

The plaintiff demurs to the [first] counterclaim pleaded in the answer herein on the ground that it does not state facts sufficient to constitute a counterclaim.

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ABATEMENT AND REVIVAL

952. Plea of another action pending.

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 [this court] [the district court for county, Minnesota,] between the parties to this action and for the same cause of action as that alleged in the complaint herein.

See § 535, and Dunnell, Minn. Digest, §§ 4–12.

953. Reply alleging dismissal of former action.

The plaintiff, replying to the answer herein, alleges that the action therein mentioned was duly dismissed by plaintiff on 19 , [at the commencement of this action,] and has not since been pending.

See § 535, and Dunnell, Minn. Digest, §§ 4–12.

954. Action prematurely brought—Credit unexpired.

The defendant for answer to the complaint herein alleges that the [goods] therein mentioned were sold to him by plaintiff on a credit of months from 19 , and such period of credit had not expired at the commencement of this action.

See § 536.

955. Extension of time of payment.

That after said debt became due and before this action was brought defendant transferred to plaintiff a promissory note of one A. B. as collateral security for the payment of said debt and in consideration thereof plaintiff agreed with defendant to extend the time of the payment of said debt to 19 , and the period of such extension has not expired.

Based on Lyman v. Rasmussen, 27 Minn. 384, 7 N. W. 687. See § 1688.

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ACCORD AND SATISFACTION

956. General form.

The defendant for answer to the complaint herein alleges that on 19 , defendant delivered to plaintiff and plaintiff accepted and received from defendant [state the thing given in satisfaction] in full satisfaction and discharge of the claim set forth in the complaint.

See § 538, and Dunnell, Minn. Digest, §§ 34–49.

957. Acceptance of note.

The defendant for answer to the complaint herein alleges that on 19 , plaintiff agreed with defendant to accept in full satisfaction of the claim set forth in the complaint the promissory note of defendant for $, payable on or before 19 , and thereupon defendant made and delivered such a note to plaintiff and plaintiff accepted and received the same in full satisfaction of said claim.

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958. On an account—Short statutory form.

I. That defendant is indebted to plaintiff on an account [for goods sold and delivered] [for work done (and materials for the same provided)] by plaintiff for defendant, at his request, [on 19 ,] [between 19 , and 19 ,] [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That no part thereof has been paid.

Wherefore [as in § 919].

This short form of complaint for a debt on an account, arising from either an express or an implied promise, is authorized by G. S. 1913, § 7777. See §§ 405–409, supra. It may be used to recover for goods sold and delivered, for professional services, and the like. Under it a recovery may be had upon proof of either an express or implied contract. The basis of the action is the debt, while the various items of the account are matters of inducement and may be described in a general way as in the common counts. All the various items of account may be grouped in a single count. A claim for services and for money advanced in connection therewith may be stated in one count. The same is true of a claim for work and for materials provided in connection therewith. As against a demurrer it is not necessary to attach a statement of the account, but ordinarily it is advisable to do so to force an admission of the items of the account and compel the defendant to plead specifically.

959. Account stated—Common indebitatus count.[1]

I. That defendant is indebted to plaintiff in the sum of $ for money found to be due from defendant to plaintiff on an account stated between them [on 19 ,] [2] [a copy of which is hereto attached, marked Exhibit A, and made a part hereof].[3]

II. That no part thereof has been paid.

Wherefore [as in § 919].

[1] This is substantially the common indebitatus count. See § 530. Its sufficiency under the code is well established. See §§ 531, 539.

[2] It is good practice but not necessary to give the date.

[3] As the defendant is entitled to a bill of particulars it is generally advisable to attach a copy of the account. See § 405.

960. Same—General form.

I. That on 19 , an account was stated between plaintiff and defendant.

II. That upon such statement a balance of $ was found due from defendant to plaintiff [as more fully appears by a copy of said statement hereto attached, marked Exhibit A, and made a part hereof].

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III. That no part thereof has been paid.

Wherefore [as in § 919].

Sustained by Heinrich v. Englund, 34 Minn. 395, 26 N. W. 112. See § 539, and Dunnell, Minn. Digest, §§ 50–57. It is generally advisable to attach a copy of the account as the defendant is entitled to a bill of particulars. See § 405.

961. For correction of account stated.

I. That on 19 , an account was stated between plaintiff and defendant upon which statement a balance of $ was found due from [plaintiff to defendant] [defendant to plaintiff], as more fully appears by a copy of said statement hereto attached, marked Exhibit A, and made a part hereof.

II. That since said statement of account plaintiff has discovered errors and false [charges] [credits] [charges and credits] therein, of which he was ignorant at the time of such settlement.

III. That in said statement so settled plaintiff is charged [specify items wrongfully charged].

IV. That the following items, which ought to have been entered to plaintiff's credit were by mistake wholly omitted: [Specify items, with date, amount, etc.]

V. That the following items are erroneous in amount, in this: [Specify items and state briefly why they should be more or less.]

VI. That said statement of account ought to be corrected in the particulars mentioned and the balance thereon ought to be $ in favor of [plaintiff], instead of $ in favor of [defendant].

VII. That on 19 , as soon as plaintiff discovered said mistakes and errors, he informed defendant thereof and demanded of him a restatement of the account and a correction of said mistakes and errors, which defendant refused and still refuses.

VIII. That no part of the amount due to plaintiff from defendant on said account has been paid.

Wherefore plaintiff demands judgment:

1. That said account be opened and that plaintiff be allowed to prove said mistakes and errors.

2. That judgment may be rendered against defendant for any balance found due to plaintiff on said account when corrected, and interest thereon from 19 , with costs.

962. Denial of accounting.

The defendant for answer to the complaint herein denies that an account was ever stated between plaintiff and defendant as alleged in the complaint [or otherwise].

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963. Plea of mistake in account stated.

The defendant for answer to the complaint herein alleges that said account was incorrectly stated, over-charging defendant with the sum of $ [in adding up the items thereof] [in charging him $ for , though the agreed price thereof, at which it was sold by plaintiff to defendant, was $] [or specify the error otherwise according to the facts]; that defendant did not discover said mistake until 19 , when he at once notified plaintiff thereof and demanded of him a restatement of the account and a correction of said mistake, which plaintiff refused, and still refuses.

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964. For impairment of lateral support.

I. That at the times herein mentioned plaintiff was and still is the owner of [description of premises].

II. That at divers times during the years 1888, 1889, 1890, 1891, 1892 and 1893, defendant excavated the land adjacent to said premises to a depth of about twenty-five feet and took and carried away the soil therefrom without leaving sufficient support for the soil of plaintiff's said land in its natural state, whereby it sank and gave way and is still sinking and giving way, and by reason thereof has been lessened in value to plaintiff's damage $2,000.

Wherefore [as in § 919].

Recovery on this complaint sustained in Schultz v. Bower, 57 Minn. 493, 59 N. W. 631. See Dunnell, Minn. Digest, §§ 96, 97.

965. Same—Special damages—Retaining wall.

I. That at the times herein mentioned plaintiff was and still is the owner of lot twenty-two, in block seven, of Warren and Winslow's Addition to the city of St. Paul, Minnesota, according to the plat thereof on file and of record in the office of the register of deeds for Ramsey county, Minnesota, and of the buildings thereon, and occupied the same as his home.

II. That said lot has a frontage of fifty feet on Rivoli street, and a frontage of fifty feet on Arkwright street, in said city, and is about two hundred feet long.

III. That at divers times in the months of June, July and August 1880, defendant excavated the land adjacent to the south line of said lot to the depth of about one hundred feet and to the entire length of the lot, and thereby deprived said lot of its natural lateral support on its south side, to the depth of about one hundred feet and to its entire length, and failed to provide any artificial support therefor.

IV. That in consequence thereof, in the month of June 1883, the soil of said lot sank and gave way for nearly the entire length of the lot, and continued to give way each year thereafter until August 1887.

V. That thereby said lot was diminished in value $

VI. That in 1883 plaintiff necessarily incurred an expense of $ for labor and materials in repairing and strengthening the foundation walls of his stable on said lot which was undermined and weakened by said excavation; and in 1885 necessarily incurred an expense of $ for labor and materials in attempting to support the soil of said lot from said excavation; and in 1887 necessarily incurred an expense of $ for labor and materials in the construction of a retaining wall for said lot against said excavation.

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VII. That by reason of the premises plaintiff has been damaged $.

Wherefore [as in § 919].

Substance of complaint in Kopp v. Northern Pacific Ry., 41 Minn. 310, 43 N. W. 73.

966. Same—Railroad cut.

I. That at the times herein mentioned defendant operated a railroad in this state.

II. That plaintiffs are, and for three years past have been, the owners in fee of lots one and two, block five, of Oswald's Addition to the city of Minneapolis, Minnesota, according to the plat thereof on file and of record in the office of the register of deeds for Hennepin county, Minnesota.

III. That in the year 1882, defendant constructed a line of railroad from the city of Minneapolis to the city of St. Cloud, in this state, running past the side of said lot one; that in constructing said railroad defendant excavated along said lot a cut twenty feet deep; that in making said cut defendant failed and ever since has neglected to protect said property of plaintiff, and during the three years last past, by reason of said cut and the removal from said lots of the natural support caused by the making of said excavation, the earth in said lots has given way, sunk and fallen in, the fall increasing from time to time, until said lot one has almost entirely fallen away, and said lot two has fallen to a large extent.

IV. That prior to said excavation and until said falling away on account thereof, said lots were high and in every way suitable for residence building lots, but by reason of said falling away, caused by the making of said excavation, the same are rendered worthless.

V. That in their natural condition with the earth maintained as it was prior to said falling away, said lots were and still are of the reasonable value of $.

Wherefore [as in § 919].

Substance of complaint in McCullough v. St. Paul etc. Ry., 52 Minn. 12, 53 N. W. 802.

967. Same—Against municipality—Grading street.

I. [Allege defendant's incorporation as in § 1609.]

II. That at the times herein mentioned plaintiff was, and still is, the owner of [description of lot].

III. That during the month of 19 , defendant lowered the grade of street, on the [north] side of said lot, and in doing so cut away the earth adjoining the [north] side of said lot sheer down about feet and left the earth of said lot along the whole length of the north side thereof without its natural support, and without providing any artificial support therefor, so that it was liable to fall.

IV. That to prevent said earth from falling plaintiff necessarily built a re-

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taining wall of [cement] [stone], feet high, the whole length of the north side of said lot.

V. That the reasonable cost of said wall was $, which plaintiff has paid.

VI. That by reason of the premises plaintiff has been damaged $

Wherefore [as in § 919].

Based on Nichols v. Duluth, 40 Minn. 389, 42 N. W. 84.

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ADVERSE POSSESSION

968. Plea of adverse possession.[1]

That for more than fifteen years immediately prior to the commencement of this action defendant [and his predecessors in interest] [and his grantor one A. B.] [and his ancestor one A. B.] [has] [have] [successively] been in the actual, open, continuous and exclusive possession of the whole of the premises described in the complaint, under a claim of right to the ownership to fee thereof and hostile to all adverse claims thereto [and (has) (have) paid the taxes thereon (during all such time) (for more than five consecutive years of such period)].[2]

[1] See § 542, and Dunnell, Minn. Digest, §§ 107–131.
[2] G. S. 1913 § 7696.

969. Adverse possession avoiding deed.

That at the time of the delivery of the deed mentioned in the complaint the premises therein described were in the actual possession and occupancy of one A. B., claiming under a title adverse to that of the grantor in said deed.

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AGENCY

970. Allegation of act through agent.

That [plaintiff] [defendant] by A. B., [his duly authorized agent,] [his agent, duly authorized thereto,] ——.

See § 543.

971. Ratification of acts of agent.

That [plaintiff] [defendant] with full knowledge thereof ratified and confirmed said acts of A. B.

Sustained by Pollitz v. Wabash Ry., 207 N. Y. 113, 100 N. E. 721.

972. Against agent for not using due diligence in selling goods.

I. That on 19 , plaintiff employed defendant as his agent to sell certain [describe goods in general terms], the property of plaintiff, of the value of $, for a commission of , and thereupon defendant received the same for that purpose.

II. That defendant negligently failed to use reasonable diligence to sell or in selling said goods and kept them until 19 ; that in the meanwhile [and by reason of being so kept they deteriorated in quality and value] the market price of such goods fell; that on said day defendant sold said goods for $, which was $ less than they could have been sold for by the exercise of reasonable diligence on the part of defendant after so receiving them.

III. That thereby plaintiff was damaged $

Wherefore [as in § 919].

973. Against agent for selling to insolvent purchaser.

I. [As in § 972.]

II. That defendant did not exercise reasonable care and diligence in selling the same, but negligently sold them to one A. B., who was then insolvent, as defendant well knew, or but for the want of reasonable care and diligence on his part would have known, without receiving the price therefor, or any part thereof, or taking any security for the payment thereof, and the said A. B. is still insolvent and plaintiff has thereby lost said goods and the price thereof, to his damage $

Wherefore [as in § 919].

974. Against agent for disobeying instructions.

I. [As in § 972.]

II. That plaintiff at the same time instructed defendant to sell the same at the price of $, and not less, but defendant, disobeying the instructions of plaintiff, thereafter sold the same for $

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III. That thereby plaintiff was damaged $.
Wherefore [as in § 919].

975. Against agent for selling on credit.

I. [As in § 972.]
II. That plaintiff at the same time instructed defendant to sell the same at the price of $, for cash, and not on credit.
III. That defendant, disobeying the instructions of plaintiff, thereafter sold the same to one A. B. on credit, who then was and still is insolvent, and plaintiff has thereby lost the same and the [value] [price] thereof, to his damage $.
Wherefore [as in § 919].

See Nichols, Shepard & Co. v. Wadsworth, 40 Minn. 547, 42 N. W. 541; Chase v. Baskerville, 93 Minn. 402, 101 N. W. 950; Parsons v. Martin, 11 Gray 115; Delafield v. Illinois, 26 Wend. (N. Y.) 192.

976. Against agent for failure to collect rents.

I. That at the times herein mentioned plaintiff was the owner of [description of premises].
II. That on 19 , plaintiff employed defendant as his agent to take charge of said premises, to rent them and to collect the rent therefrom and to account for the same to plaintiff.
III. That thereupon defendant assumed exclusive control of said premises as such agent for the purposes aforesaid and so remained in control thereof from 19 , to 19 .
IV. That during all such time defendant negligently failed to rent said premises or collect rent therefrom, though he could have rented them and collected rent therefrom, if he had exercised reasonable diligence and skill to that end, which he failed to do.
V. That the rental value of said premises during said period was $, and plaintiff has received nothing therefor.
VI. That thereby plaintiff has been damaged $.
Wherefore [as in § 919].

Based on Burpe v Van Eman, 11 Minn. 327 (231).

977. Against agent in charge of realty for an accounting.

I. That from 19 , to 19 , plaintiff was the owner in fee of [description of premises].
II. That during all such time defendant had the exclusive control and management of said premises as the agent of plaintiff and as such collected all the rentals therefrom and expended large sums of money for the repair of the buildings thereon.
III. That defendant has failed and refused to account to plaintiff for any

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of the moneys so collected or to pay to plaintiff any of the same, though frequently requested by plaintiff to do so, and particularly on 19 .

IV. That defendant has failed to pay the taxes assessed and due on said premises for said period.

V. That defendant has collected a large revenue from said premises during said period, but the exact amount plaintiff is unable to ascertain.

Wherefore plaintiff demands judgment for an accounting to determine the amount due plaintiff from defendant on account of such matters, and that plaintiff have judgment for the amount so determined, and for such other relief as may be just, with costs.

Based on Coffin v. Craig, 89 Minn. 226, 94 N. W. 680.

978. Counterclaim for profits realized by agent belonging to principal.

For a counterclaim:

I. That in July 1901, plaintiff was the agent of defendant in the sale and disposal of a certain building belonging to defendant in the city of Chicago, Illinois, and was instructed by defendant to exchange the same for farm lands in Minnesota; that as such agent and in pursuance of such instructions plaintiff effected an exchange of the building for a certain farm in Norman county, Minnesota, owned by one A. B., and on July 15, 1901, received from said A. B., in such exchange and as such agent, the sum of $5,000, for and on account of defendant.

II. That plaintiff has refused and neglected to pay any part of said sum to defendant or to account therefor to defendant, though requested to do so [by defendant on 19].

Wherefore [as in § 919.]

Substance of counterclaim in Schick v. Suttle, 94 Minn. 135, 102 N. W. 217.

979. Plea of accounting and settlement by agent.

The defendant for answer to the complaint herein alleges that on 19 , he accounted with plaintiff as to all matters mentioned in the complaint and paid over to plaintiff all moneys received by him up to that date as agent of plaintiff.

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ALTERATION OF INSTRUMENTS

980. General form.

The defendant for answer to the complaint herein alleges that after the making and delivery of the [note] mentioned in the complaint and before this action was brought said [note] was materially altered by plaintiff without the knowledge, authority or consent of defendant, by [state the alteration].

See § 546, and Dunnell, Minn. Digest, §§ 259–272.

981. Alteration of mortgage—Cancelation and injunction against foreclosure.

I. That at the times herein mentioned plaintiff was and still is the owner in fee of [describe premises as in a deed], county, Minnesota.

II. That on 19 , plaintiff, his wife joining him therein, made and delivered to defendant a mortgage of said premises to secure the payment of a note of even date for $ then made and delivered by plaintiff and his wife to defendant.

III. That after the delivery of said mortgage and note defendant, without the knowledge, authority or consent of plaintiff, fraudulently and materially altered said mortgage by adding thereto a clause making it secure an additional note for $.

IV. That on 19 , said mortgage, so altered, was recorded in the office of the register of deeds for said county, in Book , of Mortgages, on page .

V. That defendant has commenced foreclosure proceedings to foreclose said mortgage by advertisement under a power therein, and in the notice of foreclosure sale in such proceedings claims that $ are due on said mortgage.

VI. That said mortgage was given to secure the payment of only one note for $, and since its execution plaintiff has not agreed that it should be changed so as to secure the payment of any larger or other sum, and there is now due thereon no more than $.

Wherefore plaintiff demands judgment canceling said mortgage, and the record thereof, and permanently enjoining defendant, and all persons acting under him, from foreclosing the same, and for such other relief as may be just, with costs.

Based on Russell v. Reed, 36 Minn. 376, 31 N. W. 452.

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982. For damages by escaping cattle.

That on 19 , defendant permitted cattle belonging to him to escape from his lands and they entered upon lands in the possession of plaintiff in township, county, in this state, and there trod down, ate and destroyed growing grass and crops of plaintiff to his damage $.

Wherefore [as in § 919].

983. For injury from vicious dog.

I. That at the time herein mentioned defendant [owned and] kept a dog, knowing him to be of a vicious disposition [and accustomed to attack and bite human beings], [and negligently allowed him to go at large, without being properly guarded or confined].

II. That on 19 , said dog attacked plaintiff and bit his right leg and tore his clothes [or otherwise according to the facts], to his damage $.

III. [Allege any special damages sought.]

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 275.

984. For shooting plaintiff's dog.

That on 19 , defendant shot and killed a dog, the property of plaintiff, of the value of $, to plaintiff's damage $.

Wherefore [as in § 919].

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ARBITRATION AND AWARD

985. Complaint on written submission.

I. That on 19 , plaintiff and defendant, there being matters in controversy between them as to their debts, dealings and mutual accounts, by mutual agreement in writing appointed A. B. and C. D. as arbitrators, to hear and determine and make an award on said controversies, and mutually agreed to abide by and perform the award of said arbitrators, of which agreement a copy is hereto attached, marked Exhibit A, and made a part hereof.

II. That on 19 , said arbitrators duly made their award in writing, a copy of which is hereto attached, marked Exhibit B, and made a part hereof.

III. That plaintiff duly [allege performance of any conditions imposed on plaintiff by the award].

IV. That on 19 , plaintiff notified defendant of the award and demanded of him payment thereof [or other performance according to the award], but no part thereof has been paid.

Wherefore [as in § 919].

986. Complaint on oral submission.

I. That on 19 , plaintiff and defendant, there being matters in controversy between them as to their debts, dealings and mutual accounts, by mutual agreement appointed A. B. and C. D. as arbitrators, to hear and determine and make an award on said controversies, and mutually agreed to abide by and perform the award of said arbitrators.

II. That on 19, said arbitrators duly made their award, adjudging and awarding that defendant should pay plaintiff [on demand] $ in full satisfaction and discharge of all said matters in controversy.

III. [That on 19 , plaintiff demanded payment of said award but no part thereof has been paid.] [That no part of said award has been paid.]

Wherefore [as in § 919].

987. Denial of oral submission.

The defendant for answer to the complaint herein [denies each and every allegation in the (first) paragraph thereof] [denies that he ever agreed to submit to arbitration said matters in controversy between plaintiff and defendant, or any of them, as alleged in the complaint or otherwise].

988. Denial of performance by plaintiff.

The defendant for answer to the complaint herein denies that plaintiff performed said award on his part, and alleges that, on the contrary, plaintiff did not [specify non-performance].

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989. Plea of—General form.

The defendant for answer to the complaint herein alleges that 19 , plaintiff and defendant mutually submitted the claim set forth in the complaint to the arbitration of A. B. and C. D., who on 19 , duly made and published their award, which is still in force, and of which the following is a copy: [Copy of award.]

See § 548.

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ASSAULT AND BATTERY

990. For assault.[1]

That on 19 , in the city of , Minnesota, defendant assaulted plaintiff, to his damage $.[2]

Wherefore [as in § 919].

[1] Sustained by Mitchell v. Mitchell, 45 Minn. 50, 47 N. W. 308. See also State v. Bell, 26 Minn. 388, 5 N. W. 970.

[2] Andrews v. Stone, 10 Minn. 72(52).

991. For threatening to shoot plaintiff.

The plaintiff complains of defendant and alleges that on 19 , in the city of , defendant assaulted plaintiff by pointing a revolver at him within shooting distance, and threatening to shoot him, to his damage $.

Wherefore [as in § 919].

992. For assault and battery.[1]

I. That on 19 , in the city of , Minnesota, defendant [wilfully, wantonly and maliciously] [2] assaulted and beat plaintiff, to his damage $.[3]

II. That plaintiff was thereby disabled and prevented from attending to his business for weeks, to his loss $, and was compelled to pay [4] for nursing, medical attendance and medicines $.[5]

Wherefore [as in § 919].

[1] Sustained by Andrews v. Stone, 10 Minn. 72(52); Greenman v. Smith, 20 Minn. 418(370); Mitchell v. Mitchell, 45 Minn. 50, 47 N. W. 308. See also, State v. Bell, 26 Minn. 388, 5 N. W. 970, and § 549.

[2] Add when punitive damages are sought. See Dunnell, Minn. Digest, § 532.

[3] Andrews v. Stone, 10 Minn. 72(52). See Dunnell, Minn. Digest, § 531.

[4] This does not admit proof of expense incurred but not paid. Ward v. Haws, 5 Minn. 440(359).

[5] Or allege injuries and damages as in §§ 1250–1255.

993. Assault and battery by servant.

I. That on 19 , in the city of , Minnesota, one A. B., acting in the course and scope of his employment as a servant of defendant, [wilfully, wantonly and maliciously] assaulted and beat plaintiff, to his damage $.

[Continue as in § 992.]

Sustained by Foran v. Levin, 76 Minn. 178, 78 N. W. 1047; Kuhl v. U. S. etc. Co., 112 Minn. 197, 127 N. W. 628.

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994. Wrongful entry into house—Shaking fist in face—Refusing to leave on request.

I. That at the times herein mentioned plaintiff occupied as her home a dwelling house known as No. , street, in the city of , Minnesota.

II. That on 19 , defendants maliciously entered said house against the wishes and protests of plaintiff and then and there maliciously assaulted plaintiff, and threatened to remove therefrom forcibly personal property of plaintiff's, and threatened to break through doors in said house, and shook their fists close to plaintiff's face and told her that if she did not deliver said property to them they would strike her, and called her a bitch and a liar and used other offensive language toward her, and upon her ordering them to leave the house refused to do so and remained until she had called in a policeman, to her damage $

Wherefore [as in § 919].

Substance of complaint in Mitchell v. Mitchell, 45 Minn. 50, 47 N. W. 308.

995. Indecent assault.

I. That on 19 , in the city of , defendant wrongfully and indecently assaulted plaintiff and laid his hands upon her and solicited her to then and there have sexual intercourse with him.

II. That thereby plaintiff suffered a severe nervous shock and great distress of body and mind, to her damage $

Wherefore [as in § 919].

Substance of complaint in Bingham v. Bernard, 36 Minn. 114, 30 N. W. 404.

996. Plea of 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.

997. Same—Another form.

The defendant for answer to the complaint herein alleges that immediately before the assault therein mentioned plaintiff made an assault upon defendant and would have beaten and ill-treated him if he had not immediately defended himself against plaintiff; that thereupon defendant did so defend himself and in so doing necessarily and unavoidably struck and beat plaintiff, using no more force than was reasonably necessary, and such acts of defendant are those of which plaintiff complains.

998. Defence of wife, child, or servant.

The defendant for answer to the complaint herein alleges that plaintiff first assaulted A. B. the [wife] [child] [servant] of defendant and was continuing

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to do so, whereupon defendant [did the acts complained of] [laid his hands on plaintiff] in defence of said A. B. [using no more force than was reasonably necessary] [which is the alleged assault].

999. To preserve the peace.

The defendant for answer to the complaint herein alleges that at the time of the alleged assault plaintiff had made an assault on one A. B. and was then and there beating him, and defendant, to preserve the peace and to prevent plaintiff from further beating said A. B., laid his hands on plaintiff, using no more force than was reasonably necessary and thereupon plaintiff assaulted defendant who thereupon necessarily [committed the acts complained of] [struck the plaintiff] in self-defence, and such acts of defendant are those of which plaintiff complains.

1000. Defence of dwelling.

The defendant for answer to the complaint herein alleges that at the time therein mentioned he was lawfully possessed and in the actual occupancy of the dwelling house known as No. , street, in said city, and plaintiff wrongfully entered the same, and made a great noise and disturbance therein, against the will of defendant, and disturbing him and his family in the enjoyment of their said dwelling; that defendant requested plaintiff to leave, but he refused to do so, whereupon defendant, in defence of his possession of his said dwelling, laid his hands upon plaintiff to remove him, using no more force than was reasonably necessary for that purpose, and said acts of defendant are those of which plaintiff complains.

1001. Resistance to entrance into dwelling.

The defendant for answer to the complaint herein alleges that at the time therein mentioned defendant was lawfully possessed and in the actual occupancy of the dwelling house known as No. , street, in said city; that plaintiff then and there, with force and violence, attempted to break into said dwelling, without the leave and against the will of defendant, who thereupon, in order to preserve the peaceable possession thereof, resisted plaintiff's entrance and in doing so necessarily [assaulted and beat plaintiff,] [laid his hands on plaintiff,] using no more force than was reasonably necessary, and such acts of defendant are those of which plaintiff complains.

1002. Defence of possession of goods.

The defendant for answer to the complaint herein alleges that at the time therein mentioned he was the owner and in the actual possession of [describe property in general terms], and defendant was wrongfully about to take and carry away and convert the same to his own use, and defendant requested him to refrain from doing so, but he persisted, whereupon defendant gently laid his

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hands upon him to prevent his doing so, but he persisted with force and violence and thereupon defendant used sufficient force to cause him to desist and to take said property from him, using no more force than was reasonably necessary, and such acts of defendant are those of which plaintiff complains.

1003. Removal of person from train for non-payment of fare.

The defendant for answer to the complaint herein alleges that at the time of the assault therein mentioned he was the conductor and in charge and control of a passenger train of the Railway Company; running from to ; that it was then one of the rules of said company that no person should be permitted to ride on the trains thereof without having purchased a ticket therefor or paid the fare therefor; that at said time plaintiff was riding on said train, without having a ticket therefor as aforesaid or having paid the fare therefor, and when requested by defendant to pay such fare refused to do so; that thereupon defendant caused said train to be stopped and requested plaintiff to leave it, but he refused to do so, and thereupon defendant, using no more force than was reasonably necessary, laid his hands on plaintiff and removed him from the train, and such acts of defendant are the acts of which plaintiff complains.

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1004. Of specific claim to plaintiff.

I. [State cause of action accrued to assignor.]

II. That on 19 , and before the commencement of this action, the said A. B. duly assigned said claim to plaintiff.

1005. Assignment in writing.

I. [Allege making of contract.]

II. That on 19 , and before the commencement of this action, said A. B. duly assigned said claim [or name instrument] to plaintiff, by an instrument in writing of which the following is a copy: [Copy of assignment.]

1006. To assignee for benefit of creditors.

I. [State cause of action accrued to assignor.]

II. That on 19 , at , the said A. B. assigned all his non-exempt property, including said claim, to plaintiff in trust for the purpose of paying all his debts.

1007. Plaintiff not real party in interest because of assignment.

The defendant for answer to the complaint herein alleges, [upon information and belief,] that before the commencement of this action plaintiff assigned and transferred to one A. B. the alleged cause of action set forth in the complaint herein, and all his right, title and interest therein; and that at the commencement of this action the said A. B. was and still is the real party in interest and sole owner of said alleged cause of action.

See § 169.

1008. Consent to assignment.

I. [State defendant's contract with assignor.]

II. That thereafter defendant duly gave to said A. B. his consent in writing to an assignment of said contract, of which consent the following is a copy: [Copy of consent.]

1009. Plea of payment to assignor before notice of assignment.

That on 19 , before the commencement of this action, defendant, without notice of any assignment or transfer of the claim set forth in the complaint, paid to the said [assignor], and he accepted from this defendant, the full amount of said claim in full satisfaction thereof.

1010. Denial of assignment.

The defendant for answer to the complaint herein denies [that the (claim) (cause of action) therein set forth was ever assigned or transferred to plaintiff

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(in the manner alleged or otherwise), and denies that plaintiff was the owner or holder thereof at the commencement of this action] [each and every allegation in the (second) paragraph thereof].

1011. Same—Another form.

The defendant for answer to the complaint herein denies that [he has any knowledge or information sufficient to form a belief as to whether] A. B. ever assigned the [note] to plaintiff as alleged in the complaint or otherwise.

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ATTACHMENT

1012. On bond for attachment.

I. That on 19 , an action for the recovery of money was commenced in this court by defendant A. B. against this plaintiff, wherein the said A. B. applied to the judge of this court for a writ of attachment against the property of this plaintiff, and to secure said writ defendants herein executed and filed with the clerk of this court, pursuant to G. S. 1913 §§ 7847, 7848, a bond of which the following is a copy: [Copy of bond with acknowledgment, justification and approval by judge.]

II. That pursuant to an order of said judge on said application the clerk of this court duly issued a writ of attachment out of this court directed to the sheriff of this county whereby said sheriff was required to attach and safely keep the unexempt property of this plaintiff found in this county, or so much thereof as should suffice to satisfy the amount claimed in said action, to wit, $, with costs and expenses.

III. [Allege the levy under the writ and the consequent damages], to plaintiff's damage $.

IV. That such proceedings were had in said action that on 19 , this plaintiff recovered judgment therein, which was duly made by said court, against the said A. B. for $, his costs in defending said action, no part of which has been paid.

V. [That on 19 , an order was duly made and filed in said action setting aside and vacating said writ of attachment.]

VI. [That in moving for said order plaintiff necessarily incurred an expense of $ attorney's fees.]

Wherefore plaintiff demands judgment for $ damages for said levy, [and $ attorney's fees in moving to vacate said attachment,] [and $ costs in defending said action,] and for costs in this action.

See § 551, and Dunnell, Minn. Digest, § 638.

1013. On bond to discharge attachment.

I. That on 19 , in an action for the recovery of money pending in the district court for county, Minnesota, wherein this plaintiff was plaintiff and A. B., defendant herein, was defendant, a writ of attachment was duly issued out of said court directed to the sheriff of [said] county, requiring him to attach and safely keep the unexempt property of the said A. B. in said county, or so much thereof as should suffice to satisfy the amount claimed in said action, to wit, $, with costs and expenses.

II. That on 19 , defendants herein, for the purpose of procuring the discharge of said attachment, executed to plaintiff a bond, pursuant to G. S. 1913 § 7886, of which the following is a copy: [Copy of bond with acknowledgment, justification and approval.]

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III. That on 19 , the judge of said court approved said bond and made an order, upon due notice of the application therefor to plaintiff in said action, discharging said attachment, and on said day said order and bond were duly filed in said court, and thereupon said attachment was discharged.

IV. That on 19 , judgment was duly rendered in said action in favor of plaintiff and against said A. B., defendant therein, for $, no part of which has been paid.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 643.

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1014. Common indebitatus count for services and advances.

I. That defendant is indebted to plaintiff in the sum of $ for services rendered by plaintiff for defendant, at his request, as an attorney at law, between 19 , and 19 , [in the prosecution of an action against one A. B.] [in the defence of an action by one A. B. against defendant] in [this court] [the district court for county, Minnesota] [and on appeal in the supreme court] [and for money paid and advanced by plaintiff for the use of defendant, at his request, in connection therewith] [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That no part thereof has been paid.

Wherefore [as in § 919],

See § 552.

1015. Quantum meruit for services.

I. That between 19 , and 19 , plaintiff rendered services for defendant, at his request, as an attorney at law, [in the prosecution of an action against one A. B.] [in the defence of an action by one A. B. against defendant] in [this court] [the district court for county, Minnesota] [and on appeal in the supreme court].

II. That the same were reasonably worth $.

III. That no part thereof has been paid.

Wherefore [as in § 919].

1016. Quantum meruit for services and count for money advanced.

[See forms under §§ 1015, 1950.]

1017. For negligence in prosecuting an action.

I. That on 19 , defendant, being an attorney at law, was employed as such by plaintiff to prosecute, for a compensation, an action in [the district court for county, Minnesota] [this court], on behalf of plaintiff, against one A. B. for the recovery of $ [for breach of a contract].

II. That by the exercise of due diligence and skill defendant might have obtained a judgment in such action for plaintiff herein before 19 , on which day the said A. B. had property out of which the judgment might have been satisfied, but through his negligence and want of skill defendant did not obtain such a judgment until 19 , and meanwhile the said A. B. had become insolvent, whereby plaintiff was hindered and deprived of the means of recovering on his claim, to his damage $.

Wherefore [as in § 919].

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1018. For negligence in defending an action.

I. That on 19 , defendant, being an attorney at law, was employed as such by plaintiff to defend, for a compensation, an action then pending in [the district court for county, Minnesota,] [this court,] wherein one A. B. was plaintiff and plaintiff herein defendant.

II. That plaintiff had a complete defence to said action, which on said day he communicated to defendant who promised to interpose the same by answer, the time to answer not expiring until 19 .

III. That defendant negligently failed to interpose said defence by answer or otherwise and by reason thereof judgment by default was entered in said action against plaintiff herein for $, which he necessarily paid, with $ costs.

IV. That promptly upon hearing of the entry of said judgment plaintiff, on 19 , applied to the court to have the judgment set aside and to be allowed to interpose such defence, but his application was denied and he necessarily paid $ attorney's fees on such application.

Wherefore [as in § 919].

1019. For negligence in examining a title.

I. That on 19 , defendant, being an attorney at law, was employed as such by plaintiff to examine the title of one A. B. to the [describe premises], which plaintiff was intending to purchase from the said A. B. for $.

II. That defendant accepted said employment for a compensation and after an examination of the title reported to plaintiff that it was good and that there were no incumbrances of record on the premises.

III. That plaintiff, relying on such examination and report of defendant, was thereby induced to purchase the property from the said A. B. for $, upon payment of which he received a deed therefor from the said A. B.

IV. That defendant negligently and unskilfully conducted such examination, and overlooked a mortgage for $, on record, to one C. D. from the said A. B. covering said premises, which was then due and unsatisfied.

V. That in order to release the premises from said mortgage plaintiff necessarily paid the holder thereof $.

VI. That the said A. B. is insolvent.

VII. That by reason of the premises plaintiff has been damaged $.

Wherefore [as in § 919].

1020. For unauthorized compromise of judgment by attorney.

I. That at the times herein mentioned defendant was an attorney at law duly admitted to practice in all the courts of this state.

II. That on 19 , plaintiff employed defendant as such attorney to collect from one A. B. the sum of $, and to that end instructed defendant to bring an action in this court to recover the same.

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III. That defendant accepted such employment and as such attorney brought such action; that such proceedings were had therein that on 19 , a judgment was duly rendered therein in favor of this plaintiff against the said A. B. for $.

IV. That on 19 , defendant herein, without any instructions or authority from plaintiff, settled and compromised said judgment with said A. B. for the sum of $, and as such attorney satisfied the same of record in full.

V. That there was due upon said judgment at the time defendant so settled and compromised the same the sum of $.

VI. That plaintiff did not discover that said judgment had been satisfied by defendant until 19 ; that in the meanwhile the said A. B. had disposed of all his real property upon which said judgment was a lien, and all of his personal property upon which an execution could be levied, and plaintiff was thereby prevented and deprived of the means of recovering the balance due upon said judgment, and the same has not, nor any part thereof, been recovered or made by plaintiff.

VII. That thereby plaintiff was damaged $.

Wherefore [as in § 919].

Substance of complaint in Burgraf v. Byrnes, 94 Minn. 418, 103 N. W. 215.

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1021. On a recognizance.

I. That on 19 , defendant A. B. was duly indicted by the grand jury of Ramsey county, Minnesota, of the crime of rape, and said indictment was duly returned into this court, and presented by said grand jury, and duly filed in this court.

II. That on 19 , A. B. was duly arraigned before this court on such indictment.

III. That on 19 , defendant A. B. duly appeared in and before said court and duly entered into a recognizance in open court, with defendants C. D., E. F., G. H., and I. J. as sureties; that a copy of said recognizance is hereto attached, marked Exhibit A, and made a part hereof.

IV. That said recognizance was thereupon duly filed in this court, and made a part of the records thereof.

V. That on 19 , at a general term of this court, and during a regular session thereof, the said case of the state of Minnesota against the said A. B., indicted as aforesaid, was duly called in open court, and the said A. B. then and there responded to said call and was then and there duly ordered and directed by said court to be and remain in said court, and to appear from day to day at the opening of said court, and to remain in said court until said case was reached for trial, or until further notified by said court.

VI. That on 19 , at a general term of said court, and during the sessions thereof, the case of the state of Minnesota against the said A. B., indicted as aforesaid, was duly reached and called in open court for trial, and the said A. B. was duly called three times in open court, and at the front door of said court house, and the said A. B. failed to answer said call, and to stand trial upon said indictment, and to be and appear in said court; and each of said sureties in said recognizance, to-wit: C. D., E. F., G. H., and I. J. were likewise duly called, and they and each of them failed to respond and to produce said defendant A. B. in court.

VII. That said defendants, and each of them, after having been called as aforesaid and each and all of them failing to appear and produce said A. B. in said court, and to comply with the terms and conditions of said recognizance, the same was duly declared forfeited and all of said defendants were duly adjudged by said court to be in default and such judgment was duly recorded in said court.

VIII. That no part of said $, in said recognizance, has been paid by said defendants or any of them, though duly demanded.

Wherefore [as in § 919].

Sustained in State v. McGuire, 42 Minn. 27, 43 N. W. 687. See § 553.

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1022. Common count for pasturing stock.

I. That defendant is indebted to plaintiff in the sum of $ for the agistment, feeding and taking care of cattle by plaintiff, on his land, for defendant, at his request, [between 19 , and 19].

II. That no part thereof has been paid.

Wherefore [as in § 919].

1023. Common count for hire of personal property.

I. That defendant is indebted to plaintiff in the sum of $ for the use and hire of a [horse] [automobile] by plaintiff let to hire to defendant, at his request, [from 19 , to 19 ,] [on 19].

II. That no part thereof has been paid.

Wherefore [as in § 919].

1024. For hire of personal property—Express contract.

I. That [between 19 , and 19 ,] [on 19 ,] defendant hired from plaintiff a [horse] [automobile] for which he agreed to pay plaintiff $ [on 19].

II. That no part thereof has been paid.

Wherefore [as in § 919].

1025. For hire of personal property—Implied contract.

I. That [between 19 , and 19 ,] [on 19 ,] defendant hired from plaintiff a [horse] [automobile] [for days].

II. That the reasonable value of the use thereof was $.

III. That no part thereof has been paid.

Wherefore [as in § 919].

1026. For hire of personal property with damages for failure to return or for ill-use.

For a first cause of action:

I. That on 19 , defendant hired from plaintiff a [piano] for a period of weeks, then next ensuing, and to be returned to plaintiff at the expiration of such period, for which he agreed to pay plaintiff $ [on 19].

II. That no part thereof has been paid.

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 paragraph of the first cause of action herein set forth and further alleges;

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II. That the value of said [piano] was $.

III. [That defendant has not returned the same, though the time agreed for its return has expired and plaintiff on 19 , requested defendant to return it, to plaintiff's damage $.] [That while said (piano) was in the possession of defendant it was injured through his negligence and misuse, beyond ordinary wear, and thereby diminished in value $, and was returned to plaintiff in such injured condition, to his damage $.]

Wherefore [as in § 919].

1027. Against bailee for hire—For loss of goods.

I. That on 19 , plaintiff delivered to defendant [a quantity of], of the value of $, which defendant received and agreed to keep safely and securely for plaintiff [for a compensation of $,] [for a reasonable compensation,] and to return and redeliver to plaintiff on request.

II. That plaintiff duly performed all the conditions of said agreement on his part, and on 19 , requested defendant to redeliver said goods to him.

III. That defendant did not take reasonable care of said goods, nor keep them safely for plaintiff, nor return them to plaintiff when so requested, but through defendant's negligent failure to exercise reasonable care thereof they were, while so in his possession, [burned] [stolen] [destroyed] and wholly lost to plaintiff, to his damage $.

Wherefore [as in § 919].

See § 554.

1028. Same—Another form.

I. That on 19 , plaintiff delivered to defendant [describe goods in general terms], of the value of $, which defendant received and promised plaintiff to keep safely and securely for a reward and redeliver to plaintiff on request.

II. That plaintiff duly performed all the conditions of said agreement on his part, and on 19 , requested defendant to redeliver said goods to him, but though a reasonable time has since elapsed he has failed to do so, to plaintiff's damage $.

Wherefore [as in § 919].

1029. Same—Return of goods in damaged condition.

I. [As in § 1028.]

II. That plaintiff duly performed all the conditions of said agreement on his part.

III. That defendant did not keep said goods safely and securely, but while they were in his possession they were [state injury] and were returned to plaintiff in such injured condition.

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IV. That by reason of said injury said goods were lessened in value $.

Wherefore [as in § 919].

1030. For injury to hired horse.

I. That on 19 , defendant hired and received from plaintiff a horse, belonging to plaintiff, of the value of $, to drive.

II. That defendant drove the horse so immoderately and so neglected the care of him that on 19 , the horse died, to plaintiff's damage $.

Wherefore [as in § 919].

1031. For failure to return goods deposited for repair.

I. That at the times herein mentioned defendants were partners engaged in the business of manufacturing, repairing, upholstering and storing furniture in the city of St. Paul, Minnesota, under the firm name of A. & B.

II. That on 19 , plaintiff delivered to defendants certain furniture and other household goods, the property of plaintiff, of the value of $, and defendants agreed with plaintiff to repair, upholster and renew the same for a reward, and to return the same to plaintiff when finished.

III. That plaintiff has duly performed all the conditions of said agreement on his part.

IV. That on 19 , and after a reasonable time for making such repairs, plaintiff demanded a return of said goods by defendants, but they refused and still refuse to return them to plaintiff, to his damage $.

Wherefore [as in § 919].

Based on complaint in Johnson v. Smith, 54 Minn. 319, 56 N. W. 37.

1032. Deposit of money for safe-keeping.

I. That on 19 , plaintiff delivered $ to defendant and defendant promised plaintiff to keep the same safely and to redeliver the same to plaintiff upon request.

II. That on 19 , plaintiff requested defendant to redeliver the same, but defendant refused to do so and still refuses, to plaintiff's damage $.

Wherefore [as in § 919].

1033. Same—Another form—Conversion.

I. That on 19 , plaintiff intrusted to defendant the sum of $ for safe-keeping and defendant promised plaintiff to keep the same safely and return it to plaintiff on demand.

II. That on 19 , defendant refused to return the same to plaintiff on demand and has converted it to his own use, to plaintiff's damage $.

Wherefore [as in § 919].

Sustained in Wickstrom v. Swanson, 107 Minn. 482, 120 N. W 1090.

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1034. For loss of coins deposited for exhibition.

I. That defendant is a corporation, duly organized and existing under chapter 3 of Special Laws of the state of Minnesota, for the year 1885.

II. That on 19 , at the city of Minneapolis, Minnesota, plaintiff, then and there being the owner of a large collection of rare coins, of the value of many thousand dollars, delivered the same to defendant for deposit and exhibition in the Public Library in said city, owned and conducted by defendant; that said collection of coins was so delivered by plaintiff to defendant upon the condition that defendant might place the same upon exhibition in its said library building, and should keep the same safely without charge to plaintiff, and exercise due care to prevent the loss or theft thereof, or of any part thereof, and to return the same to plaintiff, at her request; that said collection of coins was so delivered to defendant, and was by defendant placed upon exhibition in its library building, and remained on exhibition there until 19 , and, except as hereinafter stated, still remains in the custody of defendant, under said agreement.

III. That defendant failed to exercise due care of said coins, in this, that on 19 , defendant negligently permitted said collection of coins to be unguarded, and the room and building in which the same were deposited and kept to be left unguarded and unprotected, and the door of said building and of said room to be left unlocked; that by reason of said negligence on the part of defendant, said building and room were entered by some person or persons unknown and a portion of said collection of coins, enumerated in the bill of particulars hereto annexed, marked Exhibit A, and made a part hereof, of the value of $1,500, were stolen and carried away, and wholly lost, to plaintiff's damage $1,500.

Wherefore [as in § 919].

Substance of complaint in Smith v. Library Board, 58 Minn. 108, 59 N. W. 979.

1035. For money deposited in bank by bailee—Husband and wife.

I. That plaintiff and defendant A. B. are now and ever since 19 , have been husband and wife.

II. That defendant The Farmers' and Mechanics' Savings Bank of Minneapolis is now and at all the times herein mentioned was a corporation duly organized and existing under the laws of this state for the purpose of conducting a savings bank.

III. That on 19 , plaintiff was the owner and in possession of the sum of $.

IV. That on that day defendant A. B. took said money under an agreement with plaintiff for safe-keeping and for the purpose of depositing the same for plaintiff in her name with defendant bank, but instead of depositing the same in the name of plaintiff he deposited the same in his own name with defendant bank, which ever since has retained the same in the name of defendant A. B.

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V. That said money at all the times since said time has been and still is the property of plaintiff and she is entitled to the immediate possession thereof.

VI. That defendants have refused to deliver said money to plaintiff on demand.

Wherefore [as in § 919].

Substance of complaint sustained in Gillespie v. Gillespie, 64 Minn. 381, 67 N. W. 206.

1036. Denial of receipt of goods.

The defendant for answer to the complaint herein denies [that plaintiff ever delivered to him the goods mentioned in the complaint, or that defendant ever received the same, or any part thereof] [each and every allegation in the (first) paragraph thereof].

1037. Same—Another form.

The defendant for answer to the complaint herein denies that he ever received the goods mentioned in the complaint.

1038. Delivery to third party.

The defendant for answer to the complaint herein alleges that on 19 , before the commencement of this action, he delivered on demand the goods mentioned in the complaint to one A. B. who then was the owner and entitled to the immediate possession thereof.

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1039. Allegation of appointment of trustee.

That on 19 , the United States District Court for the District of Minnesota, [Third] Division, duly appointed plaintiff a trustee in bankruptcy of one A. B., who, on 19 , had been duly adjudged a bankrupt by said court, and plaintiff thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such trustee.

1040. Plea in bankruptcy.

The defendant for answer to the complaint herein alleges that on 19 , after the claim alleged in the complaint accrued, and before this action was brought, plaintiff was duly adjudged a bankrupt by the United States District Court for the District of Minnesota, [Third] Division, and on 19 , one A. B. was by said court duly appointed trustee in bankruptcy of plaintiff and duly qualified as such, and thereupon all of plaintiff's non-exempt property, including said claim, vested in the said A. B., as such trustee, who still holds said claim as such trustee.

See § 555.

1041. Discharge in bankruptcy.

The defendant for answer to the complaint herein alleges that on 19 , he was discharged from the claim alleged in the complaint by an order in bankruptcy duly made by the United States District Court for the District of Minnesota, [Third] Division, [of which order the following is a copy:].

This form admits proof of an order confirming a composition with creditors. Broadway Trust Co. v. Manheim, 95 N. Y. S. 93.

1042. Reply alleging revival of debt.

The plaintiff for reply to the answer herein alleges that on 19 , subsequent to said discharge in bankruptcy, defendant expressly, positively and unconditionally promised plaintiff that he would pay said [note].

If the promise is conditional allege its acceptance and the fulfilment of the conditions. Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917; International Harvester Co. v. Lyman, 90 Minn. 275, 96 N. W. 87; Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808.

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1043. For recovery of deposit.

I. That at the times herein mentioned defendant was and still is a banking corporation duly organized and existing under the general banking laws of the United States and conducting a bank in the city of , Minnesota.

II. That at various times between 19 , and 19 , plaintiff made general deposits of money with defendant, subject to repayment to him or his order on demand.

III. That on 19 , there remained in the hands of defendant of the money so deposited a balance of $.

IV. That on that day plaintiff duly demanded of defendant, at its banking house in said city, the repayment of said balance, but it refused and still refuses to repay the same.

Wherefore [as in § 919].

Based on complaint in Branch v. Dawson, 33 Minn. 399, 23 N. W. 552.

1044. For negligence in collection of note.

I. [Allege defendant's incorporation as in § 1043.]

II. That on and prior to 19 , plaintiff was a depositor in defendant bank, and on that day deposited therein for collection a promissory note, of which the following is a copy: [Copy of note with indorsement.]

III. That defendant, in consideration thereof, undertook and promised plaintiff to use due diligence in presenting said note to the maker thereof at its maturity for payment, and in case of default in payment thereof, according to its tenor, to cause the same to be duly protested for non-payment, and to cause due notice thereof to be given to A. B., the indorser thereof, whereby to render him liable thereon.

IV. [That defendant negligently failed to present said note to the maker thereof at its maturity for payment, by reason whereof the same has not been paid; that said maker is insolvent and plaintiff is unable to make collection thereof from said maker or indorser; that by reason of the premises plaintiff has wholly lost the moneys due on said note, to his damage $.] [That defendant duly presented said note to the maker thereof at its maturity for payment, and it was not paid, but defendant negligently failed to give due notice of such presentment and non-payment to said A. B., the indorser, by reason whereof the note has not been paid and the said A. B. has been discharged of his liability thereon; that said maker is insolvent and plaintiff is unable to collect said note from him; that by reason of the premises plaintiff has wholly lost the moneys due on said note, to his damage $.]

Wherefore [as in § 919].

Based on Jagger v. Nat. German-American Bank, 53 Minn. 386, 55 N. W. 545; Bank of Utica v. Swedes, 3 Cow. (N. Y.) 662; 1 Abbott's Forms of Pl. Nos. 501, 502.

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BILLS AND NOTES

PROMISSORY NOTES

1045. Payee against maker of note.

I. That on 19 , defendant made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That no part thereof has been paid [except].

Wherefore [as in § 919].

1046. Same—Pleading legal effect of note.

I. That on 19 , defendant made and delivered to plaintiff his promissory note dated on [that day], whereby he promised to pay to plaintiff [or his order], at , $, [one] [year] [months] [after] [said date] [on 19] [on demand], with interest at per cent. per annum.

II. That no part thereof has been paid [except].

Wherefore [as in § 919].

1047. Payee against maker on two notes.

For a first cause of action:

I. As in § 1045.

II. As in § 1045.

For a second cause of action:

I. As in § 1045.

II. As in § 1045.

Wherefore plaintiff demands judgment for $,[1] with interest on $ thereof at the rate of per cent. per annum from 19 , and with interest on $ thereof at the rate of per cent. per annum from 19 , with costs.

[1] Aggregate of principals.

1048. Payee against maker of note payable a specified time after sight.

I. [Allege making of note as in § 1045.]

II. That on 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.

Wherefore [as in § 919].

1049. Principal of note due upon default in interest.

I. That on 19 , defendant made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That defendant has made default in the payment of the interest thereon which became due on 19 .

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III. That no part of said note or the interest thereon has been paid [except $].

Wherefore [as in § 919].

1050. Note with interest coupons and default clause—Action by payee.

I. That on 19 , defendant made and delivered to plaintiff his promissory note whereby he promised to pay [to the order of] plaintiff $ [five] years after that date, with interest thereon at the rate of per cent. per annum, payable annually according to the tenor of [five] interest coupons attached thereto.

II. That it was stipulated in said note that, in case of default in the payment of any instalment of interest thereon when it should become due, the principal should forthwith, at the option of plaintiff, become due and payable.[1]

III. That defendant has made default in the payment of the instalment of interest which became due and payable on 19 .

IV. That no part of said note or the interest thereon has been paid [except $].

Wherefore [as in § 919].

[1] This paragraph is a mere suggestion. It should be modified by the pleader so as to follow the language of the default clause of the particular note. It is unnecessary to allege the option of plaintiff to declare the principal due. The institution of the suit is sufficient. Northwestern Mutual Life Ins. Co. v. Allis, 23 Minn. 337; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231; St. Paul Title Ins. & Trust Co. v. Thomas, 60 Minn. 140, 61 N. W. 1134.

1051. Payee against maker on lost note.

I. That on 19 , defendant made and delivered to plaintiff his promissory note, dated on that day, whereby he promised to pay to plaintiff or his order, at , $, one year from that date, with interest at per cent. per annum.

II. That while plaintiff was the owner and holder of said note, and before it became due, he lost it and has never found it.

III. That on 19 , when said note became due and payable, plaintiff notified defendant of said loss and tendered to him a sufficient bond of indemnity, signed by plaintiff as principal and A. B. and C. D. as sureties, conditioned to indemnify defendant, his heirs and personal representatives, against all claims by any other person on account of said note, and against all costs and expenses by reason of such claims, and requested defendant to pay said note, but it has not been paid.

IV. That plaintiff brings said bond into court and tenders the same to defendant.

Wherefore [as in § 919].

See G. S. 1913 § 8434.

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1052. Payee, having indorsed and paid note, against maker.

I. That on 19 , defendant made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That thereafter plaintiff indorsed and transferred the same.

III. That at maturity the same was duly presented to defendant for payment, but was not paid.

IV. That due notice was given plaintiff of said presentment and non-payment.

V. That on 19 , plaintiff paid to one A. B., the then holder of said note, $ in full payment thereof.

VI. That no part thereof has been repaid to plaintiff.

Wherefore [as in § 919].

1053. Payee against maker of note wrongly dated.

I. That on 19 , defendant made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That the same was by mistake wrongly dated on 19 , whereas it was intended by plaintiff and defendant that it should bear date on 19 .

[Continue as in other cases.]

See Almich v. Downey, 45 Minn. 460, 48 N. W. 197.

1054. Payee of note against maker and irregular indorser.

I. That on 19 , defendant A. B. made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That prior to the delivery thereof to plaintiff by defendant A. B., defendant C.D., who was not otherwise a party to said note, placed his signature in blank on the back thereof.

III. That at maturity the same was duly presented to defendant A. B. for payment, but was not paid.

IV. That defendant C. D. was given due notice of said presentment and non-payment.

V. That no part of said note has been paid.

Wherefore [as in § 919].

See G. S. 1913 § 5876. This statute overrules a long line of cases. See Dunnell, Minn. Digest, § 945.

1055. Indorsee of note against maker, payee and irregular indorser.

I. That on 19 , defendant A. B. made and delivered to defendant C. D. his promissory note, of which the following is a copy: [Copy of note.]

II. That thereafter and before its maturity defendant C. D. indorsed the same to plaintiff.

III. That prior to said indorsement defendant E. F., who was not other-

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wise a party to said note, [indorsed the same] [placed his name on the back thereof].

IV. That at its maturity the same was duly presented to defendant A. B. for payment, but was not paid.

V. That defendants C. D. and E. F. were given due notice of said presentment and non-payment.

Wherefore [as in § 919].

Sustained by Buck v. Hutchins, 45 Minn. 270, 47 N. W. 808. See G. S. 1913 § 5875.

1056. First indorsee of note against maker.

I. That on 19 , defendant made and delivered to one A. B. his promissory note, of which the following is a copy: [Copy of note.]

II. That thereafter the said A. B. indorsed the same to plaintiff.

III. That no part thereof has been paid [except $].

Wherefore [as in § 919].

1057. Indorsee of note against payee.

I. That on 19 , one A. B. made and delivered to defendant his promissory note, of which the following is a copy: [Copy of note.]

II. That thereafter defendant indorsed the same to plaintiff.

III. That at its maturity the same was duly presented to said A. B. for payment, but was not paid.

IV. That defendant was given due notice of said presentment and non-payment.

V. That no part of said note has been paid.

Wherefore [as in § 919].

1058. Indorsee of note against indorser.

I. That on 19 , one A. B. made and delivered to one C. D. his promissory note, of which the following is a copy: [Copy of note.]

II. [That the said C. D. thereafter indorsed the same to defendant.] [That the said C. D. thereafter indorsed the same to one E. F. who in turn thereafter indorsed the same to defendant.]

III. That thereafter defendant indorsed the same to plaintiff.

IV. That on 19 , the same was duly presented to the said A. B. for payment, but was not paid.

V. That defendant was given due notice of said presentment and non-payment.

VI. That no part of said note has been paid.

Wherefore [as in § 919].

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1059. Indorsee of note against all prior parties.

I. That on 19 , defendant A. B. made and delivered to defendant C. D. his promissory note, of which the following is a copy: [Copy of note.]

II. That thereafter defendant C. D. indorsed the same to defendant E. F.

III. That thereafter defendant E. F. indorsed the same to plaintiff.

IV. That at its maturity the same was duly presented to defendant A. B. for payment, but was not paid.

V. That due notice of said presentment and non-payment was given defendants C. D. and E. F.

VI. That no part of said note has been paid.

Wherefore [as in § 919].

1060. Holder of note indorsed in blank or to bearer against maker.

I. That on 19 , defendant made and delivered to one A. B. his promissory note, of which the following is a copy: [Copy of note.]

II. That thereafter the said A. B. indorsed the same [in blank] [to bearer].

III. That plaintiff is the owner and holder thereof.

IV. That no part thereof has been paid.

Wherefore [as in § 919].

1061. Assignee of note against maker.

I. That on 19 , defendant made and delivered to one A. B. his promissory note, of which the following is a copy: [Copy of note.]

II. That thereafter the said A. B. duly assigned the same to plaintiff.

III. That no part thereof has been paid.

Wherefore [as in § 919].

1062. By payee of note against surviving member of firm.

I. That at the time of the making and delivery of the note hereinafter mentioned defendant and one A. B. were partners, doing business under the firm name of .

II. That on 19 , defendant and said A. B., under their said firm name, made and delivered to plaintiff their promissory note, of which the following is a copy: [Copy of note.]

III. That no part thereof has been paid.

IV. That on 19 , said A. B. died, leaving defendant the sole surviving partner of said firm.

Wherefore [as in § 919].

1063. On note signed by agent.

I. That on 19 , defendant, by one A. B., his agent, duly authorized

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thereto, made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

[Continue as in other cases.]

1064. On note made by partners.

I. That at the times herein mentioned defendants were and still are partners, doing business under the firm name of .

II. That on 19 , defendants, as such partners and under their said firm name, made and delivered to plaintiff their promissory note, of which the following is a copy: [Copy of note.]

[Continue as in other cases.]

1065. On note payable to order of firm.

I. That at the times herein mentioned plaintiffs were and still are partners, doing business under the firm name of .

II. That on 19 , defendant made and delivered to plaintiffs, under their said firm name of , his promissory note, of which the following is a copy: [Copy of note.]

[Continue as in other cases.]

1066. By surviving partner on note payable to order of firm.

I. That at the time of the making and delivery of the note hereinafter mentioned plaintiff and one A. B. were partners, doing business under the firm name of .

II. That on 19 , defendant made and delivered to plaintiff and said A. B., as such partners, his promissory note, of which the following is a copy: [Copy of note.]

III. That no part thereof has been paid.

IV. That on 19 , the said A. B. died, leaving plaintiff the sole surviving partner of said firm.

Wherefore [as in § 919].

1067. Against maker and guarantor of note.

I. That on 19 , defendant A. B. made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That at the same time defendant C. D., for a valuable consideration, guaranteed the payment of said note by indorsing thereon the following words, "For value received I guarantee the payment of the within note." subscribing his name thereto, and delivering said note so guaranteed to plaintiff.

III. That no part of said note has been paid.

Wherefore [as in § 919].

See G. S. 1913 § 7683; Hammel v. Beardsley, 31 Minn. 314, 17 N. W. 858.

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1068. For breach of warranty of genuineness of note.

I. That on 19 , defendant offered to sell and transfer to plaintiff by delivery without indorsement a promissory note made by one A. B., of which the following is a copy: [Copy of note.]

II. That to induce plaintiff to buy said note defendant warranted to plaintiff that it was made by said A. B.

III. That plaintiff was thereby induced to buy said note of defendant and pay him $ therefor.

IV. That said note was not made by A. B., but his name thereon was forged.

V. That in consequence said note was worthless, whereas it would have been worth $ if it had been made by A. B.

VI. That thereby plaintiff was damaged $.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 931.

1069. For instalment of interest.

I. That on 19 , defendant made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That defendant has not paid any part of the instalment of interest on said note which became due on 19 , amounting to $.

Wherefore [as in § 919].

1070. Denial of execution, indorsement or delivery of note.

The defendant for answer to the complaint herein denies that he ever [made] [executed] [indorsed] [or delivered] said note.

[Personal verification.]

R. L. 1905 § 4730; G. S. 1913 § 8448.

1071. Denial of plaintiff's title.

The defendant for answer to the complaint herein [denies each and every allegation in the paragraph thereof] [denies that said note was ever transferred to plaintiff or that he is or was at any time the owner and holder thereof] [and defendant alleges that plaintiff is not the real party in interest, but that A. B. is the owner and holder of said note, and that it was transferred to him by (defendant)] [denies that plaintiff is the owner and holder of said note, and alleges that on 19 , before this action was brought, plaintiff sold, assigned and transferred said note, for a valuable consideration, to one C. D., who was the owner and holder thereof when this action was brought] [denies that said note was ever transferred to plaintiff and alleges that A. B. the payee named in said note, is still the owner and holder thereof].[1]

[1] This puts in issue an alleged sale and indorsement to plaintiff. Tarbox v. Gorman, 31 Minn. 62, 16 N. W. 466.

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1072. Same—Denial of knowledge or information.

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 in the paragraph thereof] [whether said note was ever indorsed to plaintiff as alleged in the complaint or as to whether plaintiff is the owner and holder thereof].

1073. Denial of presentment.

The defendant for answer to the complaint herein denies [each and every allegation in the paragraph thereof] [that said note was ever presented for payment to (him) (A. B.)].

1074. Denial of notice.

The defendant for answer to the complaint herein denies [each and every allegation in the paragraph thereof] [that notice of the non-payment of said note was ever given to him].

1075. Excuse for non-presentment where maker cannot be found.

That at the maturity of said note due search and inquiry were made for said A. B. at [place of payment], in order that the same might be duly presented to him for payment, but he could not be found, and the same was not paid; of all of which due notice was given to defendant.

1076. Waiver of demand and notice.

That afterwards defendant indorsed the same to plaintiff, and in and by said indorsement, expressly waived demand and notice.

Or follow language of waiver. See Dunnell, Minn. Digest, § 916.

1077. Same—Another form.

That plaintiff did not present said note to A. B. for payment and did not give defendant notice of the non-payment thereof, but defendant, on 19 , with full knowledge thereof, waived said omission and promised to pay said note.

1078. Same—Another form.

That [at] [before] the maturity of said note defendant waived presentment to and demand of payment of said A. B. and notice to defendant of the non-payment thereof.

1079. Want of consideration.

The defendant for answer to the complaint herein alleges that there was no consideration for said note.

Sustained by Grimes v. Erickson, 94 Minn. 461, 103 N. W. 334.

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1080. Failure of consideration.

The defendant for answer to the complaint herein alleges that said note was given in payment for a [horse] sold and delivered by plaintiff to defendant and for no other consideration; that plaintiff was not then the owner of said horse, but one A. B. was then the owner thereof, and on 19 , the said A. B. duly recovered the same from defendant in an action of replevin, whereby the consideration for said note has wholly failed.

1081. Same—Another form.

The defendant for answer to the complaint herein alleges that on 19 , plaintiff and defendant entered into an agreement whereby plaintiff agreed to drill and construct for defendant on his farm in this county a tubular well which would produce a constant supply of water, in sufficient quantity for defendant's wants; that thereupon in pursuance of said agreement plaintiff drilled a well on defendant's said farm to the depth of about 180 feet and represented to defendant that he had found water in the well of the agreed quantity; that thereupon, in pursuance of said agreement and relying on said representation, defendant made and delivered to plaintiff his promissory note of the same tenor as that alleged in the complaint; that said well was not as represented by plaintiff and did not furnish more than a few pails of water at a time and was of no value to defendant, of all of which plaintiff had due notice; that plaintiff repeatedly promised defendant that he would bore the well deeper and cause it to supply the agreed quantity of water; that when said note matured defendant gave to plaintiff a renewal note, in consideration of said promises to make the well conform to the original agreement, which is the note alleged in the complaint; that the payments which defendant has made on said renewal note were made in consideration of said promises to make the well conform to the original agreement; that plaintiff has wholly failed to carry out said promises and said well does not furnish the agreed quantity of water, or more than a few pails of water at a time, and is of no value to plaintiff, whereby the consideration for said note has wholly failed.

Substance of answer sustained in Conroy v. Logue, 87 Minn. 289, 91 N. W. 1105.

1082. Fraud in procuring note.

I. That prior to the making and delivery of said note plaintiff represented to defendant that [state representations].

II. That said representations were false.

III. That plaintiff made said representations knowing them to be false and with intent to deceive and defraud defendant and induce him to make said note.

IV. That defendant, believing said representations to be true, was thereby induced to make and deliver said note to plaintiff.

V. [That on 19 , defendant notified plaintiff that he rescinded (said sale) on the ground of said fraud, and then and there tendered to him

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a return of (said goods), and demanded of plaintiff that he surrender said note to him, but plaintiff refused and still refuses to accept a return of (said goods), or to surrender said note.]

1083. Defence of fraud under G. S. 1913 § 6015.

I. That defendant's signature to said note was obtained by fraudulent representations, [trick and artifice,] as to the nature and terms of the contract so signed, as hereinafter alleged.

II. That at the time of signing said note defendant did not believe it to be a bill of exchange, promissory note, or other paper negotiable under the law merchant.

III. That defendant was not negligent in signing said note without knowledge of its nature and terms.

IV. That prior to the signing and delivery of said note [plaintiff] represented to defendant that [state representations, trick or artifice].

V. That said representations were false.

VI. That [plaintiff] made said representations knowing them to be false and with intent to deceive and defraud defendant and to induce him to sign and deliver said note to plaintiff.

VII. That defendant, believing said representations to be true, [and being deceived by said trick and artifice,] was thereby induced to sign and deliver said note to [plaintiff] as alleged.

VIII. [That plaintiff gave no valuable consideration for said note and the same was transferred and delivered to him after maturity and with notice of all the facts herein alleged.]

1084. Same—Another form.

Defendant denies that he made, executed or delivered the promissory note set forth in the complaint herein or any promissory note to said insurance company, and alleges that if plaintiff has in his possession such a note, that the same was obtained by trick, artifice and fraud, in this, that at the time of securing defendant's signature the said agent of said company, represented to defendant that the paper which he at that time induced defendant to sign was merely a receipt, and that defendant, who can only read English with great difficulty and imperfectly, relied upon said agent and believing the paper so signed merely a receipt, signed the same.

Part of answer in Farris v. Koplau, 113 Minn. 397, 129 N. W. 770.

1085. Accommodation indorsers—Extension to makers.

I. That said note was indorsed by these defendants without consideration, and for the accommodation of defendant A. B., the maker thereof.

II. That plaintiff had notice thereof when he received said note.

III. That at or about the time of its maturity, at the request of said A. B.,

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and for a valuable consideration, and without the knowledge or consent of these defendants, plaintiff extended the time for the payment of said note by the said A. B. [for months from the time it became due, according to its terms.]

See § 887.

1086. Injunction against transfer of note.

I. That on 19 , plaintiff made and delivered to defendant his negotiable promissory note, of which the following is a copy: [Copy of note.]

II. [That said note was given for the purchase of (describe premises as in a deed), which defendant, in consideration thereof, on said day conveyed to plaintiff by a deed wherein defendant covenanted with plaintiff that said premises were free and clear of all incumbrances.]

III. [That at the time of the making and delivery of said deed said premises were not free and clear of all incumbrances, but were incumbered by a mortgage which defendant had made and delivered on 19 , to one A. B. to secure the payment of $, with interest.]

IV. That defendant still retains possession of said note.

V. That on 19 , plaintiff demanded of defendant that he deliver the same to plaintiff, but he refused and still refuses to do so, [and threatens to transfer it to a bona fide purchaser].

Wherefore plaintiff demands judgment enjoining defendant from negotiating, indorsing, assigning, or in any way transferring [said note] [any interest in said note to the amount of said incumbrance]; that said note be delivered up and canceled; and for such other relief as may be just, with costs.

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BILLS OF EXCHANGE

1087. Drawer of bill against acceptor.

I. That on 19 , plaintiff drew his bill of exchange on defendant, of which the following is a copy: [Copy of bill.]

II. That on 19 , defendant accepted the same and delivered it to plaintiff.

III. That no part thereof has been paid

Wherefore [as in § 919].

1088. Payee of bill against acceptor.

I. That on 19 , one A. B. made and delivered to plaintiff his bill of exchange on defendant, of which the following is a copy: [Copy of bill.]

II. That on 19 , defendant accepted said bill.

III. That no part thereof has been paid.

Wherefore [as in § 919].

1089. On a bill directed by drawer to himself and accepted by him.

I. That on 19 , defendant made, accepted and delivered to plaintiff his bill of exchange, of which the following is a copy: [Copy of bill.]

II. That no part thereof has been paid.

Wherefore [as in § 919].

1090. Payee of bill against acceptor and drawer.

I. That on 19 , defendant A. B. made and delivered to plaintiff his bill of exchange on defendant C. D., of which the following is a copy: [Copy of bill.]

II. That on 19 , defendant C. D. duly accepted said bill.

III. That at its maturity the same was duly presented to defendant C. D. for payment, but was not paid, [whereupon the same was duly protested for non-payment, at a cost of $, which plaintiff paid].

IV. That defendant A. B. was given due notice of said presentment and non-payment [and protest].

V. That no part of said bill has been paid.

Wherefore [as in § 919].

See note to § 1098.

1091. Payee of bill against drawer, for non-acceptance.

I. That on 19 , defendant made and delivered to plaintiff his bill of exchange on one A. B., of which the following is a copy: [Copy of bill.]

II. That on 19 , the same was duly presented to said A. B. for acceptance, but was not accepted, and was thereupon duly protested for non-acceptance at a cost of $, which plaintiff paid.

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III. That due notice thereof was given to defendant, but he has not paid the same.

Wherefore [as in § 919].

See note to § 1098.

1092. Payee against drawer on bill payable on a day certain, or at sight, or at a certain time after sight.

I. That on 19 , defendant made and delivered to plaintiff his bill of exchange on one A. B., of which the following is a copy: [Copy of bill.]

II. That on 19 , the same was duly presented to said A. B. for payment, but was not paid [whereupon the same was duly protested for non-payment, at a cost of $, which plaintiff paid].

III. That defendant was given due notice of said presentment and non-payment [and protest].

IV. That no part of said bill has been paid.

Wherefore [as in § 919].

See note to § 1098.

1093. Same—Waiver of demand and notice.

[I. and II. as in preceding form.]

III. That at the time said bill was made and delivered as aforesaid, defendant waived presentment of the same to said A. B. for payment and notice of the non-payment thereof.

IV. That no part of said bill has been paid.

Wherefore [as in § 919].

1094. Payee of bill against acceptor for honor.

I. That on 19 , one A. B. made and delivered to plaintiff his bill of exchange on one C. D., of which the following is a copy: [Copy of bill.]

II. That on 19 , said bill was duly presented to said C. D. for acceptance, but it was not accepted [whereupon the same was duly protested for non-acceptance at a cost of $, which plaintiff paid].

III. That the said A. B. was given due notice of said presentment and non-acceptance [and protest].

IV. That on 19 , defendant accepted said bill for the honor of said A. B.

V. That [at its maturity] [on 19 ,] said bill was duly presented to said C. D. for payment, but was not paid [whereupon the same was duly protested for non-payment, at a cost of $, which plaintiff paid].

VI. That said A. B. and defendant were given due notice of said presentment and non-payment [and protest].

VII. That no part of said bill has been paid.

Wherefore [as in § 919].

See note to § 1098.

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1095. Payee of bill against acceptor for honor and maker.

I. That on 19 , defendant A. B. made and delivered to plaintiff his bill of exchange on one C. D., of which the following is a copy: [Copy of bill.]

II. That on 19 , said bill was duly presented to said C. D. for acceptance, but it was not accepted [whereupon the same was duly protested for non-acceptance, at a cost of $, which plaintiff paid].

III. That defendant A. B. was given due notice of said presentment and non-acceptance [and protest].

IV. That on 19 , defendant E. F., upon sight thereof, accepted said bill for the honor of defendant A. B.

V. That [at its maturity] [on 19 ,] said bill was duly presented to said C. D. for payment, but was not paid, whereupon the same was duly protested for non-payment at a cost of $, which plaintiff paid.[1]

VI. That defendants were given due notice of said presentment, non-payment, and dishonor.

VII. That thereupon said bill was duly presented to defendant E. F. for payment, but was not paid, whereupon the same was duly protested for non-payment, at a cost of $, which plaintiff paid.[2]

VIII. That defendant A. B. was given due notice of said presentment, non-payment and protest.

IX. That no part of said bill has been paid.

Wherefore [as in § 919].[3]

[1] See G. S. 1913 §§ 5977, 5979.

[2] See G. S. 1913 § 5982.

[3] Include demand for protest fees.

1096. First indorsee of bill against acceptor.

I. That on 19 , defendant accepted a bill of exchange drawn on him by one A. B., of which the following is a copy: [Copy of bill.]

II. That thereafter the said C. D. indorsed the same to plaintiff.

III. That on 19 , plaintiff duly presented the same to defendant for payment, but it has not been paid.

Wherefore [as in § 919].

1097. Indorsee of bill against drawer and indorser—Non-acceptance.

I. That on 19 , defendant A. B. made and delivered to defendant C. D. his bill of exchange on one E. F., of which the following is a copy: [Copy of bill.]

II. That thereupon defendant C. D. indorsed the same to plaintiff.

III. That on 19 , the same was duly presented to said E. F. for acceptance, but was not accepted [whereupon the same was duly protested for non-acceptance, at a cost of $, which plaintiff paid].

IV. That defendants were given due notice of said presentment and non-acceptance [and protest].

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V. That no part of said bill has been paid.
Wherefore [as in § 919].

See note to § 1098.

1098. Indorsee of bill against drawer, acceptor and indorser—Non-payment.

I. That on 19 , defendant A. B. made and delivered to defendant C. D. his bill of exchange on defendant E. F., of which the following is a copy: [Copy of bill.]

II. That defendant E. F. accepted the same on 19 .

III. That [thereafter] [on the same day] defendant C. D. indorsed the same to plaintiff.

IV. That on 19 , the same was duly presented to defendant E. F. for payment, but was not paid, [whereupon the same was duly protested for non-payment at a cost of $, which plaintiff paid].

V. That defendants A. B. and C. D. were given due notice of said presentment and non-payment [and protest].

VI. That no part of said bill has been paid.
Wherefore [as in § 919].

In appropriate cases include a demand for protest fees and statutory damages. See G. S. 1913 §§ 6013, 6014.

1099. First indorsee of bill against first indorser.

I. That on 19 , one A. B. made and delivered to defendant his bill of exchange on one C. D., of which the following is a copy: [Copy of bill.]

II. That on 19 , the said C. D. accepted the same.

III. That thereafter defendant indorsed the same to plaintiff.

IV. That on 19 , the same was duly presented to the said C. D. for payment, but was not paid, [whereupon the same was duly protested for non-payment, at a cost of $, which plaintiff paid].

V. That defendant was given due notice of said presentment and non-payment [and protest].

VI. That no part of said bill has been paid.
Wherefore [as in § 919].

See note to § 1098.

1100. Remote indorsee of bill against acceptor.

I. [As in § 1096.]

II. That thereafter the said C. D. indorsed the same to E. F., who indorsed the same to G. H., who indorsed the same to plaintiff.

III. [As in § 1096.]
Wherefore [as in § 919].

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1101. Acceptance of bill for accommodation.

The defendant for answer to the complaint herein alleges that he accepted said bill for the accommodation of plaintiff, and that there was no value or consideration for the acceptance or payment thereof by defendant.

BANK CHECKS

1102. Payee against drawer of check.

I. That on 19 , defendant made and delivered to plaintiff his check, of which the following is a copy: [Copy of check.]

II. That on 19 , the same was duly presented to said bank for payment, but was not paid [because defendant had no funds with said bank].

III. That defendant was given due notice of said presentment and non-payment.[1]

IV. That no part of said check has been paid.

Wherefore [as in § 919].

[1] As to the necessity of this allegation the case of Spink & Keyes Drug Co. v. Ryan Drug Co., 72 Minn. 178, 75 N. W. 18, may have been overruled by statute. See G. S. 1913 § 5997.

1103. Indorsee or bearer of check against drawer.

I. That on 19 , defendant made and delivered to one A. B. his check, of which the following is a copy: [Copy of check.]

II. That the said A. B. indorsed the same [to plaintiff] [in blank] [indorsed the same and delivered it so indorsed] [and the same thereafter came lawfully into the possession of plaintiff] [and plaintiff is now the owner and holder thereof].

III. [As II. in § 1102.]

IV. [As III. in § 1102.]

V. [As IV. in § 1102.]

Wherefore [as in § 919].

1104. Indorsee or bearer of check against drawer and indorser.

I. That on 19 , defendant A. B. made and delivered to defendant C. D. his check, of which the following is a copy: [Copy of check.]

II. That defendant C. D. indorsed the same [to plaintiff] [in blank] [indorsed the same and delivered it so indorsed] [and the same thereafter came lawfully into the possession of plaintiff] [and plaintiff is now the owner and holder thereof].

III. That on 19 , the same was indorsed by plaintiff and duly presented to said bank for payment, but was not paid.

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IV. That defendants were given due notice of said presentment and non-payment.

V. That no part of said check has been paid.

Wherefore [as in § 919].

1105. Payee of certified check against bank.

I. That defendant is, and at all the times herein mentioned was, a national bank, duly organized and existing as a banking corporation under the laws of the United States.

II. That on 19 , one A. B. made and delivered to plaintiff his check on the defendant, of which the following is a copy: [Copy of check.]

III. That on 19 , defendant certified in writing thereon that the same was good [or follow language of certification].

IV. That on 19 , the same was indorsed by plaintiff and duly presented to defendant for payment, but it has not been paid.

Wherefore [as in § 919].

1106. Plea that payment of check was stopped.

I. That after the making of said check on Feb. 9, 1912, and before the same was presented to defendant bank for payment, the drawer stopped payment of said check and directed and requested said bank not to pay the same when presented, and not to turn over or pay to the order of plaintiff any funds on deposit in said bank to the credit of the drawer, and not to charge the amount of said check against the drawer, and that the drawer has ever since demanded and required that defendant refuse payment of said check, and has ever since refused defendant permission or authority to charge the amount of said check to his account, if paid to the plaintiff's order.

II. That on Feb. 9, 1912, and continuously long prior thereto, and at the time when A. C. [the drawer of said check] made deposits subject to check with defendant bank, it was the prevailing custom and usage between banks and their depositors throughout the city of Minneapolis and the state of Minnesota that a bank withhold and refuse payment of a check drawn for part of the amount on deposit whenever the drawer thereof notified or directed the bank so to do prior to the presentation of the check; that said custom was known to defendant bank and to A. C. at the time said A. C. opened an account with defendant bank and at all times thereafter while said account was maintained and while said A. C. placed and had on deposit in the defendant bank funds subject to check; that it was understood between said A. C. and defendant that defendant would at all times regard and follow such custom whenever a check drawn by said A. C. was presented to said bank for payment, and thereby it was understood and agreed between them that said bank did not consent or agree to pay upon presentation any checks drawn by said A. C. for a part of the money due him from defendant, if, prior to such presentation, said

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A. C. had notified the bank not to pay the same, and that said A. C. did not authorize the defendant to pay under such circumstances any such check drawn by him and to charge the amount thereof to his account.

III. Further answering said complaint, defendant alleges that, prior to the presentation of said check, when A. C., the drawer, directed and requested that defendant refuse payment of the same, he stated to the defendant that said check was obtained by plaintiff from him by and through fraudulent representations, and that there was no consideration for said check and that the same was wholly void and represented no claim or demand on the part of plaintiff against the drawer.

Sustained in Taylor v. First Nat. Bank, 119 Minn. 525, 138 N. W. 783.

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BOARD AND LODGING

1107. Common indebitatus count.

I. That defendant is indebted to plaintiff in the sum of $, for board and lodging furnished by plaintiff to defendant, at his request, between 19 , and 19 .

II. That no part thereof has been paid.

Wherefore [as in § 919].

1108. General form.

I. That between 19 , and 19 , defendant used and occupied, as his lodgings, certain furnished rooms in the dwelling house No. , street, in the city of , by permission of the plaintiff, and was furnished by plaintiff, at his request, with food, attendance, and other necessaries.

II. [That in consideration thereof defendant promised to pay plaintiff $.] [That the same were reasonably worth $.]

III. That no part thereof has been paid.

Wherefore [as in § 919].

1109. Same—Another form.

I. That on 19 , plaintiff received defendant, at his request, as boarder and lodger, and continued to board and lodge him until 19 , [for which defendant promised to pay plaintiff $] [and said accommodations were reasonably worth $].

II. That no part thereof has been paid.

Wherefore [as in § 919].

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1110. On a supersedeas bond—Appeal from judgment.

I. That on 19 , in an action between A. B. and C. D., a judgment was duly rendered by this court in favor of said A. B. against said C. D. for $.

II. That thereafter the said C. D. duly appealed from said judgment to the supreme court of this state.

III. That upon said appeal defendants duly made and filed a supersedeas bond, of which the following is a copy: [Copy of bond.]

IV. That on 19 , the supreme court duly affirmed said judgment in all respects, and awarded the respondent costs on the appeal, amounting to $.

V. That on 19 , plaintiff served notice of said affirmance and award of costs on defendants and demanded payment of said judgment and costs, but no part thereof has been paid.

Wherefore [as in § 919].

1111. On bond for removal of cause in federal court.

I. That defendant is, and at all the times herein mentioned was, a corporation duly organized and existing under the laws of the state of Maryland, and authorized to do business in this state.

II. That on 19 , a judgment was duly rendered by the Circuit Court of the United States, District of Minnesota, Fifth Division, in favor of A. B., as plaintiff, and against C. D. and E. F., defendants, for the sum of $ and costs to be taxed, and thereafter the defendants C. D. and E. F. prosecuted a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit to the Circuit Court of the United States for the District of Minnesota, Fifth Division, for the correction of alleged errors in obtaining said judgment, and said appeal was in all things duly perfected, and said cause removed for review to the said United States Circuit Court of Appeals for the Eighth Circuit.

III. That upon said appeal said defendants made and filed with the clerk of the said Circuit Court of the United States a certain bond in writing, as principals, upon which the defendant, the United States Fidelity and Guaranty Company of Baltimore, Maryland, became surety; that said bond was duly executed and acknowledged by said principals and surety; that a copy of said bond and acknowledgment is hereto attached, marked Exhibit A, and made a part hereof.

IV. That on 19 , the judgment so appealed from was by said United States Circuit Court of Appeals for the Eighth Circuit in all things affirmed, with costs of the appeal; that on 19 , the said United States Circuit Court of Appeals caused its mandate to be duly filed in the office of the

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clerk of the United States Circuit Court, for the District of Minnesota, Fifth Division; that on 19 , execution was duly issued upon said judgment against C. D. and E. F., and placed in the hands of the United States marshal of said district for collection of said judgment, and said execution has been returned by said marshal wholly unsatisfied.

V. That by the affirmation of said judgment by said United States Circuit Court of Appeals on 19 , the condition of said bond became operative, and the failure of said C. D. and E. F. to make good their plea, or to answer for the damages and costs, constituted a breach of the condition of said bond, and the said principals therein, and the said surety, the United States Fidelity and Guaranty Company of Baltimore, Maryland, have been ever since 19 , and now are in default thereon.

VI. That on 19 , the said A. B., for a valuable consideration, by an instrument in writing, a copy of which is hereto annexed, marked Exhibit B, and hereby made a part hereof, duly assigned to plaintiff the above mentioned judgment against the said defendants, C. D. and E. F. and also by the same instrument assigned to plaintiff all right of action for or on account of the breach of the conditions of said appeal bond, and plaintiff is now the owner of said judgment, and of any and all right of action upon said appeal bond; that said assignment of judgment and of right of action upon the bond was filed in the office of the clerk of the United States Circuit Court, District of Minnesota, Fifth Division, on 19 .

VII. That said judgment, so rendered in the said United States Circuit Court has never been paid, nor any part thereof, nor the costs in said action, nor any part thereof; that there was due on said judgment on 19 , including the interest from the date of its entry $.

Wherefore [as in § 919].

Sustained on demurrer in Hollister v. U. S. Fidelity & Guaranty Co., 84 Minn. 251, 87 N. W. 776.

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BOUNDARIES

1112. Statutory action to determine boundary lines—Complaint.

I. That plaintiff is the owner of [describe premises as in a deed].

II. That defendant is the owner of adjoining lands, to wit, [describe premises as in a deed].

III. That the location of the boundary line between said tracts is in dispute between the parties hereto [the true location thereof depending on the location of the section corner at the (southwest) corner of section , township , range].

Wherefore plaintiff demands judgment defining and locating such boundary line [and for an order establishing a permanent stone or iron landmark for said section corner] and for such order respecting costs and disbursements as to the court may seem just.

See § 571, and Dunnell, Minn. Digest, § 1084.

1113. Same—Action against town.

I. That the defendant, the town of Agassiz, is a town of this state, duly organized and existing as a public corporation under the laws thereof, and forming a part of county.

II. That plaintiff is the owner of the northwest quarter of section four, in township one hundred twenty, of range forty-five, in said township of Agassiz, in said county.

III. That the location of the boundary line of said section four, on the west, and therefore the western boundary of the tract so owned by plaintiff, is in dispute between plaintiff and all of the defendants, except defendant A. B.; that all of the other defendants except the said town of Agassiz, have or claim an interest in the east half of section five in said town, or some part thereof, and the eastern boundary of the lands so owned by them is the same line as that aforesaid forming the western boundary of plaintiff's tract.

IV. That the defendant, the town of Agassiz, has and is entitled to an easement for a public road upon the section line between said sections five and four in said town, and is claiming the right to maintain said road, upon a line, which plaintiff claims is not the proper or correct section line between said sections, but is largely divergent from said true line, for a portion of its distance, and is an encroachment upon the said land of plaintiff.

V. That all the parties hereto agree upon the location of the point constituting the southwest corner of section four, and the southeast corner of section five in said town; and the location of the boundaries of the lands owned by plaintiff and defendants, as well as the location of said public road, depends upon the common point, which constitutes the northwest corner of section four and the northeast corner of section five, and on the line extending between that point and the ascertained point first above mentioned.

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VI. That the line constituting the northern boundary of said sections is a correction line, so that the adjacent sections on the north do not serve as a guide as to the location of either said common point or common line which determines the boundaries, of the several tracts in said sections, abutting on said line.

VII. That defendant A. B. owns or claims an interest in the southwest quarter of said section four, and the line, which all the other defendants contend to be the boundary between said section, and the location of the said northern section corner between said section, is several rods to the eastward of where said line is claimed by plaintiff.

VIII. That all of the parties known to plaintiff to have or claim any title or interest in or to the lands, the boundaries of which will be affected by this action, are made parties hereto.

Wherefore plaintiff demands judgment defining and locating said point and line, constituting the boundaries of the said land of plaintiff and defendants, and for the establishment at said point of such judicial landmark, as the court may determine necessary, and for such other relief as may be just, with costs.

Substance of complaint in Ferch v. Konne, 78 Minn. 515, 81 N. W. 524.

1114. Same—Answer.

The defendant for answer to the complaint herein admits the dispute alleged therein as to said boundary line and joins plaintiff in his demand for judgment.

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BREACH OF PROMISE

1115. Time not agreed upon.

I. That on 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 $.

Wherefore [as in § 919].

See § 573.

1116. Time agreed upon.

I. That heretofore plaintiff and defendant mutually promised to marry each other on 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 $.

Wherefore [as in § 919].

1117. Marriage to another.

I. That on 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 $.

Wherefore [as in § 919].

1118. Unchasity as a defence.

The defendant for answer to the complaint herein alleges that at the time of his making said promise plaintiff was unchaste, of which fact he was then ignorant, and that as soon as he learned thereof he refused to marry plaintiff for that reason.

1119. Same—Another form.

The defendant for answer to the complaint herein alleges that after he made said promise of marriage the plaintiff, on 19 , at , had sexual intercourse with one A. B., without the connivance of defendant, and that as soon as he learned thereof he refused to marry plaintiff for that reason.

1120. Mutual rescission of agreement.

The defendant for answer to the complaint herein alleges that said agreement, before breach thereof, was rescinded and abandoned by plaintiff and defendant by mutual agreement.

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1121. For injury from defective bridge—Action against municipality.[1]

I. [Allege incorporation of defendant city as in § 1609.]

II. That on 19 , and for several years prior thereto, West Seventh street was a public street and highway of said city, extending from the eastern boundaries thereof to the extreme western end thereof.

III. That during such time there was, at the westerly end of said street and within the limits of defendant, a bridge over the Mississippi river, maintained by defendant as a public highway for foot passengers and vehicles, the easterly end of which abutted the westerly end of said Seventh street, [and under its charter it was the duty of defendant to keep said bridge in a reasonably safe condition for such use].[2]

IV. That on 19 , and for a long time prior thereto, said bridge was, to the knowledge of defendant and through its negligence, in a dangerous condition for pedestrians by reason of large nails and spikes protruding from the sidewalk thereof.

V. That on 19 , while plaintiff was walking across said bridge, on the sidewalk thereof, he was tripped by one of said spikes and thrown violently down upon said bridge and was thereby [allege injuries and damages as in §§ 1250–1255].

VI. [Allege service of notice of claim as in § 1613.]

Wherefore [as in § 919].

[1] Substance of complaint in Moore v. St. Paul, 82 Minn. 494, 85 N. W. 163. See § 574.

[2] Probably unnecessary. See §§ 812, 1609.

1122. Same—Against contractor.

I. That at the times herein mentioned there was a public highway between the villages of and , in county, Minnesota.

II. That about miles south of said village of said highway is intersected by a creek known as creek.

III. That on 19 , defendant, under contract with said county, constructed a bridge across said creek where it intersects said highway so that such bridge constituted part of said highway and the public were then and at the time of the accident hereinafter mentioned, invited by defendant and said county to use said bridge as a part of said highway; that defendant negligently used defective material in the construction of said bridge and negligently put the bridge together, in consequence whereof, on 19 , while plaintiff was driving a team of horses attached to a wagon across the bridge as a part of said highway, it gave way and plaintiff, with the horses and wagon, was thrown into said creek, a distance of feet and was thereby [allege injuries and damages as in §§ 1250–1255].

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IV. That said horses and wagon were the property of plaintiff, and of the value of $, and were damaged by said fall $.

Wherefore [as in § 919].

Based on Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623, 624; O'Brien v. American Bridge Co., 110 Minn. 364, 125 N. W. 1012.

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1123. Common indebitatus count for commission and advances.

I. That defendant is indebted to plaintiff in the sum of $ for services rendered by plaintiff for defendant, at his request, as a broker in the [purchase] [sale] [exchange] of certain real estate in county, Minnesota, [on 19 ,] [between 19 , and 19 ,] [and for money paid and advanced by plaintiff for the use of defendant, at his request, in connection therewith].

II. That no part thereof has been paid.

Wherefore [as in § 919].

See § 575.

1124. Quantum meruit for services.

[See forms under §§ 1947, 1948, 1949, 1951.]

1125. Quantum meruit for services and count for money advanced.

[See forms under §§ 1947, 1950, 1951.]

1126. General form—Express agreement for commission.

I. That on 19 , defendant employed plaintiff as a broker to find a purchaser for [describe lands], belonging to defendant, at [state price] and agreed to pay plaintiff for his services a commission [state what].

II. That plaintiff accepted said employment and in pursuance of said agreement on 19 , found a purchaser, one A. B., [ready, able and willing to purchase said land at said price from defendant] [and presented him to defendant] [and so notified defendant].

III. That defendant thereupon sold said land to the said A. B. for $, but no part of plaintiff's commission on said sale has been paid.

Wherefore [as in § 919].

See § 575.

1127. Same—Another form.

I. That at the times herein mentioned plaintiff was engaged in the business of selling real estate in the states of Iowa, Minnesota, and elsewhere, on commission, as a real estate broker.

II. That on 19 , plaintiff and defendant entered into an agreement whereby plaintiff was to procure a purchaser for [description of the land to be sold], at the price of $ per acre, and for procuring such purchaser defendant agreed to pay to plaintiff, as a broker's commission, the sum of $ per acre; in the aggregate the sum of $.

III. That thereupon plaintiff expended a great deal of time and money in an effort to find a purchaser for said lands, and on 19 , procured a

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purchaser therefor, and sent him to defendant to buy said lands, and at the same time notified defendant that he had procured said purchaser for said land, and defendant, at the time well knowing said purchaser had been sent to him by plaintiff to purchase said lands, on said last named day, sold the same to said purchaser for the sum of $ per acre, and upon terms which were accepted by defendant.

IV. That by reason of said sale defendant became indebted to plaintiff in the sum of $, no part of which has been paid, though demanded.

Wherefore [as in § 919].

Sustained in Lemon v. DeWolf, 89 Minn. 465, 95 N. W. 316.

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CANCELATION OF INSTRUMENTS

1128. Deed obtained by undue influence and fraud.

I. That on 19 , one A. B. died in this county, intestate, leaving surviving him his wife, the defendant C. B., and four children, these plaintiffs, who are daughters of said A. B., and the defendant E. F., who is a son of said A. B., and plaintiffs and said defendants are the only heirs at law of said A. B.

II. That prior to the conveyances hereinafter mentioned, said A. B. was the owner in fee of [description of several tracts of land]; that all of said premises were conveyed to and held by said A. B. under the name of G. H.; that he was also the owner in fee [description of several other tracts]; that the latter tracts were held by the said A. B. in his own name.

III. That said A. B. was also then and there the owner of and in possession of a large amount of personal property, consisting of horses, cattle, sheep, hogs, wagons, farm implements and machinery, wheat, oats, corn, barley, creamery stock and other personal property, of the aggregate value of $; that said real and personal property comprised all of the property which said A. B. owned at the time of making said conveyances and transfers, and he died owning no other property.

IV. That on 19 , and for a long time prior thereto, said A. B. was sick and weak physically and mentally, and at that time and for a long time prior thereto defendants had obtained and then had a complete mastery over the mind and property of said A. B., and he was incompetent to manage himself or his affairs by reason of the influence exerted over him by defendants; that defendants well knew the same and fraudulently taking advantage thereof, obtained from said A. B., without paying any consideration therefor, conveyances to said E. F. of all said real estate [one of which conveyances was made by A. B. under the said name of G. H., the same being the name under which the land described in said conveyances had been conveyed to said A. B. as aforesaid], and also so fraudulently obtained, without paying any consideration therefor, conveyances and transfers to said E. F. and said C. B. of all of said personal property.

V. That said conveyances, though made without consideration as aforesaid, recite a consideration.

VI. That at the time of the execution of said conveyances and transfers, said A. B. was of weak and unsound mind, and was induced to make and did make said conveyances and transfers solely through the improper and undue influence exerted over him by defendants.

VII. That said conveyances were dated on 19 , and were recorded in the office of the register of deeds for Jackson county on 19 , one of them in Book 44, of Deeds, on page 145, and the other in Book 46, of Deeds, on page 365.

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VIII. That said conveyances and transfers of personal property have never been recorded, as plaintiffs are informed and believe.

IX. That defendants continued to maintain a complete dominion over the mind and property of said A. B. until his death, and he remained of weak and unsound mind until his death.

Wherefore plaintiffs demand judgment canceling said conveyances and transfers of A. B., and the records thereof, and for such other relief as may be just, with costs.

Substance of complaint sustained on demurrer as to one of the defendants in Johnson v. Velve, 86 Minn. 46, 90 N. W. 126.

1129. Deed—Abuse of confidence by child.

I. That plaintiff is a widow eighty-one years of age, and is, and for several years last past, has been very feeble and infirm, and is the mother of seven children now living, one of whom is defendant.

II. That on Jan. 26, 1887, and for many years prior thereto, plaintiff owned and occupied as her homestead, the [description of premises], and said premises then were and now are worth $1,500.

III. That on Jan. 26, 1887, and for more than one year prior thereto, defendant was the only one of plaintiff's children residing in said city of Shakopee, and the only near relative or person in whom she had full trust and confidence in said city, to whom she could apply for counsel and advice, and for such assistance as she, in her old age, and infirm and friendless condition, required.

IV. That for several months prior to Jan. 26, 1887, and for more than a year and a half afterwards, defendant with his family lived with plaintiff in a portion of her house on said premises.

V. That prior to Jan. 26, 1887, defendant was kind and dutiful in his treatment of plaintiff and rendered her such assistance in and about the house as an ordinary kind and dutiful son would naturally do, under the circumstances.

VI. That during said time and on Jan. 26, 1887, defendant agreed to remain and live with plaintiff during her life and at all times treat her in a kind and dutiful manner, and to render her such assistance in and about the house as she should need for her comfort, and upon her death to pay to his brothers and sisters, her children and heirs, the sum of $800, if she would convey to him the said premises to have and own after her death, and upon his having performed his part of said agreement as aforesaid, and plaintiff agreed to so convey said premises to him.

VII. That thereupon defendant volunteered to procure a scrivener and have the necessary papers drawn and executed to carry out said agreement and to bind the parties to the performance thereof; and defendant procured a scrivener who came to plaintiff's said home, where she was then sick and in bed, and drew a deed of said premises from plaintiff as grantor, to defendant; that said deed was an ordinary warranty deed, in form, and contained no conditions or restrictions other than the following words inserted therein after the de-

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scription of said premises, to wit, "Reserving the full and absolute possession of the above described premises for and during her natural lifetime."

VIII. That plaintiff is unable to read or understand the English language, and wholly ignorant of business forms or of what papers were necessary to bind each of the parties to the performance of said agreement, and relied wholly upon her son, the defendant, to cause to be made and executed all the papers necessary to fully embody all the terms of said agreement and to bind each and both the parties to the performance thereof; that believing that he had so done, plaintiff executed said deed, which the defendant then took and has ever since retained and caused to be recorded on May 23, 1888, in the office of the register of deeds for said county, in Book 12, of Deeds, on page 294.

IX. That defendant did not cause to be drawn or executed any paper or instrument, embodying any of the conditions of said agreement to be by him performed, and since he has received said deed as aforesaid wholly repudiates said agreement and denies each and all the conditions thereof, and has and does wholly refuse and neglect to perform the same.

X. That since receiving said deed defendant has entirely changed in his conduct toward and treatment of plaintiff and has treated her in an unkind, undutiful and insulting manner, and has wholly neglected and refused to render plaintiff any assistance in or about said house though much of the time she has been sick and unable to wait upon herself and with no one but defendant to assist her.

XI. That defendant obtained and procured said deed to be made without having any papers or instruments made binding him in any manner to the performance of his part of said agreement, and without intending to perform the same, fraudulently for the purpose of obtaining the title of said property without consideration and relying upon and imposing upon the confidence and trust which plaintiff reposed in him; and defendant has in fact never paid any consideration for said property or said deed.

Wherefore plaintiff demands judgment canceling said deed and the record thereof, and for such other relief as may be just, with costs.

Sustained in Pinger v. Pinger, 40 Minn. 417, 42 N. W. 289.

1130. Deed—Exchange of lands procured by fraud.

I. That plaintiff is sixty-nine years of age, feeble and weak minded, and unable to read or understand the English language.

II. That prior to the times hereinafter mentioned plaintiff was the owner of [description of premises].

III. That said premises are worth $1,000, and are subject to a mortgage for $335.

IV. That on March 24, 1892, defendant, for the purpose of defrauding plaintiff and of obtaining a conveyance of said property from plaintiff, falsely and fraudulently represented to plaintiff that he was the owner of and pro-

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posed to convey to plaintiff in exchange for said premises [description of premises to be exchanged].

V. That defendant pointed out and designated the premises last mentioned to plaintiff as the premises he would convey to plaintiff in exchange for plaintiff's said premises.

VI. That defendant agreed to convey his said premises to plaintiff by warranty deed subject to a mortgage for $1,300.

VII. That defendant's said premises are worth $2,000.

VIII. That on March 24, 1892, plaintiff, believing such representations of defendant to be true and induced thereby, made and delivered to defendant a conveyance of his said premises, on the condition that defendant would convey to him the premises so pointed out to him by defendant.

IX. That defendant was never the owner of, and failed and refused to convey to plaintiff, the premises which he proposed to convey to plaintiff in exchange as aforesaid.

X. That defendant, for the purpose of defrauding plaintiff, conveyed to him the [description of premises conveyed].

XI. That the premises last mentioned are subject to a mortgage for $1,300, and accrued interest and taxes, and are of no value whatever over and above the said incumbrances, and, as plaintiff is informed and believes, said mortgage is foreclosed and the equity of redemption thereof is about to expire.

XII. That as soon as plaintiff learned that the premises so conveyed to him by defendant were not the premises which defendant had promised to convey to him, he immediately notified defendant that he rescinded said exchange and offered to return the deed given him by defendant and demanded that defendant return to him the deed given by him to defendant as aforesaid, but defendant refused and still refuses to do so, and still holds the same.

Wherefore plaintiff demands judgment canceling his said deed and the record thereof, upon his reconveying to defendant the premises conveyed to him by defendant, and for such other relief as may be just, with costs.

Substance of complaint in Nelson v. Carlson, 54 Minn. 90, 55 N. W. 821.

1131. Breach of condition to maintain grantor for life.

I. That on March 21, 1900, plaintiff, being the owner in fee of the premises therein described, made and delivered to his daughter, defendant A. B., who has since married defendant C. D., a deed, of which the following is a copy: [Copy of deed.]

II. That on May 18, 1900, said deed was recorded in the office of the register of deeds for Sibley county, Minnesota, in Book 16, of Deeds, on page 278.

III. That at the time of said conveyance and in consideration therefor, and as one of the conditions therof, defendant A. B. made and delivered to plaintiff a written contract, of which the following is a copy: [Copy of contract.]

IV. That on April 9, 1910, said contract was recorded in said register's office in Book C, of Miscellaneous, on pages 331, 332.

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V. That on May 15, 1900, defendant A. B., her said husband joining her therein, by deed conveyed said premises to defendant E. F., the father of her husband, and on May 18, 1900, said deed was recorded in said register's office in Book 16, of Deeds, on page 279.

VI. That after the execution of the last mentioned deed, and on the same day, the said E. F., his wife joining him therein, by deed conveyed said premises to defendant C. D., and on May 18, 1900, said deed was recorded in said register's office in Book 16, of Deeds, on page 280.

VII. That, as plaintiff is informed and believes, each of said grantees of said premises, respectively, at the time of the conveyance to them respectively of said premises, had full notice and knowledge of the terms and conditions of the deed and contract, respectively, between plaintiff and said A. B. aforesaid; and that neither said E. F. nor said C. D. paid any consideration for the deeds executed to them, respectively, for said premises as aforesaid.

VIII. That immediately upon the execution by plaintiff of his said deed to A. B., and of the execution of said contract, A. B., acting under and by virtue of said deed and contract, entered into the possession of said premises and she and her said assigns have ever since, by themselves and their tenants, retained and still retain possession thereof.

IX. That, from the time said A. B. took possession of said premises as aforesaid to Sept. 15, 1906, she allowed plaintiff to use the room which she had by said contract agreed to allow him to use, and in other respects substantially complied with the terms and conditions of said contract; that on Sept. 15, 1906, against the wishes of plaintiff, and in disregard of her said contract and her duties to plaintiff thereunder, said A. B. and her said husband and their family removed from said premises and took up their residence in the village of Gaylord, where they have since resided, and leased said premises to one G. H., who was a stranger to plaintiff, and told plaintiff that if he wished to live at his old home that he must board with the family of said G. H.; that, rather than leave his old home, but against his wishes, plaintiff attempted to live on said premises with said G. H. and to board in his family, and continued to do so until Sept. 15, 1907, when they refused longer to board him; that, at no time, was the board so furnished him by said G. H. such as he had been accustomed to have, nor was it suitable to a person of his age and condition in life.

X. That defendants and said G. H., during the spring and summer of 1907, have refused and neglected to furnish plaintiff feed and pasturage for his horse, though requested by plaintiff to do so.

XI. That since Sept. 15, 1907, defendants have neglected and refused to furnish plaintiff any board or care and plaintiff has been obliged to furnish and cook his own food, or to go a considerable distance from his home to the home of his neighbors and there procure the same at his own expense.

Wherefore plaintiff demands judgment canceling said deeds and the records thereof unless the said A. B., or her said assigns, shall pay to plaintiff as and

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for the purchase price of said premises, and in lieu of providing the things referred to and to be provided by them to said plaintiff under and by virtue of the terms of said contract, the further sum of $2,000; and that plaintiff be reinstated in the possession and ownership of said premises; and that no one of said defendants has any right, title, estate, lien or interest therein; and for such other relief as may be just, with costs.

Recovery sustained under this complaint in Ebert v. Gildemeister, 106 Minn. 83, 118 N. W. 155.

1132. For breach of condition subsequent respecting use of property—Cancelation of deed.

I. That plaintiff is, and at all the times herein mentioned was, a corporation, duly organized and existing under the laws of this state.

II. That at all such times the Falls City Manufacturing Company has been a corporation, duly organized and existing under the laws of this state.

III. That plaintiff now is, and at all the times herein mentioned has been, the owner in fee and entitled to the immediate possession of [description of premises], except that on July 25, 1890, plaintiff by deed conveyed said premises to said Falls City Manufacturing Company in fee, upon the condition, expressed in said deed, that said premises were to be used for the purposes of accommodating the manufacturing business of said Falls City Manufacturing Company in the manufacture and sale of sash, doors, blinds, lumber, finishings, and furniture, said conveyance being for said purpose only, and that said land should revert to plaintiff whenever said premises were no longer used for the purpose aforesaid, and that in case the said company or its assigns, should cease to use said premises for said purpose, sixty days should be allowed the said company, or its assigns, in which to remove its buildings and machinery therefrom.

IV. That said deed recited that the same was executed for the consideration of one dollar, but the same was in fact executed and delivered without any consideration whatever.

V. That said Falls City Manufacturing Company, under and pursuant to said deed, and not otherwise, went into possession of said premises immediately upon the execution of said deed.

VI. That for more than three years last past no part of said property has been used in the manufacture or sale of sash, doors, or blinds, or lumber finishings, or furniture, either by said Falls City Manufacturing Company, or its successors or assigns, or defendants, or any or either of them or by any other person.

VII. That on 18 , plaintiff demanded possession of said premises from defendants on the ground of said breach of said condition, but they refused to give him possession and have ever since wrongfully withheld possession of the same from him and still so withhold it.

VIII. That defendants, and each of them, claim some right, title and

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interest in said premises adverse to plaintiff, and each and all of said claims are under and by virtue of the deed above set forth and not otherwise.

IX. That the defendant A. B. claims to be the owner of all the right, title and interest of the said Falls City Manufacturing Company acquired under said deed.

X. That the said Falls City Manufacturing Company, on 18 , being insolvent, duly made an assignment of all its property for the benefit of its creditors to one C. D., pursuant to the statute in such case made and provided, and such proceedings were thereafter had in said assignment proceedings that all the right, title and interest in said property of the said Falls City Manufacturing Company was duly sold and transferred to the defendant A. B., who claims to be the successor in interest of said Falls City Manufacturing Company.

XI. That the reasonable value of the use of said premises since 18 , is $300.

Wherefore plaintiff demands judgment canceling his said deed and the record thereof; adjudging that defendants, and each of them, have no right, title or interest in said premises; and adjudging plaintiff to be the owner in fee thereof and that he have possession of the same and $300 damages, with costs.

Recovery under this complaint sustained in Little Falls Water-Power Co. v. Mahan, 69 Minn. 253, 72 N. W. 69.

1133. Antenuptial contract obtained by fraud and undue influence.

I. That plaintiff and defendant entered into a mutual agreement of marriage and were married to each other, in the year 1889, and have ever since been husband and wife and have cohabited together as such; that their marriage aforesaid, at the time the same was entered into, was not publicly celebrated for the reasons hereinafter set forth.

II. That at the time of said marriage the defendant, a widower, was sixty-seven years of age, a man of large business experience, and of strong will and an unyielding disposition; that plaintiff was then twenty-three years of age, wholly without business experience and without any person of mature judgment or experience with whom to advise or to consult, except defendant.

III. That defendant had a son by a former marriage with whom he was engaged in litigation at the time of his marriage to plaintiff, and prior thereto, of which fact plaintiff had knowledge; that said litigation involved a large amount of property claimed by the son from defendant, and defendant prior to their said marriage represented to plaintiff that if their said marriage was publicly celebrated or published at all during the pendency of the suit aforesaid with his son, such publication would jeopardize his chances of prevailing therein, and insure the recovery by his son of said property from the defendant, and that for that reason he would not have a ceremonial marriage or any publication thereof and that the marriage contract entered into by plaintiff and

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defendant without a ceremonial celebration thereof would be as effective and valid as though the same were so celebrated; that defendant also stated to plaintiff that after the determination of said litigation with his son, he would procure a ceremonial celebration of their marriage and publish the same, all of which statements and representations this plaintiff believed and relied upon, and being induced thereby, consented to said marriage without a ceremonial publication thereof.

IV. That in the month of January, 1890, while plaintiff and defendant were so cohabiting together as husband and wife, plaintiff became pregnant with a child begotten by defendant; that thereafter owing to her condition, and to the fact that no ceremonial marriage had been celebrated between them, plaintiff became and was ill in body and mind, and was suffering great mental distress and nervous strain, and repeatedly appealed to defendant to consent to the performance of a ceremonial marriage so that the child to be born to them would not, in the eyes of the public, be born out of lawful wedlock; that defendant while promising to have said marriage ceremonial celebrated repeatedly put it off and delayed the same from time to time, which conduct on his part further increased the plaintiff's physical and mental distress.

V. That shortly before May 20, 1890, when plaintiff's pregnancy had advanced so that the same could not longer be concealed from the observation of the public, defendant stated to plaintiff that he had some business with his lawyer at the city of Winona and that he desired the plaintiff to go there with him; that on May 20, 1890, plaintiff accompanied defendant to Winona to the office of the defendant's attorney, and was there directed to sign an instrument in writing drawn up in triplicate, and already prepared and ready for signature; that she signed the same at her husband's request and the same was also signed by her husband; that said instrument so signed by plaintiff and defendant, was not read or explained to her nor did plaintiff read the same, and she had no comprehension of its contents or import; that while she signed said instrument as aforesaid, he did not deliver the same, nor was the same or any of the triplicates delivered to her, and that said instrument never was in fact delivered; that some four years ago, defendant, having in the meantime frequently referred in conversation to the existence of an instrument signed by plaintiff, which purported to be a marriage settlement, plaintiff obtained from defendant, without his knowledge, possession of one of the triplicates bearing her signature, a copy of which is hereto annexed, marked Exhibit A, and made a part hereof.

VI. That at the time of the signature by defendant of said instrument defendant was and still is very wealthy, and plaintiff is informed and believes that he was then worth and had property of the value of upwards of $500,000 and that he is now worth and has property of the value of more than $1,000,000; and while plaintiff had, before she signed said instrument, heard in a general way by public repute that defendant was a man of large property, she did not know or believe that he had property in excess of some $50,000; that

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defendant at and prior to the signing of said instrument, had never informed plaintiff of the value of his possessions.

VII. That plaintiff at, and prior to the time of the signing of said instrument, reposed absolute confidence in defendant, and in all his actions and directions, and believed that defendant would in all things guard her welfare and best interest, and so relying and believing, and on account of her physical condition and mental anxiety in regard to her unborn child, plaintiff signed said instrument as directed by her husband, without knowledge or inquiry as to the contents thereof, and without understanding the same or its import.

VIII. That shortly after May 20, 1908, defendant caused a public ceremonial of their marriage to be celebrated in the state of Wisconsin.

IX. That defendant has never at any time paid or delivered to plaintiff the sum of $5,000, specified in said instrument, or any sum whatever, as provided therein or otherwise.

X. That after the birth of the child, with which she was pregnant at the time of signing said instrument, defendant on several occasions spoke to plaintiff about her having signed said instrument, but he also in the same connection repeatedly assured plaintiff that she and the children to be born to them would receive all of defendant's property, and informed plaintiff that said instrument was of no effect or consequence, and that plaintiff should have no concern about the same, and plaintiff alleges that by mutual consent and understanding between the plaintiff and defendant said instrument, if the same ever had any validity, was rescinded and revoked more than fifteen years before defendant ever assumed to claim any validity therefor; that in the meantime five more children (three of whom are living) were born to plaintiff and defendant; that defendant is now aged and at times exceedingly ill-tempered and harsh and cruel in his treatment of plaintiff, and he has within the last two years repeatedly represented and claimed to plaintiff that said instrument was a subsisting and valid agreement and that his lawyer had a copy thereof to be asserted in case of his death.

XI. That defendant, well knowing the physical and mental condition of plaintiff, the confidence she reposed in him, and her great anxiety to have a ceremonial marriage celebrated before the birth of her child, wrongfully and fraudulently availed himself of his influence over plaintiff and of her distressed condition and of her want of knowledge and capacity, to procure her signature to said instrument; that by reason thereof the same is void, but plaintiff alleges that its existence uncanceled is a menace to her right and well being.

Wherefore plaintiff demands judgment canceling said instrument, and for such other relief as may be just, with costs.

Sustained on demurrer in Slingerland v. Slingerland, 109 Minn. 407, 124 N. W. 19.

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1134. For non-delivery of goods—Action by consignor.

I. That at the times herein mentioned defendant was a common carrier of [freight] [goods] [live stock] for hire, by railroad, [between the places hereinafter mentioned] [and as such accepting goods for transportation over its own and connecting lines between the places hereinafter mentioned].

II. That on 19 , at , defendant, as such carrier, received from plaintiff [1000 barrels of flour], the property of plaintiff, of the value of $, and agreed with plaintiff, for a valuable consideration, to carry the same to , and there deliver [them] to A. B., or order.

III. That though a reasonable time therefor has elapsed defendant has not carried said goods to , and has not delivered them to A. B., or order, though delivery thereof was duly demanded of defendant by [A. B.] [plaintiff] at on 19 , whereby said goods have been wholly lost to plaintiff, to his damage $.

Wherefore [as in § 919].

Sustained by Jarrett v. Great Northern Ry., 74 Minn. 477, 77 N. W. 304; Zalk v. Great Northern Ry., 98 Minn. 65, 107 N. W. 814. See § 578.

1135. Same—Connecting carriers.

[I. and II. as in § 1134.]

III. That through the negligence of defendant and of the Railroad Company, a common carrier connecting with defendant and to which defendant had delivered said [goods] [cattle] for transportation under said agreement, such goods, while in their possession as such carriers under said agreement and in the course of transportation, were [lost] [injured by frost and thereby greatly depreciated in value], to plaintiff's damage $.

Wherefore [as in § 919].

1136. For injury to or loss of goods.

[I. and II. as in § 1134.]

III. That through the negligence of defendant said [goods], while in the possession of defendant as such carrier under said agreement, and in the course of transportation, were [lost] [injured (by frost) and thereby depreciated in value], to plaintiff's damage $.

Wherefore [as in § 919].

Smith v. Great Northern Ry., 92 Minn. 11, 99 N. W. 47. See § 816, and note, 59 L. R. A. 209–277.

1137. For death and injury of cattle.[1]

I. That at the times herein mentioned defendant was a common carrier of live stock for hire by railroad between the places hereinafter mentioned.[2]

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II. That on 19 , at , defendant, as such carrier, received from plaintiff 500 cattle, the property of plaintiff, of the value of $, and agreed with plaintiff, for a valuable consideration, to carry them to , and there deliver them to A. B., or order.

III. That through the negligence of defendant,[3] while said cattle were in the possession of defendant as such carrier under said agreement, in the course of transportation, twenty-five of them died, and the rest of them were injured and reduced in weight and quality.

IV. That in the care of said cattle in the course of such transportation defendant was negligent, in addition to other particulars, in this, that contrary to the act of Congress, approved June 29, 1906, it kept the cattle confined in its cars, without unloading them for feed, water or rest, for more than twenty-eight consecutive hours, though it was not prevented from doing so by storm or other accidental or unavoidable cause which could not be anticipated or avoided by the exercise of due diligence and foresight on its part; and in this, that it handled the cars in which the cattle were carried with unreasonable roughness and with violent jerking and bumping; and in this, that it took hours to carry them to , though in the ordinary course of transportation and by the exercise of reasonable diligence they would have been carried there in hours; that by reason of such negligence the cattle died and were injured as aforesaid.

V. That the value of the cattle which died as aforesaid was $, and the remainder of the cattle were depreciated in value by the negligence of defendant as aforesaid $, all to plaintiff's damage $.

Wherefore [as in § 919].

[1] Based on Willison v. Northern Pacific Ry., 111 Minn. 370, 127 N. W. 4; Knowlton v. Chicago etc. Ry., 115 Minn. 71, 131 N. W. 858. See § 578, and Dunnell, Minn. Digest, §§ 1362–1366.

[2] Or as in § 1135.

[3] Smith v. Great Northern Ry., 92 Minn. 11, 99 N. W. 47.

1138. For delay in delivery.

[I. and II. as in § 1137].

III. That defendant did not carry or deliver said [cattle] as agreed, within a reasonable time, but unreasonably and negligently failed to carry and deliver them until 19 , though in the ordinary course of transportation and by the exercise of reasonable diligence they would have been carried and delivered, as agreed, prior to 19 .

IV. That by reason of such delay [ten] of the cattle, of the value of $, died in the course of such carriage, and the remainder thereof were greatly depreciated in value by loss of weight and quality and a fall in the market price of such cattle at , so that when they were delivered by defendant at , they were worth $ less than they would have been worth

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if they had been carried and delivered by defendant within a reasonable time, to plaintiff's damage $.

Wherefore [as in § 919].

1139. For breach of contract to furnish cars.

I. That at the times herein mentioned plaintiffs were and still are partners, doing business in the city of , under the firm name of .

II. That at all such times defendant was a common carrier of freight for hire by railroad between Twin City Stock Yards, in the city of St. Paul, Minnesota, and Chicago, Illinois.

III. That on Sept. 18, 1907, plaintiffs, owning and having in their possession at said Twin City Stock Yards, St. Paul, 3,679 fat sheep, all in excellent, prime shipping order and marketable condition, requested defendant to furnish them at said place on the following day, a sufficient number of suitable stock cars, for the transportation of said sheep over the line of defendant to the city of Chicago, there to be sold and disposed of upon the market, promptly on arrival, and defendant promised and agreed to do so.

IV. That defendant failed to furnish plaintiffs said stock cars or any cars at said Stock Yards, St. Paul, on Sept. 19, 1907, except four cars, which were capable of conveniently and safely transporting only 929 sheep, which number out of said 3,679 plaintiffs on that date loaded into said four cars and delivered them to defendant for transportation to Chicago, leaving 2,750 sheep for which no transportation facilities were furnished on that day to plaintiffs by defendant; that defendant on said day, in order to induce plaintiffs not to ship such sheep over the line of a competing carrier, agreed to furnish a sufficient number of suitable stock cars at said Stock Yards for the use of plaintiffs, into which to load and ship said sheep over the line of defendant to Chicago on the following day, but failed to do so; and again on said following day agreed to furnish such cars on the next day, but failed to so; and again on Sept. 21, 1907, agreed to furnish said cars for the use of plaintiffs for the shipment of said sheep on the following day, Sept. 22, 1907, but failed to do so.

V. That plaintiffs, relying upon the several agreements so made by defendant as aforesaid, from day to day and from time to time as hereinbefore alleged, were induced in reliance thereon to keep the sheep in said Stock Yards to await the furnishing of such cars by defendant from day to day, down to and including Sept. 22, 1907, on which date they delivered the same to another common carrier and caused them to be promptly shipped to destination.

VI. That on Sept. 19, 1907, and daily thereafter, down to and including Sept. 22, 1907, plaintiffs at said Stock Yards, St. Paul, tendered their said 2,750 sheep to defendant for transportation to Chicago and requested defendant to accept and transport the same to Chicago, but defendant on said days and each of them failed and refused to receive or accept said sheep for transportation on the occasion of each tender on each said day respectively, down to and including said Sept. 22, 1907.

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VII. That by reason of said failure of defendant to furnish said cars on said Sept. 19, 1907, as it undertook and agreed to do, and of its several promises and corresponding failures to furnish cars from day to day thereafter, down to and including Sept. 22, 1907, plaintiffs were induced to hold and keep their said 2,750 sheep at said Stock Yards, St. Paul, for the period of three full days, during which time the sheep fell off in weight, and the market price and value of said sheep and of sheep in general at Chicago suddenly and seriously declined between the date and time when the said sheep would have arrived there and been in readiness for sale had the defendant furnished cars for their transportation on Sept. 19, 1907, as it undertook and agreed to do, and the date and time when the said sheep did in fact reach Chicago, in the usual course of transportation from St. Paul after being shipped on Sept. 22, 1907, and by reason of said decline in market and loss in weight, the said sheep became damaged and depreciated in market value, to plaintiffs' damage $1,500.

VIII. That between Sept. 19 and Sept. 22, 1907, plaintiffs necessarily fed to said sheep food of the reasonable value of $175, and no part of either of said amounts has ever been paid, though demanded.

Wherefore [as in § 919].

Substance of complaint in Pope v. Wisconsin Central Ry., 112 Minn. 112, 127 N. W. 436.

1140. For negligent delay in furnishing cars.

I. That at the times herein mentioned plaintiffs were and still are partners, doing business in the city of Mora, Minnesota, under the firm name of A. and B.

II. That at all such times defendant was a common carrier of freight for hire by railroad from Mora to St. Paul, Minnesota.

III. That at all such times plaintiffs were engaged in the business of buying potatoes in large quantities at Mora, and shipping the same in carload lots from Mora, over the railroad of defendant to different parts of the United States, as defendant well knew.

IV. That during the months of September, October, November and December, 1909, and January, 1910, plaintiffs owned and had stored in their warehouse at Mora, ready for shipment over the railroad of defendant, more than 18,000 bushels of potatoes.

V. That on different dates between Sept. 25, 1909, and March 7, 1910, both dates inclusive, plaintiffs ordered of defendant at least fifty-nine cars to be used in shipping said potatoes from Mora to different parts of the United States and in each instance when cars were so ordered of defendant, plaintiffs had said potatoes in its warehouse at Mora ready for shipment as defendant well knew, and tendered the same to defendant for shipment.

VI. That defendant failed to furnish any of said cars within a reasonable time after they were so ordered, and the market value of said potatoes at Mora,

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between the time said cars were so ordered [and 19 ,] when the same were furnished, declined at least one cent a bushel on 500 bushels, three cents a bushel on 1,600 bushels, four cents a bushel on 1,000 bushels, six cents a bushel on 500 bushels, nine cents a bushel on 500 bushels, ten cents a bushel on 1,000 bushels, eleven cents a bushel on 500 bushels, twelve cents a bushel on 500 bushels, thirteen cents a bushel on 500 bushels, thirteen and one-half cents a bushel on 600 bushels, fourteen cents a bushel on 1,000 bushels, sixteen cents a bushel on 2,300 bushels, seventeen cents a bushel on 1,100 bushels, and eighteen cents a bushel on 500 bushels, to plaintiffs' damage $1,314.

VII. That on account of the failure of defendant to furnish cars for shipping said potatoes within a reasonable time plaintiff was compelled to and did hold said potatoes in its warehouse at Mora, for several months and on account of such delay they shrank in weight at least 1800 bushels.

VIII. That said 1,800 bushels were of the reasonable market value at Mora, of $648.

IX. That by reason of the premises plaintiffs have been damaged $1,962.

Wherefore [as in § 919].

Substance of complaint sustained on demurrer in Zetterberg v. Great Northern Ry., 117 Minn. 495, 136 N. W. 295.

1141. For delay in furnishing cars—Demurrage.

I. That at the times herein mentioned plaintiff was and still is a corporation, duly organized and existing under the laws of this state, and engaged in the buying and selling of grain, coal and feed in the village of Hardwick, Minnesota.

II. That at all such times defendant was a common carrier of freight for hire by railroad between the station of Hardwick and the other stations herein mentioned.

III. That said station of Hardwick is an intermediate point on the line of defendant's railroad, as the term is used in Chapter 23 of General Laws of Minnesota of 1907.

IV. That at various times in the year 1907, plaintiff made application in writing to defendant's agent at said station of Hardwick for cars in which to ship freight; that said applications stated the number of cars wanted, the time and place desired, the character of the freight and its final destination, and were made upon suitable blanks for that purpose provided by defendant; that an itemized statement of the times said applications were made, and received by defendant, the number of cars wanted, the time and place desired, the character of the freight and its final destination, is hereto attached, marked Exhibit A, and made a part hereof; that all of said applications were made in good faith, and at the respective times of the making thereof plaintiff actually had for transportation and shipment the freight described therein and as shown in Exhibit A.

V. That defendant failed to furnish any cars to plaintiff within seventy-

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two hours after the receipt by defendant of said respective applications, Sundays and legal holidays excepted, as prescribed by said chapter 23 of General Laws of 1907; but defendant furnished said respective cars as shown in said Exhibit A and the number of days late, exclusive of said seventy-two hours, Sundays and legal holidays, as shown in said Exhibit A.

VI. That by reason of the premises, under the terms of said chapter 23 of General Laws of 1907, defendant became indebted to plaintiff on Nov. 11, 1907, in the sum of $218, the payment whereof has been duly demanded by plaintiff from defendant, but no part thereof has been paid.

VII. That the sum of $50 is a reasonable attorney's fee for bringing this action.

Wherefore [as in § 919].

Substance of complaint in Hardwick Farmers Elevator Co. v. Chicago etc. Ry., 110 Minn. 25, 124 N. W. 819.

1142. Against express company for non-delivery of money.

I. That defendant is, and at the times herein mentioned was, a common carrier engaged in the carriage of express matter for hire, including moneys, goods, wares and merchandise, and had an office and place of business in the city of Minneapolis, Minnesota, where it received express matter for carriage for hire, and also an office and place of business at Wimbledon, North Dakota, and was engaged in the carriage of express matter, including moneys, in the usual course of such business, between Minneapolis and Wimbledon.

II. That on Sept. 17, 1894, plaintiff, by the Northwestern National Bank as its agent, delivered to defendant, as such carrier of express matter, at its office in Minneapolis, $500 in United States currency, of the value of $500, to be transported by defendant as such carrier of express matter, in the usual course of its business, from Minneapolis to Wimbledon, and paid defendant for such service the charge required by defendant therefor, and took a receipt from defendant therefor, of which the following is a copy: [Copy of receipt.]

III. That said money was delivered to defendant properly inclosed and sealed, and was directed to one A. B., the agent of plaintiff at Wimbledon.

IV. That plaintiff has duly performed all the conditions of said receipt and contract on its part.

V. That plaintiff has duly demanded the delivery of said money from defendant at its offices at Wimbledon, and Minneapolis, but defendant has not delivered the same, or any part thereof, to plaintiff, or to its agent, said A. B., to plaintiff's damage $500.

Wherefore [as in § 919].

Substance of complaint in Geo. C. Bagley El. Co. v. American Express Co., 63 Minn. 142, 65 N. W. 264.

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1143. For loss of baggage.

I. That at the times herein mentioned defendant was a common carrier of passengers and baggage for hire, by railroad, between the places hereinafter mentioned.

II. That on 19 , for a valuable consideration, defendant received plaintiff as a passenger on said railroad, and his trunk as his baggage, containing necessary wearing apparel and other personal effects belonging to him, of the value of $, and agreed with plaintiff to carry the same from to .

III. That through the negligence of defendant said trunk, while in the possession of defendant as such carrier and in the course of transportation, [was wholly lost with all its contents] [was broken and its contents injured], to plaintiff's damage $.

Wherefore [as in § 919].

1144. For being run over by a train at a station.

I. [As in § 1143.]

II. [As in § 1145.]

III. That upon the arrival of the train at the station of defendant in the city of , plaintiff alighted from the train as soon as it stopped for the purpose of allowing passengers therein to alight, and then and there, through the negligence of defendant in the management of its trains, was struck by a passing train of defendant and thereby [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

See Parsons v. N. Y. etc. Ry., 113 N. Y. 355, and note, 59 L. R. A. 209–277.

1145. For injury to passenger from collision.[1]

I. [As in § 1143.]

II. That on 19 , plaintiff bought of defendant a ticket entitling him to transportation from to , and thereupon entered and became a passenger on one of the trains of defendant on said railroad.

III. That while he was such a passenger a collision, caused by the negligence of defendant,[2] occurred between said train and another train of defendant, near the village of , whereby plaintiff was thrown violently to the floor of the car in which he was riding and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

[1] Based on Form 79, Conn. Pr. Act.

[2] Smith v. Great Northern Ry., 92 Minn. 11, 99 N. W. 47. See 816, and note, 59 L. R. A. 209–277.

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1146. Collision between trains—Action against two companies.

The plaintiff, as administratrix of the estate of A. B., deceased, complains of defendants and alleges:

I. That on 19 , said A. B. died at , intestate; that on 19 , letters of administration on his estate were duly issued and granted to plaintiff by the probate court of county, Minnesota, whereupon plaintiff duly qualified and entered upon the duties of and now is such administratrix.

II. That at the times herein mentioned defendants operated railroads as common carriers of passengers for hire in this state.

III. That on 19 , the said A. B. was a passenger upon one of the passenger trains of the defendant, the Northern Pacific Railroad Company, which was then and there proceeding from the yard of said company, in the city of St. Paul, Minnesota, to the Union Depot in said city; that said train then and their collided with a train of the defendant, the Minneapolis and St. Louis Railway Company, by reason of the negligence with which said train was being run and operated and the negligent manner in which the train of the defendant, the Minneapolis & St. Louis Railway Company, was being run and operated, the said trains of the defendants proceeding in opposite directions, whereby the said A. B. was instantly killed.

IV. That said collision occurred within the corporate limits of the city of St. Paul, then and there a municipal corporation, and at the time of the occurrence there was in force an ordinance of said city, providing, among other things, that no railroad company should run a locomotive or train of cars within the limits of said city at a greater speed than four miles an hour, nor without having and ringing a bell of sufficient size at all times while so in motion; that at the time of said collision both of said trains were being run off their schedule time and at a high and dangerous rate of speed, greatly in excess of four miles an hour, and without the bells of their locomotives being rung, though at the time there was a dense fog which obscured objects at a short distance and rendered the danger of traveling much greater than it would ordinarily be; that the brakes and machinery for stopping said train of the defendant, the Northern Pacific Railroad Company, were, through its negligence, out of order and insufficient for the purpose of controlling said train; that said train was being propelled in such a manner that it was impossible properly to control its movement or speed, and no efficient means were taken for the purpose of stopping said train and averting said accident; that through the negligence of defendants the switches upon the lines of road upon which said trains were being run were not properly arranged for the running of said trains, and said collision was caused solely by reason of the negligence of the defendants as aforesaid.

[Continue as in § 1258.]

Sustained on demurrer in Flaherty v. Minneapolis etc. Ry., 39 Minn. 328, 40 N. W. 160.

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1147. Collision between two parts of separated train.

I. [As I. in § 1145.]

II. [As II. in § 1145.]

III. That defendant negligently failed to construct and maintain its roadbed and track at and near the place of the accident hereinafter mentioned, in a safe and suitable condition for said train, and negligently failed to sufficiently inspect said roadbed and track, and negligently made up said train upon an improper and unsafe plan, and negligently failed to provide sufficient and proper coupling between the cars in said train, and negligently operated said train, by reason of all of which, after said train had started and had proceeded but a short distance, it broke in two; that plaintiff was thereby left in the rear part of said train disconnected from the front part thereof, and thereupon defendant so negligently ran and operated the said two parts and failed to properly protect the same, that the rear end of said train, in which plaintiff was then and there riding, collided with the front part thereof, in which collision plaintiff was with great force and violence thrown out of her seat and upon the floor of the car and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Based on complaint in Campbell v. Duluth etc. Ry., 111 Minn. 410, 127 N. W. 413.

1148. For injury from derailment.

I. [As I in § 1145.]

II. [As II in § 1145.]

III. That while plaintiff was such passenger defendant so negligently ran and operated[1] said train and railroad that near the village of , while the train was running at a high speed, it was derailed and overturned, and thereby plaintiff was thrown violently to the floor of the car in which he was riding and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

[1] Eldridge v. Minneapolis etc. Ry., 32 Minn. 253, 20 N. W. 151. See § 816, and note, 59 L. R. A. 209–277.

1149. For wrongful ejection of passenger—Error regarding ticket.

I. That at the times herein mentioned defendant was a common carrier of passengers and baggage for hire, by railroad, between the places hereinafter mentioned.

II. That on 19 , plaintiff bought a ticket of defendant entitling plaintiff, with his baggage, to passage on said railroad from to .

III. That thereupon plaintiff boarded one of defendant's regular passenger trains at , bound for , and presented said ticket to the conductor of the train for his passage thereon; that the conductor wrongfully refused to accept the ticket for plaintiff's passage and returned it to him, and stated as the reason for his refusal to accept it that [state reason]; that the

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conductor then demanded of plaintiff that he pay his fare and upon plaintiff's refusing to do so informed plaintiff that he would put him off the train at the next station if he did not pay his fare; that when the train arrived at the next station, the village of , the conductor of the train, acting in the course and scope of his employment as a servant of defendant, wrongfully [forcibly] [wantonly and maliciously] ejected plaintiff and his baggage from said train because of his refusal to pay his fare thereon otherwise than by said ticket, whereby plaintiff was caused great humiliation and nervous distress.

IV. That said village contained only a few inhabitants and was without any hotel or lodging house; that when plaintiff was so ejected from the train it was about 11 o'clock at night, and was snowing heavily and very cold; that plaintiff was just recovering from a severe illness and was very weak; that defendant's station in said village was closed and plaintiff was unable to find any shelter in the village; that while plaintiff was waiting for a freight train upon which to return to , he was necessarily exposed to the elements for more than two hours; that after returning to , on a freight train arriving there at about 2 o'clock the next morning, plaintiff necessarily walked over a mile in a heavy snow storm before finding shelter; that by reason of such ejection and exposure, caused by the wrongful acts of defendant's servant as aforesaid, plaintiff was ill for two months and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

See Serwe v. Northern Pacific Ry., 48 Minn. 78, 50 N. W. 1021, and Dunnell, Minn. Digest, §§ 1247–1260.

1150. Same—Refusal to pay fare if not furnished with a seat.

I. [As I. in § 1145.]

II. [As II. in § 1145.]

III. That as soon as plaintiff entered said train it started, and before plaintiff could look through the various passenger cars thereof for a seat the train was running at a high rate of speed; that plaintiff failed to find a vacant seat in the train after diligent search; that at the first opportunity he applied to the conductor of said train for a seat, but he failed and refused to furnish plaintiff with a seat, and wholly neglected and refused to seek for one for plaintiff; that thereupon the conductor demanded of plaintiff his fare; that plaintiff offered to pay his fare if supplied with a seat, but refused to pay his fare unless so supplied.

IV. That thereupon and before any stop had been made by the train after leaving said city of , and before plaintiff had had any opportunity to leave the train after he failed to find a seat, the conductor stopped the train at an improper place out in the country remote from any dwelling house and more than two miles distant from any flag station of defendant, and more than five miles distant from any regular station of defendant, and then and there wrongfully ejected plaintiff from said train; that without any warning

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or previous request that plaintiff leave the train, and when plaintiff had not made or threatened that he would make any forcible resistance to his authority, the conductor wrongfully seized plaintiff and by force dragged him down the aisle of the car in which he was standing and violently shoved him off from the car to the ground at said point and went on with the train and left plaintiff at said point, refusing and preventing him from re-entering the train.

V. That throughout plaintiff was peaceable and offered no forcible resistance and was ready and willing to pay his fare if supplied with a seat.

VI. That the conductor was without cause, insolent, violent, brutal, rude and boisterous in his treatment of plaintiff and wrongfully inflicted insults and indignities on plaintiff in the presence of the other passengers on the train, many of whom were friends or relatives of plaintiff.

VII. That said conductor was then and there the servant of defendant in charge of said train, acting in the course and scope of his employment as such.

VIII. That there was no opportunity whatever for plaintiff to get off the train prior to his ejectment after leaving said city; that the first stop made by said train after leaving said city was the one made as aforesaid in the country at a distance from any station or dwelling house for the purpose of ejecting plaintiff, and there were no means of getting from said place to said city or any other city, or to any other means of conveyance, except by walking several miles.

IX. That plaintiff was thereby damaged $.

Wherefore [as in § 919].

Substance of complaint in Hardenbergh v. St. Paul etc. Ry., 39 Minn. 3, 38 N. W. 625.

1151. For injury to passenger alighting from street car—Car started suddenly.

I. That at the times herein mentioned defendant was a common carrier of passengers for hire, by electric street railway, in and upon the streets of the city of , Minnesota.

II. That on 19 , plaintiff entered one of the cars of defendant at the intersection of and streets in said city, paid his fare to the conductor of the car and was received and carried as a passenger by defendant to the intersection of and streets where he desired to alight.

III. That when the car arrived at the latter place the motorman of the car, who was then and there running it as defendant's servant, stopped it for passengers to alight, and while plaintiff was in the act of alighting from the car, negligently and without warning or notice to plaintiff, and without giving him a reasonable time to alight, caused the car to start suddenly and with a violent jerk, thereby throwing plaintiff to the ground with such violence and in such manner that he [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

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1152. For injury to passenger boarding a street car—Car started suddenly.

I. [As in preceding form.]

II. That on 19 , at the intersection of and streets in said city a car of defendant stopped to take on passengers and plaintiff stepped on the rear platform of the car, as a passenger for hire, intending to take a seat in the car; that as soon as plaintiff had stepped on the platform and before he had a reasonable time to enter the car and take a seat, the motorman of the car, who was then and there running it as defendant's servant, negligently started it suddenly without warning and with a violent jerk, thereby throwing plaintiff [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

1153. For injury from collision between two street cars.

I. [As I. in § 1151.]

II. That on 19 , plaintiff entered a car of defendant at the intersection of and streets in said city, paid his fare to the conductor of the car and was received by defendant as a passenger therein.

III. That while he was such a passenger a collision, caused by the negligence of defendant, occurred between said car and another car of defendant, whereby plaintiff was thrown violently to the floor of the car in which he was riding and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

See note to § 1145.

1154. For injury to passenger from fright.

I. That at the times herein mentioned defendant was a common carrier of passengers for hire, by electric street railway, in and upon the streets of the city of St. Paul, Minnesota.

II. That on Dec. 1, 1890, plaintiff entered one of the cars of defendant at the intersection of Acker and Cortland streets in said city, paid her fare to the conductor of the car, and was received and carried as a passenger by defendant to the intersection of Jackson and Seventh streets, where she desired to alight.

III. That when said car arrived at the intersection of said street car line on Jackson street with the east Seventh street cable line, running from Duluth avenue to Wabasha street and also owned and operated by the defendant, defendant negligently drove it across said cable line, in front of a then near and rapidly approaching cable train thereon; that a collision between the two cars seemed so imminent and was so nearly caused, that the incident and attending confusion of ringing of alarm bells and of passengers jumping up and rushing out of the car in which plaintiff was a passenger, caused plaintiff sudden fright and reasonable fear of immediate and instant death, or great bodily injury, and the shock thus caused to plaintiff threw her into violent nervous convulsions.

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IV. That plaintiff was at the time pregnant and such convulsions and injuries caused her a miscarriage, and [allege other injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Substance of complaint in Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N. W. 1034.

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1155. Foreclosure by action.

I. That on 19 , defendant A. B. made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That at the same time and to secure the payment of said note the defendant A. B. made and delivered to plaintiff a chattel mortgage, of which the following is a copy: [Copy of mortgage, omitting acknowledgment.]

III. That said mortgage was duly attested and acknowledged and on 19 , filed for record in the office of the register of deeds for county, Minnesota, in which county the said A. B. resided at the time the mortgage was executed.

IV. That no part of the principal or interest of said note and mortgage has been paid and no proceedings have been had at law on said note or to foreclose said mortgage and there is now due from defendant A. B. to plaintiff thereon the sum of $, with interest from 19 .

V. That the defendants C. D. and E. F. claim to have some interest in or lien upon said mortgaged property, but said interests or liens, if any exist, accrued since the lien of said mortgage and are subject thereto, [or specify the liens claimed and any proceedings taken thereunder for their enforcement or any threatened proceedings].

Wherefore plaintiff demands judgment:

1. Against the defendant A. B. for $.

2. Adjudging and directing a sale of said mortgaged property and the application of the proceeds thereof to the payment of the personal judgment against the defendant A. B. in favor of plaintiff and the costs and disbursements of this action.

3. Barring and foreclosing each and all the defendants and all persons claiming under them or either of them of all right of redemption or interest in said mortgaged property [except the right to redeem from the sale herein adjudged and directed, in the manner provided for redemption under the statute from a sale in foreclosure proceedings under a power].

4. For such other relief as may be just.

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COMPOSITION WITH CREDITORS

1156. General form.

The defendant for answer to the complaint herein alleges that on 19 , defendant, being in embarrassed circumstances financially, his creditors, including plaintiff, agreed with him and with each other to accept from him a certain proportion, to wit, per cent. of their respective claims, in full satisfaction and discharge thereof, and to release him from the balance, and thereupon defendant paid said amounts to his said creditors respectively, including plaintiff, and they each received the same in full satisfaction and discharge of all demands against him.

1157. Same—Another form.

That he was indebted to plaintiff as alleged and to divers other persons respectively, and that it was thereupon mutually agreed by and between defendant and plaintiff and the said other persons, that defendant should pay to plaintiff and the said other persons respectively, and the plaintiff and said other persons respectively should accept from defendant a composition at the rate of cents on the dollar on their respective debts, in full satisfaction and discharge of their respective debts; and defendant afterwards, in pursuance of said agreement, paid to plaintiff, and plaintiff accepted and received from defendant, the said composition on the said debt of plaintiff in full satisfaction and discharge of said debt.

COMPROMISE AND SETTLEMENT

1158. General form.

I. That on 19 , before this action was brought, plaintiff demanded of defendant $ on the grounds alleged in the complaint herein, and defendant refused to pay the same because [state facts showing claim was doubtful].

II. That [on 19 , before this action was brought] [then and there] plaintiff and defendant agreed to compromise plaintiff's claim, and that in compromise thereof defendant should pay and plaintiff accept $ in satisfaction thereof; and thereupon defendant paid and plaintiff accepted said sum in compromise and full satisfaction of said claim.

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1159. General skeleton form—Written contract.

I. That on 19 , [for a valuable consideration] [upon the consideration therein expressed], defendant entered into a written agreement with plaintiff, of which the following is a copy: [Copy of agreement.]

II. [That plaintiff has duly performed all the conditions thereof on his part.] [That on 19 , at , plaintiff tendered to defendant .] [That on 19 , at , plaintiff offered to .] [That on 19 , at , plaintiff was ready and willing to .]

III. That defendant has not performed said agreement on his part in this, that [allege one or more breaches and make it appear that time for performance has expired—if no time for performance was agreed upon, allege that a reasonable time for performance has elapsed].

IV. [That on 19 , at plaintiff (demanded) (requested) of defendant that he , but defendant refused and still refuses to do so.]

V. That thereby plaintiff was damaged $

VI. [Allege any special damages sought.]

Wherefore [as in § 919].

See §§ 584–602.

1160. Same—Oral or written contract.

I. That on 19 , plaintiff and defendant entered into an agreement wherein plaintiff promised defendant that [state promise].

II. That in consideration of said promise defendant promised plaintiff in said agreement [among other things] that [state promise].

[Continue as in § 1159.]

1161. Same—Another form.

That on 19 , it was mutually agreed[1] by plaintiff and defendant that defendant would [allege promise of defendant] and that plaintiff would [allege promise of plaintiff].

[Continue as in § 1159.]

[1] This is an allegation of fact. Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39.

1162. Same—Assignment and performance by assignee.

I. That on 19 , [for a valuable consideration] [upon the consideration therein expressed], defendant entered into a written contract with one A. B., of which the following is a copy: [Copy of contract.]

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II. That on 19 , said A. B. duly assigned said contract and all his rights thereunder to plaintiff.

III. That up to the time of said assignment the said A. B. had duly performed all the conditions of said contract on his part, and since said assignment plaintiff has duly performed all the conditions of said contract on his part.

[Continue as IV., V. and VI. in § 1159.]

1163. On a contract to repair a machine.

I. That on 19 , plaintiff purchased of defendant a steam thresher and separator for which he paid to defendant the sum of $; that at and prior to the purchase of said machine, defendant represented and warranted to plaintiff that said machine was well made, in good condition and repair, and in every respect a first class machine; that upon the delivery of said machine the same was found by plaintiff to be broken in several of its parts, defective, out of repair, not well made or in good condition as represented and warranted; that thereupon plaintiff refused to accept said machine or receive or pay for the same, and defendant, for the purpose of inducing plaintiff to accept the machine, promised plaintiff that if he would accept the machine and pay for it, defendant would place the same, in a reasonable time, in good repair and condition, so that it would be a first class machine in every respect; that plaintiff, relying on such promise of defendant, accepted the machine and paid therefor the sum of $.

II. That defendant has not made any repairs in said machine since making said promise or attempted in any way to put it into a condition to do good work, but has left it as it was at the time of said promise, though requested by plaintiff to repair it.

III. That it would reasonably cost $ to put said machine in the condition in which defendant represented and warranted it to be, and in which he promised to put it.

IV. That by reason of the premises plaintiff has been damaged $.

Wherefore [as in § 919].

Substance of complaint sustained in King v. Nichols & Shepard Co., 53 Minn. 453, 55 N. W. 604.

1164. On a contract to pay debts of another.

I. That plaintiffs are and for more than one year last past have been partners, doing business under the firm name of M. and S.

II. That on 19 , and for more than one year prior thereto, N. B. and J. N. were partners, doing business as general merchants in the city of Shakopee, under the firm name of B. and N., and as such owned a large and valuable stock of merchandise and other property and had owing and due to them a large amount in book accounts, notes and other claims and demands.

III. That on 19 , the said B. and N. and defendants made and

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entered into an agreement in writing whereby the said B. and N. agreed to sell and deliver to defendants all the property of every kind then belonging to said firm of B. and N. and the defendants agreed to pay therefor the sum of $, as a part consideration for said purchase, and as a further consideration therefor, undertook and agreed with said B. and N., and all persons to whom they were then indebted or liable in any manner, to pay all the debts and liabilities of the said firm of B. and N., at the respective times when the same should mature, become due and payable.

IV. That thereupon defendants paid to said B. and N. the said sum of $ and assumed said debts and liabilities and said B. and N. then and there delivered and turned over to defendants all their said firm property of every kind.

V. That at the time of said agreement and sale and delivery the said B. and N. were indebted to plaintiffs for a balance due upon an account for goods theretofore sold and delivered by plaintiffs to said B. and N., in the sum of $, no part of which has been paid.

Wherefore [as in § 919].

Sustained on demurrer in Maxfield v. Schwartz, 43 Minn. 221, 45 N. W. 429.

1165. Same—Another form.

I. That on 19 , one A. B. was, and still is, indebted to plaintiff in the sum of $ for goods sold and delivered by plaintiff to him [on 19] [between 19 , and 19].

II. That on 19 , said A. B., while so indebted to plaintiff, sold and delivered to defendant a [stock of merchandise], and in consideration of said sale [and as part of the purchase price therefor] defendant then promised said A. B. to pay to plaintiff on 19 , A. B.'s said debt to plaintiff, amounting to $.

III. That on 19 , plaintiff demanded payment thereof from defendant, but no part thereof has been paid.

Wherefore [as in § 919].

Sustained by Sanders v. Classon, 13 Minn. 379(352); Maxfield v. Schwartz, 43 Minn. 221, 45 N. W. 429.

1166. On a contract to pay a debt upon dismissal of action.

I. That on 19 , there was pending in the district court for county, Minnesota, an action brought by the plaintiff herein against the defendant herein for [state in general terms the ground of claim].

II. That in consideration that plaintiff would dismiss said action and accept $ in full satisfaction of said claim defendant on said day promised to pay to plaintiff that amount [on 19].

III. That thereupon and in consideration of said promise plaintiff duly

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dismissed said action and ever since said promise has been and now is willing to accept said amount in satisfaction of said claim.

IV. That no part thereof has been paid.

Wherefore [as in § 919].

1167. On a contract to pay for goods to be manufactured.

I. That on 19 , defendant employed plaintiff to manufacture for him a [wagon], and agreed to pay plaintiff therefor $ on its completion.

II. That in pursuance of said agreement plaintiff manufactured a wagon for plaintiff, and on 19 , tendered the same to him and demanded payment therefor, but defendant refused and still refuses to accept the same or to pay therefor, to plaintiff's damage $

III. That plaintiff has duly performed all the conditions of said agreement on his part.

Wherefore [as in § 919].

1168. Denial of agreement.

The defendant for answer to the complaint herein denies [that he ever made the agreement mentioned therein] [that he ever (promised) (warranted) (agreed) (covenanted)] that [negativing the allegations of the complaint so as to avoid a negative pregnant] [each and every allegation in the paragraph thereof].

1169. Denial of signature or execution of instrument.

The defendant for answer to the complaint herein denies that he ever signed or executed the [instrument] [deed] [note] mentioned in the complaint.

[Personal verification.]

See §§ 323, 601; R. L. 1905 § 4730; G. S. 1913 § 8448; Dunnell, Minn. Digest, § 3365.

1170. Denial of plaintiff's performance.

The defendant for answer to the complaint herein denies that plaintiff has performed all the conditions of said agreement on his part and alleges that [state wherein plaintiff has failed of performance].

See § 258.

1171. Denial of conditional delivery.

The defendant for answer to the complaint herein denies that the [note] [deed] mentioned therein was executed or delivered by plaintiff on the condition alleged in the complaint and alleges that the same was executed and delivered by plaintiff absolutely and without condition.

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1172. Want of consideration.

The defendant for answer to the complaint herein alleges that there was no consideration for said [agreement].

Sustained by Grimes v. Erickson, 94 Minn. 461, 103 N. W. 334. See § 591.

1173. Failure of consideration.

I. That defendant gave the [undertaking] mentioned in the complaint to plaintiff solely in consideration of the performance by plaintiff of the covenants and conditions, upon his part, in a written agreement then made between them, of which the following is a copy: [Copy of agreement.]

II. That defendant duly performed all the conditions thereof on his part.

III. That plaintiff [allege non-performance by plaintiff constituting a failure of consideration].

See § 592.

1174. Rescission by mutual agreement.

That on 19 , after the making of said contract and before any breach thereof, the same was rescinded and abandoned by mutual agreement of plaintiff and defendant.

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CONTRIBUTION

1175. Common count.

[See form of complaint under § 1591.]

1176. Between makers of note.

I. That on 19 , plaintiff and defendant made and delivered to one A. B. their joint and several promissory note, of which the following is a copy: [Copy of note.]

II. That at the maturity of said note plaintiff necessarily paid the whole amount due thereon amounting to $.

III. That on 19 , plaintiff demanded of defendant that he pay him one-half of said amount as his contributive share, but no part thereof has been paid.

Wherefore [as in § 919].

1177. Between co-sureties on note.

I. That on 19 , one A. B., with plaintiff and defendant as sureties, made and delivered to C. D. a promissory note, of which the following is a copy: [Copy of note.]

II. That at the maturity of said note the said A. B. had become insolvent, and plaintiff, as one of his sureties on said note, necessarily paid the whole amount due thereon amounting to $.

III. That on 19 , plaintiff demanded of defendant that he pay him one-half of said amount as his contributive share, but no part thereof has been paid.

Wherefore [as in § 919].

1178. Between co-sureties on payment of judgment.

I. That on 19 , a judgment was duly rendered in the district court for county, Minnesota, in favor of one A. B. against one C. D. as principal, and against this plaintiff and the defendants herein, as sureties, for $.

II. That the cause of action on which said judgment was rendered was a bond made by said C. D. as principal and this plaintiff and the defendants herein as sureties, payable to the said A. B., in the sum of $.

III. That on 19 , plaintiff necessarily satisfied said judgment by payment to the said A. B. of $, the whole amount due thereon.

IV. That on 19 , plaintiff duly notified defendants of said payment and demanded contribution of their proportion from each, but no part thereof has been paid.

Wherefore [as in § 919].

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1179. Between tenants in common of leased premises.

I. That on 19 , plaintiff and defendant entered into two written leases, as lessees and tenants in common, one thereof made by A. B. as lessor, and plaintiff and defendant as lessees, and the other made by C. D. as lessor and the plaintiff and defendant as lessees, each of said leases bearing date 19 , and leasing the premises therein described for the period of fifteen years, upon the terms and conditions in said leases mentioned; that copies of said leases are hereto attached, marked respectively Exhibit A and Exhibit B, and made a part hereof.

II. That on 19 , and at the commencement of the second five-year period in said leases specified, the market value of said demised premises was agreed upon and determined by the parties to said leases at the sum of $, whereupon, by the terms of said leases, it became the duty of plaintiff and defendant to pay the sum of $ per year, as rent for said premises, besides all taxes and assessments of every kind that might be assessed or imposed upon said demised premises or any part thereof during the continuance of said leases.

III. That during the period between 19 , and 19 , plaintiff necessarily paid all of the taxes and assessments levied and imposed upon said demised premises during such period, and during the continuance of said leases, and all of the rent provided for under said leases, during the continuance thereof, aggregating $.

IV. That plaintiff duly demanded of defendant, prior to each of said payments for taxes, assessments and rent, that he should pay one-half thereof, his proportionate part, but he always declined and refused to do so; and he has never paid any part thereof.

V. That on 19 , said leases were both determined and canceled by the act and agreement of the parties thereto; that no rents, issues, profits or revenues of any sort have, at any time, been received from said leased premises by plaintiff, or by any one for him; but said premises have, as to said lessees, during the whole period of said leases, remained wholly unproductive.

VI. That a statement of the amounts paid by plaintiff for taxes, assessments and rent as aforesaid is hereto attached, marked Exhibit C, and made a part hereof.

Wherefore [as in § 919].

Substance of complaint in Van Brunt v. Gordon, 53 Minn. 227, 54 N. W. 1113. A common count for money paid would be sufficient in such a case as this. See §§ 797, 1591.

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CONVERSION

1180. General form applicable to all cases.[1]

I. That at the times herein mentioned plaintiff was the owner [and entitled to the immediate possession][2] of [describe property in general terms].

II. That on 19 , defendant [wilfully, wantonly and maliciously][3] converted the same to his own use.

III. That the then value thereof was $.

IV. [That on 19 , defendant refused to deliver the same to plaintiff on demand.][4]

V. [Allege any special damages sought.][5]

Wherefore [as in § 919].

[1] Sustained in Cordill v. Minn. Elevator Co., 89 Minn. 442, 95 N. W. 306. See § 603 and 2 Chitty, Pl. 621 (1a); Brunswick etc. Co. v. Brackett, 37 Minn. 58, 33 N. W. 214; Green v. Palmer, 15 Cal. 414; Baals v. Stewart, 109 Ind. 371. This form may be used in all cases regardless of the nature of plaintiff's title or the manner in which the conversion was committed, or whether the original taking or possession of defendant was rightful or not. It may be used against all classes of persons, including sheriffs, bailees, pledgees, factors, agents, servants, mortgagors, mortgagees, common carriers, executors, administrators, and warehousemen, without describing them as such, or the manner in which they acquired possession.

[2] This is a usual but not a necessary allegation. See § 603.

[3] Add only when exemplary damages are sought. See § 630 and Dunnell, Minn. Digest, § 1963.

[4] This allegation is not necessary, but it is often practically advantageous. See § 603.

[5] See § 624 and Dunnell, Minn. Digest, § 1961.

1181. Short general form.

That on 19 , defendant converted to his own use a [horse], the property of plaintiff, of the value of $, to plaintiff's damage $.

Wherefore [as in § 919].

Based on 2 Chitty, Pl. 16 Am. ed. 621; Duggan v. Wright, 157 Mass. 228, 32 N. E. 159 (under statute declaratory of common law). See § 603.

1182. General form—Without wrongful taking.

I. [As I. in § 1180.]

II. That on 19 , defendant, being in possession of said property, [wrongfully] converted the same to his own use, to plaintiff's damage $.

[Continue as in § 1180.]

1183. Same—Short form.

That on 19 , defendant, being in possession of a [horse], the property of plaintiff, of the value of $, wrongfully refused to deliver the

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same to plaintiff on demand and converted the same to his own use, to plaintiff's damage $.

Wherefore [as in § 919].

1184. General form—Wrongful taking.

I. That at the times herein mentioned plaintiff was the owner [and entitled to the immediate possession] of [describe property in general terms].

II. That on 19 , defendant wrongfully [wantonly and maliciously] took said property from the possession of plaintiff and converted it to his own use, to plaintiff's damage $.

III. That the then value thereof was $.

IV. [That on 19 , defendant refused to deliver the same to plaintiff on demand.]

V. [Allege any special damages sought.]

Wherefore [as in § 919].

See § 603.

1185. Same—Another form.

I. That on 19 , plaintiff was in the actual possession of [describe property in general terms], in the county and state aforesaid.

II. That on said day, and while plaintiff was so possessed, defendant [wrongfully] took said property from plaintiff and converted it to his own use.

III. That the then value thereof was $.

[Continue as in § 1184.]

1186. Short form—Wrongful taking.

That on 19 , defendant wrongfully took from plaintiff's possession a [horse], the property of plaintiff, of the value of $, and converted it to his own use, to plaintiff's damage $.

Wherefore [as in § 919].

1187. Wrongful taking—Refusal to deliver on demand.

I. [As I. in § 1180.]

II. That on 19 , defendant wrongfully took said property from the possession of plaintiff.

III. That on 19 , plaintiff demanded of defendant that he deliver said property to plaintiff, but he refused to do so, to plaintiff's damage $.

IV. That the then value thereof was $.

Wherefore [as in § 919].

Sustained by National Citizens Bank v. McKinley, 115 Minn. 378, 132 N. W. 290.

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1188. Against subsequent holder.

I. [As I. in § 1180.]

II. That on 19 , one A. B. wrongfully took said property from the possession of plaintiff.

III. That thereafter the same came into the possession of defendant, who, on 19 , while in such possession, refused to deliver the same to plaintiff on demand, and converted the same to his own use, to plaintiff's damage $.

[Continue as in § 1180.]

1189. Short form—Conversion by sale.

That on 19 , defendant, being in possession of [one hundred bushels of wheat], the property of plaintiff, of the value of $, wrongfully sold and converted the same to his own use, to plaintiff's damage $.

Wherefore [as in § 919].

1190. By assignee after conversion.

I. That at the time mentioned in the next paragraph one A. B. was the owner and entitled to the immediate possession of [describe property in general terms].

II. That on 19 , defendant converted the same to his own use, to the damage of said A. B. $.

III. That the then value thereof was $.

IV. That on 19 , said A. B. duly assigned to plaintiff all his claim against defendant for said conversion and damages.

Wherefore [as in § 919].

1191. By executor or administrator for conversion during decedent's lifetime.

[I. II. and III. as in § 1190.]

IV. [Allege death of A. B. and appointment of plaintiff as in § 1314 or § 1316.]

Wherefore [as in § 919].

1192. Bailor or principal against bailee or agent.

I. That at the times herein mentioned plaintiff was the owner of [describe property in general terms].

II. That on 19 , defendant was in possession thereof as [agent] [bailee] of plaintiff and refused to deliver the same to plaintiff on demand, to plaintiff's damage $.

III. That the then value thereof was $.

Wherefore [as in § 919].

Sustained by Gregory v. Fichtner, 14 N. Y. S. 891.

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1193. Bailor or principal against third person.

I. That at the time mentioned in the next paragraph plaintiff was the owner of [describe property in general terms], and the same were in the possession of one A. B. as the [bailee] [agent] of plaintiff.

II. That on 19 , defendant wrongfully took said [goods] from the possession of said A. B. and converted them to his own use.

III. That the then value thereof was $.

IV. That on 19 , the time during which said A. B. was entitled to the possession of said [goods] expired and thereupon plaintiff became entitled to the immediate possession thereof.

V. That by reason of said conversion plaintiff was damaged in the sum of $.

Wherefore [as in § 919].

1194. By one cotenant against another.

I. That at the times herein mentioned plaintiff and defendant owned, as tenants in common, [describe property in general terms], plaintiff owning one undivided half thereof, and defendant owning the other half.

II. That on 19 , defendant, [on plaintiff's demand, wrongfully refused to make or permit a division thereof and claimed to be the absolute owner of the whole thereof] [took exclusive possession thereof], and wrongfully sold and converted the whole thereof to his own use, to plaintiff's damage $.

III. That the then value thereof was $.

Wherefore [as in § 919].

Based on Stall v. Wilber, 77 N. Y. 158, 162.

1195. Sale by one cotenant of the whole property as his own—Action by assignee.

I. That throughout the month of August, 1880, defendant was the owner of a three-fourths undivided interest in and to 1,156,252 feet of pine saw-logs marked [description of marks] then lying in Lake St. Croix, near the city of Stillwater, Minnesota.

II. That plaintiff was then and there the owner of a one-eighth undivided interest in and to said logs and one A. B. was the owner of a one-eighth undivided interest therein.

III. That in the month of August, 1880, at said city, defendant, without the leave or consent of either said A. B. or plaintiff, wrongfully sold all of said logs as his own property and received all the avails of said sale, and then and there wrongfully converted the said logs and the avails thereof to his own use.

IV. That said logs were then worth $7.50 for each thousand feet thereof, in all $8,671.89.

V. That before the commencement of this action the said A. B. duly sold, assigned and set over to plaintiff, all his right, title and interest in and to

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said logs, and the avails thereof, and his claim against defendant for said wrongful conversion, and plaintiff now owns and holds the same.

Wherefore [as in § 919].

Complaint in Shepard v. Pettit, 30 Minn. 119, 14 N. W. 511.

1196. Against sheriff—Property taken from third party.[1]

I. That at the times herein mentioned defendant was and still is the sheriff of county, Minnesota.

II. That at all such times plaintiff was and still is the owner and entitled to the immediate possession of [describe goods in general terms].

III. That on 19 , defendant, as such sheriff, wrongfully [took said property from the possession of one A. B.] [levied upon said property in the possession of one A. B.] [under process directed against the property of said A. B.] and wrongfully [detains the same from plaintiff, to his damage $] [sold the same (under said process), to plaintiff's damage $].

IV. That the value of said property at the time of said [taking] [levy] was $.

V. That on 19 , [at the time of such taking] plaintiff duly served upon defendant an affidavit of his title and right to the possession of said property, stating its value and the ground of such title and right, as provided by G. S. 1913 § 7843, and demanded of defendant that he deliver said property to plaintiff, but defendant refused, and still refuses to do so.[2]

Wherefore [as in § 919].

[1] See § 878 and Kloos v. Gatz, 97 Minn. 167, 105 N. W. 639.

[2] Not essential. Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

1197. Against sheriff for conversion of grain—Setting out the facts.[1]

I. That at the times herein mentioned, defendant A. B. was the sheriff of Carver county, Minnesota.

II. That on Aug. 22, 1904, plaintiff was the owner [and entitled to the immediate possession] [2] of six stacks of wheat situated on the west sixty acres of the southeast quarter of section ten, township of Dahlgren, in said county, [of the value of $].[2]

III. That on Aug. 22, 1904, the defendant A. B. wrongfully and maliciously levied upon said wheat under and by virtue of an execution issued out of this court, on a judgment rendered therein on June 10, 1901, in favor of one C. D. against one E. F.

IV. That defendant A. B. thereby wrongfully detained said wheat from plaintiff and converted it to his own use.

V. That on Sept. 22, 1904, said wheat, while under said levy, was burned without any fault or act of plaintiff, and was thereby wholly destroyed.

VI. That because of said levy plaintiff was prevented from taking possession of and threshing said wheat.

VII. That on Sept. 2, 1904, and prior and subsequent thereto, plaintiff de-

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manded of defendant that he release said stacks of grain from said levy, and that plaintiff be permitted to thresh the same, but defendant refused to release said levy or to allow plaintiff to thresh the same.

VIII. That on Sept. 2, 1904, plaintiff made affidavit of his title to said stacks of wheat, and to his right to the possession thereof, stating the value thereof and the ground of such title and right, and served such affidavit upon defendant, and in connection therewith demanded of defendant that he release said levy, which defendant refused to do.[3]

IX. That all of said acts of defendant A. B. were done under the direction and at the instigation of said C. D., and said C. D. directed said levy to be made and to be retained as aforesaid.

X. That by reason of the premises plaintiff has been damaged $1,000.

Wherefore [as in § 919].

[1] Substance of complaint in Kloos v. Gatz, 97 Minn. 167, 105 N. W. 639. A complaint in the form of that given under § 1180 would suffice. See § 878.

[2] Not in the original.

[3] Not essential. Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

1198. Conversion of timber—Sale—Action against purchaser by purchaser of premises at execution sale.

I. That at the times herein mentioned one A. B. was the owner, subject to the execution sale hereinafter mentioned, of [describe premises as in a deed].

II. That on 19 , said premises were duly sold to plaintiff by the sheriff of county, Minnesota, under an execution on a judgment which was duly rendered by [this court] [the district court for county, Minnesota], against said A. B. in favor of one C. D., and on 19 , duly docketed in county, Minnesota.

III. That the time for redemption from said sale provided by statute has expired, and no redemption has been made from said sale, and plaintiff has, by virtue of the premises, become the absolute owner of said premises and entitled to the immediate possession thereof.

IV. That on 19 , after said execution sale and during the statutory period of redemption therefrom, one E. F. wilfully and with full knowledge of plaintiff's rights therein, and without any color or claim of right therein on his part, wrongfully entered said premises and cut and carried away and converted to his own use feet of pine lumber which then, and at the time of said execution sale, was growing thereon.

V. That on 19 , defendant purchased said lumber from said E. F. with knowledge of plaintiff's rights therein and on 19 , wrongfully refused to deliver the same to plaintiff on demand.

VI. That the value of said lumber at the time it was so purchased by defendant was $

Wherefore [as in § 919].

Adapted from complaint in Whitney v. Huntington, 34 Minn. 458, 26 N. W. 631.

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1199. Denial of conversion.

The defendant for answer to the complaint herein denies [each and every allegation in the (second) paragraph thereof] [that he ever converted to his own use said property] [that he ever (took or carried away) (sold) (disposed of) said property] [that he ever refused to deliver said property to plaintiff].

1200. Denial of plaintiff's ownership.

The defendant for answer to the complaint herein denies each and every allegation contained in the first paragraph thereof.

1201. Same—Another form.

The defendant for answer to the complaint herein denies that at the time of the conversion alleged in the complaint the plaintiff was the owner, or entitled to the possession of said property.

1202. Denial of demand and detention.

The defendant for answer to the complaint herein denies that plaintiff has heretofore demanded possession of the goods mentioned in the complaint, or any part thereof, and defendant denies that he wrongfully or otherwise detains them, or any part of them, from plaintiff.

1203. Justification by agent.

The defendant for answer to the complaint herein alleges that at the time of the alleged conversion one A. B. was the owner of the property therein described and defendant was in possession thereof as his agent.

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1204. Allegation of incorporation.

That at the times herein mentioned [plaintiff] [defendant] was, and still is, a corporation, duly organized and existing under the laws of [this state] [the state of and authorized to do business in this state].

See § 607; R. L. 1905 § 4148; G. S. 1913 § 7774.

1205. Denial of incorporation.

The defendant for answer to the complaint herein alleges that the plaintiff is not a corporation.

See § 611; R. L. 1905 § 4148; G. S. 1913 § 7774.

1206. Denial of license of foreign corporation.

That at the times alleged in the complaint and at the commencement of this action defendant was a foreign corporation for pecuniary profit, organized and existing under the laws of the state of [New York] and doing business in this state; that the contract alleged in the complaint was made in this state; that plaintiff did not, before doing business in this state, or entering into said contract, or before commencing this action, establish and maintain a public office or place in this state for the transaction of its business, nor appoint a resident agent authorized to accept service of process and upon whom service of process might be had in any action to which said corporation might be a party, nor file with the secretary of state a copy of its charter or certificate or articles of incorporation; nor file with the secretary of state a statement showing the proportion of its capital stock represented by its property located and business transacted in this state; nor pay a license fee and obtain a license to do business in this state, as provided by G. S. 1913 §§ 6206–6208.

1207. On a stock subscription.[1]

I. That ever since 19 , plaintiff has been and still is a corporation, duly organized and existing under the laws of this state, for the purpose of carrying on a [describe business in general terms], with a capital stock of $, divided into shares of $ each.

II. That on 19 , prior to and in contemplation of the incorporation of plaintiff, defendant and others subscribed to the capital stock of plaintiff by a written agreement, of which the following is a copy: [Copy of agreement.]

III. That prior to the incorporation of plaintiff all its capital stock was subscribed for.[2]

IV. That plaintiff became incorporated as aforesaid on 19 , where-

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upon said subscription agreement was delivered to plaintiff by the subscribers thereto and accepted by plaintiff, of which defendant had due notice.

V. That on 19 , plaintiff, by a resolution of its board of directors, duly passed at a regular meeting thereof duly called and held at , duly made a call requiring defendant to pay on his said subscription the sum of $ to the treasurer of plaintiff, within days after notice of the [call] [resolution].[3]

VI. That plaintiff has duly performed all the conditions of said subscription agreement on its part, and on 19 , duly notified defendant of said [call] [resolution].[3]

VII. [That plaintiff is ready, able and willing to deliver to defendant a certificate for shares of its capital stock so subscribed for by him, upon his making such payment.] [4]

VIII. That defendant has not paid said sum or any part thereof.

Wherefore [as in § 919].

[1] See § 613, and Dunnell, Minn. Digest, §§ 2045–2062.

[2] See Dunnell, Minn. Digest, § 2051.

[3] Sustained by Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317.

[4] Insert if action is for total subscription or final instalment. Walter A. Wood Harvester Co. v. Jefferson, 57 Minn. 456, 59 N. W. 532; Id., 71 Minn. 367, 74 N. W. 149.

1208. Same—Another form.

I. That since Jan. 21, 1892, plaintiff has been, and still is a corporation, duly organized and existing under the laws of this state, for the purpose of manufacturing agricultural machines, with a capital stock of $2,500,000, divided into 25,000 shares of $100 each, and was fully authorized to receive subscriptions for and to sell and issue said capital stock.

II. That on Jan. 22, 1892, defendant, for value received, subscribed for and agreed to take and pay for fifty shares of the capital stock of plaintiff of the par value of $100 each, and to that end, defendant, with many others, duly signed and delivered to plaintiff a stock subscription agreement in the words and figures following: "We, the undersigned, severally subscribe for and agree to take and pay for the number of shares set opposite our names respectively of the capital stock of the Walter A. Wood Harvester Company (being the same corporation formerly known as the Minneapolis Harvester Works), of the par value of $100 each. These subscriptions shall become binding as soon as stock in said company to the amount of $1,500,000 at par value shall have been subscribed for, of which amount of stock to the amount of $750,000 at par value shall be subscribed for by the Walter A. Wood Mowing and Reaping Machine Company, of Hoosick Falls, N. Y., or by the stockholders in that company. Payments on these subscriptions shall be made in instalments as called for by the board of directors of said company, and at such times as said board shall direct, provided that not more than fifty per cent. thereof shall be called for, or be payable, within one year from Jan. 1, 1893."

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III. That prior to Feb. 9, 1892, $1,500,000 of the capital stock of plaintiff, the said Walter A. Wood Harvester Company, had been duly subscribed for by various parties at the par value thereof, and of the said $1,500,000 the stockholders of the Walter A. Wood Mowing and Reaping Machine Company, of Hoosick Falls, N. Y., duly subscribed for $750,000 at the par value thereof.

IV. That on Feb. 9, 1892, and prior thereto, the board of directors of said plaintiff consisted of nine persons who had been duly designated as such board of directors in and by the articles of incorporation of plaintiff, the names of the said board of directors being as follows: [Names of directors.]

V. That on Feb. 9, 1892, the above named directors were, and during all the time hereinafter mentioned have been, duly acting as the board of directors of plaintiff; that at a meeting of said board of directors duly called and held on Feb. 9, 1892, a resolution was duly adopted by said board of directors calling for the payment of five per cent. of the said subscribed capital stock of plaintiff, including that of defendant, the same to be payable on March 5, 1892.

VI. That thereafter, and more than twenty days prior to March 5, 1892, defendant was duly notified in writing of the passage of the resolution above referred to by the board of directors of plaintiff, and requested to pay said five per cent. of the amount of stock so subscribed for by defendant to the treasurer of plaintiff on March 5, 1892.

VII. That defendant has not paid said five per cent. of the stock so subscribed for by him, or any part thereof.

Wherefore [as in § 919].

Sustained on demurrer in Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317. See § 613.

1209. Same—Another form.

I. That plaintiff is a corporation duly organized and existing under the laws of this state.

II. That at Duluth, Minnesota, in June, 1890, defendant and several other persons, by a written subscription paper duly executed, subscribed for stock in the plaintiff, the Duluth Investment Company, a corporation to be thereafter organized, and each of them thereby promised and agreed to and with the others so subscribing, to take and pay for a certain number of shares of the capital stock of said corporation so to be organized, said shares to be of the par value of $20 each, and to be paid for at the rate of 50 cents per month per share after the payments were begun, and each to pay 50 cents per share as an admission fee; that defendant, in and by said subscription promised and agreed to and with the other persons signing said paper and with said corporation thereafter to be organized, that he would take and pay for twenty-five shares of the capital stock of said corporation so to be organized, of the par value of $20 each, and that he would pay thereafter the sum of 50 cents per share for an admission fee and 50 cents per share per month thereafter until said shares were fully paid up, [and the rest of the capital of plaintiff was duly subscribed for by other persons].

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III. That the articles of incorporation of plaintiff were thereafter, on June 30, 1890, duly executed, and thereafter plaintiff was duly organized under the laws of this state, and ever since has been, and now is, a corporation, duly existing under such laws; that said subscriptions for stock, including that of defendant, were, upon the formation of said company, transferred to and accepted by it.

IV. That said corporation, so organized, was duly authorized to have and issue a capital stock and to take and receive the subscriptions to the same, and after its due incorporation, on Sept. 1, 1890, it duly issued and delivered to defendant, a duly executed certificate of stock for twenty-five shares of its capital stock, which was received and accepted by defendant.

V. That on July 2, 1890, defendant paid to and for said corporation the 50 cents admission fee on each of twenty-five shares of the stock subscribed for by him as aforesaid, and also on said day paid the first instalment of 50 cents per share on said twenty-five shares of stock; that thereafter defendant paid the monthly instalments of 50 cents per share on said stock for the months of August, September, October and November, 1890, and received credit on the books of plaintiff for one dividend of 50 cents per share and no other or further payments have been made thereon.

VI. That the articles of incorporation of said company provided that its capital stock should be paid in monthly instalments of 50 cents per share at such times and under such regulations as the by-laws might direct; that the by-laws of said company contained, among others, the following provisions:

"Article 1, Sec. 3. Every stockholder shall pay for each and every share of stock he may hold in this company fifty cents admission fee on subscribing, and the monthly instalments of fifty cents per share; and nothing less than the whole amount of dues, together with fines, if any, shall be taken. The monthly payments of fifty cents per share must be made for each month before the reading of the minutes of the previous meeting at the regular monthly meeting of the calendar month for which the same is due, or fines attach."

"Article V, Sec. 1. The regular meeting of this company shall be held on the third Wednesday of each month, at the hour of 7:30 P. M."

Wherefore [as in § 919].

Sustained on demurrer in Duluth Investment Co. v. Witt, 63 Minn. 538, 65 N. W. 956. See § 613.

1210. On contract of promoter.

I. That from and after the time hereinafter mentioned defendant has been and now is a corporation duly organized and existing under the laws of this state.

II. That prior to the month of November, 1895, one A. B. duly entered into an agreement with one C. D. whereby it was mutually agreed by them that said C. D. should devote his time and services to the business of manufacturing Cementico, calcimine and merchandise of a kindred nature; and in consideration thereof, said A. B. agreed to pay said C. D. therefor the sum of $125 per

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month, of which amount said C. D. agreed to leave in the business the sum of $50 per month; and it was further agreed that if the said business should be sold at any time, then said C. D. should receive payment in cash for the said sum of $50 so remaining in said business for each month during his said employment therein; that thereafter and during the month of January, 1896, a partial memorandum of said agreement was reduced to writing by said A. B., a copy of which is hereto attached, marked Exhibit A, and made a part hereof; that said agreement was entered into by said A. B. and said business was conducted by him during all the time herein mentioned until the organization of the defendant corporation, for and on behalf of C. B., his wife and undisclosed principal.

III. That said C. D. devoted his time and services to said business and duly performed all the conditions of said agreement on his part, during all the time from and including the month of November, 1895, until the organization of the defendant corporation as hereinafter stated.

IV. That some time prior to Nov. 2, 1896, said A. B. undertook to promote the incorporation of the said business under the name of The Church Cementico Company by which it had theretofore been known, and while so promoting the said incorporation of said business, and to induce said C. D. to join therein and to continue in the service of said business, said A. B., acting on behalf and for the benefit of said contemplated corporation, promoted and agreed with the said C. D. that said contemplated corporation should assume and be liable for all the indebtedness and obligations theretofore incurred by said A. B. in said business, including the indebtedness and obligation under the agreement hereinbefore described; that said C. D. should continue in said business at a salary of $125 per month, $50 thereof to be left in said business each month as theretofore, and that in case of the sale of said business by said corporation when organized, the same should pay to said C. D. in cash the said $50 per month so left by him in said business during all the time from the month of November, 1895, inclusive, until the date of such sale.

V. That on Nov. 2, 1896, defendant corporation was organized by said A. B., C. B., and C. D. as the incorporators; that under and pursuant to the agreement last above described, C. D. continued to devote his time and services to defendant's said business and to duly perform all the conditions of said agreement on his part, until and including the month of April, 1897; that after its organization, defendant with full knowledge thereof duly affirmed, adopted and ratified said agreement made on its behalf by said A. B., and thereafter continued to receive, enjoy and retain all the benefits accruing to it therefrom.

VI. That on May 15, 1897, defendant duly sold and transferred said business, and all its rights and interest therein, to one G. H., doing business as the Baker Plaster Company.

VII. That the total amount of the $50 left in said business each month out of the salary of said C. D. at no time equalled the amount contributed to said business by said A. B., and, as plaintiff is informed and believes, no profits were ever realized out of said business.

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VIII. That at all the times herein mentioned said C. D. was and still is indebted to this plaintiff in excess of the sum of $900, in consideration whereof it was mutually agreed between them, at the times of entering upon the several agreements above described, that plaintiff should have and be entitled to receive and apply upon said indebtedness all of said instalments of $50 of the earnings of said C. D. remaining in said business under the terms and conditions of said several agreements during all the time from and including the month of November, 1895, until such time when the said indebtedness should be wholly paid and satisfied out of said instalments of said $50, which said agreements were made with the full knowledge and consent of all the parties to the said agreements hereinbefore described.

IX. That by reason of the premises there is now due and owing from defendant to plaintiff the sum of $900, being the $50 left in said business each month during all the time from and including the month of November, 1895, until and including the month of April, 1897, no part whereof has ever been paid, though payment thereof has been duly demanded.

Wherefore [as in § 919].

Complaint in Church v. Church Cementico Co., 75 Minn. 85, 77 N. W. 548.

1211. Against promoters on their contract.

I. That at the times herein mentioned plaintiff was, and still is, a corporation duly organized and existing under the laws of this state, and doing business in the city of St. Paul, Minnesota.

II. That on April 1, 1893, A. B., C. D., E. F., G. H., I. J., K. L., M. N., O. P., Q. R., S. T. and the defendant U. V., associated themselves together for the purpose of organizing a corporation to carry on and conduct a general banking business in the city of St. Paul, Minnesota, for pecuniary profit, under and pursuant to the laws of the United States, under the name and title of The Metropolitan National Bank of St. Paul; that in pursuance of said purpose and with the intent to incorporate said bank, the above named persons held meetings, elected officers and directors, entered into contracts for supplies and furniture for said intended corporation, published notices in the daily papers of their intention to incorporate said bank and carry on a general banking business for mutual profit and gain and the said above named persons, including defendant, subscribed and paid money and incurred obligations in the name of said Metropolitan National Bank thus intended to be incorporated, and for the benefit of said intended corporation, and for the benefit of the above named persons and for the benefit of defendant, who were intended stockholders and had agreed to become stockholders and directors, and who were the promoters of said intended corporation.

III. That on April 19, 1893, plaintiff entered into a contract with the above named persons including defendant, promoters as aforesaid, of said intended corporation in the name of the Metropolitan National Bank of St. Paul, whereby plaintiff agreed to manufacture for and sell and deliver to the above named

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persons, including defendant, and the said persons including the said defendant, agreed to purchase of and pay this plaintiff for, certain desks and bank fixtures and furniture to be used in carrying on and conducting said bank, and each of the above named persons, including the said defendant, agreed to pay therefor to this plaintiff the sum of $2,000.

IV. That plaintiff in pursuance of said contract did manufacture, furnish, sell and deliver to said persons, including said defendant, said desks, bank fixtures and furniture.

V. That the above named persons failed to incorporate said Metropolitan National Bank of St. Paul.

VI. That the above named goods and bank fixtures were manufactured, furnished, sold and delivered by plaintiff to the above named persons, including defendant, upon their credit and at their request and for their benefit, and said contract was made and entered into between plaintiff and the above named persons, including the said defendant, and with his full knowledge and consent, and upon reliance on their promise to pay for the same.

VII. That said goods and bank fixtures were duly accepted by said persons including this defendant, when delivered as aforesaid to them.

VIII. That said goods and bank fixtures were reasonably worth $2,000.

IX. That the above named A. B., C. D., E. F., G. H., I. J., K. L., M. N., O. P., and Q. R. have each paid to this plaintiff on account of and as part payment for said desks and bank fixtures the sum of $179.09, or the total sum of $1,611.81.

X. That the above named A. B., C. D., E. F., G. H., I. J., K. L., M. N., O. P., and Q. R., in consideration of the aforesaid payment by each of them, have been released and discharged from any further liability to plaintiff on account of said contract.

XI. That plaintiff has made and allowed a reduction from the said amount of $2,000, the agreed price of said desks and fixtures, of the sum of $30.

XII. That defendant has paid to plaintiff, on account of and as part payment for the amount due from him for said desks and bank fixtures the sum of $50, and no more.

XIII. That the above named S. T. has paid no part of said $2,000, the agreed price of said desks, bank fixtures and furniture.

XIV. That there still remains due and unpaid on said contract and for said desks and fixtures the sum of $308.18, of which amount there is claimed to be due, and is due, from defendant the sum of $129.09.

XV. That defendant has refused to pay said balance of $129.09, and still refuses to pay the same or any part thereof, though payment thereof has been frequently demanded.

Wherefore [as in § 919].

Recovery on this complaint sustained in Roberts Mfg. Co. v. Schlick, 62 Minn. 332, 64 N. W. 826.

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1212. On contract of promoter for services rendered corporation.

I. That at the times herein mentioned defendant was and still is a corporation duly organized and existing under the laws of this state.

II. That on Oct. 1, 1889, plaintiff entered into a contract with defendant for the term of one year to solicit advertising matter in the city of Minneapolis for defendant, for which services defendant agreed to pay plaintiff $20 per week for and during the month of October, 1889, and $30 per week for each and every week during the remainder of said year, in cash, and to issue and deliver to plaintiff at the end of said year, paid up stock of said defendant company to the amount of five shares of $100 each, amounting in the aggregate to $500.

III. That plaintiff continued in the employ of defendant until April 12, 1890, a period of twenty-three weeks, and defendant paid him all the cash that, by the terms of said contract, he was to receive, allowing the time he was actually employed, to wit, $20 per week for the month of October, 1889, and $30 per week for each and every week thereafter until April 12, 1890.

IV. That on April 12, 1890, defendant, without any fault of plaintiff's, and wholly disregarding its said contract and without plaintiff's consent, discharged plaintiff, and, during all that remained of the year ending Oct. 1, 1890, refused to comply with its contract with plaintiff in any manner whatever.

V. That plaintiff would have earned and received in cash from defendant under and by virtue of said contract during the balance of said year, the sum of $870 and would have been entitled to receive the said five shares of stock from defendant.

VI. That after his discharge and until Oct. 1, 1890, plaintiff made diligent effort to obtain employment of the like kind and nature as that given and to be furnished plaintiff under said contract, and was during said time unable to receive for his said services any more than $300.

VII. That prior to the commencement of this action and subsequent to Oct. 1, 1890, plaintiff duly demanded of defendant that it pay him the sum of $570 and deliver to him five shares of $100 each of the fully paid up stock of said company, but defendant refused and still refuses to do so, to plaintiff's damage $1,070.

Wherefore [as in § 919].

Complaint in McArthur v. Times Printing Co., 48 Minn. 319, 51 N. W. 216.

1213. For inspection of corporate books—Petition for writ of mandamus.

Your petitioner respectfully represents:

I. That defendant is a corporation duly organized and existing under the laws of this state.

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II. That your petitioner is a stockholder therein and owner of shares of its capital stock, and was such at the times herein mentioned.

III. That on 19 , your petitioner duly requested defendant to allow him to inspect its corporate books and records, for the purpose of [state purpose in general terms], and requested defendant to fix a time therefor.

IV. That defendant refused such request and still refuses to allow your petitioner to inspect its corporate books and records for such purpose at any time.

Wherefore your petitioner prays [as in § 1536].

1214. For refusal to transfer stock on books.

I. That ever since April 1, 1886, and long prior thereto, plaintiff has been and still is a banking corporation duly organized and existing, and carrying on a banking business, under the laws of the United States relating to national banks, with its principal place of business in Minneapolis, Minnesota.

II. That ever since July 1, 1884, and long prior thereto, defendant has been and still is a banking corporation duly organized and existing, and carrying on a banking business, under the laws of this state relating to banks and banking, with its principal place of business in Minneapolis, Minnesota.

III. That on and prior to April 5, 1886, one A. B. was the lawful owner and holder of thirty-five shares, of the denomination of $100 each, of stock in defendant corporation, evidenced by three stock certificates described and designated as follows: Certificate No. 163 for twenty shares dated July 11, 1884; certificate No. 164 for ten shares dated July 11, 1884, and certificate No. 168 for five shares dated July 11, 1884.

IV. That on April 5, 1886, said A. B. made and delivered to plaintiff his promissory note, dated on that day, whereby for value received from plaintiff, the said A. B. promised to pay plaintiff, thirty days after said date, at plaintiff's bank in Minneapolis, the sum of $3,500 with interest thereon at the rate of eight per cent. per annum until paid; that plaintiff has ever since been and still is the owner and holder of said note; that the same has long since become due, but has not been paid nor any part thereof, except interest to its maturity; that said A. B. is justly indebted to plaintiff upon said note in the sum of $3,500 and interest thereon since May 5, 1886, at the rate of eight per cent. per annum.

V. That at the time of making said note, and to secure the payment thereof, the said A. B. assigned and transferred all of the said stock in said defendant bank to plaintiff and delivered said three stock certificates, duly indorsed, assigned and transferred by said A. B. to plaintiff, who has ever since been and still is the owner and holder of said stock and certificates.

VI. That shortly after the maturity of said note, and during the month of May, 1886, defendant was duly notified by plaintiff of said A. B.'s default in the payment of said note, and of plaintiff's ownership and possession of said stock, and was requested to transfer the same on the books of defendant bank to plaintiff.

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VII. That again on July 31, 1886, plaintiff gave defendant a written notice of plaintiff's possession and ownership of said stock and demanded the transfer of the same on the books of defendant and for that purpose offered to surrender to defendant said stock certificates, but defendant at all times since the maturity of said note, and particularly on July 31, 1886, has wrongfuly refused, and still so refuses, to make such transfer of said stock on its books.

VIII. That said stock ever since May 5, 1886, has been, and now is of the value of $3,745, in which sum plaintiff has suffered damage by reason of said wrongful acts of defendant.

Wherefore [as in § 919].

Substance of complaint in Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 35 N. W. 577.

1215. Same—Special damages.

I. That defendant is, and at the times herein mentioned was, a corporation, duly organized and existing under the laws of this state.

II. That prior to Dec. 11, 1901, plaintiff subscribed for seventy-five shares of the capital stock of said corporation, each share being of the par value of $100, and on Dec. 11, 1901, for value received, said corporation duly issued and delivered to plaintiff, certificates for all said stock; that among other certificates of said stock so issued and delivered to plaintiff were the following, to wit, certificate number 6 for ten shares of stock, certificate number 7 for ten shares of stock and certificate number 11 for ten shares of stock.

III. That after the execution and delivery of said certificates of stock as aforesaid, said corporation, acting by and through its board of directors, without any power or authority therefor, and without any justification, caused a resolution to be passed by said board of directors and to be incorporated, as plaintiff is informed and believes, in the minutes of said corporation, attempting to cancel and annul the certificates of stock so issued to plaintiff; that said action was taken without plaintiff's knowledge or consent, either express or implied, nor has he ever in any way consented to or approved of said action.

IV. That on Sept. 29, 1903, plaintiff, without any knowledge that any action had been taken by defendant affecting or attempting to affect the validity of his stock, contracted in writing with one A. B., of Redwood county, Minnesota, to purchase from said A. B. a certain farm in said county owned by said A. B., containing two hundred and forty acres of land and described as follows: [description of land]; that said land was to be taken by plaintiff at $46 per acre, and was to be taken subject to a mortgage of $6,000 thereon; that said land was then, ever since has been, and now is of the reasonable value of $46 per acre.

V. That in and by said contract plaintiff agreed to pay for said land as follows: first by conveying to said A. B. 367.1 acres of land in Foster county, North Dakota, being all the land in section three, town one hundred and forty-seven, range sixty-two, in said county and state, lying north of the right of

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way of the Northern Pacific Railway; that plaintiff further agreed therein to pay the balance of the consideration by assigning and transferring to said A. B. twenty-nine shares of the par value of $2,900 of the said capital stock owned by plaintiff in the defendant corporation.

VI. That in said transaction the said A. B. agreed to take said stock at a valuation of $2,000, and it was reasonably worth that amount; that had said contract of purchase and sale between plaintiff and said A. B. been consummated according to its terms, plaintiff would have received for said twenty-nine shares of stock a consideration of the value of $2,000.

VII. That the contract and all the conveyances and other papers necessary to carry out said contract between plaintiff and said A. B., except the assignment of stock, had been actually executed by the respective parties and placed in escrow with the Citizens State Bank of Lamberton, for delivery according to the terms of the contract, and everything necessary to complete the terms of said contract had been done by the respective parties except to transfer said stock and to adjust any slight differences of interest on mortgage incumbrances, when defendant wrongfully, maliciously, and without any warrant therefor, notified said A. B. that plaintiff was not a stockholder in the Minnesota Clay Company; that the stock, which he claimed to own, had been illegally issued to him and was void, and had been canceled by the company, and defendant warned and advised said A. B. not to accept said stock because, as it alleged, it had no validity.

VIII. That said A. B. thereupon notified plaintiff that his said stock had been repudiated by said corporation, and he refused to carry out said contract unless plaintiff would get the validity of said stock recognized by the corporation and have the said shares transferred to him on the books of the corporation.

IX. That on Oct. 21, 1903, at St. Paul, Minnesota, at the office of defendant corporation, plaintiff tendered to defendant the said certificates numbered 6, 7 and 11, each for ten shares of said stock, and demanded in writing that 29 of said shares be transferred on the books of the corporation to said A. B., and that new certificates be issued to said A. B. for said 29 shares and to plaintiff for said remaining one share; that afterwards plaintiff, by his attorney, on Nov. 15, 1903, presented a similar demand orally to the full board of directors of defendant; that defendant, in answer to said demands, absolutely repudiated said stock so issued to plaintiff and declined to recognize it as valid stock, and has absolutely refused to transfer to said A. B. on its books any of the stock represented by said certificates.

X. That, because of such repudiation of said stock by defendant, said A. B. has refused and still refuses to carry out his contract with plaintiff, and has withdrawn from said Citizens State Bank of Lamberton the papers deposited by him in escrow with said bank, and has caused the papers deposited by plaintiff in escrow with said bank to be returned to him; and has finally and absolutely refused to consider said contract any longer of any binding force.

XI. That because of the said action of defendant plaintiff is unable to en-

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force said contract with A. B. and has been deprived of the power to sell said stock to any person for any sum whatsoever, to his damage $2,000.

Wherefore [as in § 919].

Sustained in Humphreys v. Minnesota Clay Co., 94 Minn. 469, 103 N. W. 338.

1216. Acquiescence of minority stockholder.

That plaintiff knew of said transaction of Jan. 16, 1902, at the time it occurred and knew all the terms and conditions thereof, and knew and has ever since known that the said H. had acquired the business and property of said Roberts Architectural and Ornamental Iron Company in the manner aforesaid, and more than six years have elapsed since the said transaction and prior to the commencement of this action, and more than six years have elapsed since plaintiff acquired knowledge of said transaction and prior to the commencement of this action, and the claim of plaintiff and of said Roberts Architectural and Ornamental Iron Company and each and all of its stockholders is barred by the statute of limitations.

Part of answer in Roberts v. Herzog, 110 Minn. 258, 124 N. W. 997.

1217. Complaint for sequestration under G. S. 1913 § 6634.

I. That at the times herein mentioned defendant was and still is a corporation duly organized and existing under the laws of this state for the purpose of [state nature of business], and having its principal office at county, Minnesota.

II. That on 19 , defendant was indebted to plaintiff in the sum of $ for [goods sold and delivered by plaintiff to defendant, at its request, (between 19 , and 19) (on 19)]; that on said day plaintiff brought an action in [this court] [the district court for county, Minnesota] to recover said amount on said debt; that on 19 , judgment was duly rendered therein by said court in favor of plaintiff against defendant for $.

III. That on 19 , said judgment was duly docketed in said county, and thereupon execution was duly issued thereon to the sheriff of said county, wherein defendant than had its principal office; that on 19 , said sheriff duly returned said execution wholly unsatisfied; that said judgment is still wholly unsatisfied and defendant is insolvent.

Wherefore plaintiff demands judgment that the stock, property, things in action and effects of defendant be sequestrated and placed in the hands of a receiver appointed by this court as provided by General Statutes 1913, § 6634; that the proceeds thereof be distributed as provided by law and the order of this court, and for such other relief as may be just, with costs.

1218. Complaint on order assessing stockholders.

I. That on 19 , in an action brought under General Statutes 1913, § 6634, in [this court,] [the district court for county, Minnesota,]

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by one A. B. against , a corporation duly organized and existing under the laws of this state, to sequestrate the stock and assets of said corporation and enforce the liability of its stockholders to its creditors, said court duly made an order assessing its stockholders per cent. on the amount of stock held by each stockholder and authorized and directed this plaintiff, who on 19 , was duly appointed by said court in said action receiver of said corporation, and who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such receiver, to collect the amounts so assessed by action in case of their non-payment within the time prescribed by said order.

II. That at the time of said order defendant was a stockholder in said corporation, owning shares thereof, and in said order was duly assessed as such by said court in the sum of $ and directed to pay the same to this plaintiff on or before 19 .

III. That on 19 , and within days after said order was filed, plaintiff duly mailed a copy thereof to defendant.[1]

IV. That by virtue of said order and the premises, defendant is indebted to plaintiff in the sum of $, no part of which has been paid, though payment thereof was duly demanded of defendant by plaintiff on 19 .

Wherefore plaintiff, as such receiver, demands judgment [as in § 919].

[1] Or otherwise according to the order.

1219. Same—Another form.

I. That at all the times herein mentioned said Allemannia Bank was, ever since has been, and now is a corporation duly organized and existing under Chapter 33 of the Statutes of Minnesota for the year 1878, and the laws amendatory thereof and supplementary thereto; that said corporation was so organized for the purpose of becoming and being a bank of deposit and discount under the laws of this state, and pursuant to its said organization and incorporation carried on business as a bank of deposit and discount from the date of its organization until Jan. 4, 1897; that according to the terms of its certificate of organization it has an issued and outstanding capital stock of $400,000 divided into 4,000 shares of the par value of $100 each.

II. That said Allemannia Bank was so organized on Oct. 27, 1890, under the name of the "Commercial Bank" and from the date of its organization to Feb. 4, 1896, its name was the "Commercial Bank;" that on Feb. 4, 1896, said bank, in accordance with the laws of this state, changed its name to the Allemannia Bank; and on Jan. 4, 1897, and for more than a year prior thereto, said bank was, ever since has been and now is insolvent.

III. That on June 6, 1900, an action was duly commenced in this court, ex rel. W. B. Douglas, Attorney General, as the plaintiff and against said Allemannia Bank as the defendant, under Chapter 145 of the General Laws of this state for the year 1895 and the laws amendatory thereof and supplementary thereto, for the purpose of sequestrating all property and assets of said

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bank and appointing a receiver of said bank therefor; that the summons in said action was duly served upon said bank, and said bank duly appeared and answered in said action and this court duly acquired jurisdiction of the parties and of the subject-matter of said action; that thereafter such further proceedings were duly had in said action that on June 8, 1900, this court duly made an order in said action appointing this plaintiff as the receiver of said bank to take possession of all the assets of said bank, convert them into cash and apply the same in payment of the debts of said bank, and to perform such other duties as might devolve upon him as such receiver; that accordingly plaintiff on June 9, 1900, duly qualified as such receiver and immediately thereupon took possession of all the property and assets of said bank and has ever since his said appointment as receiver of said bank been actively engaged in the discharge of his duties as such receiver.

IV. That said bank has not since Jan. 4, 1897, acquired any new or additional assets or incurred any new or additional indebtedness, and ever since said Jan. 4, 1897, and for more than a year prior thereto, the indebtedness of said bank has greatly exceeded the value of all its assets; that the amount which can be realized from all the assets of said bank together with the probable amount which can be raised and realized from the enforcement of the liability of the stockholders of said bank is not sufficient to pay the indebtedness of said bank and the expenses of this receivership.

V. That on Jan. 2, 1901, plaintiff, as the receiver of said bank, duly filed his petition in this court in the action in which he was appointed receiver as aforesaid, setting forth, among other things, that the assets of said bank were insufficient to pay the debts of said bank, and asking for an order of this court assessing the stock and stockholders of said bank under chapter 272 of the General Laws of Minnesota for the year 1899.

VI. That thereupon this court duly made an order fixing the time for hearing said petition for an assessment, due notice of which was given; and thereafter such further proceedings were duly had in said action on said petition pursuant to said notice of hearing thereon that on April 3, 1901, this court duly made an order of assessment in said action assessing each and every share of the stock of said bank to the amount of the par value thereof; that said order of assessment was made and filed in said action on April 3, 1901; that a copy thereof is hereto attached, marked Exhibit A, and made a part hereof.

VII. That on Jan. 4, 1893, defendant became, ever since has been and now is the owner and holder of five shares of the capital stock of said bank of the par value of $500, upon which stock defendant is liable under the constitution and laws of this state for the debts of said bank in an amount equal to the par value of said stock so owned by defendant; under and by virtue of said order of assessment said defendant became and is required to pay to this plaintiff, as receiver of said Allemannia Bank, upon his said liability as the owner of said stock the said sum of $500, being the amount of his said assessment upon his said liability on the said stock of said bank owned by defendant as aforesaid.

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VIII. That the notice provided and required by the terms of said order of assessment has been duly given to defendant, and though due and duly demanded said assessment has not been paid, nor any part thereof.

Wherefore [as in § 919].

Substance of complaint in Hunt v. Roosen, 87 Minn. 68, 91 N. W. 259.

1220. Same—Against transferrer of stock secondarily liable.

I. That at the times herein mentioned plaintiff was, and still is, a corporation duly organized and existing under the laws of this state, and duly authorized to act as receiver under appointment of court of insolvent corporations of the character of the State Bank of St. Paul, hereinafter mentioned.

II. That at the times herein mentioned said State Bank of St. Paul was and still is a corporation duly organized and existing under the laws of this state, as a banking corporation and was during all of said times and until the appointment of the plaintiff as the receiver of said bank duly engaged in carrying on a general banking business under the laws of this state at the city of St. Paul, Minnesota, with a capital stock of $25,000, divided into 250 shares of the par value of $100 each; and was not a bank of issue.

III. That on Sept. 30, 1908, in an action duly commenced in the district court for Ramsey county, Minnesota, wherein the state of Minnesota on the relation of Anton Schaefer, Public Examiner, was plaintiff and said State Bank of St. Paul was defendant, such proceedings were had that said State Bank of St. Paul was duly adjudged to be insolvent and plaintiff herein was in and by the order of said court, made and entered on that day, duly appointed receiver of said bank, for the purpose, among other things, of marshaling the assets of said bank and distributing the same among its creditors and such persons as might be entitled thereto; that plaintiff immediately qualified as such receiver and immediately took possession of the assets of said bank and ever since has been and still is engaged in the due performance of its duties as receiver as aforesaid; that said receivership is now pending in said court, which has full jurisdiction of the same and full jurisdiction and right to administer the estate of said State Bank of St. Paul and to direct and control the carrying on of said receivership and had full right and authority to order and direct the assessment upon the capital stock of said State Bank of St. Paul, hereinafter mentioned.

IV. That on April 13, 1909, in proceedings duly had in said court, of which proceedings the defendant herein had due notice and to which said proceedings he was a party, the said court duly made and entered its order, dated upon that day, levying an assessment of one hundred per cent. of the par value of each share of the capital stock of said State Bank of St. Paul, to wit, the sum of $100 on each share thereof, upon and against each and every share of the said capital stock and upon and against each and every person, party or corporation liable as stockholder of said State Bank of St. Paul, and ordering that each and every person, party or corporation liable as such stockholder pay to

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plaintiff, as receiver, in the city of St. Paul, Minnesota, within thirty days from and after the date of said order, the sum of $100 for and on account of each and every share of said stock for or on account of which said parties, persons or corporations or any of them were liable as stockholders of said bank, and said court further directed that in case of the failure of any person so liable to pay the said assessment as directed in and by said order, said receiver should institute suit against such person or persons to enforce the collection of the same.

V. That on Sept. 30, 1908, and for some time prior thereto, one A. B. was, and now is, the owner of 25 shares of the capital stock of said State Bank of St. Paul, which were transferred to him by defendant on March 9, 1908, the transfer of said stock from defendant to the said A. B. having been duly entered on the books of the said State Bank of St. Paul as of said date; that at the time of said transfer, and for some time prior thereto, defendant had been a stockholder in said State Bank of St. Paul by reason of his ownership of the said 25 shares of stock, and to the extent thereof was liable as hereinafter alleged for the then existing indebtedness of said bank; that the said A. B. on Sept. 30, 1908, was, and now is, the owner of 110 shares of the capital stock of said State Bank of St. Paul, in addition to the 25 shares transferred to him by defendant, owning in all 135 shares of said stock.

VI. That said A. B. having neglected and refused to pay the aforesaid assessment on account of the stock so held and owned by him, plaintiff, in an action instituted against said A. B. for that purpose in this court, on July 22, 1909, procured judgment against the said A. B., and judgment was on that day duly entered and docketed in said court in favor of this plaintiff as the plaintiff in said action, and against said A. B. as the defendant therein, on account of his liability for the assessment on the said 135 shares of stock in the sum of $13,500, the par value of such stock, together with interest and costs, in all $13,661.25; that an execution was forthwith issued on said judgment and placed in the hands of the sheriff of the said county of Ramsey for enforcement and collection as provided by law; that on July 23, 1909, the said sheriff duly returned said execution wholly unsatisfied, duly certifying and returning that, after diligent search and inquiry, he had been unable to find any property, personal or real, belonging to the said A. B., from which to satisfy the said execution.

VII. That, as plaintiff is informed and believes, the said A. B. is wholly insolvent, and plaintiff will continue to be unable to collect from him the said judgment or any part thereof.

VIII. That substantially all of the indebtedness of said State Bank of St. Paul now outstanding, and in order to pay which the assessment of the stock of said bank was made as aforesaid, existed prior to March 9, 1908, on which date the aforesaid 25 shares of said stock were transferred by the defendant to said A. B.; that by reason of the statute in such case made and provided, the defendant is secondarily liable to plaintiff for the payment of the assessment aforesaid

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on said 25 shares of stock, amounting to $2,500, together with lawful interest thereon, and that plaintiff has exhausted its remedies against the said A. B. and has been unable, and will continue to be unable, to collect from him anything on account of said assessment.

IX. That though the payment of the said assessment and interest as aforesaid has been duly demanded of defendant, he has neglected and refused and still neglects and refuses to pay the same or any part thereof, and by reason of the premises he is now indebted to plaintiff in the sum of $2,500 with interest thereon from May 13, 1908, at the rate of six per cent. per annum.

Wherefore [as in § 919].

Sustained in Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386.

1221. Same—Enforcement of assessment in probate court.

I. That the Motor Line Improvement Company is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state, for the purpose of buying, selling, operating, and dealing in lands and tenements, and personal property, and its stockholders and stock were and are liable to assessment for its debts under the constitution and laws of this state.

II. That on 19 , plaintiff was duly appointed by the district court for St. Louis county, Minnesota, receiver of said corporation, after proceedings as provided by chapter 76 of General Statutes 1878 of said state, and amendments thereto, and has qualified and is now acting as such receiver.

III. That in proceedings instituted by plaintiff as such receiver under said chapter 76, and under chapter 272, General Laws of Minnesota, 1899, a judgment of the district court for St. Louis county, Minnesota, was duly made and filed on Aug. 20, 1904, whereby it was duly adjudged and ordered that the stockholders, and the capital stock of said corporation, and the persons liable thereupon, be assessed 100 per cent. on the par value of the shares of stock, which is $100, and that said assessment be paid on or before Sept. 1, 1904.

IV. That one A. B. was at the time of his death the owner of, and liable upon fifty shares of such capital stock and in said assessment was duly assessed $ thereon, no part of which has been paid.

V. That said judgment and order further provided that plaintiff should, upon default in such payment, forthwith bring actions against each and every such stockholder and person so liable and in default.

VI. That the said A. B., while being such owner as aforesaid, died in the county of Blue Earth, Minnesota, on 19 , testate, naming the defendant C. D. as his executor, and thereafter the said C. D. duly qualified as such executor and is now acting as such.

VII. That thereafter, and within the time allowed by law, plaintiff duly presented his claim as such receiver to the probate court of said Blue Earth county, Minnesota, the court in which the will of the said A. B. was being pro-

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bated and having jurisdiction of his estate, and the said claim of plaintiff was duly allowed by said probate court.

Wherefore plaintiff demands that the order of the probate court of Blue Earth county allowing his claim for $5,000, with interest since Sept. 1, 1904, be affirmed.

Complaint in Neff v. Lamm, 99 Minn. 115, 108 N. W. 849.

1222. Same—For sequestration and to collect amount due on stock.

I. [As I. in § 1217.]

II. [As II. in § 1217.]

III. [As III. in § 1217.]

IV. That defendants A. B. and C. D. are stockholders of defendant corporation and have subscribed for and hold stock therein of the amount of shares and shares, and of the par value of $ and $, respectively.

V. That said defendants A. B. and C. D. have not paid to defendant corporation the par value of their said respective shares of stock [except].

Wherefore [add to prayer in § 1217]: that the amounts unpaid by defendants A. B. and C. D. upon their said stock be ascertained and their liability thereon adjudged and that they be required to pay such amounts to the receiver herein.

1223. On directors' liability to creditors.

I. That at the times herein mentioned the defendant, the Minnesota Manufacturing Company, was and still is a corporation, duly organized and existing under the laws of this state as a manufacturing corporation.

II. That on April 1, 1883, plaintiff loaned to said defendant, the Minnesota Manufacturing Company, the sum of $250, and said Minnesota Manufacturing Company, to evidence the indebtedness to plaintiff so created, did then and there by its officers thereunto duly authorized, make, execute and deliver to plaintiff its promissory note, whereby it agreed to pay to plaintiff six months from the date thereof the sum of $250, with interest on said note from its said date until paid at the rate of six per cent. per annum.

III. That said note is now and for a long time past has been due and payable, but said defendant has not paid the same or any part thereof.

For a first cause of action against defendant A. B. plaintiff alleges:

I. That on April 1, 1883, the defendant, the Minnesota Manufacturing Company, became indebted to plaintiff as above set out, in the sum of $250, and said Minnesota Manufacturing Company still is indebted to plaintiff in said sum of $250, with interest thereon from said April 1, 1883, at six per cent. per annum upon said $250 from said date.

II. That on Dec. 22, 1875, said Minnesota Manufacturing Company was engaged in the business of manufacturing and selling agricultural implements, and it was unlawful for said corporation and in violation of the laws of this

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state in that behalf provided, to direct its operations or divert its funds to any other purposes whatever, but from about said Dec. 22, 1875, down to and including Jan. 15, 1888, through its officers duly authorized by said corporation to make, execute, indorse and deliver negotiable paper on its behalf, and generally to transact any and all business on its behalf, said corporation made and delivered a large amount of negotiable paper whereupon it was liable as maker thereof, and indorsed a large amount of negotiable paper, whereon it then and there became liable as the indorser thereof, without any consideration whatever moving to it from any person whatever, in consideration of the execution, delivery or indorsement of such negotiable paper; that the execution, delivery and indorsement of said negotiable paper was solely for the accommodation of other persons or corporations in which said corporation, the Minnesota Manufacturing Company, had no interest whatever, and from whom said defendant could expect no return other than a similar gratuitous loan to it of the credit of such persons or corporations.

III. That during all said period said corporation loaned large sums of money to other persons and corporations, though the same were needed and could have been profitably employed in its own business, for the loan of most which sums of money said corporation never received any return whatever, whether in the form of interest or otherwise.

IV. That by reason of its course in making and indorsing said negotiable paper for accommodation and by reason of the loan of said sums of money, said corporation became insolvent, and on Jan 15, 1888, was duly placed in the hands of a receiver by the district court for county, Minnesota.

V. That from Dec. 22, 1875, down to and including Jan. 15, 1888, defendant A. B. was a member of the board of directors of said Minnesota Manufacturing Company, and did not at any time object to the transactions above set out, but on the contrary had full knowledge of the by-laws and resolutions of said corporation whereby the officers thereof were given authority to execute such paper and indorsements and make such loans as aforesaid, and acquiesced in the same.

For a second cause of action against defendant A. B. plaintiff alleges:

I. That defendant, the Minnesota Manufacturing Company, is indebted to plaintiff in the sum of $250, with interest thereon from April 1, 1883, at the rate of six per cent. per annum, as above set out.

II. That prior to the year 1882 the president and secretary of said corporation had always made the certificate required by section 12 of the act of the legislature of the state of Minnesota relating to manufacturing corporations, approved March 7, 1873, and had deposited the same with the register of deeds of Ramsey county, the county wherein said corporation transacted its business, before Feb. 15, of each year, but that during neither said year 1882 nor said year 1883 did either said president or said secretary make, execute or deliver such certificate as is required by said section 12 of said act, or any certificate at all relative to the affairs of said corporation, or file them with said register of

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deeds of said Ramsey county or elsewhere, either before said Feb. 15 or thereafter.

III. That during all said years 1882 and 1883 said A. B. was a member of the board of directors of said corporation, the Minnesota Manufacturing Company, and did not at any time object or remonstrate with said president or said secretary, or with any other of the members of the board of directors of said corporation, or of the officers thereof, in regard to such failure to file said certificate as aforesaid.

Wherefore [as in § 919].

Sustained on demurrer in Patterson v. Stewart, 41 Minn. 84, 42 N. W. 926.

1224. Action by domestic creditors against stockholders of foreign corporation on bonus stock.

I. That plaintiffs are residents of this state and the Randall Printing Company is a domestic trading corporation.

II. That at the times herein mentioned the defendant, Sanitas Mineral Water Company, was and is a trading corporation duly organized and existing under the laws of the state of South Dakota, and at the times herein mentioned was engaged in the business of bottling and selling mineral water, and other business incidental thereto, in Nobles county, Minnesota.

III. [Allegation of separate indebtedness of defendant to plaintiffs for goods sold and delivered.]

IV. [Allegation of recovery of judgment on such indebtedness, docketing of judgment, issue of execution thereon and return of execution unsatisfied. See § 1217.]

V. That on Jan. 1, 1909, the defendant company disposed of all its property and assets in the state of Minnesota; that it has not and never has had any property or assets in the state of South Dakota, and since Jan. 1, 1909, has wholly ceased to do business and is notoriously and hopelessly insolvent and has no assets or property of any kind, anywhere.

VI. That the said defendant company had a capital stock in the sum of $500,000, divided into 500,000 shares of the par value of $1 each; that in the month of July, 1908, and prior to the time hereinbefore mentioned, the defendants A. B., C. D., E. F., G. H. and I. J. subscribed for and became owners of shares of the capital stock of the said company of the par value as set after their several names, respectively, as follows, to wit: [Specification of stock held by each.]

VII. That at the times herein mentioned the said company was expressly prohibited by the provisions of section 8 of article 17 of the constitution of the state of South Dakota, from issuing the said capital stock except for money, labor done, or money or property actually received, which said section provided as follows: "No corporation shall issue its stocks or bonds except for money, labor done, or money or property actually received."

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VIII. That the said shares of the capital stock of the said defendant company were nevertheless so issued by the said defendant company to the aforesaid defendant stockholders prior to the times and in the sums and amounts hereinbefore mentioned, for services rendered by the said defendants as directors of the said company of no appreciable value whatsoever.

IX. That about the times the said defendants became the owners of the said shares of the capital stock of the said defendant company as aforesaid, the said defendant company made and delivered to each of the said defendants stock certificates in the sums and amounts of their respective holdings, as aforesaid, purporting to show that the par value of the said shares were "fully paid," and each of said defendants thereafter severally kept and retained the same and at all the times hereinbefore mentioned, were and still are the owners of shares of the capital stock of the said defendant company in the sums and amounts hereinbefore mentioned and set forth.

X. That the said shares were so issued by the defendant company to each of said defendants without any actual consideration whatsoever, and no part of the par value of said shares has been actually paid by said defendants to said company.

XI. That by reason of the premises the said defendant stockholders are severally and respectively liable to the several plaintiffs, respectively, in the several sums and amounts unpaid upon their respective stock as aforesaid, to the extent necessary to pay and satisfy the respective sums and amounts due plaintiffs for and on account of the unpaid indebtedness of said company.

XII. That, as plaintiffs are informed and believe, the defendants C. D. and E. F. are insolvent and are not able to pay the entire amount of said sums so unpaid upon their respective stock, and there may be certain other defendants who are also insolvent and unable to pay the same.

Wherefore plaintiffs demand judgment against the several defendants respectively as follows:

1. That a receiver be appointed herein with the usual bond according to law, and that an accounting be had of the several sums and amounts unpaid upon the stock of the several individual defendants herein, respectively, and of the several sums and amounts due the several plaintiffs, respectively, and of the costs and expenses of the plaintiffs herein and of the costs and expenses of such receivership; and that the solvency and ability of the several defendants to pay and discharge the sums and amounts aforesaid, be likewise ascertained and determined.

2. That the several plaintiffs, respectively, have and recover judgment against such of the several individual defendants as are so ascertained and determined to be solvent for the respective sums and amounts so ascertained to be unpaid upon the respective stock of the several defendants, respectively, to the extent necessary to pay and satisfy in the several sums and amounts so ascertained and determined to be due the several plaintiffs, respectively, together with the costs and expenses of such receivership, and that such receiver be au-

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thorized and directed to receive and collect the sums so ascertained as aforesaid, and to pay and distribute the same to the plaintiffs under the direction of the court and in accordance with the terms and direction of such judgment.

3. For such other relief as may be just, with costs.

Sustained in Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

1225. Foreign corporation—Unpaid stock subscriptions.

I. That plaintiff brings this action on his own behalf and on behalf of all other creditors of defendant Omega Stove & Grate Company.

II. That the defendant Omega Stove & Grate Company is a corporation for profit duly organized and existing under the laws of the state of Ohio, with a capital stock of $150,000, divided into shares of $100 each, and was such corporation prior to the indebtedness hereinafter mentioned.

III. That on Dec. 22, 1891, in the court of common pleas of the county of Cuyahoga, in the state of Ohio, plaintiff duly recovered a judgment against the defendant Omega Stove & Grate Company for $1,969.75, with interest from Sept. 21, 1891, at eight per cent. per annum, and his costs of suit taxed at $81.21, which costs have since been increased in the sum of $1.65; that said court then and there had jurisdiction of the subject-matter of said action and the parties thereto.

IV. That said judgment was rendered upon a certain note of the Omega Stove & Grate Company for $1,523, made and delivered by said company to plaintiff on Jan. 21, 1888, and payable to the order of plaintiff in six months from said date, with eight per cent. interest.

V. That on Jan. 21, 1892, an execution was duly issued upon said judgment and directed and delivered to the sheriff of said Cuyahoga county, where the said defendant had its chief office; that thereafter said sheriff duly returned said execution wholly unsatisfied, and said judgment remains wholly unpaid.

VI. That said company has ceased doing business and has disposed of all its assets and now has no property.

VII. That at the time the said debts were incurred, and at all times herein mentioned, the other defendants herein were owners of stock in said Omega Stove & Grate Company, as follows: [Specification of the number of shares of stock held by each defendant.]

VIII. That all of said defendants were subscribers for the stock so held and owned by them, but no part of the subscription for said stock has been paid.

IX. That section 3258 of the Revised Statutes of the state of Ohio, which at all the times herein mentioned was and now is in force and the duly enacted general law of said state, provides that "the stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable in addition to their stock in an amount equal to the stock by them subscribed or otherwise acquired to the

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creditors of the corporation to secure the payments of the debts and liabilities of the corporation."

X. That by reason of the premises the said defendants are liable to plaintiff, and such other creditors of said company as there may be, to an amount equal to the stock so owned by each and also in the amount remaining unpaid on said stock.

XI. That said defendants are all of the stockholders of said company.

Wherefore plaintiff prays that the creditors of said company and the amount due each may be ascertained; that the stockholders of said company in arrear for payment of subscription to the stock of said company may be compelled to pay the balance due from them respectively upon said subscription; that judgment may be rendered against the said defendants for the amount due the creditors of said company in the premises, and for such other relief as may be just, with costs.

Sustained on demurrer in Rule v. Omega Stove & Grate Co., 64 Minn. 326, 67 N. W. 60.

1226. Foreclosure of lien of corporation on stock of officer.

I. That at the times herein mentioned plaintiff was, and still is, a corporation, duly organized and existing under the laws of this state.

II. That during all the year 1906 the defendant A. B. was the treasurer and a member of the board of directors of the plaintiff corporation; that during such time said A. B. was in the employment of plaintiff under and by virtue of a contract entered into between him and plaintiff whereby he agreed to devote all of his time and services to the business of plaintiff, and to finance plaintiff company and manage and conduct the financial matters thereof, at the agreed salary of $300 per month.

III. That said salary was, during all of said time, paid by plaintiff to said A. B.; that by the terms of said contract it was the duty of said A. B. during all of said time to apply his efforts and industry, and the funds of said corporation in his hands, to the sole use and benefit of said corporation and not for his own private investments and emoluments, and to account for and turn over to plaintiff all investments and profits made and obtained by him through the use of the moneys and funds of plaintiff.

IV. That on June 5, 1906, said A. B. purchased and received from one C. D. and one E. F., 91 shares and certificates of the capital stock of plaintiff at the agreed price of $2,275, and said A. B. then and there paid said C. D. and E. F., out of the moneys and funds of plaintiff then in his hands, the said sum of $2,275 as and for the purchase price of said capital stock.

V. That on July 5, 1906, said A. B. sold and delivered said capital stock to one G. H. for the agreed price of $9,100, which amount was then paid to him by said G. H. as and for the purchase price of said capital stock, and said A. B. realized and received in and by said transaction a profit of $6,825; that said A. B. has never in any manner accounted for or paid to plaintiff said sum of

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$6,825, nor any part thereof, though often requested to do so, and has never accounted to plaintiff for the stock so bought with plaintiff's funds, but has at all times wrongfully and fraudulently withheld and misappropriated said sum to his own use; that by reason of the premises said A. B. ever since July 5, 1906, has been and now is justly indebted to plaintiff in the sum of $6,825, and interest thereon from that date.

VI. That on May 1, 1906, the defendant A. B. conducted a party of land seekers to the region known as Peace River, in the Dominion of Canada, and paid the railroad fare and other expenses of said parties upon said trip in the sum of $640 out of the funds of plaintiff then in his hands, without the authority of plaintiff, and said A. B. has ever since failed and refused to account for or repay to plaintiff the said sum of $640, or any part thereof, though often requested to do so; that by reason of the premises the defendant A. B., ever since said May 1, 1906, has been, and is now, justly indebted to plaintiff in said further sum of $640, and interest since May 1, 1906.

VII. That said A. B. is the owner, on the books of plaintiff corporation, of fifty shares of the capital stock thereof, represented by ten stock certificates of five shares each, numbered respectively 92, 93, 97, 98, 99, 122, 123, 124, 126 and 128, and plaintiff has and claims a first lien thereon for said sums so owing from defendant A. B. to plaintiff, under and by virtue of the provisions of sections 2863 and 2864, Revised Laws of Minnesota, 1905.

VIII. That defendant, I. J., trustee, has, or claims some interest in or on said capital stock of the defendant A. B., which claim or lien, if any, is subject to the said lien of plaintiff.

Wherefore, plaintiff demands judgment:

1. That defendant A. B. is indebted to plaintiff in the sum of $6,825, and interest thereon since July 5, 1906, and in the further sum of $640, and interest thereon since May 1, 1906, and that plaintiff have judgment against defendant, A B., for said sums, with costs.

2. That plaintiff has a first and valid lien on the above described capital stock of defendant A. B., in the amount of said debt and judgment, and that said judgment be decreed a first lien upon said capital stock.

3. That said capital stock of defendant A. B. be sold under the direction of the court in the manner usually provided for the sale of property upon the foreclosure of liens to satisfy said lien and judgment of plaintiff, with the costs and expenses of sale, and that new certificates of said capital stock be issued by plaintiff in lieu thereof to the purchaser at such sale.

4. That the proceeds of such sale be applied first to the payment of plaintiff's said claim and judgment against said A. B., and the expenses of sale, and that the surplus, if any, be paid to the party or parties entitled thereto.

5. For such other relief as may be just.

Complaint in United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112.

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1227. For cancelation of fraudulent stock—Action by stockholder.

I. That the Pacific Coast and Norway Packing Company now is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state, with its main office in the city of Minneapolis, Minnesota; that said corporation is a manufacturing corporation, and was incorporated under the laws of this state for the purpose of manufacturing, and was and is engaged in the business of canning, packing and selling fish.

II. That the par value of each share of stock in said corporation is $10.

III. That A. B. was one of the promoters of said corporation and at all the times herein mentioned was a stockholder and director thereof, and at the time of the issuance of the stock herein mentioned on June 5, 1900, and thereafter, until Jan. 1, 1903, was the manager and secretary thereof.

IV. That on May 24, 1900, plaintiff C. D. purchased from said corporation, and there was issued to him by said corporation in due form, 300 shares of the stock of said corporation, evidenced by certificate No. 4 the par value of which stock was $3,000, and he now is, and ever since the issuance of said stock has been, the owner of said 300 shares of stock in said corporation.

V. That on Sept. 22, 1900, plaintiff E. F. purchased from said corporation, and said corporation duly issued to her, 100 shares of the stock of said corporation, evidenced by certificate No. 65, the par value of which stock was $1,000, and ever since said Sept. 22, 1900, she has been and now is the owner of said 100 shares of stock in said corporation.

VI. That on Sept. 22, 1900, plaintiff G. H. purchased from said corporation, and said corporation issued to her 100 shares of the stock of said corporation, evidenced by certificate No. 66 the par value of which stock was $1,000, and ever since said Sept. 22, 1900, she has been, and now is the owner of said 100 shares of stock in said corporation.

VII. That said corporation was duly incorporated, and the articles of incorporation were duly published as provided by law, and filed with the register of deeds for Hennepin county, Minnesota, and with the Secretary of State of Minnesota, and duly recorded in said offices, on May 11, 1900, but the certificate of incorporation was not issued until May 8, 1902.

VIII. That the first board of directors of said corporation was I. J., A. B., K. L., and M. N.; that the first officers of said corporation were I. J., president, and A. B., secretary, treasurer, and manager; and said directors and officers were directors and officials of said corporation during all the times herein mentioned.

IX. That on June 5, 1900, the officers of said corporation unlawfully and fraudulently issued certificate of stock in said corporation No. 6 for 5,000 shares of the capital stock thereof to said A. B., for which stock said A. B. paid nothing and for which said corporation received nothing, said A. B. being then and there a director in said corporation and secretary of the same; that the issuance of said stock was made without the knowledge or consent of these

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plaintiffs, or of any of the stockholders of said corporation except the officials and directors thereof.

X. That on Nov. 24, 1900, said A. B., without consideration therefor, purported to, and in form did, assign 4,000 shares of the capital stock of said corporation evidenced by said certificate No. 6 to O. P., upon which pretended assignment said O. P. on Oct. 24, 1901, procured to be issued to him by said corporation certificates Nos. 188, 189, 190 and 191 for 1,000 shares each, aggregating 4,000 shares, for which pretended certificates this corporation received no value either in money or property, and for which stock said O. P. paid nothing whatever, and gave no consideration for the same; that said stock was so assigned to said O. P. without the knowledge or consent of these plaintiffs, or any of the stockholders of said corporation except the said directors and officials of said corporation, and was unlawfully and fraudulently issued and sold to him.

XI. That said O. P. still possesses said certificates of stock so issued to him, and pretends to be the owner of said 4,000 shares of stock in said corporation, and said corporation has and does refuse to bring any action to annul or cancel said stock.

Wherefore plaintiffs demand judgment that defendant O. P. surrender said 4,000 shares of stock evidenced by said certificates Nos. 188, 189, 190 and 191 to defendant corporation and that said corporation cancel the same and the record thereof; that a temporary injunction issue enjoining defendant O. P. from selling, transferring or incumbering said stock or certificates during the pendency of this action, and enjoining the defendant corporation from transferring the same on its corporate books during the pendency of this action; and for such other relief as may be just, with costs.

Sustained in Shaw v. Staight, 107 Minn. 152, 119 N. W. 951.

1228. Withdrawal of capital—Liability of stockholder.

I. That on Aug. 15, 1900, the Preiss & Wimmer Brewing Company was a manufacturing corporation duly organized and existing under the laws of this state, and owned and operated a brewery plant known as Preiss & Wimmer Brewery in the city of St. Cloud, Minnesota, and continued to exist as such corporation and to own and operate said brewery until the adjudication of bankruptcy hereinafter mentioned.

II. That its capital stock consisted of 900 shares of $100 each, and all of said stock was issued and delivered to actual purchasers thereof and the full amount of the par value of said stock paid in by the owners and holders thereof.

III. That on Aug. 15, 1900, after the organization of said corporation, defendant became a stockholder therein, holding 100 shares of the capital stock thereof, of the par value of $10,000; that defendant continued to own and hold said stock until May 3, 1910, when he surrendered all of it to the stockholders of said corporation, and said stock was thereupon duly canceled; that the officers and stockholders of said corporation then entered into an agreement in

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writing with defendant to refund to defendant the full par value of said stock, to wit, $10,000.

IV. That between May 3, 1910, and Dec. 3, 1911, said officers and stockholders paid defendant in monthly instalments, each month, during said time, the sum of $7,409.06, in consideration of which the said 100 shares of stock held and owned by defendant were withdrawn and refunded to the stockholders of said corporation and surrendered and canceled, contrary to the provisions of G. S. 1913 § 6450, and no other certificates of stock were issued in lieu thereof.

V. That at the time of such withdrawal and refundment of all of said stock said corporation had a large number of debts due and unpaid, including claims of creditors whom the plaintiff represents in the bankruptcy proceedings hereinafter mentioned.

VI. That said claims of the creditors whom plaintiff so represents remained unpaid at the time of the adjudication of bankruptcy hereinafter mentioned, and are still unpaid.

VII. That on Jan. 10, 1912, in bankruptcy proceedings instituted for that purpose, said corporation was duly adjudged a bankrupt by the United States District Court for the District of Minnesota, [Third] Division.

VIII. That on Feb. 22, 1912, in such bankruptcy proceedings, plaintiff was duly appointed trustee of said bankrupt corporation by said United States District Court, and plaintiff thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such trustee.

IX. That plaintiff has been duly authorized and directed by said United States District Court, in said bankruptcy proceedings, to commence this action in his capacity as such trustee to recover for the use of the creditors of said corporation the money so refunded to defendant.

X. That prior to the commencement of this action plaintiff, as such trustee, demanded of defendant the return of the money so refunded to him, but defendant refused and still refuses to return the same, or any part thereof.

XI. That there are insufficient assets in the hands of plaintiff to pay the unsecured debts and liabilities of said corporation, and it is necessary to secure the return of the money, belonging to said corporation, so wrongfully refunded to defendant, to apply the same to the payment of the debts of the corporation for which the same is liable.

Wherefore [as in § 919].

Substance of complaint sustained on demurrer in Preiss v. Zins, 122 Minn. 441, 142 N. W. 822.

1229. Action by corporation against director for neglect of duty.

I. That plaintiff is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of the Territory of Utah.

II. That on Oct. 5, 1880, the defendant, together with A. B., C. D., and E. F., was duly elected a director of plaintiff, and forthwith entered upon the

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discharge of his duties as such director, and was annually thereafter re-elected director of said company, and served as such director until March 3, 1887.

III. That during said period from Oct. 5, 1880, to March 3, 1887, the said A. B. and C. D. were also directors of said company, and said A. B. was the president thereof, and said C. D. was the vice-president thereof.

IV. That A. B. and C. D. had and exercised control and management of said company, and of its property and moneys, with full knowledge of defendant; that at different times between Sept. 20, 1881, and April 1, 1886, A. B. and C. D., without the authority of the directors of plaintiff, or of plaintiff, wrongfully withdrew from the funds of plaintiff large sums of money and loaned the same to themselves, appropriating the same to their own use; that an account was kept of the moneys so withdrawn upon the regular books of plaintiff, and entries were therein regularly made from time to time by the direction of A. B. and C. D. of the said amounts of money so wrongfully withdrawn from plaintiff; that a small portion of the amount first wrongfully taken and appropriated by A. B. and C. D. and loaned to themselves, as aforesaid, was repaid, all without the authority or consent of the board of directors of plaintiff.

V. That during the time that said moneys were being withdrawn from the funds of plaintiff by A. B. and C. D., defendant had access to plaintiff's books, and had knowledge, and the means of knowledge, of said acts of A. B. and C. D., with respect to the funds of plaintiff.

VI. That defendant negligently failed to make any effort to prevent the withdrawal by A. B. and C. D. of any of the moneys so wrongfully taken from plaintiff.

VII. That defendant, though a director of plaintiff, with full authority to act in the premises, negligently failed to bring any of the facts aforesaid to the attention of the board of directors or of the stockholders of plaintiff, and neglected to do anything in the nature of prevention of the continued depletion of the funds of plaintiff during the period aforesaid by A. B. and C. D., or of compelling the restoration to plaintiff of any of the moneys so withdrawn from it.

VIII. That it was the duty of defendant, during the period aforesaid of his directorship of plaintiff, to exercise care and oversight over the affairs of plaintiff; to be acquainted personally with the accounts and entries in its books of record; to attend regularly the meetings of its board of directors, and to demand that regular meetings of said board be held; to bring to the attention of said board the facts connected with the dealings of said officers with the funds of plaintiff that appeared upon the regular books of account of plaintiff, or otherwise; to prevent a wrongful and unlawful withdrawal of the funds of plaintiff, and to collect the same; and generally to do and perform all the duties that usually pertain to the office of director of a corporation.

IX. That defendant, during the period that he was a director of plaintiff, from Oct. 5, 1880, to March 3, 1887, wholly neglected his duties as director in connection with the transactions aforesaid, and wholly failed to perform his duty toward plaintiff and its stockholders in the protection of its funds.

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X. That A. B. and C. D. are now, and for a long time past have been insolvent.

XI. That by reason of said neglect of defendant of his duties as a director plaintiff has been damaged $500.

Wherefore [as in § 919].

Substance of complaint sustained on demurrer in Horn Silver Mining Co. v. Ryan, 42 Minn. 196, 44 N. W. 56.

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1230. Allegation of corporate existence.

That at the times herein mentioned [plaintiff] [defendant] was and still is one of the counties of this state, duly organized and existing as a public corporation under the laws thereof.

Some such allegation as this is usual but unnecessary. Courts take judicial notice of the political subdivisions of the state. See Dunnell, Minn. Digest, § 3456; Rutherford v. Yorks, 113 Minn. 248, 129 N. W. 386. All counties are corporations. G. S. 1913 § 668; Dunnell, Minn. Digest, § 2241.

1231. Allegation of presentation of claim to county board.

That on 19 , plaintiff duly presented said claim, in writing, itemized, and duly verified by plaintiff, to the county board of defendant county, but it has failed to act upon the same.

R. L. 1905 § 620; G. S. 1913 § 1094.

1232. Allegation of demand on county order.

That on 19 , and more than thirty days before this action was brought, plaintiff duly presented said order to the treasurer of defendant county and demanded payment thereof, but it was not paid.

R. L. 1905 § 620; G. S. 1913 § 1094.

1233. Denial of presentation of claim to county board.

The defendant for answer to the complaint herein alleges that at no time prior to the commencement of this action was the claim set forth in the complaint presented to the county board of defendant county, nor has said board consented to the bringing of this action.

R. L. 1905 § 620; G. S. 1913 § 1094.

1234. On county treasurer's bond—Failure to pay over money to successor.[1]

I. That the defendant A. B. was duly elected county treasurer of Redwood county, Minnesota, at the general election held in said county in November 1877, for the term of office commencing March 1, 1878, and ending March 1, 1880, and duly qualified and held said office for said term.

II. That for the purpose of qualifying for said office the defendant A. B., as principal, and defendants C. D. and E. F., as sureties, duly made and filed for record an official bond, of which the following is a copy: [Copy of bond.]

III. That said bond was duly approved by the county board of said county and filed and recorded in the office of the register of deeds of said county.

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IV. That at the general election held in said county in November 1879, one G. H. was duly elected to said office for the term commencing March 1, 1880, and duly qualified and entered upon the duties of such office on that day, succeeding the defendant A. B. therein.

V. That during his said term of office the defendant A. B. received various sums of public moneys as such treasurer from taxes and various other sources of public revenue, aggregating $1,099.66 in excess of the amount accounted for by him, or paid over by him to his successor in office, the said G. H.

VI. That in going out of office at the expiration of his said term the defendant A. B. did not deliver said sum of $1,099.66 or any part thereof, to his successor in office, the said G. H.[2]

VII. [That on 19 , plaintiff demanded payment of said amount from defendant A. B., but no part thereof has been paid.]

Wherefore [as in § 919].

[1] Based on complaint in Redwood County v. Tower, 28 Minn. 45, 8 N. W. 907. See Dunnell, Minn. Digest, § 2327.

[2] G. S. 1913 § 884.

1235. Against county treasurer for negligent payment of forged orders.

I. That at the times herein mentioned the county of Ramsey was, and still is, a duly organized and existing county of this state.

II. That on Jan. 5, 1889, the defendant A. B. was, ever since has been and still is, the duly elected, qualified and acting treasurer of said county.

III. That at all the times herein mentioned, one C. D. was the duly appointed, qualified and acting deputy clerk of the district court for said county; that during all of said times it was a part of the duties of the clerk of the district court for said county to issue to the various persons attending said court, as petit jurors therein, certificates as to their length of service as such jurors, and as to the amount of compensation which they were entitled to for such services from said county, and for that purpose said C. D. had access to all the books and records in the office of the clerk of said court, and to the seal of said court.

IV. That between Jan. 5, 1889, and Dec. 1, 1890, both inclusive, said C. D., acting as the deputy clerk of said court, and on behalf of the clerk of said court, wrongfully, unlawfully and knowingly made, executed and prepared 1,328 certificates of the kind and manner, and to the effect hereinafter described; that each of said certificates purported to be issued to a different person, and purported to be genuine and true statements as to the number of days the person therein named had attended as a juror before said court, and the amount of compensation to which such person was entitled; that each of said certificates, except as regards the name, date and amount thereof, was in the following form: [Form of certificates.]

V. That a detailed list of said certificates, showing the number thereof, the name of the person to whom the same purports to be issued, and the amount

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of compensation to which such person was stated to be entitled to, is hereto attached, marked Exhibit A, and made a part hereof.

VI. That each of said certificates was executed by said C. D. as deputy clerk of said court, and had attached thereto the seal of said court.

VII. That such certificates amounted in the aggregate to the sum of $15,559.50, and it appeared upon the face of said certificates that there was due from the county of Ramsey to the various persons named in the said certificates amounts aggregating the said sum of $15,559.50, for services rendered by them as such jurors as aforesaid.

VIII. That each and every of such certificates was forged and untrue; that none of the persons named in said certificates had attended said court as juror or otherwise, nor was there due to any of the persons named in any of such certificates any sum whatever from the county of Ramsey for such services as jurors or otherwise, but the same were by said C. D. declared, made and issued for the purpose of obtaining thereby from the county of Ramsey, said sum of $15,559.50, for his own use.

IX. That thereafter and between the dates hereinbefore alleged, said C. D., for the purpose of cashing said certificates, and fraudulently obtaining from the county of Ramsey, for his own use as aforesaid, the sum of money hereinbefore mentioned, wrongfully, unlawfully and wilfully presented each of said certificates to the county auditor of said Ramsey county for audit and allowance; that thereupon each and every of said certificates was by said county auditor of Ramsey county attempted to be audited and allowed by writing across the back of each of said certificates, "Office, Auditor, Ramsey County, Treasurer of Ramsey County pay within amount from revenue fund. M. F. Kain, County Auditor."

X. That said county auditor issued no other or different order, warrant or voucher upon the county of Ramsey for any of said sums except by indorsement upon each of said certificates as above mentioned.

XI. That between the dates above mentioned, said C. D., for the purpose of procuring from the county of Ramsey said sum of money above mentioned wrongfully, unlawfully and negligently wrote, forged and indorsed upon the back of each of said certificates the name of the person to whom the same purported to be payable as hereinbefore described; that each of said indorsements was wholly false, fraudulent, forged, and without authority, as said C. D. well knew that none of the persons named in said certificates, nor any of them ever indorsed any of the same, nor either or any of their names upon the same, but each and all of said certificates were by said C. D. between the dates aforesaid and from time to time and on or about the date of each of said certificates respectively, after having been by him so wrongfully issued, drawn and indorsed, and attempted to be audited as aforesaid, presented for payment to the defendant, A. B., and said defendant, thereupon, for, and on account of said false and forged certificates, wrongfully, unlawfully and negligently paid over and delivered to said C. D. the amounts of said certificates aggregating as aforesaid

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the sum of $15,559.50, out of the moneys in his hands as county treasurer of Ramsey county, and out of the money of said Ramsey county.

XII. That no other or different voucher, order or warrant was ever drawn by the auditor of Ramsey county by any other person upon the said defendant, A. B., as county treasurer, for any of the amounts purporting to be due according to said certificates, and each and all of said sums were as aforesaid by the defendant A. B., as hereinbefore alleged, wrongfully and without authority of law paid out and delivered to said C. D. upon said false and forged certificates hereinbefore described, so attempted to be indorsed, audited and allowed as hereinbefore set forth, and not otherwise.

XIII. That on 18 , plaintiff demanded payment of said sum from defendant, but no part thereof has been paid.

Wherefore [as in § 919].

Sustained on demurrer in Ramsey County v. Nelson, 51 Minn. 79, 52 N. W. 991.

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COVENANTS

1236. On covenant of warranty—Failure of title—Eviction.

I. That on 19 , defendant, for a valuable consideration, by deed conveyed to [plaintiff] [one A. B.], in fee, the [describe the premises as in the deed].

II. That said deed contained a covenant of warranty, on the part of defendant, of which the following is a copy: [Copy of covenant.]

III. That defendant was not then the owner in fee of said premises, but one C. D. was such owner.

IV. That on 19 , the said C. D., by virtue of such title, which he still retained, lawfully evicted plaintiff from said premises and still withholds possession thereof from him, to his damage $.

Wherefore [as in § 919].

See § 617.

1237. Same—Plaintiff unable to obtain possession.

[I. and II. as in § 1236.]

III. That defendant has not warranted and defended the premises to plaintiff; but at the time of the making and delivery of said deed, one A. B. was seized and in possession of the premises, lawfully claiming the same by a paramount title, excluding plaintiff from the possession thereof, and still withholds possession thereof from plaintiff, to his damage $.

Wherefore [as in § 919].

1238. Same—Eviction by judgment.

[I. and II. as in § 1236.]

III. That defendant has not warranted and defended said premises to plaintiff; but one A. B., lawfully claiming the same by a paramount title, afterwards, in an action of ejectment brought by him in the district court for county, Minnesota, recovered a judgment against plaintiff herein, duly rendered by said court on 19 , for the recovery of the possession of said premises, and on 19 , lawfully entered into possession of the same by virtue of said judgment and ousted plaintiff and still withholds possession thereof from him, to his damage $.

IV. That immediately after being served with summons in said action plaintiff gave defendant herein written notice thereof and requested him to appear and defend the action.

Wherefore [as in § 919].

1239. Same—By assignee of covenantee.

[I. and II. as in § 1236.]

III. That on 19 , the said A. B., for a valuable consideration, by

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deed conveyed said premises to one C. D. in fee, and on 19 , the said C. D., for a valuable consideration, by deed conveyed said premises to plaintiff in fee.

[Continue as in preceding forms.]

1240. Same—Constructive eviction by judgment.

[I. and II. as in § 1236.]

III. That defendant has not warranted and defended said premises to plaintiff; but one A. B., lawfully claiming the same by a paramount title, afterwards, in an action to determine adverse claims brought by him in the district court for county, Minnesota, recovered a judgment against the plaintiff herein, duly rendered by said court on 19 , adjudging that said A. B. was the owner in fee and in possession of said premises, and that plaintiff herein had no estate or interest in or lien upon said premises.

IV. That plaintiff herein appeared in said action and asserted title to said premises by virtue of said deed from defendant and said title was in issue in said action.

V. That immediately after being served with summons in said action plaintiff gave defendant herein written notice thereof and requested him to appear and defend the action.

VI. That by reason of the premises plaintiff has been damaged $.

Wherefore [as in § 919].

Based on Larson v. Goettl, 103 Minn. 272, 114 N. W. 840.

1241. Same—Allegation of plaintiff's capacity as devisee of covenantee.

[I. and II. as in § 1236.]

III. That thereafter the said A. B. entered into possession of said premises and on 19 , when in such ownership and possession, died, leaving a last will, wherein he devised to plaintiff the said premises in fee; that on 19 , said will was duly proved and admitted to probate in the probate court for county, Minnesota; that on 19 , in a decree of final distribution which was duly made by said court, said premises were assigned to plaintiff in fee and such estate he still retains; that on 19 , plaintiff entered into possession of said premises and continued in possession until ousted as hereinafter alleged.

[Continue as in preceding forms.]

1242. Same—Allegation of plaintiff's capacity as heir of covenantee.

[I. and II. as in § 1236.]

III. That thereafter the said A. B. entered into possession of said premises and on 19 , while in such ownership and possession, died intestate, leaving this plaintiff his only child and heir at law; that thereafter the estate of the said A. B. was duly administered upon in the probate court for

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county, Minnesota, and on 19 , in a decree of final distribution, which was duly made by said court, said premises were assigned in fee to this plaintiff and such estate he still retains; that on 19 , plaintiff entered into possession of said premises and continued in possession until ousted as hereinafter alleged.

[Continue as in preceding forms.]

1243. On covenant against incumbrances.

I. [As in § 1236.]

II. That said deed contained a covenant against incumbrances, on the part of defendant, of which the following is a copy: [Copy of covenant.]

III. [That at the time of the making and delivery of said deed said premises were not free from all incumbrance, but on the contrary the defendant before that time, on 19 , had made and delivered a mortgage on said premises to one A. B. to secure the payment of $, with interest.]

IV. [That on 19 , in the district court for county, Minnesota, judgment was duly rendered against defendant in favor of C. D. for the sum of $, and on 19 , was duly docketed in said county; that at the time of the execution of the said deed to plaintiff said judgment was unpaid and unsatisfied of record and a valid lien on said premises.]

V. [That at the time of the making and delivery of said deed said premises were subject to certain taxes theretofore duly assessed and levied on said premises for state and municipal purposes in the year , amounting to $, and at the time of the making and delivery of said deed said taxes were unpaid and a valid lien on said premises.]

VI. That plaintiff necessarily paid $ in extinguishing the lien of said [judgment] [mortgage] [taxes], no part of which has been repaid.

Wherefore [as in § 919].

1244. On covenant for quiet enjoyment.

I. [As in § 1236.]

II. That said deed contained a covenant for quiet enjoyment, on the part of defendant, of which the following is a copy: [Copy of covenant.]

III. That plaintiff has not been permitted peaceably to occupy and enjoy said premises under said deed, or to receive the rents and profits thereof; but one A. B. who, at the time of the making and delivery of said deed, had a paramount legal title to said premises, entered thereon on 19 , under such title, which he still retained, and by due process of law evicted plaintiff and still withholds possession thereof from him.

IV. That by reason thereof plaintiff has not only lost said premises, but also the sum of $, by him expended in repairing and improving said premises, and the sum of $ necessarily paid by him as costs and charges of A. B. in prosecuting his action for the recovery of said premises, and the sum

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of $ for his own costs, charges, and counsel fees in defending said action.

Wherefore [as in § 919].

1245. On covenants against incumbrances and for quiet enjoyment.

I. [As in § 1236.]

II. That said deed contained covenants against incumbrances and for quiet enjoyment, on the part of defendant, of which the following are copies: [Copies of covenants.]

III. That at the time of the making and delivery of said deed said premises were not free from all incumbrance, but on the contrary defendant had theretofore leased said premises to one A. B. for a term which did not expire until 19 ; that at the time of the making and delivery of said deed said A. B. was lawfully in possession of said premises under said lease from defendant and so remained until 19 ; that immediately upon obtaining said deed plaintiff demanded possession of said premises from said A. B., but he refused to surrender possession and lawfully withheld possession from plaintiff until 19 , by virtue of said paramount lease, whereby plaintiff lost the use of said premises from 19 , to 19 .

IV. That the value of the use of said premises for said period was $.

Wherefore [as in § 919].

Based on complaint in Fritz v. Pusey, 31 Minn. 368, 18 N. W. 94.

1246. On covenant of seizin.

I. [As in § 1236.]

II. That said deed contained a covenant of seizin, on the part of defendant, of which the following is a copy: [Copy of covenant.]

III That defendant was not then [seized in fee] [the rightful owner in fee] [or otherwise negative the words of the covenant] of said premises, but [continue as in § 1237 or § 1238].

Sustained by Veit v. McCauslan, 142 N. Y. S. 281. See § 618.

1247. Denial of covenant.

The defendant for answer to the complaint herein denies that he covenanted or agreed with plaintiff as alleged therein or at all.

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CREDITORS' SUIT

1248. To reach property fraudulently conveyed.

I. That on April 25, 1882, judgment was duly rendered and docketed in justice court before A. B., a duly elected and qualified justice of the peace in and for McLeod county, Minnesota, in favor of one C. D., plaintiff in said justice court and against the defendant E. F. herein, for the sum of $66.55, in an action duly commenced in said justice court upon a promissory note, made and delivered by defendant E. F. to C. D.

II. That after the rendition and docketing of said judgment execution was duly issued thereon out of said justice court, in favor of said C. D. and against the property of defendant E. F., and placed in the hands of the proper officer for service, who after due and diligent search duly returned said execution wholly unsatisfied.

III. That on Jan. 24, 1883, a transcript of said judgment was duly filed and docketed in the office of the clerk of the district court for said county.

IV. That on Jan. 25, 1883, and before the commencement of this action, said C. D., for a valuable consideration, assigned all his right, title and interest in and to said judgment to plaintiff, who is now the owner and holder thereof, and said assignment was duly filed with the clerk of said district court.

V. That on Jan. 13, 1883, judgment was duly rendered and docketed in plaintiff's favor and against defendant E. F. herein, for the sum of $92.40, in justice court before A. B., a duly elected and qualified justice of the peace in and for said county and state, in an action on an express contract, duly commenced therein, wherein this plaintiff was plaintiff and defendant, E. F. was defendant.

VI. That on Jan. 24, 1883, execution was duly issued upon said last mentioned judgment out of said justice court in favor of this plaintiff and against the property of defendant E. F., and placed in the hands of the proper officer for service, who after due and diligent search duly returned said execution wholly unsatisfied.

VII. That on Jan. 24, 1883, a transcript of said last mentioned judgment was duly filed and docketed in the office of the clerk of the district court for said county.

VIII. That on Jan. 25, 1883, and before the commencement of this action, and after the assignment of the judgment as hereinbefore stated from said C. D. to this plaintiff, executions were duly issued out of the district court for said county, upon the two judgments so filed and docketed in said district court, in favor of this plaintiff and against the property of defendant E. F. herein, and delivered to the sheriff of said county, where the said E. F. then resided and still resides; that on 18 , said sheriff duly returned said executions wholly unsatisfied, and said judgments are still wholly unsatisfied.

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IX. That the defendant G. F. is, and prior to March 24, 1882, was, the wife of the defendant E. F.

X. That on March 24, 1882, and for a long time prior thereto, the defendant E. F. was the owner in fee and in the possession of lots one, two, three, six, and seven, in block seven, in the townsite of Glencoe and within the platted portion thereof, in said county, and said lots contained more than one acre of land; that on March 24, 1882, and after the defendant E. F. had become indebted to the plaintiff and said C. D., and after their respective claims and demands had become due and payable, and upon which the aforesaid judgments were rendered and the executions issued as aforesaid, the defendants E. F., and G. F., his wife, with the intention of defrauding the plaintiff and his other creditors, and without any consideration, executed and delivered to defendant I. J., a deed of said lots; that defendant I. J. had, at the time said deed was so executed and delivered to him, full notice and knowledge of the fraudulent intention of the defendants E. F., and G. F., his said wife, as aforesaid.

XI. That said deed was, on March 27, 1882, recorded in the office of the register of deeds for said county, in Book L, of Deeds, on page 247, and remains of record, as aforesaid.

XII. That on April 15, 1882, the defendant I. J. executed and delivered to defendant G. F., a deed of conveyance of said lots, without any consideration on her part, and said deed was on April 17, 1882, recorded in the office of the register of deeds for said county, in Book U, of Deeds, on page 151, and still remains of record as aforesaid.

Wherefore plaintiff demands judgment that said deeds from E. F. and G. F. to defendant I. J., and from defendant I. J. to defendant G. F., are fraudulent and void as to plaintiff, and canceling the same and the records thereof, and for such other relief as may be just, with costs.

Substance of complaint sustained on demurrer in Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390. See § 619.

1249. To reach proceeds of sale to bona fide purchaser in hands of fraudulent grantee.

[I. II. III. and IV. as in § 1360.]

V. That on 19 , defendant A. B., being then the owner thereof, conveyed to defendant C. D., without any consideration therefor, the [describe premises].

VI. That defendant A. B. made said conveyance with intent to hinder, delay and defraud plaintiff in the collection of his said claim and the same was received by defendant C. D. with full knowledge of such intent.

VII. That on 19 , defendant C. D. conveyed said premises to [one E. F.] [defendant E. F.] and received in payment therefor the sum of $.

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VIII. That defendant G. D. is the wife of defendant C. D.

Wherefore plaintiff demands judgment that the deed from defendant A. B. to defendant C. D. is fraudulent and void as to plaintiff; that the moneys received by defendant C. D. for his said conveyance to defendant E. F. are held in trust by defendant C. D. for plaintiff as a creditor of defendant A. B. and that defendant C. D. account to plaintiff for any such moneys so received by him, and any rents and profits thereof and of said premises, and pay the same or so much thereof as may be necessary, to plaintiff in satisfaction of said judgment and interest thereon and the costs of this action; and that plaintiff have such other relief as may be just.

See § 619.

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1250. General form—Personal injuries—Loss of earnings—Medical attendance, etc.

* * * that thereby plaintiff was severely [and permanently] injured in body and mind so that he became sick, sore and disabled [and so remains] and suffered and will [long] [permanently] suffer great bodily and mental pain;[1] that among the injuries so caused his [eyesight] [hearing] [2] [liver] [kidneys] [heart] [lungs] [bladder] [spine] [urinary organs] [sexual organs] [was] [were] seriously and permanently injured [his skull was fractured] [his left leg was broken] [his left leg was so badly crushed that it was necessarily amputated] [the ankle bones of his right leg were crushed] [his right shoulder was dislocated] [his mind was seriously and permanently injured] [his nervous system was severely shocked and permanently injured] [his right side was paralyzed] [his face, arms and legs were seriously cut and bruised] [he suffered serious and permanent internal injuries, including injuries to his heart, liver, kidneys and bladder] [she suffered a miscarriage] [and he was otherwise injured and made sick, sore and lame in his entire body] [3] [that such injuries are of a permanent nature and he will remain a cripple for life] [and was rendered unfit and unable to do manual labor for months] [and was rendered unfit and unable to perform her household duties for months] [that by reason of said injuries he has suffered and will (long) (permanently) suffer from (specify disease)] [that by reason of said injuries plaintiff has ever since been, and will permanently be, wholly incapacitated and prevented from carrying on his business as a , from which he was receiving a yearly income of $ when so injured] [that by reason of said injuries he has been unable, for months, to attend to his business as a , from which he had before been able to earn $ a month] [and has ever since been, and will for a long time to come, be prevented from attending to his ordinary business] [4] [that he has necessarily (expended [5] $) (incurred [6] large expense) (incurred [6] an expense of $)] for medical attendance, nursing, hospital fees and medicines in endeavoring to be cured of said injuries, [and will hereafter necessarily incur large expense for such purpose], all to his damage $.[7]

[1] See § 627. This general allegation is sufficient, standing alone, to admit proof of any specific injury, whether temporary or permanent, in the absence of a motion, before trial, to make more definite and certain. Lindholm v. St. Paul, 19 Minn. 245(204); Smith v. St. Paul etc. Ry., 30 Minn. 169, 14 N. W. 797 (injury occasioned by fright); Babcock v. St. Paul etc. Ry., 36 Minn. 147, 30 N. W. 449; Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623; Evertson v. McKay, 124 Minn. 260, 144 N. W. 950; 2 Abbott's Trial Brief on Pl. 2 ed., 1402; 1 Bates, Pl. 279–298. It is not, however, practically advisable to rely on so general an allegation. A motion to make such an allegation more definite and certain will ordi-

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narily be granted as a matter of course. See Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623.

[2] See Keefe v. Lee, 197 N. Y. 68, 90 N. E. 344, 27 L. R. A. (N. S.) 837, note.

[3] See Smith v. St. Paul etc. Ry., 30 Minn. 169, 14 N. W. 797; Ward v. Meeds, 114 Minn. 18, 130 N. W. 2; 1 Bates, Pl. 279.

[4] This is ordinarily sufficient to admit proof of the nature of the business and the amount of income therefrom. Lindholm v. St. Paul, 19 Minn. 245(204); Collins v. Dodge, 37 Minn. 503, 35 N. W. 368; Ehrgott v. New York, 96 N. Y. 264; 2 Abbott's Trial Brief on Pl. 2 ed. 1407; 1 Bates, Pl. 294. It is practically advisable, however, to allege the nature of the party's occupation and the amount of his yearly, monthly or daily income therefrom before the injury. See 1 Bates, Pl. 293–298.

[5] This is not sufficient to admit proof of expense incurred but not paid. Ward v. Haws, 5 Minn. 440(359); McLaughlin v. San Francisco etc. Ry., 113 Cal. 590, 45 Pac. 839. See 2 Abbott's Trial Brief on Pl. 2 ed. 1411; 1 Bates, Pl. 293.

[6] This is sufficient to admit proof of expense paid as well as incurred and the amount. Lindholm v. St. Paul, 19 Minn. 245(204); (the allegation in this case was "put to great expense"); Curtis v. McNair, 173 Mo. 270, 73 S. W. 167. See 2 Abbott's Trial Brief on Pl. 2 ed. 1411; 1 Bates, Pl. 292. A recovery may be had for gratuitous nursing by a member of the plaintiff's family. Wells v. Minneapolis B. & A. Assn., 122 Minn. 327, 142 N. W. 706. It seems that a married woman cannot recover for expense incurred for medical attendance. Belyea v. Minneapolis etc. Ry., 61 Minn. 224, 63 N. W. 627.

[7] See § 627.

1251. Same—Approved form.

That the plaintiff thereby sustained great bodily injury, and was made sick and was absolutely prevented from attending to his business for the space of two months, and has ever since been hindered from pursuing his business with his former customary attention, and was disfigured in his person, which injuries and disfigurement are permanent in their character and effects; and was made to suffer, and has, ever since said accident, suffered and still does suffer great pain of body, and was put to great expense for nurses and physicians in order to save his life, which was greatly imperilled by said injuries, and in trying to be cured, to his damage in the sum of $5,000.

From complaint in Lindholm v. St. Paul, 19 Minn. 245(204).

1252. Same—Another form.

That by reason of said injury plaintiff was compelled to and did employ a surgeon to treat his said arm, whose services therefor were of the reasonable value of $40.50; which sum plaintiff has paid and incurred therefor; that plaintiff's arm by reason of said injury has been permanently disabled, and plaintiff has and will continue to suffer great physical and mental pain and discomfort on account thereof; that by reason of the facts aforesaid the plaintiff has been damaged in the sum of $2,000.

From complaint in Palmer v. Winona Railway and Light Co., 78 Minn. 138, 80 N. W. 869.

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1253. Same—Woman rendered unfit for household duties.

* * * she was thereby severely hurt, lamed, and bruised, in and about her back, shoulders, and head, and ever since then till now she has been and still is sick, lame and sore, and unfitted for manual labor and attending to her household duties, and by reason thereof has suffered great pain of body and mind, and, as she is informed and believes, she will be permanently disabled thereby, and will always suffer therefrom, and be wholly or partially rendered unfit and unable to perform her household duties by reason thereof.

From complaint in Babcock v. St. Paul, 36 Minn. 147, 30 N. W. 449.

1254. Loss of earnings by married woman.

That plaintiff, though a married woman, was engaged at the time of said injury, in the business of , upon her own sole and separate account, and had an annual income therefrom of $; that by reason of said injury she will for a long time to come be prevented from carrying on her said business.

1255. Expense of employing a substitute.

That by reason of said injuries plaintiff was compelled to and did employ one A. B. from 19 , to 19 , to perform plaintiff's duties as , and paid to him therefor $.

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DEAD BODIES

1256. For mutilation of dead body—Unauthorized dissection.

I. That on 19 , one A. B. died in the city of , Minnesota.

II. That plaintiff was then the wife of the said A. B., living with him as such, and entitled to the exclusive possession of his dead body for the purpose of preservation and burial.

III. That on 19 , within [three] hours of the death of said A. B., defendant wrongfully and without the consent of plaintiff took possession of the dead body of the said A. B., and wrongfully, wilfully, wantonly and maliciously, and without the consent of plaintiff, dissected and mutilated it.

IV. That shortly thereafter, when plaintiff saw said body in its mutilated condition and learned that it had been dissected as aforesaid, she was thereby caused great mental distress and a severe nervous shock, and has ever since suffered great mental distress and nervous debility and will so suffer for a long time to come, because of said wrongful acts of defendant, to her damage $.

Wherefore [as in § 919].

Based on Larson v. Chase, 47 Minn. 307, 50 N. W. 238.

1257. For exposure of dead body to the elements by a carrier.

I. That at the times herein mentioned defendant was a common carrier of passengers for hire by railroad and as such owned and operated a railroad in this state.

II. That on 19 , one A. B. died at .

III. That plaintiff was then the husband of the said A. B., living with her as such, and entitled to the exclusive possession of her dead body for the purpose of preservation and burial, and was so entitled at the times hereinafter mentioned.

IV. That on 19 , at , defendant, as such carrier, received from plaintiff the dead body of said A. B., securely inclosed in a casket, and agreed with plaintiff to transport the same from to , for a reward, to which latter place plaintiff was then causing said body to be carried for burial.

V. That on 19 , defendant, in the course of said transportation, wilfully, wantonly and negligently left said casket, containing the dead body of A. B., on a truck on a platform of defendant at , exposed to the elements, and while so exposed it rained heavily and the rain entered the casket and soiled it and wet, soiled and disfigured said body.

VI. That shortly thereafter, when plaintiff saw said body in its soiled and disfigured condition, he was thereby caused great mental distress and a severe

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nervous shock, and has ever since suffered great mental distress and nervous debility and will so suffer for a long time to come, because of said wrongful acts of defendant, to his damage $

Wherefore [as in § 919].

Based on Lindh v. Great Northern Ry., 99 Minn. 408, 109 N. W. 823.

DEATH BY WRONGFUL ACT

1258. By administrator.

The plaintiff, as administrator of the estate of A. B., deceased, complains of defendant and alleges:

I. [Allege facts constituting cause of action for negligence as in an ordinary action, including the death of the injured party through the negligence of defendant.]

II. That the said A. B. left surviving him a widow and as next of kin [three minor children, to wit, C. B., D. B., and E. B.] [his father F. B.], who are still living and for whose benefit plaintiff brings this action under G. S. 1913 § 8175.

III. That said A. B. died intestate, and on 19 , letters of administration on his estate were duly issued to plaintiff by the probate court for county, Minnesota, who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such administrator.

IV. That by the death of said A. B. his said widow and next of kin suffered damage in the sum of $

V. That there are outstanding claims for the support of the said A. B. during his last illness, and for his funeral, amounting to $

Wherefore plaintiff, as such administrator, demands judgment [as in § 919].

See § 634, and Dunnell, Minn. Digest, §§ 2600–2621.

1259. By executor.

The plaintiff, as executor of the last will and testament of A. B., deceased, complains of defendant and alleges:

[I. and II. as in § 1258.]

III. [Allege appointment of executor as in § 1314.]

[IV. and V. as in § 1258.]

Wherefore plaintiff, as such executor, demands judgment [as in § 919.]

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DEDICATION

1260. General form.

That [heretofore] a tract of land in said [city], [description of land], was dedicated to the public as a park and was accepted by the public for [that] purpose.

Sustained in Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931. See § 635.

DEEDS

1261. Allegation of execution and recording of deed.

That on 19 , [one] [said] A. B. [and his wife,] for a valuable consideration, by a [warranty] deed, conveyed[1] to [plaintiff] [defendant] [C. D.], in fee, the [description of premises] [said premises], and on [the same day] [19 ,] said deed was recorded in the office of the register of deeds for [said county] [county, Minnesota,] in Book , of Deeds, on page .

[1] The word "conveyed" includes everything essential to transfer the title. Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357.

1262. Denial of deed—Non est factum.

The defendant for answer to the complaint herein denies [that the deed therein mentioned is his deed] [that he ever made or delivered, or caused or authorized to be made or delivered, to plaintiff, or to any one in his behalf, the deed mentioned in the complaint] [each and every allegation in the paragraph thereof].

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1263. Complaint against heirs under G. S. 1913 § 8182.

I. [Allege a claim against decedent in favor of plaintiff not provable in the probate court.]

II. That on 19 , at , said A. B., who was then the owner in fee of the premises hereinafter described, died intestate [as to said property], and on 19 , letters of administration on his estate were duly issued and granted to one C. D., by the probate court of county, Minnesota, who duly qualified and administered the estate, and on 19 was discharged and the administration of the estate closed.

III. That the said A. B. left surviving him as his sole heirs at law, the defendant , his widow, and children, the defendants , who are the persons mentioned in the next paragraph and who inherited his property as therein specified.

IV. That on 19 , a final decree of distribution was duly made by said court of said estate, of which the following is a copy: [Copy of decree.]

V. That the value of the realty so assigned to defendant , was $.

VI. That the value of the realty so assigned to defendant , was $.

VII. That there are no personal assets whatever now belonging to the estate of the said A. B., but all of such assets left by him have been duly applied by said administrator to the payment of the expenses of administration and claims prior to plaintiff's, [except that plaintiff received a pro rata payment of $ on his claim from said administrator]; and no personal assets of said estate were distributed to the widow, heirs, next of kin [or legatees] of said A. B.

VIII. That plaintiff's said claim was not provable in the probate court in the course of said administration proceedings because [state reason].

IX. [That the personal assets of said estate were not sufficient to discharge plaintiff's claim in addition to paying the expenses of administration and claims having priority over plaintiff's.] [That after due proceedings before the proper probate court plaintiff has been unable (by action or otherwise) to collect his claim from said administrator, or from the next of kin or legatees of the said A. B.]

X. That by reason of the premises and of the statutes in such case provided defendants are indebted to plaintiff for his said claim, and interest accrued thereon, in the sum of $, in the following proportions and amounts: [Specify amounts due from each defendant.]

Wherefore plaintiff demands judgment against defendants in the several amounts aforesaid, with costs apportioned as provided by statute, and that the same be levied upon the said realty of each.

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1264. Complaint against all devisees under G. S. 1913 § 8182.

I. [Allege a claim against decedent in favor of plaintiff not provable in the probate court.]

II. [As II in § 1266.]

III. That defendants are the sole devisees of the said A. B. who by said will devised to them the premises assigned to them in the decree of final distribution set out in the next paragraph.

IV. That on 19 , a final decree of distribution of the estate of the said A. B. was duly made by said court, of which the following is a copy: [Copy of decree.]

V. That the value of the realty so devised and assigned to defendant was $.

VI. That the value of the realty so devised and assigned to defendant was $.

VII. That there are no personal assets whatever now belonging to the estate of the said A. B., but all such assets left by him have been duly applied by said administrator to the expenses of administration and claims of a class prior to that of plaintiff, [except that plaintiff received a pro rata payment of $ on his claim from said administrator]; and no personal assets of said estate were distributed to the widow, heirs, next of kin, or legatees of said A. B.

VIII. [That the personal assets of the said estate were not sufficient to discharge plaintiff's claim, in addition to paying the expenses of administration and claims of a prior class.] [That after due proceedings before the proper probate court plaintiff has been unable to collect [by action or otherwise] his claim from said administrator, or from the widow of the said A. B., or from his next of kin, legatees, or heirs.]

IX. That plaintiff's said claim was not provable in the probate court in the course of said administration proceedings because [state reason].

X. [As in § 1263.]

Wherefore [as in § 1263].

1265. Complaint against next of kin under G. S. 1913 § 8179.

I. [Allege a claim against decedent in favor of plaintiff not provable in the probate court.]

II. [As II. in § 1263, omitting allegation of property.]

III. That the defendants are the next of kin, and all the next of kin, of the said A. B., and are the persons mentioned as distributees in the next paragraph.

IV. That on 19 , a final decree of distribution of the estate of the said A. B. was duly made by said court, of which the following is a copy: [Copy of decree].

V. That [on 19 ,] [heretofore] said administrator, in pursuance of said decree, delivered to defendants, as such next of kin, the amounts of

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their respective distributive shares, as follows: [Specify amount in dollars received by each defendant.]

VI. That the value of all the assets received by defendants was $

VII. That plaintiff's said claim was not provable in the probate court in the course of said administration proceedings because [state reason].

VIII. That by reason of the premises and of the statutes in such case provided defendants are indebted to plaintiff for his said claim, and interest accrued thereon, in the sum of $, in the following proportions and amounts: [Specify amount due from each defendant.]

Wherefore plaintiff demands judgment against defendants in the several amounts aforesaid, with costs.

1266. Complaint against all legatees under G. S 1913 § 8180.

I. [Allege a claim against decedent in favor of plaintiff not provable in the probate court.]

II. That on 19 , at , said A. B. died, leaving a last will and testament, by which he appointed one C. D. sole executor thereof; that on 19 , said will was duly admitted to probate and allowed by the probate court of county, Minnesota, and on 19 , letters testamentary thereon were duly issued and granted by said court to said C. D., who duly qualified and administered the estate of the said A. B., and on 19 , was discharged and the administration of the estate closed.

III. That defendants are the legatees, and the only legatees, of said A. B. and are the persons mentioned as such in the next paragraph.

IV. That on 19 , a final decree of distribution of the estate of the said A. B. was duly made by said court of which the following is a copy: [Copy of decree.]

V. That [on 19 ,] [heretofore] said executor, in pursuance of said decree, delivered to the defendants, as such legatees, the amounts of their respective legacies as follows: [Specify amount in dollars of the legacy of each defendant.]

VI. [That no assets have been delivered by said executor to the heirs or next of kin of said A. B.] [That no assets have been delivered by said executor to the heirs or next of kin of said A. B. except certain assets amounting in value to $; and the value of the assets so delivered has been recovered from said heirs and next of kin by one E. F., a creditor of the decedent.] [That the assets which have been delivered by said executor to the heirs and next of kin of said A. B. are not sufficient to satisfy the demands of plaintiff.]

VII. That plaintiff's said claim was not provable in the probate court in the course of said administration proceedings because [state reason].

VIII. That by reason of the premises and of the statutes in such case provided defendants are indebted to plaintiff for his said claim, and interest ac-

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crued thereon, amounting to $, in the following proportions and amounts: [Specify amount due from each defendant.]

Wherefore plaintiff demands judgment against defendants in the several amounts aforesaid, with costs.

1267. Complaint against heirs or devisees where they have aliened the land.

[Add to preceding forms.]

That on 19 , defendants conveyed said premises to one E. F. and the then value thereof was $.

Wherefore [demanding personal judgment if not exceeding value of premises].

1268. Action on note by heir without administration.

I. That on March 10, 1887, defendant made and delivered to one A. B. his promissory note, of which the following is a copy: [Copy of note].

II. That in the year 1889, while still holding and owning said note, the said A. B. died intestate, leaving surviving him his widow and two daughters, this plaintiff and C. D., as his sole heirs at law; that in year 1890, C. B., the widow of A. B., died intestate, leaving surviving her plaintiff and C. D., as her sole heirs at law.

III. That no administration has ever been had or applied for on the estate of A. B., or the estate of C. B., and no claims have ever been filed or presented against either estate, and there are no debts outstanding against either estate.

IV. That in the year 1895, plaintiff and C. D., being entitled under the laws of descent to the ownership and possession of all of the personal property of which said A. B. and C. D. died possessed, including said note, mutually agreed to divide the same between them; that under said agreement said note, and the title thereto, fell to the share of plaintiff, who is now the owner and holder thereof, and entitled to collect the same.

V. That no part thereof has been paid.

Wherefore [as in § 919].

Substance of complaint in Granger v. Harriman, 89 Minn. 303, 94 N. W. 869.

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DISORDERLY HOUSE

1269. Injunction and abatement under G. S. 1913 §§ 8717-8726.

I. That the relator A. B. is a citizen of this county [residing at No. , street, in the city of , Minnesota.]

II. That defendant C. D. maintains and uses the premises known as No. , street, in the city of , Minnesota, as a public resort for the purpose of lewdness, assignation and prostitution and [owns and] uses therein a large amount of furniture and other movable property in conducting and maintaining said resort.

III. That defendant E. F. is the owner of said premises.

IV. That the maintenance and use of said premises as aforesaid are a public nuisance.

Wherefore plaintiff demands judgment:

1. For a perpetual injunction, as provided by G. S. 1913 § 8718, enjoining the defendant C. D., and all other persons, from conducting or maintaining said nuisance, and defendant E. F., and all persons under him, from further permitting said premises to be so used.

2. For a temporary injunction as provided by G. S. 1913 § 8718.

3. For the abatement of said nuisance and the seizure and sale of said furniture and other movable property, as provided by G. S. 1913 § 8721.

4. For the imposition of the penalty provided for in G. S. 1913 §§ 8724, 8725.

5. For such other relief as may be just, with costs.

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DIVORCE

1270. For adultery.

I. That defendant and plaintiff are husband and wife and were married on 19 , in the city of , [Minnesota].

II. That plaintiff is years of age and defendant is years of age.[1]

III. That plaintiff is a resident of this state and has resided therein continuously for more than one year immediately preceding the filing of this complaint.[2]

IV. [That on 19 , defendant committed adultery with one A. B. at (No. , street) (a hotel known as), in the city of , Minnesota.][3] [That between 19 , and 19 , at times which the plaintiff is unable to state more definitely, defendant committed adultery with one A. B., at (No. , street) (a hotel known as), in the city of , Minnesota.] [That on 19 , at some place in the city of , Minnesota, which plaintiff is unable to specify, defendant committed adultery with one A. B.] [That on 19 , at (the house of C. D.) No. , street, (a house of ill fame) in the city of , Minnesota, defendant committed adultery with a (woman) (man) whose name is unknown to plaintiff.] [That for the past (two) months defendant has been living in adulterous intercourse with one A. B. in the city of , Minnesota.]

V. [That there is no (living) issue of said marriage.] [That there are living of the issue of said marriage children, to wit, (give names and ages).]

VI. [That (defendant is a man of vicious and vulgar habits and) (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.][4]

VII. [That defendant is possessed of real property of the value of $, and of personal property of the value of $, and has an annual income of $.][5]

VIII. [That the maiden name of plaintiff was .]

Wherefore plaintiff demands judgment:

1. [Dissolving the marriage relation between plaintiff and defendant.] [Divorcing plaintiff from defendant.][6]

2. [Awarding the custody of the minor children of said marriage to plaintiff.]

3. [Restoring to plaintiff her maiden name.] [Changing the name of plaintiff to .]

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4. Awarding to plaintiff such alimony and such part of the property of defendant as may be just or authorized by statute.

5. For such other relief as may be just, with costs.

[1] G. S. 1913 § 7115. See § 638.

[2] G. S. 1913 § 7112; Dunnell, Minn. Digest, § 2789.

[3] Freeman v. Freeman, 39 Minn. 370, 40 N. W. 167. See § 638.

[4] Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736.

[5] It is a common and convenient practice to allege in the complaint the faculties of the defendant, that is, the 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.

[6] Both of these phrases are in common use and are synonymous.

1271. For cruel and inhuman treatment.

[I. II. and III. as in § 1270.]

IV. 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 [state several acts of cruelty, with time, place and circumstances].[1]

[Continue as in § 1270.]

[1] Sagelbaum v. Sagelbaum, 39 Minn. 258, 39 N. W. 492; Westphal v. Westphal, 81 Minn. 242, 83 N. W. 988. See § 638; Dunnell, Minn. Digest, § 2778; Jokela v. Jokela, 111 Minn. 403, 127 N. W. 391; Martinson v. Martinson, 116 Minn. 128, 133 N. W. 460.

1272. For habitual drunkenness.

[I. II. and III. as in § 1270.]

IV. That defendant has been in a state of habitual drunkenness for more than one year immediately preceding the filing of this complaint.[1]

[Continue as in § 1270.]

[1] Forney v. Forney, 80 Cal. 528, 22 Pac. 294; 2 Bishop, Marriage & Divorce, § 1503. See § 638.

1273. For desertion.

[I. II. and III. as in § 1270.]

IV. That on 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.

[Continue as in § 1270.]

Based on 2 Bishop, Marriage & Divorce, § 1464. See § 638, and Dunnell, Minn. Digest, § 2776.

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1274. For imprisonment.

[I. II. and III. as in § 1270.]

IV. That on 19 , defendant was sentenced by the district court for county, Minnesota, to imprisonment in the state [prison] [reformatory] of Minnesota, where he is now confined under said sentence.

[Continue as in § 1270.]

1275. Annulment for nonage of plaintiff.

[I. II. and III. as in § 1270.]

IV. That at the time of said marriage plaintiff had not attained the age of [fifteen] [eighteen] years.

V. That plaintiff and defendant have never [voluntarily] cohabited together as husband and wife since plaintiff attained the age of [fifteen] [eighteen] years.

Wherefore plaintiff demands judgment adjudging said marriage null and void, and for such other relief as may be just, with costs.

G. S. 1913 § 7107. If plaintiff is not of age at the time of the action add to the above form an allegation of the appointment of a guardian ad litem as in § 1407.

1276. Annulment for former insanity of plaintiff.

[I. II. and III. as in § 1270.]

IV. That at the time of said marriage plaintiff was insane and for that reason incapable of assenting thereto.

V. That plaintiff remained insane until 19 , when he was restored to sound mind.

VI. That plaintiff and defendant have never [voluntarily] cohabited together as husband and wife since plaintiff was restored to sound mind as aforesaid.

Wherefore plaintiff demands judgment adjudging said marriage null and void, and for such other relief as may be just, with costs.

1277. Annulment for existence of former spouse of defendant living.

I. That plaintiff and defendant were married on 19 , in the city of , [Minnesota].

[II. and III. as in § 1270.]

IV. That at the time of said marriage defendant had a former [husband] [wife] then living, to wit, one A. B., to whom defendant was married on 19 , in the city of , [New York], and such marriage was, at the time of the aforesaid marriage of plaintiff and defendant, and still is, in full force and effect.

V. That plaintiff married defendant as aforesaid [without any knowledge of such former marriage] [in the belief that said A. B. was dead].

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VI. [That there are living of the issue of said marriage of plaintiff and defendant children, to wit, (give names and ages).]

Wherefore plaintiff demands judgment adjudging said marriage between plaintiff and defendant null and void; adjudging said children to be the legitimate issue of plaintiff,[1] and awarding their custody to her; and for such other relief as may be just, with costs.

[1] See G. S. 1913 § 7105.

1278. Annulment for existence of former spouse of plaintiff living.

[I. II. and III. as in § 1277.]

IV. That on 19 , plaintiff and one A. B. were married in the city of , [New York] and lived together as man and wife for years, [when plaintiff moved to this state and has ever since been a resident thereof] [that said A. B. deserted plaintiff in 19 ,] [and shortly thereafter plaintiff heard that she was dead;] that at and next prior to the time plaintiff married defendant as aforesaid the said A. B. had been absent from plaintiff for more than five successive years without being known to plaintiff to be living during that time;[1] that at the time plaintiff married defendant he believed the said A. B. was dead and had not seen or heard from or of her for more than years, [and during all that time believed that she was dead].

V. That on 19 , for the first time after the marriage of plaintiff and defendant, plaintiff learned that the said A. B. was living and she is now living in the city of , [New York], and claiming plaintiff as her husband.

VI. That since plaintiff so learned that said A. B. was still living plaintiff and defendant have not cohabited as husband and wife.

VII. That at the time plaintiff married defendant as aforesaid his marriage with said A. B. was and still is in full force and effect.

VIII. [Allege issue of second marriage if any as in § 1277.]

Wherefore [as in § 1277].

[1] G. S. 1913 § 7106.

1279. Annulment for fraud of wife.

[I. II. and III. as in § 1277.]

IV. That to induce plaintiff to enter into said marriage defendant falsely and fraudulently represented to plaintiff that she was chaste and virtuous [and physically competent to marry], whereas in fact she was not chaste and virtuous [and was not physically competent to marry,] but was at that time pregnant of an illegitimate child by some other man than plaintiff, which facts she fraudulently concealed from plaintiff.

V. That believing said representations to be true, plaintiff was thereby induced to enter into said marriage.

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VI. That plaintiff has not cohabited with defendant since discovering said pregnancy and the falsity of said representations.

VII. That there is no issue of said marriage.

Wherefore (as in § 1277).

1280. Denial of adultery.

The defendant for answer to the complaint herein denies [that he ever committed adultery with , or with any other person] [each and every allegation in the paragraph thereof].

1281. Denial of charge of adultery, cruelty, drunkenness, imprisonment or desertion.

The defendant for answer to the complaint herein denies each and every allegation in the [third] paragraph thereof.

1282. Condonation.

That after the times mentioned in the complaint, and before the commencement of this action, the plaintiff, being fully informed of the matters therein alleged, freely condoned said alleged adultery and forgave the defendant therefor, [and thereafter freely cohabited with him].

1283. Connivance.

That the adultery alleged in the complaint was committed, if at all, with the consent, connivance, privity and procurement of plaintiff.

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1284. Injunction against obstruction of ditch along highway.

I. That plaintiff is, and for a year last past has been, the owner and in possession of [description of premises].

II. That along the north line of said land, being a distance of a mile, a public road has been laid out, and for many years last past has been a public highway and used as such by the public; that said road extends for several miles further east and west, and has been graded for several miles to the east; that in constructing said grade, ditches or drains have been formed along said grade on the road on both sides of the grade, such ditches serving to drain said road and the adjacent country; that said ditches are necessary to drain said road and said land, and in order not to flood adjacent land at any place the said ditches should be kept open.

III. That the slope of the land in the neighborhood of said ditches and plaintiff's said land is to the northwest, and said ditches are constructed directly east and west; that in the spring and in the summer, at times of heavy rains, said ditches accumulate large and destructive quantities of surface water from the east for several miles and carry the water to the west through said ditches; that such water would not run in said direction and in said large quantities if said ditches were not constructed, but would run over said country in smaller quantities to the northwest, and would not accumulate and flow past plaintiff's said land.

IV. That defendants, on April 13, 1899, entered upon said road, and at a point near the southeast corner of section 32 of the town of Andover in said county, and near the northwest corner of plaintiff's said land, and wrongfully obstructed said road and the ditch on the north side thereof, and thereby obstructed the flow of water in said ditch; that by reason of said large accumulation of water by said ditch and the said obstruction the said water overflowed and set back and flooded the plaintiff's said land, and has ever since accumulated large and destructive quantities of water and thrown the same on plaintiff's said land; that thereby said land along said road to an area of over eighty acres has been and now is covered with water to a depth of from six inches to two feet, to the great and irreparable damage of plaintiff; and plaintiff has no adequate remedy at law.

V. That said land of plaintiff is tillable land of great value and said water destroys its value for farming purposes.

VI. That thereafter plaintiff removed a portion of said obstruction, but defendants thereupon put the obstruction back and by means of threats and violence prevent plaintiff from removing the same, and keep the obstruction in said ditch and thereby keep the water overflowing the land of plaintiff to his irreparable injury.

VII. That if said obstruction is allowed to remain in said ditch the surface

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water during the spring and summer will keep plaintiff's land continuously overflowed and wet so that no crops can be planted thereon.

VIII. That by reason of said obstruction and damming of said ditch plaintiff will be prevented from planting a crop on the larger portion of his said land unless the said obstruction is removed at once.

IX. That by reason of said obstruction plaintiff has been damaged $150, and if the embankment and obstruction is allowed to remain the plaintiff will suffer irreparable injury and will have no adequate remedy at law.

Wherefore plaintiff demands judgment permanently enjoining the defendants, and their employees, servants, agents, and all persons under their control or in their employ, from entering on said road for the purpose of obstructing said ditch, or in any way obstructing or damming up said ditch at the point described or in any other place along plaintiff's said land, or at any other place, and from interfering with plaintiff or any other person in lawfully removing the obstruction complained of; for $150 damages; and for such other relief as may be just, with costs.

Injunction granted under this complaint in Galbraith v. Yates, 79 Minn. 436, 82 N. W. 683.

1285. Removal of cloud of illegal ditch assessment.

I. That defendant is, and at all times herein mentioned was, a duly organized and existing county of this state.

II. That plaintiff is, and at all the times herein mentioned was, the owner of [description of premises].

III. That on Feb. 1904, certain residents and landowners of said county petitioned the board of county commissioners thereof to lay out and establish a ditch in said township and county; that such petition was on Feb. 23, 1904, duly filed in the office of the county auditor of said county, and such ditch in all proceedings thereafter was designated as county ditch No. 8.

IV. That in an attempt to proceed under the drainage laws of this state such proceedings were thereafter had in said matter by said board of county commissioners that an order was made therein by said board, bearing date July 5, 1904, attempting to lay out, locate and establish said county ditch No. 8.

V. That the auditor of said county, in pursuance of said ditch proceedings, on Feb. 21, 1907, prepared a tabular list and statement showing, among other things, the amount each tract of land benefited by said ditch was liable for and must pay for the location, construction and establishment of said ditch, and such tabular statement was signed and acknowledged by said auditor and by him filed on said day for record in the office of the register of deeds for said county, and by said register of deeds recorded in said office in Book 1, of Miscellaneous Records, on pages 565 and 566, where it still remains, constituting an apparent tax, lien and cloud upon the title of plaintiff's said lands in amount as follows: [Specification.]

VI. That all of said proceedings by said county commissioners and by others

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under their direction and authority in laying out and pretending to establish said ditch were each and all absolutely void for the reason among others, that no notice of the filing or making of said ditch petition, or of the time and place of the hearing to be had thereon, was ever made, given, posted, mailed or published as the statute required; that no viewer or engineer ever made or filed a proper report of his doings in said ditch matter as the law requires; that no notice of the time and place of the special meeting of the said board of county commissioners or of the pendency of said petition and viewer's and engineer's report and of the time and place set by said board of county commissioners for the hearing and consideration thereof was ever made, given, posted, mailed or published as by the statute in such case required; and neither said engineer's report nor the order of said board of county commissioners pretending to locate, lay out and establish said ditch described the said proposed ditch in such a manner and with sufficient definiteness that it could be located therefrom; and by reason of the facts aforesaid the said county commissioners in said ditch proceedings were without jurisdiction or authority of law in said matter.

VII. That the officers of said county will attempt to enforce said apparent ditch lien unless the same is vacated, and the record thereof as aforesaid canceled, by a judgment of this court, and the same will continue to be a cloud on plaintiff's title and an irreparable injury to him.

Wherefore plaintiff demands judgment declaring void and vacating, as to this plaintiff, the said ditch proceedings, and said order of said county commissioners pretending to lay out and establish said ditch; vacating and setting aside the said tabular list and lien statement and the record thereof; removing the cloud on plaintiff's title created thereby and forever discharging said land from the apparent cloud created thereby and quieting plaintiff's title as against said pretended ditch lien; and for such other relief as may be just, with costs.

Recovery under this complaint sustained in Lindbergh v. Morrison County, 116 Minn. 504, 134 N. W. 126.

DURESS

1286. Plea of duress by threats.

The defendant for answer to the complaint herein alleges that the instrument mentioned in the complaint was obtained from defendant by plaintiff by duress of defendant in threatening defendant with [state the ultimate facts]; in consequence of which, and in fear thereof, defendant executed said instrument.

See § 641.

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EJECTMENT

1287. General form without demand for mesne profits.[1]

I. That plaintiff is the owner [in fee] of [describe premises as in a deed], in county, Minnesota.

II. That defendant is in possession thereof and withholds the same from plaintiff, to his damage $.

Wherefore plaintiff demands judgment [that he is the owner in fee of said premises,][2] for the recovery of the possession [thereof,] [of said premises,] and for $ damages for withholding the same, with costs.

[1] This form is sustained by Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947, and is sufficient in all cases where the object is to try title and recover possession, with nominal damages for the withholding. If substantial damages are sought use the form under § 1289, or § 1290. See §§ 643–652.

[2] This is not in the common-law form of judgment, but it is quite common in our practice and desirable for obvious reasons.

1288. Same—Another form.

I. That plaintiff is the owner [in fee] and entitled to the immediate possession of [describe premises as in a deed], in county, Minnesota.

II. That defendant is in possession thereof and wrongfully withholds the same from plaintiff, to his damage $.

Wherefore [as in § 1287].

Sustained by Pinney v. Fridley, 9 Minn. 34(23); Merrill v. Dearing, 22 Minn. 376. This form may be used in all cases where the object is to try title and recover possession, with nominal damages for the withholding. If substantial damages are sought use the form given under § 1289, or § 1290. See §§ 643–652.

1289. Alleging an ouster and demanding mesne profits.[1]

I. That at the times herein mentioned plaintiff was and still is the owner in fee and entitled to the immediate possession of [describe premises as in a deed], in county, Minnesota.

II. That on 19, and when plaintiff was in possession thereof as such owner, defendant wrongfully entered said premises and ousted plaintiff and has ever since wrongfully withheld and still so withholds the same from plaintiff, to his damage $.

III. That the value of the [use and occupation] [rents and profits][2] of said premises since said day and while plaintiff has been so excluded therefrom by defendant is $.[3]

IV. [Allege damage to freehold, if any.][4]

Wherefore plaintiff demands judgment [that he is the owner in fee of said premises;] for the recovery of the possession thereof; for $ damages for

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the withholding thereof; for $ the rents and profits thereof; [for $ damages for injuries to the same], with costs.

[1] This form is sustained by G. S. 1913 § 7780; Payne v. Treadwell, 16 Cal. 221; McClane v. White, 5 Minn. 178(139); Merrill v. Dearing, 22 Minn. 376. See §§ 643–652.

[2] These expressions are synonymous. See Dunnell, Minn. Digest, § 2898.

[3] This allegation is not traversable. German-American Bank v. White, 38 Minn. 471, 38 N. W. 361.

[4] Pierro v. St. Paul etc. Ry., 37 Minn. 314, 34 N. W. 38; Id., 39 Minn. 451, 40 N. W. 520.

1290. Same—Another form.

I. That plaintiff now is, and for more than years last past has been, the owner in fee and entitled to the immediate possession of [describe premises as in a deed], in county, Minnesota.

II. That ever since 19 , defendant has been, and now is, wrongfully in the possession of said premises, and wrongfully withholds possession thereof from plaintiff, to his damage $

III. That the value of the rents and profits of said premises while they have been so wrongfully withheld from plaintiff by defendant is $

Wherefore plaintiff demands judgment for the recovery of the possession of said premises; for $ damages for the withholding thereof; for $, the value of the rents and profits thereof, with costs.

This form is sustained by Merrill v. Dearing, 22 Minn. 376.

1291. By owner of undivided interest.

I. That plaintiff is the owner in fee and entitled to the immediate possession of an undivided [one-third] part of [description of premises].

[Continue as in other cases.]

See Holmes v. Williams, 16 Minn. 164(146); Sherin v. Larson, 28 Minn. 523, 11 N. W. 70.

1292. Alleging title from a common source.

I. That on and prior to 19 , one A. B. was the owner in fee and in possession of [describe premises as in a deed], in county, Minnesota.

II. That on that day, and while in such ownership and possession, the said A. B. [and his wife], by a [warranty] deed, conveyed said premises to plaintiff in fee, who ever since has been and now is the owner in fee and entitled to the immediate possession thereof by virtue of said deed.

[Continue as in preceding forms.]

This form is advantageous when the plaintiff and the defendant claim title from a common source, for it relieves the plaintiff of the burden of proving title prior to the common source, and forces the defendant to plead specifically. See Dunnell, Minn. Digest, § 2893.

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1293. Alleging title by devise.

I. That on 19 , one A. B. was the owner in fee and in the possession of [describe premises as in a deed], in county, Minnesota.

II. That on that day, and when in such ownership and possession, the said A. B. died, leaving a last will, wherein he devised said premises to plaintiff in fee.

III. That on 19 , said will was duly proved and admitted to probate in the probate court of county, Minnesota.

IV. That on 19 , in a decree of final distribution, which was duly made by said court, said premises were assigned to plaintiff in fee and such estate he still retains, and he is entitled to the immediate possession of said premises.

[Continue as in § 1287 or § 1289.]

1294. Same—Another form.

I. That on 19 , one A. B. was the owner in fee and in possession of [describe premises as in a deed], in county, Minnesota.

II. That on said day, and when in such ownership and possession, the said A. B. died, leaving a last will wherein he devised said premises to plaintiff in fee, who thereby succeeded to his title and ever since has been and now is the owner in fee and entitled to the immediate possession of said premises.

III. That on 19 , said will was duly proved and admitted to probate in the probate court for county, Minnesota.

IV. That defendant is in possession of said premises and wrongfully withholds the same from plaintiff, to his damage $.

Wherefore [as in § 1287].

1295. Alleging title by descent.

I. That on 19 , one A. B. was the owner in fee and in the possession of [describe premises as in a deed], in county, Minnesota.

II. That on that day, and when in such ownership and possession, the said A. B. died intestate, leaving these plaintiffs his only children and heirs at law, who succeeded to his title and ever since have been and now are owners in fee and entitled to the immediate possession of said premises by virtue of such succession.

III. That thereafter the estate of the said A. B. was duly administered upon in the probate court of county, Minnesota, and on 19 , in a decree of final distribution, which was duly made by said court, said premises were assigned to plaintiffs in fee.

[Continue as in § 1287 or § 1289.]

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1296. Succession to title—Another form.

That on 19 , one A. B. was the owner in fee of the [describe premises as in deed], and plaintiff has succeeded to and now holds the title which the said A. B. then had.

Sustained by Cleveland v. Stone, 51 Minn. 274, 53 N. W. 647.

1297. Denial of title.

The defendant for answer to the complaint herein denies that at the commencement of this action plaintiff was the owner in fee of the premises described in the complaint [or entitled to the possession thereof].

This form is appropriate only where the title is alleged in the complaint in general terms without disclosing the source.

1298. Claim for improvements under unofficial deed.

I. Denies each and every allegation thereof, and alleges

II. That on 19 , defendant, under color of title in fee and in good faith, peaceably took possession of said premises under a deed, for which he paid a valuable consideration as therein stated, and of which the following is a copy: [Copy of deed.]

III. That plaintiff has ever since remained in possession of said premises under said deed believing in good faith that he had a good title in fee thereto by virtue of said deed.

IV. That while so possessed and in such belief, and previous to actual notice of the claim upon which this action is founded, defendant made the following permanent improvements on said premises: [Itemize the improvements and state the value of each and the total.]

V. That while so possessed and in such belief defendant paid the following taxes duly assessed and levied on said premises and a valid charge thereon and due when paid:

Taxes for,	Date of payment.	Amount paid.
19....	.....	.....
19....	.....	.....
19....	.....	.....
	Total,	.....

Wherefore defendant demands judgment dismissing this action, with costs to defendant; or, if plaintiff be adjudged entitled to recover possession of said premises, that defendant have judgment against plaintiff for $, for said taxes and improvements, with interest.

See G. S. 1913 §§ 8070, 8071, and § 675, supra.

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1299. Claim for improvements under official deed.

I. That on 19 , defendant took possession of the premises described in the complaint herein under an official deed, regular on its face, duly executed by as authorized [by law,] [by an order duly made by the court, for county, Minnesota,] of which the following is a copy: [Copy of deed.]

II. That defendant paid $ for said deed as stated therein.

III. That while so possessed, and previous to actual notice of defects invalidating said deed, defendant made the following permanent improvements on said premises: [Itemize the improvements and state the value of each and the total.]

IV. That while so possessed and previous to actual notice of defects invalidating said deed, defendant paid the following taxes duly assessed and levied on said premises and a valid charge thereon and due when paid: [Itemize taxes as in preceding form.]

Wherefore defendant demands judgment dismissing this action, with costs to defendant; or, if plaintiff be adjudged entitled to recover possession of said premises, that defendant have judgment against plaintiff for $ the amount paid by defendant for said deed, taxes and improvements, with interest.

See G. S. 1913 §§ 8070, 8071, and § 675, supra.

1300. Claim of offset for improvements under G. S. 1913 § 8068.

I. That defendant holds possession of the premises described in the complaint herein under color of title adversely to the claims of the plaintiff, in good faith, by virtue of a certain deed from one A. B. to defendant of which the following is a copy: [Copy of deed.]

II. That while so possessed and in the belief, in good faith, that he had a good title to said premises by virtue of said deed, defendant made the following permanent improvements on said premises: [Itemize the improvements and state the value of each and the total.]

Wherefore defendant demands judgment:

1. That this action be dismissed, with costs to defendant; or, if plaintiff be adjudged entitled to recover posssession of said premises,

2. That the sum of $, the value of said improvements, be allowed as a setoff against the damages of plaintiff.

1301. Reply to claim for improvements.

The plaintiff for reply to the answer herein alleges that said premises were of the value of $ at the commencement of this action without said improvements, and that the yearly rent of said premises without said improve-

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ments during the time defendant has been in possession thereof was of the value of $.

G. S. 1913 § 8071. The claim for improvements is in issue without a denial. See § 675.

1302. Demand by railroad for assessment of compensation for taking for railroad purposes.

Further answering, defendant alleges that it has been in occupation of said premises with its railroad tracks for more than one year before the commencement of this action; that it is the owner in fee of said premises and such occupation was necessary to the construction and is necessary to the operation of its main line of railroad.

That no compensation has been made to the plaintiff for such taking, and if plaintiff is the owner of said premises defendant is ready and willing to pay such compensation as shall be just and as plaintiff may be entitled to receive on having the same assessed and ascertained by the jury in this action, provided plaintiff on the trial so establishes his right to recover said premises, which defendant needs for its purposes and desires to take and pay for.

Wherefore defendant demands judgment that this action be dismissed, or, if plaintiff establishes his title to said premises, that the compensation which he is entitled to receive be assessed by the jury and be paid by defendant as the court shall direct, and that the said payment being made, defendant be entitled to take said premises and use the same for railroad purposes.

From answer in Fish v. Chicago etc. Ry., 84 Minn. 179, 87 N. W. 606.

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1303. For injury from electric wire on sidewalk.

I. That at the times herein mentioned the defendant, the Twin City Telephone Company, was a corporation duly organized and existing under the laws of the state of Iowa, and as such corporation was in the possession and operation, in conjunction with the above named Tri-State Telephone Company, of a line of telephone and telephone system extending along and upon University Avenue between St. Paul and Minneapolis, Minnesota, and at and past the junction of University and Prior avenues in the city of St. Paul.

II. That at such times defendant, the Tri-State Telephone Company, was in the possession and operation of a line of telephone and telephone system, in conjunction with the above named Twin City Telephone Company, extending from the city of St. Paul to the city of Minneapolis, Minnesota, and over and along University avenue and along and past the junction of University avenue and Prior avenue in the city of St. Paul.

III. That on May 24, 1906, at about the hour of six o'clock and seven minutes A. M., while plaintiff was walking upon the sidewalk of said University avenue, near and just west of the junction of said avenue and Prior avenue, his attention was attracted to an approaching street car and he turned to look at it; that while in the act of walking as aforesaid and looking at said street car, his body and left hand came in contact with an electric wire belonging to defendants and operated by them and under their control, and charged with electricity with a current of more than five thousand voltage; that thereby plaintiff was thrown to the ground, [allege injuries and damages as in §§ 1250–1255].

IV. That defendants had then and there negligently allowed said wire to remain down and upon the ground and in the way of passengers and pedestrians upon such street for more than ten hours, with knowledge and notice that the same was down and that it was liable to injure persons passing upon the street, and in consequence of said negligence said plaintiff was injured as aforesaid.

V. That plaintiff had no knowledge that said wire was down and upon the ground until he received said shock.

Wherefore [as in § 919] .

Substance of complaint in Parmelee v. Tri-State T. & T. Co., 103 Minn. 530, 115 N. W. 1135.

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EQUITY

1304. Adequate remedy at law.

The defendant for answer to the complaint herein alleges that plaintiff has an adequate remedy at law [for damages against defendant, who is financially solvent and able to respond in damages for the breach of any contract to which he is a party,] and for that reason plaintiff cannot maintain this action in equity.

ESCROWS

1305. Delivery in escrow.

I. That defendant delivered the deed mentioned in the complaint to one A. B. to be by him kept in escrow, and to be delivered to plaintiff only on condition that plaintiff [state condition].

II. That plaintiff has never [negative performance of condition], but said A. B., without any authority from defendant, gave said deed to plaintiff, and said deed is the one under which plaintiff claims title.

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ESTOPPEL

1306. Estoppel in pais—General form.

The defendant for answer to the complaint herein alleges that plaintiff is estopped from claiming that [state the matter as to which he is estopped] because [state the declarations or conduct of plaintiff giving rise to the estoppel and the facts showing that defendant changed his position in reliance thereon so that it would be unjust to permit plaintiff to recover on his claim].

See § 660.

1307. Estoppel of owner of realty.

That plaintiff is estopped from claiming that he is the owner of the premises described in the complaint [or that he has a lien by mortgage thereon which he now sets up and seeks to foreclose] because, at the time defendant was negotiating for the purchase of said premises of one A. B., the plaintiff, knowing that such purchase was in negotiation, represented to defendant, to induce him to purchase the same, that the said mortgage had been fully paid, satisfied and discharged, and that said premises were free and clear of all incumbrance, as far as he, the plaintiff, knew; and that, induced thereto by such statement and fully believing the same, defendant purchased said premises of the said A. B. paying therefor $.

1308. Estoppel of owner against lessee by representations as to title of lessor.

I. That on June 1, 1893, one A. B., by a written lease dated on that day, let to plaintiff for a period of two years, from the date, for a monthly rental of $5, the [description of premises].

II. That said lease was made and accepted by plaintiff from the said A. B., in reliance upon the express representations of defendant to the plaintiff herein, made immediately before the making and delivery of said lease, that the said A. B. was the owner of said premises and authorized to make said lease.

III. That in reliance upon said representations of defendant plaintiff thereupon entered into possession of said premises under said lease and erected and maintained thereon a building of the value of $275.

IV. That in reliance upon said representations plaintiff, shortly after the making and delivery of said lease, paid to said A. B. the rent for the whole term of two years from and after June 1, 1893, amounting in the aggregate to $120.

V. That said A. B. has since become insolvent.

VI. That at the time of the making and delivery of said lease and the making by defendant of said representations as to the ownership of said premises,

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defendant was himself the owner thereof, as he then well knew, but of such ownership plaintiff was then [and until 19 ,] ignorant.

VII. That on March 26, 1894, and during the temporary absence of plaintiff, defendant wrongfully and maliciously entered upon said premises and evicted plaintiff therefrom, and from the further enjoyment thereof under said lease for the unexpired term thereof, and granted possession thereof to one C. D., and wrongfully and maliciously converted to his own use said building.

VIII. That by reason of the premises plaintiff has been damaged $500.

Wherefore [as in § 919].

Sustained on demurrer in Norman v. Eckern, 60 Minn. 531, 63 N. W. 170.

1309. Estoppel by deed.

That plaintiff is estopped from claiming that the premises described in the complaint belonged to A. B., because, on 19 , plaintiff conveyed said premises to defendant by deed containing a full covenant of warranty.

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EXECUTION

1310. For damages for wrongful levy—False return of service of summons.

I. That the defendant A. B., during all the time herein mentioned, was an attorney at law, authorized to practice as such in the courts of this state.

II. That on Feb. 16, 1888, defendants caused a complaint to be filed in, and a summons to be issued by, the municipal court of St. Paul, in said county, in an action wherein the defendant C. D. was plaintiff and this plaintiff was defendant, and the defendant A. B. appeared and acted as attorney for the plaintiff C. D.

III. That on Feb. 20, 1888, defendant C. D. as such plaintiff, and the defendant A. B. as his attorney as aforesaid, falsely and maliciously caused and procured one E. F., a police officer of said city of St. Paul, to make a false return on said summons as follows: [Copy of return of personal service of summons on plaintiff.]

IV. That this plaintiff then resided and for more than thirty years next prior thereto had resided in Steele county, Minnesota, and never resided or had a place of abode in said city of St. Paul, or in said Ramsey county, all of which facts were well known to defendants herein at the time they procured said false return to be made.

V. That on March 2, 1888, the said C. D., as plaintiff as aforesaid, and the said A. B. as his attorney therein, knowing said return on said summons to be false, fraudulently and maliciously procured and caused a judgment to be entered in said action by the said municipal court in favor of the said C. D. and against this plaintiff for the sum of $111.20; that at the time of the entry of said judgment no summons in said action had been served on this plaintiff, nor had he any notice or knowledge of the pendency of said action, nor had he in any way appeared in the action or in any way consented to the jurisdiction of the court therein; all of which facts were well known to both the defendants herein at the time of the entry of said judgment.

VI. That on March 2, 1888, the said C. D. as judgment creditor and the said A. B. as his said attorney, fraudulently and maliciously, and with full knowledge of all the facts aforesaid, procured and caused a transcript of said judgment to be filed in the district court for said county of Ramsey and caused the said judgment to be docketed in said court and the same still remains of record therein to the damage of this plaintiff in the sum of $200.

VII. That on March 14, 1888, these defendants, as judgment creditor and attorney respectively as aforesaid, fraudulently and maliciously, and with full knowledge of all the facts aforesaid, procured and caused a transcript of said judgment to be filed in the district court for Steele county, wherein this plaintiff then resided and still resides, and caused the judgment to be docketed in said court and the same still remains of record therein.

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VIII. That plaintiff is the owner of valuable real estate in said county not exempt by law from levy and sale on execution and has been damaged by reason of the docketing of said judgment in said county in the sum of $200.

IX. That on March 5, 1888, this plaintiff learned for the first time that said summons had been issued and said judgment entered in said municipal court, and he thereupon caused such proceedings to be had that on March 20, 1888, the said court, after due notice to these defendants, and upon being satisfied by proper evidence that the summons in said action had not been served on the defendant therein, duly made its order, vacating the said judgment, for the reason that summons had not been served on defendant in the action, and that the court had not acquired jurisdiction of the person of the defendant therein.

X. That in procuring said order of vacation plaintiff was put to great trouble and necessarily expended $58.50, and has been damaged thereby $75.

XI. That defendants, as judgment creditor and attorney respectively as aforesaid, maliciously procured and caused an execution to be issued, on said judgment, out of the district court for Ramsey county, directed to the sheriff of said Steele county, and on April 3, 1888, fraudulently and maliciously, with full knowledge of all the facts aforesaid, well knowing that said judgment had been vacated, as aforesaid, and for the purpose of annoying and injuring plaintiff, caused said execution to be levied upon three horses, the property of plaintiff, of the value of $400; and said horses have been taken and are detained by said sheriff by virtue of said execution, to plaintiff's damage $500.

Wherefore [as in § 919].

Substance of complaint in Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866.

1311. Injunction against execution sale—Fraud—Cloud on title.

I. That on May 1, 1892, plaintiff, in conjunction with one A. B., and her husband C. B. entered into a contract with defendant, whereby defendant agreed to erect and construct for said A. B. and her husband, a two-story frame dwelling house, on a certain lot then owned by A. B., described as follows: [Description of lot.]

II. That under said agreement plaintiff was to furnish defendant the money wherewith to build said house to the amount of about $1,000, and A. B. and her husband C. B. were, when said house should be fully completed and ready for occupancy, to make and deliver to plaintiff their mortgage of said premises for a sum equal to the total cost of said house.

III. That thereafter defendant constructed a house upon said lot, of the value of $1,035, which amount plaintiff paid to defendant therefor.

IV. That when said house was so completed A. B. and her husband C. B. refused to sign a mortgage which plaintiff had procured to be drawn up in pursuance of said agreement, and refused to sign or execute any mortgage securing plaintiff as so agreed, or to reimburse plaintiff in any manner for the money so expended by him.

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V. That thereupon plaintiff entered into an agreement with defendant, whereby it was mutually agreed that defendant should file a mechanic's lien upon said premises for the total cost of said house, and should proceed to have said lien foreclosed, for the protection, benefit, security of, and in trust for plaintiff, to protect plaintiff for the money so advanced, and such proceedings were to be conducted in the name of defendant.

VI. That in pursuance of said agreement defendant caused two mechanic's liens to be filed against said premises on July 29, 1892, for the sum of $1,035, the total cost of said house, and said liens were recorded in Book 13, of Liens, on pages 191 and 192, in the office of the register of deeds for Hennepin county; and immediately thereafter defendant proceeded to foreclose said lien by an action in this court.

VII. That before the time to answer in said action had expired, on Aug. 13, 1892, plaintiff purchased of said A. B. and her husband C. B. all their right, title and interest in and to said premises, and they made and delivered to plaintiff their warranty deed to said premises, dated Aug. 13, 1892, and recorded in the office of the register of deeds for Hennepin county in Book 366, of Deeds, on page 392, of all which defendant had knowledge.

VIII. That on Aug. 15, 1892, plaintiff settled in full with defendant for said house, paying all that remained due thereon, including the attorney's fees and costs which had been incurred in said action by defendant, and it was then agreed that defendant should dismiss all proceedings in that behalf and satisfy the liens filed as aforesaid, in full.

IX. That defendant failed to satisfy said liens or dismiss said proceedings as agreed, but on the contrary, some three months thereafter, defendant caused the further prosecution of said action, without the knowledge or consent of plaintiff, and caused judgment to be entered in said action in his favor for the sum of $1,035, with interest and costs, on Nov. 23, 1892, and some time thereafter defendant and his attorneys caused a certified copy of said judgment to be delivered to the sheriff of Hennepin county, and said sheriff in conjunction with defendant and his attorneys proceeded to give published notice of the sale of said premises, to satisfy said judgment, by publishing a notice therefor in "The Register," a newspaper published in said county, which notice among other things states that such sale will be made on May 8, 1893, and said sale will be so made unless the relief herein sought is granted.

X. That all the proceedings in said action subsequent to Aug. 15, 1892, were unknown to plaintiff until April 18, 1893.

XI. That it is the intention of defendant to proceed in said action in his own behalf, and to claim the proceeds of, or the title acquired under, said sale against the rights of plaintiff.

XII. That such sale will work irreparable injury to plaintiff, and will cloud his title to said premises.

Wherefore plaintiff demands judgment for a temporary injunction restraining defendant, and all persons acting under him, from making said sale or

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proceeding further in said action until the final determination of this action; directing defendant to satisfy said lien in full; adjudging said proceedings void; and for such other relief as may be just, with costs.

Substance of complaint in Hamilton v. Wood, 55 Minn. 482, 57 N. W. 208.

1312. Setting aside levy on homestead.

I. That the defendant A. B. is, and at the times herein mentioned was, the sheriff of Waseca county, Minnesota.

II. That plaintiff is, and ever since June 30, 1890, has been, the owner in fee of the north half of the northwest quarter of section nine, in township one hundred and six north, of range twenty-two west, in said county, containing eighty acres, subject, however, to a life estate in the north ten acres thereof, vested in and owned by one C. D., and during all said time there has been and is a dwelling house on said premises owned and occupied by plaintiff, who during all said time has been and still is a resident of said county.

III. That said premises, and the appurtenances thereto, have, during all said time, since June 30, 1890, been the plaintiff's homestead, duly selected, claimed and occupied by him as such, and as such exempt by law from levy or sale upon execution, or any other process issued out of any court within the state of Minnesota.

IV. That on May 29, 1894, the defendant E. F. duly recovered judgment against plaintiff, C. D., and G. H., in the district court for Waseca county, for the sum of $317.80, and said judgment was, on that day, duly docketed in the office of the clerk of said district court.

V. That on June 1, 1894, an execution was duly issued out of and under the seal of said court upon said judgment by the direction of said judgment creditor, and by him on said date placed in the hands of the defendant A. B., as such sheriff of said county, for service and levy upon said premises of plaintiff; that said writ of execution was in the usual form of execution issued out of the district court of this state upon money judgments, directed to the sheriff of said county and commanded him to satisfy said judgment with interest out of the personal property of the judgment debtors, and if sufficient personal property could not be found, then out of real estate in said county belonging to the judgment debtors on the day when said judgment was docketed in said county, or at any time thereafter, not exceeding ten years, and to return said execution within sixty days after its receipt by the sheriff to the said clerk of said court.

VI. That thereafter and on June 1, 1894, the defendant A. B., as such sheriff, by direction of said judgment creditor, the defendant E. F., levied upon said premises of plaintiff, by virtue of said writ of execution, and thereupon the said defendant A. B., as such sheriff, duly posted and published notices of sale of said premises, and on July 21, 1894, at 10 o'clock A. M., offered said premises for sale, under said pretended levy, and then pretended to strike off and sell the same, by virtue of said execution, to the defendant

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E. F., in satisfaction of said judgment for the amount thereof, with interest and costs, and thereafter and before the commencement of this action issued and delivered his sheriff's certificate of said sale to the defendant E. F., who is now the owner and holder thereof.

VII. That defendants, and each of them, had due and actual notice, and acknowledged at the time of said sale, prior thereto and ever since, that said premises were the homestead of plaintiff as herein alleged.

VIII. That said sale and certificate constitute a cloud on plaintiff's title to said premises.

Wherefore the plaintiff demands judgment vacating said levy and sale, or canceling said certificate, and for such other relief as may be just, with costs.

Complaint in Kugath v. Meyers, 62 Minn. 399, 64 N. W. 1138.

1313. Unlawful detainer proceedings against one holding over after execution sale.

I. That defendant is in possession of the [describe premises as in a deed], county, Minnesota, and at the time of the docketing of the judgment hereinafter mentioned was the owner in fee thereof.

II. That on 19 , in an action wherein this plaintiff was plaintiff and the defendant herein was defendant, a judgment was duly rendered by the district court for county, Minnesota, against the defendant in favor of the plaintiff for $, and on the same day was duly docketed in the office of the clerk of said court.

III. That on 19 , a writ of execution was duly issued out of said court on said judgment against the property of defendant and delivered to the sheriff of said county for levy; that on 19 , said sheriff duly levied said writ on said premises; and on 19 , duly sold the same under said writ and levy to plaintiff at public auction, in conformity with the statute in such case made and provided, and thereupon duly made and delivered to plaintiff his official certificate of said sale as provided by G. S. 1913 § 7942; that on 19 , said certificate was recorded in the office of the register of deeds for said county, in Book , of Deeds, on page .

IV. That more than one year has elapsed since said sale and no redemption has been made therefrom [and no notice has ever been filed by a creditor of defendant with the clerk of said court of an intention to redeem from said sale,] and the time for redemption therefrom has expired.

V. That by reason thereof and of the statute in such case made and provided plaintiff is the owner in fee and entitled to the immediate possession of said premises.

VI. That defendant withholds possession thereof from plaintiff.

Wherefore [as in § 1505].

See G. S. 1913 § 7658; Dunnell, Minn. Digest, § 3538.

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EXECUTORS AND ADMINISTRATORS

1314. Allegation of appointment of executor.

That on 19 , [said] [one] A. B. died in county, Minnesota, leaving a last will and testament which, on 19 , was duly admitted to probate and allowed by the probate court of [said county,] [county, Minnesota,] and on 19 , letters testamentary thereon were duly issued by said court to plaintiff as executor of said will, who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such executor.

See § 662.

1315. Same—Short form.

That ever since 19 , plaintiff has been and now is executor of the will of A. B. deceased, duly qualified and acting as such under letters testamentary duly issued to him by the probate court of county, Minnesota, on that day.

See § 662.

1316. Allegation of appointment of administrator.

That on 19 , [said] [one] A. B. died in county, Minnesota, intestate, and on 19 , letters of administration on his estate were duly issued to plaintiff by the probate court of [said county,] [county, Minnesota,] who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such administrator.

See § 662.

1317. Same—Short form.

That ever since 19 , plaintiff has been and now is the administrator of the estate of A. B., deceased, duly qualified and acting as such under letters of administration duly issued to him by the probate court of county, Minnesota, on that day.

See § 662.

1318. Same—With will annexed.

That on 19 , [said] [one] A. B. died in county, Minnesota, leaving a last will and testament but not naming an executor therein, and on 19 , letters of administration with the will annexed on the estate of the said A. B. were duly issued to plaintiff by the probate court of

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[said county,] [county, Minnesota,] who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such administrator.

See § 662.

1319. Allegation of appointment of a foreign executor.

I. That on 19 , [said] [one] A. B. died in county, [New York,] leaving a last will and testament which, on 19 , was duly admitted to probate and allowed by the [surrogate] [probate court] of [said county,] [county, New York,] and on 19 , letters testamentary thereon were duly issued by said [court] [surrogate] to plaintiff as executor of said will, who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such executor.

II. That on 19 , before the commencement of this action, plaintiff duly filed a duly authenticated copy of his appointment as such executor with the probate court of this county.

See § 662, and G. S. 1913 § 8178.

1320. Allegation of appointment of administrator de bonis non.

I. That on 19 , [said] [one] A. B. died in county, Minnesota, intestate, and on 19 , letters of administration on his estate were duly issued to one C. D. by the probate court of [said county] [county, Minnesota,] who thereupon duly qualified and entered upon the duties of such administrator.

II. That on 19 , said C. D. died without having fully administered said estate, and on 19 , said court duly issued to plaintiff letters of administration on said estate de bonis non, and thereupon plaintiff duly qualified and entered upon the duties of, and ever since has been and now is, such administrator.

See G. S. 1913 § 7292; Hamilton v. McIndoo, 81 Minn. 324, 84 N. W. 118, and § 662, supra.

1321. Allegation of appointment of administrator with the will annexed de bonis non.

I. That on 19 , [said] [one] A. B. died in county, Minnesota, leaving a last will and testament which, on 19 , was duly admitted to probate and allowed by the probate court of [said county] [county, Minnesota,] and on 19 , letters testamentary thereon were duly issued by said court to one C. D. as executor of said will, who thereupon duly qualified and entered upon the duties of such executor.

II. That on 19 , said C. D. died without having fully administered the estate of said A. B., and on 19 , said court duly issued to plaintiff letters of administration with the will annexed an the estate of said A. B. de bonis non, and thereupon plaintiff duly qualified and entered upon the duties of, and ever since has been and now is, such administrator.

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1322. Denial that plaintiff is executor or administrator.

The defendant for answer to the complaint herein denies that plaintiff is or ever has been the [executor] [administrator] of said A. B., deceased.

1323. Against executor on contingent claim for rent, taxes and insurance—Contribution between lessees.

I. That on April 3, 1892, plaintiffs and one A. B. entered into a written lease with one C. D. and E. D., his wife, a copy of which is hereto attached, marked Exhibit A, and made a part hereof.

II. That thereby plaintiffs and said A. B. leased of said C. D. and E. D. the premises described in said lease for the term of eleven years from the date of said lease, and agreed to pay therefor to said C. D. the sum of $800 in equal quarterly payments, payable in advance on the first days of the months of April, July, October and January in each year, and said lessees agreed also to pay the taxes which should be levied upon said premises as soon in each year as the same should become due and payable, and to keep the buildings on said premises insured in a responsible insurance company for at least $1,200, payable in case of loss to C. D., but to be applied to rebuild or replace the buildings if said buildings burned.

III. That all of said lessees, including said A. B., immediately entered upon said premises and occupied the same, and all of said lessees had possession of said premises, pursuant to said agreement, whereby all of said lessees, plaintiffs herein and said A. B., became liable jointly and severally to the said C. D. for the rent therein named.

IV. That on May 15, 1892, the said A. B. died, intestate, and on June 13, 1892, letters of administration on his estate were duly issued to defendant by the probate court of Hennepin county, Minnesota, whereupon defendant duly qualified and entered upon the discharge of his duties as such administrator, and is now so acting.

V. That on June 13, 1892, said court duly made an order limiting the time for creditors to present claims against said estate to a time six months from that date, to wit, the first Monday in January, 1893, and said order was duly published as provided by law.

VI. That the time within which to present claims against said estate to the probate court has expired and all claims against said estate proper to be presented to the probate court are accordingly barred.

VII. That defendant, as administrator of the estate of said A. B., received and still has in his hands personal property amply sufficient to pay the claims of plaintiffs hereinafter set forth.

VIII. That subsequent to the execution of said lease, said G. H. died and before any instalments of rents, taxes and insurance set forth herein and paid by plaintiffs were paid; that I. J. is the sole heir of said G. H., and immediately after the death of G. H., as aforesaid, assumed his liability on said lease and signed said lease in the place of said G. H.

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IX. That plaintiffs, within four months prior to the commencement of this action, duly demanded payment of the claims hereinafter set forth of defendant as administrator of the estate of said A. B., but he refused to pay the same.

X. That the instalments of rent of $200 each, which became due on the first days of January, April, July and October in the year 1893 and the instalments of rent of $200 each which became due on the first days of January, April, July and October, 1894, were paid by plaintiffs, but the said A. B., his heirs and the defendant herein, failed to pay any part of the same.

XI. That plaintiffs necessarily paid at the aforesaid times during the two years above specified, the instalments of rent as they accrued to the said C. D., amounting in all to $1,600, and for the use of defendant administrator as aforesaid, the sum of $114.43, and no part of the same has been repaid to plaintiffs.

XII. That during the year 1893 taxes were duly levied and assessed upon said premises and became due in said year amounting to $786.02, and during the year 1894 taxes were duly levied and assessed upon said premises which became due in said year amounting to $751.85; that said taxes were paid by plaintiffs, but the said A. B., his heirs and the defendant herein, failed to pay any part of the same.

XIII. That the plaintiffs necessarily paid during said years 1893 and 1894, and before any penalty provided by law attached to the same, the said taxes for the two years above specified, amounting in all to $1,537.87, and for the use of defendant as administrator as aforesaid, the sum of $109.85, and no part of the same has been repaid to plaintiffs.

XIV. That during the years 1893 and 1894 plaintiffs, in accordance with their covenant in said lease, insured said buildings on said premises in responsible insurance companies; that the premiums for said insurance, amounting to $127.95 for the years 1893 and 1894, were paid by plaintiffs, but the said A. B., his heirs and the defendant herein failed to pay any part of the same.

XV. That plaintiffs necessarily paid during the years 1893 and 1894 said sum of $127.95 for the insurance of said buildings on said premises, and for the use of defendant administrator as aforesaid the sum of $9, and no part of the same has been repaid to plaintiffs.

Wherefore [as in § 919].

Sustained on demurrer in Oswald v. Pillsbury, 61 Minn. 520, 63 N. W. 1072.

1324. Against administratrix and her bondsmen for distributive share of estate.

I. That on June 30, 1890, in Ramsey county, Minnesota, one A. B. died, intestate, leaving surviving him his widow C. B., and six children, to wit, D. B., E. B., F. B., G. B., H. B. and this plaintiff.

II. That until June 6, 1900, plaintiff's name was I. B., and in all the files,

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papers, and matters in said estate she was referred to and called J. B., and on June 6, 1900, she was married and her name ever since has been E. F.

III. That plaintiff was a minor until Sept. 23, 1900, when she became of full age.

IV. That on July 9, 1890, letters of administration on the estate of the said A. B. were duly issued by the probate court of said county to defendant C. B., who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, administratrix of said estate.

V. That on July 9, 1890, defendant C. B., as principal and G. H. and I. J., as sureties, duly executed their joint and several bond, and said G. H. and I. J. duly qualified and were accepted and approved as the sureties on the said bond of said administratrix, and ever since have been and now are the sureties on said bond; that a copy thereof is hereto attached, marked Exhibit A, and made a part hereof.

VI. That on Feb. 24, 1892, G. H. died, intestate, leaving surviving him, as plaintiff is informed and believes, his widow A. H., and four children, to wit, B. H., G. H., I. H. [now J. H.,] and K. H., who are the next of kin and sole heirs at law of said G. H.

VII. That at the time of his death, as plaintiff is informed and believes, the said G. H. was possessed of real estate in Hennepin county, Minnesota, of the value of $15,000, exclusive of his homestead, and also of personal property of the value of $14,000.

VIII. That the estate of said G. H. has been duly administered and a decree of final distribution has been duly made and entered therein in the probate court of said county, and all of said real estate and personal property has been duly assigned and distributed by the judgment and decree of said probate court to the widow and heirs and next of kin of said deceased, who still own the same.

IX. That on April 7, 1891, said administratrix duly made and filed her final account in said estate, and on that day the said probate court of Ramsey county duly made and entered its final decree assigning the residue of said estate.

X. That by and in said final decree the residue of said estate then in the hands of said administratrix was fixed at the sum of $1,874.76, and the same was by and in said decree distributed as follows:

To C. B. [said administratrix] one-third of said sum, and to the remaining heirs, of said deceased, two-thirds of said sum, and the share to which plaintiff became and was entitled and was due and payable to her was $178.54.

XI. That said administratrix has refused upon demand to pay to plaintiff her said share of said estate, and still refuses and neglects to do so, and no part of said judgment and decree has been paid to plaintiff.

XII. That prior to the commencement of this action said probate court duly authorized plaintiff to prosecute the same.

Wherefore [as in § 919].

Sustained in Miller v. Ganser, 87 Minn. 345, 92 N. W. 3. See § 663.

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1325. For refusal to pay claim against estate allowed by probate court.

I. That on March 27, 1893, in St. Louis county, Minnesota, one A. B. died, intestate, and on May 2, 1893, letters of administration on his estate were duly issued to plaintiff by the probate court of said county, who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such administrator.

II. That on July 4, 1893, in said county, one C. D. died, intestate, and on Aug. 12, 1893, letters of administration on his estate were duly issued to defendant E. F. by said court, who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, administratrix of said estate.

III. That on August 11, 1893, the defendant E. F., as principal, and the defendants G. H. and I. J., as sureties, made and delivered to the judge of said court, and to his successors in office, a bond, of which a copy is hereto attached, marked Exhibit A, and made a part hereof.

IV. That on April 2, 1894, plaintiff filed with said court his claim against the estate of said C. D., deceased, for $435; that on Aug. 7, 1894, said claim was disallowed by said court, whereupon plaintiff appealed to this court from the order of said probate court disallowing said claim; that thereafter said claim was heard and tried in this court, and as a final result the order of said probate court disallowing said claim was reversed; that from said order of this court said E. F., as administratrix of the estate of C. D., appealed to the supreme court of this state, and such proceedings were had therein that said order of this court was affirmed, whereupon a judgment was entered in this court in January, 1897, in said case, whereby the said probate court was ordered to allow said claim together with interest and all costs and disbursements against the estate of C. D., deceased; that pursuant to said judgment, a certified copy of which was filed with said probate court on Jan. 30, 1897, said probate court, on said date, duly made an order allowing said claim to plaintiff against said estate of C. D., deceased, amounting to $673.03, including interest and costs aforesaid.

V. That the time fixed by said probate court for the presentation of claims against said estate of C. D. for allowance by said court has expired, and defendant has, and since Jan. 30, 1897, has had, in her hands, as such administratrix, sufficient funds of said estate to pay all claims against the same, including said claim of plaintiff.

VI. That on 1897, plaintiff demanded of defendants payment of his said claim, but they refused, and still refuse to pay the same.

VII. That prior to the commencement of this action said probate court duly authorized plaintiff to prosecute the same.

Wherefore [as in § 919].

Adapted from complaint in Johanson v. Hoff, 70 Minn. 140, 72 N. W. 965. See § 663.

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1326. For negligence in storing and caring for dynamite—Destruction of adjacent building.

I. That the defendant, the Biwabik-Bessemer Company, is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state, and as such was engaged in mining in and about Biwabik, Minnesota, and in its work made use of large quantities of explosives commonly called black or blasting powder and dynamite.

II. That defendants A. B. and C. D. were, at all of said times, respectively, the superintendent and the timekeeper of said work, and both of them were in control for said corporation, of the powder-house and the explosives therein hereinafter mentioned.

III. That for a long time immediately prior to and on Feb. 24, 1895, plaintiffs were in the actual possession, use and occupation of a dwelling-house or boarding camp near defendant's said mine and place of work in the village of Biwabik, and such building was then and had theretofore been used by them as their residence and as a boarding house.

IV. That at the times herein mentioned plaintiffs owned and kept in said boarding house household goods and other personal property of the value of $1,027.43.

V. That at such times defendants were in possession of a small frame shanty in close proximity to said boarding house, which they used as an office, tool and powder house in connection with said mine, and wantonly and negligently stored in said shanty large quantities of inflammable oil and exploders, blasting powder and dynamite, and wantonly and negligently kept a stove and fire therein, while said explosives were there stored, and so negligently cared for said fire that on Feb. 24, 1895, said shanty caught fire therefrom and said explosives exploded with great force and destroyed said boarding house and household goods and other personal property of plaintiffs, to their damage $.

Wherefore [as in § 919].

Adapted from Clarkin v. Biwabik-Bessemer Co., 65 Minn. 483, 67 N. W. 1020.

1327. For injury to child from explosion of dynamite left exposed near highway.

I. That at the times herein mentioned defendant operated a railroad running through Scanlon, Minnesota.

II. That plaintiff is the father of one A. B., a minor boy born in the year 1895.

III. That during the years 1901 and 1903, and until after the accident hereinafter mentioned, defendant was engaged in constructing, straightening,

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altering and improving the road-bed of its line of railroad from Scanlon northeasterly along and close by the farm and dwelling house of plaintiff, in which work it furnished, kept and made use of a large amount of powder and dynamite with which to break, loosen and throw out stones, rock and material in such road-bed.

IV. That at all such times plaintiff resided in the said dwelling house with his wife and children, including the said A. B.; that between his said house and said railroad track was a well-traveled highway, and in the immediate neighborhood thereof were a number of farms occupied by a large number of people.

V. That said dynamite was a highly dangerous explosive, liable to explode and cause great damage near to it when dropped upon or struck by any hard substance, as defendant at all such times well knew.

VI. That defendant so negligently kept, handled and used said dynamite that it was a nuisance and source of great and imminent danger to all persons who might be about and near to defendant's work, and defendant negligently and unlawfully placed and permitted large quantities thereof to remain scattered around its said work, as well as outside thereof and along said highway and within a few feet of plaintiff's said farm and dwelling house, in an open and exposed condition upon the surface of the ground and among the bushes thereon, without being guarded, covered or in any way inclosed or protected, whereby the same was and continued to be attractive and tempting to children of tender years, and a tempting subject to them to examine and play with, and as such liable to explode, and their lives and limbs and that of a large number of persons were thereby at all times exposed to great and imminent danger.

VII. That the places where said explosives were so kept by defendant were habitually resorted to and made use of by children for their walks, and as a playground, whereby they were exposed to great and imminent danger from said dynamite, all of which was without objection or hindrance by defendant and with its knowledge and consent, and in wilful disregard on its part of the safety of said persons; that defendant wilfully, unlawfully and negligently permitted said explosives to so lie and remain undestroyed and unguarded, and within the reach and observation of said children and passers-by; that defendant at all such times knew and had reason to believe that children would find and play with said dynamite, but it negligently failed to remove or to cover up, conceal or protect said dynamite.

VIII. That such use, handling and keeping of said dynamite endangered the safety of a considerable number of persons living nearby, including plaintiff, the said infant, and the rest of plaintiff's family, and the same were a nuisance.

IX. That on July 29, 1903, while said explosives were in said places, and so exposed and attractive, and in such dangerous condition, said infant A. B. and his younger brother temporarily strayed away from their door-yard, the home of plaintiff, to the said places where defendant had left said dynamite,

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and while there playing their childish curiosity and instinct were attracted by said dynamite and they were thereby tempted to and did thereupon take, handle and play therewith, whereby a portion thereof came in violent contact with some other hard substance, and thereupon exploded with terrific force and [allege injuries as in §§ 1250–1255].

X. That neither said A. B. nor his said younger brother had any knowledge or information whatever of the dangerous character or composition of dynamite, or of any dangers from the handling thereof, and said injury was caused solely through the negligent and unlawful acts of the defendant as aforesaid.

Wherefore [as in § 919].

Substance of complaint in Mattson v. Minn. etc. Ry., 95 Minn. 477, 104 N. W. 443.

1328. For injury to traveler along highway from explosion in nearby iron mine.

I. That at the times herein mentioned defendant operated an open iron mine, known as mine near , county, Minnesota.

II. That in the operation of said mine defendant was accustomed to explode large quantities of dynamite and blasting powder in pockets or holes which it made in said mine, whereby large quantities of ore and rocks were hurled a great distance unless such charges of dynamite or blasting powder were properly protected and weighted down.

III. That at the times herein mentioned there was a public highway running near said mine, which was much traveled by the general public at all hours of the day and night, and the country between said mine and said highway was open and in no way protected to prevent materials hurled by such explosions from landing on and beyond said highway.

IV. That on 19 , while plaintiff was walking along said highway, defendant negligently, unlawfully and wantonly exploded several large charges of dynamite or blasting powder, which it had theretofore placed in pockets or holes in said mine, whereby large rocks and pieces of ore were hurled with great force through the air a great distance and one piece of such ore struck plaintiff.

V. That defendant was then and there negligent in this, that it loaded said holes or pockets with excessive, unusual and dangerous quantities of said explosives; and in this, that it failed to properly cover or protect the ground wherein such explosive was placed; and in this, that it failed to give plaintiff any notice or warning of said explosion.

VI. That defendant knew, or but for the want of reasonable care and diligence on its part would have known, of plaintiff's presence on the highway as aforesaid.

VII. That by reason of being so struck plaintiff [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Based on complaint in Bartnes v. Pittsburg Iron Ore Co., 123 Minn. 131, 143 N. W. 117.

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FACTORS

1329. Common indebitatus count for services.

I. That defendant is indebted to plaintiff in the sum of $ for services rendered by plaintiff for defendant, at his request, [on 19 ,] [between 19 , and 19 ,] as the factor and agent of defendant in selling [and disposing] of certain [describe goods in general terms].[1]

II. That no part thereof has been paid.

Wherefore [as in § 919].

[1] A claim for money advanced may be added as in § 1123.

1330. Quantum meruit for services.

[See forms under §§ 1947, 1951.]

1331. Quantum meruit for services and count for money advanced.

[See forms under §§ 1950, 1951.]

1332. Against factor for price of goods sold by him.

I. That on 19 , plaintiff delivered to defendant [one hundred barrels of flour] for sale on commission.

II. That [on 19 ,] [thereafter and before 19 ,] defendant sold the same for $, [and thereafter received said sum] [on a credit of months from the time of such sale, which credit expired before the commencement of this action, and which sum defendant has heretofore received].

III. That on 19 , plaintiff demanded from defendant the net proceeds of said merchandise after deducting defendant's charges.

IV. That defendant has not paid the same.

Wherefore [as in § 919].

Based on Form 117, Conn. Pr. Act. A common count for mony had and received would suffice in such a case as this. See §§ 765, 1575.

1333. Against del credere factor.

I. That on 19 , plaintiff employed defendant, for reward as his factor, to sell, upon a del credere commission [ten pieces of silk]; and thereupon delivered said [silk] to defendant, who received the same.

II. That on 19 , defendant sold and delivered said [silk] to A. B. on three months' credit.

III. That said A. B. did not pay for said [silk] when payment became due, but before the expiration of said credit he became insolvent; and plaintiff has never received anything in payment for the same, [which, at the time of said sale was of the value of $].

Wherefore [as in § 919].

Based on Form 118, Conn. Pr. Act.

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FALSE IMPRISONMENT

1334. For general damages.

The plaintiff complains of defendant and alleges that on 19 , in the city of , defendant, [unlawfully, maliciously and] without probable cause, [imprisoned plaintiff] [arrested and imprisoned plaintiff] [caused plaintiff to be arrested and imprisoned] for [hours] [days], to his damage $.

Wherefore [as in § 919].

See § 665.

1335. For special damages.

I. [As in § 1334.]

II. That by reason thereof plaintiff was greatly injured in his reputation and credit in that [specify injury], and suffered greatly in body and mind, and was prevented from attending to his business as a [specify business], and thereby lost [specify business loss], and was compelled to pay $ for costs and counsel fees in obtaining his release, all to his damage $.

Wherefore [as in § 919].

1336. Denial of arrest or imprisonment.

The defendant for answer to the complaint herein denies that he [caused the arrest or imprisonment of] [imprisoned] plaintiff as alleged or otherwise.

1337. Denial of malice and want of probable cause.

The defendant for answer to the complaint herein denies that he maliciously or without probable cause [imprisoned plaintiff] [caused plaintiff to be arrested and imprisoned], as alleged or otherwise.

1338. Justification under process.

I. That at and immediately before the time mentioned in the complaint defendant was the sheriff of county, Minnesota.

II. That on 19 , a warrant was duly issued by A. B., who was then a municipal judge of the city of , in said county, and directed to the sheriff of said county; that said warrant was thereupon delivered to defendant as such sheriff to be executed; that by said warrant defendant was commanded to arrest the plaintiff and [repeat substance of warrant].

III. That by virtue of said warrant defendant arrested plaintiff and promptly took him before said [municipal judge], to answer to the complaint aforesaid, and said acts of defendant are the acts of which plaintiff complains.

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1339. Suspicion of a felony.

I. That immediately before the time mentioned in the complaint defendant was informed by one A. B. that a felony had been committed in [state felony and the grounds for believing defendant committed it].

II. That thereupon defendant, who was then and there [sheriff of county,] [a police officer of the city of ,] believing such information to be true and having reasonable cause for believing that plaintiff had committed such felony, arrested him and brought him before C. D., a magistrate of the city of , to be dealt with according to law.

III. That said acts of defendant are the acts of which plaintiff complains.

FIRES

1340. For allowing fire to escape.

I. That at the time herein mentioned plaintiff was the [owner and in possession] [the occupant] of [describe premises as in a deed].

II. That on 19 , defendant [negligently] set fire to grass on premises occupied by him near said premises of plaintiff and so negligently watched and tended said fire that it came into plaintiff's said premises and there totally destroyed property of plaintiff's consisting of tons of hay, of the value of $, and stacks of wheat of the value of $, and a barn, of the value of $, and injured a fence of plaintiff's to the extent of $, and trees and shrubbery of plaintiff's to the extent of $, all to plaintiff's damage $.

Wherefore [as in § 919].

Based on Keating v. Brown, 30 Minn. 9, 13 N. W. 909.

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1341. For sale of impure food.

I. That at the times herein mentioned defendant was engaged in the manufacture and sale of sweet oil designed and offered for use as a food.

II. That on 19 , plaintiff purchased from one A. B., a retail grocer in the city of , Minnesota, one quart of sweet oil so manufactured and sold by defendant for use as a food.

III. That defendant sold said oil to said A. B. knowing that in the regular course of business it would be resold by him to his customers for use as a food.

IV. That said oil was impure, poisonous and injurious to health.

V. That on 19 , plaintiff used said oil in his food and was thereby poisoned and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Based on G. S. 1913 §§ 3705, 3742; Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428.

1342. For injury to business from sale of impure food.

I. That at the times herein mentioned defendant was and still is a corporation duly organized and existing under the laws of the state of Missouri.

II. That plaintiff is, and at all such times was, a retail grocer doing business at No. 578, Eighth Avenue North, in the city of Minneapolis, Minnesota, and as a part of said business sold and still sells to the public and his customers sweet oil for cooking purposes at retail.

III. That defendant is, and at all such times was, engaged in the manufacture and sale to the public and retail dealers of sweet oil to be used as a food and for cooking purposes and represented the same to be healthful and pure and adapted for use in cooking food.

IV. That plaintiff, relying on such representations of defendant, on March 9, 1908, purchased of defendant five gallons of cooking oil for the purpose of selling the same to his customers to be used by them for cooking purposes, and sold to his customers a large portion of the oil so purchased from defendant.

V. That said oil so purchased of defendant by plaintiff and sold by him to his customers, was, through the fraud, negligence and wanton disregard of human life of defendant in manufacturing the same, impure, adulterated, poisonous and not adapted for cooking purposes and the customers of plaintiff so purchasing said oil and using the same for cooking purposes were poisoned and sickened thereby.

VI. That thereby plaintiff was injured in his good name and reputation as

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a grocer and in his business, and was otherwise damaged, all in the sum of $5,000.

Wherefore [as in § 919].

Substance of complaint in Neiman v. Channellene Oil & Mfg. Co., 112 Minn. 11, 127 N. W. 394.

FORCIBLE ENTRY AND DETAINER

1343. General form.

I. That at the time of the entry mentioned in the next paragraph plaintiff was in the actual and peaceable possession of [describe premises as in a deed], in county, Minnesota.

II. That on 19 , defendant unlawfully and forcibly entered upon said premises and dispossessed plaintiff and still unlawfully and forcibly detains the same from plaintiff.

Wherefore plaintiff demands judgment for the restitution of said premises and costs.

[Verification.]

See § 666; G. S. 1913 §§ 7656–7672. For forms against tenants see § 1505.

1344. Denials.

The defendant for answer to the complaint herein [pleads not guilty] [denies each and every allegation thereof] [denies each and every allegation in the (first) (second) paragraph thereof] [denies that he entered said premises unlawfully or forcibly] [denies that he unlawfully or forcibly detains said premises from plaintiff].

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FOREIGN LAWS

1345. Foreign statutes.

I. That by chapter of the General Laws of 19 , of the state of , approved 19 , and entitled, , it is provided as follows: [Set out statute in full and verbatim or at least so much of it as may be material to the cause of action or defence.]

II. That said act now is and ever since its passage has been in full force in said state.

III. That the Supreme Court of , being the highest appellate court of said state, in the case of , held and still holds that [state construction or application of statute].

See § 668.

1346. Same—Approved form.

That at the time of said injury it was the common law of the state of North Dakota that railroad companies running and operating railroads should be liable and responsible for injuries occurring to their servants through negligence and carelessness of fellow servants engaged in the same employment and in the same work.

Sustained by Crandall v. Great Northern Ry., 83 Minn. 190, 86 N. W. 10. See § 668.

1347. Common law of foreign state.

That at the times herein mentioned it was the common law of the state of that [state in general terms what the law was without referring to decisions].

See § 668.

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FRAUD

1348. General skeleton form for deceit.

I. That on 19 , defendant stated and represented to plaintiff that [state the representations].

II. That said representations were false.

III. That defendant made said representations knowing them to be false and with intent to deceive and defraud plaintiff [and induce him to].

IV. That plaintiff, believing said representations to be true, was thereby induced to [state what plaintiff did in reliance on the representations].

V. [State facts showing damage to plaintiff resulting from the deceit as, for example, That said property was worth $ less than it would have been worth if said representations had been true.]

VI. [That thereby plaintiff was damaged $.]

Wherefore [as in § 919].

See § 669.

1349. Fraud in procuring contract.

I. That shortly prior to said agreement and to induce defendant to enter into it plaintiff represented and stated to defendant that [continue as in § 1348].

Wherefore defendant demands judgment [rescinding and canceling said agreement, and for such other relief as may be just, with costs][1] [dismissing this action, with costs to defendant].[2]

[1] See § 576, and Dunnell, Minn. Digest, §§ 1188, 1815.

[2] When fraud is used merely as a defence it is to be pleaded and proved the same as when affirmative relief is sought. Wilder v. De Cou, 18 Minn. 470(421).

1350. Fraud in procuring signature to contract—Reducing oral agreement to writing.

That on March 20, 1907, and immediately after said oral agreement between plaintiff and defendant was entered into, plaintiff, by its said agent voluntarily assumed to reduce the same to writing, and, representing to defendant that the writing embodied the exact terms of the oral agreement, requested defendant to sign it; that defendant, believing said representation to be true, was thereby induced to sign the writing without examining its contents; that in fact said writing did not embody the terms of said oral agreement, as said agent well knew, but was an entirely different agreement, and was so made and so represented and so presented to defendant for signature with the fraudulent intent on the part of plaintiff and his said agent to deceive and defraud defendant; that defendant has never consented to said written agreement; that on 19 , immediately upon discovering the contents of said writ-

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ten agreement and before receiving said goods, defendant wrote to plaintiff and rescinded said oral contract with plaintiff.

Substance of answer in Providence Jewelry Co. v. Crowe, 113 Minn. 209, 129 N. W. 224.

1351. Fraud in claiming title to realty.

I. That on 19 , plaintiff and defendant entered into a written agreement whereby defendant agreed to sell and convey to plaintiff by a good and sufficient warranty deed the fee of [description of premises].

II. That upon the making and delivery of said agreement, plaintiff paid to defendant, as a part payment of the purchase price of said premises under said agreement, the sum of $

III. That at the time of making said agreement defendant was not the owner of said premises, and had no title thereto, nor has he subsequently acquired the title thereto.

IV. That at the time of making said agreement defendant stated and represented to plaintiff that he was the owner of said premises.

V. That defendant made said representation knowing it to be false and with intent to defraud and deceive plaintiff and to induce him to enter into said agreement and to pay said money to defendant.

VI. That plaintiff, believing said representation to be true and that defendant was the owner of said premises, was thereby induced to enter into said agreement and make said payment.

VII. That said sum of $ has not been repaid to plaintiff, though demanded.

Wherefore [as in § 919].

A common count for money had and received would be sufficient in a case like this. See §§ 762, 1575.

1352. For representing a third person as fit to be trusted.

I. That on 19 , defendant represented to plaintiff that one A. B. [who was then proposing to purchase goods of plaintiff on credit, and had referred plaintiff to defendant for information respecting his character and financial circumstances,] had done much business with him; that he had received a large amount of money from said A. B.; that he then did business with said A. B., and that he, the defendant, believed the said A. B. to be a man in good financial circumstances, and fit to be trusted with goods on credit.

II. That plaintiff believed said representations to be true, and was thereby induced to sell, and did, on said day, sell and deliver to said A. B. [describe goods in general terms], of the value of $, upon a credit of [sixty] days.

III. That on 19 , plaintiff, relying upon said representations, and believing them to be true, sold and delivered to said A. B. [describe goods in general terms], of the value of $, upon a credit of [sixty] days.

IV. That in fact said A. B., at the time of said representations, was insol-

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vent and not fit to be trusted with goods on credit [as defendant then well knew], and defendant did not at that time do business with said A. B., and did not believe him to be a man in good financial circumstances, and fit to be trusted with goods on credit.

V. That defendant made said false representations well knowing them to be false, and with intent to induce plaintiff thereby to sell goods to said A. B. on credit, and to defraud plaintiff.

VI. That said A. B. has not paid for said goods sold to him by plaintiff, though the time of credit has long since expired; and plaintiff will wholly lose the value of said goods.

VII. That by reason of the premises plaintiff has been damaged $.

Wherefore [as in § 919].

Based on Form 119, Conn. Pr. Act.

1353. For fraudulently concealing insolvency of a person.

I. That at the times herein mentioned plaintiff was a wholesale grocery merchant.

II. That on 19 , defendant introduced to plaintiff, as a customer, one A. B., who wished to procure goods on credit, and defendant then represented to plaintiff that he had no doubt said A. B. would pay for any goods he might buy, and said A. B. then said, in the presence of and uncontradicted by defendant, that he, A. B. was worth $5,000.

III. That plaintiff believed said representations of defendant to be true, and that said A. B. was worth $5,000, and was thereby induced to sell, and did sell to said A. B. a stock of general groceries to the amount of $1,000, upon a credit of thirty days.

IV. That in fact said A. B., at the time of said representations, was insolvent, as defendant then knew, and defendant did not believe that said A. B. would pay for said goods, and, with intent to defraud plaintiff, refrained from informing him that said A. B.'s assertion of his solvency was false.

V. That defendant made said false representations with intent to induce plaintiff thereby to sell said goods on credit, as aforesaid, and to defraud him.

VI. That said A. B., immediately after the purchase of said goods, transferred them to defendant, who received them in part payment of a debt owing him from said A. B. at the time of said purchase, knowing when he received them, that they were the goods bought of plaintiff, as aforesaid, and that said A. B. had not paid for them.

VII. That said credit given said A. B. has expired, and he has not paid for said goods.

VIII. That by reason of the premises plaintiff has been damaged $.

Wherefore [as in § 919].

Based on Form 120, Conn. Pr. Act.

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1354. For fraud in sale of a horse.

I. That on 19 , plaintiff bargained with defendant for the purchase of a horse belonging to defendant, and defendant, to induce plaintiff to buy said horse and to pay $ therefor, declared to plaintiff that said horse was [sound in wind and limb, and free from any defect whatever].

II. That plaintiff, believing said statements to be true and induced thereby, bought said horse of defendant and paid him $ therefor.

III. That defendant made said statements knowing them to be false, with intent thereby to induce plaintiff to make such purchase and to defraud him.

IV. That said horse was then unsound, and then and for a long time before, had an incurable disease called the glanders.

V. That said horse is unfit for use and of [no] [little] value, and plaintiff has [expended] [incurred an expense of] $ in feeding and taking care of him and in endeavoring to cure him of said disease.

VI. That by reason thereof plaintiff has been damaged $.

Wherefore [as in § 919].

Based on Form 132, Conn. Pr. Act.

1355. For misrepresenting the value of a trade and business.

I. That on 19 , defendant kept a circulating library and carried on the trade of bookseller and stationer in the building known as No. , street, in the city of , and was possessed of a lease of said building for the term of five years from 19 , and then offered to sell to plaintiff his interest in said unexpired lease and said library and the stock, fixtures, and good-will of said trade, and then pretended and represented to plaintiff that the profits of said circulating library, as theretofore conducted by defendant, had been at the rate of $ a year; that there were subscribers to said library; and that said building and trade, as theretofore conducted by defendant, produced profits at the rate of $ a year.

II. That plaintiff believed said representations of defendant to be true, and was induced thereby to purchase, and did purchase, of defendant said lease, library, stock, fixtures and good-will, and paid him $ therefor.

III. That in fact [for several years prior to said sale] the profits of said library had not been over $ a year, and the number of subscribers thereto had not been over a year, and said building and trade, as conducted by defendant, had not produced profits of more than $ a year.

IV. That defendant made said false representations to plaintiff well knowing them to be false, and with intent to induce him to make said purchase, and to defraud him.

V. That said lease, library, stock, fixtures and good-will were worth less than $ when so purchased by plaintiff and he has incurred great trouble and expense in carrying on and endeavoring to sell the same.

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VI. That by reason thereof plaintiff has been damaged $.

Wherefore [as in § 919].

Based on Form 133, Conn. Pr. Act.

1356. For fraud in procuring money for a proposed corporation.

I. That on Jan. 24, 1910, and on Feb. 7, 1910, defendant represented to plaintiff that he intended forthwith to incorporate or cause to be incorporated, under the laws of this state, a corporation, under the name of John A. Rush & Co., with a capital stock of $35,000, to be divided into 350 shares of $100 each, for the purpose of carrying on the merchant tailoring business, in which defendant was then engaged.

II. That defendant further represented to plaintiff that it was necessary to have at once to conduct such business the sum of $2,000 and that if plaintiff would furnish said proposed corporation said sum of $2,000 there would be issued to him twenty shares of the capital stock of said corporation of the face value of $2,000.

III. The defendant represented to plaintiff that he had property of the value of $23,000 in excess of his debts and liabilities, and that he could and would subscribe for and take, and procure to be subscribed for and taken, all of the capital stock of said corporation except that which was to be taken by plaintiff as aforesaid.

IV. That said representations were false and defendant made them knowing them to be false and with intent to deceive and defraud plaintiff.

V. That, relying upon said false and fraudulent representations, plaintiff, at the request of defendant, on Jan. 24, 1910, paid into the Security National Bank of Minneapolis, the sum of $1,300, and on Feb. 7, 1910, the further sum of $700, in the name of John A. Rush & Co., for the benefit of and to be used and checked out by said proposed corporation, John A. Rush & Co.

VI. That at the time of said representations defendant was not worth $23,000 over and above his debts and liabilities or any other or greater sum than $5,000, and defendant did not organize or cause to be organized said corporation and did not subscribe for or obtain subscribers for stock in said corporation in any sum whatever.

VII. That defendant wilfully, maliciously and fraudulently withdrew said sum of $2,000 from said bank and appropriated the same to his own use, without the knowledge or consent of plaintiff.

VIII. That by reason of the premises defendant became and is indebted to plaintiff in the sum of $2,000 as for money had and received by defendant from plaintiff to the use of plaintiff.

IX. That plaintiff has demanded from defendant the repayment of said sum, but no part thereof has been repaid.

Wherefore [as in § 919].

Adapted from complaint sustained in Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754. A common count for money had and received would have been sufficient in this case. See §§ 762, 1575.

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1357. For attempt to defeat unrecorded title to land.

I. That on Nov. 1, 1879, and for a long time prior thereto, one A. B. was the owner in fee of [description of premises].

II. That on that day said A. B. and C. B., his wife, by their warranty deed, sold and conveyed said premises to one E. F. of said county, but said deed has never been recorded.

III. That on said day said E. F. made and delivered to one G. H., of Douglass county, Nebraska, a mortgage on said premises, which was duly recorded in the office of the register of deeds for Hennepin county, Minnesota, in Book 50, of Mortgages, on page 532.

IV. That thereafter said mortgage was duly foreclosed by advertisement, and on March 6, 1882, said premises were sold by the sheriff of said Hennepin county; that at said foreclosure sale plaintiff became the purchaser of said premises, and said sheriff made and delivered to plaintiff a certificate of sale in due form of said premises, and such certificate was duly recorded in the office of the register of deeds for said Hennepin county, in Book 97, on pages 226, 227 and 228.

V. That the time for the redemption of said premises from said foreclosure sale expired on March 6, 1883, and no redemption has ever been made therefrom.

VI. That plaintiff has never assigned his estate and interest in said premises, nor has he assigned the rights which accrue to him through or by virtue of his said purchase of said premises at said foreclosure sale.

VII. That on March 8, 1882, defendant I. J., well knowing the facts aforesaid, and intending to defraud plaintiff out of said premises, and to deprive him of his title and estate therein, procured a deed of quitclaim to be made and delivered by said A. B. and C. B., his wife, to defendant K. L., which deed is recorded in the office of the register of deeds for said Hennepin county, in Book 95, of Deeds, on page 366; that the consideration for said deed was paid by defendant I. J., and he procured it to be executed for his own use and benefit, and to convert to his own use and benefit the value of said premises; that at the time when said last mentioned deed was executed, said K. L., the grantee therein, well knew the facts aforesaid, and she accepted said deed intending to defraud plaintiff out of said premises and to deprive him of his title and estate therein and to convert the value thereof to the use and benefit of defendant I. J.

VIII. That on Feb. 1, 1883, defendant I. J., well knowing the facts aforesaid and intending to defraud plaintiff out of said premises, and to deprive him of his title and estate therein, procured a deed of quitclaim to be made and delivered by defendant K. L. to defendant M. N.; that such deed is recorded in the office of the register of deeds for said Hennepin county, in Book 121, of Deeds, on page 203; that, as plaintiff is informed and believes, at the time said last mentioned deed was executed, said M. N., the grantee therein, well knew the facts aforesaid, and she accepted said deed, intending

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to defraud plaintiff out of said premises and to deprive him of his title and estate therein, and to convert the value thereof to the use and benefit of said defendant I. J.; that no consideration was ever paid or intended to be paid for said deed, and defendant I. J. procured the execution of said deed with the sole purpose and object, and said deed was executed with the sole purpose and object, of defrauding plaintiff out of said premises, and to deprive him of his title and estate therein, and to convert the value of the same to the use and benefit of defendant I. J.

IX. That on June 12, 1883, defendant I. J., well knowing the facts aforesaid, and intending to defraud plaintiff out of said premises, and to deprive him of his title and estate therein, procured a deed of quitclaim to be made and delivered by defendant M. N. to one O. P.; that said O. P. was an innocent purchaser of said real estate in good faith and for a valuable consideration; that, as plaintiff is informed and believes, the consideration for said deed was paid to defendant I. J., who procured said deed to be executed for the sole purpose of defrauding plaintiff out of said premises and to deprive him of his title and estate therein, and to convert the value thereof to the use and benefit of said I. J.

X. That said acts of defendant I. J., in thus depriving plaintiff of his title and estate in said premises, were a fraud upon plaintiff.

XI. That at the time of the making and delivery of said first mentioned deed from said A. B. and wife to said E. F., the said premises were reasonably worth $500; that at the time of the making and delivery of the deed from said M. N. to said O. P., they were reasonably worth $700; and they are now reasonably worth $800.

XII. That by reason of said fraudulent acts of defendants plaintiff has been defrauded out of said premises, and has been deprived of his title and estate therein, and has been damaged $800.

Wherefore [as in § 919].

Substance of complaint sustained in Scott v. Reed, 33 Minn. 341, 23 N. W. 463.

1358. Exchange of land—Misrepresentations by third party as to condition, quality and value of land.

I. That on Feb. 18, 1885, in the city of Minneapolis, Minnesota, A. B. and C. D. negotiated with plaintiff to exchange certain land, hereinafter described, for plaintiff's interest in the [description of plaintiff's land].

II. That in exchange for plaintiff's said land A. B. and C. D. offered to procure a conveyance to plaintiff from defendant, by a good and sufficient warranty deed, of the [description of lot], in the village of Grand Rapids, Minnesota.

III. That thereupon, on said Feb. 18, 1885, plaintiff applied to defendant and asked him to give plaintiff information as to the location and value of the lot last above described; that defendant represented to plaintiff that he was well acquainted with the location and value of said lot; that it was of

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the value of $400, and would sell therefor in the market for cash; that lots near it and of no greater value had been sold by defendant for $500; that defendant had sold an undivided one-third interest in certain water power in said village for $2,000 in cash; that seven saloons were located in said village and doing business therein; and that in the last presidential election thirteen hundred votes had been cast for presidential electors by residents of said village.

IV. That defendant then and there exhibited to plaintiff a pretended plat of said village and pointed out to plaintiff thereon the pretended location of a railway depot and other public and private buildings stated by him to have been erected in said village, and stated that a small piece of land, the location of which defendant then pointed out upon said plat, had been sold by him for the sum of $1,300 in cash.

V. That plaintiff, at the time of the aforesaid representations of defendant, and of the exchange of property hereinafter alleged, had never seen said village, and was wholly unacquainted therewith, and wholly ignorant of the value of lots located therein, and so informed defendant, and that in the purchase of any lot in said village or the exchange of other property therefor, he should rely solely upon the information then given by defendant.

VI. That plaintiff, believing said representations of defendant to be true, and relying thereon, was thereby induced to convey to A. B. and C. D. the land first above described, and accepted in exchange therefor a conveyance from defendant of said lot in said village.

VII. That in fact said lot has not been at any time of any value, and would not at any time heretofore sell for any sum whatever, in the market or otherwise; that lots near it in said village, had not, nor had any interest of defendant in any water power or in any real estate therein, been sold as stated by him or otherwise for any sum or amount whatever; that no saloon was located in said village or doing business therein, and in no presidential election heretofore have any votes been cast by residents of said village for presidential electors or other officers; that no railroad has been constructed to said village and no railway depot or other building, public or private, has been erected therein; that said alleged village was and is wholly uninhabited and waste land; that it is many miles from any city or village and land therein has been at all times heretofore of no value whatever except for pine growing thereon, which, prior to the representations aforesaid, had been wholly removed or taken therefrom.

VIII. That all of said representations and statements of defendant were false, and he made them knowing them to be false and with intent to deceive and defraud plaintiff and induce him to make said exchange.

IX. That the land so conveyed by plaintiff was worth $400.

X. That by reason of the premises plaintiff has been damaged $400.

Wherefore [as in § 919].

Substance of complaint sustained on demurrer in Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360.

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1359. Fraudulent representation as to completion and running of a railroad.

I. That on April 15, 1909, plaintiffs and defendant entered into a written contract whereby defendant leased to plaintiffs certain property in Antlers Park, Minnesota, of which contract the following is a copy: [Copy of contract.]

II. That to induce plaintiffs to enter into said contract defendant represented to plaintiffs that the Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Company would complete its electric railroad, and would run electric cars over the same from Minneapolis to and beyond said Antlers Park during the summer of 1909, and about July 1, of that year.

III. That such representation was false and defendant made it knowing it to be false and with intent to deceive plaintiffs and induce them to enter into said contract.

IV. That plaintiffs, believing such representation to be true, was thereby induced to enter into said contract.

V. That said Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Company did not complete its railroad or run electric cars to said Antlers Park during the summer of 1909, or at any time during that year.

VI. That long prior to the making of said contract plaintiffs were engaged in business, and relying upon said representation and induced thereby, they sold it at a sacrifice; that in the running of said hotel, as provided in said contract, plaintiffs were unable to earn running expenses to the date of this complaint, but on the contrary lost in said business $1,280 to the date of this complaint, and are still losing money, and will continue to lose money until such time as said electric railroad shall run its said cars from Minneapolis to Antlers Park.

VII. That had said railroad been run to Antlers Park, as promised and represented by defendant, plaintiffs would have earned, above the expenses of the running of said hotel, not less than $1,000 during the year ending April 15, 1910, and not less than $1,500 for the year commencing on April 15, 1910.

VIII. That at the time of the making of said contract defendant was the financial agent of the Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Company; that the officers of defendant were substantially the same persons as the officers of said Minneapolis, St. Paul & Dubuque Electric Traction Company; that defendant had full knowledge of all the plans and purposes of said Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Company; that the truthfulness or falsity of the said representation made by defendant to plaintiffs, was peculiarly within the knowledge of defendant, and plaintiff had no means of knowledge concerning the truthfulness of the same.

IX. That by reason of the premises plaintiff was damaged $3,780.

Wherefore [as in § 919].

Substance of complaint sustained on demurrer in McElrath v. Electric Investment Co., 114 Minn. 358, 131 N. W. 380.

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1360. General form.

I. That on 19 , a judgment was duly rendered in [this court] [the district court for county, Minnesota,] in favor of the plaintiff herein and against the defendant A. B., herein, for $, in an action on a claim which accrued prior to the conveyance hereinafter mentioned.

II. That on 19 , said judgment was duly docketed in the office of the clerk of the district court for said county, [and on 19 , in the office of the clerk of the district court for county, Minnesota].

III. That on 19 , plaintiff caused an execution on said judgment to be duly issued out of said court against the property of said defendant, to the sheriff of [said] county, wherein said defendant then resided [and still resides], and on 19 , said sheriff duly returned said execution wholly unsatisfied.

IV. That said judgment is still owned by plaintiff and remains wholly unsatisfied.

V. That on 19 , defendant A. B., being then the owner thereof, conveyed to defendant C. D. the [describe premises as in a deed].

VI. That defendant A. B. made said conveyance with the intent to hinder, delay and defraud his creditors, including plaintiff, and the same was received by defendant C. D. with full knowledge of such intent.

VII. [That defendant E. D. is the wife of defendant C. D.]

Wherefore plaintiff demands judgment that said conveyance is fraudulent and void as to plaintiff, and for such other relief as may be just, with costs.

See § 670.

1361. Same—On judgment in justice court.

I. That on 19 , before M. N., a justice of the peace in and for the town of , county, Minnesota, plaintiff herein recovered a judgment, which was duly given by said justice, against defendant A. B. herein for $, in an action on a claim which accrued prior to the conveyance hereinafter mentioned.

II. That on 19 , a transcript of said judgment was duly filed and docketed in the office of the clerk of the district court for county.

III. That on 19 , plaintiff caused an execution on said judgment to be duly issued out of the district court for said county, against the property of defendant A. B., to the sheriff of said county, wherein defendant A. B. then resided [and still resides], and on 19 , said sheriff duly returned said execution wholly unsatisfied.

[Continue as in § 1360.]

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1362. Conveyance in trust for grantor.[1]

[I. II. III. and IV. as in § 1360.]

V. That on 19 , defendant A. B., being then the owner thereof, by deed conveyed the [describe premises as in deed], to defendant C. D., in trust[2] for the use of defendant A. B. [a copy of which deed is hereto attached, marked Exhibit A, and made a part hereof].

VI. [That defendant A. B. made said conveyance with the intent to hinder, delay and defraud his creditors, including plaintiff, and the same was received by defendant C. D. with full knowledge of such intent.]

VII. [That defendant E. D. is the wife of defendant C. D.]

Wherefore [as in § 1360].

[1] See G. S. 1913 § 7010; Dunnell, Minn. Digest, § 3854.

[2] See Wetherill v. Canney, 62 Minn. 341, 64 N. W. 818; Anderson v. Lindberg, 64 Minn. 476, 67 N. W. 538.

1363. Same—Another form.

[I. II. III. and IV. as in § 1360.]

V. That on 19 , defendant A. B., being then the owner thereof, by deed conveyed the [describe premises as in deed] to defendant C. D., in trust, reserving in himself the beneficial interest in said property for life, subject to the necessary expenses of said trustee, with remainder over and with full power of sale in said trustee; that a copy of said deed is hereto attached, marked Exhibit A, and made a part hereof.

VI. That defendant C. D. is now in possession of said premises under said conveyance.

VII. That said property is worth at least $, and, as plaintiff is informed and believes, is free and clear from all incumbrances.

Wherefore plaintiff demands judgment determining the amount of the interest which defendant A. B. reserved in himself in and to said trust fund, and directing a sale of such interest and the application of the proceeds to the satisfaction of plaintiff's said judgment, with interest thereon, and the costs of this action, and for such other relief as may be just.

Based on Schenck v. Barnes, 156 N. Y. 316.

1364. To set aside a voluntary conveyance.

[I. II. III. IV. and V. as in § 1360.]

VI. That said conveyance was made without any consideration whatever [though for the ostensible consideration of $], and was made by defendant A. B. with intent to hinder, delay and defraud his creditors, including plaintiff, and the same was received by defendant C. D. with full knowledge of such intent.

VII. [That defendant E. D. is the wife of defendant C. D.]

Wherefore [as in § 1360].

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1365. For fraudulent confession of judgment.

[I. II. III. and IV. as in § 1360, substituting "confession of judgment" for "conveyance" in the first paragraph.]

V. That on 19 , prior to the entry of said judgment, but after the claim on which said judgment was recovered had accrued, defendant A. B. authorized a judgment to be entered, on confession, [in this court] [in the district court for county, Minnesota], against him and in favor of defendant C. D., for $, on a pretended indebtedness for money alleged to have been theretofore loaned by defendant C. D. to defendant A. B.

VI. That on 19 , under an execution on said judgment the sheriff of said county sold [describe personal property in general terms], the property of defendant A. B. of the value of $ to defendant C. D. for $, who thereupon took possession thereof, and is still in possession, claiming to be the owner thereof.

VII. That on 19 , under an execution on said judgment, the sheriff of said county sold [describe real property in said county as in a deed], the property of defendant A. B., of the value of $, to defendant C. D. for $, and made and delivered to defendant C. D. his certificate of sale of said premises.

VIII. That said judgment in favor of defendant C. D. was fraudulently confessed by defendant A. B. for the purpose of covering up the property of defendant A. B. and to hinder, delay and defraud plaintiff in the collection of his said claim, and was received by defendant C. D. with full knowledge of such intent; that defendant A. B. was not indebted to defendant C. D. in any sum whatever at the time of the confession of said judgment and there was no consideration whatever for the same; that said sales were made with the intent on the part of both defendants to hinder, delay and defraud plaintiff in the collection of his said claim and of transferring the ostensible ownership and possession of said property so as to prevent plaintiff, or any other creditor, from levying upon or selling any part thereof.

IX. [That defendant E. D. is the wife of defendant C. D.]

Wherefore plaintiff demands judgment:

1. That said judgment in favor of defendant C. D. and said sales and sheriff's certificate are fraudulent and void as to plaintiff.

2. That defendants be enjoined from disposing of, transferring, incumbering, or in any way interfering with said property, or any part thereof; that a receiver be appointed, to whom defendants shall be directed to transfer said property and all other non-exempt property of defendant A. B., and who shall be directed to sell the same and apply the proceeds, or so much thereof as may be necessary, to the payment of plaintiff's said judgment and interest thereon, and the costs of this action.

3. For such other relief as may be just.

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1366. To set aside a general assignment for the benefit of creditors.

[I. II. III. and IV. as in § 1360, substituting "assignment" for "conveyance" in the first paragraph.]

V. That on 19 , defendant A. B. made an assignment of all his non-exempt property in trust for the benefit of his creditors to defendant C. D.

VI. That defendant C. D. has accepted said trust and collected [and distributed] a large sum of money and other property from the assets of defendant A. B., amounting to more than $.

VII. That the property so assigned is of the value of at least $.

VIII. That defendant A. B. made said assignment with intent to hinder, delay and defraud his creditors, including plaintiff, and the same was accepted by defendant C. D. with full knowledge of such intent.

IX. That the indebtedness set forth in said assignment as due from defendant E. F. to defendant A. B. is fictitious and was inserted by defendant A. B. for the fraudulent purpose of enabling him [to distribute his property among his friends] [and to be held by them for his benefit] [and thereby to keep the possession and control thereof himself] [to retain a large portion of the proceeds of the sale of said property].

X. That defendant A. B. has no property, aside from that included in said assignment, out of which said judgment may be satisfied in whole or in part.

Wherefore plaintiff demands judgment:

1. That said assignment is fraudulent and void as to plaintiff.

2. That a receiver be appointed of all the non-exempt property of defendant A. B.

3. That defendants account for all the property received by them or either of them under said assignment and for all the proceeds of any sales or transfers thereof, and deliver the same to such receiver.

4. That defendants be enjoined, in the meantime, from disposing of any of said property or the proceeds thereof, or in any way interfering therewith.

5. That said receiver pay, out of the proceeds of said property, plaintiff's said judgment, and the costs and expenses of this action, and hold the balance subject to the further order of this court.

6. For such other relief as may be just.

1367. Same—Assignment void on its face.

[I. II. III. and IV. as in § 1360, substituting "assignment" for "conveyance" in the first paragraph.]

V. That on 19 , defendant A. B. made an assignment of all his non-exempt property in trust for the benefit of his creditors to defendant C. D., of which the following is a copy: [Copy of assignment.]

VI. That said assignment is fraudulent and void on its face in that [specify fraudulent features].

Wherefore [as in § 1360 or § 1366].

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1368. Sale of stock of merchandise.

[I. II. III. and IV. as in § 1360, substituting "sale" for "conveyance" in the first paragraph.]

V. That on 19 , defendant A. B., then being engaged in the retail grocery business in the city of , and owning a stock of groceries in such business, sold all of such stock to defendant C. D. who thereupon took possession thereof and is still in possession claiming to be the owner thereof.

VI. That defendant A. B. made said sale with the intent to hinder, delay and defraud his creditors, including plaintiff, and defendant C. D. purchased and paid for said stock with full knowledge of such intent.

Wherefore plaintiff demands judgment:

1. That said sale is fraudulent and void as to plaintiff.
2. [As in § 1365.]
3. For such other relief as may be just.

1369. Unlawful preference—Action by trustee in bankruptcy.

I. That at the times herein mentioned defendants were partners doing business under the firm name of John B. Hoxsie & Co.

II. That for more than one year prior to Sept. 20, 1911, the Washington County Co-Operative Company was a corporation duly organized and existing under the laws of this state, and was conducting a general retail merchandise business at Stillwater, Minnesota.

III. That for more than two months immediately prior to Sept. 20, 1911, the said Washington County Co-Operative Company had been and on said date was insolvent, and its liabilities exceeded the fair value of all its property.

IV. That during the time said Washington County Co-Operative Company so conducted said business, and prior to Sept. 1, 1911, it purchased of defendants certain merchandise from time to time, on account of which purchases it was on and prior to Sept. 1, 1911, indebted to said John B. Hoxsie & Co. in the sum of $235.36.

V. That on Aug. 15, 1911, while said Washington County Co-Operative Company was so insolvent, defendants commenced an action in the district court for Washington county, Minnesota, wherein they were plaintiffs and said Washington County Co-Operative Company was defendant, for the recovery of said indebtedness; that no answer or defence was interposed by said Co-Operative Company in said action, but it suffered and permitted judgment to be entered therein by default, and defendants herein on Sept. 20, 1911, procured judgment in their favor, which was duly rendered by said court, for the sum of $235.36.

VI. That thereafter an execution against the property of the said company was duly issued out of said court on said judgment and directed and delivered to the sheriff of said Washington county, who, on Sept. 20, 1911, levied upon and took possession of a large quantity of merchandise belonging to said Washington County Co-Operative Company of the value of $400.

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VII. That thereafter said sheriff gave notice of the sale of said merchandise so levied upon, and pursuant thereto on Oct. 3, 1911, and while said Washington County Co-Operative Company was insolvent, as hereinbefore alleged, said sheriff sold and disposed of all of the merchandise so levied upon at public sale, and realized thereon the sum of $254.70, of which amount he retained for his fees and expenses of sale, the sum of $18.32, and paid to defendants herein, on account of and in payment of said judgment and interest accrued thereon the sum of $236.38.

VIII. That said Washington County Co-Operative Company intended thereby to give a preference to said John B. Hoxsie & Co., over the other creditors of said Washington County Co-Operative Company of the same class, and the said judgment and the enforcement thereof as alleged enabled said John B. Hoxsie & Co. to obtain a greater percentage of its debt than will be obtained by any other of such creditors of said Washington County Co-Operative Company of the same class, all of which facts defendants had reasonable cause to believe and know, and all of which was done by them with intent to obtain such preference.

IX. That on Sept. 20, 1911, A. B. and certain other creditors of said Washington County Co-Operative Company duly instituted certain bankruptcy proceedings in the District Court of the United States for the District of Minnesota, Third Division, for the purpose of having said Washington County Co-Operative Company adjudged a bankrupt; that thereafter such proceedings were duly had in said bankruptcy proceedings that on Oct. 6, 1911, said Washington County Co-Operative Company was duly adjudged a bankrupt by said court; that on Nov. 15, 1911, the plaintiff herein was duly appointed by said court trustee in bankruptcy of said Washington County Co-Operative Company, and thereupon accepted said trust and qualified as such trustee, and now is the duly qualified and acting trustee in bankruptcy of said bankrupt.

X. That plaintiff, after diligent search and inquiry, is unable to find assets belonging to said bankrupt sufficient to pay the claims of creditors in said bankruptcy proceedings which have been filed and allowed therein, and which will hereafter be filed and allowed.

XI. That prior to the commencement of this action plaintiff demanded of defendants that they return and surrender to him as such trustee the money so received by them from said levy, but they refused and still refuse to do so, to plaintiff's damage $400.

Wherefore [as in § 919].

Substance of complaint in Galbraith v. Whitaker, 119 Minn. 447, 138 N. W. 772.

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GARNISHMENT

1370. Plea in abatement.

The defendant for answer to the complaint herein alleges that on 19 , before the commencement of this action, one A. B. commenced an action in the district court for county, Minnesota, against the plaintiff herein, upon a claim alleged by said A. B. to be, and which was, due and owing by plaintiff to him, amounting to $; that such proceedings were had in said action that a garnishee summons was duly issued therein and duly served upon defendant herein as garnishee therein, thereby attaching and binding all the property and money in defendant's hands or under his control belonging to plaintiff herein, the defendant in said action, and all indebtedness owing by defendant herein to plaintiff herein at the date of the service of said garnishee summons, including the claim set forth in the complaint herein, and said action is still pending and said garnishment is still in full force.

Wherefore defendant prays that all proceedings in this action be stayed until said garnishment proceedings are disposed of.

See Dunnell, Minn. Digest, § 3960.

1371. On a bond to release garnishment.

I. That on 19 , in an action [on contract] for the recovery of $, then pending in [this court] [the district for county, Minnesota], wherein this plaintiff was plaintiff and defendant A. B. herein was defendant, such proceedings were duly had that one C. D. was duly and personally served with a garnishee summons whereby all the property and money in his hands, or under his control, belonging to defendant A. B., and all indebtedness owing by him to said defendant at the date of such service, were duly attached and bound to respond to final judgment in said action.

II. That a copy of said garnishee summons, together with a notice to him stating the time, place and manner of the service of said summons on said C. D., signed by , attorney for the plaintiff in said action, and requiring him to appear and take part in the examination of said C. D., was, on 19 , ten days before the time specified in said summons for the appearance of said C. D., duly and personally served on defendant A. B.

III. That on 19 , for the purpose of releasing said garnishment, defendant, A. B., as principal, and defendants E. F. and G. H., as sureties, executed a bond as provided by G. S. 1913 § 7886, of which the following is a copy: [Copy of bond.]

IV. That said bond was duly approved by Hon. , judge of said court, who thereupon made an order discharging said garnishment and releasing the property bound thereby.

V. That on 19 , said order and bond were duly filed in said court

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and a copy of said order duly and personally served on said C. D., and said garnishment was thereupon discharged.

VI. That thereafter such proceedings were had in said action that on 19 , a judgment was duly rendered therein by said court for $, in favor of this plaintiff against defendant A. B., no part of which has been paid, [though demanded].

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 3975.

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1372. Negligent failure to shut off meter.

I. That at the times herein mentioned defendant operated a gas plant in the city of St. Paul, Minnesota, and sold gas and furnished meters for measuring the amount of gas used by its customers.

II. That on April 29, 1908, plaintiff occupied the house known as No. 293 Pleasant Avenue, in said city, and defendant maintained a gas meter in said house to measure the gas used by the occupants thereof.

III. That on said day defendant removed said meter and negligently failed to lock the gas pipe connected therewith, or to take other precautions to prevent the escape of its gas from said pipe upon the removal of the meter and thereby negligently allowed its gas to escape into the basement of said house and diffuse itself in large and dangerous quantities through the house.

IV. That in the evening of said day, plaintiff, being ignorant of the presence of gas in dangerous quantities, lighted a match in starting a fire in a stove in one of the rooms of said house, and thereupon, and through the negligence of defendant as aforesaid, a violent explosion occurred by the ignition of said gas from the fire of the match, and thereby plaintiff was [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Substance of complaint in Haas v. St. Paul Gaslight Co., 113 Minn. 379, 129 N. W. 759.

1373. For injury to trees from gas.

I. That at the times herein mentioned defendant operated a gas plant in the city of , Minnesota.

II. That at such times plaintiff owned and occupied the premises known as No. , , in said city, and owned [four] large [elm] trees, of the value of $, growing in the boulevard along the sidewalk in front of said premises.

III. That during the summer of 19 , defendant maintained and operated certain gas pipes, under the surface of the street near the roots of said trees, wherein it distributed gas from its said plant.

IV. That during said summer defendant negligently allowed gas to escape from said pipes and to diffuse itself through the earth [and the air] to the roots [and branches] of said trees, whereby said trees were killed, to plaintiff's damage $.

Wherefore [as in § 919].

Based on Gould v. Winona Gas Co., 100 Minn. 258, 111 N. W. 254.

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GUARANTY

1374. Guaranty of collection of note.

I. That on 19 , one A. B. made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That on said day defendant, for a valuable consideration, guaranteed the collection of said note by writing thereon the following words [For value received I guarantee collection of the within note and the costs thereof], subscribing his name thereto, and delivering said note so guaranteed to plaintiff.

III. That said note became due and payable as therein stated on 19 , and plaintiff on that day duly demanded payment of the said A. B., but he failed to pay the same, or any part thereof, of which default defendant was on 19 , [duly] notified by plaintiff.

IV. That on 19 , plaintiff commenced an action on said note against said A. B. in [the district court for county, Minnesota,] [this court] and on 19 , a judgment was duly rendered therein in favor of plaintiff against said A. B. for $, being the amount due on said note for principal and interest, and $ for costs and disbursements of the action.

V. That on 19 , plaintiff caused said judgment to be docketed in county, in this state, in which county said A. B. then resided.

VI. That on 19 , plaintiff caused an execution thereon to be issued out of said court, against the property of said A. B., directed to the sheriff of said county, and said execution was on 19 , returned by said sheriff wholly unsatisfied, of which fact defendant was [on 19 ,] [duly] notified.

VII. That though payment thereof has been duly demanded of defendant he has paid no part thereof.

Wherefore plaintiff demands judgment for $, and interest thereon at said rate, being the principal and interest due on said note; for $, the costs of said action against the principal and interest thereon; and for the costs of this action.

1375. Guaranty of payment of note.

I. That on 19 , one A. B. made and delivered to plaintiff his promissory note, of which the following is a copy: [Copy of note.]

II. That on said day defendant, for a valuable consideration, guaranteed the payment of said note by indorsing thereon the following words, [For value received I guarantee the payment of the within note], subscribing his name thereto, and delivering said note so guaranteed to plaintiff.

III. That though said note became due before the commencement of this action the said A. B. has not, nor has defendant, paid the same or any part thereof, and there is now due thereon $.

Wherefore [as in § 919].

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1376. Guaranty of payment for goods delivered to another.

I. That on 19 , defendant [upon the consideration therein expressed], made and delivered to plaintiff his special promise in writing to answer for the debt of one A. B., of which the following is a copy: [Copy of guaranty.]

II. That [thereupon plaintiff accepted said guaranty and notified defendant of such acceptance and] on 19 , plaintiff, in consideration of said guaranty and relying thereon, sold and delivered to the said A. B., at his request, certain merchandise on credit of months, [of the value of $] of which fact defendant was duly notified.

III. That the time of credit given said A. B. on said sale has expired, but he has not paid for said goods, or any part thereof, though payment has been demanded of him by plaintiff, of which default defendant was [on 19 ,] [duly] notified by plaintiff and payment by him demanded, but he has not paid the same or any part thereof.

Wherefore [as in § 919].

1377. Guaranty of payment of rent.

I. That on 19 , one A. B. leased from plaintiff the [describe premises], at a yearly rent of $, [payable monthly in advance].

II. That at the time of making said lease defendant, in consideration of the aforesaid leasing of said premises to said A. B., and as security for the payment of the rent thereof, made and delivered to plaintiff an agreement of which the following is a copy: [Copy of guaranty.]

III. That said A. B. entered into possession of said premises under said lease on 19 , and occupied the same until 19 .

IV. That said A. B. failed to pay the rent due thereon from 19 , to 19 , amounting to $, and on 19 , plaintiff demanded payment thereof from him but he did not pay the same, of which fact defendant was thereupon duly notified by plaintiff and requested by plaintiff to pay said amount, but no part thereof has been paid.

Wherefore [as in § 919].

1378. Guaranty of mortgage.

I. That on 19 , defendant entered into an agreement in writing with plaintiff of which the following is a copy: [Copy of guaranty.]

II. That default was made in the payment of the principal and interest of said note and mortgage when the same became due, and thereupon an action was commenced in [the district court for county, Minnesota,] [in this court] to foreclose said mortgage; that such proceedings were thereupon had in said action that on 19 , judgment was duly rendered by said court adjudging the amount due on said note and mortgage and adjudging and directing a sale of said mortgaged premises and the application of the proceeds

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thereof to the payment of the costs and disbursements of said action and the amount due plaintiff with interest thereon to the time of payment.

III. That pursuant to said judgment said premises were duly sold on 19 , by the sheriff of said county for $.

IV. That on said sale there occurred a deficiency of $, and on 19 , the clerk of said court duly issued execution on said judgment for such deficiency, directed to the sheriff of said county, who thereafter returned the same wholly unsatisfied, and said mortgagor is insolvent.

V. That on 19 , plaintiff demanded of defendant the payment of the amount of such deficiency, and at the same time tendered to him an assignment of said judgment, duly executed by plaintiff, but defendant refused to pay the same and still refuses though plaintiff is still ready and willing to deliver to defendant an assignment of said judgment upon being paid the amount due thereon.

Wherefore [as in § 919].

1379. Guaranty on release of lien.

I. That on 19 , one A. B. was indebted to plaintiff in the sum of $, then due and payable, which debt was secured by a lien on certain goods of A. B. then in plaintiff's possession.

II. That on said day defendant requested plaintiff to surrender said goods to the said A. B. and abandon his lien thereon, in consideration whereof defendant promised in writing to pay plaintiff the amount of said debt on 19 .

III. That in consideration of said promise and in reliance thereon plaintiff then and there gave up possession of said goods to said A. B. and abandoned his lien thereon.

IV. That no part of said debt has been paid.

Wherefore [as in § 919].

1380. Guaranty of precedent debt—Extension.

I. That on 19 , one A. B. was indebted to plaintiff in the sum of $, then due and payable.

II. That on said day defendant, in consideration of [an extension by plaintiff of the time of payment of said debt, from 19 , to 19 ,] [forbearance of suit by plaintiff for said debt for sixty days,] made and delivered to plaintiff an agreement of which the following is a copy: [Copy of guaranty.]

III. That plaintiff duly performed all the conditions of said agreement on his part.

IV. That no part of said debt has been paid and there is now due and payable thereon from defendant to plaintiff $.

Wherefore [as in § 919].

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1381. Departure from guaranty.

The defendant for answer to the complaint herein alleges that he did not agree to be answerable generally to plaintiff for the value of goods sold to defendant, but only for goods to an amount not exceeding $, which limit plaintiff exceeded in his alleged sale.

GUARDIAN AND WARD

1382. Allegation of appointment of general guardian.

That said A. B. is, and ever since 19 , has been, the general guardian of the person and estate of [plaintiff], duly qualified and acting as such under letters of guardianship duly issued to him on that date by the probate court for county, Minnesota.

Sustained by Patterson v. Melchior, 102 Minn. 363, 113 N. W. 902.

1383. On guardian's bond.

I. That plaintiff is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state.

II. That plaintiff is, and ever since May 28, 1886, has been, the general guardian of the person and estate of A. B., duly qualified and acting as such under letters of guardianship duly issued to it on that day by the probate court for Hennepin county, Minnesota.

III. That on Jan. 9, 1867, one C. D., the brother of said A. B., was duly appointed by said probate court as the general guardian of A. B., and duly accepted such appointment and qualified as said guardian, and thereafter until May 28, 1886, continued to be and acted as such guardian.

IV. That on Jan. 9, 1867, the said C. D., as principal, and defendants as sureties, made and delivered to the judge of said probate court their bond, of which the following is a copy: [Copy of bond.]

V. That before the appointment of plaintiff as such guardian, the said C. D. filed an account of his trust as guardian of said A. B., and said account was passed upon and allowed by said court, and by said account it appeared, and by the order allowing said account said probate court found, that there was in the hands of C. D., as such guardian, the sum of $3,068.20, and said court charged C. D. with that amount.

VI. That at or about the time of the making of said order, C. D. duly resigned his position of guardian of A. B., and was removed by order of said court; and immediately thereafter plaintiff was appointed as such guardian.

VII. That since the appointment of plaintiff as such guardian it has duly demanded of C. D. the said sum of $3,068.20, belonging to the estate of A. B.,

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but he has neglected and refused, and still neglects and refuses, to pay any part thereof to plaintiff.

VIII. That the said A. B. during all the time aforesaid was and now is of unsound mind.

IX. That on Dec. 30, 1886, in an action in this court, wherein this plaintiff, as such guardian, was plaintiff, and the said C. D. was defendant, a judgment was duly rendered by this court in favor of this plaintiff, as such guardian, against the said C. D., as said guardian, for the sum of $3,138.46, with costs, on account of moneys in his hands belonging to the estate of said A. B.

X. [Allege issue of execution on said judgment and its return unsatisfied as in § 1360.]

XI. That on Sept. 15, 1886, the judge of said probate court duly made an order authorizing plaintiff, as such guardian, to prosecute this action.

XII. That plaintiff, as such guardian, has duly demanded of said defendants that they pay to it as such guardian, the sum of $1,000, the amount of said bond, but no part thereof has been paid.

Wherefore [as in § 919].

Substance of complaint in Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. 232.

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HABEAS CORPUS

1384. General form of petition.

PETITION OF A. B. FOR A WRIT OF HABEAS CORPUS.

To the Honorable , judge of the district court for county, Minnesota:

Your petitioner, A. B., respectfully represents:

I. That he is imprisoned in the county jail of county, in the city 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 for county directed to the said , commanding him to have the body of the said A. B. before me at chambers, in the court house, 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.

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1385. For collision between pedestrian and automobile.

I. That on 19 , plaintiff was walking across a public highway known as street, near the corner of street, in the city of , Minnesota.

II. That at the same time defendant was driving [his] [an] automobile along street near where plaintiff was crossing it.

III. That defendant then and there so negligently drove and managed [1] said automobile that it struck plaintiff and knocked him down and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

[1] Under this general allegation of negligence plaintiff can prove the particulars of the negligence, as for example, excessive speed, a failure to slow down or stop, a failure to blow a horn or give other signal, or a failure to keep to the proper side of the street. See § 816, and Note, 59 L. R. A. 209–277.

1386. Same—Automobile driven by servant.

I. [As in § 1385.]

II. That at the same time a servant of defendant, in the course and scope of his employment, was driving an automobile owned by defendant along street near where plaintiff was crossing it.

III. That said servant then and there so negligently drove and managed [1] said automobile that it struck plaintiff and knocked him down and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

[1] See note to § 1385.

1387. Same—Collision with pedestrian alighting from street car.

I. That on 19 , while plaintiff was alighting from a street car at the intersection of street and street in the city of , Minnesota, defendant was driving his automobile along street in a [northerly] direction and near the point where plaintiff was alighting.

II. That defendant then and there so negligently drove and managed [1] said automobile that it struck plaintiff and knocked him down and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

[1] See note to § 1385.

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1388. Collision between automobile and motorcycle—Failure to keep to the right at intersection of streets.

I. That on 19 , plaintiff was riding a motorcycle toward the south on the west and right side of Rice street in the city of St. Paul, Minnesota, near the intersection of Rice street, which runs north and south, and Central avenue, which runs east and west.

II. That at the same time defendant was driving his automobile toward the west on Central avenue near its intersection with Rice street, and as he reached said intersection he negligently failed to have his automobile under control and negligently drove it at an excessive speed, and negligently turned it into Rice street while so driving it, at an excessive speed and without having it under control, and negligently failed to keep it to the right of the intersection of said streets, and negligently drove it at an excessive speed diagonally across to the west and left side of Rice street, and negligently failed to keep it to the right side of said street, and in consequence it collided with said motorcycle and plaintiff was thereby thrown therefrom and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Based on Molin v. Wark, 113 Minn. 190, 129 N. W. 383.

1389. Starting motor so as to frighten horse.

I. That on 19 , at about o'clock in the forenoon, plaintiff was driving a horse and carriage along a country road about miles [north] of the city of , Minnesota, and at the same time defendant, who had been driving his automobile along said road in an opposite direction, stopped it in the road and was standing in the road near it as plaintiff approached.

II. That defendant knew of plaintiff's approach, or but for the want of reasonable care on his part, would have known of it.

III. That just as plaintiff was driving past said automobile defendant, without warning plaintiff, suddenly and negligently started the motor of the automobile and thereby caused a great noise which frightened the horse which plaintiff was driving so that it ran away and plaintiff was thereby thrown from the carriage [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Based on Fischer v. McGrath, 112 Minn. 456, 128 N. W. 579.

1390. For injury from obstruction in street.

I. That shortly prior to 19 , defendant placed a large quantity of building materials in a public highway known as street, in the city of , Minnesota, and negligently left the same therein, [thereby unreasonably obstructing the street and creating a nuisance therein,] and negligently failed to place a guard or rail about them, or light near or upon them,

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or to take any other means to warn travelers of their presence in the nighttime.

II. That in consequence thereof, plaintiff, while driving an automobile along said street after dark on said day, ran into said materials and was thereby thrown from the automobile and [allege injuries and damages as in §§ 1250–1255].

III. That said automobile was the property of plaintiff, of the value of $, and was [totally destroyed] [rendered worthless] [damaged to the extent of $] by said collision.

Wherefore [as in § 919].

1391. Railroad cutting off access to lot.

I. That at the times herein mentioned plaintiff owned and occupied as his residence the premises known as No. , street, in the city of , Minnesota [including the fee to the center of said street in front of said premises, subject to a public easement therein for highway purposes].

II. That at all such times defendant owned and operated a railroad running through said city.

III. That in the month of , 19 , defendant wrongfully entered upon said street [near] [in front of] said premises and wrongfully made an excavation therein for its roadbed, feet deep and feet wide, with steep embankments, whereby said street was obstructed and rendered wholly impassable for public travel, and access to and egress from said premises by said street was completely cut off, [in the direction of said obstruction,] to plaintiff's damage $.

Wherefore [as in § 919].

See Brakken v. Minneapolis etc. Ry., 29 Minn. 41, 11 N. W. 124.

1392. Encroachment on street by abutting owner—Injunction.

I. That plaintiff is, and at the times herein mentioned was, a municipal corporation duly organized and existing under the laws of this state and particularly under chapter 4 of Special Laws 1891.

II. That there is now, and for more than twenty years last past has been, a public street and highway wholly within the limits of said city, known as Fourth street, duly dedicated to the public as a public street and highway and accepted, laid out, opened, kept in repair and used by the public as a public highway.

III. That on and before May 5, 1911, defendant owned lot 6, block 7, Holmes' addition to said city, abutting on said street.

IV. That on that day defendant built a fence on the north side of said lot.

V. That said fence is not on the true lot line of said lot but encroaches upon

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said street and incloses the following portions thereof: [Description of portion of street inclosed.]

VI. That defendant claims that said fence is on the true line of his said lot and has announced that he will maintain said fence and will build a porch and other permanent structures on said inclosed portion of said street, whereby said street will be reduced in width sixteen feet and rendered less convenient for public use and be in a dangerous condition.

VII. That unless restrained by order of this court defendant will maintain said fence and build said permanent structures and plaintiff is without adequate remedy at law.

Wherefore plaintiff demands judgment permanently enjoining defendant from maintaining said fence or building said structures or otherwise interfering with the rights of the public in said street and directing him to remove said fence; and for such other relief as may be just, with costs.

Substance of complaint sustained on demurrer in Jordan v. Leonard, 119 Minn. 162, 137 N. W. 740.

1393. Action by town for obstruction of road—Injunction.

I. That plaintiff is, and at the times herein mentioned was, a town of this state duly organized and existing as a public corporation under the laws thereof.

II. That defendant is, and for more than [ten] years last past has been, the owner in fee and in possession of [describe premises].

III. That there is now, and for more than [ten] years last past has been, a public road and highway running through said premises; that said road has been duly laid out and kept in repair by public authority, and traveled by the public, as and for a public highway for more than six years continuously and immediately prior to 19 , to the knowledge of defendant.

IV. That on 19 , defendant wrongfully entered upon said highway where the same crosses his said land and then and there built an obstruction thereon consisting of a fence feet high and feet long, so as to obstruct and prevent public travel thereon.

V. That on 19 , plaintiff removed said obstruction but shortly thereafter defendant wrongfully renewed it.

VI. That defendant threatens to and will, unless restrained by order of this court, maintain said obstruction, and plaintiff is without adequate remedy at law.

VII. That plaintiff necessarily expended $ in removing said original obstruction and in repairs on said road rendered necessary by said obstruction.

Wherefore plaintiff demands judgment permanently enjoining defendant from maintaining and erecting said obstruction, or any obstruction, on said road and directing him to remove the same; for $ damages; and for such other relief as may be just, with costs.

Based on Hutchinson v. Filk, 44 Minn. 536, 47 N. W. 255.

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1394. Tunnel of street railway—Injury to abutting owner.

I. That at the times herein mentioned defendant owned and operated an electric street railway in and upon the streets of the city of St. Paul, Minnesota.

II. That at all such times plaintiff was and still is the owner of [description of land].

III. That Third street, Selby, Dayton and Pleasant avenues are public streets in said city, duly dedicated and accepted by the public; that Third street is a business thoroughfare and for many years last past has been and still is used for business purposes along the whole line thereof to Pleasant avenue; that Pleasant avenue is a residence street and crosses Third street at plaintiff's said property; that Selby avenue is both a residence and business street and commences at Third street and runs thence in a westerly direction.

IV. That plaintiff's said property is situated at the northwesterly corner of Third street and Pleasant avenue and has a frontage on the southwesterly side of Third street of sixty-three feet and a depth along Pleasant avenue of one hundred and forty-three feet.

V. That plaintiff's said property is improved with buildings, now and for some years used for residence purposes, and is located at a prominent corner in said city, and by reason of its location on Third street is well adapted for use as business property, and is of great value by reason of its location on said business street.

VI. That along the southwesterly side of Third street and running past plaintiff's said property there has existed for many years a sidewalk which has afforded convenient access to and from plaintiff's said property, for a large number of pedestrians coming and going from and to that part of said city lying to the north and northwest of plaintiff's said property; that said sidewalk extends from Pleasant avenue, and the streets lying to the south and east of Pleasant avenue, and along Third street past plaintiff's said property to the south side of Selby avenue, and along the south side of said avenue for many miles beyond Third street, and across Selby avenue and thence along the southwesterly side of Third street to Dayton avenue, and thence along the south side of Dayton avenue westerly from Third street.

VII. That prior to the acts of defendant herein complained of, the said sidewalks along Selby avenue and along the southwesterly side of Third street and along Dayton avenue, were extensively traveled by the residents of the western part of said city, and prior to said acts a large number of said residents were in the habit of passing plaintiff's said property on said sidewalk, in coming to and from their homes and places of business, and Third street in front of plaintiff's said property was also extensively used by those driving to and from their homes and places of business, and by reason of said extensive travel upon said sidewalk and street in front of plaintiff's said property the value thereof was largely increased and it was rendered peculiarly adapted to business purposes.

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VIII. That for many years last past defendant has operated and maintained one of its lines of street railway along Third street past plaintiff's said property and along Selby avenue; that in the autumn of 1906 defendant commenced and has now completed the construction of a tunnel, partly open and partly covered, along Selby avenue, and westward for about 1,500 feet to Nina avenue in said city; that the open part of said tunnel projects into Third street to the extent of about one-third of the width thereof, and crosses the sidewalk on Third street and is adjacent to and distant from plaintiff's said property about seventy-five feet; that said open tunnel is of sufficient width to accommodate two street car tracks and is sunk below the grade of Selby avenue and Third street at the point where the same intersect and below the said sidewalk along the southwesterly side of Third street; that said open tunnel is provided with high iron fences running across said sidewalk and projecting into Third street as aforesaid.

IX. That said open and covered tunnel is an improvement of great magnitude, and as plaintiff is informed and believes, cost about $300,000; that it is permanent in character and cannot be altered or changed without abandonment of the whole of said improvement; that said tunnel, where it crosses the said sidewalk on Third street and the part thereof projecting into said Third street, are essential parts of said improvement, and by reason of the nature of the grade at said point are permanent and cannot be changed or altered.

X. That the construction and maintenance of said open tunnel across said sidewalk and into Third street as aforesaid and across and along Selby avenue, have wholly prevented and obstructed access to and from plaintiff's said property along said sidewalk on the southwesterly side of Third street and the south side of Selby and Dayton avenues, and have materially obstructed access to and from plaintiff's said property along the paved part of Third street, and have diverted from plaintiff's said property all said travel of pedestrians and those driving on Third street.

XI. That by reason of the premises said property of plaintiff has been lessened in value to the extent of $3,000, to plaintiff's damage in that amount.

Wherefore [as in § 919].

Substance of complaint in Fitzer v. St. Paul City Ry., 105 Minn. 221, 117 N. W. 434.

1395. Removal of fence on highway—Justification by highway officer.

I. That at the time alleged in the complaint, and for a long time prior thereto, and ever since said time, there was and still is a road duly laid out, established, kept in repair and maintained as a public highway along, over and across the lands mentioned in the complaint.

II. That defendant was at the time mentioned in the complaint, and for a long time prior thereto had been and now is, the assistant road inspector, in and for the town of Runeberg, in which town said lands are located.

III. That prior to said date plaintiff wrongfully erected a fence in and upon

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said road thereby obstructing the same so that without taking down and removing the fence, the road could not be traveled and used as a public highway.

IV. That prior to that time plaintiff was duly notified and directed by the board of supervisors of said town to remove said fence from said highway so as not to obstruct and impede the free use thereof, but plaintiff disregarded the same.

V. That on May 26, 1908, the defendant, acting in his official capacity as such road inspector, and under and by direction of the board of supervisors of said town of Runeberg, entered in and upon said road, and, in order to remove said obstructions so placed there by plaintiff, took down and removed the said fence of plaintiff, doing no unnecessary damage to the same, as he had a full right to do, which are the acts of which plaintiff complains.

Substance of answer in Danielson v. Kyllonen, 111 Minn. 47, 126 N. W. 404.

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HUSBAND AND WIFE

1396. Complaint by husband for injury to wife.

I. That at the times herein mentioned one A. B. was and still is the wife of plaintiff, living with him as such and keeping house with him, and prior to the accident hereinafter mentioned she did all the household work in such housekeeping, without the aid of servants.

II. [Allege cause of action against defendant for injury to wife and allege injuries to wife as in §§ 1250–1255.]

III. That in consequence of said injuries to said A. B. plaintiff necessarily [paid] [incurred an expense amounting to] $, for medical attendance, nursing, hospital fees and medicines, in endeavoring to cure said A. B. of said injuries.

IV. That in consequence of said injuries plaintiff's said wife has ever since been unable to perform her domestic duties, which she had theretofore performed for plaintiff, and plaintiff has necessarily employed [a servant] [servants] to perform domestic services for him theretofore performed by his said wife and has incurred an expense therefor amounting to $.

V. That in consequence of said injuries plaintiff has been deprived of the services of his said wife, and his comfort and happiness in her society and companionship have been impaired, and, as plaintiff is informed and believes, such deprivation and impairment will long continue.

VI. That by reason of the premises plaintiff has been damaged $.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 4296, and Stone v. Evans, 32 Minn. 243, 20 N. W. 149.

1397. Same—Death of wife.

I. That at the times herein mentioned and for many years prior thereto one A. B. was the wife of plaintiff, living with him as such, and keeping house with him, and prior to the accident hereinafter mentioned she did [all] the household work in such housekeeping [without the aid of servants].

II. [Allege cause of action against defendant for injury to wife and allege her injuries as in §§ 1250–1255.]

III. That in consequence of said injuries the said A. B. died on 19 , but prior to her death plaintiff necessarily [paid] [incurred an expense amounting to] $, for medical attendance, nursing, hospital fees and medicines, in endeavoring to cure her of said injuries.

IV. That from the time of said accident to her death the said A. B. was unable to perform her household duties, which she had theretofore performed for plaintiff, and plaintiff during said period necessarily employed [a servant]

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[servants] to perform domestic services for him theretofore performed by his said wife and [paid] [incurred an expense amounting to] $ therefor.

V. That in consequence of said injuries plaintiff was deprived of the services of his said wife and his comfort and happiness in her society.

VI. That by reason of the premises plaintiff has been damaged $.

Wherefore [as in § 919].

Based on Mageau v. Great Northern Ry., 103 Minn. 290, 115 N. W. 651, 946.

1398. Alienation of husband's affections.

I. That on 19 , at , plaintiff was married to one A. B. and they have ever since been and now are husband and wife.

II. That while plaintiff was living with said A. B. as his wife, enjoying his society, affection, protection and support, defendant, well knowing that plaintiff and said A. B. were husband and wife, wilfully and maliciously alienated the affections of said A. B. from plaintiff, and induced him to desert plaintiff on 19 , and thereby deprived plaintiff of the society, affection, protection and support of her husband, and caused plaintiff great distress of mind, to her damage $.

Wherefore [as in § 919].

1399. Alienation of wife's affection—Enticement.

I. [As I. in § 1398.]

II. That while plaintiff was living with said A. B., as her husband, enjoying her society, affection and services, defendant, well knowing that said A. B. was plaintiff's wife, wilfully and maliciously alienated the affections of said A. B. from plaintiff [and induced her to desert plaintiff on 19 ,] [and on 19 ,] [enticed her away from] [induced her to leave plaintiff's and her then residence at , to a separate residence at , and has ever since detained and harbored her there against the consent of plaintiff and his efforts to persuade her to return to his residence,] and has thereby deprived plaintiff of her society, affection and services, and caused plaintiff great distress of mind, to his damage $.

Wherefore [as in § 919].

1400. By deserted wife barring husband from interest in her realty, and for support.

For a first cause of action:

I. That plaintiff and defendant were married in Baytown, Washington county, Minnesota, on June 24, 1884, and ever since have been and now are husband and wife.

II. That plaintiff is forty-four years of age and defendant is forty-eight years of age.

III. That both plaintiff and defendant are residents of said county and have

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resided therein for more than five years immediately preceding the commencement of this action.

IV. That there is living, the issue of said marriage, one son, A. B., eighteen years of age.

V. That in the year 1897 defendant wilfully deserted plaintiff and has ever since uninterruptedly continued said desertion, and wholly failed to support plaintiff and the said A. B., except that he has occasionaly given the said A. B. small sums of money, not exceeding in the aggregate $531.25.

VI. That defendant has a monthly income of $125.

VII. That $50 a month would be a reasonable amount for defendant to pay to plaintiff for the support of herself and said A. B.

For a second cause of action:

I. The plaintiff repeats and realleges as a part of this cause of action, all the allegations in the first five paragraphs of the above first cause of action, and further alleges,

II. That plaintiff is the owner of certain real estate and she desires to be able to sell, convey or dispose of the same, and any other real estate that she may hereafter own, as freely as if she were unmarried and without the signature or interference of her said husband, the defendant herein, and she brings this action under the provisions of G. S. 1913 § 7148.

Wherefore plaintiff demands judgment that defendant pay to her $50 per month for the support of herself and the said A. B.; barring defendant from any estate or interest, by reason of said marriage or otherwise, in the real estate which plaintiff may at any time own, and authorizing plaintiff to sell, convey, alien or dispose of her real estate without the signature or interference of defendant, and as freely and fully as if she were unmarried; that defendant pay to plaintiff $ for her counsel fees and other expenses of this action; and that plaintiff have such other relief as may be just, with costs.

Substance of complaint in Stephen v. Stephen, 102 Minn. 301, 113 N. W. 913. See also complaint in Giles v. Giles, 22 Minn. 348.

1401. For support of minor—Action by divorced wife.

I. That plaintiff and defendant were married on 19 , and on 19 , a son was born to them.

II. That on 19 , defendant deserted plaintiff and his said child and has ever since uninterruptedly maintained such desertion and wholly failed to provide for the support of said child.

III. That on 19 , a judgment was duly rendered by the district court for county, Minnesota, divorcing plaintiff from defendant and awarding to plaintiff the custody of such child.

IV. That ever since such desertion plaintiff has supported such child and has necessarily expended for such purpose the reasonable sum of $ for things which were necessaries for such child and of a character suited to his position in life.

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V. That no part thereof has been repaid to plaintiff by defendant though demanded.

Wherefore [as in § 919].

Based on Spencer v. Spencer, 97 Minn. 56, 105 N. W. 483.

1402. Against husband and wife for household supplies.

I. That [on 19 ,] [between 19 , and 19 ,] plaintiff furnished defendants, at their request, certain necessary household [articles and] supplies, [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That defendants were then living together as husband and wife and said goods were used by them in the family as household supplies [articles].

III. [That the reasonable value thereof was $.] [That defendant A. B. promised to pay plaintiff therefor $.]

IV. [That on 19 , plaintiff notified defendant C. D. that defendant A. B. had failed to pay for said supplies and demanded payment thereof from her.]

V. That no part thereof has been paid.

Wherefore [as in § 919].

R. L. 1905 § 3608; G. S. 1913 § 7146.

1403. For value of necessaries furnished wife.

I. That [on 19 ,] [between 19 , and 19 ,] plaintiff furnished to A. B., the wife of defendant, at her request, certain articles, necessaries for her use, [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That defendant neglected to supply her with said necessaries, or any of them.

III. That the reasonable value thereof was $.

IV. That on 19 , plaintiff demanded payment thereof from defendant, but no part thereof has been paid.

Wherefore [as in § 919].

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INDEMNITY

1404. Common count.

[See form of complaint under § 1591.]

1405. Surety on bond against principal.

I. That on 19 , defendant, in consideration that plaintiff would become surety for him, by executing a bond, of which a copy is hereto attached, marked Exhibit A, and made a part hereof, agreed with plaintiff that he would indemnify him, and save him harmless from and against all damages, costs, and charges which he might sustain by reason of his becoming surety as aforesaid.

II. That thereafter plaintiff, relying on said agreement, executed said bond.

III. That defendant did not indemnify plaintiff nor save him harmless from such damages, costs or charges; but, on the contrary, plaintiff, under a judgment duly rendered against him on 19 , by [this court,] [the district court for county, Minnesota,] in an action brought against him on said bond by A. B., the obligee therein named, was compelled to pay and did pay on 19 , $ in satisfaction and discharge of said judgment, and also necessary attorney's fees, costs and expenses in defending said action and on account of said bond to the amount of $.

IV. [That on 19 , immediately upon being served with summons therein, plaintiff gave defendant herein written notice of the pendency of said action and requested him to appear and defend the same.][1]

V. That plaintiff duly performed all the conditions of said agreement on his part.

VI. That on 19 , plaintiff demanded from defendant repayment of said amounts, aggregating $, with interest from [19 ,] [the time of their respective payments,] but no part thereof has been paid.

Wherefore [as in § 919].

[1] See Dunnell, Minn. Digest, § 5176; Henderson v. Eckern, 115 Minn. 410, 132 N. W. 715.

1406. By retiring partner.

I. That on 19 , plaintiff and defendant, being partners in business under the firm name of , dissolved said partnership, and mutually agreed that defendant should take and keep all the partnership property, pay all debts of the firm, and indemnify plaintiff against all claims that might be made upon him on account of any indebtedness of said firm.

II. That plaintiff duly performed all the conditions of said agreement on his part.

III. That on 19 , in an action by one A. B. against plaintiff and

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defendant on a debt due from said firm, a judgment was duly rendered by [this court,] [the district court for county, Minnesota,] against plaintiff and defendant for $, in favor of said A. B., and on 19 , plaintiff necessarily paid $ in satisfaction [of the same] [of an execution issued on said judgment].

IV. That defendant has has not repaid any part thereof to plaintiff.

Wherefore [as in § 919].

Based on Form 144, Conn. Pr. Act. See Dunham v. Johnson, 85 Minn. 268, 88 N. W. 737.

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1407. Allegation of appointment of guardian ad litem.

I. That plaintiff is a minor, between [fourteen] and [fifteen] years of age.

II. [That on 19 , said A. B. was, by an order of this court, duly appointed the guardian of plaintiff for the purposes of this action, and on that day duly filed his consent to such appointment with the clerk of this court.] [That on 19 , said A. B. was duly appointed general guardian of the person and estate of plaintiff by the probate court for county, Minnesota, and thereupon the said A. B. duly qualified and entered upon the duties of and now is such guardian.]

1408. Plea of infancy.

The defendant for answer to the complaint herein alleges that at the time [of making the agreement] [of the delivery of the goods] alleged in the complaint defendant was a minor, between [fourteen] and [fifteen] years of age.

1409. Infancy of plaintiff—No guardian.

The defendant for answer to the complaint herein alleges that when this action was brought the plaintiff was and still is under the age of twenty-one years, and has no guardian appointed or acting herein.

1410. Against infant for necessaries.

I. That defendant is a minor, between [fourteen and fifteen] years of age.

II. That between 19 , and 19 , plaintiff furnished defendant, at his request, board and lodging at .

III. That said board and lodging were necessaries for defendant and of a character suited to his position in life.

IV. That the reasonable value thereof was $.

V. That no part thereof has been paid.

Wherefore [as in § 919].

Sustained by Goodman v. Alexander, 165 N. Y. 289, 59 N. E. 145.

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1411. Trespass to realty—Quarrying stone in street.

I. That for two years last past plaintiff has been and now is the owner in fee of [description of lot including the fee to the center of the street as in § 1391].

II. That there is on said land a large and valuable quarry of building stone which is the property of plaintiff.

III. That at divers times during the last ten days defendant has wrongfully entered upon said land with a large force of men, his servants, and quarried and removed large quantities of stone therefrom, and converted the same to his own use.

IV. That to-day, Aug. 28, 1883, defendant has again wrongfully entered upon said land, and is now thereon with a large force of men, his servants, and is so quarrying, removing and converting large quantities of stone therefrom, and threatens to, and will unless restrained by the order of this court, continue indefinitely to so quarry, remove and convert stone from said land and exhaust said quarry.

V. That defendant has already quarried, removed and converted stone from said quarry to the value of $100, to plaintiff's damage in that amount.

VI. That defendant has now quarried from said quarry and piled on said land stone of the value of $50, which he threatens to, and will unless restrained by the order of this court, remove and convert to his own use.

VII. That plaintiff is a stone mason by trade and working at his trade in said city, and quarrying stone therein, and resides on said land; that said quarry of building stone, by reason of its situation and plaintiff's trade, is peculiarly valuable to him and worth more to him than its market value; that the value of said land is due almost wholly to said quarry.

VIII. That plaintiff has no adequate remedy at law against said wrongful acts of defendant, and unless an injunction is granted as herein prayed plaintiff will suffer irreparable injury and be forced to resort to a multiplicity of actions.

Wherefore plaintiff demands judgment permanently enjoining defendant, and all persons acting under him, from quarrying and removing any more stone from said land, and from removing any of the stone now quarried from and piled upon said land; for a temporary injunction restraining defendant as aforesaid, and all persons acting under him, during the pendency of this action; for $100 damages; and for such other relief as may be just, with costs.

Substance of complaint in Althen v. Kelly, 32 Minn. 280, 20 N. W. 188.

1412. Trespass to realty—Threatening to crop land of another and interfering with his tenants.

I. That at the times herein mentioned plaintiff was, and still is, the owner in fee of [description of premises].

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II. That on March 10, 1900, plaintiff leased to one A. B., a son of defendant, all of said premises, except the dwelling house thereon and a small quantity of land about the house, for the term of one year from that date.

III. That at the times herein mentioned plaintiff has been entitled to the immediate possession of said premises except for said lease, and since the expiration of said lease on March 10, 1901, plaintiff has been entitled to the immediate, and exclusive possession of said premises, and has been and now is in such possession thereof.

IV. That notwithstanding plaintiff's possession and right to possession of said premises, the defendant has repeatedly and publicly threatened to this plaintiff and to others, that he will go upon said land and invade plaintiff's possession of the same, and that it is his intention to seed and cultivate said land during this season and to harvest the crops therefrom, and that he intends to prevent plaintiff from cultivating, seeding or working said land, and to prevent him from putting in or harvesting any crops thereon, and that it is his intention to prevent any one other than himself from putting in, working or harvesting any crops on said land.

V. That defendant has already carried out a portion of said threats.

VI. That during the autumn of 1900, and while plaintiff was in possession of said land by and through his tenant, the said A. B., the defendant, without the knowledge or consent of plaintiff, wrongfully broke and entered upon said premises and plowed the same; that on March 11, 1901, and after the expiration of said lease, the defendant, without the knowledge or consent of plaintiff, wrongfully broke and entered upon said premises and trespassed thereon by storing thereon certain corn and grain that he had, as this plaintiff is informed and believes, bought from the said A. B.; that on March 12, 1901, the defendant, without the knowledge or consent of plaintiff, wrongfully broke and entered upon said premises and hauled and placed certain machinery thereon, and left the same standing thereon; that on March 13, 1901, the defendant, without the knowledge or consent of plaintiff, wrongfully broke and entered upon said premises and trespassed thereon by taking upon said premises certain machinery and placing the same in the buildings or granaries thereon.

VII. That plaintiff does not reside on said premises, and the dwelling house, suitable grounds about the same, and a garden spot near said house reserved from the above described lease to the said A. B., were during said time and now are leased by plaintiff to one C. D., who, during said time did, and now does, reside there, and is now in possession of the same as the tenant of plaintiff.

VIII. That it is the desire of plaintiff to again rent that portion of said premises heretofore leased to the said A. B., and plaintiff has had repeated opportunities to so lease the same, but has been unable to do so on account of said threats of defendant; that defendant resides just across the road from said premises, and plaintiff could not prevent said threatened trespasses without remaining upon said premises continually and maintaining there a number of persons for the purpose of repelling said trespasses by force.

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IX. That unless restrained by the order of this court, defendant will carry out said threats, and will continue in the future as in the past to make repeated trespasses upon said land and to interfere with the plaintiff's possession thereof, and by reason of said trespasses and threats, it will be impossible for plaintiff to lease said premises for the ensuing year, and they will necessarily remain idle and without cultivation during the ensuing year, to their great injury.

X. That plaintiff has no adequate remedy at law against said wrongful acts of defendnt, and unless an injunction is granted as herein prayed, plaintiff will suffer irreparable injury and be forced to resort to a multiplicity of actions.

Wherefore plaintiff demands judgment permanently enjoining defendant, and all persons acting under him, from trespassing upon said premises or carrying out any of said threats; for a temporary injunction restraining defendant as aforesaid, and all persons acting under him, during the pendency of this action; and for such other relief as may be just, with costs.

Substance of complaint in Colliton v. Oxborough, 86 Minn. 361, 90 N. W. 793.

1413. Against unnecessary cutting of trees in a street by municipal authorities.

I. That the defendant, the village of White Bear, now is and for many years last past has been a municipal corporation, duly organized, and existing under the general laws of this state.

II. That the defendant A. B. is the president of said village, the defendant C. D. is the recorder of said village; and said defendants, together with the defendants E. F., G. H. and I. J., constitute the council of said village; that the defendant K. L. is the street commissioner of said village.

III. That plaintiff owns and occupies as his homestead the [description of premises].

IV. That said premises, for a distance of ninety-five feet front upon and overlook a lake known as White Bear Lake, which is a large body of pure, clear spring water, covering an area of upwards of 2,400 acres of land.

V. That on said premises, and next to and fronting upon said lake, is a grove of oak trees that has been growing thereon for more than fifty years.

VI. That said premises are valuable for residence purposes only, and plaintiff uses and occupies the same as his homestead and for that purpose has erected thereon a dwelling house of the value of at least $3,000, and has improved said premises by the planting of trees and shrubbery thereon, and has made other improvements thereon, and said premises are worth at least $5,000.

VII. That said premises would be worth at least $1,000 less without said trees than with them.

VIII. That if said trees are destroyed they could not be replaced by means of any reasonable expenditure of money within at least thirty years.

IX. That the defendants threaten to, and will unless restrained by this

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court, enter upon said premises and cut and destroy and remove said trees, and to that end have directed and instructed the defendant K. L. to enter upon said premises and cut, destroy, and remove said trees, and defendant K. L., acting in behalf of said other defendants, threatens, intends and will do so at once unless restrained by this court.

X. That if defendants are permitted to carry out their said intentions this plaintiff will suffer irreparable damage and be without any adequate remedy in law.

Wherefore plaintiff demands judgment permanently enjoining defendants, and all persons acting under them, from cutting down, removing or in any way interfering with said trees; for a temporary injunction restraining defendants as aforesaid, and all persons acting under them, during the pendency of this action; and for such other relief as may be just, with costs.

Injunction granted under this complaint in West v. White Bear, 107 Minn. 237, 119 N. W. 1064.

1414. Against continuing in business after selling out.

I. That on 19 , defendant, being a physician practicing in the city of , and its vicinity, in consideration that plaintiff, who was also a physician, would purchase of him the good-will of his practice, for $, agreed with plaintiff that he would not practice medicine, or in any manner do business as a physician in said city or the vicinity thereof, at any time after said day.

II. That plaintiff accordingly, on said day, purchased from defendant the good-will of his said practice, for the price and on the terms aforesaid, and paid to defendant said sum therefor.

III. That plaintiff thereupon opened and has since maintained an office in said city as a practicing physician.

IV. That defendant, in violation of his said agreement, on 19 , opened an office in said city, and commenced and still continues to practice medicine, and do business as a physician in said city and the vicinity.

V. That by reason thereof plaintiff has been damaged $.

VI. That plaintiff has duly performed all the conditions of said agreement on his part.

Wherefore plaintiff demands judgment permanently enjoining defendant from continuing said practice, and for $ damages, with costs.

Based on Form 137, Conn. Pr. Act.

1415. Same—Another form.

I. That prior to Dec. 21, 1906, defendants had established and for several years conducted in the city of Northfield, Minnesota, a steam laundry under the partnership name of A. and B., the said business being known also as the Northfield Steam Laundry; that on that date they were carrying on said busi-

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ness, using all the property hereinafter mentioned therein, and were enjoying a large and profitable trade in and about said city.

II. That on Dec. 21, 1906, plaintiffs and defendants entered into a written contract, of which the following is a copy: [Copy of contract.]

III. That plaintiffs paid to defendants all the moneys stipulated in said agreement to be paid by them, and in all other respects duly performed all the conditions of said agreement on their part.

IV. That plaintiffs received possession of said property from defendants and commenced to operate the same as a laundry business on Dec. 31, 1906, in accordance with the terms of said agreement, and they have ever since continued to do so and are now operating the same.

V. That notwithstanding said sale by defendants of the good-will of their said business and their agreement not to engage in the laundry business within a radius of five miles from said city, they thereafter solicited, encouraged and assisted in the creation of a corporation for the purpose of doing a laundry business in said city, and encouraged, assisted in and caused the organization of a corporation known as the Co-Operative Laundry Company of Northfield; that through the aid and efforts of defendants and at great expense the said Co-Operative Laundry Company has established a plant in said city, equipped with all necessary machinery to do laundry business, intending to do laundry business therein indefinitely, and has been and is now conducting a laundry business in said city and vicinity, and has solicited the laundry trade of said city, and the customers of plaintiffs for their laundry trade, and intends to do so indefinitely.

VI. That defendants have become and are stockholders in said Co-Operative Laundry Company, the defendant A. owning and holding stock in his own name therein, and the defendant B. owning stock therein which is held for him in the names C. and D. or some other persons to plaintiff unknown; that defendant A. is one of the principal managers of said corporation and solicits trade for and supervises the operation of said business and defendant B. participates in the management of said business.

VII. That defendants are experienced in the said laundry business and know the customers of plaintiffs' said laundry, and the people of said city who would patronize a laundry, and by and through the said laundry business so established and being carried on by said corporation, they have interfered with and taken away from plaintiffs a large part of their custom, have destroyed the good-will of the business so purchased by plaintiffs from them, and have depreciated the value of plaintiffs' said property.

VIII. That by reason of the premises plaintiffs have been damaged $5,000.

Wherefore plaintiffs demand judgment permanently enjoining defendants from engaging in the laundry business within a radius of five miles from the city of Northfield, either individually or by and through said Co-Operative Laundry Company, and from holding or owning stock in said company, and from acting for said company as foreman, solicitor or manager, or in any other

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capacity intended or calculated to get laundry business in said city away from plaintiffs' said laundry to said company; for $5,000 damages; and for such other relief as may be just, with costs.

Substance of complaint sustained on demurrer in Southworth v. Davison, 106 Minn. 119, 118 N. W. 363.

1416. On injunction bond.

I. That on 19 , in an action brought by A. B., one of the defendants herein, against this plaintiff, a writ of injunction duly issued out of [this court] [the district court for county, Minnesota,] was duly served on this plaintiff whereby he was enjoined from [state acts enjoined].

II. That before said writ issued, and for the purpose of securing its issue, the defendants herein made and filed in said court, pursuant to G. S. 1913 § 7891, a bond to plaintiff herein, of which the following is a copy: [Copy of bond with acknowledgment, justification and approval.]

III. That on 19 , [it was finally decided by said court] [judgment was duly given by said court in said action adjudging] that the said A. B. was not entitled to the said writ and the same was vacated.

IV. That the damages sustained by this plaintiff by reason of said injunction amounted to the sum of $, and interest thereon from 19 , which said court on that day determined and awarded to this plaintiff, but no part thereof has been paid.

Wherefore [as in § 919].

See § 683, and Dunnell, Minn. Digest, § 4499.

1417. Same—Special damages.

That at the time said writ was issued plaintiff was engaged in [state nature of business and how it was injured or state other facts showing special damages], to plaintiff's damage $; and plaintiff necessarily spent $ attorney's fees in securing the dissolution of said writ, all to plaintiff's damage $, no part of which has been paid.

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1418. Against innkeeper for loss of goods by theft.

I. That at the times herein mentioned defendant was an innkeeper, and in the city of kept a common inn or hotel, known as the [Astor House].

II. That on 19 , defendant as such innkeeper received plaintiff, as and being a traveler, into said hotel as a transient guest therein, together with a trunk of plaintiff's containing among other things certain [describe articles stolen], the property of plaintiff, of the value of $.

III. That while plaintiff was remaining in said hotel, with his said trunk, as such guest, [defendant negligently failed to exercise due care to keep said trunk and goods safely and securely, and by reason thereof] said trunk was broken into and said articles were wrongfully taken and carried away by some person to the plaintiff unknown, whereby they were lost to plaintiff, to his damage $.

Wherefore [as in § 919].

1419. Against innkeeper for refusal to lodge.

I. [As I. in § 1418.]

II. That on 19 , plaintiff, as and being a traveler, entered said hotel and requested defendant to receive and lodge him as a guest therein during the night of that day.

III. That plaintiff was ready and willing and offered to pay defendant his reasonable charges for such lodging.

IV. That defendant refused to receive and lodge plaintiff as a guest for that night [though he had room to accommodate him].

V. That by reason thereof plaintiff was obliged to travel miles to procure a lodging elsewhere and to spend $ for a conveyance for such purpose [allege any other special damage], all to his damage $.

Wherefore [as in § 919].

1420. Denial of negligence—Contributory negligence—Statute.

The defendant for answer to the complaint herein:

I. For a first defence denies [each and every allegation in the (third) paragraph thereof] [that he negligently failed to exercise due care to keep said trunk and goods safely and securely] [that said loss was due to the negligence of defendant, his agents or servants].

II. For a second defence defendant alleges that at the times mentioned in the complaint he provided in said hotel an iron safe suitable for the keeping of valuables, and kept posted conspicuously in the office of said hotel and on the inside of the entrance door to every bedroom thereof, including the bedroom wherein said trunk was deposited, and to every parlor and other public

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room thereof, a notice to the guests thereof that they might leave their money and other valuables with the proprietor for deposit in said safe; and defendant also provided locks and bolts for all the rooms of said hotel including the one in which said trunk was deposited; that plaintiff neglected to deposit [said money and jewelry] in said safe, and neglected to lock [or] [and] bolt the door of the room wherein said trunk was deposited, and by reason of such neglect of plaintiff said loss occurred.

See G. S. 1913 § 6080.

INSANE PERSONS

1421. Insanity of defendant.

The defendant for answer to the complaint herein alleges that at the time of [making the supposed agreement] [executing the supposed deed] mentioned in the complaint, defendant was of unsound mind and thereby incapable of making [executing] and understanding the same, as plaintiff then well knew.

1422. Reply to answer alleging insanity.

The plaintiff for reply to the answer herein alleges that before this action was commenced defendant was restored to soundness of mind and thereafter ratified and confirmed said [agreement] [deed].

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1423. Complaint by wife on life policy of husband.

I. That on 19 , defendant, [in consideration of the payment to it of a premium of $, and of a like sum, to be paid to it by him annually during his life,] [for a valuable consideration,] made and delivered to one A. B. its policy of insurance, [and thereby insured the life of said A. B. in the sum of $, payable to plaintiff within (sixty) days after notice and proof of the death of said A. B.] [of which the following is a copy: (Copy of policy)].

II. That said A. B. died on 19 , while said policy was in full force and effect, in the city of , Minnesota.

III. That plaintiff was the wife of said A. B. when said policy was issued to him and at the time of his death.

IV. That up to the time of the death of said A. B. all premiums which accrued on said policy were duly paid by him at the time they accrued, and in all other respects he duly performed all the conditions of said policy on his part.

V. That on 19 , and more than [sixty] days before this action was brought, plaintiff duly gave defendant notice and proof of the death of said A. B., as provided in said policy, and in all other respects has duly performed all the conditions of said policy on her part.

VI. [That no part of said insurance has been paid.] [That on 19 , plaintiff demanded payment of said insurance from defendant, but no part thereof has been paid.]

Wherefore [as in § 919].

See § 684.

1424. Complaint by executor or administrator.

I. That on 19 , defendant, in consideration of the payment to it of a premium of $, and of a like sum, to be paid to it by him annually during his life, made and delivered to one A. B. its policy of insurance, [and thereby insured the life of said A. B. in the sum of , payable to the executors, administrators or assigns of said A. B., within (sixty) days after notice and proof of the death of said A. B.] [of which the following is a copy: (Copy of policy)].

II. That on 19 , while said policy was in full force and effect, in the city of , Minnesota, said A. B. died [allege appointment of plaintiff as administrator or executor as in §§ 1314, 1316].

III. [As IV. in § 1423.]

IV. [As V. in § 1423, changing "her" to "his."]

V. That on 19 , plaintiff, as such [administrator], [executor], de-

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manded payment of said insurance from defendant, but no part thereof has been paid.

Wherefore plaintiff, as such [administrator] [executor] demands judgment [as in § 919].

1425. On accident policy for injury resulting in death.

I. That on Oct. 17, 1908, defendant, for a valuable consideration, made and delivered to one A. B., a brother of plaintiff, its policy of insurance, of which the following is a copy: [Copy of policy.]

II. That on July 4, 1910, while said policy was in full force and effect, said A. B. sustained injuries in the city of Duluth, Minnesota, by falling and injuring his head, by reason of which he died on July 7, 1910.

III. That within ten days after the date of the death of said A. B., plaintiff notified defendant of the injuries and death of said A. B., and requested defendant to pay to plaintiff said sum of $330, but no part thereof has been paid.

IV. That said A. B. and plaintiff each duly performed all the conditions of said policy, on his part.

Wherefore [as in § 919].

Substance of complaint in James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582.

1426. On a mutual benefit certificate.

I. That at the times herein mentioned defendant was and still is a [mutual benefit] [society] [association] [fraternal order] duly organized and existing under the laws of the state of [New York], and engaged in the business of insuring the lives of its members on the mutual or assessment plan.

II. That on 19 , one A. B. was received into said [society] [association] as a member thereof, and remained a member thereof in good standing until his death.

III. That at the time said A. B. became such member defendant, for a valuable consideration, made and delivered to him its [beneficiary] certificate, of which the following is a copy: [Copy of certificate.]

IV. That while said A. B. was such member and until his death he duly complied with all the conditions of said certificate and of the constitution and by-laws of defendant on his part.

V. That on 19 , and while said certificate was in full force, said A. B. died in the city of , [but not from any of the causes excepted in said certificate or the by-laws of defendant].

VI. That plaintiff is the beneficiary named in said certificate and is now the holder thereof [and was the wife of said A. B. when it was issued and so remained until his death].

VII. That on 19 , and more than days before the commencement of this action, plaintiff gave defendant due notice and proof of the death

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of said A. B., and in all other respects duly performed all the conditions of said certificate [and the by-laws of defendant] on her part.

VIII. [That defendant has failed and refused to levy or collect an assessment upon its members to pay said claim of plaintiff, though sufficient funds to pay the same might have been collected by such a levy and assessment.] [That there are sufficient funds in the treasury of defendant to pay said claim of plaintiff.] [1]

IX. That defendant has refused upon demand to pay to plaintiff the sum specified in said certificate, or any part thereof, and still refuses and neglects to do so [and denies any liability to plaintiff or any one on said certificate on account of the death of said A. B.].[2]

Wherefore [as in § 919].

[1] This paragraph must be varied to meet the requirements of the particular certificate. When the condition of the certificate is to pay the beneficiary a certain sum absolutely this paragraph may be omitted. In such case it is only necessary to allege non-payment. See 11 Ency. Pl. & Pr. 417.

[2] See Hand v. Nat. Live Stock Ins. Co., 57 Minn. 519, 59 N. W. 538; La Plant v. Firemen's Ins. Co., 68 Minn. 82, 70 N. W. 856.

1427. Same—Another form.

I. That the defendant, Brotherhood of Railroad Trainmen, also known as Grand Lodge, Brotherhood of Railroad Trainmen, now is and at all the times herein mentioned was, an association of individuals conducting business under a common name.

II. That by agreement of the individuals so associated, the said association was to be known, and transact its business under the name, Brotherhood of Railroad Trainmen, and was to consist of a grand lodge and subordinate lodges, by and through means of which they should conduct their said business; that at all times the said association has conducted its said business under the common name of Brotherhood of Railroad Trainmen, and portions thereof also under the name, Grand Lodge, Brotherhood of Railroad Trainmen.

III. That it was agreed by and between the individuals so associated to do business under a common name as aforesaid, that a part of said business to be done should be the establishment and maintenance of a beneficiary fund, to be provided by contributions made by the different members so associated, by way of dues and assessments and other contributions, and that the persons so associated should, in case of injury or sickness, receive certain portions of such beneficiary fund by way of benefits, and in case of death certain portions thereof should be paid to persons to be designated by said members.

IV. That the persons so associated doing business under a common name, adopted rules and regulations for the transaction of said business, in which rules it was provided that there should be issued to each member entitled to share in the said beneficiary fund, a beneficiary certificate designated by Classes A, B and C; that upon the death of a member of said association in good standing who held a beneficiary certificate, Class C, there should be paid from

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the said beneficiary fund to the person named in such beneficiary certificate, the sum of $1,350.

V. That on Dec. 10, 1906, A. B., then the husband of plaintiff, became a member of said association, and there was issued and delivered to him a beneficiary certificate of Class C, whereby the persons so conducting business under a common name, agreed to pay out of said beneficiary fund the sum of $1,350 to plaintiff, upon the death of said A. B., a member in good standing in said association.

VI. That from the time said A. B. became a member of said association until the time of his death he duly complied with all the rules and regulations of defendant, and duly paid all dues and assessments, and all other contributions, by the rules and regulations of said association required to be paid by him.

VII. That on March 22, 1907, said A. B. died, and at the time of his death he was a member in good standing in said association, and said certificate was in full force.

VIII. That thereafter plaintiff duly kept and performed all the conditions of said beneficiary certificate and of the rules and regulations of said association on his part.

IX. That by reason of the premises there is due and payable to plaintiff from defendants the sum of $1,350, and interest thereon from April 1, 1907, no part of which has been paid, though demanded of defendants by plaintiff.

X. The said beneficiary fund now is and at all the times herein mentioned has been more than sufficient to pay plaintiff's said claim in full and to pay all other claims and demands upon the same.

XI. The said A. B. was a member of the subordinate lodge of the Brotherhood of Railroad Trainmen known as Hearts of Oaks Lodge Number 525, and said beneficiary certificate is number 174,417, dated Nov. 30, 1906, and accepted by said A. B. on Dec. 10, 1906.

Wherefore [as in § 919].

Substance of complaint in Price v. Brotherhood of Railroad Trainmen, 116 Minn. 275, 133 N. W. 793.

1428. Complaint by owner on standard fire policy.

I. That at the times herein mentioned plaintiff was [and still is] the owner of [describe property as in policy].

II. That on 19 , defendant, in consideration of the payment to it of a premium of $, made and delivered to plaintiff its policy of insurance on said property, [and thereby insured plaintiff, for a period of (one) year from said date, against loss or damage by fire in respect to said property, to the amount of $] [of which the following is a copy: (Copy of policy)].

III. That on 19 , and while said policy was in full force and effect,

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said [dwelling house and furniture] were [totally destroyed] [greatly damaged and partly destroyed] by fire.

IV. [That the loss to plaintiff from said fire was $.] [That the insurable value of said property as fixed and stated in said policy, was $, and plaintiff was damaged by said fire to that amount.] [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 said referees duly made their award in writing, finding said loss to be the sum of $.]

V. [That plaintiff had no other insurance on said property.] [That plaintiff had on said property, in addition to said policy of defendant, insurance amounting to $ and no more.]

VI. That on 19 , forthwith after said loss, and more than sixty days before this action was brought, plaintiff duly rendered to defendant a written statement of said loss as provided by said policy, and in all other respects 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 $.] [That on 19 , plaintiff demanded payment of said policy from defendant, but no part thereof has been paid.]

Wherefore [as in § 919].

See § 684.

1429. Same—Against several companies.

I. That at the times herein mentioned plaintiff was [and still is] the owner of [describe property as in policy].

II. That on 19 , defendant A. B. [continue as in II. in § 1428].

III. That on 19 , defendant C. D. [continue as in II. in § 1428].

IV. That on 19 , defendant E. F. [continue as in II. in § 1428].

V. That each of said policies expressly permitted concurrent insurance on said property [without limit].

VI. That on 19 , and while all of said policies were in full force and effect, said insured property was greatly damaged and partly destroyed by fire.

VII. That the loss to plaintiff from said fire was $.

VIII. That on 19 , forthwith after said loss, and more than sixty days before this action was brought, plaintiff duly rendered to each of the defendants a written statement of said loss as provided by said policies, and in all other respects has duly performed all the conditions of said policies on his part.

IX. That no part of said loss has been paid.

X. That each of the defendants claims that it is liable for said loss, if at all, only for such proportion of said loss as the amount of its policy bears to the whole amount of insurance on said property at the time of said loss.

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Wherefore plaintiff demands judgment adjudging the total amount of said loss and the proportionate liability of each defendant therefor, and that plaintiff have judgment against each of the defendants for its proportionate share, with costs.

Based on Fegelson v. Niagara Fire Ins. Co., 94 Minn. 486, 103 N. W. 495.

1430. Complaint by purchaser.

I. That on 19 , defendant, in consideration of the payment to it of a premium of $, made and delivered to one A. B. a policy of insurance on the [describe insured property as in policy], and thereby insured the said A. B., for a period of [one] year from said date, against loss or damage by fire in respect to said property, to the amount of $.

II. That on 19 , with the assent of defendant, duly indorsed on said policy, the said A. B. sold and conveyed said premises and assigned said policy to plaintiff.

III. That at the time of obtaining said policy, and from that time until said sale thereof to plaintiff, said A. B. was the owner of said property.

[Continue as in § 1428.]

1431. Complaint by mortgagee.

I. That at the times herein mentioned one A. B. was [and still is] the owner of [describe property as in policy].

II. That on 19 , defendant, in consideration of the payment to it of a premium of $, made and delivered to the said A. B. a policy of insurance on said premises, of which the following is a copy: [Copy of policy] [or allege effect of policy as in § 1428].

III. That on 19 , said A. B. made and delivered to plaintiff his promissory note for $, payable 19 , and at the same time made and delivered to plaintiff a mortgage on said premises for the same amount to secure the payment of said note, and said mortgage contained a covenant on the part of the said A. B. to keep said premises insured against damage by fire for the benefit of plaintiff.

IV. That thereupon, in compliance with said covenant, said A. B. obtained said policy of insurance, [payable to plaintiff and delivered the same to him] [and assigned the same to plaintiff with the assent of the insurer indorsed thereon,] and plaintiff is still the holder and owner thereof.

V. That said note and mortgage are past due and wholly unpaid and plaintiff is still the holder and owner thereof.

VI. [As in III. in § 1428.]

VII. [As in IV. in § 1428.]

VIII. [As in V. in § 1428, changing "plaintiff" to "said A. B."]

IX. That on 19 , forthwith after said loss, and more than sixty days before this action was brought, [said A. B.] [plaintiff] duly rendered to

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defendant a written statement of said loss as provided by said policy, and in all other respects said A. B. and plaintiff have each duly performed all the conditions of said policy on his part.

X. [As VII. in § 1428.]

Wherefore [as in § 919].

1432. On a renewal of policy.

I. [As I. in § 1428.]

II. [As II. in § 1428.]

III. That on 19 , defendant, in consideration of $ to it paid by plaintiff, renewed said insurance for one year from said day, on the same terms and conditions as in the original policy.

[Continue as in § 1428.]

1433. Assignment of policy.

I. That on 19 , defendant, in consideration of the payment to it of a premium of $, made to one A. B. [continue as in § 1430].

II. That on 19 , the said A. B., with the written assent of defendant indorsed thereon, duly assigned said policy to plaintiff.

[Continue as in preceding forms.]

1434. On an adjustment of loss.

[I. II. and III. as in § 1428.]

IV. That the loss to plaintiff from said fire was, on 19 , duly adjusted and settled between plaintiff and defendant as amounting to $, and defendant then promised to pay to plaintiff [on or before 19], that amount, and plaintiff agreed to accept the same, in full settlement and adjustment of said loss and liability of defendant therefor under said policy.

V. [That plaintiff has duly performed all the conditions of said agreement of settlement and adjustment on his part.]

VI. That defendant has not paid any part of said sum of $ to plaintiff [though requested to do so by plaintiff on 19].

Wherefore [as in § 919].

Based on Strampe v. Minn. Farmers' Mut. Ins. Co., 109 Minn. 364, 123 N. W. 1083.

1435. For vacation of award.

I. That at the times herein mentioned each of the defendants was and still is a corporation, duly organized and existing under the laws of the respective states as hereinafter alleged, to wit, the defendants, The New York Fire Insurance Company and National Standard Insurance Company of New York, under the laws of the state of New York; the defendant, American Central Insurance Company, under the laws of the state of Missouri; the defendant,

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The Mercantile Fire & Marine Insurance Company, under the laws of the state of Massachusetts.

II. That at the times herein mentioned each of said defendants was duly authorized to engage in the fire insurance business in this state and was so engaged.

III. That at the times herein mentioned up to Jan. 16, 1903, one A. B. was the owner of [description of personal property insured], all contained and situate in the building numbered 1200 to 1204 Nicollet Avenue, in the city of Minneapolis, Minnesota.

IV. That on the respective dates hereinafter alleged, each of the above named defendants duly caused to be issued to the said A. B. its policy of insurance, numbered as hereinafter alleged, in the form and containing the several conditions as provided by the laws of this state and the Minnesota Standard Policy, whereby each of said defendants for and in consideration of a stipulated premium expressed by its policy and first paid by the said A. B., as a consideration therefor, insured the property aforesaid against loss or damage by fire from the date of its policy during the respective periods and in the respective amounts as hereinafter alleged, to wit: [Specification of policies, amounts, dates, etc.]

V. That each of said policies covered and insured the personal property hereinbefore described, located in the premises above described, and the sound value of said property, during all the times hereinafter and hereinbefore mentioned, up to the time of the fire hereinafter alleged, was the sum of $5,000.

VI. That each of said policies was duly made and delivered by the respective defendant companies therein designated, and each thereof, was in full force and effect at the date of the fire hereinafter alleged.

VII. That on Jan. 16, 1903, the said A. B., for a valuable consideration, duly sold, assigned and transferred to plaintiff herein, the said insured property and on said day duly assigned, by and with the consent in writing of the respective defendant companies indorsed thereon, the several policies hereinbefore described; and from and after said last mentioned date, up to and at the time of the fire hereinafter mentioned, plaintiff was the owner of said property and the holder of the several insurance policies herein described.

VIII. That subsequent to the issuance of the said policies, and while the same were in full force and effect, on April 9, 1903, an accidental fire occurred in said building, so containing said insured property, and as a direct and immediate result of said fire the said property was damaged in the sum of $1,500, to plaintiff's damage in that amount.

IX. That upon the happening of said fire notice was forthwith duly given by plaintiff to the several defendants herein.

X. That thereafter it was mutually agreed by plaintiff and defendants that the amount of plaintiff's loss and damage sustained by reason of said fire to the property so insured, should be determined by submission to arbitration according to, and as provided by said several policies, and in pursuance of such

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agreement, on April 27, 1903, an agreement in writing was entered into by and between plaintiff and defendants, for a joint and common arbitration of said loss under said several policies and as to all parties in interest before a single board of arbitrators or appraisers; that pursuant to said agreement plaintiff selected C. D. to act as arbitrator from the names proposed by defendants; the defendants similarly selected E. F. as arbitrator; that the two arbitrators so selected duly qualified, and thereafter designated G. H. as and for the third arbitrator; and said G. H. thereafter on April 27, 1903, duly qualified.

XI. That on May 11, 1903, the said G. H. and C. D. made and returned a purported award under said arbitration, whereby it was found and determined that the direct and immediate damage caused by said fire to the property so insured as aforesaid was the sum of $400.

XII. That the arbitrator E. F. refused to join in said award, and the same was accordingly returned by the other two arbitrators.

XIII. That plaintiff has at all times refused and still refuses to abide by said award; that shortly after the rendition thereof, and on May 11, 1903, plaintiff duly rejected said award, and demanded a re-submission to arbitration, according to the terms and provisions of said several policies, and duly submitted to the several defendants the names of three disinterested men, and duly requested said defendants to choose from the names so submitted one man to act as arbitrator, pursuant to the terms of said several policies; but the defendants have each and all wholly failed and refused to comply with said request.

XIV. That said purported award was illegal and void in this, that plaintiff duly demanded of said arbitrators the privilege of appearing before them and of producing evidence material and pertinent to the subject-matter of the submission, to wit, the amount of plaintiff's loss and damage, but said arbitrators refused said privilege and at all times pending the determination of the matter submitted to them declined to receive or hear any evidence from plaintiff or the witnesses by him produced; that plaintiff duly protested against the action of said arbitrators last aforesaid, and duly appeared before said board of arbitrators at the first session or meeting thereof, and produced his witnesses, and demanded that their testimony be heard: but said arbitrators then and there, and at all times thereafter, refused to receive or hear such testimony, or any testimony in plaintiff's behalf; and notwithstanding plaintiff's said protest, said board proceeded to consider said matter, and to return the purported award aforesaid.

XV. That the witnesses produced by plaintiff, as aforesaid, for the purpose of giving evidence before said board of arbitrators, were familiar and expert in the subject-matter then pending before said board of arbitrators, and were material witnesses on behalf of the plaintiff in said matter.

XVI. That said purported award was grossly inadequate, and was, by reason of the facts hereinbefore set forth, wholly void and of no effect.

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XVII. That in and by each of said policies it was provided that concurrent insurance might be effected upon the property so insured.

XVIII. That the plaintiff has duly performed all the conditions of said policies on his part.

Wherefore plaintiff demands judgment setting aside said award; determining the pro rata liability of each defendant for said loss and awarding plaintiff judgment therefor; and for such other relief as may be just, with costs.

Sustained on demurrer in Redner v. New York Fire Ins. Co., 92 Minn. 306, 99 N. W. 886.

1436. On live stock policy—Death from disease.

I. That on 19 , defendant, in consideration of the payment to it of a premium of $, made and delivered to plaintiff its policy of insurance, whereby it insured plaintiff to the amount of $, against loss by death caused by disease [or accident], of a [bay mare], the property of plaintiff, for one year from that date.

II. That on 19 , while said policy was in full force, said [mare] died from disease [or allege other cause according to the facts so as to bring the case within the terms of the policy].

III. That on 19 , immediately upon discovering that said [mare] was [affected with the disease which caused her death] [sick] plaintiff employed A. B., a competent and duly licensed veterinary surgeon, to attend and attempt to cure the [mare], and duly gave immediate notice in writing to the secretary of defendant at its home office in the city of , of the fact of such [disease] [sickness] and the name and address of A. B. [or allege the facts otherwise according to the conditions of the policy].

IV. That at the time of her death the mare was still the property of plaintiff and of the value of $.

V. That plaintiff duly performed all the conditions of said policy on his part, and on 19 , and more than days before this action was brought, duly [allege notice and proof of loss according to the terms of the policy].

VI. That plaintiff's loss from said death was $, no part of which has been paid by defendant, though duly demanded prior to this action, and defendant has disclaimed all liability for said loss.

Wherefore [as in § 919].

Based on Hand v. National Live Stock Ins. Co., 57 Minn. 519, 59 N. W. 538; Knutzen v. Nat. Live Stock Ins. Co., 108 Minn. 163, 121 N. W. 632. See § 688.

1437. On policy insuring title to realty.

I. That on May 1, 1889, defendant, under the name of the St. Paul Real Estate Title Insurance Company, made and delivered to plaintiffs its policy of insurance, of which the following is a copy: [Copy of policy.]

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II. That the above described land has a frontage of one hundred feet on Eighth street in St. Paul.

III. That at the date and delivery of said policy the plaintiffs paid the defendant $56 therefor as a premium thereon.

IV. That at the date of said policy the said A. B. was justly indebted to plaintiffs in the sum of $20,000, and said indebtedness was evidenced by the promissory note of the said A. B. for said sum and was secured by a mortgage deed of said land, made and delivered by said A. B. and his said wife, to plaintiffs, dated May 1, 1889, and recorded in the office of the register of deeds for said county, on May 1, 1889.

V. That thereafter, default having been made in the payment of said note, plaintiffs duly foreclosed said mortgage and at the sale in said foreclosure proceedings, held on March 27, 1894, bid off said property at the sum of $21,798.33, which was the amount then due on said mortgage, including taxes paid by plaintiff and the expenses of said sale.

VI. That a certificate of said sale was duly issued by the sheriff of said county to plaintiffs and duly recorded in the office of the register of deeds for said county on March 28, 1894.

VII. That no redemption has ever been made from said sale and the plaintiffs are now the owners in fee of all of said land which the said A. B. and his wife owned at the date of said mortgage.

VIII. That at the date of said mortgage neither the said A. B., nor his said wife, had, nor have they at any time since had, any right, title, estate or interest in or to that part of said land which is described as follows, to wit, commencing at the southeast corner of said lot nine, running thence west on the north line of Eighth street 4.42 feet, thence running northerly at right angles to said Eighth street, 75 feet, thence running easterly, parallel with the said Eighth street, 4.42 feet to the east line of said lot nine, thence southerly on said east line to the point of beginning.

IX. That at the date of said policy, and ever since, the said strip of land has been and now is owned in fee by, and during all said time has been and now is in the actual adverse possession of, persons other than the said A. B. or his said wife, or any one claiming under either of them.

X. That prior to the date of said policy the said A. B. and his said wife, and those under whom they claimed title to said land, had been evicted from said strip of land.

XI. That the public has never had any right in said strip of land for a street or alley or other purpose.

XII. That plaintiffs had no notice or knowledge of the said defect in said title until the year 1895.

XIII. That in 1896, and more than thirty days before the commencement of this action, plaintiffs gave the defendant due notice in writing of the said defect in said title and of their claim for damages on account thereof.

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XIV. That plaintiffs have duly performed all the conditions of said policy on their part.

XV. That prior to the commencement of this action plaintiffs offered in writing to convey to defendant on demand all their right, title and interest in the land described in said policy on being paid the amount of said bid, with interest from the date thereof, and their expenditures since said date for improvements, taxes and assessments thereon.

XVI. That plaintiffs have, in addition to the amount bid at said sale, paid for taxes on said lands described in said policy, and insurance and repairs on the buildings thereon, the sum of $1,502.59, and have received as rents from the same $1,226.18.

XVII. That the value of said strip of land, so lost to plaintiffs, is, and ever since May 1, 1889, has been, $1,200.

XVIII. That by reason of the premises defendant is indebted to plaintiffs in the sum of $1,200, no part of which has been paid, though demanded of defendant by plaintiffs.

Wherefore [as in § 919].

Substance of complaint sustained on demurrer in Place v. St. Paul Title Ins. & Trust Co., 67 Minn. 126, 69 N. W. 706.

1438. Against surety company on fidelity bond of employee.

I. That plaintiff is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state, with its principal place of business in the city of Rochester, Minnesota.

II. That at such times defendant was a corporation, duly organized and existing under the laws of the state of Massachusetts, and authorized to do business in this state.

III. That at such times plaintiff has been engaged in the business of buying and selling all kinds of fruits and vegetables, garden, farm and dairy products, and in the transaction of a general commission business in said commodities; that in such business plaintiff had in its employ certain traveling salesmen, engaged in selling the above commodities for plaintiff through the territory contiguous to the city of Rochester; that it was the duty of said salesmen to collect for account of plaintiff the moneys realized from the sales of said commodities, and to account to plaintiff for all such commodities intrusted to them, and for the moneys collected by them as aforesaid.

IV. That on May 21, 1908, plaintiff, having in its employ a certain traveling salesman, named A. B., engaged as aforesaid, made application to defendant for its bond of indemnity; and thereupon defendant, for the consideration named therein, made and delivered to plaintiff a bond, of which the following is a copy: [Copy of bond.]

V. That between the first day of July and the third day of August, 1908, and when said bond was in full force, the said A. B., having in his possession money to the amount of $499, which had been received by him as such traveling

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salesman from the sale of commodities as aforesaid, to the use of the plaintiff, wrongfully and fraudulently converted the same to his own use, and has not accounted for the same to plaintiff, though an account thereof has been duly demanded of him, to plaintiff's damage $499.

VI. That plaintiff has duly performed all the conditions of said bond on its part, and has duly demanded payment from defendant of the said sum of $499, according to the terms of said bond, but the same has not been paid, or any part thereof.

Wherefore [as in § 919].

Substance of complaint in Gamble-Robinson Co. v. Mass. B. & Ins. Co., 113 Minn. 38, 129 N. W. 131.

1439. Against surety company on bond of commission merchant.

I. That plaintiff is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state, and engaged in the business of buying and selling grain and other farm products at the village of Atwater, Minnesota.

II. That defendant, Massachusetts Bonding & Insurance Company, is, and at the times herein mentioned was, a corporation duly organizedand existing under the laws of the state of Massachusetts, and duly authorized to do business in this state.

III. That on April 27, 1908, defendant A. B. made an application in writing to the Railroad and Warehouse Commission of this state, for a license to engage in the business of a grain commission merchant at Minneapolis, Minnesota, as the same is defined by sections 2114 to 2120 inclusive, of Revised Laws of Minnesota, 1905, and the laws supplementary to and amendatory thereof; that thereupon said Railroad and Warehouse Commission required said A. B. to furnish a bond with satisfactory surety in the sum of $2,000, conditioned as required by said laws relating to dealers engaged in the grain commission business.

IV. That thereupon, for the purpose of complying with the requirements of said laws and the order of said Railroad and Warehouse Commission, said defendant A. B. for a valuable consideration by him paid to it, procured the defendant, Massachusetts Bonding & Insurance Company, to act as his surety on the bond so required, and accordingly on May 15, 1908, said defendants A. B., as principal, and said Massachusetts Bonding & Insurance Company, as his surety, executed a bond of which the following is a copy: [Copy of bond.]

V. That said bond, with said surety thereon, was duly approved by said Railroad and Warehouse Commission on May 15, 1908, and thereupon was duly filed as required by law in the office of the Secretary of State, of Minnesota, and a license as a gain commission merchant was accordingly thereupon issued and delivered to said defendant A. B. for one year from May 31, 1908.

VI. That under the terms of said bond, and without any change therein or

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renewal thereon, the defendant A. B. duly applied for and was duly granted a license to carry on the same business during the license years 1909, 1910 and 1911, but on Sept. 10, 1911, said Massachusetts Bonding & Insurance Company notified said Railroad and Warehouse Commission of its withdrawal as surety on said bond, whereupon the license to said A. B. was canceled.

VII. That while said A. B. was so duly licensed as such grain commission merchant, and while said bond was in full force and effect, on April 27, 1911, plaintiff consigned to said A. B., as such grain commission merchant, 134,640 pounds, net weight, of wheat owned by it, to be sold by him for it in the market at Minneapolis, the proceeds, less commission, to be accounted for, and paid over to it, as required by law, and caused said wheat to be delivered to said A. B. at Minneapolis, on or about said last mentioned date, and plaintiff's said wheat was, on or about the date last aforesaid, received by said A. B., and the same was worth, and was by him sold at the price of 98½ cents per bushel; that the net value of said wheat and the amount due to plaintiff out of the proceeds of the sale thereof made by the said A. B., over and above all charges and commissions due to the said A. B. on account thereof, was $1.253.07.

VIII. That said A. B. wholly failed to account for said grain, or the sale thereof, to plaintiff, and wholly failed to pay to plaintiff for said grain, or the money received by him on the sale thereof, or any part thereof, though such accounting and payment has often been demanded, but, on the contrary, said A. B. wrongfully and fraudulently converted said grain, and the proceeds thereof, to his own use, to plaintiff's damage $1,253.07.

Wherefore [as in § 919].

Substance of complaint in Farmers Co-operative El. Co. v. Enge, 122 Minn. 316, 142 N. W. 328.

1440. On employer's liability policy.

I. That plaintiff is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state, and engaged in carrying on a general telephone exchange business, including the erection and maintenance of poles, wires, and appliances therefor, and in the carrying on and maintenance of said business employed a large number of men in the erection and maintenance of such poles and telephone lines.

II. That at the times herein mentioned defendant was and still is a corporation duly organized and existing under the laws of the state of Maryland as a casualty insurance company, engaged in the business of insuring employers against loss from common-law or statutory liability which they might sustain by reason of being compelled to pay damages on account of bodily injuries sustained by their employees; and as such was duly licensed and authorized to transact business, and issue insurance policies in this state.

III. That on Dec. 16, 1898, defendant, in consideration of a premium there-

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for paid to it by plaintiff, issued to plaintiff its policy of insurance, No. 4380, dated on that day, whereby it promised and agreed to insure plaintiff against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered within one year from said date by any employee of plaintiff and occurring on or before Dec. 17, 1899, within the factory, shop or yards of plaintiff at Minneapolis, St. Paul, Stillwater or Mankato, in the state of Minnesota, and other places, or upon the ways immediately adjacent thereto provided for the use of employees or the public, and caused by the negligence of the insured and resulting from the operation of the trade or business carried on by plaintiff, to the sum of $5,000 for the injury to or death of any one person, and the sum of $10,000 for the injuries resulting from any one accident, and said policy of insurance remained in full force and effect up to and until Dec. 17, 1899.

IV. That on Oct. 14, 1899, one A. B. was in the employ of plaintiff as a lineman engaged in placing poles along Mississippi street in the city of St. Paul and digging holes therefor, and while he was engaged in excavating a hole for the placing of a pole as aforesaid, the surrounding earth caved in, upon and against him.

V. That said Mississippi street, and particularly that part thereof where said work was being done, was one of the ways immediately adjacent to the factory, shop or yards of plaintiff in said city, provided for the use of the employees of plaintiff, and one of the ways and places used in the carrying on of plaintiff's business, and included within the places and territory described and covered by said insurance policy; that the digging of said holes and the erection of said poles was necessary to the operation of the business of plaintiff as understood and described in said insurance policy.

VI. That at the time of said accident said A. B. was a minor between seventeen and eighteen years of age; that on Nov. 30, 1900, C. D., the father of said minor, commenced an action in this court on behalf of his said minor son, in which said C. D. was plaintiff, and this plaintiff was defendant, to recover from this plaintiff the sum of $50,000, to which amount it was claimed in said action that said A. B. had been damaged by reason of bodily injuries sustained by him through said accident on Oct. 14, 1899.

VII. That in and by said action it was claimed that said accident to said A. B. was caused by the negligence of this plaintiff in and about the carrying on of its business, and resulted from the operation of the business of this plaintiff as described and understood in said insurance policy; and the plaintiff in said action, C. D., claimed the right to recover damages in said action from the plaintiff herein by and because of the alleged negligence of this plaintiff.

VIII. That the commencement of said action by said C. D. was the first notice that this plaintiff had of the occurrence of said accident, or that the plaintiff in said action or said A. B. claimed to have sustained any injuries therefrom.

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IX. That immediately upon the service of the summons in said action this plaintiff duly notified the defendant herein of the commencement of the same, and of said claim for damages, and delivered to this defendant the summons served in said action, and the defendant thereupon duly entered upon the defence of said action in the name and on behalf of the plaintiff herein; that thereafter and in the month of January, 1901, the defendant herein notified this plaintiff that it would no longer maintain the defence of said action, and demanded that this plaintiff carry on and maintain said defence, and the defendant herein thereupon and thereafter refused to maintain the defence of said action in any manner.

X. That thereupon this plaintiff entered upon the defence of said action, employed attorneys to appear for it and maintain said defence, and also employed expert physicians and surgeons to make an examination of said A. B., for the purpose of being prepared to testify in said action.

XI. That on Jan. 22, 1901, by and through the advice of the attorneys so acting for this plaintiff, it was stipulated and agreed in said action between said C. D., plaintiff, and this plaintiff as defendant, that judgment be entered in said action in favor of said plaintiff C. D. and against this plaintiff, defendant therein, for the sum of $750, without costs to either party; and judgment was entered therein in accordance with such stipulation, and on Jan. 23, 1901, this plaintiff necessarily paid to said C. D. said sum of $750 in full satisfaction of said judgment.

XII. That pending the negotiations for said settlement this plaintiff notified the defendant thereof and on Jan. 22, 1901, the defendant duly consented to the settlement of said action and the making of said stipulation without prejudice to the rights of this plaintiff.

XIII. That the reasonable cost to this plaintiff and the fees paid by it to said physicians and surgeons and for their said preparation and examination in said case, was the sum of $75; and the reasonable value of the services of the attorneys employed by plaintiff in maintaining said defence was and is the sum of $250.

XIV. That plaintiff has duly performed all the conditions of said policy on his part.

XV. That by reason of the premises defendant is indebted to plaintiff in the sum of $1,075, no part of which has been paid, though demanded of defendant by plaintiff.

Wherefore [as in § 919].

Substance of complaint in Northwestern Tel. Exchange Co. v. Maryland Casualty Co., 86 Minn. 467, 90 N. W. 1110.

1441. Same—Another form.

I. That plaintiff, the Anoka Lumber Company, now is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state.

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II. That on Oct. 4, 1893, the said Anoka Lumber Company was insolvent, and made an assignment of all its property for the benefit of its creditors to plaintiff A. B., pursuant to the provisions of chapter 148 of the General Laws of the state of Minnesota for the year 1881 and the several acts amendatory thereof; that said A. B., on Oct. 11, 1893, duly qualified as assignee of said company and has ever since been, and still is such assignee.

III. That defendant now is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of the state of New York.

IV. That between March 1, and June 1, 1893, the said Anoka Lumber Company was engaged in constructing a sawmill at the town of Fridley, Anoka county, Minnesota, and was employing in such construction laborers, mechanics and other persons.

V. That on March 24, 1893, defendant, in consideration of a premium of $165 to it paid by said Anoka Lumber Company, made and delivered to said Anoka Lumber Company its policy of insurance, of which the following is a copy: [Copy of policy.]

VI. That on May 25, 1893, and for a long time prior thereto, one C. D. was in the employ of said Anoka Lumber Company as a laborer, and engaged in the construction of said sawmill.

VII. That on May 25, 1893, while said C. D. was so engaged in the construction of said sawmill, a certain heavy wheel constituting part of the machinery for said sawmill, which the said C. D. and other employees of said Anoka Lumber Company were then and there putting into its place in said mill, swung around while the same was being raised by said C. D. and such other employees, and thereby struck and crushed one of the legs of said C. D., causing him severe bodily injury; that said C. D. was at the time of the happening of said injuries an employee of the said Anoka Lumber Company within the terms of said policy of insurance; and said injury and accident happened at a place within the terms of said policy; and said policy was then in full force and effect.

VIII. That on Oct. 3, 1893, the said C. D. first informed the said Anoka Lumber Company that he claimed damages from said company for said injuries and said company then first learned of said claim.

IX. That said Anoka Lumber Company immediately thereupon in writing notified defendant, upon blanks furnished by it for that purpose, of the accident by which said C. D. was injured and of the said claim made by him, and at the same time furnished defendant with full information concerning said accident and claim.

X. That the notice of said accident and claim and the information so furnished defendant by said Anoka Lumber Company were then and there satisfactory to defendant, and all irregularities and omissions on the part of said Anoka Lumber Company in the giving of such notice and in furnishing of such information, if any there were, were then and there waived by the

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defendant; and said Anoka Lumber Company duly performed all the conditions of said policy on its part.

XI. That on Dec. 20, 1893, said C. D. commenced an action against said Anoka Lumber Company in the district court for Anoka county, Minnesota, to recover $5,000 damages for said injuries.

XII. That immediately after said action was so commenced, the said Anoka Lumber Company notified defendant thereof, and demanded of defendant that it defend said action, but defendant refused, and has ever since refused, to do so.

XIII. That after defendant had so refused to defend in said action, the said Anoka Lumber Company employed attorneys and defended said action, and in so doing necessarily incurred an expense of $375.

XIV. That on July 5, 1894, a judgment was duly rendered by said court in said action in favor of said C. D. and against said Anoka Lumber Company for the sum of $2,285.02, and said judgment was on said day duly docketed in the office of the clerk of said court.

XV. That defendant now repudiates any liability to plaintiffs, or either of them under said policy, and refuses to pay said judgment or the expenses incurred by said company in defending said action, though requested by plaintiffs to do so, and said judgment is still in full force and effect.

Wherefore [as in § 919].

Substance of complaint in Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286, 65 N. W. 353.

1442. Same—Another form.

I. That defendant is, and at the times mentioned herein was, a corporation duly organized and existing under the laws of the state of Maryland.

II. That on Jan. 15, 1901, defendant, in consideration of the payment to it of a premium of $259.32 by plaintiff, made and delivered to plaintiff its policy of insurance, whereby it agreed to indemnify plaintiff, for the term of one year beginning on Dec. 7, 1900, at noon, and ending on Dec. 17, 1901, at noon, against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of said policy by any person or persons while within the premises numbered 500 to 512 Nicollet Avenue, Minneapolis, Minnesota, or upon the sidewalk or other ways immediately adjacent thereto, and stipulated that its liability for an accident resulting in injuries to, or in the death of, one person should be limited to $5,000.

III. That at the times herein mentioned said premises were used and occupied as a store and office building, and plaintiff was the owner thereof in fee and operated thereon certain hydraulic elevators.

IV. That on March 27, 1901, when said policy was in full force, one A. B., while engaged in the operation of one of said elevators on said premises, accidentally suffered certain bodily injuries from causes making the plaintiff liable

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for damages therefor; that on Nov. 2, 1901, the said A. B., by service of a summons and complaint on this plaintiff, commenced an action against this plaintiff for damages on account of said injuries; that a copy of said complaint, except the verification thereof, is hereto attached, marked Exhibit A, and made a part hereof.

V. That in and by said policy it was further provided that if any action should be brought on account of an accident covered by said policy, plaintiff should immediately forward to the home office of defendant every summons or other process as soon as the same should be served on him, and that defendant would, at its own cost, defend against such proceedings in the name and on behalf of this plaintiff or settle the same, unless it should elect to pay this plaintiff the indemnity in said policy provided.

VI. That immediately upon the service of the summons in said action by said A. B., this plaintiff forwarded the same, together with the complaint therein, to the home office of defendant; that thereupon defendant denied liability under its said policy for any damages recovered by said A. B. in said action, and refused to defend the said proceedings or settle the same, or to pay to plaintiff the indemnity provided for in said policy, but undertook to and did furnish its own counsel to represent plaintiff in said action, without prejudice, however, to its right to claim that the damages, if any, recovered by said A. B. for said injuries were not covered by its said policy.

VII. That in said action by said A. B. against this plaintiff, issues were made and a jury trial thereof had, and on said trial the jury rendered a verdict in favor of said A. B. and against this plaintiff, on Nov. 14, 1902, for the sum of $8,500; that all the proceedings in said action were conducted on behalf of this plaintiff, defendant therein, by the counsel so furnished by the defendant herein.

VIII. That a motion for a new trial was duly made in said action, and on the hearing of said motion an order was made by said court granting said motion unless the said A. B. should, on or before March 10, 1903, file with the clerk of this court a writing, signed by him personally and by his attorney of record, remitting all of said verdict over and above the sum of $4,000, and remitting also his costs and disbursements in said action, and consenting that judgment on said verdict might be entered in his favor and against this plaintiff, defendant therein, for $4,000, but without costs or disbursements.

IX. That on March 4, 1903, said A. B. filed in said action a writing, in compliance with said order of court, and thereupon, in pursuance of said order and by consent of said A. B. and his attorney of record, judgment was duly entered in said action in favor of said A. B. and against this plaintiff, defendant therein, for $4,000.

X. That after the entry of said judgment this plaintiff, on March 4, 1903, necessarily paid to said A. B. the sum of $4,000, and received from him a satisfaction of said judgment, which satisfaction was filed on said day in the

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office of the clerk of this court, and thereupon the said judgment of said A. B. against this plaintiff was satisfied of record on said March 4, 1903.

XI. That before the said judgment was entered plaintiff requested defendant to pay to the said A. B. the sum of $4,000 in satisfaction of his claim against plaintiff, which request defendant refused; and before the payment or satisfaction of said judgment, plaintiff notified defendant that he would pay said judgment and bring action against it for the amount so paid, unless defendant would withdraw its said denial of liability; that defendant refused to withdraw said denial, but on the contrary repeated its said denial, and declined, and still declines, to pay the said sum of $4,000 or any part thereof.

XII. That plaintiff has duly performed all the conditions of said policy on his part.

Wherefore [as in § 919].

Substance of complaint in Andrus v. Maryland Casualty Co., 91 Minn. 358, 98 N. W. 200.

1443. For premium on employer's liability policy.

I. That plaintiff is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of the state of New York.

II. That the true given name of each of the defendants is unknown to plaintiff.

III. That at the times herein mentioned defendants were and now are partners doing business under the firm name of A. and B.

IV. That on April 20, 1907, plaintiff, at the request of defendants, made and delivered to them its liability policy of insurance, wherein plaintiff undertook to indemnify defendants against loss from liability imposed by law upon them for damages on account of bodily injuries or death, accidentally suffered by any of their employees during the year beginning April 20, 1907, and ending April 20, 1908.

V. That as a consideration for said policy, defendants and each of them promised and agreed to pay to plaintiff therefor an amount equal to 2.75 per cent. of the entire amount of wages paid by defendants to masons and their helpers employed by them during said time, and an amount equal to 2 per cent. of the entire amount of wages paid by defendants to carpenters and their helpers employed by them during said time; and it was further agreed by and between plaintiff and defendants as and for a further consideration for said policy, that defendants would make and deliver to plaintiff a monthly statement, showing the wages so paid by defendants to their employees as aforesaid, and would permit plaintiff and its officers and agents to inspect and audit their books showing the amount of wages so paid as aforesaid.

VI. That defendants have neglected and refused to make and furnish to plaintiff a monthly statement, or any statement whatever, of the wages so paid by them to their employees as aforesaid, and have refused to permit plain-

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tiff to examine and audit its books showing the amount of said wages so paid as aforesaid, though often requested to do so.

VII. That, as plaintiff is informed and believes, the wages paid by defendants to masons and their helpers during said year were $1,250 per month, and amounted in the aggregate for the year to $15,000, and that the monthly wages paid by defendants to carpenters and their helpers during said year amounted in the aggregate to $10,000.

VIII. That there is now due and owing from defendants to plaintiff as a consideration for said policy so issued and delivered as aforesaid the sum of $600, no part of which has been paid, though demanded, except the sum of $50 paid on or about April 20, 1907.

IX. That plaintiff has duly performed all the conditions of said policy on its part.

Wherefore [as in § 919].

Substance of complaint in Empire State Surety Co. v. Cameron, 110 Minn. 92, 124 N. W. 442.

1444. On assessment of stockholder in a mutual company.

I. That the Minneapolis Fire and Marine Mutual Insurance Company is a corporation duly organized and existing under chapter 175 of the General Laws of Minnesota for the year 1895, to do a mutual fire insurance business, with its principal office and place of business in the city of Minneapolis in said state; that it was so organized and created on Oct. 25, 1895, under the name of the Mutual Fire Insurance Company of Minnesota, but on May 25, 1898, its name was changed to that of the Minneapolis Fire and Marine Mutual Insurance Company.

II. That the articles of incorporation of said corporation provided, among other things, that every person holding a policy of insurance therein should be a member of said company.

III. That on March 5, 1901, in a sequestration proceeding duly instituted in the district court for Hennepin county, Minnesota, the said Minneapolis Fire and Marine Mutual Insurance Company was duly adjudged insolvent, and A. B., one of the plaintiffs herein, was duly appointed receiver thereof, to wind up its affairs, which trust was by him thereupon accepted, and he has been at all times since, and still is, the duly qualified and acting receiver of said corporation.

IV. That on July 9, 1901, in said sequestration proceeding, said court also duly appointed C. D., one of the plaintiffs herein, as an additional receiver to wind up the affairs of said company, which said trust was by him accepted, and he is now, and has been ever since said last named day, one of the duly qualified and acting receivers of said corporation.

V. That immediately upon the organization of said corporation, as aforesaid, it duly qualified as a mutual fire insurance company, and was thereupon duly authorized to engage in the business of fire insurance on the mutual

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plan, and ever since said time, and down to March 5, 1901, had been a corporation duly organized and authorized to engage in the said business of mutual fire insurance; that at and prior to the issuance of the policy of insurance hereinafter mentioned, said Minneapolis Fire and Marine Mutual Insurance Company had duly complied with all of the provisions and requirements of the statutes of this state, relating to the transaction of business therein by mutual fire insurance companies, and had been, and at said time was, duly licensed and authorized by the authorities of this state to carry on the business of mutual insurance therein, and said company has at all times duly complied with all the statutes and laws of this state with respect to the transaction of business therein, and has at all times herein mentioned been authorized to transact the business of mutual fire insurance therein.

VI. That on March 13, 1900, the Minneapolis Fire and Marine Mutual Insurance Company, upon the request of defendant, and in consideration of the payment to it by him of $4.58, as premium, made and delivered to defendant its policy of insurance, a copy of which is hereto attached, marked Exhibit A, and made a part hereof.

VII. That on Jan. 28, 1901, said Minneapolis Fire and Marine Mutual Insurance Company, was not possessed of cash funds above its reinsurance reserve sufficient for the payment of incurred losses and expenses, and on said day the board of directors of said company, pursuant to the provisions of section 42 of said chapter 175, duly levied an assessment upon all the policyholders of said company.

VIII. That the said assessment upon defendant, which was duly levied by the board of directors of said company as above set forth, on account of said policy, amounted to the sum of $3.25.

IX. That on March 15, 1901, it appearing to said district court, in the said sequestration proceeding, that the assessment heretofore referred to as having been levied by the board of directors of said company, was not sufficient to meet and liquidate the liabilities of said company, as the same existed at the time of the said judgment of insolvency, said court duly made and entered an order assessing the policyholders of the said Minneapolis Fire and Marine Mutual Insurance Company, their pro rata share of all losses which arose during the period in which their respective policies were in force: that the assessment so levied and directed against defendant, as aforesaid, was in the sum of $4.58.

X. That said assessment was equitably levied against the members or policyholders of said company for losses and expenses occurring while their policies were in force, and the said assessment so levied against defendant was levied for losses and expenses incurred while said policy of defendant was in force.

XI. That notice of said assessment was duly given to defendant prior to April 1, 1901, but no part thereof has ever been paid, though demanded.

Wherefore [as in § 919].

Sustained on demurrer in Dwinnell v. Felt, 90 Minn. 9, 95 N. W. 579.

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1445. For breach of contract to procure insurance.

I. That at the times herein mentioned defendant was engaged in business at Coleraine, Itasca county, Minnesota, as a fire insurance agent, representing several fire insurance companies.

II. That on Oct. 18, 1909, plaintiff was the owner of a certain building on lots twenty-two and twenty-three, in block two of the village of Bovey, according to the plat thereof, on file and of record in the office of the register of deeds for said county.

III. That on Oct. 18, 1909, an agreement was entered into between plaintiff and defendant whereby, in consideration of the promise and agreement of plaintiff to pay the premiums on such insurance, defendant agreed to insure forthwith the said building of plaintiff against loss by fire in the sum of $1,000 in some one or more of the said insurance companies so represented by plaintiff as agent, and to deliver the policy or policies representing said fire insurance in said amount of $1,000 upon said building to plaintiff.

IV. That plaintiff has duly performed all the conditions of said agreement on his part.

V. That defendant did not cause said building to be so insured in the sum of $1,000, or in any sum whatever.

VI. That on Oct. 25, 1909, and while plaintiff was the owner of said building, it was totally destroyed by fire, and it was then of the value of $2,500.

VII. That by reason of the premises plaintiff has been damaged $1,000.

Wherefore [as in § 919].

Substance of complaint in Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148.

1446. Denial of policy.

The defendant for answer to the complaint herein denies [each and every allegation in the paragraph thereof] [that it made or delivered said policy of insurance].

1447. Denial of notice and proof of loss.

The defendant for answer to the complaint herein alleges that it was provided in said policy of insurance that in case of loss the insured should [insert language of policy as to notice of proof and loss]; that plaintiff did not [specify wherein plaintiff failed to comply with provision of policy].

1448. Denial of ownership or insurable interest.

The defendant for answer to the complaint herein denies [each and every allegation in the paragraph thereof] [that plaintiff was the owner of or had any insurable interest in said (goods) (premises) at the time said policy of insurance was made and delivered or at the time of said loss].

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1449. Loss by excepted peril.

The defendant for answer to the complaint herein alleges that said loss was not caused by any of the perils insured against by said policy, but was caused wholly by [state excepted peril].

1450. Fraud in procuring policy.

The defendant for answer to the complaint herein alleges that it was provided in said policy of insurance that the same should be void [if any material fact or circumstance stated in writing was not fairly represented by the insured]; that in his written application for said policy [which was attached thereto] plaintiff represented to defendant that [state representation in language of application]; that said representation was false as plaintiff then well knew; that it was made to deceive and defraud defendant and to induce it to issue said policy to plaintiff; that defendant, believing it to be true, was thereby deceived and induced to issue said policy to plaintiff, [and the matter so misrepresented was material to be known to defendant and increased the risk of loss on said policy (in that said disease tends to shorten life)].

1451. Fraudulent account of loss.

The defendant for answer to the complaint herein alleges that after said loss and before this action was brought plaintiff rendered to defendant a false and fraudulent statement in writing of the alleged loss and damage, as and for such statement of loss and damage as is mentioned in said policy, in which statement he stated that insured goods of plaintiff, to the value of $, had been destroyed by said fire and that his damage by said fire was to that amount, with a fraudulent intent to induce defendant to pay him that amount; that said insured goods of plaintiff were not destroyed by said fire to an amount exceeding in value $, and his damage was not over $, as plaintiff then well knew.

1452. Refusal of arbitration.

The defendant for answer to the complaint herein alleges that it was provided in said policy of insurance that in case of loss, and a failure of the parties to agree as to the amount of the loss, the amount of the loss should be referred to three disinterested persons, the insurer and the insured each to choose one out of three persons named by the other, and the third to be selected by the two so chosen, and that such reference should be a condition precedent to any right of action, in law or equity, to recover for such loss; that after said loss an actual disagreement arose between plaintiff and defendant as to the amount thereof, which still exists; that on 19 , after such disagreement arose and before this action was brought, defendant duly demanded of plaintiff that

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the amount of the loss be referred as so provided and submitted to plaintiff the names of three disinterested persons as proposed referees, but plaintiff refused and still refuses to select a referee or submit the amount of said loss to any referees for arbitration.

1453. Failure to attempt to put out fire.

The defendant for answer to the complaint herein alleges that it was provided in said policy that [if the insured property should be exposed to loss or damage by fire, the insured should make all reasonable exertions to save and protect the same]; that at the time of said fire plaintiff failed to make reasonable exertion to save and protect the insured property in this, that [specify neglect].

1454. Breach of condition against other insurance.

The defendant for answer to the complaint herein alleges that it was provided in said policy of insurance that [insert language of policy as to other insurance]; that [before] [after] [at the time of] the issuance of said policy plaintiff became insured on the same property in another company, to wit, the Company, in the sum of $, of which defendant was never notified, and to which defendant never consented, nor was any consent indorsed on the policy.

1455. Unauthorized vacancy.

The defendant for answer to the complaint herein alleges that it was provided in said policy that the same should be void if [the premises insured thereby should become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without the assent of defendant]; that after said policy was made and before said fire said premises became vacant by the removal of plaintiff therefrom and the same were vacant at the time of said fire, without the assent of defendant, and had remained vacant for more than thirty days immediately prior to said fire, without the assent of defendant.

Sustained by Doten v. Aetna Ins. Co., 77 Minn. 474, 80 N. W. 630.

1456. Prohibited articles in building.

The defendant for answer to the complaint herein alleges that it was provided in said policy of insurance that the same should be void if [insert language of policy as to prohibited article]; that after the making of said policy and before said loss plaintiff received into his said [store], and had there at the time of said fire, a large quantity of [prohibited article], well knowing that such reception was in violation of the conditions of said policy.

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1457. Sale of goods.

The defendant for answer to the complaint herein alleges that it was provided in said policy of insurance that the same should be void if the insured property should be sold without the assent of defendant; that on 19 , after the making and delivery of said policy and before the alleged loss, the entire interest of plaintiff in said property was sold and transferred to one A. B., by an absolute sale and delivery of said property to him, by plaintiff, without the assent of defendant, and remained in said A. B., at the time of said loss.

1458. Statute of limitations.

The defendant for answer to the complaint herein alleges that it was provided in said policy of insurance that [no suit or action against the insurer for the recovery of any claim by virtue of the policy should be sustained in any court of law or equity in this state, unless commenced within two years from the time the loss occurred]: that said fire and loss occurred on 19 , more than two years before the commencement of this action.

1459. Waiver of condition.

That on 19 , defendant waived the condition of said policy requiring [state condition] and released plaintiff from the performance thereof by [specify facts constituting the waiver].

1460. Reply alleging waiver of forfeiture for non-payment of dues within stipulated time.

That said policy of insurance provides that all dues and assessments shall be paid within thirty days from the day on which notices bear date; that nevertheless, the defendant, for many years prior to the time of the death of the insured, followed and permitted the custom and practice of accepting payments from the insured after the expiration of such thirty days, and at irregular intervals, after the expiration of such thirty days, and by said practice and custom defendant encouraged the insured in the belief that it would continue to accept payments of dues and assessments within a reasonable time after the expiration of such thirty days, and thereby the defendant waived strict compliance with, and performance of, the provisions of its policy of insurance requiring such payment within thirty days from the day on which notices bear date, and is now estopped from alleging that the insured was in default in the payment of said pretended dues and assessments; that on June 29, 1910, plaintiff remitted to defendant the sum of $35.95 in payment of the alleged and pretended assessment and dues referred to in defendant's answer, and said sum was received by defendant not later than July 1, 1910, and retained in its possession until Aug. 31, 1910; that the said payment of the said alleged and pre-

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tended assessment was made within a reasonable time after the expiration of the thirty days referred to in said policy, and in accordance with the practice and custom theretofore existing between the defendant and the insured.

From reply in Ibs v. Hartford Life Ins. Co., 119 Minn. 113, 137 N. W. 289.

INTERPLEADER

1461. General form.

I. That defendants have each preferred a claim against plaintiff respecting [specifying the debt, thing or duty with particularity and showing that the property is in the possession of plaintiff].

II. That defendant A. B. claims the same [specifying with particularity the grounds of claim].

III. That the defendant C. D. claims the same [specifying with particularity the grounds of claim].

IV. That plaintiff is ignorant of the respective rights of defendants and cannot determine the same without hazard to himself.

V. That 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 defendants.

Wherefore plaintiff demands judgment:

(1) That defendants be restrained by injunction from taking any proceedings against 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 plaintiff be discharged from all liability to either of defendants in relation thereto.

(5) That plaintiff's costs be paid out of the same.

Based on Code Commissioners' Form, No. 156; Crane v. McDonald, 118 N. Y. 648; Bassett v. Leslie, 123 N. Y. 396.

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1462. Action for destruction of personal property by negligence—Intervention by mortgagee.

C. D. hereby intervenes in this action and for complaint alleges:

I. That it is a corporation duly organized and existing under the laws of the state of Wisconsin.

II. That on Sept. 23, 1886, the plaintiffs and one A. B. made and delivered to this intervener their promissory note, dated on that day, whereby for value received they promised to pay to this intervener or bearer, the sum of $600, on or before Sept. 1, 1887, at the First National Bank of Fargo, North Dakota, with interest thereon at the rate of ten per cent. per annum from said date.

III. That on Sept. 23, 1886, the said plaintiffs, and said A. B. made and delivered to this intervener their other promissory note, dated on that day, whereby for value received they promised to pay to this intervener, or bearer on or before Dec. 1, 1887, the sum of $800, at the First National Bank of Fargo, North Dakota, with interest thereon at the rate of ten per cent. per annum from said date.

IV. That on Sept. 23, 1886, the plaintiffs and the said A. B. made and delivered to this intervener their other promissory note, dated on that day whereby for value received they promised to pay to this intervener or bearer, the sum of $705, at the First National Bank of Fargo, North Dakota, with interest thereon at the rate of ten per cent. per annum, from said date.

V. That to secure the payment of said notes according to their terms, the said plaintiffs and the said A. B. made and delivered to this intervener, a chattel mortgage, of and upon one 12-horse power traction engine, and said mortgage was duly filed in the office of the town clerk of the town of Humboldt, in Clay county, Minnesota, on Oct. 5, 1886, at 8 o'clock P. M., which said town was, as this intervener is informed and believes, the town where said mortgaged property was, at the time of the execution of such mortgage, and was also the town where said mortgagors resided at the time of the execution thereof.

VI. That thereafter in the month of September, 1888, and while said plaintiffs were crossing the track of the defendant Railway Company, with said traction engine, the said defendant negligently ran one of its engines against and upon said traction engine, and thereby damaged the same in the sum of $400.

VII. That at the time of the said damage there was due upon the debt secured by said chattel mortgage the sum of $1,505, and interest thereon from Sept. 23, 1886, less the sum of $4.35 paid thereon Jan. 22, 1889.

VIII. That the entire value of said mortgaged engine, immediately prior to said damage, did not exceed the sum of $1,000.

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Wherefore this intervener demands judgment against the defendant for $400, with costs, and that plaintiffs take nothing herein.

Sustained on demurrer in Wohlwend v. J. I. Case Threshing Machine Co., 42 Minn. 500, 44 N. W. 517.

INTOXICATING LIQUORS

1463. On bond of saloon-keeper.

I. That during the month of December, 1911, defendant A. B. kept a saloon in the city of Virginia, Minnesota, for the sale of intoxicating liquors under a license duly issued to him by the council of said city on Sept. 3, 1911.

II. That to procure said license defendant A. B., as principal, and defendant C. D., as surety, made and filed in the office of the clerk of said city, on Aug. 11, 1911, a bond of which the following is a copy: [Copy of bond.]

III. That said bond was duly accepted and approved by the council of said city, and said license was issued thereon.

IV. That during the night of Dec. 23, 1911, and until about four o'clock in the morning of Dec. 24, 1911, and while said license and bond were in full force and effect, defendant A. B. unlawfully kept said saloon open for business and unlawfully sold intoxicating liquors to numerous persons therein, including one E. F. and G. H., who were habitual drunkards as defendant A. B. then well knew, whereby they then and there became intoxicated; that after they became so intoxicated defendant A. B. unlawfully allowed them to remain in said saloon and unlawfully sold more intoxicating liquor to them whereby they became further intoxicated and disorderly, and in that condition were unlawfully allowed to remain in said saloon by defendant A. B.; that at about four o'clock in the morning of Dec. 24, 1911, the said E. F., in a drunken, crazed condition, caused by the intoxicating liquor so sold to him by defendant A. B., drew a revolver from his pocket and began to shoot it indiscriminately about said saloon and shot and killed said G. H.; that said shooting and death of the said G. H. were caused by said wrongful acts of defendant A. B.

V. That said G. H. left surviving him his wife, this plaintiff, and five children the oldest of whom is fourteen years of age and all of whom are dependent upon plaintiff for their care and support.

VI. That on 19 , I. J., the court commissioner of St. Louis county, duly made an order authorizing plaintiff to maintain this action on said bond.

VII. That by reason of the premises defendants are indebted to plaintiff on said bond in the sum of $, no part of which has been paid, though demanded of defendants by plaintiff.

Wherefore [as in § 919].

Based on complaint sustained on demurrer in Koski v. Pakkala, 121 Minn. 450, 141 N. W. 793.

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1464. Rendition and docketing.

That on 19 , in an action wherein [A. B.] [this plaintiff] was plaintiff and [C. D.] [the defendant herein] was defendant, a judgment was duly rendered [1] by [this court] [the district court for county, Minnesota,] against [the said C. D.] [the defendant] in favor of the plaintiff for $, and on [the same day] [19] the same was duly docketed in the office of the clerk of said court [and on 19 , in the office of the clerk of the district court for county, Minnesota].

[1] See § 689.

1465. Same—Another form.

That on 19 , plaintiff recovered a personal judgment in [this court] [the district court for county, Minnesota,] against defendant for $, which was duly rendered [1] by said court, in an action wherein this plaintiff was plaintiff and the defendant herein defendant.

[1] See § 689.

1466. On a domestic judgment.

I. That on 19 , plaintiff recovered a personal judgment in the district court for county, Minnesota, which was duly rendered [1] by said court, against defendant, for $, 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.

IV. [That on 19 , before the commencement of this action, an order was duly made by this court authorizing plaintiff to bring this action.] [2]

Wherefore [as in § 919].

[1] G. S. 1913 § 7772. See § 689, supra.

[2] G. S. 1913 § 7979; Ringle v. Wallis Iron Works, 16 Misc. N. Y. 167.

1467. On a foreign judgment.[1]

I. That on 19 , plaintiff recovered a personal judgment, in the court, for county, in the state of [New York], which was duly rendered [2] by said court, against defendant for $, 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.

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IV. That by the law of said state the interest on such a judgment runs at the rate of per cent. per annum.

Wherefore [as in § 919].

[1] Sustained by Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466; Benedict v. Clarke, 123 N. Y. S. 964.

[2] G. S. 1913 § 7772. See § 689, supra.

1468. Same—Another form.

I. That at the times herein mentioned the Supreme Court of Nova Scotia was, ever since has been and still is, a court of general common-law and equity jurisdiction, both original and appellate, duly constituted, established and acting under and by virtue of the laws of the Province of Nova Scotia.

II. That on June 17, 1881, plaintiff herein commenced an action in said court against defendant herein by issuance of summons, which was duly and personally served upon said defendant on June 17, 1881, and thereupon said defendant duly appeared by an attorney of said court and filed his plea or answer to said action in said court.

III. That thereafter such proceedings were had in said action in said court that, on Oct. 6, 1881, a judgment for the sum of $579.16, was duly made and entered by said court in favor of said plaintiff and against said defendant.

IV. That neither said judgment nor any part thereof has ever been paid; that the same is in full force unsatisfied; and there is now due thereon from defendant to plaintiff the sum of $579.16, with interest thereon since Oct. 6, 1881, at the rate of six per cent. per annum.

Wherefore [as in § 919].

Complaint in Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466. See § 689.

1469. Same—Answer.

The defendant for answer to the complaint herein denies that the summons in said action was personally served on defendant, and denies that he personally appeared in said action; and as to each and every other allegation of said complaint defendant alleges that he has no knowledge or information thereof sufficient to form a belief.

From answer in Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466.

1470. Plea of res judicata—Former judgment.

The defendant for answer to the complaint herein alleges that on 19 , in an action brought by plaintiff against defendant in the district court for county, Minnesota, wherein the facts alleged in the complaint were the same facts alleged in the complaint herein,[1] plaintiff recovered a judg-

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ment, which was duly rendered [2] by said court on the merits,[3] against defendant herein [for $].

[1] Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263. See § 690, supra.
[2] G. S. 1913 § 7772. See § 689, supra.
[3] Terryll v. Bailey, 27 Minn. 304, 7 N. W. 261; Andrews v. School District, 35 Minn. 70, 27 N. W. 303. See § 690, supra, and Dunnell, Minn. Digest, § 5179.

1471. Counterclaim—Vacation for fraud.

For a counterclaim:

I. That after the commencement of the action in which the judgment mentioned in the complaint herein was rendered, plaintiff came to defendant, and with intent to deceive him, and prevent him from defending it, falsely and fraudulently represented [state misrepresentations, as e. g. "that he, the plaintiff, would dismiss said action and that defendant need not appear therein"].

II. That relying on said representations defendant omitted to appear therein, as he otherwise would have done.

III. That plaintiff thereafter, and without the knowledge of, or notice to, defendant, took judgment therein upon default with intent to defraud him.

Wherefore defendant demands judgment vacating said judgment and enjoining plaintiff from enforcing it, and dismissing this action, with costs to defendant.

1472. Counterclaim—Vacation for want of service of summons.

For a counterclaim:

I. That said pretended judgment was so entered without authority of law and contrary thereto, and said A. B. had not, at the time, jurisdiction to render or enter a judgment against defendant in said action, for the reason that no summons in said action was ever served upon defendant, either personally or otherwise, as by law required, and defendant had no knowledge of said proceedings, or of the rendition or entry of judgment therein until a long time subsequent to the occurrence of said acts.

II. That no complaint was made or filed in said proceeding before said A. B., and no bond was filed as by law required, and judgment was rendered against defendant upon default, and no evidence was introduced by plaintiff in said action, and no testimony was offered therein, to prove the case of plaintiff, and no proof of the claim of plaintiff was presented in said action, and defendant did not at any time appear or answer therein and was not present at the hearing thereof and no copy of a complaint therein was ever served on defendant.

III. That the claim upon which said pretended judgment was based was a purported assignment of an account held by one C. D. against defendant; that defendant has long since, and many years before the commencement of this action, paid the said account in full to said C. D.

IV. That defendant has no knowledge or information sufficient to form

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a belief as to whether or not said pretended judgment is now the property of the plaintiff in this action.

Wherefore defendant demands judgment canceling said judgment, dismissing this action, and for such other relief as may be just, with costs.

From answer in Vaule v. Miller, 69 Minn. 440, 72 N. W. 452.

1473. To cancel a redemption and compel a judgment creditor to accept a tender and satisfy the judgment.

I. That on July 23, 1889, one A. B. and C. B., his wife, being the owners in fee of [description of premises], made and delivered a mortgage of said premises to one C. D., to secure the payment of the sum of $800, and interest thereon, according to the terms of a promissory note of that date, made and delivered by said A. B. to said C. D.

II. That on Sept. 4, 1889, said mortgage was recorded in the office of the register of deeds for Winona county, in Book 42, of Mortgages, on page 572.

III. That default having been made by the mortgagors in the terms and conditions of said mortgage, the same was duly foreclosed under a power of sale contained therein, and said mortgaged premises were duly sold at such foreclosure sale on Sept. 26, 1892, to said mortgagee for $946, and thereupon a sheriff's certificate of sale was duly made and delivered by the sheriff of said county to said purchaser, dated on Sept. 26, 1892, and on the same day recorded in the office of said register of deeds, in Book 86, of Deeds, on page 1.

IV. That on Jan. 14, 1893, plaintiff, for a valuable consideration, purchased of said C. D. said certificate of mortgage sale and all the interest of said purchaser derived from said sale; and an assignment was thereupon made thereof by C. D. to plaintiff.

V. That though more than one year has elapsed since the date of said sale, no redemption has been made therefrom by the mortgagors, or by any one claiming under or through them, by reason whereof the plaintiff on Sept. 26, 1893, became and now is the owner of said premises by virtue of her purchase of said certificate of sale.

VI. That on Aug. 6, 1891, a judgment was duly rendered by this court against said mortgagors, A. B. and C. B., his wife, in favor of one E. F. for $168.57, and was duly docketed in the office of the clerk of said court on said day.

VII. That on Feb. 16, 1893, defendant, claiming to have purchased said judgment and to have an assignment thereof to him from said E. F., caused a notation to be made on the docket entry of said judgment in said court to the effect that said judgment had been assigned to him.

VIII. That on Sept. 20, 1893, defendant filed in the office of said register of deeds, a notice of his intention to redeem said land from said mortgage sale under and by virtue of his said pretended ownership of said judgment.

IX. That before the year allowed by law to the mortgagor or his assigns to redeem from said sale, to wit, on Sept. 26, 1893, the said mortgagor and

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judgment debtor, A. B., tendered to defendant, in lawful legal tender money of the United States, the full amount due on said judgment in payment and discharge thereof, and requested defendant to accept the same which he then and there refused to do, whereby the lien of said judgment became and was extinguished.

X. That at the time of making said tender, said A. B. informed defendant that he, said defendant, could have said money in payment of said judgment at any time by calling for it, or that he would deposit the same for the defendant with the sheriff of said Winona county, but defendant declined to accept said money and refused said tender solely upon the ground as then stated by him that the same was made too late.

XI. That thereupon said A. B., on the same day, went with said money to G. H., sheriff of said county, and in the presence of defendant's attorney offered to deposit said money with said sheriff for defendant, but said sheriff at the suggestion of defendant's attorney refused to receive the same.

XII. That at the time of making the pretended redemption hereinafter mentioned both defendant and said sheriff had knowledge and were fully aware of the making and refusal of said tender and that said A. B. was then ready and willing to pay the amount due on said judgment at any time.

XIII. That ever since making said tender said A. B. has remained ready and willing, and now is ready and willing, to pay said money whenever called for by defendant, but defendant has never asked for or demanded the same, and plaintiff in behalf of said A. B. and at his request now brings said amount, to wit, $195, into court, and has deposited the same with the clerk thereof to abide such order in relation thereto as may be made herein.

XIV. That after the time for redemption from said sale had expired, to wit, on Sept. 27, 1893, as plaintiff is informed and believes, defendant paid to G. H., then sheriff of said county, the sum of $1,021.88, to redeem said land from said sale, and said G. H. thereupon accepted said money and as such sheriff made and delivered to defendant a certificate of redemption from said foreclosure sale, which certificate of redemption was on the same day recorded in the office of said register of deeds, in Book 86, of Deeds, on pages 339, 340, and said certificate and the record thereof constitute a cloud upon the record title of plaintiff to said property.

Wherefore plaintiff demands judgment canceling said redemption certificate and the record thereof, and requiring defendant to accept said tender and satisfy said judgment, and for such other relief as may be just, with costs.

Sustained on demurrer in Rother v. Monahan, 60 Minn. 186, 62 N. W. 263.

1474. Denial of judgment.

The defendant for answer to the complaint herein denies [that there is any record of the judgment alleged in the complaint, or that the same was ever rendered in said court as alleged] [each and every allegation in the paragraph thereof].

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1475. Denial of regularity or validity of judgment.

The defendant for answer to the complaint herein denies that said judgment was duly rendered against him and alleges that [specify defect].

1476. Invalidity of domestic judgment.

I. That the action in which the judgment against defendant is alleged to have been recovered was founded upon an alleged contract.

II. That when said action was commenced defendant was a non-resident of the state of Minnesota and was a resident of [New York].

III. That defendant never appeared in said action, in person or by attorney, and never was personally served in the state of Minnesota with summons therein.

1477. Invalidity of foreign judgment.

I. That no [summons] [process] was ever served upon defendant in the action resulting in the judgment mentioned in the complaint.

II. That defendant never appeared in person or by attorney in said action.

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1478. For rent—Common count.

[See form of complaint under § 1897.]

1479. For rent—General form—Oral or written lease.[1]

I. That from 19 , to 19 , defendant occupied the premises of plaintiff known as No. , street, in the city of as the tenant of plaintiff and under an agreement whereby he promised to pay to plaintiff as rent therefor $ per month, payable [in advance].

II. That defendant has not paid the rent due under said agreement for the months of , amounting to $.

III. That plaintiff has duly performed all the conditions of said agreement on his part.[2]

Wherefore [as in § 919].

[1] Under this form of complaint the plaintiff may recover upon proof of either an oral or written lease or upon an implied contract to pay the reasonable value of the use and occupation. See § 704, and Dunnell, Minn. Digest, §§ 5476–5483.

[2] Omit when the rent is payable in advance. Hurliman v. Seckendorf, 9 Misc. (N. Y.) 264.

1480. For rent—General form on written lease.[1]

I. That on 19 , plaintiff and defendant entered into a written agreement [of which the following is a copy:] [whereby plaintiff leased 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 $ per (month) (year), payable (in advance)].

II. That defendant has not paid the rent due under said agreement [for the months of ,] amounting to $.

III. That plaintiff has duly performed all the conditions of said agreement on his part.[2]

Wherefore [as in § 919].

[1] See § 704, and Dunnell, Minn. Digest, §§ 5476–5483.

[2] Omit when the rent is payable in advance. Hurliman v. Seckendorf, 9 Misc. (N. Y.) 264.

1481. For rent—Grantee of lessor against lessee.

I. That on 19 , one A. B. was the owner in fee of [describe premises], and on that day the said A. B. entered into a written agreement with defendant whereby he leased to defendant said premises for the term of years from that date and defendant promised to pay rent therefor to

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the said A. B., his heirs and assigns, at the rate of $ per year, payable quarterly.

II. That by virtue thereof defendant entered into said premises and is still in possession thereof.

III. That on 19 , the said A. B., by deed conveyed said premises to plaintiff in fee, of which fact defendant had due notice.

IV. That on 19 , while defendant was so possessed, the sum of $ rent for the quarter ending on that day became due to plaintiff from defendant, but no part thereof has been paid.

Wherefore [as in § 919].

1482. For rent—Assignee against lessee.

[I. and II. as in § 1481.]

III. That on 19 , the said A. B. duly assigned to plaintiff, for a valuable consideration, all his right to the rent due and to become due under said lease, of which fact defendant had due notice.

IV. [As in § 1481.]

Wherefore [as in § 919].

1483. For rent—Against assignee of lessee.

I. That on 19 , plaintiff and one A. B. entered into a written agreement whereby plaintiff leased to the said A. B., for the term of years from that date, the premises known as No. , street, in the city of , and the said A. B., covenanted, for himself and his assigns, to pay rent therefor to plaintiff at the rate of $ per year, payable quarterly.

II. That thereafter and during said term, on 19 , [naming a day before the breach,] all the estate and interest of the said A. B. in said lease and the unexpired term, by an assignment then made by him, became vested in defendant, who thereupon entered into possession of said premises.

III. That on 19 , while defendant was so possessed, the sum of $ rent for the quarter ending on that day, became due to plaintiff from defendant, but no part thereof has been paid.

Wherefore [as in § 919].

1484. For rent—Heir of lessor against lessee.

I. That on 19 , one A. B., being then the owner in fee of [describe premises], entered into a written agreement with defendant whereby he leased said premises to defendant for the term of years from that day and defendant promised to pay rent therefor to the said A. B., his heirs or assigns, at the rate of $ per month, payable in advance.

II. That on 19 , during said term and while such owner, the said A. B. died intestate; whereupon the said reversion descended to plaintiff as

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the [only child and sole] heir at law of the said A. B. and thereby plaintiff became owner in fee of said premises.

III. That on 19 , the sum of $ rent, for the month beginning 19 , became due to plaintiff from defendant, but no part thereof has been paid.

Wherefore [as in § 919].

1485. For rent—Lessor against executors of lessee.

I. [As I. in § 1483.]

II. That thereupon said A. B. entered into possession of said premises under said agreement and so remained until his death.

III. [Allege death of A. B. and appointment of defendant as his executor as in § 1314.]

IV. That thereupon defendant, as such executor, entered into possession of said premises under said lease.

V. That after the death of said A. B. and while defendant was so in possession, the sum of $ of said rent for the [quarter] ending 19 , on that day became due to plaintiff from defendant, but no part thereof has been paid.

Wherefore [as in § 919].

1486. For rent—Tenant holding over.

I. [As in § 1480.]

II. That defendant thereupon entered into the possession of said premises under said agreement.

III. That after 19 , defendant remained in possession of said premises after the end of his said term, whereby he elected to continue his said tenancy for another year, commencing on 19 , on the same terms as those provided in said agreement.

IV. That defendant has not paid the rent for the quarter ending 19 .

Wherefore [as in § 919].

1487. Denial of leasing.

The defendant for answer to the complaint herein denies [that he ever leased said premises from plaintiff] [each and every allegation in the paragraph thereof].

1488. Surrender of premises.

The defendant for answer to the complaint herein alleges that on 19 , before said rent became due, defendant surrendered said premises, and all his interest therein under said lease, to plaintiff, who then accepted such surrender and has since had possession of said premises.

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1489. Eviction by lessor.

The defendant for answer to the complaint herein alleges that after the making of said lease, and before said rent became due, plaintiff entered into possession of said premises and evicted defendant therefrom and has ever since kept him out of the possession thereof.

See § 696.

1490. Assignment of lease.

The defendant for answer to the complaint herein alleges that on 19 , before said rent became due, defendant duly assigned all his right, title and interest in said lease to one A. B., who thereupon took possession of said premises; that on 19 , plaintiff was duly notified of said assignment and thereupon agreed to accept A. B. as his tenant of said premises, and to look only to him for the rent thereof.

1491. Surrender and eviction.

I. That by agreement of said parties defendants surrendered and delivered up to plaintiff all of said leased premises on the day prior to Sept. 1, 1893, and plaintiff thereupon accepted such surrender and took possession of said leased premises, and has ever since had possession thereof to the exclusion of defendants.

II. That between July 1 and Sept. 1, 1893, and while defendants were still in possession of a portion of said leased premises, plaintiff took from defendants the possession of the second floor of said premises and leased the same without the consent or knowledge of defendants, and at a less price than that which said defendants had theretofore received for said second floor of said building; that at the time defendants surrendered said leased building to plaintiff as aforesaid, defendants delivered the key to said building to plaintiff who accepted and received the same, and took possession of all said building and re-arranged and re-modelled the same, and plaintiff thereupon ordered and directed that defendants should remove from said building all signs bearing defendants' name and business, and all evidence of defendants' right to the possession of said building or any part thereof, which said defendants did.

Part of answer in Lafferty v. Hawes, 63 Minn. 13, 65 N. W. 87.

1492. Wrongful eviction—Counterclaim for damages.

The defendant for answer to the complaint herein alleges that plaintiff failed to give notice to defendant, required by statute, for the termination of said tenancy, and while said tenancy was subsisting and defendant entitled to possession of said premises plaintiff wrongfully, wilfully and maliciously evicted defendant therefrom, and before the rent for July was due.

For a counterclaim defendant alleges that because of the wrongful eviction of defendant by plaintiff as above set forth, which defendant realleges and

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makes a part hereof, defendant was put to great trouble and expense in securing other premises for the location of its business and was compelled for some time to discontinue the operation of its plant, by reason of which defendant was damaged in the sum of $150.

Wherefore defendant demands judgment for $150 with costs.

Recovery on this answer sustained in Chapman-Drake Co. v. Frank Fabian Mfg. Co., 104 Minn. 176, 116 N. W. 207.

1493. Premises untenantable—Surrender under statute.

For a [second defence] defendant alleges that on 19 , without fault or neglect on his part, said premises were so injured by [the elements] [fire and water] that they became untenantable and unfit for occupancy in that [specify wherein premises became unfit for occupancy]; that in consequence thereof, defendant, on 19 , and before the rent claimed in the complaint became due, quit said premises and surrendered possession thereof to plaintiff as authorized by G. S. 1913 § 6810.

1494. Failure to furnish fire escapes.

I. That said premises were situated in a four story tenement or flat building, containing four separate family apartments or flats leased on each floor thereof; that the apartment or flat leased by plaintiff to defendant is on the fourth floor thereof; that said building has an area of approximately 10,000 square feet on each floor, and is designed to and does in fact accommodate approximately twenty persons on each floor thereof.

II. That plaintiff, as the proprietor of said tenement or flat building, wholly failed to supply said building with any fixtures or facilities for the prevention or extinguishment of fire, or for the inmates of said building to escape therefrom in case of fire.

III. That said building was neither supplied with chemical fire extinguishers, nor with stand-pipe and hose connection in the hallways, nor with any exterior stand-pipes with hose connections, nor with any outside metallic or non-combustible ladder.

IV. That said building is not fire-proof and by reason of the failure of plaintiff so to equip said building with facilities for the extinguishment of fires, or for the escape of its inmates in the event of fire, the premises leased to the defendant were so dangerous to the lives of defendant and the members of his family as to be wholly unfit for human occupancy.

V. That when defendant realized the dangerous character of said premises, he demanded of plaintiff that the facilities and appliances required by law for the extinguishment of fires, and for the escape of the inmates in case of fire be supplied; that upon the failure of plaintiff to supply said facilities, defendant, on Feb. 26, 1910, removed his family and belongings from said premises and advised plaintiff that he would return thereto or pay rent therefor only when said facilities were supplied.

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VI. That during the whole term of said lease plaintiff wholly failed, neglected and refused to supply said building with said appliances or with any of them.

From answer in Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856.

1495. On covenant for quiet enjoyment.

I. That on 19 , defendant by a written lease let to plaintiff the premises known as No. , street, in the city of , for the term of years, covenanting in said lease that plaintiff should quietly enjoy the possession of said premises during said term.

II. That thereupon plaintiff entered into possession of said premises under said lease, but on 19 , one A. B., who then had and still has a paramount title thereto, lawfully evicted plaintiff therefrom under said title, and still withholds the possession thereof from him.

III. That plaintiff was thereby prevented from continuing the business of on said premises and was compelled to expend $ in moving to another place of business; that his stock of goods was impaired in value $ in moving; and by such removal he lost many customers.

IV. That thereby plaintiff was damaged $.

Wherefore [as in § 919].

1496. On covenant of lessee to keep in repair.

I. That on 19 , plaintiff by a written lease let to defendant the premises known as No. , street, in the city of , for the term of from that date.

II. That by the terms of said lease defendant covenanted that he would [state covenant to keep in repair in language of lease].

III. That thereupon defendant entered into possession of said premises under said lease and so remained until the expiration of his term, but he did not [negative covenant, specifying wherein defendant failed to make repairs], to plaintiff's damage $.

Wherefore [as in § 919].

1497. On covenant of lessor to keep in repair.

I. That on 19 , defendant by a written lease let to plaintiff the premises known as No. , street, in the city of , for the term of [one year] from that date.

II. That by the terms of said lease defendant covenanted that he would [state covenant to keep in repair in language of lease].

III. That thereupon plaintiff entered into possession of said premises under said lease and used the same as a store and warehouse for storing and selling various articles of dry goods.

IV. That defendant has failed to perform said covenant and keep the prem-

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ises in repair, and has allowed the walls and roof to become and remain leaky, by means whereof the water has entered said premises and utterly ruined a portion of said goods and seriously injured others, all to plaintiff's damage $.

Wherefore [as in § 919].

Based on Form 180, Conn. Pr. Act.

1498. On a promise to pay for the surrender of a lease.

I. That on 19 , plaintiff had a lease of a house and lot known as No. , street, in the city of , for a term commencing on 19 , and ending 19 , under which he was entitled to the possession of said house and lot.

II. That on 19 , defendant [being the owner of] [having purchased] the reversion of said premises, subject to the unexpired term of said lease, promised to pay plaintiff the sum of $ in consideration that plaintiff would at once surrender to him said unexpired term and the possession of said premises.

III. That thereupon plaintiff, in accordance with said agreement, surrendered said unexpired term and the possession of said premises to defendant, and otherwise duly performed all the conditions of said agreement on his part.

IV. That said sum has not been paid.

Wherefore [as in § 919].

Based on Form 184, Conn. Pr. Act.

1499. Lessee against lessor for refusal to give possession.

I. [Allege execution of lease as in § 1497.]

II. That on 19 , plaintiff [paid] [tendered] to defendant $ as payment in advance of the rent for said premises for the month of 19 , in accordance with the terms of said lease [allege performance by plaintiff of any other condition precedent].[1]

III. That on 19 , plaintiff demanded of defendant possession of said premises by virtue of said lease, but defendant refused, and still refuses, to give plaintiff possession thereof.

IV. That at the time of making said lease plaintiff was engaged, as defendant well knew, in the business of [a retail grocer] and intended to use said premises for conducting such business, for which they were peculiarly adapted, and were worth for that purpose at least $, per month, and plaintiff has been forced by defendant's default to expend much time and money in seeking other quarters in which to conduct such business and has been unable to secure any as suitable as said premises, [allege other special damages according to the facts], all to plaintiff's damage $.

Wherefore [as in § 919].

[1] If rent is not payable in advance and there are no other conditions precedent this paragraph may be omitted.

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1500. Against owner of flat building for defective stairway.

I. That at the times herein mentioned defendant was the owner and in control of the flat building known as No. , street, in the city of , Minnesota.

II. That at such times said building was occupied by tenants of defendant and had, as a part thereof, a stairway at the rear thereof and connected with the upper flats thereof, maintained and controlled by defendant, for the use of such tenants and their servants and all other persons properly going to or from said flats.

III. That on and prior to 19 , defendant negligently allowed the railing which formed a part of said stairway to be so rotten, loose and defective that it was dangerous to persons using said stairway and such dangerous condition was for a long time known to defendant, or would have been known to him but for the want of reasonable care and diligence on his part.

IV. That on 19 , while plaintiff was a servant of a tenant of one of the upper flats of said building and in connection with her work as such was using said stairway to ascend to said flat and was assisting herself up said stairway by means of said railing, said railing, by reason of its said defective condition, suddenly broke and gave way, causing plaintiff to fall feet to the ground whereby her [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Based on Williams v. Dickson, 122 Minn. 49, 141 N. W. 849.

1501. For injury from defective porch of tenement.

I. That at the times herein mentioned defendant owned and controlled a tenement house known as No. , street, in the city of , Minnesota, and plaintiff was occupying one of the apartments on the second floor thereof as a tenant of defendant.

II. That at the rear of said house, and forming a part thereof, there was a wooden porch with wooden steps maintained and controlled by defendant for the common use of all his tenants on the second floor of said building, as a means of access to and egress from their apartments and for their general use.

III. That on 19 , and for a long time prior thereto, defendant negligently allowed the floor of said porch to be and remain in a decayed, worn out and unsafe condition.

IV. That defendant knew, or but for the want of reasonable care and diligence on his part would have known, of such condition.

V. That on 19 , while plaintiff was walking on said porch, [on her way to her said apartment] [in the course of her household duties], the floor thereof, by reason of its said condition, gave way and plaintiff was thereby thrown to the ground and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Based on Farley v. Byers, 106 Minn. 260, 118 N. W. 1023. See Dunnell, Minn. Digest, § 5369.

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1502. For treble damages for wrongful eviction of subtenant.

I. That at the times herein mentioned one A. B. was the owner in fee of [describe premises as in a deed].

II. That on 19 , said A. B. leased said premises to one C. D. for a term of years from that date, and thereupon the said C. D. went into possession thereof under said lease as the tenant of said A. B.

III. That said C. D. so remained in possession until 19 , when he duly assigned all his interest in said lease to one E. F. who thereupon went into possession of said premises under said lease and assignment and so remained until 19 , when he duly assigned all his interest in said lease to plaintiff, who thereupon entered into the exclusive and peaceable possession of said premises under said lease and assignment and so remained until 19 .

IV. That on 19 , while plaintiff was so possessed and entitled to the immediate possession thereof under his unexpired term, defendant forcibly and without lawful authority evicted plaintiff therefrom [and removed a large amount of personal property belonging to plaintiff, of the value of $], to plaintiff's actual damage $.

Wherefore plaintiff demands judgment for $, treble damages as authorized by General Statutes 1913, § 8092, with interest thereon from 19 , and for costs.

Based on Bagley v. Sternberg, 34 Minn. 470, 26 N. W. 602.

1503. Injunction against removal of fixtures—Lessor against lessee.

I. That plaintiff owns a house known as No. , street, in the city of .

II. That defendant is in possession of said house under a lease from plaintiff.

III. That said house contains in each bed room thereof, a marble wash-basin in a stationary wash-stand, supplied by pipes with water, from a tank in the attic of the house.

IV. That defendant threatens to remove said basins, pipes and wash-stands from said house, and has detached six of said basins and wash-stands, in order to remove them from said house; all of which is without plaintiff's consent.

V. That by reason thereof plaintiff has been damaged $.

Wherefore plaintiff demands judgment permanently enjoining defendant from removing said basins, pipes and wash-stands from said house, and for $ damages, with costs.

Based on Form 183, Conn. Pr. Act.

1504. Farm contract—Injunction against breach—Division of crops—Receiver.

I. That plaintiff is, and for eight years last past has been, the owner in fee of [description of premises].

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II. That in the month of July, 1881, plaintiff commenced an action in this court for divorce against her then husband A. B., and in said action, and as a part of the relief desired by her, prayed that she be awarded immediate possession and control of her said premises.

III. That said A. B. in said action, disputed plaintiff's title to said premises and claimed that he was the owner thereof; and pending said action one C. D. was, by an order duly made by said court, appointed receiver therein, to collect the rents and profits of said premises.

IV. That on Aug. 18, 1882, judgment was duly entered in said action by said court, in favor of plaintiff therein and against said A. B. defendant therein, adjudging, among other things, that the marriage theretofore existing between plaintiff and said A B. be dissolved and that plaintiff was the owner and entitled to the possession of said premises, and the rents and profits thereof.

V. That at the time of the commencement of said action, the defendant herein was occupying and cultivating a portion of said premises as tenant of this plaintiff for and during the farming season of 1881, to wit, [description of land], at the agreed rental of one-third of all crops raised by defendant upon said premises, to be paid as follows, to wit, said one-third of the wheat and oats so raised was to be delivered to plaintiff when the same was threshed, and said one-third of the other crops so raised was to be delivered to plaintiff when the same was ripe and harvested.

VI. That said receiver collected said rents for the year 1881, and said action being undetermined at the commencement of the farming year of 1882, defendant with the consent and permission of said receiver, and of the parties to the suit then pending, continued to occupy, and farmed and cultivated said premises so rented by him, during the present farming season of 1882, and agreed to pay therefor the same proportion of the crops raised as rent and in the same time and manner as during the previous year.

VII. That during the said farming season of 1882 defendant has raised upon said premises so rented and cultivated by him, six hundred bushels of wheat, and one hundred bushels of oats and ten tons of hay, besides a large quantity of corn and potatoes, but said corn and potatoes are not yet matured or harvested, and plaintiff cannot state the exact quantity thereof.

VIII. That said wheat and oats are harvested and a large portion thereof threshed and defendant is now threshing the remainder thereof, and plaintiff has demanded her one-third thereof at the machine as the same is being threshed, but defendant has refused and still refuses to divide and separate plaintiff's one-third thereof and to pay over and deliver the one-third thereof due to plaintiff for rent of said premises as aforesaid, or any part thereof, and threatens to and is about to retain, hold and appropriate the whole of said crops so raised by him upon said premises including plaintiff's share thereof to his own use and sell and dispose of the same.

IX. That defendant has no property except such as is exempt by law from

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seizure and sale under execution, besides said crops, and any action at law which plaintiff might bring against defendant, for breach of said contract to pay rent, would be unavailing, as no judgment or damage for such breach could be collected of defendant.

X. That plaintiff's one-third of said crops, due to her for rent of said premises from defendant is of the value of $400.

Wherefore plaintiff demands judgment:

1. That a receiver be appointed to take possession of and divide and separate said crops and deliver to each party hereto their respective portions thereof.

2. That defendant be restrained from in any manner appropriating or using or disposing of plaintiff's share and portion of said crops raised on her said premises.

3. That in the meantime and until such receiver is appointed and said crops so divided and delivered, said defendant and all other persons acting for or under him be restrained from appropriating, disposing of or in any manner using any portion of said crops.

4. For such other relief as may be just, with costs.

Sustained in Schmitt v. Cassilius, 31 Minn. 7, 16 N. W. 453.

1505. For possession under unlawful detainer act—Lessor against lessee—Written lease—Failure to pay rent.[1]

I. That on 19 , plaintiff and defendant entered into a written agreement whereby plaintiff leased to defendant for the term of [years] from that day the premises known as No. , in the city of , county, Minnesota, and defendant promised to pay rent therefor to plaintiff at the rate of $ per [month] [year], 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 due under said agreement for the month of 19 , yet withholds possession of said premises from plaintiff, [who is the owner and entitled to the immediate possession thereof].[2]

Wherefore plaintiff demands judgment for the restitution of said premises under G. S. 1913, § 7664, with costs.

[Verification.]

[1] See § 697; G. S. 1913 §§ 7658–7672; Dunnell, Minn. Digest, §§ 5448–5475.

[2] Appropriate but not essential. Engels v. Mitchell, 30 Minn. 122, 14 N. W. 510.

1506. Same—Oral lease.

I. That on 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 [continue as in § 1505].

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1507. Same—Tenant holding over after expiration of term—Written lease.

I. That on 19 , plaintiff, by a written lease, let to defendant for the term of years from that day the premises known as No. , street, in the city of , county, Minnesota.

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 let has expired, yet defendant withholds possession thereof from plaintiff, [who is the owner and entitled to the immediate possession thereof].[1]

Wherefore [as in § 1505].

[1] Appropriate but not essential. Engels v. Mitchell, 30 Minn. 122, 14 N. W. 510.

1508. Same—Termination of lease from month to month—Notice to quit.

I. That on 19 , plaintiff leased to defendant from month to month from that day the premises known as No. , street, in the city of , county, Minnesota.

II. That thereafter defendant went into possession of said premises under said lease and still retains possession thereof.

III. That on 19 , plaintiff served on defendant a written notice to quit possession of said premises on 19 ., [of which notice the following is a copy:].[1]

IV. That the term of defendant's tenancy of said premises under said lease has expired, yet he withholds possession thereof from plaintiff, [who is the owner and entitled to the immediate possession thereof].[2]

Wherefore [as in § 1505].

[1] See Dunnell, Minn. Digest, §§ 5440–5447.

[2] Appropriate but not essential. Engels v. Mitchell, 30 Minn. 122, 14 N. W. 510.

1509. Same—Against tenant and subtenants.

I. That on 19 , plaintiff leased to defendant A. B., for a term of one year from that date, the [describe premises as in § 1505].

II. That thereupon defendant A. B. entered into possession of said premises under said lease as the tenant of plaintiff and is now in possession thereof.

III. That defendants C. D. and E. F. are in possession of portions of said premises under sub-leases from said A. B.

IV. That defendant A. B. had no authority from plaintiff to sub-lease any portions of said premises to any one and defendants C. D. and E. F. are unlawfully in possession of portions of said premises and unlawfully withhold the same from plaintiff.

V. That on 19 , plaintiff duly served notice on each of said defendants to quit possession of said premises on 19 , and on that day the term of said A. B. expired, yet defendants withhold possession of said

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premises from plaintiff [who is the owner and entitled to the immediate possession thereof].

Wherefore [as in § 1505].

Based on Judd v. Arnold, 31 Minn. 430, 18 N. W. 151.

1510. Same—Lessee against prior lessee holding over.

I. That at all the times herein mentioned one A. B. was and still is the owner of [describe premises as in § 1505].

II. That on 19 , said A. B. leased said premises to defendant C. D. for a term of one year from that date, and thereupon said C. D. entered into possession of said premises under said lease as the tenant of said A. B. and so remained until 19 .

III. That on 19 , said C. D. duly assigned all his interest in said lease to defendant E. F., who thereupon went into possession of said premises under said lease and assignment and is still in possession thereof.

IV. That on 19 , said A. B. leased said premises to plaintiff for a term of one year beginning on 19 , at the expiration of the term of said C. D. and E. F., and plaintiff is entitled to the immediate possession thereof by reason of the premises.

V. That the term of said C. D. and E. F. has expired, yet defendant E. F. withholds possession of said premises from plaintiff [though plaintiff demanded possession thereof from him on 19].

Wherefore [as in § 1505].

Based on Burton v. Rohrbeck, 30 Minn. 393, 15 N. W. 678.

1511. Same—Tenancy at will changed by mutual agreement to tenancy for a fixed term.

I. That on April 15, 1882, plaintiff leased to defendant the second story of the dwelling house known as No. 47, Mississippi street, in the city of St. Paul, Ramsey county, Minnesota, for one month, and from month to month thereafter, at the will of the said parties, for the monthly rent of $20, payable in advance.

II. That thereupon defendant entered into the possession of said premises under said leasing, and still occupies the same.

III. That on June 2, 1882, plaintiff and defendant mutually agreed that defendant should leave and vacate said premises, and surrender the same to plaintiff on or before June 15, 1882, and that plaintiff should discharge defendant from all further obligations under said lease, and should accept such surrender.

IV. That defendant refuses to vacate said premises or to surrender them to plaintiff, though requested by plaintiff to do so.

Wherefore [as in § 1505].

Sustained in Engels v. Mitchell, 30 Minn. 122, 14 N. W. 510.

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1512. Tender of rent and costs.

The defendant for answer to the complaint herein alleges that on 19 , he duly tendered to plaintiff $, the total amount then due from defendant to plaintiff as rent under said lease, with interest, and offered to pay to plaintiff all costs which had then accrued in this action, and an attorney's fee of $5, but plaintiff refused to accept the same; that defendant is still ready to pay the rent due under said lease, with interest, and the costs of this action incurred by plaintiff prior to the filing of this answer, and an attorney's fee of $5, and brings the same into court.

Wherefore defendant prays that this action be dismissed upon his paying to the plaintiff or the clerk of this court the amounts last aforesaid.

Based on G. S. 1913 § 6807; George v. Mahoney, 62 Minn. 370, 64 N. W. 911.

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1513. Slander—General form—Words defamatory on their face.

I. That on 19 , in the city of , defendant maliciously spoke, in the presence and hearing of others, of and concerning plaintiff, these words: [Set out words exactly as spoken.]

II. That said words were false.

III. That thereby plaintiff has suffered in his reputation, to his damage $.

IV. [Allege any special damages sought.]

Wherefore [as in § 919].

Based on Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879. See §§ 708–719.

1514. Slander—Words not defamatory on their face.

I. That on 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 plaintiff was not making money dishonestly and was not keeping a house of prostitution.

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 thereby plaintiff has suffered in her reputation, to her damage $.

VI. [Allege any special damages sought.]

Wherefore [as in § 919].

Based on Richmond v. Post, 69 Minn. 457, 72 N. W. 704.

1515. Slander—Defamation in relation to one's business or calling.

I. That on 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 of retail dry goods merchant in which he was then and there engaged], these words: [Set out words exactly as spoken.]

II. That said words were false.

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III. That thereby plaintiff has suffered in his reputation and [loss of trade] [profits] in said [calling] [business], to his damage $.

IV. [Allege any special damages sought.]

Wherefore [as in § 919].

Based on 2 Chitty, Pl. 16 Am. ed. 547; Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879. See §§ 708–719.

1516. Libel—Words defamatory on their face.

I. That on 19 , in the city of , defendant maliciously published, in a daily newspaper called the , of and concerning plaintiff, these words: [Set out article exactly as printed.]

II. That said words were false.

III. That thereby plaintiff has suffered in his reputation, to his damage $.

IV. [Allege any special damages sought.]

Wherefore [as in § 919].

See §§ 708–719.

1517. Libel—Words not defamatory on face.

[I. and II. as in § 1516.]

III. [Allege extrinsic facts essential to disclose defamatory character of words published, as, for example, in paragraph III. in § 1514, 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 was [allege defamatory charge as, for example, in paragraph IV. in § 1514].

V. That thereby plaintiff has suffered in his reputation, to his damage $.

VI. [Allege any special damages sought.]

Wherefore [as in § 919].

See §§ 708–719.

1518. Libel—For slander of title to personalty.

I. That at the times herein mentioned plaintiff was and still is engaged in the business of selling horses in the city of Minneapolis, Minnesota, and was and still is endeavoring to sell a certain race horse called Barney Kelly, belonging to plaintiff.

II. That on Jan. 30, 1886, defendant wilfully, maliciously and with intent to injure plaintiff and prevent the sale of said horse, wrote and published in the Saturday Evening Spectator, of which he was owner, editor and publisher, and which had a large circulation in this and other states, in an article purporting to give the name and record of a large number of race horses in said city, but which did not attempt to state the age of any horse except that of

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plaintiff, these false words of and concerning said horse Barney Kelly: "M. D. Wilson, new 21 years old, from Chicago, 2.25."

III. That plaintiff meant by said words and was so understood by persons reading the same that said horse was 21 years old.

IV. That said horse was then not more than 12 years old as defendant then well knew.

V. That at the time of said publication plaintiff was negotiating with one A. B. for the purchase of said horse, for the sum of $1,000, but upon said publication and in consequence thereof the said A. B. broke off said negotiations and refused to buy said horse; that but for said publication the said A. B. would have bought said horse and paid plaintiff said price therefor.

VI. That before said publication said horse was reasonably worth $1,000, but because of said publication plaintiff is unable to sell said horse, which he still owns, to any one for more than $500, and he is not now worth more than that amount.

VII. That by reason thereof plaintiff has been damaged $500.

Wherefore [as in § 919].

Based on Wilson v. Dubois, 35 Minn. 471, 29 N. W. 68.

1519. Justification where charge is specific.

That the supposed defamatory words set forth in the complaint were [and are] true.

1520. Same—General charge of being a thief.

That on 19 , before said supposed defamatory words were spoken by defendant, plaintiff feloniously stole and carried away , the property of , of the value of $, and therefore said supposed defamatory words were true.

1521. Demand of retraction by newspaper.

I. That on 19 , plaintiff served upon [defendant] [A. B., the publisher of said newspaper] personally [in said city] [at the principal place of publication of said newspaper] a notice and demand of retraction, of which the following is a copy: [Copy of notice.]

II. That a retraction of said defamatory statements was not published in a regular issue of said newspaper within one week after the service of said notice [in as conspicuous a place and type in said newspaper as were the statements herein complained of] [in a conspicuous place on the editorial page of said newspaper].

G. S. 1913 § 7901. See Dunnell, Minn. Digest, §§ 5533–5537; Lysacker v. Bemidji Pioneer Pub. Co., 114 Minn. 179, 130 N. W. 850.

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LIMITATION OF ACTIONS

1522. General form of plea.

The defendant for answer to the complaint herein alleges that the cause of action therein alleged did not accrue within [six] years before the commencement of this action.

See §§ 724–732.

1523. Same—Another form.

The defendant, answering the complaint herein:

I. For a first defence denies each and every allegation in the paragraph thereof.

II. For a second defence alleges that the cause of action therein alleged did not accrue within [six] years before the commencement of this action.

See §§ 724–732.

1524. Partial payment avoiding statute.

I. That on 19 , plaintiff loaned to defendant, at his request, $, which defendant promised to repay to plaintiff [on demand] [on 19].

II. That on 19 , plaintiff demanded repayment thereof from defendant.

III. That no part thereof has been repaid except the sum of $, which defendant paid on [insert date within six years before commencement of action].

Wherefore [as in § 919].

Sustained by Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084. See § 728.

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1525. On contract for driving logs.[1]

I. That on 19 , plaintiff contracted with defendant to drive certain logs of defendant from Mike Drew Brook into the Anoka Boom, in the city of , Minnesota, and defendant agreed to pay plaintiff therefor at the rate of $ per thousand feet, to be paid in full when the logs were in the boom.

II. That plaintiff thereupon drove about feet of said logs into said boom in the month of , and about feet thereof in the month of , making in all feet, being all the logs so agreed to be driven by plaintiff.

III. [That plaintiff has duly performed all the conditions of said agreement on his part.] [2]

IV. That defendant has not paid to plaintiff the amount agreed upon for said driving, nor any part thereof.

Wherefore [as in § 919].

[1] Sustained in Rollins v. St. Paul Lumber Co., 21 Minn. 5.
[2] Not in the original.

1526. For foreclosure of lien on logs.

I. That between Dec. 1, 1910, and April 6, 1911, both days inclusive, plaintiff performed manual labor and services for defendants in cutting, hauling and banking logs, piling, pulpwood, etc., in their logging operations in and near Hornby, Minnesota.

II. That defendants promised to pay plaintiff for such labor and services the sum of $638.49, but no part thereof has been paid, though due demand has been made therefor before the commencement of this action, except the sum of $198.73, and the sum of $439.76 with interest from April 6, 1911, is now due and owing on said contract.

III. That on April 29, 1911, a duly verified claim of lien was duly filed in the office of the Surveyor General at Duluth, Minnesota, on all said ties, logs, piling, pulpwood, etc., stamped with the registered marks [copy of marks].

Wherefore plaintiff demands judgment against defendants for $439.76, with interest from April 6, 1911, and that said sum, together with his costs and disbursements in this action, and an attorney's fee of $20, as allowed by Section 3533, Revised Laws of 1905, be declared a lien upon all of said ties, logs, piling, pulpwood, etc., and that such lien may be foreclosed by attachment upon said property, and for such other relief as may be just.

Complaint in Smith v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6.

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MALICIOUS PROSECUTION

1527. General form.

I. That on 19 , defendant falsely and maliciously, and without reasonable or probable cause, preferred a charge of against plaintiff before A. B. [a justice of the peace in and for the (town) (village) of , county, Minnesota] [judge of the municipal court of the city of , Minnesota], and procured a warrant to be issued by said [justice] for the arrest of plaintiff.

II. That thereupon plaintiff was arrested under said warrant and imprisoned for [hours] [days], and was compelled to give bail in the sum $ to obtain his release.

III. [That on 19 , said (justice) dismissed the complaint of defendant and acquitted plaintiff] [That on 19 , at the trial of said cause, plaintiff was acquitted of said crime] [That on 19 , the said justice, having heard said charge, dismissed the same and discharged plaintiff from custody] [That on 19 , after a trial of said charge (before said justice) (in said court) plaintiff was acquitted thereof and discharged], and said prosecution is wholly determined.

IV. That by reason of the premises plaintiff has been greatly injured in his credit and reputation, and suffered great mental and bodily distress, and was prevented for days from transacting his business, and incurred large expense for costs and attorney's fees and bail, all to his damage $.

Wherefore [as in § 919].

See § 735.

1528. For causing plaintiff to be indicted.

I. That on 19 , defendant falsely and maliciously, and without reasonable or probable cause, procured plaintiff to be indicted by the grand jury of county, for the crime of .

II. That by reason thereof plaintiff was arrested and imprisoned for [hours] [days] and was compelled to give bail in the sum of $, to obtain his release.

III. That thereafter defendant falsely and maliciously, and without reasonable or probable cause, prosecuted and caused to be prosecuted said indictment, and at the trial thereof in the district court for said county on 19 , plaintiff was duly acquitted of said charge, whereby the said prosecution was terminated.

IV. [As in § 1527.]

Wherefore [as in § 919].

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1529. For false arrest.

I. That at the times herein mentioned the defendant A. B. was a duly elected, qualified and acting constable, in and for the county of Lac qui Parle, Minnesota, and residing in the village of Dawson, Minnesota, and defendant C. D. was engaged in business in said village.

II. That at said village on Dec. 6, 1910, defendant C. D., in order to intimidate plaintiff and compel him by threats and duress to settle and pay some pretended indebtedness or spurious claims in favor of a third party, induced said constable to pretend and state to plaintiff that he had in his possession a warrant for plaintiff's arrest on a criminal charge, and to arrest plaintiff and bring him before said C. D., and by force, threats and violence compel plaintiff to pay said pretended indebtedness.

III. That on said day defendant A. B. approached plaintiff and informed him that he was a constable and that he had a warrant for his arrest on a criminal charge and informed plaintiff that he must go with him.

IV. That plaintiff is ignorant of criminal procedure and supposed that the statements made by said constable were true and that he did in fact have a warrant for him and therefore submitted to said arrest and followed the said constable.

V. That at the time said constable approached plaintiff and made the unlawful arrest as aforesaid, plaintiff was on an outgoing train from said village, and said A. B. caused the train to be stopped and took plaintiff therefrom and to the place of business of defendant C. D., and defendants then and there made threats to lock plaintiff up and threats of personal violence toward plaintiff, and said C. D. made an assault upon plaintiff and beat and bruised him, and searched his person and clothing for the purpose of filching from him a sum of money sufficient to pay said pretended indebtedness or claim to a third party.

VI. That said false arrest was made about the hour of 11:30 A. M., on Dec. 6, 1910, and said constable kept and held plaintiff as a prisoner in his charge, and in the charge of others appointed by said constable, and deprived him of his liberties, until 3 o'clock P. M. Dec. 7, 1910, at which time the said constable informed plaintiff that he was discharged, and released him.

VII. That at the time of said arrest and detention of plaintiff by defendants, said constable had no warrant for plaintiff's arrest, and no complaint had been made or filed against plaintiff and no hearing or trial of any kind was had before any magistrate, or otherwise, but plaintiff was not permitted to leave the custody of said constable until defendants were fully aware that the arrest, detention, threats, abuse and ill-treatment so inflicted upon him by them were ineffectual to compel plaintiff to pay said pretended indebtedness.

VIII. That said arrest and detention were unlawful, wanton and malicious, and without any probable cause, and were made by defendant A. B. at the instigation and request of defendant C. D. for the purpose of injuring plaintiff in his good name and reputation and to humiliate him before his friends.

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IX. That by reason thereof plaintiff was greatly injured in his reputation and suffered great humiliation and distress of mind, to his damage $5,000.

Wherefore [as in § 919].

Substance of complaint in Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818.

1530. For wrongful issuance and execution of a search warrant.

I. That plaintiff is, and for nine years last past has been, a resident of Battle Lake, in Otter Tail county, Minnesota, and during all of said time has been engaged in business there as a general merchant; that plaintiff has occupied the upper half of his store building in said village during the last year as a residence for himself and family, the lower part being used as his store.

II. That defendant is also a resident of, and a general merchant at, said village of Battle Lake, and for six years last past has occupied a building close to that of plaintiff, and has therein carried on the business of general merchandise.

III. That on Oct. 25, 1889, one A. B., acting for and at the special instance and request of defendant, made a complaint to C. D., one of the justices of the peace in and for the city of Fergus Falls, in said county, stating on oath that on Oct. 25, 1889, at Battle Lake, in said county, divers goods and chattels, the property of defendant, and of the value of $20, were feloniously stolen, taken and carried away from the shop of defendant, situated in said village, and that the said A. B. had good reason to believe and did believe that the said goods and chattels were concealed in the said buildings of plaintiff in said village, and prayed that a warrant issue to make search for said goods and chattels in said buildings; that said complaint was signed by said A. B. and sworn to by him, before said C. D., on Oct. 25, 1889; that a copy of the same is hereto attached, marked Exhibit A, and made a part hereof.

IV. That soon after the making and filing of said complaint the said C. D., as such justice of the peace, issued a search warrant over his official signature, directed to the sheriff or any constable of said county, commanding them forthwith to enter the said buildings of plaintiff, and there to make search for the said stolen property, and that if the same or any part thereof be found, to bring the same, together with the person in whose possession the same might be found, before said justice to be dealt with according to law.

V. That said warrant, as soon as issued by said justice, was placed in the hands of G. H., sheriff of said county, and on Oct. 29, 1889, said premises of plaintiff were searched by I. J., a deputy sheriff of said county, under and by virtue of said warrant.

VI. That none of the said goods of defendant were found in any of the buildings of plaintiff nor anywhere on his premises, and on Oct. 30, 1889, said deputy sheriff made a return to said justice of his service thereon, stating that he had searched the said buildings of plaintiff, and that none of said goods were found therein.

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VII. That a copy of said warrant, together with the return of the officer thereon, is hereto attached, marked Exhibit B, and made a part hereof.

VIII. That plaintiff has no knowledge or information sufficient to form a belief as to whether the said goods described in said criminal complaint were stolen from defendant.

IX. That defendant wilfully, maliciously and without probable cause, procured and caused the said A. B. to make said complaint and to cause said warrant to issue; and defendant had no reason whatever to believe, and did not believe, that said goods were concealed on plaintiff's premises, as alleged in said complaint and warrant.

X. That after said warrant was issued defendant, on Oct. 29, 1889, wilfully, maliciously and without probable cause, with a desire to humiliate and injure plaintiff, caused said premises of plaintiff to be searched by said officer, as aforesaid, under said warrant.

XI. That no part of said goods were ever concealed or placed on any of the premises of plaintiff, and no part thereof was ever found on said premises, as defendant well knew at all of said times.

XII. That since the return of said warrant defendant has failed to prosecute his alleged criminal action against plaintiff, though the grand jury has been in session and adjourned since the date of the issue of said warrant.

XIII. That said malicious acts of defendant caused a great injury to plaintiff in his reputation and business, and greatly humiliated him, his wife and family, to his damage, $10,000.

Wherefore [as in § 919].

Substance of complaint in Olson v. Tvete, 46 Minn. 225, 48 N. W. 914.

1531. Malicious attachment.

I. That on 19 , in an action then pending in the district court for county, Minnesota, wherein this plaintiff was defendant and the defendant herein plaintiff, the defendant herein, maliciously intending to injure plaintiff and without probable cause, made an affidavit for an attachment against the property of plaintiff, falsely alleging therein that plaintiff [state its false allegations].

II. That thereafter, on said false affidavit, defendant, maliciously and without probable cause, caused a writ of attachment to be issued out of said court directed to the sheriff of [said] county and requiring him to attach and safely keep the unexempt property of this plaintiff in said county, or so much thereof as should suffice to satisfy the amount claimed in said action, to wit, $, with costs and expenses.

III. That thereafter defendant delivered said writ to said sheriff and maliciously and without probable cause [and with intent to injure plaintiff and break up his business] directed said sheriff to levy upon and take into his possession, under said writ, a [stock of merchandise], belonging to plaintiff in the city of

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IV. That on 19 , said attachment was vacated on motion of plaintiff by said court, after due notice to defendant, and said goods returned to the possession of plaintiff.

V. [Allege damages.]

Wherefore [as in § 919].

See § 737, and Dunnell, Minn. Digest, § 5751.

1532. Same—Another form.

I. That on Nov. 11, 1893, defendant, maliciously and intending to injure plaintiff, commenced in the district court for Ramsey county, Minnesota, an action by attachment against plaintiff for the recovery of money, falsely, maliciously and without probable cause, alleging in the affidavit for such attachment, and as a ground therefor, that plaintiff herein had assigned, secreted and disposed of his property with intent to delay or defraud his creditors, and was about to assign, secrete or dispose of the remainder of his property with like intent, a copy of which affidavit is hereto attached, marked Exhibit A, and made a part hereof.

II. That thereupon by direction of defendant, the clerk of said court issued two writs of attachment, copies of which are hereto attached, marked Exhibits B and C, and made a part hereof.

III. That said writs were delivered or caused to be delivered by defendant, one to the sheriff of Ramsey county, Minnesota, and one to the sheriff of Washington county, Minnesota, and by the direction of defendant, the sheriff of Ramsey county, on Nov. 13, 1893, levied the said writ of attachment issued for said county upon the following goods and chattels of the plaintiff: [Description of goods.]

IV. That by direction of defendant the sheriff of Washington county, on Nov. 11, 1893, levied the said writ of attachment directed to the sheriff of said Washington county, upon the following goods and chattels of the plaintiff: [Description of goods.]

V. That all of said goods and chattels were taken into the custody of said sheriffs respectively, and the goods and chattels so taken by the sheriff of Ramsey county were retained by said sheriff until Dec. 30, 1893, and the goods and chattels so taken by the sheriff of Washington county were retained under said writ of attachment until Dec. 26, 1893.

VI. That defendant caused said levies to be made maliciously, without probable cause, and with intent to injure plaintiff herein.

VII. That on Dec. 11, 1893, said writs of attachment, and the levies made thereunder, were duly vacated, set aside and discharged by an order of said court, which was duly served on the attorney of defendant, and on said sheriffs and also on defendant personally.

VIII. That at the time said writs of attachment were levied as aforesaid upon the goods and chattels of plaintiff, he was engaged in the business of a farmer in the town of Oakdale, Washington county, Minnesota, and his finan-

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cial standing and credit were good; that by reason of said levies and the removal of said goods and chattels under said writs of attachment, his business was interrupted for a period of forty-five days, to his damage $135; that during that time he was deprived of the use of his said horses and cows to his damage $100; that during that time he lost the amount paid for a man hired by him, and for which he was compelled to pay, without any compensation on his part, the sum of $45; that by the wrongful and malicious suing out and levy of said writs of attachment his credit and reputation have been greatly impaired and injured, all to his damage $1,000.

Wherefore [as in § 919].

Substance of complaint in Tykeson v. Bowman, 60 Minn. 108, 61 N. W. 909.

1533. Malicious prosecution of a civil action.

I. That on 19 , defendant maliciously and without probable cause commenced an action against plaintiff in [the district court for county, Minnesota,] [this court,] on a false and groundless claim that [state claim].

II. That plaintiff appeared in said action by attorney and defended the same; that said action was tried by a jury and a verdict returned for the defendant and thereon a judgment was duly entered in favor of the defendant, the plaintiff in this action, against the plaintiff, the defendant in this action.

III. That plaintiff herein was necessarily put to great inconvenience and expense in defending said action, in procuring witnesses, employing counsel, and otherwise, and necessarily expended $ therefor and in said action recovered only $ as costs and disbursements therein.

IV. That by reason thereof plaintiff has been damaged $.

Wherefore [as in § 919].

1534. Same—Another form.

I. That plaintiff is, and at the times herein mentioned was, an employee of the Northern Pacific Railway Co., residing with his family at Dilworth, Minnesota, and his only means of earning money with which to support himself and his family was such employment.

II. That defendant is a foreign corporation, duly organized and existing under the laws of the state of Wisconsin.

III. That on Jan. 31, 1910, at the city of Moorhead, Minnesota, defendant maliciously and without probable cause commenced an action against plaintiff in the justice court in said city of Moorhead, upon a complaint duly filed therein in which defendant herein falsely alleged that this plaintiff was indebted to the defendant herein, upon a pretended claim therein set forth, in the sum of $40.50, with interest thereon at the rate of ten per cent. per annum from Nov. 15, 1906.

IV. That such claim was false as the plaintiff therein then well knew; that

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this plaintiff was not indebted to the defendant, the plaintiff in said action, and was not liable to it in any sum, upon said pretended claim or in any other manner, as the defendant then well knew.

V. That on Jan. 31, 1910, defendant, maliciously intending to injure the plaintiff, falsely and without probable cause, caused a garnishee summons to issue out of said court, in said action, and caused the same to be served upon the Northern Pacific Railway Company, and a copy thereof and notice to the defendant, as required by law, were on said day duly served on this plaintiff, and thereby the sum of $97.81, belonging to this plaintiff, then in the hands of said garnishee, the Northern Pacific Railway Company, was seized, attached and held to abide the final determination of said action, as provided by law.

VI. That the purpose and intent of defendant in said garnishment proceeding was to vex, harass and injure this plaintiff, and annoy the said Northern Pacific Railway Company so as to cause it to discharge this plaintiff from its employ, and cause and compel this plaintiff to pay said unjust and illegal claim out of the money so garnished.

VII. That, on May 9, 1910, upon a trial had in the district court for Clay county, Minnesota, to which court said case had been appealed, upon the issues raised by the pleadings in said action, a jury impaneled to hear, try and determine said action, returned a verdict in favor of the defendant therein, this plaintiff.

VIII. That after the rendition of said verdict for the defendant in said action, and on May 15, 1910, the plaintiff in said action, this defendant, falsely, maliciously and without probable cause, caused a garnishee summons to be issued in said action out of said district court, upon a false and malicious affidavit, and caused the same to be served upon the said Northern Pacific Railway Co., and a copy thereof and notice to the defendant as required by law, were on said day duly served upon this plaintiff, the defendant therein; that thereby the sum of $198.18, belonging to this plaintiff then in the hands of said garnishee, was seized, attached and held to abide the final determination of said action as provided by law.

IX. That the purpose and intent of said garnishment proceeding was to vex, harass and injure this plaintiff and to deprive him of said money and the use thereof, and to vex, harass and annoy the said Northern Pacific Railway Co., so as to cause it to discharge plaintiff from its employ and to cause and compel plaintiff to pay said unjust and illegal claim out of the money so garnished.

X. That thereafter this plaintiff duly moved said district court to set aside and vacate said last mentioned garnishee summons, and all proceedings based thereon, and the said affidavit for garnishment and all proceedings thereunder, which said motion was, on June 2, 1910, duly granted by said court.

XI. That thereafter the plaintiff in said action, this defendant, duly made a motion for a new trial of said action, which said motion was duly heard by the court and said motion was, on June 27, 1910, by said court duly denied.

XII. That on July 27, 1910, the plaintiff in said action, this defendant, duly served upon this plaintiff a notice of the appeal of said action to the

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supreme court of this state; that thereafter on August 8, 1910, the plaintiff in said action duly dismissed the same and said action thereupon finally terminated in favor of this plaintiff.

XIII. That by reason of the premises plaintiff has been greatly injured in his good name and credit, and has been compelled to pay large sums for attorney's fees in defending himself, and has been injured in his business and employment, all to his damage $1,000.

Wherefore [as in § 919].

Complaint in Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808.

1535. Denial of malice or want of probable cause.

The defendant for answer to the complaint herein denies that said charge was [preferred] [made] maliciously, or without probable cause, [or falsely].

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1536. Skeleton forms in mandamus proceedings.

[Title of action.]

To the Honorable District Court for 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 court house, in the city of , on 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 for county, to be held at the court house, in the city of , on the 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.

1537. To compel issue of county warrant.

I. That at the times herein mentioned Ramsey county was and still is a duly organized county of this state, and the defendant A. B. was and still is vice-chairman of the county board of said county, and the acting chairman of said county board on account of the absence of the chairman of said board from the county and state, and defendant C. D. was and still is the county auditor of said county.

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II. That on August 19, 1907, your petitioner and the said county of Ramsey through its county board entered into an agreement whereby in consideration of the agreed sum of $7,432 your petitioner agreed to improve Rice street, a country road in said county, from the north end of the present macadam to the White Bear and Lake Johanna Road, all in accordance with plans and specifications therefor duly prepared by the county surveyor of said county, and approved by the county board of said county; that said contract was in writing and pursuant thereto and the terms thereof, your petitioner completed said work on or before May 1, 1908, to the satisfaction of said county board and of the county surveyor of said county, all as provided by the terms of said contract.

III. That your petitioner has been paid for and on account of said work the sum of $6,317.20, and there remains unpaid thereon and due to him on account of said work the sum of $1,114.80.

IV. That on May 4, 1908, your petitioner duly prepared an itemized and verified statement of his claim for the balance due on account of said work, to wit, the sum of $1,114.80, and duly presented the same to the county board of said county at a regular meeting of said board held on that day for audit and allowance, and on said day the said board duly audited, allowed, approved and ordered the said sum paid to your petitioner for and on account of said work; that said order and allowance of said claim have never been appealed from and after the expiration of fifteen days from such allowance and before the commencement of this action, your petitioner demanded of defendant A. B., as such acting chairman of the said county board, and of defendant C. D., as such county auditor, that they draw, prepare, seal and deliver to your petitioner the warrant of said county upon the county treasurer of said Ramsey county for the payment of said sum, but said defendants refused to draw, attest, seal or deliver said warrant to your petitioner and he has never received the same, or said balance of moneys due him or any part thereof.

V. That there is now, and ever since the allowance of said account has been, in the treasury of said county, sufficient moneys applicable for such purpose to pay said claim.

VI. That your petitioner has no plain, speedy or adequate remedy in law with respect to the matters set forth in this petition.

Wherefore, your petitioner, who has made no other application therefor, prays that an alternative writ of mandamus be issued commanding and requiring the defendants to issue, seal, attest and deliver to your petitioner the warrant of said county for said sum upon the county treasurer of said Ramsey county, or show cause why they have not done so before this court.

Substance of petition in State v. Peter, 107 Minn. 460, 120 N. W. 896.

1538. To compel issue of redemption certificate on tax sale.

I. That he is, and ever since 19 , has been, the owner in fee of [description of land].

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II. That pursuant to a tax judgment rendered by the district court for county, on 19 , said land was sold by A. B., the auditor of said county, under the provisions of [Laws 1895 c. 150], to one C. D., on 19 , and thereupon a tax certificate of such sale was duly issued to said C. D. by said auditor.

III. That on 19 , as your petitioner is informed and believes, C. D. presented such certificate to said auditor and requested him to prepare and cause to be served a statutory notice of the time for the expiration of the period in which to redeem from said sale.

IV. That on 19 , said auditor issued and delivered to the sheriff of said county such a notice, of which the following is a copy: [Copy of notice.]

V. That on 19 , said sheriff, having made return that the persons named in said notice could not be found in his county, served said notice on one E. F. who was then in the actual possession of said land, by handing to and leaving with him a copy thereof.

VI. That your petitioner never knew or received notice until 19 , that taxes were unpaid or delinquent on said land, or that the land had been sold as aforesaid, or that such notice had been so issued or served.

VII. That said E. F. was not in any way interested in or connected with your petitioner's title to said land or in possession thereunder at the time of the service of said notice upon him.

VIII. That no other notice of the expiration of the redemption period from said sale has been issued or served, and the right of your petitioner to redeem from said sale has not been terminated or extinguished in any way.

IX. That on 19 , your petitioner, desiring to redeem said land from such tax sale, presented himself at the office of said auditor and requested him then and there to execute and deliver to your petitioner, in accordance with the statute in such case made and provided, his official certificate showing the amount necessary to be paid to redeem said land from such tax sale, and at the same time presented to said auditor due proof of the title of your petitioner to said land.

X. That said auditor then and there refused, and still refuses, to make or deliver to your petitioner such a certificate, stating as the sole reason for his refusal that the time in which redemption from said tax sale might be made had expired.

XI. That your petitioner desires to redeem said land from such tax sale but is unable to do so because of such refusal of said auditor to make and deliver to him such a certificate.

Wherefore your petitioner, who has made no other application therefor, prays that an alternative writ of mandamus issue out of this court directed to the said A. B., as such auditor, commanding him to make and deliver to your petitioner such a certificate forthwith, or show cause before this court, at a time and place specified, why he has not done so.

Substance of petition sustained on demurrer in State v. Nord, 73 Minn. 1, 75 N. W. 760.

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1539. Against owner of automobile let for hire for negligence of driver.[1]

I. That at the times herein mentioned defendant was engaged in the business of letting automobiles for hire in the city of , Minnesota.

II. That on 19 , at , while plaintiff was [a passenger for hire in an automobile of defendant, then being operated by defendant as a common carrier,] [2] one A. B., who was then and there driving it in the course and scope of his employment as a servant of defendant, negligently ran it out of the road and over an embankment while going at a high rate of speed, whereby it was overturned and plaintiff was [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

[1] Based on complaint in Meyers v. Tri-State Automobile Co., 121 Minn. 68, 140 N. W. 184.

[2] For the language of the original substitute "riding in an automobile of defendant let for hire by him to plaintiff." The letter is not ordinarily a common carrier.

1540. For providing unsafe place for work—Skeleton form.

I. That at the times herein mentioned defendant operated a [box factory] in the city of , Minnesota, and plaintiff was in its employ in said factory as a [carpenter].

II. That defendant required plaintiff, in the discharge of his duties, to work [state where]; that said place was not a reasonably safe place in which to work, in this, that [state dangers], of all of which defendant had knowledge.

III. That on 19 , while plaintiff was working in said place, in the course and scope of his employment as such servant of defendant, [describe the accident in general terms making it appear that it resulted from the dangers specified, and allege injuries and damages as in §§ 1250–1255].

IV. That defendant was negligent in providing said place for plaintiff to work in and by reason of such negligence plaintiff was injured as aforesaid.

Wherefore [as in § 919].

1541. Dangerous place for work—Ordering servant to work in dangerous place with assurance of safety and protection.

I. That at the times herein mentioned defendant was a contractor engaged in the construction of a sewer for the city of St. Paul, Minnesota, in Pascal Avenue, a public highway of said city, and plaintiff was in his employ in such work as a common laborer.

II. That in making said sewer it was necessary to dig a trench along the

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center of said highway and for that purpose defendant employed plaintiff and several other men, some of whom worked with shovels and others with pick-axes; that said trench was about feet deep and only feet wide, and was dug in sections eight feet long; that the sections thereof were so narrow and short that it was dangerous for two men to work in a single section at the same time, one using a pick-ax to loosen the earth and the other shoveling out the loosened earth; that for several days prior to 19 , it was the custom of defendant to place a man in each section to loosen the earth with a pick-ax, and then, after withdrawing him, to place another man therein to remove with his shovel the earth so loosened; that on 19 , defendant negligently ordered plaintiff to enter a section of the trench and shovel out loosened earth therein while another man was at the same time loosening the earth therein with a pick-ax, and negligently ordered plaintiff to take his stand and work within less than eight feet of the man using a pick-ax; that when so ordered plaintiff remonstrated with defendant and told him that there was not room enough for two men to work in said section and as so ordered, but defendant emphatically told plaintiff to go ahead and work therein as so ordered and said "if you are going to work around here, you must go and help that man;" that defendant then and there assured plaintiff that he would protect him against all injuries by reason of obeying said order, and plaintiff, not daring to refuse to obey and relying upon such assurance of safety, entered the trench as so ordered and commenced to shovel away the loosened earth, standing in the position and at the point indicated by defendant as aforesaid, and while so engaged was, through the negligence of defendant as aforesaid, accidentally struck on the left hand by the pick-ax then in use by the man placed close behind him by defendant as aforesaid [allege injuries and damages as in §§ 1250-1255].

Wherefore [as in § 919].

Based on complaint in Manks v. Moore, 108 Minn. 284, 122 N. W. 5.

1542. Failure to warn and instruct—Dangerous place for work—Tearing down building.

I. That at the times herein mentioned defendant was engaged as a general contractor in tearing down a building at Fort Snelling, Minnesota, and plaintiff was in his employ in such work as a common laborer.

II. That to the knowledge of defendant plaintiff had had no prior experience in such work and was ignorant of the dangers incident thereto, yet defendant negligently failed to warn and instruct plaintiff concerning such dangers.

III. That the third floor of said building was unsafe in that its supporting timbers were rotten and there were no bents, timbers, braces, scaffolds or supports around or under the said floor to support it; that in consequence said floor was a dangerous place on which to work in tearing down said building; that defendant knew, or but for the want of reasonable care and

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diligence on his part would have known, of the dangerous condition of said floor; that on 19 , defendant negligently and without warning plaintiff of the dangerous condition of said floor, ordered plaintiff to go and work thereon; that while plaintiff was working thereon as so ordered the floor gave way and he was thereby thrown a great distance to the ground and [allege injuries and damages as in §§ 1250-1255].

IV. That said injuries were caused by the negligence of defendant as aforesaid.

Wherefore [as in § 919].

Based on complaint in Barrett v. Reardon, 95 Minn. 425, 104 N. W. 309.

1543. For providing an unsafe instrumentality—Skeleton form.

I. [As I. in § 1540].

II. That defendant furnished plaintiff for his use in said employment a [describe instrumentality in general terms], which was not reasonably safe and suitable for such use, but was defective, in this, that [specify defect], [of all of which defendant had knowledge].

III. That on 19 , while plaintiff was using said , in the course and scope of his employment as such servant of defendant, [describe the accident in general terms, making it appear that it resulted from the defects alleged and pleading injuries and damages as in §§ 1250–1255].

IV. That defendant was negligent in furnishing plaintiff said for such use and by reason of such negligence plaintiff was injured as aforesaid.

Wherefore [as in § 919].

1544. For injury from defective locomotive.

I. That at the times herein mentioned defendant operated a railroad in this state and plaintiff was in its employ as a locomotive engineer on said railroad.

II. That defendant negligently furnished plaintiff for his use in said employment a steam locomotive engine which was not reasonably safe and suitable for such use, but was defective in this, that the boiler thereof was old, worn and unsafe; that on 19 , while plaintiff was operating said engine on the railroad of defendant near the city of , Minnesota, in the performance of his duties as such engineer in said employment, the boiler thereof, by reason of said defects burst, and large quantities of steam and hot water were thrown therefrom upon plaintiff severely scalding and injuring him about the face and hands [allege other injuries and damages as in §§ 1250-1255].

III. That said injuries were caused by the negligence of defendant as aforesaid.

Wherefore [as in § 919].

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1545. For injury from defective road-bed.

I. [As I. in § 1544.]

II. That on and for a long time prior to 19 , defendant's road-bed about miles [north] of the city of , was not reasonably safe and suitable for the passage of its trains thereon, but was defective in that [specify defects], of all of which defendant had knowledge, or would have had but for the want of due care and diligence on its part.

III. That on 19 , as plaintiff was driving one of defendant's locomotives along said road-bed, in the course and scope of his employment as a servant of defendant, said road-bed suddenly gave way by reason of its said defective condition, and thereby the locomotive was derailed and plaintiff was thrown violently to the ground and [allege injuries and damages as in §§ 1250-1255].

IV. That defendant was negligent in furnishing said defective road-bed for the use of plaintiff in his said employment and said injuries were caused by such negligence.

Wherefore [as in § 919].

1546. For injury from defective elevator.

I. [As I. in § 1540.]

II. That defendant maintained in said factory an elevator for the use of its employees.

III. That on and prior to 19 , said elevator was not reasonably safe and suitable for carrying passengers [or freight], but was defective and unsafe in that it had no guard rails about it, and in that the hoisting cables thereof were weak and worn out, and in that the floor thereof was loose and worn out [or specify other defects according to the facts].

IV. That defendant had knowledge of such defects, or would have had knowledge thereof but for the want of reasonable care and diligence on its part, and was negligent in furnishing said elevator for the use of its employees in such condition.

V. That in consequence thereof, on 19 , while plaintiff was using said elevator, in the course and scope of his said employment, the [describe accident in general terms,] and plaintiff was thereby [allege injuries and damages as in §§ 1250-1255].

Wherefore [as in § 919].

1547. For injury from defective ax.

I. That at the times herein mentioned defendant was engaged in the business of lumbering and cutting and selling railroad cross-ties and other timber, in the county of St. Louis, Minnesota, and plaintiff was employed by him as a chopper in one of his lumber camps in said county.

II. That in the prosecution of the work in which defendant employed

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plaintiff it was necessary for several employees of defendant to work in close proximity; that for their work defendant furnished plaintiff and his fellow servants, axes and other tools; that defendant negligently furnished one A. B., a fellow servant of plaintiff, with an ax, the handle of which was old, weak, cracked and worn out, so that it was not reasonably safe and suitable for the work assigned to the said A. B. [of which defendant had knowledge]; that on 19 , while said A. B. was using said ax in the course and scope of his said employment, and while plaintiff was working nearby in the course and scope of his said employment, the handle of the ax suddenly broke, causing the ax to fly through the air a distance of about ten feet and strike plaintiff [allege injuries and damages as in §§ 1250-1255].

III. That said injuries were caused by the negligence of the defendant as aforesaid.

Wherefore [as in § 919].

Based on complaint in Pearson v. Norling, 117 Minn. 527, 135 N. W. 1134.

1548. For injury from unguarded machinery—Skeleton form.

I. That at the times herein mentioned defendant operated a factory in the city of and plaintiff was in the employ of defendant as an operator of a certain machine in said factory.

II. That said machine was dangerous to one operating it, or working about it, and it was practicable to place a guard or fence about the of said machine, but defendant negligently failed to provide such a guard therefor, as required by G. S. 1913, § 3862; that on 19 , plaintiff, while operating said machine in the performance of his duties in said employment, by reason of defendant's neglect to provide such a guard, was [describe accident and make it appear that it was due to the unguarded condition of the machine and allege injuries and damages as in §§ 1250-1255].

Wherefore [as in § 919].

1549. Defective emery wheel—Failure to guard—Incompetent fellow servant.

I. That at the times herein mentioned defendant operated shops for the manufacture of ornamental ironwork, in the city of Minneapolis, Minnesota.

II. That in said shops, and forming a part of the machinery therein operated by defendant, was a certain emery-wheel machine, equipped with an emery wheel about twenty-four inches in diameter; that in the operation of the machine said emery wheel was caused to revolve with great rapidity, and when in motion became and was liable to fly asunder as the defendant well knew; that the sole use of said emery wheel was for grinding and polishing pieces of iron and steel, which was effected by placing the object to be ground or polished against the flat side of the wheel; that it was practicable, and would not have impaired the usefulness of said wheel, to have placed and

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maintained around the same, in its plane of rotation, a guard of such construction and strength as to prevent pieces of said wheel from being thrown to where plaintiff and other servants of defendant were employed in said shops, should said wheel fly asunder while in rotation, and without such guard, said wheel was an exceedingly dangerous instrumentality.

III. That on Oct. 3, 1907, plaintiff entered defendant's employ as a helper in said shops, and so continued in said employ until the time of the injury hereinafter mentioned; that as helper it was the duty of plaintiff to work where directed by defendant; and plaintiff's place of work was at the opposite side of the shops from the said wheel and about forty feet distant therefrom, but in the plane of its rotation.

IV. That while plaintiff was working in said place according to defendant's directions, on Nov. 7, 1907, defendant negligently caused to be used in connection with said machine a defective emery wheel of soft material and poor quality which was more liable to fly asunder when in rotation than one of good quality, as defendant well knew; and defendant had negligently placed in charge of said wheel and the operation of said machine a servant who was without experience and was wholly incompetent to operate the same safely or to judge of the dangers attendant upon its operation; and defendant had negligently failed to have said wheel adequately guarded, or guarded in any manner whatever; and defendant then and there negligently caused said emery wheel to revolve with great and dangerous velocity.

V. That at the time aforesaid, while defendant was so negligently operating said wheel, and by reason thereof, and while plaintiff was so engaged at work, and without any negligence on his part or any knowledge of the unsafe condition or negligent operation of said wheel, it flew asunder; that some of the pieces thereof hit plaintiff in the left thigh and the back of the knee and [allege injuries and damages as in §§ 1250-1255].

VI. That said injuries were caused by the negligence of defendant as aforesaid.

Wherefore [as in § 919].

Based on complaint in Davidson v. Flour City Ornamental Iron Works, 107 Minn. 17, 119 N. W. 483.

1550. Defective countershaft and pulley—Failure to furnish belt-shifter.

I. That at the times herein mentioned defendant operated a grain elevator in the city of St. Hilaire, Minnesota, and plaintiff was in its employ as the operator of the machinery therein.

II. That connected with an engine of defendant in said elevator, which was used to operate the machinery therein, there was a countershaft and pulley connected with a similar countershaft and pulley by a belt; that through the negligence of defendant said countershafts and pulleys were in a defective and unsafe condition, in that they were out of plumb and not in alignment with one another; that in consequence said belt would often slip off the pulleys;

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that the defendant negligently failed to provide a belt-shifter or other mechanical contrivance for shifting said belt or replacing or controlling it on said pulleys; that on 19 , while said machinery was in operation, the belt came off the pulleys and plaintiff, in the course and scope of his said employment, attempted to shift the same back upon the pulleys with his hands and in so doing his left hand and wrist caught between the belt and the pulley on the countershaft nearest the engine with such force as to [allege injuries and damages as in §§ 1250-1255].

III. That said injuries were caused by the negligence of defendant as aforesaid.

Wherefore [as in § 919].

Based on complaint in Sorseleil v. Red Lake, 111 Minn. 275, 126 N. W. 903.

1551. Failure to instruct as to operation of dangerous and complicated machine—Change of machine without notice to servant.

I. That at the times herein mentioned defendant was a corporation engaged in operating and maintaining an iron foundry in the city of St. Paul, Minnesota, for casting and working in iron, and manufacturing structural and other heavy iron articles; and in its said foundry was carrying on its said business with the aid of different machines and appliances, one of which was known as an air hoist, which was used for the purpose of hoisting heavy articles from the floor for the purpose of moving and transporting the same to whatever points it was desired to move them; that said air hoist was operated by atmospheric pressure, controlled by valves designed to be opened or shut by chains pulled by the operator, so as to raise or lower the objects being lifted, transported or shifted thereby at the will of and as required by the operator and under his control.

II. That prior to Nov. 12, 1906, defendant had and maintained in its establishment a number of such air hoists, intended for the purpose and operated as aforesaid, and upon all of said air hoists the valves for raising and lowering objects by said air hoists were similarly operated by chains to be pulled by the operator, one of which said chains was pulled to raise the load and the other to lower the load; and all of said chains upon all of said machines were placed in the same relative position so that a person operating one machine could operate other machines in a like manner by pulling the chains relatively situated alike; that said air hoists acted with moderate speed, and in raising and lowering the objects therewith, the object was raised or lowered only while the appropriate chain for that purpose was pulled, but as soon as said chain was released said hoist ceased to rise or fall.

III. That for a considerable time prior to Nov. 12, 1906, with the exception of about twelve days, plaintiff had worked in and about said foundry, and as part of his duty had operated said air hoists in the manner aforesaid.

IV. That from Nov. 1, 1906, until Nov. 12, 1906, plaintiff was absent, with the knowledge of defendant, from his work at said foundry on account

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of illness, and in the meantime, defendant, without the knowledge of plaintiff, installed in its said foundry an air hoist which was so situated that the raising and lowering valves were operated by chains opposite to or in the reverse order of the other hoists in said foundry, during the plaintiff's employment there; that said hoist so installed, during plaintiff's absence, also differed in other particulars from the hoists with which plaintiff had been working, in that it was a very quick-acting machine, hoisting or lowering articles with much greater speed than said other machines, and also on account of its defective condition would not stop its upper or downward movement when the appropriate chain was released, but the movement had to be checked by using the opposite chain; and said hoist was also so defectively constructed and maintained, that it would not hold its load, and defendant negligently, during plaintiff's absence as aforesaid, installed and maintained said hoist in said defective condition.

V. That on Nov. 12, 1906, plaintiff returned to his employment, and was then and there directed by defendant to operate said air hoist that had been so installed during his absence, and without his knowledge.

VI. That defendant then and there negligently failed to inform plaintiff of the defects and peculiarities of said hoist, or that the same was to be operated differently from other air hoists theretofore operated by plaintiff in said foundry, and negligently failed to instruct plaintiff as to the proper method of operating said hoist; that the plaintiff was ignorant of the peculiarities and defects of said machine, as defendant then and there well knew.

VII. That on Nov. 12, 1906, as aforesaid, plaintiff, under the direction of the defendant and as its servant and as part of the duties of said employment, undertook to operate said defective hoist and to shift certain large, long and heavy steel plates by means thereof, and in attempting to do so, intending to lower the load, pulled the chain, which upon the other hoists in said establishment with which the plaintiff had been working would have that effect, but which upon the hoist then being used had the opposite effect, so that said hoisting apparatus quickly and violently lifted said load into the air and against the cylinder of said hoisting machine, thereby jarring said plates out of the grabs by which they were held and throwing them upon plaintiff [allege injuries and damages as in §§ 1250–1255].

VIII. That said injuries were caused by the negligence of defendant as aforesaid.

Wherefore [as in § 919].

Based on complaint in Waligora v. St. Paul Foundry Co., 107 Minn. 554, 119 N. W. 395.

1552. Defective coupler—Federal safety appliance act.

I. That defendant is, and at the times herein mentioned was, a railroad corporation organized and existing under the laws of this state; that during all of said times defendant was a common carrier engaged in interstate

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commerce by railroad and in connection with said business owned, and operated a line of railroad in and through the states of Minnesota and North Dakota, together with the usual locomotive engines, freight and passenger cars and other railroad equipment.

II. That on Sept. 6, 1909, one A. B. was in the employ of defendant as a brakeman and was engaged in the performance of his duties as such brakeman upon and about defendant's trains, engines and cars then being moved along and over defendant's tracks at a place or station on defendant's railroad called Mahnomen, Minnesota, which tracks constituted a railroad yard and formed a part of, and were used in connection with, defendant's said interstate railroad; that A. B. was then and there engaged in the due performance of his duties in and about certain switching operations being conducted by defendant; that during the progress of said operations it was necessary to uncouple certain cars then and there being switched and distributed and made up into a train; that A. B., in the proper performance of his duties, attempted to make such uncoupling in the customary manner, to wit, by use of the pin-lifter, so called, but was unable to so uncouple said cars; that he thereupon went between said cars, as it was his duty to do, for the purpose of making said uncoupling; that while he was in between said cars endeavoring to effect such uncoupling and while walking with said cars which were moving slowly, his foot was caught between the main rail and a guard rail of said tracks and he was thereby thrown down and run over by the cars and so badly crushed and mangled that he died within a short time thereafter solely on account thereof.

III. That the cars between which said A. B. was caught and injured were in use, and had been in common and regular use, upon the lines of railroad of defendant engaged in moving and transporting interstate commerce and traffic, and they were at the time of said accident being used in the making up and distribution of trains for the purpose of transporting and moving interstate commerce and traffic over defendant's said line of railroad; that the coupling appliances on said cars were then and there in a defective condition in that the pin-lifter would not work and said cars could not be uncoupled without the necessity of going between the same; that the coupling pin in the automatic coupling device on one of said cars was bent, worn and defective and would not respond to the pin-lifter thereto attached and the end of the other one of said cars projected over and out to such an extent as to make and render it impossible to operate the pin-lifter thereon and so uncouple said cars; that said guard rail was not properly, or at all, blocked, filled and guarded and was in an unsafe and dangerous condition at all of said times; that all of said defective appliances and unsafe and dangerous conditions aforesaid were then and there due to the negligent and wrongful conduct and omissions of defendant and said defective appliances and dangerous conditions were the sole cause of said accident and the death of said A. B.

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IV. That at the time of said accident the said A. B. was twenty years of age, strong and able-bodied and earning and capable of earning an average wage of $100 per month; that he left surviving him this plaintiff, his father, and his mother, who are his next of kin and sole heirs at law and for whose benefit this action is brought.

V. That before the commencement of this action plaintiff was duly appointed the administrator of the estate of said deceased by the county court for Cass county, North Dakota; that letters of administration thereon were duly issued to him by said court, a duly authenticated copy of which letters has been duly filed with the probate court for Ramsey county, Minnesota, as by law in such case made and provided.

VI. That by reason of the premises said parents of A. B. have been damaged $25,000.

Wherefore [as in § 919].

Complaint in Popplar v. Minneapolis etc. Ry., 121 Minn. 413, 141 N. W. 798.

1553. For injury from defective scaffold.

I. That at the times herein mentioned defendant was a building contractor and was engaged in the construction of a building known as No. , street, in the city of , Minnesota, and plaintiff was in the employ of defendant as a [carpenter] in and about the construction of said building.

II. That defendant negligently furnished plaintiff for his use in said employment a scaffold, attached to said building, which was not reasonably safe and suitable for such use, but was defective in this, that the [lumber used in its construction was of a poor quality and not of sufficient thickness and strength for the purpose,] [of all of which defendant had knowledge].

III. That by reason thereof, on 19 , while plaintiff was working thereon in the course and scope of his employment as such servant of defendant, said scaffold broke and plaintiff was thereby thrown to the ground and [allege injuries and damages as in §§ 1250-1255].

Wherefore [as in § 919].

1554. For failure to warn and instruct—Skeleton form.

I. [As I. in § 1540].

II. That on 19 , defendant ordered plaintiff to [operate] [work about] a certain [planer] of defendant in said factory; that said [planer] was a complicated and dangerous machine and plaintiff was then wholly unfamiliar with its structure and operation and ignorant of the dangers to which one [operating it] [working about it] was exposed [of all of which defendant had knowledge]; that defendant negligently failed to warn plaintiff of said dangers or give him any instruction in the structure and operation of said [planer] before ordering him to [operate] [work about] it.

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III. That by reason of such negligence of defendant, on 19 , while plaintiff was [operating] [working about] said [planer], in the course and scope of his employment as such servant of defendant, [describe accident and allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

1555. Failure to warn—Ordering servant into a dangerous place.

I. That at the times herein mentioned defendant owned and operated a telephone system in and about the city of Minneapolis, Minnesota.

II. That prior to Aug. 3, 1893, defendant had dug a ditch on the east side of Nicollet avenue near its intersection with Grant street in said city for the purpose of laying certain of its wires and pipes.

III. That on Aug. 3, 1893, defendant was engaged in digging a continuation of said ditch at a point a short distance south of said Grant street, and ordered plaintiff, who was then and there in its employ as a common laborer, to go into said ditch at a point at the intersection of said Grant street and Nicollet avenue, there to assist in removing the loose dirt from the bottom of the ditch preparatory to the laying of the defendant's said pipes and wires; that plaintiff immediately entered said ditch and began work as so ordered; that at said point said ditch was about seven feet deep and four feet wide, and was an unsafe place in which to do the work which plaintiff was ordered to do unless the walls thereof were properly propped and braced to prevent their caving in; that when defendant so ordered plaintiff to work in said ditch as aforesaid, he knew, or but for the want of due care and diligence on his part would have known, that the walls of said ditch at that point were dangerous and liable to cave in and injure plaintiff, but he negligently failed to warn plaintiff, who was ignorant thereof, of such danger; that defendant negligently failed to provide suitable and safe props or braces or other support for the walls of said ditch, and in consequence thereof the east wall of the said ditch caved in on plaintiff, a short time after he began work as he was so ordered to do, and he thereby [allege injuries and damages as in §§ 1250–1255].

IV. That said injuries were caused by the negligence of defendant as aforesaid.

Wherefore [as in § 919].

Based on complaint in Carlson v. Northwestern Tel. Exch. Co., 63 Minn. 428, 65 N. W. 914.

1556. Failure to warn—Starting machine.

I. That at the times herein mentioned defendant operated a slaughter house in the city of South St. Paul, Minnesota, and plaintiff was in its employ as a common laborer therein.

II. That defendant operated in said slaughter house a machine called a "back-fat-skinner;" that said machine was so constructed that a person

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working inside it was in great danger if it were moved while he was therein without notice to him; that on 19 , while plaintiff, to the knowledge of defendant, was inside of said machine for the purpose of cleaning it, in the course and scope of his said employment, defendant negligently and without warning to plaintiff started the machine, whereby plaintiff's right hand was caught between a wheel and other parts thereof and [allege injuries and damages as in §§ 1250-1255].

Wherefore [as in § 919].

Based on complaint in Lohman v. Swift & Co., 105 Minn. 148, 117 N. W. 418.

1557. Failure to give customary signals—Unloading vessel.

I. That at the times herein mentioned defendant, the Pittsburgh Coal Company, operated a coal dock in the city of Duluth, Minnesota, upon which it received and handled coal received from carriers on the Great Lakes, and plaintiff was in its employ as a common laborer in and about such dock.

II. That at the time of the injury herein complained of a large vessel loaded with coal was tied up at said dock and there being unloaded, in which work the defendant coal company made use of a number of clam-shell buckets, which were lowered into and raised out of every alternate hatchway in said vessel, by means of long heavy wire cables running over shives at different booms and other appliances projecting over said vessel, which clam-shells were operated by steam power from said dock; that said vessel was provided with an upper and a middle deck and said unloading was being done from the hold of said vessel underneath its middle deck; that each of said clam-shells was of heavy steel, very large and weighed about one and one-half tons; that as said clam-shells were lowered down to and upon the coal in said vessel they would open and by means of their great weight sink into said coal, whereupon by certain contrivances operated by the hoister, they could then be closed and hoisted to said dock and there unloaded.

III. That in said work, as well as in the usual and customary operation of said clam-shells, defendant employed a number of laborers, one of whom was plaintiff, to work in the hold of said vessel, their work being in part shoveling coal, and in part, as the clam-shells were being lowered down toward the coal therein and while they were still in the swing of the cable, pushing the same to the proper place under the decks of said vessel to the coal there to be taken up, and as they were being raised, steadying and guiding them up to the proper hatchway.

IV. That at a high elevation above said coal dock were various hoisting rigs, in each of which one of defendant coal company's workmen, called a hoister, was placed, who by means of steam power cables and appliances connected with said clam-shells, moved said clam-shells up or down and at such speed and at such times as were given him by signals from the hatch tenders hereinafter mentioned; that none of said hoisters from their position could see down into the hold of said vessel, nor the men therein at work, nor

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could such men see the hoisters or any of them, nor could such employees in the vessel see the clam-shells when about to be lowered into said vessel, nor was there any means of communication or method of giving signals between any of said hoisters, and the men in the hold of the vessel.

V. That in the usual and ordinary operation of said clam-shells they moved at a very high speed and with great quickness, and were, unless properly controlled, liable at any time to suddenly descend upon the employees in the hold of said vessel, as well as to be deflected in their swing while in said vessel, in such a manner as to cause imminent danger to the life and limb of all persons who were employed in the hold of said vessel, unless the management and control of said clam-shells was done carefully and skilfully and under the constant supervision of some competent person to give signals and control said work, and unless such person so in charge thereof in giving the signals controlling said work should at all times be in the exercise of due care; that said clam-shells ordinarily followed no definite course or speed, but came in manner and at times as variously directed by the hatch tender, and the men in the hold of the vessel were at all times ignorant thereof until warning was by them received from the hatch tender.

VI. That the work in the hold of said vessel, including that of plaintiff, was arduous and required his undivided time and attention; that said employees, including plaintiff, were unable to look for or control the movement of said clam-shells or to do anything other than to attend to their said work and obey orders and warning given them by the hatch tender, and in the ordinary practice they reposed implicit confidence in his care and protection, and full faith in the belief that proper signals and warning would at all times be given.

VII. That the aforesaid work in the hold of said vessel was being done very rapidly and was of such complicated and highly dangerous character that it necessarily required the personal supervision of defendant company through a properly appointed person, to give constant direction and warnings governing the movements of the employees in said boat and of the hoister at said clam-shells, in order to enable plaintiff and the men in said vessel to perform said work and to have and maintain a reasonably safe place wherein to work.

VIII. That at all times in the usual and ordinary operation of said work of unloading coal, including the time when plaintiff was injured, as herein complained of, the defendant coal company by and through its co-defendant assumed personal direction and control over plaintiff and his associates in said vessel, including the hoister on said coal dock, who operated the rig and hoisting out of the hatchway where plaintiff was at work, and placed its said co-defendant on the upper deck of said vessel near the hatchway underneath which plaintiff was at work, in charge of said clam-shells and of all of said employees, and delegated to him full and exclusive authority to, and it was his duty to, order and regulate the actions of said hoister and to control every

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movement of said clam-shells at said hatchway, and it required of said hatch tender that he watch said hoister and plaintiff and his associates working under and about said hatchway, as well as the movements of said clam-shells and give them proper and safe signals, warning and direction to govern their actions and the movements of said clam-shells, to the end that said work could properly proceed, and that the same should not cause any injury to plaintiff and his associates in said vessel, and that their place of work should at all times be reasonably safe and free from danger; and the defendant coal company required of all its employees, including the said hoister, that the clam-shells should be moved upon the orders of said hatch tender alone, and that the speed thereof should be regulated, and that they be raised, lowered and held stationary pursuant to his orders alone, and pursuant to said orders and not otherwise the position and movements of plaintiff and his associates, and of said clam-shells, were at all times regulated.

IX. That pursuant to the foregoing and for the aforesaid purposes, the defendant coal company placed its co-defendant as such hatch tender on the upper deck of said vessel near the hatchway underneath which plaintiff was at work; that from said position said hatch tender had at all times a full view of the plaintiff and his associates working with him, as well as of the hoister and from said position said hatch tender could at all times be seen by said hoister as well as by plaintiff and his associates in the vessel.

X. That pursuant to the foregoing method said work of unloading was at and prior to the plaintiff's injury, upon the orders of the defendant company, in the sole and direct charge and control of said hatch tender, who ordinarily and customarily controlled the actions of said hoister in all the movements as well as the speed of said clam-shells by and through a code of signals agreed upon between them and the hatch tender, and who also ordinarily and customarily controlled the movements of plaintiff and his associates in the vessel by giving them proper and sufficient signal and warning of the coming as well as of the contemplated movements of said claim-shells to the end that no injury should result to them, but that their place of work should be and remain reasonably safe.

XI. That on Oct. 22, 1907, plaintiff was in the employ of the defendant coal company working for it for hire in the hold of said vessel then and there being unloaded of its cargo of coal; that while so at work defendant A. B. was employed by and at work for his co-defendant as hoist tender and stationed on the upper deck of said vessel at the hatchway about and underneath which plaintiff was at work; that said hatch tender was then and there placed by his co-defendant for the purpose of discharging the duties chargeable to the hatch tender as hereinbefore stated, and in accordance with the said rule and custom.

XII. That defendants then and there well knew that plaintiff was underneath the middle deck of said vessel and there engaged at work and subjected

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to imminent danger from the careless or negligent orders given by said hatch tender

XIII. That thereupon after one of said clam-shells had been properly placed in the coal underneath and about said hatchway, the defendants caused said clam-shell to be closed and hoisted, whereupon plaintiff was necessarily and in accordance with the custom theretofore obtaining, in the act of steadying the same in the swing as it was being hoisted, whereupon said clam-shell was without plaintiff's fault, but by reason of its catching in part of the floor in said vessel, swung against the plaintiff whereby he was knocked down upon the coal but not injured, and thereupon said clam-shell was raised a few feet directly over the plaintiff there lying upon said bed of coal, whereupon the defendants by signal to that effect, given the aforesaid hoister, negligently caused said clam-shell to be dropped down and upon plaintiff and to strike him and crush him underneath its great weight, and [allege injuries and damages as in §§ 1250-1255].

XIV. That defendants then and there well knew, or but for the want of reasonable care on their part would have known, that plaintiff was then and there lying upon said bed of coal and there exposed to imminent danger in case said bucket should be dropped down upon him and his said place of work made unsafe, yet they negligently made his said place of work highly dangerous and unsafe and neglected to give him any warning of the contemplated act of dropping said bucket, and neglected to give him any opportunity to escape therefrom, and negligently signalled said hoister to drop said bucket down upon plaintiff as aforesaid.

Wherefore [as in § 919].

Substance of complaint in Anderson v. Pittsburgh Coal Co., 108 Minn. 455, 122 N. W. 794.

1558. Failure to warn—Injury to sectionman—Railroad hazard.

I. That at the times herein mentioned defendant operated a railroad within the state of Minnesota, including a railroad yard at St. Paul, Minnesota, consisting of a large number of tracks, side tracks and switches, and plaintiff was in its employ as a sectionman.

II. That it was a part of the duty of plaintiff as such sectionman to keep the tracks and switches in said yard in repair and free from dirt, ice and snow; that said switches were so constructed that during snow storms, snow and dirt would lodge therein and prevent their working freely and properly; that on 19 , while plaintiff, in the course and scope of his said employment, was engaged, during a snow storm, in cleaning out snow and dirt from one of said switches, and while standing on a track of defendant with which said switch was connected, defendant negligently, and without due notice or warning to plaintiff, ran one of its freight cars along said track and

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against plaintiff, knocking him down, whereby he was [allege injuries and damages as in §§ 1250-1255].

Wherefore [as in § 919].

Based on complaint in Murran v. Chicago etc. Ry., 86 Minn. 470, 90 N. W. 1056.

1559. For employing incompetent servants—Skeleton form.

I. That on 19 , plaintiff was in the employ of defendant as a [carpenter] in its factory in the city of , Minnesota.

II. That at the same time and for several months prior thereto defendant negligently had in its employ as a [carpenter] one A. B. who was, to the knowledge of defendant [but not to the knowledge of plaintiff], incompetent and habitually careless in his work.

III. That on said day plaintiff and said A. B. were working together for defendant in the construction of [describe circumstances of the accident and make it appear that it was due to the negligence of A. B. and allege injuries and damages as in §§ 1250-1255].

IV. That said injuries were caused by the negligence of defendant as aforesaid.

Wherefore [as in § 919].

1560. For failure to adopt rules—Skeleton form.

I. [As I. in § 1540].

II. That [describe defendant's business, making it appear that it was complicated and necessarily involved many servants working together in such a way that it would be dangerous for them if there were no rules for their government].

III. That defendant employed plaintiff as a and it was plaintiff's duty as such servant of defendant to [describe duties in general terms].

IV. That on 19 , while plaintiff was [state what plaintiff was doing at the time of the accident], in the course and scope of his employment as such servant of defendant, [describe accident in general terms, making it appear that it was due to the lack of rules, and allege injuries and damages as in §§ 1250-1255].

V. That defendant negligently failed to adopt and enforce rules for the government of its servants in said work and by reason of such negligence plaintiff was injured as aforesaid.

Wherefore [as in § 919].

1561. Negligence of fellow servant—Railroad hazard—Injury from hand car.

I. That at the times herein mentioned defendant operated a railroad running through the villages of and in this state, and plaintiff was in its employ as a sectionman.

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II. That on 19 , while plaintiff and one A. B. and one C. D., who were then and there servants of defendant and belonged to the same section crew of defendant as plaintiff, were running a hand car on the tracks of defendant between said villages, in the course and scope of their employment, it became necessary to remove said hand car from the tracks hastily to avoid a collision with a rapidly approaching train of defendant which was unexpected by them; that while the plaintiff and said A. B. and C. D. were in the act of removing the hand car from the tracks by lifting it with their hands, the said A. B. and C. D., in the haste and confusion resulting from their perilous position, negligently and without warning plaintiff, suddenly let go their hands from the car and in consequence plaintiff, who retained his hold on the car, was thrown violently upon the car and across one of its wheels and was thereby [allege injuries and damages as in §§ 1250-1255].

Wherefore [as in § 919].

Based on complaint in Lindgren v. Minneapolis etc. Ry., 86 Minn. 152, 90 N. W. 381.

1562. Same—Fall of rail.

I. That at the times herein mentioned defendant operated a railroad running through the village of , Minnesota, and plaintiff was in its employ as a sectionman on said railroad.

II. That on 19 , plaintiff was engaged with other members of a section crew in the employ of defendant in the repair of defendant's tracks near said village; that it then and there became necessary in the performance of such work to take up from the track a heavy steel rail, in order to remove the old and decayed ties under it and replace them with new ones; that in doing so it was necessary to use great and extraordinary haste, so as to finish replacing the rail before the arrival of a coming train; that while plaintiff and one A. B., who was a fellow servant of plaintiff in the employ of defendant and a member of said section crew, were carrying said rail in the course and scope of their said employment, under orders from the foreman of the crew to make haste to avert danger to a then approaching train, the said A. B., negligently and without warning plaintiff, suddenly released his hold of the rail and dropped it, whereby it struck plaintiff [allege injuries and damages as in §§ 1250-1255].

Wherefore [as in § 919].

Substance of complaint sustained on demurrer in Blomquist v. Great Northern Ry., 65 Minn. 69, 67 N. W. 804.

1563. Allegation of defendant's knowledge.

That defendant knew, or but for the want of reasonable care and diligence on his part would have known, of said defects.

Sustained by Cox v. Providence Gas Co., 17 R. I. 199, 21 Atl. 344.

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1564. Injury from fellow servant.

That said injuries, [if any,] were not caused by the negligence of defendant, but were solely caused [if at all] by the negligence of [one A. B.] a fellow servant [fellow servants] of plaintiff, who [was] [were] then and there in the employment of defendant in the same general business with plaintiff.

1565. Assumption of risk.

That at the time of said accident plaintiff was years of age and had had many years of experience in [machine shops] and in operating machines similar to that from which he received the alleged injury, and had been working about said machine for several months prior to said injury, and at the time of said injury and for a long time prior thereto had knowledge of said [specify defects or dangers], and fully appreciated the risks to which he was thereby exposed, yet after acquiring such knowledge and appreciation he voluntarily continued to [work about said machine] [operate said machine], at his own risk, without any compulsion by defendant.

1566. Same—Another form.

That at the time of said accident, and for many days prior thereto, plaintiff had knowledge of said defects in said [engine] and fully appreciated the risks to which he was thereby exposed, yet, after acquiring such knowledge and appreciation he voluntarily continued, [without complaining of such defects to defendant], to operate said [engine], at his own risk, and without any compulsion by defendant.

1567. Reply—Promise of master to remedy defect.

The plaintiff for reply to the answer herein alleges that on 19 , [three] days prior to said accident, he complained to defendant of said defects in said [engine] and defendant promised plaintiff that he would remedy the same [the next day] [before the next trip] [and ordered plaintiff to continue its use until it could be repaired]; that in consideration of said promise [and in obedience to said order], plaintiff continued to operate said [engine] in its defective condition, believing that defendant would repair it as promised and that there was no imminent and serious danger therefrom, but defendant did not repair it prior to said accident.

1568. Independent contractor.

That at the time of said accident said building was not in the possession or control of defendant, but was in the exclusive possession and control of one A. B., a building contractor, under a contract with defendant to construct said building, and said A. B. was constructing the same according to his own

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methods and without being subject to the control of defendant except as to the results of his work, [and the acts complained of were the acts of said A. B. or his servants or agents and not the acts of defendant or his servants or agents] [and said C. D. was the servant of said A. B. and not the servant of defendant].

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1569. For foreclosure of lien—Action by materialman—Material furnished directly to owner.

I. That [on 19 ,] [between 19 , and 19 ,] plaintiff sold and delivered to defendant A. B. 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 hereof.

II. [That said materials were reasonably worth $.] [That said defendant promised to pay to plaintiff therefor $, on or before 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 [describe premises as in a deed], in county, Minnesota.

V. That at the time said materials were so sold and delivered the defendant A. B. was and still is the owner in fee of said premises.

VI. That on 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 for [said county] [county, Minnesota,] a verified lien statement, of which a copy is hereto attached, marked Exhibit B, and made a part hereof.

VII. [That defendants C. D. and E. F. have lien claims of record upon said premises for materials furnished for or labor performed upon said dwelling house.]

Wherefore plaintiff demands judgment against the defandant A. B. for $, with interest thereon from 19 ; adjudging the same a lien upon said [premises] [land and building]; adjudging the amount of the lien claims of defendants C. D. and E. F.; directing a sale of said [premises] [land and building] and the application of the proceeds thereof to the payment of the claims herein adjudged liens thereon; and for such other relief as may be just, with costs.

See § 746.

1570. Same—Action by principal contractor.

I. That on 19 , plaintiff and defendant A. B. entered into an agreement whereby plaintiff agreed to build a dwelling house for defendant A. B. upon the premises hereinafter described, furnishing the materials and labor therefor, and the said A. B. agreed to pay to plaintiff therefor upon its completion $.

II. That no part thereof has been paid [except $].

III. That plaintiff has duly performed all the conditions of said agreement on his part.

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IV. That the premises upon which said dwelling house was built by plaintiff for said defendant under said agreement are described as follows: [Describe premises as in a deed], in county, Minnesota.

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 19 , plaintiff began to furnish materials and perform labor in the erection of said building in accordance with said agreement and all the materials furnished for and labor performed upon said building were furnished and performed between that day and 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 hereof.

VII. [As VI. in § 1569.]

VIII. [As VII. in § 1569.]

Wherefore [as in § 1569].

1571. Same—Action by subcontractor, laborer or materialman where his contract was with the principal contractor.

I. That on 19 , the defendant A. B. [principal contractor] entered into an agreement with the defendant C. D. [owner] whereby he promised to build a dwelling house upon the premises hereinafter described for the said C. D., agreeing to furnish all the materials and labor therefor.

II. That between 19 , and 19 , plaintiff, in pursuance of an agreement theretofore entered into by him with the defendant A. B., and in conformity with the said agreement between the defendant C. D. and the defendant A. B. [furnished to the defendant A. B.] [certain building materials] [peformed for the defendant A. B. 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 hereof.

III. That said materials [services] were reasonably worth $.

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] [labor was performed in the construction of] a dwelling house upon the following described premises: [Describe premises as in a deed], county, Minnesota.

VI. That at the time said [materials were so furnished] [labor was so performed] the defendant C. D. was and still is the owner in fee of said premises.

VII. That on 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 for [said county] [county, Minnesota], a verified lien statement, of which a copy is hereto attached, marked Exhibit B, and made a part hereof.

VIII. [As VII. in § 1569.]

Wherefore [as in § 1569].

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1572. On indemnifying bond.

I. That on Aug. 30, 1890, plaintiff and defendant A. B. entered into an agreement whereby defendant A. B. agreed, for a valuable consideration, to construct for plaintiff a dwelling house at No. 815, 16th Ave., South, in the city of Minneapolis, Minnesota, and to provide the materials therefor.

II. That for the purpose of protecting and indemnifying plaintiff, and to keep the said house, and the premises upon which the same then stood and now stands, from liens for labor and materials for either or both, and to secure the payment by defendant A. B. of all claims for labor and materials performed and furnished in the construction of said house, and for the purpose of holding said property and lot on which the house is situated, harmless from said claims, and said lot free from liens for labor or materials, defendant A. B., as principal, and defendants C. D. and E. F., as sureties, made and delivered to plaintiff their bond, of which the following is a copy: [Copy of bond.]

III. That under and in pursuance of said contract and said bond of indemnity, defendant A. B. entered upon the work specified and provided in said contract, and finished and completed the same, but he failed to pay a large number of claims for labor and materials, performed and furnished in the construction of said house, and by reason thereof a large number of liens against said house and lot were duly filed, aggregating $1,575.15.

IV. That subsequently an action was begun in this court by one of said lienholders to foreclose his lien, and such proceedings were had in said action, that on 18 , this court duly adjudged that there was due from the said A. B. to the said several lienholders the several amounts in said judgment specified, amounting in the aggregate to $1,521.49, and that said several liens to said amount were valid liens against said lot and said house; that in addition to the liens so foreclosed and adjudicated in said action, there was subsequently file against said house and lot by G. H., a claim and lien of $53.66 for materials furnished said A. B., for use in the construction of said house under said contract.

V. That after said action for the foreclosure of said liens was so begun, and long prior to the trial and determination thereof, plaintiff duly served upon defendants a written notice of the filing of said several liens, and of the pendency of said action, and requested them to join in the defence of said action but they refused and neglected to do so.

VI. That by reason of the failure of defendant A. B. to pay for said labor and materials as aforesaid, and by reason of said liens so filed against said house and lot as aforesaid, and by reason of said judgment, this plaintiff, in order to protect his said property from a foreclosure sale on said judgment, and to satisfy and discharge said liens, necessarily paid to the several lienholders, various sums of money, aggregating $1,411.31, being a part, and $164 less than the amount so adjudged to be due them and actually due them as aforesaid.

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VII. That in the defence of said action plaintiff necessarily incurred an expense of $106.05 for attorney's fees, costs and expenses.

VIII. That defendants have not paid said sums, or any part thereof, to plaintiff, though requested to do so, and by reason of the premises they are indebted to plaintiff in the sum of $1,500 on said bond.

Wherefore [as in § 919].

Substance of complaint in Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62.

1573. Denial of authorization of improvements—Notice.

I. Deny that they at any time authorized the improvements or alterations alleged in the complaint and deny that said alterations or improvements, or the material used and expended thereon, were furnished at the instance or authority of defendants, or of any person having authority from said defendants to make alterations upon said premises; but on the contrary, defendants allege, on information and belief, that plaintiff had due notice that any alterations or repairs on the building or premises described in the complaint were unauthorized by defendants, and that any claim for work or materials furnished in making any alterations or repairs on said building would not be paid by defendants; that the improvements and alterations alleged in the complaint were of a temporary character intended for temporary use, and were of no benefit to the premises or to the owners thereof.

II. That on April 10, 1908, and within five days after defendants had any knowledge of any alterations or improvements contemplated, or to be made on said building, defendants posted, or caused to be posted, and kept posted in a conspicuous place or places on the premises and in the building described aforesaid, a notice stating that any claim for work or materials furnished for alterations or repairs on said building would not be paid for by said owners and was not authorized by said owners; that a copy of said notice is hereto attached, marked Exhibit A, and made part hereof.

From answer in Wallinder v. Weiss, 119 Minn. 412, 138 N. W. 417.

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1574. For mistake as to effect of quitclaim deed in releasing a mortgage lien—Reinstating mortgage.

I. That on Oct. 1, 1883, plaintiff, being the owner in fee and in possession of [description of premises], conveyed the same by deed to A. B., a son of defendant; that a copy of said deed is hereto attached, marked Exhibit A, and made a part hereof.

II. That in payment of the purchase price of said premises the said A. B. made and delivered to plaintiff his four promissory notes, of which the following are copies: [Copies of notes.]

III. That to secure the payment of said notes the said A. B., a bachelor, made and delivered to plaintiff a deed conveying said premises to plaintiff by way of mortgage.

IV. That said mortgage was recorded in the office of the register of deeds for Ramsey county, Minnesota, on Nov. 10, 1883, in Book 79, of Mortgages, on page 139.

V. That said mortgage contained a stipulation that, should there be any default in the payment of said notes, or of the interest thereon, on any day whereon either of said amounts became due and payable, that all of the principal sum of said notes, together with all interest accrued thereon, should, at the option of the holder of said notes, become due and payable, within thirty days from the time of such default.

VI. That on Jan. 5, 1886, none of said notes had been paid, nor had any part of the sum specified in any one of said notes been paid, except the sum of $630, paid on Nov. 14, 1883, on the note for $3,970, due, as aforesaid on or before Oct. 1, 1892, nor had any part of the interest accruing upon said notes after April 1, 1885, been paid; and more than thirty days had elapsed since the date of such default.

VII. That on Jan. 5, 1886, plaintiff, as mortgagee in said mortgage, elected to claim all of said notes as immediately due and payable, with all arrearages of interest thereon, and, on said day, duly commenced proceedings to foreclose said mortgage by advertisement under a power therein; that thereafter such proceedings were duly had that said foreclosure was duly consummated.

VIII. That on April 15, 1885, the said A. B. requested plaintiff to make and deliver to him a quitclaim deed of said mortgaged premises, alleging, as a reason for such request, that a certain quantity of surplus land, over and above the area specified upon the officially recorded town plat of the village of White Bear, existed in the block or square wherein said mortgaged premises were situated, and that the proportion of such surplus justly pertaining to said mortgaged premises had not been conveyed by plaintiff to A. B., by the original conveyance to him made, as aforesaid, prior to the execution and delivery of said mortgage.

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IX. That on the date last mentioned, plaintiff, relying upon said representation and believing the same to be true, made and delivered to said A. B., a quitclaim deed conveying said premises to said A. B., his heirs and assigns; that a copy of said deed is hereto attached, marked Exhibit B, and made a part hereof.

X. That said deed was recorded in the office of the register of deeds for said county, in Book 124, of Deeds, on page 706.

XI. That said quitclaim deed was made and delivered prior to the date of the maturity of any of the notes secured by said mortgage; and was so made and delivered without any consideration whatever; that plaintiff never intended, in and by the making and delivery of said quitclaim deed to release or discharge the said mortgage or any interest acquired thereunder; and to construe said quitclaim deed as a release and extinguishment of the mortgage lien of plaintiff upon said premises would operate as a fraud upon him.

XII. That at some time after the making and delivery of said quitclaim deed, but at what precise date plaintiff is unable to state, the said A. B. made and delivered to defendant, a deed conveying said premises to defendant; and defendant now wrongfully claims to be the owner of said premises under and by virtue of said deed, and wrongfully claims that said mortgage has been discharged, and that said lands are no longer subject to the lien thereof.

XIII. That defendant received said deed from said A. B. with notice and knowledge of all the facts aforesaid.

XIV. That said A. B., the mortgagor in said mortgage, is insolvent; and plaintiff cannot recover the debt due from said A. B., to plaintiff, on account of the purchase price of said premises, except by sustaining his mortgage lien upon said lands and by the enforcement thereof.

Wherefore plaintiff demands judgment adjudging him the owner and holder of a first mortgage lien on said premises for the amount due on said notes; adjudging said quitclaim deed to be merely confirmatory of said prior deed from plaintiff to said A. B., and not to operate as a release, discharge or satisfaction of said mortgage; adjudging the title of defendant to said lands to be subject to said mortgage; and for such other relief as may be just, with costs.

Sustained on demurrer in Benson v. Markoe, 37 Minn. 30, 33 N. W. 38.

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MONEY HAD AND RECEIVED

1575. Common indebitatus count.[1]

I. That defendant is indebted to plaintiff in the sum of $ for money had and received by defendant [from one A. B.,] [from divers persons,] [from plaintiff,] [2] [on 19 ,] [between 19 , and 19 ,] for the use of plaintiff.

II. That [on 19 ,] [before this action] plaintiff demanded payment thereof from defendant.[3]

III. That no part thereof has been paid.

Wherefore [as in § 919].

[1] This is substantially the common indebitatus count for money had and received. See § 530. Its sufficiency under the code is well settled. See §§ 531, 752. As to when it will lie see §§ 755–789.

[2] It is not necessary, as against a demurrer, to allege the persons from whom the money was received or the time of its receipt, but it is practically advisable to do so to avoid the danger of a motion to make more definite and certain. See § 752.

[3] This allegation is not necessary but generally advisable. See § 752.

1576. Same—Shorter form.

I. That defendant is indebted to plaintiff in the sum of $ for money had and received by defendant [on 19 ,] [between 19 , and 19 ,] for the use of plaintiff.

II. That no part thereof has been paid.

Wherefore [as in § 919].

This form is sufficient on demurrer, but it is advisable to use the preceding form when it is possible to give the additional details. See §§ 752–789.

1577. General form.

I. That [on 19 ,] [between 19 , and 19 ,] defendant received from [one A. B.] [plaintiff] [divers persons] $, for the use of plaintiff, [which defendant promised to pay to plaintiff (on demand) (on 19)].[1]

II. That [on 19 ,] [before this action] plaintiff demanded payment thereof from defendant.

III. That no part thereof has been paid.

Wherefore [as in § 919].

[1] See Briggs v. Rutherford, 94 Minn. 23, 101 N. W. 954; Farrington v. Farrington, 117 Minn. 272, 135 N. W. 815.

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1578. Against agent for money collected.[1]

I. That [on 19 , defendant, acting as the agent of plaintiff, collected from one A. B. $,] [between 19 , and 19 , defendant, acting as the agent of plaintiff, collected various sums of money from divers persons, aggregating $,] for and on account of plaintiff.[2]

II. That on 19 , plaintiff demanded payment thereof from defendant, but no part thereof has been paid.[3]

Wherefore [as in § 919].

[1] A common count for money had and received is sufficient for the recovery of money collected by an agent. See §§ 765, 1575.

[2] Or "for the use of plaintiff." See Jackson v. Kansas City Packing Co., 42 Minn. 382, 44 N. W. 126.

[3] See, as to the necessity of a demand, Ford v. Brownell, 13 Minn. 184(174); P. P. Mast & Co. v. Easton, 33 Minn. 161, 22 N. W. 253.

1579. Same—Another form.

I. That on 19 , defendant, as agent of plaintiff, received from one A. B. $ for the use of plaintiff.

II. That on 19 , plaintiff demanded payment thereof from defendant.

III. That no part thereof has been paid.

Wherefore [as in § 919].

1580. Same—Another form.

I. That from 19 , to 19 , defendant was the agent and manager of plaintiff in charge of its business of operating a grain elevator in the city of .

II. That on 19 , at the commencement of said agency, there was in the hands of defendant, as such agent, the sum of $, the property of plaintiff; that during the continuance of said agency as aforesaid, defendant received as such agent the further sum of $, for the use of plaintiff, the same being the gross proceeds of said business during such period; that during the same period defendant paid out for plaintiff in the conduct of said business the sum of $, leaving a net balance in his hands for the use of plaintiff of $, no part of which has been paid to plaintiff except the sum of $, leaving a balance still unpaid of $.

III. That on 19 , plaintiff demanded of defendant said sum of $, but no part thereof has been paid.

Wherefore [as in § 919].

Substance of complaint in Farmers' Warehouse Assn. v. Montgomery, 92 Minn. 194, 99 N. W. 776.

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1581. For money received by agent on a settlement of a claim.

I. That on 19 , plaintiff appointed defendant his agent to effect a settlement of a certain claim of plaintiff's against one A. B. for [state in very general terms the ground of claim], and authorized defendant to settle the same for $.

II. That thereupon defendant settled said claim, and received from the said A. B. $ in settlement thereof, for the use of plaintiff.

III. That defendant has refused upon demand to pay to plaintiff said money or any part thereof.

Wherefore [as in § 919].

Based on complaint in Christopherson v. Olson, 104 Minn. 330, 116 N. W. 840. A common count for money had and received would suffice. See §§ 765, 1575.

1582. For money paid on contract void under statute of frauds.

I. That on and prior to 19 , defendant was the owner of [describe premises as in a deed].

II. That on said day plaintiff and defendant entered into an oral agreement whereby defendant agreed to sell and convey to plaintiff said premises for $, and plaintiff agreed to purchase the same from defendant and to pay him $ therefor.

III. That plaintiff then paid defendant $ as part of the purchase price of said premises and defendant received the same as such on said oral agreement.

IV. That no part of said agreement was ever reduced to writing, nor was any memorandum thereof ever made or signed by either of said parties, and plaintiff never took possession of said premises nor did defendant ever surrender possession thereof under said agreement.

V. That said oral agreement was and is void under the statute of frauds, and no part thereof was ever carried out, except that said $ were paid by plaintiff to defendant.

VI. That on 19 , plaintiff demanded of defendant a repayment of said money, but no part thereof has been repaid.

Wherefore [as in § 919].

A common count would be sufficient. See §§ 778, 1575.

1583. For money paid on an account by mistake.

I. That on 19 , defendant rendered an account to plaintiff of mutual dealings theretofore had between them, showing a balance due from plaintiff to defendant of $.

II. That plaintiff, believing said account to be correctly stated and relying thereon, paid said sum of $ to defendant.

III. That said account was incorrectly stated, overcharging plaintiff with the sum of $ [in adding up the items thereof] [in charging him $

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for , though the agreed price thereof, at which it was sold by defendant to plaintiff, was $] [or specify the error otherwise according to the facts].

IV. That on 19 , plaintiff notified defendant of said error and demanded a repayment of the said sum of $, but no part thereof has been repaid.

Wherefore [as in § 919].

1584. Denial of receipt of money.

The defendant for answer to the complaint herein denies that he ever received the money mentioned therein or any part thereof, [or any money whatever for plaintiff's use].

1585. Admission and denial.

The defendant for answer to the complaint herein [admits that he received the money therein mentioned but denies that he received it for plaintiff's use] [denies that he received the money therein mentioned for plaintiff's use].

1586. Accounting and payment.

The defendant for answer to the complaint herein alleges that on 19 , he accounted with plaintiff [as to all matters referred to in the complaint] and paid over to plaintiff all moneys received by him up to that day [as such agent of plaintiff].

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MONEY LENT

1587. Common indebitatus count.[1]

I. That defendant is indebted to plaintiff in the sum of $ for money lent by plaintiff to defendant at his request [on 19 ,] [between 19 , and 19].[2]

II. [That (on 19 ,) (before this action) plaintiff demanded repayment thereof from defendant.] [3]

III. That no part thereof has been repaid.

Wherefore [as in § 919].

[1] This is substantially the common indebitatus count for money lent. See § 530. Its sufficiency under the code is well settled. See §§ 531, 790. As to when it will lie see § 793.

[2] It is not necessary, as against a demurrer, to allege the time of the loan, but it is practically advisable to do so to avoid the danger of a motion to make more definite and certain.

[3] This allegation is not necessary but sometimes advisable.

1588. General form.

I. That [on 19 ,] [at divers times between 19 , and 19 ,] plaintiff loaned to defendant, at his request, [$,] [various amounts aggregating $,] [which defendant promised to repay to plaintiff (on demand) (on 19 ,) (with interest)].

II. That [on 19 ,] [before this action] plaintiff demanded repayment thereof from defendant.

III. That no part thereof has been repaid.

Wherefore [as in § 919].

See § 790.

1589. Denial of loan.

The defendant for answer to the complaint herein denies that plaintiff loaned him the money mentioned therein, or any money whatever.

1590. Satisfaction by sale of security.

The defendant for answer to the complaint herein admits said loan and alleges that at the time it was made plaintiff received from defendant as collateral security for the repayment thereof [describe collateral in general terms]; that thereafter and before this action was brought plaintiff sold said collateral, and received therefor and retained an amount exceeding said loan, with interest thereon to the date of said sale.

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MONEY PAID

1591. Common indebitatus count.[1]

I. That defendant is indebted to plaintiff in the sum of $ for money paid by plaintiff [to one A. B.] [2] [on 19], for the use of [3] defendant at his request.

II. That [on 19 ,] [prior to this action] plaintiff demanded payment thereof from defendant.[4]

III. That no part thereof has been paid.

Wherefore [as in § 919].

[1] This is substantially the common indebitatus count for money paid. See § 530. Its sufficiency under the code is well settled. See §§ 531, 796. As to when it will lie, see §§ 797–803.

[2] It is not necessary, as against a demurrer, to allege the person to whom the payment was made or the time thereof, but it is practically advisable to do so to avoid the danger of a motion to make more definite and certain.

[3] Or "for the use and benefit and at the request of defendant." See Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487. Or "for and on account of defendant." Under the Common Law Practice Act of 1852 the phrase is "for money paid by the plaintiff for the defendant at his request." Prior to the Act of 1852 the phrase was, "for money paid by the plaintiff for the use of the defendant at his request." See § 530.

[4] This allegation is not necessary but sometimes practically advisable.

1592. General form.

I. That on 19 , plaintiff paid to one A. B. $, for and at the request of defendant, [in satisfaction of a debt then due to A. B. from defendant].[1]

II. That in consideration thereof defendant promised to repay the same to plaintiff on [demand] [19].[2]

III. That [on 19 ,] [before this action] plaintiff demanded repayment thereof from defendant.[3]

IV. That no part thereof has been repaid.

Wherefore [as in § 919].

[1] Or otherwise according to the facts. The object of the payment may and should be stated very briefly.

[2] If the promise is only such as is implied by law it need not be alleged. See § 588.

[3] This allegation is not necessary unless it is alleged that the promise was to make payment on demand, but it is sometimes practically advisable.

1593. For money paid by accommodation maker of note.

I. That on 19 , plaintiff made and delivered to defendant his promissory note, of which the following is a copy: [Copy of note.]

II. That plaintiff never received any consideration therefor, but said note was made and given to defendant, at his request and for his accommodation, and upon his promise that he would pay it at its maturity.

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III. That, as plaintiff is informed and believes, defendant thereafter and before its maturity negotiated said note for value.

IV. That defendant did not pay said note at its maturity, and in consequence plaintiff was compelled to pay it, and on 19 , paid to A. B., who was then the owner and holder of the note, $ in satisfaction thereof, but no part of said sum has been repaid to plaintiff.

Wherefore [as in § 919].

A common count for money paid would be sufficient in this case. See §§ 797, 1591.

1594. Denial.

The defendant for answer to the complaint herein denies that he ever requested plaintiff to pay any money to A. B.

MORTGAGES

1595. Allegation of execution and recording of mortgage.

That on 19 , [A. B.], [and his wife,] [made and delivered] [executed] to C. D. a mortgage of [said premises] [description of premises], and on 19 , said mortgage was recorded in the office of the register of deeds for [said county] [county, Minnesota], in Book , of Mortgages, on page .

1596. On assumption of mortgage.

I. That on 19 , defendants A. B. and C. B. made and delivered to E. F. their promissory note of that date and thereby, for value received, promised to pay to the order of said E. F. the sum of $, on or before years from that date, with interest at the rate of six per cent. per annum.

II. That at the same time, to secure the payment of said note, defendants A. B. and C. B. made and delivered to said E. F., payee of said note, their mortgage deed, and thereby conveyed to said E. F., his heirs and assigns, the [description of premises]; that on 19 , said mortgage was recorded in the office of the register of deeds for said county, in Book , of Mortgages, on page .

III. That on 19 , the defendants A. B. and C. B. sold and conveyed said mortgaged premises to the defendant G. H.

IV. That defendant G. H., as a part of the purchase price of said premises, assumed and agreed to pay said note and mortgage.

V. That on 19 , said E. F., for value received, indorsed and assigned to plaintiff said note and mortgage, together with all claim and demand against the defendant G. H. by reason of said assumption and agreement to pay said note and mortgage.

VI. That plaintiff is now the lawful owner and holder of said note and

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mortgage, and he has duly demanded of each of said defendants the payment thereof, but no part thereof has been paid.

Wherefore [as in § 919].

Based on complaint in Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882.

1597. For foreclosure—General form.

I. That on 19 , defendants A. B. and C. B. made and delivered to plaintiff their promissory note, of which the following is a copy: [Copy of note.] [1]

II. That at the same time and to secure the payment of said note defendants A. B. and C. B. made and delivered to plaintiff a mortgage, of which the following is a copy: [Copy of mortgage omitting the acknowledgment.] [2]

III. That said mortgage was duly acknowledged and recorded in the office of the register of deeds for county, Minnesota, on 19 , in Book , of Mortgages, on page .[3]

IV. That no part of the principal or interest of said note and mortgage has been paid [except], and there is now due thereon from said defendants to plaintiff $.

V. [That no action or proceeding has been instituted at law for the recovery of the amount due on said note and mortgage, or any part thereof.] [4]

VI. That defendant C. B. is the wife of defendant A. B.

VII. [That defendants C. D. and E. F. claim to have some interest in or lien upon said mortgaged premises, but said interests or liens, if any exist, accrued since the lien of said mortgage and are subject thereto.] [5]

VIII. [That defendants A. B. and C. B. failed to keep said premises insured and in consequence plaintiff caused them to be insured for his benefit in the Insurance Company of , for the term of , from 19 , and paid therefor the premium of $.]

IX. [That defendants A. B. and C. B. failed to pay the taxes on said premises for the years 19 , 19 , and 19 , amounting in all to $, and in order to protect his security plaintiff paid the same.] [6]

Wherefore plaintiff demands judgment: [7]

1. Adjudging the amount due him from defendants A. B. and C. B. on said note and mortgage, including $ as attorney's fees [and $ paid by plaintiff for taxes and insurance on said mortgaged premises].[8]

2. Adjudging and directing a sale of said mortgaged premises as provided by G. S. 1913 § 8154, and the application of the proceeds thereof to the payment of the amount so adjudged due, with interest thereon to the time of payment, and the expenses of such sale and the costs and disbursements of this action.

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

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in said mortgaged premises except the right to redeem, as provided by statute, from the sale herein adjudged and directed.

4. For such other relief as may be just.

[1] Or plead note according to its legal effect. See § 804.

[2] Or plead the mortgage according to its legal effect, setting out in full the condition, the breach of which authorizes the foreclosure. It is better practice, however, to set out the mortgage in full.

[3] This allegation may be omitted when there are no third parties as defendants, but it is customary to insert it in all cases.

[4] This allegation is probably unnecessary. See Jones v. Ewing, 22 Minn. 157.

[5] Howard v. Iron & Land Co., 62 Minn. 298, 64 N. W. 896. See Seager v. Burns, 4 Minn. 141(93).

[6] G. S. 1913 § 2190.

[7] G. S. 1913 § 8154. See Dunnell, Minn. Digest, § 6442.

[8] G. S. 1913 § 8154. It is quite common practice to demand 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 this seems unnecessary and improper as no personal judgment for a deficiency is contemplated by our statute. Execution for any deficiency is authorized by statute without any personal judgment. G. S. 1913 § 8160. See § 804; Thompson v. Dale, 58 Minn. 365, 59 N. W. 1086; Dunnell, Minn. Digest, § 6442.

1598. Same—In case of a prior mortgage.

[I. to VIII. as in § 1597.]

VIII. That defendant G. H. is the holder and owner of a mortgage upon said premises which is prior and superior in lien to plaintiff's said mortgage, and, as plaintiff is informed and believes, the principal sum thereon is now due and payable.

[Continue as in § 1597 and modify the demand for judgment by asking that the amount due on said mortgage to defendant G. H. be ascertained and such amount be first paid out of the proceeds of the sale.]

1599. Same—On default in payment of interest.

[I. II. and III. as in § 1597.]

IV. That the interest on said note and mortgage, which became due on 19 , has not been paid and plaintiff elects to declare the whole amount secured by said mortgage due and payable, and there is now due on said note and mortgage from defendant A. B. to plaintiff $.

[Continue as in § 1597.]

1600. For recovery of excess at foreclosure.

I. That on 19 , plaintiff made and delivered to defendant a mortgage on the [describe premises as in mortgage], to secure the payment of a note for $, made and delivered by plaintiff to defendant at the same time.

II. That thereafter, default having been made in the payment of the prin-

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cipal and interest of said note and mortgage, defendant duly instituted proceedings to foreclose said mortgage by advertisement under a power of sale therein and caused said premises to be duly sold at public auction in such proceedings, in conformity with the statute in such case made and provided, by the sheriff of county, at , on 19 ; that at such sale said premises were bid off to defendant for $, he being the highest bidder and that amount being the highest bid at such sale, and thereupon said sheriff duly made and delivered to defendant a certificate of such sale.

III. That no money was paid to the sheriff by defendant or other person for said premises on said sale, but defendant bid off the premises as such mortgagee for the exact amount claimed by him in such proceedings to be due on said note and mortgage at the time of the sale, with the costs and disbursements of the foreclosure, including attorney's fees, aggregating $.

IV. That at the time of said sale there was due on said note and mortgage only $, and the costs and disbursements of such foreclosure, including attorney's fees, amounting to only $, in all $, and defendant bid off said premises and the same were sold to him at said sale for $ in excess of the amount then due on said note and mortgage and for the expenses of foreclosure, and defendant received the latter amount for plaintiff's use at said sale.

V. That no part thereof has been repaid to plaintiff though demanded of defendant on 19 .

Wherefore [as in § 919].

Sustained by Bailey v. Merritt, 7 Minn. 159(102). A common count for money had and received would suffice. See §§ 768, 1575.

1601. Non-delivery of loan—Cancelation of mortgage.

I. That at the times herein mentioned plaintiff was and now is the owner and in possession of the [description of premises].

II. That on May 1, 1890, defendant, desiring to make a loan of money to plaintiff, proposed to plaintiff to loan him the sum of $1,400, with interest at the rate of 7 per cent. per annum for the use of said money, the said sum of money to be secured by a mortgage on said premises; that plaintiff, desiring to obtain said loan from defendant, thereupon, with her husband, made and delivered to defendant their note for $1,400, dated on May 1, 1890, with interest thereon at the rate of 7 per cent. per annum, payable semi-annually as per coupons attached thereto, the principal sum therein to become due and payable to defendant in five years after said date; and to secure the payment of said note and said sum of money and interest as aforesaid, plaintiff and her said husband made and delivered to defendant a mortgage conveying all of said premises as security as aforesaid, and defendant caused said mortgage to be recorded in the office of the register of deeds for said Meeker county, on June 7, 1890, in Book 43, of Deeds, on page 461.

III. That said note and mortgage were so made and delivered to defendant with the understanding that as soon as said mortgage should be recorded de-

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fendant would pay to plaintiff the said sum of $1,400, but defendant has not paid to plaintiff said sum of $1,400, nor any part thereof, except the sum of $565, though often requested to do so.

IV. That said mortgage is so on record for the full amount of said note and constitutes a cloud upon plaintiff's title to said property.

V. That plaintiff has tendered to defendant the said sum of $565, and the interest thereon, if defendant would deliver back her said note and cancel and satisfy said mortgage of record, but defendant refused, and still refuses to do so.

Wherefore plaintiff demands judgment canceling said mortgage and the record thereof [or directing defendant to satisfy said mortgage of record], and directing defendant to deliver said note and coupons to plaintiff for cancelation, upon receiving from plaintiff said sum of $565 and interest thereon while the same was retained by plaintiff, and for such other relief as may be just, with costs.

Sustained in Payne v. Loan & Guaranty Co., 54 Minn. 255, 55 N. W. 1128.

1602. For injunction against foreclosure under power—Overstatement of debt in notice of sale.

I. That at the times herein mentioned the defendant A. B. was and now is the sheriff of Koochiching county, Minnesota.

II. That at all such times plaintiff was and now is, the owner and in possession of [description of premises].

III. That on Feb. 6, 1908, plaintiff was indebted to the defendants C. D. and E. F., on account of goods purchased of said defendants.

IV. That to secure the payment of said indebtedness and any indebtedness that might thereafter be incurred with said defendants, plaintiff on that day made and delivered to the defendant G. H., as trustee for defendants C. D. and E. F., a mortgage on said premises, of which a copy is hereto attached, marked Exhibit A, and made a part hereof.

V. That at the time said mortgage was so made and delivered no settlement was made or had between plaintiff and defendants C. D. and E. F., and the amount owing by plaintiff to said defendants was undetermined.

VI. That thereafter and prior to Aug. 26, 1910, plaintiff ordered and purchased of said defendants, other goods and paid various amounts therefor at different times.

VII. That on Aug. 26, 1910, plaintiff did not owe said defendants to exceed the sum of $3,800.

VIII. That on that day the defendant G. H. duly gave notice in writing under the statute that said premises would be sold by the sheriff of said county on Oct. 15, 1910, at 10 o'clock A. M. at the front door of the court house in the city of International Falls, in said county, to satisfy the sum of $4,388.81 claimed to be due under said mortgage, and the costs of said sale.

IX. That the amount claimed as due under said mortgage exceeds by at least the sum of $588.81 the amount actually due thereunder.

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X. That no settlement has ever been made or had of the amount due or owing under said mortgage.

XI. That at the times herein mentioned plaintiff has been and now is engaged in a general mercantile business at the village of Big Falls, in said county, and during all of said times has had many and various business dealings with the defendants C. D. and E. F., and has counterclaims against them aggregating at least $500.

Wherefore plaintiff demands judgment enjoining said foreclosure proceedings pending the determination by the court of the amount due on said mortgage, and for such other relief as may be just, with costs.

Substance of complaint in Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787.

1603. For an accounting between partners and an injunction against a foreclosure sale on the ground that the mortgage had been satisfied.

I. That plaintiff is the owner and in possession as his homestead, with his family, of lots nine and ten, in block five, in Paquin's 2nd Addition to the Town of Faribault; that at the time of his purchase of said property on July 19, 1866, plaintiff executed his note to the grantor A. B., for a portion of the purchase money, and he and his wife made and delivered to said grantor a mortgage upon said premises as security therefor, which was recorded in the office of the register of deeds for Rice county, Minnesota, on July 20, 1866, in Book K, of Mortgages, on page 14; that said mortgage and the debt thereby secured were thereafter assigned by said A. B. to one C. D., which assignment is recorded in the office of said register of deeds, on Aug. 23, 1866, in Book J, of Mortgages, on page 488.

II. That some time in the month of September or October, in the year 1865, plaintiff entered into a partnership with defendant and one E. F., in the business of milling and manufacturing flour; that by the terms of said partnership agreement plaintiff, who was a practical miller, was to contribute his time and services, and to have the whole charge and control and management of the grist mill, and defendant was to furnish the use of his mill and machinery, and the said E. F. was to keep the accounts of said partnership; that the expenses of running the mill were to be shared equally between said partners; that said firm was to be at no expense for office or other expenses than those connected with running said mill, and that the profits of said business were to be divided equally between said partners.

III. That pursuant to said agreement plaintiff and defendant and said E. F. entered into said partnership, and continued to carry on said business until some time in the winter of 1870, and during said period made from said business large profits, and plaintiff's share of said profits greatly exceeded any sum drawn out by him, including the amount of said mortgage.

IV. That on Aug. 23, 1867, there was due to said C. D. on said mortgage the sum of $943.25; that at that time and during the entire period of the continuance of said partnership defendant and said E. F. were engaged as part-

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ners in banking; that on Aug. 23, 1867, plaintiff's interest in said partnership and in its profits and assets greatly exceeded the amount of said mortgage, and on that day he requested the said E. F., who had the personal charge of said bank in which the surplus funds of said partnership were kept, and who also had charge of the books of said firm, to pay said mortgage to said C. D., and procure a discharge thereof, and charge the amount thereof so paid by him to plaintiff on the books of said partnership between plaintiff and defendant and said E. F.; that said E. F., with the knowledge of defendant, assented to said request, and agreed to do so, and accordingly, on said Aug. 23, 1867, paid the amount of said mortgage to said C. D., and charged the same to plaintiff upon the books of said firm; that said C. D. neglected to discharge the same; that in the following November, defendant and said E. F., without the knowledge or assent of plaintiff, and notwithstanding the payment thereof as aforesaid, secretly caused said mortgage to be assigned and transferred by said C. D. to them, which assignment was on Feb. 6, 1868, recorded in the office of the said register of deeds; that thereafter, and prior to the commencement of this action, the said E. F. sold and transferred all his interest in said firm and its assets to defendant, and on Jan. 1, 1871, transferred and assigned his pretended interest in said mortgage to defendant, which assignment was on Jan. 2, 1871, recorded in the office of the register of deeds for said county.

V. That there has never been any final settlement and accounting between plaintiff and defendant of the affairs of said firm, though plaintiff has often demanded such accounting and settlement; that defendant claims to charge, and has caused to be charged in the accounts of said firm, the sum of $900 to plaintiff, as one-third of the office expenses of the banking business conducted by defendant and said E. F., and in which plaintiff had no interest; that there is about $2,000 in value of machinery and improvements still in and about defendant's mill belonging to and purchased by the profits of said firm, for which plaintiff has received no credit; that defendant claims to charge, and has charged plaintiff with $400 in said partnership account as interest upon alleged overdrafts by plaintiff, all of which are in violation of the said partnership agreement and of the rights of plaintiff.

VI. That plaintiff's share and interest in the assets and profits of said firm were greater than any amount drawn out by him, and a part of said alleged overdrafts by plaintiff, upon which defendant claims to charge said interest in said account, is the sum so paid on said mortgage.

VII. That since the dissolution of said partnership defendant has had entire control of its books, accounts and assets, and has sold and disposed of many of said assets and received the money therefor, and has appropriated all not sold to his own use and benefit; that there are no debts or liabilities of said partnership, and no accounts unsettled except the account between plaintiff and defendant as aforesaid; that said mortgage is and has been fully paid and satisfied with and by the funds of plaintiff, and the assignment thereof to defendant and the record thereof are fraudulent against plaintiff, and a cloud

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upon his title; that there is, after deducting the amount charged in said firm account as used to pay said mortgage, a large balance due plaintiff.

VIII. That notwithstanding the full payment and satisfaction of said mortgage defendant is proceeding to foreclose the same, and has caused a notice of foreclosure to be inserted in the Faribault Republican, a weekly newspaper printed and published in said county, a copy of which notice is hereto attached, marked Exhibit A, and made a part hereof, and threatens to sell the premises hereinbefore described and covered by said mortgage, on Feb. 17, 1871, at 10 o'clock in the forenoon, at the office of the sheriff of said county, in Faribault, to satisfy the sum of $1,228.95, which he claims to be due on said mortgage, and the costs of sale, and will proceed to sell the same unless restrained by the order of this court; that said sale, if made, will be productive of great and irreparable injury to plaintiff and will constitute a cloud upon his title to said premises, and he has no adequate remedy at law.

Wherefore the plaintiff demands judgment for an accounting and settlement of the affairs of said partnership, and that defendant account for the balance found due from him to plaintiff, and that plaintiff have judgment therefor, and that said mortgage and all the assignments thereof, from said C. D. to defendant and said E. F., and from said E. F. to defendant, and the record thereof, be canceled, and that defendant satisfy the same of record and deliver up the note and mortgage to plaintiff, and be perpetually enjoined from foreclosing or enforcing the same against plaintiff or said property, and that in the meantime a temporary injunction issue enjoining defendant and his attorneys, agents and servants, from proceeding further with said foreclosure proceedings, and from selling said premises therein until the further order of this court, and for such other relief as may be just, with costs.

Complaint in Conkey v. Dike, 17 Minn. 457(434).

1604. To set aside foreclosure sale, for an accounting and a redemption from the mortgage—Defective notice of sale.

I. That at the times herein mentioned defendants were partners doing business at Milwaukee, Wisconsin, under the firm name of H. & Co.

II. That on Feb. 19, 1883, one A. B. was, and for a long time prior thereto had been, the owner in fee of [description of premises].

III. That on Feb. 19, 1883, the said A. B., and his wife, made and delivered to defendants, under their said firm name of H. & Co., a mortgage of said premises to secure the sum of $285.92 payable Aug. 19, 1883, with interest thereon at the rate of 7 per cent. per annum, which was, on March 15, 1883, recorded in the office of the register of deeds for said Carlton county, in Book A, of Mortgages, on page 500.

IV. That said mortgage was not paid at the maturity thereof and on July 25, 1885, defendants made an attempt to foreclose the same by advertisement under a power therein, and on Sept. 7, 1885, caused to be made a pretended sale of the premises described in said mortgage to satisfy the amount then

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claimed to be due thereon, at which said pretended sale defendants bid in said premises under their firm name of H. & Co. for the sum of $426.95, the amount then claimed to be due on said mortgage, and have ever since claimed and still claim to own said premises by virtue of the pretended foreclosure and sale aforesaid.

V. That no notice of such pretended foreclosure or any foreclosure, or of said pretended sale or any sale specifying the names of the mortgagors or either of them, was ever given or published as required by law or otherwise, and the said pretended foreclosure and sale thereunder were without authority of law and void, and said mortgage is still in full force and effect and wholly unpaid.

VI. That on Jan. 26, 1890, at Lake Linden, Houghton county, Michigan, the said mortgagor A. B., who was then a widower, died intestate, leaving surviving him these plaintiffs, who are his sons and sole heirs at law, and they are now the owners in fee of said premises, and the same were at all the times herein mentioned and still are wholly vacant and unoccupied.

VII. That plaintiffs C. D. and E. F. are minors of the age of eighteen and fourteen years respectively, and on Aug. 25, 1890, the said G. H. was by order of this court duly appointed guardian ad litem of said minors for the purposes of this action, and said G. H. on the same day duly accepted such appointment, which said order and acceptance have been duly filed in the office of the clerk of this court.

VIII. That on Aug. 29, 1890, plaintiffs duly tendered to defendants in redemption of said mortgage the sum of $676.25, which was the amount then due on said mortgage, including interest and all taxes paid by defendants on the premises described in said mortgage, with interest thereon to said date, and demanded that defendants satisfy said mortgage and have ever since been ready and willing to pay the same, but defendants refused to receive said money or to deliver up said mortgage to be canceled.

IX. [Allege facts excusing delay in bringing action].

Wherefore plaintiffs demand judgment that an account be taken of the amount now due defendants on said mortgage for principal and interest, and taxes and interest, and that plaintiffs may redeem said mortgaged premises upon payment of whatever may be found to be so due: and that defendants upon payment thereof acknowledge satisfaction of said mortgage, and discharge the same of record, and for such other relief as may be just, with costs.

Complaint in Marcotte v. Hartman, 46 Minn. 202, 48 N. W. 767.

1605. To set aside irregular foreclosure sale.

I. That plaintiff is the owner in fee of [description of lots].

II. That said lots are incumbered by certain mortgages, and especially by two certain mortgages, one on each of said lots, both of said mortgages being included in one instrument bearing date Jan. 27, 1885, made and delivered by A. B. and C. B., his wife, to C. D., and recorded in the office of the register

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of deeds for said Hennepin county on Feb. 18, 1885, in Book 133, of Mortgages, on page 188; that a copy of said instrument is hereto attached, marked Exhibit A, and made a part hereof.

III. That on May 16, 1887, there was recorded in the office of the register of deeds for said Hennepin county, in Book 238, of Deeds, on page 53, and following pages, certain instruments purporting to be the notice of mortgage sale, sheriff's certificate, sheriff's affidavit, notice of sale and printer's affidavit in the foreclosure of said mortgages, copies of which are hereto attached, marked Exhibits B, C, D and E, respectively, and made a part hereof.

IV. That at said pretended foreclosure sale, one E. F. was the purchaser of said lots, and thereafter conveyed all his rights acquired under and by virtue of said pretended sale to the defendants herein, as appears by a deed duly executed by said E. F. and C. F., his wife, and recorded in the office of the register of deeds of said Hennepin county, in Book 261, of Deeds, on page 583.

V. That said pretended foreclosure sale was irregular and void in this, that the pretended notice of sale does not describe either of the mortgages, but by said pretended notice an attempt is made to describe two separate and distinct mortgages on two different lots in one notice; and in this, that said pretended notice does not specify the amount due or claimed to be due on each of said mortgages, in accordance with the requirements of the statute relating to foreclosures by advertisement.

VI. That plaintiff's grantor is a resident of the state of New York, and had no knowledge or information of any kind of said pretended sale prior to Dec. 28, 1888, on which day plaintiff became the owner in fee of said premises, and on said day plaintiff tendered to defendants the full amount of principal, interest, and the costs incurred in said pretended foreclosure, which money defendants refused to accept, claiming to own said premises in fee as grantees of the purchaser under said pretended foreclosure sale, and plaintiff now brings into court the sum of $1,135, the same being the amount now due on said mortgages as principal, interest, and costs, to abide the decision of the court.

VII. That said premises are vacant and unimproved.

Wherefore plaintiff demands judgment setting aside said foreclosure sale and enjoining defendants from asserting any claim thereunder, and for such other relief as may be just, with costs.

Sustained on demurrer in Mason v. Goodnow, 41 Minn. 9, 42 N. W. 482.

1606. Same—Sale of several lots in gross.

I. That plaintiff is the owner in fee of [description of lots].

II. That said lots are incumbered by certain mortgages, and especially by a certain mortgage bearing date Nov. 21, 1884, executed by one A. B. and C. B., his wife, to the Northwestern Guaranty Loan Company, and recorded in the office of the register of deeds, for Hennepin county, Minnesota, in Book 131, of Mortgages, on page 104; that a copy of said mortgage is hereto attached, marked Exhibit A, and made a part hereof.

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III. That there appears upon the records of said register of deeds, in Book 161, of Deeds, on page 386, and following pages, the record of certain instruments purporting to be the notice of mortgage sale and sheriff's certificate and affidavit in the foreclosure of the said mortgage, copies of which are hereto attached, marked Exhibits B, C, and D, and made a part hereof.

IV. That at said pretended foreclosure sale, said A. B. was the purchaser and thereafter conveyed all his rights acquired under and by virtue of said pretended sale to defendant, as appears by a deed of record in the office of said register of deeds, in Book 205, of Deeds, on page 477.

V. That said pretended foreclosure sale was irregular and void for the following reasons:

1. That the pretended notice of sale was defective in that it does not properly describe the mortgage. The said mortgage affirms repeatedly the intention of the parties to be to make seven separate and distinct mortgages upon the seven lots therein mentioned, said mortgages securing different sums of money upon the different lots and being a specific lien upon each lot for said sum of money and no more; the notice of sale does not so describe the mortgage, but represents it as a blanket mortgage covering all the lots.

2. The publication of said pretended notice of sale was irregular and void in that it was made in a so-called journal named the "Northwestern Presbyterian;" that said "Northwestern Presbyterian" is not a newspaper in such a sense as to meet the requirements of the statute; that it had a limited circulation, in the very nature of the case, being intended only for the votaries of a particular sect of Christians; that it was not a paper for the dissemination of general news, but only for the publication of religious items and theological discussions and news pertaining only to the denomination of Christians which it represented, to wit, the Presbyterians.

3. Because the several lots were attempted to be sold in one parcel instead of separately and in seven distinct parcels. The mortgage divides the premises mortgaged into seven lots and the so-called sale should have recognized this division and each lot been sold separately.

VI. That plaintiff herein is excused for the delay in commencing this action because, before the time for redemption expired from the said pretended foreclosure sale, plaintiff's grantor had a verbal agreement with said A. B., the purchaser at said pretended sale, that he might delay redeeming the lots owned by him with perfect safety and no advantage would be taken of said delay; that before plaintiff purchased said lots he received from said A. B. an assurance that at any time before March 1, 1887, the said lots could be redeemed from said pretended sale, and no attempt would be made to take advantage of the fact that the time for redemption had apparently passed; that said A. B. made a memorandum in writing for plaintiff showing the exact sum required to redeem said lots upon March 1, 1887, and delivered the same to plaintiff; that in pursuance of said agreement on Feb. 28, 1887, plaintiff went to the office of said A. B. and offered to redeem said lots; that he was then informed

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that defendant herein was now the owner of the said mortgage and so-called certificate of sale, and plaintiff thereupon went to the office of defendant and offered to redeem said lots and his offer was refused, and defendant then and there claimed to be the owner in fee of said premises and refused to accept the money for the redemption of said lots from the said pretended foreclosure sale, according to the aforesaid memorandum of A. B., or in any sum whatever; that thereupon plaintiff proceeded to employ counsel at once in this matter and this action has been begun with due diligence.

VII. That said premises are vacant and unimproved.

Wherefore plaintiff demands judgment setting aside said foreclosure sale and enjoining defendant from asserting any claim thereunder, and for such other relief as may be just, with costs.

Complaint in Hull v. King, 38 Minn. 349, 37 N. W. 792.

1607. For redemption from mortgage—Mortgagor against mortgagee.

I. That on 19 , plaintiff made and delivered to defendant his promissory note, of which the following is a copy: [Copy of note.]

II. That at the same time and to secure the payment of said note plaintiff made and delivered to defendant a mortgage, of which the following is a copy: [Copy of mortgage.]

III. That plaintiff has paid to defendant all the interest due on said note and mortgage up to 19 , and on 19 , [when] [after] said note and mortgage became due, duly tendered to defendant $, that amount being the whole amount then due thereon, both principal and interest, and has ever since and still is ready and willing to pay the same, but defendant refused and still refuses to receive the same or to deliver said note and mortgage to plaintiff for cancelation, or to give to plaintiff a written satisfaction of said mortgage.

Wherefore plaintiff demands judgment adjudging the amount due from plaintiff to defendant on said note and mortgage; that plaintiff be permitted to redeem said mortgaged premises upon paying whatever may be so adjudged due; that upon such payment defendant be directed to surrender said note to plaintiff and [give to plaintiff a written satisfaction of said mortgage] [satisfy said mortgage of record], and for such other relief as may be just, with costs.

1608. Unlawful detainer proceedings against mortgagor holding over after foreclosure.

I. That defendant is in possession of the [describe premises as in the mortgage], county, Minnesota, and was the owner in fee thereof at the time of the execution of the mortgage hereinafter mentioned.

II. That on 19 , defendant made and delivered to plaintiff a mortgage of said premises to secure the payment of a promissory note for $, then made and delivered by defendant to plaintiff; that on 19 , said

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mortgage was recorded in the office of the register of deeds for said county in Book , of Mortgages, on page .

III. That thereafter, default having been made in the payment of the principal and interest of said note and mortgage, plaintiff duly foreclosed said mortgage by advertisement under a power therein, and duly caused the same to be sold by the sheriff of said county at public auction on 19 , in conformity with the statute in such case made and provided; that at said sale plaintiff was the purchaser of said premises and said sheriff duly made and delivered to plaintiff his official certificate of said sale as provided by G. S. 1913, § 8133; that on 19 , said certificate was recorded in the office of the register of deeds for said county, in Book , of Deeds, on page .

IV. That more than one year has elapsed since said sale and no redemption has been made therefrom [and no notice has ever been filed by a creditor of defendant with the register of deeds of said county of an intention to redeem from said sale,] and the time for redemption therefrom has expired.

V. That by reason thereof and of the statute in such case made and provided plaintiff is the owner in fee and entitled to the immediate possession of said premises.

VI. That defendant withholds possession thereof from plaintiff.

Wherefore [as in § 1505].

See G. S. 1913 § 7658; Dunnell, Minn. Digest, § 6474.

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1609. Allegation of incorporation.

That at the times herein mentioned [plaintiff] [defendant] was and still is a municipal corporation duly organized and existing under the [general laws of this state] [laws of this state and in particular under chapter of Special Laws 18 ; and the acts amendatory thereof and supplementary thereto].

Some such allegation as this is usual but unnecessary. Courts take judicial notice of the existence and organization of the municipalities of the state. See Dunnell, Minn. Digest, § 3456. They generally take notice of the charters of municipalities. See Dunnell, Minn. Digest, § 3452. They take notice of home rule charters, including amendments thereto. G. S. 1913 § 1349; A. A. White Townsite Co. v. Moorhead, 120 Minn. 1, 138 N. W. 939.

1610. Allegation of existence of street.

That [Grant avenue] is, and at all the times herein mentioned was, a public street and highway of [said city] [the city of].

See, for another form, § 1615.

1611. Allegation of existence of ordinance.

That at the times herein mentioned there was, and still is, in force, an ordinance of said [city] [village], entitled [title], and approved 19 , providing that [set out ordinance].

See G. S. 1913 § 7773 and § 811.

1612. Private action for violation of an ordinance.

I. [Allege ordinance as in § 1611.]

II. That on 19 , defendant, in violation of said ordinance, [allege acts of defendant and consequent injury to plaintiff].

III. That by reason of the premises defendant is indebted to plaintiff in the sum [amount of prescribed penalty].

Wherefore [as in § 919].

1613. Notice of claim under G. S. 1913 § 1786.

That on 19 , and within thirty days after receiving [said injury and loss] [the injury and loss herein alleged] plaintiff duly [presented] [caused to be presented] to the council of defendant city, a written notice and claim, signed by plaintiff and stating the time when and the place where said injury and loss occurred and the circumstances thereof, and the [amount of compensation] [nature of relief] demanded by plaintiff from defendant for such

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injury and loss, in compliance with G. S. 1913 § 1786; that more than ten days have since elapsed, but defendant has not satisfied said claim or any part thereof.

1614. Same—Another form setting out notice.

I. That on 19 , and within thirty days after receiving [said injury and loss] [the injury and loss herein alleged] plaintiff duly [presented] [caused to be presented] to the council of defendant city a written notice and claim for said injury and loss, of which the following is a copy: [Copy of notice and claim.]

II. That more than ten days have elapsed since said notice and claim were so presented but defendant has not satisfied said claim or any part thereof.

1615. For injury from defective sidewalk.

I. [Allege incorporation as in § 1609.]

II. That [Oak] street, between [First and Second] street, within the corporate limits of defendant, was, at the times hereinafter mentioned, a [much traveled] public street and highway [near the center] of said city, and the sidewalks thereof were in constant use by many persons.

III. That on and [for several days] prior to 19 , defendant negligently allowed the sidewalk on the side of said street, in front of the premises known as No. , to be improperly and dangerously constructed and to be and remain in an unsafe and dangerous condition for ordinary travel in that [specify defect], of all of which defendant had notice.

IV. That on 19 , at about o'clock in the [afternoon], while plaintiff was walking on said sidewalk, he [stumbled] [slipped] and fell thereon by reason of its said condition and was [allege injuries and damages as in §§ 1250–1255].

V. [Allege service of notice as in § 1613.]

Wherefore [as in § 919].

1616. For injury from open coal-hole.

I. That at the times herein mentioned defendant was [owner and] occupant of the premises known as No. , street, in the city of , Minnesota.

II. That in the sidewalk in front of said premises, which was a public highway, there was a coal-hole opening into a cellar below and such coal-hole and cellar were a part of said premises of defendant and were in his use, occupancy and control.

III. That on 19 , defendant negligently allowed said coal-hole to remain open and unguarded and by reason thereof plaintiff fell therein, as he

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was walking on said sidewalk, and was [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

1617. For injury from open cellar-way in sidewalk.

I. That at the times herein mentioned defendant was the [owner and] occupant of the building known as No. , street, in the city of , Minnesota.

II. That in the sidewalk on the [north] side of said building there was a cellar-way, appurtenant to said building, used by defendant as a means of access to and egress from the cellar under said building.

III. That said sidewalk was a part of street of said city and a public highway, in constant use by the public.

IV. That on the night of 19 , defendant negligently allowed said cellar-way to remain open and exposed, without any guard, or railing, or light, or other means to warn persons walking along said sidewalk of its presence and open condition, and in such condition it was a nuisance and dangerous to persons walking along said sidewalk.

V. That after dark on said day plaintiff, while walking along said sidewalk, fell into said cellar-way by reason of its said condition and the negligence of defendant as aforesaid, and was [allege injuries and damages as in §§ 1250-1255].

Wherefore [as in § 919].

Based on complaint sustained on demurrer in Landru v. Lund, 38 Minn. 538, 38 N. W. 699.

1618. For injury from icy sidewalk.

I. [Allege incorporation of defendant as in § 1609.]

II. [Allege existence of street as in § 1610 or § 1615.]

III. That on 19 , and for days prior thereto, defendant negligently allowed snow and ice to accumulate and remain on the sidewalk on the north side of said street between street and street; that said accumulation of snow and ice was, to the knowledge of defendant, uneven, round and slippery, so as to be exceedingly dangerous to persons walking on said sidewalk; that defendant negligently allowed children to coast with sleds on said sidewalk and it was thereby rendered much more slippery than it would naturally have been.

IV. That on 19 , plaintiff, while walking on said sidewalk at a point about feet from the corner of street, slipped on said accumulation of ice by reason of its said condition and fell and was thereby [allege injuries and damages as in §§ 1250–1255].

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V. [Allege service of notice of claim on defendant as in § 1613.]
Wherefore [as in § 919].

Based on Smith v. Cloquet, 120 Minn. 50, 139 N. W. 141.

1619. For injury from obstruction in sidewalk—Action against owner, lessee and city.

I. That at the times herein mentioned the defendant city of St. Paul, was, and still is, a municipal corporation, duly organized and existing under the laws of this state.

II. That during all such times the defendant A. B. was and still is the owner of lots 1, 2 and 3, in block 20, Roberts & Randall's Addition to the city of St. Paul, Minnesota, and of the building thereon; that said lots are located at the southwest corner of Minnesota and Eighth streets in said city, and have a frontage on each of said streets of about 120 feet.

III. That during all such times the defendant C. D. was and still is the lessee and occupant of said premises.

IV. That more than five years ago the defendant city of St. Paul opened, graded and paved Eighth street in front of said premises, and between Minnesota and Cedar streets in said city, and constructed a stone sidewalk along the south side of Eighth street and in front of said premises, and opened said sidewalk for public use and travel, and the same has ever since so remained open for public use and travel and has been so used.

V. That more than five years ago the owner of said premises, defendant A. B., with the permission and authority of defendant city of St. Paul, constructed an areaway in front of said building and under said sidewalk on the south side of Eighth street and at a point about 65 feet west of Minnesota street, and with like permission and authority made an opening in said sidewalk over said areaway; that said opening was covered by two iron doors working upon hinges, and the hinges extended about an inch above the level of the doors and sidewalk so as to be dangerous to persons walking on the sidewalk and a nuisance.

VI. That the defendant C. D., as such lessee, for more than five years last past, has maintained and used said opening and areaway, with said doors and hinges in said condition.

VII. That all of the defendants knew of the dangerous condition of said doors and hinges long before the accident hereinafter mentioned and negligently allowed them to be and remain in such condition at the time of said accident and for more than five years prior thereto.

VIII. That on Dec. 17, 1910, while plaintiff was walking on said sidewalk on Eighth street in front of said premises, he tripped, stumbled and fell over one of said hinges by reason of its said condition and was thereby [allege injuries and damages as in §§ 1250-1255].

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IX. [Allege service of notice of claim on city as in § 1613.]
Wherefore [as in § 919].

Substance of complaint sustained on demurrer in Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461.

1620. For injury from unguarded excavation in street—Action against city.

I. [Allege incorporation of defendant as in § 1609.]

II. [Allege existence of street as in § 1610.]

III. That prior to 19 , there was a wooden bridge in the middle of the beaten track of said street; that on that day defendant removed said bridge to a point ten or twenty feet to one side of its former position and about that distance to one side of the beaten path in said street; that said bridge led over an excavation or drain running across said street which was about three feet deep; that at the time of removing said bridge defendant negligently left said excavation uncovered and unguarded so that it was dangerous to travelers along said street.

IV. That on the night of 19 , defendant negligently left said excavation or drain without any guard about it, or light near or upon it, or other means to warn travelers on said street of its existence.

V. That about o'clock on the evening of said day, while plaintiff was driving a horse and carriage, the property of plaintiff, along said street, he drove into said excavation or drain, by reason of defendant's said negligence, and was thereby [allege injuries and damages as in §§ 1250-1255].

VI. [Allege any injury to horse or carriage and the amount of damages as in § 1722.]

VII. [Allege service of notice of claim on defendant as in § 1613.]
Wherefore [as in § 919].

Based on complaint in O'Leary v. Mankato, 21 Minn. 65.

1621. For injury from obstruction in street.

I. [Allege incorporation of defendant as in § 1609.]

II. [Allege existence of street as in § 1610.]

III. That on 19 , and for ten or more days prior thereto, there existed, to the knowledge of defendant, an obstruction in said street between street and street in said city, consisting of a pile of stone and other building materials, deposited there by certain contractors who were constructing a building on adjacent property; that on the night of 19 , defendant negligently allowed said obstruction to remain without any guard about it, or light near or upon it, or other means to warn travelers along said street of its existence.

IV. That about o'clock on the evening of 19 , plaintiff, while

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driving [a horse and carriage,] [an automobile] the property of plaintiff, along said street, drove against said obstruction, by reason of said negligence of defendant, and was thereby thrown violently to the ground and [allege injuries and damages as in §§ 1250-1255].

V. [Allege any injury to horse and carriage or automobile and the amount of damages thereto as in § 1722.]

VI. [Allege service of notice of claim on defendant as in § 1613.]

Wherefore [as in § 919].

Based on complaint in Grant v. Stillwater, 35 Minn. 242, 28 N. W. 660.

1622. Same—Action against city and abutting owner.

I. [Allege incorporation of defendant city as in § 1609.]

II. [Allege existence of street as in § 1610.]

III. That at the times herein mentioned defendant A. B. was the owner and in possession of the premises known as No. , street in said city.

IV. That several days prior to 19 , defendant A. B. dug an excavation about feet deep and feet long, in front of said premises and extending several feet into said street; that on the night of 19 , defendants negligently failed to surround said excavation with a guard, or to place a light near or upon it, or to take any other precautions to warn persons traveling along said street of its existence, and in consequence said excavation was dangerous to such travelers.

V. That at about o'clock on the evening of 19 , while plaintiff was walking along said street, he fell into said excavation by reason of said negligence of defendants, and was thereby [allege injuries and damages as in §§ 1250-1255].

VI. [Allege service of notice of claim on defendant city as in § 1613.]

Wherefore [as in § 919].

Based on complaint in Clark v. Austin, 38 Minn. 487, 38 N. W. 615.

1623. By municipality against abutting owner to recover money paid by former on judgment.[1]

I. [Allege incorporation of plaintiff as in § 1609.]

II. [Allege defendant's negligence as if the action were against him. See, for example, §§ 1615-1622.]

III. That on 19 , one A. B., by reason of defendant's negligence as aforesaid, while walking on said sidewalk, [allege injuries as in §§ 1250–1255, 1615-1622].

IV. That on 19 , said A. B. brought an action against the plaintiff herein, in [this court,] [the district court for county, Minnesota,] to recover for the damages suffered by him as aforesaid; that thereafter such proceedings were had in such action that on 19 , a judgment was duly

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rendered by said court against the plaintiff herein in favor of said A. B. for $, with costs.

V. [That on 19 , plaintiff gave defendant herein written notice of the pendency of said action, and requested him to appear and defend the same.] [2]

VI. That on 19 , plaintiff necessarily paid $ in full satisfaction of said judgment.

VII. That plaintiff necessarily incurred an expense of $ for attorney's fees, costs and expenses in defending said action.

VIII. That on 19 , plaintiff demanded of defendant repayment of said amounts, aggregating $ with interest from [19 ,] [the time of their respective payments,] but no part thereof has been paid.

Wherefore [as in § 919].

[1] See Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818; Rochester v. Campbell, 123 N. Y. 405; Bailey v. Bussing, 28 Conn. 455, and Dunnell, Minn. Digest, § 6845. A common count for money paid would suffice. See §§ 797, 1591.

[2] See Dunnell, Minn. Digest, § 5176, and Henderson v. Eckern, 115 Minn. 410, 132 N. W. 715.

1624. For damages from obstructed sewer.

I. [Allege defendant's incorporation as in § 1609.]

II. That on and along the east side of Main street in said city, which is one of the principal public streets thereof, there was at the times hereinafter mentioned a sewer constructed by and under the absolute control and supervision of defendant, and used and designed for conducting and carrying off the water running in and upon said street, and other streets adjacent thereto.

III. That for more than one year preceding the commencement of this action plaintiff was in possession and occupancy of a building, including the cellar thereunder, situated upon the east side of said street, wherein he carried on the business of a grocery and provision store, and where he was conducting a large business in selling groceries and provisions; that a large portion of plaintiff's stock in trade was stored in the cellar; that said sewer, running from south to north, passed near by and in front of plaintiff's said store building.

IV. That on April 12, 1883, defendant negligently failed to keep said sewer in proper repair and negligently allowed the same to become filled with ice, dirt, paper and rubbish, and so obstructed that it would not carry off the water, and negligently failed to remove said obstructions and keep said sewer in proper condition and repair, by reason of which the flow of water therein was impeded and stopped, causing it to set back and flow into said cellar, by reason whereof the cellar was overflowed, and a large amount of vegetables, wrapping paper, sugar and other goods therein, belonging to plaintiff, were saturated with water and damaged, and plaintiff was deprived of the use of his cellar for

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the period of about ninety days, and necessarily incurred an expense of $ in removing said water and in clearing out the cellar, all to his damage $120.

V. [Allege service of notice of claim as in § 1613.]

Wherefore [as in § 919].

Substance of complaint in Taylor v. Austin, 32 Minn. 247, 20 N. W. 157.

1625. For damages from establishment of street grade.

I. [Allege defendant's incorporation as in § 1609.]

II. That for more than twenty years last past Juliet Place has been a duly laid out and open public street within the corporate limits of said city, extending from Victoria street in a westerly direction to Pleasant avenue.

III. That plaintiff now is, and for a long time prior to the grading of Juliet Place as hereinafter described, was the owner in fee of lot seven, block one, Michel Robertson's Addition to St. Paul, with all appurtenances thereto, said lot fronting upon Juliet Place upon the south side thereof.

IV. That prior to the grading of Juliet Place said lot had been improved by the erection thereon of a frame dwelling house, and at the time that said house was built said lot was upon a level and even with the surface of Juliet Place.

V. That during the years 1909 and 1910 defendant caused said Juliet Place to be graded, said work having been completed and accepted by said city on Dec. 14, 1910.

VI. That by the grading of said street as aforesaid, a fill was made in front of plaintiff's premises raising the surface of said street to a height of about six and one-half feet above the level of said lot, thus leaving said lot and the house thereon below the street level six and one-half feet.

VII. That the grade thus made and established on said street was and is impracticable and unreasonable in that it unnecessarily raises the grade of said street, requiring a fill to be made in front of plaintiff's premises to a height of six and one-half feet.

VIII. That said grade so established and made is impracticable, unreasonable and unnecessary, in this, that the surface of said street as now graded is raised to a height of several feet above the grades of the intersecting streets at each end of said block one, and if said Juliet Place had been graded upon a level with said intersecting streets and upon a level with the property abutting thereon, as said street had theretofore existed, it would have constituted a practical and easy grade for all purposes of travel and traffic thereon between said intersecting streets.

IX. That by reason of the impracticable and unnecessary grade so made and established, whereby said lot and house are left six and one-half feet below the street level, access to said property has been practically shut off and the surface water from said street is cast over and upon said lot in great quantities and collects thereon, undermining the foundation and flooding the cellar of said

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house, thereby creating an unhealthy and dangerous condition for persons residing thereon.

X. That by reason of the premises plaintiff has been damaged $2,000, for which he has not been, in any manner, compensated.

Wherefore [as in § 919].

Sustained in Hirsch v. St. Paul, 117 Minn. 476, 136 N. W. 269.

1626. Same—Another form.

I. [Allege defendant's incorporation as in § 1609.]

II. That plaintiff is, and ever since April 30, 1903, has been, the owner in fee of [description of lot].

III. That said lot is bounded on the west by Front street and on the north by Broadway street of said city of Little Falls.

IV. That when plaintiff became the owner of said lot there was standing thereon a good and substantial brick building which was used as a hotel, two stories high on a good and substantial basement with stone walls, and said lot and building were of the reasonable value of $4,000; that said building was erected before the grade of said Broadway street was established or changed, and was erected so as to conform to the then existing grade of said street as near as the same could be ascertained.

V. That on Nov. 2, 1904, defendant changed and established the grade on said street in front of said lot, and thereafter worked and graded said street to the grade so established, and in doing so filled in the earth, pavement and curbing in front of said lot and building thereon, thereby raising the surface of said street in front of said lot two and one-half feet.

VI. That ever since said grading and in consequence thereof plaintiff has been unable to use or lease said building for the purposes for which it was intended or for any other purpose; that before said building can be used or leased it will be necessary to expend at least $1,000 in repairing and raising the same, and in grading the lot to the street grade as now established.

VII. That by reason of said change and establishment of grade said premises have been diminished in value $1,000.

Wherefore [as in § 919].

Substance of complaint in Sallden v. Little Falls, 102 Minn. 358, 113 N. W. 884.

1627. For damages from change of street grade.

I. [Allege defendant's incorporation as in § 1609.]

II. That plaintiff is, and ever since March 30, 1910, has been, the owner in fee of the southerly half of lot 28, block 1, Industrial Division to the city of Duluth, Minnesota.

III. That said lot has a frontage of 25 feet on St. Croix Avenue of said city and extends easterly therefrom a distance of about 300 feet.

IV. That said Industrial Division was platted and the plat thereof filed in 1874.

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V. That long prior to 1893 defendant caused that part of St. Croix Avenue through said block 1, in said Division to be graded and improved as a street suitable for public travel and for access to the lots abutting thereon and the buildings and improvements located thereon.

VI. That prior to the year 1893, the then owner of said southerly half of said lot 28, caused to be constructed thereon a two and a half story frame building 16x34 feet, adjacent to the street, and located on a level with the grade and the sidewalk as then graded, constructed and used; that said building has always been used for a dwelling house with the exception of the front room down stairs which has always been used as a store building; that said lot and building as above described was in the same condition with respect to the grade of the street and the sidewalk at the time plaintiff became the purchaser of said premises on March 30, 1910.

VII. That on Feb. 17, 1893, as plaintiff is informed and believes, the defendant caused the grade of said street through said block 1, as it was then improved and traveled, to become the permanent and established grade, and until the time hereinafter stated the owners of the lots abutting thereon improved the same with reference thereto.

VIII. That during the year 1909, defendant re-established the grade of said street through said block 1 in said Division by raising the same 16 inches, and during the year 1911 caused that portion of the street in front of said premises to be filled and graded to such new grade, and caused a new sidewalk to be constructed upon said new established grade in front of said premises, with the result that the surface of said lot was left about 16 inches below said new sidewalk.

IX. That said change of grade, and the improvement of the street and construction of said sidewalk, in front of plaintiff's said premises, as aforesaid, caused the same to become undesirable for either residence or business purposes, and to be greatly depreciated in value, to plaintiff's damage $600.

Wherefore [as in § 919].

Sustained on demurrer in Sather v. Duluth, 123 Minn. 300, 143 N. W. 906.

1628. Same—Another form.

I. [Allege incorporation of defendant city as in § 1609.]

II. That plaintiff is, and since 1890 has been, the owner in fee of [description of premises].

III. That said property is located within the corporate limits of defendant, and at all said times was located on and fronting Melbourne avenue, one of the public streets and highways of defendant.

IV. That at the time plaintiff became the owner of said property in 1890, said Melbourne avenue was one of the public streets and highways of said city, the dedication of which had been duly accepted by said city, and the same was

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graded by said defendant city and was in daily use as one of the public streets and highways of said city.

V. That plaintiff immediately on becoming the owner of said property, erected thereon a dwelling house for the use of himself and family and proceeded to improve said property with reference to said street as established and maintained by defendant, which grade so established was maintained by said defendant continuously up to the year 1906.

VI. That during the summer of 1906 and the summer of 1908, defendant, without plaintiff's consent and without compensating plaintiff for any damages to his property, wrongfully entered upon plaintiff's property and said Melbourne avenue and changed the grade of said Melbourne avenue by lowering the same eight feet immediately in front of plaintiff's property and grading said avenue down eight feet below the grade which had been in existence and maintained from the year 1890, and defendant removed therefrom, in front of plaintiff's premises, the sand, dirt and gravel to an extent of eight feet below said former grade and removed the lateral support from the front part of said lot, whereby the earth and soil in front of said lot was allowed to fall down into the street to the extent of about five feet back from the street line, and defendant also removed the dirt from the front part of plaintiff's lot in connection with the work of lowering said grade, and said street, as aforesaid, all to plaintiff's damages in the sum of $2,000, no part of which has been paid.

VII. That immediately prior to the lowering of said grade by defendant, as aforesaid, plaintiff's property was of the reasonable market value of $3,500, but since the completion of said grading, as aforesaid, and by reason thereof, the reasonable market value of plaintiff's said property has declined to the extent that the same is not worth to exceed the sum of $1,500.

VIII. That in order to be able to use said lot for any purpose it will be necessary to grade it down a distance of eight feet and lower the buildings thereon to the same extent, and in order to so lower the lot, the trees and shrubbery thereon, of the value of $300 would necessarily be destroyed.

Wherefore [as in § 919].

Substance of complaint in Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856.

1629. For damages from grading street—Impairment of lateral support.

I. That plaintiff is, and at all the times herein mentioned was, the owner in fee of lot 14, in block 4, of Whitney's Subdivision of Brewster's Addition to the city of St. Paul, Minnesota.

II. [Allege defendant's incorporation as in § 1609.]

III. That in grading, and for the purpose of grading and constructing, a certain street in said city, known as Park avenue, the defendant on 19 , wrongfully entered upon a certain portion of plaintiff's said premises, extending from where the same adjoins said avenue, in front of said avenue, back a

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distance of thirty-five feet from said street, and appropriated and took said portion of said premises without authority and without the consent of plaintiff, and carried away from the said portion of said premises the soil thereof, to plaintiff's damage $.

Wherefore [as in § 919].

Complaint in Dyer v. St. Paul, 27 Minn. 457, 8 N. W. 272.

1630. On bond of public contractor.

I. That on Oct. 8, 1908, the defendant A. B. entered into a contract with School District No. 39, St. Louis county, Minnesota, whereby, among other things, he agreed to provide all the materials and perform all the work for the erection and completion of a certain public high school building at Eveleth, Minnesota, according to the plans and specifications prepared by C. D., for the agreed price of $58,300.

II. That said school district is a public corporation duly organized and existing under the laws of this state, for public school purposes, as a common school district.

III. That for the purpose of enabling defendant A. B. to carry out said contract, and to give the same validity under the laws of this state, in such case made and provided, the defendant A. B., as principal, and the defendant the National Surety Company, as surety, on Oct. 17, 1908, made and delivered to said school district for the use of said school district and of all other persons doing work or furnishing skill, tools, machinery or materials under, or for the purpose of, such contract, a certain bond, a copy of which is hereto attached, marked Exhibit A, and made a part hereof; that thereupon such bond was duly accepted by said school district and was approved by and filed with the treasurer of said school district.

IV. That the contract referred to and attached to said bond is the same contract as the one referred to in the first paragraph hereof.

V. That thereafter and between July 16, 1909, and August 16, 1909, both dates inclusive, plaintiff, at the special instance and request of defendant A. B., and for the purpose of enabling said A. B. to carry out said contract, furnished certain labor and materials consisting of ornamental plaster work for the Eveleth High School building referred to in said contract, in accordance with the plans and specifications prepared by the architect mentioned in said contract, all of which labor and materials were so furnished and erected in place in the said Eveleth High School building in accordance with said plans and specifications, and used in the erection of said building; that for such labor and materials said A. B. agreed to pay to plaintiff the sum of $1,050, which was the reasonable value of the same, and all of the same was used therein under said contract between said A. B. and said school district.

VI. That no part of said claim has ever been paid except the sum of $15.05, and there is justly due to plaintiff for said labor and materials the sum of

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$1,034.95, with interest from Aug. 16, 1909, which said sum is long past due, though payment thereof has been duly demanded.

VII. That, as plaintiff is informed and believes, said A. B. has not yet fully completed said contract and said high school building has not been accepted by said school district; that on March 8, 1910, plaintiff caused a written notice to be served upon the defendant, the National Surety Company, specifying the nature and amount of plaintiff's claim and the date of furnishing the last item thereof; and on March 11, 1910, plaintiff caused to be served on the defendant A. B. a like notice, a copy of which is hereto attached, marked Exhibit B, and made a part hereof.

VIII. That by reason of the premises defendants are indebted to plaintiff on said bond in the sum of $1,034.95, no part of which has been paid, though duly demanded.

Wherefore [as in § 919].

Sustained on demurrer in Architectural Decorating Co. v. National Surety Co., 115 Minn. 382, 132 N. W. 289.

1631. For failure to take a bond from a public contractor.

I. [Allege defendant's incorporation as in § 1609.]

II. That on June 2, 1909, defendant entered into a contract in writing with one A. B. for the construction of a village hall and lockup, upon lots 12 and 13 in block 2 of Auditor's subdivision of the northwest quarter of the southwest quarter of section 32, in said village of Pine Island, a copy of which contract is hereto attached, marked Exhibit A, and made a part hereof.

III. That thereafter said village hall and lockup were constructed by said A. B. under and pursuant to said contract; that, in carrying out said contract, and for the purpose of procuring materials for the erection of said village hall and lockup, said A. B. ordered of plaintiff certain lumber and building materials, and in accordance with said order and at the instance and request of said A. B., plaintiff, after the execution of said contract, sold and delivered to said A. B., as such contractor with defendant, said lumber and building materials for use in the construction of said village hall and lockup, and the same were actually used in such construction; that the reasonable value of the materials so furnished was $923.57, which sum said A. B. promised to pay to plaintiff therefor; that said sum is now wholly due and payable, and no part thereof has been paid, except the sum of $540.35, paid at different times in the months of August, September, November and December, 1909.

IV. That defendant failed to take or require from said A. B., in connection with said contract and the performance thereof, the bond required and provided for by section 4535, of the Revised Laws of 1905, of this state, and failed to take a bond conditioned for the payment, as they became due, of all just claims for materials furnished for the purposes of said contract, as required by said section, or any bond for the use or benefit of plaintiff or any other person furnishing materials under or for the purpose of such contract.

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V. That payment of said sum owing to plaintiff for said materials was demanded of said A. B. when the same became due, and has since been repeatedly demanded, but plaintiff has been and is unable to collect the same from him; that said A. B. is insolvent and unable to pay his debts, or any part of them, and neither said claim of plaintiff, or any part thereof, can be collected from said A. B. or out of any property belonging to him.

VI. That by reason of the premises, and of the failure of defendant to demand and receive from said A. B. a bond according to law and conditioned as provided by the statutes, plaintiff has been damaged $383.22.

VII. That a statement or account of said claim of plaintiff, made out in items and verified by the affidavit of C. D., president of plaintiff corporation, as provided by statute, showing in detail the materials furnished as aforesaid and the value thereof, has been heretofore duly presented to and filed with defendant, and payment thereof demanded, and said claim has been disallowed and payment refused by defendant, prior to the commencement of this action.

Wherefore [as in § 919].

Substance of complaint in McMullin Lumber Co. v. Pine Island, 119 Minn. 60, 137 N. W. 192.

1632. Injunction against illegal issue of municipal bonds—Contract not conforming to bid—Lowest bidder.

I. That plaintiff is a resident and taxpayer of the city of Duluth, and brings this action on behalf of himself and all other taxpayers of said city.

II. That the defendant, the city of Duluth, is a municipal corporation, duly organized and existing under the laws of this state.

III. That the defendants A. B., C. D., E. F., and G. H. are respectively the mayor, clerk, controller and engineer of said city, and the defendants I. J., K. L. [and others] constitute the common council of said city.

IV. That the city of Duluth is situated upon the shores of Lake Superior, and a portion of said city is upon Minnesota Point, a tongue of land extending from the mainland upon which is located the principal portion of the city of Duluth, between Lake Superior and the Bay of Duluth and Superior.

V. That Lake Superior and the Bay of Duluth are connected, and the mainland of the city of Duluth and that portion of the city located upon Minnesota Point are separated by a canal under the charge and control of the United States Government, navigable for vessels, and three hundred feet in width, and bounded upon each bank by lands owned by the United States Government.

VI. That there is no bridge across said canal and the only means of communication across the same is by boat; that to accommodate the public in crossing said canal, the city of Duluth maintains and operates a ferry boat, at an expense of $30 per day.

VII. That in the year 1901, the city of Duluth obtained from the War De-

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partment of the United States permission to occupy temporarily a portion of the government piers and grounds adjacent to said canal, for the purpose of constructing thereon a ferry bridge, to consist of piers on each side of said canal and an elevated and suspended truss to support a traveling car.

VIII. That on Feb. 7, 1902, the Congress of the United States passed an act granting to the city of Duluth the right to construct a ferry bridge across said canal, and to occupy the government piers and property necessary in doing so.

IX. That in the year 1903, the common council of the city of Duluth appointed certain officers of the city of Duluth as a Ferry Bridge Commission, and authorized said Ferry Bridge Commission to advertise for bids for the construction of a bridge across said canal.

X. That bids were duly advertised for by said Ferry Bridge Commission, as required by the charter of the city of Duluth and by the general law, by publication in the official paper of said city.

XI. That the call of said Ferry Bridge Commission for bids referred to certain general specifications, terms and conditions, upon which all bids should be based; that a copy of said call for bids is hereto attached, marked Exhibit A, and made a part hereof.

XII. That in response to said call for bids, the Modern Steel Structural Co., a corporation organized under the laws of Wisconsin and doing business at Waukesha, Wisconsin, submitted a bid or proposition, a copy of which is hereto attached, marked Exhibit B, and made a part hereof, which was the only bid received.

XIII. That attached to said bid or proposition are plans and profiles of the bridge proposed to be constructed, and showing the method of such construction; that said plans have been submitted to the War Department of the United States Government, and said plans, together with the method of construction therein proposed, have been approved by the Secretary of War, and consent given by him that the bridge may be erected according to the plans and method therein set forth.

XIV. That thereafter and on Sept. 26, 1903, said Modern Steel Structural Co., in pursuance of said bid and in accordance with said original specifications, proposed to enter into a contract, in form hereto attached, marked Exhibit C, and made a part hereof.

XV. That said form of contract contained certain modifications of the specifications upon which bids were called for, as shown therein, and the general terms and conditions attached to said specifications upon which bids were based were modified in certain particulars, by omitting therefrom the following: [Specifying modifications.]

XVI. That on Sept. 28, 1903, the common council of the city of Duluth, by resolution, formally accepted the bid of said Modern Steel Structural Co., to erect said ferry bridge, as modified by the proposed form of contract hereinbefore referred to; and by resolution directed defendants herein, the mayor,

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city clerk and city controller, to execute said contract with said Modern Steel Structural Company.

XVII. That at the time of advertising for said bids and at the time of receiving the same, and on Sept. 28, 1903, and at all intermediate dates, there was not at any one time in the general fund of the city of Duluth, unappropriated, a sum sufficient to pay the contract price of said bridge, as proposed to be paid by said agreement.

XVIII. That there has been no election within the city of Duluth to vote upon the question of the building of such bridge, or a vote upon the question of issuing bonds to raise the money to pay for the same.

XIX. That notwithstanding the foregoing, the above named defendants, the mayor, city clerk and city controller, as officials of the city of Duluth, will, unless restrained by the order of this court, sign said proposed contract, and will attempt to carry out and enforce the same; and the defendant city engineer will, unless restrained by the order of this court, supervise and superintend the construction of said bridge, and expend money in and about the employment of inspectors therefor, and will at the completion thereof, if completed in accordance with said contract, accept the same on behalf of the city of Duluth; and the common council of the city of Duluth will thereupon, unless restrained by the order of this court, issue and sell negotiable bonds of the city of Duluth, in an amount not exceeding $100,000 for the purpose of raising money to pay for said bridge.

XX. That plaintiff has no adequate remedy at law.

Wherefore plaintiff demands judgment permanently enjoining the defendants and each of them from executing said contract, or from in any manner attempting to carry out the same, or from issuing or attempting to sell any bonds of the city of Duluth for the purpose of providing money to pay therefor, and for such other relief as may be just, with costs.

Complaint sustained in Le Tourneau v. Hugo, 90 Minn. 420, 97 N. W. 115.

1633. Injunction against issue of municipal bonds under an unconstitutional act.[1]

I. That plaintiff is, and for more than one year last past has been a resident of and taxpayer of the city of St. Cloud, Minnesota.

II. That the defendant, the city of St. Cloud, is a municipal corporation duly organized and existing under chapter 28 of the Special Laws of Minnesota, 1868, and the several acts amendatory thereof.

III. That the defendant A. B. is the mayor of said city, and the defendant C. D. is the city clerk thereof.

IV. That claiming and pretending to act under and pursuant to the provisions of chapter 50 of General Laws of Minnesota, 1903, the common council of said city submitted the question of the issuing the bonds of said city as in said act provided, to the legal voters of said city at a special election called

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for that purpose and held on May 7, 1903, at which election a majority of the votes cast were in favor of issuing said bonds.

V. That said common council canvassed said votes and declared that a majority thereof had been cast in favor of issuing said bonds, and by a resolution thereof, duly passed, directed and authorized the issuance of the bonds of said city in the sum of $60,000 pursuant to the provisions of said chapter 50, and ordered and directed the said mayor and the said clerk to sign, execute and deliver said bonds for and on behalf of said city.

VI. [That said chapter 50 of General Laws of Minnesota, 1903, is unconstitutional and void in that (specify grounds).] [2]

VII. That said city and said council threaten and intend to issue and dispose of said bonds and said mayor and said clerk to sign, execute and deliver the same as and for the bonds and obligations of said city and will do so unless restrained by the order of this court, and plaintiff is without any adequate remedy at law.

Wherefore plaintiff demands judgment permanently enjoining defendants and each of them from signing, executing and delivering or in any manner disposing of said bonds, or any of them, and for such other relief as may be just, with costs.

[1] Complaint in Thomas v. St. Cloud, 90 Minn. 477, 97 N. W. 125.
[2] Not in the original, but appropriate.

1634. Injunction against payment of money on illegal contract.

I. That plaintiff is, and for more than one year last past has been, a resident and taxpayer of defendant city and brings this action on behalf of himself and all other taxpayers of said city similarly situated.

II. That the defendant, the city of Little Falls, is a municipal corporation duly organized and existing under chapter 8, of the Special Laws of Minnesota for the year 1889.

III. That the defendant A. B. is the mayor of said city; the defendant C. D. the clerk of said city; the defendant E. F. the treasurer of said city; and the defendants G. H., I. J., K. L., M. N., O. P., Q. R., and S. T. are the common council of said city.

IV. That the defendant, the Little Falls Electric and Water Company is a corporation duly organized and existing under the laws of this state.

V. That for more than one year prior to the passage of said chapter 8 of the Special Laws of Minnesota for the year 1889, the village of Little Falls was a municipal corporation duly organized and existing under the laws of this state, and was established and existed within territory described in section 2 of said chapter 8, and was and is the village of Little Falls mentioned and referred to in said chapter 8.

VI. That on Jan. 16, 1889, there was passed and published in the manner provided by law, chapter 31, of the ordinances of said village of Little Falls,

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which chapter 31 was thereafter amended by ordinance number 34 of the ordinances of said city of Little Falls, passed and approved as provided by law on Dec. 10, 1889, and duly published as by law required, a copy of which ordinance, number 31, as amended by said ordinance number 34, excepting section number 8 thereof, is hereto attached, marked Exhibit A, and made a part hereof; that said section number 8 of said ordinance referred wholly to the amounts to be charged consumers of water other than said city.

VII. That the terms and conditions of said ordinance as so amended were duly accepted by the said U. V. and W. X. therein named as therein provided.

VIII. That on May 1, 1890, the said U. V. and W. X. transferred and set over to defendant, the Little Falls Electric and Water Company, all rights, titles, privileges and franchises acquired under and by virtue of said chapter 31 and amendments thereto.

IX. That claiming and pretending to act under and pursuant to the provisions of said chapter 31, and not otherwise, said defendant, the Little Falls Electric and Water Company, has constructed a system of waterworks in said city, placing mains and pipes in the streets and erecting hydrants therein; that on all said mains and pipes there have been placed and erected hydrants not less than fourteen to the mile as provided in said ordinance and in all the number of fifty-five hydrants.

X. That pursuant to the terms of said ordinance and amendments, there have been erected as a part of said waterworks system fifty-five hydrants, which have been for more than one year last past and now are maintained as a part of said waterworks system; and for forty-three of said hydrants said city has for more than one year last past, under and pursuant to said ordinance and not otherwise, paid to said Electric and Water Company the sum of $80 per year for each hydrant, and unless restrained by the order of this court said city and its officers threaten and intend to continue paying for said hydrants at said rate.

XI. That the needs of said city do not now require and never have required, and as plaintiff believes will not for a number of years require, a greater number of said hydrants than thirty-five, which number always has been and now is ample for all uses to which said hydrants can be put, and $80 per hydrant per year is and has been unreasonable and exhorbitant, and at least $40 higher than the necessary and reasonable cost and value thereof, and said ordinances and amendments and the pretended contract claimed to be created thereby are for such reasons against public policy, illegal and void.

XII. That on April 4, 1896, said ordinance and amendments were, by ordinance number 72, of the ordinances of said city duly passed and published as provided by the law, duly repealed.

XIII. That notwithstanding the premises said city and its officers, claiming and pretending that said ordinance and contract are still in full force and effect, continue to pay the money of the city for said hydrants at the rates fixed in said ordinance and amendments above set forth, and threaten and intend

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to perform and carry out the terms and conditions of said ordinance unless restrained by the order of this court.

XIV. That at the time of the passage of said ordinance said city was the owner of water power mentioned in said ordinance to the extent of one hundred and ten horse power, which then was and still is of the value of $1,500, which said defendant, the Little Falls and Electric Company, is now using and claims to own pursuant to the terms of said ordinance as amended as aforesaid.

Wherefore plaintiff demands judgment adjudging said ordinance as amended as herein stated, and the contract claimed to be created thereby to be void, and adjudging the attempted transfer of the water power above mentioned to be void and setting the same aside; enjoining the defendants and each of them from carrying out or performing any of the terms or conditions of said ordinance as amended as aforesaid, or the pretended contract claimed to be created thereby, and enjoining each and all of the defendants, excepting said Little Falls Electric and Water Company, from paying to said company any further sums of money under said contract and from issuing, signing and delivering any city orders or warrants in payment of any sums of money claimed on account of the use of said hydrants, or of any of them; or in case such relief can not be had, then that said defendants be enjoined from paying directly or indirectly for any greater number of said hydrants than twenty-three and at no higher rate than $40 dollars per year; and for such other relief as may be just, with costs.

Complaint in Flynn v. Little Falls Electric & Water Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106.

1635. For recovery of money illegally paid by municipality.

I. [Allege incorporation of plaintiff city as in § 1609.]

II. That on Dec. 14, 1891, the city council of said city entered into an agreement in writing with defendants whereby it was agreed, among other things, that defendants would establish in said city of Chaska a factory for the manufacture of shoes and would operate the same with a force of not less than fifty hands continuously for a period of eight years, and at least nine months in each year, and plaintiff would pay to them, when they commenced the manufacture of shoes in said city with a force of not less than fifty hands, the sum of $5,000.

III. That relying on said agreement, and under and pursuant thereto, the city council of said city, during the months of March, April and May of the present year, appropriated of the funds of said city the sum of $4,500 and paid the same to defendants.

IV. That as an inducement to said council to make said agreement and to appropriate and pay said sum of money, defendants fraudulently represented to said council that they were possessed of ample means to operate the factory

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contemplated by said agreement and to carry on the business of manufacturing shoes with a force of fifty hands, and that they would upon being paid said sum as bonds, establish their said business in said city and would furnish employment for at least fifty hands in their said factory and would operate the same for at least eight years and for at least nine months in each year.

V. That said city council believed said representations to be true and relied thereon and was induced thereby to enter into said agreement and to pay the money to said defendants as aforesaid.

VI. That said representations were false as defendants well knew when they made them.

VII. That defendants made said representations and entered into said agreement for the purpose of fraudulently procuring from said city as a bonus for establishing and operating in said city a factory for the manufacture of shoes said sum of $5,000, without any intention whatever of carrying out the conditions upon which the same was to be made payable or to perform their said agreement.

VIII. That defendants never in any manner performed or carried out their said agreement or became entitled to receive said sum so paid to them or any part thereof.

IX. That said council had no authority under the charter of said city or the laws of said state to enter into said agreement or to appropriate said sum of money for said purpose or to bind said city to the payment of a bonus to defendants for such object or for any other purpose.

That the payment of said money to defendants was made without any consideration therefor and was so made without authority of law and in violation of the rights and interests of the taxpayers and citizens of said city.

Wherefore [as in § 919].

Substance of complaint in Chaska v. Hedman, 53 Minn. 525, 55 N. W. 737. A common count for money had and received would be sufficient in such a case as this. See §§ 762, 782, 1575.

NAMES

1636. Misnomer.

The defendant, whose true name is A. B., for answer to the complaint herein denies that he now is, or when this action was brought was, or ever before had been, named or called by the name of C. D., by which he is sued herein.

See § 815.

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1637. Injunction against interference with riparian rights—Piers and booms in river.

I. That defendant is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state.

II. That plaintiff is, and at all such times was, the owner in fee of [description of premises]; that said land, consisting of about five acres, fronts upon the Mississippi river for a distance of about twenty rods and is valuable and tillable land, and is within the corporate limits of the city of Minneapolis.

III. That in the early part of the year 1899, defendant, without the permission or consent of plaintiff, entered upon said land and built and constructed piers in the Mississippi river where said land fronts on said river and occupied the river front thereof and the shore of said river on said land with booms, piles, fastenings, logs and piers, and still maintains the same; that defendant has fastened a boom or chain of logs to the shore of said river at the north side of said land and has run the same in said river the whole distance of said land and close up to said land, and has fastened the other end of said boom to a point about twenty rods below the south line thereof.

IV. That by reason thereof said land has been completely shut off from said river and plaintiff is deprived of access to and from said river and of his water frontage and of all of his rights as a riparian proprietor upon said river, and of the right of navigation on said river, and his free use thereof has been obstructed; that by reason thereof said land has been injured and diminished in value; that plaintiff and the members of his family can no longer go upon said river in boats from his said land by reason of the manner in which defendant has shut them off therefrom, as aforesaid, as they would be able to do were said obstructions not in the river; that by reason of said obstructions plaintiff has been deprived of all beneficial use of said river and all rights and privileges possessed and enjoyed by him as a riparian proprietor prior to said wrongful acts of defendant.

V. That by reason of said obstructions sand-bars are forming and will continue to form in said river close to plaintiff's land and the same are gradually increasing in size, and if defendant is not enjoined from occupying the river front along said land in the manner aforesaid, the sand-bars will attain such a size that the natural channel of said river will be diverted away from said land, and the bed of the river close to and along by said land will be filled in by the sand-bars and all of plaintiff's riparian rights will be destroyed.

VI. That defendant has continued said wrongful acts for about eighteen months and threatens to, and will unless restrained by order of this court, continue them indefinitely, to plaintiff's irreparable injury, and plaintiff is without any adequate remedy at law.

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VII. That by reason of the premises plaintiff has been damaged $300.

Wherefore plaintiff demands judgment permanently enjoining defendants and all persons under them from maintaining said booms, logs, piles, piers or fastenings in such a manner as to obstruct said river or deprive plaintiff of access to the main body of said river from his said land, and from occupying the shore of plaintiff's said land with logs, booms, or piers, or leaving them thereon, and from keeping or maintaining booms, piers, pilings, logs or fastenings in said river close to plaintiff's said land in such a manner as to cause sand-bars to form therein, or to cause the said river to be diverted from its natural channel, and from in anywise interfering with or impairing the riparian rights of plaintiff as the owner of said land; for $300 damages; and for such other relief as may be just, with costs.

Substance of complaint in Reeves v. Backus-Brooks Co., 83 Minn. 339, 86 N. W. 337.

1638. For damages from piers and booms in navigable river.

I. That for more than ten years last past plaintiff has been, and still is, the owner and in possession of [description of premises].

II. That said lands border upon the Mississippi river, which is a large and navigable body of water and is navigable for large boats, crafts, rafts of wood, timber and other material, for many miles above said premises and from said premises to the city of Minneapolis, Minnesota.

III. That during all the time aforesaid plaintiff has used, and still uses, said premises as a farm and residence for himself or tenants.

IV. That defendant has for more than ten years last past constructed and maintained piers, booms and obstructions in said river opposite said premises, as well as for a long distance below and above said premises, and during such time has, and still does, by means of said booms and piers, collect large quantities of logs in the river below and opposite said premises, thereby damming up and throwing the water of said river back upon said premises, and overflowing portions thereof, and thereby depriving plaintiff of the use of the same for agricultural or other purposes, and has thereby caused to be thrown upon said land, large quantities of sand, bark, logs, drift wood and debris, rendering said lands unsightly and unhealthful as a place of residence and greatly depreciating the value thereof, and cutting off plaintiff's access to said river and depriving him of his shore rights thereto, and obstructing navigation both across said river and back and forth above and below the same, and polluting the water of the river, rendering it unfit for use either in its natural condition or when frozen.

V. That when the water recedes from the land so overflowed there are left pools of water thereon which render them unsightly and unhealthful.

VI. That plaintiff has repeatedly demanded that defendant remove said obstructions but defendant has neglected and refused to do so.

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VII. That by reason of the premises plaintiff has been damaged $3,000. Wherefore [as in § 919].

Substance of complaint in Osborn v. Mississippi & Rum River Boom Co., 95 Minn. 149, 103 N. W. 879.

1639. For damages from piling in navigable river—Deflection of waters—Wearing away of land.

I. That plaintiff is, and for more than ten years last past has been, the owner in fee of [description of premises].

II. That in the year 1887 defendant caused to be driven and placed in the Mississippi river, which bounds the above described premises westerly and southerly, a large quantity of piling opposite said premises at two different points; that the effect of said piling was, is, and will continue to be, to change and deflect the great mass and body of water in said river from its former and natural course and direction and to carry the same upon and against said premises.

III. That by reason of such diversion of the water of said river, and by the continual impact of the water upon and against the shores and banks of the same, and by reason of large quantities of logs being thereby turned against said river banks at said points, and by reason of great masses of ice being thereby floated and wedged in against said shores, both opposite and just below said piling, said premises have been washed away each year since said piling was so placed in said river at said points, in all to the amount of about ten acres, and at least four and one-half to five acres of said premises have been so washed away since Feb. 5, 1895.

IV. That all said washing has been caused by the placing of said piling in said river at said points, and defendant has had knowledge of the damage so being done to said premises, but has neglected to take due means to stop or to prevent the same.

V. That there now exists an island opposite said premises which was not there prior to the putting in of said piling and the effect of which is to cause said river to continually cut into and carry away the soil of said premises.

VI. That by reason of the premises said farm and lands have been lessened at least $1,000 in value and plaintiff has been damaged in that amount, since Feb. 5, 1895.

Wherefore [as in § 919].

Substance of complaint in Bowers v. Mississippi & Rum River Boom Co., 78 Minn. 398, 81 N. W. 208.

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1640. Leaving horses unhitched.

I. That at the times herein mentioned there was in force in the city of St. Paul, Minnesota, a duly enacted ordinance, approved 19 , providing that, "It shall not hereafter be lawful for any teamster or driver or owner, or any person having in charge any team attached to any vehicle within the city of St. Paul, to leave the same standing in or along any public street in said city, without being securely hitched or fastened, or without being held by some one securely."

II. That on Nov. 7, 1882, defendant, in violation of said ordinance, negligently left a team of horses attached to a wagon standing in and along Wabasha street in said city, without being hitched, fastened or secured in any manner, and without being held by any one, and without any one being in charge of or in attendance upon the same.

III. That said Wabasha street is a public street and highway of said city, and as such is constantly in use by a great many persons walking and driving thereon, and at the time said team was so left there were many persons passing back and forth on said street, at the place where said team was left, both on foot and in wagons, carriages and other vehicles.

IV. That said team when so left, and by reason thereof, ran away down said Wabasha street, across the Wabasha street bridge, and on the street at the end thereof collided with the carriage and horse of plaintiff and plaintiff was thereby thrown to the ground and [allege injuries and damages as in §§ 1250–1255].

V. [Allege damage to horse and carriage as in § 1722.]

Wherefore [as in § 919].

Substance of complaint in Bott v. Pratt, 33 Minn. 323, 23 N. W. 237.

1641. For injury from fall of snow from roof.

I. That at the times herein mentioned defendant was the owner and in the possession and control of the premises known as lots four and five, of block twenty-three, of the town [now city] of Minneapolis, Minnesota, and the building thereon erected by defendant, commonly known as the "Pence Opera House."

II. That said building was and is situated at the corner of Second street and Hennepin avenue in said city; that at the times herein mentioned, and for many years last past, said Hennepin avenue, in front of said premises so owned and occupied by defendant, was one of the most frequented streets of said city, and several hundred persons passed and repassed on the sidewalk on said Hennepin Avenue in front of said Pence Opera House and immediately below the

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roof cornice hereinafter mentioned, during every minute of the day, as defendant then well knew.

III. That in constructing said building defendant negligently caused the roof of said building to be projected over said building immediately over and above the sidewalk, then part of said Hennepin avenue, to the extent of more than two feet, and ever since has negligently maintained such roof projection.

IV. That for some time prior to and including Jan. 30, 1888, defendant negligently allowed ice and snow to gather in large quantities at the lower portion of said roof of said building on its front toward Hennepin avenue, where the roof overhung said avenue, and negligently allowed the ice and snow so gathered at the edge of said roof to remain in said dangerous condition immediately above said street.

V. That on Jan. 30, 1888, by reason of said negligence of defendant, a great portion of said ice and frozen snow loosened from said roof and slipped from the same, and fell upon the head of plaintiff, while he was walking on said sidewalk and he was thereby [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Substance of complaint in Hannem v. Pence, 40 Minn. 127, 41 N. W. 657.

1642. For negligence in the manufacture and sale of a defective stepladder.[1]

I. That at the times herein mentioned defendant was engaged in the manufacture and sale of stepladders for the general use of the public.

II. That at such times one A. B. was engaged in the business of house painting and paper hanging in the city of , and plaintiff was in his employ in such business.

III. That on 19 , said A. B. purchased of one C. D., a retail hardware dealer of said city, a stepladder manufactured and sold by defendant to C. D. for general use.

IV. That defendant sold said stepladder to said C. D., knowing that in the regular course of business it would be resold by him to one of his customers, for general use.

V. That through the negligence of defendant said stepladder was made of poor, crossgrained and decayed lumber, and was so weak that it was dangerous to the life and limb of any one who might use it in the ordinary way, but by reason of its being oiled, varnished and painted its defects were not patent.

VI. [That defendant knew of such defects, or would have known of them but for want of reasonable care and diligence on his part, and plaintiff was ignorant thereof.] [2]

VII. That on 19 , while plaintiff was using said stepladder in the ordinary course of his work as a painter and employee of said A. B., and was standing on it about seven feet above the floor of a house he was painting, it

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suddenly broke by reason of said defects and plaintiff was thereby thrown to the floor and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

[1] Based on complaint sustained on demurrer in Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103.

[2] This is in the original but clearly unnecessary.

1643. Contributory negligence—General form.

That said [accident] [collision] [injury] would not have occurred if plaintiff had not then and there failed to exercise reasonable care to avoid it, thereby proximately contributing thereto, in this, that he negligently [specify wherein plaintiff was negligent].

1644. Same—At railroad crossing.

[As in § 1643, adding] [drove] [stepped] upon said track without first looking and listening, at a reasonable distance therefrom, for approaching trains thereon.

1645. Same—Driving or walking near street car track.

[As in § 1643, adding] [drove] [walked] near said track [when said car was (rapidly) moving toward him, at a short distance, in plain sight] [without first looking] [and listening], at a reasonable distance therefrom, for approaching cars thereon.

1646. Same—Driving or walking on street car track.

[As in § 1643, adding] [drove] [stepped] upon said track in front of said car [when it was moving (rapidly) toward him, at a short distance, in plain sight] [without first looking] [and listening], at a reasonable distance therefrom, for approaching cars thereon.

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1647. Slaughter-house—Injunction—Damages—Abatement.

I. That plaintiff is, and at the times herein mentioned was, [the owner and] in possession of the dwelling house and lot known as No. , street, in the city of , Minnesota.

II. That on 19 , defendant erected on [the adjoining premises] [his premises in the vicinity thereof], known as No. , street, a slaughter-house, and still maintains the same, and from said day until the present time has continuously caused cattle, sheep and hogs to be kept and killed there, and kept there blood and offal, thereby causing offensive and noxious smells and loud and offensive sounds, so as to render plaintiff's said dwelling house and premises uninhabitable, to his damage $.

Wherefore plaintiff demands judgment permanently enjoining defendant from using said premises for a slaughter-house; abating said nuisance; for $ damages, and for such other relief as may be just, with costs.

1648. Same—Against continuer.

I. [As in § 1647.]

II. That since 19 , defendant has maintained on [the adjoining premises] [his premises in the vicinity thereof], known as No. , street, a slaughter-house, and still maintains the same, and from said day until the present time has continuously caused cattle [continue as in § 1647].

III. That on 19 , plaintiff requested defendant to remove said slaughter-house or to discontinue using his premises for such purpose, but he has not done so.

Wherefore [as in § 1647].

1649. Noise—Injunction.

I. That plaintiff owns, and since 19 , has owned and resided in the house known as No. , street, in the city of .

II. That defendant owns and operates a factory upon adjacent premises known as No. , street, in said city and in the operation of said factory uses a steam trip-hammer almost constantly.

III. That the use of said trip-hammer makes so loud a noise as to render it impossible, while it is being operated, to hear ordinary conversation in plaintiff's said house, and causes great discomfort to plaintiff and his family.

IV. That on 19 , plaintiff notified defendant that such use of said trip-hammer was a nuisance, for said reasons, and requested him to discontinue its use, but he refused to do so, and threatens to continue said use and will do so unless restrained by this court.

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V. That by reason thereof plaintiff has been damaged $.

Wherefore plaintiff demands judgment permanently enjoining defendant from such use of said trip-hammer, and for $ damages, with costs.

Based on Form 146, Conn. Pr. Act.

1650. Filthy stockyards—Damages.

I. That at the times herein mentioned defendant owned and operated a railroad running through the city of , Minnesota, and owned and operated, in connection therewith, stockyards in said city, adjacent to its tracks.

II. That plaintiff is, and at the times herein mentioned was, [the owner and] in possession of the premises known as No. , street, in said city, occupying the same as a home for himself and family.

III. That said premises are in the immediate vicinity of said stockyards.

IV. That during the months of [June and July] 19 , defendant allowed filth to accumulate and remain in said stockyards, which gave off noxious and offensive odors rendering said premises of plaintiff unpleasant and unhealthful, to his damage $.

Wherefore [as in § 919].

Based on Anderson v. Burlington etc. Ry., 82 Minn. 293, 84 N. W. 145, 1021.

1651. Gas and electric light plant—Injunction—Damages.

I. That plaintiff is, and for more than twenty-six years last past has been, the owner of lots nine and ten in block thirty-five of the original town [now city] of Stillwater, Minnesota.

II. That there now is, and for more than fifteen years last past has been, situated thereon a valuable dwelling house, barn and out-buildings, owned and occupied by plaintiff as a home for himself and family.

III. That more than six years ago defendant constructed, and has ever since operated and maintained, upon a plat of ground adjoining and contiguous to said property of plaintiff a gas and electric light plant.

IV. That in the operation of said plant defendant has used heavy engines and a large amount of machinery, thereby wrongfully and wantonly causing loud noises and vibrations to the great annoyance and disturbance of plaintiff and his family in their said home.

V. That defendant also uses in and about said plant, and in the operation thereof, large quantities of petroleum, coal, gasolene and other ingredients the names of which are to plaintiff unknown.

VI. That in operating and carrying on said plant defendant has continuously created and expelled therefrom upon said property of plaintiff and other property in the neighborhood, and into said dwelling house large quantities of dust, dirt, cinders and other annoying and unpleasant substances, the names of which are to plaintiff unknown, thereby greatly annoying and injuring

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plaintiff and his family and practically destroying the value of said property of plaintiff.

VII. That in the operation of said plant, during the whole of said period, defendant wrongfully and wantonly generated and allowed to escape highly penetrating and permeating gases and substances, the names of which are to plaintiff unknown, all of highly unpleasant, nauseating odor and taste, creating and producing noxious and offensive smells, tainting and corrupting the atmosphere, and wrongfully and wantonly allowed the same to escape from its said plants upon and through the said property of plaintiff, into said dwelling house and other buildings of plaintiff to the great injury of said property and home of plaintiff and the use and occupation thereof, and to the great impairment of the comfort, happiness and health of plaintiff and his family and all occupants of plaintiff's said premises.

VIII. That said acts of defendant, during all the period aforesaid, have been and are a continuous nuisance.

IX. That defendant threatens to, and will continue said wrongful acts indefinitely, unless restrained by the order of this court.

X. That thereby plaintiff has been damaged $5,000.

Wherefore plaintiff demands judgment permanently enjoining defendants from continuing said wrongful acts; that during the pendency of this action a temporary injunction issue restraining defendants as aforesaid; for $5,000 damages; and for such other relief as may be just, with costs.

Substance of complaint in Matthews v. Stillwater Gas & Electric Light Co., 63 Minn. 493, 65 N. W. 947.

1652. Discharge of city sewer—Injunction—Abatement—Damages.

I. [Allege defendant's incorporation as in § 1609.]

II. That plaintiff is, and at the times herein mentioned was, the owner of the northwest quarter of the southwest quarter and the southwest quarter of the northwest quarter of section 6, township 133, range 32, in Todd county, Minnesota.

III. That said premises consist of several acres of cultivated land, several acres of pasture land and valuable meadow, and there are situated thereon good and substantial buildings, placed there before the construction and use of the sewer hereinafter mentioned, and the reasonable value of said land and improvements, before the construction and use of said sewer, was $4,000.

IV. That prior to the wrongful acts of defendant hereinafter mentioned said buildings and land were used and occupied by plaintiff and his tenants; that the reasonable rental value of said premises, prior to the construction and use of said sewer, was $300 per year.

V. That during the year 1907 defendant constructed, and has since maintained, a system of sewerage for its use, and the sewers thereof have ever since collected such refuse matter from the different portions of said city as is usual

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for city sewers to collect, and have discharged the same at the terminal thereof, which is on the land immediately adjoining said land of plaintiff.

VI. That at the place where said sewer deposits such refuse matter there is a small brook that flows eastward from the place where said refuse matter is discharged, which is on the northeast quarter of the southeast quarter of section 1, township 133, range 33, in said Todd county, to where said brook flows into a stream called Hayden's Brook, and from there naturally flows in a northerly direction across the said land of plaintiff; that the source of said Hayden's Brook is on or about section 7, township 133, range 32 in said county, and the waters thereof naturally flow in a northerly direction across said land of plaintiff; that said Hayden's Brook is naturally a tortuous, sluggish and winding stream, especially where the same crosses the said land of plaintiff.

VII. That prior to the construction of said sewer by defendant, there was dug a ditch following the north line of the northeast quarter of the southeast quarter of section 1, township 133, range 32, in said county, joining said Hayden's Brook at or near the point where the spring brook herein mentioned flowed into Hayden's Brook, on the west line of said land of plaintiff, and was constructed along said brook in the same general direction, but leaving several places in said brook where by reason of its windings there had naturally formed bays or pockets in which water still remained, and which were connected with said ditch, as dug and constructed.

VIII. That said sewer, ever since its construction, use and maintenance, has collected, and has deposited on the land of plaintiff, large quantities of foul, offensive, decayed and poisonous matter, which polluted, corrupted and poisoned the waters of said spring brook and Hayden's Brook, rendering the same poisonous and unfit for use, and filling the air with offensive and poisonous vapors; that by reason of the discharge of said foul, offensive and poisonous matter over and upon said land of plaintiff, he has been deprived of the use and enjoyment of the same; that the vegetation in said meadow and pasture has thereby been rendered unfit for use, and said buildings unfit for occupancy; that tenants refuse to use and occupy said buildings and premises because of said foul, offensive and poisonous gases and matter; that by reason of said wrongful acts of defendant said premises of plaintiff have been and are greatly depreciated in value.

IX. That thereby plaintiff has been damaged $900.

X. That the maintenance of said sewer by defendant and the discharge of said foul, offensive and poisonous matter constitute and are a nuisance.

XI. That unless defendant is restrained by the order of this court it will continue to maintain said nuisance to plaintiff's irreparable injury and plaintiff is without any adequate remedy at law.

Wherefore plaintiff demands judgment permanently enjoining defendant

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from continuing said nuisance and directing defendant to abate the same; for $900 damages; and for such other relief as may be just, with costs.

Substance of complaint sustained in Batcher v. Staples, 120 Minn. 86, 139 N. W. 140.

1653. Private building on public grounds—Injunction.

I. [Allege plaintiff's incorporation as in § 1609.]

II. That a certain strip of land in said village, lying between Lake street and Buffalo Lake, has been dedicated to the public as a promenade or park, and has been accepted by the public for such purpose.

III. That defendant threatens and is about to erect a blacksmith shop upon said strip of land, without any right or authority, and to erect and maintain a nuisance upon said strip of land and to deprive the public of its right and easement in and to said land lying between said Lake street and Buffalo Lake as aforesaid, and especially to that part lying opposite lot 6, block A, of the amended plat of the village of Buffalo.

Wherefore plaintiff demands judgment permanently enjoining defendant from entering upon said land for the purpose of erecting a building thereon or doing any act to interfere with the rights of the public therein; that during the pendency of this action a temporary injunction issue restraining the defendant as aforesaid; and for such other relief as may be just, with costs.

Substance of complaint in Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931.

1654. Filthy and noisy stable—Damages.

I. That plaintiff is, and for five years last past has been, the owner and in the actual possession of [description of premises].

II. That during all said time plaintiff has occupied and still occupies a house on said land as a home for himself and family.

III. That for more than five years last past defendants have been the owners and in possession of [description of premises].

IV. That more than five years ago defendants erected upon said land owned by them a large barn capable of housing thirty or forty horses.

V. That during all such time defendants have stabled in said barn from twenty-five to thirty-five horses, part of them being stabled in the basement and part of them on a floor above the basement, but all standing on plank floors.

VI. That during all such time defendants have allowed said building to be in an extremely filthy condition and have allowed manure and urine to accumulate and to saturate the walls and floors thereof, from which noxious and offensive odors have been given off continuously during all such time, and said conditions have caused the atmosphere about said barn and the premises of plaintiff to be polluted and have rendered the home of plaintiff unfit for

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habitation and injured the health of plaintiff and his family; that said horses during all the hours of the day and night during all of said time when going in and out of said barn, and by pawing and kicking while standing therein, have made loud and offensive noises; that during all said time there has been a great number of men in charge of said horses, and while handling them the men have used loud, profane and indecent language, and such noise and polluted atmosphere have made it impossible for plaintiff and his family to sleep during many hours of the night and have lessened the rental value of the premises of plaintiff in the sum of $1,000.

VII. That said barn is located in a thickly populated and residential portion of the city of Duluth and is entirely surrounded by residences occupied by citizens of Duluth and their families.

VIII. That many times prior to the commencement of this action plaintiff has requested defendants to abate said nuisance and cease the keeping of such a number of horses on said premises and to put said barn in a decent condition, but they have at all times refused to do so.

IX. That by reason of the premises plaintiff has been damaged $2,000.

Wherefore [as in § 919].

Substance of complaint in Lead v. Inch, 116 Minn. 467, 134 N. W. 218.

1655. Denial of nuisance.

The defendant for answer to the complaint herein denies that his said premises have been used as a [slaughter-house] as alleged or otherwise.

1656. Denial of plaintiff's title.

The defendant for answer to the complaint herein denies each and every allegation contained in the [first] paragraph thereof.

1657. Admission and denial.

The defendant for answer to the complaint herein denies that [negative allegations of complaint as to objectionable features of the alleged nuisance], as alleged in the complaint, or that the same [is] in any way [injurious to health] [offensive to the senses] [indecent] [interferes or has interfered with the comfortable and healthful enjoyment by the plaintiff or his family of his said premises].

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PARENT AND CHILD

1658. By parent for injury to minor child.

I. That plaintiff is the father of A. B., a [boy] [girl] between [fourteen] and [fifteen] years of age, and brings this action for the benefit of such child.

II. [Allege cause of action against defendant for injury to child.]

III. That by reason of the premises said child was damaged $.

Wherefore plaintiff demands judgment for $ damages, with costs, for the benefit of such child.

See § 58.

1659. By parent for services of minor child.

I. That between 19 , and 19 , one A. B. rendered services to defendant, at his request, and with plaintiff's permission, as a clerk in defendant's store in the city of .

II. That said A. B. is the son of plaintiff, and then was and still is under twenty-one years of age.

III. That such services were reasonably worth $, which defendant promised to pay to plaintiff therefor.

IV. That no part thereof has been paid.

V. That before such services were rendered plaintiff notified defendant that he claimed the wages of said A. B. for said services.[1]

Wherefore [as in § 919].

[1] See G. S. 1913 § 3857.

PARTIES

1660. Non-joinder of plaintiff.

The defendant for answer to the complaint herein alleges that he made said contract [if at all] with plaintiff and one A. B. jointly and that the said A. B. is still living and residing in the city of , Minnesota.

1661. Same—Partners.

The defendant for answer to the complaint herein alleges that the goods therein mentioned were sold to defendant by plaintiff and one A. B. jointly as partners under the firm name of , and that the said A. B. is still living and residing in the city of , Minnesota.

1662. Same—Tenants in common.

The defendant for answer to the complaint herein alleges that A. B., residing at , county, Minnesota, and C. D., residing at , county, Minnesota, are tenants in common of the premises described in the complaint and necessary parties to this action.

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PARTITION

1663. General form.

I. That plaintiff and defendants are owners [and in possession] as [tenants in common] [joint tenants] of the [describe premises as in a deed], in county, Minnesota.

II. That plaintiff is the owner in fee of one undivided one-third part of said premises, and desires a partition thereof.

III. That defendant A. B. is [specify his interest].

IV. That defendant C. D. is [specify his interest].

V. That there are no liens or incumbrances of record on said premises, and, as plaintiff is informed and believes, there are no other persons having any estate or interest therein or lien thereon.

VI. That the cash value of said premises is $.

Wherefore plaintiff demands judgment:

1. For a partition of said premises according to the respective rights and interests of the parties interested therein, or for a sale of said premises, or a part thereof, if it appears that a partition cannot be had without great prejudice to the owners thereof, and that the proceeds of such sale be brought into court and divided among the parties, according to their respective rights and interests, as provided by statute.

2. That the costs, charges and disbursements of this action be apportioned and paid as provided by statute.

[Verification.]

See § 828; G. S. 1913 §§ 8028–8059; Dunnell, Minn. Digest, §§ 7333–7345.

1664. Same—Another form.

I. That plaintiff and defendants A. B., C. D., and the heirs of one E. F., are owners as tenants in common of [describe premises as in a deed], in county, Minnesota.

II. That plaintiff is the owner in fee [and in possession] of one undivided one-fourth part of said premises, and desires a partition thereof.

III. That defendants A. B. and C. D. each owns a one undivided fourth part of said premises in fee [and is in possession of his interest].

IV. That one E. F., who in his lifetime was owner in fee of one undivided fourth part of said premises, several years ago removed from this state to , and subsequently married there and had children, some of whom are now living, but their names and residences are unknown to plaintiff, though he has made diligent search for them; that E. F. and his wife are now dead; that the children of the said E. F., or the heirs at law of any who may be dead are collectively entitled to the undivided one-fourth in-

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terest in said premises which belonged to the said E. F., and to which he would be entitled if he were now living.

V. That defendant G. H. holds a judgment duly rendered by the district court for county, Minnesota, on 19 , against [name one or more of the cotenants] for the sum of $, which judgment was duly docketed in said county on 19 , and remains unpaid and unsatisfied of record.

VI. That defendant I. J. holds a mortgage on the said interest of defendant C. D. for $, payable on 19 , at , with interest from 19 , at per cent. per annum, and recorded in the office of the register of deeds of said county, in Book A, of Mortgages, on page , and is unpaid and unsatisfied of record.

VII. That no other incumbrances or liens appear of record on said premises, and, as plaintiff is informed and believes, there are no other persons having any estate or interest therein or lien thereon.

VIII. That the cash value of said premises is $.

Wherefore [as in § 1663].

1665. Same—Pleading source of title.

I. That on Feb. 20, 1874, one A. B. was the owner in fee of the undivided one-third part of lots one, two, three, four, five and six, in block five, in Cobb's addition to St. Anthony, in Hennepin county, Minnesota, according to the plat thereof on file and of record in the office of the register of deeds for said county.

II. That on Feb. 20, 1874, while such owner, the said A. B. died, intestate, and left surviving him his widow C. B. and D. B., E. B., F. B., G. B., H. B., I. B., J. B., and K. B., his children, as his only heirs at law.

III. That on Aug. 4, 1878, the said K. B. died and left surviving him his widow, L. B. and M. B. and N. B., his sons, as his only heirs at law.

IV. That on Sept. 30, 1887, C. B., widow of said A. B., and each and all the heirs at law of said A. B., by their duly executed deed, conveyed all their rights and interest in and to said premises to plaintiff.

V. That plaintiff and the defendant C. D. are owners of said premises as tenants in common, the plaintiff being seized of the undivided one-third part thereof in fee, and the defendant C. D. being seized of the undivided two-thirds thereof in fee.

VI. That the defendant, E. D. is the wife of C. D. and as such has an inchoate right of inheritance to the undivided one-third of two-thirds of said premises.

VII. That there are no other persons having any estate or interest in or lien upon said premises.

VIII. That plaintiff has requested, or caused to be requested, from defendants, a partition of said premises, according to the respective rights and

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interests of plaintiff and defendants therein, but defendants have refused to partition said premises.

IX. That the cash value of said premises is $3,600.

Wherefore [as in § 1663].

Substance of complaint in Bonham v. Weymouth, 39 Minn. 92, 38 N. W. 805.

1666. Same—Mortgage liens.

I. That plaintiffs A. B. and C. B. are husband and wife.

II. That the defendants A. C. and B. C. are husband and wife.

III. That the plaintiff A. B. and the defendant B. C., each are the owners in fee simple of an undivided half of [description of premises].

IV. That said premises consist of one lot and two small dwelling houses thereon and are of the cash value of about $2,000.

V. That said premises cannot be divided except at a great loss and at a great disadvantage to all parties interested therein.

VI. That the defendant C. D. claims some right, title or interest in and upon the undivided interest of the defendant B. C., in said premises, but the nature of such right, title or interest is to plaintiffs unknown.

VII. That defendant E. F. owns and holds a mortgage which is a lien upon the whole of said premises; that said mortgage was foreclosed by advertisement and said premises sold thereunder on Oct. 7, 1903, for the sum of $206.08, to the defendant E. F., that being the amount of said mortgage with interest and costs.

VIII. That the defendant G. H. is the owner of a mortgage upon the whole of said premises, which is now a lien thereon; that said last mentioned mortgage was given on May 28, 1898, to secure the payment of $275, with interest, but as to whether any of said mortgage or the interest thereon has ever been paid, the plaintiffs have no knowledge or information.

IX. That there are taxes which are a lien upon said premises for the year 1902, due and unpaid, amounting to the sum of $79.86 and penalty.

Wherefore [as in § 1663].

Complaint in Hennes v. Huston, 93 Minn. 334, 101 N. W. 1133.

1667. Same—Interest of divorced wife.

I. That plaintiff and defendant are the owners and possessed as tenants in common of [description of premises], and plaintiff desires a partition thereof.

II. That plaintiff has an estate of inheritance therein of one undivided third interest, in the fee thereof, and the defendant A. B. has an estate of inheritance therein of an undivided two-thirds interest in the fee thereof.

III. That there are no liens or incumbrances appearing of record against

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said land, and no persons other than plaintiff and defendant are interested in said premises as owners or lienholders or otherwise, known to plaintiff.

IV. That plaintiff and one C. D. were married on Dec. 26, 1877, and said C. D. and E. D. are one and the same person.

V. That on Jan. 31, 1893, an action was duly pending in the district court for Lyon county, Minnesota, between this plaintiff, as plaintiff, and said C. D. defendant, wherein this plaintiff sought a divorce on the ground of adultery, and such proceedings were thereafter had therein that on Jan. 31, 1893, a decree of divorce in said action was duly granted this plaintiff by said court on said ground of adultery, and said decree was duly recorded in Judgment Book B, on page 117, in the office of the clerk of the district court for said Lyon county, Minnesota.

VI. That the value of the use and occupation of the plaintiff's estate in said premises since Jan. 3, 1893, and while she has been excluded therefrom is the sum of $240.

VII. That while this plaintiff and said C. D. were husband and wife as aforesaid, said C. D. became the owner in fee of said premises by virtue of a warranty deed, executed to said C. D. by E. F., a single person, on March 21, 1883, and recorded in the office of the register of deeds for Lyon county, Minnesota, on April 26, 1883, in Book E, of Deeds, on page 345, and by reason thereof and of the facts hereinbefore set forth, this plaintiff is entitled to an estate of inheritance in said premises as hereinbefore set forth.

VIII. That said premises are of the cash value of $2,400.

Wherefore plaintiff demands judgment for a partition of said premises according to the respective rights of the parties, and for the recovery of the sum of $240, the value of the use and occupation of said premises while plaintiff has been so excluded therefrom; or if a partition cannot be had without material injury to those rights, then for a sale of said premises, and a division of the proceeds between the parties according to their rights, after payment of the costs of this action.

Substance of complaint in Keith v. Mellenthin, 92 Minn. 527, 100 N. W. 366.

1668. Unknown parties.

That defendant A. B., if living, is the owner in fee of an undivided [one-fourth] part of said premises; that about 19 , he left this state and, if still living, is now residing out of this state, in parts unknown to plaintiff; that after diligent search and inquiry plaintiff has been unable to ascertain whether the said A. B. is still living or whether he has a wife or heirs at law having an interest in said premises.

1669. Unknown interests.

That defendants A. B. and C. D. claim an estate or interest in said premises or lien thereon, the exact nature of which is unknown to plaintiff.

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PARTNERSHIP

1670. Allegation of partnership.

That at the times herein mentioned [plaintiffs] [defendants] were [and still are] partners, doing business in the city of , under the firm name of A. & B.

See § 829.

1671. Denial of partnership.

The defendant for answer to the complaint herein denies that the said A. B. and C. D. were, or are, partners, as alleged in the complaint or otherwise.

Sustained by Dessaint v. Elling, 31 Minn. 287, 17 N. W. 480.

1672. For dissolution of partnership and for a receiver.[1]

I. That on 19 , plaintiff and defendant formed a partnership under the firm name of , for the purpose of , under an agreement of which the following is a copy: [Copy of articles.]

II. That plaintiff and defendant as such partners now own a valuable lease of the premises known as No. , street, in the city of , and a large and valuable stock of goods; that they also have a large amount of debts due to them and a valuable good-will.

III. That on 19 , [plaintiff], [defendant], pursuant to the provisions of said agreement, gave to [defendant] [plaintiff] written notice of his intention to dissolve said partnership, of which the following is a copy: [Copy of notice.] [2]

IV. That a considerable amount of property belonging to the partnership is in the possession and under the control of defendant, which is liable to injury and waste, unless speedily sold; but he neglects to sell the same, and refuses to allow it to be sold by plaintiff.

V. That there are unsettled partnership claims and demands requiring attention; and the books and papers of the firm are in defendant's hands, and he wholly neglects to attend to the business of settling the affairs of the firm.

Wherefore plaintiff demands judgment:

1. That said partnership be dissolved.

2. That a receiver of the property, rights and good-will of said partnership be appointed, with the usual powers to dispose of the same, and to collect all debts due the partnership, for the benefit of all parties entitled thereto.

3. That the proceeds thereof be divided, after the payment of all just debts

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of said partnership and the costs incident to this action, between the parties hereto, according to their respective rights.

4. For such other relief as may be just.

[1] Based on Form 241, Conn. Pr. Act.

[2] Or insert one or more of the grounds stated in §§ 1673–1676.

1673. Same—For assignment of partner's interest.

III. That on 19 , defendant A. B., without the knowledge or consent of plaintiff, assigned all his right, title and interest in said partnership and in the property thereof to one C. D., thereby dissolving said partnership.

1674. Same—For exclusion of plaintiff.

III. That on 19 , defendant A. B. took exclusive possession of the partnership books, stock and other effects and refused and still refuses to allow plaintiff access thereto.

1675. Same—For bankruptcy of partner.

III. That on 19 , defendant A. B. was duly adjudged a bankrupt by the United States District Court for the District of Minnesota, Third Division, in a proceeding instituted for that purpose by one C. D.; that thereafter the defendant E. F. was duly appointed and qualified as the trustee in bankruptcy of said defendant A. B. and is now such trustee.

1676. Same—For drunkenness of partner.

III. That defendant A. B. has become a drunkard and the business of the firm has thereby greatly suffered.

1677. Same—For misappropriation of funds by partner.

I. [As in § 1672.]

II. That thereupon plaintiff and defendant entered upon and have since carried on said partnership business at , under said agreement.

III. That since the commencement of said partnership defendant has, from time to time, applied to his own use, from the receipts and profits of said business, large sums of money, greatly exceeding the proportion thereof to which he was entitled, [and has refused, and still refuses, to account with or to plaintiff for the same, though plaintiff has often requested such an accounting] [and, in order to conceal the same has never balanced the firm books, though he has always had the management thereof] [and has concealed the same from plaintiff].

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IV. That on 19 , plaintiff discovered that defendant was largely indebted to the firm by reason of such misappropriations of firm moneys to his own use and at once requested defendant to deposit in the bank, where the firm kept its account, all firm moneys that he had received and to draw therefrom only such amounts as were needed in the firm business, but defendant disregarded such request and still continues to misapply firm moneys to his own use, increasing his indebtedness to the firm and withholding from plaintiff all means of ascertaining the amount thereof and the true state of the firm accounts.

V. That defendant has received at least $ over and above his due proportion of the firm profits and continues to collect firm debts and income and appropriate the moneys so collected to his own use.

Wherefore plaintiff demands judgment:

1. That said partnership be dissolved.

2. That an account be taken of all the transactions of said partnership from the commencement thereof, and of the moneys received and paid by plaintiff and defendant respectively in relation thereto and that plaintiff recover of defendant the amount found due him on such accounting.

3. That a receiver of the property, rights and good-will of said partnership be appointed, with power to dispose of the same and to collect all debts due to the partnership, for the benefit of all parties entitled thereto.

4. That the proceeds thereof be divided, after the payment of all just debts of said partnership and the costs incident to this action, between the parties hereto according to their respective rights.

5. That in the meanwhile defendant be enjoined from collecting or receiving, or in any manner interfering with, or disposing of, the partnership debts, moneys, or other property or effects of the partnership.

6. For such other relief as may be just, with costs.

1678. Same—Exclusion of partner—Refusal to account.

I. That during the month of October, 1905, plaintiff and defendant, at St. Paul, Minnesota, entered into a partnership agreement for carrying on the business of buying, selling and dealing in and improving real estate and managing properties as agents for others as brokers and in their own behalf, during the will of the parties.

II. That by the terms of said partnership agreement the parties were to contribute equally in capital and also to give their entire time and attention to the business of the partnership and were to share equally in the losses and profits thereof.

III. That thereupon the parties actively engaged in carrying on said business, which at first was transacted under the name of Sperry Realty Company, but said title was changed about May 1, 1907, to Sperry-Norton Realty Company, under which title it has ever since continued.

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IV. That during said time the said firm had its principal place of business in St. Paul, Minnesota, and did a large and profitable business, accounts of which were substantially kept in books of account of said partnership affairs.

V. That in the carrying on of said business the firm acquired considerable property in money, personal property and real estate and has and maintains an office in St. Paul, furnished with fixtures, furniture, maps, diagrams, books of reference, and other equipment suitable for carrying on said business.

VI. That part of the title of said real estate so acquired, was for convenience taken in the name of defendant, to wit, [description of land].

VII. That the firm also has valuable rights, equities and demands upon contracts made by it with various parties for the handling and sale of real estate.

VIII. That on Aug. 9, 1909, defendant served a notice upon plaintiff declaring and notifying plaintiff that said partnership was dissolved and that defendant demanded an accounting and distribution of the assets thereof; that plaintiff acquiesced in the dissolution of the partnership, and then did, and still does, declare himself willing and ready to divide the assets thereof and to account to defendant for all its assets.

IX. That immediately after giving said notice defendant wilfully and wrongfully and with intent to take advantage to himself, took entire charge of all the business of said firm and refused and still refuses to allow plaintiff to participate therein or to have access to the place of business aforesaid, and has taken away and secreted all said books of account and assumed the exclusive charge, control and management of all the property of the firm, and refused to allow plaintiff to participate therein, and has refused upon demand to account to plaintiff for any of the transactions of said business.

X. That during the progress of said business, there has never been a complete accounting between the partners of said firm; and they have each from time to time drawn out considerable sums of money, the exact amount thereof plaintiff cannot state without reference to said books of account, but the amount drawn by defendant greatly exceeds the amount drawn by plaintiff.

XI. That a large part of the real estate acquired by said firm is improved rental property requiring constant care and attention in making repairs, and attending to the other matters incident to such property, and much of said property is incumbered with mortgages upon which interest has to be paid semi-annually, and it is necessary to keep all of said improvements insured against loss by fire.

XII. That plaintiff fears that defendant, unless restrained by the order of this court, will attempt to dispose of said firm property and assets for his own benefit and will convert the proceeds to his own use, and for a proper preservation of the firm property it is necessary that a receiver should be appointed to

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take charge of the same and manage it during the existence of this litigation and until the affairs of the partnership are adjusted.

Wherefore plaintiff demands judgment that said partnership be declared dissolved; that defendant be required to account and an accounting be taken of all the affairs of said partnership and that the assets thereof be distributed; that a receiver be forthwith appointed to take charge of said property and assets and manage and preserve the same under the direction of the court and dispose of or distribute the same as directed by the court; that defendant be ordered and directed to turn over all of said property, books, furniture, assets, choses in action, deeds and other muniments of title to said receiver, and that in the meantime and until the further order of the court, defendant be restrained from excluding the plaintiff from participating in the business affairs of said firm, or from excluding plaintiff from any of the premises of the firm, or from selling the assets or any of the property or assets of said firm, and that the respective accounts of the parties be adjusted and their respective rights in said partnership assets ascertained, and said assets distributed under the direction of the court to the parties entitled thereto, and for such other relief as may be just, with costs.

Complaint in Norton v. Sperry, 113 Minn. 447, 129 N. W. 843.

1679. By administrator for dissolution.

I. That on 19 , one A. B. and defendant formed a partnership under the firm name of , for the purpose of [continue as in § 1672].

II. That said A. B. and defendant then entered upon and continued said partnership business under said agreement until the death of said A. B. on 19 .

III. That the said A. B. died intestate and on 19 , letters of administration on his estate were duly issued and granted to plaintiff by the probate court of county, Minnesota, whereupon plaintiff duly qualified and entered upon the duties of and now is such administrator.

IV. That at the death of the said A. B. the assets of the partnership were of the approximate value of $ and its liabilities approximately $.

V. That ever since the death of the said A. B. defendant has retained possession of all the real and personal property of the firm and has continued to manage and carry on said business and sell goods out of the stock of the firm, and to collect the debts due the firm, and out of the proceeds to pay the debts of the firm, and has collected large sums of money, the exact amount of which plaintiff does not know and cannot ascertain.

VI. That defendant has not paid to plaintiff any moneys or other proceeds of the firm since the death of the said A. B., nor has he transferred to plaintiff any assets or property of the firm.

VII. [That defendant has recently become insolvent.]

VIII. That on 19 , plaintiff requested of defendant a statement

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and account of the firm transactions, which he refused to give, [and also refused to settle the affairs of the firm in the manner provided for in the partnership agreement].

Wherefore plaintiff, as such administrator, demands judgment:

1. That an account may be taken of all the firm business from the beginning thereof until the death of the said A. B., and of the moneys received and paid by the said partners respectively in regard thereto; and that defendant account to plaintiff for all the property, assets and effects of the firm since its dissolution by the death of the said A. B., and that defendant pay plaintiff whatever may be found due on such accounting.

2. That a receiver of the property, rights and good-will of said partnership be appointed, with the usual powers to dispose of the same and to collect all debts due the partnership, for the benefit of all parties entitled thereto, and to pay all just debts and expenses of the partnership.

3. That defendant be restrained from disposing of, or in any manner interfering with, the property or effects of the firm, or from collecting or receiving firm debts or other moneys, coming to the firm.

4. For such other relief as may be just, with costs.

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PAYMENT

1680. General form.

The defendant for answer to the complaint herein alleges that on 19 , and before this action was brought, defendant paid to plaintiff $ in [full] [part] payment [of the note] [of the claim] set forth in the complaint.

See § 831.

1681. Another general form.

The defendant for answer to the complaint herein alleges that before this action was brought defendant satisfied and discharged the claim therein alleged by full payment thereof.

1682. Same—Amount due in controversy.

The defendant for answer to the complaint herein denies that the [goods] [services] mentioned therein were worth $, and alleges that they were worth not to exceed $, which last amount defendant paid to plaintiff therefor on 19 .

1683. Same—Another form.

The defendant for answer to the complaint herein alleges that he promised to pay to plaintiff for the [goods] mentioned therein the sum of $, and no more, which sum on 19 , defendant paid to plaintiff.

1684. Payment in services.

The defendant for answer to the complaint herein alleges that on 19 , after the claim therein alleged accrued and before this action was brought, it was agreed between plaintiff and defendant that defendant should render to plaintiff his services as , at the rate of $ per day, to an amount equal at such rate to the amount of said claim and in payment thereof; that thereafter and under said agreement defendant rendered such services to plaintiff equal in value at such rate to the full amount of such claim.

1685. Payment by note.

The defendant for answer to the complaint herein alleges that after the accrual of the debt therein alleged, and before this action was brought, defendant delivered to plaintiff, and plaintiff received from him [in full payment of] [for and on account of] said debt, a promissory note made by de-

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fendant and dated 19 , for the sum of $, payable to plaintiff, or order, months after date, which period had not elapsed when this action was brought.

1686. Payment by note to third party.

The defendant for answer to the complaint herein alleges that on 19 , at the request of plaintiff, he made and delivered to one A. B. his promissory note for $, in full discharge of the debt alleged in the complaint.

1687. Payment after commencement of action.

The defendant for answer to the complaint herein alleges that after the commencement of this action defendant satisfied and discharged by payment in full the claim therein alleged, together with all costs then accrued.

1688. Extension of time of payment.

The defendant for answer to the complaint herein alleges that before said debt became due plaintiff extended the time for the payment thereof to 19 , and in consideration therefor defendant [state consideration for extension]; and such period of extension has not expired.

See Lyman v. Rasmussen, 27 Minn. 384, 7 N. W. 687, and § 955.

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PHYSICIANS AND SURGEONS

1689. Common indebitatus count for services.[1]

I. That defendant is indebted to plaintiff in the sum of $ for services rendered as a physician in treating [defendant] [defendant's wife] for certain diseases from which [he] [she] then suffered, and for medicines and other articles provided and administered in that behalf by plaintiff for defendant, at his request, [on 19 ,] [between 19 , and 19 ,] [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].[2]

II. That no part thereof has been paid.

Wherefore [as in § 919].

[1] See § 833.

[2] It is not necessary to attach a statement of account, but it is generally advisable to do so as the defendant is entitled to a bill of particulars. See § 405.

1690. Quantum meruit for services.

[See forms under §§ 1947, 1951.]

1691. Malpractice in setting a leg.

I. That on 19 , the defendant being a surgeon, plaintiff employed him, as such, to set and heal one of plaintiff's legs, which was broken, and for that purpose defendant undertook as a surgeon to attend and care for plaintiff.

II. That defendant so negligently and unskilfully conducted himself in setting and attempting to heal plaintiff's leg as to bring on inflammation, and to make it necessary to have it amputated.

III. That by reason of defendant's said negligence plaintiff's leg was amputated and he was made sick and permanently disabled, and was kept from his business for months, and necessarily spent $ for said amputation, and for nursing, medicine, and hospital expenses [or otherwise according to the facts], all to plaintiff's damage $.

Wherefore [as in § 919].

1692. Malpractice in care of fever patient.

I. That on 19 , the defendant, being a physician, plaintiff employed him, as such, to attend and cure plaintiff of a [fever] from which he then suffered, and for that purpose defendant undertook, as a physician, to attend and care for plaintiff.

II. That defendant negligently failed to exercise due care and skill in endeavoring to cure plaintiff of said fever, in this, that [specify the want of care or skill].

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III. That by reason of defendant's said negligence plaintiff was and is greatly injured in his health and constitution and suffered great pain, and necessarily spent $ in endeavoring to be cured of said [fever] which was prolonged and increased and plaintiff's health permanently impaired by said want of care and skill on defendant's part [or otherwise according to the facts], all to plaintiff's damage $.

Wherefore [as in § 919].

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PLEDGE

1693. Against pledgee for return of pledge or for damages.

I. That on 19 , in consideration of a sum of money lent to plaintiff by defendant, plaintiff delivered to defendant by way of pledge for said loan, to be re-delivered to plaintiff on his paying to defendant the amount of said loan and interest, a gold watch of the value of $.

II. That plaintiff has repaid to defendant the amount of said loan and interest.

III. That defendant refused to deliver said watch to plaintiff on his repaying said loan and interest, and still refuses to do so.

Wherefore plaintiff demands judgment for a return of said watch, or if that cannot be had, for $ damages, with costs.

Based on Form 245, Conn. Pr. Act.

1694. For redelivery of pledge and an injunction against its sale or transfer.

I. That on 19 , defendant lent to plaintiff $.

II. That at the same time plaintiff deposited with defendant ten gold Waltham watches of the value of $ each, and signed and delivered to him an absolute bill of sale thereof.

III. That said deposit and bill of sale were understood by both parties to be, and were intended for, a pledge of said watches merely, to secure the repayment of said loan with interest.

IV. That on 19 , plaintiff tendered to defendant $, in repayment of said loan with interest, that being the whole amount due from plaintiff to defendant on said loan, and requested defendant to redeliver said watches to him, but defendant refused and still refuses to accept said tender or to redeliver said watches.

V. That defendant now threatens to sell said watches, claiming them to be absolutely his own under said bill of sale.

VI. That plaintiff has been at all times since said tender, and now is, ready to pay said sum to redeem said pledge.

Wherefore plaintiff demands judgment enjoining defendant from selling or otherwise disposing of said watches, and for their delivery to plaintiff upon his paying to defendant said sum of $, and for such other relief as may be just, with costs.

1695. For foreclosure of collateral security by judicial sale.

I. That on Oct. 13, 1892, the defendant A. B. made and delivered to one C. D. his promissory note, of which the following is a copy: [Copy of note.]

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II. That thereafter the said C. D. assigned, transferred and delivered the same to plaintiff who is now the owner and holder thereof.

III. That no part thereof has been paid and there is now due thereon the sum of $.

IV. That to secure the payment of said note defendant A. B., on Oct. 13, 1892, assigned, transferred and delivered to said C. D. a certain promissory note made and delivered by one E. F. to defendant A. B., of which the following is a copy: [Copy of note.]

V. That at the same time and for the same purpose defendant A. B. also assigned, transferred and delivered to said C. D. a certain mortgage deed given by said E. F. to defendant A. B. to secure said last mentioned note, dated the same day as said note and mortgaging to said A. B. the [description of premises].

VI. That on Aug. 19, 1892, said mortgage was recorded in the office of the register of deeds for Hennepin county, Minnesota, in Book 365, of Mortgages, on page 636.

VII. That on Oct. 17, 1892, the said assignment of said mortgage was recorded in the office of said register of deeds in Book 373, of Mortgages, on page 35.

VIII. That on Oct. 14, 1892, to secure the payment of said note of defendant A. B. said C. D. assigned, transferred and delivered to plaintiff the said note and mortgage of E. F., and plaintiff still holds the same for such purpose.

IX. That on 1892, the assignment of said mortgage to plaintiff was recorded in the office of said register of deeds in Book , of Mortgages, on page .

X. That on June 28, 1893, defendant A. B., being insolvent, made an assignment for the benefit of his creditors, under the provisions of the insolvency laws of this state, to the Minnesota Title Insurance & Trust Co., which duly accepted said trust and entered upon and is now performing the duties thereof; that the matter of said assignment is now pending in this court; that on Oct. 13, 1893, plaintiff filed a claim with said assignee against said insolvent estate upon said note of defendant A. B., and notified said assignee that he intended to exhaust his collateral security above mentioned, and look to said assigned estate for any deficiency that might exist after exhausting said security; that the time limit for filing proof of claims with said assignee expired on Oct. 25, 1893; that there was not sufficient time between said Oct. 13, 1893, and Oct. 25, 1893, within which to exhaust said security; that said assigned estate is largely insolvent, and as plaintiff is informed and believes will pay its creditors but a small percentage of its debts; that plaintiff has no means of exhausting his said security except by foreclosing his said lien upon the note and mortgage of said E. F.; that by virtue of said assignment of defendant A. B. for the benefit of his creditors his right, title,

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and interest in and to said note and mortgage of E. F. passed to and became vested in defendant Minnesota Title Insurance & Trust Co., his assignee.

Wherefore plaintiff demands judgment against defendant A. B. for the sum of $, and interest thereon from Oct. 13, 1893, at the rate of 8 per cent, per annum, with the costs and disbursements of this action; that said judgment be declared a specific lien upon said note and mortgage of E. F.; that said note and mortgage of E. F., and all the right, title, and equity of said assignee and of defendant A. B. therein, be ordered sold by the sheriff of Hennepin county, Minnesota, as upon execution, to satisfy said judgment; that upon such sale all the right, title and equity of redemption of defendant A. B. and of defendant Minnesota Title Insurance & Trust Co., assignee, be declared vested in the purchaser of such sale free from any claim or equity of redemption of said defendants; and for such other relief as may be just.

Substance of complaint sustained on demurrer in Cleghorn v. Minn. Title Ins. & Trust Co., 57 Minn. 341, 59 N. W. 320.

1696. For excess on sale of collateral.

I. That on 19 , defendant loaned to plaintiff $, and as collateral security for the payment of the loan received from plaintiff a promissory note made by one A. B. for $, dated 19 , payable one year thereafter to plaintiff or his order.

II. That at its maturity defendant received from A. B. $ in payment of said note.

III. That the period of plaintiff's said loan from defendant expired on 19 ; that the amount then due defendant from plaintiff thereon was $; that after deducting said amount from the amount so received by defendant from A. B. there remained in defendant's hands a balance of $, belonging to plaintiff, which amount plaintiff demanded of defendant on 19 , but defendant refused and still refuses to pay the same, or any amount whatever.

Wherefore [as in § 919].

A common count for money had and received would suffice. See §§ 768, 1575.

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1697. For abuse of process—Causing arrest.

I. That on 19 , defendant demanded of plaintiff that he pay defendant $, defendant then and there claiming that such amount was due him from plaintiff for [state grounds of claim, e. g. for moneys received by plaintiff as defendant's agent]; that such claim was wholly false as defendant well knew.

II. That on 19 , defendant [maliciously] procured the arrest of plaintiff on a charge of embezzlement in order to compel plaintiff through fear and the duress of imprisonment to pay said false claim.

III. That plaintiff was confined in jail under said charge days, and suffered great distress of mind and body, and necessarily spent $ in the employment of counsel and securing witnesses, to his damage $.

Wherefore [as in § 919].

1698. Same—Execution on satisfied judgment.

I. That on 19 , defendant recovered judgment against plaintiff in the district court for county, Minnesota, for $, and on 19 , plaintiff fully paid and satisfied the same to defendant.

II. That on 19 , defendant, well knowing the premises, [maliciously intending to injure plaintiff,] caused an execution to be issued out of said court on said judgment, directed to the sheriff of county, Minnesota.

III. That thereupon said sheriff, acting under and by virtue of said execution, levied upon and seized certain , belonging to plaintiff, of the value of $.

IV. That by reason of the premises plaintiff has been wrongfully deprived of said property, and has been damaged to the amount of $.

V. [Allege special damages if sought.]

Wherefore [as in § 919].

Based on Brown v. Feeter, 7 Wend. (N. Y.) 302.

1699. Same—Filing lis pendens.

I. That at the times herein mentioned plaintiff was and still is the owner in fee of [describe premises as in a deed], in county, Minnesota.

II. That on 19 , defendants filed, or caused to be filed, in the office of the register of deeds for said county, a notice of the pendency of an action in the district court for county, Minnesota, wherein defendants were plaintiffs and this plaintiff and others were defendants; that it was alleged in said notice that said action had been commenced and was pending to recover the interest of one A. B., the husband of this plaintiff, in said

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premises; that in the complaint in said action defendants falsely [and maliciously] alleged that said premises were the property of said A. B. and that plaintiff's title thereto was fraudulent and void as against the plaintiffs therein, who alleged that they were judgment creditors of said A. B.

III. That defendants, well knowing that plaintiff was the owner of said premises, [maliciously and without probable cause,] and with intent to throw suspicion on plaintiff's title to said premises and to prevent her from effecting a sale thereof, brought said action and made the allegations in the complaint therein, and caused notice of the pendency of the action to be filed as aforesaid.

IV. That on 19 , while said notice was so on file and in force, plaintiff had a bona fide offer and could have sold said premises for $ to one C. D., but because of the filing of said notice, and the allegations therein and in said complaint, plaintiff was unable to consummate a sale thereof to said C. D., to plaintiff's damage $.

Wherefore [as in § 919].

Based on Smith v. Smith, 20 Hun (N. Y.) 555.

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1700. To prevent removal of municipal officer—Affidavit.

To the Honorable Supreme Court, State of Minnesota:

[Venue.]

A. B., being duly sworn, says:

I. That he is a resident and duly qualified elector of the city of East Grand Forks, in Polk county, Minnesota.

II. That said city was first organized as a municipal corporation in the year 1887, under the provisions of chapter 45, of the Special Laws of Minnesota for the year 1887, and so remained until Sept. 1, 1898, when it was duly incorporated as a city under the provisions of chapter 8 of the General Laws of Minnesota for the year 1895, and has ever since been and still is organized and existing as a city thereunder exclusively.

III. That since 19 , affiant has been and still is the duly elected, qualified and acting mayor of said city.

IV. That at the times hereinafter mentioned C. D., E. F., G. H., I. J., K. L, and M. N. were and still are the council of said city.

V. That on 19 , a charge was presented to said council for the removal of affiant from the office of mayor of said city on the ground of his alleged malfeasance in said office.

VI. That at a regular meeting of said council held in said city on 19 , it adopted a resolution to the effect that said charge should be heard and tried before said council at the city hall in said city, on 19 , at o'clock P. M., and notice of such hearing and trial was served on affiant on 19 .

VII. That said E. F., G. H., I. J., and K. L., are political opponents of affiant, and anxious for his removal from said office, and have instigated said charge against him, and as they constitute two-thirds of said council they can and will cause him to be removed from said office on said charge unless restrained by this court.

VIII. That the council of said city has no authority under said chapter 8, or the general laws of this state, or otherwise, to remove any elective officer of said city for any reason, but its authority to remove such officers is limited to appointive officers; that as affiant as such mayor is an elective and not an appointive officer said council is without authority or jurisdiction to hear and try said charge or to remove affiant from his said office on that or any other ground.

IX. That notwithstanding its want of authority and jurisdiction in the premises said council is about to proceed with the hearing and trial of said charge and will remove affiant from his said office unless restrained by the order of this court.

Wherefore affiant prays that a writ of prohibition issue from this court di-

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rected to the said C. D., E. F., G. H., I. J., K. L., and M. N., as such council, commanding them to refrain from any further proceeding in the matter of the hearing and trial and removal of affiant from said office on said charge until the next term of this court, or the further order of this court herein, and to show cause at such term why they should not be absolutely restrained from any further proceedings in such matter.

[Jurat.] A. B.

1701. Same—Alternative writ.

[Title of case.]

The State of Minnesota to C. D., E. F., G. H., I. J., K. L., and M. N., as the council of the city of East Grand Forks, Greeting:

Whereas it appears to this court by the affidavit of A. B. that [repeat allegations of affidavit for writ except the prayer].

Therefore you are commanded immediately after the receipt of this writ to refrain from any further proceeding in the matter of the removal of said A. B. from the office of mayor of the city of East Grand Forks, now pending before you as aforesaid, until the next term of this court, to be held on 19 , or the further order of the court herein, and to show cause at such term why you should not be absolutely restrained from any further proceedings in such matter, and then and there to make return to this writ.

Witness the Honorable Calvin L. Brown, Chief Justice of said court, and the seal thereof, this day of 19 .

[Seal.] Irving A. Caswell,
Clerk.

The foregoing writ of prohibition is hereby allowed, returnable at the next term of this court, to be held on 19 , at o'clock in the forenoon; service thereof is hereby directed to be made by delivering to and leaving with , a copy of said writ, together with a copy of this order and the affidavit for said writ.

[Date.] Calvin L. Brown,
Chief Justice.

Based on the forms in State v. Thompson, 91 Minn. 279, 97 N. W. 887. For further forms in prohibition proceedings see, Dunnell, Minn. Pr. § 2648.

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1702. For usurpation of office—Action by attorney general and claimant.[1]

I. That at the times herein mentioned the city of , was and still is a municipal corporation duly organized and existing under [the general laws of this state] [the laws of this state and in particular under chapter of Special Laws 18].

II. That on 19 , a regular election was duly held in said city for the purpose, among others, of electing some person to fill the office of [mayor] of said city for the term of [one] year, beginning 19 , on which day the term of the then [mayor] would expire; that at said election plaintiff A. B. received votes for said office, which was the largest number of legal votes cast for any person at said election for said office, and defendant received votes for said office at said election; and the said A. B. was thereby duly elected [mayor] of said city for said term, and claims the right to hold and exercise said office for said term, and this action is brought on his motion.

III. That at the time of said election plaintiff A. B. was and still is a male citizen of the United States, over twenty-one years of age and a duly qualified elector and resident of said city, having resided therein continuously since 19 .

IV. That notwithstanding the premises defendant unlawfully usurps, intrudes into and holds and exercises said office and unlawfully claims and assumes to be such officer and to have the right to hold and exercise said office for said term [by virtue of said election], to the exclusion and against the rights of said A. B.

Wherefore plaintiffs demand judgment that defendant is not entitled to said office for said term and ousting and excluding him therefrom, and that plaintiff A. B. is entitled to said office for said term, and for such other relief as may be just, with costs.[2]

[1] G. S. 1913 § 8255. See Dunnell, Minn. Digest, § 8074.

[2] G. S. 1913 §§ 8258, 8259, 8261. If the claimant needs the aid of the court in securing possession of the office, and the books and papers thereof, he may obtain an order of court for that purpose. Our statute does not contemplate that the judgment should award him possession or give him damages for the usurpation. See G. S. 1913 § 8259.

1703. Against usurper of office for damages.

I. That on 19 , the state of Minnesota and this plaintiff brought an action in [the district court for county, Minnesota] [this court] against defendant for usurping, intruding into and unlawfully holding and exercising the office of [mayor] of the city of ; that on 19 ,

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said court duly rendered judgment against defendant ousting and excluding him from said office and that he was not entitled to said office from 19 , to the time of said judgment, and that this plaintiff was entitled to said office from 19 , to 19 .

II. That defendant has received from said city as the salary of said office during the time he so usurped it, to wit, from 19 , to 19 , the sum of $ for the use of plaintiff.

III. That defendant has refused to pay the same to plaintiff on demand, to plaintiff's damage $.

Wherefore [as in § 919].

This action is authorized by G. S. 1913 § 8259. See People v. Nolan, 101 N. Y. 539. A common count for money had and received would suffice. See §§ 771, 1575.

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1704. To determine adverse claims under G. S. 1913 § 8060—Plaintiff in possession.

I. That plaintiff is the owner in fee [1] of the [describe premises as in a deed], in county, Minnesota.

II. That plaintiff is in the actual possession of said premises [by his tenant A. B.].[2]

III. That defendant claims an estate or interest in said premises or lien thereon adverse to plaintiff.[3]

Wherefore plaintiff demands judgment that he is the owner in fee of said premises and that defendant has no estate or interest therein or lien thereon, with costs.

[1] Or allege plaintiff's title as in §§ 1292–1296. If plaintiff's title is of an equitable nature all the material facts giving rise to the equity must be alleged. See §§ 644, 840. It is not necessary for plaintiff to allege title when in possession. See § 840. Generally he will desire to do so in order to recover a judgment to that effect. What is said in Wilder v. St. Paul, 12–192(116) as to the propriety of trying an issue as to plaintiff's title in this form of action is misleading if not erroneous. Clearly the plaintiff has a right to tender such an issue if he desires, for the statute expressly provides for a determination of the respective rights of the parties.

[2] This is a proper and safe allegation to make, but it is probably unnecessary as the possession of a tenant is regarded as the possession of his landlord for the purposes of this form of action. See Lowe v. Lowe, 83 Minn. 206, 86 N. W. 11; Trimble v. Lake Superior & Puget Sound Co., 99 Minn. 11, 108 N. W. 867.

[3] This is sufficient without setting out the adverse claim or alleging that it is unfounded. Steele v. Fish, 2 Minn. 153(129); Barber v. Evans, 27 Minn. 92, 6 N. W. 445; Walton v. Perkins, 28 Minn. 413, 10 N. W. 424; Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662. See § 840.

1705. Same—Setting forth defendant's claim.

[I. and II. as in § 1704 or § 1706.]

III. That defendant claims an estate or interest in said premises adverse to plaintiff by virtue of a certain [tax certificate issued by the auditor of county, Minnesota, on 19].

IV. [That said tax certificate is void by reason of the fact that (allege ground of invalidity).]

Wherefore plaintiff demands judgment that he is the owner in fee of said premises; that said tax certificate is void; that defendant has no estate or interest in said premises or lien thereon, with costs.

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1706. Same—Land vacant.

I. That plaintiff is the owner in fee of [describe premises as in a deed], in county, Minnesota.

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 that he is the owner in fee of said premises and that defendant has no estate or interest therein or lien thereon, with costs.

Or allege title as under §§ 1292–1296. If plaintiff is the equitable owner he must allege all the material facts giving rise to his equity. See § 840.

1707. Claim for improvements.

[See forms under §§ 1298–1301.]

1708. Answer—Plaintiff in possession—Counterclaim in ejectment.

The defendant, answering the complaint herein,

I. Denies that plaintiff is the owner in fee of said premises.

II. Admits that plaintiff is in possession thereof.

For a counterclaim alleges:

I. That defendant is the owner in fee and entitled to the immediate possession of said premises.

II. That plaintiff is in possession thereof and wrongfully withholds the same from defendant.

Wherefore defendant demands judgment that he is the owner in fee of said premises; that he recover possession thereof; and that plaintiff has no estate or interest therein or lien thereon, with costs.

See Eastman v. Linn, 20 Minn. 433(387); Mueller v. Jackson, 39 Minn. 431, 40 N. W. 565; Godfrey v. Valentine, 50 Minn. 284, 52 N. W. 643. If the defendant seeks to recover mesne profits he should draft his answer after the form under § 1289.

1709. Answer—Land vacant—Defendant alleging an equitable title.

The defendant, answering the complaint herein,

I. Admits that plaintiff is the legal owner in fee of said premises.

II. Admits that said premises are vacant and unoccupied.

For a counterclaim alleges:

[Allege all the material facts giving rise to defendant's equitable title.]

Wherefore defendant demands judgment that he is the equitable owner of said premises; that the legal title of plaintiff to said premises is void as against defendant; that plaintiff has no estate or interest in said premises or lien thereon; and for such other relief as may be just, with costs.

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1710. Answer—Land vacant—Defendant alleging a lien.

The defendant, answering the complaint herein,

I. Admits that plaintiff is the owner in fee of said premises.

II. Admits that said premises are vacant and unoccupied.

For a counterclaim alleges:

[Allege all the material facts giving rise to the lien.]

Wherefore [demanding judgment that defendant has a lien on the premises and for such other relief as may be necessary to make the lien effective, varying with the nature of the lien and the facts of the particular case]; and for such other relief as may be just, with costs.

1711. Answer—Denial of plaintiff's title and vacancy—Defendant alleging legal title in fee.

The defendant, answering the complaint herein,

I. Denies each and every allegation in the [first] and [second] paragraphs thereof.

II. Admits that he claims an estate or interest in said premises adverse to plaintiff.

III. Alleges that he is the owner in fee of said premises [and entitled to the immediate possession thereof].

Wherefore defendant demands judgment that he is the owner in fee [and entitled to the immediate possession] of said premises; that plaintiff has no estate or interest therein or lien thereon; and for costs.

1712. Answer—Land vacant—Defendant pleading a legal title.

The defendant, answering the complaint herein,

I. Denies that plaintiff is the owner in fee [or entitled to the immediate possession] of said premises.

II. Admits each and every allegation in the [second] and [third] paragraphs thereof.

III. Alleges that defendent is the owner in fee [and entitled to the immediate possession] of said premises.

Wherefore [as in § 1711].

1713. Answer—Admission of plaintiff's possession—Defendant alleging legal title.

The defendant, answering the complaint herein,

I. Denies that plaintiff is the owner in fee [or entitled to the immediate possession] of said premises.

II. Admits all the other allegations thereof.

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III. Alleges that he is the owner in fee [and entitled to the immediate possession] of said premises.

Wherefore [as in § 1711].

1714. Reply.

The plaintiff for reply to the answer herein denies each and every allegation of new matter therein.

1715. Disclaimer.

The defendant [A. B.,] for answer to the complaint herein, disclaims having any estate or interest in said premises or lien thereon.

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QUO WARRANTO

1716. Skeleton forms in quo warranto proceedings.

[Title of action.]

INFORMATION.

The Attorney General, on behalf of the state of Minnesota, respectfully causes the court to be informed 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 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 19 , by any sheriff or elector of this state.

.....

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 court room, in the capitol building of said state, in the city of St. Paul, on , 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

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warrant you assume to exercise jurisdiction as , and to abide the judgment of this court herein.

Witness the Honorable Calvin L. Brown, Chief Justice of said court, and the seal thereof, this day of , 19 .

[Seal of court.] .....

Clerk.

1717. To test the right to an elective municipal office.

H. W. Childs, Attorney General of the state of Minnesota, comes hereby before said court on behalf of said state, and hereby gives said court to understand and be informed as follows, to wit:

I. That the city of St. Paul is and ever since the year 1874 has been a municipal corporation of this state organized and existing under and by virtue of an act of the legislature of the state of Minnesota, entitled, "An act entitled an act to reduce the law incorporating the city of St. Paul in the county of Ramsey and state of Minnesota, and the several acts amendatory thereof, and certain other acts relating to said city into one act and to amend the same," approved March 5, 1874, and the various acts amendatory thereof and supplementary thereto, among which were and are the two acts known and designated as Chapters six and seven of the Special Laws of Minnesota for the year 1891.

II. That on May 1, 1894, a general municipal election of said city was duly held for the election of nine assemblymen at large from the electors of said city to serve for the term of two years, commencing on the first Tuesday of June, 1894.

III. That the thirty-six persons hereinafter named and described in Exhibit A, hereto attached, were duly nominated as candidates for election as said assemblymen, all of whom were for more than thirty days prior to said election and ever since have been duly qualified as electors of said city of St. Paul and residents thereof.

IV. That the official ballot for said election was duly printed, distributed and used in said election and said ballot was so far as the same related to said assemblymen in the form and figures set out in Exhibit A, hereto attached and made a part hereof.

V. That upon said election the following votes and no more were cast for assemblymen of said city and the same were duly counted and returned, to wit: [Specification.]

VI. That thereafter and on May 15, 1894, the votes cast at said election were duly canvassed by the common council of said city of St. Paul, and found and canvassed as to said assemblymen by said council with the same result and with the same number of votes for each of said candidates as hereinbefore set out.

VII. That thereafter the respondents, Oscar E. Holman and William Banholzer, being the same persons whose names are upon said ballots as candidates

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for election as assemblymen, pretended to qualify as assemblymen and took the oath of office as assemblymen and on the said first Tuesday of June, 1894, said respondents and each of them wrongfully and unlawfully and without color of right or title thereto intruded into and usurped the office of assemblyman of said city and still do so intrude into and usurp said office and claim to be assemblymen of said city, and to have been elected at said election, and are still claiming and asserting the right to act and are claiming to act as assemblymen of said city.

VIII. That the state of Minnesota and the city of St. Paul, and the citizens thereof have sustained and are suffering great inconvenience, injury and expense by reason of the aforesaid intrusion into and usurpation of said offices by said respondents and each thereof, and by reason of their said unlawful and wrongful acts.

Wherefore the state of Minnesota by its Attorney General prays this honorable court that the proper writ and process of this court may issue out of this court and under its seal and in the name of the state, directed to said Oscar E. Holman and Wm. Banholzer, commanding them and each of them at a time and place in said writ named, to be and appear before this court then and there to show by what warrant they and each of them hold and exercise and claim to hold and exercise the said offices of assemblymen, and to abide the order and judgment of this court herein and that said writ may direct the time and manner of the service thereof.

H. W. Childs,
Attorney General of the state of Minnesota.
W. H. Lightner,
F. W. Zollman,
Counsel.

Petition in State v. Holman, 58 Minn. 219, 59 N. W. 1006.

1718. To try title to appointive municipal office.

Now comes the state of Minnesota by W. B. Douglas, its Attorney General, upon the relation of said P. L. Getchell and informs said court and alleges:

I. That said relator P. L. Getchell is a citizen of the United States, more than twenty-one years of age, and for more than eighteen years last past has been and now is a resident of the city of St. Paul, county of Ramsey and state of Minnesota, and a duly qualified voter and taxpayer of said city, county and state.

II. That during all the time herein mentioned, said John J. O'Connor, defendant, was and now is, a citizen and resident of said city, county and state.

III. That the city of St. Paul is now, and during all the time herein mentioned, has been, a municipal corporation, duly organized and existing under and by virtue of the laws of the state of Minnesota.

IV. That the above named P. L. Getchell was, on or about June 23, 1881,

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by the mayor of St. Paul, duly appointed police officer of said city of St. Paul, by and with the advice and consent of the common council of said city, and on or about that day duly qualified and entered upon the discharge of his duties as such policeman, and ever since has continued to perform the duties of such police officer of said city.

V. That on or about Feb. 1, 1900, this complainant, P. L. Getchell, who was then and for more than three years prior thereto had been, a duly appointed, qualified and acting captain of police of said city, was by the mayor of said city of St. Paul, then duly appointed chief of police of said city of St. Paul, by and with the advice and consent of the assembly of said city, and thereafter and on or about Feb. 1, 1900, duly qualified as such chief of police and entered upon the discharge of his duties as such, and has ever since been, and is now, a duly qualified and acting chief of police of said city of St. Paul and entitled to hold said office and enjoy the benefits, emoluments and salary thereof.

VI. That said office of chief of police is a public office of great responsibility and importance in said city of St. Paul, created by the charter of said city under and by virtue of the laws of the state of Minnesota, and in which the taxpayers and citizens are vitally interested.

VII. That on June 11, 1900, R. T. O'Connor, L. L. May, Charles L. Haas, Wm. Foelsen and D. W. Lawler, pretending to act as an alleged board of police of said city of St. Paul, but without any authority or warrant in law, and contrary to law, issued to said John J. O'Connor, as complainant is informed and believes, an appointment or commission as chief of police of said city of St. Paul; that said pretended board of police has no existence in law.

VIII. That said defendant, John J. O'Connor, acting upon said pretended appointment and commission, and claiming to be appointed to the office of chief of police of said city, has accepted said appointment and has assumed and undertaken to enter into the possession and control of said office and has entered into, and has wrongfully and unlawfully usurped and intruded into, and unlawfully holds and exercises said office of chief of police of said city of St. Paul, and has assumed to himself the enjoyment of said office and the profits and emoluments thereof without any legal warrant, grant, appointment or right whatever, and still does so usurp, intrude into, unlawfully hold and exercise said office and the profits and emoluments thereof, and is now pretending and assuming to act as such chief of police and pretends and assumes that he will continue to hold, enjoy, usurp and intrude into said office and discharge the duties thereof, and to demand, receive and appropriate to his own use the salary attached thereto, all of which will be to the great damage and injury of this complainant and to the people of the state of Minnesota and against the peace and dignity of said state.

Wherefore, it is prayed that this court allow an order that the proper writ and process may be issued out of this court directed to said John J. O'Con-

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nor, commanding him, at a time and place to be named in said process and writ, to be and appear before said court, to show by what warrant he holds and exercises the said office of chief of police of the city of St. Paul, and to abide the order and judgment of said court, and to show cause why P. L. Getchell should not be adjudged to be rightfully entitled to said office, and that said writ may direct the time and manner of the service of said process and the penalty under which the same shall be obeyed.

Dated at St. Paul, Minnesota, June 14, 1900.

W. B. Douglas,
Attorney General of the State of Minnesota.
E. E. McDonald,
Walter L. Chapin,
Attorneys for Relator.

Petition in State v. O'Connor, 81 Minn. 79, 83 N. W. 498.

1719. To test jurisdiction of a county over certain territory.

INFORMATION.

Now comes George T. Simpson, the Attorney General of the state of Minnesota and on behalf of said state, and upon his own relation as such Attorney General, gives the Honorable Supreme Court to understand and be informed:

I. That the aforesaid county of St. Louis is now and for more than forty years last past has been one of the political subdivisions of the state of Minnesota, a body politic and corporate, created and existing under and by virtue of the laws of said state.

II. That the county of Lake, in said state of Minnesota, is now and for more than forty years last past has been one of the political subdivisions of the state of Minnesota, a body politic and corporate, created and existing under and by virtue of the laws of said state.

III. That heretofore and on April 9, 1895, for the reasons set forth in the enacting clause thereof, the legislature of the state of Minnesota passed an Act, entitled "An Act to define the boundary between the counties of St. Louis and Lake," and thereby fixed the boundary line between the said counties of St. Louis and Lake at and made it coincident with the line known as the True Meridian, the same being the line dividing range eleven west from range twelve west, in said state of Minnesota.

IV. That ever since the said year 1895, the said county of Lake, as such, has actually had complete control of and exercised jurisdiction in every way over all of the territory lying east of said boundary line, as hereinbefore described, and west of the range line between ranges five and six west of the fourth principal meridian, and as far north as the boundary line between the United States and the British Possessions, and as far south as the boundary line between the states of Minnesota and Wisconsin; that the exercise of such jurisdiction and control over said territory and the whole thereof by said

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Lake county, ever since the said year 1895, has been recognized and acquiesced in by the state of Minnesota.

V. That the exercise of such jurisdiction and control over the said territory by said Lake county, and the right to do so, has been recognized and acquiesced in by said county of St. Louis ever since the year 1895, and the said line dividing the said range eleven west from the said range twelve west has been recognized, accepted, and acquiesced in thereby ever since the year 1895, as the true boundary line between the said counties of Lake and St. Louis, until on or about the month of December, 1910.

VI. That since December, 1910, the said county of St. Louis, without any right, warrant or authority to do so, has been and is now claiming that the said range line hereinbefore referred to between range eleven and twelve is not the true and common boundary line between said Lake and St. Louis counties, and during the said time since December, 1910, has been, and now is, encroaching upon the jurisdiction of said Lake county over that portion thereof hereinafter referred to, to wit, a strip of land about one mile in width off of and along the west side of said range eleven west, and extending from the south boundary line of township sixty-two to the north boundary line of township sixty-four, containing in the aggregate, approximately, eleven thousand acres of land, lying wholly within and belonging to said Lake county.

VII. That during said time since December, 1910, the said county of St. Louis has actually attempted to exercise jurisdiction within and over said strip of land, by the levy and collection of taxes therein and thereupon, and in divers other ways, is now and has in all things assumed to exercise the same authority and control over said strip of land as over the territory actually lying within and belonging to the said county of St. Louis and threatens to continue, and will continue to unlawfully encroach upon and usurp and exercise jurisdiction and control over said strip of land and portion of said Lake county, thereby producing conflict of jurisdiction between the said counties of Lake and St. Louis, in contempt of the dignity of the state of Minnesota, and to its great danger and prejudice.

Wherefore your relator, on behalf of the state of Minnesota, prays that the proper writ and process of this court may issue therefrom, directed to the said county of St. Louis, commanding it, at a time and place in said writ to be named, to be and appear before this court, then and there to show by what warrant it exercises and claims the right to exercise jurisdiction, control and authority over said territory of Lake county aforesaid, and to abide the order and judgment herein, and that said writ direct the time and manner of the service thereof.

George T. Simpson,
Attorney General.

[VERIFICATION.]

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ORDER FOR WRIT.

[Title of action.]

The within information having been presented to me this 29th day of September, 1911,

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 October 23, 1911, at the opening of court on said day, and that a copy of said writ be served on the county of St Louis, the respondent herein, on or before October 2, 1911, by any sheriff or elector of this state.

Chas. M. Start,
Chief Justice of the Supreme Court.

WRIT.

[Title of action.]

Whereas it has been made to appear to this court, upon the relation of George T. Simpson, as Attorney General for the state of Minnesota: [Repeating allegations of information.]

Now therefore, in the name of the state of Minnesota, you the said county of St. Louis, are hereby commanded and required to appear before this court, in the court room, in the capitol building of said state, in the city of St. Paul, on October 23, 1911, 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 te exercise jurisdiction over the strip of land hereinbefore referred to as being a part of the county of Lake, state of Minnesota, and to abide the judgment of this court herein.

Witness the Honorable Charles M. Start, Chief Justice of said court, and the seal thereof, this 27th day of September, 1911.

[Seal of court.]

H. Caswell, Clerk,
By V. C. Pidgeon, Deputy.

Forms in State v. St. Louis County, 117 Minn. 42, 134 N. W. 299.

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RAILROADS

1720. Allegation of incorporation, etc.

That at the times herein mentioned [defendent] was [and still is] a corporation duly organized and existing under the laws of [this state] [the state of] and [owned and] operated a railroad running through county, Minnesota.

In ordinary actions against railroads, such as actions for negligence, omit any allegation of incorporation. See § 606.

1721. Allegation of operation of railroad.

That at the times herein mentioned [defendant] [owned and] [1] operated a railroad running through [county,] [the city of], Minnesota.

[1] Omit except where ownership is material. It is not material in ordinary actions for negligence, or for failure of duty as a carrier.

1722. For injury from collision at railroad crossing.

I. That at the times herein mentioned defendant operated a railroad running through county, Minnesota.

II. That on 19 , at about o'clock in the [forenoon], plaintiff was [riding in a wagon drawn by a pair of horses] [driving a pair of horses attached to a wagon] [driving an automobile] [riding in an automobile] along a public highway which crosses said railroad by a public crossing about [five] miles [north] of the city of , in said county; that as plaintiff was [about to cross] [crossing] said railroad at said public crossing in said [wagon] [automobile], defendant then and there so negligently managed and ran one of its locomotive engines on said railroad, with a train of cars attached, across said highway at said crossing, that it struck [said horses and wagon] [said automobile] and threw plaintiff out upon the ground with such force that [allege injuries and damages as in §§ 1250–1255].

III. [That said automobile was the property of plaintiff, of the value of $, and was (rendered worthless by said collision) (damaged by said collision to the extent of $), to plaintiff's damage $.] [That said horses, with the harnesses they then wore, and said wagon, were the property of plaintiff, of the value of $, and both horses were killed and the harnesses and wagon rendered worthless by said collision, to plaintiff's damage $.]

Wherefore [as in § 919].

Based on Clark v. Chicago etc. Ry., 28 Minn. 69, 9 N. W. 75. Under this general allegation of negligence 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. See § 816, supra; Note, 59 L. R. A. 224–228.

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1723. For injury to pedestrian at street crossing in a city.

I. That at the times herein mentioned defendant operated a railroad running through the city of , Minnesota.

II. That said railroad runs across a public street and highway of said city known as street.

III. That on 19 , at about o'clock in the [afternoon], as plaintiff was walking along the sidewalk on said street and across the tracks of defendant where they cross said street and sidewalk, defendant [negligently and wantonly ran one of its trains across said street at an excessive speed and without ringing the bell or blowing the whistle of the engine of the train, and without having a flagman at said crossing, or taking other means to warn travelers on said street of the approach of the train, and in consequence of such negligence of defendant the train struck] [so negligently and wantonly managed one of its trains running across said street that it struck] [negligently and wantonly backed one of its freight trains across said street (at an excessive speed and) without having a flagman at said crossing, or a person on the the train to warn travelers on said street of the approach of the train, or having any lights on the leading car of the train, or blowing the whistle or ringing the bell of the engine of the train, or taking any other means of warning travelers on said street of the approach of the train, and in consequence of said negligence of defendant the train struck] plaintiff, and thereby he was [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

See § 847, supra; Dunnell, Minn. Digest, §§ 8174–8203; Note, 59 L. R. A. 224–228.

1724. For injury from fire set by locomotive.

I. That at the time herein mentioned defendant [was a corporation duly organized and existing under the laws of the state of and] operated a railroad running through county, Minnesota.

II. That at such time plaintiff [owned and] occupied as a farm the [describe premises as in a deed], lying along the right of way of defendant in the county and state aforesaid.

III. That there were upon said premises [three] stacks of wheat, belonging to plaintiff, of the value of $.

IV. That on 19 , at about o'clock in the [forenoon], defendant, while running one of its trains of cars on said railroad past said premises, allowed the locomotive engine of the train to throw, drop and scatter sparks of fire in the grass and other combustible materials [near] [upon] said premises of plaintiff and thereby caused a fire which spread [to and] upon said

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premises and completely consumed said stacks of wheat, to plaintiff's damage $.

Wherefore [as in § 919].

Based on G. S. 1913 § 4426. See, for other allegations of damage to property by fire, § 1340.

1725. For killing of stock due to defective fence.[1]

I. That at the time herein mentioned defendant operated a railroad running through county, Minnesota.

II. That on 19 , two horses, the property of plaintiff, of the value of $, in consequence of the negligent failure of defendant to repair and maintain the fence along its right of way at a point about miles north of the city of , in said county, strayed upon the track of defendant at such point and were then and there run into and killed by a train of defendant [through the negligence of defendant in failing to repair and maintain its fence as aforesaid and through the negligent failure of the engineer of said train to exercise reasonable care to avoid running said train into said horses after seeing them in a position of peril on said right of way],[2] to plaintiff's damage $.

III. That more than thirty days have elapsed since said damages occurred and defendant has failed and refused to pay the same to plaintiff.

Wherefore plaintiff demands judgment for $ damages, with interest thereon from 19 , and double costs as authorized by G. S. 1913 § 4264.

[1] Based on G. S. 1913 §§ 4263, 4264.

[2] This allegation may be omitted if the action is predicated solely on the negligence of the company to repair and maintain the fence. It is generally advisable, however, to charge negligence on the part of the engineer in order that a recovery may possibly be had on that ground if not on the first. See Mooers v. Northern Pacific Ry., 69 Minn. 90, 71 N. W. 905.

1726. For injury from turntable.

I. That plaintiff is a minor, between [fourteen] and [fifteen] years of age.

II. [Allegation of appointment of guardian ad litem as in § 1407.]

III. That on and for a long time prior to 19 , defendant operated a railroad running through the village of , Minnesota, and in connection therewith owned and operated a turntable in an open, public place near street in said city.

IV. That at such times defendant negligently left said turntable unfastened and unguarded and in such a condition that it was easily moved and dangerous and attractive to young children playing about and with it, as defendant well knew.

V. That children were attracted to and were in the habit of playing about and with said turntable, as defendant well knew.

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VI. That on 19 , plaintiff, and several other children, all too young to appreciate the danger of doing so, were playing about and with said turntable, and through the negligence of defendant in not fastening or guarding it they were able to and did move it about so that [describe accident and allege injuries and damages as in §§ 1250–1255.]

Wherefore [as in § 919].

See Dunnell, Minn. Digest, §§ 6989, 8158.

1727. For injury from defective platform.

I. That at the times herein mentioned defendant operated a railroad passing through the city of Waseca, Minnesota, and there maintained, in connection with the Chicago & Northwestern Railway Company, a passenger station.

II. That on and for a long time prior to Dec. 16, 1910, defendant maintained a wooden platform connected with and affording a means of approach to said station; that at the north end of the platform defendant maintained wooden steps as a means of mounting to and descending from the platform.

III. That defendant invited the public to use said platform and steps as a means of approach to and in connection with said station and they were so used on and for a long time prior to Dec. 16, 1910.

IV. That on and for a long time prior to Dec. 16, 1910, said steps were rotten, defective and unsafe, as defendant well knew, or would have known but for the want of reasonable care and diligence on its part.

V. That defendant then and there negligently failed to maintain any light upon or near said steps, by means of which their rotten, defective and unsafe condition would be disclosed to persons using them, and such negligence directly contributed to the accident hereinafter mentioned.

VI. That on Dec. 16, 1910, at about six o'clock in the evening, plaintiff went to said station on business connected with defendant and while he was walking down said steps upon his return shortly thereafter, they suddenly gave way, by reason of their said condition, and he was thereby thrown to the ground and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Substance of complaint in English v. Minneapolis & St. Louis Ry., 117 Minn. 131, 134 N. W. 518.

1728. For wilful injury to trespasser on tracks.

I. That at the times herein mentioned defendant operated a railroad running through the city of , Minnesota.

II. That on 19 , while plaintiff was walking on the track of defendant in a northerly direction near said city, a servant of defendant, acting in the course and scope of his employment as engineer of one of defendant's passenger trains running in the same direction on said track, after discovering

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plaintiff upon said track in front of said train at such a distance that a collision between plaintiff and the train might have been avoided by the exercise of reasonable care on the part of said engineer, did not exercise such care, but wilfully and with a reckless disregard of plaintiff's safety, ran said train upon plaintiff without warning him of the approach of the train by ringing the bell or blowing the whistle of his engine or otherwise, and without attempting to stop the train or check its speed, though it might have been stopped in time to avoid the collision, whereby plaintiff was thrown [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

See § 846.

1729. For unlawful blowing of locomotive whistle.

I. That at the times herein mentioned defendant operated a railroad which ran into the city of Duluth, Minnesota.

II. That on 19 , at or near a point in said city where its tracks cross First avenue east at its junction with St. Croix avenue, public highways in said city, defendant negligently, wilfully, maliciously and wantonly blew the whistle of one of its locomotives with a frightful noise, in violation of an ordinance of said city No. 25, entitled Railroads; that thereby a team of horses, which was then being driven along said St. Croix avenue, was greatly frightened and ran away and down St. Croix avenue and against plaintiff whereby she was [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

Based on complaint in Dugan v. St. Paul etc. Ry., 40 Minn. 544, 42 N. W. 538. See Note, 59 L. R. A. 230.

1730. For failure to fence right of way across farm.

I. That at the times herein mentioned defendant [owned and] operated a railroad running through county, Minnesota.

II. That plaintiff is, and for years last past has been, the owner and occupant of the [description of premises], in said county.

III. That said land is suitable for general farming purposes, including the raising of stock, and during all such time plaintiff has occupied and cultivated the same as a farm and raised and kept a large amount of live stock thereon, and is now doing so.

IV. That during all such time defendant has operated its railroad across said premises, and has failed to construct and maintain any fence along its right of way across said premises, whereby said premises have been lessened in value for the purpose of stock-raising and general farming, and plaintiff has been put to great trouble and expense in caring for his live stock on said farm

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to avoid their being run over by the trains of defendant, and has been hindered and delayed in his farming operations on said farm, all to his damage $.

Wherefore [as in § 919].

Substance of complaint in Gould v. Great Northern Ry., 63 Minn. 37, 65 N. W. 125.

1731. For taking land for railroad purposes without compensation.

I. That at the times herein mentioned plaintiff was and still is the owner in fee of [describe premises as in a deed], county, Minnesota.

II. That on 19 , defendant wrongfully entered upon said premises and ousted plaintiff therefrom, and built a railroad thereon, and has ever since wrongfully withheld possession thereof from plaintiff and maintained and operated said railroad thereon, to plaintiff's damage $.

Wherefore [as in § 919].

Based on complaint in Colstrum v. Minneapolis etc. Ry., 31 Minn. 367, 18 N. W. 94.

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RECEIVERS

1732. Allegation of appointment—General form.

I. That on 19 , [in an action by A. B. against C. D.,] plaintiff was duly appointed receiver of the estate of said C. D. by the district court for county, Minnesota, and thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such receiver.

II. [That on 19 , an order was duly made by this court authorizing plaintiff to bring this action.] [That by the order appointing him receiver as aforesaid plaintiff was duly authorized to bring this action.]

Sustained by Rossman v. Mitchell, 73 Minn. 198, 75 N. W. 1053. See § 849.

1733. Same—Receiver of partnership property.

I. That on 19 , in an action by A. B. against C. D. for the dissolution of a partnership existing between them, plaintiff was duly appointed receiver of all the property and assets of said partnership, by the district court for county, Minnesota, and thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such receiver.

II. [As in § 1732.]

1734. Same—Receiver of corporation in sequestration proceedings.

I. That on 19 , in an action under G. S. 1913, § 6634, by A. B. against the Company, to sequestrate the property of said company for the benefit of its creditors, plaintiff was duly appointed receiver of all the stock, property, things in action and effects of said company by the district court for county, Minnesota, and thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such receiver.

II. [As in § 1732.]

1735. Same—Receiver in supplementary proceedings.

I. That on 19 , in proceedings supplementary to execution on a judgment against C. D., in an action by A. B. against said C. D. in [this court] [the district court for county, Minnesota], plaintiff was duly appointed receiver of the unexempt property of said C. D. by Hon. , judge of said court, under G. S. 1913, § 7957, and thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such receiver.

II. [As in § 1732.]

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RECORDING OF INSTRUMENTS

1736. Allegation of recording of deed or mortgage.

That on 19 , said [deed] [mortgage] was recorded in the office of the register of deeds for [county, Minnesota] [said county,] in Book , of [Deeds] [Mortgages], on page .

REFORMATION OF INSTRUMENTS

1737. General form—Mistake in description in deed.

I. That on 19 , for a valuable consideration, defendant sold to plaintiff the [correct description of premises].

II. That on said day defendant made and delivered to plaintiff a deed which both parties supposed conveyed said premises to plaintiff, but the description of the premises in said deed was, by mistake of the scrivener, made as follows: [Copy of description in the deed.]

III. That upon the delivery of said deed plaintiff paid to defendant the consideration therein named, to wit, $.

IV. That on 19 , and before discovering said mistake, plaintiff caused said deed to be recorded in the office of the register of deeds for county, Minnesota, in Book , of Deeds, on page .

V. That on 19 , plaintiff requested defendant to execute a deed to correct said mistake, but he refused and still refuses to do so.

Wherefore plaintiff demands judgment reforming said deed and the record thereof so as to correct said mistake, and for such other relief as may be just, with costs.

See § 851.

1738. Reformation of land contract—Assumption of mortgage—Mutual mistake.

I. That on March 1, 1904, plaintiff was the owner in fee of the northeast quarter, of the southeast quarter, and lot one, of section twenty-four, in township one hundred thirty-four north, of range thirty-eight, in Otter Tail county, Minnesota, subject to two mortgages given by plaintiff to one A. B., one for $800, and one for $61, the former bearing interest at the rate of five and one-half per cent. payable on the first day of November in each year, and the latter payable in instalments of $12, an instalment maturing on Nov. 1, 1904.

II. That on March 1, 1904, plaintiff entered into a contract with defendant C. D., whereby he agreed to convey said land to defendant C. D., and said defendant agreed, in addition to paying the $682 named in said contract as con-

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sideration, to assume and pay when due said mortgages, but through the mutual mistake of plaintiff and defendant C. D., the contract between them was drawn omitting all reference to said mortgages; that a copy of said contract as drawn is hereto attached, marked Exhibit A, and made a part hereof.

III. That on Nov. 1, 1904, an instalment of interest amounting to $44 became due and payable on said $800 mortgage, and an instalment of $12 became due and payable on said $61 mortgage, but defendant C. D. refused and neglected to pay said sums or any part thereof, though requested to do so by plaintiff.

IV. That on Jan. 20, 1905, plaintiff, to protect his interest in said land and to save costs of foreclosure of said mortgages, paid said sums of $44 and $12, respectively, due on said mortgages, with interest, amounting to $56.85 in all.

V. That on Aug. 23, 1904, defendant C. D., and his wife, defendant E. D., sold, assigned and transferred to defendant E. F., all their right, title and interest in said land held by virtue of said contract with plaintiff, but before said transfer was made to said E. F., plaintiff informed said E. F. of the existence of said mortgages and of the fact that the defendant C. D. had assumed and agreed to pay them, and said E. F. received said assignment of said contract with full knowledge of said mortgages and of the fact that said C. D. had assumed and agreed to pay them.

VI. That said mortgages to A. B. were made and delivered on Oct. 4, 1901, and shortly thereafter were recorded in the office of the register of deeds for said Otter Tail county.

VII. The defendant E. F. is a foreign corporation duly organized and existing under the laws of the state of Indiana.

VIII. That defendant C. D. and defendant E. D. are husband and wife.

IX. That said contract, Exhibit A, if made to read in accordance with the intentions of the parties thereto, would have the following clause incorporated therein: "The said party of the second part, as additional consideration for these presents, hereby assumes and agrees to pay when due two mortgages both dated Oct. 4, 1901, executed to A. B. on said land one for $800, with interest at five and one-half per cent. per annum payable on Nov. 1 of each and every year, and one for $61, payable in instalments of $12, each payable on Nov. 1 of every year."

Wherefore plaintiff demands judgment reforming said contract between plaintiff and defendant C. D. so as to conform to the intentions of the parties as alleged; fixing a reasonable time in which to pay the said sum of $56.85, paid out by plaintiff as alleged, with interest, and providing that if said sum is not paid within said time that said contract be forfeited and all interest of the defendants therein and in said land be forever foreclosed; and for such other relief as may be just, with costs.

Substance of complaint in Massey v. Lindeni, 98 Minn. 133, 107 N. W. 146.

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RELEASE

1739. General form.

The defendant for answer to the complaint herein alleges that on 19 , before this action was brought, plaintiff, for a valuable consideration, released defendant from the claim alleged in the complaint, by a written instrument of which the following is a copy: [Copy of instrument.]

See § 852.

REPLEVIN

1740. General form for all cases—Wrongful detention.[1]

I. That at the times herein mentioned plaintiff was and still is the owner and entitled to the immediate possession of [describe property in general terms].

II. That defendant is in possession thereof and wrongfully detains the same from plaintiff, in the county and state aforesaid, [and has so detained the same ever since 19], to plaintiff's damage $.

III. That on 19 , plaintiff demanded of defendant that he deliver possession thereof to plaintiff, but he refused and still refuses to do so.[2]

IV. That the value thereof is $.[3]

V. [That the value of the use thereof during said detention is $.][4]

VI. [Allege any special damages sought.]

Wherefore plaintiff demands judgment[5] [that he is the owner of said property;] for the recovery of the possession [thereof] [of said property], or for $, the value thereof, in case a recovery of possession cannot be had;[6] for $, damages for the detention thereof; [for $, the value of the use thereof during said detention], with costs.

[1] See § 853. This form may be used in all cases regardless of whether the original taking was wrongful or not. In case of a wrongful taking the plaintiff may ignore the taking and simply allege a wrongful detention. Proof of wrongful taking will support a complaint for wrongful detention even without proof of a demand before suit. Guthrie v. Olson, 44 Minn. 404, 46 N. W. 853; Oleson v. Merrill, 20 Wis. 462. This form may be used where the original taking by defendant was from a third party, as, for example, a bailee, or agent, or assignor of plaintiff and it may be used against a sheriff or other officer seizing the property under process. It may be used though the plaintiff has a mere possessory right and the legal title is in another. The facts giving rise to a special property need not be alleged, but may be proved under a general allegation that the plaintiff is the owner of the property.

[2] In Stratton v. Allen, 7 Minn. 502(409) it was held that where no wrongful taking is alleged it is necessary to allege a demand before suit. This case is clearly indefensible and is inferentially overruled by Guthrie v. Olson, 44 Minn. 404, 46

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N. W. 853, which holds that a complaint for wrongful detention may be sustained without proof of a demand. If a demand need not be proved it necessarily follows that it need not be alleged, at least if the complaint does not affirmatively show that the original taking was rightful. Even where upon the evidence proof of a demand is essential to a recovery it may be proved under an allegation of wrongful detention. Oleson v. Merrill, 20 Wis. 462; Simser v. Cowan, 56 Barb. (N. Y.) 395; Ross v. Menefee, 125 Ind. 432; Heath v. Morgan, 117 N. C. 504; 3 Bates, Pl. 2601; Maxwell, Pl. 296, 761. The want of an allegation of a demand is cured by a verdict for the plaintiff. Hurd v. Simonton, 10 Minn. 423(340). If objection is made on the trial to the want of an allegation of demand the court should order an amendment as a matter of course. See Caldwell v. Bruggerman, 8 Minn. 286(252). While it may not be necessary to allege a demand it is generally practically advisable to do so to force an admission from the defendant and thereby obviate the necessity of proof on the trial.

[3] See § 853.

[4] See Dunnell, Minn. Digest, § 8420.

[5] G. S. 1913 § 7899; Dunnell, Minn. Digest, § 8425.

[6] Washburn v. Mendenhall, 21 Minn. 332 (holding form as above appropriate).

1741. Same—Short form—Wrongful detention.

I. That plaintiff is the owner of [describe property in general terms].

II. That defendant is in possession thereof, in the county and state aforesaid, and refuses to deliver the same to plaintiff, on demand, to plaintiff's damage $.

III. That the value thereof is $.

Wherefore [as in § 1740].

Sustained by Griswold v. Manning, 73 N. Y. S. 702.

1742. General form—Wrongful taking.

I. That at the times herein mentioned plaintiff was and still is the owner and entitled to the immediate possession of [describe property in general terms].

II. That on . 19 , defendant wrongfully took said property from plaintiff's possession and has ever since wrongfully detained, and still so detains the same, from plaintiff, in the county and state aforesaid, to plaintiff's damage $.

III. [Allege a demand as in § 1740 if desired, though it is unnecessary.]

IV. That the value thereof is $.

V. [Allege any special damages sought.]

VI. [That the value of the use thereof during said detention is $.]

Wherefore [as in § 1740].

This form should be used in all cases where it is unquestioned that the property was taken by defendant from the possession of 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 is prima facie evidence of title and right to immediate possession. It follows that if defendant admits the

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taking he assumes the burden of going on with the evidence. See Dunnell, Minn. Digest, § 8418. It is not necessary to use this form in any case, though the taking was wrongful. The form under § 1740 may be used.

1743. Against sheriff—Property taken from plaintiff's possession.

I. That at the times herein mentioned defendant was and still is the sheriff of county, Minnesota.

II. That at all such times plaintiff was and still is the owner and entitled to the immediate possession of [describe property in general terms].

III. That on 19 , defendant, as such sheriff, wrongfully took said property from the possession of plaintiff, [under process directed against the property of one A. B.], and has ever since wrongfully detained, and still so detains the same, from plaintiff, in the county and state aforesaid, to plaintiff's damage $.

[Add paragraphs III. IV. V. VI. of § 1740.]

Wherefore [as in § 1740].

See § 878.

1744. Same—Another form.

I. That at the times herein mentioned defendant was and still is the sheriff of county, Minnesota.

II. That on 19 , defendant, as such sheriff, wrongfully took from plaintiff's possession [describe goods in general terms], then and still the property of plaintiff, of the value of $ and wrongfully [detains the same from plaintiff, to his damage $] [sold the same, to plaintiff's damage $].

[Continue as in § 1740.]

Sustained by Moses v Bowe, 35 Hun (N. Y.) 560. See § 878.

1745. Against sheriff—Taking property from possession of third party.

I. That at the times herein mentioned defendant was and still is the sheriff of county, Minnesota.

II. That at all such times plaintiff was and still is the owner and entitled to the immediate possession of [describe property in general terms].

III. That on 19 , defendant, as such sheriff, wrongfully took said property from the possession of one A. B. [under process directed against the property of said A. B.] and has ever since wrongfully detained, and still so detains the same, from plaintiff, in the county and state aforesaid, to plaintiff's damage $.

IV. That on 19 , [at the time of such taking] plaintiff duly served upon defendant an affidavit of his title and right to the possession of said property, stating its value and the ground of such title and right, as provided

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by G. S. 1913 § 7843, and demanded of defendant that he deliver said property to plaintiff, but defendant refused and still refuses to do so.

V. That the value thereof is $.

VI. [Allege any special damages sought.]

VII. [That the value of the use thereof during said detention is $.]

Wherefore [as in § 1740].

1746. Against sheriff for exempt property.

I. [As I. in § 1745.]

II. [As II. in § 1745.]

III. That on 19 , defendant levied on said property under an execution issued upon a judgment recovered by one A. B. against plaintiff; that said judgment was not recovered for the purchase price of said property or any part thereof.

IV. That at the time of such levy plaintiff was and still is an actual resident of this state [and head of a family], [and engaged in the business of , in this state], having a residence in the city of ; that [said property] [said property to the amount of] [was then and still is exempt from execution]; [that at the time of said levy plaintiff duly notified defendant that said property was exempt from execution] [that defendant has not made an inventory thereof or caused the same to be appraised as provided by statute, though more than a reasonable time for doing so has elapsed since said levy, and plaintiff has selected (describe property selected) as exempt] [that defendant caused an appraisement of said property and plaintiff thereupon selected (describe property selected) as exempt] and demanded of defendant that he deliver the same to plaintiff, but defendant refused to do so and has ever since wrongfully detained, and still so detains the same, from plaintiff, to his damage $.

[Continue as in § 1740.]

1747. On plaintiff's bond.

I. That on 19 , A. B., one of the defendants herein, commenced an action in [the district court for county, Minnesota,] [this court,] against this plaintiff to recover possession of specific personal property, and on said day presented to the sheriff of [this] county an affidavit and requisition indorsed thereon as required by statute to secure the immediate delivery to him of said property.

II. That on said day the defendants herein made and delivered to said sheriff, pursuant to G. S. 1913, § 7836, a bond to plaintiff herein of which the following is a copy: [Copy of bond, with acknowledgment, justification and approval.]

III. That on 19 , upon receiving said affidavit, requisition and bond and in pursuance thereof, said sheriff took said property from plaintiff's possession and thereupon delivered it to plaintiff in said action.

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IV. That on 19 , a judgment was duly rendered by said court in said action wherein the possession of said property was adjudged to this plaintiff and the sum of $ damages, and the sum of $ costs and disbursements, were awarded to him against said A. B., and wherein it was further adjudged that said property was of the value of $, and that if the same was not returned to this planitiff by said A. B. that said A. B. pay to this plaintiff said sum of $.

V. That said property has not been returned to this plaintiff, nor has any part of said aggregate sum of $ been paid.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 8431.

1748. On defendant's bond.

I. That on 19 , this plaintiff commenced an action in [the district court for county, Minnesota,] [this court,] against A. B., one of the defendants herein, to recover possession of specific personal property.

II. That in the course of said action such proceedings were had under the statute that on 19 , the defendants herein made and delivered to the sheriff of said county, pursuant to G. S. 1913, § 7838, a bond to plaintiff of which the following is a copy: [Copy of bond, with acknowledgment, justification and approval.]

III. That said property, which had theretofore been replevied by the plaintiff in said action, was returned to the said A. B., defendant in said action, pursuant to said bond and to a written demand made by him upon said sheriff pursuant to G. S. 1913, § 7838.

IV. That thereafter such proceedings were had in such action that on 19 , this plaintiff recovered judgment, which was duly rendered by said court in said action, against said A. B., the defendant therein, adjudging that the plaintiff therein recover possession of said property, or the sum of $, in case possession could not be had, and for the sum of $ damages, and the sum of $ costs and disbursements.

V. That no return of the property has been had and no part of said judgment has been paid.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 8432.

1749. Denial of taking.

The defendant for answer to the complaint herein denies [that he took said goods, or any part thereof, from plaintiff's possession] [each and every allegation in the paragraph thereof].

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1750. Denial of wrongful detention.

The defendant for answer to the complaint herein denies [each and every allegation in the paragraph thereof] [that plaintiff has ever demanded from defendant the delivery of said goods, or any part thereof, or that defendant has refused to deliver them to plaintiff, or (wrongfully) detains them from plaintiff].

1751. Denial of plaintiff's title.

The defendant for answer to the complaint herein denies [each and every allegation in the paragraph thereof] [that plaintiff, at the commencement of this action, was or now is, the owner, or then was or now is entitled to the possession of said goods, or any part thereof] [and alleges that defendant then was and now is the owner and entitled to the immediate possession thereof] [and alleges that one A. B. then was and now is the owner and entitled to the immediate possession thereof].

1752. Denial of value.

The defendant for answer to the complaint herein denies that said goods are of the value of $, or more than $.

1753. Justification of taking by servant.

The defendant for answer to the complaint herein alleges that said goods were, at the time mentioned therein, and still are, the property of one A. B., who was then this defendant's employer, and in whose behalf and at whose direction defendant was acting in taking them from plaintiff's possession.

1754. Property in custodia legis—Trustee in bankruptcy.

The defendant for answer to the complaint herein alleges:

I. That on 19 , the United States District Court for the District of Minnesota, [Third] Division, duly appointed defendant a trustee in bankruptcy of one A. B., who on 19 , had been duly adjudged a bankrupt by said court, and defendant thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such trustee.

II. That the property described in the complaint is the property of said A. B. and part of the assets of his estate in bankruptcy, and defendant holds the same as such trustee and officer of said United States District Court.

III. That by reason of the premises this court is without jurisdiction in this action.

Wherefore plaintiff demands judgment dismissing this action, with costs.

See Druhe Hardwood Lumber Co. v. Fischbein, 101 Minn. 81, 111 N. W. 950.

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1755. Defence that thing is held as a pledge or as collateral security.

The defendant for answer to the complaint herein alleges that said was delivered by plaintiff to defendant [as collateral security] [by way of pledge] to defendant to secure the payment of a loan of $, then made by defendant to plaintiff, no part of which has been paid, and defendant detains the same for such security.

1756. Claim of lien by factor.

The defendant for answer to the complaint herein admits that plaintiff is the owner of said property and alleges that defendant received the same from plaintiff as his agent to sell on commission; that defendant paid the freight on the same from New York to Minneapolis, and at the request of plaintiff paid insurance on it, and stored it in its warehouse in Minneapolis, and thereby advanced and expended $ as such agent in connection with said property, and he withholds the same from plaintiff to secure the repayment from plaintiff of said advances and expenditures, for which defendant claims a lien on said property.

Based on answer in Haebler v. Luttgen, 61 Minn. 315, 63 N. W. 720.

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1757. Trust in restraint of trade—Forfeiture of corporate charter—Prohibiting foreign corporation from doing business.

The state of Minnesota, upon the relation of the Attorney General and the County Attorney of Steele county, brings this action under the provisions of G. S. 1913 §§ 8973, 8974, and alleges:

I. That the defendant, Creamery Package Manufacturing Company, is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of the state of Illinois and authorized to do business in this state.

II. That the defendant, Owatonna Manufacturing Company, is, and at the times herein mentioned was, a corporation duly organized and existing under the laws of this state, with its office and principal place of business in the city of Owatonna, Minnesota.

III. That on and prior to March 1, 1898, the said Creamery Package Manufacturing Company maintained a place of business in the city of Minneapolis, Minnesota, from which it sold throughout this state churns, butter-making machines, and all kinds of creamery supplies, in direct competition with all other persons, firms and corporations engaged in the business of selling such articles in this state.

IV. That on and prior to March 1, 1898, F. B. Fargo & Company, a corporation duly organized and existing under the laws of this state, maintained a place of business in the city of St. Paul, Minnesota, from which it sold throughout this state, churns, butter-making machines, and all kinds of creamery supplies, manufactured by it, in direct competition with said Owatonna Manufacturing Company, and all other persons, firms and corporations engaged in the business of selling such articles in this state.

V. That on and prior to March 1, 1898, the defendant, Owatonna Manufacturing Company, was engaged in the business of manufacturing and selling throughout this state churns, butter-making machines and creamery supplies, in the open market, to all persons, firms, corporations and creameries purchasing such articles, in direct competition with said F. B. Fargo & Company, and all other persons, firms and corporations engaged in the business of selling such articles in this state.

VI. That on March 1, 1898, defendants, and many other corporations, firms and persons, to plaintiff unknown, which were engaged in the same business as that of defendants, and among all of which there was then and for several years last past had been strong competition, did create and enter into an agreement, trust and combination, in and by which, under various written and oral agreements between them the said Creamery Package Manufacturing Company purchased and became the owner of all the property of said F. B. Fargo &

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Company, and in payment thereof issued certain shares of its capital stock; and the said Creamery Package Manufacturing Company likewise purchased, paid for and became the owner of all the property of said many other corporations, firms and persons to the plaintiff unknown; and the said Owatonna Manufacturing Company agreed to no longer sell in the open market any of the churns, butter-makers or creamery supplies manufactured by it, but agreed to sell to said Creamery Package Manufacturing Company alone all the churns and butter-making machines thereafter to be made by it, and the said Creamery Package Manufacturing Company agreed to sell the same at a greatly increased price to the persons, firms and corporations purchasing the same, and to pay to said Owatonna Manufacturing Company fifty per cent. of the price so obtained, and to purchase of the said Owatonna Manufacturing Company a certain per cent. (about 55%) of the churns and butter-makers sold by it, said Creamery Package Manufacturing Company, and the said Owatonna Manufacturing Company agreed to sell and dispose of no churns or butter-making machines to any firm, person or corporation other than said Creamery Package Manufacturing Company; and it was further understood and agreed between defendants and all said other corporations, firms and persons to plaintiff unknown that there should never thereafter be any competition between them or any of them.

VII. That said Creamery Package Manufacturing Company has never operated the said F. B. Fargo & Company business under the name of said Creamery Package Manufacturing Company, but has always claimed and pretended to the general public that said F. B. Fargo & Company and said Creamery Package Manufacturing Company were and are selling churns, butter-making machines and creamery supplies in direct competition with each other, while in fact there never has been any competition between them since March 1, 1898, and ever since that day all the property and rights of the said F. B. Fargo & Company have been owned and controlled by the said Creamery Package Manufacturing Company.

VIII. That the object of said trust, combination and agreements was to regulate and fix the prices of said churns, butter-making machines and creamery supplies within this state, and to limit the production thereof, in restraint of trade, and to prevent, limit and destroy all competition in the purchase and sale of such churns, butter-making machines and creamery supplies within this state.

IX. That ever since March 1, 1898, all said agreements have been continued, renewed and carried out by defendants and said other corporations, firms and persons to plaintiff unknown, and for the same purpose on the part of defendants and all others connected with them, to wit, to regulate and fix the prices of said churns, butter-making machines and creamery supplies within this state, and to limit the production thereof, in restraint of trade, and to prevent, limit and destroy all competition in the purchase and sale of such churns, butter-making machines and creamery supplies within this state.

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X. That by virtue of said trust, combination and agreements, the defendants and the other said corporations, firms and persons to plaintiff unknown, have, ever since March 1, 1898, regulated and fixed the prices of such churns, butter-making machines and creamery supplies within this state, and have limited the production thereof, in restraint of trade, and have prevented, limited and destroyed competition in the purchase and sale of such churns, butter-making machines and creamery supplies in this state, and are now doing so.

XI. That immediately upon the formation of said trust and combination and the making of said agreements, and by reason thereof, the selling prices throughout this state of such churns, butter-making machines and creamery supplies were arbitrarily advanced from ten to fifty per cent. by defendants and the other said corporations, firms and persons to the plaintiff unknown, without any justification or cause therefor except the formation of said trust, which advance in selling prices has ever since been, and still continues to be, maintained by said trust.

XII. That prior to and ever since March 1, 1898, the said Creamery Package Manufacturing Company has maintained, and still maintains and operates, under its own name, a manufactory and place of business in the city of Mankato, Minnesota, and a place of business under its own name in the city of Minneapolis, Minnesota; and ever since March 1, 1898, it has operated and conducted the said place of business of F. B. Fargo & Company (now the Fargo Creamery Supply House).

XIII. That through the means aforesaid the said Creamery Package Manufacturing Company has wrongfully secured and now wrongfully controls more than three-fourths of all the business of manufacturing and selling churns, butter-making machines and creamery supplies in this state, amounting to several hundreds of thousands of dollars annually; and ever since March 1, 1898, it has sold, and still continues to sell, said churns, butter-making machines and creamery supplies at excessively high prices, and with excessive profits to itself, which prices would not and could not have been secured in the open market with healthful and bona fide competition, in the absence of any such combination, trust and agreements as aforesaid.

Wherefore plaintiff demands judgment forfeiting the corporate franchises of said Owatonna Manufacturing Company and prohibiting said Creamery Package Manufacturing Company from continuing its business in this state; for a temporary injunction restraining the defendants from transacting business in this state during the pendency of this action; and for such other relief as may be just, with costs.

Substance of complaint in State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126, 623.

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1758. Allegation of existence of road.

That [running through said premises] is a public road and highway [duly laid out, opened, kept in repair, maintained and used by the public].[1]

[1] This may ordinarily be omitted, but it is sometimes practically advantageous to allege it.

1759. Dedication by user.

That [running through said premises] is a public road and highway which has been continuously used and kept in repair and worked as a public highway for more than six years immediately prior to [19] [the commencement of this action] [the acts complained of in the complaint].

See G. S. 1913 § 2563, and Dunnell, Minn. Digest, § 8444.

1760. Injunction against proceedings to lay out road.

I. That plaintiff is the owner and in possession of the south half of section 36, township 122, range 40, in Swift county, Minnesota.

II. That said land is inclosed by a wire fence and during the proper season is used as a pasture for cattle; that it was so used last year, and it is the intention of plaintiff to so use it during the year 1904.

III. That prior to March 19, 1903, a petition was presented to the board of county commissioners of said county praying for the laying out of a public highway as follows: Beginning at the common quarter post between section 19 of the town of Benson and section 24 of the town of Clontarf, and running thence south on the town line between the townships of Benson and Clontarf, and between the township of Six Mile Grove and the village of Benson, to a point where the said township line intersects the Benson and Clontarf road, to intersect the said road and there terminate.

IV. That such proceedings were had upon said petition in relation to the same, by said board, that on March 19, 1903, an order purporting to lay out said highway, along the line designated in said petition, was directed to be made by said board.

V. That afterwards the auditor of said county notified the board of supervisors of said towns, that said road had been ordered as aforesaid, and plaintiff has been notified to remove his fence from the route of said proposed road over his said land.

VI. That said petition, in pursuance of which said road was attempted to be laid out as aforesaid, was not in accordance with the requirements of section one, chapter 196 of the General Laws of Minnesota for 1897, in that it was not signed by the requisite number of freeholders, and did not properly

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describe the road to be laid out, nor one that said board had the authority to lay out, and did not give the names of the owners of the land through which said road would pass, and said petition, by reason of said defects and omissions, was insufficient to authorize or warrant any action or proceedings by said board in the matter whatever.

VII. That no notice was given to plaintiff of the institution and pendency of said proceedings, and plaintiff made no appearance in said proceedings except specially, for the express purpose of objecting to the jurisdiction of said board in the premises.

VIII. That said board did not make any assessment or award of damages or compensation for the taking of plaintiff's said land, or for the taking of any land, for said road, nor did it make any assessment of the benefits or damages to any land by reason of the laying out of said road.

IX. That by reason of said defects and omissions in the proceedings of said board, as well as other defects and irregularities, said board never had any authority or jurisdiction to make or lay out the proposed highway as aforesaid, and their proceedings therein are wholly void; and that no legal highway has ever been laid out over the route designated in said petition.

X. That notwithstanding the facts aforesaid, the defendants, as supervisors of the said towns of Contarf and Benson, threaten and propose to lay out and construct a public highway over and across the land of plaintiff, on the line of the said proposed highway in compliance with the said order of said board and in the belief that the same is a valid and duly laid out public highway.

XI. That if said highway is laid out and constructed as is threatened and proposed, plaintiff will suffer great and irreparable injury, for which he has no adequate remedy at law.

XII. That the building of said highway will necessitate the removal of plaintiff's fence, and prevent his using said land, for the purpose for which it is now used and adapted, and will require grading and digging up the soil and construction of grade drains, and the trespass thereon of a large number of persons necessary to do said work, and plaintiff's remedy at law therefore would involve a multitude of suits.

XIII. That plaintiff also owns land adjoining on the east the land hereinbefore described, which is used in connection with said land, and within said inclosure, and affords access to the Chippewa River, and the construction of said road would cut the said pasture in two parts and cut off all access to the river, thereby destroying the value of said land for the purpose of pasture.

XIV. That A. B., C. D., and E. F. are the supervisors of the town of Benson, and G. H., I. J., and K. L. are the supervisors of the town of Clontarf, and duly qualified and acting as such, and both said towns are duly created and existing townships under the laws of Minnesota.

Wherefore plaintiff demands judgment that said highway attempted to be laid out by the board of county commissioners of Swift county, as above set forth, is not a legally laid out or established highway; enjoining the said towns

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of Clontarf and Benson, and the defendants as supervisors of said towns, respectively, as above stated, their officers, agents and servants, and all and each of them, from laying out, working or constructing a highway over a line of road set forth in the complaint where it crosses the land of plaintiff as aforesaid, in pursuance of the order and direction of the board of county commissioners of Swift county as herein set forth, or of entering upon the premises of plaintiff, therefor, or taking down the fence of plaintiff on said land or any of them, and generally to refrain from carrying out the order of said board of county commissioners, so far as it affects said land of plaintiff; and that they be temporarily enjoined as aforesaid during the pendency of this action; and for such other relief as may be just, with costs.

Complaint in Johnson v. Clontarf, 98 Minn. 281, 108 N. W. 521.

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SALES

1761. Common indebitatus count for goods sold and delivered.[1]

I. That defendant is indebted to plaintiff in the sum of $ for goods sold and delivered by plaintiff to defendant, at his request,[2] [on 19 ,] [between 19 , and 19 ,] [3] [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].[4]

II. That no part thereof has been paid [except $].

Wherefore [as in § 919].

[1] This is substantially the common indebitatus count for goods sold and delivered. See § 530. Its sufficiency under the code is well settled. See §§ 531, 860. As to when it will lie see § 862. This form is recommended for use in all cases when applicable. It is preferable to a quantum valebant count as it avoids the danger of a variance.

[2] This allegation is usual and appropriate but unnecessary as it is implied in the allegation of a sale. Victors v. Davis, 12 M. & W. 760, Dereimer v. Fenna, 7 M. & W. 439; Acome v. American Mineral Co., 11 How. Pr. (N. Y.) 24.

[3] The various sales made by a merchant to his customer in a running account constitute a single cause of action and a complaint may state an indebtedness in a gross sum for all the sales. Memmer v. Carey, 30 Minn. 458, 15 N. W. 877; Ferguson v. Mitchell, 2 C. M. & R. 687. See § 859.

[4] It is not necessary, as against a demurrer, to attach a statement of the account, but it is generally advisable to do so to anticipate a demand for a bill of particulars and to force the defendant to admit the items of the account or plead specifically. The statement should be itemized, with dates, quantity and value or price, and any credits or deductions. See § 405.

1762. Common indebitatus count for goods bargained and sold.

I. That defendant is indebted to plaintiff in the sum of $ for goods bargained and sold by plaintiff to defendant, at his request, [on 19 ,] [between 19 , and 19 ,] [as more fully appears by a statement of account hereto attached, marked exhibit A, and made a part hereof].

II. That no part thereof has been paid.

Wherefore [as in § 919].

See § 863.

1763. On express contract at fixed price.

I. That [on 19 ,] [between 19 , and 19 ,] plaintiff [sold and delivered] [bargained and sold] to defendant, at his request, [describe goods in general terms], [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That defendant then promised to pay plaintiff therefor $ [within days from said sale and delivery] [on 19].

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III. That [on 19 , plaintiff demanded payment thereof from defendant but] no part thereof has been paid [except $].

Wherefore [as in § 919].

See § 864, and Dunnell, Minn. Digest, §§ 8630–8644.

1764. Same—Setting out contract in writing.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. [That plaintiff duly performed all the conditions thereof on his part.] [That on 19 , plaintiff delivered said to defendant at , and has otherwise duly performed all the conditions of said agreement on his part.]

[Continue as in preceding forms.]

1765. Sale to defendant with delivery to third person.

I. That on 19 , plaintiff bargained and sold to defendant, and delivered to one A. B., at defendant's request [continue as in §§ 1761, 1763].

A recovery may be had in this class of cases under a common count for goods sold and delivered to defendant. 19 Ency. Pl. & Pr. 17. See §§ 862, 1761.

1766. Against buyer for price—Goods delivered but not accepted.

I. [As in § 1773.]

II. That plaintiff has fully performed all the conditions of said agreement on his part, and on 19 , delivered said goods to defendant at , but defendant refused to accept the same or to pay plaintiff therefor, to plaintiff's damage $.

Wherefore [as in § 919].

1767. For reasonable value of goods—On implied contract—Quantum valebant.

I. That [on 19 ,] [between 19 , and 19 ,] plaintiff sold and delivered to defendant, at his request, [describe goods in general terms], [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That the same were reasonably worth $.

III. That no part thereof has been paid.

Wherefore [as in § 919].

See § 868.

1768. Same—Quantum valebant and express contract.[1]

I. [As in § 1767.]

II. That the same were [reasonably worth $, which defendant agreed

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to pay to plaintiff therefor] [of the agreed and reasonable value of $] [of the reasonable value and agreed price of $].

III. That no part thereof has been paid.

Wherefore [as in § 919].

[1] This form is often used in this state. See cases under § 868. If no objection is made a recovery may be had under it upon proof of either an express or implied contract. See Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444. It is safer to use the form given under § 1761 or § 1769.

1769. On express and implied contract—Two causes of action.

For a first cause of action:

I. That [on 19 ,] [between 19 , and 19 ,] plaintiff sold and delivered to defendant, at his request, [describe goods in general terms], [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That the same were reasonably worth $.

III. That no part thereof has been paid [except $].

For a second cause of action:

I. The plaintiff repeats and makes a part of this cause of action each and every allegation in the first paragraph of the first cause of action herein set forth and further alleges:

II. That defendant promised to pay plaintiff therefor $.

III. That no part thereof has been paid [except $].

Wherefore [as in § 919].

This form may be used to avoid a variance where it is doubtful whether the goods were sold under an express or implied contract. The two causes of action are not inconsistent and plaintiff cannot be required to elect between them, but may recover on either one according to the proof on the trial. Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124 (this was an action for services but the principle is the same as in an action for goods sold and delivered).

1770. For reasonable value of goods sold on credit.

I. That on 19 , plaintiff sold and delivered to defendant, at his request, [describe goods in general terms], for which defendant agreed to pay to plaintiff what they were reasonably worth, in [thirty] days after delivery.

II. That the same were reasonably worth $.

III. That no part thereof has been paid.

Wherefore [as in § 919].

1771. Against buyer for agreed price—Delivery on trial—Failure to return.

I. That on 19 , plaintiff delivered to defendant, at his request, [a horse], to be had and used on trial by defendant, and in consideration

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thereof defendant promised plaintiff to return the same to him [within a reasonable time] [on 19], or to pay him $ therefor.

II. That defendant has not returned said [horse] to plaintiff, [though a reasonable time has elapsed,] nor has he paid any part of the agreed purchase price, to plaintiff's damage $.

Wherefore [as in § 919].

1772. Against buyer for anticipatory breach of contract.

I. [As in § 1773.]

II. That on 19 , before the agreed time for the delivery of said goods, defendant notified plaintiff that he would not [accept or pay for the same] [pay the agreed price for the same if delivered, and that he would only pay $ therefor].

III. That up to the time when he was so notified plaintiff had duly performed all the conditions of said agreement on his part, and was ready and willing to fully carry out said agreement, and would have delivered said goods as agreed but for defendant's said refusal.

IV. That by reason of the premises plaintiff has been damaged in the sum of $.

Wherefore [as in § 919].

See Alger-Fowler Co. v. Tracy, 98 Minn. 432, 107 N. W. 1124.

1773. Against buyer for breach of contract—Refusal of buyer to accept goods—No delivery.

I. That on 19 , plaintiff and defendant mutually agreed that plaintiff should sell to defendant and defendant should buy from plaintiff [describe goods in general terms stating quantity]; that plaintiff should deliver the same to defendant at , on 19 ; and that defendant should then accept the same and pay plaintiff $ therefor [upon delivery] [within days from the delivery thereof].

II. That plaintiff has duly performed all the conditions of said contract of sale on his part, and on 19 , was ready and willing [and offered] to deliver said goods to defendant at , [and duly tendered the same to defendant].

III. That defendant refused to accept said goods or any part thereof, or to pay for them as agreed, to plaintiff's damage $.

IV. [That the market price of said goods on 19 , at , was $.]

V. [That on 19 , at , plaintiff resold said goods to one A. B. for $.]

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VI. [Allege any special damages sought.]
Wherefore [as in § 919].

See Dunnell, Minn. Digest, §§ 8628, 8629.

1774. Acceptance of part performance.

I. [As in § 1773.]

II. That on 19 , plaintiff delivered to defendant , and the latter received and accepted the same, without objection that the amount thereof was not the amount called for by said agreement, and as a full performance thereof by plaintiff.

[Continue as in preceding forms.]

1775. Against seller for not delivering goods.

I. That on 19 , plaintiff and defendant mutually agreed that defendant should sell to plaintiff and plaintiff should buy from defendant [describe goods in general terms stating quantity]; that defendant should deliver the same to plaintiff at , [on 19 ,] [on demand] [within a reasonable time] [in instalments as follows:]; and that plaintiff should accept the same and pay defendant $ therefor [upon delivery] [within days from the delivery thereof].

II. [That on 19 , plaintiff duly demanded of defendant that he (immediately) deliver said goods to plaintiff at .] [That plaintiff was ready and willing, at the agreed time and place, to receive and pay for the goods according to the agreement, and has otherwise duly performed all the conditions of said agreement on his part.] [That more than a reasonable time for the delivery of said goods has elapsed, and plaintiff has always been ready and willing, and on 19 , at , duly offered to receive and pay for the same according to said agreement, and has otherwise duly performed all the conditions of said agreement on his part.] [That more than a reasonable time for the delivery of said goods has elapsed; that plaintiff has at all times since said agreement been ready and willing to receive said goods at , and to pay therefor, according to said agreement, of which defendant had due notice, and plaintiff has otherwise duly performed all the conditions of said agreement on his part.] [That on 19 , at , plaintiff was ready and willing and duly offered to defendant to receive and pay for said goods according to said agreement, and requested defendant to deliver the same, and has otherwise duly performed all the conditions of said agreement on his part.]

III. That defendant has not delivered any part of said goods to plaintiff, [to plaintiff's damage $].

IV. [That because of defendant's failure to deliver said goods plaintiff was compelled to purchase the same in open market at a cost of $.]

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V. [That the market price of said goods at , on 19 , was $.]

VI. [That by reason of the premises plaintiff has been damaged in the sum of $.]

Wherefore [as in § 919].

See § 870, and Dunnell, Minn. Digest, §§ 8613–8615.

1776. Same—Non-delivery of part.

I. [As in § 1775.]

II. That on 19 , defendant delivered to plaintiff [five hundred bushels of wheat] under said agreement and plaintiff paid to defendant $ therefor.

III. [Allege plaintiff's performance, and readiness and defendant's default, and resulting damages as in § 1775.]

1777. Against seller—No delivery—Part payment.

I. That on 19 , it was mutually agreed between plaintiff and defendant that defendant should sell to plaintiff and plaintiff should buy from defendant [describe goods in general terms]; that defendant should deliver the same to plaintiff at , on 19 ; and that plaintiff should then accept the same and pay defendant $ therefor as follows: $ payable at the time of making the agreement, and $ payable on the delivery of the goods.

II. That plaintiff then and there paid $ to defendant as agreed.

III. That plaintiff has duly performed all the conditions of said agreement on his part, and at the time and place for the delivery of the goods was ready and willing to receive and accept the same and pay the balance of the purchase price therefor, of all of which defendant had due notice, yet defendant has delivered no part of said goods, to plaintiff's damage $.

Wherefore [as in § 919].

1778. Against seller for anticipatory breach.

I. [Allege making of contract as in § 1775.]

II. That on 19 , before the agreed time for the delivery of said goods, defendant notified plaintiff [that he would not deliver the same or any part thereof] [that he would not carry out the agreement].

III. That up to the time when he was so notified plaintiff had duly performed all the conditions of said agreement on his part, and was ready and willing to fully carry out said agreement, and would have been ready and willing to accept and pay for said goods as agreed but for defendant's said refusal.

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IV. That by reason of the premises plaintiff has been damaged in the sum of $.

Wherefore [as in § 919].

See Alger-Fowler Co. v. Tracy, 98 Minn. 432, 107 N. W. 1124.

1779. Against seller—Special damages—Loss of profits.

That prior to the making of said agreement one A. B. had agreed to purchase said goods from plaintiff and to pay him $ therefor; that defendant had notice of the terms of said agreement between plaintiff and A. B. and agreed to sell said goods to plaintiff to enable him to resell them to A. B.; that such goods were not purchasable in the open market at , on 19 .

1780. Sale by sample—Breach of condition.

I. That on 19 , plaintiff bought of defendant certain [describe goods in general terms], by samples which represented sound and merchantable goods and defendant agreed that the goods sold and to be delivered to plaintiff should in all respects be equal to such samples and plaintiff bought relying thereon.

II. That on 19 , defendant delivered said goods to plaintiff in several boxes and upon examination of the goods in some of the boxes they appeared to plaintiff to correspond to said samples.

III. That thereupon, relying on said agreement, plaintiff accepted all said goods and paid to defendant the agreed price therefor, to wit, $.

IV. That thereafter, and without knowledge of their real condition, plaintiff sold and delivered a portion of said goods to his customers; that said customers returned the same as [damaged] [imperfect] and refused to keep or pay for them; and thereupon plaintiff examined all the rest of said goods so delivered by defendant and found that no part thereof corresponded with said samples, but were imperfect and unmarketable and of no value.

V. That plaintiff promptly notified defendant of the character and condition of said goods and offered to return the same, but defendant refused to receive them or to repay to plaintiff the purchase price thereof, to his damage $.

Wherefore [as in § 919].

1781. For breach of warranty—General form.

I. That on 19 , defendant warranted to plaintiff that a certain [machine] which he offered to sell to plaintiff was [state warranty].

II. That plaintiff was thereby induced to buy said [machine] of defendant and pay him $ therefor.

III. That said [machine] was not [negative warranty].

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IV. That in consequence said [machine] was [not worth more than $] [worthless], whereas it would have been worth $, if it had been as warranted by defendant.

V. That thereby plaintiff was damaged $.

VI. [Allege any special damages sought.]

Wherefore [as in § 919].

See § 872, and Dunnell, Minn. Digest, §§ 8618–8627.

1782. Breach of warranty of soundness of horse.

I. That on 19 , defendant, offering to sell to plaintiff a certain horse, warranted said horse to be sound, kind and true, and gentle in the harness.

II. That plaintiff, relying upon said warranty, purchased said horse of defendant and paid him $ therefor.

III. That at the time of said sale and warranty, said horse was unsound, unkind and untrue, and restive, and ungovernable in harness, and had an infectious disease, to wit, the glanders, and was worthless, all of which was then well known by defendant.

IV. That thereafter said horse infected with said disease three other horses of plaintiff, of the value of $, by reason whereof one of said horses died and the others were rendered worthless; that defendant has spent $ in attempting to cure said horses.

V. That by reason thereof plaintiff has been damaged $.

Wherefore [as in § 919].

Based on Form 321, Conn. Pr. Act.

1783. Same—Another form.

I. That on 19 , defendant warranted to plaintiff that a certain horse was sound and thereby induced plaintiff to buy said horse of him and pay him $ therefor.

II. That said horse was not then sound and in consequence was worth $ less than if he had been as warranted by defendant, to plaintiff's damage $.

Wherefore [as in § 919].

1784. For breach of warranty of title.

I. That on 19 , defendant offered to sell to plaintiff a certain [automobile], then in defendant's possession, and warranted the same to be defendant's property.

II. That plaintiff, relying upon said warranty, purchased said [automobile] from defendant and paid him $ therefor.

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III. That said [automobile] was not then the property of defendant, but belonged to one A. B.

IV. That thereafter the said A. B. sued plaintiff to recover possession of the same; that plaintiff gave defendant due and timely notice of the commencement of said action and required him to defend the same or judgment would be suffered by failure to answer; that defendant neglected to defend said action, and such proceedings were afterwards had therein that the said A. B. recovered, by legal process, possession of said [automobile] from plaintiff, with $ costs, which plaintiff paid.

V. That thereby plaintiff was damaged $.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 8571.

1785. For recovery of money paid on a fraudulent sale.

I. That on 19 , defendant offered to sell to plaintiff an [automobile], and to induce plaintiff to buy it stated and represented to plaintiff that [state representations].

II. That said representations were false.

III. That defendant made said representations knowing them to be false and with intent to deceive and defraud plaintiff.

IV. That plaintiff, believing said representations to be true, was thereby induced to buy said [automobile] of defendant and pay him $ therefor.

V. That on 19 , immediately upon discovering the falsity of said representations, plaintiff notified defendant that he rescinded said sale and [offered to return] [returned] said [automobile] to defendant and demanded a return of the purchase price so paid, but defendant refused to return the same or any part thereof, [and refused to receive the automobile].

Wherefore [as in § 919].

See Dunnell, Minn. Digest §§ 8616, 8617. A common count for money had and received would suffice. See §§ 762, 1575.

1786. For breach of contract to give a note upon delivery of a machine.

I. That at the times herein mentioned plaintiffs were, ever since have been, and still are partners, doing business under the firm name of Deering Harvester Company.

II. That on May 27, 1901, at St. Peter, Minnesota, plaintiffs and defendant, entered into an agreement in writing, of which the following is a copy: [Copy of agreement in the form of an order for a harvester, bundle carrier, and binder cover, for which defendant was to turn over, on its delivery, an old Deering binder, and an approved note for $100, payable in November following. This order was addressed to plaintiffs' agents, signed by defendant and accepted by plaintiffs.]

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III. That plaintiffs duly accepted said order or contract and have duly performed all the conditions thereof on their part, and, on June 17, 1901, were ready and willing to deliver said harvester and binder with bundle carrier and binder cover, to defendant in accordance with said contract or order, and on June 25, 1901, duly delivered the same to defendant in accordance with said order or contract.

IV. That defendant refused to accept said machine, and refused to settle for the same in accordance with the terms of said contract or order, and to give to plaintiffs said note for $100, and still refuses, though frequently requested to do so, to plaintiffs' damage $100.

Wherefore [as in § 919].

Sustained on demurrer in Deering v. Johnson, 86 Minn. 172, 90 N. W. 363.

1787. Denial and allegation of express contract.

The defendant for answer to the complaint herein:

I. For a first defence denies each and every allegation in the [second] paragraph thereof.

II. For a second defence alleges that said goods were sold to defendant by plaintiff under an express contract between plaintiff and defendant, which is still in force, whereby it was agreed that [state substance of agreement and show that plaintiff is in default, that the agreement is still in force and that defendant has duly performed all the conditions thereof on his part].

1788. Denial of plaintiff's performance.

The defendant for answer to the complaint herein denies [each and every allegation in the paragraph thereof] [that plaintiff has duly performed all the conditions of said agreement on his part and alleges that (state wherein plaintiff has failed of performance)].

1789. Denial of sale.

The defendant for answer to the complaint herein denies that plaintiff sold and delivered to defendant said goods.

1790. Denial of value.

The defendant for answer to the complaint herein denies [each and every allegation contained in the paragraph thereof] [that said goods were reasonably worth $ and alleges that they were reasonably worth no more than $].

This is not new matter requiring a reply. King v. Burnham, 93 Minn. 288, 101 N. W. 302.

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1791. Denial of proper delivery.

The defendant for answer to the complaint herein alleges that it was a part of said agreement that plaintiff should deliver said goods at , but they have not been so delivered, or offered for such delivery.

1792. Denial that goods were necessaries.

The defendant for answer to the complaint herein denies that said goods were necessary for the use of the said A. B.

1793. Excuse for defendant's non-performance.

The defendant for answer to the complaint herein alleges that on 19 , before the time fixed in said agreement for defendant to perform his part thereof, plaintiff notified defendant that he would not [deliver said goods to defendant] [carry out said agreement], and thereupon defendant abandoned said agreement.

1794. Payment.

The defendant for answer to the complaint herein alleges that on 19 , he paid to plaintiff $ in full payment for said goods.

For other forms see §§ 1680–1688.

1795. Rescission by mutual consent.

The defendant for answer to the complaint herein alleges that on 19 , said sale was rescinded by mutual agreement of plaintiff and defendant and thereupon defendant returned said goods to plaintiff and plaintiff received the same from defendant in full satisfaction and discharge of any and all claims arising out of the transaction alleged in the complaint.

1796. Title in third party—Surrender of possession—Payment to third party.

The defendant for answer to the complaint herein denies that said goods were the property of plaintiff at the time of the alleged sale and alleges that they were then the property of one A. B. [from whom defendant purchased them and not from plaintiff] [and that on 19 , the said A. B. demanded possession thereof from defendant and threatened to begin legal proceedings against defendant to obtain possession thereof, and thereupon defendant (surrendered possession thereof to the said A. B.) (paid to the said A. B. $, the full value thereof)].

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1797. Return of machine after trial as unsatisfactory.

The defendant for answer to the complaint herein alleges that said machine was sold to him by plaintiff upon the condition that he might take it and try it and that if it did not work satisfactorily to him he [might return it to plaintiff] [need not accept it]; that defendant took the machine on that condition and gave it a fair trial for days, but it did not work satisfactorily to him, and on 19 , he [returned it to plaintiff] [notified plaintiff that he would not accept it] for that reason.

See Dunnell, Minn. Digest, § 8562.

1798. Counterclaim for breach of warranty—Skeleton form.

The defendant, answering the complaint herein:

I. Admits that [state matters admitted].

II. Denies each and every allegation in the [second] and [third] paragraphs thereof.

For a counterclaim alleges:

I. That at the time of the sale of said [machine] plaintiff warranted to defendant that [state warranty].

II. That defendant was thereby induced to buy said [machine] of plaintiff [and agree to pay him $ therefor] [and give him said note therefor] [and pay him $ therefor].

III. That said [machine] was not [negative warranty].

IV. That in consequence said [machine] was [worthless] [not worth more than $], whereas it would have been worth $, if it had been as warranted by plaintiff.

V. That defendant was thereby damaged $.

Wherefore [as in § 919].

See § 865.

1799. Counterclaim for breach of warranty—Sale by sample and description.

[See form of answer in Miamisburg Twine & Cordage Co. v. Wohlhuter, 71 Minn 484, 74 N. W. 175.]

1800. Counterclaim for instalment of price paid—Breach of warranty.

[See form of answer in W. W. Kimball Co. v. Massey, 148 N. W. 307.]

1801. Recoupment for breach of warranty—Skeleton form.

The defendant, answering the complaint herein:

I. For a first defence denies each and every allegation in the [second] and [third] paragraphs thereof.

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II. For a second defence alleges that at the time of the sale of said [machine] plaintiff warranted to defendant that [state warranty]; that defendant was thereby induced to buy said [machine] of plaintiff; that said [machine] was not [negative warranty], and in consequence was [worthless] [not worth more than $], whereas it would have been worth $, if it had been as warranted by plaintiff; that defendant was thereby damaged $.

Wherefore defendant demands that that amount be deducted from any amount proved against him herein.

See § 866.

1802. Same—Another form.

I. That said goods were sold and delivered in the piece or package and without an opportunity for defendant to examine the same.

II. That at the time of the sale plaintiff warranted to defendant that the goods were and should be free from any defect or injury and should be marketable.

III. That a portion of said goods, [being the dry goods and hosiery in the package marked A, were defective, injured and unmarketable].

IV. That said defects were unknown to defendant at the time of the sale and delivery.

V. That defendant was thereby damaged $, the amount of the price of the goods so injured or defective.

Wherefore defendant demands that said amount be deducted from any amount that may be proved against him on the trial of this action.

Based on Form 426, Conn. Pr. Act. See § 866.

1803. Recoupment for delay in delivery.

[See form of answer in Paine v. Sherwood, 21 Minn. 225.]

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1804. Allegation of corporate existence.

That [plaintiff] [defendant] is, [and at the times herein mentioned was,] a [common] school district of county, [duly organized and existing as a public corporation under the laws of this state].

Some such allegation as this is usual but unnecessary. Courts take judicial notice of the organization and existence of the political subdivisions of the state. See Dunnell, Minn. Digest, § 3456. All school districts are corporations. G. S. 1913 § 2671.

1805. For services of teacher.

I. That defendant is, and at the times herein mentioned was a [common] school district, of county, [duly organized and existing as a public corporation under the laws of this state].

II. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

III. That in pursuance of said agreement plaintiff taught in said school from 19 , to 19 , and duly performed all the conditions of said agreement on his part.

IV. That defendant has not paid to plaintiff his salary under said agreement for the months of , amounting to $.

V. That at the times herein mentioned plaintiff was duly qualified to enter into said agreement and teach in said school by virtue of holding a [first] grade teacher's certificate duly issued to him on 19 , by , of which a certified copy was duly filed for record with the county superintendent of schools of said county on 19 .

Wherefore [as in § 919].

See § 877, supra; G. S. 1913 §§ 2829–2832, 2996; Dunnell, Minn. Digest, §§ 8686, 8700.

1806. On a district order.

I. That defendant school district is, and at all the times herein mentioned was, a common school district of Blue Earth county, duly organized and existing as a public corporation under the laws of this state.

II. That defendants A. B., C. D., and E. F. are the director, treasurer and clerk, respectively, of said district.

III. That on Nov. 5, 1896, one G. H. was the director, said C. D. was the treasurer, and one I. J. was the clerk, respectively, of said district.

IV. That on Nov. 5, 1896, said school district, by its said officers, made and delivered to plaintiff its written order on the treasurer of said district, of

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which the following is a copy: [Copy of order.] [If the consideration for the order does not appear on the face thereof allege the consideration and make it appear that the order was drawn for a proper object.]

V. That on Nov. 5, 1896, plaintiff presented said order to the treasurer of said district for payment, and demanded payment thereof and thereupon said treasurer duly accepted the order but refused payment thereof for want of funds and indorsed thereon, "Not paid for want of funds," and then returned it to plaintiff.

VI. That at various times since Nov. 5, 1896, and before the commencement of this action, and particularly on Oct. 29, 1900, plaintiff presented said order, indorsed as aforesaid, to the treasurer of said district and demanded payment thereof, but no part thereof has been paid.

Wherefore [as in § 919].

Substance of complaint sustained in Brown v. Fitcher, 91 Minn. 41, 97 N. W. 416.

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SEDUCTION

1807. Action by father.

I. That at the times herein mentioned A. B., aged years, was an unmarried daughter of plaintiff, living with him as a member of his family.

II. That about 19 , defendant [wilfully and maliciously] seduced said A. B., whereby she became pregnant, and on 19 , was delivered of a child.

III. That by reason thereof plaintiff necessarily spent $ for medical attendance and nursing the said A. B. in her confinement, and lost her services for months, and suffered great mental anxiety and shame for the dishonor to himself and family, all to his damage $.

Wherefore [as in § 919].

See § 57, and Dunnell, Minn. Digest, §§ 8709–8716.

SHERIFFS AND CONSTABLES

1808. Allegation of official character.

That at the times herein mentioned [plaintiff] [defendant] [one A. B.] was, and still is, the [duly elected, qualified and acting] [1] sheriff of [county, Minnesota] [said county].

[1] Omit except where the validity of his election or qualification is involved. See § 878.

1809. For neglecting to levy execution.

I. That at the times herein mentioned defendant was the sheriff of [this county] [county, Minnesota].

II. That on 19 , a judgment was duly rendered by [this court] [the district court for county, Minnesota], in favor of plaintiff and against one A. B. for $.

III. That on 19 , an execution against the property of the said A. B. was duly issued out of said court on said judgment, directed to defendant and delivered to him on that day, of which the following is a copy: [Copy of writ.]

IV. That at the time defendant received said writ, and while he had it in his hands, there was sufficient property in said county, belonging to said A. B. and subject to execution, out of which to satisfy said judgment in full, of all of which defendant had notice.

V. That defendant neglected to levy upon said property or to satisfy said

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judgment, or any part thereof, as by said execution he was required to do, and on 19 , returned the same wholly unsatisfied.

VI. [That after said return said A. B. became and still is insolvent.]

VII. That by reason thereof plaintiff has been damaged $.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 8741.

1810. For neglecting to make return.

[I. II. and III. as in § 1809.]

IV. That though more than sixty days have elapsed since the delivery of said execution to defendant, and before this action was brought, yet defendant has neglected to return the same, to plaintiff's damage $.

Wherefore [as in § 919].

1811. For neglecting to pay over moneys collected.

[I. II. and III. as in § 1809.]

IV. That thereafter defendant, as such sheriff, collected upon said execution $, besides his lawful fees.

V. That defendant has failed and neglected to pay to the clerk of said court or to plaintiff the amount so collected, or any part thereof, though more than sixty days have elapsed since the delivery of said execution to him, to plaintiff's damage $.

VI. [That on 19 , plaintiff demanded of defendant that he deliver to plaintiff the amount so collected, but he refused to do so.]

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 8745.

1812. For false return.

[I. II. and III. as in § 1809.]

IV. That within sixty days thereafter, defendant, as such sheriff, levied said execution upon certain goods and chattels of said A. B., in said county, of the value of $, an amount sufficient to satisfy said judgment in full and defendant's lawful fees, [but defendant refused to sell the same, and on 19 , released said levy] [but defendant did not satisfy said judgment or any part thereof out of said goods and chattels], but on 19 , falsely returned upon said execution to the clerk of said court, that said A. B. had no goods or chattels, [lands or tenements], within said county whereon to levy the amount of said judgment, or any part thereof, to plaintiff's damage $.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 8750.

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1813. Justification under process in replevin.

The defendant answering the complaint herein,

I. For a first defence denies each and every allegation contained in the [first] and [third] paragraphs thereof.

II. For a second defence alleges that on 19 , in an action brought by one A. B. against C. D. in [the district court for county, Minnesota,] [this court] to recover possession [among other things] of the property mentioned in the complaint in this action, said A. B., delivered to defendant, who then was and still is the sheriff of this county, an affidavit made by the said A. B. [made in his behalf] with a requisition indorsed thereon requiring this defendant, as such sheriff, to take said property from the said C. D. and deliver it to the said A. B.; and at the same time the said A. B. delivered to this defendant, as such sheriff, a bond, as required by statute in such case, of which affidavit, requisition and bond copies are hereto attached, marked Exhibits A, B, C, respectively, and made a part hereof; that by virtue of said proceedings, this defendant, as such sheriff, took and detained said property, and such taking and detention are the acts complained of in the complaint herein.

1814. Justification under writ of attachment.

I. That on 19 , one A. B. was indebted to C. D. in a cause of action arising on contract in the sum of $; that in an action brought in [this court,] [the district court for county, Minnesota,] by the said C. D. against the said A. B. for the recovery of said money and interest, a writ of attachment was duly allowed by the judge of said court on 19 , [after] [at the time] the summons was issued in said action, on an application of the plaintiff presenting an affidavit made by the plaintiff that a cause of action existed against the defendant, specifying the amount of the claim and the ground therefor, and alleging that [the debt was fraudulently contracted], and also presenting a bond in the sum of $, executed by the plaintiff with sufficient sureties conditioned that if judgment should be given for the defendant, or if the writ should be vacated, the plaintiff would pay all costs that might be awarded against him, and all damages caused by the attachment, not exceeding the penalty of the bond; that upon the filing of said affidavit and bond and the order of said judge allowing the writ, a writ of attachment was duly issued out of said court directed to this defendant, who then was and still is sheriff of this county, requiring him to attach and safely keep all the unexempt property of said A. B. within this county, or so much thereof as might be sufficient to satisfy the demand of plaintiff in said action, amounting to the sum of $, with costs and expenses; that on 19 , defendant, as such sheriff, acting under and by virtue of said writ, which had been delivered to him and was then in full force, duly levied upon and attached and

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took into his possession the goods mentioned in the complaint, as the property of the said A. B., which they then were and subject to such levy, and such levy and taking were the taking [and detention] alleged in the complaint.

1815. Justification under writ of execution.

The defendant, answering the complaint herein:

I. For a first defence denies each and every allegation contained in the [first] and [third] paragraphs thereof.

II. For a second defence alleges that on 19 , a judgment was duly rendered by [this court,] [the district court for county, Minnesota], in favor of one A. B. against one C. D. for $; [that on 19 , said judgment was duly docketed in this county]; that on 19 , a writ of execution was duly issued on said judgment out of said court directed to this defendant, who then was and still is sheriff of said county, for service, requiring him [copy substance of writ]; that on 19 , defendant, as such sheriff, acting under and by virtue of said writ, which had been delivered to him on that day and which was in full force and wholly unsatisfied, duly levied upon and took into his possession the goods mentioned in the complaint, as the property of the said C. D. which they then were and subject to said levy, and said levy and taking were the taking alleged in the complaint.

1816. On bond to indemnify sheriff against claims of third parties.[1]

I. That at the times herein mentioned plaintiff was the sheriff of [this county] [county, Minnesota].

II. That on 19 , defendants made and delivered to plaintiff, as such sheriff, their bond, of which the following is a copy: [Copy of bond.]

III. That, in pursuance of the request of defendant A. B. in respect to the [execution] mentioned in said bond, plaintiff, as such sheriff, levied upon certain personal property in the possession of the defendant in said [execution], for the purpose of satisfying, in whole or in part, said [execution].

IV. That on 19 , one C. D. brought an action for damages on account of said levy against this plaintiff as such sheriff, in [this court;] [the district court for county, Minnesota;] that such proceedings were thereafter had in such action that on 19 , judgment was duly rendered by said court in favor of the said C. D. against this plaintiff for $ damages for said levy, with costs.

V. [That on 19 , plaintiff gave defendants herein written notice of the pendency of said action and requested them to appear and defend the same.] [2]

VI. That plaintiff necessarily incurred an expense of $, for attorney's fees, costs and expenses, in defending said action.

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VII. [That plaintiff duly performed all the conditions of said bond on his part.] [3]

VIII. That by reason of the premises defendants are indebted to plaintiff on said bond in the sum of $.

Wherefore [as in § 919].

[1] R. L. 1905 § 4213; G. S. 1913 § 7843. This form may be easily adapted to the case of a writ of attachment or taking in replevin. See Dunnell, Minn. Digest, § 3529.

[2] See Dunnell, Minn. Digest, § 5176; Henderson v. Eckern, 115 Minn. 410, 132 N. W. 715.

[3] Insert if the bond imposes any conditions on the plaintiff.

1817. On sheriff's bond—Failure to pay over money.

I. [That the defendant A. B. was duly elected sheriff of Ramsey county, Minnesota, at the general election held in said county in November, 1894, for the term of office commencing Jan. 1, 1895, and ending Jan. 1, 1899, and duly qualified and held said office for said term.] [That defendant A. B. was the sheriff of Ramsey county, Minnesota, for the term of office commencing Jan. 1, 1895, and ending Jan. 1, 1899.]

II. That for the purpose of qualifying for said office the defendant A. B., as principal, and defendants C. D. and E. F., as sureties, duly made and filed for record an official bond, of which the following is a copy: [Copy of bond.]

III. That said bond was duly approved by the county board of said county and filed and recorded in the office of the register of deeds for said county.

IV. That on Nov. 26, 1894, plaintiff was the owner and holder of a certain first mortgage and senior incumbrance upon lot 1, block 63, of White Bear, Ramsey county, Minnesota, according to the plat thereof on file and of record in the office of the register of deeds for said county; that said mortgage bears date, Jan. 18, 1888, and was executed by one G. H., who was then the owner of said premises, and his wife, to plaintiff; that long prior to Nov. 26, 1894, default had been made in the conditions of said mortgage and a power of sale therein contained had become operative and such proceedings had then been had, and were then pending, that on said day, said mortgaged premises were duly sold, under foreclosure by advertisement, to plaintiff, by the sheriff of said county, for the sum of $1,801.75, which amount was then due under said mortgage, for principal, interest and expenses of said foreclosure.

V. That on Dec. 2, 1895, plaintiff was still the owner and holder of the sheriff's certificate of the foreclosure of said mortgage and of all rights, title and interest conveyed thereby, and on said day one I. J., who was then the owner and holder of an incumbrance upon said premises, subsequent to said mortgage, within the time allowed by law, duly redeemed from said foreclosure sale, and paid to the defendant A. B., as such sheriff, the sum of $1,548.50, for the use of plaintiff, as the owner of said sheriff's certificate, and

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said sheriff then issued to said I. J. a certificate of redemption from said foreclosure sale.

VI. That said sheriff has, in violation of his duty as said sheriff and of the condition of said bond, ever since failed and refused to pay over to plaintiff the amount so collected by him upon the redemption from said sale of said premises, as aforesaid, or any part thereof, though plaintiff duly demanded payment of the sum so received by defendant A. B. on July 24, 1896, and again on June 29, 1897.

Wherefore [as in § 919].

Substance of complaint in Hull v. Chapel, 78 Minn. 6, 80 N. W. 692.

1818. Same—Assault and battery in making a levy.

For a first cause of action:

[I. II. and III. as in § 1817.]

IV. That on July 2, 1901, the defendant A. B., with two or more deputies, came to the premises of plaintiff in said county, and made demand upon plaintiff for the possession of certain cattle described in a certain chattel mortgage theretofore given by plaintiff to the Deering Harvester Company, a corporation; that plaintiff thereupon refused to deliver any of said cattle, unless and until said sheriff produced proper papers in replevin showing his right to come upon said premises and take said cattle, and agreed to deliver to him said cattle upon production of such proper papers; that said sheriff failed and refused to produce any such or any proper papers, save the original of a certain written notice of sale, a copy of which he had served upon plaintiff on June 29 preceding, in connection with an attempt on the part of the Deering Harvester Company or its assigns to foreclose the said chattel mortgage; and said sheriff claimed the right to take said cattle by virtue of said notice, so placed in his hands for service by said mortgagee or its assigns.

V. That thereupon, against the refusal, protest and remonstrance of plaintiff, said sheriff and his said deputies, by his orders, forcibly entered upon said premises of plaintiff, and then and there attempted to take and drive away from said premises a number of cattle, other than those described in the said mortgage and upon which said Deering Harvester Company or its assigns had no claim, as said sheriff then and there well knew; that plaintiff endeavored to protect his said property from such wrongful taking, and thereupon said sheriff and his said deputies wilfully, wantonly, unlawfully and maliciously attacked, assaulted, beat, and maltreated plaintiff, and threw him with great force upon the ground, whereby plaintiff became sore, lame, bruised and for a time helpless, and suffered a severe fracture of the bones of his shoulder joint and arm and a dislocation of his said shoulder joint, and was otherwise painfully injured in and about his said shoulder, arm and other parts of his body; that said injuries to his arm and shoulder are permanent, and are such as to im-

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pair the use of the same to a great extent, making them practically useless for life.

VI. That said assault was wholly without any just cause, provocation or justification.

VII. That in each and every act and thing aforesaid, said sheriff acted and claimed to act officially, as the sheriff of said county, and not otherwise.

VIII. That thereby plaintiff was damaged $4,000.

For a second cause of action:

I. The plaintiff repeats and makes a part of this cause of action each and every allegation in the first three paragraphs of the first cause of action herein set forth and further alleges,

II. That on July 2, 1901, and after the commission by defendant A. B. of said assault, and immediately thereupon, said defendant, forcibly and against the will of plaintiff, took, lifted and carried plaintiff away from his said premises, in the condition of helplessness hereinbefore described, and then arrested plaintiff and restrained him of his liberty, and took him to the city of Anoka, a distance of about eight miles, and then and there incarcerated him in the common jail of said county, and restrained him of his liberty therein for more than twenty-four hours.

III. That such action was taken by defendant A. B. as sheriff of said county in his official capacity, and was wholly without warrant of law, malicious, unlawful and wanton, and without any just cause.

IV. That plaintiff was thereby obliged to employ counsel, and put to great trouble and expense, and was subsequently released and discharged by the district court for said county, after the grand jury of said county had considered the evidence and had formally returned into court a statement that no bill was found against plaintiff for any offence against the law.

V. That thereby plaintiff was damaged $1,000.

Wherefore [as in § 919].

Substance of complaint sustained on demurrer in Hall v. Tierney, 89 Minn. 407, 95 N. W. 219.

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SPECIFIC PERFORMANCE

1819. Purchaser against vendor—Short form.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That defendant then was and still is the owner in fee of said premises.

III. That plaintiff has duly performed all the conditions of said agreement on his part.

IV. That on 19 , plaintiff tendered $ to defendant and demanded from him a [describe kind of deed as in agreement] deed of said premises, but he refused and still refuses to execute such a deed.

V. That plaintiff is still ready and willing to pay to defendant the [balance of the] purchase money upon receiving such a deed.

Wherefore plaintiff demands judgment that defendant execute such a deed and deliver it to plaintiff upon payment of the [balance of the] purchase money; for $ damages, with interest thereon from 19 , in case defendant cannot execute such a deed; and for such other relief as may be just, with costs.

See § 879.

1820. Same—Another form.

I. That on 19 , defendant, then being the owner in fee of [describe premises as in a deed], entered into a written agreement with plaintiff whereby he promised, in consideration of the sum of $, to be paid to him by plaintiff, $ thereof in cash, and the balance in equal annual instalments, at six per cent. interest, secured by a mortgage on said premises, to convey said premises to plaintiff by a [warranty] deed [on 19 ,] [within a reasonable time thereafter].

II. That plaintiff duly performed all the conditions of said agreement on his part, and on 19 , tendered to defendant said sum of $, and was ready and willing, and offered to execute to defendant a mortgage and notes on said premises, for said deferred payments, and demanded a deed of the same to him from defendant, but defendant then and ever since has refused to execute and deliver such a deed to plaintiff.

III. That plaintiff is still ready and willing to pay said purchase money and to execute said notes and mortgage as agreed.

Wherefore plaintiff demands judgment that defendant execute to plaintiff a warranty deed of said premises upon payment by plaintiff of said purchase money and the execution of said notes and mortgage, and for such other relief as may be just, with costs.

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1821. Purchaser against vendor—Verbal agreement.

I. That on 19 , defendant, then being the owner in fee of [describe premises as in a deed], sold the same to plaintiff for $, payable [dates and amounts of payments], and agreed to convey the same to plaintiff by a [good and sufficient] [warranty] deed upon payment of said several amounts of money.

II. That defendant thereupon delivered possession of said premises to plaintiff under said contract and plaintiff has ever since been and now is in possession thereof under and in pursuance of said contract and with defendant's consent.

III. That in pursuance of said contract plaintiff has paid to defendant $, on 19 , $, on 19 and $, on 19 .

IV. That on 19 , plaintiff duly tendered to defendant $, that amount being the balance of the purchase money for said premises and the whole amount due from plaintiff to defendant under said contract, and demanded of defendant that he execute a [warranty] deed of said premises to plaintiff in accordance with the terms of said contract, but he refused and still refuses to do so.

V. That while so in possession of said premises plaintiff, in reliance upon and in pursuance of said contract, and with the knowledge and [consent] [assent] [acquiescence] of defendant, has [specify improvements and their value].

VI. That plaintiff has paid the taxes on said premises for the years 19 , 19 , 19 .

VII. That plaintiff has duly performed all the conditions of said contract on his part, and is still ready and willing to pay to defendant the balance of the purchase money upon receiving a warranty deed of said premises from defendant.

VIII. That defendant still has the legal title to said premises.

Wherefore [as in § 1819].

See Dunnell, Minn. Digest, § 8885. In McClane v. White, 5 Minn. 178(139), it is intimated that it is necessary to allege that the defendant is unable to respond in damages, but this clearly does not apply to a complaint showing improvements on the land in reliance on the contract, or other equities.

1822. Purchaser against administrator of vendor and heirs.

I. That on 19 , one A. B., then being the owner in fee of [describe premises as in a deed], entered into a written agreement with plaintiff, of which the following is a copy: [Copy of agreement.]

II. That on 19 , said A. B., while still holding the legal title in fee to said premises, died intestate, leaving defendant C. D., his widow, and defendants E. D. and F. D. his only children, his sole heirs at law.

III. That on 19 , letters of administration upon the estate of said A. B. were duly issued by the probate court of county, Minnesota, to

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defendant E. F., who thereupon duly qualified and entered upon the duties of, and ever since has been and now is, such administrator.

IV. That on 19 , plaintiff tendered $ to defendant E. F., as such administrator, and demanded from him a [describe kind of deed as in agreement] deed of said premises, but he refused and still refuses to do so, alleging want of authority on his part and said widow and children have refused to give plaintiff a deed of said premises.

V. [That defendant F. D. is a minor and unable to execute a deed.]

VI. [That plaintiff has duly performed all the conditions of said contract on his part, and is still ready and willing to pay to defendant E. F. the (balance of the) purchase money upon receiving such a deed from him as such administrator.]

Wherefore plaintiff demands judgment that defendant E. F., as such administrator, execute such a deed and deliver it to plaintiff upon payment of the [balance of the] purchase money, and for such other relief as may be just, with costs.

1823. For as much as vendor can convey—Tenants in common.

I. That on April 19, 1906, plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That at the date of said agreement there was and still is situated upon the lot described in said agreement a double frame dwelling house, known as number 2613 and 2615 Columbus avenue, in the city of Minneapolis, Minnesota; that said building is divided into two separate dwellings, that portion known as number 2613 being upon the north one-half of said lot, and that portion known as number 2615 being upon the south one-half of said lot; that such portions are of equal value; that at the date of said agreement one A. B. was and still is the owner in fee of the divided south one-half of said lot, and of that portion of the dwelling house located upon said lot and known as 2615 Columbus avenue in said city; that defendant claimed to have authority from said A. B. to act as his agent in making a sale of the south one-half of said lot, and affixed the signature of said A. B. to said agreement under such claim of agency; that plaintiff was then ignorant of defendant's want of such authority and entered into said agreement in reliance on said claim of authority by defendant; that defendant at the time of making such agreement claimed to be the owner in fee of the north one-half of said lot.

III. That as plaintiff is informed and believes, defendant, at the time of making said agreement, had no authority to act as the agent of said A. B., in making the sale of the south one-half of said lot or to affix the signature of said A. B. to said agreement for the sale of the south one-half of said lot; that, as plaintiff is informed and believes, defendant was not the owner in fee of the north one-half of said lot at the time of entering into said agreement, but was

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then the owner of an undivided one-half of the north one-half of said lot and no more.

IV. That on May 1, 1906, plaintiff was advised by defendant that she refused to be bound by said agreement, and then and there refused, and has ever since refused, to convey any part of said lot, or to carry out any of the terms of said agreement, and further repudiated the fact of her agency at the time of making said agreement.

V. That plaintiff has duly performed all the conditions of said agreement on his part, and has been at all times since the making of said agreement, and still is, ready and willing to pay to defendant the balance of said purchase money upon receipt of a full warranty deed of said lot 1, or one-half of the balance of said purchase money upon receipt of a full warranty deed to the north one-half of said lot, or a proportionate amount of the balance of said purchase price for such portion of said lot as defendant owns and is able to convey.

Wherefore plaintiff demands judgment that defendant execute to plaintiff a full warranty deed of the north one-half of said lot, or of such portion thereof as shall appear to be owned by her; that if for any reason a conveyance cannot be made by defendant the plaintiff shall have such indemnity by way of damages as the nature of the case may require; and for such other relief as may be just, with costs.

Substance of complaint sustained on demurrer in Melin v. Woolley, 103 Minn. 498, 115 N. W. 654, 946.

1824. On an exchange of land, the parties having taken possession.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That thereupon, in pursuance of said agreement, plaintiff and defendant respectively took possession of the premises so to be conveyed to them and still severally occupy the same.

III. That plaintiff has duly performed all the conditions of said contract on his part, and on 19 , tendered to defendant a [describe deed as in contract] deed of his said premises, duly executed and acknowledged by plaintiff, [his wife joining therein], and demanded of defendant a [describe deed as in contract] deed of his said premises, but defendant refused and still refuses to deliver such a deed to plaintiff.

IV. That plaintiff is still ready and willing to deliver such a deed of his said premises to defendant upon receiving a deed from defendant as aforesaid.

Wherefore plaintiff demands judgment that defendant execute and deliver to plaintiff such a deed of his said premises and accept from plaintiff his said deed in exchange, and for such other relief as may be just, with costs.

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1825. Agreement for a lease.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That defendant then was and still is the owner in fee of said premises.

III. That in reliance upon said agreement plaintiff has spent $ in repairing and improving said premises by [state what plaintiff has done].

IV. That plaintiff has duly performed all the conditions of said contract on his part.

V. That on 19 , plaintiff duly tendered to defendant $, [the amount of the rent for said premises for the year 19 , as provided in said agreement], and demanded that he execute a lease of said premises to plaintiff as provided in said agreement, but he refused and still refuses to do so.

Wherefore plaintiff demands judgment that defendant execute such a lease, and if that cannot be done, for $, as damages, and for such other relief as may be just, with costs.

1826. Same—Another form.

I. That on April 30, 1902, defendants, through their duly authorized agent A. B., entered into a written agreement with plaintiff, of which the following is a copy: [Copy of agreement.]

II. That defendants then were and still are the owners in fee and in possession of said premises.

III. That afterwards, within the ten days specified in said agreement, plaintiff duly gave defendants notice that he would and did accept the offer contained in said agreement.

IV. That thereupon plaintiff and the said A. B., agent of defendants as aforesaid, agreed upon the nature and character of the buildings to be constructed on said premises, and agreed to construct on the same a theatre building; that said A. B. agent as aforesaid, further agreed that said lease should be signed by both parties and placed in the hands of C. D., in escrow, to be delivered to plaintiff on the performance by plaintiff of his covenants; that plaintiff should pay $500 at once, and should deposit within thirty days in the Hennepin County Savings Bank of Minneapolis the sum of $30,000, and should furnish a good and sufficient bond, to be approved by the said C. D., to pay the rent specified in said agreement for the term of ten years from the execution of said lease.

V. That said lease to be made was also agreed upon by said A. B., and he expressed himself as satisfied with the financial ability of the parties by prescribing the foregoing conditions and otherwise.

VI. That plaintiff duly performed all the conditions of said agreement on his part, and on May 6, 1902, tendered to said A. B. the sum of $500, and a lease, the covenants in which had been agreed upon and prescribed by said A. B., and offered to deposit the sum of $30,000 in said Hennepin County

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Savings Bank of Minneapolis within a week therefrom, and was ready and willing and offered to execute a lease signed by himself and The Amusement Syndicate Company, a corporation of the state of Kansas, abundantly responsible, and to do all called for by said contract on his part, but the said A. B. refused to go any further in the matter or to execute said lease or to perform said contract, on the ground that defendants or some of them had conscientious scruples about allowing their said property to be used for a theatre.

VII. That plaintiff has always been willing and ready, and still is, to pay said $30,000, and to give a bond as agreed to and understood with said A. B., and to execute the lease so agreed upon.

Wherefore plaintiff demands judgment that defendant convey said premises to plaintiff by a lease for ninety-nine years, as prescribed in said contract, and for any such other relief as may be just, with costs.

Substance of complaint sustained on demurrer in Crawford v. Lillibridge, 89 Minn. 276, 94 N. W. 868.

1827. For reformation and specific performance.

I. That on May 30, 1885, defendant bought of the state of Minnesota the east half of the southwest quarter, and the west half of the southeast quarter, of section six, in township 111 north, of range 36, in Redwood county, Minnesota, and paid to the state 15 per cent. of the purchase price therefor, and all payments and interest required by law to be paid thereon, and thereafter certificates of purchase therefor were by the state of Minnesota duly issued to him on said premises.

II. That on Feb. 1, 1886, plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

III. That defendant then was and still is the owner and holder of said certificates and the owner of said land.

IV. That on said day plaintiff made and delivered to defendant the notes described in said contract, and thereupon entered into the possession of said premises.

V. That by the mutual mistake of plaintiff and defendant, the word "thirty-seven (37)" was inserted in said contract where it occurs after the word "range," instead of the word "thirty-six (36)," which should have been used in place thereof; and the premises were erroneously described as being in range 37 instead of range 36, the true description; and to make said contract conform to the actual intention of the parties, it is necessary to amend it by substituting the word "thirty-six (36)" for the word "thirty-seven (37)," where it occurs after the word "range," so as to make the description of the premises therein described read as follows: [True description.]

VI. That plaintiff has duly paid the note for $190, and interest according to the terms thereof, and also paid to the state of Minnesota all interest due

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on the unpaid portion of the purchase money due the state on said premises, and all taxes due on the same as required by the terms of said contract.

VII. That on the day the note for $400 mentioned in said contract was due, to wit, Feb. 4, 1888, plaintiff duly tendered to defendant $464.30, the amount due thereon, and demanded an assignment by defendant to plaintiff of said certificates of the state for the land bought of defendant by plaintiff, but defendant refused to accept said money or to assign said certificates to plaintiff, whereupon plaintiff, still tendering the amount due as aforesaid, presented defendant a quitclaim deed for said premises, and demanded that defendant execute the same, but the defendant refused to accept said money or execute said deed.

VIII. That plaintiff has duly performed all the conditions of said contract on his part.

IX. That on said Feb. 4, 1888, plaintiff was, ever since has been, and still is ready and willing to pay the amount due for the purchase price of said premises, and is ready and willing and offers to pay and bring into court such amount and to comply with the decision of the court in regard to the same, and to do and perform all other acts and things necessary to secure the proper conveyance of the certificates of said premises to him.

Wherefore plaintiff demands judgment reforming said contract so as to conform to the intention of the parties as alleged; that defendant execute any and all assignments and deeds necessary to transfer said certificates and the title of said premises, and all interest which defendant had on Feb. 1, 1886, or at any time since said date, in said premises, to plaintiff; that if for any cause such conveyances cannot be had, that the judgment of the court stand for and be an assignment of said certificates of the state, and a conveyance of said lands to plaintiff; and for such other relief as may be just, with costs.

Substance of complaint in Thompson v. Winter, 42 Minn. 121, 43 N. W. 796.

1828. Vendor against purchaser.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That plaintiff then was and still is the owner in fee of said premises.

III. That plaintiff has duly performed all the conditions of said agreement on his part.

IV. That on 19 , plaintiff tendered to defendant a [describe kind of deed as in agreement] deed of said premises, duly executed and acknowledged by plaintiff, [his wife joining therein], in accordance with the terms of said agreement, and demanded payment from him of the balance of the purchase money and interest due under said agreement, but defendant refused and still refuses to accept said deed or make such payment.

Wherefore plaintiff demands judgment that defendant perform said agree-

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ment and pay to plaintiff the said sum of $, with interest thereon from 19 , and for such other relief as may be just, with costs.

1829. Vendor against purchaser—Enforcement of vendor's lien.

I. That on Jan. 17, 1896, one A. B. died in the city of Utica, Oneida county, New York, leaving a will, a copy of which is hereto attached, marked Exhibit A, and made a part hereof, whereby he appointed C. D., E. F., G. H., and I. J., as executors thereof, and empowered them to sell and give deeds of any and all real estate belonging to his estate wherever the same might be situated.

II. That on Feb. 10, 1896, said will of A. B., deceased, was duly proved and admitted to probate in the surrogate's court for Oneida county, New York.

III. That on Feb. 10, 1896, letters testamentary were duly issued and granted by said surrogate to said C. D., E. F., G. H., and I. J., the plaintiffs herein, and thereupon, they duly qualified as such executors, and ever since have been and now are, the duly appointed, qualified, and acting executors of said estate.

IV. That before the commencement of this action, on April 29, 1896, plaintiffs duly filed in the probate court of Redwood county, Minnesota, a duly authenticated copy of their said appointment as such executors.

V. That on Sept. 15, 1891, the said A. B. was the owner in fee and in possession of [description of premises].

VI. That on said day said A. B. made an agreement, in writing, with the defendant K. L., whereby the said A. B. agreed to sell and convey to the said defendant or his assigns, by deed of warranty, the said premises and in consideration thereof the said defendant agreed to buy the same and to pay the said A. B. therefor, the sum of $880, payment thereof to be made at such time and in the manner set out in said contract, a copy of which contract is hereto attached, marked Exhibit B, and made a part hereof.

VII. That said contract was further conditioned that the defendant K. L. should pay all taxes or assessments that might be thereafter levied or assessed against said premises.

VIII. That there were levied on said premises for the years 1892, 1893, 1894 and 1895, taxes and interest on the same amounting in all to the sum of $59.55, which the defendant K. L. failed to pay, and the same was paid by plaintiffs before the commencement of this action.

IX. That in accordance with the terms of said contract, the defendant K. L. made and delivered his four promissory notes in writing of even date of said contract, to the said A. B., for the sums specified and payable at the times mentioned in said contract.

X. That under and by virtue of said agreement the defendant K. L. thereupon took possession of said land and ever since has been and now is in possession thereof.

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XI. That said A. B. duly performed all the conditions of said contract on his part.

XII. That plaintiffs have duly performed all of the conditions of said contract on their part, and they have been at all times herein mentioned, and still are, ready and willing, and have full power and authority, to convey said premises to defendant, as specified in said contract upon the payment by defendant K. L. of the sum of $880, with interest thereon, according to the terms of said contract.

XIII. That the defendant K. L. has failed and refused to comply with the terms of said contract on his part, and has failed and refused to pay the said sum of money or any part thereof.

XIV. That, as plaintiffs are informed and believe, defendant M. L., wife of K. L., has or claims to have some right, title or interest in and to said premises.

Wherefore plaintiffs demand judgment against the defendant K. L. fixing an early day for the payment of the whole amount due them under said contract, to be ascertained by the court, as provided by the terms of said contract; adjudging said contract to be a lien on said premises and that said premises be sold to pay the same, the expenses of sale and the costs and disbursements of this action, and that plaintiffs have judgment for the deficiency, if any, against the defendant K. L., and that the defendants K. L. and M. L., his wife, and all persons claiming under, by or through them or either of them, be barred and foreclosed of all right, claim, title or interest in and to said premises; and for such other relief as may be just, with costs.

Recovery sustained under this complaint in Abbott v. Moldestad, 74 Minn. 293, 77 N. W. 227.

1830. Denial of plaintiff's title.

The defendant for answer to the complaint herein denies [each and every allegation in the paragraph thereof] [that at the times alleged in the complaint plaintiff was or is now the owner in fee of said premises].

1831. Defective title.

The defendant for answer to the complaint herein alleges that plaintiff was unable to convey to defendant a good and sufficient title to said premises and that the title tendered by plaintiff to defendant was defective in this, that [specify defect].

1832. Outstanding incumbrance.

The defendant for answer to the complaint herein alleges that it was a condition of said agreement that plaintiff should convey said premises to defendant free and clear of all incumbrances; that at the times alleged in the com-

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plaint there was and still is [a mortgage thereon for the sum of $, unsatisfied of record, dated 19 , and recorded on 19 , in Book , of Mortgages, on page , in the office of the register of deeds of this county].

STATUTE OF FRAUDS

1833. Sale of goods.

The defendant for answer to the complaint herein alleges that though the contract therein set forth was for the sale of [goods] [chattels] [things in action] for the price of $50 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.

See § 883.

1834. 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.

1835. Special promise to answer for another.

The defendant for answer to the complaint herein alleges that though the promise therein set forth was a special promise to answer for the debt, default or doings of another, to wit, one A. B., mentioned therein, neither said promise nor any note or memorandum thereof, expressing the consideration, is in writing and subscribed by the defendant.

1836. Agreement not to be performed within a year.

The defendant for answer to the complaint herein alleges that though 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.

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1837. Private action on statute.[1]

I. That at the times herein mentioned there was, and still is, in force, a statute of this state, [being chapter , of the General Laws of this state, approved 19 ,] [being section of the General Statutes of 1913 of this state], providing [set out statute].[2]

II. That on 19 , defendant, in violation of said statute, [allege acts of defendant and consequent injury to plaintiff and make it appear that plaintiff belongs to the class of persons whom the statute was designed to protect, and negative any exceptions in the statute].

III. [That by reason of the premises defendant is indebted to plaintiff in the sum of $.] [That thereby plaintiff was damaged $.]

Wherefore [as in § 919].

[1] See § 884.

[2] While not necessary it is often good practice to set out the statute.

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1838. For collision with automobile.

I. That at the times herein mentioned defendant operated an electric street railway on street, a public highway of the city of , Minnesota.

II. That on 19 , at about o'clock in the [afternoon], plaintiff was driving an automobile across said street at its intersection with street, and at the same time a servant of defendant,[1] in the course and scope of his employment, was driving one of defendant's street cars along said street in a [southerly] direction near said intersection.

III. That said servant then and there so negligently drove and managed[2] said car that it struck said automobile and threw plaintiff out and upon the ground with great violence and plaintiff was thereby [allege injuries and damages as in §§ 1250–1255].

IV. That said automobile was the property of plaintiff, of the value of $, and was [totally destroyed], [rendered worthless] [damaged to the extent of $], by said collision.

Wherefore [as in § 919].

[1] Or allege that defendant was driving the street car and his negligence as in § 1841.

[2] See note to § 1839.

1839. Same—Another form.[1]

I. That at the times herein mentioned defendant operated a double-track electric street railway on Second street, in the city of Duluth, Minnesota, and its cars ran west on the upper or north side of said street and east on the south side.

II. That said street was a public street and highway and ran east and west and was intersected at right angles by Lake avenue and other numbered avenues of said city; that First avenue east was the next street east from Lake avenue, Second avenue east the next, Third avenue east the next, Fourth avenue east the next, and so on.

III. That at about nine o'clock in the morning of Aug. 31, 1911, plaintiff was driving an automobile and entered said Second street at said Fourth avenue east; that as plaintiff turned his automobile on Second street a westbound car of defendant had just passed Fourth avenue and plaintiff drove his automobile on the north track of defendant behind this car, following it until it began to slacken its speed to stop at Second avenue east, when he turned his automobile to the left and south, intending to drive south on Second avenue; that as he was turning his automobile to the left and south and crossing the south track of defendant, defendant then and there so negligently drove and managed[2] one of its cars running east on said south track that it struck plaintiff's auto-

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mobile and threw plaintiff out and upon the ground with great force and thereby [allege injuries and damages as in §§ 1250–1255].

IV. [As in § 1838.]

Wherefore [as in § 919].

[1] Based on Day v. Duluth St. Ry., 121 Minn. 445, 141 N. W. 795.

[2] Under this general allegation of negligence plaintiff can prove the particulars of the negligence, as for example, excessive speed, or the failure to slow down or stop, or the failure to sound the gong. See § 816, and Note, 59 L. R. A. 209–277.

1840. For collision with pedestrian.

I. That at the times herein mentioned defendant operated an electric street railway on street, a public highway of the city of , Minnesota.

II. That on 19 , plaintiff was walking across said street near its intersection with street; and at the same time a servant of defendant,[1] in the course and scope of his employment, was driving one of defendant's street cars along said street in a [southerly] direction near said intersection.

III. That said servant then and there so negligently drove and managed [2] said car that it struck plaintiff and knocked him down and [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

[1] Or allege that defendant was driving the car as in § 1841.

[2] See note to § 1839.

1841. Same—Another form.

I. That at the times herein mentioned defendant operated a double track electric street railway on street, a public highway of the city of , Minnesota.

II. That on 19 , at about o'clock in the [afternoon], plaintiff alighted from one of defendant's street cars, upon which he had been a passenger and which was running in a [northerly] direction, at the intersection of said street and street, and was in the act of walking around the rear of said car to cross to the other side of street, and stepped upon the other track of defendant which ran near and parallel to that on which said car was running; that then and there defendant was driving one of its street cars on said parallel track in a [southerly] direction and so negligently drove and managed [1] said car that it struck plaintiff and threw him violently to the ground and thereby [allege injuries and damages as in §§ 1250–1255].

Wherefore [as in § 919].

[1] See note to § 1839.

1842. Injunction against laying tracks—Action by abutting owner.

I. The plaintiff is the owner and in the actual possession of [description of premises].

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II. That a public highway extends through said lands east and west, which is known, as to the part within the city of International Falls as Fourth street, and as to the part outside of the city of International Falls as an extension of Fourth street.

III. That the plaintiff has constructed a large sawmill on the easterly portion of lot one, section thirty-four, between Fourth street and Rainy river and is now engaged in equipping it with machinery and will have the mill completed and in operation in about thirty days, and has already expended in the construction of said mill and in machinery therefor, a sum exceeding $75,000; that plaintiff has also prepared that portion of said lot one, section thirty-four, which lies south of Fourth street for piling the lumber which will be put out by said sawmill.

IV. That said Fourth street and the extension thereof furnish the only means of access by public way from the city of International Falls where a large part of the product of said sawmill will be marketed, and from which a large part of the supplies for said mill will be obtained, and said street and the extension thereof furnish the only means of access by public way to said mill for plaintiff and its employees; that said Fourth street and the extension thereof furnish the only means of access by public way to all the lands above described in the first paragraph of this complaint, from the city of International Falls; [allege additional facts showing special damages].

V. That the public has in said Fourth street and the extension thereof only a highway easement and plaintiff is the owner of said lands on which these highways are laid subject to such easement.

VI. That defendants threaten and intend wrongfully to enter upon and to dig up the soil of said Fourth street and of the entire portion of the roadway that has been graded and prepared for public use and threaten and intend wrongfully to take and hold permanent possession thereof by means of rails and other structures, and likewise threaten and intend to dig up the soil of a portion of the extension of said Fourth street through section thirty-five aforesaid, and to take and hold permanent possession thereof by means of rails and other structures.

VII. That defendants have no right or interest in any of said lands and have no right or authority to so enter upon the said lands of plaintiff or dig up the soil thereof or so take or hold possession thereof or of any part thereof.

VIII. That defendants will, unless restrained by the order of this court, do each and all of the things aforesaid and will thereby do great and irreparable injury to plaintiff and to his said lands and property and to said sawmill of plaintiff.

Wherefore plaintiff demands judgment permanently enjoining the defendants and each of them, as well as their officers, agents and employees, from digging up or in any manner interfering with the soil of any of plaintiff's said lands and particularly the soil of Fourth street and the said extension thereof, and from taking possession of said lands or any thereof, and from

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laying rails or other structures therein, as well as from entering upon or interfering with in any manner any of the lands of plaintiff and the highways aforesaid; for a temporary injunction restraining defendants as aforesaid during the pendency of this action; and for such other relief as may be just, with costs.

Sustained in International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395.

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SUBROGATION

1843. Answer by surety asking to be subrogated to securities.

I. That defendant signed said note merely as surety for the maker A. B., as plaintiff well knew when he received the same.

II. That on 19 , said A. B., to secure the payment of said note, made and delivered to plaintiff a mortgage upon [describe premises as in a deed], which security plaintiff still holds, and is ample to secure and satisfy plaintiff's claim.

III. That said A. B. is insolvent and unable to pay said note, except as the amount thereof may be made out of said mortgaged premises.

IV. That defendant has offered to plaintiff to pay said note, with interest and costs, if plaintiff would assign said mortgage to defendant upon such payment, but plaintiff refused and still refuses to do so.

V. [That plaintiff is a non-resident, residing at , and defendant will be remediless unless said mortgage is assigned to him as security.]

Wherefore defendant demands judgment that plaintiff assign to him said mortgage, upon his paying said note, with interest and costs, as security for defendant's claim against said A. B., and for such other relief as may be just.

1844. Same—Another form.

I. That defendant signed said note merely as surety for the maker, A. B., as plaintiff well knew when he received the same.

II. That plaintiff has in his possession and control, as collateral security for the payment of said note, [describe collateral,] which were delivered to him by the said A. B. for that purpose.

III. That defendant has offered to plaintiff to pay said note, with interest and costs, if plaintiff would assign said securities to defendant upon such payment, but plaintiff refused and still refuses to do so.

Wherefore [as in § 1843].

1845. For subrogation to rights of mortgagee.

I. That at the time of the making and delivery of the note set out in the complaint, defendants made and delivered to A. B., mentioned in the complaint, another note for the sum of $500, payable to said A. B. or order, on or before the month of May, 1884; that at the same time and as part of the same transaction and to secure the payment of both of said notes, and of the interest thereon, defendants made and delivered to the said A. B. a mortgage deed of [description of premises].

II. That on May 5, 1883, the said mortgage deed was recorded in the office

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of the register of deeds for Carver county, Minnesota, in Book , of Mortgages, on page .

III. That prior to Feb. 11, 1884, the said A. B. sold, assigned, transferred and delivered the said mortgage, and sold, indorsed and delivered the said notes to plaintiff in this action; and said assignment of the mortgage was duly recorded in the office of said register of deeds prior to Feb. 11, 1884, as defendants are informed and believe.

IV. That on Feb. 13, 1884, defendants paid to plaintiff the full amount then due on the note payable on or before the month of May, 1884, and then received the said note from plaintiff and now have the same, and the note described in the complaint is one of the notes secured by said mortgage and is the only one of the notes secured thereby that yet remains unpaid.

V. That on Feb. 13, 1884, defendants sold and by deed conveyed to one C. D. the premises described in said mortgage; that in consideration of said conveyance and as a part payment of the purchase price thereof the said C. D. assumed the payment of the note described in the complaint and undertook and agreed to and with defendants to pay and discharge the same and to forever save defendants harmless therefrom; that said deed was recorded in the office of said register of deeds on Feb. 13, 1884, in Book , of Deeds, on page .

VI. That on Feb. 13, 1884, plaintiff had full and actual notice and knowledge of said conveyance to said C. D., and of the assumption by her of the payment of said note.

VII. That said mortgage is still a valid and subsisting first lien upon said premises for the payment of the note described in the complaint; that plaintiff is still the owner of said mortgage and it secures the payment of and the performance of nothing except said note.

VIII. That defendants are now ready and willing and hereby offer to pay to plaintiff the full amount now due upon the note described in the complaint, upon the assignment to them of said mortgage and the indorsement and delivery to them of said note.

Wherefore defendants pray that the plaintiff have no judgment against either one of these defendants until he has deposited in this court said mortgage, duly assigned to the defendants, and the note described in the complaint duly indorsed to them, to be delivered by the clerk of this court to the defendants upon the payment by them of any judgment which may be rendered against them in this action; and for such other relief as may be just, with costs.

Answer sustained on demurrer in Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. 865.

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SUBSCRIPTIONS

1846. On a subscription for a public or charitable object.

I. That on 19 , plaintiff was and still is a corporation duly organized and existing under the laws of this state for the purpose of .

II. That in the year 19 , plaintiff [was about to erect] [was erecting] a building at , for the purpose of .

III. That defendant, to enable plaintiff to [erect] [complete] said building, and in consideration of the premises and the like agreement and subscriptions of other parties, subscribed and promised to pay plaintiff $ for that purpose.

IV. That plaintiff, relying on said subscription of defendant, proceeded with the erection of said building and completed it, and thereby expended large sums of money and incurred large liabilities, and has otherwise duly performed all the conditions of said agreement on its part.

V. That no part of defendant's subscription has been paid, though demanded.

Wherefore [as in § 919].

1847. For removal of a manufacturing plant to another city.

I. [Allege plaintiff's incorporation as in § 1204.]

II. That on and prior to Jan. 29, 1886, plaintiff owned and operated in the city of Winona, Minnesota, a large manufactory for the manufacture of lumber into sash, doors, blinds, mouldings, and other mill work, and employed a large number of mechanics and artisans therein; that on or about the said last mentioned date several persons, residents of the city of St. Paul, Minnesota, among them defendant, conceiving it to be for their interests and to the business interest and growth of said city, proposed to plaintiff to move its said factory and plant to the city of St. Paul, and to erect and establish the same upon certain lands then owned by the plaintiff in the city of St. Paul, which plaintiff then agreed to do if defendant, and other persons, residents of St. Paul, would subscribe and pay to plaintiff the sum of $35,000, in part payment of the cost and expenses of such removal and construction, and as an inducement to move its said factory to St. Paul, and there carry on its said manufacturing business; and thereupon, in consideration of the promise of plaintiff to so remove its said factory, and for other valuable consideration, and for the purpose of making up said sum of $35,000, and to induce plaintiff to so remove its said factory to St. Paul, defendant, on Jan. 29, 1886, subscribed to said object the sum of $500, and agreed to pay said sum to the St. Paul Trust Co., on or before Aug. 1, 1886, for plaintiff when it should move its said fac-

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tory from Winona and erect and establish the same upon the said tract of land in the city of St. Paul.

III. That upon the faith of said subscription of defendant, several other persons, residents of St. Paul, and desirous of securing said removal, also subscribed various sums to said project, amounting in all to the aggregate sum of $35,000, and upon the faith of said subscriptions and in consideration of said agreement on the part of defendant, and other persons thereunto subscribing, plaintiff immediately proceeded to remove its said manufacturing plant and factory from Winona, and to construct and establish the same upon said tract of land in St. Paul, and expended thereon large sums of money and incurred large liabilities by reason of said removal, and had the said factory so removed, located and in operation in St. Paul on or before Nov. 1, 1886, and on or before said date fully complied with all of the conditions of said contract on its part.

IV. That a large number of the persons who so subscribed to said object paid to plaintiff the amounts respectively subscribed by them, in the aggregate more than $20,000.

V. That defendant has not paid any part of his said subscription, though requested by plaintiff to do so.

Wherefore [as in § 919].

Substance of complaint in Bohn Mfg. Co. v. Lewis, 45 Minn. 164, 47 N. W. 652.

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1848. Common count for reimbursement of surety.

[See form of complaint under § 1591.]

1849. For reimbursement of surety who has paid the principal's debt.

I. That on March 15, 1871, in the state of Maryland, the defendant and one A. B. and plaintiff, made their promissory note, dated that day, whereby for value received they jointly and severally promised to pay, ninety days after the date thereof, to C. D., cashier, or order, the sum of $1,500.

II. That said C. D. was then cashier of the Farmer's and Mechanic's National Bank, of Frederick, Maryland, and said note was given to said C. D. for the benefit of said bank.

III. That said Farmer's and Mechanic's National Bank was then, and at all the times herein mentioned was, a corporation duly organized and existing under the laws of the United States and of the state of Maryland.

IV. That plaintiff and said A. B. made and delivered said note at the request of defendant and only as surety for him.

V. That the entire consideration of said note was received by defendant, and neither plaintiff nor said A. B. received any part thereof, neither was there any consideration whatever for the same to plaintiff or said A. B., save only that they executed the same as sureties of defendant.

VI. That defendant has never paid any part of said note, nor has said A. B. ever paid any part of said note, nor has either of them ever paid any part of the judgment hereinafter mentioned.

VII. That at the times hereinafter mentioned, the circuit court of the sixth judicial circuit of the state of Maryland, comprehending the counties of Frederick and Montgomery, was a court of general jurisdiction duly created and organized under the laws of said state of Maryland.

VIII. That on Sept. 13, 1871, the said The Farmer's and Mechanic's Bank duly commenced an action in said court against defendant herein and said A. B., and this plaintiff, to enforce the payment of said promissory note.

IX. That a summons was issued in said action and served personally on each of said defendants therein, and each and all of said defendants duly appeared in said action by attorney.

X. That thereupon such proceedings were had in said court in said action, that on Dec. 13, 1871, a judgment for the sum of $1,553, was duly rendered by said court on the confession of said defendants in open court in favor of said Farmer's and Mechanic's National Bank, plaintiff in said action, and against the defendants therein.

XI. That on May 16, 1879, this plaintiff, one of the defendants in said action and judgment, and surety for defendant herein, necessarily paid to the

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said Farmer's and Mechanic's Bank the full amount of said judgment of $1,553, and interest thereon at 7 per cent. per annum from Dec. 13, 1871, and on said May 16, 1879, the said Farmer's and Mechanic's National Bank duly assigned, transferred and set over to plaintiff, the said judgment, by an instrument in writing, duly executed under the seal of said bank, and said assignment was, on May 16, 1879, duly filed in the office of the clerk of said court.

XII. That defendant herein has never paid to plaintiff said judgment or any part thereof, or said sum so paid by plaintiff to said bank, or any part thereof, nor has the said A. B.

XIII. That during all the times herein mentioned it was provided by the laws of the state of Maryland as follows: "When any person shall recover a judgment against the principal debtor and surety and the judgment shall be satisfied by the surety, the creditor shall assign the same to the surety, and such assignment being recorded in the court where the judgment was rendered, the assignee shall be entitled to execution in his own name against the principal. The assignee of any judgment by assignment in writing, may, by virtue of said judgment, maintain an action in his own name, against the debtor therein named, or issue an execution thereon, in the same manner that the assignor might have done before the assignment."

Wherefore [as in § 919].

Sustained on demurrer in Kimmel v. Lowe, 28 Minn. 265, 9 N. W. 764. A common count for money paid would be sufficient in this case. See §§ 797, 1591.

1850. Action by surety to compel principal to pay debt or give surety indemnity.

I. That for a long time prior to Sept. 14, 1883, plaintiff and defendant were partners in the general mercantile and agricultural implement business at Good Thunder, Minnesota, under the firm name of W. & S. and by the terms of said partnership the several partners were to share alike in the profits and losses of said business.

II. That said partners, during the year 1883, became indebted to A. B. in the sum of $170, for machinery then shipped to and received by them, from said A. B., and said indebtedness is now overdue and unpaid, except as hereinafter set forth.

III. That on Nov. 21, 1885, the parties hereto formally dissolved said partnership by mutual consent, and had an accounting and settlement among themselves, in which it was intended and supposed that all matters pertaining to said partnership business, between themselves as partners and between themselves and said A. B. were considered and adjusted.

IV. That through inadvertence or mistake, the indebtedness of said partnership, of $170 to said A. B. was not considered by the partners at the time of their dissolution, accounting and settlement as aforesaid, and until June 24,

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1886, plaintiff continued liable to said A. B. for said sum of $170, and the interest accruing thereupon, at the rate of 7 per cent. per annum.

V. That on June 24, 1886, plaintiff paid to said A. B. $85, that being one-half of the said indebtedness of the said firm of W. & S. to A. B., and then and there requested said A. B. to demand and collect the remainder of said indebtedness and accrued interest from defendant; and as plaintiff is informed and believes, the same has been so demanded by said A. B. from defendant, and payment thereof has been refused by defendant.

VI. That in equity and good conscience, defendant ought to pay to said A. B. the remainder of said indebtedness of W. & S. to A. B. and relieve plaintiff from liability therefor.

VII. That though plaintiff has already paid to A. B. his just proportion of the indebtedness due to A. B. from the said firm of W. & S., yet he remains liable for the payment of the share thereof which ought to be borne and paid by defendant.

VIII. That said A. B. has demanded of plaintiff payment of the share of the late firm's indebtedness, which ought to be paid by defendant; and in default thereof threatens to bring action against plaintiff and defendant for the recovery thereof.

Wherefore plaintiff demands judgment directing defendant to pay to said A. B. $, on said indebtedness, within a specified time, and in default thereof that defendant give to plaintiff a bond of indemnity, with good and sufficient sureties, to be approved as directed by the court, and so conditioned as to protect and save plaintiff harmless from liability on account of the remaining sum due as aforesaid, from said late firm of W. & S. to said A. B., and for such other relief as may be just, with costs.

Substance of complaint sustained on demurrer in Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700.

1851. Complaint by surety to compel principal to pay debt under G. S. 1913 § 7684.

I. That on 19 , defendant A. B. made and delivered to defendant C. D. his promissory note, whereby he promised to pay to the order of the said C. D. $, one year from that date, with interest at six per cent. per annum.

II. That before the delivery thereof plaintiff [indorsed said note] [signed said note as surety for the maker A. B.].

III. That since 19 , said note has been overdue and payable, but defendant A. B. has not paid the same or any part thereof, and plaintiff is still liable thereon for the full amount thereof.

Wherefore plaintiff demands judgment against defendant A. B. adjudging

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that he pay defendant C. D. $, the amount due on said note, including interest, with costs to plaintiff.

See Dunnell, Minn. Digest, § 9109.

1852. Alteration of contract releasing surety.

I. That defendant gave said bond to plaintiff as surety for one A. B., to secure the performance by the said A. B. of [state principal contract in general terms or attach a copy as an exhibit].

II. That [on 19 ,] [thereafter], without the knowledge or consent of defendant, plaintiff, for a valuable consideration, agreed with said A. B. that [state modification of contract].

1853. Extension of time of payment releasing surety.

The defendant for answer to the complaint herein alleges that [on 19 ,] [a short time before the maturity of said note,] plaintiff, at the request of said A. B., and for a valuable consideration paid to him by A. B., and without the knowledge or consent of defendant, extended the time of the payment of said note by said A. B. from the time it became due according to its terms, to wit, 19 , to 19 , whereby defendant was released from his liability thereon.

See § 888, and Dunnell, Minn. Digest, § 9096.

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1854. To test tax title.

[See forms of complaints under §§ 1704–1706.]

1855. For refundment of money paid at a void tax sale.

I. That at a tax sale in Houston county, Minnesota, on Jan. 27, 1874, plaintiff purchased certain premises claimed to be forfeited to the state for the nonpayment of taxes thereon, and upon paying into the county treasury of said county, $111.10 therefor, received a tax deed thereof, a copy of which is hereto attached, marked Exhibit A, and made a part hereof.

II. That plaintiff is still the owner of said tax deed and of all the interests acquired thereby.

III. That in October, 1881, a judgment was duly rendered by this court adjudging said tax deed, and the tax sale in pursuance of which said deed was made, void for the reasons stated in said judgment, a copy of which is hereto attached, marked Exhibit B, and made a part hereof.

IV. That defendant is the county auditor of said county, and was such at the times hereinafter mentioned.

V. That on Jan. 11, 1882, plaintiff caused to be presented to defendant, as the county auditor of said county, said original judgment, and the judgment roll of the action in which said judgment was rendered, and also a certified copy of said judgment, and demanded that defendant, as said county auditor, draw his order on the treasurer of said county for the amount paid by plaintiff as aforesaid, together with interest from the date of such payment at the rate of 10 per cent. per annum, and deliver the same to plaintiff.

VI. That defendant, as the county auditor aforesaid, refused, and still refuses, to draw such order.

Wherefore plaintiff demands judgment directing the defendant, as county auditor of said county, to draw his order in favor of plaintiff on the treasurer of said county for the said sum of $111.10, and interest thereon at 10 per cent. from Jan. 27, 1874, and deliver the same to plaintiff; and for such other relief as may be just, with costs.

Substance of complaint sustained on demurrer in Fleming v. Roverud, 30 Minn. 273, 15 N. W. 119.

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1856. For delay in transmitting message.[1]

I. That at the times herein mentioned defendant was a common carrier [2] engaged in the business of transmitting messages by telegraph lines between the places hereinafter mentioned.

II. That on . 19 , at 9 o'clock A. M., at its office in the city of Minneapolis, Minnesota, defendant received from plaintiff a message for transmission over its lines, and agreed with plaintiff, for a valuable consideration, promptly to transmit and deliver the same to John Doe, at Duluth, Minnesota; that the following is a copy of such message:

Minneapolis, Minn.
Jan. 1, 1914.

John Doe,
Duluth, Minn.

Buy for my account 1000 bushels No. 1 hard winter wheat at the market price.

Richard Roe.

III. That through the negligence of defendant said message was not transmitted and delivered to said John Doe, at Duluth, until 2 o'clock P. M. on said day, though in the ordinary course of transmission and by the exercise of reasonable diligence it would have been transmitted and delivered to him there by 10 o'clock A. M. on said day.

IV. That between 10 o'clock A. M. and 2 o'clock P. M. on said day the market price of such wheat at Duluth advanced ten cents per bushel.

V. That immediately upon the receipt of said message, and in pursuance of the instructions therein, the said John Doe purchased 1,000 bushels of such wheat at Duluth for account of plaintiff, at the market price, and plaintiff necessarily paid therefor $100 more than he would have paid if such message had been transmitted and delivered by defendant with reasonable diligence.

VI. That by reason thereof plaintiff has been damaged $.

Wherefore [as in § 919].

[1] See G. S. 1913 § 6259; Kolliner v. Western Union Tel. Co., 126 Minn. 122, 147 N. W. 961; Dunnell, Minn. Digest, § 9590.

[2] See G. S. 1913 § 6256.

1857. For mistake in transmitting message.

[I. and II. as in preceding form.]

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III. That through the negligence and mistake of defendant said message was transmitted and delivered to said John Doe so as to read as follows:

Minneapolis, Minn.
Jan. 1, 1914.

John Doe,
Duluth, Minn.

Buy for my account 10,000 bushels No. 1 hard winter wheat at the market price.

Richard Roe.

IV. That immediately upon the receipt of such message, and in pursuance of the instructions therein, the said John Doe bought 10,000 bushels of such wheat at Duluth for account of plaintiff, at $ per bushel, the market price, and plaintiff paid therefor the aggregate sum of $, including a broker's commission of $.

V. That on 19 , immediately upon learning of the mistake in the message as delivered, and said purchase of wheat, plaintiff notified defendant of the mistake and purchase and requested instructions as to the disposition of the 9,000 bushels of wheat so purchased through the mistake and negligence of defendant, but defendant refused to give any instructions to plaintiff concerning the same [and denied all liability for the mistake].

VI. That thereupon, on 19 , plaintiff sold said 9,000 bushels of wheat at Duluth, for $ per bushel, which was then and there the highest market price thereof, and paid $ as a broker's commission on said sale.

VII. That by reason thereof plaintiff has been damaged $.

Wherefore [as in § 919].

1858. For injury to trees from telephone wires in boulevard.

I. That at the times herein mentioned plaintiff was and still is the owner in fee, including the fee to the center of the streets bounding the same, of lots 29, 30 and 31 in block 3, of Rosedale Park Addition to the city of St. Paul, Minnesota, situated at the southeast corner of Grand and Cleveland avenues of said city, and known as No. 2050 Grand avenue.

II. That at such times defendant owned and operated a telephone system in said city.

III. That for several years last past defendant has owned and maintained certain telephone lines, forming a part of its said telephone system, along said Cleveland avenue, consisting of wires and cables attached to poles set at certain intervals in the boulevard along said avenue and adjacent to plaintiff's said premises.

IV. That at such times plaintiff owned several ornamental trees situated on his said premises and the boulevard adjacent thereto along said Cleveland avenue, and of the value of $600.

V. That defendant so negligently placed and maintained its said poles and

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wires in said boulevard that the wires came in contact with the branches of said trees, and gave off electric discharges, and thereby killed the trees.

VI. That plaintiff has necessarily incurred an expense of $300 in removing said dead trees and repairing the lawn about them.

Wherefore [as in § 919].

Based on complaint in St. Paul Realty & Assets Co. v. Tri-State Tel. & Tel. Co., 122 Minn. 424, 142 N. W. 807.

1859. For trespass in placing poles in boulevard and in threatening abutting owner's wife.

I. That at the times herein mentioned defendant operated a system of telephone lines in the city of St. Paul and other cities in the state of Minnesota, having exchanges in the city of St. Paul, with poles, wires and conduits located along and in the streets of said city.

II. That plaintiff is a married woman residing with her husband at their home at the intersection of Aldine street and Van Buren street in the city of St. Paul, which home is owned by plaintiff's husband, together with half of that portion of Aldine street upon which said home abuts, subject only to the lawful use of said Aldine street by said city and the public for street purposes; that said premises are described as lot one, block four, Woodland Park, a subdivision of Kinney's Outlots, in addition to the city of St. Paul.

III. That on May 23, 1910, defendant, with a large force of men, without any lawful right or authority to do so, entered upon that portion of Aldine street abutting plaintiff's home and dug holes to receive large and unsightly poles intended to support its telephone wires; that plaintiff, for the purpose of preventing such trespass and to prevent the erection of said poles, placed herself in one of said holes so that a pole could not be erected therein without assaulting or removing plaintiff, and in this manner offered such passive resistance as was within her power to prevent said trespass and wrongs.

IV. That defendant, by its servants, agents, and employees, notwithstanding plaintiff's said position, and with full knowledge thereof, continued in its efforts to erect said pole in the hole so dug and in which plaintiff had so placed herself, and in so doing caused plaintiff to be struck violently with an iron bar in the hands of one of its employees, thereby bruising plaintiff's leg; that as a result of said conduct of defendant's servants and of the blow from said iron bar, plaintiff fainted, and fell, and received severe bruises about the head and breast; that said employees of defendant in their efforts to commit said trespass, with the use of shovels and iron bars, moved the base of a large telephone pole in close proximity to plaintiff and continued, with the apparent intention of placing the same in said hole, notwithstanding the presence of plaintiff therein, to move the same toward the plaintiff and to use said shovels and iron bars so close to plaintiff as to create an appearance of imminent danger to

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plaintiff's personal safety, and thereby caused her to become frightened, agitated and nervous to the extent of producing a nervous collapse and hysteria.

V. That as the result of the injuries so inflicted by said iron bar, and the fright, agitation and nervous collapse so caused by the threatening attitude and conduct of the defendant's servants, the plaintiff was made sick, lame and nervous and was confined to her bed for a period of about one week, and for a further period of one week was confined to the house and was compelled to and did procure the services of a physician in treating said injuries and the condition brought about by defendant's wrongful acts as aforesaid.

VI. That as the result of said injuries and of the said apparently dangerous and threatening conduct of the defendant's servants, plaintiff became and ever since has been and still is, and will in the future for a long time continue to be, nervous, irritable and easily excited; and her peace of mind and ability to enjoy life, her sense of security, and her ability to perform her duties in her family household, have been, and are still, and will in the future be, greatly impaired.

VII. That the said trespass and injuries to plaintiff and the said conduct resulting in the fright and excitement and nervous results to plaintiff, were committed with full knowledge of all of the facts which rendered the same wrongful and a violation of the plaintiff's rights, and were done for the sole purpose of securing an advantage in violation of the law which would compel the plaintiff and her husband to resort to expensive and troublesome legal proceedings for the protection of their rights; and said acts were done wilfully, maliciously, recklessly and wantonly, and in voluntary disregard of the rights of plaintiff and plaintiff's husband.

VIII. That thereby plaintiff was damaged $4,000.

Wherefore [as in § 919].

Complaint in Souther v. Northwestern Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571.

1860. For recovery of money sent on message forged by agent of telegraph company.

I. That plaintiff is a resident of Minneapolis, Minnesota, and doing business there under the name of T. M. McCord & Co., and defendant is a corporation duly organized and existing under the laws of the state of New York, and doing business in Minnesota and elsewhere as a transmitter and common carrier for hire, of telegraphic messages, by means of electricity.

II. That on Feb. 1, 1887, defendant delivered to plaintiff, at Minneapolis, a telegraphic message of which the following is a copy:

Feb. 1, 1887.
Dated Grove City, Minn.

To T. M. McCord & Co., Minneapolis:
Send one thousand or fifteen hundred to-morrow.

Dudley & Co.

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III. That on the date of the receipt of said message, and for a long time prior thereto, the said firm of Dudley & Co., had been the agents of plaintiff at said Grove City, for the purchase of wheat, and plaintiff had been in the habit of forwarding money to said Dudley & Co., at said Grove City, as hereinafter stated, on receiving telegraphic messages over the said system of telegraph lines of defendant from said Dudley & Co., requesting the same to be done, all of which was well known to defendant and to the agent of defendant at said Grove City, hereinafter mentioned.

IV. That on Feb. 1, 1887, and thereafter and for a long time prior thereto, defendant had employed and kept as its agent, for the receipt and transmission of telegraphic messages at said Grove City, one A. B., and the said A. B. was also during all of said times, the agent for the receipt and transmission of money, and other express matter at said Grove City, of the American Express Co., which said last named company was, and is a corporation doing business in Minnesota and elsewhere as a common carrier for hire, of money and general express matter; that it was the custom of plaintiff on receipt of telegraphic messages from said Dudley & Co., requesting the forwarding of money, to forward the same by the said American Express Company, to Grove City, consigned to Dudley & Co., all of which was well known to defendant, and to the said A. B., its agent.

V. That said telegraphic message was never written by or sent by Dudley & Co., or by any one in their behalf or acting under their authority, to plaintiff, but was falsely and fraudulently written, and sent from Grove City, by the said agent of defendant, the said agent then and there relying upon his said position as agent of said American Express Company, and upon the said custom of plaintiff to forward money by said American Express Company, to intercept and obtain possession of said sum of money, and to convert the same to his own use when the same should arrive at Grove City, and said telegraphic message was by defendant delivered to plaintiff at Minneapolis, without any notice to plaintiff of the false and fraudulent character thereof, and in the usual course of business.

VI. That acting upon the request contained in said message, and in accordance with its said custom, plaintiff thereupon sent by means of the American Express Company the sum of $1,500 in legal currency, to Grove City, addressed to Dudley & Co., but on the arrival of said sum at Grove City, the said agent of defendant intercepted and took possession of the said sum of money, and wrongfully appropriated the same to his own use, and did not deliver the same or any part thereof to Dudley & Co., or to any one of them, but has ever since retained, and still continues to retain the same, and every part thereof.

VII. That plaintiff has duly demanded of defendant the return and repay-

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ment of said sum of $1,500 but the same has not been returned or repaid, nor any part thereof.

Wherefore [as in § 919].

Sustained on demurrer in McCord v. Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315.

TENDER

1861. General form.

The defendant for answer to the complaint herein alleges that on 19 , before this action was brought, at , he tendered to plaintiff $, [in gold and silver coin of the United States], in payment of the [debt] [claim] alleged in the complaint, [and interest], but plaintiff refused to accept the same; that defendant has ever since been, and still is, ready, able and willing to pay said sum to plaintiff, [and now pays the same into this court] [and brings the same into court ready to be paid].

See § 891.

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1862. For unfair competition—Action for damages.

I. That for more than ten years last past plaintiff has been and still is a barber by trade, and engaged in business as such in the village of Howard Lake, Minnesota, where he resides, owning and operating a shop for the purpose of his said trade.

II. That prior to the wrongful acts of defendant hereinafter mentioned plaintiff enjoyed an annual income of $ from said business.

III. That defendant, for the period of about twelve months last past, has wrongfully and maliciously endeavored to destroy plaintiff's said business, and compel plaintiff to abandon the same; that to that end he has persistently and systematically sought by false and malicious reports and accusations of and concerning the plaintiff, by personally soliciting and urging plaintiff's patrons no longer to employ plaintiff, by threats of his personal displeasure, and by various other unlawful means and devices, to induce, and has thereby induced, many of said patrons to withhold from plaintiff the employment by them formerly given.

IV. That defendant is possessed of large means, and is engaged in the business of a banker at said village of Howard Lake, and also at Dassel, Minnesota, and at other places, and is in nowise interested in the occupation of a barber; yet, in pursuance of the wrongful and malicious purpose aforesaid, and for the sole purpose of injuring the trade of plaintiff, and of accomplishing his purpose and threats of ruining plaintiff's said business, and of driving him out of said village, defendant fitted up and furnished a barber shop in said village for conducting the trade of barbering.

V. That failing to induce any barber to occupy said shop on his own account, though offered at nominal rental, defendant, with the wrongful and malicious purpose aforesaid, has during the time herein stated, hired two barbers in succession for a stated salary paid by him to occupy said shop, and to serve so many of plaintiff's patrons as said defendant has been or may be able by the means aforesaid to direct from plaintiff's said shop.

VI. That at the present time a barber so employed and paid by defendant is occupying and nominally conducting the shop thus fitted and furnished by defendant, without paying any rent therefor and under an agreement with defendant whereby the income of said shop is required to be paid to defendant, and is so paid in partial return for his wages.

VII. That all of said acts were and are done by defendant with the sole design of injuring plaintiff, and of destroying his said business and not for the purpose of serving any legitimate interest of his own.

VIII. That by reason of the great wealth and prominence of defendant and the personal and financial influence consequent thereon, he has, by the means

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aforesaid, and other unlawful means and devices, materially injured the business of plaintiff, and has largely reduced the income and profits thereof, and intends and threatens to destroy the same altogether, to plaintiff's damage, $10,000.

Wherefore [as in § 919].

Sustained on demurrer in Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946.

1863. Interference with contract relations of others—Causing school district to cancel contract with teacher.

I. That for more than five years last past plaintiff has been engaged in the occupation of teaching and superintending schools in the state of Minnesota; that in the year 1905 he graduated and received a diploma from the University of Minnesota and holds a life certificate which qualifies him to teach school in any of the high schools or public schools of this state.

II. That during the school year 1910 and 1911 he was superintendent of the Independent school district of the village of Lakefield, Minnesota, having been hired as such by the board of education of said district and taught during said time a number of classes in the school of said district.

III. That his occupation has been and now is teaching school, and he studied and qualified himself for such occupation.

IV. That on March 1, 1911, defendants and other persons, to plaintiff unknown, maliciously conspired together for the purpose of inducing the school board of said district to cancel its contract with plaintiff and of preventing plaintiff from teaching or superintending said school in said village, or from exercising any occupation in connection therewith, and for the purpose of driving him from the occupation in which he was then engaged, and for the purpose of preventing him from thereafter engaging in teaching or superintending said school or any other school.

V. That on March 11, 1911, plaintiff was employed by the board of education of the Independent School District of the village of Lakefield to teach in and superintend said school for the school year of 1911 and 1912, and he entered into a written contract with said district whereby the district employed him to teach in and superintend its school at the agreed price of $1,050 for one year, and plaintiff has been and now is ready, able, and willing to enter upon his employment under and pursuant to said contract and to perform his part of the same in all things.

VI. That pursuant to said conspiracy and as a part thereof defendants, with other persons to plaintiff unknown, with the malicious intent aforesaid, represented and stated to the patrons of the school in said village that plaintiff was not qualified to teach said school; that he had no certificate permitting him to do so; that he was not authorized by law, and that he could not act as teacher or superintendent in said school by reason thereof; and that he had demoralized the school of said village in the past year while he had been super-

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intending and teaching therein, and had degraded and demoralized the condition and standing of said school; and that he was wholly unfit to conduct, manage, teach in or superintend such school.

VII. That defendants made such representations to the school board of said village, with the malicious intent aforesaid, and prevailed upon said board not to hire plaintiff, but to cancel his said contract for teaching said school, and to hire some other teacher or person to superintend and manage the same.

VIII. That defendants, with divers other persons, and in furtherance of said conspiracy, with the malicious intent aforesaid, caused to be made and circulated in said school district and village of and concerning plaintiff a libelous petition wherein they falsely stated that plaintiff had demoralized the schools of said school district, and that he was not qualified to teach said school; that he was not permitted by law to teach or superintend the same by reason of the fact that he had no certificate authorizing him so to do; that he was not qualified by reason of his moral and intellectual standing and conduct in the school, and by such false representations, induced divers persons, patrons of said school and village, together with a number of school children and minors of said village, to sign a petition circulated by them, and then presented the same to the board of education of said school, and caused the same to be read therein, and in the presence of a large number of people, all of which they did with the malicious intent aforesaid.

IX. That in furtherance of said conspiracy and with the malicious intent aforesaid defendants caused to be circulated through said district and village other malicious, false and slanderous statements of and concerning plaintiff.

X. That by such means defendants prevailed upon the said board of education to repudiate and cancel their said contract with plaintiff as superintendent and teacher in said school for the coming year, and said board has, by reason thereof, hired and entered into a contract with another superintendent to take the place of plaintiff in said school, and has notified plaintiff that it does not desire his services any longer in said school and that it has canceled his said contract.

XI. That through said wrongful acts of defendants plaintiff has been prevented from teaching in said school and superintending the same as he otherwise could have done, and has been prevented from securing any school elsewhere, and has been greatly injured in his professional standing, to his damage $10,000.

Wherefore [as in § 919].

Substance of complaint in Faunce v. Searles, 122 Minn. 343, 142 N. W. 816.

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TOWNS

1864. Allegation of corporate existence.

That at the times herein mentioned [plaintiff] [defendant] was and still is a town of this state, duly organized and existing as a public corporation under the laws thereof, forming a part of county.

Some such allegation as this is usual but unnecessary. Courts take judicial notice of the political subdivisions of the state. See Dunnell, Minn. Digest, § 3456. All towns are public corporations. See G. S. 1913 § 1097; Dunnell, Minn. Digest, § 9645.

1865. Failure to file claim.

The defendant for answer to the complaint herein alleges that at no time prior to the commencement of this action was a statement of the claim set forth in the complaint filed with the town clerk of defendant town.

R. L. 1905 § 695; G. S. 1913 § 1199.

TRADE-MARKS AND TRADE-NAMES

1866. For injunction against infringement of trade-mark and for damages—Accounting.[1]

I. That plaintiff is, and for ten years last past has been, the manufacturer of an article known as [describe commodity], which he has, during all said time, offered for sale and sold in packages [describing them, if defendant's are similar], labeled with his own proper device and trade-mark, adopted by plaintiff for the purpose in 19 , of which the following is a copy: [Copy of trade-mark.]

II. That by reason of the long experience and great care of plaintiff in his said business, and the good quality of said article, the same has become widely known [in the community] [throughout the United States] as a valuable and useful article, and acquired a high reputation as such, and has commanded and still commands an extensive sale, which is and has been a source of great profit to plaintiff.

III. That said article is known to the public and to the buyers and consumers thereof, by said name of , and by plaintiff's own proper device and trade-mark aforesaid.

IV. That, notwithstanding the long and quiet use and enjoyment by plaintiff of said name and trade-mark, defendant, well knowing the premises, but wilfully disregarding plaintiff's rights, thereafter, and in 19 , wrong-

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fully prepared and offered for sale, and now offers for sale and sells, at , and elsewhere, an article in imitation of plaintiff's said article, which he has caused to be put up in similar packages, and labeled with a similar label, of which false label the following is a copy: [Copy of false trade-mark.]

V. That such imitation is calculated to deceive the purchasers and consumers of plaintiff's said article, and has misled and still misleads many of them to buy the article sold by defendant, in the belief that it is the article manufactured by plaintiff, greatly to the diminution of said business and profits of plaintiff.

VI. [That the article so put up and sold by defendant, in imitation of plaintiff's article, is of a greatly inferior quality.] [2]

VII. That by reason of the premises plaintiff has been damaged $.

Wherefore plaintiff demands judgment permanently enjoining defendant, and all persons acting under him, from preparing, putting up, selling, or offering for sale said imitation of plaintiff's said article, or any article bearing the name of , or any such imitation of said name, or bearing said false trade-mark, or any similar imitation of the label or trade-mark of plaintiff; that defendant account for and pay over to plaintiff all the profits realized by him upon sales of said articles, sold by him with any imitation of the plaintiff's said trade-mark; for $ damages; and for such other relief as may be just, with costs.

[1] Based on Form 304, Conn. Pr. Act. See also, Hier v. Abrahams, 82 N. Y. 519; Fish v. Reddington, 31 Cal. 187; No. 1117, Abbott's Forms of Pleadings.

[2] This is not essential but may appropriately be inserted as affecting damages.

1867. Same—Another form.

I. That plaintiff is, and ever since Jan. 11, 1894, has been, a corporation duly organized and existing under the laws of this state, under the corporate name and style of The J. R. Watkins Medical Company.

II. That defendants are now, and during all the times herein mentioned were, partners doing business under the firm name of the Dr. Ward's Medical Company.

III. That one A. B. on and for more than twenty-three years next prior to Jan. 11, 1894, manufactured a medical preparation known as Dr. Ward's Liniment, which during all such time he offered for sale and sold in bottles marked with his own proper device and trade-mark, adopted and used by him from May 14, 1870, to July 11, 1894, consisting of the words and letters Dr. Ward's Liniment, lettered and blown into the glass on the side of each of the bottles in which said medical preparation was contained.

IV. That on May 14, 1870, while said A. B. was engaged in the manufacture and sale of such medical preparation, he labeled and inclosed, and caused the bottles containing said medical preparation to be labeled and inclosed in paper wrappers on which was affixed, stamped and printed his own proper device and

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trade-mark, adopted and used by him from May 14, 1870, to Jan. 11, 1894, which device and trade-mark was in the following words and letters, to wit, Dr. Ward's Vegetable Anodyne Liniment, and such device and trade-mark was duly registered by the said A. B. on May 14, 1870, in conformity with an act of Congress entitled "An Act to Amend the several Acts respecting Copyrights."

V. That on May 24, 1893, while said A. B. was so engaged in the manufacture and sale of such medical preparation, he caused the words and letters, to wit, Dr. Ward's, with a line passing horizontally through the center of said words and letters, to be lettered and blown into the glass of each of the bottles containing said medical preparation, and also caused said words and letters to be stamped and printed on the paper wrappers in which said bottles were inclosed, as hereinbefore set forth, which words, letters, device and trade-mark said A. B. duly adopted and used as his own device and trade-mark from May 24, 1893, to Jan 11, 1894, and which trade-mark the said A. B. duly filed for record in the office of the Secretary of State of Minnesota, and which was duly recorded therein as such trade-mark, on May 24, 1893.

VI. That on Jan. 11, 1894, said A. B., for value received, sold, assigned and made over to plaintiff all of his right, title and interest in and to said trade-marks and devices and all of his rights to manufacture and sell said medical preparation known as Dr. Ward's Liniment, and Dr. Ward's Vegetable Anodyne Liniment, in the state of Minnesota and elsewhere and all his right, title and interest in and to the formula or receipt for making the same.

VII. That by reason of the long experience and great care of the said A. B. and this plaintiff in the preparation, compounding and manufacture of said medicine, and the superiority and value of the same, it has become and now is widely known to the public as a most valuable and useful medicine and has acquired a high reputation as such and has commanded and still commands an extensive sale throughout the state of Minnesota and elsewhere, which has been the source of great profit to said A. B. and has been and is now to plaintiff.

VIII. That by reason of the efforts of said A. B. and plaintiff in the careful and skilful preparation and advertising of said medicinal compound, the same has become generally and universally known throughout the state of Minnesota and elsewhere to the buyers and consumers of the same and to the public generally as Dr. Ward's Liniment, and by said trade-marks and devices, and plaintiff since its incorporation, and the said A. B. prior thereto, have been well known as the manufacturers and proprietors thereof.

IX. That defendants, well knowing the premises, but wilfully disregarding the plaintiff's rights, have since the year 1897 made and offered for sale and sold, and still sell, a similar article in imitation of the plaintiff's article, which defendants have and do now put up and sell in bottles similar to plaintiff's, labeled and inclosed in paper wrappers on which is stamped and printed a device and trade-mark similar to that of the plaintiff's, to wit, the words Dr.

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Ward's Liniment, Dr. Ward's Vegetable Liniment, and Dr. Ward's Vegetable Oil Liniment.

X. That such imitation of plaintiff's said device and trade-marks is calculated to deceive and does deceive and mislead purchasers and consumers of plaintiff's said medicinal preparation into purchasing the article so spuriously made and sold by defendants under the names of Dr. Ward's Liniment, Dr. Ward's Vegetable Liniment, and Dr. Ward's Vegetable Oil Liniment, in the belief on their part that it is the preparation manufactured by plaintiff.

XI. That by reason of the imitation, infringement and counterfeiting of plaintiff's device and trade-marks as aforesaid, and the sale by defendants of said wrongful imitation of plaintiff's said medicinal preparation, plaintiff's business has been diminished and plaintiff has at all times since 1897 suffered loss of profits therefrom.

XII. That before the commencement of this action plaintiff requested defendants to desist from their use of plaintiff's devices and trade-marks and to cease and refrain from selling said spurious articles under said names and trade-marks, but defendants have failed and refused and still refuse and neglect to do so.

XIII. That by reason of the premises plaintiff has been damaged $1,000.

XIV. That the defendants are about to, and will, unless restrained by this court, continue to infringe on the plaintiff's rights as aforesaid, and plaintiff is without any adequate remedy at law.

Wherefore plaintiff demands judgment perpetually enjoining the defendants, and their agents and servants, from manufacturing, selling or offering for sale any imitation of plaintiff's proprietary medicine or any article bearing the name Dr. Ward's Liniment, or Dr. Ward's Vegetable Anodyne Liniment, or any imitation of said names or bearing said false trade-marks or any imitation of said labels or trade-marks of plaintiff; and from fraudulently, wrongfully and unfairly competing with plaintiff by representing any preparation they may compound, as being plaintiff's preparation, and in any way deceiving purchasers and consumers into believing such to be the case, or undermining plaintiff's business in any way whatever by any imitations, false devices or unfair or fraudulent representation; for $2,000 damages; and for such other relief as may be just, with costs.

Sustained on demurrer in J. R. Watkins Medical Co. v. Sands, 80 Minn. 89, 82 N. W. 1109.

1868. Injunction against use of trade-name.

I. That on June 15, 1901, plaintiff and A. B. and C. D. entered into a partnership under the firm name of the Crookston Marble Works; that the office and principal place of business of said partnership was in the city of Crookston, Minnesota; that ever since June 15, 1901, and up to July 7, 1902, said partnership was actively engaged in said city in the business of manufacturing

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marble, granite and other stone monuments and all kinds of cemetery work, and of selling and erecting all kinds of monuments and stone in cemeteries and burial places; that said partnership, during all of said time, extensively advertised their said business in Crookston and its vicinity and had business cards, letterheads, envelopes, contract blanks, and other stationery, printed with their said firm name and had their said firm name conspicuously displayed over their place of business, and during all of said time were actively engaged in carrying on said business and soliciting new business; that they had in said business a large amount of correspondence through the United States mail with their customers and patrons, which has been and is directed to the Crookston Marble Works, and said firm is widely and extensively known among its patrons and the public generally in northern Minnesota and North Dakota, and also throughout the United States, to manufacturers and dealers in stone and monuments and supplies for said business, and the said name, Crookston Marble Works, has become and is a trade-name and a valuable property interest.

II. That on July 7, 1902, plaintiff purchased from said A. B. and C. D. all their right, title and interest in and to the property and good-will, name and assets of said partnership, with the intention and for the purpose of carrying on said business thereafter under said firm name, Crookston Marble Works, and by said purchase thereby succeeded to and became possessed of all the right, title and interest of his said partners in and to said business, trade-name, good-will and assets of said firm; that since his purchase as aforesaid of the interest therein of his partners, plaintiff has continued and carried on the business of said firm as hereinbefore described, under the name and style of Crookston Marble Works, and intends to continue doing so, at Crookston, Minnesota; that for the business of said Crookston Marble Works, it is necessary that the same be conducted and carried on under said name and said name has become and will continue to be a useful and valuable asset of said business.

III. That on July 8, 1902, defendants associated themselves together for the purpose of forming a corporation under the laws of this state and adopted and executed articles of incorporation wherein they assumed as a name for said corporation Crookston Marble Works, and stated that the general nature of the business of said corporation would be the manufacture of marble, granite and other stone monuments and all kinds of cemetery work, and acquiring and owning copyrighted designs of the same, and such business as may be necessary and incident thereto, and that the principal place of business of said corporation would be in the city of Crookston, Minnesota, and that the time of commencement of said corporation should be July 8, 1902, and the period of its continuance thirty years from that time; that said defendants have caused said articles of incorporation to be published in the Crookston Daily Times, a daily newspaper printed and published in said city, and, as plaintiff is informed and believes, it is the intent and purpose of said incorporators, and said

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proposed corporation when perfected, to engage in the business of the manufacture of marble, granite and other stone monuments and all kinds of cemetery work and of selling, erecting and placing all kinds of monuments and stones in cemeteries and burial places and soliciting orders for the same under said name, Crookston Marble Works, all of which said business is intended to be conducted under said name.

IV. That the principal place of business and the post office address and central office and distributing point of said corporation is to be at Crookston, Minnesota; that defendants intend to transact said business in the same territory in which the business of plaintiff has been and will be carried on; that if defendants are allowed to carry on said business under said corporate name of Crookston Marble Works, the necessary result will be that the mail intended for the plaintiff will become confused with that of defendants and trade secrets of plaintiff will become known to defendants, and moneys intended for plaintiff will be paid to defendants, and defendants will be enabled to obtain possession of and take advantage of contracts and orders forwarded to and intended for plaintiff, and customers unacquainted with the city of Crookston will be misled by the sign used by defendants and deal with them when intending to deal with plaintiff, and shipments made and intended to be delivered to plaintiff will be delivered to defendants; that if defendants are permitted to use and carry on business as aforesaid under said name, the business of plaintiff will be so confused and intermixed with that of defendants as to be incapable of separation and much of the business intended for plaintiff will be diverted to defendants; that the said use of such name if permitted by the defendants will have the effect to make it impossible for plaintiff to continue and carry on the said business, to his irreparable injury; that, as plaintiff is informed and believes, defendants intend, if they are allowed to conduct said business under said name, to claim and demand all of the mail received at the post office at Crookston, Minnesota, directed to Crookston Marble Works, and unfairly to obtain from said post office the mail intended for plaintiff and plaintiff will be deprived of the means of obtaining his mail without having a large part of it pass through the hands of said corporation, and the secrets of his business made known to the defendants, thereby greatly increasing the defendants' business to the great damage of plaintiff; that the defendants took the name of Crookston Marble Works as their corporate name, and assumed the name Crookston Marble Works for the purpose of enabling them to compete unfairly with this plaintiff and to enjoy knowledge of the affairs and business of this plaintiff by prying into and examining the plaintiff's mail, greatly to the plaintiff's injury, and defendants' desire and intent by assuming such corporate name is to trade upon the reputation established by plaintiff and to enjoy the fruits of the advertisements of plaintiff and the established reputation which plaintiff has acquired by his labors and expenditures while carrying on the said business as aforesaid; that each and every of the

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acts of defendants as hereinbefore set forth are intended to and will deceive the customers of plaintiff and defraud plaintiff, and is intended to secure unfair and unscrupulous advantage of plaintiff in his business.

Wherefore plaintiff demands judgment perpetually enjoining defendants and each of them, their agents, servants and employees, from in any manner by sign, advertisement, representations or post office address, or otherwise, using the name, Crookston Marble Works, as the name of said corporation, and from in any manner conducting any of its business hereinbefore specified under said name, and from proceeding to further perfect said incorporation under said name or the organization of said corporation under said name; for a temporary injunction restraining defendants as aforesaid during the pendency of this action; and for such other relief as may be just, with costs.

Complaint in Nesne v. Sundet, 93 Minn. 299, 101 N. W. 490.

1869. Same—Another form—Accounting.

I. That plaintiff is a corporation duly organized and existing under the laws of this state, and having its principal place of business at Minneapolis, Minnesota; that said corporation was so organized and created on March 1, 1887; that defendant is a resident of the city of Duluth, Minnesota.

II. That plaintiff has been continuously engaged since the date of its incorporation in the business of manufacturing and selling knit goods, and particularly the kind of knit goods generally known as underwear; that it has since the date of its incorporation carried on said manufacturing business at Minneapolis, where it has a large manufacturing plant with a daily capacity of more than 1,500 dozen garments, and in such plant and business plaintiff has a cash investment of over $600,000 and employs in its said factory about 660 operatives; that said knit goods have been and are sold by plaintiff throughout the United States; and plaintiff has continuously carried on said business under its corporate name of Northwestern Knitting Company.

III. That defendant is engaged at Duluth, in manufacturing and selling knit goods, including underwear, and is carrying on his business under the name of Northwestern Knitting Mill; that defendant began using said name long after the incorporation of plaintiff and plaintiff first learned that defendant was using the said name on March 20, 1908; that the name Northwestern Knitting Mill, used by defendant as the name under which he carries on his business, so closely resembles the name of plaintiff corporation as to be liable to mislead and deceive the public, and cause confusion in the minds of the public between the two manufacturing establishments, and thereby to permit defendant to secure a considerable part of the business and trade of plaintiff; that such confusion has frequently occurred, and the confusion is increased by the fact that plaintiff and defendant are engaged in the same business and in the same state, thereby causing the consuming public to mistake defendant for plaintiff, and defendant's knit goods for plaintiff's knit goods.

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IV. That defendant is thereby practicing unfair competition in business, and is diverting to itself a portion of plaintiff's trade; that said name, Northwestern Knitting Mill, was adopted by defendant for the purpose of causing confusion between plaintiff and defendant, and to enable defendant to unfairly compete with plaintiff and to divert the established business of plaintiff to defendant, to encroach upon the good-will of plaintiff's business, and to cause purchasers to buy defendant's knit goods in the belief that they are the knit goods manufactured by plaintiff.

V. That said acts of defendant constitute an infringement upon plaintiff's established trade-name and legally adopted corporate name, and also constitute false, fraudulent, unlawful, and unfair competition with plaintiff's business.

VI. That plaintiff has never, at any time, assented to the conduct of defendant in adopting the name Northwestern Knitting Mill, or to any of said acts of defendant; that plaintiff has repeatedly notified and requested defendant to cease using the name Northwestern Knitting Mill, but defendant has refused, and still refuses, to do so.

VII. That the damage inflicted upon plaintiff by means of said acts of defendant, and the loss of profits to plaintiff and injury to its trade, business and reputation, are an irreparable injury to plaintiff, and the continuance of the same would inflict irreparable injury upon him.

VIII. That defendant threatens to and will, unless restrained by the order of this court, continue to use the name Northwestern Knitting Mill, as aforesaid, and to falsely, fraudulently and unfairly compete in business with plaintiff in the manner aforesaid, and plaintiff has no adequate remedy at law.

Wherefore plaintiff demands judgment perpetually enjoining defendant from using the name, Northwestern Knitting Mill, or any other name that is a colorable imitation of plaintiff's corporate name; and from doing any act or thing which tends to deceive and mislead the public and to cause it to believe that it is dealing with plaintiff when it is in fact dealing with defendant; and from selling any knit goods manufactured by him as knit goods manufactured by plaintiff; for a temporary injunction restraining defendant as aforesaid during the pendency of this action; for an accounting under the direction of this court as to all profits that have been received by defendant from all business received by him by reason of his infringement of the trade-name of plaintiff, or by reason of the aforesaid acts constituting false, fraudulent and unfair competition with the plaintiff as aforesaid; and for such other relief as may be just, with costs.

Complaint in Northwestern Knitting Co. v. Garon, 112 Minn. 321, 128 N. W. 288.

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1870. Trespass to personalty—De bonis asportatis.

The plaintiff complains of defendant and alleges that on 19 , defendant wrongfully took from the possession of plaintiff a sheep, the property of plaintiff, of the value of $25, and carried away and converted the same to his own use, to plaintiff's damage $75.

Wherefore [as in § 919].

Sustained by Clague v. Hodgson, 16 Minn. 329(291). See § 894, and Dunnell, Minn. Digest, §§ 9681, 9682.

1871. For breaking leg of horse.

I. That on 19 , defendant [wilfully, wantonly and maliciously] struck with a large club and broke one of the legs of a horse, the property of plaintiff, of the value of $.

II. That thereby plaintiff was damaged $.

Wherefore [as in § 919].

1872. For taking and riding a horse to its injury.

That on 19 , defendant wrongfully took a horse, belonging to plaintiff, and rode it for a long distance at an excessive speed, whereby the horse became broken winded and greatly depreciated in value, to plaintiff's damage $.

Wherefore [as in § 919].

1873. For wilful injury—Collision.

I. That on 19 , while plaintiff was driving an automobile belonging to him along street, a public highway in the city of , defendant wilfully, wantonly and maliciously drove a wagon against said automobile, whereby plaintiff was thrown violently to the ground and [allege injuries and damages as in §§ 1250–1255].

II. That said automobile was thereby damaged to the extent of $.

III. That thereby plaintiff was damaged $.

Wherefore [as in § 919].

1874. Trespass to realty—General form.[1]

I. That at the times herein mentioned plaintiff was the owner and in possession of [describe premises as in a deed], county, Minnesota.

II. That [on 19 ,] [at divers times between 19 , and 19 ,] defendant wrongfully [wantonly and maliciously] [2] [and with

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force broke and] entered said premises and [describe acts of depredation in general terms as in §§ 1875, 1878, 1880, 1925], to plaintiff's damage $.[3]

III. [That thereby plaintiff was deprived of the use of said premises for a period of , and the reasonable value of the use thereof during said period was $.][4]

IV. [Allege any special damages sought.][5]

Wherefore [as in § 919].

[1] See § 895, and Dunnell, Minn. Digest, §§ 9684–9696.

[2] Add when exemplary damages are sought. See § 630, and Dunnell, Minn. Digest, §§ 2539–2558.

[3] See Dunnell, Minn. Digest, § 9694.

[4] Weaver v. Mississippi & Rum River Boom Co., 28 Minn. 542, 11 N. W. 113.

[5] See §§ 624, 895, and Dunnell, Minn. Digest, § 9694.

1875. Same—Various allegations of damage.

[and then and there broke down and destroyed rods of fence and trod down the grass and crops thereon, to plaintiff's damage $.]

[and caused his cattle to run upon said premises and depasture the same, and trod down and injure the grass and growing grains thereon, to plaintiff's damage $.]

[and cut down and carried away the trees and timber of plaintiff, of the value of $, and converted and disposed of the same to his own use, to plaintiff's damage $.]

1876. Same—Short form.

That [on 19 ,] [at divers times between 19 , and 19 ,] defendant [wrongfully] [wantonly and maliciously] [and with force broke and] entered [the close of] [a dwelling house, the property of] plaintiff, situated [in the township of , in the county and state aforesaid], and [describe in general terms the acts of depredation], to plaintiff's damage $.

Wherefore [as in § 919].

1877. Conversion of timber.

I. [As in § 1878.]

II. That on 19 , [at divers times between 19 , and 19 ,] defendant wrongfully entered upon said premises and cut and carried away, and converted to his own use about feet of pine timber growing thereon.

III. That the reasonable value of such timber [was] [is] $.

Wherefore [as in § 919].

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1878. Same—Another form.

I. That at the times herein mentioned, plaintiff was the owner and entitled to the immediate possession of [describe premises as in a deed], and of all the pine timber growing thereon.

II. That on 19 , one A. B. wrongfully entered said premises and cut and carried away and converted to his own use feet of said timber, [with full knowledge of plaintiff's rights therein, and without any color or claim of right therein on his part].

III. That on 19 , defendant purchased said timber from the said A. B. [with full knowledge of plaintiff's rights therein and of said conversion by A. B.], and on 19 , at , [wrongfully refused to deliver the same to plaintiff on demand] [wrongfully converted the same to his own use].

IV. That the value of said timber at the time it was [so converted by said A. B.] [so purchased by defendant] [so converted by defendant] was $.

Wherefore [as in § 919].

1879. Trespass for mesne profits.

I. That at the times herein mentioned plaintiff was and now is the owner and entitled to the possession of the [describe premises as in a deed], in county, Minnesota.

II. That on 19 , while plaintiff was in possession of said premises, defendant wrongfully entered the same and ousted plaintiff and wrongfully retained possession from plaintiff until 19 , and in the meanwhile cultivated the same as a farm and enjoyed the rents and profits thereof.

III. That by reason thereof plaintiff was wrongfully deprived of the use of said premises by defendant for a period of months, and the reasonable value of the use and occupation thereof during such period was $.

IV. That plaintiff is now in possession of said premises, as such owner.

Wherefore [as in § 919].

Based on Blew v. Ritz, 82 Minn. 530, 85 N. W. 548.

1880. For treble damages under G. S. 1913 § 7900.

I. That at the times herein mentioned plaintiff was the owner and in possession of [describe premises as in a deed], in county, Minnesota.

II. That [on 19 ,] [at divers times between 19 , and 19 ,] defendant, without lawful authority, entered upon said premises and [cut down and carried away about pine trees and oak trees growing thereon, the property of plaintiff, of the value of $.] [cut and carried away about tons of grass growing thereon, the property of plaintiff, of the value of $], whereby the same were wholly lost to plaintiff, to his actual damage $.

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Wherefore plaintiff demands judgment for $, treble damages as authorized by G. S. 1913 § 7900, with costs.

See G. S. 1913 § 7900, and Dunnell, Minn. Digest, § 9696.

1881. Malicious injury to property—Treble damages under G. S. 1913 § 8944.

That on 19 , at , defendant unlawfully and wilfully [cut, broke, mutilated and defaced] certain [describe property in general terms], the property of plaintiff, of the value of $, and thereby [wholly destroyed] [injured them], to plaintiff's actual damage $.

Wherefore plaintiff demands judgment for $, treble damages as authorized by G. S. 1913, § 8944, with costs.

1882. Denial of trespass to realty.

The defendant for answer to the complaint herein denies that he [broke or entered upon] the premises described therein at the times alleged in the complaint or at any other time.

1883. Denial of taking.

The defendant for answer to the complaint herein denies that he took or carried away the goods alleged in the complaint, or any part thereof.

1884. Denial of plaintiff's ownership or possession.

The defendant for answer to the complaint herein denies that plaintiff was the owner or in possession of the [premises] [goods] described therein at the times alleged.

1885. License from plaintiff.

The defendant for answer to the complaint herein alleges that on 19 , plaintiff gave to defendant license to enter the premises therein described [etc., according to the facts]; that under said license defendant entered said premises and [state what he did according to the facts], which are the acts of which plaintiff complains.

1886. Same—Another form.

The defendant for answer to the complaint herein alleges that the acts therein complained of were done by leave of plaintiff.

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1887. Agent taking title to realty in his own name.

I. That on April 17, 1884, defendant A. B., at the request of plaintiff and as her agent, purchased for plaintiff the [description of premises], and paid therefor $, furnished by plaintiff; that plaintiff intrusted defendant A. B. with the entire management of such purchase and relied entirely upon him in all matters relating thereto, and it was agreed between them that he should have the deed of said premises made out to her, in her name, as the grantee.

II. That defendant A. B. fraudulently caused and procured a deed of conveyance of said property to be made out and executed in his name as grantee therein, and secured the delivery thereof to him, and caused the same to be recorded in the office of the register of deeds for Ramsey county, Minnesota.

III. That plaintiff, after said lot was purchased as aforesaid, gave to the defendant A. B. the money with which to construct on said lot a dwelling house for plaintiff; that the same was so given to defendant A. B. with no knowledge that the title to said lot or the deed of said lot was in the name of defendant A. B., but was so given in the belief that the title to said lot was in plaintiff, and that said deed was taken in her name.

IV. That with the money so given to the defendant A. B., he caused, at plaintiff's request, to be constructed for her a dwelling house on said lot; that prior to March 1, 1885, said dwelling house was completed, and fully paid for out of said money so furnished and given to the defendant A. B. for said purpose, except the sum of $500, which was paid thereafter in paying a mortgage that was on said premises.

V. That on March 14, 1886, plaintiff for the first time learned, and for the first time had any notice whatever, that the title to said premises had been taken in the name of the defendant A. B., and that he had procured said deed to be made out and executed in his name instead of in her name; that thereupon said defendant A. B. made and delivered to plaintiff, an instrument or memorandum in writing, subscribed by him, acknowledging and declaring that he held and holds said property in his name in trust for plaintiff.

VI. That on Dec. 21, 1891, defendants were married at St. Paul, Minnesota, and ever since have been, and now are, husband and wife.

VII. That prior to said marriage, both defendants had full knowledge and notice of all the facts aforesaid.

VIII. That defendants have failed and refused to convey said premises to plaintiff, though requested to do so.

IX. That plaintiff entered into possession of said premises in the fall of 1884 and ever since then has been continuously, and now is, in possession

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thereof as the owner, with the full knowledge of defendants and the defendant A. B. has never repudiated said trust.

Wherefore plaintiff demands judgment that the defendant A. B. holds title to said premises as trustee thereof for plaintiff, and that defendants convey said premises to plaintiff, and for such other relief as may be just, with costs.

Substance of complaint in Snell v. Snell, 54 Minn. 285, 55 N. W. 1131.

1888. Promoter of corporation taking deed in his own name.

I. That on Nov. 4, 1892, the People's Gas & Electric Company was a corporation, duly organized and existing under the laws of this state, for the manufacture and sale of illuminating gas and other purposes; that the authorized capital stock of said corporation consisted of five hundred shares, of $100 each, but no more than sixty of said shares were ever subscribed for and taken.

II. That the defendant A. B. was president of said corporation, and was the principal organizer and promoter thereof, and had subscribed for twenty shares of the capital stock of said corporation, at $100 each, but had not paid for any part thereof.

III. That on Nov. 4, 1892, said A. B. was employed by said corporation to purchase for it lot eight, in block fifty-three, of the original townsite of the town [now city] of Little Falls, Minnesota, according to a plat and survey thereof, made by S. P., which is now on file and of record in the office of the register of deeds for said Morrison county, Minnesota.

IV. That said A. B., acting as president and agent for said company, purchased said lot and paid therefor the sum of $700, and charged said amount against his indebtedness to said company on his said subscription of stock, but wrongfully, and in violation of his trust as agent of said company, and without the knowledge and consent of said company, or any of its stockholders except himself, said A. B. caused the title of said property to be taken in his own name.

V. That immediately afterwards, not knowing said facts, said company caused to be erected upon said lot a gas plant, buildings and appurtenances, and expended thereon the sum of $3,000.

VI. That ever since the purchase of said lot, and up to the time of the purchase of the same by plaintiff, the said People's Gas & Electric Company, and the assignees in the insolvency proceedings hereinafter mentioned, have been in the actual possession and absolute and uninterrupted control thereof, claiming to be the owner thereof.

VII. That afterwards the fact was discovered by said company that their said conveyance had been taken by said A. B. in his own name, and said company, by its officers, immediately demanded that A. B. convey said lot to said company, and A. B. promised to do so, but neglected and refused to execute any conveyance thereof.

VIII. That afterwards said company became insolvent, and duly made an

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assignment of all its property to one C. D., for the benefit of its creditors; that thereupon said C. D. accepted said trust, and duly qualified and entered upon the discharge of his duties as such assignee, but afterwards, on Feb. 5, 1894, said C. D. resigned said trust, and the district court for said county, accepted said resignation, and duly appointed E. F. as assignee in his place.

IX. That on July 24, 1894, said E. F., having duly qualified and entered upon the discharge of his duties as such assignee, did, under and pursuant to an order of said court, duly and properly made therein, sell and convey to plaintiff, the real estate above described, together with the plant and all appurtenances situated thereon, for the sum of $725, paid by plaintiff.

X. That on August 9, 1893, said A. B. and his wife, the defendant C. B., conveyed the property mentioned to one D. B., who, on the same day, conveyed the property to said C. B.; that both of said conveyances were without consideration and were made solely for the purpose of transferring the record title of said property from defendant A. B., to his wife, and to defraud the said Gas Company and those claiming under it.

XI. That on Jan. 2, 1894, said C. B. and A. B. made and delivered to defendant G. H. a deed of said property and the same was on that day recorded in the office of said register of deeds; that said conveyance was fraudulent and without consideration, and defendant G. H. well knew all the above mentioned facts at the time said conveyance was made, and well knew that the said Gas Company and its assignee claimed to be the owner of said property, and said conveyance was made in pursuance of a conspiracy between said A. B. and said G. H. to defraud said Gas Company and its successors.

Wherefore plaintiff demands judgment that defendants G. H., A. B., and C. B., hold said land in trust for him, and that they execute to him a good and sufficient conveyance thereof, and for such other relief as may be just, with costs.

Substance of complaint in Nester v. Gross, 66 Minn. 371, 69 N. W. 39.

1889. Officer of corporation taking title in his own name—Trust ex maleficio.

I. That at the times herein mentioned and until March 26, 1907, the Minnesota Title Insurance & Trust Company was a corporation duly organized and existing under the laws of this state, and engaged among other things in the conduct of the business of a trust company; that on March 26, 1907, in an action in this court, in which the State of Minnesota, ex rel. Anton Schaefer, as Public Examiner of the State of Minnesota, was plaintiff, and the said Minnesota Title Insurance & Trust Company was defendant, the said Minnesota Title Insurance & Trust Company, was found and declared to be insolvent, and plaintiff in this action was appointed by the court receiver of said corporation with full power and authority to take into possession and control all

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of the property and assets of said Minnesota Title Insurance & Trust Company and convert the same into cash and distribute the same to the persons entitled thereto pursuant to law and the practice of the court; that plaintiff duly accepted said trust, gave bond and otherwise qualified as by law required, and since said time has been and still is the duly appointed, qualified and acting receiver of said Minnesota Title Insurance & Trust Company; that as such receiver he has since had, and now has, the custody and control of its books, papers and records.

II. That at the times herein mentioned defendants were and still are husband and wife, and the defendant A. B. was, until March 26, 1907, the president of said Minnesota Title Insurance & Trust Company, and its chief executive officer in charge of its business affairs.

III. That on March 2, 1906, defendant A. B. purchased from one C. D. the [description of premises], and received the title thereto in his own name by a warranty deed, which was recorded in the office of the register of deeds for said Hennepin county, on March 17, 1906, in Book 604, of Deeds, on page 299; that defendant A. B. paid $10,000 for said property by drawing two checks upon the general bank account of the said Minnesota Title Insurance & Trust Company in the Security Bank of Minnesota, numbered 35,904 and 35,909, dated March 16, 1906, each for the sum of $5,000; that each of said checks was payable to the order of said bank for cashier's check and were signed by said defendant A. B. in behalf of and for the said Minnesota Title & Trust Company; that said checks together amounted to $10,000 and were by said defendant duly presented to the said Security Bank and exchanged for cashier's checks of said bank for said amount, made payable to said C. D., the vendor of said property, and she obtained the money thereon; that said $10,000 so paid by said defendant to said C. D. was wholly the money, funds and property of the said Minnesota Title Insurance & Trust Company, and the same and all thereof was so paid by said defendant to said C. D. for the said real estate without the authority, knowledge or consent of said company, or its board of directors, or officers, and in violation of the statutes of the state of Minnesota in such case made and provided; that no part of said sum has ever been repaid by him to said company.

IV. That defendants have had the exclusive use and occupancy of said real estate, and the rents and profits derived therefrom since March 2, 1906, and the value of such rents and profits is the sum of $10,000.

Wherefore plaintiff demands judgment that said defendants from and after March 2, 1906, held the title to said real estate in trust for the said Minnesota Title Insurance & Trust Company until plaintiff became the receiver thereof, and thereafter held, and still hold title thereto, in trust for plaintiff; and that plaintiff is now the owner of the same; and for the immediate restitution of said real estate; and for $10,000 damages, the value of such rents and profits thereof; and for such other relief as may be just, with costs.

Complaint in Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861.

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1890. Partnership to buy and sell land—Fraud of partner—Transfer to his wife.

I. That defendants are, and at the times herein mentioned were, husband and wife, and living together as such.

II. That plaintiff, the defendant A. B., and one C. B., on Jan. 22, 1883, agreed to invest certain money in real estate, in the city of Minneapolis, Minnesota, to contribute share and share alike toward any such purchase they might make, and to become the owners of any property they might purchase in common, share and share alike.

III. That said A. B. at that time and previous thereto represented to plaintiff that he was then and for a long time had been negotiating with one E. F. for the purchase of all of lot twelve, in block six, of what is known as Ridgewood Addition to Minneapolis, as the same appears on the plat of said addition, on file and of record in the office of the register of deeds, for Hennepin county, Minnesota, except the north fifty feet of said lot; that said north fifty feet had previously been sold and conveyed by the said E. F. and could not now be included in said proposed purchase; that said lot exclusive of said north fifty feet could be purchased of said E. F. for the sum of $2,500 and no less sum, $1,600 of which would have to be paid in cash and the balance of said purchase money, to wit, the sum of $900, would have to be secured by a mortgage on that part of said lot exclusive of the north fifty feet; that said property was cheap at the proposed price and could be sold again at a profit.

IV. That plaintiff relied upon said representations made by said defendant and believed them to be true, and was induced thereby to join said C. B. and defendant A. B. in purchasing, as he supposed, and was so led to believe, the lot above described, exclusive of the north fifty feet thereof, at the price and on the terms aforesaid, and paid his share of the purchase price therefor, to wit, the sum of $533.33 in cash, and joined the defendant A. B. and said C. B. in executing a note and mortgage on said lot exclusive of the north fifty feet thereof, to secure the sum of $900, the remaining part of said purchase price; that thereupon the said E. F. caused said lot, exclusive of the north fifty feet thereof, to be conveyed by warranty deed to plaintiff, C. B., and A. B., and at the same time by the procurement of the defendant A. B., and as a part of the consideration for the $2,500 paid and secured as aforesaid, conveyed by a good and sufficient deed the north fifty feet of said lot to the defendant G. B.

V. That the said representations of the defendant A. B. made to the plaintiff as aforesaid in reference to his negotiations for said lot were false, as said defendant well knew at the time he made them; that in fact said A. B. negotiated for the whole of said lot at the price and upon the terms which he induced plaintiff to believe was for that part of said lot exclusive of the north fifty feet thereof; that by the procurement of said A. B., said north fifty feet of said lot was, without the knowledge or consent of plaintiff, conveyed to the defendant G. B., who is now the apparent owner thereof; that said false rep-

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resentations were made by the defendant A. B. to plaintiff, and said conveyance of the north fifty feet of said lot was by him procured to be made to the defendant G. B., for the purpose of defrauding plaintiff out of his undivided one-third of said north fifty feet of said lot, and the said G. B. knowing fully the said fraudulent intent of said A. B. and acquiescing therein and for the purpose of assisting and abetting the said A. B. in defrauding plaintiff as aforesaid, became a party thereto and consented to have said property conveyed to her as aforesaid; that the said G. B.'s title to the north fifty feet of said lot is merely colorable, and plaintiff is the owner of the undivided one-third thereof.

VI. That plaintiff's interest in said north fifty feet is of the value of $800.

VII. That defendant A. B. owns no property which can be levied upon and sold on execution for the payment of his debts.

Wherefore plaintiff demands judgment that he is the owner of an undivided one-third of the land so conveyed to defendant G. B., and that said conveyance to defendant G. B. is fraudulent and void as to plaintiff, and that defendant G. B. holds an undivided one-third of said land in trust for plaintiff, and that defendant G. B. convey the same to plaintiff, and for such other relief as may be just, with costs.

Complaint in Hodge v. Twitchell, 33 Minn. 389, 23 N. W. 547.

1891. Absolute deed as mortgage—Transfer by mortgagee—Accounting.

I. That on Nov. 5, 1884, plaintiff was the owner in fee of [description of premises], subject however, to a mortgage of $4,000, bearing date July 7, 1882, and recorded in the office of the register of deeds for Hennepin county, Minnesota, in Book 77, of Mortgages, on page 501.

II. That on Nov. 5, 1884, and while she was the owner of said premises, for the purpose of securing the payment of $500, loaned on said day to plaintiff by the National Bank of Commerce, a national banking corporation, doing business in the city of Minneapolis, in said state, of which said banking corporation, defendant then and for a long time thereafter was the president, and for which sum plaintiff and one A. B., as partners as B. & C., had given their promissory note bearing date on said day, and for the purpose of securing such other and further sums of money as might be loaned and advanced in the future by defendant or said bank, to plaintiff or the said B. & C., and for no other purpose, plaintiff and her husband, the said A. B., made and delivered to defendant a quitclaim deed to said premises, absolute in form, but intended to stand as security only for said $500 and said future advances, which said deed bears date Nov. 5, 1884, and was thereafter on Oct. 30, 1885, recorded in the office of said register of deeds in Book 152, of Deeds, on page 95.

III. That at the time of the making and delivery of said deed and as a part of the same transaction, and to show that said deed was made for the purpose as aforesaid, the defendant made, acknowledged and delivered to plaintiff an instrument in writing, a copy of which is hereto attached, marked Exhibit A,

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and made a part hereof; that immediately upon the making and delivery of said deed, defendant went into possession of said premises, and from that time to the times of the sales of said premises hereinafter alleged, collected and retained to his own use all the rents and profits of said premises, amounting to a large sum of money.

IV. That between the date of said deed and May 18, 1885, through A. B., her said agent, plaintiff borrowed from said bank, and while the said defendant was acting as its president, on account of said security, several sums of money, for which she gave notes of said B. & C., and there is now due and owing on all of said sums, so borrowed as aforesaid, on account of said security, the sum of $2,000, with interest as specified in the notes representing the same, which said notes and indebtedness said bank has sold to defendant prior to the commencement of this action and defendant is now the holder thereof.

V. That thereafter and on Dec. 1, 1885, defendant, without having foreclosed or attempted to foreclose as a mortgage said quitclaim deed or otherwise, and without the knowledge or consent of plaintiff, and without notice to her of his intention to sell, and without notice to the purchasers of the nature and state of his title, sold and conveyed to bona fide purchasers, without notice, by an absolute title, a part of said premises, by a deed bearing date Dec. 1, 1885, and recorded in the office of said register of deeds on Dec. 19, 1885, in Book 175, of Deeds, on page 504.

VI. That defendant received and was paid for said sale and conveyance the sum of $1,000.

VII. That on June 28, 1887, defendant, without having foreclosed or attempted to foreclose as a mortgage or otherwise, said quitclaim deed and without the knowledge or consent of plaintiff, and without notice to her of his intention to sell, and without notice to the purchaser of the nature and state of his title, sold and conveyed to a bona fide purchaser, to wit, one C. D., without notice, by an absolute title, the balance of said premises, by a deed bearing date June 28, 1887, and recorded in the office of said register of deeds on July 18, 1887, in Book 228, of Deeds, on page 621.

VIII. That in consideration of said sale and conveyance, and in payment of the same, the said purchaser thereof paid to said defendant, the sum of $7,500, all of which said sums so received from each of said alleged sales, defendant has retained to his own use and benefit.

IX. That by reason of said sales and conveyances plaintiff is unable to redeem said premises by paying the amount due defendant on said notes, which she is ready, anxious and willing to do.

Wherefore plaintiff demands judgment that an account be taken under the direction of the court of the rents and profits which defendant received from said premises quitclaimed to him as aforesaid, on Nov. 5, 1884, or which, without his wilful default, he might have received from the time he took possession, until he sold the same; and of the amounts received by defendant from said

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sales with interest thereon from the date of such sales; and of what is due and owing defendant upon said promissory notes for principal and interest; and requiring defendant, after deducting the amount found to be due on said promissory notes, to pay to plaintiff the residue arising from said sales and said rents and profits received by defendant as aforesaid; and for such other relief as may be just, with costs.

Complaint in Darling v. Harmon, 47 Minn. 166, 49 N. W. 686.

1892. Same—Another form.

I. That one A. B. is now, and for thirty years last past has been, insane, and during all of said time has been incapaciated and incompetent to manage and care for his property, and is now confined in the state insane asylum in the city of Anoka, Minnesota.

II. That said A. B. was at the time he was committed to said insane asylum a resident of Polk county, Minnesota.

III. That on Feb. 6, 1904, plaintiff was by an order of the probate court for Polk county, Minnesota, duly appointed guardian of the person and estate of the said A. B., and thereupon plaintiff duly qualified and entered upon the duties of, and ever since has been and now is, such guardian.

IV. That defendant and said A. B. are brothers.

V. That long prior to Aug. 1, 1890, said A. B. entered the [description of land]; that on Aug. 1, 1890, the said A. B. duly made final proof for said land under the homestead laws of the United States, and thereupon became the owner in fee of said land, and a patent was thereafter issued by the United States for the said land to the said A. B.; that from the time of said entry the said A. B. lived upon and occupied said land as his home till the month of February, 1903.

VI. That on Aug. 6, 1890, the said A. B. was indebted to one C. D. in the sum of $58.95, and to secure the payment of said sum he mortgaged said land to the said C. D., which mortgage was thereafter recorded in the office of said register of deeds for Polk county, Minnesota.

VII. That in the winter of 1895 defendant loaned to the said A. B. certain sums of money, not exceeding in all, as plaintiff is informed and believes, the sum of $100, to enable the said A. B. to pay his said indebtedness to C. D. and taxes on said land, and to secure the repayment thereof said A. B. made and delivered to defendant a warranty deed of said land, upon the express condition and agreement that the same should be held as security for the said loan and that the said land should be reconveyed by defendant on the payment of the said sums so advanced; that thereafter and on June 5, 1895, said A. B., for the purpose of further securing the said sums of money so advanced by defendant, and for the purpose of correcting a mistake that had been made in the deed theretofore made to secure the same debt, and at the request of defendant, made and delivered to defendant another warranty deed of said land, which

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expressed a consideration of $140, being the same consideration expressed in the first mentioned deed; that said deed was on June 6, 1895, recorded in the office of said register of deeds, in Book 64, of Deeds, on page 247.

VIII. That at the time of the advancement of the money aforesaid by defendant to said A. B., and at the time of the conveyance of said premises, it was expressly agreed by and between A. B. and defendant, that the said conveyances should be and were intended as a mortgage for the purpose of securing the money so loaned by defendant to A. B., and at the same time defendant made and delivered to A. B. an agreement in writing whereby it was agreed between the said parties that defendant would hold the said conveyance of the said land as a mortgage, and on repayment to him of the sums so advanced by defendant, that he would reconvey the said premises to A. B.

IX. That, as plaintiff is informed and believes, at some time prior to the commencement of this action, defendant fraudulently, through misrepresentations and by taking advantage of the weak mental condition of A. B., obtained possession of said agreement to reconvey and fraudulently, and for the purpose of obliterating all evidence of said agreement to reconvey the said land, destroyed said agreement.

X. That defendant fraudulently took advantage of the weak mental condition of A. B. and without an adequate consideration paid therefor, obtained the record title to said land.

XI. That, as plaintiff is informed and believes, the value of said premises at the time of the conveyances aforesaid, was $1,500, which was well known to defendant.

XII. That during the month of February, 1903, defendant went to the home of A. B. and removed him to Grant county, Minnesota, from which county, on the application of defendant, A. B. was shortly thereafter committed to the state insane asylum at Fergus Falls, Minnesota, under the name of E. F., a name by which he was never before known.

XIII. That, as plaintiff is informed and believes, since the year 1895, said A. B. has paid and caused to be paid to defendant, to apply on said indebtedness for which the said deeds were given to secure, large sums of money; and defendant has since the said time collected large sums of money, the rents, issues and profits of said land; that the money so paid by A. B., and the amounts so collected by defendant as rents, issues and profits of said land, exceed the amount of said debt from plaintiff's said ward to defendant; and A. B. has paid to defendant the full amount of the money loaned to him by defendant.

XIV. That on Nov. 23, 1903, defendant made an absolute sale of said land to one G. H. and thereupon defendant made and delivered to G. H. an absolute warranty deed of said land and received therefor the sum of $2,600.

XV. That defendant made the conveyance of said land to G. H. for the purpose of defrauding A. B.

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XVI. That plaintiff has demanded an accounting of defendant of the said sum received by him for the property of A. B., but defendant has refused to make such accounting and has converted the moneys and property of A. B. to his own use.

Wherefore plaintiff, as such guardian, demands judgment for $2,600, with interest thereon at the rate of six per cent. per annum since Nov. 23, 1903, with costs.

Complaint in Dybdal v. Fagerberg, 102 Minn. 130, 112 N. W. 1018.

1893. For an accounting, partition of property and a receiver.

I. That on March 2, 1881, and for a long time prior thereto and subsequently until the exchange thereof for cash and bonds hereinafter set forth, plaintiff and defendant were the owners of four Minnesota State Railroad Bonds, each of the denomination of $1,000 and numbered 1740, 1742, 1743 and 1745, respectively, and drawing interest at the rate of seven per cent. per annum from March 10, 1869, and payable to bearer, and the same were then in the possession of defendant.

II. That defendant's interest therein was two-thirds and the plaintiff's one-third thereof.

III. That on March 22, 1881, defendant with plaintiff's consent, deposited said bonds with the state auditor of Minnesota, pursuant to an act of the legislature of said state providing for the adjustment of certain alleged claims against said state approved Nov. 4, 1881, and received from the governor of said state in lieu thereof, and as a just compensation therefor, $126.30 in cash and seven Minnesota State Railroad Adjustment Bonds, each of the denomination and value of $1,000 and numbered 3162, 3163, 3164, 3165, 3166, 3167 and 3168, respectively, bearing date July 1, 1881, payable to bearer and bearing interest from Jan. 1, 1882, at the rate of four and one-half per cent. per annum; that in consideration of plaintiff's interest in and consent to the depositing and exchange of the first mentioned bonds, defendant promised plaintiff to pay to her her proportionate share of the proceeds thereof.

IV. That on Jan. 1, 1882, defendant, as plaintiff is informed and believes, sold and disposed of two of the seven bonds last above described, without plaintiff's consent or knowledge, at their par value, and received in money for the same the sum of $2,000 and interest accrued thereon to the time of such sale by defendant.

V. That on Feb. 20, 1882, plaintiff demanded of defendant her share of the proceeds of the original bonds exchanged and disposed of as aforesaid, but defendant has not paid to plaintiff her said share of the $126.31, nor any part thereof, nor her said share of the proceeds of the two bonds so sold and disposed of as aforesaid, nor any part thereof, nor delivered to plaintiff her said share of the five bonds still remaining unsold in his possession as aforesaid,

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nor any part thereof, but wholly refuses to do so and has converted the same to his own use.

Wherefore plaintiff demands judgment that defendant account for and pay to plaintiff her share of the proceeds of the original bonds and of the money and property realized, and, in case it shall be found that a portion of the proceeds remaining in defendant's hands consist of Minnesota State Railroad Adjustment Bonds or other property which are incapable of being justly divided, that plaintiff recover her share of the value thereof, or that the same be placed in the hands of a receiver or some suitable person appointed by the court to be disposed of and converted into money under the direction of the court, and the proceeds thereof be distributed between the parties as their respective interests may require; and for such other relief as may be just, with costs.

Recovery on this complaint sustained in Judd v. Dike, 30 Minn. 380, 15 N. W. 672.

1894. Unauthorized trust as a power in trust—Accounting—Recovery of proceeds.

I. That in 1856 one A. B. entered into a contract with one C. D. to buy of C. D., for the benefit of C. B., the wife of A. B., the [description of premises]; that A. B. then paid to C. D. a portion of the purchase price of said land, the exact amount of which is to plaintiff unknown, and said contract was of great value to C. B.

II. That before the time for final payment on said contract, A. B. became pecuniarily embarrassed, so that it was impossible for him promptly to meet his engagements to pay for said real estate, and the taxes thereon; that prior to such time A. B. had largely and in various ways assisted defendant in defendant's business, and A. B. and defendant were warm personal friends, and thereupon, in consideration of the kindness of A. B. to defendant, the defendant offered to advance the money necessary to complete the purchase from C. D., and assist A. B. and C. B. in protecting their interests in said property; and it was thereupon agreed between the defendant and A. B. and C. B. that defendant should take a deed of said premises, and hold the same in trust for the benefit of C. B. until the same could be advantageously sold; and defendant agreed with C. B. to hold the said real estate in trust and for her benefit, to collect the rents, pay the taxes and incumbrances thereon, and sell the same, and after deducting the difference between the sums collected for rents or otherwise from said land, and the sums he should advance for said land, taxes, repairs, and insurance, to pay over the proceeds to C. B., without charge for his services in and about said trust; and afterwards defendant repeatedly promised C. B. and plaintiff, who was her agent, and acted as such for her in the matter, that he would sell the said land, and account for the proceeds.

III. That A. B. died in the year 1861, intestate, and C. B. died on March 6, 1877, intestate, and on June 23, 1883, plaintiff was duly appointed administrator of the estate of C. B. by the probate court of county, Minnesota,

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and thereupon duly qualified, and has ever since been and now is acting as such administrator.

IV. That under and pursuant to the agreement aforesaid, and at the request of A. B. and C. B., C. D., on July 18, 1856, made and delivered to defendant a deed of said premises, and defendant paid C. D. therefor a sum to plaintiff unknown, and defendant entered into possession of said land, under and pursuant to said agreement, and collected large sums for rent, for right of way, and other purposes, the amount of which is unknown to plaintiff; and paid the taxes on said premises, and continued to do so until he sold the land as hereinafter stated.

V. That in February, 1883, defendant sold and conveyed said premises to one E. F., who paid to defendant $8,600 therefor, which amount exceeds all sums expended by defendant in and about said land, but the amount of such difference is unknown to plaintiff.

VI. That thereupon the heirs of C. B. duly demanded an accounting of defendant for all rents and income received from said property, and the sum received upon the sale thereof, and after deducting the sum paid for said premises, for taxes, insurance, and incumbrances, that he pay over the balance to the parties entitled thereto; but defendant has refused to make and state such or any account, or pay any sums on account thereof to plaintiff or any one, though frequently requested to do so by the heirs of C. B., and by plaintiff.

Wherefore plaintiff demands judgment that defendant make and deliver to plaintiff an account, stating all sums he has paid for said premises, and all the sums he has received therefrom for rents, right of way, sale, or otherwise; and that plaintiff recover judgment against the defendant for the difference, and for such other relief as may be just, with costs.

Held indefinite but sustained on demurrer in Randall v. Constans, 33 Minn. 329, 23 N. W. 530.

1895. Consideration for deed to third party—Resulting trust under G. S. 1913 § 6707.

[I. II. III. and IV. as in § 1360.]

V. That on 19 , [one C. D.] [defendant C. D.], for a consideration of $, by deed conveyed to defendant E. F. the [describe premises].

VI. That the consideration for said conveyance was paid by defendant A. B.

VII. That the title to said premises was so taken in the name of defendant E. F., as grantee in said deed, to hinder, delay and defraud the creditors of defendant A. B., including plaintiff, and to prevent the collection of their just claims.

VIII. That defendant G. F. is the [husband] [wife] of defendant E. F.

Wherefore plaintiff demands judgment that defendant E. F. holds title to said premises in trust for the creditors of defendant A. B.; that a receiver of said premises be appointed and defendant E. F. be directed to make and deliver

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to said receiver a deed of said premises; that said receiver be directed to sell the same and out of the proceeds thereof pay to plaintiff the amount of his said judgment, with interest and the costs of this action; and for such other relief as may be just.

1896. Resulting trust in favor of creditors—Non-resident debtor.

I. That at the times herein mentioned plaintiff was, and still is, a resident of this state, engaged in business as a real estate agent and broker, and on March 1, 1889, was employed by one A. B., to negotiate an exchange of certain stock of the City Coal Company, a corporation duly organized and existing under the laws of the state of Illinois, of the face value of $6,000, which was then owned by A. B., for a certain piece of land lying in Hennepin county, Minnesota, known as lots 24, 25 and 26 in Maplewood, Lake Minnetonka, according to the plat of said Maplewood on file and of record in the office of the register of deeds for said county, which land was then owned by one C. D., and A. B. agreed to pay plaintiff for such services, in case such exchange should be made, ten per cent. of the face value of such stock, which sum was the reasonable value of such services.

II. That pursuant to the terms of such employment, plaintiff negotiated the exchange of said stock for said land and procured and induced C. D. to sell and convey the said land in consideration of the transfer to him of said stock, and at the request of A. B., C. D. conveyed the said land to the defendant herein, who then was and still is the wife of A. B., and who paid no consideration whatever for such conveyance or for said land.

III. That A. B., at the time of such conveyance had not, nor has he now, nor has he at any time since, had any property in the state of Minnesota, except the land conveyed as aforesaid to defendant, and the interest and estate therein, acquired by him by the transaction herein before alleged, and A. B. caused such conveyance to be made to defendant, and defendant received the same, with the purpose and intent on the part of both defendant and her said husband to hinder, delay and defraud the creditors of A. B., and in particular to hinder and delay plaintiff in the collection of the amount due him, as aforesaid, for said services, and to defraud plaintiff.

IV. That defendant still holds the title to said premises so conveyed to her.

V. That on Sept. 17, 1889, plaintiff commenced an action in this court, upon the cause of action above stated, against A. B., who was then, and ever since has been, a resident of the state of Illinois, and not a resident of this state; that a writ of attachment was duly issued out of this court in said action against the property of the defendant therein, and on Sept. 17, 1889, said writ was duly levied upon the above described land as the property of the defendant in said action, and such writ and levy remained in full force and effect at the time of the entry of judgment therein.

VI. That thereafter the summons in said action was regularly and duly served upon said defendant therein by publication thereof and not otherwise,

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and on Nov. 27, 1889, said A. B. not having appeared in said action, by attorney or otherwise, judgment was duly rendered and docketed in said action in favor of the plaintiff, and against the defendant therein, for $631.22.

VII. That said court had duly acquired jurisdiction to enter said judgment, and the same became and still is a lien upon all the right, title and interest of the said A. B. in said land.

VIII. That defendant claims to own said land free from any rights of the plaintiff thereto.

IX. That neither said A. B. nor any one has ever paid any part of said sum due and owing, as aforesaid, to plaintiff.

Wherefore plaintiff demands judgment that defendant holds said land in trust for the payment of said claim of plaintiff, amounting to $631.22, with interest thereon from Nov. 27, 1889, and directing that said land be sold to satisfy said claim, and for such other relief as may be just, with costs.

Complaint in Overmire v. Haworth, 48 Minn. 372, 51 N. W. 121.

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USE AND OCCUPATION

1897. Common indebitatus count.

I. That defendant is indebted to plaintiff in the sum of $ for the use and occupation by defendant, with the permission and as the tenant of plaintiff, from 19 , to 19 , of plaintiff's premises known as No. , street, in the city of .

II. That no part thereof has been paid.

Wherefore [as in § 919].

This is substantially the common indebitatus count for use and occupation. See § 530. Its sufficiency under the code is well settled. See §§ 531, 901. Under this form the plaintiff may prove an occupation under a written or oral lease, or such facts as will raise an implied promise to pay for the occupation of the premises in case there was no express agreement. As it avoids the danger of a variance its advantages are obvious. Waters v. Clark, 22 How. Pr. (N. Y.) 104. As to when it will lie, see Dunnell, Minn. Digest, § 9957.

1898. General form—Implied contract.

I. That from 19 , to 19 , defendant used and occupied the premises of plaintiff known as No. , street, in the city of , with the permission and as the tenant of plaintiff.

II. That such use and occupation were reasonably worth $.

III. That no part thereof has been paid.

Wherefore [as in § 919].

Sustained by Dean v. Leonard, 9 Minn. 190(176). See Maxwell, Code Pl. Form 274; 1 Abbott's Forms of Pl. 163.

1899. General form authorizing recovery on express or implied contract.

I. That on 19 , defendant hired from plaintiff the premises known as No. , street, in the city of , at a monthly rent of $, payable on the first day of each month.

II. That defendant used and occupied said premises as the tenant of plaintiff from 19 , to 19 , and such use and occupation were reasonably worth the said sum of $ per month or $ for all of said period.

III. That no part thereof has been paid.

Wherefore [as in § 919].

This form is good on demurrer, but is subject to a motion to compel an election. Dean v. Leonard, 9 Minn. 190(176). See 1 Abbott's Forms of Pl. 164; Form 172, Conn. Pr. Act. It is better to avoid a possible variance or a compulsory election by using the common count in § 1897.

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USURY

1900. Plea of usury in action on note.

The defendant for answer to the complaint herein alleges that said note was made and delivered to plaintiff by defendant upon the usurious agreement between them, that plaintiff should take and receive from defendant and defendant should pay to plaintiff for the loan of money, to wit, the sum of $, a greater sum than per cent. per annum, to wit, per cent. per annum; that the sum of $ was reserved from the amount of said loan by plaintiff and defendant received from plaintiff only $, the remainder of said sum of $ being reserved by plaintiff as a part of the interest on said note, though said note was made for the full sum of $, as alleged in the complaint.

See § 902.

1901. For recovery of usurious interest under statute.

I. That on 19 , plaintiff and defendant entered into an agreement whereby defendant, for the purpose of taking and receiving a greater sum for the loan of his money than at the rate of per cent. per annum, agreed to loan plaintiff $, for the period of months, on condition that plaintiff should pay to defendant for said loan for said time $ as interest.

II. That in pursuance of said agreement plaintiff accepted said loan from defendant, and on 19 , plaintiff repaid the principal and in addition paid to defendant and defendant, with usurious intent, took and received the said sum of $ as interest for said loan, which was in excess of per cent. per annum.

Wherefore plaintiff demands judgment for $, the amount of said interest, as authorized by G. S. 1913, § 5806, with costs.

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1902. For forfeiture of contract for deed and restitution of possession.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That thereupon defendant went into possession of said premises under said agreement.

III. That defendant has not paid the instalment of the purchase price for said premises falling due on 19 , and amounting to $.

IV. That plaintiff has duly performed all the conditions of said agreement on his part.

V. That on 19 , plaintiff duly served upon defendant a notice terminating said contract, as provided by G. S. 1913, § 8081, of which notice the following is a copy: [Copy of notice.]

Wherefore plaintiff demands judgment adjudging the amount due plaintiff from defendant under said contract, and fixing a day at or before which defendant shall pay the same, and in default of such payment that said contract be forfeited and plaintiff have restitution of said premises, and for such other relief as may be just, with costs.

1903. For forfeiture of contract upon its abandonment by purchaser.[1]

I. That plaintiff is the widow and sole heir at law of A. B., who died intestate on Feb. 4, 1883, and plaintiff has succeeded to all his estate.

II. That on Sept. 28, 1882, the said A. B. and plaintiff entered into a written agreement with defendants, of which the following is a copy: [Copy of agreement.]

III. That said agreement was thereafter recorded in the office of the register of deeds for St. Louis county, Minnesota, in Book B, of Agreements, on page 634.

IV. That said A. B. was the owner in fee of said premises at the time of making said agreement and at the time of his death and plaintiff has ever since been and now is, such owner, succeeding to the interest of said A. B. therein, as his sole heir at law.

V. That defendants have made default in the payment of all the taxes levied on said land since the date of said agreement, and of said several sums of money agreed by them to be paid on May 17, 1883, and on May 17, 1884, respectively, as provided in said agreement, and no amount whatever has been paid pursuant to said agreement, other than said sum of $250, paid at the execution of said instrument.

VI. That upon the delivery of said agreement defendants entered into possession of said land thereunder, and cut and removed therefrom timber of great

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value, and thereafter, in the year 1883, abandoned said land, and repudiated and abandoned said agreement, and left this state and are not now residents thereof.

VII. [That said A. B. and plaintiff have duly performed all the conditions of said agreement on their part.] [2]

VIII. [That on 19 , plaintiff duly served upon defendants a notice terminating said contract, as provided by G. S. 1913, § 8081, of which notice the following is a copy: (Copy of notice.)] [2]

Wherefore plaintiff demands judgment canceling said agreement and the record thereof, and adjudging that defendants have no estate or interest in said land by virtue of said agreement, and for such other relief as may be just, with costs.

[1] Substance of complaint in Holingren v. Piete, 50 Minn. 27, 52 N. W. 266.
[2] Not in the original.

1904. For forfeiture of a bond for a deed for non-payment of purchase money notes and for restitution of possession.[1]

I. That on May 9, 1874, plaintiff, being the owner in fee and in possession of certain realty, made and delivered to defendants a bond for the conveyance of the same to defendants, of which the following is a copy: [Copy of bond.]

II. That in pursuance of the terms of said bond defendants made and delivered to plaintiff their promissory notes of which the following are copies: [Copies of notes.]

III. That thereupon defendants entered into possession of said premises, and ever since have occupied and cultivated the same, raising therefrom and converting to their own use large amounts of wheat and other grain during each year, and still are in the possession of said premises.

IV. That defendants have paid on said notes $338, and interest due in 1874; $1,000, and interest due in 1875; and on account of the note due in 1876 the sum of $500.

V. That in the month of October, 1878, defendants having neglected and refused to pay the amount remaining due upon said note due Nov. 1, 1876, and having neglected and refused to make any payment on account of said note due Nov. 1, 1877, plaintiff instituted in this court an action against defendants to recover the amount due on said notes; that defendants answered therein and sought to defeat plaintiff's recovery of said amounts; that such proceedings were afterwards had in said action, that judgment was duly entered and docketed therein on Dec. 5, 1878, in favor of the plaintiff therein, for the amount due on said notes, with the costs and disbursements therein, and execution was then and there duly issued out of said court on said judgment and levied upon certain lands owned by defendants, situated in said county; that thereafter defendants instituted an action in this court alleging that said lands were exempt from execution as being the homestead of said

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defendants, and praying that said levy and all proceedings thereunder be vacated.

VI. That said action is now pending and undetermined in this court; that if said action is determined in favor of these defendants, plaintiff will be unable to recover his said judgment to the extent of $2,000 and more; that aside from said lands so levied upon and their interest in the lands described in said bond, defendants have no property not exempt from execution.

VII. That said note for $1,000, falling due Nov. 1, 1878, is wholly unpaid; that no portion of said notes due in November, 1879, and November, 1880, has been paid; that there is now due and unpaid on account of the purchase price of said lands, aside from the amount included in said judgment, $1,000 and interest at 10 per cent. per annum since Nov. 1, 1874, and to become due $1,469.90, with like interest.

VIII. That defendants have neglected to pay the taxes assessed on said premises and have allowed the same to be sold for taxes.

IX. That the rents and profits of said premises are of the yearly value of $300 and more.

X. That the value of said premises is $500.

XI. [That plaintiff has duly performed all the conditions of said bond on his part.] [2]

XII. [That on 19 , plaintiff duly served upon defendants a notice terminating said contract, as provided by G. S. 1913, § 8081, of which notice the following is a copy: (Copy of notice.)] [2]

Wherefore plaintiff demands judgment adjudging the amount due plaintiff from defendants under said contract and upon said notes, and fixing a day at or before which defendants shall pay the same, and in default of such payment that said bond be forfeited and plaintiff have restitution of said premises, and for such other relief as may be just, with costs.

[1] Substance of complaint sustained on demurrer in Denton v. Scully, 26 Minn. 325, 4 N. W. 41.

[2] Not in the original.

1905. Vendor against purchaser for purchase price—Deed from third party.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That on 19 , plaintiff caused said lands to be conveyed to defendant in fee by a good and sufficient warranty deed, executed by one A. B. and his wife, then the owners thereof in fee, and defendant then and there accepted said deed in performance of said agreement.

III. That plaintiff has otherwise duly performed all the conditions of said agreement on his part.

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IV. That defendant has not paid any part of the purchase price for said lands stipulated in said agreement.

Wherefore [as in § 919].

Based on Hamilton v. Hulett, 51 Minn. 208, 53 N. W. 364.

1906. Vendor against purchaser for breach of contract.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That on 19 , at , plaintiff was ready and willing to complete said agreement on his part [and then and there tendered defendant a good and sufficient (warranty) deed of said premises and demanded payment of said sum of $] [or otherwise according to the contract], and has otherwise duly performed all the conditions of said agreement on his part.

III. That defendant refused to accept said deed, and has failed to comply with the terms of said agreement on his part, and has wholly failed to pay to plaintiff the purchase money therein stipulated, to plaintiff's damage $.

IV. [Allege any special damages sought.]

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 10083.

1907. Vendor against purchaser for unpaid purchase money and enforcement of vendor's lien.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That on 19 , plaintiff and his wife, being the owners in fee thereof, conveyed said premises in fee to defendant by a warranty deed, which defendant accepted as in performance of said agreement.

III. [That plaintiff has duly performed all the conditions of said agreement on his part.]

IV. That defendant has paid no part of the purchase price for said conveyance except the sum of $, and there is now due from defendant to plaintiff under said agreement the sum of $, the balance of the purchase price for said conveyance.

V. That plaintiff has no security for the payment of said sum other than his vendor's lien upon said premises.

VI. That defendant is insolvent.

Wherefore plaintiff demands judgment for $, with interest thereon from 19 , and for a lien for that amount on said premises, and directing a sale of said premises to satisfy said lien and the costs and expenses of this action, and for such other relief as may be just.

Based on Paget v. Barton, 58 Minn. 510, 60 N. W. 342. See Dunnell, Minn. Digest, §§ 10051–10058.

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1908. Same—Another form—Fraudulent conveyance—Other lien holders.

I. That on May 31, 1882, plaintiff, being the owner in fee of [description of premises], sold the same to defendant A. B., for the sum of $1,500.

II. That all of said sum was by the terms of said sale and conveyance, payable in cash by said A. B. to plaintiff on the delivery of the deed of said land; that on May 31, 1882, plaintiff and his wife made and delivered a deed of said land to defendant A. B.; that said defendant paid to plaintiff on the delivery of said deed, $400 of said purchase money, and agreed to pay to plaintiff the balance of said purchase money within a few days thereafter.

III. That no part of the balance of said purchase money, nor any interest thereon, has ever been paid, though often demanded, and the same, with interest thereon, is now justly due and owing by defendant A. B. to plaintiff.

IV. That plaintiff has never had any security for said sum other than his vendor's lien upon said land.

V. That on July 1, 1882, defendant A. B. and his wife executed a mortgage upon said premises to C. D., to secure the payment of the sum of $1,000 and said mortgage still remains wholly unsatisfied.

VI. That on May 17, 1883, the defendant A. B. and his wife executed a deed to defendant E. F. of a portion of said land, described as follows: [Description.]

VII. That on Aug. 28, 1883, said defendant A. B. and his wife executed to defendant E. F. a deed of another portion of said land, described as follows: [Description.]

VIII. That both of said deeds to defendant E. F. were warranty deeds covenanting against all incumbrances, except a mortgage of $1,000; that they were given without consideration, and the said E. F. had, at the time of their delivery to him, full knowledge of the said unpaid balance of purchase money due to plaintiff; that said conveyances to defendant E. F. were made with intent that he should hold the same as a secret trust for the defendant A. B., in order that said premises might not be reached by the creditors of defendant A. B., and both said conveyances were fraudulent and void as against plaintiff.

IX. That defendant A. B. was at the time of said conveyances to defendant E. F., and has ever since been, and now is wholly insolvent, and has no property except said premises out of which plaintiff can collect the balance of said purchase money due him as aforesaid.

Wherefore plaintiff demands judgment against the defendant A. B. for $1,100, and interest thereon at the rate of 7 per cent. per annum from May 31, 1882, and for his costs and disbursements in this action; and that said sum be adjudged a lien upon the whole of said premises, subject only to the mortgage of said C. D. for said $1,000; that the said deeds of conveyance to defendant E. F. be declared null and void as against plaintiff; that all the right, title and interest of the defendant A. B. in said premises and all the interest of defendant E. F., or any one else except said C. D.'s mortgage interest, be sold under

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the order and decree of this court and the proceeds of such sale be applied to the payment of the costs and disbursements herein and of the plaintiff's claim as aforesaid, and that plaintiff have execution for any deficiency; that the defendant E. F., and all persons claiming by, from or under him, be forever barred and foreclosed of all right, title and interest in and to said premises, and for such other relief as may be just.

Substance of complaint sustained on demurrer in Walter v. Hanson, 33 Minn. 474, 24 N. W. 186. See Dunnell, Minn. Digest, §§ 10051–10058.

1909. Vendor against purchaser for liquidated damages for breach of contract.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. [Allege tender of performance by plaintiff as in § 1906.]

III. That defendant has failed and refused to perform said agreement on his part, and still refuses to do so.

IV. That by reason of the premises defendant is indebted to plaintiff in the sum of $ as liquidated damages, no part of which has been paid, though duly demanded.

Wherefore [as in § 919].

Based on Blunt v. Egeland, 104 Minn. 351, 116 N. W. 653.

1910. Purchaser against vendor for breach of contract.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That on 19 , at , plaintiff demanded a good and sufficient [warranty] deed of said premises from defendant, and tendered to him the sum of $ therefor, pursuant to said agreement, and has duly performed all the conditions of said agreement on his part.

III. That defendant refused and still refuses to execute to plaintiff a good and sufficient [warranty] deed of said premises, and has failed to comply with the terms of said agreement on his part, to plaintiff's damage $.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 10101.

1911. Same—Defective deed tendered.

[I. and II. as in preceding form.]

III. That thereupon defendant tendered to plaintiff a deed which plaintiff declined to accept because it [state that it was not such a deed as was called for by the agreement and specify defects].

IV. [As III. in preceding form.]

Wherefore [as in § 919].

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1912. Purchaser against vendor for anticipatory breach of contract.

I. [Allegation of defendant's incorporation as in § 1204.]

II. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

III. [Allege any part payment of the purchase price.]

IV. That plaintiff has duly performed all the conditions of said agreement on his part and has at all times since said agreement been ready and willing to accept a good warranty deed of said premises from defendant and to pay for the same in accordance with the terms of said agreement, and in all other respect carry out said agreement on his part.

V. That on 19 , defendant expressly and unqualifiedly repudiated said agreement and notified plaintiff that he would not [and could not] carry out said agreement on his part.

VI. That on 19 , when defendant so repudiated said agreement, said premises were worth $ an acre, in all $.

VII. That by reason of the premises plaintiff has been damaged in the sum of $.

VIII. [That on 19 , plaintiff demanded of defendant a return of the $ so deposited with defendant by plaintiff as a part of the purchase price of said premises under said agreement, but no part thereof has been returned.]

Wherefore [as in § 919].

Based on Matteson v. United States & Canada Land Co., 103 Minn. 407, 115 N. W. 195.

1913. Breach of contract by vendor—Fraudulent representations of title—Improvements—Damages.

I. That on Sept. 29, 1886, plaintiff and defendants entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That at the time of making said agreement defendants fraudulently and falsely represented to plaintiff that they were the owners of the premises therein described, though they then well knew that they were not such owners and had no title to said premises and could not carry out said agreement.

III. That immediately upon the making of said contract, and in pursuance of the terms thereof, plaintiff took possession of said premises as his property and retained possession thereof until the termination of the action hereinafter mentioned.

IV. That one of the covenants of said contract was that plaintiff should pay to defendants the sum of $60 on receipt of the contract, $40 on Oct. 11, 1886, and $25 on the eleventh day of each month thereafter until the sum of $600 should be paid.

V. That plaintiff has paid to defendants, pursuant to the terms of said contract, the sum of $60 on Sept. 29, 1886; the sum of $40 on Oct. 11, 1886; and

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the sum of $25 on Nov. 1, 1886—making a total of $125 that the plaintiff has paid to defendant upon the purchase price named in said contract.

VI. That plaintiff, immediately after taking possession of said premises, and relying upon defendants' contracts and representations that they were the owners thereof, erected a dwelling house thereon and made other valuable improvements, all of the value of $250.

VII. That the value of said lot at the time of the making of said contract was, and still is, the sum of $1,300.

VIII. That on Nov. 16, 1886, an action of ejectment was commenced in this court, by one A. B., as plaintiff, against this plaintiff as defendant therein, and said A. B. claimed and alleged in said action that he was the sole and absolute owner of said lot in fee, and had been such owner ever since June 12, 1883, and that this plaintiff had no right thereto, and so wrongfully detained the same from him.

IX. That immediately upon being served with the summons in said action this plaintiff duly notified the defendants herein of said action, and requested them to defend the same and to keep good the covenants of said contract; and in consideration of the said agreement as aforesaid, defendants promised to defend said action, and assumed absolute control and management thereof, and defended the same until judgment therein was rendered.

X. That on July 25, 1887, a judgment in said action was duly rendered by this court, adjudging that the title in fee to said lot was in said A. B., the plaintiff in said action, and that this plaintiff had no right or title thereto by virtue of his said contract with defendants, or otherwise, and adjudging that this plaintiff was a trespasser upon said lot.

XI. That immediately after the rendition of said judgment an execution was issued thereon, directing the sheriff of Hennepin county to eject this plaintiff from said premises; and this plaintiff was, prior to the commencement of this action, ejected from said lot by said sheriff, pursuant to the terms of said writ of execution.

XII. That after the commencement of said action of ejectment defendants requested this plaintiff to make no further payments upon his said contract until the final determination of said action.

XIII. That by reason of being so put out of said lot said improvements made thereon by plaintiff became valueless to him.

XIV. That on July 26, 1887, plaintiff demanded of defendants possession of said lot, and duly offered to further perform the conditions of said contract, and defendants then and there refused to deliver to plaintiff possession of said lot, and have ever since neglected and refused to do so; and defendants then and there declared to plaintiff that they were unable to furnish him title to said lot or to give him possession thereof, and that they could not and would not carry out the terms of said contract.

XV. That plaintiff has been able and willing at all times to duly perform all the conditions of said contract on his part.

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XVI. That defendants, in fact, are not the owners of said lot, and were not the owners at the time of the making of said contract of sale with the plaintiff as they then well knew, but plaintiff had no knowledge or intimation thereof until the commencement of said action of ejectment, and until then believed said representations to be true and relied upon them in entering into said agreement and making said payments, and defendants are entirely unable to fulfil the terms of said contract and to give plaintiff possession of or title to said lot.

XVII. That no part of the said $125 paid by plaintiff to defendants upon said contract has been repaid to plaintiff, though demanded.

XVIII. That by reason of the premises plaintiff has been damaged $500.

Wherefore [as in § 919].

Substance of complaint in Erickson v. Bennet, 39 Minn. 326, 40 N. W. 157.

1914. Purchaser against vendor for fraudulent representations as to quantity of land—Damages.

I. That on and prior to Oct. 10, 1902, defendant was the owner and in the possession of the northwest quarter of section 7, in township 121, of range 26, in Wright county, Minnesota, and negotiations between plaintiff and defendant were then in progress for the sale by defendant to plaintiff of said real estate; that during said negotiations, for the purpose of inducing plaintiff to purchase said real estate, defendant, among other representations, represented to plaintiff that said northwest quarter of said section 7, contained 160 acres of land.

II. That plaintiff had no means of knowing and did not know, how many acres of land said northwest quarter of section 7 contained until long subsequent to the purchase of said land by plaintiff of defendant as hereinafter set forth, and in making said purchase plaintiff relied upon said representation, and believed the same to be true, and would not have purchased said land if he had not believed said representation to be true.

III. That said northwest quarter of section 7 did not and does not contain 160 acres of land, but contains only one hundred thirty and two hundred fourteen thousandths acres of land.

IV. That defendant, at all times mentioned in this complaint, well knew that said northwest quarter of said section 7 did not contain 160 acres of land, but that it only contained one hundred thirty and two hundred fourteen thousandths acres of land, and he made said representation to deceive plaintiff and to induce him to purchase said land, and plaintiff was deceived thereby and relied upon said representation in all that he thereafter did with respect to the purchase of said land.

V. That, relying upon said representation, plaintiff and the defendant and his wife, on Oct. 10, 1902, entered into a written agreement for the purchase

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of said land by plaintiff from defendant, of which agreement a copy is hereto attached, marked Exhibit A, and made a part hereof.

VI. That plaintiff has duly performed all the conditions of said agreement on his part.

VII. That said land purchased as aforesaid by plaintiff from defendant, would have been reasonably worth $6,800, if said land had contained the amount of 160 acres as represented by defendant to plaintiff, and was reasonably worth the sum of $42.50 an acre for each and every acre therein contained; that said land as described in said agreement was reasonably worth $5,549.

VIII. That by reason of the premises plaintiff has been damaged $1,251.

Wherefore [as in § 919].

Substance of complaint in Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212.

1915. Purchaser against vendor for recovery of deposit.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That plaintiff then and there deposited in defendant's hands $ as and for a part of the purchase money for said premises, if plaintiff should complete his purchase and receive a deed as agreed, but to be to and for the use of plaintiff and to be returned to him, if defendant should fail to fulfil his agreement, and fail to give a good and sufficient warranty deed as agreed.

III. That plaintiff duly performed all the conditions of said agreement on his part, and on 19 , at , duly offered to receive from defendant a good and sufficient warranty deed of said premises as agreed, and demanded the same of defendant and tendered to him the balance of the purchase money therefor.

IV. That defendant then and there failed and refused to deliver to plaintiff such a deed, and though a reasonable time has elapsed, still fails and refuses to do so.

V. That on 19 , plaintiff demanded of defendant a return of the money so deposited, but no part thereof has been repaid.

Wherefore [as in § 919].

See Dunnell, Minn. Digest, § 10098. A common count for money had and received would be sufficient. See §§ 761, 1575.

1916. Bona fide purchaser.

I. That on 19 , one A. B. was in the actual possession of the premises described in the complaint, claiming to be the owner in fee thereof free from all incumbrances.

II. That defendant, believing said A. B. to be the owner of said premises, on said day purchased the same from him for the sum of $ and received

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from him on said day a deed thereof containing a covenant that he was seized in fee of said premises and that the same were free from all incumbrances.

III. That on said day defendant actually paid said sum of $ to said A. B. for said premises and at or before the time of so purchasing said premises and receiving said deed and making said payment defendant had no notice whatever, either express, implied, or constructive of any claim, right, title, lien or other interest of plaintiff, or of any other person than the said A. B., in said premises.

WAGERS

1917. For recovery of money lost at cards.

I. That [on 19 ,] [at various times between 19 , and 19 ,] in the city of , Minnesota, plaintiff played cards with defendant and thereby lost and paid to him $.

II. That by reason thereof and the provisions of G. S. 1913, § 8735, defendant is indebted to plaintiff in the sum of $.

Wherefore [as in § 919].

Sustained by Parsons v. Wilson, 94 Minn. 416, 103 N. W. 163.

1918. For recovery from stakeholder.

I. That on 19 , plaintiff and one A. B. made a wager with one another, on the result of [the then approaching presidential election], and thereupon each deposited with defendant, as stakeholder, to abide the result of the wager and to be paid by him to the winner, the sum of $.

II. That on 19 , before defendant had paid over said money to A. B. plaintiff notified defendant that he revoked the wager and demanded of defendant that he repay to plaintiff the money so deposited, but he refused and still refuses to do so.

Wherefore [as in § 919].

A common count for money had and received would be sufficient. See §§ 779, 1575.

1919. Plea of gambling transaction.

The defendant for answer to the complaint herein alleges that the sole consideration for said note was certain sums of money theretofore staked and lost by defendant to plaintiff in certain games of chance with cards played by them with each other.

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WAREHOUSEMEN

1920. Common indebitatus count for charges.

I. That defendant is indebted to plaintiff in the sum of $ for services rendered by plaintiff as a warehouseman in keeping, storing and taking care of goods for defendant, at his request, between 19 , and 19 .

II. That no part thereof has been paid.

Wherefore [as in § 919].

1921. For refusal to deliver.

I. That at the times herein mentioned defendant kept a public warehouse at , for the storage of grain for hire.

II. That on 19 , one A. B. delivered at said warehouse for storage bushels of No. 1 hard wheat, the property of said A. B., of the value of $, which defendant then and there received for storage for hire, and for which he issued to the said A. B. a receipt.

III. That on 19 , the said A. B. sold said wheat to plaintiff and indorsed, transferred and delivered to plaintiff said receipt and plaintiff has ever since been and still is the owner and holder of said receipt.

IV. That on 19 , plaintiff duly presented said receipt to defendant and demanded said wheat, and offered to pay all storage and other charges thereon, but defendant refused to deliver the same or any part thereof to plaintiff, to his damage $.

Wherefore [as in § 919].

1922. For injury to goods.

I. That at the times herein mentioned defendant kept a public warehouse at .

II. That on 19 , plaintiff delivered certain [describe goods in general terms], the property of plaintiff, of the value of $, to defendant for storage and safe-keeping in said warehouse, and defendant, as a warehouseman, received the same for such purpose.

III. That at the time of such delivery plaintiff informed defendant that it was necessary for their preservation that said goods should be kept dry.

IV. That while said goods were so stored defendant negligently permitted them to become wet, whereby they were soiled, mildewed and greatly injured [rendered worthless], to plaintiff's damage $.

Wherefore [as in § 919].

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1923. Same—Another form.

I. That on 19 , defendant kept a public warehouse at , and plaintiff then delivered to defendant at said warehouse certain [describe goods], the property of plaintiff, of the value of $, to be stored and safely kept in said warehouse, for a reward to defendant [until called for by plaintiff] [to be redelivered to plaintiff on his request] [or otherwise according to the agreement]; and defendant, as a warehouseman, than and there received said goods for that purpose.

II. That defendant did not safely keep said goods, but through his negligence they were wholly destroyed by fire [or otherwise according to the facts], to plaintiff's damage $.

Wherefore [as in § 919].

Based on Form 322, Conn. Pr. Act.

1924. Same—Removal to another warehouse.

I. That on 19 , defendant kept a public warehouse known as No. , street, in the city of , Minnesota, and plaintiff then delivered to defendant at said warehouse certain [describe goods], the property of plaintiff, of the value of $, and defendant, as such warehouseman, then and there received said goods and promised plaintiff to store and safely keep them in said warehouse for a reward and to redeliver them to plaintiff on demand.

II. That thereafter and while said agreement was in force defendant, without notice to and without the knowledge or consent of plaintiff, removed said goods from said warehouse to another warehouse known as No. , street, in said city, where they were totally destroyed by fire on 19 , to plaintiff's damage $.

Wherefore [as in § 919].

Based on McCurdy v. Wallblom, 94 Minn. 326, 102 N. W. 873.

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WASTE

1925. Lessor against lessee.

I. That at the times herein mentioned plaintiff was and still is the owner in fee of [describe premises as in a deed].

II. That at said times defendant was in possession of said premises as the tenant of plaintiff under a lease from plaintiff for the term of years from 19 .

III. That on 19 , and on divers other days thereafter and before this action, defendant committed the following acts of waste:

1. [Cut down and removed from said premises and converted to his own use twenty oak trees of the value of $.]

2. [Tore down and removed from said premises and converted to his own use a stable of the value of $.]

3. [Dug up and carried from said premises cubic yards of gravel of the value of $.]

IV. That by reason thereof the reversionary estate of plaintiff in said premises was injured $.

Wherefore plaintiff demands judgment for $, treble damages, as authorized by G. S. 1913, § 8088, with costs.

1926. Tenant in common against cotenant.

I. That at the times herein mentioned plaintiff and defendant were and still are owners in fee as tenants in common of [describe premises as in a deed].

II. That at divers times between 19 , and the commencement of this action, defendant, while in possession of said premises as such cotenant, committed the following acts of waste thereon:

1.

2.

3.

III. That by reason of said acts of waste the estate of plaintiff in said premises was injured $.

Wherefore [as in § 1925].

1927. Remainderman against tenant for life.

I. That on 19 , one A. B. died seized as owner in fee of [describe premises as in a deed].

II. That in his life time the said A. B. made and published his last will and testament whereby he devised said premises to defendant for life, with remainder in fee to plaintiff.

III. That on 19 , said will was duly admitted to probate by the

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probate court for county, Minnesota, and on 19 , said premises were duly assigned by said court to defendant for life and the remainder thereof in fee to plaintiff.

IV. That defendant entered into possession of said premises under said will and while in such possession [continuing as in III. § 1925].

[Continue as in § 1925.]

1928. Reversioner against assignee of life estate.

I. That plaintiffs are husband and wife and defendants are husband and wife.

II. That on March 23, 1879, one A. B. was the owner in fee and in the possession of [description of premises].

III. That on said day, while such owner, the said A. B. conveyed said premises by deed to plaintiff C. D., who ever since has been and still is the owner in fee thereof, subject to the life estate hereinafter mentioned.

IV. That at the time of the execution of said deed the plaintiffs made and delivered to said A. B. and his wife, the grantors in said deed, a life lease of said premises, for and during the natural lives of said A. B. and his wife.

V. That after the making and delivery of said lease defendants succeeded to, and became possessed of the said life interest and estate of said A. B. and his wife, and thereupon and thereunder took, and ever since have remained in, the actual possession of said premises.

VI. That said A. B. has since died, and his wife, though now living, is very aged and infirm, and in the ordinary course of events, will survive but a few years.

VII. That during the period of such occupation and possession of said premises by defendants, they have maliciously committed great waste thereon, and have without cause, greatly injured and damaged the same, and the freehold, and reversionary interest of plaintiffs.

VIII. That when defendants came into the possession of said premises, from twenty to twenty-five acres thereof were covered by fine, heavy growing timber, consisting in part of sugar maple and oak, and there was a large and valuable sugar bush thereon, all of which materially added to the value and desirability of the premises.

IX. That from such growing timber, including many young and thrifty sugar maple trees, defendants have maliciously cut about two hundred cords of cord-wood, most of which they have already sold to third parties.

X. That defendants are now continuing said acts of waste, and threatening to cut down and destroy all the growing timber on said premises.

XI. That by said acts of waste plaintiffs' reversionary estate in said prem-

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ises has been damaged in the sum of $500, which exceeds the value of defendants' unexpired term therein.

Wherefore plaintiffs demand judgment for $1,500, treble damages, as authorized by G. S. 1913, § 8088; forfeiting the estate of defendants in said premises and evicting them therefrom; and for such other relief as may be just, with costs.

Substance of complaint sustained on demurrer in Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357.

1929. Children against widow.

I. That on 19 , one A. B. died intestate, seized in fee of [describe premises as in a deed], leaving defendant, his widow, and plaintiffs, his only children and heirs at law.

II. That on 19 , the probate court for county, Minnesota, in administration of the estate of the said A. B., duly made a final decree of distribution assigning to defendant a life estate in said premises, and to plaintiffs the remainder in fee as tenants in common.

III. That thereafter defendant entered into possession of said premises as such life tenant, and while so possessed, between 19 , and the commencement of this action, committed the following acts of waste thereon:

1.

2.

3.

IV. That by reason thereof plaintiffs' reversionary estates in said premises were injured $.

Wherefore [as in § 1925].

1930. Ward against guardian.

I. That on 19 , defendant was duly appointed the general guardian of the estate of plaintiff by the probate court for county, Minnesota, and has ever since continued to be and now is such guardian.

II. That at the times hereinafter mentioned defendant was in possession as such guardian of the following described premises of which plaintiff then was and still is the owner in fee: [Describe premises as in a deed.]

III. [As III. in § 1925.]

IV. [As in III. in § 1926.]

V. [If plaintiff is still a minor allege appointment of guardian ad litem as in § 1407.]

Wherefore [as in § 1925].

1931. For forfeiture of estate and eviction.

[I. II. and III. as in § 1925.]

IV. That said acts of waste were committed maliciously.

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V. That by reason thereof plaintiff's [reversionary] estate in said premises was injured $, which amount [is equal] [exceeds by $] the value of defendant's estate therein.

Wherefore plaintiff demands judgment forfeiting the estate of defendant in said premises and evicting him therefrom, and for $, treble damages, as authorized by G. S. 1913, § 8088, and for such other relief as may be just, with costs.

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1932. Fouling a stream.

I. That plaintiff owns a farm in county, consisting of [describe land as in a deed].

II. That through said farm there flows and has flowed from time immemorial a stream known as Rock creek.

III. That defendant owns a paper mill on said creek about one-half mile above plaintiff's said farm.

IV. That during the last few months defendant has used, in the operation of said mill, various noxious chemical substances and fluids for cleaning rags, and has allowed the same, after they have been so used, to be thrown into or mixed with the water of said creek, whereby such water has been greatly fouled.

V. That before that time plaintiff had always watered his stock at said creek, and had also carried the water therefrom into his house, by pipes, and was using it for his domestic purposes.

VI. That since defendant has discharged such substances in said creek as aforesaid the water thereof, where it enters plaintiff's said farm, and throughout its entire course through the same, is so foul and unwholesome, that he has been and is unable to use it either for his stock or his domestic purposes.

VII. That on 19 , plaintiff notified defendant of such injury to the water of the creek and requested him to desist from any such use of the creek thereafter, but he still continues said nuisance.

VIII. That plaintiff has already been damaged thereby to the extent of $, and if said nuisance is continued indefinitely said farm will be greatly reduced in value.

Wherefore plaintiff demands judgment permanently enjoining defendant from continuing said nuisance, and for $ damages, with costs.

Based on Form 327, Conn. Pr. Act.

1933. For pollution of spring.

I. That plaintiff is, and at the times herein mentioned was, a corporation, duly organized and existing under the laws of this state, and engaged in the business of bottling and selling natural spring water; that prior to April 1, 1909, the name of plaintiff was Englis Spring Water Company, but after that date its name was duly changed to Sandstone Spring Water Company.

II. That defendant is, and at the times herein mentioned was, a corporation, duly organized and existing under the laws of this state, and engaged, among other things, in maintaining and operating at Sandstone, Pine county, Minnesota, a plant for the purpose of creosoting paving blocks.

III. That on Feb. 27, 1909, plaintiff acquired and ever since has been the

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owner and in possession of a certain tract of land of about twenty-five acres in Sandstone, described as follows: [Description of land.]

IV. That said land, at the time of its acquisition by plaintiff, contained a natural spring of large volume, the water from which was of unusual purity and excellence and had many desirable qualities for drinking purposes, and by reason of these qualities and of the accessibility of said spring to the cities of Minneapolis and St. Paul, and of the railroad facilities between said cities and Sandstone, the water from said spring could be economically delivered in Minneapolis and St. Paul, and was especially adapted for sale and use in said cities and other cities in Minnesota and elsewhere.

V. That after acquiring said land and the spring thereon plaintiff improved the spring so that the water might be obtained therefrom economically and without contamination, and also erected a bottling house on said land and connected the same with the spring by pipes, and expended in said improvements and in said bottling house $12,000.

VI. That after acquiring said spring plaintiff devoted all its energy and efforts and expended large sums of money in building up a business in the sale of said water in Minneapolis and elsewhere, and by reason of said efforts and expenditure of money, and by reason of the excellence and purity of said water, and the preservation of its qualities for delivery to consumers, through the plaintiff's said improvements and said bottling house, plaintiff had, prior to the commission of the wrongful acts of defendant hereinafter mentioned, succeeded in establishing and maintaining a large and profitable business in the sale and delivery of the water from the spring to a large number of customers in the cities of Minneapolis and St. Paul and elsewhere, and at and prior to the commission of said wrongful acts of defendant the spring was of the value of $100,000.

VII. That at all the times herein mentioned defendant has maintained and operated in Sandstone, and in the vicinity of plaintiff's said land, a plant for the creosoting of paving blocks; that in the work of creosoting said blocks defendant has at the times herein mentioned used large quantities of creosote and other deleterious and noxious products of petroleum, which, as defendant well knew, have a tendency to percolate through the ground and contaminate, pollute and render utterly worthless for drinking or domestic use any natural spring water with which the same might come in contact or be intermingled.

VIII. That on and prior to April 1, 1911, and continuously thereafter, notwithstanding the repeated protests of plaintiff, defendant, in the operation of said creosoting plant, negligently allowed large quantities of said creosote, and other deleterious and noxious products of petroleum, to escape from its said premises, and negligently allowed the same to spread over its own and neighboring lands and to percolate and permeate into plaintiff's said land and into said spring; that thereby the spring was and ever since has been and now is polluted, and the water therefrom rendered utterly worthless for drinking

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purposes or domestic use, and the value of the same and of said bottling plant and said improvements has been totally destroyed, and thereby plaintiff has been compelled to abandon the use of the spring, and the business theretofore established and maintained by plaintiff in the sale and delivery of water from the spring has been totally destroyed, and the value of the spring and of said improvements and of said bottling plant has been totally lost to plaintiff.

IX. That the value of said land of plaintiff consists almost wholly in the value of said spring and said bottling plant, and said improvements, and by reason of the said wrongful acts of defendant the value of said land has been depreciated in at least the sum of $112,000.

X. That by reason of the premises plaintiff has been damaged $112,000.

Wherefore [as in § 919].

Substance of complaint in Sandstone Spring Water Co. v. Kettle River Co., 122 Minn. 510, 142 N. W. 885.

1934. Deposit of waste from sawmill into stream with injury to lower water power—Injunction.

I. That plaintiff is, and during the times herein mentioned was, the owner in fee of [description of land], and also of the mill dam now constructed, maintained and extending southerly across said river from the southeast corner of the tract of land above described, and of all rights, privileges and immunities pertaining to said land, dam and the water power thereby created.

II. That during all such times plaintiff has been in the possession of said premises and has had thereon a large water power, flouring mill and elevator, all of the value of $32,000.

III. That said mill when allowed to run and operate at its full capacity is capable of manufacturing three hundred barrels of flour per day.

IV. That during all such times plaintiff has had the undisputed usufructuary right to the use of the water of said river for the purpose of operating its said mill and elevator, which said right, together with the quiet enjoyment of the same, was granted and guaranteed to plaintiff by defendant through various mesne conveyances and deeds.

V. That plaintiff is extensively engaged in the manufacturing of the best grades of flour, which is mostly sold in Glasgow, Scotland; that in said market plaintiff is obliged to compete with the best mills and manufacturers of the world, and the profits of plaintiff in its said business, all depend upon its reputation in the markets for manufacturing the best grades of flour; that the wrongful acts of defendant hereinafter mentioned, so affect said mill and machinery as to render it impossible during their continuance to manufacture the best grades of flour, which it otherwise could.

VI. That on April 22, 1881, defendant owned, occupied and commenced the operation of a sawmill upon and up said river a distance of about one thousand feet from plaintiff's said flour mill; that in the operation of said sawmill the

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defendant negligently and unreasonably drops all of the sawdust and bark from his said mill into said river, and the same is carried down the river by the current thereof, and collects in great quantities at the rack in front of the flume to plaintiff's mill, thereby preventing the free passage of the water of said river to the water wheel of plaintiff's said mill.

VII. That said obstruction prevents plaintiff from operating his said mill to the full capacity thereof, and prevents a steady flow of the water into said wheel, and thereby causes an unsteady motion of the machinery of said mill, and renders it impossible to manufacture, at such times, the best grades of flour.

VIII. That the sawdust and fine bark from defendant's mill passes in large quantities through the flume of plaintiff's mill and into the water wheel thereof, and there collects in such large quantities as to hinder and make unsteady the motion of plaintiff's mill, and compels plaintiff frequently to stop and shut down its mill and remove the sawdust and bark from the water wheel.

IX. That plaintiff is unable to prevent the accumulation of sawdust and bark in its water wheel without shutting the water entirely from the wheel.

X. That defendant now has in his mill pond above his sawmill a large quantity of logs, which he intends to manufacture into lumber, laths and shingles during the present season.

XI. That plaintiff has already suffered damages by reason of the premises in the sum of $200, and if defendant is not restrained by order of this court from dropping sawdust and bark into said stream as aforesaid, plaintiff will be prevented from operating its said flouring mill to more than two-thirds of its said capacity, and will be subjected to irreparable injury and be without any adequate remedy at law.

XII. That before the commencement of this action plaintiff requested defendant to discontinue said wrongful acts, but defendant disregarded such request and still continues said acts.

Wherefore plaintiff demands judgment permanently enjoining defendant, and all persons acting under him, from dropping sawdust or bark into said river from said sawmill; for $200 damages; and for such other relief as may be just, with costs.

Substance of complaint in Red River Roller Mills v. Wright, 30 Minn. 249, 15 N. W. 167.

1935. Draining lake to injury of adjacent owner.

I. That plaintiff is, and at all the times herein mentioned was, the owner in fee and in the possession of [describe premises].

II. That defendant is, and during the last three years has been, the owner and in possession of certain land adjoining plaintiff's said land.

III. That there is, and at all the times herein mentioned was, a small lake situated in part upon plaintiff's said land and in part on defendant's said land;

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that said lake is supplied by a spring of water and is, in its natural state, and while uninterrupted by artificial means, a permanent body of water, having its natural basin, flow and general course upon and over both plaintiff's and defendant's said land.

IV. That for more than three years last past said lake has been and still is plaintiff's sole source of water supply for himself and family and stock.

V. That at divers times during the last three years, and particularly on Dec. 12, 1883, defendant wrongfully dug a ditch through his said land, and near plaintiff's said land, beginning at and opening out of said lake, whereby he has wrongfully drained and is still draining the water out of said lake, and threatens to, and will unless restrained by the order of this court, drain said lake dry and thereby deprive plaintiff of his said supply of water, and plaintiff is without any adequate remedy at law.

Wherefore plaintiff demands judgment permanently enjoining defendant, and all persons acting under him, from interfering with or directing the course and flow of said lake, or draining the same; directing defendant to fill up said drain at its source; and for such other relief as may be just, with costs.

Based on complaint in Schaefer v. Marthaler, 34 Minn. 487, 26 N. W. 726.

1936. Overflowing lands by draining a lake through a ditch—Action against town—Injunction.

I. That at the times herein mentioned defendant was and still is a town of this state, duly organized and existing as a public corporation under the laws thereof, forming a part of Scott county.

II. That for more than five years last past plaintiff has been, and now is, the owner and in possession of the northwest quarter of the southwest quarter of section 12, in township 115 north, of range 23, in the township of Jackson, Scott county, Minnesota.

III. That from time immemorial there has been a deep lake lying partly in the township of Louisville, defendant herein, and partly in the township of Eagle Creek, in said county, known as O'Dowds Lake, a meandered lake about one mile long and half a mile wide, and connected by pipes and drains with another lake called Tholes Lake, which is a large and deep lake, and so connected said lakes constitute, in effect, one body of water, meandered by the United States Government, over two miles in length and in some places over a mile in width.

IV. That on Nov. 25, 1907, defendant, through its board of supervisors, in an effort to improve the highway in defendant township, along the shore at the south end of O'Dowds Lake, unnecessarily and unreasonably dug a ditch through the north bank of O'Dowds Lake in said highway, several feet below the surface of said lake, whereby the waters of the lake were allowed and caused to escape in large quantities, and to run over the lands of a large num-

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ber of persons, and over and upon said premises of plaintiff, which lie in another township, and about three miles north of said lake.

V. That said water has ever since continued to flow out of said lake through said ditch in large quantities, and with great force, and is now running upon said premises of plaintiff in a stream about one foot deep and four or five feet wide, with a heavy and swift current.

VI. That said water has nearly covered said premises of plaintiff, and has carried and deposited thereon large quantities of sand and gravel of a worthless and injurious character, and if said water is allowed to continue to flow it will entirely destroy the value of said land.

VII. That said water has already impaired the value of said land to the extent of $300, and destroyed crops of plaintiff growing thereon of the value of $700, to plaintiff's damage $1,000.

VIII. That unless said opening in said lake is closed and said flow of water prevented said land and other land of plaintiff will be destroyed and plaintiff will suffer irreparable injury and be compelled to bring repeated actions for his damages.

Wherefore plaintiff demands judgment permanently enjoining defendant, and all persons acting under it, from maintaining said flow of water, and requiring defendant to close said opening whereby said water is allowed to flow out of said lake; for $1.000 damages; and for such other relief as may be just, with costs.

Substance of complaint in Koeper v. Louisville, 106 Minn. 269, 118 N. W. 1025.

1937. Same—Another form.

I. That plaintiffs are the owners and in the possession and occupancy of the following described lands in Kandiyohi county, Minnesota, [describing the land of each plaintiff separately].

II. That said lands are used and occupied by plaintiffs respectively, for the purpose of raising crops and also for meadow lands.

III. That lying adjacent to said lands, and on the north thereof, is a large lake known as Lake Waconda, a navigable and meandered lake of great depth and covering in the neighborhood of six sections of land, in sections 4, 5, 6, 7 and 8 of said township and range, and sections 1, 10, 11 and 12 in township 118, range 35, of said county; that the natural outlet to said lake is to the east and into what is known as Little Kandiyohi lake, which is situated in sections 1, 2 and 3 of said township 118, range 34, and sections 34, 35 and 36 of township 119, range 34.

IV. That south of said Waconda lake there is another small lake known as Lake Fanny, covering a part of sections 9, 17 and 16 in said township 118, range 34.

V. That on May 8, 1906, defendants, without any right or authority, dug a

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ditch, about two feet deep and five or six feet wide, on the south side of Lake Waconda and upon lot 6, of section 5, of said township 118, range 34; and defendants dug said ditch in such a manner that the waters from Lake Waconda flowed out of that lake and into, upon and over said lands of plaintiffs.

VI. That on May 10, 1906, plaintiffs caused the said ditch or drain to be stopped up and refilled for the purpose of preventing said lands of plaintiffs from being damaged by the flowing of waters from Lake Waconda over them; and defendants and each of them threaten to again dig out the said ditch or drain so as to permit and allow the waters of Lake Waconda to flow upon said lands of plaintiffs, and if defendants persist in their said threats and carry the same out, the plaintiffs will sustain irreparable damage to their said lands, as the land lying between said Lake Waconda and Lake Fanny is somewhat low and insufficient to carry off the waters that would necessarily flow through said ditch or drain, and said waters so coming upon plaintiffs' said lands will remain there, and thereby plaintiffs' crops heretofore planted upon said lands, and the grass growing thereon, will, for the farming season of the year 1906, be entirely ruined and plaintiffs will be deprived of their quiet and peaceable possession of their said lands.

VII. That the damage that will be done to plaintiffs, if defendants are not restrained from again digging a ditch or drain at the place above mentioned, and restrained from permitting the waters of Lake Waconda to flow upon said lands of plaintiffs, is common to each of the plaintiffs herein, and plaintiffs have no adequate remedy at law.

VIII. That the natural outlet from Lake Fanny is toward the south therefrom and into Big Kanhiyohi lake, and if Lake Fanny and the outlet from Lake Fanny into Big Kandiyohi lake were first lowered, the waters flowing from Lake Waconda over and across the lands of plaintiffs would easily flow off of the lands of plaintiffs without any serious damage, but by the acts of defendants in attempting to cast the waters of Lake Waconda upon the lands of plaintiffs and into Lake Fanny there is not sufficient flow in the condition in which Lake Fanny now is to cause the water to flow off the lands of plaintiffs, but all of the waters coming from Lake Waconda upon the lands of plaintiffs and each of them will remain there with irreparable damage to plaintiffs.

Wherefore plaintiffs demand judgment permanently enjoining defendants, and all persons acting under them, from draining and emptying the waters of said Lake Waconda upon, over and across said lands of plaintiffs and from again opening, digging and constructing said ditch in such a manner that the waters from Lake Waconda shall in any manner flow upon any of said lands of plaintiffs or so that the waters from said lake shall be diverted into or upon said lands of plaintiffs; and for a temporary injunction restraining defendants as aforesaid during the pendency of this action; and for such other relief as may be just, with costs.

Substance of complaint in Felt v. Elmquist, 104 Minn. 33, 115 N. W. 746.

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1938. Injunction against obstruction of natural watercourse and repeated trespasses on land.

I. That plaintiff is the owner of [description of premises].

II. That plaintiff has occupied, improved, cultivated and operated said land as a farm and home for himself and family for more than twenty-five years last past; that upon said land, in the central part of said section thirty-five, there is a natural meadow of one hundred acres through and over which flows the water from a large area of adjoining lands; that there is a deep ravine extending from the northerly edge of said meadow across the north half of the northeast quarter of said section thirty-five and emptying into a creek which drains that entire region; that this ravine is the natural and the only outlet for all the water flowing or being upon said meadow; that from said meadow to said creek, a distance of three-fourths of a mile, there is a fall of more than fifty feet, and along the bottom of said ravine there there is a natural channel or watercourse in which the water flows continuously except at rare intervals in the latter part of the summer of an unusually dry year; that in the years 1880 and 1881, plaintiff constructed a ditch through said meadow and extended the same into the channel in said ravine, and deepened and improved portions of said channel so that there was a free and unimpeded flow of water from said meadow through said channel and into the creek into which the same empties, and which drained said meadow and all the lands abutting upon said channel so that neither said meadow, nor any of the lands abutting upon said channel, were ever thereafter overflowed except as such overflow has been caused by the acts of defendants hereinafter mentioned; that ever since the construction of said ditch and the improving of said channel, plaintiff has kept up and maintained the same at his own expense and without objection by or from any one except as hereinafter stated; that by reason thereof plaintiff has been enabled to and has cut more than one hundred tons of hay on said meadow annually for more than twenty years, of the average value of more than $500 per year.

III. That during the two years last past defendants have wilfully, maliciously, and repeatedly filled up said ditch and said channel for a long distance so as to prevent the flow of water through the same and overflow the said meadow of plaintiff; that plaintiff repeatedly removed said obstructions, but defendants persistently replaced the same; that solely by reason of said obstructions the said meadow of plaintiff was overflowed during the season of 1904 to such an extent as to wholly destroy the crop of grass and hay thereon and the same was wholly lost, to plaintiff's damage $900; that after the destruction of his hay crop in 1904, plaintiff again removed said obstructions so as to save such crop in 1905, but about May 1, 1905, defendants filled up said channel and said ditch for a distance of twenty rods on the land of plaintiff and in connection therewith plowed up and destroyed a large quantity of plaintiff's grain then growing in plaintiff's field; that by reason of said obstruction, plaintiff's said meadow is again overflowed and his said crop of grass

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and hay is nearly destroyed and will be wholly destroyed if defendants are permitted to maintain said obstructions.

IV. That in the year 1904 plaintiff constructed a fence along the west line of said land in section two, but constructed the same wholly upon his own land; that said fence incloses the west side of his cattle pasture and also the west side of his hog pasture, and in said pastures respectively he had a large number of cattle and a large number of hogs confined; that about the last of May, 1905, defendants wrongfully tore down portions of said fence so that said cattle and hogs could escape into the fields; and defendants have repeatedly, thereafter torn down portions of plaintiff's fence on said land and allowed the cattle to escape into plaintiff's grain and corn fields.

Wherefore plaintiff demands judgment enjoining defendants, and all persons acting under them, from in any manner filling up, obstructing or interfering with said ditch and channel, or in any manner obstructing, preventing or hindering the free and unimpeded flow of water through the same, and from destroying, injuring or in any way interfering with the grain, corn, grass, hay or other crops of plaintiff, on said premises, and from destroying, breaking down, opening, or in any manner interfering with any of the fences of plaintiff on said premises, and for such other relief as may be just, with costs.

Substance of complaint in Baldwin v. Fisher, 110 Minn. 186, 124 N. W. 1094.

1939. Obstruction of watercourse by railroad embankment—Overflow of adjacent lands.

I. That plaintiff is, and at all the times herein mentioned was, the owner in fee and in possession of [description of premises].

II. That during all such times defendant owned and operated a railroad in said county.

III. That during and throughout the years 1881, 1882, 1883, 1884 and 1885, defendant wrongfully maintained its railroad near plaintiff's said land so as to obstruct a natural watercourse, which, before the construction of said railroad, ran through plaintiff's said land, and by such obstruction caused the water in said watercourse to rise and overflow and remain on plaintiff's said land.

IV. That thereby said land was impaired in value to the extent of $, and crops of plaintiff growing thereon, of the value of $, were totally destroyed, all to plaintiff's damage $.

Wherefore [as in § 919].

Based on complaint in Byrne v. Minneapolis & St. Louis Ry., 38 Minn. 212, 36 N. W. 339.

1940. Surface waters—Diversion by railroad—Damage to crops.

I. That at the times herein mentioned defendant owned and operated a railroad in Polk county, Minnesota.

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II. That the Marshalltown State Bank, a corporation, of Marshalltown, Iowa, was at all the times herein mentioned the owner of [description of land], in the town of Kertsonville, Polk county, Minnesota.

III. That said land is, and at the times herein mentioned was, a tillable farm, a portion thereof being pasture, and was occupied and farmed by plaintiff, who during the crop season of 1906 sowed the same to flax and small grain under an agreement with the said Marshalltown State Bank, whereby plaintiff and the said bank were the owners each of one undivided half interest in said crop.

IV. That the land in said town of Kertsonville is a prairie land and generally flat; that the town of Tilden adjoins said township of Kertsonville upon the east; that the township of Tilden consists of prairie land, but contains large ridges of sand running north and south, and between said ridges there is a low swampy tract of land which contains much surface water during ordinary seasons.

V. That a short distance east of the tract of land described in paragraph two hereof, there is a large tract of wet and swampy land covering many hundreds of acres, and constituting an extensive marsh or slough extending through sections seven, eighteen, nineteen and thirty in the township of Tilden.

VI. That into said wet and swampy land there drain large sections of country to the east and northeast thereof, and between said low and swampy land and the tract of land described in paragraph two hereof there is a high sand-ridge extending through said sections, lying immediately west of said low and swampy land and completely protecting the tract of land described in paragraph two hereof from any water flowing upon it from said marsh.

VII. That the natural outlet for the water from said low and swampy land is to the south through a well defined watercourse extending south from section thirty in the township of Tilden, to the southwest through section thirty-one in said township and section thirty-six in the township of Kertsonville, thence northwest through a well defined watercourse into a large ravine, where it is carried into other ravines and watercourses, and where said watercourse is again intersected by the defendant's railway constructed as hereinafter alleged.

VIII. That said sand-ridge is much higher than said low, wet and marshy land.

IX. That defendant's railway is constructed about one hundred feet north of the section line between sections twenty-three and twenty-six, twenty-four and twenty-five in said town of Kertsonville, and between sections nineteen and thirty and twenty and twenty-nine in said town of Tilden.

X. That in constructing said railway defendant has unnecessarily and unreasonably caused to be constructed a continuous cut through said sand-ridge, and has made ditches along both sides of its track through said sand-ridge, thereby making an outlet through said sand-ridge for the water in said low

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marshy land to the east thereof, and in so intersecting said sand-ridge it has made a lower outlet for said water than the natural outlet to the south hereinbefore described.

XI. That to the west of said sand-ridge and along the defendant's right of way and where the same intersects the watercourse hereinbefore described, there is a well defined watercourse which is and was at all the times herein mentioned reasonably accessible for the purpose of draining said marshy tract, and the water, which defendant by constructing its said railway, turned through said sand-ridge, and it was practical and convenient for defendant to have so drained said tract and its said right of way without unreasonable and unnecessary injury to any one; but defendant, disregarding its duty to plaintiff, instead of draining said tract of low and marshy land through said natural watercourse, unreasonably and unnecessarily conveyed the water, which had formerly run to the south, through its said cut and ditches, in destructive currents, from said marshy land and along its right of way to a point on its right of way in the vicinity of the town line between the towns of Kertsonville and Tilden, and there unreasonably and unnecessarily dammed up its said ditches and discharged said water in destructive currents so that it ran in a northwesterly direction over and upon the land described in paragraph two hereof, where it would not have naturally gone except for said cut, ditch and dams.

XII. That said water so unnecessarily and unreasonably conducted from said marsh, flowed upon the land described in paragraph two hereof, and there overflowed and destroyed plaintiff's crops of flax and grain and said pasture, all to plaintiff's damage in the sum of $500, which was the value of plaintiff's interest in said crops and pasture at the time the same were destroyed in the months of June and July, 1906.

Wherefore [as in § 919].

Complaint in Johnson v. Great Northern Ry., 110 Minn. 412, 125 N. W. 1018.

1941. Diversion of surface waters—Road and culverts—Slough—Action against towns.

I. That defendant towns are, and at all the times herein mentioned were, municipal corporations duly organized and existing under the laws of this state, and forming a part of Clay county.

II. That plaintiff is, and at the times herein mentioned was, the owner in fee of the northwest quarter of section 6, in township 140 north, of range 46 west, in the town of Spring Prairie, one of defendants.

III. That lying to the east of plaintiff's said land, and located principally in section 4 of said township, there is, and at all the times herein mentioned was, a slough or depression in the surface of the land which constituted a natural reservoir into which surface waters were and are gathered, and into

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which from the east, south and southeast well-defined and natural watercourses empty their waters.

IV. That a natural coulee runs from said slough or depression in a northeasterly direction through sections 32 and 33 in said town of Flowing, and thence into what is known as the state ditch, which extends east and west along the north line of sections 32 and 33, thence westerly to the Buffalo River in Clay county.

V. That in the year 1898 defendants laid out and graded a public road running east and west between sections 4, 5 and 6, in said town of Spring Prairie and sections 32, 33 and 34, in said town of Flowing, and excavated ditches along the north and south sides of said road and as a part of said road, and said road and ditches intersect and connect with the said slough or depression.

VI. That ever since the construction of said road and ditches defendants have maintained the same and have thereby during all of said time unnecessarily and unreasonably collected the waters from said slough or depression and the adjoining lands and diverted the same from their natural course as hereinbefore described into said ditches and conveyed such waters in a due westerly course down said ditches, and unnecessarily and unreasonably discharged the same over and upon plaintiff's said land.

VII. That in the rainy season of the year, particularly in the spring before seeding, defendants have annually for several years last past collected large quantities of water by means of said ditches and unnecessarily and unreasonably discharged the same over and upon plaintiff's said land.

VIII. That by reason of the ditches so constructed and made a part of said road, and because of the negligent and unskilful acts of defendants and the defective plan upon which said road and ditches were constructed, large quantities of the waters gathered in said slough or natural depression were carried in said ditches in a due westerly direction out of their natural course and discharged over and upon plaintiff's said land.

IX. That through said wrongful acts of defendants, about sixty acres of plaintiff's crop of wheat, oats and flax were destroyed in the year 1899, about twenty acres of plaintiff's crops were destroyed in the year 1901, and about fifty acres of plaintiff's said land were rendered useless for all purposes in the year 1902, and the rental value of plaintiff's said land was lessened in each of the years 1899, 1900, 1901 and 1902, in the sum of $150 or in the total sum of $600.

X. That the crops destroyed as aforesaid were reasonably worth $600.

Wherefore [as in § 919].

Substance of complaint in Gunnerus v. Spring Prairie, 91 Minn. 473, 98 N. W. 340, 974.

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1942. Diversion of surface water from natural channel.

I. That on Jan. 18, 1888, plaintiff was, ever since has been and now is, the owner and in possession of the southwest quarter of the northwest quarter of section 25, town 104 north, of range 9 west, situated in Fillmore county, Minnesota, except a strip extending across said tract from the south to the east side thereof, being a strip fifty feet wide along each side of defendant's railway track where it crosses said land.

II. That in April, 1898, defendant, without the consent of plaintiff, wrongfully entered plaintiff's said premises and dug a large and deep ditch thereon and extending across defendant's right of way; that said ditch diverted the surface water from its natural channel where it flowed at stated periods in large quantities and discharged it in and upon plaintiff's cultivated field on said premises in large quantities.

III. That there is a natural channel on said premises extending from the north down to and then in a southwesterly direction across defendant's right of way through a culvert and passage under defendant's track, where the surface water, accumulated in large quantities in times of heavy rains, naturally flowed, which fact was to defendant well known.

IV. That on May 15, 1898, defendant unnecessarily and unreasonably filled up said culvert and passage and the natural channel where the water flowed, thereby causing the water to be accumulated and discharged upon plaintiff's said premises through said ditch in large quantities, washing gravel and rocks thereon, and upon his cultivated field, destroying his growing crops thereon, which were reasonably worth $, and depreciating the value of said land to the extent of $, all to plaintiff's damage $.

Wherefore [as in § 919].

Substance of complaint in Fossum v. Chicago etc. Ry., 80 Minn. 9, 82 N. W. 979.

1943. For overflow of lands by dam.

I. That plaintiff is, and at the times herein mentioned was, the owner in fee and in the actual possession of lot five, in section twenty-two, in township forty-four north, of range twenty west, in Pine county Minnesota; that said land lies in the valley of the Kettle river, a stream of water flowing through and draining the same.

II. That at the times herein mentioned, said land was partly cleared and cultivated and included a natural hay meadow from which could be cut annually, if not overflowed by the dam hereinafter mentioned, a large quantity of hay, and which could be cultivated by the plaintiff and the usual farm products grown thereon.

III. That prior to June 1, 1891, defendant wrongfully caused to be raised, and has continuously since that time, wrongfully maintained a dam across

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said Kettle river at a point below plaintiff's said land, and so as to set back the waters of Kettle river and overflow a large and valuable part of said land.

IV. That during the spring and summer months of the years 1891 to 1897 inclusive, said waters were by reason of the wrongful raising and maintenance of said dam by defendant, obstructed in their natural flow and set back upon said land so as to overflow and submerge a large part thereof and to surround and cut off egress and ingress to and from the balance thereof, rendering said land unfit for any purpose.

V. That during said period defendant has wrongfully raised and maintained said dam higher and higher each successive year and set back more water each successive year upon said land.

VI. That thereby plaintiff has been damaged $500.

Wherefore [as in § 919].

Substance of complaint in Gniadek v. Northwestern Imp. & Boom Co., 73 Minn. 87, 75 N. W. 894.

WHARVES

1944. For injury to wharf.

I. That at the times herein mentioned plaintiff owned a wharf in the harbor of Duluth, Minnesota.

II. That on 19 , defendant moored one of its steamers at said wharf for the purpose of discharging her cargo; that while the discharging of the cargo was in progress a sudden and violent storm arose which had not abated when all the cargo was discharged; that the storm was so violent that reasonable care required the master of the steamer to keep her moored to the wharf during its continuance and after the discharge of the cargo, which he did; that while so moored, after the discharge of the cargo, the steamer, driven by the storm, struck and pounded the wharf and injured it, to plaintiff's damage $

Wherefore [as in § 919].

Based on Vincent v. Lake Erie Transportation Co., 109 Minn. 456, 124 N. W. 221.

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WORK AND LABOR

1945. Common indebitatus count.[1]

I. That defendant is indebted to plaintiff in the sum of $, for [work done] [2] [and materials for the same provided] [3] [services rendered] by plaintiff for defendant, at his request, [on 19 ,] [between 19 , and 19 ,] [and for money paid and advanced by plaintiff for the use of defendant, at his request, in connection therewith,] [4] [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].[5]

II. That no part thereof has been paid.

Wherefore [as in § 919].

[1] This is substantially the common indebitatus count for work and labor. See § 530. Its sufficiency under the code is well settled. See §§ 531, 910. As to when it will lie, see §§ 914, 915. This form is recommended for use in all cases when applicable. It is preferable to a quantum meruit count as it avoids the danger of a variance. Recovery may be had upon proof of either an express or implied contract. Swartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41. See § 917.

[2] This includes all kinds of work, professional or otherwise.

[3] That is, materials provided for and in connection with the work.

[4] This is not a separate cause of action but one item of the indebtedness on which the action is based. See Donegan v. Houston, 5 Cal. App. 626, 90 Pac. 1073.

[5] It is not necessary, as against a demurrer, to attach a statement of the account, but it is generally advisable to do so to anticipate a demand for a bill of particulars and to force the defendant to admit the items or plead specifically. The statement should be itemized with dates, and value or prices, and any credits or deductions. See § 405.

1946. For services rendered on express contract—General form.

I. That [on 19 ,] [between 19 , and 19 ,] plaintiff rendered services to defendant, at his request, as [describe services in general terms as in § 1951], [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That defendant promised to pay plaintiff therefor [$ per month] [the sum of $].

III. That no part thereof has been paid [except].

Wherefore [as in § 919].

See §§ 908–917.

1947. For services rendered on implied contract—Quantum meruit count.

I. That [on 19 ,] [between 19 , and 19 ,] plaintiff [rendered services] [performed work] [and provided the necessary materials therefor] for defendant, at his request, as [describe services or work in

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general terms as in § 1951,] [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That the same were reasonably worth $.

III. That no part thereof has been paid.

Wherefore [as in § 919].

This is substantially the common quantum meruit count. See § 911 as to its sufficiency, and §§ 914 and 915 as to when it will lie.

1948. Quantum meruit and express contract in one count.

I. [As in § 1947.]

II. That the same were [reasonably worth $, which defendant promised to pay to plaintiff therefor] [of the agreed and reasonable value of $].

III. That no part thereof has been paid.

Wherefore [as in § 919].

This form is often used in this state. See cases under § 911. If no objection is made a recovery may be had under it upon proof of either an express or implied contract. See § 911. It is safer to use the form given under § 1945, or § 1949.

1949. Quantum meruit and express contract in separate counts.

For a first cause of action:

I. That [on 19 ,] [between 19 , and 19 ,] plaintiff [performed work] [and provided the necessary materials therefor] [rendered services], for defendant, at his request, as [describe services as in § 1951,] [as more fully appears by a statement of account hereto attached, marked Exhibit A, and made a part hereof].

II. That the same were reasonably worth $.

III. That no part thereof has been paid [except $].

For a second cause of action:

I. The plaintiff repeats and makes a part of this cause of action each and every allegation in the first paragraph of the first cause of action herein set forth and further alleges:

II. That defendant promised to pay to plaintiff therefor $ [per month].

III. That no part thereof has been paid [except $].

Wherefore [as in § 919].

This form may be used to avoid a variance where it is doubtful whether the work was performed under an express or implied contract. The two causes of action are not inconsistent and plaintiff cannot be required to elect between them, but may recover on either one according to the proof on the trial. Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124. See 40 Cyc. 2840: Waterman v. Waterman, 81 Wis. 17, 50 N. W. 668; Rubin v. Cohen, 113 N. Y. S. 843.

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1950. For compensation for services and for money advanced.

For a first cause of action:

[I. II. and III. as in §§ 1945–1948.]

For a second cause of action:

I. That defendant is indebted to plaintiff in the sum of $ for money paid and advanced by plaintiff for the use of defendant, at his request, in connection with the services mentioned in the first paragraph of the first cause of action herein alleged, all the allegations in which paragraph plaintiff realleges and makes a part of this cause of action.

II. That no part thereof has been paid.

Wherefore [as in § 919].

When an indebitatus count is used it is not necessary to treat a claim for money advanced as a separate cause of action, but it may be alleged as one of the items of the indebtedness. See § 1945.

1951. Various allegations of services for insertion in forms under §§ 1945–1950.

as a laborer [in the factory of defendant in the city of].

* * *

as a household servant.

* * *

as a farm laborer.

* * *

as a [clerk] [salesman] [bookkeeper] [stenographer and typewriter].

* * *

as a [carpenter] [mason] in and about the [construction] [repair] of a building known as No. , street, in the city of .

* * *

as an architect in forming and drawing plans and specifications, and making estimates for, and superintending the construction of a building to be known as No. , street, in the city of .

* * *

as an attorney at law [in prosecuting an action in the district court for county, Minnesota, against one A. B.].

* * *

as a physician in treating defendant's [wife] for certain diseases from which she then suffered, and for medicines and other articles provided and administered in that behalf, by plaintiff for defendant, at his request.

* * *

as a broker in the [purchase] [sale] [exchange] of certain real estate in county, in this state [the premises known as No. , street, in the city of , in this state].

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as a blacksmith in shoeing horses of defendant.

* * *

as a dentist [in filling, repairing and cleaning defendant's teeth] [in manufacturing for defendant a set of teeth].

* * *

in instructing a child of defendant at plaintiff's school in the city of , and in providing the child with board, lodgings, books, papers and other necessary things in connection with such instruction, at defendant's request.

* * *

in stabling, feeding and caring for two horses of defendant.

* * *

as the factor and agent of defendant, in selling [and disposing] of certain [describe goods in general terms].

* * *

as an auctioneer, in selling and disposing of, and in endeavoring to dispose of, by auction [and otherwise] certain [household] goods, [chattels and effects].

* * *

as an undertaker, in preparing for the burial and conducting the burial of a child of plaintiff.

* * *

as a painter, in painting plaintiff's dwelling house, [known as No. , street,] in the city of .

1952. For breach of contract to employ.

I. That on 19 , plaintiff and defendant entered into an agreement whereby defendant promised to employ plaintiff as [a salesman] [for a period of ,] [from month to month,] beginning on [that day,] [19 ,] at a salary of $ per month, and plaintiff promised to render such services.

II. That on 19 , plaintiff duly offered to render such services and to perform all the conditions of said agreement on his part, but defendant refused to permit him to do so, to plaintiff's damage $.

Wherefore [as in § 919].

Sustained by Starkey v. Minneapolis, 19 Minn. 203(166, 167); Drea v. Cariveau, 28 Minn. 280, 284, 9 N. W. 802. See § 907.

1953. For wrongful discharge from service.[1]

I. That on 19 , plaintiff and defendant entered into an agreement whereby defendant promised to employ plaintiff as a [salesman,] [from month to month,] [for a period of ,] beginning [on 19 ,] [on that day] at a salary of $ per month, and plaintiff promised to render such services.

II. That on 19 , plaintiff entered the service of defendant under

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said agreement and remained in such service until 19 , when he was discharged by defendant, though the term of his employment had not yet expired.[2]

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.

IV. That the salary of plaintiff, under said agreement, from 19 , to 19 , amounting to $, is due and unpaid.[3]

Wherefore [as in § 919].

[1] See § 909.

[2] Unnecessary to allege that the discharge was wrongful or without just cause. Linton v. Unexcelled Fire Works Co., 124 N. Y. 533, 27 N. E. 406.

[3] See Dunnell, Minn. Digest, § 5850.

1954. For breach of contract of employment by reduction of grade of servant.

I. That defendant is in the millinery business and operates branch stores at several places throughout the United States.

II. That on Dec. 1, 1909, plaintiff and defendant entered into an agreement whereby defendant hired plaintiff to manage one of its said branch stores, to commence such management on March 1, 1909, and continue until Aug. 1, 1909, both days inclusive, and agreed with plaintiff to pay her for such services a weekly salary of $25.

III. That on March 1, 1909, plaintiff presented herself to defendant for duty and shortly thereafter plaintiff was sent by defendant to take charge of the store belonging to defendant at the city of Duluth, Minnesota, under said agreement.

IV. That plaintiff took charge of said store and conducted the same under said agreement for about six weeks, at the end of which time defendant, without any explanation to plaintiff, made a change in the management of said store and superseded plaintiff in the management thereof.

V. That plaintiff has ever since held herself in readiness at all times, and so notified defendant, to perform her said contract with defendant.

VI. That plaintiff has duly performed all the conditions of said contract on her part.

VII. That defendant has paid plaintiff on account of said contract $150, and no more, and plaintiff has duly demanded the balance of the salary due her thereunder but defendant has not paid the same or any part thereof, to plaintiff's damage $400.

Wherefore [as in § 919].

Based on complaint in Cooper v. Stronge & Warner Co., 111 Minn. 177, 126 N. W. 541.

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1955. Denial and allegation of express contract.

The defendant for answer to the complaint herein:

I. For a first defence denies each and every allegation in the [second] paragraph thereof.

II. For a second defence alleges that said [work was done] [services were performed] under an express contract between the plaintiff and defendant, which is still in force, whereby it was agreed that [state substance of agreement and show that plaintiff is in default, that the agreement is still in force and that defendant has duly performed all the conditions thereof on his part].

1956. Discharge for misconduct.

The defendant for answer to the complaint herein alleges that after the making of said contract, and before the alleged dismissal, plaintiff wilfully misconducted himself by [allege misconduct according to the facts], wherefore defendant dismissed plaintiff, which is the alleged breach.

1957. Plea of embezzlement.

The defendant for answer to the complaint herein alleges that during all the time of his said employment plaintiff stole and appropriated to his own use large sums of money belonging to defendant which came into his hands in the course of such employment, and as soon as defendant learned thereof he discharged plaintiff from his service for that reason.

Based on Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245.

1958. Discharge for incompetency.

The defendant for answer to the complaint herein alleges that at the time of making said agreement plaintiff represented to defendant that he was competent and had sufficient skill and ability to perform said services and defendant relied on said representations in making said agreement; that plaintiff was not competent and did not have sufficient skill and ability to perform said services and for that reason defendant discharged plaintiff on 19 .

1959. Abandonment of service.

The defendant for answer to the complaint herein alleges that on 19 , plaintiff voluntarily left defendant's service.

1960. Defence of entire contract—Breach by plaintiff.

The defendant for answer to the complaint herein alleges that the services mentioned in the complaint were rendered under an express and entire con-

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tract between plaintiff and defendant whereby plaintiff agreed to work for defendant as a [clerk] for the entire period of [one year] beginning on 19 ; that after working for defendant under said agreement until 19 , plaintiff, without any legal excuse or justification and without the consent of defendant, abandoned said contract and refused to perform it and quit the service of defendant; that up to the time of said abandonment defendant had duly performed all the conditions of said agreement on his part, and was then ready and willing to fully perform it on his part until the expiration of the agreed period of service.

See Dunnell, Minn. Digest, § 10369.

1961. Reply excusing abandonment of contract.

The plaintiff for reply to the answer herein admits the contract therein mentioned and alleges that on 19 , defendant wrongfully [struck the plaintiff with his fist] [assaulted and beat the plaintiff] and for that reason plaintiff abandoned said contract and quit the service of defendant.

See Dunnell, Minn. Digest, § 10369.

1962. Same—Illness of employee.

The plaintiff for reply to the answer herein admits the contract therein mentioned and alleges that in the month of 19 , plaintiff became so seriously ill that he could not perform said services longer and for that reason plaintiff necessarily abandoned said contract and quit the service of defendant on 19 .

See Dunnell, Minn. Digest, § 10369.

BUILDING AND CONSTRUCTION CONTRACTS

1963. Common count.

I. That defendant is indebted to plaintiff in the sum of $ for work done and materials for the same provided by plaintiff for defendant, at his request, in and about the construction of a [dwelling house] [store building] in the city of , [between 19 , and 19] [during the months of 19].

II. That no part thereof has been paid.

Wherefore [as in § 919].

This is an extremely convenient form for all kinds of construction contracts for it admits proof of all the various items of work and materials and of the entire course of dealings between the parties. A recovery may be had under it for a substantial performance and for extras, and it also admits proof of a modification of the original contract and of an excuse for not obtaining a final certificate of completion from the architect. See § 917.

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1964. On building contract subsequently modified—Claim for extra work.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That on 19 , at the request of defendant, said agreement was modified and plaintiff [state what he did in the form of extra work], and defendant promised to pay plaintiff therefor [the reasonable value thereof] [the sum of $] in addition to the sum stated in the original agreement.

III. [That the reasonable value of said extra work was $.]

IV. That plaintiff has duly performed all the conditions of said original agreement and of the said agreement for extra work on his part.

V. That defendant has paid plaintiff no part of the contract price for said building except $, and no part of the amount due for said extra work.

Wherefore [as in § 919].

1965. Same—Another form.

For a first cause of action:

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That thereafter and before 19 , plaintiff duly performed all the conditions of said agreement on his part, except that, at the request of defendant, he [covered the roof of said building with slate instead of shingles, for which defendant promised to pay plaintiff a reasonable sum in addition to the price named in said agreement; and that, at the like request, he omitted to put blinds on the rear of said building, on the agreement with defendant that a reasonable deduction should be made for such omission from the price named in said agreement; and that, by consent of defendant, the time for completing said building was extended to 19 , on which day it was completed by plaintiff].

III. That the sum of $ is a reasonable amount to be paid in addition to the price named in said agreement, for covering said roof with slate instead of shingles.

IV. That the sum of $ is a reasonable deduction to be made from the price named in said agreement for the omission to put blinds on said building.

V. That on 19 , payment of $, being the balance due on said agreement after making such allowance and deduction, was duly demanded of defendant by plaintiff, but no part thereof has been paid, [except].

For a second cause of action:

I. That between 19 , and 19 , plaintiff rendered further services to defendant at his request in [specify extra work done and materials

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furnished therefor], [of the reasonable value of $] [for which defendant promised to pay plaintiff $], no part of which has been paid.

Wherefore [as in § 919].

Based on Form 73, Conn. Pr. Act.

1966. For balance due on building contract.

I. [As I. in § 1968.]

II. That plaintiff has duly performed all the conditions of said agreement on his part and on 19 , completed said building [and the same was thereupon accepted by defendant] [and obtained a certificate from the architect thereof that it had been completed to his satisfaction].

III. That defendant has paid plaintiff no part of the contract price for said building [except $], and there is now due plaintiff from defendant on said agreement a balance of $.

Wherefore [as in § 919].

1967. For breach of contract.

I. [As I. in § 1968.]

II. [As II. in § 1968.]

III. That defendant has not performed said agreement on his part, in this, that [specify wherein defendant failed to perform], to plaintiff's damage $.

IV. [Allege any special damages sought.]

Wherefore [as in § 919].

1968. For damages from negligent construction.

I. That on 19 , plaintiff and defendant entered into a written agreement, of which the following is a copy: [Copy of agreement.]

II. That plaintiff duly performed all the conditions of said agreement on his part.

III. That defendant constructed said building in so unskilful and negligent a manner, and of such defective and unsuitable materials, that shortly after its completion the foundations settled, the walls cracked, the roof and walls became leaky, a considerable portion of the plastering fell, and the building was and is, entirely untenantable, and nearly useless, through the negligent and unskilful manner of its construction, to plaintiff's damage $.

Wherefore [as in § 919].

Based on Form 71, Conn. Pr. Act.

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1969. For failure to complete building in time—Loss of rent.

I. [As I. in § 1968.]

II. [As II. in § 1968.]

III. That by the terms of said agreement defendant agreed to finish said building on 19 , but he did not finish it until 19 .

IV. That on 19 , plaintiff leased said building to one A. B. for the term of years, at an annual rent of $, of which fact defendant had knowledge at the time he entered into said agreement with plaintiff.

V. That by reason of defendant's failure to finish said building within the agreed time plaintiff was unable to give said A. B. possession of the same at the time agreed and the said A. B. for that reason canceled said lease, to plaintiff's damage $.

VI. That plaintiff was unable to lease said building until 19 , and then was unable to lease it for more than $ a year.

Wherefore [as in § 919].

See Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 44 N. W. 306.

1970. Failure to obtain architect's certificate.

That it was a condition of said agreement that said building was to be completed in a good workmanlike manner by 19 , to the satisfaction of one A. B., the architect of said building, and his certificate obtained by plaintiff that the same was completed to his satisfaction; but plaintiff did not obtain such a certificate from the said A. B. before this action [nor has he since obtained one].

1971. Excuse for failing to secure architect's certificate.

That plaintiff has duly performed all the conditions of said agreement on his part except the condition requiring him to obtain a certificate of the architect that [quote language of agreement as to certificate]; that on 19 , after he had completed said building in accordance with said agreement, plaintiff demanded such a certificate from A. B., the architect of the building, who, [acting in furtherance of a conspiracy with defendant to defraud plaintiff, fraudulently withheld the same].[1]

[1] Sustained by Michaelis v. Wolf, 136 Ill. 68, 26 N. E. 384.

1972. Work not completed.

The defendant for answer to the complaint herein alleges that plaintiff has not completed said building in accordance with said agreement, in that [specify in what particulars the building is incomplete], and said building is still incomplete and unfinished.

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1973. Recoupment for defective work.

The defendant for answer to the complaint herein alleges that said building was not constructed by plaintiff in a good and workmanlike manner, in this, that [specify defects]; that by reason thereof said building is worth $ less than it would have been if it had been constructed in a good and workmanlike manner, and defendant demands that that amount be deducted from [the price named in said agreement in any recovery against him herein] [any amount proved against him on the trial of this action].

1974. Non-performance by plaintiff.

That it was a condition of said agreement that [specify condition in language of agreement]; that plaintiff did not [specify wherein he failed to perform].

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