Loose Cannons

of

Common Law Actions

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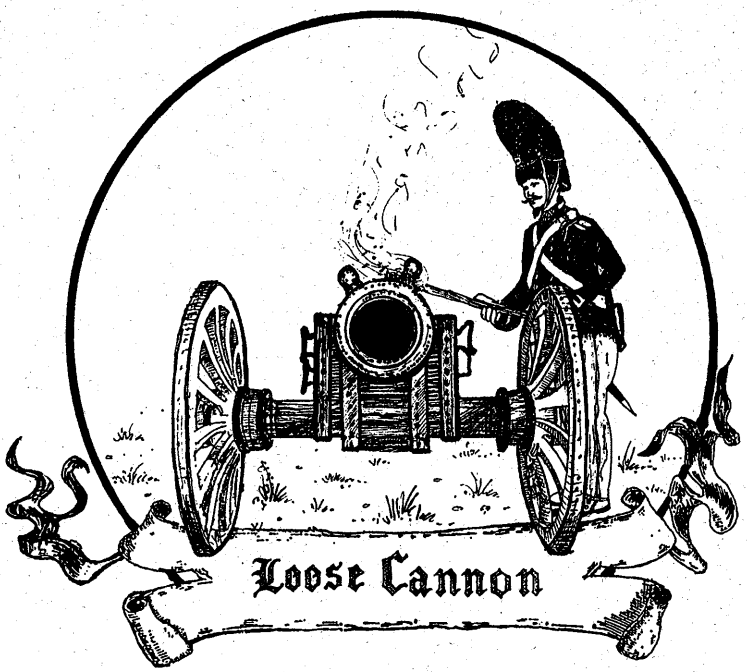

Introduction

The Anglo-Saxon law was in greater part customary in its nature and local in its application; its principal features differed in the three major regions of the realm, and much of it consisted of neighborhood usages of very limited acceptance. But, such as it was, the native population were much attached to their law.

The courts were communal in character, being essentially popular assemblies composed of the freeholders domiciled within their areas of jurisdiction.

Franchise courts, also existing, were courts having from some source the prerogative of jurisdiction in certain limited classes of controversies among particular persons, as those living in a certain district. A type of franchise court, the Manorial Court, for instance, was one held by the lord of a manor in the exercise of his right and duty to do justice to his tenants, and also for the purpose of obtaining their assistance in administering the affairs of the lordship. In like manner certain Borough Courts held jurisdiction of some cases arising within the municipal territory, and the religious houses had similar authority within analogous limits.

At the beginning of the twelfth century, England was covered by an intricate network of local courts. In the first place, there were the ancient courts of the shires and the hundred, courts older than feudalism-- some of them older than the English kingdom. Then again there were the feudal

courts of certain districts, and ecclesiastic courts of the church; and above all these rose the King's court. The King's court was destined to increase, while all the other courts were destined to decrease; but we must not think of the King's court as a court of the first instance for all litigants. The various courts have their roots in various principles, in various rights, by the rights: of the King, of the Church, of feudal lords, and of ancient communities.

At the time of the Norman Conquest there was no central court which regularly administered a law common to the whole country, but the land was covered with an intricate network of competing courts and conflicting jurisdictions, which had their roots in various principles and in various rights.

The "justice system" in vogue in the American states today is of a feudal sort. I say this, because, the so-called "justice system" is franchised or segmented into judicial districts. The term "district" in law means: "The territory under the jurisdiction of a feudal lord" (Oxford's Universal Dictionary).

The status of the lord of the district, in modern feudalism, was created by the "fourteenth amendment" to the national Constitution.

The authority for the modern feudal lords' action and deeds comes from an artifice called the "fifteenth amendment." After the so-called "Civil War", which was not "Civil" nor a "War," the Sovereignty was absent from the general Government. So the national Government, using said artifice created itself a soviet-styled voting trust by giving a voting privilege to a class of persons not free and independent from government, but one created by the national Government, which trust

today purports to ratify and legitimize the general Government's acts and deeds.

The jurisdiction of the modern feudal lord is found in the so-called "thirteenth amendment." This amendment said slavery shall not exist in the United States, or any place subject to their jurisdiction-- except, or course, if the Sovereignty allowed it during some criminal action.

Slavery is the dominion of one man over another; resulting in one man's loss of liberty. Well, the United States is a corporation; not a man; therefore, it is impossible for it to have and maintain slaves. So it is right to say that slavery shall not exist in the United States, or any place subject to their jurisdiction.

Now, what the inclusion of the idea of involuntary servitude means is, that, the United States does not have to voluntarily honor any servitude of easement, except as a punishment for crime whereof the party shall have been duly convicted. The use of the word crime means the Sovereignty is involved in the action. It is important to keep in mind, that, sovereignty never existed in the Federal, National, or State governments; in the ways of a Republic, said governments only have representatives from the Sovereignty. So in the law we say the State, Federal and National governments are merely cloaked in sovereignty.

Benjamin Franklin told us, that: "The definition of infamy is the telling, of two lies, to the people and getting them to fight over which one is true." The "Civil War" is a perfect example of the infamy Benjamin Franklin described; because, both

sides fought for something neither possessed, namely sovereignty.

Well, the prosecution of State Sovereignty vs Federal Supremacy (1860's), two paper lies, resulting in the bloodshed of the Sovereign body-politic; which bloodshed is a delivered indictment constituting the end of Justice, domestic Tranquility, common Defence, general Welfare, and the security of the Blessings of Liberty to ourselves and our Posterity-- indeed, the death of a Union and the beginning of life in conflict.

Truly, in law and in nature there are only two states; namely, Union and Conflict. Also, it is wise to note, that, in international law there are only two forms of law which govern: Firstly, Common Law, which is for one people, as mentioned in the Declaration of Independence; and, Secondly, Martial Law, which is for a multiple body-politic system. For there to be one people, enjoying common law, the people must have some substantive things in common, for example: common genetics, customs and usages, and theory of life. Life, Liberty, and Property, in a Union, are self-governed by the common people or one people in common-unity, or community, who create and constitute their own Customs, Standing Decisions, and Law of the Land.

Life, Liberty, and Property in the state of Conflict(a dual body-politic system) exists under martial law, which is no law at all, but, is as arbitrary and capricious as the will of the Commander. We in the American states have endured "martial law" since the fall of the Union in A.D. 1861.

The Federal, National, and State governments

are merely cloaked with sovereignty, because their constitutions are ratified. Ratification is the act of rendering valid something done without authority(Bouvier's 1914 under *assent*).

The Sovereignty resides in the people, and they reside in the counties, provinces, or political subdivisions of the State. The law that governs the people arises from the same venue of the county. Said law is custom in the form of standing decisions from the jury-boxes, applicable to specific cases and elections made from ballot-boxes.

The corporate feudal lord known as the STATE OF CALIFORNIA notices some servitudes in its by-laws, at Civil Code section 801, and they are as follows: 1st, the right of pasture; 2nd, the right of fishing; 3rd, the right of taking game; 4th, the right -of-way; 5th, The right of taking water, wood, minerals, and other things; 6th, The right of conducting lawful sports upon land; 7th, the right of having public conveyances stopped, or of stopping the same on land; and 8th, the right of a seat in church. These servitude do not have to be honored voluntarily by the corporate feudal lords.

However, if the sovereignty, from the jury box, proclaims that someone has the right to pasture, then the corporate feudal lord must honor the servitude. A right is legal, because it is protected by a legal system; for, it has been said, the characteristic mark of a legal right is its recognition by a legal system. Without such legal recognition of our traditional vested rights, how could anyone?--much less a low and lawless corporate feudal lord--know who was vested with certain legal rights, especially in our dual body-politic system of

jurisprudence.

This book is intended to inform the common people as to the many different forms of actions, which allow a man to perfect decisional law, from a Court of Record, with his name on it. So all the world can see, that, he is vested with rights, be they from Almighty God, contract, covenant, land, tort, or promise; and, further, those legal rights are protected by a jural society. It is critical!! that all the law and matters of record be established before placing any issues upon the scales in a court of law, in an attempt to get justice.

Generally throughout history there has never existed a time when persons owned their own homes, cars, kids, etc.. Most folks are finding out that, even in modern America, the same is true: persons still do not own their homes, cars, kids, etc..

If you do not have a Court of Record to bring your Way, Truth, or Life before, do not feel inhibited from creating, ordaining, and establishing one. We the People create governments, courts, jural societies, and more. So please join in Union with like kind and make your rights a matter of Record.

Thank you in advance for your diligent efforts; and, may Almighty God Bless, Keep, and Sustain you and yours.

Joyfully submitted for your enjoyment by His Obliged and Obedient Servant the Housekeeper and Scribe in the First House of Delegates, Los Angeles county, California, United States of America.

Contents

Common Law Contract Actions

Account

The form of an action on the account, or as it is sometimes called "*account render,*" is an *ex contractu* action which lies against a person, who by reason of some fiduciary relationship (as guardian, bailiff, receiver, etc.), was bound to render an account to another, but refused to do so. If the fiduciary is found to be in arrear, the Auditors, that are assigned to him, have power to award him to prison, there to remain, till he makes agreement with plaintiff. But if the Auditors will not allow reasonable expense and costs, or if they charge him whit more Receipts then they ought; his next friend may sue a Writ of *Ex parte talis* out of a Jural Society sitting in Equity, directed to the Sheriff, to bring bail, and bring defendant's body before the Jural Society sitting in Law, and to warn the plaintiff to appear there at a certain day.

The purpose of bringing the action is to ascertain whether or not there is an uncertain amount owing.

The Elements are:

1. There exists a fiduciary relationship?
2. There exists an uncertain amount owing?

Note: In modern law a bill is brought in equity for an accounting which is handled by auditors.

Real Property

Trespass *quare clausum fregit*:

This action is brought to prevent the defendant from getting a prescriptive right over the plaintiff's land.

Damage need not be shown and force may be implied. In the Latin form of the writ, the defendant was called upon to show why he broke the plaintiff's close; *i. e.*, the real or imaginary structure inclosing the land, whence the name. Any unauthorized entry at common law is actionable and recovery would be at least nominal damages.

It is commonly abbreviated to "*trespass qu. cl. fr.*"

Trespass to try title-- The name of the action used in the several states for the recovery of the possession of real property, with damages for any trespass committed upon the same by the defendant.

In the main a procedure by which rival claims to title or right to possession of land may also be had when the controversy concerning title or right to possession is settled.

It is different from "trespass *quare clausum fregit*," in that title must be proved.

Covenant

Covenant, the name of a common-law form of action *ex contract,* which lies for the recovery of damages for breach of a covenant, or contract under seal. A covenant make use of words in a deed whereby the covenantor(grantor), the covenantee(grantee), or each of them, binds himself to the other for the performance or nonperformance of a particular act or thing, or for the existence or nonexistence of a particular state of facts, and for the breach of which obligation the party bound should be answerable in damages; a term now used principally in connection with promises in conveyances or other instruments pertaining to real estate, although in the broadest sense of the term it indicates a contract. In a more specific application of the term, it imports an agreement reduced to writing and duly executed whereby one or more of the parties named therein engages that a named act is to be performed or is to be performed sometime in the future. A seal was a requisite of a covenant at common law, but with the elimination of the requirement of a seal upon written contracts, such has occurred in most jurisdictions organized in a commercial venue, a mere written agreement may suffice as a covenant.

Origin and History:

This action is said to have descended from the ancient writ *breve de conventione.* Primarily its purpose seemed to be to enforce the specific performance of the covenant broken, although if the

breach was such that performance could not be enforced, or defendant continued refractory, damages occasioned thereby in proportion to the injury sustained were accorded plaintiff. It was also by virtue of this action that fines were collected at common law. Likewise it was the ancient remedy of a lessee, if ejected, against his lessor to recover the term and damages, or if the term had expired, or the ouster had been committed by a stranger claiming paramount title, then to recover damages only. Its use as a real action, except in conveyancing, early disappeared, however, but as a personal action *ex contractu* it has been brought down to the present time.

Classification:

Covenants may be classified according to several distinct principles of division. According as one or other of these is adopted, they are:

Express or implied. The former being those which are created by the express words of the parties to the deed declaratory of their intention, while implied covenants are those which are inferred by the law from certain words in a deed which imply (though they do not express) them. Express covenants are also called covenants "in deed," as distinguished from covenants "in law."

Dependent, concurrent, and independent. Covenants are either dependent, concurrent, or mutual and independent. The first depends on the prior performance of some act or condition, and, until the condition is performed, the other party is not liable to an action on his covenant. In the second, mutual acts are to be performed at the same time; and if one party is ready, and offers to perform his part, and the other neglects or refuses to perform

his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act. The third sort is where either party may recover damages from the other for the injuries he may have received by a breach of the covenants in his favor; and it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff.

Mutual and independent covenants are such as do not go to the whole consideration on both sides, but only to a part, and where separate actions lie for breaches on either side to recover damages for the injury sustained by breach.

Covenants are dependent where performance by one party is conditioned on and subject to performance by the other, and in such case the party who seeks performance must show performance or a tender or readiness to perform on his part; but covenants are independent when actual performance of one is not dependent on another, and where, in consequence, the remedy of both sides is by action.

Principal and auxiliary. The former being those which relate directly to the principal matter of the contract entered into between the parties; while auxiliary covenants are those which do not relate directly to the principal matter of contract between the parties, but to some thing connected with it.

Inherent and collateral. The former being such as immediately affect the particular property, while the latter affect some property collateral thereto or some matter collateral to the grant or lease.

A covenant inherent is one which is conversant about the land, and knit to the estate in the land; as, that the thing demised shall be quietly

enjoyed, shall be kept in repair, or shall not be aliened. A covenant collateral is one which is conversant about some collateral thing that doth nothing at all, or not so immediately, concern the thing granted; as to pay a sum of money in gross, etc.

Joint or several. The former bind both or all the covenantors together; the latter bind each of them separately. A covenant may be both joint and several at the same time, as regards the covenantors; but, as regards the covenantees, they cannot be joint and several for one and the same cause, but must be either joint or several only.

Covenants are usually joint or several according as the interests of the covenantees are such; but the words of the covenant, where they are unambiguous, will decide, although, where they are ambiguous the nature of the interest as being joint or several is left to decide.

General or specific. The former relate to land generally and place the covenantee in the position of a specialty creditor only; the latter relate to particular lands and give the covenantee a lien thereon.

Executed or executory. The former being such as relate to an act already performed; while the latter are those whose performance is to be future.

Affirmative or negative. The former being those in which the party binds himself to the existence of a present state of facts as represented or to the future performance of some act; while the latter are those in which the covenantor obliges himself not to do or perform some act.

Declaratory or obligatory. The former being those which serve to limit or direct uses; while the latter are those which are binding on the party

himself.

Real and personal. A real covenant is one which binds the heirs of the covenantor and passes to assignees or purchasers; also, a covenant the obligation of which is so connected with the realty that he who has the latter is either entitled to the benefit of it or is liable to perform it; a covenant which has for its object something annexed to, or inherent in, or connected with, land or other real property, and runs with the land, so that the grantee of the land is invested with it and may sue upon it for a breach happening in his time.

In the old books, a covenant real is also defined to be a covenant by which a man binds himself to pass a thing real, as lands or tenements. A personal covenant, on the other hand is one which, instead of being a charge upon real estate of the covenantor, only binds himself and his personal representatives in respect to assets. The phrase may also mean a covenant which is personal to the covenantor, that is, one which he must perform in person, and cannot procure another person to perform for him. "Real covenants" relate to realty and have for their main object some benefit thereto, inuring to benefit of and becoming binding on subsequent grantees, while personal covenants" do not run with land. Very considerable confusion exists among the authorities in the use of the term real covenants. The definition of Blackstone which determines the character of covenants from the insertion or noninsertion of the word "deir" by the covenantor, is pretty generally rejected.

Transitive or intransitive. The former being those personal covenants the duty of performing which passes over to the representatives of the covenantor; while the latter are those the duty of

performing, which is limited to the covenantee himself, and does not pass over to his representative.

Disjunctive covenants. Those which are for the performance of one or more of several things at the election of the covenantor or covenantee, as the case may be.

Absolute or conditional. An absolute covenant is one which is not qualified or limited by any condition.

Other Compound and Descriptive Terms:

Continuing covenant. One which indicates or necessarily implies the doing of stipulated acts successively or as often as the occasion may require; as, a covenant to pay rent by installments, to keep the premises in repair or insured, to cultivate land, etc.

Full covenants. As this term is used in american law, it includes the following: the covenants for seisin; for right to convey; against incumbrance; for quiet enjoyment; some times for further assurance; and almost always of warranty, this last often taking the place of the covenant for quiet enjoyment, and indeed in many states being the only covenant in practical use.

Mutual covenants. A mutual covenant is one where either party may recover damages from the other for the injury he may have received from a breach of the covenants in his favor.

Separate covenant. A several covenant; one which binds the several covenantors each for himself, but not jointly.

Usual covenants. An agreement on the part of a seller of real property to give the usual covenants binds him to insert in the grant covenants of "seisin," "quiet enjoyment," "further assurance,"

"general warranty," and " against incumbrance."

The result of the authorities appears to be that in a case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing "usual covenants," or, which is the same thing, in an open agreement without any reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon, namely: Covenants by the lessee (1) to pay rent; (2) to pay taxes, except such as are expressly payable by the landlord; (3) to deed and deliver up the premises in repair; and (4) to allow the lessor to enter and view the state of repair; and the usual qualified covenant by the lessor for quiet enjoyment by the lessee.

Specific Covenants

Covenants against incumbrance. A covenant that there are no incumbrance on the land conveyed; a stipulation against all rights to or interests in the land which may subsist in third persons to the diminution of the value of the estate granted.

Covenant for further assurance. An undertaking, in the form of a covenant, on the part of the vendor of real estate to do such further acts for the purpose of perfecting the purchaser's title as the latter may reasonably require. This covenant is deemed of great importance, since it relates both to the vendor's title of and to the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts necessary for supplying any defect in the former as to remove all objections to the sufficiency and security of the latter.

Covenant for quiet enjoyment. An assurance

against the consequences of a defective title, and of any disturbances thereupon.

A covenant that the tenant or grantee of an estate shall enjoy the possession of the premises in peace and without disturbance by hostile claimants.

Covenants for title. Covenants usually inserted in a conveyance of land, on the part of the grantor, and binding him for the completeness, security, and continuance of the title transferred to the grantee. They comprise "covenants for seisin; for right to convey; against incumbrance, or quiet enjoyment; sometimes for further assurance, and almost always or warranty."

Covenants in gross. Such as do not run with the land.

Covenant not to sue. A covenant by one who had a right of action at the time of making it against another person, by which he agrees not to sue to enforce such right of action.

Covenant of non-claim. A covenant sometimes employed, particularly in the New England states, and in deeds of extinguishment of ground rents in Pennsylvania, that neither the vendor, nor his heirs, nor any other person, etc., shall claim any title in the premises conveyed.

Covenant of right to convey. An assurance by the covenantor that the grantor has sufficient capacity and title to convey the estate which he by his deed undertakes to convey.

Covenant of seisin. An assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey. It is said that the covenant of seisin is not now in use in England, being embraced in that of a right to convey; but it is used in several of the United States. Covenants of seisin and good right to convey are

synonymous.

Covenant of warranty. An assurance by the grantor of an estate that the grantee shall enjoy the same without interruption by virtue of paramount title.

Covenant running with land. A covenant which goes with the land, as being annexed to the estate, and which cannot be separated from the land, and transferred without it.

A covenants said to run with the land, when not only the original parties or their representatives, by each successive owner of the land, will be entitled to its benefit, or be liable (as the case may be) to its obligation. Or, in other words, it is so called when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. One which touches and concerns the land itself, so that its benefit or obligation passes with the ownership.

Covenant to convey. A covenant by which the covenantor agrees to convey to the covenantee a certain estate, under certain circumstances.

Covenant to renew. An executory contract, giving lessee the right to renew on compliance with the terms specified in the renewal clause, if any, or, if none, on giving notice, prior to termination of the lease, of his desire to renew, whereupon the contract becomes executed as to him.

Covenant to stand seised. A conveyance adapted to the case where a person seised of land in possession, reversion, or vested remainder, proposes to convey it to his wife, child, or kinsman. In its terms it consists of a covenant by him, in consideration of his natural love and affection, to stand seised of the land to the use of the intended transferee. Before the statute of uses this would

merely have raised a use in favor of the covenantee; but by that act this use is converted into the legal estate, and the covenant therefore operates as a conveyance of the land to the covenantee. It is now almost obsolete.

By What Law Governed:

As the remedy by which an agreement may be enforced is determined by the *lex fori*, it follows that covenant will not lie on an instrument which is not, by the law of the forum in which the action is brought, a specialty, although it would be considered as under seal in the place where it was made.

Jurisdiction and Venue:

Under the common law the action of covenant, when founded on privity of contract, is transitory and may be brought as a transitory action; but when founded upon privity of estate the action is local and must be brought where the land is located. Where, however, plaintiff's cause of action depends upon several facts which arise in different counties, the action may be brought in any one of them.

Parties:

Under the common-law rule the action of covenant will lie only between those parties between whom exists a privity of contract or estate.

Pleadings:

As a general rule, a declaration in an action of covenant is sufficient where it declares upon the instrument according to its legal operation and assigns breaches substantially in the action of the covenant; and averments which are not necessary to a recovery, when not contradictory, will be

considered as surplusage. The declaration may also be varied according to the nature of the instrument declared on. But the declaration in an action of covenant must show with whom defendant covenant must show with whom defendant covenanted, and also aver the amount of damages claimed, especially where plaintiff claims special damages such as the law does not imply from the facts stated.

The usual conclusion in a declaration of covenant is "that the defendant (although often requested so to do,) hath not kept his said covenant, but hath broken the same," followed by a demand of damages. But this conclusion is merely formal and not necessary to the legality of the declaration.

Plea

Non est Factum. A plea denying execution of instrument sued on.

A plea by way of traverse, which occurs in debt on bond or other specialty, and also in covenant. It denies that the deed mentioned in the declaration is the defendants deed under this, the defendants may contend at the trial that the deed was never executed in point of fact; but he cannot deny its validity in point of law.

The plea of *non est factum* is a denial of the execution of the instrument sued upon, and applies to notes or other instruments, as well as deeds, and applies only when the execution of the instrument is alleged to be the act of the party filing the plea, or adopted by him.

Special *Non Ext Factum.* A form of the plea of *non est factum,* in debt on a specialty, by which the defendant alleges that, although he executed the deed, yet it is in law "not his deed," because of certain special circumstances which he proceeds to set out; as, where he delivered the deed as an

escrow, and it was turned over to the plaintiff prematurely or without performance of the condition.

The plea of *non est factum*, which denies the execution of a written instrument, must be verified by affidavit.

The plea of *non infregit conventionem* admits the deed but denies the breaches assigned. Where the breach of the covenant is assigned in the negative, or where the declaration states several breaches, the plea of *non infregit conventionem* is bad on demurrer, but good after verdict on motion in arrest of judgment.

In actions of covenant, the evidence, trial, verdict, and judgment are governed by the usual rules applicable to such civil cases . The judgement should be for damages; and a judgment which allows accruing interest is erroneous.

Covenant Outline

I. By Word:
   - A. Personal touching:
     - i. of Chattel Real or Personal
   - B. A Real thing.

II. By Deed:
   - A. Indented:
     - i. of Warranty de qua non est bact.
     - ii. Covenant de qua non est ba Et. be seized to use.
     - iii. Covenant to levy fine.

III. By Implication:
   - A. Personal.
   - B. Real.

Debt

Debt is the name of a common-law action, which lies to recover a certain specific sum of money, or a sum that can readily be reduced to a certainty due by a certain and express agreement; as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the amount is fixed and specific, an unconditional promise to pay a fixed sum at a specified time, also, a contractual obligation to pay in the future for considerations received in the present and does not depend upon any subsequent valuation to settle it.

Others definitions.-- 1st-- The appropriate action upon any contract, express or implied, for the payment of a sum certain in money, or which can be reduced to certainty ... and proceeds for the recovery of a debt, as contradistinguished from damages. 2nd-- An action at law to recover a specified sum of money alleged to be due. 3rd-- A general remedy for the recovery of all sums certain. 4th-- A form of action provided at common law as the remedy for the recovery of a sum certain due to the plaintiff. 5th-- An appropriate remedy, upon all legal liabilities upon simple contracts, whether written or unwritten; upon notes, whether with or without seals; and upon statutes by a party grieved or by a common informer; whenever the demand was for a sum certain or was capable of being readily reduced to a certainty. 6th-- The action of debt is in legal contemplation for the recovery of a debt *eo nomine* and *in numero.* 7th-- An action ... which is a

remedy for the recovery of a debt *eo nomine* and *in numero*, though damages, generally nominal, are awarded for its detention.

History:

It is uncertain whether the action of debt is derived from the Roman law or from the early German law. Whatever its origin, it is one of the oldest actions known to the common law. In the early common law the action was of a droitural or proprietary nature, and was used, prior to the development of the action of detinue from the action of debt, for the recovery of specific chattels as well as for the recovery of money due. The conception of proprietorship in the money due was inconsistent with the idea of a contractual relation of debtor and creditor as now understood, and began to give way to it at an early date. By the early common law, with the exception of covenants under seal which could be enforced by the action of covenant, all matters of personal contract were considered as binding only in the light of debts, and the only means of recovery in a court was by action of debt. After the evolution and development of the action of assumpsit that action for a time supplanted debt on simple contracts, for the reason that in the former a defendant could not invoke trial by wager of law, a right which he retained in the latter until the abolition of that procedure in the reign of King William IV, when it again came to be used as well in actions on simple contracts as in actions on specialties under seal.

It is thus distinguished from assumpsit, which lies as well where the sum due is uncertain as where it is certain and from covenant, which lies only upon contracts evidenced in a certain manner.

It is said to lie in the *debet* and *detinet*, (when

it is stated that the defendant owes and detains,) or in the *detinet*, (when it is stated merely that he detains.) Debt in the *detinet* for goods differs from detinue, because it is not essential in this action, as in detinue, that the specific property in the goods should have vested in the plaintiff at the time the action is brought.

An action on the debt will lie for:

Existing debt. To have an "existing debt" it is sufficient if there is an absolute debt owing though the period for its payment may not yet have arrived.

Fraudulent debt. A debt created by fraud. Such a debt implies confidence and deception. It implies that it arose out of a contract, express or implied, and that fraudulent practices were employed by the debtor, by which the creditor was defrauded.

Hypothecary debt. One which is a lien upon an estate.

Judgement debt. One which is evidenced by matter of record, also, a debt, whether on simple contract or by specialty, for the recovery of which judgment has been entered up, either upon a *cognovit* or upon a warrant of attorney or as the result of a successful action.

Legal debts. those that are recoverable in a court of common law, as debt on a bill of exchange, a bond, or a simple contract.

Liquid debt. One which is immediately and unconditionally due.

Mutual debts. Money due on both sides between two persons. Such debts must be due to and from same persons in same capacity. Cross debts in the same capacity and right, and of the same kind and quality.

Passive debt. A debt upon which, by agreement between the debtor and creditor, no interest is payable, as distinguished from active debt; i. e., a debt upon which interest is payable. In this sense, the terms "active" and "passive" are applied to certain debts due from the Spanish government to Great Britain. In another sense of the words, a debt is "active " or "passive" according as the person of the creditor or debtor is regarded; a passive debt being that which a man owes; an active debt that which is owing to him. In this meaning every debt is both active and passive,-- active as regards the creditor, passive as regards the debtor.

Privileged debt. One which is to be paid before others in case a debtor is insolvent.

Simple contract debt. One where the contract upon which the obligation arises is neither ascertained by matter of record nor yet by deed or special instrument, but by mere oral evidence the most simple or any, or by notes unsealed, which are capable of a more easy proof, and therefore only better than a verbal promise.

Nature and Scope:

At common law there was perhaps no action which had so extensive and varied in application as the of debt, since it was an appropriate remedy whenever plaintiff sought to recover a sum certain, or a sum which could readily be reduced to a certainty, irrespective of the manner in which the obligation arose or by what it was evidenced. Although seemingly there has been a difference of opinion between the courts and some of the elementary writers as to the exact scope of the remedy, the courts are not inclined to extend its scope. However, the scope of the remedy has been

the subject of the statutory regulation in some jurisdictions.

While the action of debt is classified as an action *ex contractu*, yet, generally speaking, it is immaterial whether the obligation arose by contract or by operation of common or statute law, in what manner the obligation was incurred, or by what the obligation is evidenced; if it is for a sum certain, or a sum readily reducible to a certainty, debt will lie. So the obligation may arise from a simple contract either express or implied, or a contract under seal; from matter of record; from statutory penalties and obligations; and even from torts in some jurisdictions, usually by statute.

As a general rule debt is the proper form of action to enforce a debt of record, such as a judgment, whether it is a judgment of a court of the same or a sister state, or of a foreign country.

Since debt will lie only for a sum which is either certain or readily reduced to a certainty, ordinarily it will not lie when the cause of action arises from a tort where the damages are uncertain; but when the damages are rendered certain by unrefuted affidavits of amounts owed for damages incurred by tort. In some jurisdictions the tort may be waived and debt maintained.

Defenses:

In general it may be said that any matters which show that defendant is not indebted to plaintiff in a sum certain of money will constitute a good defense, whether the action be grounded upon a simple contract, a specialty, a judgment, or an obligation imposed by statute.

Parties:

The general rule is that whenever a sum certain is due a person he may maintain an action of debt thereon, regardless of the personnel of plaintiff. The action may be maintained by the United States, by a state, by beneficiaries in a certificate in a mutual benefit association, by legatees, or by executors.

Only those parties who are legally bound to pay the debt alleged to be due should be made parties defendant, by the personnel of defendant ordinarily is immaterial.

Pleading:

At common law the writ usually runs in the debet and detinet, although at present this precise expression usually is not required; yet it must be sufficiently technical to enable defendant to determine the style of action. In some jurisdictions the debt must be demanded in the writ as a particular sum; and while in other jurisdictions a failure so to do is not fatal, yet the insertion of the sum is regarded as the better form of pleading.

It is a general rule that the declaration should conform to and follow the writ, summons, or praecipe, and it must be sufficiently technical to distinguish the form of action. The general rule is that the declaration should be both in the debet and detinet; but this is not always necessary; and where, as in the case of an action against an executor or an administrator, the proper form of pleading may require that the declaration be in the detinet only, it has been held not to be a fatal defect to lay it in both the debt and detinet. The omission of both the debet and detinet is a fatal defect, when demurred to specially. In accordance with the general rules of pleading the declaration must, by definite and

certain allegations, aver every material fact which constitutes plaintiff's cause of action.

Plea:

Non est Factum. A plea denying execution of instrument sued on.

A plea by way of traverse, which occurs in debt on bond or other specialty, and also in covenant. It denies that the deed mentioned in the declaration is the defendants deed Under this, the defendants may contend at the trial that the deed was never executed in point of fact; but he cannot deny its validity in point of law.

The plea of non est factum is a denial of the execution of the instrument sued upon, and applies to notes or other instruments, as well as deeds, and applies only when the execution of the instrument is alleged to be the act of the party filing the plea, or adopted by him.

Special Non Ext Factum. A form of the plea of non est factum, in debt on a specialty, by which the defendant alleges that, although he executed the deed, yet it is in law "not his deed," because of certain special circumstances which he proceeds to set out; as, where he delivered the deed as an escrow, and it was turned over to the plaintiff prematurely or without performance of the condition.

Nul Tiel Record. No such record. A plea denying the existence of any such record as that alleged by the plaintiff. It is the general plea in an action of debt on a judgment.

Judgment of nul tiel record occurs when some pleading denies the existence of a record and issue is joined thereon; the record being produced is compared by the court with the statement in the

pleading which alleges it; and if they correspond, the party asserting its existence obtains judgment; if they do not correspond, the other party obtains judgment of *nul tiel record* (no such record)

Nil Debit. He owes nothing. A plea of the general issue which may be asserted by the defendant in an action of debt on a simple contract, and in all other actions of debt which are not founded on a specialty or conclusive record.

Essentials:

The "debt action" carries with it the requirement of certainty, the foundation of promise by express contract, and necessarily implies legality.

Where the action is brought on a contract executed on one side a quid pro quo must be shown by the Plaintiff. That is a consideration must be shown.

Debt would not lie where there was a bilateral contract.

Proof:

The general rules of pleading which require a party to prove every material allegation of his cause of action or defense apply to the action of debt. Thus where a special contract is laid in the declaration is upon a simple contract it is not necessary in order to recover that he prove the whole debt claimed. So, where defendant pleads non est factum to a declaration on a specialty, plaintiff, it is held, must prove the execution and delivery of the specialty.

Evidence:

The general rules of evidence in civil actions

in regard to the burden of proof seem to apply without exceptions to the action of debt.

Trial:

The general rules applicable to the trial of civil actions seem to apply to the action of debt. Thus where the declaration is in separate counts on a judgment and a negotiable instrument which is the basis upon which the judgment was obtained, plaintiff is not required to elect whether he will proceed upon the judgment or the instrument. While final judgment may be rendered on demurrer, default, or *nil dicit*, the whole and not a part only of the issue must be tried; but this does not preclude plaintiff, where his declaration contains both a count upon the note and an indebitatus count upon an account stated, from disregarding the second and taking judgment for the amount of the note upon the first count, where defendant makes default. Judgment cannot be rendered while a material plea remains untired or undisposed of. In some jurisdictions where the judgment is rendered on demurrer, or by default, or on *nil dicit*, a writ of inquiry to assess the amount is unnecessary; but in other jurisdictions it seems that whenever damages are to be assessed a writ of inquiry is necessary. And it is also held that where final judgment is by default or upon *nil debet*, and the action is upon a bond or judgment, it should not be rendered by the court until evidence concerning the amount of damages has been taken. A judgment by *nil dicit* operates substantially as a judgment by default and admits every material allegation of the declaration, except the material allegation of the declaration, except the amount of the damages. The issue of *nul tiel record* is an issue triable by the court alone upon

inspection of the record. The instructions must be definite and certain and must conform to the evidence.

Verdict and Judgment:

In accordance with the general rule applicable to civil actions mere informalities in the form of the verdict will not render it invalid. It must correspond to the issue presented and must dispose of the whole defense upon which issue has been joined; and if for plaintiff, it must be for a certain sum.

The general rule that mere informalities in the form of the judgment will not render it invalid applies to a judgment in an action of debt. Thus it has been held not to be fatal that the judgment is entered up in the form of a judgment in assumpsit, if it is for the proper amount.

Assumpsit

Definition:

Assumpsit. He undertook; he promised.

Assumpsit, in the law of contracts, is a promise or undertaking, either express or implied, made either orally or in writing not under seal.

A promise or engagement by which one person assumes or undertakes to do some act or pay something to another. It may be either oral or in writing, but is not under seal. It is express if the promisor puts his engagement in distinct and definite language; it is implied where the law infers a promise (though no formal one has passed) from the conduct of the party or the circumstances of the case.

Practice

A form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; or a contract that is neither of record nor under seal. A liberal and equitable action, applicable to almost every case where money has been received which in equity and good conscience ought to be refunded; express promise is not necessary to sustain action, but it may be maintained whenever any thing is received or done from the circumstances of which the law implies a promise of compensation.

Express assumpsit. An undertaking to do some act, or to pay a sum of money to another, manifested by express terms.

An assumpsit is "express" if promisor puts his

engagement in distinct and definite language.

An undertaking made orally, by writing not under seal, or by matter of record, to perform act or to pay sum of money to another.

Special assumpsit is an action of assumpsit brought upon an express contract or promise.

General (common or indegitatus) *assumpsit* is an action of assumpsit brought upon the promise or contract implied by law in certain cases. It is founded upon what the law terms an implied promise on the part of defendant to pay what, in good conscience, he is bound to pay to plaintiff.

The action of *assumpsit* differs from *trespass* and *trover*, which are founded on a tort, not upon a contract; from *covenant* and *debt*, which are appropriate where the ground of recovery is a sealed instrument, or special obligation to pay a fixed sum; and from *replevin*, which seeks the recovery of specific property, if attainable, rather than of damages.

General assumpsit will not lie where there is an express contract except:

One- Where the express or implied contract has been abandoned or extinguished.

Two- Where defendant prevents the plaintiff from performing.

Three Where there is an executed contract.

Four- Where performance is impossible in law.

Five- For extra work done outside of an express or implied in law contract.

Six- Where an express contract or an implied in law contract is void because as where the contract is unenforceable under the statute of Frauds

Plea

Non Assumpsit is the plea for general and

special assumpsit.

Assumpsit on quantum meruit. When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit. In such case, the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an "assumpsit on quantum meruit".

Indebitatus assumpsit. Being indebted, he undertook. A common-law form of action. In its specific sense, that form of assumpsit which is available for the recovery of any simple common-law debt without regard to any express promise to pay the debt; in its enlarged sense, a remedy embracing all cases in which the plaintiff has equity and conscience on his side and the defendant is bound by ties of natural justice and equity to pay the money, even being applied to all the common counts, namely the quantum counts, the money counts, and the count upon an account stated.

Indebitatus nunquam. Never indebted.

Common Counts

Common counts are the various forms of an action of assumpsit, as follows:

Money counts are those forms of general assumpsit or the common counts which comprise the following:

Insumul computassent. Literally, they accounted together. When an account has been stated, and a balance ascertained between the parties, they are said to have computed together,

and the amount due may be recovered in an action of assumpsit, which could not have been done, if the defendant had been the mere bailiff or partner of the plaintiff, and there had been no settlement made; for in that case, the remedy would be an action of account render, or a bill in chancery. It is usual in actions of assumpsit, to add a count commonly called *insimul computassent*, or an account stated.

Money had and received. One of the money counts of general assumpsit or the common counts which lies upon an express promise, if nothing remains to be done but the payment of money. It is not dependent, however, upon an express promise, or even upon one implied in fact, but lies in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and exaequo it bono it belongs to another. This is so whether the money was received from the plaintiff or from a third person.

Money lent. One of the common counts which lies to recover back money loaned. It cannot otherwise be maintained; for example, it will not lie to recover interest on an assessment levied on the defendant"s land.

Money paid. The common count for money paid, laid out and expended, which lies when the act of paying out or expending the money was the result of an express or implied contract or gives rise to a quasi contract. But one cannot by a voluntary payment of another's debt make himself creditor of that other.

Assumpsit for money paid will not lie where property, not money, has been paid or received.

But where money has been paid to the defendant either for a just, legal or equitable claim,

although it could not have been enforced at law, it cannot be recovered as money paid.

Pleading:

Generally, it may be said that the declaration must contain all that it is necessary for plaintiff to prove under the plea of the general issue. Counts in assumpsit, which aver defendant's undertaking and a legal consideration therefor, the breach of defendant in failing to keep that undertaking, and the injury to plaintiff therefrom, are generally sufficient. Surplusage will not vitiate a count containing sufficient averments. One good count will sustain a declaration, as against a general demurrer.

Qunatum Meruit. As much as he has deserved. When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services, as much as he may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an assumpsit on a *quantum merut.*

When there is an express contract for a stipulated amount and mode of compensation for service, the plaintiff cannot abandon the contract and resort to an action for a *quantum merit* on an implied assumpsit.

Quantum Valebat. As much as it was worth. When foods are sold, without specifying any price, the law implies a promise from the buyer to the seller that he will pay him for them as much as they

were worth.

The plaintiff may, in such case, suggest in this declaration that the defendant promised to pay him as much as the said foods were worth, and then aver that they were worth so much, which the defendant has refused to pay.

Parties:

Assumpsit must be brought in the name of the party really interested, except in jurisdictions which hole that plaintiff must be privy to the express of implied promise declared upon. In these jurisdictions, assumpsit must be brought in the name of the party who is privy to the promise declared upon. Nonjoinder or misjoinder of parties plaintiff may, in some jurisdictions, be shown under the general issue. In one state it has been held that the objection must be taken by plea and abatement.

Joint promisors should be jointly sued, or a showing made that a promisor not joined is incapable of being sued. Advantage can be taken of the non joinder of defendants, however, only by a plea in abatement a common law or by answer or demurrer. It cannot be shown under the general issue or the general denial.

Assumpsit will lie on an implied promise against an individual. This, it has been said, is the rule based on common-law principles and not in consequence of any specific statutory enactment. Whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation, and all duties imposed upon them by law and all benefits rendered at their request raised implied promises, for the enforcement of which an action lies.

Evidence:

The burden is on plaintiff to prove the contract and the breach assigned in his declaration by evidence sufficiently clear and satisfactory to enable the jury to intelligently make the necessary findings. If the evidence deduced is so vague and unsatisfactory that no findings can be intelligently based upon it the necessary result will be a verdict for defendant.

The burden is on defendant to prove the amount of a set-off claimed. And, if it is set up, in defense to an action of assumpsit, that plaintiff and defendant are partners, the burden of proof is on defendant to show the existence of the partnership.

The presumption of an implied assumpsit may be repelled by evidence of a special agreement or of general usage of the relations between the parties and surrounding circumstances.

Trial:

Plaintiff who has declared upon the common counts and also upon special count cannot be compelled, on the trial, to elect upon which count he will proceed. It has been said, however, that a motion to require plaintiff to elect between common and special counts in his declaration ought to be granted where the grounds for recovery thereunder may be inconsistent with each other; or else the trial judge should restrict recovery under the special counts to items which fall within the precise terms of the agreement on which the count is based.

The question whether there is a contract, express or implied, between the parties in one for the jury.

The principles governing instructions in civil actions generally apply in actions of assumpsit.

Defendant in an action of assumpsit is entitled to a trial by jury, unless a jury is waived.

Verdict:

A verdict for plaintiff should assess the amount of damages to which he is entitled. A mere finding for him is not a sufficient foundation for a judgment. A general verdict will be upheld where there are several counts, if any one of the counts is good.

Judgment:

A judgment in plaintiff's favor in assumpsit is that he shall recover a specified sum assessed by the jury or on reference to a master for damages sustained by reason of defendant's nonperformance of his promises and undertakings and for full costs of suit, unless deprived of the right to costs by virtue of some statute or some default of his own in not proceeding in some inferior court having jurisdiction of the action. A judgment substantially good will be upheld, although not technically expressed.

It has been held that, on the overruling of a demurrer to a declaration containing the common counts, final judgment cannot be rendered without a writ of inquiry to ascertain the damages. It has also been held that final judgment cannot be taken, on the overruling of a demurrer to a count of the declaration, if defendant has interposed a plea to another count, and the issue raised by such plea has not been disposed of.

Recovery:

The damages to be recovered must always depend upon the nature of the action and the circumstances of the case, and ordinarily plaintiff is

limited in ascertaining the damages arising directly form the breach of the contract. The willfulness or wantonness of the breach and other circumstances incidentally connected therewith have nothing to do with the case. The sole question is what is the pecuniary value of the contract right taken from plaintiff.

Trespass

Definitions and Distinctions:

Trespass. An unlawful act committed with violence, *vi et armis*, to the person, property or relative rights of another. Every felony includes a trespass; in common parlance, which acts are not in general considered as trespasses, yet they subject the offender to an action of trespass after his conviction or acquittal.

In practice the action of trespass is a civil remedy. The term civil remedy is used in opposition to the remedy given by indictment in a criminal case, and signifies the remedy which the law gives to the party against the offender.

In cases of treason and felony, the law, for wise purpose, suspends this remedy in order to promote the public interest, until the wrongdoer shall have been prosecuted for the public wrong. By common law, in cases of homicide, the civil remedy is merged in the felony.

There is another kind of trespass, which is committed without force, and is known by the name of trespass on the case. This is not generally known by the name of trespass.

Elements and Acts Constituting:

The following rules characterize the injuries which are denominated trespasses, namely:

One-- To determine whether an injury is a trespass, due regard must be had to the nature of

the right affected. A wrong with force can only be offered to the absolute rights of personal liberty and security, and to those of property corporeal; those of death, reputation and in property incorporeal, together with the relative rights of persons, are, strictly speaking, incapable of being injured with violence, because the subject-matter to which they relate, exists in either case only in idea, and is not to be seen or handled. An exception to this rule, however, often obtains in the very instance of injuries to the relative rights of persons; and wrongs offered to these last are frequently denominated trespasses, that is, injuries with force.

Two-- Those wrongs alone are characterized as trespasses the immediate consequences of which are injurious to the plaintiff; if the damage sustained is a remote consequence of the act, the injury falls under the denomination of trespass on the case.

Three-- No act is injurious but that which is unlawful; and, therefore, where the force applied to the plaintiff property or person is the act of the law itself, it constitutes no cause of complaint.

A battery is the unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him. It must be either wilfully committed, or proceed from want of due care. Hence an injury, be it ever so small, done to the person of another, in an angry, spiteful, rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him, are batteries in the eye of the law. And any thing attached to the person, partakes of its inviolability; if, therefore, A strikes a cane in the hands of B, it is a battery.

A battery may be justified, One-- on the

ground of the parental relation; Two-- in the exercise of an office; Three-- under process of a court of justice or other legal tribunal; Four-- in aid of an authority in law; and lastly, as a necessary means of defence.

First-- As a salutary mode of correction. For example: a parent may correct his child, a master his apprentice, a school-master his scholar; and a superior officer, one under his command.

2nd-- As a means to preserve the peace; and therefore if the plaintiff assaults or is fighting with another, the defendant may lay hands upon him, and restrain him until his anger is cooled; but he cannot strike him in order to protect the party assailed, as be may in self-defence; also,

Watchmen may arrest, and detain in prison for examination, persons walking in the streets by night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed; also,

Any person has a right to arrest another to prevent a felony; also,

Any one may arrest another upon suspicion of felony, provided a felony has actually been committed, and there is reasonable ground for suspecting the person arrested to be the criminal, and that the party making the arrest, entertained the suspicion; also,

Any private individual may arrest a felon; also,

It is lawful for every man to lay hands on another to preserve public decorum; as to turn him out of church, and to prevent him from disturbing the congregation or a funeral ceremony. But a request to desist should be first made, unless the urgent necessity of the case dispenses with it.

Thirdly. A battery may be justified under the process of a court of justice, or of a magistrate having competent jurisdiction.

Fourthly. A battery may be justified in aid of an authority in law. Every person is empowered to restrain breaches of the peace, by virtue of the authority vested in him by the law.

Lastly. A battery may be justified as a necessary means of defence. One-- Against the plaintiff assaults in the following instances: In defence of himself, his wife, his child, and his servant. So, likewise, the wife may justify a battery in defending her husband; the child its parent; and the servant his master. In these situations, the party need not wait until a blow has been given, for then he might come too late, and be disabled from warding off a second stroke, or from protecting the person assailed. Care, however, must be taken, that the battery do not exceed the bounds of necessary defence and protection; for it is only permitted as a means to avert an impending evil, which might otherwise overwhelm the party, and not as a punishment or retaliation for the injurious attempt. The degree of force necessary to repel an assault, will naturally depend upon, and be proportioned to, the violence of the assailant; but with this limitation any degree is justifiable.

A battery may likewise be justified in the necessary defence of one's property; if the plaintiff is in the act of entering peaceably upon the defendant's land, or having entered, is discovered, not committing violence, a request to depart is necessary in the first instance; and if the plaintiff refuses, the defendant may then, and not till then, gently lay hands upon the plaintiff to remove him from the close; and for this purpose may use, if necessary,

any degree of force short of striking the plaintiff, as by thrusting him off. If the plaintiff resists, the defendant may oppose force to force. But if the plaintiff is in the act of forcibly entering upon the land, or having entered, is discovered subverting the soil, cutting down a tree or the like, a previous request is unnecessary, and the defendant may immediately lay hands upon justify a battery in defence of his personal property, without a previous request, if another forcibly attempts to take away such property.

Persons Entitled to Sue:

Generally speaking any person may maintain trespass to realty who has sufficient possession of the land although title is in another. A person seized of an estate in reversion or remainder, whether it be in fee, or for life or for years, may maintain trespass as may also a minister in possession of land occupied by him as a parsonage. If the land is unoccupied, the owner alone may sue. Action for trespass to the person should be brought by the person injured.

An action of trespass not being assignable, as assignee of the action cannot sue, except where authorized by statute. An assignee of the equity of redemption in possession, however, may maintain the action.

Persons Liable:

In general where the act of trespass is done by one person other independent persons are not liable for the act. A person present at a trespass but taking no part in it is not liable for it, nor is one having more

Defenses:

A defense must be substantial. That the entry was peaceable is no defense, nor is the fact that a third person also trespassed on the land, or that his wrongful act contributed to the damage. If a justification is joint, it must be good or bad as to all.

Good faith. Where defendant had a right to do the act his motive is generally immaterial; but the act must have been done in the intentional exercise of the right. Generally, good faith, or that defendant acted on advice of counsel, is no defense, at least if full disclosure of the facts was not made. Hence, a bona fide claim of right either to real or personal property constitutes no defense to trespass, although the belief was unintentionally induced by plaintiff.

Accident, if entirely unavoidable and without the doer's fault has also been held to be an excuse. Physical duress has been held a defense, as where a tenant or some member of his family is, through illness, obliged to remain in a portion of the demised premises after expiration of the lease.

Benefit to property. A trespasser on real estate may not, when compensation is demanded for his trespass, urge in defense that he has benefited plaintiff by his wrongful acts.

Injunction. An injunction against plaintiff forbidding him to assert any right in land is a good defense in trespass, although an appeal is pending; but an injunction in plaintiff favor against further trespass by defendant will not prevent recovery for trespasses whether done prior to or during the period covered by it.

Another action pending. The pendency of another action in the United States courts involving

title to property in plaintiff's possession but to which defendant is not a party does not prevent recovery.

Nature and Form:

Trespass is an action at law for damages. It is an action in personam and not in rem and ordinarily the only redress available therein is damages. However, in some cases an action in equity for an injunction and damages is also available. An incidental injunction may sometimes be granted to prevent further acts of trespass; and a landowner may compel a trespasser to withdraw. In connection with the foregoing rules, it has been held that accounts between the parties could not be adjusted in a trespass action, that plaintiff's rights, as to the character of a division fence, were not involved, that the jury could not establish a disputed boundary, although the true boundary may be a proper subject of inquiry, and that the court could not give possession of the land and would not grant a rule to stay waste.

Damages:

Trespass lies for the recovery of damages which are the natural and necessary consequences of a tort committed with force, while, if the injury results from mere negligence or is not the immediate consequence of the act complained of, the appropriate remedy is case. It is not necessary that the particular injury should have been contemplated if some injury was the unavoidable result. Damages cannot be recovered twice over under two different forms.

Criminal Trespass:

At Common Law. No trespass to property is

a crime at common law unless it is accompanied by or tends to create a breach of the peace. This is so, although the act be committed forcibly, willfully, or maliciously. Some thing more must be done than what amounts to a mere civil trespass, expressed by the terms *vi et armis*; the peace must be actually broken or the act complained of must directly and manifestly tend to it, as being done in the presence of the owner, to his terror or against his will. But when a trespass is attended by circumstances constituting a breach of the peace, it becomes a public offense subject to criminal prosecution.

Rights Acquired by Trespassers:

A trespass action settles nothing but the damages sustained by the occupancy of the land up to the time of the trial. A mere trespasser on land acquires no rights in the property trespassed upon, against the owner of the land, nor right against the owner to compensation for benefit rendered by the trespass, the owner being entitled to the fruits of the trespass. The recovery of a judgment for damages for a trespass to land does not operate to transfer the title to the property to defendant, either before or after satisfaction, and recovery of damages for the breaking and entering only does not vest in defendant title to part of the realty severed by him. Nor does the severance from the realty give title to the thing severed, even against a stranger, and the trespasser can therefore bring no action if to maintain it he must establish the ownership. In general a trespasser who takes and holds possession of land for a period short of an adverse holding for the period of the statute of limitations acquires no rights against the owner to improvements therein, but by statute in some states possession for a

shorter time gives a right to the value of improvement made by the trespasser. A trespasser cannot initiate a legal right which is dependent for its inception upon a rightful entry, but it has been held that a stranger to the owner of the riparian rights was liable for willfully releasing a catch of fish made by a trespasser. Defendant in trespass *de bonis* does not acquire title to the goods before the judgment is satisfied, but satisfaction of the judgment vests the title in him, which relates back to the time of taking. A trespasser, however, who has obtained possession of the property, whether it be real or personal, may maintain any action which can be supported by merely establishing possession, and may be described as owner in an indictment for larceny; and an owner who is out of possession cannot transfer his title, unless he is aided by statute.

Trespass Outline

Trespass is either by doing wrong to:

I. the Body:
- A. Menace.
- B. Siege.
- C. Assault.
- D. Battery.
- E. Wounding.
- F. Imprisonment.
- G. Imprisonment till they make:
  - i. Fine.
  - ii. Acquittance.
  - iii. Statue.
  - iv. Obligation
  - v. Find Pledges.
  - vi. Release.
  - vii. Oath.

II. the Chattels:
- A. Reals:
  - i. Sons.
  - ii. Daughters.
  - iii. Nieces and Nephew.
  - iv. Ward.
  - v. Woman.
  - vi. Servant.
  - vii. Prentice.
  - viii. Tenants.
  - ix. Prisoner.
  - x. Captive.
- B. Personal:
  - i. Lead away, abduct

ii. Chase.
iii. to Catch and make War upon
iv. Hunt and Slay.
v. Distract.
vi. Drive.
vii. Treating war.
viii. Beating.
ix. Loud sounds.

Larceny

At Common Law:

Larceny at common law may be defined to be the taking and carrying away from any place, at any time, of the personal property of another, without his consent, by a person not entitled to the possession thereof, feloniously, with intent to deprive the owner of his property permanently, and to convert it to the use of the taker or of some person other than the owner. In some jurisdictions the intent of the taker to convert the property to his own use or to the use of some person other than the owner is not an essential element of the offense, and hence in these jurisdictions the last clause of the definition must be omitted. It is by one or more of the elements composing this definition that larceny is distinguished form burglary, embezzlement, extortion, false personation, false pretenses receiving stolen goods, and robbery. "Larceny" comprehends "petit larceny" as well as "grand larceny."

Subjects of Larceny:

Must Be Something Capable of Ownership. In order that a thing may be the subject of larceny, the first essential is that it be something which is capable of individual ownership, for if the thing stolen is something in which no one can have property, the act of taking it, although it may constitute some other crime, is not larceny.

Elements of Larceny:

Taking and Carrying Away. To constitute larceny the first essential is that the thing which is the subject of the crime should be taken from the possession of the owner into the possession of the thief, and be carried away by him, for until this is done there is no larceny, however definite may be the intent of the prospective thief to commit the theft, and however elaborate his preparations for doing so. This was the rule at common law and seems to be the rule under most corporate States by-laws.

Who May Commit Larceny:

Possession Lawfully Acquired. One who is in lawful possession of the goods or money of another cannot commit larceny by feloniously converting them to his own use, for the very obvious reason that larceny, being a criminal trespass upon the right of possession, cannot be committed by one who, being invested with that right, is consequently incapable of trespassing upon it.

Some one who merely aids a person in possession to convert the goods of another is not guilty of larceny.

Principals and Accessaries:

Commonly. Participants in the commission of a larceny are criminally liable either as principals in the first or second degree, or as accessaries before or after the fact, if the grade of the offense committed by them constitutes a felony; but if the grade of the offense is only a misdemeanor, no distinction is made as respects the criminality of those participating in it, and all are equally guilty as principals.

Single and Successive Larcenies:

Taking Several Articles an Once. If several articles ar stolen form the same owner at the same time and place, only a single crime is committed.

Successive takings from the Same Place. Where the property is stolen from the same owner and from the same place by a series of acts, if each taking is the result of a separate, independent, impulse, each is a separate crime; but if the successive takings are all pursuant to a single, sustained criminal impulse and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse between each act.

Taking from Different Places. The taking of separate articles belonging to the same owner from different places in the same building, pursuant to a single criminal impulse, is usually held to constitute a single larceny only.

Taking a Receptacle and Its Contents. One who takes a thing in which another thing is contained may be convicted of stealing either of both, but the taking constitutes a single crime and cannot support more than on indictment.

At Different Times and Places. If, however, articles belonging to different owners are taken at different times or from different places, it is usually held that each taking is a distinct and independent larceny. A short space of time and distance will have this effect.

Kinds and Degrees of Larceny:

At common law, larceny is distinguished as either simple larceny, which is plain theft unaccompanied with any other atrocious circumstances; or mixed or compound larceny, which

also includes in it the aggravation of a taking from one's house or person. Simple larceny at common law was also divided into grand larceny, where the property stolen exceeded in value twelve pence, and petit larceny, where the value was twelve pence or under, but both were felonies and were distinguished by the punishments inflicted, that of grand larceny being death, and of petit larceny whipping or some corporal punishment. In distinguishing between grand and petit larceny the criterion of value has been said to be the price which the subject of the larceny would bring in open market.

Attempts to Commit Larceny:

An attempt to commit larceny is a crime at common law.

The essentials of the crime are: 1st-- An intent to commit larceny. 2nd-- The doing of some overt act or acts which would, in the usual and natural course of events, if unhindered by extraneous causes, result in the commission of a larceny. 3rd-- A failure to consummate the larceny. This third element is as important as either of the others, for if the attempt is successful, the crime of larceny is complete, and there can be no conviction of the attempt to commit it. Mere preparation for the commission of larceny has usually been held not to be an overt act sufficient to constitute an attempt to commit the crime, but the contrary has been held in a few instances.

Indictment, Information, or Complaint:

An indictment, information, or complaint for larceny must allege with reasonable precision and certainty, by positive statement and not by

inference, all the facts necessary to constitute the offense.

Naming the offense. The indictment need not in the inducement name the offense as larceny, nor need in explicitly allege that the grade of the offense is grand or petit larceny; nor is the indictment bad if it names the offense wrongly in the inducement, as by calling it "embezzlement" or "burglary."

Surplusage. If the indictment contains a good charge of larceny, but contains additional useless allegations, these allegations will not harm the indictment if it is not thereby rendered so prolix as to prejudice accused in making his defense.

Conclusion. An indictment charging the theft of a thing which was not a subject of larceny at common law is bad if concluding as at common law.

Issues, Proof, and Variance:

Since the plea of not guilty puts in issue every material allegation of the indictment or information upon which accused is being tried, to justify a conviction of larceny in any of its grades or degrees it is necessary for the prosecution to prove beyond a reasonable doubt all the essential ingredients of the offense charged, that it was committed by accused within the venue as laid in the indictment prior to the finding thereof, within the period of time prescribed by the statute of limitations, and subsequent to the passage of the act under which the indictment is brought.

Evidence:

The general rules control the burden of proof in prosecutions for larceny.

The burden is on the prosecution to establish the guilt of accused, that is, to prove every fact and

circumstance which is essential to the guilt of the accused, or, as frequently stated, to prove every essential element of the crime charged, and to prove each item as though the whole issue rested on it, except in so far as a statute establishes a different rule. Stated in another way, the rule is that the law does not cast on accused the burden of satisfying the jury of his innocence. The burden of proof does not shift on the establishing of a prima facie case by the prosecution, but continues on the prosecution throughout the trial and until the verdict is rendered and defendant's guilt is established beyond a reasonable doubt. Where the crime charged is distinguished into degrees, the burden of proof never shifts from the prosecution to accused in respect either to the degree charged or to the essential elements of that degree.

Corpus Delicti. The prosecution has the burden of proving that a crime has been committed before the jury proceed to inquire as to who committed it.

Intent and Motive. The burden is on the prosecution to prove that accused had the specific intent involved in the charge, or to show facts from which it may be presumed. It is not incumbent on the prosecution to prove either the presence or the absence of motive.

Time:

The prosecution has the burden of proving that the offense was committed within the statutory period of limitations, and if this is not done a conviction will be reversed. So also it is for the prosecution to show that the crime was committed before the indictment was found, and where it fails to do so a conviction will be reversed.

Jurisdiction and Venue:

The burden is on the prosecution to prove that the offense was committed within the county where the venue is laid. This is true, although venue is not alleged in the indictment, or although the judge and the jury may personally know the *locus in quo* to be within the county, but the admission of accused on arraignment that he is guilty of voluntary manslaughter when he is indicted for murder in a particular county dispenses with the necessity for proof of venue. Sometimes the prosecution has the burden of proving venue in a part of a county, as where the county is divided into two judicial districts, or where the prosecution is before a justice of the peace whose jurisdiction is limited by statute to the township where the offense is alleged to have been committed.

Elements of the Offense:

Whether the performance of an act or series of acts constitutes larceny or not is a question of law; whether such acts were or were not performed is a question of fact. This distinction runs through all the elements of the offense, the court defining the *corpus delicti*, the jury determining whether the evidence established it or not, that is, whether the property described in the indictment was or was not taken and carried away, at the time, and from the place, and in the manner alleged; whether the property was taken with or without the consent of the owner, and, if with his consent, whether such consent was obtained by fraud or not, and if by fraud, whether the owner intended to pass title to the property or merely to part with its possession temporarily; whether the taking was done with a felonious intent, or innocently in jest, or under a

mistaken claim of right made in food faith; or in the mistaken belief that the owner has consented to the taking; whether the intent was to deprive the owner of his property permanently or only temporarily; and if the taking was done feloniously with intent to deprive the owner of his property permanently, whether such intent existed at the time of the taking, or was formed afterward.

Sentence and Punishment:

The punishment for grand larceny at common law was death, but the crime ceased to be a capital felony in this country at an early date except in case of the larceny of horses, and cattle; because life was near impossible without them.

Petit larceny, although a felony at common law, was punishable only by imprisonment or whipping.

Restitution of Stolen Property:

At common law, the holder, owner or possessor of stolen goods might, upon the conviction of the thief, institute a proceeding called an appeal of larceny, wherein the court in its discretion might order restitution to be made to the owner provided he had used reasonable diligence in apprehending and prosecuting the thief.

Mandamus did not lie to compel the court to issue an order for restitution, but if an order was made, attachment issued for its disobedience. The fact that the stolen goods had passed into the hands of a bona fide purchaser for value did not affect the owner's right to restitution, except, it would seem, in the case of current coins, and, by express exception in the statute, in the case of negotiable instruments.

Burglary

Definition:

Burglary as a common-law offense is the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein, whether the felony is committed or not.

Nature and elements of the Offense:

At Common Law burglary is a felony; and it is an offense against the habitation not against the property. The following are the essential elements of the offense at common law: 1st-- A breaking, 2nd-- and entry, 3rd-- of the dwelling house 4th-- of another, 5th-- in the night, 6th-- with intent to commit a felony therein.

Attempt to Commit Burglary:

An attempt to commit burglary is an indictable offense at common law. A person is liable to indictment for the misdemeanor of attempting to commit burglary, if, with intent to break and enter a house under such circumstances that the breaking and entering would amount to burglary, he does any act toward the accomplishment of his purpose, which goes beyond mere preparation, as the turning of a knob with intent to open a door and enter, or the breaking of a window without entering, etc. to constitute an attempt there must be an overt act, not merely an intent, and the act must be something more than mere preparation. But whenever the acts

of the person have gone to the extent of placing it in his power to commit the offense unless interrupted, and nothing but such interruption prevents his commission of the offense, then at least he is guilty of an attempt to commit the offense, whatever may be the rule as to his conduct before it reached that stage.

Indictment or Information:

An indictment or information for burglary, at common law, must allege every fact and circumstance which is necessary to constitute the offense, and with sufficient certainty as to time, place, and intent to inform the accused of the particular crime with which he is charged. An indictment will not be rendered bad merely because it is not properly punctuated or is otherwise ungrammatical, if the meaning is clear; but it may be bad by reason of errors in spelling or by the inadvertent omission of words. An indictment which would be insufficient at common law may be good under a statute declaring indictments sufficient if the offense is charged with such certainty as to enable a person of common understanding to know what is intended, and under other statutes making technical defects immaterial.

Burglariously, is a technical word, which must be introduced into an indictment for burglary; no other word will answer the same purpose, nor will any circumlocution be sufficient.

Variance Between the Allegations and the Proof:

On the trial of an indictment for burglary, the allegations must be sustained by the proof. In the absence of a statute changing the common-law rule, a material variance between an essential allegation

of the indictment and the proof will entitle defendant to an acquittal. And the same is true with respect to an allegation which, although it may been unnecessary, is descriptive of the offense. But a variance between the proof and an unnecessary allegation which is not descriptive of the offense and which may be rejected as surplusage is immaterial.

Burden of Proof and Presumptions:

Since every person under indictment is presumed to be innocent until the contrary is proved beyond a reasonable doubt, the burden of proof is on the state, on the trial of an indictment for burglary, to prove every fact which is alleged in the indictment and which is essential to constitute the crime charged, and no essential fact can be presumed. But this does not prevent the inference of facts from the circumstances proved. Where under the statutes there are two offenses, burglary in the daytime being the lesser, the presumption in favor of the appellant is that the burglary was committed in the daytime.

It will not be presumed that the breaking and entry were in the nighttime, but facts must be proved from which this fact may be inferred.

Where an indictment for burglary laid ownership of the property intended to be stolen in two persons jointly, and but one of them had exclusive possession and control, it was held unnecessary for the prosecution to prove that the other did not consent to the taking, on the ground that if the accused had such consent the burden was on him to prove it. To constitute the crime of forcible entry of a dwelling it is essential that the entry shall be made against the will of the occupant of the house; and, in order to justify a conviction this

fact must be established by the prosecution. It is not, however, always necessary that an express prohibition be proved; under certain circumstances it will be presumed, as where a person enters with force or by intimidation.

Trial:

In most respects the trial of an indictment for burglary is governed by the same principles of law as is any other criminal prosecution.

Punishment:

At common law burglary was a felony and punishable by death, but within the benefit of clergy. Early statutes, however, took away the benefit of clergy and made the offense punishable in all cases by death.

Extortion

Definition and Distinctions:

The ordinary meaning to the word "extortion" is the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. In the common law the term has acquired a technical meaning and designates a crime committed by and officer of the law who under cover of his office unlawfully and corruptly takes any money or thing of value that is not due him or more than is due or before it is due. In a more enlarged sense, it signifies any oppression by color or pretense of right. The word "oppression" is a word of more extensive signification than "extortion" and will embrace many other acts of official malfeasance and misfeasance, and in its ordinary sense indicates an act of cruelty, severity, unlawful exaction, domination, or excessive use of authority.

Criminal Prosecutions:

Extortion is an abuse of public justice and has been said to be an offense of a particularly odious character. It was regarded as a misdemeanor at common law.

At common law the crime of extortion may be committed only by an officer. In general it may be said that any officer, whether he is a federal, state, municipal, or judicial officer and that every person occupying an official or quasi-official position may be guilty of this offense. One may be guilty of extortion where he occupies and official or quasi-official

position, although he is compensated through private sources. But a legally existing office giving to the incumbent an official character, either *de facto* or *de jure*, is essential. The fact that the office is of recent origin, and that no precedent can be found of the conviction of such an officer of the offense of extortion is not conclusive as against liability.

One is a public officer within the meaning of the law of extortion who exercises the powers generally of the office. The offense may be committed by a *de facto* officer and defendant cannot set up the irregularity of his appointment or his failure to take oath of office.

Color of Office or Right:

The taking must be by the officer in his official capacity, and by color of his office. But this does not necessarily imply that the taking must be for an act or service which the officer is under a duty or has a discretionary power to perform. It does imply, however, an exercise of official power possessed or pretended to be possessed by the officer as distinguished from an act which could have been performed by any other person, and the person paying must have been yielding to official authority, not acting voluntarily. Where charges for official services and services rendered by the officer in his individual capacity are lumped, but in such a way that a separation is not thereby converted into a criminal demand for a gratuity for doing an official criminal demand for a gratuity for doing an official act. It has been held, however, that if a public officer could not lawfully act in his private capacity, it is no defense to a prosecution by indictment that money was taken for services so rendered.

At common law an officer who demands: fees not allowed by law; fees greater than allowed by law; fees exacted before due; fees for services not performed is guilty of extortion.

Intent:

At common law in order to constitute extortion, the act must have been done with a corrupt intent, however, the unlawful taking by an officer under color of his office of money not due to him is criminal without a specific intent. The corrupt intent lies in the design upon the part of the officer to collect fees to which he is not legally entitled, and the fact that the money is not taken for the officer's own use may be of evidential value as showing absence of intent, as may be the fact that the aggregate of the officer's fees is less than the total amount which he has a right to demand, or that the payment is voluntary. So a custom or usage in the community as to the fees demanded may be shown as contradicting a corrupt intent, but it will not in itself constitute a defense. Notwithstanding the officer has acted in good faith and under mistake or ignorance of the law he cannot upon that account be held free of criminal intent, although an exception has been made in some decisions in cases in which the law is not settled or is obscure, or where the officer has acted after the advice and consolation of counsel. The fact that the officer has acted under a mistake of fact may show the absence of a criminal intent. A bona fide belief that service had been rendered and that the fee was legally due may constitute a defense under a statute punishing one who knowingly takes for services not actually rendered, or other or greater fees than are by law allowed for any services done by him.

Indictment of Information:

Under the general rules applicable to indictments and informations, and indictment or information for extortion must charge the essential elements of the offense, in the form of facts and not of conclusions. It must contain a definite description of the offense charged and a statement of the facts in the case at bar which constitute it, and with such certainty as to be pleadable in bar of another prosecution. A general charge in which a number of extortionate acts are accumulated is bad. Each act is a separate offense and must be precisely and distinctly laid. The technical charging words in an indictment for extortion at common law are "extort" or "extorsively" and "by color of office." It is not necessary to allege the section of the statute violated.

An indictment at common law with reference to intent must allege a corrupt purpose. The words "extort" and "extorsively" are descriptive of the crime and are generally used to charge the corrupt purpose in the approved precedents of common-law indictments for extortion. The word "knowingly" need not be employed in a common-law indictment. The word "corruptly" is not indispensable, nor is the word "willfully."

Proof:

As in other criminal prosecutions the burden is upon the prosecution to establish the guilt of the accused. It must be shown that the payment was not voluntary. The presumption of knowledge of the law is applicable. Matters of which judicial notice is taken need not be proved. An officer's return of his official actions on process is presumed to be correct, but its truth is put directly in issue by an

indictment for extortion, and the presumption may be overthrown by proof. The burden is on defendant to maintain by proof his defense that the fees were taken through a mistake of fact. When an itemized bill is not rendered by merely a single charge for services is made, the presumption is that it is made for the services at that time rendered, unless it otherwise appears in the evidence.

Questions of Law and Fact:

Under the rules as to the functions of court and jury in criminal prosecutions generally, it is ordinarily held that it is for the jury to determine the character of the transaction and the intent to defendant. The nature of the powers determining the official capacity of defendant is a question partly of law and a partly of fact. Where the evidence shows that no money has been paid to defendant but merely a note or due bill which has not been paid, it has been held that a direction of a verdict for defendant is correct.

Punishment:

Extortion was punished at common law by fine and imprisonment, and also removal from office.

False Personation

Definition:

False personation is the offense of falsely personating another, or representing one's self to be another person and acting in such assumed character either with the view of obtaining some property or exercising some right belonging to such person, or with the view or effect of subjecting such person to some legal liability.

Common-law Offense:

Apart from the species of cheat or fraud at common law accomplished through the false personation of another or where there is a conspiracy or other circumstances affecting the public, it seems that the mere fact of personating another is not an offense at common law.

Elements of the Offense:

To constitute the offense there must be an untrue or false personation. Ordinarily there cannot be a personation of a supposititious individual who never existed, or of an officer where there is no legally appointed officer of the character which the accused was assuming to personate; but under a statue punishing one assuming to be an officer of the government the offense may be committed, although the offender assumes to hole an office which has no legal existence. The offense may be committed, although the person whose name and character are assumed is dead. It has been held that a mere

unwarranted exercise of authority by an officer under a misconception of his powers does not constitute a false personation.

The intent to defraud is an essential element to the offense.

To consummate the offense in cases where there is receipt of money or property by the impersonator it seems that the person defrauded must have paid the money because of the false personation.

Person Liable:

All persons present aiding and abetting in the false personation are liable as principals and one who procures the crime to be committed is equally guilty with the one committing it.

Indictment:

Unless otherwise laid down by the act creating the offense, the common-law procedure by indictment is impliedly to be followed. It is a fundamental rule of criminal pleading that an indictment must allege all the facts necessary to constitute the crime with which defendant is charged, with such particularity that the accused is notified with reasonable certainty of the precise offense with which he is charged, may be advised of what he must answer; be able to prepare his defense; and that the judgment may be a bar to any other prosecution for the same offense. At common law it was necessary that the several elements of the offense should be alleged and with due particularity; and in indictments upon statutes, it has been held that the facts should be given as minutely and particularly as would be required by common-law rules. The indictment should set forth affirmatively

all the elements constituting the offense. An indictment is insufficient where it is susceptible of two different constructions, under neither of which a complete offense is stated. It is not necessary to state anything in the indictment which it is not necessary to prove. It seems that it should be alleged that accused was not the person personated; and that he falsely personated the individual named, rather than that he did an act in the name of that person.

The personation of another particular individual it has been held that the indictment is demurrable if it does not state the name of the individual personated, but it is not necessary to state his whereabouts or residence. Applying the general rule that two or more distinct and substantive offenses cannot be charged in the same count, an indictment for false personation is insufficient where it undertakes to charge two separate offenses in a single count. Where accessories before the fact are declared to be principals, an indictment may state the circumstances as in an indictment against an accessory before the fact; but it must contain an allegation charging the accused as principal.

Variance:

As in the case of other offenses, in a prosecution for false personation all allegations of the indictment which are descriptive of the offense must be proved as alleged, and this is so, although it was not necessary to have made the allegation in the manner in which it was made.

Evidence:

To warrant a conviction under an indictment

for the offense of false personation it is essential that every element of the offense shall be proved, and the guilt of the accused must be established by more than a mere presumption, as in other criminal prosecutions the guilt of the accused must be established beyond a reasonable doubt.

Trial:

As in all criminal cases it is the duty of the trial court to instruct the jury distinctly and precisely upon the law of the case; and, under proper instructions, it is for the jury to determine whether the actions of the accused were such as to render him guilty.

Cheat or Swindle

Cheat Defined:

Deceitful practices in defrauding or endeavoring to defraud another of his known right, by some willful device, contrary to the plain rules of common honesty. Fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public. A wrong accomplished through the false impersonation of another; a mere private deception. All cheats are not criminal, and many acts which would be denounced as cheats by the principles of morality are not legally cheaters, but are mere private frauds and not punishable criminally. The common law, however, has been extended by statute.

Swindle Defined:

The acquisition of any personal or movable property, money, or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same.

The word implies a high degree of moral depravity and its essence is fraud.

Kinds and Sorts:

Clogging. Cheating with clogged or loaded dice.

False measures. Fraudulently constructed measures or containers for measuring size or capacity, employed to defraud.

False token. Any device having the semblance of public authenticity, such as spurious money of the realm, of banknotes circulating throughout the community as a medium of exchange, or false weights and measures, for example metric usage, or false impersonation of another person, or any symbol of such a nature as to affect the public and as common prudence cannot guard against.

False weights. Weighing devices so constructed as to enable a tradesman to cheat and defraud his customers.

Fleece. To cheat; to defraud; to rob.

Hornswoggle. While the term cannot be approved by the literati due to its uncertain origin and may sound somewhat formidable, it has, nevertheless found its way into the English language as a simple slang word, meaning: to conceal one's true motives from a person or the public especially by elaborately feigning good intentions so as to gain an end or achieve an advantage, in less words *bamboozle, mislead* or *hoodwink.* Could be considered to be acts committed by an *actor*; actor being the in the Roman forum term for Plaintiff; also,

Something accepted or believed in through trickery or established by fraud or fabrication; also, to trick into delivering or accepting or doing something, or playing upon the credulity of a person or the public so as to bring about belief in or acceptance of what is actually false and often preposterous, in less words *hoax, delude, dupe, mislead, victimize.* Could be considered to be

propagation of commercial ideology as public polices and promulgation of feigned edicts without legal or political significance.

Persons liable:

A humbug, quack, hoax, fraud, imposture are the terms for a person who usually and willfully deceives and misleads a person or gullible public as to his true conditions or attitudes; also, one who passes himself off as something that he is not, in other words a sham, hypocrite, an impostor.

Brought into the light and examined, we find him to be a human advancing masked with an attitude or spirit of pretense and deception and self-deception with a sense of emptiness void of meaning; seeking, not the true power of creativity, but, power over a person or public.

Humbugs are found wherever victim-hood and disparagement are plentiful.

A knave is a swindler; a cheat; a rogue. The term implies one who has been guilty of dishonest acts.

A grafter is one who takes or makes graft, or dishonest private gain, especially in positions of trust, and in ways peculiarly corrupt.

Swindler is of German origin and of indefinite meaning. It is held to mean no more than the word "cheat."

Elements:

To make out offense of "cheating" and "swindling" by false representations, prosecution must prove: that, representations were made, that were made, that, representations were made with intent to defraud, that, representations related to existing fact or past event, and that party to whom

representations were made, rely on their truth, was thereby induced to part with his property.

Punishment:

Pursuant, Numbers chapter 18 verse 32 the pollution or adulteration of the persons, places or things of the sons of God brings death by summary judgement of the Sovereign.

Receiving Stolen Goods

Defined:

Receiving stolen property is the short name usually given to the offense of receiving any property with the knowledge that it has been feloniously, or unlawfully stolen, taken extorted, obtained, embezzled, or deposed of.

Hot: the word is used as an adjective by thieves and receivers of stolen goods to designate property which has been stolen; as "hot" goods.

Intaker: A receiver of stolen goods.

Punishment:

The prosecution may try the crime of receiving stolen property as a high misdemeanor, or wait till the felon is convicted, and then punish the receiver as an accessory to the felony. But the prosecution shall only make use of one not both of these methods of punishment.

Robbery

Definition:

At common law robbery is the felonious taking of goods or money from the person or presence of another by means of force or intimidation.

Classes and Distinctions:

Statutes prescribing a punishment for robbery without defining the crime do not change the common law definition, which prevails in such jurisdictions.

Enactment of statutes classifying robbery with out division into degrees does not repeal existing statutes defining robbery.

"Automobile Banditry" consists in the use or attempt to use an automobile, aeroplane, or other self propelling vehicle to facilitate escape from the scene of a robbery or other felony.

"Conjoint Robbery" is a term describing robbery committed by two or more persons.

"Highway robbery" is robbery committed on or near the highway. A robbery committed on a railroad track or wharf is not committed on a highway. Robbery committed in plain view of and within a reasonable distance from a highway is highway robbery.

"Plain robbery" is a term having no technical meaning, but sometimes used to distinguish robbery without aggravation from the aggravated classification of the offense.

"Rapine", as the term is used in the civil law,

is "the violent taking from the person of another of money or goods for the sake of gain."

"Robo" under the Philippine penal code consists in taking, with intent to gain, any personal property by the use of violence or intimidation against any person or force upon any thing. It is a hybrid crime peculiar to the Philippines, being broader in its scope than either "rapine" of the civilians, or the "robbery" of the common law. While the offense is often called "robbery," it includes sundry crimes which would be classified as distinct offenses at common law.

"Robo en cuadrilla" as that term is used under statutes making it a classification of robbery subject to increased penalty, is shown where robbery is committed by more that three persons armed and acting in concert. It is not shown, however, where the robbers numbered three or less, nor where, although more than three in number, only three or less were armed.

Nature and Elements of Offense:

Robbery is a felony both at common law and under the statutes, and constitutes and offense against both person and property. It has been characterized as a grave, various, aggravated, infamous, and heinous crime.

Generally speaking the elements of robbery are the taking, of personal property or money from the person or presence of another, by actual or constructive force, without his consent, and with *animus furandi* or intent to steal.

Threats of arrest and prosecution, ordinarily, is not robbery, however, under our common law system of jurisprudence the crime would be classified as "extortion." But where an officer, under

pretense of making a search, holds up the victim's hands and extracts money from victim's pocket, this is robbery.

It is essential to the commission of the crime of robbery that the taking should be without the consent of the victim. "Consent" as used in the law of robbery has been said to mean a voluntary yielding of the will by one with power to act, and cannot exist where there is either force or intimidation.

As a general rule it is not robbery to take property under a bona fide claim of right or title thereto. Cases held within this rule and therefore not robbery include the forcible taking under a bona fide claim of specific property, of property taken as security, of gambling gains or losses, and of money taken from the alleged thief in reimbursement for money honestly believed to have been stolen.

Grade, Degree, or Classification of Offense:

Under statutes in some jurisdiction robbery is divided into degrees, or otherwise classified in accordance with the nature and extent of the violence of intimidation employed, and other circumstances or aggravation.

Under statute classifying "First degree robbery" constitutes: 1st-- armed with a deadly or dangerous weapon, or 2nd-- aided by an accomplice actually present, or 3rd-- whenever the offender inflicts grievous bodily harm, defendant may be guilty of robbery in the first degree with a dangerous weapon, even though he inflicts no bodily harm.

Under statutes robbery committed without a dangerous or deadly weapon is second degree robbery.

Defenses:

In general the defense of limitations and matters of defense consisting in the absence of an aforesaid necessary element of the crime.

The general capacity of particular parties to commit robbery or crime generally.

It is not a defense that the robbery was committed under the command of a superior.

Arresting officers who use violence and rob the party arrested are not exonerated on account of the legality of the arrest.

It is a defense that property was taken as an act of war.

Trespass by the victim on defendant's property does not justify defendant in robbing the trespasser.

Prosecution and Punishment:

In accordance with general rules, and in the absence of statutory provisions to the contrary, an indictment or information for robbery must allege all the elements of the offense. In jurisdictions where statutes prescribe a punishment for robbery without defining the crime, an indictment or information following the common-law definition of the crime is sufficient.

At common law robbery was regarded as a felony of the gravest character, punishable by death, without benefit of clergy.

To justify imposition of dearth penalty for robbery while armed with a dangerous or deadly weapon, both defendant's connection with the crime and all elements of the particular statutory classification of robbery must be established by sufficient evidence.

Attempted or assault with intent to commit

robbery as a general rule brings the same punishment as robbery.

Case

Definition:

The form of action, at common law, adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct or immediate force, or which is the indirect or secondary consequence of defendant's act.

Historical:

Originally actions at law were commenced by the issuance of a writ out of chancery which performed a twofold function. It authorized the law court in which the action was directed to be brought to assume jurisdiction thereof and it enforced the appearance of defendant. Plaintiff was required to set forth specifically and with particularity, in the writ, the grounds and nature of his cause of action. Very early in the history of the common law approved forms for writs, applicable to the usual and common causes of action, were preserved in the register of writs for use by the persons charged with the issuance thereof. If none of the approved forms found in the register were applicable to the facts of plaintiff's case, he was authorized to bring a special action of his own case. This fact gave rise to the name "action on the case." In the course of time, as novel subjects of litigation became more frequent, the clerks charged with the issuance of writs which were not found in the register, and doubted their authority so to do. To enforce the issuance of writs in such cases parliament enacted the Statute of

westminster II. Thus it will be seen that the statute did not give rise to the action on the case, but was designed merely to enforce plaintiff right to have a writ issued on his special case was a remedy given by the common law, but it appears to have existed only in a limited form, and to a certain prescribed extent, until the Statute of Westminster II.

Nature and Scope of Action:

In its most comprehensive signification, an action of the case includes assumpsit as well as an action in form *ex delicto,* although in modern times it is usually understood to mean an action in the latter form. It is a suppletory, personal action. It was designed to be residuary in its scope but is always classed among the actions in tort. It is often referred to as "case" and it was originally called "special action of the case."

The action on the case is founded on the mere justice and conscience of plaintiff's right to recover and is in the nature of a bill in equity, being peculiarly adapted to the redress of injuries arising from any new relation in which parties may be placed by the varying changes in society and business, whether arising from statutory provisions or otherwise.

When any special consequential damage arises from a wrong which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed to bring a special action on his own case on a declaration formed according to the peculiar circumstances of his own particular grievance, for whenever the common law gives a right, or prohibits an injury, it also gives a remedy by action; and, therefore, whenever a new injury is done, a new method of remedy may be pursued.

An action on the case lies to recover damages for torts not committed with force, actual or implied; or having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate by consequential; or where the interest in the property was only in reversion-- in all of which cases trespass is not sustainable.

Particular Cases When Action Lies:

Applying the general rule as to when the action lies, it is well established that this remedy in the proper one to recover damages for conspiracy, criminal conversation, deceit or fraud, libel and slander, malicious prosecution, and seduction.

Whenever an injury to a person or his property is effected by a regular process of a court of competent jurisdiction, case is the proper remedy and trespass is not sustainable, although the process may have been maliciously adopted. But where the process is void, trespass will lie; or the trespass may be waived and an action of the case brought if the issuance of the process was malicious. This right to bring case embraces actions for malicious prosecution, and also actions for abuse of civil process, including actions based on the wrongful issuance of an attachment, execution, or search warrant.

Case is also the proper remedy for resistance to, or disobedience of, legal process, as for pound breach or rescue of property distrained, or against a witness for disobeying a subpoena.

Wherever there is carelessness, recklessness, want of reasonable skill, or the violation or disregard of a duty which the law implies from the conditions or attendant circumstances, and individual injury results therefrom, an action on the

case lies in favor of the party injured, although there is some conflict of opinion where the negligence is the immediate cause of the injury. This is equally true where the neglect is of a corporate duty by a corporation.

Fraud or deceit, resulting in damage, gives a good cause of action, no matter whether the representations made relate to personal chattels or to realty. So, where a person in the sale of property knowingly makes false representations concerning the quality or title of the property, and such representations are relied on by plaintiff under circumstances which warrant him in so doing, and he is injured thereby, case is an appropriate form of action for the recovery of the damages sustained. This includes an action of a fraudulent warranty of the quality of land, or as to the ownership or title, or that it is free from encumbrance.

Defenses:

When parties by an express agreement assume the performance of an obligation which, aside from the agreement, the law imposes, whatever will in law excuse a breach of the express obligation will, in an action on the case for breach of the implied obligation, be a defense thereto. Coverture, however, is not a defense, as the action is in form *ex delicito*. The defense of contributory negligence to an action on the case for damages for neglect to perform an obligation arising out of contract must be based on plaintiff's obligation under the contract or its incidents, and plaintiff negligence must be a proximate cause of defendant's breach, and hence must occur before or concurrently with such breach.

Jurisdiction:

In some jurisdictions, an action on the case cannot be brought before a court of inferior jurisdiction, but must be brought in a higher court. And in states where justices of the peace have jurisdiction of actions *ex contractu* but not of actions *ex delicto,* an action on the case to recover for injuries caused by defendant's negligence and unskillfulness in performing a contract, although an action for the breach of a duty imposed on defendant by a contract, is not an action *ex contracty* so as to give a justice jurisdiction thereof.

Venue:

Whether case is to be regarded as a local or transitory action depends on whether the cause of action arose from an injury to real property or from an injury to personal rights or personal property.

Parties:

The joinder of plaintiffs in an action on the case is usually dependent on whether they are jointly or severally interested in the subject matter and have sustained a joint or several damage, but as a general rule where parties are jointly interested they must be joined as plaintiffs. Where a wrong constitutes a direct as well as a consequential injury to land in the possession of a life tenant, the latter may waive the trespass and join with the remainderman in an action on the case for the recovery of the consequential damages sustained by him.

An assignor of a part of a claim for damages may nevertheless sue in some states at least.
A licensee may have such a title as authorizes him to sue.

Where two or more have jointly committed an injury which is in itself a tort, or which the liability sought to be enforced does not originate in a contract, or is not so declared on, plaintiff may at his option sue one, or join as defendants all or some, of those who committed the alleged injury.

Pleading:

The requisites and sufficiency of a declaration in case generally depend on those particular circumstances on which the action is founded, and reference should be made to those articles dealing with special kinds of tort for which as action of case is the proper remedy. The distinguishing characteristic of an action on the case seems to be that all the facts on which plaintiff relies must be stated in his declaration which, except where brought on a statute, should show clearly and distinctly that some tort and not a mere breach of contract has been committed, and must sufficiently state such facts as show a invasion of the legal right of plaintiff with a proper allegation of injury, or the invasion of such a right that the law implies some resulting injury. Where plaintiffs show generally and comprehensively a right in themselves, an injury by defendants, and a loss sustained by them in consequence, it is as a rule sufficient.

The name given to the declaration or writ by plaintiff is not conclusive as to the form of the action, but such question is to be determined from the nature of the wrong alleged and the character of the relief sought. For instance, if the declaration sets forth a contract as mere inducement, but the gravamen of the action is a tort action connected with the contract, the declaration will be construed as one in case.

A declaration in case should as in other forms of action conform to the process with regard to the names and number of the parties to the action, the character or right in which they sue or are sued, and the form of the action.

A declaration in case stating facts constituting more than one cause of action against defendant is not bad for duplicity, unless plaintiff relies on each of them as a distinct ground of recovery.

The general rules as to the joinder of counts should be followed, and where several counts are adopted the pleader should be careful not to misjoin them.

The declaration should not conclude *contra pacem*, but should conclude "to the damage of the plaintiff," and the sum named should be sufficient to cover the real demand, since greater damages cannot be recovered than the plaintiff has laid in the conclusion of his declaration unless it is a modified practice, in the particular state. It is not an objection to a count in case that the form of the conclusion is in debt and not in case, but lack of an ad damnum clause in a declaration is an omission of matter of substance, and cannot be disregarded on a demurrer to the declaration.

Plaintiff may amend his declaration so as to change the form of the action to an action on the case, where the amendment does not change the cause of action.

The declaration should set forth a breach of duty imposed on defendant by contract or the breach of an obligation of law which defendant owed to plaintiff. If the gist of the action is defendant's negligence, the declaration should allege the specific acts of negligence filed on as a ground for recovery.

Where the act or omission complained of was

not prima facie action able, it should be stated that the act was done wrongfully; or some equivalent averment must be used. And the facts showing the unlaw fullness must be set out

Where the act or omission complained of was not prima facie actionable, because indifferent in itself, the intent with which it was done becomes material and requires, as do all substantive matters of fact, a specific allegation thereof; but where the act occasioning the damage is itself unlawful, without any other extrinsic circumstances, the intent of the wrongdoer is immaterial, and no allegation thereof is necessary.

Where it is necessary to state an intent or motive, it is sufficient if it is stated substantially in accordance with the facts of the case.

Issues and Proof:

The pleading and the proof must correspond, and this rule is not affected by statutes abolishing the distinctions between the forms of actions in trespass and in case. The acts or omissions of defendant, which are insisted on as a tortious violation of the duty imposed by his contract, must be proved as alleged; but plaintiff need not prove each and every allegation of the declaration, it being sufficient to prove enough of the allegations to establish a cause of action. In other words, the material averments of the declaration must be proved. It has been held that a variance from the statement of the injury will not be fatally erroneous, provided the statement is substantially correct, although not true to the letter; but that, where the injury and the means of effecting it have been stated with needless minuteness and specification, a substantial variance therefrom in the proof will be

fatal.

Where plaintiff has gone out of his way to particularize and state in detail his title or interest instead of contenting himself with a general statement thereof and there is a misdescription, the variance will be fatal, unless it is matter that can be regarded as merely surplusage which may be rejected. So where it is necessary specially to describe plaintiff's title, a variance therefrom is fatal.

Where it was requisite to set out a contract by way of inducement to plaintiff's right, a material variance between the allegation of the contract as stated and the proof adduced in support thereof will be fatal, the rule governing being the same as in assumpsit; and although unnecessary details stated in connection with the contract must be proved as alleged, yet the proof of more than is stated will not occasion a fatal variance.

Instructions:

In actions on the case general rules should be adopted in giving instructions to the jury, and those should correctly state the law applicable to the case, but instructions that do not correctly state the law should be refused if requested. So where the leading proposition of an instruction requested is proper, but taken as a whole the instruction is defective in distinctness and clearness, the court has a right to refuse it.

Amount of Recovery:

Since the action is "found on the plaintiff's title in justice and equity to receive a compensation in damages" the damages are to be estimated by the jury in view of all the circumstances of the

particular case, and complete recovery may be had for all damages suffered as the proximate result of the wrong.

Action upon the Case Outline

I. Doing of Wrong to another:
   - A. Inheritance.
   - B. Chattels Personal.
   - C. Body.
   - D. Name.
   - E. Suits in Law.

II. Not doing of a thing ought to be done by:
   - A. Law to the wrong of the:
     - i. Inheritance.
     - ii. Chattels.
     - iii. Corps.
     - iv. Suits in law.
   - B. Assumpsit.
     - i. Inheritance.
     - ii. Chattels.
     - iii. Corps.
     - iv. Suits in law.

III. Misdoing.

IV. Negligence.

V. Deceit in bar
   - A. With warranty.
   - B. Without warranty.

VI. Trover and Conversion in:
   - A. Deed.
   - B. Law, as to persons discontinued, Wasting, Denial to re-deliver

Replevin

Definitions:

1st-- The name of one of the common-law actions, the distinguishing features of which are that it is brought to obtain possession of specific chattel property, and is prosecuted by a provisional seizure and delivery to plaintiff of the thing in suit; and,

2nd-- A personal action *ex delicto* brought to recover possession of goods unlawfully taken (generally, but not only applicable to the taking of goods distrained for rent), the validity of which taking it is the mode of contesting if the party from whom the goods were taken wishes to have them back in specie, whereas, if he prefer to have damages instead the validity may be contested by action of trespass or unlawful distress. The word means a redelivery to the owner of the pledge or thing taken in distress.

3rd-- A judicial writ to the sheriff, complaining of an unjust taking and detention of goods and chattels, commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattel.

4th-- A form of action which is employed to recover possession of personal chattels that have been unlawfully taken or obtained from their owner.

5th-- A possessory action for the recovery of specific personal property.

6th-- The plain, simple, and speedy process by which one may get possession of personal

property, to the possession of which he is entitled.

7th-- A form of action which lies to regain the possession of personal chattels which have been taken from the plaintiff unlawfully.

Replevy means to redeliver goods which have been distrained, to the original possessor of them, on his giving pledges.

Personal Replevin is a species of action to replevy a man held in the custody of any natural or artificial person upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. It took the place of the old writ *de homine replegiando*; but, for the specific purpose of examining into the legality of an imprisonment, it is now superseded by the writ of habeas corpus.

Replevin bond is a bond executed to indemnify the officer who executed a writ of replevin and to indemnify the defendant or person from whose custody the property was taken for such damages as he may sustain.

Replevisor is the plaintiff in an action of replevin.

Nature and Scope of Remedy:

Replevin originated in common law as a remedy against the wrongful exercise of the right of distress for rent, and according to some authorities could only be maintained in such a case; and under some statutes has been limited to such cases. But by the great weight of authority the remedy is not and never was restricted to cases of wrongful distress in the absence of any statutes relating to

the subject but is a proper remedy for any unlawful taking.

Replevin being strictly a proceeding at law, it cannot be invoked as in an equitable suit for rescission, modification, or cancellation of a contract.

Replevin is a possessory action. The property is the subject of the action. The gist of the action is plaintiff"s right to immediate possession and defendant's wrongful taking or wrongful or unlawful detention. The issues to be determined are plaintiff"s present right to possession of the property and defendant's unlawful detention or possession; and the question of title is not necessarily involved in such an action, although it may be put in issue. The primary object of the action is the recovery of the property itself with damages for the taking and detention, and secondarily the recovery of a sum of money equivalent to the value of the property taken and detained, with interest thereon. Being purely possessory, replevin is not a proper remedy for the collection of a debt, nor for money due on account, nor to enforce a mere contractual duty, nor to enforce delivery of a deed, nor to determine defendant's liability as indorser of a note, and it cannot be sustained for the purpose of trying the right of property. It affords no relief for the adjudication of successive liens. An action to be declared owner of an interest in a patent is not an action of replevin. The right to hold office in a corporation cannot be determined in an action of replevin of corporation property appertaining to that office.

Replevin is not an action in rem, although it is said to have been so originally, but is what is usually called a mixed action, being partly in rem an partly in personam; in rem so far as specific

recovery of the chattels is concerned, and in personam as to the damages.

Property Recoverable:

The general rule is that a writ of replevin is effectual for the recovery of personal property only, and that it cannot be maintained to recover real property. The general rule is that all personal property, including animate as well as inanimate movable property, unlawfully taken or retained from the owner thereof, is the subject of an action of replevin. Replevin will not lie for incorporeal personal property, such as shares in a corporation, as distinguished from certificates of stock nor will it lie for property destroyed and not in existence at the commencement of the action. Replevin will not lie to recover property received in exchange for plaintiff's property.

The general rule is that money is not the subject of an action of replevin, unless it is so marked or labeled as to be capable of identification.

Replevin, it was held, would lie for the recovery of slaves, but not for a free negro.

Title and Right to Possession of Plaintiff:

As replevin is strictly a possessory action it lies only in behalf of one entitled to possession. Not only must plaintiff have the right to possession generally, but he must have the right to immediate as well as the right to exclusive possession at the time of the commencement of the action, or issuance of the writ; or, as is sometimes stated, at the time of the taking and detention.

The gist of the action of replevin is the right to possession of the property involved; this right of possession may result from a general or from a

special interest or ownership, but such a general or special interest or ownership in plaintiff so far as requisite to confer a right of immediate possession against defendant is essential to his action. Ownership in plaintiff is material only so far as it is necessary to show the right to possession.

Taking, Detention, or Possession by Defendant:

At common law a writ of replevin lies only where there has been a tortious or wrongful taking of the property by defendant, with the exception of cattle distrained damage feasant, where before impounding sufficient amends were tendered; and it will not lie for a mere detention where the property was lawfully obtained. Herein it is distinguishable from detinue which is the common-law action to obtain the property where defendant came rightfully into possession and the detention only was wrongful. Any unlawful interference with or assertion of control over the property is sufficient without an actual forcible dispossession, although an actual taking was wrongful *ab initio*.

Conditions Precedent:

Since in order to maintain an action of replevin plaintiff must be entitled to the immediate possession of the property, he must as a condition precedent make payment or tender any money or performance of any other condition or obligation which may be necessary to vest in him such right of possession; while on the other hand, although there may be something due from plaintiff to defendant, if its return or payment is not essential to vest in plaintiff a right to the possession of the property in question, no tender or payment is necessary as a condition precedent to the right to maintain the

action. Where payment or tender is a condition precedent, it must be made before the action is commenced, unless, by reason of the defendant claiming absolute ownership, the cause of action is complete without such payment or tender; and must be kept good up to and at the time of the trial. Where plaintiff has parted with property under circumstances which entitle him to recover the same, he must return or tender the money, notes, or other thing of value which was the consideration on which he acted in parting with such property, unless he is prevented from so doing by defendant. Where expenses have been incurred by an officer in regard to property taken under a wrongful levy, the owner may replevy the same without tendering the amount so expended. If plaintiff's property has been sold to defendant by a third person having no right to dispose of it, it is not necessary for him to refund to defendant the amount paid by the latter to such third person. Where property is obtained by fraud on plaintiff's borrowing a sum of money from defendant to be repaid in a certain time which has not yet expired, no tender of the sum need be made.

Defenses:

It is no defense to replevin for a wrongful taking that the owner of the property was indebted to defendant. Any defense which controverts plaintiff's right of possession at the time the suit was brought is allowable, such as invalidity of plaintiff's title or right to possession in defendant of some stranger to the action.

Where parties engage in an unlawful transaction, and in the accomplishment of the illegal purpose one party obtains possession of property claimed by the other, replevin will not lie in behalf

of claimant to recover such possession.

Pleading:

In an action of replevin as in other civil actions the complaint must allege facts sufficient to constitute a cause of action, and to show that it exists in favor of plaintiff, and against defendant. The complaint must state in clear and concise language the facts upon which plaintiff bases his right and which entitle him to recover, and it must allege facts and not matters of evidence, or legal conclusions, and it should allege the material facts distinctly and separately, instead of assuming them. The material facts to be alleged are plaintiff's ownership, either general or special, of the property, describing it, his right to its immediate possession, and the wrongful taking or detention thereof by defendant, and a complaint which states these essentials ordinarily sufficiently states a cause of action, except where it is necessary to allege a demand, it being unnecessary to anticipate and negative matters of defense. In some jurisdictions statutes provide what allegations the petition shall contain, and a petition containing all the required allegations states a cause of action. The complaint is sufficient if it contains a plain and concise statement of the cause of action, and it is not always necessary to allege in the complaint everything that is required to be stated in the affidavit. A declaration or complaint is not demurrable for failure to state a cause of action if the facts stated are sufficient to constitute any cause of action against defendant, even though such facts may not be sufficient to sustain the particular cause of action upon which the complaint may seem to be based. If the complaint states a cause of action in replevin,

the fact that it also alleges a conversion of the property by defendant to his own use does not change the form of action, or deprive plaintiff of his right to a recovery of the property, if the evidence upon the trial justifies such relief.

The sufficiency of declaration, petition, or complaint is determined by its averments, and it is not affected by defects in the affidavit, nor by the name given to the pleading or cause of action. A complaint which is otherwise sufficient is not defective because of failure to add immediate delivery of the property.

Affidavit as complaint. The affidavit required to be filed in an action of replevin has been held to be no part of the pleadings. The facts set forth in the affidavit form no part of the issues of the case, unless they are again set forth in the pleadings. In some jurisdictions however where the action is brought before a justice of the peace, the affidavit is the only pleading required, and in others, it has been held that an affidavit filed without a sperate complaint, but containing all the essentials of a complaint, is to be treated as both affidavit and complaint.

The omission of a prayer for judgement is not fatal where it is apparent what judgment plaintiff would be entitled to.

Replevin at common law is regarded as a local action, and the complaint should contain allegations of venue, and should allege the place from which the property was taken, and show the county in which the property is wrongfully held at the time the action is instituted. In some jurisdictions it has been held that the venue must be alleged as of a particular place within the town or parish, but in other jurisdictions it is held that, except perhaps in

replevin of property seized in distress for rent, it is sufficient if the venue is laid within the town or county. In some jurisdictions it is held that in actions of replevin brought before a justice of the peace, it is not necessary to allege detention of the property in the county in which suit is brought, and in others it is held that the venue is sufficiently laid if it appears in the margin of the complaint instead of the body.

The declaration, complaint, or petition in an action of replevin shall be verified,a nd in the absence of such verification the writ cannot legally be issued; the verification need not be by plaintiff in person, but it may be by an agent, or by plaintiff's attorney. A verification by an agent which fails to show for whom he acts is insufficient. If the verification contains the proper allegations for the purpose of a verification the fact that it contains additional allegation will not vitiate it, but such additional matter may be treated as surplusage.

As in civil actions generally, in replevin it is necessary that defendant file a plea or answer, or there can be no trial for want of an issue; and such plea must either traverse or confess and avoid the allegations in the complaint. A plea of the general issue or a general denial is not compulsory, but defendant may, if he so desires, plead his defenses specifically, in which case his answer will be subject to the ordinary rules of pleading. The plea or answer must therefore state the facts upon which defendant relies and not matters of evidence, or legal conclusions, and it need not negative matters of defense to matter alleged. Unnecessary allegations may be treated as surplusage, and may be stricken out, and a plea which is merely frivolous or impertinent may be disregarded or stricken out

on motion.

In jurisdictions where an affidavit of defense is required to be filed, the fact that the property sought was not found in the possession of defendant or any third person does not relieve defendant of the necessity of filing an affidavit of defense. The affidavit of defense is not necessary if plaintiff fails to state in his declaration the facts upon which he claims title and right to possession. the sufficiency of such an affidavit in an action of replevin must be determined by the same rules that control in other actions where like affidavits are required. The affidavit must state frankly and fairly the facts that support the claim advanced, and any subject of defense set up must be specifically averred and nothing left to inference. Where defendant gives bond and retains the property, his affidavit of defense must allege that he is the owner of the goods.

Evidence:

The rules applicable to presumptions and burden of proof in civil action generally apply in action of replevin. Thus the burden is on plaintiff to establish his right to recover. Where plaintiff has made out a prima facie case, the burden of proof is on defendant to show matter in justification of proving allegations which, although unnecessary to his recovery, have been made in anticipation of special defenses.

It is presumed that the officer executing the writ of replevin took the bond required and acted regularly.

Trial:

In an action of replevin both parties are

regarded as equally actors; and, where plaintiff in replevin has been put in possession of property under his writ, he cannot be permitted to liability to defendant by suffering a nonsuit escape or dismissing his action, except with the consent of the latter. Such consent must be actual, not constructive, and, if made by an agent of defendant without special authority therefor, or by one of several defendants having interests adverse to the others, is not sufficient. But an order of dismissal of an action of replevin against a constable levying upon personal property will not be set aside on the mere ground that a stipulation for such dismissal signed by the constable was not signed or consented to by the execution plaintiff, where no application was made to substitute him in the action as defendant in lieu of the constable. After the property has been seized and delivered to plaintiff defendant becomes the virtual plaintiff in the case. Plaintiff cannot and does not thereby deprive defendant of his right to establish his title and right to possession, and obtain a judgment for the return of the property or its value, and damages for the taking and withholding of the property. If the rule were otherwise plaintiff, under color of legal process, would perpetrate a fraud on the law and be allowed to keep property, the title to which was prime facie in defendant form whom it was taken at the beginning of the suit.

The court has power to set aside a voluntary nonsuit and reinstate the case on the docket for the next term.

The common-law rule is that in replevin defendant cannot move for judgment as in case of nonsuit for failure of plaintiff to proceed to trial, both parties being regarded as actors in such action

and either having the right to bring the case to trial.

Damages:

The general rule is, some times by virtue of express provision of the statutes, that a plaintiff in replevin, if successful, may recover damages for the wrongful taking and detention of the property, together with, where a return of the property is not had, a recovery of its value, or the value of his special interest therein; except as the right to recover both the value of the property and damages for its detention may be controlled by rules hereinafter considered as to the time as of which the value is to be ascertained, and has the right to recover for depreciation. Damages to the successful party in a replevin suit are ordinarily to compensate him for the loss he has sustained by being wrongfully deprived of the possession of his property, and the award involves a prior finding that he is entitled to the immediate possession of the property at the time the suit was commenced. By the action the law intends to give a complete remedy to the party entitled to possession not only as to the property itself, by also in respect to damages which are the natural result of the wrongful act. Exemplary or punitive damages are recoverable where the peculiar circumstances warrant, but in the absence of circumstances upon which exemplary damages could be awarded just compensation can only be allowed, as the object of the law is to restore the party, so far as possible, to the condition he was in prior to the commission of the wrongful act. These damages are not limited to such as have accrued when the suit is instituted but may be estimated to the date of the verdict.

Liability on Replevin and Redelivery Bonds:

A replevin bond is to be interpreted like any other contract or bond, and its several conditions are separate and independent, so that an action may be maintained on the bond for the breach of any of its conditions. A right of action on a replevin bond carries with it the right to recover damages for a failure to perform its conditions. the obligation of the sureties on defendant's replevy bond is created by the bond and dates only form it date; and to justify a judgment against the obligor and sureties, there must have been some breach of the bond, for until a breach of one of the conditions the liability of the obligors is merely contingent. Where the statutes confer on a married woman the right to execute a forthcoming or redelivery bond, she is subject to judgment of it.

Detinue

Definition:

Detinue is a common-law action which lies for the recovery of personal chattels, in specie, or their value if they cannot be had, from one who acquired possession of them lawfully, but retains them without right, together with the damages for the wrongful detention. Under the almost universal modern rule, however, the action will lie not only where the original taking was lawful but also where it was tortious.

Lord Coke's definition.-- "It lyeth where any may come to goods, eyther by delivery or by finding. In this writ, the plaintiffs shall recover the thing detained."

Other definitions.-- 1st, A common-law action which lies for the recovery of personal chattels in specie where the same are unlawfully detained or for damages for their detention. 2nd, A mode of action given for the recovery of a specific thing and damages for its detention, though judgment is also rendered in favor of the plaintiff for the alternate value, provided the thing cannot be had; yet the recovery of the thing itself is the main object and inducement to the allowing of the action. 3rd, Where a party resorts to the action of detinue, he elects to take the specific article or elects to take the specific article or thing, if to be had, and if not, he is entitled to its value at the time it is found and decided to be his property.

Nature and Scope of Remedy:

There has been some doubt as to whether detinue is founded on tort or on contract; and in some decisions it has been said to partake of both. The action of detinue was originally no other than the action of debt in the detinet instead of debt. It is now considered to be an action ex delicto since it is a personal action, the gist of which is the wrongful detention of personal property, regardless of the manner in which defendant acquired possession.

In order therefore, to ground an action of detinue... these points are necessary: 1st, That the defendant come lawfully into possession of the goods, as either by delivery to him, or by finding them; 2nd, That the plaintiff finding them; 3rd, That the goods themselves be of some value; 4th, That they be ascertained in point of identity.

Chitty says: It is "an action somewhat peculiar [in its character and] in its nature, and it may be difficult to decide whether it should be classed amongst forms of action *ex contractu,* or should be ranked with actions *ex delicto.* The right to join detinue with debt, and to sue in detinue for not delivering goods in pursuance of the terms of a bailment to the defendant, seem to afford ground for considering it rather as an action *ex contractu* than an action of tort. On the other hand, it seems that detinue lies although the defendant wrongfully became the possessor thereof in the first instance, without relation to any contract. And it has recently been considered as an action for tort, the gist of the action not being the breach of contract, but the wrongful detainer.

Property Recoverable:

The action of detinue has been held to lie only

for the recovery of personal property. The property must have some value, and be capable of identification so as to be recoverable in specie, capable of ownership, and be in existence at the time the action is brought. Subject to these considerations, it has been held that detinue will lie for deeds, leases, notes or other evidences of debt, abstracts, and muniment of title, patents to land, legal papers, insurance policies, letters, bank checks, and currency. The common-law action would not lie to recover corporate stock as distinguished from the certificate evidencing such stock.

Things severed from the realty become personal property and belong to the owner of the land, who may maintain detinue for them, unless defendant is in possession of the land from which they were severed, holding it adversely to plaintiff. But where the chattel cannot be removed without injury to the premises, detinue cannot be maintained for it.

Right to Maintain Detinue:

For plaintiff to recover in an action of detinue, he must show that at the commencement of the action he had a general or special property in the goods sued for with the right to the immediate possession. A bailee, or a person holding the property under an order of court, has such interest as will support detinue; however, a mere executory agreement to deliver property does not give the person such an interest as will support detinue. A person who purchases property and gives his note for the purchase price cannot maintain detinue to recover the note on the discovery of such fraud as would entitle him to rescission of the contract.

The legal title to personal property usually

carries with it the right to its possession, and hence is sufficient to sustain detinue for the recovery thereof, unless someone else has a special interest entitling him to its possession. The action may be maintained by a remainderman, or reversioner, when his interest has become absolute; and property deposited in escrow may also be recovered by the party contingently entitled thereto, if he has performed the condition of deposit.

An equitable interest in personalty is not alone sufficient to sustain detinue for the recovery thereof, and this rule is also applicable to a claim interposed by a person not a party to the action. Likewise detinue will not lie by a person holding merely an equitable lien, or an equitable title resting on an unexecuted executory contract.

Liability in Detinue:

Under the modern rule the manner in which defendant acquired possession of the property is immaterial, although under the earlier rule he must have come into possession lawfully.

Since the gist of the action is the wrongful detention of the property, any one who wrongfully detains the personal property of another may be sued in detinue. Thus infants, attaching creditors, bailee, or warehousemen wrongfully detaining the property of another are liable in detinue.

If plaintiff consents to the detention of the property by defendant it will prevent his recovery in the action.

As a general rule liability in detinue cannot arise except on account of actual possession of the property, either at the time of the action or at some time prior thereto, and constructive possession is insufficient. When property belonging to a third

person is no claim or interest therein, he is not liable in detinue to the owner. But where a party represents that he has possession of the property, plaintiff will be entitled to recover, even though such representation was false.

It has been held that detinue may be maintained against a person who has control of the property, although it is in the possession of another. Thus the action may be maintained against the bailor, where the bailee holds at the will of the bailor. In some jurisdictions the action may be maintained against either the principal or agent, where the property is in the agent's possession, subject to the control of his principal, while in other jurisdictions the principal alone may be sued.

Parties:

All persons having a legal possessory interest in the property must be joined as parties plaintiff, as for example tenants in common, or joint tenants. So the joinder of a party who has not an interest in the property or the failure to join one who has an interest therein is fatal to the action.

The action should be brought against the party in possession or chargeable with the wrongful detention, regardless of the number of persons that may be interested in the property; and in some jurisdictions, where detinue has been superseded by statutory proceedings, it has been held, under the statutes, that the action may be maintained jointly against a person who fraudulently acquired possession and his transferee who refuses to deliver such possession the owner. Where the property is jointly detained by several persons, all should be joined as defendants.

In order to obtain jurisdiction to proceed to a

valid judgment, in an action of detinue, the service of process or summons is necessary, unless defendant waives the necessity thereof. But the failure to find or seize the property, if summons has been served, does not prevent the court from having jurisdiction.

Procedure for Taking and Redelivery of Property:

By making an affidavit of ownership, and executing a statutory bond for the payment of such costs and damages as defendant may sustain by reason of a wrongful action, plaintiff may obtain an order directing the officer executing the summons to seize the property. A bond given after levy, although required before the levy, is valid as a common-law bond. The officer is required to hold the property for a certain time, during which plaintiff may take possession of the property by giving another bond conditioned to return the property to defendant in the event of a judgment in his favor; but if he does not give such bond within the specified period, it is the duty of the sheriff to release the property, and failure to release it at the expiration of the specified period renders him liable to defendant as a trespasser *ab initio*.

After the officer has seized the property, defendant may retain the property by giving a forthcoming or redelivery bond. But where a sheriff is sued in detinue for the recovery of property in his possession under a levy, he is not obliged to give a forthcoming bond, but may notify the execution creditor, who is thereupon charged with the responsibility of protecting his own interests. The validity of the bond is not affected by the failure of the officer to seize part of the property, nor by including articles not sued for. It is also sufficient

if the bond is executed by one of several defendants who alone has possession of the property.

Claims by Third Persons:

At common law detinue was the only personal action in which interpleader was allowed, and this procedure has been adopted in several jurisdictions in the American states of the Union.

Pleading:

In setting forth a cause of action it is necessary that the declaration, petition, or complaint should contain an allegation of plaintiff's general or special interest in the property sued for, on which he bases his right to immediate possession. But it is not necessary to negative any special possessory interest that defendant may have in the property, although an averment which is not inconsistent with right of possession in defendant is insufficient.

According to the modern practice, it is necessary to allege that defendant is in possession of the property and is wrongfully detaining it, and the omission of such allegations is fatal even after verdict. The manner of taking need not be alleged and an allegation of manner is ordinarily regarded as surplusage, since the gist of the action is in the detention and not in the taking. It has, however, been held that an allegation that the taking was tortious is demurrable, since such an allegation might induce the jury to assess damages for the wrongful taking as well as for the detention.

At common law there were two modes of declaring defendant's possession in detinue: First, on a bailment; and second, upon the fiction that plaintiff lost and defendant found the property which he detains, although it was permissible to use

the latter form in either case.

The declaration or complaint should particularly and specifically describe the property sued for.

It is generally necessary to allege the value of the property in controversy, since the judgment is in the alternative form.

Where a demand is a condition precedent to the right to maintain the action, it must be alleged.

No allegation of special damages is essential to the recovery of damages for the detention of the property, since damages are a mere incident to such wrongful detention, it being sufficient if damages are claimed in the demand for relief.

The place at which the property is detained must be alleged where it is essential to show the jurisdiction of the subject matter.

Evidence:

The burden of proof is on plaintiff to prove the legal title or other interest in the property upon which he relies as giving him the right of possession; and the rule is not changed where a third person intervenes and claims the property in controversy; but having proved such a title or interest in himself he need not go further and disprove a superior interest defendant.

The burden of proof is on plaintiff to prove defendant's possession. Whether, after having shown possession in defendant prior to the action, plaintiff has the additional burden of showing that such possession continued up to the time of the action seems to be involved in the same confusion as is the question of the effect of a transfer by defendant. The weight of authority, however, seems to be that plaintiff need not show continuance of

possession up to the time of the action, and that if defendant relies on a transfer of possession, he has the burden of proving it, and also of proving that the transfer was such as will relieve him of liability; but there is respectable authority which seems to place upon plaintiff the burden of proving defendant's possession at the time of the action, or otherwise of showing defendant's possession at the time of the action, or other wise of showing that having had possession he has lost it through his own fault or wrong. However, proof showing the chattels detained were in defendant's possession a short time before an action of detinue was commenced rests the presumption that they were in his possession at the date of the suit.

As a general rule plaintiff is required to prove the value of the property in controversy, since the judgment is rendered in the alternative.

Trial:

Questions of fact and law in actions of detinue are, as in other common law actions, are for a legally constituted jury of Electors from the county.

The rules governing instructions in civil actions generally are applicable to detinue. Instructions should not be argumentative, nor abstract and misleading, and where there is conflicting evidence, it is error to give an affirmative instruction. The necessity of a demand, to recover damages prior to the commencement of the action, cannot be raised by a general affirmative charge.

The verdict in detinue should be responsive to all the issues brought out on the trial, and should be supported by the evidence.

As a general rule a verdict in detinue which does not assess the value of the property is fatally

defective.

If the jury, after ascertaining the right to belong to plaintiff, omit to find the value, it is usually provided by statute that a writ of inquiry may be awarded to supply the defect, in stead of ordering a *trial de novo.*

At common law, and in some jurisdictions in this country, a partial finding on the issues, or a partial disposition of the property will make the verdict erroneous, and in such case a *venire de novo* should be awarded.

Judgment:

As a general rule the judgment in detinue as in other civil actions should follow the verdict, although a judgment which amends the verdict in a particular which is harmless to the complaining party will not be set aside because it does not follow the verdict. The judgment should be supported by the pleadings, and should not be rendered for more than the amount claimed in the declaration. A judgment in detinue need not be wholly for either party, since plaintiff may recover part of the property sued for and fail as to the rest; and in such case the judgment is for plaintiff for the part recovered and for defendant as to the remainder. Likewise it is not necessary that the judgment be rendered against all of the defendants, since detinue is an action ex delicto.

At common law the partial finding on the issues, or a partial disposition of the property will make the verdict erroneous, and in such case a venire de novo should be awarded.

If the judgment is for plaintiff, it must be in the alternative for the recovery of the specific property sued for, describing it, or its value as

assessed by the jury, together weigh damages for the detention of the property and costs, and plaintiff cannot elect to have judgment for the property or for its value. Where plaintiff waives an alternative judgment for the value of the property, the court should give judgment in his favor for possession alone.

The better practice requires that the judgment point out precisely the thing recovered, although it is sufficient if the property is described by a reference to the complaint where it is adequately described. However, if the description in the complaint is insufficient such a reference is ground for the arrest of the judgment.

Where plaintiff is not successful in maintaining the action, and has not taken possession of the property, defendant is entitled to a judgment for costs only, but when plaintiff has given bond and taken possession of the property, the judgment in favor of defendant should be for the property or its alternative value.

Damages:

Where plaintiff recovers either the property or its alternative value, he is entitled to damages for the wrongful detention of the property. The value of the property, however, is not part of the damages for the wrongful detention. Damages in excess of the value of the property, although unusual, are not necessarily excessive.

Plaintiff may recover damages, even thought he regains possession of the property pending the action, although in some jurisdictions, in such case, the contrary rule prevails. But where defendant offers to return the property in a damaged condition, plaintiff need not accept such property without

compensation for the depreciation. Likewise where the goods were returned after the action was brought, plaintiff may show their damaged state while in defendant's possession.

Where no special damages are alleged, upon the restoration of the property by defendant and payment of nominal damages and costs, the court will compel plaintiff to elect whether he will stay all proceedings, or proceed for greater damages at the risk of all costs.

Vindictive damages, it is held, cannot be awarded.

Detinue Outline

I. Upon bailment.
   A. To the Defendant himself:
      i. of Chattels Personal:
         1. Alive.
         2. Dead.
   B. To another.

II. Upon a Devenerunt:
   A. General:
      i. of Deeds:
         1. Certain:
            a. Chattels.
         2. In certain thing sealed:
            a. Bag.
            b. Box.
            c. Chest.
         3. Unsealed Reals.

Trover and Conversion

Definitions:

Conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights" the legal wrong denominated "conversion" is any unauthorized act of dominion over personal property belonging to another in denial of, or inconsistent with, his right; also,

A conversion in the sense of the law of trover, consists either in the appropriation of the thing to the party's own and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff, under a claim of title inconsistent with his own; also,

A wrong done by an unauthorized act which deprives another of his property permanently or for an indefinite time; also,

An assuming upon one's self the property and right of disposing another's goods.

Any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent with it.

Any wrongful exercise of dominion by one person over the goods and chattels of another, which is inconsistent with and exclusive of the owner's rights therein.

The assertion of a title to, or an act of dominion over personal property, inconsistent with the right of the owner.

The unlawful and wrongful exercise of dominion, ownership, or control by one person over the property of another, to the exclusion of the exercise of the same rights by the owner, either permanently or for an indefinite time.

A dealing by a person with chattels not belonging to him, in a manner inconsistent with the rights of the owner.

An appropriation of and dealing with the property of another as if it were one's own, without right.

The unlawful turning or applying the personal goods of another to the use of the taker, or of some other person than the owner; or the unlawful destroying or altering their nature.

Unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of his goods temporarily or permanently.

The exercise of dominion and control over property inconsistent with, and in denial of, the rights of the true owner, or the party having the right of possession.

The appropriation of the property of another or in its destruction, or in exercising dominion over it in defiance of the owner's rights, or in withholding the possession from him under an adverse claim of title.

Any unauthorized act which deprives a man of his property permanently.

A tortious act by defendant, by which he deprives plaintiff of his goods either wholly, or but for a time.

Constructive conversion takes place when a

person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself.

Trover is the technical name of the action to recover damages for a wrongful conversion of the personal property of another.

Nature and Elements of Conversion:

Conversion is a tort, a wrongful act, which in the nature of things cannot spring from the exercise of a legal right. The law of conversion, it has been said, is concerned with possession, not title, conversion being an offense against possession of property. It may be either direct or constructive, and may be proved directly or by inference. The essence of conversion is not acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner, although a temporary deprivation will be sufficient; and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from his act. To constitute a conversion there must be either some repudiation of the owner's right, or some exercise of dominion over it inconsistent with such rights, or some act done which has the effect of destroying or changing its character, or, as otherwise expressed, there must be a wrongful taking or a wrongful detention, or an illegal assumption of ownership, or an illegal user or misuser.

Mere words--declarations--will not, in and of themselves alone, amount to a conversion; it must be accomplished by acts. Furthermore, the acts alleged to constitute a conversion must be positive and tortious. Mere nonfeasance or neglect of some legal duty does not amount to conversion and will not

support an action of trover, although it may constitute sufficient ground to maintain an action of the case. And a mere breach of contract does not constitute conversion, although resulting in a loss of property.

To constitute conversion, nonconsent to the possession and disposition of the property by defendant is indispensable. If the owner expressly or impliedly assents to or ratifies the trading, use, or disposition of his property, he cannot recover as for a conversion thereof; and this is so although defendant exceeded the power given him.

Neither actual manual taking nor asportation are essential elements of conversion. The question is: "Does he exercise dominion over it in exclusion of or in defiance of the owner's right? If he does, that is conversion."

While an intent to do come act amounting to a conversion is necessary, mere intention to convert property, without more, is not enough to constitute a conversion, but the intent must be accompanied by some positive act. It is the act of conversion itself that gives a right of action, and not the intent to convert. But while an intent to convert, consummated by some positive act, is necessary to constitute conversion, it is very generally held that it is not essential to conversion that the motive or intent with which the act was committed would be wrongful or willful or corrupt, although, as in actions for damages for torts generally, factors of this character may be taken into consideration in determining whether exemplary damages shall be allowed. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it. It is the effect of the act which constitutes

the conversion. In consequence, subject to some limitations hereinafter noticed, it has very generally been held that the question of good faith, knowledge or ignorance, care or negligence, is not involved in actions for conversion.

The general rule is that one who exercises unauthorized acts of dominion over the property of another, in exclusion or denial of his rights or inconsistent therewith, is guilty of conversion although he acted in good faith and in ignorance of the rights or title of the owner. The state of his knowledge with reference to the rights of such owner is of no importance, and cannot in any respect affect the case. Circumstances may exist, however, by virtue of which it is the duty of a party to give notice, either actual or constructive, of his ownership or right to possession, and in this event the general rule does not apply. Nor does the rule apply to one who, in good faith and without notice of the owner's rights, received in payment of a debt the proceeds of a sale of the property by the party who converted it.

Property Subject of Conversion:

An action of trover lies only for the conversion of personal chattels. Such action does not lie for a wrongful deprivation of, or for injuries to, land or other real property which is the subject of private ownership is the subject of conversion, if of a tangible nature, or if it is tangible evidence of title to intangible or real property, but not otherwise.

Generally speaking, all valuable written instruments may be the subjects of conversion. It has been held so in respect of certificates of stock, promissory notes, bills of exchange, drafts, checks, bonds, muniment of title, copies of account and account books, county warrants, a military

certificate issued by the state to a soldier for the balance of his pay and subsistence, post-office orders, instruments giving the right to deliver or call for stock, fire insurance policies, liquor licenses which under the ordinance granting them were transferable, a liquor law certificate, a written guarantee, a bank deposit book, and a solicitor's docket and papers.

It is generally held that trover will not lie for a public record because it is not private property; and in accordance with this principle, it has been held that judgements of courts of record are not private property for which an action of trover will lie.

Mail matter, such as First-Class Matter, is a subject of conversion, and a wrongful detention of mail matter by a postmaster will render him liable to an action for trover.

Money of any kind is as much the subject of conversion as any description of personal chattels, and trover will lie whenever plaintiff's money has come into defendant's possession, and has been converted by him, without any assent on plaintiff's part, express or implied, that the relation of debtor and creditor should thereby arise.

Other things that properly are the subject may include: Earth, sand, and gravel where it has been wrongfully severed and removed, it becomes personalty for the conversion of which an action will lie; and,

Manure; and,

Fixtures which have been affixed or annexed to the soil or freehold; and,

All kinds of buildings and building materials which are personal property are subject to conversion, and the owner or possessor of the land

who wrongfully prevents their removal may be compelled to respond in trover for their value; also,

Timber, Crops, Fruit, and turpentine; and,

Animals, automobiles, trucks, and farm equipment.

Actions for Conversion:

The action of trover was, in its origin, an action of trespass on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use, from which word finding (trover) the remedy is called an action of trover. By a fiction of law actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another, or sold or used the same without the consent of the owner, or refused to deliver the same when demanded. As was said of this action by Lord Mansfield: " In for it is a fiction; in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use." The form supposes defendant may have come lawfully by the possession of the goods, and if he did not, yet by bringing this action plaintiff waives the trespass, and admits the possession to have been lawfully gotten.

A conversion is the gist of the action of trover, irrespective of the manner in which defendant obtained possession of the property. Where the act of conversion is admitted, the only question to be determined is the amount recoverable, and without proof of conversion plaintiff cannot recover, whatever else he may prove, or whatever may be his right of recovery in another form of action. No damages are recoverable for the act of taking; all must be for the

act of conversion. As conversion is the gist of the action, the statement of finding or trover is now immaterial and not traversable.

The remedy by action of trover is in its nature legal as distinguished from equitable, and, while it has been said that the action of trover is equitable in its nature, and that "it is competent for the law court to administer justice according to the principles of equity," this form of action is not available for the protection or enforcement of equitable titles or rights.

It has been held that trover is a possessory action based on a disturbance of the owner's right to possession of a chattel.

Unless otherwise provided by statute, the action of trover is a remedy to recover the value of the property wrongfully converted, and not the specific property it self. The property itself can only be recovered by an action of detinue or replevin.

The law which governs in an action of trover is that of the place where the property in question was situated at the time of the alleged conversion thereof.

An equitable title or right will not suffice for the maintenance of trover. A vested legal interest, if acquired prior to the conversion alleged, is sufficient to support trover. Such an interest may be either general or special and may be founded on a possession warranted by law, or consented to by the owner. Plaintiff must recover on the strength of his own right or title, and not on the weakness of that of his adversary; and where his alleged title is void, he cannot recover unless he had actual possession and defendant is a stranger to the title; but possession under a claim of title or right is sufficient to sustain an action for conversion against

one who does not show a better right or title.

Right to immediate possession, to constitute the basis of plaintiff's suit in trover, must be absolute and unconditional.

Defendant in trover will not be permitted to set up a defense inconsistent with his silence, language, or conduct whereby he induced plaintiff to act to his prejudice. It has been held that one who on demand admitted being in possession of goods and refused to give them up is estopped when sued in trover to allege that he did not have them at such time; but the contrary has also been held.

As the action of trover is transitory, an action may be brought in one state, or province, for a conversion of personal property in another state or province; and an action of trover may be maintained in one country for the conversion of personal property in another country.

Jurisdiction, it has been said, will not by refused on ground of public policy.

An action of trover is transitory in its nature, and, unless it is otherwise provided by statute, an action of trover may be brought in any county where jurisdiction over the parties can be obtained, although the conversion was not committed in that county.

In accordance with general principles of pleading, a complaint in trover need not negative possible defenses.

Defense:

At common law the general issue in trover is not guilty. It denies all which plaintiff, in legal effect, alleges in the declaration, namely, property in himself and an illegal conversion by defendant.

As in other civil actions, the statement in the

same plea of two or more grounds of defense renders the plea bad for duplicity.

Evidence:

The same character of evidence which will suffice to establish title or possession, or right to possession of chattels in other actions, will suffice to prove these facts in an action for conversion. Proof of title will suffice as proof of possession until the presumption created thereby is overcome by other evidence, since one having title is constructively in possession in the absence of testimony showing the contrary; and actual possession is sufficient evidence of title to maintain an action for conversion unless the presumption of title arising from possession is rebutted by evidence adduced by defendant. So, possession of land, either under a title or a claim of title, is sufficient proof of ownership in an action of the conversion of crops or timber asproted therefrom. One who has never been in possession may establish prima facie title by showing a sale to him be one in actual possession claiming title. Plaintiff must prove his right of possession by a preponderance of the evidence, and if the evidence is evenly balanced on the right of possession, he cannot recover.

In actions for conversion, the conversion must be established by a preponderance of the evidence, but it may be proved either directly or by inference, and may be shown by circumstantial evidence.

In general, a refusal to surrender property on demand is evidence of conversion, and proof of demand and refusal makes a prima facie case for plaintiff. Nevertheless, a demand made after the property was out of defendant's possession and in consequence when he could not give it up is not

evidence of a conversion. Evidence of conversion arising from demand and refusal is rebutted by proof that compliance with the demand was impossible.

Where the case is tried by the court without a jury, the question of conversion is ordinarily a question of fact to be determined by the court sitting as a jury.

Whether the taking or detention of plaintiff's chattels by defendant, relied on as constituting a conversion, was in good faith or if for any reasonable or proper purpose and, therefore, justifiable, is ordinarily a question for the jury. However, if what evidence there is on the issue of malice rebuts any inference thereof, it is error to submit the issue to the jury.

The judgment must conform to, and be supported by, the pleadings and evidence; otherwise it will be reversed; and it must conform to, and be supported by, the verdict of the jury or the findings of the court. If it fails to meet this requirement, it will be void, except in cases where the discrepancy between the verdict and judgment dose not prejudice the rights of the parties. Since, as elsewhere shown, an action of trover is an action to recover the value of the property wrongfully converted, and not the specific property itself the judgment in this form of action should be for damages only, and not for the recovery of the property converted, unless the statutes authorize other relief; and the judgment in the alternative for damages or for a return of the property is erroneous.

Damages:

Although no actual loss is shown, if there has been a technical conversion the defendant is liable for at least nominal damages.

As a general rule plaintiff's damages, in an action of conversion, are measured by the sum necessary to compensate him for all actual losses or injuries sustained as a natural and proximate result of defendant's wrong; but there can be no recovery for losses which are too remote and uncertain.

It is the duty of the court, when an action for conversion has been referred, to see that the measure of damages adopted conforms to the rule applicable in such trails by juries.

Ejectment

Definitions:

It has been said, that: "As no branch of jurisprudence is more important than that portion of it by which real estate is governed; so no legal remedy should be more clearly understood, than that by which the title to landed property is judicially determined."

The action of ejectment is a fictitious mode of legal proceeding, by which possessory titles to corporeal hereditament and tithes, may be tried, and possession obtained, without the process of a real action.

Ejectment has been defined as "an action to recover immediate possession of real property" ; "a possessory action" ; "an action to try the right of possession to the land in controversy" ; "a remedy for one who claiming paramount title is out of possession." It has also been defined as "a possessory action *ex delicto*, founded upon a trespass, actual or supposed, committed by defendant in wrongfully obtaining possession of plaintiff's land."

Nature and Scope of Remedy:

It has been said that, although the form of the early common-law real actions for the recovery of the possession of lands may have been changed by the action of ejectment, yet the great principles of right involved in these real actions "have not been changed, nor can they be without a total subversion

of the whole system of property in land." And since the principles of the common-law action of ejectment are applicable to the more simple forms of procedure that have been adopted in many of the states of the American Union, it is important to refer briefly to the old real actions for the recovery of the possession of lands, in order to understand the purpose for which the action of ejectment in the common law.

Estates of freehold in land originally passed by livery of seizin only, that is, by delivery of actual possession, and therefore one who was in actual possession of the land was prima facie a tenant of the freehold, and under the common law if he were ousted, or dispossessed, of his freehold by one who had no right, he might without process of law make peaceable entry, but if deterred from that, he might be restored to his lawful seizin by making continual claim as near the land as he could. But if he suffered his rights of entry to be actually lost, by descent or otherwise, he could no longer restore himself by his own act, but must have recourse to his action at law. This action might be by writ of entry, in which he undertook to prove his own former possession and his dispossession by defendant or some one under whom he held, to which defendant might answer denying the fact of dispossession, or by showing in himself an older and better possession, and then upon the trial it was adjudged who had the clearest right; or it might be commenced by writ of assize, which went upon the suggestion that the demandant's ancestor died in possession and that he was the next heir, and therefore directed the sheriff to inquire by a jury whether this was so, and if found for the demandant, the land was immediately restored. The result of these real actions, however, was merely to

restore the claimant, if successful, to his former possession, and decided nothing with respect to the ultimate right of property.

The common-law action of ejectment succeeded the former real actions for the recovery of the possession of land. It was not originally devised as a remedy for injuries done to estates of freehold in lands, but as a remedy to chattels real, such as terms for years, which were considered as mere chattel interests. Ejectment was originally employed in England to enable the lessee of lands who had been ejected therefrom during his term to recover damages therefore, but it was subsequently enlarged to enable him to recover possession of the land. But as one who claimed that he had been ousted of his term must necessarily show that such term existed and that the lease under which he claimed was valid, the title of the lessor was thereby brought into question as fully and upon the same principles as it would have been in the real action, so that by alleging a fictious demise, the action became an easy and expeditious method of trying title to land.

Equitable Title:

The general rule is that a plaintiff in ejectment cannot recover on a mere equitable title, but is required to go into a court of chancery to secure the recognition and assertion of such title. Even a perfect equitable title will not prevail against a naked legal title. Neither can a recovery be had in ejectment where the only remedy is in equity. In a number of jurisdiction, however, an equitable title will support ejectment, even as against the holder of the legal title, at least where the equitable title is coupled with the right of possession, and where the

equitable title is paramount, or the parties claim under a common source. Exceptions to or qualifications of the general rule have been frequently recognized.

Thus it has been held that the action may be maintained against a trespasser by one in possession of land under an executory contract of sale, or by a partner claiming under a deed to his firm, whatever may be the precise nature of his interest, or by a purchaser to whom the vendor of the land has not executed the deed and so is in equity the trustee of the vendee. And in some jurisdictions one who has a perfect equity in land can maintain ejectment, as for instance, where the vendee in possession under a contract of sale has paid the full purchase price, or otherwise complied with the terms and conditions of the contract, or where plaintiff is in possession under an exchange of lands and is entitled to a conveyance. But a mere option is neither a legal nor an equitable title, and will not support ejectment. The beneficiary under a trust may recover against a trustee holding the mere naked title.

Equitable Estoppel:

The authorities are not in accord upon the question whether ejectment may be maintained upon an equitable estoppel. In a number of cases a title by estoppel has been recognized as sufficient to support the action; and it has been held that, where plaintiff traces his title back to a point at which defendant is estopped from denying title, he need go no further. It has also been held that, where plaintiff cannot recover under the rule as to paramount title, his action must be defeated, if defendant does not stand in a relation which estops him from denying plaintiff title. According to other

authorities, however, a plaintiff in ejectment cannot recover upon facts merely estopping defendant from denying his ownership or title. But plaintiff, not relying upon estoppel for his title, may use it to rebut a defense.

Superior Title:

Since the rule which renders it unnecessary for a plaintiff to deraign title beyond the common source is one of convenience, it does not deprive a defendant of the right to show that he has a superior title through the common source, or otherwise. Neither party is precluded from showing that the has acquired another and better title from some other person. Nor does the rule preclude defendant from showing that plaintiff has parted with his title. Defendant may justify his possession by showing that he holds under another deed, thereby destroying the proof of title from a common source. But a defendant cannot defeat the action by showing title in a third person independent of the common source without connecting himself with such independent title. Nor may a defendant defeat the rule of common source by disclaiming title under it and setting up an outstanding title with which he is not connected.

Right of Plaintiff to Possession.

While the general rule in ejectment is that the legal title must prevail, yet ejectment depends on the right of possession when the action is commenced, and it is essential to recovery that plaintiff have a present or immediate right of possession, notwithstanding he may have the legal title in himself; and where there are two or more plaintiffs, all must have the right of possession.

Conversely a right to immediate possession will support ejectment, even against the holder of the legal title. But since the legal title to land carries with it the right of possession, ejectment may be maintained of the legal title alone, as against an intruder, or one who has neither claim or color of title, and has admitted title in plaintiff's grantor. It has been held, however, that a right of possession will be determined only on the record title or title by limitation.

Ouster of Plaintiff and Possession by Defendant:

While ejectment lies where there is an actual tortious eviction, an actual ouster does not necessarily imply an act accompanied by force, but may be inferred from circumstances. There is a sufficient ouster when there is an unlawful interference with the owner's enjoyment of his estate by an unlawful or wrongful entry, with full notice of his rights. While mere entry unaccompanied by expulsion does not amount to disseizin, there may be sufficient ouster where an entry is peaceable and without force but is equivalent to a forcible entry, or where there is an entry and a claim of possession adverse to the true owner. And, although mere words are insufficient, a notice not to trespass may operate to give construction to defendant's acts upon the land, and so aid in determining whether or not there has been an ouster. A refusal of possession even for a temporary period, may be such wrongful exclusion of one entitled to possession as will be sufficient to support ejectment, and, where defendant's possession is unlawful, there is sufficient basis for ejectment, even though he has a right in the nature of an easement. A mere claim of right and title to land in possession of the owner is not an

interference with his possession, but there may be sufficient ouster where defendant in possession expressly denies plaintiff's title, or claims title in himself as by the record of a tax deed, or is in possession under chain of title from the lessor's ancestor; or where a widow in possession asserts title as donee to the exclusion of the heirs; or where a purchaser at a guardian's sale is in possession claiming title under the guardian's sale; or where defendant under a claim of right uses the premises in a manner inconsistent with plaintiff's ownership, as where there is a subjection of the land to the actual dominion of defendant, or where defendant exercises acts of ownership and control to the exclusion of plaintiff, as distinguished from a single act, or occasional acts of intrusion, such as the mere act of cutting timber on land and hauling it off, although it has been held that occasional entries and acts may be a sufficient possession when coupled with a claim of right and a refusal to deliver possession on demand. But where the acts done show no claim of title or interest in the land itself, and there are no acts of ownership and control nor any inclosure, there is no sufficient ouster. So where defendant has lawful possession and dominion over the premises, there can be no recovery.

Whether or not defendant's possession continues after he leaves the land must be determined by his acts at the time of his departure, the appearance of the land thereafter, and also his claims and intentions.

Successive Actions:

At common law, a judgment in ejectment is not conclusive on the question of title, and an indefinite number of successive actions in ejectment

may be brought of recover the same land, regardless of the result of previous actions. To prevent such a multiplicity of suits, equity assumed jurisdictional an early day to entertain bills of peace and to restrain repeated actions after the title had been established at law.

Defenses:

Since the fundamental question in an action of ejectment is the legal right of possession, and since plaintiff must rely upon the strength of his own title and not upon the weakness of his adversary's, as a general rule defendant in ejectment may, so to speak, fold his arms and await the establishment of plaintiff's title, since the burden of proof is on plaintiff. Any facts which go to disprove an unlawful entry and wrongful withholding by defendant constitute a legal defense. But facts which do not negative a wrongful withholding of the land from plaintiff do not constitute a defense. And since the right of the parties is governed by the facts as they existed when the action was commenced, defendant cannot defeat recovery by showing that he has abandoned possession since the beginning of the suit, or by showing that there has been an intervening period between the bringing of the suit and the final trial, during which plaintiff has been divested of his title even by his own act. So a defendant having no interest in the premises either at the time of action or of trial, but only in the interval, cannot contest plaintiff's prima facie title. Good faith is not an essential element in a defense to a possessory action. Possession which has been acquired by force or fraud against the will of consent of the owner and without color or lawful authority is no bar to an action by such owner. Nor is it any

defense that defendant is the wife of one of plaintiffs.

It is no defense: That plaintiff has failed to pay the taxes on the land; or, that, defendant's possession was under a mistake as to boundaries; or, that, defendant was in possession as an employee of plaintiff under an agreement that he was to have a lien on the land until his wages were paid; or, that, defendant went into possession under a contract with plaintiff's grantor after she had parted with the title; or, that the land was temporarily unenclosed, where defendant had full notice of plaintiff's claim; or, that, plaintiff had offered to lease to defendant at a nominal sum the land occupied by him; or, that, the delay of trustees, plaintiffs in ejectment, in executing their trust had been sufficient to divest their title to the lands, where defendant shows no claim whatever to the premises; or, that, plaintiff had sued on a note given to him by one who had contracted to purchase the land, there being no connection between such third person and defendant; or, that, the land in dispute is inaccessible at the time of trial or judgment so that the sheriff cannot deliver possession; or, that, there is the possibility of an adverse right arising; or, that, one defendant was acting as agent for the other defendant, where possession is wrongfully withheld by both.

As a general rule defendant in ejectment, when not estopped from so doing, may defeat plaintiff's recovery by showing title in himself, and for this purpose may purchase outstanding claims and procure as many conveyances as he deems necessary or sufficient, even subsequent to the commencement of the action.

Defects in plaintiff's title constitute a good

defense in an action against one in peaceable possession, although without color or title. Title by possession must prevail until plaintiff establishes evidence of superior right to the possession.

Jurisdiction, Venue, Parties, Process, and Incidental Proceedings:

The question as to what court has jurisdiction of an action of ejectment must be determined by reference to the constitutional or statutory provisions creating the courts and conferring jurisdiction is upon them. Defendant may show that the value of the premises is in excess of the court's jurisdiction.

Ejectment is a local action, and the venue is determined by the situation of the premises, and not by the residence of the parties. The action must be brought in the county where the land lies. Notwithstanding the local character of the action, the venue may be changed.

Plaintiffs:

Plaintiff in ejectment must be one who has the right to enter and take possession of the premises in respect of which the action is brought as incident to some estate or interest therein. Whoever has such right is the proper plaintiff. Who this person is, under particular circumstances, has already been considered. Generally the holder of the legal title is the proper plaintiff. Under codes and practice acts, the action must be brought by the real party in interest. But the trustee of an express trust may sue.

At common law tenants in common could not join in ejectment: each was required to sue separately for his own share, counting upon separate

demises.

Return or Proof or Service:

At common law proof of service of the declaration and notice must be made be affidavit, which is jurisdictional; a sheriff's return will not give jurisdiction. But ordinarily where service is made by an officer of the court his return reciting the manner of service is sufficient proof thereof. An affidavit of return of service must state all facts necessary to show proper and sufficient service. The affidavit may be filed *nunc pro tunc*. An affidavit that defendant served was in actual possession, although part of the sheriff's return, may be controverted.

Pleading:

At common law the action was begun by filing a declaration in the name of a fictitious plaintiff against a fictitious defendant, in which the nominal plaintiff alleged that the land sought to be recovered had been leased to him, for a term of years not yet expired, by the real plaintiff, and that by virtue of such lease, he had entered upon the land, and was ejected therefrom by the nominal defendant after such entry. The rules governing pleadings in ejectment are the same as in other actions, and a declaration or complaint is sufficient where it contains a plain and concise statement of the facts constituting the cause of action, with an appropriate prayer for relief.

Generally speaking, a declaration or complaint in ejectment is sufficient if it contains averments showing that plaintiff is entitled to possession, and that defendant wrongfully or unlawfully keeps him out of possession; lacking such

averments it is insufficient. In the case of vacant and unoccupied lands, it is sufficient under some statutes to allege that defendant claims title thereto. Each count or paragraph should be perfect and complete within itself, and defective allegations in one paragraph cannot be aided by reference to another paragraph. A compliant which fails to state a cause of action cannot be aided by allegations in the answer. An allegation that plaintiff is suing for the use of another may be considered as surplusage.

Description of Property:

The declaration, petition, or complaint must describe the premises sought to be recovered. Formerly it was necessary to describe the premises with great accuracy, but under the modern practice the rule has been relaxed, and it has been held sufficient to give a general description of the land, or to describe it with "reasonable certainty," "convenient certainty," or "common certainty," or so that he land can be identified with the description in the complaint, or so as to authorize a judgment based on the pleadings, or by the application of the evidence to the description. And the rule which seems to find most favor is that the description must be sufficient to enable the sheriff to know what land should be placed in plaintiff's possession in the event of his recovery. An insufficient description may afford enough to amend by, so that an amendment sufficiently describing the property will not amount to setting up a new and distinct cause of action for the recovery of different property. If the complaint describes the premises with apparent certainty it will be sufficient of demurrer, as the court will not indulge in conjecture for the purpose of making doubtful or equivocal that which seems to be

definite. Where the premises are otherwise sufficiently described it is not necessary to designate the quantity, nor will a reference to a record in a public office, or a subsequent erroneous addition to the description, invalidate the declaration. If from the description the court can judicially know that the land is in a certain county the complaint will be good in this regard so as to give the court jurisdiction. The complaint need not describe the land in the same manner as in the deeds under which plaintiff claims, provided identity is shown. Before plaintiff can recover he must prove the identity of the land claimed. Where defendant is in doubt as to what property plaintiff means to proceed for, the latter may be compelled by rule to specify the premises sought to be recovered. Where plaintiff is in doubt as to the territorial extent of defendant's claim or possession, he may include in his complaint all possible territory. A complaint is not insufficient because plaintiffs may have claimed more land than they can prove they are entitled to recover.

Particular forms of description which have been held sufficient include: A designation by name where the property is known; a description by boundaries; by established lot, block, or plot number, or survey number; by sections and townships, or designated fractions or parts thereof; by structures, improvements, or other physical characteristics; by reference to a map or plat, or to a document describing the property; or by quantity in connection with other controlling particulars. A description of the land sued for merely as part of a larger tract is insufficient, although such larger tract is itself sufficiently described; the description must be such that the part sought to be recovered may be identified. But where the part is designated so that

it can be identified and segregated from the remainder of the tract, it is sufficient to describe it as such part of the larger tract described. The method of exclusion it is necessary to describe accurately the exclusion. The word "tenement" is sufficiently descriptive of land, the metes and bounds being given.

Where a complaint contains both a general and a particular description of the property, and they conflict, the particular description will control.

The complaint must allege that plaintiff is entitled to the possession at the time of the commencement of the action.

Since entry and ouster by defendant or a wrongful withholding of possession by him, is essential to give rise to a cause of action in ejectment against him, the declaration or complaint must allege such entry and ouster by defendant, or possession by defendant. At common law the allegation of lease, entry, and ouster was a mere fiction, and was admitted by the consent rule which let in the actual defendant to defend. In the modern form of the action, where fictions are abolished, entry and ouster need not be alleged, but it is sufficient to allege plaintiff's title and right to possession, and then to allege that defendant is in possession, and withholds the same form plaintiff wrongfully or unlawfully.

The declaration or complaint must show that the withholding of possession by defendant is unlawful or wrongful. It is usual to allege in terms that defendant withholds possession "wrongfully," or to use some similar equivalent characterization.

As in other civil cases, so long as a new cause of action is not introduced, an amendment may properly be allowed as amount or items of the

damages claimed.

Issues, Proof and Variance:

Under the general rules of pleading matters which are well pleaded and are not denied are to be taken as admitted and there need be no further proof thereof. So if plaintiff's title is admitted, but an equitable defense is set up, the only issue to be tried is that presented in the equitable defense. Plaintiff cannot, however, rely upon that part of defendant's answer which suits his purpose and reject the rest; and where defendant pleads two defenses, one a general denial and the other by way of confession and avoidance, any admission contained in the latter plea cannot be resorted to by plaintiff to establish the issue raised by the former. But a plaintiff may rely on an admission in an answer of title in his grantor prior to the date of his deed without admitting a further allegation therein as to a grant of the same or other lands by the same grantor to defendant. Immaterial averments in the complaint need not be denied. And denial of immaterial allegations as to time of seizin or ouster raises no issue except where the mesne profits are in question. Denials should be made in positive and unequivocal terms. A negative pregnant or a denial of a legal conclusion raises no issue.

New matter pleaded by war of defense or counterclaim is admitted if not denied in the reply where a reply is necessary. Issues as to title and right of possession must be as of the time when the action was commenced. Where issue is taken upon an immaterial special plea, if the truth of the plea is established, defendant is entitled to judgment.

At common law the plea of the general issue put plaintiff upon the proof of his whole declaration.

The consent rule confessing lease, entry and ouster does not relieve plaintiff of the necessity of proving that defendant is in possession of the premises which he seeks to recover.

Where the complaint does not set up any particular evidence of title in plaintiff, that, plaintiff claims under any special title he may prove title in himself in any way he can allowed by law.

The proofs must correspond with the allegations and cannot be contradictory to them, and plaintiff cannot recover upon proof of a cause of action different from and inconsistent with that alleged.

Where plaintiff pleads his title specially he is confined to such title and can only recover thereon, even though his title was unnecessarily pleaded specifically.

Evidence:

Under the general rule the burden of proof and primarily the burden of evidence are on plaintiff to sustain the issues made; but the burden of evidence may shift from plaintiff to defendant, or back again from defendant to plaintiff, as the case may be under the general rules of evidence. Matters pleaded in avoidance must be proved by the party who pleads them.

The indulgence or nonindulgence of presumptions is governed by the general rules, in so far as applicable. Where several demises of the land are laid in the complaint, each lessor is presumed to have consented to the action and to the use of his or her title by the nominal plaintiff. Where a deed from a common grantor is produced by defendant under notice, the presumption arises that defendant claims under the deed until the contrary appear.

A deed to land from a person in possession presumptively establishes title; but when plaintiff's title does not reach back to the sovereignty of the soil, a prima facie case only is established by proving the possession of some one of the grantors in his chain of title; but it has been held that where plaintiff adduces a chain of title to himself from a source known to be valid, possession in each of the immediate grantees will be presumed. A party will not be aided by presumptions favoring the validity of sufficiency of title deeds, where he is able to produce them and fails to do so.

Title is presumed to be in plaintiff where it is shown that he derainged title under a patent from the People; and where he traces he's title from the People to himself he establishes a prima facie case, and need not show possession in any of the grantees in his chain of title.

Presumptions in favor of title may be overcome by documentary evidence, or by proof of facts inconsistent with the supposed existence of a grantor deed, or by showing a better title or right, by showing title in defendant or in a third person, or that the action is barred by the statute of limitations. So the presumption of title arising from prior possession may be overcome by stronger and better evidence. Presumption of possession following the legal title to land is destroyed by a subsequent grant of the land. Presumption that possession of the land is lawful may be rebutted by circumstances showing such possession to be unlawful.

Trial:

The proceedings preliminary to a trial or ejectment, are governed by the rules of which pertain to preliminary proceedings to the trial of

civil cases generally, such as to notice of trial. Under some rules of practice where a rule for trial or non prosequitur is entered, plaintiff is bound, if he does not wish a non prosequitur, to file a description of the land, and to join issue and put the cause on the trial list.

The court has power, in a proper case, to appoint a receiver to take charge of the property during the pendency of the action, and the sheriff may properly be appointed such receiver, but the court cannot summarily eject defendant by ordering the sheriff as such, without giving the oath or bond of a receiver, to take possession of the premises.

In ejectment, as in other civil cases, it is the province of the court of determine all questions of law, and it is error to submit such questions to the jury. It is in the province of the court to determine questions relating to the validity, interpretation, and effect, of written instruments, and as to what constitutes title, seniority of title, adverse possession, and color of title, as distinguished from the facts upon which such questions arise; as to whether a deed shows title in the party offering it, or whether a grant can fairly be implied from possession of a certain character. And although it is generally the province of the jury to pass upon the questions of fact, yet where the action of ejectment is substituted for a bill for specific performance as in case of a parol contract for land, the court may also pass upon the facts.

The verdict and finding should contain a determination of the issue as to the right of possession in one of the parties, as a verdict or a finding that plaintiff is entitled to the possession. A verdict or finding that plaintiff is entitled to a fee simple estate in the premises, is not sufficient,

unless it also finds that the right of possession is in plaintiff.

Judgment:

Judgments in ejectment actions are governed by the general rules relating to judgments in civil actions in so far as they may be applicable.

The judgment must be supported by the pleading, and must conform to the material issues and proof; and hence a judgment following a description in the complaint which is not supported by the evidence cannot stand.

Keeping in view the changes in the form of the action of ejectment, it may be generally stated that a judgment by default cannot be entered unless such conditions precedent as exist in the particular jurisdiction have been complied with.

At common law a judgment of default for want of appearance can be entered only against the casual ejector.

Within and under the general rules, a judgment may be modified or set aside for a sufficient cause, whether the judgment is against the casual ejector, or against the tenant, on a proper showing made under a seasonable application; and the cause may be reinstated.

A new trial will be granted for sufficient cause, and in the absence of such cause it will not be granted. It has been held that a court may vacate an order granting a new trial in ejectment.

Execution and Enforcement of Judgment:

A successful plaintiff may enter and take possession of the premises independent of process, if he can do so peaceably, even though possession may have been given under a writ of *habere facias* and

the premises afterward restored to defendant, and in such case he is not a trespasser, at least so long as the judgment continues in force. A transferee of plaintiff, after judgment, may become invested with the legal right of entry and take possession.

The judgment cannot be enforced without process. A successful plaintiff generally is entitled to the proper writ for such enforcement after verdict and judgment in his favor. The fact that defendant has a right to a new trial does not militate against plaintiff's right to such a writ. However the right to such a writ may be kept in abeyance and made conditional by stipulation between the parties; or the issuance of the writ may depend upon the doing of certain acts as prerequisites. The court also may refuse to issue the writ for possession where defendant has made improvements for which he may have a claim, particularly pending an appeal.

Process is not necessary, however, where defendant quits possession or has had only technical possession; where defendant has disclaimed title; where plaintiff after recovery has accepted defendant as a tenant, or has made a peaceable entry.

As a rule where a judgment in ejectment has been fully executed by putting plaintiff in possession an alias writ will not be issued, especially where plaintiff is turned out by a stranger. In certain cases, however, an alias writ may issue, as where defendant subsequently dispossesses plaintiff by force; where, although the return day of the writ has not arrived, plaintiff is dispossessed by a person claiming under defendant's title; where the person against whom the writ is to run is guilty of contempt; where, although the title under which defendant claims has been acquired by him since

judgment rendered, the statute permits such writs to be awarded within a limited time; or where there is not a compliance with a mandatory statutory requirement for service a certain number of days before the return of a rule to show cause. And on the hearing for the issuance of such alias writ, and as bearing on the question whether defendant had reentered into possession of any of plaintiff's land as described in the judgment, evidence of a resurvey, made after the trial be the surveyor who testified on the trial, is not improper.

Costs:

As a general rule a successful plaintiff in ejectment is entitled to costs; and he may proceed therefor, although his title becomes divested pending suit. Where plaintiff sold the land and moved for a dismissal without prejudice, it was held he should be taxed with costs incurred previous to the nonsuit. It has been held, however that plaintiff cannot have costs where the evidence does not show any wrongful act done by defendant, even though it establishes plaintiff's title. Costs may be allowed, although defendant quits possession after service of writ or commencement of the action. Right to costs may be waived.

Mesne Profits Defined:

Mesne profits are the pecuniary benefits which one who dispossesses the true owner receives between disseizin and the restoration of possession, those profits which are received intermediate the original entry and the restoration of the possession of the premises.

When ejectment became a method of trying fictitious, the practice was introduced of allowing

plaintiff to recover only nominal damages, rents, and profits by way of damages not being recoverable at common law. To meet this difficulty the remedy sanctioned by the courts was an action of trespass *vi et armis*, usually termed an action for mesne profits, such action being regarded as a continuation of the action of ejectment, and supplemental thereto; and only the lands embraced in the action of ejectment were affected by the action.

An action of trespass for mesne profits may be maintained by a disseizee or plaintiff in ejectment who has recovered possession.

Liability for mesne profits rests upon the disseizor receiving the rents and profits.

The declaration or complaint in an action of trespass for mesne profits should allege plaintiff's expulsion, the length of time during which he was deprived of possession, and the receipt of rents and profits by defendant; and also the recovery of plaintiff in the ejectment action, and the reentry and possession by plaintiff, when these are essential ingredients of plaintiff's right to recover.

An action for mesne profits, although in form of trespass, is really for the use and occupation, involving the statement of an account, and it is proper to permit plaintiff to send out a statement based on the evidence to aid the jury in their calculation. It is too late after verdict to object to the action of the court in allowing the same jury which tried the case on the merits to fix the value of the land and the rents and profits thereof and the value of the improvements claimed by defendant. It is no ground to stay an action to recover mesne profits that there is a suit pending in the federal court brought by the United States to cancel a patent under which plaintiff claimed title.