Reeve Tapping

Note by Henry L. Ellsworth

Pleas and Pleadings

Pleadings are the mutual allegations between Plff and Def put down into the legal form and set down in writing.

Pleas were anciently oral 3 B C 223

10 Coke 132 —

From Edward 1st the reign of William they were made in Norman French —

From Edward 6th to Cromwell in latin

From George 2d they have been made in english —

3 B C 317 and onward 324. 3 S & R 159 —

In order to a full attainment of the intricate science of law — sound sense and correct logic are necessary —

For all pleading is a syllogistic process having a major and minor proposition and consequently a conclusion — If the major and minor proposition

are admitted the conclusion is only to be avoided by alledging some new matter—

The first stage of a suit is a writ— a mandatory letter directed to some sheriff to compell the Defft to appear and answer to the Pltff—

The Action in most cases commences at the writ

3 B & P 73— Comyns 454— 1 Will. 147— 2 Burr 916— 7 D & R 4—

Declarations come out with the writs in Connecticut— The suit does not in all cases commence untill the writ is served— this is not the case in England—

The Pltff must have his cause of action complete at the time of commencing the suit—

The first stage of the proceedings is the Declaration— The writ is no part of

of the Pleading

Plowd 84 Just 171 L P 75 6 B 296

4 Bol 8 -

Declaration is an exposition & amplifyication of what the writ contains

Plea answers to the latin word placitare

Carthew 304 - 1st Saunders 338 note 6 Laws

1 & 2 Salk 219

The next part of the proceedings which follows the writ or declaration is the Deft's plea -

4 Bacon 1st B B 628 -

There are 2 kinds of pleas on the part of the deft - Dilatory pleas - and pleas to the action 4 Bac 6 - B B 301st

Dilatory pleas are such as tend to delay the suit by questioning the mode of obtaining redress rather than disputing the action itself -

3 Instances of Dilatory pleas -

1 Pleas to the jurisdiction of a court

2 to the disability of the Plff.

3 Pleas in Abatement-

3 BC601. 4 B35th-

Plea to the action always denies the merits of the case and the right of action in the Plff- The cause of action may be denied by denying the Plffs allegation or in confessing it in & avoiding it by estoppel-

Lawes 87 and 8- 115- 130- 140- 3d B 303-805-6

2 modes in the forms of denying

1 General issue-

2 Special plea in bar-

3 B 805- 4 Bac 54-

The Deft may answer the Plff in a demurrer in a point of law- yet a demurrer is no plea- but a cause for not pleading-

4 B 129- 1st Inst 72 A 5 Mans- 132-

Note General issue is the same as plea in Bar-

In every kind of plea 2 things are necessary

1 That the matter be sufficient-

2 That that matter or substance must be expressed according to law-

A defect in these respects give cause to a demurrer- Hob 164- Crok 683- Law 45
It is necessary to state only facts- and unnecessary to state the conclusion of those facts leaving to the judge to determine what is law- But in pleading a custom the party must plead the law
Doug 159 5 T.R. 70 Law 46-
All pleading should be direct and not argumentative or by way inference-
Plowd 128- 7 T.R 458- 1st Inst 603
Law 75-6- 131-2 134
'Pro eo quod' quia- first have been considered to be sufficiently affirmative
1 Saund 117 note 4 2 Vent 278 Law 47-69
It is never sufficient to state the evidence of the fact in the declaration- as that I can prove the Deft did so- or A said that B did so and so-
2 Mort 73- Co James 683 --

Pleas and Pleadings

1 Each party pleading, is to be taken most strongly against himself – this is the case in all contracts –
Hob 234 1 Inst 303 Plow 252 – Lev 52 Salk 186 –

2 Time and place must be alleged in traverseable parts – parts traversable by a general issue is what is meant by traverseable parts – Lev 57 8

3 The number price or quantity never need be stated truly except where a variance might be produced – Wkly the omission –
Lev 29 –

4 Mere surplussage does not vitiate any pleadings – material repugnancy or contradiction will destroy the Pleadings
4 Bac Ab 94 1 Inst 303 4 Co 42 –

5 All things should be pleaded according to their legal operation –
1 Inst 193 B. 200 B Comb 59 Doug 642
1 Ld Ray 446 2 H Bl 11 –

That which sufficiently appears on the face of the record need not be averred—

9 C 54 Andr B— 11 C 25 A— 7 C 40— Mod 65— 248

1 Inst 303—

All necessary circumstances implied in the facts already stated need not be averred specially

1 Inst 303 B—

What is admitted in the Pl^a by the parties cannot be contradicted even by the verdict of jury— since the office of a jury is to determine the facts in dispute—

B R 289— 4 Bac 2— 2 Ins 418— 2 Mod 5^th

General estates in fee simple may be alledged generally— But in particular estates particulars must be alledged—

2 Ins 47— 2 B. 333— 6 W 72

Immaterial averments need not be proved But impertinent averments need

"not be proved—"

Doug 640 Burton and Wright— 2 BR BF R 246

2 East 446—497— 5 E R 31—33

7 C 25 A— 8 C 120— 1 Inst 303 Carthew 66

Salk 519—

A party need not allege more than will amount prima facie to a cause of action— —

The party on one side is not bound to anticipate answers the possible answers of his opponent—

2 Will 100— 2 Bur 1137— L R 400— 1 Saund 299

If either party omits a material fact yet if the other party alledges the fact omitted by his adversary his adversarys plea is benefitted thereby and made good

5 Bur 197 1 Sid 184— Com Di tit Pleader C 85 E 37—

New matter alleged after the declaration must conclude with a verification

that each of the parties may answer the argu-
ments of his adversary — with either
1 a Confession 2 denial 3 Demurrer
3 BC 309th Doug 58 - Comp 578 - 2 Bur 772d -
1 Saund 103 in the notes —
Declaration — plea in bar
Replication — rejoinder
~~Rebutter~~ — surrebutter 1 Inst 304 A 6 BC 310th
~~surrejoinder~~ —
2 R 1449 - Str - 422d - 2 H B 28

Judgment of the law is always pronounced
upon the whole record —
The judgement of the law always attaches upon
the first defect —
& Bur 131 - Hob - 199 - 210. 8 C 120. 133 B.
120 B. 1 Saund 285.

Declaration as it is the foundation of
all the pleadings must set forth all the
claims of the ~~Pl~~ Plaintiff — as he must
recover ~~the~~ upon the allegations only

Plowd 84 - 1 Inst 117 A Hob 199 - 4 Bur 6-18
2 ws 68 -

If on the face of the record declaration there appear any fault which shew the ground of the action not to be good the action must fail-

Plowd 847- Cro Eliz 845 2d Saund 397 Comp 484

7 T R 4th Doug 61 3 B & C 278

When the party bound to a contract disables himself before the time for performance the Covenantee may prosecute for a breach of Contract 5 Co 22b 2

The omission of any thing in the declaration which is of the gist of the action is an inamendable defect-

Hence in this case the defendant may demur or arrest judgment

5 Mod 350- Doug 658 Gwinnett 3 B & C 395

4 T R 472 2d H B 201-

Matter of inducement

Matter of aggravation

1 Matter of inducement is some introductory

matter by way of explanation or amplification -

2 Matter of aggravation is some introductory matter showing under what circumstances the wrong was done -

These however both differ from the gist of the declaration -

Laws 66-69-70 -

In direct pleas the utmost certainty is required - This certainty relates to the description of the parties, time and place and the subject matter of dispute These things must be clearly understood so that a regular issue may be joined that the adverse party may know him and what he answers and also that the Ct may give judgment -

4 Bac Ab 1 Ins 303 Plowd 84 - Laws 52-7 - 5 685 - Comyns 683 -

As to matter of inducement and aggravation less certainty is required -

Laws 71-72

The word said does not imply sufficient certainty when there are two antecedents to which

15

it may be referred — some other sensible word should be added — as the first said &c —
2d E 66 — 2 L.R. 888 — 8 T.R. 178 —

Where the Dec. is sufficiently certain as to one part sued for and not to some other part the only part correctly sued for can be recovered —

Com D title pleader C. 32 2d Saund 379 — 1 Salk 218 — 1 Saund 286 in note Laws on p 59 —
Errors in the declaration must be demurred to; a plea of abatement cannot be plead to the Declaration — except in misnomers a plea in abatement may be made

Salk 212 — 1 B 15 — 1 Show 91 — Wills 278
Laws 172
A contract which at common law is not good without writing the declaration must declare the contract to be in writing —
But where the common law does not require a contract to be written the declaration need not state it as written —
12 Mod 540 — 6 638 — Bull N P 279
A party declaring upon a deed is not bound to set forth any more in the declaration than

will entitle him the Pltff to recover—
Doug 642—

Where from the facts stated the law raises a promise still in Indebitatus assumpsit the promise must be raised as stated in the raised face of the declaration—

1 164 - 2 L R 1517. Cro 2 913 - 3 Eden B 2 198
Salk 128 - L B 538 - 2 New Reports note B -
Strange 224 -

an agreement is tantamount to the word promise—
2 N B 62

Declaration may be either General or Special
1 General where the general facts are stated out of which the law arises—
2 Special where the special facts are stated from which the law by fiction is drawn—
4 Bac 8vo

Misjoinder of different parties in the same Declaration

When two or more persons are jointly interested in any right they both may and ought to join in defence of their right whenever it is infringed upon-
4 Bac 9 - 5 Co R B - 19 A - 1 Saund 153 - 291 f 5 T B 651
1 Inst 164 - 198 -

2 But when the right violated is vested in one person no other person can join in the support of action — he must sue in his own name Cro 2 143 - 1 Lev 315 —

3 In action by executors all must join in the support of the action even if one of the executors is an infant —

1 Saund 291 G - Salk 3 - 9667 - W Ca 95 —
non-joinder is to plead in abatement —
1 Saund 291

When there is no joint right violated no two can join in the action

B N P 5th - 4 Bu 511 2 W 427 - 2 Saund 215
Cush 6 - 512

When joined as Dfts —

When the cause of action arises out of the joint act of two or more persons all may be joined and in contracts all must join —

Hob 6 - Lutch 2 17 - B N P 5th —

If two join in publishing a libel one or both may be sued 2 Bu 985 2 T R 199 —

If the cause of action does not arise out of the joint act of two or more they cannot be joined in the action — Two persons are the same should cause words against the same persons existantaneously the two cannot be joined in the action — as the cause cannot be joined —

Croh 3 674 — 1 Bulstrod. 15 — 3 Wils — 5th Esp 564

In no case can two persons be said to be distinct torts committed severally —

Stiles 153 — 4 B 10th —

When there are two joint creditors the executor cannot join in an action with the survivor — the entire right of recovery rest in the survivor — 1 Bm & L 145 — 1 East 497 —

If two or more persons make an joint contract all must be joint in action —

2 Ab 393 & 99 3 Bro 697 —

But if two persons bind themselves jointly and severally — the Plff may sue one or both —

But if 3 on the same — the creditor may sue them all 3 or one of them — since it must be considered as joint or several — so if he takes 2 it is treated as neither — 3 Bro 698 — 6 T R 782 1 Saund 291 c 1 Sid 238 —

If two persons enter into a joint contract and one dies the action must survive the survivor

1 E 468

If two or more persons bind them selves by one con-
tract it must be considered as joint unless
the word severally is added—
2 Atkins 31 – Chit on Bs 175 – 1 H Bl 265 – –

Where the remedy is against executors
the action must be brought against them
who have administered—
Com Dig tit abatement to 1 Saund 291 g—
1 Ld Ray 567 – 3 Term – 557 –

If A delivers goods to B to be delivered over
to C – and B does not deliver them – the
Bailor A may sue – or the Bailee B may
sue – but A and C cannot join in the
action since their rights are totally distinct.
Chit on Bills 220 – 1 Bulst 81 – 8 B & Cr 9–10

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Title of Pleas and Pleadings—

What causes of action may be joined in one dec—

Several causes of action of the same nature may

Com D title action G – Com B 224

If several causes of action which require the sameness of judgment, at common law they may be joined in the dec—

Capiatur

Misera cordiat

5 Ben 191 – Doug 652 – 2 Will 319 – 1 Ven 366. 1 Will 252

1 Bin 30th –

Not an universal rule

1 Will 252

If several causes of action require the same judgments at common law and also may the same pleas they may be joined in the same count –

1 Will 252 1 T R 276 –

Several trespasses with force may be inserted in the same declaration –

Also several action sounding in trespass on the case

So also trover and slander —

1 Will 252 2 – 319

8' 67 – 8 1 Vent 223 – 2 B R 848 –

6 East 70 Comp 230th –

Debt and Detinue – sometimes several actions which require the same judgments at common law

but where general issue differ they may be joined

1 Vent 366th — 6 th 620-36 — 1 Keb 147 — 4 Bur 11

Several actions. If they are to persons in different rights they cannot be joined

Salk 10th 3 T R 659 — 2 Stran 1221 — 1 Wils 171

Carthew 235th 10th Mod 316 — 11 do 196th

What may not be joined

Where the general issues differ they cannot

Salk 10th 1 Bur 30th

Nor can trespass arising ex delicto be joined with trespass on the case —

Nor do be joined with contracts —

Salk 10th Th R 238 2 Wils 319 2 Bur 1114

Carthew 189 — 1 Bur 30th

Nor in any case can tort be joined with an action sounding of contract — vid. sa

Nor debt and account can be joined —

An account cannot be joined with

1 Bur 21 1 Mod 42 —

Where the judgment and the General issue be the same, the number of actions is indefinite that can be joined —

Effect of Misjoining -

A misjoining is an incurable defect and may be demurred to or the judgment may be arrested This is to prevent confusion and mistakes in record - Salk 10 - 1 H Bl 118 Carthew 236

3 Lev 99 -

In Connecticut we have no misdemeanors or capias - however these distinctions are observed here -

Misjoinder is often confused with Duplicity but they are entirely different -

Duplicity -

Missjoinder -

A dec may state that A entered into the house of B and broke open his house beat his servant per quod servitium & which joins these 2 actions -

5 T R 304 6 E 388 - 5 Bur 197 Salk 642
2 T R 160 2 R 1032 Str 61 - Com Digest title Pleader
W 2 M 1149 - 1178 Comb 244
2 T R 639 - 1 Chitty on Pl 196 -

If a demurrer is made to a misnomer the Plff cannot plead

1 H B 118

rules General rules -

1 The Dec must always agree with the writ
Doc Str 84th Cuts C 325 Hob 180

2 If the Plffs right of action is to accrue upon the performance of some f action he must aver the performance else the decl is fatally bad
7 C 10 A 1 T R 645 Vaughan 125 2 H B 574 1 Saun 319
2 N R - 240

3 But when a Plffs rights of action depend or accrues to something subsequent he is not bound to take notice of it -
7 C 10th 4 T R 688 - 2 H B 254 2 H B 574

4 If there are reciprocal covenants the Plffs need not prove the performance on his part -
But when the promises are dependent the performance must be plead

Cro S 645 - 2 Mod 309 - Hob 88th Com. R 265
1 Pon on C 359 - 3 C 10th 2 N R per 240 et al -

Pleas and Pleadings

1 The Dec must set forth the facts expressly and positively which support the gist of the action
1 Bos 303 Cuth 8369-2 Salk 636-

2 Allegation under a scilicet is certain and positive enough
2 Wils 335-1 Saund 169-2 291-1 Str 232-

The first general rule does not hold as to facts which are traversable- 1 Saund 169-170 note 2 4 Bl 18 10th 77th Mod 5-18

Nor does the first general rule hold with regard to matter of inducement- 4 BenB-14 Bong Yelm 80

The thing sued for must be described with certainty but the description is sufficiently certain if the jury can understand it- a ship and sails was sufficient in trover- 5 Bos 272 and 3- 5 6 3 4th Cuth 1817- Sal 628

Strange 637- 2 Saund 74 a note 379-

In trover a library of books is held to be sufficient- Quer? yet some six or seven pieces of linnen were not sufficiently certain though not so vague as the library-
5 Bos 252 5 6 3 4 1 Vent 114- Cuth E 806- 2 Shower 433

If the declaration is sufficiently certain as to some part and insufficient as to some other part and the whole is demurred to the Plff may recover as to that part which is correct if it is not one entire demand

Cro J 104-10 L 115- S R 395-1 Saund 286 in the note
Pa 344

Com Dig. Ple. C 32 - E 36 - F 25 - U 3 -

Bul. N P 8 - 10th Coke 130 3 Wils 177 - 2 Burr 985 - 1 Sh. 518
2 H. Bl. 318 Hob 178 -

When the action is brought for one entire indivisible demand and the Dec is not substantial defect the whole Decl. must be bad -

4 Burr 26 -

When the plea of the Def it being made to the whole decl. is defective as to any part of the Decl the defence must be bad in toto -

Com Dig. Pl E 36 - F 25 - 1 Saund 28 [illegible] 337 -
2 Saund 49th - Salk 312th -

If the jury assess greater damages than the Plff demands he may ~~take~~ remit the excess - or he may release and take judgment for the remainder 10 C 113 - 2 Burr 2 23 Moore 28 - 2 Bul 280
4 Burr 25 -

And if the Plff demands more than by his own showing he is entitled to, he may release and take judgment for the remainder — -

1 Roll 20 785 - Stiles 175 - 5 Burr 195 - 2 T R 2 Sh 113 - 123

An insufficient Dec may be aided by the plea in bar - Com Dig Pl C 85 - C 87 - 86 120th B 7 - 245 - 5th
- 59 -

Pleadings which follow the Declaration—

2 kinds 1 Dilatory 2 pleas to the action

1 Dilatory

formerly used for mere delay— an act was passed to prevent these dilatory pleas in Anne reign— 3 Bl 303 3 Wil 51—

We have no statute here— dilatory pleas must be tried the first court—

3 kinds of pleas. to the
1 Jurisdiction of the court
2 Disability of the Plantiff
3 Plea in Abatement

1 Jurisdiction— a plea to the jurisdiction may be the plea of certain privileges—

2 Where the cause arose out of the jurisdiction of the court if it is limited it may be pleaded— ~~3 The~~ Carthew 11th 354— 1 Bur 5th 3 Bl 301 Salk 2d 404

3 that the ct applied to ... has not jurisdiction of the subject matter. a plea to the jurisdiction may be made 1 Vent 333 10 C 68— 1 East 352—

4 Where the action is local it is a good plea that the cause of action arose in a foreign country——

Criminal causes are all local—

But when the cause of action is transitory no matter where it is tried—

transitory actions may be sued for in any part of the civilized world — Cowp 161-175-181-4 I B 5 B Brown 846 2 H B 145-6 —

the lex loci must always govern the decision —

A plea to the jurisdiction is on the part of the deft is the first plea since any other plea will waive his objection to the jurisdiction —

1 Inst 127 B — 4 Ban & Hob 1821

Pleas & Pleadings —

Pleas to the jurisd. are always signed by the defendant in person according to the English mode —
6 Mod. 146 Barnes 190 —

This rule cannot prevail when the plea goes to the subject matter — this practice does not prevail in Connect — this is a plea to the cognizance of the court 3 Bl C 303 Salk 298 Cowp 365 2 ... 10

Dilatory pleas of the 2 sort to the disability of the Plff —

1 Outlawry of the Plff — since he is out of the protection of the law — 3 Bac 761 — 2 Littl ... 197 1 Crokes 128 A —

Outlawry suspends rather than abates the suit —
4 Bac B 5th Lns 102 — 3 — 109th

Outlawry does not prevent a person acting for another person
1 Inst 128 A — 3 Bac 762 —

But if an action is brought by a testator or administrator who was an outlaw the outlawry may be pleaded in the suit Salk 1014 1 Com D 6th —

An outlaw is not furnished with immunity against a suit though he cannot sue himself —
Noye 1 — 1 Sid 60 — 3 Bac 761st —

Pleas & Pleadings.

Outlawry is always in the Plt pleaded in dilatory pleas or in plea of bar—
5th C 109 - 7 Co 29th - 1 Ins. 128 b - 1 Bac 4

But where the cause of action is not forfeited by outlawry it can be pleaded only in Dilatory—
1 Inst 128 b Dyer 227—

Excommunication— prevents a man from sustaining an action either in his own name or in the name of anoth
8 C 68 - 2 Bac 319 - 1 Inst 133 - 4th
The only plea to this is absolution—
8 C 96

3 ground of

1 Alienage that the Pltf is an alien—
An alien friend may bring an action for personal property but not for mixed or Real—since they cannot hold this last species of property
In Con. Aliens cannot purchase—though they may in some states of the U.S.
Comp 171st 3 B.C. 384 - Esp D. 489th 1 Bac 4 2d & 102
1 B C 371 - Stat Con 239—
Alien enemy can sustain no action—

Pleas and Pleadings —

therefore as a general rule viz an alien enemy may be pleaded in all suits —

Stran 1182 1 Bros cnt 158 6 T R 23 - 1 B[illegible] 83

1 Inst 129th

founded upon 2 reasons —

1 Being as an Alien and an enemy to the govern-ment he cannot maintain his suit

2 It would be nugatory to recover since the recovery is followed with an instantaneous forfeiture —

Public law or the law of nations is all his protection —

But an Alien enemy may maintain an action for an ransom bill —

All contracts between alien enemies arising in a state of warfare which tend to a reconciliation are binding between the parties —

Doug 612 625 - Crawe v Bland 3 Burr 1734 —

An alien residing under a protection from the govern-ment may maintain a personal action though he cannot support real actions as this protection neutralizes this person

2 H B 282 Salk 46 — 1 Bin 4 841 2 Str 810

8 T R 166

Pleas and Pleadings

Doubted whether an alien enemy not under the protection of government can maintain an action for another as administrator or executor

the weight of Mr Gould's opinion lies against him

1 Ben 84th Ord 65 & 8 infra dat

1 Popish recusant

2 Pramunire

3 attainder for treason or felony

4 Monk professed — These are minor pleas

3 B C 301 — 4 B C 880 — 4 Ben 36 — 148

Coverture is another plea —

This lies against feme covert suing in their sole capacity without joining their husbands —

1 Salk 332 — 1 B C 443 — 3 T R 631 — Doug 115

Coverture is only pleadable as a dilatory plea

Whatever advantage the deft can take in beginning of the suit by a dilatory plea if neglected cannot be pleaded to the action —

Carthew 124 — 3 T R 631 — 5 T R 705 —

If a female pltf has sued as a sole and marries pendente lite afterwards her coverture may be pleaded — This is the common law

1 B C 310 — Stat Ann 577 —

That the Pltf is an infant not suing in his own ~~name~~ the name of his Guardian or his next friend — 3 Bac 148-9 - 3 B C 301st Poll 291 - 2 Inst 1356 - Carthew 123 -

Lastly it is pleadable in abatement that the Pltf is non in rerum natura, non esse

2 Ws 104 - 3 B C 301 -

A plea to the dissability of a Pltf concludes to the person of the Pltf — where the dissability is permanent —

And where the dissability is temporary the Pltf prays the suit may ~~continue~~ be delayed untill the dissability is removed —

3 B 303 2 Ws 113 - 109

Last kind — Pleas in abatement —

Abatement in law denotes a destruction or taking away

These pleas extend to the writ only —

3 B C 303 — 1 Bac 15 Salk 295th Carthew 172d

3 Lewis 351st —

The cause of action begins with the word wherefore —

2d Swift 186 —

A plea to the writ is always an abatement but on the other hand all pleas in abatement do not

abate the writ – as in misnomer in the dec–
laration. 3 Bac 624 – 3 Bl 301 to 303 Lw 105 – Hem ... 3 Com 7 ...
3 Mod 132 – 1 ...

In the structure of Pls in abatement must be perfectly
strict – the least deviation will destroy
the utmost certainty in certain points must be used –
Com D 1st Abat l 10 8 T R – 185 – 6 – 5th 487 – Lws on Pl
55 – 6 – 107 – 134 –

Causes various of pleas in abatement –
1 Misnomer or the want of addition –
Misnomer of the Deft either in the writ or declaration
3 Bac 624 Salk 7th 3 B.C. 302 –
So also in Eng – the want of the Deft's addition –
– By which is meant the party's title place trade
By stat H 6 – pleadable in abatement –
This is in order to distinguish the party
3 B C 302 Carthew 12th 6 Mod – 103 – Lws on Pls 106
The deft's addition with his place of abode is
sufficient – Lws 106 –
Executors to personal actions –
6 Mod 85th 3 Bac 6 18 –

Pleas and Pleadings 35

Pleas and Pleadings —

Pleas and Pleadings Additions and Omissions—

A wrong addition as well as omission is pleadable in abatement— 2 L R 1114 Comberbach 63
3 B C 302

In Con— the only addition is place of abode in ordinary cases—

But when one is sued in his official capacity his title must be stated—

This is not for the sake of certainty but to show in what capacity he is liable—

3 Ban 620 Carthew 301—2 2 Vent 84

If such an addition by way of inducement is made this is surplusage and does not vitiate the writ— Croke Eliz 838— 3 Ban 621st—

When one is sued in his official capacity though his official title is stated still the place of abode &c must be mentioned—

When two Defts are sued— the misnomer of the one can not plead against the other

3 Ban 626

Quære— whether two persons being sued and on account of naming of one of the parties a plea of abatement is made does it abate the writ as to the other—

Carthew 96— 8 Coke 6 Ban 625— 1 Ben 465— 1 Com 279

Pleas and Pleadings — Misnomer of the Defdt

A defdt who pleads mis nomer want of addition or mistake of or in his addition he must give the Pltff a better writ—

As in the case of mis nomer he must deny he was known or called by the name by which he was sued—

Wms 554- 8 Bac 624- 8 Ed R- 515—

As a general rule all pleas of abatement must give a better writ—

Lws 89th 103-4 1 Saun 284 n 4 note Ld- 1078- Com Dig title abate L 1-2—

He must aver his known name by which he is called is his true name—

Salk 6-7- Ld R- 118-249-

If the defdt names himself in the beginning of the writ by the same name by which he is sued he cannot after aver mis nomer—

Lws 92 6 Ed R 487—

Mis nomer is to be taken advantage of by or plea in abatement— general rule

Cro Eliz 124- Salk- 2 Com L 186- 8 Ed R 058—

If one mentions or writ by a wrong name he must be sued it is said and in that name but his right name must come in by or plea—

Pleas & Proceedings — Misnomer of Deft and Plff

Mr Gaubert thinks he should be sued by his right name and in the writ an averment that he executed the writ by a wrong name should be made — 1 Burr R 18th — 3 Bac Abr 670 — 1 Bac Abr 216 — 3 Bac Abr 686 — Lord Coke says a mistake in his Christian name is an unpardonable error — because a man cannot be 1 Burr 8 — 5648 Christened but once —

When several persons are to be sued as partners and liable under a firm the true names of the individual partners must be given —

4 T R 608th —

Corporations on the contrary must be sued by their name as such — a mention of their several names which compose the corporation is superfluity —

2 Ld 244 —

A Deft may waive the misnomer — it is not necessary he should take advantage of the misnomer —

1 Burr R 18 3 Bac Abr 825 —

This misnomer of the Plff may be pleaded in abatement 3 Bac Abr 677 — 18 1 Com Dig 15 — 6th Mod 85 —

1 Show 392 —

At Common law a misnomer was not pleadable in abatement it is an indictment per judeng — and this would be no use since the Crown never prosecute

40th

Pleas and Pleadings Feme Covert &c

1 Chit 440 2 Hawk 181 – Cro Car 104 – –

Another cause is that the Deft is a feme covert
1 Inst 132 – 1 Sid 146th –

But if a woman sole being sued marries pendente lite she cannot abate the writ
1 Bur 9-10 Cro Eliz 828 Ld Ray 1525 – Mans 811 –

But she must plead it in abatement if she would avail herself of the plea –
Latch 24 – 4 Bur 29-39 –

But the husband may come 'coram vobis' and plead it in bar if the feme covert has omitted the plea in abatement Cro Car 331 5 Co 131 – Sal 400 4 Bur 9.1039th –

If judgment is rendered against the feme covert a writ of error may be brought by the husband and wife – 3 Esp R – 16th & 19"

If two persons are sued as husband and wife when they are not married it may be pleaded in abatement –
Lns 105

If an infant is sued without summoning his guardian a writ of abatement cannot be brought – the court will appoint a guardian ad litem – or call in his guardian
1 Inst 89th / 135 – 3 Bl C 427th 3 Bur 149 – 151 note –

If an heir is sued upon an obligation of his ancestor a demurrer is made – and not a plea in abatement – Lns 105 – 4 East 485 –

In Con. a conservator is appointed to take care of the estates of persons dissolute &c
If a person under conservator is sued – the conservator must be called in

Kir 174

Plead and Pleading 8 vol — grounds of Abatement

The death of the party or parties —
At common law of the sole Deft or sole Plff dur the suit abates
1 Inst 139 Cok 2 982 10 C 134
So also if one of several Plffs died the action abated
~~the action~~ unless in joint and several actions after summons
and severance
In actions real there is no such exception —
10 C 134-6626- 1 Ben 28 —
If one of several Plffs died after verdict before judgment
gives the action abated Roy 46B — at common law —
But if one of several Defts died pendente lite the rule at
common law was that the suit should not abate —
So whenever any joint tenants die the suit should not abate —
1 Ben & 3 Mod 249 1 Show 185
But if one of the Defts should die and the Plff should neg
lect to note it the Court the 249 judgment would be bad —
By Stat Con — and The suit does not abate,
if the cause of action will survive to the survivor
this was intended to remedy the abatement by the death
of the parties So vice versa. the same is the rule with
regard to the Plffs — 8 vol
2 Mod 115 to — 2 Ben 42 — Stat Con — title abate —
So if a sole Plff dies and his action survives to
his executor the cause of action does not abate —
In England the cause does not abate if the cause of action
survives to his executor after interlocutory judgment
In Con the interlocutory judgment is disregarded
4 Ben 257 Stat Con title Abatement

When a sole ~~Deft~~ Plff dies the executor suggest the death of the party and proceeds as executor —
When a sole Deft dies a scire facias must issue vs the executor of the Deft why the cause should not proceed — 4 Bun 42 Stat tithat 1 Com 5-4-5th —
If both of two Plffs die who may prosecute — the executor of the last Plff that survived the 1st —
The same with regard to Defts —
Real actions remain as at common law —
1 Ben 7-9 - Cok. 2 R 92 1 Inst 139th —

Variance another cause —
If the decl. varies from the writ this variance may be pleaded in abatement — Gyb. 5th 1 H B 240
If the variance is in the form only a plea in abatement is necessary to take advantage of it — Hob 279th 199-38 - 1 Bos and Pul 1926 - Cok 8 121 122
Pleading slight variances between the writ and Decl are discouraged in the English courts —
2 Wm 394th — 2 Mod 246 — Salk - 658 - 701st 6 Mod 303 —
Variance between the instrument sued upon and the description of that instrument in the writ — is no plea of abatement —
5 C 14th — 2 Wm 232 4 T R 814-16 1 Bos and Pul 7 67
Com Digest title abate c 12th —

Pleas and Pleadings — 43 cont.

If there is a difference between the instrument and the description of it in the Dec there is a mode to take advantage of it is by general issue — Plund 84th — Comp 167 — Doug 641 1 Str 660 4th T. 672 — 687 — 8 — 1 Bos and P. — 1 Shun 164 new Com Dittl returnd 12 Salk 659 — advantage may be taken.

1 Plea in Abat —

2 Under the General Issue —

3 By writing the error in the instrument and then demurs — Ibid 167

+Hob 18th 2 Wils — 389 — 2 Show 346 1 Saund 317 Plund 286 Com Dig. 3 93 —

Misnomer where it makes a variance may be taken advantage of by a general issue — But Misnomer as such must have a plea of Abat —

4 T.R. 612th — 1 T.R. 656 —

Commencement day morning a most beautiful day

the Nonjoinder or Misjoinder of parties in the suit is another cause of abatement —

When one sues alone when the others ought to join whatever may be the action an abatement may be plead —

1 Inst 164 A 189 A 195 B — 198 A — Salk 4 7 T.R. 243 1 Saund 291 291 b —

Pleas and Pleadings &c. causes of abatement

So also, one when several sue when the right action is in one a plea of abatement will lie

Cro 2 143 - 1 Leonard 315th Hob 72

these are universal rules -

If in an action in contracts one sues alone when others ought to be joined an advantage may be taken under a general issue - So vice versa if two sue where the right of action is in one -

2 T R 282 But N P 452 - Str 820 - 1 B and P 78

1 Saund 291 f - + 1 B & P 67 - 1 Saund 153 291 + 2

Where one of several partners who has withdrawn his name from the firm it is not necessary to sue him among the other partners to enforce any right

1 E P Rep 20 B -

If in an action on contract where one sues where another ought to be joined as appears in the declaration nothing will mend the error - 5 618 T R - Str 1146 & 1 Saund 153 - 291 f

Esp Digest 304th -

So if two sue where the cause lies in one

Pleas and Pleadings - 45th Cause of abatement

On the contrary Actions sounding of tort if one sues where another ought to join as Pltff a plea of abatement lies ——

Strang 820-1146 Sal 4 290-6 T R 766-5 6 186

On the other hand if two or more sue in tort where the right of action lies in one only an advantage may be taken by a general issue - 5 Bur 2611 Cro E-143-

If one part owner of a chattell sues upon action of wrong committed upon the whole and the Deft makes ~~no ate~~ abatement the other party may sue the same Deft for his half -

2 T R 279 1 Eb 416 - 2 " 536 - 622

Non joinder of Defts -

If one ~~of~~ two partners be sued on contract the nonjoinder is only pleadable in abatement - 5 Bur-2611 - 2 B 1947 - 5 T R 651 -

1 Henry B-236 - 6 T R 827. 369 Comp 832

Salk 440 cont -

The rule is the same in actions arising in quasi contractu" 1 Saund 291 b in the note 2 New R 365

6 T R 369 Carther-62-3-

9 6 52 B 6 T R 769 — 1 Wentl 34th

But in actions of tort by two or more the Pltffs may sue one two or more and they cannot plead nonjoinder in abatement —

8 C 159th — 1 Saun 420th 5 Bin 192 — 185 —

Torts are joint and several —

When the action respects the real property all must be joined though it sounds in tort — this is the only exception to the last rule

5 T R 651st — 1 Saund 291 E — 2 B C 182 —

In actions of contract made jointly and several committed by three if two are sued they may plead non joinder in abatement since they must either sue one or three

1 Saund 291-2 + 3 East 70th 71st

Misjoinder of Defts —

If two persons are sued on one contract made by one the advantage may be taken by general issue — 1 East 48th — 2 Day 272

+ 3 East 62.7 — — —

When there is a misjoinder of Defts there is another advantage given by Mr Gould

Pleas and Pleadings (47) causes of abatement—
expediency or to give the Pltf a better writ—

1 Pendency of a prior suit between the same parties for the same cause of action—
To prevent the profession in bringing a multiplicity of suits for the same action—
1 Ben 13 – 4 Ben 418th
Both the suits must be of the same kind and the cause of action the same—
2 The causes of action must be concurrent—
5 6 61st A&B L. C 4 B A– Hob–184th—
The pendency of the same suit in different courts may be plead in abatement– but this plea cannot be made when the cause is pending in West minster if the same cause is pending in inferior courts &
5 8 62, 2 Wil 87th 1 Com–49–50th
September 12th 1811–
It is not necessary that that the first suit should be pending at the time of pleading abatement—
It is suffecient if it was pending at the time of bringing the second action—
1 Ben 13– Dov Pda 10–
If the first suit is wholy ineffectual the pendency will not abate the second this is decided by law judges—
For if the first action is misconceived it will not abate the second– as they are not concurrent and the first is not therefore vexatious—

Plead & Pleadings 448th cause of abatement
1 Root 365-502
While the second action is not vexatious the Pendency of the prior action will not abate the suit—
If A owes B and there is an action pending A may sue A or A may sue B in actions of book debt—this is according to the statutes of Ca 1 Root 155 that Con sit both M—
The pendency of a former suit is a good plea though the second action contains another defendant— the suit abate in toto 1 Dist 47—1 Mon 21—
Hob 127 4 Ben 40 Carthew 90 7—1 Bro 13-14
If one of the defts are omitted in the first suit the action may be plead in abatement—
1 Bun 13-14 vide ante— no petition in 10 days—
If the second action is commenced on the same day on which the first was instituted it shall be presumed the second was commenced after the termination of the first—
C. M Chest 1 Com 122 2 Allyn 64—1 Bro 14th
No cause of abatement that the same action is pending against a stranger—
Anton 120 Hob 137-8

In case of an indictment it is no plea that the same indictment is brought against the same person during the pendency of the former — no plea of abatement can be made - the court has discretion to abate —

1 Bur 18th 2 Hawk 190 - 275th 367th

If two informations are exhibited against one person the same day they abate each other —

Hob 128th Moore 821-5 - 1 Com 49

The writs having unduly issued is another ground and so in general is any informality.

2 ms 101 Com D - tit abate h 1 -

If the writ is made returnable to another than the next term succeeding it is abateable —

3 Will 341st Salk 700 -

All writs must be returned to the next succeeding term which by law it can be returned —

If the writ is not issued by proper authority it is void and will abate. also for want of date or an impossible date. a want of certificate.

1 Show 80th 1 Lev 2 Ventr 2 592 - 1 Sid 304

4 Bur 2143 and cases cited —

A mistake in a writ is not amendable -
. 1 Show 80th

Pleas and Pleadings (50) causes of abatement

That the writ has a defective return — viz that the
is not sufficient time between the writ and the
return — 15 days in England —
Crob 250 Salk 63 — 1 Sid 406 2 Keb 402 —

If the service of the writ upon the Sheriff is
insufficient — eg if it is endorsed 4 or more days
Conn 8 Co 1 B 393 —

The return of the Sheriff cannot be contradicted
by a plea in abatement but by a general
issue when the Deft may be one of the Jurors —
In attachments the copy of the writ and of attach
ment with the list of the property attached
must be left with the Deft in this State (Con) —
1 Mod 54 — 128 — 563 — 2 B 130 — 346 —
When real property is attached a copy of
the property attached must be left with the
Town Clerks office — Stat Con — Attachment —
The want of a venue — 5 B in B 22 — 7 Sh 248
But in transitory actions the laying of
a wrong venue is no plea of abatement —
The Court may alter the venue —
The Deft must make affidavit

Att 94   Salk 699. 670 1 Bos and P 20-245 Comp 570

3 East 329th Com Dowtion Ch B[13] Lnes 74th —

At Common law the action whether real or personal must be brought in the county where the action arose —

However all actions are by fiction supposed to be brought in transitory actions where the court is held or in that county —

So that as a general rule transitory may be tried in any county —

But Real actions must be brought in the county where the action was committed —

Com Dig tit abate W7 — 16 Ch 2 & 3 1 Bos — 34 —

Our laws here differ from those in England in transitory actions —

In Con — Where the parties live — all causes must be brought in the county where either of the parties Plff or Deft live —

Before single ministers of the law the actions must be brought in the same town where ~~either~~ one of the parties reside —

Stat of Con title action acc —

That the action is misconceived ~~—~~ is a cause of abatement — As if a Plant sues on

Pleas and Pleadings (52) mode and effect of pleading in abate
ment — Trespass on the case when it should have been
trespass is pleadable in abatement —
Hob 129 Com Dabat. g 5 — Laws 108th
That the action had not accrued at the com-
mencement of the writ is pleadable in abate
& may also be demurred to — Com Dabat. g 6th
Action c — Hob 199 — Carthew 114 — 1 Thomas 147th

Mode and effect of pleading in abatement —

Pleas in abatement they begin and conclude
to the writ or as the case may be to the de
maying that the aforesaid may be abated or quashed —
B B C 313 Laws 108 — 9 160 5 Mod 132

When the plea goes to the person it concludes
with praying judgment whether the defendant
ought to answer — as in case of coverture having no
as sole —
Laws 109 Laws 110
When the matter of abatement is intrinsick the plea
concludes with praying judgment but does not begin —
Laws 108 — 9 Com Dig 4 172
When the matter is intrinsick the plea may begin
by praying judgment —
When the writ is abated de facto as the language of the
law the plea is to enquire whether the court will proceed —
Laws 109

Pleas and Pleadings Causes of Abatement

Character of a plea is said to be formed from the conclusion—

Lucas 112 4 Ben 50

By its beginning and conclusion says Lord Holt.

As a general rule the determination of the plea depends upon the beginning and ending—

Sws 107—145-6-3 2 B 593—4 Ben 49th

If the matter goes in bar ~~only~~ to the and the plea begins or concludes in bar it is a plea in bar—

When the plea begins in one form and ends in another recourse ~~[illegible]~~ must be had to the subject matter—

When the plea of the Pltf goes in bar and that of Deft ~~begins~~ begins and concludes in abatement the plea must be an abatement and not a plea to the action

1 L 593 2 do 1018 6 Mod 113-

Where the subject will go either in plea in abatement or a plea in bar and the plea begins in one manner and ends in another the opposite party may answer the plea either as a plea in bar or as a plea in abatement—

1 Ven 136 3 Mod 281

As to form vide 3 L R 11—58—57th 92—117—116

Sws on Plead in the appendix

Pleas & Pleadings (54th) Causes of Abatement

A plea in abatement which goes in bar is not a good plea –

A plea in abatement which shows the Pltff had no cause of abatement is irregular & bad in substance – 1 Bin 14th 85th Mod 244 Ra 40s – 1 Inst 128th 129 a & b – Lns 39-40-2 D 227 –

This distinction does not hold as to actions which are either pleadable in abatement or in bar

1 M 202 2 Bin 50 – Duplicity –

The Deft may plead the several dilatory pleas in their proper successive order – –

He may not plead two causes (at the same time) of abatement – Lns 108th Doulers Chaillard intro auto page 6 Com D tit Abat 1 3-4-5-6 –

1 Inst 304 A 1 Bin 15 –

When a plea of abatement is made and judgment is rendered a writ of error may be brought

No writ of error can be brought ~~fro~~ on any interlocutory judgment untill the final judgment –

A pleadable abatement if not made is waived –

3 Bin 151 6 D R 66 Carth 554 Carthew 124

But if the defect may be taken notice of in any stage of the proceeding a plea of abatement may be brought even after the action is decided —

2 B 594 2 Bott 253 — Stiles 254 —

A deft cannot assign for error that which he might have pleaded in abatement —

Salk 2 1 Snot 303 Cert 2 283 _ 575th —

A writ may be abated as to part and remain good as to part —

Hence a Deft may plead in abatement as to part and at the same time plead in bar as to the remainder — 2 Ber 8 D 420 Lwo 106 — th

A judgment rendered on a plea in Abat is not a bar to another action for the same cause — Com D — titl ae 2 4 — d 1 6. 43 — 662 8 — 46 — 8 6 33 8 — 98

[illegible]

When the judgment goes in chief no plea of Abatm to mak judgments when in chief —

If the judgment is for the Deft it is that the writ may be quashed — 1 Vent 22 Gil 112 - 2 Shr 42 —

If upon demurrer judgment is given for the Pltf it is that the Defs answer over

3 B 6 313 - 396 and 7 - 2 Wils 367 — 1 East 542 -

 Causes of Abatement

If an issue in fact is joined upon the plea in abatement of the Defft and judgment is given for the Plff the judgment goes against the Defft

Yelv 172 2 Wm 357 1 East 544 2 A 594 Plum 119—

This rule does not hold in indictments

2 Hawk 332 1 Bac 15 note—

If matter of abatement is plead on a plea in bar it is insufficient—

2 Ld 1020—1 East 634 ——

A plaintiff may pray a of the writ the cause is going to fall against him—

2 Ld in P 188—Bac pas 663—

That A defend cannot demur in abatement—

That is matter of abatement cannot be demurred to

2 Salk 220 1 Mod 6 Mod 198—Willes 410—2 Ld 73

After judgment upon a plea in abatement the Defft cannot make another plea in abatement

Hob 120 2 Saund 40 Bac Abr in Pleas 6—

But if after jud on Writ of Error

amends his writ he the Deft may plea to to the amendment—
Kirby 5-6—
After a general imparlance he cannot avail himself of the plea unless the cause of abatement arises after the imparlance—
8 B 6 316 1 Benj Salk 130
After the time has expired six days the Deft cannot make this plea— Com D-let abate 1 18—
All pleas of abatement in the Superior court must be made before the PM of the second day of the court In the County court before the impannelling of the jury—
1 Root 564th Stat Con 8-42 + 2 ws 173 and on new Swift P 297- Kirs plead 777-

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Pleas to the action 2 kinds
General issue
Plea in bar—
Issue is defined to be a single certain and material point issuing out of the allegation of the parties and a direct affirmative and negative—
1 Inst 126 A Com D pleader
The object of pleading is to bring the parties to a point—or issue
There can be no issue without an affirmative and negative— two affirmatives will not make an issue
1 Inst 126 A— 1 Pert 213- 2 B R 1312th 8 T R 278

Pleas & Pleadings (58) General issue—

1 W. Stran 1177 Rastall ent 535-b

In a writ of right the General issue (or mise)
is formed of two

3 B & C 305 - 2 Stran 1177

Issues in fact either General or Special

Lws 110th 4 Bac 54th

General issue is a denial of all the facts in the
declaration of the Pltf which it is necessary
for the Deft to prove —

A Special denies a particular fact —

4 Lws 126 A - 4 Bac 54th - 2 Lws on Plea 112 B
145th

For actions founded in any misfeasance
not Guilty is a General issue —

Misfeasance is any positive wrong —

Nil debet or similar contraria

Action on bond - non est factum -

Debt in judgment

Action of account against bailiff never bailiff

Action of account against one not receiver

Action of assumpsit non assumpsit -

Pleas & Pleadings - (59) pleas to the action -

Replevin - nil capit

Warranty - non Warranty -

Disseisin no mony no deeds in -

3 B B 305 - Buth E - 257 - 4 B 54 - 2 Cont 446 - 3 Mod -

324 th - 2 K 1500 - + 1 Str 467 - Buth E 259 -

Not guilty was a general issue formerly in assump

2 Str 1022 - Esp Digest 169 12 Cov 142 -

No rent in arrear or non debt is a general issue

in actions per cent - Comp 588 th

If to debt on bond - non debt is used instead

of non est factum, and the Defendant may never his debt as a simple contract -

5 Co R 118 -

General issue concludes to the Country or jury -

Not universal rule at Common Law - for they

may sometimes be tried by record or inspection

3 B C 331 -

Special plea concludes with a verification -

2 Str 943 - Laws 148 th - 2 Will - 113 - 14 - Laws 226 Pa th

1 B. & P 411 - by statute in Com - all acts by the common

consent of the parties may conclude to the court

The judges try every issue in fact & at Com -

mon Law - by the incompetency of the jury

If therefore there is no evidence found there is no trial

Pleas and Pleadings- 160

Pleas to the action-

Form of tendering an issue in fact-

If the issue is tendered by the def.t he in this form "and of this he puts himself upon the country"-

If the issue is tendered by the Pltff- that the fact may be enquired of by the country-

Joining the issue is done always by the similiter-

3 B & C 313- 1 Salk 126 A- 2 Ins 147-

Question- what may be the effect of omitting the similiter-

The want of similiter is not aided by verdict- in England-

Here the want of a similiter is aided by verdict in Co-

St 641- Comp 417- 1 Saund 319- nte 2 Day 392-

An issue closes the pleadings- and when it is well tendered by one party it must be compelled to be joined by the other-

Cas this 28th- 3 B & C 314- 1 Salk 126 A- 1 Saund- 338 Com 180

In tendering an issue in fact "the manner and form" is always used- sometimes the words are of the substance of the issue and sometimes they are not- when they are of the substance they amount to a traverse of the facts contained in the allegation- when they are not of the substance they do not traverse.

If the title goes to the point of [illegible] the words manner and form goes only to the form

If the issue is taken upon collateral facts issuing out of the pleadings there is a traverse

Litt Ent 483- 1 Salk 281 b- 4 Bac- 56-

These words-manner and form- do not put in issue the circumstances alledged to have attended the principal traverse

2 Ins 49- 1 Ld 120- St- 317- 2 Saund 319- nte 6-

action unless the facts are material-

If the circumstances are material vice versa

Pleas & Pleadings - (61) Issue pregnant

An immaterial issue is one taken on a point which does not decide the point of the cause -

And such issues are not aided by verdict - a repleader must be made - 2 Saund 319 - note 6 1 Burr 103 - 3 B 6 - 395 - Cowper 371 - 1 Lev 32 - Gilb 227 - 2 Mod 137

Also - An issue cannot be joined upon a negative pregnant -

A negative pregnant is that which contains an affirmative - 1 Inst 126 - 303 - 5 B on 201 - Crokes 87 - 2 Bur 944 - ...

A negative pregnant is good when the affirmative is not sufficient to maintain what is alledged on the other side - 2 ws 144 - & is bad vice versa - 2 ws 114 -

General issue is sometimes proper where none of the particulars alledged in the declarations are denied -

e g an action upon a bond by a female covertum a general issue is good alleging her incapacity though she acknowledg all the facts stated

1 Bon on bon 97 Salk 78 - 2 B R 1082 2 Pen Will 145 - Gilb Law of E 162 6 Mod 311 -

If the contract is in itself void and not in the incapacity of the deft a general issue is improper -

If the contract is only voidable it is improper to make a general issue - as by duress or imprisonment

2 B 6 292 - Esp Di 223 -

If the contract is invalid by reason of incapacity not absolute a general issue is improper - Esp Di 223 - 5 6 119 - Plowd 65 -

G L of E 162 - 3 Burr 1805 - Salk 675 - 1 Stran 498 -

If a Specialty is made void by Statute law the defence must plead the Statute this is at common law -

5 C 119 A - Hob 72 - G L on E 163 - 2 B R 1118 Esp Di 223-4

Pleas & Pleadings (62) issue

If a deed which has been (well executed but afterwards) destroyed by erasure & a general issue may be pleaded — the deft may plead non est factum 5 C 119 & B Mo 224 & D 234

Matters in fact in general only are non est factum —

Matters of law are not in question under the general issue —
Esp Di 224th

In the action at Common law of assumpsit any thing in general which shows the cause of action does not exist in the Pltf may be pleaded under the general issue —
[illegible] 118 3 Bur 353 2 Blks Stran 498 Bul N P 51 2 Salk 140 1 Leo 142 2 Ld Ray
1 Mod 210 denies the above —

Matters of law which do not go to the gist of the action —
Chitty 198 Es D 147 — 3 Bur 513 — 1 Saund 283 — L B 566

In debt on simple contract the stat of limitations may be plead in general issue —
So in an action of debt nil debet may be
L B 566 — Salk — 278th 5 Mod — 18th — Comp 588th 1 Saun 283 —

The consistency of the defence of (evidence) with the plea pleading [illegible] aside actions of assumpsit is a general rule & a general rule of giving in evidence in general issue
In actions of assumpsit advantage may be taken of the Statutes of fraud may be plead in general issue — by objecting to the admission of evidence on —
1 Brownlow 92 2 P Swift 214th
A licence cannot be given under the general issue — matter of justification being insufficient
4 Bur 6 Bul N P 17 1 Inst 282 & Hob 172 — Comp 478
2 Esp Di 317 —
Every defence which cannot be specially pleaded may be plead in general issue — and vice versa —
Every defence which cannot be given in evidence under the general issue must be specially pleaded —

Pleas & Pleadings (63) Gen^l Issue—

Lws 111

The Deft may give in matter evidence under the general issue any defence or matter of justification which does not arise from some act of the Plff

Stat lit Ple— this obtains here—

2 Swift 2 08— His 289^th—

So in an action of contract money may be given in evidence of an general issue— also by Stat of lim may be given in actions of both debt and all acts of torts— 2 Swift 215 not law—

L B 506— Salk 278— Comp 588—

Release in an action of assumpsit and debt may be plead in General issue by the Stat of Con—

The deft instead of pleading the gen^l Issue he may select a traversable a fact which goes to the gist of the action and plead to the country but must demur to the remainder of the declaration— This is called a Special traverse

Com D pleader 1 Lws 112—135 191—2 1 Inst 282^d Gil His 61—

A [illegible] Special plea alleging new matter that amounts to a general issue cannot be made—

For no special plea can be made which amounts to a general issue— 5 Bin 201—2 Hob 127^th Cok E 2 11^th 1069—

3 B 6 309^th— Statute Con trespass—

A special plea amounting to a gen^l issue may be made if the matter of justification be alledged

1 Lev 41 or k i 268— E S Bi— 38— an exception—

It is in the discretion of the court to allow a special plea that amounts to a gen^l issue

Cok E 871 2 Mod— 274^th— 8 Mod 166— 4 Bin 62 B— Hob 227—

Pleading specialy what amounts to a genl issue without regarding their distinction may be taken notice of a spe cial demurrer –
10 695 A 5 Bur 202d Cuk 6 112 157

The ~~fuss~~ ordinary cause is to plead the court to compel the deft to make a genl issue
Hob 127 5 B 201-2 Cr S 16 5 2 Mod 274 – 5 D of B – Inst B 3..
2 Day L 131st + 4 Bur 134 – 10 694 ~~A~~ Dink 306 –

Sept 18th

Special Plea

No plea which acknowledges there was once a cause of action or confesses the allegations in the declaration can support the general issue –

Duress in contracts may be given in general issue –
Usury on bond may be given in general issue –
L. R. 88-9 – 566 – Cowthw 356 – Lws 112th – Salk 394th – Cuk E 871 –
Com Reports 4th

Pleading specially what amounts to a general in tres-pass and assize at common ~~may~~ can be given in general issue by giving colour to the plff –
10 690-91-88th – 3 B C 309 – Cuk James 122 – 5 B ur 208-9 –
Lws 51 126 – 150 –

There is a species of plea which is neither a special plea or a simple general issue –
It is a statement of special facts concluding with the general ..
G. A. law of ev 16 – Plowd 66 1 Vent 9 – 210 – Salk 274 –
Mr Gould thinks it should conclude to the country
3 Keb 26th Plowd 66 1 Vent 9 – 210 2 Esp D 222 Sal 274 –

Gilb lawyer—163-4—
Such a plea may be demurred to— as 164-5—
Anciently if the deed upon which instrument the

5 6119 Gilb 163-4— thus far as to the Gen

Special pleas in Bar—

A special plea in bar is one which admits the facts stated in the declaration but alleges something as a defence or avoidance
4 Bac 2d— Lws 32 8th 115th 129—
Pleas in estoppel do not admit and avoid on the one hand or deny them on the other— Lws 38th 130-146-6 158
168-170— Will 13th 8 East 346— 3 B C 308—
A special plea in bar does not always though it does sometimes admit all in the declaration—
Hob 124 4 B 20th 95— Cro E 30th 418— 2 Lut 79th Lws 116-118
121-148— + Salk 41— 4 Bac 2d 73—
In all pleas of justification the facts intended to be justified must be confessed 1 Saun 28 3 T R 298 Salk 394 Cas 380
Co Di 318th—
The same hold with regard to matter of excuse

1 Saun 28 note 1
A special plea in bar always advances some new matter— most always in the affirmative—
3 B C 309th—
Hence a special plea in bar must conclude with a verification not to the Country—

The reasons that the replication must keep open the pleadings 3 Bl C 309-10 Lawes 158 - Comp 175th
2 Burr 772 - 8 Burr 725 - 2d Vaugh 368 -
The Stat permits a special plea in bar in bankruptcy to conclude to the country -
Laws 145 - 224 - 27
A deft may plead as to one part of the declaration and not to another and the first part shall be good
1 Saunders 338th note 5 - 339 - 1 Salk 208 - 312 - Carthew 3
All pleas of course admit ~~of~~ whatever they ~~are~~ not deny - Hard - 33 - 321 - 4 Burr 88 -
18th Sept Every deft must plead such a plea as is pertinent to the quality of estate which he is supporting,
1 Inst 285th 303 -
Every special plea must contain issue in the matter - some fact which is capable of proof or disproof - 1 Will 138 -
Every plea in which the matter of fact and matter of law is so blended that they cannot be separated ~~the plea~~ is bad - 1625 - 1 Ins 138th
A plea in bar must answer the whole gravamen or cause of action or it is not good - Saun 28 - 208th note 1 2d 5 0129 Leonard
Com Di pleader E 1 - Crok 268th -
And if a defendant in trespass pleads a release he must plead the trespass after the date of the release
Cob 104

Pleadings & Pleas – (67) plea in Bar

And the same rule holds with regard to the rest of the pleas
1 TR 40 – 1 Saund 28 in notes Lev 127 – 337th
1 Hob 28th 4 Bur 80th –
A sues B in an action of trespass where he says he
was a thief

Cro Jac 670 4 Bur 89 –
If a plea begins as an answer to the whole dec and is
good in part, the plea is bad –
Salk 179th Lev 135–6 – Strang 303 2 B 231 –
But if the plea begins as an answer to part and
furnishes only an answer to part it makes a dis-
continuance of defence the plff takes advantage
by nil dicit 4 6 b2 1 Saund 28th – note 3 –

4662 – Stran 303 – 2 Bur 1 TR 27 – Lev 135–6 – 161–2
A justification which answers the gist ~~of the gist~~ of the action
covers all matter of aggravation
3d TR 292 – 1 Ld 479th 136 – 3 Wil 20th 1 Saund 28th note 3 –
1 Hen B 555 –
Novel assignment is setting forth circumstantially
and particularly in the replication what was
generally set forth in the declaration –
3 B C 311th 5th Bur 213 – Lev 163 – 240th 197 –
A N Assignment concludes with an aver-
ment that the trespass newly assigned are differ-
ent from those stated in the plea
1 Saund 299 note Lev 164 – 5 – 240th

67

This averment cannot be traversed — 3 East 244 1 Saund 299

2 vo 165-241 - note 5th as to form

Directly necessary for the Deft to set forth all the special matter in avoidance however numerous But now if the particulars would lead to infiniteness more general pleading is admissible this is to avoid prolixity — Cro. E 749-916 1 Inst 303 - 1 Sid 215-334 2 Vent 256th 1 Saund - 117th note 1 2 & 4 Cr 4 2 vo 60-67th —

The def cannot plead performance generally if the covenants are partly negative — 1 Inst 303 — Cro. E 691 -

Pleading of performance where the covenants are in the negative the objection is only in point of form and advantage is only taken by demurrer. Cro. E 297

The Deft need not alledge more in his special plea than amounts prima facie to an answer - 2 Wils 100 2 R 400 - 1 Saund - 298th

Repugnancy in points material necessarily vitiates the plea though in points immaterial it does not vitiate his plea this is only surplus[age] 1 Inst 303 2 East 333 - as to form vide 2 vo 138 145th 154th 167th

Pleas & Pleadings - (69) Special plea in bar. Traverse

Doug 108 - 3 Tr 186" Lws 738 -

Traverse

A denial of some particular point alledged in the pleadings and tenders an issue. It may be made to any part of the proceedings —

1 Inst 282 Co 105

If it denies a point that is alledged on the other side it is a Special plea traverse.

Lws 116 118 121 149

It is said by Bowen and others that a traverse (concludes with a verification) closes the issue —

Ab Thom 877 4 Bin 67 - imm 5 624 3 Bur 321"

1 Saunde 103 to 1036

Absque hoc - are technical words of denial they are not indispensable - A non - without this will no answer - Lws 119 Saun 22 2 Tr 239 -

A general traverse may and generally does conclude to the country — in point of principle it ought always to conclude to the country with the exception since this will keep the pleadings open —

2 Tr 443 - 2 Will - 113 5 Roy 199 - 2 Bur 822 Saun 103 Salk 4 2 Ken 364

You may traverse by a direct ~~direct~~ denial of what is alledged on the opposite side—

A technical traverse generally concludes with a verification

A traverse by by direct and positive denial concludes to the county— 2 Show. 871 1 Saund 206 &c 207 A— 2 Saund 103 B— 1 Burr 320 2 do 1022 2 ... 364 &c

A wrong conclusion of a traverse is a matter of substance at common law and advantage may be taken of it by general demurrer But by the Statutes no advantage can be taken but by special demurrer

7 B 94 Co. 61 B 4 1 Vent 240 1 Saun 103 b— 2d 190 note 5

When ~~a~~ an absolute denial is made to an allegation on the other party a formal traverse is not necessary— 4 B 67 2 Show 871 1 Vent 111 Bay 98 2 Saund 108 &c

When a party alledges new matter inconsistent with any allegations advanced by those on the other side but not tendering an issue it is necessary to make a traverse— 4 Burr 27-8 Cro. 230 &c Lev 117-18-451- 1 Wilson 253— 1 Saund 22- 2 do 209 note 8 &c 3 B 6 810—

When that which is inconsistent on one side is alledged on the other

Pleadings & Pleas (71) Traverse-

Hob233- Lus150- 2 Stran 1132 1 Wilson 6

on the other hand when one party merely confesses or avoids what is alleged on the other side a traverse is improper — Cuk O2212 Mod 168 Lus 118 - 4 Ben 70

1 Saund - 14 - note 2 - 207 Com 4th Ed 624 B - Cuh 9.161 Carthew 166

Roll 14 2 149 1 Inst 1284

2 negatives will not answer

4 Ben 68 Lus 121-

The omission of a traverse when necessary was a matter of substance of common law but by stat

Amend

1 Saund 103 - b - 2 Mod 60 - 2 Saund 5 A - 1 Leon 43 - 4

2° There cannot be a traverse upon a traverse +

that is that when one of the parties has tendered a traverse the other party cannot traverse the same point but if it is tendered on one side it must be denied on the other side —

1 Inst 282 79 Hob 104 - Com Di plead g 18

But a traverse after a traverse may be taken though it is material - But this does not go to same point of the first traverse Hob 104

1 exception When the first traverse is upon an immaterial part the other party may treat the first traverse as nullity and therefore bring a new traverse by way of inducement - Hob 104 Saund 22 note

4 T R 440 6 24. 1 H B 376 400. Starr 117.

+ A deft may be plead ... demurrer to an immaterial traverse —
1 Saund 2 ... 221 ... 151

Where an action of trespass brought in one one county the deft pleads justification in a ~~...~~ another county when the fact was committed —

Cro. E 99 – 418. Cro. C 105 – 1 Saund 22 note –

1 Saund 207 – 9 Lev 118 – Com. Di. plea G 20

The party to whom the traverse tendered does not by joining it admit the matter of inducement – 4 B 416 note –

A protestation is sometimes ~~admitted~~

A protestation is "an exclusion of conclusion"

Com. Di. plea 10 –

The party tendering the traverse admits what he does not deny

6 Co 41 4 Bin 2 – + Lev 141 2 B 441 – 1 Ind 1120

... Section 192 8 B. C 311-12 –

A protestation is the only mode of denying those facts which cannot be put in issue

Plow 276 B Lev 141 + Lev 142 Com Di plead 10

A traverse cannot be taken but upon some material point 4 Bur 75 - 2 Saund 207 B - do 5 - 28 6 Coh 24th

But if such a traverse be demurred to it must be a special demurrer - this is not so by com law but by statute - 1 Bur 94-5 - 1 Saund 14th note 2 do 207 B -

lost one lecture Saturday Sept 16 1811 - vide the other title Sept to Octob 1st 1811 -

Duplicity - A double plea is one that consists of several distinct points independent of each other and requiring several distinct answers - 1 Inst 303 & 304 A - 3 Salk 142 - 1 Salk 180-218 1 Saund 336-7 -

Giving different answers to different parts is not duplicity - 1 Inst 304 A ~~Lw~~ Lws 131 - 133 -

Nor does the rule prevent each of several defendants from making different deffences to the whole dec or to ~~the~~ different parts -

Hob 70 - Lws 132 - 2 Stran 1140 - 6 Co

2 N B 72 - Com Di pleader e 2 - Doc Plaintand c 135 -

Duplicity is not allowed as it tends to prolixity and may be vexatious and produce confusion in records Plow 194 - 1 Vent 47 - 8

Every plea must be simple ~~single~~ - entire - connected and confined to a single point - 3 B C 311 -

This single point need not be ~~in~~ one fact as many facts may be necessary to constitute one complete cause of action - 1 Bur 320 - 2 B R 1028 - 4 Bur 120 - 21

Pleas & Pleading S (94) Duplicity

3 Salk 142

Some exceptions — in false imprisonment
many causes may be mentioned by the Deft since
they all go to prove the fact of imprisonment —
Plowd 85 2 Hawk 121 —

In action for malicious prosecution many facts
may be mentioned to prove the suspicion —
Cro L 134 — 871 — 900 — 583 — 4 —
And where one fact is alledged as the consequence
of another fact alledged it is not Duplicity
to plead both or rather to mention both
Com Dig Plead c 2 — Plowd 140 — A — 1 Burr 320
Distinct accounts in one dec tending to
establish one right of recovery does not
make Duplicity — 3 B 6295 —
Mere Surplusage will never make the
pleading double — 1 Sid 175 — 1 Keb 66 — Dyer 42 c
Duplicity in dec consists in making different
counts supporting different actions when
the design is to support one entire action
Co Ch Chas 2 c 14 — 1 Burr 665 — Com Dig Plead c 38
abatement y 4 — action a — L R 404 — 2 Burr 1098 —
If in debt on bond if the plaintiff states more

than one breach it makes duplicity

Com Di plead c 33 — 2 Lent 198 — 222 — Comber 203

3 Salk 108 — 1 Lent 114 126 — Ins 25 — 27 —

A new rule under Stat Williams — 8 Term R 126

459 — 2 B R — 1016 — 1011 2 Burr 820 — 2 Will 377 —

Comp 357 —

A com law the Pltff may assign as many breaches of covenant broken in covenants as he pleases — Com Di plead c 33 — 1 Bin 544 —

Cook C 176 — 4 Bin 131 —

In Con the action on penal bonds is the same as in actions of covenant broken at common law — 782 Stat Con tit action civil —

By Stat 4 and 5 of Anne the Def by leave of the court may plead many defences as there are

2 ns 27 — 8 3 B C 808 — called pleading double

no such practice with this in Con — but if the Def has made an ineffectual plea and can show to the court if he had taken another ground he might have substantiated his plea the court may grant a new trial — This Stat of Anne relates only to pleas to the Declaration —

4 Bin 121 Com D p c 2 —

Pleas & Pleadings (70) - Duplicity

Advantage can be taken of Duplicity but by Special Demurrer since it is a defect only in form and this Special Demurrer must state specially the grounds of demurrer

Salk 219 398th - Ld R 662 - 798 - 2 Will 219 - 1 Saund 337 Lms 182 -

If two distinct answers are given in bar to what is alledged on the other and the plt does not make demurrer he must answer both 1 Vent 202 - 4 Burr 119 -

The same rule does not hold in new matter or in duplicity since the last is radical defect pleaded as by Gen Demurrer Salk 10th 2 Ld 99th Ray 233 - 1 Ld R 274 8 Co 82 - Com 683

Defect & Oyer

When a party pleads a deed and makes his title from it he must make profert

Com Dig p 6 Com Dig p 6 Lms 96 - 7 B R 30 - Appen 22

This profert is made that the party may have a copy of it and the court may inspect it -

Com Dig p 10 6 Co 8 - 10 Co 93 - Rob 233

Profert & Oyer

When a party is entitled to oyer he need not plead without it and if he does plead without it he waives it. 6 Mod 28 Chitty 185 - 3 Salk 119

A bill of exchange or promissory note need not be profered - Chitty 185 - Bunbury 233 -

If a right acquired by deed will pass by law without the deed the party who claims the right need not produce the deed since the right is sufficient without profert -

Assignment of a lease is good by parol there fore the lease did not be profered

6 Coke 38 Ante b - 1 Bulstrode 179 - 1 Saund 9 - 4 3 T R 156 -

If a right will pass without deed if the party pleads the deed and makes tit under it he must grant oyer

3 Mod 64 Lutw 97

If a party makes title without the deed he need not make profert - 6 C 38 a if it is not necessary

Exception to the general rule -

A stranger need not make profert though he claims title under it because he is supposed not to be in possession of it Saund 9 A 1 Ld Ray 694 - 1 Ld Ray 694 3 Lev 83 Ld Ray 149

And generally any one who gets title by operation of law need not make profert of the deed

Plea & Pleading 78 Profert & Oyer

1 Inst 100 b 675 Gen hist 303

A Tenant by Curtesy must make profert but
dissent in the case in tenant in dower
1 Inst 225 A 1069 4-

Privies to deed must make profert in pleading
in all cases when the originals themselves would
be - 1069 2 94 - 1 Inst 265 - 817 -

A record may be pleaded without profert because
no person is supposed to be in possession
of these records - Dws 97 Bul N P 252 1 Inst 225

And to the first general rule there is an exception when the deeds are lost by time or chance or casualty - and the party claiming must
show the reason why he does not produce it
5 Co 74 B - 75 A B Ld Ray 151 - 1 Will 16 - Skang 1168
2 H & B 263 10 Coke 92 - B - 1 Saunders 9 d - - -
If the party pleads oyer profert he must
give the other party oyer which is impossible
B N 16 B L B 163 note 1 Saund 9 - A

When a deed is merely inducement no profert
need be made - 8 Co R 57 B 1069 2 - 6 C 33 B -
In Con it has been determined that profert is
unnecessary since oyer is demandable
without it 1 Root 366

At com law the omission of profert was an irremediable defect though by statute Anne and it a defect in form and ~~cured~~ liable to demurrer —
Hob 301 - Cesto 8 219th - 4 Ben 113th

When a deed is lost by time and accident or destroy by casualty it may be sworn to by witness —
It must first be proved there was once a deed
And in the second place that it is lost —
10 B 92 B - Peaks evi 29-30 Chitty on Bills 203-6
2 Ba 267 1 Atkyns 446 1 East 347 - 7" 65"
8th 273 1 N Y cases in error 272 Harris 367
3 Johnson 316 -
It was attempted to admit the Plaintiffs oaths —
2 Strange 1186 -
A sworn copy may be pleaded when the deed is in the hands of the adverse party —
Peaks evi 165 - 1 Esp R 50th Chitty on Bills 200
The profert being made the opposite party may crave oyer that is to hear it read and he may have a copy at his own expence —
3 B C 299 Lws 96 Hob 217 - 4 B 217 -
If a party pleades a deed where profert is unnecessary, it is mere surplusage and the other party cannot take advantage of it
Salk 497 2 Wm 395 Douglas
476-7
Ordering the oyer by the Court is not error but refusing oyer where it is demandable it is an error

Salk 498 - 1 Saund 9 b Lws 99 -

Where oyer is demandable the party must enter it on record — Salk 498 - 6 Mod 28 1 Saund 9 B - L R - 969 -

When oyer is granted by the court the party against whom it is made may enter it upon record and take advantage of it 3 B C 299 - Lws 98 - 9 - 6 Mod 28th -

After it is recited upon record if the illegality is evident from the face of it he must demur too 2 Will Lws 99

If the party praying oyer recites it incorrectly the Plantiff may sign judgment for want of a plea - Lws 101 - 1 Saund 9 - 6 316 - 17 Carthew 301st 2. T R 670 -

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Departure is the dereliction of a former defence or claim distinct from the former and not supporting it - 3 B C 310th - Plowd 1 - 105 - 1 Inst 303 - 4th - 2 Henry B 280 - 2 B 449 - Strang 422d - eg feoffment in fee afterwards in tail 1 Lev 81 - 1 Keble 376 - 409 - 512th -

3 Lev 48th -

If one pleads common law and afterwards special custom 1 Lev 81st 1 Inst 304th A Strang 422

Macomb and Fowler Assumpsit Salk 222 6 Mod 115 4 Bur 125 - 6

Novel Assignment in the replication is no departure in the declaration 3 B C 311 B N 464-17- Lev 164-5 8 Wils 20

Departure may be taken advantage of by Gen Demurrer Salk 221-2 6 T R 22-94- Stran 422. Cro Car 165-228.

Departure in pleadings is aided by verdict

T R 86 1 Lev 110 2 Saund 84 1 Saund-117-

Because enough appears upon record to entitle the party to judgment-

Demurrer is

A denial of the legal sufficiency of the allegation demurred to-

It admits such matters alledged by the adverse party which are well pleaded but denies their sufficiency to support the action Hob 233 1 Saund 88 &c Com Dig p g 5 & p g 3 B C 314-

A demurrer advances legal propositions- is not in strictness a plea but an excuse for not pleading- 3 B C appendix 23-24 2 Wils 292-

A demurrer may be taken to any part of the plea 1 Inst 72 A- 5 Mod-132-

At common law admits no facts but what are well pleaded- that is rightly pleaded in point of form-

But by Stat 4 Anne 27 Elizabeth it confesses other facts informally pleaded- It does not however confess any facts which are not aided by the statutes-

1 Wils 248- Holt 21 2 Salk 218- Hob-56 1 Saund- 286 Com Dig p g 3

The reason why Demurrer need not be made to matter informally pleaded is because such a plea fails if it is insufficient grounds of demurrer
1 Febc 10 Confesses an averment which

A demurrer never contradicts what appears already certain on the record
3 Lev 124 — 6 Mod 62 5th 85 5th Lms 168 5th

An averment of what is impossible is not confessed by demurrer — it being impossible is sufficient ground of demurrer —
1 Lill. 10 Com Di Ip 9 6th

A demurrer never admits facts averred which can never be proved as averred
6 Co Rep 44 A 2 Will 378 — Cyc 1192

A demurrer never confesses the truth of the allegations which are impertinent or immaterial
Mod 56 1st Lms 168 5th — 4 Bac 131

A demurrer never confesses conclusions of law made by the adverse party from facts stated —
Mod 56 — 4 Bac 131 —

After an issue in fact is joined there can be no demurrer — Com Di Ip 9 6th

A demurrer is generally called an issue in law
it more strictly implies an issue on a point
3 B 318 th 316 th

If there is a demurrer and an issue in fact in the same cause the demurrer is first

determined — Farmer 517 — 1 Salk 172 & 1256 —
If in such a case if the demurrer is for the Pltff he may enter a non pros for the part and have the jury assess damages upon the first
Sal 219 Show 574

There cannot be a demurrer to a demurrer — one exception where the plea in abatement is apposite says Ld Holt — 1 R 20 — Salk 219th — Lws 172 — Comb 306

When one party tenders a demurrer the other party must join —
It is usual in England to conclude a demurrer with a verification but this is unnecessary — Lws 172 — 1 Bl com 24 3 Mod 132 for the form 3 Bl C 28 append

In civil cases the judgment rendered upon any but is a judgment in chief —
In criminal short of felony the same —
Bl Com 1962 Hawk 334 — 1166 —

In prosecutions for felony if the prisoner's demurrer is overruled he may plead over
4 Bl C 332 — 2 Hawk 334 2 Hale 239 Cro 2 — ves 2 Hale 257 — 243 — 315 —
If a deft ~~ever~~ demurs to a dilatation and concludes in abatement

3 Lev 233 — Lws 178

Pleas and Pleadings — (84) Demurrer

Two kinds — General or Special Demurrers

1 Inst 72 A Lws 167

A demurrer assigning no particular cause of demur is general

But a Demurrer pointing out the special cause of demurrer is Special—

1 Inst 172 2 Ben 132

Anciently all demurrers were special—

Hob 232 1 Vent 240 — 1 Saund 337 b—

There must not only be a cause of demurrer but that cause must be specially defined in order to make it a Special demurrer

1 Wils 219 — 1 Show 242 — Comb 297 — 2 Lk 798 —

Ld Coke says it is a good rule to make them special always — 2 Bul 207 —

Special Demurrer reaches all that a general demurrer will reach and sometimes more

All substantial defects are reached as well by Gen as Special Demurrers by states of 27 Eliz and 5 Anne formal defects are reached only by Spec

1 Ins 172 A — Hob — 127 — 164 232 3 Salk 291 —

Strang 624 — — Com Di p 9 5 — 6 — Lws 167

for Stat 133 — 4 136 — 27 Anne does not extend to offer lo — Co 1.43

Plead & Pleadings (86) Demurrer—

In all pleadings there are two requisites—

1 That the matter be sufficient in law

2 That this matter be expressed according to the forms of law— 4 Bac 2 Hob 164th

The want of either of these requisites is good cause of demurrer— If the first requisite is omitted then you Demurrer— If the latter then there is Special demurrer only—

Hob 232 1 Mod—71—2 Lk—198—802—

The omission of that by which the right does not appear for the party is insufficient

Hob 232—3 4 Bac 2—119—134th—2 Roo 197—

When there is total want of substance a general Demurrer is proper— so when any material allegation is omitted as in cases where the owner omits to state the property in himself a general Demurrer—

Hob 166—198th—232—601 1 Inst 72 a Cas 1839—

6 Mc 69th 1 Sid 184th—

If one of the party pleads what he does upon the face of the proceedings to put a stop a general Demurrer is proper Laws 170th Wills 98—Inn 38—141

Plea & Pleadings (85) Demurrer

146-158-167-

A special Demurrer reaches only those defects which are mentioned as the cause of demurrer for as to all defects not assigned the Spec. Dem is a Gen Demurrer 1 b 688 4 B 122

If upon demurrer upon a particular point of the declaration is made the party could not make another plea to that part by any other original action-

But if the Pltf omits to state in the first some material allegation he may bring another similar action stating the particular allegation omitted in the first the judgment in the first declaration are no bar to the second- 14 Vin 610- 6 Mod 20- 4 Bur 116

If the first action was misconceived the judgment will be no bar to a second similar proper action brought by the same Pltf since the actions are not concurrent- and the rule is no concurrent and similar action can be brought for the same cause

1 b 7 3 Wils 240 Cowp 6 3 5 3 Wils 304 2 H B 779 & 1 7 831

Pleas & Pleadings 1861 Demurrer

Demurrer must be to the whole evidence and not to any one point—

Admissability is always a matter of law determinable by the Court—

But the evidence of an admissable evidence is a point determinable by the jury—

× Doug 650 2 Henry B 205th + Carpenters vs Haywood

It cannot hence be proper to demurrer to evidence relevant to the whole issue in any case whatever—

Evidence is always relevant to the whole issue when it conduces at all to prove the issue

2 H B 205th—

A demurrer to evidence puts an end to the question and refers to the court the application of the law to the facts stated—

A demurrer confesses the facts but denies their sufficiency to support the action—

4 Wan 36

The point must be first be obtained or ascertained before how upon the fact can be referred to the Court

2 H B 205—6th

Pleas & Pleadings — (87) Demurrer

When the whole evidence exhibited is written it may be demurred to this has been held always —
5 Coke 104 A. 1 Sid 442 A. Coke 8 751-2
3 BC 372 —

When it is proper for one the parties to demur to the other the other party must join the demurrer or waive his demurrer —
vide 5 Coke 104 Q. 8 751-2 1 Lev 87 —

1 Though the evidence is all parol the may argue on one side to demur and on the other side to join there can be no objection

2 If any one of the parties produces witnesses to prove an essential fact the adverse party by admitting the fact may compel the other to join or waive the evidence — Allen 182 H B 256

3 If parol evidence exhibiting the support the issue being certain and confessed by the opposite party he may compel the Pltff to join in demur —
2 H B 256 —

4 If the parol evidence produced is loose and did not terminate the adverse party cannot demur without admitting it to be certain and determinate — Rose and determinate means that last positive and determinate

5 Co Lit 102 2 Sc B 207th Bul NP 313-

5 If the evidence offered is circumstantial the adverse party demurring must admit admissibly every fact which that evidence goes to support- the evidence conduces to prove every point of fact to which it is relevant

Circumstantial evidence means not that which proves the fact directly but the proof of some other fact from which the first fact may not be deduced- It is improper to demur to this kind of evidence-

Doug 114-129th Com 127th- Co Litt 283 a

2 Hen B 207-9 Allen 18th- Bul NP 313th Stiles 22. 34th

If in any of these cases the party demurring does admit the evidence the other is not bound to join and if he does join the court cannot give judgment but a writ of novo venire-

Bul NP 313 4 Bac 137-2 Hen B 209 + Rusty 68-

In the year 95

2 Wils 257th-

On a demurrer to evidence no advantage can be taken to the pleadings- but after determination of the demurrer advantage may be taken

Pleas & Pleadings (89) Demurrer

by arrest of judgment - Doug 208-213th Bull NP 313-

It may be doubted

2 Swift 258-

The party whose evidence is demurred to may always demand judgment whether he ought to join - and if there is no colourable cause for demurrer the party need not join in demurrer P

Bul N P 314 Allen 18th 2 Hen B 205-208 2 Bull R 117th

On demurrer to evidence and joinder of demurrer the usual course is to discharge the jury and a new jury is summoned to assess damages - sometimes the jury assess damages conditionally Bul N P 314th Cro Eliz 143 2 D R 60 - Plowd 411th - Salk 284th Doug 212 2 Hen B 201 -

In Con no writ of enquiry - the judges ass damages - 1 Rook 670 2 Swift

If improper The party cannot demur because the judge has admitted improper evidence - a bill of exceptions is the proper method Salk 284th Bul N P 314

Pleas & Pleadings (80) Demurrer
6 E 7 A - Cro: C 66 8th -

exceptions in actions real -
If a pltf is overruled in a real action it is no bar to an action of an higher nature to enforce the same right - 6 E 7th.
This exception cannot obtain here as we have but one real action viz dessuzin and this is a mixed action since damages are recovered which is not the case in real actions -
If the declaration is insufficient and the Deft making no demurrer makes a plea in bar and the Pltf takes issue the Pltf can have no other action -

Skinner 120th 6 Mod 207th -

And the rule is the same if the plea in bar is a good one and the plantiff confesses the plea - some authorities -
When a party demurs to any part of the allegations to what is alledged on the other side it extend to all that is unanswered
Wills 288 - 2 wo 135-6 - 161-7 -
A demurrer looks back upon the record and attacks upon the first error on either side and judgn.

Pleas & Pleadings (BB) Demurrer — to Evidence

ment must be given to or against him who has made the first substantial mistake —

Hob 56th 199 200th — 3 Co 26 — 9 Co 119 D & B 1080 —

Sodh 458th 640th Com Dig — c 67th —

If in debt on bond a Deft makes a plea in bar and no breach is laid by the Plff the Deft shall have judgment upon demurrer

3 Co 52 8 Co 120 b — 1 Bls b — Palmer 287th

2 Bul 94th — Cro E 136 221st D & B 1080 —

If upon two pleas in bar which go to the whole declaration — and one of them goes to whole declaration and the other gives judgment for the Plff no Judgment must be given for Deft

1 Saund 80 note 2 Bur 749 —

Demurrer to evidence —

When the pleadings terminates in an issue in fact one of the parties may take the issue from the jury by demurrer

1 Inst 72 Bulst 213 D & B 1044 Bac 130

A demurrer to evidence is to be taken before the party demurrer ind makes evidence —

1857 70

Plea & Pleadings (90) Arrest of Judgment

If a party offering to demur is overruled by the court his remedy is by a bill of exceptions—

1 Bac 696 2 B 136 Crok 6249 — 341

The whole proceedings of demurrers are under the authority or direction of the court—

Hence a court may prevent demurring if the cause is improper—

2 Rol 1117 2 Hen B 108

The party dem must always state the evidence upon record and make all the aforementioned admissions— and then he says the aforementioned evidence is insufficient to support the issue aforesaid

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Arrest of Judgment and Repleader—

To arrest a judgment is to stop it or stay it—

This is done on both reduced to writing and read to court—

This proceeding is usually only [redacted] after the issue in fact and judgment has been given— but it may be arrested [redacted] after

2 Bur 900— Doug— 208 216 & 2 Hawk 271

According to Common law that judgment

Pleas and Pleadings (91) Arrest of Judgment

can be arrested for intrinsick causes—
8 BC 693—

When the verdict varies materially from the issue judgment may be arrested— 8 BC 693—

If the declaration is wholly insufficient judgment may be arrested— 8 BC 693

Contra If the issue is taken & defendants plea is radically bad the Plaintiff may arrest the judgment 1 Vol 2—778— 8 BC 695—

After verdict judgment may be arrested for any cause which after verdict and judgment might not be assigned for error—

1 Vol 97— 2 Vol 716—

The principal questions have arisen from defects in Pleadings— and here it has been determined—

1 If the statement of the title and that only is defective it is aided by verdict but if no title is shown or a defective one is shown the declarations not aided by verdict— and here a difference is made between the defect in the statement and the defect in the cause of action—

A verdict may cure a defect in statement but not in the cause of action—

Pleas & Pleadings – (92) Arrest of Judgment –

Doug 658 – Rushton v Aspenall – 3 B 6 394 1 Sid 184

Com Di pl c 87 – Salk – 365th Cowp – 825th – Bul B 320th –

The same distinction applies mutatis mutandis to the defendants plea or defence –

3 B 6 395th – Cuk E 228th – 1 T R 145th – Ld do 412d

7 do 518th 3 Bur – 1728th –

1 Any defect in the pls which will support an arrest of jd it would have been fatal upon a genl Demurrer – 3 B 6 393–4 –

2 But it is not true e converso that whatever will support a general Demurrer will support an arrest of judgment –

Hutton 54th 5 Bac 317 – 10 Mod 311th – 2 Wil 336th –

per Curtiu Buller – vide –

3 After a general verdict the court will presume that all facts not alleged but implied from those that were found ~~tha~~ were proved to the jury –

4 Every thing which was necessary to be proved for ~~for~~ the purpose of proving the issue as found, will be presumed to have been proved after verdict to the jury 7 B 487 Carthew 389 1 T R 6 1st – Bul N P 321

Doug 688 – 1 Wil 172d – Comp 827th –

All these rules conduce to the same point —

But why does the verdict aid the declaration.

Because upon presumption afforded by that verdict it supplies those defects which were omitted — 1 Com Dig 145 T R 487 — 2 Show. 233 — Cont Croke E 401 Com Plead 29 — 1 Inst 303 B. — Lev 48 — 8 Coke 82 b —

1 ms 48 et supra —

Contra — Nothing can be presumed after verdict but those facts which are found and proved and implied from those facts what must have been proved in proving what ~~must~~ has been found —

3 Burr 1728 — D R 810 1 Burr 17 — 7 T R 523 —

T R 487

Inadequate if no material allegation is made it cannot be ~~made~~ aided by verdict — So where the pleadings omit some material fact which are not proved from what has been found it is not aided by judgment

Bull N P 321 1 T R 645 Do 127 Do 125 — 2 Henry B 574

4 T R 472 — + Salk 662 3 Salk 12 — Doug 654

The court cannot upon the principle presume the existence of any fact which has not been proved but exists in matter of law — 1 Burr 27 3 T R 351 —

A motion of arrest of judgment after default operates exactly like a Demurrer— 1

2 Burr 900 — 2 Strang 291 — 1 Will 171st—

In some cases judgment will not be arrested for the error or defect though nothing is aided by verdict

this happens when the first radical fault happens on his side who makes arrest of judgment— The rule is that the party who upon the whole record is entitled to verdict shall have judgment however faulty 20 the pleadings may be on his side—

Hob 56th 199 — 8th C 120 133 Ld 1080—81 + 9 C 110 b Lev 244

1 Burr 311 n 306—

When issue is taken upon an immaterial point the Court may award a repleader

2 Saund 319 b—

Repleader is a pleading anew or over again

Issue may be immaterial in two ways

1 When the traverse is too precisely upon an immaterial point

2 Leaving that which is material puts in issue that which is not material—

If the issue on which the verdict is found is immaterial so that the Court cannot tell for [motion] judgment judgment ought to be undone— judgment

may be arrested and a repleader awarded

2 Bur 944 - + 3 BC 395 - 2 Vent 196th - Strang 994
1 Burrow 301 - 6 - Th B 458th - Ld R - 707th -

++ Lws 170 - 1 Ken 127th -

Suppose the declaration to be good - the plea in bar to be insufficient - and the pltff traverses the whole or part of the plea the Deft cannot arrest judgment and of course no repleader awarded in favour of the deft -

A repleader is never awarded for a defect which cannot be cured by a different issue
1 Bur 301 & 6 120b - 138b - Strang 394th Hob 56th 99

On a repleader awarded the pls begin de novo and at that stage from which the first deviation takes place from the true rules of pleadings - 3 BC 395th Salk 173 216th - 579th - R 458
Cowp 510th 1 Mod 2 -

A repleader is never awarded for the immateriality of an issue in favour of him who tenders the Issue - Doug 380 Cowp 501
1 Henry B 644th - 2 Saund 319th - Com Sid 324th -

An issue may be immaterial if found one way and material if found another - . .

2 B9442 Wd1448-4 Bac 66"

If a jury after finding a fact specially make a conclusion of their own the court are not bound to regard the verdict but may give the judgment as if they were none

11 C 10 Dyer 3 62 - Hob-53-56-

A repleader is never awarded after Demurrer but only after an issue in fact - for by demurrer says the law the parties have put themselves upon the court -

An issue in law ~~me~~ cannot be immaterial

5 C 56 Pop 42 - Salk 148 - 6 Mod 102 - cont vide 3 Lev 20 440 -

If a repleader is awarded where it ought to be denied or vice versa it is an error

Salk 579 - 6 Mod 2 - 1 Days Chester vs Ryleason & Contra

No Resp after default or discontinuance

Salk 579 - 6 Mod 3 - Comb - 328 -

At Com law repleaders were awarded before trials but since the Statute of Jeofail repleader may be awarded before verdict -

1 Bac 90 - 103 - 3 Keb - 684 - 6 Mod 2 Carthew 371 -

Salk 579"

Repleader is never awarded after a writ of error.

2 Saund 319 - 2 Lev 12 - 6 Mod 102.

Judgment is sometimes arrested for defects in the verdict - Croke E 133 - 1 Inst 227 D. 152 1 Strang 484 1089 - 3 Leon 82 -

Pleas and Pleadings — Of the Arrest of Judgment

If in a Special verdict & the jury find only the evidence and not the fact itself there must be a writ de novo — 1 East 111 2 Bur 1243 10 C 56-7 —

But if the jury find all the substance of the issue the verdict is sufficient 1 Vent 2.7.72 Mod 5th 1 Inst 227th —

A verdict which finds the issue is not vitiated by finding more — Cro Eliz 107th 6 C 57th 2 Rolls Abridg 717 — 5 Bac 297th —

But if the verdict varies from the issue in substance it is ~~[illegible]~~ not good — 2 Roll 707 — 719 2 Vent 151st

10 C 13 c Bul or B 8th 2 Wils 677th 1 Th — 508 — 532 Strang 1094th 2 Henry B 318th —

3 Ld B vid supra —

If the jury sever damages when they cannot be severed and ~~the~~ the Plaintiff does not attend on all his right to damages but one judgment cannot be given, for the Plaintiff 2 Bac 8th — 1160 — 7th Carthew 19th — 5 Bur 2790 — Esp D. 321 — 420 — 537th

Strang 513 515th 1 Lev 184th

When jd is arrested &c on account of an improper assessment of damages or any defect of verdict there is a venire de novo issued - 8 Mod 564th -

In criminal prosecution if there are two counts and one of them are defective and judgment is given generally, judgment cannot be arrested because verdict of guilty or not Guilty is given by jury

2 B 985 2 Hawk 627 6 Mod 384th Doug 703 - Ld R 886

In Conn. jd is ar- for many intrinsick causes - No other causes in general are arrested but what are arrested at Common -

Defect of verdict Kir 183-4 -

Thus if a jury should ask a third person his opinion - or determine the verdict upon a die

5 Bac 291 642 -

The latter crime is considered as very great misdemeanor -

So for any mis conduct on the part of the officer &c or party with the jury - 1 Burt 185th english practice

3 Bac 292

If one of the jurors is interested jd may be arrested or if one of the jury is so related as to found a principal challenge jd may arrested

Kirb 184th

If one of the jury is so nearly related to the trail of the prevailing party so that he could not judge upon the trail & jd may be arr

Hirb 279

If a juror has been before an arbitrator or attorney (or a juror on the same issue) or if he has given a previous opinion jud may be arrested Hirby 166-

Gen[l] rule - Incompetency in a juror if it goes to his impartiality and would furnish a principal Challenge is a sufficient cause for arresting judgment

Hirb-133-184

But any Incomp- which goes to his partiality only does not arrise from imparticle

by

Hirb 184 [illegible]

And though the incompetency does exist and go to his impartiality if the party knew this in sufficient season to make a Challenge and does not make a Challenge he waives it Hirb 166- 2 Dev 232- his right to arr

If one of the jurors has tried the same cause in court below the unsuccessful party cannot arrest the jd for the word is a sufficient means to determine the fact and make a Challenge—

A previous opinion upon a general principal of law by a juror does not support an arrest of jd— nor does it make cause for a Challenge— Kirb 426—

If a previous opinion upon the merits of the cause tried appears clearly not to have influenced the verdict jd cannot be arrested—
Kir 62 2 Swift 282 —

The party of moving an arrest of judgment cannot go into an evidence of the verdict
Kirb 67 [illegible] 87— 142— 273— 277— 2 Swift 264—
2 Swift 264 1 Root 578 —— + 3 Bac && 291— 2 2 Lev 206
Stran 604 Bunbury 51— + 1 Freeman 79— 5 Bac 291
where judgment is arrested for intrinsic cause upon motion—

On an arrest of jd no ~~co~~ cost are regularly allowed on either side because the party may have brought a demurrer
Salk 679— 2 Vent 196— 1 Sh 267— Kirb 89
1 Root 69— 70— 572—

The rule is the same if the motion in arrest of jd if the party making the arrest ~~brings~~ is overruled and the party brings a writ of error—

But this does not hold for intrinsic causes 1 Bott 572—

Nor does the rule hold in Con when an issue ~~is tried~~ in fact is tried by the Court instead of the jury— constant practice—

In Engd arr. of jd are made within 4 first days succeeding the 1 day of the term instant 1 B 6095

In Con— the arrest must be made on the giving of jd. it must be made within 24 hours after the verdict is accepted—

Kirb 2 & 5 572— for the form 3 B c appendix No 2 pay 21'''

End of Pleas & Pleadings delivered in 28 Lectures by James Gould Esq of Litchfield finished October 9th 1811

No 1 Writs of error

A writ of error is a commission given to the judges of ~~the court to examine~~ a superior court by which they are authorised to examine the errors upon which judgment was given in an inf

2 kinds Error in law — and Error in fact the former is the most common — the latter error may be brought before itself —

1 Writ of error in point of law —

This must appear upon the record; if you wish to bring a writ of error upon some proceedings not upon record you must get it put upon rec.d 2 Bac 183 ad 315 - Yel 209 - 1 Com 286

No question of fact can be tried upon this ~~demurrer~~ writ any more than upon Demurrer —

No writ of error is brought before the final issue upon the interlocutory judgments

1 Roll 3 B 191 8 Keb 108 - 1 Bert 215 Latch - 183

1 Sid 104th —

If a man omits to make a plea of abatement when he

6 TR 766 - 2 Hen 267 - 299th Carthew 124th -

object of this writ

It is to restore to a man what is lost by

an erroneous judgment - it must restore to a man just what is lost and no more -

By a supersedeas - a stopping the process of execution - a bond must be taken in every case in this state

But at common law no bond is necessary because the judgment may just as well be formed without bonds given - but this bond operates against the party who brings the writ as a security to the person against whom the error is brought or the Deft -

2 Bac 210 1 Wil 129th 1 Str 280 -

A judge has the power to reject a writ of error if brought for trivial causes -

A writ of error summons the Deft to appear before the court to hear record and answer

There can be no supersedeas where the judgment is executed - but it operates a supersedeas while the property is sold and ~~[illegible]~~ the money is recovered - there can be no supersedeas where the body is taken - 4 Bac 70 - 684 - 1 Bent 30th 2 Henry 172 - 4 Bac 681 -

The General issue is nothing erroneous in all writs of error - Court of KB is a writ of error in common as well as civil - from the KB to Exchequer Chamber from Ex Chamb to the house of lords - but you may go directly to the house of lords - 9 Judges are now a final court of appeal in Connect -

Writs of Error

At that time since the trial court of error in this State was the legislature but the impropriety of this court was fully perceived and they Legislature passed an act making the 9 Judges a trial court of appeal.

The house of lords in England is nominally a supreme court of error but it is a mere matter of form for the opinion of that respectable body has been formed upon each subject for 200 years without vacation from the opinion of the judges and if they happen to be equally divided then the Chancellor is called in to decide the point.

Lecture 2d

In a writ of error only costs are allowed when the judgments are affirmed. the former judgment in the court below is valid and an execution issues upon that. 1 Roll 774th 2. 805th Cro. C 442 2. 509th 2. 512th Cyl. 47th 1 Sid 202 Carthw 228.

When on the other hand the court reversing the recovering judgment if they have power to render judgment they render the same that the court below ought to do.

Error brought upon demurrer in the declaration is judged of and the court remanded or sent back

Writs of Error

4

To the court from whence it came -

When error is made by an inferior court who has the only jurisdiction of that offence the error must be heard by the court of appeal and sent back to the court from whence it came -

When a suit is to be tried by a jury court reversing the error the cause must always be remanded -

Writs of error lies well to Courts of Chancery a writ of error must be brought within 5 years -

Effect of reversal

When a person taken upon an execution and judgment is reversed it is not false imprisonment 1 Roll Abr 770 Cyc 179 8 Com 177

If property is taken upon execution before judgment is reversed the person reversing the judgment must be indemnified for his loss - but the identical thing so taken cannot always be returned but something equivalent in such cases must be given -

Though the officer has no right to sell yet law wonks at it make the bona fide purchaser safe.
2 Bac 281 2 Cyc 118 - 1 Mod 58 8 Coke 146
Croke Eliz 278 Croke 245

Writ of Error

5 In case of elegit - if judgment is reversed - the goods and lands are to be sold are to be returned - the difference between lands or goods sold by elegit and at the port is this, the former is private sale the latter is public at the port -

If a Sherriff sells lands to a stranger when he is not obliged by law to sell it is restored by reversal -

So in case of outlaws if the property is sold and reversal is obtained the goods must be returned or their equivalent -

1 Roll 778 Bac on error 86 1413 Cro Eliz 278 Yel 108 - 2 179 - Roll 107"

Judgments may be affirmed in part and reversed in part - as in debt and costs if the debt is brought before the County court and damages of 2 dolls &c are given - here damages may be recovered but not Costs and hence if costs are allowed and a writ of error be brought the judgment may affirm the damages and reverse the costs -

If jdg is given against adults and minors who do not appear by Guardian the judgments is reversed against both but here in Con the jdg is reversed only on the part of the minor -

It sometimes happens that a subsequent jd depends upon a prior judgment and if the subsequent jd stands when the prior is reversed—

An executor eg is sued as executor and refuses to pay a sci facias issues—the former judgment is reversed—will the sci facias be good Judge Reeve thinks the latter will not stand—
Ti'd 253 Pal 487— + 8 C 143 1 Roll 777th—

If a jury give more damages than is stated in the Declaration it is an erroneous judgment—but if after the ~~judge~~ verdict is rendered the court see fit they may discharge the surplus and give judgment for the rest
11 Co 115 Roll 281 Yel 45th—

In trover and trespass Judge Reeve thinks that more damages may !

11 C 115th Moore 281 Yel 45th

Errors in fact—

Are founded upon the hypothesis that some fact exists which makes the judgment erroneous—this may be and not be upon a record 5 Bac 157th [illegible] 198-217th 228th Lev 1207

Writs of Error

1 Salk 400 Carth 22 - 129th
This writ may be brought before the court who gives their judgment coram vobis.

Sh 4 59 Carth 338 Stran 639th
You cannot assign a error of law and fact in the same writ - for they ~~have~~ are incongruous the fact must be tried by a jury - but why may not the writs be united and brought before a court who has a jury and so let them try both - 1 Roll 751 1 Sid 142 1 Ven 252, 4 d 58th Carth 338th.

No fact against the record can support a writ of error in fact
1 Sal 262 - 1 Lev 76th - Cro J 508 Hob 264th Cro Eliz 464th

If a man is appointed justice of peace but not taken the oath - and gives judgment can this be assigned as error - doubted!

5 Coke 39th - 8 6 3 9 -
Can a man bring a writ of error in his own ~~favour~~ a judgment given in his own favour - he can this has been done by the court of this state Ct -
There is a diminution of the record - may be plead by the deft - and then a mandamus to bring up the

8th Writs of Error

The whole record—

Writs of error are neither matter of right nor grace but partake of both

Bill of Exceptions

1

This was not known at Common Law it was introduced at Common by Statute –
This is brought upon an error founded upon some interlocutory judgment – so in any other case where the opinion of the court has been expressed
3 B C 372 1 Bac 323 4 Bac 101. 7 C 13th –
A bill of exceptions cannot be taken in a court where a writ of error cannot be taken –
Writs of error may be taken from justices of peace to the Superior court in Con.
No writ of error lies in the Court of Probate since by statute there lies an appeal to the superior court –
1 Bac 327th 2 Show 287 – 147th –
Bills of exceptions are not as a general rule are not allowed in criminal cases
Cro. C 249 1 Bac 226 But N B 2 18-3 1 Bent 366 – Kelly 4th of 15 for criminal cases –
1 Inag. B R 551 Cont. 161 – 8 S R 239th
an account of the case – the interlocutory judgement with the facts upon which it was founded –
12 Mod 604
This bill must be tendered during the trial

10 New Trials —
1 Sal 218 Bul NP 315 —
If the facts are truly stated the judge must
signed the bill of exceptions —

New Trials

When a verdict is given against statute
a new trial must be granted — but it is
discretionary with the judges —
This power of revoke in all courts of Gen
jurisdiction
3 BC 1884 1 Burr 2956 Dr 698 5 Bac 240 —
1 Sal 648th —
Granting a new trial determines nothing
it only gives the party liberty to try the
cause 2 Will 316 Bul NP 326 1 Salk 644
4 Dr 469 —
A new trial must be given without prejudice
Effects of new trial
It introduces the the new trial without pre
judice de novo —
If money has been paid upon judgment the
money may be recovd back by indebitatus

New Trials

Assumpsit -

No man body be taken and a new trial is granted he must be let at liberty -

Bail is always discharged upon granting a new trial -

But the party claiming a new rule must be compelled to enter bonds to answer to the plaintiff in case he may again recover

1 Mod 21 2 Bl 892 1 Sid 348

Where there is no equity

When the object is the gratification of passion

A new trial is not granted -

If the former decision is wrong but would operate as to punish the party when the party was liable to be punished -

An exception where the Def^t prevents the joinder in trial 2 Burrows 1023 4 Term 338 5 Bac 246 [illegible]

Causes for granting new Trials -

1 When the verdict is contrary to law when there is no dispute about the fact -

2 Will 309 1 Salk 646 2 Str 407 1 Strang 405

2 When the verdict is against Evidence the court are very tender in granting new trials

12 New Trials
upon this point as it is the province of the jury to determine the weight of evidence —
Where two evidences appear and swear directly opposite the court will not of course grant a new trial —
5 Bac 247 do 290 2 Burr 654 B N P 327. 3 B 2897
2 Stronge 1140 —
3 Another ground for granting new trials is for excessive damages —
120 Cases where new trials were claimed only 6 were granted — they are seldom granted since they are properly the province of the jury to decide. — 2 Wils 246 — 161 — 205 —
In case of torts very seldom if ever made —
Bull N P B 327 2 Wils 405 6 Wils 5 Bac 250
4 Another ground of ~~damages~~ new trials is where the damages are too small
Judge Reeves said he never knew a case of this kind —
If a jury make any mistake there may be a new trial as for instance by a mistake in addition of charges costs and interest

New Trials

13

1 Strang 140 2 Strang 1052 1 Burr 342 5 Bac 248.

5 Another ground is misleadings.

when the Deft or Pltf. are under a demurrer by mocking a wrong replication—

A man praying a new trial must not only state his former plea but he must also show that he could not produce some evidence under the former issue which he could plead under another plea and which if plead is according to law must decide the cause in favour of the Countiff

6 Mod 82. 3 Burr 1845 2 T R 184 6 Mod 222 1 Salk 643-

In plea of bar the deft admits the facts of being guilty but asserts a new denies being guilty a cause must be tried granted—

This seems rather irregular but still it is so. no abuse of right is prevented by it—

In case of demurrer when a new trial is refused the judge must consider the ground

as frivolous -

6 Another ground is new discovered evidence -
In Con you may claim a new trial with
in 3 years - without it is the principal
ground of granting new trials -
The testimony must be new discovered and
if it could have been produced at the time
of trial a new trial will not be granted
5 Bac 252

7 When the witness has forgotten the fact
this opens a door for fraud and perjury
Why one case where a timid man fears to
cheat the whole -
5 Bac 252 3 Bac 352

In Con the motion by petition after court
has finished its session -

8 Where judgment is obtained against
on absent person or where the writ was not
returned - the ground is for fraud - if a
witness is hired to go away & a good cause
5 Bac 241 if Ab 246 & BC 891 2 Lev 140

New Trials

9 For some mistake or default in the conduct of the jury - eg if they cast lots - if one of the jury is interested and the fact is not known to the party -

In this case we move an arrest of judgment but a new trial for a fact is the only method at Comb. 7 Mod 54 1 Ventr 30 Strang 129 5 Bac 250 ca 288 2 Ld Ray 1401 1 Salk 285 Carth 299 2 Ld Ray 1248

10 For some mistake in the opinion of the court this mistake may be taken advantage of by a bill of exceptions -

5 Bac 244 - ca 245 - 1 Mod 119 6 Mod 242 7 Mod 63 - 10 Mod 262 1 Salk 17

11 When the council have made a mistake or in short have not been managed the cause with propriety - if an attorney engages to manage a cause and goes a hunting sporting &c - a new trial is granted the party injured must sue the attorney for redress -

But when an attorney manages a cause to the best abilities and makes some mistake which the best council are liable to, the Court grant a new trial when an attorney &c

10 New Trials —
not objected to illegal testimony
2 Salk 645 3 Burr 1885 2 Ld K 184
12 Where witnesses summoned are absent
but absence of Sheriff is no ground that is to
say the witnesses would not come —
If the adverse party has prevented the wit
nesses appearance a new trial must
be granted — and if any act of God prevents
his coming the same — but in this case
the witness must make affidavit and
if the evidence is important a new
trial is had 11 Mod 101 5 Bac 252 1 Salk 645
1 Ld Ray 30 1 Strn 691 1 Will 98 Bac 494
13 If a cause has been lost by the testimony
of an infamous and illegal witness, no decis
ion of this kind is known to have occurred
Bac Abr New 94 1 Salk 653 2 Atk 18 19 5 Bac
252

sometimes the court directs the jury to
bring in a special verdict but it is not
usual to bring a special but if parties
do not bring in a special verdict they
at will grant a new trial —

New Trials

Hardwick B 23, 7 Mod 87th.

Cases which do not fall under these heads may be the cause of granting a new trial— 1 Bur 54 & 1 Bur 390

13 Any misconduct of the parties— any attempt to influence the jury that are illegal— a new trial is granted without considering the merits of the cause— 11 Mod 141 5 Bur 2682

2 Vent 173 1 Vent 125th.—

Cases where the Ct will not grant a new trial

1 one new trial cannot be granted after another but this is old law not good—

6 Mod 22 1 Stran 691 2 Wils 244—

2 If it is mere question of evidence a new trial will not be granted 6 T R 638

3 No new trial is to be granted in criminal prosecutions brought by the public— There is this one exception if the criminal has seduced the witnesses— there is one more exception— when the judge has

18 New Trials
directed this year wrong in point of law -

1 Chan 345 1 Salk 626 Show 899

1 Wil 117 3 Wil 129 Stra 238 5 Mod 20 2 Ld 1203

On the part of the criminal a new trial will always be granted when the criminal has been unjustly convicted This is the case with all Qui tam actions

Quest. whether a Plaintiff shall have a new trial if he has not proved the Defts guilty in Contempt - This can have never been judicially decided - It operates like a criminal suit on the part of the Pltff -

For Slander no new trial is granted

No new trial is to be granted for any defect which might have been challenged at the time of the Trial

When there are two Defts and judgment is given against one -

In Cases the criminal convicted may

10th
Non Trial
may a new trial for himself but it does not affect
the other Defts - B & B 326 B & Salk 362.
Non Trials are never granted to plead the
Statutes of Limitations

Evidence

No 1

Witnesses are the persons who testify whether they speak viva voce or make depositions & Classed under three distinct heads

1 That written this includes all writings & documents up to the record itself

As a general rule the best evidence must be admitted that the nature of the case will admit of

2 Written testimony better than parol

2 Parol which includes all that may be obtained by witnesses viva voce or by deposition

Depositions are no better evidence than viva voce

This is supposed to go directly to the fact

3 Circumstantial or Presumptive testimony does not prove the fact directly but something else from which the fact is inferred

Sometimes presumptive evidence amounts to absolute certainty

It must not be a slight presumption

Evidence

Bad evidence presumption must be admitted since it is such that if all the facts offered by way of presumption be considered the result is absolute conviction upon every mind -

When presumptive evidence is drawn from written instruments it is called Constructive evidence

Legal causes for excluding witnesses

1 Interest - pecuniary interest is meant the kind of interest makes no difference the least interest is sufficient to exclude a person from giving evidence -

2 Infamy - is not meant a man having bad character or liar thief rogue &c but a man who has been convicted of the crime of false - It is that act of crimes which go to attack a man integrity such as forging - perjury -

3 Atheism - that is no evidence can be given with out an oath cannot be taken by him

Evidence

Therefore he cannot be admitted to give testimony

There is but one relation which excludes evidence - a son may testify against a father and vice versa &c &c

Husband and wife - they cannot testify against each other -

When both parties are willing the evidence of an interested person may be admitted -

A sues B on a note of hand - A is willing that B should testify and B also is willing, his evidence therefore is admitted -

Bunn 47 1 Salk 283 1 Salk 284 Harden 284

2 Hawk 431 2 Hawk 402

An exception to wife and husband testimony - when they swear the peace against each other -

2 When the public prosecution against the man for abusing the wife shall be the wife is admitted to testify - would - but judge never thanks the Court ought to be

Husband & Wife case in Strange

There is no decision to the contrary -

Hutton 108 - 1 T R + 1 Bent 144th

Another say the elementary writers when a wife may testify vs her husband viz in treason Browlow 47 - decisions have not supported this opinion of the elementary writers -

Relationship between clients and attorneys

An attorney cannot testify the facts confidentially entrusted to him

2 Bent 197

He may testify as to those facts which came to his knowledge without the means of his client -

Doubted - Whether if a man discloses a fact confidentially entrusted a friend can be given against him - the English courts have decided that he must give this evidence but it is to be regretted since its tendency is to destroy all confidence among mankind E N B

Evidence

Parties cannot testify - but suppose a man sues a number merely to prevent their giving their evidence - when this is done the immediate parties are struck out and the Declaration is altered - and then they give their evidence -

2 Bac 287 -

Accomplices or participes criminis are not witnesses - as turning states evidence &c -

They suppose themselves screened by giving evidence against their accomplices But there is no law to this effect the court may or may not be prosecuted -

2 Hawk 484 -

2d There is another cause for excluding witnesses for want of Discretion -

As respects persons interested -

No interested persons can be a witness and no matter how small that interest may be because it is impossible for the courts to discriminate the interests in all cases

Evidence

The interest must be an interest in the event and not in the cause. the latter never excludes but goes to the credibility of the witness. interest in the event is of two kinds - 1 Direct interest - as if he is a party - 2 Consequential interest. A sues B - A takes B to jail B gives bail - now in an action which may arise can B give give witness - since if he could swear B clear he might be released from his responsibility as bail - but he is only interested in the event and not directly but consequentially -

But a contingent interest cannot exclude the evidence - A 20 years old sues B for Rent due - he has one son - he is admitted as a witness perhaps yet he is soon to be heir and to have interested.

Examples of interested persons

A & B crimen three cases especially

Evidence

Their losses are the same – a judgment as one decides the principle for the other insurers – can these be considered as distinct persons? no!

The law never presumes that where two persons are similarly situated that they will conspire to swear the case in their favour – But where A and B are alike and A gives testimony for D and he gets judgment, this judgment cannot be given in evidence against A in a similar case against him –

1 Harris 958 – 2 Bac 2031 – 1 Salk 283 Dougl 174

When a witness says he is bound he must be excluded –

2 Burr 2459

Interest between the record and question.

Witness in civil suits when they were interested is the question always were excluded – But in criminal suits they are not excluded for prejudice but when excluded them in these cases

+ Forgery and usury

Forgery

origin of these distinctions with respect to forgery A grew out of the statute which gave the person injured 10 pounds & such matter him interested-

But in forgery- it was supposed that the report would be cancelled and then you he is interested- 4 Burr 2461- This distinction grew out of Ld Mansfield-

3 Burr Bent and Barber

It is now decided that interest in question does not exclude either in criminal or civil suits-

This doctrine has been adopted in the U.S. by the supreme court of errors in this union-

Exceptions to the general rule of interest including

There are a variety of cases which arise from necessity- the exception must be more as the statute must be construed as is regarded- 2 Roll 686 & Mod 114, 10 mod 193 Cald 361.

This rule has been applied in most actions where the goods were stolen-

Evidence

When a action is brought by the father for the seduction of his daughter the daughter may testify but then she is interested - yet this is necessary

Stran 1034

When a Guardian brings an action for the insant he cannot formerly be admitted as a witness - but any judge knows he can for suppose he recovers he recovers not for him self but for the insant - but he is as a bailor and interested consequentially -

Many 506 - 1026 - the same for the prochein

Hardress 176 -

When a sheriff has suffered an escape the escape is an involuntary escape -

The escaper is bound at all to testify against the Sheriff - he may and must testify - nor when the escape is voluntary no action lies against the escaper by the sheriff. The same is the situation of rescues - the man rescued may testify - these are admitted from a matter of necessity -

In all tort cases the exception holds good – A. B. C. commit assault and battery upon D – now D may sue A and admit B and C as witnesses – but if he sues them all he have no witness – but these persons are interested.

Third Class are Agents who transact business they are allowed to swear

Persons who become interested wantonly must give evidence – but who ever becomes interested by the act of God or by the concourse of events common to mankind must be excluded – Hardres 3 424 – Strange 406

There is one action at common law where the Deft is admitted as a witness viz in action of account where it is left out of to arbitrators. In Connecticut there is a statute regulating and we carry it still farther to book debts –

Where the master has sued for the injury done to the servant – the servant is not introduced, but judge Reeve thinks he ought to be admitted since the case of Strange 414 – 1 Bos 95 [illegible] 1 Nos 944

Evidence

"Generally when property is sold through a number of hands and action is brought against these sellers they cannot be admitted as witnesses for or against each other—

In case of Quit Claim Deed—shall you admit the person who gave this deed?

He certainly has no interest in it—but there is a difference of opinion—

It is understood in cases of hazard—the Deedee can have no claim against the Deedor All hazards are right when the hazard is equally known to the parties—

But when a quit claim deed is given as a bona fide purchase then this deed is the same as a Warrantee deed and the Deedee may recover against the Deedor—

Now in this case the Deedor ought not to be admitted but he is admitted—

another set of cases which arise out of the Statute of Forsign attachments—

A sues B and B absconds he owes C— A continues his suit against B and after judgment & several issues vs C— but here it must be

Evidence

proved that C owes D—then D is admitted to prove the debt which if proved must go to him—

Oct 21st Aw—

The court of Chancery observe the same rules for the admission of witnesses as the court of law—with this exception—interested persons are admitted—the Plaintiffs have a right to put the antagonist upon the his oath if they cannot prove the facts without his testimony but then one party cannot compel the other party to testify if the testimony would subject him to a criminal prosecution nor if his testimony would work a penalty to be paid to the opposite party—

In the court of common law you cannot bring another witness to prove the illegality of [one] witness by the admission of an other witness in his deposition but in a court of Chancery it is different—

Yet if A swears directly to a point in support of it B may be admitted to prove the opposite—

Evidence

In courts of law a man is compelled to speak - but in courts of Chancery all the facts stated in the bill are admitted pro confesso, if the D^ft will not speak - and sometimes a witness had rather that it should be taken pro confesso than testify. vide Peak -

A person equally interested on both sides was admitted as a witness -

A verdict found by a jury cannot be alledged as an evidence against the same person on for the same act in a criminal but civil prosecution -

Where there is no real interest however great the probability is the person is admitted as witness - eg - a remainder is no real interest

2 Persons that are infamous that is those which are committed the crimen falsi. It was formerly that perjury only was understood by the crimen falsi - but those crimes which now go to impeach the veracity of a man directly - Doug^s whether the crime of legal barratry - stirring up neighbours by

Evidence
the case - but whoever commits this crime
is excluded as a witness -

3 Lev 426 - 52 - Mod 75 -

According to former opinion infamous
punishment excluded -

This infamous punishment may be restored
to his veracity by parliament in most
cases -

Lord Reeves thinks this principle is not
correct to suppose that pardon reverses
the infamy - because pardon does not
suppose the person was not guilty
but it is a mere act of grace - for the jury
does adjudge him guilty and if the magis-
trate pardon and reverses the infamy
that is only he did not commit the act
is to put him as before the opinion
of the jury -

To exclude the witness for this crime the record
must be produced - no witness can be ad-
mitted unless the record is turned up

Evidence

The supreme court admitted a man who had been convicted of crimen falsi. A young man 15 years of age committed forgery. He led a virtuous life ever since and the court upon the presumption that his after integrity had done away the influence of his former infamy. But when a statute declares that a man committing a certain crime shall never be admitted as a witness in this state it is reversed - 2 Hawk 462 . . . .

1 Ld R 369 1 Salk 149 1 Ld Ray 349 Barwell Haw 629
3 Atheism Salk 690 -

No person professing to be an Atheist can be admitted as a witness though his mind may be proper in other respects - and it goes upon the principle that he does not acknowledge the notion of an oath - he is just as good without an oath as with an oath cap

16

Evelyne

It was formerly the law that no Jew Turk or infidel should be evidences - this was prevalent at the time of our great master Lo Coke the great Luminary of our law -

Coke Lit 6th 2 Hawk P C 4

All persons believing in a future state of retributions and rewards must be sworn according to his own creed -

Bracy 11 Johns R 528 Atkins 21 -

We only swear by the everliving God. We never have made any exception -

2 me - what must be done with Universalist who do not believe in future rewards who nevertheless believe in a God &c -

It has never been decided in the Supreme court in the United States but our Supreme court decided that an universalist could not be admitted as a witness. It has also been decided in the court of appeals in the New York State in the same manner -

2 Defect of Understanding Evidence — no persons having
such defect shall be admitted —
As to minors they are admitted at the
age of discretion and this varies some are
admitted at the age of nine and others twelve —
But if they are under twelve the court exam
ine them as to the nature of an oath —
2 Inst 709 —
Children under this age & in twelve are per —
mitted to tell their story —
In the English law Quakers can not be
admitted to testify in criminal cases
but not in common civil cases it is dif
ferent — In our Country they are admitt
ed in both cases — vide Burr. under the head of Quakers
Judge Reeve thinks this a most dangerous
& ill distinction —

Oath —

The best evidence that the nature of the case will
admit of must be admitted —
Affirmation not admitted nor other com —
When particular ceremonies particular

Evidence
evidence ~~and~~ no other must be admitted -
If there is written evidence parol evidence will not be good since written evidence is better -
Where there are subscribing witnesses these must testify since these are the best evidences to be had -
Cases where the Pltff will not produce nonsuit if the best evidence is not introduced -
eg A commits an assault and Battery upon B an C stands close by and sees the transaction and is the best ~~tes~~ evidence - but D and E stands a considerable distance off they are brought forward - but C is left behind - why - because the Pltff choose the latter - but this omitting to choose the best evidence is generally construed against the party -
2 The Court is always to exclude testimony that is irrelevant - A is sued by B for money C testifys that A was Intentional but this is irrelevant -
3 Hearsay evidence is not admissible. viz that one shall not be admitted in

Evidence
"Court to say what he heard another say"
but this rule has its exceptions-
1 A witness has testified under oath in Court
but you may introduce witnesses to prove
how he related the same story out of Court
before he is put under oath- this is into
duced merely to show the credibility of the
witness- but this is hearsay-
A party has not a right to impeach
his own witness- if a witness does not
swear as he was expected to swear the party
cannot impeach him if he summoned
him-
2 You may introduce hearsay evidence
to corroborate what is said in Court
by a witness that is impeached- and
when the least impeachment is made you
may go into an enquiry to establish the
credibility of the witness-
3 Whatever the parties have themselves said
or read- but all the party has said must
be admitted into Court and not a part-
But here it must be proved that the

Evidence

"party confessed the facts - As if a man was
entitled to forgery & confesses that
he has committed forgery in generally
and not confessed any particular facts
this cannot be testified against him -

If A man induced by advice or encouragements or threats it shall never be heard.
No interrogatory to the criminal need be
answered by him nor is any inference
to be drawn from his silence as to his
guilt -

Confessions voluntarily made is
the best evidence - It is sufficient in
civil cases but in criminal cases it is
different

A. B. C. commit burglary - A confesses it and
testifys against B & C - this witness cannot
condemn the other two, but it will condemn
himself but you may strike out the name
of B and then admit as a witness against
B and C -

In Courts of record the confession is worth
nothing unless in Chancery

Evidence hearsay evidence

21 An agents confession cannot operate against his principal - 1 Burr 53 - 3 Mod 259

22 What people have said about boundaries may be admitted after they are dead if living otherwise - a general belief that he is dead is sufficient - a general reputation of the fact is necessary -

Formerly a mans pedigree could not be proved but by the Heralds books - but this became corrupt and now common evidence is admitted - In testimony respecting the reputation of hearsay evidence is always admitted a good and end as this is the only testimony to be had - The question here is what is a mans general reputation among mankind and not what the particular witness thinks of the man himself -

With respect to the party his character is sometimes put in issue - As if a man sues another for calling him a thief - the party sued may prove the fact and if he could not prove the fact he may prove his general character -

In witness to deed they need not be admitted if the party making the deed confesses it - this is law in Conn - but it is different in English law -

What a person has said on his death bed or in contemplation of death because he is supposed to tell the truth 3 Bur 1244 always in such circumstances -

Pe 428 -

No man shall be compelled as a witness to criminate himself - unless in Chancery where the case is different - exceptions -

1 A woman may be compelled to prove the illegitimacy of her child - though she confesses her own illicit connection by the testimony - therefore A person may give evidence that will criminate himself in certain cases -

2 A naked trustee may be made to testify -

Hard 337.358th

3 Where there is an affirmative and negative testimony the affirmative must be admitted says Judge Reeve suppose a man swears that A shot a gun at Mr Beecher last

Evidence

Sundays and all the rest of the congregation
swear contrary, that they do not perceive it

The number of Witnesses

By the Civil law we were are told required to
two witnesses are required to prove a fact
but according to our law one credible wit-
ness is sufficient to outbalance any
fact- The derivation of the English com
from the custom of the common law was
the introduction of trial by jury- presuming
that the jury themselves had some information into
or might be the testimony of another witness
2 La 220 1 Inves 158 Carthew 104

In the court of Chancery one witness cannot
always be sufficient-
In perjury in common law one witness
is insufficient 2 Bro 554 2 Hawk 428
Also in Treason one witness is never suf-
ficient- perhaps because it is such an
enormous offence that it is presumed no
man will commit it
In Cases where a statute which

24 Evidence

Statutes that 2 witnesses or what is equal to two witnesses shall be necessary to convict a man of any capital offence

Laws respecting Depositions

The General rule is no testimony that is parol cannot be given but viva voce. But it is customary now to take Depositions where the person has been taken sick or is absent.

There is however a statute which authorizes depositions to be taken before Commissioners out of the county and in cases where the witness is in prison &c.

Depositions are generally taken in court of Equity in preference to testimony viva voce. Courts of Chancery always send all issues in fact as soon to be tried by a jury.

But in criminal prosecutions no depositions can be admitted to the conse

25th Evidence - compelling witnesses to attend - quences what they may

In Con - in criminal prosecution deposition cannot be taken but in Common law and Equity cases they are used equally - No Depositions must be taken within 20 miles - The Statute compels an opposition party to accept of a deposition if it be legally taken -

If a deposition is taken before a man's be come infamous his depositions is good -

But where a person makes deposition and becomes afterwards interested he is excluded giving his deposition - the equity of it doubted - 2 Lev 100 2 Ver 11 288 679

24th

Modes of compelling witnesses to admit -

By a subpoena - or by a summons to appear in court on such a day - and if the witness does not appear at the time summoned he is guilty of contempt. a tender must be made before the witness is compellable to

to appear – a capias issues to compel the attendance if he will not appear without –

The court has a power to imprisonment the witness sometimes longer than its own session –

If a witness does not answer he may be imprisoned and fined – and yet besides this he is to pay damages to the party who loses his cause –

In criminal suits where a man has been bound over by the justice of peace the witness are bound over also –

Privileges of witness have of being free from arrest in going remaining and returning –

They cannot be arrested in going remaining or returning – that is he shall not be imprisoned – but a suit may in other respects be instituted against him –

His privilege begins from the time when he sets out –

If a witness is arrested he must

to witness before the court and if he is found to be a witness on his oath of giving testimony a subpoena as must be given by the court which supersedes the arrest of the officer - 2 D & Rep - great case

A witness must have a reasonable time to return - Com Dig testimony. A is desirous any with the court -

Our Court will grant a subpoena before a man sets out from home if the witness requires it - If an officer arrest a witness who has a subpoena it is false imprisonment - Judge Chase decided this in Con. But if a Sheriff arrests a person who has a subpoena but does not show them he may be arrested -

Brunton 15 1 Wh 101 2 Mod 181 1 Rol Ab 270 4 Com Dig 2 Sandy R 1113-1120 1 Salk 644 17 Jan 12 or 18th in third month

A writ of protection extends also to the

28 Evidence
goods & return hour with him —

Rules of examining Witness

The party may examine his own witness first —

2 Written testimony 3 classes —

1 All that arising from records
2 All that which arises from other writings but they are specialties —
3 Writings not under seal —

1 Records — the actions of Legislature judgments of Courts &

A record is of itself of sufficient proof of which it purports to be =

A copy is had and not the record itself is obtained — since this is the best evidence the nature of the case allows of —

1st Coke 92 Coke Lit 260
Croke J 7 B.R. 159 72.6

Evidence

The copy must be legally taken by an officer who is supposed to be always sworn—
But if the Clerk is sick or absent the judge may take the copy and certify—
But if both are incapacitated a private person may take the copy and swear the same by deposition to be a true copy— The copy must be the whole and not an extract however long the record may be—
As to the records of the Legislature we have them printed— and if the Statutes are printed by the appointment and superintendance of the State they are a good record— but a publishment in a newspaper is insufficient— unless the printer was authorized to print the same by the state—
Almanacks are admitted as evidence in many cases—
Family records in Bible Almanacks are admitted as evidence—
Records cannot be proved by anything but

30 Evidence
themselves -

When the conveyances to be in writing no conveyance can be made without the said writing &c -

Deeds &c -

24th October

Note - When there is a record between the same parties upon the same subject but not containing the same subject matter it may be given in evidence - This law but it has no great influence for the same sentiment be given in evidence to prove the latter as the former point, but after these same facts are alleged the proof may be substantiated or corroborated by the former verdict -

Carthew 79 5 Mod 386 8 Bac Abr 240

A copy of deeds though they are recorded by thereby become records, is not admitted the instrument itself must be produced because the original deed is better testimony than a certified copy of the record

Evidence

By the common law therefore the deed must be produced but there are exceptions.

Where a man claiming under a deed is not supposed to have possession of the deed This applies to bonds and other writings when it can be proved the said writings were burnt - and this goes upon the principal of receiving the best evidence the nature of the case will admit of -

But in Con: after the first sale a copy of the deed is good evidence since the deeds are not handed down - but in England the deeds go down with the land and there they are bound to shew the deed -

Private writings

These cannot prove themselves they must be proved by proof - viz by witnesses who sign'd the deed - Where the original writing is disputed and the witnesses are all dead you must shew the hand writing of the

witnesses and then infer by inference—
And if a witness becomes infamous after
he has signed the deed he must be con-
sidered as dead— and when the man be-
comes interested after signing he must
also be considered as dead— but this law rule
is doubted. So if a man is absent or not
your reach by a subpoena you may consid-
er him as dead.
In Con A a man confesses his own subscrip
tion no witnesses are necessary
But at Common law a 40 years possession
is sufficient without any other proof—

Witnesses do not very often see the delivery
of the deed yet this presumed where the gran
tee is in possession of the deed— The possess-
sion of a legal deed is prima facie evidence
that a man came rightfully by it
You cannot introduce parol evidence to vary
the operation of the writing—
A deed cannot be delivered upon a contingency
for instance if A engages to deliver a deed

33 Evidence
to B if B will perform certain condition.
such a condition overthrows the legal delivery.
Croke Elizabeth 803-4th 520 884th

An obligation delivered by Escrow is not
a good delivery until the condition is per-
formed—
If a grantor leave a deed on a table for the
grantee and the grantee gets the deed it
is a good delivery—
25 No parol evidence can be admitted to prove
the efficacy of a deed— This a common law adop
ted by all the states—
In every conveyance of real property, there is
consideration— A specialty always contains
prima facie evidence of a consideration and
you are not permitted to go in to proof that
specialties do not contain any consideration
The sealing presumes consideration— and
the signing here is tantamount to a seal
At Common law— but in fact a specialty
requires consideration as much as any
parol promise and if the specialty con-
tains in the face of it want of consider—

33 Evidence
ration it is void - and no parol evidence is
admitted to prove the want of consideration
in a Specialty -
Pre in Chan 405

Simple contracts are either by writing or
parol - these contracts you may prove
by parol - and so when the law requires
any agreements to be made in writing
if the writing is not made parol evidence
cannot be admitted to prove the agreement

No parol evidence can be admitted to vary
explain or contradict an agreement by
writing - exceptions Parol evidence
though it may be admitted in some cases
yet it must go to corroborate the
writing
Parol proof may be admitted to prove an
ambiguity - no ambiguity arising from
the construction of sentences can be
removed by admitting parol evidence
for this is left to the court to determine

24 Evidence

and if there is so much doubt that no agreement can be perceived the contract is void –

Parol evidence may also be admitted to prove equivocal terms –

A man eg. A gives all his money to A that is contained in a pollh – the court do not know what a man means by this word and admit parol evidence to prove that it is a purse –

Particular terms of art often arise in court and parol averments may be admitted to prove them – Powell on Devises chap parol testimony

Parol evidence is always let in to show the testators property by which in some measure the testators will is determined –

If all the legacys are made which the testator directed and a surplus remains this surplus belongs constructively to the executor but the court of Equity will compel a distribution to the heirs.

Equity may be raised by parol or rebutted by parol-

2 Atk Stoker 400-

Presumptive evidence is only where something is infered from the existence of circumstantial facts-

But where the facts are presumed from certain circumstantial facts reduced to writing this is called ~~presumptive~~ constructive evidence-

Presumptive evidence as to facts is as good untill such evidence is removed which may be done-

Interested persons viz Corporations. a degree of uncertainty-

Members of a charitable institution may be witnesses when the funds are increased because they have no interest

~~Atonst~~ But if they are witnesses to prove a fact which enriches himself he is excluded-

36 Evidence

eg If the question is whether a corporation owns a certain toll-bridge if they can be proved each member passes it which makes 1 Rent 851 Holt 97 him interested -

The court may remit and reject as they consider the quantity of interest may bias the witness - 2 Lev 261 -

This is the common law -

In short we in Conn admit all confessions and of course must be admitted -

Comparison of hands

In some books it is said that this is good evidence in civil but not in criminal cases, but now there is no difference - 1 Burr 642 -

So a man who never saw another write may be admitted to prove his hand writing eg by correspondence &c -

1 Leach Black 89 4th Esch 142

By comparison of hands is meant [illegible] when they are true

Evidence
writings the first compares with the third or the third ~~witness~~ with the first — the first is sworn to and admitted — the third agrees with it it is therefore his hand writing — but then No 2 cannot be admitted — Esp. Cases 8 or 1 the general opinion is that ~~words~~ words & under No 2 cannot be given to jury to decide the hand writing of No 3 — and this upon the ground that a jury are incompetent judges to make the comparison — Semblance of deception is not admitted — Can a man upon his particular skill in detecting forgeries be admitted — he can by the last report of report —

4 T. R. 497 Lord Kenyon in the principal Carey against Pitt —
It is much question whether a man may give evidence

4 Esp. 117

Ch. Jordan
Can a man be compelled to testify what will disgrace him - not decided - 2 Ld Raym 1240 - in this case he was compelled - But this is decided that you cannot compel a person to testify what will subject him to punishment -
Judge Reeves thinks testimony which is obtained by fraud ought not to be admitted - however it has been admitted in this State - When a man wants to prove usury and has no proof he hires two men to shut themselves up in or about to peep through a hole and so hear the conversation - this was admitted - it was not proper that the jury knew -

1 Powers of Chancery Oct 29th 1811

Lect 1 Given By Judge Reeves—

A very singular institution - found in no other country beside England and those who derived their laws from England -
It originated without any Statute -
As courts of law were very severe there needed some alleviation to those who were afflicted with their severity - The kings Chancellor was supposed to be the keeper of the kings conscience and hence he gradually assumed that power which that court possesses -
1 It is the province of the court of equity to abate the rigour of the common law -
2 They decide according to the spirit and not according to the letter -
3 Some say that parties accidents and trusts are the proper acts for courts of Equity -
4 That they are not bound by precedents -
But there are restrictions merely with out any substantial

2/1 A court of Equity cannot decide contrary to law—that is Statute—

3 B C 429 - 10 Mod 1 2 Atk. 189 1 Term 22

Doug 264 - for the first rule

As to the second rule—

II The court of Equity is bound to decide according to the law or rather spirit of law as the court of law

H As to the third—

III Frauds are cognizant in a court of common ~~law~~ law frauds in every shape are so— The same is the case with accidents— and trusts— Courts of Chancery have jurisdiction over trusts but it is not an exclusive jurisdiction

8 T R 147 - 1 Peere Will 287 - 548 - 695 - 3 Atk 177 - 544
6 T R 151 - 2 Hen B 2 63 - 1 Will 16 -

IV That was once true but Chancellors now consider themselves bound by precedents as much as courts of law—

1 Atk 600 3 B C 4132 - 2 Peer Will 640 - 6 Ho 2 Ver 289 - 816 3 Atk 520 -

8 Powers of Chancery mode of trial &c

The essential difference consists in

1 The mode of proof

2 In the mode of trial not by jury

3 Mode of relief - Courts of law give you judgment for damages and issue execution for the money but a court of Chancery (Equity) compels a performance of the contract - they give no execution - and if a man does not abide by the decree of the court then is a heavy penalty -

4 There are some maxims in common law which the court of Equity adopt which the common law courts do not - a striking instance -

A widow has a daughter who she consents shall be married to a young man - but they were both rich and the widow is the guardian of the child and has received the rents and profits of the childs lands for 10 years and therefore tells the young man that although the match has progressed thus far he must consent to one thing what! to consent ~~that~~ to release her as guardian from paying the rents she would object to the match - the young man sees the influence the mother has over the

4 Powers of Chancery — mode of Trial &
of her daughter consents to the release —
and after marriage sues the widow for the
aforesaid rents — the court of Equity decided
the release not good —

As to proofs — The court compels the party
to disclose all the points which he knows —

But if the disclosure is made the judgment
is the same as in common law —

As to the mode of Trial —
The depositions of witnesses are taken whether
in court or out of court — 3 Blac. 382 —
As to relief — They grant specific relief by
compelling the performance —
Before Chancery, no specific performance
could be made — and they do not give the
relief because the party could not recover
by common (law) A only gives a different relief
and they do not declare anything valid in
Equity which is invalid in Courts of law

Powers of Chancery

2 Atch 177 - 2 Powell on Con 46 - 1 Hom 268th

The jurisdiction of Equity is great over contracts but they will not always grant relief but leave the parties just where they are - because they can recover at law -

2 Fern 480th - 1 Hom 137th 189 - 93 - 2 Pow 172 218, 2 Atk 97

2 Powell on Con 5 and 6th -

6 180th

Marriage contracts entered into for the settlements of Estates are good in courts of Chancery - x

In personal contracts where there are two joint Obligors each promising to pay half and one pays the whole he may recover his money from the other other Obligor in a court of Chancery -

1 Powell 6. 316 2 Vez 660 3 Pr 428

x 2 Powell 19 - 2 Ver 157 - 2 P W 243 - 1 Pow 6. 315 - 2 Vez

2 Powell 29. 2 Ver 194 1 Vez 204th -

Courts of Chancery will not compel the performance of contracts where the third person is interested has had no notice of it -

Powers of Chancery

because it might work an injury to the third person - 1 Henry & B 22 - 1 Powell 14 - 2 54 1 Ves Jun 109 177 359 1 Peu W 287 -

+ 2 P W 248 1 D R 315 - 2 Ves 6 14 17 264 -

The rule is that courts of Chancery will grant no remedy where the court of Law will - But this means you shall go to a court of Equity to get money but to get some specific performance -

This court generally exert their power upon contracts respecting real property but it will not intercede in personal contracts - because the injuries resulting personal contracts are supposed to be remedied by damages in courts of law - 2 Ves 245 1 Bro 447 - 1 P W 571 2 P W 805 2 Atk 393 -

John Stiles promises to convey Black acre to Tom Nokes upon Tom Nokes paying 1000 £ - Tom Nokes may come into a court of Equity and pray the specific performance of the agreement - and John Stiles may pray for the specific perform

7 Powers of Chancery
came on the part of Tom Noakes—
While the performances 2 Bon 219—
are reciprocable
court of Chancery unless one party has
performed his part I cannot grant relief against
the other for the maxim is you must do
equity before you ask it—
2 Powell 19, 1 Ston Blane 288—
With personal things courts of Chancery
does not intermeddle—
In all contracts for the transfer of stocks
specific performance is given—
2 Bon 217th 2 Bl 2 Vern 694th 1 Pow 408th 1 Ver 207
1 Equity cases abridged 271th
If man enters into an agreement to perform
something which he has a right to do
and before the performance of the con-
tract a law is made forbidding the per-
formance—here the court of Equity will
grant a relief that is they will compel
the performance of so much as is legal
under the new statute—for instance—

a man ~~grante~~ agreed to make a lease for 90 years and before the execution of the con-tract the statute was made forbidding leases longer than 30 years here a court would compel a man to make a lease of 30 years if the other party wished it -
1 Cont 207

The same rule obtains if the man is preven-ted by some act of God -
2 T R 252 - 1 Pow 428ⁿ 2 Pow 84 Plowd 284
2 Brow Chancery 341 - 1 Pee W 570ⁿ -

7 T R 143 2 T R 424 - 5 do 219 - 320 4 T R 82
254 2 Pow 41 - 1 Pee W 123 2 P W 249 1 Cont
399 -

Whatever is agreed to be done by the parties the court of Equity considers as done from the time of agreement -

John Stiles agrees to convey to Tom Nokes black acre for a valuable consideration But John Stiles dies ~~and~~ before the conveyance The court in this case will not consider the land as descending to his heirs but to Tom Nokes -

1 Pre W 61 1 Atk 572 2 Vern 68 - 79. 222. 1 Ch Con 44, 359 + 2 Vern 60 3 Atk 291 1 Ch Con 351 - 1 P W 274, 282 429 -

If a contract was original mutual and equal the court will compel the performance although some subsequent events render the contract no longer mutual -

In all cases of hazards where they are mutual the court of E - will compel their performance.

2 Brow Par cases 414 - Prec in Ch 156 2 Vern 132

Money paid under mistake are recoverable ~~under~~ by and Action or assumpsit -

1 P. W 488 - 3 Atk 221 - 1 Con 414 - 16 - 1 Vernon 556. 583

In agreements to transfer stock they act dis-
cretionally - but seldom compel the performance.
1 PW 571 - 2 PW 386 - 3 Atk 383 - 2 Vern 133 - 1 Bro
in Chancery 226 2 Ves 12th - 72 - 227th 1 Ves 27 -
And so where there is no unfairness and where
the contract is not mutual the court will com
pel the performance it being an voluntary
executory agreement -
Voluntary executory agreements to make provision
for the wife are valid in Chancery - marriage
is consideration sufficient
1 Vern 50 1 Atk 10 1 P 241 2 do 256 242

Power of Chancery in rescinding agreements
Whenever courts of Ch - rescind agreements they do
it with regard to strict justice to the parties -
they execute no vengeance - they have no pas-
sions -
Wherever there is a mistake without which
the contract would not have been performed
the contract is rescinded -
Wherever there is ignorance of the law the contract is often
rescinded.

However in criminal cases this does not obtain ignorantia juris excusat neminem —

1 Ver 22 1 Very 122. 400

Where money is paid by mistake in debt ... an assumpsit lies to recover it back in courts of law so that in this case courts of Equity do not interfere —

Nov 1st 1818

In matters of fraud Chancery has jurisdiction —

But they have no more jurisdiction where contracts are fraudulently than where they are not —

But where there is a misrepresentation to make a man do his duty this misrepresentation is not recognized in courts of Chancery —

This thing to wit Equity call pious fraud

1 B Powell 261 an —

But in all cases where there is fraud in the original ~~fraud~~ contract the court of Chancery give relief —

The court of Equity for inadequacy of price

will not interfere to rescind the contract because this does not furnish evidence of any imposition.

The case may be such where the court will rescind the contract for great inadequacy of ~~punishments~~ price.

e.g. where A owes B — for money lent — B demands the money of A but A has not got the money but has a farm which B insists upon the money being paid he must sell and asks B what he will give — he replies 1000£ when it is worth 2000 — here they grant relief.

Rule — The court of Chancery will will give relief where one of the contracting parties takes ^unfair^ advantage of the others ~~unfortunate~~ situation.

A is in goal if A is imprisoned and B promises to release him upon a promise of great compensation.

130 P.W. 29. Pow. 1 cott 171 1st cont. 62 —

Another ground is where one of the parties are intoxicated here the court of Chancery will rescind the contract—
The same rule holds good whether the party gets the other drunk or whether he finds another drunk and then cheats him— but the latter is not so immoral as the first— but they are both fraudulently made and therefore equitably rescinded.
Again when frauds are practised upon third persons the contracts are vitiated and therefore must be rescinded— here the courts of law will give damages but the court of equity goes further and resiinds it entirely— 764, a Vern. 2 Powel 6th 1 Vern 475—
A contract obtained through fear will vitiate the contract if that fear amounts to legal duress per minas. The court of Equity go much further than courts law— But where a man is induced mere by from respect and the like the court of

4th Powers of Chancery.
Equity will not rescind because here there
may not be more than a suitable revenue
1 P W 118 - 639th - 1 Bron Chan 369th 2 Ven 160
187th - 264th - 3 P W 298th -
Chancery will interfere to rescind un-
lawful contracts - but do not courts of law
interfere. -
You may introduce parol evidence
to prove the illegality of a bond &
but not to prove there is no bond &.
For instance in usury. In courts of
Equity a man confesses conscientiously
upon oath - but here does not the
man subject himself to a penalty
no - 1 Atk 250 - 2 Atk 397th -
We have a Statute which makes the
suit half way between courts of law
and courts of Equity -
Originally no parol evidence could be
admitted to show the turpitude of an
sealed writing - but this has been
otherwise since 2 Wils 347 Collins vs Bla-
nchard

15th Powers of Chancery.

When contracts are contracts are contrary to the statute they are rescinded—

1 This is the case in marriage brokerage where a sum of money is given to procure a good match—

2 Commission or reward for doing some thing which is wrong or improper by leading young heirs to prodigality. Those are radically wrong say the Court of Equity— 3 P Wms 131 2 Ves 640— 2 Atk 64 1 Atk 354—

All agreements to convey any of lands not in writing are void by the statute of frauds and perjury. If a party has done something by paid by which ought to be in writing by which the party has derived some benefit in this case the court of Chancery will compel the execution of the conveyance—

But if the party has not received any benefit the contract cannot be considered as part executed which in the former case

is considered as part executed and it is upon this ground that the court of Chancery moved to avoid the statute of frauds & perjury—

November 2 1811

Chancery has a power to relieve against penalties. In every State there is now a statute to relieve against penalties But before this statute courts of Chancery did grant relief. Courts of law now do it by virtue of the statute—

When money is to be paid the penalty amounts to nothing more than a mere is to pay the principal and interest— But when the penalty is to build a house or build a ship and does not perform the contract the penalty is forfeited if the party has sustained any injury by the non performance— In that courts of Chancery grant relief against the penalty

is greater than the damage sustained—
They go upon the ground that such contracts are unlawful—
The first statute vesting courts of law with the power of relieving penalties was enacted in Massachusetts and what is singular the statute in England was not made untill some years afterwards—
2 Ch. 2. Pow 2 Ver 216 2 & 9 3 Atk 520 th 9 Mod 172

A penalty is very often added to a covenant In this state you may bring your action upon the covenant or the penalty but you cannot sue upon one ~~at~~ and then the other— But here a court of equity will grant only part of the penalty as the case may be but in courts of law the whole penalty is to be recovered— 2 P W 1 9th 10 Mod 517—
2 Vesy, 52 6 Bron 2 Law 419 2 Pow 214

A penalty given by Chancery cannot be chancelled— sometimes the court give double the penalty— but in this case the party ~~cannot~~ perform the specific—

agreement and by this means avoid the penalty. But when a man cannot perform the agreement then the court of Chancery will not give double damages or rather double the penalty—

Another subject of equitable jurisdiction is the Mortgage—

If a mortgagor does not pay the money by the time appointed the land in a court of law with immediately in the mortgagee— But the court of equity in different light— they consider the land as merely a security for the money and therefore the court of Equity will grant a right of redemption— in which case the mortgagor must pay the principle and interest to the mortgagee otherwise the mortgagee will hold it— 15 years will bar a right of redemption a writ of foreclosure also bars the right of redemption—

In the case of compound interest once

19th Powell of Chancery
of law and equity proceed upon the same grounds
because this contract is not usurious-
But this will be believed against upon the
principle of policy- since men are unwilling
to be how fast compound interest mounts
up- but after the compound interest has
accrued and a promise is made to pay it
this is good-

Power to grant injunctions-

May grant injunctions against a tenant
cutting down timber- but has not the
law given redress? no- because a jury
may destroy the timber & and then be poor-

No action of waste lies against a trustee-

So a mortgagee shall not do any thing
to lessen the value of the mortgage and
by this means defraud the mortgagee
of his security-

You may issue an injunction against
a tenant in tail- through no action lies

B B 0227- 2 Show 69 3 Mod 94 at law
2 Ch 0291

An action of waste will not lie ~~against~~ in favour of the remainder man if another estate intervenes between the present estate and the remainder- In this case the court of Chancery will grant a injunction against waste though a court of ~~Chan~~ law will not-

Where a lease is made to a man without any restrictions from waste- he may use it as though he had it in fee simple- but where the waste is malicious and diabolical the court in this case will grant an injunction- the principle is this the waste committed ~~was~~ contrary to the intention of the lessor.

2 Chan 169 2 ~~Ver~~ Ver 708 2 Atk 216- 2 Vern Chi 289

An injunction to stay a suit of court- this is granted against a court who cannot grant relief- as in the case of brokerage bond- suppose in a bond they have got too much money- the court of law cannot grant relief- here a court of Chan enjoins- this occurred in Con-

21 Powers of Chancery
1 Ves 489th
So where a man is acting without authority the court grant an injunction—
So in the case where the man claims a right to his literary production—
The Statute of Anne has fixed this point that a man has a right—
In Burrows it was contended there was a right at common law—4 Burr 2414th—
This power of Chancery extends to all inferior courts except in this State it does not extend to courts of probate since there lies an appeal from all the decision of this court—
Novemb 2 Saturday afternoon—
Application for the payment of legacies are much more frequent than in courts of law—
It formerly belonged to Ecclesiastical courts—
no redress was had in common law courts—
The executors are trustees—these kind of cases are compelled to execute their trust by courts of Chancery—Executors first pay the creditors and then pay legacies

Powers of Chancery

In this country we sue for legacies at common law—

Executor at common law is only trustee of the personal property. At Common law he is under no authority unless there is a statute as is the case in this state viz con— to sell lands—

But Courts of Chancery consider the executor as having undertaken a trust and they will permit him to dispose of the real estate to execute his trust— But still this right is given by Chancery

1 P Wms 582 2 P Wms 771 3 P Wms 21— 1 Bro C C 47 1 Bro 271 2 Bro 679 3 C C 254

If the executor will not sell the land the court of equity will appoint some person who will undertake it

N.B. There is no precedents of suits in courts of Chancery in this respect

The court of Law knows no such things as equity of redemption—

28 / Powers of Chancery
In Con. an equity of redemption may be attached for debt—

Marshalling the assets of a decease man's estate— It is letting in the simple contract creditors upon the heir— but then the heir is not liable only to the amount of bond debtor creditors—

Where one man give another an estate for the third person— this is the case of an express trust— But if the trustee sells to a bona fide purchaser the court of Chancery will give no relief—

Fraudulent trusts are not taken notice of by Chancery—

A conveys his estate to a trustee to escape his creditors and after he has compromis with his creditors he returns to his trustee and demands his property— but the trustee refuses— he may keep by the common law—

2 Ver 28 63 —

Courts of Chancery have a power to compel persons to deliver up papers which they have no right to hold—

9 Mod 297th—2 Atk 307—1 Vern 79th—

Formerly there was no remedy when a man lost his security because profert must be made—

But now you may sue without it but must state that it was lost and prove it else profert ~~will~~ be demanded and cannot be refused

3 Atk 17th 1 Mod 392 2 Atk 1 Bro c 621

3 T R 151th—

They have also a right to compel tenants in common to make partition——

You may prove the joint ownership by need—

They also grant relief in ~~——~~ mistakes

If the drawer uses words that was not intended the court will relieve

25 Powers of Chancery

Chancery will aid an instrument that are defective by giving form to it eg when there is one witness when there ought 1 Ven 37. should be two—

You may compel a party to record a deed if he refuses, by Chancery—

To protect contracts in writing which are not negotiable— they will protect the assignment— Dd 12 683 2 Ven 541

In case of awards if the award is defective and the parties come together and agree to the award this agreement is binding— this proceeds upon the footing of Agreement—

Law upon Partners— A and B are partners B dies and appoints D his executor— they owe money— A proves to be a bankrupt you may therefore file a bill of in Equity against D.

If a purchase is made and before the conveyance some claim is made upon the 2 Pw 120 2 Atk 19th land his chancellor

20 Powers of Chancery
enention of the contract is not compelled