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## OUTLINE OF THE LAW OF COMMON LAW PLEADING.

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### INTRODUCTION.

*A pleading* is a statement, in logical and legal form, of a cause of action or the grounds of a defense, terminating in a single proposition affirmed on one side and denied on the other.

*An action* is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. (Code.)

*A cause of action* is the ground on which an action may be sustained and includes the fact or combination of facts which gives rise to and sustains a right of action.

*Common Law Pleading* is the form in which the issues were presented to common law courts of justice for determination.

Great exactness and technical niceties were developed, used and insisted upon and the merits of the controversy were frequently lost in the maze of technicalities.

### DEMURRERS.

#### *General Demurrers.*

- I. A demurrer is not a plea but an excuse for not pleading.
  1. A demurrer is so far a pleading as to preclude a judgment for default.
  2. Pleading and demurring to the same pleading formerly resulted in the expunging of both and judgment followed as by default.
- II. A demurrer reaches only defects apparent on the face of the pleading challenged.
- III. A demurrer admits all the material facts well pleaded.
  1. If a defendant demurs he admits, not by his demurrer but by his omission to deny, all the material well pleaded facts averred in the declaration, and if the demurrer is over-ruled the case is in the precise condition it would have been if he had suffered a default.

COMMON LAW PLEADING

- (a) A demurrer admits the allegations as to the law of another state, special or general customs, but not allegations contrary to legislative acts and records, of which courts take judicial notice.
    - 1. A plea which contradicts a verdict is no plea and is therefore demurrable.
  - (b) A demurrer does not admit facts contrary to common knowledge.
    - 1. If specific facts alleged contradict general allegations, demurrer will not admit the truth of the general allegations.
- IV. A demurrer does not reach objections that do not necessarily and clearly appear on the face of the pleading challenged.
  - 1. In deciding a demurrer superfluous allegations will be ignored.
- V. A plea which contains repugnant allegations respecting a material matter is bad on demurrer.
- VI. A demurrer does not admit conclusions of law pleaded.
  - 1. Demurrer does not admit conclusions pleaded from facts alleged.
  - 2. The soundness of the conclusions to be drawn from the facts pleaded is the very question raised by the demurrer.
- VII. Legitimate inferences from the facts alleged will be drawn to resist a demurrer.
  - (a) A copy of an instrument attached to a pleading but not made a part thereof will not be considered on demurrer to contradict allegations of the pleading.
- VIII. The office of a demurrer is to raise issues of law upon the facts stated in the challenged pleading and not to state facts.
  - 1. It is not permissible to set out extrinsic facts in a demurrer.
- IX. On a demurrer to one count of a pleading, statements in other counts cannot be considered to sustain the pleading.
  - 1. Each count is a separate and distinct declaration and a complete cause of action.
  - 2. Upon demurrer to a declaration the court cannot consider any statement in the plea or subsequent pleading nor in any other part of the record.

3. Only that part of the record upon which the demurrer arises will be considered in deciding a demurrer.
- X. A plea professing to answer the whole declaration, but answering only a part, is demurrable.
1. If demurrer is sustained or over-ruled, the court has discretion, on application, to permit pleading over.
  2. On demurrer to several pleas sustained as to some and over-ruled as to others, such action is a decision only *pro tanto*, unless one plea is sufficient as a bar to the whole action when the decision on such plea is decisive of the whole.
  3. If for improper joinder of two counts demurrer will be over-ruled if one count is bad and stricken out.
  4. If a separate demurrer to each count or to each of several pleas, the demurrer will be over-ruled or sustained according as to each count is good or bad.
  5. No demurrer is allowed to part of a single cause of action or defense. Proper proceeding is a motion to strike out.
  6. A plea purporting to answer a declaration containing two or more counts, is demurrable if not an answer to every count.
  7. If several parties join in a demurrer to the same pleading and pleading is good against any one of them, the demurrer is over-ruled.
  8. A demurrer to a joint affirmative plea will be sustained if the plea is bad as to any co-defendant.

*Special Demurrers.*

Under an early English statute it was attempted to abolish the confusion and defeat of justice which had resulted from the practice growing out of the decisions affecting demurrers generally by providing that the judges upon issues raised by demurrer should decide the question on the merits, overlooking mere imperfections or irregularities unless the party demurring specially and particularly alleged the particular defect relied on; it was further provided that upon writ of error no judgment should be reversed for mere matters of form or mere irregularities.

1. While there were special demurrers at common law they served no useful purpose and were seldom used

since a party so demurring could take advantage of no other defect except the one specially alleged.

2. Upon general demurrer a party could take advantage of all kinds of defects, excepting duplicity only. Generally, demurrers were taken orally.
3. Even this early statute was interpreted so narrowly by the courts that further legislation was necessary to accomplish the purpose of compelling the decision of demurrers upon the merits.

I. A pleading dilatory and not to the merits will be eliminated on demurrer.

1. If the demurrer to a plea in abatement is sustained, the judgment is not final but that the defendant answer over.
2. If a plea in abatement is traversed and the verdict is for the plaintiff, the judgment is that the plaintiff recover, not that the defendant plead over.
3. A plea in abatement is one which sets up matter tending to defeat or suspend the action or proceeding, but which, if sustained, does not bar the plaintiff. It does not go to the merits of the action but rather to the procedure.

*Effect of Demurrer in Opening the Record.*

I. A demurrer opens the record, that is, reaches defects in any prior pleading.

1. On demurrer to a pleading judgment should be given against the party who committed the first substantial fault.
2. On a demurrer to any pleading any prior pleading in the line back to the declaration may be attacked and hence a demurrer to a reply strikes not only the plea but the declaration also.

II. Even if original demurrer is overruled and demurrant pleads over, if his pleading is demurred to, the sufficiency of the declaration is again at issue.

1. The decision on a demurrer to a declaration does not preclude the defendant from objecting at the trial that the declaration alleges no cause of action.

- III. While a party cannot plead and demur at the same time, he may plead two pleas at different times and the party finally interposing a demurrer must take the consequences of an opening of the whole record.
- IV. If on the opening of the record by reason of a demurrer it appears plaintiff relies for his cause of action on adversary's plea, he must fail because he must recover, if at all, upon his own pleading.
- V. A defective pleading may be cured by the subsequent pleading of the adversary and that such pleading was so cured may appear on demurrer, motion in arrest of judgment, or writ of error.
  1. Although a statement of a claim is demurrable because of the omission of a material allegation, if the defendant, instead of demurring, pleads a denial of the missing averment and verdict is found for the plaintiff, the defect is cured.
  2. A party by his subsequent pleading may destroy the effect of his prior good pleading; e. g., a good count in ejectment followed by a bad plea will be ruined by a replication disclosing an insufficient title in plaintiff.
    - (a) If a party can trace back the vice in the pleading to the first fault he has a right to take advantage of it on demurrer.

*DEFAULT.*

- I. A default, like a demurrer, is a constructive admission of the truth of the adversary's pleading.
  1. Although a defendant by reason of his default cannot introduce evidence, the plaintiff is generally not entitled to judgment until he has made out his case by proof.
  2. If the claim is liquidated the plaintiff, upon defendant's default, is entitled to judgment for the amount claimed. If the claim is unliquidated, a jury must assess the damages.
- II. A default does not render a defective declaration sufficient.
  1. Generally judgments on default are either arrested or reversed if the declaration is insufficient.
- III. A default, like a demurrer, does not admit the truth of superfluous allegations nor legal conclusions.

*NEGATIVE ANSWERS OR PLEAS BY WAY  
OF TRAVERSE.*

- I. A traverse must contain an affirmative and a negative allegation, otherwise it is argumentative and demurrable.
- II. A denial of legal conclusions or consequences is insufficient.
- III. A denial of immaterial matter, not affecting the gist of the action, is insufficient.
- IV. When declarations allege several matters in the conjunctive, the denial must be in the disjunctive. Otherwise such denial will amount to a negative pregnant.
  - i. A denial of knowledge or information sufficient to form a belief as to the allegations in the declaration is sufficient, while a denial of knowledge or information as to the truth of all of the allegations or as to each and every allegation is bad since it implies knowledge or information as to one or more of them.
- V. Where denial is too large, i. e., denies the whole where only a part is alleged as a cause of action or defense, the denial is demurrable.
- VI. A denial must be of substantial matter and not raise merely immaterial issues.
  - (a) A denial of matters improperly alleged in a declaration not necessary.
  - (b) If declaration puts in issue immaterial matters and the plea traverses these matters, they must be proven.
    - i. Unnecessary averments such as that the defendant being of full age executed a bond, a traverse admitting the execution of the bond but denying full age, raises an issue which must be submitted to the jury.
- VII. A plea alleging a general fact and the reply denying this fact and alleging the true facts, demurrer to the reply will vitiate the original plea.
- VIII. If pleading is limited in its allegations of a particular fact, denial of the limited fact is sufficient.
- IX. A special plea may deny part of the issue without being demurrable. This is the difference between pleading a general and a special issue.
- X. Where a plea consists of several material allegations, one of which is traversed and found for plaintiff, there is an end of the plea altogether.

*AFFIRMATIVE ANSWER OR PLEAS IN CON-  
FESSION AND AVOIDANCE.*

- I. This plea must both confess and avoid. An entire plea cannot be good in part and bad in another part, because not divisible.
- II. Confession may be pleaded by inference so as to allow direct allegations of avoidance.
- III. A plea which either confesses or avoids, but does not do both is insufficient.
  - (a) By not confessing but merely avoiding, plea leaves material part of the declaration unanswered and hence is bad.
- IV. If the avoidance is positively stated the confession may be hypothetically stated.
  - i. At common law a hypothetical plea was defective in form and a special demurrer to it was sustained. The decisions, however, on this point are not uniform.
- V. In every plea material facts should be alleged directly and positively so as to bring the controversy to a precise and definite issue.
  - i. While confession can be inferentially or hypothetically pleaded avoidance cannot.
- VI. Statements contained in a special plea which has been held bad are not admissible as evidence on the general issue.
- VII. If the declaration alleges facts constituting an affirmative defense, this does not prevent the plea setting up such defense.
  - i. It is always bad practice to allege in the declaration an anticipated affirmative defense. The plaintiff gains nothing thereby neither does the defendant lose anything.
    - (a) A declaration stating a cause of action and also facts constituting a defense is bad on demurrer.
- VIII. The plea of an estoppel is not a confession of the cause of action because it neither admits nor denies but alleges new matter which denies the right of the opposite party to insist on his claim.
  - i. The very notion of an estoppel is that the plea to which it is interposed cannot at law be set up in the particular action. The estoppel therefore cannot be relied upon as an admission of the facts.



IX. A declaration should not contain defensive matters which would be waived by a defendant unless he pleaded them.

1. There is a division in the authorities on the question whether a declaration setting out matters defeating a claim because of the statute of limitations is good or bad. Some authorities hold that such declaration is good at law and in equity.
2. If the declaration does not indicate that the bar of the statute has attached, the objection must be taken by an answer.

*DILATORY PLEAS.*

I. If declaration disclose misjoinder of plaintiffs, defendant may demur, move in arrest of judgment or sue out writ of error.

1. At common law if the declaration discloses a misjoinder of plaintiffs the defendant might demur, move in arrest of judgment after verdict, or proceed by writ of error after judgment on the ground that the declaration was not sufficient in law since it did not state a joint cause of action in favor of all plaintiffs.
2. By statute misjoinder of plaintiffs is no longer a ground for demurrer but for a motion to strike out the superfluous party or parties.
3. If there is a misjoinder of parties plaintiff, but not apparent on the face of the declaration, the defendant can usually raise the objection by a negative plea, for the plaintiffs will rarely be able to prove their allegation of a joint right in contract or tort of all the plaintiffs against the defendants.
4. The party improperly made a defendant may demur not on the ground of a misjoinder of defendants, but because the declaration does not state a cause of action against him.
5. If one improperly joined as a defendant fails to demur when he might properly do so, he waives the objection.
6. At common law if the declaration in an action on contract did not disclose the actual misjoinder of the defendants, the defendant under a general denial might move for a nonsuit on the ground of variance or obtain a verdict in his favor.

7. By the common law the joinder of superfluous persons as defendants in actions upon a joint tort is no ground of objection by those properly made defendants. A verdict and judgment was given against those properly joined and in favor of those improperly joined.

II. Unless non-joinder of parties is pleaded in abatement, the fault cannot be taken advantage of on a plea of the general issue, on demurrer, motion in arrest of judgment or writ of error.

1. At common law the non-joinder of a necessary party plaintiff, if apparent on the face of the declaration, was ground for demurrer, a motion in arrest of judgment or a writ of error because the declaration did not disclose a cause of action in favor of the actual plaintiff or plaintiffs but only a cause of action in favor of a group or larger group of persons.
2. The declaration disclosing the non-joinder of an essential party is demurrable although it does not appear that such party is alive. To save the declaration the plaintiff must allege the death of the one not joined.
3. A party may demur for the non-joinder of another only when he is interested in having that other joined.
4. If the declaration is demurrable for defect of parties plaintiff the objection is waived if not taken by demurrer. It cannot be taken by answer.
5. Under the common law the objection of non-joinder of plaintiffs in action for tort can be taken only by a plea in abatement. In actions on contract if the non-joinder of necessary parties defendant appears from the declaration and it also appears that they are alive and in the jurisdiction, the declaration is bad on demurrer because not containing a cause of action against the actual defendant or defendants.
6. If the defect of parties is not apparent on the face of the declaration the objection must be taken by a plea in abatement, in cases of contract under seal. Upon a simple contract, it was formerly a ground for non-suit but now may be taken by a plea in abatement.

III. A defense of prior action pending or decided being an affirmative defense, must be specially pleaded.

## COMMON LAW PLEADING

1. Under the common law the objection of a prior action pending must be taken by a plea in abatement and before pleading to the merits.
2. Pleas in abatement have been abolished in England and if an action is brought while another is pending, the defendant may apply for a stay of proceedings in one or the other of the two actions.
3. The plea or answer of a prior action pending must make clear that the two causes of action are identical and between the same parties or their privies. The requisites of such plea or answer are: (1) That the prior action was pending at the time the second action was brought; (2) That it is still pending at the time of the plea or answer; (3) The identity of the cause of action and of the parties; (4) The designation of the court in which the prior action is pending; and (5) A reference to the record of the prior action.

### *DEPARTURE.*

#### *Definition.*

A departure is the statement of matter in a reply, replication, rejoinder or subsequent pleading as a cause of action or defense which is not pursuant to the previous pleading of the same party and which does not support and fortify it.

#### *Another.*

Where a party quits or departs from the case or defense which he first made, and has recourse to another; when one case or defense is abandoned or departed from, which was first made and recourse had to another; when the second plea contradicts the first plea and does not contain matter pursuant to it going to support and fortify it.

#### *The Test.*

Is the question whether evidence of facts alleged in the subsequent pleading could be received under the allegations of the previous pleading. If such evidence could not be received, there is a departure.

#### *Examples of departure by plaintiff:*

Declaration alleging performance, answer non-performance, and reply sets out excuse for non-performance.

Declaration alleging delivery, answer denies and reply alleges tender and refusal.

*Departure by defendant:*

Performance pleaded in answer, reply denies and rejoinder sets forth matter excusing performance.

Answer denies an award, reply asserts it and rejoinder alleges incomplete award or award not properly tendered.

Answer alleges plaintiff not injured, reply that he was, rejoinder that plaintiff was injured but had no legal claim or that plaintiff was injured by his own wrong.

- I. In a subsequent pleading a party cannot shift his cause of action or defense from that alleged in a prior pleading.
- II. If the opposite party takes issue with a pleading amounting to a departure, a verdict cures the fault. Advantage of the fault must be taken by demurrer or other appropriate plea.
- III. If the plaintiff finds his cause of action upon the common law and replies by relying on a statute, there is departure.
- IV. Where the second pleading supports by inference even the first pleading there is no departure.

*NEW ASSIGNMENT.*

When a declaration or complaint is too general or vague and defendant has pleaded to a grievance other than that intended by plaintiff, a pleading in reply with more definiteness and exactness is a new assignment. A new assignment is limited to a reply or replication and generally occurs in actions for trespass in the description of property or place.

- I. Where the declaration is so general as to apply to several situations and the plea meets one of them, but not the one intended by the declaration, there ought to be a new assignment.
- II. When declaration describes a close by a certain name, plea claims a close by the same name owned by defendant, reply that close owned by defendant not the one intended, no new assignment is necessary.
- III. If the declaration rests on debt and the plea is payment then no new assignment is necessary, although payment pleaded exceeds the amount stated in the declaration.

## COMMON LAW PLEADING

- i. If the defendant identifies the debt as growing out of a particular contract and pleads payment of such debt, the plaintiff must new assign if he wishes to recover on a debt arising from some other contract.
- IV. Amplification of the original cause of action is not allowed under the guise of a new assignment.
- V. If the plea justifies the whole trespass and plaintiff relies on trespass exceeding the time specified in the justification, a new assignment is necessary.
- VI. Where the plea is justification going to the gist of the action in trespass, it is necessary newly to assign matters of aggravation if relied on.

### AMENDMENT OF PLEADINGS.

England, 1883, Court Rule. The court or a judge may, at any state of the proceedings, allow either party to alter or amend his pleadings, in such manner and upon such terms as may be just, and all such amendments shall be made that may be necessary for the purpose of determining the real questions in controversy between the parties.

Wisconsin Statute, Section 2830: The court, may upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and upon such terms as may be just, amend any process, pleading or proceeding by adding to, striking out, the name of any party or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceedings to the facts proved.

Wisconsin, Chapter 353, Laws of 1911: The court, in its discretion, and on such terms as may be just, may allow the pleading to be amended regardless of whether it will change the nature of the action from one at law to one in equity, or from one on contract to one in tort, or vice versa, provided the pleading, as amended, states a cause of action arising out of the same contract or transaction, or is connected with the same subject.

- I. Amendments which prejudice the rights of the opposite party as they existed at the date of the amendment are not allowed.

- i. Examples of amendment not allowed: Declaration for money payable on demand — amendment to repay after a certain event; declaration for negligent running of train — amendment for negligent equipment; declaration in slander for malpractice — amendment for calling plaintiff quack; declaration on contract for fixed price — amendment for *quantum meruit*.
- II. If amendment introduces a new cause of action, the date of the running of the statute of limitations is the date of amendment and not that of the original declaration.
- III. A declaration may be amended to recite the law of another state, if it stated a cause of action in the first place.
  - i. Examples of permissible amendments: Declaration for negligence — amendment alleging absence of contributory negligence; declaration on insurance policy — amendment alleging performance of condition precedent; declaration against endorsee — amendment to allege notice of dishonor.
- IV. Where original declaration fails in a material matter, amendment cannot be allowed to bar the defense of the statute of limitations.
  - (a) A declaration on money had and received, money loaned and money paid on behalf of the principal, cannot be amended to count on a guaranty. Such amendment would exonerate the bail.
    - i. The test whether an amendment is allowable or not is whether evidence to sustain the amended declaration would have been admissible to support the original declaration.
- V. A substitution of a party defendant for the one originally named may be made by amendment.
- VI. The character in which a party sues or is sued may be changed by amendment.
- VII. A superfluous party may be eliminated by amendment.
- VIII. All parties to be bound by the judgment must have notice of the amendments to the declaration.
- IX. Leave to amend before answer by stating an additional cause of action of the same nature and arising out of the same transaction set out in the declaration will be granted.

## COMMON LAW PLEADING

1. Cases where leave to amend were allowed although amendment introduced a new cause of action: Count for partition by sale—amended to count for partition without sale; count on false warranty of title—amended to count for fraud inducing purchase of land; count upon a negligent injury—amended to count upon a wilful injury; count for work and labor—amended to count for breach of express contract; count on breach of contract—amended to count for restitution of consideration.
  2. Amendment should be allowed which does not introduce a new cause of action, where the new count merely amplifies or varies in non-essential matters the original count; as for example, amended count dropping a co-defendant in actions of tort; count upon note amended to count upon conditional note; count on special contract—amended to count on *quantum meruit*.
- X. Amendments to cure defects of substance in the declaration will not be allowed; of form, they will be.
1. Examples of what has been held defects of substance and amendment not allowed: count for breach of contract—amended to count for negligent tort; count for fraud—amended to count for mistake; count upon an account—amended to count on breach of warranty; count for libel—amended to count for malicious prosecution; count for conversion of money—amended to count for money had and received.
- XI. Amendments should be allowed even though injury result to the opposite party, if such injury can be compensated by costs or otherwise; if compensation is impossible, then such amendments are not allowed.

### SET-OFF AND COUNTERCLAIM.

*Common Law.* It was necessary in case the defendant desired to rely upon a counterclaim to state specifically the facts tending to support such defense, and if on the trial a set-off or counterclaim is established, the amount thereof was set off against the claim of the plaintiff, if the latter sustained the same, or if the claims of the defendant exceeded that of the plaintiff he had judgment for the excess.

*Statutes.* A defendant may counterclaim upon a cause of action arising out of the contract or transaction set forth in the complaint or, in an action arising on contract, any other cause of action also arising on contract and existing at the commencement of the action. But a counterclaim must be pleaded as such and be so denominated and a demand of judgment thereon must be made.

- I. Reply to set-off may now contain two defenses which under the common law would have been objectionable as double.
- II. If plaintiff does not answer a set-off pleaded, he is in default and if he discontinues his action, judgment will go against him.
  1. Pleading a set-off is in effect a cross action against plaintiff and not, strictly speaking, a defense.
  2. The set-off must state a cause of action the same as a declaration and being introduced as a plea or answer, the plaintiff must reply or be in default.

#### MOTIONS BASED ON PLEADING.

##### *Motion in Arrest of Judgment.*

- I. Any matter going to the merits of the case may be shown in arrest of judgment if the motion is made between the award and the perfected judgment.
- II. A judgment cannot be arrested, except for substantial errors apparent upon the face of the record.
  1. A motion in arrest of judgment cannot be based on extrinsic matter and extrinsic matter cannot be made part of the record by the motion papers.
- III. The sufficiency of the declaration can be challenged on a motion in arrest of judgment.
  1. When a declaration states a ground of action defectively, a verdict cures the defect, but when it wholly fails to state a cause of action, verdict does not cure.
- IV. When any material fact necessary to state a cause of action is neither directly nor inferentially stated, the judgment will be arrested, but if such fact though not expressly stated, can be implied from what is stated, judgment will not be arrested.



V. After judgment on demurrer, the defendant cannot raise the same question on motion in arrest of judgment. This rule does not apply in cases of judgment by default or where the error arises on verdict or subsequent proceedings.

(This is not the universal rule.)

VI. If some counts of a declaration are good and some bad, and there is a general verdict, the judgment will be arrested.

VII. Where two good counts are misjoined in a declaration, and there is a general verdict, the judgment will be arrested.

1. If two good counts are improperly joined and the verdict is for the plaintiff in one and for the defendant in the other, judgment will not be arrested but will be given in accordance with the verdict.

2. If damages are assessed separately upon counts improperly joined, the plaintiff may have judgment upon the counts that might properly be joined and judgment arrested on the other counts.

*Motion for Judgment Before or Notwithstanding the Verdict.*

I. On motion for judgment notwithstanding the verdict the record must be produced and the motion cannot be based on affidavits.

II. Where a verdict is given defendant on an insufficient plea, judgment for plaintiff will be given on a motion for judgment notwithstanding the verdict.

III. After issue joined, non-suit will not be granted defendant on account of a defective declaration. He should demur or move in arrest of judgment.

*ERROR AND APPEAL ON THE PLEADINGS.*

I. Error that can be cured by motion in arrest of judgment can be reached by writ of error.

II. On writ of error only errors appearing upon the face of the record will be considered.

1. The assignments of error and the papers used as evidence are no part of the record.

III. Unless a party has been prejudiced by the action of the trial court writ of error is unavailable.

PLEADINGS IN PARTICULAR ACTIONS —  
CONTRACTS.

*Specialty and Simple Contracts.*

(a) Covenant or debt on specialty. Necessary allegations.

I. In action on simple contract declaration must allege the consideration. In action on a specialty such allegation is unnecessary.

1. In declaring upon a bill or note it is not necessary to allege delivery. It is enough to state that the defendant made or endorsed the bill or note, the delivery being thereby implied.

II. In action on a specialty the sealing of the instrument need not be alleged, because it is implied.

1. In declaring upon such instrument, the sealing is inferred for otherwise there is no writing obligatory.

III. Strained inferences will not be placed on the allegations of a declaration even to sustain the pleading.

IV. If the contract declared on contains exceptions or reservations, the declaration must aver these reservations or exceptions or upon their being afterwards proven a fatal variance results.

1. If the exception is incorporated in the general clause of a contract, party relying on such clause must set out the exception.

2. If there is a general clause and a separate and distinct clause contains exceptions, a party relying on the general clause need not set out the exceptions.

V. Provisos furnishing matters of excuse need not be negatived by declaration. Pleas must aver them. Exceptions must be negatived.

1. The proviso forms no part of plaintiff's cause of action. It is merely affirmative defensive matter.

VI. Covenants must be set out in full, and if a qualification forms part of a covenant it must be alleged.

(b) Special Assumpsit — Necessary Allegations.

I. In actions on oral contract the declaration must allege the consideration. Want of such allegation is not cured by verdict.

- II. If consideration is alleged as a conclusion of law, it is insufficient on demurrer; but if issue is joined on such pleading, verdict cures the defect.
- III. Where declaration in assumpsit alleges agreement to do a number of things, but verdict finds only an agreement to do one or several, but not all, judgment must go for defendant.
- IV. Under common law an undertaking to pay the past debt of another must be based on a consideration and a declaration on a guaranty must allege a consideration.
- V. In declaring on contract, the declaration must truly describe the contract and according to its legal effect and any material variance will be fatal.
  - i. While only material parts of the contract need be alleged, if the parts omitted qualify the parts set out, the omission is fatal.
  - (a) In an action on an insurance contract only so much need be alleged as will show a right to recover.
    - 1. The various limitations, conditions, etc., contained in the policy are defensive matter and must be pleaded by defendant.
    - (b) A declaration cannot count on absolute contract when in fact the contract is conditional.
      - 1. A general allegation that plaintiff has performed all things and kept all conditions is insufficient.
      - 2. The general averment of performance of conditions precedent is insufficient; the performance of each condition must be alleged with particularity.
      - 3. A defendant who wishes to put the plaintiff to proving the performance of any condition must specifically deny the performance of the particular condition, a general denial of such general averment of performance being insufficient.
- VII. In an action on a note, evidence of a waiver of demand supports the allegation of demand and notice.
- VIII. In an action on contract the breach thereof must be alleged.
- IX. In an action an official bond payment of the obligation for which bond was given may be proven under a general denial.

1. A general denial puts in issue more than the non-execution of the bond. It also denies conversion and payment is evidence of non-conversion.

*Defenses.*

- I. The defense of failure of consideration must be specially pleaded.
- II. In assumpsit pleading the statute of frauds is in fact pleading non-assumpsit but is an untrue and argumentative denial of the contract and hence bad.
  1. Non-compliance with the statute of frauds is not a plea like that of fraud, usury, gaming, infancy or forfeiture, which are pleas amounting to confession and avoidance.
  2. Plaintiff need not show in his declaration upon a claim included within the statute of frauds that its provisions have been complied with.
  3. The defendant is allowed to show a non-compliance with the statute of fraud under a general denial of the contract.
- III. Bills of exchange and promissory notes are exceptions to the rule that in actions on simple contract the consideration must be alleged. This exception is created by statute.
- IV. Infancy makes a note voidable but not void and cannot be shown under a general denial.

*TORT ACTIONS — TRESPASS.*

*Scope of the Action.*

- I. Where the injury is the direct result of the agency used to commit the trespass, action for trespass is the proper remedy.
- II. Declaration in form *vi et armis*, but only alleging consequential damages, is bad on demurrer.
  1. While an action on the case will lie wherever trespass lies, the converse is not true.
  2. Trespass will lie whenever the injury is the direct result of the act complained of.
  3. Trespass on the case will lie if injury, in law, is not forcible or not the direct result of the act complained of but only consequential.

- III. One not directly connected with the trespass cannot be liable therefor unless he ratifies the same and consents thereto.
  - 1. One who takes by trespass from a trespasser is liable.
  - 2. A bailee is not liable in trespass for wrongful acts affecting the property done after the termination of the bailment.
- IV. Where the damages are neither intentional, nor direct, nor immediate, trespass will not lie.
- V. Where facts alleged show lawful arrest but wrongful obtaining of the process, the action should be for malicious prosecution, and not for false imprisonment.
- VI. Trespass *quare clausum fregit* can be brought only by the person in possession, actual or constructive, because the gist of the action is the injury to the possession.
  - 1. If premises are occupied the action must be brought by the party occupying the same; if unoccupied, by the party having title and right of possession.

*Necessary Allegations.*

- I. Mere technical and formal allegations necessary in criminal actions, are not necessary in civil cases.
  - 1. *Vi et armis* was necessary under the common law because the civil action was also the criminal process. These words are not necessary now.
  - 2. False imprisonment lies for detention manifestly illegal while in malicious prosecution the arrest and detention is legal.
  - 3. The gravamen of false imprisonment is the unlawful detention, while of malicious prosecution it is the malice and want of probable cause.
- II. In actions of trespass allegation of ownership is sustained by any proof of any form of ownership. Mere right of possession is sufficient against everybody but the owner.

*Defenses.*

- I. Under a general denial for injury by trespass, evidence that the injury was the result of an accident is not admissible.
  - 1. If the injury was due to accident then defendant confesses the trespass and should have pleaded the avoidance.

- II. Under a general denial in trespass *quare clausum fregit* evidence of title and of right of possession in the defendant may be given.
  1. Possession or right of possession in plaintiff is necessary to sustain his cause of action and showing title and right of possession in the defendant defeats the action and can be shown under the general issue.
- III. A special plea amounting to the general issue is insufficient.
  1. Whether a plea amounts to the general issue is determined by whether it takes away all color for maintaining the action in compelling plaintiff to prove a negative in the first instance.
  2. Such special pleas are bad unless the express color for action be given by alleging that plaintiff has a defective title.
- IV. Matters of justification in actions for a tort must be specially pleaded.
- V. Where the act complained of is *prima facie* a trespass any matter of justification or excuse must be specially pleaded.
  1. The plea of justification is pleaded only where the defendant is a trespasser, but under this plea it may not be shown that plaintiff was not entitled to possession while defendant was in constructive possession, the actual possession being in plaintiff.
- VI. Under the plea of the general issue advantage cannot be taken of the defense of the statute of limitations. This statute must be specially pleaded.

### EJECTMENT.

#### *Scope of the Action.*

- I. In ejectment a mere trespasser cannot set up a title in another than the plaintiff as a defense.
  1. To maintain ejectment the plaintiff must show something more than a mere right to possession except as against a mere intruder.
- II. To maintain ejectment plaintiff need not necessarily show a possession of twenty years or a paper title. Possession for

less than twenty years will raise a presumption sufficient to put the defendant upon his defense.

- I. Unless a prior possession is shown, a subsequent possession will raise the presumption of title unless the second possession was acquired by a mere entry without lawful right.

*Necessary Allegations.*

- I. In ejectment the plaintiff must correctly allege his estate in the land he seeks to recover.
  - I. Thus declaring upon an estate in fee is not established by showing a life estate.
- II. The declaration must allege that plaintiff was possessed of the land before he was dispossessed thereof, or that a right of possession accrued in him before the defendant entered thereupon.

*Defenses.*

- I. A special plea or special pleas amounting to the general issue in ejectment are demurrable.
  - I. Under the common law the only plea permitted in ejectment was not guilty and under this plea evidence was generally admitted to establish the facts later sought to be pleaded under special pleas.
- II. Special pleas merely alleging the negative of what the plaintiff must prove are superfluous.
  - I. Special pleas containing unnecessary and superfluous matter should be disregarded or stricken out but not demurred to.
- III. A plea denying possession, but not denying the right to possession, is demurrable.
  - I. Such pleas answer only a part of the declaration though professing to answer the whole and hence are obnoxious.
- IV. In ejectment the plaintiff must show a right of possession as well as title and if the title of his grantor was barred by the statute of limitations, he cannot recover.
  - I. Ejectment is a possessory action and lies only where the lessor of the plaintiff might enter and hence in such case plaintiff must show his lessor's right to enter by showing possession in the latter within twenty years.

ACTIONS ON THE CASE.

*Scope of the Action.*

- I. The gist of the action on the case is not a failure to perform but a failure to perform in a proper manner.
  1. Even though the action grows out of a contract, if it is based on want of skill and diligence implied in every instance where one is employed by reason of his skill and diligence, it is a tort action since the gravamen of the action is the breach of this duty.
- II. A declaration alleging facts sustaining an action for money had and received states a cause of action *ex contractu* and not *ex delicto*.
  1. Where a declaration alleges the breach of duty in not paying over money after demand, this is an allegation for the recovery of money had and received.
  2. If allegation in such action that failure to pay over the money was with intent to defraud made such action one sounding in tort, it would destroy the distinction between actions on contract and those in tort.

*Necessary Allegations.*

- I. In actions on the case by reversioner, a declaration alleging facts injurious to the possession rather than necessarily to the reversion, is insufficient.
  1. Such defect will not be cured by verdict because it is too serious and material.
- II. In an action for injury to easements the right to the easement need not be alleged as a prescriptive one since it may arise in any way as long as it exists at all.
  1. Merely alleging the existence of an easement is sufficient and general averments of possession and right to the easement are also sufficient.
- III. In actions for negligence, facts showing a duty owing and failure to perform such duty must be alleged.
  1. In such cases the relationship between plaintiff and defendant and the consequent duty owing must be set out because a trespasser could not recover.
- IV. In actions for wrongful death, two causes of action arising by reason thereof one for the estate and the other for the



widow and next of kin, the declaration must allege whether the action is brought for the estate or for the widow, and if for the latter, that the deceased left a widow and next of kin surviving him.

1. In actions of this kind necessary allegations are, 1, the death of the deceased in this state; 2, due to the tortious act of the defendant; 3, that plaintiff is the personal representative of the deceased, if for the estate, and if for the widow and next of kin, that deceased left them surviving.
  2. Such action could not be brought under the common law and hence is strictly a statutory action.
- V. In actions for negligence a declaration must set out the negligent acts which are the proximate cause of the injury. Pleading mere legal conclusions is insufficient.
- VI. Only the duty or duties alleged in the declaration to have been violated can be proven, although evidentiary facts should not be alleged.
- VII. In actions for negligence, contributory negligence is a defense and the declaration need not allege the exercise of due care.
- VIII. In actions for personal injury the declaration need not negative that injury was caused by the neglect of a fellow servant because negligence of a fellow servant is an affirmative defense.
- IX. In actions for personal injury the declaration must negative the assumption of a known risk or set out a sufficient excuse to take the case out of this doctrine.
- X. Words in themselves harmless in order to become slanderous must be made actionable by a colloquim directly connecting them with the meaning alleged in the inducement, and the ordinary and natural meaning of the words must be susceptible of the construction put on them. *Innuendoes* cannot extend the sense or effect of the words used.
- XI. The words claimed as defamatory must be set out in *haec verba*.
1. The exact words must be set out so that the court and the jury may determine their meaning and effect.

- XII. In libel and slander, under a general denial, proof of the bad reputation of the plaintiff is not admissible.
- XIII. To be actionable per se as charging a crime, the words must necessarily impute a crime.
- XIV. In libel and slander the declaration must allege publication of the defamation to others than the plaintiff.
- i. Libel or slander is an injury to the reputation and hence a defamatory letter seen only by the plaintiff causes no such injury.
- XV. Where there is no such colloquium an innuendo, however broad and comprehensive, cannot supply the defect.
- i. An *inducement* explains that which is doubtfully expressed and to make doubtful matters clear; a *colloquium* shows that the words were spoken in reference to the matter set out in the inducement; an *innuendo* is explanatory of the subject matter sufficiently but ambiguously expressed before.
- XVI. In libel and slander the declaration must not only allege the words used, but also that they were false and malicious.
- i. Defamatory words are only actionable when false and malicious and falsity and maliciousness must be averred in some form. Malice is of the essence of the cause of action.
- XVII. In malicious prosecution the declaration must contain (1) That defendant is responsible for the false charge made; (2) What the charge was; (3) That the prosecution of the plaintiff was without probable cause; (4) The favorable termination of the prosecution.
- XVIII. The necessary allegations of a declaration in an action for deceit are, (1) That false representations were made; (2) That they were made with intent to defraud; (3) That they were believed to be true and relied on and induced the parting with the property; (4) That defendant knew the representations were untrue; (5) That plaintiff was damaged thereby, alleging the damages specially, and (6) That the damages proximately followed from the deception.
- i. When several persons are charged with deceit an actual participation by all or a conspiracy to defraud should be alleged.

## COMMON LAW PLEADING

XIX. In deceit intent to defraud must be alleged and that the false representation was the proximate cause of damages and that the representation was in fact false.

### *Defenses.*

- I. In actions for obstructing the easement of right of way, the general issue denies plaintiff's right of way as well as the fact of obstruction by the defendant.
  1. On this point there is an essential difference between actions of trespass and trespass on the case. In the former, matters in excuse or justification must be specially pleaded; in the latter, they need not be pleaded because the plaintiff must recover upon the justice and equity of his case.
  2. In actions on the case the general issue is a denial of the whole cause of action and every essential fact alleged in the declaration, which plaintiff must prove to establish his case.
- II. Limitations which operate as an absolute bar to the action need not be negatived in the declaration if enough is alleged to show that such bar does not in fact apply.

## TROVER.

### *Scope of the Action.*

- I. If bailee violates terms of the bailment the right to immediate possession revives in the owner and the latter may maintain trover, if conversion occurs by reason of and at the time of the violating of such terms.
- II. In trover naked possession is sufficient against anyone but the true owner. If possession, however, is surrendered, such fact will not support the action. Neither can there be conversion where the taking is consented to.
  1. Naked possession, however obtained, is sufficient against a stranger. Surrender thereof destroys such title and surrender under protest does not protect such title.
  2. Where taking is by consent there is no conversion and under such circumstances a demand and refusal is no evidence of conversion.

*Necessary Allegations.*

- I. A declaration in trover must allege title or other right to immediate possession in the plaintiff.
- II. A declaration in trover alleging property in goods, does not necessarily mean absolute ownership, but such relation to the property as to entitle the plaintiff to possession.
  - I. General allegations of conversion permit evidence of such unjustified dealing with the property as shows a wrongful taking and disposal of it, prejudicial to the right of plaintiff.

*Defenses.*

- I. In trover a defendant must plead a former judgment in order to avail himself of this defense.
- II. In declaring in trover plaintiff need not set out the nature of his title, such as that he received it by an assignment of the cause of action.

REPLEVIN.

*Scope of the Action.*

- I. Answering in replevin it is sufficient to allege title to the property in question in a third person.
  - I. Whether a defendant or a stranger has the title is immaterial since the plaintiff has not.
- II. In replevin the declaration must aver a general or special title in the plaintiff and the right of immediate possession. Hence a plea of title in a stranger is sufficient.
  - I. While possession is sufficient for trespass, it is not in replevin.
- III. Replevin will not lie for severed fixtures where the plaintiff is out of possession of the realty when the severance occurred. If he was in possession at such time it will lie.
  - I. Replevin will not lie where a plaintiff must prove property in the chattel by proving property in the realty, unless he is in possession of the latter at the time the chattel was severed from the realty.
- IV. Replevin will lie only against a defendant who has the possession or the control of the goods or chattels.

## COMMON LAW PLEADING

- i. Attached goods are in the legal custody and possession of the officer only and an attaching creditor has no property, special or general, in the goods, no right of possession and hence no cause of action against a third party who takes them from the officer or destroys them.
- V. The owner of personal property in the actual possession of another and taken from such other under process against him, can maintain replevin and the officer cannot exonerate himself by showing that plaintiff failed to establish his title in another proceeding.
- i. The question of title may be litigated in the replevin action even if the plaintiff failed to establish his title in another proceeding.
  2. An officer must at his peril, seize the goods of the execution debtor and not those of a stranger. Possession by a bailee is the possession of the owner.

### *Necessary Allegations.*

- I. In replevin the declaration must aver title or interest in goods in the plaintiff, and not the evidence of title or of interest.
  - i. If it were otherwise a traverse would merely traverse the evidence of title or interest and not the fact.
- II. In replevin the declaration must allege the unlawful taking of the property by the defendant as well as the unlawful detention.

### *Defenses.*

- I. Under a plea of *non cepit*, the plaintiff need not prove title or right of possession because that is admitted, the only issue being the taking and detention. Under such plea plaintiff need not prove an unlawful taking because, title being admitted, any taking is unlawful.
  - i. The taking and carrying away of the personal property of another is trespass and evidence of detention is proof of an unlawful taking.
- II. The plea of *non detinet* puts in issue the right of property and the right of possession of the plaintiff.
  - i. Under the general plea all the necessary rights of plaintiff are put in issue and if plaintiff fails in any of them defendant must recover.

- III. In replevin a plea may set up *non cepit*, property in the defendant or in a stranger, although these pleas are inconsistent.
1. The plaintiff must show right of possession in himself, and to meet this a defendant may interpose and prove inconsistent pleas.
- IV. Under a plea of property in another than plaintiff, the defendant may show that the title or the claim to right of possession of the plaintiff was fraudulently obtained.
1. It is not necessary under this plea specially to allege fraud.
  2. Under the common law, if the plaintiff fails to show title, it was immaterial, whether the defendant showed title in himself or not.
  3. A plaintiff, who knows what title he has, showing title by a transfer of a questionable nature, is not surprised when his title is attacked for fraud.
  4. Replevin is a proper action to test title and anybody who claims an interest in the property may enter the contest.

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## THE LAW OF EVIDENCE IN WISCONSIN.

### PART THREE.

#### THE THEORY OF ADMISSIBILITY.

##### I. Multiple admissibility.

1. The principle of multiple admissibility is that evidence may be admissible for *one* purpose and not for one or more other purposes. From this principle it follows:
  - A. That an offer of evidence made generally should be received if admissible for some purpose, even though it would be inadmissible if offered for some other purpose.
  - B. But if you make an offer for a specific purpose, for which purpose it is not admissible, and the judge rejects it, that rejection is correct even though it would be admissible for some other purpose.

##### II. Curative admissibility.

1. The principle of curative admissibility is that you can admit anything to cure erroneous admission of irrelevant evidence on the other side.