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THE COMPLAINT—ALLEGATIONS IN PARTICULAR ACTIONS*

CHARLES EDWARD CLARK**

ACTIONS FOR BREACH OF CONTRACT

Since under the requirement of the code the complaint must state the *facts* constituting the plaintiff's cause of action, it is necessary in an action on a contract to set forth "the contract and its breach." This means that the plaintiff shall state consecutively the facts showing the primary right-duty relationship between the plaintiff and the defendant—here arising from the agreement—and the defendant's breach of his duty resulting in the secondary or remedial right-duty relationship which the court is asked to recognize and enforce in the action. Here, as elsewhere, it should be the aim of the pleader to state so far as he can and so briefly as possible the specific acts of the parties, what each did, rather than the legal interpretation of these acts which he expects to ask the court to make.¹

Pleading the Contract—Effect of a Writing

Where the contract is oral, the meeting of the minds of the parties in a definite promise must be shown by the allegations. It has been held that the allegation that the parties "mutually agreed," etc. (stating the promise) is not objectionable as stating a conclusion of law; in fact that it is the proper form rather than to allege what

* This article will form the substance of a chapter in a book on Code Pleading, to be published by the West Publishing Co., St. Paul, Minn. It supplements an article entitled "The Complaint in Code Pleading," 35 Yale L. J. 259 (1926). Other articles to be incorporated in the proposed book are *History, Systems and Functions of Pleading*, 11 Va. L. R. 517 (1925), reprinted in 5 Am. L. Sch. R. 716 (1926); *The Union of Law and Equity*, 25 Col. L. R. 1 (1924); *Trial of Actions Under the Code*, 11 Corn. L. Q. 482 (1926); *The Code Cause of Action*, 33 Yale L. J. 81 (1924); *The Real Party in Interest* (with R. M. Hutchins), 34 Yale L. J. 259 (1925); *Joinder and Splitting of Causes of Action*, 25 Mich. L. R. (Feb. 1927).

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¹ The general idea of stating the facts constituting the cause in the complaint, wherein it is always necessary to show facts from which at least the secondary remedial right-duty relationship results, is developed in the writer's article on the complaint, referred to in the star footnote above; and also the article on the cause of action therein referred to.

each said in making the agreement, which would be to state the evidence.²

Where the contract is evidenced by a writing, under principles of contract law, the whole contract must be found therein. Should the detailed writing be considered the "fact" which must be alleged as it exists; or should it be considered merely the *evidence* of the legal agreement which alone should be alleged? There has been a slight tendency for the courts to split on this issue; but the vast majority hold that it is the pleader's option whether to plead the contract according to its legal effect, or in *ipsis verbis*.³ This would seem the better view, since the question is one of fair notice of the contract and this may be given by either method. Pleading the legal effect of the contract allows abbreviation but is subject to the danger that the legal effect of the contract may be misstated and a variance later be claimed; pleading the contract leads to exactness, but in the case of a long instrument, to the cluttering of the record. In any event, the matter should be subject to the control of the trial court, which on a motion to make more definite can, where necessary, require more exact notice.⁴

The common law rule,—perhaps only slightly modified by the ideal of fair notice—was that the details of the contract must be set out with particularity and that any variation between pleading and proof was fatal.⁵

² *Grossman v. Schenker*, 206 N. Y. 466, 470, 100 N. E. 39 (1912). Allegations as to what the parties said should be good except as against a motion, provided they show a contract. See 35 Yale L. J. 264-266.

³ *Fairbanks v. Isham*, 16 Wis. 118 (1862); *Joseph v. Holt*, 37 Calif. 250 (1869); *Frick v. Hartford Life Ins. Co.* 98 Conn. 251, 119 Atl. 229 (1922); Conn. Prac. Bk. (1922), sec. 181, p. 283; *New York News Pub. Co. v. Steamship Co.*, 148 N. Y. 39, 42 N. E. 514 (1895); *Sunderland's Cas. Code Plg.*, 309 n. But see *Reilly v. Cullen*, 159 Mo. 322, 60 S. W. 126 (1910); *Estes v. Desnoyers Shoe Co.*, 155 Mo. 577, 56 S. W. 316 (1900); cf. *Kidder v. Port Henry*, 201 N. Y. 445, 94 N. E. 1070 (1911).

⁴ Cf. *Kidder v. Port Henry*, *supra*. Statutes permitting the use of a copy of an instrument for the payment of money, together with a mere allegation of the amount due thereon, are cited, note 53, *infra*.

⁵ *Laing v. Fidgeon*, 6 Taunton, 108 (1815); *Curley v. Dean*, 4 Conn. 259 (1822); *Hill v. Barrett*, 14 B. Mon. 83 (1853); *Mazziotti v. Di Martino*, 103 Conn. 491, 130 Atl. 844 (1925). See notes 11, 13, 26, *infra*. It was not necessary, however, to allege irrelevant, immaterial or collateral promises. *Miles v. Sheward*, 8 East 7 (1806); *Parker v. Palmer*, 4 B. & Ald. 387 (1821). See *Pope v. Terre Haute Car & Mfg. Co.*, 107 N. Y. 61, 13 N. E. 592 (1887) that an implied term of the contract must be pleaded.

Statutes often require copies of written instruments made the basis of claim or defense to be filed with the pleading.⁶ Often, too, the denial of the execution of a writing, as alleged by the opposing party, must be verified.⁷

Where the contract is within the statute of frauds, the existence of a writing need not be alleged; though some courts have held that a complaint showing that there was no writing in such case is demurrable, unless facts taking the case "out of the statute" are alleged.⁸

The Consideration

Since in all but a few cases consideration is necessary for the existence of a valid contract, the consideration for the contract must be alleged.⁹ In cases where "consideration is presumed," as in the case of negotiable instruments, such allegation is not necessary.¹⁰

The common law rule was that the specific consideration must be set forth and that the proof of any other consideration than that alleged constituted a fatal variance.¹¹ A question has been made under the codes, however, whether the allegation that the contract was made for "a valuable consideration" is not sufficiently specific. On this point the lower New York courts divided until the Court of

⁶ See e.g. statutes of Indiana, Burns Ann. St. 1924, sec. 368; Kansas, Rev. St. 1923, 60-739; Ohio, Gen. Code, 1921, sec. 11, 333; Wisconsin, St. 1921, sec. 2675.

⁷ See e.g. statutes of California, Code C. P. 1923, sec. 446-9; Indiana, Burns Ann. St. 1924, sec. 370; Kansas, R. S. 1923, 60-729; Missouri, Rev. St. 1919, sec. 1415.

⁸ See *Dorema v. Powers*, N. J. 115 Atl. 50 (1920), with note 69 U. of Pa. L. R. 279; *Harmon v. Alfred Peats Co.*, 214 N. Y. S. 353 (1925) (may be raised by motion for judgment). But see *Mason-Heflin Coal Co. v. Currie*, 270 Pa. 221 Pa. 113 Atl. 202 (1921), *Collins v. Oil Co.*, 125 S. E. 223 (1921), with note 25 Col. L. R. 844; cf. *Am. Products Co. v. Franklin Refining Co.*, 295 Pa. 332, 119 Atl. 414 (1923). Cf. Lorenzen, 32 Yale. L. J. 311.

⁹ *Blanckenhagen v. Blundell*, 2 B. & A. 417 (1819); *Swift v. Fire Ins. Co.*, 279 Mo. 606, 216 S. W. 935 (1919); Dec. Dig. Pleading, Sec. 8 (4); Contracts, sec. 334.

¹⁰ *Pastene v. Pardini*, 135 Calif. 431, 67 Pac. 681 (1902); *Rector v. Fornier*, 1 Mo. 204 (1822); *Caples v. Branham*, 20 Mo. 244 (1855). For the history of the rule as to promissory notes, going back to the statute of 3 & 4 Anne. c. 9, see *Carlos v. Fancourt*, 5 D. & E. 482 (1794). But see *Delano v. Barilett*, 6 Cush. 364 (1850). See 21 Mich. L. R. 697. As to contracts under seal, see *Montgomery v. Auckley*, 92 Mo. 126 (1887); *Considine v. Gallagher*, 31 Wash. 669, 72 Pac. 469 (1903). Under statutes providing that written contracts "import" consideration, no allegation of consideration is necessary. *Globe etc. Ins. Co. v. Heysley*, 206 Ky. 202, 266 S. W. 1074 (1925); *Brown v. Irving*, Mo. 269 S. W. 686 (1925).

¹¹ *Lansing v. McKillip*, 3 Caines, N. Y., 286 (1805); *Curley v. Dean*, 4 Conn. 259 (1822); *Woodruff v. Wentworth*, 133 Mass. 309 (1882). As these cases pointed out, it was necessary to allege the whole of the consideration.

Appeals ruled that the allegation was sufficient.¹² The decisions elsewhere are conflicting, perhaps the majority favoring the older rule.¹³

Performance of Conditions Precedent

Since at common law the contract must be set forth with particularity, the conditions to be performed by the plaintiff precedent to the defendant's duty would appear as a part of such particular obligations; and hence it became necessary to show performance of such conditions or else no duty, and therefore no right of action, was shown. The acts or events constituting such performance were to be stated, a general allegation of performance being insufficient.¹⁴ In the absence of express code provisions, the same rule has been applied in code pleading.¹⁵ The rule may be a burdensome one, however, especially in cases where the conditions are very numerous, as in the case of a contract of insurance, and the tendency has been to relax the rule. Most codes, therefore, contain express provisions permitting a general allegation of due performance of all conditions precedent.¹⁶ In some cases the rule has been modified by

¹² *California Packing Co. v. Kelly*, 228 N. Y. 49, 126 N. E. 269 (1920); *Brennan v. Standard Wood & Feed Co.*, 211 N. Y. S. 649 (1925). See W. W. Cook, 21 Col. L. Rev. 416; 35 Yale L. J. 263, 264. Cf. *St. Lawrence Co. Nat. Bank v. Watkins*, 153 A. D. 551, 138 N. Y. S. 116 (1912) with *White v. Western Union Telegraph Co.*, 153 A. D. 684, 138 N. Y. S. 598 (1912).

¹³ *Leach v. Rhodes*, 49 Ind. 291 (1874); *Beck v. Odell*, Ind. App. 127 N. E. 852 (1920); *Anderson v. Charles*, 52 Cal. App. 290, 198 Pac. 641 (1921) (insufficient). But see Pomeroy, *Code Remedies* (4th ed.) 562, 673; *Patille v. Jones*, 113 Ga. 330, 38 S. E. 745 (1901); *Storseth v. Folsom*, 45 Wash. 374, 88 Pac. 632 (1907). See *Kean v. Mitchell*, 13 Mich. 207 (1865) (good after verdict); *Bk. v. Ger. Ins. Co.*, 72 Wis. 535, 40 N. W. 506 (1880) (good v. general demurrer). See cases collected Dec. Dig. Pl. sec. 8 (4).

¹⁴ *Sanderson v. Bowes*, 14 East 500 (1811); *Vivian v. Shipping*, Croke, Charles, 384 (1635) (good after verdict); Shipman on Com. L. Pl. (Ball. ed.) 246.

¹⁵ *Tooker v. Arnoux*, 76 N. Y. 397 (1879); *Root v. Childs*, 68 Minn. 142, 70 N. W. 1087 (1897); *Korbly v. Loomis*, 172 Ind. 352, 88 N. E. 698 (1909); *Griffin v. Bass Foundry Co.*, 135 Ala. 490, 33 So. 177 (1902); *California Canneries Co. v. Great Western Lumber Co.*, 44 Cal. App. 69, 185 Pac. 1008 (1919); *Willey v. Cameron, Michel & Co., Inc.*, A. D., 217 N. Y. S. 248 (1926).

¹⁶ See N. Y. C. P. A. Rule 92, from C. C. P. s. 533: "the party may state, in general terms, that he, or the person whom he represents, duly performed all the conditions of such contract on his part." Cf. Alaska, Stat. 1913, sec. 910; Arizona, R. S. 1913, sec. 431; Arkansas, Dig. Stat. 1921, sec. 1227; California, Code C. P. 1923, sec. 457; Colorado, Code 1921, sec. 72; Idaho, Comp. Stat. 1919, sec. 6712; Iowa, Comp. Code, 1919, sec. 7267; Kansas, Rev. Stat. 1923, 60-743; Minnesota, G. S. 1913, sec. 7767; Missouri, R. S. 1919, sec. 1258; Montana, Rev. Code, 1921, sec. 9170; Nebraska, Comp. Stat. 1922, sec. 8640; Nevada, Rev. L. 1912, sec. 5071; New Mexico, Ann. St. 1915, sec. 4153; North Carolina, Consol. St. 1919, sec. 539; North Dakota, Comp. L. 1913, sec. 7461;

decisions.¹⁷ In any event, the courts strive to construe conditions as *subsequent*, where possible, since in such case non-performance is considered matter of defense to be raised by the defendant.¹⁸

Whether a condition is precedent or subsequent involves a nice question of interpretation of the contract.¹⁹ Since conditions precedent are so much disfavored, a condition which is merely precedent to the accruing of the right of action is held not to come within the rule; it must be precedent to the *making* of the contract rather than its *breach*, i.e., it must be one which will be fulfilled, if at all, before even a conditional duty of performance rests upon the defendant. Some courts have seemingly made their decisions turn on this question of time;²⁰ but this has not been decisive in many cases. In the case of the ordinary bilateral contract, it must be decided further whether the mutual promises are "dependent" or "independent"; if the former, performance or readiness to perform by the plaintiff must be shown before the defendant is in default.²¹ Further, it

Ohio, Gen. Code, 1921, sec. 11339; Oklahoma, Comp. Stat. 1921, sec. 301; Oregon, Code C. P. 1920, sec. 88; Porto Rico, Rev. Stats. 1911, sec. 5111; South Carolina, Code 1922, sec. 212; South Dakota, Rev. Code, 1919, sec. 2366; Utah, Comp. L. 1917, sec. 6601; Washington, Rem. & Bal. Comp. Stat. 1922, sec. 288; Wisconsin, Stat. 1921, sec. 2674; Wyoming, Comp. St. 1920, sec. 5681. The New York cases tend to hold strictly that the statutory language must be followed. *Berger v. Urban Motion Pictures Industries, Inc.*, 206 A. D. 379, 201 N. Y. S. 489 (1923) (that the plaintiff "duly performed all the terms and obligations of said contract" is insufficient); *Weinstein v. Ruthland Realty Corp.*, 208 N. Y. S. 953 (1925); but see *Murphy v. Hart*, 122 A. D. 548, 107 N. Y. S. 542 (1907); 5 Minn. L. R. 147, citing cases from other jurisdictions. Stating the details is still permissible. *Moghabghab v. Sherman & Sons, Co.*, 161 A. D. 135, 146 N. Y. S. 392 (1914); *Korbly v. Loomis*, 172 Ind. 352, 88 N. E. 69 (1909).

¹⁷ *Benanti v. Delaware Ins. Co.*, 86 Conn. 15, 84 Atl. 35 (1912); *Vincent v. Mutual Reserve Assoc.*, 77 Conn. 281, 287, 58 Atl. 963 (1904) (while plaintiff suing on an insurance policy must prove performance of conditions precedent, where in issue, yet defendant must raise the issue and plaintiff need not plead performance).

¹⁸ *Johnson v. Northwestern Ins. Co.*, 94 Wis. 117, 68 N. W. 868 (1896); *Jones v. Accident Ass'n.*, 92 Iowa, 652, 61 N. W. 485 (1854); *Title Guaranty & S. Co. v. Nichols*, 224 U. S. 346, 32 Sup. Ct. 475 (1911). See 50 L. R. A., n.s., 1006 note.

¹⁹ See Corbin's *Anson on Contract*, Ch. XIII, esp. p. 434: "Thus it is evident, in spite of very general assumptions to the contrary, that the burden of allegation and the burden of proof cannot be determined by the test of such descriptive adjectives as precedent and subsequent. It is no doubt true that the law on this subject needs entire reconstruction and restatement, that there is no existing test capable of logical definition, and that the rules are largely arbitrary as well as conflicting." See also Corbin's *Cas. on Contracts*, 478-480, 702, et seq.

²⁰ *Benanti v. Delaware Ins. Co.*, *supra* note 17; *Johnson v. Northwestern Ins. Co.*, *supra* note 18.

²¹ Corbin's *Anson on Contracts*, 435, 469-473.

seems that even facts which it is agreed must exist at the time of making the contract may not be considered as conditions precedent, if the language of the defendant's promise is absolute and the further requirements seem inserted by way of collateral provisos. A similar question has arisen with reference to rights of action upon statutes. The plaintiff must negative *exceptions* in the statute, but not *provisos* which are only to be relied on by the defendant as matters of defense. The distinction is largely one of position and wording.²² So in contracts the use of the terms *exception* and *proviso* in this connection might be at least not as misleading as the labels *precedent* and *subsequent*.²³ The distinction is narrow but perhaps not unfair. Where the very promise sued on is of limited scope (as 'to pay out of money realized from the sale of a particular house'),²⁴ plaintiff should show the facts were not outside the limitation; but where the defendant, as in the insurance case, promises broadly and then with excessive caution seeks to protect himself in the event of the happening of many contingencies which probably will not happen, he may well be expected to assume the burden of raising the question.²⁵

It is generally, though not universally, held that proof of waiver of performance of conditions is a fatal variance from allegations of performance. The waiver itself must be pleaded.²⁶

²² See Comment, 5 Corn. L. Q. 199, discussing *People v. Bradford*, 227 N. Y. 45, 124 N. E. 118 (1919); 16 Col. L. R. 527; *Barker v. H. & St. J. R. R. Co.*, 91 Mo. 86, 14 S. W. 280, (1886); *Ansell v. Boston*, Mass. 150 N. E. 166 (1926); *State v. Cohen*, N. J. 131 Atl. 675 (1926).

²³ Cf. *Lunt v. Aetna Life Ins. Co.*, 149 N. E. 660 (Mass.-1925); *Fike v. Stratton*, 174 Ala. 541, 558, 9, 56 So. 929 (1911); *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459 (1831); *Ferguson v. Cappeau*, 6 Harr. & J. (Md.) 394 (1825); Shipman on C. L. Pl'g (Ball. ed.) 250.

²⁴ As in *Tooker v. Arnoux*, *supra* note 15.

²⁵ "It is well settled that in actions upon insurance policies containing a stipulation that the policy shall be void if any of the representations of the insured are untrue, the defendant must allege and prove the untruth of the particular representation claimed to be untrue." Ames, Cas. Pl., 2d ed. 304, 305, note, citing cases; Corbin's Cas. on Contracts, 709, note; 50 L. R. A., n.s., 1006 note.

²⁶ *Feder v. Midland Casualty Co.*, 316 Ill. 552, 147 N. E. 468 (1924); *Thompson v. St. Charles*, 227 Mo. 220, 126 S. W. 1044 (1910); *Garvey v. Fowler*, 4 Sandf. 665 (1851); *Lumbert & Co. v. Palmer*, 29 Iowa, 104 (1870); *Cavanagh v. Iowa Beer Co.*, 136 Iowa, 236, 113 N. W. 856 (1907); *Burgh v. Legge*, 5 M. & W. 418 (1839); *Hind v. Oriental Products Co.*, 195 Cal. 655, 235 Pac. 438 (1925). *Contra*, *Eq. Life Ass. Soc. v. Campbell*, Ind. App. 148 N. E. 505 (1925); *Traveller's Ins. Co. v. Fletcher Ann. Nat. Bk.*, Ind. App. 148 N. E. 501 (1925). Cf. *Black Co. v. London G. & A. Co., Ltd.*, 190 A. D. 218, 180 N. Y. S. 74 (1919) with note, 5 Corn L. Q. 351; *Harrison v. Bailey*, 99 Mass. 620 (1868); *Duffy Bros. v. Bing & Bing*, A. D. 215 N. Y. S. 755 (1926); *Town of Potsdam v. Aetna Cas. & Surety*, A. D. 217 N. Y. S. 541

The Breach

The acts of the defendant constituting the breach must be set forth with definiteness and particularity. An allegation that the defendant "failed to perform his contract," or breached it, is held bad as being a conclusion of law.²⁷ "The allegation of the breach must obviously be governed by the nature of the stipulation. It should be assigned in the words of the contract, either negatively or affirmatively; or in words which are co-extensive with the import and effect of it."²⁸

Where the breach consists of the defendant's non-payment of an obligation at maturity, a question of some difficulty has arisen. This is due to the well settled rule of the codes that "payment is an affirmative defense." The matter may be considered more at length in connection with the answer where it may be suggested that a logical and convenient distinction might be made between payment at maturity of the obligation and payment later to obtain the release of an already accrued right of action. On this theory plaintiff should allege and prove non-payment at maturity, while the defendant should allege and prove payment after the right has accrued. This distinction seems not to be applied generally, the burden being placed on the defendant in both situations to allege and prove payment.²⁹ Is it so then that the plaintiff need not allege non-payment

(1926). As these cases indicate, sometimes an exception is made in actions on insurance policies, or on negotiable instruments where waiver of presentment is relied on. See Shipman, C. L. Pl., Ball. ed., 247-48, note. A case note in 11 Corn. L. Q. 394 analyzes the cases and points out a distinction between cases expressly alleging performance of conditions and those, such as where the common counts are used, ignoring the conditions altogether. See also 20 Ill. R. 499 on the Feder Case, *supra*, 36 Yale L. J. 579.

²⁷ *Crossways Apts. Corp. v. Amante*, 210 N. Y. S. 346 (1925); *Du Pont Auto Distributors v. Du Pont Motors*, 210 N. Y. S. 577 (1925); Shipman, C. L. Pl., Ball. ed. 252.

²⁸ *Withers v. Knox*, 4 Ala. 148 (1842) cit. Chitty; *United Iron Works v. Standard Brass Casting Co.*, Calif. 231 Pac. 567 (1925); *Shering v. Kelley*, 200 Mass. 232, 86 N. E. 293 (1908); *Jones County v. Sales*, 25 Iowa 25 (1868); *Sistare v. People's Supply Co.*, 87 S. C. 171, 69 S. E. 152 (1910) (assignment should be sufficiently definite so that defendant may intelligently prepare his defense); Shipman C. L. Pl., Ball. ed. 251, 252. Under certain circumstances the allegations must be more detailed than the language of the contract as where the contract is ambiguous. *Ibid.*; *Worthington v. McDonald*, 4 Ind. 483 (1853). Cf. *Jennings v. Kiernan*, 35 Ore. 349, 55 Pac. 443 (1898); *Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850 (1893). Where a contingency must happen before there is a breach, this must be alleged. See p. 104 *supra*; *Talkorn v. Wrigg*, Croke Jac. 406 (1617).

²⁹ Alison Reppy, *The Anomaly of Payment as an Affirmative Defense*, 10 Corn. L. Q. 269 (1925); C. C. Alden, *The Defense of Payment Under Code Procedure*, 19 Yale L. J. 647; 1 Minn. L. R. 462; 3 N. Y. Law R. 89; 2 *Ibid.*

at maturity? While this would mean that the complaint would not show a complete right of action on its face, some courts have answered in the affirmative.³⁰ Probably the majority meet the dilemma by saying that the complaint is demurrable if non-payment is not alleged; but where alleged, it need not be proved.³¹

Except where nominal damages only are sought, or where the amount of damages has been liquidated by agreement of the parties, the damage resulting to the plaintiff must be set forth. The method of alleging damages is discussed hereinafter.³²

ACTIONS FOR DEBTS OR ACCOUNTS DUE—THE COMMON COUNTS

At Common Law

A common law declaration in the action of debt contains a statement of the amount of the indebtedness, together with the grounds thereof, and, where based upon the defendant's promise, an allegation of the promise, and further, the failure of the defendant to pay the indebtedness.³³ For interesting historical reasons involving the availability of a new form of remedy—trial by jury—the action in general assumpsit came largely to supersede the action of debt.³⁴ In the action of general assumpsit, which was originally developed, as was special assumpsit, from the old action of trespass on the case, the assumpsit or promise was an important element. In general assumpsit four counts were in ordinary use,—the indebitatus

³⁰ *Archambeault v. Jamille*, 100 Conn. 692, 124 Atl. 820 (1924); *Morchouse v. Throckmorton*, 72 Conn. 449, 452, 44 Atl. 747 (1899); *First Natl. Bank v. Strait*, 71 Minn. 69, 75, 73 N. W. 645 (1898); *Montgomery v. Lonifer*, 94 Minn. 133, 102 N. W. 367 (1905); *Rossiter v. Schultz*, 62 Wis. 655, 22 N. W. 839 (1885); 16 Ency. Pl. & Pr. 104, 178. In the first four cases the statement was dicta; the allegation was made.

³¹ *Lent v. N. Y. & M. R. R. Co.*, 130 N. Y. 504, 29 N. E. 988 (1892); *Lappin v. Martin*, 71 Mont. 233, 228 Pac. 763 (1924); *Harrod v. Wineman*, 146 Iowa, 718, 125 N. W. 812 (1910); *Mahne v. Ruffino*, 129 Cal. 514, 62 Pac. 93 (1900); *Jenkins v. Sullivan*, 110 Md. 539, 73 Atl. 264 (1909); *Wheeler & Wilson Co. v. Worrale*, 80 Ind. 297 (1881); *Reppy*, 10 Corn. L. Q. 269, 295-297, 301, 1 Minn. L. R. 46. In Montana, by perhaps the more logical rule, the allegation must be proven. *Young v. Northern Pac. Ry. Co.*, 42 Mont. 342, 112 Pac. 533 (1910).

³² See *Morwitz v. De Bar*, 61 Colo. 363, 157 Pac. 1163 (1916) and p. *infra*.

³³ 2 Chitty, Pleading, 13th Am. ed. 385, et seq.; Shipman, C. L. Pl., Ball, ed. 132; *The Lady Shandois v. Simson*, Cro. Eliz. 880 (1602); *Raborg v. Peyton*, 2 Wheat. 385 (1817). An acknowledgment of indebtedness was sufficient to show the obligation. *Elder v. Rouse*, 15 Wend. 218 (1836). A greater particularity was required than in the action of indebitatus assumpsit. Ames, Lectures, Leg. Hist. 53.

³⁴ Ames, Lectures, Leg. Hist. VIII, XIV; Holdsworth, 3 Hist. Eng. Law, 3d ed. 412-454; 6 *ibid.* 639; Pt. II, c. 3, p.

count, the quantum meruit count, the quantum valebat count, and the count on account stated. The indebitatus count, which was the more inclusive and more generally used, recited an indebtedness to the plaintiff in a specified sum; then the consideration, which might take a variety of well-known forms of expression, such as goods sold and delivered, work done and labor performed, money had and received, etc.; followed by an allegation that the defendant had promised to pay the amount in question to the plaintiff, and a further allegation that the defendant had disregarded his promise and had not paid the indebtedness. The quantum meruit count was similar, except that it was used for work done and labor performed and alleged that the defendant promised to pay the reasonable value of the same instead of a specific amount. So in the quantum valebat count used for the sale of goods, the allegation was of a promise to pay the reasonable value rather than a specific sum. Since it was held that the indebitatus count could be used where an exact sum was alleged, even though the proof showed a promise to pay the reasonable value, the indebitatus count operated as a substitute for the two quantum meruit and quantum valebat counts. The count on account stated was employed very generally at common law as an additional count following others, since it relied on an agreement between plaintiff and defendant of acknowledgment of the latter that a certain amount was due. Hence the plaintiff would customarily add to his declaration a count of this type in the hope that the proof might show such an acknowledgment of a balance due and reliance could in that event be had upon that count alone. If no such agreement or accounting was shown, of course the count would drop out. Since in each case the gist of the action was an assumpsit, it was necessary to allege a promise by the defendant, even though the proof would show a promise implied in law.³⁵ And since a promise implied in law was sufficient for a general assumpsit, the common law came to allow the use of the indebitatus count for money had and received in a wide variety of claims involving generally the field of law which we now term that of "quasi-contracts." Thus the indebitatus count might be used for the recovery of money fraudulently obtained from the plaintiff. And again, it might be used where the plaintiff "waived the tort and sued in assumpsit" where there had been a conversion of personal property from him. Hence it often resulted that a

³⁵ Ames, Lectures, Leg. Hist. XIII; 2 Harv. L. R. 1, 53; Henry, 26 Yale L. J. 664; Shipman, C. L. Pl., Ball. ed. 148.

plaintiff would declare upon an indebtedness of a defendant to him for money had and received, which indebtedness the defendant had promised to pay to him but had failed to do, and would then show at the trial that the defendant actually had made no promise other than that implied by law from a conversion of the plaintiff's chattels and a sale and receipt of money therefor.³⁶ In other words, there was developed at the common law a brief and summary form of statement of an indebtedness which it is true showed the ground of the debt, but often showed it no further than the somewhat general phrase "for money had and received," a phrase covering a variety of situations where in law the defendant was indebted to the plaintiff.

Under the Code

With the abolition of the forms of action the question was immediately raised whether the summary form of statement in use in general assumpsit could be likewise employed with the same broad scope as at common law. Many early commentators strenuously opposed this on the ground that the code required the pleading of the facts of each cause of action and that the old common counts in general assumpsit did not really set forth the facts but tended in reality to conceal them. This was, so it was claimed, especially true in the case of the quasi-contractual remedies. Among the strenuous advocates of this line of thought was Mr. Pomeroy, who, in his belief that the "dry naked actual facts" alone should be stated, was quite clear that the use of the common counts was a violation of the spirit of the code.³⁷ His views, so strongly put forth and supported by other textwriters, influenced certain of the courts who argued against the use of the common counts under the code.³⁸ But the common counts were apparently too well and favorably known and too convenient a form of pleading to succumb to this strenuous attack, for in probably all jurisdictions the use of the common counts, at least for an indebtedness incurred with the defendant's

³⁶ Ames, Lectures, Leg. Hist. XIV; Martin, Civil Procedure, 355-58; *Slade v. Morley*, 4 Coke 92 b (1603); *Moses v. Macferlan*, 2 Burr. 1010 (1760).

³⁷ Pomeroy, Code Remedies, 4th ed. s. 436-438. See also Kerr, Pl. & Prac. in the Western States, sec. 26; Note, 57 Am. Dec. 544; 3 Cor. L. Q. 145.

³⁸ For criticisms in the cases, see *Thomson v. Elton*, 109 Wis. 589, 85 N. W. 425 (1901); *Bowen v. Emmerson*, 3 Ore. 452 (1869); *Forster v. Kirkpatrick*, 2 Minn. 210; *Pioneer Fuel Co. v. Hager*, 57 Minn. 76, 57 N. W. 828 (1894). Cf. *Abadie v. Cerrillo*, 32 Cal. 172 (1867). The objections seem not to have prevailed even in the states where uttered. See note 39 *infra*.

consent, is well settled.³⁹ It will be perceived that in this case at least there is no misstatement, for the complaint alleges the amount of indebtedness and the cause thereof but alleges it in very general and summary form. In view of the fact that actions for a debt due are usually summary in nature, involving the collection of a claim, it would seem convenient to use such a brief form. The objection is the generality of the allegation, but it would seem that for practical purposes the allegation is sufficiently definite. A question has arisen in some of the cases whether it is necessary longer to allege the defendant's promise where the other facts in the complaint would show that such promise is implied. One commentator has urged that the only real objection to the common counts under the code is the general tendency to omit the promise, and hence, not to bring it within the common law definition of a count in *assumpsit*.⁴⁰ This, it is submitted, is not to state the real objection as it is thought to be a sound conclusion that the promise, where definitely implied from the other facts stated, may be omitted as the conclusion which is to be drawn by the court.⁴¹ Yet, as there may often be doubt whether the court will surely draw the conclusion from the facts stated, the more careful pleader will tend to guard himself against all difficulty by inserting a definite allegation of the defendant's promise.⁴²

May this summary form of statement be used in cases where the tort is waived and the amount is claimed as an indebtedness due? The objection here made is that the facts are not stated but concealed. This objection, however, is based upon a supposed absolute distinction between facts and law. Under this view the acts of the

³⁹ See Kerr, *op. cit.*, note 37, that it is permitted in practically every code state. Cf. *Speck v. Kramer*, Ind. 151 N. E. 37 (1926). See discussion *Weber v. Lewis*, 19 N. D. 473, 126 N. W. 105, 34 L. R. A., n.s., 364, note (1910); 35 Yale L. J. 273; 32 Yale L. J. 485; 7 *Ibid.* 197, and in authorities cited note 37 *supra*. Some statutes require the filing of a written instrument or account made the foundation of suit. See statutes cited, note 6 *supra*, and see also notes 52, 53, *infra*. A bill of particulars is often used in connection with the common counts. See discussion below.

⁴⁰ 34 L. R. A., n. s., 364. Cf. L. R. A. 1918 F. 437.

⁴¹ *Wilkins v. Stidger*, 22 Cal. 232 (1863); *Farren v. Sherwood*, 17 N. Y. 227 (1858); *Higgins v. Germaine*, 1 Mont. 230. *Contra, Railroad Co. v. Kimmel*, 58 Mo. 83 (1874); *Tripp v. Park St. Motor Corp.*, 122 Me. 59, 118 Atl. 793 (1922); *Kilpatrick-Koch Dry-Goods Co. v. Box*, 13 Utah 494, 45 Pac. 629 (1896). Cf. Lumpkin, Jr., in *Tuggle, Admin. v. Wilkinson*, 12 Ga. 90 (1885); "This writ, tested by the Common Law Forms, wants only the *super se assumpsit*, and who cares a fig for that?"

⁴² See *Bowen v. Emerson*, 3 Ore. 452 (1869) and *Conrad Natl. Bk. v. Great Northern Ry.*, 24 Mont. 178, 61 Pac. 1 (1900) as examples of cases where the court was slow to imply a promise to pay.

defendant in converting the plaintiff's chattel would be considered the facts and the statement that the defendant owes the plaintiff money would be treated as law and not a sufficient allegation of the facts. But, as pointed out in the writer's article on "The Complaint," there is no such arbitrary distinction between facts and law. Any selection of facts by a plaintiff to prove a case involves a selection according to the legal effect which he hopes to prove. The stating of the facts of a cause of action, in other words, is really the selecting from a mass of data covering the relationship between plaintiff and defendant those which are favorable to the plaintiff's case, and the interpretation of them in the light of the law which will show a recovery. The difference between facts and conclusions of law is therefore simply a more or less convenient difference of degree.⁴³ On this analysis one is not departing from the code ideal of pleading facts when he puts the legal interpretation upon the facts which he sets forth, as where he says that the defendant is indebted to the plaintiff for so many dollars for money had and received. Here again, the real objection is that the statement involves a broad generalization, a generalization which depends for the notice that it shall give to the other party partly upon the other party's knowledge of the law. This, however, is true in case of any pleading, only it is perhaps somewhat more striking in the present case. The question is one of degree of particularity required and convenience in the use of the more general form. In view of the history and the convenience which has seemed to result from the use of this general form and also that the inconvenience does not seem from the cases to have been very manifest, it is not thought objectionable to use this form of pleading. Probably the majority of cases under the code allow it to be used even in the quasi-contractual cases.⁴⁴

⁴³ See *The Complaint in Code Pleading*, 35 Yale L. J. 259-268.

⁴⁴ *Grannis v. Hooker*, 29 Wis. 65 (1871); *Knapp v. Walker*, 73 Conn. 459, 47 Atl. 655 (1900); *Minor v. Baldridge*, 123 Cal. 187, 55 Pac. 783 (1898); *Clifford Banking Co. v. Donovan Commission Co.*, 195 Mo. 262, 94 S. W. 527 (1905); *Walker v. Duncan*, 68 Wis. 624 (1887); *Markermare Co., Inc. v. Alper*, 210 A. D. 389, 206 N. Y. S. 233 (1924). *Contra*, *Moser v. Pugh-Jenkins Furniture Co.*, 31 Idaho, 438, 173 Pac. 639, L. R. A. 1918 F. 437, with note; *Truro v. Passmore*, 38 Mont. 544, 100 Pac. 966 (1909); *Buchanan v. Black*, 15 Ore. 563, 16 Pac. 422 (1888). The common counts are not appropriate for an action for breach of conditions of a penal bond. *Gallup v. Jeffery*, 86 Conn. 308, 85 Atl. 374 (1912); or against an indorser on a note, *Worley v. Johnson*, 60 Fla. 294, 53 So. 543, 33 L. R. A., n. s., 639 (1910); or to settle a partnership, *Lakitsch Admr. v. Brand*, 99 Conn. 388, 121 Atl. 865 (1923); or on a promise other than to pay money, *Ogden v. Rubin*, 7 Fed. (2d) 1007 (1925). In Connecticut the common counts must follow a standard form covering nine different alle-

A general allegation that a certain amount is due or that the defendant is indebted in a certain amount with no further specification of reasons is generally held too indefinite under the code.⁴⁵

At common law the allegation of the defendant's breach, that is, non-payment, was necessary.⁴⁶ As already pointed out in connection with special contracts, the code rule is in general the same though there may be some doubt whether the plaintiff must prove this allegation.⁴⁷

Variance

The question of variance has been most important in this connection where either a special contract was alleged and a general indebtedness proven, or a general indebtedness alleged and only a breach of an executory contract shown. From a comparatively early date it has been settled that the common counts would lie for money due on performance of a contract.⁴⁸ On the other hand, where the claim was merely for damages for breach of an executory contract, the common counts were not available.⁴⁹ Hence, it has been neces-

gations of the ground of indebtedness, and thereafter a bill of particulars must be filed showing the exact ground relied on. Conn. G. S. 1918, S. 5651; Conn. Prac. Bk. 1922, p. 279, 289, 358. The plaintiff cannot waive the tort of converting personal property, unless the defendant has sold the property. *Ibid.*, p. 280. On the necessity of a sale generally, see Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 Yale L. J. 221, 229; Woodward, *Quasi-Contracts*, s. 273.

⁴⁵ See 35 Yale L. J. 263, note 24; cases collected, Dec. Dig. Pl. sec. 8 (5). Cf. *Sparks v. Ducos*, 123 A. D. 507, 108 N. Y. S. 546 (1908) with *Gillespie Bros. v. Page*, 87 S. C. 82, 68 S. E. 1044 (1910); *Kilpatrick Koch Co. v. Box*, note 41 *supra* with *Christensen v. Crane*, 156 Cal. 633, 105 Pac. 950 (1909). See also *Bowen v. Emmerson*, 3 Ore. 452 (1869), which erroneously criticises *Allen v. Patterson*, 7 N. Y. 476 (1852), where the consideration was stated; *Chesney v. Chesney* 33 Utah 503, 94 Pac. 989 (1908); but see *Gillespie Bros. v. Page* 87 S. C. 82, 68 S. E. 1044 (1910). On account stated, see note 29 L. R. A. n. s., 334.

⁴⁶ *Yong Don v. Hitchcock*, 11 Hawaii, 270 (1898); Shipman, C. L. Pl., Ball. ed. 258.

⁴⁷ See discussion, *supra*, p. 107. Where the allegation is of a balance due on account it has been held that the plaintiff must prove the allegation. *Quinn v. Loyd*, 41 N. Y. 349 (1869).

⁴⁸ *N. Y. News Co. v. National Steamship Co.*, 148 N. Y. 39, 42 N. E. 514 (1895); *Farron v. Sherwood*, 17 N. Y. 227; *Voorhees Rubber Mfg. Co. v. Cheeney*, 89 Conn. 714, 95 Atl. 5 (1915); *Gilman v. Cross*, Ohio, 151 N. E. 782 (1925); *Elliott v. Wilson*, 2 Boyce, Del. 445, 80 Atl. 35 (1911); *McKinnie v. Lane*, 230 Ill. 544, 82 N. E. 878 (1907); *Wilcox v. Newman*, 58 Mont. 54, 190 Pac. 138 (1925); *Douglas v. Brandt*, 99 Conn. 161, 121 Atl. 179 (1923); *Heitz v. Sayres*, 31 Del. 221, 113 A. 901 (1923). But see *U. S. Rubber Co. v. Grigsby*, 113 Neb. 695, 204 N. W. 817 (1925) criticised in 24 Mich. L. R. 313.

⁴⁹ *Mankin v. Jones*, 68 W. Va. 422, 69 S. E. 981 (1910); *Meyer v. Frenkel*, 113 Md. 36, 77 Atl. 369; *Cook v. Dade*, 191 Mich. 561, 158 N. W. 175 (1916); *Expanded Metal Fireproofing Co. v. Boyce*, 233 Ill. 284, 84 N. E. 275 (1908).

sary to distinguish between the cases where merely damages are due for breach of contract and the cases where an indebtedness is due on completion of the contract. In this connection arise certain interesting questions of substantive law, as, for example, whether and under what circumstances a plaintiff who has not fully performed may recover the amount due him under the contract.⁶⁰ But when these questions are solved and it is seen that either claims for damages should have been used in place of the common counts, or vice versa, the next question is whether the evidence at the trial is inadmissible without a change in the pleading,—that is, whether there is a variance. Many cases hold in such case that a material variance exists, but several recent cases have suggested that the shift in position of the plaintiff is, under the facts alleged, immaterial.⁶¹

Pleading Accounts or Written Instruments Under Statute

Many codes provide for simple pleadings in the case of account and in the case of written obligations for the payment of money only. Thus it is not unusual to provide that it is not necessary for a party to set forth in a pleading the items of an account alleged in it, but in such case, it is usually stated that he must furnish within a certain period after written demand a true copy of the items of account. In other words the individual items are not set up unless the defendant requires it.⁶² So where a cause of action is founded

⁶⁰ See discussion in Martin, Civil Prac. 341-349; Shipman, C. L. Pl., Ball. ed. 153-160.

⁶¹ From implied to proof of express contract a variance; *Glass v. Misroch*, 206 N. Y. S. 373 (1924) modified on another point, 239 N. Y. 418, 147 N. E. 71 (1925); *Expanded Metal Fireproofing Co. v. Boyce*, note 49 supra. Contra, *Franklin Bk. v. Boeckeler Lumber Co.*, Ind. App. 147 N. E. 722 (1925); *Scanlan v. Gill & Sons Co.*, 166 N. Y. S. 742 (1917), criticised in 3 Corn. L. Q. 145. Cf. cases note 48, supra. Cf. *Berkshire Cotton Mfg. Co. v. Cohen*, 236 N. Y. 364, 140 N. E. 726 (1923), allegation of goods sold and delivered; recovery allowed on showing that title had passed although there was no delivery; approved 24 Col. L. R. 97; *Mazziotti v. Di Martino*, 103 Conn. 491, 130 Atl. 844 (1925). Note in 11 Corn. L. Q. 394. From express contract to proof as on a quantum meruit, no variance; *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566 (1899); contra, *Rockwell Stock & Land Co. v. Cestroni*, 6 Colo. App. 528, 42 Pac. 182, 42 Cant. L. J. 31 (1895).

⁶² N. Y. C. P. A., S. 246. Cf. *ibid.*, S. 255 A (items of claim in action for the sale and delivery of goods). Alaska, St. 1913, S. 906; Arizona, R. L. 1913, S. 421; California, Code C. P. 1923, S. 454; Colorado, Code C. P. 1921, S. 69; Idaho, Comp. St. 1919, S. 6709; Rev. Stat. 1923, 60-740; Minnesota, Rev. St. 1923, S. 9274; Missouri Rev. St. 1919, S. 1258; Montana, Rev. Code, 1921, S. 9167; Nebraska, Comp. St. 1923, S. 8641; New Mexico, Ann. St. 1915, S. 4149; North Dakota, Comp. L. 1913, S. 7457; North Carolina, Consol. St. 1919, S. 534; Oklahoma, Comp. St. 1921; S. 302; Oregon, Code C. P. 1920, S. 84; Porto Rico, St. 1912, S. 5108; South Carolina, Code, 1922, S. 419; South Da-

upon an instrument for the payment of money only, it is provided in some codes that the party may set forth a copy of the instrument and state merely that there is due to him thereon from the adverse party a specified sum which he claims, such an allegation being equivalent to setting forth the instrument according to its legal effect.⁵³ In still other codes, provision is made for a short and summary procedure to secure a judgment in this class of cases.⁵⁴

ACTIONS FOR DAMAGES FOR NEGLIGENCE

The Defendant's Breach of Duty

Pleading in negligence actions follows in general the same form as the old declarations in actions of trespass on the case which would seem proper models for our modern complaint in these actions. In accordance with the rules we have already discussed, it is not proper for the plaintiff to allege that due to the defendant's negligence, he was injured in a certain fashion. That is the conclusion he is asking the court to draw and he must go at least one step farther back in his allegation. Hence, it is the usual rule that the complaint must show the defendant's duty to the plaintiff, his breach thereof, and the injury which results from such breach to the plaintiff, together with the resulting damage. In the general discussion of the complaint numerous examples were cited from negligence actions. Reference is made to this discussion.⁵⁵ Here it may suffice to point

kota, Rev. Code, 1919, S. 2362; Utah, Comp. L. 1917, S. 6598; Washington, Rem. Comp. St. 1922, S. 284; Wisconsin, St. 1921, S. 2672; Wyoming, Comp. St. 1920, S. 5676. See also note 6 *supra*.

⁵³ N. Y. C. P. A., rule 94; Ariz. Dig. Stat. 1921, S. 1222; Kansas Rev. Stat. 1923, 60-740; Montana, Rev. Code, 1921, S. 9171, 2; Missouri, Rev. St. 1919 S. 1270; Nevada, R. L. 1912, S. 5068; Nebraska, Comp. St. 1922, S. 8641; North Carolina, Consol. St., S. 540; Oklahoma, Comp. St. 1921, S. 302; Ohio, Gen. Code, 1921, S. 11334; Washington, Rem. Comp. St. 1922, S. 284; Wisconsin, St. 1921, S. 2675; Wyoming Comp. St. 1920, S. 5676. See also p. 101 *supra* that pleading of a written instrument in *ipsis verbis* is generally permitted. The statute does not apply where the defendant's obligations is conditional. *Tooker v. Arnoux*, 76 N. Y. 397 (1879); *State v. Collins*, 82 Ohio St. 240, 92 N. E. 439 (1910). The copy of the instrument must be complete; failure to include the endorsements on a note in an action against the endorser has been held a fatal defect; *Cosmopolitan Bank v. Blumberg*, 215 N. Y. S. 436 (1926), but this has been reversed on appeal. 218 N. Y. S. 465 (1926).

⁵⁴ See, e.g., Arkansas, Dig. St. 1921, S. 1233 (in an action on written obligation, plaintiff may file affidavit of merits, whereupon defendant cannot answer without an affidavit that he has a good defense; with a penalty by way of costs). See also the motion for summary judgment in New York, C. P. A. rule 113.

⁵⁵ 35 Yale L. J. 264-269.

out that it is necessary to set forth with reasonable clearness and definiteness the facts which are relied on as showing the defendant's duty to the plaintiff. If the court can easily see such duty, as would be the case in various circumstances, such as where the defendant drives his automobile upon the plaintiff, it is not necessary to specify in detail. But where such duty is not clear, as, for example, where a workman is upon a railroad track and struck by a train, the facts must be set forth.⁵⁶ Further, it is necessary to give sufficient details so that the court may itself be convinced that the duty arose and not be compelled to rely on the mere statement that there was a legal duty.⁵⁷ It is then necessary to state the facts which are relied upon as being the defendant's breach of duty and to show how they cause the resulting injury to the plaintiff.⁵⁸ A very common error is made by stating the defendant's wrongful act and the injury to the plaintiff but not the connection between the two. This renders the complaint demurrable for failure to state a cause of action.⁵⁹ Since the plaintiff's injury is a necessary fact in any showing of negligence, that must be set forth and the resulting damage to the plaintiff must be set forth in accordance with the usual rules governing allegations of damage.⁶⁰ Furthermore, if there are any conditions precedent to the defendant's primary or secondary duty, performance of these must be shown.⁶¹

In practice it seems quite usual and convenient to show the defendant's primary duty to the plaintiff by showing first, the plaintiff's position just prior to the accident, and second, the defendant's position prior thereto and then the steps leading to the accident. Thus,

⁵⁶ See *Chicago & Erie R. Co. v. Lain*, 170 Ind. 84, 83 N. E. 632 (1907) and discussion 35 Yale L. J. 268-269. Cf. *Valin v. Jewell*, 88 Conn. 151, 90 Atl. 36 (1914); *Cleveland C. C. & St. L. Ry. v. Potter*, Ohio 150 N. E. 44 (1925).

⁵⁷ Thus in *Field v. C. R. I. & P. Ry. Co.*, 76 Mo. 614 (1882), in a complaint for negligence for failing to keep open drainage ditches, the court's holding that no duty on the part of the defendant was shown goes back to its conception of the substantive law of surface water drainage. Cf. *Seymour v. Maddox*, 16 Q. B. 326 (1851) (no duty to light the rear of a theatre for an actor); *Mimmelli v. Marotta*, 208 N. Y. S. 238 (1925).

⁵⁸ See 35 Yale L. J. 269-270.

⁵⁹ Cf. *City of Logansport v. Kihm*, 159 Ind. 68, 83 N. E. 632 (1902), and discussion, in the article cited note 58, *supra*.

⁶⁰ See the cases cited in this section for forms of alleging the injury. Cf. *Jackson v. Pesked*, 1 M. & S. 234 (1813). As to pleading damage, see p. 123 *infra*.

⁶¹ *Barker v. H. & St. J. R. R. Co.*, 91 Mo. 86 (1886); *Radezky v. Sargent & Co.*, 77 Conn. 110, 58 Atl. 709 (1904). Cf. *Sharrow v. Inland Lines*, 214 N. Y. 101, 108 N. E. 217 (1915), L. R. A. 1915 E. 1192, with note. See p. 104 *supra*.

in the ordinary highway injury case, the first paragraph of the complaint very normally will fix the plaintiff's position on the highway, and the second paragraph will fix the defendant's position just before the accident and the direction he was taking, and the third will set forth the steps resulting in the collision and the injury. Succeeding paragraphs may allege the extent of the injury and other items of damage.⁶²

Generality of Allegations

While it has always been improper to allege merely that the plaintiff's injury was due to the defendant's negligence, the common law precedents sustain a form of pleading only a little less general than that. Under the common law precedents it was customary to state in fairly general form what the defendant's act was and characterize it as negligent. Thus, in a complaint for injury on the highway the form of statement would be that the defendant so carelessly drove his horse that through his carelessness the plaintiff was struck and injured.⁶³ Some modern authorities follow the same outline and allow the same liberality.⁶⁴ Others go quite to the other extreme and say that such an allegation merely states a conclusion of law and that it is necessary to state just what the particular acts of the defendant were which are claimed to be negligent, as, for instance, the speed at which he drove, the place on the highway, the failure to keep a proper lookout, etc.⁶⁵ Still others hold the more general form of allegation sufficient against the objection that the complaint fails to state a cause of action, but usually insufficient where the

⁶² For forms, see e.g. Maxwell, Code Pl. 724; Conn. Pr. Bk. (1922) 452, and other references in 32 Yale L. J. 483.

⁶³ *Williams v. Holland*, 10 Bing. 112 (1833); cf. 2 Chitty, 13 Am. ed. 707, which in spite of repetition and verbosity contains no more definite allegations than as indicated in the text. See the writer's comment, Pleading Negligence, 32 Yale L. J. 483.

⁶⁴ Mass. Gen. L. 1921, ch. 231, sec. 147, no. 13; Conn. Prac. Bk. 1922, p. 452; *Dunn v. Duffy*, 194 Cal. 383, 228 Pac. 1029 (1924); *Dewhirst v. Leopold*, 194 Cal. 424, 229 Pac. 30 (1924); *Jones v. Great Northern Ry. Co.* 12 N. D. 343, 97 N. W. 535 (1903); *Davis v. Drennan Co. Dept. Stores*, 189 Ala. 683, 66 So. 642 (1915); *McLeod v. Chicago etc. Ry.*, 65 Wash. 62, 117 Pac. 749 (1911); *Deal v. U. S.*, 11 Fed. (2d) 3 (1926). See authorities in 32 Yale L. J. 48, note 12; 33 Yale L. J. 559.

⁶⁵ *Woodward v. O. R. & N. Co.*, 18 Or. 289, 22 Pac. 1076 (1890); cf. *Jones v. Portland*, 35 Or. 512, 58 Pac. 657 (1899); *Clinchfield Coal Co. v. Wheeler's Adm'r.* 108 Va. 448, 62 S. E. 269 (1908); *Silvia v. Scotten*, 31, Del. 290, 114 Atl. 206 (1921); 33 Yale L. J. 559. For an extreme case, see *Kramer v. Kas. City Power & Lt. Co.*, Mo. 279 S. W. 43 (1925).

defendant asks for a more particular statement.⁶⁶ Perhaps the greater number of cases at the present time tend to this latter position. It may be doubted whether this even is not too strict. As we have seen, the distinction between conclusions of law and statements of fact is one really of degree.⁶⁷ An accident involving negligence happens so quickly and the various details must be testified to at such a length of time afterwards by non-expert witnesses that it is harsh to attempt to tie down either party to a particular conjunction of circumstances as being the only one upon which he may rely. Very often the time at which the occurrences took place is vitally important and a difference of a second or two or a difference of a few feet in the setting of the parties may make the greatest difference in the legal situation. So long as the plaintiff is as sufficiently definite as reasonably could be expected under the circumstances, it seems altogether too strict to require him to pin himself down to more definite allegation. As a matter of fact, he will decline to do this anyhow, since a good pleader, being forced to more particular statements, will incorporate in his pleading long detailed allegations of any matters which by any possibility he may prove. This is especially true as there is no penalty upon him for failure to prove those which he alleges so long as he proves a single one.⁶⁸ He thus protects himself by an excess of detail which only serves the more to confuse and to draw out the pleading. A sounder view, it is submitted, would be to say that in general the common law form of allegation should be sufficient. In certain cases where the defendant may show by affidavit that in the particular case under consideration he actually cannot prepare his defense for lack of definite allegation, the court would still have discretion to order a more particular statement, but such statement should not be ordered on any theory of a general rule of law but only where the court is really convinced that fairness demands it in the particular case.⁶⁹

⁶⁶ *Couture v. Gauthier*, 123 Me. 132, 122 Atl. 54 (1923); *Van Bibber v. Willman Fruit Co.*, Mo. 234 S. W. 356 (1922). See law review articles cited notes 63-64 *supra*; and cases collected, Am. Dig. Negligence, secs. 108, 111.

⁶⁷ See reference note 55 *supra*.

⁶⁸ *Lathrop v. Frank Bud Transfer Co.*, 81 Ind. App. 549, 142 N. E. 868 (1924); *Soltész v. Belz Provision Co.*, Mo. 260 S. W. 990 (1924); *Nichols v. Champion Fibre Co.*, 190 N. C. 1, 128 S. E. 471 (1925). Unless the acts are alleged as concurring to produce the injury. *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472, 42 N. W. 1000 (1889); *Soltész v. Belz Provision Co.*, *supra*.

⁶⁹ 32 Yale L. J. 483. At common law a motion for a bill of particulars was supported by the defendant's affidavit, showing that a more specific statement was necessary. *Johnson v. Birley*, 5 B. & A. 540 (1822).

It is usually stated that where specifications of negligence are incorporated in the complaint, these control all general allegations so that only the acts specified may be proven at the trial.⁷⁰ The effect of this strict rule may sometimes be somewhat avoided by putting in the specifications of negligence, not as explanations of a general allegation, but as further specified acts of which the more general allegation is only the first.⁷¹

Contributory Negligence.

Under the substantive law of negligence we have the rule that where the plaintiff is guilty of negligence contributing to the accident, he cannot recover. A question arises, must the plaintiff negate such negligence on his part in the complaint? The answer may come somewhat from a logical analysis of the problem. If we say, as some courts do, that where the plaintiff's negligence contributes to the accident, the defendant's negligence cannot be said to be the sole proximate cause, we may then consider that by alleging negligence on the part of the defendant we have excluded the idea of contributory negligence on the part of the plaintiff. On the other hand, the doctrine may be considered a penalty which prevents a person who is himself at fault from recovering. In this event, it is quite possible to say that the defendant should himself raise the issue if he wishes to take advantage of the fault. On the other hand, it still might be said that since the plaintiff must show such freedom from negligence as an operative fact, he has the burden of alleging and showing it in the first instance. Due in part to this difference in analysis of the underlying problem there seem to be at least three rules of pleading as to contributory negligence which have support

⁷⁰ *N. E. Fruit & Produce Co. v. Hines*, 97 Conn. 225, 235, 116 Atl. 243 (1922); *Capell v. N. Y. Transp. Co.*, 150 A. D. 723, 135 N. Y. S. 906 (1912); *Waldhier v. Ry.*, 71 Mo. 514 (1880); *Pogue v. Crunden-Martin Mfg. Co.*, Mo. 273 S. W. 782 (1925). But see *Edgerton v. N. Y. etc. R. R. Co.*, 39 N. Y. 227 (1868); *Cunningham v. Union Pac. Ry. Co.*, 4 Utah, 206, 7 Pac. 795 (1885).

⁷¹ Thus a general charge of reckless driving on a highway, followed by a paragraph specifying the manner in which the defendant was reckless, would call for the application of the rule (see cases note 70 supra); but allegations that the defendant was operating his car upon the highway in a negligent, careless and reckless manner and without keeping a proper lookout and without sounding a horn, etc., may perhaps all be treated as of equal standing. This seems to have been the case in *Mezzi v. Taylor*, 99 Conn. 1, 120 Atl. 871 (1923). Since generality is only a question of degree, and since the distinction seems to follow one in the pleader's own mind, the ruling seems not objectionable. Cf. *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284 (1901), resting upon the pleader's intent.

in various jurisdictions—first, the plaintiff has the burden of showing such freedom from contributory negligence but no express allegation is necessary in the complaint since the charge that the action was caused by the defendant's negligence in effect contains the other allegation;⁷² second, the plaintiff has both the burden of alleging and of proving freedom from contributory negligence;⁷³ third, contributory negligence is a defense to be alleged and proved by the defendant.⁷⁴ The third rule is sometimes embodied in a code provision.⁷⁵

Where the third view is followed some courts have raised the question whether the defendant may both deny the plaintiff's allegation of negligence and assert that the plaintiff was contributorily negligent. It is asserted that the defendant must confess his own

⁷² *Greenberg v. Branciere*, 100 Conn. 596, 124 Atl. 216 (1924); *Lee v. Troy Gas Co.*, 98 N. Y. 115 (1885); as to death cases, see note 75, *infra*; *Fuller v. Boston etc. R. R. Co.*, 133 Mass. 491 (1882); *Benedict v. Union Agr. 1. Soc.*, 74 Vt. 91, 52 Atl. 110 (1902); *Potter v. Chicago etc. Ry. Co.*, 20 Wis. 533 (1866). A few jurisdictions hold that the burden of proof is on the defendant, but the evidence is admissible under a general denial. *Ry. Co. v. Darnell*, 221 Fed. 191 (1915). This seems to be the rule in Wisconsin, *Cunningham v. Lyness*, 22 Wis. 245 (1867); *Sweetman v. Green Bay*, 147 Wis. 586, 132 N. W. 1111 (1911) (but see Marshall, C. J., dis. that the burden of going forward only is on the defendant).

⁷³ *Jamison v. Myrtle Lodge*, 158 Ia. 264, 139 N. W. 547 (1915); *Mich. etc. R. R. Co. v. N. Y. R. Co.*, 29 Ind. 258, changed by statute, note 75 *infra*. *Buzzell v. Lacomia Mfg. Co.*, 48 Me. 113 (1861); *Thompson v. Flint etc. R. Co.*, 57 Mich. 300, 23 N. W. 820 (1885); *Guthrie v. Nix*, 3 Okla. 136, 41 Pac. 343 (1895).

⁷⁴ *Thompson v. North Mo. R. R. Co.*, 51 Mo. 190 (1873); *Clark v. Ry.*, 28 Minn. 69 (1881); *Paducah etc. R. Co. v. Hoehl*, 12 Buck. Ky. 41 (1876). This seems by far the more usual rule. See cases cited Shearman & Redfield, Negligence, 6th ed., sec. 107, 108; 1 Thomp. Neg., sec. 366; 33 L. R. A., n.s. 1152; Am. Dig., Negligence, sec. 113, 117. A general averment seems usually held sufficient, except as against motion. *L. & N. R. R. Co. v. Wolfe*, 80 Ky. 82 (1882); 3 Bates, New Pleading, 2302; but see *Cogdell v. R. R. Co.*, 132 N. C. 852, 44 S. E. 618 (1903). Where the plaintiff anticipates the defense, the allegation is usually held immaterial, not put in issue by a denial. *Hudson v. Wabash etc. R.*, 101 Mo. 13; *Cincinnati Traction Co. v. Forrest*, 73 Oh. St. 1, 75 N. E. 818 (1905). *Contra*, *Hoblit v. Minneapolis St. Ry. Co.*, 111 Minn. 77, 126 N. W. 407 (1910). See 1 Minn. L. R. 463; Bates, 2303. That the defendant may take advantage of contributory negligence, when clearly disclosed by the plaintiff's own pleading or evidence, even if not pleaded, see *State v. Hallen*, 165 Mo. App. 422, 146 S. W. 1171 (1912); *Birsch v. Citizens Elec. Co.*, 36 Mont. 574, 93 Pac. 940 (1908); cf. 1 Thompson, Neg. 2d. ed., sec. 369.

⁷⁵ Idaho, Comp. St. 1919, sec. 6721; Ind. Burn's Ann. St. 1914, sec. 362, (applying to personal injury but not property damage suits, *Phillips v. Jackson*, Ind. 147 N. E. 818 (1925); *Engle v. C. C. & St. L. Ry. Co.*, Ind. 149 N. E. 643 (1925); *C. C. & St. L. Ry. Co. v. Tauer*, 176 Ind. 621, 96 N. E. 758 (1911); N. Y. C. P. A., sec. 265, applying only to actions for wrongful death, *Davis v. N. Y. St. Rys.*, 206 N. Y. S. 138 (1924); North Carolina, Consol. St. 1919, sec. 523.

negligence before he may allege negligence on the part of the plaintiff. This is perhaps a logical argument but it is sacrificing the practical necessities of the case to logic for it is often the case that the defendant may be fairly in doubt as to whether the evidence will show freedom from negligence on his part or contributory negligence upon the part of the plaintiff. It seems unfair to require him to elect before trial which of these grounds he shall stand upon.⁷⁶

Assumption of Risk and Fellow-Servant Rule

Before the adoption of workmen's compensation acts generally, the defenses of assumption of risk and the act of a fellow-servant were important in suits by an employee against his employer for negligent injury. Whether these matters were strictly defenses, or the plaintiff was required to take notice of them in his complaint, depended on similar questions of analysis of substantive law to those presented in the matter of contributory negligence. There was a similar split in the authorities, although the same court did not necessarily treat these matters as identical with contributory negligence or with each other.⁷⁷

⁷⁶ Generally the defense of contributory negligence is allowed with a denial of negligence. *Leavenworth Light Co. v. Waller*, 65 Kan. 514, 70 Pac. 365 (1902) reversing 9 Kan. App. 301, 61 Pac. 327; *McMillan v. So. Ry.*, 54 S. C. 485, 32 S. E. 539 (1898); *Kimble v. Stockpole*, 60 Wash. 35, 110 Pac. 677 (1910); *Elliott Jobbing Co. v. Chicago etc. Ry. Co.*, 136 Minn. 138, 161 N. W. 390 (1917). It has been said, however, that the plea of contributory negligence, being a plea in confession and avoidance, must necessarily admit negligence on the defendant's part, and hence it is inconsistent with a denial. *Cinn. Traction Co. v. Stephens*, 75 Oh. St. 171, 178, 79 N. E. 235 (1906). Cf. 5 Encyc. Pl. Prac. 10, 11. In *Elliott Jobbing Co. v. Chicago Ry. Co.*, *supra*, an allegation that an injury was due solely to plaintiff's negligence was held in effect a plea of contributory negligence. Perhaps the majority of courts say, however, that such a plea does not admit the defendant's negligence, it is another and an unnecessary way of denying defendant's negligence and adds nothing to a denial. *Watkins v. S. Pac. Ry. Co.*, 38 Fed. 711 (1889); *Kamp v. Metrop. St. Ry. Co.*, 133 Mo. App. 700, 114 S. W. 59 (1908); *Birsch v. Citizens Elec. Co.*, 36 Mont. 574, 93 Pac. 940 (1908); *Cogdell v. R. R. Co.*, note 74, *supra*; *Thayer v. Denver & R. G. R. Co.*, 21 N. M. 330, 1544 Pac. 691 (1916). The reasoning of the Elliott case disregarding strict logic for practical convenience seems commendable; 1 Minn. L. R. 463.

⁷⁷ Assumption of risk must be specially pleaded by the defendant. *Duffy v. Consolidated Coal Co.*, 147 Ia. 225, 124 N. W. 609 (1910); *Lloyd v. Southern Ry. Co.*, 166 N. C. 24, 81. S. E. 1003 (1914). Aff'd. 239 U. S. 496, 60 L. Ed. 402 (1916). *Contra*, *Multnomah Co. v. Willamette Touring Co.*, 49 Ore. 204, 89 Pac. 389 (1907); *Buzzell v. Laconia Mfg. Co.*, note 73 *supra*; *Evans Laundry Co. v. Crawford*, 67 Neb. 153, 93 N. W. 177 (1903). Act of a fellow servant must be specially pleaded by the defendant. *Laying v. Mt. Shasta Muncie Spring Co.*, 135 Cal. 141, 67 Pac. 48 (1901); *Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131 (1909); *Duff v. Willamette Street Works*, 45 Ore. 479, 78 Pac. 363, 668 (1904). *Contra*, *Kaminski v. Tudor Iron*

Last Clear Chance

Where the plaintiff wishes to rely upon the so-called last clear chance or humanitarian doctrine, namely, upon the claim that even if he were negligent, the defendant had the last opportunity to avoid the accident and is therefore the proximate cause of it, a question arises whether the plaintiff must allege these facts in detail. Some courts have even gone so far as to say that unless the plaintiff confesses his own negligence, he cannot set up the last clear chance doctrine. This is a ruling similar to that criticized with reference to the defendant's position in pleading contributory negligence. It is unfairly requiring the plaintiff to choose between two situations as to which he may be honestly in doubt in advance of the trial.⁷⁸ An allegation which sets forth that the defendant is the proximate cause of the accident should be held sufficiently general so that under it the plaintiff could show that this was the case, either because of the defendant's sole negligence or because of the defendant's supervening negligence. Any other rule requires an unfair particularity of allegation concerning events which happen very quickly and as to the exact order of which the plaintiff may be fairly in doubt until the evidence is all in.⁷⁹

Wilful Negligence and Res Ipsa Loquitur

On similar principles an allegation of "wilful negligence" so-called, that is, wanton injury as to which contributory negligence is not a defense, should be permitted at the same time that the pleader asserts ordinary negligence. In fact the better rule seems to be that one alleging wilful negligence may recover upon proof of ordinary negligence only.⁸⁰ So also the question is raised whether a plaintiff,

Works, 167 Mo. 462, 67 S. W. 221 (1901); *Roberts v. Virginia-Carolina Chem. Co.*, 84 S. C. 283, 66 S. E. 298 (1909); *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830 (1890). See cases cited Am. Dig., Master and Servant, sec. 262.

⁷⁸ Cf. cases on contributory negligence, note 76 *supra*.

⁷⁹ Special allegations necessary; *Emmons v. So. Pac. Co.*, 97 Ore. 263, 191 Pac. 333 (1920); *Drown v. No. Ohio T. Co.*, 76 Oh. St. 234, 81 N. E. 326 (1907); *Houston v. Mo. etc. Ry.*, 36 Tex. Civ. App. 633, 83 S. W. 52 (1904). *Contra*, *Mezzi v. Taylor*, 99 Conn. 1, 120 Atl. 871 (1923) (even though plaintiff pleads lack of contributory negligence); *Johnson v. Springfield Traction Co.*, 176 Mo. App. 174, 161 S. W. 1193 (1914); *Welch v. Fargo & M. St. Ry. Co.*, 24 N. D. 463, 140 N. W. 680 (1914); *Ky. Traction etc. Co. v. Wilburn*, 206 Ky. 510, 267 S. W. 1090 (1925). Cf. *Melzner v. No. Pac. Ry. Co.*, 46 Mont. 162, 127 Pac. 146 (1912); *Newsome v. L. & N. R. Co.*, Ala. 102 So. 61 (1925) (under general count); *Banks v. Morris & Co.*, 302 Mo. 254, 257 S. W. 482 (1924).

⁸⁰ *Sanders v. Hayes*, 128 S. C. 181, 122 S. E. 572 (1924); 1 Thompson, Neg., 2d ed., sec. 383; cf. *Anderson v. Minneapolis etc. Ry.*, 103 Minn. 224, 114 N. W. 1123 (1908).

who has asserted specific acts of negligence upon the part of the defendant, may rely upon the general presumption of negligence in circumstances where the doctrine of *res ipsa loquitur* is applicable. There is a definite division of opinion in the cases, but in accordance with the general view above expressed that it is unfair to insist upon a minute specification of facts in this class of cases, it is suggested that the question should be answered in the affirmative.⁸¹

Damages

Since injury to the plaintiff or his property is an essential operative fact to a cause of action for negligence, such injury must be set forth. Where that is shown, the law will presume general damages to follow, to use the ordinary expression of the court. Special damages must be specifically alleged. The rules governing the matter of alleging damage are discussed hereinafter.

(TO BE CONCLUDED)

⁸¹ *Res ipsa loquitur* inapplicable where specific negligence pleaded. *Bogreess v. Wabash Ry. Co.*, Mo. 266 S. W. 333 (1924); *Wichita Valley Ry. Co. v. Helms*, Tex. 261 S. W. 225 (1924). *Contra*, *Firsst v. Capitol Pk. Realty Co.*, 98 Conn. 627, 120 Atl. 300 (1923); *Walters v. Seattle etc. Ry.*, 48 Wash. 233, 93 Pac. 419 (1908); *Biddle v. Riley*, 118 Ark. 206, 176 S. W. 134 (1915). See L. R. A. 1915 F. 992, note; 24 L. R. A., n. s., 788, note; *So. Pac. Co. v. Hanlon*, 9 Fed. (2d) 293 (1926); *B. & O. S. W. R. Co. v. Hill*, Ind. 148 N. E. 489 (1925); *Kaemmerling v. Athletic Mining & Smelting Co.*, 2 Fed. (2d) 574 (1924).