Lectures on Common Law Pleading

Forest John Martin
MARTIN'S
COMMON LAW PLEADING
NOTES

MAINE LAW REVIEW

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FOREWORD

These lectures on Common Law Pleading by Forest J. Martin, of the Maine Bar, are the work of a practitioner of great ability and wide reputation. They have stood the test of thirteen years of law school teaching. They have during that time been continually improved and amended, and instead of having lost in that process their great merit of comprehensive conciseness they have gained every year in value and in excellence.

In memory of her husband, Mrs. Clara J. Martin has dedicated these lectures to the University of Maine College of Law so that they may be:

A souvenir of her husband and of the past to the alumni of the School.

A benefit to the students of Common Law Pleading at the present time, and

An aid in the practice of the law to future generations of lawyers everywhere.

The value of these lectures, long before they were published and given to the public, has been tested in the classroom and in many an office in Maine and New England. They will make their way to law students and law offices by virtue of their own inherent merit.

W. E. Walz.
Lectures on Common Law Pleading

These lectures will be divided into the following divisions:

I  Introduction.
II  Definition and Nature of Pleading.
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I. INTRODUCTION.

There is an idea which prevails to a great extent among law students, and to no little extent among lawyers, and that is that common law pleading has become and now is virtually obsolete; that it is a relic of the past and that a knowledge of its principles is no longer essential; that the study of it is useful only to the same extent and in the same way and for the same purposes that a study of the history of the law is useful and beneficial.

I should certainly be surprised if this idea did not prevail to a considerable degree at least among the students of this school.

The first great lesson for you to learn is that common law pleading in this country, and especially in Maine, is not obsolete, but in full force; that in Maine it may be employed to the extent that it was employed, and exists to the same extent that it existed, in England before the passage of the Judicature Act in 1873.
And furthermore, *special* pleading exists in Maine, notwithstanding the statement of Lord Chief Justice Coleridge in an address before the law students at Birmingham in 1889, reported in the "Contemporary Review," June number, 1890, that "special pleading finds no refuge upon the habitable globe except in the state of New Jersey in America."

I do not state that a defendant must plead specially, but that he may plead specially.

Although special pleading was once abolished in this state by the Public Laws of 1831, Chapter 514, which provided in substance that in all civil actions the general issue shall be pleaded by the defendant and joined by the plaintiff, and which was construed by our Supreme Court to amount to an abolition of special pleading, in Potter vs. Titcomb, 13 Me. 36, (1836), yet it was afterwards fully restored and exists here today.

Revised Statutes, Chapter 84, Section 34, provides, "The general issue may be pleaded in all cases, and a brief statement of special matter of defence, or special or double pleas in bar may be filed."

Pleading everywhere, and especially with us, is a most important subject. Lord Coke among his frequent commendations upon the science of pleading has characterized it as "the truest guide to the knowledge of the common law," and as "the key that opens its inmost recess, and an expositor that discloses and explains the most abstruse parts of it." Again, this great jurist styles pleading as "the living voice of the law itself."

The late Judge Story, eminent jurist and author, well remarked "that if the practice of special pleading were entirely abolished from courts of justice, the science of pleading would still be the most important and instructive branch of the common law."

In a recent work, Pollock and Maitland's *History of the English Law*, the learned authors say, "Our forms of actions are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials; they are the institutes of the law; they are, we say it without scruple, living things."

The late James Gould, one of the greatest judges Connecticut ever
INTRODUCTION

had, and author of a most admirable work upon pleading, speaking of the importance of the subject, said, "It owes its pre-eminence not only to the intrinsic value of its own exact and logical principles but also, in no small degree, to the fact that the principles of pleading are necessarily and closely interwoven, both in theory and practice, with those of every other title of the law. I say 'necessarily interwoven' because even the most simple of the judicial remedies which the law affords, and without which it would be practically a dead letter, cannot be obtained without the aid of pleading."

So much for the attestation of great jurists and authors as to the relative importance of the subject of pleading.

A few practical illustrations will also serve to impress upon your minds the importance of a knowledge of this subject.

For example, you are employed to defend a replevin suit brought against your client. A horse which he says he owns has been taken away from him by the plaintiff upon a writ of replevin. From an examination of the case, you are satisfied that your client has a perfect title to the horse. The case comes on for trial and you plead the general issue, that is, that you did not take the plaintiff's horse. The plaintiff offers evidence that on January 1, 1899, he bought the horse of John Smith, in whose possession the horse was at the time, and Smith delivered the horse to him and he paid for it. This makes out a prima facie case for the plaintiff and he rests.

You offer evidence that in June 1898, while the horse was owned by the said Smith, and while it was in Smith's possession, you loaned Smith one hundred dollars and he gave you a mortgage of the said horse to secure the loan, which mortgage was properly recorded. The plaintiff objects to the evidence.

What is the result? The court excludes the evidence and the plaintiff gets judgment, and why? Because the defendant's counsel was ignorant of the law of pleading and did not know that title in replevin must be specially pleaded and cannot be shown under the general issue. In other words, that the general issue in replevin does not raise the question of title; that on the contrary, it admits the title to be in the plaintiff.

Vickery vs. Sherburne, 20 Me. 34.
Well, you will say, it is not necessary to know much about pleading because all I need to do is to put in a special plea, or brief statement, with the general issue in every case, and then no harm can come to me. Let us see.

It is an elementary principle of law that if a man comes lawfully into possession of personal property, an action of replevin or trover cannot be maintained against him to recover said property, or its value, without proof of a demand and refusal. You are again employed to defend a replevin suit. Your client came lawfully into possession of the horse replevied and the plaintiff made no demand before commencing the action. The defendant's title to the horse is, however, a little doubtful. You lost your first case by not putting in a brief statement or special plea and you propose to be on the safe side this time, so you not only plead the general issue, that you did not take the plaintiff's horse, but you also add a brief statement in which you allege that there was no demand and refusal, and that at the time the action was commenced the title to the horse was in the defendant and not in the plaintiff. You say that that is broad enough to cover every conceivable defence.

Plaintiff puts in his evidence but does not prove any demand and refusal, although his evidence shows that the defendant came into possession of the horse lawfully, and rests.

You move for a non-suit on the ground that he cannot recover without proving a demand and refusal, or, perhaps, as your evidence of title is a little shaky, you rest and go to the jury without offering any evidence. Result, a judgment for plaintiff, because by pleading title in himself, defendant waives demand and refusal; that is, he excuses plaintiff from making any demand. If counsel had known enough to have pleaded the general issue alone, he would have defeated plaintiff's action. It is often dangerous to add a brief statement and often dangerous not to add it.

Lewis vs. Smart, 67 Me. 206.

Pleading is not only one of the most important subjects of the law but it is also one of the most instructive.

A man cannot be a good lawyer, a safe man to employ, who is ignorant of the principles of pleading. A man cannot be a poor
A lawyer who has a thorough knowledge of the principles of pleading. A man cannot be ignorant of the principles of any subject of the law, who possesses a thorough knowledge of the principles of pleading. For pleading involves and includes a knowledge of all the principles of the substantive law.

To illustrate: In an action for false representation, you must set forth all the essential elements of deceit, and how can a lawyer do this who does not know what elements constitute deceit? You must allege a false representation of a material fact, that it was made by the defendant with a knowledge of its falsity, that it was made to the plaintiff, who was ignorant of its falsity and who believed it to be true, that it was made with intent that it be acted upon, and that plaintiff acted upon said representation and was thereby damaged. If any one of the five elements of deceit is omitted, for instance, if you should fail to allege the defendant's knowledge of the falsity of the representation, your declaration would be worthless.

And, on the other hand, if instead, of bringing an action you are defending one, the same is true.

To illustrate: How would a lawyer know what to plead to an action of slander or libel who had no knowledge of privileged communications?

You must first know what to assert or plead, and secondly, how to assert or plead it.

What I have said concerning these two actions is equally applicable to all others.

Pleading is important and instructive and it is also difficult; and, being difficult, it is the subject least understood of any branch of the law. It is a subject that gives students more trouble than all others put together and an exceedingly hard subject to learn from simply reading a text book on it. One reason for this is that most of the text books upon the subject are nothing more than a compilation of abstract rules without giving the reasons upon which the rules are founded.

The statement of principles with citations is useful to the practitioner but of little value to the student. A digest states the princi-
ple of law but does not teach the science; and most of the texts on pleading no more teach the science of pleading than an almanac teaches the science of astronomy. To show how little the subject is understood, it is said that forty per cent of the cases in the reports in this country are on questions of pleading or practice.

**SYSTEMS OF PROCEDURE.**

In this country there are three systems of procedure:

1. **Common Law** as regulated by the rules of the King’s Bench and Chancery at the time of our Revolution, with such changes and modifications as have been made from time to time by the courts and by the legislatures of the states retaining this method of procedure.

2. **Code,** or as it is sometimes termed, Reformed Procedure, by which the entire practice and procedure in court is regulated by positive enactments of the legislature entirely independent of the decisions and rules of court. As one writer has aptly said, “Codes are framed for, but not by, the judicial power.”

3. **Practice Acts.** The states whose procedure is regulated by practice acts occupy the middle ground between the common law and the code states. Practice acts are quasi codes, comprising some of the positive enactments of the codes, and some of the rules and principles of common law pleading, supplemented by rules adopted by the courts. The practice acts have the distinctive features of both the other systems.

To my mind, the practice under the common law modified to some extent by legislation and supplemented by the rules of court, is the clearest and simplest method of procedure. Although efforts have been made to improve upon it, and although at one time the code procedure, commonly called the “Reformed Procedure,” met with great popular favor, it has fallen far short of meeting the expectations of its admirers. There can be no better evidence of this than the report of the committee appointed by the American Bar Association to investigate the different systems of procedure in the different states of the Union, and to devise and suggest some universal system of practice. I quote from this report:
DEFINITION AND NATURE

"On the other hand the reformed procedure is purely a creature of the legislature, and leaves to the court only the enforcement of statutory provisions, with no voice in regard to their enactment, having its origin with the Field Code of 391 sections, enacted in New York in 1848, and reaching its most unhealthy and abnormal development in the present code of New York, containing nearly 3500 sections. It was the direct result of the reaction against the refinements, subtleties, and technicalities of the practice and pleading at common law, and sought to avoid these objections by clearness, conciseness, and simplicity. It was doubtless impossible to bring any substantial reform through the court and hence resort was necessarily had to legislative action, contrary to the established customs of the bar and the bench.

"Whatever may be the merits or demerits of the reformed procedure as such, it must be conceded by its warmest advocates that it has not accomplished all that was expected from it at the outset and has not fulfilled the reasonable expectations of its supporters in simplifying the practice of the law. So much so, that in recent years there has been a marked indisposition on the part of the common law states to adopt the code procedure, or even to take any steps in that direction."

II. DEFINITION AND NATURE OF PLEADING.

Pleading is the statement in a legal and logical manner of those facts which constitute the plaintiff's cause of action or the defendant's ground of defence. In civil actions, the pleadings are reduced to writing, but in criminal actions, they are usually oral.

While pleading consists merely in alleging matters of fact or in denying what is alleged as such by the adverse party, yet in theory the averment of facts on either side always presupposes the existence of some principle or rule of law applicable to the facts alleged, which taken in connection with these facts is claimed by the party pleading them to operate in his favor.

The principle of law applicable to the facts alleged is always implied and need not be expressed in the pleadings.
By analyzing any good declaration or special plea, and taking into consideration with what is expressed that which is necessarily supposed and implied, you will find in it all the elements of a syllogism, all pleading being in substance a syllogistic process though abridged in form.

To illustrate, if an action is brought for trespass on land, the first or major proposition would be, Against him who has forcibly entered upon my land, I have a right by law to recover damages. Second or minor proposition, The defendant has forcibly entered upon my land. Third proposition, or conclusion, Therefore, against the defendant, I have a right by law to recover damages.

The defendant can contest the plaintiff's claim in the illustration above given by denying or contesting any one of the three propositions in the plaintiff's declaration. If he contests the first, or one of law, he would do so by means of a demurrer, which would raise a question of law.

If he cares to contest the second or minor proposition, he would do so by denying the facts therein set forth, and his denial is called in law the defendant's plea.

If not able to contest either the first or second propositions, he can contest the third, not by direct denial, for if the first and second propositions are true the third must necessarily be true, but by an indirect denial; that is, by first confessing and admitting them to be true, and then affirmatively setting up some fact or facts inconsistent with them and which avoid their effect. This is done by a special plea which is known in law as a plea of confession and avoidance and constitutes what is known in law as special pleading.

If the defendant in the example given above pleads a release by the plaintiff of his right of action, his plea fully expressed will form a syllogism thus: First or major proposition, If he upon whose land I have forcibly entered releases to me his right of action for such entry, he has thenceforth no right by law to recover damages for said entry. Second or minor proposition, The plaintiff has released to me his right of action for my said entry upon his land. Third proposition, or conclusion, Therefore the plaintiff has by law no right to recover damages of me for the said entry.
The process in the preceding illustration can if necessary be continued and repeated until all the allegations on the one side are directly denied on the other. Then the parties are said to arrive at an issue and the pleadings terminate.

An issue in pleading is defined to be a single, certain, and material point arising out of the allegations of the parties consisting regularly of an affirmative on one side and a negative on the other.

There are two kinds of issues:

1. **Issues of Law** which are raised by demurrer. When an issue of law is raised in this manner, all facts well pleaded are admitted to be true. That is, all facts properly alleged.

2. **Issues of Fact** are raised by pleas which are of two kinds, either a traverse, or a special plea, that is, in confession and avoidance.

   A **General Traverse** is one which directly denies all the material allegations on the other side. A **Specific Traverse** denies one or more essential facts.

   A **Special Plea** indirectly denies the facts alleged on the other side by first confessing and admitting them and then avoiding them by setting up some new matter repugnant to or inconsistent with the right claimed or sought to be established on the other side.

### III. GENERAL SUBDIVISIONS OF PLEADING.

The *writ*, which forms the first stage of a suit at law, is a mandatory precept issued in the name of the sovereign or state for the purpose of compelling the appearance of the defendant at court to answer to the plaintiff's allegations against him. The writ is no part of the pleadings since it does not consist of the allegations and is not the act of either party.

Bean vs. Green, 4 Cush. 279.

While the writ is no part of the pleadings, it may for various causes be destroyed or abated by pleadings.

The pleadings in a civil suit commence with the declaration.

The *declaration* is a statement at large of the plaintiff's cause of action. More than one cause of action may be embraced in the same declaration and on the other hand a single cause of action may be set forth in more than one way, in fact, in as many ways as the pleader sees fit.
In order to set forth more than one cause of action in the same declaration, or to set forth a single cause of action in more than one way, more than one count must be employed.

A count may be defined to be one of the distinct and separate causes of action set forth in the declaration. If there is but one cause of action in the declaration set forth in but one way, it is called indiscriminately a count or a declaration. If there is more than one cause of action or one cause of action set forth in more than one way, each statement or setting forth is called a count, and all of them taken together constitute a declaration. The chief use of more than one count is to guard against a variance between the declaration and the proof, and to set out more than one cause of action in the same declaration.

The first step for the defendant to take after the writ has been served upon him is to appear and answer to the suit at court. An appearance is effected by the defendant or his attorney writing his name or causing it to be written under the name of the defendant on the docket of the court.

There are two kinds of appearance, General and Special. A defendant appears generally when he proposes to put in a defense to the merits of the case.

Bank vs. Hervey, 21 Me. 38.

A defendant should appear specially when he wants to take advantage of some informality in the proceedings.

Mitchell vs. Ins. Co., 45 Me. 104.

If the defendant wishes to object to the jurisdiction of the court, he should appear in person, for an appearance by attorney, either general or special, waives this defect and gives the court jurisdiction, except in cases where there is an inherent lack of jurisdiction, that is, where there is no jurisdiction over the subject matter of the suit.

Smith vs. Hunt, 91 Me. 572.

If an attorney acting without authority appears for the defendant, an objection may be made. It is important to note, however, that this objection must be made at the return term or the objection is waived.

Prentiss vs. Kelley, 41 Me. 436.
The defendant, after entering his name upon the docket in one of the two ways above mentioned, must do one of two things, either demur to the declaration or plead to it.

If the defendant is of the opinion that the declaration is insufficient in law, he should demur. If the defect which he seeks to take advantage of is one of substance, he may file a general demurrer, which means that he does not assign any cause for demurring, or he may file a special demurrer, which does assign a cause for demurring. If the defect he seeks to take advantage of is one of form, he must file a special demurrer.

If the defendant does not demur, he must plead.

There are two kinds of pleas, Dilatory pleas and Pleas in bar.

A dilatory plea is one offering some excuse for not pleading in bar, and never goes to the merits of the case. An example of a dilatory plea would be a plea to the jurisdiction, a plea in abatement, or a plea to the disability of the parties, as for instance, that the plaintiff is a minor and should have brought the suit in the name of his next friend.

A plea in bar is a plea to the merits of the case.

Pleas in bar are divided into two kinds, Traverse and Pleas in confession and avoidance.

See infra, VII Pleas in Bar.

The next step after the defendant’s plea is the plaintiff’s replication, after which comes the defendant’s rejoinder, which is his reply or answer to the replication.

The next step is the plaintiff’s sur-rejoinder, followed by the defendant’s rebutter.

Following this comes the plaintiff’s sur-rebutter.

No train of pleading has ever been known to go beyond this point, and in practice you seldom go beyond the replication.

The statute provides that the general issue may be pleaded in all cases and the defendant may file a brief statement of special matter of defence. When this is done, the only reply necessary for the plaintiff to make is to join in the general issue. It is not necessary for the plaintiff to reply to the brief statement, though he may do so if he sees fit by filing a counter brief statement.
IV. PARTIES TO THE ACTION.

The general rule is that the action must be brought in the name of the person whose legal rights have been infringed and against the party who committed or caused the injury, or by or against their personal representatives.

1. EX CONTRACTU.

(a) WHO SHALL BE PLAINTIFF.

(1) Contracts Under Seal.

The person to sue on a contract under seal at common law is the person to whom the promise or, more properly speaking, the covenant is expressed in the contract made, that is, the covenantee. This is true even though the covenantee has no beneficial interest therein. This is true even though it is expressly stated in the contract that the promise is made to the covenantee for the sole and exclusive benefit of a person other than the covenantee; as where A promises B to pay $1,000 to C, the action must be brought in the name of B and not of C.

Hinkley vs. Fowler, 15 Me. 285.

Brann vs. Me. Benefit Ass'n, 92 Me. 341.

In a case of this kind, where there is a contract under seal, the action must not only be brought in the name of the covenantee, but also on the covenant.

For example, in the case of a bond to convey real property, if the covenantor does not convey, the action must be brought on the bond for damages, and not in assumpsit to recover the money paid.

Charles vs. Dana, 14 Me. 383.

(2) Simple Contracts.

In actions upon simple contracts, an entirely different rule prevails.

On contracts not under seal, whether oral or written, the action may be brought in the name of the person to whom the promise is made, that is, the promisee, but it may also be brought in the name of the person from whom the consideration moved, though he be a person other than the promisee.
PARTIES TO THE ACTION

The reason for this rule is that where one person owes to another in right and justice a strong and clearly defined duty to do some act, the law will imply and create the promise to do the act, though no express promise ever existed. The law implies the promise on account of the existing duty.

Hinkley vs. Fowler, 15 Me. 285.
Bohanan vs. Pope, 42 Me. 93.
Brewer vs. Dyer, 7 Cush. 337.

Joinder of Plaintiffs.

When a contract, whether oral or written or under seal, made with several persons, is joint, all must, if living, be joined in an action upon it.

If one or more joint promisees die before the action is commenced, it should be brought in the name of the survivors, and it should be stated in the writ why the other promisees are not joined, that is, that they are dead.

A contract with several persons is joint if their legal interest is joint, though the contract may be in terms joint and several. In determining whether a contract is joint or several, you must look not only to the language but also to the interests of the promisees.

In simple contracts, it is often difficult to tell whether they are joint or several and who should be made plaintiff in an action upon them. These rules may be of some benefit:

First, Where the consideration moves from several jointly, as payment from a joint fund, or where there is an express joint promise, or where the consideration has moved separately from each but the benefit to be derived is joint, the action should be brought by all.

Lombard vs. Cobb, 14 Me. 222.

Second, Where there is a separate consideration moving from different persons, it is considered to be a contract of each, and they cannot join in an action for the breach of it, but must sue severally.

Lombard vs. Cobb, supra.

The reason for this rule is that one person should not be allowed to sue for the whole of that of which he is entitled to only a part, or by joining some other person with him, to make the defendant liable
to a third party to whom he owed no legal duty, and to whom he made no promise.

**Death of Contractees.**

At common law on the death of a contractee, if the contract was joint, the right of action passed to the survivor, and on the death of the last survivor, to his personal representatives.

By statute, after an action which survives has been commenced by or against several persons in a joint action, if one dies pending the suit, his executor or administrator may voluntarily become a party to the suit, or he may be summoned into court and made a party.

Me. R. S. (1903) Chap. 89, Sect. 12.
Treat vs. Dwinel, 59 Me. 341.

**Assignees.**

At common law, the right to sue a person could not be assigned so as to give the assignee a right of action in his own name. The suit had to be brought in the name of the assignor for the benefit of the assignee.

Moore vs. Coughlin, 4 Allen, 335.
Brigham vs. Clark, 20 Pick. 43.

If the assignor be dead, the action at common law is brought in the name of his personal representatives.

To this rule there are five exceptions:

**Exception I.**

Contracts or choses in action assignable by custom, such as promissory notes, bills of exchange, checks, etc., which according to the custom of the law merchant are transferable.

**Exception II.**

Where a debtor after assignment promises to pay assignee.
Norris vs. Hall, 18 Me. 332.
Lang vs. Fiske, 2 Fairfield, 385.
Vose vs. Treat, 58 Me. 378.

**Exception III.**

Actions on covenants which run with the land.
The chief characteristics of such covenants are that the covenantee must have some interest in the land to which the covenant refers.

The usual covenants in a deed are the covenant of seisin, of the right to sell and convey, against incumbrances, for quiet enjoyment, and of general warranty. The first three at common law are covenants in praesenti and do not run with the land. They are broken when made, if at all. The last two are covenants in futuro, and run with the land.

Allen vs. Little, 36 Me. 170.
Heath vs. Whidden, 24 Me. 383.
Me. R. S. Chap. 84, Sect. 30.

Exception IV.
Assignments by operation of law.
In the event of the death of a plaintiff, his right to sue is transferred by operation of law to his personal representatives. So in the event of the bankruptcy of a person, his right to sue is transferred by operation of law to his trustee in bankruptcy.

Exception V.
Contracts made assignable by statute.
Revised Statutes, Chapter 84, Sect. 146, provides that assignees of choses in action, not negotiable, assigned in writing, may bring actions in their own names, but the assignee shall hold the assignor harmless of costs, and shall file with his writ the assignment or a copy thereof.

For example, you are employed to defend a suit that has been brought by the assignee of the claim. You examine the papers and find that neither the assignment nor a copy thereof has been filed. A safe thing to do would be to file a plea or motion in abatement during the first two days of the term.

In case the declaration does not show an assignment, of course you would object to it when it was offered in evidence. If you were plaintiff in the suit and found that you had not filed your assignment, you should ask the court to allow you to file it.

I wish to call your attention to the case of Littlefield vs. Pinkham,
72 Me. 369. Here the court seemed to hold that if you would take advantage of the failure to file the assignment, you must plead it in abatement, and if you do not, you waive it. See also,

Bank vs. Gooding, 87 Me. 337.
Damren vs. Amer. Lt. & Power Co., 91 Me. 334.
Me. R. S. Chap. 84, Sect. 146.

Now I cannot reconcile those cases and I do not see how any one can. If I were for the defendant and the assignment was not filed, I should plead in abatement, as that is safe. If I did not know of it in season to do so, I should object to it when it was offered and cite the case in 91 Me.

If I were for the plaintiff, I should ask leave of the court to file the assignment and take the position that the defendant had waived the objection, citing the Littlefield vs. Pinkham case.

**Principal and Agent.**

If a person makes a contract through an agent, it is, in law, the contract of the principal, and the principal, and not the agent, is the proper person to sue for a breach of it.

Garland vs. Reynolds, 20 Me. 45.

There are three exceptions to this rule,

**Exception I. Contracts Under Seal.**

At common law, if an agent makes a contract for his principal which is under seal and taken in the name of the agent, the action must be brought in the name of the agent, even though it is stated in the body of the contract that he is acting as agent for his principal.

Wilks vs. Back, 2 East, 142; s. c. 102 Engl. Reprint, 323.

**Exception II, Promissory Notes.**

If an agent takes a note for his principal and has the note made payable to himself, that is, if he is named as payee in it, and the note is not negotiated, the action must be brought in the name of the agent.

**Exception III.**

Where by the authorized terms of the contract, the right to sue upon it is expressly restricted to the agent.
Sometimes on a contract made by an agent, either may sue:

First, Where the agent is treated as the actual party with whom the contract is made, the reason for this being that a person has a right to know with whom he is doing business.

Cothay vs. Fennell, 10 B. & C. 672.

Second, Where the agent has made a contract in his own name (at common law not under seal) for an undisclosed principal.

Cushing vs. Rice, 46 Me. 303.

An undisclosed principal means either a principal who is known to exist but whose name is not known to the party contracting, or a principal whose existence is unknown.

If an undisclosed principal comes forward and brings an action upon a contract of his agent, he must put the defendant in the same position at the time of the disclosure that he would have occupied had the agent been the real contracting party. The defendant can set off against the principal any claims that he might have against the agent.

Traub vs. Milliken, 57 Me. 63.

Third, Where the agent has made a contract in the subject matter of which he has a special interest. Under this head come auctioneers, and other agents who have possession coupled with some interest, as an agent who has a lien upon the goods or property for his services.

Porter vs. Raymond, 53 N. H. 519.

It has been held, however, that a broker is not such an agent as can sue in his own name.

Fairlie vs. Fenton, 1 L. R. V Exch. Cases, 169.

Fourth, Where the agent has paid his principal's money under circumstances which give him a right to recover it back. For instance, if he pays it to someone in good faith, thinking he has a right to pay it, when he has not, he has a right to bring suit in his own name to recover it so as to pay the money over to the principal for whom he has been holding it in trust.

But the agent's right to sue is subject to the interposition of the principal, except in those cases where the agent has some special interest in the subject matter of the contract.
Where an agent of an undisclosed principal who has no interest in the contract sues in his own name, the defendant may avail himself of those defences which are good against the agent, and also those which are good against the principal for whose benefit the action is brought.

Thompson vs. Davenport, 3 Smith's Ld. Cases, 1648.

A person who enters into a contract in reality for himself, but apparently as an agent for another whom he does not name, can sue on the contract as principal.

But a person who contracts in reality for himself, but apparently as agent for another whose name he gives, cannot sue as principal.

Winchester vs. Howard, 97 Mass. 303.

**Partnership.**

Actions in which a firm is plaintiff should be brought in the name of the individual members composing the firm, and not in the firm name.

There are two exceptions or modifications of this rule:

First, *dormant partners*, and second, *nominal partners*.

A dormant partner is a person who does not appear to be a partner, but who really is so in fact. He never need join with the other partners, but of course he may do so if he chooses.

A nominal partner is a person who appears to be a partner but who is not one in fact.

Sometimes he must and sometimes he need not join with the other partners as a co-plaintiff.

(a). If a contract is made expressly with a real and a nominal partner, both must join in suing upon it.

(b). Prima facie, a nominal partner ought to join in suing on a contract made by a firm, either express or implied, but if it can be shown by clear and unmistakable evidence that the nominal partner is in reality not a partner, and that he has no interest whatever in the business, an action can be maintained in the name of the real partner alone.

There is one principle in regard to suits by partners which you want to bear in mind, and that is that one partner cannot sue another upon any matters concerning the partnership business. The injured party must seek redress in a court of equity.

Hawes on Parties to Actions, section 88.

The one exception to this rule is in case of fraud practiced by one partner upon another.

Farnsworth vs. Whitney, 74 Me. 370.

On the death of a partner, the surviving partners and ultimately the last survivor, and on his death his personal representatives, must sue on contracts made by the firm.

Corporations.

An action by a corporation must be brought in the corporate name; not in the names of the persons who compose it.

Infants.

A suit by an infant must be brought in the name of the infant's next friend.

Raymond vs. Sawyer, 37 Me. 406.

Bernard vs. Merrill, 91 Me. 358.

Blood vs. Harrington, 8 Pick. 552.

Exception to the rule: When an infant is a co-executor with an adult.

Sick vs. Michigan Aid Ass., 49 Mich. 50.

Advantage can be taken only by plea in abatement.

McMullin vs. McMullin, 92 Me. 338.

Smith vs. Carney, 127 Mass. 179.

Married Women.

In Maine, by statute, a married woman may prosecute or defend suits in law or in equity, either in tort or in contract, in her own name, without the joinder of her husband, for the preservation and protection of her property or personal rights, or for the redress of her injuries, as if unmarried, or may do so jointly with her husband; and the husband shall not settle or discharge any such action without the written consent of the wife. Neither of them can be arrested on such a writ or execution, nor can the husband alone maintain an action respecting his wife's property.
With one exception there is nothing to hinder a married woman from entering into a contract with her husband; she and her husband cannot enter into a contract of partnership with each other. In Haggett vs Hurley, 91 Me. 542, the court held, "She cannot form a business partnership with her husband and thereby subject her personal estate to debts contracted by the partnership."

While a married woman in this state may make a contract with her husband, it is difficult to enforce such a contract. A wife cannot sue her husband at common law.

Neither can the husband sue the wife during coverture.

Hobbs vs. Hobbs, 70 Me. 381.
Carlton vs. Carlton, 72 Me. 115.

A wife during coverture cannot maintain an action upon a contract made with her husband before marriage, but she can after divorce. She can then maintain an action upon any contract made before or during marriage.

Webster vs. Webster, 58 Me. 139.

Neither can the assignee of the wife or husband maintain an action against the other, but may have recourse to equity.

Perkins vs. Blethen, 107 Me. 443.

Neither a wife nor husband can maintain an action against the other for a tort committed during coverture, even after a divorce.

Abbott vs. Abbott, 67 Me. 304. (Peters C. J.)

**Executors, Administrators and Heirs.**

If a person dies, the proper person to sue for a breach of a contract made with the deceased is his personal representative. This rule obtains whether the breach occurs before or after his death.

There is one important difference between the rights of an executor and an administrator in reference to commencing actions.

An executor derives his authority from the will and can commence an action the moment the testator dies, even before the will is probated.

Rand vs. Hubbard, 4 Metc. 252.

Strong vs. Perkins, 3 N. H. 517.
An administrator takes his authority from the letters of administration issued to him by the probate court, and cannot commence an action until such letters have been issued to him.


(b) **WHO SHALL BE DEFENDANT.**

The general rule is that no person can be sued for the breach of a contract unless he is a party to it.

But an exception would be a person appointed by statute to stand in the place of the contractor after his death, as an executor.

(1) **Contracts Under Seal.**

The person to be sued for the breach of a contract under seal is the person by whom the contract appears to be made, that is, the covenator.

Briggs vs. Partridge, 64 N. Y. 357.
Duvall vs. Craig, 2 Wheaton, (U. S.) 45.

This is true even though the covenator expresses himself as covenanting for another, as when A covenants in behalf of B.

(2) **Simple Contracts.**

The person to be sued for the breach of a simple contract is the person who promises or allows credit to be given him.

McGreary vs. Chandler, 58 Me. 537.
Davis vs. Patrick, 122 U. S. 138.
Stearns vs. Foote, 20 Pick. 432.

**Joinder of Defendants**

It is the general rule that where several persons are jointly liable on a contract, they must all be joined in an action for a breach thereof.

Searles vs. Reed, 63 Mich. 485.
Castner vs. Slater, 50 Me. 212.

There are certain exceptions, however.

**Exception 1.**

Where one joint promisor resides out of the jurisdiction, having no property and no attorney, tenant, or agent therein, so that no service can be made upon him.
Dennett vs. Chick, 2 Me. 191.
Rand vs. Nutter, 56 Me. 339.

Exception II.
Where one joint promisor had died before the action was commenced.
Harwood vs. Roberts, 5 Me. 441.
Goodhue vs. Luce, 82 Me. 222.

Exception III.
Where one joint contractor has pleaded infancy, judgment may be recovered against the remaining contractors.
Cutts vs. Gordon, 13 Me. 474.

Exception IV.
Where one promisor has pleaded bankruptcy, judgment may be recovered against the remaining co-promisors.
Coburn vs. Ware, 25 Me. 330.
West vs. Furbish, '67 Me. 17.

If the contractors bind themselves jointly and severally they may be sued either jointly or severally at the option of the contractees.

Liability to an action on a contract made jointly passes at the death of each to the survivors, and on the death of the last, to his personal representatives.

Principal and Agent.
The general rule is that on a contract made with an agent the action should be brought against the principal.
Mann vs. Chandler, 9 Mass. 335.

Exception I.
Where an agent contracts by deed in his own name. This common law rule has been modified by statute in Maine (Chapter 75, Sect. 15) providing "deeds and contracts executed by an authorized agent of a person or corporation in the name of his principal or in his own name for his principal, are in law the deeds and contracts of the principal."
Nobleboro vs. Clark, 68 Me. 87.
Simpson vs. Garland, 72 Me. 40.
Exception II.
Where an agent makes a note or draws a bill of exchange in his own name.
Williams vs. Robbins, 16 Gray, 77.

Exception III.
Where credit is given exclusively to the agent, when the principal is known.

Exception IV.
Where the agent, though acting for his principal, so contracts as to make himself personally liable.
Goodwin vs. Bowden, 34 Me. 424.

Exception V.
Where an agent contracts for an undisclosed principal, or where an agent induces credit to be given to himself without disclosing his agency.
If an agent enters into a contract for his principal without authority, he is not personally liable on the contract, although he is liable otherwise.
Neither would the principal be liable on such a contract.
Williams vs. Robbins, 16 Gray, 77.

Partnership.
All persons who are members of a firm or unincorporated company at the time a contract is made by the firm or company should be joined in an action against it.
Smith vs. Canfield, 8 Mich. 493.
The same rule that I gave you in regard to plaintiffs holds good. The action should be brought against the members and not against the firm by its firm name.
On the death of a member of a firm, the survivors are the proper persons to be sued.
Dormant partners need not be made defendants.
Lord vs. Baldwin, 6 Pick. 348.
Dry Dock Co. vs. Treadwell, 19 Wend. 525.
But a judgment against ostensible partners will bind interest of
dormant partners in firm property.
Wright vs. Herrick, 125 Mass. 154.
Plaintiff may waive estoppel of nominal partner and not join him.
Hatch vs. Wood, 43 N. H. 633.

**Corporations.**
A corporation or an incorporated body must be sued in its corporate name.
Even though contract is in name of officer or agent.

**Infants.**
Actions on contracts of minors should be brought against the
minor and not against the guardian ad litem, whose duty it is to look
out for the interests of the minor in the suit.
Tucker vs. Bean, 65 Me. 352.
Wakefield vs. Marr, 65 Me. 341.
If you fail to have a guardian ad litem appointed, any judgment
against the minor will be void.
Swan vs. Horton, 14 Gray, 179.
The same rule does not hold good in the case of an insane per-
son.
Guardian ad litem cannot bind infant by admissions.
Stinson vs. Pickering, 70 Me. 273.

**Executors, Administrators and Heirs.**
The personal representatives of a deceased person can be sued on
contracts made with the deceased person whether broken before or
after his death.
Cawley vs. Reeve, 17 N. J. L. 415.
There is one exception—contracts limited to the life-time of the
contractor.
An action can be *commenced* against an executor before probate,
but not against an administrator before letters of administration
are granted to him.
On all contracts made by an executor or an administrator, though
expressly for and on behalf of the estate, the action must be brought against him personally.

Davis vs. French, 20 Me. 21.

The heir can be sued upon the following contracts of the deceased:

1. Contracts by deed in which the contractor binds himself and his heirs.

2. Covenants real.

The common law liability of an heir upon a covenant made by his ancestor is superseded by our statutes for the distribution and settlement of estates, which render such liability contingent upon the inability of the creditor, from the nature of his claim, to procure satisfaction during the existence of administration.


Webber vs. Webber, 6 Me. 127, 137.

Me. R. S. Chap. 89, Sects. 16, 17 and 18.

A devisee is liable under the same circumstances under which an heir would be liable.

In no case can an executor or an administrator be sued together with an heir or devisee.

2. **EX DELICTO** = *actions of tort.*

(a.) **WHO SHALL BE PLAINITFF.**

In actions of tort, the person to be made plaintiff is he whose rights either personal or property, have been violated.

Day vs. Whitney, 1 Pick. 503.


Sometimes two persons may, independently of each other, be entitled to bring an action of tort against the same defendant for the same injury.

**Joinder of Plaintiffs.**

Whether two or more persons should be joined in an action of tort as plaintiffs depends upon two things:

**First,** If the injury is to the joint right of several, all must sue.

McArthur vs. Lane, 15 Me. 245.

**Second,** If the wrongful act caused a joint resulting damage to them all, all must sue, though the wrong be a separate injury to each.
Hart vs. Fitzgerald, 2 Mass. 509.
Patten vs. Gurney, 17 Mass. 182.
Bray vs. Raymond, 166 Mass. 146. 2 Saunders Reports, 115-116.

If both entirety of interest and joint damage are wanting, they must sue separately. A wrong to one person cannot in law be a prejudice to another nor would there be any standard by which in such a case an entire sum could be assessed as damages.

(b). WHO SHALL BE DEFENDANT.
The proper person to be made defendant in an action of tort is he whose wrongful act has caused the injury, and it matters not whether he caused it by his own hand or by the hand of another, if done by the defendant's express command or with his sanction or in the regular course of an authorized employment or business of the defendant and in furtherance of that business.

Tripp vs. Leland, 42 Vt. 487.
Moore vs. Tracy, 7 Wend. (N. Y.) 229.

Joinder of Defendants.
First, If the wrongful act was one which in legal consideration could be committed by several persons, the plaintiff may sue any number jointly or may sue any one alone.

Patten vs. Gurney, 17 Mass. 182.
Page vs. Parker, 40 N. H. 47.
Olsen vs. Upsahl, 69 Ill. 273.
Harris vs. Huntington, 2 Tyler, (Vt.) 129.

There is a distinction between cases of contract and tort in regard to the right of contribution. If several persons are liable on a contract and you collect the whole amount from one, he has a right of action against the others for contribution. It is different in cases of tort. There is no contribution between wrongdoers.

Second, If the wrongful act is one which several cannot commit jointly, but can only be considered the distinct tort of each, though several participated, each must be sued separately.


For instance, if several persons should say the same thing about a
PARTIES TO THE ACTION

person amounting to slander, that person would have to bring separate actions against each.

HOW TO TAKE ADVANTAGE OF MISJOINDER AND NONJOINDER OF PARTIES.

1. Ex Contractu.

(a). Nonjoinder and Misjoinder of Plaintiffs.

If, in an action upon a contract, one person sues when the right of action is in himself and another (nonjoinder) or if two or more sue together when the right of action is in one alone (misjoinder), advantage may be taken of the mistake as well under the general issue as by a plea in abatement.

Marshall vs. Jones, 11 Me. 54.
Austin vs. Walsh, 2 Mass. 401.
White vs. Curtis, 35 Me. 534.
Holyoke vs. Loud, 69 Me. 59.
Halliday vs. Doggett, 6 Pick. 359.
Hall vs. Adams, 1 Aikens, (Vt.) 166.
Ulmer vs. Cunningham, 2 Me. 117. (Misjoinder).

The contract offered in evidence will not in either case correspond with the one declared on, so there will be a variance between the declaration and the proof.

Rule.

If the proof which supports the objections arising from misjoinder or nonjoinder goes in denial or disproof of the declaration, or any material allegation in it, advantage may be taken of the mistake as well under the general issue as by a plea in abatement, for whatever denies the declaration goes in support of the general issue. If on the other hand the proof which shows the mistake does not deny and is not inconsistent with any material part of the declaration, the mistake can only be taken advantage of by a plea in abatement.

To this rule there are two exceptions.

Exception 1.

If in an action upon a contract it appears on the face of the declaration that there is a misjoinder or a nonjoinder of the parties, advantage can be taken by demurrer. For when from the plaintiff's own
declaration it appears that he has no right of action, there is no necessity of the defendant pleading the fact which occasioned it.

Exception II.

Nonjoinder of co-executors or co-administrators does not in any respect involve a contradiction of the declaration because they are not parties to the contract. The only remedy is by a plea in abatement.

(b). Nonjoinder of Defendants.

Advantage can be taken only by a plea in abatement unless it appears on the face of the record, in which case advantage can be taken by demurrer.

Chick vs. Trevett, 20 Me. 462.

The reason is that if A and B promise, the promise is A's, although not his sole promise, and the fact that B promised with A does not disprove the allegation in the declaration that A promised.

(c). Misjoinder of Defendants.

Misjoinder can be taken advantage of either under the general issue or by plea in abatement, for if A and B are sued on a contract made by A alone, the evidence that A alone promised, disproves the declaration and supports the general issue.

Bangor Bank vs. Treat, 6 Me. 207.

Walcott vs. Canfield, 3 Ct. 194.

2. Ex Delicto.

(a). Nonjoinder of Plaintiffs.

Nonjoinder of plaintiffs in tort can be taken advantage of only by a plea of abatement, for proof that the right violated was joint does not disprove the declaration that defendant injured plaintiff's property; on the contrary, it admits that fact but simply shows that the injury was not to his sole property.

Lothrop vs. Arnold, 25 Me. 136.

May vs. Western Union Tel. Co., 112 Mass. 90.

Call vs. Buttrick, 4 Cush. 345.

The fact of non-joinder may be shown under the general issue for one purpose only, not that of defeating the action but of reducing
the damages. Otherwise the plaintiff might recover damages for the full amount of the injury and still leave the defendant liable to the other party in interest.

(b). Misjoinder of Plaintiffs.

Misjoinder of plaintiffs in tort can be taken advantage of as well under the general issue as by a plea in abatement. For example, for trespass on the land of A, A and B sue. Proof that B has no interest in the land and therefore has not been damaged disproves the declaration.

Glover vs. Hunnewell, 6 Pick. 222.
Vinton vs. Welsh, 9 Pick. 87.

(c). Non Joinder of Defendants.

Nonjoinder of defendants in tort cannot be taken advantage of even in abatement.

Buddington vs. Shearer, 22 Pick. 428.

Exception.

Where one is sued alone in tort upon a cause of action arising out of or concerning real property held by him jointly, or in common with other persons, he may plead the nonjoinder of his co-tenant in abatement.

The reason for the exception is that in every such suit the interests of all tenants are necessarily in question, a reason not applicable to cases where a tort committed by several persons does not arise out of or concern a joint or common estate of their own.

(d). Misjoinder of Defendants.

Misjoinder of defendants in tort cannot be taken advantage of even in abatement.

Keer vs. Oliver, 61 N. J. L. 154.

The proper course for those not properly joined and hence not guilty is to plead not guilty, that is, the general issue. For a plea in abatement setting up the misjoinder would in reality amount to the general issue, and so would be held bad on demurrer.

The following is a chart which condenses the whole subject:
EX CONTRACTU:

Plaintiffs: Nonjoinder: General issue or abatement.
           Misjoinder: General issue or abatement.

Defendants: Nonjoinder: Plea in abatement only.
            Misjoinder: Plea in abatement or general issue.

EX DELICTO.

Plaintiffs: Nonjoinder: Plea in abatement only.
           Misjoinder: Plea in abatement or general issue.

Defendants: Nonjoinder: No remedy except in cases concerning real property held jointly.
            Misjoinder: No remedy. Those not guilty must plead the general issue.

V. THE DECLARATION.

The first step in the pleadings is the declaration, which is a statement in detail of the facts which constitute the plaintiff's cause of action.

A count is one of the separate and distinct causes of action set forth in the declaration.

An action is a proceeding in a court of justice for the establishment of a right, the redress of an injury, or for the punishment of a person for the commission of a crime.

FORMS OF ACTIONS.

Actions are divided into two classes, civil and criminal.

Civil Actions are of three kinds, real, personal and mixed.

I. Real actions are those brought for the specific recovery of real property only.

II. Personal actions are those brought for the recovery of a debt or specific personal property.

III. Mixed actions are those brought for the recovery of real property and for damages for any injury in respect to it, usually termed mesne profits.

I. The real actions are (a) writ of entry, (b) writ of dower, (c) writ of forcible entry and detainer.
(a) A writ of entry is an action brought for the purpose of trying the title to land. With us, this action is regulated and prescribed by statute. (Chapter 106.)

(b) A writ of dower is an action brought by a widow for the specific recovery of her dower, no part having been assigned to her, against the tenant in possession.

Me. R. S. Chap. 105.

In 1895 there was a statute passed abolishing dower, and making the wife an heir, or quasi heir, of her husband. There is no form of action prescribed in the statute, but it has been determined by a decision that the proper form is a petition for partition.

Longley vs. Longley, 92 Me. 395.

(c) Forcible Entry and Detainer is an action brought for the recovery of the possession of real property.

There are not with us any real actions, to speak strictly, as in all of them we recover mesne profits.

In real actions, the party bringing the action is called the demand-ant and the party against whom it is brought is called the tenant.

II. Personal Actions are divided into two great classes: ex contractu and ex delicto.

ACTIONS EX CONTRACTU.

There are three kinds of actions ex contractu: 1, debt; 2, covenant; and 3, assumpsit.

1. Debt lies for the recovery of a fixed or liquidated sum of money upon a contract under seal or not or upon a judgment or statute.

An action of debt will not lie for the recovery of an uncertain sum of money, for the recovery of an installment, or part of a debt pay-able in installments, or upon a promise to pay out of a particular fund, or in a particular kind of money or in property or in services.

There are four kinds of actions of debt:

First.

Debt on Simple Contracts.

The essential allegations are,
(1). A statement of the debt or contract.
(2). A statement of the breach.
(3). The damages.
McVicker vs. Beedy, 31 Me. 314.
Raborg vs. Peyton, 2 Wheaton, (U. S.) 385.

Second.

Debt on Contracts under Seal.
The essential allegations are,
(1). A description of the specialty.
(2). Non-payment by the defendant.
(3). The damages.

Third.

Debt on a Judgment.
The essential allegations are,
(1). A statement or description of the judgment.
(2). Non-payment or non-satisfaction.
(3). The damages.
McKim vs. Odom, 12 Me. 94.

Fourth.

Debt on Statutes.
The essential allegations are,
(1). A statement of the act or omission in violation of the statute.
(2). Non-payment of the debt or penalty.
(3). The damages.
If a debt or penalty is created by statute, but no form of action is prescribed for its recovery, debt is the proper form.
Lebanon vs. Olcott, 1 N. H. 339.

2. Covenant lies for the breach of a contract under seal.
The essential allegations are,
(1). A statement of the covenant.
(2). A statement of the breach.
(3). The damages.
3. Assumpsit may be of two kinds, general and special.

*General assumpsit* is brought on an implied promise or contract as distinguished from an *express one*.

The basis of the action is a promise implied by law from the execution of the consideration or from the legal duty resting on the defendant.

The essential allegations are,

1. A statement of the consideration.
2. A promise by the defendant.
3. A breach of that promise.
4. The damages.

*Special assumpsit* lies on an express promise whether oral or written, if not under seal.

The essential allegations are,

1. A statement of the contract relied upon, including the consideration.
2. Full performance on plaintiff's part, including a performance of all conditions precedent, and a readiness and willingness to perform all concurrent conditions.
3. A breach by the defendant.
4. The damages.

**Rule.**

The general rule is that there cannot be an implied promise where there is an express one already existing, and that therefore general assumpsit will not lie upon an express contract.

From the existence of certain circumstances, the law creates a promise, and upon this promise you bring general assumpsit, but the law does not create a promise where the parties have made one themselves. Where they make one themselves, there is no need for the law to make one for them, and you should bring special and not general assumpsit.

There are four exceptions to this rule:

**Exception I.**

General assumpsit will lie where there has been a full performance of an express contract on the plaintiff's part and nothing remains to
be done but the payment of the money by the defendant. Plaintiff has his option, and can bring either general or special assumpsit.

Felton vs. Dickinson, 10 Mass. 287.
Knight vs. The N. E. Worsted Co., 2 Cush. 271.
Baker vs. Corey, 19 Pick. 496.
Hunneman vs. Grafton, 10 Metc. 454.

It is to be borne in mind that the amount of damages recoverable under the exception given above will be limited to that fixed by the terms of the express contract.

The reason is that where the parties have fixed a price in the contract, the law will not fix a different one.

**Exception II.**

Where after part performance by the plaintiff, further performance was prevented by the defendant or by some act not within either party’s control, which in law operates as a discharge of the contract, or if the contract is abandoned or rescinded by mutual agreement, general assumpsit will lie.

Moulton vs. Trask, 9 Metc. 577.
Hill vs. Green, 4 Pick. 113.
Wright vs. Haskell, 45 Me. 489.
Lakeman vs. Pollard, 43 Me. 465.

While you may bring general assumpsit, you are not obliged to. You may declare upon the special contract, alleging that it has been broken by the defendant, and recover damages for the breach of it.

Jones vs. Judd, 4 N. Y. 412.
Derby vs. Johnson, 21 Vt. 17.

**Exception III.**

General Assumpsit will lie where there is a failure on the plaintiff’s part of the strict performance of all the terms of the express contract, but where he has acted in good faith and the defendant has accepted the benefit of that which he has done.

White vs. Oliver, 36 Me. 92.
Hayward vs. Leonard, 7 Pick. 181.
Blood vs. Wilson, 141 Mass. 25.
Kelly vs. Bradford, 33 Vt. 35.
THE DECLARATION

Blakeslee vs. Holt, 42 Conn. 226.
Wadleigh vs. Sutton, 6 N. H. 15.
(Cases Contra)
Smith vs. Brady, 17 N. Y. 173.
Bogarth vs. Dudley, 44 N. J. L. 304.
Elliott vs. Caldwell, 43 Minn. 357.

Exception IV.

If the special contract which the plaintiff has partially performed is void or voidable but not illegal, and has been avoided by the plaintiff or the defendant, general assumpsit may be maintained for the partial performance.

Thurston vs. Percival, 1 Pick. 415.

For example, if an infant performs services under a special contract which he avoids before full performance, he may recover for the partial performance in general assumpsit.
Moses vs. Stephens, 2 Pick. 332.
Gaffney vs. Hayden, 110 Mass. 137.

The different forms of general assumpsit are:

(a) Money had and received.
(b) Money lent.
(c) Goods bargained and sold.
(d) Goods sold and delivered.
(e) Use and occupation.
(f) Work and labor performed. (Quantum Meruit.)
(g) Materials furnished. (Quantum Valebant.)
(h) Accounting together or account stated.
(i) Account annexed.

If the only count in your writ is upon an account annexed, the account annexed must be itemized, otherwise your declaration will be bad on demurrer.

Bennett vs. Davis, 62 Me. 544.

Exception.

If two or more articles are sold for a gross sum, or in case the suit
is brought to recover an agreed price for two or more articles, and not for the sale and delivery of an article.

Milliken vs. Waldron, 89 Me. 394.

Under account annexed by statute in Maine, you may also recover for rent due on leases under seal or otherwise, and claims for damages to premises rented. You must specify the nature and amount of claim.

Plummer vs. Bowie, 76 Me. 496.

Me. R. S. Chap. 96, Sect. 10.

**ACTIONS EX DELICTO.**

There are five kinds of actions *ex delicto*:

1. Trespass.
2. Trespass on the case.
3. Trover.
4. Detinue.
5. Replevin.

1. **Trespass** is an action brought for an injury to the person or to property and implies direct force.

   There are three kinds of trespass,—

   *First*, to the person, such as assault and battery.

   *Second*, to personal property, called trespass *de bonis asportatis*, such as the taking and carrying away of the property of another.

   *Third*, Trespass to real property, called trespass *quare clausum fregit*.

   **General Rule.**

   When the injury was not committed by force actual or implied, or when the injury was merely consequential, or, when in the case of injury to property, the plaintiff's interest or right at the time of the injury was only in remainder or reversion, trespass will not lie, and the remedy is an action of trespass on the case.

   Adams vs. Hemmenway, 1 Mass. 145.

   **Exception.**

   The owner of real property can maintain an action of trespass for an unlawful and forcible entry even though at the time the land was occupied by his tenant at will.
THE DECLARATION

Lawry vs. Lawry, 88 Me. 482.

In Maine, by statute, the distinction between trespass and trespass on the case has been abolished, and a declaration in either form is good.

Me. R. S. Chap. 84, Sect. 26.

Hathorn vs. Eaton, 70 Me. 219.

I have said that trespass implies force. That force may be of two kinds, actual or implied.

Assault and battery, tearing down a fence, breaking into a house, or carrying away goods are examples of actual force.

Fouldes vs. Willoughby, 8 M. & W. 540.

On the other hand, if I walk across the land of my neighbor, however peaceably, if without permission, it would be a trespass and an example of implied force.

Daniels vs. Pond, 21 Pick. 367.

Decker vs. Gammon, 44 Me. 322.

The essential allegations are,

(In trespass to the person,)

(1). The injury.
(2). The damages.

(In trespass to property, real or personal,)

(1). Possession or right of possession of the property.

Lawry vs. Lawry, 88 Me. 482.

(2). A description of the property sufficient to identify it.

(3). The forcible entry or taking.

(4). The damages.

2. Trespass on the Case.

This is an action brought for injuries to the person or property which are not the result of force actual or implied, or for forcible injuries where the matter affected is not of a tangible nature, as for example, the obstruction of a right of way, or where the plaintiff's interest in the property was only in reversion, or where the injury was not immediate but consequential.

The essential allegations are,

(1). A statement of the matter or thing affected, and the plaintiff's right thereto.
(2). The injury.
(3). The damages.

3. Trover.

Trover is an action brought for the recovery of the value of personal property converted by the defendant in which the plaintiff at the time of the conversion had a general or special interest and of which he had the possession or the right of possession.

The essential allegations are,
(1). A description of the property and the plaintiff's right thereto.
(2). The conversion by the defendant.
(3). The damages.

4. Detinue

Detinue is an action to recover specific personal property which was or had been in the actual possession of the defendant, and by him wrongfully taken or detained, or for the value of such property in case it cannot be returned.

This action is practically obsolete in this country, having been superseded by the action of replevin.

5. Replevin.

Replevin at common law may be defined to be an action brought for the recovery of specific personal property unlawfully taken or detained from the owner or the person entitled to the possession, and for damages for its detention.

The Revised Statutes of Maine provide in chapter 98, section 8, "When goods unlawfully taken or detained from the owner or person entitled to the possession thereof, or attached on mesne process, or taken on execution, are claimed by any person other than the defendant in the suit in which they were taken or attached, such owner or person may cause them to be replevied."

The essential allegations are,
(1). Possession or right to immediate possession in the plaintiff.
(2). A description of the goods sufficient to identify them.
(3). Unlawful taking or detention by the defendant.
(4). Allegation that the same are not attached on mesne process or taken on execution as the property of the plaintiff.

(5). The damages.
A demand in replevin is sufficient though made by an officer before service of a replevin writ already in his possession.

Webber vs. Read, 65 Me. 564.
O'Neil vs. Bailey, 68 Me. 429.
Sanborn vs. Leavitt, 43 N. H. 472.
Hines vs. Allen, 55 Me. 114.

Replevin must be brought against the person in possession of the chattel at the time when the suit was commenced, no matter by whom the chattel was taken.

Ramsdell vs. Buswell, 54 Me. 546.
The case of Sayward vs. Warren, 27 Me. 453 holds the opposite of the above proposition, but has been overruled.

The defendant need not have possession personally. Where the chattel is held by an agent or servant for the principal or master, the action will lie against the latter.
So it may lie against a firm, one member of which holds the chattel for all.

Howe vs. Shaw, 56 Me. 291.
In a case where a demand is necessary, plaintiff is excused from proving a demand if the defendant pleads title in himself.

Lewis vs. Smart, 67 Me. 206.

The plea of the general issue in replevin admits the title to be in the plaintiff and it also admits the capacity of the plaintiff to sue.

For example, if you bring an action in the name of a corporation and the defendant pleads the general issue, you are not obliged to prove that the plaintiff is a corporation.

If the defendant pleads title in himself and traverses title in the plaintiff, the burden of proof is on the plaintiff on the question of title.

But if the defendant simply pleads title in himself and does not traverse title in the plaintiff, the burden of proof is on him.

Pope vs. Jackson, 65 Me. 162.
GENERAL REQUISITES OF A DECLARATION.

The first and most important requisite is that all the material facts must be alleged, that is, every fact which you must prove to make out a prima facie case must be alleged in the declaration.

If the declaration is insufficient, no subsequent allegation in any of the later stages of the pleadings will entitle the plaintiff to recover. He must recover or fail upon the grounds upon which he first placed his claim.

Conditions Precedent.

Another essential is that when the right of recovery depends upon a condition precedent, the declaration must aver a performance of it.

Concurrent Conditions.

If the condition in a contract is concurrent, as distinguished from a condition precedent, the plaintiff need only allege his willingness and readiness to perform.

When an actual request is necessary, the general averment that “though often requested, etc.” is not sufficient, it being but a matter of form and not traversable. A special request should be alleged.

Birks vs. Trippet, 1 Saunders Reports, 33 (note 2); s. c. 85 Engl. Reprint, 37.

It seems to make a difference whether the duty resting on the defendant is created by law or by contract. If it is created by law, no request is necessary, but where the duty is created by contract, and the express terms of the contract make the request a condition precedent, then it must be specially alleged.

Conditions Subsequent.

Conditions subsequent need not be set out in the declaration and the reason is that they do not create the right of action, but, on the other hand, qualify or defeat it.

If the defendant has performed the condition, it is a matter of defense for him to plead.

For example, in a suit on a bond, you simply declare on the penal part of the bond, taking no notice of the condition in it. If the defendant has performed the condition, he should plead it as a defense.
In declaring on a deed or written instrument, you need only set out as much of it as you rely upon, provided it makes out a prima facie case; but if there is an exception in the body of the contract it must be set out and the subject matter of the exception excluded from the breach assigned.

When A covenants with B to convey a farm with the exception of a part of it, in declaring upon this covenant, you must state the exception not only in that part of the declaration describing the covenant, but also in that part assigning the breach; that is, you should allege that A has not conveyed the farm with the exception of that particular part.

The reason for this is, that if the exception were not set out in the description of the covenant, it would work a variance, and if omitted in the assignment of the breach, no breach within the terms of the covenant would appear, since all the land not embraced in the exception might have been conveyed consistently with the truth of the breach assigned.

On the other hand, a separate proviso need not be set out in the declaration.

For example, if A covenants with B to convey a farm, with the separate proviso that on A’s performing a certain act, he should not be bound to convey a certain part of it, B, in declaring on the covenant, need not take notice of the proviso, for it does not enter into the description of the covenanting clause but is in the nature of a condition subsequent, of which advantage may be taken by way of defense.

Penal Statutes.

In declaring upon penal statutes, if there is an exception in the enacting or prohibitory clause of the act, it must be excluded by averment in the declaration, but any proviso or qualification in a separate and substantive clause need not be taken notice of in the declaration.

In the first instance, it is a part of the description of the offense itself, while, in the latter case, it amounts to an excuse or defense for the defendant.
In a declaration on a penal statute, you must allege that the act was contrary to the form of the statute, either in those words or in others of equivalent import.

Penley vs. Whitney, 48 Me. 351.

In actions for injuries caused by force, such as assault and battery, trespass, or false imprisonment, you must allege that the act was committed _vi et armis_, and also against the peace of the state, or your declaration will be bad on special demurrer.

Saunders' Reports, 81, 82, (note 1.)

Contracts in writing and under the Statute of Frauds.

The next requisite of a declaration is that in actions upon contracts required by common law to be under seal, it must be alleged in the declaration that they were by deed or under seal.

But in an action upon a contract which is valid at common law without a writing, but which some statute requires to be in writing, as the statute of frauds, plaintiff need not allege in his declaration that the contract is in writing.

The statute of frauds introduces a new rule of evidence, but does not alter or affect the manner of pleading the facts.

If, to a declaration on a contract within the statute of frauds, defendant demurs, the demurrer admits the promise to be in writing, though it was not alleged in the declaration to be so. The reason is that if the defendant demurs, he confesses the promise, and thus precludes the plaintiff from proving it; and therefore it must have been intended by the defendant to admit a promise which the plaintiff had means of proving by legal evidence.

It should be remembered, however, that if a contract within the statute of frauds is pleaded in defense to an action, the plea must show that the contract is in writing, as required by the statute.

The reason for this is that the plea being in confession and avoidance, confesses a good cause of action, and if the defendant seeks to avoid liability on the ground that the plaintiff has accepted a new contract as a substitute for the original contract, for example, the plea must show that the contract accepted was one which the plaintiff could enforce.
1 Saunders' Reports, 276 a (note 2).
When a contract or conveyance unknown to the common law is created by a statute and required by statute to be in writing it must be alleged in the declaration that it is in writing, and also in any other stage of the pleadings. An example would be a devise of real estate.

Allegations of Time.
The next requisite of the declaration is the allegation of time. The time of every traversable fact must be stated in the declaration; that is, it must be alleged that it occurred on a certain day, month, and year. This rule holds good not only in regard to the declaration, but also as to all other stages of the pleadings.

- Gilmore vs. Mathews, 67 Me. 517.
- Shorey vs. Chandler, 80 Me. 409. General demurrer sufficient.
- Wellington vs. Milliken, 82 Me. 58.
- Platt vs. Jones, 59 Me. 232.

You need not prove the time as alleged unless it constitutes a material part of the contract or instrument declared on, or unless you are describing the date of a written contract or instrument.

- Ripley vs. Hebron, 60 Me. 379.

Time is sometimes made material by the subsequent pleadings. It the plaintiff alleges a promise more than six years prior to the date of the writ, and the defendant pleads the statute of limitations, the plaintiff in his replication may set forth a promise within six years before the suit was brought.

When the time alleged is not material, but is made so by the defendant's plea, plaintiff may reply a different time and it will not be a departure or a deviation from what was material in the prior pleading.

This is true also in all of the subsequent stages of the pleadings.

- Little vs. Blunt, 16 Pick. 359.
- 2 Saunders' Reports, 5 ab (note 3).

If time is not material in the declaration, the defendant in his plea must follow the time as alleged, even though it is not the true time.

For example, in an action for an assault and battery, the time
alleged in the declaration is May 3, 1898. Defendant claimed that 
the act was committed in self defense. Both the assault and the 
self defense must be alleged to have occurred on May 3, 1898. 
1 Saunders’ Reports, 82, (note 3).

Exception I.

If the justification set up by the defendant in his plea is such as to 
render it necessary to his defence that the true time be stated in his 
plea, then time becomes material and the defendant not only may 
but he must state the true time, though it varies from the time 
alleged in the declaration.

For example, in an action for trespass de bonis against an officer, 
the defence is justification by taking the goods in question on a legal 
precept issued and dated subsequent to the day on which the trespass 
was alleged to have been committed. In this case, the defendant 
may do one of two things.
1. He may allege the true time in his plea and traverse any trespass 
on all other days.
   1 Chitty on Pleading, 534.
2. Or he may allege that the trespass declared on in the declaration 
and the one described in the plea are one and the same.
   1 Saunders’ Reports, 298, (note 2).
   1 Saunders’ Reports, 82, (note 3).

Exception II.

If the defence pleaded be a discharge of a previously existing 
liability, as a release or payment, defendant is never obliged to follow 
the day mentioned in the writ, even if time be material, for a devia-
tion in a plea of this sort produces no apparent variance upon the 
record in regard to time, since all matters of discharge must neces-
sarily have accrued subsequently to the creation of the debt or 
liability declared on.
1 Chitty on Pleading, 517.

If the plaintiff alleges that the act of which he complains occurred 
on a single day only, he can recover for the acts of some one day only.
If the acts of trespass complained of are separate and distinct acts
but are committed on a series of consecutive days, you can do one of two things.

You can bring as many actions as there are trespasses or you can recover for all the trespasses in one action.

In the latter case, you allege the acts to have been committed on a certain day and on divers days and times from that day to the day of the date of the writ.

An example of such trespasses would be the acts of defendant in cutting lumber on the plaintiff's land on successive days.

If the acts, though committed on successive days, are of such a nature that the trespasses of one day cannot be distinguished from those of the succeeding day, that is, if the trespasses are in reality a continuous act, the time of the trespass in your declaration should be laid with a continuando; that is, that the defendant on a certain day and continuously from that day to another certain day committed the acts in question.

An example of a continuing trespass would be the acts of the defendant's cattle in unlawfully entering and remaining in plaintiff's field for a number of successive days.

2 Chitty on Pleading, 367.
3 Blackstone's Comm. 212.
1 Saunders' Reports, 23, (note 1.)

A declaration alleging the acts to have been committed on divers days and times between two certain days is bad on demurrer. It should allege them to have been committed on a certain day and on divers days and times between that day and another certain day.

If the acts are laid on divers days and times or with a continuando, you are confined in your evidence to the period of time covered by the declaration even though time is not material, for the continuando or words "on divers days and times" are regarded as descriptive of the alleged trespasses or at least of the manner in which they were committed.

Pierce vs. Pickens, 16 Mass. 470.
1 Saunders', 24, (note).

If you find that the act committed did not occur within the time set forth in the declaration, you should move to amend the declara-
tion by striking out the *continuando* or the words "*on divers days and times*" and leaving the simple allegation of the acts of a single day. Then you can recover for all the acts of any single day within the period fixed by the statute of limitations.

Pierce vs. Pickens, supra.

If, when time is not material, the plaintiff states an impossible day, as the 30th of February, or a day future to that of the pleading, or an inconsistent day, as where in trover the loss is alleged on the tenth day of May and the finding or conversion on the fifth of the same May, the effect is the same as if no time had been alleged, a demurrer will lie.

**Allegations in Regard to Place and the Law of Venue.**

It is a general rule of the common law that some certain place must be alleged at which every material and traversable fact occurred.

This is usually done by designating the town or city, county, and state in which the act is alleged to have occurred.

Sometimes it is necessary to state the true place, and when it is the place laid must be proved.

Sometimes it is not necessary to allege any place at all.

The question when the true place must be, and when it need not be alleged gives rise to the divisions of actions into two classes, local and transitory.

*Local actions* are those which must be brought in the county where the cause of action actually arose.

The local actions are:

(a) Real actions.
(b) All crimes.
(c) Trespass to real property.
(d) Replevin.
(e) Waste at common law.

*Transitory actions* are those which follow the person and at common law may be brought in any county in the state.

The transitory actions are,

(a) Personal trespass.
(b) Trespass on the case.
(c) Trover.
(d) Assumpsit.
(e) Debt.
(f) Covenant.

Transitory actions are more or less limited in the different states by statutes; therefore you should be very careful to examine the statute before bringing your action.

In local actions, it should be borne in mind that not only some place must be alleged for every material fact, but also that the true place must be alleged.

In transitory actions, though at common law you need allege a place at which every material fact occurred, you need not allege the true place nor need the proof correspond to the place alleged.

All actions for the recovery of seisin or the possession of real estate must be brought in the county where the land lies, though neither plaintiff nor defendant live in that county.

Also, these actions must be tried in the county where they are commenced, even though, after suit is brought, the town where the land lies is set off and annexed to another county.

Blake vs. Freeman, 13 Me. 130.

The action of replevin must be brought in the county in which the original taking was or where the chattel is detained.

Pease vs. Simpson, 12 Me. 261.

In local actions, wrong venue or want of venue can be taken advantage of by plea in abatement or under the general issue or, if apparent on the face of the record, by demurrer.

Hathorne vs. Haines, 1 Me. 238.

Blake vs. Freeman, 13 Me. 130.

In transitory actions, great particularity in laying venue was never required in this state.

Names of towns and cities and their locations are part of the public law of which the court will take judicial notice.

It has been held that to name a town without naming the county is sufficient even in criminal actions, as well as in civil.

Martin vs. Martin, 51 Me. 366.
State vs. Simpson, 91 Me. 83.
Or to name the county without naming the town.
   Bacon's Abridgement, Venue.

Or to name the town and county without naming the state.
   1 Bishop's Crim. Prac. 383.
   Commonwealth vs. Quin, 5 Gray, 478.

It is no longer necessary to allege a venue in transitory actions in
Maine, Massachusetts, or England.
   Blackstone Bank vs. Lane, 80 Me. 165.
   Rule of Court XLV, 24 Pick. 398.

**Joinder and Misjoinder of Causes of Action.**

The general rule is that when several causes of action accruing
between the same parties in the same capacity all require not only
the same judgment at common law, but also the same general issue,
all may be joined in one action.

   2 Saunders' Reports, 117 c; 85 Engl. Reprint, 828.

**Exception.**

An action of debt on a bond cannot be joined with an action of
covenant broken although the general issue is the same in both cases
and both require the same kind of judgment at common law.

   1 Chitty on Pleading, 199.

Actions of tort cannot be joined with actions of contract for they
require not only different judgments but also different general issues.

   Church vs. Mumford, 11 Johnson, 479.
   Crooker vs. Willard, 28 N. H. 134.
   Stoyel vs. Wescott, 2 Day (Conn.) 418.

By the common law of England, when a recovery was secured in
an action against the defendant for a forcible wrong, i. e., committed
*vi et armis*, the defendant was obliged to pay a fine to the king for
the breach of the peace thereby occasioned, and the judgment of
capiatur pro fine was rendered against him, on which he could be
arrested and imprisoned.

But if the declaration did not allege that the wrong was committed
*vi et armis*, the judgment of capiatur could not be rendered but a
judgment called *misericordia* was given.

   3 Blackstone's Comm. 398.
Based upon this distinction between these two judgments, it is held that actions for forcible injuries cannot be joined with actions for injuries not alleged to have been committed vi et armis, because, as just seen, they formerly required different judgments.

For this reason, at common law, a count for trespass cannot be joined with a count for trespass on the case even when the latter arises ex delicto.

Therefore assault and battery, false imprisonment, or trespass to property of any kind, cannot be joined with trover, slander, fraud, malicious prosecution, negligence, or any other wrong unaccompanied by force, for although all of these require the same general issue, that is, not guilty, the first mentioned require the judgment of capiatur, while the second require the judgment of misericordia.

2 Saunders' Reports, 117 e, note; 85 Engl. Reprint, 832.

A joinder of different demands is never allowed when it would cause a blending of different forms of action, even though the same form of judgment would be adapted to them all.

Therefore debt, covenant, and assumpsit cannot be joined in one action nor can either of them be joined with either of the others, although they are all actions ex contractu, and require the same kind of judgment at common law, that is, misericordia; for each requires a different general issue and as the forms of action adapted to them are essentially different, the joinder would tend to perplexity and confusion, which the law always seeks to avoid.

1 Chitty on Pleading, 199.

Because different actions require different general issues, it does not necessarily follow that they cannot be joined.

Debt on a judgment, debt on a specialty, and debt on a simple contract may all be joined in one action although the general issue in the first is nul tiel record, in the second is non est factum, and in the third is nil debet, for they all require the same kind of judgment, misericordia.

1 Saunders' Reports, 117 b, note 2; 85 Engl. Reprint, 829.

Union Mfg. Co. vs. Lobdell, 13 Johnson, 462.

The court in this state has said, "With respect to the joinder of actions, one sure test of propriety is, can the same plea be pleaded,
and the same kind of judgment rendered on both; if yes, the joinder is proper."

Allen vs. Ham, 63 Me. 532.

How to Take Advantage of Misjoinder of Causes of Action.

By the common law of England, the joinder of causes of action which the law did not allow to be joined could be taken advantage of by demurrer, or after verdict by a motion in arrest of judgment, or by a writ of error.

Bacon’s Abridgment, Pleas B, 3.
1 Term Reports, 274; s. c. 99 Engl. Reprint, 1091.

In Maine, misjoinder of causes of action or counts can be taken advantage of by special demurrer only.

Nat’l Bank vs. Abell, 63 Me. 346.

The reason for requiring a special demurrer in this state is that in case there were two or more counts in the declaration and the same were not properly joined, if one count is held good, a general demurrer would be overruled.

Blanchard vs. Hoxie, 34 Me. 376.

VI. DILATORY PLEAS.

A dilatory plea is neither a traverse, which denies the cause of action directly, nor a plea of confession and avoidance, which denies the cause of action indirectly, nor a demurrer, which admits the facts alleged in the declaration, but a plea which offers some excuse for not pleading to the merits of the case; the effect of such a plea is to defeat the plaintiff’s present, but not ultimate, right of recovery.

Dilatory Pleas are of three classes:
1. Pleas to the jurisdiction of the court.
2. Pleas to the disability of the parties.
3. Pleas in abatement.

The order in which these pleas are named is important, because by pleading a plea of one class, you waive your right to file a plea of the preceding class; but you may file a plea of each class if you do so in the order named and within the time required by the rules of court for filing dilatory pleas.
DILATORY PLEAS

A defendant cannot simultaneously plead two dilatory pleas to the same action, for such pleading would not only be double, which is not allowed, but also the subsequent plea would be a waiver of the first.

Bacon's Abridgment, Abatement, Section O.

A defendant may however plead at the same time two different dilatory pleas, either of the same or of a different nature, to different defects, for that would not constitute duplicity.

1. PLEAS TO THE JURISDICTION.

A plea to the jurisdiction is a plea which denies the right of the court to hear and decide the case.

If the defendant desires to plead to the jurisdiction, he must appear in person, and not by attorney, within the time allowed by the rules of court, which in this state is within the first two days of the return term.

By pleading any other plea or by appearing by an attorney, who is an officer of the court, it is held that the defendant admits that the court has jurisdiction and all objection to it is waived.

Carlisle vs. Weston, 21 Pick. 535.
Guild vs. Richardson, 6 Pick. 364.
Rules of Court, 103 Me. 519.

Lack of jurisdiction is of two kinds, inherent and lack of which the defendant can take advantage.

If there is an inherent lack of jurisdiction, as where a suit in admiralty is brought before a common law court, nothing that the defendant can do will give the court jurisdiction. The court will dismiss the action ex officio, for the whole proceeding will be utterly void.

Comm. vs. Johnson, 8 Mass. 87.

If the court has jurisdiction of the subject matter of the suit, but not over the parties, as where an action is brought in the wrong county, the defendant can confer jurisdiction upon the court by consent, as where he appears by attorney.

In a transitory action, wrong venue must be taken advantage of by a plea to the jurisdiction, or if it appears on the face of the record, by a motion to dismiss the action.
MODE OF PLEADING TO THE JURISDICTION.

There is an essential difference in the mode of pleading to the jurisdiction of a court of general jurisdiction, like our Supreme Judicial Court, and one of limited jurisdiction like a municipal court. In a court of general jurisdiction, it is not enough to plead negatively that the court has no jurisdiction, but you must go further and point out specifically some other court which has jurisdiction. For if it does not appear that a remedy can be had in some other tribunal that very fact will confer jurisdiction upon a court of general jurisdiction.

In courts of limited jurisdiction, you need not point out in your plea what court does have jurisdiction.

Gould on Pleading, 222 (5th ed.)

A plea to the jurisdiction concludes by praying judgment if the court will take cognizance of the suit, or in technical language, "of the plea aforesaid."

3 Blackstone's Comm. 308.
2 Chitty on Pleading, 412.

2. PLEAS TO THE DISABILITY OF THE PARTIES.

Disability of the parties may be of four kinds:

(a) Alienage.
(b) Coverture.
(c) Infancy.
(d) That the person named as plaintiff never existed, or having once existed, had ceased to exist at the commencement of the suit.

(a) Alienage.

It is a general rule that alien enemies cannot maintain an action in their own right or even in the right of another, as an executor or administrator, and this may be pleaded in bar as well as by a plea to the disability of the parties.

When the disability is removed, the right of action revives, so the effect is to suspend, rather than to defeat it.
Exception.

An alien enemy under a license or letters of protection for safe conduct can maintain actions, for he stands on the same footing as an alien friend.

8 Term Reports, 166; s. c. 101 Engl. Reprint, 1325.
Clarke vs. Morey, 10 Johnson, 69.

An alien friend, being under the protection of the law, can generally maintain an action in his own right, either in his individual capacity or his representative capacity, except so far as legal incapacity prevents him.

By the common law both of England and of this country, he cannot hold real estate, but in Maine by statute, he can take, hold, convey, and devise real property or any interest therein and such conveyances to or by an alien are valid.

Me. R. S. Chap. 75, Sect. 2.

(b) Coverture.

That a married woman was sued alone without the joinder of her husband was pleadable to her disability at common law.

Hayden vs. Attleborough, 7 Gray, 338.

In Maine by statute, a married woman can maintain actions in her own name with or without the joinder of her husband at her option.

Me. R. S. Chap. 63, Sect. 5.

(c) Infancy.

If a person under twenty-one years of age brings an action in his own name, it is pleadable to his disability in abatement.

Infancy of the plaintiff can be taken advantage of in no other way.

Smith vs. Carney, 127 Mass. 179.
McMullin vs. McMullin, 92 Me. 338.

The reason why an infant cannot maintain an action in his own name is because he cannot appear in person on account of his want
of judgment to conduct a suit, nor by attorney on account of his legal incapacity to appoint one.

The action should be brought in the name of the infant’s next friend.

At common law, where an infant sues as co-executor with an adult, both may appear by attorney, for, as the rights and property of the infant are not affected by the suit, he acting in his representative capacity only, the adult is permitted to appoint an attorney for both.

2 Saunders’ Reports 212; s. c. 85 Engl. Reprint, 1009.

(d) That the Plaintiff Never Existed or is Dead.

That the action is brought in the name of a person who never existed is good ground for a plea to the disability of the parties, for in such case there is in fact no plaintiff.

1 Chitty on Pleading, 448.
Doe vs. Penfield, 19 Johnson, 308.
Boston Foundry vs. Spooner, 5 Vt. 93.

It is probably also a good plea in bar, for that a right of action should exist in favor of an imaginary person is clearly wrong.

Where a suit is brought in the name of a person who once actually lived but who at the time of the commencement of the suit was dead, a plea that the plaintiff was not in esse at the date of the writ is bad; the proper plea being that the plaintiff was dead at the time.

This diversity in the forms of pleading seems intended merely to mark the difference between the case of a person named as a plaintiff after he is dead and the case where an imaginary person is named.

Pleas to the disability of the plaintiff should conclude by praying judgment “if the said John Smith ought to be answered,” or, when the disability operates only as a temporary suspension of the suit, “that the plaint may remain sine die”, that is, that it may be dropped until the disability be removed.

3 Blackstone’s Comm. 303.

3. PLEAS IN ABATEMENT.

Pleas in abatement are those pleas which abate or destroy the writ without destroying the cause of action.
If a defect which is a cause of abatement only does not appear on the face of the record, it must be pleaded in abatement. If it is apparent on the face of the record, advantage may be taken either by a plea in abatement or a motion to dismiss the action.

Chamberlain vs. Lake, 36 Me. 388.
Badger vs. Towle, 48 Me. 20.
Billings vs. Berry, 50 Me. 31.

The law does not favor pleas in abatement and they should be pleaded with great precision and certainty.

Hazzard vs. Haskell, 27 Me. 549.
Burnham vs. Howard, 31 Me. 569.

**CAUSES OR GROUND OF ABATEMENT.**

(a) Misnomer.
(b) Death of the parties at common law.
(c) Nonjoinder or misjoinder of parties.
(d) Variance.
(e) Pendency of prior suit for the same cause.
(f) Defects in the service of the writ.
(g) In Maine, certain defenses to writs of entry, petitions for partition, and formerly actions of dower.
(h) Any defect, unauthorized change, or irregularity in the writ or process.

(a) **Misnomer.**

All the parties to a suit should be identified by their full Christian names and also their surnames.

A mistake in the name of either party to a suit can be taken advantage of only by a plea in abatement. It cannot be objected to on the ground of a variance between the declaration and the proof.

Baker vs. Bessey, 73 Me. 472.

This is true in criminal as well as in civil actions.

State vs. Knowlton, 70 Me. 200.

It is otherwise, however, in the case of a person not a party to the suit.

Mistakes in the names of such persons can be taken advantage of on the ground of a variance.

Perry on Pleading, 340.
The greatest care must be exercised in pleading misnomer. The plea must be direct and positive and not argumentative. It is safer to have your client plead in person.

1 Chitty on Pleading, 457.

Will the plea by attorney be bad? There are cases both ways.

2 Saunders’ Reports, 209 b; 85 Engl. Reprint, 997.

You must be careful in pleading misnomer not to call your client by the name given him in the writ. If you do, you will be estopped from denying that that is his true name. If A is sued by the name of B and he in his plea says, “and now the said B comes and defends, etc.,” the plea would be bad. The plea should say, “and now A, against whom the plaintiff has sued out his writ in the name of B, comes and defends, etc.”

2 Saunders’ Reports, 209 b; 85 Engl. Reprint, 999.

In pleading misnomer, the defendant should give his full middle name. Giving the initial is not sufficient.

State vs. Homer, 40 Me. 438.

Commonwealth vs. Perkins, 1 Pick. 388.

If the person pleading the misnomer has no middle name but only a letter instead, that fact should be stated in the plea.

Of course a plea giving only the initials of both his middle and Christian names would be bad.

Davis vs. Philbrick, 87 Me. 196.

The plea should also state the full surname. If it omits the full surname, as where John G. Smith in his plea says that his name is “John G. and not John J. Smith,” the plea is bad.

2 Saunders’ Reports, 209, a & b note; 85 Engl. Reprint, 998.

Haworth vs. Spraggs, 8 Term Reports, 515; s. c. 101 Engl. Reprint, 1521.

It is a good reply to a plea of misnomer that at the time of the commencement of the suit, the defendant was as well known by the name by which he was sued as by his true name.

Frye vs. Hinkley, 18 Me. 320.

2 Chitty on Pleading, 590.

This is true even in criminal cases.

State vs. Corkrey, 64 Me. 521.
(b) **Death of the Parties at Common Law.**

At common law, the death of a sole plaintiff or defendant or one of several co-plaintiffs abated the suit.

Bacon’s Abridgement, *Abatement*, F.

In this state, by statute, when a party dies, if the cause of action survives, his death may be suggested on the record, and his personal representative may voluntarily become a party to the suit, or he may at the request of the other party to the suit be summoned in and made a party. If he does not appear after being summoned, judgment may be entered against him, either a default or a nonsuit, as the case may require. A judgment against the survivors and against the goods and estate of the deceased in the hands of the personal representatives may be rendered.

Me R. S. Chap. 84, Sect. 51.
Me. R. S. Chap. 89, Sect. 12.

(c) **Nonjoinder or Misjoinder of Parties.**

See *Parties to Actions*.

(d) **Variance.**

Any variance between the declaration and the writ or between the writ or declaration and the instrument declared on, may be taken advantage of by a plea in abatement.

If the variance is a mere matter of form, advantage can be taken only by a plea in abatement, but if the variance is a matter of substance, it can be taken advantage of under the general issue.


(e) **Pendency of a Prior Suit for the Same Cause.**

The pendency of another action for the same cause between the same parties at the time the second action is commenced, in a court having jurisdiction, is a good ground of abatement, but it can be taken advantage of only in abatement.

Small vs. Thurlow, 37 Me. 504.

The reason for this is that the law abhors a multiplicity of suits and will not permit a man to be harassed by two suits for the same cause.
It is not necessary that the two suits be of the same kind; it is enough that they are for the same cause of action; as trespass _de bonis_ and trover to recover the value of the same chattel, or trover and replevin for the same taking.

Bacon's Abridgment, _Abatement_, M.

But the court must have jurisdiction of the prior action.

If the prior action is in an inferior court, that is, a court of limited jurisdiction, you should allege in your plea that the court has jurisdiction of the action.

**Exception.**

If a contract is joint and several, a person entering into it makes himself liable jointly and severally and therefore renders himself liable by consent to two actions for the same cause and both can be carried on at the same time.

Turner vs. Whitmore, 63 Me. 526.

The defendant should enroll in or with his plea a record of the process upon which he relies. It then becomes a part of the plea and affords a means by which the court is enabled to determine the truth of the plea by inspection.

Turner vs. Whitmore, supra.

(f) **Defects in the Service of the Writ.**

If the return of the service of the writ by the officer is defective, it must be taken advantage of, if at all, either by a plea in abatement or a motion to dismiss.

If the defect is apparent on inspection, it can be taken advantage of either by the plea or by the motion; but if it is not apparent, the plea is the only remedy.

Richardson vs. Rich, 66 Me. 249.

Defendant should appear specially and file either the plea or the motion within the first two days of the return term.

If he appears generally, it cures all defects in the service, even lack of service.

If it appears on inspection that there has been no service and the defendant has not waived the same, the court will dismiss the action _ex officio._
Cook vs. Lothrop, 18 Me. 260.
Shaw vs. Usher, 41 Me. 102.
Mace vs. Woodward, 38 Me. 426.

If the officer's return shows a good service, you can not plead in abatement a defective service, even though as a matter of fact there has been no service at all. The officer's return as between the parties to the suit is conclusive and cannot be controverted. The only remedy is a suit against the officer for a false return.

Stinson vs. Snow, 10 Me. 263.

(g) In Maine, Certain Defences to Writs of Entry, Etc.

I. Writs of Entry.

(a) Disseisin by Ancestor.

In a writ of entry, when the disseisin was committed by the defendant's ancestor, it must be pleaded in abatement.

Porter vs. Cole, 4 Me. 20.
Gordan vs. Peirce, 11 Me. 213.

(b) Non-Tenure.

That the defendant was not a tenant of the freehold must be pleaded in abatement or under a brief statement within the time allowed for filing pleas in abatement, unless the time is extended by the court.

Me. R. S. Chap. 106, Sect. 6.
Fogg vs. Fogg, 31 Me. 302.
Manning vs. Laboree, 33 Me. 343.
Wyman vs. Brown, 50 Me. 139.

II. Petitions For Partition.

In such petitions, the inability or incapacity of the petitioner may be taken advantage of only by a plea in abatement.

Upham vs. Bradley, 17 Me. 423.
Blaisdell vs. Pray, 68 Me. 269.

III. Formerly Actions of Dower.

The objection that it did not appear that the defendant was tenant of the freehold at the time the action was commenced could be made only under a plea in abatement.

Me. R. S. Chap. 105, Sect. 4.
Lewis vs. Meserve, 61 Me. 374.
(h) Any Defect or Change in the Writ of Process.

If these defects are not apparent on the face of the record, they can be taken advantage of only by a plea in abatement.

Chamberlain vs. Lake, 36 Me. 388.

Where there is no return day in the writ or an erroneous one, the defect may be taken advantage of by a plea in abatement or a motion to dismiss the action.

Pattee vs. Low, 36 Me. 138.

A mistake in the residence of a party must be taken advantage of by a plea in abatement.

Mahan vs. Sutherland, 73 Me. 158.

An unauthorized change in the writ after service must be taken advantage of either by a plea in abatement or a motion to dismiss.

Bray vs. Libby, 71 Me. 276.

Dodge vs. Hunter, 85 Me. 121.

That a replevin bond was not double the value of the goods, or was executed by one surety only, should be taken advantage of by a plea in abatement.

Douglass vs. Gardner, 63 Me. 462.

Greely vs. Currier, 39 Me. 516.

MODE AND EFFECT OF PLEADING IN ABATEMENT.

1. MODE.

One important rule in regard to pleading in abatement is that the defendant in his plea must give the plaintiff a better writ; that is, he must set out sufficient facts to enable the plaintiff, in a second suit for the same cause, to avoid the same defects.

This applies to facts only and not to the law governing the case.

Brown vs. Gordon, 1 Me. 165.

Defendant must in his plea anticipate all such matters as, if alleged on the other side, could defeat his plea.

Therefore, a plea of the nonjoinder of a plaintiff was held fatally defective that did not allege that the co-plaintiff, who was not joined, was alive, and a resident of the state at the date of the writ.

Furbish vs. Robertson, 67 Me. 35.

Abbreviations should not be used in pleas in abatement.
The abbreviation *judg.* for *judgment* was held to render a plea fatally defective.

Cassidy vs. Holbrook, 81 Me. 589.

**Beginning and Conclusion of Pleas in Abatement.**

If the matter pleaded is apparent on the face of the record, the plea should both commence and conclude by praying judgment of the writ and declaration.

Otherwise the plea should conclude, but not begin, by praying judgment of the writ and declaration.

Cassidy vs. Holbrook, *supra.* 81 Me. 589.

By Rule VI of the Supreme Judicial Court (103 Maine) pleas and motions in abatement must be filed within the first two days of the return term, the day of entry being reckoned as one; if matter of fact not apparent on the face of the record is pleaded, it must be verified by affidavit. If there is no affidavit or a defective one, the plea is bad on demurrer.

Bellamy vs. Oliver, 65 Me. 108.

The affidavit may be made by defendant’s agent or attorney.

Atwood vs. Higgins, 76 Me. 423.

**How to Distinguish Whether a Plea is in Abatement or in Bar.**

The beginning and conclusion of any given plea determines whether it is in abatement or in bar, for if a plea both begins and concludes in abatement, it is a plea in abatement, even though the matter pleaded is in bar.

If it both begins and concludes in bar, it is a plea in bar, even though the matter pleaded is in abatement.

2 Saunders’ Reports, 209 cd, note 1; 85 Engl. Reprint, 1000.

1 Chitty on Pleading, 446, 456-7.

If the beginning and conclusion differ and the subject matter goes either in abatement or in bar, the plaintiff may treat the plea as either at his option.

Bacon’s Abridgment, *Abatement*, P.
2. EFFECT OF PLEAS IN ABATEMENT OR JUDGMENTS ON DILATORY PLEAS.

Judgments in Favor of Plaintiff.

If an issue of fact is joined on a dilatory plea, and found in favor of the plaintiff, the judgment is final; that is, *quod recuperet*.

Frye vs. Hinkley, 18 Me. 329.
2 Saunders’ Reports, 211, (note 3); 85 Engl. Reprint, 1008.
Good vs. Lehan, 8 Cush. 301.

*Exception.*

In indictments for capital offences, if an issue of fact is joined upon a dilatory plea and found in favor of the state, the judgment is *respondeat ouster*, *(in favorem vitae)*. 2 Hawkins’ Crown Pleas, 23, section 128.

The King vs. Gibson, 8 East, 107; s. c. 103 Engl. Reprint, 284.

There is no exception to the rule in civil pleading and only in criminal when the offence charged is a capital one.

If an issue of law is raised upon a dilatory plea, as where the plaintiff demurs to the plea, and it is found in favor of the plaintiff, the judgment is *respondeat ouster*, that is, that the defendant plead over again.

In Maine, exceptions to the overruling of a dilatory plea should not be taken to the law court until after trial on the merits; otherwise the defendant is held to have waived his right to plead over.

Me. R. S. Chap. 79, Sect. 56.
Smith vs. Hunt, 91 Me. 572.

Judgments in Favor of the Defendant.

If an issue either of law or fact upon a dilatory plea is found in favor of the defendant, the judgment is not final but is merely that the writ be quashed.

This judgment ends the present suit but does not terminate the cause of action.

Sometimes the defect can be remedied by amendment at the discretion of the court.
VII. PLEAS IN BAR.

Pleas in bar are of two kinds and may be divided thus:

I. TRAVERSES.

Traverses are of three kinds, general, specific and special.

A general traverse denies all the material facts alleged on the other side.

A specific traverse denies some one particular material fact alleged on the other side and is now seldom if ever used.

1 Chitty on Pleading, 473.

A special traverse consists of a statement of new matter amounting to an argumentative denial of facts already alleged, as an affirmative inducement to a specific traverse of some allegation in the pleading opposed to it. It consists of an affirmative not compatible with the adversary's former pleading, and a negative in direct contradiction to it. It must not consist of a direct denial, nor be in the nature of confession and avoidance. Practically obsolete.

Fox vs. Nathans, 32 Conn. 348.
State vs. Chrisman, 2 Ind. 130.

The affirmative part of the traverse is called the inducement and the negative part the absque hoc (without this).

II. PLEAS IN CONFESSION AND AVOIDANCE.

These are pleas which admit the truth of the plaintiff's allegations but avoid their legal effect by affirmatively alleging other and inconsistent facts.

They are of two classes.

In justification and excuse, which claims to show that the plaintiff never at any time had a good cause of action either by reason of some legal right of defendant, justifying his conduct in point of law, or conduct on the part of plaintiff excusing the defendant from liability in this particular case.

Smart vs. Hyde, 8 M. & W. 723.
Briggs vs. Mason, 31 Vt. 433.
Or *pleas in discharge*, which admit that the plaintiff once had a right of action but show that it is released by some matter subsequent, either of law or fact.

Examples, pleas of a release, a tender, bankruptcy, set-off, and the statute of limitations.

Eavestaff vs. Russell, 10 M. & W. 365.
McAllister vs. Reab, 4 Wend. 483.

Pleas in confession and avoidance can be set up in Maine under a brief statement with the general issue.

Me. R. S. Chap. 84, Sect. 34.

### THE GENERAL ISSUE.

The plea of the general issue denies every material allegation in the declaration and, either alone or with a brief statement, is the plea almost universally used in this state.

I will now give you the general issues in the different actions and what may be shown under them.

The general issue in *assumpsit* is *non assumpsit*.

Under this the defendant may show anything tending to deny his liability, with five exceptions:

1. Statute of Limitations.
2. Tender.
3. Set-off.
4. Bankruptcy.
5. In Maine and Massachusetts, the statute of frauds.

   Lawrence vs. Chase, 54 Me. 196.
   Boston Duck Co. vs. Dewey, 6 Gray, 446.

The common law is the other way, that the statute of frauds can be shown under the general issue, but in these two states it is held that it must be pleaded specially.

There is a dictum in the case of Clark vs. Holway, 101 Me. 391, to the effect, by implication at least, that payment cannot be shown under the general issue.

The general issue in *debt on a simple contract* is *nil debet*.

As to what can be shown under this plea, the same rule that I have given you under *non assumpsit* applies. Some authorities hold...
that the statute of limitations can be set up under the general issue, but it is very doubtful.

The general issue in debt on a specialty is *non est factum.* Under this plea the defendant may show:

1. That he never executed the deed.
2. That it is absolutely void in law.
3. That there has been a material alteration by a party thereto; or, if he declares on it in its altered condition, by a stranger.

*Nil debet* is not a good plea to debt on a bond or specialty, the reason being that you cannot say to an action on a specialty that you do not owe, for the seal imports a consideration. The plea is therefore bad on demurrer.

But if the plaintiff joins in a plea of *nil debet* instead of demurring, defendant may prove anything under this that he could under the same plea in debt on a simple contract.

Miller vs. Moses, 56 Me. 128.

The general issue to debt on a foreign judgment is *nil debet.*

By *foreign judgment* as here used, I mean a judgment of a foreign country, and not a judgment of a sister state.

The general issue to debt on a domestic judgment is *nul tiel record.*

Under the plea of *nul tiel record*, the existence of the record only is in issue. Under this plea, all you can show is that no such record or judgment exists.

Tourigney vs. Hoole, 88 Me. 406.

The general issue in debt on a penal statute is *nil debet* or *not guilty.*

1 Chitty on Pleading, 481.

1 Burnham vs. Webster, 5 Mass. 266.

1 Term Reports, 462; s. c. 99 Engl. Reprint, 1198.

The general issue in covenant broken is *non est factum.*

As to what may be shown under this plea, the same rule applies as to debt on a specialty.

The general issue in trespass is *not guilty.*
Under this plea, defendant may show that he did not commit the act described, and, in trespass *de bonis*, that the goods did not belong to the plaintiff, and, in trespass *quare clausum*, that the close was not the plaintiff's.

The general issue in trespass on the case is *not guilty*.

Under this plea the same rule as given for *non assumpsit* applies with few exceptions.

One is, that truth in slander and libel must be pleaded specially.

The general issue in trespass is *not guilty*.

Under this plea the defendant can set up anything in defense except a release, which is said to be the only special plea in bar to an action of trover, all others amounting to the general issue.

The general issue in *detinue* is *non detinet*.

Under this, defendant may show either that he did not detain the goods or that they did not belong to the plaintiff.

The general issue in *replevin* is *non cepit*.

Under this, the defendant may show that he did not take the plaintiff's goods or, it being a local action, that he did not take them at the place mentioned.

If the defendant claims title to the goods replevied, he must set it up under a brief statement or by a special plea, for the general issue pleaded alone admits the title to be in the plaintiff.

See *Replevin* under *The Declaration*.

**Conclusion of Pleas of the General Issue.**

When any matter not of record is denied by the general issue, the plea, if the case is before a jury, concludes "to the country," that is, the jury.

All issues of fact, if triable by a jury, conclude in the same manner.

3 Blackstone's Comm. 315.

**Exception.**

The general issue in debt on a domestic judgment (*nulla tiae record*) is the only one that does not conclude to the country. This, like a special plea in bar, concludes with a verification. The issue is then closed by the adverse party re-affirming the record and praying that it be examined by the court.
DEMMURRERS

2 Chitty on Pleading, 488.
Stephen on Pleading, 255.

The reason is that a record is considered of too high a nature to be tried by a jury or in any other way than by itself, that is, by personal inspection by the court.

The form of conclusion of a plea to the country is as follows: “And of this, defendant puts himself upon the country”; or, if it is a denial on the part of the plaintiff, “This the plaintiff prays may be inquired of by the country.”

3 Blackstone’s Comm. 313.

If in a court without a jury, the conclusion is, “and of this, defendant puts himself upon trial.”

In a plea of the general issue, the plaintiff must join and this is done by the plaintiff’s adding below the defendant’s plea the words, “and the plaintiff likewise,” or “and the plaintiff doth the like,” meaning of course that plaintiff also refers the case to the country, or the court, as the case may be.

This addition is known in pleading as the similiter.

3 Blackstone’s Comm. 315.

VIII. DEMURRERS.

To demur is to rest or pause and he who demurs to his adversary’s pleading rests or pauses upon it as requiring no answer because it is insufficient in law.

3 Blackstone’s Comm. 314.

A demurrer is not strictly a plea since it neither asserts nor denies any fact but raises a question of law as to the sufficiency of the previous pleading.

Either party may demur to any stage of the pleading on either side before an issue is reached and his opponent must join in the demurrer.

Coke on Littleton, 72.

A demurrer once filed and joined cannot be withdrawn without leave of the court and the adverse party.

Me. R. S. Chap. 84, Sect. 35.

A demurrer admits all facts well pleaded to be true, but only such facts.
Formerly, by the common law of England, a demurrer only admitted the truth of facts well pleaded both in substance and in form, and a general demurrer reached defects in form as well as in substance. There was no such thing as a special demurrer.

But by the statute of XXVII Elizabeth, Chapter V, Section 1, it was provided that all defects and imperfections merely formal were aided on demurrer and might be amended by the court, except such as were expressly and specifically set down and assigned as a cause of demurrer.

Bacon's Abridgment, Pleas, N. 6.

This statute gave rise to two kinds of demurrers which now exist, general and special.

A general demurrer is one not specially assigning any cause for demurrer but which simply asserts in general terms that the pleading demurred to is insufficient in law.

Two important requisites of all good pleading are that the matter pleaded be sufficient in substance and that it be pleaded according to the forms of law.

If the first requisite be lacking, it is a defect that can be taken advantage of by a general demurrer.

But if the matter itself is sufficient, and the only defect be in the form of the pleading, it can only be taken advantage of by a special demurrer.

An example of a defect in substance is the failure to allege a consideration in an action on a simple contract, or the performance of a condition precedent.

An example of a defect in form is a special plea in bar amounting to the general issue, or double pleading, or argumentative pleading.

Bacon's Abridgment, Pleas N. 5 and 6.
Ryan vs. Watson, 2 Me. 382.
Briggs vs. G. T. R. R. Co., 54 Me. 375.

It is the general rule that defects in substance, and those only, can be taken advantage of by a general demurrer.

There are two exceptions to this rule:

Exception I.

Formal defects in dilatory pleas.
Exception II.

Formal defects in indictments and other criminal processes.

The statute of XXVII Elizabeth (which was later supplemented by the statutes of IV and V Anne, which specified that certain defects in substance should be considered defects in form) did not extend to criminal proceedings or to dilatory pleas, the words of both statutes being, "any action or suit."

As the statute of XXVII Elizabeth expressly excluded from its operation criminal proceedings, it of course did not apply to indictments, and the object of the statute being expressed to be in furtherance of justice, and dilatory pleas not being favored in the law, the latter were held not to be within the spirit of the statute.

So, as regards criminal proceedings and dilatory pleas, the law in force prior to the statute of XXVII Elizabeth prevails, and therefore a general demurrer to a dilatory plea or to an indictment reaches all defects in form as well as in substance.

Severy vs. Nye, 58 Me. 246.
Bellamy vs. Oliver, 65 Me. 108.
State vs. Dresser, 54 Me. 569.

The usual form of a general demurrer is, "And now the defendant comes, etc., when etc., and says that the plaintiff's declaration is insufficient in law, wherefore he prays judgment and for his costs."

All matter, though sufficient in substance, must be pleaded according to the forms of law or the pleading will be defective. How formal defects in the pleading can be taken advantage of brings us to the consideration of special demurrers.

A special demurrer is one which denies the legal sufficiency of the previous pleading in certain matters of form specially assigned and pointed out by the demurrer.

It also reaches defects in substance, whether they are specially assigned as causes of demurrer or not.

Scott vs. Whipple, 6 Greenleaf, 425.

If the defect is one of form, it can be taken advantage of by special demurrer only, with the exception, stated above, of dilatory pleas and criminal proceedings.

Neal vs. Hanson, 60 Me. 84.
If the defect is one of substance, it can be taken advantage of either by a general or a special demurrer.

Scott vs. Whipple, 6 Greenleaf, 425.

A special demurrer to reach a defect in form must point out specifically wherein the previous pleading is defective.

It is not sufficient to allege in general terms that the previous pleading is double, informal, or argumentative. You must go further and point out exactly wherein it is double, informal, or argumentative.

Briggs vs. G. T. R. R. Co., 54 Me. 375.

Ryan vs. Watson, 2 Me. 382.

There cannot be a demurrer to a demurrer. If one party demurs, the adverse party must join, even though the demurrer be informal.

Wakefield vs. Littlefield, 52 Me. 21.

Bacon’s Abridgment, Pleas, N. 2.

Failure to join in a demurrer works a discontinuance.

Heard on Pleading, 57.

There are two things of supreme importance which you must consider before you file a demurrer.

First, all facts well pleaded are admitted to be true,

Facts ill pleaded are not admitted. Therefore an allegation in consistent with a prior allegation of the same party, allegations of facts which are not material or legally impossible, facts of which the court will take judicial notice, and matters of law, are never admitted by a demurrer.

Jones vs. Dow, 137 Mass. 119.

Second, a demurrer opens the entire record and judgment will be given against the party making the first error of substance from the declaration down.

If a declaration is defective in substance and the defendant’s plea is also defective, and the plaintiff demurs to the plea, notwithstanding that the plea is defective, judgment will be given to the defendant, for the plaintiff made the first error of substance, and a defective plea is a good answer to a defective declaration.

So if the declaration is good but the plea and the replication are
defective, and the defendant demurs to the replication, judgment will be entered for the plaintiff, for defendant made the first error of substance.

Shelden vs. Call, 55 Me. 159.
Calais vs. Bradford, 51 Me. 414.
Stilphen vs. Stilphen, 58 Me. 508.
Poor vs. R. R. Co., 59 Me. 270.
State vs. Sweetsir, 53 Me. 438.
Rule applies to general demurrers only.
Bell vs. Lamprey, 52 N. H. 49.

There are four exceptions to the rule that a demurrer opens the entire record.

Exception I.

A demurrer to a dilatory plea does not reach back.

For example, if plaintiff demurs to a plea in abatement, and the court decides against the plea, they will give judgment of respondeat ouster without regard to the defects, if there are any, in the declaration.

1 Saunders’ Reports, 285; 85 Engl. Reprint, 370.
Heard on Pleading, 109.
Ryan vs. May, 14 Ill. 49.
Ellis vs. Ellis, 4 R. I. 110.
Clifford vs. Cony, 1 Mass., 500.
Bent vs. Bent, 43 Vt. 42.

Exception II.

Although upon the whole record the right may appear to be with the plaintiff, yet the court will not give judgment for such right, unless the plaintiff has himself put his action upon that ground.

Head vs. Baldrey, 6 Ad. & El. 459; s. c. 112 Engl. Reprint, 175.

For example, in an action to perform an award, and not, to prevent the arbitrators from making an award, plaintiff declared in covenant, and assigned as a breach that the defendant would not pay the sum awarded; defendant pleaded that, before the award was made, he revoked by deed the authority of the arbitrators, to which plea the plaintiff demurred.
The court held the plea good as being a sufficient answer to the breach alleged and gave judgment for the defendant, although they were also of the opinion that the matter stated in the plea would have entitled plaintiff to recover if he had alleged by way of breach that defendant had prevented the arbitrators from making the award.

Exception III.
When the replication to a defective plea is not only insufficient in substance, but also shows that the plaintiff has no cause of action, although the declaration is good.

For example, if, in an action on a penal bond, defendant pleads an insufficient bar, and plaintiff in his replication assigns as a breach what is in law no breach, the judgment on a demurrer to the replication would be for the defendant although his plea is defective in substance, for it appears from the whole record that the plaintiff is not entitled to recover.

Gould on Pleading, 5th Ed. 443.
Shaw vs. Peckett, 25 Vt. 423.

Exception IV.
If the demurrer to the declaration is "too large" as it is called, that is, if, to a declaration containing two counts, defendant, instead of confining his demurrer to the count which is defective, demurs to the whole declaration, judgment will be given to the plaintiff; for, if a demurrer is filed to a declaration one count of which is good, it will be overruled.

Blanchard vs. Hoxie, 34 Me. 376.

In Maine, if a demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs from the time it is filed, unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered.

Me. R. S., Chap. 84, Sect. 35.

IX. SOME RULES OF PLEADING

Rule 1.

After the declaration, the parties must either demur or plead to the declaration by way of traverse or confession and avoidance.
Rule II.
Upon a traverse, issue must be tendered.
Weltale vs. Glover, 10 Modern, 160; s. c. 88 Engl. Reprint, 677.
Hartwell vs. Hemmenway, 7 Pick, 116.

Rule III.
An issue either of law or fact, if well tendered, must be accepted. If the issue is well tendered both in substance and form, it must be accepted and the adverse party can neither demur, traverse, nor plead in confession and avoidance.
Dawes vs. Winship, 16 Mass. 290.
Earle vs. Hall, 22 Pick. 102.

Rule IV.
The pleading must not be double at common law.
This applies to all stages of the pleadings. The declaration must not, in support of a single demand, allege several matters by any one of which the demand may be proved.
With reference to the later stages of the pleadings, the rule means that two distinct matters, either of which if taken by itself would be a sufficient answer to the previous pleading, should not be contained in the same plea.
Ferguson vs. Meredith, 1 Wall. 26.
Lord vs. Tyler, 14 Pick. 156.
A pleading will be double if it contains several answers whatever may be their quality, that is, containing several matters in bar or in abatement, or containing several matters in confession and avoidance, or containing a traverse with a matter in confession and avoidance.
Stephen on Pleading, 316.
Duplicity is an error in form and can be taken advantage of by a special demurrer only.
Kipp vs. Bell, 86 Ill. 577.
Double pleas are allowed in Maine by statute.
Me. R. S. Chap. 84, Sect. 34.
Rule V.
A party cannot both plead and demur to the same matter.
By this is meant, that you cannot both plead and demur to the same count at the same time, but at common law you can plead to one count and demur to another in the same declaration.
Heard on Pleading, 208.

Rule VI.
It is not necessary or proper to state in the pleadings that which is merely evidence. Facts only should be stated.
Williams vs. Wilcox, 8 Ad. & El. 331; s. c. 112 Engl. Reprint, 863.
Watriss vs. Pierce, 36 N. H. 232.
Smith vs. Wiggin, 51 N. H. 156.

Rule VII.
It is not necessary to allege the existence of facts of which the courts will take judicial notice.
1 Blackstone's Comm. 85.
Coke on Littleton, 303 b.
Shipman on Pleading, 426.

Rule VIII.
It is not necessary to allege presumptions of law.
Williams vs. E. India Co., 3 East, 192; s. c. 102 Engl. Reprint, 571.
For example, in an action for imputing theft, plaintiff need not allege that he is not a thief, the reason being that every man is presumed to be honest until the contrary is proved.
Heard on Pleading, 255.

Rule IX.
Pleadings must not be argumentative.
This is an error in form and can be taken advantage of by a special demurrer only.
Pendleton vs. Amy, 13 Wall. 297.
Hodgson vs. E. India Co. 8 Term Reports, 278; s. c. 101 Engl. Reprint, 1389.
For example, if a party should allege that A was dead and in your reply you should allege that he was alive, your reply would be bad on special demurrer because it would be argumentative. The proper plea is that A is not dead.
Rule X.

Things are to be pleaded according to their legal effect or operation.

Bean vs. Ayers, 67 Me. 482.
Howell vs. Richards, 11 East, 633; s. c. 103 Engl. Reprint, 1150.
Commercial Bank vs. French, 20 Pick. 489.

Rule XI.

When a plea amounts to the general issue, it should be so pleaded.

Thayer vs. Brewer, 15 Pick. 217.

For example, in trespass for entering the plaintiff's garden, defendant pleaded that plaintiff had no such garden, and the plea was held to be bad, as it amounted to the general issue, not guilty.

Heard on Pleading, 304.
Merritt vs. Miller, 13 Vt. 416.

X. STEPS TO BE TAKEN AFTER VERDICT.

After verdict, but before entry of judgment, the unsuccessful party may take certain steps, which are:

1. Motion for a new trial.
2. Exceptions.
3. Motion in arrest of judgment.
4. Repleader.
5. Judgment non obstante veredicto.

1. MOTION FOR A NEW TRIAL.

In Maine, in civil cases, a motion for a new trial can be addressed either to the law court or to the presiding justice; you must, however, elect which course you will pursue, for you cannot file a motion to the presiding justice and, if unsuccessful, then file another to the law court. If you file a motion to the presiding justice, his decision is final.

In practice, if the motion is addressed to the presiding justice, it is not necessary to present a copy of the evidence.

There is one thing important to remember. A presiding justice cannot set aside a second verdict in the same party's favor.

Me. R. S. Chap. 84, Sect. 54.

If the motion is addressed to the law court, it must be sustained by a copy of the full evidence submitted to the jury.
Rule of Court XVII, 103 Me.
Rogers vs. R. R. Co., 38 Me. 227.
Nutt vs. Merrill, 40 Me. 237.
Lakeman vs. Pollard, 43 Me. 463.

In criminal cases, a motion for a new trial must be addressed to
the presiding justice, for the law court has no jurisdiction over such
a motion.

Exception.

Where the punishment may be imprisonment for life, if the de-
cision of the presiding justice is unfavorable to the respondent, he
can appeal to the full bench and the favorable decision of three of
the eight judges is sufficient to give him a new trial. This is the
law in this state by statute.

Me. R. S. Chap. 135, Sect. 27.
State vs. Hill, 48 Me. 241.
State vs. Smith, 54 Me. 33.
See further Chapter 184 of the Public Laws of 1909.

The usual grounds on which a motion for a new trial is based are,

a. That the verdict is against the law.
b. That the verdict is against the evidence.
c. That the verdict is against the weight of the evidence.
d. That the damages are excessive or inadequate.

Or
e. Newly discovered evidence.

The grounds usually relied on in practice are that the verdict is
against the evidence, that the damages are excessive, or newly dis-
covered evidence.

The court will not set aside the verdict as against the evidence
unless it appears that the jury acted under the influence of some
passion, bias, or prejudice, or misapprehended the evidence or issue.

Glidden vs. Dunlap, 28 Me. 379.
Purinton vs. M. C. R. R. Co., 78 Me. 569.

The court will not grant a new trial unless the verdict is manifestly
against the evidence, even though the court would have rendered a
contrary verdict had the evidence been submitted to it instead of to
the jury.
Googins vs. Gilmore, 47 Me. 9.
Williams vs. Bucker, 49 Me. 427.

If the ground for the motion is that the damages are excessive, the court may say, "Remit all over a certain sum or a new trial will be granted."

A new trial will sometimes be granted when the damages are too small, that is, when they are inadequate.

Powell vs. Haines, Maine Supreme Court, 1899.
(Not reported.)

The disqualification of a juror is a good ground for setting aside a verdict providing the party objecting did not know of the disqualification until after the trial had commenced.

If he knew of it before the trial and did not object, he will be considered as having waived the objection.

His motion should negative knowledge; that is, he should state in his motion that he did not know of the disqualification until after the trial had commenced.

Dolloff vs. Stimpson, 33 Me. 546.
Jameson vs. R. R. Co., 52 Me. 412.
Tilton vs. Kimball, 52 Me. 500.

A new trial will be granted when material and not cumulative evidence, the existence of which was not known to the party making the motion, is discovered after verdict.

Warren vs. Hope, 6 Me. 479.

A new trial will not be granted when the evidence claimed to be newly discovered might have been ascertained before trial by the use of proper diligence.

Falmouth vs. Windham, 63 Me. 44.
Hunter vs. Randall, 69 Me. 183.

Nor unless it appears that injustice has been done.

Woods vs. Jordan, 62 Me. 490.

A motion of this kind should state what the verdict was, the nature and grounds of the action against the defendant, and what the newly discovered evidence is.

Bartlett vs. Lewis, 58 Me. 350.

For other grounds, see Me. R. S. Chap. 84, Sect. 104.
2. EXCEPTIONS.

The proper way to take advantage of errors of the court in matters of law, either a wrong ruling on the admissibility of evidence or a misstatement of the law in his charge, is by a bill of exceptions.

Exceptions to the admissibility of evidence must be taken and a note thereof made by the presiding justice at the time the ruling is made or all objection is waived.

Exceptions to any opinion, direction, or omission of the presiding justice in his charge must be taken before the jury retire or all objection is waived.

Rule of Court XVIII, 103 Me.

Exceptions do not lie to the decision of the court on matters within its discretion.

As, for example, the refusal to grant a non-suit, or to allow an attorney to read decisions to the jury.

Ricker vs. Joy, 72 Me. 106.
Moody vs. Hinkley, 34 Me. 200.
Crosby vs. M. C. R. R. Co., 69 Me. 418.

Exceptions do not lie to the decisions of the court on any matter of fact.

Clement vs. Foster, 69 Me. 318.

To sustain objections and exceptions, it must not only clearly and affirmatively appear that the ruling was wrong but also that the party excepting was prejudiced thereby.

Soule vs. Winslow, 66 Me. 447.
State vs. Pike, 65 Me. 111.
Reed vs. Reed, 70 Me. 504.

Exceptions cannot be taken by the party in whose favor the instruction was given.

Rice vs. Wallace, 30 Me. 252.

It is no ground for exception that the court referred a question of law to the jury, provided that they decided it correctly.

Osgood vs. Lansil, 33 Me. 360.

It is a good ground for exception that the judge during trial, including his charge, expressed an opinion upon issues of fact arising in the case, but the judge may comment upon the testimony.
Exceptions will not lie to the omission of the court to give instructions unless requested.

Gardner vs. Gooch, 48 Me. 487.

If a judge inadvertently misstates a fact in the evidence, counsel should call his attention to it at the time in order that it may be corrected or he waives exception thereto.

Grows vs. M. C. R. R. Co., 69 Me. 412.

A bill of exceptions should state enough of the case to enable the court to tell whether the ruling excepted to was erroneous and whether the party excepting was injured.

Holbrook vs. Knight, 67 Me. 244.

Pullen vs. Glidden, 68 Me. 559.

For example, where the exception merely set forth the rejection or admission of the evidence, without stating the ground, the exceptions will be overruled.


An exception to the whole charge or to the most of it will not be sustained unless all the legal propositions therein are erroneous.

Bacheller vs. Pinkham, 68 Me. 253.

Macintosh vs. Bartlett, 67 Me. 130.

You must in your bill of exceptions point out exactly that part of the charge to which you object.

An exception to "that part of the charge which connects the trustees of the M. E. Church of Freeport with the cause at bar" is too general when the trustees are mentioned on eight of the eleven pages of the charge.

Brackett vs. Brewer, 71 Me. 478.

For other bills of exceptions held too general, see

Crosby vs. M. C. R. R. Co., 69 Me. 418.

Webber vs. Dunn, 71 Me. 331.

State vs. Savage, 69 Me. 112.

Hunter vs. Randall, 69 Me. 183.

You should be very careful in making your bill of exceptions as the court can act on them only as they are made up and allowed at nisi prius.
Hunter vs. Heath, 76 Me. 219.  
A point not covered by the bill of exceptions cannot be raised in argument before the law court.  
Harwood vs. Siphers, 70 Me. 464.

3. MOTION IN ARREST OF JUDGMENT.

To such a motion there are three essentials:

a. The grounds on which it is based must be specifically stated.  
   State vs. Wing, 32 Me. 581.  
   Hamilton vs. Pease, 38 Conn. 120.

b. It must be an error in substance and not one which is cured by a verdict.  
   Slack vs. Lyon, 9 Pick. 62.  
   Sawyer vs. Boston, 144 Mass. 470.  
   Read vs. Chelmsford, 16 Pick. 128.

It is a rule that no defects in the pleadings which would not have been fatal on a general demurrer can be reached by a motion in arrest of judgment.  
3 Blackstone’s Comm. 394.

c. The error must appear on the face of the record.  
   Sewall Falls Bridge vs. Fisk, 23 N. H. 171.  
   State vs. Carver, 49 Me. 588.

Motions in arrest of judgment in civil actions have been abolished in Maine by statute.  
Me. R. S. Chap. 84, Sect. 46.  
Stetson vs. Corinna, 44 Me. 29.

4. REPLEADER.

A motion for a repleader is made upon the single ground of the immateriality of the issue upon which judgment was rendered.  
Gerrish vs. Train, 3 Pick. 124.  
Potter vs. Titcomb, 7 Me. 302.  

Whether this motion can be made by the party raising the immaterial issue is a question. There are cases both ways.  
In Maine, it is probably a matter within the discretion of the court.  
Strout vs. Durham, 23 Me. 483.  
Ham vs. Ham, 37 Me. 261.
5. **JUDGMENT NON OBSTANTE VEREDICTO.**

This motion is made by the plaintiff after a verdict against him, the plea of the defendant having been by confession and avoidance and the matter of avoidance being bad in law, so that the plaintiff's cause stands confessed. The plaintiff asks for judgment, the verdict notwithstanding.

Dewey vs. Humphrey, 5 Pick. 187.
Buckley vs. Duff, 111 Pa. St. 223; s. c. 3 Atl. 823.

This motion is never made by the defendant.
Smith vs. Powers, 15 N. H. 546.

Sometimes when the verdict is in plaintiff's favor, he may fear to take judgment on account of some irregularity in the pleading and may then make this motion for a judgment notwithstanding the verdict.

XI. **PECULIARITIES AND INCIDENTS OF PLEADING.**

**THE PLEA OF PUIS DARREIN CONTINUANCE.**

It is a general rule of the common law that any matter of defense arising after the commencement of the suit cannot be pleaded in bar to the suit.

If such matter arises before the plea or demurrer of the defendant is filed, it must be pleaded to the further maintenance of the action.
Rowell vs. Hayden, 40 Me. 582.

If such matter arises after the plea is filed or even after issue is joined, but before verdict, then it must be pleaded *puis darrein continuance*.

This is a plea by the defendant of such matters of defence as have arisen since the last continuance. It may be pleaded in abatement or in bar according as the subject matter of it is in abatement or in bar.

The effect of such a plea is that all the former pleas are superseded and everything is confessed except the matter raised by the plea.

Such pleas are not favored and the greatest care must be exercised in pleading them.
Hilliker vs. Simpson, 92 Me. 590.
Augusta vs. Moulton, 75 Me. 551.
It is not sufficient to state that the matter arose since the last continuance; it is necessary to state the precise day on which the matter arose which constitutes the defense.

Cummings vs. Smith, 50 Me. 568.

It is also necessary to state the day of the last continuance, otherwise the plea will be bad on demurrer.

Poland vs. Davis, 103 Me. 55.

Augusta vs. Moulton, supra.

The plea should be filed at the next term after the matter of defense arose and the defendant has no right to file it at any other time. It is however within the discretion of the court to allow him to do so, and as a matter of practice, it will be allowed if the justice of the case seems to require it.

The way to take advantage of the failure to seasonably file the plea is not by demurrer but by a motion to dismiss the plea.

Rowell vs. Hayden, 40 Me. 582.

The judgment on a demurrer to a defective plea of this kind is final.

McKeen vs. Parker, 51 Me. 389.

The court has the power to award a repleader in the cause of justice, but it is within its discretion and no exception will lie to its ruling.

Cummings vs. Smith, 50 Me. 568.

It cannot be pleaded after verdict.

State vs. Peck, 60 Me. 498.

NEW ASSIGNMENTS.

A new assignment is a restatement by the plaintiff in his replication of his cause of action.

Where the declaration is ambiguous and the defendant pleads facts which are literally an answer to it, but which do not answer the real claim set up by the plaintiff, he should reply with a new assignment, setting up with greater clearness the particular cause of action relied upon.

1 Saunders' Reports, 299 a, note 6; 85 Engl. Reprint, 408.

Barnes vs. Hunt, 11 East, 451; s. c. 103 Engl. Reprint, 1078.

Taylor vs. Smith, 7 Taunton, 156; s. c. 129 Engl. Reprint, 62.

Spencer vs. Bemis, 46 Vt. 29.

Hannen vs. Edes, 15 Mass. 347.
For a form of replication setting forth a new assignment, see Shipman on Pleading, Form 38, page 526.

XII. STEPS TO BE TAKEN AFTER JUDGMENT.

1. Audita querela.
2. Certiorari.
3. Writ of review.
4. Writ of error.

1. AUDITA QUERELA.

This writ is a remedial process to relieve a party who has been injured or who is in danger of being injured from the consequences of a judgment because of some improper action of the party who obtained it which could not have been pleaded in bar to the action. It is in the nature of a bill in equity to obtain relief against oppression or the danger of oppression, and that danger is necessary to maintain the action.

Bryant vs. Johnson, 24 Me. 304.
3 Blackstone’s Comm. 405.

It relates to the wrongful acts of the adverse party only and not to the errors of the court.


This writ is seldom used. The form of the writ and the proceedings can be found in chapter 102 of the Revised Statutes.

2. CERTIORARI.

This is a writ issued by the Supreme Judicial Court addressed to an inferior court commanding it to certify and return its records.

It is the regular process under which errors in the proceedings of inferior courts from which there is no appeal can be examined and corrected.

Dow vs. True, 19 Me. 46.

It is only to correct errors of law, and where the record contains no error, the writ cannot be issued.

Levant vs. Co. Commrs., 67 Me. 429.

Writs of certiorari are granted only at the discretion of the court, but this is a legal discretion and must be exercised under rules of law.
Cushing vs. Gay, 23 Me. 9.

A writ of certiorari will not be granted to correct simply errors of form which do not affect the merits of the case, nor on account of mere technical objections to the record when substantial justice does not require it.

- Waterville, etc., 31 Me. 506.
- Furbush vs. Cunningham, 56 Me. 184.

A writ of certiorari lies,

First, in all proceedings of the city council in relation to ways, acting under a charter which gives to that body exclusive power to lay out, repair, or alter ways.

- Baldwin vs. Bangor, 36 Me. 518.
- Gay vs. Bradstreet, 49 Me. 580.
- Preble vs. Portland, 45 Me. 241.

Second, in all proceedings before the county commissioners in laying out highways.

- Goodwin vs. Hallowell, 12 Me. 271.
- White vs. Co. Commrs., 70 Me. 317.
- Commonwealth vs. Coombs, 2 Mass. 489.

Third, in all proceedings before commissioners in setting off land under petitions for partition.

- Dyer vs. Lowell, 30 Me. 217.

Fourth, on the complaints against the putative father of a bastard child.

- Drowne vs. Stimpson, 2 Mass. 441.
- Gile vs. Moore, 2 Pick. 386.

The judgment on a petition of certiorari is simply that the writ be granted or denied.

The granting of the writ does not quash the proceedings complained of. They remain valid until quashed by a judgment on the writ.

- State vs. Madison, 63 Me. 546.

The hearing on a writ of certiorari must be before the full court. A new assignment of errors is not necessary.

- Commonwealth vs. Sheldon, 3 Mass. 188.
The judgment on a writ of certiorari is that the proceedings of the inferior court be affirmed or quashed.
No new judgment can be rendered.
Commonwealth vs. Ellis, 11 Mass. 462.
A petition for a writ of certiorari will be granted only if made within six years next after the proceedings complained of.
Me. R. S. Chap. 104, Sect. 16.

3. WRIT OF REVIEW.

This is a statutory method, unknown to the common law, of retrying the case where it is made to appear that through fraud, accident, mistake, or misfortune, justice has not been done, and that a new trial would be equitable.
Wilbur vs. Dyer, 39 Me. 169.
By statute, in Maine, the Supreme Judicial Court held by one justice may grant one review in civil actions, including petitions for partition, and for certiorari, and proceedings for the location of lands reserved for public uses, when judgment has been rendered in any tribunal, and a petition therefor has been presented within three years.
Me. R. S. Chap. 91, Sect. 1.
The special cases in which a review may be granted are found in section 1 of chapter 91 of the Revised Statutes.
In all cases there enumerated, the defendant is not entitled to a review as a matter of right, but only in the discretion of the court.
In certain cases, the defendant does not have to appeal to the discretion of the court, but is entitled to a review as a matter of right.
When a judgment is rendered on default of an absent defendant, who, being an inhabitant of the state, had no actual notice of the suit, or who was not an inhabitant of the state, he is entitled of right to a review of the judgment if action therefor is brought within one year.
Me. R. S. Chap. 84, Sects. 3 and 4.
Davis vs. Stevens, 57 Me. 593.
When entitled to a writ of review as a matter of right, it is unnecessary to petition therefor.
Jackson vs. Gould, 72 Me. 335.
4. WRIT OF ERROR.

A writ of error is an original writ, in the nature of a commission to the judges of the court from which it issues, authorizing and requiring them to examine the grounds upon which a judgment, either in their own or in an inferior court, was given, in the same case specified in the writ, and to determine whether said judgment should be altered, reversed, or affirmed.

In Maine, a writ of error is issued from and is returnable to the Supreme Judicial Court only.

It can issue in term time or in vacation.

Me. R. S. Chap. 104, Sect. 1.

Certain Requisites.

a. The error must be one of substance and not one aided by verdict, or amendable by common law or statute.
   Piper vs. Goodwin, 23 Me. 251.

b. The plaintiff must be aggrieved by the error complained of.
   Shirley vs. Lunenburg, 11 Mass. 379.
   Whiting vs. Cochran, 9 Mass. 532.

c. It lies only to reverse a final as distinguished from an interlocutory judgment.
   Butterfield vs. Briggs, 92 Me. 49.

d. It lies only to reverse judgments of courts of record acting according to the course of the common law.
   Commonwealth vs. Ellis, 11 Mass. 466.

e. It must be a judgment from which the aggrieved party at the time of bringing the writ has no means or right of appeal, and it should appear that this right has not been lost through his negligence.
   Savage vs. Gulliver, 4 Mass. 171.
   Howard vs. Hill, 31 Me. 420.

f. That the aggrieved party has no remedy by writ of review.
   Dennison vs. Portland Co., 60 Me. 519.

g. That the aggrieved party has no remedy by a bill of exceptions.
   Howard vs. Hill, 31 Me. 420.

In general terms, the object of a writ of error is to obtain a reversal or correction of a judgment, either by reason of some error in
fact affecting the validity and regularity of the legal decision itself, or on account of some mistake or error in law, apparent upon the face of the record, from which the judgment appears to be incorrect or rendered in favor of the wrong party.

The form of the writ and the proceedings thereon are prescribed by statute in Maine.

Me. R. S. Chap. 104.
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