

# THE COMPLAINT-ALLEGATIONS 'IN PARTICULAR ACTIONS\*

CHARLES EDWARD CLARK

## FRAUD AND OTHER DISFAVORED ACTIONS

At common law a higher degree of certainty and more specific details were required in the declaration in actions which were disfavored because of their nature, or in which the defendant's morality was brought in question. These rules are enforced under the codes.

### *Fraud and Deceit*

Where the defendant is charged with fraud, misrepresentation, or deceit, it is felt that the defendant is entitled to the fullest particulars of the claim or defense in order that he may have every opportunity to meet the allegations made. Hence, it has been the rule under both common law and code pleading that allegations of fraud must be made with a great degree of particularity. Thus, it is said that the elements of fraud in an action for false representation are five, as follows: (1) a specific false representation of material facts; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage.<sup>83</sup> The question of fraud may come up not only in an action for damages but also in actions involving the rescission of a contract, or for some form of equitable redress, such as reformation of a contract, or as a defense

---

\*The first part of this article appeared in the last number of the NORTH CAROLINA LAW REVIEW, February, 1927.

<sup>83</sup> *Colorado Springs Co. v. Wight*, 44 Colo. 179, 96 Pac. 820 (1908); *Reno v. Bull*, 226 N. Y. 546, 550, 124 N. E. 144 (1919) with note 5 Corn. L. Q. 167; *Martin v. Durham National Bank*, 211 N. Y. S. 828 (1925); *Troganorski v. Boccafogly*, 212 N. Y. S. 89 (1925); *Duncan v. Dagen*, 318 Ill. 500, 149 N. E. 495 (1925); *Adams v. Barber*, 157 Mo. App. 370, 139 S. W. 489 (1911); *Inman v. Round Valley Irr. Co.*, 238 Pac. 1018 (Idaho-1925); *J. B. Colt Co. v. Kimball*, 190 N. C. 169, 129 S. E. 406 (1925); 8 Enc. Pl. & Pr. 901; Shipman, *Common Law Pleading*, Ball ed., 221. A statement negligently made may amount to a false representation; *Weston v. Brown*, 131 Atl. 141 (N. H.-1925); 35 Yale L. J. 767. Plaintiff need not prove all the fraudulent representations alleged if he proves any material false representation which in fact served as an inducing cause. *Conn. Fuel Co. v. McNeil*, 103 Conn. 390, 130 Atl. 794 (1925). See also *State v. Martin*, 154 N. E. 284 (Ind. 1926).

against the enforcement of some claim by the plaintiff.<sup>84</sup> Substantially the same pleading requirements as in the action for deceit must be fulfilled when fraud is relied on in the other cases. Thus, in the equity cases the enumeration of the elements is substantially the same with the suggestion that possibly the second element, and perhaps sometimes the fifth, may be dispensed with.<sup>85</sup> Similar particularity of allegation is required where fraud is set up as a defense to an action and this requirement is stated in some of the newer codes.<sup>86</sup>

This rule requiring the pleading of the details of the defendant's fraud has been incorporated into the model code of the American Judicature Society following the English practice.<sup>87</sup>

### *False Imprisonment and Malicious Prosecution*

At common law the actions of false imprisonment and malicious prosecution were sharply distinguished, since the gist of the former was a direct injury involving a direct restraint upon the plaintiff which was redressed in the action of trespass, whereas the latter was an indirect injury requiring an action of trespass on the case. The gist of the latter action is a prosecution instituted with malice and without probable cause, resulting in damage in the plaintiff. The

<sup>84</sup> See *Merry Realty Co. v. Shamokin & Hollis R. E. Co.*, 230 N. Y. 316, 130 N. E. 306 (1921).

<sup>85</sup> See *Colorado Springs Co. v. Wight*, *supra*, n. 83; 2 Pomeroy, *Equity Jurisprudence*, 357; *Ambler v. Chottau*, 107 U. S. 586, 1 Sup. Ct. 550 (1882); Keigwin, *Cases on Equity Pleading*, 192. There may perhaps be more stringent rules as to the burden of proof resting upon the plaintiff in the equitable cases. See interesting discussion as to mistake, in *Susquehanna S. S. Co., Inc. v. Anderson & Co.*, 235 N. Y. 285, 146 N. E. 381 (1925); *Back v. People's National Fire Ins. Co.*, 97 Conn. 336, 116 Atl. 603 (1922); 11 Corn. L. Q. 396; *DeKay v. Shorehaven Realty Co.*, 104 Conn. 36, 132 Atl. 533 (1926).

<sup>86</sup> N. Y. C. P. A., sec. 242; Eng. Order 19, rule 15; American Judicature Society, *Rules of Civil Procedure*, Bull. 14 (1919) art. 15, sec. 27. See cases cited and criticism of the case of *Edgell v. Sigerson*, 20 Mo. 494 (1855) in Bliss on *Code Pleading*, 3d ed., sec. 339, note.

<sup>87</sup> American Judicature Society, *Rules of Civil Procedure*, Bull. 14 (1919) art. 15, sec. 18: "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, the facts must be stated with full particularity, but whenever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting up circumstances from which the same is to be inferred." The reason given is as follows: "This is a class of allegation concerning the morality of the defendant's conduct in which he is entitled to know fully the grounds on which the allegations are made, so that he may have every opportunity to prepare his case to clear himself at the trial." See also English Order 19, rules 6 and 22; Report of New York Board of Statutory Consolidation, 1915, rules 145, 159.

allegations must be specific and pointed.<sup>88</sup> Where the defendant, in securing the arrest of the plaintiff, has not attempted to meet the formal requirements of the law, he is responsible for the damages for false imprisonment and the elements of malice and want of probable cause need not be shown; but where he has complied with such formal requirements, the elements of malice and want of probable cause must be alleged and proven. Where he has attempted to meet such formal requirements but where through no fault of his they are not actually met, most courts likewise impose responsibility only upon a showing of malice and want of probable cause.<sup>89</sup> Hence, probably the most important distinction between the two actions, now that the forms have been abolished, is that in the latter action of malicious prosecution malice and want of probable cause must be alleged and proven, while it is not necessary in the former.<sup>90</sup>

### *Slander and Libel*

At common law the courts seem to have wished to discourage actions for defamation and hence they strained to find an innocent meaning for the words charged. Therefore the requirements of common law pleading in the case of slander and libel are very strict. There was necessary a variety of minute averments which would show the circumstances under which the speaking was made, the actual words spoken or written, the fact that they were spoken of and concerning the plaintiff, the innuendoes indicating the meaning conveyed to the hearers detrimental to the plaintiff, the consequent damage, etc.<sup>91</sup> A corresponding particularity of alleg-

<sup>88</sup> Shipman on *Common Law Pleading*, ed. Ball., 222; note 34 Yale L. J. 908-9; *Dunn v. Gray Co.*, 150 N. E. 166 (Mass.-1926) holding the declaration there given too general; if conviction resulted, facts must be set forth to show that it was wrongful and was caused solely by the defendant; *Wingersky v. Gray Co.*, 150 N. E. 164 (Mass.-1926).

<sup>89</sup> *Langford v. Boston & Albany R.R.*, 144 Mass. 431, 11 N. E., 697 (1887); *Utz v. Mayes*, 267 S. W. 59 (Mo.-1925); contra, *Krause v. Spiegel*, 94 Calif. 370, 29 Pac. 707 (1892); 34 Yale L. J. 908-9.

<sup>90</sup> For the modern distinction between the two actions see *Milton v. Hill*, 232 Pac. 526 (N. M.-1924), with discussion in 34 Yale L. J. 908-9. For "malicious prosecution" of a civil action, see *Louis J. Sigl, Inc. v. Bresnahan*, 215 N. Y. S. 735 (1926). For a form of complaint in false imprisonment see *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947 (1911). Cf. also *McAvey v. Emergency Fleet Corp.*, 15 F. (2d) 405 (1926).

<sup>91</sup> See Shipman, *Common Law Pleading*, ed. Ball., 219, stating the following as the formal parts of the declaration for defamation, (1) the inducement or prefatory statement of the subject matter; (2) the colloquium; (3) the publication of the scandal itself; (4) the innuendoes; (5) the consequent damages. See also Odgers, *Libel*, 5th ed., 136-137; Newell, *Slander and Libel*, 3d ed., 733.

ation is required in substance under the codes, except that statutes in most of the code states do away with some of the formalities of the complaint in this class of cases. The statutes in substance are in the following form: "In an action for libel or slander, it is not necessary to state in the complaint any existing fact for the purpose of showing the application to the plaintiff of the defamatory matter, but the plaintiff may state in general terms that such matter was published or spoken concerning him."<sup>92</sup> It is held that the legislative purpose was to avoid setting forth at length the extrinsic facts tending to show that plaintiff was the one referred to and to make sufficient a general averment that the defamatory words were spoken or published of the plaintiff. It is still as necessary as formerly to allege not merely the publication of the exact defamatory words relied upon and that they were spoken or published of and concerning the plaintiff, but also any facts necessary to explain the meaning of the words used and to show that they are of defamatory character.<sup>93</sup> Where the defamatory words are considered, by reason of their serious nature, to be "actionable per se" it is not necessary to set forth special damages in order to recover, but where the words are not actionable per se, the special loss to the plaintiff must be alleged with particularity.<sup>94</sup>

<sup>92</sup> N. Y. C. P. A. Rule 96. Substantially this statute seems to have been adopted in all code jurisdictions except Arizona and Connecticut. For example, see Arkansas, Dig. Stat. 1921, sec. 1228; Calif. Code C. P., 1923, sec. 460; North Carolina, Consol. St., 1919, sec. 542.

<sup>93</sup> *Dias v. Short*, 16 How. Pr. 322 (1858); *Corr v. Sun Printing Assn.*, 177 N. Y. 131, 69 N. E. 288 (1904); *Anderson v. Shockley*, 266 Mo. 543, 181 S. W. 1151 (1916); *Hatfield v. Gazette Printing Co.*, 103 Kans. 513, 175 Pac. 382 (1918), with note in 3 A. L. R. 1276, 1279; 48 L. R. A. n.s., 355, note. For additional cases where the innuendo must be pleaded, see *Benz v. Wiedenhoef*, 83 Wis. 397, 53 N. W. 686 (1892); *Chrystal v. Craig*, 80 Mo. 357 (1883); *DeSanto v. DiNicola*, 99 Conn. 717, 122 Atl. 708 (1923) ("bum" in Italian); *Com. v. Szlickys*, 150 N. E. 190 (Mass.-1926). For an amusing case holding that "souplead" is not a defamatory word, see *Re Kirk*, 130 Atl. 569 (N. J.-1925). It is urged in some of these cases that the exact words should be used so that the question of their actionability may be considered on demurrer.

<sup>94</sup> Compare *Hatfield v. Gazette Printing Co.*, *supra*, n. 93; *Zanker v. Lackey*, 128 Atl. 373 (Del.-1926); *Binston v. O'Malley*, 25 Ariz. 552, 220 Pac. 393 (1923); 37 A. L. R. 877, 883 with note; Newell on *Slander and Libel*, 4th ed., p. 810 *et seq.*; note 124 *infra*. Compare N. Y. Civil Practice Rule 97, "In an action of slander brought by a woman for words imputing unchastity to her, it is not necessary to allege or prove special damages." For an interesting case holding it libelous *per se* to state of a woman, known to be married, that she was the latest lady love of another man, see *Sidney v. MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, 151 N. E. 209 (1926); 11 Corn. L. Q. 568; 35 Yale L. J. 1021; 40 Harv. L. R. 323. See 14 Calif. L. R. 61 urging that every written defamation should be considered a libel *per se* or not libelous at all; discussing *Wiley v. Okla. Press Pub. Co.*, 106 Okla. 52, 233 Pac. 224

## PLEADING TITLE

In actions involving realty or personalty, it is necessary, in order to show the defendant's duty to the plaintiff, to allege title in the plaintiff. Thus it becomes necessary in actions for injury or trespass to property, real or personal, for conversion of personalty, for the recovery of specific realty or personalty, (the modern substitutes for ejectment and replevin) and for equitable relief involving property rights, to show the plaintiff's interest in the property in question.

At common law it was a definite principle that "the pleadings must show title" and somewhat extensive rules were developed. Thus in the case of estates *in fee simple* a general allegation of seisin in fee simple was sufficient; while the commencement of *particular* estates must be shown; where a party claims by inheritance he must in general show he is heir; by conveyance, the nature of the conveyance stated according to legal effect. It is often sufficient, where the substantive rules of law permit recovery, to allege a title by mere possession. But where a party alleges title in his adversary, he need not do so more precisely than is sufficient "to show a liability in the party charged, or to defeat his present claim."<sup>95</sup>

Under the codes there has been some difference of opinion as to just how definite the allegations of title must be. Certain of the cases were referred to in the previous article.<sup>96</sup> Thus while an allegation that one is entitled to possession of specific property has been held to be a mere conclusion, yet the allegation that one is the owner of described property is generally considered sufficient.<sup>97</sup>

(1925). Cf. however, *Kee v. Armstrong, Byrd & Co.*, 75 Okla. 84, 182 Pac. 494, 5 A. L. R. 1349 (1919); *Reporter's Assn. v. Sun Printing Assn.*, 186 N. Y. 437, 79 N. E. 710 (1906).

<sup>95</sup> Stephen, *Pleading* (ed. Williston), 341-365; Shipman, C. L. Pl. (ed. Ball.) 467-479.

<sup>96</sup> See 35 Yale L. J. 262, notes 14-16.

<sup>97</sup> Compare *Payne v. Treadwell*, 16 Calif. 221 (1860) with *Sheridan v. Jackson*, 72 N. Y. 170 (1878); and see other cases cited in the article referred to note 96, *supra*; Am. Dig. Pleading, sec. 8 (11). Cf. also *Prindle v. Caruthers*, 15 N. Y. 425 (1857); *First Nat. Bk. v. Stallo*, 160 A. D. 702 145 N. Y. S. 747 (1914); *Land Co. v. Lange*, 150 N. C. 26, 63 S. E. 164 (1908). As to personalty see *Hunt v. First Nat. Bank of Halfway*, 102 Or. 298, 202 Pac. 564 (1921); *Scofield v. Whitelegge*, 49 N. Y. 259 (1872). Many codes provide that in an action for the recovery of real property, plaintiff may allege merely that he has a legal estate therein and is entitled to the possession thereof, describing it with such certainty as to identify it, and that the defendant unlawfully keeps him out of the possession; it is not necessary to state how the plaintiff's estate or ownership is derived. Ohio Gen. Code, 1921, sec. 11903; Ore. L. 1920, sec. 327; Wyo. Comp. St. 1920, sec. 6236; Wash. Rem. Comp.

On the other hand, the stating of specific detailed facts which lead directly to the inference that plaintiff is entitled to possession has been held to state evidentiary and not the necessary ultimate facts.<sup>98</sup> In spite of the seeming confusion of the cases it would seem that the rules discussed in the previous article as to the degree of particularity of allegation should apply. In general, the allegation of ownership should be sufficient as showing title. Essentially the same principles should govern whether realty or personalty is involved. A good statement of the rule is found in a recent New York case criticising the plaintiff for stating his entire chain of title: "In any real property action, plaintiff must, as the pleading phrase goes, show his title; that is, he must state some fact or facts which give him the right to possession, as that he is the owner of the fee or of a term of years or otherwise. The ordinary form of statement is that plaintiff is the owner in fee or otherwise, and is entitled to the immediate possession of certain described premises. He may, however, show his title by deed, alleging that his grantor was, on a certain date, lawfully seized of certain described premises, and while in such ownership and possession conveyed the same to plaintiff by a certain described deed: Similarly, if plaintiff's title comes to him by devise or by descent, the facts may be pleaded. But ordinarily it is neither permissible nor necessary to go back and set forth the entire chain of title in the grantor, deviser, or ancestor."<sup>99</sup>

---

St. 1922, sec. 793; Wis. Stat. 1921, sec. 3077; Kas. Rev. St. 1923, sec. 60-2001 (may also sue on equitable title); cf. Iowa, Comp. Code 1919, sec. 7272, 7273 (deed may be pleaded according to legal effect; commencement of a particular estate not necessary unless essential to the merits of the cause). It has been held that upon a showing of lawful title in the plaintiff and an unlawful withholding of possession by the defendant, it is not necessary to add an allegation that the plaintiff is entitled to possession, *Walter v. Lockwood*, 23 Barb. 228 (1856); *Townsite Co. v. Saive*, 104 Minn. 472, 116 N. W. 947 (1908), but see *Mansur v. Streight*, 103 Ind. 358, 3 N. E. 112 (1885); *Mash v. Bloom*, 113 Wis. 646, 114 N. W. 457 (1907), holding also that the extent of the plaintiff's estate or interest must be stated.

<sup>98</sup> *McCaughy v. Schuette*, 117 Calif. 223, 46 Pac. 666 (1896) criticised in 35 Yale L. J. 266, n. 33. Cf. *Schultz v. Salberg*, 80 Ore. 668, 157 Pac. 1114 (1916).

<sup>99</sup> *Crook v. Licourt*, 214 N. Y. S. 774 (1926). Cf. also *Brooks v. Wheeler*, 243 N. Y. 28, 152 N. E. 455 (1926). Most of the code states require that the realty must be described with such convenient certainty that the sheriff on execution may identify it. Ark. Dig. Stat. 1921, sec. 1230; Cal. C. C. P. 1923, sec. 455; Kas. Rev. Stat. 1923, sec. 60-748; Ohio Gen. Code, sec. 11344; Wyo. Comp. St. 1920, sec. 5685; Nev. R. L. 1912, sec. 5069. Cf. Iowa Comp. Code, 1919, sec. 7275; *Frazier v. Nichols*, 48 Okla. 33, 150 Pac. 711 (1915).

The same case also states the requirement that the premises must be described with directness and not merely by deduction or inference.

Here, as elsewhere, a following of the common law precedents should be a protection to the pleader.<sup>100</sup>

### *Legal or Equitable Title*

In connection with the question who is the real party in interest, to bring suit, the question may be raised whether an equitable titleholder can bring an action for possession of land or personalty or for injury thereto in view of the oft repeated statements in code cases of common law rules such as that "an equitable title will not support ejectment." This, as we saw, involved a very serious failure to give due recognition to the union of law and equity. The problem now is, not what facts would support one of the old common law forms of action, but did the plaintiff before the code have a substantive jural right enforceable either at law or in equity. If he did, he probably has it still, enforceable in the code action, since the code was not intended to take away rights but to facilitate their enforcement. While many holders of equities could not sue for possession or for injury thereto—witness the ordinary cestui of an express trust,—yet they had remedies in equity under certain conditions. Thus a claim for specific performance with delivery of possession should not be denied by calling it "ejectment." In fact the delivery of possession, under modern conditions where the court judgment filed in the land records, makes title, may be perhaps the most important part of the judgment.<sup>101</sup> The combined procedure should permit also of short cuts, such as reformation of a deed and possession thereunder.<sup>102</sup> Similar rules apply in the case of

<sup>100</sup> 35 Yale L. J. 273, 4.

<sup>101</sup> See discussion by R. M. Hutchins, *Equitable Ejectment*, 26 Col. L. R. 436 (1926); Clark & Hutchins, *The Real Party in Interest*, 34 Yale L. J. 259 (1925). Cf. *Klapp v. Dealey*, 213 A. D. 523, 211 N. Y. S. 22 (1925); *Neal v. Baker*, 147 N. E. 635 (Ind.-1925); *Warner v. Coleman*, 107 Okla. 292, 231 Pac. 1053 (1924); *Rocha v. Rocha*, 240 Pac. 1010 (Cal.-1925) with *Peck v. Newton*, 46 Barb. 173 (1862); *McDonald v. Skinner*, 124 Misc. 545, 209 N. Y. S. 219 (1925); *Halsell v. Beartail*, Okla. 227 Pac. 39 (Okla.-1924); *Grace v. Hildebrandt*, 237 Pac. 98 (Okla.-1925). Several states by statute permit suit by the equitable owner. 26 Col. L. R. 436, n. 4.

<sup>102</sup> *Warner v. Coleman* and *Rocha v. Rocha*, *supra*, note 101. Cf. *Mirando v. Mirando*, 104 Conn. 318, 132 Atl. 110 (1926) with *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143, 62 N. E. 167 (1901); *Johnson v. Purpura*, 208 A. D. 505, 203 N. Y. S. 536 (1924); Comment 34 Yale L. J. 536; 36 Yale L. J. 279 (1926).

personalty and have been followed with perhaps less question.<sup>103</sup>

The stating of the equitable interest involves no different principle, although the conditions are somewhat different. It is necessary to set forth the facts showing the plaintiff's right. This may mean, therefore, not the mere statement that the plaintiff is the owner or "entitled to" Blackacre, but that plaintiff entered into a contract for the purchase of Blackacre, etc.,—i. e., allegations justifying specific performance under the old equity procedure.<sup>104</sup>

#### PLEADING CORPORATE OR FIDUCIARY CAPACITY

A distinction is drawn in the cases between the right to sue and capacity to sue. A person has the right to sue when he has a right or action against a defendant, and the defendant is under an immediate duty to him; while he has the capacity only if he is free from such legal disabilities as would prevent his appearance as a party litigant in a court of law. Thus, if the plaintiff is not the person injured, he has not a right of action; whereas if the plaintiff is the person injured but he is a minor or under legal disability or is a foreign corporation which has not complied with the rules of the state as to conditions precedent to doing business within the state, he may lack capacity to appear in a court of justice.<sup>105</sup> The showing of a right to sue is part of the plaintiff's case but it is a matter of defense to be set up by the defendant that the plaintiff lacks legal capacity to sue.

Since lack of capacity may in effect prevent the immediate enforcement of a right of action, the distinction tends to become faint and shadowy. It seems, however, a fair one between a showing of any substantial legal right on the one hand, and on the other a showing of some purely procedural defect which, even if existing, can in the greater number of cases easily be remedied and is probably being relied upon by the defendant for the sake of delay. Since objections to the capacity of the parties are looked upon as generally

<sup>103</sup> *Cassidy v. First National Bank*, 30 Minn. 86 (1882); *Kingsland v. Chrisman*, 28 Mo. App. 308 (1887); see *Wheeler v. Allen*, 51 N. Y. 37 (1872).

<sup>104</sup> Cf. *Klapp v. Dealey* and *Neal v. Baker*, *supra*, note 101; Kas. Rev. Stat. 1923, sec. 60-2001; *Grave v. Templier*, 151 N. E. 514 (Ill.-1926). Cf. also *Brooks v. Wheeler*, note 99, *supra*. As to the bill to quiet title—the substitute for "ejectment" when the plaintiff is in possession—no essentially different principles apply, although the operative facts as to possession are obviously different. Pomeroy, *Equity Jurisp.*, sec. 2146 *et seq.*

<sup>105</sup> *Brown v. Curtis*, 128 Cal. 193, Pac. (1900); *Ward v. Petrie*, 157 N. Y. 301, 311, 51 N. E. 1002 (1898); *Berken v. Marsh*, 18 Mont. 152, 44 Pac. 528 (1896); *Wiesmann v. Donald*, 125 Wis. 600, 104 N. W. 916 (1905).



dilatory, no allegations by the plaintiff are necessary other than the showing who the parties are, while the objections must be made specifically by the defendant.<sup>106</sup> The distinction is therefore justified from the standpoint of fairness and convenience.

### *Pleading Corporate Capacity.*

In accordance with the distinctions just stated, it seems to have been the rule at common law that where a suit was brought by a corporation in its corporate name, or against a corporation in such name, no allegation of corporate existence was necessary. The cases are divided under the codes<sup>107</sup> but the greater number and the better rule would seem to hold that no such allegation is necessary. In New York by specific provision the allegation is required.<sup>108</sup> Where either party is a corporation it may be made in general form, viz., "that the plaintiff is and at all times hereinafter mentioned was a domestic corporation, organized under the laws of the state of New York."<sup>109</sup>

### *Pleading Fiduciary Capacity*

A somewhat similar situation exists as to the pleading of the appointment of the plaintiff as administrator, executor, guardian, receiver, and the like. It is necessary in any event that the pleading should show the capacity in which the plaintiff is attempting to sue, for if the right of action is shown to be in the plaintiff as adminis-

<sup>106</sup> Under most codes it must be done by special demurrer. See e.g., North Carolina Consol. St. 1919, sec. 511 (2); *Hicks v. Beam*, 112 N. C. 642, 17 S. E. 490 (1893).

<sup>107</sup> That specific allegations are not necessary, see *N. W. Hardware & Steel Co. v. Winnett*, 67 Mont. 545, 216 Pac. 568 (1923) with note in 22 Mich. L. R. 175; *Moorman Mfg. Co. v. Heach*, 135 Minn. 126, 160 N. W. 258 (1916) with note 1 Minn. L. R. 181; *Burlington Groc. Co. v. Heaphy's Estate*, 126 Atl. 525 (Vt.-1924). Contra, *Miller v. Pine Mining Co.*, 2 Idaho 1206, 3 Idaho 493, 31 Pac. 803 (1892), 35 A. S. R. 289 and note; *Citizens Bank v. Corkings*, 9 S. D. 614, 70 N. W. 1059 (1897). Cf. where the action involves the facts of corporate existence. *Holden v. Great Western Elev. Co.*, 69 Minn. 527, 72 N. W. 805 (1897). For the common law rule, see *Woolf v. City Steamboat Co.*, 7 C. B. 103 (1849). In general see Fletcher, Cyc. Corp. sec. 3042, 3042, citing cases; Ann. Cas. 1913 C. 33; 14A, C. J. 815, 818.

<sup>108</sup> C. P. A. rule 93; C. C. P. 1775; Federal Equity Rule 25. Cf. Minn. G. S. 1923, sec. 9271; Ariz. Rev. Stat. 1913, sec. 429; Iowa Comp. Code, 1919, sec. 7268; Wis. Stat. 1921, sec. 3205, 4199; Utah, Comp. L. 1917, sec. 6610, 6611; Nev. R. L. 1912, sec. 5078, 9.

<sup>109</sup> Abbott's *Forms of Pleading*, 2d ed., 54; 2 Bradbury's *Forms*, 2d ed., 20; Fletcher's Cyc. Corporations, sec. 3043; Ann. Cas. 1913, C. 335; N. Y. C. P. A. rule 93; statutes, ante note 108.

trator and he is suing as an individual, no right of action is stated. The plaintiff as individual and the plaintiff as executor or administrator are fundamentally different persons.<sup>110</sup> Hence, the caption or description of the parties to the complaint should clearly show the capacity in which the plaintiff is suing. A question has been raised whether the giving of the plaintiff's name, followed by the words "administrator or executor" with or without the name of the estate, are sufficient or are anything more than descriptive personae without the complete form using the word "as," viz., "John Smith, as Administrator of the Estate of James Jones." The omission of the word "as" has been held to show the suit to be in the personal capacity,<sup>111</sup> though the better rule would seem to be that where the word is omitted, yet if the whole complaint shows the plaintiff to have sued in the representative capacity, the omission is supplied.<sup>112</sup> Where the parties are correctly described, no further allegation of the appointment of the plaintiff in the representative capacity should be held necessary.<sup>113</sup> It is possible to argue that unless the plaintiff shows his due appointment, he has shown no right, not merely no capacity, to sue. From the more practical standpoint, however, he has sufficiently shown this by his description of himself as administrator in the caption of the suit, and it is probable that the objection under the circumstances is likely to be dilatory, just as in the case of a similar objection in the case of lack of allegation of

<sup>110</sup> *Williams v. Fischlein*, 144 A. D. 244, 129 N. Y. S. 129 (1911); *Powell v. Jackson*, 60 Ind. App. 597, 111 N. E. 208 (1916). See *Dennison v. Payne*, 293 Fed. 333, 342 (1923), which is disapproved on its exact point in *Chicago, R. I. & P. Co. v. Schendel*, 46 Sup. Ct. 420 (1926). Cf. *Mo. K. & T. Ry v. Wulff*, 226 U. S. 570, 33 Sup. Ct. 135 (1913); 33 Yale L. J. 326.

<sup>111</sup> Cf. *Genet v. De Graaf*, 27 A. D. 238, 50 N. Y. S. 442 (1898); *Nolin v. Mooty*, 29 Ga. App. 97, 113 S. E. 814 (1922); *Stilwell v. Carpenter*, 62 N. Y. 639, 2 Abb. N. C. 238 (1875) and note; *Lucas v. Pittman*, 94 Ala. 616, 10 So. 603 (1892).

<sup>112</sup> *Beers v. Shannon*, 73 N. Y. 292 (1878); *Willets v. Haines*, 96 A. D. 5, 88 N. Y. S. 1018 (1904), affd. 182 N. Y. 543, 75 N. E. 1135 (1905); *Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261 (1911); *Rich v. Lowles*, 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850 (with note) (1892); *Holloway v. Galvin*, 203 Ala. 663, 84 So. 737 (1920).

<sup>113</sup> *Southern Ry. v. Gantt*, 210 Ala. 383, 98 So. 192 (1923); *Toner v. Wagner*, 158 Ind. 447, 63 N. E. 859 (1902); *Langdon v. Potter*, 11 Mass. 313 (1814); *Brown v. Nourse*, 55 Me. 230 (1867); *Champlin v. Tilley*, 3 Day (Conn.) 303, 305 (1809); *Lawson v. Lawson* (16 Gratt.), 57 Va. 230 (1861); *Sabin v. Hamilton*, 2 Ark. 485 (1839); *Kelly v. Leve*, 35 Ind. 106 (1871); *Hyde v. Keonshe Co.*, 43 Wis. 129 (1877); *Ellis v. Appleby*, 4 R. I. 462 (1857); *Jordan v. Hamlink*, 21 D. C. 189 (1892); 2 S. W. Dig. 461, 462 (1871). Contra, *Sheldon v. Joy*, 11 How. Prac. 11 (1855); *White v. Jay*, 13 N. Y. 83 (1855) (receiver); *Ferris v. Jones*, 78 Okla. 154, 189 Pac. 527 (1920). See Am. Dig. Parties 71, Pleading 46.

corporate capacity. To require a specific allegation in every case is to require the addition to a complaint of an allegation which is naturally to be assumed in practically every case and which will be of importance only in the comparatively rare case where the defendant will have a real opportunity to make objection upon the score of a defect in the appointment. The defendant should have the burden of raising the issue in such extraordinary situation. A similar rule should apply to a suit against a fiduciary, with perhaps even stronger reason since the knowledge of the appointment is with the defendant.<sup>114</sup>

It is sometimes asserted that while the above general rule may apply to the case of administrators or executors, a special and stricter rule should apply to the more unusual appointments, such as those of administrators d. b. n. It is not clear, however, why any different rule should apply in such cases.<sup>115</sup>

Under the New York rule, where the specific allegation must be made, it is sufficient to make it in general form, referring to the appointment by the surrogate of a specified county, in view of the rule that a judgment may be pleaded in general form.<sup>116</sup>

Where the right of action is actually in the plaintiff in his personal capacity, the reference to his fiduciary capacity may be treated as *descriptio personae*, and if necessary, rejected as surplusage.<sup>117</sup>

#### PLEADING DAMAGE

We have already seen that the complaint must demand judgment.<sup>118</sup> Where money damages are demanded, the complaint must show a right of action in the plaintiff for such damages. The nature of the facts to be alleged to such end will of course vary

<sup>114</sup> *Miller v. Wilmington Trust Co.*, 24 Del. 251, 75 Atl. 789 (1910); *Giglio v. Barrett*, 207 Ala. 278, 92 So. 668 (1922) (city commissioners). Cf. *Jatti-McQuade Co. v. Flynn*, 79 Misc. 430, 140 N. Y. S. 135; *Rich v. Lowles*, note 112 *supra*; see also cases, note 113, *supra*.

<sup>115</sup> *Hamilton v. McIndoo*, 81 Minn. 324, 84 N. W. 118 (1900), criticized by Professor Costigan, 11 Ill. L. R. 517, 528; cf. 8 Ency. Pl. Prac. 669, 670.

<sup>116</sup> *Secor v. Pendleton*, 47 Hun. 281 (1888) (must state that deceased left property and letters of administration were issued by a surrogate having authority); *Brenner v. McMahon*, 20 A.D. 3, 46 N. Y. S. 643 (1897) (more general allegations permissible as to executors). As to pleading a judgment, see N. Y. C. P. A. Rule 95; C. C. P. sec. 532. Cf. *Chamberlain v. Limer*, 31 Minn. 371, 18 N. W. 97 (1884); *Judah v. Fredericks*, 57 Cal. 389 (1881). As to pleading appointment of a receiver, see *Manley v. Rassiga*, 13 Hun. 288 (1878); *Rockwell v. Merwin*, 45 N. Y. 166 (1871).

<sup>117</sup> See *Hitt v. Carr*, 77 Ind. App. 488, 130 N. E. 1 (1921); *Huot v. Osler*, 118 Atl. 871 (R. I.-1923); cases in notes 111, 112 *supra*; 15 L. R. A. 850, note

<sup>118</sup> 35 Yale L. J. 285-292.

according to the controlling substantive rules of law. In some of these the nature and extent of the injury is more important than in others. Thus, in an action for trespass to land the mere entry upon the land of another constitutes an actionable wrong without reference to the extent of the plaintiff's loss. So, also, a breach of contract may give rise to a claim for at least nominal damages. On the other hand, there is no claim for negligence or for fraud except where actual injury has been caused to the plaintiff, and only to the extent of such injury.<sup>119</sup> Even in the cases where the extent of the injury is not important in showing that a right of action exists, it is nevertheless important if more than a small sum is to be recovered. Thus, in the action of trespass, the extent of the loss caused to the plaintiff by the defendant's acts should be shown if any extensive recovery is desired. In general the facts of injury or loss to the plaintiff should be set forth in the statement of his story in substantially similar form to the other facts upon which he wishes to rely.<sup>120</sup>

---

<sup>119</sup> See e.g., *Ashby v. White*, Ld. Raym, 928 (1763); *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, Fed. Cas. No. 17, 322 (1838); *Chamberlain v. Parker*, 45 N. Y. 569 (1871); and cf. *Schlesinger v. O'Rourke*, 121 Atl. 214 (R. I. 1923) (declaration in fraud held demurrable for failure to show damage). See discussion, Hale, *Damages* (ed. Colley), 29-41; Sedgwick, *Damages*, 9th ed., Ch. VI; *Martz v. De Bar*, note 32, *supra*.

<sup>120</sup> Damages must be alleged to have been sustained. *Harndon v. Stultz*, 124 Iowa, 734, 100 N. W. 851 (1904). Even where the defendant has defaulted, a judgment for substantial damages can only be based upon a failure of duty of the defendant set forth in the complaint. *Seltzer v. Davenport*, 74 Conn. 46, 49 Atl. 482 (1901); cf. 2 Sutherland, *Damages*, 4th ed., sec. 429. The damages need not be itemized. *Salt River Canal Co. v. Hickey*, 4 Ariz. 240, 36 Pac. 171 (1894); *Castino v. Ritzman*, 156 Cal. 587, 105 Pac. 739 (1909); *Prentiss v. Barness*, & *Allen*, 410 (1863). Nor the precise amount, nor the true theory given, where a legal wrong and a resulting pecuniary injury are averred. *Colrick v. Swinburne*, 105 N. Y. 503, 507 (1887); *Winter v. Am. Aniline Products, Inc.*, 236 N. Y. 199, 140 N. E. 561 (1923). Cf. *Matyzevski v. Wheeler*, 97 Conn. 593, 117 Atl. 545 (1922) (complaint for personal injuries as a result of which plaintiff was obliged to have hospital treatment and medical attention for which he had spent and must continue to spend large sums of money; held, items of expenditure admissible). Where double or treble damages are sought under a statute they should be specifically demanded. *Dunbar v. Jones*, 87 Conn. 253, 87 Atl. 787 (1913); *Salmon v. Blasier Co.*, 123 A. D. 171, 108 N. Y. S. 448 (1908). But see *Smith v. Hallahan*, 75 N. H. 534, 78 Atl. 122 (1910). Where exemplary damages are claimed the facts justifying the award should be stated, although it has been held that no special claim is required. *Gustavson v. Wind*, 62 Iowa, 281 (1883); *Andrews v. Stone*, 10 Minn. 72 (1865); *Kearns v. Widman*, 94 Conn. 257, 108 Atl. 661 (1919); *Stark v. Epler*, 59 Ore. 262, 117 Pac. 276 (1911). But see *Anderson v. Shockley*, 159 Mo. A. 334, 140 S. W. 755 (1911); *Krone v. Block*, 144 Mo. App. 575, 129 S. W. 43 (1910) under a statute. See Dec. Dig. Damages, sec. 151.

*General and Special Damages*

A distinction has been drawn for pleading purposes between general damages, which it is said need not be alleged, and special damages, which must be alleged, in order that the defendant may not be taken by surprise. General damages are such as are naturally presumed to follow from the injuries alleged, while special damages are those which are not so presumed to follow.<sup>121</sup> The distinction is stated as an arbitrary one, but in practice it seems to become a distinction of degree only. The general theory of damage in law depends on the theory of proximate cause; such damages are recoverable as are the proximate results of the defendant's wrongful act.<sup>122</sup> Such damages as in the natural normal course of events may be expected to happen need not be set forth with particularity, although it should be noted that the fact of injury itself giving rise to the damage must be set forth. On the other hand, results out of the ordinary must be stated with some degree of care. Thus, if plaintiff is run into by the defendant's automobile and his leg broken, certain damages for pain and suffering may naturally be expected to follow; whereas, on the other hand, loss of a permanent job may not, and, if claimed, must be set out with some detail.<sup>123</sup> Examples of this general nature between what may normally be expected, which need not be set forth beyond the fact of the injury itself, and what may not be expected, which must be set forth in

<sup>121</sup> See classic treatment of the rule by Chitty. Ch. Pl. 410, 411 quoted 4 Sedgwick, *Damages*, 9th ed., sec. 1261; Hale, *Damages*, ed. Cooley, 332-337; *Dumont v. Smith*, 4 Denio, 319, 322 (1847); *Tomlinson v. Derby*, 43 Conn. 567 (1876). Cf. also *Sailer v. Fine*, N. J. 130 Atl. 610 (1925); 2 Sutherland, *Damages*, 4th ed., sec. 419-421; Comment, 9 Corn. L. Q. 70, on *Winter v. Am. Aniline Products, Inc.*, 236 N. Y. 199, 140 N. E. 561 (1923). For collections of some of the many cases applying the distinction in pleading, see the texts above cited; also Dec. Dig. *Damages*, sec. 6, 142 *et seq.*

<sup>122</sup> *Gilman v. Noyes*, 57 N. H. 627 (1876); *Georgia v. Keppford*, 45 Iowa, 48 (1876); *McNamara v. Clintonville*, 62 Wis. 207, 22 N. W. 472 (1885); Mecham and Gilbert's Cas. *Damages*, 145-220; Sedgwick, *Damages*, 9th ed., Chap. VII, *et seq.*; Hale, *Damages*, ed. Cooley, 42-87. The same rule is applied in contract cases although the famous "rule in *Hadley v. Baxendale*," 9 Exch. 341 (1854) emphasizes the element of foreseeability. Sedgwick, *op. cit.*, sec. 147a *et seq.*; 11 Corn L. Q. 223, 540 (1926).

<sup>123</sup> An allegation that plaintiff "was prevented from transacting his ordinary business" does not justify the admission of evidence as to the per diem value of plaintiff's services. *Eckert v. Levinson*, 91 Conn. 338, 99 Atl. 699 (1917); *Taylor v. Monroe*, 46 Conn. 36, 46 (1875); *Tomlinson v. Derby*, *supra*, note 121. On recovery of lost earnings, see *Dempsey v. Scranton*, 264 Pa. 495, 107, Atl. 877 (1919); *Baxter v. Phila. etc. Ry.*, 264 Pa. 467, 107 Atl. 881 (1919) with note 29 Yale L. J. 565. Cf. *Winter v. Am. Aniline Products, Inc.*, note 121, *supra* (where complaint shows non-acceptance of goods by a vendee, loss due to decreased market value is general and may be recovered).

some detail, are numerous. In fact, special damages may be of two kinds; first, in certain classes of cases, such damages must be shown in order that there be any substantive right of action at all, as, for instance, in certain forms of slander; and second, in the ordinary case above stated, where additional damages over the ordinary loss which is presumed are being claimed by the plaintiff.<sup>124</sup>

Where the damages are held to be special and thus require particular specification, the degree of particularity required varies. Here, as in the case of other allegations in the complaint, there should be no set rule but the general test should be fair notice to the defendant with the right in him to ask for a more complete statement upon his showing that he is not fairly apprised of the elements of the plaintiff's case.<sup>125</sup>

#### CLAIMS FOR SPECIFIC RELIEF

The demand for a judgment may be for a judgment in specie, such as specific performance or injunction. In general, such a demand will be based upon a right of action recognized in the ancient courts of chancery, and should therefore be based upon such facts as would have sustained the old equitable bill. Thus, in a code action for the specific performance of a contract the allegations should be sufficient to have justified specific performance in a court of equity.<sup>126</sup> The same also is true with reference to claims for the

<sup>124</sup> Cf. Bliss, *Code Pleading*, 3d ed., sec. 297b. As to fraud, see *Schlesinger v. O'Rourke*, note 119, *supra*; Comment, 5 Corn. L. Q. 167. As to words not slanderous *per se*, see cases and authorities cited note 94 *supra*; 37 A. L. R. 877, 883; N. Y. C. P. A. rule 97; *Yakavicz v. Vatentukevicious*, 84 Conn. 350, 80 Atl. 94, Ann. Cas. 1912 C, 1264, with note (1911); *Krone v. Block*, note 120, *supra*. Cf. *Georgia v. Kefford*, *supra*, note 122. For special damages as additional damages, see note 121, *supra*. As to damages where a public nuisance is also claimed to be a private one, see *Brown v. Rea*, 150 Calif. 171, 88 Pac. 713 (1907).

<sup>125</sup> See cases, *supra*, e.g., *Matysewski v. Wheeler*, note 120, *supra*; *Winter v. Am. Aniline Products, Inc.*, notes 121, 123, *supra*; *Eckert v. Levinson*, note 123, *supra*. Examples of pleading damage are given in Sedgwick, *Elements of the Law of Damages*, 2d ed., Chap. 25. Cf. *Fledderman v. St. Louis Transit Co.*, 134 Mo. App. 199, 113 S. W. 1143 (1908) (allegation that plaintiff's right leg was broken near the hip will justify proof that the leg was shortened by the fracture); *Keefe v. Lee*, 197 N. Y. 68, 90 N. E. 344 (1909), 3 judges dissenting (that plaintiff was "seriously and permanently injured through his head, skull, eyes and bruises to his right leg and body" did not permit of recovery of damages for deafness caused by the injury to his head); *Kane v. New Idea Realty Co.*, 133 Atl. 686 (Conn.-1926); Am. Jud. Soc. Rules, Bull. XIV (1919), Art. 15, Sec. 21 (allegations in general terms sufficient).

<sup>126</sup> See cases collected in 2 Cook's Cas. Equity, p. 1, *et seq.*; Dec. Dig. Sp. Perf., sec. 112-114. Cf. e.g., *Newham v. Kenton*, 79 Mo. 382 (1883); *Grove v. Templin*, 151 N. E. 514 (Ill.-1926).

cancellation or reformation of a contract,<sup>127</sup> or for the granting of an injunction.<sup>128</sup> No technical requirement is made other than a stating of facts sufficient to justify the equitable relief asked for. Under the more flexible procedure of the code, too, it is possible to ask for such equitable relief in specific cases in addition to legal claims, such as formerly must have been considered alone in a court of law.<sup>129</sup>

Since the demand for judgment forms no part of the cause of action, a complaint which fails to show ground for the equitable relief claimed, but does show ground for money damages, should not be considered demurrable. This point has already been discussed elsewhere at some length.<sup>130</sup>

### THE DECLARATORY JUDGMENT

One of the most desirable of the newly developed procedural devices is that of the declaratory judgment, known for some time to the jurisprudence of other countries, notably England, and really employed in this country to a limited extent in a certain class of cases such as actions to construe wills, but only recognized since 1919 by state legislatures as a distinctive remedial step. Since that date the statutes of some nineteen states have provided for the use of

<sup>127</sup> See cases collected, 3 Cook's Cas. Equity, p. 1, *et seq.*; 9 C. J. 1331, *et seq.*; 34 Cyc. 976, *et seq.*; Dec. Dig. Cancellation sec. 36, *et seq.*, Reformation, sec. 36. Cf. *Merry Realty Co. v. Shamokin & Hollis R. E. Co.*, 230 N. Y. 101, 130 N. E. 306 (1921) and see the discussion and cases cited, note 85, *supra*, as to pleading fraud, referring to the interesting question of quantum of proof in the proceedings for equitable relief.

<sup>128</sup> See cases collected 32 C. J. 319, *et seq.*; Dec. Dig. Injunctions, sec. 116-118; *McHenry v. Jewett*, 90 N. Y. 58 (1882) ("It is not sufficient to authorize the remedy by injunction, that a violation of a naked legal right of property is threatened. There must be some special ground of jurisdiction, and where an injunction is the final relief sought, facts which entitle the plaintiff to this remedy, must be averred in the complaint, and established on the hearing"); *Brown v. Rea*, 150 Calif. 171 88 Pac. 713 (1907) (special injury must be alleged and proven before a private person is entitled to an injunction against a public nuisance). That ordinarily in proceedings for equitable relief more detailed statements of facts are expected and permitted, see *Smith v. Smith*, 50 S. C. 54, 27 S. E. 545 (1897) quoting Pomeroy, *Code Remedies*, sec. 527.

<sup>129</sup> See e.g., *Mirando v. Mirando*, 104 Conn. 318, 132 Atl. 110 (1926) with note 36 Yale L. J. 279; cases note 102, *supra*; *Back v. People's Natl. Fire Ins. Co.*, 97 Conn. 336, 116 Atl. 603 (1922); *Syracuse v. Hogan*, 234 N. Y. 457, 138 N. E. 406 (1923); *Johnson v. Purpura*, 208 A. D. 505, 203 N. Y. S. 581 (1924), discussed in 34 Yale L. J. 536-542.

<sup>130</sup> Clark, *The Union of Law and Equity*, 25 Columbia L. R. 1; 35 Yale L. J. 288, 289. For the necessity in general of alleging facts showing the inadequacy of money damages as a remedy where equitable relief is claimed, see *ibid.*; also 34 Yale L. J. 208.

this remedy and a uniform declaratory judgment act has been prepared by the commissioners on uniform state laws and has already been adopted in several of these states. An act has also been presented to Congress authorizing the federal courts to render declaratory judgments. It has a good chance of passage.<sup>131</sup>

Under this procedure the courts may declare rights and other legal relations in a binding judgment between the parties without granting other remedies, such as damages or injunction. This permits a court, for example, to declare the meaning of a contract or a will before one of the parties has committed a wrong or suffered a definite loss. The Michigan law was declared unconstitutional by the Michigan courts on the theory that it attempted to empower the court to render an advisory opinion only,<sup>132</sup> a non-judicial function, according to the court's view. The court was, however, quite in error on this point, since the judgment is not advisory but is a definite judgment which becomes *res adjudicata* like any other. The decision has been thoroughly repudiated by the courts of all other states where the matter has come up and has been severely criticized by text writers and may now be considered of little weight.<sup>133</sup>

<sup>131</sup> This practice, known in England since 1852, and on the European continent and in Scotland for hundreds of years prior thereto, seems to have been introduced to the profession of this country in its more extended form by Professors Sunderland (*A Modern Evolution in Remedial Rights*, 16 Mich. L. R. 69, 1917; cf. 54 Am. L. R. 161, 1920) and Borchard (*The Declaratory Judgment—A Needed Procedural Reform*), 28 Yale L. J. 1, 105 (1918). The latter monograph gives an extended account of the history of the procedure in other countries. Since these pioneer articles the law review literature has been voluminous. For bibliography of articles in addition to those herein-after cited, see the various articles of Professor Borchard, including *The Uniform Act on Declaratory Judgments*, 36 Harv. L. R. 687; 29 Yale L. J. 545; 30 Yale L. J. 161; 31 *ibid.*, 419; *Progress of the Declaratory Judgment*, 35 *ibid.*, 473, 867; 18 Am. Pol. Sc. Rev. 305; 66 Cong. Rev. 432 and Rice, 28 W. Va. L. Q. 1, 27, 28; see also Freeman, *Judgments*, 5th ed., 2780-2792; 12 A. L. R. 1, 52-92; 19 A. L. R. 1124-1137. For the state statutes see Florida, Laws, 1919, ch. 7857 (No. 75); Michigan, Pub. Acts, 1919, No. 150, p. 278; Wisconsin, Laws, 1919, ch. 242, sec. 2687m, p. 253, repealed in 1923, Laws, ch. 440; New York, 1920, C. P. A., sec. 473; Connecticut, Acts, 1921, ch. 258; Kansas, Acts, 1921, ch. 168; California, Sts., 1921, ch. 463, Code of Civ. Proc., secs. 1060-1062; Hawaii, Laws, 1921, ch. 162; Kentucky, Acts, 1922, ch. 83; Virginia, Acts, 1922, ch. 517; South Carolina, Stats. at L. 1922, ch. 542. The Uniform Declaratory Judgment Act, approved in 1922, has been adopted practically unchanged by Pennsylvania, Laws, 1923, ch. 321; Tennessee, Acts, 1923, ch. 29; Colorado, Acts, 1923, ch. 98; Wyoming, Acts, 1923, ch. 50; North Dakota, Acts, 1923, ch. 237; New Jersey, Pub. Laws, 1924, p. 312; Utah, Laws, 1925, p. 40; South Dakota, Laws, 1925, ch. 24, p. 230. The Federal Act has passed the Federal House of Representatives.

<sup>132</sup> *Anway v. Grand Rapids Ry.*, 211 Mich. 592, 179 N. W. 350 (1920); 12 A. L. R. 26, 52.

<sup>133</sup> *State ex rel. Hopkins v. Grove*, 109 Kan. 619, 201 Pac. 82 (1921) (see 31 Yale L. J. 419, 19 A. L. R. 1124); *Braman v. Babcock*, 98 Conn. 549, 120 Atl.



Under the procedure of the states where the remedy has been most fully developed, the plaintiff may in his demand for judgment ask for a declaration declaring the rights of the parties either as the sole relief asked for or else in addition to or as auxiliary to other relief. Likewise the defendant may counterclaim for such relief.<sup>184</sup> This permits of a very flexible and desirable procedure whereby the parties may seek such remedial relief as they may think they are entitled to and at the same time the court may go on and settle fully the rights of the parties even though as yet no loss or damage has been incurred upon the points so settled. Formerly the courts could only give remedial relief. Under this procedure they may give preventive and declaratory relief alone or declaratory and remedial relief combined.<sup>185</sup>

---

150 (1923); *Blakeslee v. Wilson*, 190 Calif. 479, 213 Pac. 495 (1923) (see 8 Iowa L. Bull. 272); *Patterson's Ex v. Patterson*, 131 S. E. 217 (Va.-1925) (see 12 Va. L. R. 591); *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1923) (see 24 Col. L. R. 790, 73 U. of Pa. L. R. 100, 34 Yale L. J. 109); *Kariher's Petition, No. 1*, 131 Atl. 265 (Pa.-1925) (see 35 Yale L. J. 473; 74 U. of Pa. L. R. 624); *McCrorry Stores Corp. v. Braunstein*, 134 Atl. 752 (N. J.-1926) the last three dealing with the Uniform Act. For criticisms of the *Anway* case, see the dissenting opinion therein; Borchard, *op. cit.*, note 131 *supra*; 19 Mich. L. R. 86; 21 Col. L. R. 168; 4 Ill. L. Q. 126; 6 A. B. A. Jour. 145; 7 *ibid.*, 141; 7 Corn. L. Q. 255; 28 W. Va. L. Q. 1; 5 Minn. L. R. 172. But cf. dicta in *Liberty Warehouse v. Grannis*, 47 Sup. Ct. 282 (1927), criticised by Professors Sunderland, 25 Mich. L. R. 529, and Borchard, 36 Yale L. J. 845 (April, 1927).

<sup>184</sup> Under the Connecticut Act, *supra*, the court has "power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment." The judges were directed to make rules to carry the Act into effect, and pursuant to this direction, made admirable rules (Conn. Prac. Bk. 1922, p. 255, 6) which are quoted in full in *Braman v. Babcock*, n. 133 *supra*. These state the scope of the remedy in broad terms, the conditions requisite thereto (interest of the parties; actual question in dispute or substantial uncertainty of legal relations, etc.) the procedure, permitting the claim for such judgment without claim for consequential relief, or with claim for coercive relief either as an alternative or an independent remedy, or by a defendant on cross-complaint; the costs, and the effect of the decision as a final judgment. The remedy is now being freely employed in Connecticut. See n. 138 *infra*. The New York statute is embodied in C. P. A., sec. 473, although the rules, C. P. A. r. 210-214 are not so definite and clear. The Uniform Act is so drawn that no further rules to carry it out are contemplated. Sections 2 to 5 of that act amplify the general statement in section 1 of the classes of cases where the remedy may be employed. Borchard, 36 Harv. L. R. 697; Gordon, 9 Va. L. R. 169; Freeman, *Judgments*, 5th ed., 2784-2786.

<sup>185</sup> See e.g., *Joy v. New Amsterdam Casualty Co.*, 98 Conn. 794, 120 Atl. 684 (1923); 33 Yale L. J. 105; cf. *Tanner v. Boynton Lumber Co.*, 129 Atl. 617 (N. J.-1925); *Ezzell v. Ezzell*, 207 Ky. 615, 269 S. W. 752 (1925). See sec. 8 of the Uniform Act, construed in *Sloan v. Longcope*, 135 Atl. 117 (Pa.-1927).

The Michigan decision seems to have had the effect of making courts somewhat cautious to grant this simple and desirable relief in many cases where it is proper. Some statutes even have provided that the power is conferred to grant such judgments "in cases of actual controversy only." On the surface this might seem a not undesirable provision since the courts cannot be expected to act in purely academic cases; but it is unnecessary as no one would expect them to act in such cases anyhow, and the presence of the clause seems to have had a restrictive effect upon the decisions. The courts are likely to put too narrow a construction upon these words and to demand a fully ripe litigation as a condition to giving the relief where there should be required merely, as the Pennsylvania Supreme Court has said, "an actual controversy or the ripening seeds of one."<sup>136</sup> It has also been suggested that the relief should not be given where another form of remedy is available, and in one case the relief was denied on the theory that the remedy of quo warranto might be employed.<sup>137</sup> This again seems unfortunate since it tends to make this a separate form of action rather than simply an auxiliary relief to allow the court to do complete justice and to endeavor to end litigation at one time. The declaratory judgment should not be considered an extraordinary remedy; it should be considered a simple ordinary auxiliary remedy to be asked for and given whenever it will remove uncertainty in the rights of a litigant or settle a controversy immediate or incipient.<sup>138</sup>

<sup>136</sup> *Kariher's Petition, No. 1*, note 133 *supra*. See *Shearer v. Backer*, 207 Ky. 455, 269 S. W. 543 (1925); *Axton v. Goodman*, 205 Ky. 382, 265 S. W. 806 (1924) criticised by Professor Borchard in 35 Yale L. J. 475, 6. See also *West v. Wichita*, 118 Kan. 265, 234, p. 978 (1925); *State v. Bd. of Com'rs.*, Kan. 230 Pac. 531 (1924); *Kelly v. Jackson*, 206 Ky. 815, 268 S. W. 539 (1925); *Procter v. Avondale Heights Co.*, 200 Ky. 477, 255 S. W. 81 (1923); *Naugle v. Baumann*, 125 Atl. 489 (N. J.-1924); *Colo. & Utah Coal Co. v. Walter*, 75 Colo. 489, 226 Pac. 864 (1924); *Hodges v. Hamblen Co.*, 277 S. W. 901 (Tenn.-1925); cf. *Loesch v. Manhattan Life Ins. Co.*, 218 N. Y. S. 412 (1926), criticised by Professor Borchard in 36 Yale L. J. 403; also in 27 Columbia L. R. 332.

<sup>137</sup> *Kaleikau v. Hall*, 27 Haw. 420 (1923); see also *In re List's Estate*, 283 Pa. 255, 129 Atl. 64 (1925) and the criticism in 35 Yale L. J. 474, 5. The English courts raised a question as to whether a negative declaration (plaintiff's no-right; defendant's privilege) was permissible. Many American statutes, including the Uniform Act, so provide specifically, and it should be so held in any event. See Connecticut Act and Rules, and the Uniform Act and citations thereon in note 134 *supra*; also 28 Yale L. J. 1, 9.

<sup>138</sup> Cf. *Yale University v. New Haven*, 104 Conn. 610, 134 Atl. 268 (1926) (see 36 Yale L. J. 147); *Hewitt v. Sanborn*, 103 Conn. 352, 364, 378, 134 Atl. 268 (1925); *Russo v. Corideo*, 102 Conn. 663, 129 Atl. 849 (1925); *Lehmaier v. Bradford*, 99 Conn. 468, 121 Atl. 810 (1923); *Bd. of Education v. Van Zandt*, 195 N. Y. S. 297; *Craig v. Com'rs. of Sinking Fund*, 203 N. Y. S. 236;

The declaratory judgment may be asked for upon either an equitable claim or a legal claim.<sup>139</sup> A question may be raised whether it should be considered an equitable proceeding, justifying refusal of trial by jury. The basis for such an assertion seems to be that it developed from the chancery courts in England.<sup>140</sup> To hold that such claims were to be tried only by the court might seem desirable on the surface as limiting the more inefficient trial by jury, but in the long run it would probably prove quite undesirable since it would tend to restrict judges in granting the declaratory judgment if they felt thereby that a litigant's usual right to trial by jury would be limited. Here, too, the rule already discussed should govern, namely, that the issues finally claimed for trial should control the question of form of trial rather than a particular theory or claim of relief.<sup>141</sup>

The new form of relief is being taken for granted in many states now and declarations of rights have been given in various classes or cases.<sup>142</sup> This procedural remedy will undoubtedly be more used in the future.

---

*Sainer v. Kantor*, 123 Misc. 469, 205 N. Y. S. 760; *Kings Co. Trust Co. v. Melville*, 216 N. Y. S. 278 (1926); *Reynolds v. Browning, King & Co.*, 217 N. Y. S. 15 (1926); *Re Dommell's Est.*, 134 Atl. 379 (Pa.-1926). "Many courts, notably those of Connecticut and New York, now take the new form of action for granted, and do not especially refer to it in their opinions. For that reason, the digesters often fail to refer to the fact that the action was declaratory in form, and the bar thus frequently overlooks procedural precedents thereby created." 35 Yale L. J. 478, n. 20. Cf. also *Empire Natural Gas Co. v. Thorp*, 245 Pac. 1058 (Kan.-1926) noted in 25 Mich. L. R. 821; also comment in 12 Ia. L. Bull. 62

<sup>139</sup> Where law and equity are not combined, the declaration must be sought in the proper tribunal. *Paterson v. Currier*, 129 Atl. 711 (N. J.-1925) (declaration as to realty title should have been sought in the law, not the equity court; so also in *Wight v. Bd. of Education*, 133 Atl. 387 (N. J.-1926)). The first draft of the Uniform Act restricted the power to courts having jurisdiction in equity. Borchard, 36 Harv. L. R. 702, 703, but this limitation was wisely omitted from the final draft (see Gordon and Freeman, note 134 *supra*), and is not found in the usual statute, note 131 *supra*.

<sup>140</sup> Borchard, 28 Yale L. J. 25-28. The power is still most freely exercised in the Chancery Division, *ibid.*, although Farwell, L. J., in *Chapman v. Michaelson* (1909) 1 Ch. 238, 243, denied that it was strictly "equitable relief." Most American statutes provide that the court "may" send issues to the jury. See Uniform Act, sec. 9; N. Y. C. P. A. rule 213; Conn. Prac. Bk., p. 65, sec. 648 ("as in other actions"). "May" should be construed as "must" where the issue, if arising in an action for consequential relief, would be triable to the jury. Borchard, 36 Harv. L. R. 714, 5.

<sup>141</sup> See Trial of Actions Under the Code, 11 Corn. L. Q. 482 (1926).

<sup>142</sup> In addition to the cases cited above, see 35 Yale L. J. 473-477 for a discussion of many recent cases applying the declaratory judgment. For statements of the rule that in the absence of legislation, courts will not decide "most questions," or act in advance of actual injury to the plaintiff, see *Micklish v.*

## BILLS OF PARTICULARS

A bill of particulars is a document setting forth the particulars of a pleader's claim which is supposedly not definitely enough stated in his original complaint. At common law it could be required of a pleader in any form of action and was not limited to contract actions merely. Where the adverse party sought a bill of particulars, he was required to file with his motion an affidavit showing in what respect he needed to know further particulars of the plaintiff's claim.<sup>143</sup>

Under the codes, in general, a bill of particulars may still be had and by the more usual rule may be had in all the cases available at common law, including matters of defense or set-off.<sup>144</sup> There is some authority, however, that it may only be had in actions involving an account, or for money demands arising upon contract.<sup>145</sup> This is in part due to the fact that the code provision for a bill of particulars refers to an action based upon an account.<sup>146</sup>

The office of the bill of particulars may be covered in large measure by a motion on the part of the defendant to require that the complaint be made more definite and certain and by an amend-

*Grand Lodge*, 162 Ark. 71, 257 S. W. 353 (1924); *Burton v. Durham Realty Co.*, 188 N. C. 473, 125 S. E. 3 (1924); *Yates v. Beasley*, 133 Miss. 301, 97 So. 676 (1923); *Richardson v. Mayes*, 223 S. W. 546 (Tex.-1920); *Univ. of Utah v. Indust. Com'n.*, 64 Utah 221, 229 Pac. 1103 (1924); *State v. Circuit Court*, 178 Wis. 89, 190 N. W. 563 (1922); *Panama Ry. Co. v. Johnson*, 289 F. 964 (1923).

<sup>143</sup> *Johnson v. Birely*, 5 B. & A. 540 (1822); *Tilton v. Beecher*, 59 N. Y. 176 (1874) citing cases; *Dixon v. Swenson*, 127 Atl. 591 (N. J.-1925); 31 Cyc. 565; 19 Ill. L. R. 315.

<sup>144</sup> *Tilton v. Beecher*, *supra*; *Markel Tucker Lock Co., Inc. v. Ehrlich*, 204 N. Y. S. 876 (1924); *Stern v. Woodhouse*, 205 N. Y. S. 352; annotations to N. Y. C. P. A., sec. 247. Allowed in actions of slander and libel, *Irwin v. Taubman*, 30 S. D. 502, 139 N. W. 115 (1912) annotated in Ann. Cas. 1915 C. 1266-1269; in negligence actions, Ann. Cas. 1916 B, 105-111, stating that the motion to make more definite and certain is the more usual practice; 3 Ann. Cas. 161-163; 35 Am. St. Rep. 883; Dec. Dig. Pl., sec. 317, 319; see Bills of Particulars in Actions Based upon Negligence, 49 Cent. L. J. 362 (1899); L. D. Landrum, 50 Cent. L. J. 364 (1900).

<sup>145</sup> *Bd. of Co. Com'rs. v. Am. Loan & Trust Co.*, 75 Minn. 489, 78 N. W. 113 (1899). Under the special statutory procedure in Connecticut the bill of particulars is used only in connection with the common counts. Conn. G. S. 1918, sec. 5651; Prac. Bk. 1922, p. 279, 358; *Price v. Boutieller*, 79 Conn. 255, 64 Atl. 227 (1906); note 44 *supra*.

<sup>146</sup> It is usually provided that the plaintiff need not set forth in a pleading the items of an account therein alleged, but must, after demand, give the adverse party a copy of the account. See the statutes cited, note 52 *supra*. Some of the codes go further: "The court . . . may order a further account, when the one delivered is defective, and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished." Wash. Rem. Comp. St. 1922, sec. 284; N. Y. C. P. A., sec. 247; S. D. Rev. Code 1919, sec. 2362; S. C. Code 1922, sec. 419; N. D. Comp. L. 1913, sec. 7457; N. C. Consol. St. 1919, sec. 534; Wis. Stat. 1921, sec. 2672.

ment on the part of the plaintiff of his complaint.<sup>147</sup> It would seem immaterial what form the provision takes, whether the addition should be made by a bill of particulars or by amendment. Under the theory of some states, however, a bill of particulars is given a somewhat more limited application than an amendment or a substituted complaint. It has been ruled that a bill of particulars when filed limits the complaint so that nothing can be claimed beyond what is set forth in the bill.<sup>148</sup> On the other hand, it has been held that a bill of particulars adds nothing to the complaint so that the plaintiff cannot rely upon his bill of particulars to supplement his complaint.<sup>149</sup> It would seem simpler and more desirable to hold that the plaintiff need not resort to an amendment in such case but that his claim now is to be considered upon a basis of both his complaint and his bill of particulars and whatever is fairly and reasonably claimed upon a construction of both should be considered to be sufficiently pleaded.<sup>150</sup>

An order for a bill of particulars or for a more definite statement in the plaintiff's complaint is a highly desirable remedy in view of the lack of a definite standard of particularity of allegation required under the codes. Such order should not, however, be entered as of course whenever the defendant claims that he is in doubt, but only upon a showing to the court that fair notice demands the additional matter upon which particulars are asked.<sup>151</sup>

<sup>147</sup> See note 150 *infra*.

<sup>148</sup> *Colby v. Wilson*, 151 N. E. 269 (Ill.-1926); *Anderson v. Rucker Bros.*, 107 Wash. 595, 183 Pac. 70 (1919) annotated in 8 A. L. R. 550-563; *DuPont Automobile Distributors v. DuPont Motors*, 213 A. D. 313, 210 N. Y. S. 577 (1925).

<sup>149</sup> *Graves v. McLaurin*, 66 Fla. 230, 63 So. 439 (1907); *Singers-Bigger v. Young*, 166 F. 82 (1908); *Applebaum v. Goldman*, 155 Mich. 369, 121 N. W. 288 (1909); *Marshall v. Sackett & Wilhelms Co.*, 166 A. D. 141, 151 N. Y. S. 1045 (1915); *Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68 (1902) where the defendant claimed that the bill supplemented the complaint. But see *Gage v. Billing*, 12 Cal. App. 668, 108 Pac. 664 (1910); *Underwood v. Scott*, 43 Kan. 714, 23 Pac. 942 (1890). It is not the office of the bill of particulars to substitute a new cause of action or defense. *St. Albans Beef Co. v. Aldridge*, 112 A. D. 803, 99 N. Y. S. 398 (1906); cf. *Harmon v. Alfred Peats Co.*, 243 N. Y. 473, 154 N. E. 314 (1926).

<sup>150</sup> Cf. *Conover v. Knight*, 84 Wis. 639, 54 N. W. 1002 (1893): "We are not disposed to draw any nice distinction between the functions of an order for a bill of particulars and an order requiring a pleading to be made more definite and certain, for we think such a distinction has no tangible existence in reason or law." Approved, *Stocklen v. Barrett*, 58 Ore. 281, 115 Pac. 108 (1911); and in note 24 Mich. L. R. 315 on *Ashton Bill Co. v. Bailey*, 6 F. (2d.) 235 (1925). See also *Universal Oil Products Co. v. Spelly Oil Co.*, 12 F. (2d.) 271 (1926).

<sup>151</sup> *Johnson v. Birely*, note 143 *supra*; 32 Yale L. J. 488, 489; *Oppenheim v. Sterling Tire Corp.*, 126 Atl. 728 (Del.-1924); *Cohn v. Baldwin*, 74 Hun (N. Y.) 346, 26 N. Y. S. 457 (1893); 31 Cyc. 585.

## THE CONSTRUCTION OF PLEADINGS

The common law rule was quite definite that all pleadings were to be more strongly construed against the pleader on the ground that he would state his case in its strongest aspects. Accordingly, in case of any doubt any statement in the pleading was to be taken in its most unfavorable aspect toward the person making it.<sup>152</sup> The code represented in part a reaction from this somewhat harsh view, and hence the code provisions of almost all the states definitely provide that the pleadings shall be liberally construed, with a view to carry out their obvious intent.<sup>153</sup> In spite of such statements in the code itself, the statements in the cases are still conflicting. Many code cases still say that the pleadings are to be more strongly construed against the pleader as at common law.<sup>154</sup> Others say that the pleadings are to be liberally construed in favor of the pleader.<sup>155</sup>

The cases would indicate that little help is to be gained from such presumption. It is at the most but a suggestion to the court which is trying to find some meaning from written words. Even if the court has determined to be somewhat liberal in its attitude, it is doubtful if it will care to read into the pleading something it cannot find therein, although it feels that the pleader must have expected to put it therein. Probably a better test than one based upon a presumption derived from the authorship of the pleading is the one previously noted that the pleadings must give fair notice to the court and to the opposing side of the pleader's position. As pointed out above, this is not a rule of thumb test but rather the statement

---

<sup>152</sup> Stephen, *Pleading*, ed. Williston, 415; Shipman, *Common Law Pleading*, ed. Ball., 518, 519; *Lyons v. Reinecke*, 10 F. (2d.) 3 (1926); *Klemmer v. Peters*, 106 So. 401 (Fla.-1925); *O'Quinn v. Carter*, 34 Ga. App. 310, 129 S. E. 296 (1925).

<sup>153</sup> "In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties." First Rep. N. Y. Com'rs. Pl. & Prac. 1848, sec. 136; N. Y. C. P. A., sec. 275. Repeated in all the codes except Arizona and Kentucky. See e.g., Calif. C. C. P. 1923, sec. 452 ("must"); Wash. Rem. Comp. St. 1922, sec. 285; North Carolina, Consol. St., 1919, sec. 535.

<sup>154</sup> *Philbin v. Creasey Corp.*, 274 S. W. 1113 (Ky.-1925); *Witham v. Blood*, 124 Ia. 695, 100 N. W. 558 (1904); *Nicholson v. Leatham*, 28 Cal. App. 597, 604, 153 Pac. 965, 155 Pac. 98 (1915). The statements in the decisions of a single state are often conflicting. See Sunderland, quoted note 156 *infra*; cases collected Dec. Dig. Pl. sec. 34; 31 Cyc. 78-81.

<sup>155</sup> *Seeley v. Morris*, 242 Pac. 359 (Wash.-1926); *Guaranty State Bk. v. Sumner*, 278 S. W. 459 (Tex.-1926); *Conrad v. Bd. of Education*, 190 N. C. 389, 130 S. E. 53 (1925); *Walker v. Traylor Eng'g. Co.* 12 F. (2nd.) 382 (1926); *Hornwell v. Ark. etc. Coöp. Assn.*, 276 S. W. 371 (Ark.-1925); *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513 (1895); *State v. Ford Motor Co.*, 151 N. E. 171 (Ohio-1926); cf. *Pettijohn v. Halloran*, 206 N. W. 631 (Ia.-1925).

of the ideal of pleading, leaving its particular applications to the exact case before the court.<sup>156</sup>

Certain subordinate rules of construction have at times been resorted to by the courts. Thus a pleading must be construed as a whole and not by detached parts;<sup>157</sup> words may be read in their ordinary and popular sense where clearly so intended, even against a judicial or statutory definition;<sup>158</sup> abbreviations clearly understood will be read as though the words were written in full;<sup>159</sup> clerical mistakes, where the intended meaning is clear, will not vitiate the pleading;<sup>160</sup> and even where a strict rule of construction is adopted against a pleading on demurrer, a liberal rule will be followed where objection is first made at the trial or on appeal.<sup>161</sup> Specific allegations control and limit general allegations<sup>162</sup> and statements of facts control statements of conclusions.<sup>163</sup>

<sup>156</sup> See 35 Yale L. J. 265. Cf. Sunderland, *Cas. Code Pl.*, 750, note: "There is much conflict in the language of the decisions in the code states on this subject of construction of pleadings on demurrer, and even the same court seldom adheres to an entirely consistent policy. In each case as it comes up the court attempts to do justice to the parties, and there seems to be little difference in the general results whether the rule announced calls for a liberal construction or, as is true in many code states, for a construction against the pleader. It is indeed doubtful whether pleadings are construed very differently under the code than they are in states which still retain the common law form of pleading. The construction of pleadings is determined by the general liberal or technical attitude of the judiciary more than by statute, and that attitude is not very closely subject to legislative control."

<sup>157</sup> *State ex rel. Kansas City etc. Co. v. Dew*, 279 S. W. 65 (Mo.-1926); *Carpenter Const. Co. v. Sevonover*, 148 N. E. 429 (Ind.-1925); *Molineux v. Hurlbut*, 79 Conn. 243, 64 Atl. 350 (1906); 31 Cyc. 83.

<sup>158</sup> *Cook v. Warren*, 88 N. Y. 37 (1882) (declining under the circumstances to depart from the statutory meaning); 31 Cyc. 80, 81.

<sup>159</sup> *Odd Fellows Bldg. Assn. v. Hogan*, 28 Ark. 261 (1873); *D. R. Vivion Mfg. Co. v. Robertson*, 176 Mo. 219, 75 S. W. 644 (1903); Dec. Dig. Pl., sec. 29.

<sup>160</sup> *State v. Quantie*, 87 Mont. 32, 94 Pac. 491 (1908); *Ky. Ont. Ry. Co. v. Carr*, 19 Ky. L. R. 1172, 43 S. W. 193 (1897); *King v. Marl & Express Co.*, 113 A. D. 90, 98 N. Y. S. 891 (1906); Dec. Dig. Pl., sec. 30. Luckily bad grammar does not vitiate a pleading, *Moore v. Beern*, 83 Ind. 219 (1882).

<sup>161</sup> *Dodson v. Bend*, 242 Pac. 821 (Ore.-1926); *Black Dog Lumber Co. v. Stepp*, 277 S. W. 466 (Ky.-1925); *Natl. Surety Co. v. Bk. of Debeque*, 240 Pac. 691 (Colo.-1925); Dec. Dig. Pl., sec. 34 (6) (7).

<sup>162</sup> *Fortier v. Larabie Bros.*, 241 Pac. 237 (Mont.-1925); *Anderson v. Inter-River etc. Dist.*, 274 S. W. 448 (Mo.-1925). See *supra* on negligence actions, notes 70, 71; Dec. Dig. Pl., sec. 34 (2).

<sup>163</sup> *Little v. Union Oil Co.*, 238 Pac. 1066 (Cal.-1925); *Owens v. Anchor Duck Mills*, 34 Ga. App. 347, 129 S. E. 301 (1925). As to the construction of the prayer for relief see 35 Yale L. J. 289, 290. As to other rules of construction see Bryant, *Code Pl.*, 2d ed., 298-300.