CHAPTER 8

THE ACTION OF TRESPASS ON THE CASE [1]

Sec.

SCOPE OF THE ACTION

84. An Action on the Case lies to recover damages:

(I) For Torts not committed by force, actual or implied;

(II) For Torts committed by force, actual or implied, where:

(A) The injury was not immediate, but consequential;

(II) For Torts committed by force, actual or implied, where—Cont'd

(B) The subject matter affected was not tangible, or

(C) The interest in the property affected did not give the right of possession.

Case is the Great Residuary Remedy of the Common Law covering in general non-violent wrongs. In the Field of Tort the Actions of

1. In general, on the History and Development of Trespass on the Case, see:

Treatises: Holmes, The Common Law, Lecture I, The Early Forms of Liability (Boston, 1881); Martin, Civil Procedure at Common Law, c. III, Personal Actions Ex Delicto, Art. III, Trespass on the Case, 78 (St. Paul, 1905); 3 Street, Foundations of Legal Liability, c. XVIII, The Action on the Case, 245 (Northport, 1906); Id., c. XIX, The Action on the Case, 268; Jenks, Short History of English Law, c. X, Contract and Tort, 136 (Boston, 1913); Davies, The Baronial Opposition to Edward II (Cambridge, 1918); 2 Holdsworth, History of English Law, c. IV, 365 (4th ed. Boston, 1931); Maitland, The Forms of Action at Common Law, Lecture VI, 66–68 (Cambridge, 1948); Morgan, The Study of Law, c. VI, Trespass on the Case, 105 (2d ed. Chicago, 1948); Fifoot, History and Sources of the Common Law, c. IV, The Development of Action on the Case, 66 (London, 1949); Id., c. IX, Trespass and Case, 184; Kiralfy, The Action on the Case (London, 1951); Williams, Liability for Animals (Cambridge, 1929); Plucknett, A Concise History of the Common Law, c. IV, Liability, Civil and Criminal, 463–475 (5th ed., Boston, 1956).

Trespass and Trespass on the Case are supplementary to each other; and it may be said that, in general, Case lies where no other theory or Form of Action is available, though it is sometimes concurrent with other forms. The Statute of Westminster II (1285) authorized the Clerks in Chancery to issue New Writs in cases similar to, but not identical with, cases in which Writs had been previously issued. Various theories have been advanced as to the effect of this Statute upon the development of the action of Trespass on the Case.

Trespass and Case as the Source of Our Tort Law

AT Common Law civil injuries were divided into two kinds, the one without force or violence, such as deceit, libel and slander, or the detention of goods; the other, coupled with force and violence, such as assault and battery or false imprisonment. This distinction between private wrongs resulting from forcible injuries and those without force arose out of the Forms of Action or Remedies which were available. The two great Remedies which thus divided the Field of Tort are Trespass and Trespass on the Case. And it may be added that the modern theory of Tort Liability is the joint product of these two Actions.

From the nucleus of violent wrongs, originally remediable alone by the Action of Trespass, remedies were extended to cover non-violent injuries under the great residuary Action of Trespass on the Case, popularly referred to merely as "Case." The Action was not based on any distinct theory of wrong except the supplementary and exclusory one, covering all non-violent injuries, that is, those not falling within the theory of trespass. Case proceeded either by analogy to Trespass, where there was an indirect application of force, or on the general Common-Law principle of affording a remedy for every wrong, even though without violence, direct or indirect. There was and there is still no strict limit to this action and it is the vehicle which the Judges in England and America have used in constantly expanding the Scope of Tort Liability[2] and in giving

Articles: Wigmore, Responsibility for Tortious Acts, 7 Harv.L.Rev. 315, 383, 441 (1894); Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. of Pa.L.Rev. 217, 316 (1908); Veeder, The History of the Law of Defamation, 3 Select Essays in Anglo-American Legal History, 446 (Boston, 1909); Jenks, On Negligence and Deceit in the Law of Torts, 26 L.Q.Rev. 159 (1910); Ames, Lectures on Legal History; Law and Morals, Lecture VII, 442 (Cambridge 1913); Terry, Negligence, 29 Harv.L. Rev. 40 (1915); Smith, Tort and Absolute Liability, 30 Harv.L.Rev. 241 (1917); Issacs, Fault and Liability, 31 Harv.L.Rev. 954 (1918); Goodrich, Permanent Structures and Continuing Injuries—The Iowa Rule, 4 Iowa L.Bul. 65 (1918); Smith, Liability for Substantial Physical Damage to Land by Blasting, 33 Harv.L.Rev. 442 (1920); Albertsworth, Recognition of New Interest in the Law of Torts, 10 Calif. L.Rev. 461 (1922); McCormick, Damages for Anticipated Injury to Land, 37 Harv.L.Rev. 574, 593 (1924); Winfield, The Myth of Absolute Liability, 42 L.Q.Rev. 37 (1926); Winfield, History of Negligence in the Law of Torts, 42 L.Q.Rev. 184 (1926); Asterburn, The Origin and First Test of Public Callings, 75 U. of Pa.L.Rev. 411 (1927); Plucknett, Case and the Statute of Westminster II, 31 Col.L.Rev. 778 (1931); Winfield and Goodhart, Trespass and Negligence, 49 L.Q.Rev. 359 (1933); Landon, Case and Westminster II, 52 L.Q.Rev. 68 (1936); Plucknett, The Action on the Case and Westminster II, 52 L.Q.Rev. 220 (1936); Landon, The Action on the Case and the Statute of Westminster II, 52 L.Q.Rev. 68 (1936); Dix, The Origins of the Action of Trespass on the Case, 46 Yale L.J. 1142 (1937); Harper, Malicious Prosecution, False Imprisonment and Defamation, 15 Tex.L.Rev. 157 (1937); Kiralfy, The Humber Ferryman and the Action on the Case, 11 Camb.L.J. 421 (1953).

2. For a comparatively recent example of this process, see the case of Sims v. Sims, 79 N.J.L. 577, 76 Atl. 1063 (1910) in which a case of novel impression was considered involving the Issue as to whether a wife could maintain an Action under New Jersey Law against the defendants for "maliciously enticing away the plaintiff's husband, and thereby alienating from her his affections." In sustaining the wife's action, Minturn, J., declared: "That the Common-Law Courts failed to find a remedy is, under the decisions, rather a recognition of the right, than the denial of its existence. For it may be said that the history of Common-Law Procedure is largely the history of Substantive Rights, remediless at first for lack of a suitable Writ or Precedent in the Registrum Brevium, until the persistence of

redress for such wrongs as deceit, detention of goods, libel and slander, malicious prosecution, negligent injuries and nuisance.[3]

Development of Trespass on the Case

IT should be observed that in the beginning the only remedy for Torts was the Action of Trespass, and that in order to maintain it, actual or implied violence must be shown. It was formerly thought, that up until the Enactment of the Statute of Westminster II in 1285, there was no Form of Action or Original Writ which could be invoked to recover Damages for other or nonviolent injuries; that under this Statute the Action of Trespass on the Case arose under which any aggrieved party could sue for damages for any wrong to which Trespass would not apply; that the Action originated in the power given by the Statute to the Clerks in Chancery to frame New Writs *in consimili casu*—that is, in cases similar to, but not identical with, cases in which Writs had been previously issued.

This view of the Action of Trespass on the Case, as being the product of the Statute of Westminster II (1285), has been placed in grave doubt by the latest research on the subject. Fifoot flatly declares that "The Actions on the Case derived, not from the statutory powers of Chancery Clerks, but from the Fiat of Judges." [4] And those authorities who agree with Fifoot, point out that when Case underwent its initial development in the last third of the Fourteenth Century, it was founded, not upon Writs issued by the Clerks in Chancery, but upon Writs issued by the Judges under the broad authority of the Common Law, using the Action of Trespass as the stock for grafting, as illustrated in *The Miller's Case* [5] and *The Innkeeper's Case*.[6]

However this may be, the New Writs invented by the Judges to cover the cases were supposed to bear an analogy to Trespass and hence received the appellation of Trespass on the Case (*brevia de transgressione super casum*), as being grounded upon the particular circumstances of the case requiring a remedy, and in order to distinguish them from the older and parent Action of Trespass; and likewise, for further differentiation, the injuries themselves, which were the subject of such Writs, were not called "Trespasses," but "Torts," "Wrongs," or "Grievances."

The Writs of Trespass on the Case, though invented *pro re nata*, in various forms, according to the nature of the different wrongs which called them forth, began, nevertheless, to be viewed as constituting collectively a New Individual Form of Action. Accordingly, this new genus took its place, under the name of "Trespass on the Case," alongside of the more ancient actions of Debt, Covenant, Trespass and the like.

In view of the Origin and Nature of this Action, it is important to note that it is comprised of several different species, two of which, however, are of more frequent use and of greater significance than any other, to wit, the Action of Trover and the Action of Assumpsit, both of which developed out of Case, and were originally known as Trespass on the Case in Assumpsit and Trespass on the Case in Trover, but now referred to respectively simply as "Assumpsit" and

the demand for a remedy developed the Action of Trespass on the Case as a General Specific in *consimili casu* under the provisions of the Statute of Westminster II."

The learned judge simply was not conversant with the latest research in the field concerning the alleged relationship of the Statute and the Action of Trespass on the Case.

3. See 3 Street, Foundations of Legal Liability, c. XVIII, The Action of Trespass on the Case, 245 (Northport 1906).

4. Fifoot, History and Sources of the Common Law, c. IV, The Development of the Actions on the Case, 74 (London 1949).

5. Y. B. Mich. 41 Edw. III, f. 24, pl. 17 (1367).

6. Y. B. Easter, 42 Edw. III, f. 11, pl. 13 (1369).

"Trover." Other Forms of the Action of Trespass on the Case are generally known and designated as "Case" or as an "Action on the Case."

CASE DISTINGUISHED FROM TRESPASS

85. The distinctions between wrongs which are included under Trespass and those under Case relate:

(I) To the element of Force, Express or Implied,

(II) Whether the injury is immediate or consequential on defendant's act,

(III) Whether the liability is for Trespasses of defendant's agents,

(IV) Whether possession is interfered with.

ALTHOUGH Case was complementary to Trespass, the two actions were to a certain extent mutually exclusive,[7] and in theory distinctly differentiated. Where the factual situation essential to constitute a trespass exists, as, for example, where the act was direct and wilful, the Action must be in Trespass. If, however, there was something else in the factual situation, such as negligence, the plaintiff might have an option as to Case or Trespass. And, of course, where any one of the elements required to constitute a trespass is wanting, the Remedy is in Case, assuming the facts make out a Tort.[8]

Distinction Between Trespass and Case—In General

AS we have already seen, where a Tort or Civil Wrong is committed with force, actual or implied, and the matter affected is tangible, as where the person or corporeal property of another is affected, and the injury is immediate, and not merely consequential, and, in the case of injury to property, the property was in possession of the person complaining, the proper remedy to recover damages for the injury is the Action of Trespass.[9] If, on the other hand, a Tort is committed without force, actual or implied, or if, though the Act was committed with force, the matter affected was not tangible, or the injury was not immediate, but consequential, or, in the case of injury to property, the plaintiff's interest in the property was only in reversion, Trespass will not lie, and the proper remedy is Action on the Case.[10]

The Element of Force

UNLESS the case falls within one of the exceptions which we have already stated, and which will presently be explained more at length, an Action on the Case will not lie for an injury committed with force, but the party injured must sue in Trespass. Trespass is excluded, however, if the harm resulted indirectly from the act of the defendant, or the injury was not to the possession of the plaintiff.

Force is either actual or implied. Assault and Battery, tearing down a fence, or breaking into a house are examples of actual force, and there is no difficulty in determining that Trespass, and not Case, is usually the only remedy.

In many cases where there is no actual force, the Law will imply force, and the ef-

7. Day v. Edwards, 5 T.R. 648, 101 Eng.Rep. 361 (1794).

8. Sharrod v. London & North Western Railway Co., 4 Exch. 580, 154 Eng.Rep. 1345 (1849).

9. English: Scott v. Shepherd, 2 W.Bl. 892, 96 Eng. Rep. 525 (1773); Leame v. Bray, 3 East 593, 602, 102 Eng.Rep. 724 (1803); Gregory v. Piper, 9 B. & C. 591, 109 Eng.Rep. 220 (1829); Reynolds v. Clarke, 2 Ld.Raym. 1399, 92 Eng.Rep. 410 (1725); Illinois: Painter v. Baker, 16 Ill. 103 (1854); Michigan: Barry v. Peterson, 48 Mich. 263, 12 N.W. 181 (1882); New Hampshire: Ricker v. Freeman, 50 N.H. 420, (1870); Vermont: Claflin v. Wilcox, 18 Vt. 605 (1846); Virginia: Winslow v. Beal, 6 Call. (Va.) 44 (1806).

10. English: Ward v. Macauley, 4 T.R. 489, 100 Eng. Rep. 1135 (1791); Gordon v. Harper, 7 T.R. 9, 101 Eng.Rep. 829 (1796); Illinois: Frankenthal v. Camp, 55 Ill. 169 (1870); Massachusetts: Adams v. Hemmenway, 1 Mass. 145 (1804); Michigan: Eaton v. Winnie, 20 Mich. 156 (1870); Barry v. Peterson, 48 Mich. 263, 12 N.W. 181 (1882); Pennsylvania: Cotteral v. Cummins, 6 Serg. & R. (Pa.) 343 (1871).

fect will be the same as if there had been actual force, so far as regards the Form of Action. Force, as we have seen, is implied in every Trespass Quare Clausum Fregit. If a man, without right, goes upon another's land, however quietly and peaceable, the Law will imply force, and Trespass is the remedy, not Case; and the same is true where a man's cattle stray upon another's land. Force is also implied in every false imprisonment, and the proper remedy is Trespass, and not Case. And where a wife, daughter, or servant is debauched, or enticed away, the Law implies force, notwithstanding their consent, and the husband, parent, or master may declare in Trespass.[11] And where a fire is started, and, as an immediate consequence, another's property is destroyed, there is constructive force.[12]

Generally, as we have seen, a mere nonfeasance cannot be regarded as forcible; for where there has been no act there can be no force. There is no force, for instance, in a mere detention of goods without an unlawful taking; or in neglect to repair the bank of a stream, whereby another's land is overflowed;[13] or in neglect to repair a fence whereby another's animal escapes on to the land of the person so negligent or elsewhere, and is injured;[14] and in these instances Case, and not Trespass, must be the remedy.

The Injury as Immediate or Consequential

Even though an injury may have been committed by force, Case will lie, if it was not immediate, but consequential; for, to sustain Trespass, as we have seen, the injury must have been immediate. An injury is considered as immediate when the act complained of, itself, and not merely a consequence of that act, occasioned it. But where the damage or injury ensued, not directly from the act complained of, it is consequential or mediate, and cannot amount to a trespass.[15]

To take an illustration already used, if a person in the act of throwing a log into the highway hits and injures a passer-by, the injury is immediate, and trespass is the proper remedy; but if, after a log has been thrown into the highway, some one in passing, falls over it, and is injured, the injury is consequential, and the Action must be in Case.[16]

If a person forcibly takes another's goods, the Action must generally be Trespass. An Action on the Case, however, will also lie at the suit of a seller of goods against a person who, after the sale and before delivery, forcibly and wrongfully takes the goods, and so

11. Chamberlain v. Hazlewood, 5 Mees. & W. 515, 151 Eng.Rep. 218 (1839). As we shall see, he may waive Trespass and declare in Case for the consequential injury,—loss of services or society.

12. Jordan v. Wyatt, 4 Grat. (Va.) 151 (1847).

13. Hinks v. Hinks, 46 Me. 423 (1859). See, also, 1 Chitty, On Pleading, c. II, Of the Forms of Action, 141 (7th ed., Springfield, Mass. 1882).

14. English: Star v. Rookesby, 1 Salk. 335, 91 Eng. Rep. 295 (1710); Rooth v. Wilson, 1 B. & A. 59, 106 Eng.Rep. 22 (1817); Powell v. Salisbury, 2 Younge, & J. 391, 148 Eng.Rep. 970 (1828); Illinois: Burke v. Daley, 32 Ill.App. 326 (1890); Vermont: Saxton v. Bacon, 31 Vt. 540 (1859).

For the failure of a railroad company to fence its track, see: Illinois: Kankakee & S. W. R. Co. v. Fitzgerald, 17 Ill.App. 525 (1885); Massachusetts: Eames v. Salem & L. R. Co., 98 Mass. 560 (1868); Vermont: Holden v. Rutland & B. R. Co., 30 Vt. 297 (1858).

And for the negligent failure to close the gates on a private right of way, see: Pennsylvania: Nirdlinger v. American Dist. Tel. Co., 240 Pa. 571, 88 A. 6 (1913); Vermont: Gregoir v. Leonard, 71 Vt. 410, 45 A. 748 (1899).

15. Michigan: Barry v. Peterson, 48 Mich. 263, 12 N. W. 181 (1882); Massachusetts: Adams v. Hemmenway, 1 Mass. 145 (1804).

16. Leame v. Bray, 3 East 593, 602, 102 Eng.Rep. 724 (1803).

That Case is the remedy to recover for an injury to one's vehicle from a stone deposited in the highway, see Green v. Belitz, 34 Mich. 512 (1876).

In Actions where the injury is occasioned by the forcible act of the defendant, if the injury is direct and immediate, the Action is Trespass, while if consequential or mediate, the Action is Case. Reed v. Guessford, 7 Boyce (Del.) 228, 105 A. 428 (1918).

puts it out of the seller's power to perform his contract, so that the buyer avoids it; for the injury by the loss of the sale is consequential. Trespass would lie for the forcible and wrongful taking; Case will also lie for the consequential injury, so that here the two actions are concurrent remedies.[17]

If a person lays rubbish so near another's wall that, as a necessary or natural consequence, some of it rolls against the wall, the injury is immediate, and the remedy is in Trespass.[18]

If a blow be given to the person or property of another, the Action must be Trespass, and not Case.[19] And if a person willfully drives his horse or carriage against another's person or property, Trespass and not Case is the remedy. But where, through negligent and careless driving, and not willfully, one vehicle is caused forcibly to strike another, it is held that an action on the Case is sustainable for the injury, either to the vehicle or the occupant, though in such a case the injury is immediate upon the violence.[20] Trespass would also lie in such a case.[21] And in the case of an injury arising from carelessness or unskillfulness in navigating a ship or vessel, if the injury is merely attributable to negligence or want of skill, and not to willfulness, the party injured may, at his election, sue in Case or Trespass.[22] In these cases the negligence or unskillfulness of the defendant is treated as the Cause of Action when Case is brought, while in Trespass the act itself is the Cause of Action. By the weight of authority, the rule is not confined to these particular cases, but is general, that where there is an immediate injury to person or property attributable to negligence, the party injured has an election either to treat the negligence of the wrongdoer as the Cause of Action, and to declare in Case, or to consider the act itself as the injury, and to declare in Trespass.[23]

17. Frankenthal v. Camp, 55 Ill. 169 (1870), in which the only ground for reversal was the selection of the wrong Form of Action—Case instead of Trespass. The explanation of the result probably lies in the fact that the Court was willing to stretch a point in order to avoid a reversal on this barren technicality.

18. Gregory v. Piper, 9 B. & C. 591, 109 Eng.Rep. 220 (1829).

19. In Ricker v. Freeman, 50 N.H. 420 (1870), it appeared that the defendant had seized the plaintiff by the arm and swung him violently around, and let him go, and that the plaintiff, having become dizzy, involuntarily passed rapidly in the direction of a third person, and came violently in contact with him, whereupon the latter pushed him away, and he came in contact with a hook and was injured. It was held that Trespass, not Case, was the Remedy. See, also, Lowery v. Manhattan R. Co., 99 N.Y. 158, 1 N.E. 608 (1885); Tuttle v. Atlantic City R. Co., 66 N.J.L. 327, 49 A. 450 (1901).

20. English: Williams v. Holland, 10 Bing. 112, 131 Eng.Rep. 848 (1833); Indiana: Schuer v. Veeder, 7 Blackf. (Ind.) 342 (1845); Kentucky: Payne v. Smith, 4 Dana (Ky.) 497 (1836); Michigan: Bradford v. Ball, 38 Mich. 673 (1878); Wyant v. Crouse, 127 Mich. 158, 86 N.W. 527 (1901); New Hampshire: Ricker v. Freeman, 50 N.H. 420 (1870); New York: Wilson v. Smith, 10 Wend. (N.Y.) 324 (1833); McAllister v. Hammond, 6 Cow. (N.Y.) 342 (1826); Vermont: Claflin v. Wilcox, 18 Vt. 605 (1846).

21. English: Turner v. Hawkins, 1 Bos. & P. 472, 126 Eng.Rep. 1016 (1796); New York: Wilson v. Smith, 10 Wend. (N.Y.) 324 (1833); McAllister v. Hammond, 6 Cow. (N.Y.) 342 (1826); Pennsylvania: Strohl v. Levan, 39 Pa. 177 (1861); Vermont: Claflin v. Wilcox, 18 Vt. 605 (1846).

"Where an injury is attributable to negligence, although it were the immediate effect of the defendant's act, the party injured has an election, either to treat the negligence of the defendant as the Cause of Action and declare in Case; or to consider the Act itself, as the cause of the injury, and declare in Trespass." Richardson, C.J., in Dalton v. Favour, 3 N.H. 465, 466 (1826). See, also, Mullan v. Belbin, 130 Md. 313, 326, 100 A. 384 (1917).

22. English: Rogers v. Imbleton, 2 Bos. & P. (N.R.) 117, 127 Eng.Rep. 568 (1806); Ogle v. Barnes, 8 T.R. 188, 101 Eng.Rep. 1338 (1799); Turner v. Hawkins, 1 Bos. & P. 472, 126 Eng.Rep. 1016 (1796); Moreton v. Hardern, 4 Barn. & C. 226, 107 Eng.Rep. 1043 (1825); New York: Percival v. Hickey, 18 Johns. (N.Y.) 257 (1820); Rathbun v. Payne, 19 Wend. (N.Y.) 399 (1838); Barnes v. Cole & Fitzhugh, 21 Wend. (N.Y.) 188 (1839).

23. New York: Blin v. Campbell, 14 Johns. (N.Y.) 432 (1817); Vermont: Howard v. Tyler, 46 Vt. 683 (1874). See, also, Wells v. Knight, 32 R.I. 432, 80 A.

If a person pours water directly upon another's person or land, the injury is immediate and trespass is the proper remedy.[24] But if a person stops a water course on his own land, whereby it is prevented from flowing as usual, or if he place a spout on his own building, and in consequence thereof the water afterwards runs therefrom upon another's land or house or person, the injury is consequential, and Case is the proper action.[25] Case also lies where excavations are made by a person on his own land in such a way as to cause the soil of an adjoining proprietor to fall.[26] And it lies for injury to person or property communicated by infection.[27]

If a person entices away, or seduces, or debauches another's wife, daughter, or servant, the Law, as we have seen, implies force, and the husband, father or master may sue in trespass for the injury.[28] Or he may at his election treat the loss of society or services, and not the defendant's act, as the injury, and, as that is merely consequential, sue in Case.[29]

If a wild or vicious beast, or other dangerous thing, is turned loose or put in motion, and mischief immediately ensues to the person or property of another, the injury is immediate, and Trespass, not Case, is the remedy.[30] But if a vicious animal is kept with knowledge of its propensities, or a dangerous substance, like explosives or poison, is negli-

16 (1911), in which the Declaration was in Trespass rather than Case, and alleged that a stone thrown by the defendant's blast struck the deceased while he was traveling on a highway, but did not aver whether the act was due to the defendant's negligence.

24. Reynolds v. Clarke, 2 Ld.Raym. 1399, 92 Eng.Rep. 410 (1725). And where water is discharged on *A's* property, and from there finds its way on to the property of *B*, *B's* remedy is in Case. Nichols v. Ely Beet Sugar Factory [1931] 2 Ch. 84.

25. In the latter case "the flowing of the water, which was the immediate injury, was not the wrongdoer's immediate act, but only the consequence thereof, and which will not render the act itself a Trespass or immediate wrong." 1 Chitty, On Pleading, c. II, Of the Forms of Action, 142 (17th ed. Springfield, Mass. 1882). See, also, following cases: English: Reynolds v. Clarke, 1 Str. 635, 93 Eng.Rep. 747 (1738); 2 Ld.Raym. 1399, 92 Eng.Rep. 410 (1725); Howard v. Bankes, 2 Burr. 1114, 97 Eng.Rep. 740 (1760); Illinois: Winkler v. Meister, 40 Ill. 349 (1869); Nevins v. Peoria, 41 Ill. 502 (1866); Michigan: Hamilton v. Plainwell Water-Power Co., 81 Mich. 21, 45 N.W. 648 (1890); New York: Arnold v. Foot, 12 Wend. (N.Y.) 330 (1834).

26. City of Pekin v. Brereton, 67 Ill. 477 (1873). Or the party may elect to bring Trespass. Buskirk v. Strickland, 47 Mich. 389, 11 N.W. 210 (1882).

27. Eaton v. Winnie, 20 Mich. 156 (1870).

28. Chamberlain v. Hazlewood, 5 M. & W. 515, 151 Eng.Rep. 218 (1839); Tullidge v. Wade, 3 Wils. 18, 95 Eng.Rep. 909 (1769). See, also, 1 Street, Foundations of Legal Liability, c. XVIII, Interference with Domestic Relations, 265, 271 (Northport, 1906); 3 Street, Foundations of Legal Liability, c. XVIII, Trespass on the Case, 266 (Northport, 1906).

29. English: Chamberlain v. Hazlewood, 5 M. & W. 515, 151 Eng.Rep. 218 (1839); Weedon v. Timbrell, 5 T.R. 361, 101 Eng.Rep. 202 (1793); Indiana: Van Vacter v. McKillip, 7 Blackf. (Ind.) 578 (1845); Kentucky: Jones v. Tevis, 4 Litt. (Ky.) 25 (1823); Maine: Clough v. Tenney, 5 Greenl. (Me.) 446 (1828); New Jersey: Van Horn v. Freeman, 6 N.J. L. 322 (1796); New York: Martin v. Payne, 9 Johns. (N.Y.) 387 (1812); Moran v. Dawes, 4 Cow. (N.Y.) 412 (1825); North Carolina: McClure's Ex'rs v. Miller, 11 N.C. 133 (1825); Pennsylvania: Ream v. Rank, 3 Serg. & R. (Pa.) 215 (1817); Wilt v. Vickers, 8 Watts (Pa.) 227 (1839); Legaux v. Feasor, 1 Yeates (Pa.) 586 (1795); South Carolina: Haney v. Townsend, 1 McCord (S.C.) 206 (1821); Virginia: Parker v. Elliott, 6 Munf. (Va.) 587 (1820).

30. English: Leame v. Bray, 3 East 593, 596, 102 Eng.Rep. 724 (1803); Mason v. Keeling, 12 Mod. 333, 88 Eng.Rep. 1360 (1699); Beckwith v. Shardike, 4 Burr. 2092, 98 Eng.Rep. 91 (1767); Maine: Decker v. Gammon, 44 Me. 322 (1857). Thus, where a lighted squib was thrown into a market place, and, being thrown about by others in self-defense, ultimately injured a person, the injury was considered as the immediate act of the first thrower, and a Trespass, the new direction and the new force given it by the intermediate persons not being a New Trespass, but merely a continuance of the original force. Scott v. Shepherd, 2 Wm.Bl. 892, 96 Eng.Rep. 525 (1773). See, also, Ricker v. Freeman, 50 N.H. 420 (1870). Cf. Russo v. Dinerstein, 138 Conn. 220, 83 A.2d 222 (1951).

gently left exposed, and a person is thereby injured, the remedy is in Case.[31]

And where a person negligently causes the burning of another's property, as where a fire is set by sparks from a railroad company's locomotive, or where a man starts a fire on his own land and it reaches and burns adjoining property, Case is the proper action.[32]

As we have seen, if a person's cattle stray on another's land and cause injury, Trespass by the latter is the proper remedy.[33] If, however, the cattle got out because of the owner's neglect of his duty to repair fences, the person may treat this neglect as his Cause of Action, and bring Case for the consequential injury;[34] or he may sue in Trespass as in other cases, treating the Trespass as his Cause of Action.[35]

Intangible Property or Rights

AS we have shown, in treating of Trespass, where the property or right injured is intangible, as the right to reputation, or health and comfort, or incorporeal real property, the injury can never be considered as committed with force, however malicious and however contrived, for the matter injured cannot possibly be affected immediately by any substance. Case, therefore, and not Trespass, must be the remedy.[36] An Action on the Case is the remedy for libel or slander;[37] for injury to health or comfort from a nuisance;[38] for obstructing a private right of way,[39] or a public highway,[40] or navigable river,[41] and causing special damages to an individual; or for interference with any other easement, as by obstructing light and air through ancient windows by an erection on adjoining land.[42] Case is also the proper remedy for diversion of, or other injuries to, water courses or waters, where the plaintiff is not the owner of the soil, but is merely entitled to the use of the water.[43] And it will lie for infringing a copyright, patent, or trade-mark,[44] though a bill in Equity for an

31. English: Mason v. Keeling, 12 Mod. 333, 88 Eng. Rep. 1360 (1699); Sarch v. Blackburn, 4 Car. & P. 297, 172 Eng.Rep. (1830); Alabama: Durden v. Barnett, 7 Ala. 169 (1844); Illinois: Stumps v. Kelley, 22 Ill. 140 (1859).

32. Illinois: Burton v. McClellan, 2 Scam. (Ill.) 434 (1840); Massachusetts: Barnard v. Poor, 21 Pick. 378 (1838); Illinois: Armstrong v. Cooley, 5 Gil. (Ill.) 509 (1849); Virginia: Jordan v. Wyatt, 4 Grat. (Va.) 151 (1847).

33. Wells v. Howell, 19 Johns. (N.Y.) 385 (1822).

34. Star v. Rookesby, 1 Salk. 335, 91 Eng.Rep. 295 (1710). See, also, Mason v. Keeling, 12 Mod. 333, 88 Eng.Rep. 1360 (1699); Decker v. Gammon, 44 Me. 322 (1857).

35. English: Star v. Rookesby, 1 Salk. 335, 91 Eng. Rep. 295 (1710); New York: Wells v. Howell, 19 Johns. (N.Y.) 385 (1822).

36. Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. 173 (1833).

37. Pollard v. Lyon, 91 U.S. 225, 23 L.Ed. 308 (1875).

38. Nevins v. Peoria, 41 Ill. 502 (1866).

39. Maryland: Wright v. Freeman, 5 Har. & J. (Md.) 467 (1823); New Jersey: Osborne v. Butcher, 26 N. J.L. 308 (1857); New York: Lansing v. Wiswall, 5 Denio (N.Y.) 213 (1818); Lambert v. Hoke, 14 Johns. (N.Y.) 383 (1817); Pennsylvania: Jones v. Park, 10 Philadelphia (Pa.) 165 (1874); Okeson v. Patterson, 29 Pa.Sta.Rep. 22 (1857); Vermont: Wilson v. Wilson, 2 Vt. 68 (1829).

40. English: Greasley v. Codling, 2 Bing. 261, 130 Eng.Rep. 307 (1824); Illinois: City of Pekin v. Brereton, 67 Ill. 477 (1873); New York: Lansing v. Wiswall, 5 Denio (N.Y.) 213 (1818); Vermont: Wilson v. Wilson, 2 Vt. 68 (1829).

41. English: Rose v. Miles, 4 M. & S. 101, 105 Eng. Rep. 773 (1815); Michigan: Bellant v. Brown, 78 Mich. 294, 44 N.W. 326 (1889).

42. Shadwell v. Hutchinson, 2 Barn. & Adol. 97, 109 Eng.Rep. 1079 (1831). See, also, Blunt v. McCormick, 3 Denio (N.Y.) 283 (1846).

43. English: Williams v. Morland, 2 Barn. & C. 910, 107 Eng.Rep. 620 (1824); Illinois: Ottawa Gaslight & Coke Co. v. Thompson, 39 Ill. 598 (1864); Maryland: Shafer v. Smith, 7 Har. & J. (Md.) 67 (1826); Pennsylvania: Lindeman v. Lindsey, 69 Pa. 93 (1871); Strickler v. Todd, 10 Serg. & R. (Pa.) 63 (1823).

44. Clementi v. Goulding, 11 East 244, 103 Eng.Rep. 998 (1809); Roworth v. Wilkes, 1 Camp. 98, 170 Eng.Rep. 890 (1807); Minter v. Mower, 6 Adol. & El. 735, 112 Eng.Rep. 282 (1837); Perry v. Skinner, 2 Mees. & W. 471, 150 Eng.Rep. 873 (1837).

injunction and an accounting is the usual remedy.

If the injury is to corporeal property, and is immediate, and committed with force, case will not lie merely because that property was the means by which an incorporeal right was enjoyed. Thus, where, by Legislative Authority, a dam has been erected and maintained in a navigable river in connection with a mill, and the dam is wrongfully cut away by another, Case will not lie on the ground that an incorporeal right has been injured. "The ground on which the Form of Action was endeavored to be maintained," it was said in an Action on the Case for such a wrong, "was that the right to erect the dam, for an injury to which the action was brought, was a franchise, and incorporeal hereditament, and that for an injury to property, or right of that description, Trespass will not lie. The principle here adverted to does not apply to the case. The right to erect the dam is a franchise; it is conferred by the legislature, the sovereign power; it is an incorporeal right, but the dam itself is not a franchise, nor is it incorporeal. The right to keep a ferry, or to erect a bridge, or to navigate a particular river or lake by steam, may be a franchise; but the bridge itself, or the boats and machinery employed in the ferry, or the navigation of the river, may, notwithstanding, be the subjects of Trespass. * * * So far as the incorporeal right is invaded, the redress is by Action on the Case. But when visible, tangible, corporeal property is injured, if the injury is direct, immediate and willful, Trespass is the proper Form of Action, although that property may be connected with, or be the means by which an incorporeal right is enjoyed." [45]

ELECTION BETWEEN TRESPASS AND CASE

86. When an injury results directly from a Negligent Act, the injured party has an Election of Remedies. The injured party may maintain an Action in Trespass, relying upon the *fact that the injury resulted directly from the* act; or he may maintain an Action of Trespass on the Case relying upon the negligence as the basis for the action.

WHILE Trespass and Case were designed to apply to different factual situations, as we have seen, there came a time in their development, when the effort to distinguish the two actions on the basis of proximity, broke down, and it was realized that a single tortious act might be at one and the same time a direct trespass and an injury resulting from negligence, actionable on the basis of a legal principle other than that effectuated by the Action of Trespass. Thus, in *Dalton* v. *Favour*,[46] where the plaintiff was wounded by the accidental discharge of a gun held by the defendant, the wrong contained all the elements of Trespass. But looked at from another viewpoint, or with a fuller understanding of the facts, the act may be the foundation of another tort. In such a situation the injured person sues in Trespass on the basis of a direct and forcible injury, or he may elect to treat the tort as the result of negligence in maneuvering the gun, and hence declare in Case.[47] When, therefore, in *Leame* v. *Bray*,[48] there was a collision, which was caused by negligence which combined facts of force, direct injury, as well as infringement of possession there was clearly a Trespass. But the same factual situation might be treated as the consequences of an anterior tort, to wit, the guilty party's negligent driving, which might be regarded as a wrong of another species for which the remedy might be Case and not Trespass. It thus appears that the injured party has a choice of remedies, as was held in *Williams*

45. *Wilson* v. *Smith*, 10 Wend. (N.Y.) 324 (1833).

46. 3 N.H. 465 (1826).

47. New York: Blins v. Campbell, 14 Johns. (N.Y.) 432 (1817); New Hampshire: Dalton v. Favour, 3 N.H. 465 (1826); Vermont: Waterman v. Hall, 12 Vt. 128 (1843).

48. 3 East. 593, 102 Eng.Rep. 724 (1803).

v. *Holland*,[49] according to the view he takes of the wrongdoer's conduct; he may sue in Trespass for the forcible wrong, or make the negligence of the defendant the ground of his action and declare in Case. Other acts trespassatory in their character may be injurious because of their indirect results, as in the case of the seduction of a man's wife, or daughter, in which instance Case would be the proper remedy, the plaintiff making the consequences of the act,—the loss of services —the gist of his Complaint.[50] But clearly, the plaintiff-husband may elect to treat the direct injury to his wife or daughter as the basis of the action, in which case Trespass is the proper remedy.[51]

FORM OF THE DECLARATION IN TRESPASS ON THE CASE

87. As the action of Trespass on the Case was the Great Residuary Remedy of the Common Law, the forms in which it has found expression are as varied as the wrongs for which it has afforded a remedy.

A Form of a Declaration in Trespass on the Case as a remedy for a personal injury is set forth in this section.

DECLARATION IN TRESPASS ON THE CASE FOR PERSONAL INJURY

IN THE QUEEN'S BENCH the 15th day of June, in the year of our Lord 1845.

LANCASHIRE (Southern Division), to wit,—Thomas Moody (the plaintiff in this suit), by Frederick Jones, his attorney, complains of William White (the defendant in this suit), who has been summoned to answer the said plaintiff in an action of Trespass on the Case. For that whereas the defendant before, and at the time of the commencement of this suit, and of the injury and damage occurring, as hereinafter mentioned, was the possessor and occupier of a certain messuage, vault, cellar, and premises, with appurtenances, situated in the town of Liverpool, in the County of Lancaster, and near to a certain common and public footway there, and in which vault and cellar there was a certain hole or aperture opening into the said public footway. Yet the defendant, well knowing the premises, whilst he was so the possessor and occupier of the said messuage, vault, cellar, and premises, with the appurtenances, and whilst there was such hole as aforesaid, heretofore, to wit, on the first day of May, in the year of our Lord 1845, wrongfully and unjustly, and contrary to his duty in that behalf, permitted the said hole to be, and continue, and the same was then so badly, insufficiently, and defectively covered, that, by means of the premises, and for want of a proper and sufficient covering to the said hole, the plaintiff, who was then lawfully passing in and along the said footway, then slipped and fell into the said hole, and thereby the left leg of the plaintiff was then fractured and broken, and greatly damaged; and the plaintiff became and was sick, sore, lame, and disordered, and so remained and continued for a long time, to wit, thence hitherto, during all which time the plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his lawful affairs and business, by him during that time to be performed and transacted; and was also, by means of the premises, forced and obliged to pay, lay out, and expend, and did pay, lay out and expend a large sum of money, to wit, the sum of £60 in and about the endeavoring to be healed and cured of the wounds, lameness, sickness, and disorder so occasioned as aforesaid, to

49. English: 10 Bing. 112, 131 Eng.Rep. 848 (1833); New York: Percival v. Hickey, 18 Johns. (N.Y.) 257 (1820); Vermont: Claflin v. Wilcox, 18 Vt. 605 (1846).

50. Moran v. Dawes, 4 Cow. (N.Y.) 412 (1825).

51. English: Woodward v. Walton, 2 Bos. & P. (N.R.) 476, 127 Eng.Rep. 715 (1807); Ditcham v. Bond, 2 M. & S. 436, 105 Eng.Rep. 443 (1814); Chamberlain v. Hazlewood, 5 M. & W. 515, 151 Eng.Rep. 218 (1839); Illinois: Yundt v. Hartrunft, 41 Ill. 9 (1866); Massachusetts: Bigaoutte v. Paulet, 134 Mass. 123 (1883).

the plaintiff's damage of £200, and thereupon he bring suit, &c.

MARTIN, Civil Procedure at Common Law, 372 (St. Paul, 1905).

DECLARATION IN TRESPASS ON THE CASE —ESSENTIAL ALLEGATIONS: (1) IN GENERAL

88. The Essential Allegations in Actions of Trespass on the Case are:

(I) The plaintiff's Right, Title or Possession;

(II) The Facts showing the existence of a Legal Duty on the part of the defendant;

(III) A Wrongful Act by the defendant in Breach of his Duty;

(IV) Damages proximately caused by the Wrongful Act.

DECLARATION IN TRESPASS ON THE CASE—ESSENTIAL ALLEGATIONS: (2) THE PLAINTIFF'S RIGHT, TITLE, INTEREST OR POSSESSION

89. In the case of injury to chattels, plaintiff's right or interest in them is usually sufficiently described by an averment that they are his goods and chattels, or that he was lawfully possessed of them as his own property.

IN actions for injury to property, the plaintiff's right or interest in the thing affected must be clearly stated. In the case of injury to chattels, the plaintiff's right or interest in them will be ordinarily sufficiently described by an averment that they are his goods and chattels, or that he was lawfully possessed of them as his own property; but "if the plaintiff sues as a reversioner, he must either state an injury of such a permanent nature, as to be necessarily injurious to his reversion; or if the wrongful acts complained of are not of such a nature as necessarily to result in an injury to the reversionary estate, but only of an equivocal character, the plaintiff must aver that they were done to the damage, or prejudice of his reversion; and in the latter case, the want of such an averment, will be fatal on demurrer; or good cause for arresting the judgment." [52]

Where the injury is to intangible personal rights such as reputation or incorporeal property rights, such as an easement and reversion, Case and not Trespass is the proper remedy.

Reversionary Right of Bailor

UNDER the Common-Law Forms of Action, a bailor could not ordinarily bring an Action of Trespass, Trover or Detinue, these actions being founded upon a violation of possession or upon an immediate right of possession.[53] Where any permanent injury is done to a chattel, the bailor may maintain an Action on the Case against a third party for an injury to his reversionary interest.[54] The bailor also has concurrent possessory remedies with the bailee, if the bailment is revocable by him at his pleasure as in the case of a gratuitous loan of a chaise.[55]

DECLARATION IN TRESPASS ON THE CASE—ESSENTIAL ALLEGATIONS: (3) THE FACTS SHOWING THE EXISTENCE OF A LEGAL DUTY ON THE PART OF THE DEFENDANT

90. In many cases it is necessary to State Facts showing the existence of a duty owing from the defendant to the plaintiff, as where

52. Hornblower, C. J., in Potts v. Clarke, 20 N.J.L. 536, 541 (1845), citing Jackson v. Pesked, 1 Mau. & Sel. 234, 105 Eng.Rep. 88 (1813). See, also, the following cases: Illinois: City of Chicago v. McDonough, 112 Ill. 85, 1 N.E. 337 (1884); New Hampshire: George v. Fisk & Norcross, 32 N.H. 32 (1855).

53. English: Wilby v. Bower [N.P.1649], 1 Gray's Cases on the Law of Property, 241 (2d ed. Cambridge, 1905–06).

54. English: Ward v. Macauley, 4 T.R. 489, 100 Eng. Rep. 1135 (1791); Gordon v. Harper, 7 T.R. 9, 101 Eng.Rep. 829 (1796); Hall v. Pickard, 3 Camp. 187, 170 Eng.Rep. 1350 (1812); Florida: Bucki v. Cone, 25 Fla. 1, 6 So. 160 (1878); Massachusetts: Ayer v. Bartlett, 9 Pick. (Mass.) 156 (1829); New Jersey: New York, L. E. & W. R. Co. v. New Jersey Electric Ry. Co., 60 N.J.L. 338, 38 Atl. 828, 43 L.R.A. 849 (1859).

55. Lotan v. Cross, 2 Camp. 464, 170 Eng.Rep. 1219 (1810).

it arises from the relation of passenger and carrier or master and servant, or where the defendant was in control of some dangerous machinery or a vicious animal.

THE Declaration in Trespass on the Case must not only allege a right or interest in the plaintiff but it must also set forth a duty existing on the part of the defendant, and a violation of that duty. If, however, the right which is violated is that of personal security, this need not be stated.[56] It is usually necessary to state somewhat fully the facts and circumstances showing the existence of a duty toward the plaintiff on the part of the defendant, the neglect or breach of which would be an injury to the plaintiff.[57]

Thus, in an action for negligent injury, it must appear that the plaintiff was in a situation where the defendant owed him a duty to exercise due care for his safety, as that the defendant was in control of machinery or other agency causing danger to the plaintiff, for which the defendant was responsible. A bare allegation that the defendant owed a legal duty to the plaintiff is a mere conclusion of law and hence worthless; the facts creating the duty must be alleged, as that the relation of carrier and passenger existed.[58] The existence of the defendant's duty toward the plaintiff must appear from facts or circumstances from which the law infers such duty, as where the defendant's liability is based upon his ownership or control of the premises upon which the injury occurred and his duty to furnish employees a safe place to work.[59]

DECLARATION IN TRESPASS ON THE CASE—ESSENTIAL ALLEGATIONS: (4) THE DEFENDANT'S WRONGFUL ACT IN BREACH OF HIS DUTY

91. To show a Breach of Duty, the defendant's Wrongful Act and the mental conditions

56. In such a case, as in Trespass *vi et armis* for injuries to persons, the plaintiff's Allegations commence with a statement of the injury committed, and no Inducement or statement of his right is necessary.

57. In an Action on the Case, all the facts upon which the plaintiff relies, must be stated in the Declaration. Wadleigh v. Katahdin Pulp & Paper Co., 116 Me. 107, 100 Atl. 150 (1917).

See, also, on this point, the case of S. J. & W. M. Bayard v. Smith, 17 Wend. 88 (1837), in which Nelson, C. J., said: "All the circumstances essential to support the Action must be alleged, or in substance appear on the face of the Declaration."

58. English: Seymour v. Maddox, 16 Q.B. 326, 117 Eng.Rep. 904 (1851); Alabama: Ensley Ry. Co. v. Chewning, 93 Ala. 24, 9 So. 458 (1891); Illinois: City of Chicago v. Selz, Schwab & Co., 202 Ill. 545, 67 N.E. 386 (1903); Mackey v. Northern Mill Co., 210 Ill. 115, 71 N.E. 448 (1904); Maryland: Macnner v. Carroll, 46 Md. 193 (1877). See, also, 14 Cyc. 331, 332; 29 Cyc. 566.

In Gillman v. Chicago Rys. Co., 268 Ill. 305, 109 N.E. 181 (1915), it was held that in an Action of Tort in a fourth class case in the Municipal Court of Chicago the statement of claim must show a Cause of Action based on a Breach of Legal Duty by the defendant, such, for example, as facts showing the relation of carrier and passenger, a duty owed by the defendant to the plaintiff, and neglect of that duty by the defendant or its servants in the scope of their employment, and damage to the plaintiff as the result of that neglect. The Court emphasizes the function of the Statement of Claim, which is the substitute for a Declaration, as the basis of a Judgment, and the insufficiency of the statement of claim may be availed of on a Writ of Error even in the absence of a Demurrer.

59. A Declaration by an employee against a corporation, his employer, for injury by a grindstone bursting should allege: (1) the relation, that plaintiff was in the employ of the defendant and was its servant, and was subject to its orders and directions in his work; (2) the duty of the defendant to furnish safe appliances and place to work; (3) the negligent acts of defendant in permitting the grindstone to be and remain in a dangerous condition, showing how it was defective and why dangerous, and that defendant knew or ought to have known of the defects; (4) the causal connection between the negligence and the injury; (5) the due care of the plaintiff (in some Jurisdictions) and the fact that plaintiff did not know of the danger and was not chargeable with knowledge of it; (6) the damages. What Allegations show a Breach of the master's duty to furnish servant a safe place to work, see Sargent Co. v. Baublis, 215 Ill. 429, 74 N.E. 455 (1905); Raxworthy v. Heisen, 274 Ill. 398, 407, 113 N.E. 699 (1918); Vogrin v. American Steel & Wire Co., 263 Ill. 474, 105 N.E. 332 (1914); Romani v. Shoal Creek Coal Co., 271 Ill. 366, 111 N.E. 88 (1916).

of responsibility, such as intent or negligence or malice or fraud, must be alleged.

IN Declarations in Trespass, the injury is stated without any averment of the defendant's motive or intent or of the circumstances under which it was committed. In general, in actions on the case, it is necessary to state, not only the wrongful act complained of, but also the wrongful intent, fraud, or negligence with which it was done and the circumstances showing that it was wrongful. In some actions the scienter (knowledge) must be alleged and proved, as of the vicious propensity of the dog in an action for keeping a dog accustomed to bite people or sheep. But in an action for debauching a wife or servant it is not necessary to allege or prove that the defendant knew that the female was the wife or servant of the plaintiff.

In actions for negligence there is some conflict whether a general charge of negligence, as that defendant so negligently and carelessly operated a car that plaintiff was thrown from the car and injured, is sufficient, or whether the facts and circumstances showing negligence must be stated specifically.[60] When it is said that it is sufficient to plead negligence generally, it is usually meant that the pleader, having set out the specific facts showing a duty of care and acts causing injury, may state generally that such acts were negligently done. A mere general averment of negligence is insufficient.[61]

In the case of a passenger injured in a street car collision, it will be sufficient for the declaration to show that the plaintiff was a passenger upon defendant's car, that defendant was a common carrier, and that defendant failed to perform its duty to carry safely, by permitting the car to collide with another of defendant's cars. It will not be necessary to plead the facts showing the cause of the collision, as the facts alleged bring the case within the doctrine of *res ipsa loquitur*,[62] and an allegation of negligence is unnecessary.[63]

60. That a General Allegation of Negligence is insufficient, see the following cases:

Delaware: King v. Wilmington & N. C. Electric Ry. Co., 1 Penn. (Del.) 452, 41 Atl. 975 (1898); Illinois: East St. Louis Connecting Ry. v. Wabash, St. L. & P. Ry. Co., 123 Ill. 504, 15 N.E. 45 (1888); New Jersey: Race v. Easton & A. R. Co., 62 N.J.L. 536, 41 A. 710 (1898).

That a General Allegation may be permitted, see: Illinois: Chicago City Ry. Co. v. Jennings, 157 Ill. 274, 41 N.E. 629 (1895); City of Chicago v. Selz, Schwab & Co., 202 Ill. 549, 67 N.E. 386 (1903); Greinke v. Chicago City Ry. Co., 234 Ill. 564, 85 N.E. 327 (1908).

That a general charge of negligence is sufficient After Verdict, see: Chicago City Ry. Co. v. Shreve, 226 Ill. 536, 80 N.E. 1049 (1907).

And in Illinois, it is sufficient to allege that the defendant negligently and carelessly propelled the engine with great force against certain cars where the plaintiff was working with the knowledge of the defendant. Illinois Cent. Ry. Co. v. Aland, 192 Ill. 39, 61 N.E. 450 (1901).

61. Shipman, Handbook of Common-Law Pleading, c. 10, The Declaration in General—Tort Actions, §§ 93, 94, p. 216 (3rd ed. by Ballantine, St. Paul, 1923).

62. In general, on the various aspects of the Doctrine of Res Ipsa Loquitur, see:

Treatises: Shain, Res Ipsa Loquitur, Presumptions and Burden of Proof (Los Angeles, 1945); id. (2d ed. Los Angeles, 1947).

Articles: Bond, The Use of the Phrase Res Ipsa Loquitur, 66 Cent.L.J. 386 (1908); Berry, The Application of Res Ipsa Loquitur in Master and Servant Cases, 84 Cent.L.J. 67, 53 Can.L.J. 104 (1917); Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur, 22 Ill.L.Rev. 724 (1928); Niles, Pleading Res Ipsa Loquitur, 7 N.Y.U.L.Q.Rev. 415 (1930); Carpenter, The Doctrine of Res Ipsa Loquitur, 1 U. Chi.L.Rev. 519 (1934); Prosser, Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles, 30 Ill.L. Rev. 980 (1936); Rosenthal, The Procedural Effect of Res Ipsa Loquitur in New York, 22 Corn.L.Q. 30 (1936); Prosser, The Procedural Effect of Res Ipsa Loquitur, 20 Minn.L.Rev. 241, 271 (1936); Carpenter, The Doctrine of Res Ipsa Loquitur in California, 10 So.Cal.L.Rev. 166 (1937); Prosser, Res Ipsa Loquitur: A Reply to Professor Carpenter, 10 So.Cal.L.Rev. 459 (1937); Carpenter, Res Ipsa Loquitur: A Rejoinder to Professor Prosser, 10 So.Cal.L.Rev. 467 (1937); Malone, Res Ipsa Loquitur and Proof by Inference, 4 La.L.Rev. 70 (1941); Shain, Res Ipsa Loquitur, 17 So.Cal.L.Rev. 187 (1944); Goldin, The Doctrine of Res Ipsa Loquitur

63. See Note 63 on Page 186.

The causal connection between the negligent act of the defendant and the injury received by the plaintiff should be made to appear. "Whereby" and "by means of the premises" are frequently used to charge that injury resulted from the defendant's act to plaintiff's person or property, and that the negligence was the proximate cause of the injury.[64]

in Aviation Law, 18 So.Cal.L.Rev. 15, 124 (1944); Morris, Res Ipsa Loquitur in Texas, 26 Tex.L.Rev. 257 (1948); Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183 (1949), reprinted in Prosser Selected Topics on the Law of Torts, 302 (Ann Arbor, 1954); Dewey, A Tare in the Field of Res Ipsa Loquitur, 19 U. of Cin.L.Rev. 415 (1950); Seavey, Res Ipsa Loquitur: Tabula in Naufragio, 63 Harv. L.Rev. 643 (1950); Slife, The Iowa Doctrine of Res Ipsa Loquitur, 35 Iowa L.Rev. 393 (1950); Jaffe, Res Ipsa Loquitur Vindicated, 1 Buffalo L.Rev. 1 (1951); McLarty, Res Ipsa Loquitur in Airline Passenger Litigation, 37 Va.L.Rev. 55 (1951).

Comments: Torts-Res Ipsa Loquitur—Injury to Adjacent Nerve in the Course of an Operation, 40 Col.L. Rev. 161 (1940). Res Ipsa Loquitur: Applicability to Airplane Accidents: Haasman v. Pacific Alaska Air Express, 100 F.Supp. 1 (D.C.Alaska 1951), 37 Cornell L.Q. 543 (1952); Res Ipsa Loquitur: Its Nature and Effect, 3 U.Chi.L.Rev. 126 (1935); Application of the rule "Res Ipsa Loquitur" to Actions by Employee Against his Employer. Whitmaker v. Pitcairn, 174 S.W.2d 163 (Mo.1943), 9 Mo.L.Rev. 283 (1944); Food—Res Ipsa Loquitur as Applied to Suits Against the Manufacturer or Preparer of Articles Intended for Human Consumption, 23 Ky.L.J. 534 (1935); Res Ipsa Loquitur as Applied to a Runaway Car—Lewis v. Wolk, 39 Ky.L.J. 328 (1951); Practice and Procedure—The Effect of Plaintiff's Pleading on the Doctrine of Res Ipsa Loquitur, 31 Mich.L.Rev. 817 (1933); Evidence—Application of Res Ipsa Loquitur to Automobile Accidents—(1) The Doctrine in General, 24 Geo.L.J. 448 (1936); Evidence—Negligence—Res Ipsa Loquitur—The Doctrine Applied in an Action for Malpractice to do away with the Need for Expert Testimony, 9 Brook. L.Rev. 335 (1940); Evidence—Presumptions—Plaintiff's Res Ipsa Loquitur Against Defendant's Presumption of Due Care, 1 Mich.L.Rev. 295 (1952); Directing a Verdict for Plaintiff in Res Ipsa Loquitur Cases, 22 Wash.V.L.Q. 100 (1936); Negligence—Res Ipsa Loquitur—Justification for a Directed Verdict in Favor of the Plaintiff, 51 Mich.L.Rev. 119 (1952); Arnold, Instructions on Res Ipsa Loquitur, 13 Mo.L.Rev. 217, 221 (1948); Evidence—Res Ipsa Loquitur—Evidence of Specific Negligence as Affecting Reliance upon General Negligence, 50 Mich.L. Rev. 1108 (1952).

Annotations: Res Ipsa Loquitur as Applicable to Injury to passenger in collision where other vehicle was not within carrier's control, 25 A.L.R. 600 (1923); 83 A.L.R. 1163 (1933); 161 A.L.R. 1113 (1946); "Res Ipsa Loquitur" as a Presumption or a mere Permissible "Inference", 53 A.L.R. 1494 (1928), 167 A.L.R. 658 (1947); Res Ipsa Loquitur distinguished from characterization of a known condition as negligence, and the establishment of negligence by circumstantial evidence, 59 A.L.R. 468 (1929), 78 A.L.R. 731 (1932), 141 A.L.R. 1016 (1942); Res Ipsa Loquitur in its relation to the burden of proof and burden of evidence, 59 A.L.R. 486 (1929), 92 A.L.R. 653 (1934); Res Ipsa Loquitur as applicable in case of injury by X-Ray, 152 A.L.R. 638 (1944); Res Ipsa Loquitur as applied to collision between a moving automobile and a standing automobile or other vehicle, 151 A.L.R. 876 (1944); Res Ipsa Loquitur as ground for direction of verdict in favor of plaintiff, 153 A.L.R. 1134 (1944); Pleading particular cause of injury as waiver of right to rely on Res Ipsa Loquitur, 79 A.L.R. 48 (1932), 160 A.L.R. 1450 (1946); Physicians and Surgeons: Presumption or Inference of Negligence in Malpractice Cases, Res Ipsa Loquitur, 162 A.L.R. 1265 (1946); Res Ipsa Loquitur Doctrine as Affected by Injured Person's Control over or Connection with Instrumentality, 169 A.L.R. 953 (1947); Res Ipsa Loquitur as applied to bursting of bottled beverages, food containers, etc., 4 A.L.R.2d 466 (1949); Res Ipsa Loquitur in Aviation Accidents, 6 A.L.R.2d 528 (1949).

DECLARATION IN TRESPASS ON THE CASE—ESSENTIAL ALLEGATIONS: (5) THE DAMAGES

92. It must appear that the Wrongful Act of the defendant was the legal cause of the injury to the plaintiff's right.

THE Declaration must state the damages resulting as the legal and natural consequences of the injury done. These may be general or special, and special damages should be alleged specifically. In many torts falling within the scope of the action on the case, damage is the gist of the action, and must be alleged in order to show a cause of action.

Whatever damages the plaintiff has suffered from the injury committed by the defend-

63. Ellis v. Waldron, 19 R.I. 369, 33 Atl. 869 (1896) (Res Ipsa Loquitur).

64. Strain v. Strain, 14 Ill. 368 (1853); McGanahan v. East St. Louis & C. Ry. Co., 72 Ill. 557 (1874); Hartnett v. Boston Store of Chicago, 185 Ill.App. 332 (1914).

ant, which follow as the legal and natural consequences of such injury, are recoverable, and should be laid in a sum sufficiently high to cover all the plaintiff expects to prove, as his recovery will be limited by the amount stated.[65] As in all other actions the damages may be either general or special and, if special or peculiar to the case, they must be alleged specifically.[66] Recovery will be confined to the injuries alleged by the declaration to have resulted from the particular negligence charged. In Case, unlike Trespass, damage is usually an essential element of liability.[67]

PARTICULAR APPLICATIONS OF CASE AS THE GREAT RESIDUARY COMMON-LAW REMEDY FOR VARIOUS WRONGS

93. Case lies for certain wrongs of negligence and misfeasance, which may be committed in the course of performance of a contract, and also for the nonperformance of certain obligations prescribed by law, such as those incident to bailments and public callings; also neglect of official duty, and for certain statutory liabilities.

THE history of the Common Law Procedure is the history of moral rights, without remedy because of the lack of an appropriate Writ or precedent in the Register of Writs, until the persistence of a demand for remedy developed the Action of Trespass on the Case to cover all cases similar to, but not quite identical with Trespass.[68] In the beginning the new action was merely supplementary to the old. But through the continual and constantly expanding application of Case, the first instance of which appeared in 1369,[69] as a remedy for a wide variety of human wrongs, not otherwise remediable, most of our modern law, contract, quasi-contract, property, and tort, has been evolved, and by reason thereof, the Common Law has been able to largely make good its proud boast, first uttered as early as and by Bracton, that where there is a wrong there is a remedy. It is for this reason that the Action on the Case is frequently referred to as the Great Residuary Remedy of the Common Law.

Torts in Connection with Contract

MERE breach of Contract, without more, will not sustain an Action on the Case, but the remedy is Assumpsit, Covenant, or Debt.[70] But often one of the parties to a contract may commit a tort in the execution of it, or in its nonperformance, and case may lie for the injury. Thus, it lies against attorneys or other agents for neglect or other breach of duty, or misfeasance in the conduct of a cause, or other business,[71] though it is

65. See Foreman v. Sawyer, 73 Ill. 484 (1874), holding that a Judgment cannot exceed the *ad damnum* laid in the Declaration.

66. City of Chicago v. McLean, 133 Ill. 148, 24 N.E. 527, 8 L.R.A. 765 (1866). Special Damages must be pleaded with particularity, such as Mental pain and expenses of cure. Illinois: Garvey v. Metropolitan West Side Elevated R. Co., 155 Ill.App. 601 (1908), involving mental suffering; New Hampshire: Corey v. Bath, 35 N.H. 530, 545 (1857), involving General Damage.

67. English: Howell v. Young, 5 B. & C. 259, 108 Eng. Rep. 97 (1826); Rhode Island: Sullivan v. Waterman, 20 R.I. 372, 39 A. 243, 39 L.R.A. 773 (1828), involving a public nuisance; West Virginia: Washington v. Baltimore and O. R. Co., 17 W.Va. 190 (1880), involving negligence; McGlamery v. Jackson, 67 W.Va. 417, 68 S.E. 105, 21 Ann.Cas. 239 (1910), holding that a lack of an *ad damnum* clause in Trespass on the Case is demurrable. Federal: Jackson and Sharp Co. v. Fay, 20 App.D.C. 105 (1902), involving damages in deceit; Pollard v. Lyon, 91 U.S. 225, 23 L.Ed. 308 (1875), involving libel and slander.

68. Sims v. Sims, 79 N.J.L. 577, 76 A. 1063 (1910).

69. Y.B. 43 Edw. III, f. 33, pl. 38 (1369).

70. Michigan: Potter v. Brown, 35 Mich. 274 (1877); New York: Masters v. Stratton, 7 Hill. (N.Y.) 101 (1845).

71. Alabama: Walker v. Goodman, 21 Ala. 647 (1852); Goodman v. Walker, 30 Ala. 482, 68 Am.Dec. 134 (1857); Arkansas: Penningtons Ex'rs. v. Yell, 11 Ark. 212, 52 Am.Dec. 262 (1850). Rhode Island: Holmes v. Peck, 1 R.I. 242 (1849); Massachusetts: Ashley v. Root, 4 Allen (Mass.) 504 (1862); Gilbert v. Williams, 8 Mass. 51, 5 Am.Dec. 77 (1811); Dearborn v. Dearborn, 15 Mass. 316 (1818); Varnum v. Martin, 15 Pick. (Mass.) 440 (1834); Mississippi: Coopwood v. Bolton, 26 Miss. 212 (1853); New York: Church v. Murmford, 11 Johns. (N.Y.) 479

more usual to declare in Assumpsit. Assumpsit is the usual remedy for neglect or breach of duty against bailees, as against carriers, wharfingers, warehousemen, and others having the use or care of personal property, whose liability is founded on the Common Law as well as upon Contract; but they are also liable in case for an injury resulting from their neglect or breach of duty in the course of their employment.[72] For any nonfeasance by a party in a public employment which he professes, an Action on the Case will lie by the party injured, as where a common carrier fails to perform its common law obligation to serve all who apply.[73]

Even though there may be an express contract, still, if a Common Law duty results from the facts, the party may be sued *ex delicto* in Case for any neglect of misfeasance in performing it.[74] "If the contract be laid as inducement only, it seems that Case for an act, in its nature a tort or injury, afterwards committed in breach of the contract, may often be adopted." [75] Thus, Case will lie for not accounting for, and for converting

(1814); Pennsylvania: Lynch v. Com., to Use of Barton, 16 Serg. & R. (Pa.) 368, 16 Am.Dec. 582 (1827); Shreeve v. Adams, 6 Phila. (Pa.) 260 (1867); Vermont: Crooker v. Hutchinson, 1 Vt. 73 (1827).

And Case also lies for negligence by a surgeon in performing an operation. Cadwell v. Farrell, 28 Ill. 438 (1862).

72. English: Carbett v. Packington, 6 Barn. & C. 268, 108 Eng.Rep. 451 (1827); Pozzi v. Shipton, 8 Adol. & E. 963, 112 Eng.Rep. 1106 (1838); Illinois: Warner v. Dunnavan, 23 Ill. 380 (1859); Wabash, St. L. & P. Ry. Co. v. McCasland, 11 Ill.App. 491 (1882); Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am.Rep. 688 (1883); Kentucky: Bell v. Wood, 1 Dana (Ky.) 147 (1833); Massachusetts: School District in Medfield v. Boston, H. & E. R. Co., 102 Mass. 552, 3 Am. Rep. 502 (1869); New York: Bank of Orange County v. Brown, 3 Wend. (N.Y.) 158 (1830); Lockwood v. Bull, 1 Cow. (N.Y.) 322, 13 Am.Dec. 539 (1823); Virginia: Southern Express Co. v. McVeigh, 20 Grat. (Va.) 264 (1871).

And Case is a proper remedy against one who has hired a horse and has ill-used it. Rotch v. Hawes, 12 Pick. (Mass.) 136, 22 Am.Dec. 414 (1831).

73. Illinois: Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am.Rep. 688 (1883); Virginia: Southern Express Co. v. McVeigh, 20 Grat. (Va.) 264 (1871).

And where the manufacturer of an article negligently furnishes to a purchaser something different from what he purports to furnish, such as a defective rope, whereby the purchaser is injured, Case will lie. Brown v. Edgington, 2 Man. & G. 279, 133 Eng. Rep. 751 (1841).

74. English: Dickson v. Clifton, 2 Wils. 319, 95 Eng. Rep. 834 (1766); Burnett v. Lynch, 5 Barn. & C. 605, 108 Eng.Rep. 220 (1826); Illinois: Kankakee & S. W. R. Co. v. Fitzgerald, 17 Ill.App. 525 (1885); Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688 (1883).

Where a person engaged in lending money on real estate security solicits money to loan, and obtains it on his promise to take security by first mortgage on property in value double the sum loaned, and then takes a second mortgage unknown to his principal, whereby the money is lost, his principal is not limited to an Action of Assumpsit, for Breach of the Contract, but may sue in Case. Shipherd v. Field, 70 Ill. 438 (1873).

For the diversion of a stream of water, the use of which is directly granted by Contract under Seal, Case is the Proper Remedy. The party need not bring Covenant on the agreement. Lindeman v. Lindsey, 69 Pa. 93, 8 Am.Rep. 210 (1871). And see, also, Strickler v. Todd, 10 Serg. & R. (Pa.) 63, 13 Am. Dec. 649 (1823).

Where there is a positive duty created by implication of Law independent of Contract, though arising out of a relation or state of facts created by Contract, an Action on the Case as for a Tort will lie for disregard or violation of that duty. Flessher v. Carstens Packing Co., 93 Wash. 48, 160 P. 14 (1916). See, also, Indiana: Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N.E. 503, 12 L.R.A. 924 (1906); Massachusetts: Tuttle v. Gilbert Mfg. Co., 145 Mass. 169, 13 N.E. 465 (1887); and Comment, Landlord & Tenant; Breach of Agreement to Repair, 8 Col.L.Rev. 666 (1908).

75. 1 Chitty, A Treatise on Pleading Action on the Case, 152 (Springfield, 1833); Burnett v. Lynch, 5 Barn. & C. 609, 108 Eng.Rep. 220 (1826); Mast v. Goodson, 3 Wils. 348, 95 Eng.R 994 (1772); Corbett v. Packington, 6 Barn. & C. 273, 108 Eng.Rep. 451 (1827).

See, generally, as to Actions on the Case *ex delicto*, where there has been a Contract: Connecticut: Stoyel v. Westcott, 2 Day (Conn.) 422, 2 Am.Dec. 109 (1807); Bulckley v. Storer, 2 Day (Conn.) 531 (1807); Humiston v. Smith, 22 Conn. 19 (1852); Maryland: Philadelphia W. & B. R. Co. v. Constable, 39 Md. 155 (1873); Federal: Vasse v. Smith, 6 Cranch 227, 3 L.Ed. 207 (1810); Emigh v. Pittsburg, Ft. W. & C. R. Co., 4 (Biss.) 114, Fed.Cas.No.4,449 (1867).

to his own use, bills delivered to a person to be discounted, or the proceeds of such bills.[76] And a Count in Case stating that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter work on a building, and to use those materials, but that the defendant, instead of using them, made use of new materials, thereby increasing the expense, was sustained.[77]

Though Covenant or Assumpsit is a concurrent remedy, Case will lie for a false warranty on the sale of land or goods.[78] And Case is the remedy for false representations (required by the Statute of Frauds to be in writing) as to the credit of a person.[79] It is also the proper remedy for any other fraud or deceit independently of and without relation to any contract between the parties,[80] and for fraudulent representations, not introduced into a written contract between the parties respecting the subject-matter of the representations.[81]

If goods are obtained on credit through a fraudulent contract, the proper remedy is Case (or Trover), at least before the expiration of the credit; for if, before that time, Assumpsit is brought to recover the price, it is a recognition and affirmance of the contract, and it may be successfully met by the defense that the term of credit has not expired.[82]

Case will lie against a surgeon or agent to recover damages for improper treatment, or for want of skill or care though there is a concurrent remedy by Assumpsit on the contract.[83]

A reversioner may maintain an Action on the Case against his tenant or against a stranger for commissive or willful waste, to the injury of the reversion; and it makes no difference that the tenant has covenanted not to commit waste, for the remedy on the covenant is merely concurrent, and not exclusive.[84] As to whether the action will lie

76. English: Samuel v. Judin, 6 East 333, 102 Eng. Rep. 1314 (1805); North Carolina: Smith v. White, 6 Bing. (N.C.) 218 (1828).

77. Elsee v. Gatward, 5 T.R. 143, 101 Eng.Rep. 82 (1793).

78. English: Stuart v. Wilkins, 1 Doug. 21, 99 Eng. Rep. 15 (1778); Williamson v. Allison, 2 East 446, 102 Eng.Rep. 439 (1802); Michigan: Beebe v. Knapp, 28 Mich. 53 (1873); Carter v. Glass, 44 Mich. 154, 6 N.W. 200, 38 Am.Rep. 240 (1880); New Hampshire: Mahurin v. Harding, 28 N.H. 128, 59 Am.Dec. 401 (1853); New York: Culver v. Avery, 7 Wend. (N.Y.) 380, 22 Am.Dec. 586 (1831); Ward v. Wiman, 17 Wend. (N.Y.) 193 (1837); Evertson's Ex'rs. v. Miles, 6 Johns. (N.Y.) 138 (1810).

79. New York: Upton v. Vail, 6 Johns. (N.Y.) 181, 5 Am.Dec. 210 (1810); Federal: Russell v. Clark's Ex'rs., 7 Cranch (U.S.) 92, 3 L.Ed. 271 (1812).

80. English: Pasley v. Freeman, 3 T.R. 51, 100 Eng. Rep. 450 (1789); Adamson v. Jarvis, 4 Bing. 73, 130 Eng.Rep. 693 (1827); New York: Culver v. Avery, 7 Wend. (N.Y.) 380, 22 Am.Dec. 586 (1831); Barney v. Dewey, 13 Johns. (N.Y.) 226, 7 Am.Dec. 372 (1816); Wardell v. Fosdick, 13 Johns. (N.Y.) 325, 7 Am.Dec. 383 (1816); Monell v. Colden, 13 Johns. (N.Y.) 395, 7 Am.Dec. 390 (1816); 1 Street, Foundations of Legal Liability, 375 (Northport, 1906).

81. Illinois: Applebee v. Rumery, 28 Ill. 280 (1862); Peck v. Brewer, 48 Ill. 54 (1868); Brumbach v. Flower, 20 Ill.App. 219 (1889); Massachusetts: Burns v. Dockray, 156 Mass. 135, 30 N.E. 551 (1892); Michigan: Walsh v. Sisson, 49 Mich. 423, 13 N.W. 802 (1882); New York: Culver v. Avery, 7 Wend. (N.Y.) 280, 22 Am.Dec. 586 (1831); Wardell v. Fosdick, 13 Johns. (N.Y.) 325, 7 Am.Dec. 280 (1816); Hallock v. Powell, 2 Cai. (N.Y.) 216 (1804).

82. English: Ferguson v. Carrington, 9 Barn. & C. 59, 109 Eng.Rep. 22 (1829); Illinois: Kellogg v. Turpie, 93 Ill. 265, 34 Am.Rep. 163 (1879).

In some Jurisdictions, however, immediate recovery of the price is allowed. Heilbronn v. Herzog, 165 N. Y. 98, 58 N.E. 759 (1900).

83. English: Seare v. Prentice, 8 East 348, 103 Eng. Rep. 376 (1807); North Carolina: Gladwell v. Steggall, 5 Bing. (N.C.) 733 (1866).

84. 1 Saund. 323b, 85 Eng.Rep. 459 (1669); Greene v. Cole, 2 Saund. 252b, 85 Eng.Rep. 1037 (1670); 1 Chitty, A Treatise on Pleading, c. II, Of the Form of Action, 142 (3rd Am. from the second London edition by Dunlap) (Philadelphia, 1819); English: Kinlyside v. Thornton, 2 W.Bl. 1111, 96 Eng.Rep. 657 (1776); New York: Short v. Wilson, 13 Johns. (N. Y.) 33 (1814).

The tenant's remedy against a stranger is Trespass, 1 Chitty, A Treatise on Pleading, c. II, Of the Form of Action, 107 (3rd Am. from the second London edition by Dunlap, Philadelphia, 1819); Attersoll v. Stevens, 1 Taunt. 194, 127 Eng.Rep. 807 (1808).

against a tenant for permissive waste (that is, a neglect to repair), there is a conflict of opinion. It seems that it does not lie, and that the only remedy is on the covenants in the lease.[85]

Injury to a Lien

IN the New York case of *Yates* v. *Joyce*,[86] the plaintiff, *A*, alleged that he, as assignee of a Judgment from one *K* against *J*, which was a lien on the property of *J*, was about to take out Execution and seize a certain lot of land; that the defendant, *B*, well knowing the premises and intending to injure the plaintiff, and prevent him having satisfaction, tore down a barn on the premises worth $300, leaving the ground of less value than the plaintiff's judgment; and that *J*, being insolvent, had no other property with which to satisfy the Judgment. The defendant Demurred, and on the argument contended that the plaintiff, having a mere lien only, and not being in possession could not maintain *any* action against the defendant, who is answerable only to the person in possession, and that there was no precedent for such an action.

The Court, in overruling the defendant's Demurrer, declared: "This appears to be an action of the first impression. The books do not furnish a precedent in its favor. It is obvious, however, from the statement of the plaintiff's case, in the Declaration the truth of which is admitted by the Demurrer, that he has sustained damage by the act of the defendant, which he alleges was done fraudulently, and with intent to injure him. It is the pride of the Common Law, that wherever it recognizes or creates a private right, it also gives a remedy for the wilful violation of it. The facts stated in the Declaration being admitted by the Demurrer, we are to assume that the plaintiff had acquired a legal *lien* on the property, by means of the Judgment in favor of Kane, and the assignment of it to himself; and that the injury to the property was done with a full knowledge of the plaintiff's rights. If, then, there is any remedy for him, it is in this Form of Action only that he can obtain it. Trespass will not lie; for the plaintiff was not in possession. The principle which governed the decision in the case of Smith v. Tonstall, (Carth. 3; 13 Vin.Abr. 553) is somewhat analogous. It was there ruled that an action will lie against the defendant for confessing a Judgment by fraud, in order to prevent the plaintiff from having the benefit of a Judgment he had obtained against him. It is sound principle, that where the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages for the same; and such is the case presented by the pleadings in this cause." [87]

Injury to Reversionary Interest

TRESPASS *quase clausum fregit* may be maintained by the owner of land for an injury to his freehold where it is in the occupation of a tenant at will.[88] This doctrine was not extended so as to apply to a remainderman who was not entitled to possession. And it has been held that such an action will not lie by the reversioner for waste committed by a person acting under the authority of the tenant for life.[89] But the reversioner or re-

85. Gibson v. Wells, 1 Bos. & P. (N.R.) 290, 127 Eng. Rep. 473 (1805); Herne v. Bembow, 4 Taunt. 764, 128 Eng.Rep. 531 (1813); Jones v. Hill, 7 Taunt. 392, 129 Eng.Rep. 156 (1817).

But is seems to lie against an assignee of the lease. Burnett v. Lynch, 5 Barn. & C. 589, 108 Eng.Rep. 220 (1826).

86. 11 Johns. (N.Y.) 136 (1814).

87. In *accord*: Goulet v. Asseler, 22 N.Y. 225 (1860), which was decided under the Reformed Procedure.

88. Bartlett v. Perkins, 13 Me. 87 (1836); Kimball v. Sumner, 62 Me. 305 (1823); Starr v. Jackson, 11 Mass. 519 (1810).

As to the true explanation of this result, see the discussion under Injury to Freehold by Tenant at Will, following immediately hereinafter.

89. Shattuck v. Gragg, 23 Pick. (Mass.) 88 (1839).

mainderman is not without remedy when the injury is of a permanent character affecting the inheritance, for in such case an Action of Trespass on the Case would lie.[90] The Rule of Pleading, as clearly laid down in the leading case of *Jackson* v. *Pesked*,[91] is that where the plaintiff sues as a reversioner, he must either state an injury of such a permanent nature as to be necessarily injurious to his reversion; or if the wrongful acts complained of are not of such a character as necessarily to result in an injury to the reversionary estate, but only of an equivocal nature, the plaintiff must allege that they were done to the damage or prejudice of his reversion; and in the latter case, the lack of such an allegation, will be fatal on demurrer; or good cause for arresting the judgment.[92]

Injury to Freehold by Tenant at Will

AT Common Law, a landlord, in order to maintain Trespass, must have been in actual possession of the premises at the time the trespass occurred.[93] And he had no Remedy in Waste against a tenant at will.[94] In this situation it has usually been said that the wrongful act of the tenant at will terminated the tenancy, restored the possession to the landlord, who could then maintain an Action of Trespass. Actually there was no direct forcible invasion of the landlord's possession; in fact the tenant had possession by legal means. But in the face of an urgent demand for a remedy, by resort to a fiction, Trespass was commandeered to serve, and to fill in a temporary gap in the remedial law, although its fundamental theory that it lay only for wrongful interference with possession, was clearly violated; the tenant at will in fact remained in possession after his misconduct. Thus Trespass, Case not being in existence when the problem first arose, was stretched beyond all semblance of its original theory, to cover what was in fact an indirect, consequential injury to the landlord's interest. And the proof of this is that when Case came in, it was said in *West* v. *Treude*[95] that the landlord might have either an Action on the Case or Trespass against a tenant at will. In time however Trespass ceased to be used and the accepted remedy became an Action on the Case in the Nature of Waste.

Seduction of Another Man's Daughter, Wife or Servant

WHEN the demand for a remedy arose for the seduction or debauching of another's daughter, wife or servant, the first remedy given by the Common Law was Trespass *vi et armis,* the law implying force, thus enabling the father, husband or servant to sue in that action.[96] Here again the injury was an indirect consequential one, and here, again, as in the tenant at will case, Trespass was commandeered to supply a remedy, Case not yet being available. By resort to a fiction, the courts treated the daughter as the servant of the master, who thus acquired a possessory interest. Seduction was an interference with such possessory interest, resulting in damage, for which Trespass thus became a remedy. When Case came in, it was utilized as a remedy for what was clearly an indirect consequential injury, not an injury to the possession of the husband, par-

90. Lawry v. Lawry, 88 Me. 482, 34 A. 273 (1896).

91. 1 Maule & S. 234, 105 Eng.Rep. 88 (1813). See also, Maine: Lawry v. Lawry, 88 Me. 482, 34 A. 273 (1896); New Jersey: Potts v. Clark, 20 N.J.L. 536, 541 (1844).

92. Cf. Halligan v. Chicago & Rock Island R. R., 15 Ill. 558 (1854).

93. Campbell v. Arnold, 1 Johns. (N.Y.) 511 (1806). Cf. Shrewsbury's Case, 5 Co.Rep. 13a, 77 Eng.Rep. 68 (1600); Starr v. Jackson, 11 Mass. 519 (1814).

94. Anonymous, Saville 84, 123 Eng.Rep. 1027; Cf. Shrewsbury's Case, 5 Co.Rep. 13a, 77 Eng.Rep. 68 (1600); Starr v. Jackson, 11 Mass. 519 (1814).

95. Cro.Car. 187, 79 Eng.Rep. 764 (1630).

96. Chamberlain v. Hazlewood, 5 Mees. & W. 515, 151 Eng.Rep. 218 (1839); Tullidge v. Wade, 3 Wils.K.B. 18, 95 Eng.Rep. 909 (1769); Woodward v. Walton, 2 B. & P. (N.R.) 476, 127 Eng.Rep. 715 (1807), in which the Declaration was in Trespass.

ent or master. Accordingly, in *Chamberlain* v. *Hazlewood,*[97] we find the plaintiff bringing Case for the consequential damage. In such case he may now, at his election, treat the loss of society or services, and not the defendant's act of seduction, as the injury, and, as that is merely consequential, sue in Case.[98]

The order of development is illustrated by two New York cases; in the first, *Akerley* v. *Haines,*[99] decided in the year 1805, Trespass was held to be the proper remedy for the seduction of a daughter, whereas, in the second, *Moran* v. *Dawes,*[1] decided just twenty years later, in 1825, the Supreme Court of the State sustained Case, declaring: "It is clear, we think, both upon principle and authority, that Case, is, without exception, a proper remedy. (Selw. N. P. 1083, note (17) cites 2 T.R. 167, 8, per Buller, J., and per Holt, C. J., Ld. Raym. 1032.) Neither the injury to the person of the child nor the property of the plaintiff are, in truth, ever taken into the account. They are little more than a mere fiction, adopted in order to sustain the Remedy by Trespass. The direct injury may be waived in all cases; and the declaration framed to meet the consequential injury, disregarding entirely every consideration except the loss of service, and the more important one of seduction and disgrace. A very usual case may be supposed, in which, if we are to be governed by the technical rules relating to an Action of Trespass, the father would be remediless for the most aggravated form of the injury, unless he has an election. The seducer is received at the dwelling of the father on the footing of a suitor; he thus having a license to enter the house, of which he avails himself to accomplish the seduction, with the consent of the daughter. It could hardly be said that Trespass and Assault would lie for such an act. The father is then put to his remedy by Trespass *quare domum fregit,* laying the seduction, &c., by way of aggravation. The defendant does not become a trespasser *ab initio,* for license was given by the party. A person who is guilty of abusing an authority in fact, does not thereby become a trespasser *ab initio;* but it is otherwise where a license is given by the law." [2]

97. 5 Mees. & W. 515, 151 Eng.Rep. 218 (1839).

98. English: Chamberlain v. Hazlewood, 5 Mees. & W. 515, 151 Eng.Rep. 218 (1839).

99. 2 Cai. (N.Y.) 292 (1805).

1. 4 Cow. (N.Y.) 412 (1825).

Actions Against the Master for Injuries Occasioned by the Wrong of the Servant—Vicarious Liability

THE relation of master and servant was and is contractual in nature. Once the relationship was established obligations accrued on both sides. The master was under a duty to provide a safe place to work, to provide safe appliances and equipment, to warn the servant of dangerous conditions on the premises, to provide suitable and competent fellow servants, and to make reasonable rules to regulate the conduct of the work. On the other hand the servant was required to exercise reasonable care for his own safety and in the exercise of his duties within the scope of his employment. And it is important to observe that once the master-servant relationship is established, the master may be subjected to vicarious liability for the servant's torts, although the master is free of any wrongful conduct.[3] Such liability has to do with those acts so closely related with what the servant was employed to do, and which were reasonably incidental to it, as they could be viewed as methods, although of questionable validity, of carrying out the master's instructions. As to what acts are authorized, depends upon the time, place and purpose of the act, together with its similarity to the acts authorized. And in 1834, in

2. 4 Cow. (N.Y.) 412, 413 (1825).

3. See article by Powell, Some Phases of the Law of Master and Servant, 10 Col.L.Rev. 1 (1910).

the case of *Joel* v. *Morrison*,[4] Baron Parke, ruled that a master was not liable for the tortious acts of his servant where the servant was not in pursuit of his master's business, but was "on a frolic of his own."

In general, the master is subject to liability for injuries caused by the tortious conduct of the servant where such conduct is within the scope of his employment; and the remedy against the master for injuries resulting from the wrong of his servant is in Case, even though, against the servant, it might for the same act be Trespass; [5] but under some circumstances, the master may also be liable in Trespass.[6] Where an injury arises from the want of care or negligence of the servant, the remedy against the master is in Case; [7] but if it occurs as the necessary or natural and probable consequence of an act of the servant, ordered expressly or impliedly by the master, then the act is the master's, and, if the act was forcible and the injury immediate, the remedy is Trespass.[8] Under the early decisions such as *M'Manus* v. *Crickett*,[9] the courts refused to hold the master liable for intentional misconduct on the part of the servant, on the theory that the fiction of an implied command of the master was inapplicable. But under modern law, in allocating the risk of the servant's conduct, it has been held that wilful torts may be so connected with the employment as to fall within its scope.[10]

Alienation of Husband's Affection

IT has long been the law that a husband could maintain an action for the alienation of his wife's affections. Comparatively recently a case [11] of novel impression was considered involving the issue as to whether a wife could maintain an action under New Jersey law against the defendant for "maliciously enticing away the plaintiff's husband, and thereby alienating from her his affections." It appeared that the Common-Law impediment as to remedy had been removed by a statute permitting a married woman to maintain an action in her own name, without joining her husband therein, for all torts committed against her or her separate property, in the same manner as if she were a *feme sole*.[12] In sustaining the wife's action, Minturn, J., after alluding to the earlier, but incorrect view as to the origin of Case out of the Statute of Westminster II (1285),[13] concluded that the wife was entitled to vindicate her right *in personam* for a tort committed against her, and thus remedy the inequality to which she was subjected by the common law.

4. 6 Car. & P. 501, 502, 172 Eng.Rep. 1338 (1834).

5. English: M'Manus v. Crickett, 1 East 106, 102 Eng. Rep. 43 (1800); Connecticut: Haven v. Hartford & N. H. R. Co., 28 Conn. 69 (1831); Illinois: Arasmith v. Tample, 11 Ill.App. 39 (1882); Illinois Cent. R. Co. v. Rudy, 17 Ill. 580 (1856); Toledo W. & W. R. Co. v. Harmon, 47 Ill. 298, 306, 95 Am.Dec. 489, 490 (1868); New York: Broughton v. Whallon, 8 Wend. (N.Y.) 474 (1832). See, also, Wright v. Wilcox, 19 Wend. (N.Y.) 343, 32 Am.Dec. 507 (1838); Mali v. Lord, 39 N.Y. 381, 100 Am.Dec. 448 (1868).

What the servant does in the course of business without directions is not the master's act, but the latter is nevertheless liable on the principle of respondeat superior, a kind of insurance obligation to answer for the acts of the servant.

6. Gregory v. Piper, 9 Barn. & C. 591, 109 Eng.Rep. 220 (1829). See, also, Chicago & N. W. v. Peacock, 48 Ill. 253 (1868), which involved Trespass against a railroad company where the Conductor forcibly expelled a passenger from a car. Cf. St. Louis A. & C. R. Co. v. Dalby, 19 Ill. 353, 375 (1857).

7. English: Moreton v. Hardern, 4 Barn. & C. 223, 107 Eng.Rep. 1042 (1825); Kentucky: Johnson v. Castleman, 2 Dana (Ky.) 378 (1834); Massachusetts: Barnes v. Hurd, 11 Mass. 57 (1814); New York: Wright v. Wilcox, 19 Wend. (N.Y.) 343, 32 Am.Dec. 507 (1838).

8. Illinois Cent. R. Co. v. Reedy, 17 Ill. 580 (1822).

9. 1 East 106, 102 Eng.Rep. 43 (1800).

10. See article by Seavey, Speculations as to "Respondeat Superior," Harvard Legal Essays, 433, 453 (Cambridge, 1934).

11. Sims v. Sims, 79 N.J.L. 577, 76 A. 1063 (1910).

12. N.J.P.L.'s 525 (1906).

13. 13 Edw. I.

Deceit

THE Declaration, in an action in an Action of Trespass on the Case for Deceit, must show the essential elements in the wrong,[14] to wit: 1. The specific false representations of material facts; 2. The scienter that the defendant knew his statements to be untrue; [15] 3. That they were believed to be true by the plaintiff and were relied upon by him; 4. That the plaintiff acted thereon; and 5. That the plaintiff suffered damages by such action.

It should appear that the damage is the result of the deceit.[16] It is not sufficient to charge fraud generally, but the specific facts constituting the fraud must be set forth in some detail, including the actual misrepresentations. While it is not necessary to charge an intent to defraud, it should appear that the representations were intended or calculated to influence the plaintiff to act upon them.[17]

14. Florida: Watson v. Jones, 41 Fla. 241, 25 So. 678 (1899); Illinois: Cantwell v. Harding, 249 Ill. 354, 94 N.E. 488 (1911); New Jersey: Eibel v. Von Fell, 63 N.J.L. 3, 42 A. 754 (1899); Michigan: Pforzheimer v. Selkirk, 71 Mich. 600, 40 N.W. 12 (1888); New York: Arthur v. Griswold, 55 N.Y. 410. See, also, 20 Cyc. 102.

15. English: Pasley v. Freeman, 3 T.R. 51, 100 Eng. Rep. 450 (1789); New York: Upton v. Vail, 6 Johns. (N.Y.) 181 (1810); Pennsylvania: Lummis v. Stratton, 1 Pa. 245 (1807).

16. "As the plaintiff can recover nothing in this action without proof of material fraud—that is, such as has resulted in actual damage—and can recover for such loss only as he can show to be a direct consequence of that fraud (Sedgwick on Meas. of Dam. 659; 2 Parsons on Contracts, 769; *Ib.* 771), it follows that the plaintiff must show, with reasonable certainty, in his Declaration, not only what the fraud was by which he has been injured, but also its connection with the alleged damage, so that it may appear judicially to the Court that the fraud and the damage sustain to each other the relation of cause and effect, or, at least, that the one might have resulted directly from the other." Byard v. Holmes, 34 N.J.L. 296, 297 (1870).

17. "The result of the authorities, so far as I have examined them, whether cases or precedents, is, that a mere General Allegation that the matter stated was a pretence, and that the plaintiff was falsely and fraudulently deceived by it, is not sufficient, either in Criminal or Civil Cases, to fasten upon such matter the character of a *false pretence*, and that this can be done in no other way than by a distinct and specific averment of the falsehood of each separate matter of fact stated by the defendant, and intended to be denied by the plaintiff. . . . What has been said with reference to the first Count will be found to apply in all respects, to the second and third, and, I think, substantially to the fourth Count also." Byard v. Holmes, 34 N.J.L. 296, 299 (1870).

Malicious Prosecution [18]

AT Common Law, when an injury is done to another maliciously, by the Process of a Court, as for example, in the case of a malicious arrest, a malicious prosecution of a criminal charge, or a malicious attachment of goods, the Action of Trespass on the Case is the proper remedy, if the Process was regular and the Court had jurisdiction; for there has been no trespass. It is said, however, that either Case or Trespass will lie if the Process was both malicious and unfounded, even though the Court had jurisdiction. Of course, the remedy is in Trespass, and not Case, where the Process or proceeding was irregular and void.

In case for malicious prosecution, the Declaration must show that the original prose-

18. In general, on the subject of Malicious Prosecution, see:

Articles: Ormsby, Malice in the Law of Torts, 8 L.Q.Rev. 140 (1892); Elliott, Malice in Tort, 4 St. Louis L.Rev. 50 (1919); Harper, Malicious Prosecution, False Imprisonment and Defamation, 15 Tex. L.Rev. 157 (1937).

Comments: Malicious Prosecution—Civil Action—Absence of Arrest or Seizure, 16 Mich.L.Rev. 653 (1917–18); The Right to Recover for Malicious Alienation of a Child's Affections, 40 Harv.L.Rev. 711 (1927); Torts—Action for Malicious Prosecution—Failure of Information to State Facts Constituting Crime as Defense, 11 Minn.L.Rev. 678 (1927); Malicious Prosecution—Liability of Prosecuting Attorney, 12 Minn. L.Rev. 665 (1928); Malicious Prosecution—Conviction and Reversal in Criminal Suits as Evidence of Probable Cause, 22 Minn.L.Rev. 740 (1938); Malicious Prosecution—Juvenile Delinquency Proceedings as a Basis for an Action, 22 Minn.L.Rev. 1060 (1938).

cution of the plaintiff by the defendant was brought in a court at the instance of the defendant; the crime charged must be stated, although it is not necessary that it appear that it was sufficiently charged, and it must appear that the charge was made falsely, maliciously, and without any reasonable and probable cause; it must also appear that the accused was innocent, and that the proceedings are at an end, having been terminated in his favor; and the damages must also be alleged, as damage is the gist of the action.[19]

The form of a Declaration for Malicious Prosecution is set out below:

FORM OF DECLARATION IN TRESPASS ON THE CASE FOR MALICIOUS PROSECUTION

_____ Court of the County of _____, to wit, _____ Term.

_____ complains of _____, who has been summoned to answer the said plaintiff of a plea of trespass on the case, for this, to wit, that on the _____ day of _____, 19__, at _____, the defendant went before one _____, a United States commissioner for the _____ district of _____, and then and there before said _____ falsely and maliciously and without any reasonable or probable cause whatsoever, charged plaintiff with having feloniously stolen or taken from out of a mail of the United States a certain registered letter received by plaintiff as postmaster at _____, on or about the _____ day of _____, 19__, and upon such charge the defendant falsely and maliciously and without any reasonable or probable cause whatever, caused and procured said _____, United States commissioner as aforesaid, to make and grant his certain warrant under his hand for the apprehending of plaintiff and for having plaintiff before him, the said _____, or some other United States commissioner, to be dealt with according to the law of said supposed offense, and said defendant, under and by virtue of said warrant, afterwards, to wit, _____, 19__, at _____ county, _____, aforesaid, wrongfully and unjustly and without any reasonable cause whatsoever, caused plaintiff to be arrested by his body and taken into custody and to be imprisoned and brought by public conveyance from _____, _____ county, to _____, in the custody of a deputy marshal of the United States, and before a great many people in the public highway and the streets of _____, and to be detained in custody a long space of time, to wit, _____ hours then next following and defendant afterwards, to wit, _____, 19__, at _____, falsely and maliciously and without any reasonable or probable cause whatsoever, caused the plaintiff to be carried in custody before said _____, so being United States commissioner as aforesaid, to be examined before said commissioner of and concerning said supposed crime, which said commissioner, having heard and considered all that said defendant could say or allege against the plaintiff touching said supposed offense, then and there, to wit, on the day last aforesaid, at _____, adjudged and determined that the said plaintiff was not guilty of the said supposed offense, and then and there caused the plaintiff to be discharged out of custody, fully acquitted and discharged of the said supposed offense, and the defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution is wholly ended and determined, to wit, at _____, aforesaid; to the plaintiff's damage _____ dollars. And therefore he brings his suit.

ENCYCLOPEDIA OF FORMS No. 13415 and No. 6951.

Slander and Libel

(I) *Strictness of Common-Law Pleading in Defamation Cases Explained.*—The requirements of Common-Law Pleading are

19. On the Declaration in Malicious Prosecution, see 19 Standard Proc. 83-97; Pippet v. Hearn, 5 Barn. & Ald. 634, 106 Eng.Rep. 1322 (1822).

strict and technical in regard to Declarations for Slander and Libel. This was true because the idea of defamation originated in the Civil Law, coming into English law through the Ecclesiastical or Church Courts, and hence the allowance of a remedy at Common Law for such actions invoked the rule of strict construction in pleading such causes. It was for this reason, that in declaring on contracts or other written instruments, the General Common Law Rule that the pleader might set out the instrument or writing verbatim, or according to its legal effect, was inapplicable as to libel and slander cases; the libel or slander had to be set forth *verbatim.*[20] This rule, first adopted in England by the Criminal Court of Appeal was in time assimilated by the Civil Courts, and hence passed on down to modern time. The reason for this rule was that the Appellate Court could not tell whether the Lower Court had ruled correctly that the words spoken or written constituted libel or slander, as a matter of law, without having the very words as used in the Criminal Indictment before it. It was therefore required that the very words complained of be set out "in order that the court may judge whether they constitute a ground of action and also because the defendant is entitled to know the precise charge against him and cannot shape his case until he knows." [21]

(II) *The Characteristics and Form of the Declaration in Slander.*—Because the Common-Law Courts regarded libel and slander actions as an innovation, and applied the rule of strict construction in pleading such actions, it is no surprise to find that the Declaration in slander at Common Law consists of an elaborate and absurd jargon of recitals and explanations which obscure the real issues to be tried almost as effectually as if the pleadings were still drawn in Latin, as will appear from the form set out below:

FORM OF DECLARATION IN [22] TRESPASS ON THE CASE FOR SLANDER

CAPTION OR TITLE:

Court: IN THE CIRCUIT COURT OF COOK COUNTY

Term: To the October Term, A.D. 1926

VENUE: COUNTY OF COOK, } ss.
STATE OF ILLINOIS, }

COMMENCEMENT: Arthur Brown, by William Johnson, his attorney, complains of Clarence Dowell, defendant, who has been summoned to answer the plaintiff in a plea of trespass on the case for slander.

BODY:

INDUCEMENT: For that whereas, on the 16th day of January, 1926, in the County of Cook, and until the committing of the grievance by the defendant as hereinafter mentioned,

Plaintiff's Good Name: the plaintiff was always reputed, esteemed, and accepted by all his neighbors, and other good and worthy citizens of the State to whom he was in any wise known, to be a person of good name, fame and credit, and he was, is, and always has been a good, true and faithful citizen of the State, and has never been guilty of or suspected of being guilty of the crime of perjury or any other crime.

20. In declaring on Contracts or other Written Instruments the genus Common Law Rule is that the pleader must set out the Instrument sued upon verbatim, or in the words in which they were made, or according to their legal effect. 1 Chitty, A Treatise on Pleading, 229 (Springfield, 1833). To this General Rule there were two exceptions, to wit, in cases involving Negotiable Instruments and in Libel and Slander cases, the original Common Law Rule being that in such cases the words had to be set out *verbatim.* It has, of course, been modified.

21. Webster v. Holmes, 62 N.J.L. 55, 40 A. 778 (1898).

22. The principles of General Application as to Declaration and subsequent pleadings, both as to Form and Substance, are considered in Chapter 5, The Declaration—General Rules as to Alleging Place, Time, Title and Other Common Matters; and Chapter 6, The Declaration—General Rules as to Manner of Pleading.

BODY:

Preliminary Extrinsic Facts: And whereas also, before the said grievance of the said defendant, a certain action had been pending before a certain justice of the peace, wherein the State of Illinois was the plaintiff and one Fred Jones was the defendant, and which action had been tried at the Circuit Court for the County of Cook, and on such trial the plaintiff was examined on oath, and had given his evidence as a witness on behalf of the State of Illinois, to wit, on June 25, 1925, at Chicago, in the County of Cook as aforesaid.

GRAVAMEN: Yet the said defendant, well knowing the premises, but contriving, wickedly and maliciously, to injure the said plaintiff in his name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good citizens of the State, and cause it to be suspected and believed by those neighbors and citizens of the State that plaintiff had been guilty of the crime of perjury.

COLLOQUIUM: In a certain discourse which the defendant had with the said plaintiff, on the 16th day of January, 1926, in the County of Cook, of and concerning the said plaintiff, in the presence and hearing of divers persons, and of and concerning the said action, and of and concerning the said evidence given by the plaintiff on the trial aforesaid, did falsely, wickedly, and maliciously compose, speak and publish, of and concerning the plaintiff, in the presence of divers persons, certain false, scandalous, malicious and defamatory words, that is to say, "He" (meaning the plaintiff) "took a false oath."

INNUENDO: Thereby meaning and intending that the plaintiff, in the evidence given as a witness at the trial aforesaid, had sworn falsely and had been guilty of the crime known as perjury.

DAMAGES: And by means of the said premises the said plaintiff is greatly injured in his credit and reputation, and brought into public scandal, infamy and disgrace with and amongst his neighbors, &c.

CONCLUSION: Wherefore the said plaintiff saith he is injured and hath sustained damage to the amount of five thousand dollars, and therefore he brings his suit.

WILLIAM JOHNSON
Attorney for plaintiff.

2 CHITTY on Pleading, 620–626 (Springfield, 1833).

(III) *Essential Allegations in Slander and Libel.*—In the Declaration for slander or libel elaborate averments are required to produce "certainty" in the charge, the formal parts of which are five in number:

(A) *The Inducement, the Preliminary Statement of Extrinsic Matter; and the Gravamen.*—This part of the Declaration contained a statement that prior to a certain day the plaintiff had enjoyed a good name among his neighbors, and if the words uttered were not actionable in themselves, it set forth the preliminary extrinsic facts to which the slander applied, and established a basis for showing damage to the plaintiff. But if the words are *prima facie* actionable, no averment of extrinsic facts was necessary, as, for example, in *Worth* v. *Butler*,[23] in which the defendant charged the plaintiff, an unmarried woman, of fornication, which was a felony.

The gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. It is not sufficient, therefore, that the plaintiff should understand himself to be referred to in the article. It is necessary to constitute libel that others than the plaintiff should be in a position to understand that the plaintiff is the person referred to.[24]

(B) *The Colloquium.*—Another technical requirement of a Declaration in Slander was the Colloquium, which was an averment that the defendant was speaking of and concerning the plaintiff. Where the words uttered

23. 7 Blackf. (Ind.) 251 (1844).

24. Divivier v. French, 104 Fed. 278, 43 C.C.A. 529 (1900).

clearly apply to the plaintiff, a colloquium is not necessary. In *Milligan* v. *Thorn*,[25] the plaintiff complained that he had been slandered, but he was not named in the slanderous words. The plaintiff therefore was required to include a colloquium, that a conversation was had of and concerning him. Without this nothing was expressed to which the innuendo could refer, when the plaintiff stated that he was intended.[26]

(C) *The Publication of the Scandal Itself.*—As the basis of actions for libel and slander is damages for the injury to the character of the plaintiff in the opinion of others, and that can only arise where the words uttered or written are published to third persons, the declaration must allege publication of the slanderous or libelous matter. Thus, for example, in *Waistel* v. *Holman*,[27] where the declaration averred that the defendant composed, wrote and delivered to the plaintiff a certain libel, addressed and directed to the plaintiff, a Demurrer was sustained, as the averment failed to show a publication of the libel; sending a sealed letter to the plaintiff was not a publication.

(D) *The Innuendo.*—This part of the Declaration followed the colloquium, and its object was to explain the defendant's meaning by reference to the previous statements in the inducement and colloquium; but an innuendo cannot enlarge the meaning shown by the inducement in which the surrounding conditions are set forth.[28] In *Roella* v. *Follow*,[29] the colloquium stated that "He" (meaning the plaintiff) "took a false oath," but the Court held that the Declaration was inadequate in that the words were not in themselves actionable, and require an "innuendo which is necessary, in such cases, to explain the defendant's meaning by reference to previous matter."

(E) *The Consequent Damages.*—This was merely a conclusion of the plaintiff that he had sustained damages to a certain amount, and therefore, he brings his suit.

Over and above these technical parts of the Declaration, there were other requirements, Odgers,[30] in his famous work on Libel

25. 6 Wend. (N.Y.) 412 (1831).

26. Where Defamatory language is of a clear import and on its face applies to the plaintiff, no Colloquium or setting is necessary in the Declaration. Choctaw Coal & Mining Co. v. Lillich, 204 Ala. 533, 86 South. 383, 11 A.L.R. 383; 17 R.C.L. 394. "Thus, if the imputation be that the plaintiff was 'foresworn,' this not being of itself actionable, because it does not necessarily impute the offense of perjury, it must be specifically alleged, by way of Inducement, that there had been a Judicial Proceeding, in which the plaintiff was a witness and gave evidence, and that the defendant when speaking the words, referred to such matter in using the term 'foresworn,' and intended to impute that the plaintiff had been guilty of the crime of perjury." 1 Chitty, Pleading, 415. "Where the libelous matter can be collected from the words themselves, there need be no averment as to circumstances." Thus, if the Declaration be, "He perjured himself," the charge of crime appears, and it is for the defendant to plead its truth if he can. A Declaration was sustained by the King's Bench in 1661 as against a Motion in Arrest of Judgment which charged the defendant with saying of plaintiff, an attorney, "He has no more Judgment in the Law than Master Cheyny's bull," although it was urged that the Declaration was defective in not alleging that Mr. Cheyny had a bull, sed. non allocatur. Baker v. Morphew, 2 Keble, 202, 84 Eng.Rep. 126. A charge, ironically made, that the plaintiff was an "honest lawyer," would have required more explanation. See Keigwin, Precedents of Pleading, 285, 295 (Washington, D. C. 1928).

27. 2 Hall (N.Y.) 193 (1829).

28. Innuendoes are not sufficient to supply the lack of Inducement and Colloquium or extend the meaning of words beyond their natural import or sense. MacLaughlin v. Fisher, 136 Ill. 111, 116, 24 N.E. 60; Brettun v. Anthony, 103 Mass. 37 (1869); Whittier, Cases on Common Law Pleading, 136, 137 Note; Barnett v. Phelps, 97 Or. 242, 191 Pac. 502, 11 A.L.R. 663.

See also, Triggs v. Sun Printing and Publishing Association, 179 N.Y. 144, 71 N.E. 739, 66 L.R.A. 612, 103 Am.St.Rep. 841, 1 Ann.Cas. 326 (1904), reversing 91 App.Div. 259, 86 N.Y.Supp. 486 (1904).

29. 7 Blackf. (Ind.) 377 (1845).

30. c. V, 136, 137 (5th ed. Chicago, 1900). See, also, Newell, Slander and Libel, c. VII, 733 (4th ed. Chi-

and Slander, states: "So, too, many other allegations were required describing the locality, the relationship between the various persons mentioned, and all the surrounding circumstances necessary to fully understand the defendant's words. And these matters could not properly be proved at the trial unless they were set out on the record; if they were not, and the plaintiff had a verdict, the court would subsequently arrest judgment on the ground that it did not appear clearly on the face of the record that the words were actionable. And this technicality was carried to an absurd extent. Thus, where the defendant said, 'Thou art a murderer, for thou art the fellow that didst kill Mr. Sydnam's man,' the court of Exchequer Chamber, on error brought, arrested judgment, because there was no averment that any man of Mr. Sydnam's had in fact been killed.[31] Had the words been '*and* thou art', instead of '*for* thou art,' the plaintiff would probably have been allowed to recover. Again, in Ball v. Roane (1598) Cro.Eliz. 308, the words were: 'There was never a robbery committed within forty miles of Wellingborough but thou hadst thy part in it.' After a verdict for the plaintiff, the court arrested judgment, 'because it was not averred there was any robbery committed within forty miles, etc., for otherwise it is no slander.' So in Foster v. Browning (1625) Cro.Jac. 688, where the words were, 'Thou art as arrant a thief as any is in England,' the court arrested judgment 'because the plaintiff had not averred that there was any thief in England.' But the climax was reached in a case cited in Dacy v. Clinch (1661) 1 Sid. 53, where the defendant had said to the plaintiff, 'As sure as God governs the world, or King James this kingdom, you are a thief.' After verdict for the plaintiff, the defendant moved in arrest of judgment, on the ground that there was no averment on the record that God did govern the world, or King James this kingdom. But here the Court drew the line, and held that 'these things were so apparent' that neither of them need be averred."

(F) *The Defamatory Words Themselves Must be Set Out Verbatim.*—At Common Law, the general rule was that in suing on written instruments, the contract could be set out verbatim or according to its legal effect. As setting forth a writing verbatim often resulted in a motion for nonsuit on the ground of variance between allegation and proof, usually the writing was set out according to its legal effect. But in libel and slander cases the words had to be alleged verbatim, or in *haec verba.*[32] As we have stated earlier, this was due to the civil law origin of libel and slander, both of which were regarded as innovations upon the Common Law, and to the fact that the criminal and Appellate Courts, on review, could not determine whether the lower courts had properly determined whether the words uttered or written, as a matter of law, were slanderous or libelous. The defendant, of course, was also entitled to know the precise charge against him.[33]

cago, 1724); Keigwin, Precedents in Pleading, 285 (Washington, D. C. 1928).

31. Barrons v. Ball, Cro.Jac. 331, 79 Eng.Rep. 282.

32. Webster v. Holmes, 62 N.J.L. 55, 40 A. 778 (1898). See, also, Wormouth v. Cramer, 3 Wend. (N.Y.) 394 (1829), where the words uttered were in the German language, but were set forth in the Declaration in the English language, with the result that the plaintiff was Nonsuited.

Proof of similar or equivalent words is not admissible. Wallace v. Dixon, 82 Ill. 202 (1876); Schultz v. Short, 201 Ill.App. 74 (1915). But a slight variance is not fatal; i. e., "You are a liar" is supported by proof that "You are a damned liar." 25 Cyc. 472.

33. "The gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. It is not sufficient, therefore, that the plaintiff should understand himself to be referred to in the article. It is necessary to constitute libel that others than the plaintiff should be in a position to understand that the plaintiff is the person referred to." Duvivier v. French, 104 Fed. 278, 43 C.C.A. 529 (1900).

(G) *The Technical Common-Law Rules of Pleading in Libel and Slander Modified.*— Under modern practice the technicalities governing pleading in libel and slander cases have been largely abandoned. This tendency first took on substantial form in England when the Common Law Procedure Act of 1852 [34] provided:

"In Actions of libel and slander, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the Declaration shall be sufficient."

This section was adopted into the New Jersey statutes in 1855.[35]

The purpose of the above provision, as expounded by the courts of England and New Jersey, was to afford the plaintiff the right to set out in his Declaration the words complained of, and to place upon those words, by innuendo or specified defamatory sense, any construction he may see fit to attribute to them, without showing, by means of a colloquium, or other explanatory matter, how the words contained a defamatory charge.[36] "The effect of this change," according to Lanning, J., in *Allen* v. *Oppenheimer*,[37] "in the law of pleading, as to this class of cases, is that if the words complained of are actionable *per se*, and the plaintiff by innuendo puts a construction upon them different from what they would mean without the innuendo the count containing them should be read as two counts, one with the innuendo, and the other without it. Such was the conclusion reached in Watkin v. Hall, L.R. 3 Q.B. 396, and in view of the last clause of the section the conclusion seems to be sound." [38]

And in some states, such as New York, in an action for slander brought by a woman imputing unchastity to her, it is not necessary to allege or prove special damages.[39]

Neglect of Official Duty

CASE is a proper remedy against an officer for failure to perform his duty, whereby the plaintiff has sustained an injury (though an action ex contractu on his bond may be a concurrent remedy), as, for not Levying an Execution, or for not returning it, or for not taking a Replevin Bond, or for taking an insufficient bond, etc.; [40] and it will lie against an officer for making a False Return; [41] or against an election officer for

34. 15 and 16 Vict. c. 76, § 61, 92 Statutes at Large 298 (1852).

35. Act of March 17, 1855 P.L. § 26, 295, later § 106 New Jersey Practice Act (P.L.1903, 568).

36. English: Hemmings v. Gasson, 4 Jur. (N.S.) 834 (1858); New Jersey: Hand v. Winton, 38 N.J.L. 122 (1875); Andrew v. Deshler, 43 N.J.L. 16 (1881).

37. 166 Fed. 826 (C.C., D.N.J., 1909).

38. "At Common Law the pleading of a plaintiff in a slander suit, contained, when necessary, what was known as an 'Inducement', a 'Colloquium', and an 'Innuendo'. The peculiar office of these separate divisions of the Pleading was distinctly circumscribed, but in more Modern Times, when the Technical Rules of Common-Law Pleading have been superseded by the enactment of Codes of Practice, the extreme Common-Law Technical Rules with respect to Pleadings in Libel and Slander Cases have been largely modified, so that now, if a Pleading contains the necessary Allegations, whether they be found in that part of it appropriately styled the 'Inducement,' the 'Colloquium', or the 'Innuendo', it will be sufficient although not contained in that particular division where the Rules of the Common-Law required it to be." Thomas, J., in Gastineau v. McCoy, 190 Ky. 463, 465, 227 S.W. 801, 802 (1921).

39. In general, on Libel and Slander, see Veeder, History and Theory of the Law of Defamation, 3 Col.L. Rev. 546 (1903).

40. Sabourin v. Marshall, 3 Barn. & Adol. 440, 110 Eng.Rep. 158 (1832); Mason v. Paynter, 1 Gale & D. 381, 113 Eng.Rep. 1406 (1841); Billings v. Lafferty, 31 Ill. 318 (1863).

41. Wintle v. Freeman, 11 Adol. & El. 539, 113 Eng. Rep. 520 (1841).

refusal to allow a vote;[42] and, generally, against an officer for any neglect of duty.[43]

Statutory Liability

WHENEVER a Statute prohibits an injury to an individual, or enacts that he shall recover a penalty or damages for such injury, and is silent as to the form of remedy, an Action on the Case (and in some cases other actions) will lie.[44] And if a statute gives a remedy in the affirmative, without a negative, express or implied, for a matter which was actionable in Case at Common Law, the party may still sue at Common Law.[45] But where a statute gives a new right, or creates a new liability, and prescribes a particular remedy, or if it prescribes a new remedy to enforce a Common-Law right, and expressly or impliedly excludes the Common Law remedy, the statutory remedy must be pursued.[46]

42. Keith v. Howard, 24 Pick. (Mass.) 292 (1841); Gates v. Neal, 23 Pick. (Mass.) 308 (1840). Or against taxing officer for maliciously failing to tax a person, causing him to lose his right to vote. Griffin v. Rising, 11 Metc. (Mass.) 339 (1846).

43. English: Aireton v. Davis, 9 Bing. 741, 131 Eng. Rep. 792 (1833); Jacobs v. Humphrey, 2 Cromp. & M. 413, 149 Eng.Rep. 821 (1834); Massachusetts: Spear v. Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53 (1839); Vermont: Abbott v. Kimball, 19 Vt. 551, 47 Am.Dec. 708 (1847).

44. President & College of Physicians London v. Salmon, 2 Salk. 451, 91 Eng.Rep. 391; Friend v. Dunks, 37 Mich. 25 (1877); Id. 39 Mich. 733 (1878).

45. Maine: Bearcamp River Co. v. Woodman, 2 Greenl. (Me.) 404 (1824); Proprietors of Fryeburg Canal Co. v. Frye, 5 Greenl. (Me.) 38 (1827); New Hampshire: Adams v. Richardson, 43 N.H. 212 (1861); New Jersey: Coxe v. Robbins, 9 N.J.L. 384 (1828); New York: Scidmore v. Smith, 13 Johns. (N.Y.) 322 (1816); Almy v. Harris, 5 Johns. (N.Y.) 175 (1809).

46. New Hampshire: Henniker v. Contoocook Val. R. R. Co., 29 N.H. 146 (1854); New Jersey: City of Camden v. Allen, 26 N.J.L. 398 (1857); New York: Almy v. Harris, 5 Johns. (N.Y.) 175 (1809); Pennsylvania: Weller v. Weyand, 2 Grant, Cas. (Pa.) 103 (1853); Brown v. White Deer Tp., 27 Pa. 109 (1856); Wisconsin: Babb v. Mackey, 10 Wis. 371 (1860).

Thus, where a Statute authorizes the taking or injuring of private property for a public use, under the right of eminent domain, and prescribes the remedy by which the owner shall obtain redress, that remedy must be pursued. Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466 (1815); Proprietors of Sudbury Meadows v. Proprietors of Middlesex Canal, 23 Pick. (Mass.) 36 (1840); Hazen v. Essex Co., 12 Cush. (Mass.) 475 (1853). But if the damage done is not incident to the exercise of the power given, but is due to an improper exercise of the power, Case or Trespass will lie. Massachusetts: Mellen v. Western R. Corp., 4 Gray (Mass.) 301 (1855); Thompson v. Moore, 2 Allen (Mass.) 350 (1861); Michigan: Detroit Post Co. v. McArthur, 16 Mich. 447 (1868); Mississippi: Thomasson v. Agnew, 24 Miss. 93 (1852).

Liability for Injuries by Animals

AT Common Law, if a wild or vicious beast is turned loose, and mischief immediately ensues to the person or property of another, the injury is immediate, and Trespass, not Case is the remedy.[47] But if a vicious animal is kept with knowledge of its dangerous propensities, and a person is thereby injured, the remedy is in Case.[48] Where, however, damage is done by a domestic animal, kept for use or convenience, the owner is not liable to action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief.[49]

If the action for injury by an animal is in Trespass, it should contain a concise statement as to the injury complained of, whether to the person, or to the personal or real property, and should allege that such injury was committed with force and arms and against the peace.[50]

47. Leame v. Bray, 3 East 593, 596, 102 Eng.Rep. 724, 725 (1803).

48. English: Mason v. Keeling, 12 Mod. 333, 1 Ld. Raym. 606, 91 Eng.Rep. 1305 (1699); Sarch v. Blackburn, 4 Car. & P. 297, 173 Eng.Rep. 712 (1830); Alabama: Durden v. Barnett, 7 Ala. 169 (1844); Illinois: Stumps v. Kelley, 22 Ill. 140 (1859).

49. English: Buxendin v. Sharp, 2 Salk. 662, 91 Eng. Rep. 564 (1696); New York: Vrooman v. Lawyer, 13 Johns. (N.Y.) 339 (1816).

50. Perry, Common-Law Pleading: Its History and Principles of Forms of Action, c. III, Of Forms of Action, 73 (Boston, 1897).

ANTICIPATING DEFENSES IN CASE

94. In some Jurisdictions the plaintiff must negative the possible existence of certain technical defenses, viz. contributory negligence, fellow-servant rule, and assumption of risk.

IN some Jurisdictions it is necessary in a Declaration for negligence by a servant against the employer to negative the defenses of contributory negligence, fellow-servant rule, and assumption of risk. In *Calumet Iron and Steel Company* v. *Martin*,[51] the general rule is declared to be that, in order to recover for injuries from negligence, it must be alleged and proved that the plaintiff was, at the time he was injured, observing ordinary care for his personal safety. After the period of the statute of limitations, the declaration cannot be amended to supply this "substantial fact." [52] In an Action of Trespass on the Case by a servant against his employer a Declaration was defective in Illinois and some other states which did not negative knowledge or assumption of risk.[53] It has been held that negativing knowledge of the risk is insufficient as it does not appear but that the servant had easy means of knowing.[54]

In an action by a servant against his employer to recover for a personal injury for negligence, the declaration must negative the defense of the fellow-servant rule, if it is alleged that the negligent acts were done by the servants of the defendant without showing to what class they belonged. It is held, however, that if the allegations indicate that the plaintiff was not a fellow servant, no negative allegation is needed.[55]

What the plaintiff must allege as a matter of pleading to state a cause of action is a more or less arbitrary matter. Since the plaintiff comes into court asking relief, it might seem that logically he should be required to set up and prove all the conditions essential to recovery, and that he should negative all possible defenses, such as contributory negligence, assumption of risk, and fellow-servant rule. In fact, however, the plaintiff is ordinarily only required to make out a prima facie case and need not refer to all the conditions, positive and negative, which are ultimately essential to a recovery. The plaintiff must show an apparent reason for his request and give fair notice of the facts relied on as the basis of his claim. This will, in general, indicate as to what matters the plaintiff has the burden of proof, which is a question of fairness, policy and convenience. Matters of justification and excuse are for the defendant to prove, since it is unfair to require the plaintiff to disprove the existence of each and all of them.[56] The defenses of contributory negligence, assumption of risk, and fellow-servant rule are technical at best and should not be favored by the rules of pleading. If they are to be raised at all, they should be set up affirmatively by the defendant.

51. 115 Ill. 358, 3 N.E. 456 (1885).

52. Walters v. City of Ottawa, 240 Ill. 259, 266, 88 N. E. 651 (1909).

53. City of LaSalle v. Kostka, 190 Ill. 130, 60 N.E. 72 (1901); Dalton v. Rhode Island Co., 25 R.I. 574, 57 Atl. 383 (1904).

54. Gould v. Aurora, E. & C. Ry. Co., 141 Ill.App. 344 (1909).

55. Illinois: Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 34 N.E. 801, 37 Am.St.Rep. 191 (1893); Schillinger Bros. Co. v. Smith, 225 Ill. 74, 81, 80 N. E. 65 (1907); McInerney v. Western Packing & Provision Co., 249 Ill. 240, 243, 94 N.E. 519 (1911); Richter v. Chicago & E. R. Co., 273 Ill. 625, 113 N. E. 153 (1916); Rhode Island: DiMarcho v. Builders' Iron Foundry, 18 R.I. 514, 27 Atl. 328, 28 Atl. 661 (1894).

56. In Illinois the burden of proof to negative assumption of risk was on the plaintiff. Swift Co. v. Gaylord, 229 Ill. 339, 340, 82 N.E. 299 (1907).

THE EXPANSIONISTIC CHARACTER OF CASE

95. The Action of Trespass on the Case was adapted to many circumstances and factual situations which characterized the growth of society, and the ability of the law to meet the demands of a constantly advancing civilization largely has been made possible by the expansionistic character of this action.

IT is impossible to enumerate all the factual situations in which an Action of Trespass on the Case can be maintained, hence the particular applications of the action above discussed are merely illustrative of its enormous scope. It is referred to as the Great Residuary Remedy of the Common Law for the reason that the law has never placed a limitation on its continual expansion. As we have seen it was largely through the constant and ever increasing application of this action to a myriad of different factual situations involving a wrong not remediable by any other Form of Action which enabled the Judges of England to build up the Common Law of that country as it is known today.

Before modern research revealed that Case did not originate out of the Statute of Westminster II (1285),[57] it was often suggested that a liberal construction of that Statute would have eliminated any need for the Chancellor's extraordinary jurisdiction in filling out the alleged deficiencies of the Common Law. This suggestion was predicated upon the view that Equity originated out of the failure of the Common Law Courts to adapt themselves to the changes and needs of a developing society. It is submitted, however, that the view that Equity originated out of a failure of the Common Law Courts to so adapt themselves is wholly untenable and contrary to fact, for, as has been observed, the Common Law Courts could in no event have afforded the kind of relief which Equity was eventually to offer without completely revolutionizing their procedures and enlarging their jurisdiction.

What is true, however, is that the Action of Trespass on the Case revealed such great potentialities as to permit its adaptability to the many circumstances and factual situations which have characterized the growth of our society. Indeed, the ability of our law to meet the demands of our constantly advancing civilization largely has been made possible by the expansionistic character of this action. And, in this connection, it should be remembered that the capacity of this action has not been destroyed by the Reformed Procedure, under which the Single Action provided is in the Nature of an Action on the Case, and hence the process of expansion and growth continues at full pace.

STATUS UNDER MODERN CODES, PRACTICE ACTS AND RULES OF COURT

96. The Common Law Action of Trespass on the Case continues to exist under modern Codes, Practice Acts and Rules of Court, although the label, as such, has been removed.

THE Modern Status of the Action of Trespass on the Case appears plainly from two cases, one decided in 1939,[58] the other in 1951.[59]

In the first case, *Williamson* v. *Columbia Gas & Electric Corporation*,[60] in which the plaintiff complained that the acts of The Columbia Gas & Electric Corporation were in violation of Section 7 of the Clayton Act,[61] the section which barred corporations from acquiring, directly or indirectly, any stock of another corporation engaged in commerce,

57. Fifoot, History and Sources of the Common Law, c. IV, The Development of Actions on the Case, 66–78 (London, 1949).

58. Williamson v. Columbia Gas & Electric Corp., 110F(2d) 15 (3rd Cir.1939).

59. Eisener v. Maxwell, 28 M.P.Rep. 213 (1951).

60. *Supra, note* 58.

61. 15 U.S.C., § 18, 15 U.S.C.A. § 18.

where the effect would be to substantially lessen competition, the plaintiff also claimed threefold damages under Section 4 of the Clayton Act.[62] The defendant moved to dismiss the complaint, on the ground that it did not state a cause of action which accrued within a period of three years prior to the Commencement of the Action. It was stipulated that the right of action accrued not later than January 1, 1931. The complaint having been dismissed by the District Court, the plaintiff appealed, thus raising a question as to whether the plaintiff's action was barred under the applicable Delaware Statute of Limitations,[63] Section 5129 of which provided: "No Action of Trespass, no Action of Replevin, no Action of Detinue, no Action of Debt not found upon a Record or Specialty, no Action of Account, no Action of Assumpsit, and no Action upon the Case shall be brought after the expiration of three years from the accruing of the cause of such action."

In this situation the plaintiff concluded his action was in the nature of an Action of Debt on a Specialty and hence was not barred, having been brought within twenty years, the period prescribed by the Statute. The defendant argued that the complaint set forth a cause in tort for which an Action on the Case was the only remedy and that since the suit was brought more than three years after the action had accrued, recovery was barred by the Statute. Thus, in the Appeal, the issue of law was whether an Action in the Nature of Debt on a Specialty at Common Law might be brought to recover Damages for injuries to business resulting from acts prohibited by Section 7 of the Clayton Act; or whether an action in the Nature of the Common Law Action of Trespass on the Case was the sole remedy of the aggrieved party. In affirming the Order of the District Court, the Circuit Court of Appeals held that the action sounded in tort and that the appropriate Form of Action was the Common Law Action of Trespass on the Case. Chief Justice Maris declared: "In order to apply a statute of limitations, such as that of Delaware, which reads in terms of Common Law Actions, to a Civil Action brought in a District Court, it is necessary for the court through a consideration of the nature of the Cause of Action disclosed in the complaint to determine the Form of Action which would have been brought upon it at Common Law. It is evident that the complaint in the case before us discloses a Cause of Action which, under the Common Law of Delaware, would be enforceable in an Action on the Case and not in an Action of Debt on a Specialty. The District Court, therefore, properly held that the action was barred by the Delaware Statute of Limitations."

In the second case, *Eisener* v. *Maxwell*,[64] a Canadian case decided in 1951, the plaintiff's Statement of Claim alleged Damages caused by the negligent operation of a motor vehicle on a highway, to which the defendant pleaded that there had been no negligence. The Statute of Limitations for batteries was one year, and for causes which formerly would have been brought in the Form of Action Known as Trespass on the Case, six years. At the Trial the defendant urged that an action for personal injury was an Action for Assault and Battery, and since it was brought after the expiration of one year, was barred by the Statute of Limitations. The plaintiff contended that automobile collisions on the highway should be treated as Actions of Negligence, and hence should be regarded as within the class which formerly would have been brought in the Form of Action called

62. 15 U.S.C. § 15, 15 U.S.C.A. § 15.

63. Revised Code of Delaware (1935).

64. 28 M.P.Rep. 213 (1951).

Trespass on the Case, and, therefore, was not barred, as it fell within the purview of that Section of the Statute of Limitations which prescribed a six year period of limitations. The Lower Court held for the defendant, but on Appeal, it was held that automobile collisions on the highway should be treated as giving rise to a new right of action to be known as an Action of Negligence. As such, it fell within the class which formerly would have been brought in the Form of Action Known as Trespass on the Case, and hence the six year Statute of Limitations applied.

Thus, from the standpoint of a Federal case, decided in 1939, or a Canadian case, decided in 1951, it clearly appears that the Common Law Action of Trespass on the Case is very much alive under Modern Codes, Practice Acts, and Rules of Court, even though the label, as such, has been removed; and, what is more significant, is showing sufficient strength to create new substantive rights of action.