NY CLS CPLR R 3014

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Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 30 Remedies and Pleading (§§ 3001 — 3045)

R 3014. Statements.

Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation. Reference to and incorporation of allegations may subsequently be by number. Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters. Separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency. Causes of action or defenses may be stated alternatively or hypothetically. A copy of any writing which is attached to a pleading is a part thereof for all purposes.

History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963.

Annotations

Notes

Derivation Notes

Earlier statutes and rules: CPA §§ 241, 255, 258, 262, 272; RCP 90; CCP §§ 481, 483, 484, 500, 507, 508, 514, 517; Code Proc §§ 142, 150, 153, 167.

Advisory Committee Notes

The phrase “plain and concise” of this rule is taken from CPA § 241. The second and third sentences are based upon RCP 90. The restriction on the provision for incorporation by reference has been removed to permit reference and incorporation in other than the same pleading.

The fourth sentence of this rule is new. It is an extension of the provision of RCP 90 for incorporation by reference and permits elimination of the paragraphs of a pleading which “repeat and reallege each and every allegation contained in paragraph—to paragraph—inclusive with the same force and effect as if the same had been more fully set forth hereunder,” provided that such a recitation is not needed for clarity.

The next two sentences are simplifications of provisions contained in CPA §§ 258 and 262 and RCP 90. The rule as to joinder covers hypothetical as well as alternative causes of action or defenses, since the difference is often only one of form.

The remaining sentence is taken from Federal rule 10(c) and is intended to eliminate the usual allegation to that effect.

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I. Under CPLR

1. In general

Defaulting buyer whose “affirmative defense, counterclaim, and offset” alleging seller’s breach and claiming consequential damages was dismissed for failure to state a cause of action under contract expressly absolving seller of liability for consequential damages, was given an opportunity to replead its defense and offset in an amended answer in accordance with CPLR § 3014 where counterclaim was pleaded in such a way as to be mingled with the defense and offset to the action. Singer Co. v Alka Knitting Mills, Inc., 41 A.D.2d 856, 343 N.Y.S.2d 146, 1973 N.Y. App. Div. LEXIS 4617 (N.Y. App. Div. 2d Dep't 1973).

In an action against a doctor for medical malpractice, negligence, intentional tort, and lack of informed consent, in which he moved for an order dismissing certain of the causes of action, the test of whether the action for personal injuries could be maintained on the theory of medical malpractice was whether the case involved a matter of science or art requiring special knowledge or skill not ordinarily possessed by the average person or was one where the common everyday experiences of the trier of the facts was sufficient in order to reach the proper conclusion. Twitchell v MacKay, 78 A.D.2d 125, 434 N.Y.S.2d 516, 1980 N.Y. App. Div. LEXIS 13413 (N.Y. App. Div. 4th Dep't 1980).

It is not the title of the action, nor the prayer for judgment, but the facts set out in the complaint which determine the kind and character of the action. Rubinfeld v Mappa, 42 Misc. 2d 464, 248 N.Y.S.2d 276, 1964 N.Y. Misc. LEXIS 2027 (N.Y. Sup. Ct. 1964), aff'd, 24 A.D.2d 489, 261 N.Y.S.2d 274, 1965 N.Y. App. Div. LEXIS 3956 (N.Y. App. Div. 2d Dep't 1965).

Pleadings shall contain a plain and concise statement of facts sufficiently particular to give the court and parties notice of the transactions and occurrences intended to be proved and the material elements of each cause of action, but a photograph of the sidewalk upon which plaintiff allegedly fell may not be included as part of the complaint. English v Genovese, 49 Misc. 2d 321, 267 N.Y.S.2d 283, 1966 N.Y. Misc. LEXIS 2168 (N.Y. Sup. Ct. 1966).

The purchaser of drugs, seized by the federal government as in violation of the Pure Food and Drug Act, brought an action for breach of warranty against the wholesale distributor of the drugs, which impleaded the manufacturer as a third party defendant; whereupon the purchaser made a settlement with the manufacturer and executed its general release, without reservations. Thereafter, the purchaser could not reconstitute its action against the wholesaler, because that would permit the prosecution of a split cause of action, not allowable under this section. Montgomery Ward & Co. v McKesson & Robbins, Inc., 55 Misc. 2d 529, 285 N.Y.S.2d 462, 1967 N.Y. Misc. LEXIS 995 (N.Y. Civ. Ct. 1967).

N.Y. C.P.L.R. 3014 and 3017 permit a cause of action to be pled in the alternative. American Intl. Group, Inc. v Greenberg, 877 N.Y.S.2d 614, 23 Misc. 3d 278, 2008 N.Y. Misc. LEXIS 7333 (N.Y. Sup. Ct. 2008).

2. Sufficiency, generally

Complaint for unjust enrichment alleging in conclusory fashion that the damages sought in a second cause of action in fraud constituted the unjust enrichment, fails to allege defendant’s receipt of profits or property of plaintiff’s, and is insufficient. Alko Mfg. Corp. v Neptune Meter Co., 20 A.D.2d 635, 246 N.Y.S.2d 265, 1964 N.Y. App. Div. LEXIS 4493 (N.Y. App. Div. 1st Dep't 1964), aff'd, 16 N.Y.2d 777, 262 N.Y.S.2d 500, 209 N.E.2d 819, 1965 N.Y. LEXIS 1228 (N.Y. 1965).

In action for inducing a breach of contract, it is essential to allege that defendant had actual knowledge of the contract, and pleading that defendant “knew or should have known” of the contract renders the complaint insufficient, since it pleads the action in the alternative, and one of the alternatives is insufficiently pleaded. A A Tube Testing Co. v Sohne, 20 A.D.2d 639, 246 N.Y.S.2d 247, 1964 N.Y. App. Div. LEXIS 4572 (N.Y. App. Div. 2d Dep't 1964).

In action for divorce, complaint paragraph consisting of some 13 and one-half pages of allegations, subdivided into 65 paragraphs, violated mandate of statute requiring that every pleading consist of plain and concise statements, and service of amended complaint would be

required, whereby trivia would be eliminated and only allegations of serious misconduct, constituting cruel and inhuman treatment, would be set forth. Weissglass v Weissglass, 52 A.D.2d 582, 382 N.Y.S.2d 534, 1976 N.Y. App. Div. LEXIS 12164 (N.Y. App. Div. 2d Dep't 1976).

While original and amended complaints in civil action did not contain clear and concise statement of underlying facts, trial court acted properly in denying renewed motion to serve amended complaint on ground that there was no substantive difference between original and amended complaints; however, ruling was not prejudicial to plaintiff’s right to make application, upon proper evidentiary showing for leave to serve properly drawn and comprehensible complaint. Connelly v American East India Corp., 57 A.D.2d 518, 393 N.Y.S.2d 564, 1977 N.Y. App. Div. LEXIS 11421 (N.Y. App. Div. 1st Dep't 1977).

Court reinstated the first cause of action of a complaint which sought to impress a constructive trust on premises where the complaint sufficiently stated facts such as an agreement by one of the defendants to purchase the premises on behalf of the plaintiff, and the existence of a confidential relationship between them, which, if established at trial, would create a cause of action based on the theory of constructive trust. Sarnataro v Presta, 79 A.D.2d 986, 434 N.Y.S.2d 472, 1981 N.Y. App. Div. LEXIS 9877 (N.Y. App. Div. 2d Dep't 1981).

Complaint, although long and somewhat inartfully drawn, should not have been dismissed since it complied with requirements of CLS CPLR §§ 3013 and 3014, 8 of 12 defendants answered complaint, and none of defendants moved under CLS CPLR § 3024 to correct pleadings. Estate of Unterweiser v Town of Hempstead, 235 A.D.2d 453, 652 N.Y.S.2d 1007, 1997 N.Y. App. Div. LEXIS 410 (N.Y. App. Div. 2d Dep't 1997).

Although CLS CPLR § 3014 allows party to plead inconsistent theories of recovery, summary judgment is procedural equivalent of trial, and thus litigant must elect among inconsistent positions on seeking expedited disposition. Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 A.D.2d 168, 674 N.Y.S.2d 280, 1998 N.Y. App. Div. LEXIS 4053 (N.Y. App. Div.

1st Dep't), app. dismissed, 92 N.Y.2d 962, 683 N.Y.S.2d 172, 705 N.E.2d 1213, 1998 N.Y. LEXIS 4090 (N.Y. 1998).

Court erred in granting plaintiff's motion for leave to amend her pleading to include causes of action based on remaining counts of criminal indictment which had been dismissed on defendant's guilty plea in criminal proceeding, where original papers on plaintiff's motion under CLS CPLR § 3213, which were converted to pleading only by operation of law, sought to impose liability on defendant based on his guilty plea to single criminal transaction, and motion for summary judgment in lieu of complaint alleged that plaintiff was seeking damages based solely on his actions under that count of indictment; mere fact that original indictment was fortuitously included as exhibit to plaintiff's original motion papers, defendant was not thereby given sufficient notice that plaintiff was seeking damages based on all of transactions set out in indictment and therefore all plaintiff's additional causes of action in proposed amended complaint related back to original complaint under CLS CPLR § 203(f). Roe v Barad, 267 A.D.2d 221, 699 N.Y.S.2d 484, 1999 N.Y. App. Div. LEXIS 12528 (N.Y. App. Div. 2d Dep't 1999).

Administrator's complaint survived because negligence and wrongful death claims gave defendants contractors, manufacturers, and operators notice of claims and occurrences. Archer-Vail v LHV Precast Inc., 168 A.D.3d 1257, 92 N.Y.S.3d 434, 2019 N.Y. App. Div. LEXIS 357 (N.Y. App. Div. 3d Dep't 2019).

Pro se plaintiff's claims, which were prepared with aid of court clerk and set forth on endorsed complaint, were sufficient to withstand dismissal under CLS CPLR §§ 3014 and 3211(a)(7) where summons indicated damages sought and date from which interest was sought (which, by inference, was date of events giving rise to action) and endorsed complaint specifically described nature of claims as "$25,000 Damage Caused to Person" and "$25,000 Loss of Time from Work"; if defendant wanted more detailed facts, it could move for order directing plaintiff to serve and file "formal pleading" under CLS NYC Civil Ct Act § 902(e). Holloway v New York City Transit Auth., 182 Misc. 2d 749, 699 N.Y.S.2d 261, 1999 N.Y. Misc. LEXIS 500 (N.Y. Civ. Ct. 1999).

While a pedestrian alleged more than one fact in a paragraph, comprehension of claim was not impeded; thus, the pedestrian's alleged failure to comply with N.Y. C.P.L.R. §§ 3013, 3014 did not support the driver's motion to dismiss under N.Y. C.P.L.R. § 3211(a)(7); the allegations of facts accepted as true supported a tort claim of negligence against the driver based on the striking of the pedestrian with a vehicle. Ndiaye v Cangelosi, 787 N.Y.S.2d 679, 3 Misc. 3d 1104(A), 2004 N.Y. Misc. LEXIS 528 (N.Y. Sup. Ct. 2004).

3. Effect of insufficiency; dismissal

In an action in which plaintiff charged defendant with applying economic duress to compel the execution of a contract modification by threatening not to perform under the parties' contract for the sale of air rights, and in which plaintiff sought a rescission of the modified contract, the appellate court properly dismissed the complaint, where plaintiff had pleaded no actionable wrong in that it had failed to perform the preconditions for transfer set out in the parties' original contract and therefore defendant had no obligation to perform under the contract at the time that the defendant's performance was withheld and the modification negotiated; plaintiff could not claim that its own nonperformance under the original contract terms was excused or that it was defensive matter. 805 Third Ave. Co. v M.W. Realty Associates, 58 N.Y.2d 447, 461 N.Y.S.2d 778, 448 N.E.2d 445, 1983 N.Y. LEXIS 2938 (N.Y. 1983).

The primary function of a pleading under the CPLR is to advise the adverse party adequately of the pleader's claim or defense so to facilitate a proper decision on the merits, and should not be dismissed or ordered amended unless the allegations are not sufficiently particular to apprise the Court and parties of the subject matter. Lane v Mercury Record Corp., 21 A.D.2d 602, 252 N.Y.S.2d 1011, 1964 N.Y. App. Div. LEXIS 3101 (N.Y. App. Div. 1st Dep't 1964), aff'd, 18 N.Y.2d 889, 276 N.Y.S.2d 626, 223 N.E.2d 35, 1966 N.Y. LEXIS 1006 (N.Y. 1966).

Complaint against corporation and three of its alleged officers for slander, fraud, interference with contractual relations, conspiracy, and prima facie tort was subject to being dismissed for failure to state a cause of action, even though it contained allegations which might have been

appropriate to some or all of alleged torts, where allegations were pleaded in form of a single cause of action contrary to statutory requirements, and, though damage seemed to be attributed to alleged defamation, plaintiff failed to fulfill further requirement of setting forth particular words claimed to have been uttered by individual defendants. Roberts v Finkel, 46 A.D.2d 878, 362 N.Y.S.2d 176, 1974 N.Y. App. Div. LEXIS 3232 (N.Y. App. Div. 1st Dep't 1974).

In an action by a former tenant of a rent controlled apartment against a city and the owner of a nursing home business, in which the tenant alleged that she was harassed in order to force her to vacate a premises to make room for a proposed extension of the nursing home business, the city's motion to dismiss the complaint would be granted where the complaint failed to allege what the city did or threatened to do that was a violation of the tenant's rights; the motion of defendants other than the city to dismiss the complaint for failure to comply with the statutory requirements of pleadings would be granted where the complaint contained many obviously irrelevant and prejudicial allegations as well as much trivia and where, after 19 pages of allegations, the complaint for the first time referred to 11 separate causes of action without any indication of which allegations of the 19 preceding pages related to any particular cause of action. Barsella v New York, 82 A.D.2d 747, 440 N.Y.S.2d 12, 1981 N.Y. App. Div. LEXIS 14378 (N.Y. App. Div. 1st Dep't 1981).

In action by excess insurer as subrogee in its own right alleging bad faith, breach of contract, and malpractice against primary insurer and its house counsel, trial court erred in denying defendants' motions for an order directing plaintiff to state and number separately each cause of action, where the complaint consisted of 42 pages and 104 paragraphs and was a prime example of a loosely drawn, verbose and poorly organized pleading, and where the first four causes of action were pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant. Aetna Casualty & Surety Co. v Merchants Mut. Ins. Co., 84 A.D.2d 736, 444 N.Y.S.2d 79, 1981 N.Y. App. Div. LEXIS 15898 (N.Y. App. Div. 1st Dep't 1981).

Plaintiff husband, employee of utility company, was lawfully on defendant's premises, for purpose of turning off electrical services to nonpaying utility customers when he was injured as result of alleged assault by defendant's superintendent; in plaintiffs' action to recover damages for husband's injuries and wife's loss of services, complaint asserts alternate theories of liability, negligence and assault "without intent to cause injury"–CPLR 3014 authorizes plaintiff to allege alternate and/or inconsistent theories of liability in complaint, and pleading, although inartfully drawn, should not be dismissed, so long as it sets forth cause of action; plaintiffs provided details of alleged assault in examination before trial testimony and affidavit submitted in opposition to defendant's motion for summary judgment; while plaintiff was turning off electricity, he was injured on premises, when defendant's superintendent attacked him, by slamming door on his right foot, striking him in back, and throwing him down flight of stairs–complaint states cause of action and plaintiff's allegations raise material triable issues of fact, such as whether defendant was negligent; therefore, trial court erred in granting defendant's motion for summary judgment–since there is no significant prejudice to defendant, trial court abused its discretion in denying plaintiffs leave to serve amended complaint. McLaughlin v Thaima Realty Corp., 161 A.D.2d 383, 555 N.Y.S.2d 125, 1990 N.Y. App. Div. LEXIS 5578 (N.Y. App. Div. 1st Dep't 1990).

To extent Supreme Court held that second cause of action was legally insufficient for failure to reallege or refer to prior allegations of complaint, CPLR 3014 obviated necessity to do so; CPLR 3014 states prior statements in pleading shall be deemed repeated or adopted subsequently in same pleading whenever express repetition or adoption is unnecessary for clear presentation of subsequent matters; nevertheless, second cause of action, sounding in fraud, was properly dismissed for failure to plead circumstances constituting wrong with specificity. RGW Realty Assoc. v Martone, 163 A.D.2d 598, 559 N.Y.S.2d 36, 1990 N.Y. App. Div. LEXIS 10137 (N.Y. App. Div. 2d Dep't 1990).

Article 78 proceeding was dismissed for petitioner's failure to follow dictates of CLS CPLR §§ 3013 and 3014, where amended petition consisted of 7 pages of single-spaced, unnumbered

paragraphs, import of which was unascertainable. Sibersky v New York City, 270 A.D.2d 209, 706 N.Y.S.2d 323, 2000 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 1st Dep't 2000).

Where the respondent interposes an answer to the petition, such respondent waives the right to assert that the petition should be dismissed on the ground it fails to separately state, plead and number separate causes. H. P. V. T. Corp. v McGuire, 58 Misc. 2d 159, 294 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1047 (N.Y. Sup. Ct. 1968).

Where plaintiffs have separately stated and numbered the paragraphs in the complaint and properly realleged prior paragraphs, a motion to dismiss does not lie. Alpert v Haimes, 64 Misc. 2d 608, 315 N.Y.S.2d 332, 1970 N.Y. Misc. LEXIS 1275 (N.Y. Sup. Ct. 1970).

4. Consecutively numbered paragraphs

Motion to dismiss should have been granted where complaint did not adhere to requirements that pleadings be set out in plain and concise statements in consecutively numbered paragraphs and be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense and even liberal construction of the pleadings could not sustain them. Joffe v Rubenstein, 24 A.D.2d 752, 263 N.Y.S.2d 867, 1965 N.Y. App. Div. LEXIS 3168 (N.Y. App. Div. 1st Dep't 1965), app. dismissed, 21 N.Y.2d 721, 287 N.Y.S.2d 685, 234 N.E.2d 706, 1968 N.Y. LEXIS 1686 (N.Y. 1968).

While this section requires causes of action to be separately stated and numbered, motions thereunder are not specifically authorized, but in a proper case the CPLR permits motions to be made under § 3024(a) for a more definite statement “which would have the same practical effect as a motion to state and number separately.” Weicker v Weicker, 26 A.D.2d 39, 270 N.Y.S.2d 640, 1966 N.Y. App. Div. LEXIS 4031 (N.Y. App. Div. 1st Dep't 1966).

A motion lies under CPLR 3014 to compel the plaintiff to separately state and number the causes of action in the complaint. Russo v Advance Publications, Inc., 33 A.D.2d 1025, 307 N.Y.S.2d 916, 1970 N.Y. App. Div. LEXIS 5623 (N.Y. App. Div. 2d Dep't 1970).

Orders made on motions under CPLR 3014 to compel the plaintiff to separately state and number the causes of action in the complaint are appealable. Russo v Advance Publications, Inc., 33 A.D.2d 1025, 307 N.Y.S.2d 916, 1970 N.Y. App. Div. LEXIS 5623 (N.Y. App. Div. 2d Dep't 1970).

An order was modified compelling plaintiff to separately state and number all causes of action alleged in three causes of action to the extent that plaintiffs were directed to serve a further amended complaint making the third cause of action more definite and certain by stating the amount of loans made to plaintiff by defendants which he claims were usurious, when loans were made, the respect in which the loans were usurious and the amount of principal and interest repaid on the loans. Lence v Sheldon, 34 A.D.2d 966, 312 N.Y.S.2d 725, 1970 N.Y. App. Div. LEXIS 4589 (N.Y. App. Div. 2d Dep't 1970).

Although orders made on motions seeking to compel the plaintiff to separately state and number his causes of action have been held appealable, the instant order did not affect a substantial right of plaintiffs and therefore was not appealable as of right. Alexander v Kiviranna, 52 A.D.2d 982, 383 N.Y.S.2d 122, 1976 N.Y. App. Div. LEXIS 12861 (N.Y. App. Div. 3d Dep't 1976).

In medical malpractice actions, leave to amend bills of particulars is to be liberally granted in the absence of prejudice; accordingly, the trial court properly permitted plaintiff patient to amend his bill of particulars to include allegations of injuries to other parts of his body, where, although the proposed amendments came six months after the original bill of particulars, the delay caused no prejudice to defendants in that no physical examination of the patient had been conducted, no depositions taken, no certificate of readiness filed, and the injury that the patient sought to add was mentioned in the hospital records, rendering it impossible for defendants to claim surprise. Simino v St. Mary's Hospital, 107 A.D.2d 800, 484 N.Y.S.2d 634, 1985 N.Y. App. Div. LEXIS 42721 (N.Y. App. Div. 2d Dep't 1985).

In light of CLS CPLR § 3026, which provides for liberal construction of pleadings and states that "[d]efects shall be ignored if a substantial right of a party is not prejudiced," proper remedy is dismissal of pleading with leave to replead where party has failed to separately set forth and number allegations of pleading as required by CLS CPLR § 3014. Gerena v New York State Div. of Parole, 266 A.D.2d 761, 698 N.Y.S.2d 750, 1999 N.Y. App. Div. LEXIS 12140 (N.Y. App. Div. 3d Dep't 1999).

Trial court erred in granting an owner's motion for summary judgment and dismissing the complaint because, while a plumber's statute of limitations defense was inadequately pleaded due to its failure to separately state and number the defense, and the owner was prejudiced by the defective pleading, the prejudice was curable by allowing the plumber to amend its pleading and then allowing the owner to conduct discovery on the statute of limitations issue, particularly to determine when the plumber completed its work on the plumbing system. Scholastic Inc. v Pace Plumbing Corp., 129 A.D.3d 75, 8 N.Y.S.3d 143, 2015 N.Y. App. Div. LEXIS 3456 (N.Y. App. Div. 1st Dep't 2015).

The state's motion requiring the claimant to separately state and number each incident of assault and battery averred was denied where the motion was not made until a year after the pleading was served, where plaintiff had filed a complete bill of particulars, and where all of the alleged assaults occurred while the claimant was under defendant's supervision and control in a mental institution. Whitree v State, 48 Misc. 2d 673, 265 N.Y.S.2d 709, 1965 N.Y. Misc. LEXIS 1235 (N.Y. Ct. Cl. 1965), aff'd, 26 A.D.2d 720, 271 N.Y.S.2d 319, 1966 N.Y. App. Div. LEXIS 3753 (N.Y. App. Div. 3d Dep't 1966).

Rule 3014 of the CPLR does not authorize an order to state causes of action in separately numbered paragraphs. Seneca Steel Service, Inc. v Northern Financial Corp., 63 Misc. 2d 1086, 314 N.Y.S.2d 304, 1970 N.Y. Misc. LEXIS 1335 (N.Y. Sup. Ct. 1970).

Where the complaint in a proceeding pursuant to Article 3-A of the Lien Law in which the plaintiff sought an accounting of funds alleged that between certain dates the plaintiff had supplied steel to one of the defendant corporations to be used by it in the construction and improvement of real

property and that there remained a certain amount due and owing to it for such steel, such allegation, although general, sufficiently stated a single cause of action for the cost of the goods sold and delivered to such defendant, and the plaintiff was not required, as contended by the defendant-assignee of such corporation's assets, to set forth the separate parcels of real property for which the plaintiff allegedly was a materialman, especially since such information could be obtained in a bill of particulars or any other of the existing pre-trial devices available to amplify pleadings. Seneca Steel Service, Inc. v Northern Financial Corp., 63 Misc. 2d 1086, 314 N.Y.S.2d 304, 1970 N.Y. Misc. LEXIS 1335 (N.Y. Sup. Ct. 1970).

Fact that defendant had unsuccessfully moved for an order requiring plaintiff to serve an amended complaint separately stating and numbering each cause of action did not preclude defendant from subsequently maintaining a motion to dismiss for failure to state cause of action. Drago v Buonagurio, 89 Misc. 2d 171, 391 N.Y.S.2d 61, 1977 N.Y. Misc. LEXIS 1855 (N.Y. Sup. Ct. 1977), rev'd, 61 A.D.2d 282, 402 N.Y.S.2d 250, 1978 N.Y. App. Div. LEXIS 9735 (N.Y. App. Div. 3d Dep't 1978).

5. Incorporation by reference

Although plaintiff improperly sought to incorporate in her complaint by reference pleadings in a prior action, her error did not render deficient her negligence cause of action, and she was permitted to replead upon a proper application. Card v Budini, 29 A.D.2d 35, 285 N.Y.S.2d 734, 1967 N.Y. App. Div. LEXIS 2741 (N.Y. App. Div. 3d Dep't 1967).

Complaint which alleged entry and partial enforcement of a default judgment which plaintiff subsequently successfully moved to vacate did not state cause of action for malicious prosecution or abuse of process where, although the complaint alleged that defendant acted with malice, there was no indication in the pleadings or in the moving papers which substantiated that allegation. Howell v Davis, 58 A.D.2d 852, 396 N.Y.S.2d 866, 1977 N.Y. App. Div. LEXIS 13035 (N.Y. App. Div. 2d Dep't 1977), aff'd, 43 N.Y.2d 874, 403 N.Y.S.2d 496, 374 N.E.2d 393, 1978 N.Y. LEXIS 1800 (N.Y. 1978).

Complaint would be deemed to demand punitive damages, although not specifically asserted in particular cause of action, where plaintiff had incorporated in that cause of action all prior paragraphs of complaint, some of which claimed punitive damages; this was true despite fact that some paragraphs thus incorporated in cause of action were taken from other causes of action which had properly been dismissed. Green v Fischbein Olivieri Rozenholc & Badillo, 119 A.D.2d 345, 507 N.Y.S.2d 148, 1986 N.Y. App. Div. LEXIS 60631 (N.Y. App. Div. 1st Dep't 1986).

Matters left out of a counterclaim or previously alleged in an affirmative defense contained in the same pleading, as far as a motion to dismiss for insufficiency is concerned, are deemed repeated and adopted in the counterclaim. Nussenblatt v Nussenblatt, 62 Misc. 2d 792, 309 N.Y.S.2d 397, 1970 N.Y. Misc. LEXIS 1743 (N.Y. Sup. Ct. 1970).

6. Separate causes of action or defenses

A complaint which as a whole is unnecessarily complicated and joins causes of action for alleged breach of contract, or contracts, with a charge of the business tort of disparagement and unfair competition fails to comply with CPLR § 3013 and Rule 3014. Payrolls & Tabulating, Inc. v Sperry Rand Corp., 22 A.D.2d 595, 257 N.Y.S.2d 884, 1965 N.Y. App. Div. LEXIS 4564 (N.Y. App. Div. 1st Dep't 1965).

Complaint against corporation and three of its alleged officers for slander, fraud, interference with contractual relations, conspiracy, and prima facie tort was subject to being dismissed for failure to state a cause of action, even though it contained allegations which might have been appropriate to some or all of alleged torts, where allegations were pleaded in form of a single cause of action contrary to statutory requirements, and, though damage seemed to be attributed to alleged defamation, plaintiff failed to fulfill further requirement of setting forth particular words claimed to have been uttered by individual defendants. Roberts v Finkel, 46 A.D.2d 878, 362 N.Y.S.2d 176, 1974 N.Y. App. Div. LEXIS 3232 (N.Y. App. Div. 1st Dep't 1974).

A trespass action brought by the plaintiff was barred by the doctrine of res judicata where the claim arose out of the same series of events as a prior action in which the plaintiff alleged a de facto taking of his real property and sought condemnation damages in the amount of $1,000,000 and which was dismissed for failure to state a cause of action; even if the two causes of action were considered inconsistent, CPLR 3014 specifically authorizes separate causes of action to be stated regardless of consistency. O'Brien v Syracuse, 79 A.D.2d 874, 434 N.Y.S.2d 547, 1980 N.Y. App. Div. LEXIS 14290 (N.Y. App. Div. 4th Dep't 1980), aff'd, 54 N.Y.2d 353, 445 N.Y.S.2d 687, 429 N.E.2d 1158, 1981 N.Y. LEXIS 3161 (N.Y. 1981).

In an action to enforce a non-competition covenant in an employment contract and to recover damages for misappropriation of trade secrets, the defendant’s second and third counterclaims satisfied the requirements of CPLR § 3016(a) governing libel and slander actions, where a copy of an allegedly libelous letter was attached to the amended answer and was expressly incorporated in the second counterclaim and where the third counterclaim alleged specific slanderous statements made by the third-party defendant in a telephone conversation; however, two paragraphs of the amended answer alleging additional defamations failed to set forth the particular words complained of and failed to meet the requirements of CPLR § 3014 that separate causes of action be separately stated and numbered and would be struck. Liberally construed, the pleading sufficiently alleged separate causes of action against the third-party defendant to withstand a motion to dismiss made pursuant to CPLR § 3211(a)(7), despite the fact that it did not in make clear whether the defendant was not an individual or corporate or partnership capacity. David J. Cogan Management Co. v Lipset, 79 A.D.2d 918, 434 N.Y.S.2d 417, 1981 N.Y. App. Div. LEXIS 9790 (N.Y. App. Div. 1st Dep't 1981).

In libel action against newspaper, university coach’s cause of action did not require dismissal for combining of legal theories where only single set of material facts was involved regardless of theory of liability and there was no overriding impediment to answering of complaint. Talbot v Johnson Newspaper Corp., 124 A.D.2d 284, 508 N.Y.S.2d 80, 1986 N.Y. App. Div. LEXIS 61325 (N.Y. App. Div. 3d Dep't 1986).

Court should have granted defendant’s motion to require plaintiff to separately state and number causes of action where amended and second amended complaints failed to clarify whether plaintiff’s single cause of action was for negligence or for intentional tort of assault and battery. Rafferty v Arnot Ogden Memorial Hospital, 140 A.D.2d 911, 528 N.Y.S.2d 729, 1988 N.Y. App. Div. LEXIS 5737 (N.Y. App. Div. 3d Dep't 1988).

A claim for punitive damages does not constitute a separate cause of action. Goldman v Garofalo, 59 A.D.2d 933, 399 N.Y.S.2d 447, 1977 N.Y. App. Div. LEXIS 14165 (N.Y. App. Div. 2d Dep't 1977).

Because pleading in the alternative was authorized under N.Y. C.P.L.R. 3014, the homeowners’ action attacking a home-improvement contract as unenforceable by a contractor did not thwart their causes of action to recover damages for breach of contract; therefore, the trial court erred in refusing to charge the jury on the elements of a breach of contract. West Park Assoc., Inc. v Cohen, 43 A.D.3d 818, 841 N.Y.S.2d 350, 2007 N.Y. App. Div. LEXIS 9482 (N.Y. App. Div. 2d Dep't 2007).

Although the definition of cross-claim contained in CPLR § 3019, subd b includes a claim of a “respondent” against a “judgment debtor” in a special proceeding brought pursuant to CPLR § 5227, counterclaim was not proper in special proceeding where court had not granted garnishee permission to file such counterclaim against judgment creditor, and where counterclaim, set forth in “wherefore” clause of garnishee’s answer failed to comply with separate pleading requirements of CPLR § 3014. Michigan Associates v Emigrant Sav. Bank, 74 Misc. 2d 495, 345 N.Y.S.2d 329, 1973 N.Y. Misc. LEXIS 1888 (N.Y. Civ. Ct. 1973).

Where cause of action pleaded an action for breach of warranty and an action for strict products liability in use of an exercisor, the causes should have been separately pleaded, but such failure was not fatal in determining that the four-year statute of limitations applicable to torts applied and not the three-year statute of limitations applicable to contracts. Simmons v Albany Boys Club, Inc., 80 Misc. 2d 19, 362 N.Y.S.2d 113, 1974 N.Y. Misc. LEXIS 1831 (N.Y. Sup. Ct. 1974).

In a negligence and medical malpractice action in which claimant's bill of particulars against the State of New York alleged, in addition to various departures from good medical practice, that defendant's agents failed to obtain the informed consent of claimant's decedent prior to the performance of certain unspecified medical procedures, the cause of action for lack of informed consent (Pub H Law § 2805-d) should have been separately pleaded pursuant to CPLR § 3014, since an action for lack of informed consent although akin to an action for medical malpractice, is a distinct cause of action. Pagan v State, 124 Misc. 2d 366, 476 N.Y.S.2d 468, 1984 N.Y. Misc. LEXIS 3207 (N.Y. Ct. Cl. 1984).

In summary holdover proceeding where portion of petition based on nonpayment was dismissed, remaining portions of petition based on nuisance and breach of various lease provisions were not thereby subject to dismissal; assertion of separate theories or causes of action was authorized by CLS CPLR § 3014. Lambert Houses Redevelopment Co. v Adam & Peck Org., 169 Misc. 2d 667, 652 N.Y.S.2d 202, 1996 N.Y. Misc. LEXIS 481 (N.Y. App. Term 1996).

7. —Punitive damages

Motion to separately state and number causes of action was granted to require the separation of those allegations which recite the breach of a separation agreement from those referable to a demand for "punitive damages", and which constituted two causes of action. Wolf v Wolf, 22 A.D.2d 678, 253 N.Y.S.2d 509, 1964 N.Y. App. Div. LEXIS 2884 (N.Y. App. Div. 1st Dep't 1964).

Although complaint against individual for tortious interference with contract, which plaintiff corporation had with defendant corporation bearing the name of the individual defendant, was sufficient to state a cause of action, since it was intertwined with breach of contract claim against defendant corporation the complaint against the individual defendant would be dismissed with leave to serve an amended complaint. Charitable Promotions, Div. of Hanson-Griffis, Inc. v Anka, 58 A.D.2d 165, 396 N.Y.S.2d 228, 1977 N.Y. App. Div. LEXIS 11850 (N.Y. App. Div. 1st Dep't 1977).

It is improper to interpose claim for punitive damages as separate cause of action. Bishop v Bostick, 141 A.D.2d 487, 529 N.Y.S.2d 116, 1988 N.Y. App. Div. LEXIS 6342 (N.Y. App. Div. 2d Dep't 1988).

In action under Penal Law § 273 for treble damages against attorneys who allegedly deceived the court, involving other claims against other defendants, allegations for treble damages should be pleaded in separate causes of action. Dworski v Empire Discount Corp., 46 Misc. 2d 844, 260 N.Y.S.2d 938, 1965 N.Y. Misc. LEXIS 1738 (N.Y. Sup. Ct. 1965).

A demand for punitive damages does not amount to a separate cause of action and may be pleaded in the same item with a demand for special or general damages. Dworski v Empire Discount Corp., 46 Misc. 2d 844, 260 N.Y.S.2d 938, 1965 N.Y. Misc. LEXIS 1738 (N.Y. Sup. Ct. 1965).

8. Inconsistent or alternate theories, generally

Pleading of inconsistent theories does not render the causes of action insufficient. Severino v Salisbury Point Cooperatives, Inc., 21 A.D.2d 813, 250 N.Y.S.2d 896, 1964 N.Y. App. Div. LEXIS 3542 (N.Y. App. Div. 2d Dep't 1964).

Inconsistent and hypothetical causes of action may be pleaded subject to such rights as a defendant may have to object to an improper joinder or to move for severance. Plant City Steel Corp. v National Machinery Exchange, Inc., 28 A.D.2d 268, 284 N.Y.S.2d 632, 1967 N.Y. App. Div. LEXIS 3019 (N.Y. App. Div. 1st Dep't 1967), aff'd, 23 N.Y.2d 472, 297 N.Y.S.2d 559, 245 N.E.2d 213, 1969 N.Y. LEXIS 1614 (N.Y. 1969).

CPLR § 3014 specifically authorizes the pleading of inconsistent allegations and defenses, and although the parties may not succeed on each of their inconsistent claims, the assertion of one claim does not constitute an abandonment of another. Frantz v Frantz, 92 A.D.2d 950, 460 N.Y.S.2d 668, 1983 N.Y. App. Div. LEXIS 17374 (N.Y. App. Div. 3d Dep't 1983).

In action for breach of lease covenant of repair, court should have granted plaintiff's motion to amend complaint to add cause of action for waste in view of liberal policy of allowing pleading of inconsistent and alternative claims under CLS CPLR § 3014, and since covenant to repair includes and is construed in light of tenant's common law obligation to repair, there was no incompatibility between such claims; in any event, plaintiff was entitled to assert alternative claim for waste given that defendant had denied that plaintiff had succeeded to rights under lease. Watner v P & C Food Markets, Inc., 138 A.D.2d 959, 526 N.Y.S.2d 292, 1988 N.Y. App. Div. LEXIS 2593 (N.Y. App. Div. 4th Dep't 1988).

In light of CLS CPLR § 3014, court properly denied plaintiff's motion to strike defendant's answer on ground that defendant had asserted inconsistent defenses. Anamdi v Anugo, 238 A.D.2d 366, 657 N.Y.S.2d 328, 1997 N.Y. App. Div. LEXIS 3867 (N.Y. App. Div. 2d Dep't 1997).

Causes of action alleging breach of contract and unjust enrichment may be pleaded alternatively. Auguston v Spry, 282 A.D.2d 489, 723 N.Y.S.2d 103, 2001 N.Y. App. Div. LEXIS 3523 (N.Y. App. Div. 2d Dep't 2001).

Even if regarded as inconsistent remedies, there is no impediment to plaintiff asserting both a cause of action for conversion and another for recovery of the chattel. Tollin v Elleby, 77 Misc. 2d 708, 354 N.Y.S.2d 856, 1974 N.Y. Misc. LEXIS 1223 (N.Y. Civ. Ct. 1974).

9. —Law and equity

Under the CPLR equity and law actions no longer are to be distinguished at the pleading stage, so that where a complaint is framed in equity and seeks equitable relief, it will not be dismissed if the facts alleged entitle plaintiff only to legal relief, since the CPLR has effectively merged law and equity actions by removing the prior stumbling blocks thereto: shifting from the requirement that a complaint conform to a "theory of the pleadings", to the requirement that a complaint need only give notice of the transactions intended to be proved and the material elements of the cause of action; and removing the possibility of prejudice to a defendant faced with an equitable complaint which turns out to be a legal action and thereby deprives him of a jury trial, by giving

him the right to a jury trial under these circumstances. Lane v Mercury Record Corp., 21 A.D.2d 602, 252 N.Y.S.2d 1011, 1964 N.Y. App. Div. LEXIS 3101 (N.Y. App. Div. 1st Dep't 1964), aff'd, 18 N.Y.2d 889, 276 N.Y.S.2d 626, 223 N.E.2d 35, 1966 N.Y. LEXIS 1006 (N.Y. 1966).

Partnership was not entitled to dismissal of a declaratory judgment action brought by a limited liability company (LLC) because, inter alia, the partnership failed to prove that it sustained damages of more than $250,000 as required to invoke indemnification clause; the LLC's claim against a corporation's former attorneys were plainly cast as a hypothetical alternative and did not amount to an admission that the claimed damages were sustained. Orbimed Advisors, LLC v QVT Fund LP, 72 A.D.3d 521, 898 N.Y.S.2d 140, 2010 N.Y. App. Div. LEXIS 3096 (N.Y. App. Div. 1st Dep't 2010).

10. —Waiver

Where seller did not object to complaint alleging inconsistent causes of action, but proceeded to trial without seeking an election, he must be deemed to have waived any right he may have had to compel seller to elect. Plant City Steel Corp. v National Machinery Exchange, Inc., 28 A.D.2d 268, 284 N.Y.S.2d 632, 1967 N.Y. App. Div. LEXIS 3019 (N.Y. App. Div. 1st Dep't 1967), aff'd, 23 N.Y.2d 472, 297 N.Y.S.2d 559, 245 N.E.2d 213, 1969 N.Y. LEXIS 1614 (N.Y. 1969).

11. —Illustrative cases

Although defendant building owner in its answer denied employment of plaintiff suing for personal injuries, it could nonetheless plead the inconsistent defense of workmen's compensation coverage. George v Sparwood Realty Corp., 34 A.D.2d 768, 311 N.Y.S.2d 422, 1970 N.Y. App. Div. LEXIS 4808 (N.Y. App. Div. 1st Dep't 1970).

In wife's action seeking judgment declaring husband's Haitian divorce invalid, husband was not estopped from counterclaiming for divorce or precluded from alleging alternative defenses. Kiley

v Kiley, 48 A.D.2d 807, 369 N.Y.S.2d 410, 1975 N.Y. App. Div. LEXIS 10003 (N.Y. App. Div. 1st Dep't 1975).

In a wrongful death action against a hospital and three doctors, plaintiff's discontinuance of his claim against the doctors does not divest Special Term of personal jurisdiction to entertain a motion by the hospital to examine the doctors before trial as codefendants regarding a cross claim for indemnification, as a dismissal of plaintiff's claim against the doctors does not carry with it a dismissal of claims, even if inconsistent (CPLR 3014), interposed against them by a codefendant, inasmuch as it cannot be conclusively presumed that evidence will not be adduced at an examination before trial that any or all of the three doctors were not under the control and direction of the hospital at the time of the occurrence. This is true despite the hospital's response to the doctors' notice to admit that they, the doctors, were independent contractors, in that a hospital may be held vicariously liable for the negligent acts of an independent contractor-physician where the doctor holds himself out to the public in such a manner as to cause the patients to assume that he was acting on the hospital's behalf. Moreover, the purpose of the notice to admit procedure is not to obtain information in lieu of other disclosure devices, but only to eliminate from the issues matters which will not really be in dispute at the trial and whether a person is an employee or an independent contractor is an ultimate or conclusory fact which can only be determined from the evidence itself. Therefore, it is in accordance with sound procedural practice, i.e., to avoid multiplicity of litigation by determining the ultimate rights of all parties in one trial, to defer consideration of any application dealing with the true relationship between the hospital and the three doctors at the time of the occurrence, at least until after pretrial depositions of all the litigants as parties to the action have been conducted. Felice v St. Agnes Hospital, 65 A.D.2d 388, 411 N.Y.S.2d 901, 1978 N.Y. App. Div. LEXIS 13431 (N.Y. App. Div. 2d Dep't 1978).

In an action by the alleged assignee of a subcontractor against the contractor to recover retainage due on a 1970 subcontract, wherein the contractor interposed two counterclaims arising out of two 1968 subcontracts on a separate project with a company related to the first

subcontractor, summary judgment was improperly granted to the plaintiff since there was a question of fact as to whether the plaintiff acquired the claim sued upon; the contractor cannot be deemed to have admitted the assignment since inconsistency in pleadings is expressly permitted (CPLR 3014), and moreover, an alleged admission made upon “information and belief” does not constitute a formal or informal judicial admission. Additionally, there is a question of fact as to whether defendant’s counterclaim is related to plaintiff’s cause of action, thus barring an award of summary judgment to plaintiff. Scolite International Corp. v Vincent J. Smith, Inc., 68 A.D.2d 417, 418 N.Y.S.2d 191, 1979 N.Y. App. Div. LEXIS 10955 (N.Y. App. Div. 3d Dep't 1979).

In a personal injury action against an ice cream store to recover for injuries sustained when plaintiff tripped on a coaming between the sidewalk and the entrance to the store, the trial court erred in directing a verdict for defendant, where the fact that plaintiff had commenced a separate suit against the city did not justify the court’s conclusion that as a matter of law plaintiff had fallen on the sidewalk, which was not under defendant’s control, where plaintiff was entitled to every favorable inference that could reasonably be drawn from the evidence and was entitled to assert inconsistent causes of action in separate lawsuits, where it would not have been utterly irrational for the jury to have found that the dangerous condition existed on defendant’s property, and where plaintiff adequately raised the issue of whether defendant met the reasonable person standard of care for property owners. Pontiatowski v Baskin-Robbins, 91 A.D.2d 1035, 458 N.Y.S.2d 629, 1983 N.Y. App. Div. LEXIS 16360 (N.Y. App. Div. 2d Dep't 1983).

Determination to permit plaintiffs to seek both punitive damages and treble damages against defendant under New York and Massachusetts law was not internally inconsistent in light of clear mandate of CLS CPLR §§ 3014 and 3017 which permit and encourage pleading of claims and remedies in alternative, and state practice that election of remedies, if any, need not be made until all proof has been presented. Volt System Dev. Corp. v Raytheon Co., 155 A.D.2d 309, 547 N.Y.S.2d 280, 1989 N.Y. App. Div. LEXIS 14200 (N.Y. App. Div. 1st Dep't 1989).

Defendants were not entitled to dismissal of action for prima facie tort, even though complaint alleged that defendant doctors were partly motivated by business purpose of obtaining fees from plaintiff doctor's patients, thereby arguably vitiating "disinterested malevolence" requirement for prima facie tort, since various other allegations in complaint sufficiently supported claim that actions alleged were undertaken with "disinterested malevolence." Chime v Sicuranza, 221 A.D.2d 401, 633 N.Y.S.2d 536, 1995 N.Y. App. Div. LEXIS 11974 (N.Y. App. Div. 2d Dep't 1995), overruled in part, Taggart v Costabile, 131 A.D.3d 243, 14 N.Y.S.3d 388, 2015 N.Y. App. Div. LEXIS 5349 (N.Y. App. Div. 2d Dep't 2015).

Justice court had jurisdiction to entertain a landlord's summary proceeding under circumstances in which the petition was based on a tenant's nonpayment of rent and holding over after expiration of tenancy; although these grounds for eviction were inconsistent, inconsistent causes of action were allowed to have been pleaded in the alternative. Matter of Kern v Guller, 40 A.D.3d 1231, 835 N.Y.S.2d 764, 2007 N.Y. App. Div. LEXIS 5809 (N.Y. App. Div. 3d Dep't 2007).

Property purchasers were permitted pursuant to N.Y. C.P.L.R. §§ 3014, 3017 to seek a declaration that a real estate contract had been terminated and the return of their down payment or, in the alternative, to have the closing stayed until the seller had obtained a certificate of occupancy for the commercial property and had cured various violations. Gold v 29-15 Queens Plaza Realty, LLC, 43 A.D.3d 866, 841 N.Y.S.2d 668, 2007 N.Y. App. Div. LEXIS 9551 (N.Y. App. Div. 2d Dep't 2007).

Though the plaintiff's first cause of action for divorce was based on abandonment and her second cause of action claimed the parties had entered into a valid separation agreement, confirmed by a foreign court in a decree that might be converted into a judgment of divorce, were inconsistent, this was not contrary to statutory pleading requirements. Shapiro v Shapiro, 110 Misc. 2d 726, 442 N.Y.S.2d 928, 1981 N.Y. Misc. LEXIS 3149 (N.Y. Sup. Ct. 1981), modified, 88 A.D.2d 592, 449 N.Y.S.2d 806, 1982 N.Y. App. Div. LEXIS 16766 (N.Y. App. Div. 2d Dep't 1982).

Where grounds existed for the maintenance of both a nuisance holdover and a holdover based on breach of a substantial obligation of the lease, the landlord was permitted to proceed on both grounds in the alternative without the procedural prerequisites of the one becoming engrafted on the other. Inasmuch as the evidence established a pattern of continuity or recurrence of objectionable conduct which began long before the termination of the tenancy and continued throughout the probationary period and up through the time of trial, no further opportunities to cure were either required or warranted. Rockaway One Co. v Califf, 194 Misc. 2d 191, 751 N.Y.S.2d 670, 2002 N.Y. Misc. LEXIS 1539 (N.Y. App. Term 2002).

Company's motion for summary judgment, seeking dismissal of a real estate broker's claim that the company's alleged taking of her computerized and hard copy client lists constituted a breach of bailment of those materials with the company, was denied because, while the theory of conversion alleged earlier in the complaint was inconsistent with the bailment theory, which was premised on lawful possession in the first instance, modern pleading practice permitted alternative assertion of inconsistent causes of action, as evidenced by N.Y. C.P.L.R. 3014. The broker had adequately alleged that she entrusted her client lists to the company for as long as they were affiliated in the real estate brokerage industry, and the company's failure to return them upon termination of that relationship was, therefore, adequately alleged to be a breach of the bailment. Shmueli v Corcoran Group, 802 N.Y.S.2d 871, 9 Misc. 3d 589, 234 N.Y.L.J. 24, 2005 N.Y. Misc. LEXIS 1551 (N.Y. Sup. Ct. 2005).

12. Hypothetical pleadings

Hypothetical pleadings under the CPLR are permitted if the facts alleged show good faith and honesty on the part of the pleader. Complaint of retailer of dolls against manufacturer for breach of implied warranty of merchantability, and for recovery of any amount for which retailer may be held liable in an action brought against him by purchaser of one of said dolls who was injured while playing with it, sufficiently states a cause of action, even though it alleges that "if" said injuries were not caused by the negligence of the retailer or his customer, "then" they were

caused by the breach of warranty, since it is evident that plaintiff honestly sets forth the facts, and pleads in good faith his doubt as to liability. W. T. Grant Co. v Uneeda Doll Co., 19 A.D.2d 361, 243 N.Y.S.2d 428, 1963 N.Y. App. Div. LEXIS 3101 (N.Y. App. Div. 1st Dep't 1963), vacated, 20 A.D.2d 688, 246 N.Y.S.2d 585, 1964 N.Y. App. Div. LEXIS 4464 (N.Y. App. Div. 1st Dep't 1964), aff'd, 15 N.Y.2d 571, 254 N.Y.S.2d 834, 203 N.E.2d 299, 1964 N.Y. LEXIS 844 (N.Y. 1964).

Morey v Sealright Co., 41 Misc. 2d 1068, 247 N.Y.S.2d 306, 1964 N.Y. Misc. LEXIS 2035 (N.Y. Sup. Ct. 1964).

This section permits hypothetical pleadings, subject to the requirement of honesty and good faith. Banco Do Brasil, S. A. v Calhoon, 50 Misc. 2d 512, 270 N.Y.S.2d 691, 1966 N.Y. Misc. LEXIS 2027 (N.Y. Sup. Ct. 1966).

13. Writings attached to pleadings

Where a complaint alleges that defendant in breach of his fiduciary duties caused his corporation to enter into a contract with a third party, and a copy of the written agreement, annexed to the complaint, discloses that the corporation did not execute the contract, since the annexed copy must prevail over its pleaded version, the complaint must be dismissed for insufficiency. 300 Broadway Realty Corp. v Kommit, 21 A.D.2d 836, 250 N.Y.S.2d 103, 1964 N.Y. App. Div. LEXIS 3645 (N.Y. App. Div. 3d Dep't 1964).

N.Y. C.P.L.R. § 3014 tracks Fed. R. Civ. P. 10(c) with the exception that it broadly governs any writing and not simply a written instrument; the differences between the two rules supported defendant drug-delivery-product maker’s contention that the terms written instrument did not encompass any document attached to a pleading, and an expert’s affidavit attached to plaintiff class representatives’ pleading was not a written instrument under Fed. R. Civ. P. 10(c). DeMarco v Depotech Corp., 149 F. Supp. 2d 1212, 2001 U.S. Dist. LEXIS 5336 (S.D. Cal. 2001), aff'd, 32 Fed. Appx. 260, 2002 U.S. App. LEXIS 2993 (9th Cir. Cal. 2002).

II. Under Former Civil Practice Laws

14. Pleadings, generally

Allegations in the present tense relate to the date of verification. Prindle v Caruthers, 15 N.Y. 425, 15 N.Y. (N.Y.S.) 425, 1857 N.Y. LEXIS 20 (N.Y. 1857).

Time when a promise is to be performed is always material and must be stated according to the truth and proved as stated. Pope v Terre Haute Car & Mfg. Co., 107 N.Y. 61, 13 N.E. 592, 107 N.Y. (N.Y.S.) 61, 11 N.Y. St. 209, 1887 N.Y. LEXIS 984 (N.Y. 1887).

It is essential to set forth every material fact which forms a part of a cause of action or defense, and a complaint must contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition. National Citizens' Bank v Toplitz, 178 N.Y. 464, 71 N.E. 1, 178 N.Y. (N.Y.S.) 464, 1904 N.Y. LEXIS 734 (N.Y. 1904).

Unnecessary to label causes of action as being in tort or in contract. Lays Bros. & Boss, Inc. v American R. E. Co., 228 A.D. 746, 239 N.Y.S. 478, 1930 N.Y. App. Div. LEXIS 12805 (N.Y. App. Div. 1930).

Prolixity and surplusage in pleadings condemned. Isaacs v Washougal Clothing Co., 233 A.D. 568, 253 N.Y.S. 387, 1931 N.Y. App. Div. LEXIS 11366 (N.Y. App. Div. 1931).

The courts do not favor long and confused pleadings. Virdone v Globe Bank & Trust Co., 235 A.D. 125, 256 N.Y.S. 421, 1932 N.Y. App. Div. LEXIS 7904 (N.Y. App. Div. 1932).

Unnecessarily long complaint was held sufficient. Gerety v Yahya Aryeh, 273 A.D. 974, 78 N.Y.S.2d 232, 1948 N.Y. App. Div. LEXIS 5554 (N.Y. App. Div. 1948).

A complaint may be legally sufficient and yet contain much more than a plain and concise statement of the material facts as required under the general rules of pleading. Brandt v Winchell, 283 A.D. 338, 127 N.Y.S.2d 865, 1954 N.Y. App. Div. LEXIS 4675 (N.Y. App. Div.),

app. denied, 283 A.D. 794, 129 N.Y.S.2d 232, 1954 N.Y. App. Div. LEXIS 5345 (N.Y. App. Div. 1954).

Concise statement of facts is required in pleading to enable party served with pleading to prepare intelligently for trial and avoid some unforeseen construction put upon allegations of complaint. Weisberg v Brogan, 144 N.Y.S.2d 255, 208 Misc. 524, 1955 N.Y. Misc. LEXIS 3719 (N.Y. City Ct. 1955).

A complaint is sufficiently clear and concise where acts are all properly alleged as one cause of action sounding in unfair competition and allegations which have a reasonable or probable bearing on the controversy will not be stricken as harmful or prejudicial. Dior v Milton, 9 Misc. 2d 425, 155 N.Y.S.2d 443, 1956 N.Y. Misc. LEXIS 1678 (N.Y. Sup. Ct.), aff'd, 2 A.D.2d 878, 156 N.Y.S.2d 996, 1956 N.Y. App. Div. LEXIS 4009 (N.Y. App. Div. 1st Dep't 1956).

A complaint purporting to state a cause of action against an employer and union did not comply with CPA section 241 where it did not contain a plain and concise statement of the material facts on which the petitioner as plaintiff relied. Calka v Tobin Packing Co., 12 Misc. 2d 455, 176 N.Y.S.2d 910, 1958 N.Y. Misc. LEXIS 2901 (N.Y. Sup. Ct. 1958), aff'd, 9 A.D.2d 820, 192 N.Y.S.2d 886, 1959 N.Y. App. Div. LEXIS 6176 (N.Y. App. Div. 3d Dep't 1959).

A pleading should contain a plain and concise statement of the material facts. Mordkowitz v Mordkowitz, 13 Misc. 2d 495, 177 N.Y.S.2d 328, 1958 N.Y. Misc. LEXIS 3479 (N.Y. Sup. Ct. 1958).

Defendant is entitled to a plain and concise statement in the complaint as to the facts upon which plaintiff depends and plaintiff cannot rely on his statement of his claim in a notice to defendant attached to the complaint where the complaint itself is silent as to the claim. Lockwood v Buchanan, 18 Misc. 2d 862, 182 N.Y.S.2d 754, 1959 N.Y. Misc. LEXIS 4580 (N.Y. County Ct. 1959).

Background material to support charge of specific wrongs alleged, is unnecessary. Schierenbeck v John Krauss, Inc., 104 N.Y.S.2d 180, 1951 N.Y. Misc. LEXIS 1723 (N.Y. Sup.

Ct.), aff'd, 278 A.D. 856, 105 N.Y.S.2d 360, 1951 N.Y. App. Div. LEXIS 4984 (N.Y. App. Div. 1951).

Complaint for personal injury must state acts or omissions of defendant which constitute claimed negligence, along with factual recital of specific acts or omissions of defendant causing injury claimed. Brodsky v Cross, 106 N.Y.S.2d 191, 1951 N.Y. Misc. LEXIS 2021 (N.Y. Sup. Ct. 1951).

15. —Purpose

The intendment of the provisions of CPA § 241 was that the defendant should have been notified of the facts upon which the plaintiff relied for a recovery and his proofs had to correspond to the issues presented. Claflins, Inc. v Gerber, 214 A.D. 245, 212 N.Y.S. 170, 1925 N.Y. App. Div. LEXIS 10491 (N.Y. App. Div. 1925).

The purpose of pleading is to present and define the issues to be tried and determined. Isaacs v Washougal Clothing Co., 233 A.D. 568, 253 N.Y.S. 387, 1931 N.Y. App. Div. LEXIS 11366 (N.Y. App. Div. 1931).

Purpose of CPA § 241 was to enable party served with pleading to prepare intelligently for trial and avoid some unforeseen construction put upon obscure allegations. Shass v Abgold Realty Corp., 277 A.D. 346, 100 N.Y.S.2d 121, 1950 N.Y. App. Div. LEXIS 3052 (N.Y. App. Div. 1950).

16. —Courts

In any proceeding in surrogate’s court, facts must be pleaded in same manner as is required in civil actions. In re Eitingon's Estate, 77 N.Y.S.2d 492, 192 Misc. 836, 1947 N.Y. Misc. LEXIS 3710 (N.Y. Sur. Ct. 1947), aff'd, 273 A.D. 998, 79 N.Y.S.2d 897 (N.Y. App. Div. 1948), aff'd, 274 A.D. 882, 84 N.Y.S.2d 699, 1948 N.Y. App. Div. LEXIS 3859 (N.Y. App. Div. 1948), modified, 275 A.D. 706, 88 N.Y.S.2d 248, 1949 N.Y. App. Div. LEXIS 4112 (N.Y. App. Div. 1949).

Among the sections of civil practice act which have been held to apply in the court of claims was CPA § 241. Easley v State, 10 Misc. 2d 370, 169 N.Y.S.2d 354, 1957 N.Y. Misc. LEXIS 1958 (N.Y. Ct. Cl. 1957).

CPA § 241 applied to Court of Claims. Taylor v State, 58 N.Y.S.2d 33, 1945 N.Y. Misc. LEXIS 2380 (N.Y. Ct. Cl. 1945), app. dismissed, 65 N.Y.S.2d 437 (N.Y. App. Div. 1946).

17. —Actions or proceedings to which applicable

CPA §§ 241–284, dealing with pleadings, applied only to actions as distinguished from special proceedings. In re Fields' Trust, 84 N.Y.S.2d 656, 193 Misc. 781, 1948 N.Y. Misc. LEXIS 3645 (N.Y. Sup. Ct. 1948), aff'd, 276 A.D. 835, 93 N.Y.S.2d 267 (N.Y. App. Div. 1949).

18. —Construction of pleadings

However allegations of matters of substance cannot be overlooked under guise of liberal construction. Didier v MacFadden Publications, Inc., 299 N.Y. 49, 85 N.E.2d 612, 299 N.Y. (N.Y.S.) 49, 1949 N.Y. LEXIS 983 (N.Y. 1949).

CPA § 241, requiring every pleading to contain concise statement of material facts, was to be read with CPA § 275 (Rule 2103(b), § 3026 herein) requiring pleadings to be liberally construed. Dulberg v Mock, 1 N.Y.2d 54, 150 N.Y.S.2d 180, 133 N.E.2d 695, 1956 N.Y. LEXIS 982 (N.Y. 1956).

CPA § 241 was to be read with CPA § 275 (Rule 2103(b), § 3026 herein) which commanded that pleadings be liberally construed with a view to substantial justice between the parties. Morgenstern v Cohon, 2 N.Y.2d 302, 160 N.Y.S.2d 633, 141 N.E.2d 314, 1957 N.Y. LEXIS 1205 (N.Y. 1957).

A plaintiff is not required to prove his cause of action in his complaint but he must allege sufficient facts rather than conclusions and the court may not supply missing elements in order to hold the complaint good even though the courts endeavor to give liberal construction to

pleadings. Williams & Co. v Collins, Tuttle & Co., 6 A.D.2d 302, 176 N.Y.S.2d 99, 1958 N.Y. App. Div. LEXIS 5297 (N.Y. App. Div. 1st Dep't 1958), app. denied, 6 A.D.2d 1006, 178 N.Y.S.2d 212, 1958 N.Y. App. Div. LEXIS 4824 (N.Y. App. Div. 1st Dep't 1958), app. denied, 5 N.Y.2d 710, 1959 N.Y. LEXIS 1979 (N.Y. 1959).

Pleadings are not now construed with the same nicety of phrase and balance of words as formerly. Keuka College v Citizens' Nat'l Bank, 248 N.Y.S. 750, 139 Misc. 324, 1931 N.Y. Misc. LEXIS 1173 (N.Y. Sup. Ct. 1931).

Notice stating sum of money for which judgment would be taken in case of default, under CPA § 486 (§ 3215 herein), was not complaint. Carr v Cunningham, 91 N.Y.S.2d 858, 196 Misc. 198, 1949 N.Y. Misc. LEXIS 2725 (N.Y. County Ct. 1949).

A pleading which violated the requirement of CPA § 241 that every pleading had to contain a plain and concise statement of the material facts, was not saved by the doctrine of liberal construction prescribed by CPA § 275 (Rule 2103(b), § 3026 herein) since liberality could not be used as a substitute for matters of substance. Schreck v Schreck, 128 N.Y.S.2d 840, 205 Misc. 703, 1954 N.Y. Misc. LEXIS 2335 (N.Y. Sup. Ct. 1954).

19. —Trial without pleadings

Parties may elect to try their case without pleadings and frame their own issues upon the trial. Alber-Wickes Platform Service v Freiburg Passion Play in English, Inc., 252 N.Y.S. 209, 141 Misc. 480, 1931 N.Y. Misc. LEXIS 1617 (N.Y. Sup. Ct. 1931).

20. Sufficiency of allegations, generally

CPA § 241 requiring every pleading to state material facts was not satisfied by conclusory statements. Kalmanash v Smith, 291 N.Y. 142, 51 N.E.2d 681, 291 N.Y. (N.Y.S.) 142, 1943 N.Y. LEXIS 1047 (N.Y. 1943).

Totality of facts must be examined to determine complaint's validity, not plaintiff's characterization of them or conclusion which he seeks to draw from them. Perlmutter v Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792, 308 N.Y. (N.Y.S.) 100, 1954 N.Y. LEXIS 922 (N.Y. 1954), reh'g denied, 308 N.Y. 812, 125 N.E.2d 869, 308 N.Y. (N.Y.S.) 812, 1955 N.Y. LEXIS 1076 (N.Y. 1955).

Cause of action should contain concise statement of material facts. Forbes v Finkelstein, 2 A.D.2d 669, 152 N.Y.S.2d 902, 1956 N.Y. App. Div. LEXIS 4907 (N.Y. App. Div. 1st Dep't 1956).

Where pleader alleges specific wrongful acts by defendant, and entire cause of action as set forth is permeated throughout with innumerable conclusions, and where it is difficult if not impossible for defendants to adequately respond to these allegations, plaintiff was required to replead cause of action in proper form. Forbes v Finkelstein, 2 A.D.2d 669, 152 N.Y.S.2d 902, 1956 N.Y. App. Div. LEXIS 4907 (N.Y. App. Div. 1st Dep't 1956).

Alleging conclusions of law is forbidden. Cochran v Wyer, 117 N.Y.S.2d 910, 203 Misc. 890, 1952 N.Y. Misc. LEXIS 2098 (N.Y. Sup. Ct. 1952); Fieger v Glen Oaks Village, Inc., 132 N.Y.S.2d 88, 206 Misc. 137, 1954 N.Y. Misc. LEXIS 3391 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 814, 136 N.Y.S.2d 539, 1955 N.Y. App. Div. LEXIS 5690 (N.Y. App. Div. 1955).

Cause of action replete with conclusions is insufficient to satisfy statutory requirement that every pleading shall contain plain and concise statement of material facts. Schreck v Schreck, 128 N.Y.S.2d 840, 205 Misc. 703, 1954 N.Y. Misc. LEXIS 2335 (N.Y. Sup. Ct. 1954).

Husband has cause of action for loss of services and society resulting from deliberate libel upon wife but his complaint was dismissed for insufficiency, with leave to replead, where he claimed for loss of society without claiming for loss of services as well. Russell v Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8, 1959 N.Y. Misc. LEXIS 4540 (N.Y. Sup. Ct. 1959).

In wife's action to declare husband's Nevada divorce void, allegation in his answer that since his subsequent marriage two children were born to defendants was insufficient to spell out defense of wife's laches, where answer did not allege factually that plaintiff had actual knowledge of his

divorce and remarriage and date when she acquired such knowledge. Berkley v Berkley, 142 N.Y.S.2d 273, 1955 N.Y. Misc. LEXIS 2790 (N.Y. Sup. Ct. 1955).

21. —Remedy for incorrect pleading

When the provisions of CPA § 241 had been violated the defendant could not be required to make answer to a pleading that was unnecessarily prolix, redundant and repetitious and contained evidentiary matter and was cumbered by immaterialities. In such a case the court would strike out the entire pleading and require the plaintiff to serve an amended pleading following proper methods. Tankoos v Conford Realty Co., 248 A.D. 614, 287 N.Y.S. 823, 1936 N.Y. App. Div. LEXIS 6542 (N.Y. App. Div. 1936).

22. — —Complaint

A refusal of defendant’s motion to strike certain parts of a complaint was reversed and the plaintiff given ten days to serve a complaint containing a plain and concise statement of his material facts without the evidence by which they were to be proved. Cohu v Travelers' Ins. Co., 219 A.D. 771, 220 N.Y.S. 839, 1927 N.Y. App. Div. LEXIS 11693 (N.Y. App. Div. 1927).

It was held improper on a motion under Rule 106 (Rule 3211 herein) of the Rules of Civil Practice to dismiss a cause of action for insufficiency, to grant the motion upon the ground a complaint was unduly repetitious in violation of CPA § 241 since the motion did not search the sufficiency of the complaint as a whole. Keller v Levy, 265 A.D. 723, 40 N.Y.S.2d 580, 1943 N.Y. App. Div. LEXIS 6401 (N.Y. App. Div. 1943).

Complaint which does not plead conclusions of fact constituting enforceable contract is insufficient, and reference to bill of particulars does not help it over its deficiency. North America Wines Corp. v Wine Growers Guild, 283 A.D. 693, 127 N.Y.S.2d 337, 1954 N.Y. App. Div. LEXIS 4961 (N.Y. App. Div. 1954).

Where theory on which plaintiff is attempting to proceed is not supported by the necessary factual allegations and only by mere conclusory statements, such causes of action stricken out. Powers v Murray, 6 A.D.2d 828, 176 N.Y.S.2d 49, 1958 N.Y. App. Div. LEXIS 5464 (N.Y. App. Div. 2d Dep't 1958).

Where amended complaint contains mass of evidentiary matter and multiplicity of irrelevant, repetitious and unnecessary details, it may be stricken out in its entirety. Grobman v Freiman, 3 Misc. 2d 656, 152 N.Y.S.2d 898, 1956 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1956).

Entire complaint struck out with leave to amend. Levine v Schaffzin, 99 N.Y.S.2d 248, 1949 N.Y. Misc. LEXIS 3231 (N.Y. Sup. Ct. 1949).

23. — —Striking objectionable portions

In case a complaint violates the rules of correct pleading, a new complaint may be ordered served but material allegations of fact should not be stricken if they may be concisely and properly stated in the new complaint. Bruckenstein v Marcus, 219 A.D. 806, 220 N.Y.S. 798, 1927 N.Y. App. Div. LEXIS 12071 (N.Y. App. Div. 1927).

Order striking out portions of a complaint was too broad since it eliminated the basis ground work for relief against waste and dissipation of plaintiff’s inheritance. Squier v Houghton, 225 A.D. 221, 232 N.Y.S. 560, 1929 N.Y. App. Div. LEXIS 11604 (N.Y. App. Div. 1929).

Parts of a complaint which alleged waste and misappropriation of assets of an estate, showing interests of parties not summoned, but for whom plaintiff complained as having a common interest, were improperly stricken. Squier v Houghton, 225 A.D. 221, 232 N.Y.S. 560, 1929 N.Y. App. Div. LEXIS 11604 (N.Y. App. Div. 1929).

Where complaint did not rest on a legally sufficient basis, it was appropriate to grant a motion to strike, or for judgment, “not only against a separate cause of action, but also against a distinct and independent act or specification of wrongdoing which does not give rise to a remedial legal wrong or which cannot serve as a basis for defendants’ liability and which, if dismissed, will not

prejudice . . . the fair trial of the . . . issues." Taller & Cooper, Inc. v Neptune Meter Co., 8 Misc. 2d 107, 166 N.Y.S.2d 693, 1957 N.Y. Misc. LEXIS 2444 (N.Y. Sup. Ct. 1957).

In an action for libel based upon a publication which was an attack in part upon plaintiff and in part upon another, the complaint properly set out the article as a whole, and a motion to strike parts thereof not referring to plaintiff was properly denied. Adirondack Record, Inc. v Lawrence, 193 N.Y.S. 122, 1922 N.Y. Misc. LEXIS 1065 (N.Y. Sup. Ct.), rev'd, 202 A.D. 251, 195 N.Y.S. 627, 1922 N.Y. App. Div. LEXIS 4889 (N.Y. App. Div. 1922).

24. — —Answer

The provisions of CPA § 241 not having been complied with, an answer containing several defenses was stricken out with leave to amend. Merchants' Nat'l Bank v R. Prescott & Son, Inc., 223 A.D. 194, 228 N.Y.S. 483, 1928 N.Y. App. Div. LEXIS 6164 (N.Y. App. Div. 1928).

Motion to strike out defense and dismiss counterclaim, granted, same being insufficient. Rifkin v Ed Zit Holding Corp., 225 A.D. 891, 233 N.Y.S. 873, 1929 N.Y. App. Div. LEXIS 12622 (N.Y. App. Div. 1929), modified, 254 N.Y. 352, 173 N.E. 219, 254 N.Y. (N.Y.S.) 352, 1930 N.Y. LEXIS 1049 (N.Y. 1930).

A motion to strike out the defenses of contributory negligence and assumption of risk in an action by a seaman against his employer for maritime tort must be granted. Dopico v New York Marine Co., 217 N.Y.S. 295, 127 Misc. 677, 1926 N.Y. Misc. LEXIS 1087 (N.Y. Sup. Ct. 1926).

Motions to strike out parts of a pleading as irrelevant are not favored, especially in libel actions, if such parts tend to disprove actual malice; and the plaintiff will not be prejudiced by allowing them to remain. Russo v Howard, 217 N.Y.S. 407, 127 Misc. 762, 1926 N.Y. Misc. LEXIS 1105 (N.Y. Sup. Ct. 1926).

Irrelevant matter in an answer pleading justification in action for libel was stricken. Dinwiddie v Rochester News Corp., 230 N.Y.S. 717, 132 Misc. 876, 1928 N.Y. Misc. LEXIS 1049 (N.Y. Sup. Ct. 1928).

Parts of an answer setting up as a defense transactions which occurred prior to the execution of the contract sued upon were stricken. Shea-Lutz Realty Co. v Sperry, 231 N.Y.S. 217, 132 Misc. 879, 1928 N.Y. Misc. LEXIS 1105 (N.Y. Sup. Ct. 1928).

Matter relating to the defense of a codefendant not pertinent to the defense of the pleader will be stricken. Shea-Lutz Realty Co. v Sperry, 231 N.Y.S. 217, 132 Misc. 879, 1928 N.Y. Misc. LEXIS 1105 (N.Y. Sup. Ct. 1928).

Parts of an answer of a defendant whose liability was alternative, which set up defenses of other defendants rather than his own, were stricken on motion. Shea-Lutz Realty Co. v Sperry, 231 N.Y.S. 217, 132 Misc. 879, 1928 N.Y. Misc. LEXIS 1105 (N.Y. Sup. Ct. 1928).

When RCP 90 (Rule 3014 herein) prohibiting repetition, in a separate defense, of denials set up in the answer, was violated, no motion to strike was necessary. 276 Spring Street Corp. v Forbes, 235 N.Y.S. 257, 134 Misc. 537, 1929 N.Y. Misc. LEXIS 854 (N.Y. Sup. Ct.), modified, 226 A.D. 354, 235 N.Y.S. 523, 1929 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 1929).

Where the answer raises the question whether a provision of a contract is for liquidated damages or in fact a penalty, motion to strike will be denied. Norris v McMechen, 236 N.Y.S. 486, 134 Misc. 866, 1929 N.Y. Misc. LEXIS 1241 (N.Y. Sup. Ct. 1929).

If any portion of an answer raises an issue, motion to strike it out for insufficiency must be denied. General Inv. Co. v Interborough Rapid Transit Co., 193 N.Y.S. 881, 1921 N.Y. Misc. LEXIS 2006 (N.Y. Sup. Ct. 1921).

25. —Determination of sufficiency

On motion to dismiss a complaint as failing to state a cause of action, the determination of the court must be based upon the complaint alone. American Ry. Express Co. v Lassen Realty Co., 205 A.D. 238, 199 N.Y.S. 744, 1923 N.Y. App. Div. LEXIS 4992 (N.Y. App. Div. 1923).

26. —Pleading common-law counts

Pleading by way of common counts is still permissible; but a plaintiff who so pleads cannot object if the defendant assumes she knows the details in his mind when so pleading, in framing her counterclaim. Coppola v Di Benedetto, 215 N.Y.S. 722, 127 Misc. 276, 1926 N.Y. Misc. LEXIS 964 (N.Y. App. Term 1926).

27. —Separate statement of causes of action

Complaint in a stockholders' action against derelict directors, asking for various kinds of relief common to defendants, and in one instance relating to an alleged fraudulent transfer to an individual defendant by asserted conniving directors, held not subject to motion to state causes of action separately. Ringler v Jetter, 206 A.D. 478, 201 N.Y.S. 523, 1923 N.Y. App. Div. LEXIS 7253 (N.Y. App. Div. 1923).

A plaintiff need not separately number in his complaint causes of action at common law and causes of action under the Donnelly Anti-Trust Law. Gerseta Corp. v Silk Ass'n of America, 220 A.D. 302, 222 N.Y.S. 7, 1927 N.Y. App. Div. LEXIS 9294 (N.Y. App. Div. 1927).

The rule that multiplying demands does not multiply causes of action, applied where plaintiff sought to compel directors and officers of a corporation to undo fraudulent deeds so that his deficiency judgment of foreclosure could be satisfied. Whalen v Strong, 230 A.D. 617, 246 N.Y.S. 40, 1930 N.Y. App. Div. LEXIS 8699 (N.Y. App. Div. 1930).

Where same allegations of fact are contained in first two causes of action, their reallegation in third cause of action is repetitious and unnecessary. Sperling v McGee, 268 A.D. 1049, 52 N.Y.S.2d 229, 1945 N.Y. App. Div. LEXIS 5443 (N.Y. App. Div. 1945).

Each cause of action set forth in complaint is to be treated separately in order to ascertain whether it stands or falls. Spring v Moncrieff, 144 N.Y.S.2d 664, 208 Misc. 671, 1955 N.Y. Misc. LEXIS 3802 (N.Y. Sup. Ct. 1955).

Under the Code of Procedure the following could be joined: Libel, slander and malicious prosecution. Martin v Mattison, 8 Abb Pr 3; assault and slander, Brewer v Temple, 15 How Pr

286; but see Anderson v Hill, 53 Barb 238; slander and malicious prosecution, Hull v Vreeland, 42 Barb 543; recovery or assignment of dower, with damages for the wrongful act of withholding the same or for mesne profits, Van Name v Van Name, 23 How Pr 247; action for tort, whether with or without force may be joined, Colton v Jones (1868) 30 Super Ct (7 Robt) 164, 649; Lovett v Pell, 22 Wend 369; for goods sold and for the price of goods wrongfully taken from a third person and sold, HAWK & RUNYON v THORN & MARCLAY, 54 Barb. 164, 1869 N.Y. App. Div. LEXIS 40 (N.Y. Sup. Ct. June 7, 1869).

28. —Ultimate facts

A complaint must contain a concise statement of the material facts which must be proved upon the trial. Al Raschid v News Syndicate Co., 265 N.Y. 1, 191 N.E. 713, 265 N.Y. (N.Y.S.) 1, 1934 N.Y. LEXIS 988 (N.Y. 1934).

Ultimate facts only should be pleaded and not the evidence to establish such facts. Manhattan Co. v Morgan, 199 A.D. 767, 192 N.Y.S. 239, 1922 N.Y. App. Div. LEXIS 8086 (N.Y. App. Div. 1922); Sherman v International Publications, Inc., 214 A.D. 437, 212 N.Y.S. 478, 1925 N.Y. App. Div. LEXIS 10544 (N.Y. App. Div. 1925); Reicher v Trade Bank of New York, 207 N.Y.S. 178, 124 Misc. 166, 1924 N.Y. Misc. LEXIS 1044 (N.Y. App. Term 1924); Tammero v Tammero, 125 N.Y.S.2d 355, 1953 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1953).

Complaint should contain a concise statement of the facts constituting the cause of action which the plaintiff intends to support by evidence. Page v St. Lawrence Condensed Milk Corp., 213 A.D. 336, 210 N.Y.S. 261, 1925 N.Y. App. Div. LEXIS 8490 (N.Y. App. Div. 1925).

An allegation that an agreement was made for a valuable consideration is an allegation of an ultimate fact and not a legal conclusion. Royal Bank of Canada v Williams, 220 A.D. 603, 222 N.Y.S. 425, 1927 N.Y. App. Div. LEXIS 9371 (N.Y. App. Div. 1927).

Cause of action, failing to set forth ultimate and necessary facts and containing evidentiary and argumentative allegations is insufficient. Middleton v Siegel, 269 A.D. 491, 56 N.Y.S.2d 607, 1945 N.Y. App. Div. LEXIS 3020 (N.Y. App. Div. 1945).

Complaint should state the facts upon which plaintiffs rely for their cause of action. Weiss v Sondok, 282 A.D. 948, 125 N.Y.S.2d 162, 1953 N.Y. App. Div. LEXIS 5539 (N.Y. App. Div. 1953).

Where complaint sets forth chronologically series of events including purchase of piece of machinery, subsequent written agreement between parties containing warranty and further oral agreement to enter into second formal contract in writing which defendant failed to execute, and plaintiff ultimately claims that machine did not function properly with resulting damage, and complaint is so framed that it is impossible to separate what may be historical facts from gravamen of action, complaint was dismissed with leave to amend. Teitelbaum v Hald, 1 A.D.2d 668, 146 N.Y.S.2d 558, 1955 N.Y. App. Div. LEXIS 3808 (N.Y. App. Div. 1st Dep't 1955).

In action for unlawful interference with plaintiff’s contract rights, his claim must rest on wrongful violation of legal rights vouchsafed to him under his contract, and what those legal rights are and how they were violated, should be set out in terms of ultimate facts. Benton v Kennedy-Van Saun Mfg. & Eng. Corp., 2 A.D.2d 27, 152 N.Y.S.2d 955, 1956 N.Y. App. Div. LEXIS 4817 (N.Y. App. Div. 1st Dep't 1956).

While pleadings must be liberally construed with a view to substantial justice between the parties, ultimate facts and not legal conclusions must be pleaded. Swacker v Moody, 5 A.D.2d 836, 170 N.Y.S.2d 576, 1958 N.Y. App. Div. LEXIS 7071 (N.Y. App. Div. 2d Dep't 1958).

A plaintiff relying on an actual promise or undertaking by defendant should plead the facts plainly and concisely, and eliminate reference to duties imposed by law. Silver's Lunch Stores, Inc. v United Electric Light & Power Co., 261 N.Y.S. 714, 146 Misc. 554, 1932 N.Y. Misc. LEXIS 1733 (N.Y. App. Term 1932).

Complaint in action to cancel tax deed, alleging that boundaries are improperly described and are inaccurate did not allege conclusions; plaintiffs are not required to plead evidentiary facts. Slud v Guild Properties, Inc., 6 Misc. 2d 188, 119 N.Y.S.2d 347, 1952 N.Y. Misc. LEXIS 1551 (N.Y. Sup. Ct.), aff'd, 280 A.D. 1018, 116 N.Y.S.2d 748, 1952 N.Y. App. Div. LEXIS 4579 (N.Y. App. Div. 1952).

Feigned or non-existent interest as ultimate fact, see Auerbach v Commercial Capital Corp., 71 N.Y.S.2d 470, 1947 N.Y. Misc. LEXIS 2579 (N.Y. Sup. Ct. 1947).

Ultimate facts should be pleaded as to transactions constituting debt. Colonial Discount Co. v Martel, 73 N.Y.S.2d 8, 1947 N.Y. Misc. LEXIS 2914 (N.Y. Sup. Ct. 1947).

When fact to be pleaded is result of other facts, resultant facts only should be pleaded. Malcolm E. Smith, Inc. v Zabriskie, 84 N.Y.S.2d 362, 1948 N.Y. Misc. LEXIS 3579 (N.Y. Sup. Ct. 1948).

Allegation that plaintiff obtained control over mind of deceased while he was bereaved by death of son and that execution of change of beneficiary was not his free act but was result of duress and undue influence exercised by plaintiff, was insufficient as allegation of ultimate facts. Borchert v Metropolitan Life Ins. Co., 86 N.Y.S.2d 803, 1949 N.Y. Misc. LEXIS 1840 (N.Y. Sup. Ct. 1949).

There should be showing of facts from which damages can be inferred. Barber v Farmers & Traders Life Ins. Co., 109 N.Y.S.2d 448, 1951 N.Y. Misc. LEXIS 2690 (N.Y. Sup. Ct. 1951).

Where allegations of amended complaint sufficiently alleged ultimate facts to comply with CPA § 241 such allegations could not be struck out. Pittman v March Service Co., 141 N.Y.S.2d 74, 1955 N.Y. Misc. LEXIS 2470 (N.Y. Sup. Ct. 1955).

29. —Evidence

The fact that the complaint states matters belonging to the province of the trial, i. e., details of proof showing the sham or mock nature of the alleged investment, and the methods adopted by

the defendant to disguise his retention of the money, do not constitute a material defect. King v Mackellar, 109 N.Y. 215, 16 N.E. 201, 109 N.Y. (N.Y.S.) 215, 14 N.Y. St. 838, 1888 N.Y. LEXIS 721 (N.Y. 1888).

Evidence by which the material facts required to be stated are to be proved must not be included. Winter v American Aniline Products, Inc., 236 N.Y. 199, 140 N.E. 561, 236 N.Y. (N.Y.S.) 199, 1923 N.Y. LEXIS 875 (N.Y. 1923).

Evidence is to be excluded from pleadings. Joannes Bros. Co. v Lamborn, 237 N.Y. 207, 142 N.E. 587, 237 N.Y. (N.Y.S.) 207, 1923 N.Y. LEXIS 705 (N.Y. 1923).

Plaintiff's evidence may not be pleaded. Curren v O'Connor, 304 N.Y. 515, 109 N.E.2d 605, 304 N.Y. (N.Y.S.) 515, 1952 N.Y. LEXIS 721 (N.Y. 1952).

Extracts from public statutes and from private contracts and various matters which are merely evidence have no proper place in a pleading and such allegations should be stricken out upon motion. Parsons v McDonald, 88 A.D. 552, 85 N.Y.S. 190, 1903 N.Y. App. Div. LEXIS 3194 (N.Y. App. Div. 1903).

A complaint excusing the joinder of parties whose subscriptions are forfeited need not allege the details essential to the declaration of forfeiture by the directors pursuant to § 43 of the Stock Corporation Law, such facts being merely evidential. Ford v Chase, 118 A.D. 605, 103 N.Y.S. 30, 1907 N.Y. App. Div. LEXIS 726 (N.Y. App. Div.), aff'd, 189 N.Y. 504, 81 N.E. 1164, 189 N.Y. (N.Y.S.) 504, 1907 N.Y. LEXIS 974 (N.Y. 1907).

Allegations of evidence tending to prove a fact are not equivalent to an allegation of fact. Moffett v Jaffe, 132 A.D. 7, 116 N.Y.S. 402, 1909 N.Y. App. Div. LEXIS 1411 (N.Y. App. Div. 1909).

A complaint in an action to recover commissions for procuring a loan, which alleged that the plaintiff procured one S "to accept said application," is sufficient, and it is not necessary to allege the evidence by which the acceptance is to be proved. Morton v Petit, 133 A.D. 377, 117 N.Y.S. 364, 1909 N.Y. App. Div. LEXIS 2181 (N.Y. App. Div. 1909).

Where a complaint, after properly stating the cause of action, goes on to allege evidentiary facts, the latter will be stricken out on motion. Cleminshaw v Coon, 136 A.D. 160, 120 N.Y.S. 181, 1909 N.Y. App. Div. LEXIS 4292 (N.Y. App. Div. 1909).

Recitals in detail of negotiations, interviews, correspondence, conferences and like matters of evidentiary character improper. Stephen Peabody, Jr. & Co. v Travelers Ins. Co., 206 A.D. 206, 200 N.Y.S. 612, 1923 N.Y. App. Div. LEXIS 7178 (N.Y. App. Div. 1923).

The pleader is not required to set forth the evidence by which the material facts he alleges are to be proved but it is sufficient if he makes a plain and concise statement of those facts showing their legal effect. Universal By-Products Corp. v Schwartz, 216 A.D. 311, 215 N.Y.S. 45, 1926 N.Y. App. Div. LEXIS 9219 (N.Y. App. Div. 1926).

Complaint in narrative form violated rule. Coons v Florentine, 229 A.D. 532, 242 N.Y.S. 519, 1930 N.Y. App. Div. LEXIS 10435 (N.Y. App. Div. 1930).

Improper to plead matters pertinent as proof, but unnecessary to a statement of a cause of action. Newton v Livingston County Trust Co., 231 A.D. 355, 247 N.Y.S. 121, 1931 N.Y. App. Div. LEXIS 16056 (N.Y. App. Div. 1931).

In action against school bus operator for personal injury to child, terms of contract between school district and school bus operator are evidentiary, and should not be alleged at length in complaint. Scalzo v Vincent, 279 A.D. 1141, 113 N.Y.S.2d 218, 1952 N.Y. App. Div. LEXIS 6096 (N.Y. App. Div. 1952).

In action against attorney for damages from malpractice, where third amended complaint was so general, indefinite, conclusory, and lacking in factual specifications as not to state cause of action, leave to serve fourth amended complaint was denied. Dulberg v Mock, 286 A.D. 1008, 145 N.Y.S.2d 533, 1955 N.Y. App. Div. LEXIS 4972 (N.Y. App. Div. 1955), modified, 1 N.Y.2d 54, 150 N.Y.S.2d 180, 133 N.E.2d 695, 1956 N.Y. LEXIS 982 (N.Y. 1956).

Where in an action against an agent for conversion of his principal's money, the only allegation is "that the books showed the defendant had taken from said business and converted to his own use" a specific sum, the complaint should be dismissed as tendering no issue, for it is no more than a statement of the existence of evidence. Robinson v Stanley, 114 N.Y.S. 162, 61 Misc. 608, 1909 N.Y. Misc. LEXIS 6 (N.Y. App. Term 1909).

Where complaint set forth court decisions in exhibits attached to complaint and made part thereof by reference, such complaint violated CPA § 241, in that such exhibits were evidentiary and argumentative. Gifford v Whittemore, 3 Misc. 2d 389, 152 N.Y.S.2d 549, 1956 N.Y. Misc. LEXIS 1844 (N.Y. Sup. Ct. 1956), modified, 4 A.D.2d 379, 165 N.Y.S.2d 201, 1957 N.Y. App. Div. LEXIS 4683 (N.Y. App. Div. 3d Dep't 1957).

Setting forth court decisions, either in complaint or in exhibits attached to complaint and made part thereof by reference, is open to objection that such averment is but allegation of conclusion of pleader that facts involved in decided cases were in legal effect same as those in case at issue. Gifford v Whittemore, 3 Misc. 2d 389, 152 N.Y.S.2d 549, 1956 N.Y. Misc. LEXIS 1844 (N.Y. Sup. Ct. 1956), modified, 4 A.D.2d 379, 165 N.Y.S.2d 201, 1957 N.Y. App. Div. LEXIS 4683 (N.Y. App. Div. 3d Dep't 1957).

Where amended complaint contains 61 paragraphs, mass of evidentiary matter, multiplicity of minute, irrelevant, repetitious, redundant and unnecessary details, substance of conferences among parties and witnesses and other objectionable matter, it was struck out in its entirety, with leave to replead. Grobman v Freiman, 3 Misc. 2d 656, 152 N.Y.S.2d 898, 1956 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1956).

A complaint ought not contain irrelevant and immaterial statements or evidentiary matter. Alpert v Hein, 8 Misc. 2d 1010, 166 N.Y.S.2d 851, 1957 N.Y. Misc. LEXIS 2555 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 771, 170 N.Y.S.2d 296, 1958 N.Y. App. Div. LEXIS 7333 (N.Y. App. Div. 2d Dep't 1958).

Causes of action which set forth redundant repetitious questions and evidentiary matters should be stricken with leave to serve an amended complaint. Kasen v Morrell, 10 Misc. 2d 176, 167 N.Y.S.2d 322, 1957 N.Y. Misc. LEXIS 2707 (N.Y. Sup. Ct. 1957).

Paragraph of complaint alleging irrelevant or evidentiary matter was stricken. Kasen v Morrell, 18 Misc. 2d 158, 183 N.Y.S.2d 928, 1959 N.Y. Misc. LEXIS 4334 (N.Y. Sup. Ct. 1959).

In personal injury action, evidence of prior similar accidents at place in question and defendant's knowledge thereof, should not be stated in complaint. Binder v Zelda Const. Corp., 51 N.Y.S.2d 660, 1944 N.Y. Misc. LEXIS 2589 (N.Y. Sup. Ct. 1944).

Affirmative defense may plead foreign law by pleading specific decrees relied upon. Meijer v General Cigar Co., 73 N.Y.S.2d 576, 1947 N.Y. Misc. LEXIS 3077 (N.Y. Sup. Ct.), modified, 273 A.D. 760, 75 N.Y.S.2d 536, 1947 N.Y. App. Div. LEXIS 3036 (N.Y. App. Div. 1947).

Where complaint charges conspiracy to deprive plaintiff of his claimed property in puppets, pleads his qualifications as puppeteer and attaches 4-page exhibit reciting background material, exhibit and reference thereto were struck from complaint as evidentiary. Paris v Smith, 135 N.Y.S.2d 146, 1954 N.Y. Misc. LEXIS 2898 (N.Y. Sup. Ct.), aff'd, 284 A.D. 946, 135 N.Y.S.2d 622, 1954 N.Y. App. Div. LEXIS 4155 (N.Y. App. Div. 1954).

30. —Certainty

Neither prolixity nor repetitiousness nor unnecessary averment of evidentiary facts destroys complaint's sufficiency. Pomerance v Pomerance, 301 N.Y. 254, 93 N.E.2d 832, 301 N.Y. (N.Y.S.) 254, 1950 N.Y. LEXIS 808 (N.Y. 1950).

Use of "and/or" leads to confusion in understanding allegations of complaint, and is contrary to concise pleading. Becker v Burkes, 262 A.D. 893, 28 N.Y.S.2d 850, 1941 N.Y. App. Div. LEXIS 6417 (N.Y. App. Div. 1941); Kleinfeld v Roburn Agencies, Inc., 270 A.D. 509, 60 N.Y.S.2d 485, 1946 N.Y. App. Div. LEXIS 3729 (N.Y. App. Div. 1946); Dreben v Belloise, 275 A.D. 755, 87 N.Y.S.2d 572, 1949 N.Y. App. Div. LEXIS 4327 (N.Y. App. Div. 1949).

Allegation that plaintiff directed and authorized named person to obtain prices from and place order with defendant, was equivocal and insufficient to allege agency. Doherty, Clifford & Shenfield, Inc. v Tabard Press Corp., 274 A.D. 914, 83 N.Y.S.2d 473, 1948 N.Y. App. Div. LEXIS 4017 (N.Y. App. Div. 1948).

Facts must be pleaded directly and positively and not by way of recital; the participle “being” assumes but does not allege the existence of a fact; and a complaint, which does not otherwise state a fact that is material and essential to the cause of action than by a participle cause is bad. Thompson v Read, 118 N.Y.S. 452, 63 Misc. 235, 1909 N.Y. Misc. LEXIS 85 (N.Y. Sup. Ct. 1909).

Lengthy complaint, pleading facts chronologically over several years and alleging but single cause of action, held sufficient. Savage v Mathieson Alkali Works, Inc., 22 N.Y.S.2d 692, 174 Misc. 1022, 1940 N.Y. Misc. LEXIS 2198 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 1053, 27 N.Y.S.2d 454, 1941 N.Y. App. Div. LEXIS 8705 (N.Y. App. Div. 1941).

A construction of doubtful or uncertain allegations in a pleading which enables a party by his pleading to throw upon his adversary the hazard of interpreting their meaning is no more allowable now than formerly. Where a pleading is susceptible of two meanings, that shall be taken which is most unfavorable to the pleader. McLeod v Maloney, 3 N.Y.S. 617, 51 Hun 636, 1889 N.Y. Misc. LEXIS 44 (N.Y. Sup. Ct. 1889), aff'd, 121 N.Y. 698, 24 N.E. 1099, 121 N.Y. (N.Y.S.) 698, 1890 N.Y. LEXIS 1537 (N.Y. 1890).

When motion to make more definite and certain the complaint in an action against a railroad company for discriminating against the shipper in the transmission of merchandise will be granted. See LANGDON v N. Y., LAKE ERIE & WESTERN RY. CO., 15 N.Y.S. 255, 60 Hun 584, 27 Abb. N. Cas. 166, 1891 N.Y. Misc. LEXIS 3379 (N.Y. App. Term 1891).

Paragraph of 3 pages of typewritten matter, on legal cap paper, was held too long and too confusing. Schierenbeck v John Krauss, Inc., 104 N.Y.S.2d 180, 1951 N.Y. Misc. LEXIS 1723

(N.Y. Sup. Ct.), aff'd, 278 A.D. 856, 105 N.Y.S.2d 360, 1951 N.Y. App. Div. LEXIS 4984 (N.Y. App. Div. 1951).

31. —Particularity

Meticulous particularity in pleading the facts which must be shown by way of evidence to establish a cause of action is neither necessary nor proper. Morgenstern v Cohon, 2 N.Y.2d 302, 160 N.Y.S.2d 633, 141 N.E.2d 314, 1957 N.Y. LEXIS 1205 (N.Y. 1957).

The complaint is insufficient in a stockholder's derivative action against a company, four of its subsidiaries and sixteen individuals, "some or all" of whom are alleged to have been directors of the company. The use of the words "some or all" has made the complaint so indefinite that none of the defendants is charged with any particular wrongdoing. Nicholson v Close, 258 A.D. 488, 17 N.Y.S.2d 83, 1940 N.Y. App. Div. LEXIS 8224 (N.Y. App. Div. 1940).

Complaint for conspiracy should state facts constituting conspiracy, clearly, concisely and with sufficient particularity. Ledwith v Ignatius, 39 N.Y.S.2d 133, 179 Misc. 394, 1942 N.Y. Misc. LEXIS 2305 (N.Y. Sup. Ct. 1942), aff'd, 265 A.D. 987, 39 N.Y.S.2d 988, 1943 N.Y. App. Div. LEXIS 6421 (N.Y. App. Div. 1943).

In action to recover for miscomputation of bonuses paid to employees, allegation that directors failed to deduct excess profits taxes and "other income and contingent taxes" was not plain and concise statement of material fact, requiring dismissal of complaint. Mencher v Alden, 41 N.Y.S.2d 678, 181 Misc. 452, 1943 N.Y. Misc. LEXIS 1885 (N.Y. Sup. Ct. 1943).

Reference in counterclaim to facts alleged in complaint was insufficient. Lederman v Cal-Therm Industries, Inc., 81 N.Y.S.2d 845, 1948 N.Y. Misc. LEXIS 2974 (N.Y. Sup. Ct. 1948).

Where a general allegation in a complaint is sufficient to make a good cause of action, the court cannot compel the allegation of specific facts leading to the general conclusions alleged. Jackman v Lord, 9 N.Y.S. 200, 56 Hun 192, 1890 N.Y. Misc. LEXIS 85 (N.Y. App. Term 1890).

32. —Inconsistency

Where the complaint set forth two causes of action, one in affirmance of the contract to recover the price agreed to be paid, and the refusal of the defendants to return the stock which would entitle plaintiff to recover its value as for a conversion, held, these were inconsistent causes of action and that the trial court would require plaintiff to elect as to which cause of action he would rely upon. Stewart v Huntington, 124 N.Y. 127, 26 N.E. 289, 124 N.Y. (N.Y.S.) 127, 1891 N.Y. LEXIS 1352 (N.Y. 1891).

Allegation that bank paid over to corporation entire amount of $15,000 “contrary to its express promise” conflicts with allegation that “balance of $7500 was to be repaid by corporation”. Schultz v Krefetz, 85 N.Y.S.2d 249, 1948 N.Y. Misc. LEXIS 3753 (N.Y. Sup. Ct. 1948), app. dismissed, 94 N.Y.S.2d 920 (N.Y. App. Div. 1950).

33. —Argument

Evidentiary or argumentative allegations are improper. Leighton v New York Tel. Co., 69 N.Y.S.2d 249, 1947 N.Y. Misc. LEXIS 2225 (N.Y. Sup. Ct. 1947).

Argumentative matters and conclusory statements cannot be utilized to supply material facts by inference. Berkowitz v Wilson, 118 N.Y.S.2d 291, 1952 N.Y. Misc. LEXIS 2147 (N.Y. Sup. Ct. 1952), aff'd, 282 A.D. 875, 124 N.Y.S.2d 718, 1953 N.Y. App. Div. LEXIS 5296 (N.Y. App. Div. 1953).

An argumentative or inferential averment is permitted unless motion is made for order requiring complaint to be more definite and certain. Whatever may be inferred logically and directly from the complaint is in judgment of law contained in it. Cowper v Theall, 4 N.Y. St. 674.

34. —Statute

In pleading a public statute the complaint must show that every requisite to the cause of action exists. Austin v Goodrich, 49 N.Y. 266, 49 N.Y. (N.Y.S.) 266, 1872 N.Y. LEXIS 166 (N.Y. 1872).

Where statute expressly or impliedly requires a particular allegation of fact as element of action, complaint must allege such fact. New Rochelle v Echo Bay Waterfront Corp., 268 A.D. 182, 49 N.Y.S.2d 673, 1944 N.Y. App. Div. LEXIS 3140 (N.Y. App. Div. 1944), aff'd, 294 N.Y. 678, 60 N.E.2d 838, 294 N.Y. (N.Y.S.) 678, 1945 N.Y. LEXIS 876 (N.Y. 1945).

35. — —Following language of statute

A complaint to recover money from one who converted it to his own use while acting in a fiduciary capacity is sufficient if it sets forth the facts showing that the money was received in a fiduciary capacity, without copying the words of the statute, which would be pleading a mere conclusion of law. Moffatt v Fulton, 132 N.Y. 507, 30 N.E. 992, 132 N.Y. (N.Y.S.) 507, 1892 N.Y. LEXIS 1222 (N.Y. 1892).

The mere allegation of conclusions of fact in the language of the statute, although sufficient to confer jurisdiction, should not be considered by the court as sufficient to authorize judicial action. In re Plumb, 4 N.Y.S. 831, 52 Hun 119, 1889 N.Y. Misc. LEXIS 1738 (N.Y. App. Term 1889).

36. —Pleading written instruments

It is not necessary to set forth in a pleading the circumstances attending a transaction, contract, or instrument in writing; it is sufficient to charge its legal effect. Brown v Champlin, 66 N.Y. 214, 66 N.Y. (N.Y.S.) 214, 1876 N.Y. LEXIS 214 (N.Y. 1876).

Where a complaint against seven trustees of a corporation averred that they signed a certificate, “a copy of which is hereto annexed,” and the copy was only signed by four of them, it was held that it was only an averment of the signing by the four who signed. Bonnell v Griswold, 68 N.Y. 294, 68 N.Y. (N.Y.S.) 294, 1877 N.Y. LEXIS 718 (N.Y. 1877).

Any facts recited in an instrument sued upon, and annexed to and made part of the complaint, are to be considered as alleged in the pleading. Spence v Woods, 134 A.D. 182, 118 N.Y.S. 807, 1909 N.Y. App. Div. LEXIS 2810 (N.Y. App. Div. 1909).

Terms of contract must be plainly stated. Trousdell Village, Inc. v Meadows, 283 A.D. 888, 129 N.Y.S.2d 369, 1954 N.Y. App. Div. LEXIS 5653 (N.Y. App. Div. 1954).

If plaintiff relies on any contract between himself and buyer or between buyer and defendant, he should allege that fact and make contract or contracts part of his complaint. Yahya Aryeh v United States Finishing Co., 1 A.D.2d 1001, 151 N.Y.S.2d 829, 1956 N.Y. App. Div. LEXIS 5212 (N.Y. App. Div. 1st Dep't), reh'g denied, 2 A.D.2d 745, 153 N.Y.S.2d 564, 1956 N.Y. App. Div. LEXIS 4771 (N.Y. App. Div. 1st Dep't 1956).

In actions on contract it is good practice to annex a copy of the contract to the complaint and make it a part of it, to cure any defective statement of its legal effect in the complaint. Taylor v MacLea, 11 N.Y.S. 640, 1890 N.Y. Misc. LEXIS 2280 (N.Y. City Ct. 1890).

37. —Matters to be presumed, inferred or implied

An averment of the making of an instrument for the payment of money is equivalent to averring a delivery. Prindle v Caruthers, 15 N.Y. 425, 15 N.Y. (N.Y.S.) 425, 1857 N.Y. LEXIS 20 (N.Y. 1857); Keteltas v Myers, 19 N.Y. 231, 19 N.Y. (N.Y.S.) 231, 1859 N.Y. LEXIS 27 (N.Y. 1859).

Where from the facts stated a promise may be implied, it need not be alleged. Farron v Sherwood, 17 N.Y. 227, 17 N.Y. (N.Y.S.) 227, 1858 N.Y. LEXIS 57 (N.Y. 1858); Jordan & Skaneateles Plankroad Co. v Morley, 23 N.Y. 552, 23 N.Y. (N.Y.S.) 552, 1861 N.Y. LEXIS 52 (N.Y. 1861).

As to acts regulated as to mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute. Therefore a promise to pay the debt of another need not be averred to have been in writing. So with the transfer of a sealed instrument. Horner v Wood, 23 N.Y. 350, 23 N.Y. (N.Y.S.) 350, 1861 N.Y. LEXIS 35 (N.Y. 1861).

In an action on a contract required to be in writing, it is not necessary to allege in the complaint that it is in writing. This will be presumed, and if the defendant wishes to raise the point, he must

allege in his answer that the contract is void because not in writing. Marston v Swett, 66 N.Y. 206, 66 N.Y. (N.Y.S.) 206, 1876 N.Y. LEXIS 213 (N.Y. 1876).

In determining the sufficiency of a pleading, not only the facts alleged, but also such facts as can by reasonable and fair intendments be implied from them, must be considered. Ampersand Hotel Co. v Home Ins. Co., 131 A.D. 361, 115 N.Y.S. 480, 1909 N.Y. App. Div. LEXIS 818 (N.Y. App. Div. 1909), rev'd, 198 N.Y. 495, 91 N.E. 1099, 198 N.Y. (N.Y.S.) 495, 1910 N.Y. LEXIS 825 (N.Y. 1910).

Where a complaint alleges circumstances from which the conclusion of the ultimate fact to be proven will follow as an inference of law, it may be sufficient, but where it merely alleges circumstances from which an inference of fact may be drawn by the jury, it is insufficient. Cohn-Hall-Marx Co. v Gutman, 185 N.Y.S. 182, 1920 N.Y. Misc. LEXIS 1876 (N.Y. App. Term 1920).

An allegation of indorsement and transfer by a corporation is sufficient. Nelson & Stukges trustees, 15 How. Pr. 305, 1857 N.Y. Misc. LEXIS 153 (N.Y. Sup. Ct. 1857), rev'd, NELSON v EATON, 7 Abb. Pr. 305, 1858 N.Y. Misc. LEXIS 342 (N.Y. Sup. Ct. Oct. 1, 1858).

38. —Effect of defendant’s knowledge of facts

Under CPA § 241 a defendant was entitled to be informed by the complaint of the facts constituting plaintiff’s cause of action, and it was not an answer to a motion to make a complaint more definite and certain that the defendant had become acquainted with all the facts upon which plaintiff’s claim was founded in another action relating to the same subject matter. Ottomann v Fletcher, 10 N.Y.S. 128, 1889 N.Y. Misc. LEXIS 2458 (N.Y. Super. Ct. 1889).

39. —Matters judicially known

When the statute of limitations of another state is a necessary part of a plaintiff’s cause of action, it is incumbent upon him to produce affirmative proof thereof, as the courts of the state of

New York do not take judicial notice of the statutes of another state. Moore v Coler, 106 A.D. 331, 94 N.Y.S. 630, 1905 N.Y. App. Div. LEXIS 2575 (N.Y. App. Div. 1905).

Plaintiff could not ask court to take judicial notice of foreign laws where merely their purported effect was pleaded in complete disregard of requirement of plain and concise statement of material facts recited in CPA § 241. Greiner v Freund, 286 A.D. 996, 144 N.Y.S.2d 766, 1955 N.Y. App. Div. LEXIS 4892 (N.Y. App. Div. 1955).

40. Pleading facts or conclusions, generally

Facts should be stated as they actually occurred or exist. Farron v Sherwood, 17 N.Y. 227, 17 N.Y. (N.Y.S.) 227, 1858 N.Y. LEXIS 57 (N.Y. 1858); Barney v Worthington, 37 N.Y. 112, 37 N.Y. (N.Y.S.) 112, 1867 N.Y. LEXIS 113 (N.Y. 1867).

A plaintiff may plead conclusions of fact subject to defendant’s right to move to make the allegations more specific. Ranken v Probey, 131 A.D. 328, 115 N.Y.S. 832, 1909 N.Y. App. Div. LEXIS 807 (N.Y. App. Div. 1909).

If plaintiff desires to avail himself of right to replead, he should predicate his complaint on statements of fact rather than conclusions of law. Yahya Aryeh v United States Finishing Co., 1 A.D.2d 1001, 151 N.Y.S.2d 829, 1956 N.Y. App. Div. LEXIS 5212 (N.Y. App. Div. 1st Dep't), reh'g denied, 2 A.D.2d 745, 153 N.Y.S.2d 564, 1956 N.Y. App. Div. LEXIS 4771 (N.Y. App. Div. 1st Dep't 1956).

It is unnecessary and improper to allege law or legal principles in pleading, for what law is cannot become triable issue of fact between parties, though it may be matter of argument. Gifford v Whittemore, 3 Misc. 2d 389, 152 N.Y.S.2d 549, 1956 N.Y. Misc. LEXIS 1844 (N.Y. Sup. Ct. 1956), modified, 4 A.D.2d 379, 165 N.Y.S.2d 201, 1957 N.Y. App. Div. LEXIS 4683 (N.Y. App. Div. 3d Dep't 1957).

Affidavit must state facts; conclusory and argumentative statements in affidavit were insufficient. Spaulding v Hotchkiss, 62 N.Y.S.2d 151, 1946 N.Y. Misc. LEXIS 2201 (N.Y. Sup. Ct. 1946).

Conclusions of law cannot be used to supply by inference material facts which must be alleged. Chapin v Elson, 136 N.Y.S.2d 914, 1954 N.Y. Misc. LEXIS 3551 (N.Y. Sup. Ct. 1954).

All allegations of pleadings must be made with sufficiency of factual averment required by CPA § 241. Lesser v Ringelheim, 154 N.Y.S.2d 554 (N.Y. Sup. Ct. 1956).

41. —Pleading facts according to legal effect

Facts should be stated according to their legal effect. Coggill v American Exchange Bank, 1 N.Y. 113, 1 N.Y. (N.Y.S.) 113, How. A. Cas. 203, 1847 N.Y. LEXIS 10 (N.Y. 1847).

It is not necessary in a pleading to set forth the circumstances attending the transaction or instrument in writing counted upon. It is sufficient to charge the legal effect thereof. Brown v Champlin, 66 N.Y. 214, 66 N.Y. (N.Y.S.) 214, 1876 N.Y. LEXIS 214 (N.Y. 1876).

Allegation that defendant disclosed to strangers other than plaintiff the formulae he had agreed to keep secret, in such manner as to destroy their secrecy, is a concise statement of material fact, and to add thereto, what formula was disclosed and to whom, would be improper as a recitation of evidence. Latta Brook Corp. v Bo Products Corp., 9 A.D.2d 158, 192 N.Y.S.2d 586, 1959 N.Y. App. Div. LEXIS 6114 (N.Y. App. Div. 3d Dep't 1959).

42. —Conclusions of law from facts alleged

An allegation that a representation was “false” is not a mere conclusion of law but is a statement of ultimate fact. Samuel W. Hurowitz, Inc. v Selkin, 241 A.D. 269, 271 N.Y.S. 576, 1934 N.Y. App. Div. LEXIS 8228 (N.Y. App. Div. 1934).

An allegation that defendants charged one dollar and fifty cents per thousand for labels costing forty cents per thousand and, on information and belief, that the charge of one dollar and fifty cents per thousand was fixed by defendants despite their knowledge that the cost would not exceed forty cents is an allegation of fact rather than a conclusion of law. Salant & Salant, Inc. v Hunter, 248 A.D. 104, 288 N.Y.S. 1005, 1936 N.Y. App. Div. LEXIS 6086 (N.Y. App. Div. 1936).

A mere allegation that a party to an action is not the real party in interest states only a conclusion of law; to present the defense, facts must be alleged, such as if established by proof would enable the court to say, as matter of law, that the party is not the real party in interest. Continental Sec. Co. v Interborough Rapid Transit Co., 193 N.Y.S. 892, 118 Misc. 11, 1922 N.Y. Misc. LEXIS 1170 (N.Y. Sup. Ct.), aff'd, 200 A.D. 794, 193 N.Y.S. 903, 1922 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 1922), aff'd, 202 A.D. 804, 194 N.Y.S. 986, 1922 N.Y. App. Div. LEXIS 5812 (N.Y. App. Div. 1922).

An allegation that a decedent died intestate, held merely a conclusion of law based upon the subsequent allegation that his alleged will was invalid because of undue influence. Velsor v Freeman, 194 N.Y.S. 191, 118 Misc. 276, 1922 N.Y. Misc. LEXIS 1210 (N.Y. Sup. Ct. 1922).

In an action by carrier to recover of a consignee money paid on the shipment, an allegation of the complaint that plaintiff “was compelled to pay and did pay the said amount to the United States customs authorities,” is a conclusion of law and not a correct statement of the law if assuming that the obligation to pay arose from the fact that it was the carrier that brought the goods into the United States. American R. E. Co. v Heilbrunn, 198 N.Y.S. 801, 120 Misc. 501, 1923 N.Y. Misc. LEXIS 864 (N.Y. Sup. Ct. 1923).

In a probate proceeding allegations by a contestant that the execution of the papers offered for probate was caused by undue influence or procured by fraud are mere conclusions of law and insufficient. In re Mullin's Will, 256 N.Y.S. 519, 143 Misc. 256, 1932 N.Y. Misc. LEXIS 990 (N.Y. Sur. Ct. 1932), aff'd, 240 A.D. 996, 268 N.Y.S. 948, 1933 N.Y. App. Div. LEXIS 7819 (N.Y. App. Div. 1933).

An allegation that payment was “wrongfully” refused is a mere conclusion of law. Union Trust Co. v Rasch, 267 N.Y.S. 861, 149 Misc. 616, 1933 N.Y. Misc. LEXIS 1890 (N.Y. Sup. Ct. 1933).

An allegation “that by reason of the foregoing facts” the plaintiff alleges upon information and belief that the above named defendants were at the time hereinafter named copartners doing and carrying on the business of banking under the name and style of the “Home Savings Bank”

is an allegation of a conclusion, and not an allegation of independent facts. Merchants' Nat'l Bank v Pendleton, 9 N.Y.S. 46, 55 Hun 579, 1890 N.Y. Misc. LEXIS 22 (N.Y. Sup. Ct. 1890), aff'd, 129 N.Y. 662, 30 N.E. 65, 129 N.Y. (N.Y.S.) 662, 1892 N.Y. LEXIS 920 (N.Y. 1892).

43. — —Answer

Allegation of a balance due being merely a conclusion of law, answer denying same raises no issue. Lion Brewery of New York City v Loughran, 223 A.D. 623, 229 N.Y.S. 216, 1928 N.Y. App. Div. LEXIS 6282 (N.Y. App. Div. 1928).

In action for personal injuries and damage to automobile, caused by defendant’s negligent operation of his car, answer alleging that plaintiff’s insurer had taken a release of all claims, was insufficient. Emery v Litchard, 245 N.Y.S. 209, 137 Misc. 885, 1930 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1930).

Allegations in answer that complaint is insufficient is a conclusion of law. Sado v Marlun Mfg. Co., 196 N.Y.S.2d 32 (N.Y. Sup. Ct. 1959).

44. —Jurisdiction

Where a complaint sets up an order of a surrogate in a matter within his jurisdiction, and where a want of jurisdiction does not appear on the face of the order, the existence of the facts necessary to give jurisdiction need not be alleged, but will be presumed. Bearns v Gould, 77 N.Y. 455, 77 N.Y. (N.Y.S.) 455, 1879 N.Y. LEXIS 800 (N.Y. 1879).

A complaint which alleges that defendant had no jurisdiction of the plaintiff is a mere conclusion of law, unsupported by facts. McClerg v Vielee, 116 A.D. 731, 102 N.Y.S. 45, 1907 N.Y. App. Div. LEXIS 12 (N.Y. App. Div. 1907).

45. —Validity of acts or instruments

Complaint should plainly plead that tax sale was invalid because of failure to follow statutory directions in giving notice of sale and notice to redeem, in action to determine adverse claims to realty. Eller v Loch Sheldrake Improv. Corp., 87 N.Y.S.2d 301, 194 Misc. 542, 1948 N.Y. Misc. LEXIS 3935 (N.Y. Sup. Ct. 1948).

Allegation that defendant violated certain specified sections of various statutes, without pleading facts constituting such violations, were bare conclusions unsubstantiated by ultimate facts. Reynolds v Coles, 83 N.Y.S.2d 608, 1948 N.Y. Misc. LEXIS 3393 (N.Y. Sup. Ct. 1948).

Complaint to enjoin violation of building zone ordinance must allege that portion of ordinance violated or state its substance in sufficient detail to identify it and show primary fact that continuance of act is violation. Oyster Bay v Hicksville Air Park, 94 N.Y.S.2d 393, 1949 N.Y. Misc. LEXIS 3086 (N.Y. Sup. Ct. 1949).

46. —Legality

“Lawfully,” when used in a complaint for negligence for injuries received while upon real property, is a legal conclusion from facts, and renders the complaint demurrable, where the facts making the use lawful are not alleged. Wagner v Shoemaker, 161 N.Y.S. 376, 97 Misc. 432, 1916 N.Y. Misc. LEXIS 1117 (N.Y. Sup. Ct. 1916).

Allegation that agreement is a lease is legal conclusion. Halpern v Silver, 65 N.Y.S.2d 336, 187 Misc. 1023, 1946 N.Y. Misc. LEXIS 2816 (N.Y. City Ct. 1946).

47. — —“Duly”; “due”

That an election “was duly and legally held pursuant to the statute” was held, a sufficient statement of the time when the election took place, and that it was on the day prescribed by law. People ex rel. Crane v Ryder, 12 N.Y. 433, 12 N.Y. (N.Y.S.) 433, 1855 N.Y. LEXIS 27 (N.Y. 1855).

It is not necessary to aver that a sealed contract was transferred in compliance with the provisions of the statute, that is matter of evidence only, an averment that it was duly transferred is sufficient. Horner v Wood, 23 N.Y. 350, 23 N.Y. (N.Y.S.) 350, 1861 N.Y. LEXIS 35 (N.Y. 1861).

Where a complaint alleged the due organization of a corporation this imports the requisite number of incorporators. Lorillard v Clyde, 86 N.Y. 384, 86 N.Y. (N.Y.S.) 384, 1881 N.Y. LEXIS 224 (N.Y. 1881).

An allegation that a claim was “duly audited and allowed” was sufficient in a pleading. Seaton v Board of Education, 253 A.D. 736, 300 N.Y.S. 633, 1937 N.Y. App. Div. LEXIS 5380 (N.Y. App. Div. 1937).

Allegation that “due notice” was given to town of defect in sidewalk was insufficient, where written notice was required. Walker v Huntington, 106 N.Y.S.2d 185, 200 Misc. 522, 1951 N.Y. Misc. LEXIS 2020 (N.Y. Sup. Ct. 1951).

An allegation that due proceedings had been taken is an allegation of a fact and not an allegation of law. McCorkle v Herrmann, 5 N.Y.S. 881, 52 Hun 610, 1889 N.Y. Misc. LEXIS 2660 (N.Y. Sup. Ct.), rev'd, 117 N.Y. 297, 22 N.E. 948, 117 N.Y. (N.Y.S.) 297, 1889 N.Y. LEXIS 1434 (N.Y. 1889).

While word “duly” connotes regularity of procedure, use of term alone is conclusory in legal sense, and will not be sufficient. Velson v Green, 64 N.Y.S.2d 845, 1946 N.Y. Misc. LEXIS 2736 (N.Y. Sup. Ct. 1946).

That a policy of insurance was “duly assigned” indicated that the assignment was by a sealed instrument, and a consideration was inferred. Fowler v N.Y. Indemnity Ins. Co., 23 Barb. 143, 1856 N.Y. App. Div. LEXIS 132 (N.Y. Sup. Ct. Oct. 14, 1856), rev'd, Fowler v New York Indem. Ins. Co., 26 N.Y. 422, 26 N.Y. (N.Y.S.) 422, 1863 N.Y. LEXIS 118 (N.Y. 1863).

48. —Unlawfulness

An allegation that the defendant “wrongfully and maliciously” enticed away the plaintiff’s employees, not supported by facts, is a mere conclusion of law. De Jong v B. G. Behrman Co., 148 A.D. 37, 131 N.Y.S. 1083, 1911 N.Y. App. Div. LEXIS 134 (N.Y. App. Div. 1911).

Bare allegations of wrongdoing based upon undisclosed facts will not support cause of action. O'Brien v Rome, 262 A.D. 940, 29 N.Y.S.2d 456, 1941 N.Y. App. Div. LEXIS 6535 (N.Y. App. Div. 1941).

Allegation of “unlawful sale” assumed sufficient as statement of ultimate fact. Scatorchia v Caputo, 263 A.D. 304, 32 N.Y.S.2d 532, 1942 N.Y. App. Div. LEXIS 6875 (N.Y. App. Div. 1942).

Allegation that defendant wrongfully and unlawfully conspired to withhold fact that contract of sale of realty had been entered into, was merely conclusory. Rubin v M. S. W. Hotels, Inc., 275 A.D. 829, 89 N.Y.S.2d 241, 1949 N.Y. App. Div. LEXIS 4670 (N.Y. App. Div. 1949).

Where apart from conclusory allegations there are not ultimate facts alleged sufficient to charge defendants with actionable wrongdoing, complaint was insufficient. Wood & Selick, Inc. v Calvert, 284 A.D. 874, 134 N.Y.S.2d 228, 1954 N.Y. App. Div. LEXIS 3879 (N.Y. App. Div. 1954).

Allegation that certain official act is illegal is not averment of issuable fact, but statement of legal conclusion. Kahn v Blinn, 60 N.Y.S.2d 413, 1946 N.Y. Misc. LEXIS 1877 (N.Y. Sup. Ct. 1946).

Illicit arrangement; conclusion. Auerbach v Commercial Capital Corp., 71 N.Y.S.2d 470, 1947 N.Y. Misc. LEXIS 2579 (N.Y. Sup. Ct. 1947).

Fraudulently, tortiously, illegally, see Levine v Schaffzin, 99 N.Y.S.2d 251, 1950 N.Y. Misc. LEXIS 1915 (N.Y. Sup. Ct. 1950).

In an action by plaintiff as general agent of defendant insurance company, for breach of the agency agreement, conclusory allegations such as: “thereby breaching its agreement”, and “wantonly and wilfully” do not add to the cause of action. Barber v Farmers & Traders Life Ins. Co., 109 N.Y.S.2d 448, 1951 N.Y. Misc. LEXIS 2690 (N.Y. Sup. Ct. 1951).

Wrongful contract to waste and squander money of corporation, was conclusory allegation. Myers v Jeffe, 111 N.Y.S.2d 384, 1952 N.Y. Misc. LEXIS 2512 (N.Y. Sup. Ct. 1952).

Allegation in complaint that individual defendant acted wrongfully, improperly and unlawfully in action for breach of contract by corporation was conclusory. Horan v John F. Trommer, Inc., 124 N.Y.S.2d 217, 1953 N.Y. Misc. LEXIS 2136 (N.Y. Sup. Ct. 1953).

General allegations of wrongdoing will not suffice without stating those facts upon which are based pleader's conclusions. Chaffee v Glens Falls Nat'l Bank & Trust Co., 125 N.Y.S.2d 626, 1953 N.Y. Misc. LEXIS 2351 (N.Y. Sup. Ct. 1953).

49. —Duty

Allegation of duty is of no avail, unless the facts necessary to raise the duty can be collected from the complaint. 7 N.Y. 493.

Allegations of a complaint as to the duties of certain city officials, prescribed by statute, are conclusions of law and a complaint containing such allegations is defective. McGuinness v Allison Realty Co., 93 N.Y.S. 267, 46 Misc. 8, 1904 N.Y. Misc. LEXIS 580 (N.Y. Sup. Ct. 1904), aff'd, 97 N.Y.S. 1142, 49 Misc. 653, 1906 N.Y. Misc. LEXIS 670 (N.Y. App. Term 1906).

50. —Negligence

Allegation that liability on part of third-party plaintiff will have been caused and brought about by carelessness and negligence of third-party defendant is not sufficient. Weisberg v Brogan, 144 N.Y.S.2d 255, 208 Misc. 524, 1955 N.Y. Misc. LEXIS 3719 (N.Y. City Ct. 1955).

Allegation that plaintiff was "lawfully" on defendant's premises and had been "invited thereto by defendant", was required to be made more definite and certain as to the nature of the invitation. Appel v Lippe, 20 Misc. 2d 849, 194 N.Y.S.2d 650, 1959 N.Y. Misc. LEXIS 2822 (N.Y. Sup. Ct. 1959).

51. —Fraud

In stockholder's derivative action against trustees for breach of duty or neglect, complaint alleging fraud held insufficient as allegation of actual fraud so as to invoke CPA § 48 subd 5 (§ 213 herein). Lever v Guaranty Trust Co., 262 A.D. 1044, 30 N.Y.S.2d 532, 1941 N.Y. App. Div. LEXIS 7167 (N.Y. App. Div. 1941), aff'd, 289 N.Y. 615, 43 N.E.2d 837, 289 N.Y. (N.Y.S.) 615, 1942 N.Y. LEXIS 1171 (N.Y. 1942).

Complaint characterizing actions of defendants as part of fraudulent plan added nothing in absence of facts stated to justify conclusion that acts were wrongful, fraudulent or unlawful. Pletman v Goldsoll, 264 A.D. 393, 35 N.Y.S.2d 541, 1942 N.Y. App. Div. LEXIS 4162 (N.Y. App. Div. 1942).

Allegation, "Aided, abetted, and participated in fraud" is a legal conclusion. Halperin v Lieberman, 271 A.D. 878, 66 N.Y.S.2d 78, 1946 N.Y. App. Div. LEXIS 3551 (N.Y. App. Div. 1946).

Complaint for equitable relief decreeing lease fraudulent, wholly lacking in statement of facts to support conclusory allegations of fraud, was dismissed for insufficiency without leave to amend. Thrifty Outlet Stores, Inc. v Erwill Realty Corp., 283 A.D. 941, 131 N.Y.S.2d 131, 1954 N.Y. App. Div. LEXIS 5851 (N.Y. App. Div. 1954).

Complaint, alleging that defendant by fraudulent misrepresentations induced plaintiff to sign renunciation of power of appointment under trust, was insufficient as conclusory. Manville v Dresselhuys, 43 N.Y.S.2d 658, 181 Misc. 290, 1943 N.Y. Misc. LEXIS 2291 (N.Y. Sup. Ct. 1943).

General allegations of wrongdoing, such as "defrauded" "conspired to interfere," and "interfered and intermeddled," based upon undisclosed facts, are insufficient. National Foundry Co. v Niman, 67 N.Y.S.2d 327, 189 Misc. 34, 1946 N.Y. Misc. LEXIS 3236 (N.Y. Sup. Ct. 1946).

Verbose allegations of indefinite generalizations held insufficient to state fraud. Citrone v Palladino, 34 Misc. 2d 838, 77 N.Y.S.2d 489, 1947 N.Y. Misc. LEXIS 1939 (N.Y. Sup. Ct. 1947).

As to conclusory allegations of inducement to sign agreement under fraud and duress, see Deroode v Gross, 49 N.Y.S.2d 15, 1944 N.Y. Misc. LEXIS 2045 (N.Y. Sup. Ct. 1944).

Allegation of conspiracy to commit fraud was conclusion. Kane v Harris, 81 N.Y.S.2d 325, 1948 N.Y. Misc. LEXIS 2774 (N.Y. Sup. Ct. 1948).

Petition to revoke letters of administration, alleging that appointment was obtained by false suggestion of material fact, in that petition for letters alleged that respondent had failed to apprise surrogate that respondent had abandoned decedent and had ever since neglected to provide for her, was sufficient. In re McConnell's Estate, 118 N.Y.S.2d 583, 1953 N.Y. Misc. LEXIS 1465 (N.Y. Sur. Ct. 1953).

General allegation that transfer or execution and delivery of instrument were procured by fraud and undue influence, was insufficient as conclusion of law. Prouty v Nichols, 123 N.Y.S.2d 789, 1953 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct.), aff'd, 282 A.D. 962, 126 N.Y.S.2d 199, 1953 N.Y. App. Div. LEXIS 5576 (N.Y. App. Div. 1953).

General allegations of fraud or undue influence, without stating ultimate facts tending to establish same, are insufficient as matter of pleading. Prouty v Nichols, 123 N.Y.S.2d 789, 1953 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct.), aff'd, 282 A.D. 962, 126 N.Y.S.2d 199, 1953 N.Y. App. Div. LEXIS 5576 (N.Y. App. Div. 1953).

52. —Title or possession

Adverse possession is purely a question of law where there is no conflict of evidence and the facts are undisputed. Munro v Merchant, 28 N.Y. 9, 28 N.Y. (N.Y.S.) 9, 1863 N.Y. LEXIS 43 (N.Y. 1863).

An allegation, that plaintiff is entitled to the possession of the land and to the rents and profits, is a mere allegation of a conclusion of law; the facts should be alleged, from which such a conclusion may be drawn. Sheridan v Jackson, 72 N.Y. 170, 72 N.Y. (N.Y.S.) 170, 1878 N.Y. LEXIS 495 (N.Y. 1878).

In an action for a breach of a covenant of seizin in a deed, it is not necessary to set forth in the complaint the title; and the allegations that the defendant was not the true owner, and was not seized in fee, are allegations of matters of fact. Woolley v Newcombe, 87 N.Y. 605, 87 N.Y. (N.Y.S.) 605, 1882 N.Y. LEXIS 47 (N.Y. 1882).

53. —Ownership

Allegation that by laws of France plaintiff became owner of property was conclusion. Fliegelman v Fliegelman, 67 N.Y.S.2d 154, 1946 N.Y. Misc. LEXIS 3196 (N.Y. Sup. Ct. 1946).

54. —Indebtedness

See also an allegation that a specified sum was “due and owing.” 7 N.Y. 476; McKyring v Bull, 16 N.Y. 297, 16 N.Y. (N.Y.S.) 297, 1857 N.Y. LEXIS 73 (N.Y. 1857); Keteltas v Myers, 19 N.Y. 231, 19 N.Y. (N.Y.S.) 231, 1859 N.Y. LEXIS 27 (N.Y. 1859).

A general allegation that a debt had been “repeatedly acknowledged” is not enough. 8 N.Y. 362.

An allegation that the defendant was “indebted” to the plaintiff’s assignee for money had and received is a mere conclusion of law, and does not state a cause of action. Tate v American Woolen Co., 114 A.D. 106, 99 N.Y.S. 678, 1906 N.Y. App. Div. LEXIS 2034 (N.Y. App. Div. 1906).

An allegation, to justify the abandonment of a contract, that the work and materials “which had not been paid for were of the total reasonable value of” a certain sum, where the contract is not annexed nor its terms shown, is a mere conclusion of law with no facts to sustain it. Mitchell v

Dunmore Realty Co., 112 N.Y.S. 659, 60 Misc. 563, 1908 N.Y. Misc. LEXIS 756 (N.Y. Sup. Ct. 1908).

An allegation of an indebtedness under a contract is not an allegation of fact. Clements v W. S. Cooper Co., 136 N.Y.S. 93 (N.Y. App. Term 1912).

Allegation of indebtedness is not allegation of fact, but conclusion of law. Geller v Schulman, 110 N.Y.S.2d 862, 1951 N.Y. Misc. LEXIS 2814 (N.Y. Sup. Ct. 1951), aff'd, 280 A.D. 933, 115 N.Y.S.2d 824, 1952 N.Y. App. Div. LEXIS 4280 (N.Y. App. Div. 1952).

55. —Insanity

To say that a person “being insane” does an act is not an allegation as to the condition of that person, and does not present an issuable fact or ground of relief in respect to such condition. Valentine v Lunt, 115 N.Y. 496, 22 N.E. 209, 115 N.Y. (N.Y.S.) 496, 1889 N.Y. LEXIS 1230 (N.Y. 1889).

Allegation that person at certain time was of unsound mind is allegation of pleadable fact and not conclusion of law. In re Will of Anderson, 138 N.Y.S.2d 157, 1954 N.Y. Misc. LEXIS 2942 (N.Y. Sur. Ct. 1954), modified, 285 A.D. 971, 138 N.Y.S.2d 700, 1955 N.Y. App. Div. LEXIS 6332 (N.Y. App. Div. 1955).

56. —Miscellaneous allegations

Instances of sufficient allegations as stating conclusions of law. 7 N.Y. 493.

In stockholders’ derivative action, allegations that corporation paid, as “honorarium” for year 1937 $7,085 to individual defendant and $12,500 to attorney and employee, and that such payments were “gifts of corporate funds,” were statements of ultimate fact. Kalmanash v Smith, 291 N.Y. 142, 51 N.E.2d 681, 291 N.Y. (N.Y.S.) 142, 1943 N.Y. LEXIS 1047 (N.Y. 1943).

In stockholders' derivative action, allegations that defendants "caused corporation to make improvident employment contracts with officers," "at direction of" and "with approval of" defendants, that such contracts were "not bona fide" but were "subterfuge" to cover "gratuitous gift" of corporate property and "amounted to waste" of its assets, were conclusory, without supporting facts. Kalmanash v Smith, 291 N.Y. 142, 51 N.E.2d 681, 291 N.Y. (N.Y.S.) 142, 1943 N.Y. LEXIS 1047 (N.Y. 1943).

In stockholders' derivative action, allegations that payments under employment contracts amounted to "excessive bonuses," were "not bona fide" but were "grossly excessive" and "entirely out of proportion to net earnings and had no relation to value of services," and that "exact amount of excessive payments is unknown," were conclusions without factual bases. Kalmanash v Smith, 291 N.Y. 142, 51 N.E.2d 681, 291 N.Y. (N.Y.S.) 142, 1943 N.Y. LEXIS 1047 (N.Y. 1943).

In stockholders' derivative action, allegations that defendant directors conspired to cause election of some of them to corporate offices and to pay to them "excessive" salaries, were insufficient, without alleging that all defendants or any particular one voted or received excessive salary. Oshrin v Celanese Corp. of America, 291 N.Y. 170, 51 N.E.2d 694, 291 N.Y. (N.Y.S.) 170, 1943 N.Y. LEXIS 1049 (N.Y. 1943).

Complaint in action by attorney for legal services rendered to wife as necessaries, that he commenced action and "requested relief deemed necessary," was insufficient. Kaufman v Farah, 303 N.Y. 819, 104 N.E.2d 368, 303 N.Y. (N.Y.S.) 819, 1952 N.Y. LEXIS 1303 (N.Y. 1952).

Where a lease gave the lessor an option either to renew the lease or to pay the tenant the fair value of a stable on the lands, the tenant by alleging that the defendant at the expiration of the lease "elected" to pay the value of the stable does not allege a legal conclusion but a fact, and the form of the allegation furnishes no ground for a dismissal. Eisner v Pringle Memorial Home, 130 A.D. 559, 115 N.Y.S. 58, 1909 N.Y. App. Div. LEXIS 256 (N.Y. App. Div. 1909).

A complaint which merely sets out a contract of employment and alleges that the plaintiff has earned commissions, has demanded payment, but that no part has been paid, and that a certain sum is due and owing does not state a cause of action, as conclusions only are alleged. Mitchell, Schiller & Barnes v Follett Time Recording Co., 142 A.D. 687, 127 N.Y.S. 709, 1911 N.Y. App. Div. LEXIS 371 (N.Y. App. Div. 1911).

An allegation of a complaint that plaintiff is the only legal representative of one of a testator's deceased sons is a mere conclusion of law. Dwight v Gibb, 145 A.D. 223, 129 N.Y.S. 961, 1911 N.Y. App. Div. LEXIS 1771 (N.Y. App. Div. 1911).

Mere charge that defendants "assaulted" the plaintiff was a conclusion and not a statement of facts sufficient to authorize recovery. Hendrix v Manhattan Beach Development Co., 181 A.D. 111, 168 N.Y.S. 316, 1917 N.Y. App. Div. LEXIS 9121 (N.Y. App. Div. 1917).

Allegation that agreement constituted plaintiff, "permanently for his lifetime," exclusive sales agent, was mere conclusion as to legal effect of terms of oral contract. Suslak v I. Rokeach & Sons, Inc., 269 A.D. 779, 55 N.Y.S.2d 78, 1945 N.Y. App. Div. LEXIS 3812 (N.Y. App. Div. 1945), aff'd, 295 N.Y. 799, 66 N.E.2d 581, 295 N.Y. (N.Y.S.) 799, 1946 N.Y. LEXIS 965 (N.Y. 1946).

Allegations that plaintiff "authorized" defendants to sell were conclusions. Dache v Abraham & Straus, Inc., 271 A.D. 895, 67 N.Y.S.2d 128, 1946 N.Y. App. Div. LEXIS 3633 (N.Y. App. Div. 1946).

Allegation of "entitled" was conclusion. Newgold v WLIB, Inc., 273 A.D. 892, 77 N.Y.S.2d 663, 1948 N.Y. App. Div. LEXIS 5164 (N.Y. App. Div. 1948).

"Arbitrarily" and "capriciously," when used in pleading, have vitality only when supported by palpable facts. Buck v Hurd, 281 A.D. 115, 118 N.Y.S.2d 305, 1952 N.Y. App. Div. LEXIS 3078 (N.Y. App. Div. 1952), aff'd, 307 N.Y. 730, 121 N.E.2d 546, 307 N.Y. (N.Y.S.) 730, 1954 N.Y. LEXIS 1459 (N.Y. 1954).

Allegation that corporation is individual's "alter ego" is conclusory in absence of ultimate facts establishing such conclusion. Pathe Laboratories, Inc. v Vidicam Corp., 282 A.D. 1026, 126 N.Y.S.2d 889, 1953 N.Y. App. Div. LEXIS 5712 (N.Y. App. Div. 1953).

Where there are no allegations sufficient to show that plaintiff's business was diverted by use of specified secret and confidential information obtained by individual defendants while they were employed by plaintiff or that business was diverted by use of any other specified acts which constituted breaches of duty owed by individual defendants to plaintiff, complaint was insufficient. Wood & Selick, Inc. v Calvert, 284 A.D. 874, 134 N.Y.S.2d 228, 1954 N.Y. App. Div. LEXIS 3879 (N.Y. App. Div. 1954).

In stockholder's derivative action, general allegations of wrongdoing, based upon undisclosed facts, do not state cause of action. Kinsella v Goff, 284 A.D. 1024, 134 N.Y.S.2d 802, 1954 N.Y. App. Div. LEXIS 4401 (N.Y. App. Div. 1954).

Where complaint alleged that voting trust agreement was intended "to maintain same proportionate voting control among stockholders in event of transfer of voting stock, and that proportions originally established have been destroyed by subsequent voting trust agreement," alleging such intent by mere conclusory allegations to that effect, is insufficient. Gamson v Robinson, 286 A.D. 827, 141 N.Y.S.2d 883, 1955 N.Y. App. Div. LEXIS 4231 (N.Y. App. Div. 1955).

Complaint must state facts, and general allegations of wrongdoing based upon undisclosed facts do not state cause of action. Katz v Manhattan General, Inc., 1 A.D.2d 134, 148 N.Y.S.2d 155, 1956 N.Y. App. Div. LEXIS 6452 (N.Y. App. Div. 1st Dep't 1956), aff'd, 3 N.Y.2d 840, 166 N.Y.S.2d 80, 144 N.E.2d 724, 1957 N.Y. LEXIS 933 (N.Y. 1957).

Allegations that defendants did certain things wrongfully and maliciously amount to nothing more than pleader's conclusions from alleged facts. Benton v Kennedy-Van Saun Mfg. & Eng. Corp., 2 A.D.2d 27, 152 N.Y.S.2d 955, 1956 N.Y. App. Div. LEXIS 4817 (N.Y. App. Div. 1st Dep't 1956).

Allegation of mistreatment was legal conclusion. Edmond v American-Hawaiian S.S. Co., 65 N.Y.S.2d 433, 187 Misc. 723, 1946 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1946), aff'd, 274 A.D. 1035, 85 N.Y.S.2d 915, 1949 N.Y. App. Div. LEXIS 5938 (N.Y. App. Div. 1949).

Conclusory allegations which are not supported by facts from which pleader drew his conclusions are legally ineffective; such allegations as “grossly excessive” and “arbitrary, capricious and unreasonable” are conclusions. Dinkes v Glen Oaks Village, Inc., 132 N.Y.S.2d 138, 206 Misc. 143, 1954 N.Y. Misc. LEXIS 3404 (N.Y. Sup. Ct. 1954).

In stockholder’s derivative action for distribution of undivided profits, allegation that certain person owned and controlled majority of stock was insufficient as conclusion to justify inference of wrongdoing. Reid v Long Island Bond & Mortg. Guarantee Co., 98 N.Y.S.2d 739, 198 Misc. 460, 1949 N.Y. Misc. LEXIS 3227 (N.Y. Sup. Ct. 1949), aff'd, 277 A.D. 888, 98 N.Y.S.2d 389 (N.Y. App. Div. 1950).

In action on employees’ group life policy, allegation in complaint that insurer waived conditions voiding policy, was conclusion and insufficient; supporting facts must be pleaded. King v Sperry Gyroscope Co., 57 N.Y.S.2d 684, 1945 N.Y. Misc. LEXIS 2323 (N.Y. Sup. Ct. 1945).

Allegation that defendants “are using this special information and knowledge to detriment of plaintiff,” is conclusory. Di Raimondo v Lembo, 63 N.Y.S.2d 906, 1946 N.Y. Misc. LEXIS 2524 (N.Y. Sup. Ct. 1946).

Allegations that defendant as agent entered into lease with plaintiff in violation of Emergency Price Control Act and demanded and received rental in excess of maximum allowed by law, were allegations of ultimate fact. Lerner v Participant Realty Corp., 64 N.Y.S.2d 272, 1946 N.Y. Misc. LEXIS 2604 (N.Y. City Ct. 1946).

Allegation of chronological order was legal conclusion. Garfinkel v Pape, 66 N.Y.S.2d 586, 1946 N.Y. Misc. LEXIS 3107 (N.Y. Sup. Ct. 1946).

Allegation of misjudgment on matters of corporate policy was no more than conclusion, where there was no charge of fraud, bad faith or other improper conduct. Wechsler v Metropolitan Broadcasting & Television, Inc., 83 N.Y.S.2d 667, 1948 N.Y. Misc. LEXIS 3407 (N.Y. Sup. Ct. 1948).

In action for breach of contract, allegation that defendant repudiated contract was insufficient as being conclusion. Tillett v Deering, Milliken & Co., 88 N.Y.S.2d 148, 1948 N.Y. Misc. LEXIS 3950 (N.Y. Sup. Ct. 1948).

Allegation that named person was alter ego of plaintiff was conclusory, insufficient to pierce plaintiff's corporate existence. Truman Homes, Inc. v Lane Holding Corp., 88 N.Y.S.2d 403, 1949 N.Y. Misc. LEXIS 2112 (N.Y. Sup. Ct. 1949).

In action for price of goods sold, allegation that goods were "sold" was not conclusion but allegation of ultimate fact. Mantell v Acker, 93 N.Y.S.2d 524, 1949 N.Y. Misc. LEXIS 2975 (N.Y. City Ct. 1949).

It is not sufficient to allege that plaintiffs transferred their stock to defendant because of "duress and undue influence"; complaint must state facts constituting legal basis for charge so that court can see that pleader's conclusion of law is justified. Wolfson v Babyhood Industries, Inc., 121 N.Y.S.2d 820, 1953 N.Y. Misc. LEXIS 1793 (N.Y. Sup. Ct. 1953).

So with "unnecessary", and "spiteful". Davalos v Davalos, 130 N.Y.S.2d 824, 1954 N.Y. Misc. LEXIS 2096 (N.Y. Sup. Ct. 1954).

Where it was not possible to determine exactly the extent, manner, nature or cause of "damages or defective condition" alleged in counterclaim, CPA § 241 was not complied with. Thermo Electric Corp. v Kremers, 143 N.Y.S.2d 252, 1955 N.Y. Misc. LEXIS 3646 (N.Y. Sup. Ct. 1955).

Averment that plaintiffs and three other surviving great-grandchildren of named ancestor inherited all his property rights is mere conclusion. Schumann v Loew's Inc., 144 N.Y.S.2d 27, 1955 N.Y. Misc. LEXIS 2936 (N.Y. Sup. Ct. 1955).

Mere statement that defendant has “failed and refused” to perform contract is conclusory and insufficient factually to show absolute repudiation by language or act, which would make it futile for plaintiff to await expiration of required period for performance. Spice v Ruby Brokerage Service, Inc., 153 N.Y.S.2d 807, 1956 N.Y. Misc. LEXIS 2533 (N.Y. Sup. Ct. 1956).

An allegation in an action of conversion that defendant “converted” the property in question to his own use is an allegation of fact. Berney v Drexel, 33 Hun 419 (N.Y.).

57. Allegations as to particular matters, generally

The words “her husband” used in the caption of a complaint relate to the time when the action was commenced but do not amount to an allegation that she was a married woman at the time of giving the bond. Broome v Taylor, 9 Hun 155 (N.Y.), rev'd, 76 N.Y. 564, 76 N.Y. (N.Y.S.) 564, 1879 N.Y. LEXIS 539 (N.Y. 1879).

58. —Conspiracy

Where numerous specific acts were alleged to have been committed in furtherance of a conspiracy such acts were not separate causes of action and did not violate RCP 90 (R 241 herein). Meinhardt v Britting, 10 Misc. 2d 757, 169 N.Y.S.2d 925, 1958 N.Y. Misc. LEXIS 4082 (N.Y. Sup. Ct. 1958).

59. —Performance of conditions

Whichever party seeks to enforce the contract against the other must show performance, or a tender of performance on his part. 8 N.Y. 508; Lester v Jewett, 11 N.Y. 453, 11 N.Y. (N.Y.S.) 453, 1854 N.Y. LEXIS 91 (N.Y. 1854); Tipton v Feitner, 20 N.Y. 423, 20 N.Y. (N.Y.S.) 423, 1859 N.Y. LEXIS 211 (N.Y. 1859); Pope v Terre Haute Car & Mfg. Co., 107 N.Y. 61, 13 N.E. 592, 107 N.Y. (N.Y.S.) 61, 11 N.Y. St. 209, 1887 N.Y. LEXIS 984 (N.Y. 1887).

Concurrent acts. See 8 N.Y. 508.

Where the plaintiff being prevented by sickness from completing his contract for personal services sues upon a quantum meruit for the services actually rendered, it is unnecessary to set up his complaint the excuse for not performing the contract. Wolfe v Howes, 20 N.Y. 197, 20 N.Y. (N.Y.S.) 197, 1859 N.Y. LEXIS 181 (N.Y. 1859).

Under an allegation of performance, evidence in excuse for nonperformance is not admissible; but plaintiff may amend his complaint. HOSLEY v BLACK, 26 How. Pr. 97, 1863 N.Y. Misc. LEXIS 307 (N.Y. Oct. 1, 1863).

Concurrent or precedent acts. See Meriden Britannia Co. v Zingsen, 48 N.Y. 247, 48 N.Y. (N.Y.S.) 247, 1872 N.Y. LEXIS 283 (N.Y. 1872); President, Managers & Co. of Delaware & Hudson Canal Co. v Pennsylvania Coal Co., 50 N.Y. 250, 50 N.Y. (N.Y.S.) 250, 1872 N.Y. LEXIS 414 (N.Y. 1872).

Condition precedent. See Board of Water Comm'rs v Burr, 56 N.Y. 665, 56 N.Y. (N.Y.S.) 665, 1874 N.Y. LEXIS 245 (N.Y. 1874).

If a contractor is prevented by the law from completing the contract, he may recover for the work done, at the contract price. Heine v Meyer, 61 N.Y. 171, 61 N.Y. (N.Y.S.) 171, 1874 N.Y. LEXIS 626 (N.Y. 1874).

It is essential to the legal statement in a complaint of a cause of action ex contractu that it should allege an existing contract and the performance by plaintiff of such conditions precedent as are thereby provided, or a tender of performance or some adequate excuse for nonperformance. Bogardus v New York Life Ins. Co., 101 N.Y. 328, 4 N.E. 522, 101 N.Y. (N.Y.S.) 328, 1886 N.Y. LEXIS 635 (N.Y. 1886).

An allegation that the defendant, with full knowledge of the breach of a condition, represents that the plaintiff shall be paid in full, without regard to the breach, is sufficient to establish a waiver. Clark v West, 193 N.Y. 349, 86 N.E. 1, 193 N.Y. (N.Y.S.) 349, 1908 N.Y. LEXIS 654 (N.Y. 1908).

Where a building contract provides for payment, “after written acceptance by the architect,” such acceptance is a condition precedent and performance or a waiver thereof must be pleaded and proved. A. D. Granger Co. v Brown-Ketcham Iron Works, 204 N.Y. 218, 97 N.E. 523, 204 N.Y. (N.Y.S.) 218, 1912 N.Y. LEXIS 756 (N.Y. 1912).

Although the complaint alleges a right to commissions dependent upon an agreement to erect a hotel upon the “land then owned by” the defendant, it does not fail to allege performance because the proposed hotel was to be built partly “upon land of other parties,” when such lands became necessary to meet the requirements of all concerned. Lucas v Smith, 113 A.D. 31, 98 N.Y.S. 1037, 1906 N.Y. App. Div. LEXIS 1362 (N.Y. App. Div. 1906).

Under an allegation of performance of a contract of which time is the essence, there can be no recovery only secundum allegata; evidence excusing performance within the stipulated time is not admissible in the absence of an amendment alleging the facts which excuse performance. Hecla Iron Works v Hall, 115 A.D. 126, 100 N.Y.S. 696, 1906 N.Y. App. Div. LEXIS 3637 (N.Y. App. Div. 1906).

Where defendant agreed to cause to be conveyed to plaintiff certain land owned by a corporation, to be selected by plaintiff “out of one of the plots owned by the company,” or in default to make a cash payment, the selection is a condition precedent, and a mere allegation that a demand was duly made is insufficient to give a right of action. Jacocks v Morrison, 129 A.D. 284, 113 N.Y.S. 322, 1908 N.Y. App. Div. LEXIS 1280 (N.Y. App. Div. 1908).

The complaint in an action on a contract whereby it was agreed that a third party should certify to the completion of the work, must allege either that the certificate was obtained or unreasonably refused. Bell v Fox, 129 A.D. 405, 113 N.Y.S. 231, 1908 N.Y. App. Div. LEXIS 1310 (N.Y. App. Div. 1908), reh'g denied, 130 A.D. 887, 114 N.Y.S. 1119, 1909 N.Y. App. Div. LEXIS 482 (N.Y. App. Div. 1909).

Where a building contract provides for certificates of satisfaction, the obtaining of such certificate is a condition precedent to maintaining an action on the contract and performance must be

alleged in the complaint. Bell v Fox, 138 A.D. 569, 123 N.Y.S. 310, 1910 N.Y. App. Div. LEXIS 1582 (N.Y. App. Div. 1910).

An allegation in a complaint in an action on contract that plaintiff has complied with “all the terms and provisions” of the agreement is a sufficient averment that he has performed his contractual duty. Consolidated Rubber Tire Co. v Firestone Tire & Rubber Co., 144 A.D. 225, 129 N.Y.S. 117, 1911 N.Y. App. Div. LEXIS 1667 (N.Y. App. Div. 1911).

Where a complaint sets forth an agreement containing several stipulations which might or might not be construed as conditions that must be complied with before the plaintiff can put the defendant in default, a further allegation that “all the conditions above mentioned were fulfilled or were waived by the defendants” determines the character of such conditions and requires that the facts constituting performance and waiver should be alleged; and in the absence of such allegations an objection to said complaint should be sustained. Alden Speare's Sons' Co. v Casein Co., 103 N.Y.S. 1015, 53 Misc. 58, 1907 N.Y. Misc. LEXIS 156 (N.Y. Sup. Ct. 1907).

60. —Demand or request

No demand need be alleged in action for goods fraudulently obtained against one not a bona fide purchaser from the original vendee. Ely v Ehle, 3 N.Y. 506, 3 N.Y. (N.Y.S.) 506, 1850 N.Y. LEXIS 51 (N.Y. 1850); Gillet v Roberts, 57 N.Y. 28, 57 N.Y. (N.Y.S.) 28, 1874 N.Y. LEXIS 263 (N.Y. 1874); (nor where a person receives money to remit to another) Stacy v Graham, 14 N.Y. 492, 14 N.Y. (N.Y.S.) 492, 1856 N.Y. LEXIS 44 (N.Y. 1856); (nor in an action against a sheriff to recover money collected on execution) Nelson v Kerr, 59 N.Y. 224, 59 N.Y. (N.Y.S.) 224, 1874 N.Y. LEXIS 405 (N.Y. 1874).

A demand on one of two joint tenants is a demand on both. 9 N.Y. 227.

A party entitled to a conveyance upon request may bring his action for specific performance without request. Bruce v Tilson, 25 N.Y. 194, 25 N.Y. (N.Y.S.) 194, 1862 N.Y. LEXIS 122 (N.Y. 1862).

Request must be alleged where the act is to be performed on request, as in action to recover for money deposited. Payne v Gardiner, 29 N.Y. 146, 29 N.Y. (N.Y.S.) 146, 1864 N.Y. LEXIS 23 (N.Y. 1864).

A demand is not necessary before suit where one receives money for the use of another. Howard v France, 43 N.Y. 593, 43 N.Y. (N.Y.S.) 593, 1871 N.Y. LEXIS 37 (N.Y. 1871).

In an action for the detention of chattels, where the defendant came lawfully by possession, a demand must be alleged. Simmons v Lyons, 55 N.Y. 671, 55 N.Y. (N.Y.S.) 671, 1874 N.Y. LEXIS 60 (N.Y. 1874).

An allegation that defendant became possessed of the goods by forcible taking from the plaintiffs avoids the necessity of alleging a demand. Simmons v Lyons, 55 N.Y. 671, 55 N.Y. (N.Y.S.) 671, 1874 N.Y. LEXIS 60 (N.Y. 1874).

A bona fide purchaser from one who obtained wrongfully, is entitled to demand. Gillet v Roberts, 57 N.Y. 28, 57 N.Y. (N.Y.S.) 28, 1874 N.Y. LEXIS 263 (N.Y. 1874).

Where a specific sum is by agreement of the parties made payable at a specified time and place, demand is not necessary at the time or place, as against the original debtor. Locklin v Moore, 57 N.Y. 360, 57 N.Y. (N.Y.S.) 360, 1874 N.Y. LEXIS 294 (N.Y. 1874).

There is no right of action upon a certificate of deposit in ordinary form issued by a bank until demand of payment. Munger v Albany City Nat'l Bank, 85 N.Y. 580, 85 N.Y. (N.Y.S.) 580, 1881 N.Y. LEXIS 127 (N.Y. 1881).

Where one party to a contract, by mistake, makes an overpayment thereon, which is received by the other party without any mistake on his part, and with full knowledge of all the facts, a demand is not necessary before bringing suit to recover back the overpayment. Sharkey v Mansfield, 90 N.Y. 227, 90 N.Y. (N.Y.S.) 227, 1882 N.Y. LEXIS 367 (N.Y. 1882).

Certification of a check does not make it due without demand. Bank of British North America v Merchants' Nat'l Bank, 91 N.Y. 106, 91 N.Y. (N.Y.S.) 106, 1883 N.Y. LEXIS 12 (N.Y. 1883).

In an action for legacies the complaint need not allege that plaintiff has demanded his legacies, where it alleges a refusal of executors to pay it. Foulks v Foulks, 6 N.Y.S. 112, 53 Hun 633, 1889 N.Y. Misc. LEXIS 429 (N.Y. Sup. Ct. 1889).

To charge the indorser, upon a note payable at a particular place, the complaint must aver that payment was demanded at such place. But where the note is payable at a bank it is not necessary to aver and prove demand at such bank. Hills v Place (1868) 30 Super Ct (7 Robt) 389, affd 48 N.Y. 520.

In an action against a bailee or depositary, a demand is necessary. As to money deposited in bank, see National Bank of Ft. Edward v Washington County Nat'l Bank, 5 Hun 605 (N.Y.), app. dismissed, 72 N.Y. 606, 72 N.Y. (N.Y.S.) 606, 1878 N.Y. LEXIS 563 (N.Y. 1878).

An allegation of a demand after the expiration of the period covered by the contract, without alleging any extension, is insufficient. Rutty v Consolidated Fruit Jar Co., 6 N.Y.S. 23, 52 Hun 492, 1889 N.Y. Misc. LEXIS 378 (N.Y. App. Term 1889), aff'd, Rutty v Consolidated Fruit-Jar Co., 126 N.Y. 639, 27 N.E. 411, 126 N.Y. (N.Y.S.) 639, 1891 N.Y. LEXIS 1697 (N.Y. 1891).

61. — —Taxes or assessments

If an illegal tax is paid, an action for its recovery will lie without previous demand. Newman v Board of Supervisors, 45 N.Y. 676, 45 N.Y. (N.Y.S.) 676, 1871 N.Y. LEXIS 195 (N.Y. 1871).

No demand for a return of the money paid to an officer who has a valid warrant for the collection of a void assignment, and who threatens to execute the same, is necessary before the commencement of an action. Breucher v Port Chester, 101 N.Y. 240, 4 N.E. 272, 101 N.Y. (N.Y.S.) 240, 1886 N.Y. LEXIS 621 (N.Y. 1886).

62. —Residence

In a county court the complaint must show defendant to be a resident of the county. A statement that defendants are engaged in business in such county is not sufficient. Frees v Ford, 6 N.Y. 176, 6 N.Y. (N.Y.S.) 176, 1852 N.Y. LEXIS 53 (N.Y. 1852).

A plaintiff's residence in this state, although necessary to confer jurisdiction upon the municipal court of the city of New York to entertain an action, need not be alleged in the complaint. Pratt v Pennsylvania R. Co., 121 N.Y.S. 357, 66 Misc. 183, 1910 N.Y. Misc. LEXIS 80 (N.Y. App. Term 1910).

63. —Scienter, knowledge or intent

Scienter must be averred in an action for keeping dangerous or mischievous animals. Van Leuven v Lyke, 1 N.Y. 515, 1 N.Y. (N.Y.S.) 515, 1848 N.Y. LEXIS 48 (N.Y. 1848).

An allegation in the complaint that the defendant "falsely and fraudulently" represented, is a sufficient statement of the scienter. Thomas v Beebe, 25 N.Y. 244, 25 N.Y. (N.Y.S.) 244, 1862 N.Y. LEXIS 129 (N.Y. 1862).

An averment of want of knowledge of fraud is necessary to avoid statute of limitations. Erickson v Quinn, 47 N.Y. 410, 47 N.Y. (N.Y.S.) 410, 1872 N.Y. LEXIS 34 (N.Y. 1872).

Knowledge must be alleged in an action for fraud in the sale of property. Lamb v Kelsey, 54 N.Y. 645, 54 N.Y. (N.Y.S.) 645, 1873 N.Y. LEXIS 88 (N.Y. 1873); as to an action against one who continues a private nuisance originated by another, see Brown v Cayuga & S. R. Co., 12 N.Y. 486, 12 N.Y. (N.Y.S.) 486, 1855 N.Y. LEXIS 32 (N.Y. 1855).

Generally in all actions for deceit, the intent to deceive must be averred and proved. Chester v Comstock, 40 N.Y. 575, 40 N.Y. (N.Y.S.) 575 (N.Y. 1869); Hubbard v Briggs, 31 N.Y. 518, 31 N.Y. (N.Y.S.) 518, 1865 N.Y. LEXIS 70 (N.Y. 1865); Marsh v Falker, 40 N.Y. 562, 40 N.Y. (N.Y.S.) 562, 1869 N.Y. LEXIS 59 (N.Y. 1869); Meyer v Amidon, 45 N.Y. 169, 45 N.Y. (N.Y.S.) 169, 1871 N.Y. LEXIS 120 (N.Y. 1871); Oberlander v Spiess, 45 N.Y. 175, 45 N.Y. (N.Y.S.) 175,

1871 N.Y. LEXIS 121 (N.Y. 1871); Stitt v Little, 63 N.Y. 427, 63 N.Y. (N.Y.S.) 427, 1875 N.Y. LEXIS 65 (N.Y. 1875).

In an action by a city against a property owner, a complaint alleging the recovery of a judgment against plaintiff for an injury caused by the negligent act of defendant is sufficient, though it does not allege notice to the city of the defect in the street. New York v Dimick 20 Abb NC 15, 11 NYSR 519, affd 49 Hun 241, 2 NYS 46; New York v Bookman, 20 Abb NC 18; Reich v New York, 12 Daly 72, 20 Abb NC 19.

64. —Threat

Allegations in a complaint in an action for an injunction that manufacturers were prevented from making sales to the plaintiff because they wished to protect themselves with those who had adopted the contract or rebate plan and agreed to maintain prices, do not allege a threat. John D. Park & Sons Co. v National Whoesale Druggists' Ass'n, 175 N.Y. 1, 67 N.E. 136, 175 N.Y. (N.Y.S.) 1, 1903 N.Y. LEXIS 949 (N.Y. 1903).

65. —Warranty, and breach thereof

A cause of action is stated whenever the requisite allegations can be fairly gathered from all the averments, although the facts are imperfectly or argumentatively averred; complaint held to state a cause of action for the breach of an implied warranty. Heath Dry Gas Co. v Hurd, 124 A.D. 68, 108 N.Y.S. 410, 1908 N.Y. App. Div. LEXIS 2036 (N.Y. App. Div.), rev'd, 193 N.Y. 255, 86 N.E. 18, 193 N.Y. (N.Y.S.) 255, 1908 N.Y. LEXIS 642 (N.Y. 1908).

Whether a warranty of fitness of an article purchased, to the knowledge of the seller, for a specified use and purpose, was expressed or implied need not be pleaded. B. P. Ducas Co. v American Silk Dyeing & Finishing Co., 95 N.Y.S. 590, 48 Misc. 411, 1905 N.Y. Misc. LEXIS 435 (N.Y. App. Term 1905).

Complaint alleging that plaintiff's customers found product to be defective, was insufficient to state a cause of action for breach of warranty where there was no categorical statement of the existence of any specified defect or variance of the product delivered from the product as warranted. Northeastern Wholesalers, Inc. v Owens-Corning Fiberglas Corp., 24 Misc. 2d 165, 198 N.Y.S.2d 945, 1960 N.Y. Misc. LEXIS 3809 (N.Y. Sup. Ct. 1960).

An allegation of conditions broken is conclusory where the conditions allegedly broken are not specified. Northeastern Wholesalers, Inc. v Owens-Corning Fiberglas Corp., 24 Misc. 2d 165, 198 N.Y.S.2d 945, 1960 N.Y. Misc. LEXIS 3809 (N.Y. Sup. Ct. 1960).

66. —Anticipation of defense

Complaint need not aver that no part of the debt has been paid. Keteltas v Myers, 19 N.Y. 231, 19 N.Y. (N.Y.S.) 231, 1859 N.Y. LEXIS 27 (N.Y. 1859).

Matter of defense need not be anticipated by complaint. Williams v Tilt, 36 N.Y. 319, 36 N.Y. (N.Y.S.) 319, 1867 N.Y. LEXIS 50 (N.Y. 1867); Cahen v Continental Life Ins. Co., 69 N.Y. 300, 69 N.Y. (N.Y.S.) 300, 1877 N.Y. LEXIS 839 (N.Y. 1877).

67. —Damages, general and special

Damages which temporarily result from the injuries complained of are called general damages, and may be proved under a general demand for relief. Laraway v Perkins (1852) 10 NY 371; Jutte v Hughes (1876) 67 NY 267. But such damages as are the natural although not the necessary result of the injury are termed special damages and must be stated in the complaint. Vanderslice v Newton, 4 N.Y. 130, 4 N.Y. (N.Y.S.) 130, 1850 N.Y. LEXIS 72 (N.Y. 1850); Bergmann v Jones, 94 N.Y. 51, 94 N.Y. (N.Y.S.) 51, 1883 N.Y. LEXIS 394 (N.Y. 1883); (averment is not traversable) Low v Archer, 12 N.Y. 277, 12 N.Y. (N.Y.S.) 277, 1855 N.Y. LEXIS 8 (N.Y. 1855).

In an action against a sheriff for neglecting to return an execution it is not necessary to allege or prove special damage. 7 N.Y. 550.

As to damages in action for causing death. See Althorf v Wolfe, 22 N.Y. 355, 22 N.Y. (N.Y.S.) 355, 1860 N.Y. LEXIS 33 (N.Y. 1860), and Tilley v Hudson R. R. Co., 24 N.Y. 471, 24 N.Y. (N.Y.S.) 471, 1862 N.Y. LEXIS 88 (N.Y. 1862).

Special damage need not be averred in order to entitle a party to an injunction to prevent diversion of a watercourse. Corning v Troy Iron & Nail Factory, 40 N.Y. 191, 40 N.Y. (N.Y.S.) 191, 1869 N.Y. LEXIS 17 (N.Y. 1869).

As to particularity required in alleging damages for trespassing on real estate. See Eten v Luyster, 60 N.Y. 252, 60 N.Y. (N.Y.S.) 252, 1875 N.Y. LEXIS 176 (N.Y. 1875).

Where special damage is sought to be recovered in an action for failure to deliver goods which cannot be had with reasonable diligence, such special damage must be alleged in the pleadings. Parsons v Sutton, 66 N.Y. 92, 66 N.Y. (N.Y.S.) 92, 1876 N.Y. LEXIS 198 (N.Y. 1876).

Loss of tenants by reason of nuisance can be proved in an action for overflowing a cellar without a special averment of such loss. Jutte v Hughes, 67 N.Y. 267, 67 N.Y. (N.Y.S.) 267, 1876 N.Y. LEXIS 383 (N.Y. 1876).

In an action of trespass it was not necessary, in order to recover damages which necessarily and naturally resulted from the injury, to specifically allege them in the complaint. Argotsinger v Vines, 82 N.Y. 308, 82 N.Y. (N.Y.S.) 308, 1880 N.Y. LEXIS 359 (N.Y. 1880).

When special damages sufficiently alleged. Callanan v Gilman, 107 N.Y. 360, 14 N.E. 264, 107 N.Y. (N.Y.S.) 360, 12 N.Y. St. 21, 1887 N.Y. LEXIS 1021 (N.Y. 1887), limited, Richardson & Boynton Co. v Barstow Stove Co., 13 N.Y.S. 358, 59 Hun 624, 1891 N.Y. Misc. LEXIS 1110 (N.Y. Sup. Ct. 1891).

Damages and rescission under CPA § 112-e (§ 3002(e) herein); unduly repetitious. Campel v Carrier, 277 A.D. 772, 97 N.Y.S.2d 1, 1950 N.Y. App. Div. LEXIS 3262 (N.Y. App. Div. 1950).

Special damages in complaint for libel must be pleaded with such particularity as will enable defendant to meet same. Kennedy Const. Co. v Press Co., 106 N.Y.S.2d 8, 199 Misc. 370, 1950 N.Y. Misc. LEXIS 2526 (N.Y. Sup. Ct. 1950).

In pleading a cause of action for libelous publication, plaintiff must plead special damages so as to enable defendant to meet same. Levine v Teitler, 6 Misc. 2d 592, 164 N.Y.S.2d 588, 1956 N.Y. Misc. LEXIS 1669 (N.Y. Sup. Ct. 1956).

The complaint in an action for slander for words not actionable per se, alleged that because of the speaking of the words complained of divers persons refused to associate or transact any business with the plaintiff, and the plaintiff was thereby deprived of the benefits which would accrue to him from such association and business; held that while the allegation of special damage should have been more specific it nevertheless set forth a sufficient cause of action. Flatow v Von Bremsen, 11 N.Y.S. 677, 1890 N.Y. Misc. LEXIS 2296 (N.Y. City Ct. 1890).

In an action for possession of real estate, damages for rents and profits cannot also be shown, unless specially alleged in the complaint. Livingston v Tanner, 12 Barb. 481, 1852 N.Y. App. Div. LEXIS 18 (N.Y. Sup. Ct. Feb. 2, 1852).

Damages arising from bodily pain need not be alleged specially in the complaint. Curtiss v Rochester & Syracuse R.R., 20 Barb. 282, 1855 N.Y. App. Div. LEXIS 91 (N.Y. Sup. Ct. June 4, 1855), aff'd, Curtis v Rochester & S. R. Co., 18 N.Y. 534, 18 N.Y. (N.Y.S.) 534, 1859 N.Y. LEXIS 239 (N.Y. 1859).

In an action for inducing plaintiff by false representations to sign a bond a special allegation of damages is not necessary; the presumption that plaintiff will be obliged to pay the bond is enough. De Silver v Holden.

68. — —Exemplary damages

The complaint in an action for tort need not specifically ask for exemplary damages in order that they may be recovered. Korber v Dime Sav. Bank, 134 A.D. 149, 118 N.Y.S. 857, 1909 N.Y. App. Div. LEXIS 2797 (N.Y. App. Div. 1909).

69. Formal requirements of pleading, generally

Purpose of RCP 90 was to require the complaint to be in such form that defendant may make his denials with clearness and certainty and to aid him in preparation for trial. O'Hara v Derschug, 232 A.D. 31, 248 N.Y.S. 621, 1931 N.Y. App. Div. LEXIS 13722 (N.Y. App. Div. 1931).

Where paragraph of complaint for false arrest, false imprisonment, malicious prosecution and assault and battery failed to conform to requirements of RCP 90, complaint was ordered amended. Saunders v New York, 1 A.D.2d 983, 151 N.Y.S.2d 400, 1956 N.Y. App. Div. LEXIS 5646 (N.Y. App. Div. 2d Dep't), app. denied, 2 A.D.2d 693, 153 N.Y.S.2d 590, 1956 N.Y. App. Div. LEXIS 4960 (N.Y. App. Div. 2d Dep't 1956), app. dismissed, 2 N.Y.2d 731, 157 N.Y.S.2d 370, 138 N.E.2d 733, 1956 N.Y. LEXIS 718 (N.Y. 1956), app. dismissed, 2 N.Y.2d 707, 1956 N.Y. LEXIS 1238 (N.Y. 1956).

Amended complaint required to comply with RCP 90 requiring that each paragraph of a pleading contain, as nearly as may be, separate allegation. Raeder v New York Times, 1 A.D.2d 1017, 151 N.Y.S.2d 579, 1956 N.Y. App. Div. LEXIS 5572 (N.Y. App. Div. 2d Dep't 1956).

Enforcement of RCP 90 was largely in the discretion of the special term. Crawford Music Corp. v American Record Corp., 17 N.Y.S.2d 838, 173 Misc. 205, 1939 N.Y. Misc. LEXIS 2701 (N.Y. Sup. Ct. 1939), aff'd, 258 A.D. 955, 17 N.Y.S.2d 841, 1940 N.Y. App. Div. LEXIS 8405 (N.Y. App. Div. 1940).

Purpose of RCP 90 was to require complaint to be in such form that defendant might make denials with clearness and certainty and thus aid in preparation for trial. Culpepper v Culpepper, 1 Misc. 2d 355, 146 N.Y.S.2d 338, 1955 N.Y. Misc. LEXIS 2278 (N.Y. Sup. Ct. 1955).

RCP 90 requiring separate statement and numbering of each cause of action was a practice regulation intended to facilitate not to harass. In the absence of a showing of prejudice, enforcement of the rule rested largely in the discretion of special term. Manufacturers Casualty Ins. Co. v Lafayette Nat'l Bank, 6 Misc. 2d 1017, 159 N.Y.S.2d 260, 1957 N.Y. Misc. LEXIS 3605 (N.Y. Sup. Ct. 1957).

A complaint did not comply with RCP 90 where plaintiff sought to incorporate in the amended complaint allegations in the prior superseded complaint. Calka v Tobin Packing Co., 12 Misc. 2d 455, 176 N.Y.S.2d 910, 1958 N.Y. Misc. LEXIS 2901 (N.Y. Sup. Ct. 1958), aff'd, 9 A.D.2d 820, 192 N.Y.S.2d 886, 1959 N.Y. App. Div. LEXIS 6176 (N.Y. App. Div. 3d Dep't 1959).

Relief rests in sound discretion of court. Bauer v Leider, 17 Misc. 2d 308, 182 N.Y.S.2d 972, 1958 N.Y. Misc. LEXIS 2072 (N.Y. Sup. Ct. 1958).

RCP 90 provided a means by which an adverse party might be fully informed as to the extent of the claims being made so that he might properly and intelligently prepare his pleading in response thereto. United Lakeland Air Conditioning Co. v Ahneman-Christiansen, Inc., 22 Misc. 2d 80, 194 N.Y.S.2d 84, 1959 N.Y. Misc. LEXIS 2856 (N.Y. Sup. Ct. 1959).

Where complaint contains more than one cause, motion must be granted, unless too onerous to plaintiff or with no useful purpose. Garment Center Capital, Inc. v Rentner, 77 N.Y.S.2d 17, 1947 N.Y. Misc. LEXIS 3658 (N.Y. Sup. Ct. 1947).

Motion under RCP 90 could not be used to attack sufficiency of complaint, requiring motion under RCP 106 (Rule 3211 herein). Sutter v Marcus, 81 N.Y.S.2d 242, 1948 N.Y. Misc. LEXIS 2744 (N.Y. Sup. Ct. 1948).

70. —Issues framed by consent

Parties may elect to try their case outside of the pleadings and frame their own issues upon the trial. Ackerman & Hartnick, Inc. v Berkowitz, 206 N.Y.S. 624, 123 Misc. 937, 1924 N.Y. Misc. LEXIS 1232 (N.Y. App. Term 1924).

If the parties desire to litigate a claim without pleadings or objection they may do so. Alber-Wickes Platform Service v Freiburg Passion Play in English, Inc., 252 N.Y.S. 209, 141 Misc. 480, 1931 N.Y. Misc. LEXIS 1617 (N.Y. Sup. Ct. 1931).

71. —Separate statement of grounds and demands for single cause

Multiplying demands does not multiply causes of action which are to be separately stated. Whalen v Strong, 230 A.D. 617, 246 N.Y.S. 40, 1930 N.Y. App. Div. LEXIS 8699 (N.Y. App. Div. 1930).

Where paragraphs of complaint allege facts which taken together support the single cause of action in contract which complaint set forth as constituting plaintiff's cause of action, order requiring amended complaint separately stating and numbering causes of action is error. McKinney v C. I. T. Corp., 263 A.D. 1066, 34 N.Y.S.2d 384, 1942 N.Y. App. Div. LEXIS 8078 (N.Y. App. Div. 1942).

Where facts alleged in each of causes of action set forth in complaint state several grounds for only one claimed primary right, motion to number separately was denied. General Acci. Fire & Life Assurance Corp. v Rupp, 278 A.D. 666, 102 N.Y.S.2d 654, 1951 N.Y. App. Div. LEXIS 4286 (N.Y. App. Div. 1951).

In action for judgment declaring zoning ordinance to be invalid, where complaint alleges single right on behalf of plaintiffs, allegedly invaded by single wrong by defendants, there is but one cause of action, and it is immaterial that interests of plaintiffs may not in every respect be identical. Davlee Constr. Corp. v Huntington, 285 A.D. 971, 138 N.Y.S.2d 884, 1955 N.Y. App. Div. LEXIS 6329 (N.Y. App. Div. 1955).

Different legal theories and different grounds of liability do not make different causes of action, and it is incumbent upon plaintiffs, suing for unauthorized use of their picture in magazine to assert in one action all possible grounds of liability. Metzger v Dell Publishing Co., 136 N.Y.S.2d 888, 207 Misc. 182, 1955 N.Y. Misc. LEXIS 3385 (N.Y. Sup. Ct. 1955).

Where acts alleged are all properly alleged as one cause of action, the plaintiffs cannot be required to separately state and number the alleged acts as different causes of action. Dior v Milton, 9 Misc. 2d 425, 155 N.Y.S.2d 443, 1956 N.Y. Misc. LEXIS 1678 (N.Y. Sup. Ct.), aff'd, 2 A.D.2d 878, 156 N.Y.S.2d 996, 1956 N.Y. App. Div. LEXIS 4009 (N.Y. App. Div. 1st Dep't 1956).

A cause of action based upon a series of acts, all of which tend to spell out a single continuous breach of duty may not be attacked by a motion to separately state and number. Gauthier v Port of New York Authority, 7 Misc. 2d 201, 160 N.Y.S.2d 461, 1957 N.Y. Misc. LEXIS 3667 (N.Y. Sup. Ct. 1957).

Where plaintiffs' claims are not several against defendants, plaintiffs will not be required to state separately and number their causes of action. Crowell-Collier Publishing Co. v Josefowitz, 9 Misc. 2d 613, 170 N.Y.S.2d 373, 1957 N.Y. Misc. LEXIS 1978 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 987, 173 N.Y.S.2d 992, 1958 N.Y. App. Div. LEXIS 6115 (N.Y. App. Div. 1st Dep't 1958).

Plaintiff corporation pleaded a single cause of action when it alleged that defendant, an officer and stockholder of the corporation, wrongfully purchased stock on his own behalf and the fact that his actions were not only a violation of his duty as an officer not to acquire for himself property rightfully belonging to the corporation did not create an additional cause of action. North American Iron & Steel Co. v Lefkowitz, 17 Misc. 2d 284, 184 N.Y.S.2d 707, 1959 N.Y. Misc. LEXIS 4120 (N.Y. Sup. Ct. 1959).

Statement in single cause of action of different grounds upon which liability is predicated for one wrong is proper. Mayer v Hochman, 73 N.Y.S.2d 97, 1947 N.Y. Misc. LEXIS 2944 (N.Y. Sup. Ct. 1947).

Different legal theories or different grounds of liability do not make different causes of action. Weinstein v Schwartz, 107 N.Y.S.2d 337, 1951 N.Y. Misc. LEXIS 2352 (N.Y. Sup. Ct. 1951).

If facts alleged in complaint show one primary right of plaintiff and one wrong done by defendant which involves that right, plaintiff has stated but a single cause of action, and cannot be required to allege as a separate cause of action each of the several grounds upon which he predicates

his claim of an invasion of that right. Kings County Pharmaceutical Soc. v New York, 198 N.Y.S.2d 339 (N.Y. Sup. Ct. 1960).

Different legal theories of liability; e.g., easement by grant and easement by prescription, do not necessarily create different causes of action, and need not be separately stated. Bradley v Condon, 217 N.Y.S.2d 821, 1961 N.Y. Misc. LEXIS 3648 (N.Y. Sup. Ct. 1961).

Supplemental allegations of facts merely tending to strengthen complainant's right to relief originally demanded, and not to separate and distinct relief, do not constitute a separate cause of action. Estate of Smith, 15 N.Y. St. 435.

Even though plaintiff might be entitled to three kinds of relief upon the same state of facts, the complaint may present but one cause of action. Hammond v Cockle, 2 Hun 495 (N.Y.).

A complaint is not to be deemed to unite several causes of action, simply because it sets forth several grounds on which the defendant might be liable in respect to the same transaction. Walters v Continental Ins. Co., 5 Hun 343 (N.Y.).

More than one count upon the same instrument or transaction may in a proper case be allowed under CPA § 255 (§§ 3013, 3017(a), Rule 3014 herein). Longprey v Yates, 31 Hun 432 (N.Y.).

Where a complaint sets forth but a single cause of action, the fact that it is divided and stated as two causes of action does not make two causes of action of facts which in the judgment of the law creates but one. Welch v Platt, 32 Hun 194 (N.Y.).

A complaint may state several grounds or reasons for the relief demanded, or may be framed to meet the contingencies of the trial. Velie v Newark City Ins. Co., 65 How. Pr. 1, 1883 N.Y. Misc. LEXIS 85 (N.Y. Sup. Ct. Feb. 1, 1883); Velie v Newark City Ins. Co. 23 NY Week Dig 456.

The stating of one cause of action in several different forms as so many causes of action, is not authorized by the Civil Practice Act, and is inconsistent with its provisions. And where, upon the trial, it appears that two or more of the causes of action set forth in the complaint, are founded upon substantially the same facts, a motion to compel an election should be granted. But this is

in the discretion of the judge at the trial term, and a new trial will not be granted for the exercise of his discretion, unless it appears that the appellant was prejudiced. Roberts v Leslie (1880) 46 Super Ct (14 Jones & S) 76.

72. Separate causes of action, generally

This provision relates simply to questions of practice, and the right is merely formal, not substantial, and an order denying the right is not reviewable by the court of appeals. Goldberg v Utley, 60 N.Y. 427, 60 N.Y. (N.Y.S.) 427, 1875 N.Y. LEXIS 198 (N.Y. 1875).

One of the tests which will determine whether two causes of action are identical is to see if the same evidence will sustain both; though the form of the action may be different, the causes may be the same, where the same evidence equally supports either. Bell v Merrifield, 109 N.Y. 202, 16 N.E. 55, 109 N.Y. (N.Y.S.) 202, 14 N.Y. St. 796, 1888 N.Y. LEXIS 720 (N.Y. 1888).

Complaint may allege inconsistent causes of action, and no election is required until the close of the evidence. Irving Trust Co. v Reikes, 228 A.D. 510, 240 N.Y.S. 232, 1930 N.Y. App. Div. LEXIS 12208 (N.Y. App. Div. 1930).

In action to recover price of goods sold and damages for nonacceptance of same, the causes of action were consistent, since if plaintiff should fail to prove facts in the first he might rely upon the second. Anness v Seaboard Trading Co., 230 A.D. 69, 243 N.Y.S. 27, 1930 N.Y. App. Div. LEXIS 8547 (N.Y. App. Div. 1930).

Several causes commingled, see Clark v Bee Line, Inc., 271 A.D. 793, 65 N.Y.S.2d 52, 1946 N.Y. App. Div. LEXIS 3099 (N.Y. App. Div. 1946).

Where plaintiff disclaims intention of alleging more than single cause of action against defendant, as joint tortfeasor in prima facie tort, separate statement was unnecessary. R. K. Corbin, Inc. v Levine, 284 A.D. 1035, 137 N.Y.S.2d 351, 1954 N.Y. App. Div. LEXIS 4473 (N.Y. App. Div. 1st Dep't 1954).

Where in complaint claims on behalf of both corporate respondent and individual respondents are commingled and rights of corporation and rights of individuals are basically different, the cause of action on behalf on each should be separately stated and numbered with appropriate allegations in support of each cause. North American Iron & Steel Co. v Lefkowitz, 7 A.D.2d 647, 180 N.Y.S.2d 365, 1958 N.Y. App. Div. LEXIS 4223 (N.Y. App. Div. 2d Dep't 1958).

Common law and statute liability, see Frick Co. v Central Ice Co., 51 N.Y.S.2d 164, 182 Misc. 380, 1943 N.Y. Misc. LEXIS 2902 (N.Y. Sup. Ct. 1943).

Where each of two causes of action commingle causes of action for libel and invasion of plaintiff’s rights of privacy, the complaint is subject to a motion to separately state and number or in the alternative to allege a cause of action under the Civil Rights Law and to eliminate irrelevant matter. Goelet v Confidential, Inc., 9 Misc. 2d 311, 167 N.Y.S.2d 91, 1957 N.Y. Misc. LEXIS 2491 (N.Y. Sup. Ct. 1957), rev'd, 5 A.D.2d 226, 171 N.Y.S.2d 223, 1958 N.Y. App. Div. LEXIS 6651 (N.Y. App. Div. 1st Dep't 1958).

Plaintiff cannot properly commingle two causes of action, one upon a guarantee for breach of performance of a contract, and the other for damages for unlawfully urging or inducing breach of contract and plaintiff directed to serve amended complaint separately stating and numbering. Kasen v Morrell, 10 Misc. 2d 176, 167 N.Y.S.2d 322, 1957 N.Y. Misc. LEXIS 2707 (N.Y. Sup. Ct. 1957).

Where action brought for pain and suffering and second cause of action is for wrongful death but second cause of action also claims damages for pain and suffering, complaint dismissed and plaintiff required to separately state and number. Slutsky v Hospital for Joint Diseases, 10 Misc. 2d 853, 169 N.Y.S.2d 780, 1957 N.Y. Misc. LEXIS 2000 (N.Y. Sup. Ct. 1957).

While different claims may not be united in a single cause of action by stating them together instead of separately, it is well established that where the facts alleged are all parts of one continuing act creating a single cause of action they may be united. Newcombe v Chicago & N. W. R. Co., 8 N.Y.S. 366, 55 Hun 607, 1890 N.Y. Misc. LEXIS 1588 (N.Y. Sup. Ct. 1890).

If complaint states more than one primary right or subject of action, it contains more than single cause of action. Garment Center Capital, Inc. v Rentner, 77 N.Y.S.2d 17, 1947 N.Y. Misc. LEXIS 3658 (N.Y. Sup. Ct. 1947).

In action by plumbing contractors against builders for money had and received, background material to establish right of plaintiffs and correlative duty of defendant to do what justice requires, were not to be construed as separate wrongs to be pleaded as separate causes of action. Horowitz v Alley Pond Park Apartments No. 1, Inc., 142 N.Y.S.2d 610, 1955 N.Y. Misc. LEXIS 3501 (N.Y. Sup. Ct. 1955), app. dismissed, 1 A.D.2d 1012, 151 N.Y.S.2d 619, 1956 N.Y. App. Div. LEXIS 5558 (N.Y. App. Div. 2d Dep't 1956).

Where two persons, plaintiff and his assignor, are damaged by same continuing fraud, each has cause of action, but where it is only by transfer that their causes are united in same person, by transfer of prior factor’s fraud to present plaintiff factor, these causes are united in same person, defendant will not be faced with any difficulty in answering plaintiff’s pleading, and unnecessary repetition will be eliminated. Hamilton Factors Corp. v Zacharia, 142 N.Y.S.2d 687, 1955 N.Y. Misc. LEXIS 3520 (N.Y. Sup. Ct. 1955).

Separate statement is not required in every instance where more than one cause of action exists; it is only where joinder in single statement makes it difficult to answer or otherwise prejudices defendant that separate statement is ordered. Hamilton Factors Corp. v Zacharia, 142 N.Y.S.2d 687, 1955 N.Y. Misc. LEXIS 3520 (N.Y. Sup. Ct. 1955).

It is impossible to make two causes of action out of a litigation over the single question whether the defendant lawfully held a certain office at the commencement of the action, and whatever facts tend to show that he did not lawfully hold that office at that time, bear upon that one cause of action. People v Platt, 10 N.Y. St. 717.

Separate causes of action exist only when plaintiff may demand separate judgment for different sums of money or different form of relief in different actions, if he did not elect to include his

whole claim against defendant in a single action. Richards v Kinsley, 12 N.Y. St. 125, 14 N.Y. St. 701 (N.Y.C.P. Dec. 5, 1887).

Plaintiff may or may not unite legal and equitable causes of action, even arising out of one transaction, in one suit as he chooses. Bruce v Kelly, 5 Hun 229 (N.Y.).

Where it can be seen that the statement of each cause of action is probably needful in order to prevent a failure of justice, consequence of a variance between the pleading and the proof, such statement, provided it be plain and concise, is not unnecessary repetition. Blank v Hartshorn, 37 Hun 101 (N.Y.).

Before a complaint could be considered bad, under RCP 90, it had to contain two or more good causes of action well pleaded. Trenndlich v Hall.

In an action to set aside a conveyance and an assignment of a claim, a complaint which also alleges a confession of judgment made to one defendant after the conveyance states but one cause of action. Merchants' Bank v Thalheimer, 23 NY Week Dig 116.

73. —Separately stating and numbering

Failure to separately state two causes of action did not preclude their consideration. Hevia v Wheelock, 155 A.D. 387, 140 N.Y.S. 351, 1913 N.Y. App. Div. LEXIS 5102 (N.Y. App. Div. 1913).

Complaint held to state three causes of action so that it was open to objection for not separately stating and numbering causes of action. Raftery v Carter, 162 A.D. 17, 147 N.Y.S. 271, 1914 N.Y. App. Div. LEXIS 5967 (N.Y. App. Div. 1914).

Complaint under General Municipal Law, § 51 (Consol Laws 1909, ch 44), alleging official position of various defendants followed by numbered paragraphs, designated causes of action, was insufficient where such paragraphs did not each allege defendants' official positions and

plaintiff's capacity to sue. Daly v Haight, 163 A.D. 234, 148 N.Y.S. 42, 1914 N.Y. App. Div. LEXIS 6859 (N.Y. App. Div. 1914).

If statement of facts in complaint is such that there might be two distinct causes of action stated, and such was the purpose of the complaint, defendant is entitled to have each cause of action separately stated and numbered. Stabilimento Metallurgico Ligure v Joseph, 189 A.D. 173, 178 N.Y.S. 241, 1919 N.Y. App. Div. LEXIS 4621 (N.Y. App. Div. 1919).

Where complaint states more than one cause of action defendant is entitled to have them separately stated and numbered. De Groot v Brooklyn Daily Times, 230 A.D. 783, 244 N.Y.S. 778, 1930 N.Y. App. Div. LEXIS 9321 (N.Y. App. Div. 1930).

Pleading in question does not conform to the requirement that separate causes of action should be separately stated and numbered. Manufacturers Trust Co. v Weitemeyer, 261 A.D. 281, 24 N.Y.S.2d 794, 1941 N.Y. App. Div. LEXIS 7310 (N.Y. App. Div. 1941).

Where acts alleged in complaint are fairly and reasonably related to subject matter pleaded, separate statement was denied. Taintor v Hattemer, 273 A.D. 1024, 79 N.Y.S.2d 236, 1948 N.Y. App. Div. LEXIS 5837 (N.Y. App. Div. 1948).

Complaint intermingling factual allegations relevant only to cause of action at law with those for equitable relief, was dismissed, with leave to amend complaint separately stating causes of action. Bernsley v Reiss, 276 A.D. 827, 93 N.Y.S.2d 249, 1949 N.Y. App. Div. LEXIS 3481 (N.Y. App. Div. 1949).

Where complaint combines several suggested causes of action based on fraud, trust, malicious interference with business, breach of contract and unfair competition, plaintiff was required to serve amended complaint setting forth separately which cause is intended to be stated and basis of each cause as to each defendant. Glatter-Gotz v Reiger Organs, Inc., 286 A.D. 1088, 146 N.Y.S.2d 142, 1955 N.Y. App. Div. LEXIS 5263 (N.Y. App. Div. 1955).

Under strict rules of pleading, paragraph of complaint alleging no cause of action against some defendants should be separately stated and numbered, but in view of facility with which defendants may answer allegation in that paragraph and magnitude of task of amending complaint as compared with any advantages thereof, amendment was denied. Orr v Weissberger, 1 A.D.2d 844, 148 N.Y.S.2d 770, 1956 N.Y. App. Div. LEXIS 6335 (N.Y. App. Div. 2d Dep't 1956).

Where “second cause” of action purports to state cause of action for breach of warranty in alleged agreements as well as cause of action for reformation and breach of warranty, such two causes of action should be separately stated. Citizens Utilities Co. v American Locomotive Co., 1 A.D.2d 941, 150 N.Y.S.2d 33, 1956 N.Y. App. Div. LEXIS 5775 (N.Y. App. Div. 1st Dep't 1956).

Where complaint commingled claims on behalf of both the corporation and individuals, the cause of action on behalf of each should be separately stated and numbered. North American Iron & Steel Co. v Lefkowitz, 7 A.D.2d 647, 180 N.Y.S.2d 365, 1958 N.Y. App. Div. LEXIS 4223 (N.Y. App. Div. 2d Dep't 1958).

The provision requiring that when two or more causes of action are stated in a complaint, they must be separately stated and numbered, applies only to cases where the court can see from the pleading itself that there is more than one cause of action alleged so that a separation should be made. Hatch v Matthews, 30 N.Y.S. 309, 9 Misc. 307, 1894 N.Y. Misc. LEXIS 702 (N.Y. Sup. Ct. 1894), aff'd, 33 N.Y.S. 332, 85 Hun 522 (1895).

Each cause of action must be stated separately and shall contain every allegation which is necessary to maintain that cause of action independently. Wright v Larkin, 154 N.Y.S. 961, 91 Misc. 573, 1915 N.Y. Misc. LEXIS 1137 (N.Y. Sup. Ct. 1915).

If a plaintiff relies on more than one cause of action he should separately set forth and number in his complaint the causes of action he does rely on. Prudence Holding Corp. v Jennie E.

Gordon Realty Corp., 225 N.Y.S. 237, 130 Misc. 784, 1927 N.Y. Misc. LEXIS 1195 (N.Y. Sup. Ct. 1927).

Where complaint pleads several causes of action against different defendants, he must separately state and number his causes and specify who are defendants in each cause and relief demanded in each cause. Gruenebaum v Lissauer, 57 N.Y.S.2d 137, 185 Misc. 718, 1945 N.Y. Misc. LEXIS 2184 (N.Y. Sup. Ct. 1945), aff'd, 270 A.D. 836, 61 N.Y.S.2d 372, 1946 N.Y. App. Div. LEXIS 4197 (N.Y. App. Div. 1946).

Although no specific request is made that two causes of action be separately stated and numbered, where such relief is necessary, the court will make such a direction pursuant to the omnibus prayer for other and further relief. Nigro v Caserta, 16 Misc. 2d 355, 184 N.Y.S.2d 1001, 1959 N.Y. Misc. LEXIS 3918 (N.Y. Sup. Ct. 1959).

Complaint which interweaves causes of action for breach of contract, conversion, and fraud in one cause of action will be ordered amended so as to separate and number causes of action; attorney and not court must draft pleading. Cordo v Mazza, 20 Misc. 2d 611, 190 N.Y.S.2d 115, 1959 N.Y. Misc. LEXIS 3325 (N.Y. Sup. Ct. 1959).

Where mortgagees alleged four different acts or omissions causing impairment of mortgage security, and sought a different amount of damages in each instance, four causes of action were set forth which should have been separately stated and numbered. Garliner v Glicken, 23 Misc. 2d 170, 196 N.Y.S.2d 784, 1960 N.Y. Misc. LEXIS 3527 (N.Y. Sup. Ct. 1960).

In complaint in stockholder’s derivative action for waste where it appears that only one right and one duty were breached, although by a number of acts of same or varied character, it is improper to allege a separate cause of action for each act, as in the case of alleging a cause of action for each category of waste complained of. Tomasello v Trump, 29 Misc. 2d 713, 211 N.Y.S.2d 944, 1961 N.Y. Misc. LEXIS 3462 (N.Y. Sup. Ct. 1961).

Alternative theories of liability, having different defenses, must be separately stated. Garment Center Capital, Inc. v Rentner, 77 N.Y.S.2d 17, 1947 N.Y. Misc. LEXIS 3658 (N.Y. Sup. Ct. 1947).

Prejudice must be shown before motion to require separate statement and numbering will be granted. Greenberg v Greenberg, 95 N.Y.S.2d 676, 1950 N.Y. Misc. LEXIS 1451 (N.Y. Sup. Ct. 1950).

Alternative theories of liability having different defenses must be stated separately. Grodsky v Bernstein, 135 N.Y.S.2d 897, 1954 N.Y. Misc. LEXIS 3079 (N.Y. County Ct. 1954).

Where several causes of action are set up in one complaint and each is identifiable, each should be separate in complaint as distinct causes of action; plaintiff should separately state and number, as well as paragraph, the four causes of action that apparently have been alleged in original complaint. Rocissano v Fernandez, 149 N.Y.S.2d 916 (N.Y. County Ct. 1956).

Different legal theories of liability; e.g., easement by grant and easement by prescription, do not necessarily create different causes of action, and need not be separately stated. Bradley v Condon, 217 N.Y.S.2d 821, 1961 N.Y. Misc. LEXIS 3648 (N.Y. Sup. Ct. 1961).

Each cause of action must contain a complete statement thereof in itself, and one cause of action cannot be supplemented by statement made in another, unless distinctly connected therewith by appropriate words. Anderson v Speers 8 Abb NC 382, revd on other grounds 21 Hun 568; Reiners v Brandhorst, 59 How. Pr. 91; Sinclair v Fitch, 3 E.D. Smith 677; Landau v Levy, 1 Abb. Pr. 376.

But there is no particular mode by which causes of action are to be separated in a complaint in a justice's court. Any mode which apprises the defendant of what is intended is sufficient. Hall & Wheeler v McKechnie, 22 Barb. 244, 1856 N.Y. App. Div. LEXIS 82 (N.Y. Sup. Ct. Sept. 1, 1856).

If the several causes of action are stated in paragraphs separately numbered it is enough. Parsons v Hayes, 4 Month L Bull 31.

Where several items are intended to be embraced in one action, they should be stated in separate counts; i. e., causes of action accruing to plaintiff in his own right should be stated separately from those assigned; and those assigned by different parties should also be stated separately. Adams v Holley, 12 How. Pr. 326, 1854 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. Nov. 1, 1854).

It is good practice to distinguish them by the phrase “and for further cause of action,” or some equivalent words. Benedict v Seymour, 6 How. Pr. 298, 1852 N.Y. Misc. LEXIS 25 (N.Y. Sup. Ct. 1852).

A motion to have causes of action in complaint separately numbered and stated should be granted, where although facts which may constitute two causes of action are contained in separate paragraphs, it is not apparent whether it is intended to set forth two causes of action or only one. Oakley v Tuthill.

74. —Repetition of allegations by reference

Although reference in the statement of a separate cause of action to allegations in the previous statement of another cause of action in the same complaint may suffice to incorporate such allegations in the statement which refers to them, yet where, in the latter, a certain other allegation in a later part of the complaint is necessary for a full statement of a cause of action and no reference to that allegation is made, the statement must be deemed incomplete. Marrietta v Cleveland, C., C. & S. L. R. Co., 100 N.Y.S. 1027, 52 Misc. 16, 1906 N.Y. Misc. LEXIS 403 (N.Y. Sup. Ct. 1906), aff'd, 123 A.D. 911, 108 N.Y.S. 1140, 1908 N.Y. App. Div. LEXIS 214 (N.Y. App. Div. 1908).

A recitation of allegations in one cause of action by general reference in following causes of action is improper, as defendants are entitled to be so placed as to enable them to plead or

move as they may be advised with regard to each separately numbered cause or allegation. James Rees & Sons Co. v Angel, 211 N.Y.S. 817, 125 Misc. 771, 1925 N.Y. Misc. LEXIS 1039 (N.Y. Sup. Ct. 1925), aff'd, 218 A.D. 831, 219 N.Y.S. 838, 1926 N.Y. App. Div. LEXIS 7365 (N.Y. App. Div. 1926).

RCP 90 did not permit the incorporation by reference in an amended pleading of allegations in a superseded original pleading. Baldwin v Hegeman Farms Corp., 277 N.Y.S. 705, 154 Misc. 285, 1934 N.Y. Misc. LEXIS 1951 (N.Y. Sup. Ct. 1934).

Where plaintiff has incorporated in second cause of action by reference allegations of first cause of action resting in express contract, he cannot ask recovery on quantum meruit. De Leeuw v Ziff-Davis Pub. Co., 97 N.Y.S.2d 652, 198 Misc. 162, 1950 N.Y. Misc. LEXIS 1686 (N.Y. Sup. Ct.), modified, 277 A.D. 1055, 100 N.Y.S.2d 915, 1950 N.Y. App. Div. LEXIS 4478 (N.Y. App. Div. 1950).

A counterclaim must state a cause of action completely in itself and the only reference allowed is to paragraphs in the same pleading and defendant may not plead by reference paragraphs of the complaint. Davidow v Gusmor Realty Corp., 12 Misc. 2d 801, 177 N.Y.S.2d 759, 1958 N.Y. Misc. LEXIS 3263 (N.Y. Sup. Ct. 1958).

In incorporating by reference allegations of a cause of action it is improper to incorporate all the allegations thereof unless they are necessary and material to the subsequent cause of action. Meyers v Cohen, 25 Misc. 2d 283, 205 N.Y.S.2d 787, 1960 N.Y. Misc. LEXIS 2671 (N.Y. Sup. Ct. 1960).

Incorporation by reference of certain specified paragraphs “with the same force and effect as though fully set forth herein, except with the following changes”, which are set forth, is improper and renders complaint uncertain and indefinite. Tomasello v Trump, 29 Misc. 2d 713, 211 N.Y.S.2d 944, 1961 N.Y. Misc. LEXIS 3462 (N.Y. Sup. Ct. 1961), and Tomasello v Trump, 29 Misc. 2d 717, 214 N.Y.S.2d 966 (N.Y. Sup. Ct. 1961).

Where the complaint in an action for slander alleged that at the time of committing the grievance mentioned the defendants were husband and wife and then alleged three separate slanders in different paragraphs. The allegation that defendants were husband and wife was broad enough to cover all the charges, and if not the court had power to amend it in that respect. Ronnie v Ryder, 8 N.Y.S. 5, 1889 N.Y. Misc. LEXIS 2143 (N.Y. City Ct. 1889).

Damages, see Wood v Woodmere Hats, Inc., 24 N.Y.S.2d 162, 1940 N.Y. Misc. LEXIS 2445 (N.Y. App. Term 1940).

Allegations of first cause of action incorporated by reference in second cause of action were struck therefrom where it was difficult to see relevancy of specified paragraphs to second cause of action. Stoll v Long Islander Pub. Co., 40 N.Y.S.2d 412, 1942 N.Y. Misc. LEXIS 2381 (N.Y. Sup. Ct. 1942), aff'd, 265 A.D. 1059, 39 N.Y.S.2d 1018, 1943 N.Y. App. Div. LEXIS 6903 (N.Y. App. Div. 1943).

Incorporation of allegations by reference not proper where separate actions have been instituted in different counties at different times. Mack v Wyer, 120 N.Y.S.2d 99, 1952 N.Y. Misc. LEXIS 2267 (N.Y. Sup. Ct. 1952).

Incorporation of matter from preceding causes of action, presenting substantially same issue, becomes redundant and warrants striking pleading. Chapin v Elson, 136 N.Y.S.2d 914, 1954 N.Y. Misc. LEXIS 3551 (N.Y. Sup. Ct. 1954).

Complaint violated RCP 90 where paragraphs sought to be realleged were referred to by paragraph numbers in the headings beginning each separate cause of action, rather than by setting forth in a separately numbered paragraph in each cause of action the specific paragraphs of complaint sought to be realleged therein. Rothmann v Rager, 202 N.Y.S.2d 79, 1960 N.Y. Misc. LEXIS 3928 (N.Y. Sup. Ct. 1960).

Where several breaches of the same contract were stated in different counts it was held that the amounts as to the contract and performance need not be repeated, if they were by some reference made applicable. Rowland v Phalen, 1 Bosw 43. And a reference in subsequent

counts to allegations in the first by the words “as above stated,” was held good. Woodbury v Delap, 65 Barb. 501.

Where the first count of a complaint was upon a policy and specifically described the property as belonging to one C, and the second count set up an oral agreement with defendants’ agents to insure the property “hereinbefore set forth,” held that the second count, read with the first, sufficiently set up an insurable interest in the property in C, and that an objection thereto on this ground was bad. Velie v Newark City Ins. Co. 23 NY Week Dig 456.

75. Particular causes; alimony and maintenance

Complaint in separation action should comply with requirements of this rule, requiring separate causes to be separately stated and numbered. Paper v Paper, 263 A.D. 831, 31 N.Y.S.2d 589, 1941 N.Y. App. Div. LEXIS 5180 (N.Y. App. Div. 1941).

A cause of action for the balance due under a separation agreement is not a necessary consequential relief of a declaration of the present marital status of the parties, and, therefore, should be separately stated and numbered. Gold v Gold, 275 N.Y.S. 506, 154 Misc. 93, 1934 N.Y. Misc. LEXIS 1812 (N.Y. Sup. Ct. 1934), aff'd, 243 A.D. 666, 276 N.Y.S. 900, 1935 N.Y. App. Div. LEXIS 7544 (N.Y. App. Div. 1935).

In an action to recover the sum due under a foreign decree of divorce which directed the defendant husband to pay the plaintiff alimony and also a certain amount for the maintenance and support of the children, a motion by the defendant to strike out a portion of the complaint, or, in the alternative, to compel the plaintiff to separately state and number the causes of action was denied. Ogle v Ogle, 24 N.Y.S.2d 926, 175 Misc. 661, 1941 N.Y. Misc. LEXIS 1396 (N.Y. Sup. Ct. 1941).

76. —Conspiracy

Where a series of acts committed by conspirators acting in pursuance of a common scheme result in damages, the facts may be set up as one cause of action. Travelers' Ins. Co. v Chiarello Stevedoring Co., 236 A.D. 468, 260 N.Y.S. 18, 1932 N.Y. App. Div. LEXIS 6000 (N.Y. App. Div.), reh'g denied, 237 A.D. 806, 260 N.Y.S. 966, 1932 N.Y. App. Div. LEXIS 5394 (N.Y. App. Div. 1932).

Where first cause of action alleged breach of employment and second cause added allegation that defendant’s acts were done maliciously and in pursuance of conspiracy, only one cause of action was stated. Friedman v Roseth Corp., 270 A.D. 988, 62 N.Y.S.2d 663, 1946 N.Y. App. Div. LEXIS 4983 (N.Y. App. Div. 1946), aff'd, 297 N.Y. 495, 74 N.E.2d 192, 297 N.Y. (N.Y.S.) 495, 1947 N.Y. LEXIS 999 (N.Y. 1947).

Complaint for conspiracy to discharge plaintiff from employment, alleging that defendants as part of conspiracy slandered plaintiff, did not transform such allegations into separate cause of action. Ledwith v Ignatius, 39 N.Y.S.2d 133, 179 Misc. 394, 1942 N.Y. Misc. LEXIS 2305 (N.Y. Sup. Ct. 1942), aff'd, 265 A.D. 987, 39 N.Y.S.2d 988, 1943 N.Y. App. Div. LEXIS 6421 (N.Y. App. Div. 1943).

Series of acts, committed by alleged conspirators in carrying out common scheme which inflicts damage, may be stated as single cause of action. Paramount Pictures, Inc. v Brandt, 84 N.Y.S.2d 64, 193 Misc. 657, 1948 N.Y. Misc. LEXIS 3501 (N.Y. Sup. Ct. 1948), aff'd, 275 A.D. 652, 86 N.Y.S.2d 659, 1949 N.Y. App. Div. LEXIS 3847 (N.Y. App. Div. 1949).

The fact that plaintiffs also allege a conspiracy does not permit them to state as one cause of action facts stating several and distinct causes of action. Alpert v Hein, 8 Misc. 2d 1010, 166 N.Y.S.2d 851, 1957 N.Y. Misc. LEXIS 2555 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 771, 170 N.Y.S.2d 296, 1958 N.Y. App. Div. LEXIS 7333 (N.Y. App. Div. 2d Dep't 1958).

Where numerous specific acts were alleged to have been committed in furtherance of a conspiracy, such acts were not separate causes of action and did not violate RCP 90. Meinhardt

v Britting, 10 Misc. 2d 757, 169 N.Y.S.2d 925, 1958 N.Y. Misc. LEXIS 4082 (N.Y. Sup. Ct. 1958).

Conspiracy, see Singer v Carlisle, 23 N.Y.S.2d 1014, 1939 N.Y. Misc. LEXIS 2809 (N.Y. Sup. Ct.), aff'd, 258 A.D. 905, 16 N.Y.S.2d 832, 1939 N.Y. App. Div. LEXIS 7523 (N.Y. App. Div. 1939).

Different conspiracies, disclosed by different dates named in complaint, required separate statement. Bolmer Const. Co. v 9 Kew Gardens Road Corp., 82 N.Y.S.2d 632, 1948 N.Y. Misc. LEXIS 3184 (N.Y. Sup. Ct. 1948).

Complaint by broker for conspiracy to deprive him of commissions and for cancellation of release state separate causes of action, requiring separate statement. Slomka v Halperin, 112 N.Y.S.2d 818, 1952 N.Y. Misc. LEXIS 2699 (N.Y. Sup. Ct. 1952).

Series of acts committed by conspirators in carrying out common scheme or plan may be stated as single cause of action. Paliotto v Hartman, 148 N.Y.S.2d 164, 1956 N.Y. Misc. LEXIS 2283 (N.Y. Sup. Ct.), modified, 2 A.D.2d 866, 156 N.Y.S.2d 220, 1956 N.Y. App. Div. LEXIS 4133 (N.Y. App. Div. 2d Dep't 1956).

77. —Contracts

A complaint by a debtor to have his notes delivered up, for an account of money received on collaterals and payment of the surplus, states a single cause of action. 7 N.Y. 486.

Where the complaint in an action of account based upon several claims for work and material furnished stated the same in two parts, one for the year 1921 and one for the years 1917–1920, inclusive, there was no occasion for an order to state causes of action separately as contemplated by this rule, and defendant, desiring more specific information respecting the cause of action, should have asked for a verified copy of the account as provided for in § 246, Civil Practice Act. Walton Foundry Co. v A. D. Granger Co., 203 A.D. 226, 196 N.Y.S. 719, 1922 N.Y. App. Div. LEXIS 7164 (N.Y. App. Div. 1922).

Where recovery was sought for breach of contract and for loss sustained under it, complaint was sufficient without separately numbering and stating each alleged cause of action. Janoff v Kaufman, 231 A.D. 703, 245 N.Y.S. 548, 1930 N.Y. App. Div. LEXIS 7047 (N.Y. App. Div. 1930).

In action to recover damages for breach of a written contract by which defendant agreed to build three machines for plaintiff, the complaint stated facts sufficient to constitute a cause of action, but did not contain plain and concise statement of the material facts upon which plaintiff relied, as required by RCP 90 and CPA § 241. Drydock Knitting Mills, Inc. v Queens Mach. Corp., 254 A.D. 568, 2 N.Y.S.2d 717, 1938 N.Y. App. Div. LEXIS 6598 (N.Y. App. Div. 1938).

Defendants are not entitled to an order directing plaintiff to separately state and number three alleged causes of action on the theory that the first is for breach of contract for an agreed remuneration; the second in quantum meruit, predicated upon the same services, and the third for loss of anticipated profits. Rodger v Emigrant Industrial Sav. Bank, 258 A.D. 614, 17 N.Y.S.2d 530, 1940 N.Y. App. Div. LEXIS 8251 (N.Y. App. Div. 1940).

Separate causes for breach of contract and breach of fiduciary obligation were ordered separately stated. Hatch v Visual Enterprises, Inc., 279 A.D. 1083, 112 N.Y.S.2d 530, 1952 N.Y. App. Div. LEXIS 5912 (N.Y. App. Div. 1952).

Where complaint indicates, both in factual allegations and demand for judgment, that it is based on breaches of separate contracts and fiduciary relationships and that varying legal and equitable relief is requested, complaint should separately state and number causes of action based on such separate contracts and relationships. Christmas v Norden, 282 A.D. 923, 125 N.Y.S.2d 249, 1953 N.Y. App. Div. LEXIS 5449 (N.Y. App. Div. 1953).

Where complaint alleged cause of action in contract and another in negligence, order requiring separate statement and numbering was proper. Lavigne v St. Lawrence County Sav. Bank, 282 A.D. 978, 125 N.Y.S.2d 583, 1953 N.Y. App. Div. LEXIS 5611 (N.Y. App. Div. 1953).

Plaintiff will be required separately to state and number allegations in a cause of action for breach of contract, which have no relation to such breach, but relate to a cause of action sounding in tort. Sands v Comerford, 203 N.Y.S. 772, 123 Misc. 104, 1924 N.Y. Misc. LEXIS 752 (N.Y. Sup. Ct. 1924).

Causes of action growing out of separate and distinct contracts should be separately stated. James Rees & Sons Co. v Angel, 211 N.Y.S. 817, 125 Misc. 771, 1925 N.Y. Misc. LEXIS 1039 (N.Y. Sup. Ct. 1925), aff'd, 218 A.D. 831, 219 N.Y.S. 838, 1926 N.Y. App. Div. LEXIS 7365 (N.Y. App. Div. 1926).

In a cause of action to recover moneys claimed to be due under a written building contract it is proper to include a claim for “extras” performed under the contract. James Rees & Sons Co. v Angel, 211 N.Y.S. 817, 125 Misc. 771, 1925 N.Y. Misc. LEXIS 1039 (N.Y. Sup. Ct. 1925), aff'd, 218 A.D. 831, 219 N.Y.S. 838, 1926 N.Y. App. Div. LEXIS 7365 (N.Y. App. Div. 1926).

Causes of action for money loaned and those for an account stated should be separately alleged. James Rees & Sons Co. v Angel, 211 N.Y.S. 817, 125 Misc. 771, 1925 N.Y. Misc. LEXIS 1039 (N.Y. Sup. Ct. 1925), aff'd, 218 A.D. 831, 219 N.Y.S. 838, 1926 N.Y. App. Div. LEXIS 7365 (N.Y. App. Div. 1926).

Where the complaint stated in one cause of action four different and separate shipments without alleging that all were included in the same contract of carriage, motion to state separately and number was granted. Winslow Bros. & Smith Co. v Grace S.S. Co., 233 N.Y.S. 448, 133 Misc. 902, 1929 N.Y. Misc. LEXIS 709 (N.Y. City Ct. 1929).

Where complaint counted on breaches of contract contained in several bills of lading, each breach constituted a separate cause of action, requiring separate statement and number. Leveille v Osaka Shosen Kaisha, 244 N.Y.S. 112, 137 Misc. 873, 1930 N.Y. Misc. LEXIS 1431 (N.Y. City Ct. 1930).

Application to compel plaintiff to separately state and number its causes of action is denied where the complaint sets forth sixty-one causes of action to recover certain royalties on the

number of phonograph records of certain musical compositions manufactured by the defendant under 498 non-exclusive licenses from the plaintiff. Crawford Music Corp. v American Record Corp., 17 N.Y.S.2d 838, 173 Misc. 205, 1939 N.Y. Misc. LEXIS 2701 (N.Y. Sup. Ct. 1939), aff'd, 258 A.D. 955, 17 N.Y.S.2d 841, 1940 N.Y. App. Div. LEXIS 8405 (N.Y. App. Div. 1940).

Where plaintiff sues for breach of original and two supplemental contracts, he should separately state and number them and state amount sought to be recovered upon each of them. Medin v De Gennaro, 3 Misc. 2d 40, 149 N.Y.S.2d 918, 1956 N.Y. Misc. LEXIS 1986 (N.Y. County Ct. 1956).

Where complaint alleges cause of action for breach of contract against one defendant as joint adventurer, against another defendant for inducing breach and against both defendants for wrongful conspiracy to deprive plaintiff of his profits in venture, such causes should be separately stated and numbered. Grobman v Freiman, 3 Misc. 2d 656, 152 N.Y.S.2d 898, 1956 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1956).

Since the inducing of a breach of contract was in itself an actionable wrong entirely separate from the cause of action for breach of contract, such cause had to be separately stated and numbered in order to comply with RCP 90. Grobman v Freiman, 3 Misc. 2d 656, 152 N.Y.S.2d 898, 1956 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1956).

Allegations in a complaint for breach of contract and for inducing a breach of contract had to be separately stated and numbered. Alpert v Hein, 8 Misc. 2d 1010, 166 N.Y.S.2d 851, 1957 N.Y. Misc. LEXIS 2555 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 771, 170 N.Y.S.2d 296, 1958 N.Y. App. Div. LEXIS 7333 (N.Y. App. Div. 2d Dep't 1958).

A complaint alleging an agreement between plaintiff and defendant, the latter acting in behalf of a corporation, that the corporation should pay a certain percentage of the receipts derived from the sales of the products of certain patents owned by plaintiff; that periodical statements of the sales should be rendered; that on failure to pay, defendant could sue the corporation and further alleging a default in the performance of the agreement, on defendant’s part, and asking for an

accounting, for judgment against the defendant, and for other relief, etc., stated but one cause of action. Good v Daland, 6 N.Y.S. 204, 53 Hun 634, 1889 N.Y. Misc. LEXIS 501 (N.Y. Sup. Ct. 1889), aff'd, 121 N.Y. 1, 24 N.E. 15, 121 N.Y. (N.Y.S.) 1, 1890 N.Y. LEXIS 1370 (N.Y. 1890).

See also Woodbury v Delap, 65 Barb. 501.

A complaint in an action brought upon an agreement for the transaction of certain business, which alleges a breach of several covenants, each breach being separately numbered and set out as a separate cause of action, states only one cause of action. Madge v Puig, 12 Hun 15 (N.Y.), rev'd, 71 N.Y. 608, 71 N.Y. (N.Y.S.) 608, 1877 N.Y. LEXIS 570 (N.Y. 1877).

Where the various causes of action alleged are practically the same and they are all founded on an alleged breach of contract, they may be set forth in different counts with allegations which are obviously designed to prevent a variance between pleading and proof. Rothchild v Grank T. Ry. Co., 10 N.Y.S. 36, 1890 N.Y. Misc. LEXIS 1953 (N.Y. Sup. Ct. 1890), aff'd, 14 N.Y.S. 807, 60 Hun 582, 1891 N.Y. Misc. LEXIS 2511 (N.Y. Sup. Ct. 1891).

A complaint asking for reformation of a contract and judgment thereon, states a single cause of action. Gooding v M'Alister, 9 How. Pr. 123, 1854 N.Y. Misc. LEXIS 68 (N.Y. Sup. Ct. Feb. 1, 1854).

Where a complaint alleged that certain services and materials sued for, were reasonably worth the sum of $1,523.85, and defendants promised and agreed to pay therefor the sum of $1,523.85 it was held that the complaint should be amended so as to state a cause of action in one form either on quantum meruit or a promise to pay. Dorr v Mills.

78. — —Employment contracts

Where a complaint sets up two causes of action, one for an amount due for services rendered and the other for damages alleged to have been caused by defendant’s breach, a motion to separately state and number the causes of action should be granted. Joy v Urban Motion

Picture Industries, Inc., 207 A.D. 833, 202 N.Y.S. 200, 1923 N.Y. App. Div. LEXIS 6354 (N.Y. App. Div. 1923).

RCP 90 as to separate statement and numbering of causes of action applied in action for services and wrongful discharge. Lezinsky v Roubaix Mills, Inc., 210 A.D. 102, 205 N.Y.S. 573, 1924 N.Y. App. Div. LEXIS 6665 (N.Y. App. Div. 1924).

Motion by defendant to compel the plaintiff to state separately and number the causes of action is granted where the complaint states a cause of action for tortiously causing plaintiff's discharge from her employment and also alleges one or more acts of assault. Brown v Yaspan, 256 A.D. 991, 10 N.Y.S.2d 502, 1939 N.Y. App. Div. LEXIS 5797 (N.Y. App. Div. 1939).

Where complaint alleges but one cause of action upon single contract of employment for amount due at commencement of action, reference to account stated for specified year is merely evidentiary allegation, and not statement of another cause of action. Bowman v Tooker, 278 A.D. 951, 105 N.Y.S.2d 36, 1951 N.Y. App. Div. LEXIS 5344 (N.Y. App. Div. 1951).

Complaint for salary and for breach of contract to bequeath business, should separately state and number each cause. Lewis v Herskowitz, 72 N.Y.S.2d 714, 1947 N.Y. Misc. LEXIS 2847 (N.Y. Sup. Ct. 1947).

In action for labor and services alleged to have been performed under a special contract at an agreed price, where it was doubtful whether the alleged contract could be satisfactorily established, the spirit of the Code did not prevent the adding of a count for the same labor and services upon a quantum meruit. Evans v Kalbfleisch (1873) 36 Super Ct (4 Jones & S) 450; Blank v Hartshorn (1885, NY) 37 Hun 101; but see Gardner v Locke, 2 Civ Proc (Browne) 252; McIntyre v Second Ave. R. Co. 1 Month L Bull 17.

79. — —Wage disputes

Employees, suing on behalf of other employees for overtime wages under Fair Labor Standards Act, are required to state and number separately causes of action of each of the persons on

whose behalf they sued. Simmons v Rudolph Knitting Mills, Inc., 264 A.D. 871, 35 N.Y.S.2d 494, 1942 N.Y. App. Div. LEXIS 5187 (N.Y. App. Div. 1942).

Causes of action against employer under Fair Labor Standards Act must be separately stated. Slavin v Trachtenberg, 41 N.Y.S.2d 86, 180 Misc. 324, 1943 N.Y. Misc. LEXIS 1788 (N.Y. County Ct. 1943).

Contra, see Emanuele v Rochester Packing Co., 45 N.Y.S.2d 164, 182 Misc. 348, 1943 N.Y. Misc. LEXIS 2581 (N.Y. Sup. Ct. 1943).

Causes of action for claim for difference between wages paid and minimum wage and for claim for overtime payment, under different section of Fair Labor Standards Act, should be separately stated and numbered. Hanson v Queensboro Farm Products, Inc., 34 N.Y.S.2d 260, 1942 N.Y. Misc. LEXIS 1495 (N.Y. Sup. Ct.), aff'd, 265 A.D. 819, 37 N.Y.S.2d 447, 1942 N.Y. App. Div. LEXIS 5955 (N.Y. App. Div. 1942).

Where nine employees, having no joint interest in litigation, sue for their wages, they may join in one complaint but they must state each employee’s cause separately. Levey v Empire Millwork Corp., 58 N.Y.S.2d 408, 1945 N.Y. Misc. LEXIS 2451 (N.Y. Sup. Ct. 1945).

80. —Conversion and money had and received

In an action for conversion of 50 boxes of gloves, whereof two of the plaintiffs admittedly owned 7 boxes each, and the third plaintiff claimed a lien upon the remaining 36 boxes, the separate causes of action, while properly joined under former CPA § 209, should be separately stated and numbered, on motion of defendant under this rule. Fleitmann & Co. v Colonial Finance Corp., 203 A.D. 827, 197 N.Y.S. 125, 1922 N.Y. App. Div. LEXIS 7311 (N.Y. App. Div. 1922).

Complaint in conversion of ward’s funds against a former committee, his surety and others stated separate causes of action against defendants and was subject to this rule. Newton v Livingston County Trust Co., 231 A.D. 355, 247 N.Y.S. 121, 1931 N.Y. App. Div. LEXIS 16056 (N.Y. App. Div. 1931).

Where complaint against a former committee of an incompetent, his surety and a bank for conversion of ward's funds by withdrawing same by several separate checks, it was unnecessary to set up each withdrawal as a separate cause of action. Newton v Livingston County Trust Co., 231 A.D. 355, 247 N.Y.S. 121, 1931 N.Y. App. Div. LEXIS 16056 (N.Y. App. Div. 1931).

Where a complaint states several causes of action for conversion and money had and received, more or less jumbled together, the number may be directed to separately state and number the causes of action. Virdone v Globe Bank & Trust Co., 235 A.D. 125, 256 N.Y.S. 421, 1932 N.Y. App. Div. LEXIS 7904 (N.Y. App. Div. 1932).

A complaint which alleges as a first cause of action, an usurious loan of money, and the execution and delivery of a chattel mortgage to secure it; that the mortgage was void and that it should be surrendered and canceled; and then sets forth as a second cause of action, that the plaintiff owned certain articles of personal property which were included in said mortgage; that the defendant, without process of law, wrongfully took this property from the possession of the plaintiff and unjustly detained it, sets forth but a single cause of action, for the taking and conversion of the property. Welch v Platt, 32 Hun 194 (N.Y.).

81. —Corporations and business associations

Complaint in an action by stockholders against certain corporations and individuals conspiring to injure and destroy the business of the corporation, held to state two causes of action, one to recover damages for injury and the other for diminution in the value of the stock of the corporation which should be separately stated and numbered. Fleitmann v Werner, 174 A.D. 781, 161 N.Y.S. 650, 1916 N.Y. App. Div. LEXIS 8284 (N.Y. App. Div. 1916).

Defendants were entitled to an order directing plaintiff, as trustee in bankruptcy of an individual, and on his own behalf and on behalf of all stockholders of a corporation, to separately state and number his causes of action, where it appeared that plaintiff's complaint in a single cause prayed for the cancellation of a legacy, and a real property mortgage, as in fraud of the

bankrupt’s creditors, and sought declaration that one of the individual defendants had no lien on said property or on certain jewelry, and usual accounting in a stockholder’s derivative action. Levine v Elbe, 252 A.D. 511, 299 N.Y.S. 888, 1937 N.Y. App. Div. LEXIS 5707 (N.Y. App. Div. 1937).

Causes of action inuring to benefit of association and causes inuring to benefit of plaintiffs, suing for themselves and for restitution to association, should be separately stated. Gem Music Corp. v Taylor, 267 A.D. 895, 47 N.Y.S.2d 53, 1944 N.Y. App. Div. LEXIS 5374 (N.Y. App. Div. 1944), rev'd, 294 N.Y. 34, 60 N.E.2d 196, 294 N.Y. (N.Y.S.) 34, 1945 N.Y. LEXIS 825 (N.Y. 1945).

Where in action for services schedule annexed to complaint itemized different litigations involving separate corporations, complaint should be clarified by stating separate causes of action against separate corporations or by alleging facts to show undertaking by both corporations to answer for all services rendered. Allen v H. E. R. Laboratories, Inc., 281 A.D. 740, 118 N.Y.S.2d 106, 1953 N.Y. App. Div. LEXIS 3121 (N.Y. App. Div. 1953).

Where corporate plaintiff was entity separate and apart from the individual plaintiff, and damages for a wrong perpetrated upon one could not be claimed and collected by the other, the causes of action accruing to each must be separately stated. Bushwick-Decatur Motors, Inc. v Ford Motor Co., 255 A.D. 802, 7 N.Y.S.2d 268, 1938 N.Y. App. Div. LEXIS 5379 (N.Y. App. Div. 2d Dep't 1938).

In stockholder’s action motions to state separately and number causes of action, to make complaint more definite and certain, and to strike out unnecessary allegations will be denied, where the allegations comprehend but one cause of action, designed to restore to the corporation stock and property of which the corporation has been deprived through the alleged wrongful acts of one or more of the defendants. Baker v Baker, 204 N.Y.S. 11, 122 Misc. 757, 1924 N.Y. Misc. LEXIS 773 (N.Y. Sup. Ct. 1924), aff'd, 212 A.D. 850, 207 N.Y.S. 809, 1925 N.Y. App. Div. LEXIS 10054 (N.Y. App. Div. 4th Dep't 1925).

In complaint in stockholder's derivative action for waste where it appears that only one right and one duty were breached, although by a number of acts of same or varied character, it is improper to allege a separate cause of action for each act, as in the case of alleging a cause of action for each category of waste complained of. Tomasello v Trump, 29 Misc. 2d 713, 211 N.Y.S.2d 944, 1961 N.Y. Misc. LEXIS 3462 (N.Y. Sup. Ct. 1961).

In stockholder's action against officers for deprivation of plaintiff's equality of control of corporate defendant pursuant to agreement, allegations of wrongs against corporation and other allegations of wrongs against plaintiff individually, were ordered to be separately stated and numbered. Schierenbeck v John Krauss, Inc., 104 N.Y.S.2d 180, 1951 N.Y. Misc. LEXIS 1723 (N.Y. Sup. Ct.), aff'd, 278 A.D. 856, 105 N.Y.S.2d 360, 1951 N.Y. App. Div. LEXIS 4984 (N.Y. App. Div. 1951).

When the complaint, by the receiver of an insolvent insurance company, contains two counts founded upon the same instrument, i. e., one a note as given for capital and in another as given for premium, the court will neither compel the plaintiff to elect between such counts nor strike out either of them as repetitions. Birdseye v Smith, 32 Barb. 217, 1860 N.Y. App. Div. LEXIS 97 (N.Y. Sup. Ct. July 3, 1860).

Actions under the Sherman Anti-trust Act and under the Clayton Act should be separately stated and numbered. Hansen Packing Co. v Armour & Co., 16 F. Supp. 784, 1936 U.S. Dist. LEXIS 1872 (D.N.Y. 1936).

82. — —Actions against officers or directors

Causes of action to compel officers of corporation to account for their official conduct, to recover royalties on patent and to enjoin defendant corporation from paying moneys to apply on royalties, should be separately stated and numbered. Mayer v Siller, 251 A.D. 677, 297 N.Y.S. 341, 1937 N.Y. App. Div. LEXIS 7022 (N.Y. App. Div. 1937).

In representative action by stockholder of three corporations for an accounting and damages by reason of the malfeasance and nonfeasance in office of the officers and directors of the corporation, the complaint actually alleged three causes of action which should have been separately stated and numbered. Melniker v American Title & Guaranty Co., 253 A.D. 570, 3 N.Y.S.2d 198, 1938 N.Y. App. Div. LEXIS 8497 (N.Y. App. Div. 1938).

Complaint by bankruptcy trustee against former directors for unlawful diversion of property and transferee held to state but one cause of action. Rubenstein v Berch, 261 A.D. 265, 25 N.Y.S.2d 202, 1941 N.Y. App. Div. LEXIS 7305 (N.Y. App. Div. 1941).

Motion to compel plaintiff to state and number causes of action denied in action by Superintendent of Banks under Banking Law, former § 81, (present § 631) and Gen. Corp. Law, §§ 60, 61, against directors of insolvent bank for negligence and illegal conduct. Broderick v Marcus, 261 N.Y.S. 625, 146 Misc. 240, 1933 N.Y. Misc. LEXIS 1449 (N.Y. Sup. Ct.), aff'd, 239 A.D. 816, 263 N.Y.S. 981, 1933 N.Y. App. Div. LEXIS 8608 (N.Y. App. Div. 1933).

Several derivative actions brought by one or more minority stockholders against present and past officers and directors and certain other individuals, each seeking recovery on behalf of corporation, ordered consolidated and separately stated and numbered. Burnham v Brush, 26 N.Y.S.2d 397, 176 Misc. 39, 1941 N.Y. Misc. LEXIS 1570 (N.Y. Sup. Ct. 1941).

In an action by the president and the corporation against a bank for refusing to honor check signed by the corporation and the president, the causes of action claimed to accrue to each plaintiff were ordered separately stated and numbered. Schwertfeger v Bank of Manhattan Co., 67 N.Y.S.2d 84, 187 Misc. 998, 1946 N.Y. Misc. LEXIS 3185 (N.Y. Sup. Ct. 1946).

In stockholder’s derivative action, plaintiff must separately state her causes of action with respect to particular defendants directly involved in specific acts of wrongdoing complained of. Charlop v Cohen, 4 Misc. 2d 1015, 147 N.Y.S.2d 348, 1955 N.Y. Misc. LEXIS 2239 (N.Y. Sup. Ct. 1955).

Where over period of time embraced in complaint in stockholder's derivative action, there were different compositions of directors and officers, independent and separate causes of action should identify particular directors and officers according to their term of office and allege in that cause acts of wrongdoing attributable to them so that it will clearly appear against which defendants liability is claimed thereunder. Charlop v Cohen, 4 Misc. 2d 1015, 147 N.Y.S.2d 348, 1955 N.Y. Misc. LEXIS 2239 (N.Y. Sup. Ct. 1955).

In derivative stockholder's action, if plaintiff intends to state a cause of action in his individual capacity, that cause of action must be separately stated and numbered. Kerekes v Greenwood Properties, Inc., 18 Misc. 2d 84, 186 N.Y.S.2d 90, 1959 N.Y. Misc. LEXIS 4045 (N.Y. Sup. Ct. 1959).

Stockholder suing derivatively on behalf of multiple corporations for waste of corporate assets and to compel declaration of dividends was required to separately state and number as many causes as there were corporations on whose behalf he sued. Tomasello v Trump, 22 Misc. 2d 484, 194 N.Y.S.2d 956, 1959 N.Y. Misc. LEXIS 2700 (N.Y. Sup. Ct. 1959).

In minority stockholder's action plaintiff will not be required to separately state and number each category of acts complained of, since it is only one duty of trust which has been breached, although by a number of different acts. Brilliant v Long Island Waste Co., 23 Misc. 2d 788, 192 N.Y.S.2d 797, 1959 N.Y. Misc. LEXIS 2920 (N.Y. Sup. Ct.), aff'd, 9 A.D.2d 926, 196 N.Y.S.2d 558, 1959 N.Y. App. Div. LEXIS 5370 (N.Y. App. Div. 2d Dep't 1959).

In stockholders' derivative action for accounting by directors who conspired to withhold business opportunity from corporation, complaint stated but single cause of action. Diamond v Russeks, Fifth Ave., Inc., 44 N.Y.S.2d 129, 1939 N.Y. Misc. LEXIS 2834 (N.Y. Sup. Ct.), aff'd, 258 A.D. 789, 16 N.Y.S.2d 99, 1939 N.Y. App. Div. LEXIS 6924 (N.Y. App. Div. 1939).

Where all the paragraphs of a complaint were directly connected with its main charge of wrongful use of corporate funds for private advantage of president and members of his family,

such charges were properly consolidated in one cause of action. Steinberg v Altschuler, 158 N.Y.S.2d 411 (N.Y. Sup. Ct. 1956).

Complaint against stockholder who is also director of corporation alleging unpaid subscription and filing false report, etc., states but one cause of action. Richards v Kinsley, 12 N.Y. St. 125, 14 N.Y. St. 701 (N.Y.C.P. Dec. 5, 1887).

Where a complaint charged directors with personal liability for a debt of the corporation, it may set forth, as one cause of action, several grounds of such liability, i. e., that the corporation was not legally formed, and that the trustees have become personally liable by negligence. Stating several grounds of complaint does not necessarily imply several causes of action. Durant v Gardner, 19 How. Pr. 94, 10 Abb. Pr. 445.

83. —Equity causes generally

Cause of action to impress equitable lien in favor of mortgagee, based on agreement between mortgagee and mortgagor, executed when mortgage was executed, must be separately stated and numbered. Castelli v Walton Lake Country Club, Inc., 112 N.Y.S.2d 179, 1952 N.Y. Misc. LEXIS 2623 (N.Y. Sup. Ct. 1952).

As to what averments are necessary in action for an equitable set-off and when complaint states but one cause of action see Weston v Turner, 8 N.Y. St. 296.

84. —False imprisonment and malicious prosecution

Actions for false imprisonment and malicious prosecution arising out of the same transaction are not necessarily inconsistent and they may be joined in one complaint; but, they should be separately stated and numbered. The objection that such actions, united in one complaint, are not separately stated and numbered, is waived unless taken before trial. Gearity v Strasbourger, 133 A.D. 701, 118 N.Y.S. 257, 1909 N.Y. App. Div. LEXIS 2252 (N.Y. App. Div. 1909).

Plaintiff may stipulate that she intends to state one cause of action only, and that allegations of other tortious acts are alleged only by way of malice and aggravation of damages claimed. Smith v Bower, 270 A.D. 977, 62 N.Y.S.2d 763, 1946 N.Y. App. Div. LEXIS 4924 (N.Y. App. Div. 1946).

Cause of action for malicious prosecution was stricken where plaintiff's grievances sounded in breach of contract, false arrest, extortion and abuse of process. Kasen v Morrell, 10 Misc. 2d 176, 167 N.Y.S.2d 322, 1957 N.Y. Misc. LEXIS 2707 (N.Y. Sup. Ct. 1957).

85. —Fraud

A complaint which alleges different acts of fraud in procuring fictitious claims against a municipal corporation to be certified and paid, in pursuance of a general conspiracy, giving a history thereof, whereby it also appears that he and his associates were guilty of neglect of duty as well as fraud, all of which frauds are stated in a schedule attached, held to state but one cause of action, and it is not necessary that the different acts should be separately stated. PEOPLE OP THE STATE OP NEW YORK v TWEED, 63 N.Y. 194, 63 N.Y. (N.Y.S.) 194, 50 How. Pr. 38, 1875 N.Y. Misc. LEXIS 149 (N.Y. 1875).

In action by three plaintiffs to recover the amounts paid by them respectively for the purchase from defendant of certificates of undivided shares in a bond secured by a mortgage on real property, alleged to have been induced by false representations made by defendant to each plaintiff, motion for an order requiring the three plaintiffs separately to state and number their separate causes of action and to strike from the complaint all allegations that the action is also brought on behalf of other holders of guaranteed mortgage certificates issued by the defendant, should have been granted. Brenner v Title Guarantee & Trust Co., 276 N.Y. 230, 11 N.E.2d 890, 276 N.Y. (N.Y.S.) 230, 1937 N.Y. LEXIS 1055 (N.Y. 1937).

Each transaction by which it is claimed that the defendant obtained goods fraudulently, should be set out in a separate cause of action. Westheimer v Musliner, 46 A.D. 96, 61 N.Y.S. 348, 1899 N.Y. App. Div. LEXIS 2756 (N.Y. App. Div. 1899).

A single cause of action was set forth in complaint for rescission of contract for fraud of defendants and, incidentally, for recovery back from all defendants of the moneys paid thereon. Ressler v Samphimor Holding Corp., 201 A.D. 344, 194 N.Y.S. 363, 1922 N.Y. App. Div. LEXIS 6317 (N.Y. App. Div. 1922).

A cause of action for commissions in an action by a real estate broker and one for conspiracy and fraud on the part of the defendants, are separate causes of action and should be separately stated and numbered. Popper v Korn, 218 A.D. 513, 218 N.Y.S. 631, 1926 N.Y. App. Div. LEXIS 5968 (N.Y. App. Div. 1926).

Motion to separately state number of causes of action granted where complaint states cause of action in equity to set aside alleged fraudulent transfers and also action in tort for money damages. Cole v Goodman, 234 A.D. 562, 255 N.Y.S. 720, 1932 N.Y. App. Div. LEXIS 10488 (N.Y. App. Div. 1932).

Several and different acts of fraud alleged in an equitable cause of action do not constitute each a separate cause of action. Cole v Goodman, 234 A.D. 562, 255 N.Y.S. 720, 1932 N.Y. App. Div. LEXIS 10488 (N.Y. App. Div. 1932).

Complaint alleging as one cause of action several acts of defendants, each of which resulted from concerted attempt to defraud plaintiff, stated, nevertheless, separate causes of action. Bob v Hecksher, 235 A.D. 82, 256 N.Y.S. 126, 1932 N.Y. App. Div. LEXIS 7887 (N.Y. App. Div. 1932).

Cause of action for fraud and an action founded upon breach of a contract to redeliver corporate stock should be separately stated and numbered. Brooklyn Nat'l Bank v Werblow, 235 A.D. 625, 254 N.Y.S. 813, 1932 N.Y. App. Div. LEXIS 8271 (N.Y. App. Div. 1932).

In an action to recover damages arising from fraud in the sale of certain bonds, in which it appeared that the causes of action accruing to each of the four assignors of the plaintiff depended upon different factual situations, and did not merge upon assignment to the plaintiff, the motion of the defendants, under RCP 90 to require the plaintiff to separately state and

number his causes of action, should have been granted. McCaffrey v Halsey Stuart & Co., 250 A.D. 429, 294 N.Y.S. 335, 1937 N.Y. App. Div. LEXIS 8360 (N.Y. App. Div. 1937).

Action for commissions based on fraud see Ligety v B. & E. Aloer, Inc., 262 A.D. 1033, 30 N.Y.S.2d 335, 1941 N.Y. App. Div. LEXIS 7122 (N.Y. App. Div. 1941).

In action by individual and corporate plaintiff, named as “tenant” in lease, for fraud inducing execution of such lease, claiming as damages cost of repairs and moving, each plaintiff was required to demand separately damages to which he or it is entitled. American Ball Bearing Corp. v Hewes & Penn Corp., 281 A.D. 679, 117 N.Y.S.2d 98, 1952 N.Y. App. Div. LEXIS 3217 (N.Y. App. Div. 1952).

Where “first cause of action” purports to allege cause of action for breach of warranty in each of two separate agreements and cause of action for fraud, such three causes should be separately stated, not because different modes of relief are sought but because different gravamen and different items of recovery are involved. Citizens Utilities Co. v American Locomotive Co., 1 A.D.2d 941, 150 N.Y.S.2d 33, 1956 N.Y. App. Div. LEXIS 5775 (N.Y. App. Div. 1st Dep't 1956).

Order made requiring plaintiff to state separately and number causes of action set forth in the complaint, where two separate causes of action were attempted to be set forth therein, one for false representations in inducing plaintiff to enter into an agreement, and a second one for breach of it. J. Pratt Carroll v Murphy Fruit Co., 205 N.Y.S. 401, 123 Misc. 519, 1924 N.Y. Misc. LEXIS 952 (N.Y. App. Term 1924).

Complaint for fraud, in one paragraph of one sentence containing many allegations, should be divided into separate paragraphs for each separate allegation. Belkor Knitwear Co. v Posner, 78 N.Y.S.2d 618, 1948 N.Y. Misc. LEXIS 2286 (N.Y. Sup. Ct. 1948).

Where complaint alleged distinct causes of action for breach of contract and actual or constructive fraud, defendant was entitled to have each cause of action separately stated and numbered. Greenfield v Greenfield, 123 N.Y.S.2d 19, 1953 N.Y. Misc. LEXIS 1908 (N.Y. Sup. Ct. 1953).

Judgment creditor, suing to set aside transfer by debtor corporation of its funds to individual defendants, and seeking to present cause of action for fraud from outset of transaction between parties to its conclusion, must state and number such claim separately from causes of action based upon its rights as judgment creditor. 609 Holding Corp. v Schanen, 154 N.Y.S.2d 812 (N.Y. Sup. Ct. 1956).

A complaint containing allegations showing a series of fraudulent acts, necessary either to the statement of the cause of action or an aggravation of damages, by which the plaintiff had been induced to marry the defendant, contains but one cause of action. 2 Hun 611.

A complaint in an action to foreclose mechanic's lien, which alleges a fraudulent conveyance of the premises and makes defendants of parties to such conveyances, and asks relief against such conveyances as well as the enforcement of the lien, sets up only one cause of action. Tisdale v Moore, 8 Hun 19 (N.Y.).

The liabilities of trustees of a manufacturing company for making false reports and allowing the indebtedness to exceed the capital are penal, and each act becomes a separate cause of action. Anderson v Speers, 21 Hun 568, 59 How. Pr. 421, 1880 N.Y. Misc. LEXIS 180 (N.Y. Sup. Ct. May 1, 1880).

Instance of a complaint in a judgment creditor's action to set aside mortgages as usurious and deeds as fraudulent, held to state more than one cause of action. Marx v Tailer, 9 N.Y. St. 22.

A complaint in an action by a judgment creditor to set aside a conveyance as fraudulent contained an allegation in the general statement of facts that by virtue of the conveyance the grantee became the real party in interest in the action in which the judgment was obtained and was liable for the costs thereof, but because such conveyance was made prior to docketing the judgment, said grantee holds the lands apparently free of the lien of said judgment, and claims that it is not a lien. Held that this was not sufficient to constitute an independent cause of action. Reed v Davis, 14 NY Week Dig 516.

86. —Gaming

Complaint to recover $13,500, lost in playing slot machines during period of 6 months, should separately state each loss in excess of $25 as single cause of action. Mrowiec v Polish Army Veterans Ass'n, 73 N.Y.S.2d 361, 190 Misc. 423, 1947 N.Y. Misc. LEXIS 3011 (N.Y. Sup. Ct. 1947).

87. —Gift

Complaint contained but a single cause of action on a gift. Keuka College v Citizens' Nat'l Bank, 248 N.Y.S. 750, 139 Misc. 324, 1931 N.Y. Misc. LEXIS 1173 (N.Y. Sup. Ct. 1931).

88. —Injunction

Motion to require plaintiff separately to state and number the alleged causes of action should be denied where the complaint states merely an action to restrain defendants from violating a restrictive covenant contained in the plaintiff’s lease, for damages, and for an accounting of profits by defendants. Kitty Kelly Stores, Inc. v Edison New York Stores, Inc., 243 A.D. 562, 277 N.Y.S. 160, 1934 N.Y. App. Div. LEXIS 5898 (N.Y. App. Div. 1934).

In action by six named plaintiffs, allegedly independent businessmen, against labor union to restrain them from picketing businesses of plaintiffs, separately stating and numbering their causes was required. Reinman v Jaffe, 281 A.D. 833, 118 N.Y.S.2d 475, 1953 N.Y. App. Div. LEXIS 3474 (N.Y. App. Div. 1953).

In injunction action statement in separate paragraphs of acts of each defendant is sufficient. Endlich v Ginsburg, 67 N.Y.S.2d 160, 1946 N.Y. Misc. LEXIS 3197 (N.Y. Sup. Ct. 1946).

89. —Judgment

Allegations in a complaint based on a foreign judgment, relating to a covenant on which that judgment was based, are not to be construed as an attempt to set out an independent cause of

action on such covenant, where a material averment to such cause of action is wanting, and where the allegations though not necessary are proper in the action on the judgment. Krower v Reynolds, 99 N.Y. 245, 1 N.E. 775, 99 N.Y. (N.Y.S.) 245, 1885 N.Y. LEXIS 780 (N.Y. 1885).

In action on a new promise reviving a judgment which had been discharged in bankruptcy, plaintiff was not required to state causes of action separately, since the new promise was relied upon, although the judgment was recited. Eric v Gumpert, 245 N.Y.S. 381, 138 Misc. 278, 1930 N.Y. Misc. LEXIS 1609 (N.Y. Sup. Ct.), aff'd, 231 A.D. 722, 246 N.Y.S. 869, 1930 N.Y. App. Div. LEXIS 7242 (N.Y. App. Div. 1930).

90. —Landlord and tenant

A separate allegation in a complaint, stating that by reason of the premises plaintiff has sustained damages in being unable to let her house, and lost the rental thereof, was violative of RCP 90 requiring each separate cause of action to be complete in itself, and should have been required to be made definite and certain. McKenzie v Fox, 8 N.Y.S. 460, 55 Hun 608, 1890 N.Y. Misc. LEXIS 1617 (N.Y. Sup. Ct. 1890).

A complaint alleging that defendant led plaintiff into making a hard and unconscionable lease, and then after plaintiff had sown crops, etc., evicted him and procured his arrest on a malicious charge of embezzlement, and took possession of his household goods, etc., and that all these acts were in pursuance of defendant’s plan to defraud plaintiff, states but one cause of action. Bebinger v Sweet, 6 Hun 478.

Where a complaint alleged that the plaintiff was the tenant of and in possession of certain premises, and that defendant entered thereupon during plaintiff’s absence therefrom and broke down walls and partitions, and afterwards carried away his fixtures, goods and chattels, and converted them to his own use, and held possession of the said premises and refused to allow plaintiff to enter thereon, it was held that the complaint did not improperly unite two causes of action; that although stated in separate paragraphs but one continuous transaction was set out. Polley v Wilkisson.

91. —Libel and slander

Where the complaint in an action for libel sets out prior libelous publications having no connection therewith they will be stricken out, or the plaintiff will be compelled separately to state and number the causes of action. Burkan v Musical Courier Co., 141 A.D. 202, 125 N.Y.S. 1059, 1910 N.Y. App. Div. LEXIS 3842 (N.Y. App. Div. 1910).

A complaint alleging publication of a single item of libelous matter among various individuals states but one cause of action, and it was error to require service of a new complaint separately stating and numbering causes of action. Fried, Mendelson & Co. v Halstead, 203 A.D. 113, 196 N.Y.S. 285, 1922 N.Y. App. Div. LEXIS 7140 (N.Y. App. Div. 1922).

A defendant to a libel action should not combine in one affirmative defense the plea of fair comment and the plea of qualified privilege but should separately state and number those defenses or when so commingled that it is impossible to separate them they should be stricken out. Burnham v Hornaday, 223 A.D. 218, 228 N.Y.S. 246, 1928 N.Y. App. Div. LEXIS 6173 (N.Y. App. Div. 1928).

Where first alleged cause of action in complaint stated two causes of action, each upon a separate and distinct libel, defendants were entitled to have them separated and numbered. Margolin v Silver, 234 A.D. 723, 252 N.Y.S. 976, 1931 N.Y. App. Div. LEXIS 9556 (N.Y. App. Div. 2d Dep't 1931).

Where complaint contained four possible causes of action, plaintiff was given leave to replead and separately state and number. Munzer v Blaisdell, 268 A.D. 9, 48 N.Y.S.2d 355, 1944 N.Y. App. Div. LEXIS 3094 (N.Y. App. Div. 1944).

Separately stating and numbering justification and mitigation not required. Wiley v Bass, 272 A.D. 926, 70 N.Y.S.2d 853, 1947 N.Y. App. Div. LEXIS 4242 (N.Y. App. Div. 1947).

In action for defamation, plaintiffs were required to serve amended complaint eliminating all joint causes of action and setting forth separately each plaintiff's several causes of actions against defendants. Rockville Park Homes, Inc. v Blumenfeld, 282 A.D. 895, 125 N.Y.S.2d 11, 1953 N.Y. App. Div. LEXIS 5358 (N.Y. App. Div. 1953).

Slander and libel are separate causes, may not be united, and should be separated and numbered. Roberts v Pratt, 21 N.Y.S.2d 545, 174 Misc. 585, 1940 N.Y. Misc. LEXIS 1968 (N.Y. Sup. Ct. 1940), app. denied, app. dismissed, 24 N.Y.S.2d 137 (N.Y. App. Div. 1940), app. denied, 25 N.Y.S.2d 1019 (N.Y. App. Div. 1941), app. dismissed, 27 N.Y.S.2d 449 (N.Y. App. Div. 1941).

In action against magazine to recover damages for publication of alleged sordid article concerning plaintiffs, complaint stated a cause of action for invasion of privacy, but plaintiffs were required to separately state this cause of action and a cause of action for libel. Goelet v Confidential, Inc., 9 Misc. 2d 311, 167 N.Y.S.2d 91, 1957 N.Y. Misc. LEXIS 2491 (N.Y. Sup. Ct. 1957), rev'd, 5 A.D.2d 226, 171 N.Y.S.2d 223, 1958 N.Y. App. Div. LEXIS 6651 (N.Y. App. Div. 1st Dep't 1958).

Where plaintiff's cause of action was based on a single act of publishing an altered photograph of her the commingling of her claim for defamation with her claim for violation of privacy was held proper. Russell v Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8, 1959 N.Y. Misc. LEXIS 4540 (N.Y. Sup. Ct. 1959).

See also Ronnie v Ryder, 8 N.Y.S. 5, 1889 N.Y. Misc. LEXIS 2143 (N.Y. City Ct. 1889).

Causes of action for libel and for unauthorized use of name for advertising purposes should be separately stated and numbered. Dache v Abraham & Straus, Inc., 39 N.Y.S.2d 981, 1942 N.Y. Misc. LEXIS 2368 (N.Y. Sup. Ct. 1942), app. dismissed, 268 A.D. 929, 51 N.Y.S.2d 856, 1944 N.Y. App. Div. LEXIS 4295 (N.Y. App. Div. 1944), aff'd, 269 A.D. 692, 54 N.Y.S.2d 400, 1945 N.Y. App. Div. LEXIS 3332 (N.Y. App. Div. 1945).

Claim of wrong by libel to one person may not be joined in single cause of action with claim of wrong by same libel to another person; separate wrongs to each person must be stated in separate causes, despite contention that single cause is justified because two concerns are operated jointly as single entity. National Cancer Hospital v Confidential, Inc., 136 N.Y.S.2d 921, 1954 N.Y. Misc. LEXIS 3553 (N.Y. Sup. Ct. 1954).

Where “first cause of action” rests upon three separate publications between specified dates and each claimed to be libelous, each publication is subject of separate libel and constitutes independent cause and each must be separately stated. Cazes v News Syndicate Co., 147 N.Y.S.2d 268, 1955 N.Y. Misc. LEXIS 3008 (N.Y. Sup. Ct. 1955).

92. — —New publication of defamatory words

A complaint charging six separate publications by the defendant of certain alleged libelous matter, and claiming damage caused by all of them, held to involve six several causes of action, and motion to compel separate statement and numbering thereof in the complaint granted. Woodhouse v New York Evening Post, Inc., 201 A.D. 9, 193 N.Y.S. 705, 1922 N.Y. App. Div. LEXIS 6240 (N.Y. App. Div. 1922).

In libel, an amended complaint which abandoned two of three causes of action, complied with an order to separately state and number the causes of action. De Groot v Brooklyn Daily Times, 230 A.D. 783, 244 N.Y.S. 778, 1930 N.Y. App. Div. LEXIS 9321 (N.Y. App. Div. 1930).

Every repetition of defamatory words was a new publication and constitutes a distinct cause of action requiring a separate statement and numbering thereof pursuant to RCP 90. Keystone Oil Burner Co. v Dun & Bradstreet, Inc., 23 N.Y.S.2d 110, 175 Misc. 277, 1940 N.Y. Misc. LEXIS 2290 (N.Y. Sup. Ct. 1940).

Separate publications of alleged defamatory matter which are sued upon must be separately stated and numbered since every publication of defamatory words is a new publication and

distinct cause of action. Brown v Reed, 10 Misc. 2d 8, 167 N.Y.S.2d 41, 1957 N.Y. Misc. LEXIS 2593 (N.Y. Sup. Ct. 1957).

If plaintiff claims defendant uttered slanderous words at more than one time and place, each time and place and words then and there used must be set forth as separate causes. Szwarce v Buenaventura, 82 N.Y.S.2d 292, 1948 N.Y. Misc. LEXIS 3094 (N.Y. Sup. Ct. 1948).

93. —Mechanic's lien

In action by materialmen and subcontractor to foreclose a mechanic's lien, plaintiff was required to separately state and number the alleged causes of action. Lyon v Israel, 249 A.D. 787, 292 N.Y.S. 377, 1936 N.Y. App. Div. LEXIS 6008 (N.Y. App. Div. 1936).

94. —Negligence

In an action to recover damages for personal injuries claimed to have been caused by the negligence to defendant, the plaintiff may allege in a single cause of action all the facts which he claims contributed to or caused the accident, and plaintiff may not be compelled to separately state and number the facts relied upon to support an action on each ground of liability as a separate and distinct cause of action. Payne v New York, S. & W. R. Co., 201 N.Y. 436, 95 N.E. 19, 201 N.Y. (N.Y.S.) 436, 1911 N.Y. LEXIS 1261 (N.Y. 1911).

Two causes of action based upon distinct acts of negligence of different parties must be separately stated. Hamnstrown v New York Contracting Co., 122 A.D. 43, 106 N.Y.S. 880, 1907 N.Y. App. Div. LEXIS 2369 (N.Y. App. Div. 1907).

Negligence action against two defendants; motion to compel causes of action to be separately stated and numbered. Crosby v Otis Elevator Co., 141 A.D. 369, 126 N.Y.S. 204, 1910 N.Y. App. Div. LEXIS 3872 (N.Y. App. Div. 1910).

Where the complaint in a negligence action alleges facts which would permit plaintiff to invoke either the common law, the Federal Employers' Liability Act, or the New Jersey Employers'

Liability Act, he will be compelled, on a motion to make the complaint more definite and certain, to separate and number the causes of action. Payne v New York, S & W. R. Co., 141 A.D. 833, 125 N.Y.S. 1011, 1910 N.Y. App. Div. LEXIS 3966 (N.Y. App. Div. 1910).

In action against two dentists for malpractice, order was granted that the action be severed, that separate trials of the alleged causes of action against defendants be had, and that plaintiffs serve on defendant an amended complaint separately stating and numbering the causes of action. Senatore v Falk, 249 A.D. 782, 292 N.Y.S. 235, 1936 N.Y. App. Div. LEXIS 5992 (N.Y. App. Div. 1936).

Where third-party complaint alleged statutory cause of action for violation of statutory duty and another cause of action for common-law negligence, such causes were ordered to be separately stated and numbered. Altieri v Doral Const. Corp., 128 N.Y.S.2d 452, 205 Misc. 733, 1954 N.Y. Misc. LEXIS 2297 (N.Y. Sup. Ct. 1954).

Complaint alleging that a municipal corporation and the owners of an adjoining lot carelessly and negligently permitted the construction of an insecure bridge, does not unite causes of action improperly. Van Wagenen v Kemp, 7 Hun 328 (N.Y.).

A cause of action for carelessness and negligence, by means of which injury and death ensued, may and should be stated in one count in the complaint. Dickens v New-York Cent. R.R., 13 How. Pr. 228, 1856 N.Y. Misc. LEXIS 63 (N.Y. Sup. Ct. July 1, 1856); Smith v Rathbun, 22 Hun 150 (N.Y.), app. dismissed, 88 N.Y. 660, 88 N.Y. (N.Y.S.) 660, 1882 N.Y. LEXIS 178 (N.Y. 1882).

In an action by seaman employed by different steamship companies to recover for their negligence in failing to provide proper living conditions, the causes of action should be separately stated and numbered. Totten v United States Lines, 16 F. Supp. 57, 1936 U.S. Dist. LEXIS 1964 (D.N.Y. 1936).

95. —Nuisance

A complaint stating that constructors of subway temporarily injured plaintiff by constructing temporary structures in street, and permanently injured plaintiff's property by erecting stairways and exits, stated two causes of action which should be separately stated and numbered. Stines v New York, 154 A.D. 276, 138 N.Y.S. 962, 1912 N.Y. App. Div. LEXIS 11254, 1912 N.Y. App. Div. LEXIS 9921 (N.Y. App. Div. 1912).

Where each cause of action alleged in complaint would warrant a recovery for unlawfully and wrongfully maintaining a nuisance or for negligence, defendant was entitled to have them separately numbered and stated. Glover v Holbrook, Cabot & Rollins Corp., 189 A.D. 328, 178 N.Y.S. 517, 1919 N.Y. App. Div. LEXIS 4657 (N.Y. App. Div. 1919).

Where the facts would have warranted recovery by an injured person for both negligence and maintenance of a nuisance, his administrator, in an action for wrongful death may properly join the causes of action, but they must be separately stated and numbered. Smith v Earle, 202 A.D. 305, 195 N.Y.S. 342, 1922 N.Y. App. Div. LEXIS 4897 (N.Y. App. Div. 1922).

Complaint against two railroad companies stating separately acts which combined created the nuisance and caused the damage complained of, stated but one action in equity. Schenectady Holding Co. v New York C. R. Co., 225 A.D. 479, 233 N.Y.S. 495, 1929 N.Y. App. Div. LEXIS 11674 (N.Y. App. Div. 1929).

Where complaint was based on causes of action for negligence and nuisance, defendant was entitled to an order requiring plaintiffs to separately state and number the causes of action in order to permit appellant to plead the Statute of Limitations as to the cause of action for nuisance. Bresnihan v United States Trust Co., 257 A.D. 195, 12 N.Y.S.2d 495, 1939 N.Y. App. Div. LEXIS 7705 (N.Y. App. Div. 1939).

In an action alleging nuisance and negligence, as well as temporary and permanent damages to plaintiff's property, such separate wrongs should be separately stated and numbered. Elfenbein v Mamaroneck, 267 A.D. 998, 48 N.Y.S.2d 211, 1944 N.Y. App. Div. LEXIS 5993 (N.Y. App. Div. 1944).

96. —Partnership

Action for accounting of affairs of two successive law partnerships held to state separate causes, requiring separate statement and numbering. Jones v Gogolick, 262 A.D. 960, 29 N.Y.S.2d 961, 1941 N.Y. App. Div. LEXIS 6632 (N.Y. App. Div. 1941).

Causes of action against partnership for breach of contract and against others for inducing breach were ordered separately stated and numbered. Kramer v Hubbell, 269 A.D. 759, 54 N.Y.S.2d 739, 1945 N.Y. App. Div. LEXIS 3668 (N.Y. App. Div. 1945).

Where three of five partnership agreements alleged in complaint provided for arbitration of all disputes and last two did not contain arbitration provision, defendant was entitled to complaint separately stating and numbering partnership causes of action based on violations under each of separate partnership agreements between parties. Newmark v Harris, 284 A.D. 962, 135 N.Y.S.2d 499, 1954 N.Y. App. Div. LEXIS 4247 (N.Y. App. Div. 1954).

In an action for dissolution of a partnership, since accounting and impressment of a trust were merely incidental relief, where the plaintiff pleaded all the essential elements needed for such an action, even though they were pleaded in an unworkmanlike manner, motion under RCP 90 denied. Friedland v Friedland, 12 Misc. 2d 349, 175 N.Y.S.2d 264, 1958 N.Y. Misc. LEXIS 3514 (N.Y. Sup. Ct. 1958).

Partnership accounting, see Cohen v Tefft, 51 N.Y.S.2d 106, 1944 N.Y. Misc. LEXIS 2465 (N.Y. Sup. Ct. 1944).

Complaint on check, alleging partnership and agency of partners, stated single cause of action. Sutter v Marcus, 81 N.Y.S.2d 242, 1948 N.Y. Misc. LEXIS 2744 (N.Y. Sup. Ct. 1948).

In action against partnership involving changes in membership, each change in contract and in parties calls for independent cause of action for accounting, where plaintiff seeks general accounting as to business done during period such several firms operated. Gardiner v Hyde, 144 N.Y.S.2d 426, 1955 N.Y. Misc. LEXIS 3760 (N.Y. Sup. Ct. 1955).

97. —Penalties

In action for penalties against ferry companies, plaintiff required to set forth the particular violations complained of and to separately state and number his different causes of action. Wray v Pennsylvania R. Co., 4 N.Y.S. 354, 1888 N.Y. Misc. LEXIS 1109 (N.Y. Sup. Ct. 1888).

Numerous penalties claimed for similar offenses, as one for each day's violation of a law or ordinance, can be embraced in one count. Longworthy v Knapp, 4 Abb Pr 115; but see Ogdensburgh Bank v Paige, 2 NY Code R 75; or trespass by cattle on different days RICHARDSON v NORTHRUP, 66 Barb. 85, 1867 N.Y. App. Div. LEXIS 281 (N.Y. Sup. Ct. June 25, 1867).

98. —Personal and representative causes

Motion to compel plaintiffs separately to state and number the respective causes of action of each individual plaintiff in a representative action was improperly denied. Society Milion Athena, Inc. v National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374, 281 N.Y. (N.Y.S.) 282, 1939 N.Y. LEXIS 1010 (N.Y. 1939).

In an action brought in an individual capacity and also as administratrix, plaintiff should be required to separately state and number the facts constituting her cause of action in each of such capacities. Deigel v Magee, 132 N.Y.S. 665, 74 Misc. 520, 1911 N.Y. Misc. LEXIS 691 (N.Y. Sup. Ct. 1911).

Where allegations seeking recovery of a personal judgment are mingled with those seeking recovery in a representative capacity separate statement may be required. MacLeod v Miller, 201 N.Y.S. 108, 1923 N.Y. Misc. LEXIS 1208 (N.Y. Sup. Ct. 1923).

Causes of action for fraud, where plaintiff sues individually and as executrix, must be separately stated and numbered. Rubinstein v Rubinstein, 61 N.Y.S.2d 44, 1946 N.Y. Misc. LEXIS 1967 (N.Y. Sup. Ct. 1946).

99. —Royalties

In action by authors against publisher, cause of action for nonpayment of sum due for accrued royalties and cause of action for damages for expected royalties should be separately stated and numbered. Schisgall v Fairchild Publications, Inc., 137 N.Y.S.2d 312, 207 Misc. 224, 1955 N.Y. Misc. LEXIS 2547 (N.Y. Sup. Ct. 1955).

100. —Sales

In an action for damages due to breach of warranty, if more than one warranty is relied upon, each must be alleged in separate cause of action. Cohen v Japan Cotton & Silk Trading Co., 250 A.D. 770, 294 N.Y.S. 28, 1937 N.Y. App. Div. LEXIS 8924 (N.Y. App. Div. 1937).

An action under the Agriculture and Markets Laws, in which it was alleged that the plaintiff became ill from eating canned salmon constituted but one cause of action and, therefore, a motion to require plaintiff to separately state and number different causes of action was denied. Goodrow v MacDonald, 256 A.D. 1023, 10 N.Y.S.2d 839, 1939 N.Y. App. Div. LEXIS 5921 (N.Y. App. Div. 1939).

Cause of action for price of goods sold and delivered may be joined with one on a guaranty of payment, but should be separately stated and numbered. Winter v Maple City Mfg. Co., 230 N.Y.S. 458, 132 Misc. 631, 1928 N.Y. Misc. LEXIS 1009 (N.Y. Sup. Ct. 1928).

A complaint which alleges in a single count the wrongful taking, and detention of certain specified goods and a refusal to deliver them on demand, does not set forth two or more causes of action, although such goods were sold to defendant’s assignor at different times and delivered at different places. Ackerman v O'Gorman, 6 N.Y.S. 825, 53 Hun 638, 1889 N.Y. Misc. LEXIS 804 (N.Y. Sup. Ct. 1889).

Where the complaint contained two counts; one for goods sold and delivered at an agreed price of $239.36, the other for goods of the value of $210.74, delivered on a written order, and demanded judgment for $210.74 there was sufficient dissimilarity to relieve the pleading from

the charge of unnecessary repetition, and plaintiff was not compelled to elect on which count he would rely. Goldstein v Stern, 9 N.Y.S. 274, 1890 N.Y. Misc. LEXIS 124 (N.Y. City Ct.), app. dismissed, 9 N.Y.S. 956, 1890 N.Y. Misc. LEXIS 545 (N.Y.C.P. 1890).

A cause of action upon a warranty as to an article, and a cause of action for a false representation in respect of such article, as to matters covered by the warranty, are separate and distinct causes of action, but under the allegations of the complaint but one sum of money can be recovered. A motion to compel an election was properly denied. Seymour v Lorillard (1885) 51 Super Ct (19 Jones & S) 399.

As to what allegations in a complaint do not necessarily interfere with the action being for goods sold and delivered, and make it one solely for damages for nonacceptance of drafts see Patterson v Stettauer (1875) 40 Super Ct (8 Jones & S) 54.

101. —Torts generally

The commission of two or more actionable torts by a single individual against another, or two or more actionable wrongs perpetrated upon one by two or more joint tort-feasors raises two or more causes of action, each of which should be separately alleged and numbered. Moskin v Paine, 200 A.D. 304, 191 N.Y.S. 36, 1921 N.Y. App. Div. LEXIS 9123 (N.Y. App. Div. 1921).

Cause of action for violation of plaintiff's rights as a riparian owner of land bordering upon the ocean and one for the violation of his rights derived from an easement or right of way thereto should be separately stated and numbered. Mater Realty Co. v B. B. Bathing Park, Inc., 209 A.D. 885, 205 N.Y.S. 528, 1924 N.Y. App. Div. LEXIS 9599 (N.Y. App. Div. 1924).

Complaint stated but one cause of action for waste and diversion of plaintiff's inheritance, consequently motion to require the plaintiff to separately state and number the causes of action was properly denied. Squier v Houghton, 225 A.D. 221, 232 N.Y.S. 560, 1929 N.Y. App. Div. LEXIS 11604 (N.Y. App. Div. 1929).

Where the original complaint pleaded two causes, negligence and trespass, in commingled form, plaintiff was permitted to amend by separately stating and numbering the causes. Delfino v Naidich, 232 A.D. 822, 248 N.Y.S. 855, 1931 N.Y. App. Div. LEXIS 15546 (N.Y. App. Div. 1931).

In an action against a number of defendants to recover damages for being deprived of several separate pieces of property by a series of wholly unrelated torts committed by defendants, the plaintiff should be required to separately state and number the different causes of action. Bob v Hecksher, 235 A.D. 82, 256 N.Y.S. 126, 1932 N.Y. App. Div. LEXIS 7887 (N.Y. App. Div. 1932).

Though complaint failed to plead other causes, allegations of trespass on which plaintiff relies should be separately stated and numbered. Weiss v M. Shapiro & Son Const. Co., 276 A.D. 886, 93 N.Y.S.2d 789, 1949 N.Y. App. Div. LEXIS 3683 (N.Y. App. Div. 1949).

Causes of action for wrongfully inducing breach of contract and for wrongful removal of property from jurisdiction should be separately stated and numbered. Shepard Chemical Corp. v Philipp Bros. Chemicals International Co., 281 A.D. 820, 119 N.Y.S.2d 40, 1953 N.Y. App. Div. LEXIS 3434 (N.Y. App. Div. 1953).

Where plaintiff intends to add claim for damages based on any of traditional torts, each tort should be pleaded as separate cause of action and resultant damage or injury separately stated. Brandt v Winchell, 283 A.D. 338, 127 N.Y.S.2d 865, 1954 N.Y. App. Div. LEXIS 4675 (N.Y. App. Div.), app. denied, 283 A.D. 794, 129 N.Y.S.2d 232, 1954 N.Y. App. Div. LEXIS 5345 (N.Y. App. Div. 1954).

Rule applied as to complaint joining cause of action for negligence in blasting with one for trespass upon premises. First Const. Co. v Rapid Transit Subway Const. Co., 203 N.Y.S. 359, 122 Misc. 145, 1923 N.Y. Misc. LEXIS 1451 (N.Y. Sup. Ct. 1923), aff'd, 211 A.D. 184, 206 N.Y.S. 822, 1924 N.Y. App. Div. LEXIS 9906 (N.Y. App. Div. 1924).

Complaint alleging death from administration of drug which defendant manufacturer misrepresented as not dangerous but which it knew to be dangerous, did not require repleading.

Wechsler v Hoffman-La Roche, Inc., 99 N.Y.S.2d 588, 198 Misc. 540, 1950 N.Y. Misc. LEXIS 1979 (N.Y. Sup. Ct. 1950).

Separate wrongs, see Endlich v Ginsburg, 67 N.Y.S.2d 160, 1946 N.Y. Misc. LEXIS 3197 (N.Y. Sup. Ct. 1946).

In an action of trespass every item of damage sustained may be alleged in one count. 41 Hun 46.

Where the first count alleged an assault and battery, the second that defendants broke plaintiff's door, and broke down the grass and crops and assaulted and beat the plaintiff it was held that the second count stated but one cause of action. 41 Hun 46.

A complaint alleged that defendant broke and entered plaintiff's house, and injured the building and personal property and assaulted the plaintiff. Held, that the first part alleged a trespass and the latter an assault and battery, and that the statement of each cause of action should be separate and numbered. Gunn v Fellows, 41 Hun 257, 4 N.Y. St. 155 (N.Y.).

Allegations of a forcible assault on plaintiff, followed by a forcible dragging through the street, and imprisonment and restraint of his liberty, without probable cause constitute but one cause of action. Sheldon v Lake, 9 Abb. Pr. (n.s.) 306, 1871 N.Y. Misc. LEXIS 57 (N.Y.C.P. 1871).

Allegation that defendants entered plaintiff's house, and arrested her and another and forcibly removed her therefrom and took her to jail constitutes but one cause of action. Exner v Exner, 2 Abb NC 108.

102. —Trusts and estates

In action to obtain accounting from trustees holding stock of several corporations, complaint construed as causes of action required to be separately stated. Huguley v Gardner, 157 A.D. 720, 142 N.Y.S. 660, 1913 N.Y. App. Div. LEXIS 6613 (N.Y. App. Div. 1913).

Plaintiff was not compelled under this rule to separate facts constituting cause of action for accounting from any facts on which cause of action for cancellation of trust may rest. Genesee Valley Trust Co. v Newborn, 6 N.Y.S.2d 498, 168 Misc. 703, 1938 N.Y. Misc. LEXIS 1880 (N.Y. Sup. Ct. 1938).

In action by husband against wife and adult sons for judgment declaring trustees of realty purchased by wife from household funds contributed by him for his benefit, and directing them to convey such realty to him and to account for income and profits derived therefrom, such causes of action should be separately stated and numbered. Culpepper v Culpepper, 1 Misc. 2d 355, 146 N.Y.S.2d 338, 1955 N.Y. Misc. LEXIS 2278 (N.Y. Sup. Ct. 1955).

Causes of action for rescission of trusts or breaches of said trusts for inducing others to breach trusts for torts as to property unrelated to trusts and for conspiracy must be separately stated and numbered. Lipin v Salkin, 10 Misc. 2d 243, 171 N.Y.S.2d 578, 1957 N.Y. Misc. LEXIS 2667 (N.Y. Sup. Ct. 1957).

Complaint to impress trust upon patent invented by plaintiff and for accounting of profits resulting from breach of trust and for injunction, stated single cause of action. Mayer v Hochman, 73 N.Y.S.2d 97, 1947 N.Y. Misc. LEXIS 2944 (N.Y. Sup. Ct. 1947).

Complaint alleging abuse of trust relationship between plaintiff and defendant in which codefendant is sought to be held as tortious recipient of property in question, states single cause of action. Greenberg v Greenberg, 95 N.Y.S.2d 676, 1950 N.Y. Misc. LEXIS 1451 (N.Y. Sup. Ct. 1950).

Complaint seeking construction of trust agreement, especially as to its sinking fund provisions, states but single cause of action. City Bank Farmers Trust Co. v National Cuba Hotel Corp., 133 N.Y.S.2d 8, 1954 N.Y. Misc. LEXIS 2727 (N.Y. Sup. Ct. 1954).

What facts set forth in complaint by creditors against heirs, etc., of decedent to obtain payment of claim out of proceeds of partition sale of decedent’s real property and judgment against heirs

for deficiency to extent of assets received by them, constitute but a single cause of action. United States Life Ins. Co. v Jordan, 15 N.Y. St. 240.

A complaint against the administrator of plaintiff's agent, for an accounting, etc., which demands judgment against the administrator individually for the payment of money and delivery of books and property of plaintiff, taken by the administrator and refused to be given up, does not unite two causes of action. Day v Stone (N.Y.C.P.).

103. —Undisclosed principal

Where complaint alleged that plaintiff was employed by hotel represented by individual defendant who did not disclose that hotel was owned and operated by corporate defendants, in his action for breach of employment contract, plaintiff was not required to separately state and number causes of action against agent of undisclosed principal and against undisclosed principal. Grodsky v Bernstein, 135 N.Y.S.2d 897, 1954 N.Y. Misc. LEXIS 3079 (N.Y. County Ct. 1954).

104. —Declaratory judgment

Action for declaratory judgment based on impropriety or unlawfulness of original zoning of property, to mistake made in zoning map in placing premises in residential zone when there was no intention to zone said property, and to unconstitutionality of restriction presently imposing unnecessary hardship on plaintiff without promoting general welfare states several causes of action which must be separately stated and numbered. Verity v Larkin, 200 N.Y.S.2d 207, 1960 N.Y. Misc. LEXIS 3981 (N.Y. Sup. Ct. 1960).

105. —Lien law action

Where subcontractors and materialmen sued in their representative capacity on behalf of all creditors to recover for conversion by several defendants of trust funds arising out of a common

transaction, it was unnecessary to separately state each claim against each defendant, inasmuch as the claims grew out of the same transaction and the decision of the common point of litigation presented would settle the rights of all the parties. United Lakeland Air Conditioning Co. v Ahneman-Christiansen, Inc., 22 Misc. 2d 80, 194 N.Y.S.2d 84, 1959 N.Y. Misc. LEXIS 2856 (N.Y. Sup. Ct. 1959).

106. —Matrimonial actions

Claims of abandonment, inadequate support, and cruel and inhuman treatment should be separately stated and numbered where used as the basis for a separation action. Maas v Maas, 5 Misc. 2d 840, 161 N.Y.S.2d 685, 1957 N.Y. Misc. LEXIS 3277 (N.Y. Sup. Ct. 1957).

A counterclaim seeking to set aside a separation agreement must separately state and number the grounds which (1) antedate the execution of the agreement, (2) are concomitant with the agreement, and (3) occurred after it. Mordkowitz v Mordkowitz, 13 Misc. 2d 495, 177 N.Y.S.2d 328, 1958 N.Y. Misc. LEXIS 3479 (N.Y. Sup. Ct. 1958).

A counterclaim for judgment of separation must separately state and number such grounds as (1) cruelty; (2) abandonment and nonsupport, and (3) forcing defendant to sign separation agreement. Mordkowitz v Mordkowitz, 13 Misc. 2d 495, 177 N.Y.S.2d 328, 1958 N.Y. Misc. LEXIS 3479 (N.Y. Sup. Ct. 1958).

107. —Mortgages

Claim for cancellation of mortgages because of usury and claim for accounting under trust agreement between parties pursuant to which defendant was to apply rents to payment of mortgages must be separately stated and numbered since they are based on different theories of liability. Power v Falk, 199 N.Y.S.2d 824, 1960 N.Y. Misc. LEXIS 3917 (N.Y. Sup. Ct. 1960).

108. —Zoning

Action for declaratory judgment based on impropriety or unlawfulness of original zoning of property, to mistake made in zoning map in placing premises in residential zone when there was no intention to zone said property, and to unconstitutionality of restriction presently imposing unnecessary hardship on plaintiff without promoting general welfare states several causes of action which must be separately stated and numbered. Verity v Larkin, 200 N.Y.S.2d 207, 1960 N.Y. Misc. LEXIS 3981 (N.Y. Sup. Ct. 1960).

109. Answers, generally

The requirement that defenses containing new matter must be separately stated and numbered, is mandatory. Stern v Marcuse, 119 A.D. 478, 103 N.Y.S. 1026, 1907 N.Y. App. Div. LEXIS 3969 (N.Y. App. Div. 1907).

Under CPA §§ 261 (§§ 3011, 3018(a) herein), 262 (Rule 3014, now Civ. Rights Law 78) and RCP 90, an answer should have been so drafted as to disclose readily to the court what the issues were. It was unnecessary to admit formally anything in the complaint; as to such matters denials only are provided for. Following denials, the answer might next contain a statement of new matter constituting a defense or counterclaim, and it might set forth as many defenses or counterclaims, or both, as defendant had; but each should have been separately stated, numbered and divided into paragraphs, numbered consecutively, each as nearly as may be stating a separate allegation. These provisions were mandatory. International R. Co. v Jaggard, 204 A.D. 67, 197 N.Y.S. 384, 1922 N.Y. App. Div. LEXIS 8927 (N.Y. App. Div. 1922).

Where matters alleged in connection with denials constitute neither complete nor partial defenses to the causes of action alleged, they need not be separately stated and numbered or specifically set forth. Martel v Iselin, 246 A.D. 696, 284 N.Y.S. 977, 1935 N.Y. App. Div. LEXIS 9748 (N.Y. App. Div. 1935).

Complete and partial defenses were ordered to be pleaded separately, but partial defenses in libel actions were not required to be pleaded separately in justification and mitigation of damages. Zirn v Bradley, 270 A.D. 829, 60 N.Y.S.2d 114, 1946 N.Y. App. Div. LEXIS 4141 (N.Y.

App. Div.), app. denied, 270 A.D. 897, 61 N.Y.S.2d 926, 1946 N.Y. App. Div. LEXIS 4544 (N.Y. App. Div. 1946).

The requirement that when more than one defense is alleged in the answer, they should be separately stated and numbered, applies only to cases where the court can see from the pleading itself that there is more than one defense alleged so that a separation should be made. Hatch v Matthews, 30 N.Y.S. 309, 9 Misc. 307, 1894 N.Y. Misc. LEXIS 702 (N.Y. Sup. Ct. 1894), aff'd, 33 N.Y.S. 332, 85 Hun 522 (1895).

A general or specific denial cannot be associated with new matter in one paragraph. Zacharias v French, 30 N.Y.S. 945, 10 Misc. 202, 1 N.Y. Ann. Cas. 72, 1894 N.Y. Misc. LEXIS 927 (N.Y.C.P. 1894).

The requirement that defense be separately stated and numbered is not satisfied by simply numbering the separate paragraphs of the answer. Fay v Hauerwas, 57 N.Y.S. 155, 26 Misc. 421, 1899 N.Y. Misc. LEXIS 1268 (N.Y. Sup. Ct.), aff'd, 43 A.D. 621, 60 N.Y.S. 1138, 1899 N.Y. App. Div. LEXIS 2078 (N.Y. App. Div. 1899).

Motion to strike out portions of the answer which reserved the objection to service of process, or, in the alternative, to require defendant to amend by specifically pleading such matter as a defense, and by separately stating and numbering it, should be granted, since, if it is not issuable matter, it should be stricken out, and if it is issuable, and relied on as a defense, it should be separately stated and numbered. Burke v New York N. H. & H. R. Co., 15 N.Y.S. 148, 59 N.Y. Super. Ct. 569, 1891 N.Y. Misc. LEXIS 3094 (N.Y. Super. Ct. 1891).

Notwithstanding RCP 90 a motion for judgment on the pleadings under former RCP 112, would have been granted where the only essential material fact alleged in the complaint denied in the answer was admitted elsewhere in the answer. Golde Clothes Shop, Inc. v Loew's Buffalo Theatres, Inc., 198 N.Y.S. 457, 1923 N.Y. Misc. LEXIS 797 (N.Y. Sup. Ct.), aff'd, 206 A.D. 730, 199 N.Y.S. 924, 1923 N.Y. App. Div. LEXIS 8585 (N.Y. App. Div. 1923).

In an action on an insurance policy, denial in the answer of the nondelivery of the policy must be deemed a denial for all the purposes of the pleading and this defense is not only good on its face, but also when read in connection with the complaint. Rahaim v Rossia Ins. Co., 202 N.Y.S. 257, 1923 N.Y. Misc. LEXIS 1375 (N.Y. App. Term 1923).

Where defendant in affirmative defense denied allegations of complaint as to assignment of debt to third party and alleged payment to such party, he was not precluded from challenging such assignment. Transamerica General Corp. v Zunino, 82 N.Y.S.2d 595, 1948 N.Y. Misc. LEXIS 3173 (N.Y. Sup. Ct. 1948).

Allegations making but a simple defense, although separately prepared for a further answer and as a distinct defense, will be massed to make a sufficient defense. Thompson v Kearney, 12 N.Y. St. 682 (N.Y.C.P. Dec. 5, 1887).

It is the duty of the court to take the answer as it was framed and not attempt to defeat it by transposing a statement from the introduction to other portions of the answer. Myers v Portsmouth Bank, 2 N.Y. St. 125.

A defense will not be either defeated or completed by connecting a number of defenses together. Spencer v Babcock, 22 Barb. 326, 1856 N.Y. App. Div. LEXIS 72 (N.Y. Sup. Ct. Sept. 1, 1856); Ayrault v Chamberlain, 33 Barb. 229, 1860 N.Y. App. Div. LEXIS 179 (N.Y. Sup. Ct. Dec. 3, 1860); Ritchie v Garrison, 10 Abb. Pr. 246, 1858 N.Y. Misc. LEXIS 361 (N.Y. Super. Ct. Mar. 1, 1858); Ryle v Harrington, 4 Abb. Pr. 421, 1857 N.Y. Misc. LEXIS 186 (N.Y. Sup. Ct. Mar. 1, 1857).

110. —Defense or counterclaim

Allegations allowed to stand as counterclaim though not separately stated. Loew v McInerney, 159 A.D. 513, 144 N.Y.S. 546, 1913 N.Y. App. Div. LEXIS 8174 (N.Y. App. Div.), reh'g denied, 160 A.D. 902, 144 N.Y.S. 1126, 1913 N.Y. App. Div. LEXIS 8558 (N.Y. App. Div. 1913).

In action for breach of contract, where answer sets up several other contracts, plaintiff is entitled to have the defenses and counterclaims separately stated and numbered. William J. Dixon & Co. v Bronston Bros. & Co., 171 A.D. 552, 157 N.Y.S. 385, 1916 N.Y. App. Div. LEXIS 5294 (N.Y. App. Div. 1916).

A defense and counterclaim must be separately stated and numbered, except where the same facts constitute a complete defense and also a complete counterclaim. Weinstein v Ken-Wel Sporting Goods Co., 231 A.D. 51, 246 N.Y.S. 270, 1930 N.Y. App. Div. LEXIS 6996 (N.Y. App. Div. 1930).

Fraudulent representation alleged in counterclaim, where not claimed to be part of general plant, should be separately stated. E. Sonnenschein & Co. v Roberts Cos. of America, Inc., 272 A.D. 1010, 74 N.Y.S.2d 55, 1947 N.Y. App. Div. LEXIS 4684 (N.Y. App. Div. 1947).

Where the counterclaim unites a cause of action for breach of contract and a cause of action based on plaintiff's negligence, the causes of action should be separately stated and numbered. Bernascheff v Roeth, 70 N.Y.S. 369, 34 Misc. 588, 1901 N.Y. Misc. LEXIS 995 (N.Y. Sup. Ct. 1901).

In libel action, defense that the matter complained of consisted of statements of fact and statements of comments, the former being true and the latter being fairly warranted by facts truly stated pleaded the single defense of fair comment and not two separate defenses of justification and fair comment and motion to separately state and number was denied. J. Radley Metzger Co. v New York Times Publishing Co., 15 Misc. 2d 1037, 183 N.Y.S.2d 131, 1958 N.Y. Misc. LEXIS 2383 (N.Y. Sup. Ct. 1958).

Plaintiff is entitled to have a separate distinct defense and a counterclaim separately stated and numbered. L. T. Hollister, Inc. v Huselton, 172 N.Y.S. 177 (N.Y. App. Term 1918).

In action for unpaid purchase price of plant, defendant purchaser, as assignee of 324 claims of employees against plaintiff for bonus, was permitted, in counterclaim, to bulk claims together by listing employees and specifying amounts claimed. Carillon Ceramics Corp. v Richmond

Radiator Co., 60 N.Y.S.2d 559, 1946 N.Y. Misc. LEXIS 1896 (N.Y. Sup. Ct.), aff'd, 270 A.D. 833, 61 N.Y.S.2d 605, 1946 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 1946).

Where counterclaim sets forth three separate causes of action, each cause of action must be stated separately and must contain every allegation which is necessary to maintain that cause of action independently. Leisse v Wilbet Realty Corp., 150 N.Y.S.2d 825 (N.Y. App. Term 1956).

111. —Incorporation of defense by reference

A defense pleaded as a separate and distinct defense must be complete in itself and contain all that is necessary to answer the whole cause of action, or that part thereof which it purports to answer. Such defense cannot be aided by resorting to other parts of the answer to which it contains no reference in terms or by necessary implication. Outcault v Bonheur, 120 A.D. 168, 104 N.Y.S. 1099, 1907 N.Y. App. Div. LEXIS 1136 (N.Y. App. Div. 1907).

Separate defenses stating that the defendant “realleges all that he has hereinbefore alleged” incorporate prior affirmative defenses, but not prior denials. Stemmerman v Kelly, 122 A.D. 669, 107 N.Y.S. 379, 1907 N.Y. App. Div. LEXIS 2528 (N.Y. App. Div. 1907), altered, 150 A.D. 735, 135 N.Y.S. 827, 1912 N.Y. App. Div. LEXIS 7205 (N.Y. App. Div. 1912).

In an action on a bond, a defense that said bond was secured by a mortgage which defendant’s grantees paid when due, is good, although there be no allegation as to whom payment was made; where a defendant repeats by specific reference all the allegations of a good defense in four other separate defenses the new matter alleged is sufficient. Wiener v Boehm, 126 A.D. 703, 111 N.Y.S. 126, 1908 N.Y. App. Div. LEXIS 3431 (N.Y. App. Div. 1908).

Allegations in alleged defenses and counterclaims, “Said defendant repeats all the allegations hereinbefore contained,” did not include prior denials, which are not “allegations.” Dry Milk Co. v Dairy Products Co., 171 A.D. 296, 156 N.Y.S. 869, 1916 N.Y. App. Div. LEXIS 9439 (N.Y. App. Div. 1916).

Introduction to separate defenses setting forth that “Defendant realleges the allegations hereinbefore contained as if the same were herein alleged at length and in detail” violated RCP 90. Clinckett v Casseres, 205 A.D. 710, 200 N.Y.S. 178, 1923 N.Y. App. Div. LEXIS 5124 (N.Y. App. Div. 1923).

In action for accounting, for professional services and for other relief, incorporation by reference of first and second causes of action into third cause of action for professional services was improper. Baliba v Michael, 1 A.D.2d 847, 149 N.Y.S.2d 96, 1956 N.Y. App. Div. LEXIS 6188 (N.Y. App. Div. 2d Dep't 1956).

A separate and distinct defense cannot be aided by denials in another part of the answer unless incorporated therein by reference to them. Singer v Abrams, 94 N.Y.S. 7, 47 Misc. 360, 1905 N.Y. Misc. LEXIS 247 (N.Y. App. Term 1905).

While several defenses may be separately stated each defense must be complete in itself and must contain all that is necessary to answer the cause of action alleged in the complaint or that part of it which defendant purports to answer. Royal Bank of New York v Goldschmidt, 101 N.Y.S. 101, 51 Misc. 622, 1906 N.Y. Misc. LEXIS 359 (N.Y. App. Term 1906).

In the statement of separate defenses, each must be complete in itself, either by the restatement of material facts previously stated or by proper reference thereto. Walsh v Lispenard Realty Co., 106 N.Y.S. 570, 55 Misc. 400, 1907 N.Y. Misc. LEXIS 631 (N.Y. Sup. Ct. 1907).

Where, in the statement of a separate defense, the defendant intended to refer to and reiterate the allegations contained in previous paragraphs of his answer, but by mistake referred to them as paragraphs of “this amended complaint,” the answer was insufficient. Aetna Life Ins. Co. v North Star Mines Co., 106 N.Y.S. 545, 55 Misc. 402, 1907 N.Y. Misc. LEXIS 632 (N.Y. Sup. Ct. 1907).

A defense which referred to a new agreement as “heretofore described” was an insufficient incorporation by reference under RCP 90. Each defense had to be sufficient in itself. Spirit v

Black Diamond Furniture Works, 241 N.Y.S. 194, 137 Misc. 398, 1930 N.Y. Misc. LEXIS 1177 (N.Y. City Ct. 1930).

Denial in answer of allegations that contract was made in New Jersey and was enforcible there need not be repeated in separate defenses and such denials may be deemed part of such defenses. Regan v Nelden, 33 N.Y.S.2d 138, 178 Misc. 86, 1942 N.Y. Misc. LEXIS 1336 (N.Y. Sup. Ct. 1942).

While a defendant may set forth in his answer as many defenses or counterclaims as he chooses, each defense or counterclaim must be complete in itself, and allegations contained in another part of the answer, not referred to in the counterclaim, cannot avail to help out the pleading. Boyd v McDonald, 12 N.Y.S. 356, 58 Hun 609, 1890 N.Y. Misc. LEXIS 3586 (N.Y. Sup. Ct. 1890).

The incorporation in an affirmative defense or in a counterclaim of details and allegations contained in other parts of the answer, by the words “repeats all of the denials and allegations hereinbefore stated,” is not permitted by the practice and is bad pleading. Tracy Development Co. v Empire Gas & Electric Co., 190 N.Y.S. 172, 1920 N.Y. Misc. LEXIS 2003 (N.Y. Sup. Ct. 1920).

Each defense or counterclaim is regarded as standing alone. Hamer v McFarlin, 1847 N.Y. LEXIS 166 (N.Y. Sup. Ct. May 1, 1847); Baldwin v United States Tel. Co., 45 N.Y. 744, 45 N.Y. (N.Y.S.) 744, 1871 N.Y. LEXIS 205 (N.Y. 1871); Ayres v Covill, 18 Barb. 260, 1854 N.Y. App. Div. LEXIS 88 (N.Y. Sup. Ct. July 3, 1854); Swift v Kingsley, 24 Barb. 541, 1857 N.Y. App. Div. LEXIS 86 (N.Y. Sup. Ct. June 1, 1857).

Facts common to several defenses once set out may be referred to in subsequent defenses if done intelligibly and distinctly. Ayrault v Chamberlain, 33 Barb. 229, 1860 N.Y. App. Div. LEXIS 179 (N.Y. Sup. Ct. Dec. 3, 1860); Xenia Bank v Lee, 15 Super Ct (2 Bosw) 694; Williams v Richmond, 9 How. Pr. 522, 1854 N.Y. Misc. LEXIS 24 (N.Y. Sup. Ct. Aug. 8, 1854); Sinclair v

Fitch, 3 E.D. Smith 677; Ayres v Covill, 18 Barb. 260, 1854 N.Y. App. Div. LEXIS 88 (N.Y. Sup. Ct. July 3, 1854).

Each defense must be complete in itself without any reference to the others, Spencer v Babcock, 22 Barb 326; Markham v Barnes, 8 NYSR 502; Xenia Bank v Lee, 15 Super Ct (2 Bosw) 694; Loosey v Orser, 17 Super Ct (4 Bosw) 391; Benedict v Seymour, 6 How Pr 298; unless it refers to and adopts them. Hammond v Earle, 58 How. Pr. 426, 1880 N.Y. Misc. LEXIS 142 (N.Y. Sup. Ct. 1880).

112. Motions and objections, generally

Complaint not complying with provisions of RCP 90 as to separate statement and numbering of causes of action was open to motion. Bass v Comstock, 38 N.Y. 21, 38 N.Y. (N.Y.S.) 21, 1868 N.Y. LEXIS 40 (N.Y. 1868); Freer v Denton, 61 N.Y. 492, 61 N.Y. (N.Y.S.) 492, 1875 N.Y. LEXIS 431 (N.Y. 1875); Sherlock v Manwaren, 208 A.D. 538, 203 N.Y.S. 709, 1924 N.Y. App. Div. LEXIS 5084 (N.Y. App. Div. 1924); ; Gunn v Fellows, 41 Hun 257, 4 N.Y. St. 155 (N.Y.); Griffith v Friendly, 62 N.Y.S. 391, 30 Misc. 393, 1900 N.Y. Misc. LEXIS 60 (N.Y. Sup. Ct.), aff'd, 47 A.D. 635, 62 N.Y.S. 1138 (N.Y. App. Div. 1900).

Where the complaint states two grounds of action, one of which is good and the other bad, the latter does not render the complaint invalid, but it may be treated as surplusage. Boyle v Brooklyn, 71 N.Y. 1, 71 N.Y. (N.Y.S.) 1, 1877 N.Y. LEXIS 455 (N.Y. 1877).

The granting of such motion does not involve the sufficiency of the allegations of the complaint. Astoria Silk Works v Plymouth Rubber Co., 126 A.D. 18, 110 N.Y.S. 175, 1908 N.Y. App. Div. LEXIS 3281 (N.Y. App. Div. 1908).

Earlier cases stated that an objection that separate actions united in one complaint are not separately stated and numbered is waived unless taken before trial. Gearity v Strasbourger, 133 A.D. 701, 118 N.Y.S. 257, 1909 N.Y. App. Div. LEXIS 2252 (N.Y. App. Div. 1909); Tyson v Joseph H. Bauland Co., 68 A.D. 310, 74 N.Y.S. 59, 1902 N.Y. App. Div. LEXIS 111 (N.Y. App.

Div. 1902); Mulinos v Walkoff, 156 N.Y.S. 1032, 93 Misc. 189, 1916 N.Y. Misc. LEXIS 917 (N.Y. App. Term 1916).

When ordering the plaintiff to state and number his causes of action separately, it is unnecessary to direct him to make his complaint more definite and certain. Brown v Thompson-Starrett Co., 139 A.D. 632, 124 N.Y.S. 396, 1910 N.Y. App. Div. LEXIS 2255 (N.Y. App. Div. 1910).

It was no part of the court's duty, on motion under RCP 90 and RCP 103 (Rule 3024b herein), addressed to a pleading containing a mass of irrelevancies and redundancies, mingled with admissions, denials and defenses so inextricably that it is impossible to separate them and strike out the bad without redrafting the pleading, to attempt to eliminate the parts of the pleading that are not good; the parts so mingled and objected to should have been stricken out entirely. International R. Co. v Jaggard, 204 A.D. 67, 197 N.Y.S. 384, 1922 N.Y. App. Div. LEXIS 8927 (N.Y. App. Div. 1922).

Motion to separately state and number causes of action in a complaint should be made before answer. Brown-Duffy Goatskin Corp. v Henkel, 211 A.D. 342, 207 N.Y.S. 357, 1925 N.Y. App. Div. LEXIS 10627 (N.Y. App. Div. 1925).

The limitation fixed by RCP 105 (Rule 3024(c) herein) did not apply to a motion made under RCP 90 to separately state and number causes of action in a complaint. Brown-Duffy Goatskin Corp. v Henkel, 211 A.D. 342, 207 N.Y.S. 357, 1925 N.Y. App. Div. LEXIS 10627 (N.Y. App. Div. 1925).

Motion for separate stating and numbering may be made by a single defendant where others fail to join, and may be made at any time before answer served. Newton v Livingston County Trust Co., 231 A.D. 355, 247 N.Y.S. 121, 1931 N.Y. App. Div. LEXIS 16056 (N.Y. App. Div. 1931).

No error in order of special term denying motion for separately stating and numbering when made after answer and no special circumstances existed. O'Hara v Derschug, 232 A.D. 31, 248 N.Y.S. 621, 1931 N.Y. App. Div. LEXIS 13722 (N.Y. App. Div. 1931).

Failure of defendants to move to compel plaintiff separately to state and number causes of action did not bar them from moving for a judgment on the pleadings. Melniker v American Title & Guaranty Co., 253 A.D. 570, 3 N.Y.S.2d 198, 1938 N.Y. App. Div. LEXIS 8497 (N.Y. App. Div. 1938).

Motion to require separate causes of action to be separately stated and numbered is timely if made at any time before answer. Altieri v Doral Const. Corp., 128 N.Y.S.2d 452, 205 Misc. 733, 1954 N.Y. Misc. LEXIS 2297 (N.Y. Sup. Ct. 1954).

Under RCP 90 the service of a reply to a counterclaim either before or after a motion to compel separate statement of pleaded causes of action was considered a withdrawal of the motion unless special circumstances were shown. Mordkowitz v Mordkowitz, 13 Misc. 2d 495, 177 N.Y.S.2d 328, 1958 N.Y. Misc. LEXIS 3479 (N.Y. Sup. Ct. 1958).

Argument and briefs of plaintiff, that only single cause of action was stated, required denial of motion to separately state and number. Krause v Fresh Meadow Country Club, Inc., 69 N.Y.S.2d 768, 1946 N.Y. Misc. LEXIS 3415 (N.Y. Sup. Ct. 1946), aff'd, 271 A.D. 1018, 69 N.Y.S.2d 343, 1947 N.Y. App. Div. LEXIS 5669 (N.Y. App. Div. 1947).

Special circumstances may require consideration of motion to compel separate statement and numbering causes of action, though ordinarily such motion should be made before answer. City Bank Farmers Trust Co. v National Cuba Hotel Corp., 133 N.Y.S.2d 8, 1954 N.Y. Misc. LEXIS 2727 (N.Y. Sup. Ct. 1954).

When a complaint contains a statement of the facts necessary to constitute two distinct causes of action, the failure of plaintiff to separately state and number them cannot be urged as a ground for a nonsuit at the trial; if there be any doubt as to which cause of action the plaintiff intends to rely upon, the remedy of the defendant is by a motion to make the complaint more definite and certain. Commercial Bank Keokuk v Pfeiffer, 22 Hun 327 (N.Y.).

Where plaintiff embodies in his complaint two causes of action based upon the same transaction, which may tend to confuse the jury, he may be required to elect before the trial upon which he shall rely. Waller v Lyon, 30 Hun 84 (N.Y. 1883).

An objection that mesne profits are not claimed in a separate count, must be taken before trial. Candee v Burke (1902) 4 NY Week Dig 484.

A motion to set aside complaint is not proper, but should be to make it more definite and certain. Wood v ANTHONY, 9 How. Pr. 78, 1853 N.Y. Misc. LEXIS 168 (N.Y. Sup. Ct. Dec. 1, 1853); Colton v Jones (1868) 30 Super Ct (7 Robt) 164, 649; but see Blanchard v Strait, 8 How. Pr. 83, 1853 N.Y. Misc. LEXIS 107 (N.Y. Sup. Ct. Mar. 1, 1853).

Where a complaint founded upon a single cause of action states in several different counts, the remedy is by motion to compel plaintiff to elect which count shall stand and to strike out the other. Fern v Vanderbilt, 13 Abb Pr 72; Comstock v Hoyt, 1 Month L Bull 43.

Whether the plaintiff should be compelled to elect rests in the discretion of the court. Seymour v Lorillard (1885) 51 Super Ct (19 Jones & S) 399.

The courts will not compel a party to elect between several causes of action properly pleaded, although it appears probable that on the trial but one cause of action will be presented by the pleader. Smith v Douglass, 15 Abb. Pr. 266, 1862 N.Y. Misc. LEXIS 138 (N.Y.C.P. Aug. 1, 1862); Jones v Palmer, 1 Abb. Pr. 422; Thompson v Minford, 11 How. Pr. 273, 1855 N.Y. Misc. LEXIS 197 (N.Y. Sup. Ct. Feb. 1, 1855); Ketcham v Zerega, 1 E.D. Smith 553.

Merely because the amounts claimed are the same and the demand for judgment is for one sum, it will not be inferred that there is but one cause of action. Carney v Bernheimer, 3 Month L Bull 22.

Where a complaint sets out two causes of action on the same claim, plaintiff must elect on which he will go to trial, and amend his complaint accordingly. Gardner v Locke, 2 Civ Proc (Brown) 252; Williams v Gannon, 2 Month L Bull 19.

An objection that the causes of action contained in different counts in the same complaint are one, can be made to appear only upon affidavit, and can be available only upon motion. Stockbridge Iron Co. v Mellen, 5 How. Pr. 439, 1851 N.Y. Misc. LEXIS 34 (N.Y. Sup. Ct. Mar. 1, 1851); Lackey v Vanderbilt, 10 How. Pr. 155, 1854 N.Y. Misc. LEXIS 164 (N.Y. Sup. Ct. Nov. 1, 1854); Dunning v Thomas, 11 How. Pr. 281, 1855 N.Y. Misc. LEXIS 201 (N.Y. Sup. Ct. Mar. 1, 1855); Dickens v New-York Cent. R.R., 13 How. Pr. 228, 1856 N.Y. Misc. LEXIS 63 (N.Y. Sup. Ct. July 1, 1856).

But where it appears from the face of the complaint, that several counts therein are really for the same thing, no affidavit by the defendant is required. Ford v Mattice, 14 How. Pr. 91.

113. —Striking out

Where amended complaint fails to separate and number each cause of action as ordered, it is properly stricken out on defendant's motion. Mongaup Valley Co. v Bethlehem Engineering Export Corp., 264 A.D. 929, 36 N.Y.S.2d 40, 1942 N.Y. App. Div. LEXIS 5405 (N.Y. App. Div. 1942).

Alleged defects were not sufficient to justify an order striking out answers. Sebring v Globe & Rutgers Fire Ins. Co., 230 N.Y.S. 286, 132 Misc. 756, 1928 N.Y. Misc. LEXIS 969 (N.Y. Sup. Ct. 1928).

Complaint in which allegation of fraud, conversion and breach of contract were mingled was stricken, since the court will not be required to do the separating. Roulston v Warner, 234 N.Y.S. 643, 134 Misc. 459, 1929 N.Y. Misc. LEXIS 802 (N.Y. Sup. Ct. 1929).

No motion to strike was necessary when the third sentence of RCP 90 was violated. 276 Spring Street Corp. v Forbes, 235 N.Y.S. 257, 134 Misc. 537, 1929 N.Y. Misc. LEXIS 854 (N.Y. Sup. Ct.), modified, 226 A.D. 354, 235 N.Y.S. 523, 1929 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 1929).

In action against innkeeper for breach of contract to furnish lodging, allegations as to injuries to nerves and to “depression,” which were not recoverable, should be stricken from complaint. Kellogg v Commodore Hotel, Inc., 64 N.Y.S.2d 131, 187 Misc. 319, 1946 N.Y. Misc. LEXIS 2569 (N.Y. Sup. Ct. 1946).

114. —Amended pleading

Redraft of complaint was ordered so that allegations of each cause of action may be clear in intendment, pointed in reference to various defendants, and related to relief requested. Bailey v Aerodynamic Research Corp., 270 A.D. 1006, 62 N.Y.S.2d 883, 1946 N.Y. App. Div. LEXIS 5101 (N.Y. App. Div. 1946).

Consonant with the practice that where no rule of court is applicable the court will make one, in an action against several for personal injury, where the answer of one defendant did not disclose whether he sought relief from any responsibility, or a judgment against a codefendant, or both, the court ruled him to serve an amended answer, setting forth his claims for affirmative relief, as required of a complaint or counterclaim, otherwise his answer in that respect would be stricken. Farrell v Malcom, 236 N.Y.S. 704, 135 Misc. 101, 1929 N.Y. Misc. LEXIS 916 (N.Y. City Ct. 1929).

Third-party complaint, if defective, may be corrected. Van Pelt v New York, 69 N.Y.S.2d 116, 188 Misc. 995, 1947 N.Y. Misc. LEXIS 2194 (N.Y. Sup. Ct. 1947).

Special Term order directing service of amended complaint so as to separately state and number the causes of action was the law of the case until reversed, or settled, and amended complaint which failed to comply with order was dismissed. McHenry v Keith, 21 Misc. 2d 542, 196 N.Y.S.2d 162, 1959 N.Y. Misc. LEXIS 2632 (N.Y. Sup. Ct. 1959).

115. Comnplaints, generally

Where complaint states cause of action against each defendant, it is immune from attack for insufficiency, though it may contain additional allegations inadequate to charge any further cause of action. Rager v McCloskey, 305 N.Y. 75, 111 N.E.2d 214, 305 N.Y. (N.Y.S.) 75, 1953 N.Y. LEXIS 838 (N.Y.), reh'g denied, 305 N.Y. 924, 114 N.E.2d 476, 305 N.Y. (N.Y.S.) 924, 1953 N.Y. LEXIS 1385 (N.Y. 1953).

While a plaintiff, for the purpose of establishing his cause of action, may state as many grounds as he has to maintain it, he is not required to refer to the applicable law. Kent v Erie R. Co., 201 A.D. 293, 194 N.Y.S. 629, 1922 N.Y. App. Div. LEXIS 6306 (N.Y. App. Div. 1922).

Plainness and conciseness is required in the statement of the cause of action. Ringler v Jetter, 206 A.D. 478, 201 N.Y.S. 523, 1923 N.Y. App. Div. LEXIS 7253 (N.Y. App. Div. 1923).

A complaint states a cause of action if, under the allegations, evidence is admissible which will prove a cause of action. Rockefeller v Kellas, 222 A.D. 368, 226 N.Y.S. 325, 1928 N.Y. App. Div. LEXIS 8066 (N.Y. App. Div. 1928).

A cause of action inherently includes and comprehends, in the absence of restrictive language, the right to maintain an action upon the claim or matter, which is also inherently included in it. United States Fidelity & Guaranty Co. v Graham & Norton Co., 228 A.D. 45, 239 N.Y.S. 134, 1930 N.Y. App. Div. LEXIS 12095 (N.Y. App. Div.), rev'd, 254 N.Y. 50, 171 N.E. 903, 254 N.Y. (N.Y.S.) 50, 1930 N.Y. LEXIS 1002 (N.Y. 1930).

No technical or exact language is required; it is enough, if the statement of facts necessary to make out a cause of action can fairly be gathered from the complaint. Isaacs v Washougal Clothing Co., 233 A.D. 568, 253 N.Y.S. 387, 1931 N.Y. App. Div. LEXIS 11366 (N.Y. App. Div. 1931).

Where writing is annexed to and made part of pleading, court must construe it as found, and not according to its legal effect which pleader places upon it. Red Robin Stores, Inc. v Rose, 274 A.D. 462, 84 N.Y.S.2d 685, 1948 N.Y. App. Div. LEXIS 3108 (N.Y. App. Div. 1948).

Although a complaint did not comply with CPA § 255 in covering some 78 typewritten pages abounding in unnecessary repetitions and including many matters that on no conceivable theory could be of assistance in stating a cause of action, the court considered it, indulging in all reasonable intendments in its support. Squier v Houghton, 226 N.Y.S. 162, 131 Misc. 129, 1927 N.Y. Misc. LEXIS 1269 (N.Y. Sup. Ct. 1927).

116. Joinder of causes, generally

The distinction between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Secor v Sturgis, 16 N.Y. 548, 16 N.Y. (N.Y.S.) 548, 1858 N.Y. LEXIS 11 (N.Y. 1858); Staples v Goodrich, 21 Barb. 317, 1856 N.Y. App. Div. LEXIS 9 (N.Y. Sup. Ct. 1856); Mulford v Hodges, 10 Hun 79 (N.Y. 1877).

Under CPA 255 a complaint could have contained a statement of each cause of action which the plaintiff had and this was true notwithstanding that the action had been commenced by the earlier service of a summons without a complaint. This right was not circumscribed or limited by the service of a notice with the summons in case of a default. And where there had been no default, it was as though the notice had not been served. Everitt v Everitt, 4 N.Y.2d 13, 171 N.Y.S.2d 836, 148 N.E.2d 891, 1958 N.Y. LEXIS 1185 (N.Y. 1958).

When the plaintiff has served a complaint containing more than one cause of action and an order has been granted requiring the service of an amended complaint separately stating and numbering the alleged causes of action, the order does not mean that the plaintiff nolens volens must serve a complaint containing two causes of action. The order is complied with if the plaintiff serve an amended complaint setting up but one cause of action, and the defendant will be ordered to accept service thereof. O'Reilly v Skelly, 117 A.D. 559, 102 N.Y.S. 884, 1907 N.Y. App. Div. LEXIS 300 (N.Y. App. Div. 1907).

Each cause of action must be stated separately and shall contain every allegation which is necessary to maintain that cause of action independently. Wright v Larkin, 154 N.Y.S. 961, 91 Misc. 573, 1915 N.Y. Misc. LEXIS 1137 (N.Y. Sup. Ct. 1915).

What are separate causes of action, and when plaintiff will not be required to state and number separately in the complaint causes of action against various parties defendant, see Leary v Melcher, 14 N.Y.S. 689, 60 Hun 578, 1891 N.Y. Misc. LEXIS 2459 (N.Y. Sup. Ct. 1891).

Where third-party complaint alleges certain acts and omissions upon proof of some of which third-party defendant might be primarily liable in damages and upon proof of others of which liability might be secondary and imposed by law without regard to breach of duty, such complaint was sufficient. Streeter v Smucker, 107 N.Y.S.2d 246, 1951 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1951).

Each cause of action stated in complaint should be complete in itself. Lampert v Hollis Music, Inc., 109 N.Y.S.2d 319, 1951 N.Y. Misc. LEXIS 2670 (N.Y. Sup. Ct. 1951).

117. —Consistency

Where there were breaches of several and distinct covenants contained in the same instrument, judgment in an action for a breach of one is a bar to an action for the breach of another committed before the first suit was commenced. Beach v Crain, 2 N.Y. 86, 2 N.Y. (N.Y.S.) 86, 1848 N.Y. LEXIS 77 (N.Y. 1848).

A recovery for a part only of an entire and indivisible demand is a bar to a subsequent suit for the rest. Draper v Stouvenel, 38 N.Y. 219, 38 N.Y. (N.Y.S.) 219, 1868 N.Y. LEXIS 81 (N.Y. 1868); O'Beirne v Lloyd, 43 N.Y. 248, 43 N.Y. (N.Y.S.) 248, 1870 N.Y. LEXIS 118 (N.Y. 1870).

A voluntary compromise and settlement of part of the demand does not necessarily merge the whole demand. The parties may sever the demand and compromise the part sued for, leaving the rest to stand. O'Beirne v Lloyd, 43 N.Y. 248, 43 N.Y. (N.Y.S.) 248, 1870 N.Y. LEXIS 118 (N.Y. 1870).

Successive actions cannot be maintained for the recovery of damages, as they may accrue from time to time, resulting from an injury to the person, the consequence of a single wrongful act; but the injured party may recover in a single action for all damages, present or prospective. Filer v New York C. R. Co., 49 N.Y. 42, 49 N.Y. (N.Y.S.) 42, 1872 N.Y. LEXIS 131 (N.Y. 1872).

The law to prevent vexatious or oppressive litigation, forbids the splitting up of one single or entire cause of action into parts, and the bringing of separate actions for each. There can be but one recovery for an injury from a single wrong, however numerous the items of danger may be, and but one action for a single breach of a contract. Perry v Dickerson, 85 N.Y. 345, 85 N.Y. (N.Y.S.) 345, 1881 N.Y. LEXIS 92 (N.Y. 1881).

Where the complaint charges a joint promise on the part of the defendants and a failure on their part to perform their contract, it states one cause of action against both defendants. Hirsch v New England Navigation Co., 200 N.Y. 263, 93 N.E. 524, 200 N.Y. (N.Y.S.) 263, 1910 N.Y. LEXIS 1441 (N.Y. 1910).

In an action to recover damages for personal injuries claimed to have been caused by the negligence of defendant, the plaintiff may allege in a single cause of action all the facts which he claims contributed to or caused the accident, and plaintiff may not be compelled to separately state and number the facts relied upon to support an action on each ground of liability as a separate and distinct cause of action. Payne v New York, S. & W. R. Co., 201 N.Y. 436, 95 N.E. 19, 201 N.Y. (N.Y.S.) 436, 1911 N.Y. LEXIS 1261 (N.Y. 1911).

Where the plaintiff has a single cause of action based upon the negligence of the defendant and sets out separate acts of negligence, some constituting negligence at common law and others under the Employers' Liability Act he should not be compelled to amend his pleading, separately stating the common-law action and the action under the statute; allegations of negligence not proved at trial may be considered as surplusage. Acardo v New York Contracting & Trucking Co., 116 A.D. 793, 102 N.Y.S. 7, 1907 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 1907).

A complaint which alleges that the defendant, a newspaper, which together with other newspapers had received pictures furnished by plaintiff under an agreement not to publish them before a certain date, made a breach of that promise by prematurely publishing the pictures whereby they were “stale” and the plaintiff lost the benefit of his contracts with other papers, which also asks damages for the injury to the plaintiff’s standing with publishers, does not state two causes of action. The allegations as to plaintiff’s injured reputation go to damages only. Dunn v New York Herald Co., 119 A.D. 477, 104 N.Y.S. 94, 1907 N.Y. App. Div. LEXIS 3968 (N.Y. App. Div. 1907).

In an action for damages alleged to have been sustained by defendant’s negligence, actionable upon common-law grounds as well as under the Employers’ Liability Act (Laws 1920, ch 600), the complaint states two causes of action, which must be separately stated and numbered. Hamnstrown v New York Contracting Co., 122 A.D. 43, 106 N.Y.S. 880, 1907 N.Y. App. Div. LEXIS 2369 (N.Y. App. Div. 1907).

The following are cases of consent: Agreeing that if plaintiff would sue for part only defendant would pay the whole, if judgment went against him for the part. Mills v Garrison, 3 Keyes 40; Giving security to pay a portion, Secor v Sturgis (1858) 16 NY 548; striking out by motion a joint owner plaintiff, Carrington v Crocker (1867) 37 NY 336; confessing a judgment, Cornell v Cook, 7 Cow 310; settling with one owner, Gock v Keneda, 29 Barb. 120, 1859 N.Y. App. Div. LEXIS 112 (N.Y. Sup. Ct. Feb. 14, 1859).

Where on the trial of an action, on the defendant’s objection, a portion of the claim is excluded by the court, the judgment is no bar to a new action for that portion. Millard v Missouri, K. & T. R. Co., 20 Hun 191 (N.Y.), aff'd, 86 N.Y. 441, 86 N.Y. (N.Y.S.) 441, 1881 N.Y. LEXIS 237 (N.Y. 1881).

The contract of an attorney with his client in the prosecution of a suit is entire, and unless by express agreement, he cannot recover for his services until his relation to the action as attorney ceased. Gustine v Stoddard, 23 Hun 99 (N.Y.).

A plaintiff can have only one action for a single cause of damages, and after one recovery in an action for an injurious act, another action cannot be maintained on account of any further consequences of that act. He may recover in the first action all the damages caused by the injurious acts, either past or prospective. Law v McDonald, 25 Hun 190 (N.Y. 1881).

An action to procure equitable relief cannot be maintained, where the relief sought has already been awarded by a judgment in another action between the same parties; but damages occasioned by the violation of an injunction may be recovered by action or in proceedings for contempt, at the election of the party injured. Porous Plaster Co. v Seabury, 43 Hun 611 (N.Y.).

Separate actions cannot be brought for the amount insured by a policy on life and for dividends thereon. New England Mut. Life Ins. Co. v Odell, 2 N.Y.S. 873, 50 Hun 279, 1888 N.Y. Misc. LEXIS 887 (N.Y. App. Term 1888).

Rights of owner to sell and assign a part of an entire debt without the consent of his debtor, so as to vest in the assignee a right to proceed in his own name for the recovery of the portion of the debt transferred. Lauer v Dunn, 5 N.Y.S. 161, 52 Hun 191, 1889 N.Y. Misc. LEXIS 2864 (N.Y. Sup. Ct.), aff'd, 115 N.Y. 405, 22 N.E. 270, 115 N.Y. (N.Y.S.) 405, 1889 N.Y. LEXIS 1219 (N.Y. 1889).

A complaint in an action to set aside an assignment for creditors, which alleges that such assignment is null and void on its face and was made to hinder, etc., creditors, contains but one cause of action, and such statements need not be separately stated and numbered. Pittsfield Nat'l Bank v Tailer, 14 N.Y.S. 557, 60 Hun 130, 1891 N.Y. Misc. LEXIS 2398 (N.Y. App. Term 1891).

An entire and indivisible demand cannot be split and made the basis of two actions. Draper v Stouvenel, 38 N.Y. 219, 38 N.Y. (N.Y.S.) 219, 1868 N.Y. LEXIS 81 (1868); Staples v Goodrich, 21 Barb. 317, 1856 N.Y. App. Div. LEXIS 9. And this is so though vested in two or more. Coster v New York & E. R. Co. 13 Super Ct (6 Duer) 43.

A letter agreeing to become security for rent, requesting that it be shown to the landlord and the papers be sent to the writer for execution, held to be an entire contract. It is not to pay the rent quarterly as it falls due, but to execute an obligation to that effect. One suit and recovery on the contract is a bar to any subsequent suit thereon. Waterbury v Graham, 6 Super Ct (4 Sandf) 215.

118. —Causes as single

A party may bring suit, though he could set up the claim as a counterclaim in an action then pending. Gillespie v Torrance, 25 N.Y. 306, 25 N.Y. (N.Y.S.) 306, 1862 N.Y. LEXIS 137 (N.Y. 1862); Inslee v Hampton, 8 Hun 230 (N.Y.).

If, after a recovery against two jointly, for slanderous words, one of them repeats the wrong, there may be another recovery; and a satisfaction of the former recovery is not a satisfaction of the latter. Woods v Pangburn, 75 N.Y. 495, 75 N.Y. (N.Y.S.) 495, 1878 N.Y. LEXIS 894 (N.Y. 1878).

The holder of several past due promissory notes, against the same parties, may bring separate actions upon each; and a recovery in one, and satisfaction of the judgment, is not a bar to the other actions. The fact that the notes were given upon settlement of one and same demand, does not make each a part of the original demand, so as to compel the bringing of a single action upon all the notes. Nathans v Hope, 77 N.Y. 420, 77 N.Y. (N.Y.S.) 420, 1879 N.Y. LEXIS 792 (N.Y. 1879).

119. —Causes as several

The holder of several past due promissory notes, against the same parties, may bring separate actions upon each; and a recovery in one, and satisfaction of the judgment, is not a bar to the other actions. Nathans v Hope, 77 N.Y. 420, 77 N.Y. (N.Y.S.) 420, 1879 N.Y. LEXIS 792 (N.Y. 1879).

Plaintiff, being the owner of a bond and mortgage, assigned them to C as security for a debt. C brought an action to foreclose the mortgage, claiming only the amount due him, and judgment was obtained therein, adjuding that C had a lien for that amount and directing the enforcement of such a lien by a sale, etc. Plaintiff thereafter paid the amount due C, and then brought this action to foreclose the mortgage. Held that the judgment in the prior action was not a bar; that the rule that where an action is brought for part only of an entire demand, the verdict and judgment are a conclusive bar to a subsequent action, for another part of the demand, did not apply. O'Dougherty v Remington Paper Co., 81 N.Y. 496, 81 N.Y. (N.Y.S.) 496, 1880 N.Y. LEXIS 265 (N.Y. 1880).

The plaintiff brought an action for damages for wrongfully dismissing him from the defendant's employment, before the expiration of the stipulated term. Held, that the judgment therein was not a bar to an action for wages earned before the wrongful dismissal, as the two claims were separate and independent causes of action upon which separate actions were maintainable. Perry v Dickerson, 85 N.Y. 345, 85 N.Y. (N.Y.S.) 345, 1881 N.Y. LEXIS 92 (N.Y. 1881).

A complaint for sums due the plaintiff on a breach of contract of service and for damages caused by the breach sets out two causes of action, which should be separately stated. Carlson v Albert, 117 A.D. 836, 102 N.Y.S. 944, 1907 N.Y. App. Div. LEXIS 358 (N.Y. App. Div. 1907).

If statement of facts in complaint is such that there might be two distinct causes of action stated, and such was the purpose of the complaint, defendant is entitled to have each cause of action separately stated and numbered. Stabilimento Metallurgico Ligure v Joseph, 189 A.D. 173, 178 N.Y.S. 241, 1919 N.Y. App. Div. LEXIS 4621 (N.Y. App. Div. 1919).

Where each of causes of action alleged in complaint would warrant a recovery for unlawfully and wrongfully maintaining a nuisance or for negligence, defendant was entitled to have them separately numbered and stated. Glover v Holbrook, Cabot & Rollins Corp., 189 A.D. 328, 178 N.Y.S. 517, 1919 N.Y. App. Div. LEXIS 4657 (N.Y. App. Div. 1919).

Causes of action for fraud and trespass, assault or false arrest, should be pleaded separately. Cutrone v Kelly, 68 N.Y.S.2d 878, 1947 N.Y. Misc. LEXIS 2173 (N.Y. Sup. Ct. 1947).

Cause of action, intermingling elements of several causes and containing unrelated allegations pursuant to which variety of relief is sought, is fatally confusing. Western Woodworking Co. v Kaskel, 133 N.Y.S.2d 632, 1954 N.Y. Misc. LEXIS 2274 (N.Y. Sup. Ct. 1954).

Creditor's complaint which pleads in one cause of action elements of causes of action to set aside fraudulent conveyance, for breach of contract and for conspiracy to breach it, is insufficient. Western Woodworking Co. v Kaskel, 133 N.Y.S.2d 632, 1954 N.Y. Misc. LEXIS 2274 (N.Y. Sup. Ct. 1954).

And so though they belong to the same family of causes, if their identity is not the same. Staples v Goodrich, 21 Barb. 317, 1856 N.Y. App. Div. LEXIS 9 (N.Y. Sup. Ct. 1856).

Where a decree of a surrogate directed an administratrix to pay plaintiff as a general guardian of infants a sum "for each of said infants as the distributive shares" of each of them, held, on demurrer, that a separate suit might be brought for each share. Haunstein v Kull, 59 How. Pr. 24, 1880 N.Y. Misc. LEXIS 194 (N.Y. Sup. Ct. Feb. 1, 1880).

A separate action may be brought for the money lost in gaming at each sitting. Betts v Iilllman, 15 Abb. Pr. 184, 1862 N.Y. Misc. LEXIS 117 (N.Y.C.P. May 1, 1862).

120. —Allegations in the alternative

Complaint based upon right to recover unpaid profits held to contain two distinct alternative causes of action which should be separately stated and numbered. Heaphy v Eidlitz, 197 A.D. 455, 189 N.Y.S. 431, 1921 N.Y. App. Div. LEXIS 7481 (N.Y. App. Div. 1921).

A cross-complaint for indemnity will not be dismissed on motion because plaintiff may succeed on the theory of active negligence, where it is also possible that he will recover for passive

negligence and so sustain the cross action. Brady v Stanley Weiss & Sons, Inc., 6 A.D.2d 241, 175 N.Y.S.2d 850, 1958 N.Y. App. Div. LEXIS 5104 (N.Y. App. Div. 4th Dep't 1958).

Where a complaint is based on alternative theories of negligence, one of which is without merit, it is well settled that the complaint must be dismissed as insufficient. Pilinko v Merlau, 7 A.D.2d 617, 179 N.Y.S.2d 136, 1958 N.Y. App. Div. LEXIS 4588 (N.Y. App. Div. 4th Dep't 1958).

A complaint alleging two alternative theories on which to hold defendant liable must be dismissed unless both theories are sufficient in law. Carroll v Doolittle, 21 Misc. 2d 203, 191 N.Y.S.2d 398, 1959 N.Y. Misc. LEXIS 2864 (N.Y. Sup. Ct. 1959).

A complaint contained two counts—one for goods sold and delivered at the agreed price of $239.36 and the other for goods of the value of $210.74, delivered on the order of the defendant. Judgment was rendered for the latter amount. Held, that there was no unnecessary repetition. Schuyler v Peck, 8 N.Y.S. 849, 1890 N.Y. Misc. LEXIS 1811 (N.Y. City Ct. 1890).

121. —Reference to other counts

As to injury by one animal to another. See Van Leuven v Lyke, 1 N.Y. 515, 1 N.Y. (N.Y.S.) 515, 1848 N.Y. LEXIS 48 (N.Y. 1848).

Incorporation of allegations from one paragraph of a pleading into another should be by specific reference; lack of a necessary allegation that a certain conveyance was without consideration, was not cured by a subsequent allegation that the party similarly diverted other assets without adequate consideration. Heller v Rose, 5 A.D.2d 831, 170 N.Y.S.2d 609, 1958 N.Y. App. Div. LEXIS 7060 (N.Y. App. Div. 2d Dep't 1958).

Where, under a complaint alleging several causes of action, the second and each succeeding alleged cause of action do not repeat or refer to essential facts set out in the first cause of action, the complaint upon its face shows that no separate or independent cause of action has been properly set forth, as required by the second subdivision of this section, and, therefore, as

to those causes of action does not state facts sufficient to constitute a cause of action. People v Koster, 97 N.Y.S. 829, 50 Misc. 46, 1906 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct. 1906).

Although reference in the statement of a separate cause of action to allegations in the previous statement of another cause of action in the same complaint may suffice to incorporate such allegations in the statement which refers to them, yet where, in the latter, a certain other allegation in a later part of the complaint is necessary for a full statement of a cause of action and no reference to that allegation is made, the statement must be deemed incomplete. Marrietta v Cleveland, C., C. & S. L. R. Co., 100 N.Y.S. 1027, 52 Misc. 16, 1906 N.Y. Misc. LEXIS 403 (N.Y. Sup. Ct. 1906), aff'd, 123 A.D. 911, 108 N.Y.S. 1140, 1908 N.Y. App. Div. LEXIS 214 (N.Y. App. Div. 1908).

Where complaint in tort against Communist Party, its official and newspaper, alleged that Party has its principal office in New York to guide its communizing conspiracy and that defendant newspaper and its personnel were under Party's iron discipline, such allegations are not scandalous but sufficient against contention that plaintiff failed to allege that claimed tortious act was authorized or ratified by members of unincorporated association, as considerations upon nature of Party are sufficient to supply requirement of knowledge and consent. Crouch v Publishers New Press, Inc., 137 N.Y.S.2d 867, 207 Misc. 253, 1955 N.Y. Misc. LEXIS 2581 (N.Y. Sup. Ct. 1955).

A second cause of action is clearly insufficient where it merely incorporates by reference paragraphs comprising a prior cause of action and the only additional allegation is a conclusory statement that by reason of the foregoing the defendant has wrongfully deprived the plaintiff of its rightful commissions and has wrongfully interfered with a specified contract and wrongfully prevented the plaintiff from acting as broker thereunder. Malcolm E. Smith, Inc. v Zabriskie, 84 N.Y.S.2d 362, 1948 N.Y. Misc. LEXIS 3579 (N.Y. Sup. Ct. 1948).

122. —Separate counts on one cause of action

A complaint, though stating matters which would in part support an action for breach of contract as well as for fraud and deceit, is not bad where no attempt is made to separately state two causes of action, and the action is apparently one for fraud and deceit. Fay v Bronson, 134 A.D. 972, 119 N.Y.S. 423, 1909 N.Y. App. Div. LEXIS 3654 (N.Y. App. Div. 1909).

Where plaintiff may recover on several distinct grounds on a single cause of action, it is proper to allege under different counts each ground of liability, and he cannot be compelled to elect. Anness v Seaboard Trading Co., 230 A.D. 69, 243 N.Y.S. 27, 1930 N.Y. App. Div. LEXIS 8547 (N.Y. App. Div. 1930).

The plaintiff may set out in separate counts the same cause of action. Reilly v Steinhardt, 111 N.Y.S. 472, 58 Misc. 471, 1908 N.Y. Misc. LEXIS 377 (N.Y. Sup. Ct.), aff'd, 126 A.D. 903, 110 N.Y.S. 1143, 1908 N.Y. App. Div. LEXIS 3476 (N.Y. App. Div. 1908).

In complaint in stockholder’s derivative action for waste where it appears that only one right and one duty were breached, although by a number of acts of same or varied character, it is improper to allege a separate cause of action for each act, as in the case of alleging a cause of action for each category of waste complained of. Tomasello v Trump, 29 Misc. 2d 713, 211 N.Y.S.2d 944, 1961 N.Y. Misc. LEXIS 3462 (N.Y. Sup. Ct. 1961).

A complaint contained two counts, one for goods sold and delivered at the agreed price of $239.36, and the other for goods of the value of $210.74, delivered on the order of defendant. Judgment was rendered for the latter count. Held, that there was no unnecessary repetition, within the meaning of CPA § 255. Schuyler v Peck, 8 N.Y.S. 849, 1890 N.Y. Misc. LEXIS 1811 (N.Y. City Ct. 1890).

Where it can be seen that the statements in the complaint of each of several causes of action arising out of one transaction are probably modified to prevent failure of justice in consequence of variance between the pleading and the proof, such statement, if plain and concise is not “unnecessary repetition.” Blank v Hartshorn, 37 Hun 101 (N.Y.).

When a complaint alleges that the “defendant is indebted to this plaintiff upon contract” and then states the particulars of such indebtedness. Tracy v Tracy, 12 N.Y.S. 665, 59 Hun 1, 1891 N.Y. Misc. LEXIS 829 (N.Y. Sup. Ct. 1891).

When a plaintiff has two or more distinct reasons for obtaining the relief he asks, or when there is some uncertainty as to the grounds of recovery, the complaint may set forth a single claim in several distinct counts or statements, and an election should not be compelled. Velie v Newark City Ins. Co., 65 How. Pr. 1, 1883 N.Y. Misc. LEXIS 85 (N.Y. Sup. Ct. Feb. 1, 1883).

123. —Waiver of objection

Actions for false imprisonment and malicious prosecution arising out of the same transaction are not necessarily inconsistent and they may be joined in one complaint; but, being separate causes of action, they should be separately stated and numbered; the objection that such actions, united in one complaint, are not separately stated and numbered, is waived unless taken before trial. Gearity v Strasbourger, 133 A.D. 701, 118 N.Y.S. 257, 1909 N.Y. App. Div. LEXIS 2252 (N.Y. App. Div. 1909).

Any error in stating two causes of action, false arrest and malicious prosecution, in same complaint without separating them, was waived by pleading general denial without objecting to form of pleading. Vallon v Ramage, 93 N.Y.S.2d 56, 196 Misc. 740, 1949 N.Y. Misc. LEXIS 2932 (N.Y. Sup. Ct. 1949).

124. Curing defects: improper separation of causes

Where a complaint states or appears to state several causes of action, and they are not separately stated or numbered, a motion will be granted to make the complaint more definite and certain unless the plaintiff’s attorney is willing to so amend the complaint that it shall state but a single cause of action. Blake v Barnes, 9 N.Y.S. 933, 56 Hun 640, 1890 N.Y. Misc. LEXIS 444 (N.Y. Sup. Ct. 1890).

Trial court may compel plaintiff to elect between different statements of same claim in complaint. This power discretionary but reviewable. Taylor v Arnoux, 13 N.Y. St. 148.

Where in an action for work, labor and services, the complaint alleged that the "services were reasonably worth the sum of one thousand dollars, which defendant promised and agreed to pay." Held, on a motion to make the complaint more definite and certain, that the complaint sets out two causes of action for the same claim, and that the plaintiff must elect on which he will go to trial, and amend his complaint accordingly. Gardner v Locke.

125. Pleading separate defenses or counterclaims, generally

Where the complaint in an equitable action states several transactions or transfers of property following a general allegation of a conspiracy to defraud and procure the title to the property by means of certain written instruments, all grouped and connected together so as to constitute but one cause of action or omnibus bill, the defendant may plead facts that constitute a defense to any one of the causes of action or a partial defense to the whole complaint. Coyle v Ward, 167 N.Y. 240, 60 N.E. 596, 167 N.Y. (N.Y.S.) 240, 1901 N.Y. LEXIS 1063 (N.Y. 1901).

Provisions of CPA § 262 and §§ 261 (§§ 3011, 3018(a) herein) 339 (now Civ Rights Law 78) were intended to govern when a pleading was served, and had no application upon assessment of damages, taken upon default of an answer, except as provided in CPA § 339 (now Civ Rights Law 78). McClelland v Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, 252 N.Y. (N.Y.S.) 347, 1930 N.Y. LEXIS 631 (N.Y. 1930).

Under CPA §§ 261 (§§ 3011, 3018(a) herein), 262, and RCP 90 an answer should have been so drafted as to disclose readily to the court what the issues were. It was unnecessary to admit formally anything in the complaint; as to such matters denials only were provided for. Following denials, the answer could have next contained a statement of new matter constituting a defense or counterclaim, and it could have set forth as many defenses or counterclaims or both as defendant had; but each should have been separately stated, numbered and divided into paragraphs, numbered consecutively, each as nearly as could have been stating a separate

allegation. These provisions were mandatory. International R. Co. v Jaggard, 204 A.D. 67, 197 N.Y.S. 384, 1922 N.Y. App. Div. LEXIS 8927 (N.Y. App. Div. 1922).

In action to recover from third party, whose negligence caused death of assured's employee, special payments directed to be made by state insurance commissioners into special funds for vocational rehabilitation and reopened cases, such third party may avail itself of all defenses which it could have asserted in prior wrongful death action against it, and it may test validity of awards to special funds against insurance carrier by any defense which carrier could have interposed, as it was not party to such proceeding. Commissioners of State Ins. Fund v Consolidated Edison Co., 2 Misc. 2d 410, 151 N.Y.S.2d 215, 1956 N.Y. Misc. LEXIS 2204 (N.Y. App. Term 1956).

Habeas corpus return is in legal effect answer to allegations of relator's petition, and is intended to operate as pleading within this section, and should set forth his defenses or counterclaims, if any, pursuant to this section. People ex rel. Bernard v Ashworth, 43 N.Y.S.2d 366, 1943 N.Y. Misc. LEXIS 2211 (N.Y. Sup. Ct. 1943).

126. —Relating defense or counterclaim to complaint

New matter alleged in an answer will be treated as a defense of all the causes of action in the complaint, unless it refers to a single cause of action. Price v Derbyshire Coffee Co., 128 A.D. 472, 112 N.Y.S. 830, 1908 N.Y. App. Div. LEXIS 507 (N.Y. App. Div. 1st Dep't 1908).

A separate defense to one of two causes of action must distinctly refer to the cause of action which it is intended to answer as required. Browning, King & Co. v Terwilliger, 144 A.D. 516, 129 N.Y.S. 431, 1911 N.Y. App. Div. LEXIS 4182 (N.Y. App. Div. 1911).

Where one count of complaint was admitted by defendants, court treated counterclaim as directed to other counts, though not specified in the counterclaim. A. D. Kneuper Specialty Co. v Kneuper, 171 A.D. 555, 157 N.Y.S. 395, 1916 N.Y. App. Div. LEXIS 10343 (N.Y. App. Div. 1916).

Where statement is not alleged as a defense to either cause of action separately but as a defense to the complaint, its sufficiency must be judged as a defense to both causes of action alleged. Meyer v Central R. Co., 185 A.D. 812, 174 N.Y.S. 93, 1919 N.Y. App. Div. LEXIS 5802 (N.Y. App. Div. 1919).

Where the complaint alleges only part of the facts, the defendant may qualify a denial or an admission in the answer by affirmative matter which states from its standpoint the facts in their entirety. Montval v Munson S. S. Line, 261 N.Y.S. 177, 146 Misc. 334, 1932 N.Y. Misc. LEXIS 1685 (N.Y. City Ct. 1932).

A counterclaim is defective which seeks to incorporate by a general reference allegations contained in the complaint which are essential to the defendant's cause of action, but which are not sufficiently identified. Libman-Spanjer Corp. v Royal Hall, Inc., 263 N.Y.S. 98, 146 Misc. 348, 1932 N.Y. Misc. LEXIS 1808 (N.Y. Sup. Ct. 1932).

A defense distinctly refers to a cause of action in the complaint when its allegations and denials can but refer to one particular cause of action set out therein. Crasto v White, 5 N.Y.S. 718, 52 Hun 473, 1889 N.Y. Misc. LEXIS 2591 (N.Y. App. Term 1889).

127. —Combining defense and counterclaim

Defense and counterclaim may be combined where it is claimed that the same facts constitute both. D. H. Hayden Co. v Mitchell-Tappen Co., 247 N.Y.S. 537, 139 Misc. 480, 1931 N.Y. Misc. LEXIS 1053 (N.Y. Sup. Ct. 1931).

In action on series of notes, answer alleging usury "as separate defense and as counterclaim," was construed to allege only defense. Schussler v Richards, 61 N.Y.S.2d 800, 186 Misc. 963, 1946 N.Y. Misc. LEXIS 2150 (N.Y. Sup. Ct. 1946).

If defense and counterclaim are combined in answer, facts must constitute both defense and counterclaim to be properly pleaded as both. Capital Auto Stores, Inc. v Bradley, 2 Misc. 2d 413, 152 N.Y.S.2d 567, 1956 N.Y. Misc. LEXIS 1819 (N.Y. County Ct. 1956).

Defenses and counterclaims may be combined where the facts constitute both. Mark v Prentice, 19 Misc. 2d 907, 193 N.Y.S.2d 891, 1959 N.Y. Misc. LEXIS 2844 (N.Y. Sup. Ct. 1959).

Plaintiff is entitled to have the defendant set forth separately the facts claimed to constitute a defense and facts claimed to constitute a counterclaim, even though defendant may claim that the same facts constitute both. Walker v James J. Matchett Co., 167 N.Y.S. 600 (N.Y. Sup. Ct. 1917).

Where new matter may be either counterclaim or defense, it will be treated as defense unless it is characterized as counterclaim. Zacher v Bogie, 84 N.Y.S.2d 404, 1948 N.Y. Misc. LEXIS 3589 (N.Y. Sup. Ct. 1948).

Defense and counterclaim may be combined where facts constitute complete defense and also complete counterclaim. Sheppard v Ridgewood Grove, Inc., 126 N.Y.S.2d 761, 1953 N.Y. Misc. LEXIS 2491 (N.Y. Sup. Ct. 1953).

128. —Equitable defenses or counterclaims

Equitable defenses under this section include all matters which formerly would have authorized an application to a court of chancery for relief against a legal liability, but which at law could not have been pleaded in bar. Susquehanna S.S. Co. v A. O. Andersen & Co., 239 N.Y. 285, 146 N.E. 381, 239 N.Y. (N.Y.S.) 285, 1925 N.Y. LEXIS 966 (N.Y. 1925).

In a suit on a contract facts establishing the need of reformation of the contract, though not stated as a counterclaim, make out an equitable defense under the present section. Susquehanna S.S. Co. v A. O. Andersen & Co., 239 N.Y. 285, 146 N.E. 381, 239 N.Y. (N.Y.S.) 285, 1925 N.Y. LEXIS 966 (N.Y. 1925).

In an action at law based on a contract the defendant may set up in his answer an equitable counterclaim asking a refusal or cancellation of the contract. Madison v Benedict, 73 A.D. 112, 76 N.Y.S. 402, 1902 N.Y. App. Div. LEXIS 1516 (N.Y. App. Div. 1902).

An equitable defense does not change a legal action into one in equity. New York & Brooklyn Brewing Co. v Angelo, 144 A.D. 655, 129 N.Y.S. 713, 1911 N.Y. App. Div. LEXIS 4211 (N.Y. App. Div.), reh'g denied, 145 A.D. 928, 126 N.Y.S. 393, 1911 N.Y. App. Div. LEXIS 5174 (N.Y. App. Div. 2d Dep't 1911).

The mere fact that the same facts upon which a plaintiff founds a complaint in equity could be pleaded by him as a counterclaim in an action at law previously instituted against him, does not necessitate his taking that course, and does not authorize a dismissal of the complaint on the ground that he has an adequate remedy at law. Robinson v Whitaker, 205 A.D. 286, 199 N.Y.S. 680, 1923 N.Y. App. Div. LEXIS 5005 (N.Y. App. Div. 1923).

An equitable cause of action may be interposed as a counterclaim in an action at law. New York Trust Co. v American Realty Co., 215 A.D. 416, 213 N.Y.S. 569, 1926 N.Y. App. Div. LEXIS 10981 (N.Y. App. Div.), aff'd, 244 N.Y. 209, 155 N.E. 102, 244 N.Y. (N.Y.S.) 209, 1926 N.Y. LEXIS 641 (N.Y. 1926).

A defendant may set up an equitable defense in his answer although equitable relief is not demanded and the court is without jurisdiction to grant affirmative equitable relief. Homestead Bank v Wood, 20 N.Y.S. 640, 1 Misc. 145, 1892 N.Y. Misc. LEXIS 44 (N.Y.C.P. 1892).

“Equitable defense” means a defense which the court of equity would recognize or a defense founded upon some distinct ground of equitable jurisdiction. New York v Holzderber, 90 N.Y.S. 63, 44 Misc. 509, 1904 N.Y. Misc. LEXIS 359 (N.Y. Sup. Ct. 1904).

In an action for a deficiency upon the foreclosure of a chattel mortgage of saloon fixtures, the defense that defendant assumed the apparent relation of mortgagor and conducted the saloon solely for the benefit of plaintiff and that it was understood the writing was to have no efficacy as a contract, is not of an equitable nature. H. Koehler & Co. v Duggan, 96 N.Y.S. 1025, 49 Misc. 100, 1905 N.Y. Misc. LEXIS 553 (N.Y. App. Term 1905).

An equitable defense may be pleaded in ejectment, but if affirmative relief is sought it must be set up as a counterclaim and not merely as a defense. Newborn v Peart, 200 N.Y.S. 890, 121

Misc. 221, 1923 N.Y. Misc. LEXIS 1170 (N.Y. Sup. Ct. 1923), rev'd, 219 A.D. 249, 219 N.Y.S. 146, 1927 N.Y. App. Div. LEXIS 10889 (N.Y. App. Div. 1927).

Equitable defenses may be asserted to a suit at law and the action may be defeated by establishing facts entitling the party to a decree in equity. Jacoby v Duncan, 247 N.Y.S. 318, 138 Misc. 777, 1931 N.Y. Misc. LEXIS 1831 (N.Y. Sup. Ct. 1931).

Any counterclaim which defendant may have had could have been interposed, subject only to limitations of CPA § 267 (§ 3019(c), (d), (e) herein). De Bermingham v De Bermingham, 116 N.Y.S.2d 697, 203 Misc. 529, 1952 N.Y. Misc. LEXIS 1939 (N.Y. Sup. Ct. 1952).

Where plaintiff in ejectment proceedings is made defendant in an equitable action brought by the ejectment defendant wherein the relief sought includes a prayer that the defendant in equity be decreed to hold the property in suit as trustee for the plaintiff in equity, a motion for the continuance of an injunction restraining prosecution of the ejectment proceedings pending determination of the equitable action will be denied, since under this section the ejectment defendant could set up his equitable cause of action as a defense in the ejectment proceedings, although he was not required to do so, and although if he so elected, the nature of his defense would require a determination of its merits independently of and in advance of any determination of the legal questions raised in the ejectment suit. Schenectady Holding Co. v Ashton, 197 N.Y.S. 476, 1922 N.Y. Misc. LEXIS 1714 (N.Y. Sup. Ct. 1922), modified, 204 A.D. 348, 197 N.Y.S. 737, 1923 N.Y. App. Div. LEXIS 9468 (N.Y. App. Div. 1923).

An assignee for benefit of creditors sued for the price of goods sold may plead as an equitable defense that he has made accommodation paper for the benefit of the assignor on release upon his promise to hold him harmless, and that the assignor being insolvent and the paper unpaid judgment had been recovered against defendant therein. Mack v Kitsell, 20 Abb NC 293.

129. —Consistency of defenses or counterclaims

A defense of defect of parties may be united with one on the merits. Sweet v Tuttle, 14 N.Y. 465, 14 N.Y. (N.Y.S.) 465, 1856 N.Y. LEXIS 40 (N.Y. 1856); Gardner v Clark, 21 N.Y. 399, 21 N.Y. (N.Y.S.) 399, 1860 N.Y. LEXIS 108 (N.Y. 1860).

Defense of a former suit pending could be united with a defense on the merits. Gardner v Clark, 21 N.Y. 399, 21 N.Y. (N.Y.S.) 399, 1860 N.Y. LEXIS 108 (N.Y. 1860).

A defendant may set up inconsistent defenses or counterclaims and rely on those he is able to establish. Bruce v Burr, 67 N.Y. 237, 67 N.Y. (N.Y.S.) 237, 1876 N.Y. LEXIS 377 (N.Y. 1876); Goodwin v Wertheimer, 99 N.Y. 149, 1 N.E. 404, 99 N.Y. (N.Y.S.) 149, 1885 N.Y. LEXIS 766 (N.Y. 1885); Wendling v Pierce, 27 A.D. 517, 50 N.Y.S. 509, 1898 N.Y. App. Div. LEXIS 665 (N.Y. App. Div. 1898); Conklin v John H. Woodbury Dermatological Inst., 37 A.D. 610, 56 N.Y.S. 258, 1899 N.Y. App. Div. LEXIS 314 (N.Y. App. Div. 1899); Putnam v Interior Metal Mfg. Co., 169 A.D. 248, 154 N.Y.S. 464, 1915 N.Y. App. Div. LEXIS 9014 (N.Y. App. Div. 1915); Carter, Macy & Co. v Matthews, 220 A.D. 679, 222 N.Y.S. 472, 1927 N.Y. App. Div. LEXIS 9392 (N.Y. App. Div. 1927), aff'd, 247 N.Y. 532, 161 N.E. 171, 247 N.Y. (N.Y.S.) 532, 1928 N.Y. LEXIS 1120 (N.Y. 1928); John E. Rosasco Creameries v Cohen, 249 A.D. 228, 292 N.Y.S. 1, 1936 N.Y. App. Div. LEXIS 5077 (N.Y. App. Div. 1936), rev'd, 276 N.Y. 274, 11 N.E.2d 908, 276 N.Y. (N.Y.S.) 274, 1937 N.Y. LEXIS 1061 (N.Y. 1937); Ross v Duffy, 12 N.Y. St. 584; MacColl v American Union Life Ins. Co., 35 N.Y.S. 364, 89 Hun 490 (1895); Gilbert v Burnstine, 237 N.Y.S. 171, 135 Misc. 305, 1929 N.Y. Misc. LEXIS 925 (N.Y. Sup. Ct. 1929), aff'd, 229 A.D. 170, 241 N.Y.S. 54, 1930 N.Y. App. Div. LEXIS 10330 (N.Y. App. Div. 1930); Besler v Eldorado Cleaners, 261 N.Y.S. 673, 146 Misc. 579, 1932 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1932); Spaulding v Hotchkiss, 62 N.Y.S.2d 151, 1946 N.Y. Misc. LEXIS 2201 (N.Y. Sup. Ct. 1946).

Usury and tender—the last may be stricken out. Breunich v Weselman, 100 N.Y. 609, 2 N.E. 385, 100 N.Y. (N.Y.S.) 609, 1885 N.Y. LEXIS 1024 (N.Y. 1885).

In view of CPA § 262 and § 261 (§§ 3011, 3018(a) herein) a defendant was not precluded from setting up the defense that the court was without jurisdiction of the action because the defendant was a department of a foreign government, by reason of the fact that in the same answer it

undertook to plead to the merits of the action. De Simone v Transportes Maritimos De Estado, 199 A.D. 602, 191 N.Y.S. 864, 1922 N.Y. App. Div. LEXIS 8058 (N.Y. App. Div.), reh'g denied, 200 A.D. 82, 192 N.Y.S. 815, 1922 N.Y. App. Div. LEXIS 8127 (N.Y. App. Div. 1922).

A defendant is entitled to deny the passing of title in goods bought by him as a matter of law, and without prejudice to that denial to claim the proceeds of a resale by the plaintiff in the event the title is found to have passed to the defendant. Carter, Macy & Co. v Matthews, 220 A.D. 679, 222 N.Y.S. 472, 1927 N.Y. App. Div. LEXIS 9392 (N.Y. App. Div. 1927), aff'd, 247 N.Y. 532, 161 N.E. 171, 247 N.Y. (N.Y.S.) 532, 1928 N.Y. LEXIS 1120 (N.Y. 1928).

In an action to foreclose a mortgage given by defendant to plaintiff, counterclaims for money due and unpaid for professional services alleged to have been rendered to plaintiff a considerable time before the delivery of the bond and mortgage were properly stricken out, without prejudice to the bringing of another action. Smyth v McDonogh, 260 A.D. 889, 22 N.Y.S.2d 631, 1940 N.Y. App. Div. LEXIS 5238 (N.Y. App. Div. 1940).

But every defense stands separate and independent. Manhattan Brick & Terra-Cotta Co. v Clark, 69 N.Y.S. 649, 34 Misc. 819, 1901 N.Y. Misc. LEXIS 1026 (N.Y. City Ct. 1901).

General denial and allegation that the contract sued on was procured by plaintiff’s fraudulent representations. Marx v Gross, 9 N.Y.S. 719, 58 N.Y. Super. Ct. 221, 1890 N.Y. Misc. LEXIS 345 (N.Y. Super. Ct. 1890), app. dismissed, 125 N.Y. 747, 27 N.E. 407, 125 N.Y. (N.Y.S.) 747, 1891 N.Y. LEXIS 1576 (N.Y. 1891).

A denial by the defendants in an action of foreclosure that they have or claim an interest in the premises which accrued subsequent to the lien of the plaintiff’s mortgage is not inconsistent with the further defense of payment, both defenses may stand. Moody v Belden, 15 N.Y.S. 119, 60 Hun 582, 1891 N.Y. Misc. LEXIS 3075 (N.Y. Sup. Ct. 1891).

Inconsistency in challenging first portion of will and then whole will, even if contradictory, does not render contestant’s pleading defective. In re Satterlee's Estate, 111 N.Y.S.2d 280, 1952 N.Y. Misc. LEXIS 2503 (N.Y. Sur. Ct. 1952).

Defendant in libel or slander action may plead an affirmative defense of justification with a general denial of publication, such contentions even if inconsistent, being permissible. Benn v Lucks, 201 N.Y.S.2d 18 (N.Y. Sup. Ct. 1960).

Defense of want of jurisdiction may be set up with other defenses. Hamburger v Baker, 35 Hun 455 (N.Y.).

Defendant may join in his answer a general denial with matter in avoidance and a plea of payment. Woods v Reiss, 29 N.Y.S. 263, 78 Hun 78 (1894).

130. — —Determining consistency

A bill of particulars is not the remedy to determine upon which of two inconsistent defenses, defendant will rely. M. J. Kraus & Co. v Mayer, 150 A.D. 122, 134 N.Y.S. 694, 1912 N.Y. App. Div. LEXIS 7067 (N.Y. App. Div. 1912).

Inconsistency was indulgence which law allowed to defendant, and he may have moved for new trial under CPA § 549 (§ 4404(a), (b) herein) and for dismissal of complaint on trial and yet he may have rested on earlier motion to dismiss. O'Brien v Lehigh V. R. Co., 27 N.Y.S.2d 540, 176 Misc. 404, 1941 N.Y. Misc. LEXIS 1764 (N.Y. Sup. Ct. 1941).

XIV. Counterclaims

131. Counterclaims; test of propriety

CPA § 266 (§ 3019(a) herein) did not bar the court in the interests of justice from striking out counterclaim whenever it deemed it proper to do so. Ritter v Mountain Camp Holding Corp., 252 A.D. 602, 299 N.Y.S. 876, 1937 N.Y. App. Div. LEXIS 5736 (N.Y. App. Div. 1937).

Sole test is whether counterclaim can be conveniently and justly determined in connection with plaintiff’s cause of action. Panzer v Panzer, 274 A.D. 940, 83 N.Y.S.2d 525, 1948 N.Y. App. Div. LEXIS 4178 (N.Y. App. Div. 2d Dep't 1948); Ippisch v Moricz-Smith, 1 Misc. 2d 120, 144

N.Y.S.2d 505, 1955 N.Y. Misc. LEXIS 2328 (N.Y. Sup. Ct. 1955), modified, 1 A.D.2d 968, 150 N.Y.S.2d 419, 1956 N.Y. App. Div. LEXIS 5765 (N.Y. App. Div. 2d Dep't 1956); Moser v Fieland, 5 Misc. 2d 937, 158 N.Y.S.2d 1020, 1956 N.Y. Misc. LEXIS 1423 (N.Y. App. Term 1956).

132. —Retention of counterclaim or defense

In an action to foreclose a purchase money mortgage covering premises conveyed by the plaintiff to the defendant, the defendant may counterclaim for breach of covenant against incumbrances. Herb v Metropolitan Hospital & Dispensary, 80 A.D. 145, 80 N.Y.S. 552, 12 N.Y. Ann. Cas. 415, 1903 N.Y. App. Div. LEXIS 528 (N.Y. App. Div. 1903).

Where plaintiff moved to strike out certain separate and distinct defenses and to make another more definite and certain, the special term should have considered and decided the motion on the merits; it was discretionary with the court to withhold final decision pending determination of test cases involving similar questions. Rudkowsky v Equitable Life Assurance Soc., 232 A.D. 472, 252 N.Y.S. 111, 1931 N.Y. App. Div. LEXIS 13852 (N.Y. App. Div. 1931).

A wife, in an action against her for divorce, may counterclaim on the inadequacy of a separation agreement allowance as ground for asking alimony; and in any event the agreement does not cover counsel fees and other expenses of matrimonial actions. Smith v Smith, 217 N.Y.S. 3, 127 Misc. 764, 1926 N.Y. Misc. LEXIS 1053 (N.Y. Sup. Ct. 1926).

With repeal of CPA § 1168, counterclaims in matrimonial actions could have been interposed in accord with former CPA § 226. Thompson v Thompson, 85 N.Y.S.2d 75, 194 Misc. 41, 1948 N.Y. Misc. LEXIS 3713 (N.Y. City Ct. 1948).

In action to determine claims to realty under Real Prop L § 504, defendant may counterclaim for money lent. De Bermingham v De Bermingham, 116 N.Y.S.2d 697, 203 Misc. 529, 1952 N.Y. Misc. LEXIS 1939 (N.Y. Sup. Ct. 1952).

Motion to strike out counterclaim in discretion of court need not be made before reply. Jayell Films, Inc. v A. F. E. Corp., 67 N.Y.S.2d 77, 1946 N.Y. Misc. LEXIS 3184 (N.Y. Sup. Ct. 1946).

Where matter in counterclaim is directly connected with continued relationship and prejudice would result to defendant by dismissal, motion to strike was denied. Carlo Erba, S. A., v Carlo Erba, Inc., 72 N.Y.S.2d 693, 1947 N.Y. Misc. LEXIS 2840 (N.Y. Sup. Ct. 1947).

Where plaintiff seeks recovery in amount in excess of amount of defendant's counterclaim, it would prejudice plaintiff to deny him opportunity, in event of ultimate success, to deduct amount which defendant recovers. Lipman v New York Herald Tribune, Inc., 114 N.Y.S.2d 7, 1952 N.Y. Misc. LEXIS 2835 (N.Y. Sup. Ct. 1952).

In action by wife to impress trust on divorced husband's realty, counterclaim by him, attacking validity of foreign divorce obtained by wife, could not be struck out, since it would be necessary to determine whether divorced husband and wife held such realty as tenants in common or as tenants by entirety in case she succeeded in action. Kennedy v Schnell, 136 N.Y.S.2d 912, 1954 N.Y. Misc. LEXIS 3550 (N.Y. Sup. Ct. 1954).

In action for personal injuries, counterclaim for assault and battery held properly interposed and to state cause of action therefor. Halpern v Hindin, 141 N.Y.S.2d 799, 1955 N.Y. Misc. LEXIS 2745 (N.Y. Sup. Ct. 1955).

133. —Striking counterclaim or defense

In actions by owner of a patent against several licensees who contracted to operate under it, for rescission of the contract and accounting, the answers, containing several defenses and counterclaims of defendants, were properly stricken out because presenting no defense or ground for counterclaim. L. Heller & Son, Inc. v Lassner Co., 214 A.D. 315, 212 N.Y.S. 175, 1925 N.Y. App. Div. LEXIS 10507 (N.Y. App. Div. 1925).

Where counterclaim alleges that plaintiff's action is baseless and brought to intimidate defendant's customers and to inflict intentional wrong without justification, impact of complaint and counterclaim might obscure claims of both plaintiff and defendant, and in interests of justice counterclaim was dismissed without prejudice to bringing separate action. Knapp Engraving Co.

v Keystone Photo Engraving Corp., 1 A.D.2d 170, 148 N.Y.S.2d 635, 1956 N.Y. App. Div. LEXIS 6348 (N.Y. App. Div. 1st Dep't 1956).

In action for libel, wherein defendant pleaded three counterclaims charging commission of various torts by plaintiff, and where issues presented in complaint and counterclaims are completely different, plaintiff's substantial rights would be prejudiced and confusion would arise if all issues were tried together, severance of counterclaims was required. Ippisch v Moricz-Smith, 1 A.D.2d 968, 150 N.Y.S.2d 419, 1956 N.Y. App. Div. LEXIS 5765 (N.Y. App. Div. 2d Dep't 1956).

Counterclaims charging abuse of process, libel and slander, and malicious prosecution, all in connection with initiation of instant action by plaintiff, which would impede progress of action, were stricken without prejudice to the bringing of separate action. Stuyvesant Ins. Co. v Matusow, 7 A.D.2d 843, 181 N.Y.S.2d 720, 1959 N.Y. App. Div. LEXIS 10159 (N.Y. App. Div. 1st Dep't 1959).

Counterclaim for conversion was improper, especially where another action is pending between same parties. Bailey v Bailey, 66 N.Y.S.2d 314, 187 Misc. 1072, 1946 N.Y. Misc. LEXIS 3053 (N.Y. County Ct. 1946).

In an action against a defendant in his individual capacity on a claim wholly unconnected with the affairs of a Nebraska corporation, the defendant may not interpose a counterclaim derivative in character in favor of the Nebraska corporation. Brando v Black, 9 Misc. 2d 534, 169 N.Y.S.2d 923, 1957 N.Y. Misc. LEXIS 1902 (N.Y. Sup. Ct. 1957).

Where mere reading of defense indicates that counterclaim was intended, but no prayer for relief in respect thereto was made, it was struck out. Zacher v Bogie, 84 N.Y.S.2d 404, 1948 N.Y. Misc. LEXIS 3589 (N.Y. Sup. Ct. 1948).

134. —Severance or separate trial

Dismissal of counterclaim without prejudice to bringing separate action for cause set forth in counterclaim as not conveniently triable with plaintiff's cause of action, was improper, as court may sever such causes. Panzer v Panzer, 274 A.D. 940, 83 N.Y.S.2d 525, 1948 N.Y. App. Div. LEXIS 4178 (N.Y. App. Div. 2d Dep't 1948).

Where counterclaim required determination of issues already raised between plaintiff and defendant's assignors, and would unduly prejudice plaintiff seeking recovery against defendant's surety, counterclaim was severed. Bata v National Surety Corp., 279 A.D. 726, 108 N.Y.S.2d 737, 1951 N.Y. App. Div. LEXIS 3554 (N.Y. App. Div. 1951).

In action for declaration as to validity of local zoning ordinance, wherein defendant counterclaimed for injunction on ground that plaintiff's quarrying was nuisance, plaintiff's motion for severance was granted. New York Trap Rock Corp. v Clarkstown, 281 A.D. 1046, 122 N.Y.S.2d 624, 1953 N.Y. App. Div. LEXIS 4281 (N.Y. App. Div. 1953).

In action for libel and slander counterclaims charging various torts against plaintiff and others were severed to avoid prejudice and confusion. Ippisch v Moricz-Smith, 1 A.D.2d 968, 150 N.Y.S.2d 419, 1956 N.Y. App. Div. LEXIS 5765 (N.Y. App. Div. 2d Dep't 1956).

In action for libel and slander, where counterclaim of defendant charged the commission of various torts by the plaintiff and others, severance of the counterclaim should have been granted. Ippisch v Moricz-Smith, 1 A.D.2d 968, 150 N.Y.S.2d 419, 1956 N.Y. App. Div. LEXIS 5765 (N.Y. App. Div. 2d Dep't 1956).

In wife's action for separation, husband may counterclaim for divorce and for declaration that he is owner of certain realty, but court has discretion to sever action or order separate trial, or to strike out counterclaim. Matthews v Matthews, 84 N.Y.S.2d 197, 193 Misc. 258, 1948 N.Y. Misc. LEXIS 3546 (N.Y. Sup. Ct. 1948).

In action by husband against wife for partition wherein defendant counterclaimed for annulment, court may sever action and order separate trials. Cecil v Cecil, 102 N.Y.S.2d 874, 198 Misc. 653, 1950 N.Y. Misc. LEXIS 2445 (N.Y. Sup. Ct. 1950).

In partition action wherein counterclaim for money lent is outlawed, court ordered severance of counterclaim so as not to impede prosecution of partition action where answer was struck out as sham. Zaveloff v Zaveloff, 37 N.Y.S.2d 46, 1942 N.Y. Misc. LEXIS 1961 (N.Y. Sup. Ct. 1942).

Court may sever causes and order separate trials, or, if necessary, direct priority of trials. Truman Homes, Inc. v Lane Holding Corp., 88 N.Y.S.2d 403, 1949 N.Y. Misc. LEXIS 2112 (N.Y. Sup. Ct. 1949).

135. Pleading partial defenses; generally

The word defense now applies to partial as well as complete defenses. Bush v Prosser, 11 N.Y. 347, 11 N.Y. (N.Y.S.) 347, 1854 N.Y. LEXIS 78 (N.Y. 1854).

Mitigation and partial defenses must be pleaded. Willover v Hill, 72 N.Y. 36, 72 N.Y. (N.Y.S.) 36, 1878 N.Y. LEXIS 476 (N.Y. 1878).

CPA § 262 did not change the rule that, without pleading, mitigating circumstances may be shown to reduce damages claimed. Separate concurring opinion of McClelland v Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, 252 N.Y. (N.Y.S.) 347, 1930 N.Y. LEXIS 631 (N.Y. 1930).

Matter tending to disprove actual damages or damages claimed to be actual, could have been proved by defendant though not set up in the answer, since such matter was not in mitigation within the meaning of CPA § 262. Fleckenstein v Friedman, 266 N.Y. 19, 193 N.E. 537, 266 N.Y. (N.Y.S.) 19, 1934 N.Y. LEXIS 881 (N.Y. 1934).

The phrases “mitigating circumstances” and “matter tending only to mitigate or reduce damages,” mean the same thing. They mean circumstances that bear “upon a defendant’s liability for punitive or exemplary damages by reducing or softening the moral or social culpability attaching to his act, or upon his liability for actual damages by showing that, though suffered, they had been partially extinguished.” Fleckenstein v Friedman, 266 N.Y. 19, 193 N.E. 537, 266 N.Y. (N.Y.S.) 19, 1934 N.Y. LEXIS 881 (N.Y. 1934).

The defendant could have, under CPA § 262, set out in his answer, as a partial defense and in mitigation of damages, occurrences which took place since the action began and which had a relation to the cause of action alleged, § 262 did not limit the right to interpose such defenses to actions to recover damages for a personal injury or an injury to property, but applied in all cases. Gabay v Doane, 77 A.D. 413, 79 N.Y.S. 312, 1902 N.Y. App. Div. LEXIS 2872 (N.Y. App. Div. 1902).

Partial defenses which plead matters tending to mitigate damages are permissible under this section. Benn v Lucks, 201 N.Y.S.2d 18 (N.Y. Sup. Ct. 1960).

136. —Designation of partial defense as such

The Civil Practice Act requires no label characterizing the purpose of a partial defense. A plain statement of the facts relied upon, pleaded expressly as a partial defense to the entire complaint, or to one or more causes of action therein, is sufficient. So pleaded, the matter may be utilized for any proper purpose. Fleckenstein v Friedman, 266 N.Y. 19, 193 N.E. 537, 266 N.Y. (N.Y.S.) 19, 1934 N.Y. LEXIS 881 (N.Y. 1934).

Matter pleaded in an answer, which is upon its face insufficient as a defense to the cause of action alleged and which, at most, is a partial defense, is bad unless it is expressly stated to have been pleaded as a partial defense. Butler v General Acc. Assurance Corp., 103 A.D. 273, 92 N.Y.S. 1025, 16 N.Y. Ann. Cas. 201, 1905 N.Y. App. Div. LEXIS 1064 (N.Y. App. Div. 1905).

A partial defense must be pleaded as such. Murphy v Eidlitz, 113 A.D. 659, 99 N.Y.S. 950, 1906 N.Y. App. Div. LEXIS 1502 (N.Y. App. Div. 1906).

A partial defense must be alleged to be a partial defense. Ward v Chelsea Exch. Bank, 153 A.D. 638, 138 N.Y.S. 720, 1912 N.Y. App. Div. LEXIS 11199, 1912 N.Y. App. Div. LEXIS 9334 (N.Y. App. Div. 1912).

A partial defense to be valid must be so named. Houston v Coombs, 224 A.D. 396, 231 N.Y.S. 176, 1928 N.Y. App. Div. LEXIS 10019 (N.Y. App. Div. 1928).

Where partial defense in answer was not so designated, it was struck out. Kenny v Terwilliger, 281 A.D. 952, 120 N.Y.S.2d 87, 1953 N.Y. App. Div. LEXIS 3862 (N.Y. App. Div. 1953).

CPA § 262 required that a partial defense had to be expressly stated to be such. Bernascheff v Roeth, 70 N.Y.S. 369, 34 Misc. 588, 1901 N.Y. Misc. LEXIS 995 (N.Y. Sup. Ct. 1901).

Where portions of an answer as pleaded do not set up a complete defense and the pleader omits to state that it is pleaded as a partial defense, an order will be granted requiring it to be made more definite and certain. Simmons v Simmons, 4 N.Y.S. 221, 1888 N.Y. Misc. LEXIS 1104 (N.Y. Sup. Ct. 1888).

Where a partial defense is set up by the answer it is not necessary to characterize the pleading as such; such an answer characterizes itself. Howd v Cole, 26 N.Y.S. 431, 74 Hun 121 (1893).

137. —Pleading partial defense as a complete defense; effect

Matter pleaded as a complete defense which constitutes only a partial defense is bad. Ivy Courts Realty Co. v Morton, 73 A.D. 335, 76 N.Y.S. 687, 1902 N.Y. App. Div. LEXIS 1564 (N.Y. App. Div. 1902); O'Hara v Murray, 144 A.D. 113, 128 N.Y.S. 1009, 1911 N.Y. App. Div. LEXIS 1637 (N.Y. App. Div. 1911); Freeman v United States Fidelity & Guaranty Co., 87 N.Y.S. 493, 43 Misc. 364, 1904 N.Y. Misc. LEXIS 155 (N.Y. App. Term 1904).

A reply which alleges the modification of the contract on which a counterclaim is founded is not a denial thereof, but, at most, a partial defense, and if pleaded as a complete defense, is bad. Pope Mfg. Co. v Rubber Goods Mfg. Co., 110 A.D. 341, 97 N.Y.S. 73, 1905 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 1905).

A separate defense not pleaded as a partial defense, nor stating to which of two causes of action it refers, will be deemed to be intended to be a complete defense to both of the causes of action. Browning, King & Co. v Terwilliger, 144 A.D. 516, 129 N.Y.S. 431, 1911 N.Y. App. Div. LEXIS 4182 (N.Y. App. Div. 1911).

Answer was struck with leave to replead as partial defense so much of allegations of stricken pleading as is appropriate as partial defense; vice in allowing defense as presently pleaded to stand as partial defense is that it is largely conceived and framed as counterclaim which is not allowed. Flegenheimer v Bergl, 283 A.D. 1054, 131 N.Y.S.2d 490, 1954 N.Y. App. Div. LEXIS 6292 (N.Y. App. Div. 1954).

If a defense be not pleaded as a “partial” defense, it is taken to be pleaded as a complete defense. Burkert v Bennett, 71 N.Y.S. 144, 35 Misc. 318, 1901 N.Y. Misc. LEXIS 384 (N.Y. Sup. Ct. 1901).

Allegations not designated as a partial defense must be tested as though pleaded for the purpose of a complete defense and when it is not a complete defense it is bad. Loos v McCormack, 93 N.Y.S. 1088, 46 Misc. 144, 1905 N.Y. Misc. LEXIS 10 (N.Y. Sup. Ct.), aff'd, 107 A.D. 8, 95 N.Y.S. 1141, 1905 N.Y. App. Div. LEXIS 2756 (N.Y. App. Div. 1905).

138. —Repeating defenses as partial defenses

Defenses should not be repeated. Houston v Coombs, 224 A.D. 396, 231 N.Y.S. 176, 1928 N.Y. App. Div. LEXIS 10019 (N.Y. App. Div. 1928).

The same facts may be pleaded both as a complete and a partial defense, if each defense is separately stated and numbered. Zacharias v French, 30 N.Y.S. 945, 10 Misc. 202, 1 N.Y. Ann. Cas. 72, 1894 N.Y. Misc. LEXIS 927 (N.Y.C.P. 1894).

Defendant may reassert matters, pleaded as complete defense, as partial defense and also in mitigation of damages. Dache v Abraham & Straus, Inc., 65 N.Y.S.2d 682, 1946 N.Y. Misc. LEXIS 2907 (N.Y. Sup. Ct.), rev'd, 271 A.D. 895, 67 N.Y.S.2d 128, 1946 N.Y. App. Div. LEXIS 3633 (N.Y. App. Div. 1946).

Defendant may repeat complete defenses as partial defenses in order to obtain partial relief if proof falls short of establishing his right to full relief. Reswick v Owens-Illinois Glass Co., 156 N.Y.S.2d 712 (N.Y. Sup. Ct. 1956).

139. —Partial defenses in defamation actions

Where in an action for libel the defendant in his answer has separately pleaded the same facts as partial defenses in justification and in mitigation of damages, the separate defense in justification is superfluous and may be stricken out. The label to each separate defense may be disregarded. Fleckenstein v Friedman, 266 N.Y. 19, 193 N.E. 537, 266 N.Y. (N.Y.S.) 19, 1934 N.Y. LEXIS 881 (N.Y. 1934).

When one paragraph of a complaint sets out the whole of the article charging the plaintiff with the commission of several acts, and the following paragraph contains an innuendo referring only to some of the charges set forth in the preceding paragraph, such following paragraph is surplusage when the article set out is libelous on its face, and an alleged defense in partial justification of the charges not referred to in the innuendo is good. Nunnally v Press Pub. Co., 110 A.D. 10, 96 N.Y.S. 1042, 1905 N.Y. App. Div. LEXIS 3851 (N.Y. App. Div. 1905).

Qualified privilege is an affirmative defense to be pleaded and proved by defendant and it cannot serve as ground for motion to dismiss complaint. Teichner v Bellan, 7 A.D.2d 247, 181 N.Y.S.2d 842, 1959 N.Y. App. Div. LEXIS 9977 (N.Y. App. Div. 4th Dep't 1959).

The naked allegation of the belief in the truth of a libelous charge, is insufficient to constitute a defense in mitigation of damages to an action for libel. Hearst v Ridder, 129 N.Y.S. 1098, 71 Misc. 18, 1911 N.Y. Misc. LEXIS 157 (N.Y. Sup. Ct.), aff'd, 144 A.D. 896, 129 N.Y.S. 1126, 1911 N.Y. App. Div. LEXIS 4329 (N.Y. App. Div. 1911).

Answer in action for libel sufficiently alleges defense of truth and defense of fair comment in mitigation of damages. Flynn v New York World-Telegram Corp., 268 N.Y.S. 753, 150 Misc. 241, 1934 N.Y. Misc. LEXIS 1048 (N.Y. Sup. Ct. 1934).

In action for slander, while defamatory words provoked by remarks of plaintiff are not absolutely privileged as made by attorney in judicial proceeding, such provocation may form basis of partial

defense. Kraushaar v Lavin, 39 N.Y.S.2d 880, 1943 N.Y. Misc. LEXIS 1591 (N.Y. Sup. Ct. 1943).

140. Instrument for payment of money, generally

The sentence at the close of RCP 94 adopted the conclusion in Conkling v Gandall, 1 Keyes 228. And it seems that RCP 94 relieved a party from setting out an instrument for the payment of money only according to its legal effect, and that the plaintiff had to state his title and such other extrinsic facts necessary to enable him to recover. Rose v Meyer, 1 How Pr NS 274, 7 Civ Proc 219; Bank of Geneva v Gulick, 8 How Pr 51. But it had previously been decided that it was sufficient to give a copy of the instrument and to state that there was a specified sum due thereon from the defendant to the plaintiff. Prindle v Caruthers, 15 N.Y. 425, 15 N.Y. (N.Y.S.) 425, 1857 N.Y. LEXIS 20 (N.Y. 1857).

Unless the issue tendered can be gathered from a reading of the instrument itself, as, for instance, when cause of action is predicated upon an instrument for the payment of money only, the pleader should determine in his own mind the legel effect of the written contract or other document upon which his cause of action is founded and plead its legal effect as he understands it, and as he purposes to maintain it, even though a copy be annexed. Where the instrument is such that ambiguity necessarily exists as to its purport and intent, compliance with the foregoing requirement is especially desirable and omission thereof will render the complaint legally insufficient. United States Printing & Lithograph Co. v Powers, 183 A.D. 513, 170 N.Y.S. 314, 1918 N.Y. App. Div. LEXIS 5025 (N.Y. App. Div. 1918).

It was not necessary, under RCP 94 that the instrument should have contained an express promise to pay; it sufficed if the instrument was such that the law implied from it a promise to pay, e.g., a simple acknowledgement of indebtedness. Burke v Ashley, 12 Hun 637 (N.Y.).

A pleading which conformed to RCP 94, except that it failed to state that the indebtedness was “thereon,” i.e., upon the instrument set forth, was not defective for that reason. Smith v Fellows, 26 Hun 384 (N.Y.).

A complaint that there is due a certain sum with interest from a certain time on an instrument of which a copy is given, with the indorsements, and that the plaintiff has duly performed the contract, is sufficient. Butchers' & D. Bank v Jacobson, 22 Super Ct 204, 15 (9 Bosw) 595, affd 33 How. Pr. 620.

141. —Particular instruments

In an action against husband and wife, on a bond executed by them, it was not sufficient as against the wife merely to set forth the execution and delivery of the bond, and to give a copy of it. Broome v Taylor, 76 N.Y. 564, 76 N.Y. (N.Y.S.) 564, 1879 N.Y. LEXIS 539 (N.Y. 1879).

In an action on an insurance policy, a complaint is sufficient which sets forth a copy of the policy, the amount due and other allegations showing loss. Sullivan v Spring Garden Ins. Co., 34 A.D. 128, 54 N.Y.S. 629, 1898 N.Y. App. Div. LEXIS 2222 (N.Y. App. Div. 1898).

A mortgage was not within RCP 94. Peyser v McCormack, 7 Hun 300, 51 How. Pr. 205, 1876 N.Y. Misc. LEXIS 174 (N.Y. App. Term May 1, 1876); Rose v Meyer, 1 How. Pr. (n.s.) 274.

Articles of separation between husband and wife, with a covenant to pay to a trustee a stipulated sum for the wife's support, were not within RCP 94. Dupre v Rein, 7 Abb NC 256.

142. — —Guaranty contract

Sufficiency of a complaint in an action on a contract of guaranty of the payment of certain promissory notes, see Fidelity & Casualty Co. v Wells, 49 A.D. 171, 62 N.Y.S. 1066, 1900 N.Y. App. Div. LEXIS 710 (N.Y. App. Div. 1900).

On complaint in action on guaranty, setting forth the guaranty in full, plaintiff is entitled to the benefit of its every feature and its full legal effect, and if susceptible of conflicting interpretations, the one most favorable to the plaintiff must be adopted. Westchester Mortg. Co. v Thomas B. McIntire, Inc., 168 A.D. 139, 153 N.Y.S. 437, 1915 N.Y. App. Div. LEXIS 8273 (N.Y. App. Div. 1915).

143. — —Instrument of conditional liability

As to whether a note payable only upon a contingency was within RCP 94, see Prindle v Caruthers, 15 N.Y. 425, 15 N.Y. (N.Y.S.) 425, 1857 N.Y. LEXIS 20 (N.Y. 1857).

Under § 162 of the former Code of Procedure, which in this respect was the same as this rule it was held that the provision was not applicable where the liability of the party, by the terms of the instrument, was conditional, and depended upon outside facts; in such case those facts must be averred. Tooker v Arnoux, 76 N.Y. 397, 76 N.Y. (N.Y.S.) 397, 1879 N.Y. LEXIS 514 (N.Y. 1879).

Under the same provision it was held that the instrument so set forth must, upon its face, be a complete, valid and binding obligation. Where it is, upon its face, incomplete and invalid, and facts not stated in it need to appear to show its validity, such other facts must be alleged. Broome v Taylor, 76 N.Y. 564, 76 N.Y. (N.Y.S.) 564, 1879 N.Y. LEXIS 539 (N.Y. 1879); Spear v Downing, 34 Barb. 522, 1861 N.Y. App. Div. LEXIS 90 (N.Y. Sup. Ct. Mar. 4, 1861).

144. — —Negotiable instruments

Demand and notice must be averred, when the action is against an indorser. Marshall v Rockwood, 12 How Pr 452; Lord v Chesebrough, 6 Super Ct (4 Sandf) 696; Alder v Bloomingdale, 8 Super Ct (1 Duer) 601. See Prindle v Caruthers, 15 N.Y. 425, 15 N.Y. (N.Y.S.) 425, 1857 N.Y. LEXIS 20 (N.Y. 1857); Roberts v Morrison, 11 Leg Obs 60.

Where a complaint upon a promissory note did not allege that it was executed by defendant or that any sum was due plaintiff, this is cured by an answer admitting execution and not setting up payment, but want of consideration. Cohu v Husson, 113 N.Y. 662, 21 N.E. 703, 113 N.Y. (N.Y.S.) 662, 1889 N.Y. LEXIS 1045 (N.Y. 1889).

A complaint on a promissory note, which sets forth the note, alleges that it was made by one of the defendants, indorsed by the other, discounted by the plaintiff, that it was presented at maturity, was not paid and was thereafter protested, and further alleges that no part of it has

been paid, states a good cause of action. Lafayette Trust Co. v Lacher, 139 A.D. 797, 124 N.Y.S. 401, 1910 N.Y. App. Div. LEXIS 2304 (N.Y. App. Div. 1910).

A complaint is sufficient which alleges the making of a note and by proper averments set forth the indorsement of that note by the defendant and the special circumstances under which the indorsement was made, without setting forth a copy of the indorsement in addition; and in such case the defendant should be compelled to plead any defense by way of answer, as the allegations are sufficient to render the defendant presumably liable and rebut the presumption as to secondary indorsement. Cosmopolitan Bank v Blumberg, 218 A.D. 475, 218 N.Y.S. 465, 1926 N.Y. App. Div. LEXIS 5961 (N.Y. App. Div. 1926).

A complaint on a promissory note which fails to allege nonpayment or present indebtedness is fatally defective. Wright v Deering, 21 N.Y.S. 929, 2 Misc. 296, 1893 N.Y. Misc. LEXIS 59 (N.Y.C.P. 1893).

Allegations that the note is due, that no part has been paid and that it has been protested, “all of which has damaged the plaintiff” to a specified amount, are sufficient to state a cause of action. Oishei v Craven, 31 N.Y.S. 1021, 11 Misc. 139, 1895 N.Y. Misc. LEXIS 86 (N.Y. Super. Ct. 1895).

An allegation in the complaint that the note sued upon was assigned, transferred, delivered and indorsed to plaintiff is sufficient to show title in him; it is not necessary to allege by whom such assignment was made, nor the consideration therefor. Oishei v Craven, 31 N.Y.S. 1021, 11 Misc. 139, 1895 N.Y. Misc. LEXIS 86 (N.Y. Super. Ct. 1895).

RCP 94 applied to an action upon a note signed by defendants as executors managing the business and making contracts in the name of the estate which they represented. Darling v Powell, 45 N.Y.S. 794, 20 Misc. 240, 1897 N.Y. Misc. LEXIS 282 (N.Y. Sup. Ct. 1897).

A complaint which alleged the execution by defendant and the delivery to the plaintiff of certain instruments set out in full and described as promissory notes, and demand for payment by

plaintiff and of nonpayment of any part thereof was sufficient under RCP 94. Didato v Coniglio, 100 N.Y.S. 466, 50 Misc. 280, 1906 N.Y. Misc. LEXIS 60 (N.Y. Sup. Ct. 1906).

Complaint in action on note was defective as to indorser where it did not set forth the indorsement. Kahnweiler v Salomon, 177 N.Y.S. 739, 107 Misc. 602, 1919 N.Y. Misc. LEXIS 1070 (N.Y. City Ct. 1919).

If copy of the instrument indicates that it is negotiable, the legal effect is that it was given for a consideration, otherwise when non-negotiable. Kaynee Co. v Lesnik, 254 N.Y.S. 822, 142 Misc. 497, 1932 N.Y. Misc. LEXIS 931 (N.Y. Mun. Ct. 1932).

Where liability on note was conditional and depended upon facts outside of note, setting forth copy of note and complying with RCP 94 without alleging performance of condition required dismissal of complaint. Burke v Gotlieb, 19 Misc. 2d 893, 9 Misc. 2d 893, 191 N.Y.S.2d 343, 1959 N.Y. Misc. LEXIS 3143 (N.Y. Sup. Ct. 1959).

Giving a copy and stating a sum due has been held sufficient without averring execution or delivery, Marshall v Rockwood, 12 How Pr 452; and so of course, where besides a copy it was averred that defendant made and delivered the note and that there was due and owing to plaintiff said sum with interest. Keteltas v Myers (1859) 19 NY 231, and so is an averment that defendants made the note to their own order, indorsed the same and delivered it to plaintiff, who duly presented it for payment at maturity. Hendricks v Wolff, 1 N.Y.S. 607, 49 Hun 606, 1888 N.Y. Misc. LEXIS 1469 (N.Y. Sup. Ct. 1888).

A complaint setting forth a copy of the note not alleging the making thereof by defendant is insufficient. Vogle v Kirby, 4 N.Y.S. 99, 1888 N.Y. Misc. LEXIS 1083 (N.Y. City Ct. 1888).

Notwithstanding RCP 94 a complaint was insufficient in an action against an indorser against his contract of indorsement where the note was set forth in the complaint but no copy of the indorsement was given. Woodruff v Leonard, 1 Hun 632 (N.Y.).

An instrument in writing promising to pay seven dollars per month upon the first of every month for the term of one year, was a promissory note and could have been pleaded as an instrument for the payment of money only, under RCP 94. Chase v Behrman (N.Y.C.P. Feb. 6, 1882).

Complaint held sufficient under RCP 94 in action upon negotiable instrument. Lewinsohn v Kent & Stanley Co., 33 N.Y.S. 826, 87 Hun 257 (1895).

It is unnecessary to allege of an acceptance by a corporation's president that he was authorized. Price v McClave (1893) 13 Super Ct (6 Duer) 544.

A statement that the note was passed to plaintiff, the word signed being added to the maker's name, and indorsed to the indorsee's in the copy may be construed as an averment of signing and indorsing. Price v McClave, 13 Super Ct (6 Duer) 544; President, Dirs. & Co. v Gulick, 8 How. Pr. 51, 1853 N.Y. Misc. LEXIS 99 (N.Y. Sup. Ct. Apr. 1, 1853).

Research References & Practice Aids

Cross References:

Form of papers, CLS CPLR Rule 2101.

Kinds of pleadings, CLS CPLR § 3011.

Particularity of statements generally, CLS CPLR § 3013.

Demand for relief, CLS CPLR § 3017.

Responsive pleadings, CLS CPLR § 3018.

Counterclaims and cross-claims, CLS CPLR § 3019.

Injunction for unlawful manufacturing, sale or consumption of liquor, wine or beer, CLS Al Bev § 123.

Effect of accepting claims and accounts; limitation upon actions to establish claims and accounts; necessary allegations; effect of judgment, CLS Bank § 625.

Permissive referendum, CLS County § 101.

Application for appointment of committee, CLS Correc § 321.

Contents of petition, CLS Correc § 353.; Dr & Cr §§ 52., 101., 123.

Contents, CLS Civ R § 61.

Distribution of assets, CLS Educ § 220.

Disposition of property for charitable purposes, CLS EPTL § 8-1.1.

By whom proposed district represented, CLS Gen Mun § 120-e.

Apportionment of cost, CLS Gen Mun § 120-g.

Means of payment, CLS Gen Mun § 120-i.

Payments to injured or representatives of deceased volunteer firemen, CLS Gen Mun § 205.

Widening highways; petition, CLS High § 199.

Lien of bailees for hire CLS Lien § 186.

Definitions, CLS Men Hyg § 81.03.

Proceedings to condemn, CLS Pub Hous § 125.

County and part-county health districts, CLS Pub Health §§ 340.— 357.

County mosquito control commission; appointment; membership, CLS Pub Health § 1520.

Consolidation of incorporated churches, CLS Rel Corp § 13.

Property of extinct churches, CLS Rel Corp § 16.

Dissolution of religious corporations, CLS Rel Corp § 18.

Consolidation, CLS Rel Corp § 208 .

Action for cutting, removing, injuring or destroying trees or timber, and damaging lands thereon, CLS Real P Actions & Pr § 861.

Complaint, CLS Real P Actions & Pr § 1031.

Contents of petition, CLS Real P Actions & Pr § 1102.

Additional parties, CLS Real P Actions & Pr § 1511.

Application by trustee for court authorization to mortgage, to lease, to sell, to acquire or to exchange real property or for confirmation of a lease of real property, CLS Real P Actions & Pr § 1601.

Proceedings for voluntary partitition of infant’s, incompetent’s, or conservatee’s real property, CLS Real P Actions & Pr § 1651.

Release of rents reserved by leases in perpetuity, CLS Real P Actions & Pr § 1901.

Discharge of record of ancient mortgages presumed paid, CLS Real P Actions & Pr § 1931.

Petition in special proceeding to quiet title, CLS Real P Actions & Pr § 1942.

Contents of petition for registration; other papers to be filed, CLS Real P § 379.

Location of route, CLS R R § 16.

In proceedings, pleadings and process, CLS SCPA §§ 301.– 304.; NYC Civ Ct Act §§ 901.– 907.; UJCA §§ 901.– 907.

Petition, CLS Town § 191.

Proceedings for lateral sewers, drains or water mains, CLS Town § 199.

Petition for street improvement and proceedings thereon, CLS Town § 200.

Apportionment of completed local assessment upon subdivision or sale of part of land affected, CLS Town § 244-a.

Removal of remains of deceased members of armed forces, CLS Town § 295.

Town boards may establish park districts, petition, CLS Unconsol Ch 205, § 1.

Appointment of appraisers; petition, CLS Unconsol Ch 79, § 5.

Review, CLS Vill § 8-806.

Diminishing boundaries, CLS Vill § 18-1804.

Federal Aspects:

Pleadings and motions, Rules 7 to 16 of the Federal Rules of Civil Procedure, USCS Court Rules.

General rules of pleading, Rule 8 of the Federal Rules of Civil Procedure, USCS Court Rules.

Claims for relief, Rule 8(a) of the Federal Rules of Civil Procedure, USCS Court Rules.

Paragraphs; separate statements, Rule 10(b) of the Federal Rules of Civil Procedure, USCS Court Rules.

Adoption by reference; exhibits, Rule 10(c) of the Federal Rules of Civil Procedure, USCS Court Rules.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3014, Statements.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 33.01, 33.02, 34.01, 34.03.

1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶302.01, 302.05; 5 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶2103.02, 2103.12.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 3.09. Jurisdiction based on presence of property.

CPLR Manual § 6.01. Joinder of claims and consolidation of actions; joint trials.

CPLR Manual § 7.09. Third-party practice.

CPLR Manual § 19.03. Election of remedies.

CPLR Manual § 19.07. Rules governing drafting of pleadings.

CPLR Manual § 19.16. Motion to correct pleadings.

Matthew Bender's New York Practice Guides:

1 New York Practice Guide: Domestic Relations §§ 3.04, 4.07, 4.13.

2 New York Practice Guide: Business and Commercial § 12.14.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Negligence § 5.29. Preparing Answer and Asserting Affirmative Defenses.

Appleman on Insurance:

1-7 New Appleman New York Insurance Law, 2nd Ed. (Matthew Bender) § 7.03.

Matthew Bender's New York Checklists:

Checklist for Preparing Initial Pleadings LexisNexis AnswerGuide New York Civil Litigation § 1.08.

Forms:

Bender’s Forms for the Civil Practice Form No. CPLR 3014:1 et seq.

LexisNexis Forms FORM 75-CPLR 3014:10.— Complaint; Pleading Hypothetical Cause of Action.

LexisNexis Forms FORM 75-CPLR 3014:11.— Allegations as to Writing Attached as an Exhibit.

LexisNexis Forms FORM 75-CPLR 3014:4.— Allegation of Adoption by Reference; Allegation in Answer Incorporating by Reference Allegations Contained in Another Defense.

LexisNexis Forms FORM 75-CPLR 3014:5.— Notice of Motion for Order Requiring Plaintiffs to Separately State and Number Each Cause of Action.

LexisNexis Forms FORM 75-CPLR 3014:6.— Affidavit in Support of Motion Requiring Plaintiffs to Separately State and Number Each Cause of Action.

LexisNexis Forms FORM 75-CPLR 3014:7.— Order Requiring Plaintiffs to Separately State and Number Each Cause of Action.

LexisNexis Forms FORM 75-CPLR 3014:7A.— Affidavit in Support of Motion to Separately State and Number Each Cause of Action; Another Form.

LexisNexis Forms FORM 75-CPLR 3014:8.— Heading for Cause of Action in the Alternative.

LexisNexis Forms FORM 75-CPLR 3014:9.— Complaint; Pleading Alternative Causes of Action.

LexisNexis Forms FORM 521-11-1.— Notice of Motion for Order Requiring Plaintiffs to State and Number Separately Each Cause of Action.

LexisNexis Forms FORM 521-11-2.— Affidavit in Support of Motion Requiring Plaintiffs to State and Number Separately Each Cause of Action.

LexisNexis Forms FORM 521-11-3.— Order Requiring Plaintiffs to State and Number Separately Each Cause of Action.

1 Medina's Bostwick Practice Manual (Matthew Bender), Forms 14:101 et seq. (remedies and pleadings).

Texts:

2 Bergman on New York Mortgage Foreclosures (Matthew Bender) §§ 16.01., 17.02.

Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York (Matthew Bender) § 7.10.

Hierarchy Notes:

NY CLS CPLR, Art. 30

Forms

Forms

Form 1 Notice of Motion to Separately State and Number

SUPREME COURT, _____ COUNTY

Notice of Motion

[Title of cause] Index No. _____ [if assigned]

PLEASE TAKE NOTICE that upon the complaint herein [and the attached affidavit of _____, sworn to the _____ day of _____, 20_____], a motion will be made at a Motion Term [Part _____], of this Court to be held in and for the County of _____, at the County Court House in the City of _____, on the _____ day of _____ 20_____, at the opening of court on that day or as soon thereafter as counsel can be heard for an order requiring the plaintiff to serve an amended complaint wherein the plaintiff shall separately state and number each cause of action contained therein, namely:

(a) A statement of the facts which constitute the alleged cause of action against the defendant for _____; and

(b) A statement of the facts which constitute the alleged cause of action against the defendant for _____; and for such other and further relief as may seem just and proper, together with the costs of this motion.

Dated _____, 20_____.

_____

Attorney for Defendant

Office & P. O. Address _____

Telephone No.

To:_____

Attorney for Plaintiff

Form 2 Affidavit to Obtain Order to Show Cause Why Causes of Action Should Not Be Separately Stated and Numbered

SUPREME COURT _____ COUNTY

Affidavit

[Title of cause] Index No._____ [if assigned]

STATE OF NEW YORK

COUNTY OF _____

_____, being duly sworn, deposes and says:

1. He is the attorney for the defendant in the above action.

2. He has examined the complaint herein and finds that it attempts to set forth two alleged causes of action which are not separately stated and numbered as required by Rule 3014 of the Civil Practice Law and Rules.

3. The summons and complaint in the above-entitled action were served on the defendant on the _____ day of _____, 20_____ and the defendant has not answered the complaint or made any motion addressed to the complaint and the time to do so expires on the _____ day of _____, 20_____.

4. The defendant intends to move for an order dismissing the cause of action in the complaint based upon [insert cause of action] on the ground that said cause of action arose on or about the _____ day of _____, 20_____ and the action is barred under the _____ year statute of limitation governing the commencement of such actions. This motion for dismissal cannot be brought until the causes of action alleged in the complaint are separately stated and numbered. Defendant's time to move to dismiss the complaint will have expired before a motion to separately state and number can be determined and an order to show cause permitting the making of the motion to dismiss within 10 days after an order is entered on this motion is necessary.

5. No previous application has been made to any court or judge for the relief prayed for on this motion nor for any similar relief.

WHEREFORE, deponent requests that an order to show cause be granted herein directing plaintiff to show cause why he should not be required to state separately and number, such order to show cause to contain an extension of the time of the defendant to answer or make a motion addressed to the complaint herein until 10 days after the service of a copy of the order entered on this motion with notice of entry thereof.

_____

[Print signer's name below signature]

[Jurat]

Form 3 Order to Show Cause Why Causes of Action Should Not Be Separately Stated and Numbered

SUPREME COURT _____ COUNTY

R 3014. Statements.

Order to Show Cause

[Title of cause] Index No._____ [if assigned]

PRESENT: Hon. _____, Justice.

Upon the complaint herein and the attached affidavit of _____, sworn to the _____ day of _____, 20_____, and on motion of _____, attorney for the defendant herein, it is

ORDERED that the plaintiff show cause at a Motion Term [Part _____] of this court, to be held in and for the County of _____, at the County Court House in the City of _____ on the _____ day of _____, 20_____ at _____ o'clock in the _____ noon of that day or as soon thereafter as counsel can be heard why an order should not be made requiring the plaintiff to state separately and number the causes of action set forth in the complaint by setting forth his claim for _____ [state nature or cause of action] as a single cause of action and his claim for _____ [state nature of cause of action] as a separate cause of action and for such other and further relief as may be just and proper, and it is further

ORDERED that the time of the defendant to answer or to make any motion addressed to the complaint herein be and hereby is extended until 10 days after service of a copy of an order entered upon this motion with notice of entry thereof upon defendant's attorney, and it is further

ORDERED that service of a copy of this order and the papers upon which it is granted, made on plaintiff's attorney, in accordance with Rule 2103(b) of the Civil Practice Law and Rules on or before the _____ day of _____, 20_____ shall be considered due and sufficient service.

Signed this _____ day of _____, 20_____ at _____, New York.

_____

Justice, Supreme Court

_____ County

Form 4 Order to Separately State and Number

SUPREME COURT, _____ COUNTY

Order

[Title of cause] Index No. _____ [if assigned]

PRESENT: Hon. _____, Justice.

A motion having been regularly made by the defendant to require the plaintiff to separately state and number the different causes of action contained in the complaint and said motion having come on regularly to be heard;

NOW, after reading the complaint [duly verified the _____ day of _____, 20_____] heretofore filed in the office of the clerk of the County of _____, and after reading and filing the notice of motion herein, dated the _____ day of _____, 20_____, with proof of due service thereof, and after hearing _____, attorney for the defendant in support of said motion, and _____, attorney for the plaintiff in opposition thereto, and due deliberation having been had,

NOW, on motion of _____, attorney for the defendant [and on the decision of the court filed herein] it is

ORDERED, that the plaintiff within _____ days serve an amended complaint upon the attorney for the defendant in which he shall separately state and number the various causes of action therein, that is to say, the cause of action for _____ and the cause of action for _____.

Signed this _____ day of _____, 20_____, at _____, New York.

Enter

_____

[Print name to be signed]

Justice, Supreme Court

_____ County

Form 5 Complaint Alleging Cause of Action Hypothetically

Complaint

[Caption and introductory paragraph] Index No._____

1. That at all times hereinafter mentioned plaintiff was and still is a corporation existing under and by virtue of the laws of the State of Delaware, authorized to do business in the State of New York, and having an office for the conduct of its business at _____, New York, New York.

2. That at all times hereinafter mentioned defendant _____ was and still is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York.

3. That at all times hereinafter mentioned defendant _____ was and still is a foreign corporation solely authorized to do business in the State of New York.

4. That at all times hereinafter mentioned defendant _____ was and still is in the business of manufacturing, handling, distributing and selling certain products including toy dolls to various retail stores for the purpose of resale to the public.

5. That prior to _____ , plaintiff purchased from defendant _____ for a valuable consideration a certain quantity of toy dolls for resale to the general public.

6. That defendant _____ knew that plaintiff purchased the aforementioned toy dolls for resale to the general public.

7. That defendant _____ warranted that the toy dolls sold to plaintiff were of merchantable quality, were free from injurious ingredients or dangerous components or parts, and were reasonably fit and safe for the purpose for which they were sold.

8. That plaintiff purchased the aforementioned toy dolls relying upon the warranties, skill and judgment of defendant _____.

9. That on or about _____ a legal action was instituted by _____ in [Superior Court of Connecticut, County of New Haven], against defendant _____ in the sum of $_____.

10. It is alleged in the aforementioned [Connecticut] action that a toy doll was purchased by _____ from _____ on _____ and it is further alleged that while _____ was playing with the doll an earring on the doll sprung into the eye of _____ causing her severe personal injury, and that said doll was defective, unmerchantable and unfit for the use for which it was intended.

11. That the toy doll allegedly purchased by said _____ was manufactured by defendant _____, and sold by defendant _____ to plaintiff.

12. That defendant _____ denied the allegations of _____, _____, and _____ but if _____ did indeed sustain the injuries alleged in the [Connecticut] complaint at the time and place and in the manner set forth therein as a result of any wrongdoing other than their own negligence, then such injuries were caused solely by reason of the breach of warranty on the part of defendant _____ in selling and supplying to _____ a certain doll which was not of merchantable quality, and not free from ingredients or dangerous components or parts, injurious defects, and not reasonably fit and safe for the purpose for which it was sold.

13. That if any recovery is had by _____, _____, and _____, any or all of them, against _____, defendant will be liable to _____ for the amount of said recovery and all costs and all expenses incurred in defending such action.

WHEREFORE, plaintiff demands judgment against defendant for any and all sums that may be recovered against plaintiff by _____, _____, and _____, any or all of them, with the costs, reasonable expenses and counsel fees incurred in defense of said action and the costs and disbursements of this action and for such other and further relief as the Court may deem just and proper.

[Endorsement and address]

End of Document