REPORTS OF CASES argued and decided in the House of Lords, on Appeals and Writs of Error, and Claims of Peerage, during the Session 1844. By C. CLARK and W. FINNELLY, Barristers-at-Law. Vol. XI.

RICHARD THORNTON BROWN,—*Plaintiff in Error;* THOMAS HUGH BOORMAN, THOMAS BOORMAN, and THOMAS MARTYR WILD,—*Defendants in Error* [May 31, June 3, 1844].

[Mews' Dig. i. 182; iv. 829; S.C., in Ex. Ch., 3 Q.B. 511. Adopted in *Baylis* v. *Lintott*, 1873, L.R. 8, C.P. 349; and *Hyman* v. *Nye*, 1881, 6 Q.B.D. 689.]

Broker—Pleading.

In case, the declaration alleged that A. employed B. as a broker, to sell and deliver oil, on the terms contained in such contracts of sale as should be made with persons who should become purchasers thereof, for reasonable commission to B.: That B. accepted the employment, and sold oil to C. on the terms of payment on delivery: That it thereupon became the duty of B. not to deliver the oil without payment: That B. delivered the oil to C., but did not obtain payment, whereby the plaintiff was damnified.—Held that this declaration set forth a good cause of action: that the duty of B. arose out of the contract: and that, after verdict, judgment could not be arrested.

Wherever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract.

This action was brought by the Defendants in Error to recover from the Plaintiff in Error the damages which they alleged they had sustained by the negligent and improper conduct of the Plaintiff in Error.

The declaration, which was in case, contained the following allegations:—

For that whereas, before, etc., the said Plaintiffs carried on the trade or business of linseed-crushers at [2] Branbridges, in the county of Kent, and the Defendant during all that time carried on the trade or business of an oil-broker at London aforesaid: And whereas also, on the 1st day of January 1836, the said Plaintiffs had retained and employed the said Defendant, as such broker as aforesaid, to sell at London aforesaid, for and on the behalf of them the said plaintiffs, certain quantities, to wit 30 tons, of linseed oil, and to deliver the same in the port of London aforesaid, according to the terms of the contract or contracts of sale, to such person or persons as should become the purchaser or purchasers thereof, for certain reasonable commission and reward to him the said Defendant in that behalf; which said retainer and employment the said Defendant then accepted: And whereas also the said Defendant, as such broker as aforesaid, in pursuance of the said retainer and employment, and being duly authorised by the Plaintiffs and one J. G. P. in that behalf, made a certain contract between the Plaintiffs and J. G. P., whereby the Plaintiffs sold to J. G. P., and J. G. P. purchased of the Plaintiffs, the

said 30 tons of linseed oil, at the price of, etc., to be delivered in parcels, the amount of each parcel to be paid for from delivery, in ready money; which said contract the Plaintiffs and J. G. P. then respectively accepted.

The declaration then alleged the consignment of part of the cargo to the Defendant, and the delivery of and payment for two parcels according to the contract, and proceeded thus: And whereas also after, etc., the Plaintiffs consigned to the Defendant, as such broker as aforesaid, 10 other tons of linseed oil, being the residue of the 30 tons comprised in the contract, to be delivered by him the Defendant to J. G. P., upon payment of the price thereof by J. G. P. to the Defendant; and the said last-[3]-mentioned 10 tons of linseed oil being so consigned, afterwards, etc. arrived in London; of all which the Defendant then had notice, and then took upon himself the delivery of the said last-mentioned 10 tons of linseed oil, according to the terms of the contract; and thereupon it became and was the duty of the said Defendant, as such broker as aforesaid, to use all reasonable care and diligence that the said 10 tons of linseed oil should not be delivered to J. G. P., or any other person, without the price thereof being paid to him the Defendant, according to the terms of the contract; yet the Defendant, not regarding his said duty, but contriving and intending to defraud and injure the said Plaintiffs, did not nor would use reasonable care and diligence that the said last-mentioned 10 tons of linseed oil should not be delivered to J. G. P., or any other person, without the price thereof being paid to the said Defendant, but wholly neglected and refused so to do, and so negligently and carelessly behaved in the premises, that by and through the mere carelessness and negligence of the Defendant the said last-mentioned 10 tons of linseed oil were delivered to certain persons, etc. without the price for the same or any part thereof being paid by J. G. P., or any other person, to the said Defendant; by reason whereof, etc. the Plaintiffs have lost and been deprived of the said oil, and the price and value thereof.

The Defendant pleaded, first, not guilty; secondly, that he did not undertake to deliver in manner and form, etc.; and, thirdly, that the Plaintiffs had not employed, nor had the Defendant accepted employment as such broker to sell and deliver in manner and form, etc. Issue was taken on all these pleas.

The cause was tried before Lord Denman, at the [4] sittings after Hilary term 1839, and the jury returned a verdict for the Plaintiffs below upon all the issues, with damages £425. In the following term the Defendant below moved in arrest of judgment, for the badness of the declaration, insisting that the declaration showed no good cause of action; and that if it did, the form of action should have been assumpsit, and not case. In Trinity term 1841, the Court of Queen's Bench gave judgment for the Defendant below, on the ground that the declaration did not state a good cause of action (3 Queen's Bench, 515).

The Plaintiffs below thereupon brought a writ of error in the Exchequer Chamber, assigning for error that the declaration did state a good cause of action, and that judgment ought to have been given for them. On the 21st of June 1842, the Court of Exchequer Chamber, after argument, reversed the judgment of the Court of Queen's Bench, and gave judgment for the Plaintiffs below (*id.* 525).

The present writ of error was then brought by the Defendant in the original action.

Mr. Butt and Mr. J. W. Smith, for Plaintiff in Error (Defendant below):—The action in this case is misconceived. The remedy was by an action of contract, and not by an action on the case. The obligation here, which is alleged to have been broken, is not one which would have existed at common law, and would have been implied at law to arise from the character of the broker as such. It is the result of a special contract. The breach stated is not that which relates to the common-law character of broker, but to the special duty of not delivering without payment of price. The action is therefore misconceived.—[Lord Brougham:—Originally there must have been but [5] a slight difference between tort and contract, as the words of the breach in assumpsit itself, "fraudulently contriving," clearly show.]—

It is, no doubt, so; but the difference is now well established. Slade's Case (4 Co. 92 b.) shows that an action on the case lies on contract as well as debt. But that was case on assumpsit, the nature of the writ depending on the nature of the complaint for which the Plaintiff sought a remedy. In Viner's Abridgment and other books an action on the case is said to lie, without taking notice of the distinction between

actions on the case *ex contractu* and actions *ex delicto;* yet the distinction is one which is well established in pleading. The real complaint here is misdelivery. It may be admitted that for misdelivery, or for injury to a chattel, where the party had undertaken to deliver or to take care of it, an action on the case would lie; but what sort of action on the case? The declaration here says, that the Defendant took on himself the duty of delivering the goods; but the only complaint is that there was an omission to obtain the money when the goods were so delivered. There is no complaint of a misdelivery in itself. The complaint is therefore wholly independent of the contract. It was assumed in the Court below that wherever a contract exists, and a duty arises out of that contract, an action on the case will lie. But that rule is too broadly stated. If correctly stated, it would put an end to all distinctions between actions *ex contractu* and *ex delicto.* If a man receives a sum of money for another, a duty to pay it over would arise; yet no one ever heard of an action on the case for not paying it over. The same may be observed of a contract to build a house, or of an action on a bill of exchange or pro-[6]-missory note, or guarantie or policy of insurance, or for not accounting. Consistently with the present judgment, no line of distinction could be drawn. The objection to this declaration is, that the duty or obligation described in it as the foundation of the action, is described as resulting from the character of broker alone. If that is so, then the declaration is clearly bad. A broker is not a person to whom goods are consigned; he is not a factor.

[Lord Campbell:—But though called a broker, the special contract with him is set out in the declaration; so that the name of broker appears to be immaterial.]—The allegation that he was a broker may be struck out of the declaration; but even then it is clear that the obligation, for the breach of which the action is brought, is stated as arising on a contract, and in no other manner; and as it could not be implied on the mere employment, it can only exist on the contract, and the remedy must be on the contract.

[Lord Campbell:—Is it not sufficient to show the contract, and the breach of it?]—No, there must be words of promise. There are no such words here. It never was contended below that this was a good declaration on contract.

Lord Campbell:—The declaration alleges the employment of the Defendant to perform any contract that he should make with the buyers of the oil; that he made a particular contract for the sale of the oil for ready money; that he undertook to deliver the oil according to the contract he had made, which was for ready money; and then it alleges that he delivered the oil without payment of ready money. Where is the necessity for the statement of a promise?]

If there were words equivalent to a promise, the promise need not be alleged. But there are no such [7] words here. There is no statement of an undertaking between himself and the Plaintiffs. The words ought to have been, that he took on himself, to or with the Plaintiffs, to deliver the oil; that would have made the assumpsit.—[Lord Brougham:—That is not necessary. In a declaration in assumpsit, you say he undertook and faithfully promised to pay the Plaintiff; not that he promised to the Plaintiff to pay the Plaintiff.] — This declaration does not state a contract between the parties to do this particular thing, the not doing of which is the subject of complaint.—[Lord Brougham:—Is this an allegation of a contract with the purchaser, to deliver to the purchaser?]—It is not, on the face of this declaration, an undertaking with anybody. In all the old forms, the undertaking was to the party to pay the party. The supposed contract to deliver is subsequent to the contract made with the Plaintiffs below; it is altogether distinct from the employment with his principal.—[Lord Campbell:—May not this be an application of his general promise to this particular parcel of oil?]—That would not be sufficient. It is necessary to aver a distinct promise. There is none such here. The words are not that he undertook to deliver, but that he took upon himself to deliver.

This cannot be the subject of an action on the case; *Orton* v. *Butler* (5 Barn. and Ald. 652). All the cases on the subject of different forms of action, were there considered, and the Lord Chief Justice stated, "The law has provided certain specific forms of action for particular cases, and it is of importance that they should be preserved. We ought therefore to look with great jealousy to an innovation of this sort. The present count states that the Defendant had and received to the use [8] of the Plaintiff a certain sum of money, to wit 10s., to be paid to the Plaintiff, but which the Defendant converted to his own use. It is contended that this is a count in trover.

Now the action of trover is only maintainable for specific property; it will lie for so many pieces of gold or silver, and in that case the Defendant can only redeem himself by tendering to the Plaintiff the same specific pieces. But in this case he clearly might do so by returning an equal sum of money. There is therefore not merely a want of certainty in the count, but it states that which is not the subject of an action of trover at all. The demurrer, therefore, must be allowed." And Mr. Justice Bayley supported this view of the case, upon the ground of the necessity of adhering to the established forms of action. That case is an authority to show that the present declaration cannot be supported. *Corbett* v. *Packington* (6 Barn. and Cr. 268) is to the same effect. There the question was on the misjoinder of counts, and the case shows that under circumstances like these the plaintiff has not his option to declare in assumpsit or in tort, but must declare in assumpsit. *Lea* v. *Welch* (2 Ld. Raym. 1516; 2 Str. 793) and *Mountford* v. *Horton* (2 New Rep. 62) are there referred to, and are directly in point here. There were no words in *Lea* v. *Welch* importing a promise, and the declaration was therefore held bad. There must be a promise and a consideration, to enable a party to maintain assumpsit. There is neither here.—[Lord Brougham:—The consideration stated at the commencement of this declaration overrides the whole.]—This case is distinguishable from that of an attorney or a surgeon, for in them there is a duty implied by law; here the duty depends wholly on the contract, and the remedy therefore ought to be on the contract alone.—[Lord [9] Campbell:—What is the distinction you make between an action on the case *ex contractu*, and an action on the case *ex delicto?*]—In the first all the facts which constitute the contract must be set forth; in the other the law implies a duty, the breach of which may be alleged, as it is here. Comyns' Digest (Action on the Case; in Assumpsit; for Deceit, and for Negligence) shows the distinctions between the different sorts of actions. This case does not come under the division of actions on the case *ex delicto et*, yet it is brought in that form. The case of *Coggs* v. *Bernard* (2 Ld. Raym. 909; Comyns, 133; 1 Salk. 26) was relied on below. The marginal note is this: "Case upon a promise to take up brandies, and carry them to D., and safely to lay them down, without showing any consideration;" and the declaration there was held to have stated the contract sufficiently.—[Lord Campbell:—There was no consideration there, to sustain an action of contract.]—It was cited in the Court below to show that case would lie, though there was a contract between the parties. It is no authority for such a proposition here. The obligation there was one which arose at common law. The question as to the form of action was not material there. The only question was whether the action would lie for such a misfeasance as existed there. So that that case is not in point here. In the case of *Rogers* v. *Head* (Cro. Jac. 262) assumpsit was not only a proper, but the only remedy. The action on the case, as spoken of in the old books, means nothing more than an action on the special circumstances of the case; the distinction between assumpsit and tort not being properly preserved. In *Burnett* v. *Lynch* (5 Barn. and C. 589) Lord Tenterden expressly says (5 Barn. and C. 602), "The defendant here has not engaged by deed to perform the covenants, [10] and consequently covenant will not lie." He then says that he thinks assumpsit would lie, because the defendant had entered on the estate, and the law therefore cast on him the duty of paying the rents and performing the covenants, and implied a promise to perform that duty; but for that very reason case was maintainable for the breach of that duty. The absence of words of contract there, makes that case inapplicable to the present. *Kinlyside* v. *Thornton* (2 Sir W. Bl. 1111) likewise went on the principle of an antecedent duty, and merely decided that such a duty would not deprive the party of his remedy by action on the case. But neither of these cases applies to one where the only duty to be performed specially arises out of the contract. *Marzetti* v. *Williams* (1 Barn. and Adol. 415) was also cited in the Court below; but there the form of the action was never made the subject of discussion; the only question was whether the action would lie there, without proof of special damage. *Govett* v. *Radnidge* (3 East, 62) is like the case of *Coggs* v. *Bernard*, so far as this matter is concerned. The undertaking to do the thing there undertaken raised the common-law objection, and enabled the party to maintain an action on the case. *Pozzi* v. *Shipton* (8 Adol. and E. 963) is capable of the same answer. The action was founded on the common-law obligation of carriers to deliver safely goods entrusted to them. Here the obligation does not arise from the common law,

but only on the contract, and the remedy must be confined to the contract. The note to *Cabell* v. *Vaughan* (1 Wms. Saund. 291 e) shows that where the action must originate in a contract, the action must be in the form *ex contractu.*

[11] *Godefroy* v. *Jay* (5 Moo. and P. 284; 7 Bing. 413), which appeared to be much relied on in argument in the Court below, is not in point here; for there again the liability of the party was, in respect of his duty as an attorney, a common-law obligation arising from the employment, without any express contract. No contract could have enlarged the obligation. But suppose the action against the attorney had been for not riding to York, that must have been brought in the form of contract; for as it is not any part of the common-law obligation of an attorney to go thither, he could only have been liable in that respect by positive contract. The words of the judgment here are too large (3 Queen's B. 526): "The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort." That statement is directly at variance with many decided cases. *Jones* v. *Hill* (1 Bayly Moore, 100) is in point. That was an action on the case for permissive waste, which was held not maintainable against a tenant for years, where he held the premises under an express contract or covenant to repair.

[Lord Campbell:—Do you think that if the money counts had been added here, there might have been a demurrer for misjoinder?]—Undoubtedly there might.

In the Court below it was wrongly assumed that there are no classes of cases in which the party might not have his election as to the form of his action. It was said (3 Queen's B. 525), "There is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indif-**[12]**-ferently either assumpsit or case upon tort, is not disputed. Such are actions against attornies, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render; actions against common carriers, against shipowners on bills of lading, against bailies of different descriptions; and numerous other instances occur in which the action is brought in tort or contract, at the election of the plaintiff." This part of the judgment applies to all undertakings whatever, and is therefore manifestly too broad in its statement; for, if correct, it would altogether destroy the distinction between assumpsit and tort. The proper question ought to be whether the obligation arises on the individual contract only, or on a general duty implied by law. The judgment then goes on to refer to *Marzetti* v. *Williams,* in support of this view of the matter. But it is curious that the very first count there is on the general custom of bankers in London. So that that case cannot be said to be one of contract alone. This action ought to have been brought in assumpsit only; it is not maintainable in the form of case; and if treated as assumpsit, then the declaration cannot be supported, for it is defective in the statement of the promise and breach. However slight might have been originally the distinction between assumpsit and tort, it has been so long and so fully established, and has been so interwoven in the practice of the law, that the greatest inconvenience would follow from now disregarding it. If so, the only other question here is, whether this case falls within the class of cases which it is settled ought to be brought in the form of assumpsit. It is submitted that it does. This is an express contract of a particular kind; it therefore lies on the Plaintiff to point out a rule showing that this is a case in which **[13]** an action in the form of tort may be maintained. The rule is, that where there is a general relation and there is also a general duty, the plaintiff may have his election as to the form of action. But he cannot have that election where the supposed duty is altogether the creature of the convention and agreement of the parties. In such a case the cause of action is a contract and nothing else, and the action must be in the form of contract and none other. In all the cases where tort has been held to be maintainable, the action was brought in respect of the general pre-existing relation between the parties. *Marzetti* v. *Williams* (1 Barn. and Adol. 415), *Burnett* v. *Lynch* (5 Barn. and Cr. 589), *Godefroy* v. *Jay* (7 Bing. 413; 5 Moo. and P. 284), *Govett* v. *Radinge* (3 East, 62), *Powell* v. *Layton* (2 New Rep. 365), *Pozzi* v. *Shipton* (8 Adol. and E. 963), *Coggs* v. *Bernard* (2 Lord Raym. 909; Comyns, 133), *Hancock* v. *Caffyn* (8 Bing. 358), (where it is said that the law implies it to be the duty of the landlord to protect his tenant against distress from the superior landlord),

are all instances of this kind. And this doctrine agrees with what is stated in Buller's Nisi Prius (Bull. N.P. 73), where it is said that if the law lays a duty on a man, case will lie for the breach of the duty, but not if the duty is not laid on him by the law. *Corbett* v. *Packington* (6 Barn. and Cr. 268) is a decisive authority against this declaration; for if the second count there was not a count in case, and it was held not to be so, but to be a count in assumpsit, it is impossible to maintain this declaration as a good count in case, for they are exactly like.

[Lord Campbell:—Suppose the second count there had stood by itself, would it have been good?]—It would not as a count in case; for Mr. Justice Little-**[14]**-dale there says that the count by itself could not be supported as a count in tort, for that the undertaking alleged went beyond the duty, which was sought to be set up as a duty implied by law.

Then as to the question whether, supposing assumpsit to be maintainable, this is a good count in assumpsit: It is bad, because the contract is not stated as a contract between certain parties, so as to show a breach of that contract.—[Lord Campbell:—Suppose that the contract had been in writing, and the writing was in the terms stated here, would not that be sufficient?]—No contract is here stated on the declaration, with a sufficient breach. The first part of the declaration states a contract, but it states that of which no breach is afterwards alleged. It states an employment, but not that it was the employment not to deliver the goods without payment of the money.—

[Lord Campbell:—But the declaration alleges an undertaking not to deliver but on the terms of the contract, and then the contract is set out.]—It is not enough to say that the Defendant took on himself the delivery of the oil. Even if that could be sufficient as an undertaking, that undertaking ought to be stated as entered into "in consideration of" something else, which is not stated here. In that important respect, therefore, the declaration is defective. It does not sufficiently state a contract, and a breach arising on the contract so stated; and in both respects, therefore, it is objectionable. The judgment of the Court of Queen's Bench was right, and that of the Exchequer Chamber must be reversed.

Mr. Erle (June 3), for the Defendants in Error:—This declaration is perfectly good. The action is maintainable in the form of tort, in respect of the general duty of **[15]** a broker. A broker is a person known to the law, and bound by law to act in a particular manner in every employment which he undertakes. The declaration here contains nothing which is not connected with the Defendant's character as broker. There is no authority for saying that the duty of a broker is confined to making out the bought-and-sold notes. The statute which regulates brokers contains no restrictive provision of that kind. His employment is generally to make contracts for the purchase and sale of merchandise, and to see them completed. This general duty binds him to observe the special directions of his principal.—[Lord Cottenham:—If you employ a stock-broker to sell your stock, and he receives the money but does not pay it over, should you say that the neglect to do so would be a matter directly connected with his duty of broker?]—

That is so. A stranger is not allowed to go on the Stock Exchange, and the law therefore imposes on the stock-broker a general duty, which binds him to perform all the special directions of his principal. The only restriction in the case of a special bailee, is that the special matter must relate to the general duty of the bailee. If a man employs a builder to build a house and gives him old materials to do so, and he does not use them but buys new materials for the purpose, and so the expense is increased, an action will lie for the breach of duty. To return to the question last raised on the other side; *Corbett* v. *Packington* (6 Barn. and Cr. 268) is not in point. That is a case of misjoinder only, and simply decides that two counts, one in assumpsit and another *ex delicto*, cannot be put together in the same declaration. But in *Brown* v. *Dixon* (1 Term Rep. 274), the first count was in trover; the other **[16]** counts were in a form which the defendant assumed to be that of assumpsit, and he demurred for that reason, but the Court held the counts good. The Court said, "The rule of judging whether two counts can be joined, by considering whether the same judgment can be given on both, is perhaps not true in its extent, but by adding another requisite, it is universally true. For wherever the same plea may be pleaded, and the same judg-

ment may be given on two counts, they may be found in the same declaration." Apply that test here, and the declaration will appear perfectly good. Here the same plea of not guilty goes to the whole declaration, and the same judgment can be given on the whole. But besides this, the objection now made comes too late. However much a count may be subject to special demurrer, still, after verdict, this House will, if possible, maintain the declaration, if on the whole declaration a good cause of action is set out. In Coke on Littleton (89 a), it is shown that if a bailment is made with a contract to redeliver, the bailee will be liable at all events. That must mean, that if there was a special duty, an action in the form of case would be maintainable for the breach of it. Another case relied on by the other side is that of *Orton* v. *Butler* (5 Barn. and Ald. 652), but the principle of that case does not apply here; for there the question simply was, whether a count charging money to have been had and received by the defendant to the use of the plaintiff, could be framed in tort, and joined to two counts in case for deceit.

In *Coggs* v. *Bernard* (2 Lord Raym. 909; Comyns, 133; 1 Salk. 26), the cause of action arose out of a contract. There the count was an informal count in assumpsit, as it did not state the [17] consideration, and the only question was as to the sufficiency of its form. *Dale* v. *Hall* (1 Wils. 281) was the case of goods delivered to a hoyman, on a contract to carry from port to port, and he was held liable to deliver them at all events. *Dickon* v. *Clifton* (2 Wils. 319) was another case of a special employment where a general duty existed. In the course of that employment an injury occurred, and the count stated the special circumstances of the employment; a motion in arrest of judgment was made, and Lord Chief Justice Wilmot said, "It is objected that the first count is laid *quasi ex contractu*, and cannot be joined with trover; but I think the first count is laid *ex delicto* and as a misfeasance, which may undoubtedly be joined with trover;" and the plaintiff had judgment. *Govett* v. *Radnidge* (3 East, 62), and *Mast* v. *Goodson* (3 Wils. 348; 2 Sir W. Bl. 848), are to the same effect. *Marzetti* v. *Williams* (1 Barn. and Adol. 415) is the case of a bailment of money to a banker, who had a duty to perform in respect of it; and the Court there held that the breach of that duty might be treated as a tort. That case is exactly in point with the present.

[Lord Campbell:—May there not be a distinction between a case where you merely show an employment, and one where in addition you show a special contract?]—In all cases of bailment, there must be a special contract in addition to the general bailment. *Marzetti* v. *Williams* will always allow the customer the option of suing the banker in case, for a breach of special contract. It has been pressed on the House that the first count there is on a special duty, founded on the custom of the city of London. But the other counts are on the general implied contract of a [18] banker with his customer; and the remark therefore, as to the special custom of the city of London, does not affect the argument. That case shows distinctly that the right of the plaintiff to have damages, though he proved none, was because there had been a breach of contract His right was founded on the general law. There too the fault was more one of a nonfeasance than of a misfeasance; it was an omission to do something: but, in truth, it is hardly possible to show any real distinction between the two.

In *Smith* v. *Lascelles* (2 Term Rep. 187) the action was on the case, for neglecting to make an insurance on the freight. The note is: "A merchant abroad having effects in the hands of his correspondent here, may compel him to procure an insurance. If a merchant here has been accustomed to procure insurances for his correspondent abroad in the usual course of trade, the latter has a right to expect an insurance at the hands of the former, unless some previous notice be given to the contrary." Nothing can be stronger than this doctrine, for there a general duty is made to arise out of a special mode of dealing between the parties: and the liability of the defendant existing under these circumstances, was enforced there in an action on the case. That form of action was held maintainable, though the Court held that the agent here had a general duty to perform, and though there appeared to be at the same time a special contract between the parties. The doctrine of that case is decisive as to the principle applicable to the present. The averment of duty is immaterial; it is not traversable. *Parnaby* v. *The Lancashire Canal Company* (11 Adol. and E. 223) is in point. The declaration there was in case, and was [19] framed on an Act of Parliament; and the Court of Queen's Bench thought that, as the Act gave the Company an option to call

on the owners of a sunken barge to clear the passage of the canal, or to do it by the Company's officers and compel payment of expenses from the owner, the duty of clearing the passage was imposed by the Act, and the action was not misconceived. The Court of Error did not concur with this judgment, so far as it presumed a duty imposed by the Act, but held the duty to be a common-law duty, on the ground that if the Company opened a canal and invited persons to use it when it was in a condition in which injury was sure to happen to the boats passing over the canal, the Company was guilty of a breach of a common-law duty, and was therefore liable to the action. And in the judgment there it was said, "The statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all; or if improperly stated, may be altogether rejected. . . The declaration, it is true, contains no averment of such a duty; which it need not do, nor any allegation in express terms of the breach of such duty." That is the principle relied on here.

The second point is, that this count is good as a count in assumpsit; and if the House can find a good cause of action stated, it will support the declaration. In *Hudson* v. *Nicholson* (5 Mee. and W. 437), the declaration was in form on the case: it stated that the defendant had wrongfully kept shores and timbers upon the close of the plaintiff; a verdict was, after objection to the declaration, found for the plaintiff. An argument was heard, and the Court thought that the cause [20] of action was in fact trespass; on which it was insisted that it was the declaration that was bad, for that it was in the form of a case, and had no allegation of *vi et armis*. On the other hand it was contended, that after verdict for such a cause of action, the omission of *vi et armis* would not affect the case. And of that opinion was the Court. In *Smith* v. *Goodwin* (4 Barn. and Adol. 413), there were six counts in case for an irregular distress, and a seventh count for wrongfully, injuriously, and vexatiously taking goods after the distress was satisfied. It was there argued that it was the statement of the cause of action, and not the form of the commencement of the declaration, that determines what the action is. And it was said there that the seventh count showed the cause of action to be mere trespass, and that as the damages were entire the misjoinder was cause for arresting the judgment. But the Court thought otherwise; Mr. Justice Parke thinking that the seventh count was an informal count in trover, and trover being a special action on the case, was as such maintainable. The declaration was therefore held, after verdict, to be sufficient. The principle of that case applies here. Here is the substance of a good count in contract, both as to promise and breach; and after verdict, no objection can be made to it.

Mr. Cleasby, on the same side:—Two propositions are to be supported here. First, that this cause of action sounds in tort, and that a good cause of action appears on the face of the declaration; and next, that there is a good cause of action in trespass on the case. There is an employment for a particular purpose. [21] The Plaintiffs below entrust the Defendant below with their goods: he takes on himself the sale and delivery of their goods, and so misconducts himself in the employment that they lose the value of their property. The ground of action sounds in deceit, and the Plaintiffs may therefore maintain an action on the case. The cause of action here arose not on the contract only, but on the parting with the goods without payment, and the loss thereon. This is not a case in which the parties merely contracted. Here the case went farther,—there was an acting on the contract: a confidence was reposed in the Defendant, and he betrayed that confidence. In such circumstances as these, the party injured has his election as to the form of action. Where there appears to be deceit he may be sueable in tort or on the contract, as in the case of the warranty of goods. There the action might be assumpsit, but it might also be tort *warrantizando vendidit;* Comyns' Digest (Action on the Case; false warranty). Actions against shipowners for not carrying goods may be brought in either way. There may be some doubt to what extent this election will apply; but that very circumstance shows how closely they are connected. Where the form of action is in tort, but applies altogether to contracts, there doubt may arise. *Govett* v. *Radnidge* (3 East, 62) was a case of that sort. The cause of action arose upon the misconduct of the defendants in executing a contract, and the Court held that the gist of the action was tort, and therefore each defendant was treated as separately as well as jointly liable. In *Pozzi* v. *Shipton* (8 Adol. and E. 963) the point was again discussed, and the same rule was held. Bailees of goods for any purpose whatever, come within this rule. In Buller's

[22] Nisi Prius (p. 73, 6th edit.) it is said, "That in all cases where a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie; as if a farrier kill my horse by bad medicines, or refuse to shoe him, or prick him in the shoeing. But it is otherwise where the law lays no duty upon him; as if a man find garments, and by negligent keeping they be spoiled." The real question therefore is, whether the duty does exist. There can be no doubt that it does. The law is not affected by the particular nature of the trade, so as to lose its force if the party is not a broker or a banker. The law does not take notice of those distinctions of fact, but merely refers to the question whether a duty necessarily arises from the employment, and whether a trust is placed in virtue of that employment. In Comyns' Digest (action on the case for negligence, A. 4. Action on the case for misfeasance, A. 3, n.) the rule that "if a man neglect to do that which he has undertaken to do, an action on the case lies," is broadly stated. And many of the cases put by way of illustration of the doctrine are cases where no particular trade is carried on, but where a general employment exists, and a general duty arises.

In such cases there are often instances where assumpsit might perhaps be maintainable; but it has always been contended for the defendants here, that both forms of action would be good. So that that objection does not apply. One instance put is this (Com. Dig., Action on the case for negligence, A. 4): "So if a man lend his horse or other profitable cattle to another gratis, he is bound to a strict care; and therefore, if he neglect to take due care of it, an action on the case lies: as if he do not shut the stable, [23] and it is stolen." That is strictly speaking a tort, but it is in virtue of the contract arising from the circumstance of being entrusted with the profitable cattle. In *Cabell* v. *Vaughan* (1 Wms. Saund. 291) there are some very learned notes upon this subject, the result of which seems summed up in a note of one of the recent editors, where it is said: "From all the cases the principle appears to be this, that where the action is maintainable for the tort simply, without reference to any contract made between the parties, no advantage can be taken of the omission of some defendants, or of the joinder of too many; as for instance, in actions against carriers, which are grounded on the custom of the realm. But where the action is not maintainable without referring to a contract between the parties, and laying a previous ground for it by showing such contract, there, although the plaintiff shapes his case in tort, he shall yet be liable to a plea in abatement if he omit any defendant, or to a nonsuit if he join too many." That statement shows, that although the action is founded on contract, it might be shaped in tort, if the confidence placed, arose out of a general duty attaching to the party confided in, and had been betrayed by that party. There is a case in Croke's Reports, *Lewson* v. *Kirke* (Cro. Jac. 265), referred to by Comyns (action on the case, for deceit in his trust), where a master appointed his servant his agent to receive goods from beyond sea, and the declaration alleged the arrival of the goods; that certain customs were due in respect of them; that the servant took them out of the ship, and landed them without payment of the customs, whereby they were lost. It was, after verdict, moved in arrest of judgment, that case lay not, by reason of the confidence or trust reposed in [24] the defendant as plaintiff's servant, and that the declaration was defective in not alleging that he had money to pay the customs. But the Court held the declaration good, and sustained the verdict. There the servant carried on no particular trade, yet a general duty was held to arise on his employment. The breach of duty alleged there was, that he received the goods but did not pay the money. That is exactly like the present case; where the charge is, that the Defendant's duty was to deliver the goods and receive the money; and the breach, that he did deliver the goods but did not receive the money. *Dickon* v. *Clifton* (2 Wils. 319) is to the same effect. *Elsee* v. *Gatward* (5 Term Rep. 143), where the action was in the form of case, was decided on demurrer; and it was held that a count, stating that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials, but that the defendant, instead of using those, made use of new ones, thereby increasing the expense; was good. Mr. Justice Ashurst said (*id.* 150): "If a party undertakes to perform work, and proceeds on the employment, he makes himself liable for any mis-

feasance in the course of that work; but if he undertakes and does not proceed on the work, no action will lie against him for the nonfeasance." That case is a clear authority to show that a general duty may exist at the same time with a special contract; and that where the injury sustained is in consequence of the breach of that duty, case will lie. The first count in that case, which was for not performing the work in proper time, was held bad; but the reason was that that count did not show that, in fact, there was **[25]** any binding contract. In *Burnett* v. *Lynch* (5 Barn. and Cr. 589), there was nothing but the contract on which the cause of action could be founded. The action was framed in case; which was held maintainable by the lessee against the assignee of a lease, for having neglected to perform the covenants of the lease during the time he continued assignee. It was contended that assumpsit, and not case, ought to have been brought. Lord Tenterden said (*id.* 602), that in his opinion assumpsit would lie, because the defendant had taken on himself a burden in respect of which the law would imply a promise. He added: "But it by no means follows, that because a promise may be implied by law, this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable." And Mr. Justice Bayley said: "I have no difficulty in saying that an action on the case founded in tort will lie, upon this ground, that from the facts stated in this declaration, the law raises a duty in the defendant to perform the covenants; that there has been a breach of that duty, and that damage has accrued to the plaintiffs in consequence of that breach of duty." These authorities show that where there is a contract, there may be an action of tort founded on the neglect to perform that duty, as such neglect amounts to a deceit. The contract creates a duty, and the neglect to perform that duty is a misfeasance and a tort. It is like the case of a false warranty, where, if the parties act on it, the person making it may be sued in case. In *Coggs* v. *Bernard*, Lord Holt says (2 L. Raym. 919; Comyns, 133; 1 Salk. 26), in speaking of a bailee to do a thing gratis: "The reason is, because in such a case a neglect is a deceit upon the bailor. **[26]** For where he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent; his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily, will be a good ground of action." That is precisely the case here. The Plaintiffs below were induced to entrust the Defendant with the oil, and they have been deceived. As soon as the Plaintiffs below had parted with their property to Defendant below, he incurred an obligation to treat those goods in a particular manner. The relation from which this action arises subsists by reason of the goods of one party coming under the control of the other.

As to *Corbett* v. *Packington* (6 Barn. and C. 268; 9 Dowl. and Ryl. 258), that was not only a case of misjoinder, but there the count was only good as a count in assumpsit, therefore it could not be joined with counts in tort. Here the count is alleged not to be a good count in assumpsit. It does not appear that a good count in case might not have been framed there. But the only matter of promise there stated was the promise to redeliver on request; and being thus put clearly and exclusively in assumpsit, the party could not afterwards treat it as case.

As to *Orton* v. *Butler* (1 Dowl. and R. 282; 5 Barn. and Ald. 652), there are but two remarks that need be made: namely, that if that action was maintainable, a party would always be deprived of his set off; and next, that he could not pay what was required, except in the very same coin in which he had received the money. The circumstances of that case render it wholly inapplicable to the present.

Then on the second point: If a good cause of **[27]** action is shown, that is sufficient. It is not denied that there appears a good statement of some right of action; the question has been confined to the mere form.

The two statutes, 5 Geo. 1, c. 13, and 16 and 17 C. 2, c. 8, and the case of *Hudson* v. *Nicholson* (5 Mee. and Wels. 437), show that no judgment shall be arrested for a variance between the writ and declaration, nor for mere matter of form. The remedies must depend on the transactions themselves.—[Lord Campbell:—Did you argue it on this ground in the Exchequer Chamber?]—Not exactly; but it has always been argued, not that assumpsit will not lie, but that a good cause of action in case is shown. That necessarily involves the existence of an assumpsit. But if a good cause of action is shown, it is immaterial, after verdict, to consider in what form it has been

shown. In *Mountford* v. *Horton* (2 New Rep. 62), an agreement was set forth without a promise. In *Nurse* v. *Wills* (4 Barn. and Adol. 739) a promise was stated, but not a promise to the plaintiff; and in both the omission was aided after verdict. There are many cases in which a count may be good after verdict, to be read either in assumpsit or in case. All counts on bailments might be so framed. The breach shown would be either that of the breach of a duty, or of a contract. Wherever case and assumpsit are concurrent remedies, that must be so. The only matters that are traversable are the acts between the persons; the others are matters of form which, after verdict, become immaterial. If a good cause of action is shown, it is a good cause of action on the case; for by the Statute of Westminster the subject is entitled to his writ on the case; and after verdict, the good cause of action being **[28]** shown, it is sufficient, though the action may sound in assumpsit.

The argument addressed by the other side to this point, merely shows that case is not the proper remedy; that there is no breach of a specific contract. But any argument that may be used to show that the declaration does not set forth a good cause of action in case, will show that there is a good cause of action in assumpsit, unless the existence of any cause of action whatever can be denied. The cause of action is properly laid here in case; the breach arises from the relation between the parties, and that makes it a good cause of action in case. There is no reason for taking this case out of the general rule, that where agents and servants are entrusted with property of other persons for any purpose, it is a fault in them to act contrary to their engagement; and though assumpsit may be maintained against them in respect of a particular contract, case may also be maintained against them for a breach of their general duty.

Mr. Butt, in reply:—The declaration here only states that the goods were consigned to the Plaintiff.—[Lord Campbell:—Does not that mean that they were sent under a bill of lading, which put them under his control?]—They might have come to him as a general bailee, or in a different character. In none of the statutes is there anything to impose on the broker, as broker, the liability here insisted on. It may be admitted that there is in the books some confusion between misfeasance and nonfeasance; but here the circumstances plainly enough raise the distinction, and avoid the argument founded on that supposed confusion. There is no other reason given for adopting this form of action in the present case, than would **[29]** apply equally to justify the bringing an action on the case for not conveying a house and land, or for not paying a sum of money. Suppose a smith was to take a horse to shoe, undertaking to give it a feed of corn, could the smith be charged, on account of his general character of a smith, with not giving the horse a feed of corn? Certainly he could not. If the horse suffered injury while in his possession for want of food, the smith might be charged with not having taken care of the horse, and the not giving him a feed of corn might be given in evidence in proof of his neglect, but could not be made the subject of a distinct cause of action, upon any supposed general duty of the smith as such. In such a case, if the action was to be maintained at all, the count must be in assumpsit and not in tort. Then as to the case of stock-brokers: There is a distinction between them and other brokers. It is the duty of a broker to make a contract with respect to the sale of goods, and nothing more; he is not bound to see them properly transferred; but it is a part of the duty of a stock-broker, as such, to transfer the stocks he has sold. That instance, therefore, is not in point here. The law, as laid down by Mr. Justice Littledale in *Corbett* v. *Packington* (6 Barn. and Cres. 268; 9 Dowl. and Ryl. 258), has not been disputed on the other side, and the attempt to distinguish it from the present cannot succeed. In *Brown* v. *Dixon* (1 Term Rep. 274), the first count of the declaration was in trover; the second alleged that the plaintiff had delivered to the defendant a spaniel, to be seen and viewed by the defendant, and to be returned by him in a reasonable time to the plaintiff; that he did not return it, but took and carried away the spaniel, and detained **[30]** it until he lost it. The question in that case was, whether this special count was not a count on promises incapable of being joined with a count in tort; but as the breach was in respect of the unlawful keeping of the dog, which was a tortious act, the declaration was held good. It is clear that if a bailee has goods and misuses them, he will be liable for that misuse, for that has nothing to do with his contract; and so he will, if instead of goods an animal is entrusted to him, for there the law, independently of the

contract, will imply a duty to do that which is necessary to its safety and its existence. But here the supposed duty is altogether one arising out of the contract and dependent on it, and the breach is nothing but a breach of that contract. *Coggs* v. *Bernard* (2 Lord Raym. 909; Comyns, 133; 1 Salk. 26) will not help the other side; for the real question is, whether the duty, the breach of which is complained of, would have arisen without an express contract. If it would not, the action for the breach must be founded on the contract itself. *Mast* v. *Goodson* (2 Wils. 348; Sir W. Bl. 848) was an action on the case for disturbing a party in the enjoyment of an easement, and no other form of action was there maintainable. *Marzetti* v. *Williams* (1 Barn. and Adol. 415) is a case where the duty arose independently of the contract, upon the bare employment.—[Lord Campbell:—Whether you declare in case or assumpsit, the declaration must state a contract; that is, something on which a promise or a duty arises. You say that if there is nothing more than a mere employment, case alone can be brought; that is, where there is no other evidence than that which would raise the implied contract. But looking at the face of this count, how can you tell whether it is to be [31] supported by showing a general employment, or a special contract?]—In *Marzetti* v. *Williams* (1 Barn. and Ad. 415), the custom which raised the implied contract was stated on the face of the count.—[Lord Campbell:—There is a difficulty in saying, in all cases, whether the obligation arises from a general employment or a special contract. If a declaration is against a surgeon, it would not be sufficient to say that one party was a patient, and the other was a surgeon; you must state what the surgeon was to do, and that he accepted the employment. So that you must show something of the nature of the contract, whether you proceed in assumpsit or in tort.]—In *Smith* v. *Lascelles* (2 Term. Rep. 187) all the duty charged would have arisen from the mere employment, from the relation of the principal and agent; besides which, no question was there raised as to the form of the action; that case, therefore, is not in point. A factor who receives goods of his principal may be bound as a rule to insure the goods; but that being a general duty, does not arise from the particular contract, and this circumstance distinguishes that case from the present.

Then as to the other point: It is said that if the duty should be found to be incorrectly stated on the face of this declaration, the House would afterwards reject the statement, and treat the count as good. That might be so if the duty was a common-law obligation, which arose from the mere relation of broker and principal; but that is not the case here; it arises from a special contract between the parties.—[Lord Campbell:—Does this declaration equally state the duty as a general duty, and as arising from a special contract?]—It does, and is therefore objectionable; for if it could only arise from contract, then this [32] form of action is not maintainable, and the statement which leaves it doubtful from what the duty arises is objectionable. This action will not lie for a mere nonfeasance, yet a mere nonfeasance is all that is complained of. *Elsee* v. *Gatward* (5 Term Rep. 143) is a strong authority for the Plaintiff in Error. The Court there decided that the omission to do that which the contract imposed on the party the duty to do, would not give a cause of action in case. In *Burnett* v. *Lynch* (5 Barn. and Cr. 589) there was no contract between the parties; the plaintiff was the lessor, the defendant was the assignee, who had taken an assignment by deed-poll, and the question was, whether covenant was or not well brought under such circumstances; and as there was no contract but only a duty, it was held that case was the proper form of remedy.

It is clear that this is a bad count; and being so, it cannot be treated as good after verdict. It is not assisted by the statute of Jeofails, which applies to objections of form only and not of substance.—[Lord Brougham:—But there was a case of this kind: There was a contract allowing the plaintiff to take furze-bushes, but not before Michaelmas. The declaration did not say that he took them before Michaelmas, and objection was made thereon, but after verdict the allegation was considered sufficient. That was a declaration in assumpsit; *Hall* v. *Marshall* (Cro. Car. 497).—Lord Campbell:—What is the objection to this count as a count in contract?]—That there is no express promise stated, nor anything from which such a promise can be inferred. And secondly, that, whether as expressed or implied, the consideration is stated as an executed consideration. In *Savignac* v. *Roome* (6 Term Rep. 125), the count alleged [33] that the plaintiff's servant wilfully drove against the plaintiff's carriage, and this allegation was held after verdict fatal to the de-

claration; and it was further held that the statute 16 and 17 Cha. 2, c. 8, only applied to cases that appeared, on the face of the declaration, as evidently intended to be actions of trespass, and not trespass on the case.—[Lord Campbell:—To return to the question of the statement of the consideration; suppose there is a binding contract between the parties, and that that is shown, would not that be sufficient after verdict?]—No; there must be a legal consideration legally and properly set out.—[Lord Campbell:—Where is there a case of a declaration, with a valid promise, being held bad for merely omitting to set out a breach of duty?]—*Buckler* v. *Angel* (1 Lev. 164; 1 Ld. Raym. 23). There it was stated that the defendant had agreed to surrender a term, and the defendant would be willing to pay £10. After verdict for the plaintiff, it was objected that there was no promise set forth in the declaration.—[Lord Campbell:—Certainly not; for "would be willing" was not an absolute promise; it was not a contract, but at most an offer to make one. That is not a case of a valid promise set out, but omitting to add a breach of duty.]—In *Lee* v. *Welch* (2 Lord Raym. 1516), the ruling in *Buckler* v. *Angel* was considered and acted on. There the defect was that there was no promise alleged, so as to show a foundation for the action. *Thomas* v. *Shillibeer and Morton* (1 Mee. and Wels. 124) is a case where, a contract not being sufficiently shown on the face of the declaration so as to render both the defendants liable, the judgment was entered for the defendant *non obstante veredicto.* In *Edwards* v. *Baugh* (11 Id. 641), the declaration was held bad **[34]** after verdict, as not showing a sufficient consideration for the promise, there being no allegation of any debt due, but merely that a dispute and controversy existed respecting it. *Tollet* v. *Shenstone* (5 Mee. and Wels. 283) is to the same effect. There the declaration stated that J. G. delivered to the defendant, a livery-stable keeper, a horse, to be kept for J. Y., and to be redelivered on request, on satisfaction of the defendant's demands; and it thereon became and was the duty of the defendant, on being paid his demand in respect of the horse, to redeliver it on the request of J. Y. Averment that J. Y. requested the defendant to redeliver the horse to the plaintiff, and that the plaintiff then paid the defendant all his demands in respect of the horse; yet that the defendant would not, when so requested, deliver the horse to the plaintiff, but wrongfully kept and detained it, etc., whereby the plaintiff lost the benefit, etc. It was held, on motion in arrest of judgment, that the count was bad, as not showing any duty in the defendant to redeliver the horse to the plaintiff; and that it could not be supported as an informal count in trover, the detention under such circumstances not amounting to a conversion. That case is precisely like the present, and unless overruled by the authority of this House, must govern the decision here. *Hayter* v. *Moat* (2 Id. 56) laid down the same rule. There the want, in an indebitatus count, of an allegation of a promise to pay, was held, after verdict, not to be cured by the effect of a plea of non-assumpsit to the whole declaration; or by a statement, at the commencement of the declaration, that the defendant was summoned to answer in an action on promises; or by the conclusion, that in **[35]** consideration of the promises respectively before mentioned, the defendant promised to pay. It is hardly possible that that case should be held to be erroneously decided; and yet, if supported, the argument on the other side cannot be good. There is nothing here which can enable the Defendants in Error to take advantage of the verdict.—[Lord Campbell:—The reason of that decision is plain; no contract was set out there, and the promise to pay, if applicable at all, was applicable to the other counts, and not to the indebitatus count.]—The case of *Wise* v. *Wise* (2 Lev. 152) is applicable to both points here. There an action on the case was held not to be maintainable, as the record showed that there was a contract, and the remedy was on that contract. These cases, it is contended, exemplify the rules under which this declaration must be held insufficient, and the judgment of the Court below must be reversed.

Mr. Cleasby was allowed to observe on the case of *Hayter* v. *Moat* (2 Mee. and W. 56), which had been cited for the first time in the reply:—The declaration there did not state that the defendant was indebted to pay on request, but left it doubtful whether the allegation of indebted might not be a *debitum in praesenti, solvendum in futuro.* Mr. Baron Parke there said, "You do not even state that the defendant was indebted to pay on request; it is quite consistent with your statement that he was to pay on six months' credit. We must find premises stated on which the law will imply a promise to pay on request." And Mr. Baron Alderson added, "You

only state a *debitum*, not *solvendum in praesenti*." That case is therefore inapplicable to the present.

[36] Lord Brougham:—This case has been very ably argued, and great assistance has been given to the House by the arguments of the learned counsel at the bar, on the one side and the other. I am of opinion that there is set forth upon this declaration, as the learned Judges appear to have thought in the Court of Exchequer Chamber, a specific contract between the parties. The contract is that of the retainer and employment of the Defendant, by the Plaintiffs, to sell their oil to such persons as should become the purchasers thereof, for certain reasonable commission and reward to him the said Defendant, in that behalf; that is to say, some proportion being kept between the price of the article and the reward, for that is the very force and effect of the term "commission," and that shows it to be discretionary, and in the nature of an executory contract. Then it is alleged that this retainer and employment were accepted by the Defendant. It is then specifically alleged that the Plaintiffs consigned to him certain oils, and that those oils being so consigned afterwards arrived in the port of London, where he carried on the trade of a broker; that he had notice of the arrival of the said oils so consigned to him, and that he took upon himself the delivery of the 10 tons of linseed oil in question, according to the terms of the said contract. I thought that perhaps that might mean according to the terms of the general contract made between him and his employers, but it is not so; it is the contract he had made with the purchasers of the oils, he having made a contract with those purchasers in virtue of his profession as a broker. A breach is then assigned, in a manner to which I understand there is no objection.

This being the case, it appears to me that the Court [37] of Exchequer Chamber has come to a right conclusion; which renders it wholly unnecessary, in the view which I take of the case, to ask whether the Court of Queen's Bench was right in its view of the office of a broker, namely, that he was not to do more than to make contracts; that he was not to obtain a ready-money price for the goods he should sell, or even to sell goods consigned to him, which indeed is rather the office of a factor or a consignee than a broker. But a broker may be a factor or a consignee, and may contract with his employer not only to pass the property in goods, which is the proper office of a broker, but to receive the trust in the goods consigned; to have the control over those goods, which also is not the ordinary office of a broker; and to deliver those goods, and so to deliver them for such price as he might contract for, which in this case was a ready-money price. The breach is that he did not deliver them, according to the terms of that contract, for a ready-money price, but on credit, whereby the Plaintiffs were damnified to the extent of the price of 10 tons.

Being of opinion that it is by virtue of the contract that the liability arises, and that the damage arises from a breach of that contract, it is wholly unnecessary to say whether it is within the ordinary employment of a broker that he should perform this duty, which was the ground on which the Court of Exchequer Chamber differed from the Court of Queen's Bench; the former Court holding that there was such a contract with the Defendant, a broker, as rendered him liable, on a breach of that duty, to the party employing him, for an injury arising in consequence of his not having kept within the terms of his employment and undertaking.

[38] Then the question is, is this declaration, taking it altogether, sufficient to support the judgment of the Court of Exchequer Chamber? Is this declaration, after verdict, sufficient to show a contract, and a binding of himself by the terms of that contract, by this Defendant, against whom the action is brought? I am of opinion that it is, and I think the authorities cited are quite sufficient for that purpose. The authorities show that, after verdict, it is immaterial whether there are or not technical words; if there are clear words to show that the Defendant has made such contract and has broken it, after verdict everything will be intended that can be intended to support that verdict. All matters of form will be got rid of, to get at the substance. If the substance had been insufficient, the result would have been different. If there had been no allegation of a contract; if, for instance, there had been no allegation of a consideration, if there had been no allegation of a breach, it might have been otherwise; although, indeed, if some of the cases in Comyns' Digest, under the head "Pleader," are to be relied on, there

are cases where there seems such a tendency to support the verdict, that even where there was a most deficient statement of a breach, the Courts have overlooked that, to support the verdict. But it is not necessary here to go that length; it is sufficient to see whether there is an averment that the undertaking of the Defendant to the Plaintiffs has not been fulfilled, and that loss has in consequence accrued to the Plaintiffs.

Now in *Mountford* v. *Nelson* (2 New Rep. 62), which has been cited at the bar, there was no doubt that an agreement existed, but it was said there was no promise at **[39]** all alleged; not only no promise to the plaintiff, but no promise at all; but the Court was of opinion that whatever might have been the force of that objection on special demurrer, there was sufficient to support the verdict.

In the case of *Nurse* v. *Wills* (4 Barn. and Adol. 739), there was an agreement between the parties, but the promise was not stated to be to the plaintiff; nevertheless their Lordships held it was sufficient, after verdict, to support the action.

Then there is the case of *Hall* v. *Marshall* (Cro. Car. 497), which goes a great way; in which the contract with the parties was to permit the plaintiff to take all the furse on certain premises, which he should cut, take, and carry away, on or before Michaelmas 1635. The case only set forth the contract; and in assigning the breach, stated—for on looking into it, it appears to have been an action of assumpsit,—in assigning the breach, stated that he was disturbed in taking away the furze, but did not state that he took away the furze, and was so disturbed in taking them away, on or before Michaelmas 1635. That seems to me to make out a very strong case, as indicating the disposition of the Court, after verdict, to presume every thing which can be presumed to support it. I do not think that this case goes half so far as that; I should rather be disposed to say, that in that case there was more substantial ground for the objection than in this case, which, according to the view I take, does show a contract, and a breach of the contract: I am therefore of opinion, without referring to the other part of the case, that the judgment of the Court of Exchequer Chamber must be affirmed.

[40] I was at first staggered by the statement in *Hayter* v. *Moat* (2 Mee. and Wels. 56): but, in the first place, the request was not enough to show the liability. It is not enough to say that the man is liable, and that a request was made; a request does not amount to a contract: but, secondly, I was satisfied by the answer given by Mr. Cleasby; for on looking to the very ground of the decision, the promise to make the payment "when thereunto requested," was not set forth; so that it was impossible to say whether the contract was performed or not. It is rather implied, that had it, after verdict, been set forth that he was to pay either on the *quantum meruit*, though no specific sum, and had it been further set forth that he had undertaken or was liable, and being indebted, had become liable to pay when called upon, that would have been sufficient. Upon the whole I am of opinion with the Court below, and shall move your Lordships to give judgment for the Defendant in Error.

Lord Cottenham:—My Lords, I am of opinion that the Court of Error came to a right conclusion, and I concur with the reasons stated by my noble and learned friend. It appears to me perfectly clear that the declaration correctly states a case of neglect of duty. The action being an action of trespass on the case, it states that the defendant undertook, for a certain commission or reward, to sell for the plaintiffs certain quantities of linseed oil, and to deliver the same according to the terms of the contract of sale: then it alleges the contract, the terms of the sale being that the oil should be paid for on delivery.

Then with respect to the 10 last tons of linseed oil, **[41]** which are the subject-matter of the action, it is alleged in terms, that the defendant delivered them without having received the money. The case therefore, if stated at length, is that he had undertaken this employment for a commission, and had not fulfilled the duty he had undertaken; the declaration being in tort, which it is admitted would be the proper mode and form of action, if the duty to be performed had been an ordinary duty; and therefore the Chief Justice, in delivering the judgment in the Exchequer Chamber, concludes in these words: "Coupling together the terms of the particular contract made by the defendant, with the terms of the defendant's retainer by the plaintiffs, we think it amounts to an express contract on the part of the defendant to deliver what he sold on the payment of ready money only; and that the duty of the broker arose from this express contract so stated in the declaration, and not

simply from his character of broker." It appears therefore, according to the facts, that the broker had undertaken the duties imposed upon him by virtue of the contract into which he had entered with the plaintiffs, and that he had neglected to perform the duties, by parting with the oil without receiving the money. The question raised is, whether the Court of Exchequer Chamber was in error upon this point. I think it was not. I am of opinion, that under these circumstances the remedy pursued in the present case was the proper remedy. The contract was specially made; and, on the authorities referred to, the broker's duty must depend upon the contract expressed or implied into which he entered, and it is difficult to conceive a case in which a contract of this sort must not be special; it must have reference to the price of the goods, and the terms on which they are to be **[42]** sold; and it is difficult to conceive a case in which there is not something passing between the broker and his employer to regulate the contract. It is said that the proper form of proceeding is by an action of assumpsit, and not an action on the case. The cases referred to disprove that proposition altogether; and the terms of the Lord Chief Justice are, that this is a proper remedy where there are duties imposed upon the party, though they are imposed by an express contract, and are not what are called the ordinary duties imposed on brokers as such. That being the only ground on which the judgment of the Exchequer Chamber appears to have been impeached, I am of opinion that it fails, and that the judgment of that Court is correct, and ought to be affirmed.

Lord Campbell:—My Lords, after having heard this case very ably argued on both sides, I have come to the conclusion that the judgment of the Court below ought to be affirmed. In the first place, I think this declaration sets out a sufficient cause of action; it alleges a binding contract between the parties; that the plaintiff employed the defendant as a broker for a certain reward to do certain things, and that he undertook that employment; which is tantamount to saying that the plaintiff paid him a certain reward, and that he, in consideration of that reward, undertook that duty. The declaration then goes on distinctly to show a breach of that contract, because it alleges that the defendant having contracted that he would see the price of the goods paid, allowed the purchaser to receive them before they were paid for, whereby the plaintiff lost the value. Now that being the case, I think that, after verdict, it is immaterial to consider whether this count is framed in tort or in **[43]** contract. It sets out a cause of action for which the plaintiff is entitled to recover. The cases referred to by the counsel for the Plaintiff in Error do not apply, because there is no question raised here as to misjoinder or damages, plea in abatement, or whether a verdict can be sustained against one defendant and not against another. There is only one count, and there is only one defendant; and, after verdict, the question is whether the judgment shall be arrested upon that count, by reason that there is not an express promise to pay, or an express promise to perform the agreement. Now no case has been cited to show that the judgment should be arrested on such a ground. The only case applying at all was that case of *Hayter* v. *Moat* [2 M. and W. 56], which, until I heard the explanation of it, did appear to me to impeach the general doctrine for which I should contend, that if the count sets out a general contract, and a breach of that contract, after verdict the Court will not arrest the judgment on account of any defect of form in setting it out. But on examining that case, it appears to have been rightly decided; for it does not show that there had been any breach of the contract, but the plaintiff merely alleged a conclusion of law, that the defendant was liable for goods supplied at his request, but that they were to be paid for at a future day, and it did not appear there that there had been any breach. I apprehend, therefore, that whether this count be in contract or in tort is quite immaterial; it is a count on the case, setting out the circumstances and facts of which the plaintiff complains; he shows a cause of action, by showing a contract, a duty, and a breach; and if so, it is a good count in an action on the case, and he is entitled to his judgment.

But then there is a question whether this count **[44]** was a good count in law, and could not be demurred to. I think that the judgment of the Court of Exchequer Chamber is right, for you cannot confine the right of recovery merely to those cases where there is an employment without any special contract. But wherever there is a contract, and something to be done in the course of the employment which is

the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract. It is impossible to say that the whole of this is not connected with the duty of the defendant as a broker in this case. It is not the duty of the broker, unless there are words importing that he is to perform such a duty, to see to the delivery of the goods on the payment of the price. But it may be the duty of the broker, under the employment he has undertaken, to see to the delivery of the goods, and to take care that the price is paid; and I apprehend, though that is connected with the capacity of a broker, an action being brought against him in that capacity, and the duty arising on a particular contract entered into between him and the plaintiff, the plaintiff has a right to declare either in contract or in tort, as he has done. Upon both these grounds, I think that the judgment ought to be affirmed.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

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[45] RICHARD BOURNE and Others,—*Plaintiffs in Error;* SAMUEL GATLIFF,—*Defendant in Error* [June 7, 10, 1844].

[Mews' Dig. iii. 156; vi. 722; xiii. 534. S.C. 8 Scott N.R. 604; 7 Man. and Gr. 850; and, in C.P., 4 Bing. N.R. 314. Commented on, on point as to duty of carrier in *Cargo Ex Argos*, 1873, L.R. 5 P.C. 160; *Mitchell* v. *Lancashire and Yorkshire Ry. Co.*, 1875, L.R. 10 Q.B. 260; *Chapman* v. *Great Western Ry. Co.*, 5 Q.B.D. 280; and see *Petrocochino* v. *Bott*, 1874, L.R. 9 C.P. 358.]

Carrier—Evidence—Pleading—Costs—Practice.

A carrier by sea, under a bill of lading of goods "to be delivered in the like good order, etc., at the port of, etc., unto Mr. ——, or assigns, on paying for the said goods freight and charges as per margin, with primage and average accustomed," is not entitled immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and if he should land them, and they should be destroyed, he will be answerable to the owner for the loss.

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract.

A declaration consisted of two counts. The defendants pleaded six pleas; 4 to the first, and two to the 2d count. The plaintiff demurred specially to the third and fourth pleas, and generally to the sixth plea, and took issue on the others. The Court of Common Pleas gave judgment for the plaintiff on all the demurrers. The cause went to trial on the issues, and a verdict was found for the plaintiff on the issues raised on the first count: as to the issue on the 2d count, the jurors were discharged by consent. Judgment was afterwards entered for the plaintiff. On a writ of error, the Exchequer Chamber affirmed the judgment of the Common Pleas, except as to the demurrer to the sixth plea, which plea the Exchequer Chamber declared to be a sufficient answer in law to the 2d count. A general order was made for the defendants to pay costs to the plaintiff, but no order was made to except, out of these general costs, the costs of the sixth plea and the demurrer. The Exchequer Chamber awarded to the plaintiff costs under the statute, for delay in the execution of his judgment, by reason of the writ of error:—

Held, that the Court of Exchequer Chamber ought not to have awarded the costs under the statute, and ought to have excepted the costs of the sixth plea out of the general costs awarded to the plaintiff.

In a declaration against carriers, one of the counts averred the contract to be to carry goods from D. to L., and to take care of them on landing them at a wharf there, and to deliver them to the plaintiff; the defendants pleaded that they did take care of the goods at the wharf till they were destroyed by fire, without defendants' default:—

Held, a good plea to the count.